EDITORIAL NOTE

The Gujarat National Law University (**GNLU**) is home to several initiatives in furtherance of its aim to promote knowledge with values. The GNLU Student Law Review (**Review**) is a mission to fructify this objective in the form of a flagship journal run solely by students. The Review is student edited and published annually with a double-blind peer review process.

The Review seeks to promote a culture of research, venturing into scholastic endeavours with an inter-disciplinary approach. With the first volume being published in 2020, the Review departed from the erstwhile publication culture, reaping its success solely through student efforts and academic freedom..

The preparation of the second volume of the Review was undertaken amidst the turbulent times of the pandemic, when the entire world struggled with an unprecedented crisis. With the news of the vaccine appearing to bring an end to these difficult times, the release of the second volume is a testament to the hard work of the contributors and the dedication of the editorial team. The enthusiasm of students, practitioners, and academicians was evidenced in the voluminous number of submissions received. The elaborate and strict screening process helped in bringing out some of the best pieces in the second volume, which combine sound legal analysis and crisp articulation on contemporary issues of significance.

To introduce these remarkable pieces of our second volume, Aishwarya Singh writes on '*Property Rights in Parenthood: A Lockean Analysis of Surrogacy*'. The author juxtaposes multiple philosophies of parenthood to develop an analytical tool to deconstruct surrogacy in its socio-legal perspective. Taking the labour theory of John Locke as the base, the author undertakes a study of evolving the legal regime and presents an interesting conclusion with regard to the possibility of commercial surrogacy.

Next Dr. Akshaya Kamalnath takes us to the corporate world with, '*The Corporate Purpose Debate*' addressing Plato's question of 'What should be the purpose of a corporation.' Rich academic

discussion is put together encapsulating both the ideologies, one favouring all stakeholders, and the other, only favouring shareholders. International developments from the United States of America, the United Kingdom, and Australia are surveyed and the article ends with key implications of this debate for India.

Anitta M Jose and Angelina Joy write on '*Contextualising Climate Change Litigation in India through Incorporation of Right to Climate Protection*' portraying the depleting climatic resources and the importance of litigation to bring climate justice. Analysing *State of Netherlands v Urgenda Foundation*, a Hague district court verdict, the authors present a strong argument for change in climate policies and incorporating the right to climate protection under the right to life.

Turning next to intellectual property (IP) Ashutosh Kashyap and Vishakha Srivastava write on '*IPR: An Ignored Asset under the IBC*'. While discussing the importance of IP assets for the Indian economy, the authors examine their treatment under the Indian insolvency regime and unfurl the system of the United States and Canada on the other hand. The authors indicate how these assets remain ignored from the domestic regime and provide various suggestions based on the latest trends.

Next Bhushan M Shinde and Manohar Samal take us to the poignant reality of begging through their article, '*Decriminalising Anti- Begging Laws by the Implementation of Right to City: An Indian Perspective*'. Discussing the anti-begging laws in India with their defects, 'right to city' is proposed as the solution. Support from constitutional jurisprudence is taken to substantiate on health, safety, housing and employment opportunities, thus reaching a conclusion important for policy making.

Thereafter Gautam Mohanty discusses the concept of *ex aequo et bono*, tracing its history and analyzing its contemporary relevance in '*Ex aequo et bono: A redundant concept in a modern legislation? Some reflections from Indian Arbitral Jurisprudence*'. He examines the debate surrounding the application of the concept, and discusses its treatment by Courts in disputes involving the Indian Arbitration and Conciliation Act, 1996. Through an analysis of academic literature and jurisprudence, the author explores the utility of the concept in arbitration, and its position in modern legislations.

Next Tushar Chitlangia and Nikshetaa Jain explore the relevance and consequence of the Investment Cooperation and Facilitation Treaty 2020 between India and Brazil, in '*India Brazil BIT 2020: Unfolding of a new era in dispute resolution*'. The authors examine two distinct features of the Treaty, which sets it apart from other similar instruments, namely, the focus on dispute prevention, and the inclusion of State-State Dispute Settlement clause. Recognizing the shortcomings, the authors recommend avenues for the development of the environment for bilateral trade and investment, keeping in mind the interests of all stakeholders.

Tavashya Kumar in '*COVID-19 as a force majeure & frustrating event in Indian law: A critical & comparative analysis*' examines whether the pandemic constitutes an event precluding contractual obligations, by undertaking a comparative geographical and temporal analysis. The author also analyses the utility of the doctrine of frustration in availing remedies in the absence of *force majeure* clauses in contracts. Exploring the interaction of the two concepts, the author clarifies the scope of their application in aiding breaching parties to preclude themselves from legal liability in these turbulent times.

Mohina Anand analyses the interesting dichotomy between enforcement of competition law and intellectual property rights, in '*Application of FRAND licensing and competition law to SEP litigation in India: A critical analysis*'. The author discusses the legal and economic consequences of relying solely on a FRAND regime as against reconciling FRAND terms with the competition law framework. Noting the inadequacies of relying solely on a FRAND regime, the author lays down recommendations to recognize potential consequences to the market and consumers, promoting consumer welfare as a whole.

To conclude the second volume of the Review, among the **Articles**, Himanshu Dixit in '*A dilemma for Indian Shop Occupants & Lessees in times of Pandemic attacks*' examines the consequences of the Government Order relieving commercial lessees from paying rent during the pandemic. Analyzing the existing regime for precluding contractual obligations and their application in cases of lease, the author recognizes the inadequacies in the Government Order. Drawing from best practices across the globe, the author provides a way forward for the justification of welfare measures adopted by the Government for poor and small commercial business operators.

The efficient running of the Review would not have been possible without the continued support and guidance of our Faculty Advisor - Dr. William Nunes. We would also like to express our gratitude to Prof. (Dr.) S Shanthakumar, Director, GNLU for providing institutional support to the initiative. Finally, thanks are also due to Dr. A N Rao, Dean, Research & Publications Division, Dr. Ranita Nagar, Professor of Economics, and Mr. Tarun Singh, Assistant Professor (Research) for providing adequate space for student initiatives since they took office.

We cannot proceed further without recognizing the hard work and efforts of the entire Editorial Board who worked tirelessly through each stage of the editorial process, even during the harsh lockdowns imposed in light of the pandemic.. In these times of increased polarisation and shrinking academic spaces, we hope that this academic venture acts as a meaningful platform for legal discourse on contemporary issues.

We hope that you will find the contributions to this volume engaging, provocative, and insightful.

Raghav Bhargava
Editor in Chief
and
The Editorial Board
GNLU Student Law Review

ARTICLE

THE CORPORATE PURPOSE DEBATE

Dr. Akshaya Kamalnath[*]

ABSTRACT

A debate has been raging across the world about what the purpose of the modern corporation should be. While the debate is certainly not new, the most recent point of ignition has been a statement from the Business Roundtable, a group of America's top CEOs, about the purpose of the corporation. Parallelly, the UK corporate governance code has been amended to reflect the new expectations from companies; and in Australia, the ASX Corporate Governance Principles were amended along similar theme. This article will survey these developments in the US, UK, and Australia, summarise the academic discussion around this, and finally reflect on what this means for corporations in these countries. The article will argue that rather than creating a big shift to stakeholder centric governance, these developments, at least in the UK and Australia, signify a focus on corporate culture and the relationship of company management with employees. This focus on culture and employees is aimed at preventing, or addressing at an earlier stage, egregious corporate scandals. In conclusion, the article will discuss the implications of these developments for India.

I. INTRODUCTION

One of the oldest questions in corporate law is whether the board of directors should primarily further the interests of shareholders or whether they should further the interests of all stakeholders (shareholders, employees, consumers, environment, and society in general) equally.[1]

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[1] The debate can be traced all the way back to the 1930s. *See* A. A. Berle, *Corporate powers as powers in trust*, 44 HARV. L. REV. 1049 (1931); EM Dodd, *For whom are corporate managers trustees?* 45 HARV. L. REV. 1145 (1932); A. A. Berle, *For whom corporate managers are trustees: a note*, 45 HARV. L. REV. 1365 (1932); E. M. Dodd, *Is effective enforcement of the fiduciary duties of corporate managers practicable?*, 2 U. CHI. L. REV. 194 (1935); A. A. Berle, *Corporate decision making and social control* , 24 BUS. LAWYER 149 (1968).

Proponents of the latter argument are often labelled stakeholders and those who favour the former argument are categorised as shareholder primacists. The issue has been so fraught that Professor David Yosifon has called this question of corporate purpose not just an important issue, but the most important issue in corporate law.[2]

Over the years, it has been understood that directors have the power to further interests of various stakeholders as long as it is in the long-term interest of the corporation.[3] The protection of the business judgement rule in most jurisdictions (particularly in the US) allows directors this flexibility.[4] In the UK, the idea of enlightened shareholder value was introduced into the legislative provision on the role of the board, to underscore the need for directors to also consider the interests of other stakeholders.[5] In Australia, even without such an explicit restatement of the law, a survey comprising of 367 directors of Australian companies found that over 90 per cent the respondents felt that the law on directors duties in Australia was broad enough to allow them to consider the interests of both stakeholders and shareholders.[6] There have also been case laws over the years to support this understanding of directors.[7] Indian corporate law, in recent years, appears to have taken on a stakeholder-centric hue.[8] In India, the Companies Act 2013, with its restatement of the role of the board, seems to mirror the UK enlightened shareholder value approach; except that it does not provide that shareholders' interests should still be prioritised.[9] The same statute also introduced a mandatory corporate social responsibility requirement.[10]

Recently, starting roughly in 2018, there has been a resurgence of the corporate purpose debate. However, it is my argument in this article that these recent developments or what I label as the

[2] David G. Yosifon, *The Law of Corporate Purpose*, 10 BERKELEY BUS. L. J. 181 (2013).

[3] Akshaya Kamalnath, *Shareholder Primacy in the Time of Coronavirus*, OXFORD BUSINESS LAW BLOG (Apr. 7, 2020), https://www.law.ox.ac.uk/business-law-blog/blog/2020/04/shareholder-primacy-time-coronavirus.

[4] Stephen M. Bainbridge, *Making Sense of The Business Roundtable's Reversal on Corporate Purpose*, 46 J. CORP. L. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3664078 (hereinafter "Bainbridge").

[5] Companies Act 2006, c. 46, § 172, (UK); See Andrew Keay, *Having regard for stakeholders in practising enlightened shareholder value*, 19 OXFORD U. COMMW. L. J. 118 (2019), for a detailed discussion of § 172.

[6] Richard Williams, *Enlightened Shareholder Value in UK Company Law*, 35 U.N.S.W.L.J. 360, 366 (2012).

[7] *See* Rosemary Teele Langford, *Purpose-Based Governance: A New Paradigm*, 43(3) UNIVERSITY OF NEW SOUTH WALES LAW JOURNAL (ADVANCE) (2020). The author points out that it is now beyond doubt that directors of for-profit companies must have regard to the interests of stakeholders in acting in the interests of such companies.

[8] *See* Umakanth Varottil, *The Stakeholder Approach to Corporate Law: A Historical Perspective from India*, *in* RESEARCH HANDBOOK ON THE HISTORY OF CORPORATE AND COMPANY LAW (Harwell Wells ed., Edward Elgar Publication 2018).

[9] S. 166, Companies Act, 2013, § 166, No. 18, Acts of Parliament, 2013 (India) (hereinafter "Companies Act").

[10] *Id.* § 135.

'2018 edition of the corporate purpose debate' (particularly in UK and Australia) contains a somewhat esoteric idea shrouded within it. This idea is distinct from simply asking whose interests directors should prioritise. Instead, it is the idea that corporations should act with values and purposes that meets community expectations, which further requires companies to look within themselves, and foster a good internal work culture. The boards of such corporations would then be able to lead from the top and ensure that all employees act consistently with such a corporate purpose. I further argue that this call for corporations to act with purpose does not in fact have in its heart, a change in the scheme of corporate law, but rather a change in how business is conducted within the existing schema of corporate law and market incentives.

I develop this argument by tracing the developments of the 2018 edition of the corporate purpose debate in three countries – US, UK and Australia. I also review some prominent academic views on these developments and finally conclude with a note on the implications of these developments for India.

II. INTERNATIONAL DEVELOPMENTS

(A) DEVELOPMENTS IN THE US

It is useful to start the discussion about what the purpose of the corporation is with the controversial 1970 essay by Milton Friedman where he said that the 'corporation' has no social responsibilities except to increase its profits.[11] The role of corporate executives, as employees of the owners of the business, was to *"conduct the business in accordance with their desires, which generally will be to make as much money as possible while conforming to their basic rules of the society, both those embodied in law and those embodied in ethical custom"*.[12] Since the article was published, there has been no dearth of criticism of Friedman's view. Most of the criticism focuses on the part of the article that decries the idea of social responsibility of corporations. However, Friedman was simply expressing the view of the orthodoxy at the time rather proposing something radically new himself.[13]

[11] Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, NEW YORK TIMES MAGAZINE (Sept. 13, 1970), http://umich.edu/~thecore/doc/Friedman.pdf.
[12] *Id.*
[13] Brian Cheffins, *Stop Blaming Milton Friedman!*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (Apr. 16, 2020), https://corpgov.law.harvard.edu/2020/04/16/stop-blaming-milton-friedman.

Fast-forwarding into 2018 and then 2019, a few events have put the corporate purpose debate back on the table. The first event was the proposal of a bill titled 'the Accountable Capitalism Act' in 2018 by Senator (and US Presidential-hopeful at that time) Elizabeth Warren.[14] The proposal would require large companies (those generating a revenue of over $1 billion) to apply for a federal charter which would then tell company boards to consider the interests of all stakeholders and not just that of shareholders.[15] The rationale was that corporations should be expected to act as good citizens in exchange for corporate personality granted to them. Thus, this proposal goes beyond Friedman's expectation of corporate executives conducting business in accordance of the interests of owners. Instead, it allows the State to tell company boards (and the executives on these boards) how to conduct business.

This was followed up in early 2019, by the annual letter from Larry Fink, the head of Blackrock Inc., one of the largest fund management firms, addressed to the CEOs of companies in which Blackrock invests.[16] After describing current global problems like stagnant wages, excessive nationalism, the danger of losing jobs to technology etc., Fink asks CEOs to move away from the pursuit of short-term shareholder returns and run their businesses with a 'purpose'. This purpose, according to Fink, should be what drives businesses to create value for stakeholders other than shareholders. For instance, he says:

> "…*companies must embrace a greater responsibility to help workers navigate retirement, lending their expertise and capacity for innovation to solve this immense global challenge. In doing so, companies will create not just a more stable and engaged workforce, but also a more economically secure population in the places where they operate.*"

While it seems like Fink is also going beyond Friedman's idea of profit maximisation and advocating a role for corporations in solving world problems, one could argue that there is a hint of shareholder value in Fink's letter. By saying that assuring workers of security post-retirement, corporations will be able to ensure that their workforce is more engaged today, Fink is simply suggesting ways of enhancing shareholder value in the long term. As Fink puts it, *"purpose guides culture, provides a framework for consistent decision-making, and, ultimately, helps sustain long-term financial*

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[14] *Accountable Capitalism Act*, WARREN.SENATE.GOV (2018), https://www.warren.senate.gov/imo/media/doc/Accountable%20Capitalism%20Act%20One-Pager.pdf

[15] *Id.*

[16] Letter from Larry Link, Chairman/CEO, BlackRock, to the CEOs (2019), https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter.

returns for the shareholders of your company".[17] Yet Fink couches the need for a focused long-term shareholder value in terms of corporations addressing "pressing social and economic issues" because of the "failure of government to provide lasting solutions" to these issues.[18] Even though he stops short of explicitly inviting the State to make regulations in this regard, Fink's letter has opened the door for government regulations on the lines of the Accountable Capitalism Act, by accepting that corporations should step in where government fails. In other words, corporations should be the mythical Atlas and hold up the world.

At the heels of Warren's proposal and Fink's letter, came the 2019 statement by the Business Roundtable on corporate purpose, which consists of nearly 200 CEOs of Americas largest corporations.[19] Although the statement starts by reinforcing a belief in the free market system, it goes on to make 'a fundamental commitment to all stakeholders'.[20] This commitment to stakeholders is elaborated on by stressing a commitment to customers, employees, suppliers, communities, and finally, 'long-term value' for shareholders.[21] When the spread of coronavirus became a serious issue, the Business Roundtable released a statement reiterating support for stakeholders. It specifically mentions 'the health and safety of their employees and customers'.[22]

(B) DEVELOPMENTS IN THE UK

Parallel to the sound and fury of statements and proposals regarding the corporate purpose in the US, change has also been afoot in the UK. Even beyond mere statements, the UK's Corporate Governance Code, 2018 ("Code") introduced the idea of corporate purpose.[23] Section 1 of the Code is titled "board leadership and corporate purpose". In the Code's articulation, the board is responsible for setting the company's purpose.[24] Although purpose is not defined in the Code, the role of the board has been defined broadly to *"promote the long-term sustainable success of the*

[17] *Id.*

[18] *Id.*

[19] Kevin J. Wheeler, *Statement on purpose of Corporation*, BUSINESSROUNDTABLE.ORG (Aug. 19, 2019), https://opportunity.businessroundtable.org/wp-content/uploads/2019/09/BRT-Statement-on-the-Purpose-of-a-Corporation-with-Signatures.pdf.

[20] *Id.*

[21] *Id.*

[22] *Business Roundtable Statement on Covid-19 Response*, BUSINESSROUNDTABLE.ORG (Mar. 5, 2020), https://www.businessroundtable.org/business-roundtable-statement-on-covid-19-response.

[23] UK Corporate Governance Code 2018 (UK), https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.PDF.

[24] *Id.* § 1, Principle B.

company, generating value for shareholders and contributing to wider society".[25] Although hierarchy is not specified, shareholder value is mentioned before the much vaguer concept of contribution to society.

Having set out the role of the board on Principle A, the Code elaborates on corporate purpose in Principle B. It stipulates that *"the board should establish the company's purpose, values and strategy, and satisfy itself that these and its culture are aligned. All directors must act with integrity, lead by example and promote the desired culture."* Again, the Code does not define what it means by company culture.

Principles C, D and E of the Code aim to give form to the broad ideals in Principles A and B. Principle C stipulates that the board should not only *"ensure that the necessary resources are in place for the company to meet its objectives"* but also measure the company's performance against these objectives.[26] Therefore, it is not enough for a company to articulate purposes beyond shareholder value creation, but it is also important to perform and measure the same. Principle C goes on to emphasise that companies should establish a risk assessment framework.

Principle D then talks about the company's responsibilities to shareholders and other stakeholders and says that the board should effectively engage and encourage participation from these parties.[27] However, employees receive special mention in Principle E which states that *"the board should ensure that workforce policies and practices are consistent with the company's values and support its long-term sustainable success"* and that *"the workforce should be able to raise any matters of concern".*[28]

Thus, although Principle A mentions a broad duty to contribute to the wider society, later principles, Principle E in particular, show that employees' concerns are important. The reference to culture of the company can also be interpreted by means of Principle E since it talks about "workforce policies and practices". Provision 2 under Section 1 of the Code explaining these principles throws further light on what is meant by culture.[29] It states:

> *"The board should assess and monitor culture. Where it is not satisfied that policy, practices or behaviour throughout the business are aligned with the company's purpose, values and strategy, it should seek assurance that management has taken corrective action. The annual report should explain the board's*

[25] *Id.* § 1, Principle A.
[26] *Id.* § 1, Principle C.
[27] *Id.* § 1, Principle D.
[28] *Id.* § 1, Principle E.
[29] *Id.* § 1, Provision 2.

activities and any action taken. In addition, it should include an explanation of the company's approach to investing in and rewarding its workforce."

Thus, corporate purpose should not only be a goal in respect of the company's external stakeholders but also be relevant to how the company's workforce operates at various levels and how employees are taken care of. Provision 6 further raises the issue of interests of employees. It states that there should be channels for members of the workforce to raise concerns, and if required, anonymously. It also states that the board should make arrangements to investigate such concerns.[30] Other provisions relate to engagement with shareholders,[31] and with stakeholders in general.[32]

Thus, although the Code does not directly define corporate purpose, the Principles A to E of Section 1 indicate that the articulation of purpose is aimed to ensure that companies function in a manner that serves society's wider interests. More specifically however, the idea of purpose being linked to corporate culture and the workforce means that the Code is exhorting companies to also look within themselves and make sure that the entire workforce is acting in a manner aligned with the corporate purpose, and that the interests of the workforce are being considered.

Apart from the Code, British Academy in its November 2019 Report proposed that the *"purpose of business is to solve the problems of people and planet profitably, and not profit from causing problems"*.[33] To that end, it recommended that *"corporate law should place purpose at the heart of the corporation and require directors to state their purposes and demonstrate commitment to them"*.[34]

(C) AUSTRALIA

In Australia, the proposed revisions to the 4th edition of the Australian Securities Exchange Corporate Governance Principles and Recommendations ('ASX Corporate Governance Draft Revisions') made reference to a company's culture and 'social licence to operate'.[35] The relevant

[30] *Id.* § 1, Provision 2.
[31] *Id.* § 1, Provision 3.
[32] *Id.* § 1, Provision 5.
[33] THE BRITISH ACADEMY, PRINCIPLES FOR PURPOSEFUL BUSINESS 16 (Nov. 2019), https://www.thebritishacademy.ac.uk/documents/224/future-of-the-corporation-principles-purposeful-business.pdf.
[34] *Id.* at 20.
[35] ASX CORPORATE GOVERNANCE COUNCIL, CORPORATE GOVERNANCE PRINCIPLES AND RECOMMENDATIONS: 4TH EDITION CONSULTATION PAPER 16 (Feb. 2019), https://www.asx.com.au/documents/asx-compliance/consultation-draft-cgc-4th-edition.pdf (hereinafter "ASX CORPORATE GOVERNANCE DRAFT").

section was titled "instil desired cultures" and stipulated that listed companies *"should instil and continually reinforce a culture across the organisation of acting lawfully, ethically and in a socially responsible manner"*.[36] The commentary to the principle went on to say that a listed company's 'social licence to operate' was *"one of its most valuable assets"* and that such *"licence can be lost or seriously damaged if the entity or its officers or employees are perceived to have acted unlawfully, unethically or in a socially irresponsible manner"*.[37]

However, based on comments from commenters during the consultation period, the words "social license" were omitted from the final version of the 4th edition of the ASX Corporate Governance Principles. Nevertheless Principle 3 of the final version still mentions corporate culture and a need to "act ethically and responsibly".[38] Although it doesn't mention the phrase corporate purpose, Principle 3.1 says that a listed company should articulate and disclose its values. Further, the commentary to Principle 3.1 echoes some of the ideas regarding corporate purpose in the UK Code.[39] It says:

> *"A listed entity's values are the guiding principles and norms that define what type of organisation it aspires to be and what it requires from its directors, senior executives and employees to achieve that aspiration. Values create a link between the entity's purpose (why it exists) and its strategic goals (what it hopes to do) by expressing the standards and behaviours it expects from its directors, senior executives and employees to fulfil its purpose and meet its goals (how it will do it)."*

Thus, corporate purpose is not only the reason for the existence of the company but also constitutes its goals; and it is equally important, to achieve those goals in accordance with ethical standards its sets for its senior executives and employees. To inculcate the values of the company throughout the company, the commentary to Principle 3 goes on to say that the board should ensure that "all employees receive appropriate training" on the said values and senior executives should set the tone at the top.[40] Thus, like in the UK Code, there is a focus on the manner in which the senior executives treat the employees and the manner in which company's staff, in its entirety, operate. Also, on the lines of the UK Code, and to further emphasise the importance of

[36] *Id.* at 16.
[37] *Id.* at 16.
[38] ASX CORPORATE GOVERNANCE DRAFT, *supra* note 35, at 25.
[39] *Id.* at 25, 26.
[40] *Id.* at 25, 26.

employees, Principle 3.3 requires all listed companies to have and disclose a whistleblower policy to enable employees to report concerns internally and if they so choose, anonymously.[41]

There is also mention of other stakeholders like in the UK Code but this is articulated in terms of reputation of the company and its "standing in the community".[42] Thus, even after letting go of the term "social license to operate", the idea of a company being conscious of and managing its standing in the community is still intact in the final version of the 4th edition of the ASX Corporate Governance Principles.

III. BRIEF REVIEW OF ACADEMIC VIEWS

Much ink has been spilled by academics writing about corporate purpose, especially by those in the US, after the Business Roundtable's statement on corporate purpose. Rather than extensively reviewing all the available literature in the US, my aim simply is to indicate in this Part III, the direction and themes that emerge from academic discussions in each of the countries as discussed in Part II above.

Professor Lucian A. Bebchuk and Robert Tallarita found that the companies, whose CEOs were signatories to the Business Roundtable's 2019 statement on corporate purpose, had not amended their corporate governance guidelines to include stakeholder welfare.[43] On the contrary, they find that many of those companies' corporate governance guidelines contain strong endorsement of the shareholder primacy principle.[44]

Professor Bainbridge, in his own article on the issue, largely agrees with Bebchuk's and Tallirata's understanding that what companies do matters more than what they say. He also helpfully restates the law of corporate purpose in the US before elaborating on the impact of the Business Roundtable's 2019 statement. He writes that the obligation of the board of directors is *"to attempt, within the law, to maximize the long-run interests of the corporation's stockholders …."*[45] Further, because of investor activism in the US, boards and CEOs remain committed to shareholder interests.[46]

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[41] *Id.* at 27, 28.
[42] *Id.* at 25, 26.
[43] Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 105(7) CORNELL L. REV. (forthcoming Dec. 2020) (manuscript at 25), https://ssrn.com/abstract=3544978.
[44] *Id.* at 25.
[45] Bainbridge, *supra* note 4, at 7; Citing Katz v. Oak Industries Inc., 508 A.2d 873, 879 (Del. Ch. 1986).
[46] Bainbridge, *supra* note 4, at 49, 50.

Ultimately he concludes that the Business Roundtable statement of 2019 signifies little because *"neither the law nor the incentive structure for CEOs has changed"*.[47]

Professors Jill E. Fisch and Steven Solomon take a more positive view. They write that *"as a default matter, the purpose of a corporation should be understood as maximizing the economic value of the firm"*.[48] However, they argue that *"in pursuing long-term economic value, corporate managers are not merely permitted but compelled to consider the effect of the corporation's operations on stakeholders and society at large"*.[49] They go on to argue that corporate purpose allows a corporation to signal its priorities to its stakeholders who can then negotiate any *"contractual protections they may need to constrain corporate decisions that are inconsistent with those goals"*.[50] Thus, Fisch and Solomon are hopeful that various stakeholders would be able to hold companies to the goals that they are articulating, by negotiating the necessary contractual terms.

Finally, Bernard S. Sharfman reminds every one of the social value created by the corporation through the successful management of its stakeholder relationships and the goods and services it provides.[51] This is an important point because it speaks to the main reason for a corporation's existence. While other issues like corporate purpose are more broadly defined (in the sense of adding value to society over and above what the company does through its main business), the primary way in which a corporation adds value should not be forgotten, despite values and culture being important.

In the UK, Professors David Kershaw and Edmund Schuster argue that the Code's *"deployment of 'company purpose' has the potential to be such a transformative event"*.[52] However, according to them, this potential can only be fulfilled if the UK company law is amended to take a neutral position on *"whether or not a firm's corporate legal ecology should provide the board with insulation from shareholder value*

[47] *Id.* at 54.

[48] Jill E. Fisch & Steven Davidoff Solomon, *Should Corporations Have a Purpose?*, THE CLS BLUE SKY BLOG (Apr. 29, 2020), https://clsbluesky.law.columbia.edu/2020/04/29/should-corporations-have-a-purpose.

[49] *Id.*

[50] *Id.*

[51] Bernard S. Sharfman, *A Fuller Sense of Corporate Purpose: A Reply to Martin Lipton's 'on the Purpose of the Corporation'* , OXFORD BUSINESS LAW BLOG (June 9, 2020), https://www.law.ox.ac.uk/business-law-blog/blog/2020/06/fuller-sense-corporate-purpose-reply-martin-liptons-purpose.

[52] David Kershaw & Edmund Schuster, *The Purposive Transformation of Company Law* (London School of Economics Legal Studies, Working Paper No. 4, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3363267.

pressure".[53] However, they do not attribute any significance to the emphasis on corporate culture and the workforce from the perspective of understanding corporate purpose.

Writing from a comparative perspective, Professor Jennifer Hill assesses the developments regarding corporate purpose in all three countries discussed above in Part II i.e., US, UK and Australia.[54] She specifically addresses the concept of "corporate culture" as a regulatory concept and argues that it is a reaction to corporate scandals that were the result of flawed corporate cultures.[55] She provides a few examples to illustrate this including that of Wells Fargo, where *"wrongful acts are committed by relatively low-level employees in response to encouragement or unrealistic firm-wide goal directives from senior management"*.[56] In the case of other examples involving sexual harassment incidents, she says it was a case of *"inadequate policing of the company's culture"*.[57]

It is this link between corporate wrong doing and corporate culture that helps us understand the special focus of the UK Code and Australia's ASX Principles, not only on general ideas of purpose and values but also on prioritising the workforce and ensuring that a more virtuous way of doing business percolates down the corporation. Further, the inclusion of channels with stakeholders in general and employees in particular in order to enable them to raise concerns (even anonymously) about any issues, indicates that these concepts are aimed at preventing corporate wrongdoing.

Many academics in the US, and even Kershaw and Shuster talking about the UK Code, are right to conclude that since the law and incentives that company boards and executives are subject to has not changed, the Business Roundtable statement or UK Code cannot transform company law. However, there is a more esoteric aspect that is being pushed with the corporate purpose developments. This aspect is focused on a company's purpose, not only in terms of why it exists (the business it is carrying out), but also in terms of how it conducts itself both externally and internally. The UK Code and Australia's ASX principles are both soft law instruments that only require companies to undertake some soul searching on the lines of the principles and then make relevant disclosures. This process will be useful if companies understand that complying with these soft law mechanisms and making disclosures are not an end in itself, but rather a means to

[53] *Id.* at 44.

[54] Jennifer Hill, *Legal Personhood and Liability for Flawed Corporate Cultures* (European Corporate Governance Institute of Law, Working Paper No. 413, 2018), http://ssrn.com/abstract=3309697.

[55] *Id.* at 3.

[56] *Id.* at 9.

[57] *Id.* at 9.

an end. That end would be the prevention of egregious scandals, which is ultimately in the interests of both shareholders and stakeholders.

Although the Business Roundtable statement in the US came from the industry rather than a regulatory body or a stock exchange, the same (if less sincere) idea animates the statement. The signatories of the Business Roundtable statement would be aware of the community sentiment against corporations as a result of many egregious scandals like the ones discussed by Hill. Australia's ASX Principles makes mention of this when they use the term "community expectations". The phrase "social license to operate" (which was used in the consultation draft) is an even more blatant reference to the idea that corporations are answerable to public opinion to an extent. In the US, the writing was on the wall after the proposal by Elizabeth Warren and Larry Fink's letter. As Bainbridge muses in his article, the signatories to the Business Roundtable statement *"may be seeking to reposition their companies to take advantage of perceived shifts in consumer and labor demand"* and may also be *"trying to head off regulation by progressive politicians"*.[58] A more insidious motivation could be that the signatories of the Business Roundtable (all CEOs) are interested in giving themselves more power by embracing stakeholderism.[59] This is not an unlikely proposition since the imposition of vague duties on the board in terms of serving society, etc., allows for plenty of manoeuvring room for CEOs to peruse their own self-interests in the guise of furthering some societal welfare.

IV. CONCLUSION - IMPLICATIONS FOR INDIA

The developments surrounding corporate purpose have had a resounding impact on the rest of the world as well. Similar developments have taken place in other countries around the same time. For example, France, in 2019, introduced the *Pacte Statute* on the Development and Transformation of Businesses. It provides that companies must be managed *"in furtherance of its corporate interest"* and *"while taking into consideration the social and environmental issues arising from its activity"*.[60]

[58] Bainbridge, *supra* note 4, at 50, 51.

[59] Bainbridge, *supra* note 4, at 53.

[60] *See* Jean-Philippe Robé, Bertrand Delaunay & Benoît Fleury, *French Legislation of Corporate Purpose*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (Nov. 20, 2020), https://corpgov.law.harvard.edu/2019/06/08/french-legislation-on-corporate-purpose.

It is however important to understand both the limit and the thrust of the corporate purpose agenda, at least in the sense that it is being used in the recent years (2018 – 2020). The limit, as pointed out by various academics, is simply that articulation of a virtuous but vague corporate purpose will not have much impact as long as existing laws and incentives that the board of directors is subject to remain the same. The thrust of the agenda does not seem to be to change the existing legal paradigm from shareholder primacy to stakeholderism, but instead seems to be to ensure that companies pay attention to their internal culture, employee welfare, and other stakeholder concerns more broadly so as not to fall short of community expectations.

In India, even before this current corporate purpose debate, the government in 2013, introduced a mandatory CSR provision requiring companies to spend a certain percentage of their previous year's profits on activities to serve society (i.e. those designated by the government as CSR activities).[61] The provision about the role of the board was also amended at the same time to include a broader stakeholder focus.[62] To further emphasise this, Indian companies are required to have a stakeholder relationship committee.[63] Since November 2014, SEBI's Listing Regulations have also taken up a shareholder oriented approach by imposing a range of requirements on listed companies, including the setting of whistleblower mechanisms to enable stakeholders and employees to communicate concerns.[64] Thus, seen in plain sight, these developments are on the lines of developments in the UK and Australia. However, when viewed from the lens of corporate purpose, values and culture, as articulated in the UK Code and the ASX Principles, it is perhaps missing the exhortation to companies to get their houses in order, and treat their employees well so that the company in its entirety can operate ethically while transacting with the external world.

It has been my aim in this article to show that the implications of this round of corporate purpose developments (2018 edition) is not to shift the existing paradigm of company law into vaguely articulated goals to serve society and thereby allowing a free for all, but to provide companies with a chance to look inwards and get their houses in order. Most Indian companies

[61] Companies Act, *supra* note 9, § 135; See Sandeep Gopalan & Akshaya Kamalnath, *Mandatory Corporate Social Responsibility as a Vehicle for Reducing Inequality: An Indian Solution for Piketty and the Millennials*, 10 NW. J. L. & SOC. POL'Y 34 (2015), for a detailed discussion on the law and its implementation.

[62] Companies Act, *supra* note 9, § 166.

[63] Companies Act, *supra* note 9, § 178(5); See Afra Afsharipour, *Redefining Corporate Purpose: An International Perspective*, 40 SEATTLE U. L. REV. 465 (2017), for a more detailed discussion on compliance with this section.

[64] Sebi (Listing Obligations and Disclosure Requirements) Regulations, 2015, Gazette of India (Sept. 2, 2015), http://www.sebi.gov.in/cms/ sebi-data/pdffiles/32763_t.pdf.

are controlled by promoter groups and perhaps as a result of this, issues of corporate culture abound (notwithstanding exceptions). A 2005 global workforce study reported that, among the global workforce, Indian employees feel the least engaged by their firms because of the rigid hierarchical structure.[65] Like in other countries, Indian workplaces have also had troubles with respect to instances of sexual harassment.[66] India has also had a spate of corporate frauds in the recent past.[67] Thus, while India may already has laws on the books that seem to suggest a more stakeholder oriented focus, the requirement is of some reflection and improvement regarding corporate culture.

[65] Navi Radjou, *How Indian Corporate Culture Impedes Innovation*, HARVARD BUSINESS REVIEW (June 9,2008), https://hbr.org/2008/06/how-indian-corporate-culture-i.html.

[66] Rica Bhattacharyya, *India Inc reports 14% rise in sexual harassment complaints in FY19*, ECONOMIC TIMES (Sep. 25, 2019), https://economictimes.indiatimes.com/news/company/corporate-trends/india-inc-reports-14-rise-in-sexual-harassment-complaints-in-fy19/articleshow/71288712.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.

[67] *See* Sucheta Dalal, *Café Coffee Day Scam: Corporate Fraud Will Remain Unchecked unless Wrongdoing and Collusion Is Severely Punished*, MONEY LIFE (July 24, 2020), https://www.moneylife.in/article/caf-coffee-day-scam-corporate-fraud-will-remain-unchecked-unless-wrongdoing-and-collusion-is-severely-punished/61013.html.

EX AEQUO ET BONO: A REDUNDANT CONCEPT IN A MODERN LEGISLATION? SOME REFLECTIONS FROM INDIAN ARBITRAL JURISPRUDENCE

*-Gautam Mohanty**

I. ETYMOLOGY OF EX AEQUO ET BONO

The natural starting point for any discussion on Ex aequo et bono, is to indulge in the exercise of understanding its true connotation. The Roman legal concept of Ex aequo et bono, in its historical form, can be found postulated in Article 38(2) of the Statute of the International Court of Justice[1] which specifically authorizes the settlement of disputes based upon Ex aequo et bono, subject to express authorization by parties. However, to date, there has been no judgment by the International Court of Justice utilising the aforesaid legal concept.[2] Additionally, the origins of Ex aequo et bono can be also be traced to Article VII of the European Convention on International Arbitration which provides that, if parties so decide and the applicable law to the arbitration so recognises, the tribunal may base its decision on

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[1] Statute of the International Court of Justice, Article 38.1 (1945):

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b. international custom, as evidence of a general practice accepted as law;
> c. the general principles of law recognized by civilized nations;
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
> 2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto.

[2] P RAMANATHA AIYAR, THE MAJOR LAW LEXICON 1851 (5th ed. 2016).

principles of equity.[3] Article VII inspired Article 27 of the draft UNCITRAL Arbitration Rules wherein both Ex aequo et bono and amiable compositeurs found stipulated side by side for the first time.[4]

In the present context, it should be noted that the modern concept of Ex aequo et bono as applied within current arbitral regimes and frameworks, is different from its historical form.[5] The modernised concept empowers the arbitrators to interpret the intentions of parties vis-à-vis other equitable considerations, unlike its historical form which only limited the powers of the judges to equitable considerations. Succinctly stated, the modernised concept of Ex aequo et bono mandates arbitrators to function within the confines of mandatory rules of law, unlike the historical version which did not envisage such a requirement.[6]

A common denominator in arbitral legislations around the world is the authorization granted to arbitral tribunals to decide disputes according to Ex aequo et bono provided such arbitration is contractually authorized by the Parties. Article 28(3) of the UNCITRAL Model Law ("**Model Law**")[7], which finds itself embedded in several arbitral legislations envisages the possibility of arbitral tribunals deciding disputes as per Ex aequo et bono. Notably in practice, the power to decide disputes Ex aequo et bono, is often equated interchangeably to that of an amiable compositeur as fundamentally both terms, besides being placed together in Article 28(3) of the Model Law, empower an arbitrator to depart from legal norms in order to find an equitable solution to a dispute. However, one can possibly argue that there is indeed a difference between

[3] DOMINIQUE T. HASCHER, EUROPEAN CONVENTION ON INTERNATIONAL COMMERCIAL ARBITRATION (EUROPEAN CONVENTION, 1961) – COMMENTARY, XX Y.B. COM. ARB. 1006, 1030 (Albert Jan van den Berg ed., 1995).

[4] FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 836 (Emmanuel Gaillard & John Savage eds., 1999).

[5] NOBUMICHI TERAMURA, EX AEQUO ET BONO AS A RESPONSE TO THE 'OVER- JUDICIALISATION' OF INTERNATIONAL COMMERCIAL ARBITRATION, 9 (54 Kluwer Law International 2020).

[6] *Id.*

[7] UNCITRAL Model Law, Article 28 [Rules applicable to substance of dispute] (1976)-

(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.

(2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

(3) The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so.

(4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

both terms as amiable compositeur contemplates a conciliatory element, while Ex aequo et bono does not.[8] Nevertheless, it is crucial to note that Fouchard, Gaillard and Goldman have stated that the distinction between the two terms is '*artificial*' essentially because in either case, an arbitrator has to place his sense of justice over any other consideration.[9]

The legal scholarship has failed to adequately elaborate upon the difference between the two concepts though they are perceived to be different in juristic thinking.[10] Both concepts, albeit similar in essence, legal jurisdictions have indeed differentiated between them most notably, of which is the Swiss Law which stipulates that the power to decide Ex aequo et bono enables the arbitral tribunal to "*disregard the relevant legal rules, including mandatory rules, subject only to international public policy*" while an amiable compositeur "*must comply with mandatory rules of law*".[11] Alternatively, in ICC Case No. 7986, the tribunal opined that any attempt to distinguish Ex aequo et bono from amiable composition is artificial.[12] Similarly, in ICC Case No. 10728, the tribunal supported the aforesaid view by stating that "*the ex aequo et bono clause expresses the parties' intention to give arbitrators the powers of an amiable compositeur*", thereby implying that the there is no distinction between the powers of amiable composition and that of Ex aequo et bono.[13] Both the abovementioned cases support the view that there is no longer a distinction between both concepts.[14] Thus, in view of the author, such a quagmire necessitates discussion and efforts should be made to develop a common consensus amongst Model law jurisdictions.

A cursory glance over the *travaux preparatoires*[15] of Article 28 of the Model Law, illustrates that even though the Secretariat acknowledged the special and limited pool of arbitrations which actually utilised principles of Ex aequo et bono and *amiable compositeur* it deemed the

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[8] Mauro Rubino-Sammartano, *Amiable Compositeur (Joint Mandate to Settle) and Ex Bono et Aequo (Discretional Authority to Mitigate Strict Law): Apparent Synonyms Revisited*, 9(1) J. INT'L ARB. 5, 13 (1992).

[9] Gaillard and Savage, *supra* note 4 at 836.

[10] Mauro Rubino-Sammartano, *supra* note 8 at 13. SIGVARD JARVIN, THE SOURCES AND LIMITS OF THE ARBITRATOR'S POWERS IN CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 50, 70 (Julian D.M. Lew, ed., 1987).

[11] Karyn S. Weinberg, *Equity in International Arbitration: How Fair is "Fair": A Study of Lex Mercatoria and Amiable Composition,* 12 BOSTON UNIV. INT'L L.J. 227, 231 (1994).

[12] Laurence Kiffer, Amiable Composition and ICC Arbitration, 18(1) ICC Bull. 51, 53 (2007).

[13] *Id.*, at 54.

[14] *Id.*, at 52.

[15] HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 15 (Kluwer Law & Taxation Publishers; T.M.C. Asser Instituut 1989).

[T]he drafters of the Model Law themselves considered the travaux préparatoires significant in interpreting their work. The Commission itself suggested to the General Assembly that the travaux préparatoires from its session be sent to governments and there are a number of other instances in which the discussion refers to the travaux préparatoires as a means for clarifying the text.

incorporation of the same appropriate in the Model Law for primarily for three reasons[16]: (1) providing sufficient protection to an uninformed party about the applicability of Ex aequo et bono and *amiable compositeur* as the provision mandates express authorization of the Parties; (2) the law should not bar established features and practices of arbitration used in certain legal systems, and; (3) because it was consistent with the general policy of reducing the importance of the place of arbitration in international commercial arbitration.[17] Pertinently, when the discussion in the Secretariat arose regarding setting limitations and guidelines for the judicious application of Ex aequo et bono by arbitral tribunals, three guidelines were proposed, but only one was accepted[18] that is, the one which instructs the tribunal in all cases to decide in accordance with the terms of the contract and to take into consideration the usages of the trade applicable to the transaction.[19] However, it is noteworthy that till date there exists no uniform understanding as regards to the precise scope of the powers vested with the arbitral tribunal deciding under Ex aequo et bono which, in view of the author, necessitates a clear clarification from the parties defining the contours of the application of Ex aequo et bono by the arbitration tribunal.

In light of the uncertainties surrounding the application of Ex aequo et bono, parties and practitioners would be well advised to refer to the cornucopia of academic literature of leading authorities in international commercial arbitration. Russell[20] stipulates the following material considerations for ascertaining whether the parties could by way of a specific authorization allow an arbitral tribunal to decide Ex aequo et bono:

> *"…(2) If an arbitrator could decide on private notions of fairness, no court could supervise his decision (though his conduct of the reference could still be supervised) for it would have no basis on which to do so. But it by no means follows that if supervision of the award is not mandatory, an award not susceptible to supervision could not or should not, if duly made, be enforced…*

[16] Seventh Secretariat Note, A/CN.9/264, Art. 28, para. 8, 790 (1985).

[17] Holtzmann and Neuhaus, *supra* note 15 at 764-807.

[18] The working group was of the opinion that it was extremely difficult to define the contours of Ex aequo et bono and its limitations for all practical purposes as according to the working group such types of arbitrations come in various and often vague forms.

[19] First Secretariat Note, A/CN.9/207, para. 90, 774 (1981). First Working Group Report, A/CN.9/216, para. 93, 777 (1982).

[20] RUSSELL ON ARBITRATION, 220–221, (20th ed. 1982). PC MARKANDA: ARBITRATION STEP BY STEP, (LexisNexis India 2012).

(5) Further, in the past, there have been decisions suggesting that it might be proper for an arbitrator to disregard strict legal rights in the interests of justice (e.g. by giving relief against a claim which worked hardship but against which there was no legal defence).[21]

(6)Whilst cases such as this last may have gone too far in not paying sufficient attention to the implied agreements of the parties, it would seem unchallengeable that an arbitrator can be given far wider discretion to decide ex aequo et bono than merely in respect to rules of procedure, for it has been recognised for many years that an arbitrator can, whereas a Court cannot, make a contract for the parties; and it hardly needs to be pointed out that this may result in a decision governed by no known system of law and wholly unsupervisable by any court. But the practice is clear.

(7) However, such powers need to be conferred expressly, and in the absence of such express conferral, there can be no doubt whatever that the arbitrator must decide in accordance with the proper law…"

In pursuance to the above, shedding more light on the terminology employed in arbitration agreements between the parties empowering an arbitrator to decide Ex aequo et bono, Russell[22] on arbitration has stated as below:

"The tribunal may be specifically instructed by the arbitration agreement to decide the disputes on some basis other than the law; an agreement to this effect has generally become known as an 'equity clause'. For example, the parties may agree that the tribunal is to decide the dispute in accordance with concepts variously known as 'honourable engagement', 'amiable compositeur' 'equity', 'ex aequo et bono', the 'general principles of law recognized by civilized nations' or the 'lex mercatoria'…The courts will interpret the new statutory provisions allowing a tribunal to decide a dispute in accordance with such other considerations as are agreed or determined as obliging them to uphold equity clauses. In agreeing that a dispute shall be resolved this way, the parties are in effect excluding any right to appeal to the court, there being no question of law to appeal. "

The Black's Law Dictionary[23] defines Ex aequo et bono as "*in justice and fairness*" or "*according to equity and good conscience*" or "*it means a person who adopts a flexible approach brimful with fairness and reality*". Furthermore, the Aiyar lexicon[24], states that Ex aequo et bono denotes *"a result of fair dealing and good conscience, i.e. on the basis of equity. The phrase refers to the way in which an international tribunal can base its decision not upon conventional law but on what is just and fair to the parties before it."* In

[21] Knox v. Symmonds, (1791) 1 Ves Jun 369.
[22] Russell on Arbitration, *supra* note 20 at 163-164.
[23] Black's Law Dictionary, 557 (6th ed. 1990).
[24] Aiyar *supra* note 2.

simplistic terms, it emanates from the preceding paragraphs which state that if parties decide to have their dispute adjudicated in accordance with Ex aequo et bono then the arbitrators are vested with the requisite legal authority to adjudge the dispute in accordance with their subjective parameters of fairness and good conscience drawing from their reservoirs of expertise and experience, rather than rely upon the strict application of existing legal norms.[25] The pertinent question that follows is how exactly should the deviation from existing legal norms under Ex aequo et bono take place? The prominent school of thought in this regard observes that the decision Ex aequo et bono involves comparative analysis of legal norms.[26] The response to the above-raised query is addressed in the ICC Case No. 12070 wherein it was held that:

> *"The authorization to decide ex aequo et bono dose not place the [t]ribunal in a legal vacuum, completely unrelated to the legal regime or particular national law to which each party…must have referred when determining its conduct in concluding and performing its rights and obligations…equity and fairness may require that the [t]ribunal takes the pertinent provisions and solutions (ratio scripta) offered by such applicable law into a consideration."*[27]

In the opinion of the author, even though both concepts of amiable composition and ex aequo et bono are often used interchangeably in practice there does exist a fine line of difference between the two concepts. The difference is best understood to be that under the concept of ex aequo et bono, an arbitrator will normally begin and end with a private sense of justice which will be a personal view of the right result. However, under the tenet of amiable composition, an arbitrator has an option to depart from the rules of law only if needed to achieve a just result.[28]

II. THE CASE FOR AND AGAINST EX AEQUO ET BONO

[25] Teramura, *supra* note 5.

[26] KLAUS PETER BERGER, THE CREEPING CODIFICATION OF THE NEW LEX MERCATORIA, 81 (2nd ed. 2010).

[27] Final Award in Case 12070, 18(1) ICC BULL. 108 (2007). It implies that there may be cases where fairness requires arbitrators deciding ex aequo et bono to strictly apply the law.

[28] William W. Park, *Arbitrators and Accuracy*, 1 J. INT'L DISP. SETTLEMENT 25, 50-51 (2010).

The controversy surrounding Ex aequo et bono is primarily controlled by the narrative based on flexibility, uncertainty and undue exercise of authority by arbitrators. The proponents in favour of judicious utilisation of Ex aequo et bono put forth that the inherent flexibility of Ex aequo et bono is advantageous in adjudicating certain types of disputes while on the other hand hardliners argue that the inherent flexibility is a ripe ground for unpredictability and abuse of discretion by arbitrators. This section of the article will briefly summarize the utility and criticisms of the Ex aequo et bono with an aim to provide a more holistic understanding of the aforesaid concept.

The circumstances which are deemed to be appropriate for Ex aequo et bono are where the parties are engaged in disputes *"'in complex and long-term relationships or in emerging fields in which the law is either inadequately developed or unsuitable to resolve complex disputes".*[29] An instance of complex and long term relationships might be joint ventures where unforeseeable events may disturb the balance of interest of parties. In such a case, an arbitrator with the requisite power vested with him under Ex aequo et bono may suggest equitable remedies to the disputes arisen. In relation to '*emerging fields*', it is suggested that laws relating to the internet, intellectual property and state investor disputes fall within the category of the emerging areas.[30] Another ideal scenario, wherein Ex aequo et bono may be appropriate in arbitration is when both parties involved are from different jurisdictions who do not have the negotiating power to impose on the other the right that suits them the best.[31] The ICC France Working Group postulates that arbitrators deciding Ex aequo et bono, pursuant to authorization by parties, may do so in their pursuit of equity under the following considerations:

"–protect a party whose consent may have been imperfect but not completely vitiated; – penalize the conduct of a party which, although not negligent, appears careless, or which, although not in bad faith, appears too inflexible or legalistic; – give effect to a condition which lies entirely within the control of one party; – liberally accept circumstances that suspend or interrupt prescription or even reject exceptions to prescription where such prescription would be acquired in law; – extend indemnification to indirect or unforeseen loss; – take account of efforts that could have been made by a party when the applicable law only partially recognizes an obligation to minimize loss, and vice versa; – recognize a limitation of responsibility even when the action in vice cache

[29] Leon Trakman, *Ex Aequo et Bono: Demystifying an Ancient Concept*, 8(2) CHICAGO J. INT'L L. 621, 622, 637-638 (2008).
[30] *Id.* at 623.
[31] Giovanni Iudica, *Ex Aequo et Bono - Three Cases of Arbitration, and Some Remarks about Equity*, 21 DIG.: NAT'L ITALIAN AM. B. ASS'N L.J. 37 (2013).

(hidden defects) would not recognize such a limitation; – accept a difficulty in performance as a force majeure even if it does not fulfil the required conditions; – revise the rate of default interest stipulated in a contract."[32]

Accordingly, there are a series of ICC arbitral awards[33] which highlight that arbitral tribunals have utilized Ex aequo et bono to resolve disputes in long term relationships, thereby vouching in favour of the inherent flexibility in Ex aequo et bono. Notably, Redfern and Hunter have observed that in the context of Ex aequo et bono clause, owing to lack of a general consensus several different interpretations of the clause are available which could lead to certain issues before the arbitral tribunal such as: (1) Whether the Tribunal should apply relevant rules of law while ignoring any rule which is formalistic; (2) Whether the Tribunal should apply relevant rules of law to the dispute whilst ignoring any rule which appears to operate unfairly; (3) Whether the Tribunal should decide according to the general principles of law or ignore the rules of law completely and adjudicate the matter on its merits.[34]

The abuse of discretion by arbitrators and the unpredictability of results are the major concerns surrounding the utility of Ex aequo et bono. With regard to abuse of discretion by arbitrators, Vuillard and Vagenheim have expressed that an arbitrator if given an opportunity to decide Ex aequo et bono may create new obligations that were never agreed upon by parties based on its notions of equity.[35] Nevertheless, the author notes that such criticism may be inappropriate as most Model law jurisdictions mandate arbitrators to deliver a reasoned award which necessarily implies that if a party feels aggrieved by the award, then it may challenge the same under the relevant setting aside procedure encapsulated in the domestic arbitral legislation. In fact, when the Tribunal is empowered under the arbitration agreement to decide Ex aequo et bono it does not relieve them of their obligation to state reasons.[36] Rather, as per the author, it should be viewed by the Tribunal as an opportunity to provide sufficient

[32] Edouard Bertrand, Amiable Composition: Report of the ICC France Working Group, 6 INT'L BUS. L.J. 753, 762–763 (2005).; Laurence Kiffer, *Nature and Content of Amiable Composition*, 5 INT'L BUS. L.J. 625, 626-632 (2008).

[33] Final Award in Case 3755 (Extract), 1(2) ICC Bull. 25 (1990).; Final Award in Case 5103 (Extract), 1(2) ICC Bull. 25 (1990).; Final Award in Case 8874 (Extract), 10(2) ICC Bull. 82 (1999).; Final Award in Case 9483, 18(1) ICC Bull. 86 (2007).; Final Award in Case 9669, 18(1) ICC Bull. 85 (2007).; Final Award in Case 9704, 18(1) ICC Bull. 87 (2007).; Final Award in Case 10049, 18(1) ICC Bull. 89 (2007).; Final Award in Case 10504, 18(1) ICC Bull. 95 (2007).; Final Award in Case 12070, 18(1) ICC Bull. 108 (2007).; Final Award in Case 12099, 18(1) ICC Bull. 111 (2007).; Final Award in Case 12772, 18(1) ICC Bull. 112 (2007).

[34] REDFERN & HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 118 (4th ed. 2004).

[35] Emmanuel Vuillard & Alexandre Vagenheim, Why Resort to Amiable Composition, 5 INT'L BUS. L.J. 643, 644 (2008).

[36] Food Services of America, Inc. v. Pan Pacific Specialties Ltd., Can LII 3604 (British Columbia Supreme Court) (1997).

reasons in support of their observations arrived at by utilizing the tenets of Ex aequo et bono as it is a widely accepted practice that an arbitrator must ensure that his award is understood and accepted if he is not to deprive the arbitration process of the prestige of its utility merits.[37] A reasoned award, regarding Ex aequo et bono, suggests that the reasons stated in the award indicate the thought process behind the arbitral tribunal reaching a conclusion.[38] However, in the context of India, fears of abuse of discretion may be well-founded as under the Act, 1996 an award rendered Ex aequo et bono because they operate outside the purview of legal rules, cannot be challenged under Section 34 of the Act, 1996.[39] Predictability in reasoning and decision making is one of the cornerstones of arbitration as an arbitration agreement in a written agreement provides the parties with predictable rights and obligations in the event of a dispute. Therefore, equitable considerations that play a pivotal role in Ex aequo et bono might deter the parties from anticipating or predicting the outcome of arbitration because it is uncertain in nature and scope.[40] If foreseeability is an essential consideration, then Ex aequo et bono is without a doubt not an option for the parties.[41] Notwithstanding the above, it is noteworthy that even in its general usage, the process of arbitration is shrouded with uncertainty in the following aspects: (1) uncertainty with regard to the applicable law as an arbitrator might wrongly apply a foreign law to him/her; (2) uncertainties arising courtesy poor contractual drafting by the parties which fail to bring out the an uniform interpretation of contractual provisions and undermine predictability.[42]

III. JUDICIAL TREATMENT OF EX AEQUO ET BONO AND THE POSITION UNDER THE INDIAN ARBITRATION ACT, 1996

[37] Eric Robine, What Companies Expect of International Commercial Arbitration, 9(2) J. Int'l Arb. 31, 37 (1992).

[38] Nobumichi Teramura, Chapter 3: The Strengths and Weaknesses of Arguments Pertaining to Ex Aequo Et Bono, in Ex Aequo et Bono as a Response to the 'Over-Judicialisation' of International Commercial Arbitration (1st ed. KLUWER LAW INTERNATIONAL 2020) 49-70.

[39] PC MARKANDA: ARBITRATION STEP BY STEP, 25 (LexisNexis India 1st edition).

[40] Karyn S. Weinberg, *Equity in International Arbitration: How Fair Is Fair? A Study of Lex Mercatoria and Amiable Composition*, 12(1) B.U. INT'L L.J. 227, 253–254 (1994). Regis Bonnan, *Different Conceptions of Amiable Composition in International Commercial Arbitration: A Comparison in Space and Time*, 6(3) J. INT'L DISP. SETTLEMENT 522, 538 (2015).

[41] Bertrand, *supra* note 32.

[42] Edouard Bertrand, *Under What Circumstances Is It Suitable to Refer Disputes to Amiable Composition*, 5 INT'L BUS. L.J. 609, 617-622 (2008).

The Indian Arbitration Act, 1996 ("**Act, 1996**") under Section 28(2) postulates the possibility of application of Ex aequo et bono to arbitrations conducted within the domestic arbitration framework in India. Notably, before the enactment of the Act, 1996, under the Indian Arbitration Act, 1940 ("**Act, 1940**") an arbitrator was required to strictly decide the disputes before it, in accordance with law thereby implying that under the Act, 1940 a dispute decided either on the basis of Ex aequo et bono or *amiable compositeur* would be null and void and the arbitral award emanating from the same would be unenforceable. However, the implementation of the Act, 1996 brought about a paradigm shift in the approach towards disputes adjudicated premised on Ex aequo et bono or *amiable compositeur* by way of introducing a specific provision to the effect i.e. Section 28(2) which stipulates that the arbitral tribunal can decide disputes Ex aequo et bono or as *amiable compositeur* if the parties have expressly authorized it to do so. It is to be noted that if Parties decide their disputes Ex aequo et bono then they will have no right whatsoever to challenge the arbitral award under Section 34 of the Act, 1996[43] and it is only when an arbitral tribunal in the absence of a specific mandate from the parties decides the disputes Ex aequo et bono then the Award may be set aside under Section 34 of the Act, 1996. The following section will attempt to bring forth the position under the Act, 1996 by way of analysing judicial dicta on the subject.

(A) S. DINESH BABU V. C VENUGOPALAN & ORS.[44]

In the aforesaid case, the primary issue before the Honorable Kerala High

Court was ascertaining the contours of the terms "*ex aequo et bono*" and "*amiable compositeur*" in the context of Section 28(2) of the Act, 1996. The factual premise of the dispute was that respondent was desirous of constructing a residential building and therefore signed a construction contract with Appellants. Pursuant to the failure of the appellants to complete the construction within the stipulated time, certain disputes arose which were referred to arbitration. Thereafter, the Court appointed an arbitrator and subsequently an award was passed to which respondent filed a petition under Section 34 of the Act, 1996 before the District Court of Ernakulam which was later dismissed. On appeal, the question which arose before the Honourable Kerala High Court was whether the arbitrator, by rejecting the request made by Appellants for the appointment of an expert and conducting a personal inspection of the building without any explicit authorisation

[43] MARKANDA *supra* note 39.

[44] S. Dinesh Babu v. C. Venugopalan & Ors., 2019 (1) KLJ 416.

from the parties had acted in contravention to the provisions of Section 28(2) of the Act, 1996. The rules of procedure in arbitration, as per the Court, which are governed by Section 19 of the Act, 1996 and not by Section 28 of the Act, 1996 postulate that in the absence of any agreement between the parties, the arbitrator may conduct the proceedings in a manner which he thinks is appropriate. Taking it further, the Court observed that the arbitrator had not violated any provisions contained in Section 28(2) of the Act, 1996 by conducting personal inspection of the building.

Thus, in the present case, it is understood that the Court laid down the proposition of law that Section 28 of the Act, 1996 is only applicable to the substance of the dispute and not rules regarding the procedure.

(B) EDIFICE DEVELOPERS AND PROJECT ENGINEERS LTD. V. MS. ESSAR PROJECTS (INDIA) LTD.[45]

In the present case, the Division Bench of the Honourable High Court of Bombay was adjudicating on an appeal from the judgment of a single judge on a petition under Section 34 of the Act, 1996 which had barring one claim, had set aside the arbitral award. Notably, the award which emanated from the arbitration proceedings was pertaining to disputes between parties in the execution of the work under a construction contract. The bone of contention in the current case can be summarised as to whether the arbitrator had erred in his understanding that Hudson Formula was the only formula recognised by the Supreme Court towards calculating overhead losses. Pertinently, another justification of the arbitrator in applying only the Hudson formula and not considering any other formula was that "*prevalent trade practice*" mandated it to be so. The Division Bench noted that in *McDermott International Inc. v. Burn Standard Co. Ltd*[46] the Supreme Court had held that it is an accepted position that different formulae can be applied in different circumstances and the question as to whether damages should be computed by taking recourse to one or other formula, having regard to the facts and circumstances of a particular case, would fall within the domain of the Arbitrator.

The Court relying upon the aforesaid case opined that the approach of the Arbitrator was manifestly in the teeth of the law for two reasons: (1) the arbitrator had wrongly justified its application of Hudson formula on grounds that the formula was used as a prevalent trade practice

[45] Edifice Developers and Project Engineers Ltd. v. Ms. Essar Projects (India) Ltd., 2013 SCC OnLine Bom 5.
[46] McDermott International Inc. v. Burn Standard Co. Ltd, 2006 (2) Arb. LR 498 (SC).

and (2) the arbitrator had failed to consider any other formula other than Hudson's formula. Since in the present case there was no agreement between the parties under Section 28 of the Act, 1996 to allow the Tribunal to decide the dispute as Ex aequo et bono or *amiable compositeur*, the Court was of the opinion that the Single Judge was correct in concluding that the award was premised on the manifest misconceived notion that a contractor is entitled to claim overhead losses even in the absence of evidence on the basis of Hudson's Formula on equitable grounds. Additionally, the Court also noted that the only justification that could render the award tenable was to be found in the case of *P.R. Shah Shares and Stock Brokers Private Limited v. B.H.H. Securities Private Limited*[47] wherein the Apex Court had acknowledged, that while an Arbitral Tribunal cannot make use of its personal knowledge of the facts of a dispute which is not a part of the record, the Tribunal can certainly use its expert or technical knowledge or the general knowledge about the particular trade in deciding a matter. However, since in the present case, the arbitrator was not an arbitrator drawn from the trade, there could not be any legal basis whatsoever for his decision. Hence, as the fundamental basis of the award was founded on untenable grounds the Division Bench upheld the judgment of the Single Judge in setting aside the award barring one claim. Therefore, it can be understood that had the arbitrator possessed technical knowledge with respect to the customs and practices of the trade the Court would have approached the case from a different perspective and would have most likely not upheld the judgment of the Single Judge in entirety.

(C) MS. VEDANTA LTD. V. MS. SGS INDIA PVT. LTD.[48]

In the aforesaid case, a petition was filed under Section 34 of the Act, 1996 for setting aside an award with respect to disputes arising from a work contract pertaining to the construction of a Mechanical Sampling System machine for a period of ten years. Interestingly, the tribunal inspite of opining that Respondent had not successfully satisfied its obligation as per the contract and that the termination of the contract by petitioner-claimant was valid had awarded damages to respondent on the basis of equity and justice. The moot point which arose for consideration before the Court was whether the act of the tribunal in awarding damages to respondent on equitable grounds despite the absence of any authorization to do so by the parties was sustainable in law. The Court after having had perused the documentary evidence and pleadings of parties on record observed that none of the parties had authorized the tribunal, either to decide ex aequo et bono,

[47] P.R. Shah Shares and Stock Brokers Private Limited v. B.H.H. Securities Private Limited, AIR 2012 SC 1866.
[48] Ms. Vedanta Ltd. v. Ms. SGS India Pvt. Ltd., O.P. No.1115 of 2018 and Appl. Nos. 9660 of 2018 & 2220 of 2019.

or as amiable compositeur and hence the award was against the statute and could not be sustained in the eyes of the law. Thus, the Court set aside the award of the tribunal. The important principle that can be taken away from this case is that the Courts, whenever faced with a similar question, will at the threshold first indulge in the exercise of ascertaining as to whether the parties had authorized the tribunal to decide the dispute ex aequo et bono and then proceed to adjudicate the matter.

(D) RAMKISHAN SINGH V. ROCKS BUILDCON LTD & ORS.[49]

In this case, the petitioner filed a petition under Section 34 of the Act,1996 against the respondent before the Delhi High Court concerning an award passed by a sole arbitrator in an arbitration involving disputes arising from a contract for commission and brokerage regarding a land deal which was being conducted by the respondent. Notably, the arbitrator had passed an award which stated that as the petitioner had not fulfilled his obligations as per the agreement, it was disentitled to its claims. The question which arose for the consideration of the Court was whether the arbitrator was authorized to have varied the amount payable to petitioner towards brokerage and assistance rendered by him under the agreement inspite of specific stipulations entitling Petitioner to the entire amount premised on equitable grounds. It was noticed by the Court that the arbitrator had failed to take into account the evidence and contentions that were placed on record by the petitioner and stated that under Section 28(3) of the Act, 1996 the learned arbitrator was bound to render an award consistent with the clauses of the contract. Further, the Court also observed that under Section 28(2) of the Act, 1996 the Arbitrator shall decide ex aequo et bono only if the parties have expressly authorised it to do so. However, in the current factual matrix as the parties had not agreed that the arbitrator may decide on the basis of '*justice and fairness*', the Court was of the view that the arbitrator could not have disregarded the plain and grammatical meaning of the contractual clauses and superimposed his notions of fairness and equity.

In light of the above, the Court observed that the award was unsustainable as it was in contravention to the fundamental policy of Indian law inasmuch as it did not abide by the mandate of Section 28 of the Act, 1996. Hence, the award was set aside with the direction that the Petitioner could initiate a fresh arbitration in accordance with the law. Pursuant to a reading of the case, two conclusions come to the fore: (1) whenever the tribunal decides the award on equitable grounds without authorisation under Section 28(2) of the Act, 1996 the legal basis for setting aside such an

[49] Ramkishan Singh v. Rocks Buildcon Ltd & Ors., 236 (2017) DLT 568.

award is that it is against the fundamental policy and public policy of India and (2) the ambit of powers with the tribunal to decide a claim on equitable grounds is very small and when the clauses in an agreement are clear to that effect the arbitrator cannot bring in his own notions of fairness and justice to decide the dispute.

IV. TAKEAWAYS

On a conjoint reading of the academic literature and the judicial dicta, two major conclusions come to the fore: first, the author did not come across any judgment wherein the Parties had authorised the Tribunal to decide the matter as per Section 28(2) of the Act, 1996. Second, whenever the Courts have decided to set aside the award based on the misapplication of Section 28(2) of the Act, 1996 the common ground has always been that the award is against the fundamental policy of India thereby falling under the public policy regime in the current arbitration framework. Further, it is also noticed by the author that in all the cases where the award passed by the tribunal has been set aside due to lack of authorisation under Section 28(2) of the Act, 1996 the tribunal has failed to strive towards ensuring the enforceability of the award passed by it. In the view of the author had the tribunal taken into consideration the parameters for ensuring an enforceable award then it would not have overstepped its boundaries and justified its decision on notions of fairness and equity. The author is also of the opinion that such unwarranted excursions by the tribunals would not arise if the legislature developed a comprehensive definition pertaining to the mandate of arbitrators. From the perspective of parties, the author admits that the principle of party autonomy is to be placed at the highest threshold in arbitration, however, given the present uncertainty as to the effect of arbitrations decided under Ex aequo et bono, it would be advisable to avoid initiating arbitrations based on the principle of Ex aequo et bono. Hence, from the preceding paragraphs it can be deciphered that the utility of Ex aequo et bono concept in the Indian arbitral jurisprudence is almost negligible as the parties (1) do not prefer initiating arbitrations outside established legal rules and (2) do not prefer their arbitrations being governed by the appointed tribunal's subjective assessments of fairness and equity.

PROPERTY RIGHTS IN PARENTHOOD: A LOCKEAN ANALYSIS OF SURROGACY

Aishwarya Singh[*]

ABSTRACT

Considering the large-scale practice of surrogacy, it becomes important to address the questions of legal parenthood in the context of surrogacy. The competing claims of legal parenthood can be delineated as that of the surrogate mother, who contributed the most labour in gestating the child; the genetic parents, who could be separate from the intended parents and finally the intended parents, who contractually arranged for the creation of child. Some commentators and judgements have argued that the parenthood vests with the surrogate mother since she has contributed the most labour. However, the Surrogacy (Regulation) Bill, 2019 vests the parenthood rights in the intended parents. Amidst these competing claims of parenthood, this article argues, using the Lockean framework on labour, that the locus of the parenthood rights vests with the surrogate mother, however the parenthood rights finally accrue to intended parents because the surrogate mother has alienated her gestational labour by virtue of a surrogacy agreement. The article further argues that the critique of surrogacy agreements nested in concerns of exploitation of poor women and commodification of the body are contrary to the data produced by empirical studies and are driven by the moralism of the bourgeoisie class. The article also analyses the Indian legal framework considering these theoretical understandings.

I. INTRODUCTION

Hulu's drama "Little Fires Everywhere" which has been streaming in India on 'Hotstar' primarily deals with the trials and tribulations of motherhood. The drama involves a photographer and artist Mia, an African American woman, who has been skipping towns throughout her adult life with her daughter Pearl. Pearl complains that she has never had a normal childhood because of the nomadic lifestyle of her mother and is curious to know about her father – a question that Mia evades, time and again. The big reveal of the series is that Mia was hired as a surrogate by a wealthy infertile African American couple in New York. The show asks us to confront the question as to who deserved parenthood? The couple in New York who desperately wanted a child (and the

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father who contributed the genetic material) or Mia who, after being abandoned by her family due to her decision to become a surrogate, finds herself emotionally attached to Pearl.

The labour theory of property, proposed by John Locke, is useful in addressing the claims of parenthood because of the centrality of labour in the reproduction process of a child.[1] Locke has argued that people own their bodies and they own the labour exerted by their bodies. Hence, they own the fruits of their labour as well. It is relevant to note that Locke did not believe that parents have any property interest in their children. He observed instead that, "The power, then, that parents have over their children arises from that duty which is incumbent on them, to take care of their offspring during the imperfect state of childhood."[2] However, property concepts may work as an appropriate framework to delineate parenthood rights. It deals with the allocation of resources and the competing claims of entitlement over these resources. It has been suggested that although Locke's property argument may not establish ownership in the child, it establishes a special right to determine what is to be done with a thing, to which one has contributed labour for.[3] Moreover, Locke's observation relates to parental duties to be exercised in caring for the offspring, without taking into consideration situations where parenthood over the new-born child is itself contested, rearing of child being a subsequent duty.

This paper argues, using the Lockean framework on labour, that the locus of the parenthood rights vests with the surrogate mother, however, the parenthood rights finally accrue to intended parents because the surrogate mother has alienated her gestational labour. In some instances, the surrogate mother may also allow the use of her eggs – however that is typically a traditional model of surrogacy.[4] Section II of the essay discusses the Lockean theory of labour to ascertain rights of parenthood. Section III primarily addresses the concerns and critiques of upholding surrogacy agreements. Section IV of the essay highlights the regulatory vacuum in India in relation to surrogacy and the contradictory approaches towards its regulation by the legislature, judiciary and the executive. Finally, Section V concludes the essay reiterating the premise of the essay and highlighting that discomfort with commercial surrogacy is rooted in denial of agency of women and cultural denigration of reproductive labour as something that can be commodified even if it is source of higher income and less exploitation.

[1] Shoshana L. Gillers, *A Labor Theory of Legal Parenthood*, 110(4) YALE L.J. 691 (1989). (hereinafter "GILLERS")
[2] 5, JOHN LOCKE, TWO TREATISES OF GOVERNMENT 128 (1823). (hereinafter "LOCKE")
[3] JOHN SIMMONS, THE LOCKEAN THEORY OF RIGHTS 183 (Princeton University Press, 1992).
[4] Baby Manji Yamada v. Union of India, (2008) 13 SCC 518.

II. PARENTHOOD RIGHTS OVER CHILD UNDER THE LOCKEAN FRAMEWORK

The competing claims of parenthood are to be adjudicated generally between the surrogate mother; the genetic parents, who could be distinct from the intended parents; and finally, the intended parents who contractually arranged for the creation of child. The surrogate mother contributes the most labour to the creation of the child[5]. The surrogate mother is typically required to gestate the embryo for nine months prior to giving birth to a child, which also enables her to form a bond with the child.[6] She also contributes hormones needed for such transformation of the embryo to a child.[7] However, the complexity arises due to surrogacy agreements, where the entitlement of the surrogate mother may be challenged on the ground that she has alienated her personal labour to the commissioning parents. Further, limiting motherhood to gestation and birth gives undue primacy to the biological relationship, when parenthood is also a social relationship between the parent and the child.[8] The primacy given to biological parenthood also negates the social connections adoptive parents and/or same sex parents develop with their children. Margaret Little in her work on abortion argues that women form varying relationships to their foetuses and the mere act of gestation and birth does not determine a woman's identity as a mother.[9]

The genetic parents may have also contributed their reproductive material. It has been argued that individuals have property rights in their eggs and sperms and hence, they also have property right over the child which develops from that genetic material.[10] However, this theory fails to take into account the labour that takes place between the contribution of the reproductive material and childbirth. The gestational labour cannot be overlooked. This understanding has also seeped into legal regimes. For instance, the New Jersey Supreme Court in United States of America has held that the mother who contributes eggs helps in the creation of the embryo, however she does not

[5] Scott B. Rae, *Parental Rights and the Definition of Motherhood in Surrogate Motherhood,* 3(2) S. CAL. REV. L. & WOMEN'S STUD. 219, 236 (1994).
[6] Gostin Lawrence, *A Civil Liberties Analysis of Surrogacy Arrangements*, 16 L. MED. & HEALTH CARE 7, 15 (1988).
[7] R. Brian Oxman, *Maternal-Fetal Relationships and Nongenetic Surrogates*, 33 JURIMETRICS J. 387, 396-424 (1993).
[8] Margaret Little, *Abortion, Intimacy, and the Duty to Gestate,* 2(3) ETHICAL THEORY MORAL PRACT. 295 (1999).
[9] Jennifer Parks, 7(2) *Feminist issues in domestic and transnational surrogacy: The case of Japan,* INT. J. FEM. APPROACHES BIOETH. 121, 131 (2014).
[10] Kermit Roosevelt III, *The Newest Property: Reproductive Technologies and the Concept of Parenthood*, 39(1) SANTA CLARA L. REV. 79 (1998).

necessarily have a connection with the resulting child. It is the surrogate mother who contributes the essential nutrients required for the embryo to develop into a child.[11] No doubt in cases of commercial surrogacy, ART Clinics oversee the health of the mother and provide her with dietary supplements, if required, which may be paid for by the genetic or the intended parents, however, it is the surrogate mother's body which provides the conditions for the embryo to grow into a child.

On the other hand, some commentators have argued that since the intended parents arrange for the creation of the child, the legal parenthood should lie with them and the contractual arrangement should be upheld.[12] However, the contract assigning the parenthood rights to the intended parents does not clarify who holds the parenthood rights in the first place. For instance, one cannot sell a widget without establishing the right to own the widget in the first place.[13] Hence, the property interest must be established before giving effect to the contract.

Due to the inadequacy of arguments supporting the parenthood rights of the genetic parents and intended parents, the labour theory of property becomes relevant in addressing the claim of parenthood as it accounts for the gestational process which is instrumental in the development of the child.

The labour theory of property provides for the ability to hire services of another. Locke states, "the turfs my servant has cut…become my property".[14] If the labour of the surrogate mother is being hired by the intended parents, the ownership rights over the child will also vest with intended parents. Here, the labour theory of property ties with the arguments relating to upholding the contractual arrangements between the surrogate and the intended parents

III. UPHOLDING THE SURROGACY AGREEMENTS

It is arguable that this alienation of gestational labour supports a capitalist understanding of personal labour. Under the Marxist understanding labour cannot be bought and sold. The rights over the developed product accrue to the labourer. If the Marxist approach is adopted, the surrogate agreements cannot be upheld. However, this may not take into account the agency of

[11] A.H.W. v. G.H.B., 772 A.2d 948 (N.J. Super. Ct. Ch. Div. 2000).
[12] John Lawrence Hill, *What Does It Mean to Be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353 (1999).
[13] GILLERS, *supra* note 1, at 702.
[14] LOCKE, *supra* note 2, at 117.

the surrogate woman to voluntarily participate in the transaction. This is not to simply argue for a liberal contract-based approach. The emphasis on individual freedom and non-interference by the state under liberalism does not consider the hierarchy between the commissioning parents and the surrogates and the ramifications of entering into such agreements on the vulnerable party. The economic disadvantage may compel women to undertake surrogacy as a form of alternative employment. However, the employment may not necessarily be exploitative and in some cases may be less exploitative than the other forms of employment women seek. Women may prefer surrogacy to working in small-scale industries in the informal sector, which have despicable working conditions, unregulated working hours, windowless rooms and as a result they may be unable to look after their children, who would loiter around for 10-14 hours in these factories, as they continue to work.[15] The prohibition on commercial surrogacy will not abate women from choosing it as an option. The need of the hour is to construct laws that prevent harm caused to the vulnerable party i.e. the surrogate mother in the agreement.

Another criticism that is raised against surrogacy agreements is commodification of the surrogate mother and the children. Margaret Radin has argued that commodification of an object depends on whether it is personal property intertwined with the personhood of the individual or fungible.[16] A person's body typically comes under the ambit of personal property.[17] Hence, a transaction involving women's bodies makes the body fungible and strips them off their personhood. The argument of commodification also ties up with the Kantian argument that the surrogate is being used as a means to an end.[18] However, the body of the woman is not being commodified in this instance, it is her gestational labour which is being hired. Radin herself acknowledges that the personal labour is partially commodifiable as although it stems from the body, it can be disconnected from it.[19] The gestation of the child falls in the partially commodifiable category as it is not a part of the body that is sold, rather it is the services a body can provide that are being sold. Not only can the services here can be disconnected, but also the gestated child itself. Radin compares surrogacy agreements to baby selling which leads to their commodification[20]. However, baby selling and surrogacy agreements are different since the

[15] Bronwyn Parry & Rakhi Ghoshal, *Regulation of surrogacy in India: whenceforth now*?, 3(5) BMJ GLOB. HEALTH (2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6195148/pdf/bmjgh-2018-000986.pdf.
[16] MARGARET RADIN, CONTESTED COMMODITIES 87-88 (Harvard University Press, 1996). (hereinafter "RADIN")
[17] Margaret Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 966 (1982).
[18] Alan Wertheimer, *Two questions about surrogacy and exploitation,* 21(3) PHIL. & PUB. AFF. 211 (1992).
[19] RADIN, *supra* note 16 at 58-60.
[20] *Id.* at 131-53.

intended parents do not just walk in to purchase the baby, rather they are involved in the whole process of the creation of the baby. Here, surrogacy agreements are more analogous to other reproductive technologies used by typically infertile parents rather than baby selling markets.[21]

The feminist critique of surrogacy challenges the idea of informed consent owing to the unequal relationship between the parties hiring the reproductive labour and the woman undertaking the reproductive labour. It is argued that surrogacy arrangements reinforce the sexist beliefs relating to the reproductive obligation of women and commercialisation of women's bodies.[22] However, surrounded by the various patriarchies, women are inclined to challenge and negotiate power relations. The denial of the opportunity to make choices or the dilution of the power of her choice, replicates the patriarchal exercise of power, irrespective of it emanating from feminist concerns.[23] However, as mentioned before, a robust system of regulations that puts women, engaging in reproductive labour, in the forefront can address the concerns of inequality. This requires initiating critical dialogues involving women, alienating their reproductive labour, rather than patronizing them by seeking to regulate the way in which women can use their bodies.

Further, the dominant feminist critique of surrogacy argues that commercialisation of body is *ipso facto* exploitative. Silva and Blanchett problematise such feminist analysis and argue that analysis of such kind is grounded in bourgeoisie idea of moralism.[24] Commercialisation of body is degrading, however, women as workers in the "lower and feminized" rungs of the economy as *"telemarketing clerks, supermarket cashiers and packers, day laborers, and outsourced cleaning workers – jobs that pay far less…..and often produce more exploitation and abuse" is much more acceptable to the "bourgeoisie madam"*. Perhaps this is at the root of the "social recovery programs" for women selling their sexual or reproductive labour who need to be saved by making them "professionalized" workers.[25] The identity of the emancipated woman has been built in open opposition to the figure of women selling sex[26] or wombs for that matter. These arguments are further substantiated by empirical studies done on surrogates in India which highlight that surrogates are neither "poorest of poor"

[21] GILLERS, *supra* note 1, at 715.
[22] A. Donchin, *Reproductive tourism and the quest for global gender justice*, 24(7) BIOETHICS 323, 325 (2010).
[23] Editorial, *Loveless Patriarchy: The patriarchal complex of state, society and family converge to deny Hadiya both agency and dignity*, 52(34) ECON. POLITICAL WKLY. (2017). (hereinafter "EDITORIAL")
[24] Anna Paula Da Silva and Thaddesus Gregory Blanchett, *For Love or for Money? (Re)productive Work, Sex work, and the Transformation of Feminine Labour,* 50 CAD. PAGU (2017), https://www.scielo.br/pdf/cpa/n50/en_1809-4449-cpa-18094449201700500019.pdf. (hereinafter "SILVA & BLANCHETT")
[25] *Id.*
[26] Elizabeth Bernstein, *Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Anti-Trafficking Campaigns. Signs*, 36(1) J. WOMEN IN CULTURE & SOC'Y 45 (2010).

nor "powerless victims in need of aid",[27] rather many of them belonged to the middle class, come from advantaged and disadvantaged castes and prefer surrogacy to industry work.[28]

IV. INDIAN LEGAL FRAMEWORK RELATING TO SURROGACY

There is no single legislation regulating surrogacy in India at present. In addition to the regulatory vacuum, there are contradictory regulations issued by different institutions i.e., the medical community, the judiciary, and the government. For instance, the National Guidelines for Accreditation, Supervision and Regulation of ART Clinics issued by the Indian Council of Medical Research in 2005 ("**ICMR Guidelines**") validated commercial surrogacy agreements, provided that the child should be genetically related to the intended parents and only infertile couples are eligible to hire a surrogate.[29] Contrary to the same, The Registration of Births and Deaths Act, 1969 provides that the birthing mother is the "natural mother" or "natural parent". The question remains as to whether the birthing mother can give up her natural parenthood rights.

Due the legislative vacuum, the courts tend to grant the custody of the child either to the genetic parents or the surrogate mother. In *Baby Manji Yamada v. Union of India,*[30] a child was given birth by a surrogate mother in Gujrat, commissioned by a Japanese married couple, Dr Yuki Yamada and Dr. Ikufumi Yamada, under a surrogacy agreement. Dr. Yuki Yamada contributed his sperm. Pursuant to a matrimonial discord between the couple, only the genetic father remained interested in taking the custody of the child. The Municipality in Gujarat also issued a birth certificate in the name of the genetic father. There were some complications arising from Guardianship and Wards Act, 1980, which does not allow single fathers to adopt a female child. The mother of the genetic father filed a petition under Article 32 of the Constitution in the Supreme Court to obtain the custody of the child. The Supreme Court highlighted the lack of regulation in relation to commercial surrogacy, however decided the case under the presumption of legality of commercial agreements but did not provide the rationale for such presumption. The court could have relied

[27] Sumi Sukanya Dutta, *Surrogate Mothers In The Country Not The Poorest Of Poor, Finds Research,* THE NEW INDIAN EXPRESS (April 7, 2019), https://www.newindianexpress.com/thesundaystandard/2019/apr/07/surrogate-mothers-in-the-country-not-the-poorest-of-poor-finds-research-1961268.html (last visited June 24, 2020).

[28] La Rochebrochard, *Sociodemographic characteristics of 96 Indian surrogates: Are they disadvantaged compared with the general population?* 14(3) PLOS ONE (2019), https://doi.org/10.1371/journal.pone.0214097. (hereinafter "ROCHEBROCHARD")

[29] LAW COMMISSION OF INDIA, REPORT NO. 228: NEED FOR LEGISLATION TO REGULATE ASSISTED REPRODUCTIVE TECHNOLOGY CLINICS AS WELL AS THE RIGHTS AND OBLIGATIONS OF PARTIES TO A SURROGACY 56 (2009). (hereinafter "LAW COMMISSION OF INDIA")

[30] Baby Manji Yamada v. Union of India, (2008) 13 SCC 518.

on the ICMR Guidelines to reach such conclusion; however, no reference was made to such guidelines. The court did not deny the right of the genetic/commissioning parent to obtain the custody of the child.

In the case of *Jan Balaz v. Union of India*,[31] the nationality of a baby born of an Indian surrogate commissioned by a couple in Germany had to be decided by the Gujarat High Court. The court granted Indian citizenship to the new-born child based on the ground that the surrogate mother was an Indian. The court discussed the gestational labour put in by the surrogate mother and held that, *"In the absence of any legislation to the contrary, we are more inclined to recognize the gestational surrogate who has given birth to the child as the natural mother…. In our view, by providing ova, a woman will not become a natural mother."* It went on to hold that a commissioning parent who has not contributed any genetic material to the child cannot acquire legal parenthood. The court observed, *"Wife, of the biological father, who has neither donated the ova, nor conceived or delivered the babies cannot in the absence of legislation be treated as a legal mother and she can never be a natural mother."* The *Jan Balaz v. Union of India,*[32] upholds the Lockean labour theory to the extent that it acknowledges that the parenthood right accrues to the surrogate mother on account of her labour contribution. In addition, the court does not recognise the right of commissioning parents unless they have made some genetic contribution. This position is subject to change if the legislature raises the presumption through a legislation that the commissioning parents are the legal parents.[33] It seems that the court denigrates the rights of intended parents due to lack of contribution in the creation of child biologically. It fails to take into account the existence of the service contract, under which the surrogate has decided to alienate her labour or the fact that contribution of genetic material may provide a property like interest in the genetic material but not the new born child itself.

An interesting case came up in the Madras High Court which involved the question whether an employee at the Chennai Port Trust is entitled to take maternity leave in a case where the child has been born through a surrogacy arrangement.[34] The court ruled that it did not find anything immoral and unethical about surrogacy agreements and declared the employee as the mother of the child "for all practical purposes". It extended the benefit of availing the maternity leave to the employee.

[31] Jan Balaz v. Union of India, (2008) 13 SCC 518.
[32] Baby Manji Yamada v. Union of India, (2008) 13 SCC 518.
[33] *Id.*
[34] K. Kalaiselvi v. Chennai Port Trust, Represented by the Chairman, Chennai, 2013 (2) KLT 567.

A similar case came up at the Delhi High Court where the court held that the commissioning mother was entitled to maternity leave under Central Civil Services (Leave) Rules, 1972.[35] Interestingly, in this case the mother was not genetically related to the child, however the court observed that, " …undoubtedly, the fact that the surrogate mother carried the pregnancy to full term, involved physiological changes to her body, which were not experienced by the commissioning mother but, from this, could one possibly conclude that her emotional involvement was any less if, not more, than the surrogate mother." This is a compelling response to the primacy reposed in the biological relationship between the parent and the child, which as noted earlier undermines the social aspects of the relationship shared between the child and the parent. Unfortunately, the 228th Law Commission Report retains such a notion and provides that "one of the intended parents should be a donor as well, because the bond of love and affection with a child primarily emanates from biological relationship."[36]

Challenging the primacy given to the biological relationship between the parent and child, Kerala High Court while extending the benefits of post-delivery maternity benefits (except leave involving health of the mother) to a commissioning mother remarked that "science has forced us to alter our perspective of motherhood. It is no longer one indivisible instinct of mother to bear and bring up a child. With advancement of reproductive science, now, on occasions, the bearer of the seed is a mere vessel, a nursery to sprout, and the sapling is soon transported to some other soil to grow on. Now, it is Law's turn to appreciate the dichotomy of divine duty, the split motherhood.[37]

The above judgements show a contradiction in the approach of the courts towards commercial surrogacy. However, none of the judgements specifically deal with the question of enforceability of a surrogacy agreement.

The enforceability of such contracts is subject to scrutiny under Section 23 of the India Contract Act, 1872 ("**Contract Act**") which provides that a contract is not enforceable if the object or the consideration of an agreement is opposed to public policy. Public policy has not been defined under the Contract Act. Due to its definitional flexibility, *"it has been described as an 'untrustworthy guide', 'variable quality', 'unruly horse', etc."*[38] The discomfort with the commercialisation of reproductive labour may influence the court to rule that commercial surrogacy is opposed to public

[35] Rama Pandey v. Union of India, 221 (2015) DLT 756.
[36] LAW COMMISSION OF INDIA, *supra* note 25.
[37] P.Geetha v. The Kerala Livestock Development, 1 (2015) KHC 165.
[38] Gherulal Parekh v. Mahadevdas Maiya, AIR 1959 SC 781.

policy. However, the cases above show that courts have generally taken a positive view towards parenthood attained through surrogacy arrangements. The definitional flexibility may work in the favour of surrogacy agreement precisely because of the lack of precise definition since the contours of public policy vary "from generation to generation and from time to time."[39]

Even if the surrogacy agreements are not hit by the bar of public policy, it is to be noted that it is unlikely that the right of the intended parents over the child will be upheld as a contractual bargain in India due to the nature of the contractual remedies available under the Indian law. Pursuant to the amendments introduced to the Specific Relief Act, 1963 ("**Act**"), specific performance of the contract has become a primary remedy for breach of contracts rather than a discretionary remedy and can be refused only on the grounds listed under the Act. One such ground is that the contract is so dependent on the personal qualification of the defaulting party that the court cannot specifically enforce such a contract.[40] If the surrogate mother refuses to part with the child at a subsequent stage, the court may hold that this contract cannot be specifically enforced since it is dependent on the personal physical labour of the surrogate mother. The courts may award damages to compensate for the loss of the intended parents.

Hence, contract law may not give satisfactory resolution to the claims of parenthood of intended parents under the Indian law unless a legislation is passed by the Parliament upholding the claims of parenthood of the intended parents over the child.

Unfortunately, the present Indian government has taken steps to prohibit commercial surrogacy in India. In 2015, the government of India banned surrogacy for foreign nationals,[41] which was one of the primary markets for commercial surrogacy.[42] The government had also introduced the Surrogacy (Regulation) Bill, 2016 allowing altruistic surrogacy and prohibiting commercial surrogacy done in exchange for a monetary award which lapsed in the Parliament. The Surrogacy (Regulation) Bill, 2019 ("**Bill**") has been introduced as a replacement for the earlier bill passed in the Lok Sabha on July 15, 2019. The Bill defines surrogacy as a *"practice whereby one woman bears and gives birth to a child for an intending couple with the intention of handing over such child to the intending couple after the birth."*[43] Hence, parenthood vests with the intended parents. However, the Bill only allows

[39] ONGC Ltd. v. Saw Pipes Ltd., (2) 2003 RAJ 1 (SC).
[40] Specific Relief Act, 1963, § 14, No. 47, Acts of Parliament, 1963 (India).
[41] MINISTRY OF HOME AFFAIRS, GOVERNMENT OF INDIA, Circular No. 25022/74/2011-F.1 (Vol. III) (Nov. 3, 2015).
[42] Sarah Huber, Sharvari Karandikar & Lindsay Gezinsk, *Exploring Indian Surrogates' Perceptions of the Ban on International Surrogacy,* 33(1) J. OF WOMEN & SOC. WORK 69 (2018).
[43] The Surrogacy Regulation Bill, 2019, No. 156-C of 2019, Gazette of India, Pt. 2 Sec. II, § 2(zc).

altruistic surrogacy, which does not involve any monetary compensation to the surrogate mother except payment of medical expenses and insurance coverage during the period of pregnancy.[44] According to the Bill, exploitation exists only in the economic realm and not in the realm of the family. Very few women would willingly take up surrogacy for someone within their family.[45] The absence of the access to commercial surrogacy would only increase the familial pressure on women to take up surrogacy for close relatives. Further, a woman may have to give up employment to engage in altruistic surrogacy, however, she cannot receive any compensation for the same – if she does, it will be categorised as a commercial surrogacy. There could also be an emotional toll on a woman undergoing surrogacy for a close relative, because the child will be brought up in close proximity to her.

The Bill also contains other jarring provisions as to who is eligible to obtain surrogacy services. For instance, only a heterosexual married couple, where one of them is infertile, can commission a surrogate mother to carry the child.[46] Further, the Bill contains penal provisions for undertaking commercial surrogacy.[47] There is also the presumption that if a surrogate undertakes surrogacy for any other purposes than stipulated under the Bill, it would be presumed that she was compelled to do so by the (i) intending couple; (ii) husband or (iii) any other relative. They would be liable for abetting commercial surrogacy.[48] This is a typical reflection of the patriarchal state, wherein the agency of the woman is taken away and she is infantilised in the name of protection.

The Bill is yet to be passed by the Rajya Sabha i.e. the Upper House of the Parliament. Although a legislation recognizing the rights of the intended parents will provide clarity in relation to parenthood rights, prohibition of commercial surrogacy fails to take into account the agency of the surrogate mother to enter into contractual arrangements to alienate her gestational labour like any other bodily labour.

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[44] *Id.* § 2(b).
[45] A. Mukerjee, *Why altruistic surrogacy is impossible in India,* ASIA TIMES (Nov. 4, 2016), http://www.atimes.com/altruistic-surrogacy-impossible-india/ (last visited May 5, 2020).
[46] *Id.* § 4.
[47] *Id.* Ch. VII.
[48] *Id.* § 39.

V. CONCLUSION

This paper conceptualises the rights of the intended parents stemming from the alienation of labour by the surrogate mother, hoping to address the question of the locus of the parenthood rights and not merely the transaction giving effect to such rights. Although India seems to be on a path to give recognition to the parenthood rights of the intended parents, the prohibition on commercial surrogacy shows a general discomfort regarding the commercialisation of women's sexual or reproductive labour, even though other work linked to the feminine gender like housework does not elicit similar condemnation or prohibition by the State. Silva and Blanchett, write in the context of sex work, that "what seems to offend, in short, is that something that should be given out of love (or – more historically – out of obligation) becomes commoditized, supposedly making the seller a victim of the capitalist exploitation of her body."[49] However, as discussed above, sexual or reproductive labour can often be a useful alternative to jobs like that of daily wage labourers, domestic helps, factory workers etc., which pay far less and often result in more exploitation and abuse than sex work or surrogacy.[50] Sample studies done in India have highlighted that many women engaged in surrogacy were not the poorest women in the geographical area of study.[51] and had prior employment[52]. A study done on the socio-economic background of Indian surrogates has concluded that the surrogates primarily belong to the middle class, which is tandem with the studies conducted in rich countries like United Kingdom, United States or Israel.[53] The study also elicited limited data on caste of the surrogates and found that surrogates may come from both forward castes and the other backward classes or scheduled castes.[54] The shift to surrogacy is many times not a financial necessity rather an opportunity to earn higher income.[55]

Altruistic surrogacy on the other hand, allowed by the Bill, may be a result of coercion, as the surrogate mother can only be a close relative of the intended parents. In patriarchal households, the exercise of agency on part of the surrogate mother without any monetary consideration but

[49] SILVA & BLANCHETT, *supra* note 24.
[50] EDITORIAL, *supra* note 20.
[51] D. Deomampo, *Transnational Surrogacy in India: Interrogating Power and Women's Agency*, 34(3) FRONTIERS: A J. OF WOMEN STUD. 167 (2013).
[52] S. Rudrappa, *Working India's Reproduction Assembly Line: Surrogacy and Reproductive Rights?*, 66(3) WESTERN HUMANIT. REV. 77 (2012).
[53] ROCHEBROCHARD, *supra* note 28.
[54] *Id.*
[55] Rozée Gomez Virginie & Sayeed Unisa, *Surrogacy from A Reproductive Rights Perspective: The Case of India*, 70 (2) AUTREPART 185 (2014).

"*out of love"* is arguably more questionable than women entering into transactions to alienate their reproductive labour. The need of the hour is to recognize the agency of women to transact with their own body and their own labour. The work may be unpleasant, but as noted by a sex worker, *"Since when do you work because you like it?"*[56] and this may ring true for many people in other forms of employment.

[56] SILVA & BLANCHETT, *supra* note 24.

CONTEXTUALIZING CLIMATE CHANGE LITIGATION IN INDIA THROUGH INCORPORATION OF RIGHT TO CLIMATE PROTECTION.

*-Anitta M. Jose and Angelina Joy**

ABSTRACT

Climate litigation is a recent development catalysed by the over looming fear of habitat destruction. People's climate consciousness has heightened over the past few decades owing to the abnormal temperature increase and its consequential devastation. The historic case of State of Netherlands v. Urgenda foundation has become one of the pioneers in the field of climate litigation, wherein the judiciary has taken a step forward to confront the menace of climate change at hand and has made the government liable for its lethargic approach in attending to climate change issues. Through this paper, the authors first try to analyse the position in Urgenda on the following parameters: 'the laws to be applied, the issue of standing, establishment of causality and the concern of judicial encroachment and then compare it with the present Indian position. In the second half of the paper, the authors inspect the relevance of the current Indian legislations in the context of climate change. While investigating the current climate policies, it is pertinent to note that such legislations have little application in the present situation and henceforth Indian climate legislations suffer from climate change hypocognition. The authors, keeping in mind the state of current climate policies, seek a right to climate protection to be given constitutional sanctity under the right to life thereby widening the sphere of the right to a safe environment by recognising the right to a favourable environment.

I. CLIMATE LITIGATION: A ROAD LESS TRAVELLED

In recent decades people across the globe have become increasingly conscious of the menace of climate change as it has started to affect their mundane life. The recent Australian bushfires which were caused by an abnormal increase in the average temperature coupled with drought which then resulted in a series of unanticipated bushfires which engulfed the island continent for weeks, leading

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to the state declaring several parts of the island to be in a state of emergency.[1] Such progression of devastating calamities emanating from climate change has given rise to some awakening in the minds of the affected individuals. This awakening, thereby, has led to increased campaigning, debates, research, and consequently, litigation in the field of climate change, mainly to spread their concern to the ignorant masses and to drive the concerned government to take necessary actions to prevent any further rise in temperature and to adopt measures to adapt and to mitigate the overhanging perils of climate change. The impact of climate change would be particularly devastating for a country like India, where the majority of the population depends on climate-sensitive sectors like agriculture, forestry and fishery for livelihood.[2] Disrupted patterns of rainfall and temperatures variations which has resulted in the increased severity of drought and flooding, would imperil food security and livelihood. Climate change also means added stress on the ecological and socio-economic systems that are already under enormous trouble due to rapid industrialization.[3] According to a study published in 2019, global warming decreases the GDP of developing countries like India. It demonstrates that India's GDP is 31% lower today than it would have been had it not been affected by climate change.[4] Rapid climate change would inevitably lead to natural disasters of mammoth proportions which would displace lakhs of people. The displaced population are often left without access to health services, housing, and sanitation. Heat stress, an outcome of global warming has contributed to an increased rate in heat stroke, cardiovascular collapse and respiratory complications.[5]

The extent and severity of climate change can be understood just by looking at the wide range of natural disasters that occurred across India in the previous year. From intense heatwaves to record number of cyclones, extremely long dry phases to record-breaking volumes of rainfall, 2019 saw numerous extreme weather events across the country. The Karnataka Floods in August 2010 resulted in severe damage and destruction in terms of property as well as life - 61 recorded deaths, 15 people

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1 Pallab Ghosh, *Climate change boosted Australia bushfire risk by at least 30%,* BBC (Mar. 4, 2020), https://www.bbc.com/news/science-environment-51742646.

2 Vijaya Gupta, *Climate Change and Domestic Mitigation Efforts,* 40, Economic and Political Weekly, 981, 982 (2005).

3 *Id.* at 982.

4 Noah S. Diffenbaugh & Marshall Burk, *Global Warming has Increased Global Economic Inequality,* 116 PNAS 9808, 9809 (2019).

5 *Climate change and health,* World Health Organisation (Feb.1, 2018), https://www.who.int/en/news-room/fact-sheets/detail/climate-change-and-health.

missing, around 7 lakh people displaced, infrastructures such as roads, tanks, pipelines and schools extensively damaged and massive scale destruction of agriculture.[6] The Kerala floods of August 2019 resulted in 121 deaths, and more than 26,000 people had to move to refugee camps.[7] In the Bihar flood around, 88.4 lakh people were affected while the death count rose to 130 and five rivers flowed above their danger marks due to the torrential rains.[8] Unnaturally excessive rainfall within just a few days was cited as the primary factor to cause floods.[9] Over 11 lakh people had to be evacuated because of Cyclone Fani, one of the rarest summer cyclones to hit Odisha since 1999.[10] In May and June 2019, several parts of north India endured one of the hottest and most prolonged heatwaves in the country's recorded history.[11] The intense heat marked its biggest death toll in Bihar, killing 184 people.[12] Due to unbearable weather conditions, District Magistrate of Gaya (Bihar) imposed Section 144 of the Criminal Procedure Code.[13] It was the very first instance of this Section being issued in the region for weather-related reasons. The heatwave is also said to have accelerated the outbreak of Acute Encephalitis Syndrome in Bihar,[14] which took the lives of 161 children. According to the World Migration Report (2020), India suffered hugely because of abrupt disasters, with more than 2.7 million people displaced due to cyclones and floods.[15] One must particularly bear in mind the fact that India's coastline measure of 7,516.6 km frightfully makes the country vulnerable to climate change

[6] *Death toll mounts to 61 in Karnataka floods, more than three lakh lodged in camps*, THE NEW INDIAN EXPRESS (Aug.15, 2019, 11:41 AM), https://www.newindianexpress.com/states/karnataka/2019/aug/15/death-toll-mounts-to-61-in-karnataka-floods-more-than-three-lakh-lodged-in-camps-2019339.html.

[7] *Death toll in flood-hit Kerala rises to 121, 40 injured*, INDIA TODAY (Aug.19, 2019, 1:15 PM), https://www.indiatoday.in/india/story/death-toll-in-flood-hit-kerala-rises-to-121-40-injured-1582258-2019-08-19.

[8] *Bihar floods death toll climbs to 130*, INDIA TODAY (July 30, 2019, 10:13 PM), https://www.indiatoday.in/india/story/bihar-floods-death-toll-climbs-to-130-1575354-2019-07-30.

[9] Soumya Sarkar, *Extreme rainfall and bad infrastructure lead to extreme Indian floods*, THETHIRDPOLE.NET (Aug.23, 2019), https://www.thethirdpole.net/2019/08/23/extreme-rainfall-and-bad-infrastructure-lead-to-extreme-indian-floods/

[10] *Cyclone Fani: Odisha evacuates over 11 lakh*, THE HINDU (May 3, 2019, 12:49 AM), https://www.thehindu.com/news/national/odisha-evacuates-over-11-lakh/article27016815.ece.

[11] Mujib Mashal, *India Heat Wave, Soaring Up to 123 Degrees, Has Killed at Least 36*, N.Y. TIMES (June13, 2019), https://www.nytimes.com/2019/06/13/world/asia/india-heat-wave-deaths.html

[12] *India's heatwave turns deadly*, ALJAZEERA (June18, 2019), https://www.aljazeera.com/news/2019/06/india-heatwave-turns-deadly-190618090507114.html.

[13] *Id.*

[14] Santosh Singh, *Heat, lack of nutrition, awareness adds to AES, Bihar kids toll over 100*, THE INDIAN EXPRESS (June18, 2019, 10:11 AM), https://indianexpress.com/article/india/heat-lack-of-nutrition-awareness-add-to-aes-bihar-kids-toll-over-100-5785552/.

[15] International Organization for Migration, and United Nations [U.N.], *World Migration Report 2020*, at 74, (Nov.2019), *https://publications.iom.int/books/world-migration-report-2020.*

catastrophes, which has led to apprehensions that major coastal cities such as Mumbai, Kolkata and Chennai may be submerged by 2050.[16] The report estimates that around 31 million people who live in coastal area are at risk of annual flooding which would increase to 25 million by 2050.[17] It is high time that India becomes environmentally conscious with respect to climate change, being particularly conscious of the havoc that could be facilitated by rise in sea levels and heavier rainfall and fiercer storms' surges which have been predicted to occur from climate change.

Climate change has scientific, economic, social, political and cultural aspects along with legal ones.[18] Climate litigation cases can help shine a light on these complexities of climate change and help to amend our present laws to peacefully accommodate the needs of our time. Climate change is a recently developed area of litigation, approximately two and a half decades old. Climate litigation is in its nascent stage, whereby relevant laws covering the multifaceted dimension of the problem are still to be applied to the frameworks of our persisting legislations. So, uncertainties and lack of clarity are expected in this field - both from litigants and from the judiciary. This state of limbo casts stresses of incertitude on the stakeholders. Furthermore, ambiguity is witnessed with respect to the laws to be applied, the jurisdiction of courts and the practicalities of judicial decisions.

However, through a series of trial and errors through the years, litigation has supplied the legal community with some ideas on how to approach the issue in courts. An example of this would be the historic decision in *State of the Netherlands v. Urgenda Foundation* by the Hague District Court[19] which was confirmed by the Supreme Court of Netherlands[20] in 2019, making it the first successful climate justice case.

This paper aims to analyse the present position of climate change litigation in India and compare it with foreign jurisdictions. Furthermore, the authors endeavour to test the feasibility of successful

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[16] Disha Shetty, *Mumbai, Kolkata, Chennai May Be Submerged By 2050: Latest Data*, INDIA SPEND (Oct. 31, 2019), https://www.indiaspend.com/mumbai-kolkata-chennai-may-be-submerged-by-2050-latest-data/.

[17] *Id.*

[18] IPCC, *Climate Change 1995 - Economic and Social Dimensions of Climate Change*, 7 (1996), https://www.ipcc.ch/site/assets/uploads/2018/03/ipcc_sar_wg_III_full_report.pdf.

[19] RBDHA Hague 24 juni 2015, AB 2015, 336m.nt. Ch.W.Backes (STICHTING URGENDA/ DE STAAT DER NEDERLANDEN (MINISTERIE VAN INFRASTRUCTUUR EN MILIEU)(Neth.).(hereinafter *the Urgenda Case*).

[20] HR 20 december 2019, NJ 2020,41 m.nt. van J. Spier(DE STAAT DER NEDERLANDEN (MINISTERIE VAN ECONOMISCHE ZAKEN EN KLIMAAT/STICHTING URGENDA)(Neth.).

climate litigation with respect to the Indian scenario and henceforth seek to predict the success of the future of climate litigation in the context of the Indian framework through bringing new aspects in the right to life. The authors through this essay aim to make a case for the recognition of a new right, namely 'right to climate protection'. However, before launching into the problems posed by the current legislative framework and the inadequate climate change jurisprudence it is imperative first to appreciate the ruling in Urgenda.

In this unprecedented decision, the Hague District court examined the Dutch climate policies and held it to be inadequate and unlawful. The court further went on to label them as hazardous and negligent and ordered the Dutch government to limit the joint volume of Dutch annual greenhouse gas (GHG) emissions by at least 25 percent at the end of 2020 compared to the 1990 level.[21] The court actively further contemplated upon the submissions made by Urgenda, wherein the respondents submitted that based on the state's current policy, the Netherlands was targeting a 16 percent reduction while current prognoses show that the Netherlands will achieve a reduction of 17 percent at most in 2020.[22] According to the court, this was below the norm of 25 to 40 percent deemed necessary in climate science and international climate policy for developed countries to achieve by 2020 to avoid a more than 2°C warming of the average temperature of the earth.[23] Hence the order was pronounced in pursuant to reduce emissions by at least 25 percent by 2020. Indeed, the ruling marks the first time a court actively involved itself in the climate change jurisprudence. Thereby by pronouncing the judgment the court judiciously determined the appropriate emissions-reduction target by taking into account the current state of affairs for a developed state. It is an uncontested fact that the complications and answers in climate litigation differ from country to country, depending on their legal practices. However, some problems like 'the issue of standing', 'the concern of judicial encroachment' and 'the laws to be applied'[24] share a common ground when climate litigation is broached anywhere across the globe.

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21 *the Urgenda Case, supra* note 19, at 4.103.

22 *the Urgenda Case, supra* note 19, at 4.23-4.29.

23 *the Urgenda Case, supra* note 19, at 4.83-4.86.

24 Dr. Alexander Schmidt, Karl Stracke, Prof. Dr. Bernhard Wegener and Dr. Michael Zschiesche,*The legal debate on access to justice for environmental NGOs*,10-11 (2017),

II. THE ISSUE OF STANDING

The first and foremost matter that came during the litigation was the issue of Urgenda's *locus standi*. Urgenda institute Court for protection against inept climate policies. Nevertheless, the Court seems to suggest that if Urgenda's interest would not have been awarded, the individual citizens might have had sufficient interest and therefore standing, because the Court considered that if the present situation is to continue, in the future, there is a high chance of damage to the interest of people who are represented by Urgenda.[25] The case under its capacity as an NGO and as a representative of 886 Dutch citizens who joined the lawsuit.

The Hague District Court started with the basis that, under Netherlands law, NGOs are allowed to institute public interest cases.[26] The only condition is that the NGO or foundation bringing the action to the Court relating to the protection of the collective interests of other persons should express these general or collective interests as their objectives under its bylaws.[27] As per its bylaws, the statutory aim of Urgenda is "to stimulate and accelerate the transition process to a more sustainable society, beginning in the Netherlands".[28] Urgenda claimed that it is defending the interests of a "sustainable society." The foundation uses the word sustainability as set out in the 1987 Brundtland Report which reads as follows: "Sustainable development is the development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[29]

Based on its bylaws, the Court accepted that Urgenda has *locus standi* to present the interest of present and future generations to safe climate since the term "sustainable society" has by its very essence an intergenerational dimension.[30] The Court decided that Urgenda's claims, insofar as it acts on its behalf, are permissible.[31] However, the Court rejected the claim of Urgenda on behalf of 886 citizens since

https://www.unece.org/fileadmin/DAM/env/pp/a.to.j/AnalyticalStudies/UBA_Legal_debate_A2J_for__EnvNGOs_EN_Summary.pdf.

[25] *the Urgenda Case, supra* note 19, at 2.89.

[26] *the Urgenda Case, supra* note 19, at 4.4-4.9.

[27] Art. 3:305a para.1 BW

[28] Urgenda, https://www.urgenda.nl/en/home-en/ (last visited Mar. 6, 2020).

[29] WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE,16 (Oxford University Press 1987).

[30] *the Urgenda Case, supra* note 19, at 4.4-4.10.

[31] *the Urgenda Case, supra* note 19, at 4.10.

they did not have their own interests besides Urgenda's and left the question of locus standi open.[32] Since this crucial question was left unanswered, it is not clear whether individual citizens could ask the court for protection against inadequate climate policies.

III. INDIA

When it comes to the Indian position, the issue of *locus standi* is not a big problem. This is so because of a concept developed by the Indian Judiciary called Public Interest Litigation (PIL) which is free from constraints of traditional judicial proceedings. The origins of PIL can be traced back to the emergency era when the courts realised the general public is disconnected from the courts and that they have to be more accessible to the general public. In the case of *S. P. Gupta v. Union of India*[33] Justice Bhagwati relaxed the rigidity of *locus standi*. It declared that public-spirited citizens could file petitions – those wanting to advocate the cause of the poor and downtrodden (representative standing) and those wishing to reinforce the performance of public duties (citizen standing). Citizens can move the High Court or Supreme Court under Article 226[34] and Article 32[35] respectively, and the courts have the power to issue writs or other similar remedies. The courts have given such reliefs in environment-related issues before.[36]

IV. SEPARATION OF POWER

One of the main questions addressed by the Court was whether it is appropriate for a judge to decide on a matter of climate policy. The argument was that the issue falls under the ambit of legislative power, therefore, violates the principle of separation of powers. However, the Hague Court held that Dutch law has no absolute separation of state powers; the distribution of authorities intends to attain a balance between the state authorities. The Court clarified its stand by pointing out that a judge has to grant judicial protection and decide on legal disputes, in this respect, the power of the judges are based on democratically established legislations, and these very legislations have laid down that the

[32] *the Urgenda Case, supra* note 19, at 4.109.
[33] S. P. Gupta v. Union of India, 1981 Supp SCC 87, 94-96.
[34] INDIA CONST. art. 226.
[35] INDIA CONST. art. 32.
[36] M. C. Mehta v. Union of India (Ganga Pollution Case), (1987) 4 SCC 463, 473-74.

power of granting legal safeguard from government authorities, belongs in majority to the domain of a judge. The Court held that by fulfilling its responsibility it does not encroach upon the realm of politics and that the fact that a court ruling can have political consequences does not in itself make it a political issue.[37]

(A) INDIA

The separation of powers is a much-debated subject within the Indian legal system. The Supreme Court, unlike in countries more obedient to the separation of powers, acts as a dominant player by directing policy change, and by enlarging the scope and ambit of rights given under the constitution. The Supreme Court is constitutionally empowered to 'make such order as is necessary for doing complete justice in any cause or matter pending before it'.[38] These powers were further strengthened since the advent of PIL and judicial activism since judges are not reluctant to exercise this authority in what they regard as the public interest. When met with a climate change litigation case, the above-mentioned powers of the Supreme Court are expected to enable it to create solutions to problems, to fill in the gaps in the law, and supervise when they observe a governance shortfall. However, the recent debates on the separation of powers and judicial overreach has prompted the Court to exercise self-restraint.[39]

V. THE LAWS TO BE APPLIED

(A) TORT LAW V. ADMINISTRATIVE LAW

According to Roger Cox, the attorney who represented Urgenda foundation, it was a strategic move to base the action of Urgenda against the government on tort law rather than on administrative law.[40] If they had filed an administrative environmental law based action it would have mainly involved assessing the actions of the Dutch government in light of current environmental laws in the country. He argues that administrative environment law in the country is not adequate to tackle climate

[37] *the Urgenda Case, supra* note 19, at 4.98.
[38] INDIA CONST. art. 142.
[39] Divisional Manager, Aravalli Golf Club and Anor v. Chander Hass, (2008) 1 SCC 683, 686-90.
[40] Roger Cox, *A climate change litigation precedent: Urgenda foundation v the State of the Netherlands,* CIGI, 3, (2015),https://www.ciginline.org/publications/climate-change-litigation-precedent-urgenda-foundation-v-state-netherlands.

litigation.[41] Moreover, the issue with climate litigation is that the present administrative law is not equipped to protect against climate change. So, a venture to impose more rigid reduction obligations on the State than the State itself has undertaken using administrative law may not be fruitful. In contrast, in a tort law-based action petitioners' can rely on diverse grounds other than already existing inadequate state laws for challenging the action of the state.

There are some examples of successful action brought under administrative law, such as the Australian case *Gray v. the Minister of Planning,*[42] which ruled that the environmental impact evaluation of a proposed coal mine in New South Wales had to take into account the greenhouse gas impacts of coal burning. Furthermore, in the case of *Massachusetts v. Environmental Protection Agency (EPA)*[43] in the United States (US), 12 U.S states and various cities successfully brought a suit against EPA to compel the federal agency to modulate GHGs as air pollutants. However, these cases are rare exceptions.

The tort law approach has been used before, but only against private actors, and that too, without much success. Many of these were instituted against private US fossil fuel companies, but the US courts dismissed them all stating that GHG regulation is a political issue and not a legal one to be resolved by the courts.[44] The Urgenda case brought in a novel approach by setting in motion an action based on tort law against the State itself.

(B) WHY TORT LAW?

There were several factors which prompted Urgenda to file a tort law-based action. Firstly, the open standard in tort law for constructing the duty of care provides many more grounds for a favourable outcome.[45] In a tort law action, the judge can weigh in several facts and principles while determining the civil duty of care in a particular case. In the case of duty of care concerning climate change, the universal consensus regarding harmful climate change and the agreements among developed countries regarding the contribution from their part to prevent this danger can be crucial in defining the extent of the duty of care expected from a country. The fact that hazardous emissions occur within the State

[41] *Id.* at 2.
[42] *Gray v The Minister of Planning*, [2006] 152 LGERA 258, 288.
[43] Massachusetts v. Environmental Protection Agency, 549 U.S. 497, 528-29 (2007).
[44] Cox *supra* note 41, at 2.
[45] Cox *supra* note 41, at 2-3.

of the Netherlands and the fact that the State has the ability to control and regulate these emissions means that the country has "systemic responsibility" for the total greenhouse gas emission levels of the Netherlands and the pertinent policy.[46] In light of this, the fact that the emissions level of the Netherlands (contributes to one of many reasons for hazardous climate change can be attributed to the State. Thus, Urgenda argued that with the current climate policy, the State seriously fails to meet this duty of care and therefore acts unlawfully.

Secondly, the international commitments that Netherlands have made to battle climate change can be exploited to the maximum extent under a tort action only. Such arguments cannot be brought forth in an administrative law action. However, it should be noted that international treaty obligations have more weight in the Dutch Court than it does in the Indian Court due to the peculiarities of each legal system. The explicit commitment of the Netherlands to the dangerous climate change situation as an Annex 1 country, i.e., an industrialized country in the context of the United Nations Framework Convention on Climate Change (UNFCCC)[47] was accepted by the court as binding on the Dutch government.

Netherlands has also adopted the Intergovernmental Panel on Climate Change (IPCC) reports and depended on them as a threshold during climate change conferences.[48] According to Roger Cox, "as long as the claimant in a climate case bases its argumentation on the IPCC findings, there is little to nothing a national government can do from a legal perspective to contest these findings."[49] Such arguments put the judge in a more comfortable position to pass judgment and reach a verdict and they were successfully used in the case too. Hague Court ruling also shows that the State's obligations under other treaties, such as the European Convention on Human Rights (ECHR) and the Treaty on the Functioning of the European Union (TFEU) further define the duty of care standard.[50] As soft law, they can still carry weight - at least as it pertains to Dutch law. Private Citizens cannot directly seek remedy for violation of treaty provisions because they cannot derive rights from such

[46] Cox *Supra* note 41, at 4.
[47] Cox *supra* note 41, at 2.
[48] Cox *supra* note 41, at 2.
[49] Cox *supra* note 41, at 3.
[50] Cox *supra* note 41, at 2.

treaties. However, these provisions and recommendations can assist the judiciary in demarcating the duty of care that a government must exercise. This would apply even if these resolutions do not have any legally binding force between governments.

Urgenda also argued that unchecked emissions and its consequences constitute an infringement of Article 2 ("the right to life")[51] and Article 8 ("the right to health and respect for private and family life")[52] of the ECHR, on which both Urgenda and the parties it represents can rely as citizens of the European Union. Even Though the court held that Urgenda itself cannot be designated as a direct or indirect victim, within the meaning of Article 34 ECHR, of a violation of Articles 2 and 8 ECHR both the articles and their interpretation given by the ECtHR, particularly with respect to environmental right issues, can serve as a source of interpretation when detailing and implementing open private-law standards.[53] Therefore, the court agreed to reflect on the environmental law principles and scope of protection of Articles 2 and 8 ECHR, such as those that can be derived from the ECtHR's rulings.[54] This again was achieved by relying on tort action rather than administrative action.

To summarise, the combination of the open standard for the duty of care and its interpreted meanings along with the extent of application under climate science and international climate politics, its purpose based on the various international treaties, the acknowledgements made by the State in the national context (in ministerial letters, policy documents) form the grounds upon which the decision in Urgenda case was based.[55]

The decision of the Hague Court in *Urgenda v. the State of the Netherlands*[56] creates innovative perspectives for using a tort-law approach against the government to address the problem of climate change. Within

[51] Convention for the Protection of Human Rights and Fundamental Freedoms, art.II, Nov.4,1950, E.T.S.No.005[hereinafter ECHR].
[52] ECHR, art.VIII, Nov.4,1950, E.T.S.No.005.
[53] *the Urgenda Case, supra* note 19, at 4.45.
[54] *the Urgenda Case, supra* note 19, at 4.46.
[55] Cox *supra* note 41, at 4.
[56] HR 20 december 2019, NJ 2020,41 m.nt. van J. Spier(DE STAAT DER NEDERLANDEN (MINISTERIE VAN ECONOMISCHE ZAKEN EN KLIMAAT/STICHTING URGENDA)(Neth.).

the legal community, the ruling has spawned confidence that this type of legal action can be replicated in other countries to press for more governmental action on climate change.

VI. THE PECULIAR CASE IN INDIA

The Indian constitution designates certain rights as Fundamental rights under Part 3 of the constitution. Laws which are inconsistent with, or in derogation of, such rights are void to the extent of the contravention.[57] The most significant of these fundamental rights is the right to life and liberty given under Article 21.[58] This right has been expanded over the years through judicial activity to cover several aspects of human life such as the right to live with dignity,[59] the right to livelihood,[60] the right to health[61] and most significantly for current purposes, the 'right of enjoyment of pollution-free water and air'.[62] Until now, no specific climate litigation has been brought before the Supreme Court.

Two types of formulations can be seen in environmental rights under the constitution- expansive and limiting. The limiting formulation's definitions define the environmental right in the context of either pollution or health. Concerning pollution, environmental rights have been identified as the right to 'pollution-free air and water',[63] 'pollution-free environment'[64] and 'clean environment'[65] and in the context of human health as the rights to a 'humane and healthy environment',[66] a 'hygienic environment'.[67] It may be tough to argue within the scope of these formulations for an extension of the environmental right to include the right to climate protection, given that greenhouse gases are not generally considered as pollutants and do not typically contribute to localised pollution resulting in identifiable health impacts.

[57] INDIA CONST. art. 13, cl. 2.
[58] INDIA CONST. art. 21.
[59] Consumer Education and Research Centre v. Union of India, (1995) 3 SCC 42, 60.
[60] Olga Tellis v. Bombay Municipal Corporation, (1985) 3 SCC 545, 557.
[61] Consumer Education and Research Centre v. Union of India, (1995) 3 SCC 42, 61.
[62] Subash Kumar v. The State of Bihar, (1991) 1 SCC 598, 602.
[63] Charan Lal Sahu v. Union of India, (1990) 1 SCC 613, 674.
[64] Vellore Citizens Welfare Forum v. Union of India, (1996) 5 SCC 647, 655-56.
[65] *Id.* at 656.
[66] K. M. Chinnappa and T. N. Godavarman Thirumulpad v. Union of India, (2002) 10 SCC 606, 613.
[67] Virender Gaur and Ors v. The State of Haryana and Ors., (1995) 2 SCC 577, 579.

However, there is also a broadside to these constitutionally protected rights. Formulations like 'conservation of natural resources';[68] 'live in a healthy environment with minimal disturbance of [the] ecological balance';[69] and a 'living atmosphere congenial to human existence'[70] give space to judicial discretion in climate change litigation. The application of the human right approach using right to life, health and water, among others in climate litigation is likely to add strength to arguments.

The fundamental rights for environmental protection are complemented by Articles 47[71] and 48A,[72] also known as the Directive Principles of State Policy, which forms Part 4 of the Indian constitution. They talk about the duties of the State concerning public health and environmental protection. Although the Directive Principles of State Policy are not intended to be enforced by any court, they are nevertheless fundamental in the governance of the country, and impose a duty upon the State to further the objectives aimed to be achieved under this section by incorporating them into laws made by the parliament.[73]

VII. JUDICIAL ACTIVISM

The Indian judiciary has developed environmental jurisprudence by adopting several principles of international environmental law. Some of them are the polluter pays principle,[74] the precautionary principle,[75] the principle of intergenerational equity,[76] the principle of sustainable development and the notion of the State as a trustee of all-natural resources.[77] The Court has held these principles to be essential features of sustainable development, and part of environmental law of India, and requires these principles to be 'applied in full force for protecting the natural resources of this country'. The inclusion of such principles is supposed to have created a fertile ground for the growth of climate litigation. The precautionary principle demands that the State should anticipate and prevent threats to

[68] Intellectuals Forum, Tirupathi v. State of AP, (2006) 3 SCC 549, 568.
[69] Rural Litigation and Entitlement Kendra v. The State of UP, (1985) 2 SCC 431, 431.
[70] Virender Gaur and Ors. v. the State of Haryana and Ors., (1995) 2 SCC 577, 578.
[71] INDIA CONST. art. 47.
[72] INDIA CONST. art. 48A.
[73] INDIA CONST. art. 39.
[74] Indian Council for Enviro-legal Action v. Union of India (Bichhri Case), (1996) 3 SCC 212, 241-42.
[75] Narmada Bachao Andolan v. Union of India, (2000) 10 SCC 664, 719-20.
[76] State of Himachal Pradesh v. Ganesh Wood Products, (1995) 6 SCC 363, 371.
[77] M. C. Mehta v. Kamal Nath, (1997) 1 SCC 388, 407.

the environment and lays the onus of proof on the party whose actions might cause damage to the environment to prove that their actions are environmentally benign.[78] The public trust doctrine identifies the State as a trustee of certain public resources (water, forest, and atmosphere) and places a duty on it to protect those resources.[79] The intergenerational equity principle, which was initially formulated in the context of protection of forests, can also be applied here as climate change is ultimately an inter-generational problem. The principle holds that the current generation has no right to indiscriminately use and deplete the existing forest resources and leave nothing to future generations.[80] These principles can act as powerful building blocks in a rights-based claim seeking more aggressive State action on climate change.

Another directive principle of state policy - Article 51(c)[81] can be used as a persuasive argument in Courts as it requires the State to foster respect for international law and treaty obligations. The Supreme court has endorsed the view that the legislature has a duty to adopt and enact laws based on those international conventions which are not against the spirit of the constitution and which will enlarge the meaning and scope of Article 21.[82] Treaties and conventions like International Covenant on Economic, Social and Cultural Rights,[83] UNFCCC and Kyoto protocol,[84] to which India is a party, contain an obligation to uphold human rights which are threatened due to climate change. India commits under these treaties to uphold, protect and meet the rights contained in them.

Asking the courts to declare climate protection as a guaranteed right may be a long shot as of now. However, at least by putting the action or inaction of national authorities under scrutiny, we can ensure progressive environmental jurisprudence which can be nurtured over time to encompass the rights we seek now. A regulation can be struck down by a court for being incompatible with a statute; the employment of a statute can be revoked for being unconstitutional. Our courts have already accepted

[78] Vellore Citizens' Welfare Forum v. Union of India, (1996) 5 SCC 647, 654.
[79] M. C. Mehta v. Kamal Nath, (1997) 1 SCC 388, 407.
[80] State of Himachal Pradesh v. Ganesh Wood Products, (1995) 6 SCC 363, 371.
[81] INDIA CONST. art. 51, cl. c.
[82] Vishaka v. State of Rajasthan, (1997) 6 SCC 241, 243-245.
[83] International Covenant on Economic, Social and Cultural Rights, Dec.16,1966, 993 U.N.T.S. 3.
[84] Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec.11,1997, 2303 U.N.T.S. 162.

the right to clean environment,[85] pollution free air and water[86] as fundamental rights under Article 21. They have already integrated the principle of state as a trustee of all-natural resources[87] and precautionary principle[88] into the legal system. All this was the result of decades-long patronage of our Judiciary and active citizenry. Providing climate protection to citizens is a tremendous undertaking for any State, but it is a necessary one. At present we may not be able to ask the State to provide for a blanket climate protection for all citizens, but we can ask the State to honour the commitments already made, we can force them for stringent enforcement of current laws.

The Urgenda decision is an example of this. The Netherlands state was held liable for breach of its obligation to moderate climate change under international law and ordered it to take steps to reduce national GHG emissions by at least 25% until the end of 2020.[89] The case of *Ashgar Leghari v. Federation of Pakistan*[90] in the High Court of Lahore is an excellent example of judicial activism can. The delay in carrying out the National Climate Change Policy of 2012 and the Framework for Implementation of Climate Change Policy (2014-2030) was considered by the court to be offensive constitutional right to life[91] and right to a healthy and clean environment and to human dignity,[92] since climate change presents serious threats to water, food, and energy security in Pakistan. The reasoning in *Leghari v. Pakistan* is more progressive than Urgenda on a number of points. This could be due to the fact public interest litigation and judicial activism are more accepted in the Pakistani legal system than in the Dutch legal System. The Lahore court expressly accepted the fundamental rights argument,[93] which the Dutch court was reluctant to do. The Lahore court stated the specific actions that the government was required to take, and named an ad hoc panel of 21 experts reporting to the court to be appointed to the Climate Change Commission,[94] while the Dutch court refrained from prescribing specific tasks for the government to perform. The main difference between the two cases is the two different legal

[85] Vellore Citizens Welfare Forum v. Union of India, (1996) 5 SCC 647, 655-56.
[86] Charan Lal Sahu v. Union of India, (1990) 1 SCC 613, 674.
[87] M. C. Mehta v. Kamal Nath, (1997) 1 SCC 388, 407.
[88] Narmada Bachao Andolan v. Union of India, (2000) 10 SCC 664, 719-20.
[89] *the Urgenda Case, supra* note 19, at 4.103.
[90] Ashgar Leghari v. Federation of Pakistan, (2018) PLD (Lahore) 364.
[91] PAKISTAN CONSTI. art.9.
[92] PAKISTAN CONSTI. art.14.
[93] Ashgar Leghari v. Federation of Pakistan, (2018) PLD (Lahore) 364 ¶ Para 23.
[94] Ashgar Leghari v. Federation of Pakistan, (2018) PLD (Lahore) 364 ¶ Para 13.

contentions with potential for future climate litigation, namely, the duty of care argument and the fundamental rights argument.

VIII. PRESENT CLIMATE LEGISLATIONS IN INDIA WORN OUT FOR THE CLIMATE CHANGE ISSUE

Various environmental legislations enacted such as Forest (Conservation) Act, 1980, Environment (Protection) Act, 1986, Air (Prevention and Control of Pollution) Act, 1981, Biological Diversity Act, 2002, do not effectively tackle the problem of climate change.[95] The framework of environmental legislations, especially focused on the forests, is heavily concentrated on prevention of diversion of forests, wherein it is seen that the Government or private individuals are not allowed to indiscriminately divert the forest for non-forest purposes "like widening the roads, mining to name a few."[96] Thereupon, such environmental legislations happen to do little when it comes to constructively cope with the menace of climate change.[97]

Furthermore, it is to be noted that the various statutes enacted for the preservation of environment have been insufficient. Statues prove to be no more than enacted for the sake of enactment,[98] substantiated by the abysmal rate of afforestation in those areas wherein diversion had taken place. It is pertinent to note that, the SC, as early as in 1995 in *Godvaraman Thirumulpad,* observed the insincerity in using the allocated funds for compensatory afforestation,[99] which has since remained dismal. As a result, without proper utilization of funds to appropriately compensate for the diverted forests, deforestation remains one of the largest contributors to climate change after burning of fossil fuels.[100] Such lack of fulfilment of statutory duties has been a precursor for the rise in temperature, thereby catalysing climate change.

[95] NGT, Ridhima Pandey v. UoI, Application No. 187/2017, 12.
[96] T.N. Godavarman Thirumulpad vs Union Of India & Ors**,** (1997) 2 SCC 267, 270.
[97] NGT, Ridhima Pandey v. UoI, Application No. 187/2017, 7.
[98] NGT, Ridhima Pandey v. UoI, Application No. 187/2017, 12.
[99] T.N. Godavarman Thirumulpad vs Union Of India & Ors**,** (1997) 2 SCC 267, 270.
[100] IPCC, *Climate Change 2007: Synthesis Report*, 36 (Nov. 12, 2007), https://www.ipcc.ch/site/assets/uploads/2018/02/ar4_syr.pdf.

India being one of the signatories to the Paris Agreement,[101] had ambitiously pledged to curb carbon emissions and increase the forest cover. In line with the spirit of Article 2(b) of the agreement,[102] India should strategize to strengthen "climate change adaption, foster climate resilience and low greenhouse gas emission development" game plan. As mentioned above, the current legislations fall short of realizing these aspirations. A callous approach by the government while taking on 'climate change' was witnessed when the Prime Minister's Council on Climate Change released its National Action Plan on Climate Change ("NAPCC").[103] The eight goals set forth by the Plan did not mandate reduction of greenhouse gas emissions, nor did it lay down standards for the diminution of the consequences of climate change in its various legal obligations.[104] In fact, contrary to its objective, the plan recognized development as its primary goal and ran in sheer contravention of the central issue to be addressed by labelling climate change as a mere "co-benefit".[105] Moreover, the Plan stated that, "it is not desirable to design strategies exclusively for responding to climate change."[106]

It is contested by the authors that it is a misnomer to use climate change action as co-benefit, and should be brought under the ambit of necessity. A cogent rationale behind redefining climate change as a 'necessity', is that along with affecting the community at large, climate change also disproportionately affects the current and future generation,[107] and its reversal is indispensable for our continued existence. Consequently, the authors argue that until and unless the State necessitates the climate change action plan, incorporation of climate policies under other key development policies will not be actively taken up by the state actors. Thus, the required transformation in policy formulations would not be satisfactorily achieved. "The degree to which climate change issues are

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[101] Kumar Sambhav Shrivastava, *India ratifies Paris climate treaty: Here's all you need to know,* HINDUSTAN TIMES (OCT. 03, 2016, 15:04), https://www.hindustantimes.com/india-news/what-signing-the-paris-climate-change-treaty-means-for-india/story-RsDH1IAohQNEqRxb426YbM.html.

[102] Paris Agreement Paris Agreement under the United Nations Framework Convention on Climate Change art. 2(b), Apr. 22, 2016, UNFCC.

[103]MoEF, *National Action Plan on Climate Change* 13 (June 30, 2008), http://moef.gov.in/wp-content/uploads/2018/04/NAP_E.pdf.

[104] NGT, Ridhima Pandey v. UoI, Application No. 187/2017, 10.

[105] *Id.* at 10.

[106] MoEF, *National Action Plan on Climate Change* 13 (June 30, 2008), http://moef.gov.in/wp-content/uploads/2018/04/NAP_E.pdf.

[107] UNICEF, *Climate Change: Children's Challenge, 1, 9*(2013), https://downloads.unicef.org.uk/wp-content/uploads/2013/09/unicef-climate-change-report-2013.pdf.

considered and integrated into existing policy areas is, therefore, a key issue".[108] Conferring the title of co-benefit upon climate change would be trivializing the issue and thereby overlooking the lasting effects it would bring about in the times to come.

IX. CLIMATE CHANGE HYPO-COGNITION

The present Indian scenario suffers from massive climate change hypocognition.[109] In the present context, we take hypocognition, as the absence of linguistic representation of a concept[110] of climate change. The reason being climate change does not revolve around a single plane but spreads over multiple spheres of an individual's life.[111] It is intimately tied with other areas circling around right to life such as right of meaningful and informed participation, right to future generations, right to self-determination etc.[112] In these overlapping areas, the present legislations and judgements fall short of a framework that captures the reality of the situation.[113]

Let us inspect the very concept of 'climate change'. Climate change "refers to any change in climate over time, whether due to natural variability or as a result of human activity."[114] By virtue of this definition set forth, its beyond doubt that climate change is an intrinsic part of the environment. The individuals need fundamental right to a "clean," "healthful," or "favourable" environment,[115] herein favourable including a right against climate change. It is most important to note that the litigation can

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[108] Per Mickwitz, et al., *Climate policy integration as a necessity for an efficient climate policy,* 6 IOP Conf. Ser.: Ert. Enviorn.1, 2 (2009), https://www.researchgate.net/publication/258356319_Climate_policy_integration_as_a_necessity_for_an_efficient_climate_policy.

[109] George Lakoff, *Why it Matters How We Frame the Environment,* 4 ENVION. COMM. JOURN. 70, 76 (2010), https://www.tandfonline.com/doi/full/10.1080/17524030903529749.

[110] ULRIC NEISSER, COGNITION AND REALITY: PRINCIPLES AND IMPLICATIONS OF COGNITIVE PSYCHOLOGY 154 (W. H. Freeman and Company 1976).

[111] IPCC, *Climate Change 2014: Impacts, Adaptation, and Vulnerability, Summary for Policymakers,* 13 (2014), https://www.ipcc.ch/site/assets/uploads/2018/02/ar5_wgII_spm_en.pdf.

[112] High Commissioner for Human Rights, *Understanding Human Rights and Climate Change,* 6 (Nov. 30, 2015), https://www.ohchr.org/Documents/Issues/ClimateChange/COP21.pdf.

[113] George Lakoff, *Why it Matters How We Frame the Environment,* 4 ENVION. COMM. JOURN. 70, 78 (2010), https://www.tandfonline.com/doi/full/10.1080/17524030903529749.

[114] UNFCCC, *Fact sheet: Climate change science - the status of climate change science today,* 1 (Feb. 2011), https://unfccc.int/files/press/backgrounders/application/pdf/press_factsh_science.pdf.

[115] EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY AND INTERGENERATIONAL EQUITY,392, 394, 290 (1989).

only earn judicial imprimatur as being enforceable by individuals if "favourable" environment is covered under our current right to a clean and safe environment.

Current climate change norms have been constitutionalised as statement of policies, wherein the provisions aim at influencing decision making and are neither substantive nor enforceable.[116] The basic shortcoming of such policy statements is that they are not enforceable by aggrieved citizens.[117] Consequently, for a successful litigation against climate change, India must adopt a right against climate change for its citizens to be able to approach the court with legitimate safeguards, thereby ensuring a smoother recourse to judicial remedies in such cases. By placing the right against climate change under the ambit of right to favourable environment, the citizens would be guaranteed a substantive right which otherwise would not be conferred to them through policy statements. Thereby, empowering individuals to protect an inalienable human right against climate change.

To an enormous extent, litigation brought forth by the individuals rests upon governmental action, thereby the latter outweighs and shapes the former's actions.[118] In absence of a substantive law we would find ourselves fruitlessly litigating, wherein we are deprived of any such constitutional safeguards. Unlike Western countries, where the prevalence of well-funded groups that seek to use the media to sway public opinion often thrive to politicise the climate change issue as evident from the *Urgenda,* we find that politics is isolated from the cause of climate change in India. In fact, in recent months a lack of environmental empathy on part of the India's lawmakers has been witnessed. This is evident from the current Environment Impact Assessment (EIA) notification 2020.[119] EIA is the process of study which predicts the effects of a proposed industrial or infrastructural project on the environment. It acts as a decision-making tool and weighs different alternatives for a project and attempts to recognise the one which embodies the best combination of economic and environmental

[116] Ernest Brandl & Hartwin Bungert, *Constitutional Entrenchment of Environmental Protection: A Comparative Analysis of Experiences Abroad*, 16 HARV. ENVTL. L. REV. 1, 82 (1992) (discussing constitutional environmental policies of Germany, Austria, Switzerland, the Netherlands, Spain, Greece, Portugal, Turkey, and Brazil).
[117] *Id.* at 32 ("[Although the existence of a statement of public policy must be given some consideration in a constitutional [claim], only a fundamental right grants the individual the legal remedy of a constitutional complaint.").
[118] George Lakoff, *Why it Matters How We Frame the Environment,* 4 ENVION. COMM. JOURN. 70, 78 (2010), https://www.tandfonline.com/doi/full/10.1080/17524030903529749.
[119] MoEF, *Environment Impact Assessment Notification*, 18-28 (March, 2020), http://environmentclearance.nic.in/writereaddata/Draft_EIA_2020.pdf.

costs and benefits. The Central Government enacted the EIA Notifications through the power vested under Section 3(1) of the Environment Protection Act, 1986. The EIA draft notification 2020 seeks to replace the 2006 notification. The new draft notification is being heavily criticised for radically undermining the basic principles of the EIA process. It does away with the need for public hearing for many sectors, negating one of the redeeming features of the 2006 notification. Public hearing would have given an opportunity for the communities which were going to be affected by the proposed project to know about the environmental impact of the same. It would have further ensured that all the stakeholders were consulted and heard before the commencement of the project. What is more baffling is that the new notification does not clarify on what basis some of the projects are being excluded from public hearing. This operates against the basic tenets of administrative law, which requires exceptions to be based on sound reasons.

X. A RIGHT TO CLIMATE PROTECTION- PERHAPS A BETTER CLAIM.

"Exercising my 'reasoned judgment,' I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society."[120]

In lieu of the above contention raised, the authors want to bring to attention that the issue of climate change is no longer of the nature of an academic debate.[121] The authors are of the view that a 'right to climate protection', would essentially solve the slacking behaviour of various governments in acting upon the legislations and thereby forcing the government to prioritise cuts in greenhouse gas emissions. The issue has escalated to the point wherein it has advanced to domestic human rights violation by threatening to have negative impacts on the full enjoyment of human rights "like the right to health, the right to food, to water and sanitation, to adequate housing, and, in a number of small island States and coastal communities, the very right to self-determination and existence."[122] This leaves the judiciary with the task of stepping in and averting catastrophe. "In a democracy, issues

[120] Juliana v. US, 217 F.Supp.3d 1256 (D.Or. 2016).
[121] NGT, Ridhima Pandey v. UoI, Application No. 187/2017, 27.
[122] High Commissioner for Human Rights, *Understanding Human Rights and Climate Change*, 13 (Nov. 30, 2015), https://www.ohchr.org/Documents/Issues/ClimateChange/COP21.pdf.

certainly stop being only political when they give rise to domestic human rights violations and endangerment."[123]

While comparing the present Indian legal position with the Dutch law, we find a contrast. While in Netherlands, the State has perceived the principle of supremacy as requiring that international law – once duly introduced in national law – in the domestic legal order prevails over national law. The Dutch legal system thereby gives precedence to the International law by setting aside the Dutch law whenever the latter conflicts with treaty law.[124] The Indian position varies since, being a dualist country, the treaties never have the force of law within its domestic legal system. Thus " direct application of treaties is not even a theoretical possibility in India because all treaties are nonself-executing."[125] In such a legal system, there is a prevalence of enactment of legislation by the legislatures to incorporate a treaty into the frameworks of the domestic law,[126] and "for the courts to apply a presumption that statutory and/or constitutional provisions should be interpreted to conform to international obligations codified in unincorporated treaties".[127] Thereby when we look forward to the future of climate change litigation in India one must bear in mind that, in the absence of specific laws pertaining to climate change, the burden on the already disadvantaged plaintiff increases, further reducing the chances of any successful outcome from such litigation.

It is pertinent to note that despite extensive agreements by State actors on international platforms about the negative effects of climate change on the realization of human rights, we find a lackadaisical attitude in policy formulation and implementation at the national level. Many developed countries willingly acknowledge the interference of climate change with the enjoyment of human rights law, but fall shy of admitting whether such interference constitutes a violation of international human rights

[123] Fiona Harvey, *Dutch government may face legal action over climate change*, THE GUARDIAN (Nov. 14, 2011, 18:11), https://www.theguardian.com/environment/2012/nov/14/dutch-legal-action-climate-change.
[124] Andre Nollkaemper, *The Application of Treaties in the Netherlands, in* THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY 326 (David Sloss ed., 2009).
[125] David Sloss, Treaty Enforcement in Domestic Courts*, in* THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY 21 (David Sloss ed., 2009).
[126] INDIA CONST. art. 253.
[127] Sloss *supra* note 127, at 5.

law.[128] This is then concretised by the qualified approval of such interference with human rights violations in a strict legal sense worldwide.[129]

A right to climate protection is sought after especially keeping in mind the various hurdles a climate change plaintiff has to undergo at each juncture of the litigation process, not the least of which is getting into court.[130] Though India was the forerunner to interpret a constitutional right to life as including a fundamental right to a healthy environment[131] and boasts about a robust framework of environmental laws, litigants still need to satisfy an entourage of constitutional requirements.[132] Since the current legal structure does not freely accommodate the various facets of climate change, right to climate protection would essentially attempt to tackle the uniqueness and complexity of climate change, henceforth easing the navigation process which the court otherwise would find daunting.[133]

XI. CLIMATE JUSTICE- A DIVIDED TERRITORY?

While discussing climatic changes it invariably gives rise to a number of issues pertaining to justice especially questions addressing the degree of responsibilities on State actors, the extent to hold accountability, the high rate of non-compliance etc.[134] Thus, the issue of climate justice is looked through a bifocal approach. The two approaches characteristic to the concept of climate justice is 'isolationism' and 'integrationism'.[135]

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128 Mark Limon, *Human Rights Obligations and Accountability in the Face of Climate Change*, 38 Ga. J. Int'l & Comp. L. 543, 571 (2010).

129OHCHR, *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights*, 70 (2009).

130 *State of the Netherlands v. Urgenda Foundation,* HARVARD LAW REVIEW (May 10, 2019), https://harvardlawreview.org/2019/05/state-of-the-netherlands-v-urgenda-foundation/.

131 Carl Brunch, Wole Coker & Chris VanArsdale, *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa*, 26 Colum. J. Envtl. L. 131, 174 (2001).

132 INTERNATIONAL ENVIRONMENTAL LAW AND REGULATION 154 (Schlickman et al. eds., 1996).

133 *State of the Netherlands v. Urgenda Foundation, Hague Court of Appeal Requires Dutch Government to Meet Greenhouse Gas Emissions Reductions By 2020*, 132 HARV. L. REV. 2090, 2097 (2019), https://harvardlawreview.org/wp-content/uploads/2019/05/2090-2097_Online.pdf.

134 Caney & Simon, *Climate Justice, in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY 1-2 (Edward N. Zalta ed., 2020), https://plato.stanford.edu/archives/sum2020/entries/justice-climate/.

135 *Id.* at 2

Isolationism is a more conservative approach, wherein it holds that the issue of climate change should be treated in isolation, devoid of any considerations to issues like poverty, migration, trade etc. Thus, little flexibility is provided to developing countries and the most vulnerable classes who are made accountable to the same extent as developed nations in their emission of greenhouse gases.[136] However, the proponents of integrationsim warn us not to be misguided in our approach to treat climate change in a vacuum and thus thrust upon equal responsibility in the distribution of accountability to all the nations alike. Since, climate change is a phenomenon which can't be solely attributed to the emission of greenhouse gases, albeit it is a manifestation of an intricate link with other socio-economic factors.[137]

In recent decades, with much sensitisation to the issues pertaining to climate change, we find international organisations leaning towards an integrationist approach. Climate justice, as understood today in the international community, aims to realise the principles of equity in fight against climate change.[138] The conception of climate justice stands on the set notion that since the developed countries tremendously contributed to the problem, thus greater obligation rests on their shoulders. Climate justice thereupon seeks to reduce the disparities in development and power that drive climate change.[139] It does so by duly recognizing the unjust burden saddled on developing countries in curbing their carbon emissions.

XII. DOUBLE EXPOSURE

The authors are of the opinion that any constructive discussions on climate change is incomplete without addressing 'double exposure'. The authors have borrowed the word 'double exposure' from O'Brien and Leichenko,[140] wherein double exposure stands as a "metaphor for cases in which a particular region, sector, social group, or ecological area is simultaneously confronted by exposure to both global environmental change and globalisation".

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[136] *Id.* at 2.
[137] *Id.* at 2.
[138] UNCATD, *Climate Justice for a Changing Planet: A Primer for Policy Makers and NGOs,* 9 (2009), https://unctad.org/en/Docs/ngls20092_en.pdf.
[139] *Id.* at 9, 12.
[140] O'Brien, Karen L & Robin M. Leichenko. *Double Exposure: Assessing the Impacts of Climate Change within the Context of Economic Globalization*, 10 Glob Environ Chg 221, 223 (2000).

The implications of globalisation for the environment have been widely acknowledged in academia.[141] In the academic realm, it has long been contested that globalisation has initiated a chain reaction to the sudden mushrooming of urbanisation, which has been recognised as a significant contributor of greenhouse gases coupled with biodiversity loss.[142] Often in policy formulation, we find an absence of negative outcomes of double exposure in legislative deliberations. This is because of a strong reluctance among both the policy makers and the scientific community to recognise and discuss that there are 'winners' and losers' in the process, for it would prove to be counterproductive to the ultimate goal of reaching a global consensus over climate change. O'Brien and Leichenko are of the view, that such incidents happen due to the unequivocal outcomes experienced by different States.[143] That is, states vulnerable to the negative impacts of globalisation are susceptible to the negative effects of environmental change.[144]

This can be aptly explained through the following instances. "In 1997 the co-occurrence of both a labour market shock tied to the devaluation of the Thai baht and an El Niño-related drought shock affected 19 percent of the population in the Philippines".[145] On the other hand, it has been observed that the individuals and communities having been positively affected by globalisation have a higher degree of affinity to be positively affected by environmental change.[146] As peculiar as it sounds, the case of Estonia provides a sense of conviction to the above-mentioned correlation. Estonia, has a likelihood to experience increased forest productivity under climate change, which may have positive consequences for its timber exports.[147] Thus, the overlap of positive outcomes to positives and

[141] ENVIRONMENT IN THE NEW GLOBAL ECONOMY, 1750 (Peter M Haas ed., 2003).
[142] GORDON MCGRANAHAN, URBAN TRANSITIONS AND THE SPATIAL DISPLACEMENT OF ENVIRONMENTAL BURDENS. IN SCALING URBAN ENVIRONMENTAL CHALLENGES: FROM LOCAL TO GLOBAL AND BACK 18-44 (Peter Marcotullio & Gordon McGranahan eds., 2007).
[143] ROBIN M. LEICHENKO & KAREN L. O'BRIEN, ENVIRONMENTAL CHANGE AND GLOBALIZATION: DOUBLE EXPOSURES 10 (2008).
[144] *Id.* at 10.
[145] *Id.* at 10.
[146] *Id.* at 10.
[147] Artur Nilson, et al*., Impact of Recent and Future Climate Change on Estonian Foresty and Adaptation Tools,* 12 Cli. Resrch. 205, 205-214 (1999).

negative outcomes to negative creates two separate sets which polarizes the individuals and communities, depending on which side of the outcome they find themselves to be.

The word *'exposure'* in double exposure connotes to "the condition of being subjected to some effect or influence resulting from a process of global change"[148] This global change can be myriad such as "increased temperatures, changes in exposure to ultraviolet radiation, access to external markets, and loss of state support for education". The *exposure* is analysed in an *exposure frame,*[149] which is associated with a definite geographical boundary or a fixed economic strata wherein certain shocks and stresses are experienced by the individuals and the communities subscribing to the attributes within such definite *frames.*

XIII. UNEVEN OUTCOMES- A CASE STUDY INTO INDIAN AGRARIAN SECTOR

Globalisation and global environmental change give rise to uneven outcomes, i.e. differential outcomes are seen being witnessed by a dynamic demographic.[150] Such differential outcomes are often defined in terms of "winners and losers".[151] An apt example of such an uneven outcome is observed in the agricultural sector, wherein we see a myriad demographic. One can't be oblivious to the burgeoning asymmetries between large and small farmers, landlords and landless labourers, local farmers and multimillion grocery chains. In this section, the authors try to elucidate the negative outcome of double exposure wherein we find creation of a class of "losers" who are facing detrimental effects on both ends of globalisation and environmental change. The authors aim to analyse it through a case study of Indian agricultural sector through the identification of districts and farmers who are susceptible to be hit by drier climatic conditions and steep import competition.

Agrarian industry is among one of the most climate sensitive sectors in many national economies. Every stage of agriculture is dependent on the present climatic conditions for a better yield of crops.[152]

148 Leichenko & O'Brien *supra* note 145, at 34.
149 Leichenko & O'Brien *supra* note 145, at 34.
150 Leichenko & O'Brien *supra* note 145, at 57.
151 Leichenko & O'Brien *supra* note 145, at 57.
152 MARTIN L PARRY, CLIMATE CHANGE AND WORLD AGRICULTURE 6 (1990).

Thus, abnormal climatic conditions result in variation in the yield and the quality of the crops, length of the sowing season, stunted growth of some crops, high rate of weed growth etc.[153] Moreover, deviant instances of droughts and floods would further pose as a challenge to the country's food security.[154] Incertitude in the rate of rainfall would further increase the complications associated with the production of crops. Already burdened Indian agrarian sector faces an intricate challenge caused by the variability and change of the present-day climate.[155]

In lieu of the changing climatic conditions, the authors proceed with the second aspect of double exposure in the Indian agrarian sector, i.e. trade liberalisation, which facilitates globalisation. India's agricultural sector has undergone a rapid transition due to trade liberalisation.[156] India saw a wave of agricultural reforms starting from the end of the 20th century, which paved the way to reduced import tariffs.[157] While observing the double loss to a particular segment of the farmer community, we find that Indian farmers are hit disproportionately when there is a mismatch between climate compatibility of crops and market driven demand for the crops.[158] It is in these areas of double exposure that the authors specifically emphasize the need for policy changes and other needed interventions of the lawmakers in order to help the "double losers" of double exposure (climate change and globalisation) to negotiate the latter's position and place them in a higher end of the climate protection bargain.

If the right to climate protection is realised, then the farmers or any other individual adversely affected by climate change would be able to move to the Supreme Court under the right to Constitutional remedies.[159] Thereupon ensuring that aggrieved persons' rights are instilled and the case doesn't lag on to years before any order is passed. The compelling magnitude of the disasters piled up by climate

153 IPCC, *IPCC Fourth Assessment Report: Impacts, Vulnerability, and Adaptation,* 2273-2313, (2007).
154 Linda Mearns et. al., *Mean and Variance Change in Climate Scenarios: Methods, Agricultural Applications, and Measures of Uncertainty* 35 Cli. chg. 367, 391 (1997).
155 R. K. Mall, *Impact of Climate Change on Indian Agriculture: A Review*, 78 Cli. Chg 445, 449-452 (2006).
156 G. S. Bhalla & Gurmail Singh, *Economic Liberalisation and Indian Agriculture: A Statewise Analysis,* 44 Eco. Pol. Wkly 34, 34 (2009).
157 *Id.* at 34.
158 Leichenko & O'Brien *supra* note 145, at 68.
159 INDIA CONST. art. 32.

change demands immediate response from the courts to prevent any further addition to the already brimming pandora's box of our very own existence threatening consequences.

It is contended by the authors that in absence of a right to climate protection it would be difficult for the farmers to approach the court with any legitimate safeguard to their backing to nullify or at least mitigate the effects of double exposure. But, with the realisation of a right to climate protection the court would have a broader field to consult the various possibilities for granting relief to the affected individuals and implicate the State entities if such a violation is brought to the notice of the Court by the aggrieved parties. Additionally, incorporation of a right to climate protection would further strengthen our cause to formulate concrete policy regulations and punish the violators more stringently. In this context, it is pertinent to observe the case of Aravalli Hills mining, wherein the Supreme Court in 2018 directed the Rajasthan Government to stop illegal mining of 115.34-hectare area in Aravalli hills within 48 hours.[160] However, we see prevalence of disobedience of the Supreme Court's orders by the Government, which has especially become a norm with respect to climate change related activities.

XIV. REALISATION OF A RIGHT

If the existing right to life is stretched to include the right to climate protection, no doubt it will open floodgates for litigation. But it is necessitated by the worsening climate tragedies and the numerous injuries that have been caused to human life and property. In an action for infringement of the right to climate protection, the plaintiff will have to show that the action/inaction of the defendants or defendant's agents has contributed or would contribute to such infringement. Thus, a causal link needs to be shown. Connecting specific climate injuries to particular causes can be very difficult. Such evidence of causal link may be highly technical and scientific, making it difficult to prove. However, it is not impossible. Advanced scientific technology has provided us with ways to trace the previously untraceable. Also, the Supreme Court of India has itself held that "where there are threats of serious

[160] In re T. N. Godavarman Thirumulpad v. Union of India, Writ Petition No 202/1995, 6-7.

and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environment degradation."[161]

Some of the drastic changes in climate are caused by actions beyond our border or by the activities of the global community as a whole. In such situations, it is impossible to have a specific defendant or for the domestic courts to exercise their jurisdiction. Even in such a case, the courts can be persuaded to hold the national or state governments accountable for failure to take measures to protect its citizens from ravages of the harsh climate.

For example, The National Green Tribunal took cognisance of the degradation of the ecology of Rohtang Pass and the effect on the glaciers of serious emissions and traffic hazards. Subsequently, it passed a series of orders prohibiting activities which harmed the environment such as operationalisation of CNG and electric buses, regulation of tourism activities, etcetera.[162] A claim may lie where the government is not taking the necessary action to adapt to predicted climate change in particularly vulnerable areas such as the Sundarbans and the states which are flooded annually where the resulting climate impacts breach the citizen's protected rights to life, health, water etc.

Action can be brought seeking to stop government action that contributes to climate change, to force the government to act to mitigate the effects of climate change and to regulate private emitters directly. Remedies sought can be of two types, for mitigation or adaption. Mitigating remedies would aim at reducing ramifications of further human interference with the environment, ensure that food production is not threatened, prompting the legislature to introduce laws in line with global commitments the nation has made to stabilise greenhouse gas levels. Adaptation is accepting the irreversible damage caused to environment and taking measures to avoid potential vulnerability in the future. Restriction on mining, quarrying, illegal constructions etc. can be demanded in regions which are prone to landslides, flooding and where such activities contributed to loss of vegetation, and livelihood. Proper irrigation and urban planning to face floods, pollution control measures to prevent smog, rehabilitation plans for coastal communities from rising of sea levels, curbing emission to prevent glacier melting and consequent flooding in plains, ensuring food security and livelihood of

[161] Vellore Citizens' Welfare Forum v. Union of India, (1996) 5 SCC 647, 654.

[162] Court on its own Motion v. State of Himachal Pradesh, Application No. 237(THC)/2013 (CWPIL No. 15 of 2010), ¶ 36, 37.

farmers in the face of unpredictable weather etc. fall under the adaptation category. The inclusion of climate protection further grants the judiciary power to stop acts of private players which may be detrimental to the interest of the public and strike down legislations which are formed solely for corporate interests disregarding the realities of climate change and impact on the environment.

The authors are of the opinion that realisation of right to climate protection especially in the Indian environment can only be fruitfully realised when the twin attributes of globalisation and environmental change through are duly acknowledged by the legislators. Thereby, initiating talks for efficient policy formulation drawing substance from double exposure frame and tackling the double losers' scenarios.

XV. EPILOGUE

With respect to the right to 'favourable environment' as has been promoted by the authors to be included in the ambit of right to life, it is important to consider that the 'right to climate protection', falling under the ambit of 'right to favourable climate' ought to be implemented in a way that does not place an 'impossible or disproportionate burden' on the government.[163] Taking lessons from the application of Articles 2 and 8 of the European Court of Human Rights (ECHR) in *Urgenda*, the right should only pose such reasonable liability on the government for which there prevails a real and imminent threat, which the government knew or ought to have known.[164] Though ECHR is not binding in the Indian legal framework, a comparative analysis with the former would help to accommodate right to climate protection in the Indian climate change jurisprudence. A fundamental right would guarantee that any infringements on right to climate protection' would be prevented to a great extent through early intervention of the government.[165]

From a human rights perspective, litigation is an excellent tool to ensure climate justice to all those who are adversely affected by climate change. This becomes all the more critical when we realise that a vast majority of people affected by climate change belong to the disadvantaged sections of society,

[163] ECHR, ar.t II, VIII, Nov.4,1950, E.T.S.No.005.
[164] Jaap Spier, *There is no Future Without Addressing Climate Change*, 37 Jorn. Of Ener. And Nat. Res. Law 185, 200 (2019).
[165] *Id.* at 189.

especially the poor.[166] They are the ones who contribute the least to climate change, leaving minimum carbon footprint, yet they are the ones who have to bear all the burden. A typical example would be that of the fishermen community. Their share in causing climate change is bare minimum or even below that, but they will be the first ones to be displaced and become homeless due to rising sea levels, and to be deprived of their livelihood due to a radically altering aquatic ecosystem.

It is estimated that by 2050 the number of climate refugees could be 200 million and most of them would be groups disadvantaged due to their race, gender, ethnicity, income and age.[167] In this regard, it is interesting to note that there is no clear-cut legal definition for climate refugees or climate migrants in international law. Climate refugees are not granted refugee status under any current international conventions.[168]

Recently, the UNHRC gave a landmark decision on a complaint by a Kiribatian citizen seeking asylum in New Zealand from the effects of climate change in his home country.[169] The decision was not in favour of the citizen, citing that his home country is taking enough safety measures and therefore, New Zealand did not violate his rights. Still, the ruling by UNHRC declared for the first time that human rights law should protect people forced to flee their homes and countries due to the immediate threat of climate change. It has stated that countries may not deport individuals who face climate change-induced conditions that violate the right to life.

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[166] Islam, S. Nazrul and John Winkel, *climate change and social inequality*, 1-25 (DESA, Working Paper No. 152, 2017), https://www.un.org/esa/desa/papers/2017/wp152_2017.pdf.

[167] NORMAN MYERS WITH JENNIFER KENT, ENVIRONMENTAL EXODUS: AN EMERGENT CRISIS IN THE GLOBAL ARENA 42-43 (Climate Institute 1995).

[168] Kimberly Curtis, *"Climate Refugees," Explained,* UN DISPATCH, (Apr. 24, 2017), https://www.undispatch.com/climate-refugees-explained/.

[169] *Ioane Teitiota v. New Zealand (advance unedited version),* REFWORLD, (Jan. 7 2020), https://www.refworld.org/cases,HRC,5e26f7134.html.

IPR: AN IGNORED ASSET UNDER THE IBC

*-Ashutosh Kashyap and Vishakha Srivastva**

I. INTRODUCTION

The IP regime has remained controversial since its inception. The central idea behind IP protection regime was the encouragement of innovation. This has been backed by various theories, such as Labour, Personality, Utilitarian, etc.[1] Despite all the backing, the role of IP protection regime has remained questionable for a section of writers on this subject.[2] The Uruguay round of negotiations witnessed the emergence of the new WTO regime succeeding the GATT regime. Unlike the GATT, WTO offered a bundle of agreements that an aspiring member had to accept. Therefore, all participating member states and future members were required to accept all the agreements that came as a part of the package.[3]

TRIPS was one of the agreements which was offered by the newly emerged WTO regime as part of the bundle of agreements. With the emergence of TRIPS, it became mandatory for all countries to have an IP protection regime. WTO witnessed huge participation from countries, including developed, developing and least developed. The primary reason behind such huge participation was the fear of being left out from the international trade and seeming benefits that could arise from it.

TRIPS offered a relaxation period for implementing its obligations towards developing and least developed members. However, the efforts are still widely seen as negatively affecting the technological innovation in developing and least developed nations.[4] However, this is perhaps a

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[1] N. Wilkof, *Theories of intellectual property: Is it worth the effort*, 9 Journal of Intellectual property Law and Practice 257–257 (2014), https://academic.oup.com/jiplp/article-lookup/doi/10.1093/jiplp/jpu018 (last visited Sep 1, 2020).

[2] William Fisher, Theories of Intellectual Property, http://www.law.harvard.edu/faculty/tfisher/iptheory.html (last visited Sep 1, 2020).

[3] Cathleen D Cimino-Isaacs, Rachel F Fefer & Ian F Fergusson, *World Trade Organization: _Overview and Future Direction*, World Trade Organization 70, https://fas.org/sgp/crs/row/R45417.pdf (last visited Sep 2, 2020).

[4] Michael Yeboah, *The effects of trade related aspects of intellectual property rights on developing countries*, 2005, at 8117556, https://lib.dr.iastate.edu/rtd/17205/ (last visited Sep 1, 2020).

discussion for another day and another time. The important take away is the worldwide network of IP protection, especially one after the TRIPS mandate and its huge impact on the world economy in general.

2.1 INCREASING ROLE OF INTELLECTUAL PROPERTY IN THE INDIAN AND GLOBAL ECONOMY

1. Global Economy

Recent years have witnessed remarkable commercialisation of IP assets. Some studies have suggested that around 80% of a company's market capitalisation is realised in the form of these IP assets, which include Patents, Trademarks, Copyright, Know-how, Trade Secret, Design etc.[5]

WIPO publishes "World Intellectual Property Indicators" each year for the assessment of the increase in use of IP protection.[6] As per latest report published in 2019[7], in 2018, 3,326,300 patent applications, 2,145,960 Utility model applications, 1,312,600 Industrial designs applications and 14,321,800 trademark applications were filed worldwide.[8] This was an increase of 5.2%, 21.8%, 5.7% and 15.5% respectively (as compared to the previous year).[9] These figures are evidence of the rising importance of IP assets.

2. Indian Economy

In the same time period, the total number of Patent applications in India was 50, 0555, which is 7.5% higher than the 2017 applications.[10] India also fell in the list of top 10 offices around the globe for the highest patent activities.[11] For Trademarks, India witnessed an increase of 20.9% and was also among the top 20 offices. [12] For Industrial designs, the Indian office fell in the list of top 20 offices recording an increase of 13.6% in the number of applications received.[13]

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[5] Forbes Leadership Forum, *How To Tell What Patents Are Worth*, FORBES , https://www.forbes.com/sites/forbesleadershipforum/2013/06/25/how-to-tell-what-patents-are-worth/(last visited Apr 1, 2020).
[6] RESOURCES, https://www.wipo.int/reference/en/index.html (last visited Apr 1, 2020).
[7] World Intellectual Property Indicators 2019, https://www.wipo.int/publications/en/details.jsp?id=4464&plang=EN (last visited Apr 1, 2020).
[8] Global IP filing activity in 2018, WIPO facts and figures, https://www.wipo.int/edocs/infogdocs/en/ipfactsandfigures2018/ (last visited Apr 2, 2020).
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] World Intellectual Property Indicators: Filings for Patents, Trademarks, Industrial Design reach record heights in 2018, https://www.wipo.int/pressroom/en/articles/2019/article_0012.html (last visited Apr 2, 2020).
[13] *Id.*

One of the main indicators of the growth of IP assets is demonstrated with the number of patents. The estimated number of patents in force worldwide rose from 7.2 million in 2008 to around 14 million in 2018, with 3.3 million patent applications granted in 2018 alone.[14] Similarly, of the 49.3 million trademark registrations active worldwide, 14.3 million were registered in 2018 alone.[15] The greatest number of trademarks in force were in China (19.6 million), followed by the U.S. (2.4 million), India (1.9 million) and Japan (1.9 million).[16]This increase also has tremendous influence on the local, regional and world economy. Although IP asset in itself is not given the status of an industry, its use virtually in every part and parcel of the global economy is undeniable.[17]

Indian pharmaceutical industry is considered one of the most advanced especially in terms of generic drug manufacture and technology.[18] It is estimated at around $ 4.5 billion, with an annual growth rate of 8-9%.[19] Similarly, India is leading on the "threshold of biotech revolution" and has 280 biotech and 180 bio suppliers contributing to the entire biotech market worth US $100 billion.[20] India has a global market worth $91 billion and there is scope for cheap R&D through bio-partnering and co-developing technologies mainly with Chinese and American companies.[21] Same goes for the Indian Information Technology sector which has been globally recognised due to its vast size and potential. India is a hub of patent filing ideas for IT based U.S. companies. Indian units of Cisco Systems, Intel, IBM, Texas Instruments, GE have filed 1,000 patent applications with the US Patent Office and Texas Instruments has 225 US patents 7 awarded to its Indian operation.[22]

[14] WIPO IP facts and figures 2019, https://www.wipo.int/edocs/pubdocs/en/wipo_pub_943_2019.pdf (last visited Apr 3, 2020).
[15] *Id.*
[16] *Id.*
[17] INSOL International Special Report – Protection of Intellectual Property Rights in Insolvency Proceedings, https://www.insol.org/_files/TechnicalSeries/Special%20Reports/Protection%20of%20Intellectual%20Property%20Rights%20-%208%20November%202017.pdf (last visited Apr 3, 2020). (hereinafter Protection of Intellectual Property Rights - 8 November 2017.pdf)
[18] The Indian pharmaceutical industry – the way forward, https://www.ipa-india.org/static-files/pdf/publications/position-papers/2019/ipa-way-forward.pdf (last visited Sep 1, 2020).
[19] WIPO-UNU Joint Research Project Impact of the Intellectual Property system on economic growth, country report – India, https://www.wipo.int/export/sites/www/about-ip/en/studies/pdf/wipo_unu_07_india.pdf (last visited Apr 4, 2020).
[20] *Id.*
[21] *Id.*
[22] *Id.*

The fact remains that no enterprise owning IP assets can fully realise all aspects of ownership without the use of licenses, sub-licenses, cross-license, etc. The popularity of these instruments has grown in recent times. The above facts and figures were to show the level of permeation of these IP assets in the global as well as Indian economy. After due recognition of the key role of IP assets in the global economy today, legislators across the nations have engaged in legislating activities aimed at strengthening the IP protection in insolvency scenarios, providing consistency and predictability to stimulate economic activity, incentivizing the creation of new goods and services, creating and facilitating "intellectual property liquidity", and facilitating smooth local and cross-border financial investments.

This paper endeavours to understand the level of importance given to IP assets under the Indian insolvency and bankruptcy code and further compare it with USA and Canadian positions on the topic because of fairly developed IP provisions under their insolvency laws.

II. IP ASSETS UNDER THE INDIAN INSOLVENCY LAW

The Indian insolvency law is "Insolvency and Bankruptcy Code, 2016" (hereinafter referred as IBC, 2016). This code has seen various amendments since its inception. The code mentions "Intellectual property" under various sections.

(A) RELEVANT PROVISIONS UNDER IBC, 2016

One of the main provisions under IBC, 2016 providing for "intellectual property" is Section 18. This section deals with "duties of interim resolution professionals". Sec 18(f) says that one of the duties of the Interim Resolution Professional is to "take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including…. iv. Intangible assets including intellectual property."[23]

As per Sec 5(1) of IBC, 2016, Adjudicating Authority means "National Company Law Tribunal constituted under section 408 of the Companies Act, 2013".[24] Upon initiation of the Corporate

[23] The Insolvency and Bankruptcy Code, 2016, https://www.mca.gov.in/Ministry/pdf/TheInsolvencyandBankruptcyofIndia.pdf (last visited Apr 5, 2020).
[24] *Id.*

Insolvency Resolution Process, it is the duty of the Adjudicating Authority to appoint an Interim Resolution Professional within 14 days of the commencement of the process as per Sec 16(1) of IBC, 2016.[25]

As per Sec 21(1) of IBC, 2016, the interim resolution professional constitutes a committee of creditors, post collation of all claims received against the corporate debtor and determination of the financial position of the corporate debtor.[26] Sec 22(1) provides that the first meeting of the committee of creditors shall be held within seven days of the constitution of the committee.[27] This committee of creditors, may, in the first meeting, by a majority vote of not less than seventy-five per cent of the voting share of the financial creditors, either resolve to appoint the interim resolution professional as a resolution professional or to replace the interim resolution professional by another resolution professional.[28]

As per Sec 29 of IBC, 2016, the resolution professional shall prepare an information memorandum and further facilitate access to the resolution applicant of all such relevant information in physical and electronic form.[29] One of the provisos for access to such information is undertaking by the resolution applicants "to protect any intellectual property of the corporate debtor it may have access to; and not to share relevant information with third parties unless clauses (a) and (b) of this sub-section are complied with".[30]

Coming to the final stages of the insolvency process, Section 34 of IBC, 2016 provides that if the Adjudicating Authority passes an order under Section 33 for liquidation of the corporate debtor, the resolution professional appointed for the corporate insolvency resolution process under Chapter II shall act as the liquidator for the purposes of liquidation unless replaced by the Adjudicating Authority under sub-section (4).[31] Further upon appointment as liquidator, powers of the board of directors, key managerial personnel and the partners of the corporate debtor, as the case may be, shall cease to have an effect and shall be vested in the liquidator.[32]

[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*

For the purpose of liquidation, the liquidator is mandated to form an estate of assets, which includes all the assets mentioned under clause 3 of Sec 36. Sub-clause (d) of the same clause mentions the inclusion of intellectual property as: "intangible assets including but not limited to intellectual property, securities (including shares held in a subsidiary of the corporate debtor) and financial instruments, insurance policies, contractual rights;".[33]

Apart from these three instances, there is no mention of intellectual property under the Indian Insolvency Law. Such inclusion of IP assets can be summarised as under:

a. Inclusion of intangible assets including intellectual property at the time of preparation of information memorandum by interim resolution professional;
b. Sharing of such information with resolution applicant post undertaking by such applicant to maintain the sanctity of such information related to IP assets; and
c. If an order for liquidation has been passed and the liquidator has been appointed, then such liquidator while forming an estate of assets has to take account of the intellectual property as well.

One of the most important points to note is that the Indian law does not deal in detail about the IP assets. The mere inclusion of intangible assets is not enough. Each IP asset has its unique requirement which needs to be adequately acknowledged in the law. The law is ignorant of the unique requirement which each IP asset possesses. In addition, there is no mention of IP licensee, which forms a huge part of any business network.

Now, in the subsequent headings, we will focus on the provisions for IP assets under US and Canadian Insolvency Laws. This will give better insight into the shortcomings of the Indian insolvency legislation and will also help in finding out areas for improvement.

III. IP ASSETS UNDER THE US INSOLVENCY LAW

US has been one of the world leaders for at least a century in innovation, with heavy reliance on IP assets as a tool to propel economic advancement. However, the US law makers also gave little or no attention to the IP assets in their Bankruptcy Code until 1988.[34] This became relevant only

[33] *Id.*
[34] Protection of Intellectual Property Rights - 8 November 2017.pdf, *supra* note 17.

after huge response from the industries about insufficient attention to IP assets especially IP licenses.[35]

Licenses plays a very important role when it comes to the economic exploitation of IP rights. Thus, the issue of insignificant attention to IP licenses became important for a very obvious reason. It is premised on the idea that right of an IP asset licensee to exploit such assets should not unilaterally extinguish upon licensor's bankruptcy. Some sort of protection is needed. US attempted to address the same issue by amending Sec. 365 of its Bankruptcy Code.[36]. As discussed earlier, the Indian law has completely failed to discuss the IP assets in accordance with the unique requirements of a particular IP asset. On the other hand, the US legislation, through evolution, provides for IP assets under its bankruptcy code separately.

(A) IP ASSETS AS PART OF THE ESTATE GENERALLY

In 1985, the Fourth Circuit's decision in *Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc.* changed the world of intellectual property licensing by putting licensees at high risk of losing their licenses upon a licensor's bankruptcy.[37] Congress responded to rectify this issue by enacting Sec. 365 (n) of the Bankruptcy Code to establish specific bankruptcy protections for some IP licenses, specially leaving trademark licenses.[38] However, the Seventh Circuit's 2013 decision in *Sunbeam Products, Inc. v. Chicago American Manufacturing*, potentially turns the tide back in favour of trademark licensees by challenging the legacy of *Lubrizol* and questioning the reasoning underlying Sec. 365 (n).[39]

Upon initiation of bankruptcy proceedings, a bankruptcy estate is created including all the assets of the debtor in question. Chapter 5 of the US Bankruptcy Code deals with "Creditors, The Debtor, and The Estate".[40] This estate includes intangible assets, including IP assets and

[35] *Id.*
[36] 11 U.S. Code § 365 – Executory Contracts and Unexpired leases, https://www.law.cornell.edu/uscode/text/11/365 (last visited Apr 5, 2020).
[37] Intellectual property licenses in bankruptcy: can Lubrizol, § 365(N) and Sunbeam be reconciled?, https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2013-14/september-october-2013/intellectual-property-licenses-bankruptcy/ (last visited Apr 6, 2020).
[38] *Id.*
[39] *Id.*
[40] U.S. Code: Title 11. Bankruptcy, https://www.law.cornell.edu/uscode/text/11 (last visited Apr 6, 2020).

executory contracts; all IP license agreements in force on the date of the petition also become part of the estate under the bankruptcy proceedings.[41]

In the event of the debtor's asset becoming the property of the bankruptcy estate post filing, the nature of such asset does not change automatically.[42] All interest of the debtor in the property becomes property of the bankruptcy estate, except certain trusts which are specifically excluded from the bankruptcy estate altogether.[43] Therefore, it is implied that any attempt by a party, who is a not a debtor, to protect a license agreement contractually from falling in the debtor's estate as part of insolvency proceeding will remain unenforceable.

(B) PATENT AND COPYRIGHT LICENSES

The US bankruptcy code takes special care of Patent and copyright licenses. It explains in detail the options which are available in situations where, in an insolvency proceeding, license related to Patent and copyright is in question.

The law provides that debtors can assume or reject any executory contract, subject to court approval and certain limitations.[44] The determination of whether contract is executory is made by looking at the contract at the time the issue is before the court.[45] Under the US Bankruptcy Code, there is no uniform rule declaring a contract to be executory or not executory. The law is convoluted and complex which leads to numerous possible outcomes of executory contracts in bankruptcy.[46]

Sec 363 of the US Bankruptcy Code gives various options to the debtor and these are "Use, sale, or lease of property".[47] In the sense of IP assets, the debtors have two options. The debtors have the liberty to assume the existing license agreements, in situations where the debtor just overtakes the business and keeps it running. In other scenarios, where the debtor is willing to

[41] Protection of Intellectual Property Rights - 8 November 2017.pdf, *Supra* note 17.
[42] 11 U.S. Code § 541 – Property of the estate, https://www.law.cornell.edu/uscode/text/11/541 (last visited Apr 7, 2020).
[43] *Id.*
[44] 11 U.S. Code § 365 – Executory contracts and unexpired leases, https://www.law.cornell.edu/uscode/text/11/365 (last visited Apr 9, 2020).
[45] Executory Contracts in Bankruptcy -- Introduction, Threshold Issues, (2015), https://www.justice.gov/jm/civil-resource-manual-59-executory-contracts-bankruptcy (last visited Oct 3, 2020).
[46] Executory Contracts in Bankruptcy (United States) | Association of Corporate Counsel (ACC), https://www.acc.com/resource-library/executory-contracts-bankruptcy-united-states# (last visited Oct 3, 2020).
[47] 11 U.S. Code § 363 – Use, Sale, or Lease of property, https://www.law.cornell.edu/uscode/text/11/363 (last visited Apr 10, 2020).

buy off everything and compensate for its monetary loss, the debtor has the option to assign its licensing agreements in lieu of proper consideration.

Further, Sec 365 (c) of the Code prohibits assumption or assignment of any executory contract or unexpired lease in various circumstances.[48]The relevant circumstances for IP assets are:

a. If a party, other than the debtor, is excused from performance or rendering performance to an entity other than the debtor or the debtor in possession because of an applicable law; and
b. Absence of consent from such to such assumption or assignment.

The first scenario refers to a situation where by virtue of an agreement between the right holder and the debtor in question, such obligations are non-delegable. Further, such non-delegation is also recognised under an applicable law. The second scenario will also arise by virtue of an agreement between the right holder and the debtor in question; however, here assumption or assignment is not permitted without the due consent of the right holder. These special considerations for treatment of IP assets gives much needed protection to the exclusive rights of the right holder of a Patent or Copyright.

As per Sec 365 (g) of the Code, in certain circumstances the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease.[49] Sec. 365 (g) empowers the debtor's trustee to reject an executory contract with the approval of bankruptcy court. If rejected, it is no longer an obligation to perform under such agreement from the debtor's estate; however, the agreement is not extinguished and still exists.[50] This implies that rejection will constitute a breach of the contract, effective immediately prior to the debtor's bankruptcy filing. Thus, the obligation rests upon the debtor in question and not upon the estate which is now part of the bankruptcy estate.

In a situation where the licensor rejects a license agreement, the licensee does not automatically lose his licensing rights.[51] The law provides that licensee, who is a party other than the debtor, may treat such contract as terminated by such rejection; or to retain certain rights even in the

[48] 11 U.S. Code § 365., *supra* note 36.
[49] *Id.*
[50] Protection of Intellectual Property Rights - 8 November 2017.pdf, *supra* note 17.
[51] 11 U.S. Code § 365, *supra* note 36.

face of debtor-licensor's rejection.[52] However, this does not include the right to specific performance of such contract.[53]

It is of extreme relevance to point out that the grant of protections to the licensees in the US is almost unprecedented and seemingly exists only in Canada and Japan.[54] Licenses are key to businesses related to IP assets. It is unimaginable that the Indian law fails to discuss anything about licenses despite the prominent role of IP assets in today's business world. This clearly implies the need for clarity in law which deals with failing businesses. Such detailed protection, accompanied with clarity in the law, is required to make the IBC, 2016 efficient in dealing with IP assets.

(C) TRADEMARK LICENSES

The US bankruptcy code makes a distinction between Patent, Copyright and Trademark licenses. This is primarily to address the specific need of the trademark licenses, as different from patent and copyright licences. Sec 101 (35A) of the US Bankruptcy Code defines "Intellectual Property" to include: "trade secret; invention, process, design, or plant protected under title 35; patent application; plant variety; work of authorship protected under title 17; or mask-work protected under chapter 9 of title 17; to the extent protected by applicable non- bankruptcy law."[55] The definition does not include trademark within the realm of intellectual property.

This different treatment to trademark licenses is probably attributed to their unique nature primarily because it requires continuous monitoring by the licensor and it would become impossible once the debtor-licensor rejects the trademark license.[56] Further, trademark licenses are largely based on the identity of the licensees primarily because the good standing of the licensee can significantly affect the value of the trademark and licensor has certain expectations from the licensee in question.[57]

[52] *Id.*
[53] *Id.*
[54] Protection of Intellectual Property Rights - 8 November 2017.pdf, *supra* note 17.
[55] 11 U.S. Code § 101 - Definitions, https://www.law.cornell.edu/uscode/text/11/101 (last visited Apr 11, 2020).
[56] Protection of Intellectual Property Rights - 8 November 2017.pdf, *supra* note 17.
[57] *Id.*

The position of Trademark licenses after their rejection, which has been classified as breach under Sec. 365(g)[58] of the US bankruptcy code, has remained controversial in a number of disputes.

In *Sunbeam Products, Inc. v. Chicago Am. Manuf., LLC*, 686 F.3d 372 (7th Cir. 2012), the court was of the clear opinion that a trademark license agreement was not rescinded or terminated upon rejection of a trademark license agreement. [59] As per Court ruling, "What § 365(g) does by classifying rejection as breach is establish that in bankruptcy, as outside of it, the other party's rights remain in place."[60]

A petition for writ of Certiorari was denied by US Supreme Court in the earlier mentioned Sunbeam Products case.[61] Thus, leaving the issue to the wits of legislators. Congress came up with a bill named "The Innovation Act", in 2013.[62] This seeks to include trademarks into the definition of "Intellectual Property" under Sec 101 (35A) of the US Bankruptcy Code.[63] Therefore, enabling applicability of section 365(n) protection in trademark cases as well. This was reintroduced in a later congress on June 11, 2015.[64]

A first circuit decision of Nov. 2016, in *Mission Product Holdings, Inc. v. Tempnology LLC* 139 S. Ct. 652, 2019 WL 2166392 held affirming bankruptcy court's decision that "Mission's exclusive distribution rights and trademark license were not preserved under Section 365(n)."[65] However, the court reasoned that "Trademark owners have the obligation to maintain the quality of the goods sold under their trademark, allowing Mission to continue using these trademarks would put Tempnology in the unfair position of having to continue maintaining the trademark or lose the trademark altogether."[66] Thus holding that "Mission did not retain its trademark right after

[58] 11 U.S. Code § 365 - Executory contracts and unexpired leases, https://www.law.cornell.edu/uscode/text/11/365 (last visited Sept 15, 2020).
[59] Supreme Court rules on Trademark license agreement, https://www.jonesday.com/en/insights/2019/08/supreme-court-rules-on-trademark-license-agreement (last visited Apr 12, 2020).
[60] *Id.*
[61] Protection of Intellectual Property Rights - 8 November 2017.pdf, *supra* note 17.
[62] Text of H.R. 3309 (113th): Innovation Act (referred to the Senate committee version), https://www.govtrack.us/congress/bills/113/hr3309/text (last visited Apr 12, 2020).
[63] *Id.*
[64] Details for H.R. 3309 (113th): Innovation Act, https://www.govtrack.us/congress/bills/113/hr3309/details (last visited Apr 13, 2020).
[65] Mission Product Holding Inc. v. Temponology, LLC, https://www.law.cornell.edu/supct/cert/17-1657 (last visited Apr 13, 2020).
[66] *Id.*

the agreement rejection".[67] The US Supreme court granted certiorari on October 26, 2018.[68] Further, the US Supreme Court in a recent decision on 20th May, 2019, held that the rejection of a trademark license agreement in bankruptcy proceeding, also involving a breach of the agreement under section 365(g) of the Bankruptcy Code, has no impact on the rights of the licensee, since such rights remain intact even upon the licensor's breach as per applicable non-bankruptcy law.[69]

The US Supreme Court rules makes it clear that rejection of a trademark license agreement in a bankruptcy proceeding will have nil impact on the licensee's right to use the trademark. Such rights remain untouched. However, this decision demarcates a shift in the inquiry from whether a trademark licensee enjoys set of rights clearly set forth in section 365(n) for other intellectual property licensees arising from the breach under applicable non-bankruptcy legislation. US bankruptcy courts still do not have clear demarcation of post rejection rights of trademark licensees. Therefore, the US position on the effect of rejection of such contractual rights and whether trademark licenses are distinguishable from other IP licenses has been partly answered after the outcome of this case.

A similar line of approach is also needed under the Indian bankruptcy code. As mentioned before, a general mention of "intangible assets" is not enough. Also, similar treatment of all IP licenses is not appropriate as trademark licenses differ from patent and copyright licenses. A trademark license requires constant monitoring by the licensor because unless quality is maintained, the business represented by such trademark cannot flourish. Thus, trademark licenses require separate treatment under the relevant legislation.

IV. IP ASSETS UNDER THE CANADIAN INSOLVENCY LAW

In Canada, there are four types of insolvency proceedings a corporation may initiate: (i) reorganization proceeding under the Companies' Creditors Arrangement Act (herein after referred as "CCAA"); (ii) reorganization proposal under the Bankruptcy and Insolvency Act

[67] *Id.*
[68] *Id.*
[69] Supreme Court rules on Trademark license agreement, https://www.jonesday.com/en/insights/2019/08/supreme-court-rules-on-trademark-license-agreement (last visited Apr 12, 2020).

(herein after referred as "BIA"); (iii) assignment into bankruptcy; and, (iv) private or court-ordered receivership.[70]

(A) RECENT AMENDMENTS TO CCAA & BIA

In the year 2009, the Canadian insolvency regime witnessed few amendments which are important from the perspective of IP assets.[71] These amendments are mostly to address the issues arising in relation to various licenses issues for management and economic exploitation of intellectual property, which makes it similar to the protection offered under Section 365(n) of the US Code.[72] However, unlike US laws on the point, the Canadian regime is still falling short on providing a solution for licensees' acquisition and exploitation rights.[73] These changes may not be enough, however, are a welcome step in the right direction i.e. adequate elaboration on dealing IP assets under insolvency proceeding.

The most important amendment from the perspective of IP assets is the addition of Sec 65.11 to the BIA and the equivalent provision in the CCAA.[74] The primary purpose for such reform seems to provide protection to IP licenses at the time of insolvency of the licensor in question, while also maintaining the capability of the licensor to restructure.[75] The said amendments are not bereft of criticism. It has been noted that the protection afforded is not enough with respect to the acquisition and exploitation of IP assets by the licensee and it is also recognised that uninterrupted access is very crucial for licensee's business.[76]

Section 82 of the BIA gives the trustee the right to sell patented articles.[77] Similarly, Section 83 titled "Copyright and manuscript to revert to author"[78] provides for reversion of any interest in

[70] Protection of Intellectual Property Rights - 8 November 2017.pdf, *supra* note 17.
[71] Bankruptcy and Intellectual property licenses in Canada: it's the end of uncertainty as we know it – or is it? Clark Wilson LLP (2009), https://www.cwilson.com/bankruptcy-and-intellectual-property-licences-in-canada-its-the-end-of-uncertainty-as-we-know-it-or-is-it/ (last visited Apr 14, 2020).
[72] Protection of Intellectual Property Rights - 8 November 2017.pdf *Supra* note 17.
[73] Report of the statutory review of BIA and CCAA, https://www.ic.gc.ca/eic/site/cilp-pdci.nsf/vwapj/Joint_IIC_CAIRP_submission_July_15_2014.pdf/$FILE/Joint_IIC_CAIRP_submission_July_15_2014.pdf (last visited Apr 14, 2020).
[74] Bankruptcy and Intellectual property licenses in Canada: it's the end of uncertainty as we know it – or is it? Clark Wilson LLP (2009), https://www.cwilson.com/bankruptcy-and-intellectual-property-licences-in-canada-its-the-end-of-uncertainty-as-we-know-it-or-is-it/ (last visited Apr 14, 2020).
[75] Report of the statutory review of BIA and CCAA *Supra* note 73.
[76] Report on the Statutory review of BIA and CCAA, *supra* note 73.
[77] Legislative services branch, consolidated federal laws of Canada, Bankruptcy and Insolvency Act (2019), https://laws-lois.justice.gc.ca/eng/acts/b-3/page-31.html#docCont (last visited Apr 14, 2020).
[78] *Id.*

copyright to the author upon either full or partial assignment to the publisher or similar entity becoming bankrupt, in a situation where the work is still unpublished and there is no expense incurred for the same. If expenses are incurred, the reversion shall take place upon payment of such expense by the author. If the work has been already published, then the reversion is subject to payment of royalties or share of profit to authors or their heirs. Additionally, the first offer of sale of marketable copies is to be made to the author.

Such special and clear protection to the authors of the work, the first owner of the copyright, will inevitably lead to better management of copyrightable IP assets. However, the important point to note here is that such protection has not been offered to other forms of IP assets. It is not unknown to the world that the concept of IP assets has grown much beyond these traditional forms. Thus, a change in the direction of inclusion for a much broader and non-exhaustive definition is much needed.

Section 32(6) of CCAA refers to the situation where the company has granted a right to use IP asset to a party by some agreement, then "disclaimer or resiliation" under this Section will not affect the right to use by such party, including their right to enforce even exclusive use of such IP assets in consideration.[79] Notably, Canada's insolvency laws do not clarify about the transferability of IP assets to a third party.

Section 11.3(3) of the CCAA[80] and 84.1(4) and (5) of the BIA[81] addresses assignment of IP assets to a third party, it makes mandatory for the debtor to apply for permission to the Court along with notice to the counterparties.

(B) "CROSS BORDER INSOLVENCY" UNDER CCAA

Another noteworthy aspect of the Canadian bankruptcy regime is the detailed inclusion of "Cross Border Insolvency", which is again something entirely absent from the Indian law. In today's world of "multinational corporations", the corporation has its reach in several nations through its operations and these corporates may as well be dealing with some or other IP assets

[79] Legislative services branch, consolidated federal laws of Canada, Companies' creditors arrangement act (2019), https://laws-lois.justice.gc.ca/eng/acts/c-36/ (last visited Apr 15, 2020).
[80] *Id.*
[81] Legislative services branch, consolidated federal laws of Canada, Bankruptcy and Insolvency Act (2019), https://laws-lois.justice.gc.ca/eng/acts/b-3/page-31.html#docCont (last visited Apr 14, 2020).

through various licenses. Thus, the need to have provisions related to "Cross border insolvency" and ways to deal with IP assets in such scenarios, cannot be ignored.

Part IV of the CCAA[82] contains a detailed provision on "Cross Border Insolvency" in line with UNCITRAL Model law[83]. The rise of cross border insolvency cases beginning in 1990 is bound to reach new heights in today's globalized and interconnected world. This is the era where a company engaged in production of a particular product has its value chain spread across various continents. Such business entity going for insolvency would necessarily require a strong and clear cross legal regime providing for cross border insolvency as well.

UNCITRAL Model law is designed to assist and equip states to amend their insolvency legislations to address cross-border insolvency proceedings. It primarily focuses on four aspects: a) Access; b) Recognition; c) Relief; and d) Cooperation and coordination.[84] These elements are key for smooth conduct of cross-border insolvency.

There is no specific mention of "intellectual property" in the UNCITRAL Model law. However, it does not imply that it has no bearing upon "IP Assets". Article 21 of the UNCITRAL Model law deals with "relief that may be granted upon recognition of foreign proceeding".[85] This includes providing stay with respect to individual action or individual proceedings concerning debtor's asset; staying execution against debtor's asset; suspending the right to transfer, encumber or otherwise dispose of debtor's asset; entrusting the administration or realization of all or part of the debtor's asset by foreign representative.[86] Further Article 22 provides for "protection of creditors and other interested persons".[87] Article 28 restricts the effect of a proceeding in domestic jurisdiction post recognition of a foreign proceedings to the extent assets of the debtor are located in such jurisdiction.[88] Chapter IV of the model law deals with

[82] Legislative Services Branch, consolidated federal laws of Canada, Companies' Creditors Arrangement Act (2019), https://laws-lois.justice.gc.ca/eng/acts/c-36/page-12.html#h-93416 (last visited Oct 3, 2020).
[83] UNCITRAL model law on cross-border insolvency with guide to enactment and interpretation, https://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf. (last visited Apr 15, 2020).
[84] *Id.*
[85] United Nations Model Law on Cross Border Insolvency (1997), https://www.jus.uio.nolm/un.cross.border.insolvency.model.law.1997/ (last visited Jun 27, 2020).
[86] *Id.*
[87] *Id.*
[88] *Id.*

cooperation with foreign courts and foreign representative to better manage the assets of the debtor.[89]

UNCITRAL Model law is not to be read in isolation. The provisions have to read in the light of "UNCITRAL Legislative guidance on insolvency law", which provides that "asset" includes intangible assets as well.[90] Further, this legislative guidance provides for places one should look for better accounting of such intangible assets including intellectual property; conflicts with other laws upon inclusion of intangible assets in the estate; the need for creators of IP assets to be able to control the use of such property; effect on the business upon termination of a contract with respect to intangible assets; and exceptions to the power to continue performance, reject or assign contracts with respect to intellectual property.[91]

Therefore, it can be summarised that Canadian Insolvency legislations are fairly developed in terms of affording protection to the IP assets during insolvency situations for a corporation. It is also primarily due to the 2009 amendment. As of now, the last significant amendment is more than a decade old. Thus, it is time to ponder upon the shortcomings and make required amends.

V. CONCLUSION

The vast role played by IP assets in today's economy is undeniable. In the introductory part of the paper, we have discussed the increasing trend as per the latest WIPO reports for India and the World as a whole. It is important to notice that IPRs are increasingly recognised today across nations. With the advent of TRIPS, these rules for the protection of IP assets have somehow guaranteed minimum protection along with enough leeway for the development of municipal legislation.

It is also important to note that these intangible assets have gained huge importance for the corporations in general. The significance is vast and has also broken traditional norms with the emergence of new forms of IP. Now, Design, Trademark (surface mark, smell mark, colour mark, trade dress), Utility models etc. have also been added to the conventional IP assets domain such as Patents and Copyrights.

[89] *Id.*
[90] UNCITRAL Legislative guide on Insolvency law, (Vereinte Nationen ed., Vienna: UNCITRAL ed.), https://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf (last visited Jun 27, 2020).
[91] *Id.*

These corporations, at times face liquidation under insolvency legislations because of some or the other issue. Now, at the time of such liquidation, one cannot ignore such IP assets and its huge web of licenses for economic exploitation of the same. The Indian insolvency law has been made strong very recently with the introduction of Insolvency and Bankruptcy Code, 2016. However, under IBC, IPRs seems to be an ignored asset. IPRs have been mentioned just thrice in the extension of intangible assets. This is nowhere close to enough. Since, the Indian experience is new and laws are poorly developed in this regard, we undertook a comparative research work to gain some insights from the insolvency laws of other jurisdictions. The countries chosen were USA and Canada because of fairly developed IP provisions under their Insolvency and Bankruptcy related legislation.

Upon studying their legislation and the latest trend it becomes even more evident that, in any insolvency legislation/framework the protection of IP assets and rights is of vital importance. This is also needed to promote investment and in turn innovation. In order to balance these, such legislations should be a clear indicator of ways in which IP assets is affected upon insolvency.

The following suggestions are forwarded in the Indian context:

a. Indian legislators should consider amending IBC, 2016 to include a wider definition of "Intellectual Property" with non-exhaustive definition. It should be in a way that it does not leave out important IP assets such as "trademark" under US Bankruptcy Code.
b. Law makers should also undertake to develop these policies with respect to IP assets. Mere mentioning along with other intangible assets can never be enough. License form an important part for the economic exploitation of any IP assets. Therefore, these aspects cannot be left unaddressed.
c. A definition of "use" which clarifies the use of licensed IP assets will clarify how these rights can be used.
d. The following questions with respect to license require reflection and consideration:
    - Will licensees (before CIRP) be able to exploit IP in accordance with the earlier terms of their license?
    - What about situations in which a licensee has access to IP assets but is not "using" it per se be considered?

- How far existing rights can be modified?

e. It should be duly noted that from US experience, it is quite evident that different types of IP may require different treatments. The US experience tells us about different treatment of "trademark" license as compared to "Patents and Copyright".

f. Legislators can also undertake to develop relevant rules under IBC with respect to the treatment of various IP assets at the time of the Corporate Insolvency Resolution Process.

g. These rules should be detailed ones. Inspirations can be drawn from the USA as well as the Canadian experience. Further, these rules should address each type of IP asset individually considering their unique requirements.

h. One important point to note is that there is no mention of "cross border insolvency" under IBC. It needs no proof that Indian corporations have a presence in multiple jurisdictions as well as foreign companies too have Indian presence through Indian subsidiary. We should also add a separate dedicated chapter, same as Canadian amendments, in line with UNCITRAL Model Law on Cross Border Insolvency. Further, a detailed mechanism can be provided by a separate rule for the same under IBC.

We need to realise that it is very crucial for the legislators to address the concerns related to the treatment of IP assets under the insolvency and bankruptcy law at the earliest. There is no escape from it as IP assets have become the inevitable reality of the day. Addressing these lacunae under IBC is much needed.

DECRIMINALISING ANTI- BEGGING LAWS BY THE IMPLEMENTATION OF RIGHT TO THE CITY: AN INDIAN PERSPECTIVE

-Bhushan M. Shinde and Manohar Samal***

I. INTRODUCTION

Every human being possesses an assortment of rights by birth that is referred to as natural rights without which, the very concomitant of human life cannot be envisioned. These natural rights can never be conferred by any existing system of law, but can only be a mere realization of such rights in the form of fundamental rights, such as that realized by Part III of the Indian Constitution.[1] Over the span of years, judicial activism, transformative interpretation of the Constitution and judicial review have enabled the scope of these rights to be enlarged as per the needs of the generations with legal instruments such as public interest litigation leading to the upliftment of interests of the oppressed and downtrodden classes of the Indian society.[2] However, such legal instruments and applications have failed to obliterate the tyranny of unjust laws for people that are referred to as "*beggars"* under common parlance. This is evident from the extant anti- beggary laws that have been adopted by almost all the Indian States. Despite the fact that decisions of different High Courts have lashed out at these anti- begging laws where it has been held that acts of begging cannot be illegal under the law[3], the implementation by State authorities of these judicial decisions have not been able to address the gravity of the situation.

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[1] Justice K.S. Puttaswamy (Retd.) & Anr. v. Union of India & Ors., (2017) 10 SCC 1 (India).

[2] Volume 3, DURGA DAS BASU, COMMENTARY ON THE CONSTITUTION OF INDIA 3835*,* (LexisNexis Butterworths Wadhwa Nagpur, 6th ed. 2008).

[3] Harish Mander & Anr. v. Union of India & Ors., W.P. (C) 10498/2009 & C.M. Appl. 1837/2010 (Del.) (India); Suhail Rashid Bhat v. State of Jammu & Kashmir & Ors., PIL 24/2018 (J&K) (India).

Individuals who rely on asking for alms in public places such as traffic signals, tourist spots, parks, railway stations and the like, for livelihood are referred to as *"beggars"*. Begging can arise out of many circumstances and it seems to be undeniable that poverty and destitution has led to begging becoming a means of livelihood for various poverty- stricken people. Incessantly rising numbers of people indulging in begging has also resulted in forced begging and exploitation through human trafficking and beggar rackets, leading to colossal human rights concerns, unsafe living conditions and association of begging activities as criminal activities by the general society and by law. Therefore, it would not be incorrect to infer that in India, the primary and root causes of begging are poverty[4], followed by forced begging that is a creature of human trafficking and beggar rackets. Begging as a concept itself has originated out of systematic inequalities and the fact that a legal system would utilise criminalisation as means to alleviate such consequence of systematic inequalities is manifestly absurd, explicating the need for reforms and rethinking of the existing legal system in this sphere.

This paper argues that formalizing the right to the city into the Indian legal structure would improve the distribution of urban resources and simultaneously, enforce basic human standards upon all in Indian cities including persons who are forced into begging.

Henri Lefebvre coined the concept of the right to the city for the first time in 1968.[5] This concept was rejuvenated and was formalized under international law by the Habitat III Policy Papers (New Urban Agenda) where the right to the city has been defined as under:

"[T]he right of all inhabitants present and future, to occupy, use and produce just, inclusive and sustainable cities, defined as a common good essential to the quality of life. The right to the city further implies responsibilities on governments and people to claim, defend, and promote this right."[6]

II. ANTI- BEGGING LAWS IN INDIA: THE PRESENT SCENARIO

[4] Dyutimoy Mukherjee, *Laws For Beggars, Justice For Whom: A Critical Review of the Bombay Prevention of Begging Act 1959,* 12 INTERNATIONAL JOURNAL OF HUMAN RIGHTS, 279-288 (Apr. 04 2008).

[5] HENRI LEFEBVRE, LE DROIT A LA VILLE 148-159 (Anthropos 1968).

[6] United Nations Conference on Housing and Sustainable Development, *The Right to the City and Cities For All,* 1 HABITAT III POLICY PAPERS, 26 (2017).

The Maharashtra Prevention of Begging Act, 1960 (erstwhile referred to as the Bombay Prevention of Begging Act)[7] is the most prominent anti- begging law.[8] All other anti- beggary laws of Indian States[9] are *pari materia* to it.[10] The term *"begging"* has been defined as:

"(a) soliciting or receiving alms in a public place, whether or not under any pretense such as singing, dancing, fortune-telling, performing or offering any article for sale;
(b) entering on any private premises for the purpose of soliciting or receiving alms;
(c) exposing or exhibiting, with the object of obtaining or extorting alms any sore, wound, injury, deformity or disease whether of a human being or animal;
(d) having no visible means of subsistence and wandering about or remaining in any public place in such condition or manner, as makes it likely that the person doing so exists by soliciting or receiving alms;
(e) allowing oneself to be used as an exhibit for the purpose of soliciting or receiving alms;
but does not include soliciting or receiving money or food or gifts for a purpose authorized by any law, or authorized in the manner prescribed in Greater Bombay by the Commissioner of Police, and elsewhere by the District Magistrate, or in any part of the State by the State Government" [11]

In addition to the above mentioned definition, a bare reading of the Maharashtra Prevention of Begging Act, 1960 and the other *pari materia* laws manifest that provisions of arrest without warrant and production before a court have been prescribed for people who indulge into begging.[12] In a Democratic Republic like India, social legislation has paved the way to protect the vulnerable classes of society.[13] Under such circumstances, to have a piece of legislation that imposes undue

[7] Maharashtra (Change of Short Titles of Certain Bombay Acts) Act, No. 24 of 2012, INDIA CODE (2012), Act ID 201224.
[8] Prateek Srivastava and Dushyant Thakur, *India's Model Beggary Bill: Towards Rehabilitating the Beggars*, OxHRH Blog (Aug. 22 2017), https://ohrh.law.ox.ac.uk/indias-model-beggary-bill-towards-rehabilitating-the-beggars/ [last visited Jul. 14 2020].
[9] The Assam Prevention of Begging Act, No. 18 of 1964, ASSAM LEGISLATIVE ASSEMBLY, Act ID LJL 35/61/12; The Karnataka Prohibition of Beggary Act, No. 27 of 1975, INDIA CODE (1975), Act ID 197527; The Telangana Prevention Prevention of Begging Act, No. 12 of 1977, INDIA CODE (1977), Act ID 197712; The Gujarat Prevention of Begging Act, No. 10 of 1959, INDIA CODE (1959) Act ID 196010; The Goa Daman & Diu Prevention of Begging Act, Act No. 4 of 1973, INDIA CODE (1973) Act ID 19734.
[10] *Id.* at 4.
[11] Section 2(1)(i), Maharashtra Prevention of Begging Act, No. 10 of 1960, INDIA CODE (2013), vol. 11.
[12] Section 4, Maharashtra Prevention of Begging Act, No. 10 of 1960, INDIA CODE (2013), vol. 11.
[13] D.A. Chekki, *Social Legislation and Kinship in India: A Socio- Legal Study,* 31 JOURNAL OF MARRIAGE & FAMILY, 165 (Feb. 1969).

burden and hardships upon a vulnerable population who are forced into impoverished living is condemnable and a direct defiance to the Constitutional mandate. A person who is arrested as a "*beggar"* has to face the criminal process of law for a life that has not been chosen, but is an undeniable result of poverty, unemployment, vagrancy, social exclusion, lack of access to basic facilities, disability and/or force. The Delhi High Court[14] and the Jammu & Kashmir High Court[15] have taken the stand of decriminalizing begging under their jurisdictions stating that anti- beggary laws infringe the right to equality under Article 14, the freedom of speech and expression under Article 19(1)(a) and the right to life and personal liberty under Article 21 of the Indian Constitution. However, presently decriminalization of begging exists only in the jurisdiction of these High Courts.

It is indeed indisputable that there are people who resort to begging even though they are not forced into it. But that would not justify the existence of a law which fails to differentiate between voluntary begging, forced begging and begging for survival. Moreover, when begging is treated as a crime by law indiscriminately, such law cannot be the creature of a Constitution that embodies equality, liberty, fraternity, social justice, economic justice and political justice.[16] It is trite that for an act to be treated as a crime, such act has to be voluntary and prohibited by law, performed with *mens rea* and *actus reus* and causing physical injury, mental injury or injury to property.[17] The act of begging is involuntary and causes no harm whatsoever to the body, mind or property. In fact, begging causes self- injury rather than injury to others. Needless to say, anti- begging laws pristinely attack poverty, when in reality, it is the Government's sacramental duty to alleviate destitution by providing basic housing, food, shelter, healthcare, water supply, electricity, sanitation, safety and employment to its deprived populaces. The Central Government's failed attempt is explicated by the insufficiency and abandonment of the Persons in Destitution (Protection, Care and Rehabilitation) Model Bill, 2016.[18] Therefore, there is a crucial need for a fresh perspective and a

[14] Harish Mander & Anr. v. Union of India & Ors., W.P. (C) 10498/2009 & C.M. Appl. 1837/2010 (Del.) (India).
[15] Suhail Rashid Bhat v. State of Jammu & Kashmir & Ors., PIL 24/2018 (J&K) (India).
[16] INDIA CONST. Preamble.
[17] Arshdeep Ghuman, *Elements of Crime,* 1 INTL. J. OF LAW MANAGEMENT & HUMANITIES, 1 (2018).
[18] Venkatasubramanian, *Beggary: Out on the Streets,* India Legal (Sep. 27 2017, 4:00 PM), https://www.indialegallive.com/constitutional-law-news/acts-and-bills-news/legislation-decriminalising-beggary-not-the-beggars-fault. (last visited 20th July 2020).

new legal tool that can ensure the orderly distribution of resources by the Government and the preservation of fundamental rights of classes that have to beg for a livelihood.

III. RIGHT TO THE CITY

The right to the city has been divided into three pillars by the Habitat III Policy Papers.[19] In strict context to allocating resources to people indulging in begging, Pillar 1 deals with aspects like land for housing and livelihoods, access to basic services and infrastructure, decommodification of urban space and -informal settlements habitation; Pillar 2 deals with inclusive urban planning and inclusive governance; and Pillar 3 deals with providing safer cities, well- being and welfare and poverty risk and employment vulnerabilities. On perusal of the above, it is clear that the right to the city embraces a wide variety of facets under its substratum that are imperative for any individual's survival and simultaneously, considers many parameters of urban governance and planning that any Government or urban local body would have to fulfill in order to deliver and distribute urban resources in an efficacious and orderly fashion. Various jurisdictions such as Brazil, Canada and France have encompassed the right to the city, literally as well as in spirit, within their legal systems which has achieved the intended result of a balance between systematic development of urban governance and preservation of basic human and urban rights of citizens.[20]

The Twelfth Schedule of the Indian Constitution lists out the powers, duties, functions and responsibilities of urban local bodies (local self- government) referred to as Municipalities or Municipal Corporations which includes implementation of all the essential components of the right to the city.[21] Unfortunately, the state of urban governance and the approach of Municipalities and Municipal Corporations in India has been exclusionary towards the vulnerable classes and the conditions in which poverty- stricken families have to survive are below the minimum standards of human rights.[22] In order to break the vicious circle of destitution caused due to unplanned cities and unequal distribution of urban resources which ultimately leads to indulgence in begging, the

[19] *Id.*

[20] Miloon Kothari and Shivani Chaudhry, *Taking the 'Right to the City' Forward: Obstacles and Promises,* HOUSING AND LAND RIGHTS NETWORK, 22 (Mar. 2015).

[21] INDIA CONST. Sch. 12.

[22] Marie- Helene Zerah, et al., *Introduction: Right to the City and Urban Citizenship in the Indian Context,* URBAN POLICIES AND THE RIGHT TO THE CITY IN INDIA, 23 (Nov. 2011).

right to the city has to be implemented under the Indian legal system which will lead to the eradication of anti- begging laws, since the Government would be liable under law for not delivering basic urban amenities to its citizens. This would also result in more structured laws that battle begging rackets and trafficking rackets related to begging to take the place of the present indiscriminate anti- begging laws. This part of the paper will specifically deal with formalizing the right to the city under the Indian Constitution and also discuss the problems faced by beggars in terms of housing, access to basic urban amenities, health and safety and employment opportunities due to the operation and oppression of anti- begging laws in India. Further, this part is also dedicated to discussing the implications of right to the city in the form of statutory law and the deficiencies that need to be bridged in order to achieve such implementation.

(A) RIGHT TO THE CITY AND THE INDIAN CONSTITUTION

In India, new essential human rights have always been adopted through judicial activism by enlarging the scope of fundamental rights under Part III of the Constitution using transformative constitutionalism and including all the basic rights inherent in human beings, pivotal for the full development of their personalities.[23] Evidence of such wide interpretation can be traced to Article 21 which is also referred to as the heart of the Indian Constitution.[24] Over the span of time, a multitude of Supreme Court judgments has expanded the scope of Article 21 to include the right to livelihood[25], right to shelter[26], right to health[27] and the right to live with human dignity[28] ; all of which are essential elements of the right to the city. Therefore, it can certainly be inferred that traces of the right to the city can be found in the Indian Constitution. Moreover, in the year 2019, the Delhi High Court[29] held that the right to the city flows out from Article 21 of the Indian Constitution. The sub -species of the right to the city can not only be traced to Part III of the Indian Constitution (Fundamental Rights), but can also be found in Part IV of the Constitution (Directive Principles of State Policy) since the principles enshrined thereunder stipulate,

[23] Maneka Gandhi v. Union of India, (1978) AIR 597 (SC) (India).
[24] Unni Krishnan J.P. & Ors. v. State of Andhra Pradesh & Ors., (1993) AIR 2178 (SC) (India).
[25] Olga Tellis & Ors. v. Bombay Municipal Corporation & Ors., (1985) 3 SCC 545 (India).
[26] Chameli Singh v. State of U.P., (1996) 2 SCC 549 (India).
[27] C.E.S.C. Ltd. v. Subash Chandra Bose, (1992) AIR 573 (SC) (India).
[28] Francis Coralie Mullin v. The Administration, Union Territory of Delhi & Ors., (1981) 1 SCC 608 (India).
[29] Ajay Maken & Ors. v. Union of India & Ors., W.P. (C) 11616/2015 & C.M. Appl. 31234/2015, 3033/2016 & 10640/2017 (Del.) (India).

minimization of inequalities under Article 38(2), adequate means of livelihood for men and women equally, ownership and control of material resources of the community for the common good, equal pay for equal work, health and strength of men and women should not be abused under Article 39 and raising the level of nutrition, the standard of living of people and improvement of public health under Article 47. The efflux of time has evolved Indian Constitutional philosophy to render harmonious construction of Part III and Part IV even though directive principles of State policy are not enforceable in Courts.[30] Thus, it is clear that remedies against anti- begging laws already exist under the auspices of the Indian Constitution and positive efforts towards the encompassment of the right to the city, will benefit the poverty- stricken classes of society forced into begging.

A plethora of tests and doctrines have been utilized by Indian Courts as instruments of interpreting the Constitution. One of them is the doctrine of *parens patriae* which implies that the State is entitled to protect the rights of those citizens who are unable to protect their own interests.[31] This doctrine has been used by Indian Courts to develop the juvenile justice system, in custody cases and for the benefit of the mentally challenged or disabled people.[32] The presence of indiscriminate anti- begging laws along with the right to the city is unfeasible since they are antithesis concepts when viewed together. Development towards the right to the city would directly attack anti-beggary laws. Therefore, it is time that the application of the doctrine of *parens patriae* is also extended upon the destitute people that have to indulge in begging for basic means of survival. Only then, will all Indian States take positive action to strike down the vicious oppression of anti-begging laws. It is not very often seen in a legal system that the positive formalization of a right can result in the remedy of infringement of certain other rights. In other words, the right to the city as a right under the Constitution and in statutory form would encompass within its substratum, aspects dealing with housing, access to basic urban amenities, healthcare, safety and employment. Moreover, it is a right conferred to urban population in combination with a co- relative duty of the Government to deliver urban resources in an orderly fashion and therefore, it is capable of improving the lives of destitute populaces that have to beg for basic survival.

[30] Minerva Mills Ltd. & Ors. v. Union of India & Ors., (1980) 3 SCC 625 (India).
[31] Charan Lal Sahu v. Union of India & Ors., (1990) AIR 1480 (SC) (India).
[32] Abha Nadkarni & Adrija Ghosh, *Broadening the Scope of Liabilities For Cruelty Against Animals: Gauging the Legal Adequacy of Penal Sanctions Imposed,* 10 NUJS L. REVIEW, 545 (2017).

(B) HOUSING AND ACCESS TO BASIC URBAN AMENITIES

The Maharashtra Prevention of Begging Act, 1960 and other *pari materia* anti- beggary laws envisage provisions for detention and rehabilitation of beggars in places referred to as *"Certified Institutions."* The conditions of the institutions are condemnable and it has been reported that beggars are preferring to live on streets rather than choosing to live in such centres.[33] The rehabilitation and receiving centres are ill- equipped with untrained staff having no means of care for old aged beggars, often resulting in high amounts of deaths.[34] In order to be detained or sent for rehabilitation in these statutory centres and institutions, a person has to be arrested under the indiscriminate anti- begging laws. Without arrest, homelessness seems to be their only choice. This is evident by official data that shows that 4,13,670 beggars and vagrants still exist in India.[35] As mentioned earlier, the right to shelter has already been conferred the status of a fundamental right under Article 21 of the Constitution.[36] Despite that, if a class of population within the nation has to undergo a criminal process of arrest in order to secure adequate housing and shelter that is pertinent for survival, it leads to the creation of a legal paradox that mocks the intention of the framers of the Indian Constitution. In context of housing, a statutory right to the city will have to address key challenges of illegal development and encroachment. Master Plans in cities are not developed with the motive of ensuring efficacious land use and slum rehabilitation and resettlement have also been extremely irregular.[37] The connection between efficient land use and allocation and providing affordable and subsidized housing settlements is inevitable. Therefore, the inclusion of housing for all in Master Plans and severe penal sanctions on illegal development can act as catalysts to the process of providing housing for all, including the vagrants.

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[33] The Times of India, *Beggars Choosing Street Life Over 'Homes',* The Times of India (Feb. 12 2018, 12:07 PM), https://timesofindia.indiatimes.com/city/pune/beggars-choosing-street-life-over-homes/articleshow/62877233.cms. [last visited Jul. 20 2020]

[34] Dr. B.K. Das, *Anti- beggary Laws in India: A Critical Analysis,* 3 INTERNATIONAL JOURNAL OF LAW, 161- 163 (May 2017).

[35] Ministry of Social Justice & Empowerment, *Rehabilitation of Beggars,* Press Information Bureau Delhi (Jul. 02 2019, 02:47 PM), https://pib.gov.in/PressReleasePage.aspx?PRID=1576643. [last visited Jul. 20 2020]

[36] *Id. at* 26.

[37] Manohar Samal, *The Role of Legal and Social Policies in Attaining Sustainable Urban Development in India,* 8 EUROPEAN JOURNAL OF SUSTAINABLE DEVELOPMENT, 143 (2019).

Basic urban amenities in India include water, electricity and sanitation and access to these amenities is extremely vital since these facilities are crucial for the well- being of the urban population.[38] As pointed out above, a huge number of beggars are homeless in India. The ones who have managed to gain some form of shelter are faced with non- availability of access to basic urban amenities such as water, electricity, and sanitation.[39] Basic urban amenities are delivered by Municipalities and Municipal Corporations in urban India.[40] Regulations and Rules formulated for the purposes of delivery of urban facilities in the Indian States are delegated legislation and therefore, the statutory character of the right to the city would have to apply *mutatis mutandis*. If implemented effectively, the right to the city in statutory form can bridge the deficiencies of the present Government schemes such as the Basic Services for the Urban Poor Program.

(C) HEALTH AND SAFETY

Data collection in relation to beggar deaths in India have also not been appropriate. This is evident from the fact that the Ministry of Social Justice and Empowerment had to specifically request the States and Union Territories to furnish statistics on beggars since the National Crime Records Bureau had extremely less data and in few spheres, absolutely no data on persons forced into begging.[41] Even presently, no distinction between homeless persons and beggars are made.[42] It is an indispensable fact that data collection by the Government is one of the first steps in providing relief to a specific vulnerable class of society. However, Governmental authorities still rely on the 2011 Census data, which is outdated to suit the present needs. Moreover, the existence of anti-begging laws makes beggars, criminals and offenders who are treated as nuisance creators and that further deters the collection of official Governmental data. Considering that most beggars live homeless, without access to basic urban facilities and have no other means of sustenance except begging; diseases, lack of shelter, food and exposure to harsh weather are few of the main factors

[38] Arjun Kumar, *Access to Basic Amenities: Aspects of Caste, Ethnicity and Poverty in Rural and Urban India- 1993 to 2008-2009,* 2 JOURNAL OF LAND & RURAL STUDIES, 127 (Feb. 2014).

[39] Dr. Jabir Hasan Khan et al., *Problems of Beggars: A Case Study,* 2 INTL. J. OF MANAGEMENT & SOCIAL SCIENCES RESEARCH, 69 (Dec. 2013).

[40] INDIA CONST. Sch. 12.

[41] Aarti Dhar, *Centre Asks State for Data on Beggars,* The Hindu (Feb. 02 2014, 11:34 PM), https://www.thehindu.com/news/national/centre-asks-states-for-data-on-beggars/article5646175.ece. [last visited Aug. 25 2020]

[42] Nishikant Singh et al., *Signposting Invisibles: A Study of the Homeless Population in India,* 3 CHINESE SOCIOLOGICAL DIALOGUE, 180 (Mar. 2018).

that cause their deaths. The very fact that the definition of begging itself under the Maharashtra Prevention of Begging Act, 1960 and other *pari materia* anti-begging laws includes exposing and exhibiting any sore wound, injury or disease,[43] shows that the Legislature acknowledges the hazardous health conditions in which beggars have to survive. Due to this, it would not be wrong to presume that a *'conscious'* Legislature and Executive of the Government is clearly disregarding its duty to deliver basic healthcare services for all.

The right to the city includes delivery of basic healthcare services, equally and to all within its ambit. In order to ensure that a statutory right to the city is able to deliver basic healthcare to segments of the urban population forced to beg, a Central law and its allied State laws that regulate the establishment and functioning of rehabilitation centres for beggars have to be formulated. Under the present system, the Certified Institutions under the anti- beggary laws rehabilitate only a few number of beggars and while they are at it, the beggars are rehabilitated as criminals or offenders. Rather, if legislation emphasizes upon rehabilitating beggars as a vulnerable class that requires the assistance of the State, the scenario can ameliorate. Official data reports that 0.4% of disabled people fall under the category of beggars, vagrants and the like.[44] A nexus between young beggars and drug abuse also exists in India.[45] Therefore, it is extremely necessary to provide rehabilitation keeping in mind the special needs of certain segments of the beggar population. As pointed out even earlier, the present state of things indicates that one needs to be arrested as a beggar to receive rehabilitation, shelter and employment. Furthermore, it is also undeniable that the State has limited resources and has to function within its capabilities of the Treasury to deliver adequate necessities for all. Public- private partnerships between the Government, private entities and Non- Governmental Organizations are an age- old device used in developing nations to deliver social infrastructure.[46] This can certainly be an effective model in ensuring adequate healthcare for all, including the beggars in India. The Central and State Governments can partner with the private sector through concession agreements or management contracts using the Build- Operate Transfer

[43] *Id.* at 11.

[44] MINISTRY OF STATISTICS & PROGRAMME IMPLEMENTATION, GOVERNMENT OF INDIA, DISABLED PERSONS IN INDIA: A STATISTICAL PROFILE 33 (Government of India, 2017).

[45] Caroline Cheng & Vikash Kumar, *Pattern of Exploitation and Organised Crime: Study of Homeless Beggars in Patna, Bihar,* 2 INTL. J. OF SCIENTIFIC & RESEARCH PUBLICATIONS, 1-5 (Nov. 2012).

[46] Timothy Besley and Maitreesh Ghatak, *Public- Private Partnerships for the Provision of Public Goods: Theory and An Application to NGOs,* 17 THE DEVELOPMENT OF ECONOMICS DISCUSSION PAPER SERIES, 2 (Aug. 1999).

(BOT), Rehabilitate Operate Transfer (ROT) or Lease Develop Operate (LDO) models of public-private partnerships for creation, development and upgradation of healthcare infrastructure.[47] The Build- Operate Transfer model can be used to give incentive schemes to the private sector to build and operate healthcare facilities on behalf of the Central or State Governments for a contracted period of time after which it would be transferred to the respective Government. The Rehabilitate Operate Transfer model can be used to revive the failing Government health care facilities by providing incentives to the private sector to rejuvenate such facilities, operate them for a certain period of time and transfer it back to the respective Government. Moreover, wherever the Central or State Government deems fit, the Lease Develop Operate model can be used so that the respective Government can retain ownership but the property of healthcare facilities can be leased out to the private sector with a host of incentives to develop, upgrade and operate them. Subsequently, the Central and State Governments can partner with Non-Governmental Organizations to identify, track and locate beggars so that they can be mobilised for gaining access to healthcare services. Moreover, the partnership can also extend over to ensure that individuals forced into begging are provided health check- ups on regular intervals. This will result in amelioration of free healthcare facilities' standards for the benefit of the needy classes such as beggars.

As far as the aspect of safety is concerned, the victims of forced begging have always been threatened the most. This is because anti- begging laws have also criminalized the victims. It is trite that, in a Democratic society, the quintessential of law itself is to ensure peace and tranquillity in society where every individual has full opportunity to develop in a lawful manner. For that to happen, the law has to strike at the perpetrators of crime and not the victim. Official data indicates that 108 people were kidnapped and abducted for begging purposes and 21 people were trafficked for begging purposes in the year 2018 only.[48] Needless to say, the low discovery, apprehension and rescue rates of the perpetrators of such crime would naturally have piled up the numbers each year. An essential component of the right to the city is also *"safety"* without which, successful implementation of the same cannot be guaranteed. For it to be able to ensure safety for all, the

[47] K.M. Mital and Vivek Mital, *Public Private Partnership and Social Infrastructure,* COMPUTER SOCIETY OF INDIA, 122 (2007).

[48] Volume 1 & Volume 3, NATIONAL CRIME RECORDS BUREAU, CRIME IN INDIA 2018, 182 & 979 (Ministry of Home Affairs, Government of India, Dec. 2019).

criminal justice system and enforcement authorities need to be directed towards beggar rackets, human trafficking and other forms of organized crimes that lead to forced begging. Instead of criminalizing the victims of forced begging, emphasis should be laid upon mobilizing resources and co-operation between enforcement authorities for the better apprehension of the perpetrators of such crimes that will ultimately lead to the reduction in forced begging. Instances of sexual violence against female beggars have also been brought to light, which again raises safety concerns.[49] The chances of female beggars obtaining relief are very slim since, in the eyes of law, they themselves are offenders. This again, is another reason showing the urgent need for eradication of anti- beggary laws due to its inconsistency with basic human rights standards.

(D) EMPLOYMENT OPPORTUNITIES

One of the inextricable reasons for poverty in India is unemployment. As specified earlier, the most prominent reason for people choosing to beg is due to poverty. Employment for all in cities is also an indispensable aspect of the right to the city. Statistics suggest that, urban unemployment in India is as high as 12.02%[50] which would roughly be 10 crore people considering the humongous population of India. In light of the fact that generating employment for its citizens has been a grave problem of the Government, it is highly unlikely that people forced into begging will be provided with employment opportunities. This is also because beggars are usually uneducated and unskilled. Rehabilitation centres specifically created for beggars are the closest way to secure employment for beggars. Under the present system of rehabilitation, the skills taught to the beggars are not sufficient for them to be able to face the harsh realities after rehabilitation. In order to resolve this, it is pertinent that rehabilitation is considered as a separate subject of policy- making. There are various Government schemes that emphasize upon employment generation in India such as the Make in India Scheme, the Swachh Bharat Abhiyan, the Prime Minister's Employment Generation Program, the Pradhan Mantri Mudra Yojana and the Deen Dayal Upadhyaya Grameen Kaushalya Yojana.[51] The benefit of these schemes could be extended to beggars being rehabilitated

[49] Dr. Beejata Das, *A Study on Spatial Patterns of Rape in Assam,* 24 IOSR J. OF HUMANITIES & SOCIAL SCIENCE, 38 (Apr. 2019).

[50] Centre for Monitoring Indian Economy, *Unemployment Rate in India,* Centre for Monitoring Indian Economy, (Mar. 2020, 09:21 PM), https://unemploymentinindia.cmie.com. [last visited Jul. 20 2020]

[51] Ministry of Labour & Employment, *Scheme For Employment Generation In the Country,* Press Information Bureau, Delhi (Feb. 06 2019, 04:01 PM), https://pib.gov.in/Pressreleaseshare.aspx?PRID=1562837. [last visited Jul. 20 2020]

in partnership with the rehabilitation centres to generate employment for beggars. It is noteworthy that the delegated legislation dealing with the facilitation of such schemes could either be made under the statutory form of the right to the city or can arise out of an umbrella law that deals with rehabilitation or a separate law for the rehabilitation of beggars. These are few of the ways in which if policy making and law- making is directed, can result in increased job opportunities for beggars; resultant of which, will be the greater realization of the right to the city.

IV. THE WAY FORWARD AND CONCLUSION

On perusal of the discussions raised in the paragraphs above, it can certainly be inferred that the right to the city embraces basic human rights within its parameters that will complement the present analogies of rights conferred by the Indian Constitution. Moreover, this right was formalized in the international sphere by the Habitat III Policy Papers with the very objective of achieving sustainable urban development all throughout the world. Suffering of the urban poor and non- delivery of entitled rights to them are a product of lax urban planning and delivery reforms. Thus, due to such wide scope and capabilities of the right to the city, its benefit can be extended upon various segments of society including the people who indulge in begging for basic survival.

Looking at the failure and abandonment of the Persons in Destitution (Protection, Care and Rehabilitation) Model Bill, 2016 and the fact that only few jurisdictional High Courts have decriminalised begging, leaving inconsistency in the country in respect of the subject, it seems to be undeniable that only judicial intervention from the Supreme Court can lead to fruitful results in achieving a uniform system for decriminalisation. Needless to say, this would be dependent upon relevant actors and public spirited individuals/ organisations to file a public interest litigation in this respect. Considering the possibilities of close nexus between the right to the city and decriminalisation of begging as elucidated in the paragraphs above, this would also lead to a conducive opportunity for the Supreme Court to decide upon the fate of right to the city in the nation. However, in view of the thick line of difference between judicial affirmation of rights and actual delivery of fundamental rights capable of curbing violation, judicial intervention will have to be coupled with active legislation. Thus, in order for successful decriminalisation of begging, an umbrella and guiding Central law for decriminalisation will have to be formulated. This will have

to subsequently be followed by State legislation, following the mandate of Central legislation and also, addressing the specific needs of the States. The scheme of such laws at Central and State levels will have to encompass rehabilitation, protection and upliftment of people forced into begging such as shelter, access to urban amenities, healthcare, safety and employment. These laws will also have to bridge the lacunae and drawbacks going to emanate out of decriminalisation of begging such as increase in activities of beggar rackets and human trafficking for forced begging. In order for this to happen, a specific part in the scheme of legislation will have to be dedicated towards identification, enforcement, prosecution and penalization of beggar rackets and human traffickers. Needless to say, the scheme of legislation decriminalizing begging will have to repeal the extant anti- begging laws and act as their replacement.

The right to the city accompanied with effective legislation for decriminalisation will not only help in achieving balance between effective urban governance and preservation of human and urban rights of beggars but also create scope for inclusive governance, involving the aspect of policy-making for the development of uncoerced community participation and its linked incentives, which, today, is still an unexplored phenomenon under the Indian legal system.

A DILEMMA FOR INDIAN SHOP OCCUPANTS & LESSEES IN TIMES OF PANDEMIC ATTACKS

*- Himanshu Dixit**

ABSTRACT

The advent of 2020 with the spread of COVID-19 pandemic has posed new challenges to every society of the world, be it developed or otherwise. India, one of the most affected nations, has acted wisely in battling with the pandemic, passing a slew of directions/orders favoring the masses, specifically the downtrodden and the underprivileged. One amongst such orders was stated that a commercial lessee would not be required to pay lease rents to their lessor in light of the pandemic. This Order has been viewed as the most controversial order owing to its hardships on the lessors. The author, through this paper, endeavors to discuss whether such comprehension can be viewed in accordance with the relevant laws or not. This paper is also planned to unearth the legal perspectives regarding whether a commercial lessee of a property can take cover under the laws, including the principle of force majeure, to avoid rental obligations during the pandemic. To give this paper a wider dimension, the author has further explored all the prerequisites necessary for declaring any pandemic as a force majeure event, and has also examined the law of frustration under the Indian Contract Act, 1872 and the Transfer of Property Act, 1882, exclusively with reference to commercial leases. Furthermore, a constitutional analysis of those Government Orders which obligate a private person to discharge state-welfare duties has also been explored, along with its comparison with the models adopted by other countries. Lastly, an attempt has also been made to reveal the hidden incapacity within the Epidemic Act and the Disaster Management Act in dealing with commercial transactions, and a possible reform thereof.

Keywords: *Commercial Lease, section 108(e) of Transfer of Property Act, 1882, COVID-19, Limitations of Disaster Management Act, 2005, Force Majeure Clauses, Law of Frustration.*

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I. INTRODUCTION

At the very outset, it must be noted that every contract is guided by a set of principles, each of which has its relevance at different stages of the contract. One amongst them is the principle of restitution, which provides that in case a party is unable to perform its obligations under a contract and subsequently the contract becomes void, the non-contracting party is obliged to return any advantage obtained under the contract. In order to abstain from any such uncalled liabilities under the doctrine of restitution, parties may agree to something called a *force majeure* clause. Force Majeure clauses are inserted in agreements primarily so as to alter or suspend parties' contractual obligations, in case any exigency or any extraordinary circumstances beyond parties' control arise. In the landmark case of *Matsoukis v. Priestman and Co*,[1] *force majeure* was defined as "causes you cannot prevent and for which you are not responsible". However, the idea of *force majeure* must not be conflated with the idea of 'Act of God', as the latter characterizes phenomena and catastrophes like, tremors, hurricanes and so on, while the former incorporates mostly the man-made conditions and government actions. Unlike the initial principle of absolute contract, where the promisor performs the contract without any condition, the latest adopted principle called '*clausula rebus sic stantibus'* has brought a dramatic change in contractual obligations. This legal phrase means that obligations under any contract are binding only to the extent the matters remain the same i.e., as they were at the time of entering into the contract. The first case in India, which had seen the application of this doctrine, was decided by the Madras High Court in *Edmund Bendit* a*nd Anr. v. Edgar Raphael Prudhomme.*[2] This jurisprudential principle grants validity to the *force majeure* clauses the invocation of which essentially absolves parties from performing their obligations owing to the fundamental change in the matter existing before entering into the contract.

Much has been discussed about the origin, meaning, and interpretation of the phrase *"force majeure"* and therefore, in this paper, the author would go beyond a simplistic explanation of the meaning of force majeure, and would touch upon other aspects which directly impact commercial lease agreements. As stated earlier, *force majeure* is essentially a contractual provision which allocates the risk of loss to one party if performance becomes impossible or impracticable,

[1] Matsoukis v. Priestman and Co, (1915) 1 KB 681.
[2] Edmund Bendit And Anr. v. Edgar Raphael Prudhomme, AIR 1925 Mad 626.

especially as a result of an event that the parties could not have anticipated in prior. If the parties approve the claim of this clause, it will prevent the contract from getting frustrated and the party from bearing the burden of restitution. The courts have adopted a three-pronged test[3] for the parties to be able to successfully rely on the *force majeure* clauses:

1. The event that gave rise to a party's non-performance is covered by the *force majeure* clause, and non-performance was caused by that relevant event only.
2. The occurrence of such a relevant event, following its non-performance, was caused due to circumstances beyond the party's control.
3. There were no reasonable steps that could have been taken to avoid such an event or its consequences.[4]

II. LEGAL ANALYSIS

Can a pandemic like COVID-19 be considered as a Force Majeure event?

It has always been noticed that whenever a mass disruption in the social order occurs, the *status quo* of that society's legal system also gets disrupted. The position of law with regards to whether or not the order of a Government to lock down the whole nation to control the spread of COVID-19 would qualify as an instance of *force majeure,* is something which needs to be addressed. This question is continuously considered as the locus of debate amongst many scholars, but as early as February 19, 2020, the Ministry of Finance in one of its notifications[5], addressed this doubt and stated that the disruption of supply chains concerning government contracts due to the spread of coronavirus should be considered as a case of natural calamity, and *force majeure* clause may be invoked wherever considered appropriate, after following due procedures. On similar lines, some other ministries of the government like the Ministry of New

[3] Dhanrajamal Gobindram v. Shamji Kalidas & Co, (1961) 3 SCR 1029.

[4] Mamidoil Jetoil Greek Petroleum Company SA Moil Coal Trading Company Limited v. Okta Crude Oil Refinery, [2003] 2 Lloyd's Rep. 635.

[5] *Force Majeure* clause, MINISTRY OF FINANCE, GOVERNMENT OF INDIA (Feb. 19, 2020), https://doe.gov.in/sites/default/files/Force%20Majeure%20Clause%20-FMC.pdf..

& Renewable Energy (MNRE)[6] and the Ministry of Shipping have also issued similar notifications allowing contractors to invoke *force majeure* clause.[7] Notwithstanding the aforesaid, an important point to be noted here is that most of the relief measures announced by the Central Government apply only to those contracts where one of the contracting parties is necessarily a government body. However, no such notification was released from Ministry of Home Affairs which would have clarified the position of all the commercial lessees having private individuals as parties, and whether or not they are legally entitled to the benefit of the lockdown order and consequently are not liable to pay rents under their respective leases till the operation of the lockdown order.

Is the Lockdown Order a Force Majeure for the Lessee?

Before moving ahead with the above question, it would be apposite at this juncture to understand briefly what a lessor-lessee agreement is. Usually, in any lease agreement, there are two parties- lessor and lessee. The lessor agrees to provide an asset for use by the other party, referred to as the lessee, in return for a specified rental payment. Can the lessee, then, avoid payment of rent on grounds of *force majeure*? The answer to this question would vary as it is largely based on facts and the interpretation of the clauses contained in the contract. While dealing with this issue, the Hong Kong Higher court in one case[8], stated that the answer to this question has never been straightforward. It held that a ten day isolation order by the government does not allow a tenant to establish that his lease agreement of a premise had been frustrated by the unexpected outbreak of such a deadly virus.

To adjudicate whether a lockdown order is force majeure for the lessee or not, one actually needs to consult with the surrounding facts and circumstances before arriving to a conclusion. These may include the kind of business that the lessee operates, the geographical location of its operation, the duration for which the lockdown is imposed, the degree/phases of such lockdown etc. - are some factors which may play a crucial role in arriving at a conclusion. Perhaps, it might be plausible to argue that the order of the Hong Kong court may have been different, had the

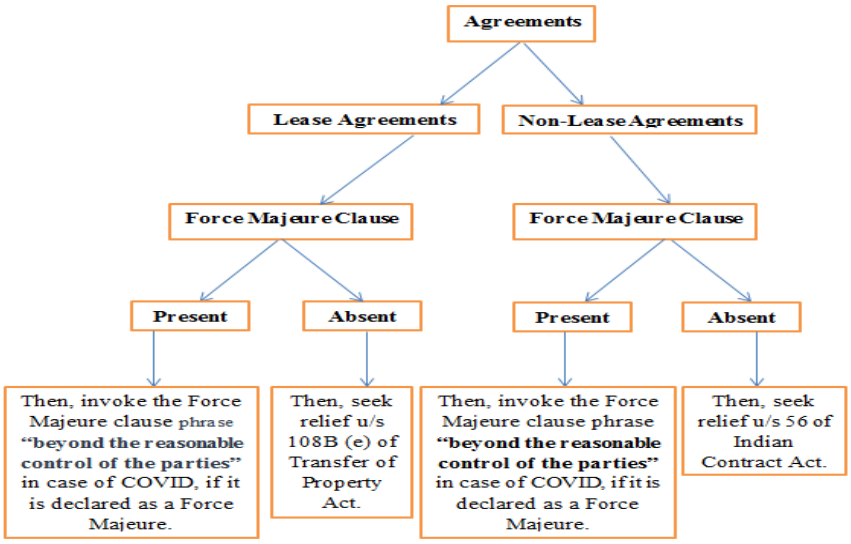
[6] *Force Majeure* clause, MINISTRY OF NEW & RENEWABLE ENERGY (MNRE), GOVERNMENT OF INDIA (Mar. 20, 2020), https://mnre.gov.in/img/documents/uploads/file_f-1584701308078.pdf.

[7] MINISTRY OF SHIPPING, GOVERNMENT OF INDIA, (Mar. 24, 2020), http://shipmin.gov.in/sites/default/files/24march.pdf.

[8] Li Ching Wing v. Xuan Yi Xiong, [2004] 1 HKLRD 754.

lockdown order been a longer one, similar to that of India of 21-days or for 40-days.

Having said that, this question can now be put more subtly in two parts. Firstly, whether the Lockdown Order, which has resulted in the temporary closure of virtually all kinds of business/commercial operations, would qualify as a *'Force Majeure'* event? Secondly, whether the lessees of purely commercial leases would be able to claim exemption from paying the agreed rents till the continuation of a Lockdown Order on the pretext of non-use or non-occupation of the leased premises during the said Lockdown? To answer these, the author has preferred to use diagrammatic as well as descriptive method of explanation for better understanding.



This diagram depicts that the impact of lockdown orders varies as the nature of agreement differs. A lease agreement involves the temporary transfer of a land or property to the other party and any agreement which is not a lease agreement, is a non-lease agreement. Since the theme of this paper is restricted to the contours of commercial leases and the relation between lessor-lessee alone, the above-framed question can arise in two cases namely: **(a) Lease agreements containing force majeure clauses**; **(b) Lease agreements not containing force majeure clauses.**

(A) LEASE AGREEMENTS CONTAINING FORCE MAJEURE CLAUSES

Ordinarily, lease agreements, and more specifically, commercial lease agreements, do stipulate the *Force Majeure* clause in the agreement which usually includes the phrase *"...event beyond reasonable control of the parties…"* in it. However, in the instant case of COVID-19 pandemic, this *Force*

Majeure clause, interestingly, would not suffice *per se* to discharge the lessee of the liability to pay the agreed lease rent until the lockdown order subsists. This is certainly because neither the claim for *force majeure* is termed as lessee's right, nor the premises that were leased by the lessor to lessee have been affected by the Lockdown order directly in any manner. The contention that the leased premise is no longer to be used or occupied by the lessee or the leased premise is rendered unfit for any use forthwith, is also ill-founded. While entering into the lease agreement, the prime object of the agreement for the lessee is to obtain the possession of premise for a certain period of time, whereas, the object for the lessor is to receive the liquidated lease rental in return. The strict interpretation of the intention behind the lease agreement hardly signifies that the payment of lease rental would ever be contingent upon the health of the occupation/business operating in the leased premise; rather, lease rental is considered as the only condition for the exclusive use of the leased premise. The court has already weeded out this doubt and has settled in 1960 that commercial hardship or onerous conditions can never be a ground to absolve a party from the performance of contractual obligations.[9] Therefore, it can be inferred that a *force majeure* event will never include financial problems like insufficient or lack of funds, inability to pay the rent, so on and so forth.[10]

In addition to the aforesaid, it can also be said that the inability to operate the business from the leased premises cannot be termed as an inability to use the leased premise, unless the lessor himself expresses so. Barring few cases, a lessee is generally never asked by the lessor to not continue to use or occupy the leased premises if the lessee is unable to run business due to extraordinary circumstances, all the furniture, equipment, electricity, necessary connectivity, etc. of the rented property still continue to be in the leased premises which means, and the lessee is continues to be in effective possession of the leased property. Therefore, the defence that the leased premise has been rendered useless for him is not legally sound.

(B) LEASE AGREEMENTS NOT CONTAINING FORCE MAJEURE CLAUSES

In this scenario, where there exist no *force majeure* clauses within the agreement or where no such formal commercial lease agreement exists in the first place between the lessor and the lessee, the remedy by invoking any clause in the said lease, will no longer remain available with lessee. Hence, the right of the lessee to claim exemption from rental liability, due to events beyond

[9] Alopi Parshad & Sons Ltd. v. Union of India, 1960 SCR (2) 793.
[10] *The Concadoro* case, [1916] 2 AC 199.

reasonable control of lessee (imposition of lockdown order, for an instance) will not survive. For them, there exists then an equitable remedy under section 108 B(e) of the Transfer of Property Act, 1882 which will be discussed later in due course. Apart from this, a question might arise as to whether the lessee, in absence of *force majeure* clause in the agreement, can resort to the Law of frustration which deals with the situations concerning supervening impossibility under Section 56 of the Indian Contract Act, 1872.

1. *Whether the Law of Frustration under section 56 of the Contract Act applies to lease agreements?*

This issue was first considered by the Hon'ble Supreme Court of India, in the case of *Satyabrata Ghose v. Mugneeram Bangur & Co*[11] followed by its decision in *Raja Dhruv v. Raja Harmohinder Singh*[12], wherein the court had answered the above question in the negative, and had held that the general rule of frustration under Section 56 of the Indian Contract Act, 1872 does not apply to lease agreements. This is because: (a) Lease agreement and its construction is mainly governed by the special statue called Transfer of Property Act, 1872 and it is a clear position of law that a special statute always overrides a general statute[13]; (b) Lease agreement is a type of executed/completed contract and as Section 56 applies only to an executory contract, lease agreements fall completely beyond the scope of the Doctrine of Frustration. This position was initially laid down by the Hon'ble Supreme Court in the case of *Sushila Devi and Ors. v. Hari Singh and Ors,*[14] wherein the court observed that:

> *"Once a valid lease comes into existence, the agreement to lease disappears and its place is taken by the lease. It becomes a completed conveyance under which the lessee gets an interest in the property. There is a clear distinction between a completed conveyance and an executory contract."*

Thus, from the above discussion, it is clear that the Law of Frustration under section 56 of the Indian Contract Act, 1872 may apply to other agreements, but it does not apply to lease agreements. However, this does not mean that a supervening impossibility cannot arise in lease

[11] Satyabrata Ghose v. Mugneeram Bangur & Co, 1954 SCR 310.
[12] Raja Dhruv v. Raja Harmohinder Singh, 1968 SCR (3) 339.
[13] UP State Electricity Board v. Hari Shankar Jain, 1979 SCR (2) 355*;* Kedar Lall v. Hari Lall, 1952 SCR 179.
[14] Sushila Devi and Ors. v. Hari Singh and Ors, 1971 SCR 671.

agreements. When such impossibility arises, the appropriate remedy for the lessee would lie in the Transfer of Property Act, 1882, which will be discussed forthwith.

2. *Whether the Law of frustration under section 108(e) Transfer of Property Act applies to lease agreements?*

Section 108(B)(e) states as follows:

> "… *if by fire, tempest or flood, or violence of an army or of a mob, or* ***other irresistible force****, any material part of the property be wholly destroyed or* ***rendered substantially and permanently unfit*** *for the purposes for which it was let,* ***the lease shall, at the option of the lessee, be void***."

The term "Lease" is defined under section 105 of the Transfer of Property Act, 1882.[15] Section 111(b) of the Transfer of Property Act, 1882, lists the situations which may lead to determination of lease, one of which is *"happening of some event"*. This phrase here refers to those situations which are mentioned under section 108(B)(e), which also has its relevance in analyzing the law of frustration vis-à-vis lease agreement, for it recognizes certain limited events that are akin to *Force Majeure* and their effect on the lease.

This section lays down four essential elements that need to be satisfied before seeking the benefit of exemption from rental obligation. These elements are as follows:

i. The lease in question is duly registered under the Registration Act, 1908;[16]
ii. There exists *other irresistible force*;
iii. As a result of which, property has become *substantially & permanently unfit* for use;
iv. Followed by *a notice*, by lessee to lessor for rendering the agreement void forthwith.

In order to appreciate the effect of section 108(B)(e) of the Transfer of Property Act, it is necessary to make an in-depth analysis of each essential components.

[15] The Transfer of Property Act, 1882, §105, No. 4, Acts of Parliament, 1882 (India).
[16] *Ibid,* read with The Indian Registration Act, 1908, §17, No. 16, Acts of Parliament, 1908 (India).

(a) The Lease must be duly registered[17]

Pursuant to section 17 of the Registration Act, 1908[18], it is necessary to register a lease agreement of more than 12-months term so as to enforce the obligations mentioned therein before the court of law. This would not be the case if the lease agreement is of an 11-month term only, as it is both authentic and hassle-free. Unlike such residential lease agreements entered into for a period of 11 months, commercial lease agreements are usually devised for more than a 12-month term. Therefore, the lease agreement is ought to be registered before the concerned local authority to avail the benefits under section 108(B)(e) of the Act.

(b) Irresistible force

Although the scope of the phrase "*other irresistible force*" under this section has hardly been discussed by courts at length, it has been made specifically clear that there lies no difference between 'irresistible force' and '*force majeure',* as both connote an uncontrolled and unpredicted event.[19] Can a widespread pandemic (COVID-19, for an instance) then be termed as an irresistible force or *force majeure*? As already discussed earlier in the paper, this is a question of fact, which differs on a case-to-case basis. However, as recent as on 20th April 2020, the Hon'ble High court of Delhi, while observing that the Lockdown is prima-facie of the nature of a *Force Majeure*, has passed an interim order restraining the invocation of bank guarantees till the date the lockdown is imposed.[20] On the contrary, a few days ahead of the Delhi High Court decision, the Hon'ble High Court of Bombay refused to accept a similar contention of seeking *"force majeure"* exemption in an agreement.[21] Hence, it seems that a mere dependence on these two components will not lead to the answer to the question. Hence, attention must also be paid to whether the pandemic-induced-lockdown can render the leased property unfit so as to determine the very lease agreement?

(c) The leased property has become substantially and permanently unfit for use

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17 *Ibid.*

18 The Indian Registration Act, 1908, §17, No. 16, Acts of Parliament, 1908 (India).

19 State of Bombay v. Mishrilal Onkardas Joshi, (1958) 60 BOMLR 560.

20 M/s Halliburton Offshore Services Inc. v. Vedanta limited & Anr., O.M.P. (I) (COMM) & I.A. 3697/2020.

21 Standard Retail Pvt. Ltd. v. M/s. G.S. Global Corp & Ors., Commercial Arbitration Petition (L) No. 404 of 2020.

It is unlikely that the imposition of lockdown due to a pandemic can be shown to render the property substantially and permanently unfit for use. An observation with respect to the meaning of the phrase "permanently unfit" was earlier discussed by a single-judge bench of High Court of Delhi,[22] and was approved by the full bench of the Hon'ble Supreme Court,[23] wherein the Supreme Court had observed that :

> "*…where a premises has fallen down under the circumstances mentioned therein, the destruction of the shop itself does not amount to determination of tenancy under Section 111 of the Act and there is no automatic determination of tenancy and it continues to exist…..Under such circumstances it is the tenant who is to suffer as he is unable to enjoy the fruits of the tenancy but he is saddled with the liability to pay monthly rent to the landlord.*"

The Supreme Court in *Raja Dhruv* also held that:

> *"Where the property leased is not destroyed or substantially and permanently unfit, the lessee cannot avoid the lease because he does not or is unable to use the land for purposes for which it is let to him."*

Furthermore, many High Courts in the country have, time and again, expressed differing views while interpreting the phrase *"permanently or temporary unfit"*. The Hon'ble High Court of Bombay in a case[24] has opined that *"mere destruction of the tenanted structure does not extinguish the tenancy and the right of occupation of the tenant under the contract of tenancy between the parties."* The liability of the lessee to pay the lease rental - as stipulated in the agreement - is absolute and is not subject to any condition, including an act of God like cyclone etc.[25] Similarly, the Hon'ble High Court of Calcutta held that "*the lease is not determined automatically even if the property is wholly destroyed.*"[26]

[22] Chamber of Colour and Chemical Pvt. Ltd. v. Trilok Chand, 9 (1973) DLT 510.
[23] M/s Shaha Ratansi Khimji & Sons v. Proposed Kumbhar Sons Hotel Private Limited. & Ors., AIR 2014 SC 2895.
[24] Hind Rubber Industries pvt. ltd. v. Tayebhai Mohammedbhai Bagasarwalla & Ors., AIR 1996 Bom. 389.
[25] Gopalakrishna Mudaliar v. Rajan Kattalai, (1974) 1 MLJ 184.
[26] Jiwanlal and Co. v. Manot & Co. Ltd., (1960) 64 CWN 932.

However, a counter-view was also expressed by the Hon'ble High Court of Madras in 1998, wherein the court ordered the lessee to pay an abated rent and held that there does not exist an explicit provision which would have nevertheless, obligated the tenant to pay rent, despite the property becoming unfit for use.[27] During the lockdown in India, since neither the leased property has been permanently destroyed by the lockdown order, nor has it been rendered permanently unfit for use, therefore, the requirement of the third essential of section 108(B)(e) of the Transfer of Property Act remains unfulfilled. Hence, the lessee can never claim unilateral suspension of the payment of rent, unless there is an explicit order issued by the court or the parties themselves mutually agree to do so.[28]

(d) Communication of notice from Lessee to Lessor

It is an obligation on the part of lessee to give notice (oral/written) to the lessor, whenever a situation of 'irresistible force' occurs. The Hon'ble High Court of Delhi has held that in the case of the leased premises being wholly destroyed or rendered substantially and permanently unfit by fire etc., if the lessee does not exercise the option to treat the lease to be void, he will remain liable to pay the rent.[29] Similarly, the Hon'ble High Court of Madhya Pradesh has also held that even if the leased property gets destroyed by fire, the liability of lessee to pay rent will not cease, until the lessee sends a notice to the lessor, as prescribed under section 108(B)(e) of the TPA.[30] If the lessee fails to exercise the option to send notice of expressing his interest of discontinuation, the lease continues, and the lessee remains liable to pay the rent to the Lessor.[31] The Hon'ble High Court of Andhra Pradesh has done an extensive examination on the issue of communication of notice from the lessor to lessee, in its case of *Gandavalla Muniswamy v. Marugn Muniramaiah*[32]. It observed that:

> "*…under section 108(B)(e), of the Transfer of Property Act, a lease is not automatically determined on the destruction by fire or irresistible force of a substantial portion of the property leased. It is a matter of option with the lessee to get rid of the lease or not… This*

[27] Kodi Idi Kondaiyan Chettiyar v. P Sivasamy & Ors., 1998 (2) CTC 641.
[28] Daya Kishan Goel v. Ramesh Chander Goel and Ors, 1969 AIR CJ (Del.) 839
[29] Sushila Devi and Ors. v. Hari Singh and Ors, 1971 SCR 671.
[30] Shankar Prasad and Ors. v. State of M.P. and Ors., ILR (2013) MP 2146. See also, AAI v. Hotel Leela Venture Ltd., O.M.P. 1206/2012.
[31] Raja Dhruv v. Raja Harmohinder Singh, 1968 SCR (3) 339.
[32] Gandavalla Muniswamy v. Marugn Muniramaiah, AIR 1965 AP 167.

> *aspect of the matter makes it all the more necessary that an unambiguous declaration of the lessees intention to treat the lease as void must be communicated to the lessor. The lessor would not otherwise be able to take appropriate steps on the footing that the lease has to come to an end and he is therefore after liberty to deal with the property as he chooses. What is even more important is that a mere declaration of intention to treat the lease as void is not sufficient. The lessee must also yield up possession of the property to the lessor as required by the provisions of Section 108(q) of the Transfer of Property Act. He cannot continue in possession and yet declare that he has treated the lease as void. That should obviously be an inconsistent and impermissible position to adopt. So long as a lessee has not surrendered to his lessor the possession which he obtained from the latter at the time of the lease, he cannot rid himself of his obligations under the lease.*"

Thus, it is established that until the lessee gives a notice to the lessor under section 108(B)(e) of the Transfer of Property Act, the lease agreement is deemed to remain unaffected irrespective of ensuing of any irresistible force/*force majeure* event. Therefore, by extending a similar observation to the present position of law with respect to the situation of the pandemic (COVID-19), it can be said that all lessees are to be considered in possession of the property and are consequently responsible for paying rents unless a notice under section 108(B) (e) of the Act to the contrary has been sent to their lessor.

III. WHETHER GOVERNMENT ORDERS ISSUED, MAY LEND ANY HELP TO LESSEES?

As discussed in the beginning of the paper, the government of India has issued several measures and mandatory directions/orders to private individuals to provide relief to their workers and tenants, and to close down the operation of private establishments under the Disaster Management Act, 2005. In the existing scenario, where not only India, but the whole world has come to a standstill, the biggest question that remains to be answered is whether the Government is empowered under the Disaster Management Act, 2005 to order private employers to remain duty-bound to remunerate its employees when the business itself has ceased

to exist or is financially unfeasible to remunerate?[33]

The direction of Government through Government Order[34] (G.O.) to landlords to not evict students and labourers, were issued through a G.O. which does not occupy any place higher than an enacted statue and therefore the said Orders may be declared as illegal and unconstitutional as it violates Article 14 and 19(1)(g) of the Constitution of India, 1950. Also, it is a settled legal proposition that an executive instruction can neither override the statute nor exceed the statutory limitations[35] and if it does so, it becomes *ultra vires* to the Act. In the instant matter, the government has passed these directions which are completely unconnected with the umbrella and spirit of the Acts meant to combat disasters (*viz.* Epidemic Disease Act and Disaster Management Act) and hence, these directions/orders also go beyond the legislative competence of the government and are ultra vires to the Disaster Management Act, 2005.

Moreover, since nothing subsists in any of the existing statutes in India, which could compel employers/landlords to provide salary or any disaster relief to its workers/lessees during a disaster, therefore, even the Government/National Executive Committee constituted under the Disaster Management Act, 2005 has no authority under section 10 or section 73 of the Act to give effect to directions which could affect the obligations of private contractual parties. Section 10 of the Disaster Management Act, 2005[36] empowers the Government/National Executive Committee to lay down guidelines for or give directions to only government institutions/machinery regarding measures to be taken by them in response to any threatening disaster situation or disaster. Even the section 73 of the said Act[37], which empowers the government to take action in good faith, does not provide any immunity for any action to or from private individuals/entities/companies, except notified government officials.

Having cited multiple reasons and grounds, it can be expected that the case challenging G.O. dated March 29, 2020, might get decided against the government and it is also crystal clear that

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[33] MINISTRY OF HOME AFFAIRS, GOVERNMENT OF INDIA, (Mar. 29, 2020), https://www.mha.gov.in/sites/default/files/MHA%20Order%20restricting%20movement%20of%20migrants%20and%20strict%20enforement%20of%20lockdown%20measures%20-%2029.03.2020.pdf

[34] *Ibid.*

[35] Naga People's Movement of Human Rights v. Union of India and Ors., AIR 1998 SC 431; B.N. Nagrajan v. State of Mysore, AIR 1966 SC 1942.

[36] The Disaster Management Act, 2005, §10, No. 53, Acts of Parliament, 2005 (India).

[37] The Disaster Management Act, 2005, §73, No. 53, Acts of Parliament, 2005 (India).

the Central Government or State Governments cannot come up with a scheme obligating persons having a sound economic background to provide altruistic reliefs to the poor/lessee/workers till the lockdown exists, as such schemes would be held arbitrary and irrational, until a legislation to that effect has been passed by the Parliament.

Unlike the parliaments of Singapore and United Kingdom, India has not enacted any temporary legislation to grant interim relief to the contractual parties with respect to their contractual obligations vis-à-vis the lockdown imposed in lieu of COVID-19. The parties to a contract in India are left with only two options: either to rely on the *force majeure* clauses in their respective agreements, or to rely on the interim-relief granted by the Indian Judiciary on a case-to-case basis.

(A) SINGAPORE COVID-19 (TEMPORARY MEASURES) ACT, 2020

The newly enacted law of Singapore provides certain categories of interim relief to the parties to a contract, if they are unable to perform contractual obligations due to obstructions materially caused by the COVID-19 outbreak. It freezes the parties' rights to enforce their respective obligations for a certain period of time. Hence, now a lease agreement in Singapore will come to a halt for a fixed period of time without affecting either party's contractual obligations. Furthermore, the law of Singapore also shifts the 'onus of proof' from the affected party to the other party. That means, the burden is on counterparty now, to establish that the affected party's performance is not impacted by lockdown orders. This approach will essentially provide protection to the lessees. Thus, it would be appropriate for India at this stage, to follow Singapore's approach of the win-win model and enact a legislation and back the March 29 Order.

(B) UNITED KINGDOM'S THE CORONAVIRUS ACT, 2020

In order to deal with problems and confusions related to commercial agreements, the UK government also passed a law on March 15, 2020. By virtue of this special legislation, a landlord, for a certain period of time, will not be able to take forfeiture action for business tenancies in England and Wales. This move of the government will protect all commercial lessees who cannot pay their rent in the meantime, and also prevent their eviction from the leased property.

IV. CONCLUSION

Till today, there has been no such Act or ordinance in India, except certain G.Os having limited scope, which could actually deal with the problem of commercial lessees or where a positive obligation on the landlord was imposed to consider the same, during any pandemic. Therefore, unless the government introduces such a specific legislation, the commercial losses will be borne by the lessees only, and they will not be able to wriggle out of their saddled legal liability of paying the lease rental. At this juncture, the model adopted by Singapore and UK is worthy enough to be appraised and therefore, India should also think a step ahead so as to legally justify its welfare measures adopted for the poor and small commercial business operators; otherwise, the PIL shops against these beneficial measures in the court, will checkmate the constitutionality and validity of the Government Orders. Further, now that the present pandemic has shown its adverse consequences and its extent, if parties enter into contracts after this which do not specifically cover pandemic and its consequences as an event of force majeure in the contract, they may not be able to seek the benefits of *force majeure*. Therefore, parties entering into fresh contracts since the outbreak should necessarily include all sorts of pandemic outbreaks as a force majeure clause while drafting their agreements.

APPLICATION OF FRAND LICENSING AND COMPETITION LAW TO SEP LITIGATION IN INDIA: A CRITICAL ANALYSIS

*- Mohina Anand**

ABSTRACT

Innovation in the globalized world of technology has led to the need for interoperability between myriad technological devices and components. This in turn has necessitated the need to establish Standard Setting Organizations (SSOs) to choose one standard from the pool of available technologies to facilitate compatibility. Often, the chosen technology may be patented and thus, the patent becomes essential to conform to the standard adopted by the industry. This gives rise to a Standard Essential Patent (SEP). Thus, mere compliance with the industry standard can give rise to a claim for infringement. SSOs encourage the licensing of SEPs on Fair, Reasonable and Non-discriminatory terms (FRAND). FRAND terms are determined via contractual negotiations between the licensor and licensee. In the event of non-compliance of FRAND terms, the licensee resorts to Section 4 of the Competition Act, 2002 alleging abuse of dominant position by the SEP holder. Though some scholars have advocated that this is a suitable route to seek remedy, it gives rise to two prominent problems. Firstly, the Tribunals tend to grant temporary injunction against the licensee for using, selling or manufacturing the SEP while the investigation is carried out by the Director General under the said Act. This creates a Catch-22 situation for the licensee as an injunction leads to severe losses for the licensee. Secondly, a separate complaint has to be filed by every licensee for breach of a FRAND condition by the same SEP holder since FRAND is contractual in nature. To overcome this, it has been advocated that a legislative framework be developed for mandatory compliance with FRAND terms. Alternatively, a new remedy may be incorporated under Competition Act, 2002 for SEP litigation. The author delves into a critical examination of legal and economic consequences of relying solely on a FRAND regime vis-à-vis reconciling FRAND terms with the competition law framework by tracing the judicial pronouncements in SEP litigation in India. The main distinction being that the former provides a remedy in personam while the latter provides a remedy in rem. While private negotiations presently focus solely on the interests of the transacting entities, the suggested competition law regulation will also take into consideration the potential consequences on the downstream market, and on the consumers, who are the ultimate beneficiaries. Furthermore, the author critically examines the role of SSOs; and whether their activities may have an appreciable adverse effect on competition. An attempt has been made to strike a balance between the autonomy of entities to decide the FRAND terms, and their regulation by competition law to ensure consumer welfare.

Keywords: *Standardization, FRAND, Competition law, Standard essential patents, remedy in rem.*

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I. INTRODUCTION

There exists an interesting dichotomy between enforcement of competition law and exercise of intellectual property rights in the market, particularly patents. While competition law seeks to prevent a monopoly, patent serves to confer exclusivity which brings the two fields in contradiction with each other.[1] Therefore, a vigilant eye has to be kept on the manner in which exclusivity is exercised by the owner of the patent. An enterprise abuses its dominant position when it resorts to an anti-competitive practice to maintain or increase its market share, "especially when such a practice is not in response to the conditions prevailing in the market, and when it has a significant effect on competition".[2] This creates a friction between free trade on the one hand and IPR rights on the other hand. Since an IPR confers on the holder a 'legal monopoly', it is crucial to ensure that it is not misused to stifle competition.[3]

Within this context, it is pertinent to understand and examine the role of competition law in licensing of patents. The issue of enforcing patent licensing through competition law regime takes great significance in considering the position of standard essential patents (SEPs). SEPs are a category of patents over technology that has acquired the status of a 'standard' in the industry i.e. it is necessary to conform to the said standard for the product to be compatible or interoperable between devices.[4]

Standard Setting Organizations (SSOs) choose from 'multiple available technologies' – that are substitutes for each other – with respect to the technological issue for which a 'standard' needs to be adopted.[5] Once a standard has been chosen, competition for that technology is eliminated and the patent on the chosen technology becomes 'essential', while the substitutes are rendered useless as it becomes mandatory for the entire industry to employ the standard now covered by an essential patent. This phenomenon is referred to as the 'Lock-In Effect'.[6] A shift from

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[1] ALAN DEVLIN, ANTITRUST AND PATENT LAW 32 (1st ed. Oxford University Press 2016). (hereinafter "ALAN")

[2] VINOD DHALL, COMPETITION LAW TODAY (1st ed. Oxford University Press 2007). (hereinafter "VINOD")

[3] Gitanjali Shankar, Nitika Gupta*, Intellectual Property and Competition Law: Divergence, Convergence, and Independence*, 4 NUJS L. REV. 115 (2011).

[4] Mark A. Lemley & Carl Shapiro, *A Simple Approach to Setting Reasonable Royalties for Standard Essential Patents*, 28 BERKELEY TECH. L.J. (2013).

[5] A. Douglas Melamed & Carl Shapiro, *How Antitrust Law Can Make FRAND Commitments More Effective*, 127 YALE L.J. 2110 (2018). [hereinafter "Carl Shapiro"]

[6] Thomas Eilmansberger, *Antitrust and Intellectual Property in Global Context: A Symposium in Celebration of the Work of Lawrence A. Sullivan: IP and Antitrust in the European Union,* 13 SW. J.L. & TRADE AM. 261, 263 (2007).

standardization is discouraged due to the high R&D costs involved, perpetuating the lock-in effect.

Due to its 'essential' nature, the SEP must be licensed since the exclusive right conferred on inventors by a patent undermines the purpose of developing a standard that is available to all players. It, therefore, increases the leverage that the SEP holder has while bargaining with potential licensees. Such a position in the market can consequently lead to a 'hold-up' situation i.e. the SEP holder by virtue of its strengthened bargaining power can exploit the entities that are implementing the standard by obtaining supra-competitive royalties.[7]

Attaining dominance in itself is not penalized under the Competition Act, 2002 as several market structures are such that the consumers benefit from having few number of major suppliers such as in monopsonistic and oligopolistic markets.[8] Therefore, dominance achieved by virtue of being granted a patent is often beneficial to all stakeholders.[9] In a scenario where the IPR owner starts abusing their leveraging power, it is irrelevant that the dominance was achieved by a lawful grant of patent, as Section 4 of the Competition Act, 2002 has not carved out any exception for intellectual property rights.[10] Another concern is that the SEP owner often charges a fee according to the price of the end product rather than just the technology offered. This is most unfair, as a device contains thousands of patented components and each piece of technology affects only certain parts of the device and does not contribute to its entire functioning.[11]

II. STANDARDIZATION

We shall next delve into a comparison of which remedy provides the better solution to the aforementioned issues: whether competition law or the current FRAND regime. This requires an in-depth analysis of the working of the FRAND regime, which will then be compared to the pros and cons of using competition law remedies for ensuring effective SEP licensing.

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[7] Kathrin Kuhnel-Fitchen, *Competition Law and Standard Essential Patents: A Transatlantic Perspective*, 74 CAMBRIDGE L.J. 635, 637 (2015).

[8] Rajasthan Cylinders and Containers Ltd. v. Union of India and Ors., 2019 (4) SCJ 247.

[9] Gitanjali Shankar; Nitika Gupta, *Intellectual Property and Competition Law: Divergence, Convergence, and Independence*, 4 NUJS L. REV. 115, 132 (2011).

[10] Competition Act, 2002, § 4, No. 12, Acts of Parliament, 2002 (India).

[11] Jorge L. Contreras; Fabian Gaessler; Christian Helmers; Brian J. Love, *Litigation of Standards-Essential Patents in Europe: A Comparative Analysis*, 32 BERKELEY TECH. L.J. 1457, 1488 (2017).

As has been explained, there is an imbalance of power when it comes to negotiating licensing of standard essential patents. To counterbalance this issue, the market has led to the setting up of Standard Setting Organisations (SSOs) which now facilitate the licensing process. The SSOs have been tasked with choosing 'the standard' in the particular industry. They comprise of industry participants, who periodically convene a meeting to vote on a specific technology which would be adopted as a standard, and also decide the uniform features which a product must adhere to, in order to become compatible and interoperable with the chosen standard.[12] The main members of an SSO include inventors, manufacturers/producers, and distributors/suppliers.[13] The primary consideration behind choosing the standard is its technical efficiency. Thus, the patent holder of the chosen standard becomes the SEP holder. The SSOs, however, do not negotiate the terms on which the SEP holder must license the patent in the market. It is left to be decided on a case-to-case contractual basis between the licensor and licensee. [14] To do so, they have developed the concept of FRAND licensing which entails Fair, Reasonable and Non-discriminatory terms.

(A) PRO-COMPETITIVE EFFECTS OF STANDARDIZATION

In an increasingly globalized world, industries need to reach out to demographics across the world. With new technologies cropping up within very short spans of time, the need for standardization has never been greater. Lack of compatibility in a product – both at the upstream and downstream level within the industry – can lead to a total exclusion from the industry.[15]All round interoperability gives the power to tap into any market, and allows for easier dissemination of the product. The European Commission Guidelines on Applicability of Article 101 TFEU to Horizontal Cooperation Agreements has observed that increased interoperability leads to increased competitiveness in the market and contributes to positive network effects.[16]

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[12] CARL SHAPIRO, *supra* note 5, at 2112.

[13] *Id.*

[14] Mark A. Lemly and Carl Shapiro, *A Simple Approach to Setting Reasonable Royalties for Standard Essential Patents*, 28 BERKELEY TECH. L.J. 1138 (2013). (hereinafter "MARK")

[15] Sergio Baches Opi, *The Application of the Essential Facilities Doctrine to Intellectual Property Licensing in the European Union and the United States: Are Intellectual Proper ty Rights Still Sacrosanct?*, 11 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 409 (2001).

[16]Guidelines on Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Cooperation Agreements, 2011, European Commission (1), 2011 O.J. (C 11) 1.

At the time of advent of the idea of standardization, it was opposed by certain policy makers due to fears that it may lead to cartel-like behaviour or collusion for mala fide interests.[17] The European Commission addressed such concerns by laying down four guidelines for the working of an SSO.[18]

1. *Unrestricted Participation* – No entity, firm, player in the industry or market shall be excluded from participating (attending meeting, providing suggestions, voting on standards) in the standard setting process unless there is cogent evidence to prove that it has attempted to, or intends to, indulge in collusive or other unlawful behaviour (such as by using its market position to influence the vote of another member).[19]

2. *Transparency* – The adoption of a standard shall be based on primarily technical considerations such as its efficiency and ease of incorporation rather than any extraneous considerations. This keeps in check the nefarious practice of patent pooling which seeks to form a group of two or more firms to cross license their patents.[20]

3. *No obligation to comply* – Participation in the standard setting process as well as incorporation of the standard adopted in the process should remain a voluntary choice.[21] Where the commercial interests of a firm do not comply with the adoption of a standard, it cannot be compelled to do so.[22]

4. *Access to Fair, Reasonable and Non-discriminatory terms* – The Commission, itself, has not laid down any framework to determine what constitutes 'fair' and 'reasonable'.[23]

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[17] MARK, *supra* note 14, at 1164; Rambus Corp. v. FTC, 522 F.3d 456 (D.C. Cir. 2008).
[18] Katherine Kuhnel Fitchen, *Standard Essential Patents*, 74 CAMBRIDGE L.J 635 (2015).
[19] Farrell, Joseph, *Standardization and Intellectual Property*, 30 Jurimetrics 35 (1989). (hereinafter "FARRELL")
[20] Carl Shapiro, *Navigating the Patent Thicket: Cross Licenses, Patent Pools, and Standard Setting,* 1 INNOVATION POLICY & ECON. 119 (2000).
[21] *Id.*; *Antitrust and Intellectual Property Rights: Promoting Innovation Enforcement and Competition*, U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, (Apr. 2007), https://www.ftc.gov/sites/default/files/documents/reports/antitrust-enforcement-and-intellectual-property-rights-promoting-innovation-and-competition-report.s.department-justice-and-federal-trade-commission/p040101promotinginnovationandcompetitionrpt0704.pdf.
[22] *Id.* at 54.
[23] *Id.* at 53.

These four principles satiated concerns regarding the misuse of the standard setting process and it has now become the norm with the emergence of major SSOs such as leading SSOs including the International Organization for Standardization (ISO), the International Telecommunication Union (ITU), the European Telecommunications Standards Institute (ETSI) and the Internet Engineering Task Force (IETF).[24] The positive effects of standardization have also been observed by the US Department of Justice including increase in network markets and consumer welfare.[25]

It would be remiss to claim that standardization can only be achieved through conscious engagement by an SSO. As with every problem or need that arises in the market, the market forces work in tandem to resolve it without any external intervention.[26] The alternative to establishing SSOs is the self -correcting market mechanism which leads to the adoption of the most dominant technology as the 'standard' in the market to achieve interoperability.[27] This alternative is, however, riddled with inefficiencies since the dominant player wins on the basis of its higher bargaining power and not on the basis of its technological prowess or superiority. Thus, the market mechanism does not take into account factors such as ease of incorporation, cost of standardization and the most importantly, the ability of the technology to produce the desired technical effect.[28]

SSOs, on the other hand, achieve greater efficiency by making a calculated decision after weighing the pros and cons of the available pool of technologies and thus, the coordinated effort of an SSO provides better incentive to comply with the chosen standard.[29]

(B) CONSEQUENCES OF STANDARDIZATION

Often there is a considerable amount of time between the application for issuance of patent and the actual registration as a patent. Therefore, it is practically impossible to obtain a license for

[24] *Standard Setting Policy Roundtable*, ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD)(Mar. 8, 2011), https://www.oecd.org/daf/competition/47381304.pdf .
[25] FARRELL, *supra* note 17.
[26] Mark A. Lemly, Timothy Simcoe, *How Essential Are Standard Essential Patents,* 104 CORNELL L. REV. 607, 615-616 (2018-2019).
[27] Jeffery Atik, *The FRAND Ceremony and the Engagement of Article 102 TFEU in the Licensing of Standard Essential Patents*, 42 FORDHAM INT'L L.J. 949, 966 (2019).
[28] CARL SHAPIRO, *supra* note 5 at 2114.
[29] *Id.*

every SEP, as development of even a single product requires the use of hundreds of SEPs.[30] Thus, FRAND negotiations are usually entered into after an alleged infringement by a manufacturer, producer or seller.[31] As a result of this lag, two scenarios crop up: the ex-ante and ex-post positions. A manufacturer has to make modifications in his product to accommodate for the technology ex-ante.[32] Once it becomes a standard, the manufacturer gets locked in with those specifications as the cost of modifying the specifications to suit a different or alternative technology is much higher ex-post (since competition at this stage has been entirely eliminated).[33] Traditionally, in patent infringement suits, a situation of infringement is remedied by determining what the royalty rate the patent holder would have been entitled to if he would have entered into a licensing agreement with the infringer. However, with SEPs, the royalty rate that the patent holder would be entitled to – had there been a licensing agreement – is the ex-ante position when the patent was in competition with other technologies to become a standard.[34] That is called the fair market value of the patent. The ex-post value of the patent is over and above the market value and reflects its monopoly status.[35]

Another remedy available in traditional patent infringement suits which is problematic in SEP litigation is that of injunction.[36] On grant of an injunction, the manufacturer loses the market value of the entire product as the product is incapable of possessing any functionality in the absence of the locked in standard.[37] The aforementioned hypothetical situations highlight the necessity for a uniform, just and equitable licensing system.

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[30] Quanta Comp. v. LG Elecs., 553 U.S. 617 (2008); For a detailed explanation of how corporations license new technologies *see* CARL SHAPIRO, *supra* note 5, at 2119.

[31] William F Lee & A Douglas, *Breaking the Vicious Cycle of Patent damages*, 101 CORNELL L.J. 503 (2000).

[32] ALAN, *supra* note 1.

[33] Damien Geradin & Miguel Rato, *Can Standard Setting Lead to Exploitative Abuse?: A Dissonant View on Patent Hold-up, Royalty Stacking and the Meaning of FRAND,* 3 EUR. COMPETITION J. 101 (2007).

[34] Ericsson, Inc. v. D-Link Sys., Inc., 773 F.3d 1201 (Fed. Cir. 2014); IP Innovation L.L.C. v. Red Hat, Inc., 705 F. Supp. 2d 687, 689 (E.D. Tex. 2010).

[35] Josh Lerner & Jean Tirole, *Standard Essential Patents*, 123 J. POL. ECON. 547 (2015).

[36] *Id.*

[37] *Id.* at 549.

III. UNDERSTANDING THE FRAND FRAMEWORK

(A) PRINCIPLES ENVISAGED BY FRAND

The Principles to be followed while implementing FRAND licensing have been recommended in the draft CEN CENELAC Workshop Agreement (CWA) on the Core Principles and Approaches for Licensing of Standard Essential Patents' by the European Committee for standardization.[38] The draft echoes the desire for an egalitarian system which would aid in protecting all entities in the market from exploitation or abuse at the hands of dominant entities.[39] This part will highlight the major recommendations of the CWA that it proposes to incorporate in a FRAND framework. We shall also examine the orders and judgments passed by the CCI which reflect the same reasoning as proposed by the CWA.

The objective of FRAND is to level the playing field between the SEP holder and other players in the market.[40] However, there is no authority or institution that is responsible for determining the nitty-gritties involved in FRAND licensing. Therefore, the need arose for the establishment of SSOs. The CEN CENELAC core principles specify guidelines which FRAND must follow to ensure fair terms for all parties involved. The guidelines provide for mainly 6 categories, namely: Parties, Non-disclosure agreements, Fundamentals, Valuations, Disputes and injunctions, and has laid down 6 core principles that are at the heart of "best practices that parties may choose to adopt."[41] Core Principle 2 contains the essence of the argument made in the previous chapter by providing that "Refusing to license some implementers is the antithesis to FRAND licensing."[42]

- Core Principle 1 embodies the rule against granting injunctions which however, has not been followed by the Indian Courts.[43]

[38] *CEN Workshop Agreement, Core Principles and Approaches for Licensing of Standard Essential Patents*, EUROPEAN COMMITTEE FOR STANDARDIZATION (June 2019, ftp://ftp.cencenelec.eu/EN/News/WS/2019/CWA_SEP/CWA95000.pdf (hereinafter "CWA")
[39] *Id.* at 7.
[40] Microsoft v. Commission, 2007 E.C.R. 11-3601 (Ct. First Instance).
[41] CWA, *supra* note 31, at 10.
[42] *Id.*
[43] *Id.*

In *Telefonaktiebolaget LM Ericsson v. Intex Techs. (India) Limited*,[44] Ericsson alleged infringement of eight of its patents registered in India by the Defendant in so much so that the Defendant has failed to obtain a license from the plaintiff for use of its patents. The Defendants claimed "essentiality of the patent" as a justification for the alleged infringement in as much as non-use of the technology would result in being driven out of the market. The Court held that a determination of the essentiality of the patent would take long and careful determination by industry experts.[45] There can be no presumption of essentiality. On the basis of this reasoning, the Court granted an interim injunction to the Plaintiff leading in long term harm to the commercial interests of the Defendant.

- Core Principle 3 envisages the manner in which royalties should be determined by providing that the royalty should strictly reflect only the actual market value of the patented technology.[46] It embodies the smallest saleable patent principle according to which the royalty must be proportionate to the value of the component within the product that is utilizing the patent and not the value of the end product.[47]

In *Telefonakiebolaet LM Ericsson v. Competition Commission of India,*[48] Micromax and Intex contended that Ericsson is abusing its dominant position in the mobile handset industry by demanding royalties for its SEPs. Intex contended that the royalty rates demanded by the Appellant are "exorbitant and excessive."[49] A mobile handset is made up of thousands of components and each of those components employ technologies that may or may not be an SEP. Thus, it was argued that the value of an SEP should be restricted to the first end component that it is facilitating and not the product in its entirety since it does not have any connection with the working of other components of the product.[50] Therefore, the Appellant was ordered to fix the

[44] Telefonaktiebolaget LM Ericsson v. Intex Techs. (India), 2015 (62) PTC 90 (Del).
[45] *Id.* ¶ 51.
[46] CWA, *supra* note 31, at 10.
[47] Sohvi Leih, David J. Teece*, Antitrust, Standard Essential Patents and the Fallacy of the Anticommons Tragedy: Legal and Industrial Policy Concerns*, 32 BERKELY TECH L.J. 1301 (2017).
[48] Telefonakiebolaet LM Ericsson v. Competition Commission of India, (2016) 4 CompLJ 122 (Del).
[49] *Id.* ¶ 19.5.
[50] Jeffery Atik, *The FRAND Ceremony and the Engagement of Article 102 TFEU in the Licensing of Standard Essential Patents*, 42 FORDHAM INT'L L.J. 949, 966 (2019).

royalty rate according to the value of its chipset technology, and not the mobile handset (which is the downstream product).[51]

- Core Principle 4 provides that a firm which has a large portfolio of patents should make licensing of an SEP contingent on the licensing of its other non-SEP patents along with the desired patent.[52]

This embodies the rule against 'tie in' in competition law where a dominant entity exercises its dominance to enter another relevant market or increase its existing market share by making access contingent on use of all its products.[53] In *M/S Best IT World India v. M/S Telefonaktiebolaget LM Ericsson,*[54] the Commission found the Defendant guilty of abusing its dominant position in the 2G handset market by compelling the Plaintiff to acquire a license for its portfolio of 11 patents and refusing to license the three SEPs that the Plaintiff required at reasonable prices.

- Core Principle 5 advocates against strict non-disclosure agreements between licensing parties.

It provides that certain information such as "patent lists, claim charts identifying relevant products, FRAND licensing terms, aspects of prior licensing history"[55] are necessary to be accessible to all parties in order to ensure whether a reasonable royalty rate is being demanded or not. In *I-Ball v. Ericsson Indian Pvt. Ltd*.,[56] the Defendant refused to share any information about the patent with the Plaintiff until and unless it signed a non-disclosure agreement. The DG came to the conclusion that this practice constitutes a prima facie case of abuse of dominant position. Thus, where the licensee is kept in the dark about the licensing terms agreed upon with other licensees, it cannot determine whether the licensor is behaving in a FRAND complaint manner and therefore, Core Principle 5 upholds the 'Non- Discriminatory' tenet of FRAND.

[51] *Id.* at 201.
[52] CWA *supra* note 31.
[53] RICHARD WHISH AND DAVID BAILEY, COMPETITION LAW, 536 (7th ed. 2012).
[54] M/S Best IT World India v. M/S Telefonaktiebolaget LM Ericsson, [2015] 131 SCL 392 CCI.
[55] CWA, *supra* note 31.
[56] I-Ball v. Ericsson Indian Pvt. Ltd, (2016) 4 CompLJ 122 (Del).

- Core Principle 6 provides that FRAND license terms remain unchanged and enforceable even when the license is transferred to a third party.[57]

This principle tackles the issues posed by Patent Assertion Entities (PAEs). The Federal Trade Commission defines the PAE as a business entity that makes profit primarily from purchasing patents, and subsequently asserting them against implementers.[58] Where an SEP or a portfolio of SEP is transferred to or bought by a PAE, it remains bound by the FRAND agreements that the original patent holder consented to. It cannot escape its contractual obligation by contending that it was not a party to the contract.[59]

Thus, these draft principles have sometimes been adhered to in judicial pronouncements, but the fact remains that they have no binding force in law, and FRAND agreements first and foremost continue to be treated solely according to contract law.

(B) ECONOMICS OF FRAND LICENSING

Berkeley scholar Carl Shapiro has conducted extensive research about the economics behind the efficiency of FRAND licensing and his recommendations on the same have been considered by the Federal Trade Commission in formulating its policies.[60] From his research, three economic effects of ex-post royalty pricing need to be understood:

i. The cost of manufacturing or producing the product increases, thereby increasing the sale price or the market value of the product. Thus, the ultimate burden of the ex-post royalty is shifted to the end consumers.[61] The increased cost also reduces the output of the manufacturers. This leads to a change in the demand-supply ratio in a way which does not reflect the actual needs of the consumers in the market and rather is an artificially created ratio.

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[57] CWA, *supra* note 31.

[58] *The Evolving IP Marketplace: Aligning Patent Notice and Remedies With Competition* FEDERAL TRADE COMMISSION (Mar. 7, 2011), https://www.ftc.gov/reports/evolving-ip-marketplace-aligning-patent-notice-remedies-competition.

[59] *Id.*

[60] Sara Jeruss, Robin Feldman & Joshua Walker, *The America Invents Act 500: Effects of Patent Monetization Entities on US Litigation*, 11 DUKE TECH. L. REV. 357, 361 (2012).

[61] CARL SHAPIRO, *supra* note 5, at 2116.

ii. Theoretically, the royalty price is intended to indicate the market value of the patented technology. However, after gaining a monopolist's position in the market, the SEP holder has the leverage to bargain supra-competitive royalties which superseded the market value of the patented technology.[62] Due to this phenomenon, the cost of driving further innovation using the SEP also increases and this is reflected in the research and development sector of the industry. Carl Shapiro has aptly termed this "a tax on follow on innovation."[63]

iii. Another function of a royalty is to act an incentive for firms to invest in developing better solutions.[64] The firm's decision making to invest in R&D is often dependent on the projected recoupment of his investment in a given time period. Ex-post royalties distort this projection by overplaying the 'recoupment numbers' and thus, exaggerating the incentive to invest.[65]

Thus, to summarize, ex-post royalties impose additional costs on consumers, slow down innovation and contribute to creating information asymmetry in the market.[66]

The brunt of ex post royalty stacking falls on the final consumers rather than on the members or participants of the SSO or even the firms involved in the supply chain from manufacturers to distributors.[67] Where there is an increase in the marginal cost of production of a firm due to ex-post charges, the "downstream consumers are harmed to the extent the firm increases its output price."[68] Consequently, there is a non-incentive for the patent holder or the implementer to try to remedy the problems left unresolved by FRAND licensing. This is the main factor why FRAND has proven to be ineffective in preventing patent lock-in and royalty stacking.[69] Since FRAND litigation is currently governed by contract law, it is only the interests of the patent holder and

[62] The Quaterly Newsletter of the Competition Commission of India, Interplay between Competition and Patents, 22 Fairplay 2017.
[63] CARL SHAPIRO, *supra* note 5, at 2116.
[64]Einer Elhaug, *Do Patent Hold up and Royalty Stacking Lead to Systematically Excessive Royalties*, 4 J. COMP. L. & ECON. 535 (2008).
[65] Mark A. Lemly and Carl Shapiro*, Patent Hold up and Royalty Stacking*, 85 TEX. L. REV. 2163 (2006-2007).
[66] ResQNet.com v. Lansa Inc., 594 F.3d 860, 868-89 (Fed. Cir. 2010).
[67] Microsoft Corp. v. Motorola Inc., 795 F.3d 1034 (9th Cir. 2015); Ericson, 773 F.3d 1201.
[68] Joseph Pharell, John Hayes, Carl Shapiro and Theresa Sullivan, *Standard Setting, Patents and Hold up,* Antitrust law Journal 14 B.U. J. SCI. & TECH. L. 144 (2008).
[69] Benjamin Klien, *Market Power in Antitrust: Economic Analysis*, 3. SUP. ECON. REV. 43, 85 (1993).

the licensee that can be protected in Court. This justifies the intervention by competition law as it aims to protect the consumers from private behaviour in the market which harms the economy or consumer welfare.[70]

(C) NEED FOR A REMEDY 'IN REM'

The role of contract law is restricted to the point of consensual determination between the parties to act according to fair and reasonable terms and the role of patent law is limited to restricting SEP holders from using injunctions as a remedy for alleged infringement.[71] The central issue that needs to be addressed by competition law is how to level the playing field between SEP holder and the implementer of standard.

When the SEP holder makes an offer, the implementer has little or no leverage to refuse the offer even when it is not in compliance with FRAND principles.[72] Furthermore, in India, there has not yet been a definitive judicial opinion which denounces the practice of granting interim or temporary injunctions to SEP holders. Even in the United States, despite the ruling in *eBay In. v. MercExchange LLC* which prohibited SEP holders from using the threat of injunctions as a hanging sword over alleged infringers during FRAND negotiations,[73] the Courts can still grant an injunction if in the opinion of the Court the FRAND license terms were indeed fair and reasonable.[74]

The position with regard to injunctions is significantly better in the European Union after the judgment in *Huawei Tech Co. v. ZTE Corp.*[75] where it was held that injunction can be granted only when the alleged infringer refuses to respond to the offer made by the SEP holder provided that the offer made was complaint with FRAND terms. In all these scenarios, the fact remains that there is no concrete legislative or judicial metric to determine whether an offer is compliant with FRAND terms or not. Thus, where an implementer in good faith refuses a license or refuses to

[70] Comeptition Commission of India v. Bharti Airtel Limited and Ors., AIR 2019 SC 113.
[71] Micheal Martinek, *Duration and Reproduction of Distribution Contracts in the Focus of Antitrust Law*, 2017 J. S. AFR. L. 511 (2017)
[72] Damien Geradin & Miguel Rato, *Can Standard Setting Lead to Exploitative Abuse: A Dissonant View on Patent Hold-up, Royalty Stacking and the Meaning of FRAND,* 3 EUR. COMPETITION J. 101, 118-19 (2007).
[73] eBay, Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391-94 (2006).
[74] Roche Products, Inc. v. Bolar Pharmaceutical Co., 733 F.2d 858 (1984); Broadcom Corp. v. Qualcomm Inc., 543 F.3d 683, 704 (Fed. Cir. 2008).
[75] C-1 7 0/13**,** Huawei Techs. Co. v. ZTE Corp., 2015 E.C.R. C 302.

negotiate or respond believing it to be non FRAND compliant, a Court can, however, later reach the conclusion that it was indeed FRAND compliant and grant an injunction. Thus, such ambiguity regarding the meaning of 'FRAND-compliant' terms keeps the threat of an injunction alive at all stages.[76] Therefore, dealing with such cases under the umbrella of 'abuse of dominant position' bodes well for the entirety of the market as the suit ceases to be of contractual nature where only the interests of the parties to the contract are relevant. The obligation to license on FRAND terms transforms from an 'in personam' obligation to an 'in rem' obligation.

IV. IDENTIFYING ANTI-COMPETITIVE CONDUCT THAT REQUIRES REGULATION

Anti-competitive conduct can be indulged in by either the SEP holder or the participants of an SSO.[77] Let us look at the competition law claims available against each.

(A) CONDUCT OF SEP HOLDERS REQUIRING COMPETITION LAW INTERFERENCE

There are several activities that an SEP holder can indulge in which would constitute a competition law violation. Firstly, an SEP holder may not license on 'fair' and 'reasonable' terms in one relevant market. Every non-compliance with FRAND terms may not result in any harm to the licensee.[78] However, it may allow the SEP holder access to a downstream market where it can start building up its market power.[79] Thus, it gains a foothold it in the market and may go on to assert dominance in the downstream market. Since, in the instant scenario, the licensee is not being directly affected by the non-compliance, contract law and patent law would be inadequate to address the situation,[80] but competition law can address it under the ambit of Section 4 of the Act.

Section 4 of the Competition Act, 2002 has been influenced by the TFEU. The Act came into effect only from 2009 and thus, the Courts have often referred to antitrust principles of the US and the EU to decide the matter before them. We shall examine the effect of a slew of cases

[76] Tom Ewing, *Indirect Exploitation of Intellectual Property Rights By Corporations and Investors: IP Privateering and Modern Letters of Marque and Reprisal*, 4 HASTINGS SCI. & TECH. L.J. 1 (2012).
[77] eBay v. MercExchange, 547 U.S. 388 (2006).
[78] Broadcom Corp. v. Qualcomm Inc., Sol F.3d 297, 303 (3d Cir. 2007); Conwood Co. v. United States Tobacco Co., 290 F.3d 768, 788 (6th Cir. 2002).
[79] Sara Jeruss, Robin Feldman & Joshua Walker, *The America Invents Act 500: Effects of Patent Monetization Entities on US Litigation*, 11 DUKE TECH. L. REV. 357, 361 (2012).
[80] CARL SHAPIRO. *supra* note 5, at 2119.

which highlight the consumer centric approach of the competition authorities in India and how that approach can be applied to SEP litigation.

First, it is pertinent to note the Patents Act, 1970 provisions for compulsory licensing in India which provides for three conditions, namely, *i. the reasonable requirements of the public have not been met.*[81] *ii. The patented invention is not available at a reasonable price and*[82] *iii. The patented invention is not worked in the territory of India.*[83] Thus, compulsory licensing does not cover instances of abuse of dominance in the market. The expectations of the public may be met even without the patented invention being licensed. It would hurt the interests of the competitors though, and therefore, the first condition is not broad enough to cover SEP litigation. The second condition, it can be argued, removes the need for anti-trust interference. But raising prices is not the only method of employing anti-competitive behaviour.[84] Thus, compulsory licensing is not a sufficient remedy to balance the interest of the dominant entity, competitors, and the consumers all at the same time.
SEP litigation in India started in 2013, when Ericsson sought an injunction against Micromax for infringing eight of its patents which had been chosen as standards and were registered in India.[85] Simultaneously, Micromax filed a suit against Ericsson with the Competition Commission of India for allegedly abusing its dominant position by virtue of being a standard by compelling Micromax to sign Non-disclosure agreements with respect to the royalty rates and thereby, violating the Non-discriminatory condition of FRAND.[86] Thus, in the instant case, the litigant approached the competition law authority for non-compliance with a FRAND obligation.

This was followed by *Ericsson v. Gionee*[87] where Ericson claimed infringement of its SEPs by Gionee and sought an injunction against Gionee in the Delhi High Court. The Delhi High Court ordered the litigants to reach a settlement of licensing according to the internationally accepted FRAND license terms.

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[81] The Patents Act, 1970, § 84, No. 10, Acts of Parliament, 1949 (India).
[82] *Id.*
[83] *Id.*
[84] Martin J. Adelman, *Property Rights Theory and Patent Antitrust: The Role of Compulsory Licensing*, 52 N.Y.U L. REV. 977 (1977).
[85] Neha Chaudhari, *Standard Essential Patents on Low Cost Mobile Phones in India: A case to Strengthen Competition Regulation?,* 11 (2) SOCIO-LEGAL REV. 41 2015 (hereinafter "NEHA").
[86] Micromax Informatics Ltd., *In re* 2013 CCI 77.
[87] Telefonaktiebolaget LM Ericsson (Publ) v. Gionee Communication Equipment CO. Ltd., CS (OS) No. 2010 of 2013 (Del.) ¶ 5(3)(b).

Similar to *Ericsson v. Micromax*, followed the same factual matrix in *Ericsson v. Intex,*[88] where Ericsson refused to fully disclose the licensing terms. Moreover, it charged excessive royalties for licensing its portfolio of SEPs to Intex despite first agreeing to license on FRAND terms. Thus, Intex had no proper metric to determine the fairness of the royalty rates and due to the patent being a standard, Ericsson forced Intex to agree to its terms, whatsoever they may be. On first examination, the CCI came to the conclusion that the conduct is prima facie a violation of Section 4 of the Competition Act, 2002.

Aside from Ercisson, Vringo is another company which has been involved in SEP litigation in India. In *Vringo v. ZTE,*[89] Vringo contended that ZTE has infringed its patents which are standards in the industry and therefore, similar to Ericsson, sought an injunction against the use or sale of the SEPs by ZTE. The Delhi High Court initially granted an injunction in favour of Vringo but subsequently lifted. In *Vringo Infrastructure v. Indiamart Interfresh Inc.,*[90] Vringo again filed for infringed of its patents by a subsidiary of ZTE. ZTE, then retaliated by filing for revocation of patent under Section 64 of the Patents Act, 1970 by contending that it does not satisfy the conditions of novelty and uniqueness which are crucial to confer a patent grant.

The act of offering discriminatory terms to different licensees i.e. being noncompliant with the 'non-discriminatory' condition of FRAND is another practice of SEP holders which requires regulation. In *Telefonaktiebolaget LM Ericsson v. Xiomi Technology and Ors.,*[91] the Delhi High Court denied the defendant access to the patent licensing agreements that the plaintiff had negotiated with the defendant's competitors as they contained sensitive business information and trade secrets.[92] An SEP holder can utilize its dominant position to offer favourable terms to certain licensees over others for considerations that find no justification in 'legitimate business interest' doctrine.[93] This affects the competitive playing field between all the licensees in a relevant market. Essentially, then what the SEP holder is doing is conferring power on entities that it

[88] Telefonaktiebolaget LM Ericsson (Publ) v.Intex technologies (India) Ltd., 2015 SCC Online Del 8229 (hereinafter "ERICSSON").
[89] ZTE Corporation v. Vringo Infrastructure, FAO (OS) NO. 143 of 2014 (Del.) (hereinafter "ZTE").
[90] Vringo Infrastructure v. Indiamart Interfresh Inc., CS (OS) No. 314 of 2014: 2014 SCC Online Del 3970.
[91] Telefonaktiebolaget LM Ericsson v. Xiomi Technology and Ors., CC (O) No. 11/2015, (decided on 24.10.2017).
[92] *Id.* at 8.
[93] Twin City Sportservice, Inc. v. Charles 0. Finley & Co., 676 F.2d 1291 (9th Cir. 1982).

favours or entities that favour it for commercial dealings.[94] It can also lead to instances where the SEP holder uses this tactic to weaken entities that it may be trying to forcefully acquire.

The common thread in all SEP litigation in India has been that it was brought about to enforce FRAND licensing or FRAND commitment made by the SEP holder. Another common thread is the practice of the High Court in granting ex-parte injunctions in favour of the SEP holder. The rules for granting injunctions provide that firstly, there must be a prima facie case, balance of convenience must be in favour of the litigant seeking injunction and lastly the harm caused by granting injunction should not outweigh the good achieved by granting injunction.[95] On this basis, the following observations have been made regarding the SEP proceedings in India:

- The Delhi High Court has, on more than one occasion, sought to refrain the alleged infringer from using, selling or marketing the SEP in India because it found the balance of convenience lies in favour of the SEP holder.[96] This shows a marked intention to protect the rights of the intellectual property rights holder as opposed to the rights of participants in the market from alleged abuse of dominant position. The usual remedy for patent infringement is payment of royalties along with compensation as the damage can be assessed in monetary terms.
- In addition to granting injunction, the Court has also continued to impose fines or order payment of royalties.[97]
- The Court order takes away any leverage the manufacturer may have to bargain the royalty terms or FRAND terms with the SEP holder because the hanging sword of injunction is ever present, thereby, forcing future litigants to concede to unreasonable terms of the SEP holder as that is preferable to being barred from using or selling the standard at all. This creates either a vicious cycle of litigation or forced cooperation.[98]

[94] Steven Anderman, *Does the Microsoft Case Offer a New Paradigm for the "Exceptional Circumstances" Test and Compulsory Copyright Licenses under EC Competition Law?*, 1 COMPETITION L. REV. 7, 7 (2004).
[95] C.K. TAKWANI, CIVIL PROCEDURE CODE, 292 (7th ed. 2014).
[96] ZTE Corporation v. Vringo Infrastructure, FAO (OS) NO. 143 of 2014 (Del.).
[97]Telefonaktiebolaget LM Ericsson (Publ) v.Intex technologies (India) Ltd., 2015 SCC Online Del 8229 ; Vringo Infrastructure Incorporated v. ZTE, CS (OS) 2168 of 2013.
[98] Vringo Infrastructure v. Indiamart Interfresh Inc., CS (OS) No. 314 of 2014: 2014 SCC Online Del 3970.

Oftentimes, SEP holder offers tying agreements to obtain a higher royalty rate for its non-SEP patents by leveraging its superior bargaining power in the SEP relevant market.[99] This is another scenario which cannot be addressed by contract law due to the ever present threat of injunction which forces the licensee to choose between unreasonable terms or being driven out of the market entirely. Thus, it falls entirely within the domain of competition law to address it.

(B) CONDUCT OF SSOS THAT REQUIRES COMPETITION LAW INTERFERENCE

It may be argued that the very reason for the existence of SSOs is to counter the problems that we are attempting to solve and thus they must be excluded from this scrutiny. However, the United States Supreme Court in *Allied Tube and Conduit Corp v. Indian Head Incorporated*[100] has held that the standard setting process is permissible "only on the understanding that it will be conducted in a nonpartisan manner offering procompetitive benefits."[101] In the instant case, attempt was made by a faction of the participants of the SSO to deliberately exclude the technology of a competitor from consideration to be a standard. An analogy can be drawn between SSOs and trade associations and trade unions. Both are a collective group of competitors in the same relevant market tasked with unanimously making decisions that benefit the entire industry.[102] Coordinated efforts between members in the same relevant market are always susceptible to anti- competitive behaviour.[103] The rule of thumb is that coordination is permissible to the extent that it does not impede, hamper or alter competition more than is absolutely necessary to do so and even so the benefits must outweigh the risk and cost of coordinated effort.[104]

(C) CAN AN SSO BE REGULATED BY THE COMPETITION ACT, 2002?

Trade Associations have been brought under the ambit of being penalized by competition law for discrimination against certain players or collusive efforts that have anti- competitive effects.[105] They provide a platform where competitors can come together and distort the market structure

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[99] Stanley M. Besen, *Why Royalties for SEPs Should Not be Set By The Courts*, 15 CHICAGO-KENT J. INTELL. PROP. L. 19, 20 (2016).

[100] Allied Tube and Conduit Corp v. Indian Head Incorporated ,486 U.S. 492 (1988).

[101] *Id.* at 506-07.

[102] Aishwarya Gupta and Vivasan Bansal, *Competition Law Regulation of Trade and Personal Associations*, 8 NUJS L. REV. 281 (2015) (hereinafter "AISHWARYA").

[103] Raylon, LLC v. Complus Data Innovations, Inc., 700 F.3d 1361, 1371 (Fed. Cir. 2012).

[104] G.R. Bhatia, Abdullah Hussain & Ravisekhar Nair, *Law in Focus: Competition Law in India*, 1 IJIEL 182 (2008).

[105] Rajasthan Cylinders v. Union of India, 2018 SCC OnLine SC 1718.

to suit their needs and imposing such conditions that increase barriers to entry in their relevant market, effectively, conferring more market power upon themselves.[106] Moreover, trade associations enjoy a dominant position by virtue of having the power to choose and implement criteria and certifications which must be met by all members seeking to exist in the market.[107] In the case of *In Re Sham Enterprises,*[108] the CCI has observed that where an association directly engages in commercial activity in its own name, then it falls under the scope of enterprise and can be penalized under the competition act.[109] Similarly, using the same rationale, in *American Society of Mechanical Engineers v. Hydrolevel Corp.,*[110] the United States Supreme Court held that an SSO boycotting a competitor's product by wrongfully claiming that it does not comply with the industry standard is violation of both Section 1 and Section 2 of the Sherman Act.[111]

The same principles can be extended to SSOs. Therefore, an SSO's actions are justified only so long as there was no alternative to conferring monopoly power on a patent holder. Therefore, where all other things remaining equal, if an SSO adopts a patent technology as a standard over a non-patented one, it becomes susceptible to inspection by competition law authorities.

Moreover, it is of utmost significance to note that the best interests of the members of an SSO lie in non-compliance with FRAND principles. Hypothetically considering, when an SEP holder indulges in royalty stacking, it receives supra competitive returns which in turn "increases the price in the downstream market to monopoly level"[112] i.e. by increasing the cost of production of the downstream product which necessarily needs to use the SEP, the members offset this increased cost as increased revenue generated from end consumers.[113] Thus, there is a clear incentive for members of an SSO to collude. Additionally, most members of an SSO are SEP holders themselves and thus would actively work against bringing stringent licensing terms in the

[106] Reliance Big Entertainment Ltd. v. Karnataka Film Chamber of Commerce, 2012 Comp LR 269.
[107] Sandhya Drug Agency, In re, 2013 SCC OnLine CCI 84.
[108] Shivam Enterprises, *In re*, 2015 Comp LR 232.
[109] *Id.* at 24.
[110] American Society of Mechanical Engineers v. Hydrolevel Corp, 456 U.S. 556 (1982).
[111] Stanley M. Besen, *Why Royalties for SEPs Should Not be Set By The Courts*, 15 CHICAGO-KENT J. INTELL. PROP. L. 19, 20 (2016).
[112] Douglas H. Ginsburg, *The Troubling Use of Antitrust to regulate FRAND Licensing*, 10 CPI. ANTITRUST. CHRON. 2 (2015).
[113] *Id.*

industry.[114] Thus, it is clear that SSOs need to be regulated by competition law. This is turn begs the question whether SSO is an enterprise under the Competition Act, 2002.

The central question which needs to be determined with respect to being an enterprise is the nature of the activity carried out by the organisation. [115] The preamble to the enactment provides that the goal of the Act is to prevent activities which have an adverse effect on competition.[116] Moreover, the definition of' 'enterprise' as contained in Section 2(h) of the Act does not provide for the need of an 'economic activity' or a 'profit making motive'.[117] Therefore, it can be interpreted that as long as an entity has the power to distort the market structure or affect competition in any manner whatsoever where such affect is not a consequence of the natural forces of the market, then such an entity should fall under the purview of the Act.[118] The CCI has at times taken a lenient approach to interpret 'associations' as enterprises. In *Hemant Sharma v. Union of India,*[119] the AICF, which was an association of chess players, was held to be an 'enterprise' by the CCI as it provided privileged access to certain events to registered members.[120] Thus, it is argued that SSOs, too, fall under the definition of 'enterprise'.

- Firstly, an SSO is comprised of profit making competitors and the foremost interest sought to be protected by an SSO is of the members itself.[121]
- Secondly, an SSO's decision with respect to choosing a standard has the consequence of conferring monopoly upon certain entities, thereby, changing the structure of the market.[122]
- Thirdly, an SSO is in a dominant position as the members can collude to exclude a major competitor or reject FRAND terms which favour consumer welfare.

[114] Richard Lloyd, *InterDigital Reveals That, Like Qualcomm, It Is Reworking Relationship with IEEE After Introduction of New Patent Policy*, 4 VAN. L.J. 491 (2011).
[115] VINOD, *supra* note 2.
[116] *See* Preamble, Competition Act, 2002, No. 12, Acts of Parliament, 2002 (India).
[117] Competition Act, 2002, § 2(h), No. 12, Acts of Parliament, 2002 (India).
[118] AISHWARYA, *supra* note 102, at 292.
[119] Hemant Sharma v. Union of India and Ors., W.P. (C) 5770/2011.
[120] *Id.* at 26.
[121] MARK, *supra* note 14, at 1150; For a detailed explanation of the inner workings of an SSO, *see* CARL, *supra* note 5.
[122] ZTE, *supra* note 82.

V. CONCLUSION

The benefit of switching from a right in personam approach to a right in rem approach enforceable by competition law is that the remedy can be availed even by the consumers who do not have a direct nexus or relationship with the SEP holder. Moreover, the compensation awarded for royalty stacking can then be available to all the downstream implementers of the standard. Where it is found that the SSO members have colluded with an intention to obstruct the enforcement of strict licensing terms, all SSO members can be made 'jointly and severally liable' for their anti -competitive conduct.

Based on this analysis of the impediments caused to the market due to conduct of SEP holders, it seems almost imperative that competition law regime needs to step in and regulate their conduct. The CCI and the NCLAT have time and again emphasized that consumer welfare is the ultimate goal of the law, as is also evident from the preamble of the Competition Act, 2002. The author advocates that the conduct of SEP holders should not be left to the discretion of private contractual negotiation between the members in the industry, instead the following suggestions are recommended:

- Section 84 of the Patents Act, 1970 provides three conditions under which a patent can be mandated to be licensed by law. However, none of the three conditions cover the issues created by SEP licensing. Thus, the author suggests that a clause be inserted in Section 84 which provides that if an SEP holder indulges in anti-competitive in its relevant market or the downstream market, it must be licensed. This would require a harmonious interpretation of both the statues as the anti-competitiveness would be judged on the threshold of the factors mentioned in Section 19(4) of the Competition Act, 2002.

- Alternatively, refusal to license SEP can be included under Section 4 of the Competition Act, 2002 as an abuse of dominant position. A corresponding remedy would also need to be provided to the CCI of ordering licensing of the SEP if it is proven to be abusing its dominant position.

COVID-19 AS A FORCE MAJEURE & FRUSTRATING EVENT IN INDIAN LAW: A CRITICAL & COMPARATIVE ANALYSIS

*-Tavashya Kumar**

ABSTRACT

The Coronavirus has brought a great degree of uncertainty in its wake and has raised several pertinent questions, most importantly in the field of law. The lockdown and social distancing measures are likely to have a detrimental impact on the economy and may prove disruptive in the fulfillment of contractual obligations for some individuals and commercial establishments. Subsequently, they may seek a remedy which allows them to refrain from fulfilling their contractual obligations. Such a remedy usually takes the form of invoking a 'force majeure' clause which is agreed upon by the parties while drafting the contract. This paper seeks to explore the prevailing literature on this area of law, and conduct a comparative geographical and temporal analysis in order to determine whether the aforementioned situation qualifies the threshold required to constitute a 'force majeure' event under a relevant contractual provision to that effect. In doing so, it reaches a conclusion that whether or not COVID-19 constitutes a force majeure event is a matter of specific factual determination because the courts have interpreted them in a narrow fashion, in conformity with the specific language used in the clause, the nature of the contract in general and the knowledge, assumptions and expectations of the parties while entering into the contract. Consequently, while COVID 19 may constitute force majeure in one particular case, it may not do so in another, if the nature of the contract or the language of the clause varies.

Furthermore, the paper takes cognizance of the existence of contracts which do not incorporate a 'force majeure' clause and seeks to ascertain, through an analysis of domestic legal doctrines developed by way of precedent and legislation, whether parties to such contracts have a potential remedy in the form of the doctrine of frustration. In doing so, the paper seeks to establish the precise and uniform standard that needs to be fulfilled in order to claim such a remedy, and analyses whether the prevailing situation fulfills the requisite standard in order to be construed as a frustrating event. In this respect, the paper concludes that while there may be instances where contracts may be deemed frustrated owing to literal impossibility or frustration of object and purpose, such instances may be relatively few and far apart. This is because the standard that needs to be fulfilled to avail such remedy is very high and it is imperative to demonstrate that the circumstances are so radically different than those foreseen when the contract was

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concluded that the performance is either impossible or completely useless since the base of the contract has been nullified. Therefore, instances of mere hardship or onerousness will definitely not be provided remedy for.

I. INTRODUCTION

The Coronavirus (or COVID-19 as christened by WHO) emerged in the city of Wuhan, China in December 2019.[1] Since then, it has spread across the globe like wildfire, resulting in crores of cases and lakhs of deaths the world over.[2] It has been officially declared as a pandemic by the World Health Organisation,[3] bringing the world to a grinding halt and forcing governments to trigger complete shutdown of their populations and economies.

The Government of India had, by exercising its powers under the Disaster Management Act,[4] issued orders requiring the closure of all offices, industries and commercial establishments, and the maintaining of social distancing across the nation.[5] This was subsequently extended till mid-June and the restrictions will continue to be in place for the foreseeable future.

While not losing sight of the consequences to public health, one must also remain cognisant of the impact which the disease will have on the economies of the world. While it is still too early to comprehensively gauge the same, economists across the world converge on one certainty - it will be staggered, long drawn and excruciating. According to the predictions by the International Monetary Fund, the international economy has entered a phase of recession as severe as the global economic depression of the 1930s and world economies are expected to 'contract' sharply in the foreseeable future.[6]

Assessing the situation from a legal viewpoint, one can ascertain that the lockdown and the resulting disruption would result in several individuals and commercial establishments being unable to perform obligations arising out of their contracts. Consequently, several litigations will

[1] WORLD HEALTH ORGANISATION, https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen (Mar. 24, 2020).
[2] Data Table, WHO Coronavirus Disease (COVID 19) Dashboard, https://covid19.who.int (Aug. 18, 2020).
[3] WHO, *supra* note 1.
[4] Disaster Management Act, 2005, §§S 6(2)(i), 10(2)(i), No. 53, Acts of Parliament, 2005 (India).
[5] MINISTRY OF HOME AFFAIRS, GOVERNMENT OF INDIA, (Mar. 24, 2020), https://www.mha.gov.in/sites/default/files/MHAorder%20copy.pdf.
[6] *World Economic Outlook*, INTERNATIONAL MONETARY FUND, (date of access, time of access), https://www.imf.org/en/Publications/WEO/Issues/2020/04/14/weo-april-2020.

be instituted before various courts and tribunals, wherein parties would seek to excuse themselves from liability by invoking force majeure clauses or, in the absence of such a clause, by turning to the domestic legal doctrines of frustration.

Consequently, this research paper shall be divided into two sections. The first section shall pertain to those contracts which include a force majeure clause. It shall investigate the interpretation of force majeure provisions, which shall further aid in determining whether the events brought about by COVID-19 may constitute Force Majeure. The second section shall deal with the remedies available in situations where a force majeure clause is absent, particularly in India (though other jurisdictions have been discussed to provide a comparative analysis). Having discussed domestic legal doctrines in both civil & common law jurisdictions, the paper shall compare and contrast the respective standards that need to be fulfilled and conduct a comprehensive analysis thereof.

II. COVID-19 AND FORCE MAJEURE CLAUSES

(A) DEFINITION

The term 'force majeure' is defined by Black's Law dictionary as "a superior or irresistible force that cannot be reasonably anticipated or controlled."[7] Though an unfamiliar concept in common law, it is a well-established doctrine in French and other Civil law jurisdictions, wherein it operates to relieve a promisor from liability for non-performance due to unavoidable circumstances.[8] However, the precise nature of these circumstances is, at best, ambiguous. This is why, usually when this term appears in a contractual clause, it is properly defined and the situations it covers are expressly delimited. In fact, in many cases, simply using the term "the usual force majeure clauses shall apply" has resulted in the contracts being voided by virtue of uncertainty.[9]

Force Majeure clauses come in varying degrees of complexity. They can be highly specific i.e. prescribing a list of events that may qualify as force majeure, or can be generic in nature by incorporating catch-all phrasing. Usually, however, they are a combination of both: they include "unforeseeable" events "beyond the control" of either party, such as "Act of God, strike,

[7] Black's Law Dictionary, Eighth Edition, First South Asian Edition 2015.
[8] WILLIAM SWADLING, THE JUDICIAL CONSTRUCTION OF FORCE MAJEURE CLAUSES, *in* EWAN MCKENDRICK (eds.), FORCE MAJEURE AND FRUSTRATION OF CONTRACT, 5 (2nd ed. 2013). (hereinafter "SWADLING").
[9] British Electrical and Associated Industries (Cardiff) Ltd. v. Patley Pressings Ltd. (1953) 1 W.L.R. 280.

lockout, disaster, war, riot or civil commotion etc."[10] The existence and operation of such a clause ensures that non-performance does not amount to a breach of contract in the given situation. This is because performance was not expected to take place in the circumstances that have occurred, owing to their unforeseeable, irresistible and insurmountable nature.[11]

(B) CONCEPTUALISATION & NECESSITY: A GENERAL OVERVIEW

The law of contract proceeds from the principle of sanctity of contract (pacta sunt servanda), which provides for literal performance of contractual obligations regardless of any supervening circumstances. It further makes the party in breach strictly liable for non-performance.[12] English courts, in early cases like *Paradine v. Jane (a case wherein the defendant was held liable to pay rent for the whole duration for which the land was leased from the plaintiff, despite the land being in possession of armed forces during the English Civil War),*[13] took an extremely restrictive view, stating that "When a party by his own contract creates a duty upon himself, s/he is bound to make it good, notwithstanding any accident or inevitable necessity, because s/he might have provided against it by his contract."[14] This is because contractual obligations are freely assumed with the full consent of both parties and this allows the parties to allocate and assume the risks. In other words, contractual obligations must be viewed as a promise to bear the consequences if the thing promised for is not brought about, rather than viewing it as a promise to do something or not do something.[15]

If, however, a party to a contract does not wish to assume a particular risk, especially unforeseeable events over which he has no control (such as an Act of God, war, Act of Government etc), s/he may want to delimit the extent of his obligations, and thus may expressly refrain from taking responsibility for performance in some predetermined situations, by providing for the same in the contract. This fixation of responsibility is achieved by inserting a force majeure clause in the contract.

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[10] SWADLING, *supra* note 6.
[11] BARRY NICHOLAS, FORCE MAJEURE IN FRENCH LAW *in* EWAN MCKENDRICK (eds.), FORCE MAJEURE AND FRUSTRATION OF CONTRACT 18-24 (2nd ed. 2013). (hereinafter "NICHOLAS").
[12] G.H. TREITEL, FRUSTRATION AND FORCE MAJEURE (3rd ed. 2014). (hereinafter "TREITEL").
[13] Paradine v. Jane, (1647) Aleyn 26.
[14] *Id.* at 27.
[15] Oliver Wendell Holmes Jr., The Common Law 298-300 (Little Brown & Co) (1881).

It is pertinent to mention that, since *Paradine v. Jane*, both civil & common law jurisdictions have seen the emergence of certain legal doctrines which excuse a party from liability for non-performance if certain unforeseeable circumstances occur, even if the terms of the contract do not, on a prima facie level, provide for any restrictions or qualifications i.e. they are absolute in nature.[16] While these doctrines shall be examined in detail later, it is pertinent to mention that such doctrines operate in narrow confines[17] and the standard that needs to be fulfilled is generally a high one across jurisdictions (though it varies according to the established judicial practice of different countries)[18] because a foundational precept of contract law is that it vests in the parties an ability to allocate the risks of performance as per their preferences. Therefore parties can be reasonably certain that they will receive what they have contracted for, or in the event of a breach, will receive damages of an equivalent amount.[19] However, such a doctrine subverts this forward-looking element of contract law and introduces a degree of uncertainty in the minds of the parties. Therefore, a high standard is maintained to ensure that only such cases wherein performance is either literally impossible, or circumstances are radically different, get relief. In contrast, however, a force majeure clause may extend protection to one whose performance has been merely 'hindered' or 'delayed' due to certain circumstances, depending upon the language of the clause and judicial practice.[20] This provides a certain degree of guarantee that commercial establishments would not be forced to perform their obligations at a great disadvantage to themselves.

Another reason why force majeure clauses are preferred is owing to the flexibility of outcome that they provide. Domestic legal doctrines have the effect of bringing the contract to an end and discharging the parties from any further obligation under the contract.[21] This may result in commercial difficulties or inconveniences for one or both parties. Force Majeure clauses, instead, may provide for a more amicable and prudent resolution such as adaptation of price, renegotiation of certain aspects, extension of time etc.[22]

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[16] SWADLING, *supra* note 8.
[17] British Movietonenews Ltd. v. London and District Cinemas, (1952) A.C. 166; Tsakirog-lou & Co. Ltd. v. Noblee Thorl G.m.b.H, (1962) A.C. 93; Pioneer Shipping Ltd v. BTP Tioxide Ltd (The Nema), (1982) A.C. 724.
[18] TREITEL, *supra* note 12, at 2-031.
[19] SWADLING, *supra* note 8, at 4.
[20] 1 CHITTY ON CONTRACTS (31st ed. 2012) para 643 (hereinafter "CHITTY"); Dixon & Sons v. Henderson Craig & Co., (1919) 2 K.B. 778.
[21] TREITEL, *supra* note 12, at 1-001.
[22] SWADLING, *supra* note 8, at 9.

(C) JUDICIAL INTERPRETATION OF FORCE MAJEURE CLAUSES IN ENGLAND

Force Majeure clauses are purely creatures of the contract between the parties, and therefore the meaning of the term, its applicability etc., is contingent upon the precise nature of the contract, the particular language adopted by it, its context and the parties' knowledge, assumptions & expectations.[23]

Since parties in England often use the term 'force majeure' in their contracts, the meaning of the term has inevitably become a matter of contention before the courts during litigation, which are, as established in *Lebeaupin v. Richard Crispin,*[24]constrained to interpret the term in the context in which they appear and thus construct the meaning in a narrow fashion.

In *Matsoukis v. Priestman & Co.,*[25] which is amongst the first cases in which the courts were called upon to attribute meaning to the term, a shipbuilding contract called for payment of liquidated damages by the defendant (builder of the ship) for each day the delivery of the ship was delayed, 'force majeure excepted'. No explanation was provided as to the events which may constitute this force majeure. Subsequently, delivery was delayed owing to a combination of factors – strike of coal miners, breakdown of machinery, bad weather, funeral and employees attending football matches. The plaintiff submitted that the term force majeure was just a French construction of the older Latin term 'vis major' which meant 'Act of God' in the prevailing English Common Law. They thus argued that losses caused by human intervention such as strikes or breakdown of machinery could not be included within the scope of the term. However, the judge rejected this argument ruled that the defendant would not be liable for the delay that was caused by the strike or by the breakdown of machines, because these events were unforeseeable and beyond its control. However, the delay caused due to the funeral etc. was not deemed excusable as the defendant should have provided for them. This interpretation was upheld in the case of Lebeaupin,[26] wherein the judge pertinently observed that the party in breach may not rely upon the defence of force majeure if its own act or omission, constituting fault or negligence, is a precipitating or causal factor for the same.

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[23] CHITTY, *supra* note 20.
[24] Lebeaupin v. Richard Crispin & Co., (1920) 2 K.B. 714, 720.
[25] Matsoukis v. Priestman & Co., (1915) 1 K.B. 681.
[26] Lebeaupin v. Richard Crispin & Co., (1920) 2 K.B. 714, 720.

Further, in the *Concadoro*[27] case wherein a ship was unable to leave port owing to lack of funds, it was held that "the superior force must constitute a physical or legal restraint on performance." Accordingly, in the case of *Brauer v. James Clark*,[28] it was held that 20-30 % increase in prices was not sufficient to constitute the defence of force majeure since it merely amounted to commercial hardship (a term which refers to a fluctuation in costs or prices which makes the performance of obligations commercially unviable or burdensome).

A perusal of the aforementioned judicial precedents leads to the conclusion that, insofar as the position of English law is concerned, the party in breach must necessarily prove that the alleged event amounts to legal or physical restraint (though not literal impossibility) on fulfilment of contractual obligations in order to pursue a force majeure claim. Furthermore, it is immaterial whether such event owes its existence to natural or man-made factors, so long as it is both unforeseeable and insurmountable.

(D) FORCE MAJEURE UNDER INTERNATIONAL SALES LAW

The issues regarding impossibility of performance, frustration and force majeure have been dealt with by the UN Convention on Contracts for the International Sale of Goods(CISG), under Part IV (Exemptions) and Article 79 thereof, which provides for exemption from performance of contractual obligations when faced with an uncontrollable 'impediment' which could not have been foreseen at the time when the contract was concluded or could not be avoided or circumvented.[29] This exemption is, however, contingent upon the party facing the impediment notifying the other party of its failure to perform.[30] Additionally, Article 79 only provides the party in breach exemption from paying damages for its breach. The injured party can still seek other remedies as envisaged in the contract and under the Convention.[31]

However, this article cannot be considered in isolation. They must be read along with the provisions of Part I, delimiting the sphere of application of the Convention.[32] As a result, the

[27] (1916) 2 A.C. 199.
[28] Brauer & Co. (Great Britain) Ltd. v. James Clark (Brush Materials) Ltd., (1952) 2 Lloyd's Rep. 147.
[29] Art. 79(1), The United Nations Convention on Contracts for the International Sale of Goods, 1980 (hereinafter, CISG).
[30] Art. 79(4), CISG, *supra* note 29.
[31] Art. 79(5), CISG, *supra* note 29.
[32] A.H. Hudson, Force Majeure and Frustration Under International Sales Contracts *in* EWAN MCKENDRICK (eds.), FORCE MAJEURE AND FRUSTRATION OF CONTRACT, 5 (2nd ed. 2013).

operation of Article 6, which provides parties the freedom to derogate from or vary the provisions of the Convention,[33] would allow the parties to supersede the application of Article 79 by inserting a *force majeure* clause, detailing the events which would otherwise fall in the scope of Article 79.[34]

There is considerable debate as to the meaning of the term 'impediment' and whether it relates only to the situation of making performance of the contract impossible or also to situations where performance is difficult or excessively onerous for the disadvantaged party. In particular, scholarly opinion is divided when it comes to including the effects of economic hardship within the scope of Article 79. While some hold the position that mere commercial hardship or practicability cannot be included, many scholars argue otherwise. However, even those who advocate for its inclusion maintain that, in order for hardship to be covered by Article 79, the effects it produces must be equivalent to the effects produced by physical impediments to performance.[35] Thus, a generally accepted threshold is a 70 percent increase as only then would it constitute unaffordability amounting to physical impediment.[36]

(E) JUDICIAL INTERPRETATION OF FORCE MAJEURE CLAUSES IN INDIA

In India, *Edmund Bendit v. Edgar Prudhomme*[37]*,* a case where the defendant was unable to fulfil his order for shipment of goods as ships had been commandeered by the Government for fighting the First World War, was perhaps the first case in which the court was called upon to adjudicate a case involving a force majeure claim. In defining the term, the court relied on the definition provided in the case of *Matsoukis v. Priestman and Co.*[38]- "causes you cannot prevent and for which you are not responsible." The court also made several other pertinent observations which were crucial to the development of the law in India. Aiyangar J., in his concurring judgment, laid down the rule that it is not sufficient for the party in breach to invoke some existing event which resembles force majeure and thereby escape liability. In fact, they are bound to provide

[33] Art. 6, CISG, *supra* note 29.
[34] Jan Hellner, "The Vienna Convention and Standard Form Contracts", Chapter 10 of Peter Sarcevic and Paul Volken, eds International Sale of Goods: Dubrovnik Lectures (New York, 1985) p. 353.
[35] PETER SCHLECHTRIEM, ULRICH G. SCHROETER, INTERNATIONALES UN-KAUFRECHT 293 (5th ed. 2013).
[36] CHRISTOPH BRUNNER, FORCE MAJEURE AND HARDSHIP UNDER GENERAL CONTRACT PRINCIPLES: EXEMPTION FOR NON-PERFORMANCE IN INTERNATIONAL ARBITRATION, 427 (Kluwer Law International 2008); Ingeborg Schwenzer, *Force Majeure and Hardship in International Sales Contracts*, 39, VICTORIA UNIVERSITY OF WELLINGTON LAW REVIEW, 717, 709–725 (2008); INGEBORG SCHWENZER, PASCAL HACHEM, CHRISTOPHER KEE, GLOBAL SALES AND CONTRACT LAW, 671 (Oxford University Press 2012).
[37] Edmund Bendit v. Edgar Prudhomme, AIR 1925 Mad 626.
[38] Matsoukis v. Priestman & Co., (1915) 1 K.B. 681.

irrefutable evidence to establish that the occurrence of said event was the actual cause which prevented the performance. He also affirmed the standard laid down in *Mamidoil-Jetoil* case[39] that the parties are required to take only reasonable steps to avoid or mitigate the event and its consequences. Further, in the case of *Dhanrajmal v. Shamji Kalidas*[40] the Supreme Court held that both the event and the non-performance accompanying it must be both unforeseeable and beyond the control of the contracting party. Additionally, it also held that mere commercial hardship is insufficient to establish the defence.

The jurisprudence surrounding force majeure clauses and their interpretation in India has been summarised and settled by the Supreme Court of India in the case of *Energy Watchdog v. CERC & Ors,*[41] a case wherein private power corporations providing electricity (such as Tata & Adani) sought to invoke *force majeure* and adjust the tariffs at which they had contracted to provide electricity owing to the increase in prices of coal purchased from Indonesia. Nariman J., while delivering the judgment of the court, clarified the legislative position as follows- "Force majeure is governed by the Indian Contract Act, 1872. In so far as it is relatable to an express or implied clause in a contract, it is governed by Chapter III dealing with the contingent contracts, and more particularly, Section 32 thereof." Section 32 of the Act[42] reads as follows-

"Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened. If the event becomes impossible, such contracts become void."

As evident from a plain reading of Section 32, force majeure clauses are governed by it because they inevitably add a 'contingent' dimension to the contact because, if any of the uncertain future events contemplated in the force majeure clause occur, then non-performance in that situation shall be excused as the clause provides for an 'agreement not to do something (i.e. not to abide by original terms & obligations) if uncertain future event occurs.'

(F) COVID- 19 AS A FORCE MAJEURE EVENT: INDIAN PERSPECTIVE

[39] Mamidoil - Jetoil Greek Petroleum Company SA Moil - Coal Trading Company Limited v. Okta Crude Oil Refinery, (2003) EWCA Civ 617.
[40] Dhanrajmal v. Shamji Kalidas, AIR 1961 SC 1285.
[41] Energy Watchdog v. CERC & Ors., (2017) 14 SCC 80.
[42] Indian Contract Act, 1872, § 32, No. 9, Acts of Parliament, 1872 (India).

As stated previously, whether a contractual obligation can be avoided on the grounds of force majeure is a highly subjective and factual inquiry which is contingent upon the specific terms of the contract in question. In doing so, the court must take cognisance of factors such as specific terminology used, foreseeability, causal linkage and surmountability.

Firstly, due regard must be given to the specific language of the clause to determine what all events it covers. If the definition ascribed specifically includes 'pandemic' or 'Acts of Government' in the list of events, it is likely that a court would allow the clause to be invoked, subject to other conditions.[43] Additionally, if the clause is phrased in a generic, non-exhaustive, catch-all manner such as "any events that are unforeseeable and beyond the control of the parties", the courts might be similarly inclined. One factor that may be indicative of whether COVID- 19 qualifies as a force majeure event is that the Ministries of Finance[44] and New & Renewable Energy,[45] in their respective office memoranda, have both designated the pandemic as a force majeure event. Similarly, the Delhi High Court, in the case of *Halliburton v. Vedanta*[46] has designated the nationwide lockdown, which was imposed as a result of the pandemic, a force majeure event.

Moreover, one primary condition that needs to be fulfilled is that the occurrence of the event must be unforeseeable by a reasonable person at the time of making the contract and in the circumstances in which it is made.[47] Therefore, if the contract was concluded before the outbreak when the parties had no knowledge of the virus, its classification as a pandemic or any governmental action such as lockdowns, it is more likely to fulfil the conditions precedent. If, however, the contract was executed in, say February 2020, the unforeseeability aspect would be more difficult to prove and therefore the case might be weakened.

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[43] Anirudh Krishnan, Hitesh Singhvi & Pranay Prakash, *The COVID-19 Pandemic And Government Lockdowns - Are they Force Majeure Events and if so, What is the Effect?,* BAR & BENCH (Apr. 20, 2020), https://www.barandbench.com/columns/policy-columns/the-covid-19-pandemic-and-government-lockdowns-are-they-force-majeure-events-and-if-so-what-is-the-effect.

[44] *Force Majeure* clause, MINISTRY OF FINANCE, GOVERNMENT OF INDIA (Feb. 19, 2020), https://doe.gov.in/sites/default/files/Force%20Majeure%20Clause%20-FMC.pdf.

[45] Office Memorandum No. 283/18/2020-GRID SOLAR, Ministry of New & Renewable Energy, Govt of India.

[46] M/S Haliburton Offshore Services v. Vedanta Limited & Anr., O.M.P. (I) (COMM) 88/2020.

[47] NICHOLAS, *supra* note 10, at 24.

In addition, the party seeking force majeure must necessarily establish a causal link between the alleged event and the resulting non-performance of obligations,[48] as stated previously, in order to invoke it successfully. By applying this rationale to specific situations, we can conclude that a party which could have performed its obligations regardless of the situation (such as an architect who could have designed the project remotely, or an artist who was commissioned to make a painting), would not be able to claim the benefits arising from the invocation of this clause. Similarly, a party who was in breach notwithstanding the force majeure event and would have been unable to fulfil his obligations even in regular circumstances will not be allowed to disguise such breach behind the veil of force majeure.[49] A case in point is the decision of the Delhi High Court in *Indirajit Power v. Union of India,*[50] wherein it was held that the petitioner, who had delayed making payments for 12 months, could not be granted an extension owing to the pandemic as its conduct in failing to make the payments suggested that the breach would've nevertheless occurred even without the pandemic situation.

However, the impact on performance, which is required to be established, depends upon the language used in the contract. If the contract provides that the event must have "prevented" the performance of contractual obligations, performance must be physically or legally impossible. This is a high standard and it may not even be enough to prove that performance has become extremely onerous. If, however, the term "hindered" or 'impeded' is used, a lesser standard may apply and the clause may be triggered in cases where the performance has become very difficult, such as a shortage of raw materials owing to the closure of transport services.[51]

Lastly, as stated previously, the breaching party must make all reasonable efforts to avoid or overcome the event or its consequences. For instance, if the lockdown was only advisory in nature and they could have fulfilled their contractual obligations, it would form a weak case for the party invoking the clause. Similarly, if one supplier was unable to deliver the goods owing to lockdown in the state but another supplier in a different state is in a position to supply the goods, the party must endeavour to get the supply from the second supplier, and fulfil its

[48] Seadrill Ghana Operations Limited v. Tullow Ghana Limited, (2018) EWHC 1640 (Comm.); Classic Maritime v. Limburgan Makmur SDN BHD and Another, (2019) EWA Civ. 1102.
[49] Abhimanyu Bhandari & Laurence Lieberman, *The forgotten Force Majeure clause and its relevance today under Indian and English Law,* BAR & BENCH (Apr. 21, 2020), https://www.barandbench.com/columns/the-forgotten-force-majeure-clause-and-its-relevance-today-under-indian-and-english-law.
[50] Indirajit Power Private Ltd. v. Union of India & Ors, W.P. (C) 2957/2020 & CM Nos. 10268-70/2020.
[51] Tsarikoglou & Co Ltd. v. Noblee Thorl GmbH, (1962) AC 93.

contractual obligations. Therefore, performance is only excusable when the injury results from a situation beyond the control of the parties, as held by the Bombay High Court in *Rural Fairprice v. IDBI,*[52] wherein the Court restrained the sale of pledged shares owing to the stock market crash, which resulted from the unprecedented and uncontrollable pandemic situation.

Regardless of the aforementioned factors, the decision ultimately depends upon the specific terms used in the contract and if a lower threshold is prescribed by the contract, the court must take that into account. Similarly, if the contract does not stipulate that the party in breach would have to prove unforeseeability or other factors to claim the remedy, the court will also take that into due consideration.

III. COVID-19 AND FRUSTRATION OF CONTRACT

While the previous section would be a useful tool in evaluating whether force majeure may be invoked if such a clause is present in the contract, the following section deals with the remedies available to the parties if there is no such clause in the agreement. This remedy takes the form of the Doctrine of Frustration in the common law jurisdictions of India & England.

(A) THE ENGLISH DOCTRINE OF FRUSTRATION OF CONTRACT

In England, the strict position adopted by the courts in *Paradine v. Jane* (as outlined above) was softened subsequently, and parties were provided relief in certain exceptional circumstances. This transformation began from the case of *Taylor v. Caldwell*[53] wherein the court laid down the doctrine of 'implied term', stating that there existed an 'implied term' in the contract that the subject matter would be in existence at the time of performance. However, this test was heavily criticised and was subsequently replaced with another test – that of 'radical change in circumstances' as laid down in *Davis Contractors v. Fareham UDC,*[54] a case where the contractor was unable to finish the construction within the timeframe contemplated in the contract owing to shortage of labour and materials. This test evaluated the nature of the change in circumstances and its effect on the parties and stated that performance would be excused in instances wherein calling for performance in the radically different circumstances would be tantamount to calling

[52] Rural Fairprice Wholesale Ltd v. IDBI Trusteeship Services Ltd. & Ors, Commercial Suit (L) 307 of 2020.
[53] Taylor v. Caldwell, QB (1863) 3 B&S 826.
[54] Davis Contractors v. Fareham, UDC [1956] A.C. 696.

upon the party to assume an obligation beyond his contemplation while entering into the contract.

The Frustration of purpose is another important aspect. It states that though performance may not be technically impossible, it may be useless and futile if the object the parties had in mind while concluding the contract failed to materialise. Thus, in *Krell v. Henry*,[55] wherein a flat was rented for viewing a coronation procession, the object was deemed to have been frustrated on account of non-happening of the coronation.

Mere hardship has been precluded from the scope of this doctrine, as laid down by the court in *Tsakiroglou v. Noblee*.[56] Here, the court held that though the Suez Canal was closed, performance was still possible by routing ships around the Cape of Good Hope. The subsequent rise in costs was insufficient to displace the obligations.

The modern approach to the doctrine is explained in a concise and precise manner in the *Sea Angel* case[57]- *"Contracts are about the allocation of risk. Since the allocation and assumption of risk is not simply a matter of express or implied provision but also depends on less easily defined matters such as the 'contemplation of the parties', the application of the doctrine is difficult. In such circumstances, the test of radically different is important: it tells us that the doctrine is not to be lightly invoked; that mere incidence of expense or delay or onerousness is not sufficient; and that there has to be as it were a break in identity between the contract as contemplated and its performance in the new circumstances."*

This case, therefore, conclusively establishes the requirement that the doctrine of frustration cannot be simplified in terms of 'implied provisions' as there needs to be an assessment of the mental state or contemplation of the parties while concluding the contract. Therefore, it entails a high threshold which is only fulfilled when circumstances have changed so radically as to cause a 'break in identity' between the result originally contemplated by the parties and the consequences that would result in the new circumstances.

(B) FORCE MAJEURE & ITS APPLICATION IN FRANCE

[55] Krell v. Henry, (1903) 2 KB 740.
[56] Tsarikoglou & Co Ltd. v. Noblee Thorl GmbH, (1962) AC 93.
[57] Edwinton Commercial Corporation & Anor v Tsavliris Russ Ltd., (2007) 2 All ER (Comm) 634.

The Doctrine of Force Majeure finds mention in Article 1218 of the updated French Civil Code,[58] though it has not been defined therein. It developed, however, from the ancient Roman doctrine of vis major (Act of God), though it has now diversified to include other aspects.[59] The aforementioned article applies to *obligations de résultat* i.e. cases where liability is otherwise strict.[60] The central precepts of the doctrine, as recognised by courts, are as follows – irresistibility, unforeseeability, externality, and impossibility (as opposed to mere onerousness). Irresistibility applies to the event and its consequences and lays down the requirement that both should have been unavoidable and insurmountable, when construed from the point of view of a reasonable person in similar circumstances.[61] The externality factor lays down a rule that the locus of the alleged force majeure event must lie outside the sphere of influence of the party in breach. The general rule is, therefore, that if the non-performance is due to the fault of the party, force majeure cannot be pleaded.[62] The aspects of un-foreseeability and impossibility have been discussed in the subsequent section.

(C) COMPARATIVE ANALYSIS: SIMILARITIES & DIFFERENCES ACROSS JURISDICTIONS

The reason why English and French law were chosen for the comparative analysis is two-fold. Firstly, the law of contract developed and crystalised in these two countries. In England, it was through the judicial decisions of courts and the House of Lords and in France, it was by way of the Civil Code promulgated by Napoleon. These laws were then adopted, and developed subsequently, in other countries (especially those colonised by these powers). Secondly, it is common knowledge that the legal systems of England and France are very different. While England follows the Common Law system, France follows the Civil law system. A comparison between the two would be fruitful in distilling the basic principles of the law.

There are several differences in the laws and interpretations attributed to them. One major difference here is that French Law started from fault liability but, over time, gradually proceeded towards a principle of strict liability, with a suitable exception for force majeure. English law, on the contrary, started from a position of absolute liability and became more flexible

[58] FRENCH CODÉ CIVIL, Art. 1218, *amended by* The Ordinance (2016).
[59] NICHOLAS, *supra* note 10, at 21.
[60] BARRY NICHOLAS, FRENCH LAW OF CONTRACT 49-56 (2nd ed. 1992).
[61] NICHOLAS, *supra* note 10, at 24.
[62] NICHOLAS, *supra* note 10, at 30.

subsequently.[63] Another major difference is that while impossibility results in termination under the doctrine of frustration, French law treats it in terms of excuses leading to a considerable flexibility given to courts to adjust the contract to the nature of impossibility by providing remedies like adaptation of price.[64] It is perhaps for this reason that French law provides for a narrower construction of impossibility wherein it takes into account only physical or legal impossibility and discounts instances where technical performance is possible, as opposed to English law, which excuses performance where the basis of the contract has been voided.[65] One similarity, however, is with respect to foreseeability of the event inhibiting performance. The event must be unforeseeable in nature and if it was foreseeable, it should have been provided for in the contract. Where the risk has been foreseen and not acted upon, the loss lies where it falls.[66]

(D) THE POSITION OF THE LAW IN INDIA

As elucidated by the Supreme Court in the case of *Energy Watchdog v. CERC*, if the alleged event occurs *'de hors'* the contract, that is, if it is not provided for in the contract, it shall be governed by the rule laid down in Section 56 of the Act.[67] As discussed previously, if the alleged event has been provided for by the contract, it shall be dealt in accordance with the provisions of Section 32. The relevant provisions of Section 56[68] are reproduced -

"A contract to do an act which, after the contract made, becomes impossible or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful."

The Act further provides the following illustration to clarify the meaning of impossibility- *"A contracts to take in cargo for B at a foreign port. A's government afterwards declares war against the country in which the port is situated. The contract becomes void when war is declared."*

The law regarding doctrine of Frustration in India was laid down in the seminal judgment of *Satyabrata Ghose v. Mugneeram Bangur*[69] wherein paragraph 2 of the section was adverted to lay

[63] *Id.* at 32.
[64] Paris 13.11.1943, Gaz. Pal. 1943.2.260.
[65] SWADLING, *supra* note 6, at 6.
[66] Wates Ltd. v. Greater London Council, (1983) 25 Build.L.R. 1; Ocean Tramp Tankers Corp v V/O Sovfracht (The Eugenia), [1964] 2 Q.B. 226, 239.
[67] Energy Watchdog v. CERC & Ors., (2017) 14 SCC 80.
[68] Indian Contract Act, 1872, § 56, No. 9, Acts of Parliament, 1872 (India).
[69] Satyabrata Ghose v. Mugneeram Bangur, AIR 1954 SC 44.

down the 'doctrine of supervening impossibility or illegality'. It was stated that this doctrine was similar to the doctrine of Frustration in English law as the word 'impossible' in the section was not meant to connote only physical or literal impossibility. It includes both physical impossibility and frustration of purpose. Even if the performance is not technically impossible, it may be that continuing performance is impracticable and useless from the point of view of the object & purpose of the contract. However, to constitute impossibility in this sense, the event or change in circumstance must be so untoward and fundamental that it upsets the very foundation upon which the parties entered the contract. In other words, it must strike at the root of the contract and the basis on which the mutual understanding was reached must have failed.[70]

As a result, the courts have been cautious in discharging contracts, which can be gleaned from the fact that 'commercial hardship' has been largely excluded from its scope. This is because 'disappointed expectations do not lead to frustrated contracts.'[71] In the *Alopi Parshad* case[72] it was held that even though there may be wholly unexpected changes in the price, this fact by itself does not render the bargain null & void. It is only if they can show that, in light of the prevailing circumstances at the time of conclusion of contract, the parties did not agree to be bound in the fundamentally different situation which has since emerged.

(E) COVID- 19 AS A FRUSTRATING EVENT : INDIAN PERSPECTIVE

It is somewhat easy to comprehend that in cases where the performance of contractual obligations is literally impossible owing to COVID-19 or the subsequent imposition of a lockdown, the contracts will be frustrated. For example, owing to the long lockdown ordered by the Government, it may not be possible to complete certain construction projects on time. Similarly, it may not be possible to produce goods previously contracted for owing to the closure of factories, or deliver goods owing to transport restrictions. However, even in this situation, one must remain mindful that if the lockdown does not significantly impact the ability to fulfil obligations in an objective manner, the party in breach cannot use it as a tool for escaping the contract. For example, in *Standard Retail v. G.S. Global* case,[73] the Bombay High Court observed that, owing to its temporary nature, the lockdown cannot be used as a justification for invoking

[70] Twentsche Overseas Trading Co. Ltd. v. Uganda Sugar Factory Ltd, AIR 1954 PC 144.
[71] Sachindra Nath v. Gopal Chandra, AIR 1949 Cal 240.
[72] M/S. Alopi Parshad & Sons Ltd. v. Union of India, AIR 1960 SC 588.
[73] Standard Retail Pvt. Ltd. & Ors v. G.S. Global Corp. & Ors, Commercial Arbitration Petition (L) No. 404/2020 (decided on 8 April, 2020).

section 56, especially when the impugned contractual obligation (in this case, payment for procured goods) can still be performed. Therefore, if the performance of the contract was possible remotely (albeit at a relatively higher cost) and was not contingent upon or significantly affected by restrictions on transport, requirements for social distancing etc., then the contracts may not be frustrated. Mere delay or any financial difficulty caused by the lockdown would merely amount to commercial hardship, which is not excusable. For example, IT professionals who can deliver the services from their homes will not be able to plead for discharge of obligations on this ground.

Similarly, the alleged event must be wholly unexpected. If the parties had full knowledge of the difficult conditions or contemplated the drastic alteration of circumstances, the doctrine may not apply.[74] Therefore, if the parties enter into a contract at a time when COVID-19 has spread in China and other parts of the world (who have started taking measures like closure of commercial establishments) but not reached India, they would have done so despite knowing of the dangers posed by COVID-19 and the fact that it may plausibly spread to India. The contracting parties then cannot take the excuse of the lockdown hindering, as it would then be reasonably foreseeable that the government may be compelled to take strict measures. If, however, the contract was executed prior to the first instance of the disease, it may be relatively straightforward for the party in breach to make the claim, provided it fulfils other pre-requisites.

IV. CONCLUSION

The purpose of this paper was to provide a certain degree of clarity on the issue of how commercial contracts might be impacted by the emergence of the coronavirus pandemic and the subsequent governmental actions to control the pandemic. It was observed that owing to the aforementioned disruption, several parties to contracts may not be able to fulfil their obligations. It was further observed that the affected parties may have two kinds of remedies, depending upon the nature of their contract. If their contract included a force majeure clause, they would be able to seek remedies under it, provided the requisite stipulations are met. However, if such a clause is absent, the party may seek remedy under the domestic legal doctrine, which in India is contained in Section 56.

[74] Joseph Steamline Ltd v. Imperial Smelting Corp., (1941) 2 All ER 165.

However, based upon the analysis of the legislative provisions and the judicial precedent, it can be concluded that-

1. The breaching party may turn to the doctrine of Frustration in the absence of a force majeure clause in the contract. However, in India, if the contract does contain such a clause and the conditions laid down thereof are not sufficiently proven, the party generally cannot then seek remedy under Doctrine of Frustration.

2. However, the presence of a force majeure clause by itself does not exclude the applicability or operation of the Doctrine of Frustration. It does, however, serve as proof that the parties have made express provisions for certain frustrating events (such as war) and this express provision excludes the application of the doctrine of frustration for these events.[75] This is because a frustrating event is one which is unforeseeable & supervening in nature and not one which can and has been anticipated & provided for in the contract.[76]

3. Force Majeure clauses need to be interpreted narrowly, as per the language used therein. Therefore, the standards and stipulations that need to be met may vary from case to case (though some aspects like unforeseeability are usually standard terms). Thus, a situation that may constitute force majeure under one clause need not necessarily be the same when another clause is considered.

4. Domestic legal doctrines, on the other hand, contain a more or less uniform standard, with slight variations depending upon the nature of the contract. This standard is also generally very high, amounting to impossibility or a radical change in circumstances. Mere commercial hardship or onerousness or reduced profitability are not sufficient to invoke this doctrine, though they may be sufficient to invoke a force majeure clause.

[75] Metropolitan Water Board v. Dick, Kerr and Co., (1918) A.C. 119; Ocean Tramp Tankers Corporation v. VIO Sovfracht, (1964) 2 Q.B. 226.
[76] Paal Wilson &. Co. A/S v. Partenreederei Hannah Blumenthal, (1983) 1 A.C. 854, 909.

INDIA BRAZIL BIT 2020: UNFOLDING OF A NEW ERA IN DISPUTE RESOLUTION

*- Tushar Chitlangia *and Nikshetaa Jain***

ABSTRACT

*In the recent visit by the Brazilian President to India in 2020, India and Brazil signed a historic treaty, the novel Investment Cooperation and Facilitation Treaty 2020 (hereinafter "**ICFT 2020**"). This BIT is first of its kind as it incorporates the dispute prevention mechanism along with the dispute settlement mechanism. The ICFT 2020 has recognized the need for dispute prevention in BITs as an alternative to international arbitration. For a developing country like India, dispute prevention would prove to be highly beneficial. This BIT also adopts a State-to-State dispute Settlement mechanism which is a deviation from India's Model BIT, 2016. India preferred to adopt State-State Dispute Settlement over Investor-State Dispute Settlement in the ICFT 2020 due to numerous reasons. However, it is unlikely that India would give up ISDS completely. This paper examines the two distinct features of the ICFT 2020. Firstly, the ICFT 2020 emphasis on dispute prevention rather than dispute settlement and secondly, the adoption of SSDS rather than ISDS as a means of dispute settlement. Finally, the authors have stated the potential shortcomings of the ICFT 2020 and suggested possible solutions for the same.*

I. INTRODUCTION

A Bilateral Investment Treaty (hereinafter "**BIT**") is an agreement which lays down the terms and conditions of investments between two countries to promote and protect the investments in each other's territory.[1] In other words, a BIT is a specialized tool used by countries to meet the mutual objectives of investment protection and promotion.[2]

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[1] Roberto Echandi, *Bilateral Investment Treaties and Investment Provisions in Regional Trade Agreements: Recent Developments in Investment Rulemaking*, *in* ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS, 3 (Katia Yannaca-Small ed., 2010).

[2] Sanyukta Chowdhury, *Investor State Dispute Settlement Provisions in India's Model Bilateral Investment Treaty: A Critique,* 58 IND. JOUR. OF INT'L L. 327, 328 (2019) (hereinafter 'Chowdhury 2019').

A recent study by the Netherlands Bureau for Economic Policy Analysis, a part of Ministry of Economic Affairs and Climate Policy of the Netherlands, has shown that the flow of foreign direct investments increases by 35% after the ratification of a BIT by the State.[3] Additionally, to achieve the sustainable development goals in developing countries like India, foreign investments become indispensable.[4] Foreign investments increase the employment opportunities, leads to the development of human resources and helps in the growth of the backward areas.[5] Thus, signing a BIT plays a significant role in the economic growth and development of countries.

In early 2020, India and Brazil concluded their Investment Cooperation and Facilitation Treaty (hereinafter "**ICFT 2020**"). It is to be noted that ICFT and BIT have the same meaning, understanding, and usage. This BIT was signed during the visit of the Brazilian President, Mr. Jair Bolsonaro to India. The treaty symbolizes the marriage between the two investment treaty models[6] - Brazil's Cooperation and Facilitation Agreement (hereinafter "**Brazil's Model BIT 2015**") and India's Model BIT (hereinafter "**India's Model BIT 2016**").

Some of the distinct provisions of the ICFT, 2020 are the definition of investment, protection against expropriation, dispute prevention procedure, and the State-State Dispute Settlement (hereinafter "**SSDS**") mode of dispute settlement. The ICFT, 2020 has adopted an enterprise-based definition of investment which states that investment is an enterprise over which an investor of the other party has substantial degree of control and the characteristics of an investment.[7] A significant variation in the definition is the exclusion of 'significant for the host state's development', a subjective feature[8] present in the India's Model BIT 2016. Another feature of the ICFT, 2020 is that it provides protection against direct expropriation only which occurs when an

[3] Arjan Lejour & Maria Salfi, *The Regional Impact of Bilateral Investment Treaties on Foreign Direct Investment*, CPB NETHERLANDS BUREAU FOR ECONOMIC POLICY ANALYSIS 2, 19 (2015).

[4] Rosmy Joan, United Nations Commission on International Trade Law [UNCITRAL], *Renegotiation of Indian Bilateral Investment Treaties: An analysis from a Development Perspective*, at 2, https://www.uncitral.org/pdf/english/congress/Papers_for_Programme/99-JOAN-Renegotiation_of_Indian_Bilateral_Investment_Treaties.pdf.

[5] Sanchi Padia, *Advantages of Foreign Direct Investment*, INVEST INDIA (Jun. 12, 2019), https://www.investindia.gov.in/team-india-blogs/advantages-foreign-direct-investment.

[6] Martin Dietrich Brauch, *The Best of Two Worlds? The Brazil-India Investment Cooperation and Facilitation Treaty*, 11 (1) INVESTMENT TREATY NEWS 4, 4 (2020), https://www.iisd.org/sites/default/files/publications/iisd-itn-march-2020-english.pdf (hereinafter 'Brauch 2020').

[7] Investment Cooperation and Facilitation Treaty, art. 2.4, India-Brazil, Jan. 25, 2020, I.L.M. (hereinafter 'ICFT 2020').

[8] Prabhas Ranjan, *India-Brazil Bilateral Investment Treaty – A New Template for India?*, KLUWER ARBITRATION BLOG (Mar. 19, 2020), http://arbitrationblog.kluwerarbitration.com/2020/03/19/india-brazil-bilateral-investment-treaty-a-new-template-for-india/ (hereinafter 'Ranjan 2020').

investment is nationalized through formal modes and thus, it explicitly prohibits challenge against indirect expropriation. This paper will largely focus on the dispute prevention procedure and the SSDS mechanism which are the major innovations in the ICFT, 2020.

The author divides the paper into the following parts: the paper starts by giving an outline of the Model BITs of both India and Brazil; then it explains the provisions of dispute prevention in the ICFT 2020, the need for dispute prevention, and its potential benefits to India; furthermore, the paper discusses the dispute settlement mechanism of the ICFT 2020 and analyze the reasons as to why India agreed to SSDS over Investor-State Dispute Settlement (hereinafter "**ISDS**"); examining the above transitions, the authors discuss India's position on ISDS in the near future; after critically analyzing the treaty, the authors attempt to list the criticisms and recommend suggestions which can be incorporated in ICFT 2020; lastly, the authors conclude the paper by asserting that dispute prevention and SSDS mechanism are two significant policies which have the potential to be implicated in many more BITs in the near future.

II. A HISTORICAL BACKGROUND TO THE MODEL BITS

In 2015, Brazil published its Model treaty, the Cooperation and Facilitation Agreement to lay down its proposal against the backlash of ISDS.[9] Brazil has been a critic of ISDS and the same is evident through the presence of only the SSDS clause in the ICFT 2020 as a means to dispute settlement. This is a deviation from India's Model BIT 2016, as it has provisions for SSDS as well as ISDS.[10]

Additionally, Brazil's Model BIT 2015 envisages a dispute prevention mechanism. Brazil's main motive is to avoid getting involved in any sort of formal dispute resolution procedure.[11] The Brazilian model aims to prevent the escalation of disputes into a formal dispute by establishing two bodies, i.e. a Joint Committee and a Focal Point/ an Ombudsman. Before commencing any arbitration proceedings, the parties shall refer the "specific question" to the Joint Committee and the Joint Committee is required to prepare a report with its recommendations.[12] If the parties are

[9] Eugina Simo, *The Changing Role of the State in Investor State Arbitration: a Comparison of Brazil's and India's Proposal*, COLUMBIA JOURNAL OF TRANSITIONAL LAW, http://blogs2.law.columbia.edu/jtl/the-changing-role-of-the-state-in-investor-state-arbitration-a-comparison-of-brazil-and-indias-proposals/?cn-reloaded=1 (last visited Apr. 2, 2020).

[10] Model Text for Indian Bilateral Investment Treaty, chp. 4 & 5, India, Dec. 16, 2015 (hereinafter 'India's Model BIT 2016').

[11] Robert G. Volterra & Giorgio Francesco Mandelli, *India and Brazil: Recent Steps towards Host State Control in the Investment Treaty Dispute Resolution Paradigm*, 6 IND. JOUR. OF ARB. L. 90, 107 (2017).

[12] Cooperation and Facilitation Agreement, art. 23, Brazil, 2015 (hereinafter 'Brazil's Model BIT 2015').

not satisfied with the report of the Joint Committee, they can commence arbitration proceedings.[13] The same approach has been adopted in the ICFT 2020.

India realized the need to change its approach towards BITs when it was faced with numerous ISDS claims.[14] In 2016, the government released the reformed Model BIT intending to create a balance between investor's rights and States' regulatory rights.[15] India's Model BIT 2016 places restrictions on the investors' right to access international arbitration,[16] specifically ISDS for resolving a dispute. This has been achieved by the 'exhaustion of local remedies' rule, which requires a disputing investor to exhaust the local remedies for a minimum period of five years. This restricts the type of disputes that can be brought under ISDS and excludes disputes regarding illegal investments.[17]

Thus, India followed the 'Limit ISDS' approach, whereas Brazil followed the 'No ISDS' approach in their respective Model BITs.[18]

III. ADOPTION OF DISPUTE PREVENTION POLICIES IN THE ICFT 2020

Dispute Prevention Policies (hereinafter "**DPPs**") are policies which are aimed at preventing the Investor-State disputes from turning into a full-fledged dispute under the agreement.[19] The purpose of DPPs is to give the government enough time and flexibility to address the investor's concern by giving an intimation to the government. The concept of DPPs is relatively new and unexplored.[20] One of the ways to implement DPPs is to incorporate dispute prevention clauses in the BITs.

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[13] *Id.* at art. 23(3)(f).

[14] PRABHAS RANJAN ET AL., BROOKINGS INDIA, INDIA'S MODEL BILATERAL INVESTMENT TREATY: IS INDIA TOO RISK AVERSE? 9 (2018) (hereinafter 'Brookings India 2018').

[15] Chowdhury 2019, *supra* note 2, at 330.

[16] Aveek Chakravarty, *India's 2015 Model BIT Against the Backdrop of Global ISDS Reforms*, OXFORD UNIVERSITY PRESS 1, 10 (2015).

[17] India's Model BIT 2016, *supra* note 10, at art. 13.4.

[18] *See* United Nations Conference on Trade & Development [UNCTAD], *Reforming Investment Dispute Settlement: A Stocktaking*, IIA Issue Note No. 1 (Mar., 2019).

[19] Roberto Echandi, *Complementing Investor–State Dispute Resolution: A Conceptual Framework for Investor–State Conflict Management*, *in* PROSPECTS IN INTERNATIONAL INVESTMENT LAW AND POLICY 270, 295 (Roberto Echandi, The World Bank and Pierre Sauve ed., Cambridge University Press, 2013).

[20] *Id.*

The ICFT 2020 fosters a cooperative approach between the investors and the State, unlike the traditional BITs[21] which focused mainly on investment protection and dispute settlement mechanism. The objective of the ICFT 2020 is to "*promote cooperation between the Parties in order to facilitate and encourage bilateral investments*"[22] not through investment protection but through a framework for the management of investment cooperation and facilitation, risk mitigation and dispute prevention mechanisms.[23] Article 18 of the ICFT 2020 states that "*if a Party considers that a specific measure adopted by the other Party constitutes a breach of this Treaty, it may invoke this Article to initiate a dispute prevention procedure within the Joint Committee."*[24] A Joint Committee consisting of government representatives of both the States[25] has been established under the ICFT 2020 with an objective to prevent disputes and facilitate dispute settlement.[26] The interested party may initiate the procedure of dispute prevention by submitting a written request to the other party in order to identify the specific measure in question.[27] Within 120 days from the date of the first meeting, the Joint Committee is required to evaluate the submission and to prepare a report containing the details of the alleged breach and findings of the Committee.[28] The dispute may be submitted for arbitration under Article 19 if it is unresolved or there is nonparticipation by one party in the meetings of the Joint Committee.[29]

Additionally, a single National Focal Point or an Ombudsman designated by each State would be responsible for supporting investors of the other State.[30] In India, the Ombudsman will be appointed from the Department of Economic Affairs, Ministry of Finance whereas Executive Secretariat of the Foreign Trade Board- CAMEX will be the Ombudsman for Brazil.[31] The Ombudsman will also address differences in investment matters and cooperate with the Joint

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21. Henrique Choer Moraes & Felie Hees, *Breaking the BIT Mold: Brazil's Pioneering Approach to Investment Agreements,* 112 AJIL UNBOUND 197 (2018).

22 ICFT 2020, *supra* note 7, at art. 1.

23 Brauch 2020, *supra* note 6, at 5.

24 ICFT 2020, *supra* note 7, at art. 18.

25 *Id.* at art. 13.2

26 Fabio Morosini & Michelle Badin, *The Brazilian Agreement on Cooperation and Facilitation of Investments (ACFI): A New Formula for International Investment Agreements?*, 6(3) INVESTMENT TREATY NEWS 1, 5 (Aug. 2015), https://www.iisd.org/sites/default/files/publications/iisd-itn-august-2015-english.pdf.

27 ICFT 2020, *supra* note 7, at art. 18.2 (a).

28 *Id.* at art 18.2.

29 *Id.* at art. 18.2 (d).

30 *Id.* at art. 14.

31 *Id.* at art 14. 2 & 14.3.

Committee to prevent disputes.[32] Since the host state can engage with the Ombudsman if a dispute arises, the host state has a forum to put forth their grievances against investors as well.[33]

In a way, Article 15 of the ICFT 2020 is also instrumental in preventing the probable disputes. Article 15 states that the parties are required to exchange information "*concerning business opportunities, procedures and requirements for investments*" through the Joint Committee and the National Focal Points.[34] With this exchange of information, the States can obtain early information about a potential investment dispute and look for amicable settlements of disputes.[35] Thus, the Joint committee and the Ombudsman also facilitate the exchange of information.[36] The ICFT 2020, by incorporating dispute prevention mechanism, attempts to resolve the disputes amicably between the investors.

(A) IS DISPUTE PREVENTION "THE NEED OF THE HOUR"?

In recent years, due to an increase in the number of BITs signed, the importance of international arbitration has come to the limelight. [37] The most common method to settle investment disputes is international arbitration.[38] International arbitration has become famous for the settlement of investment disputes due to the following advantages. Firstly, arbitration is perceived to be swifter, cheaper, and more familiar for the investors.[39] Secondly, the parties have the ability to choose the arbitrators[40] based on their past judgement and knowledge. Thirdly, international arbitration offers flexibility as the arbitrators apply general legal principles rather than one rule of law.[41]

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[32] *Id.* at 14.4.

[33] Geraldo Vidigal & Beatriz Stevens, *Brazil's New Model of Dispute Settlement for Investment: Return to the Past or Alternative for the Future?*, 19 J. OF WOR. INV. & TRADE 475, 489 (2018).

[34] ICFT 2020, *supra* note 7, at art. 15.

[35] United Nations Commission on International Trade Law [UNCITRAL], *Possible Reform of Investor State Dispute Settlement (ISDS) Dispute Prevention and Mitigation- Means of alternative dispute resolution*, at 5, A/CN.9/WG.III/WP.190 (January 15, 2020) (hereinafter 'UNCITRAL 2020').

[36] Rodrigo Polanco, *Home States and the Prevention of Investment Disputes*, *in* THE RETURN OF THE HOME STATE TO INVESTOR STATE DISPUTES: BRINGING BACK DIPLOMATIC PROTECTION? 53, 60 (Cambridge University Press, 2018).

[37] LATHAM & WATKINS, GUIDE TO INTERNATIONAL ARBITRATION (2017).

[38] Chester Brown, *Resolving International Investment Disputes*, *in* LITIGATING INTERNATIONAL LAW DISPUTES: WEIGHING THE OPTIONS 401, 433 (Natalie Klein, 2014).

[39] United Nations Conference on Trade & Development [UNCTAD], *Investor State Disputes: Prevention and Alternatives to Arbitration*, at 14, UNCTAD/DIAE/1A/2009/11 (2010) (hereinafter 'UNCTAD 2010').

[40] *Id.*

[41] Stephen E. Blythe, *The Advantages of Investor-State Arbitration as a Dispute Resolution Mechanism in Bilateral Investment Treaties*, 47 INT'L L. 273, 289 (2013).

However, international arbitration is not free from its disadvantages. According to a study by the London School of Economics, 2018 "*Cost continues to be seen as arbitration's worst feature followed by lack of effective sanctions during the arbitral process, lack of power in relation to third parties and lack of speed.*"[42] Substantial legal expenses include fees of the arbitrators, administrative fees, and expenses for an arbitral institution which can run into millions.[43] In recent years, the average duration of cases has increased to 4 years, and the parties are forced to use set aside procedures[44] such as conciliation.[45] The arbitrators appointed may have professional or personal relations with the party and thus there runs a risk of partiality.[46] The number of arbitrators is generally less and as a result, repeat appointments occur.[47] Arbitrators from different backgrounds or nationality may follow their training and experience while addressing a different issue which may not be applicable in those circumstances.[48] Due to the above-stated problems with international arbitration, it is essential to develop an alternative to the dispute settlement procedure. One of the alternatives to the dispute settlement mechanism is the dispute prevention procedure.[49]

According to the UN, *"Dispute prevention is a means to improve the business environment, to retain investments, and to resolve investors' grievances swiftly*."[50] The primary objective of dispute prevention is to solve the investors' problems at an early stage to promote healthy investment relations and to retain foreign investments.[51] The recent increase in disputes arising under treaties[52] shows how lack of dispute

[42] *2018 International Arbitration Survey: The Evolution of International Arbitration*, QUEEN MARY UNIVERSITY OF LONDON, http://www.arbitration.qmul.ac.uk/research/2018/ (last visited Apr. 21, 2020).
[43] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 15 (2nd ed. 2014).
[44] United Nations Conference on Trade & Development [UNCTAD], *Exploring Alternatives to Investment Treaty Arbitration and Other Dispute Prevention Policies*, at 16, (2009) (hereinafter 'UNCTAD Draft 2009').
[45] Société d'Energie et d'Eau du Gabon v. Gabonese Republic, ICSID Case No. CONC/18/1, (2018); Republic of Equatorial Guinea v. CMS Energy Corporation and others, ICSID Case No. CONC(AF)/12/2, (2015) (few examples of ISDS cases where conciliation has been used).
[46] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 4 (2nd ed. 2001); Chiara Giorgetti, *Independence and Impartiality of Arbitrators in Investor-State Arbitration: Perceived Problems and Possible Solutions*, EJIL: TALK! (April 4, 2019), https://www.ejiltalk.org/independence-and-impartiality-of-arbitrators-in-investor-state-arbitration-perceived-problems-and-possible-solutions/; Ariel Anderson, *Saving Private ISDS: The Case for Hardening Ethical Guidelines and Systematizing Conflicts Checks*, 49 GEORGETOWN JOUR. OF INT'L L. 1143, (2018).
[47] John Templeman, *Towards a Truly International Court of Arbitration*, 30 JOUR. INT'L. ARB. 197, 199 (2013).
[48] Matthew Hodgson & Elizabeth Evans, *Allocation of Costs in ICSID Arbitrations*, *in* ICSID CONVENTION AFTER 50 YEARS 453, 454 (Crina Baltag ed., Kluwer Law International, 2016).
[49] UNCTAD 2010, *supra* note 39, at 50.
[50] UNCITRAL 2020, *supra* note 35, at 3.
[51] Diana Truque et al., Organization of Economic Cooperation and Development [OECD], *Stocktaking of Investment Dispute Management and Prevention in the Southern Mediterranean Region*, at 32, (26-27 June, 2018).
[52] United Nations Conference on Trade and Development [UNCTAD], *World Investment Report 2018 Investment and New Industrial Policies*, at 91, (2018), https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf.

prevention mechanism comes with a high cost for both the host states and the investors.[53] Instead of taking action after a dispute has arisen, the States should anticipate possible sources of investor disputes and take necessary actions much earlier.[54] The best chance to resolve the dispute is likely before the investment dispute becomes a formal dispute under a treaty.[55]

(B) HOW WILL DISPUTE PREVENTION BENEFIT INDIA?

Developing countries entering into any investment agreement would benefit from the inclusion of DPPs into such agreements.[56] For a developing country like India, "*it is in her interest that dispute prevention strategies are adopted to prevent disputes from arising or to prevent disputes from escalating to a formal dispute.*"[57]

It is estimated that for each party it costs around USD 5 million per case on an average to cover legal fees and the cost of the arbitral tribunal.[58] It is essential for the host states, especially developing countries, to lower down the damages[59] as these funds can be utilized for enhancing development projects and the advancement of human capital.[60] Firstly, dispute prevention would be economical for India. Dispute prevention aims to solve a dispute amicably before it turns into a formal dispute. By preventing a dispute from turning into an arbitration proceeding, India would not only save the cost of litigation but also the cost of arbitral awards. In this manner, the financial risk posed to India due to investment arbitration can be circumvented.

As of April 2020, 13 out of 25 cases in which India is the respondent state is still pending.[61] Some of the cases are pending since 2012,[62] which shows that arbitration proceedings are time-consuming. Secondly, dispute prevention would prevent wastage of time as the Joint Committee

[53] UNCTAD Draft 2009, *supra* note 44, at 5.
[54] UNCTAD 2010, *supra* note 39, at 65.
[55] UNCTAD Draft 2009, *supra* note 44, at 60.
[56] UNCTAD 2010, *supra* note 39, at 129.
[57] JUSTICE B.N. SRIKRISHNA, REPORT OF THE HIGH LEVEL COMMITTEE TO REVIEW THE INSTITUTIONALIZATION OF ARBITRATION MECHANISM IN INDIA 113 (2017).
[58] Lise Johnson et al., Cost and Benefits of Investment Treaties, COLUMBIA CENTRE ON SUSTAINABLE INVESTMENT 10 (Mar. 2018) (hereinafter 'Cost & Benefits 2018').
[59] Diana Rosert, *The Stakes Are High: A review of the financial costs of investment treaty arbitration*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT [IISD] (July, 2014), https://www.iisd.org/sites/default/files/publications/stakes-are-high-review-financial-costs-investment-treaty-arbitration.pdf.
[60] UNCTAD 2010, *supra* note 39, at 130.
[61] Investment Dispute Settlement Navigator, INVESTMENT POLICY HUB, https://investmentpolicy.unctad.org/investment-dispute-settlement/country/96/india (last updated Dec. 31, 2019).
[62] *Id.*

has the responsibility to submit the report within 120 days of investor referring the matter to Dispute Prevention Procedure.[63] Presence of a time limit ensures timely resolution of the dispute. Thus, the dispute prevention procedure would be more efficient for India rather than the time-consuming investment arbitration.

Certain studies even show that a mere filing of an ISDS claim against a State, results in a decreased flow of FDIs[64] since negative perceptions are formed about the host state in the minds of investors.[65] Hence, an investment arbitration affects the relationship between the two states as well as the investors and the host state's ability for long term promotion of foreign investment.[66] Although, the inflows of FDIs of a host country depends upon certain other factors such as economic attractiveness of the host country, availability of factors of production, political atmosphere and infrastructure facilities,[67] BITs create an atmosphere which is conducive for the growth of FDIs in the host state.[68] Thus, thirdly, by adopting a dispute prevention mechanism, loss of FDIs would be fairly reduced as BITs play a key role in bringing FDIs By preventing a dispute, the atmosphere for facilitation of FDIs created by the BITs will be maintained. Dispute prevention will enable India to keep its reputation intact in the world and save reputational costs.[69] This may help India to retain its current level of FDIs and also encourage more inflow of FDIs.

Most of the developing countries do not realize the risk of signing a BIT until they are hit by their first claim.[70] It was not until the unanticipated loss like in the case of *White Industries*[71] that India realized the risk of investment arbitration and the potential liability which may arise in future. Potential liability is an essential factor to be kept in mind, especially for the emerging economies

[63] ICFT 2020, *supra* note 7, at art. 18.2 (b).

[64] *See* Todd Allee & Clint Peinhardt, *Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment,* 65 INT'L. ORGANIZATION 401 (2011).

[65] Chowdhury 2019, *supra* note 2, at 328.

[66] *See* UNCTAD Draft 2009, *supra* note 44.

[67] Aishwarya Padmanabhan, *Relationship between FDI inflows and Bilateral Investment Treaties/ International Investment Treaties in developing economies: An Empirical Analysis*, 1 INT'L JOUR. OF ECO. SC. 65, 70.

[68] Niti Bhasin and Rinku Manocha, *Do Bilateral Investment Treaties Promote FDI Inflows? Evidence from India,* 41 VIKALPA: THE JOUR. OF DECISION MAKERS 275, 285.

[69] Shahryar Minhas and Karen L. Remmer, *The Reputational Impact of Investor State Disputes*, 44 INT'L. INTERACTIONS 862, 865 (2018) (reputational cost refers to the reputational damage suffered by the Host state due to non-compliance with its international commitments); Cost & Benefits 2018, *supra* note 58, at 10.

[70] *See* Lauge Poulsen & Emma Aisbett, *When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning*, 65(2) WORLD POLITICS 273, (2013).

[71] White Industries Australia Ltd. v. Republic of India, Final Award, United Nations Commission on International Trade Law (Nov. 30, 2011).

as claims involve a large number of resources.[72] So, dispute prevention would play a vital part in determining India's potential liability. With the help of dispute prevention procedure, developing countries like India can act and formulate on mitigation techniques much earlier before a dispute gets escalated into a formal claim.

Most of the investment arbitration claims filed by the investors challenge domestic public policies[73] like environmental policy and health regulations, which also affects other sections of the society apart from the investors and the host state. In general practice, the interested stakeholders other than disputing parties are not allowed to express their views on such claims since the dispute settlement mechanism does not permit the participation of interested public other than the disputing parties.[74] Lastly, the dispute prevention procedure encourages the participation of other stakeholders and promotes transparency. The ICFT 2020 attempts to remove this problem associated with investment arbitration (specifically the ISDS). According to Article 18.4 of the ICFT 2020, the interested stakeholders may put forth their views on the measure in question before the Joint Committee upon its invitation.[75] This also ensures transparency in the dispute prevention procedure.

If the Parties are unable to resolve their disputes through the dispute prevention mechanism, the Parties may apply for SSDS under Article 19. The efforts of the Joint Committee may not be successful in resolving the dispute amicably, and party may ultimately evoke the dispute settlement mechanism under the ICFT 2020. Therefore, dispute prevention mechanism is the initial step and dispute settlement mechanism is the final step towards resolving an investment dispute under the ICFT 2020.

IV. DISPUTE SETTLEMENT MECHANISM IN THE ICFT 2020

Dispute settlement is the most critical aspect of the international investment arena.[76] This is because without a dispute settlement mechanism, all investment facilitating documents like

[72] Cost & Benefits 2018, *supra* note 58, at 10.
[73] Brookings India 2018, *supra* note 14, at 1.
[74] Nathalie Osterwalder et al., International Institute for Sustainable Development [IISD], *Investment Treaty & Why they matter to Sustainable Development: Questions & Answers*, at 46, (2012), https://www.iisd.org/pdf/2011/investment_treaties_why_they_matter_sd.pdf.
[75] ICFT 2020, *supra* note 7, art 18.4.
[76] WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited March 21, 2020).

treaties, free trade agreements, and BITs would not be able to do justice to different stakeholders involved in the "investment-easing" process. Predominantly, there are two types of dispute settlement procedures; ISDS and SSDS. ISDS refers to a system of conflict resolution between investor and state[77] where the investor is on the "driving seat".[78] SSDS is the approach where the respective countries have the mandate to settle disputes for their investors.[79] As India is not a member of ICSID,[80] it is not bound by Article 26 of the convention which restrains the states from giving diplomatic protection,[81] in other words, SSDS, to the investors.

India terminated 58 of its BITs in 2017[82] where the Finance Ministry gave no reason for the same.[83] However the timing of termination of the BITs with the States- just after its Model BIT 2016 was made public, clearly showed the intention of the Indian government to negotiate the old BITs on the basis of its Model BIT 2016.

The ICFT 2020 provides for only one form of settlement mechanism, i.e. SSDS. Although this is not expressly mentioned in the ICFT, it can be reasonably inferred from the conjoint reading of the Preamble with Article 19 of the ICFT 2020. Article 19 talks about the "Disputes between the Parties"[84] and how the disputes between the parties, i.e. the states, are resolved. Arbitration tribunals set up under Article 19 shall only deal with matters relating to the interpretation of the treaty, and they are not eligible for awarding any compensation.[85] However, if we read Article 18(1) and Article 19 (1) of the ICFT 2020 in subsequence, it conveys that arbitral tribunals can also decide on matters concerning the breach of the ICFT 2020.

India's Model BIT 2016 provides for both SSDS and ISDS mechanisms,[86] whereas Brazil's Model BIT 2015 allows only the SSDS.[87] Model BITs are prototypes or templates that determine the

[77] International Centre for Settlement of Disputes [ICSID], *Introducing ICSID*, at 2, IBRD 39525 (January 11, 2018).
[78] A. Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, AMR. JOUR. OF INT'L. L. 179, 183 (2010).
[79] *Id.*
[80] International Centre for Settlement of Disputes [ICSID], *List of Contracting States and Other Signatories of the Convention*, at 2, ICSID/3 (April 12, 2019) (showing India is not a party to ICSID).
[81] ICSID Convention, Regulations and Rules art. 26, April 2006, ICSID/15.
[82] *BIT,* DEPARTMENT OF ECONOMIC AFFAIRS, https://dea.gov.in/bipa (last updated Mar. 18, 2020).
[83] Asit Ranjan Mishra, *India on collision course with EU over trade treaty,* LIVE MINT (Feb. 21, 2017), https://www.livemint.com/Politics/UKLWUwDn33uBuwRrmBRE5M/India-on-collision-course-with-EU-over-trade-treaty.html.
[84] ICFT 2020, *supra* note 7, at art. 19.
[85] ICFT 2020, *supra* note 7, at art. 19.2.
[86] India's Model BIT 2016, *supra* note 10, at chp. 4-5.
[87] Brazil's Model BIT, *supra* note 12, at art. 24.

broad government policies in negotiating the actual BITs with the countries.[88] The adoption of the SSDS mechanism by India in the ICFT 2020 clearly shows India's concerns over the ISDS mechanism. Lately, there have been many controversies associated with ISDS mechanisms,[89] and it has been under immense scrutiny.[90] Dominic Roughton, a partner with Boies Schiller & Flexner, went on to say that *"On the face of it, it would appear that ISDS is in very rude health."*[91]

(A) COMPARING SSDS AND ISDS IN THE INDIAN SCENARIO

The ISDS model brings with it a range of issues including the risk of frivolous and vexatious claims by the investors, depletion of the time and financial resources of the host state, and comprised sovereignty of the State.[92] ISDS is that "legal regime"[93] that grants foreign corporations the rights to demand an unlimited amount of money from the taxpayers. Whereas SSDS has features like that of upholding sovereignty, and preventing frivolous claims which favours Indian context more. Now we compare SSDS and ISDS in the Indian scenario.

1. *SSDS prevents the menace of frivolous claims*

As most of the new cases are brought against developing nations,[94] there is more risk of frivolous complaints made by the investors because there are no regulatory instruments to check the genuineness of the claim. The Host State has no means to check the genuineness of an investor claim in the case of ISDS. Argentinian 2001 financial crisis saw around forty-three separate claims against the host state, and all the claims were almost similar.[95] Had the countries adopted the SSDS system, the States could have used the diplomatic protection tool and clubbed similar matters together and arbitrated them collectively. This would have saved millions of dollars for Argentina

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[88] *See* Jeongho Nam, *Model BIT: An Ideal Prototype or a Tool for Efficient Breach?*, 48 GEORGETOWN JOUR. OF INT'L. L. 1275, (2017).

[89] Geraldo Vidigal & Beatriz Stevens, *Brazil's New Model of Dispute Settlement for Investment: Return to the Past or Alternative for the Future?,* 19 J. OF WOR. INV. & TRADE 475, 476 (2018).

[90] RODRIGO POLANCO, THE RETURN OF THE HOME STATE TO INVESTOR-STATE DISPUTES BRINGING BACK DIPLOMATIC PROTECTION? 46 (Cambridge University Press 2019) (hereinafter 'POLANCO').

[91] Andrew Mizner, *Debating the future of investor-state arbitration*, ICLG.COM (Nov. 29, 2017), https://iclg.com/cdr/arbitration-and-adr/7780-debating-the-future-of-investor-state-arbitration.

[92] *See* United Nations Conference on Trade and Development [UNCTAD], *Investor-State Disputes: Prevention and Alternatives to Arbitration*, at xxiii, 5, 9, UNCTAD/DIAE/IA/2009/11 (May 2010).

[93] Puig, S. & Strezhnev, A., *The David Effect and ISDS, 28(3)* EURO JOUR. OF INT'L L 731, 739 (2017).

[94] *See* United Nations Conference on Trade and Development [UNCTAD], *Fact Sheet on Investor-State Dispute Settlement cases in 2018*, Issue Note No. 2 (May 2019).

[95] William W. Burke-White, *The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System*, 193 FACULTY SCHOLARSHIP AT PENN L 1,5 (2008).

as they would not have been required to dispose of matters on a case-by-case basis. Interestingly, the estimated claim was around 8 billion USD, which was more than the estimated financial reserves of the Argentinian government in 2002.[96]

The problem of frivolous claims is resolved in the ICFT 2020, which was evident in India's Model BIT 2016. The India's Model BIT 2016 provided that the investor had to file a case in the Indian courts first in order to seek justice.[97] Only after exhausting the local remedies, the investor had the rights to commence arbitration.[98] Whereas in the ICFT 2020, the two bodies, namely Ombudsman and Joint Committee work in coherence with each other to prevent disputes. This system will help in the elimination of frivolous claims in the arbitral tribunals as most matters would be and should be settled out with the help of the Joint Committee, which has powers to do the same.[99]

2. *SSDS upholds the sovereignty of the host state*

The main controversy of the ISDS system lies with its attack on the sovereign powers of the State.[100] The backlash against ISDS for its inherent powers of infringing on State's sovereignty is amongst the developed and developing countries alike.[101] The goal of investor protection and promotion is essential, but it must be balanced against the sovereignty of the States, which the adoption of the ISDS system significantly fails to provide. ISDS systems compromise largely on regulatory sovereignty of the host states as was witnessed in the case of *Philip Morris v. Uruguay*[102] and *Vattenfall v. Germany*[103]. In the case of Uruguay, investors filed suit against the host state because Uruguay changed the packaging requirements to reduce the habit of smoking, as a matter of public health measure.[104] In the case *Vattenfall v. Germany*, Germany was brought to two arbitration claims because of its regulatory measures to protect its environment. Financial sovereignty of the nations

[96] *Id.*
[97] India's Model BIT 2016, *supra* note 10, at art.15.1.
[98] India's Model BIT 2016, *supra* note 10, at art.15.2.
[99] ICFT 2020, *supra* note 7, at art. 13.4.
[100] Jose´ Alvarez & Gustavo Topalian, *The Paradoxical Argentina Cases*, 6 WOR. ARB. & MEDIATION REV. 491, 491–92 (2012).
[101] Tim R Samples, *Winning and Losing in Investor-State Dispute Settlement*, 56(1) AM. BUS. L. JOUR. 115, 118 (2019) (hereinafter 'Samples').
[102] Philip Morris Brands Sa`rl v. Oriental Rep. of Uruguay, ICSID Case No. ARB/10/7, Award (July 8, 2016).
[103] Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany (I) ICSID Case No. ARB/09/6, Award (March 11, 2011).
[104] Samples, *supra* note 101, at 122.

is also questioned by the ISDS system as large number of ISDS claims arise out of the financial crisis.[105] India by resorting to SSDS has somewhat insulated itself from any such occurrences in India and is in an excellent position to handle any such extraordinary situation, at least with Brazil. ISDS mechanisms have the power to create a "regulatory chill"[106] in countries like India as from a sovereign perspective, losses mean much more than wins in ISDS.[107] India being much protective about its sovereignty,[108] has craftily moved away from the ISDS mechanism, quite evident by its stance in ICFT 2020 and its termination of other BITs.

India has also compromised on a well-settled customary international law which provides that local remedies must necessarily be exhausted before the commencement of any international proceedings[109] in the ICFT 2020. The deducible reason for taking this extreme yet commendable change in its mechanism is its dynamic approach to maintain its sovereignty and simultaneously not befalling to its mistakes in the past. India maintains and upholds its sovereignty by not keeping States and Investors on the even-steven.[110] By learning lessons from *White Industries Case* where the leading cause for arbitration was the delay of enforcement of awards by the Indian Courts,[111] India has altogether removed the requirement and the option of appealing to domestic authorities in ICFT 2020. Not only in India is there a growing negative sentiment about the regime of ISDS, but

[105] Louis T. Wells, *The Emerging Global Regime for Investment: A Response*, 52 HARV. INT'L. L. JOUR. ONLINE 42, 54-55 (2010).

[106] Jarrod Hepburn, *India and bilateral investment treaties: refusal, acceptance, backlash*, 3 Ind. L. Rev. 1, 3 (2019) (book review) (hereinafter 'Hepburn').

[107] Samples, *supra* note 101, at 162.

[108]Sumit Ganguly & Eswaran Sridhan, *The End of India's Sovereignty Hawks?* FOREIGN POLICY (Nov. 7, 2013), https://foreignpolicy.com/2013/11/07/the-end-of-indias-sovereignty-hawks/; See Rohit De, *Between midnight and republic: Theory and practice of India's Dominion status,* 17(4) INT'L JOUR. OF CONST. L. 1213, (2020).

[109] POLANCO, *supra* note 90, at 38.

[110] Hepburn, *supra* note 106, at 4.

[111] Ashutosh Ray & Sapna Jhangiani, *"White Industries" and State Responsibility: Lesser-Known Facts about the Case as Discussed during the 2014 ICCA Young Arbitration Practitioners Conference*, KLUWER ARBITRATION BLOG (Jun. 30, 2014), http://arbitrationblog.kluwerarbitration.com/2014/06/30/white-industries-and-state-responsibility-lesser-known-facts-about-the-case-discussed-at-2014-icca-young-arbitration-practitioners-conference/?_ga=2.266966470.935201593.1587396610-85863912.1585241480.

this backlash can be seen in many different countries, including the Netherlands,[112] Argentina,[113] Australia,[114] and Germany[115] among many others.

3. *ISDS may not always depoliticize issues*

In the initial years of dispute settlement regime, States preferred to settle their disputes through only the SSDS mechanism[116] because the rationale was "who-ever ill-treats a citizen injures the State."[117] The authors state that the rationale has still not changed. However, SSDS method was highly criticized by investors for being a highly politicized mechanism and a system which did not grant adequate protection to foreign investment.[118] Hence, a new mechanism, i.e. ISDS began dominating the treaties,[119] and the prime reasons for adoption of ISDS were that it prevented politicization of the disputes[120] and also enhanced investor protection.[121] However, it is imperative to state that "the goals of investment protection and de-politicization of investment disputes are not absolute".[122] The protection of investments and de-politicization are not the main aim of the BITs. Instead the overall aim of the BITs is to, stimulate foreign investment and boost parties economic relations.[123]Nevertheless, de-politicisation through ISDS is more likely intended to

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112 Kabir A.N. Duggal, *With Rights Come Responsibilities: Sustainable Development and Gender Empowerment under the 209 Netherlands Model BIT*, KLUWER ARBITRATION BLOG (Jun. 15, 2019), http://arbitrationblog.kluwerarbitration.com/2019/06/15/with-rights-come-responsibilities sustainable-development-and-gender-empowerment-under-the-2019-netherlands-model-bit/.

113 Federico Lavopa, *Opinion: Crisis, Emergency Measures and Failure of the ISDS System: The Case of Argentina*, INTER PRESS SERVICE (Aug. 12, 2015), http://www.ipsnews.net/2015/08/opinion-crisis-emergency-measures-and-failure-of-the-isds-system-the-case-of-argentina/.

114 Kyla Tienhaara & Patricia Ranald, *Australia's Rejection of Investor–State Dispute Settlement: Four Potential Contributing Factors*, INVESTMENT TREATY NEWS (July 12, 2011), https://www.iisd.org/itn/2011/07/12/australias-rejection-of-investor-state-dispute-settlement-four-potential-contributing-factors/ (discussing Australia's movement away from ISDS).

115 Samples, *supra* note 101, at 146.

116 Anthea Roberts, *State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority,* 55(1) HARV. INT'L. L. JOUR. 1, 24 (2014) (hereinafter 'Roberts').; Sachet Singh & Sooraj Sharma, *Investor-State Dispute Settlement Mechanism: The Quest for a Workable Roadmap, 29(76)* UTRECHT JOUR. OF INT'L AND EURO L. 89, 90 (2013).

117 EMMERICH DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW APPLIED TO THE CONDUCT AND TO THE AFFAIRS OF NATIONS AND SOVEREIGNS 136 (Charles G. Fenwick trans., ed., 1916) (1758).

118 Roberts, *supra* note 116, at 2.

119 POLANCO, supra note 90, at 35.

120 LEARNING PUBLIC POLICY: ANALYSIS, MODES AND OUTCOMES, 300 (Dunlop et. al eds., palgrave macmillan 2018).

121 Roberts, *supra* note 116, at 12.

122 *Id.*

123 Saluka Investments BV (Neth.) v. Czech Republic, UNCITRAL, Partial Award, ¶ 300 (Mar. 17, 2006).

protect less powerful State from a more powerful State.[124] However, in this case there is no specific proof that adoption of ISDS would de-politicize the issues between India and Brazil as both countries have almost similar Gross Domestic Products.[125] Indeed, power here would mean power in terms of financial resources.

4. *Other significant points of differences*

Many of the BITs claims against India were due to domestic judicial delays, failures of due process, and bad faith executive actions.[126] Investors have remained sceptical about the efficiency and ability of the domestic courts, especially in developing countries.[127] By adoption of SSDS in ICFT 2020, a Joint Committee is formed under Article 13 which helps the parties to settle the dispute amicably, and the possibility of resolving matters through Courts is wholly eradicated, hence taking care of most of the above-stated problem. Since ISDS has been eliminated, there is no requirement for exhaustion of local remedies now. Hence, the already over-burdened Indian Judiciary[128] will now be able to focus on the huge backlogs[129] of domestic cases.

The ICFT 2020 is a new step for easing investments for individual and small companies. This will lead to the development of the informal economy of India as many unskilled and semi-skilled workers will get a job in these establishments. This is because the small companies will welcome their cases being fought by their home country, thereby avoiding legal costs from their already small investments and enable them to utilize their funds in the growth of their company and the growth of the economy as a whole.

V. WILL INDIA COMPLETELY GIVE UP ON ISDS?

As been discussed in the article, the ICFT 2020 is tilted more towards Brazil's Model BIT 2015 as it embraces Brazil's stance on dispute prevention and dispute settlement mechanism. The ICFT

[124] Roberts, *supra* note 116, at 16.

[125] *Gross Domestic Product 2019,* WORLD BANK, (Dec. 23, 2019), https://databank.worldbank.org/data/download/GDP.pdf (India's GDP- 2,718,732 million USD & Brazil's GDP- 1,868,626 million USD).

[126] Hepburn, *supra* note 106, at 3.

[127] DUGAN ET AL., INVESTOR–STATE ARBITRATION 15 (Oxford University Press 2011).

[128] *See* LAW COMMISSION OF INDIA, REPORT NO. 245, ARREARS AND BACKLOG: CREATING ADDITIONAL JUDICIAL (WO) MANPOWER (2014).

[129] *Id.*

2020 places host state's right to regulate[130] above investor's rights. Though India has agreed for SSDS in the recent BIT, but will it completely give away on ISDS remains a question which will be only deciphered in due course of time. The type of dispute settlement procedure present in the BIT would largely depend on factors such as bargaining ability of the other Party, the amount of investment received by the host state from the other party and the objective of investment of the other Party. We shall now examine the stance of the top five countries (Singapore, Mauritius, Netherlands, Japan, and the U.S.A)[131] from where India gets its highest FDIs, to analyze India's stance.

All the recent investment agreements signed by Singapore clearly indicates that Singapore has not renounced the ISDS system. The Europe Singapore Free Trade Agreement still follows the ISDS model[132] despite growing concerns against the ISDS in Europe. Additionally, all the last three treaties concluded by Singapore had ISDS provisions along with SSDS.[133] As per limited data available from UNCTAD, recently signed BITs by Mauritius have ISDS and SSDS clauses.[134] Netherlands promotes ISDS,[135] and this can be inferred from its stance taken in its Model BIT 2019, where ISDS has been incorporated without any significant changes.[136] Japan is a supporter of investment protection as most of its treaties include ISDS & SSDS provision.[137] On the other

130 Ranjan 2020, *supra* note 8.

131 MINISTRY OF COMMERCE AND INDUSTRY, DEPARTMENT FOR PROMOTION OF INDUSTRY AND INTERNAL TRADE FACT SHEET ON FOREIGN DIRECT INVESTMENT (FDI) 2 (Dec. 2019).

132 EU-Singapore Trade and Investment Protection Agreement, European Union-Singapore, 19 Oct., 2018, I.L.M.

133 Agreement between the Government of the State of Qatar and the Government of the Republic of Singapore for the Reciprocal Promotion and Protection of Investments, Singapore-Qatar, 17 Oct., 2017, I.L.M; Agreement between the Government of the Republic of Kazakhstan and the Government of the Republic of Singapore on the Promotion and Mutual Protection of Investments, Singapore-Kazakhstan, 21 Nov., 2018, I.L.M; Agreement between the Government of the Republic of Singapore and the Government of the Republic of the Union of Myanmar on the Promotion and Protection of Investments, Singapore-Myanmar, 24 Sep., 2019, I.L.M.

134 Agreement Between the Government of the Republic of Mauritius and The Government of the Arab Republic of Egypt on the Reciprocal Promotion and Protection of Investments, Mauritius- Egypt, 17 Oct., 2014 I.L.M; Agreement between the Government of the UAE and the Government of the Republic of Mauritius for the Promotion and Reciprocal Protection of Investments, Mauritius-UAE, 29 Dec., 2017, I.LM; Agreement between the Government of the State of Kuwait and the Government of the Republic of Mauritius for the Promotion and Reciprocal Protection of Investments, Kuwait-Mauritius, 24 Jul., 2014, I.LM.

135 Rohit Bhat, *Will India do away with investor state arbitration?,* KLUWER ARBITRATION BLOG (Aug. 23, 2017), http://arbitrationblog.kluwerarbitration.com/2017/08/23/will-india-away-investor-state-arbitration/.

136 Bart Verbeek & Roeline Knottnerus, *The 2018 Draft Dutch Model BIT: A Critical Assessment*, 9(2) INVESTMENT TREATY NEWS (July 30, 2018), https://www.iisd.org/itn/2018/07/30/the-2018-draft-dutch-model-bit-a-critical-assessment-bart-jaap-verbeek-and-roeline-knottnerus/.

137 Yuka Fukunaga, *ISDS Under the CPTPP and Beyond: Japanese Perspectives*, KLUWER ARBITRATION BLOG (MAY 30, 2018), http://arbitrationblog.kluwerarbitration.com/2018/05/30/isds-cptpp-beyond-japanese-perspectives/.

hand, USA has also expressed its resistance over ISDS[138] despite Trump's pro-corporatist view. The recently signed United States-Mexico-Canada Agreement (USMCA) 2020 has done away with ISDS clause between the US and Canada whereas significantly restricting the ISDS between US and Mexico.[139]

Observing the mixed stance of India's top five FDI allies on the dispute resolution mechanism, the factors affecting them has grown much out of diplomacy. Now, India's future course in these BITs will be all dependent on the level of sovereignty India is willing to maintain in the international playfield and the policies it seems to adopt.

VI. CRITICISMS AND SUGGESTIONS

According to Article 18 of the ICFT 2020, a party can initiate a dispute prevention procedure against the other, if it feels another party has breached the treaty. Article 19.1 allows the parties to initiate arbitration proceedings if the issue at dispute is not resolved using the dispute prevention procedure. However, Article 19.2 limits the usage of the article just for the interpretation of the treaty. If there has been a breach of the treaty (say for example National Treatment Clause, i.e. Article 5) and the dispute is not resolved as per the provisions of Article 18, there remains confusion as to whether the investor has rights to arbitrate because of the limitations placed by Article 19.2. The authors suggest that there should be an amendment of the treaty pursuant to Article 27 as the inconsistencies in the articles mentioned above have the potential to create confusions in the mind of investors and the arbitrators.

As per Article 6 of the ICFT 2020, the treaty protects the investor from only the direct expropriation but not indirect expropriation. Direct expropriation refers to nationalizing or affecting the rights of investors[140] through a mandatory legal transfer.[141] Indirect expropriation

[138] Lori Wallach, *The US drops ISDS*, the Globalist (Jan. 24, 2020), https://www.theglobalist.com/united-states-european-union-trade-isds-usmca-uncitral-mic/

[139] Calliope Sudborough, *What is the ISDS Landscape under the "New NAFTA"*, KLUWER ARBITRATION BLOG (Jan. 9, 2019), http://arbitrationblog.kluwerarbitration.com/2019/01/09/what-is-the-isds-landscape-under-the-new-nafta/.

[140] Suzy H. Nikiema, *Indirect Expropriation*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT (March 2012) https://www.iisd.org/sites/default/files/publications/best_practice_indirect_expropriation.pdf.

[141] United Nations Conference on Trade & Development [UNCTAD], *Expropriation –UNCTAD Series in Issues in International Investment Agreements II*, at 6, UNCTAD/DIAE/IA/2011/7 (2012) (hereinafter 'UNCTAD 2012').

refers to depreciating the economic value of an investment[142] without a formal transfer.[143] The number of cases relating to indirect expropriation has been on the increase in arbitral tribunals.[144] By eliminating the indirect expropriation clause, India will be able to take vital regulatory decisions in the sectors like health, education, and environment. This way, India will also be able to uphold its regulatory sovereignty. Though the investors will not be able to claim when the policies of the government harm them indirectly but had India inserted indirect expropriation clause, it would not have been able to regulate its developing economy efficiently.

Earlier, arbitration proceedings were conducted under conditions of confidentiality with minimal public participation.[145] The ICFT 2020 makes only a slight attempt to resolve this flaw as other than the report submitted by the Joint Committee, the treaty requires the Joint Committee's meetings and the documentation submitted under Article 18[146] to remain confidential. The authors believe that the "open court principle"[147] should be applied to the ICFT 2020 so that the proceedings which took place before the Joint Committee under the dispute prevention mechanism could be made available to the public. The provisions of the Indian Model BIT 2016, which talks about transparency in arbitral proceedings[148] may be incorporated in the ICFT 2020.

VII. CONCLUSION

This novel BIT focuses on investment promotion as suggested by its name 'Investment Cooperation and Facilitation Treaty'. The ICFT 2020 aims at dispute mitigation rather than dispute settlement. This is due to some concerns related to international arbitration- the most usual way of resolving disputes, like impartiality of investors and increased duration of investment arbitration results in recent times. Additionally, dispute prevention policies help to maintain a country's risk

[142] *Indirect Expropriation (Regulatory Taking)*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT, https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/5-investment-provisions/5-4-safeguarding-policy-space/5-4-4-indirect-expropriation-regulatory-taking/ (last visited Apr. 22,2020).

[143] UNCTAD 2012, *supra* note 141, at 7.

[144] Occidental Exploration and Production Company v. The Republic of Ecuador, LCIA Case No. UN3467, Final Award, ¶ 85 (July 1 2004).

[145] United Nations Conference on Trade and Development [UNCTAD], *Transparency,* at 8, UNCTAD/DIAE/IA/2011/6 (2012).

[146] ICFT 2020, *supra* note 7, at art. 18.5.

[147] Cohin Trehearne, *Transparency, Legitimacy, and the Investor-State Dispute Settlement: What Can We Learn from the Streaming Of Hearings?*, KLUWER ARBITRATION BLOG (Jun. 9, 2018), http://arbitrationblog.kluwerarbitration.com/2018/06/09/transparency-legitimacy-investor-state-dispute-settlement-can-learn-streaming-hearings/.

[148] ICFT 2020, *supra* note 7, at art. 22.

to financial obligations much lower and help to maintain the reputation of the country as there is no risk of losing an arbitration claim. India, by incorporating DPPs in the ICFT 2020 has played a significant role in reducing, although not eliminating, its potential liability which could have arisen in the near future. However, the dispute settlement clause is not eliminated from the treaty and is enshrined under Article 19.

Interestingly, unlike India's Model BIT 2016 and its other previous BITs, this ICFT only contains SSDS clause and no ISDS clause. The probable reasons for alternating its stance could be the attack on sovereignty by ISDS mechanism, risk of frivolous complaints by investors, and Brazil's firm reliance on just SSDS mechanism. India and Brazil are not a part of the ICSID Convention, and hence they have no bondage to use ISDS mechanism to settle disputes. The question of whether India will continue to rely solely on SSDS clause and try to eliminate ISDS clause will largely depend on how its allies will formulate their policies. It is important to note that this has been the first time where India did not include an ISDS clause amongst the string of BITs it had signed till date. This significant change opens a range of questions and a new system for the whole world.

The leaders of both nations have shown their commitment towards a congenial environment for boosting bilateral trade and investment by signing the ICFT 2020.[149] This treaty will increase the flow of investment in both the countries and is likely to boost the investors' confidence by providing a level-playing field.[150] Both the countries have set a target of USD 15 billion in bilateral trade to be achieved by 2022.[151] After his talks with the Brazilian President, Narendra Modi told the reporters "*The two countries share similar views on a number of global issues despite geographical distance. Bolsonaro's visit to India has opened a new chapter in bilateral ties between India and Brazil.*"[152]

[149] *India Brazil Joint Statement during the State Visit of President of Brazil to India (January 25-27, 2020)*, MINISTRY OF EXTERNAL AFFAIRS (Jan. 25, 2020), https://mea.gov.in/bilateral-documents.htm?dtl/32328/IndiaBrazil_Joint_Statement_during_the_State_Visit_of_President_of_Brazil_to_India_January_2527_2020.

[150] Press Release, Press Information Bureau Government of India Ministry of Finance, Cabinet Approves Investment Cooperation and Facilitation Treaty Between India and Brazil (Nov. 30, 2017), https://pib.gov.in/newsite/PrintRelease.aspx?relid=174004.

[151] Press Release, Pres Information Bureau Government of India Ministry of Finance, India-Brazil set target of USD 15 billion trade by 2022 (Jan. 27, 2020), https://pib.gov.in/newsite/PrintRelease.aspx?relid=197664.

[152] *India, Brazil ink 15 pacts; sign Action Plan to deepen strategic partnership*, THE HINDU (Jan. 25, 2020), https://www.thehindu.com/news/national/india-brazil-ink-15-pacts-to-broadbase-ties-further/article30651355.ece.