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MNLUA STUDENT LAW REVIEW

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MAHARASHTRA NATIONAL LAW UNIVERSITY
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MESSAGE FROM THE VICE CHANCELLOR

In the dynamic intersection of law and society, the release of Volume 2 of the MNLU Student Law Review Journal is a significant juncture that reflects the evolving landscape of legal scholarship. As the Vice-Chancellor of Maharashtra National Law University, Aurangabad, I am pleased to acknowledge the collective efforts that have culminated in this scholarly endeavor.

In the ever-changing social and legal landscape, the importance of law students in contributing to intellectual discourse cannot be overstated. Our students, as the future architects of legal thought, play a pivotal role in shaping the norms and frameworks that underpin our society. This journal serves as a platform for them to engage in rigorous academic inquiry, fostering a culture of critical thinking that is imperative in navigating contemporary legal challenges.

I extend my sincere thanks to Justice Abhay S. Oka, our esteemed Chancellor, for his steadfast leadership and unwavering commitment to the ideals of academic excellence. His vision has set the stage for the success of our university, and we are privileged to be guided by his wisdom.

Heartfelt appreciation is due to Prof. Dr. Dhanaji Jhadav, our Registrar, whose administrative acumen has provided a strong foundation for our academic pursuits. His dedication to the institution has been instrumental in steering the course of our university.

I commend the efforts of the Faculty Convener, Ms. Neha Tripathi, for her role in orchestrating the diverse talents that contribute to the richness of this journal. Her commitment to nurturing scholarly endeavours is evident in the quality of the publication.

To the entire student editorial board, the peer review board, and all the contributors, I express my gratitude. Your dedication to the pursuit of legal scholarship is commendable, and your contributions to this volume are a testament to the vibrancy of our academic community.

As we navigate the complexities of a changing legal landscape, let this journal serve as a beacon of intellectual exploration. May it inspire our students and legal scholars alike to contribute meaningfully to the ongoing dialogue that shapes the future of law and society.

Prof. A. Lakshminath
Vice-Chancellor (I/c)
Maharashtra National Law University, Aurangabad

MESSAGE FROM THE REGISTRAR

I am very happy and feel privileged to declare the publication of the second edition of Students Law Journal, MNLU, Aurangabad.

This edition is totally students driven initiative under able guidance and mentorship of faculty members in furtherance to accomplishment of research goals and spirit of inquiry among the students. It is not just an attempt to orient the skill of research among the students but to develop capacity building and expose them to new arenas of laws with fresh and new outlook.

Law is a changing phenomenon and it goes on changing in accordance with prevailing values of the society and innovative parameters articulated by the Court in dispensing justice to the public at large. This journal is an integration of new ideas and a platform to look law and its letters beyond the catalogue of rules. It is a platform for students, research scholars and academicians to put-forth their views, opinions in tune with changing ideas, cutting edge technology and prevailing legal and judicial parameters.

I am sure that Journal (Student Review) will be an opportunity for greater involvement of the students for effective research engagement beyond their course curriculum necessary for academic, professional and personal development. The Maharashtra National Law University, Aurangabad being an institution of national repute, the Editorial Board has maintained its quality and innovations so as to step into grey areas of legal research and allied disciplines. This will surely help to compare each other's work and ideas, engaging the students with an academic community with an intra and interdisciplinary approach.

I congratulate the Editorial Board and faculty members for able mentorship and guidance and student engagement in their research initiative. This Journal will justify the students' efforts, synergy and fullest extent of dedication in maintaining a high standard of research.

The Editorial Board has maintained coherence, consistency along with meticulous arrangement and choice of papers which has heightened credibility and quality of this Journal.

Prof. Dr. D.M. Jadhav
Registrar
Maharashtra National Law University, Aurangabad

FOREWORD

The Student Editorial Board of the MNLUA Student Law Review is delighted to present Volume II of our journal. This edition marks a significant milestone for the SLR, solidifying its position as a platform for vibrant legal discourse and insightful scholarship.

We were overwhelmed by the enthusiastic response to our call for submissions. We received a diverse range of high-quality entries from law students across the country, representing a multitude of esteemed law schools. This volume reflects the breadth and depth of contemporary legal issues that are captivating the minds of legal minds today. True to the spirit of the SLR, the articles in Volume II delve into a fascinating array of contemporary legal challenges. From emerging aspects of technology law to the ever-evolving landscape of alternate dispute resolution investment laws, the contributors have engaged with critical issues that shape our world.

The rigorous double-blind peer-review process has ensured that the articles published in this volume are not only thought-provoking but also meticulously researched and impeccably presented. We are confident that this collection will serve as a valuable resource for legal professionals, academics, and students alike.

We express our sincere gratitude to all the contributors who entrusted us with their valuable work and extend our thanks to all members of peer review board, whose expertise has been instrumental in maintaining the high standards of the SLR. Finally, a special word of thanks to the faculty advisors and the MNLUA administration for their continuous support and encouragement. We are certain that the diverse range of perspectives and the depth of analysis will stimulate thought-provoking discussions and inspire further research. We hope you find this edition of MNLUA Student Law Review as engaging and intellectually stimulating as we did.

The Student Editorial Board

MNLUA Student Law Review

ANALYSING APPLICABILITY OF ADR MECHANISM TO RESOLVE INTELLECTUAL PROPERTY DISPUTES

Sh. K.C. Mittal & Dr. Anchal Mittal Aggarwal[*]

Abstract

Arbitration is a mechanism to resolve disputes similar to court system however; it is done under purview of agreement or private contract between the parties. In this mechanism an arbitrator being a neutral third person is appointed to resolve the dispute between the parties. It is the parties to the dispute that need to agree for alternative dispute proceedings by an arbitrator. The procedure is essentially a privatized justice system. Arbitration as a mode of resolving disputes is prevalent for varied type of disputes Worldwide. Disputes relating to Intellectual Property (IP) fall in this pool of matters resolved by arbitration. Since IP rights (IPR) are territorial in nature and specialised area, nations have different practice to resolve IP matters through arbitration.

Over two decades ago the WIPO established Arbitration and Mediation Center which pertains to resolving international commercial disputes among private parties. The objective of the Centre is to provide expert cross-border dispute settlement for IP disputes. The Centre based in Geneva, Switzerland has an office in Singapore which not only adopts alternative dispute resolution mechanisms for IPR disputes in letter and spirit. The arbitrariness of IPR disputes in Singapore is clarified through the amendments made inter alia, the Singapore Arbitration Act and the International Arbitration Act. These amendments were pursuant to the passing of the Intellectual Property (Dispute Resolution) Bill, 2019. The capability of settling IPR disputes through arbitration is notably stipulated by section 52B of the Singapore Arbitration Act and section 26B of the International Arbitration Act.

In contrast, the relevance of resolving IPR disputes through arbitration in India is in the nascent stage and gaining impetus. There seems uncertainty regarding the arbitrability of IPR disputes in India because the Arbitration and Conciliation Act, 1996 or the Acts relating to the intellectual property rights such as the Trade Marks Act, 1999 and the Copyright Act, 1957, are silent on this aspect.

This paper is an attempt to analyse the feasibility and applicability of arbitration in IPR disputes in comparison with India and Singapore.

Key Words: Intellectual Property (IP), Intellectual Property Rights (IPR), Arbitration, Alternate Dispute Resolution.

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I. INTRODUCTION

The rapid development and commercialisation in today's global economies has brought alternative dispute resolution mechanism specifically, arbitration in forefront than the traditional court system. It is undeniable that the dependency of global economy on IP has intensified which calls for robust protection and enforcement of IP Laws. To strengthen the IP regime various jurisdictions across the globe have entered into bilateral and multilateral treaties. Noticeably, the multilateral agreements relating to ADR are recognizing that the traditional litigation is not the most viable means of settling disputes, especially in cases of international IP disputes. Often the distinctive feature of IP disputes that becomes significant in settlement of the matters is that it is a technical subject. Thus, such disputes must be dealt by persons having specialized knowledge in the field of IP.

One way is to choose arbitration for IP dispute settlement and appoint specialized arbitrator for such disputes. The ADR mechanism is gaining impetus to resolve matters pertaining to arbitrability of IP matters in India. The key question pertaining to arbitrability of IP disputes is whether IP related disputes can be resolved by Arbitration or not.

The legal framework of IP bequests rights to the creator of IP work and aims at protecting this incorporeal property, which is the result of intellectual efforts and skill of the creator. The jurisprudence of arbitrability of IPR disputes in India is surrounded with various conundrums. This study focuses on analysing the arbitrability of IPR disputes in India with impressions from Singapore.

II. WIPO ARBITRATION AND MEDIATION CENTER

The World Intellectual Property Organization offers flexible and specialized alternate dispute resolution through its Arbitration and Mediation Center. This center was established by the General Assembly of World Intellectual Property Organization in September 1993. The WIPO Center is known as the World Intellectual Property Organization Arbitration and Mediation Center. This facility isn't novel; it has been used by start-ups, large and small and medium size enterprise, inventors, universities, artists, producers, collecting societies and R & D centres. This option is not only cost effective but time effective, simultaneously. It enables settlement of national or cross border commercial disputes arising among private parties by providing neutral, expert and expedited arbitration and mediation services.

With the submission of arbitration request[1] to the WIPO Arbitration Center begins the arbitration procedure. Simultaneously, the claimant must transmit the request to the respondent.[2] The WIPO Rules are administered for the arbitral procedure by the WIPO Arbitration Center. Matters that can be resolved by the State Courts or Arbitration Tribunals are not interfered with or taken up by the Center. The WIPO Arbitration Center generally does not involve in review or confirmation of nomination of arbitrators, although in special cases it is called on to nominate the arbitrators. The arbitration request must include a demand to refer the dispute for arbitration under the World Intellectual Property Organization Arbitration Rules. In addition, parties details such as the names, e-mail, addresses and telephone or other communication references, copy of the arbitration agreement, a brief description of the

[1] Rule 7, WIPO Arbitration Rules.
[2] Rule 6, WIPO Arbitration Rules.

circumstances and nature of the dispute, a statement of the relief sought and any other information or observation considered useful in relation to Article 14 to 20[3] of the WIPO Rules need to be included in the arbitration request. Further, according to Article 41 of the WIPO Rules the statement of claim including statement of facts, legal arguments that support the claim, relief sought and evidence relied by the Claimant. The place of arbitration will be the place mutually decided by the parties else it shall be decided by the Center.[4] According to Article 37 of the WIPO Rules, the procedure of the arbitration relies on the principles of natural justice and treats parties equal and provides fair opportunity to each party to present its case. The arbitral procedure takes place with due expedition which shall be ensured by the Tribunal.

The law or rules of law chosen by parties to the arbitration proceedings will be basis of deciding the substance of the dispute.

The WIPO rule has introduced the provision of emergency relief proceedings to get interim relief. This emergency interim relief provision applies to arbitrations conducted under Arbitration Agreements from June 1, 2014 onwards. The particulars of the emergency relief are same as provided in the regular procedure under Article 9 of WIPO Rules accompanied with the reasons why such relief is sought on an emergency basis.

If there is disagreement on the person to act as the emergency arbitrator among the parties, the arbitrator would be appointed from the standby panel if Center is asked for. However, in certain conditions an *ex parte* hearing would be permitted by the emergency arbitrator.

If the arbitration is not started within 30 days of the date of commencement of the emergency relief proceedings it shall stand terminated.

The arbitral award of the Center is binding on the parties and the enforcement of partial or final award is allowed by the national arbitral laws. However, the enforceability of interim order is in a limbo because national arbitral laws are silent on it or the national arbitral laws exclusively allow enforcement of the partial or final award.

III. ARBITRABILITY OF IP DISPUTES: THE INDIAN PERSPECTIVE

In Indian arbitration is governed by the Arbitration and Conciliation Act, 1996 (Arbitration Act) and the intellectual property has the umbrella of IP laws. The IP laws umbrella includes the Copyright Act, 1957, Trade Mark Act, 1999, The Patents Act, 1970, the Designs Act, 2000, Geographical Indications of Goods (Registration and Protection) Act, 1999 and Protection of Plant Varieties and Farmers' Rights Act, 2001.

The Trade Marks Act, 1999 and the rules administer and provide protection to trademark of goods and services. The Trade Marks Act prevents the fraudulent use of trademark and provides remedies for authorised use of trademark. Patents are governed by the Patents Act, 1970 and rules made there under. The Patents Act provides statutory right to the patentee for the invention for a specific duration of time. The statutory right is granted by the Government authority to the patentee in exchange of the disclosure of the invention. The Designs Act, 2000 consolidates and abreast the law governing the protection of designs in India. The Designs Act aims at protecting novel and original designs from unauthorised use and loss to the proprietor. The Geographical Indications of Goods (Registration & Protection) Act, 1999 was enacted as India is a member of the World Trade Organization. The Geographical Indications

[3] Rule 14-21, WIPO Arbitration Rules.
[4] Rule 38, WIPO Arbitration Rules.

Act came into force on September 15th, 2003 to protect the distinctiveness and assure the quality of Goods originating from a particular region, locality or country. The entire IP laws umbrella is amended regularly in consonance with the changing environment and development. These laws and the legislative intent of arbitrability of IP Disputes don't seem to be clear and seem to be governed in oxymoronic nature.

At the same time, the disputes that are arbitrable are not specifically provided under Arbitration Act, though sections 2(3)[5], 34 (2) (b)[6], 48 (2)[7] indirectly pertain with non-arbitrability of IP disputes. According to sub-section (5) of section 103 of the Patent Act, if a reference is made to High Court for matters arbitration is allowed if it involves the government. Moreover, the enforcement of awards relating to IPR is not restrained under the Arbitration Act; this includes matters concerning the validity or infringement of a patent. Even the Commercial Courts Act does not oust arbitration of IP disputes however, section 10 of the Commercial Courts Act specifically provides for arbitration of commercial dispute. Therefore, a dispute relating to IP generally is commercial in nature in accordance with Section 2(c) of the Commercial Courts Act, 2015.

Ordinarily, arbitration gets initiated if the contract provides for arbitration and the parties are in agreement on appointment of arbitrators, failing to which a local jurisdictional State High Court or the Supreme Court of India (in case of international commercial arbitration) is approached under section 11 of the Arbitration Act. In case a party to such dispute rather than invoking arbitration as per arbitration agreement, approaches regular civil court then the respondent/defendant objects for reference to arbitrator as per Section 8 of the Arbitration Act. If parties to a contract that contains an arbitration clause violate any terms of the contract the competent court is empowered to refer them to arbitration. The dispute is decided according to the *lex arbitri* however, the contract should include arbitration clause relating to IP matters.

The Court is empowered to decide whether an action will be referred to arbitration or accepted by the Court is provided in Article II (3) of the New York Convention. However, the paramount issue in enforcement of the award will be the in-arbitrability of subject-matter under the national laws.

Albeit the trend is changing, still there are some countries that have reckoned intellectual property claims in-arbitrable. For Instance, disputes relating to public policy are denied arbitration in France. Even European Union refutes arbitrability of disputes which directly deal with existence or validity of registered IPR. Until 1981, patents claims were excluded from arbitration in the USA, according to section 294 of the US Code on Patents titled "Voluntary Arbitration, open the doors of arbitration to all IPR related issues".[8] However, there is no specific legislative authority making arbitration mandatory for issues relating to

[5] Section 2 (3), The Arbitration and Conciliation Act, 1996.
[6] Section 34 (2) (b), The Arbitration and Conciliation Act, 1996.
[7] Section 48 (2), The Arbitration and Conciliation Act, 1996.
[8] CAMILE JURAS, *Internaltional Intellectual Property Disputes and Arbitration: A Comparative Analysis of America, Europe and International Approaches*, eScholarship@McGill https://escholarship.mcgill.ca/downloads/3f462606g?locale=en

copyright and trademark.[9] Nevertheless, copyright issues arising out of contractual disputes are not barred from arbitration by US courts.[10]

Conversely, the Swiss patent and trade mark office recognizes arbitration awards as a basis for revocation of the patent registration. In the UK the Arbitration Acts 1950, 1979 or 1996 don't provide statutory recognition of IP disputes through arbitration.[11] Albeit, UK judiciary has generally recognized arbitrability of IP disputes[12] and disputes relating to copyright and trademark are fully arbitrable. However, arbitration is allowed under the UK Patents Act 1977 under limited circumstances. The case of *Roussel-Uclaf v. G.D. Searle & Co. Ltd*.[13] is a good example since in this case dispute relating to patent validity was held to be arbitrable.[14] In Hong Kong, the question of arbitrability of IP disputes was hazy until the Arbitration (Amendment) Ordinance 2017 (the Arbitration Ordinance) was passed. It provided that disputes relating to intellectual property (IP) are capable to be settled by arbitration between parties. The ordinance made it clear that the enforcement of arbitral awards relating to IP rights are not contrary to Hong Kong's public policy.[15]

The country that is in forefront when the question of arbitrability of IP disputes is Singapore. Its legislation allows arbitration of disputes pertaining to IP if parties agree. The next section deals with this aspect in more detailed manner. Singapore is the only center outside Geneva that hosts Arbitration and Mediation Centre of the World Intellectual Property Organization. The Singapore International Arbitration Centre has dedicated panel of arbitrators.[16]

Arbitration Tribunals in many other legal systems do not exclude IPR as a whole. Nevertheless, the arbitration system under WIPO Rules shows the admissibility of arbitrability of IP disputes in general. Since arbitration is being preferred by parties to resolve disputes relating to business. The jurisprudence of arbitrability of IP disputes is based on the concept of '*public policy*'. The stand point being to distinguish between *right in rem* and *right in personam*. To understand the arbitrability of IP disputes in India, the next part of this paper will clarify the nature of IP right visa-vis *right in rem* or *right in personam* in light of Indian judicial precedents, particularly the judgment of the Supreme Court of India in *Vidya Drolia v. Durga Trading Corporation,*[17] which is the authority holding the field in this respect.

The issue of arbitrability of disputes relating to IP initially came before the Hon'ble Delhi High Court in 1990 in the case of *Mundipharma Ag vs. Wockhardt Ltd*.[18] The key issue in this

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[9] DAVID W PLANT, *Arbitrability of Intellectual Property Issues in the United States*, World Intellectual Property Organisation
https://wipo.int/amc/en/events/conferences/1994/plant.html.

[10] *Id.*

[11] *Final Report on Intellectual Property Disputes and Arbitration https://library.iccwbo.org/content/dr/COMMISSION_REPORTS/CR_0013.htm?l 1=Bulletins&l2=ICC+International+Court+of+Arbitration+Bulletin+Vol.+9%2FNo.1+-+Eng#footnote12*.

[12] International Court of Arbitration Bulletin 58-62 (1998), *Final Report on Intellectual Property Disputes and Arbitration*
https://library.iccwbo.org/content/dr/COMMISSION_REPORTS/CR_0013.htm?l 1=Bulletins&l2=ICC+International+Court+of+Arbitration+Bulletin+Vol.+9%2FNo.1+-+Eng#footnote12, 9

[13] Llyod's Report 225 (1978).

[14] Supra note 12.

[15] TEO, *Hong Kong Arbitration (Amendment) Ordinance 2017*, Global Arbitration News https://globalarbitrationne ws.com/new-arbitration-provisions-confirm-ip-disputes-arbitrable-hong-kong.

[16] *Intellectual Property Policy*, Ministry of Law, Singapore, (29 February, 2018)
https://www.mlaw.go v.sg/content/minlaw/en/our-work/intellectualproperty-policy.html.

[17] Vijay Drolia v. Durga Trading Corporation, (2020) MANU 0939.

[18] Mundipharma Ag vs. Wockhardt Ltd, 1991 ILR 606 (Del. H.C.).

case was to determine whether arbitration in disputes relating to copyright infringement is not included under Chapter XII pertaining to civil remedies available in Copyright Act, 1957. In this case an agreement having an arbitration clause was enter by both the parties for licensing of technology. *Mundipharam AG* sought relief through arbitration to restrain infringement of its copyright over packaging, breach of terms of the license agreement and breach of confidentiality by *Wockhardt*. The Court interpreted Chapter XII of the Copyright Act, 1957 and held that remedies sought in copyright infringement includes injunctions, damages and otherwise. Further, the Court stated that District Courts have jurisdiction in such cases and excludes these cases from the subject matter of arbitration.

However, in 2011 a prominent judgement was passed by the Apex Court of India that the IP disputes are *right in rem* and were unequivocally excluded from the ambit of arbitration was posed in the case of *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd*.[19] Therefore, the nature of IP agreement and dispute would determine arbitrability of IP disputes. The Court observed that a judicial body was required to judge the arbitrability of IP disputes, especial pertaining to this case. Further in the case of *Ayyasamy v. A. Paramasivam & Ors*[20] shows a non-inclination of the Apex Court of India towards arbitrability of disputes relating to IP. The Court held that certain kinds of IP disputes such as grant, rectification or revocation, of trademarks and copyrights are non-arbitrable. However, the key issue before the Court in the present case was arbitrability of fraud and the issue of arbitrability of IP disputes was the *obiter dictum.*

Nevertheless, the famous case *Eros International v. Telemax*[21] dealt with the issue of arbitrability of IP disputes and held that a dispute relating to copyright is not *in rem* but *in personam* making it arbitrable. The scope of arbitrability of IP disputes depends on the nature of the rights involved in the matter. An antithetical decision to *Eros* case was given by the single bench of the same court in *IPRS Ltd v Entertainment Network (India) Ltd*[22]. In the latter, the Bombay High Court held that under the Copyright Act, the IPR are right in rem therefore non-arbitrable by relying on the verdict given in the case of *Mundipharma v. Workhardt*[23] by the Delhi High Court, *Booz Allen*[24]and *Vikas Sales Corpn.*[25] In this case the issue before the Delhi High Court was whether a claim of copyright infringement was arbitrable or not. The Court held that the dispute was not arbitrable because by virtue of Section 62(1) of the Copyright Act, infringement of copyright is a statutory claim and these matters can be resolved only by a competent court. Similar view was ruled by the Madras High Court that under the Copyright Act, the IPR are *right in rem* hence, oust from the realm of arbitration.[26]

The major question pertaining to whether the subject matter of a dispute in arbitration agreement is arbitrable or not was still clad with grey clouds. In this regard a fourfold test was propounded by the Apex Court of India in the case of *Vidya Drolia (supra)* which are given below:

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[19] Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd, (2011) 5 SCC 532.
[20] A. Ayyasamy v. A. Paramasivam, (2016) 10 SCC 386.
[21] Eros International v. Telemax, (2016) SCC Online 2179 (Bom H.C.).
[22] Indian Performing Right Society Ltd v. Entertainment Network (India) Ltd., (2016) SCC Online 5893 (Bom H.C.)
[23] Mundipharma v. Workhardt, (1990) SCC Online 269 (Del H.C.)
[24] Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532.
[25] Vikas Sales Corpn v. CCT, (1996) 4 SCC 43.
[26] Super Audio Madras P. Ltd. v. Entertainment Network Limited, (2011) 1 LW 611 (Mad H.C.).

- Whether the subject matter and cause of action of the dispute relates to *action in rem* or *action in personam*?
- Whether the subject matter and cause of action of the dispute pertains to the inalienable sovereign and public interest functions of the State?
- Whether third party rights are affected by the subject matter or cause of action of the dispute and has *erga omnes* (towards all) effect?
- Whether the subject matter or cause of action is expressly or by necessary implication non-arbitrable under a specific statute?

The aforementioned case not only introduced fourfold test however, clarified that what is barred by statues cannot be arbitrated since third party rights were involved. Therefore, the Courts are empowered to determine whether an IP dispute is to be referred to arbitration or not by applying the test laid down in *Vijay Drolia* case.

The Indian judicial precedence's has elucidated about arbitrability of IP disputes and its scope, although there are diverse views of different Courts. Through the authoritative pronouncement in *Vijay Drolia,* a more pro-arbitration approach is being developed, provided the issue in dispute satisfies the aforementioned tests. The succeeding section of the article will deliberate the jurisprudence of arbitrability of IP disputes in Singapore as it is considered to have pro-arbitration approach.

More recently aiding the task in promoting arbitration in IPR, the Delhi High Court in *Hero Electric Vehicles Private Limited v. Lectro E-Mobility Private Limited*[27] referred a IPR dispute with respect to a family partnership dispute with respect to the use of the mark "Hero" & "Hero electric" and its associated marks. The Court pertinently observed:

> "*49…*
>
> *…the right that the plaintiffs seek to assert, in the plaint, is clearly against the F-4 group, and the F-4 group alone, and not against the whole world. More precisely put, the plaintiffs are not seeking a declaration, of their right to use a particular trademark, against any potential infringer, anywhere in the world, as is the case with "normal" infringement suits.* ***The dispute is clearly inter-se amongst two Family Groups****, pillowed on the rights emanating from the FSA and the TMNA, and essentially alleges infraction of the terms of the FSA and TMNA, not of the provisions of the Trade Marks Act. The precise case of the plaintiff is that the defendants have, in using the "Hero" trademark in respect of electric cycles and e- cycles, infracted the covenants of the FSA and TMNA.* ***The infraction, consequently, of the provisions of the Trade Marks Act, even if asserted, is only incidental, arising from the fact that the right to use a particular trademark is statutorily conferred by the said Act. Equally, therefore, even if it were to be assumed that the declaration, by the adjudicator, of the Family Group which would be entitled to use the "Hero" or "Hero Electric" trademark on electric cycles, or e-cycles, would result in that Family Group being the repository of the said trademark, qua the said goods, against the whole world, that by itself would not convert the dispute, as raised in the plaint, as one in rem, or lend it erga omnes effect****. To reiterate, in this context, the right asserted by the plaintiffs is not a right that emanates from the Trade Marks Act, but a right that emanates from the FSA and the*

[27] Hero Electric Vehicles Private Limited v. Lectro E-Mobility Private Limited, (2021) SCC Online 1058 (Del. H.C.).

> *TMNA, and is not asserted vis-à-vis the whole world, but is asserted specifically vis-à-vis the F-4 Family Group.* ***The argument that the dispute is in rem and is, therefore, not amenable to the arbitral process, therefore, fails to impress***.
>
> *52. Vidya Drolia, as well as the earlier decisions cited therein, expressly proscribe the Section 8 court from conducting more than a prima facie examination and evaluation.* ***Where a valid arbitration agreement exists, the decision also underscores the position that, ordinarily, the disputes between the parties ought to be referred to arbitration, and it is only where a clear "chalk and cheese" case of nonarbitrability is found to exist, that the court would refrain from permitting invocation of the arbitration clause."***

The said judgment has also been followed subsequently by the Delhi High Court in *M/s. Golden Tobie Private Limited v. M/s. Golden Tobacco Limited,* where an IPR dispute regrind use of mark "Golden's Gold Flake, Golden Classic, Taj Chhap, Panama and Chancellor" was referred to arbitration. Thus, a pro-arbitration approach is developed for arbitration in IPR disputes as well.

The other test required to be satisfied in both IPR and non-IPR arbitration disputes would include that the ***case of nonarbitrability*** is not present, for instance if the arbitration clause itself excludes the dispute etc. This aspect was also futher clarified by the Hpn;ble Supreme Court in Meenakshi Solar Power Pvt. Ltd v. Abhyudaya Green Economic Zones Pvt. Ltd[28]

> "*17. Further, this Court observed that* ***the court at the referral stage can interfere only when it is manifest that the claims are ex facie time- barred and dead, or there is no subsisting dispute****. …"*

This examination was further elaborated by the Supreme Court of India in *M/s. Emaar india Ltd v. Tarun Aggarwal Projects LLP*.[29]

> "*It is further observed that the* ***prima facie review at the reference stage is to cut the deadwood and trim off the side branches in straightforward cases where dismissal is barefaced and pellucid and when on the facts and law the litigation must stop at the first stage****."*

It is the view of the authors that in majority of the cases where IPR disputes would arise and there is an arbitration cause, the tests in *Vidya Drolia* would be satisfied and would be referred to arbitration, since the disputes by their very nature would arise from some private agreement which would contain the arbitration clause and hence would satisfy the tests in *Vidya Drolia* and would be an action *in personam*, rather than *in rem* and would not have an *erga omnes* effect and hence would be arbitrable.

One worrying aspect in recent development must also be discussed which is the recent judgment of the Supreme Court of India, in the law on arbitration, as the same would have impact in arbitration related to IPR disputes as well. The pro-arbitration view as discussed above, has been slightly impeded in view of the recent judgment of the Supreme Court of India in *M/s. N.N. Global Mercantile v. Private Limited v. M/S. Indo Unique Flame Ltd*[30]*,* wherein

[28] Meenakshi Solar Power Pvt. Ltd v. Abhyudaya Green Economic Zones Pvt. Ltd, (2022) SCC Online 1616.
[29] M/s. Emaar India Ltd v. Tarun Aggarwal Projects LLP, Civ. App. No. 6774 of 2022.
[30] Axiom Cordages Ltd v. Commissioner of Customs Nhava Sheva II, Civ. App. No(s). 3802-3803 of 2020.

at the stage of reference to arbitration the court held that the requirement of valid payment of stamp duty (as per the legal mandate under the The Indian Stamp Act, 1899) as under:

> "*115. We further hold that the provisions of Sections 33 and the bar under Section 35 of the Stamp Act, applicable to instruments chargeable to stamp duty under Section 3 read with the Schedule to the Stamp Act,* ***would render the Arbitration Agreement contained in such instrument as being non-existent in law unless the instrument is validated under the Stamp Act."***

The effect of such an interpretation which has disturbed the settled law in *SMS Tea Estates (P) Ltd. v. Chandmari Tea Co*[31], which earlier held the field infers that an arbitration would remain stalled till a document containing the arbitration agreement is validly and sufficiently stamped as per the Stamp Act and if such a contrary document comes to the knowledge of the court, arbitration would not be referred to until such a defect is rectified, whereas earlier arbitration was resorted to even in such cases.

However, regardless of the aforementioned, it is seen that through the authoritative pronouncement in *Vijay Drolia*, a more pro-arbitration approach is being developed, provided the issue in dispute satisfies the aforementioned tests.

IV. ARBITRABILITY OF IP DISPUTES: SINGAPORE PERSPECTIVE

Singapore is regarded to have pro-arbitration approach than most other jurisdictions. It has well established jurisprudence of arbitrability of disputes relating to IP. This is inferred by the legislative and judicial intent prevalent in Singapore.

The legal regime of arbitrability of IP disputes in Singapore primarily deals with Part IXA of the Singapore Arbitration Act and Part IIA of the International Arbitration Act. These were introduced in 2019 through the Intellectual Property (Dispute Resolution) Act 2019.

In the erstwhile regime, arbitrability of IP disputes was uncertain under the Singapore legal regime similar to the Indian legal scenario. However, it unravelled the whole jurisprudence relating to arbitrability of IP disputes. The milestone introduction in this regard has been Part IXA to the Singapore Arbitration Act and Part IIA to the International Arbitration Act, through the Intellectual Property (Dispute Resolution) Act 2019.[32]

Section 52A of the Arbitration Act along with 26A of the International Arbitration Act states the meaning of IPR and the list of intellectual properties included in intellectual property rights.[33] Further, the section explains the scope of IPR dispute under Section 52A (3) of the Singapore Arbitration Act and Section 26A(4) of the International Arbitration Act. It includes disputes involving validity, subsistence, scope, duration, ownership, compensation payable, enforceability, compensation, infringement, or any other aspect of such IPR. Such disputes are arbitrable between the parties to an IP dispute, irrespective of the fact that arbitration is

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[31] SMS Tea Estates (P) Ltd. v. Chandmari Tea Co., (2011) 14 SCC 66.

[32] *Arbitrability of IP disputes in Singapore – recent amendments to the AA and the IAA*, Lexology https://www.lexology.com/library/detail.aspx?g=30725cb4-1ca1-4df7-bacd-1c51356904db.

[33] Section 52, The Arbitration Act, 1996.

the main issue or incidental issue.[34] Concomitantly, it is significant to know that settlement of IP disputes is not ousted though Court, Tribunals, etc. that are empowered to try IP disputes certain Singaporean or other laws.[35] Even the parties to the arbitral award have been elucidated in Section 52C of the Singapore Arbitration Act and Section 26C of the International Arbitration Act of Singapore. According to these provisions parties to the arbitral proceedings excludes a third party holder of a security interest concerning and a third party licensee relating to IPR. This means by virtue of granting a license in IPR to a third party, the third party does not become party to the arbitral proceedings. Similar is the case when party to the proceedings grants a security interest in IPR to a third party. However, this shall not affect the rights or liabilities of the parties arising out of a contract or by operation of law. This can be a drawback if in case the arbitral award is declared invalid, it'll be enforceable and valid for the third parties who are excluded from the purview of parties to the proceedings.[36]

Furthermore, the Singapore Patent Act in a way restricted the scope of arbitration relating to patents as per the Section 82(2) of the said Act. However, this was fixed by including Section 26G to the International Arbitration Act and Section 52G to the Singapore Patent Act. These provisions extended the scope of arbitrability of IP disputes as it stated *"Section 82(2) of the Patents Act (Cap. 221) does not prevent a party from putting the validity of a patent in issue in.*

With the introduction of the aforementioned amendments to Singapore's International Arbitration Act and Arbitration Act resolution of IP disputes through arbitration has got statutory backing. This invariably is promoting Singapore's reputation as an arbitration hub and making attractive option for parties involved in IP disputes rather than restricting to national adjudicating authorities.

V. CONCLUSION

The Courts in India seem to be inclined to clarify and develop the jurisprudence of arbitrability of IP disputes however, the legislators need to contribute. This is deduced through the different judicial precedents of the various Indian Courts and the fourfold test propounded in the case of *Vijay Doralia*. It is undeniable that the India has made an endeavour to support arbitrability of IP disputes however; it needs to make attempts to promote arbitration as a viable mechanism to resolve IP disputes. This will enhance international commercial arbitration framework, though conceivable amendments in the Indian statutes needs attention that will appear India progressive at global arbitration platform. Inspiration from the developments introduced in Singaporean Acts may be fruitful for India as well. Singapore is known for arbitration and provision introduced in the **Singapore Arbitration Act** and the **International Arbitration Act** of Singapore, by way of the **Intellectual Property (Dispute Resolution) Act 2019** has distant the legal regime from ambiguities and obscurity relating to arbitrability of IP disputes.

It is undeniable that arbitration proceedings are more viable for parties resorting to arbitration. It has its merits such as flexible, cost and time effective and confidentiality. In cases of IP disputes resolution by arbitration has an added advantage because in IP disputes interim

[34] Section 52, Singapore Arbitration Act, 2001 and Section 26, International Arbitration Act, 1994.
[35] *Id.*
[36] *Id.*

injunctions are quintessential. The traditional adjudication authorities take time in passing interim injunction order which dilutes the basic principle of having interim relief in cases of IP disputes. Another constraint in the scope of arbitrability of IP disputes is the enforcement of partial or final awards because many jurisdictions deny or are obscure in recognizing the power of arbitral tribunal to award interim relief. This can be a turning point for Indian jurisprudence on arbitrability of IP disputes, if India validates power of arbitral tribunal to award interim relief.

Overall, the jurisprudence of arbitrability of intellectual property disputes in India is supportive and that of Singapore is at higher footing because it is promoting arbitration as a viable alternative to traditional litigation.

TAXING THE DIGITAL ECONOMY: IS ARTICLE 12B THE SOLUTION?

Bhavya Kapoor & CA Manoj Kapoor[*]

Abstract

More and more businesses each year are going online; the economy is not just limited to the brick-and-mortar economy but we now have an extensive digital economy. However, taxing the digital economy remains an issue. While OECD and UN were both preparing a mechanism for taxation of digital businesses, UN was able to achieve the goal first by giving its final approval to inserting Article 12B to the Model Double Taxation Convention Between Developed and Developing Countries. The new insertion to the Convention calls for fresh bilateral negotiations with multiple States. It would also bring a change to current taxing structure of digital economy in various jurisdiction, which had only recently begun to adopt the interim measures suggested by the OECD in 2018. Therefore, it becomes necessary to evaluate whether such negotiations shall even be initiated. This paper looks at what Article 12B states and how would tax on various digital businesses be imposed once the Article is adopted. Further, there is an attempt to critically evaluate the taxing model in order to understand whether UN, through insertion of Article 12B, has been able to achieve its intended purpose or not.

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I. INTRODUCTION

As the world develops and globalisation and digitisation increases, the economy expands with it. This growth in digitisation has given birth to new form of businesses. These businesses work in the market in a fundamentally different manner. These businesses do not require physical presence to draw profits. They draw significant profits from interacting with users, collecting data, marketing and branding.[1] Companies like Google, Apple, Facebook, Twitter, Pinterest etc., are some of the giants in this industry. The term 'digital economy' was first seen in "The Digital Economy: Promise and Peril in the Age of Network Intelligence" written by Don Tapscott in 1995. This book depicted how internet would change the way we did business.[2]

This new economy coming into play, raised a new question: How shall digital businesses be taxed? There are two traditional taxation principles: residence-based taxation and source-based taxation. These were devised decades ago keeping in mind the real economy. Residence based taxation principle is applied on the residents. They are taxed for all income accrued worldwide, if they are residents in India.[3] Whether a company is "a company resident in India" would depend on whether the company is an Indian company or whether its Place of Effective Management (POEM) is in India. If either of the answer is an affirmative, then the company would be considered a resident in India.[4] Source-based taxation principle is applied for non-residents where the source of the income is India.[5] However, owing to the difference between a brick-and-mortar economy and a digital economy, the principles of taxation cannot apply to the digital economy in the same manner that they apply to a brick-and-mortar economy.

While Organisation for Economic Co-operation and Development (OECD) recognised and began working on the issue of digital taxation under its "Action Plan on Base Erosion and Profit Shifting (BEPS)"[6], it had timely published interim measures for taxing the digital economy.[7] United Nations, one the other hand, which published its Model Double Taxation Convention Between Developed and Developing Countries, in 1980, also felt the need to revise the convention for bringing digital businesses within its ambit. This paper discusses the action taken by UN for taxation of digital economy and whether they are adequate for the purpose intended.

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[1] HM Treasury (Government of UK), *Corporate tax and the digital economy: position paper update*, pg 7-13 (March 13, 2018). https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/689240/corporate_tax_and_the_digital_economy_update_web.pdf

[2] KOSHA GADA, *The Digital Economy In 5 Minutes*, Forbes (June 16, 2016) www.forbes.com/sites/koshagada/2016/06/16/what-is-the-digital-economy/?sh=543f6bb27628

[3] Section 5 (1), Income Tax Act, 1961.

[4] Section 6 (3), Income Tax Act, 1961, **See also**, Explanation to sub-section (3) of section 6 of Income Tax Act, 1961 states "…place of effective management means a place where key management and commercial decisions that are necessary for the conduct of business of an entity as a whole are, in substance made."

[5] Section 9, Income Tax Act, 1961.

[6] Organisation of Economic Cooperation and Development (OECD), G20 Base Erosion and Profit Shifting Project, *Action Plan on Base Erosion and Profit Shifting* (July 19, 2013).

[7] Organisation of Economic Cooperation and Development (OECD), G20 Base Erosion and Profit Shifting Project, *Tax Challenges Arising from Digitalisation – Interim Report 2018: Inclusive Framework on BEPS*, pg. 177-192, (March 16, 2018)

II. HISTORICAL BACKGROUND

As a response to the OECD Model Taxation Convention on Income and Capital, in 1980, the United Nations published its Model Double Taxation Convention Between Developed and Developing Countries. The group of experts that finalised this UN Model Tax Convention was given the title of "Ad Hoc group of Experts on International Cooperation in Tax Matters".[8] The Ad Hoc Group of Experts on International Cooperation in tax Matters, in 2004, was renamed and constituted as the Committee of Experts.[9] It was only in October 2017 that the tax challenges in the digital economy was discussed by the committee, in its fifteenth session, and in pursuance of this the Subcommittee on Tax Challenges Related to the Digitalization of the Economy was constituted.[10] The subcommittee presented a paper which dealt with tax issues relating to digital economy wich was discussed in the eighteenth session on Committee of Experts on International Cooperation in Tax Matters.[11] It suggested adding new business models to the UN Model Tax Convention. It, further, analysed the work done by OECD and European Union in furtherance of this subject.[12] Further, during the eighteenth session, the Committee of Experts on International Cooperation in Tax Matters discussed and considered how it shall take forward its mandate and a new Article 12B was proposed.[13] The work on Article 12B only commenced in 2020 by the efforts of subcommittee on tax consequences of the digitalized economy.[14]

III. ARTICLE 12B TO THE UN MODEL DOUBLE TAXATION CONVENTION BETWEEN DEVELOPED AND DEVELOPING COUNTRIES

By giving the final approval to the Article 12B, United Nations has become the first to finish the race for taxation of Digital Economy.[15] But has it really finished the race as it should have? This question will be addressed in the later part of this research. First, we need to understand what Article 12B states by analysing the approved Article.[16] To simplify the context and make it more comprehendible, instead of using the words "Contracting State", the words "State A" and "State B" will be used where State A is the state where the provider of the service, say "XYZ Inc.", has their head office/residence and State B is the state in which the income from automated digital services (ADS) arises. The word "State C" will be used for any other third

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[8] Economic and Social Council (ECOSOC), *Resolution 1980/13: International Co-operation in Tax Matters*, pg. 13 (April 28, 1980).

[9] Economic and Social Council (ECOSOC), *Resolution 2004/69: Committee of Experts on International Cooperation in Tax Matters*, pg. 1 (November 11, 2004).

[10] Committee of Experts on International Cooperation in Tax Matters, *Tax Challenges in the Digitalized Economy: Selected Issues for Possible Committee Consideration* (October 11, 2017).

[11] Committee of Experts on International Cooperation in Tax Matters, *Tax Challenges related to the Digitalisation of the Economy: Report* (April 5, 2019).

[12] Ibid 2, 4-8.

[13] Ibid 14.

[14] Committee of experts on International Cooperation in Tax Matters, *Update on Work on Taxation Issues Related to the Digitalization of the Economy* (October 23, 2020)

[15] ANJANA HAINES, *This week in tax: Article 12B is ready for use in tax treaties*, International Tax Review (April 29, 2022) www.internationaltaxreview.com/article/b1xtgtyg3ms0w9/this-week-in-tax-article-12b-is-ready-for-use-in-tax-treaties.

[16] Article 12B, United Nations Model Double Taxation Convention between Developed and Developing Countries.

State. “PQR Inc.” is an ADS provider in State C. State A and State B have entered a bilateral treaty in the lines of Article 12B for the taxation of income from automated digital services.

The first paragraph to the Article provides that income of XYZ Inc. which is related to the ADS provided by it in State B, the payment of which is made to XYZ Inc in State A, may be taxed in State A. It talks about the taxing of a resident entity in its resident State under its domestic laws, as may be applicable. The main framework of taxation of the non-resident begins with the second paragraph to Article 12B. According to it, if PQR Inc derives income from State B with respect to ADS provided by it in State B, then State B may tax such underlying payment in accordance with the domestic laws of State B since there is no bilateral treaty between State B and State C. However, if, instead of PQR Inc, the service was provided by XYZ Inc., the tax imposed will be a percentage of the gross amount derived, as was negotiated between State A and State B. By a comparison to withholding tax, which is also imposed on gross amount, it can be said that this method of collecting tax is effective and well established. However, since this taxation method may lead to double taxation, it has been clarified that under Articles 23 A and 23 B, State A can provide certain exemptions to XYZ Inc. or grant credit for tax paid in State B for providing relief from double taxation. The commentary suggests a modest rate of taxation at 3%-4%, as, if the rate is high then the services providers could pass it on to the customers and the State will be getting the revenue at the cost of its own residents. The words “beneficial owner” used in paragraph 2 makes it clear that the recipient of the payments made by customers in consideration of the service provided by XYZ Inc. will not be considered a “beneficial owner” of such income if he has not been entitled to the right to use or enjoy the income but rather, he only has the duty to pass on the income received to another person under a contractual or legal obligation. The words “beneficial owner” helps avoid shell companies and the use of tax havens for tax avoidance or, in other words, BEPS. Therefore, the nexus requirement under Article 12B is not dependent on Permanent Establishment (PE) or fixed base only. The nexus is source based and not physical presence based.

Paragraph 3 gives an option to XYZ Inc. to be taxed in accordance with the domestic laws, for the whole year. The paragraph suggests that the domestic tax will be imposed on the qualified profits. Qualified profits have been defined as “*thirty percent of the amount resulting from applying the profitability ratio of that beneficial owner’s automated digital services business segment to the gross annual revenue from automated digital services derived from the Contracting State where such income arises.*” To explain in a simple manner, if the turnover of the beneficial owner, i.e. XYZ Inc. in State B is 1000, profitability ratio of ADS segment is 50 and the domestic tax rate in State B is 25% whereas the bilaterally negotiated tax rate between State A and State B is 4%; the comparative tax calculation will be as given in the table below:

Tax as per Paragraph 2 (4% as per bilateral negotiation)	Tax as per Paragraph 3 (25% of qualified profit)
1000 * 4% = 40	1000* 50%* 30% = 150 150 *25% = 37.5

Since, the tax according to paragraph 3 is lower than tax as per paragraph 2, the beneficial owner will opt for being taxed according to paragraph 3 rather than paragraph 2. Paragraph 2 provides for taxation on gross basis whereas paragraph 3 provides for taxation on net basis. It

is not necessary that every entity files a segment wise balance sheet, therefore, the overall profitability ratio will be taken for the purpose of calculation where segment wise accounts are not maintained.

In case of a multinational enterprise (MNE) group, the profitability ratio will be of the business segment covered by this Article of the entire group. Again, if segment accounts are not maintained, profitability ratio of the group as a whole will be taken. However, as per the proviso to paragraph 3, when we are taking the profitability ratio of the whole MNE group instead of just the beneficial owner, we must ensure that the profitability ratio of such MNE group is higher than the profitability ratio of the beneficial owner. This provision is made so that no manipulation is done by a beneficial owner by decreasing the profits of the beneficial owner unit for any tax advantage. For availing the benefits of paragraph 3, MNE group is under the obligation to ensure that the applicable profitability ratio is made available to the Contracting State (State B).

Paragraph 4 provides for definition of "MNE group" as a group that has two or more enterprises having residence of tax in different jurisdictions, and which is required to either prepare a Consolidated Financial Statement. Paragraph 4 also limits the scope of Article 12B by providing those payments that fall within the definition of "royalties" as provided under Article 12 and those that fall within the definition of "fees for technical services" as provided under Article 12B will not be covered under the definition of ADS under Article 12B

Paragraph 5 gives the definition of "automated digital services" as:

> *"5. The term "automated digital services" as used in this Article means any service provided on the Internet or another electronic network, in either case requiring minimal human involvement from the service provider."*

The definition and the interpretation (as per the Commentary) is very similar to the one given by OECD[17]. The positive list for the same has been given in Paragraph 6 and the negative list has been given in the Commentary itself. Paragraph 5 and 6, read together are said to provide certainty and flexibility. However, a minority of the members are of the opinion that this definition is highly flexible and can lead to increased uncertainty and lengthy disputes.

Paragraph 7 provides that Article 12B will not apply in cases where the ADS deals with services the income from which would qualify as "royalties" or "fees for technical services", as provided under Article 12 and Article 12A. However, since Article 12A excludes from its ambit all payments that are made by consumers for their own personal use and enjoyment, Article 12B would apply to all such payments.

Another exclusion has been provided in Paragraph 8. This exclusion would apply if XYZ Inc had a PE or fixed base in State B, provided the payment is in connection with such PE or fixed base or as defined under Article 7. Such payments will be taxed in accordance with Article 7, where profits are attributable to PE and in accordance with Article 14, where the profits are attributable to the fixed base.

Paragraph 9 lays down the principle for attributing an income to State B. The income from ADS will be said to arise in State B in two circumstances: (1) when the underlying payment is

[17] Organisation of Economic Cooperation and Development (OECD), G20 Base Erosion and Profit Shifting Project, *Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint: Inclusive Framework on BEPS*, (October 14, 2020) Box 2.1 -2.2

made by a resident[18] of State B or (2) when the underlying payment is made by a non-resident who has a permanent establishment or fixed base in State B and such payment was borne by the permanent establishment or fixed base. Even if the service provided by XYZ Inc falls within the definition of "automated digital service" as per paragraph 5, it must fulfill the ingredients given under paragraph 9 for being treated for taxation in accordance with Article 12B.

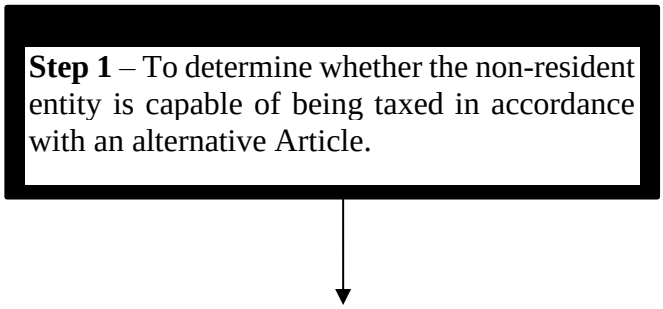
Paragraph 10 states that if there is a business entity that is a resident in State B and one of the payers of XYZ Inc (which is a resident of State A), however, the business entity has a PE or fixed base in State A itself and the payment and the underlying payment is borne by such PE or fixed base in State A, then this will not form part of income arising in State B as defined under paragraph 9.

It is interesting to note that paragraph 75 of the commentary to Article 12B is recognising the issue of not including "value of data" for the purpose of taxation when it gives that the rule under paragraph 8 operates with respect to "payment" and not "location". In other words, XYZ Inc., which is located in State A, provides search engine to users that are located in State B. These users are not required to make any payment for the said service; XYZ Inc. is only collecting data in return of providing the users with search engine service for free. This data collected would allow PQR Inc., which is located in State C, to give online advertisement targeting users in State B, through XYZ Inc. XYZ Inc is receiving payment directly from PQR Inc. and not from any user located in State B, therefore, even though a value was derived from State B, the tax will not be paid in State B. However, no solution for the same has been given in the Article.

Paragraph 11 deals with related party transactions. According to paragraph 11, if M Inc., being a resident of State B, and XYZ Inc. are related parties and the transaction that takes place between them exceeds the amount computed according to arms' length principle, then Article 12B will only apply to the arm's length price and not the whole amount. The exceeding amount will be taxed according to the domestic laws of each Contracting State.

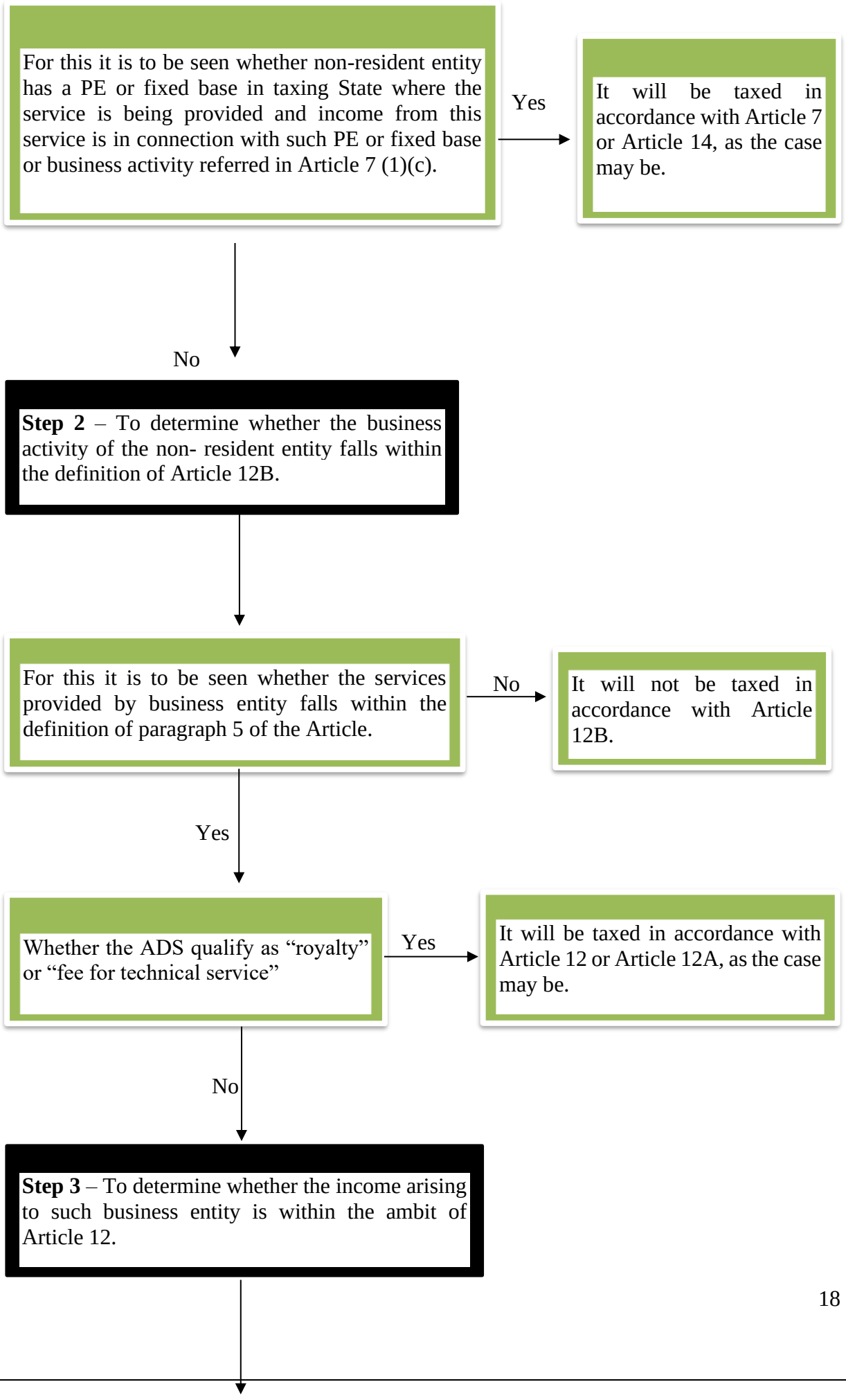
The entire article is silent on the mode of imposing tax; therefore, a State is free to apply its own laws which can be levied either through deduction at source or individual assessment. Also, Article 12B does not provide for any thresholds that are to be complied with.

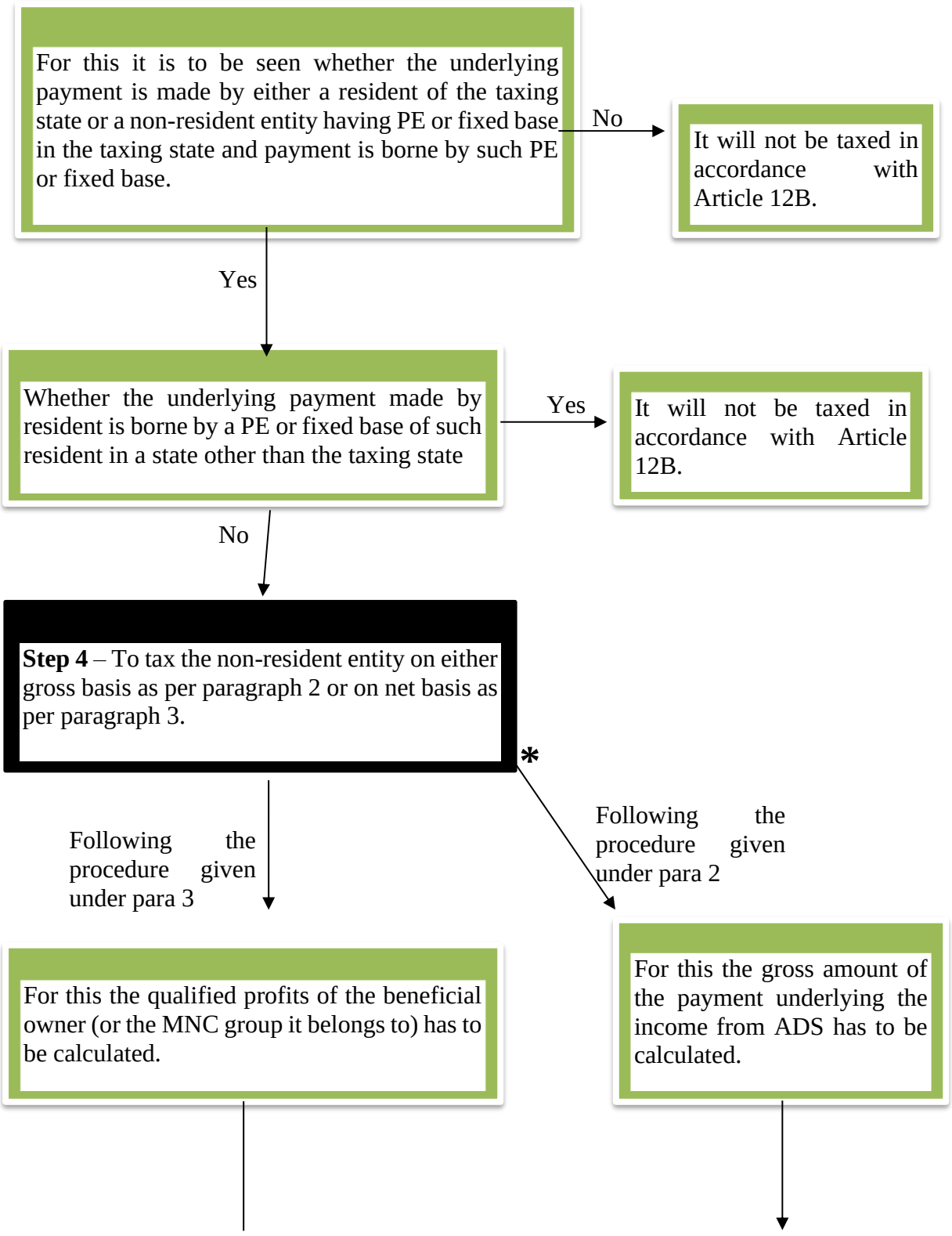
Application of Article 12B[19]:-



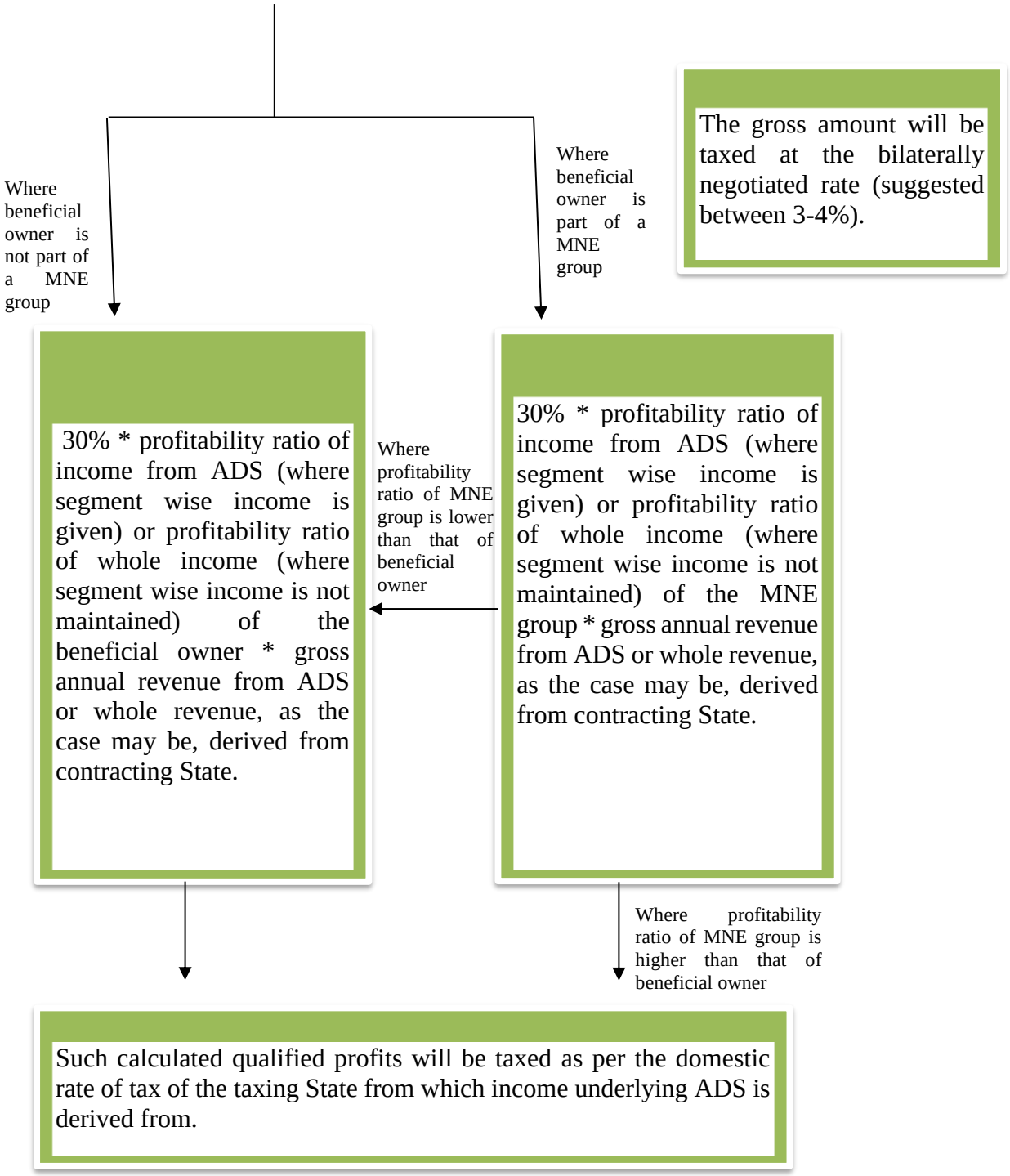
[18] The status of resident and non-resident will be determined according to the provision of Article 4 of UN Model Double Taxation Convention.

[19] LEONARDO THOMAZ PIGNATARI, *The Qualification of Technical Services in Brazilian Double Tax Treaties and the Possible Impacts of the Adoption of Article 12B, UN Model Convention*, Intertax, Vol. 49 Issue No. 8/9 (2021)


For this it is to be seen whether non-resident entity has a PE or fixed base in taxing State where the service is being provided and income from this service is in connection with such PE or fixed base or business activity referred in Article 7 (1)(c).
Yes
It will be taxed in accordance with Article 7 or Article 14, as the case may be.
No
Step 2 – To determine whether the business activity of the non- resident entity falls within the definition of Article 12B.
For this it is to be seen whether the services provided by business entity falls within the definition of paragraph 5 of the Article.
No
It will not be taxed in accordance with Article 12B.
Yes
Whether the ADS qualify as "royalty" or "fee for technical service"
Yes
It will be taxed in accordance with Article 12 or Article 12A, as the case may be.
No
Step 3 – To determine whether the income arising to such business entity is within the ambit of Article 12.



*Application of Paragraph 2 and 3 is subject to Article 8



IV. CRITICAL ANALYSIS & OBSERVATIONS

Many defects have been noted in the Article 12B proposal.[20] The scope of Article 12B is limited as the scope has been made narrow by only addressing Automated Digital Services. These services are being provided on the internet by minimal human intervention. This narrows down the tax base of a country, therefore, a country would want a solution that is broader and would result in a broad tax base. Such an approach would help formulate a tax design that is stable

[20] MEYYAPPAN NAGAPPAN, '*Digital Taxation: Can the proposed Article 12B of the Un Model work*?', 127 taxmann.com, pg. 765 (2021).

for a long taxation regime. The digital economy mostly has US based businesses and USA would not agree to a bilateral negotiation that is discriminatory to USA based businesses. Again, the Article 12B does not provide for any threshold. The administrative hurdle that it aims to cross by providing a simplified approach, it is unable to due to no threshold requirement. This includes even the small and marginal non-resident entities within the scope of taxation and increases administrative burden for a small amount a revenue. Thereby, unable to balance between the administrative cost and revenue benefit.

A large minority of members of the Co-ordination Committee have argues against the Article.[21] The first argument raised was that the allocation of profits of an MNE group is a multilateral issue and should be answered through multilateral instruments. Taxing on a gross basis can also lead to excessive or double taxation, considering that international taxation is multilateral issue. Also, the definition of income from automated digital services was said to be insufficient. The application of this Article can significantly increase the administrative burden and cost; inclusion of a threshold can provide a harmonious balance between the cost and the interest of receiving revenue. Further, Article 12B focuses on the source of payment and does not take into consideration the value generated by data collection. Therefore, in a case where a business entity targets the customers of a State by advertising in that State using online platform, this Article will not convey any taxing rights to the State which is the market state.

On the other hand, according to Mitsishiro[22], the proposal given by OECD is complex and may become an administrative challenge for the developing countries. Therefore, the UN model of taxing has been preferred over the model that is being prepared by OECD. Providing a design for taxation within the framework of existing U.N. Model Tax Convention would ease the administration aspect of taxation. Further, the existing SEP principle can still be applicable which ensures a fair tax allocation to developing countries. The new taxation approach shall be consistent with the existing rules and obligations elimination of double taxation. The solution must take into account developing countries perspectives.

However, again, Chand and Vilaseca[23] state that the UN proposal of Article 12B deserves a low ranking relying on two points. First, the Article 12B have a limited scope and only applies ADS. Consumer Facing Businesses (CFB) has been kept out of scope of Article 12B, this becomes even more evident from the commentary where we can see that many business models given in the negative list can be considered in CFB. As against its aim, this goes against the interest of the developing countries by depriving them of valuable share of revenue from taxing digital businesses covered under CFB. Secondly, the lack of threshold provided by Article 12B leads to a disproportionate administrative burden of the revenue collecting authority as well as on the tax paying assessee in comparison to the benefit of taxing these small and marginal enterprises (SMEs) as neither do they generate sufficient revenue to justify the administrative cost of taxing them nor do they themselves have the resources to meet the burden of additional computing cost and registration in every country for giving effect to the proposed treaty provision. Further, it is seen that when tax is levied on gross basis, there are chances of it being

[21] Supra note 14.
[22] HONDA MITSUHIRO, *Developing Countries' Perspectives on the Digitalization of the Economy – Focusing on the U.N. Initiatives*, Public Policy Review (Policy Research Institute, Ministry of Finance, Japan), Vol.17, Issue No.1 (January, 2021).
[23] VIKRAM CHAND and CAMILLE VILASECA, *The UN Proposal on Automated Digital Services: Is it in the Interest of Developing Countries?*, Kluwer International Tax Blog (March 5, 2021) www.kluwertaxblog.com/2021/03/05/the-un-proposal-on-automated-digital-services-is-it-in-the-interest-of-developing-countries/

carried forward to the consumer. This means that the market jurisdiction will be collecting revenue at the cost of its own residents.

The Dialogue and Economic Laws Practice constituted a team and analysed UN Article 12B.[24] They found that although UN has 197 representatives, the Co-ordinators committee which proposed Article 12B consists of merely 25 members. These members were individual experts and not representatives of the States they belong to. They were only advising in individual capacity. This means that the UN proposal of Article 12B cannot said to be reflective of the opinions of all member states or even the majority member states. Further, after evaluating the OECD proposal, UN was of the view that a simplistic approach shall be adopted for administrative ease. However, the over simplistic approach adopted by UN can actually prove to be detrimental to the developing countries, as opposed to the aim of UN of providing a solution keeping in mind the perspective of the developing nations, especially in cases where the developing nation is not the State in which the tax paying entity is situated but it is the State in which the value is derived in form of users or data. Thirdly, the gross based taxation that has been adopted under Article 12B is usually adopted in cases where the income does not involve any significant investment or expenses for the underlying service on a routine basis. Gross based taxation is mostly done in cases of dividend income, royalty, interest income and other passive incomes. The ADS businesses do not involve such passive incomes. Also, ADS is not a singular source of income, it is a business segment and it is odd to have gross bases taxation for a business segment as a whole. Another point of criticism was that this proposal would require a large number of specific amendments in all tax treaties with each contracting state. This would in turn require a number of negotiations and deliberations with respect to the tax rate and other such provisions. This makes the entire process cumbersome, time consuming and, practically speaking, not feasible. Also, different negotiations with different contracting States means different tax rate across jurisdictions. This makes it even costlier for enterprises to comply with different requirements in different markets. Therefore, a major point raised was that Article 12B call for bilateral treaties, whereas for a sound taxation framework which would not have any gaps, a multilateral solution would be required.

V. CONCLUSION

Taking forward its taxing convention, the UN Article 12B model given a solution for taxing of the digital economy, however, it has failed in doing the same properly. After an analysis of the new Article 12B, I believe that the same cannot be the right solution for its intended purpose for the following reasons:

1. It only takes into account ADS business models. A negative list has been provided in the commentary. All business models in that list and all such similar business models have been kept out of the scope of digital taxation. Which means that it has a very narrow scope. Considering that ADS businesses are large in the US, this proposal would be against the US market and therefore, it would not agree to the same in any bilateral negotiations. In turn, most States would be wanting to having bilateral negotiations with USA as most tax would be collected from entities based in USA, the bilateral negotiations would fail at a large scale among majority of the States. The OECD model,

[24] AYUSH T, NISHANT S, SHEFALI M, STELLA J, *Taxation of Digitalized Economy: Analysing the United Nations Article 12B Solution*, The Dialogue and Economic Laws Practice (June 2021) available at <www.elplaw.in/wp-content/uploads/2021/06/The-Dialogue-Economic-Laws-Practice-Taxation-of-Digitalized-Economy.pdf> (accessed on June 2, 2022)

which even cover CFB models, would be able to cover the business models given in the negative list under CFB. It also provides for Amount C which enables taxation of any profit which escapes taxation design. This creates more certainty and is able to cover more business models under its ambit. Even the Equalisation Levy provision in India has a wider scope than Article 12B. Therefore, going through several bilateral negotiations for Article 12B whose scope is already incorporated in the unilateral efforts made by India does not provide India with any benefit.[25]

2. Another manner in which the scope of Article 12B is limited is that it does not take into consideration the profits derived from collection and processing of data sets. The tax is only collected in the country in which the payment is made and not in the country in from which data is collected or from which actual profit is derived by user interaction.
3. It has been repeatedly argued that the issue of international taxation is a multilateral issue and not a bilateral issue. Bilateral negotiations with each contracting country would be a cumbersome process. Also, bilateral negotiation means a different taxing rate for different contracting states and thereby creating gaps and chances of double non-taxation or insufficient taxation of an entity. In other words, the issue BEPS would increase due to several bilateral treaties suggesting different rates.
4. The Article is also completely silent about the procedure to be adopted. This means that the States have been provided freedom to negotiate on the final procedure that each contracting State will adopt for taxation. This will lead to even more taxation gaps between different States. A multilateral consensus, on the other hand, would provide uniform decision in the taxation rules which would help overcome the gaps in the international taxation structures.
5. Negotiating a multilateral treaty instead of a bilateral treaty is a way to avoid long cumbersome negotiations between two contracting states. Considering digital taxation being an urgent issue, bilateral treaty negotiations would cause even more delay in implementation of the digital economy tax. As can be seen from the commentary of UN proposed Article 12B, states have faced difficulty in reaching a consensus on the gross tax base, this only advocates towards having one negotiation where it can be finally reached at instead of having several repeated negotiations on the same subject. Good examples of successful multilateral instruments are WIPO, UNCLOS etc.
6. The next issue faced by Article 12B is that proposal for gross taxation. When taxation is done on gross bases, there is a chance of it being passed on to the customers. This means that the revenue collection is actually being done at the cost of its own residents. The products and services, in one's own state would become more expensive. This has been seen in the past with the implementation of the DSTs in France and UK, when Amazon, on implementation of the Tax, conveyed that the cost of the Tax will be passed on to the sellers of the marketplace whereas the Tax was actually meant to be imposed on the profits generated by Amazon through these States without having physical presence.[26] Even when EL was adopted in India, it was observed that many businesses, such as Apple Inc, were passing on the Tax onto the consumers in India.[27] It was only

[25] MEYYAPPAN NAGAPPAN, *Taxing Digital Services*, The Hindu Business Line (July 7, 2021).
[26] MARK SWENEY, *Amazon to escape UK digital services tax that will hit smaller traders*, The Guardian (October 14, 2020).
https://www.theguardian.com/technology/2020/oct/14/amazon-to-escape-uk-digital-services-tax-that-will-hit-smaller-traders.
[27] SACHIN DAVE, *Apple passes on 2 per cent equalisation levy to Indian consumers*, Economic Times (October 31, 2020)

Netflix that had actually absorbed EL and did not pass it to the consumers.[28] Which means that the overall objective behind these gross taxation mechanisms was not achieved.

7. With respect to threshold, UN was of the opinion that keeping threshold would be against the interest of the developing countries having a small size of economy. Therefore, the Article 12B design does not have any threshold provision. The consequence of the same is that Article 12B requires even SMEs to register in each State and pay tax on the small amount of profit that they are able to accrue from an economy. By making it in the interest of the developing nations, it was made the design against the interest of the SMEs. In this manner it would act as a barrier for these enterprises and they would not be able to expand their business through various jurisdiction.
8. UN has aimed at providing an over simplistic approach for the taxation of digital economy. However, due to the lack of any decisions on the tax rate or the procedure for taxation and gross taxation and other measures to make it simple, it has created a lot of disparities, confusion and lack of uniform decisions, making its implementation way more complex than what it entails to be.
9. A big reason for the failure of the proposal is that it was only designed by a group of 25 individual members who given their individual expert opinion and not given any representation of the respective states they belonged to. Even in that Coordination committee there was a large minority which did not agree to the proposal. The proposal was made in a haste, by taking the consensus of only a few individuals.

https://economictimes.indiatimes.com/industry/cons-products/electronics/apple-passes-on-2-per-cent-equalisation-levy-to-indian-consumers/articleshow/78962608.cms

[28] ANUMEHA CHATURVEDI and SACHIN DAVE, *Netflix won't pass on impact of 2% equalisation levy to India users*, Economic Times (August 6, 2022). https://economictimes.indiatimes.com/tech/technology/unlike-google-netflix-wont-pass-on-equalisation-levy-to-india-users/articleshow/85082405.cms?from=mdr

PROSCRIPTION OF TWO FINGER TEST – EVOLUTIONARY ANALYSIS OF RAPE ADJUDICATION IN INDIA THROUGH THE LENS OF MEDICAL JURISPRUDENCE

Sanskruti Madhukar Kale & Harshal Chhabra[*]

Abstract

The Two-finger test, which involves an invasive examination of the vagina, constitutes more than a mere medical examination. It serves to re-traumatize the victim of rape by bringing back the harrowing experiences of the crime, thereby subjecting them to further emotional and physical trauma. This paper thus examines the legal background of the two-finger test by analysing legislative frameworks, medical practices, and their respective backgrounds. The authors of this article have conducted a historical assessment of the evolution of rape legislation and legal proceedings in India. They also examine the problematic intersection of medical and legal considerations inherent in rape victim examinations and criticize its lack of constitutionality. The paper throws light upon the correlation between Medical Jurisprudence and Colonial methods of Rape adjudication in the country and how the latter has substantially influenced the former. The authors also try to briefly summarize the International and Domestic view regarding the questionably unscientific nature of the test and concomitant human rights violation. Topics such as Two-finger test on minors, the validity of the test concerning criminal procedure code's section 52, the Role of medical professionals while carrying out medical examinations of rape victims vis-à-vis two-finger test, and other drastic consequences of the same are also discussed in the paper at hand.

Keywords – Two-Finger test, Rape, Medical Jurisprudence, History of Rape Adjudication, Colonial Rape laws

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I. INTRODUCTION

Time and again, the criminal justice system has miserably failed to provide justice to rape victims as it has treated sexual violence solely as a women's problem instead of recognizing it as a more significant societal issue that necessitates complete changes in the system. Various legal scholars and researchers have asserted that it is high time for the legal system to reinvent their approach towards rape adjudication and break away from colonial ways, formulated upon misogynist presumptions, especially the outdated medical jurisprudential examinations carried upon the victims.

The paper focuses on a critical review of the Two Finger Test by examining the historical background of rape adjudication in India, the emergence of medical jurisprudence, the influence of colonial laws on rape cases, and the current legal status of this practice. This paper aims to illuminate the problematic elements of the Two Finger Test and its ramifications for the Indian legal system and rape victims.

Firstly, the concept of Rape has been explored, followed by definitional scrutiny of Rape from a historical, legal, social, and contemporary perspective. A historical and evolutionary analysis of rape legislation in India has also been specified to make the study more encompassing and informative.

Secondly, this research paper discusses the emergence of medical jurisprudence in rape cases in India, as well as the impact of colonialism on this practice. The study explores the meaning, relevancy, and historical backdrop of medical jurisprudence, most notably the undue emphasis placed in rape cases on the virginity of women and their prior sexual history.

Thirdly, the Two finger test has been critically and comprehensively summarized by observing how it affects the individual on whom it is conducted and the misogynist presumption on which it is founded.

Further, the paper goes on to evaluate Two-finger test from several perspectives, such as blatant Medicalisation and Institutionalization of the test without a reliable scientific basis, the role of professionals in carrying out the test, the validity of the test concerning some sections of the criminal procedure code, rationality of the test when carried out on minors, ramifications of the test and domestic as well as international view regarding the test's credibility.

II. RAPE – A TRAGEDY TO WOMANKIND

> *"Since then, I've always thought that under rape in the dictionary it should tell the truth. It is not just forcible intercourse; rape means to inhabit and destroy everything"*
>
> ~Alice Seabold, Lucky

Starting from the ancient Hebrews, who attributed responsibility to women for their own violation to the First Statute of Westminster in 1275, which marked the initial recognition of Rape as a crime of violence and a danger to public safety, the evolution of rape laws has been a complex process. [1] The history of rape legislation has witnessed a plethora of

[1] SHORTER EDWARD, *"On Writing the History of Rape." Signs*, Vol. 3, Issue No. 2, pg. 471–482, (1977), JSTOR.

definitions and interpretations. Etymologically, the roots of term Rape are found in the Latin word "*rapere*," which means "to snatch, to grab, to carry off." [2] According to Roman law, "*raptus*" is the act of forcibly removing a woman, whether or not there has been sexual contact.[3] In contrast, the same term meant kidnapping in medieval English law. However, it is important to note that the definition of rape, both as a term and as a social construct, has changed and continues to change depending on the situation, the victim, the survivor, the book, the context, the courtroom, the hospital, and the culture. Whatever the case, the act's hellishness is intact.

The World Health Organisation defines rape as sexual violence, which includes actions including verbal abuse, forced penetration, and a variety of coercive techniques, including physical force, intimidation, and social pressure. Some experts define it as an intentional demonstration of abuse that is committed against somebody based on the person's sexuality or gender.[4] However, in the Indian context, the societal ideal of womanhood is one devoid of sexual desires or one with a limited sexual drive restricted by the institution of marriage. Such principles are regarded in exceptionally high esteem as an embodiment of the family's honour. Because of this, rape in the Indian context is seen as more than just violence against specific women.[5] Here, rape and other acts of violence against women are control issues that indicate to hierarchical social structures where a dominant group rules at the expense of others.[6] Today, sexual penetration of the victim by the defendant without the victim's consent is referred to as rape in mainstream legal parlance.[7] The Supreme Court (hence referred to as the SC) defined rape as the "ravishment of a woman" by threats, fear, or trickery without her consent or against her will, as well as the "carnal knowledge (penetration of slightest degree)" of a woman, in Bhupendra Sharma v. State of HP.[8]

The current legal framework in India about rape and its adjudication is primarily governed by the Penal Law's section 375. This provision was first enacted in 1860 as a part of the IPC and was amended for the first time in 1983. Notwithstanding the amendment, the essential meaning and substance of the definition of rape remain consistent with the original enactment in 1860. Under section 375, IPC defines "Rape" as:

> *"A man is said to commit "rape" who, except in the case hereinafter accepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:"*

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http://www.jstor.org/stable/3173297.

[2] CORINNE SAUNDERS, *"Rape and Ravishment in the Literature of Medieval England,"* Boydell Brewer, 2001, pg. 20.

[3] KEITH BURGESS-JACKSON, *"A Most Detestable Crime: New Philosophical Essays on Rape."* Oxford University Press, New York, (1999), pg. 16.

[4] O' TOOLE and SHIFMAN, *"Gender Violence: Interdisciplinary Perspective,"* 1997.

[5] GEETANJALI GANGOLI, *"Controlling Women's Sexuality: Rape Law in India,"*1st ed., Bristol University Press, 2011, pp. 101–20, JSTOR.
https://doi.org/10.2307/j.ctt9qgkd6.9.

[6] TANNI CHAUDHURI and ARINDAM MANDAL, *"Rape of the subaltern: India's recent sexual violence in perspective."* International Review of Modern Sociology, Vol. 43, Issue No. 1, 2017, pp. 137–55, JSTOR.
http://www.jstor.org/stable/44510058.

[7] J. HERRING, *"Rape and the definition of consent."* https://www.jstor.org/stable/44283782.

[8] Bhupendra Sharma v. State of HP, (2003) 8 SCC 551, para 10-11.

"Firstly: Against her will,"

"Secondly: Without her permission,"

"Thirdly: With her consent, after obtaining her consent by putting her or anybody else she is related to, in fear of harm or death,"

"Fourthly: With her consent, when the guy is aware that he is not her husband and that she is giving him her assent because she thinks he is another man to whom she is or thinks she is legally wed,"

"Fifthly: The offense of rape can be committed when a woman gives consent to sexual intercourse but due to mental incapacity caused by mental illness, being under the influence of drugs or alcohol, or the administration of a substance by the perpetrator or someone else, she is unable to comprehend the nature and consequences of her actions at the time of giving such consent,"

"Sixthly: with or without her agreement, when she is under sixteen,"

"Explanation provided for this section says, Penetration is sufficient to constitute the sexual intercourse required for the rape offense while the exception establishes that the Sexual intercourse between a man and his wife is not rape if the wife is not under fifteen."

However, the history of rape adjudication in India is not exactly enchanting. It has been proposed that the legal concerns with defining *rape* as a crime arose in colonial India to govern a woman's sexuality instead of protecting her integrity as a human being.[9] During the British Rule, the adjudication of rape was primarily characterized by colonial apathy rather than a deliberate effort to act upon a heinous crime.[10]

During the early colonial period, Rape laws were heavily influenced by the English common law and the Hanafi school of Islamic criminal law. In addition, a significant figure in shaping English law on rape during the eighteenth century was Sir Matthew Hale. Hales had a direct impact in colonial India since upper-level judges, all of whom were British, routinely mentioned him in their legal decisions. He defined *rape* as the vaginal penetration of a female over ten years by a man (or men) against her will.[11] Rape was described by Sir Matthew Hale as, "*The carnal knowledge of any woman over the age of ten years against her will and a woman-child under the age of ten years, with or against her will.*"[12] However, what needs to be noted in this case is that Hale was primarily concerned with the alleged issue of untrue accusations and thus portrayed rape victims as a particular class of witnesses to whom certain standards of truth applied. Therefore, he placed unsurmountable attention on the victim's "character, body, and behavior before, during, and after the alleged rape." Hale argued that the presence of a woman's prior sexual experiences, her prompt reporting of the incident to the police, and

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[9] V. DAS, *"Sexual Violence, Discursive Formations and the State,"*1996.

[10] ELIZABETH KOLSKY, *"The Rule of Colonial Indifference: Rape on Trial in Early Colonial India, 1805-57."* The Journal of Asian Studies, Vol. 69, Issue No. 4, 2010, pp. 1093–117, JSTOR. http://www.jstor.org/stable/40929285.

[11] ELIZABETH KOLSKY, *"The Rule of Colonial Indifference: Rape on Trial in Early Colonial India, 1805-57."* The Journal of Asian Studies, Vol. 69, Issue No. 4, 2010, pp. 1093–117, JSTOR. http://www.jstor.org/stable/40929285.

[12] ELIZABETH KOLSKY, *"The Rule of Colonial Indifference: Rape on Trial in Early Colonial India, 1805-57."* The Journal of Asian Studies, Vol. 69, Issue No. 4, 2010, pp. 1093–117, JSTOR. http://www.jstor.org/stable/40929285.

any physical evidence of violence were all crucial elements necessary to refute the notion that the victim had voluntarily engaged in sexual activity then made false claims about it. These factors were considered crucial in proving the absence of consent in rape or sexual assault prosecutions.[13]

The first Indian Law Commission and Thomas Macaulay's draft Indian Penal Code, which was completed and handed over to the Indian government in 1837, defined rape as, "*It is forbidden for a man to indulge in sex with a woman in any of the subsequent five instances: contrary to her will; without her consent while she is unconscious, and with her consent after inducing fear of harm or death in her; with her consent after convincing her that he is her husband; or when the girl is under the age of nine*."[14] This first draft definition of Rape didn't undergo any substantial change until the 1983 amendment came into the picture. Encouraged by the 84th Law Commission Report on "*Rape and Allied Offences: Some Questions of Substantive Law, Procedure and Evidence of 1980," i*n 1983, significant changes were made to the IPC and Indian Evidence Act, including treating the victim's testimony in rape cases as highly reliable and including provisions for defining custodial rape. These amendments, commonly called the "post-Mathura amendments," were considered significant. However, they did not address a crucial change: a woman's sexual history and overall behavior should not be admissible as legal evidence in rape cases.[15]

The 156th Law Commission Report on Indian Penal Code was issued in August 1997. The 172nd Law Commission Report, which reviewed rape laws, was released in March 2000, and the Malimath Committee Report on Criminal Justice Reforms, published in 2003, provided the foundation for the Justice Verma Committee report. This report was the first all-encompassing document on sexual violence against women in India that prompted the President of India, Dr. Pranab Mukherjee, to issue an ordinance on February 3, 2013, based on the report's recommendations. This was followed by the amendment act 2013, which modified the Criminal law. The amendment of 2013 certainly brought some substantial changes by broadening the definition of Rape "*to extend it beyond penile-vaginal penetration and by including early penetration by the penis of orifices other than the vagina of a subject woman, as well as penetration by objects or body parts other than the penis, into the vagina, and other orifices of a woman*." The amendment highlighted that mere absence of physical resistance on part of the woman cannot be construed as her consent, under the penal statute of India. Her non-consent can also be communicated through verbal and/or nonverbal expressions. It further affirmed the provisions of the UN Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985, along with that the 1966 International Covenant on Economic, Social, and Cultural Rights, that entitle rape survivors to legal procedures and further to not subject them to re-trauma and/or violate their physical, mental, or emotional integrity or dignity.

Even though Rape laws have undergone several modifications from the first inception, unfortunately, the heinous prejudices implanted in the system by a bunch of English men such as Hales regarding the construct of Rape still exist. They have not only played a

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13 TEJASWINI MALLICK, *"An Extensive study of Rape Laws in India,"* (27 Dec 2021).
[14] Indian Law Commission Report, 1837.
[15] P BAXI, *"Rape, Retribution, State: on whose bodies?,"* Economic and Political Weekly, (2000), pp. 1196- 1200.

deciding role in determining the Rape adjudication in India for the last hundreds of years but have also given birth to a bunch of other prejudices that prevalently persist in the country even today, and one such example is the Two Finger Test.

III. MEDICAL JURISPRUDENCE AND RAPE ADJUDICATION IN INDIA – A COLONIAL LOVE STORY

When the world saw the dawn of science to gain knowledge of the truth and make justice, medical jurisprudence permeated and became deemed a crucial tool at the beginning of the 20th century, even in law. There was a claim by early architects of medical jurisprudence, i.e., The Colonial masters, that India required medical jurisprudence that was different from European forensic science. Because they considered that Indians' oral evidence could not be trusted, especially in cases involving women who claimed to have been raped, as they were "unreliable."

In 1856, Norman Chevers authored one of the first books on medical law in India entitled "*Report on Medical Jurisprudence in the Bengal Presidency*." Within its pages, Chevers established a standardized protocol for physicians conducting physical examinations in cases of the alleged rape. His work also delved into the critical role of medical jurisprudence in protecting men from potentially baseless accusations of rape, particularly those made by women deemed of questionable character. He continued by reinforcing the concerns of Sir Mathew for male defendants, by stating that, "*There is always a reason to believe that persons are, by no means rarely, wrongly charged with its commission*."[16]

James Gribble, influenced by Sir Matthews Hales, proposed in 1885 that physicians should pay attention to the woman's bodily surface rather than just looking for signs of any possible criminal harassment that may have been perpetrated upon her. These physical cues could be general wounds or marks that indicate assault on the woman's body that might have been self-inflicted, whether her breasts look manipulated or virginal, or whether she gives off the impression of being addicted to masturbation or self-abuse.[17] Age, socioeconomic status, prior sexual history, and conduct of the victim were all common subjects of "medical" research. During that period, the victim's social status and caste were seen to be convincing proof under the ambit of Medical evidence. This was because "experts" believed that those in "respectable" positions and castes were unlikely to submit false allegations.

In his 1888 essay, Surgeon Major Isidore Lyon claimed that false accusations of rape were widespread in India. In such circumstances, medical evidence was often the only trustworthy proof available. He emphasized that it was necessary to consider the possibilities of trickery used by women seeking vengeance or extortion during the adjudication of rape cases since this could demonstrate their familiarity and tendency to participate in sexual activities. This viewpoint ultimately influenced the genesis of the contentious two-finger test. Lyon advised the Medical Professional examining to take note of the woman's physical development, particularly her capacity for resistance, as well as any wounds or bruises that would suggest an altercation. He also noted that self-

[16] NORMAN CHEVERS, *"Report on Medical Jurisprudence in the Bengal Presidency,"* Indian Annals of Medical Science 3 (1854), pp. 243–426.
[17] JAMES DUNNING BAKER GRIBBLE, *"Outlines of Medical Jurisprudence for India"* (1885), 3rd edn., pp. 239–42.

inflicted wounds could be used as evidence in fraudulent cases and should be considered.[18]

Previous Medical Jurists emphasized various characteristics, including the victim's virginity, sexual history, socioeconomic standing, caste, class, and ability to resist. However, Dr. H. W. V. Cox introduced the notion that the study of the hymen was the key to determining the occurrence of rape. This idea led to the development of various inhumane tests disguised as medical evidence, including the notorious Two finger test.

This clearly shows how, when Medical Jurisprudence entered the field of Rape adjudication in India, it had no other way around marrying the above-mentioned prejudices because that was what the law of White masters entailed. During the colonial era, medical jurists placed more emphasis on examining the physical indications of feminine deception rather than those of violent crimes.[19] In India, where the chastity of a woman and sexual background were seen as fundamental variables in rape adjudication, medical jurists of the colonial era viewed Hale's Warning as essential. They believed that non-virgins were unreliable compared to young girls and virgins, because they might exhibit physical "signs of defloration" that were believed to indicate whether or not a rape had taken place.[20] This way, the traces of starkly prejudiced Haleian view regarding Rape and the so-called expert successors who furthered the blinkered practises, have influenced medical jurisprudence in India ever since its advent.

> *Indian Society was always Patriarchal; it's just that the British exacerbated it and justified the exacerbation under the name of science and medical jurisprudence.*

IV. TWO FINGER TEST: COERCED TO REVISIT THE DEATH IN LIFE

On 31st October 2022, the SC in State of Jharkhand v. Shailendra Kumar Rai reiterated that, for the ingredients of Section 375 of the Penal Law of India, it is immaterial to assess whether a woman is "habitual to sexual intercourse" or "habituated to sexual intercourse," thus the "*two-finger test*" or "*pre vaginum test*" must not be conducted. This was not an unprecedented occurrence, as the judicial forums in India have repeatedly condemned the application of this retrograde and intrusive test in rape and sexual assault cases. According to the SC, this alleged test has no scientific foundation and neither supports nor annuls claims of rape. Instead, subjecting rape victims to the two-finger test serves to cause them further harm and psychological anguish, effectively causing them to relive their traumatic experience. Furthermore, this practice violates their inherent dignity and represents a solemn injustice against them.[21]

A. WHAT IS TWO-FINGER TEST?

The two-finger test, also known as the virginity test, is an intrusive medical examination, through which, a woman's virginity and her sexual history are determined.[22] The test

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[18] ISIDORE B. LYON, *"Lyon's Medical Jurisprudence for India with Illustrative Cases"* (1888) 10th edn, pg. 3.
[19] *Id.*
[20] MARTIN WIENER, *"Men of Blood"* (2004), pg. 82.
[21] State of Jharkhand v. Shailendra Kumar Rai, 2022 SCC OnLine SC 1494.
[22] ARNAV GULATI, *"Medico-Legal Dimensions of the Two-Finger Test."* JOUR, (21 March, 2022).

entails a physical examination of the female vagina to assess the flexibility of the vaginal muscles and verify whether or not the lining of the hymen is distensible. *"During the performance of the two-finger test, medical practitioners insert two fingers into the woman's vaginal canal and the ease with which the fingers penetrate her are assumed to be in direct proportion to her sexual experience."* It is assumed that the woman is sexually active if the fingers can be inserted easily, while it is assumed that the woman is chaste if the hymen is still intact and penetration is difficult or impossible. Such a practice is absolutely in violation of the law and utterly unethical.[23] It has been hundreds of years since the Two-finger test has been employed in Rape Adjudication in the country. However, it is surprising how the "Experts" in Medical Jurisprudence failed to consider a basic fact, i.e., the vaginal canal's shape and size are highly variable muscle structures that depend on individual characteristics such as *"pubertal or developmental stage, physical position, and hormonal changes."* Stress and sexual desire can also significantly impact the size and suppleness of the canal, which in turn can alter how easily fingers or other objects can be inserted or removed.[24] Therefore, it is crucial to consider these dynamic factors while conducting any medical examination of the vaginal canal, primarily when the results may be used to draw conclusions about crime as consequential as Rape.

B. ROLE OF MEDICAL PROFESSIONALS:

If the fingers advanced smoothly and easily, the doctors specifically state in their report that the woman is "habituated to sexual intercourse." Because a doctor testifies in court as an expert witness and gives out the test results, the interpretation of the doctor's findings affects whether or not a woman's allegation is taken seriously.[25] The approach adopted by medical professionals becomes very important in a circumstance such as this. Because it cannot be denied that if doctors lack the appropriate education and experience, their gender biases and presumptions might influence the outcome of the test. The medicalization of these harmful practices provides them with scientific respectability, which in turn justifies public acceptance and institutionalisation.[26] And, to worsen the worse, doctors around the country, prevalently perform this test regardless of whether the survivor is under 18 or an adult.[27]

C. MEDICALISATION AND INSTITUTIONALIZATION OF TWO-FINGER TEST:

Medical treatment of the victim plays an important role not only for the victim's immediate alleviation but also in providing fundamental evidence for the trial.[28] After filing a First Information Report, the forensic examination of a rape victim begins with urgent first assistance and then proceeds to seek informed consent for medical

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[23]State of Gujarat v. Rameshchandra Ramabhai Panchal, 2020 SCC OnLine Guj 114.

[24]J LLOYD, NS CROUCH, MINTO CL, LIAO LM, CREIGHTON SM, *"Female genital appearance: 'normality' unfolds."* (2005), BJOG. pp. 643–6.

[25]AMITA PITRE and LAKSHMI LINGAM, *"Rape and Medical Evidence Gathering Systems: Need for Urgent Intervention,"* (2013), Economic and Political Weekly, Vol. 48, Issue No. 3, pp. 16–17, JSTOR. http://www.jstor.org/stable/23391250.

[26] N KHAMBATI, *"India's two finger test after rape violates women and should be eliminated from medical practice,"* (2014), British Medical Journal, pp. 348.

[27] J. BAJORIA, *"Doctors in India Continue to Traumatise Rape Survivors with the Two – Finger test."* (2017), Human Rights Watch.

[28] Assessment of the Criminal Justice System in Response to Sexual Offences, In re, (2020) 18 SCC 540.

examinations. The medical examination of a rape victim is considered a "medico-legal emergency" and is carried out as per Section 164A of the Criminal Procedure Code, 1973. Because rape fundamentally breaches a woman's bodily autonomy, her body is recognized as the most crucial evidence for the judicial procedures that follow. Nonetheless, undergoing a forensic examination can be extremely traumatizing for a victim because it can lead her to relive the event.[29] Therefore, it is necessary to make her feel comfortable throughout the process, yet, they subject the rape victims to the inhuman two-finger test - an unscientific, unconstitutional protocol that emanates from societal norms of preserving the chastity of women and with its overtly intrusive characteristics, recreates the first penetrative attack, which causes trauma through "*re-rape*"[30]

D. WHETHER TWO FINGER TEST IS COVERED UNDER SECTION 52 OF THE CRIMINAL PROCEDURE CODE, 1973?

The Criminal Procedure Code's Section 53 requires a medical practitioner to examine the accused at the request of a police officer, whereas the subsequent section requires the medical examination to take place as quickly as possible following the arrest, and the amendment of 2005, explains these clauses for providing with a passage for medical evaluation.

In this context, the Sr. Sephy v. CBI,[31] 2023 decision is important because it addresses the legality of the Two Finger test under Section 52 of the Code of Criminal Procedure. The Delhi High Court ruled that the virginity test is not included as a procedure in Section 53's explanation for the medical examination of an accused person to establish facts that may furnish evidence. It is also important to note the legislative intent because while the 2005 amendment explained the section, the Indian Parliament categorically mentioned several sorts of medical examination, thus leaving no room for alternative techniques to be included within its scope.

The Supreme Court ruled in Selvi v. State of Karnataka[32] that the scope of medical examination under Section 53 should be governed by the rule of "ejusdem generis" and that the section's explanation requires the use of modern and scientific techniques for medical examination of an accused person. This requirement does not apply to the Two Finger Test because it is neither modern nor scientific but somewhat outdated and irrational. It is worth noting that such experiments on women are prohibited by modern medical and scientific regulations as they're outrageous to human dignity.[33]

E. TWO FINGER TEST ON MINORS

ICPD argued that gender discrimination frequently starts in childhood,[34] thus held that testing a minor's virginity is against their international rights to protection, participation,

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[29] DR. INDRAJIT KHANDEKAR and KHUSHALI MAHAJAN, *"The Dismal State of Medico-Legal Services for Rape Victims in India,"* (2020), 6.1, RSRR 170.
[30] N KHAMBATI, *"India's two finger test after rape violates women and should be eliminated from medical practice."* (2014) British Medical Journal, pp. 348.
[31] Sr. Sephy v.CBI, 2023 SCC OnLine Del 717.
[32] Selvi v. State of Karnataka, (2010) 7 SCC 263.
[33] Sr. Sephy v.CBI, 2023 SCC OnLine Del 717.
[34] Report of the International Conference on Population and Development, Cairo, 5–13 September 1994, New York: United Nations; 1994.
https://undocs.org/A/ CONF.171/13/Rev.1.

and non-discrimination.[35] Given their developing capacity for decision-making, children who consent to virginity testing are not likely to be informed, free, or devoid of compulsion, therefore prevent anyone, especially kids, from being subjected to the traumatizing two-finger test; concerned authorities should take additional precautions.[36]

F. DOMESTIC PERSPECTIVE ON TWO FINGER TEST

The Honourable SC in "State of Jharkhand v. Shailendra Kumar Rai"[37] relying upon the decision in "Lillu v. State of Haryana"[38] and the "Guidelines & Protocols: Medico-legal care for survivors/victims of sexual violence" issued by Ministry of Health and Family Welfare, Government of India in year 2014, observed anyone who conducts the Two Finger test would violate the Supreme Court's directions and be considered guilty of misconduct.

In State of "Jharkhand v. Shailendra Kumar Rai"[39] the SC directed the Union Government as well as the State Governments to:

All government and private hospitals should be made aware of the amended guidelines regarding the Two-finger test by the Ministry of Health and Family Welfare.

Workshops for healthcare professionals should be conducted to inform them of the correct approach to follow when examining individuals who survived sexual assault and rape.

The medical school curriculum should be examined to ensure that the Two-finger test is not advocated as a procedure for examining sexual assault and rape survivors.

The Ministry's guidelines of 2014 declare unequivocally that the state of the hymen is insignificant because it can be torn for various reasons, including cycling, riding, or masturbation. An intact hymen does not always imply the absence of sexual violence, and a torn hymen does not always indicate previous sexual intercourse. As a result, when recording examination results in cases of sexual violence, the hymen should be treated as any other component of the genitals. Only facts related to the assault should be reported, such as fresh tears, bleeding, and swelling.

G. INTERNATIONAL PERSPECTIVE ON TWO FINGER TEST

Article 5 of the 1979 *"Convention on the Elimination of All Forms of Discrimination Against Women,"* of which India is a signatory, mandates that states should take appropriate steps to transform social and cultural norms and practices that perpetuate gender-based stereotypes, prejudices, and discriminatory practices. The goal of such measures is to eradicate all sorts of routines based on the idea that one sex is inferior or superior to the other.

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[35] *Convention on the Rights of the Child*, United Nations General Assembly, forty-fourth session, 1989–1990. New York: United Nations, 1989
http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf

[36] Joint General Recommendation/General Comment No. 31 of the Committee on the Elimination of Discrimination against Women/ General Comment No. 18 of the Committee on the Rights of the Child on Harmful Practices, New York: United Nations, 2014.
https://documents-dds-ny.un.org/doc/UNDOC/GEN/N14/627/78/PDF/N1462778.pdf?OpenElement.

[37] State of Jharkhand v. Shailendra Kumar Rai, 2022 SCC OnLine SC 1494.

[38] Lillu v. State of Haryana, 2013 SCC OnLine SC 174.

[39] State of Jharkhand v. Shailendra Kumar Rai, 2022 SCC OnLine SC 1494.

In 2018, the UN Human Rights Office, World Health Organisation, and UN Women issued a joint statement titled "*Eliminating Virginity Testing: An Interagency Statement*," which called for the absolute eradication of virginity testing. The statement highlights that these tests are medically redundant, unreliable, and lack scientific validation. The statement asked governments, health professionals, international, regional, and national health organizations, as well as communities, to take action to ban the Two-Finger Test and set specific guidelines.

The statement makes explicit recommendations for removing virginity testing from medical practice. Healthcare Professionals should be enlightened about the practice's lack of scientific validity and adverse effects on human rights. Communities should lead awareness campaigns to combat detrimental social conventions. Governments and health authorities should implement supportive policies and legislation to end virginity testing. The World Health Organisation and other endorsing organizations reiterate their commitment to supporting all initiatives to stop virginity testing for the benefit of women, girls, communities, and national governments.

In a case concerning writ petitions challenging the use of the "Two-finger Test" and "Hymen Examination" in rape and sexual abuse cases, Justice Ayesha A. Malik of the Pakistan Supreme Court ruled that conducting these tests to determine the virginity of female victims of sexual violence is unscientific and lacks medical basis. Therefore, the tests have no forensic value and should not be carried out.[40]

H. CONSEQUENCES:

The Two-finger test damages the victim's case in court and has an enormous impact on their social, psychological, and emotional well-being. Establishing a victim's consent based on their sexual history can make the victim feel they are being accused of the crime committed against them, which is one of the principal effects of the Two-finger. It is also worth noting that, in the Indian context where "virginity of women" is a topic which carries with itself long-standing, patriarchal stigma, it is a strong enough cause to deter the victim from visiting a court of law to seek justice, as the judicial system is found to be marginalizing and identifying them as guilty even before the perpetrator is brought to trial.[41]

To begin with, the examination itself has a tendency to be painful and anxiety-provoking.[42] Secondly, the test can injure the genitalia, leading to complications such as infection and bleeding due to its invasive and forced character. Multiple girls may be tested for virginity at once, frequently by unskilled individuals or in unsanitary settings using methods like wearing the same gloves again, thus giving rise to the chance to increase the likelihood of HIV and STIs.[43]

According to research, the negative effects of Two finger test include extreme anxiety, panic attacks, despair, guilt, shame, low self-esteem, bad body images, dysfunctional sex lives, social isolation, and fear of death. The test also produces false categories of "virgin"

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[40] Sadaf Aziz v. Federation of Pakistan, WP No. 13537 (2020) (Pakistan Supreme Court).
[41] DR. INDRAJIT KHANDEKAR and KHUSHALI MAHAJAN, *"The Dismal State of Medico-Legal Services for Rape Victims in India."* (2020) 6.1 RSRR 170.
[42] S. LECLERC-MADLALA, *"Protecting girlhood? Virginity revivals in the era of AIDS. Agenda: Empowering Women for Gender Equality."* (2003), 56 pp. 16–25.
[43] LE ROUX L, *"Harmful traditional practices, male circumcision, and virginity testing of girls and the legal rights of children."* (2006), Cape Town: University of Western Cape.

or "non-virgin," which has negative psychosocial implications.[44] Virginity tests can cause individuals to feel rejected, less confident, and depressed, according to interviews with medical experts who administer them. According to reports, vaginal examinations have caused severe terror and mental pain in women and girls, and in some cases, they have even turned to suicide.[45]

In addition to the aforementioned consequences, the victim has a set of fundamental rights, such as the right to life, the right to privacy and bodily autonomy, the right to equality, the right to integrity and dignity, and the right to be free from discrimination based on gender, all of which are in jeopardy under the Two-finger test.

V. CONCLUSION AND WAY FORWARD

Starting from the intention behind the formulation of rape legislation till the definitive tests they devised to adjudicate upon the same, it will not be an exaggeration to assert that the Colonialists raped India. They not only introduced prejudiced and inherently sexist ways to adjudicate rape cases, but the worst part is they did all of this under the banner of Medical Jurisprudence. Which, therefore, justified their misogynist outlook.

Nevertheless, the British left India, not today but back in 1947. The devastation they caused cannot be erased; however, even after 75 years of Independence, the Colonialists alone cannot be blamed if we fail to abolish the outrageous practice of the Two-finger test. The SC declared the practice "sexist, patriarchal and invalid" right away in 2013, yet only one State, i.e., Maharashtra, has removed it from the medical syllabus.[46] No data regarding directions from the Ministry to the Medical Council of India can be traced vis-à-vis the Two-finger test. The Ministry of Health and Family Affairs published guidelines titled "*Medico-legal care for survivors/victims of sexual violence*" in 2013, however, it's been a decade. To date, no feedback, survey, census, or data collection has been conducted by the Ministry to monitor implementation of the SC's ban and the subsequent guidelines on the test. Neither has the Ministry conducted any kind of awareness campaign or Training program for the Medical professionals to illuminate them about the banned practice. It seems the Ministry has failed to understand the gravity of the Two-finger test.

In conclusion, this study highlights the urgent need to prioritize the implementation of the suggestions given by the SC and the 2014 guidelines. Along with that, based on the analysis, the authors would like to recommend that the Government set up a national protocol to deal with medical examination of rape victims and should widely disseminate it. The Ministry should also try setting up an oversight mechanism, such as relevant enforcing authority, which would be delegated to look into implementing the said protocol. Further, in cooperation with the MCI, the Ministry should work towards making

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[44] FRANK MW, BAUER HM, ARICAN N, SK FINCANCI, V IACOPINO, *"Virginity Examinations in Turkey: Role of Forensic Physicians in Controlling Female Sexuality."* (1999) JAMA; 282(5), pp. 485–90.

[45] Women's Rights Project, *"A Matter of Power: State Control of Women's Virginity in Turkey."* (1994) New York: Human Rights Watch https://www.hrw.org/reports/1994/turkey/TURKEY.

[46]Sumitra Debroy , *"2-finger Virginity Test" to Be Erased from Maharashtra Syllabus*, THE TIMES OF INDIA, May 8, 2019, https://timesofindia.indiatimes.com/city/mumbai/2-finger-virginity-test-to-be-erased-from-maharashtra-syllabus/articleshow/69226324.cms.

the medical syllabus more victim-centric and sensitive. The Government should also revise and revisit the existing laws and formulate legal penalties for the ones who carry out the contentious Two-finger test. Most significantly, the legislature should revise, revisit and reinvent the colonially influenced Rape Adjudication system and the dilapidated Medical Jurisprudence in the country.

DEMOCRATIZING INDIAN MARKETS: EXPLORING THE INFLUENCE OF FRACTIONAL SHARE INVESTING ON CORPORATE GOVERNANCE

Ayush Gaur and Tarun Mishra[*]

Abstract

In India, fractional shares are still a relatively new idea, yet they might completely change the way people invest. The idea of fractional shares, however, has not yet been introduced in the statute books. Fractional shares enable more individuals to invest in the stock market by enabling investors to buy shares in smaller denominations. As a result, there may be more possibilities for individual investors and a market that is more diverse and efficient. This paper discusses the advantages and disadvantages of fractional shares and its impact on the corporate governance if the idea is introduced in the corporate law jurisprudence. In recent years, fractional shares have become more popular, particularly for large firms with astronomically high share values. This research comes to the conclusion that fractional ownership may affect a company's governance in positive as well as negative ways. On the one hand, it can boost small-scale investors' stock market involvement and enhance how businesses make decisions. On the other hand, it may give the controlling owners more influence and impede the ability of the minority shareholders to voice their opinions. The adoption of fractional ownership in India should, in general, be carefully reviewed and controlled to ensure that it has a positive impact on the corporate governance of the firms.

Keywords*:* Fractional Shares, Investors, Ownership, Governance, Shareholders.

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I. INTRODUCTION

Fractional shares refer to those shares which are less than one. The issuance of fractional shares is gaining immense popularity in the recent years particularly for big corporations whose share value is exorbitantly high. The idea of fractional shares may arise from situations such as those pertaining to mergers and acquisitions, issue of bonuses or rights issue.[1] In pursuance to this, the companies are required to notify the Securities and Exchange Board of India (hereinafter, "**SEBI**") as to how they will be dealing with the fractional shares.[2] In India, however, the issuance of fractional shares (at the first instance on the stock market) is debarred by Section 4(1)(e)(*i*) of the Companies Act, 2013 in the sense that the subscribers to the memorandum are allowed to subscribe such number of shares which shall not be less than one.[3] In other words, it can be said that the shareholders of a fractional shares do not get the right to hold such shares when they are created. Furthermore, paragraph 4 of Table F of the Companies Act, 2013 also prohibits holding of fractional shares and the company shall not be bound or compelled to recognise holding of fractional shares by any shareholder.

While one may argue that in the Indian Corporate Law Jurisprudence, there is already a provision for Joint Holders whereby one or more persons can hold one share but it is very different from the fractional shareholding. This is pertinent from the fact that the joint holders do not get equal voting rights *i.e.* the vote of the senior joint holders is considered to the exclusion of other joint holders.[4] This may create disparity among the joint holders as not necessarily the other joint holders will agree on the stand taken by the senior joint holder. While the purpose of joint holders may seem similar to that of fractional shareholders *i.e.* to ensure economic feasibility, its inherent idea and the subsequent voting rights are very different from that of fractional shareholders.

When it comes to commercial usage, all the fractional entitlements arising out of stock splits or otherwise are pooled in a trust by a trustee appointed by the Board who disposes of the said shares in the market at the best available price in one or more lots and distributes such sale proceeds in proportion to the fractional entitlements.[5] A number of developed countries including the United States,[6] Canada,[7] Japan,[8] etc. have recognised issuance and holding of fractional shares which eventually entitles investors to decide the amount of money they wish to spend rather than the number of shares they want to purchase. In addition to it, the idea of fractional shares seems to be more accommodative since it interests a large percentage of population. Furthermore, the fractional shareholding concept, if introduced in India, can have both positive and negative impact on the governance of the companies. Along the same lines,

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[1] *Company Law Committee Report*, Recognising Issuance and Holding of Fractional Shares, RSUs and SARs, pg. 18 (March 21, 2022).
[2] Regulation 70(2), Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018.
[3] Section 4(1)(e)(*i*), The Companies Act, 2013.
[4] Table F, § 52 (*i*), The Companies Act, 2013.
[5] Supra note 1, at 19; A RAMAIYA, *Guide to the Companies Act 913* (2020).
[6] U.S. SECURITIES AND EXCHANGE COMMISSION https://www.sec.gov/oiea/investor-alerts-and-bulletins/fractional-share-investing-buying-slice-instead-whole-share (May 03, 2023)
[7] Section 49 (15), Canada Business Corporation Act (R.S.C., 1985 c. C-44).
[8] Section 234, Companies Act, 2005.

a holder of a fractional share will be treated at par with those investors who purchase full shares and who reap the benefits of profits and also bear the losses equitably.[9]

It is a matter of fact that the voting structures are not a standard one across various classes of shareholders. Even shares which apparently carry same level of risk have different voting patterns.[10] In the context of a company, there are two categories of shareholders, one which controls the company and the other which do not have a significant say in the business of the company. "The controlling shareholders (in terms of votes and not necessarily in terms of the capital) will take excessive risks with the company's business at the expense of non-controlling shareholders, who may be the majority contributors to the company's capital."[11] Because the controllers elect themselves or their nominees to the board and are hesitant to relinquish power, the disproportionate voting structures may be employed to keep the current directors of the company.

This research paper is an attempt to analyse the elements of fractional share investing and its situation in the Indian Corporate Law Jurisprudence. It will also ponder upon the issue of fractional shares and its impact on the governance of the company. It is true that trading and holding of fractional shares is not permissible in India but what impact will it make on the corporate governance of the companies when such a thing is brought about in India is a question to be dealt with in this research paper. Apart from that, it will also analyse the mechanism of voting rights in the context of fractional shareholders and analyse its impact on the decision making power. It will also discuss the advantages and disadvantages of the fractional shares in terms of the practical constraints. Furthermore, it will also look into the aspects of authority to the directors of the company and at the same time restricting the authority of the shareholders.

II. AN OVERVIEW OF FRACTIONAL SHAREHOLDING AND INVESTING IN INDIA

Fractional entitlements to shareholders have not been recognised in the Indian Corporate Law Jurisprudence. Though there are other ways through which the shareholders are entitled to fractional shareholding such as when there are stock splits or mergers or issue of bonus shares. But this tends to create problems for those who do not work in such establishments where shares are given on a preferential basis. Professionals, for instance, generally do not have the opportunity to hold the shares when they are given on a preferential basis. Hence, it becomes a difficult task to purchase an entire unit of the share particularly when their prices are high. Shares are generally purchased for earning some additional income but when these shares are expensive, there comes a hurdle in between. Given the fact that India is a fairly conservative market where government has extensive influence over the stock market,[12] the issue of fractional shares at the stock market is not recognised *per se*. Even the fractional shares which are a result of corporate actions are not recognised as a distinct asset by any law or regulation in India.[13]

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[9] Ajith Kidambi, *Should India allow Fractional Share Investing?*, INDIA CORP LAW (Jun. 08, 2023). https://indiacorplaw.in/2022/06/should-india-allow-fractional-share-investing.html.

[10] PAUL L. DAVIES, GOWER and DAVIES: *Principles of Modern Company Law 437* (2012).

[11] *Id.*

[12] GOVINDA SHRIKANT ASAWA and MANSI SUBRAMANIAM, *Fractional Share Investing in India: A Step in the Right Direction Journal of Corporate Law and Governance*, Vol. VI, Issue No. 1, (2023).

[13] SHASHANK SHEKHAR and UTKARSH SHARMA, *Advancing Investor Access to Fractional Shares in India: Assessing the Regulatory Landscape*, Law School Policy and Kautilya Society, (Jun. 08, 2023).

Stock market, since ages, has been a great facilitator of mobilising household and institutional savings into productive avenues. This can be attributed to the fact that individuals want to convert more and more demands into needs, thereby increasing their "domain" and "sphere" of needs. The stock market, thus, has played a major role in enhancing the wealth of the individuals. However, there is a flip side to this as well *i.e.* the side of loss. While stock markets ensure hefty returns, they do not come easy. There is an equal possibility of loss. Thus, it becomes important to analyse the channel through which the savings are to be channelized. Along with this secondary aspect of investing, the primary aspect is to have some savings. When such savings are not enough, it becomes difficult for an investor, particularly the retail investors, to invest. This problem can be coupled with the fact when the share prices of companies are too expensive to buy. This will discourage investors, particularly the new investors and conventional investors, to buy shares of companies.

Herein comes the element of fractional shares which essentially lets the investor decide his expenditure on the shares with his limited resources. It is a matter of fact that inflation is a constant thing and therefore the discretionary income may tend to reduce. This has been quite a common thing post pandemic. Thus, it becomes important to decide the investment avenue which would give maximum return while also being a viable and economically feasible option. It has been viewed in the United States that with the introduction of fractional shares, there has been an increase in the number of retail investors even during the pandemic.[14] The idea of fractional shares is much similar to the idea of crypto currency wherein instead of purchasing an entire unit, people tend to purchase a fraction of such unit.

A. UNLOCKING INVESTMENT OPPORTUNITIES: THE ADVANTAGES OF FRACTIONAL SHAREHOLDING IN INDIA

The prospects of the fractional shareholding bring with it a number of benefits. While the issuance of fractional shares brings with it affordability, it also ensures economic viability. The benefit that comes along with the fractional shares is that the investors have a choice to diversify their portfolio in the sense that instead of investing the entire amount in one company or one type of security, investors spend in different types of securities or purchase different companies' shares. This idea has also been enumerated as the portfolio theory.[15] This ensures that when the investors invest their money and in case there are chances that the money will not reap any benefit, not all the money is lost, thereby affording the investor some sort of protection from the uncertainties of the stock market. This method also affords the investor an opportunity to reap the benefits in the form of dividends of different companies, thereby providing an opportunity to the investors to assess the business capacity of different companies and their financial soundness. Furthermore, it helps the investors in the long run since they get to understand the business and their policies which might or might not help the business, thereby ensuring that the investors make an informed choice before investing their funds.

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https://lawschoolpolicyreview.com/2023/03/22/advancing-investor-access-to-fractional-shares-in-india-assessing-the-regulatory-landscape/

[14] ZHI DA and VIVIAN W. FANG, *Fractional Trading*, 1, 29 (2022) https://media.licdn.com/dms/document/media/D561FAQHqMeYvFSirXg/feedshare-document-pdf-analyzed/0/1689244564374?e=1691625600&v=beta&t=4U525O60AlnT_KIN8ASTuu9swsM1EBHakoy6-K_LeVQ

[15] DARKO MILOSEVIC, *Private Benefits from Control of Public Corporations*, 10 J. OF FIN. ECO. 371, 371 (2014).

In India, particularly the issue of shares at discount is prohibited by the provisions of the Companies Act, 2013[16] and hence the issue of fractional shares to the investors will provide an opportunity to get the shares of the company at reasonable prices. Furthermore, the expansion or increase in the price of the share will be determined by the expansion of the business entity, thus enabling the investors to know the functioning of the business and its future prospects. Recently, the International Financial Services Centres Authority (hereinafter, "**IFSCA**") has recently permitted India to trade in fractional shares wherein the Indian retail investors will be provided an opportunity to trade in selective US Stocks in fractional quantity, thereby making US Stocks affordable to Indian retail investors.[17] This enables the retail investors to trade on the NSE IFSC platform under the Reserve Bank of India's Liberalised Remittance Scheme.[18]

Furthermore, the holding of fractional shares will ensure that the investors who invest in a given asset will be responsible for sharing the risks of owing such an asset. This ensures that the risk is shared in the long run and that the investors, particularly the new and conventional investors, who are generally inclined towards bearing little to no risk will have an incentive to buy such fractional shares. Furthermore, when there is a loss to the company, the holding of fractional shares will ensure that the fractional shareholders do not incur the whole of the loss on such shares.

The issuance of fractional shares to retail investors comes with additional benefits to those companies which offer goods and services.[19] Having a large base of retail investors to such companies will prove to be fruitful as the retail investors will become the retail customers and vice versa, thereby also providing the opportunity for the investors to know about the company to which they are customers and also the investors. This will also provide them an incentive to purchase the products and services of such companies to which they are the investors. This mechanism will also ensure that the retail investors will remain invested in the company for a longer duration.

B. OPERATIONAL CONSTRAINTS IN IMPLEMENTING FRACTIONAL SHARE OWNERSHIP

Looking at the fractional shares from the other perspective, it can be said that it is riddled with its own problems. These problems are to be viewed from the view of its practical constraints.

At the very outside, having an arrangement of fractional shares would make the procedure cumbersome for the company in respect of the voting structures. The idea would be that the evaluation of the voting rights would be an onerous task since the voting structure would be riddled with so much of intricacy. For instance, a person owing 15.75 equity shares of a company would be voting in a meeting. The evaluation of 15 shares would not create any hurdle but the evaluation of .75 shares would create immense issues and it would be a tricky task. Even if a company seeks to evaluate the effects of decimal votes by combining all the decimal

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[16] Section 53(2), The Companies Act, 2013

[17] NSE International Exchange, https://www.nseifsc.com/media/nse-ifsc-to-introduce-trading-in-us-stocks#:~:text=NSE%20IFSC%20will%20be%20the,to%20transact%20in%20US%20stocks. (last visited May 03, 2023)

[18] Taxmann, (May 03, 2023). https://www.taxmann.com/post/blog/opinion-fractional-share-investment-a-step-towards-inclusive-securities-market/ .

[19] Columbia Law School's Blog on Corporations and the Capital Markets, (May 03, 2023). https://clsbluesky.law.columbia.edu/2022/08/31/how-retail-investing-improves-corporate-governance-and-benefits-society/.

votes and bringing it up to a whole number, it would be immensely difficult and alternatively a lot of resources would be used.

Keeping in view such an onerous task of evaluating the votes of the fractional shareholders, many companies may be unwilling to issue fractional shares at the very first instance. This is evident from the fact that in jurisdictions where the trading of fractional shares is allowed, many companies do not take up the task of issuing fractional shares owing to this very reason. If such a thing happens, it would defeat the entire purpose of bringing in the concept of fractional shares while also discouraging the retails investors to channelize their savings into productive avenues. Furthermore, the purpose of fractional shares, as being an accommodative one, will not be realised and that investors will necessarily have to adopt the traditional investing mechanisms.

An additional practical constraint that might come up with the implementation of fractional shares is the fact that at the time of liquidation of the company, the fractional shares cannot be easily liquidated since the trading of fractional shares could be significantly less than the traditional shares.[20] Furthermore, when it comes to preference fractional shares, their redemption would be an onerous task since to decide the manner of redemption and the amount to be paid would be difficult for the company, though not impossible.

III. SHAREHOLDER DEMOCRACY AND ITS IMPACT ON THE CORPORATE GOVERNANCE

Shareholder Democracy is the idea that the shareholders play a centric role in the governance of the companies and that their essence cannot be ignored. It is also the idea that shareholders attain the ownership rights in the company while also providing great impetus in the corporate governance. The advocates of shareholder democracy propose that with the rights of share ownership should come corporate governance responsibilities.[21] The shareholders, be it institutional investors or individual investors, do have a duty to act as watchdogs over corporate activities. As already stated, there are two categories of shareholders, the controlling or the majority shareholders and the non-controlling or the minority shareholders. In the case of Foss v. Harbottle, it was observed that the majority rule must be followed.[22] While it is true that the majority rule must prevail over the minority rule but it must also be ensured that shareholder democracy is maintained for two reasons *i.e.* for effective control and for protecting the rights of minority shareholders.

There is no concrete definition of the phrase 'corporate governance' *per se*. But, it, on the other hand, is the idea that it is more about increasing the shareholder value while also taking care of other stakeholders such as the members, outsiders, creditors, etc.[23] It is essentially the way in which the company is run or the way the decisions are made. The governance of the companies is largely centred towards the shareholders and the way they take decisions. Corporate governance, as a concept, is as old as the concept of a company. It is not something which has taken up space recently. Though the directors of a company manage the business by

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[20] SCC Online Blog, (May 03, 2023) https://www.scconline.com/blog/post/2023/01/25/analysing-the-recommendation-for-issuance-of-fractional-shares-in-india/

[21] BOB TRICKER, *Corporate Governance Principles Policies and Practices* (2014).

[22] Foss v. Harbottle, 67 ER 189.

[23] NARAYANA N.R. MURTHY, *Corporate Governance and its relevance in India*, India International Centre Quarterly, Vol. 38, Issue No. 3/4 (2012).

and large but their authority is derived from the shareholders, a process which is defined under the articles of a company and not from a grant of authority from the state. As per section 152 of the Companies Act, 2013, the directors are appointed in the general meeting of the company. Thus, it can be seen that the shareholders hold an important position in the company vis-à-vis those of the directors. However, this role can be largely jeopardised when the interests of the minority shareholders is not taken into consideration. Therefore, it is the directors of the company who stand in the fiduciary relationship and therefore they must act in the best interests of the company.[24] In the United States, the directors owe a fiduciary duty towards the minority shareholders.[25] However, in India the position is different. The directors take the decisions for the company as a whole *i.e.* a decision which is in the best interests of the company. However in some cases, the directors must also act in the best interests of the individual shareholders.[26]

A. UNLOCKING INDIA'S CORPORATE GOVERNANCE: NAVIGATING THE IMPACT OF FRACTIONAL SHAREHOLDERS

When it comes to the idea of fractional shareholders and its implementation in India, there is no empirical data *per se* to show as to how the corporate governance will be influenced. But, there are fair reasons to believe and analyse as to how it can have an impact on the corporate governance of the companies. At this juncture, it is a matter of fact that any analysis done in this regard would be from the perspective of the fact and assumption that fractional shareholders will not take up significant position in the company as a shareholder *i.e.* this class of shareholder would form a miniscule proportion of the shareholder. This is because the idea has been propounded largely from the perspective of that community of investors who find it difficult to purchase a whole bunch of shares owing to its exorbitant price. Hence, the fractional shareholders will not be considered any more than a minority shareholder. The investment made by the fractional shareholders and their subsequent role in the business of the company will be somewhat tantamount to that of a minority shareholder.

This is where the 'Agency Dilemma' will arise. Agency dilemma is essentially a situation wherein the directors of the company cannot be expected to watch over people's money with the same vigilance as they are expected to look at their own.[27] It is also a matter of fact that the fractional shareholders of a company or any shareholder for that matter is invested in the company in anticipation of some return. Similarly, the directors are also there in pursuance of some return. When this happens *i.e.* when both the parties – the shareholders and the directors – are utility maximizers, there is a fair reason to believe that the principal will always gauge for his own benefits. Therefore, every step must be taken to avoid this situation and timely measures must be taken to ensure the interests of all the members.

By investing in fractional shares, it can also be ensured that the shareholder activism increases. Shareholder activism basically refers to the idea that the shareholders use their voting rights to essentially influence the working of the business and thereby determining the direction in which the company goes. With the idea of fractional shareholders being implemented, there are fair chances that there would be new entrants in the market who would enthusiastically involve in the affairs of the company, thereby increasing the diversity in the business. This would help the company in taking informed decisions as such class of shareholders geographically spread will have different expectations of the company, thereby affording an

[24] Re: Smith and Fawcett, (1942), Ch. 304, at 308.
[25] Supra note 12, at 83.
[26] Allen v. Hyatt, (1914) 30 TLR 444, at 7.
[27] Supra note 12, at 53.

opportunity to the shareholders in wielding more power. Shareholder activism may work to alter corporate governance standards, demand a change in the make-up of the board of directors or promote alterations to the company's business plan. However, too much of shareholder activism can also leave the company in a worse position.[28]

B. FRACTIONAL SHAREHOLDERS: CATALYSTS OR CONSTRAINTS FOR CORPORATE GOVERNANCE AND SHAREHOLDER ACTIVISM IN INDIA?

The flip side of fractional shareholders and their position in the company, as minority shareholders, vis-à-vis that of the directors may lead to less effective corporate governance. This can be seen from the fact that the minority shareholders do not tend to have any significant say in the business of the company. Even if they do, it is not sufficient to override the decisions of those of the majority shareholders. Or in other words, the voting power of the minority shareholders is not as extensive as those of the majority shareholders who generally tend to influence most of the decisions of the company.[29] This problem can further be coupled with the fact that the minority shareholders may have little to no access to the management to voice their opinions or concerns. Under such situations, where minority rights are poorly protected, the controlling members can use the resources of the company to suit their own needs and fulfil their aspirations.[30]

As already stated earlier, that the voting procedure and the subsequent evaluation will be a tedious task for the management of the company, therefore also the decision making process will take a longer time to essentially be implemented. Since time is the essence of any business organisation therefore every pros and cons must be analysed properly.

IV. CONCLUSION: THE WAY FORWARD

The creation, issuance, holding and regulation of fractional shares has not yet found a place in the books of law in India. It is a mere concept which has been proposed by the Committee in 2022. Therefore, to analyse its impact on the corporate governance of the companies situated in India would be a tedious task, particularly because of its non-existence no empirical data is available. However, through this research paper, it can be said that the impact of fractional shareholders on the governance of the companies can be both positive and negative. Thus, if such a concept is implemented in India, every aspect of it must be properly analysed. Furthermore, there are other things with respect to the fractional shares which cannot be said at this juncture. For instance, whether for the issuance of fractional shares, there must be a new stock exchange altogether particularly to deal with fractional shares or do we have enough infrastructure to deal with it. Also, the question of how the fractional shares will be issued is pertinent in this regard because then it becomes important to analyse the role of brokers. Despite these uncertainties, it can be safely said that the fractional shares will turn out to be a new thing for people with limited resources but those who want to enter the stock market. In furtherance of this, when the varied investors will invest in the equity shares of the company, it will help in the wealth creation of the shareholders and also of the company. Such an investment avenue will help the investors in increasing their discretionary income. Therefore,

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[28] Supra note 12, at 78.
[29] D.C. BARAKA, *Encyclopedia of Corporate Social Responsibility 1699*, (2013).
[30] MAGNUS DAHLQUIST, *Corporate Governance and the Home Bias*, The Journal of Financial and Quantitative Analysis, Vol. 38, Issue No. 1 (March, 2003).

it is important to exercise all care and precaution in implementing the idea of fractional shares in the Indian Corporate Law Jurisprudence.

When it comes to corporate governance and shareholder activism, the notion of fractional ownership in India offers both advantages and disadvantages. On the one hand, fractional shares can make investment more accessible and inexpensive to ordinary investors, resulting in more shareholder activism and diversity in corporate decision-making. On the other side, complicated voting mechanisms and practical limits may cause obstacles for businesses, perhaps leading to less effective corporate governance. Striking a balance between empowering fractional shareholders and respecting minority rights would be critical for India's shareholder democracy to thrive. Proper study and evaluation of the ramifications of fractional shares is required to ensure an educated decision-making process that benefits all stakeholders.

FUTURE OF ONLINE CONTRACTS AND E-SIGNATURES

Mansi Singh[*]

Abstract

Due to the rapid development of technology, several sectors are experiencing a transition towards digitalization. Changes have also occurred in the domain of signatures and agreements. Online contracts and electronic signatures have revolutionised time-consuming, inefficient, and vulnerable paper-based processes. This paper discusses the growth, benefits, and potential issues of electronic signatures and online contracts in the future.

Electronic signatures and online contracts are already commonplace thanks to advancements in digital technology. The development of cloud computing, blockchain technology, and artificial intelligence has led to improved digital security, authentication, and verification methods. Smart contracts built on the blockchain may be used to automate and enforce contractual obligations, cutting out the middleman and speeding up the processing of complicated transactions.

There are several benefits to using electronic signatures and digital contracts. First, they save time and effort by doing away with paper records, human labour, and physical file cabinets. Digital contracts may be created, signed, and stored in a matter of minutes, allowing for quicker transaction closures and greater operational efficiency. With the use of e-signatures, businesses are able to eliminate geographical barriers and streamline their international trade operations by working together remotely.

Electronic signatures and digital contracts also boost safety and lawfulness. Modern encryption algorithms, multi-factor authentication, and audit trails all work together to ensure the security of digital contracts and keep their details hidden from prying eyes. They also give a detailed record of the signing process, which helps reduce conflicts and makes it easier to comply with regulations.

However, many problems must be fixed before electronic signatures and digital contracts can reach their full potential. The digital nature of these contracts necessitates revisions to legal systems to ensure their enforceability across jurisdictions. Due to privacy concerns, data protection, and cyber risks, rigorous security measures are essential to safeguard sensitive information and prevent unauthorised access or modification.

There will be a lot more online contracts and electronic signatures in the future. Incorporating state-of-the-art technologies like machine learning, biometrics, and the Internet of Things (IoT) will increase the efficiency and safety of digital transactions. Intelligent contract management solutions are able to automate the processes associated with the contract lifecycle, provide real-time data, and integrate seamlessly with other business applications.

Keywords: Online contracts, E-signature, Future, Information Technology, contracts.

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OBJECTIVE

The purpose of this study is to explore and analyse the possible applications and validity of electronic signatures and online contracts within the context of current and future legal and technical frameworks. Researchers may learn more about the current state of online contracting and e-signatures, potential future advances, and existing issues. Examining the benefits, legal repercussions, and technological advancements connected with online contracts and e-signatures, this research intends to contribute to a full understanding of the potential effect of these tools on commerce, legal processes, and consumer experiences in the digital era.

I. INTRODUCTION

E-contracts, or electronic contracts, are gradually replacing paper contracts as India becomes a fully digital nation. As technology has advanced, traditional methods of doing business have shifted, and remote workers are increasingly highly prized. Due to their low cost and many benefits, electronic contracts are gaining popularity among companies. Because of the significant restrictions on movement and physical contact brought on by the Covid-19 pandemic, it has also been difficult for people to physically congregate and sign new contracts. Companies have resorted to this strategy owing to the pressing needs of certain circumstances and the want to grow their businesses.[1]

One should, and rightly so, "Embrace the transformative power of the digital age and step into a world where technology intertwines seamlessly with every aspect of our lives." The digital revolution has become so pervasive that it has started to govern the way contracts are made and carried out. The legislative framework of the nation is not a barrier to the rapid expansion of internet media to previously unreached parts of the world. The inclusion of new technology into legal frameworks has been called for in a number of court judgements since the late 1990s. From India's first online court case, which took place in the civil court on Bhadra in 20071, to India's first paperless court, which opened in Kerela in 20221, India's whole legal system has undergone profound change.

When it comes to cutting-edge technologies like electronic signatures and online contracts, the nation has witnessed a number of different case laws. Despite the court's frequent criticism and pointing out of their flaws, electronic agreements have frequently been recognised as valid. While it's true that "we tell the version of the story that makes us good," this unfortunately isn't the case during legal processes.

A. WHAT IS AN E-CONTRACT?

With the proliferation of the internet and the rise of electronic commerce, online contracts have grown in both importance and breadth. An online contract or electronic contract is one that is drafted, signed, and executed entirely digitally, most often through the internet. In theory, a digital contract is drafted in the same manner as a traditional paper one. If a sale is to be made through the Internet, the vendor desiring the sale must disclose product details, including description, price, and shipping costs, to the buyer. Interested buyers may show their agreement with the seller's terms and conditions by either giving it some thought, clicking the "I Agree" or "Click to Agree" button, or signing electronically. Multiple options exist for completing

[1] THOMAS J. SMEDINGHOFF, *Electronic Contracts and Digital Signatures* (July 16, 2023).

electronic signatures, including typing the signer's name into a signature box, pasting a scanned signature, or clicking a checkbox. After all terms have been met and the money has been paid, the deal may be sealed. Servers' primary function is to allow two computers to exchange data with one another. The idea behind the online contract is to facilitate the creation and use of commercial contract regulations for online company. Online Contract is a template for commercial transactions between customers and suppliers. Clickwrap contracts, shrink wrap contracts, and browse contracts are the three main categories of online agreements. Other forms of online contracts include those for employment, independent contractor work, consulting, resale, distribution, confidentiality, software creation, licencing, and escrow of source code. Despite our familiarity with these types of online contracts, few of us understand the technical and legal hurdles that must be overcome when actually putting one to use.

B. WHAT IS E-SIGNATURE?

An electronic signature, or "e-signature," is a digital representation of a person's handwritten signature, indicating that the signer agrees with the terms of a document or agreement. It serves as evidence that the person signing the agreement is who they claim to be and that they want to be legally bound by its contents. Electronic signatures are increasingly used in business and legal activities conducted entirely online.

E-signatures are created electronically, usually via the use of a computer programme or the internet. They provide many advantages over traditional handwritten signatures, including convenience, speed, and safety. To ensure the legitimacy and non-repudiation of signed documents, e-signature systems often use encryption techniques. This adds credibility and legal standing to the signature by making it more difficult to forge or alter.

Many jurisdictions have their own laws and regulations concerning the use of electronic signatures. In many jurisdictions, electronic signatures have the same legal weight as a handwritten signature. It's important to remember that certain documents need specific signatures, and that additional requirements may apply for signatures to be accepted in some domains or circumstances.

Signing papers electronically saves time, eliminates the need for paper documents, and paves the door for further process digitalization in today's increasingly digital world.

II. TRENDS OF E-SIGNATURE IN FUTURE

As e-signatures gain widespread acceptance over the next decade, we may categorise the following advancements as essential enablers, driving e-Signature capabilities.

Accessible on a mobile device: As cellphones grow increasingly common, more and more businesspeople are turning to them for their day-to-day tasks. This shift has increased demand for cross-platform, mobile-friendly electronic signature services.

Thanks to mobile adaptability, users may put their signature on documents whenever and wherever they like. This convenience is especially helpful for remote workers who need to sign and distribute documents while away from the office. It may also lead to happier customers in the long run. By providing a simple and hassle-free registration process, businesses can boost their brand recognition and customer loyalty. It also helps the bottom line by decreasing the need for paper-based operations like printing, distributing, and storing information.

As our culture increasingly revolves on our mobile devices, we should expect to see the trend towards e-signature mobile compatibility persist. Companies who don't use this technology may struggle to keep up with the dynamic consumer market.[2]

Solutions hosted in the cloud To say that electronic signatures have had a profound impact on modern business would be an understatement. The long-term goal is to digitalize everything to the point where people aren't needed at all. The process has been streamlined with the emergence of cloud-based solutions, making it faster, more practical, and cheaper. Integration of electronic signatures into cloud-based solutions like document management systems, electronic signature platforms, contract management software, and workflow automation tools is growing in popularity as it reduces the need for paper-based processes, which can be inefficient and prone to mistakes.

Integrating electronic signatures into cloud-based systems has several advantages, including increased security and compliance controls. Access restriction, encrypted data storage, and other safety features are all available. Digital audit trails created by e-signatures make it straightforward to track out any revisions or anomalies in the signing process.

Electronic signatures in cloud-based systems have, without a doubt, boosted efficiency and productivity in business. In the past, completing a document may take days, but today it can be done in minutes. This not only reduces the time spent on these tasks, but also the cost of printing, scanning, signing, mailing, and storing the final product.

As society as a whole grows increasingly digital, the necessity for electronic signatures in cloud-based software is only expected to grow. This pattern is likely to persist as businesspeople continue to prioritise efficiency, effectiveness, and safety.

Collaborative skillsets: As the usage of electronic signatures in public and governmental processes grew, so did the need for a comprehensive cooperation platform. Collaborative e-signature systems allow for the simultaneous access and signing of documents by several users in different locations. This feature is especially useful for companies that employ workers in different locations or who work from home.

In addition, the platform provides a consolidated dashboard where users can see the status of each signature in real time, guaranteeing a smooth and efficient signing process. Better collaboration and communication amongst signatories, made possible by the capacity to exchange papers and annotate or comment on them, increases the accuracy and speed with which documents may be prepared.

In conclusion, the increasing emphasis on collaboration via the use of e-signatures is a remarkable development in the industry. Providing a secure, efficient, and collaborative means to sign papers, these platforms are quickly gaining appeal among businesses of all kinds.

Fourth, blockchain integration: e-signatures conducted using blockchain technology are a future trend. Blockchain technology has made electronic signatures more secure, transparent, and unalterable than ever before. It may reduce or eliminate the need for intermediaries, saving money and making the process more efficient. This will be particularly useful in industries like banking and real estate where trustworthiness of signatures is paramount.

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[2] SANTOSH K PANDEY, KAVITA BHATIA and JAHNAVI BODHANKAR, *e-Sign - An Online Digital Service: Evolving Trends & Use: Cases*, International Journal of Engineering Research & Technology (IJERT), Vol. 9 Issue No. 1, January-2020.

The use of blockchain technology may also help with the fraud issue. By recording each signature and transaction on the blockchain, any fraudulent activity may be quickly uncovered and halted.

By creating a secure, transparent, and efficient digital transaction system, blockchain technology will increase the trustworthiness and reliability of e-signatures in the future business environment.

Although advances in technology and legislation are important enablers of e-signature adoption, demand from businesses and their users is the primary driver of advancement. Users now anticipate complete digital document execution, rather than just a signature at the conclusion of the process. In an effort to fully digitalize a process, specialists have developed end-to-end solutions.

All work on the document, from its inception to its final execution, takes place online, with no paper or ink involved. To this end, e-signature systems may be embedded inside preexisting digital infrastructure, such as cloud-based applications.

Another innovation that is gaining traction is the use of server-side signing. Users are given the ability to mediate their own identity processes via the usage of digital IDs. In this way, users may sign papers on services with the confidence that their identities have been validated. With server-side signature, a TSP like e-Mudhra generates and manages the signing keys on behalf of the signatory.

In the present digital world, a fully digital process with end-to-end digitization is not just a competitive advantage but a need.

Improved Adherence to Rules and Laws In addition to these technological advances, changes in legislation are also anticipated to affect the trajectory of e-signatures. As more nations recognise the legal legitimacy of electronic signatures, regulations are shifting to encourage their usage in more contexts. There will be greater uniformity in the law, and e-signatures will be recognised and upheld in more contexts. In the United States, remote online notarial services are permitted in more than 35 states. Multiple Australian states now permit the use of advanced remote electronic witnessing tools. E-signatures for usage in business processes at financial institutions are also gaining legitimacy.

New regulations will boost the use of witnessing services for agreements that are electronically signed, making it easier to sign legal documents without being in the same physical spot. This shift is in reaction to the growing acceptance of remote work and the need that businesses stay operational during situations such as the COVID-19 pandemic. It will be more convenient for individuals and businesses alike to use trusted identities, and the security of the signing process will be assured.

III. VALIDITY OF E-SIGNATURES AND ONLINE CONTRACT

The country's well-developed legal framework for online contracts facilitates electronic commerce and digital transactions in India. Thanks to the Information Technology Act, the Indian Contract Act, and other laws, online contracts, data protection, consumer rights, and dispute resolution are all codified in law. In the ever-evolving world of online transactions, the purpose of the legal framework is to foster confidence, protect the interests of all parties, and provide clarity. Companies and individuals must satisfy certain legal requirements for their online contracts to be valid and enforceable.

A. VALIDITY OF ONLINE CONTRACTS: -

Conventional contracts, including verbal agreements created with the free consent of the contractual parties and for reasonable remuneration with legal purpose but not explicitly declared void, were accepted under the Indian Contract of 1872. Therefore, this Act contains no provision prohibiting the enforcement of electronic agreements if they have all the elements necessary for a valid contract.

It is generally accepted that the free and informed agreement of both parties is the foundation of every enforceable contract. Most electronic contracts are non-negotiable. A "take it or leave it" exchange always gives the user an option.

In many cases, particularly those involving renegotiation of contract terms, Indian courts have questioned the legitimacy of electronic contracts. Case law from the Supreme Court states that "in dotted line contracts there would be no necessity for a weaker party to negotiate as to presume to have equal negotiating strength." This was stated in the case of LIC India v. Consumer Education and Research Centre. The dotted line agreement specifies that he must take the service or return the goods. He could either accept the absurd terms and conditions or continue using the service forever.

B. VALIDITY OF E-SIGNATURES

Any need for a signature must be considered and deemed satisfied if the document is verified by an electronic signature in accordance with the regulations set out in Section 5 of the IT Act. Under Indian law, electronic/digital signatures and other authentic electronic signatures are legally binding in the same ways that handwritten signatures are. There is a presumption of validity for electronic documents signed using a valid electronic signature (as specified by the IT Act), which is considered to be equivalent to a wet signature.

Electronic signatures, or e-signatures, are legally binding and recognised wherever they are used. Many countries recognise and enforce the validity of electronic signatures if they meet certain criteria.

Many countries' laws and legislation explicitly acknowledge and manage electronic signatures. In the United States, for instance, e-signatures have a federal and state legal basis defined by the Uniform Electronic Transactions Act (UETA) and the Electronic Signatures in Global and National Commerce Act (ESIGN), respectively. A similar legal basis for e-signatures across EU member states is provided by the eIDAS Regulation adopted by the European Union.

An electronic signature is only valid if it can be shown that the signer intended to sign the document in an electronic format. Examples of such actions include typing in one's name, selecting the "I agree" radio option, or using a digital signature service.

Electronic signatures and electronic transactions need the parties' mutual consent. One technique to prove agreement is by a specifically worded phrase in a contract or terms of service.

The identity of the signer must be verified to ensure that the e-signature is genuine and untampered with. Digital certificates, passwords, and biometric data are only some of the methods that may be used to confirm an individual's identity.

Electronic signatures provide an additional layer of security and authenticity for the signed document. Encryption and tamper-evident techniques are used to protect the authenticity of the signed document.

Keeping Accurate Records: When using an electronic signature, it is essential to record specifics such as the method used, the signatory's name, and the time and date the signature was created.

Some documents may be excluded from the rules regulating electronic signatures or may need additional steps. Wills, some family law documents, and other court files may be exceptions that prevent or limit the use of electronic signatures.

It's important to keep in mind that e-signatures may be governed by different laws depending on the country, state, or area. Because of this, you should consult local legislation and legal advice to find out whether electronic signatures are recognised and legally binding in your country.

III. LAWS GOVERNING ONLINE CONTRACTS

The Indian Contract Act of 1872[3] is the law that applies to contracts in the country. Electronic contracts are governed by the Indian Contract Act in much the same way as traditional contracts are. An electronic contract must meet all of the requirements of the Act's provisions in order to be legally enforceable.

E-contracts are legally binding according to the Information Technology Act of 2000. Electronic signatures, also known as "e-signature" or "digital signature," are used to authenticate the legality of e-contracts in accordance with Section 3 of the Act. Section 4 of the IT Act, 2000 allows for valid acknowledgement of the electronic data when it is coupled with a hardcopy or printed structure and made accessible to the customer for future reference. Sections 65 through Section 71 of the IT Act[4] detail the consequences for online wrongdoing inside India.

E-contracts are recognised by law in India under Section 10A of the Information Technology Act of 2000[5]. Thus, the IT Act excludes some types of electronic transactions from the definition of negotiable documents, including powers of attorney, trust deeds, wills, sales deeds, and conveyance deeds pertaining to real property.

According to Section 65 of the Indian Evidence Act, 1872[6], the electronic documents used to make the contract must be accepted by the court. The Indian Evidence Act of 1872 was amended to include Sections 65A and 65B, which permit parties to prove the contents of electronic records in accordance with the Delhi High Court's acceptance of electronic contracts in Societies Fes Products Nestle S.A & Anr v. Essar Industries & Ors.

The case State of Delhi v. Mohd. Afzal and Others[7] was heard by the Delhi High Court, which held that "electronic records are admissible as evidence." The Supreme Court of India ruled in the case State of Punjab and Others v. Amritsar Beverages Ltd. and Others that media in paper, optical, or magnetic formats may be admitted into evidence. Information included in an electronic record is admissible in court without the need for an original document, as per

[3] Indian Contract Act, 1872.
[4] Section 71, Information Technology Act, 2000.
[5] Section 10A, Information Technology Act, 2000.
[6] Section 65, Indian Evidence Act, 1872.
[7] State of Delhi v. Mohd. Afzal and Others, 2003 VIIAD Delhi 1, 107 (2003) DLT 385, 2003 (71) DRJ 178, 2003 (3) JCC 1669.

Section 65-B of the Indian Evidence Act[8]. To be admissible, evidence must conform to a variety of criteria laid forth in Section 65-B of the Evidence Act[9].

IV. LAWS GOVERNING E-SIGNATURES

According to the Indian Stamp Act of 1899[10], some documents must be legibly stamped at the time of execution or sooner. There are currently no regulations in India that outline the process for digitally stamping documents. When stamps are acknowledged digitally, several states—including Maharashtra, Karnataka, and Delhi—explicitly include electronic documents in the need for stamping. Adobe Acrobat Sign is very adaptable and may be altered to serve such purposes.

Businesses should always consult with their internal legal team to determine whether a stamp is necessary before electronically signing and executing a document. If a document is signed, executed, and stamped digitally, the company should still produce a physical duplicate and have it stamped. Documents that have been incorrectly stamped may incur fines.

To submit any form, application, or document to a government agency; to obtain any licence, permission, or approval from a government agency; and to receive or make a payment in a specific manner using electronic means are all examples of situations where electronic or digital signatures are permissible under the IT Act. The governing body may set rules for how electronic records and signatures are regarded for these purposes. Applications, financial statements, prospectuses, returns, declarations, memoranda, articles, details of charges, and other details or documents, as well as any notices, must be filed in a computer-readable electronic form in pdf, as required by Rule 7 of the Companies (Registration Offices and Fees) Rules, 2014[11]. A digital signature is required to confirm an electronic form under Rule 8, as stated by the Central Board of Direct Taxes. This includes the e-TDS/e-TCS and other forms.

Click-wrap, certificates not issued by a CA, and other methods for generating electronic contracts are not explicitly recognised by the IT Act but may still be used. According to Section 10-A of the IT Act, a contract that was formed electronically is not invalid just because it was drawn out digitally. However, as such non-recognized electronic signatures do not have the same presumption of validity as acknowledged electronic signatures, the legality of electronic contracts signed using them may be challenged. The signer may be required to provide evidence of the following in such a case:

V. CASE LAWS ON VALIDITY OF ONLINE CONTRACTS

Numerous legal analyses of the validity and enforceability of internet contracts have been prompted by their profusion. While specific circumstances and judgements may vary depending on the decision-making body.

[8] Section 65-B, Evidence Act, 1872.
[9] Section 65-B, Evidence Act, 1872.
[10] the Indian Stamp Act, 1899.
[11] Rule 7, Companies (Registration Offices and Fees) Rules, 2014.

a number of precedents have addressed the legality of online contracts. *Vedanta Aluminium Ltd. v. Trimex International Fze*[12]. It is a well-known case involving electronic signatures and online contracts in India. The matter was heard by the Delhi High Court in 2010.

In this instance, Vedanta Aluminium, an Indian company, and Trimex International, a United Arab Emirates-based company, had executed a contract online. The agreement included the delivery of bauxite. However, disagreements emerged regarding how the parties should execute the agreement. The court's primary concern was whether or not the online contract was enforceable under the law. Trimex International asserts that all parties involved in the transaction communicated solely via email. However, Vedanta Aluminium argued that no contract existed because the requisite conditions had not been satisfied.

The Delhi High Court agreed with Trimex International that an email agreement could comprise a legally binding contract. The court determined that the parties' email exchanges contained the essential elements of a contract: an offer, an acceptance, and consideration. The significance of the parties' willingness to be bound by the terms of the contract was emphasised, and in this instance, the parties' email communications demonstrated their intent to be held legally liable.

This ruling established an important precedent for the legality and enforcement of internet-based contracts in India. It acknowledged that electronic communications, such as emails, can constitute valid offers and acceptances and that such transactions are subject to the same legal requirements as traditional contracts.

In addition to the 2015 landmark case *Shreya Singhal v. Union of India*[13], other precedents have been significant. In this decision, the Supreme Court invalidated Section 66A of the Information Technology Act of 2000[14], which had been extensively criticised for its vague and overly broad provisions criminalising internet expression. In the context of online communications and exchanges, the ruling emphasised the need to protect fundamental rights, including the right to free expression. This decision has far-reaching effects on the regulation of online content and activity, including online contracts. In the case of *Shafhi Mohammad v. State of Himachal Pradesh (2018)*[15], the Supreme Court of India ruled that digital documents, including electronic signatures, may be used as legal evidence, emphasising the significance of electronic contracts as evidence. The court upheld the arbitration clause in an online contract in the case *M/s. Sanjiv Prakashan v. Poonam Sharma (2019*). The court acknowledged the parties' agreement that internet-based contract disputes may be resolved through arbitration. In the 2018 case *Uber India Systems Pvt. Ltd. vs. Competition Commission of India*[16], Uber was accused of exploiting its dominant position in the ride-hailing industry. The online agreement between Uber and its drivers was lawful, and the Competition Commission of India (CCI) was tasked with investigating the allegations.

It is possible that courts have ruled that internet-based contracts are unenforceable. In *S. Ramanathan v. State Bank of India (2010)*[17], the court ruled that a contract allowing the bank to unilaterally modify the terms of an online banking service without the consumer's knowledge or consent was unjust and unreasonable. The court ruled that the clause was unenforceable and

[12] Trimex International Fze Limited v. Vedanta Aluminium Limited, 2010 (1) SCALE 574.
[13] Shreya Singhal v. Union of India, AIR 2015 SC 1523; Writ Petition (Criminal) No. 167 OF 2012.
[14] Section 66A, Information Technology Act, 2000.
[15] Shafhi Mohammad v. State of Himachal Pradesh, (2018) SPECIAL LEAVE PETITION (CRL.) No.2302 of 2017.
[16] Uber India Systems Pvt. Ltd. v. Competition Commission of India, CIVIL APPEAL NO. 641 OF 2017.
[17] S. Ramanathan v. State Bank of India, (2010) C.S.No.930 of 2010.

invalid. In *M/S Shriram EPC Limited v. Rioglass Solar SA (2018)*[18], the court ruled that an email purchase order without a signed written agreement did not constitute a legally binding contract. The court emphasised the necessity of a formal written agreement to establish a legally binding contract.

The rule that a person cannot be held to an online contract if they lacked the mental capacity to comprehend and consent to the terms at the time the contract was signed has been challenged in other instances. Without the knowledge or consent of the customer, discretionary terms and conditions were implemented.

Although there have been significant judgements in India regarding internet contracts, there has been no precedent-setting case law that focuses primarily on internet contracts. Cases such as Shreya Singhal v. Union of India, which emphasise the preservation of fundamental rights in the online environment, have had an indirect effect on the legal framework governing internet transactions.

VI. CONCLUSION AND WAY FORWARD

In a series of decisions, Indian courts have upheld the validity and enforceability of electronic contracts. The use of electronic contract execution has increased in India and is expected to continue doing so. COVID-19 mandates the use of electronic signatures when executing contracts. Simple to implement and legally binding, these ways of capital punishment are gaining popularity. However, extra ramifications, such as stamp duty, must be carefully considered by the parties. Notarizing electronic contracts is also crucial. In India, electronic notarization is still not recognised. As a result, the notarization of electronic contracts requires a legal framework from the proper authorities.

It is expected that the usage of online contracts and e-signature will go even further in the future as technology advances and electronic transactions become commonplace. Future developments for electronic signatures and digital contracts are discussed, and implications are drawn.

Online contracts and e-signatures are expected to become more popular as more and more businesses and individuals embrace digital processes in pursuit of efficiency, economy, and portability. E-signatures and other digital solutions have gained momentum as the COVID-19 pandemic has increased the demand for distant collaboration and contactless transactions.

As the number of electronic signatures used grows, so too will the need of taking extra precautions to prevent fraud and unauthorised access. Advances in biometrics, encryption technology, and blockchain-based solutions may help increase the trustworthiness of electronic signatures and digital contracts.

Continued work is being put towards fostering interoperability across various e-signature platforms and systems to allow for the seamless integration and exchange of electronic documents across many platforms and jurisdictions. To do this, norms and conventions will be crucial.

Regulation and Legal Frameworks: Governments and regulatory bodies will likely continue revising and upgrading laws and frameworks to accommodate the challenges and opportunities brought about by online contracts and e-signatures. Possible methods include elucidating legal

[18] M/S Shriram EPC Limited v. Rioglass Solar SA, (2018) CIVIL APPEAL NO. 9515 of 2018.

requirements, promoting international consistency, and fixing emerging issues with data protection, privacy, and electronic evidence.

Developing technologies such as blockchain and artificial intelligence (AI) may be integrated with e-signatures in the near future. Blockchain technology has the potential to improve trust and immutability, while artificial intelligence (AI) might streamline the creation and evaluation of contracts.

In conclusion, the future of online contracts and e-signatures is bright due to increasing adoption, improved security measures, and evolving legal frameworks. As businesses and individuals adopt digital workflows, electronic signatures are expected to proliferate. Knowing the specific laws and procedures controlling e-signatures in each nation is vital for ensuring compliance and the enforceability of electronic contracts.

EVOLUTIONARY JURISPRUDENCE: UNMASKING MAINE'S THEORY OF LEGAL PROGRESSION - A CONTEMPORARY EXPLORATION OF 'STATUS TO CONTRACT' IN THE INDIAN CONTEXT

Samraddhi Saxena & Siddharth Saxena.[*]

Abstract

The paper ventures into reality testing of Maine's theory of law of legal evolution through "Static" and "progressive" societies. Maine proposed the anthropological and comparative methods for studying law. Through his studies, he came to the conclusion that the progression of society has been from Status to Contract, or from status-based construction to individualistic freedom and choice. The paper views this theory in the light of contemporary setting to analyse the situation specifically figuring the Indian outlook to this principle. The paper targets and addressed the main question 'Is the law really reflecting the Freedom of Individualistic opinion or a Status oriented system?'

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I. INTRODUCTION

Historical school of Jurisprudence brought forth many learned philosophers who viewed law in the light of the thought It carried since generation. Legal evolution is crucial to comprehend the growth of law. It is key aspect in understanding the correlation of societal contract and approach of law. The study of legal evolution is largely concerned with three essential aspects: the research of doctrinal development, the investigation of paradigm shifts within specific legal domains, and the assessment of overarching alterations across the legal landscape.[1] Epochal shift in law or legal reasoning is frequently prompted by an abrupt, drastic change in society or by the law's own age.[2] Sir Henry Maine, a great contributor to historic comparative approach, guided this philosophy of Legal evolution through the traces of societal construct. Termed as "Static" and "Progressive" societies, the Societal construct over the period has been subject to evolution through the prisms of governing authority and other relevant factors. While observing this chain of evolutionary elements, Maine observed the gliding plane of Progressive society towards individualistically inclined view of Law which he termed to be 'a movement from Status to Contract". This phenomenon when viewed through the lens of contemporary state of Law, it poses the question are we still in the stage where the movement was noted to be "status to Contract" or are we retracing our steps and constructing the law with "Contract to Status" concept.

II. SIR HENRY MAINE'S THEORY

Maine's famous claim that legal growth in advanced cultures is characterised by a transition from "status to contract" is simply a caricature of the complexity and breadth of Maine's actual argument.[3] Maine's perspective on the evolution of progressive societies is based on his specific understanding of status, his interpretation of traditional family structure, and his comprehensive theory of socio-legal evolution traits.[4] For Maine, status and contract were seen in the anti-individualism of patriarchal power structures in ancient societies, where a person's status was predetermined by their positioning within the structure, and the contract was seen as a power structure wherein people create their own duties, responsibilities and reality.[5]

According to Maine's theory, status-based connections gradually disappear in progressive societies and are replaced by a generalised freedom and liberty to contract in which the attributes of the parties to the contract are insignificant.[6] In his seminal 1861 treatise, Ancient Law, Maine stated that *"the movement of the progressive societies has hitherto been a movement from Status to Contract."*[7] Maine wanted to highlight the difference between "primitive" collectivism and modern individualism by contrasting status and contract.[8] According to Maine, the steady decline of familial dependency and the emergence of individual

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[1] LARRY A. DIMATTEO, *Unframing Legal Reasoning: A Cyclic Theory of Legal Evolution*, S. Cal. Interdis. L.J., Vol. 27 (2018), pg. 485.
[2] Ibid, pg. 486.
[3] Supra note 1, pg. 489.
[4] KATHARINA ISABEL SCHMIDT, *Henry Maine's 'Modern Law': From Status to Contract and Back Again?* The American Journal of Comparative Law, Vol. 65 (2017), pg. 154.
[5] Supra note 1, pg. 487.
[6] Supra note 1, pg. 488.
[7] HENRY MAINE, *Ancient Law: Its Connection with the Early History of Society and Its Relation to Modern Ideas 101*, (1917)
https://www.gutenberg.org/files/22910/22910-h/22910-h.htm
[8] Supra note 4, pg. 155.

responsibility as a viable alternative has constantly defined the move from "primitive" to progressive civilization.[9] Maine believed that rising "moral consciousness" was what drove modern countries' proliferation of contractual freedom. As a result, he confined the scope to "those individuals" who lacked the capacity to form judgements based on their own interests, and whose rights and obligations were to be decided by their position within the societal framework. [10]

III. STATUS TO CONTRACT

When Maine devised his theory, he constructed his thesis on the observations of the society pertaining to his being. Maine observed the “status” aspect through the keyhole of what can be termed as the hierarchical construct of family and the supposed privileges that were associated by virtue of the status that the family bestowed upon the individual. Maine used the term "Status" to refer to the many relational, frequently hierarchical networks that established a person's rights and responsibilities in premodern society.[11] The “Contract” element that Maine observed referred to the individual freedom and liberty in matters of decision or opting for an opportunity. This was largely due to the fact that contract law had evolved to be founded on liberal principles by the 20th century. No matter who they were, people might establish rights and obligations with one another.[12]

The philosophy of laissez faire, which attacked the idea of the state as the foundation of law, has been referred to as the freedom of the individual in the economic sphere. Maine came to a conclusion for his thesis based on this expanding Trend. In India, The liberation of women from male dominance, the expansion of individual freedom in the social, economic, and political arenas of life, the improvement in labour and worker conditions, and other developments all show that the emphasis in modern times has shifted from status to contract.

The Spectacular shift in the plane of movement since the Indian laws framed after the Independence from British for Colonial rule in 1947 devices enough evidence to suffice the shift towards progressive individualism.

The abolition of zamindari system and other graded inequalities, laws and against racism and discrimination and constitutional mandate enshrined within the Preamble, fundamental rights and DPSPs stipulates a social economic order with the objective of securing the Indian citizens right to enjoy freedom, Liberty, equality and fraternity in the Indian state. A major reference to ideological shift to progressive individualism and reference to status to contract. Significant evidence to ‘status to contract’ shift and individualistic rights and liberties as significant indicators to the progressive society can be witnessed through the popular and growing trend of judicial activism and PIL as the accelerators and safeguards of individual freedom.

In recent Judgment of *Joseph Shine v. Union of India*[13]while revisiting the concepts discussed in *Yusuf Abdul Aziz v. State of Bombay*[14] and *Sowmithri Vishnu v. Union of India*[15], it was said by Chandrachud, J.[16] That –

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[9] Supra note 7, pg. 100.
[10] Ibid.
[11] Supra note 4, pg. 145.
[12] Supra note 4, pg. 146.
[13] Joseph Shine v. Union of India, (2019) 3 SCC 39, at para. 63.
[14]Yusuf Abdul Aziz v. State of Bombay, AIR 1954 SC 321.
[15]Sowmithri Vishnu v. Union of India, 1985 SCC (Cri) 325.
[16] Supra note 13.

'Due to long-standing societal norms that viewed married women as their husbands' properties, Section 497[17] denies the separate identity of married women. This Court has a responsibility to dispel these myths and advance a culture that values women equally in all facets of society.'

In *Navtej Singh Johar v. Union of India*[18], Supreme Court said, "By embracing LGBT rights, the Constitution confirms its role as a blueprint for governance that promotes genuine equality." This highlights the significance and necessity of individualistic freedom in the current social structure. We can see the evidence that 'status to contract' is a dynamic component of law evolution in the present.

IV. CONTRACT TO STATUS

Henry Maine's maxim "status to contract" will be ceremonially buried in not-too-distant time.[19] The aphorism reaped its full harvest in the classical era of nineteenth century.[20] Lord Simon observed in *Johnson v. Moreton*[21]'Since Maine the movement of many 'progressive' societies has been reversed….'

The wheel of history has taken a full turn rendering Maine's celebrated aphorism that 'the movement of progressive societies had hitherto been from status to contract' obsolete, unreal and inapplicable to the contemporary social conditions.[22] More than ever, in contemporary society, a person's rights and obligations are dependent on personal or "status"-based characteristics.[23]

In the classical era, "freedom of contract" and "sanctity of contract" were seen as essential tools, and the courts' role was limited to fostering the former and defending the latter.[24] The shortcomings of contract freedom were accentuated as contemporary law evolved under the influence of political and economic ideologies. A paradigm changes in thought emerged in the early twentieth century, disputing the concept that unfettered contractual freedom resulted in pronounced inequities and diminished economic liberty.[25]

The basic assumption on which the doctrine of contract was raised in the days gone by those once revolutionary theoreticians of laissez-faire to a sort of a divine ordinance is today found to be false and fallacious. [26] The industrial laws of the State are making and enforcing contracts for employer and employee without much reference to the will of the individual parties. [27] The trend towards restricted ownership, the disintegration of ownership rights, decline of the freedom of contract, adhesion contracts, collective agreements, government contracts and, of course, the view that the flow of change from "status to contract" has been reversed.[28]

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[17] Section 497, Indian Penal Code, 1860.
[18] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.
[19] AS BHAT, *Promise or Security? The Demise of Contract in India*, JILI Vol. 27 (1985), pg. 275.
[20] Ibid.
[21] Johnson v. Moreton, (1978) 3 All ER 37.
[22] DC JAIN, *Concept of Right to Public Employment 'as a New Species of Property': Penumbral Judicial Activism* (1986) 4 SCC - J Vol.4 (1986), pg. 29.
[23] Supra note 4, pg. 147.
[24]GC CHESHIRE & CHS FIFOOT, Law of Contract (1976).
[25] Printing and Numerical Registering Co. v. Sampson, 19 Eq. 462, at 465, (1875).
[26] Supra note 22.
[27] Ibid.
[28] PM BAKSHI, *East and West: The Legal Systems and Their Convergence*, JILI Vol. 26 (1984), pg. 238.

A government employee's legal status is mostly associated with the concept of status rather than contractual relation. Status is defined by its reliance on a legal framework of rights and obligations established by public law, rather than being based on the parties' mutual consent.[29] Statutes or statutory provisions that govern the terms of employment and the emolument of government employees might be unilaterally altered by the government without employee's permission.[30] The Supreme Court in *Roshanlal v. Union of India*[31] wrote reflecting transformations in the outlook of law:

"It is precise to say that contracts form the basis of government service. In every situation, there is an offer and an acceptance. Nonetheless, when a government employee assumes their job or office, they gain a distinct status in which their rights and obligations are established by legislative rules or standards rather than being dependant on the assent of both parties involved.

Without any doubt, Article 311[32] places constitutional restrictions on the President's and Governor's dismissal authority under Article 310.[33] Nonetheless, it is clear that the government's relationship with its employees deviates from the traditional master-servant employment dynamic. The legal bond formed in this document is fundamentally different and more closely aligns with the concept of status.[34]

Legislative amendments were adopted with the stated goal of redressing the balance between the weak and the strong, and the organised and the unorganised. These sparked the creation of groups like trade unions. Maine's "status to contract" thesis suffered a defeat, and the "status" movement gained momentum.[35] The common law is largely responsible for the transition from status to contract. The legislation has been substantially responsible for the reversal movement.

Marital Rape is an exception that represents the lack of legislation as a factor for movement to be Contract to status. Marital rape is not listed as an offence in the penalizing laws of India. Sec 375 IPC[36] can be read to infer that the marital rape cannot be said to be an offence if the wife is above the age of 15 years. It means that after marriage the husband is having right over the body of the wife and wife has to obey the husband’s command. The will and consent of the wife is immaterial. This shows that the status of female is not being changed yet and the society has not moved from status to contract.

According to Section 6 of the Hindu Minority and Guardianship Act, 1956[37], a Hindu child's father is the "natural guardian." Only when the father isn't there or the child is under five years old is the mother regarded as the child's guardian. This depicts that the status of females and males are still unequal referring to the ‘status’ element preferential.

In accordance with sections 6[38] and 7[39] of The Hindu Adoption and Maintenance Act, transgender people are still not accepted as adoptive parents. Following the major upheaval caused by the marriage equality case, the subject under review has become the focus of intensive debate and examination. While it is widely acknowledged that the Supreme Court of

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[29] Roshan Lal Tandon v. Union of India, AIR 1967 SC 1889.
[30] Ibid.
[31] Ibid.
[32] Article 311, The Constitution of India, 1950.
[33] Article 310, The Constitution of India, 1950.
[34] Supra note 29.
[35] Supra note 24, pg. 23.
[36] Section 375, Indian Penal Code, 1860.
[37] Section 6, The Hindu Minority and Guardianship Act, 1956.
[38] Section 6, The Hindu Adoption and Maintenance Act, 1956.
[39] Section 7, The Hindu Adoption and Maintenance Act, 1956.

India has officially recognised transgender people as a separate third gender, the actual execution of such legislation remains difficult. The lack of specific evidence proving the actual fulfilment of individual freedom and fair treatment for transgender people implies that status continues to play an important role in influencing the practise of rights and freedoms in the Indian context.

To argue that there has been a total shift from status to contract is an oversimplification that ignores the legal landscape's current intricacies. According to the research, status, with its inherent social and hierarchical implications, continues to exert enormous influence over the implementation and realisation of rights and freedoms. While acknowledging progress towards inclusivity and recognition of transgender rights, it is critical to recognise that systemic and structural barriers based on status continue to exert influence, impeding the complete transformation of the legal framework into a pure contract-based system.

V. CONCLUSION

Whether the theory of Maine stands valid or are retracing the steps stands a debatable issue. Today's definition of "status" differs from what Maine originally intended. It is now recognised to include both "ascribed" and "achieved" situations. Status in the modern sense includes not only conditions determined by birth or inherent features, but also those achieved through personal accomplishments. Furthermore, it is increasingly recognised that status involves not just individuals' social positioning but also the imposition of relational and paternalistic limits on their liberty to determine their rights and obligations autonomously.[40]

The Indian society doing what they perceive to be best in respect of Social Justice. With regard to absolute freedom in contract it put restrictions to limit exploitation. With regard to formulation of trade unions to provide better recognizance to labourers' rights, it stands valid in its approach.

In *Indian young Lawyers' Association v. State of Kerala*[41], The court emphasised that achieving equality as part of this transformative endeavour includes addressing structural forms of dominance and socioeconomic inequities rooted in variables such as race, gender, class, and other sources of inequality. This emphasises the idea that "Status" is an impediment to moving towards a more equal "Contract" framework.

What position are we in? Are we moving from status to contract or backwards? The matter is in controversy. What can truly be said as a response to this posed question is in many aspects the 'Status to Contract' approach has been seen as a valid action and in many it has not been. Majorly the Indian Constitution is inclined to visualize a society where individualistic freedom is respected and groups are acknowledged. If bestowing a 'status' is related to preservation of a right, it should stand valid whereas 'status' as a positional privilege should be eradicated.

'Status' as an element to stationariness of a society by virtue of classification has left its footsteps here and there, however, the *Grand norm* that governs and is the law of the Land prescribes equal importance to Individualistic progressive outlook to society. Often viewed in context of Capitalist nations and work force conflict, the absolute individualistic outlook is not an efficient idea to maintain order. Sir Henry Maine's legal evolution when viewed through the prism of cycle theory by Nathan Isaac, the element of reoccurrence of 'status to contract' and 'contract to status' in a cyclic manner was perceived. Therefore, what can hold true for the

[40] Supra note 4, pg. 147.
[41] Indian Young Lawyers Association. v. State of Kerala, (2019) 11 SCC 1, at para. 232.

phenomenon is its cyclic occurrence as per the outlook and ideals of the society. In the end, Maine's theory was a comparative representation of changing dynamics in social construct and every society changes with what the general conscience is. Change is inevitable, and we are in the middle of it.

THE DYNAMICS OF FORCE MAJEURE IN IBC: UNRAVELLING THE IMPACT OF ACT OF GOD AND LEGISLATIVE MEASURES

Vineet Priyadarshi & Prerna Shree[*]

Abstract

As we have seen in the instance of Covid 19, unanticipated calamities always have a substantial impact on the profitability of various businesses as well as the economy of India. In order to shield businesses, especially micro, small and medium enterprises (MSMEs), from the severe consequences of the economic downturn, the government raised the default threshold specified in the Insolvency and Bankruptcy Code, 2016 (the "IBC/Code"). The force majeure provision once ran the risk of being disregarded as a laundry list of unlikely but yet possible disasters that were tucked away in the boilerplate of a business contract. As COVID-19 and government shutdowns caused havoc with commercial leases and contracts in 2020, force majeure came to the fore. Due to disruption, litigation ensued, and it became increasingly clear that force majeure might apply to our business contracts. The early case law offers cautionary lessons on what we need to take into account regarding force majeure when creating and interpreting business contracts, which is one bright spot. The authors of this article endeavoured to examine the dearth of precedents and lucidity concerning the applicability of "force majeure" to the abridged procedures under the Code.

Keywords: Force majeure, Unforeseen circumstances, Disruption, IBC.

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I. INTRODUCTION

With the arrival of the May 2020 Memorandum by the government of India stating, "disruption in the supply chain due to coronavirus will be covered under Force Majeure Clause[1]", the Indian firms for the first time witnessed a legal action that gave reliefs to contractual performances turning crisis into a self-serving opportunity. The exhaustive insolvency and bankruptcy structure introduced in India in 2016 through the Insolvency and Bankruptcy Code (IBC) seeks to protect the rights of creditors and debtors while expediting the resolution process. The force majeure clause, which enables parties to cite exceptional circumstances that prevent performance or compliance with contractual duties, emerges as a key legal term within this framework. The interpretation and use of the IBC's force majeure provisions, however, provide a number of difficulties and unknowns.

There are two categories of contracts in terms of the legal parameters of contractual obligations- contracts that include force majeure clauses and contract that do not. Upon the occurrence of a "force majeure incident," a provision known as a "force majeure clause" allows either or both parties to delay or terminate the performance of a contract. Courts typically interpret force majeure clauses in a restrictive manner to prevent parties from evading their contractual obligations through broad interpretations. Within the examination of the extent and applicability of IBC's force majeure, a compelling conflict arises between the concept of an "Act of God" and legislative actions. Legislative acts include statutory enactments or governmental interventions that may have an impact on contractual commitments, whereas "Act of God" refers to unanticipated events brought about by natural forces. In order to understand how the IBC handles or fails to address the interaction between these two kinds of force majeure situations, this research goes deeply into the nuances of this issue.

IBC focuses on bankruptcy and resolution of bankruptcy cases and provides mechanisms for the initiation, management and resolution of such cases. Contractual disputes or force majeure events are not addressed directly. Thus, if a force majeure event affects the debtor's ability to meet its contractual obligations, it may affect bankruptcy proceedings. For example, if a debtor is unable to meet its payment obligations due to force majeure, it may result in default and possibly attract bankruptcy proceedings. In such circumstances, the specific terms of the contract, including force majeure clauses, play an important role in determining the rights and obligations of the parties involved.

A. FORCE MAJEURE CLAUSES IN FINANCIAL AGREEMENTS: ANALYSING THE PERSPECTIVE OF FINANCIAL CREDITORS

Under Section 7 of the Code, a financial creditor may file for bankruptcy against a corporate debtor. As per the provisions of the Code, the financial creditor is not obligated to provide prior intimation and may initiate insolvency proceedings based on a solitary default.The Supreme Court emphasised that a financial creditor simply needs to demonstrate the following events in the case of *Innoventive Industries Ltd. v. ICICI Bank*[2]: the payment of a debt, the declaration that it is due and payable, and an act of default by the corporate debtor. The adjudicating authority is required to approve the request if all three requirements are satisfied. In its ruling

[1] Ministry of Finance, Department of Expenditure Procurement Policy Division, "*Force Majeure Clause*" (5th July, 2023)
https://doe.gov.in/sites/default/files/Force%20Majeure%20Clause-%20FMC%20.pdf
[2] Civil Appeal Nos. 8337-8338/2017.

in the 2019 case of *Swiss Ribbons Pvt. Ltd. v. Union of India*[3], the Supreme Court verified this premise. The corporate debtor's only option, according to the NCLAT (National Company Law Appellate Tribunal), is to show that the obligation is not due. The application will be approved, nonetheless, if the adjudicating body is persuaded that a default has taken place.

Failure to make a payment of money constitutes a default for a financial creditor, and such default can be ascertained through the operational and functional status of the information utility in accordance with the provisions of the Code. As a consequence, a corporate debtor's legal options for contesting a financial creditor's application are extremely limited. Even in circumstances of unanticipated events, the adjudicating authority is not going to investigate the cause of the default once it has been established.

B. RESOLVING ENIGMATIC LEGAL CONUNDRUMS: A STAND-ALONE AUTHORITY

A real estate company appealed the application made by allottees (financial creditors) under Section 7 of the Insolvency and Bankruptcy Code (IBC) in the matter of *Navin Raheja v. Shilpa Jain*[4]. In this particular case, the NCLAT sustained the force majeure defence and ruled:

> "*It cannot be contended that the 'Corporate Debtor' failed to surrender possession if the delay was caused by force majeure, as stated above."*[5]

While the NCLAT has recognized force majeure as a legitimate defence for a financial creditor in this ruling, it is imperative to underscore that this may not invariably hold true. In Pioneer Urban Land & Infrastructure Ltd. v. Union of India,[6] the Supreme Court granted real estate companies a restricted range of defences, excluding force majeure, despite it being raised as a defence, but not considered by the Supreme Court. It is essential to observe that this judgment seems to contradict the aforementioned decision.

II. OPERATIONAL CREDITORS AND FORCE MAJEURE: ASSESSING THE LEGAL AND FINANCIAL IMPLICATIONS

In comparison to a financial creditor, an operational creditor is treated very differently under the Code. An individual who possesses a claim arising from the supply of goods and services is referred to as an operational creditor. Upon receipt of an application under Section 9 from the operational creditor, the corporate debtor has the liberty to raise a valid objection. As per Section 5(6) of the Code, a dispute may pertain to product and service quality, an ongoing legal proceeding, or an arbitration matter. In *K. Kishan v. Vijay Nirman Co*. the Supreme Court unequivocally clarified that the primary intent of the Code is to initiate bankruptcy proceedings opposing a corporate debtor solely in situations where no genuine dispute exists between the parties, particularly concerning operational creditors. The issue was further contenplated in *Mobilox Innovations Pvt. Ltd. v. Kirusa Software Pvt. Ltd.*[7], the Supreme Court asserted that the raised dispute must be a meritorious contention necessitating further examination and must not be evidently feeble argument lacking substantiating evidence.

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[3] Writ Petition (CIVIL) NO. 99/2018.
[4] Company Appeal (AT) (Insolvency) No. 864/2019.
[5] Ibid.
[6] WRIT PETITION (CIVIL) NO. 43 OF 2019.
[7] CIVIL APPEAL NO. 9405 OF 2017.

In addition, it was noted that if there is a dispute, the application will be rejected since it is not the duty of the body that gets to decide whether the corporate debtor will likely triumph. Furthermore, the Apex Court in *Swiss Ribbons v. Union of India*[8] ruled that operational debts are significantly more likely to result in a dispute than financial obligations, and that the aforementioned disagreement may also involve substandard products or services. Consequently, it can be deduced that the invocation of the force majeure clause will not meet the criteria of a "dispute" as per the statutory definition of the term and its judicial construal. Because operational creditors frequently seek payment after the delivery of goods and services, businesses cannot use a force majeure provision to withhold payment for goods and services that have already been received. Furthermore, it is customary for businesses not to enter into commercial arrangements with operational creditors that incorporate force majeure clauses, among other provisions; rather, they depend on invoices and purchase orders to substantiate their claims.

A. BALANCING ACTS: THE JUDICIARY'S APPROACH TO EVALUATING FORCE MAJEURE CLAIMS WITH REGARD TO BOTH LEGAL FACTORS

The force majeure clauses in the contracts or the concept of frustration under Section 56 of the Contract Act would be relied upon by the court in the Indian legal system. As a result, courts are generally disinclined to support parties pursuing contract frustration or termination unless substantial evidence of contractual non-performance is presented. However, given the significant devastation caused by the Pandemic to the nation's business and economic landscape, the Courts were compelled to intervene and grant relief to numerous contracting parties adversely affected. In the case of *MEP Infrastructure Developers Ltd vs. South Delhi Municipal Corporation and Ors*[9], the Delhi High Court heard the case in June 2020. The court primarily relied on a circular published by the Ministry of Roads, Transport, and Highways (MORTH) and observed that:

"The respondent Corporation itself referred to Circular dated 19.02.2020, which declared the COVID-19 pandemic a force majeure event." In fact, the force majeure clause in the agreement becomes instantly effective, and no warning is required. As a result, a rigid schedule under the agreement would be put on hold because the ground realities had significantly changed, and the execution of the contract would not be possible until the pre-force majeure conditions were reinstated."

B. FORCE MAJEURE VIS-À-VIS WAR AND THE INDIAN PERSPECTIVE

The Ukrainian crisis has had an effect on enterprises around the world, leading to a reconsideration of crucial provisions in contractual agreements. Most force majeure articles cover war and hostilities, and in the absence of a specific article, parties may rely on the theory of frustration. According to Section 56, Indian Contract Act 1872, if performance is made impracticable, the contract is void. The bar for claiming frustration is high, and injured parties must show that it would be impossible to rely on force majeure clauses and obtain a remedy. Parties are however still responsible for minimizing damages caused by non-performance.

On February 28, 2022, the Ukrainian Chambers of Commerce and Industry designated the Russian military assault as a Force Majeure event, reaffirming that these conditions were exceptional, unanticipated, and unavoidable. Food supply may not be a problem in an agro-

[8] Writ Petition (CIVIL) NO. 99 OF 2018.
[9] W.P.(C) 2241/2020.

based economy like India, but food affordability is definitely a problem for the general public because the cost of foods like grains and cereals directly influences the rate of consumption and half of urban part of the country is dependent in one way or another through the supply chain. Supply chain disruptions brought on by the crisis have had a significant impact on price rises for basic consumables like wheat and edible oil. Russia is a major producer and exporter of wheat as well as sunflower oil, an edible oil. Wheat and edible oil prices have increased in India as a result of sanctions on Russia brought on by the invasion and restrictions on goods transit. This is one of the major impacts that India have faced due to this crisis.

III. UNCOVERING GAPS AND INCONSISTENCIES IN THE CURRENT FORCE MAJEURE FRAMEWORK WITHIN THE IBC

As a consequence of contravention or deviation from the approved "Resolution Plan" amidst a "force majeure" event, the absence of a protective mechanism leaves the corporate debtor vulnerable to liquidation. Considering that the plea of frustration or impossibility of performance requires the party invoking Force Majeure to provide evidence of the genuine inability to fulfil obligations, any disruption of business or defaults may conceivably lead to the initiation of the corporate debtor's liquidation under Section 33(4) of the Insolvency and Bankruptcy Code (IBC). The Code also overlooks operational creditors from a futuristic perspective giving them a significantly disadvantaged position and making the existing 'creditor-heavy' paradigm heavier[10], as already discussed earlier. Further, there is currently no provision in the Insolvency & Bankruptcy Code to alter an authorized Resolution Plan.

Under Section 60(5)(c) of the Code and Rule 11 of the NCLT Rules, 2016, the NCLT's use of its inherent powers in Insolvency issues has been construed differently by the NCLAT and the Supreme Court[11] thereby hindering any attempt to include a Force Majeure clause in the resolution plans. Moreover, the conflicting Judicial interpretations[12] acts as an impediment for the Adjudicating Authority from attaining the goals of the Code. The CoC's function after approving the Resolution Plan pursuant to section 30 is not addressed in the Code. After CIRP is finished, CoC as it was created under the Code no longer exists. What is the Resolution Applicant's only remaining option at this point? The creditors and their respective debts continue to persist even after CIRP has been finished and CoC has ceased to exist[13]. Furthermore, the judiciary's stringent and exacting interpretation of the Force Majeure provisions, utilizing the principle of 'ejusdem generis' to determine the similarity of an unlisted event with the explicitly listed force majeure categories, frequently results in the establishment of divergent criteria for assessing the impact on performance or the ability to fulfill the contract.[14] This circumstance gives rise to disparate criteria for different parties, as they might assume that the specifications laid out in their contract exclusively govern the boundaries of a

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[10] T. HINDER, D. BHATT and RAMESH KYMAL, *Analysing the Need for a Lesser 'Creditor-Heavy' Force Majeure Model under the IBC*, (6th July, 2023). https://www.irccl.in/post/ramesh-kymal-analysing-the-need-for-a-lesser-creditor-heavy-force-majeure-model-under-the-ibc

[11] NUI Pulp and Paper Industries Pvt. Ltd. v. M/s. Roxcel Trading GMBH, 664/2019.

[12] QVC Exports Pvt. Ltd. v. United Tradeco FZC, 1351/2019.

[13] MANISHA S. UNNAM, *'The Insolvency & Bankruptcy Code' – Issues Concerning Implementation of the Resolution Plan, in the wake of Covid-19 Pandemic*, (9th July, 2023) https://ibclaw.in/the-insolvency-bankruptcy-code-issues-concerning-implementation-of-the-resolution-plan-in-the-wake-of-covid-19-pandemic-by-adv-manisha-s-unnam/

[14] Interore Fertichem Resources SA v. MMTC of India Ltd., (2007) SCC OnLine Del 1400.

force majeure event and, relying on this evaluation, ascertain the admissibility of invoking a claim of non-performance.

A potential predicament could arise in instances where the resolution plan encompasses a provision that restrictively defines force majeure events, omitting explicit mention of pandemics/epidemics or Act of God, and lacks any comprehensive language encompassing unforeseen circumstances. Under such circumstances, it may be contended that Section 56 of the Act can be invoked to excuse non-performance[15]. However, the party relying on Section 56 must satisfy the stringent criteria set forth therein and establish that the fundamental basis upon which the parties agreed to their contractual arrangement has been completely overturned[16].

A. COLLIDING FORCES: NAVIGATING THE CONFLICT BETWEEN ACTS OF GOD AND LEGISLATIVE ACTIONS

In contrast to Force Majeure, which encompasses unforeseeable occurrences or consequences that are beyond the realm of anticipation or manipulation, Vis Major or "Act of God" specifically denotes overwhelming and inevitable events caused exclusively by natural forces, such as seismic activity, inundations, or cyclones. While Force Majeure encompasses both natural and man-made unforeseen incidents, Act of God solely pertains to unforeseen natural events. Essentially, Force Majeure can be perceived as a subset of Vis Major or Act of God. As per the highest judicial authority, despite their disparities, both terms serve a shared objective of absolving a party from performance obligations and shielding them from liability in the event of contractual breach, thereby safeguarding the non-performing party from adverse consequences stemming from circumstances beyond their control[17].

The conflict arises when there is an intersection or interplay between the two categories, such as governmental intervention triggered by a natural calamity. The Insolvency and Bankruptcy Code (IBC) does not offer explicit guidance on the treatment of Act of God or Legislative Actions in the context of insolvency proceedings. This absence of specific provisions can give rise to uncertainties and disputes regarding the applicability of force majeure provisions and the ensuing consequences for the involved parties. The determination of whether an event falls within the ambit of an Act of God or a Legislative Action becomes pivotal as it dictates the rights and obligations of the parties, including potential relief from performance or termination of contracts.

IV. CONCLUSION

In conclusion, this research delves into the intricate tapestry of gaps and incongruities that pervade the prevailing force majeure framework enshrined within the esteemed Insolvency and Bankruptcy Code (IBC) 2016. The conflict stemming from the interplay between “Act of God” and "Legislative Actions" begets formidable challenges in ascertaining their application and ramifications within the realm of insolvency proceedings. The courts' constrained interpretation of force majeure clauses, anchored in the venerable principle of "ejusdem generis," engenders divergent thresholds of impact on performance, thereby fostering potential disparities among the parties involved. Moreover, the IBC, bereft of explicit provisions, fails to furnish a panacea to shield corporate debtors from the spectre of liquidation when they veer

[15] Energy Watchdog v. CERC, (2017) 14 SCC 80.
[16] Satyabrata Ghosh v. Mugneeram Bangur., 1954 AIR 44 (1954).
[17] Dhanrajamal Gobindram v. Shamji Kalidas & Co., AIR 1961 SC 1285.

astray or transgress from the ratified expanse of resolution plans during force majeure occurrences.

To redress these issues, a multifaceted approach is warranted. Legislative interventions, in the form of well-calibrated amendments, should be contemplated to elucidate the treatment of "Act of God" and "Legislative Actions" within the IBC's precincts. Such proactive measures would mitigate uncertainties and offer much-needed clarity regarding the invocation of force majeure provisions and the attendant consequences for the parties enmeshed in insolvency quagmires. Furthermore, courts must espouse a more expansive interpretation of force majeure clauses, mindful of equitable outcomes, thereby obviating the imposition of disparate standards of performance impact upon disparate parties. Lastly, the IBC must be fortified with efficacious safeguards to shield corporate debtors from the precipice of liquidation when unforeseen cataclysms disrupt the hitherto approved blueprint of resolution plans. By embracing these suggested remedies, the IBC can transcend the current labyrinthine maze of gaps and incongruities, fostering a more harmonious and equitable landscape for insolvency proceedings. It is incumbent upon legislative and judicial stakeholders to imbue the force majeure framework with resoluteness, rectitude, and coherence, ensuring its efficacy as a shield against the capricious whims of external contingencies. The IBC can only traverse the turbulent waters of force majeure events and find equilibrium between the rights and obligations of all parties bound within the complex web of bankruptcy necessities by working together to handle these perplexing challenge.

REGULATING MEDIA REPORTING OF CRIMES; WALKING *A TIGHT ROPE*.

Ryan Joseph[*]

Abstract

Media reporting of crimes has become a subject of veritable public vilification. The Delhi High Court is even examining the adequacy of existing guidelines to ensure fair media reporting of crimes.[1] *It is alarming that the courts are forced to do this once again when only early this year, the Bombay High Court established guidelines on media reporting of crimes.*[2] *This paper will attempt to delineate what should be done by the media to eschew sloppiness and revert to a constructive, stakeholder cognisant reporting. This paper is divided into two sections. The first section analyses the problems of reckless reporting of crimes which often results in the violation of an individual's right to privacy, right to live with dignity, inter alia and will assess the need to create regulations to stop such reckless behaviour. The second section attempts to answer what would be the ideal course of action to ensure that the media does not overstep its bounds when reporting crimes. Finally, this paper argues that the ideal course of action is for the media to follow the self-regulation guidelines established by the National Broadcasting Association (NBA) and that more teeth be given to the Press Council of India (PCI).*

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[1] Akshit Saxena, *Media Trial: Delhi High Court to Examine Sufficiency of Existing Guidelines, Need For Emergency Procedure*, LIVE LAW, (Oct. 8, 2021). https://www.livelaw.in/news-updates/media-trial-delhi-high-court-to-examine-sufficiency-of-existing-guidelines-need-for-emergency-procedure-183432.

[2] Live Law News Network, *What Kind Of Reporting Amounts To 'Media Trial'? Bombay High Court Gives Guidelines*, LIVE LAW, (Jan. 18, 2021, 9:31 PM). https://www.livelaw.in/top-stories/media-trial-bombay-high-court-ssr-case-guidelines-168557.

I. SHOULD MEDIA ADOPT A SET OF GUIDELINES WHEN REPORTING CRIMES?

A. AARUSHI TALWAR CASE STUDY

When talking about poor media reporting of crimes, the one case that stands out the most is the Aarushi Talwar case in which mud was wantonly swung at a family mourning the loss of their thirteen-year-old daughter. In this case, the media would publish *unverified* news regarding the case before every court hearing.[3] The bigger problem was that the media had declared the verdict even before the judge could. An article had the headline "Only Parents Could Have Killed Aarushi."[4] While this practice is obviously against journalistic ethics because its mere conjecture and not a fact, this is also a gross violation of an individual's right to a fair trial[5] as after reading such an article, the readers will view the trial as a mere legal encumbrance to achieving their idea of justice, which is to punish the person that the media has held guilty.

The media also took the initiative of going the extra mile to air unverified personal details often of salacious nature regarding the Talwars which had absolutely nothing to do with the trial. The only purpose of such reporting was to keep the masses hooked on this case. On 25th May 2008, Zee News aired a show in which the anchor, Manoj Raghuvanshi was playing the role of a mind reader and had claimed that Aarushi was indulging in a relationship with Hemraj to deal with the emotional stress arising from the (*unverified)* extramarital relation her father was having.[6] It must be noted that apart from the fact that Aarushi was no longer in this world to defend such malignant claims, she was just a thirteen-year-old girl and Zee News seemed to be so blasé about ruining her image for TRP. There are numerous other examples such as the K.M. Nanavati, O.J Simpson, and Sushant Singh Rajput case where the media reported crimes so poorly and irresponsibly that they infringed upon the rights of individuals. The media errs when, instead of reporting crimes fairly, it begins to report crimes through a lens of bias and tries to convince viewers that a particular individual is the culprit. This is exceptionally problematic because the media has an influential position in the society and viewers unsuspectingly believe most of the things, they say. Therefore, when the media accuses someone of being the culprit, the public considers this *accusation* of being a *fact* and crucifies the person on the altar of mass hysteria.

The effects of shabby reporting not only affect the viewers, but even judges feel the heat, as delivering a verdict against public opinion will lead to prejudice and unwarranted charges of incompetence against the court and the respective judges. While addressing the Bar Council of India, Justice Kurian Joseph talked about the pressure on the judge adjudicating the Nirbhaya case, and he even quoted the judge saying, "if I had not given the punishment, they

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[3] DHANANJAY MAHAPATRA, *SC gags media on cases under probe*, THE TIMES OF INDIA, (Aug. 10, 2010) https://timesofindia.indiatimes.com/india/SC-gags-media-on-cases-under-probe/articleshow/6283722.cms.

[4] DHANANJAY MAHAPATRA, *Only parents could have killed Aarushi*, (Apr. 24, 2011) https://timesofindia.indiatimes.com/india/Only-parents-could-have-killed-Aarushi/articleshow/8068770.cms.

[5] Zahira Habibullah Sheikh v. State of Gujarat, (2005) 3 SCC (86).

[6] SHOHINI GHOSH, *The Talwars and Presumed Guilt*, THE HOOT, (Nov. 6, 2013) https://asu.thehoot.org/media-watch/media-practice/the-talwars-and-presumed-guilt-7127.

(media and the public) would have hung me." [7] According to a study, 98% of attorneys felt that media could influence the judge's perception of a case under trial.[8]

Apart from violating an individual's right to a fair trial, the media also violates an individual's right to privacy, right to live with dignity and right to reputation when it unfairly accuses an individual of a crime. If media can drum up enough support for their charges, it can cause the individual to be boycotted by the society which has detrimental effects such as inability to find a job and inability to move freely in the society. Humans are social animals. When the community denigrates an individual for something they have not done, they virtually cease to recognise him/her as one of them, instead impute an identity upon the individual that is entirely biased. This causes the person to go through unimaginable mental stress for they are utterly confused about who they truly are. Khurshid Anwar and Dr. Anoop Krishna are two prominent victims of the unfair treatment meted out by the media, in their case, it made them go through veritable mental anguish and finally provoked them to take their lives.

B. THE NEED FOR GUIDELINES FOR REPORTING OF CRIMES BY THE MEDIA

The above case study clearly shows that at times media cannot be relied upon to help the truth come out and that it often goes on a crusade to destroy the personal lives of individuals who get entangled in its vicious web. This sentiment has led many people to believe that regulating media is long overdue. In Manu Sharma V. State of NCT of Delhi,[9] the court was more categorical: *"There is a danger of serious risk of prejudice if the media exercises an unrestricted and unregulated freedom."* Even The Law Commission's 200th report, **Trial by Media: Freedom of Speech versus Fair Trial Under Criminal Procedure (Amendments to the Contempt of Courts Act, 1973),** said: "*Today there is a feeling that in view of the extensive use of the television and cable services, are likely to have a prejudicial impact on the suspects, accused, witnesses and even judges and in general on the administration of justice.*"[10] Many people suggest that the government should come up with legislation to control the media and ask it to uphold the standards used by courts when coming to the truth in a criminal case such as the principles of natural justice and ensure that the right to privacy of an individual is not violated when reporting a crime.

In this regard, The USA's FCC commission showed gumption by creating the fairness doctrine under which broadcast licensees had to spend a reasonable amount of time airing matters of public importance and give time to voices on both the sides of the argument to be heard.[11] This doctrine also had a *Personal attack* rule under which if a personal attack was made on an individual during broadcasting, the licensee was supposed to notify the victim and provide him with a copy of the broadcast and give him/her time to rebut such an attack.[12] This

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[7] PTI, *Media Trials Strain Us, says SC Judge*, THE TIMES OF INDIA, (Jul. 26, 2015), https://timesofindia.indiatimes.com/india/Media-trials-strain-us-says-SC-judge/articleshow/48221249.cm.

[8] V.V.L.N SASTRY, *Influence of Trial by Media on the Criminal Justice System in India*, WALDEN DISSERTATIONS AND DOCTORAL STUDIES. 1, 122 (2019), https://scholarworks.waldenu.edu/cgi/viewcontent.cgi?article=8084&context=dissertations.

[9] Manu Sharma v. State (NCT of Delhi), (2010) 6 SCC 1.

[10] JUSTICE M. JAGANNADHA RAO, *Law Commission of India, 200th Report on Trial by Media Free Speech and Fair Trial Under Criminal Procedure Code, 1971* 1, 2 (2006) https://lawcommissionofindia.nic.in/reports/rep200.pdf.

[11] DYLAN MATTHEWS, *Everything You Need to Know About the Fairness Doctrine in One Post*, THE WASHINGTON POST, (Aug. 23, 2011) https://www.washingtonpost.com/blogs/ezra-klein/post/everything-you-need-to-know-about-the-fairness-doctrine-in-one-post/2011/08/23/gIQAN8CXZJ_blog.html.

[12] *Id.* At 8.

doctrine almost replicates the principle of *audi alteram partem* and goes a long way in ensuring that the media cannot wantonly abjure an individuals' right to privacy[13] and the right to reputation.[14]

II. SELF-REGULATION: THE IDEAL COURSE OF ACTION

A. *WHY STANDARDS USED BY COURTS CANNOT BE APPLIED TO THE MEDIA*

It is easy to understand where such arguments to heavily regulate media come from, and the alertness of citizens in asking for media to become more responsible must be appreciated. However, it must be noted that the media is not a trial court. The gravity of judicial proceedings is at a much higher level than that of media reporting a case. After all, the courts can seriously infringe upon the liberties under article 19[15] and the right to life under article 21[16] of individuals by incarcerating them for years, decades or even their lifetime. Moreover, in the rarest of rare cases, they can even sentence a person to death; the consequence of a media trial is a violation of one's right to privacy, damage to one's reputation and a considerable amount of time spent under media's lens. These are also very serious issues, and the media should show self-restraint while reporting. They also need to maintain the balance between their need to gather information and the privacy of the individual by only gathering information which is relevant to the case. However, the courts still have a greater ability to inflict harm than the media.

Another distinguishing point is that the purpose of the media and that of the courts is entirely different. Courts exist to deliver justice, hear multiple stakeholders and hard evidence to come to the truth, mandate individuals in a society to follow the law and reform those who choose to not abide by it. Media, on the other hand, exists to bring to light events occurring in the society which have consequences on the masses and individuals and help them understand the society around them to become responsible citizens and actively participate in democracy. Due to this difference in purpose and gravity of the trial, the media is not bound to follow the principles of natural justice, the CrPC, CPC, inter alia when reporting a crime.

The ability of the media and that of the courts is entirely different. When courts want to come to the truth, the executive investigates, or the courts can summon a witness or examine a person. On the other hand, the media, with limited monetary resources, can only send a reporter on the field to make observations and conduct interviews to obtain facts. By making media follow such high standards of fairness, the state will end up making it almost impossible for the media to carry out its public service. This service is extremely crucial to a democratic society, and the courts have taken cognisance of this, saying "The press is the public educator. It advances the public interest by publishing news without which a democratic society cannot make responsible judgments."[17]

As an example of the public service performed by media, one should read the two articles published by Caravan magazine[18] calling out all the discrepancies in the reporting of

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[13] K.S. Puttaswamy nd Anr. v. Union Of India And Ors., (2015) 8 SCC 735.
[14] Umesh Kumar v. State of A.P., (2013) 10 SCC 591 (India).
[15] Article. 19, The Constitution of India, 1950.
[16] Article. 21, The Constitution of India, 1950.
[17] Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India, (1985) 1 SCC 641.
[18] NIRANJAN TAKLE, *A Family Breaks Its Silence: Shocking Details Emerge in Death of Judge Presiding Over Sohrabuddin Trial*, The Caravan, (Nov. 20, 2017)

events that ensued after the death of Judge Loya. The journalist who investigated into Judge Loya's death, Niranjan Takle went to the village of Judge Loya, spoke to his relatives, conducted interviews with multiple stakeholders, and pored through all the reporting on Judge Loya's death to discern the truth. After this due process, Mr Takle published his findings without an iota of prejudice or subjectivity and gave a factual report of the discrepancies. This report eventually led to numerous petitions and PIL's being filed[19] and a lot of pressure was exerted on the judiciary to investigate this matter. Finally, the Maharashtra government conducted a discreet enquiry.[20] the findings of which were analysed by the Supreme court.[21] This process also acted as the trigger for the historic press conference held by four judges of the Supreme court to disclose the faults which plague the judiciary. The judge Loya case is only one instance out of numerous other examples such as Sucheta Dalal's reporting of the Harshad Mehta scam,[22] the reporting of the Bofors scam,[23] and the investigation on the FinCen files by BuzzFeed and the International Consortium of Investigative Journalists,[24] where media upheld journalistic norms during their investigation. These instances proved the importance of allowing media to conduct investigations and report crimes freely. All the above-mentioned examples of reporting could have been discouraged or unfairly shackled by applying the standard of fairness used by courts. It is important to note that in none of these examples, did the media declare a verdict. The media merely reported facts and did nothing more. Courts are supposed to follow high standards of fairness for they declare a verdict which can seriously abridge an individual's life and liberty. Therefore, the standard of fairness used by courts should not be applied to the media.

Another problem of imposing such a high standard of fairness is that media houses with deep pockets may still carry out their operation under the onerous guidelines, but the small media houses or independent reporters may struggle a lot and even have to shut down their practice. The media will essentially become a monopoly, and this can have detrimental consequences on democracy, as media controls the discourse in society. If the media were to become a monopoly, only one voice would be shaping the views of citizens and this one voice could be of a powerful individual who could manipulate us for their personal gains. Already there are numerous articles of the petroleum industry using the media to convince people either

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https://caravanmagazine.in/vantage/shocking-details-emerge-in-death-of-judge-presiding-over-sohrabuddin-trial-family-breaks-silence.

[19] PIL filed in Bombay High Court seeking probe in Judge Loya's death, (Jan. 9, 2018) https://www.freepressjournal.in/cmcm/pil-filed-in-bombay-high-court-seeking-probe-in-judge-loyas-death.

[20] MENAKA DOSHI, *How A Quick Acting State Government Spared Judge Loya's Death Further Inquiry*, BLOOMBERG QUINT, (Apr. 20, 2018)
https://www.bloombergquint.com/opinion/how-a-quick-acting-state-government-spared-judge-loyas-death-further-inquiry.

[21] SHRUTISAGAR YAMUNAN, *Even without an investigation, Supreme Court concludes that Judge Loya's death was natural*, SCROLL, (Apr. 19, 2018)
https://scroll.in/article/876250/without-investigation-supreme-court-says-judge-loyas-death-was-natural.

[22] SERENE ZACHARIAH, *#Scam1992: The Journalist Who Exposed Harshad Mehta's Rs 50 Billion Fraud*, THE BETTER INDIA, (Aug. 18, 2020)
https://www.thebetterindia.com/235806/scam-1992-sucheta-dalal-exposed-harshad-mehta-web-series-biopic-indian-stock-market-ser106/.

[23] SHUCHI BANSAL, *A watershed for Indian journalism*, LIVE MINT, (Apr. 25, 2019)
https://www.livemint.com/Politics/tzTKhEwYHJW7BJkLhF5pjJ/A-watershed-for-Indian-journalism.html.

[24] KENDALL TAGGART, *Suspicious Activity Reports Were at The Heart Of The FinCEN Files. This Report Says They Are Underused.*, BUZZFEED NEWS, (Sept. 24, 2020)
https://www.buzzfeednews.com/article/kendalltaggart/suspicious-activity-reports-were-at-the-heart-of-the-fincen.

that global warming is a hoax or that petroleum is not that damaging to the environment.[25] If the media were to become a monopoly, there could possibly be more of such propaganda and less objective, factual news.

B. SELF-REGULATION: THE IDEAL COURSE OF ACTION

In the discourse of regulating media, two fundamental rights take centre place, article 19 (1)(a) Freedom of Speech and from which arises the freedom of the press. *"If freedom of speech is taken away, then dumb and silent we may be led, like sheep to the slaughter."* **— George Washington.** "Freedom of press is the heart of social and political intercourse" ***Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India.***[26] Even article 19 of the UN Declaration on Human Rights expressly states that every individual has the freedom of opinion and expression. Government legislation for controlling the media is a slippery slope that will most likely end in the violation of article 19 (1) (a)[27] either directly or indirectly by being too restrictive to allow the media to fulfil its duty. After all, the media industry is the best judge of the radius of its contours, and they need to ensure that they carry out their investigation objectively and report the same responsibly. Therefore, if some other party, such as the government or the courts, were to create these contours, they may inadvertently put the media on a small leash and abridge their ability to fulfil their public duty.

Even courts have recognised this through cases such as **Halvi KS**[28] where the court refused to frame guidelines for the media after a discussion on the right to press being an aspect of the right to speech and it also relied upon **Sahara India Real Estate Corporation v. SEBI**[29] where the supreme court did not give any guidelines on media reportage. If the media's freedom of speech is abridged, the right to information of a citizen is also abridged. In **Chief Information Commissioner & Anr. v. State of Maniour & Anr.,**[30] the right to information was held to be included within the right to freedom of speech and expression guaranteed by Article 19(1)(a). In **S.P. Gupta** Justice V.R. Krishna Iyer observed that *"right to express one's thoughts is meaningless if it is not accompanied by the related right to secure all information on matters of public concern from relevant public authorities."*[31]

On a more cynical note, two things could happen if the ruling party is not happy with the media reporting about their party. First, the government could censor the media by a very restrictive law. Second, they could give themselves discretionary powers to punish specific media houses which publish articles against the ruling party. There is evidence for this happening; the government had cancelled their advertisements in three newspapers, which many critics and journalists described as an act against the anti-government editorials published in their newspapers.[32] Either way, the government coming up with regulations for the media is prejudicial to democracy.

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[25] SHARON LERNER, *How the Media Launders Fossil Fuel Industry Propaganda Through Branded Content*, THE INTERCEPT, (Apr 3, 2019), https://theintercept.com/2019/04/03/branded-content-fossil-fuel-companies/.
[26] Supra note 12.
[27] Article 19 (1)(a), The Constitution of India, 1950.
[28] Halvi K.S. v. State of Kerala, 2020 SCC OnLine Ker 3759.
[29] Sahara India Real Estate Corporation Ltd. & Ors. v. Securities and Exchange Board of India, (2012) 10 SCC 603.
[30] Chief Information Commissioner & Anr. v. State of Manipur & Anr., (2011) 15 SCC 1.
[31] S.P. Gupta v. President of India & Ors, AIR 1982 SC 149.
[32] DEVJYOT GHOSHAL, *Modi government freezes ads placed in three Indian newspaper groups*, REUTERS, (Jun. 18, 2019)

Finally, it is worth noting that the Fairness Doctrine, which was created to ensure a more balanced discourse in the media, was repealed by the FCC in 2011.[33] After investigating the efficacy of the fairness doctrine, it was found that the doctrine acted as a shackle rather than a tool to improve discourse in a democracy. FCC also stated that the most effective way to have an open exchange of ideas was to have a free, unregulated marketplace of ideas.

Considering the above arguments, it is apparent why the state does not presently regulate media and does not show any inclination to do so. This sentiment was evident when the parliament chose not to adhere to the recommendations of the Law Commission report which had suggested media regulation. Shackled media is unhealthy for democracy. But a free media which violates all reasonable standards of fairness while reporting crimes is equally bad for democracy. Therefore, media must take cognisance of the fact that they do err at times while reporting and must prevent such mistakes; it must at least adhere to a set of norms created by the media itself. As a matter of fact, such guidelines already exist.

The Press Council of India has released a set of guidelines: **Press council of India Norm of Journalistic Conduct**. Along with this, there also exists a set of self-regulating guidelines established by the National broadcaster's association, **Code of Ethics & Broadcasting Standards.** These guidelines satisfactorily cover a wide range of issues to ensure that media fulfils its service of being a public watchdog without being shackled. The only problem with this system is that these guidelines are not enforced efficiently.

A middle ground can be found by giving more teeth to the Press Council of India (PCI), which presently exists to uphold the standards of broadcasting. This is very important because even though the PCI, in case of a receipt of a complaint of a media house violating journalistic ethics and the council agreeing with the complaint can "warn, admonish or censure the newspaper" under Section 14(1) of the Press Council Act, 1978,[34] these actions are not stringent enough to ensure that the media follows the guidelines and self-regulation. It must also be noted that the PCI does not have jurisdiction over the media on the internet. "In **Ajay Goswami v. Union of India**,[35] even the courts took note of the shortcomings of PCI's powers. In 2013 the then chairman of PCI, Justice Markandey Katju had even written a letter to the parliament to increase the powers of PCI;[36] however, nothing happened after that. Giving more powers to the PCI is often argued against because people fear PCI may begin to lord over the media. While these concerns are legitimate, there are sufficient checks and balances in the structure of the PCI which ensure that it is an organisation which exercises its powers through fair and just means. PCI's composition itself would alleviate such fears: the chairman must be a retired Supreme court or High court Judge. All the stakeholders such as Indian Newspapers Society, working journalists, inter alia are represented in a balanced proportion to ensure all voices are heard when the PCI is coming to a decision. The condition in which PCI finds itself today is very pitiable. In its initial days when it had members such as Ram Jethmalani, LK Advani and George Fernandes, PCI was recognised as a robust body, and often top lawyers were hired to defend erring newspapers in proceedings carried out by the PCI. For example, In The Hindustan Times V. Times of India, LM Singhvi had appeared for the former. It is time

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https://in.reuters.com/article/india-media/modi-government-freezes-ads-placed-in-three-indian-newspaper-groups-idINKCN1TT1R6.

[33] MATT STEFON, *Fairness doctrine*, BRITANNICA, (Dec. 30, 2018) https://www.britannica.com/topic/Fairness-Doctrine.

[34] PRESS COUNCIL ACT, 1978, No. 37, Acts of Parliament, 2018.

[35] Ajay Goswami v. Union of India, (2007) 1 SCC 143.

[36] PTI, *Katju wants 'more teeth' for PCI*, THE HINDU, (Dec. 12, 2011) https://www.thehindu.com/news/national/katju-wants-more-teeth-for-pci/article2707327.ece.

the parliament gave more powers to the PCI to enforce the self-regulating guidelines created by the NBA and gave them sufficient powers to punish erring media houses, both in print and over the internet.

III. CONCLUSION

This paper set out to analyse whether there is a need to regulate the media and if so, to discuss the ideal way to ensure that the media reports crimes without infringing upon the rights of an individual. The paper concluded by establishing the need to create a set of regulations to keep the media in control. It established why the principles of natural justice are not the ideal way; rather self-regulation norms created by the media itself and enforced by the Press Council of India are the ideal way. This has been established by analysing the constitution, numerous case laws and statutes, and concluding that in a sensitive field like the media, imposing regulations will not only violate the fundamental rights of the media persons but also of the citizens at large, instead of helping democracy and public discourse, it will only have detrimental effects on them.

THE OVERREACH CONUNDRUM: ANOOP BARANWAL VS UNION OF INDIA & ORS. (2023) (CASE COMMENT)

Harshit Pathak & Vasujit Dubey[*]

Abstract

The separation of power has been held to be the basic structure of the Constitution.The Judiciary in Anoop Baranwal v. Union of India has breached the threshold limit that is being imposed through this separation of power doctrine. This continuous breach has given rise to the idea of advocating for a restraint on the illimitable reviewing powers of the Court.Through this article, the authors try to analyze the judgment of Anoop Baranwal with respect to the Separation of power and cull out the need for judicial restraint essentially in policy matters against the idea of judicial overreach. Firstly, the Authors briefly discuss the facts of the case and the issues contended by both theparties;secondly, the authors talk about the breach of the principle of separation of power by the act of forming a committee. Thirdly, the authors discuss about the saga of activism and the Court's justification for such an overreach in the garb of judicial activism. Fourthly, the authors talked about the need for judicial restraints. Finally, they conclude by holding that the Supreme Court in the present case has usurped the established principle of separation of powers by deliberating upon the approach of the Supreme Court while deciding such cases.

Keywords: Separation of Powers, Judicial Overreach and Activism, Independence of Election Commission, Judicial Restraint

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I. INTRODUCTION

The Supreme Court in the case of Anoop *Baranwal Vs Union of India & Ors.*[1] ordered for instituting a committee to elect the Chief Election Commissioner and Election Commissioners as opposed to the previous system mentioned in Article 324 (2) of the Constitution which authorized the President to appoint the Election Commissioner with the aid and advice of the Prime Minister. This was a result of four writ petitions which were filed in the Supreme Court between 2015 & 2022, challenging the procedure of appointing the Chief Election Commissioner and other Election Commissioners in the Election Commission of India, basing their claim on the apprehension that such procedure jeopardizes the independence of the Commission. The unanimous Judgment was rendered by the Constitutional bench with Justice K.M. Joseph & Justice Rastogi writing for the rest. Both, Justice K.M. Joseph and Justice Rastogi unanimously agreed on the fallibility of the appointing procedure which they found wanting. The Court held that the appointment to the post of the Chief Election Commissioner and the Election Commissioner shall be done by the President on the advice of the committee consisting of the Prime Minister, the Leader of the opposition (in absence of the leader of the opposition, the leader of the largest party in opposition) and the Chief Justice of India. Stating that this shall be the procedure until a 'good law' is enacted by the Parliament. Moreover, Justice K.M. Joseph raised the need for having a permanent secretariat for Election Commission of India which would incur its expenditure from the Consolidated Funds of India. By calling it a 'fervent appeal of the Court' the court urged the legislature to take cognizance of the matter, to realize the aim of making the Election Commission of India a 'truly independent body'. Justice Rastogi in his concurring opinion held that the grounds for removal of the Election Commissioner should be the same as that of the Chief Election Commissioner which in turn is like that of the judge of the Supreme Court of India. He further stated that such appointments shall be subjected to the recommendations of the Chief Election Commissioner of India under Article 324(5) of the Constitution. With regards to the conditions of service of the Election Commissioners, the Bench held that, shall not be changed to their disadvantage after appointment procedure is completed. Justice Rastogi also stated that the right to vote has a component of Part III of the Constitution hence, a Fundamental right enshrined in the Constitution.

II. FACTS AND LIS -

The primary concern of the petitioners was concerning the independence of the Chief Election Commissioner which according to them, required a fair procedure of appointment. For this, they suggested for the formation of a committee consisting of the Prime Minister, the leader of the opposition, and the Chief Justice of India to select the Chief Election Commissioner and other Election Commissioners. The petitioners contended the following-

Firstly, Article 324 (2) of the Constitution[2]states that the appointment of the Chief Election Commissioner and the Election Commissioner shall be done by the law made in by parliament. There is a void existing as no such law exists that specifically deals with the appointment.

[1]Anoop Baranwal v. UOI, (2023) SCC OnLine SC 216.
[2]Article 324(2), The constitution of India, 1950.

Therefore, the Court should venture in to fill this void by invoking the 'doctrine of Constitutional silence'.

Secondly, a free and fair election is the fundamental tenet of democracy. Which is also held to be a part of the 'basic structure' propounded in *Keshavananda Bharati*[3]. So, the institutions which ensure such exercise, become even more important. At present, the institution i.e. the Election Commission of India is devoid of a fair appointment process because of 'executive underreach'. Hence, in such a case the Judiciary can step in even if the matter lies in the executive domain.

Thirdly, the excessive executive interference through the appointment of the Chief Election Commissioner and the Election Commissioner makes the Election Commission a partisan organization and at the same time dependent on the executive. Hence, the independence of the body is curtailed. This promotes favoritism and biases which in turn leads to arbitrariness. The petitioners then raised the concept of 'loyalty' and 'reciprocity' to state biases in the appointment exercise undertaken by the ruling party which is also discussed in *Supreme Court Advocate on Record Association and Another v. UOI*[4] and also the Supreme Court in various judgments has held appointments by the executive as unconstitutional on this ground. Fourthly, they contended about the nature of appointments, which according to them was of a particular class of people largely consisting of the top bureaucrats, who favor the ruling dispensation. This was raised as a corollary to the issue of appointment of Mr. Arun Goel as the Chief Election Commissioner, on the very next day after him taking voluntary retirement from the post of Secretary of heavy industries. Considering all this, they urged the Court to intervene in the matter and order for a neutral committee to make the appointment of the Election Commissioners.

The Attorney General, R. Venkataramani appearing for the Government, responded by pointing out that there is 'no vacuum' in article 324 as article 324(2) clearly lays down the procedure for the appointment of the Chief election commissioner and other Election Commissioners. The respondents urged the court for continuing the status quo until a new law is enacted by the Parliament. They argued that such were the spirit of the provision and the original intent of the Constituent assembly. They also argued that forming a committee for appointment would violate Article 74 as it will trample upon the constitutional processes laid down in the Constitution. He also claimed that the matter relating to the appointment of the Chief Election Commissioner and Election Commissioners is squarely covered by *T.N. Seshan*[5], hence on existence of established precedent, the court shall not venture ahead. He further contended that the court shall only interfere in the matters where fundamental rights of the citizens are violated and because in this case no fundamental rights were violated, the court shall not interfere in the matter.

The primary contention of the government was that this judicial intervention would mean the judiciary stepping into the shoes of the legislature which would mean a clear violation of the doctrine of separation of powers. Solicitor General, Tushar Mehta argued that the legislation intended by Article 324(2) of the Constitution for the appointment of the Chief Election Commissioner and Election Commissioners is the law laid under Article 53(3)(b), in the absence of such a law, the President can be given the authority under Article 53 of the

[3] Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461.
[4] Supreme Court Advocate on Record Association and Another v. UOI, (2016) 5 SCC 1.
[5] T.N. Seshan, CEC of India v. UOI, (1995) 4 SCC 611.

Constitution. He also stated that, since Article 324(2) was included in the Constitution in 1950, its validity cannot be questioned.

The Solicitor General, relying on the doctrine of 'Judicial restraint' claimed that the matter essentially involves specific political questions so the court shall rightfully remain immune from these matters and abide by the doctrine of judicial restraint. Finally, he pointed out that a committee which includes non-executive members will vitiate the Separation of Power enshrined in the Constitution scheme.

III. DEFERENCE FOR SEPARATION OF POWERS

One of the essential features of our democratic system is the separation of powers. The separation of power has been held to be the basic structure of the constitution by the five-judge bench of the Supreme Court in *State of Tamil Nadu v. State of Kerala*[6] where the court held,

> *"Separation of powers between three organs—the legislature, executive and judiciary—is also nothing but a consequence of principles of equality enshrined in Article 14 of the Constitution of India. Accordingly, a breach of the separation of judicial power may amount to negation of equality under Article 14. Stated thus, a legislation can be invalidated on the basis of breach of the separation of powers since such breach is the negation of equality under Article 14 of the Constitution."*

Further, the separation of powers has been admitted to be a part of the basic structure of the Constitution in the case of *Keshavananda Bharati*[7] and subsequently in the *NJAC case*.[8] The Court in the latter case held, "*The principle of separation of powers is an integral part of the Constitution of India, and its basic structure cannot be altered. The Constitution provides for a clear demarcation of functions and responsibilities of the executive, legislature, and judiciary. This separation ensures the checks and balances in the exercise of power, and prevents any branch from becoming too powerful.*"[9]Therefore, alteration of powers and functions of any subject which existswithin the realms of the basic structure, by the virtue of its existence in the basic structure, cannot be amended by the Parliament. And at the same time, shall be regarded as a principle for all to adhere.

Then in the case of *Asif Hameed v. State of J & K*[10] the court held,

> "*Although the doctrine of separation of powers has not been recognized under the Constitution in its absolute rigidity, the Constitution makers have meticulously defined the functions of various organs of the State. Legislature, Executive, and Judiciary have to function within their own spheres demarcated under the Constitution. No organ can usurp the functions assigned to another…… The Constitution does not permit the court to direct or advise the executive in matters of policy or to sermonize qua any matter*

[6] State of T.N. v. State of Kerala, (2014) 12 SCC 696.
[7] Supra note 4.
[8] Supra note 5.
[9] Ibid, at para 8.
[10] Asif Hameed v. State of J&K, 1989 Supp (2) SCC 364.

which under the Constitution lies within the sphere of legislature or executive, provided these authorities do not transgress their constitutional limits or statutory powers."[11]

Justice K.M. Joseph writing for Aniruddha Bose J, Hrishikesh Roy J and C. T. Ravikumar J, deals with the issue of separation of powers separately. He first goes on to establish the proposition that the idea of separation of power shall not be read in vacuum and that the traditional understanding of separation of powers has become obsolete. For this, he refers to the case of *State of U.P. v. Jeet S. Bisht*[12]where it was held,

"*Constitutional mandate sets the dynamics of this communication between the organs of the polity. Therefore, it is suggested to not understand the separation of powers as operating in a vacuum. Separation of powers doctrine has been reinvented in modern times."*[13] He further states, "*The theory that the courts cannot or do not make laws is a myth which has been exploded a long while ago."*[14]

Thus, the question arises as to, what if the Judiciary amends the basic nature of an essential principle? Also, it is a fact that the separation of powers acts as an accountability tool for the Judicial branch of the government, but what if this accountability tool is amended by the Judiciary itself?

Here, the idea of separation of powers becomes quintessential for effectuating the fundamental tenets of the Constitution, one of which remains the doctrine of separation of power. Judicial intervention in the fields specifically prescribed for the legislature tends to violate the basic principle of natural justice, *nemo judex in causa sua*i.e., no one shall be a judge in his own cause. This is because the Judiciary being the primary adjudicatory authority, has to deal with such questions as and when the need arises. The proposition was further accepted by Joseph J. himself when he stated,

"*While it may be true that the Constitution is supreme and all disputes must finally attain repose under the aegis of the Constitution, in one sense the final arbiter of what is the law must be the court".*[15]

Notwithstanding the court's powers to act or direct in circumstances, with such powers, comes the responsibility to act judiciously. The underlying theme of judgment on the issue of 'judicial activism' has been partially positive. Joseph J. opines that judicial activism, as opposed to a merely passive role, maybe a much-needed choice,[16] this is further accompanied by a caution that such exercise shall have sound judicial justification and that such exercise shall not merely be an exercise in the realms of 'subjectivism'.

However, a subsequent judgment in NJAC delivered in the year 2016 which struck down the 99th constitutional amendment to the Constitution as unconstitutional on the pretext of the same violating the principle of separation of powers, found no mention in the Judgement. This raises questions about the deductive approach adopted by the Court as a judgment delivered in

[11]Ibid, at para 17, 19.
[12]State of U.P. v. Jeet S. Bisht, (2007) 6 SCC 586.
[13]Ibid.
[14]Supra note 12, at para 84.
[15]Ibid, at para 122.
[16]Supra note 12, at para 123.

2008 is being relied upon to cull out a principle that was already settled in subsequent judgment in 2016.

IV. THE SAGA OF ACTIVISM

Time and again the question of *Judicial activism* has hung over the Judiciary. The terms 'overreach' and 'activism' are closely interlinked. While they are used interchangeably, the fine line between them cannot be overlooked. 'Judicial activism' refers to the activist spirit of the Court which seeks to promote social change and accomplish the aims of 'social engineering', whereas 'judicial overreach' refers to the judicial intervention in matters which are purely within the realms of either the Executive or the Legislature.

The Apex Court in *Keshavananda Bharati*[17] warned against such 'overreaching' tendencies of the court wherein it held,

> "*It is not judicial activism, but judicial restraint which is the need of the hour. The court must be alive to the needs of the people and aware of the changes which are taking place in the society, but it must act within the limits of its jurisdiction and its role as a watchdog of the Constitution.*"[18]

However, in the present case, the court ambiguously blurred the line necessitated by the principles of judicial restraint and separation of powers. One of the essential propositions put forth by Justice Joseph is that the courts in certain specific situations can breach the traditional separation of power principle and venture into the territory of the other two organs of the government, for enhancing the rights of the citizens.

A corollary of this idea is that put forth by Tarunabh Khaitan in his work '*Guarantor (or the so-called 'Fourth Branch')Institutions'*[19], wherein he states that there are two prevalent norms in a constitution, one the *self-enforcing norms* (like law and order, customary law, fiduciary duties etc.)and the *non-self-enforcing norms* (consisting of the ideals such as democracy, rule of law etc.). The non-self-enforcing norms are vulnerable to attacks from the other institutions of the State (as effective empowerment of the same could lead to limiting the power of powerful organs of the state) therefore, such norms need to be protected. So, the breach of the Separation of powers is permissible proposition which shall be undertaken in order to achieve a greater goal i.e., to protects the 'fourth institution'.

Notwithstanding the claim, it is essential to understand that the idea of separation of powers is itself a 'non-self-enforcing' norm. This is because the nature of the principle is such that it seeks to limit the jurisdictions of the organs of the State thereby limiting their powers. Hence, the norm becomes vulnerable and needs to be protected. Therefore, essentially the battle is between two fundamental non-self-enforcing norms and the discretion lies before the courts to decide the validity of the propositions antithetical to these norms.

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[17] Supra note 4.
[18] Ibid, at para 1766.
[19] TARUNABH KHAITAN, *Guarantor (or the so- called 'Fourth Branch') Institutions, Jeff King and Richard Bellamy eds*, Cambridge Handbook of Constitutional Theory (CUP 2023 Forthcoming).

This discretion was particularly apparent in the *NJAC case*,[20] where inclusion of the non-judicial members in the collegium for judicial appointments, was considered to be a threat to the independence of the Judiciary and a violation of the principle of separation of powers whereas in the present case, the formation of a similar committee for the appointmentof the Election Commissioner (which is customary as well as a constitutional norm) is excusable. Hence, the discretionary power to decide for a norm justifying the same on the edifice of subjectivity raises questions on the unprejudiced nature of such exercise of discretion.

The 'Guarantor institution' theory idealizes three principles that are a prerequisite for a well-functioning fourth-branch institution namely, accountability, expertise and independence.[21] Therefore, for maintaining independence of this forth institution of our democracy the courts are justified in stepping in.[22] By drawing a corollary from Khaitan's fourth institution, one can proclaim NJAC as a fourth institution, as it aimed to provide and further the virtues of accountability, expertise and independence. However, it is a fact that despite the presence of such virtues it was called a threat to the independence of the Judiciary. Interestingly, this was justified on the pretext of the same breaching the doctrine of separation of powers.

Hence, the Judiciary accepted that the breach of the separation of powers is not justified even when a norm is non-self-enforcing. Similarly, a proposition which advocates for setting aside fundamental principles like that of separation of powers, shall not be justified merely on the grounds of the same preserving the sanctity of some non-self-enforcing norm.

A. THE INTENTIONALISM ARGUMENT

The Court's justification for this usurpation can be culled out by rationalizing the substantive intent of the Constituent assembly and the subsequent Parliaments. This approach of interpretation is called 'intentionalism'.[23] Intentionalism refers to an approach to legal interpretation that emphasizes on the subjective intent of the law's drafters or enactors as the most important factor in determining the meaning of a particular provision or statute. Some legal systems, such as that in the United States, have been associated with intentionalist approaches of statutory interpretation, particularly during certain periods in its history.[24] Even American Courts which are known for vigorously applying the intentionalist approach have accepted the validity of 'clear and unambiguous' statute have cautioned against applying the idea where the meaning of the provision can be clearly understood from the text of the statute.

The United States Court of Appeal affirmed the same in the case of *United States v. Smith*[25], where the Court opined,

> *"Our task is to apply the text of the statute as written, not to speculate about the subjective intentions of Congress…It is not our place to rewrite the statute or to read*

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[20] Supra note 5.
[21] Supra note 19.
[22] RUSHIL BATRA, *Decoding the Supreme Court's Election Commission Judgment – II: On the Separation of Powers*, (4th March, 2023). https://indconlawphil.wordpress.com/2023/03/04/decoding-the-supreme-courts-election-commission-judgment-ii-on-the-separation-of-powers-guest-post/
[23] ANIRUDH PRASAD and CHANDRASEN PRATAP SINGH, *Judicial Power and Judicial Restraint* 68, (2022).
[24] SOLI J. SORABJEE and MOOL CHAND SHARMA, *Constitutionalism Human Rights and the Rule of Law* 226, (2005).
[25] United States v. Smith, 644 F.3d 638, 643 (9th Cir. 2011).

> *into its exceptions that Congress did not include*[26] *…the district court thus relied on an*intentionalist *approach to statutory interpretation, which seeks to determine the subjective intent of the enacting legislature. But such an approach is unnecessary where the statute's text is clear and unambiguous."*[27]

Similarly, the Supreme Court in the case of *Shailesh Dhairyawan v Mohan Balkrishna Lulla* (2016)[28], edifying on the 'golden rule of interpretation' held that the 'doctrine of purposive interpretation' shall be used in those cases where a plain and literal interpretation would lead to absurdity and ambiguity.[29] This is to suggest that there exists a certain inherent limitation on the application of this principle, the foremost being the absence or a clear and an unambiguous provision in the law.

Surprisingly enough, in the present case, where despite there being a clear law prescribed under Article 324 of the Constitution, the Court acted on the pretext of 'executive underreach' (for making the Executive accountable for being unable to make a separate law for the same) and used the intentionalist approach to justify the same. Hence, there can be a case for inaccurate application of 'intentionalism' in the present scenario.

The legislative powers lie solely with the Parliament. In a system where Parliament represents the will of the people, the parliament shall perform the function of realizing the intention of the makers of the Constitution. This is not to suggest that 'progressive intentionalism' be subdued in the garb of these limitations but, it is also necessary to strike a balance such that it fulfills the purpose of its inception while at the same time keeping other constitutional principles intact.

B. THE VACUUM ARGUMENT

One of the most problematic junctures in the Court's reasoning is the 'vacuum' argument. It suggests that if the Court finds that there exists a 'Constitutional silence' or a' vacuum' because of the void between the primary intent of the provision and its realization on the ground, in such situations the Courts shall step in and fill such void. However, this power has to be rationally utilized as not doing so could amount to transgression of Constitutional provisions, which seems to have happened in the present case. The Court has used the vacuum principle to further the cause of many pertinent issues like that in Vishaka *Vs. State of Rajasthan*[30]where it provided for *Vishaka guideline* thereby enhancing the cause of women's safety at work place. At the same it, it is also true that the misuse of this principle looms other constitutional principles like that of separation of powers.

By relying upon the doctrine of constitutional silence and edifying this claim on intentionalism, the Courts can practically take over the power to overrule any provision of the Constitution despite there being an established constitutional practice. The same issue was raised in the case of *Manoj Narula v. Union of India*[31], where Justice Deepak Misra elaborated on the limitation of the doctrine of constitutional silence and stated that the interpretation shall have a basis in the Constitution and the Courts shall not rewrite the Constitution, because doing so, would be tantamount to violating the boundaries of Judicial Review.

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[26] Ibid, at para 5.
[27] Supra note 25, at para 4.
[28] Shailesh Dhairyawan v. Mohan Balkrishna Lulla, (2016) 3 SCC 619.
[29] Ibid, at para 33.
[30] Vishaka and Others v. State of Rajasthan and Others, (1997) 6 SCC 241.
[31] Manoj Narula v. Union of India, (2014) 9 SCC 1.

Thus, he highlights the distinction between the legislative void and a circumstantial void i.e., where there already existing an enactment or provision which require further interpretation. According to him the Court while filling these gaps shall behave arbitrarily and such inclusions shall be reasonable. Hence, he draws a line between Judicial Review and Judicial Overreach.[32] However, in the present case such powers have not been used very reasonably. Because despite the existence of an already established constitutional procedure the courts acted as if this was a legislative void and made the an entirely new setup against the procedure endure till now.

V. THE NEED FOR JUDICIAL RESTRAINT IN POLICY MATTERS

The recent trends of the Supreme Court showcase a tendency to venture into the political realm notwithstanding the established principle of not entering into the political thicket. This has posed a difficult question to the principle of separation of power. The Supreme Court in *State of Rajasthan v. UOI*[33]and *RC Poudyal v. UOI*[34] has acknowledged that it shall not enter the political thicket while exercising the power of judicial review, as doing so is essential for the democratic legitimacy to prevail. It was also held that policymatters essentially falls under the exclusive domain of the Executive. Therefore, such actions shall not be examined by the court, notwithstanding such exclusion does not confer an unfettered immunity to every executive action[35] The need for judicial restraint was also vehemently voiced by Justice Markandey Katju.[36]

Using the reviewing powers expansively may obliterate the doctrine of the political thicket and could create a situation where there is a dearth of intra-organ control over the Judiciary.[37] The Supreme Court in the case of the *University of Kerala v. Council of Principals of College, Kerala & Ors*[38] formulated five questions dealing with the limits of judicial review of legislations. The Court referred the same to a larger Constitution bench. The foremost question which showcases the intention of the Court to define the contoursof judicial activism was

> "*Whether under our constitution the judiciary can legislate, and if so, what is the permissible limit of judicial legislation. Will principles of judicial legislation not violate the principles of separation of powers broadly envisaged by our constitution*?"[39]

Therefore, these questions essentially becomepertinent for determining the contours of Judicial review, however the case is pending and no substantial progress is made. It is pertinent for the Cout to answer these questions before dwelling into such matters. Not doing so could disturb the power dynamics between the three branches of the State and a new paradigm could emerge

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[32] NIKITA PATTAJOSHI and SWAYAMSIDDHA MISHRA, *'A Missed Chance to De-criminalise Indian Politics: A Comment on Manoj Narula v. Union of India', 7 NLUO LJ 184, 194 (2020).*
[33] State of Rajasthan v. Union of India, 1977 3 SCC 592, at para 143.
[34] RC Poudyal v. UOI, AIR 1993 SC 1804
[35] APURVA SINGHI and KHUSHI JOSHI, *'Transformative Constitutionalism Obliterating the Political Thicket Dangers of Judicial Overreach'*, (3rd October 2021), https://wbnujscls.wordpress.com/2021/10/03/transformative-constitutionalism-obliterating-the-political-thicket-dangers-of-judicial-overreach%EF%BF%BC/
[36] Pubali Sinha Choudhary, 'From Activism to Restraint: Retrograde Judicial Philosophy or Merely Controverting Judicial Overreach' 3 GNLU Law Review 6 (2012).
[37] Ibid.
[38] University of Kerala v. Council of Principals of College, Kerala and Others, (2010) 1 SCC 353.
[39] Ibid, at para 16.

where judicial overreach becomes a norm. This shall not be so, as for a democratic system needs a certain degree of trust and transparency between different organs of the government.

This specially becomes a cause of concern in the present case where the phenomenon of the Court interfering in the appointment of Chief Election Commissioners and Election Commissioners indicates a similarly breach of trust.

A. AMBIGUOUS HORIZONTAL APPLICATION

Justice Rastogi while concurring with the majority provided a new perspective to the issue by applying the principle of the 'horizontal effect' of Fundamental rights. This principle was enunciated in the case of *Indian Young Lawyers Association Vs. State of Kerala*[40] where the Court held that Article 15(2) and 17 of the Constitution are available against the State as well as against the non-State actors. But, Article 15(1), 14, 19 and 21 are not available against the non-State actors.

Justice Rastogi while expounding on the Horizontal application writes-

> "*Therefore, the right to vote is not limited only to Article 326, but flows through Article 15, 17, 19, 21. Article 326 has to be read along with these provisions. We, therefore, declare the right to vote in direct elections as a fundamental right, subject to limitations laid down in Article 326."*[41]

It is unclear as to how the 'right to vote' flows through Article 17 which seeks to abolish untouchability. This also raises questions on the implementation of such horizontal effect as each of the Articles mentioned above, has its own limitations and harmonization of such limitations is limited. Additionally, extensive interpretation may prove to be problematic in the future as it seeks to enforce something which is not in the domain of the courts. This blurs the established boundary between the State and private bodies envisaged under Article 12 of the Constitution.

B. THE INCLUSION OF THE CHIEF JUSTICE OF INDIA -

Additionally, the decision of including the Chief Justice of India in the committee seems unempirical, especially when one considers the success rate (in terms of maintaining impartiality in functioning) of the committees formed for the appointment of the Director of Central Bureau of Investigation and Enforcement Directorate. Adding to this is the fact that there have seldom been questions raised on the conduct of the Chief Election Commissioner except in this issue.

Another important facet of this argument is the inherent assumption that such inclusion would bring about neutrality in the selection process. While such claims are largely unempirical, even if considered for their logical value, it fails to stand. One of the main concerts with such inclusion would somehow impede the assumption of impartiality, as the Chief Justice's involvement in the selection process would give a moral sanction and imprimatur to the selected candidates. Hence, the Court may face a moral conundrum if in the future it is asked to decide on the questions about the workings and impartiality of the Election Commissioners as the Chief Justice of India was involved in such a collegium.

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[40] Indian Young Lawyers Association Vs. State of Kerala, (2019) 11 SCC 1.
[41] Supra note 2.

A situation may arise where this is a complete division in the opinion of the collegium. In such cases, Chief Justice would be a mere party to such collegium and would remain a reticent member, as has been the cases, more so when the possibility of the Chief Justice knowing the person to a required considered for an appointment is abysmally low. This would fail to serve any substantive purpose.

VI. CONCLUSION

The recent Judgement of the Supreme Court have shown the tendency to tilt towards excessive judicial control thereby raising questions of judicial overreach. There is a need for the Supreme Court to give wider consideration to the principle of separation of powers. The act of formation of a committee does not completely absolve the Court from its critics who claim that such exercise was a transgression into the realms of the Judiciary especially when special powers of the Court mentioned under Article 142 of the Constitution was not exercised. At this juncture the Courts could have alternatively thought along the following lines -

(i) A modification of the *status quo*, where there would have been no committee and the Election Commissioners would have been selected through the same method. The court would have interfered where there would have been cases of gross misconduct or lack of reasonableness in the procedure of appointment of the Election Commissioners and could have gone into the questions of partiality in appointments as and when required.

(ii) Alternatively, the Court could have 'recommended' the formation of a committee consisting of the Prime Minister, the leader of the Opposition of Lok Sabha (in his absence the leader of the largest party in the Lok Sabha) and the senior most outgoing Election Commissioner. Which would advise the President. The inclusion of the outgoing Commissioner could prove to be beneficial as he/she has got nothing substantial to gain from the government and his experience in the system provides a nuanced understanding of the specific requirements of the job. This would help in a better evaluation of the prospective candidate. Although, there can be questions raised on the independence of the outgoing Commissioner too.

The principle realized by the Court i.e., for ensuring independence and transparency is a laudable step but it is the manifestation of the aim by such means which is questionable. The intention of the Court to vouch for independence is essential and legitimate, however, what remains is the effect of such legislation on the established tenets of the Indian Constitution.

ARUP BHUYAN V. UNION OF INDIA*:* THE ISSUE ARISING OUT OF THE INTERPRETATION OF GUILT BY ASSOCIATION

Souhardya Roy[*]

Abstract

The review petition filed by the Union Government in the case of Arup Bhuyan vs Union of India was recently decided by the Supreme Court and it was held that mere membership in a banned organisation would be enough to convict a person under §10 of the UAPA and §3 (5) of the TADA. This decision legitimises the Doctrine of Guilt by Association and makes it possible for the State to prosecute normal citizens on the grounds of their inactive membership or passive membership of banned organisations. This article assesses this decision of the supreme court and contests that this is a very narrow interpretation of the law, wherein the proportionality test has been misconstrued and the Doctrine of Balancing of Fundamental Rights has not been observed. This article also analyses the judgment concerning the application of the doctrine of guilt by association and its subsequent declaration as unconstitutional in the USA by the US Supreme Court. The case is primarily perceived from the perspective of the three-pronged Balancing test laid down in the Sahara India Real Estate Corpn. Ltd. v. SEBI case, consisting of – (a) test of substantial risk, (b) necessity test, and (c) proportionality test, to evaluate the judgment of the review petition. Finally, the article discusses the importance of this judgment and the necessity to fall back upon the previous decision which laid out a more liberal interpretation of the law to ensure the right to freedom of speech and expression in India.

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I. INTRODUCTION:

There is a fine line between perfect and excess, and this is the line that almost every modern nation-state toes to bring in the best possible legislation for the welfare of its population. However, when it comes to anti-terrorism laws and laws on National Security, this consideration often goes for a toss. From the National Security Act implemented in Hong Kong to the Unlawful Activities (Prevention) Act ("UAPA") in India, the justification for preserving National Security often supersedes the cries for preventing State-backed atrocities and ensuring the basic fundamental rights like freedom of speech and expression and right to life. This effectively silences the dissenting population in a democratic nation and establishes an authoritarian State which uses such legislation to curb dissent and infringe on the very tenets of democracy upon which the nation is built upon. Such legislations exist in India, in the form of the UAPA and TADA, which are intended as National Security laws but are often abused by the State. One such instance was the case of *Arup Bhuyan vs Union of India (2023)*[1], ("*Arup Bhuyan*"), which was recently decided by the Supreme Court of India. In this case, the Supreme Court upheld the doctrine of "guilt by association" and it was held that mere membership of a banned or illegal organization will be enough to incriminate a person.

This affirmation of such a draconian doctrine of guilt by association needs to be understood through a constitutional lens, wherein criminal liability is imposed on a person based on their affiliation to a banned organisation and their possession of articles related to such affiliations. This doctrine is deeply problematic as it criminalised a person based on their mere affiliations, and curbs their freedom of expression by penalising them without any reasonable apprehension of them carrying out seditious activities. Furthermore, the analysis of the court in interpreting the term "membership" forms the crux of the matter in this case, and although the black letter of the law has been followed, there are considerations that need to be made in the interests of preserving the survival of fundamental rights, due to the lack of which the decision is flawed. And, it is in that regard a thorough analysis needs to be made of the case while keeping the balancing test of Fundamental rights as an instrument of evaluation.

II. THE DOCTRINE OF GUILT BY ASSOCIATION:

The doctrine of "Guilt by Association" refers to the concept that guilt can be ascribed to a person by the people they associate with or that guilt can be ascertained through a person's social/political affiliations to organisations/institutions.[2] This doctrine essentially penalises an individual on the basis of their affiliations, and not their "personal criminal liability"[3] or the "doctrine of personal guilt"[4], which goes against the very foundations of justice. However, from the 20th century onwards, there has been a proliferation of the usage of this doctrine. One of the major applications of this doctrine was during the formulation of the amendments to the Immigration Law of the USA in 1920, wherein the legislative included provisions for the deportation of individuals who were members of communist parties or had affiliations to it

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[1] Arup Bhuyan v. Union of India, 2023 SCC OnLine SC 338.
[2] Editorial note, *Guilt by Association: Three Words in Search of a Meaning*, The University of Chicago Law Review, Vol. 17 Issue. No.1, 148–162 (Autumn, 1949)
https://doi.org/10.2307/1597797
[3] JOHN LORD O'BRIAN, *Loyalty Tests and Guilt by Association,* Harvard Law Review, Vol. 61., Issue. No. 4, 592–611 (April, 1948).
https://doi.org/10.2307/1335638.
[4] *Id*. p.604.

because the immigrants of such affiliations will incite violence against the USA government and try to overthrow the state.[5] Another similar act was enacted in 1940 by the US government to curb "seditious" behaviour in the USA.[6] This doctrine was also applied in the famous Nuremberg trials, wherein both doctrines were implemented – one which penalised personal acts of criminal liability, as well as one which penalised the association of the defendants with the Nazi Party.

Thus, in essence, this doctrine is used to penalise any form of association by a person, regardless of the status of their membership to such association. This doctrine, although useful in some cases to ascertain guilt, is an extremely draconian tool in the hands of a draconian state, which often uses this doctrine to enact legislations that often curb dissent.[7] However, this doctrine has often been criticised by several courts around the world, for its blatant misuse by the governments, where the courts had to intervene to safeguard the rights of the people. One such case was *Schneiderman v. United States* (1943)[8], where the Supreme Court of the US criticized the prevalent usage of the doctrine by stating – "that under our traditions beliefs are personal and not a matter of mere association, and that men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms or asserted principles".[9] Through this interpretation, the US Supreme Court had diluted the draconian nature and had put forth the idea that this doctrine was detrimental to the cherished right of freedom of expression in the USA.

Thus, although subject to more criticism than support, this doctrine has continued to prevail under varying circumstances, where it has been often employed by the state to curb instances of dissent against it. Such provisions find application in India through special laws which deal with national security.

III. A BRIEF ANALYSIS OF UAPA AND TADA:

The Unlawful Activities (Prevention) Act, 1967 ("UAPA"), was passed by the Indian Parliament as a means of preventing and combating illegal and terrorist activities there. The act was passed to grant the Indian government the legal and administrative authority it needs to deal with people or organizations that posed a threat to the country's security or were engaged in what was deemed to be illegal activity. The UAPA was subsequently revised in 2004 to include clauses addressing terrorist financing, money laundering, and other related offences. The act gives law enforcement agencies the authority to take action against people or groups involved in shady or terrorist activities, such as banning groups, arresting people, and seizing their property. As of now, after the Unlawful Activities (Prevention) Amendment Act of 2019, there have been certain changes that have been incorporated into the Act. Another act that is of the same nature as that of the UAPA is the Terrorist and Disruptive Activities (Prevention) Act, 1987 ("TADA"), which was also enacted to contain acts of terrorism in the nation and preserve national security.

The relevant section in the UAPA which contains provisions to punish members (both active and passive as per the recent judgment) in such organizations primarily is included in §10 of

[5] 41 Stat. 1008 (1920), Immigration Act (USA).
[6] Sections 9-17, Alien Registration Act, 54 STAT. 670, 18 U. S. C. (1940).
[7] Supra note 3, pg. 602-603.
[8] Schneiderman v. United States, 320 U.S. 118 (1943).
[9] *Id.*, para 26.

the UAPA[10] and §3 (5) of the TADA[11]. These two special laws were formed to further the doctrine of Guilt by Association, whereby proactive measures could be undertaken by the State to prevent acts of terrorism from happening against the state and ensure national security. However, thereon since, these have become instruments of oppressive state power, where dissenters and protestors have been put behind bars to curb any form of dissent against the State and the government.

The primary concern with UAPA is the fact that the accused who has been charged with this Act can be detained for prolonged periods without Bail (180 days) and trial. Furthermore, the UAPA is not subject to periodic reviews like the TADA, which makes the act an unreformable draconian clamp on freedom of life and liberty under Article 19 of the Indian Constitution. Furthermore, since the act provides for the offences under it to be cognizable, the authorities have full and unregulated power to make arbitrary arrests without warrants, merely based on suspicion, and detain people without following the procedure under Criminal Procedure Code, 1973 (CrPC).[12]

In a recent People's Union for Civil Liberties report in 2022, it was found that the rate of conviction was around 2.80% for cases lodged under UAPA, from 2015-2020. This is one of the most glaring failures of the law, which is seeing its adverse effects being inflicted upon innocents. It has been observed that most of these cases are especially filed by government authorities to curb dissent, which in itself goes against the intention of this Act.[13]

IV. A DISCUSSION ON *ARUP BHUYAN*:

The case of *Arup Bhuyan v. Union of India (2023)*[14] ("*Arup Bhuyan*"), was a review of the previously decided case of *Arup Bhuyan v. Union of India (2011)*[15], which dealt with the charge of incriminating a person who is a passive member of a banned organization. In this case, the individual was an alleged member United Liberation Front of Asom (ULFA). The previously decided case also included the two other cases, which dealt with a similar subject matter, which were *State of Kerala v. Raneef*[16] ("Raneef") and *Sri Indra Das v. State of Assam*[17], where the former accused was linked to Popular Front of India (PFI) and the latter was a member of United Liberation Front of Asom (ULFA). It was in this context that all three of them were charged under UAPA §10 and §20, which deals with membership in any unlawful or illegal organization, or any organization which has committed illegal activities.

In the 2011 case, the accused in the accused challenged the constitutional validity of this broad interpretation of "membership" under the TADA and UAPA which essentially convicted them, as well as other provisions brought under the UAPA Amendment Act, 2008, which made it

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[10] Section 10, The Unlawful Activities (Prevention) Activities, 1967.
[11] Section 3 (5), Terrorist and Disruptive Activities (Prevention) Act, 1987.
[12] Susan Abraham, Misuse of the Unlawful Activities (Prevention) Act, ECONOMIC AND POLITICAL WEEKLY, Vol. 52, Issue No.18. 23–26, (May 6, 2017). http://www.jstor.org/stable/26696056.
[13] V. SURESH, *UAPA: Criminalising Dissent and State Terror - Study of UAPA Abuse in India*, 2009-2022, p.22-24, (People's Union for Civil Liberties, 2022) https://fmesinstitute.org/wp-content/uploads/2022/09/UAPA_Study_Report_-_PUCL_-_12-08-2022_copy.pdf (Last visited on July 29, 2023).
[14] Arup Bhuyan v. Union of India, 2023 SCC OnLine SC 338.
[15] Arup Bhuyan v. Union of India, (2011) 3 SCC 377.
[16] State of Kerala v. Raneef, (2011) 1 SCC 784.
[17] Sri Indra Das v. State of Assam, (2011) 3 SCC 380.

legal for the police and other authorities to detain individuals for 180 days without bail.[18] The amendment also expanded the definition of a "terrorist act", which included membership, which was also challenged in this case.[19] The 2-judge SC bench consisting of Justices Markandey Katju and Gyan Sudha Misra decided in favour of the accused and allowed the appeal for all three cases, and struck down the amendment, quoting that the new definition of the term "terrorist act" was too broad, (i.e. "being a member in the organization which has committed a terrorist act")[20] and that it infringed upon the fundamental rights of individuals (Art. 19 and 21), as the decision to allow incrimination simply based on the mere and ambiguous definition of membership, was extremely broad. The two-judge bench decided against the doctrine of "guilt by association"[21] and stated that the term "membership" was a vague term, which would make the law ambiguous and prone to misuse.

In 2015, a review petition was filed in the SC by the Central and State Governments, which questioned the validity of the judgment of the SC in the 2011 *Arup Bhuyan* case and questioned the interpretation of the SC, which stated that there was ambiguity regarding the term "membership", and the unconstitutionality of the TADA and the UAPA sections which dealt with punishing the mere member of an unlawful organization. This case was initially heard in front of a 2-judge bench, consisting of Justices Dipak Misra and Abhay Manohar Sapre. Due to the importance of the decision, the bench referred this decision to a larger 3-judge division bench.

In due course, this decision was given by the 3-judge bench constituted by justices M.R. Shah, C.T. Ravikumar, and Sanjay Karol in 2023 (*Arup Bhuyan* 2023), where the previous decision was overturned, and it was held that even mere membership of an unlawful association is punishable or at least liable to be charged and detained under UAPA.

IV. THE CONSTITUTIONALITY OF THE DECISION:

The decision of the 3-judge bench of the SC introduced an alternative interpretation of the 2011 judgment, one which is a broader interpretation of §10(a)(i) of the UAPA and §3(5) of the TADA, as per which mere association in an illegal or a terrorist organization is punishable with incrimination, regardless of being a passive member. Furthermore, the court decided that the temporal aspect of the ban would also not be taken into consideration, where the membership occurred before the declaration of illegality of the association. In the judgment, the primary arguments which were discussed are –

A. THE APPLICATION OF THE DOCTRINE OF GUILT BY ASSOCIATION:

In the review petition filed by the State as well as the Central government, the SC three-judge bench criticized the previous judgment on the basis that it refused to apply the doctrine of guilt by association and as a result, ignored the central legislation in place. In the 2011 judgment, a reference was made to *Elfbrandt v Russell*[22], where the doctrine of "Guilt by Association" was rejected, i.e., unless the person resorts to violence or acts in a way that causes the public

[18] Clause 12, The Unlawful Activities (Prevention) Amendment Act, 2008.
[19] *Id.*, Cl. 4
[20] Section 10 and Section 20, Unlawful Activities (Prevention) Act, 1967. *supra* note 11
[21] *Supra*. note 2, at pg. 154
[22] Elfbrandt v Russell, 384 US 11 (1966)

disorder. This was read along with *Kedar Nath Singh vs State of Bihar*[23], through which the SC affirmed that in the present case, since the accused had not indulged in any violence they would not be held liable under UAPA and TADA. The 2023 judgment criticized this decision by mentioning the reference order of 2014, wherein it was held that since the section was "read down in the absence of the Union of India", i.e., the order was for a bail order, and the judgment should not have dealt with the constitutionality of the section, and it should have allowed the union to respond. As the bench did none, the correct interpretation was not derived and hence the Doctrine was forgone, which may cause lapses in national security in the future.[24]

B. THE CRITICISM OF THE APPLICATION OF CASES FROM THE USA TO READ DOWN A SECTION OF THE TADA:

The 2011 judgment of the *Arup Bhuyan* case was reviewed by the 3-judge bench in the 2023 judgment, where it was criticized on the basis that it used cases from the USA to evaluate the given subject matter. In the 2011 case, a reference was made to the USA case of *United States v. Robel*[25], it was held that a "member of a communist party cannot be said to be doing something unlawful by taking up a job in a defense facility". This case was used as a basis to read down §3(5) of the TADA. This decision was criticized by the 3-judge bench in the 2023 judgment, stating that the difference in laws in the USA and India are significant, especially the Right to free speech, wherein the USA has the right to absolute free speech as per the 1st Constitutional Amendment, the Indian form is subjected to reasonable restrictions under Art. 19(1) and 19(2). Hence, in consideration of the USA case laws as a guide, there needs to be a high degree of similarity in the laws being dealt with,[26] which as per the SC's interpretation, the laws of the USA do not put "reasonable restrictions" upon the freedom of right to speech as the Indian law does, in the form of Article 19(2) and 19(4).[27] This is an uncontested fact that the judgments in the USA cannot be used as precedent in India, however, in this case, the judgments were used in a comparative manner wherein doctrine was analysed. There was no reliance on the judgments of the US Supreme Court to deliver the *Arup Bhuyan* (2011) judgment.

C. THE ARGUMENT FOR THE RIGHT TO FREEDOM OF SPEECH AND EXPRESSION:

The argument in the 2011 judgment, which dealt with the contention that §10(a)(i) of the UAPA and §3(5) of the TADA would have a "Chilling effect" on the Right to Freedom of Speech and expression and Life[28], where Justice Katju argued that letting a vague definition of the term "membership", without clarifying the nature of the membership (whether passive membership would be considered as unlawful?), would lead to serious infringements of fundamental rights, especially an infringement on the Right to freedom of speech and expression. In the 2023 judgment, it was held that the legislation aligned with Art. 19(2) and (4), as it was a part of the "reasonable restrictions", which was as per the intended objective of the UAPA and TADA.[29]

[23] Kedar Nath Singh v. State of Bihar, AIR 1962 SC 955, at para 26.
[24] Arup Bhuyan v. State of Assam, (2015) 12 SCC 702, para 10.
[25] United States v. Robel, 389 US 258 (1967).
[26] Supra. note 14, at para 80.
[27] Article 19(2) and 19(4). The Constitution of India, 1950.
[28] Article 19(1)(c) and 21. The Constitution of India, 1950.
[29] Supra. note 14, at para 91.

D. THE EVALUATION OF THE THREE ARGUMENTS IN THE 2023 JUDGEMENT:

The *Arup Bhuyan* case (2023), overturned the 2011 decision of the SC and struck down all the arguments put forth in the previous case. The 2023 case also put down clarifications regarding the points of ambiguity, which were raised in the 2011 case, as owing to their superior bench strength, and the doctrine of stare decisis[30], the 2023 judgment now constitutes the law. However, this brings up a new question of the constitutional validity of the relevant sections of the UAPA and TADA, especially regarding the conflict between Art.19 of the constitution and §10(a)(i) of the UAPA and §3(5) of the TADA. On one hand, we have the unbridled authority of the government, affirmed by the SC, whereby it can arrest and imprison any person for prolonged periods while providing national security as a justification and on the other hand, upholding the basic fundamental rights, at the risk of an act of terrorism or an unlawful act occurring, where the probability depends entirely on facts of the situation.

In such a situation, where a generalized principle has to be put down, the judiciary needs to apply the previously determined tests to ascertain the applicability of a doctrine. In this case, where the question is regarding the choice of granting primacy to either the Right to Freedom of Speech and Expression and Life or Claims of National security, the test used in the case of *Subramanian Swamy v. Union of India, Ministry of Law & Ors.*[31] needs to be applied, i.e., the "Balancing of Fundamental Rights" Doctrine, which stated that - "State cannot make a law which directly restricts one freedom even for securing the better enjoyment of another freedom". This doctrine was further elucidated in the case of *Asha Ranjan v. State of Bihar*[32],(Asha Ranjan case) where the question of primacy was between the right to a fair trial under Art.21 of the Indian Constitution and the "public interest" at large. This doctrine states that (in the Asha Ranjan case) one right cannot be completely extinguished to achieve the other. Furthermore, invoking the tests applied in *Sahara India Real Estate Corpn. Ltd. v. SEBI*, ("Sahara case")[33] the balancing test can be divided into three components – (a) Is a "real and substantial risk" to one of the fundamental rights through the operation of the other? (test of substantial risk) (b) Is the application of one right over the other necessary, and is there a lack of alternatives? (Necessity test) (c) the overriding effect of one right must be proportional to the curtailment of the other right, to not completely prejudice the provisions and benefits of the curtailed rights (proportionality test). In the Sahara case, the court stated that upon the fulfillment of the three tests in the affirmative, a "neutralizing device" would be applied which would balance the two rights, which in the case was a postponement order.[34] However, in the *Arup Bhuyan* case, the third test is not adequately answered in the affirmative, as the implementation of the UAPA and TADA to detain individuals due to mere membership of a banned organization to preserve "Public safety" and National security is rather excessive. Also, the curtailment of the right to life and freedom of speech is not proportional to the perceived security which the act of detention of non-active members of a banned outfit provides. Thus, the reasoning does not qualify for the proportionality test.

Thus, it boils down to one major question of balancing two Part III rights of the Constitution, i.e., do the reasonable restrictions under Article 19(2) and (4) which approve the legitimacy of

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[30] Article 141, The Constitution of India, 1950; Hari Singh v. State of Haryana, 1993 SCC (3) 114.
[31] Subramanian Swamy v. Union of India, Ministry of Law & Ors., (2016) 7 SCC 221, at para 136.
[32] Asha Ranjan v. State of Bihar, (2017) 4 SCC 397, at para 62.
[33] Sahara India Real Estate Corpn. Ltd. v. SEBI, (2012) 10 SCC 603, at para 42, 43.
[34] ANUBHAV KHAMROI, *"Constitutional Silences, Balancing of Rights, and the Concept of a 'Neutralising Device'"*, Indian Constitutional Law and Philosophy Blog, (2/11/2019) https://indconlawphil.wordpress.com/tag/balancing-rights/

the UAPA and TADA have the authority to infringe upon the Article 19, which ensure right to freedom of speech? Applying the tests highlighted above the answer turns out to be no.

Therefore, taking into account the tests discussed above, it is visible in the *Arup Bhuyan* (2023) judgment, there has been a misapplication of the Balancing test, whereby the Right to Freedom of speech and expression is being curbed by the decision of the SC. As per the decision of the case, the individual can be incriminated solely based on their association with an illegal organization, without even determining the nature of their membership, which may range from active participation in terrorist/unlawful activities to being an absent and passive member. These realities were not considered while passing the *Arup Bhuyan* (2023) judgment, which essentially opens the door for the application of the UAPA and TADA to deprive people of their basic rights under Art. 19 and Art.21, without trial or bail. which is contrary to the doctrine of the Balancing of Fundamental Rights.

V. THE IMPLICATIONS OF THE DECISION OF *ARUP BHUYAN*:

This decision has the potential to have overreaching effects on the fundamental rights enshrined in the Indian Constitution, especially the Right to Freedom of Speech (and expression) as well as the Right to Life which will give rise to mass misuse of the law, especially by various governments, regardless of their political beliefs. The very existence of such a law that allows such arbitrary procedures for detentions is a lethal weapon in the hands of the state, especially against its political opponents as well as the dissenters. The recent SC interpretation by the 3-judge bench in *Arup Bhuyan* (2023), will (if it already has not) open the pandora's box for frivolous arrests of several individuals, who criticize the government. Provisions like these would only lead to cases like the death of Father Stan Swamy, who was arrested in the "Elgar Parishad Case"[35], where he was charged with UAPA, and was kept in preventive custody without bail, which eventually led to his demise due to lack of medical facilities in preventive custody.

VI. CONCLUSION:

It is in this perspective, that the decision of the SC needs to be reviewed by a larger bench, which will put down a more nuanced approach to the principle of primacy and balancing fundamental rights, and lay down a balanced approach which will ensure that the draconian nature of the UAPA is diluted so that this anti-terror legislation does not become an instrument of state terrorism itself. The ideal way so far is to apply the doctrine of primacy on a case-to-case basis, where the subject matter is studied thoroughly, and then the decision of assigning the burden of proof is done. Thus, there is a need for this decision to be reviewed by a constitutional bench, as the question in itself has far-reaching implications which has the potential to infringe upon one of the most sacred rights provided to the citizens of India, the right to speech, a right to protest, a right which is one of the most necessities to support all the other fundamental rights. The path would be similar to that of the US Supreme Court had used judicial interpretation of the statutes to give the freedom of speech a wider ambit to ensure the freedom of its citizens and dilute the application of the doctrine of guilt by association. It is in this situation, that the SC has the responsibility to do complete justice and ensure that desperate

[35] Anand Teltumbde v. National Investigation Agency, 2022 SCC OnLine Bom 5174.

voices of dissent do not fall prey to the predations of the State under the garb of ensuring absolute National security.

CREASING OUT THE 'INEFFICACY' UNDER THE INDIA PATENT REGIME: AN INTERPRETATIONAL STUDY OF SECTION 3(D) IN NOVARTIS AG V. UNION OF INDIA

Harshal Chhabra[*]

Abstract

This case commentary examines the landmark judgment of Novartis AG v. Union of India delivered by the Supreme Court of India on April 1, 2013. The case involved Novartis, a Swiss pharmaceutical company, challenging the rejection of their product patent application for the cancer-fighting drug 'Glivec' under Section 3(d) of the Indian Patents Act, 1970. Section 3(d) aimed to prevent "evergreening" of patents by requiring that inventions demonstrate enhanced efficacy to be eligible for protection.

The comment delves into the procedural history, beginning with India's compliance with the TRIPS agreement, which led to the amendment of the Patents Act in 1999, allowing for product patents in the pharmaceutical field. Novartis submitted its application during this transitional phase. However, the patent was rejected in 2005 due to the drug's failure to show improved therapeutic efficacy compared to its existing form.

The analysis explores the arguments presented by Novartis, claiming that Section 3(d) is unconstitutional and ambiguous, violating both TRIPS agreement and the Indian Constitution. The Court's reasoning is examined, which emphasized that 'efficacy' must refer specifically to therapeutic efficacy for an invention to be patentable.

The author critically evaluates the Court's decision, highlighting its adverse impact on pharmaceutical innovation and potential repercussions for the Indian pharmaceutical industry. By limiting the scope of patentability to only new chemical entities with enhanced therapeutic efficacy, the Court's interpretation undermines incremental innovations that improve drug effectiveness, safety, and reduced toxicity.

Finally, the author advocates for a purposive approach to interpretation and highlights that the current interpretation of Section 3(d) does not align with the legislature's intention to prevent evergreening while promoting innovation and accessibility to new advancements.

Keywords: "Evergreening of Patents", "Therapeutic Efficacy", "Invention", "Enhanced Potency", "Non-obviousness".

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I. INTRODUCTION

On April 1, 2013, the Supreme Court of India made an important decision in the case of Novartis AG v Union of India. Novartis, a pharmaceutical company from Switzerland, had appealed against the rejection of their product patent application by the Indian Patent Office. Novartis lost the case because Court ruled that the compound failed the tests of invention and patentability.[1] The judgment went on to be rather controversial with respect to constitutionality of section 3(d) and was challenged in the light of TRIPS compatibility.

II. PROCEDURAL HISTORY

According to the World Trade Organisation's (WTO's) TRIPS agreement, countries that did not offer product patent protection at the time of its enforcement on January 1, 1995, must provide such protection within 10 years, specifically by January 1, 2005. Before the introduction of a product patent system, WTO members were obligated to establish a system for accepting applications for product patents and granting exclusive marketing rights. In India, the Patents Act of 1970 exempted 'food or medicine or drug' from being eligible for product patents under Section 5. To comply with the TRIPS requirements, India amended the Patents Act of 1970 through the Patents (Amendment) Act of 1999, which introduced Exclusive Marketing Rights (EMR). It allowed for applications for product patents in the pharmaceutical field, but the actual granting of the patent would not happen until the end of 2004. However, if a patent had already been awarded in another WTO member country and the application had not been rejected in India as not meeting the criteria for being considered an invention, Exclusive Marketing Rights (EMR) could still be obtained for that application.[2]

III. FACTS

In 1998, Novartis International AG submitted an application to the Chennai patent office. The purpose of the application was to obtain a patent for a cancer-fighting drug called 'Glivec' used for treating Chronic Myeloid Leukemia (CML) and Gastrointestinal Stromal Tumors (GIST). This drug was developed from the Beta crystalline form of "Imatinib mesylate," which is already patented in over 35 countries. Due to the absence of patent protection for pharmaceutical and agrochemical products in India until 2005, Novartis submitted its invention through a "mailbox" application. All applications for pharmaceutical inventions were collected and stored in a mailbox for review in 2005. Novartis also submitted an application for an exclusive marketing right (EMR) while waiting for the product patent, which was granted in November 2003.[3]

The Madras Patent Office declined Novartis' patent application in 2005. The application was rejected because the drug did not meet the requirements of being new and non-obvious. It was also deemed ineligible for a patent under Section 3(d) of the Patent Act, 1970, as it did not

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[1] L NDLOVU, *"Lessons for the SADC from the Indian case of Novartis AG v Union of India"*, PELJ (2015).
[2] SUDIP CHAUDHURI, *"TRIPS Agreement and Amendment of Patents Act in India"*, 37 EPW 3354, 3354–3360 (2012).
[3] NOEMIE BISSERBE, *"Novartis takes on patent law in Glivec case"*, Economic Times, (Jan 30, 2007) https://economictimes.indiatimes.com/industry/healthcare/biotech/pharmaceuticals/novartis-takes-on-patent-law-in-glivec-case/articleshow/1525328.cms.

show significant improvement in therapeutic effectiveness compared to its existing form. Novartis filed two writ petitions challenging the rejection in the Madras High Court in 2006. The case was later transferred to the Intellectual Property Appellate Board (IPAB) in 2007. IPAB reviewed the appeal and concluded that the invention met the criteria of novelty and non-obviousness. However, the patentability of the product was affected by Section 3(d) of the Patent Act, 1970. Subsequently, in 2009, Novartis filed a Special Leave Petition before the Supreme Court.[4]

IV. ARGUMENT BY NOVARTIS :

Section 3(d) of the Patent Act, 1970 is seen as unconstitutional because it does not conform to the TRIPS agreement and violates the right to equality guaranteed by Article 14 of the Indian Constitution. The terms used in the section, like "enhancement of known efficacy" and "differ significantly in properties with regard to efficacy," lack clear guidelines, making it vague and arbitrary. This arbitrariness, empowered by unchecked authority, undermines the principle of equality stated in Article 14.

Section 3(d) gives the patent office complete freedom to set its own rules and determine what constitutes a significant enhancement in efficacy. This violates the Constitution because it involves delegating a crucial legislative function.[5]

V. COURT'S REASONING

The Apex Court thoroughly examined Section 3(d) of the Indian Patents Act, 1970 and unequivocally denied Novartis' application for protection of their beta crystalline form of imatinib mesylate. The court's decision was based on the reasoning that the beta crystalline form of imatinib mesylate does not have any therapeutic effectiveness for the drug users. The court further added another limb to its reasoning by stating that the term 'enhancement of known efficacy' found in Section 3(d) is not vague in nature. The court strengthened its stand by deriving definition of 'efficacy' from Dorland's Medical Dictionary, which defined it as "the ability of a drug to produce the desired therapeutic effect".

The court highlighted that in order for a new form of a known substance to be considered an invention, it must be demonstrated that the new form has improved therapeutic effects. To understand this, the court examined the definition of 'efficacy' in the dictionary, which refers to the healing of a disease or having a positive effect on the body. Premising its reasoning on this, the court added another layer for a new form of 'a known substance' to surpass, in order to classify it as an 'invention'. In abstract, the court construed the term 'efficacy' in a manner which limited its contours to 'therapeutic' efficacy, and rejected the concept of 'enhanced potency' of the drug as a factor leading to 'invention'.

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[4] MOHAMMAD SULEMAN PALWALA, *"A Study On: Novartis AG v. Union of India"*, Khurana & Khurana Advocates and IP Attorneys (17 July, 2019).
http://www.mondaq.com/india/x/826478/Patent/A+Study+On+Novartis+AG+v+Union+Of+India.

[5] SHAMNAD BASHEER and T. PRASHANT REDDY, "*The "Efficacy" of Indian Patent Law: Ironing out the Creases in Section 3(d)*" 5 Scripted (2014).

VI. RESEARCH QUESTION

- Does the term "efficacy" connote only "therapeutic efficacy"?
- What is the scope of *'Evergreening'* under Section 3(d) of the Patents Act, 1970?
- Does the interpretation of 'efficacy' by the court stands in concurrence with the legislative intent behind the Indian Patent Act?

VII. ANALYSIS

A. *THE WRONG TURN*

The judgement received severe criticism from the US Chamber of Commerce and a number of originator pharmaceutical companies. It is seen as a harsh blow to the future of innovation, particularly in India.[6]

The Supreme Court of India restricted the meaning of "enhancement of known efficacy" in Section 3(d) to therapeutic efficacy of the drug. Section 3(d) was introduced as a yardstick to distinguish real innovation from trivial tweaks and the campaign against the incremental innovations is largely motivated by the concern of *"evergreening"* of pharmaceutical products. The idea is that a pharmaceutical company can prolong the duration of patent protection for a drug by using an older form of the drug to acquire a subsequent patent that covers a different aspect of the same drug. This practice is known as "evergreening." However, the Court in the case has misunderstood the concept and has perhaps exaggerated its scope. The court's limited understanding of efficacy denies producers the ability to obtain patents for many valuable pharmaceutical advancements. These include improvements like increased bioavailability, longer shelf-life, and reduction of microbial growth. The sole reason for denying these patents is the lack of an enhanced healing effect on the body. The literal definition of Section 3(d) of the Act discourages the drug manufacturers from innovation in scientific research, new technology and industrial progress by rewarding the innovation. The court's understanding contradicts the viewpoints and actions of progressive pharmaceutical companies such as Ranbaxy and the Organization of Pharmaceutical Producers of India (OPPI). These companies have expressed their belief that incremental innovations, such as improving drug effectiveness, extending maximal potency, and enabling smaller doses for patients, should be eligible for patent protection as long as they are new, involve inventive steps, and have commercial value. Denying patent protection to incremental pharmaceutical innovations will have significant adverse effects on the progress and advancements in the treatment of various diseases. It will also raise concerns among investors regarding how patents are treated in India, setting a precedent for future cases.

B. THE DEFINING ERROR: THERAPEUTIC EFFICACY

The court's use of Section 3(d) to deny patents for pharmaceutical drugs creates a concerning situation. It appears that the Indian Parliament did not intend to exclude these drugs when addressing the issue of evergreening.

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[6] FREDERICK M. ABBOTT, "*The Judgment in Novartis v. India: What t he Supreme Court Of India Said*", Intellectual Property Watch (April 04, 2013) https://www.ip-watch.org/2013/04/04/the-judgment-in-novartis-v-india-what-the-supreme-court-of-india-said/.

The Court did not provide a specific definition of enhanced therapeutic efficacy, leaving it to be determined on a case-by-case basis. The patent applicant must show that there is an actual improvement in efficacy. However, the Court's failure to establish clear criteria for significant enhancement in efficacy creates uncertainty for pharmaceutical companies seeking secondary patents in India. It is impractical to expect manufacturers to prove enhanced efficacy at an early stage of drug development, as patents are usually filed years before the drug is available in the market. Patents incentivize manufacturers to conduct clinical trials to obtain efficacy data, as the patent ensures that the data cannot be used by others without permission.[7]

While the Indian Parliament aims to ensure that consumers only pay for patented products that bring significant advancements over older versions, it is worth noting that the narrow definition of enhanced efficacy, limited to curative effects, may exclude other innovations such as improved safety and reduced toxicity. The patent regime intends to promote innovation and simultaneously ensure that the fruits of the innovation are accessible to society. The need is to find an optimal balance between the needs of the general public and the rights of patent owners. Supreme Court's decision constitutes that the standard of pharmaceutical patenting in the patent regime of India has become overly protective of public health at the expense of important drug developments which eventually are the origin for these technological innovations to improve health conditions.

Such a narrow patent regime goes against the objective of TRIPS agreement which seeks to establish minimum standards in the field of intellectual property. Additionally, the Indian pharmaceutical companies lack the capability to deal with the increased competition which follows this narrow approach. The major benefit of the approach will accrue to the multinational corporations (MNCs) since the Indian companies have fewer resources and benefit from early commercialization of incremental innovations. Additionally, limiting patentability to entirely new chemical entities may seem like a convenient solution in the short term but it hampers the work of numerous scientists in R&D centres who are dedicated to the challenging task of discovering new drugs. The strength of Indian scientists has always been in innovating and improving existing products.[8]

VII. CONCLUSION AND SUGGESTION

The Indian Patent regime has seen a shift in terms of interpretation, especially in the post 2005 amendment judgments. The shift has more or less created a self-devised mechanism to limit 'patentability' under the Act. The idea of granting patent has gradually shifted from its erstwhile criterion which were largely based upon the basic premise of 'non-obviousness'. Currently, the interpretation of Sections 2(1)(j) and 2(1)(l) in conjunction with Section 3 is shaping the scope of patentability in India, deviating to some extent from the original intent of the Act and the TRIPS Agreement. Contrary to the concepts of 'non-obviousness', Section 2(1)(ja) has given a new import to the meaning of an 'Inventive Step'. The intent now seems to be to make the threshold of patentability higher than the existing standard. The additional requirements have now circumscribed themselves around technical advances or economic significance or both. 'Inventive step' was originally defined in the Patents Act to mean a feature

[7] William J. Bennett, "*Indian Pharmaceutical Patent Law and the Effects of Novartis Ag v. Union of India*, 13 Wash. U. Global Stud. L. Rev. 535 (2014).

[8] The US-India Business Council "*The Value Of Incremental Pharmaceutical Innovation: Benefits For Indian Patients and Indian Business*" White & Case LLP and DUA Consulting (June 2009), http://www.indiaenvironmentportal.org.in/files/USIBCIncrementalInnovationReportFinal.pdf.

that makes the invention not obvious to a person skilled in the art. The explanatory note to Article 27(1) of the TRIPS Agreement, which India is a part of, clarifies that 'inventive step' is essentially the same as 'non-obviousness'. The new definition has certainly raised the standards of the inventions to fall under Section 3(d), given the restrictive application of its explanatory clause. However, it has also limited the scope of inventions and innovations which were primarily based upon the ‘non-obviousness’ criteria. In simpler terms, it is basically stifling innovation.

The patent office, IPAB, and Indian courts have primarily focused on proving direct evidence of improved efficacy in their interpretation of Section 3(d). They have overlooked indirect evidence like improved bioavailability. Because these patent applications lacked direct evidence of enhanced efficacy, other aspects of Section 3(d) were not considered by the patent offices and courts.

The scheme of this comment calls for an understanding the purposive rule of interpretation. The purposive approach is an approach under which courts interpret an enactment in light of the purpose for which it was enacted. It is popularly known as the ‘Heydon’s Rule’. Laying down the intention of the legislature, it becomes prominent to highlight that the new definition is nothing but an impediment to that intention. The intention behind Section 3(d) was to prevent 'evergreening' of products, which was previously addressed through the criterion of 'non-obviousness'. However, the current standards have only restricted patent scope to a few manufacturers, thus undermining the purpose of preventing ‘evergreening’.

In a nutshell, the decision of the Apex Court has misinterpreted the definitions of ‘efficacy’ and ‘enhancement of known efficacy’, which has had a deeming effect upon this piece of legislation.