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DATA PROTECTION AND GOVERNANCE FRAMEWORK IN INDIA: ISSUES AND CHALLENGES

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ABSTRACT

The issue of data governance in Indian standpoint concerning hindrances in three distinct aspects like Technical, Political and Legal spheres is the principal outlook of this paper. Here a preferred outline is stated to overcome these challenges. Improving lives in India and elsewhere, the ground-breaking possibilities of the digital economy is ostensibly infinite at this time. In a digital economy, the chances of discrimination, harm and exclusion is very likely. Data gathering operations are usually obscure, encumbered in complex privacy forms that are abstruse, thus leading to malpractices that intended users have little restrain over. Tangible harms, consequent spam and incompetent information on data flows is an unfortunate reality. Many countries except India have well defined and established laws exclusively for data protection viz. Data Protection Act of 1998 of UK, Electronic Communications Privacy Act of 1986 of USA etc. In India, Information Technology Act 2000 gives certain protection while handling cyber issues but fail to provide adequate concern to the issue of Data governance and Protection. In the absence of any specific law relating to data governance and protection, the no-goods are acquiring expertise in their malpractices. In this paper the researcher has focussed on legal challenges, technological challenges, political and social challenges of data governance and protection in India. Considering the present standards of data, a suggestive remedy framework is provided for data governance and data protection in the Indian cyber environment.

Keywords: *Digital economy, Data governance, Legal framework, Cyber-security.*

INTRODUCTION

The term data governance may have different meanings in different scenarios. It is not known whether it was the anticipation regarding the upcoming fast paced technology or our culture and living style that has not compelled the legislators to incorporate the issue of data protection and governance while framing the legal structure for the nation. We need to be familiar with the definition of the word Data governance before indulging in the discussion about data protection and its issues.

The term 'Governance' is derived from the Greek verb "*kubernaein [kubernao]* which means to steer". It can also define practical or normative agendas. In the current broader sense, this term is used to encompass the activities of a wide range of private and public organizations including corporate, non-profit governance, global and project governance. It is widely used by political scientists and economists and promulgated by institutions like IMF, United Nations and World Bank.[1] Data governance is the formal and systematic approach towards maintaining high quality data within an organisation.[2] It includes data authorization and validation, cleansing as well as security and privacy issues. Governance of data provides a structure to manage and evaluate, protect and control the data within an organization by defining responsibilities, decision making processes and a clear role at the enterprise level.[3]

Technological trends such as Artificial Intelligence and Machine Learning highly rely on data quality and with the advancement of digitalization across the globe, Data governance has been one of the top 5 strategic initiatives for global organisations in 2020. To improve business performance, organizations must be aware about the role and impact of data governance, ensure both compliance and security and extract value from the information hoarded across the business.[4]

It has become strenuous to maintain the integrity of data through confidentiality with the precluding technologies. To achieve information security, the coverage of protection has been widened but the threat to information securities still remains despite the many efforts at the legal and technological level. To ensure complete security to the data it is fundamental to cover data privacy but the scope still remains untouched. Digitalization of data has led to data overflow making it cumbersome to cope with the management of volumes of data, sensitive and private information like that

[1]Agrawal, R., 2004. Privacy and emerging technology: Are Indian laws catching up?. *Lawyers Collective*.

2Bhattacherjee, A., 2012. Social science research: Principles, methods, and practices.

3 Bell, E., Bryman, A. and Harley, B., 2018. *Business research methods*. Oxford university press.

[4] Michelle Knight, 2017. What Is Data Governance? Available at https://www.dataversity.net/what-is-data-governance.

of credit and debit cards.[5] Although it has created convenience regarding Availability of data, improper handling of crucial and private information can prove to be devastating for an Individual as well as the Nation.

In a growing customer centric business, success depends on the user's individual predilection. In the urge to have technological adaptation, we fail to worry much about privacy and easily pass on our personal and at times sensitive information. For instance, our personal information is passed on everywhere simply while opening an online banking account or even creating a simple mail account. Instead of being used just for the intended purpose, our personal information is further transmitted, processed and misused for unaccredited purposes, without consent of the user.[6]

The many inadvertent calls proffering us various services and products that we receive in the span of a single day, we are unaware of how these tele callers get our personal number and information and specific details to call us. Unknowingly at some instance like while opening an account or buying a SIM card or performing online shopping, we tend to provide some information and these calls are the result of that. Occurrence of such cases leads to mental disturbance and harassment and in some instances, it may result to financial damages, loss of reputation and even life. This has concerned the world about the need of data governance and protection, different nations in distinctive forms have adopted frameworks and laws to ensure data protection both at the technical side and the legal level.

OECD is one of the organizations working on universally modified structure of data governance framework. UK has ratified DPA (Data Protection Act, 1998) based on OECD[7] which includes eight basic principles and considers matters like sensitive and personal information, data processor and data owner, data subject and responsibility for data protection.

ISSUES RELATING TO DATA GOVERNANCE

First and foremost, Data governance is a comprehensive issue that needs to be ingrained in the core of international governance across various arenas at multiple levels. It relies crucially on the traditions and lifestyle of the people it envisions to safeguard. In the abstract, proper discussions of this issue is not taking place. Explicitly or implicitly, data governance is immersed in prevailing governance processes involving around human rights law, privacy and e-commerce and digital trade. Unfortunately, for dealing with a major issue as Data governance that can result in

[5]Information Security policy and Security Issues available at www.alttc.bsnl.co.in/altzine/Vol_31122005/ns/l2.pps

[6]Morabito, V., 2015. Big data governance. *Big data and analytics*, pp.83-104.

[7]Information Sheet (Public Sector) 1-Information Privacy Principles under the Privacy Act

major destruction to the public and private lives of people, there is no prime legal framework as such. The overall global structure of data governance has some key gaps that need to be controlled.

The Data ecosystem quintessentially being worldwide and pluridisciplinary, uncertainties are created due to incompatibilities and gaps in mandates, restricting the tools handy in confronting the malpractices with data.[8] Therefore, there is a need for aptness, cooperation and interoperability of the multitudinous regional, local, international and national regulations and laws that influences data. [9]The ongoing arguments and the prevailing frameworks and regulations mostly emphasize on data privacy and protection with scant reflection to broader aspects like trade, adaptability and rivalry. The focus lies on data acquisition rather than its manner of use. The debates are formulated around the entitlement of data subjects undermining the society and other stakeholders widely.

The data governance framework in the future digital trade has the following void:

a. Difficulty in setting roles and building accountability for information in any association.

b. Lack of efficient management of people and responsible persons with governance as their mandate.

c. No proper structure of databases, lack of normalising and cleansing of data that delays the progress of efficient management of data.

d. Failure in side-by-side management of external information collaboration along with the internal data governance.

While talking about legal challenges the researcher is of the view that it is arduous to safeguard protection rights as there is absence of proper legislative framework for data governance in India. In the event of non-compliance of specific laws, the government is using substitute laws for protection and governance purposes. Article 21 of Indian Constitution, Indian Contract Act 1872, Indian Penal Code, Information Technology Act 2000, Consumer Protection Act 1986, Indian Telegraph Act, Specific Relief Act 1963, Indian Copyright Act are certain the laws that enables sidelong assistance to data governance concerns in India.

The Indian legal framework for data governance and protection has the subsequent hiatus:

- Absence of an inclusive law yet the data protection issue dealt by the proxy laws fails to confluence on the issue.
- Absence of a proper classification of information as private, public and sensitive information.

[8]Attard, J., Orlandi, F. and Auer, S., 2016, October. Data value networks: enabling a new data ecosystem. In *2016 IEEE/WIC/ACM International Conference on Web Intelligence (WI)* (pp. 453-456). IEEE.

[9]Patient Safety and Quality Improvement Act, 2005 (PSQIA), available at http://www.hhs.gov/ocr/privacy/psa/understanding/index.html

- Absence of legal framework highlighting the ownership of sensitive and private data.
- Absence of a certain approach of creating, transmitting, processing and storing the data.
- No guidelines defining data Proportionality, Quality and Transparency. Absence of a framework concerning nationwide flow of information.

Such a loophole in the legal framework leads to severe detriment for individuals as well as the nation and ignorance of this lace in this modern era of technology cannot be afforded. The form of information has radically changed due to Globalization and ICT revolution[10], making information easily accessible, handy and portable. Every individual, be it the government sector or the corporate sector wants to be dextrous and proficient. Regardless of the much advancement, globalization has made in our lives, it has brought unpredictable tumult and exposure of our personal lives. Radio frequency identification (RFID), Smart cards, Biometrics (viz. keystroke recognition, hand geometry, voice, face, iris and fingerprints), Data-mining and data matching technologies,[11] Location detection technologies (viz. Global Positioning Systems), Voice over Internet Protocol (VoIP) and all Wireless technologies pose a potential threat to data protection and governance.[12]

The ability to accumulate vast volumes of data and systematically elicit, sort and compare information has become handy with the advancement of Computer Technology. Known as Data matching or the process of data mining[13], this serves a serious threat to data governance and protection. It looks at specific patterns within the data or certain items as indicators of a particular tendency, attribute or conduct. It involves assessing details and particulars about a vast number of people without any prior inkling or tinge of suspicion. When databases are administered by third parties like BPO etc., this sphere becomes more pivotal.

Bruce Schneier says, “Privacy protects us from abuses by those in power, even if we're doing nothing wrong at the time of surveillance”. This has led most Internet security and data governance experts reckon that “security doesn't exist”; "Privacy is dead - get over it". Vulnerability of private information has increased with the introduction of new technologies like web logger and cookies policy. The researcher also says that while we face technological challenges also and for its thriving implementation, any form

[10] Agre, P.E. and Rotenberg, M. eds., 1998. *Technology and privacy: The new landscape*. Mit Press.

[11] Steinbock, D.J., 2005. Data matching, data mining, and due process. *Ga. L. Rev.*, *40*, p.1.

[12] Xu, L., Jiang, C., Wang, J., Yuan, J. and Ren, Y., 2014. Information security in big data: privacy and data mining. *Ieee Access*, *2*, pp.1149-1176.

[13] Steinbock, D.J., 2005. Data matching, data mining, and due process. *Ga. L. Rev.*, *40*, p.1.

of technology requires a staunch assistance of human resource. The People determine the stakeholders for a given technology when it comes to political challenges whereas the same people prove to be the weakest link in case of Information Security. In India though, public plays an important role in framing of any policy and regulate and influence the path for any technology they are least bothered about their data governance and protection of information. There has been no scam till date that directly implicates on this so the issue is not at the pinnacle in the Indian environment but it is always better to be safe than sorry.

The principal offshore task of BPO is from the nation that has enforced legislative framework organised as codified law just like the European countries observe the DPA 1998and ECPA followed by the United States. The investment cost being extremely limited in India, it is easier for them to do business here. Non-governmental international associations like ISO, ITI Land others help them manage their data.[14] Breach of privacy by virtue of violation of reliance between two parties is the reason why most cases are pending in the family court. Enlightening people about government and its policies, the pivotal role in a democracy is played by the media. For their personal interests, they do not spare in keeping someone's personal information secure and encroaches on both private and public lives of individuals.

With the adoption of new technologies by India, the use of social networking sites like Facebook, Orkut, Instagram etc. is the new trend of connecting people worldwide and it has gained a lot of popularity. Here, people sharing the same interests form a group or a community where various people express their views and concerns regarding a certain issue or share news about the latest developments and involve in criticism. These activities can aggrandize precarious issues which can create expansive misbalance in the community. Another way by which people can easily express their views and opinions is by writing blogs. They are gaining immense popularity in today's world. In the government sector though, there is a potential of sensitive information being forged and its paradigm being lost.

According to standards of data governance and protection, the government has taken the first step as it has been discussed above, though India lacks a structured law to cope with this issue. All major problems are dealt by Telegraph Act, Copyright Act, ITA Act2008, IPC, Contract Act, Special relief Act, Article 21 and many others in accordance to the nature of the case. The ITAA 2008 passed by the government of India in recent times gives the basic definition of data protection and its need.

[14] Organisation for Economic Co-operation and Development, 2015. *Health data governance: privacy, monitoring and research*. OECD Publishing..

To implement that in the Indian work environment, government has mandated DSCI (Data Security Council of India) a drive by NASCCOM.

Its core objective is to create security and data governance awareness among associations and its prime undertaking is to initiate authenticity of Indian company as off shoring provider of services. DSCI has taken the stratagem to deal with this issue through awareness and training programs. The pending cases in the courts bring about the utmost mental harassment to the user party, therefore for fast judgement it is essential to develop a fast court system.[15]

It was against this background that the Delhi State Consumer Disputes Redressal Commission (the "Commission") levied a fine of Rs. 75 lakhs on ICICI Bank, Airtel, The American Express Bank and the Cellular Operators Association of India ("COAI") on objection by consumer regarding unsolicited texts and telemarketing calls. The Reserve Bank of India ("RBI") was instructed by the Supreme Court of India to establish policies in limiting the gratuitous calls and texts[16]. The adoption of Right to Information (RTI) by India in the recent times refers to exposure of public data as and when required. RTI's are a usurpation of public information. Information classification is necessary for effective enforcement of RTI's so that it aids in exposing the information without stultification of standard work

Information is the essence of any ITES and IT industries which is why they are perturbed about Data Governance more than anything. Due to the lack of a pivotal legal framework about Data Governance in India, BPO plays a significant part here. For the implementation of regulations, they observe third party certification. In India ISO 27001, Information Security Management System (ISMS)[17] is the third-party external for processes which aims to guarantee secured arrangement of information. At the moment, India lacks legal machinery for Data Transparency, Data Protection Authority, Data Quality and Proportionality etc. which clearly deals with the problem of Data management in conformity with the ideologies of Safe Harbor Principles, EU Directive or OECD Guidelines. India still lacks in a solid lawful architecture for Data governance and management even with the adoption of the new suggested amendments to the Information Technology Act, 2000.

An uprising craze in India is in the Health and Medical tourism sector, thousands of people throughout the world visit India

[15]Lovett, R., Lee, V., Kukutai, T., Cormack, D., Rainie, S.C. and Walker, J., 2019. Good data practices for Indigenous data sovereignty and governance. *Good data*, pp.26-36.

[16]Agarwal, A., 2014. Data Protection and Privacy Laws. *The International Journal of Science and Technoledge*, *2*(2), p.15.

[17]Bennett, S., 2017. What is information governance and how does it differ from data governance?. *Governance Directions*, *69*(8), pp.462-467.

for health purposes. The absence of proper guidelines of health-related records like HIPAA (Health Insurance Portability and Accountability Act)[18]has resulted in an adverse effect in this field yet there is no effort from the administration in devising laws for proper management of health- related records. Various Privacy Enhancing Technologies (PET)[19]which are the tools application contrivances, play a major role in securing personal user identity and user information incorporated with online applications.

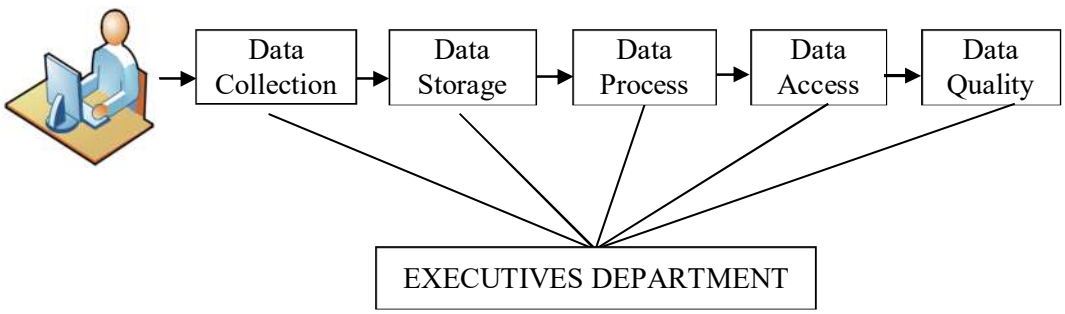
PROPOSED FRAMEWORK

Adoption of the aforementioned framework which vividly states the overall directives of information dealing in various levels is necessary for observing proper data governance in the Indian work culture. This model is set to eliminate all the susceptibility and safety hazards exhibited in the system and addresses all the necessary guidelines to be taken. Data Governance is classified into five different phases Data Collection, Data Storage, Data Process, Data Access and Data Quality.

Data Collection:

Initial phase of data governance is to begin with the collection of data itself.[20] The highest levels of authority must enforce rigorous data collection policies that evidently cite the following points:

- Accredited chosen agencies are the only ones allowed to collect information.
- Collection of information is to be done only for lawful purposes.



[18]Hash, J., Bowen, P., Johnson, A., Smith, C.D. and Steinberg, D.I., 2005. *An introductory resource guide for implementing the health insurance portability and accountability act (HIPAA) security rule*. US Department of Commerce, Technology Administration, National Institute of Standards and Technology.

[19]Data Protection Technical Guidance Note: (PET) Privacy enhancing technologies (ICO) available at http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/privacy_enhancing_technologies.pdf

[20]Weller, S.C. and Romney, A.K., 1988. *Systematic data collection* (Vol. 10). Sage publications.

- Personal information must be pertinent, sufficient and not disproportionate.
- The objective behind the collection of information must be clearly stated.

For sustaining proper data management in the ensuing steps, we need to apprehend the information properly. It must be ascertained by the government that the permitted agencies allotted for data collection processes follow the rules by doing frequent scrutiny. Collection for information must be done only for lawful purposes, there's a strict prohibition of it being used for commercial purposes.

Data Storage:

After the acquisition of data, personal information must be kept accurately and must remain abreast with the application of proper organizational and technical criterion. Government of India must possess full authority over the server that has the data stacked in it. Precautions for protection against unauthorized use, access and other modifications must be taken by the server at all times. In accordance to its nature, information classification must be done for proper organization of data. Arrangement of information in accordance to its principle of no requirement of a single person having full authority over data user subject is done by "Segregation of duties" and "Need to know".[21]

Data Process:

Legal and fair retrieval of personal information is just not computer implemented data processing, only with the consent of the user can the information be further processed. If the user is one of the parties of a certain contract, its data can be processed if it is of prime importance of the data subject, if it is necessary for judicial proceedings and if it is of equitable utilization for national concerns. In other words, data must be only processed only when the purpose of it is clearly being discussed and must be aptly discarded after the interest is fulfilled. The duration and purpose of withholding the data must be clearly stipulated in the retention policy.[22]

Data Access:

Need to Know Basis must be followed by Data Access having a full restrain that the information does not surpass the Territory of India. In case of the other, there must be legal liability between the two nations regarding data handling, adequate measures are to be taken to secure the information outside India. Any Indian or non-government industry within the country must follow all the norms followed by the Indian government for data processing.[23]

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[21]Vedaschi, A. and Lubello, V., 2015. Data retention and its implications for the fundamental right to privacy: A European perspective. *Tilburg Law Review*, *20*(1), pp.14-34.

[22]Ohlhausen, M.K. and Okuliar, A.P., 2015. Competition, consumer protection, and the right [approach] to privacy. *Antitrust LJ*, *80*, p.121.

[23]Bygrave, L.A., 1998. Data protection pursuant to the right to privacy in human rights treaties. *International Journal of Law and Information Technology*, *6*(3), pp.247-284.

Data Quality:

Data governance and data quality have a symbiotic relationship, they rely on each other and are mutually interdependent. If quality of data is lacking, it means that one can have the data but it cannot be properly put to use to achieve the purposes and goals. Manual data entry must be prohibited when instead an automated solution can be put to use as manual data entry introduces errors into the data collection. For easier translation or moving, data must be stored in formats with open standards[24]. Analysis of data must be well documented like a code must always be explained with a comment so that understanding becomes easier for anyone who is working with the data. The researcher has also focussed on few areas cited below where the proposed framework in the need of the hour.

E-Governance:

Due to large storage of sensitive and private information, e-governance has to face unparalleled concerns and troubles. Globalization and development have been given a whole new aspect because of e-governance but there must be a consistent advancement in technology-explicit policy regulations, governmental data management leadership that limits the collection and use of personally identifiable information by the government. By determining consistent, stringent rules that secure the citizens without causing any harm to the government's operativeness, the government can lead and achieve their goals by following some certain guidelines:

- Creating a Union Chief Officer.[25]
- At all major departments, installation of chief privacy officers (CPO's).
- Ensuring the Data Mining processes as addressed by the Indian Acts.
- Standardizing and strengthening notices including "data governance impact assessments".
- Protection of data on agency websites.
- Processing of Complaints in case of breach of policies.

[24]Vedaschi, A. and Lubello, V., 2015. Data retention and its implications for the fundamental right to privacy: A European perspective. *Tilburg Law Review*, *20*(1), pp.14-34.

[25]Behara, G.K., Varre, V.V. and Rao, M., 2009. Service oriented architecture for e-governance. *BPTrends, October*.

E-Jurisdiction:

The first much anticipated model e-Court in India was at the Ahmadabad City. Apparently, the commencement of e-courts in India is in its preliminary phase. Issues like data governance and protection are still pristine. Without manifestation of the conventional technological structure and methods used by e-courts, the conviction upon which the courts of law rely stands a chance to become intrinsically vague. Instead of keeping it for later, it will be best to entrench the governance framework to e-court as soon as possible. "The e-court must make any document that is filed electronically, publicly available online. It must provide protection and security of electronic filings."A rational and integrated policy for data management and access rights should be available. The policies apply to both electronic files and paperwork unless otherwise indicated. These policies must not impact or restrict the availability of case files at the courthouse.[26]

E-Media:

Internet podcast, television channels, electronic journalism, radio all fall under e-Media and are used by today's media. Bridging the gap between public grievances and government policies is the pivotal role of media. Each and every move taken by the government is shown on the TV channel and the terrorists use them to strengthen their attack as their response to it. The lack of information classification and the adverse effects that it creates can be seen when one reflects upon the 26/11 incident. For Celebrities be it in the entertainment, sports or political field, privacy is of the utmost concern but is in a big threat 24x7. Any news or gossip related to them takes no time to become the Breaking News headlines in newspapers and TV channels. Only proper data management or a guideline for such in the legal framework will provide a way out for this issue.

Business Processing Outsourcing (BPO):

IT/ITES industries Business Processing Outsourcing plays a major role for revenue generation in India. KPO (Knowledge process outsourcing), LPO (Legal process outsourcing) are some of the well-established industries complementing BPO that are based mainly on processing of information. India's business process outsourcing or BPO enterprise claims that its levels of safety regulations tally with the finest in the world. There has never been a severe data breach in India. However, associations in the United States fear that such an event may take place. Richard M. Rossow, Chief of operations at the U.S.-India Business Council in Washington, D.C. says that the fear is 'not because they are at a higher risk of such a thing taking place in India, but rather because

[26]Hon, W.K., Hörnle, J. and Millard, C., 2012. Data protection jurisdiction and cloud computing–when are cloud users and providers subject to EU data protection law? The cloud of unknowing. *International Review of Law, Computers & Technology*, *26*(2-3), pp.129-164.

public perception of sending work to India is so bad that it will take only one major event for the affected company to 'pull the plug' on their India data service venture.'[27]

It is feared that India will lose the outsourcing sector if companies are not made aware of the strong data governance and protection framework. Unless we have a proper legal structure, it will be complicated to secure stake holder's interest just by relying on some international standards. It should be noted that people are the weakest link in information security. There must be specific rules at working places like avoiding cell phones and prior screening of employees, technology used to access the computers of the employees and all must work under electronic surveillance.

Tele Communication:

Internet service providers, Telecommunications contractors, public number directory publishers, number-database operators, emergency call persons, entitled researchers and their corresponding employees must all secure the confidentiality of information. There must be strict restriction of the disclosure or use of any personal data or document that comes at their disposal during the course of business.[28] Publishers who receive information regarding the publication or law enforcement officers who receive information concerning the functions and billing information, service providers who perceived information relating to billing or network sustenance purposes or others who maintain the public number directory, the work ethics are same for all.

Health:

Health information includes any information collected concerning a health service one has received or any data about one's health and disability. It is highly sensitive and therefore of utmost importance. It is necessary to consider issues that fall under health information:

- Notes of the diagnosis, treatment and the symptoms.
- Test results and specialist reports.
- Appointment and billing details.
- Pharmaceutical purchases, prescriptions or dental records.
- Genetic information which is highly sensitive
- Collection of information by a health service provider related to race, sexuality or religion.

The US government has made particular legal architectures like PSQIA (Patient Safety Rule and HIPPA). A technical, physical and administrative framework that discusses the methods and policies to secure patient information is mandatory. There must be favoured proceedings wherein someone discloses health

[27]Singh, V., 2005. Under Pressure India Mulls Step to Protect Privacy. *IEEE Spectrum, February*.
[28]Wang, Z., Wei, G., Zhan, Y. and Sun, Y., 2017. Big data in telecommunication operators: data, platform and practices.

information without permission of patient, a scripted set of policy proceedings and nominate a officer in charge of executing the method. Policy must precisely delineate a group of staff that are enabled to access Electronic Patient Health Information, apparatus that comprises sensitive information must be appropriately supervised and regulated, securing the system from sightline of public, before provision of data one must ensure the conviction of the other party.

E-Business:

Indian economy is primarily appertaining to e-business outsourcing. It needs a governance framework clearly targeted on e-business and deal with matters and provide judicial cooperation in the event of any deceit, crime. Challenges that are needed to be covered under this framework are proper storage of discerning credentials like credit card, safe credit of money while performing online transaction. Discretion, rectitude, availability, verification of party must be guaranteed before beginning of dealings. Encrypting the data before provision of sensitive data, restrict access predicated on need-to-know basis, allocate exclusive identification to the parties that have a share in the business for authentication roles while maintaining the policy that concerns e-business management.

Tourism:

India has rich heritage and culture which contributes revenue of 6.23% to the national GDP and 8.78% of the total employment in India from the tourism industry. Data governance also impacts the tourism sector. When a tourist visits India they perform several transactions, but there is no assurance that the provided information will not be misused. It is suggested that each tourist must have a right that their information is protected, corrected, erased as per their wish. Most appropriate physical and technical measures, staff training and awareness should be adopted to ensure that unauthorized access to, alteration or destruction of personal data does not take place.[29] Similarly, for the Medical Tourism the personal information of the patient must be protected. After the completion of the transaction the credit card information must be destroyed. If these issues are covered in the tourism framework, then it adds to the Indian revenue, it reduces the crime rate and tourists feel safe while visiting the country.

National Security Surveillance:

Collection of personal information by means of a surveillance system is protected under law. However, it must be ensured what protective measures have been adopted to secure the data from any breach. People have a 'Reasonable expectation of privacy' when their data is collected under any surveillance.[30] It is

[29]Li, J., Xu, L., Tang, L., Wang, S. and Li, L., 2018. Big data in tourism research: A literature review. *Tourism Management*, *68*, pp.301-323.

[30]Whitehead, B., Invasion of privacy laws and video surveillance what's legal, what's not.

suggested that the surveillance systems should be used to address concrete problems and it should adhere to all statutory requirements. The activities like Access, Use, Disclosure, Retention, Security and Disposal of Surveillance Records must be regulated.

Before suggesting a surveillance programme, an estimation of the implications is required to be made. Public consultations should be done prior to initiating surveillance and notify those who are impacted, once it is approved. The pattern and functioning of surveillance program/practice should mitigate interference to what is imperative to reach its goals like scheming and establishing Surveillance Equipment. System operators necessitate data governance and management training. Surveillance holds great importance in preservation of National Security, including heritage, culture and life of each citizen.[31] Privacy of national security can be breached when espionage like activity can be performed by an individual to harm the reputation of the country.

As concerned to national security there is derogation of data governance. It must have a private structure with adequately configured national security benchmark. It should be incorporated that the government has right to investigate about any citizen, can confiscate any private information concerning an individual when it scales to National Security, because it is the paramount concern. Information is accessible by the command anytime whether it appertain private or public concern if they are found vulnerable or risk to national safety. It has inclusive power as it deals with the retention of millions of lives.

The author has tried to cover legal, technical and political of data governance. The author has kept in mind the present scenario, fast advancement in technology and emerging domains in the mind. The proposed system has given scope of improvements so that new domains can be added. The proposed system has been kept flexible and scalable so that not only present need but future needs can also be accommodated. Well-structured framework for Data Governance is definitely important for an individual but also for society as well as economic growth of country.

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[31]Xynou, M. and Hickok, E., 2015. Security, Surveillance and Data Sharing Schemes and Bodies in India. *The Centre for Internet & Society. Accessed June*, *13*, p.2017.

GROUNDWATER GOVERNANCE IN INDIA: A ROADMAP FOR RECHARGE

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ABSTRACT

In the wake of climate change out of anthropogenic intervention and consequent global warming, chronic scarcity of drinking water is likely to affect global population. In Particular, India will face critical crisis as, except areas adjacent to river basins, major pockets of southern, western and central India are covered by semi-arid and even arid landscape where scarcity of water reigns and the scarcity is likely to increase due to adverse impact of climate change, e.g., irregular monsoon and consequent draught, reduction of forest cover which is likely to affect rainfall, etc. Population explosion will put excessive pressure over hitherto reserve of groundwater being an exhaustible resource. Due to irregular supply of surface water, the same is bound to occur through agricultural practices dependent on groundwater. Thus, groundwater table may (and does) deplete lower and thereby affects the population with immediate effect. Despite working of the Central Ground Water Board initiated since last four decades, depletion of the groundwater table continues with impunity to gross detriment of the community. The author hereby explores inherent linkages between demography and development, along with management agenda of groundwater reserve in specific context of climate change all over the world which is beyond control of a(ny) state. Under given circumstance, recharge of groundwater through rainwater harvesting or otherwise seems a plausible way out to get rid of catastrophic effects of water scarcity in India. Groundwater recharge, however, involves delicate process of human engineering over natural resource and the same cannot afford erroneous practice(s) which may cause contamination of groundwater and other jeopardy in public life. This effort strives to introduce jurisprudent approach toward a set of climate-conscious state policy regime so that the (water-starved) people of India may get rid of chronic water crisis in time ahead.

> *"The earth has enough resources to meet the needs of people, but will never have enough to serve their greed".*[1]

Keywords: *Groundwater Table, Depletion, Desertification, Recharge, Rainwater Harve*

[1] M. K. Gandhi, quoted by Manmohan Singh, while releasing National Action Plan on Climate Change on June 30, 2008. Available at: http://pmindia.nic.in/prelease/pcontent.asp?id=765

I. INTRODUCTION

Indeed, at initial glance, the only plentiful tangible resource on the Earth is water as the same covers about three-fourth part of its surface. But, at the same time, this is also relevant fact that while the same covers 70.9% surface of the Earth, 97% of the same belongs to saline water. This effort is thus concerned over rest 3% watercourse in general and 1.6% aquifer water posited at subsurface ground in particular which belongs to sweet water and suitable for human consumption. At the threshold of this effort, therefore, this is clear from available database that water is no plentiful resource for civilization and society requires to be economic in terms of its use toward sustainable development so that, different stakeholders all over the world of the present generation along with those of future generation must not suffer from scarcity of water consequent to overuse or abuse of the same by earlier generation and be thereby left with no option but to lament for the same after the classic expression of Coleridge to this end:

"*Water, water, every where, And all the boards did shrink; Water, water every where, Nor any drop to drink.*[1]

Besides the concern for sustainable development through intra-generational and intergenerational equity, this effort is also set to explore plausibility of subtle human engineering upon hitherto groundwater reserve by replenishing aquifers through rainwater or otherwise and thereby maintain or better groundwater table which helps sustain survival of civilized human existence on the Earth. The task involves prudent planning and expedient execution with understanding the nature and law of its own. In a series of its recent observation, Apex Court of India was adhered to a similar position over water crisis as a potential threat for India.[2-3] Here this is

[1] Samuel Taylor Coleridge, The Rime of the Ancient Mariner (1912), Part II, in Ernest Hartley Coleridge (ed.), *Coleridge: Poetical Works*, Oxford University Press, New York, 1969, p. 191.

[2] "It is important to note that material resources of the community like forests, tanks, ponds, hillock, mountain etc. are nature's bounty. They maintain delicate ecological balance. They need to be protected for a proper and healthy environment which enable people to enjoy a quality life which is essence of the guaranteed right under Article 21 of the Constitution."
Hinch Lal Tiwari v. Kamala Devi and Others 2001 INDLAW SC 20074, AIR 2001 SC 3215.

[3] "Despite having immense reservoirs of water in the form of the Himalayas in the North and the Arabian sea, Indian Ocean and the Bay of Bengal in the West, South and East of India, there are water shortages everywhere often leading to riots, road blocks and other disturbances and disputes for getting water. In many cities, in many colonies people get water for half an hour in a day, and sometimes not even that, e.g., in Delhi, South India, Rajasthan, U.P., Madhya Pradesh, Orissa, Maharashtra, Northeast, etc. In large parts of rural areas there is shortage of water for irrigation and drinking purpose. Rivers in India are drying up, ground water is being rapidly depleted, and canals are polluted. The Yamuna in Delhi looks like a black drain. Several perennial rivers like the Ganga and Brahamputra are rapidly

imperative to explain that, unlike hitherto anthropogenic intervention toward climate change, artificial recharge is instrumental to fill in the setback caused out of substantial abstraction of groundwater for industrial, agrarian or household purpose. Further, despite such nomenclature, artificial recharge helps natural course of action to accomplish in its own way through the support system offered to accelerate the same.[4] This is a conscious contribution to help nature, though callous contribution is no rare phenomenon to the detriment of nature.[5] Even if the same is artificial, the same is instrumental to compensate what nature suffers out of human intervention.[6] In the absence of such scientific intervention, development agenda may and will lack sustainability in the decades ahead and insignia of the same is apparent on the face of record.[7] Besides there is

becoming seasonal. Rivers are dying or declining, and aquifers are getting over-pumped. Industries, hotels, etc. are pumping out groundwater at an alarming rate, causing sharp decline in the groundwater levels. Farmers are having a hard time finding ground water for their crops, e.g., in Punjab. In many places there are serpentine queues of exhausted housewives waiting for hours to fill their buckets of water. In this connection John Briscoe has authored a detailed World Bank report, in which he has mentioned that despite this alarming situation there is widespread complacency on the part of the authorities in India."
M. K. Balakrishnan and Others v. Union of India and Others; 2009 INDLAW SC 1005.

[4] "The process of recharge itself is not artificial. The same physical laws govern recharge, whether it occurs under natural or artificial conditions. What is artificial is the availability of water supply at a particular location and a particular time. In the broadest sense one can define artificial recharge as "any procedure, which introduces water in a pervious stratum".
The term artificial recharge refers to transfer of surface water to the aquifer by human interference. The natural process of recharging the aquifers is accelerated through percolation of stored or flowing surface water, which otherwise does not percolate into the aquifers. Artificial recharge is also defined as the process by which ground water is augmented at a rate exceeding that under natural condition of replenishment."
Manual on Artificial Recharge of Ground Water, Central Ground Water Board, Ministry of Water Resources, Government of India, New Delhi, September, 2007, p. 12. Available at: http://cgwb.gov.in/documents/Manual%20on%20Artificial%20Recharge%20of%20Ground%20Water.pdf

[5] "Recharge may be incidental or deliberate, depending on whether or not it is a by-product of normal water utilization.
"Artificial recharge can also be defined as a process of induced replenishment of the ground water reservoir by human activities. The process of supplementing may be either planned such as storing water in pits, tanks etc. for feeding the aquifer or unplanned and incidental to human activities like applied irrigation, leakages from pipes etc."
Ibid.

[6] "As the demand for irrigation could not be met by numerous canals, tanks and lakes, farmers have started digging deep bore wells. India is now perforated with 19 million wells nationwide; depleting aquifers of groundwater faster than nature can replenish. Groundwater is a nature's reserve to account for dry and drought years. The situation, however, has become alarming as out of the 5,723 geographic blocks, 600 are considered either overexploited or critically close to it."
R. K. Luna, Balancing Excess and Shortage, The Tribune, online edition, editorial, July 20, 2010. Available at: http://www.tribuneindia.com/2010/20100720/edit.htm#top

[7] "Groundwater is the major source of meeting the irrigation needs of irrigated agriculture. Currently about half the area

endeavor to minimize the spatial divergence in groundwater reserve and thereby generate groundwater reserve in deprived areas of India.

Emergent threat of climate change seems likely to add fuel to the fire as the same so often than not prompts to irregular monsoon and consequent pandemonium to attract fall of rainfall which will recharge groundwater aquifer. Thus, recharge is no longer an isolated issue; rather its underpinnings are increasingly hyperlinked to larger spectra of environment and development. The underlying challenge, therefore, lies in prudent policymaking to transcend myopic vision of immediate requirement and thereby attain a prognostic vision to minimize climate change or catastrophic effects of the same.

II. GROUNDWATER: PUBLIC TRUST IN PERIL

In the given system under constitutional governance of India, groundwater may at ease be construed to be a subject matter of public trust. Creative interpretation of Article 38(2),[8] read with 39(b),[9] 47[10] and 48[11] of the Constitution of India may enable the State to adopt policy toward protection and preservation of groundwater against excessive or arbitrary abstraction to the detriment of community at large. Even the State is under legal obligation to prevent activities which may result into leakage of untreated effluents to groundwater and consequent contamination of the same which may put public health at peril.

In India, the primary hurdle for the State is to overcome natural inequity in terms of distribution of water resources.[12]

under irrigation in the country is irrigated from groundwater sources. Large-scale groundwater development has led to fall in the water table in many areas. Over-pumping is leading to declining water table levels and failure of tubewells. Pumping costs are increasing, as is the energy consumption. In the coastal areas this has led to ingress of sea water, with serious environmental implications."
I. P. Abrol, Agriculture in India, a report to Planning Commission, p. 10. Available at: http://planningcommission.nic.in/reports/sereport/ser/vision2025/agricul.pdf

[8] Article 38 of the Constitution of India, 1950.
[9] Article 39 of the Constitution of India, 1950.
[10] Article 47 of the Constitution of India, 1950
[11] Article 48 of the Constitution of India, 1950
[12] "The water resources in the country are unevenly distributed. Some regions have abundance while others suffer from acute scarcity. The hydrological challenge is: how to preserve/conserve the rainwater so that 4 months' rainwater can be utilized for 12 months for multiple uses; human and livestock needs, domestic uses and crop irrigation. The hydrological chain has been disrupted and the highest priority should go to the restoration of the ecology of "hydrologic hot spots". Effective groundwater recharging measures as also regulations for sustainable exploitation needs to be put in place on urgent basis. Ground water legislation and Regulatory Authority can only be delayed at nation's peril. Long-term concern of policy planners should be towards evolving more sustainable rural livelihood support systems so that on the one hand, unsustainable agricultural practices do not force them to either migrate to the urban slums or on the other hand, force them to

While drafting, the Constituent Assembly was well aware of the same. No wonder that Article 262, which deals with disputes relating to waters,[13] is part of the Constitution *ab initio* since 1950. Groundwater was yet to attract its attention as the same was still a subject matter of under-exploitation at that point of time.

This was the state of affairs in the affairs of state until green revolution initiates its contentious process toward multi-crop production with need for excess water. While earlier the State identified underutilization of groundwater as a problem,[14] there was underlying admonition against overexploitation of the same as well.[15] Thereafter suggestion for utilization was heavily adhered to with no heed toward admonition annexed therewith with a result that substantial pockets of India now suffer from aftermath of overexploitation.[16]

An official Figure 1[17] provided below demonstrates recent position while ground realty vis-à-vis water table may have been worse. Lack of proactive policymaking on the part of State allowed the same to happen. In fact, groundwater was under official supervision since 1929 with constitution of Ground Water Division in the Geological Survey of India.[18] There were instances of systemic

resort to unsustainable livelihood practices, which tend to destroy local natural resources."
Report of the Steering Group (serial no. 13/2002), submitted by Chairman M. S. Swaminathan, on Agriculture and Allied Sectors, for the Tenth Five Year Plan 2002-2007, Planning Commission, Government of India, New Delhi, January 3, 2002, paragraph 2.8.Available at: http://planningcommission.nic.in/aboutus/committee/strgrp/stgp_agri.pdf

[13] Article 262 of the Constitution of India, 1950.

[14] "Under-utilization of ground water sources, mainly due to the lack of sufficient land under command, was reported from 61 of the 90 selected villages. This was especially high in Tamil Nadu, Karnataka, Punjab and Haryana."
Study (no. 89) of Tube-well Irrigation and Groundwater Development Programme-1974, conducted by Planning Commission, Government of India, paragraph 5.13. Available at: http://planningcommission.nic.in/reports/peoreport/cmpdmpeo/volume2/sti.pdf

[15] "A policy decision should be taken with regard to the exploitation of ground water resources which would not only prescribe limits on its utilization, but also define the manner in which these resources should be shared on an equitable basis between farmers in the area."
Supra, n. 13, paragraph 6.6.

[16] "Due to poor water harvesting leading to excessive run off and poor recharging of ground water but excessive drawl/exploitation mainly to meet requirement of growing population for drinking and other daily requirements as also new high yielding crops, the ground water potential has dwindled very fast. The number of dark Blocks/Mandals where there is over exploitation of groundwater (over 85% exploitation) is increasing in most of the states with larger rainfed areas (Andhra Pradesh, Karnataka, Rajasthan, Madhya Pradesh, Chattisgarh etc). During 1984-85 to 1998-99 the number of dark blocks has increased from 253 to 428."
Supra, n. 13.

[17]Available at: http://cgwb.gov.in/images/block_category.jpg

[18] *Vide* Genesis of CGWB. Available at: http://cgwb.gov.in/genesis_cgwb.htm

failure; earlier, underutilization of groundwater to address scarcity of water, and later, overutilization of to exhaust the same. There was deficiency on the part of state in policymaking and effective implementation of the same.

By the time the State became active to contain threat vis-à-vis groundwater, two points of concern initiated their lethal operation to the detriment of aquifer water, e.g., population explosion and climate change. While the former helps accelerate exhaustion of groundwater, the latter helps decelerate groundwater recharge and together both contribute to the water crisis in India. The State also failed to attain optimum water storage capacity as compared to rest of the world. As per available Comparative database[19] provided below, India is far behind from rest of the world including China, the most populated country in the world:

Consequently, India cannot contain available rainfall to recharge groundwater.[20] As per its Mid Term Appraisal, the Planning Commission is apprehensive of an imminent water crisis in decades ahead. [21] In its separate report over similar area of study, the World Bank expresses similar apprehension over

[19] Comparative database as cited by G. Kishan Reddy, Making out a case for holistic river water management, Opinion, The Hindu, online edition, August 26, 2010. Available at: http://www.hindu.com/2010/08/26/stories/2010082652191300.htm

[20] "Compared to developed countries that capture and store over 900 days of rainfall in major river basins, India captures just 30 days. Consequently, of the total precipitation, a mere 1,123 BCM of water is available for utilization: 690 BCM in the shape of surface water, and 433 BCM as groundwater resource. … There is excessive unregulated drawing of groundwater, leading to continuous depletion, as there is little effort to recharge it."
Sanjeev Chadha, Water: The country's inconvenient truth (source not mentioned) Available at: http://epaper.timesofindia.com/Default/Scripting/ArticleWin.asp?From=Archive&Source=Page&Skin=ETNEW&BaseHref=ETD/2010/08/30&PageLabel=11&EntityId=Ar01100&ViewMode=HTML&GZ=T

[21] "Natural resources like land and water have not received the attention they deserve. The sustainable development of land and water resources becomes all the more important for the nation like India, which shares about 16 per cent of the global population but has only 2.4 per cent of the total land and 4 per cent of the total water resource. Scarcity of water in rain-fed areas is causing serious hardships. Ground water resources are dwindling fast due to poor water harvesting leading to excessive run off and poor recharging of ground water. This is accompanied by excessive drawal/ exploitation mainly to meet the household needs of growing population as also irrigation needs of new high yielding crops. The number of dark blocks/mandals where there is over exploitation of groundwater (over 85 per cent) is increasing in most of the States with large rain-fed areas (Andhra Pradesh, Karnataka, Rajasthan, Madhya Pradesh, Chattisgarh etc.). Between 1984-85 and 1998-99 the number of dark blocks increased from 253 to 428. If this continues, the number of over exploited blocks will double over a period of every twelve and a half years."
Irrigation, Flood Control and Command Area Development, Mid-term Appraisal, 9th Plan, Planning Commission, as quoted in Five-year Plan, 10th vol., chapter 5, paragraph 5.1.11. Available at: http://planningcommission.nic.in/plans/planrel/fiveyr/10th/volume2/v2_ch5_1.pdf

future predicament in India.[22] Of course there is wide variation in vast territory of the country. While there is rise in groundwater table of Chennai,[23] perhaps out of good monsoon, reverse result is apparent in Delhi[24] and Kolkata.[25] Even there is wide divergence in different districts of the same province in the same year. Nellore reaps benefit out of good

[22] "According to the 2004 nationwide assessment, 29 percent of the groundwater blocks are in the semi-critical, critical, or overexploited categories. For the six states of Gujarat, Haryana, Maharashtra, Punjab, Rajasthan, and Tamil Nadu taken together, 54 percent of the groundwater blocks fall in these categories. In already large and rapidly growing segments of the economy and in many of India's most productive regions, the self-provision model of unlimited groundwater use is no longer sustainable. A crisis situation now exists in a number of states. ... If current trends continue, within 20 years 60 percent of all aquifers in India will be in a critical condition (World Bank 2005)."
Official report "Deep Wells and Prudence: Towards Pragmatic Action for Addressing Groundwater overexploitation in India", The World Bank, Washington, 2010, p. 3. Available at: http://siteresources.worldbank.org/INDIAEXTN/Resources/295583-1268190137195/DeepWellsGroundWaterMarch2010.pdf

[23] "The average groundwater level in the city has gone up by 0.2 metre since July. The level was 3.5 metre in June, senior officials of Chennai Metrowater said here recently and attributed the increase to the southwest monsoon.
"They were speaking at the launch of a series of awareness meetings on rainwater harvesting structures and their maintenance, at the Metrowater area offices till September 17.The launch function was held at the Area office II in Washermenpet. Each area office would hold meeting on an allocated day as part of the rainwater harnessing campaign."
Staff Reporter, Groundwater level goes up, thanks to southwest monsoon, The Hindu, August 27, 2010. Available at: http://www.hindu.com/2010/08/27/stories/2010082760610200.htm

[24] "Experts, however, point out that faulty planning, excessive exploitation of ground water were major reasons for frequent cave-ins. ... Experts also maintain that with excessive exploitation of groundwater, the mud beneath is drying up reducing its binding strength. As a result, when water seeps in, it simply washes off the mud column beneath the surface of the road and makes that place hollow, which lead to the caving-in."
Age Correspondent, New Delhi, posted on August 23, 2010, The Asian Age, August 31, 2010. Available at: http://www.asianage.com/delhi/'cave-ins-due-groundwater-overuse'-363

[25] "Though the cave-in on Council House Street today was due to the collapse of the underground brick sewer, engineers of Kolkata Municipal Corporation and the State Water Investigation Directorate said the groundwater table in the city has been so badly affected that if steps are not taken now, there will be massive subsidence in the city. Geologists said the groundwater level in some areas in the city has fallen below six metres. ... These areas ... are where hundreds of high-rise apartments have come up in the past three decades. Nearly all these buildings have or are in the process of installing deep tube-wells to lift groundwater. ... All these buildings will be lifting ground-water but both the state government and the KMC are silent on the issue. Architects and builders said that fearing subsidence in almost all G+4 buildings and above, builders are resorting to piling and this has led to a sharp spike in the cost of construction, which in turn is being passed on to consumers looking to purchase residential units thereby heating up the property market."
Statesman News Service, That sinking feeling, posted on August 17, 2010, The Statesman, online edition, August 31, 2010. Available at: http://thestatesman.net/index.php?option=com_content&view=article&id=338412&catid=73

monsoon[26] and Anantapur has lost the same despite better monsoon[27] while both of them are posited in Andhra Pradesh. Also, there are problems like contamination of groundwater out of untreated effluents.[28]

So far as relevant World Bank report is concerned, India is found in deeper water; or, literally speaking, deeper water is found in India. In the absence of master plan to this end, idea of groundwater recharge was ill-conceived with minimal concern for geophysical peculiarity of region concerned[29] with obvious result that

[26] "Groundwater levels have increased considerably in Nellore district in the recent past. Unlike other parts of the state, Nellore region usually experiences rains during the northeast monsoon between October and December.

"However, for the first time in the last 10 years, rains lashed the district during the southwest monsoon between May and July this year. This has resulted in an average increase of the groundwater table by 1.50 metre in July, compared to last year.

Recharge is highest with 1.25 metre in Jaladanki mandal and lowest with 13.38 metre in Marripadu mandal. Interestingly, the groundwater table has been increasing gradually in summer during the last five years, though there is not much change in the average water level of 4.50 metre during rainy season."

DC Correspondent, Groundwater levels go up in Nellore region, posted on August 19, 2010, Deccan Chronicle, online edition, August 31, 2010. Available at: http://www.deccanchronicle.com/nellore/groundwater-levels-go-nellore-region-355

[27] "The drought-prone Anantapur district once again lost a golden opportunity to conserve rainwater for groundwater recharge this monsoon due to the apathy of minor and medium irrigation officials.

After nearly three years, the district has received a record rainfall from the last two months. According to official records, the district received a record of 121.6 mm rainfall during August as against the average rainfall of 88.7 mm and 63.9 mm rainfall during July as against average rainfall of 53.6 mm.

"As officials have failed to conserve rainwater, most floodwater flows to Kurnool, Kadapa districts and Karnataka, though officials claim that crores of rupees were spent to construct water-harvesting structures such as check dams and tanks. Farmers are still experiencing water scarcity."

DC Correspondent, Irrigation officials fail to conserve rainwater, reported from Anantapur on August 29, 2010, published by Deccan Chronicle, August 31, 2010.Available at: http://www.deccanchronicle.com/anantapur/irrigation-officials-fail-conserve-rainwater-799

[28] "The groundwater in a number of parts in Erode district is contaminated heavily due to indiscriminate discharge of untreated effluents by the textile and leather processing units. A majority of the residents in the district depend on the groundwater as the local bodies are not able to meet the demand. The increasing levels of pollution in the groundwater pose serious threat to the health of thousands of people. The Cauvery Nagar in Erode is one of the most affected places in the district with high levels of pollution in groundwater. … If the unmindful discharge of effluents continued for a few more years, the groundwater in many parts of the district could not be used for any purpose, environmental activists say."

S. Ramesh, Discharge of untreated effluents leads to water contamination, Erode, the Hindu, online edition, August 19, 2010. Available at: http://www.hindu.com/2010/08/19/stories/2010081951860600.htm

[29] "From the technical perspective, alluvial aquifers present the best opportunities for groundwater recharge because of the large volumes that can be recharged into and abstracted from groundwater. ... while recharge efforts in regions with alluvial aquifer settings can have the most successful outcomes, most of the groundwater overexploitation problem in India lies elsewhere. The seven states of Andhra Pradesh, Gujarat, Karnataka, Madhya Pradesh, Maharashtra, Rajasthan, and Tamil Nadu account for more than 80 percent of

despite recharge modalities remain operative, the same has failed to be effective for one reason or another and depletion continues to push water table beneath.[30] Of late, the Central Ground water Board has had a master plan.[31] The same, however, is still subject to optimum implementation.

critical and overexploited groundwater blocks in India, mostly in hard-rock aquifer settings. Therefore, focusing recharge efforts in predominantly alluvial settings, as would happen if India's proposed Groundwater Recharge Master Plan ... were implemented, would miss the real problem areas of groundwater overexploitation."
Official report "Deep Wells and Prudence: Towards Pragmatic Action for Addressing Groundwater overexploitation in India", The World Bank, Washington, 2010, p.25-26. Available at: http://siteresources.worldbank.org/INDIAEXTN/Resources/295583-1268190137195/DeepWellsGroundWaterMarch2010.pdf

[30] "… absence of appropriate and credible models of groundwater management is one reason why state action has been limited to rather ineffective attempts at regulating groundwater use in critically threatened areas. Some of the policy measures needed for addressing the problem (such as removing the perverse incentives for groundwater pumping inherent in the provision of cheap agricultural power) are highly unpopular and therefore unviable in the current political environment. Between these "not appropriate for India" prescriptions and "sensible but infeasible" recommendations, the groundwater overexploitation crisis has continued to grow deeper in India."
Official report "Deep Wells and Prudence: Towards Pragmatic Action for Addressing Groundwater overexploitation in India", The World Bank, Washington, 2010, p. 91. Available at: http://siteresources.worldbank.org/INDIAEXTN/Resources/295583-1268190137195/DeepWellsGroundWaterMarch2010.pdf

[31] "The National Groundwater Recharge Master Plan (Central Ground Water Board 2005) provides a nationwide assessment of the groundwater recharge potential and outlines the guiding principles for an artificial groundwater recharge program.
"The plan estimates that through dedicated recharge structures in rural areas and rooftop water harvesting structures in urban areas a total of 36 billion cubic meters can be added to groundwater recharge, at a cost of approximately US$6 billion (Rs 25,000 crores). The additional quantity of groundwater amounts to approximately 15 percent of India's total current groundwater use.
"The Groundwater Recharge Master Plan follows two criteria for identifying recharge: availability of surplus water and availability of storage space in aquifers. The investments in the program would therefore be driven by the potential available for groundwater recharge, and not by the need for recharge. This is clear when the funds allocated for recharge under the plan are examined on a state-by-state basis. The three states of Andhra Pradesh, Rajasthan, and Tamil Nadu, which together account for over half of India's threatened groundwater blocks, receive only 21 percent of funds, whereas the states of the Ganga-Brahmaputra basin, which face no groundwater overdevelopment problems, receive 43 percent of the funds. The disparities are similarly marked in a district-level analysis of recharge potential and needs (Shah 2008).
"If implemented successfully, this recharge program will be able to add a significant quantity of water to India's groundwater storage, but it will not provide much help in the areas that are most in need of help. The Groundwater Recharge Master Plan illustrates the difficulties arising from disparate spatial variations in recharge potential and aquifer overexploitation, and also the limitations of recharge in addressing groundwater overexploitation in India."
Official report "Deep Wells and Prudence: Towards Pragmatic Action for Addressing Groundwater overexploitation in India", The World Bank, Washington, 2010, p. 25. Available at: http://siteresources.worldbank.org/INDIAEXTN/Resources/295583-1268190137195/DeepWellsGroundWaterMarch2010.pdf

III. GROUNDWATER RECHARGE: FAULT LINES IN THE SYSTEM

The National Groundwater Recharge Master Plan, 2005 strives to attain a vision comprehensive in its panorama. As told earlier, in India (and elsewhere as well), challenge lies in implementation of planning grandeur. While the same requires a widespread movement to this end, the Planning Commission concentrates its focus on the Ground Water Board[32] and thereby side-lines civil society movement while its stakeholders have had access to ground reality and potential to perform better with the people. For instance, the Tarun Bharat Sangh, under able leadership of Rajendra Singh- the Waterman of India,[33] has revolutionized water management in India- an assignment entrusted to the Board by the State under public trust. A brief account of their contribution will be dealt with at latter part of this effort. Thus, *pro bono* public-private partnership seems imperative to attain the grandeur set by the CGWB master plan.

Indeed, there is a series of reforms to correct water governance, the same suffers from static inertia and thereby declines to do away with archaic errors on its part. So far as organized regulatory framework vis-a-vis water management is concerned, there is a vacuum which is filled in by piecemeal instruments by and large meant for provisional arrangement and the same stand as stumbling blocks to get rid of long-term water predicament. Also, there are problematic areas of concern left aside till date. First, groundwater related statutes of different states (as the same belongs to Entry 17, List II of Schedule VII to the Constitution of India) miss the fundamental rights perspective. Panchyati Raj Institutions are yet to be included even after Entry 3 of Schedule XI was introduced by the Constitution (Seventy-third Amendment) Act, 1992. Second, common law rules giving landowners control over groundwater are yet to be abolished to clear its legal status as subject matter of public trust while such assertion seems imperative in terms of public interest.

[32] "As regards ground water, this resource can be augmented by re-charging techniques. Stress has to be laid on conjunctive use of surface and ground water in the irrigated command of minor irrigation schemes. Integrated approach for ground water management needs to address identification and protection of potential source of fresh ground water, along with sustainable ground water development, data base management, monitoring network, conjunctive use of water in irrigated command areas, recharge of ground water, and evaluation studies of ground water development. Priority has to be given to exploration work by CGWB to achieve economical and sustainable development of ground water and augmentation of ground water resources by recharging technique."
Report of the Steering Committee (serial no. 23/ 2001) on Irrigation for the Tenth Five Year Plan 2002-2007, Planning Commission, Government of India, New Delhi, May, 2002, p. 29-30. Available at: http://planningcommission.nic.in/aboutus/committee/strgrp/stgp_irrig.pdf

[33] For details, refer to relevant information in the homepage of Tarun Bharat Sangh, Alwar. Available at: http://www.tarunbharatsangh.org/

Besides such legislation takes care of groundwater as natural resource and thereby ignores its social dimension. Also, the same fails to integrate environmental law principles like precautionary principle though the Water Act, 1974 was conceived as an environmental legislation as immediate aftermath of international response to environment; by courtesy, the Stockholm Conference, 1972.[34]

Even these points of concern abovementioned suffer from limitation of vision, e.g. groundwater deserves comprehensive vision and cannot be left to supervision of only local institutions without coordination in the interest of basin level policy framework which requires broader worldview vis-a-vis water governance.[35] Further, activist fraternity may not be pleased to note that the same is a case of entitlement and not that of rights in true sense of the term.[36] In spite of the same being a case of entitlement, the State cannot afford to set aside the same as there is a question of larger public interest hyperlinked to the same. Above all, a legal framework alone cannot accomplish such Herculean task unless and until the same is boost by mass movement. Groundwater recharge requires socio-legal transformation along with scientific intervention[37] and the same

[34]"Ongoing reforms of groundwater regulation fail to bring in a regulatory framework that is either adapted to the needs of the twenty-first century or compliant with existing constitutional principles. Firstly, existing groundwater reforms fail to implement basic constitutional principles related to water that apply without doubt to groundwater. This is the case of the fundamental human right to water and the decentralisation amendment (73rd Amendment). With regard to the fundamental right to water, its application to groundwater is essential because groundwater provides most of our drinking water. Yet, groundwater legislation has only exceptionally focused on drinking water and never from a fundamental right perspective. With regard to the 73rd Amendment that gives panchayats control water management at the local level and minor irrigation, ongoing reforms conceived before 1992 are simply not in tune with the new constitutional requirements.
"Secondly, existing reforms fail to address the core issue of the legal status of groundwater. The failure to abolish common law rules giving landowners overwhelming control over groundwater … does not provide scope for bringing in a legal regime that is socially equitable and environmentally sustainable." "In addition to their failure to implement constitutional provisions, ongoing reforms also fail to take into account important objectives. Groundwater legislation is to-date conceived largely as a natural resource legislation that fails to integrate the key social dimension of groundwater. Similarly, groundwater legislation fails to integrate existing environmental law principles, such as the precautionary principle."
Philippe Cullet, Groundwater regulations-Need for Further Reforms, ILERC Working Paper 2010- 01, p. 6. Available at: http://www.ielrc.org/content/w1001.pdf

[35] For details, refer to G. Kishan Reddy, Making out a case for holistic river water management, The Hindu, Kolkata ed., August 26, 2010, p. 11.

[36]For details, refer to Swaminathan S. Anklesaria Aiyar, Let's not confuse entitlements with rights, The Times of India, August 29, 2010, p. 20.

[37]"Central Ground Water Board has also carried out studies for demarcating areas of long-term decline of ground water levels and for exploring the possibility of augmenting the ground water resources in these aquifers using available surplus monsoon runoff. An area of about 4.5 lakh sq km has been

involves interdisciplinary praxis to transcend beyond limits of hitherto water governance.

While joint ventures[38] and community initiatives[39] toward water management are

identified in the country where such augmentation measures are considered necessary. It has also been estimated that about 36 BCM of surplus monsoon runoff can be recharged into these aquifers annually (CGWB, 2002). Modification of natural movement of surface water into the aquifers through various structures like check dams, percolation ponds, recharge pits, shafts or wells are considered suitable in rural areas. On the other hand, roof-top rainwater harvesting, either for storage and direct use or for recharge into the aquifers is suited for urban habitations with its characteristic space constraints. There is a need to shift the initiative from institutional endeavor and make it into a mass movement. Community based programmes on rain water harvesting and artificial recharge would inculcate a sense of responsibility among the stake holders, thereby enhancing the efficiency level of maintenance of the schemes."
B. M. Jha & S. K. Sinha, Towards Better Management of Ground Water Resources in India, a technical paper included in the special session on ground water in the 5th Asian Regional Conference of INCID, held at Vigyan Bhavan, New Delhi, on December 9-11, 2009, paragraph 5.6. Available at: http://cgwb.gov.in/documents/papers/incidpapers/Paper%201-B.M.Jha.pdf

[38] "Construction, maintenance and modernization of minor irrigation tanks continue to be function of the State, and to some extent, of the Panchayat Raj institutions. Ground water is however, mostly in the private sector, because ground water structures are located usually on individual farmer's land, and used exclusively by him. The Working Group on Minor Irrigation has projected a total outlay of Rs 12500 crores on Minor Irrigation groundwater schemes, of which Rs 10000 crores will be institutional finance from NABARD and the balance, i.e. 20% of the cost, will be private investment. As a measure of poverty alleviation, development of minor irrigation and especially individual tube-wells/bore-wells is without parallel. NABARD, Commercial Banks and Co-operative Banks should be fully involved in the task of financing ground water development schemes, by provision of individual loans for farmers, as well as irrigation cooperatives."
Report of the Steering Committee (serial no. 23/ 2001) on Irrigation for the Tenth Five Year Plan 2002-2007, Planning Commission, Government of India, New Delhi, May, 2002, p. 30. Available at: http://planningcommission.nic.in/aboutus/committee/strgrp/stgp_irrig.pdf

[39] "In many less-favored dryland areas, which did not benefit from the new seeds, water scarcity and vulnerability to drought are driving extensive small-scale investments in groundwater abstraction. Water rights are linked to land ownership. This virtually makes many aquifers open access resources to land owners. Lack of proper legal and institutional mechanisms for regulating the use of groundwater is already leading to depletion of the resource in many rural communities. In order to address the problem of resource degradation, poverty and water scarcity in the drought-prone areas, India has been promoting community-based watershed management. Public funds and community resources have been used to build groundwater-recharging facilities in several watershed communities. However, individual farmers freely capture the irrigation benefits by installing tube wells adjacent to the recharging facilities. This creates a feeling of inequity among farmers and undermines the incentive for cooperation and collective action within the watershed communities. Moreover, very low marginal costs of pumping resulting from highly subsidized energy prices also induce farmers to use water to the point where the marginal value of production is close to zero."
B. A. Shiferaw *et al*, Irrigation investments and groundwater depletion in Indian semi-arid villages: The effect of alternative water pricing regimes, International Crops Research Institute for the Semi-Arid Tropics, Working Paper Series no. 17, p. 17.

on the cards, market-driven measures like introduction of financial implication on its use is also put as a viable instrument to check exhaustion of groundwater[40] and Planning Commission is likely to use the same to prevent (ab)use of water.[41] Also there is global consensus to this end.[42] Indeed this is no full-proof solution as the same may pose no constraint to rich farmer while the same may put poor farmer on the dock. On the reverse side of the coin, poor farmers are many more in terms of head count and waiver of charge from their shoulder may and will defeat purpose of such regulatory framework to

Available at: http://ejournal.icrisat.org/agroecosystem/v2i1/v2i1irrigation.pdf

[40] "When water is free to irrigating farmers, it has led to shifting of cropping patterns to more intensive crops that should not be encouraged in water-scarce areas. Given the open access externalities, low pumping costs and free access to water that jointly encourage groundwater depletion, water charges may be considered a suitable policy option to promote water saving and to counter depletion. Using plot level data and an econometric land productivity model, we evaluated the potentials for introducing two alternative water-charging approaches: an hourly charge and output-based charge for use of irrigation water. Both approaches are prevalent in local water markets and well known to many water users. The results indicated a good potential for using any of the two approaches. The effectiveness of these instruments could be further enhanced if the hourly charges could be differentiated by the pump capacity and location, and when the share-based charges can be varied depending on crop-water demand. For semi-arid production systems investigated here, irrigation seems to be an attractive option until the water charges reach about Rs 25-30/hr ($0.55). Alternatively, the output share charges could be increased up to 20%. If these options are carefully introduced, they are likely to induce water-saving crops and technologies."
Ibid.

[41] "In its action plan on water security, the Planning Commission will likely recommend a cess on the use of groundwater. The quantum of cess will be state-specific and will depend on the volume of water used by farmers.
"Mihir Shah, Member, Planning Commission, told Indian Express that the proposed action plan would encompass creating a new legal and institutional framework with a clear focus on sustainability and equity. "It will reconcile the conflicts arising between different users and take a holistic view of the hydrological cycle," he said. The Plan panel's objective was to place greater emphasis on demand management rather than excessively being supply-centric."
Priyadarshi Siddhanta, Plan panel mulls cess on groundwater usage, New Delhi, posted on August 11, 2010, The Indian Express, online edition, August 31, 2010. Available at: http://www.indianexpress.com/news/plan-panel-mulls-cess-on-groundwater-usage/658816/0

[42] "In thinking about forging a sustainable groundwater governance regime, the emerging global consensus is for achieving the right balance between supply and demand side measures. Governments can meet groundwater depletion in a locale by investing in recharge and/or water imports. However, without effective demand-side measures, increased supply will quickly invite increased abstraction, leaving the resource depleted. In creating demand management regimes, four sets of ideas have been tried worldwide: direct regulation, economic instruments, tradable property rights, community resource management. These are reviewed briefly; but the interesting upshot of this discussion is that throughout the world, groundwater governance is still work in progress."
Tushaar Shah, India's Ground Water Irrigation Economy: The Challenge of Balancing Livelihoods and Environment, a technical paper included in the special session on ground water in the 5th Asian Regional Conference of INCID, held at Vigyan Bhavan, New Delhi on December 9-11, 2009, p. 12. Available at: http://cgwb.gov.in/documents/papers/incidpapers/Paper%203-%20Tushaar%20Shah.pdf

the detriment of groundwater. The conundrum offers a difficult choice for policymakers. Also, there is urban counterpart of the same which moots introduction of charge for commercial use of groundwater at the Assembly of Orissa.[43] Whether and how far the same may be pragmatic is a moot point as money is no constraint to big budget projects and substantial part of the corporate world is well aware of clandestine style to escape such regulatory framework to this end. Violation may be perpetrated in two ways: (i) there may be no manipulation in billing process (which seems unlikely) and the amount charged will be paid; (ii) there may be manipulation in billing process and the State will be deprived of due amount payable by errant user. Thus, while there is exhaustion of groundwater for which regulatory framework is introduced, the perpetrator may escape payment of due charge in second case. Introduction of upper ceiling for groundwater use may be introduced, success of which will depend on manipulation in calculation process. In India, *Vedanta* seems exception while *POSCO* constitutes the rule of (environmental) law.

In its National Water Policy (2002), the State underwent a paradigm shift and putdue emphasis on sustainable mode of water resources development.[44] After understanding ground reality of groundwater crisis, the Planning Commission also insists on participatory irrigation management rather than a bureaucratic one.[45]

[43]"Parliamentary Affairs and Industries Minister Raghunath Mohanty today told the Assembly that the State Government would formulate a policy on the use of groundwater for industrial purposes and industries using groundwater illegally will be taken to task.
Replying to the demand discussion of the Water Resources Department on behalf of Chief Minister Naveen Patnaik, Mohanty said that some of the industries are obtaining no objection certificate for the use of groundwater from the Centre even without intimating the State Government."
Express News Service, Groundwater policy for industries on cards, posted on July 22, 2010, Express Buzz, August 31, 2010. Available at: http://expressbuzz.com/states/orissa/groundwater-policy-for-industries-on-cards/191933.html

[44]"Water resources development and management will have to be planned for a hydrological unit such as drainage basin as a whole or for a sub-basin, multi-sectorally, taking into account surface and ground water for sustainable use incorporating quantity and quality aspects as well as environmental considerations. All individual developmental projects and proposals should be formulated and considered within the framework of such an overall plan keeping in view the existing agreements / awards for a basin or a sub-basin so that the best possible combination of options can be selected and sustained."
National Water Policy, Ministry of Water Resources, Government of India, New Delhi, released on April 1, 2002, paragraph 3.3, Available at: http://wrmin.nic.in/writereaddata/linkimages/nwp20025617515534.pdf

[45]"Rapidly depleting water tables have prompted the Planning Commission to work on an integrated regulatory mechanism to manage water resources. This would require setting up of regulatory bodies both at the state and Center" "Prime Minister Manmohan Singh had briefed the plan panel in May on the need to develop a comprehensive strategy to manage water resources. The issue was brought to focus in the recently held National

Besides opportunities, however, challenges lie in striking an optimum balance between intra-generational and intergenerational equity in the interest of universal water justice throughout India- not only for present generation, but also for the generations ahead.[46] Water governance, therefore, is meant to prevent checkmate in an endgame with nature.

In its National Water Policy (2002), the State also put extension of the frontiers of knowledge through research efforts as a priority area-[47] a welcome initiative which is in tandem with Article 48 of its Constitution- and thereby contain crisis in groundwater reserve. In a similar line of thought, depletion in groundwater seems hyperlinked to climate change through covert chain reaction of ecosystem. Thus, this may not be too irrelevant to explore plausible threats of climate change while addressing groundwater crisis. The

Development Council meet on the insistence of Singh.**……".** "The Planning Commission is of the view that a major problem affecting the irrigation systems in states is the severe erosion of the financial status of these systems, owing to very low water charges. Not only does it encourage inefficient water use and a tendency for canal users to shift to water intensive crops, it creates an environment in which irrigation charges do not cover even the operating costs, leading to more misuse." "The solution lies in Participatory Irrigation Management (PIM), which aims to involve stakeholders into the programmes for systemic water resource management.
"However, a legal framework needs to be put in place for PIM in order to streamline it as a systemic reform. PIM has been successful in Gujarat, where it was implemented by the Government of Gujarat and Development Support Centre, Ahmedabad since 1994."
Devika Banerji, PlanCom for Regulatory Mechanism to manage groundwater, New Delhi, posted on August 13, 2010, Business Standard, August 31, 2010. Available at: http://business-standard.com/india/news/plancom-for-regulatory-mechanism-to-manage-groundwater/404466/

[46] "In sum, then, groundwater offers us few but precious opportunities for alleviating the misery of the poor; but it poses many—and daunting—challenges of preserving the resource itself. A big part of the answer is massive initiatives to augment groundwater recharge in regions suffering depletion; but, in the ultimate analysis, these cannot work without appropriate demand-side interventions. The water vision of a world that future generations will inherit will have to be the one in which groundwater plays its full developmental, productive and environmental role but in a sustainable manner; and the framework of action to realize this vision will mean eschewing the current free-for-all in groundwater appropriation and use, and promoting a more responsible management of this precious resource that is easy to deplete or ruin—through depletion, salinization and pollution."
Tushaar Shah *et al*, The Global Groundwater Situation: Overview of Opportunities and Challanges, international Water Management Institute, Colombo, 2000, p. 15. Available at: http://www.irc-eh-field-guide.com/EH_PORTABLE_LIBRARY/EH%20KEY%20REFERENCES/WATER/Ground%20Water/Global%20Groundwater%20Situation%20(IWMI).pdf

[47] "For effective and economical management of our water resources, the frontiers of knowledge need to be pushed forward in several directions by intensifying research efforts in various areas, including … surface and ground water hydrology, water harvesting and ground water recharge, etc."
National Water Policy, Ministry of Water Resources, Government of India, New Delhi, released on April 1, 2002, paragraph 25, entry 3, read with entry 6. Available at: http://wrmin.nic.in/writereaddata/linkimages/nwp20025617515534.pdf

forthcoming part, therefore, concentrates on an interface between groundwater and climate change.

IV. GROUNDWATER DEPLETION OUT OF CLIMATE CHANGE

Seemingly prognostic in its approach, the interface but poses a real threat and no surreal one. No wonder that the State is engaged in studies to initiate a process of environmental impact assessment to this end.[48] Indeed the interface is established by earlier research works as well.[49] Here there is a reiteration of the same through country specific documents and materials to set the interface in Indian context. The hitherto established links between climate change and groundwater depletion are rainwater and soil moisture which have had underpinnings with both of them. Let's explore the same one after another.

Since groundwater is an exhaustible resource, abstraction of the same requires replenishment for continuity in sustainable development. Unlike fossil fuels, groundwater gets recharged through natural course of action without intervention though pace of natural recharge cannot compensate that of random abstraction for agrarian or industrial purpose. Thus, artificial recharge of groundwater is required to supplement natural course of refilling aquifers. By and large those are rain-fed and quantum of rainwater becomes crucial irrespective of the process of recharge. Thus, good monsoon seems a *sine qua non* for groundwater recharge and, by now, a close nexus between

[48] "Five studies are being undertaken under this category to assess the water resource availability in the future that include assessment of river run off at future time scales in the various river basins of India, an assessment of ground water potential, a review of the status of himalayan glaciers, and an assessment of the changes in water demand in the future with respect to current situation."
Anonymous literature, Climate Change and India: Towards Preparation of a Comprehensive Climate Change Assessment, Ministry of Environment and Forests, Government of India, New Delhi, dated October 7, 2009, p. 10. Available at: http://moef.nic.in/downloads/others/Final_Book.pdf

[49] "According to IAH (International Association of Hydrogeologists) Working Group on Groundwater and Climate Change that was approved by the IAH Council in Bled in September 2003, there are many potential direct and indirect interactions between climate change and groundwater.
Examples of direct effects
Changes in precipitation and evapotranspiration will influence recharge.
Rising sea levels may lead to increased saline intrusion of coastal and island aquifers.
Increased rainfall intensity may lead to more runoff and less recharge.
Examples of indirect effects
Changes in natural vegetation and crops will influence recharge
Increased flood events may affect groundwater quality in alluvial aquifers
Changes in soil organic carbon may affect the infiltration properties above aquifers."
Anonymous literature, Some Critical Issues on Groundwater in India, Centre for Water Policy, Delhi, June 2005. Available at: http://www.sandrp.in/groundwater/crisugrdwtr.pdf. For details, refer to Nigel Arnell *et al*, Climate Change 2001, Working Group II: Impacts, Adaptation and Vulnerability, Chapter 4, paragraph 4.3.5 (Groundwater Recharge and Resources). Available at: http://www.ipcc.ch/ipccreports/tar/wg2/pdf/wg2TARchap4.pdf

climate change and monsoon has become axiomatic truth. In India, while groundwater dependency syndrome is pervasive in agriculture,[50] climate change is indeed relevant to this context. And there lies relevance of a holistic worldview while divergent issues- climate-aquifer-consumption- together constitutes a causal relation in chain reaction behind the civil(ized) existence[51] and rainwater does bind them together.

So far as soil moisture is concerned, the same is hyperlinked to climate change no less than rainwater. Climate change and consequent warming at local level- if not global- affects productivity of landmass through erosion of soil moisture and such hypothesis is corroborated by positive result of Empirical research in Raipur, Chhattisgarh.[52] The study also proves hypothesis of derivative relation between climate change and groundwater depletion as Raipur belongs to 'double exposed' area within highest vulnerable region (in pink background) in Figure 2 on vulnerability to climate change and globalization provided below.[53] An assumption from such available database may reasonably be derived that there is causal relation between failure of post-*kharif* attempt to *teevra* cultivation and groundwater depletion to such an extent that soil at surface ground could not regain moisture from far away groundwater table posited at remote subsurface. Such hypothesis

[50] "Groundwater accounts for nearly 40% of the total available water resources in the country and meets nearly 55% of irrigation requirements, 85% of rural requirements and 50% of urban and industrial requirements. However, overexploitation of the resource has sharply lowered the water table in many parts of the country, making them increasingly vulnerable to adverse impacts of climate change. Key areas in this programme may include the following:
Mandating water harvesting and artificial recharge in relevant urban areas
Enhancing recharge of the sources and recharge zones of deeper groundwater aquifers
Mandatory water assessments and audits; ensuring proper industrial waste disposal
Regulation of power tariffs for irrigation"
National Action Plan on Climate Change, Prime Minister's Council on Climate Change, Government of India, released on June 30, 2008, paragraph 3.2.4. Available at: http://pmindia.nic.in/Pg01-52.pdf

[51] "What is more important for food inflation is what happens to food production. Expectations are that the *rabi* crop will be good. Then everything will hinge on the *kharif* (crop). If we have a normal rainfall this year, the whole feeling of scarcity that was created this year will die down. … The supply of many of these items would not be a problem assuming we have a normal monsoon. Frankly, if we have two bad monsoons in a row, all bets are off".
Montek Singh Ahluwalia, quoted by Anjuli Bhargava; in his interview as part of Cover Story "Inflation: It's Hurting", Business World, May 3, 2010, p. 38.

[52] "The impacts of climate change on cropping patterns can be observed in Raipur, where farmers have traditionally grown a pulse crop known as teevra on residual soil moisture after the kharif season. Higher temperatures in the region in the past few years have made teevra cultivation impossible, leaving many farmers dependent on a single paddy crop, and making them substitute home-grown teevra with market purchases."
Case studies conducted by the Energy and Resources Institute, New Delhi. Available at: http://www.teriin.org/coping/casestudies.htm

[53] Available at: http://www.teriin.org/coping/casestudies.htm

has found ground in Figure 3 (Plate I)[54] provided below which demonstrates moderate groundwater table in Raipur (marked in light green background) which is likely to support *teevra* cultivation unless the same is worsened and thereby moves downward (marked in yellow background) which may happen out of lesser rainfall and thereby linked to irregular monsoon. Some other tables (Plates II-IV) of the same literature demonstrate increasingly higher fluctuation rates of groundwater table which is likely to be an aftermath of climate change.[55]

All these together constitute insignia of and *sine qua non* for climate change.[56] Indeed, the National Water Policy (2002) preaches restraint to this end.[57] As part of National Action Plan on Climate Change of 2008, the National Water Mission is meant to attain water equity across the country; thereby secure water justice.[58] The same is acknowledged under the CGWB scheme on Ground Water Management and Regulation Scheme[59] along with its priority areas.[60] Besides, a

[54]Behavior of Water Levels in the State of Chhattisgarh during November 2008. Available at: http://cgwb.gov.in/NCCR/index.html

[55] *Ibid*.

[56]"Depleting groundwater resources, unexpected floods, cloudbursts and irregular monsoons are an indication that India is showing signs of climate change."
Sudha Nambudiri, UK to fund research on 'Changing Water Cycle', Kochi, 30 August 2010. Available at: http://expressbuzz.com/cities/kochi/uk-to-fund-research-on-changing-water-cycle/202284.html

[57]"Exploitation of ground water resources should be so regulated as not to exceed the recharging possibilities, as also to ensure social equity. The detrimental environmental consequences of overexploitation of ground water need to be effectively prevented by the Central and State Governments. Ground water recharge projects should be developed and implemented for improving both the quality and availability of ground water resource."
Supra, n. 45, paragraph 7.2.

[58]"There is urgent need for appropriate measures in areas where the water resources, particularly the groundwater resources are declining due to overuse. In about 15% of the assessment blocks, groundwater has been over-exploited and about 14% of the blocks are in critical or semi-critical state."
Revised draft of Comprehensive Mission Document, Vol. I, the National Water Mission under National Action Plan on Climate Change, Ministry of Water Resources, Government of India, New Delhi, released on April 2009, paragraph 3.3. Available at: http://mowr.gov.in/writereaddata/linkimages/MissionDocument8395131900.pdf

[59] "Central Ground Water Board (CGWB) in association with State Ground Water Departments has assessed that 1065 talukas/blocks/mandals fall under over exploited and critical categories. Ground water levels have been on the decline in urban/semi-urban areas and rural areas and the issues of ground water quality are natural corollary. There is an urgent need to take up artificial recharge to ground water in these areas for augmentation and sustainable management of ground water resources."
Revised Guidelines for Implementation of Artificial Recharge Projects under the Central Sector Scheme "Ground Water Management and Regulation", Central Ground Water Board, Ministry of Water Resources, Government of India, New Delhi, paragraph 1.Available at: http://cgwb.gov.in/GroundWater/AR/Modified%20Guidelines%20-%20Revised%202[1].09.2009.pdf

[60] "The scheme covers the entire country with priority attention to the following areas:-
Over-exploited / Critical

National Perspective Plan is introduced toward increased use of groundwater.[61] The plans of action abovementioned are cited to demonstrate that the State is well aware of catastrophic climate change and its impact on groundwater. Whether and how far these will be converted to action is a matter of conjecture. Indeed, this is a Herculean task and requires time which may not be allowed by climate countdown.[62]

V. TOWARD SUSTAINABILITY OF WATER RESOURCES

Indeed, groundwater recharge is a natural process. Nowadays, however, artificial recharge of groundwater is also in vogue[63] as its natural counterpart is no more enough to meet excessive and arbitrary abstraction of groundwater. Whether and how far the same is out of human greed is a point apart.

In its essence, the same is hyperlinked to rainwater.[64] As natural recharge needs no

Blocks/Mandals/Talukas;
Urban and semi-urban areas showing decline in ground water levels; and
Areas affected by problems of water quality."
Supra, n. 58, paragraph 3.1.

[61] "The National Perspective Plan would give additional benefits of 25 million hectares of irrigation from surface waters, 10 million hectares by increased use of ground water, totaling to 35million hectares and 34,000 MW of hydro-power generation."
National Perspective Plan, Press Information Bureau, Government of India, New Delhi, released on July 2, 2008. Available at: http://www.pib.nic.in/release/release.asp?relid=39996

[62] "Monsoons might have begun, but water level in Rajasthan's dams and reservoirs is far worse than in summers. Records show that as of July 18, water level was down from close to 12,500 million cubic metres (mcm) to 2,761.53 mcm, a bare 22 per cent of the capacity of the state's dams and reservoirs. Moreover, a recent survey on groundwater says 90 per cent of the 237 blocks are overexploited."
Apurva, Water level low, Rajasthan plans extreme measures, Jaipur, posted on July 21, 2010, Indian Express, online edition, August 31, 2010. Available at: http://www.indianexpress.com/news/water-level-low-rajasthan-plans-extreme-measures/649630/0

[63] "Replenishment of groundwater by artificial recharge of aquifers in the arid and semi-arid regions of India is essential as the intensity of normal rainfalls is grossly inadequate to produce any moisture surplus under normal infiltration conditions. Although artificial groundwater recharge methods have been extensively used in the developed nations for several decades, their use in developing nations, like India, has occurred only during the last ten to twenty years."
Anonymous literature, Sourcebook of Alternative Technologies for Freshwater Augmentation in Some Countries in Asia, Artificial Groundwater Recharge- India, Division of Technology, Industry and Economics, United Nations Environment Programme (UNEP). Available at: http://www.unep.or.jp/ietc/publications/techpublications/TechPub-8e/recharge.asp

[64] "Ground water recharge may be explained as the process whereby the amount of water present in or flowing through the interstices of the sub-soil increases by natural or artificial means. The amount of water that may be extracted from an aquifer without causing depletion is primarily dependent upon the ground water recharge. Rainfall is the principal source for replenishment of moisture in the soil water system and recharge of ground water. Other sources include recharge from rivers, streams, irrigation water etc. Moisture movement in the unsaturated zone is controlled by suction

intervention, now onwards recharge will refer to artificial recharge *per se*.[65] Recharge involves delicate process of engineering with crucial natural resources. Thus, the same ought not to be accomplished at random; rather there must be an appropriate authority to take care of the same.[66] In particular, such authority is required to prevent and, in case of failure, cure contamination of groundwater. A better way out to get rid of contamination is encouraging rainwater harvesting through which people may have access to non-exhaustible water resources.[67] But, at the same time, the

pressure, moisture content and hydraulic conductivity relationships. The amount of moisture that will eventually reach the water table is defined as natural ground water recharge, which depends on the rate and duration of rainfall, the subsequent conditions at the upper boundary, the antecedent soil moisture conditions, the water table depth and the soil type."
Amitha Kommadath, Estimation of Natural Ground Water Recharge, Section- 7, Paper-5, Lake 2000, Centre for Ecological Sciences, Indian Institute of Science, Bangalore. Available at: http://ces.iisc.ernet.in/energy/water/proceed/section7/paper5/section7paper5.htm#address

[65] "Groundwater is ideal means of storage of surface water which can obviate space-time unevenness with efficient artificial recharge methods and highly improved pumping techniques. Recharging wells are increasingly being used for liquid waste disposals, for recycling and its subsequent reuse. This is a boon with prospect of water scarcity confronting us increasingly. In short, groundwater storage augmented by artificial recharge and served with efficient PUMPS is a Solution to water conservation and water recycling which will be in increasing demand in water deficient twenty-first century."
Jagdish Chandra, Focus on Groundwater Recharge, Desert Environment News, online ed., vol. 4, no. 4, 2000, Central Arid Zone Research Institute, Jodhpur. Available at: http://sdnp.nic.in/thematicareas/desert/subresources/focusongroundwater.html

[66] "Artificial recharge of ground water should be licensed and controlled by competent authorities according to specific requirements laid down in an appropriate permit system that should be flexible to adapt to site-specific conditions. The question of ground-water exploitation should be clarified on a case-by-case basis, taking into account all relevant aspects, including ecological ones. The relevant regulations should establish the extent to which exemptions are allowed". "Authorisation for artificially recharging aquifer should be granted only if hydro-geological situation, environmental condition and recharge-water quality permit injection, percolation or infiltration of water by artificial means into aquifers for storage and retrieval."
Amartya Kumar Bhattacharya, Artificial Ground Water Recharge with special reference to India, International Journal of Research and Reviews in Applied Sciences, vol. 4, no. 2, August 2010, p. 221. Available at: http://arpapress.com/Volumes/Vol4Issue2/IJRRAS_4_2_12.pdf

[67] "We all know that water is indispensable to life. Yet, water sources, including groundwater, are often contaminated by pollutants such as sewage, industrial waste and agricultural runoff. Five million people die from the consequences of lack of water, malnutrition and inadequate water affiliated hygiene every year and this crisis will only intensify with the growth in population and pressure on resources. Environmental pollution and climate change is causing decreasing amounts of rainfall with the result that the reservoirs of drinking water are no longer able to fill up sufficiently. This alarming scenario has caused the government to take steps towards the effective management of water resources in the country, laying special emphasis on rain water harvesting and its benefits."
Rai Umraopati Ray, Water: will it run out? Posted on July 29, 2010, The Asian Age, online edition, August 31, 2010. Available at: http://www.asianage.com/life-and-style/water-will-it-run-out-881

same cannot be a substitute of groundwater recharge. Rather, both oughts to be complementary and supplementary to walk hand-in-hand, yet parallel processes to gain (rain)water through altogether divergent modalities.[68] While groundwater recharge requires technical expertise and may only be done by means of technocracy, rainwater harvesting requires environmental renaissance and cannot be done sans democracy.[69] Thus the former proceeds through scientific intervention and the latter proceeds through public participation. Together both will help transcend potential water crisis.

Besides there are technical constraints to tackle water crisis through recharge as geophysical peculiarity of a particular place may not accommodate such effort.[70]

[68] "The shortage of ground water is more pronounced due to urbanization and limited open areas available for recharge of ground water. In some cities ground water extraction has reached high levels and has brought problems like declining water table, failures of wells/ tube wells and deterioration in ground water quality and quantity. Water is more than often been seen as a cause for social conflicts, protests, demonstrations and road-blockades. In the given situation rainwater harvesting could prove to be a solution for overcoming this scenario."
Anonymous literature, Measures for Ensuring Sustainability of Rainwater Harvesting, Policy Paper 2, prepared by Water for Asian Cities Program- India and Directorate of Urban Administration and Development, Government of Madhya Pradesh, p. 6. Available at: http://www.unhabitat.org/downloads/docs/4179_35990_Policy%20Paper-2.pdf

[69] "The technical issues that these various methods (of groundwater recharge) must consider include recovery efficiency, cost-effectiveness, contamination risks due to injection of poor-quality recharge water, and clogging of aquifers. Numerous artificial recharge experiments have been carried out in India and have established the technical feasibility of various approaches and combinations of approaches in unconfined, semi-confined and confined aquifer systems as well as the economic viability". "What is less understood and appreciated is the potential impacts of numerous local recharge efforts on basin-scale water availability and distribution. The popularity of groundwater recharge is a function of its local success. This, and the critical role of local involvement, highlights the advantages of community approaches to groundwater management. However, … 'successful' local efforts at recharge can cause problems further downstream. The possible impacts of local action on regional outcomes highlights the key challenge of community-based groundwater governance … the potential conflict as one moves from local to basin scales."
Ramaswamy Sakthivadivel, The Groundwater Recharge Movement in India, International Water Management institute, Comprehensive Assessment/CABI series 10, p. 209. Available at: http://www.iwmi.cgiar.org/publications/CABI_Publications/CA_CABI_Series/Ground_Water/protected/Giordano_1845931726-Chapter10.pdf

[70] "The foregoing analysis does not suggest that water harvesting and groundwater recharge systems do not generate benefits. The analysis presented in this paper on the effectiveness and impacts of WHS are for those structures and systems which have been built during the past two to two and a half decades. India had a long history of building water harvesting systems, and it goes without saying that they benefited the local people by providing protective irrigation to their crops and domestic water supplies in the socio-economic and cultural milieu of those times."
"So far as the constraints in artificial recharge go, though not all hard rock areas suffer from poor infiltration capacity of soils and lack of storage potential in the aquifers, the regions in India which generate considerable amount of run-off mostly have

The State, therefore, ought to be wise in recharge matter and proceed on its own. In case of water harvesting, however, all what the State must do is introduction of the process and thereby motivate its people to carry forward the same. Even the same also may be done by the civil society on its own. So far as rainwater harvesting is concerned, civil society and not the State is ahead its march past.[71]

Through introduction of innovative *sui generis* techniques, perhaps indigenous, two nongovernmental organizations produce wonder crops in the semi-arid land of the Alwar district in Rajasthan.[72]

In a way, groundwater contains high potential as the same needs no maintenance. Once recharged, groundwater will be taken care of by

crystalline rock and basalt. The specific yield of crystalline rocks and basalt is in the range of 0.01 and 0.03. There is very little area under hard rocks in India which have good rainfall conditions, and which have favourable geo-hydrology for artificial recharge."
M. Dinesh Kumar *et al*, *Chasing a Mirage: Water Harvesting and Artificial Recharge in Naturally Water-scarce Regions*, Special Article, Economic and Political Weekly, August 30, 2008, p. 70. Available at: http://www.indiawaterportal.org/sites/indiawaterportal.org/files/Chasing%20a%20Mirage_Water%20Harvesting%20and%20Artificial%20Recharge%20in%20Naturally%20Water-Scarce%20Regions_EPW_2008.pdf

[71] "I am neither a scientist, nor a professional water engineer nor a climate change expert. I am a small constructive worker of Gandhi and I mobilize the civil society and the community for action on natural resources management and conservation for rural uplift in India. Here I am recording the impact of the above work on the ecology of 6,500 square km area in Alwar district from 1985-2007. Since 1985, 8,600 small water harvesting talabs in 1,068 villages of Alwar district covering 6,500 square km area have been built. This has resulted in the shallow aquifer recharge in ground water bringing up the water table from about 100-120 meters depth to 3-13 meters at present. The area under single cropping increased from 11 per cent to 70 per cent out of which area under double cropping increased from 3 per cent to 50 per cent bringing prosperity to the farmers. The forest cover, which used to be around 7 per cent increased to 40 per cent through agro-forestry and social forestry, providing sufficient fuel wood and sequestering carbon from atmosphere."
Rajendra Singh, Community Driven Approach for Artificial Recharge- TBS Experience, a technical paper included in the special session on ground water in the 5th Asian Regional Conference of INCID, held at Vigyan Bhavan, New Delhi, on December 9-11, 2009, paragraph 5.A.iv. Available at: http://cgwb.gov.in/documents/papers/incidpapers/Paper%205%20-%20Rajendra%20Singh.pdf

[72] "A Johad (that Tarun Bharat Sangh works with) basically is no different from the Pals that PRADAN works with. Its purpose is to check rainwater in gullies and riverbeds, impound the water so checked for 50-60 days while the land in the submergence area 'drinks water, quenches its thirst and fills up its stomach like camels do' (as the local farmers would say). Spill-ways called uparahs are provided to allow excess water to overflow. After the water dries up, crops are grown in the 'peta' lands; and wells get recharged so that additional irrigation becomes possible. Pals are designed similarly. However, Johads are invariably designed as semi-circular structures; whereas Pals are normally straight bunds. Essentially, there is no difference. Both are low-cost, but priceless devices for capturing, storing and optimally using limited rainfall in an undulating topography."
Frank Van Steenbergen, Local Groundwater Regulation, Water Praxis Document Nr. 14, Arcadis Euroconsult, The Netherlands, paragraph 2.2 (Rajasthan, India), p. 8. Available at: http://www.groundwatermanagement.org/documents/14locgrounwregulationpraxis.pdf

nature unless and until there is human hazards, e.g., leakage, sewage and the like. Interestingly enough, recharge and harvesting have had linkages. After harvesting, rainwater may also be used to recharge groundwater.[73] Thus, subject to community cooperation, water harvesting contains higher potential. As holder of public trust the State is aware of imperative for public participation, at least nowadays, and thereby follows NGOs to encourage its community to join hands.[74] Also there is public fund to this end so that the same may not be discouraged due to dearth of financial resources.[75] A detailed plan for recharge is on its way,[76] along with a

[73] "Apart from rooftop rainwater harvesting for providing drinking water to individual households, the collection and storage of surface flood runoffs during high rainfall can also be utilized as a supplement to the existing water supply schemes providing drinking water security during drought. Rooftop rainwater can also recharge groundwater reservoirs through abandoned dugwells, defunct handpumps, recharge pits, recharge trenches, recharge shafts etc. Sustained advocacy and capacity development of the PRIs, NGOs and the community organizations in promoting adoption of rainwater harvesting is very critical."
Drinking Water Security through Rainwater Harvesting and Ground Water Recharge, feature on drinking water, Press Information Bureau, Government of India, January 20, 2010 p. 1. Available at: http://pib.nic.in/archieve/others/2010/jan/f2010012002.pdf

[74] "Governments and NGOs have increasingly come to realize that the protection of whole watersheds or catchments cannot be achieved without the willing participation of local people. Indeed, for sustainable solutions to emerge, farmers need to be sufficiently motivated to want to use resource-conserving practices on their own farms. This in turn needs investment in participatory processes to bring people together to deliberate common problems and form new groups or associations capable of developing practices of common benefit." "This had led to an expansion in programmes focused on micro-catchments- not whole river basins but areas of probably no more than several hundred ha, in which people know and trust each other. The resulting uptake has been extraordinary, with most programmes reporting substantial yield improvements, often in the order of two- to threefold. At the same time, most also report the substantial public benefits, including groundwater recharge, reappearance of springs, increased tree cover and microclimate change, increased common-land revegetation, and benefits for local economies. It is estimated that some 50,000 watershed and sustainable agriculture groups have been formed in the past decade in Australia, Brazil, Burkina Faso, Guatemala, Honduras, India, Kenya, Niger and the USA."
Jules Pretty, Investments in Collective Capacity and Social capital, in Deborah Bossio and Kim Geheb (ed.), Conserving Land, Protecting Water, Comprehensive Assessment of Water Management in Agriculture Series, vol. 6, chapter 12, p. 181. Available at: http://www.iwmi.cgiar.org/Publications/CABI_Publications/CA_CABI_Series/Conserving_Land_Protecting_Water/protected/9781845933876.pdf

[75] "The Department (of Drinking Water Supply) launched a Sub-Mission on "Scientific source finding, conservation of water and recharge of aquifers" , which gave major emphasis on Rain Water Harvesting and a special fund was provided to all States with funding pattern of 75:25 between Government of India and State Government." *Supra*, n. 51, p. 3.

[76] "The Centre will appoint experts on hydro geology to provide necessary acquifer recharge expertise and technical training to its existing engineers to enable them to execute the projects."
Amiti Sen, Plan for groundwater recharge soon, e-paper, the Times of India, New Delhi.

stocktaking of the same.[77] Even harvesting has its limits and excessive recourse to benefits may be inimical to augmentation and defeat the purpose.[78] Attainment of hydrological balance, and not utilization alone, is a need of the hour.

In particular perspective of climate change, while consequent evils loom large to complete detriment of humanity, sustainable development is hidden in the womb of efficient management of hydrological balance all over the world as the same transcends territorial limits of states.[79] Black letter law and its coercive execution cannot serve the purpose unless and until the State earns confidence of its public and thereby motivates them to this end. Unlike legal instruments, management of water resources is a subject matter of policymaking to be accomplished by people while the State must assume charge of coordination.

In public interest, therefore, the State ought to mobilize all local governance institutions and stakeholders of civil society movement to attain greater public participation toward water efficiency on one side, and water economy on the other. Without widespread support of its public, water governance will remain a distant dream, if not mirage, while increasing trend of desertification is on its way to swallow arid areas of concern and deterioration of fertile areas to semi-aridity. Lethargic effort may be too late to lament to this end.

Available at: http://epaper.timesofindia.com/Default/Scripting/ArticleWin.asp?From=Archive&Source=Page&Skin=ETNEW&BaseHref=ETD/2010/08/02&ViewMode=HTML&GZ=T&PageLabel=12&EntityId=Ar01202&AppName=1

[77] *Vide* Yagnesh Mehta, SNVIT measures groundwater recharge, TNN, e-paper, the Times of India. Available at: http://epaper.timesofindia.com/Default/Scripting/ArticleWin.asp?From=Archive&Source=Page&Skin=TOINEW&BaseHref=TOIA/2010/08/10&PageLabel=7&EntityId=Ar00702&ViewMode=GIF&GZ=T

[78] "The economic evaluation of water harvesting systems poses several complexities due to the problems in quantifying their hydrological impacts, and their various benefits. The economics of water harvesting cannot be worked out for structures on the basis of individual benefits, but on the basis of incremental benefits. In many water-scarce basins, there is a strong trade-off between maximizing the hydrological benefits from RWH and making them cost-effective. In many water-scarce basins, RWH interventions lead to the distribution of hydrological benefits rather than to their augmentation. … There is an optimum level of water harvesting that a basin can undergo to optimize the gross value product of water vis-à-vis economic, social and environmental outputs basin-wide."
M. Dinesh Kumar *et al*, Rainwater Harvesting in the Water-scarce Regions of India, Potential and Pitfalls, International Water Management Institute, Sri Lanka, p. 311.Available at: http://www.iwmi.cgiar.org/Publications/Other/PDF/NRLP%20Proceeding-2%20Paper%2013.pdf

[79] "…according to Jamie Pittock,…The situation will only be exacerbated as climate change is predicted to bring lower rainfall, increased evaporation and changed patterns of snow melting".
Burnstable Patriot, Water shortage may be next cause of world war, posted on February 23, 2007. Available at: http://www.waterconserve.org/shared/reader/welcome.aspx?linkid=69817

VI. CONCLUSION

To sum up this effort, this may not be out of context to assert imperative of good governance in water, to be more specific, in rainwater management in paramount public interest of humanity. At the threshold of global climate change, mitigation of which is beyond reach of any country in isolation and there is no consensus vis-à-vis global plan of action, the State is left with no option but to be prepared with its climate conscious policy lest the same may grapple with measures to take care and caution of the catastrophic aftermath in general and of irregular monsoon (as most common consequence of climate change) in particular. As India suffers from water crisis since long back, its people are likely to suffer worse as and when such aftermath will be intensified in the decades ahead. Groundwater recharge is required to be done by the State, but the same is no plausible option everywhere due to geophysical peculiarity of regions concerned. Rainwater harvesting is free from such constraint and ought to be done throughout the country and especially where recharge may not work for water management.

Rainwater harvesting is no full-proof prescription as the same itself may be a stumbling block toward augmentation of other water resources which will pose potential threat and thus open floodgate of water crisis. After all, all other water resources including groundwater are nourished by rainwater in a way or other and excessive harvesting of the same will leave them in peril. Let's turn to flip side of the coin. Nowadays, due to climate change, irregular monsoon becomes order of the day and the same so often than not reduces fall of rainfall so much so that rainwater itself is no longer plentiful as a regular and reliable source of water. If there is no raining, there is no water, and thus no question of harvesting the same. And there lies a potential challenge for the State Policy.

The State, therefore, is required to be prepared for lack of rainwater as well. As part of climate-wise policy matter, the State ought to identify and distinguish its territorial spread in terms of vulnerability. Thus, cultivation of lesser-water crops should be encouraged through official notification and circulated by Panchayti Raj institutions in arid and semi-arid areas along with allocation of state-sponsorship (at least partial) for those who abide by the same. Besides, there may be deterrent penal provision for recourse to groundwater for cultivation of water-thirsty crops. On the contrary, areas vulnerable due to plenty of water may be encouraged for thirsty cultivation accordingly, along with maximum rainwater harvesting there for utilization of the same during winter. In urban areas, more or less optimum harvesting should be encouraged as per requirement to attain hydrological balance at basin level, if the same is adjacent to river; and at catchment level, if it is not. In a nutshell, water

policymaking requires blend of law, science and technology. Scarcity lies in resource management; much more than resource itself.

Figure 1. Groundwater (vulnerability) map of India

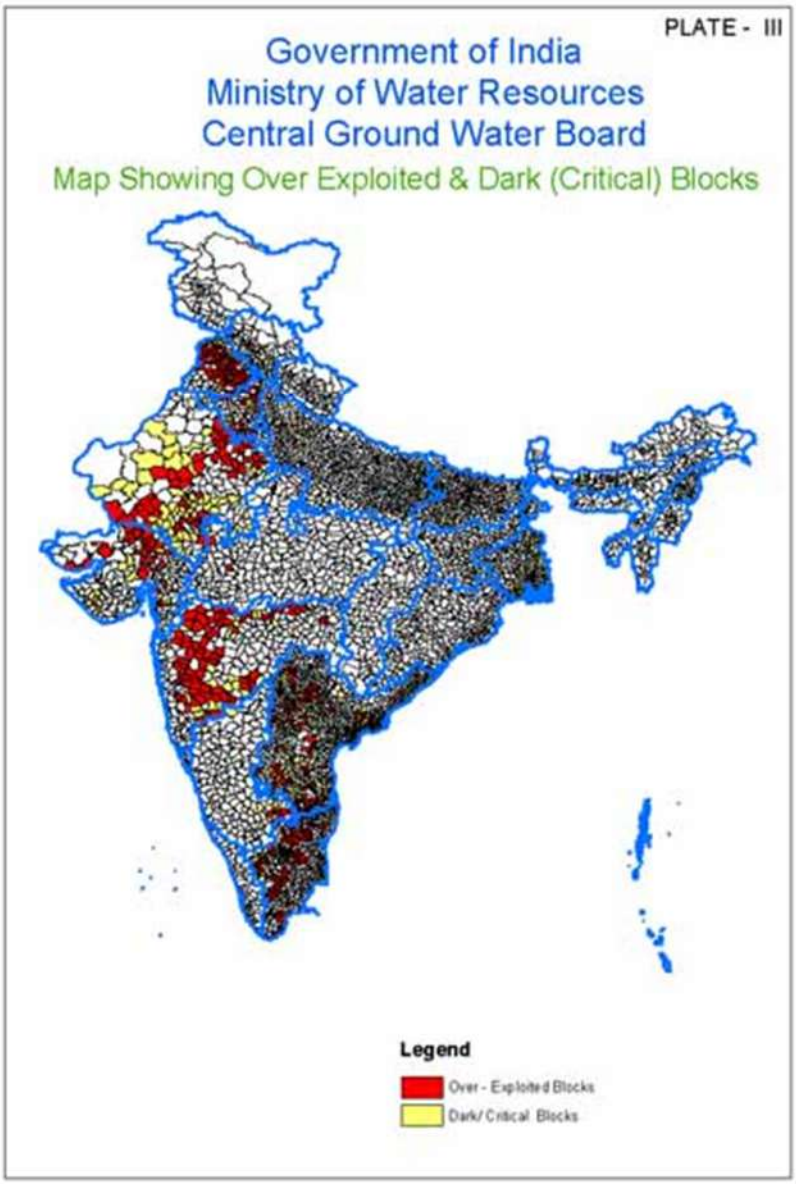

Figure 2. Vulnerability to climate change and globalization

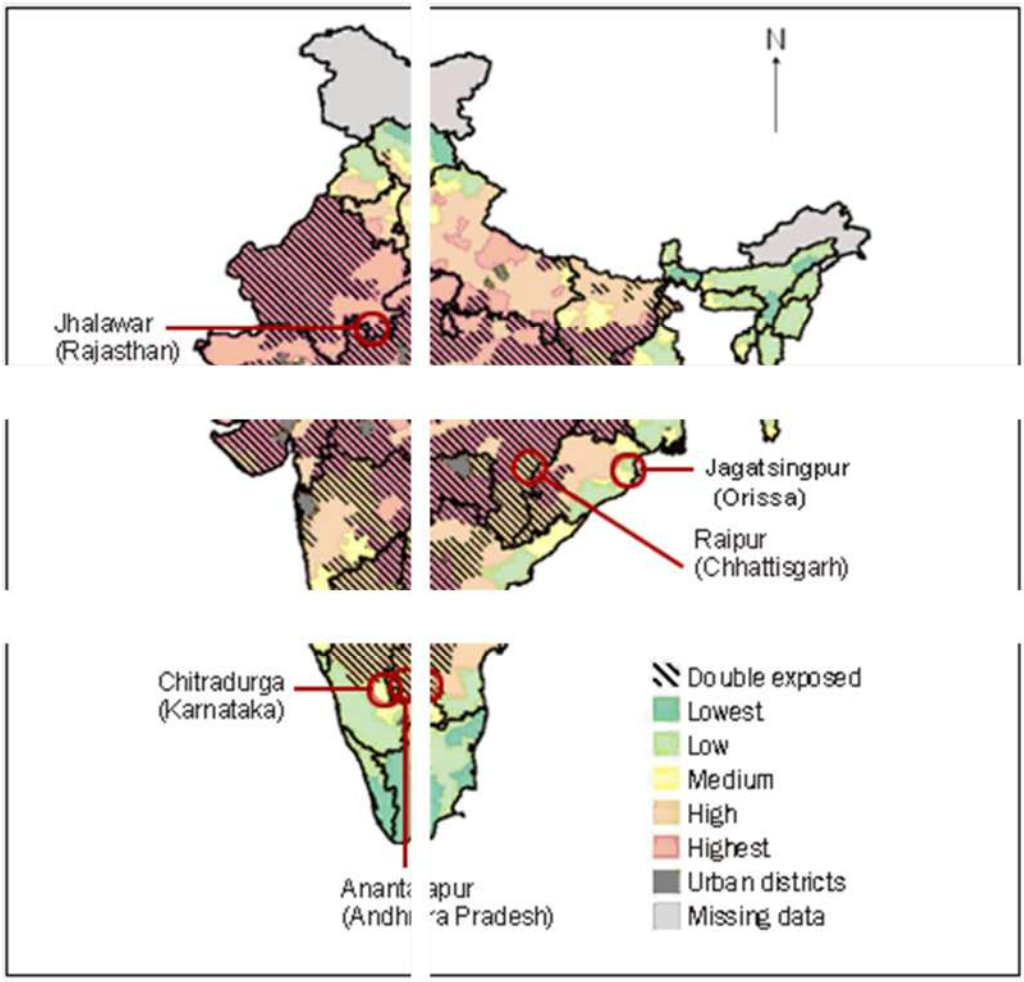

Figure 3. (Ground)water level of Chhattisgarh

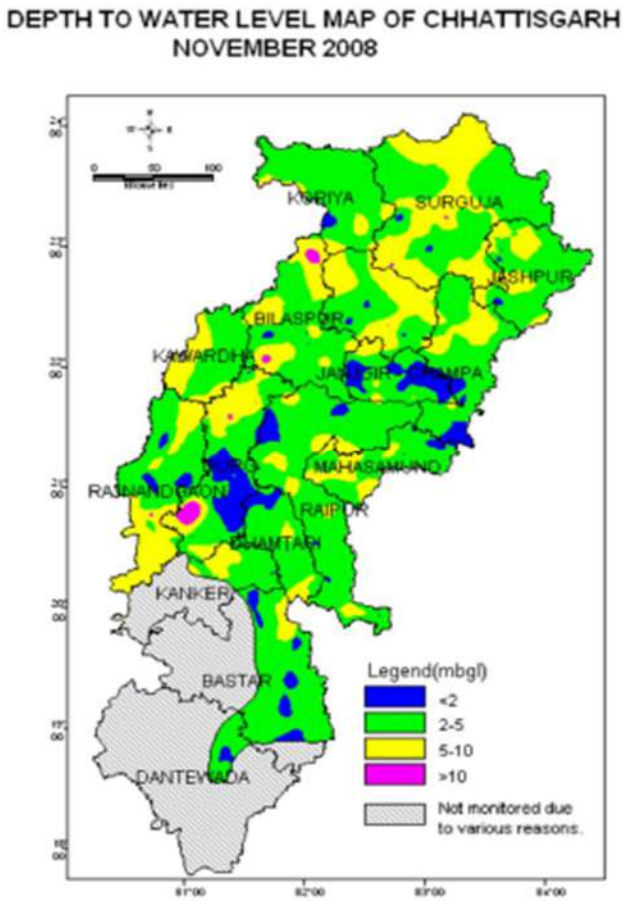

Table 1. Comparative water storage statistics

(in cubic metre)

Water storage created per person	
Country	
United States	5961
Australia	4717
Brazil	3388
China	2486
India	200

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EXPANDING HORIZONS OF THE INSOLVENCY AND BANKRUPTCY LAW IN INDIA – "SWISS RIBBON'S" AS CATALYST OF CHANGE

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ABSTRACT

An efficient insolvency and bankruptcy law is vital to stability in financial systems and fundamental to the economic growth. The existing legal framework was inadequate, ineffective and undue delays to enforce the debts led to creditor's leading to declare the debts as non-performing assets. A robust legal environment was introduced to overcome such situation by enacting the Insolvency and Bankruptcy Code, 2016 (the Code). Most importantly the Code provides a "second chance" or 'rescue' to the corporate debtor and protects its interest. The objective of the Code is to provide a "time bound resolution process" and to keep the corporate person afloat. In the result, not only the creditors will benefit with the maximization of the value of the corporate debtors' assets and will realise the debts. The primary focus is to ensure "revival and continuation" and the liquidation of the corporate debtor shall be the last resort. The resolution process is not adversarial to the corporate debtor but, protective of its interests and as a beneficial legislation, strives to bring back the corporate debtor on its feet. The Swiss Ribbon case set the platform for legislative intent by upholding the Constitutional validity of the provisions of the Code. The author in this paper identifies the narrative analysis of the court's reasoning. The Code aims to discourage individual actions for enforcement and settlement to the exclusion of the general benefit of all creditors and is a "one stop" law offering equitable treatment of the creditors and other stakeholders. The Code obligates, the resolution professional to protect and preserve the assets of the corporate debtor and work towards maximization of value of the assets. The Code being an economic legislation, the role of the court is to regulate envisioning the policy and is minimal and intends to take a 'hands-off' position and exercises judicial restraint. The author establishes that the decision has brought a positive change in the behaviour of the corporate debtor including scaling the interest of the creditors.

Keywords: *Insolvency, Resolution, Committee of Creditors, Debtors*

INTRODUCTION

The business establishments are incorporated with an objective of profit making. Businesses succeed, depending on the economic, social, legal environment in the country. On the contrary, business do fail for various reasons like, mismanagement, malfeasance, economic slump, extensive competition in the market, etc. In such scenario, the investors are the most affected, as they lose their investment. Continuation of business by an enterprise in such situation may lead to deterioration and destruction of value of the assets and all stakeholders have to suffer. Stressed businesses can be compared to a 'heart attack' patient, wherein 'time an essence'. The situation has to be handled like a trauma patient. Every stakeholder knows that the situation is bad, but no one recognizes, what is to be done?

An efficient insolvency law is vital to stability in financial systems and fundamental to economic growth. The existing legal environment involved the longest times and highest costs by world standards to resolve the issues. There was no coherent and consistent set of law for recovery. This uncertainty led to poor outcome of insolvency and bankruptcy law in India. The World Bank report provides the reflection as to how India had negative result on the resolution of insolvency process[1]. The average time for resolving the insolvency stood at 4.3 years on an average and the recovery rate was only 27% of the total dues. Whereas, Japan, Malaysia, Singapore and the United States took an average of one year or less with the recovery rate crossing 80%[2]. A robust legal environment was required to overcome such situation. India enacted, the Insolvency and Bankruptcy Code, 2016 (the Code) to overcome difficulties of the creditors to recover the dues and to protect the interest of the corporate debtor.

In the *Innoventive Industries* case, the Supreme Court held that the objective of the Code is to bring the insolvency law under a single unified umbrella by speeding up of the insolvency process.[3] Therefore, the essence of corporate insolvency resolution process (CIRP) is "speed', meaning thereby that a time bound resolution process is the objective to keep the corporate person afloat. In the result, the creditors will have maximum realization. The longer the time taken to recovery of the business will lead to depreciation of the value of the assets and liquidation would be the only option. The Code envisages that liquidation shall be the last resort, i.e., when no resolution plan is forthcoming or the plan submitted cannot be worked out or fails. Even in liquidation, the assets and business of the

[1]The World Bank of 2016, 'Ease of Doing Business' (2015), India ranked at 135 out of 190 countries on the ease of resolving insolvency based on various indicia. In 2017, India rank stood at 77 for the first time a positive move.

[2] Ibid.

[3] *Innoventive Industries Limited v ICICI Bank and another*, 2017 Indlaw SC 661

corporate debtor can be sold as a going concern[4]. Hence, the primary focus of the legislation is to ensure revival and continuation of the corporate debtor. The resolution process is not adversarial to the corporate debtor but, protective of its interests and a beneficial legislation, bringing back on its feet and not a mere recovery legislation[5]. The idea of 'moratorium' is to *"facilitate the continued operation of the business of the corporate debtor to allow it breathing space to organise its affairs so that a new management may ultimately take over and bring the corporate debtor out of financial sickness, thus benefitting all stakeholders"*[6]. The Code is a pragmatic modification in moving away from the concept of "inability to pay debts" to "determination of default"[7].

In this paper, the author analyses the fresh path India has taken with respect to the insolvency and bankruptcy situation till the Swiss Ribbon case. Part I deals with the legislative history, examining briefly the erstwhile legislation providing the remedies for the recovery of debts. Part II deals with the Scheme of the Code. Part III discusses the *Swiss Ribbon Private Limited and another v Union of India and others*[8] (Swiss Ribbons) where the Constitutional validity of certain provisions of the Code were challenged. This part is divided into three parts. Part 'A' deals with the financial and operational creditor. Part 'B' deals with the disqualification of resolution applicant. Part 'C' deals with other provisions including "withdrawal of the application under the Code". The author attempts to identify the narrative analysis of the court's reasoning. Part IV evaluates the potential impact on behavioural changes of the debtors, way forward and concludes that the Code has provided a positive legal framework for India and harmonised the ease of doing business.

PART I - THE LEGISLATIVE HISTORY

The creditors right to recover the loan against the debtor is recognised by the agreement. The rights, duties and remedies for creditors and the debtors were provided under different statutes. The problem prevailed as different statutes created different judicial forum to approach, at diverse levels including the jurisdictional issues. In India, the governing laws were the Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920. The principles laid down by these statutes were considered while interpreting the Companies Act. The adjudication of cases was taken up by the officers having no business or financial expertise. The

[4] *Arcelormittal India Private Limited v Satish Kumar Gupta and others,* 2018 Indlaw SC 919

[5] Even section 14, providing for moratorium is in the interest of the corporate debtor, preserving the assets.

[6] *P. Mohanraj and others v Shah Brothers Ispat Private Limited,* 2021 Indlaw SC 79 (Court was dealing with section 138 of the Negotiable Instruments Act, 1881 and interface with the Code)

[7] This shift was the reason to repeal Section 433(e), Companies Act, 1956

[8] *2019 Indlaw SC 77*

recovery process was delayed, and led to the vulnerability of rights of creditors, stakeholders and the economy as a whole. The consistency and efficiency of recovery was very low[9].

The Companies Act, 2013 (the Act), provided that the creditor was entitled to file a petition for winding up, if the company is unable to pay the debts[10]. Once the default is proved, the National Company Law Tribunal (NCLT),[11] will order winding up of the company. A liquidator is appointed and liquidation of the company follows[12]. The liquidator shall collate the assets, meet the liabilities, pay the debts and distribute remaining assets, as per the priority including the secured creditors and unsecured creditors detailed in the Act. If the distressed company was able to find a savior, a chance to stay afloat existed. Then company would prepare a scheme by reclassification of the rights and liabilities with the creditors and take approval of NCLT whereby, achieving the objective of a going concern[13].

India had attempted to provide legislation for recovery. Firstly, the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA)[14], through the Board for Industrial Finance and Reconstruction, made provision for revival and rehabilitation of sick industries. This statute existed with its own problems[15]. Secondly, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 provided for creditors right to recover, the debts before the Debt Recovery Tribunal (DRT)[16]. The civil court jurisdiction was barred. Thirdly, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) provided the financial creditors to recover by selling the assets without recourse to any courts[17]. Fourthly, the Reserve Bank of India (RBI) circulars and notifications through different schemes, like Joint Lenders Forum (Corrective Action Plan (CAP) (2014)), Strategic Debt Restructuring (SDR) and the Scheme for Sustainable Structuring of Stressed Assets (S4A) (2016) provided some relief to the banks and financial institutions to overcome the problem of non-performing asset (NPA)[18].

[9] RBI report provided the trends of NPA in public sector banks for the year 2011-2012 was Rs 746 billion but the closing balance for 2011-2012 was Rs. 1172 billion only.

[10] Section 433(a), The Companies Act, 1956 and Section 271, Companies Act, 2013 - both repealed after the Code came into force.

[11] The High Court had the jurisdiction under the Companies Act, 1956

[12] Sections 270 to 303 of the Act

[13] See Section 230 to 240 of the Act; Sections 390 to 396A, Companies Act, 1956

[14] *Madras Petrochem Ltd. and Anr. v BIFR and Ors., (2016) 4 SCC 1,* referred to the observation of the Eradi Committee Report relating to insolvency and winding up of companies

[15] Repealed after the Code has come into force

[16] Recovery constituted only 28%

[17] Recovery constituted 70% of the total amount recovered

[18] Schemes have been withdrawn after the Code came into force.

PART II - INSOLVENCY AND BANKRUPTCY: PRELUDE -THE BEGINNING

In the last two decades, the race for the Insolvency and bankruptcy reform has triggered across the countries and are taking strides to re-enact the law. The Insolvency Act of 2000 read with the Enterprise Act of 2002 in the United Kingdom (UK), the Bankruptcy Code, 1978 and the Bankruptcy Act,1994 in the United States and the bankruptcy reform of 2013 in Singapore are few illustrations.

In India, the existing framework for insolvency and bankruptcy was inadequate, ineffective and resulted in undue delays. The gravity of the problem had reached the stage of collapse of the credit market, which would have costed the economy. The Code envisages the possibility of bringing a financially stressed company back to life as a viable entity.

India has now adopted the path-breaking structural reforms having far-reaching affect to discipline the corporate debtor and facilitate efficient corporate governance by *"Establishing a pathway to bankruptcy that provides transparency, competition and rigor to the process makes doing business in India more binding"*[19]. The Code provides respite to the corporate debtor by giving a "second chance" or 'rescue' and an opportunity to revive in simplified method. The Code creates a "one stop" law for insolvency and bankruptcy process in a time-bound manner[20]. This can be identified by the argument of the Solicitor General of India citing the following fundamental policy changes by enactment of the Code:

a) *Predictability and certainty*

b) *Admission into the CIRP is not prejudicial and in fact, protection of the interest of the debtor is paramount.*

c) *In financial stress, "protecting the economic interest" of the corporate debtor is more relevant than the "cause of default";*

d) *Trigger liquidation only upon failure of the resolution process*[21].

This is in stark contrast with the aim of the Companies Act, 2013 (even Companies Act, 1956), wherein, the creditor could directly file a winding up petition leading to liquidation, rather than the 'revival'. Whereas, the Code strikes a balance between reorganization of corporate debtor and liquidation. The Code seeks for an equitable treatment of the creditors by maximization of value of the assets. The insolvency professional is appointed and they shall endeavour to

[19] Injeti Srinivas, Secretary, MCA, Govt. of India.

[20] The Code brings in amendments to the Indian Partnership Act, 1932, the Central Exercise Act, 1944, the Customs Act, 1962, the Income Tax Act, 1961, the Recovery of Debts Due to Banks and Financial Institutions Act, 1933, the Finance Act, 1994, the SARFAESI Act, 2002, the Sick Industrial Companies (Special Provisions) Repeal Act, 2003, the Payment and Settlement Systems Act, 2007, the Limited Liability Partnership Act, 2008, and the Companies Act, 2013

[21] Para 37 in *Swiss Ribbon Case*

protect and preserve the value of the property of the corporate debtor[22]. Further, the Act provided that the control of the company during winding up shall remain with the "same or existing management". The Code envisages a paradigm shift from "debtor in possession" to the "creditor in possession", which excludes the erstwhile management in the insolvency process. This is because, the persons in control of the company had pushed the corporate debtor into insolvency and any attempt to revive may turn out to be futile. Wherein, the creditors assuming control seeks to protect the interest of the creditors, the corporate debtor and other stakeholders undertake the CIRP[23]. The Committee of Creditors (CoC) is better equipped to approve a resolution plan of the corporate applicants. The Code aims to discourage individual actions for enforcement and settlement to the exclusion of the general benefit of all creditors. The Code being an economic legislation, the role of the court is to regulate envisioning the policy change is minimal and takes a 'hands-off' position and exercises judicial restraint[24].

A debt becomes 'due' when the corporate debtor does not pay and a 'default' occurs. A financial creditor or operational creditor or the corporate debtor may commence the CIRP by making an application to the AA. The 'debt' means the liability in respect of a claim, even if there is a 'dispute' of such claim[25]. The term 'default' has very wide meaning. The non-payment of a debt includes an instalment or part of it[26]. The debt is 'due' i.e., payable, which includes payment at a future date, unless interdicted by some law or has not yet become due. The 'financial debt' is a debt, disbursed against the consideration for time value of money including the interest. The definition of 'money' is inclusive, which may be borrowed or raised[27]. The 'operational debt' is a claim in respect of the provision of goods or services, including employment, or a debt in respect of payment of dues arising under any law and payable to the government or any local authority. When a corporate person is "unable to pay the debts" or becomes 'insolvent', the difficulties or questions of recovery will arise. When a "default" occurs, the financial creditor,

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[22] The Companies Act, 1956 and other laws had failed to maximize the value of the stressed assets.

[23] Creditors; workers; shareholders other than shareholders of the erstwhile management.

[24] The judiciary has been supportive and a provided a free hand to the legislature in the matters of economic policy decisions. Referred *R.K. Garg v Union of India,* (1981) 4 SCC 675*; Bhavesh D. Parish v. Union of India,* (2000) 5 SCC 471*; DG of Foreign Trade v. Kanak Exports,* (2016) 2 SCC 226*; Balco Employees Union v Union of India, (2002) 2 SCC 333; see also* Shayara Bano; *Ajay Hasia v Khalid Mujib Sehravardi, (1981) 1 SCC 722; Subramanian Swamy v CBI, (2014) 8 SCC 682; Khoday Distilleries Ltd. v State of Karnataka, (1996) 10 SCC 304; Indian Express Newspapers (Bombay) (P) Ltd. v Union of India, (1985) 1 SCC 641; Sharma Transport v State of A.P., (2002) 2 SCC 188*

[25] Sections 3(11) and 3(6) and see *Mobilox Innovations Private Limited v Kirusa Software Private Limited,* 2017 Indlaw SC 1041

[26] Section 3(12); see section 4 of the Code gets triggered, when a default of one lakh rupees or more occurs.

[27] Section 5(8)

either individually or jointly with other financial creditors or persons notified by the Central Government, may trigger the Code[28]. The Code may attract even a financial creditor though, the debt is not owed to the person triggering the CIRP. Once the Code is triggered, the resolution process becomes a collective proceeding *in rem* with an objective to rehabilitate the corporate debtor[29].

The Adjudicating Authority (herein after AA) shall ascertain the existence of a 'default' by the corporate debtor based on evidence furnished by the financial creditor and being satisfied that a default has occurred, by order, admit the application or otherwise dismiss the application[30]. Whereas, in case of an operational debt, on the occurrence of a default, operational creditor delivers a demand notice to the corporate debtor[31]. The corporate debtor can bring to the notice of the operational creditor, the existence of a dispute or any pendency of a suit or arbitration proceedings[32]. Moment a 'dispute' exists, the corporate debtor may go out of the clutches of the Code. When the debt is so disputed, such application would be rejected[33]. The AA has to ascertain the existence of a debt within time specified. Hence, when the AA is satisfied that a default has occurred, the corporate debtor gets an opportunity to prove that no default has occurred and no debt is due i.e., not payable in law or in fact. Then, the AA passes an order for admission of the application for CIRP. As a precaution, the Code envisages that if any person drags the corporate debtor for CIRP by any frivolous or *malafide* application, such person shall be liable for penalties[34].

The resolution applicant prepares the resolution plan and after it has passed through the meeting of the CoC, the AA grants approval. If the resolution plan is successful, the corporate person is revived as a going concern. The resolution professional appointed under the Code, takes charge of the CIRP. The objective of a resolution plan is to bring back the corporate debtor into the economic mainstream and take steps for repayment of its debts, which enhances the viability of credit in the hands of banks and financial institutions.

Part III 'A' - Swiss Ribbon – Uncut

Swiss Ribbon's is a case, where eight Writ Petitions and a Special Leave was filed before the Supreme Court of India. The petitioners challenged the constitutional validity of various provisions of the Code[35].

[28] Section 7
[29] Explanation to Section 7(1)
[30] Sections 7(4) and 7(5)
[31] Section 8
[32] ibid
[33] See Bankruptcy Law Reform Commission (BLRC), 2015

[34] Section 65 of the Code - Fraudulent or malicious initiation of proceedings and Section 75 - Punishment for false information furnished in application (prescribes penalty)
[35] Since the Court had to decide on Constitutionality, it did not discuss the facts of the cases.

The first contention was that both the financial and operational creditors provide money in terms of loans or money's worth in terms of goods and services and the Code makes a discriminatory and arbitrary process for seeking resolution. No intelligible differentia exists between financial creditors and operational creditors with the objective of the Code

1. Firstly, when a default occurs, the operational creditor has to serve a notice to the corporate debtor. When the notice is served, the corporate debtor is entitled to dispute the genuineness of the claim. However, in case of financial creditor, it can directly file the application before the AA. The Code does not envisage the requirement of service of notice by the financial creditor, which stands to be discriminatory and arbitrary.
2. Secondly, the corporate debtor does not have a chance to dispute the claim including any set-off or counterclaims against the financial creditor. It is only during the CIRP that the AA has to decide the genuineness of the claim, which is a violation of Article 14 of the Constitution[36].
3. Thirdly, sections 21 and 24 of the Code[37] makes a hostile discrimination in not making the operational creditor part of the CoC. Whereas, the operational creditor have the right of representation, only when they have 10% of the aggregate of the amount of debt owed, but without even any voting rights.

The Union of India supporting the Code, argued that the intelligible differentia between financial and operational creditors exists on the following grounds:

1. The financial creditors invest large sum of money compared to operational creditors in the corporate debtor. Whereas, the investment of the operational creditors is normally less.
2. The financial creditors have a fixed schedule for repayment to the corporate debtor and makes provision for remedies in case of default.
3. The financial creditors are those who negotiate from the initial stages of the commencement of business of the corporate debtor, assess the feasibility, and are better prepared for any eventualities like financial losses, economic slump, etc. All this leads to the inference that the financial creditor takes more responsibility in corporate debtor sailing through difficult times. In cases of financial stress, the corporate debtors or creditors may

[36] Envisages the Right to equality before law and equal protection of law

[37] Section 21 and 24 provides for creation of CoC and its role in CIRP, wherein the operational creditors are not entitled to be members of CoC and no role in decision-making process.

take steps for restructuring and reconstruction of the business, which the objective of the Code also seeks to achieve.

4. The contention that section 7 is discriminatory as it does not provide an opportunity to the corporate debtor to dispute the debt was rebutted, stating that such provision is reasonable on the ground that the financial support and structure of loan repayment is already within the knowledge of the corporate debtor. The AA has to be satisfied that the default has occurred and only then, it has to issue a notice to the corporate debtor and decision is taken after providing an opportunity of hearing[38]. Further, any dispute relating to the documentary evidence reflected in the information utilities, banks and financial institutions can be raised during the progress of the case.

5. Though, set-off and counter-claims are very rare in case of financial debts because, they are independent of the loan granted to them, nothing prevents them to claim, if any exists.

6. As to the role of operational creditors, they are generally interested in only being paid for the goods supplied or services rendered by them, and nothing more. However, the financial creditors see that the financial debts are being paid in full, for which, they are better equipped to go into the viability of corporate enterprises.

7. The Code's objective of not providing voting rights to the operational creditors is justified. When a resolution plan is approved, the interest of the operational creditors is well looked-after and normally are paid in full. If the AA, is of the opinion that the resolution plan fails to protect the interest of the operational creditors, it may reject the same or it may approve only with certain modification[39].

8. In general, the financial creditors would certainly be smaller in number than operational creditors. They have electronic records of the liabilities and obligations and are readily accessible and verifiable[40]. Even at the time of granting loans, banks and financial institutions undertake a detailed market study, which includes a techno-economic valuation report, evaluation of business, financial projection, etc. On the other hand, the operational creditor is involved only in recovering the amounts for the goods

[38] See section *8(5); Referred Innoventive Industries Ltd. v ICICI Bank and Anr., (2018) 1 SCC 407*

[39] The court observed that out of 80 cases resolved under the Code, it demonstrated that the operational creditors are paid before the financial creditors and the initial recovery of what is owed to them is slightly higher than what is owed to financial creditors.

[40] See the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016

> or services and are typically unable to assess viability and feasibility of business, wherein there may be in the form of electronic or physical evidence and proof of debtor's liability may vary.

Accepting the contentions of the Union of India, the Supreme Court held that the operational debts like the trade debts, salary or wage claims are normally small amounts or are recurring in nature and may not accurately reflect on the records of information utilities. When compared to financial creditors, the possibility of disputed debts is higher for operational creditors. When claims with reference to an operational creditor is insignificant or filed for some extraneous consideration, the premature initiation of the CIRP should not be granted, when there are alternative remedies[41].

Further, the court observed that in majority of the cases the financial creditors are secured creditors whereas, most of the operational creditors are unsecured. Apart from the above, the nature of agreements with financial creditors is different from operational creditors. Financial creditors generally lend finance on a term loan or for working capital that enables the corporate debtor to either set up and / or operate its business. Financial contracts involve large sums of money in contrast with the operational contracts. The financial creditors lend to create the company and repayment schedules are normally standardised. In case of a default of the financial debt, the financial creditor can recall the loan in totality. On the other hand, contracts with operational creditors may not necessarily have such strict schedule for payments. The contracts in case of operational creditors may stipulate different forum for dispute settlement process including arbitration. In addition, the genuine disputes in case of operational debts compared to financial debts are high. E.g., failure to perform the contract or supply of substandard goods or services and are matters to be proved in arbitration or in other forums.

The court held that financial creditors are, from the very beginning, involved in assessing the viability of the corporate debtor. When there is a financial stress, they engage in restructuring of the loan as well as reorganization of the corporate debtor's business. Whereas, the operational creditors are interested in securing their payments and may not have interest in the financial well-being of the corporate debtor. Hence, preserving the continuity of the corporate debtor and ensuring repayments for all creditors, distinguishes the financial creditors with the operational creditors thus, has an obvious intelligible differentia, which is within the limits of law.

Further, as to requirement of the notice by the operational creditor to the corporate debtor before initiating the CIRP, the

[41] Referred the Insolvency Law Committee (ILC) March 2018 Report - stated that the financial creditors include debenture holders and fixed deposit holders

court held that the financial creditor has to prove 'default' and the operational creditor only 'claims' a right to payment of a liability or obligation of the debt which is due. Hence, the differentiation to trigger the CIRP independently gets precision"[42].

The Supreme Court while interpreting the law relating the non-inclusion of the operational creditors in the CoC and not entrusted with voting rights[43] held that CoC has the primary responsibility of financial rearrangement. The CoC shall assess the viability of the corporate debtor and evaluate any appropriate opportunities for alternative investments. Financial creditors are best equipped and have trained employees to assess viability and feasibility to evaluate the contents of a resolution plan, which may not be the case.

The court analysing the provisions of the Code held, the CoC may pass a resolution plan, by 66% vote in its meeting and then place the same before the AA. Once, the AA approves the resolution plan, it becomes binding on all the stakeholders.[44]

The AA while approving, the resolution plan has to analyse that the operational creditors and financial creditors are treated fairly and equitably. If the interest of any stakeholder is not protected, the AA may either reject or order for modification of the resolution plan[45]. Hence, the court concluded that section 7 and 8 are constitutional and not violative of Article 14 and not arbitrary.

Part III 'B'- Constitutional Validity of Section 29A

Section 29A of the Code entails a disqualification for being a proposer of the resolution plan. Promoters are disqualified to participate as a resolution applicant, submit the plan and be part of the recovery process of the corporate debtor.

The petitioners fervently contended that section 29A of the Code is violative and abrogates the fundamental rights on four counts.

1) The disqualification of the promoters to participate in the recovery process of a corporate debtor will be against the spirit of the Code. Complete ban on the promoters without making any difference between dishonest or fraudulent *vis-a- vis* honest and efficient managers is nothing but, treating unequals as equals. The corporate debtor's failure to pay the

[42] Referred *Innoventive Industries* Case

[43] Section 21 – provides for COC; section 24 - Meeting of COC; section 28 - Approval of COC for certain actions

[44] Section 31 - binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders. See *COC of Essar Steel India Limited v Satish Kumar Gupta*, (2020) 8 SCC 531, it was held, "*Section 31(1) of the Code makes it clear that once a resolution plan is approved by the Committee of Creditors it shall be binding on all stakeholders, including guarantors. This is for the reason that this provision ensures that the successful resolution applicant starts running the business of the corporate debtor on a "fresh slate" as it were*"

[45] See Regulation 38 - Mandatory contents of the resolution plan

debts may be for various reasons and may not be within the control or fault of the promoters or managers. In such cases, barring honest and efficient managers to participate in the resolution process would amount to discrimination.

2) One of the objectives of the Code is "maximization of value of assets" of the corporate debtor. However, by keeping out the erstwhile promoters who may outbid other applicants would impair the said objective.

3) The term "related parties" covers any relatives of the promoters. To debar such persons, even though they do not have any business connection is against the spirit of the law[46].

4) A person's account may be classified as an NPA in accordance with the guidelines of the Reserve Bank of India (RBI), despite him not being a wilful defaulter. Also, the period of one year referred to in section 29A(c) is wholly arbitrary and without any basis either in rationality or in law[47].

The Union of India supported section 29A contending that, it does not disturb any vested or existing rights, as a resolution applicant does not have any such rights[48]. Merely because this section relies on antecedent facts for its application, does not mean that it is retrospective. In addition, section 29A sub serves the very important object of the Code, i.e., undesirable persons who are listed in the section and are rendered ineligible to submit resolution plans, so that such persons are considered unfit to be on the saddle of the management of stressed corporate debtor. Disqualification refers to not only persons who have committed acts of malfeasance, but also otherwise unfit to be resolution applicant. For e.g. undischarged insolvents and persons who have been removed as directors under Section 164 of the Companies Act, 2013[49].

The Union of India took support of the RBI Regulations dealing with NPAs and stated that even before a person's account is declared NPA, a long rope is given for such person to clear off its debts. It is only when it does not do so, that its account is declared NPA. The guidelines make it clear that an account, which has been NPA for one year, is declared as substandard asset and it is for this reason that the one-year period is given in section 29A(c), is based on reason and not arbitrary. Further, a period of one year is sufficient period within, which a person should clear, its dues. In addition, section 29A is not a section aimed at malfeasance; it is aimed at rendering ineligible persons, who are undesirable in the widest sense of the term, i.e., persons who are unfit to take over the management of a corporate debtor.

[46] See section 29A(j)
[47] See section 29A(c)
[48] See *ArcelorMittal Case*

[49] Section disqualifies directors for not filing financial statements or annual returns for any continuous period of three financial years.

The Supreme Court held that section 29A provides for disqualification of becoming a resolution applicant[50]. The object of introducing such provision was to avoid persons who were involved in misconduct or otherwise undesirable or unscrupulous or persons not with clean hands to be a corporate applicant. A corporate debtor contributing to defaults should not be rewarded at the expense of creditors[51].

The Court referring to the *ArcelorMittal*[52] and *Chitra Sharma*[53], held that the Code shall be interpreted keeping in mind purpose of the law[54]. The term "person acting in concert" shall be construed of having a wider import, including all persons who may be acting in concert with the person submitting a resolution plan. The *de facto* position of the persons rather than the *de jure* position shall be considered. The "see-through provision" enables to identify the person who are actually in 'control', either jointly or in concert with other persons. Further, referring to *Salomon v A Salomon and Co. Ltd*.,[55] the court held that, when a resolution applicant submits a resolution plan, it is competent for the authorities to go behind the smoke screen by lifting the corporate veil. Because, it is important to discover and differentiate between the persons "who are acting in concert", and thereby being unscrupulous persons to be a resolution applicant. In *Chitra Sharma* case, the court went further in holding that 29A has a larger public interest and facilitates effective corporate governance by not permitting the persons responsible for insolvency of the corporate debtor in the resolution process through back door. Referring to the amendment made to section 30 of the Code, the court held that the CoC should not consider a person ineligible under section 29A.

Further, referring to the *ArcelorMittal* case, it observed that a resolution applicant has no vested right for consideration or approval of its resolution plan.[56] Referring to section 30(4) it was held, the CoC may not approve a resolution plan after considering its feasibility and viability. The only thing, which may happen is that the CoC requires the resolution professional to

[50] Amended by the Insolvency and Bankruptcy Code, 1st Amendment (2017) e.g. an undischarged insolvent; person who has been disqualified under the Companies Act to act as a Director; person who is prohibited under the SEBI Act; A corporate debtor who has not paid the interest also and having NPA, not making the account operational but, becomes a resolution applicant and get the same enterprise back at a discounted value cannot be a resolution applicant;

[51] The Statement of Objects and Reasons of the 1st Amendment

[52] *Arcelormittal* case - observations made directly arose in order to oust the Ruias as promoters from the pale of consideration of their resolution plan in this context, held they had no vested right to be considered as resolution applicants

[53] *Chitra Sharma v Union of India*, 2018 Indlaw SC 640, IDBI Bank Ltd. instituted a petition under Section 7 of the Code and this case was filed under Article 32 to protect the interests of homebuyers in projects floated by Jaypee Infratech Ltd.

[54] Interpretation of section 27A (1) *(c), (f), (i) &(j)*

[55] [1897] AC 22; corporate veil may be lifted to know the purpose, context or circumstances. Courts may look into the substance than the form.

[56] Referred *State Bank's Staff Union (Madras Circle) v Union of India and Ors.,* (2005) 7 SCC 584 (See para 64)

invite a fresh resolution plan. At this stage, no application could be entertained before the AA. Hence, there is no vested or fundamental right to have the resolution plan approved and validity of section 29A gets the stamp of law.

The contention that section 29A(c) treats unequals as equals was brushed aside. The argument of a distinction between good and bad managers has to be recognised. An erstwhile manager not guilty of malfeasance or has not acted contrary to the interest of the company must be permitted to be a resolution applicant. One of the objectives of the Code being "maximization of value of the assets of the corporate debtor", ouster of a good erstwhile manager would go contrary to the object sought to be achieved by the Code. The Union contended that the Code does not visualize "person need not be a criminal" to be kept out of the resolution process. There may be a situation, when a person is in the wrong side without fault. E.g., an undischarged insolvent for no fault of his or when a director is disqualified for not furnishing the financial statements on time.[57]

In addition, section 35(1)(f) added a retrospective provision in the 1st Amendment of the Code that the liquidator shall have power to sell the immovable and movable property and actionable claims of the corporate debtor in liquidation. However, the proviso restrained to sell it to a person, not eligible to be a resolution applicant. Similarly, persons who are malfeasant, fallen foul of the law in some way, and who are unable to pay their debts in the grace period, by this proviso are interdicted from purchasing the assets of the corporate debtor, whose debts they have either wilfully not paid or unable to pay. The provision is unambiguous, in not allowing the resolution applicant to take advantage and hence, the proviso stood the test of constitutional validity.

As per guidelines issued by the RBI's, the 'wilful defaulter' is a person who does not pay even though, he would be able to pay[58]. The accounts are declared NPA, when the corporate debtor does not resolve defaults, i.e., interest or and/or instalment of the principal amount remaining overdue for more than three months. One-year grace period is given to such person to pay-off the debts. The Code does not prohibit such person to bid as a resolution applicant. Hence, legislative intent is clear, that a person who is unable to service its own debt beyond the grace period is ineligible, and thus, cannot be held as unconstitutional including the one-year period. Thus, ineligibility to be a resolution applicant

[57] Section 29A(e) of the Code and Section 164(2)(a), Companies Act, 2013 (deals with disqualifications for appointment of director)

[58] See RBI's Master Circular on Prudential Norms on Income Recognition, Asset Classification and Provisioning pertaining to Advances dated 01.07.2015 - Clause 2.1 defines NPAs - further, classified into Substandard Assets; Doubtful Assets; Loss Assets based on the period for which the asset has remained non-performing and the realisability of the dues

comes into force only after this one-year period is over[59]. Even in such circumstance, he can pay and become eligible.

The other ground on which, the provision of the Code was challenged was with reference to the definition of "*related party*"[60] and its implication under section 29A (j). The petitioner contended that the section is a case of excessive regulation and the disqualification to be a resolution applicant merely for the fact that somebody happens to be relative, though having no business connections is unconstitutional. Thus, a person otherwise eligible becomes disqualified to be a resolution applicant violates the doctrine of '*nexus*'[61].

However, rejecting the said contention, the court held that the intention of the statute is, persons must be those, who act 'jointly' or 'in concert with others' and shall be construed as connected with the business activity of the resolution applicant. The Supreme Court applied the principle of *noscitur a sociis*[62], indicating the categories of persons[63], must be 'connected' and need to have business connection with the resolution applicant to fall within Section 29A (j). When such is the case, it does not stand as a disqualification under section 29A(j).

Lastly, the contention of the petitioner was that the expression '*connected person*' does not refer to a person who may be in the management or control of the business of the corporate debtor in future, as it may be made applicable to an indeterminate person. This contention was also rejected, holding that 'connected person', would cover a person who is in management or control of the business of the corporate debtor during the implementation of a resolution plan. Such person shall not be treated as indeterminate, but is a person who is running the business, either prior to or at the implementation stage of the resolution plan. Hence, section 29A was held to be constitutionally valid.

Part III 'C'- Add-on Provisions and Constitutional Validity?

1. Section 12A read with Regulation 30A of the IBBI (Insolvency Process of Corporate Debtor) Regulations, 2016 provides that the AA may allow the withdrawal of application admitted under sections 7, 9 or 10,

[59] At this stage it is classified as doubtful asset

[60] Section 5(24) defines related party in relation to a corporate debtor - Provides a list of relations existing on basis of blood and business relations.

[61] Referred *Attorney General for India and Ors. v Amratlal Prajivandas and Ors.,* (1994) 5 SCC 54, case referred the provisions of the Smugglers and Foreign Exchange Manipulators Act, 1976 to the relatives, associates and other 'holders'. Held, there ought to be the connecting link between those properties and the convict/detenu, the burden of disproving which, is upon the relative/associate and held Section 2(2) (e)is not discriminatory or incompetent.

[62] Meaning of an unclear or ambiguous word should be determined by considering the words with which it is associated in the context, https://www.merriam-webster.com/legal/noscitur%20a%20sociis, last visited 16/09/2019

[63] Section 5(24A)

with the approval of ninety per cent, voting share of the CoC, in such manner as may be specified[64]. The petitioners contended that section 12A of the Code, derails the settlement process and it provides an uncontrolled and unchanalized power to the CoC to reject any legitimate settlements entered into between creditors and corporate debtor.[65]

The Union supporting this section contended that, and admission of an application by the AA becomes a proceeding *in rem*, a collective action and no longer an individual proceeding. This being the case, it is important that when a resolution process is to begin and a CoC is formed, it is the CoC who is best equipped to deal with applications for withdrawal or settlement. When the creditors pause such proceeding, it is for the benefit of corporate debtor and all stakeholders.

The Supreme Court holding that the credence shall be given to the instances of settlement between the corporate applicant, corporate debtor and the creditor as a whole, and thus, section 12A withstood the test of Article 14[66]. The courts considered that even before section 12A was inserted, it had granted permission for withdrawal of the CIRP[67]. Further, the court referring to *Brilliant Alloys Pvt. Ltd. v S. Rajagopal & Ors.*[68], held that Regulation 30A (1) being directory provision, even after issue of invitation for expression of interest the withdrawal of application may be granted in exceptional cases. Further, permission of withdrawal may be granted or rejected, even if the CoC is yet to be appointed by virtue of Regulation 11.[69] The threshold of ninety per cent is because, all financial creditors have to put their heads together and an omnibus settlement ideally ought to reach the conclusion.[70] However, if the CoC arbitrarily rejects a just settlement and / or AA rejects such withdrawal claim, the National Company Law Appellate Tribunal (NCLAT) may thereafter in appeal, test it[71]. Hence, the test of constitutional muster gets cleared.

2. In addition, the petitioner contented that the information utilities are private players and in majority of

[64] Inserted by Insolvency and Bankruptcy (Second Amendment) Act, 2018 with retrospective effect from June 6, 2018

[65] Petitioner contended 12A is contrary principle laid in *Uttara Foods and Feeds Pvt. Ltd. v Mona Pharmachem,* 2017 (13) SCALE 526

[66] See ILC Report (March 2018)

[67] *Lokhandwala Kataria Construction Pvt. Ltd. v Ninus Finance & Investment Manager LLP, Civil Appeal No. 9279 of 2017; Mothers Pride Dairy India Private Limited v Portrait Advertising and Marketing Private Limited, Civil Appeal No. 9286/2017; Uttara Foods and Feeds Private Limited v Mona Pharmacem,* 2017 (13) SCALE 526*;* also refer Regulation 30A, CIRP Regulations

[68] SLP (Civil) No. 31557/2018

[69] Rule 11, NCLT Rules, 2016

[70] See ILC Report referred by the Court.

[71] See section 60 of the Code

cases formed with an intention of gaining profits. The Code is violative of the constitutional norms as it is entrusting the adjudicating power, which the NCLT only should be empowered.[72]

However, the Supreme Court refused to hold that the information utilities have the adjudicating power, and it opined that private information utilities would only provide a *prima facie* evidence of default and nothing more and is rebuttable[73]. On receipt of information of default, the information utilities shall expeditiously undertake the process of authentication and verification of information and be dealt in the CIRP.

3. Further, the petitioners contended that the Code entrusts the power of adjudication on the resolution professional, a non-judicial authority and thereby violates the basic principles of dispensation of access to justice.

The Supreme Court accepting the rebuttal of the Union held that the resolution professional is appointed only for collating the information in CIRP and has no adjudicatory powers. Even, when the resolution professional exercises any discretion of the 'best judgment' in certain situations, it stands as only an administrative decision. The court relied its decision on section 18[74], CIRP Regulations[75] and Regulation 35A[76] and held its acts are administrative and not even quasi-judicial. The court made a comparison of the powers vested in the liquidator under sections 38 to 40 of the Code. When a liquidator determines the value of the claims admitted under section 40, the court went on to hold such decision is quasi-judicial and appeal lies to the NCLT[77]. In addition, the resolution

[72] the certificate of an information utility is in the nature of a preliminary decree issued without any hearing and without any process of adjudication; see the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017

[73] The BLRC Report - "…When the IRP commences, within less than a day, undisputed and complete information would become available to all persons involved in the IRP and thus address this source of delay". The court referred to the objective of the "credit information companies" recommended by the Siddiqui Working Group in 1999 and Aditya Puri Committee constituted by RBI (referred by the Attorney General of India) (led to the standardization of data formats for reporting corporate, consumer and MFI data); Referred Regulation 20 (Acceptance and receipt of information) & Regulation 21 (On receipt of information of default, an information utility shall expeditiously undertake the processes of authentication and verification of the information) of the Information Utilities Regulations

[74] Provides for duties of an interim resolution professional

[75] Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016; Regulation 10 (Substantiation of claims); Regulation 12 (Submission of proof of claims); Regulation 13 (Verification of claims); Regulation 14 (Determination of amount of claim)

[76] Ibid, Court while observing Regulation 35A also held that the resolution professional should apply to the Adjudicating Authority for appropriate relief. (Preferential and other transactions covered under sections 43, 45, 50 or 66)

[77] Section 41 (Determination of valuation of

professional cannot act in many matters without the approval of the CoC[78]. Holding that the resolution professional is only a facilitator of the resolution process exercise administrative functions, overseen by the CoC and by the AA.

4. The petitioners contended that the Code is contrary to the decision of the *Madras Bar Association Case*[79], wherein, the President, members of NCLT and certain members of the NCLAT are appointment by the Ministry of Corporate Affairs and not by the Ministry of Law and Justice.[80] Hence, not being a judicial or quasi-judicial authority, requested that all the orders passed by such members ought to be set aside and irrespective of applicability of the *de facto* doctrine, the members ought to be restrained from passing any orders in future and ought not to be allowed to function. In addition, the petitioner contended that the NCLAT having seat only at New Delhi shall cause greater inconvenience to the litigant and expediency is lost.[81]

   The Union rebutted the contention stating that, members of the NCLT or the NCLAT had been appointed in accordance the judgment of *Union of India v R. Gandhi, President, Madras Bar Association*[82] & *Madras Bar Association* (III)[83]. However, the Court gave direction to fulfil the conditions at the earliest including creation of benches at different places.

5. Ancillary to the above said arguments and contentions, the Supreme Court analysed sections 29A(c) and 29A(h) of the Code, granting exemptions from applicability to the Micro, Small, and Medium Enterprises (MSME's)[84]. The court came to a conclusion that the MSMEs stand in a different footing as they are the foundation of the economy and key drivers for employment, production, economic growth, entrepreneurship, and financial inclusion. The object of the Code to exclude MSME's is, such industries face difficulty in getting the resolution applicants, and in such

claims); Section 42 (Appeal against the decision of liquidator)

[78] See Section 28 of the Code

[79] See *Madras Bar Association case v Union of India,* (2015) 8 SCC 583

[80] *Swiss Ribbon,* in W.P (Civil) No. 99 of 2018

[81] Paragraph 123 of the *Madras Bar Association case v Union of India,* (2014) 10 SCC 1

[82] (2010) 11 SCC 1

[83] *Madras Bar Association v Union Of India & Anr*, (2015) 8 SCC 583; Attorney General stated that Circuit Benches will be established The appointment of the members was made by a Committee consisting of two Supreme Court Judges and two bureaucrats and is in conformity with the aforesaid judgments

[84] Referred ILC Report (March 2018) and Section 7 of the Micro, Small and Medium Enterprises Development Act, 2006; Section 240A was inserted by providing a notwithstanding clause wherein, the Central Government may, in the public interest by notification, direct that any of the provisions of this Code shall not apply to the resolution applicant in respect of CIRP of any MSMEs

cases leading the entity to liquidation rather than providing a second chance. The court held that the legislation being alive to the serious anomalies in its working, has provided such exemption.

6. Lastly, the petitioner contended that section 53 of the Code is violative of Article 14 of the Constitution of India as it has provided for priority in the distribution of the liquidation assets and this waterfall in liquidation, puts the operational creditor in a precarious condition and may not recover anything as they rank below all other creditors, including other unsecured creditors, who happen to be financial creditors. In particular, section 53(1)(f) is discriminatory and arbitrary and violative of Article 14. The law also puts the Central and State Government priority later than the unsecured creditors with an aim to increase in availability of the finance.

   The Supreme Court held, differentiating the financial debt and operational debts, puts in the relative importance of the two debts. The financial debts infuse capital into the economy through the banks and financial institutions with the money that has been paid back after the resolution plan, to facilitate further lending to other businesses is a positive step for economic development. Hence, the object of the Code is achieved by this differentiation of financial creditor and operational creditor. The Code provides protection of the workmen's due, as they are placed above most of the other debts though treated as unsecured creditors. The object was to protect the interest of the workmen, who are making a living being employed with the corporate debtor. Even on this count, the challenge to section 53 was rejected.

PART IV- IMPACT FACTOR AND WAY FORWARD

India is moved towards an insolvency law practice in tune with the international scenario. The Code deals with economic matters and reflects on the economy of the country. India has experimented with different legislations in the past, and lesson learnt with each of these statutes being tested time and again. The Code is the result of such rich experience in balancing the creditors and the corporate debtors, whereby the other stakeholder's interest is protected. The law shall not be static hence, the Code provides an opportunity for continuous progression.

The Court concluded by analysing the working of the Code, wherein, the claim amount was about INR 1,20,390 crores. Out of eighty cases that have been resolved by resolution process, liquidation value of sixty-three cases stood at about 29800 crores rupees and an amount of about 60,000 crores rupees (202% of liquidation value) were realised.

The Supreme Court analysed the RBI

report on the credit facilities made available by banks and financial institutions in the commercial sector (excluding the food industry) including the non-banking financial institutions reflected in the following table:

The above report indicates that the Code is proving to be a step in the right direction, and the court concluded that the defaulter's paradise is lost, and believed that, the economy's rightful position has been regained". The positive results are forthcoming as it shows a recovery of mean average of 44% from 2016 to 2020 compared to 24% recover from the earlier regime[85]. However, this run has temporarily halted due the Covid 19 Pandemic as the enforcement of actions was suspended including the exclusion of the limitation period for any cases to be filed during this period[86].

The owners, managers and potential capital providers of stressed assets should proactively focus on developing a credible rescue plan. The rescue plan developed should be comprehensively led by operational turnaround and monitoring of financial covenants by lenders. However, the cost of insolvency process shall be coordinated with all the stakeholders. The distribution of responsibilities to the creditors would

RBI's report referred in Swiss Ribbon Case		
RBI - Credit that has been given by banks and financial institutions in the commercial sector (other than food)		
2016 – 17	2017 - 18	1st - 6 months of 2018-19
INR 4952.24 crores	INR 9161.09 crores	INR 13195.20 crores
Non-Banking		
2016-17	1st - 2018-19 - 6 months	Not Available
INR 6819.93 crores	INR 4718 crores	-
Total flow - Bank & non-bank (Domestic & foreign lenders)		
2016 – 17	2017 - 18	1st - 6 months of 2018-19
INR 14530.47 crores	INR 18469.25 crores	INR 18798.20 crores

(*Author has created the table based on the RBI report*)

[85]https://economictimes.indiatimes.com/news/economy/policy/insolvency-resolution-the-ibc-story-so-far-and-the-way-forward/articleshow/80399160.cms, last visited May 23, 2021

[86] See In Re, Cognizance for Extension of Limitation, Suo Motu Writ Petition (Civil) No.3 of 2020

require clarity[87], i.e., criteria on treatment of secured financial creditors with unsecured financial creditors and secured financial creditors as to first and second charge holder and treatment of the homebuyers as the financial creditors and *inter-se* relationship. An approved resolution plan is a job half done. The real effort of resolution begins at the time of implementation. The CoC and the corporate applicant shall effectively implement the resolution plan. Distribution under a resolution plan is a commercial decision and it requires clarity on the parameters of sharing obligations.

The Code is a big reform and is changing not only 'credit' behaviour but also expects the corporate debtor to offer early responses to financial distress. Previously, the credit culture did not create a treat of losing the company. Default followed by CIRP can generate substantial distress. The behavioural change in the manager may be in response to this threat. Whereas, the Code has played a critical role in reshaping behaviour of borrowers and has provided a platform for better negotiation between the lenders and borrowers.

A significant issue is that the corporate debtor shall shoulder the loss of goodwill associated with the CIRP. In few cases, before the commencement of the formal proceeding, there is a necessity of maintaining confidentiality and create obligation with the stakeholders.

The Code in its nascent stage may face challenges during its implementation. The judiciary has provided some clarity on key conceptual issues, e.g., the time lines with reference to CIRP; nature of the debts (the financial or operations debt); moratorium; interplay between other statutory provisions including SARFAESI Act. The role of the judiciary has been extraordinary and the momentum is admiringly maintained. The resolution plan being a commercial decision, the judicial scrutiny is to validate just and fair CIRP. The resolution applicant, corporate debtor and the CoC shall coordinate for a credible rescue.

Taking the lead from *"Swiss Ribbon"*, the Supreme Court in *A. Navinchandra Steels*[88], *Arun Kumar Jagatramka*[89], *Phoenix Arc*[90] and *Ramesh Kymal*[91] have followed and strong foot hold over the insolvency law has been laid.

[87] See section 53 of the Code

[88] *A. Navinchandra Steels Private Limited v SREI Equipment Finance Limited and others,* 2021 Indlaw SC 83

[89] *Arun Kumar Jagatramka v Jindal Steel and Power Limited and another,* 2021 Indlaw SC 118

[90] *Phoenix Arc Private Limited v Ketulbhai Ramubhai Patel*. 2021 Indlaw SC 35

[91] *Ramesh Kymal v Siemens Gamesa Renewable Power Private Limited*, 2021 Indlaw SC 43

WAY FORWARD

The success of the Code requires the following fine-tuning

a. The insolvency law has to provide for a pre-insolvency mechanism and steps to implement pre-packs mechanisms by the creditors.

b. Guidelines on the obligations of the creditors under a resolution plan. A system of priority payment to various categories of creditors, adopted in some countries.

c. Insolvency issues relating to "group companies". The United States, the European Union and Germany have recently amended their laws and permit commencement of "group coordination proceedings". The Code may have to consider the applicable principles with reference to the group companies in the near future[92].

d. Cross-border measures and insolvency issues and regulation of financial service providers.

e. Building data sets and high-quality policy teams, which will carry the program on various fronts.

The efficient and effective legal framework shall enhance the development of the credit markets, as and when, the money is repaid to the creditors and is back into the economy, which otherwise would have turned out to be an NPA. The resolution process facilitates in repayment to the creditors as per the resolution plan keeping in the protection of workers and investors with an object to maximise the shareholder's value. The entrepreneur's get a boost in the economic structure. This encourages the "Ease of Doing Business" quotient, increases the investments, and facilitates the growth of market economy. India is set progress towards providing a platform for investors and strive to create a robust economy.

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[92] The US Bankruptcy Code (the courts have treated the entire group as one entity with a common plan for all the stakeholders., the European Union (EU3) and Germany have provided for treatment of group insolvencies.

THE MUTABLE AND EVOLVING CONCEPT OF 'EARLY DISMISSAL' IN INVESTMENT ARBITRATION-COMPARING RULES

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ABSTRACT

The discussion encompassing the summary disposal of claims with regards to International Arbitration is not a recent development. With the previously existing arbitral structures with express provisions for the summary disposal of claims, for example, ICSID (International Centre for Settlement of Investment Disputes) and other institutional principles offering expansive discretionary procedural powers on Tribunals, the topic has, nonetheless, come into re-established focus since August 2016, when the SIAC (The Singapore International Arbitration Centre) introduced in its rules an express provision for the early dismissal of claims and defenses (Rule 29) which allows for early dismissal on the basis that a claim or defense is either manifestly without legal merit; or manifestly outside the jurisdiction of the Tribunal. This paper aims to address and establish the dichotomy between the rules laid down pertaining to Early Dismissal of Claims under Rule 41(5) of ICSID in limine limis, which allows a party to pose an argument that a claim is 'obviously without legal merit and to address some of the major changes to the SIAC rules that are applicable to the practical and commercial needs of its users. The paper analyses the existence of the rules through the lens of the application given by arbitral practice. The new ICSID Rule is then compared with an alternative procedure for the summary dismissal of frivolous claims contained in the SIAC which will be substantiated with help of case studies and applications of rule in practice. Finally, it explores possible prospects of utilizing summary dismissal procedures in investor- state arbitrations and the need for refinement.

Keywords: *International Investment Law, International Commercial Arbitration, Foreign Direct Investment, ICSID, SIAC, Early Dismissal Claims*

INTRODUCTION: THE ORIGIN AND DEVELOPMENT OF INVESTMENT ARBITRATION

Judicial arbitration of investments is diversifying. At its heart, it illustrates the resolution by arbitration conflicts arise between foreign investors and host states over international investment. However, the mode of initiation of arbitration is the systemic and substantive dimensions of international investment arbitration, as there are different ways of instituting arbitral proceedings. Submitting investment cases to Mixed Cases Commissions was an early iteration of foreign investment arbitration. These were formed through the use of a number of bilateral agreements, signed between the mid-1800s and the early 1900s for the purpose of resolving disputes between the Convention's nationals of a State Party and the other State Party. The types of disputes falling under the Commission's jurisdiction were defined in the conventions and varied, depending on the convention invoked[1]. Due to the limited number of investment claims heard, this type of foreign investment arbitration has never achieved great popularity, but they were a helpful source of early jurisprudence and the basic form has continued to be used in various ways, particularly in the subsequent Iran-US Claims Tribunal.

The two dominant iterations of foreign investment arbitration in the early 21st century, however, investment arbitration are contractually based and investment arbitration is treaty- based[2]. The legal basis for arbitration in investment treaty arbitration is a linking process offer by a host state in a treaty clause, arbitrate for all protected investors, which is then openly agreed or rejected by any protected investor. For this reason, the latter has been referred to as "arbitration without privacy," a term coined by Jan Paulsson, often derisively. Having said that, several investment treaties often document an agreement to arbitrate conflicts resulting from the understanding or implementation of the Treaty between the Contracting States. Thus, the investment treaty's arbitration covers investor-State arbitration, which can have a variety of legal bases, and also state-to - state arbitration.

INTERNATIONAL ARBITRATION FOR INVESTMENT: BIRTH AND EVOLUTION

The roots of foreign investment arbitration have been closely connected to the history of international investment, based on the descriptive[3] and early development of the current principles of State Responsibility. For investor-State

[1] Antonio R. Parra 'The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes', 22 (1) ICSID Review – Foreign Investment Law Journal 56, p. 65.

[2] Black's Law Dictionary (8th ed., 2004)

[3] D. A. R. Williams and S. Foote, "Recent Developments in the Approach to Identifying an 'Investment' Pursuant to Article 25(1) of the ICSID Convention", Cambridge University Press, 2011),Pg 42-44

disputes, before international investment arbitration became de rigour, the best chance of an investor for a host state to seek compensation for interference with its properties or contractual rights rested in finding the diplomatic immunity of its home State. However, because the decision of the home State to grant diplomatic immunity was arbitrary, there was no guarantee of appeal and there was no assurance that the host State would entertain or comply with the appeal, even if the home State had made a claim on behalf of its national. The emphasis on diplomatic protection and the resolution of State-to - State disputes made the Investment Protection Law highly volatile, even though, through arbitral and judicial pronouncements, the concepts of State responsibility gradually evolved.

There were two types of investment protection, contractual security and treaty protection, other than the normal international law on the protection of aliens and their property. While there are major variations between the two forms of investment security, such as how contractual obligations are regulated by the proper law of the contract, while international law governs treaty obligations, they converge on investor-State arbitration clauses. Article 54 of the 1965 Convention on the Settlement of Disputes between States and Citizens of Other States ('ICSID' or 'Washington Convention' [the World Bank's International Centre for the Settlement of Investment Disputes]) or Article V of the Convention on the Recognition and Compliance of Investment Dispute, in the case of non-ICSID arbitration, encourages the execution of such awards.

THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (THE ICSID CONVENTION); AN OUTLINE

The contradictions in the current investment dispute resolution systems contributed to a new inventiveness in the 1960s. The plan was to develop a process explicitly designed to address conflicts between the host countries and foreign investors. The proposal came from the World Bank, an organisation dealing with the growth of the economy. The driving force behind the drafting of the Convention[4] was the General Counsel of the World Bank at the time, Aron Broches. Drafting of the convention took place from 1961 to 1965. The key bodies involved were the Legal Department of the World Bank, the Executive Directors of the World Bank and a series of regional meetings attended by experts from 86 states. On 18 March 1965, the Executive Directors of the World Bank adopted the text of the Convention, along with a brief explanatory paper[5]. The International Centre for the Settlement of Investment

[4] ICSID Convention, 575 UNTS 159, [1991] ATS 23

[5] Audley Sheppard, 'The Jurisdictional Threshold of a Prima-Facie Case', The Oxford Handbook of International Investment Law (OUP, 2008), pp.932-961

Disputes (ICSID) was established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which is why the Convention is generally referred to as the ICSID Convention

THE ENTRY INTO FORCE AND PARTICIPATION AND SUBSEQUENT DEVELOPMENTS

Following its ratification by 20 Nations, the ICSID Convention entered into force on 14 October 1966.Of the early participating States, most were developing countries, especially in Africa though it has evolved gradually over the years. 135 countries were party to the Conference by the middle of 2002. Another 17 have signed the Convention, but have not yet ratified it. All major developed countries have become parties, with the exception of Canada. Most African countries are parties. They represent the majority of Arab countries while majority of Asian nations, including China, are groups. The Convention has been signed but not yet ratified by a number of former Soviet Republics, including the Russian Federation. Latin American countries showed a reserved mindset during the drawing up of the Convention. Latin American nations uniformly remained away from the Convention until 1980. In the 1980s, this stance softened. The image changed entirely during the 1990s: the convention was ratified by most countries in Latin America. But a few big countries have stayed away so far, including Brazil and Mexico[6].

In its early years, the use of the Convention's tools was scant. Prior to 1974, the first case wasnot resolved. This condition has since fundamentally changed. There was a drastic increase in the number of reported cases, especially in the 1990s. The current rate of new cases reported is approximately one per month. By September 2002, 66 lawsuits had been closed, and 39 were pending. The Additional Facility was built in 1978.It is mainly intended to provide methods for the resolution of investment disputes where only one of the States involved, either the host State or the State of the nationality of the investor, is party to the Convention. In the sense of NAFTA and, more recently, the Energy Charter Treaty[7], this has turned out to be significant. It is also possible to use the Additional Facility for conflicts that do not result directly from an investment or from litigation relating to fact-finding. The Additional Facility is subject to laws and regulations of its own. Not related to it is the ICSID Convention.

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[6] ICSID Secretariat, 'Possible Improvements of the Framework for ICSID Arbitration', Discussion Paper (22 October 2004), para. 6, available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnouncePDF&AnnouncementType=archive&AnnounceNo=22_1.pdf (lastvisited 02 November 2020)

[7] The Energy Charter Treaty (ECT), https://www.energycharter.org/

WHAT DOES THE CONVENTION WANT TO ESTABLISH?

Promoting sustainable growth is a primary goal of the Convention. By creating a favourable environment for investment, the Convention is intended to promote private international investment. A country's adherence to the Convention will provide additional incentives and encourage a greater flow of private international investment into its territory, which is the Convention's primary aim. The ICSID Convention provides substantial advantages compared to ad hoc arbitration: it provides a dispute resolution structure providing not only common provisions and rules of procedure, but also institutional support for the conduct of proceedings. It guarantees the non-frustration of litigation and ensures acceptance and compliance of an award. ICSID arbitration provides both the investor and the host state with benefits. Proceedings can be initiated by either side, but the investor is in the place of the claimant in most cases.

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"…The Tribunal claimed in Amco v. Indonesia[9] that ICSID arbitration is in the interest not only of investors but also of host states as well. It concluded that the object of the Convention is to protect the investor and the host State to the same extent and with the same vigour, not to ignore that the purpose of investment security is to protect the general interest of developed and developing countries."

INCONSISTENT DEFINITION RELATED TO IA AND ICSID

ICSID Rules direct the arbitration pertaining to Investments under the tribunals are enabled by ICSID Arbitration Rule 41(5) and when the finding results in the claims to be 'manifestly without legal merit', it can dismiss the proceedings immediately. In few instances the new Rule had been

[8] Rule 41(5) of ICSID

[9] Amco Asia Corporation and others v. Republic of Indonesia, ICSID Case No. ARB/81/1

applied so far. While this paper doesn't mean to dive into express details into the fundamental realities at issue in the four cases, but instead tries to talk about the ways to deal with the legal difficulties which the Rule presents and present the all things that must be considered in order to give a concise outline of what was in question.

Rule 41(5) do not raise specific discussions and also deals with various issues identifying with the interpretation and use of. To start with, the standard is in the nature, for example it applies just *'except if the parties have*' consented to another sped up procedure for making primer objections a number of investment settlements accommodate an elective procedure for making fundamental protests on a sped-up basis, which consequently will have priority over ICSID Rule 41(5).

At the long last discarding the Claimants' case with all its chaperon legal effects under the ICSID Convention, it is obviously an effective complaint with regards to the show absence ofmerit of a case will enhance or expedite the issuance of an honor. It will be dependent upon the standard cures conceived by the ICSID Convention and may be dependent upon implementation and thus consequently, the honour will have res judicata impact. The dismissal of a complaint that a case needs legal merit won't influence the party's entitlement to hence record jurisdictional protests as per the conventional procedure as has been explained in the last sentence of Rule 41(5). Additionally, the utilization of the Rule is available to 'a party' which, perused in a real sense, would appear to envelop both claimant and respondent. This perception was set up in the Global Trading Tribunal case.

THE DUE PROCESS CONCERN

The procedure laid down under Rule 41(5) is significantly faster contrasted with the one set off by an issue with purview under Rule 41(1) of the ICSID Arbitration Rules[10]. Within thirty days from the constitution of the Tribunal, a party is needed to file a objection that a case is plainly without legal merit. The issue must be chosen by the Tribunal at the primary meeting or instantly thereafter. The act which is managed by the four tribunals and the protest under Rule 41(5) showed that the outcome was reached after the principal meeting as opposed to carefully at the first meeting a choice on the speed-up complaint. Consequently, an interval of time between the fourth day to about 5 five months after the first meeting of the Tribunal was deciphered to mean 'promptly thereafter'.

For the idea of a sped-up procedure essentially involved that the assessment of current realities and legal issues of the case to be made 'immediately', a full circulating of all proof which a party

[10] Chester Brown and Sergio Puig,'The Power of ICSID Tribunals to Dismiss Proceedings Summarily: An Analysis of Rule 41(5) of the ICSID Arbitration Rules', Journal of International Dispute Settlement, pp.37-168.

would somehow or another wish to introduce under normal proceedings is a requirement. However, a divergence from a fundamental rule becomes a matter of debate when it serenades along to what extent the arbitral court can go down the way of reducing the evidence procuring process without encroaching the said rights and due process along the lines. The content of Rule 41(5) does not give a lot of direction, aside from the sign that the arbitral court must 'offer the parties the chance to introduce their perceptions on the objection'. Rule 41(5) is silent and is a point to be noted, is that as to if the sped-up procedures must be done either orally or only through written documents.

REVIEWING AS TO WHEN CAN A CLAIM BE '*MANIFESTLY WITHOUT LEGAL MERIT*'?

A 'concise expression vulnerable to various meanings becoming the most debatable and concerning issue in the translation of Rule 41(5) is the specific importance of 'manifestly without legal merit'. The legal merit must be 'manifested' and it is the absence of it which hinders the procedure. As noted, the arbitral court must implement or apply the Rule, it might be accepted that 'the importance of the new guideline was planned to mirror the important significance of the older established arrangements and the word 'manifest' is likewise utilized in specific arrangements of the ICSID Convention.

THE QUALIFICATION FOR AMBIGUOUS RELATION WITH THE PRIMA FACIE TEST: THE BATTLE OF LEGAL V/S FACTUAL GROUNDS:

The standard and novel process to concern claims which were 'manifestly without merit' and are made clear in the underlying proposition made by the ICSID Secretariat in the 2005 Working Paper. The modifier 'legal' was changed in the last content of the 2006 and was embedded. In order to stay away from improper or unnecessary discussions and get acquainted at this phase of the proceedings, this change was done. The Trans-Global case noticed that the term "legal" is evidently utilized in contradiction to facts and was understood after assessing the ICSID preliminary papers. After much deliberation, it presumed that it is 'rarely possible to access any claim on the legal merits of any case without additionally looking at the authentic reason whereupon that case is progressed is not forming basis. This has its inception in choices of the Permanent Court of International Justice (PCIJ) and the ICJ. Conclusions and references is regularly made to Judge Higgins' different assessment in Oil Platforms[11]. The tribunal declined jurisdiction over that specific case and the result of a disorientation of the petitioner to test standards. For instance, in Telenor v. Hungary[12] the arbitral court, subsequent

[11] Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161
[12] Telenor Mobile Communications A.S. v. The

to inspecting the realities affirmed by appellant and the legislative demonstrations griped of, resulted in findings that there is no proof to propose any action with respect to the legislature that distantly moved toward the impact of seizure.

Regardless of whether the 'realities claimed might be fit, in treaty arbitrations for investments, the aim of the by all appearances test is for the arbitral court to assess, at the jurisdictional phase of the proceedings, and whenever demonstrated, its establishing penetrates the BIT. In the expressions of the Salini tribunal, the use of the by all appearances test finds some kind of harmony between two restricting concerns.

THE SALINI CRITERIA

The Salini criteria[13] rose up out of the instance of Salini Construttori SPA and Italstrade SPA v Kingdom of Morocco[14]. This present tribunal's endeavor to characterize investment raised the "typical characteristics" approach of the FedEx Tribunal to an unmistakable jurisdictional necessity. Schreuer, upon whose proposal the choice was based, forewarned that the Salini measures ought not be viewed as unmistakable jurisdictional necessity every one of which must be met independently concerning the meaning of investment. Proponents depict the Salini rules as a target approach that upholds the recommendation that investment under the ICSID Convention has a standard implying that is detectable after the measures. This way, the standards made some aggregate prerequisites to characterize an investment under the ICSID Convention. Conversely, the common attributes approach of the Fedax arbitral tribunal may not prompt the assurance of an investment where at least one of the set-up trademarks are missing.

The Salini measures have been condemned by ensuing ICSID arbitration tribunals as a formalization of the meaning of investment that could create a difficult patch with the arrangement of the State party and foreign investors on the meaning of "investment". The methodology, which is established on authoritative opportunity of the party, has not been effective in building up a by and large adequate meaning of investment under the ICSID Convention. Applying the Salini standards could prompt testing the jurisdictional necessities of the ICSID Convention as an issue of law. This is on the grounds that the Salini standards are "not a formal necessity for the finding that a specific movement or exchange comprises an investment."

One rival of the Salini models proposed that a "tenacious dissident" to the Salami rules is conceivable. The same commentator also takes note of that the

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Republic of Hungary, ICSID Case No. ARB/04/15.

[13] Prasad Aman, "Salini Criteria: A Strict-Deductive Approach Against the Principles of Article 25 ICSID " Available at SSRN: https://ssrn.com/abstract=3639087 or http://dx.doi.org/10.2139/ssrn.3639087

[14] Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco [I], ICSID Case No. ARB/00/4

Fedax arbitral tribunal just introduced a rundown of highlights that may make "investment" unmistakable in accordance with the ICSID Convention, while the Salini tribunal, "set up a rundown of formal prerequisites moulding a finding of jurisdiction" to fulfil the necessities of Article 25 (1) concerning the definition of "investment". The commentator dismissed the subtleties of the Salini measures and contended, all things considered, that the legally binding opportunity to characterize "investment" as a solid assumption under the ICSID Convention appears to be additionally persuading, in any case "a steady dissenter to the Salini standards might be found. Thus, ICSID arbitration statute uncovers a combination of contemplations of the meaning of investment under national unfamiliar investment enactment and material investment treaties.

THE EARLY DISMISSAL OF CLAIMS AND NEED FOR DISMISSAL IN ARBITRATION

From a procedural point of view, the constitutive instruments of international courts and tribunals are usually very rare, even at an early stage, in order to prevent misuse of judicial or arbitral proceedings, to include the express power of the courts and tribunals to assert an argument. One exception is Article 294(1) of the United Nations Convention on the Law of the Sea [UNCLOS][15] , which states that a court or tribunal created pursuant to Article 287 of the Convention shall, at the request of a party to a dispute referred to in Article 297, decide, or may decide, whether the claim constitutes an abuse of legal procedure or whether the claim constitutes an abuse of legal process. If the court or tribunal decides that the argument constitutes an abuse of the legal process or is prima facie baseless, no further action shall be taken in the case.' Such a prosecution is not provided for by other statutes of international courts and tribunals, such as the ICJ Statute. ICJ has the ability to dismiss claims at an early stage, although limited to jurisdictional issues. It does so only if it is clear from the outset that there is no ground on which jurisdiction may be based and that it is therefore not capable of dealing with the case[16]. This happens when the court deems that such is a manifest absence of jurisdiction and considering the sound administration of justice it demands that the case in question be excluded from the list.

Prior to the entry into force of Rule 41(5), the ICSID Convention did not include any clause relating to the early dismissal of claims which could constitute violation of direct access to investment arbitration. Article 36 of the ICSID Convention provides that the Secretary- General may refuse to register an application for

[15] United Nations Convention on the Law of the Sea, 1833 UNTS 396

[16] E. Lanterpacht, "Christop Schreuer: An Appreciation", International Investment Law for the 21st Century: Oxford University Press, Oxford 2009), Pg 1-5.

arbitration if, on the basis of the information contained in the request, he feels that the dispute is manifestly outside the jurisdiction of the Center. As noted by the former Deputy Secretary-General of the ICSID,' the Secretariat is powerless to avoid the introduction of proceedings that are transparent but frivolous on the merits of this jurisdictional[17] threshold.

THE NEW ICSID RULES: STATE OF PLAY

Together with the amendment of the provision contained in Rule 41(3) of the ICSID Arbitration Rules, which now imposes a voluntary rather than automatic suspension of proceedings on the merits following the formal raising of an appeal to jurisdiction[18] Rule 41(5) was adopted in 2006 to allow arbitral tribunals to dismiss claims which are manifestly without legal merit at an early stage[19]. Only a decision of the ICSID Administrative Council is required to make certain changes to the Arbitration Rules[20]. ICSID Secretariat presented a recommendation to include this new provision in a 2004 Discussion Paper and a 2005 Working Paper[21]. It stated in its 2004 Discussion Paper that, despite the success of arbitration under the ICSID Convention, questions were raised, with respect to the early dismissal of claims which are manifestly unfounded. Consequently, the Secretariat recommended that a 'special procedure' be included in the Arbitration Rules to allow the arbitral tribunal to dismiss all or portions of a claim on an expedited basis.

In order to increase the effectiveness of ICSID arbitration, the new clause was expressly implemented. The ICSID Secretariat's proposal is substantially identical to the final version of Rule 41(5) adopted in 2006.In addition to some formalist changes, the key differences are the addition in the final version of the rule of the term 'legal' to the expression 'manifestly without merit' in the original proposal. Owing to the implementation of the new paragraph in Rule 41, three forms of preliminary objections can now be posed by the parties to the ICSID Arbitration. The first complaint is the 'standard' complaint found in Rule 41(1), which allows the parties to object that the argument is not within the competence of the Centre. The two other choices are a direct consequence of the implementation of Rule 41(5), as it requires the parties to present two forms of expedited objections, one relating to the jurisdiction of the tribunal and the other relating to the merits of the conflict. Although the wording of Rule 41(5) is not clear in that regard, it was noted that 'in the light of the discussions that followed the Working Paper and of the comments received, it

[17] Antonio R. Parra (2007) 'The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes', 22 (1) ICSID Review – International Investment Law Journal 56, p. 65

[18] Rule 41 (5) and (6) of the ICSID Arbitration Rules.

[19] Ibid

[20] Article 6, ICSID Convention

[21] Article 66, ICSID Convention

was evident that expedited challenges to jurisdiction could not be excluded from the scope of Rule 41(5). Rule 41(5) also contains expedited objections to jurisdiction, although it was intended primarily to reject frivolous claims on the merits.' Moreover, it is evident from a close reading of the 2004 Discussion Paper and the 2005 Working Paper of the ICSID Secretariat referred to above that the explanation behind the implementation of the expedited procedure was not only the fact that the Secretary-General was not willing to deny the registration of a manifestly baseless argument as to the validity of the conflict, but also the fact that the Secretary-General was not in a position to reiterate the argument.

IMPLEMENTATION OF ICSID RULE 41(5): CASE ANALYSIS

Despite the strong reasoning of its implementation in the ICSID arbitration act, the new regulation clearly left several issues open to debate. The definition of terms such as 'manifestly' and 'without legal merit' and whether the rule extends to merit-based as well as jurisdictional objections were not clear when the text of the rule as adopted was taken into account. To date , four tribunals have been faced with the application of Rule 41(5) and have therefore been called upon not only to enforce the new provision, but also to further explain its scope of application and the conditions under which a party may, at an early stage, attempt to dismiss a claim. Hereinafter, we attempt to analyze the three landmark cases.

A. Trans-Global Petroleum INC. v Jordan[22]

The Trans-Global Petroleum case was the first time that Rule 41(5) had to be extended to the ICSID Tribunal. In this case, the complainant brought a complaint before the ICSID Arbitral Tribunal against Jordan for a USD 29 million investment in a Jordanian oil exploration company. Trans-Global reported that Jordan had initiated a 'systemic campaign to kill the Claimant's investment by preventing the Claimant from playing any further role in the creation of those oil deposits' upon the discovery of the presence of oil deposits in the Dead Sea and Wadi Araba basin. Accordingly, Trans-Global alleged infringement of the Jordan BIT of the United States[23], in particular of the equal and equitable treatment standard, impairment of the investment by unfair and discriminatory steps, and infringement of the duty to consult. An appeal under Rule 41(5) was lodged on the ground that the arguments of the applicant were manifestly without legal validity. First, it should be noted that, despite the absence of any procedural guidelines in this regard in the ICSID Convention or Rules, the Tribunal

[22] Trans-Global Petroleum, Inc. v. The Hashemite Kingdom of Jordan, ICSID Case No. ARB/07/25

[23] Christoph Schreuer et al., 'The ICSID Convention: A Commentary' (2nd edn., CUP, 2009), at Pg 543

agreed to schedule two rounds of submissions and a hearing to decide Jordan 's objection under Rule 41(5).The procedure thus followed indicates that, considering the expeditious existence of those preliminary proceedings, the Tribunal found it appropriate to conduct a reasonably in-depth assessment of the opposition referred to in Rule 41(5) of the claim.

This may be clarified by the fact that, since the new procedure is expeditious in nature, it is possible for the Tribunal to reject the argument by means of a final and binding award, and that the objection should then be subject to the Tribunal's careful review. The parties to the dispute were opposed to the application of Rule 41(5), particularly with regard to the principle of 'manifestly without legal merit,' and the Tribunal was therefore invited to interpret the rule. The stance of the claimant was that ICSID Rule 41(5) was 'aimed only at arguments that are transparently frivolous, advanced in bad faith or made to vex or embarrass the respondent[24].' On the other hand, the respondent claimed that the Tribunal should investigate whether the facts alleged by the other party were 'sufficiently plausible' to decide whether these facts were capable of constituting a violation of the BIT.

By referring to both its ordinary sense and its usage in other ICSID articles and laws, such as 'manifest excess of forces' in Article 52 of the ICSID Convention, and the interpretation thereof by other ICSID Tribunals and Annulment Committees, the Tribunal first described the term 'manifestly.' The Tribunal therefore confirmed that 'manifestly' requires that the objection be set 'clearly and clearly, with relative ease and shipping' and noted that 'the level required under Rule 41(5)' is therefore set high and confirmed the definition of 'manifestly' adopted by the Tribunal, in particular with regard to the strict and limited time-limits.

The Tribunal[25] also demanded that the phrase 'without legal merit' found in Rule 41(5) be explained, because the parties equally disagreed with the interpretation of that term. In fact, Jordan argued that the Tribunal should investigate whether the 'factual claims were sufficient to lift the probability that the specific argument was supported above a theoretical standard'. It was explained that the existence of the term 'legal' was specifically aimed at separating it from 'factual' in the expression 'without legal merit'. Nevertheless, the Tribunal agreed that the legal merits of any claims can seldom be determined without first reviewing the factual premise on which the argument[26] is made. However, the Tribunal did not examine the claimant's

[24] Ibid

[25] C. Schreuer, "The ICSID Convention: A Commentary", Cambridge University Press,Cambridge 2001, para119-122

[26] Judith Gill, 'Application for the Early Disposition of Claims in Arbitration Proceedings',ICCA Congress Series No. 14, Kluwer Law International (2009), pp. 513-525, at 520

position that the minimum conditions specified by the ICSID Convention and the Rules for the filing of a lawsuit, in particular those found in Articles 36(2) and (3) of the Convention and in Rule 2(e) of the ICSID Institution Rules. However, it remains an important point of debate, because, as the Tribunal has noted, it is difficult to understand how a Tribunal might determine the validity of the claim under the procedure provided for in Rule 41(5) if the applicant might send a 'shorn of all relevant factual allegations' Request for Arbitration.

In relation to factual scrutiny, the Tribunal also dismissed Jordan 's demands for a higher threshold, backed by the separate opinion of Judge Higgins in the Oil Platforms case before the ICJ and various ICSID decisions. Finally, the Tribunal dismissed the objection raised by the respondent under Rule 41(5) with respect to two claims but upheld the objection with respect to a third claim namely the alleged violation of the duty to consult provided for in Article VII of the US-Jordan BIT, because it was clear that the claimant had 'no legal rights under Article VIII of the said BIT. Nevertheless, it is important to point out that, with respect to first to claims, the Tribunal observed that they were 'manifestly without legal substance' in and of themselves.

The new rule, having taken into account the drafting history and the purpose of its inclusion in the ICSID Arbitration Rules, was undoubtedly clarified by the Tribunal and thus arrived at a reasonable interpretation and application of it in this case. It should be stressed that any comparison with the prima facie jurisdiction test, as used by the ICJ, was expressly rejected by the Tribunal. This underlines the sui generis existence of Rule 41(5) in international investment arbitration, which, as a rule, lies between the power of the Secretary-General of the ICSID to refuse to file an application for arbitration pursuant to Article 36(3) of the ICSID Convention and that of reviewing the jurisdiction of a tribunal pursuant to Rule 41(1). In that regard, it should be noted that an objection under Rule 41(5) aimed at the merits of the case, rather than the jurisdiction of the Tribunal, was confronted by the Tribunal here. The case between the parties was eventually resolved.

B. Brandes INV. Partners, LP v. Venezuela[27]

As per the facts of the case, Brandes, who was a licensed US investment advisor managed a large number of Compaña Anónima Nacional Teléfonos de Venezuela (hereinafter (CANTV) shares and American Depository Receipts. ICSID proceedings were launched against Venezuela in 2008 wherein Brandes argued that Venezuela 's acquisition of all CANTV's American Depository Receipts and shares below market value amounted to an expropriation and a breach of

[27] Brandes Investment Partners, LP v. The Bolivarian Republic of Venezuela, ICSID Case No. ARB/08/3

Venezuela 's duty not to take arbitrary and oppressive steps and to handle foreign investment equally and equitably. The parties disagreed, as was the case in Trans- Global, as to the exact meaning and conditions of the implementation of Rule 41(5). In essence, Brandes argued that the law is open only to objections relating to the merits of the case, that, in any event, the argument is not manifestly without legal merit, that the argument is not 'frivolous' or 'patently unmeritorious,' that the factual objections fall beyond the context of Rule 41(5) and, ultimately, that the ICSID Convention is an investor. The Tribunal first confirmed that the objections under Rule 41(5) which apply either to the tribunal's jurisdiction or to the merits of the case[28].

With regard to the question of fact which form part of objections posed pursuant to Rule 41(5), the Tribunal noted that the word 'legal' was included in the final version of Rule 41(5) in the word 'manifestly without legal merit' and found that the objection should concern questions of law rather than fact. At the same time, the Tribunal was aware that it was not always easy to distinguish factual and legal issues and referenced the above-mentioned Trans-Global citation of the Tribunal in that regard, but still agreed that 'the factual premise must ultimately be taken as claimed by the Complainant.'

The Tribunal in Brandes similarly dismissed the comparison with the prima facie jurisdictional test applied under Rule 41(1) with regard to the definition of 'manifestly' and agreed with the Tribunal's conclusions in Trans-Global case. As regards the burden of proof relating to the factual claims made by the applicant in its request for arbitration and subsequent pleadings in the course of the proceedings under Rule 41(5), the Tribunal observed that it was 'sufficient, at this stage of the proceedings, to consider, prima facie, the plausible facts raised by the applicant.' According to the Tribunal, a dismissal of the lawsuit would only be possible if the evidence were not manifestly of such a nature that the claim would have to be dismissed.' It rejected the objections posed by Venezuela, on the ground that both the question of the existence of a waiver and the question of whether or not an investor can be regarded as an applicant within the scope of the ICSID Convention are questions which involve an extensive examination of complex legal relations and of facts which, as provided for in Rule 41(5), are not sufficient for an expeditious procedure. Finally, in its judgement on jurisdiction, the Tribunal concluded that it did not have jurisdiction to hear the claim.

[28]ICSID Secretariat, 'Suggested Changes to the ICSID Rules and Regulations',, Working Paper of the ICSID Secretariat (12 May 2005), p. 7 available http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnouncePDF&AnnouncementType=archive&Announc eNo=14_1.pdf

C. Global Trading v. Ukraine Global Trading Resource Corp[29]

In the case of Global Trading Resource Corp., the Tribunal, after recalling that this was only the third time that a decision had to be made in relation to a claim pursuant to Article 41(5) and (6) of the arbitration act,it was especially mindful of its obligation to help form both an interpretation of the rule itself and of the process to be followed and referred to the previous two cases on several occasions. In this case, the Respondent contested that the plaintiffs were investors within the scope of the ICSID Convention and the BIT between the United States and Ukraine and lodged an objection under Rule 41(5). Since the objection was aimed at the jurisdiction of the Tribunal, the Court first affirmed Brandes' finding that the objections presented under Rule 41(5) could apply both to the merits of the case and to the jurisdiction of the tribunal.

It is interesting to note that the Tribunal went on to examine the laws relevant to the protocol to be followed. It correctly observed that Rule 41(5) includes no clear requirements in this regard, with the exception of the fact that it is appropriate for the parties to have the opportunity to be heard and that the Tribunal should inform the parties at or shortly thereafter of its decision at its first meeting. The Tribunal agreed that it was 'inevitable and still in the spirit of the Law' to hold multiple rounds of 'short and concentrated written arguments, complemented by two rounds of well-focused oral arguments.' The Tribunal subsequently turned to the issue 'when will a tribunal be properly assured that it has sufficient materials to summarily determine the matter?', which, as the Tribunal has noted, differs from the issue relating to the criteria to be applied for summary dismissal under Rule 41(5). The Tribunal found it appropriate to take the view that the Tribunal 'is under an obligation in the event that the objection is upheld, not only to be sure that the argument to which it is objected is' manifestly without legal merit,' but also to be certain that it has taken all the relevant materials into account before making a decision to that effect, with all the implications that result from it.' In other words, having reached a decision at a later stage of the trial, the Tribunal found that a tribunal faced with complaints under Rule 41(5) had a special responsibility to ensure that it had taken a decision based on all the legal and relevant knowledge it would have had. The Tribunal here observed that it was satisfied that at a later point there was no additional evidence that the parties might have provided.

As regards the criteria for the implementation of Rule 41(5), the Tribunal relied extensively on the two previous decisions faced by that rule. In relation to the definition of the term 'manifest', the Tribunal agreed with the conclusions of the Trans-Global Tribunal and subsequently analyzed whether or not

[29] Global Trading v. Ukraine Global Trading Resource Corp. (ICSID Case No. ARB/09/11)

the claim of the complainant was manifestly without legal merit. The Tribunal affirmed the position of Ukraine and ruled that the contracts of sale and purchase between the two companies and Ukraine were not an acquisition, but merely a commercial transaction which was not protected by the US-Ukraine BIT or by Article 25 of the ICSID Convention It therefore ruled that the claim was manifestly without legal merit and determined that 'given the novelty of the proceedings under Rule 41(5) of ICSID.

Principles Resulting from the Case Study

Despite initial reservations as to the effectiveness of the new law, it is evident from the cases referred to above that Law 41(5) plays an important role in the dismissal of claims which manifestly lack legal merit, either because of a manifest lack of jurisdiction or because the merits are manifestly irrelevant. A number of conditions under which the rule may apply may also already be distilled from these cases. Many interpretations, on the other hand, are compatible with both the wording of Rule 41(5) and its rationale, and it is also likely that this case-law would be confirmed by subsequent tribunals[30]

All Tribunals seem to adhere to the fact that 'manifest' should be interpreted as requiring the objection to be identified 'clearly', with relative ease and dispatch,' as specified by the Trans Global Petroleum Tribunal. Secondly, all the Tribunals have accepted that the objection may affect both the Tribunal's jurisdiction and the merits of the dispute. Thirdly, it seems that the Tribunals are unanimous that the objection should involve legal rather than factual claims. Again, such an interpretation is consistent with the language of Rule 41(5), which was revised in its final edition, as stated earlier, by adding the word 'legal' in the notion of 'without merit.

From a procedural point of view, it should also be added that all the tribunals found it appropriate to hear the parties in the cases addressed, with the Trans-Global Tribunal also arranging two rounds of written and oral arguments. From the point of view of the time-frame for dealing with the objections under Rule 41(5), it can be noted that the tribunals were all reasonably quick to offer their awards and that the time between the registration of the claim and the decision on the objection under Rule 41(5) was also relatively short.

Finally, it should be added that the proceedings referred to in Rule 41(5) are subsidiary proceedings, because the Rule specifically states 'unless other expedited proceedings for making preliminary

[30] Working Paper of the ICSID Secretariat,"Suggested Changes to the ICSID Rules and Regulations", p. 7 available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnouncePDF&AnnouncementType=archive&AnnounceNo=14_1.pdf

objections have been decided by the parties.'

THE SINGAPORE INTERNATIONAL ARBITRATION CENTRE (SIAC)

The new release of the Arbitration Rules of the Singapore International Arbitration Center (SIAC), presents a new yet standard and innovative procedure for the early dismissal claims or defenses that stands on the concepts without legitimacy. The new SIAC procedure is advancement in global arbitration[31]. It is pointed toward tending to a typical worry among arbitration clients with respect to the time and cost of arbitral proceedings. In the event that it gets on, SIAC's advancement may prompt a significant and alluring movement in worldwide arbitration culture towards more productive disposal of meritless contentions.

A. The Background

Summary disposal has for some time been a component of custom-based law court procedure which also includes Singapore. Regularly such procedures permit summary judgment to be heard into circumstances where: (a) there is no compelling issue to be attempted; or (b) there is no convincing explanation behind a full hearing. By appearing in contrast with respect to the relation between national litigation, international commercial arbitral institutions have not to date explicitly gave an identical summary procedure. They have very simply acknowledged the clarification for the nonappearance of such procedures and the need to show due process in the lead of the arbitration so as to connect with implementation rights, particularly international rights. It would be a distortion, in any case, to state that arbitration has constantly included full oral hearing, on the merits of a case. Arbitration provisos accommodating documents and report are notable.

Keen to avoid costly and lengthy litigation proceedings for claims which may often be indefensible, the tribunals who have been a major user of court litigation (and summary disposals) stressed upon the need for a faster lexology and need for refinement in rules.

B. The Due Process Paranoia

In 2015 a survey conducted by University of London International Arbitration in the renowned case of Queen Mary found that 68% of clients distinguished expenses and 36% point towards the lack of speed as among the most exceedingly dissatisfying qualities of International Arbitration.

It recognized "an apparent hesitance by tribunals to act definitively in specific circumstances inspired by a paranoid fear of the award being tested based on a party not having gotten the opportunity to present or explain its perspective completely ('due process paranoia')" as a

[31] John Choong, Mark Mangan, and Nicholas Lingard; "A Guide to the SIAC Arbitration Rules", 2nd Edition;Published: 08 April 2018,ISBN: 9780198810650

developing worry in international arbitration. In order to give authorization to arbitral awards around the globe and support the accomplishments of arbitration conducted on International Platform, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards was made to play a key role. In the case of Mr Saba Fakes v The Republic of Turkey the arbitral tribunal gives off an impression of being clashed in its own examination of the meaning of legal merits in accordance with commitment to the host's State economic development. It believed that the meaning of "manifestly legal merit" ought to be by rules, "inside the structure of the SIAC" without dismissing its ground for making the rule.

Subsequently, authorities in general were hesitant to decide any claims prior to hearing full evidence. Where the tribunal has taken legally reasonable yet a strong standpoint case the board choices than arbitrators may fear and all things considered, while reality fluctuated from locale to purview, there was an overall sense that national courts are stronger in offering impact to claims in arbitrations. In any case, for the rules of the significant international commercial arbitration organizations it was not like in domestic or national court procedures, instruments similar to summary judgment have at no other time had been introduced[32].

[32] Ibid

C. The SIAC's New Rule 29 Early Determination Procedure

The SIAC Rules 2016, which came to effect on 1st August 2016, intended to help with the speedy and effective determination of claims where suitable and contained a spectrum of changes. Rule 29 was the most critical and inventive change which talked about the new early dismissal procedure. In conditions where party may some way or another be constrained to experience a full arbitration process to overcome trivial claims or defenses, Rule 29 is effective toward tackling due process paranoia up front on by essentially decreasing duration of time and expenses.

Under SIAC's Rule 29, any party may, whenever, applies to the arbitration tribunal for the early dismissal of a claim or defenses that is "manifestly without legal merits" or "manifestly outside the jurisdiction of the tribunal". Whether to permit the application to continue or not when an application for early dismissal is recorded[33], the arbitral court must evaluate in its circumspection. In the event that it is permitted to continue, the arbitral court must issue a contemplated request or grant within 60 days of the application "subsequent to allowing the party the chance to be heard". Whether it will affect the arbitral awards to which it

[33] Josephine Kaiding , Brendan Casey." New SIAC Rules: The Need For Refinement", available at https:// ://www.mondaq.com/arbitration-dispute-resolution/973958/new-siac-rules-the-need-for-refinement

gives rise to and how arbitrators will apply Rule 29 by and by is not yet clear. The procedure as been approved by an arbitral establishment of SIAC and the two-venture process of express prerequisite that the party be given the chance to fight their case should help ease due process worries as established under SIAC.

D. The SIAC Rule 29 v/s The ICSID Rule 41(5); A Vivid Comparison

After 2006, rules that didn't follow ICSID and joined summary disposition provisions were revised to fit in and cater for international commercial arbitration. This changed distinctly in 2016, when the SIAC introduced changed rules of arbitration with another Rule 29, which is a summary procedure demonstrated after ICSID Rule 41(5). Rule 29 was viewed as a "game- changer" for International Commercial Arbitration,

The utilization of language like ICSID Rule 41(5) is expected to permit parties and tribunals to mull over existing ICSID jurisprudence. Simultaneously, Rule 29 develops ICSID Rule 41(5) in a few different ways:

a) It determines that the reason for early dismissal takes the consideration both the "manifest lack of jurisdiction" and the "manifest lack of merits".

b) It allows the early dismissal of both "claims" and "defenses". It is however not yet clear, how SIAC will interpret the word "defenses" in Rule 29, and in specific whether it would limit its application to definitions of "defenses" or whether it would apply it to possibly all questions brought by the opponent up in his presentation of claims and defenses.

c) It doesn't force any limit of time on a plea for early dismissal of claims or defenses. A plea of application can be recorded, in principle, after the filing of documents or then again after record creation. In this way, in spite of the fact that it is as an "early dismissal" arrangement, Rule 29 is practically speaking prepared to do more extensive application for the said rule.

If to permit or not the early dismissal plea or application is additionally given in Rule 29.3. Whether there is any maltreatment of the summary mien procedure also rests with the tribunal and it is empowered to check any such maltreatment and can additionally be endorsed by unfavorable expenses orders. In conditions where the tribunal chooses to continue with a plea of application, it hosts to offer the mediums or parties a chance to be heard, prior to concluding if to give, in entire or to a limited extent, the application[34]. Inside

[34] Vikrant Sopan Yadav; "Emergency arbitration

60 days of the date of the recording of the plea, except if the Registrar concedes an augmentation, the tribunal needs to make a request or grant with reasons, which may be in summary structure[35].

For particular arrangement of rules for specialized questions including states, state-controlled elements or intergovernmental associations, in 2017, SIAC delivered new Investment Arbitration Rules (the "SIAC IA Rules"). The SIAC IA Rules join a summary aura procedure at Rule 26. With Rule 29 of the 2016 SIAC Rules, which are two contrasts: "manifestly inadmissibility" being an added ground for early dismissal; and, if the plea is permitted to continue, tribunals are needed to settle on early dismissal inside 90 as opposed to 60 days from the date of utilization are otherwise is similar to the early dismissal arrangement

The Implications of Rule 29

An arbitral organization that has just been developing its standing past its traditional client base in Asia can be a pioneering arrangement may well attract in new clients to SIAC. For financial organizations, which are regularly especially concerned that their question goal process ought to permit quick and proficient assurance of direct claims, Rule 29 will help give SIAC specific appeal to truly hesitant clients of arbitration[36]. Rule 29 may for instance prove to be meaningful for managing clear claims emerging from credit arrangements. It may widely affect international arbitration culture. Other arbitral institutions will observe the new procedure demonstrates effective and is utilized practically speaking. Practically identical arrangements will clearly continue in other institutions rules. Additionally, in order to permit early assurance applications all the more widely, Rule 29 may urge international arbitration specialists to, and not just under the SIAC Rules.

As SIAC Rules in their arbitration arrangements as it oversees arbitrations situated anyplace on the plane and there is no requirement for party to mediate in Singapore to exploit the standardized novel Rules, the clients of International Arbitration for whom accessibility of early assurance procedures in fitting cases is of specific significance and they may get interested to consider joining the same.

under institutional arbitration rules: A comparative study" ;Volume 3; Issue 3; May 2017; Page No. 158-160,International Journal of Law.ISSN: 2455-2194, RJIF5.12.www.lawjournals.org

[35] Ibid

[36] Judith Gill, 'Application for the Early Disposition of Claims in Arbitration Proceedings',ICCA Congress Series No. 14, Kluwer Law International (2009), pp. 513-525, at 520

CONCLUSION: A FUTURE OUTLOOK; LOOKING FOR REMEDIES AND IMPROVEMENTS

In this paper we argued in the view of the substantial growth in the early dismissal of the claims. We tried to find out the common principal which was applied by the tribunal in through certain case laws. Many of these are not fulfilling the idea of the adopting the early dismissal of the claims and defenses. Through the paper we set to endeavor and break down the tools accessible to international courts and councils for the dismissal of plainly unmeritorious cases on an outline premise. The most recent in debate settlement components to profit by such a methodology has been ICSID mediation, to which the primary piece of our investigation has been dedicated. Protests compliant with the new ICSID Rule 41(5) have been brought up in our discussed case studies which up until now, allowed the chance to explain a portion of the difficulties which may emerge in the utilization of the standard. While this provision is adopted for the purpose of the serving the timeless and effectiveness, the questions arise in case of the Global Trading v Ukraine there was almost after ten month the award was given after the filing of the objection. The rule is still at its preliminary stage and there still persists hesitance to its broad application as deducted from the paper.

Further from the above discussion we drawn a positive conclusion from these rules which we observe in the above discussed case law related to this provision which equally established few basic standards which all tribunal have applied up until now. All in all, notwithstanding the cases of general arrangement between all tribunals, one may take note of a distinction between the norms utilized. Necessitating that the realities be 'prima facie conceivable' instead of expecting them to be valid, except if 'manifestly incredible, frivolous, vexatious or mistaken or made in dishonesty'. rules where a 41(5) complaint might be effectively brought up in future incorporate, in expansion to the ones found in the assertions held up until now, situations of unimportance of the arrangement *ratione temporis*, or issues of show absence of attribution of a purportedly illegitimate act to the respondent (an issue regularly to be chosen at the benefits phase, but which may loan itself well to a 41(5) kind of assessment.

Huge numbers of these are away from of the thought fundamental the appropriation of the standard, and will most presumably be affirmed by future tribunals. Besides, the generally brief timeframe outline in which these Tribunals have figured out how to deliver their final decisions remains as a distinct difference to the extensive methods previous tribunals needed to set out on, even to evaluate plainly unmeritorious cases. Nonetheless, one ought to be cautious about course in not taking this method too softly. So, it is clear from the above discussion that in

future this concept of the early dismissal of the claims without legal merit will play a vital role in the field of the investment arbitration and it is equally very important rule in the field of the international commercial arbitration. It will go to play a very important role in SIAC as well.

Though we can observe that there are several criticisms of this rule but this rule play an important role in order to make the arbitration process very effectively. It reduces the amount of time consumes in order to dismiss such claims which are without legal merit, and it also play an important role in order to reduce the cost of the arbitration overall despite of the several criticisms these rules are very important role in arbitration. Along these rules has many positive impacts on the arbitration of the both forum and is set to design a new era for arbitration.

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JURISPRUDENTIAL CONTOURS OF ENVIRONMENTAL CRIMES IN INDIA: A CRITICAL STUDY WITH SPECIFIC REFERENCE TO CRIME REPORTING, TRIAL AND SENTENCING

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ABSTRACT

Traditionally, for environmental protection, reliance has often been made on remedies under civil law, like torts. Though historically, there are instances of application of Criminal Law for the protection of environment, it has largely been ignored whenever the issues of environment were concerned. Criminal Law has been instrumental in addressing several social, economic and political problems and so is the case with environment. Criminalising the damage caused to the environment in the form of environmental crime has proved effective. Several laws have been passed to criminalise environmental damage. Industrial development and immense pressure on the resources have rendered the protection of environment an immediate concern for all of us. Due emphasis on environmental protection has also been laid down in the Indian Constitution. The Supreme Court of India has declared clean and wholesome environment as a fundamental right under Article 21 of the Constitution and has zealously safeguarded the interests of mankind. The Parliament has also inserted Article 48A and 51A(g) in the Constitution in order to further the environmental interests. Traditionally, we have relied upon civil remedies for environmental protection. However, they were not found to be sufficient and so, we resorted to criminal sanctions. In India, we have provisions for environmental protection under the Indian Penal Code 1860 as well as the Code of Criminal Procedure, 1973. On one hand, provisions regarding nuisance have been included under chapter XIV of the Penal Code, on the other hand, Section 133 of the Code of Criminal Procedure has been instrumental in protecting the environment against damage. Laws relating to environment have existed in India even before the Stockholm Conference of 1972. However, India has witnessed the enactment of several other laws for environmental protection including penal provisions under different statutes for example Wildlife Protection Act 1972, the Water Act 1974, Air Act 1981 and Environmental Protection Act 1986. The National Green Tribunal Act 2010 also provides for offences committed by companies and penal provisions for non-compliance of the orders of the Tribunal. But the recent data released by the NCRB regarding environmental crimes reflect a sorry state of affairs. Reporting of such crimes, trial and sentencing remain major concerns. It is important to critically analyse such penal provisions in India, their enforcement and sentencing in cases of environmental crimes.

Keywords: *Environment; Crimes; Strict Liability; Punishments; Sentencing*

INTRODUCTION

Criminal Law is as old as our civilisation and has attached immense importance since time immemorial.[1] In order to understand the evolution of Environmental Jurisprudence and role of "Criminal law as an instrument of Environmental Protection", it is pertinent to have certain historical considerations. Even a cursory view of the legal history would suggest that a traditional resort to Criminal law has been made to solve several social, economic and political issues.[2] Environment is no exception to this. The first efforts to codify the aspect of environmental protection in India came from Kautilya, the Prime Minister of Chandragupta Maurya.[3] As early as 300 B.C. Kautilya realised the importance of protection of environment and mandated the rulers to protect forests and animals. There were specific rules on the State to maintain forests, selling and damaging of trees and protection of Wildlife.[4] Penalties were also prescribed for the violation of such rules. Similar writings were also found in the fifth Rock Edict of Ashoka.[5] Indians have worshipped the nature in their religious and cultural practices also. Thus, it is pertinent that the concerns of the environment and its protection have existed in India since ancient times.

In the present era, industrial development and immense pressure on the resources have rendered the protection of environment an immediate concern for all of us. The advent of an environmental revolution is not a historical accident but it's an inevitable development which has taken place in the recent past because of the unprecedented damage caused to the environment.[6] Increase in population and hike in pollution has added to this menace. The concern for environmental protection was raised for the first time at an International level at the first UN Conference on the human environment which took place at Stockholm in the year 1972. It sowed the seeds of global environmental governance.[7] It led to the formation of United Nations Environmental Program to promote sustainable development and safeguard the natural environment. As a result of this conference the States were required to legislate for environmental protection. The then Prime Minister of India, Indira Gandhi attended the conference.[8] In 1976,

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[1] RAM CHANDRA NIGAM, LAW OF CRIMES IN INDIA. (Asia Pub. House, 1965).

[2] Antonio Vercher, "*The use of criminal law for the protection of the environment in Europe: Council of Europe resolution* (77) 28." NW. J. INT'L L. & BUS. 10 (1989): 442. Resolution (77) 28 Northwestern Journal of International Law & Business Vol 10 Issue 3 Winter

[3] See SHYAM DIVAN, and ARMIN ROSENCRANZ. ENVIRONMENTAL LAW AND POLICY IN INDIA: CASES, MATERIALS, AND STATUTES. Vol. 2. New Delhi: Oxford University Press, 2001.

[4] *Ibid.*

[5] ROMILA THAPAR, AŚOKA AND THE DECLINE OF THE MAURYAS. (Oxford University Press, 2012).

[6] Judson W. Starr,"*Countering Environmental Crimes*." *BC ENVTL. AFF. L. REV.* 13 (1985): 379.

[7] *Supra* Note 2 at 442. It provided for 26 principles for global environmental governance.

[8] Indira Gandhi Criticized the double standards of the developed countries towards pollution. She emphasized that for the Third World development cannot be compromised. See generally, Oxford

42nd Constitutional Amendment was passed which introduced Article 48 A and Article 51 A (g)[9] of the Constitution, which mandates the state to protect the environment.

In India, Water Act of 1976, Air Act of 1981 and Environmental Protection Act of 1986 have been passed in furtherance of the same.[10] The Supreme Court of India played a vital role in protecting the environment. In one of the earliest cases on environmental issues in India, *Subhash Kumar v. State of Bihar*[11], the Apex Court held Right to water as fundamental Right. In RLEK case the apex court has held that right to whole some environment is a fundamental right under Article 21 of the Constitution.[12]

The lockdown which was imposed across the world in 2020 and even in the current year 2021 has manifested how the human activities have adversely impacted the health of the environment as the restrictions have improved the quality of the environment.[13] However, such restrictions have been compulsorily imposed in order to have minimum public interactions and maintain social distance so that the virus might not spread and certainly not for the environment.[14]

Criminal Law has been resorted for better results in environmental protection. However, history also reveals that Criminology has relatively shown little interest in the matters of environment.[15] Non-compliance of environmental law provisions causes significant damage to the human health and the environment.[16] Criminal sanctions for environmental breach have existed in almost all jurisdictions but at the same time it cannot be denied that civil remedies have always been given a preference as compared to criminal enforcements which has actually taken a backseat.[17] We have heavily relied upon civil remedies in the recent past ignoring the importance of criminal sanctions and the present paper is a critique of this very approach.

THE OBJECT OF CRIMINAL LAW

It would be difficult to understand the role of Criminal Law in the enforcement of

Handbook of Environmental laws P.B Sahashranaman, (Second Edition, Oxford).

[9] Article 51 A (g) of the Indian Constitution. It imposes a duty upon every citizen of India to protect and improve the natural environment and to have compassion for living creatures.

[10] V. K. Agarwal, "*Environmental laws in India: challenges for enforcement.*" BULLETIN OF THE NATIONAL INSTITUTE OF ECOLOGY 15 (2005): 227-238.

[11] 1991 SCR (1) 5

[12] Rural Litigation & Entitlement v. State Of U.P, 1989 AIR 594

[13] Available at: https://www.ncbi.nlm.nih.gov/pmc/articles

[14] *Ibid.*

[15] Carole Gibbs, Gore L. Meredith, Edmund F. McGarrell, and Louie Rivers III. "Introducing conservation criminology: Towards interdisciplinary scholarship on environmental crimes and risks." THE BRITISH JOURNAL OF CRIMINOLOGY 50, no. 1 (2009): 124-144.

[16] *Ibid.* Illustrations of these harms include infamous incidents of crime and negligence (e.g. Exxon Valdez; Bhopal; Hooker Chemical Company; Hout Bay Fishing Industries.)

[17] Robert W Adler, and Lord Charles "*Environmental crimes: Raising the stakes.*" *GEO. WASH. L. REV.* 59 (1990): 781

environmental regulations unless we address the basic purpose or the object of Criminal Law itself. Primarily it is because of the failure of the civil or administrative remedies to address the issues of violations. By and large the rationale behind having criminal sanctions is deterrence- to deter individuals from undertaking activities that society intends to prohibit and deems wrong.[18]

A Crime can be best understood as an act prohibited by the state and declared as an offense backed by punishment or sanctions. It can be distinguished from torts or other civil remedies which are primarily based on compensation or restoration. The necessity to declare an act to be criminal arises when the civil remedy would generally be not sufficient. In order to have a preventive measure or deter persons against violations an act is labelled Criminal.[19]

Crimes in general involve the element of *Mens Rea* that is guilty mind. Criminal Intent, knowledge, negligence etc are several connotations of *mens rea*. But the requirement of such guilty mind is not there in case of any civil liability such as the cases of torts. In cases of Criminal liability moral culpability is also involved as argued by most of the philosophers.[20]

Tort and crimes are also different in remedies. While torts involve compensation for the affected persons and some deterrence at the same time Crime has a punitive, preventive and deterrent agenda which is fulfilled by providing for punishments. The traditional objective of criminal sanctions is that of deterrence, retribution, incapacitation and prevention. Some of these may be achieved by imposing punitive compensations however it may be argued that the impact of criminal sanctions is much more than that of civil ones. The moral stigma of being blamed as a criminal may also justify criminal sanctions. Judge Richard Posner however suggests that Criminal Law should be reserved only for such acts for which pure monetary sanctions and injunctions are not adequate.[21]

ENVIRONMENTAL CRIMES

The expression "environmental crime" can be defined as certain behaviour that contravenes statutory provisions enacted to protect physical environment and ecology. Though the definition for environmental crimes may be of recent origin, but the efforts to reduce the environmental harm has been there since long. For that matter, in England, there was Disraeli's Rivers Act of 1876 (Prevention of Pollution Act) and in United States, the Refuse Act of 1899 was passed which marked the beginning of

[18] Mark A. Cohen, *Environmental Crime and Punishment: Legal/Economic Theory and Empirical Evidence on Enforcement of Federal Environmental Statutes*, JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY Volume 82 Issue 4 Winter 1992

[19] *Ibid.*

[20] Jerome Hall, "*Interrelations of Criminal Law and Torts",* 43 COLUM. L. REV. 753, 771,775-79, 967 (1943).

[21] Richard A Posner, *Economic Analysis of Law.* (Wolters Kluwer Law & Business, 2014).

efforts to control pollution through national legislations in UK and USA. However, in the past century, legislative bodies in the world have defined and provided criminal penalties for increased number of acts harmful to the environment.[22] Further, the Clean Air Act, 1963, the Resource Conservation and Recovery Act, 1976 and several other legislations provided criminal penalties for environmental breaches and violations.

Environmental Crimes are of varied nature and impact. It includes loitering, intentional discharge of hazardous waste, radioactive waste, polluting air, water and land, theft and destruction of flora and fauna. They have certain direct consequences and certain long-term impacts on the environment. The negligent leakage of methyl isocynide by the Union Carbide Corporation at Bhopal is one of the most deadly and ghastliest of environmental crimes. As per the official records around 3787 persons lost their lives and more than 20,000 were seriously injured. However, the activists claim that the death toll was around 8000 to 10000.[23] The residents of Bhopal are facing the wrath of this tragedy till date. That irreparable injury caused to thousands along with the environmental damage can never be compensated. The different dimensions of environmental challenges have led to several legislative interventions. Environmental crime has a long history of evolution protecting the water supplies, soil fertility and human health in general. However, as a separate branch of law it has developed quite recently.[24] Criminal law gradually came to be perceived as panacea, an ultimate solution to all problems, it was placed solely under exclusive judicial control, and so all violations of social norms providing punishments were brought together in a single criminal code.[25] Subsequently, a plethora of socio-economic, and environmental legislations produced a set of complementary penal norms outside the Criminal codes. [26]

CRIMINAL LAW FOR ENVIRONMENTAL PROTECTION UNDER DIFFERENT JURISDICTION

In the aftermath of the industrial revolution, several laws were passed by various countries for the protection of the environment. To illustrate a few, in Germany, the German General Industrial Code of 1845, in England the British Waterworks Clauses Act of 1845, in France the French Dangerous Industrial and Commercial Activities Act of 1917, and in Spain the Spanish Water Act of

[22] Neal Shover and Aaron S. Routhe, "Environmental Crime, Crime and Justice", VOL. 32 (2005), PP. 321-371, CHICAGO UNIVERSITY PRESS

[23] Bhopal gas tragedy: What had happened this day 33 years ago that killed thousands? *Available at* www.indiatoday.in last visited on 24th April 2019

[24] GURKIRAT KAUR, ENVIRONMENTAL CRIME, (Shree Publishers New Delhi,2014)

[25] For India it has been the commencement of Indian Penal Code, 1860

[26] *Supra* Note 2 at 442-444.

1878 were passed.[27] Environmental protection however gained much momentum in late seventies and early eighties. It brought about significant changes in the criminal enforcement of Environmental Laws. Cohen argues that in United States even though the Refuse Act of 1899 made it a criminal offense to discharge any refuse into navigable waters, the actual criminal enforcement of environmental regulations is a relatively new phenomenon.[28] A comprehensive program for investigating, prosecuting and punishing environmental crimes offenders at the Federal level was taken in United States in 1982 which has witnessed a lot of success.[29] In Europe, Resolution number (77) 28 could be considered as the starting point for a more systematic use of criminal law for the protection of the environment.

These statutes contain provisions which aimed at protecting environment in general and preventing environmental pollution in particular. Apart from these provisions, the growth and development of industries and its environmentally disastrous consequences have forced some governments to look for new methods of environmental protection to complement and supplement those already existing. As a consequence, criminal law has turned out to be one of the most effective complimentary means for such protection. Owing to the importance of Criminal Law, this article would further unmask the role of criminal law as an instrument of environmental protection.

ENVIRONMENTAL CRIMES IN INDIA

Umpteen environmental legislations have been passed by the legislature in India for curbing the menace of environmental degradations but the results are not quite satisfactory. The Indian Penal Code, 1860 itself recognises certain acts against environment to be offences. A complete chapter is dedicated as offences against Public Health, Safety and Convenience.[30] The Code also provides for a "negligent act likely to spread infection or disease dangerous to life" punishable under Sec. 269 IPC., a "malignant act likely to spread infection or disease dangerous to life" under Sec. 270 IPC., or "making atmosphere noxious to health" punishable under Sec. 278 of IPC. Section 133 of the Cr.P.C., 1973 provides for procedure to remove the public nuisances which can be redressed. This provision under Cr.P.C is preventive in nature which is to be exercised by the executive magistrates to prevent nuisance.

[27] *Ibid.*
[28] *Supra* Note 15
[29] *Ibid.*

[30] Sec. 268 of IPC, 1860 provides that "a person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger, or annoyance to persons who may have occasion to use any public right."

In the backdrop of the Stockholm Conference the first legislation that was introduced in India was the Water (Prevention & Control of Pollution) Act, of 1974. It was a comprehensive legislation for preventing water pollution which provided for establishment of Central and State Pollution Control Boards. Section 44 of the Act provides for a statutory minimum of an imprisonment of 1 year six months with a maximum of six years.[31] The Act also provides for an enhanced punishment under Section 45. It also provides for offences committed by the companies.[32] If no penalty has been provided specifically an offence shall be punishable up to an imprisonment of three months. [33]

The Indian Wildlife Protection Act of 1972 provides for protection of Wildlife in general by prohibiting wildlife hunting and protecting endangered species. Section 51 of the Act prescribes for penalty for the violation of the provisions of this Act and also for noncompliance of the breach of the conditions of license or permission granted.[34] It prescribes for an imprisonment ranging from three years up to six years in special circumstances. One of the specific features of the Act is that a presumption certain cases for example when a person is in custody of certain animal or animal product like meat etc, can be raised against a person who is unlawful possession, custody or control of such captive animal, animal article, or meat. The burden of proof lies on that accused person in such cases.[35] Recently, a man was arrested in *Haldwani* District of Uttarakhand for possessing 25 turtles which is an animal specified in Schedule I of the Act and the punishment for its possession ranges from 3 years to 7 years.[36]

The Environmental Protection Act, 1986 deals with regulation of Environmental Pollution and hazardous wastes. Section 15 of the Act makes the persons liable for punishment if they act in violation of the provisions of the Act.[37] The Act also makes those persons in charge of the

[31] Section 44 The Water (Prevention & Control of Pollution) Act, 1974.
[32] Section 45 The Water (Prevention & Control of Pollution) Act, 1974 which prescribes for an enhanced penalty after previous conviction.
[33] 45A The Water (Prevention & Control of Pollution) Act, 1974.
[34] Section 51 The Wildlife Protection Act 1972.

[35] Section 57 of the Wildlife Protection Act 1972
[36] https://timesofindia.indiatimes.com/city/dehradun/25-vulnerable-category-turtles-rescued(13th March 19)
[37] Section 15. "PENALTY FOR CONTRAVENTION OF THE PROVISIONS OF THE ACT AND THE RULES, ORDERS AND DIRECTIONS
(1) Whoever fails to comply with or contravenes any of the provisions of this Act, or the rules made or orders or directions issued thereunder, shall, in respect of each such failure or contravention, be punishable with imprisonment for a term which may extend to five years with fine which may extend to one lakh rupees, or with both, and in case the failure or contravention continues, with additional fine which may extend to five thousand rupees for every day during which such failure or contravention continues after the conviction for the first such failure or contravention.
(2) If the failure or contravention referred to in sub-section (1) continues beyond a period of one year after the date of conviction, the offender shall be punishable with imprisonment for a term which may extend to seven years."

companies directly liable for the environmental crime committed by the companies.

The Indian parliament has passed the National Green Tribunal Act, 2010 and the National Green Tribunal has been established under the Act on 18th October 2010 with an objective to provide a specialized forum for speedy and effective disposal of cases related to environmental protection, conservation and for seeking compensation for damages to persons and property by the violation of environmental laws. It further intends to ensure the right to healthy environment to the people of India, which is guaranteed under Article 21 of the Constitution. The principal bench of NGT has been established in Delhi apart from regional benches at Pune, Bhopal, Kolkata and Chennai. The Act provides for a Chairperson who is a retired Supreme Court Judge. Section 26 of the Act provides for penalty for noncompliance of the orders of the Tribunal.[38] The NGT has been quite active in the recent times. Recently, NGT has banned a road construction project proposed through the core area of Corbett National Park for protecting the flora and fauna in that region.[39]

NCRB DATA ANALYSIS

Environment related crimes has constituted one of the major portions of the crime statistics. According to the National Crime Report Bureau data of 2016 out of 24604 environmental cases which were pending for trials in the Indian courts, around 3457 cases have been disposed of in 2016. Around 21370 cases were pending under the Forests Act, 1927, which comprises the substantial portion of environmental crimes in India. This was followed by the Wildlife Protection Act under which 2303 cases were pending and 207 cases have been disposed of in the year 2016. It was further followed by offences under Environmental Protection Act 1986, Air (Prevention & Control of Pollution) Act 1981, and Water (Prevention & Control of Pollution) Act, 1974. The report reveals a pendency percentage of around 85.9 percent.[40]

If we refer to the 2014 data released by NCRB only 5835 offences under environmental crimes have been registered all over India which is much less than the number of murder cases registered in that year which is 33981. It clearly manifests the non-identification and non-registration of environmental crimes in India.

In the year 2016 only, 4,732 environmental crimes were registered while 1,413 cases were pending police investigation. Cases pending in the courts

[38] Section 26 of the National Green Tribunal Act, 2010 provides for "Penalty for failure to comply with orders of Tribunal.

[39] *Available at* timesofindia.indiatimes.com/city/dehradun/ngt-bans-construction-of-road-proposed-through-core-area-of-corbett-reserve/articleshow

[40] *Available at:* ncrb.gov.in

were at an overwhelming 21,145. These are the cases which are pending in the subordinate courts in India. The plight of the National green Tribunal which has been established with lot of expectations is also not great as the NGT forced to close its regional benches in 2018 due to shortage of officers and staff.[41]

As far as 2016 data is concerned, the number of cases being disposed of per day stands at 9.3 on an average. At this speed, it will take around six years for the court to finish the existing backlog. To deteriorate the situation, 15 states registered an increase in environmental crimes between 2015 and 2016. States that witnessed the highest number of registered environmental crimes are Uttar Pradesh, Rajasthan, Maharashtra and Assam.

APPLICABILITY OF CRIMINAL LAW FOR ENVIRONMENTAL PROTECTION

The Supreme Court in *Indian Council for Enviro-Legal Action v Union of India*[42] has rightly observed: "If the mere enactment of laws relating to the protection of the environment was to ensure a clean and pollution free environment, then India would, perhaps, be the least polluted country in the world. But this is not so." Despite having more than 200 central and state statutes having some or the other concern with the environmental protection we have unfortunately failed to prevent environmental degradation which indeed has increased over the years.

Even though the utility of criminal sanctions for the protection of the environment cannot be ignored, criminal sanctions merely complement and supplement other regulatory measures. As rightly remarked by Hawke, "criminal offenses in the environmental context should support and supplement existing regulatory offenses relating principally to land, water and air pollution and nature conservation".[43] Philosophers like Hawkins believe that Criminal law does not have much role to play in environmental protection and it is hardly used.[44] In contrast Sally Hughes is of the opinion that the low prosecutions are result of the problem of bureaucracy, organization, and poor enforcement by public inspectorates.[45]

There are instances when the Courts of India have given a strong message by convicting environmental offenders. In April 2018, a Jodhpur Court has convicted a veteran actor Salman Khan under section 9 read with section 51 of the Wildlife Protection Act 1972 for killing a

[41] *Available at :www.economictimes.com* due to shortage of judicial members NGT has temporarily closed its regional branches in Pune, Bhopal, Chennai and Kolkata.

[42] 1996 (5) SCC 293

[43] Hawke, *Crimes Against the Environment,* (16 ANGLO AMERICAN LAW REV. 90 1987)

[44] K Hawkins, *Environment And Enforcement: Regulation And The Social Definition Of Pollution* 191 (1984)

[45] Hughes, *Bringing more Weight to the Green Corner, (*The Independent, July 21, 1989)

blackbuck long back in 1998.[46] In 2017 a Delhi Court has convicted the owner of a sweet shop for releasing untreated waste in river Yamuna under the provisions of water Protection Act of 1974. The case was filed by the Delhi Pollution Control Committee (DPCC) in June 2000. After 17 years the matter was decided and the person has been sentenced for an imprisonment of 2 years and a fine of 1 lac rupees along with the direction to pay 2.5 lacs to the Prime Minister Relief Fund.[47] Such convictions are rare and there is hardly any enforcement of environmental law provisions. The NCRB data mentioned above categorically mentions that only six cases under the Water act were disposed off in 2016 out of which three were acquitted.

BURDEN OF PROOF

The general rule of law is that the burden lies on the person who wants to prove his or her case and seek remedy. However, in certain cases under environmental legislations there is a reverse burden of proof. In such cases the burden to prove lies on those persons as to the absence of any injurious effect of the action who wants to change the status quo.[48] Reverse burden of Proof is an essential manifestation of the Precautionary Principle.[49]

The Indian Wildlife Protection Act of 1972 provides for a reverse burden of proof in certain cases when a person is in possession of an animal or animal product prohibited by law. Such a presumption of guilt is raised against the person and it has to be discharged by the offender.[50] Such provisions for reverse burden of proof shall be included in other environmental legislations too and the same would improve the conviction rate.

CONCLUSION

In India we have plethora of legislations related to environmental protection and environmental crimes in India. However, a large gap exists between the letter of law and the ground reality. The NCRB data of 2016 clearly shows not only the poor rate of disposal and conviction by courts but at the same time quite a lesser reporting of environmental crimes. Reporting of environmental crimes is real issue as these crimes are not seen as an immediate threat to the society, to the nation. Environmental protection has undoubtedly suffered owing to poor implementation of environmental laws.

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[46] *Available at* www.india.com/news/india/salman-convicted-in-blackbuck-poaching-case-under-section-951-of-wildlife-protection-act

[47] When the Court Convicted a Person for Polluting the Environment available at thewire.in/environment

[48] Wynne, *Uncertainty and Environmental Learning Global Environmental Change*, 1992

[49] Olson, James M. "Shifting the Burden of Proof: How the Common Law Can Safeguard Nature and Promote and Earth Ethic." *ENVTL. L.* 20 (1990): 891. Also see Hathcock, John N. "The precautionary principle-an impossible burden of proof for new products." (2000).

[50] Section 57 The Indian Wildlife Protection Act of 1972.

The establishment of National Green Tribunal has indeed been the most significant development for safeguarding the environmental interests in the recent past. The decisions of the tribunal have not only protected the flora and fauna of this country in several matters but has also served larger public interests by protecting the right to wholesome environment guaranteed under article 21 of the constitution. With the climate change in place and the ongoing pandemic of COVID19, giving life to environmental legislations becomes the need of the hour. Pollution is increasing at an alarming rate while the quality of air is depleting like anything. India has already witnessed an oxygen crisis in this pandemic. The citizens are also obliged to report environmental crimes and give up the lackadaisical approach towards environment. Crime reporting would lead to crime prosecution and will have a deterrent effect in the society. Awareness amongst the people for environment, specialized agency for investigation and prosecution of environmental crimes are the real issues.

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ORDINANCE MAKING IN INDIA: AN AREA OF RETHINKING

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ABSTRACT

In India, the ordinance is a conditional law to deal with extraordinary situation, made for a short period of time depends on the 'satisfaction' of the executive. The executive chooses ordinance route avoiding the legislative route of the Legislature and the 'satisfaction' required for the ordinance is still remained beyond the judicial scrutiny. As a result, the executive legislation is always a controversial issue and recent ordinances have refreshed the controversies. The issue of non-justiciability of the 'satisfaction' is an area requiring a fresh understanding and the author further argues that the judicial review of this 'satisfaction' may not be absolutely barred.

Keywords: *ordinance, legislation, satisfaction, judicial review*

INTRODUCTION

Since independence, the promulgation of Ordinance is a controversial issue in India. The Ordinances relating to the increase of the percentages of Foreign Direct Investment in insurance business and coal mine result fresh controversies against the exercise of executive power in law making[1]. The controversy is in particular relating to the scope of the power of executive legislation when India follows Parliamentary form of government and the act of law-making is specifically bestowed with the Parliament. The controversies are appeared to be continued as the issue of judicial scrutiny relating to the 'satisfaction' required for ordinance is still remained undecided. With this article we will look into the origin, prerequisites and the scope of the power of ordinance making provided with the Constitution. Why the executive chose the ordinance route? What is the judicial approach towards the issues related to the promulgation of ordinance? At last the areas of rethinking.

The ordinance is an executive power to make law of limited duration. The President can promulgate ordinance in case there is an extraordinary situation before the nation that requires new law to deal with this when at least one House (either Lok Sabha or Rajya Sabha) is not in session. For example, the Judiciary may within its due course hold a taxation law as unconstitutional when the Parliament is not in session. Then the Ordinance route is the followed to make law and to meet the situation and law results this route operates for a short period of time.

ORIGIN OF ORDINANCE ROUTE IN INDIA

The President of India is empowered with the power of ordinance making through Article 123 of the Constitution[2]. We never find the Ordinance mechanism in USA or UK. Both the countries are the follower of the separation of power where the legislation is exclusively deal with the Legislature. The origin of the ordinance may be traced in 18th century in India. According to section 36 of the East India

[1] The Insurance Laws (Amendment) Ordinance, 2014, and the Coal Mines (Special Provisions) Second Ordinance, 2014.

[2] Article 123 of the Constitution of India-
'(1) If at any time, except when both Houses of Parliament are in session, the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require.
(2) An Ordinance promulgated under this article shall have the same force and effect as an Act of Parliament, but every such Ordinance—
(*a*) shall be laid before both Houses of Parliament and shall cease to operate at the expiration of six weeks from the reassembly of Parliament, or, if before the expiration of that period resolutions disapproving it are passed by both Houses, upon the passing of the second of those resolutions; and
(*b*) may be withdrawn at any time by the President.
Explanation.—Where the Houses of Parliament are summoned to reassemble on different dates, the period of six weeks shall be reckoned from the later of those dates for the purposes of this clause.
(3) If and so far as an Ordinance under this article makes any provision which Parliament would not under this Constitution be competent to enact, it shall be void.'

Company Act, 1773[3] the Governor General had the power to promulgate ordinance. The Indian Council Act, 1861[4] empowered the Governor General with such power for the peach and good government of the territory, section 23. Then the Government of India Act, 1915 and the Government of India Act, 1935 provide with the power of the executive legislation. The Governor General had wide power of legislation according to Section 42 and 43 of the Government of India Act, 1935. He could make law on any subject, sometimes subject to the satisfaction of the Crown sometimes by his own. Section 88 and 89 conferred similar power to the Governor[5]

However, the independent India was also agreed to include this provision to the Constitution with some safe guards i.e., when both Houses are not in session and the President is 'satisfied' with the situation that an immediate ordinance is required to meet the situation (these conditions will be discussed in latter) he may promulgate ordinance. Such ordinance will remain in operation for 6 weeks only. The similar provisions were also included in the Constitutions of Pakistan and Bangladesh with little variation specially, relating to the span of the enforceability of the ordinance like in Pakistan an Ordinance prevails for 4 months.

PREREQUISITES AND NATURE OF EXECUTIVE LEGISLATION

The Presidential power of legislation i.e., to make law is a conditional power. First, the Houses are not in session and secondly, the President if satisfied that new law is urgent to deal with an unexpected situation that has taken place. Then, if the ordinance is promulgated it is required to be laid before the House of the Parliament when it reopens after the recess. The ordinance is a temporary law and shall cease to operate at the expiration of six weeks from the date of reassembly of the House in general. In this way the ordinance may remain in force for a maximum period of seven and a half months[6]. The ordinance is regarded as law like any legislation of the Legislature[7] and the said legislative power of the President is co-extensive with the power of the Legislature. It means that through ordinance the executive may bring any law which the legislature is empowered to legislate. In simple words, the ordinance making power enables the executive to legislate law when the law making through the Legislative procedure is not possible as the Parliament is not in session still, law is immediately required to deal with some suddenly developed unexpected circumstances. Again, an ordinance has all force of law as law

[3] Available at < https://archive.org/stream/indianconstituti00mukeuoft/indianconstituti00mukeuoft_djvu.txt > last visited on, 25/2/2015.

[4] *Ibid*.

[5] Jagadish Swarup, Constitution of India, vol. 2, (2nd Edition 2010), p. 1867.

[6] Article 174 of the Constitution

[7] A. K. Roy v. Union of India AIR 1982 SC 710

includes Ordinance also[8] and the ordinance is also regarded as law for the purpose of Article 21[9]. The similar provisions are also provided with the Art.213 empowering the State Governor to promulgate ordinance to deal with the same.

ROOT CAUSE OF ALL CONTROVERSIES

a. Why Ordinance

Both of the Ordinances relating to the insurance and the Coal Mine are of great importance in this context. The Insurance Laws (Amendment) Ordinance, 2014 was promulgated with the justification that the Insurance Bill was 'pending for long time' in the Parliament and 'could not be taken up for consideration' so ordinance. Then the Coal Mines (Special Provisions) Second Ordinance, 2014 came into force in December, 2014. The said ordinance was first promulgated in October, 2014 when the Supreme Court cancelled the allocation of coal blocks and the said ordinance was considered as immediate to meet the circumstances. Then the Coal Mines (Special Provisions) Bill, 2014 was introduced in the Lok Sabha and the Bill got it passed now, the Bill is pending in the Rajya Sabha. Now the government for the repromulgation of Coal Mine Ordinance comes with the justification that it is necessary for the continuation of the effect of the first Ordinance otherwise it will affect to the energy supply to the nation.

In both the cases mentioned above we find difficulties to trace the extraordinary circumstances. There was opportunity to get the Bills passed through the ordinary process of legislation. The Insurance Bill is pending from 2008 to the House. The Cola Block Bill is due in Rajya Sabha when the repromulgation of the ordinance is made. It is not because the so called 'extraordinary circumstances' but because the 'inability' to reach a common consensus in the Houses that results this promulgation of Ordinance. Further, the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (Amendment) Ordinance, 2014 is promulgated but the urgency is inexplicable. The aim of this ordinance is to meet the 'procedural difficulties' in the implementation of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013. All of those ordinances hardly satisfy the condition required to promulgate ordinance i.e., circumstance leading to the Presidential 'satisfaction'.

It is sometimes argued that the government chose the ordinance route if it has doubt that the Bill may not be passed due to lack of consensus in both of the Houses. For example, the current government though it has majority in the Lok Sabha, it has no majority in the Upper House. So, the Bill may be passed

[8] Article 13 (3)(a) of the Constitution
[9] A. K. Roy v Union of India, Air 1982 SC 710

in lower House however, it may be reversed in the Rajya Sabha as it happens in case of the Coal Mine (Special Provisions) Bill, 2014. The situation demands serious altercation and negotiation among the Parliamentarian to reach common conclusion. Again, the Bill may be considered in several stages like by Standing Committee, Select Committee etc. Ultimately, a fine piece of legislation takes place. Reasonably, the procedure is called as democratic procedure. Many occasions the government afraid of following this democratic process consequently it thinks of substitution. For this type of governments, a shortcut method of law making i.e., ordinance is the most suitable route. So, to bypass the democratic negotiation the government chose the ordinance route and responsible for the huge number of ordinances. This fear may be the primary reason of choosing ordinance route. The Central Government is responsible for the following ordinances:

Rank	Prime Minister	No. of Ordinance	Days in Office	Average Days
1	Indira Gandhi	208	5825	28
2	JL Nehru	200	6126	31
3	PVN Rao	108	1790	17
4	Manmahon Singh	61	3654	60
5	AB Vajpayee	58	2267	39
6	Rajiv Gandhi	37	1857	50
7	IK Gujral	23	662	14
8	HD Deve Dowda	23	324	14
9	Morarji Desai	22	865	39
10	VP Singh	10	343	34
11	LB Shastri	9	581	65
12	Narendra Modi	8	225	28
13	Charan Singh	7	170	24
14	Chandra Shekhar	6	223	37

Note: Average Days: Total days as PM/total number of ordinances issued[10]

[10] Pradeep Thakur, Times of India, available at < https://timesofindia.indiatimes.com//india/Ordinance-Raj-8-in-225-days-of-Modi-govt/articleshow/45802178.cms > last visited 8th January 2015,

The Indira Gandhi government took a period of 28 days for every ordinance (chart above). It is important to note that the Indira Government did not enjoy absolute majority in all of its period. Then other governments are most of the occasions had to run the government with poor majority strength giving birth so many ordinances. However, the instances are not less where the government with absolute majority in Houses still chooses for the ordinance route. The Nehru Government is the ultimate example. The government had absolute majority in both of the Houses still that government promulgated as many as 200 ordinances. The government promulgated an ordinance in every 31 days of its whole period. The number of days for each ordinance is little higher in comparison to the number of days taken by the Indira Government. At present, in the State of Rajasthan where the government has absolute majority in the State Assembly still the Government goes for the Rajasthan Panchayati Raj (Second Amendment) Ordinance, 2014 prescribing the educational qualification of the contestant for the election for zilla parishad or panchayat samit elections.

The primary consideration that poor strength of government in the Houses is responsible for the quick and shortcut route of ordinance may not be right proposition. The ordinance making route is the shortest and simplest route of the legislation of laws. It is an effort to place the legislative power, which is bestowed with the Parliament at the whim of the executive sometimes, to one i.e., the Prime Minister. Prof. Shubhankar Dam has termed this as 'arrogance of alternatives[11]'

b. 'Satisfaction' –a Penumbral Area

The Article 123 talks about the 'satisfaction' of the President that means if the President is satisfied that the circumstances require ordinance the ordinance may be promulgated. Here two important questions are required to consider. First, whose satisfaction? And second how far this 'satisfaction' is justifiable? The President is to exercise all his power and functions according to the aid and advice of the Council of Ministers[12]. In practice the 'satisfaction' of the President is the satisfaction of the Council of Ministers and not the independent satisfaction of the President. In addition to this, examples are not rare when this 'advice' is rendered directly to the President through the Prime Minister Office (PMO) without any consultation in the Cabinet. There are several examples of this practice especially during the Prime Minister ship of Indira Gandhi. So, the 'satisfaction' of the President mentioned under this Article is in true sense the satisfaction of the Council of Ministers.

[11] Available at < http://www.frontline.in/the-nation/arrogance-of-alternatives/article6756800.ece > last visited as on 25/2/2015.
[12] Article 74(1) of the Constitution.

Now come to the second question whether the 'satisfaction' is justiciable? Still, this question is an 'open question'. There are many cases where the court clearly held that 'satisfaction' is not justiciable but instances are also there where the court appreciates the argument that the 'satisfaction' is not beyond judicial enquiry. We may look into some of those cases.

In *King-Emperor v. Benoari Lal* 72 I. A. 57, the Privy Council hold that the 'satisfaction' of the Governor General under the Government of India Act, 1935 is a subjective satisfaction consequently it remained beyond the judicial scrutiny. Then in Venkata Reddy v. State of Andhra Pradesh AIR 1985 SC 724, the Supreme Court held that the ordinance is the result of the exercise of the executive power by the President and it is not an executive power. As the motive of the Legislator is beyond the judicial scrutiny in the same way an ordinance cannot be questioned on the ground of improper motive or no-application of mind. In the same way in K. Nagaraj v. State of Andhra Pradesh, Air 1985 SC 551, the apex Court also hold that an executive act is liable to be struck down on the ground of non-application of mind. But not an act of the Legislature and the ordinance making is a legislative act.

On the other hand, in Cooper v. Union of India, AIR 1970 SC 564, it was argued that the condition precedent for promulgating an ordinance does not exist and the Ordinance is invalid. The counter argument from the Government was that the 'satisfaction' is 'purely objective' and government is under no obligation to justify this. In this case the Court does not come to the conclusion and ends with that the issue an 'academic' question.

Then through the 38th Amendment of the Constitution 1975, all the scope of judicial scrutiny of the 'executive satisfaction' is vanished by the inclusion of Clause 4 to the Article 123. Still the Supreme Court suggested that there is scope of judicial enquiry to this matter on the ground of mala fides. Consequently the 44th Amendment of the Constitution, 1978 restored the situation as it was before its 38th Amendment.

Then, the issue of the justiciability of the 'satisfaction' of the President was discussed with some detail in A. K. Roy v. Union of India[13]. The Supreme Court suggested that the judicial review of the 'satisfaction' to the Article 123 was not totally excluded and this 'satisfaction' was not purely 'political question'. Still the Court did not come to the conclusion. The question remained open. Again, in S. R. Bommai v Union of India, AIR 1994SC 1918, the Supreme Court put the argument forward by bringing the 'satisfaction' under Article 356 within the preview of judicial scrutiny if the said satisfaction is based on the ground of mala fide, extraneous or irrelevant.

Then in *D. C. Wadhwa v. State of Bihar*, AIR 1987 SC 57, is a path breaking

[13] AIR 1982 SC 710

judgment where the apex Court clearly reaches to the conclusion in relation to the repromulgation of the ordinance. The Court held that the repromulgation of ordinance by avoiding the Legislature was a 'Fraud to the Constitution'. The verdict came against the continuous practice of repromulgation for years by the State Government of Bihar.

As it has been mentioned above that the 'satisfaction' of the President is still remained beyond the purview of judicial review still it is definitely an area which we may think again. We may further, look into some judgments. It is the Petitioner to make out a prima facie case that there could not have existed any circumstances[14]. In *Farooq Ahmed Khan Leghari v Federation of Pakistan*, the apex Court of Pakistan held that if the 'satisfaction' does not meet prerequisites provided by the statute for that purpose the Court has jurisdiction to interfere with the acts as if it has been performed without jurisdiction, corum non-judice and mala fide[15]. In *Bribary Commissioner v Ranasinghee*, (1964) 2 All ER 785, the Privy Council held "where a legislative power is given subject to certain manner and form, that power does not exist unless and until the manner and form is complied with".

According to H. M. Seervhai 'the 44th Amendment of the Constitution keeps the window of reviewing the 'satisfaction' by the Court as open. A power exercised mala fide or under a misconception of the scope and nature of the power or by ignoring relevant considerations or by taking into account irrelevant considerations is ultra vires and void.' In support of this he reminds the observation made by Privy Council in the famous Teh Cheng Poh v. Public Prosecutor (1980) A. C. 458 (P. C.), where the Privy Council opined that mandamus would lie against the Cabinet to advice His Majesty to revoke law which was proclaimed by His Majesty and executive law is subject to writ of mandamus. The cardinal importance given on the legislative power of the executive and the amenability of law made by the executive to a writ of mandamus observed in this case, lead him to the conclusion that the National Security case[16] and Nagaraj case[17] had been wrongly decided. Prof. M P jain also opined that the law of the Legislature is subject to serious debates, both within and outside of the Parliament. But the executive legislation may reflect the whim even of one person. Hence these two laws are not in the same footing.

ANALYSIS AND CONCLUSION

a. Circumstances

Now regarding the first condition of the ordinance, the case is very easy and any one can simply determine the issue. The

[14] Ibid.
[15] PLD 1999 SC 57F

[16] A. K. Roy v. Union of India AIR 1982 SC 710
[17] N Nagaraj V. State of Andhra Pradesh Air 1985 SC 551

difficulties arise in case of second condition. The required "satisfaction" is again a conditional one. It is conditional in the sense that there must be some circumstances leading to said satisfaction. Both the circumstances and satisfaction are required to deal with in detail.

To explain the required 'circumstances' we may look into the Constitutional Assembly Debates. In the Constitutional Assembly Debates the provision empowering executive legislation was included as a "necessary evil" and Dr. Ambedkar justifies the inclusion with the following words….

"…it is not difficult to imagine cases where the powers conferred by the ordinary law existing at any particular moment may be deficient to deal with a situation which may suddenly and immediately arise. What is the executive to do? The executive has got a new situation arisen, which it must deal with *ex hypothesi* is it has not got the power to deal with that in the existing code of law. The emergency must be deal with, and it seems to me that the only solution is to confer upon the President the power to promulgate a law which will enable the executive to deal with that particular situation because it cannot resort to the ordinary process of law because, again *ex hypothesi*, the legislature in not in session. Therefore, it seems to me that fundamentally there is no objection to the provisions[18]"

The framers of the Constitution thought that the situation might come when all the existing laws might prove as ineffectual. It is significant to note that the true intention of the framers was to indicate about some extraordinary circumstances that might arise which might paralyze all the laws available at that point of time. They talked about the circumstances when the existing laws become helpless. They had talked about the situation of such a nature that would put a question mark on all the laws prevailed for that time being. They talked about the event that might cause their own devised law for which they had worked so hard. The situation is not only rare but also rarest of rare cases. So the gravity for those circumstances certainly, will be of very high. Hence, the circumstances guiding to the said satisfaction may not be difficult to determine. It may be determined objectively too.

b. Aid and Advice

If the circumstance is determined, then the President may satisfy to promulgate the Ordinance. Now it is an established fact that the said satisfaction of the President is practically, the satisfaction of the Council of Ministers[19]. Further, the

[18] Constitutional Assembly Debates Vol. VIII p. 214, (4th print, Lok Sabha Secretariat, New Delhi 2003)

[19] Article 74(1) says
'There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice:
Provided that the President may require the Council of Ministers to reconsider such advice, either

aid and advice rendered by the Council of Ministers to the President are not subject to the inquiry of the court[20] but the material on which the advice is based is certainly not beyond the judicial review[21]. Hence the materials leading to such satisfaction to the Article 123 for the Ordinance may also come within the domain of the judicial review.

c. Satisfaction

Again, against the subjective satisfaction myth it may be argued that it may not be difficult to understand that this subjected satisfaction is matured with some objective circumstances that are not difficult to trace. Further, the rule of law also presumes some objectivity even in subjectivity.

In the words of Dr. D. D. Basu- 'It is now settled that the 'satisfaction' must be based on some material which shows objectivity even in subjectivity. Further, he added that the existence of objective material showing an emergency action is to be taken is a condition precedent''[22].

d. Legislative Power

It is fact that in the Constitutional Assembly Debates it was agreed to give the heading to the Chapter III of Part V of the Constitution as the Legislative Power of the President. However, it may not be right reasoning that the framers of the Constitution wanted to keep the Executive's Power of legislation with the Legislative power of the Parliament on the same footing in every aspect. We may find the reason within the rationale behind the inclusion of the Ordinance making power in the Constitution. They, reasonably, wanted to provide a provision in the Constitution, enabling the authority to meet an extraordinary event with a norm having all force of law. It was thought to put a device to bring quick law. Here law-making procedure is very short. This legislative procedure may be termed as hasty legislative procedure. As necessity knows no law this provision might have provided to the executive only to meet the immediate necessity. In addition to this, a few minds or sometimes one mind is expressed through the executive legislation.

On the other hand, by virtue of the legislative power, the legislation made by the Legislature, is a result of a well devised, democratic procedure of law making. This power imposes a duty on the Legislature to follow a procedure where a Bill is considered in various stages and by various Committees. This legislative power does not impose the duty on the Legislature to make the legislation which

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generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration.'

[20] Article 74(2)-
'The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any court.'

[21] *S R Bommai V. union of India*, AIR 1994 SC 1918

[22] Durga Das Basu, Commentary on The Constitution of India, vo.4 (8th Edition 2008), p.5513

is subject to some conditions and compulsions as it happens in case of executive legislation. The only object is to deliver a fine piece of legislation may be remained fit for years.

So, it may not be right reasoning to say that the power exercised in Ordinance making by the executive is on the same footing with power exercised by the Legislature for the same purpose. How a hasty mode of law-making procedure can be equated with the well thinking law making procedure of the Legislature? How the same power can be exercised differently? So, the power and the procedure followed in both the cases cannot and must not be regarded as in same footing. In this point the equal status given to the Executive's legislative power and Legislature's legislative power by the apex Court in Venkata Reddy[23] case does not sound convincing. So, the scope of rethinking is definitely lies here.

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[23] T. Venkata Reddy v. State of Andhra Pradesh AIR 1985 SC 724.

LEGAL AND SOCIOLOGICAL CHALLENGES OF CONDUCTING ARBITRATION IN INDIA

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ABSTRACT

Arbitration as a form of alternate dispute resolution enjoys a huge popularity all across the globe. Various developed countries like The United Kingdom, Singapore, The United States of America, France etc. have a well-developed regime of law pertaining to arbitration both domestic and International. Such a suitable dispute resolution mechanism which provides great autonomy to the parties and provides a less adversarial platform for dispute resolution should have been an instant hit in the Indian demographic context, but India ails from a poor arbitration regime, and ranks very low in the preferred seat for Arbitration. India as a country has one the highest number of pending cases in the courts, but in the event of any dispute arising between people, they prefer the traditional method of, "I'll see you in the Court" and do not refer the dispute for an amicable or alternate resolution. This also ails the Indian Arbitration regime to a great extent viz. the ignorance of people and the refusal to move beyond conventional means of dispute resolution. Now, whether it is because of the ignorance of the people, that they don't trust the arbitration process due to which Courts feel the obligation to interfere in the proceedings or whether it is because of the Court interference, that people do not trust the arbitration regime because ultimately the dispute ends up in the Court. Therefore, this paper would deal with the issues that have held back the arbitration regime in India both in the domestic and the international context and would at the end seek to provide some suggestions to overcome the issue.

Keywords: Arbitration, Courts, Legal, Sociological, Dispute

INTRODUCTION

The world as large as it gets, has seemingly come closer in the past few decades. The geographical boundaries pose no more an impediment for the far-reaching aspirations of the man, for the growth of technology and globalization of the world has fostered the aspirations and brought the nations closer. Trade and Commerce has played a vital role in reshaping the world and it is through trade and commerce through which ideas and technology has flowed from one country to another and has brought each nation to a common global marketspace where the buyers and the sellers aren't limited to the physical market, but have access to each other across corners of the globe. What it precisely has meant that, *transactions* of any and all kind are now no longer limited to the traditional concept of marketspace and has transcended boundaries. This means, on a daily basis, individuals all across the globe engage in commercial activity with each other in millions and millions of transactions, also opening up a pandora's box for disputes. It is natural that when transactions take place, not only in an international but also on a domestic level, disputes are unavoidable and when these disputes arise in such transnational transactions, they are always tacky in nature owing to the varied system of laws in different countries (*also known as the Domestic/Municipal Law*).

Therefore, for settlement of such disputes arising out of International Transactions and off late from Domestic Transactions, *Arbitration* as a means of dispute settlement is being preferred by parties owing to its less adversarial, party oriented and binding nature in dispute settlement mechanism. Arbitration, as a dispute settlement mechanism can be explained very simply where disputants agree to submit their disputes to an individual whose judgment they are prepared to trust. [1] What this implies that parties are free from the tedious process of court proceedings where mere listing of matters sometimes takes months, and to a great extent even exercise control over the proceedings. Such a dispute resolution mechanism has found a favourable place in today's international scenario where states, individuals and corporations are relying on it. It is therefore surprising that such a simple method of dispute resolution has today, emerged as the most favoured method of settlement of disputes and has been accepted by states, individuals across countries and even multi-national corporations when even the stakes are as high as it gets.[2]

Such a simple and so much favoured dispute resolution mechanism should have then compulsorily prospered all around the world, for the aim is to reduce the burden on the mainstream judiciary of the country and promote amicable settlement

[1] ALAN REDFERN ET. AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 1-70 (Kluwer Law International; Oxford University Press 2015).

[2] ALAN REDFERN ET. AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 1-70 (Kluwer Law International; Oxford University Press 2015).

between the parties, alas no system is perfect and the world is far away from Utopia.

THE INDIAN PICTURE

A noble purpose in itself is never sufficient to fulfil a dream, especially in the Indian context where the country is so diverse. Such a platform needs to ably supported by the system *viz.* the Legislature by drafting proper laws and the Judiciary by actually not intervening much in a system which seeks to distance itself from the traditional approach of dispute resolution. Anybody would expect that India, being world's largest democracy[3] would have accepted *Arbitration* with open arms and would have excelled in settlement of disputes but sadly it is not the case. According to a 2018 survey, the 5 most preferred seats for Arbitration are London, Paris, Singapore, Hong Kong and Geneva *once again.*[4] *The words once again denote a worrisome fact for India in the way that probably, India was never in the race as a preferred seat for arbitration and is still probably lagging behind with its traditional approach of settling every matter in courts as opposed to opting for a quick and efficient mechanism. It has been agreed by others, that India in fact is not a preferred seat of arbitration.*[5]

However, a layman might not seem alarmed by such a revelation for they have the argument that one must always instil faith in one's own judiciary and that such private dispute settlement may not aptly settle the disputes between the parties, but what if the layman is made to face another startling statistic which can actually cause worry among people?

WHY INDIA NEEDS ARBITRATION NOW MORE THAN EVER?

Having faith in one's own judiciary is a good belief to have, but to carry that belief so far so as to burden the system with more load that it could possibly handle is an unfavourable scenario. However, the numbers speak for themselves for India. According to the latest reports, India has now over 4 crores of pending cases across the Supreme Court, various High Courts and District & subordinate courts according to written replies submitted by the Ministry of Law and Justice in the Indian Parliament.[6]

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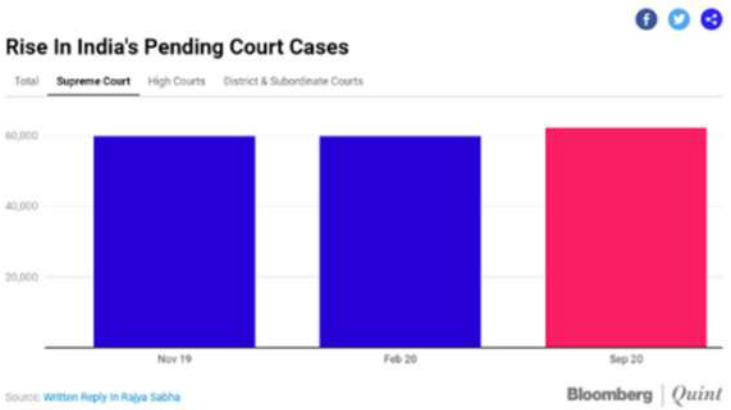
[3] Kourush Ziabari and Brahma Chellaney, *India is the Largest Democracy in the World*, FAIR OBSERVER, (Oct 10, 2020, 09:07 PM) https://www.fairobserver.com/region/central_south_asia/news-on-india-news-headlines-democracy-world-news-headlines-today-32390/.

[4] 2018 International Arbitration Survey: *The Evolution of International Arbitration*, QUEEN MARY UNIVERSITY OF LONDON, http://www.arbitration.qmul.ac.uk/research/2018/.

[5] Rishabh Gupta, *Arbitration in India: Pros and Cons*, ASIAN LEGAL BUSINESS (Aug. 27, 2018) https://www.legalbusinessonline.com/news/arbitration-india-pros-and-cons/76302#:~:text=If%20a%20party%20decides%20to,be%20applicable%20to%20that%20arbitration.&text=Therefore%2C%20not%20surprisingly%2C%20India%20is,a%20preferred%20seat%20of%20arbitration.

[6] *India's Pending Court Cases on the Rise: In Charts*, BLOOMBERG QUINT, (Sept. 29, 2020) https://www.bloombergquint.com/law-and-policy/indias-pending-court-cases-on-the-rise-in-



Graph Taken from the website of Bloomberg Quint and the authors do not claim any right over the same.

The graph represents an alarming picture as the cases pending before the Supreme Court exceeds 60,000 and it has been progressively increasing since Nov 2019. The High Court's show a trend no different, and currently stand at over 51 lakhs cases pending.[7] The numbers demonstrate one clear fact that the Indian Judiciary is overburdened already and the trend of pendency seems to increase and probably the Covid-19 pandemic has added to the woes of the system. This means there has been a maladministration of justice in India as the legal maxim goes, *'Justice delayed is justice denied'*.

Therefore, with the Indian courts clearly struggling to adjudicate disputes timely, it naturally calls for an alternate dispute mechanism to be effectively administered so as to achieve two important goals:

i. To reduce the case load on the courts and;

ii. To deliver speedy justice and provide for an efficient mechanism of dispute resolution.

While all matters cannot be referred for arbitration according to the dictate of law, matters which can be referred for arbitration as a matter of fact, *should be referred to arbitration.* However, what should be done, and what actually is done are two far away trajectories and need to be reconciliated soon enough. With the above statistics and the fact about India not being a preferred seat for arbitration, it becomes clear that India is still adopting/favouring the traditional approach and is clearly struggling with it. But the question that actually needs to be asked is, *'Why the things are the way they are?'* or in other words, *'Why has India failed to adopt to the growing arbitration regime?'*

charts.

[7] *India's Pending Court Cases on the Rise: In Charts*, BLOOMBERG QUINT, (Sept. 29, 2020) https://www.bloombergquint.com/law-and-policy/indias-pending-court-cases-on-the-rise-in-charts.

A FORGOTTEN HISTORY

Tracing the history of ADR in the Indian history, it seems as if the idea wasn't alien to the people and was the only means of dispute settlement procedure in the ancient India. The settlement of disputes in Courts was introduced by the colonialists who shadowed the then prevalent dispute settlement mechanism. Settlement of Disputes by a tribunal chosen by the people was in vogue as early as the *Vedic Era.* During the Vedic era, tribunals that functioned in the society were:

A. *Kula:* For disputes of family, community, tribes, castes and races.

B. *Shreni:* For internal disputes in business, corporation of artisans

C. *Puga:* For association of traders/commerce[8]

The village Panchayats also played a substantial part in settlement of disputes where a group of village elders adjudicated on the disputes and the decision was binding on the people. But the introduction of Courts by the British Colonialists side lined the practice, and with the proper codification of laws, people tended to rely more and more on the courts. It is only in the recent past, where the importance of ADR was recognised and a shift in focus was seen to go back to the older ways but sadly no impactful change was seen in that aspect and as already discussed earlier, India lags behind substantially with the Arbitration laws and isn't preferable as a seat for Arbitration. Therefore, as a country with a rich history of ADR mechanism it is indeed shameful that India has lost its roots.

[8] LEGAL STUDIES FOR CLASS XII 89 (Central Board of Secondary Education 2016).

THE GAP IN KNOWLEDGE

Now, it has been clearly established that India is struggling with its dispute settlement mechanism, and is in a dire need for reform. Therefore, before coming to the conclusion, one needs to analyse the ailment and derive the solution from the problem. In this rapidly growing commercial world, one cannot simply wait for courts to deliver their verdict on each and every (substantial or petty) disputes that might emerge between parties in the course of their transaction and need a mechanism which is swift in action. Therefore, Arbitration is indispensable and invaluable in today's world and India needs it now more than ever. Though there has been some approach from the system to facilitate the growth of arbitration in India clearly it isn't sufficient to tackle the issue. Therefore, it is imperative to study as to what are the challenges of conducting arbitration in India and why despite being a party-oriented approach, the system has failed in the Indian Context. Thus, the authors would approach this paper to act as a bridge in the knowledge gap of readers and help them to understand simultaneously, the benefits of arbitration

in general, and what has hampered its growth in the Indian subcontinent.

ENFORCEABILITY OF ARBITRAL AWARDS: WHEN PROCEDURE SUPERSEDES SCOPE

Contrary to the belief that an arbitral suit would come to an end when the award is announced, the real litigation starts when the award is to be enforced post announcement. For reasons best known to them, the legislators choose to make arbitral awards subject to challenge before the trial courts. The awards passed by a panel of three retired Supreme Court Chief Justices are subject to scrutiny by a Trial Judge. The arbitration experience, especially for the successful claimant can prove to be prolonged, lopsided and painful, conveniently negating the idea of quick and effective justice. *One can only imagine the plight of a successful claimant who cannot enjoy the arbitral award until such procedural challenges come to an end.* The thin line of distinction between a foreign and domestic arbitral award has been drawn as a result of multiple judicial interpretations in some landmark judgments like *Bhatia International v. Bulk Trading*[9], *Venture Global Engineering v. Satyam Computer ltd*[10]and *Bharat Aluminium Co v. Kaiser Aluminium Technical Service*[11]. The court in Bharat Aluminium observed that Part I of the Act[12] exclusively lays down the procedures and guidelines for domestic arbitrations whereas Part II of the 1996 Act in accord with the UNCITRAL Model Law, New York Convention and Geneva Convention applies to foreign seated arbitrations. Arbitrations under Part I include both, arbitration between two Indian parties in India and international commercial arbitration held in India. International commercial arbitrations held outside India would be governed under procedures mentioned under Part II of the act. *The excessive interventions by the court in the form of judicial review has decelerated the dispute resolution mechanism and frustrated the purpose of the act.* The Act under S. 34 lays down a number of reasons on which an application can be moved to the court and the arbitral award can be challenged. The S. 34 of the 1996 act is brain child of Article 34 of the UNCITRAL Model Law 1985 and its ambit in the 1996 act is much wider than the repealed act of 1940. S. 34(2)(A) mentions five sub provisions under which an arbitral award is set aside by a party who is required to furnish concrete proof in support of its petition. The point of concern here is S. 34(2)(B) which refers to two reasons of examining the arbitral award. Firstly, the arbitration in India is not capable of settlement based on the subject matter of the dispute and secondly

[9] Bhatia International V. Bulk trading S.A, (2002) 4 S.C.C. 105

[10] Venture Global Engineering V. Satyam Computers Services Ltd., (2008) 4 S.C.C. 190

[11] Bharat Aluminum Co. V. Kaiser Aluminum Technical Services Inc., (2012) 9 S.C.C. 552.

[12] The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India).

if the arbitral award is in conflict with the '*Public Policy of India'*. In *O.N.G.C v. Saw Pipes ltd*[13], the Supreme Court interpreted 'public policy' in light of principles underlying the Arbitration and Conciliation Act, Indian Contract Act, 1872 and Constitutional provisions. *Saw Pipes has expanded the scope of public policy by enhancing the possibility of a near limitless judicial review, the Act's objective of minimum court intervention was defeated.* Therefore, the decision made in Saw Pipes is a significant blemish on India's arbitration jurisprudence. An explanation next to S. 34(2)(b) briefly clarifying what is understood with public policy of India includes corruption, violation and fraud of S. 75 or S. 81 but fails to serve its purpose. Lately in the investment arbitration and international commercial arbitration, a lot of difficulties was faced by the litigants as the courts have whimsically accepted and rejected claims on this ground[14]. The amendment act 2015 however clarifies that merely on erroneous application of law or by re-appreciation of evidence an arbitral award will not be set aside by the court. To decide whether the arbitral award is in contravention with the fundamental policy of Indian law the court will not review the merits of the dispute. After the Saw Pipes judgment, the question that needs to be answered is what exactly the court meant by the term *'Patent Illegality'*. One can infer multiple meanings of the word 'illegality' in the arbitration context. The illegal nature of the underlying contract, the object of the contract or the circumstances surrounding the arbitration agreement are some suggestions but the Apex Court in the Saw Pipes judgment gave a different meaning to the term 'illegality' by equating it to mean '*Error of Law'. Upon that observation one can deduce that, the power to review on the ground of error of law is conferred by the court then it automatically defeats the objective of the Act and make arbitration the beginning of successive appeals to the highest court of the land, making it no different than litigation.* It is the same as under S. 30 of 1940 act where retaining the grounds for challenge were already available. In addition, a thorough analysis of the 1996 Act shows that the award can be set aside on two conditions, contrary to the express provisions of the substantive law or contract, are already available under sub-S. 34(2)(a)(iv) and 34(2)(a)(v) respectively[15]. Under S. 34(3), for setting aside an arbitral award, the party making such application has a three-month time period within which an application is to be made. Such time period begins with the day when the applicant received the order. The applicant can furnish

[13] O.N.G.C. Ltd. V. Saw Pipes Ltd., (2003) 5 S.C.C. 705.

[14] Charu Singhal, *Arbitration in India: A Study of Issues and Challenges*, LEX FORTI, (April 23, 2020), https://lexforti.com/legal-news/arbitration-in-india-a-study-of-issues-and-challenges/.

[15] Viplav Sharma, *Enforceability of Arbitral Awards in India: Public Policy as Ground for Setting Aside the Award,* 1(1) Gujarat Law Review, 22, 22 (2008).

substantial proof that he was hindered by a sufficient cause for making the application within three months and for this a further extension of thirty days shall be given to the applicant. The above procedure needs to be reconsidered. The act was framed for quick and effective redressal to the litigants but while doing so the person should not lose the sight of possibilities that an honest litigant may be prevented from seeking his right to be heard. The provision of S. 34(3) shuts down such persons from seeking justice. The rights provided by substantive law should not be overlapped by procedural law. Undoubtedly the objective of the act should receive paramount importance but while doing so, the aim of providing justice should not be ignored. Hence the provisions of the act require interpretation in a manner that retains the goals and values of our legal system.

COST & TIME: THE DIRECTLY PROPORTIONAL RELATIONSHIP

'*The costs are awarded, not as a punishment to the defeated party, nor as a bonus to the party which receives them, but as a recompense to the successful party in order to indemnify him, though not completely, for legal expenses to which he has been subjected in prosecuting his suit or his defence'*[16]. In the past few years, the scope of the arbitration costs has become wider. Arbitration costs now involve the fees towards 'reading charges', 'sitting fees', 'award writing fee' and other expenses to be paid to the arbitrator, coupled with the cost involved in arranging sittings, witnesses, travel charges of the parties, counsel and arbitrator. The overall expense can sometimes run into crores which, for a developing country like India is outrageous. The court fees payable on an arbitral claim is believed to make the process convenient and affordable when there is absence of ad valorem[17]. The parties are under the impression that the court fee is saved but end up paying more or less the same amount by paying for the arbitrator's fee, counsel fee, administrative expenses and stamp duty on arbitral award. In a very recent judgment of *Union of India v. Singh Builders Syndicate*[18] the Supreme Court pointed out that '*It is unfortunate that delays, high cost, frequent and sometimes unwarranted judicial interruptions at different stages are seriously hampering the growth of arbitration as an effective dispute resolution process.'* The court also observed that the solution for the problem to save arbitration from the arbitration costs is very urgent and opined that 'Institutional Arbitration' has come close to providing a solution. When the arbitration proceeding is limited then only the process of arbitration proves to be cost efficient. However, the delays caused by

[16] Anandji Haridas V. State of Gujarat, (1977) 0 G.L.R. 271.

[17] Aditya Sondhi, *Arbitration in India: Some Myths Dispelled*, 19(2) Student Bar Review, 48, 51 (2007).

[18] Union of India V. Singh Builders Syndicate, (2009) 4 S.C.C. 523.

the judicial intervention drains the finances of the parties because arbitration becomes litigation in disguise. Ironically the cost efficiency and time are hallmarks of the procedure and the reasons why arbitration is preferred over litigation as a viable option for dispute resolution especially in commercial disputes. To make India arbitration friendly destination cost effectiveness is a hurdle yet to be crossed.

As per the recommendations of the 246th Law Commission Report the legislature has added S. 31(A) to the Act. It empowers the Arbitral Tribunal or court to have discretion to determine (A) Whether costs are payable by one party to another (B) Amount of such costs and (C) When such costs are to be paid. An explanation next to S. 31(A) interprets 'cost' in reference to the section. The Fourth Schedule has also been added to the Act that lays down a fixed model fee depending upon the sum in dispute along with the percentage share based on the claim amount. It also furnishes that an additional amount of twenty five percent on the fees paid is also furnished (as per the provisions of the 'Fourth Schedule') will be added where arbitral tribunal is only a sole arbitrator. The model fee mention arbitration where the determination of fee as per the rules of arbitral institution under which arbitral proceedings are to be conducted have been agreed by the parties. The progress of commercial arbitration and international trade are hindered by such shortcomings. The goal of the government India is to attract foreign investors and commercial entities which can be done by strengthening international arbitration and providing for saving time and for a more stable process i.e., cost effective.[19]

THE FORMALITY OF ENFORCING FOREIGN AWARDS FROM OTHER COUNTRIES

Before jumping into the formality and the complications of enforcing foreign awards set from another country, we have focused as to what were the previous and present statutes dealing with the same. Currently, India has the Arbitration and Conciliation Act of 1996 that deals entirely on the subject of arbitration which obviously includes the procedure for enforcement of foreign awards as well. Prior to this, the enforcement was dealt by Arbitration (Protocol and Convention) Act of 1937 and Foreign Awards (Recognition and Enforcement) Act of 1961. Laws regarding cancellation of domestic awards and other subject matter dealing with domestic awards were governed by the Indian Arbitration Act of 1940 which is governed by the New York Convention.

The UNCITRAL Model is the most followed model when it comes to enforcement and framework of domestic statutes regarding arbitration. Hence, the Government of India made the 1996 Act in a way that it resonates with the model

[19] Union of India V. Singh Builders Syndicate, (2009) 4 S.C.C. 523.

law. Since this chapter focuses mainly on the 1996 Act, it is important to have detailed study regarding the provisions which deal with the enforcement and passing of foreign and domestic awards. Before diving into it, the authors quickly want to point out that section 2(2) of the Act deals with the Arbitration inside the territory of India. Part II of this Act governs the imposition and implementation of foreign awards. Part II also clarifies a point which was a blur under section 9(b) of the 1967 Act that the nature and character of the foreign awards will be decided by the place where it is made. The chapter I of this Part deals with the awards under the New York Convention. Coming to section 46, 47 and 48 of the Act, S.46 states as under what circumstances, the award is binding; section 47 illustrates what evidences the parties have to put forth before the court for the enforcement of the award the party is seeking; section 48 lastly enunciates the conditions to comply for enforcement of foreign award.

Section 48 of the 1996 Act also provides for the conditions under which a foreign award can be subjected to denial. The condition is that the party against whom such award is passed has to furnish sufficient proofs and grounds which have to comply with the grounds mentioned under clause (a) to (e) of section 48(1) of the 1996 Act and if it does so the award can be subjected to rejection.[20]

Therefore, so much of technicalities when faced by a party wanting to enforce a foreign award in India, makes it complicated to do the same. Moreover, if the award is not from a reciprocating territory, then enforcement of such awards is not recognised.

THE RECOMMENDATION OF AN EMERGENCY ARBITRATOR

In this modern commercial world, time is of the essence of each and every agreement. Therefore, all the obligations and duties undertaken need to be fulfilled on a timely basis as delays could cause detriment to both the parties. Therefore, in such a time regulated and time constrained business environment, the emergence of disputes which cannot wait the formation of an arbitral tribunal is bound to occur. In other words, there are certain disputes which need to be resolved/addressed immediately. This is where the concept of an *'Emergency Arbitrator'* has gained traction in the recent times.

The function of an Emergency Arbitrator comes to the fore where an Arbitral Tribunal has not been yet constituted and if engaged in forming one, the parties would lose substantial amount of time, depending on the arbitration agreement or the institutional rules. Therefore, the objective of the Emergency Arbitrator is to provide *conservatory measures* to a

[20] Ginny J. Rautray, *Enforcement of Foreign Awards in India*, HG.ORG LEGAL RESOURCES, https://www.hg.org/legal-articles/enforcement-of-foreign-awards-in-india-32348.

party or parties that need speedy or an emergency relief.[21]

The Government of India therefore felt it necessary to address the lacunae in the prevalent Arbitration law, and therefore made a reference to the law commission of India to make a comprehensive review of the Act. In 2015, the 246th Law Commission of India, made a recommendation to incorporate the concept of *'Emergency Arbitrator'* in the 2015 amendments, but this recommendation was not incorporated in the amendments to the 1996 Act.[22] The problem with the current definition of *'Arbitral Tribunal'* under the current law is that, *it includes only a sole arbitrator or a panel of arbitrators.*[23] Therefore, the concept of an Emergency Arbitrator is missing even after the amendments.

It is pertinent to note that the effectiveness of an Emergency Arbitration invoked by a party survives on two pillars;

i) *Fumus boni iuris:* A reasonable possibility that the party invoking the emergency arbitration will succeed on merits and;

ii) *Periculum in mora:* The loss apprehended is so imminent, that on the failure to receive an emergency relief, the loss cannot be compensated by way of damages.[24]

The reason for pointing out the two pillars to sustain an Emergency Arbitration is important because, the same requirements need to be fulfilled while seeking *interim relief* under Ss. 9 & 17 of the Act[25], in other words the Arbitral Tribunal needs to be satisfied with those two conditions.[26] Therefore, the authors interpret that though the conditions required to sustain an emergency arbitration has been incorporated in the Act, but such emergency powers have been vested with the Court and the Arbitral Tribunal. The problem which would arise because of such an arrangement is that, in cases

[21] Madhu Sweta & Kanika Tandon, *Emergency Arbitration in India: Concept & Beginning*, MONDAQ, (Nov. 25, 2016), https://www.mondaq.com/india/trials-appeals-compensation/547970/emergency-arbitration-in-india-concept-and-beginning.

[22] Venancio D'Costa & Astha Ojha, *Status of Emergency Arbitration in India: From the Perspective of Domestic Arbitrations*, MONDAQ (August 14, 2020), https://www.mondaq.com/india/arbitration-dispute-resolution/976170/status-of-emergency-arbitration-in-india-from-the-perspective-of-domestic-arbitrations.

[23] The Arbitration and Conciliation Act, 1996, § 2(d), No. 26, Acts of Parliament, 1996 (India).

[24] Madhu Sweta & Kanika Tandon, *Emergency Arbitration in India: Concept & Beginning*, MONDAQ, (Nov. 25, 2016), https://www.mondaq.com/india/trials-appeals-compensation/547970/emergency-arbitration-in-india-concept-and-beginning.

[25] The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India).

[26] Venancio D'Costa & Astha Ojha, *Status of Emergency Arbitration in India: From the Perspective of Domestic Arbitrations*, MONDAQ (Aug. 14, 2020), https://www.mondaq.com/india/arbitration-dispute-resolution/976170/status-of-emergency-arbitration-in-india-from-the-perspective-of-domestic-arbitrations.

[26] The Arbitration and Conciliation Act, 1996, § 2(d), No. 26, Acts of Parliament, 1996 (India).

where a party needs immediate relief/interim relief for protection of goods, securing of the assets etc. has to in fact wait for the formation of the tribunal, or wait for the order of the court which would vitiate the purpose for which the emergency relief was sought. In very simple words, this would lead to delay of remedy, where emergency relief was sought.

However, it is worthwhile to mention that, though the Act[27] has not incorporated the definition of Emergency Arbitrator, the Arbitral Institutions functioning in India have in fact in their rules, recognized and provide for Emergency Arbitration.[28] However, such a provision creates a further loophole in the proceedings. The decisions rendered by the Emergency Arbitrator, in cases of Domestic Arbitrations in enforced like an interim award (because, the decision is never final in nature), and as such under the definition of *Arbitral Award,* the Act has envisaged Interim Awards to be within the scope of Arbitral Awards.[29] But, the decisions rendered by an Emergency Arbitrator in a foreign seated arbitration in unenforceable in India, because Part II of the Act[30] does not recognize enforcement of Emergency/Interim awards from International Arbitrations.[31] Therefore, the relief for the party in such a case, is to apply before the court for interim relief under S.9 of the Arbitration and Conciliation Act of 1996.[32] Such a loophole, in in turn therefore, increasing the judicial interference in arbitration proceedings and to a large extent causes inordinate delays because the party has to seek the same remedy before two different platforms *viz.* The Emergency Arbitrator and The Court (under the aforementioned Section).

COURT INTERVENTION IN ARBITRAL PROCEEDINGS

The main reason for bringing the 1996 Act into picture and making it the primary statute when it comes to arbitration and replacing the 1940 Act was the judicial intervention it promised to reduce. However, as the legislation settled in the judicial system of the country, it was observed that the Act failed to deliver

[27] The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India).

[28] Venancio D'Costa & Astha Ojha, *Status of Emergency Arbitration in India: From the Perspective of Domestic Arbitrations*, MONDAQ (Aug. 14, 2020), https://www.mondaq.com/india/arbitration-dispute-resolution/976170/status-of-emergency-arbitration-in-india-from-the-perspective-of-domestic-arbitrations.

[29] The Arbitration and Conciliation Act, 1996, § 2(c), No. 26, Acts of Parliament, 1996 (India).

[30] The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India).

[31] Raffles Design International v. Educomp Professional Education, O.M.P.(I) (COMM.) 23/2015 & CCP(O) 59/2016

[32] Venancio D'Costa & Astha Ojha, *Status of Emergency Arbitration in India: From the Perspective of Domestic Arbitrations*, MONDAQ (Aug. 14, 2020), https://www.mondaq.com/india/arbitration-dispute-resolution/976170/status-of-emergency-arbitration-in-india-from-the-perspective-of-domestic-arbitrations.

[32] The Arbitration and Conciliation Act, 1996, § 2(d), No. 26, Acts of Parliament, 1996 (India).

what it had promised. Section 11 of the 1996 act, before the 2015 amendments, empowered the High Court's Chief Justice or his nominee or the country that is India's Chief Justice or as the scenario demands for the designation of arbitral tribunal. Orders passed under Section 11 have always been opposed of being administrative against judicial. In a case, the character of section 11 of the act i.e. whether it is administrative or not came up before the Apex Court[33] and it issued directives that the orders given under purview of Section 11 shall be deemed to be administrative and won't be subject to challenge under Article 136 of the Indian Constitution. In another case[34], the apex court reaffirmed the decision in *Ador Samia case*[35] and subsequently in *Konkan Railway Company V. Rani Construction Pvt. Ltd*[36], it was observed that no adjudicatory function is required to be performed by the Chief Justice or his designation thereby stated about the appointment order passed under Section 11 are purely administrative instead of being judicial, thereby invoking Article 141 of the Indian constitution.

Contrary to the former decrees passed by the court, it was constructed in *Agio Counter Trade v. Punjab Iron and Steel company Ltd* and *Wellington Associates* case that the functions of the Chief Justice is judicial in nature and appealable under *Article 136*[37] of the constitution of India. It was after the judgment given by 7 judge bench in the case *SBP and Co. v. Patel Engineering Co*[38] which stated the functions of the Chief Justice or his designation are judicial in nature thereby increasing the judicial intervention beyond the scope and negating the principles of quick redressal and least court intervention. Moreover, the judgment implied denial to the importance of the arbitral tribunals.

It is clear that the judgment recited in the above paragraph goes against the UNCITRAL Model Law and the Preamble to the act, 1996 explicit provisions in the statute as the statute defines that non judicial authority can always interfere except if provided otherwise in the act[39].

LACK OF CREDIBLE ARBITRAL INSTITUTIONS

Presently, in today's world, inter-state relation holds utmost value and hence the subject of commerce is grabbing attention globally. Since international commerce is grabbing global attention, dispute in the same is arising equivocally and hence the dispute mechanism that is being looked

[33] Sundaram Finance Ltd. v. N.E.P.C India Ltd., (1999) 2 SCC 479
[34] Konkan Railway Corporation Ltd. v. Mehul Constructions., (2000) 7 SCC 201
[35] Ador Samia Pvt. Ltd. v. Peekay Holdings Ltd. and Ors, (1999) 8 SCC 572
[36] Konkan Railway Company Ltd. v. Rani Constructions Pvt. Ltd., (2002) 2 SCC 388
[37] Special Leave to appeal by Supreme Court.
[38] SBP and Co. v. Patel Engineering Ltd. (2005) 8 SCC 618
[39] Ankur Khandelwal, *The Three "Battlegrounds" of Arbitration Law of India: The trilogy of grounds for unwarranted Judicial Intervention,* 3(1) contemp. Asia Arb. 165 (2010).

forth is arbitration. Hence, international commercial arbitration is getting footings all over the world. Ever since the UNCITRAL model law has come into picture, the model has been proved to be efficient and hence has been adopted by almost every country. Our country, India, who is amongst those countries that has adopted the model law is a vocal point of dispute resolution centres where laws and legislations are given primary importance and dispute resolution is given utmost priority. However, the outsourcing of these works has proved to be of some inconvenience and disadvantageous for Indian Industries and hence requires certain changes. These changes have to be initiated in a manner that the lack of confidence on Indian legal system is abolished and people need to have more faith in the same. India is set to become an important destination for alternative dispute resolution and arbitration but what is stopping the country from getting that kind of recognition is the pendency of loads of cases of arbitration throughout the years which are not getting redressed in proper time and the defects in providing arbitral awards on the same. The primary reason behind the same is the lack of sufficient credible arbitral institutions.

For those who have expertise in arbitration know for a fact that institutional arbitration has dominated the subject as opposed to the ad hoc arbitration. On the other hand, India, the country which is being touted to become a primary centre for arbitration, does not have a proper established institution which comes close to the ICC, International Court of Arbitration, the London Court of International Arbitration, the American Arbitration Association. India does have certain primary and established body like FICCI, ASSOCHAM and CII but is yet to have a credible arbitration institution and hence these primary bodies should join hands and make an effort to set up an arbitration body which matches the standard of all the popular arbitrational institutions.

OTHER (SOCIOLOGICAL) CHALLENGES OF CONDUCTING ARBITRATION IN INDIA

The previous section of the paper has gone in depth to discuss about the legal backwardness of the arbitration regime which has pulled back the development of India as the hub for arbitration both domestic and International. In this section therefore we now divert our focus towards other areas which challenges the conduct of arbitration in India. The recently implemented changes in the governing law of arbitration in India is certainly a right step forward taken towards the development of the arbitration regime, but what has actually impeded the growth of arbitration needs to be looked from other fronts as well.[40] By this the authors mean

[40] Bibek Deboroy & Suparna Jain, *Strengthening Arbitration and its Enforcement in India- Resolve in India*, https://niti.gov.in/writereaddata/files/document_publication/Arbitration.pdf.

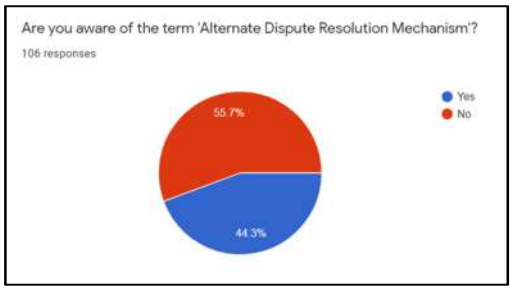
that there are a lot of other factors that shape the arbitration regime in India and there's another facet to it altogether. This means, the factor needs to be studied and appreciated from the lens of the society and how people in general have conceived the idea about the existence of an alternate dispute resolution mechanism. Therefore, to understand the perception of the people, the authors decided to conduct a sample survey by asking people from non-law background about their perceptions on ADR and Arbitration. Besides that, the authors themselves found certain interesting observations amongst themselves as to their perception of arbitration and lastly, they decided to take the opinions from people *belonging in the field viz.* from Arbitrators, as to how they perceive the proceedings from the other side of the table.

FINDINGS OF THE SURVEY

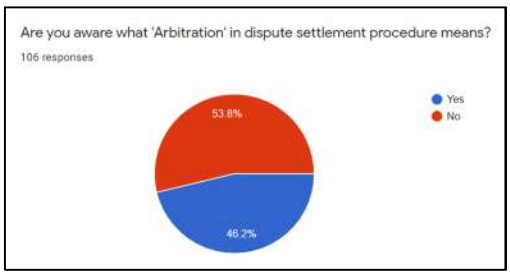
The authors sent out Google Forms to people from non-law background, and they gathered 106 responses. The objective of the survey was to *gather first-hand information (demonstrative in purpose) as to what people generally perceive about ADR and Arbitration.* Later on, this objective was slightly modified and was directed towards people not belonging to the legal fraternity because, eventually all law students learn about arbitration and ADR mechanisms, therefore the authors deemed it redundant to take their opinion and thus decided to direct their survey towards the other sections of people. The forms were sent and an analysis of the response is summarized below.

AWARENESS ABOUT THE TERM ALTERNATE DISPUTE RESOLUTION

The first question in the survey was, *'Are you aware of the term Alternate Dispute Resolution?'* and the results to it are furnished below.



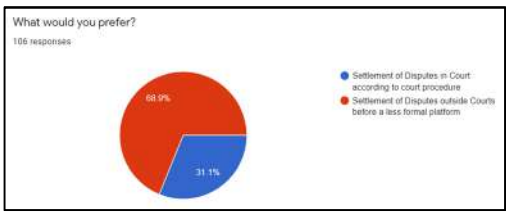
The next question was, *'Are you aware what Arbitration in dispute settlement procedure means?'* and the summary of the responses is demonstrated below.



The answers did not come as a surprise as the majority of the people (55.7%) were unaware as to what ADR meant and 53.8% of the people were unaware about the what 'Arbitration' meant in the context of ADR. The numbers show a difference when asked about ADR and Arbitration i.e. less percentage of people

is unaware about the term 'Arbitration'. Therefore, an inference can be drawn that 'Arbitration' has become in fact a term more popular than ADR and that people understand the term in the correct context. Now, the authors are aware that a criticism to the question asked could be, *'Alternate Dispute Resolution/ Arbitration is a legal term, so obviously the people from non-law background would not be aware about it.'* This could have been a valid criticism had the authors asked that particular question in an isolated context.

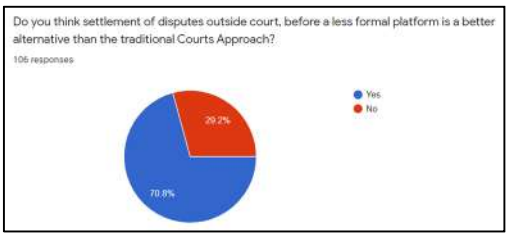
Therefore, to actually comprehend the mental faculty of the people who undertook the survey, the authors slipped into their mind about the concept of ADR, and then asked for their opinion. The next question asked was to understand the preference of the people about how they would like to settle their disputes. The response is attached below.



It clear that from the above numbers that a majority of the people (68.9%) almost 70% wanted to settle their disputes outside courts before a less formal platform. Therefore, it clearly indicates that people want to take and settle their disputes outside courts which is actually what ADR mechanism is, but are ironically unaware of the *term ADR itself. Therefore, the criticism if aimed is negated with an observation that it is not the process about which the people are unaware, rather it is the system about which they have remained largely ignorant.*

UNDERSTANDING THE PERCEPTIONS

The second part of this section will seek to understand as to how people have perceived the idea about the existence of a dispute settlement mechanism which exists outside the doors of the court. Thus, the authors asked the next question about whether people deem it fit for disputes to be settled outside court. The response is summarized below.



The response wasn't surprising as most of the people had similar ideas as to their personal preference about settlement of disputes outside courts and they deemed it proper and a better alternative than settling disputes in court. As the number suggests 70.8% of the people deem ADR to be a better alternative than Courts for the purpose of settlement of disputes. This is encouraging as it shows some hope that if properly sensitized, the ADR and Arbitration regime in India will flourish sooner rather than later because people view it as a lucrative opportunity.

However, there's a catch to this number. For the majority of the people who think that settlement of disputes outside court is a better alternative, need to be informed that not all disputes in-fact are arbitrable (meaning a dispute which is capable to be referred to arbitration/ ADR) *viz.* Criminal offences cannot be arbitrated. Apart from criminal offences, there are other categories of disputes which are not arbitrable.[41] Therefore, there are certain categories of disputes which require to be tried/settled in the public fora *viz.* before the Courts and cannot be divested to a private dispute settlement mechanism. On the other hand, the people who opine that it is the Courts which are the proper place for dispute settlement also need to be wary of the fact that, as on September 2020, there are over 4 Crores of pending cases before the Indian Courts.[42] Therefore, dragging any and all disputes to the courts is also not to be encouraged as it will only add to the already mounting pendency of cases and will delay the justice administration process ultimately.

Some of the responses which the people gave as their reason to prefer ADR or the traditional courts approach are worth noting. Many of the responses which preferred ADR method cited speedy process, doing away with the formalities and cost effectiveness of the system as a reason for favoring the same. However, some responses which were against out of court dispute resolution cited that, *'finality of the settlement'* is not guaranteed as opposed to the court settlement where decision is binding on both the parties. This is where people's perception about ADR shows the gap in knowledge. People are largely unaware that *Arbitration as a part of ADR* is in fact final in nature. In other words, the decision of the Arbitrator is final and binding on both the parties and the scope of the courts to interfere in the awards is limited.[43] Therefore a decision rendered by the Arbitrator is in fact final and when recognized by the court functions as a *deemed decree.*

The other responses which did not favor courtroom settlements highlighted the fact that decisions from courts takes time and lengthy procedures. Therefore, people are ready to accept an ADR mechanism but are unaware that such a binding system exists. This shows the unawareness of the people regarding ADR mechanism and Arbitration for settlement of disputes.

With the response of the survey being discussed, the next part of this section would focus on the observations and opinions of people from the field.

[41] Vijay K. Singh, *Certain Categories of Disputes to be Non-Arbitrable*, MONDAQ (Nov. 02, 2020, 01:20 PM) https://www.mondaq.com/india/arbitration-dispute-resolution/572050/certain-categories-of-disputes-to-be-non-arbitrable.

[42] *India's Pending Court Cases on the Rise: In Charts*, BLOOMBERG QUINT, (Sep. 29, 2020) https://www.bloombergquint.com/law-and-policy/indias-pending-court-cases-on-the-rise-in-charts.

[43] The Arbitration and Conciliation Act, 1996, § 34 & 48, No. 26, Acts of Parliament, 1996 (India).

OBSERVATIONS FROM THE OTHER SIDE OF THE TABLE

For identifying what actually transpires in an arbitration proceeding, and whether the Act[44] and the ground realities seem to match, the authors decided to talk to people who govern the proceedings *viz.* Arbitrators and to gather their opinions as to what kind of challenges they fathom are posed before the Arbitration regime in India. The authors managed to talk to two arbitrators and a summary of their response is discussed next. The responses were quite opposite to each other and presented two distinct pictures of how Arbitration goes on in India. While on one hand, the authors gathered the experience that;

i) There was a scarcity of arbitration cases in India. According to the arbitrator, the scarcity in cases for Arbitration was due to the traditional mindset of the people which is limited to the perception that the only way to redress a dispute is to knock the doors of the court.

ii) The second observation was that people generally rush to the court whenever they want their voices to be heard. As the general procedure goes, they hire a lawyer but the saddening factor is that even the lawyers who work at a court and have well established knowledge on law and are aware as to what cases are fit to be dealt under arbitration, veil their clients from opting the same by not bringing it to their notice that a separate and less time consuming and relatively an easier method of dispute redressal method does exist.

iii) Another key highlight from the conversation was that, he remarked that every State has high level of illiteracy baring few and such illiterate masses do not have enough confidence on the ADR Mechanism because this form of dispute resolution has always been overshadowed and it has been overshadowed to such extent that people belonging to rural areas or the people who are not literate enough take a back step from opting for such method of redressal. Ironically, they wish their disputes to be solved immediately but they are reluctant to opt for a mechanism which can deliver to their wishes.[45]

From the previous conversation, it seemed as if even the system wants the people to push away from ADR mechanism as the encouragement to opt for Arbitration isn't encouraging by the practitioners and the awareness of the people isn't encouraging either. But the other conversation suggested a different picture where

[44] The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India).

[45] A summary of the Conversation with Mr. Ambica Mohanty, who is an ex-arbitrator, arbitrated in various arbitrational institutions and has an experienced range of arbitration case dealing over 100 cases of arbitrations.

Arbitration has been institutionalized. The key highlights from the conversation is summarized below:

i. Working as an arbitrator in CPWD, the process of Arbitration is fairly institutionalized by virtue of compulsory arbitration by incorporating the same in all construction agreements. It means, any dispute arising relating to the terms of the agreement shall be resolved by Arbitration. This has ensured that the concerned parties do not go knocking to the doors of the court from the outset and arbitration isn't merely an option to the parties but an obligation.

ii. Interference of Courts in the ongoing Arbitration proceedings is minimal, and whenever parties have approached the courts for an intervention, the courts have taken a backseat and have shown a pro-arbitration approach and encouraged for the dispute to be settled through Arbitration.

iii. Finality of Decision: The parties to arbitration, have mostly and almost all the parties have abided to the awards and have not sought an appeal before the courts which would have further prolonged the time taken for settlement of disputes. According to him cost could have been another factor which has discouraged the parties to seek an appeal against the arbitral award or to resist the enforcement of the same.[46]

Therefore, to sum it up where Arbitration has been institutionalized as in the case of CPWD, where opting for arbitration isn't a mere choice, the situation looks better and that it has fulfilled the goals which ADR/Arbitration which originally sought to achieve.

Thus, after having assessed the legal and other challenges posed against the arbitration regime of India, it is now proper to move to certain observations and conclusion (including recommendation).

CONCLUSIONS

To summarize the whole paper in very concise words, *India has shown the potential to grow as country where Arbitration and other ADR methods can flourish, but has failed in the implementation part, which included both lack of proper and relevant laws and the mindset and thinking of the people.* Before the authors move to conclude the paper, here are some key observations made by them during the course of drafting this paper.

i) In the fast-moving commercial world, the pendency of cases before the courts has substantially slowed down the justice administration

[46] A Summary of the Conversation with Mr. Subhash Chandra Padhi, working as an Arbitrator in CPWD, and has presided over 200 Arbitration matters in his 4 years of experience.

mechanism. Therefore, ADR/ Arbitration in the present context (especially India with the magnitude of pending cases showing an upward growth) isn't mere an option but has become a necessity, to reduce the burden of the Courts.

ii) As discussed earlier in Chapter 3.1, the scope of appeal against an arbitral award under S.34 of the Act[47] has inadvertently increased judicial intervention in the arbitral proceedings which frustrates the very objective of resorting to Arbitration as a means of speedy justice mechanism.

iii) Sometimes, the cost of Arbitration becomes so high owing to the various fees that need to be paid by the parties, it has somewhat distanced Arbitration from the reaches of the lower financial strata of Indian population. Adding to the woes, when the arbitral award is dragged to the court, it becomes litigation in the disguise of Arbitration which adds to the costs and therefore does not provide any rationale for resorting to Arbitration in the first place.

iv) As far as enforcement of *Foreign (Final) Arbitral Awards* are concerned, Part II of the Act[48] deals with the same, but sadly does not recognize the *enforcement of foreign interim arbitral award,* and for the awards that have not come from the reciprocating territories are unenforceable. Also, the fact that India has 11 notified reciprocating territory does not help, as an award debtor who seeks to enforce the decree passed by a foreign court (not from a designated reciprocating territory) for the performance of the Arbitral Award in India, cannot do the same.

v) The importance of an Emergency Arbitrator has already been discussed in Chapter 3.4, and the absence of the same from the Indian Law therefore prevents the people from availing the full benefits of Arbitration (as a process), which the Act[49] initially sought to provide.

vi) Although the Arbitration and Conciliation Act, 1996 was passed with a view to take dispute resolution outside courtrooms, but the same purpose has been vitiated due to the intervention by the courts before, in and after the arbitral proceedings. This has therefore led to a loss of the separate character of Arbitration as a type of Alternate Dispute

[47] The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India).
[48] Ibid.
[49] The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India).

Resolution, as in essence it reverts back to litigation.

vii) Every country, be it London or Singapore which serves as a most sought- after seat for Arbitration is in fact backed by excellent Arbitral Institutions which have institutionalized the process and have brought about uniform laws and regulations governing Arbitration. What has pulled back India from developing as a favorable seat for arbitration lies in the fact that, India has not yet flourished with reputed and proper Arbitral Institutions, and the ones that are already in place are not met with the desired case-load which has prevented them from addressing the loopholes in the present law and has hampered the growth of the Arbitration Law in India.

viii) Now, addressing the mindset of the people, as discussed in Chapter 4, people do want to go for Alternate Dispute Resolution mechanisms i.e settling disputes outside courts, but are unaware as to what the term stands for. This means, that the system has failed to seep into the grass roots levels of the society rendering people unaware about where to go in case a dispute arises.

ix) Another important observation made by the authors lies in the fact that though people are educated in India, but legal awareness amongst the people who do not study the law is negligible. This was made evident by the fact, when a co-author of this paper admitted to the fact that she herself was unaware about ADR or Arbitration before joining law school. Therefore, it's a safe observation to make that, there's a handicap in the legal knowledge of the people of India which in fact concerns their basic rights and duties.

SUGGESTIONS

To merely point out the flaws and not providing any recommendations for the improvement will render the criticism pointless. Therefore, the authors would like to make some basic recommendations as to how to overcome the challenges faced by the Arbitration regime in India:

i) To flourish as a desired seat for Arbitration, India has to compete in a global market, and one of the key points to be noted is that these countries have constantly updated their laws relating to Arbitration to match the current demands of the present market. Therefore, India should firstly undertake a comprehensive analysis of its Arbitration laws, and compare it with the global standards, and incorporate the necessary amendments into the law.

ii) As already mentioned, a developed seat for Arbitration is always backed

by full functional Arbitral Institutions. Therefore, India needs to strengthen the infrastructure pertaining to these Institutions and ensure that it reaches the deepest part of our society and does not simply remain a corporate gimmick.

iii) Lastly, all fault cannot be ascertained to the system only. The mindset of the people also needs to be changed. Therefore, India must strive for a basic legal awareness from the days of school education, and not simply wait for *interest students* to enroll in law schools.

Therefore, to conclude the paper the authors would like to remark that, *India has a rich history of ADR mechanism, seeped deep into its societal roots, but for some reason this method has lost its essence and has been over shadowed by the Court Systems. But that does not mean that glory days cannot come back. Therefore, to build India a competitive seat for arbitration in the Global Market, it is the duty of every person to contribute in all possible ways to uplift the current Arbitration regime, and cannot wait for the affirmative action of the Government alone. It's time to take a collective step forward.*

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LEGALITY OF USE OF FORCE IN OUTER SPACE

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ABSTRACT

Cold War was the first testament to the fact that space has become the new battleground. International law, with regard to the outer space, has been developing since the first step of mankind towards the space in 1958, through the launching of Sputnik 1 and Explorer 1. Since mankind's advancement in outer space, it has become an area of growing political and economic significance. There is another, more dangerous face of outer space exploration, that is, militarization of space. Although the General Assembly Resolutions and treaties concerning outer space have reiterated that outer space must be used for "peaceful purposes", space has become a developing plat form for military defence and warfare. On June 18, 2018, the United States announced that it was establishing a space force as the sixth branch of the US military. It is proposed to be separate but equal to the US Air Force, which has so far overseen the US military operations in outer space. Meanwhile, China and Russia appear to have headed in the same direction. China has been reported to have recently designated space as a military domain. The idea of space forces has been kicked around for decades now. It is claimed to be retaliation to the space activities of China and Russia. In the light of these international developments, military actions in the outer space may be more near than we realize. International Humanitarian Law may not be well equipped to deal with space wars. Thus, it is more pertinent today than ever to study the Outer Space Law and examine the law at play. This paper examines various terms used in outer space treaties and their ambiguities to find out the legality of use of force in the outer space and the interaction of these treaties with humanitarian laws. In furtherance to find out the legality of use of force in outer space, the article examines the legality of use of force in outer space. In furtherance of this, key articles of the treaties related to outer space, the UN Charter and other international legal documents are analysed.

Keywords: *Outer, Space, International, Treaties, Charter*

INTRODUCTION

Arms race finds its origin in power rivalry and fight for and against sovereignty. The origin of the modem arms race has been traced to the Franco-Prussian war in 1870, when the French army of professionals, equipped with inferior iron guns, surrendered to the Prussian army.[1] While the legality of war is often disputed by states and scholars, what is not much debated is the reliance on space for the purpose of war. During the wars of the twentieth century, the world saw several breakthroughs in technology that pulled arms race to the outer space. The race to extend political rivalries was extended by the then polarising super powers, US and USSR, to the space more extensively during the cold war. Paul C. Warnke, former head of the US Arms Control and Disarmament Agency states in 1979 that we could have war in space within the next ten years until and unless we come up with a treaty to stop it from taking place.[2]

Outer space exploration and utilization has been growing over the past seven decades. Weaponization of space is not a recent phenomenon. Since the launching of Sputnik and Explorer I, many advances have been made in the field. Meanwhile, the outer space law regime has also expanded after the aforementioned launches. Three years after these international developments, President Eisenhower warned the U.N. General Assembly that it faced a vital decision.[3] And the years to come demonstrated the veracity of his warning, as the next decades saw outer space gradually being transformed into a battlefield.

The origin of the military use of space is difficult to pin point, but it can be traced to Nazi Germany's ballistic missile named V-2 rocket, in the 1930s.[4] More instances of significant usage of space military technology can be spotted in the Persian Gulf conflict, often said to be the first space war, in which the US Department of Defence used the INMARSAT, a satellite system, to send the graphics of the war for the rest of the world to see. This use demonstrated not only the military uses space could be put to, but its usefulness in civilian technology. This launched the idea of using effective space technology that served a dual purpose. In the 2001 war in Afghanistan, multiple operations were launched that were based on space systems.

Today, we see a manifested need of rethinking the laws behind the military use of outer space, when countries like China and the US have demonstrated significant space military capacities. This goes without saying that an international

[1] Ivan A. Vlasic, *Disarmament Decade, Outer Space and International Law*, 26 McGill L.J, 135, 135 (1980).
[2] Ibid, 146.
[3] Supra n 1, 147.
[4] Johannes M. Wolff, '*Peaceful Uses' of Outer Space Has Permitted its Militarization–Does It Also Mean Its Weaponisation?,* 1 Disarmament Forum, 5-13, 5 (2003).

development this important needs significant revisiting of the international laws, in order to find out their adequacy and efficacy.

The primary international treaty that concerns this subject matter is the UN Charter. Apart from it, there are multiple international treaties that govern the matter. In a gist, there are multiple hard and soft laws that have to be considered while inspecting the concept of use of force in outer space. This paper primarily seeks to find out the legality of use of force in outer space. Secondly, the article analyses the interaction of space law with laws of war, humanitarian laws and the UN Charter to examine their application on space militarization and weaponization. The paper can be seen to unfold in four parts. Part I studies our primary legal document in this context; the UN Charter and its relevance when it comes to use of force in outer space. Part II analyses the treaty principles relevant to our problem in question. Part III studies the interplay of these international legal documents with international humanitarian law. In Part IV, we will try to conclude our findings and come up with possible solutions to our problem.

PART I: SCOPE OF USE OF FORCE IN OUTER SPACE UNDER THE U.N. CHARTER

Unlike the Geneva Conventions and other related conventions relating humanitarian laws, the UN Charter refers to the conditions under which war or use of force may be resorted to by states, that is *jus ad bellum*.[5] These principles lay down conditions under which use of force is legally justified. *Jus in bello*, on the other hand, are the principles that regulate the conduct of parties engages in use of force, without commenting on the legality of such use.[6] This part focuses on *jus ad bellum*, which are set out in the UN Charter. The paper will engage with *jus in bello* in Part III. It must be noted that IHL's application does not depend the legality of use of force.

Article 1(1) of the Charter lays down the first objective of the United Nations to be maintaining peace and security, and, for this purpose, the Charter takes effective measures for preventing and dealing with any threat to peace and security.[7]

In her magnificent review of the use of force in the international legal order, Christine Gray has analyzed the UN Charter Scheme, as was envisioned and as it turned out in practice. We see that the UN Charter's scheme can be broken down to some important articles.

Article 2(4) of the UN Charter states:

"All Members shall refrain in their international relations from the threat or use of force against the territorial

[5] Robert Kolb, *Origin Of The Twin Terms Jus Ad Bellum/Jus In Bello*, 37(320) ICRC (1961-1997), 553-562, 553-556 (1997).

[6] Carsten Stahn, *Jus Ad Bellum','Jus In Bello'...'Jus Post Bellum'?–Rethinking The Conception Of The Law Of Armed Force*, 17(5) EJIL, 921-943, 927-929 (2006).

[7] U.N. Charter Art. 1, para.1.

integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations"

From a cursory reading, it appears that this article is prohibiting states from threatening to or actually using force against other states in a manner that is not compatible to the UN scheme. This Article is clearly limiting the use of force by states and at the same time, it is laying boundaries of sovereignty that states are allowed to practice. It must be noted that this principle was already present in the form of customary international law and *jus cogens*.[8]

This leads us to the conclusion that the aim of this Article is to regulate the use of force by states, instead of prohibiting it. The military use of outer space is compatible with international law, as long as it complies with Article 2(4) of the UN Charter and other international obligations.[9] Restriction on states and other subjects of international law from using force has been recognized as a peremptory norm of international law from which the subjects must not derogate. This view has been taken in multiple cases like the *Nicaragua Case*[10] and the *Corfu Channel Case*[11].

Hence, it is more than clear to us that the use of force has been permitted, as long as it is within the confines of what is permitted by the UN Charter. There are three exceptions to this principle. The first exception is the use of force as authorized by the Security Council under Article 42 of the Charter. The Article states that:

"Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations"

Hence, if the peaceful measures as provided in Article 41 have proven inadequate or if the Security Council is of the opinion that they would be inadequate, it can turn to use of force in order to maintain or restore international peace of security.

The second exception can be noted under Article 51 of the Charter which lays down the right of individual or collective self-defence until the Security Council has

[8] Michel Bourbonnière and Ricky J. Lee, *Legality Of The Deployment Of Conventional Weapons In Earth Orbit: Balancing Space Law And The Law Of Armed Conflict*, 18.5 EJIL, 873-901, 887 (2007).

[9] Jinyuan Su, *Use Of Outer Space For Peaceful Purposes: Non-Militarization, Non-Aggression And Prevention Of Weaponization*, 36 J. Space L., 253 , 260 (2010).

[10] Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America) I.C.J. 14 (1986).

[11] Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. People's Republic of Albania), ICJ Rep 4 [1949].

taken measures necessary to maintain international peace and security. The Article states:

"Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

Right to self-defence is a customary international law.[12] Like Article 2(4), this Article is also regulating what has already been permitted by the soft law. There is an ongoing debate on two fronts; whether the armed attack that requires self defence needs to originate from another state or whether it can originate from an armed group, and, whether the attack should actually materialise. Self-defence can be evoked to justify the necessary and proportionate use of force.[13] Any act in furtherance of self-defence by civilians does not constitute direct participation in hostilities.

The Caroline Doctrine has significantly guided the principle and right of self-defence by stating that for acting in self-defence, the necessity should be instant, overwhelming and does not give any scope to the attacked State of any selection of means or any deliberation.[14]

This third and last exception can be traced to humanitarian intervention. Chapters VI and VII of the Charter demonstrate that military activities that do not involve the use of force in the context of peacekeeping can be permissible in the interest of maintaining peace and security.[15] Humanitarian intervention, as developed through the concept of *Responsibility to Protect*, permits use of force by states.

Apart from this set of provision, Article 103 of the Charter must also be noted. IT lays down that in case of a conflict between the obligations of the members under the Charter and their obligations under any other treaty, the obligations under the Charter will prevail. This leads us to conclude that if the obligations of states under the UN Charter were to be in conflict with the Outer Space Treaty, 1967, or any other international treaty, the Charter will hold primacy.

[12] David Kretzmer, *The Inherent Right To Self-Defence And Proportionality In Jus Ad Bellum*, *24*(1) EJIL, 235-282, 241 (2013).

[13] Legality of the Threat or Use of Nuclear Weapons (Adv. Op.), I.C.J. 226, 1 105 (1996); Draft Articles on Responsibilities of States for International Wrongful Acts 2001, art. 21.

[14] Christopher Greenwood, *International Law And The 'War Against Terrorism'*, *78*(2) International Affairs, 301-317, 308 (2002).

[15] Certain Expenses of the UN, ICJ Rep 151, 167 (1962); Supra n 8, 888.

PART II: ANALYZING OUTER SPACE TREATIES: AMBIGUITIES, DEBATES AND INTERPRETATIONS

We saw the first important development in the context of peaceful purposes of the space in the year 1957-58, which was declared the international Geographical Year, when the US proposed to the UN the idea of using the outer space for peaceful and scientific purposes only.[16] Ironically, today, the decision of the US Government to go further into the direction of weaponization of the space is the triggering point of rethinking outer space law and its interpretations in terms of use of force. After this development came the first UN General Assembly resolution on the outer space, Resolution 1148, in 1957, in which the UN declared that the use of space must be in the interest of mankind.[17]

Multiple General Assembly Resolutions and most treaties related to the outer space declare that all activities aimed towards the outer space must be in the interest of mankind and be for peaceful purposes. At the same time, these documents also allow, and, at times, limit the use of the military use of outer space. There is no separate international legal document that makes principles and laws of war applicable in outer space. These must be derived from treaties, laws of armed conflict and their interaction.

Article III of the Outer Space Treaty, 1967 sets the general vibe of this treaty and the treaties that followed in terms of use of outer space for peaceful purposes. It states that the Treaty requires that space activities be conducted in accordance with international laws, including the Charter of the United Nations, which, in turn provides that obligations under it would override any rights or obligations under any other treaty, as provided by the Article 103 of the Charter.[18] The primacy that the UN Charter holds must be noted here. Article IX imposes a responsibility on the State to undertake 'appropriate international consultations' before it takes up any activity or experiment that has the potential to cause harmful interference into the use and exploration of outer space. This obligation extends to times of peace as well as state of war between two States.

The most important provision to be considered here is Article IV of the Outer Space Treaty, 1968, which states that:

"States Parties to the Treaty undertake not to place in orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner.

The Moon and other celestial bodies shall be used by all States Parties to the Treaty exclusively for peaceful purposes. The establishment of military bases,

[16] Joseph Kaplan, *The International Geophysical Year*, 68(404) *Publications of the Astronomical Society of the Pacific*, 381-404 (1956).

[17] U.N. GAOR Supp. (No. 18) at 3 (1957).

[18] Supra n 8, 888.

installations and fortifications, the testing of any type of weapons and the conduct of military manoeuvres on celestial bodies shall be forbidden. The use of military personnel for scientific research or for any other peaceful purposes shall not be prohibited. The use of any equipment or facility necessary for peaceful exploration of the Moon and other celestial bodies shall also not be prohibited."

Before delving into the analysis of this very pertinent provision, we must consider the changes the term "outer space" has went through. It now embraces the celestial bodies and the void space between them.[19] They are defined by Professor Bin Cheng as "celestial bodies" and "outer void space" respectively, two parts that constitute a whole space.[20]

Once we have understood this, we must look at the two interpretations of Article IV of the Outer Space Treaty, 1967- non-militarization and non-aggression, which are similar and at the same time, different.[21] It must be noted that Article IV, while referring to the orbit around the Earth, outer void space and celestial bodies, maintains a definite specificity about nuclear weapons and weapons of mass destruction. The framers seem to have deliberately left out conventional weapons.[22] Next, it is noteworthy that the specificity that was underlying in the first paragraph disappears when Article IV talks about Moon and other Celestial Bodies.

The only requirement laid down in this case is of using these exclusively for peaceful purposes. Using this caveat to justify prohibition of use of force in outer space would depend on how "peaceful purposes" are interpreted.[23] To get a perspective, we can note that many new technological developments have actually contributed to a peaceful weapons regime by maximising security and transparency, which, in essence, is in furtherance of peaceful usage.[24]

Considering the UN Charter and the primacy that its Article 103, Article 25 provide it, we can conclude that use of force through nuclear weapons and weapons of mass destruction or conventional on Moon and other Celestial bodies can be justified, as long the use is in accordance with the scheme of the UN Charter.

Hence, if the use of force is sanctioned by the Security Council under Article 42, or is an act of self-defence under Article 51 or is an act of humanitarian intervention, it could be construed to be for peaceful purposes as the Outer Space Treaty, 1967 envisages, and would be permitted to be used on the Moon and other celestial bodies.

Similar to Article IV of the Outer Space Treaty, 1967, Moon Agreement, 1979

[19] Supra n 9, 255.
[20] Michael N. Schmitt, *International Law Across the Spectrum of Conflict* (2000).
[21] Supra n 9, 254.
[22] Supra n 8, 888.
[23] Ibid.
[24] Supra n 9, 255.

prohibits any threat or use of force or any other hostile act or threat of hostile act on Moon, which must only be used for peaceful purposes, as per Article 3 of the 1979 Treaty. The Article also lays down that states cannot place any nuclear weapons or weapons of mass destruction in orbit around or other trajectory around the Moon. Such weapons cannot be used or placed in or on the Moon (as per Article 1, the provisions applicable on the Moon are also applicable on other celestial bodies.) Article 3, para 4, forbids the establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military manoeuvres on the Moon, and by extension provided by Article 1, on other celestial bodies.

The general scheme of Article IV of Outer Space Treaty, 1967 is visibly different from that in Article 3 of the Moon Agreement, 1978. Unlike the former, the latter forbids both nuclear and conventional weapons, without the use of ambiguous caveat of "peaceful purposes".

There are certain scholars, for instance, Richard A. Morgan, who have argued that the concept of "peaceful purposes" is malleable and fluid, and is applicable on the entire outer space and not just celestial bodies.[25] He also writes that the parameters in the UN Charter play a important role in setting the boundaries of "peaceful purposes". In the latter part of the argument, we see that even the dissenters have favoured the non-aggression interpretation in one way or the other.

We must note that the operation of Article 42 and 51 of the Charter, the latter also being a principle of *jus cogens*, prevails over the prohibitions contained in Article IV of the Outer Space Treaty, 1967 and Article 3 of the Moon Agreement, 1979, the former on account of the operation of Articles 25 and 103 of the Charter of the United Nations, and the latter because of the Article 53 of the Vienna Convention on the Law of Treaties.[26]

Let us now move to the interpretation of "peaceful purposes" as envisaged in the Outer Space Treaty, 1967. First and foremost, it must be noted that its Article IV does not use the word "attack", which could lead us to believe that it is only applicable to peacetime activities.[27]

Next, we must delve into the difference between non-militarization and non-aggression. Mathew Mowthorpe has defined militarization as "the use of assets based in space to enhance the military effectiveness of conventional forces or the use of space assets for military purposes."[28] Most international treaties have agreed upon a strict interpretation of this principle and have excluded

[25] Matthew Mowthorpe, *The Militarization And Weaponisation Of Space* (Lexington Books) 2004.

[26] Supra n 9, 255.

[27] Ibid.

[28] Matthew Mowthorpe, *The Militarization And Weaponisation Of Space* (Lexington Books) 2004.

development and testing not conducted in outer space.[29]

Going by a strict interpretation, it can be concluded that prohibitions in Article IV of Outer Space Treaty, 1967 are not exhaustive and non-militarization is not fully outlawed even for celestial bodies.[30] At the same time, this principle, to some extent, can only be applied to the celestial bodies and not outer void space, for it can be deduced that military activities are not prohibited as per Article IV, for para 2 only applies to celestial bodies and para 1 only bans weapons of mass destruction and nuclear weapons.[31]

One may attempt to interpret this provision in good faith, as Article 26 of the Vienna Convention on the Law of Treaties, 1969 demands. In doing this, one would turn to the Preamble of the treaty to find out its object and purpose.[32] The preamble of OST, 1967, calls for states to refrain from placing nuclear weapons and weapons of mass destruction limiting the provision to celestial bodies and earth orbit. At the same time, it calls for use of outer space for peaceful purposes, without placing any spatial limitation. Here, we see a contradiction. And interpreting it in good faith, one would apply the provision regarding "peaceful purposes" to both outer void space and celestial bodies.

Going by the definition of Matthew Mowthorpe, weaponization of outer space is defined as "weapons based in space or weapons based on the ground with their intended targets being located in space."[33] Jinyuan Su has concluded that conventional weapons are neither permitted nor prohibited in space.[34]

If we venture to investigate if Article IV prescribes non-militarization, we would question if military activities in question are in consonance with principles laid down in the Preamble, say "benefit of the mankind" or "international cooperation". The results would differ depending on the kind of military activity under discussion.[35] Jinyuan Su has noted that many new space weapons technologies have reduced the risk of conflict by promoting transparency and minimizing surprise attacks, which could be construed to be in coherence with the objects and principles laid in the preamble.[36]

It would be useful to refer to the preparatory work behind the Outer Space Treaty, 1967. Travaux préparatoires indicate that the peaceful principle was initially borrowed from the Antarctic Treaty. Like Antarctic Treaty, "peaceful" was intended to be construed as the opposite of "non-military", but this approach was later discarded in favour of "non-aggression".

[29] Supra n 9, 255.
[30] Supra n 8, 875-888.
[31] Ibid.
[32] Supra n 9, 256.
[33] Matthew Mowthorpe, *The Militarization And Weaponisation Of Space* (Lexington Books) 2004.
[34] Supra n 9, 268.
[35] Supra n 33.
[36] Supra n 9, 256.

We must now examine the non-aggression interpretation of Article IV. Proponents of this interpretation of the peaceful principle claim that military use of the outer space is compatible, as long as it is in compliance of the scheme of the UN Charter. This rather liberal interpretation leaves ample scope for multiple old and new space military activities to be exempted from Article IV. But there is no denying that the non-militarization principle has become outdated and the non-aggression principle stands strong, albeit with contradictions.

Right after the Outer Space Treaty, 1967, was signed, Edward R. Finch, Jr. tired to inspect the two interpretations of "peaceful purposes".[37] He wrote that in the treaty and its preamble, "peaceful purposes", or a semantic equivalent, has been expressly referred to in not less than six places.[38] He noted that when an express prohibition is intended, the treaty does so explicitly. But no such prohibition has been made against military activities per se. Since treaties are to be read as a whole, this can only mean that the treaty is referring to non-aggressive activities while talking about peaceful purposes and not non-military activities.

Another set of interpretations has been offered regarding "peaceful purposes" in terms f its spatial application. The first interpretation is a narrow one, applying the second half of Article IV only on celestial bodies and not on the entire outer space.[39] The proponents of this interpretation rely on the axiom of international law that is something is not prohibited; it is permitted under international law.[40] This view, originating from the *Lotus Case*[41], has lost its relevance since and has faced major criticism. Alternatively, we can have a look at the Preamble of the treaty, other clauses of the treaty, UN Charter and other international laws and conclude that terms like "benefit of mankind" define the meaning and applicability of "peaceful purposes, making it applicable on the entire outer space.[42]

It is also interesting to note that the framers of the 1967 Treaty used the words "peaceful purposes" instead of "peaceful use". These words bring in the notion f whether or not a particular use was peaceful would depend on its intended purpose.[43] This further broadens the ambit of this term, exempting programs that might be for the defence of the state.

It is significant to note that the failed Draft Treaty on Prevention of the Deployment of Weapons and the Threat or Use of Force in Outer Space, which

[37] Edward R Finch Jr, *Outer Space For Peaceful Purpose*, Vol. (54)4 American Bar Association Journal, 365-367 (1968).
[38] Ibid.

[39] Richard A. Morgan, *Military Use Of Commercial Communication Satellites: A New Look At The Outer Space Treaty And Peaceful Purposes*, 60 *J. air L. & com.* 237, 239-244 (1994).
[40] Robert L. Bridge, *International Law and Military Activities in Outer Space*, 13 *Akron L. Rev.* 649, 656 (1979).
[41] S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J.
[42] Supra n 39.
[43] Ibid.

was submitted by China and Russia to the UN Conference on Disarmament, called for prohibition on deployment or stationing of any weapons of any kind outer space and on the celestial bodies[44]. It prohibited resorting to threat or use of force against outer space objects and assisting or encouraging other states to participate in such prohibited activities.[45] The possibility of success of such a legal document is scarce in the international legal regime, as decisions of the Conference on Disarmament are based on consent. There is little to no possibility of the US adopting a treaty like this, even more so after the recent declarations by former President Trump.

Given that the treaties are only enforceable against the state parties, any rights arising from use of force in outer force would be exercisable only against the state actors. Should a non-state actor place a conventional weapon in earth orbit, the legal peripheries of this situation would be dubious.[46]

PART III: HUMANITARIAN LAW AND USE OF FORCE IN OUTER SPACE: EXAMINING THE INTERACTION

Outer space technology generally serves the dual purpose, in both civil and military spheres. Using outer space to assist wars on earth, through intelligence and global positioning measures, has been accepted as legal and has actually promoted precision and reduced causalities, thus furthering the cause of humanitarian law.[47] But this does not justify war itself.[48] What has been accepted as legal is limited to what has been employed so far.[49]

At the same time, the use of force in and through space raises multiple questions about the application of principles of humanitarian law.

As discussed above, COPOUS has upheld the idea that the right of self-defence is applicable in case of outer space. But, after the politically safe judgment in *Nuclear Weapons Case*[50], what is left unclear is whether using nuclear weapons for self-defence is legal under international law. Does paragraph 1 of Article IV of Outer Space Treaty 1967 restrict use of nuclear weapons in case of self-defence as well? This is an unsettled question.

The Registration Convention lays down a detailed and mandatory process of registration of space objects to a domestic registry. This domestic registry is under an obligation to share all the registration data with the UN Secretary General.[51] Article II of the Registration Convention, 1976 states that when a state launches a space object into Earth orbit or beyond,

[44] Supra n 8, 890-891.
[45] Ibid.
[46] Supra n 8, 888-891.
[47] Supra n 9, 262.
[48] Ibid.
[49] ibid
[50] Legality of the Threat or Use of Nuclear Weapons (Adv. Op.), 1996 I.C.J. 226, 1 105.
[51] Convention on Registration of Objects Launched into Outer Space 1976, Article IV.

the launching State shall register the space object by means of an entry in an appropriate registry which it shall maintain. Each launching State shall inform the Secretary-General of the United Nations of the establishment of such a registry. Article III then mandates the Security General of the UN to maintain a Register in which all information as mandates by Article IV shall be recorded.

Article IV of the Registration Convention, 1976 is the most important provision to look at, for it specifies the information to be furnished of such launchings:

a) Name of launching State or States;
b) An appropriate designator of the space object or its registration number;
c) Date and territory or location of launch;
d) Basic orbital parameters, including:
    (i) Nodal period;
    (ii) Inclination;
    (iii) Apogee;
    (iv) Perigee
e) General function of the space object

The Article further mandates that the states *may*, from time to time, provide the Secretary General with additional informational regarding the space object.

It is not difficult to notice that the Registration Convention, 1976 is rather liberal. Drafted in midst of the Cold War it reeks of secrecy and diplomacy. Vlasic has noted that the superpowers, at the time of framing, ensured that the Registration Convention, 1976 ensured maximum concealment of their military activities in outer space.[52]

The Convention does not mandate recording of the object and purpose of the space object. The only relevant information mandated by the Registration Convention, 1976 mandates the disclosing of the "general function" of the space object. Further, it is discretionary upon the states to provide any additional information regarding the space object.

The lack of a concrete mechanism here is in violation of the international humanitarian law. International Humanitarian Law calls for clear markings like carrying arms openly and distinctive markings.[53] The military nature of the space object would remain hidden, going by the Registration Convention, 1976, thus violating international humanitarian law.

This feigning of civilian status should ideally amount to perfidy under Article 85 (3)(f) of the Additional Protocol I to the Geneva Conventions, but it doesn't.[54]

Another problem area in the interaction of outer space law and humanitarian law is the constant development in the field of space technology. It remains a sceptical idea that all new technology will be in consonance with the basic principles of international humanitarian law, i.e.,

[52] Supra n 1.
[53] Supra n 8, 894.
[54] Ibid.

principle of distinction, principle of proportionality and principle of necessity. These weapons and their deployment may be declared legal as per Article IV of the Outer Space Treaty, 1967, but will it adhere to international humanitarian law? Like in the case of automated weapons technology, this question remains unsettled.

The application of Martens Clause poses another dilemma in the same direction. The preamble to the Second Hague Convention in 1899 contained what is regarded today as the Martens clause, as was named by the Russian delegate at the Conference, Fyodor Fyodorovich Martens. It lays down that in the areas where the code of laws of war have not been developed, the principles of law of nations as established from the usages by civilized peoples, the laws of humanity and dictates of public conscience must be made applicable.[55] Due to its acceptability in the Geneva Conventions and the Additional Protocols as well as by other specific Conventions, it has gained the status of customary international law. The dynamic nature of this clause extends its application to technological advances in warfare and, thus, space warfare.

There exists a line of thought that these principles of international humanitarian law are not fully applicable to the outer space regime. But the credentials of these arguments are dubious. If mankind has extended its battlefield to the space, there is little reason in not applying laws of armed conflict to the new regime created by mankind. Not doing so would be assuming that what has not been laid down is not intended, a rather flimsy approach towards international law.

An interesting problem arises in case of a conflict between outer space law and international humanitarian law. The situations discussed above, of perfidy and technological advancement, represent this conflict between the two disciplines of international law. Which of the two should be given more weight in this conflict?

In examining this conflict, we must note that most of the provisions of the Registration Convention, 1976 have not been given the status of customary international law. International norms of humanitarian law, on the other hand, enjoy a higher status in the hierarchy of sources of international law.[56] Not only have these been codified in the Hague Conferences, the Geneva Conventions and their Additional Protocols, they have been established as customary international law.

MILAMOS: A SIGNIFICANT ACADEMIC STEP AHEAD

We notice the shadow of the Cold War in outer space treaties. The treaties do not

[55] Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict: Protocols I and II to the Geneva Conventions art. 1(2), 16 I.L.M. 1396-97 (1977).

[56] Supra n 8, 894-900.

clarify or lay down any concrete constraints on use of force in outer space, especially regarding conventional weapons. These have to be rethought, in lines with international humanitarian law, in consonance with principles of peaceful purposes, international cooperation and common benefit.

MILAMOS is the **Manual on International Law Applicable to Military Uses of Outer Space (MILAMOS) Project,** launched in May 2016. It aims to develop a manual that would clarify the fundamental rules applicable to the military use of outer space.[57] It focuses on three-time frames; times of peace, periods of rising tensions and times of armed conflict. It is intended to be so drafted as to be widely accepted.

This document is being drafted by the experts in the field of space law from the UK, the US and Australia. After the failure of the Draft Treaty on the Prevention of the Deployment of Weapons and the Threat or Use of Force in Outer Space, it would be the first document clarifying the boundaries of use of force in outer space.

It would be made applicable to both state and non-state actors. It is applicable equally to both State and non-State actors. It addresses some of the tactics used in conflicts like firing of lasers and tampering with satellite imagery.

[57] McGill Institute of Air and Space Law, *Manual on International Law Applicable to Outer Space (MILAMOS)*, https://www.mcgill.ca/iasl/milamos (last retrieved on 16/09/2020).

SUMMARY OF FINDINGS

- Since the launching of Sputnik and Explorer I, many advances have been made in the field of outer space technology, leading to its civil and military use.
- Meanwhile, the outer space law regime has also expanded post the aforementioned international developments.
- Outer Space Treaty, 1967, has given way for a liberal interpretation of the vague phrases of its Article IV.
- Nuclear weapons and weapons of mass destruction are prohibited in the Earth orbit, celestial bodies and the outer void space. Conventional weapons, on the other hand, are subject to use for peaceful purposes.
- Peaceful purposes, as discussed, have to be interpreted in terms on non-aggression as against non-militarization, implying that deploying and using conventional weapons are legal as long as they are in compliance with the scheme of the UN Charter.
- As far as the weaponization of space is concerned, law is silent and we must rely on the subject interpretation of “peaceful purposes”.
- There are multiple areas of conflict between space law and international humanitarian law, for example, perfidy and technological advancement.

- The conflicts between space law and international humanitarian law should be resolved by giving precedence to international humanitarian law, the latter bearing established principles of customary international law.
- Outer space treaties must be read as a whole, in good faith and in consonance with principles like peaceful purposes, international peace and cooperation.

CONCLUSION

There is no denying that the limitations of international space law have to be clarified when it comes to use of force in outer space. We notice that the ambiguity in the key Article of the Outer Space Treaty has given way for a liberal interpretation of the vague phrases of the Article.

Nuclear weapons and weapons of mass destruction are clearly prohibited in the Earth orbit, celestial bodies and the outer void space. Conventional weapons, on the other hand, are subject to use for peaceful purposes. Peaceful purposes, as discussed, have to be interpreted in terms on non-aggression as against non-militarization, implying that deploying and using conventional weapons are legal as long as they are in compliance with the scheme of the UN Charter. As far as the weaponization of space is concerned, law is silent and we must rely on the subject interpretation of "peaceful purposes".

As of 1968, countries like Russia and China favoured a weapon-free space. The inclination of the US towards the same is evident from its proposals to use space peaceful that it makes in 1957. But the scenario has changed and countries are turning to space weaponization. One will eventually have to turn to state practice to examine the legality of space weaponization, which in turn shall remain governed by reasonableness, necessity and proportionality.

In a non-polarized world of states with immense nuclear capacity, how far we can depend on state practice is a political question. One legal solution out of this ambiguity is to develop an instant custom. UN member states must also consider establishing a space police system under treaty law to regulate use of force in outer space.

There have been multiple manuals international system has seen, for example, the San Remo Manual on Sea Warfare, the Harvard Manual on Air and Missile Warfare and the Tallinn Manual on Cyber Warfare are some examples of successful drawing of manuals. These manuals have been effectively incorporated into the national military manuals and are highly functional in the state of hostilities. Their effect has been so dramatic that they are estimated to form part of customary law through State practice in near future.[58] There is no

[58] 1(18), GEORGETOWN JOURNAL OF INTERNATIONAL AFFAIRS, *(Margaret Schaack and Will Evans,* Georgetown University Press, 2017).

reason to think why this cannot happen to the burgeoning area of outer space law too.

Another possible solution is to rethink the liberal approach taken by the outer space treaties, so as to make them more compatible with international humanitarian law. The evolutionary nature of international law should be recognized to give way to a concrete legal framework to use of force in and through outer space.

The biggest take away from the analysis above is that the principles of use of outer space for "peaceful purposes", "benefit of mankind" and "international peace and security" should be read as peremptory principles of international law, being enshrines in multiple General Assembly Resolutions and outer space treaties. All outer space treaties should be read as a whole and in good faith, giving due consideration to these principles.

It is difficult not to notice the shadow of the Cold War in the outer space treaties. These should be rethought, in lines with international humanitarian law and state practice, in consonance with principles of peaceful purposes, international cooperation and common benefit.

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OVERCOMING CORPORATE SHORT TERMISM : A QUEST FOR BOARD ROOM ACTIVISM

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ABSTRACT

The globe is experiencing a trend of corporate short termism. Corporate executives and other officers are paying much attention on the quarterly results of a company which acts as a deterrent in ensuring long-term investments needed for sustainable growth of a firm. Short termism acts as an antithetic of a company's objectives. Short-termism aggravates overvaluation of short-term returns, inevitably leading to an underestimation of long-term strategies of a firm.1 Short-termism amounts to be a considerable matter of concern for ensuring the sustainability of a firm. Short-termism has an unfavorable impact on a company such as creditors may step back from lending capital to the firm and corporate managers may pay less attention to efforts in furtherance of the long-term goals of a company.2 The company law of every jurisdiction enjoins with the directors, fiduciary duties towards the corporation. The provision as to fiduciary duties affords a scope of activism on the part of board to promote the long-run best interests of corporation. It is only in narrowly interpreted situation; the board is required to maximize the market value of stocks. The board can dispense with this requirement by not adopting transactions those results into short termism. It can be appropriately being said that corporate governance within a corporation can be ensured by the activist role by the board. This article delves in an exploration as to why corporations are seized with short-termism and how the corporations' board can alleviate it by the discharge of fiduciary duties. The article argues for the use of discretionary powers by directors by virtue of the ambiguous provisions of the Company Law. The article also provides an answer to the question as to what are the incentives for the shareholders when the short termism is overlooked by the board.

Keywords: *Short-termism, company, board, fiduciary, duty.*

INTRODUCTION

The globe is experiencing a trend of corporate short termism. Corporate executives and other officers are paying much attention on the quarterly results of a company which acts as a deterrent in ensuring long-term investments needed for sustainable growth of a firm. Short termism acts as an antithetic of company objectives. Short-termism aggravates overvaluation of short-term returns, inevitably leading to an underestimation of long-term strategies of a firm.[1] Short-termism amounts to be a considerable matter of concern for ensuring the sustainability of a firm. Impending detriment is caused to the the economy where the corporation operates and society at large. Because excessive focus on short termism lead the corporation to overlook the interest of the society and corporate managers may pay less attention to efforts in furtherance of the long term goals of a company. It may face a steady fall in business growth ultimately lending up in financial distress. When a corporation fails to do business, it impacts employment and revenue generation for the state. Short-termism also have an unfavourable impact on a company, such as creditors may step back from lending capital to the firm. The company law of every jurisdiction enjoins with the directors, fiduciary duties towards the corporation. The provision as to fiduciary duties affords a scope of activism on the part of board to promote the long-run best interests of corporation. It is only in narrowly interpreted consensus; the board is required to maximize the market value of stocks. The board can dispense with this requirement by not adopting transactions those results into short termism. It can be otherwise argued that corporate governance within a corporation can be ensured by the activist role by the board. Board must act as the first line of defence with respect to corporate short-termism. This Article delves in an exploration as to why corporations seized with short-termism and how the corporations' board can alleviate it by the discharge of fiduciary duties. The article also provides a theoretical answer to the question as to what may the incentives for the shareholders when the short termism is overlooked by the board.

SHORT TERMISM AS EVOLVING PHENOMENA.

Short-termism is an enduring debate among legal scholars, responsible investors, analyst and the government. It is a momentary choice issue of the board, where an act is ideal in the short-run but adverse in the long-run.[2] Short termism refers preference to short-term returns/earnings of a company at the cost

[1] Laverty, K.J., 2004. Managerial Myopia or Systemic Short-termism? The Importance of Managerial Systems in Valuing the Long term. Management Decision, 42(8), pp.949-962.

[2] Laverty, K.J., 1996. Economic "Short-termism": The Debate, the Unresolved Issues, and the Implications for Management Practice and Research. Academy of Management Review, 21(3), 825-860

of it's long-term goals.[3] It is pivotal to the sustenance for a company to focus on short term returns whereas on the other hand it turns out to be competitive edge to focus in long term horizons. Striking a balance between the said two aspects is a great challenge, but nevertheless a paramount importance for the board of a corporation in the context of corporate governance.

Corporations at times are held responsible for short-termism but the underlying reasons lies at the fierce stress from short-earnings focused investors, to emphasize on current earnings.[4] It is not that all classes of shareholders support short term ideology. There are investors (socially responsible investors) who focus on long term returns of investment.[5] There are some institutional investors, who have diverse portfolio, frequently buy and sell stocks with a view to realize highest possible returns on their investment because they are committed to the investment guarantees to their clients. If such institutional investors do not focus on short term performance, they may have to face negative implications on their commercial activities. Besides, there are passive retail investors who seek short-term association with the company and seek short-term earnings.[6]

From the standpoint of capital market theory, short termism culture within the board is to focus on the present value of stocks or quarterly earnings.[7] This is due to the fact that short-term investors are concerned with the share price fluctuation and are more apathetic towards long term run value of their investment.[8] It leads to an increase in high debt ratio as compared to the equity ratio within the corporate capital structure because corporation has to engage in excessive lending for expansions and growth in a situation where corporate earnings are leveraged for high dividend pay-outs. In the said context, short termism means quarterly capitalism due to the enthusiasm of shareholders with quarterly earnings.[9] Companies which focus on the short-term earnings do so at the cost of the long-term

[3] Libby, R., 2005. Capital Market Pressure, Disclosure Frequency-Induced Earnings/Cash Flow Conflict, and Managerial Myopia. Accounting Review, 80(1), 1-20.

[4] *"The current quarter is what matters, perhaps the next quarter, certainly not next year's equivalent quarter."*- Myners, P., 2002. Institutional investment in the United Kingdom: A Review. HM Treasury.

[5] "*Dedicated or patient investors"*- Bushee, B.J., 1998. The Influence of Institutional Investors on Myopic R&D Investment Behavior. Accounting Review, Pp. 305, 326.

[6] *"Such behaviours are due to their insignificant share ownership and lack of incentives to monitor corporations."*- Bushee, B.J., 1998. The Influence of Institutional Investors on Myopic R&D Investment Behavior. Accounting Review, pp.305-333.

[7] See Henry Kaufman, The Great Debt Overload Will Keep the Recovery Feeble, Fortune 23 (Dec 31, 1990)- *"The credit quality of American corporations deteriorated throughout the just-ended business expansion. That is unprecedented; normally the financial condition of business improves when the economy grows."*

[8] Stout, L.A., 2012. The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, And The Public. Berrett-Koehler Publishers.

[9] Bogle, J.C., 2010. Restoring faith in financial markets. Wall Street Journal, p.A17.

strategic plans like expansion, research and development.[10] The reasons for such focus are manifold. Quarterly profits are a benchmark of good performance under standard accounting principles. Such performance benchmark are addressed by corporate managers as corporation managers are possessed with discretion to avoid certain expenditures (e.g. expenditure in research and development) that lowers the current earnings, in order to promote quarterly earnings of the shareholders.[11] Thus short termism is a situation where corporation manager's, investor analyst and fund managers' cause extravagant focus on short term earnings or portfolio returns and at the same time discarding due regard for long term earnings of the firm and corporate value.

EVIDENCES OF CORPORATE SHORT-TERMISM

While short termism is prevalent across the developing and developed countries, it appears equally prominent within the Indian corporate scenario. Investors across the globe have become blinkered, causing the firms to excessive focus on short-term returns:

"We find that the median Corporate Horizon Index (CHI) score, across our entire sample, has become increasingly short term over time... However, short-termism resumed during the crisis and has largely continued to increase since"

--McKinsey & Company[12]

A company is expected to display consistent quarterly profit results and the expectation became so intense that one slip in quarterly profits across a financial year, affects the investment portfolios. Thus, the issue of corporate short termism has also attracted the attention of the global investor-led efforts on governance standards:

"Principle B. Institutional investors should demonstrate how they evaluate corporate governance factors with respect to the companies in which they invest.

B.1 Good corporate governance is essential to long-term value creation and risk mitigation by companies."

--Investor Stewardship Group which includes largest U.S.-based institutional investors. [13]

[10] The expenditures include expenditure for research and development, development of skill and training of the employees and customer services. Millon, D., 2012. Shareholder social responsibility. Seattle UL Rev., 36, p.911.

[11] Graham, J.R., Harvey, C.R. and Rajgopal, S., 2005. The economic implications of corporate financial reporting. Journal Of Accounting And Economics, 40(1-3), Pp.3-73.

[12] McKinsey & Company, Measuring The Economic Impact Of Short-Termism, Discussion Paper, (February 2017) *available at* https://www.mckinsey.com/~/media/mckinsey/featured%20insights/Long%20term%20Capitalism/Where%20companies%20with%20a%20long%20term%20view%20outperform%20their%20peers/MGI-Measuring-the-economic-impact-of-short-termism.ashx

[13] Stewardship Framework For Institutional Investors, *available at* https://isgframework.org/stewardship-principles/

There is a continuous pressure from investors on corporate boards:

"Board members and executives alike believe that short-term pressures continue to grow. Sixty-five percent of all respondents say the pressure on senior executives to deliver short-term results has increased in the past five years—roughly the same share who said so in 2013. And from 2013 to 2016, the share of respondents who reported feeling the most pressure to demonstrate strong financial performance within two years or less rose from 79% to 87%. Those who felt that pressure most acutely over 7 years or more fell to zero, while those who felt most pressure over a period of less than six months increased from 26% to 29%."

-- Dominic Barton, Jonathan Bailey, and Joshua Zoffer[14]

India is also not an exception to the evidence of corporate short-termism:

"Financialization, by facilitating operations that make real investments less remunerative, generates a climate of short-termism in the economy…. The share of equities as part of the total financial assets has fallen from 72.5 per cent in 2001 to 63 per cent in 2013, with respective shares of mutual funds (at 18.9 per cent) debt instruments (6.5 per cent) and other categories like approved securities and preference shares providing for the rest. Evidently, the ongoing pace of financialization has played a role in enticing Indian corporates to seek the high-return short term financial assets."
--Sunanda Sen & Zico Dasgupta[15]

CAUSES OF SHORT TERMISM

Adoption of short termism within the corporate culture can be due to variety of factors which includes existing ownership pattern of a corporation (issues on separation of ownership and control), volatility in terms of shareholding, managerial apathy to pursue long-term interest. These above stated factors get nurtured by state of affairs such as, lack of adequate information, speculative investment plans or hostile takeovers.

Informational asymmetry

The annual financial reports disclosed by some corporations provide inadequate information to the investors to facilitate them to estimate the market valuation of a corporation in the long run.[16] Often information disclosed by many corporations is historical and not prospective information to determine the

[14] Dominic Barton, Jonathan Bailey, and Joshua Zoffer, Rising to the challenge of short-termism, available at https://www.fcltglobal.org/docs/default-source/default-document-library/fclt-global-rising-to-the-challenge.pdf

[15] Sunanda Sen & Zico Dasgupta, What deters investment in India today?, available at https://www.thehindu.com/opinion/op-ed/comment-article-what-deters-investment-in-india-today/article6395004.ece

[16] Where Financial Reporting Still Falls Short, *available at* https://hbr.org/2016/07/where-financial-reporting-still-falls-short

market value of corporations. A significant percentage of market value of intangible assets owned by a corporations and prospective value (derived from expansion and growth plans) of a corporation are not exhibited on the accounts. This results in the inadequacy of disclosure relating to value drivers of performance.[17] The Chartered Financial Analyst Institute (a global association of investment professionals) criticized the corporations in its report for making merely legalistic information instead of disclosing useful or relevant information about the long terms prospect and anticipation of future earnings of a company.[18] Moreover the rampant increase in institutional investors across the different jurisdictions has created a gap between ownership and control of firms. Retail investors who invest through the institutional investors perceives themselves detached from exercise of ownership responsibilities and the actual ownership responsibilities are discharged by the institutional investors. So, such retail investors are always inclined towards short term earnings. Even if retail investors are interested in long term horizons of corporations, they find difficulties in exercising their ownership rights, because analysis of information disclosure by corporation often outweighs the benefits than the cost of analysis.

Speculative Investment

Short term investment plan of the investors turns up to be one of the significant causes of attention into short term values by the human agencies of corporations. Short term investors are inclined towards corporations that emphasizes on the short term or quarterly earnings of the investors.[19] These investors pressurize the corporations to focus short term results.[20] To attract investors, there are some corporations which furnish guidance on quarterly earnings to investors. With the help of such guidance, investors speculate the quarterly performances. Publication of guidance on quarterly earnings carries a risk of shareholders' exit from the company (when corporations fail to fulfill the performance speculation).[21] It also entails the risk of removal of human agencies of corporation from respective positions, by the influential shareholders' syndicate. The number of companies which published such guidance has

[17] Tonello M, 2006, Revisiting stock market short-termism. Corporate/Investor Summit Series, The Conference Board

[18] CFA Institute, Financial Reporting Disclosures: Transparency, Trust and Volume, July 2013, available at https://www.cfainstitute.org/en/advocacy/policy-positions/financial-reporting-disclosures-investor-perspectives-on-transparency-trust-and-volume

[19] Bushee, B.J., 2001. Do institutional investors prefer near-term earnings over long-run value? Contemporary Accounting Research, 18(2), pp.207-246.

[20] See Graves, S.B., 1988. Institutional Ownership and Corporate R&D in the Computer Industry. *Academy of Management Journal*, *31*(2), pp.417-428.

[21] Fama, Eugene F., and Kenneth R. French, 1992, The cross-section of expected stock returns, Journal of Finance 47: 427-465

decreased.[22] One possible reason for such non-disclosure of earning guidance is that managers are not prepared to face the risk of unaccomplished anticipations made by stock analyst. Thus, adoption of corporate short termism stands as a performance norm within the corporate management culture that leads to the assumption of ensuring short term earnings. The current market value of stocks is used by short-term investors for evaluating the performance of corporation and vote for strategies that trigger the short-term value of portfolio. Therefore CEOs/higher level managers pay extra effort to achieve those short-term targets.

Hostile takeovers:

With the rapid growth of industrialization, the corporate ownership structure has been concentrated by the holdings of institutional investors. Focus on the long-term health and success of corporation depends on the incentives available for investors to adapt their behaviour like the traditional investors (monitors) of a corporation. Their focus is inclined toward the immediate earning on their investment and has a supportive approach toward hostile takeovers (a kind of transaction that increases their immediate returns on their investment).

Hostile takeovers constitutes as one of the prominent cause of short termism during the last decade.[23] It is one of the key governance mechanisms adopted in outsider system of corporate governance (corporations with dispersed shareholding).

"Managers have become preoccupied with heading off take- overs through boosting near-term earnings or restructuring. While restructuring has often led to beneficial sales of underperforming assets, cost cutting, and sometimes the weeding out of poor managements, the completion of restructuring starts the same pressures running again. The taking on of substantial debt in the course of restructuring, with proceeds paid to shareholders instead of invested in the business as was the case in highly leveraged Japanese companies, often leads to risk aversion and a slowing of true strategic innovation."[24]

When corporations are found under-performing, influencial investors who are flurried to generate short term returns from takeover plans encourages hostile takeover[25] with the anticipation that high

[22] *"The number of companies in our sample that discontinued guidance has also increased steadily, growing to about 220 in 2004"*- available at https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/the-misguided-practice-of-earnings-guidance

[23] See Why Hostile Takeovers May Rise, *available at* https://www.businesstoday.in/magazine/columns/why-hostile-takeovers-may-rise/story/4704.html

[24] Porter, M., 1990. The Competitive Advantage of Nations/Michael E. Porter. NY: The Free press. A Division of Macmillan Inc, 855.

[25] *"hostile takeover as the free-market device to rid corporations of bad managers and give stockholders their entitled profit in the process"*- Lipton, M. and Rosenblum, S.A., 1991. A New

bid will supersede other takeover bids. Such hostile takeover environment causes the corporations to knock short-term returns by paying large and unoptimal rate of dividends or re-purchase the stocks held by them at high premiums.[26] In this approach short termism results in reducing the long-term profits, abandoning the market value of the firm to drop below its true value. Also, hostile takeover often results in lay off of corporation staff and employees. It also includes sale out of the corporation assets or padlock on the business operations and in turn also imposes harmful effect on the communities.[27]

BOARD ROOM ACTIVISM

Company law of every jurisdictions imposes fiduciary duties on the directors which requires them to adopt an inclusive approach in strategic planning and decision making by giving due consideration to the development of healthy relationship of the corporation with its stakeholders.[28] The objective of company law is not to promote short termism. An analysis of the fiduciary duties provision within the company law reflects no conflict-of-interest rules and no short term profit maximization rule. Under the principles of corporate governance, accountability for management of the affairs of corporations rests upon the board. The fiduciary duties unambiguously state that the directors have to act in the best interest of the company.[29] One of the objectives of infusing the fiduciary duty provision within the company law is to spotlight the essence that directors must not focus on short term earnings but also have to focus on the long term horizons of corporate strategies and plan. The provision as to fiduciary duties affords a scope of activism on the part of board to promote the long-run best interests of corporation.[30] It is only in narrowly interpreted situation, the board is required to maximize the market value of stocks.[31] The board can dispense with this requirement by not adopting transactions those results into short termism. It can be appropriately being said that corporate

System of Corporate Governance: The Quinquennial Election of Directors. The University of Chicago Law Review, 58(1), pp.187-253

[26] See Kruse, T.A., 2005. Ownership, Control and Shareholder Value in Italy: Olivetti's Hostile Takeover of Telecom Italia. *ECGI-Finance Working Paper*, (83); See also Armour, J., Jacobs, J.B. and Milhaupt, C.J., 2011. The evolution of hostile takeover regimes in developed and emerging markets: An analytical framework. *Harvard International Law Journal*, *52*, p.249.

[27] See, Faludi, S., 1990. The Reckoning: Safeway LBO yields vast profits but exacts a heavy human toll. *Wall Street Journal*, *16*, p.A1. - *"following Safeway's defensive LBO, 63,000 workers and managers were laid off"*

[28] Keay, A.R., 2010. The duty to promote the success of the company: is it fit for purpose? *University of Leeds School of Law, Centre for Business Law and Practice Working Paper*.

[29] Section 172 of Companies Act 2006

[30] Paramount Commc'ns, Inc. v. Time, Inc., 571 A.2d 1140, 1154 (Del. 1989); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Dcl. 1985).

[31] Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 37 (Del. 1994);

governance within a corporation can be ensured by the activist role by the board. It encourages the adoption of decisions established upon long term stance. In order to accomplish the objective of fiduciary duty the board has to strike a balance on the stockholders interest and consequences of the corporate decisions in the long run of the company. This balance can be achieved by an activist role expected to play by the board.

Dilution of profit maximization approach

The company law does not prescribe that the sole objective of a corporation is profits maximization[32] Rather there is shift in direction among statutes and judicial decisions upholding that a corporation must possess the impulse to protect the interests of stakeholders at large instead of mere profit maximization strategies. For instance, the Indian Companies Act 2013 has incorporated provisions relation corporate social responsibility which includes contributions for charitable, scientific, or educational purposes and environmental cause) that board has an obligation to ascertain as to whether the bid for takeover was in the best interests of the company and its stakeholders. The company law statutes do not prescribe provision as to maximization of profit by the corporation as its only goal. Instead, the company law requires that the director take into account the impact of the corporate activities over the stakeholders other than shareholders (because shareholders are assumed to take more risk compared to other stakeholders).[33]

The court also observed that the directors can take into consideration the appropriateness of the price coupled with the impact on stakeholders other than shareholders of the company.[34] More specifically the Delaware court held in *paramount case* that the maximization of shareholder value in the short-run does not *per se* find any accommodation under the duty of board as a human agency of corporation.[35] The court also held that the board by adopting business judgment rule[36] can resist a tender offer if they believe that such offer poses a threat to corporate policy and existence in the long-run.[37]

[32] Elhauge, E., 2005. Sacrificing corporate profits in the public interest. *NyUL Rev.*, *80*, p.733.

[33] *"A director of a company shall act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment."*- Section 166 (2), Companies Act 2013.

[34] Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Dcl. 1985).

[35] *"The directors are only obligated to forego a preexisting corporate strategy in order to capture a short-term profit for shareholders when there is absolutely no reason to maintain such a strategy"*- Paramount Communications, Inc. v. Time571 A.2d at 1154.

[36] Business judgment rule as *"an acknowledgement of the managerial prerogatives of Delaware directors under Section 141(a)."*: Zapata Corp. v. Maldonado, 430 A.2d 779, 782 (Del. 1981)

[37] Unocal Corp. v. Mesa Petroleum Co 493 A.2d 946 (Del. 1985).

So, it can be inferred from the above cases that court asserts the fact of allowing board to accomplish corporate strategies without a concern for realizing immediately measurable profits. The views of the court reflect the discretion entrusted upon boards to pursue corporate strategies, without complying to specific time constrain (short-term), even if the impact of the exercise of discretion negatively marks shareholders' return in the short timescale.

Quin-quennial Corporate Report:

The word '*Quin-quennial'* means "at the end of fifth year". The *Quin-quennial* corporate report requires publication of a detailed report in addition to annual report, at the end of every five years. *Quin-quennial* corporate report can be published by virtue of wide fiduciary duties entrusted upon the board under Company Law of every jurisdiction. Publication of report may be argued as an additional cost of doing business (as it requires appoint of professionals to prepare and compile information) by the company, but such cost can justify under the phrase *best interest of company*. The report will play facilitative role. The report must be more prospective in terms of decision to retain and spend corporate earnings for sustainable business and decision to sidestep high dividend pay out to existing shareholders. Several prospective or projective information can be disseminated, for instance projections of the corporations for next *quin-quennial* period, the anticipated earnings on the investment made by corporations on research and development, the expected returns on executive compensations. The report will deal with the financial and non-financial performance of a company over a period of five year in terms of the strategic plan sought to be executed by retained corporate earnings. This five-year interval would afford institutional investors ample time to assess the performance of company. At times some institutional investors may avoid the cost of monitoring corporations because the cost of corporate report analysis outweighs the benefit or return[38] and thus they may look for short term earnings. Therefore such *quin-quennial* report may include statement on the acomplishments of anticipated earnings made under the preceeding reports and reasons for unacomplishmemts (if any). In a simple construction of sentences, the report may include the possible impediments to stated positive anticipations and measures adopted to address the impediments. Also a clear nexus can be drawn in such reports

[38] *See,"The structure of the investment management industry and the corporate governance framework within which investors operate can also be impediments to shareholder activism."*- Ivanova, M.R., 2017. Institutional investors as stewards of the corporation: Exploring the challenges to the monitoring hypothesis. *Business Ethics: A European Review*, *26*(2), pp.175-188. "*SRI strategy will remain as a minor investment trend for institutional investors in Anglo-American countries."*- Wen, S., 2009. Institutional investor activism on socially responsible investment: effects and expectations. *Business Ethics: A European Review*, *18*(3), pp.308-333.

between the present strategies and the long-term earnings of the corporation. In a nutshell, the report must be capable of building a culture of long-term relationship between the corporation with it present and future stakeholders. This style of reporting may address the cost of report analysis (which requires a special skill and understanding). It will inspire institutional and retail investors to regard their shares as a stake involved in the performance of the corporation in the long-run, instead of viewing their shares as a scanty financial stake in the short-run. The report will also increase the standard of disclosure practices by corporations

Overlooking Short-Termism: Incentive for Shareholders

Change in behavior of directors by shift in emphasis from short term earnings to long term sustenance of corporations can be realized by recognizing the fact that the endmost objective of a corporation can be attained by paying adequate attention to relationship of corporation with its constituencies[39], impacts of corporate decisions and business reputation at the market.[40] The above statement has its consistency in the tune of the recommendations prescribed by the Hampell Committee Report 1998, which recommends that directors can protect the interest of shareholders and promote the long term value of the shareholders wealth only by bridging gaps between the corporation and its stakeholders.

"This does not mean that directors must run the company exclusively in the short-term interest of today's shareholders…….can pursue the objective of long-term shareholder value successfully, only by developing and sustaining these stakeholder relationships. We *believe that shareholders recognize that it is in their interests for companies to do this and - increasingly - to have regard to the broader public acceptability of their conduct*."[41]

When a company issues shares to a person, he acquires an economical right i.e., right to receive dividend in future, in addition to his political rights.[42] So in order enable the realization of economic interest in a sustainable manner, company has to perform business in the long run and generate dividends, any managerial decision must be undertaken by giving due consideration to the long term and wider consequences of such decisions.

[39] *"directors can meet their legal duties to shareholders, and can pursue the objective of long-term shareholder value successfully, only by developing and sustaining stakeholder relationship,"* Hampel Report on Corporate Governance 1998, *available at* https://ecgi.global/code/hampel-report-final

[40] J. Parkinson, "Inclusive Company Law", in J. de Lacy (ed), The Reform of United Kingdom Company Law (London 2002)

[41] Committee On Corporate Governance Final Report 1998, *available at* https://ecgi.global/code/hampel-report-final

[42] Ireland, P., 2003. Property and contract in contemporary corporate theory. *Legal Studies*, *23*(3), pp.453-509.

From the strategic management standpoint, if the long term interest of company is sacrificed for maximizing the share value, then it may pose a risk to the credibility of a corporation to sustain in the long run.[43] For instance, the income of a company will be at risk if its employees or workforce is on constant lay off or strike(*because they are not adequately incentivised due to lack of funds*), whose products and services are not within the line of satisfaction before its customers *(because company has not spent for research and evelopment to improvise the persent products manufactured and the products has lost the relevency in terms of consumption or utility in the present day)* and whose suppliers are diverted to supply raw materials to its competitors (*because they are not offered competitive rates due to lack of funds*). Employees will be dissatisfied when they realize that their interest is ignored (*recognition of the interest of employee demands spending for skill development, orientation, offering financial incentives at competitive rates etc.*). This dissatisfaction may get multiplied into unhealthy employer-employee relationships and generate a negative impact on the company due to the interdependence of the work chain, resulting into adverse production of goods and serves by the company. Thus, circumventing expenditures for the above discussed consideration in the pursuit of short-term earnings carries a risk of loss in future years due to the absence of healthy relationships with creditors, suppliers, customers and other constituencies in future years. Maintaining healthy and effective stakeholder's relationships and the market reputations is one of the important elements of company's wealth - treated as the ***relational assets***[44] which boost up the magnitude of company to increase its value in the long run. It can be hypothesized that the relational assets minimize will maintains the equilibrium of production of goods and services. When sales get stabilized, it generates revenue and it becomes possible for managers to predict the future profit of the company. The OECD principles also recognize the significance of "wealth-creating co-operation among stakeholders" and articulate that corporations must consider that the stakeholders' contribution adds to the valuable resources of corporations necessary for their sustainability in the long run.

"It is, therefore, in the long-term interest of corporations to foster wealth-creating co-operation among stakeholders. The governance framework should recognize that the interests of the corporation are served by recognizing the interests of stakeholders and their contribution to the long-term success of the corporation"[45]

[43] See Bebchuk, L.A., 2007. The myth of the shareholder franchise. *Virginia Law Review*, *93*, p.675.

[44] *See* Pickles, J., 2016. Relational Assets. International Encyclopaedia of Geography: People, the Earth, Environment and Technology: People, the Earth, Environment and Technology, pp.1-3.

[45] OECD Principles of Corporate Governance: The

These kinds of investments can also be connoted as creation of patient capital, which stabilizes corporate capital and renders assurance to other stakeholders that their effort or commitments will not be prejudiced for accumulating short term profits. Thus, long-term outlook strengthens the overall wealth of company.

CONCLUSION

Pursuance of short-term earnings for short-term investor not only prejudices stakeholders of corporations but also the corporation itself in terms of sustainability. The law on general duties of directors in different jurisdiction converges on the idea of protection of long-term interest of corporations. The company law does not provide a straightway solution to the issue of corporate short-termism, rather the solution lies in the spirit of the provisions concerning the directors' duties towards the corporation. Board should adopt an inclusive slant which requires directors to consider interest of every stakeholder associated with the company while determination of implications of their actions. They should stand under the aegis of certain responsibilities for the impact of their decisions aimed at short term goals. Business judgment rule cannot be the only defence relied upon by the boards when they approve short-term opportunities. The board has to be realistic while choosing short-term corporate transactions. The article has advocated the importance of adopting certain approaches that can promote perdurable relationship of company with its shareholders. The article stressed on the incentives of shareholders to focus on the long-term avenues rather than the short run, by arguing the building of relational assets.

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Role Of Stakeholders In Corporate Governance, *available at* http://www.oecd.org/corporate/ca/corporategovernanceprinciples/31557724.pdf

PATENTING OF PLATFORM TECHNOLOGIES: IMPLICATIONS FOR THE DEVELOPMENT OF ESSENTIAL MEDICINES FOR PANDEMICS LIKE COVID-19

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Abstract

The emergence of technology platforms represents an essential stage in the research and development of new technologies, especially drugs and medicines. Platform technologies are formed after the collective vision of developing strategic research goals to reach innovation in specific technology areas. Platform technologies are common platforms where new products can be created without any new process or further clinical trial. If these essential technologies are patented, the entire set of products will be stalled due to proprietary rights protection. This paper analyses the implications of patenting of platform technologies, especially in pharmaceutical and biomedical research. It is argued that upstream technologies should not be patented so that new products can be developed without massive amounts paid to the proprietary technology holders as royalties. Patenting of platform technologies is a barrier to develop new drugs for a pandemic like COVID-19.

Keywords: *Platform Technologies, downstream technologies, Patenting, Essential medicines, India.*

INTRODUCTION

Platform technologies are technologies that enable the creation of products and processes without further research and development. These are also known as research tools, which are not embodied in the result.[1] In pharmaceutical technologies, it further produces instant products without any hassle. For example, suppose a researcher develops a new dosage for a particular drug and an optimized amount of excipients. In that case, other researchers can use a new drug delivery dosage based on the upstream technology[2] available without royalty payments.

Consequently, this decreases the cost of producing new drugs, especially in developing essential medicines for treating diseases like Malaria, TB, and HIV/AIDS. COVID-19 pandemic opened a further discussion on working on the patented drugs and quickly developing a vaccine for the drug. Calls to COVID-19 patented drugs available to governments and institutions worldwide are loud and clear from international organizations like WHO. However, the companies close to the vaccines are going to patent the drugs they invent. This can be feasible only when the companies are agreed not to file patents for these drugs or provide royalty-free patents for these drugs. However, this process not so easy because such technologies are made on proprietary platforms such as vectors, mRNA-technology, etc. These technologies are covered by multiple patents presently, and if the existing technologies are incorporated, they require prior permission or license from the patent holders. These essential technologies become platform technologies and necessary for developing new drugs for the COVID-19 pandemic.[3]

Patenting activity is vital in the pharmaceutical industry to protect intellectual property rights and keep innovation's economic aspect of incentivizing the innovator. However, the increasing number of patenting activity in the research tools (inputs to drug discovery known as platform technologies) is a concern for the pharmaceutical industry. The number of patenting in platform (upstream) technologies are increasing in the recent past, like in pharmaceuticals, biotechnology, and biomedical research. Access to these patented research tools is also a concern of the downstream industries.[4] The devices are usually the

[1]Richard Li-Dar Wang, *Bio-medical Upstream Patenting and Scientific Research: The Case for Compulsory Licenses Bearing Reach Through Royalties,* 10 YALE JOURNAL OF LAW AND TECHNOLOGY 1, 253-330, (1980).

[2]In this study, platform technologies, upstream technologies, and research tools are used synonymously.

[3]https://www.iam-media.com/coronavirus/covid-19-platform-technology-patent-list, (last updated July.15, 2020).

[4] The downstream stage in industrial biotechnology refers to recovery, isolation, and purification of the microbial products from cell debris, processing medium, and contaminating biomolecules from the upstream process into finished product biopharmaceuticals and vaccines. MICHAEL

research area of universities, and such upstream inventions are freely available to inventors at the downstream level. The patenting of such activity may hamper the individual research activities and subsequent patenting of downstream technologies. The social cost of patenting is balanced with society's welfare, especially in the availability of essential medicines in developing countries. Society is to be better off if such upstream technologies to be made accessible and broadly available.[5] This paper aims to analyse platform technologies' patenting and their effect on downstream industries, especially on the essential medicine-producing pharmaceutical sectors. This is significant during all the countries' efforts to develop vaccines to fight against the pandemic of the Century, COVID-19.

WIPO and the International Federation of Pharmaceutical Industrial Associations (IFPMA) have come out with a list known as the Pat-INFORMED database on patented medicines used worldwide. The biopharmaceutical companies around the world directly provide the data, which declares the patented drugs.[6] This database can be used by the companies developing vaccines for COVID-19 to identify the patents on viral vectors, m-RNA, nano-particles, and adjuvants. Presently, many companies are trying to develop drugs, and many countries conduct clinical trials. The WHO has released a landscape of therapeutics that can be used for treating COVID-19. In India, at least two of such drugs are under patent protection; Remdesivir and Favipiravir. Gilead Sciences own Remdesivir drug patent (IN332280), and recently it issued non-exclusive licenses to five generic drug manufacturers to sell the drug in 127 countries. The non-exclusive licenses issued to Indian companies are Cipla, Hetero Labs, and Jubilant Lifesciences.[7] However, the patent is valid up to 2035. Favipiravir is a drug against RNA viruses used to treat deadly diseases like the Ebola virus, Lassa virus, and Toyama Chemical Co.Ltd., Japan owns the patent. Fortunately, the patent (IN226506) for this drug is expired recently. However, another patent (IN273554) is valid up to 2028. India has approved another Ayurveda drug for clinical trials named "Phytopharmaceutical."

Platform technologies and related jurisprudence in other countries are dealt with in the first part. The status of downstream technologies and their importance is increasing in the present-day context. The patentability of platform

FLICKINGER, DOWNSTREAM INDUSTRIAL BIOTECHNOLOGY: RECOVERY AND PURIFICATION, (Wiley, 2013).

[5] John P. Walsh and Ashish Arora, *Research Tool Patenting and Licensing and Biomedical Innovation,* p.291, paper available at http://www.epip.eu/papers/20031124/200411_conference/papers/Walsh.pdf (last updated Apr.20, 2021).

[6] https://www.wipo.int/pat-informed/en/, (last updated June.20, 2020).

[7] https://theprint.in/health/remdesivir-to-be-made-in-india-as-3-firms-get-nod-from-us-drug-maker-for-generic-version/420212/, (last updated June.20, 2020).

technologies is under a cloud as it is made out of existing patents. These issues are discussed in the second and third parts. Part 4 is dedicated to discussing the Indian scenario. In conclusion, it is argued that countries should use TRIPs flexibilities for fighting pandemics like COVID-19.

PLATFORM TECHNOLOGIES AND THE MEDICAL RESEARCH

Patenting is now reaching into medical research tools, and patents on genes have received the most significant attention and criticism.[8] However, the US Supreme Court decision in *Myriad Genetics*' patents on the *BRCA1*and *BRCA2* genes in which the Court held that "A naturally occurring DNA segment is a product of nature and not patent eligible merely because it has been isolated." Specifically, that invalidates some (but not all) patent claims held by Salt Lake City Firm Myriad Genetics, which has held a near-monopoly on *BRCA1* and two testings through its Sanger sequencing-based BRAC Analysis test.[9] Nevertheless, the Court held that cDNA is patent-eligible and because it is not naturally occurring. *The Myriad* case is considered to be in the right direction, and this will maintain as a platform technology that enables the drug companies to develop drugs that cater to the needs of different patients and diagnostic developers to design new tests without paying any royalties.[10] A simple patent search in the open database "the lens" for "gene patenting" come out with 1,30,322 from the US jurisdiction[11] , and a search on the DNA patent database[12] shows 2792 results for "platform technologies." This is clear evidence of increased patenting activity and the proliferation of patents in platform technologies. Recombinant DNA discoveries and the end number of proteins can be either used to develop therapeutics or produce small-molecule drugs. The patenting may hamper the development of downstream products based on platform technologies. Remdesivir is considered the most promising drug to fight against COVID-19, which is an antiviral drug. However, its patent owner, Gilead Sciences, a US company, can question the countries' clinical trials.

In the US, the patent has been granted when the invention consists of new software or statistical or other analytical approaches. Such patents can cover the analysis of genomic data or gene

[8] John H. Barton, *Research-tool Patents: Issues for Health in the Developing World,* 80 BULLETIN OF THE WORLD HEALTH ORGANIZATION 2, 121-125 (2002).

[9] *Association for Molecular Pathology v. Myriad Genetics, Inc.,* Decided in June 2013, available at https://www.aclu.org/files/assets/12-398_8njq.pdf, (last updated Apr.21, 2020).

[10]http://www.the-scientist.com/?articles.view/articleNo/36076/title/Gene-Patents-Decision--Everybody-Wins/, (last updated July.05, 2020).

[11]http://www.lens.org/lens/search/v/analysis?n=10&l=en&jo=true&j=US&sat=N&q=gene%20patenting&st=true#f/jurisdiction, (last updated July.05, 2020).

[12]https://dnapatents.georgetown.edu/search/searchbasicdnag.htm, (last updated July.05, 2020).

expression data and protein structure calculation. However, the scenario is different in the developing countries on the research of genomes of tropical pathogens. In such cases, it is concluded that the economic benefits of patenting the research tools in those countries are not significant enough to justify the cost of patenting. They always like to keep legally free these research tools under the general research exemptions.[13] In the case of part of the research done in a developed world, patents will be filed in those countries critically limit the research in the developing countries. The broader interpretation of such platform technologies patents limits the scope of downstream research activity. There is no point in limiting the platform technologies with the patent holders when they find its coverage very narrow.

One solution prescribed in those situations was to develop a broad or global license to permit the patented technologies to be used for essential applications anywhere in the world, including in developing countries. Many countries can set up such collaborative projects on genomics.[14] Pharmaceutical companies and Universities can provide a broad license to facilitate research on some or all the diseases of the developing world that will help the poor people to get cheap drugs at the laboratory level. This will help the developing countries fight against diseases like Malaria, where there is no market for such medicines in the developed world, and secure solutions to diseases like HIV/AIDS. Collaborative research and patent pools are best suited to create antiviral vaccine development for pandemics like COVID-19. WHO has already given a landscape of drugs for the treatment of COVID-19,[15] owned by different companies.

The US Supreme Court in *Brenner v. Manson*,[16] it was held that there is a public good in disclosing information, so there are reasons to encourage inventors to reveal their new chemicals.[17] If there are too many proprietary rights, it will suppress innovation because people will not be willing to work hard to find a use for the invention if they have to get a license to use it. There is also a risk that a patent holder may thereby gain "power to block off whole areas of scientific development, without compensating benefit to the public."[18] Later in 1995, in In *re Brana,*[19] the Court of Appeal for the Federal Circuit changed the utility criteria fixed in the *Manson* and held that the

[13] *Ibid.,* p. 123.

[14]International Hap Map Project, http://snp.cshl.org/thehapmap.html.en, (last updated July.05, 2020).

[15]https://www.who.int/blueprint/priority-diseases/key-action/Table_of_therapeutics_Appendix_17022020.pdf, (last updated July.15, 2020).

[16] 383 US 519 (1966).

[17]The Court of Customs and Patent Appeals (CCPA) reversed, holding that "where a claimed process produces a known product, it is not necessary to show utility for the product" as long as it is not detrimental to the public interest.

[18]See http://supreme.justia.com/us/383/519/, (last updated July.05, 2020).

[19] 51 F.3d 1560, 34 USPQ2d 1436 (Fed. Cir. 1995).

pharmaceutical companies do not have to prove the claimed invention's ultimate utility. An intermediary value and a platform creation for further research were held sufficiently useful.[20] It means that any compound that produces a pharmacological effect in-vitro is now considered useful.[21]

However, there is always an unavoidable tension in the patent law governing research tools and technologies. The best example is the *University of Rochester* patent[22] case on COX2.[23] The US Court of Appeals invalidated the patent on reach through claim and rights asserted over a future product or process that might result from the use of a patent.[24] If the patent holder is given extensive rights under the patent, it will inhibit future research in drugs for pandemics like COVID-19.

DOWNSTREAM TECHNOLOGIES AND ITS IMPORTANCE

Upstream technologies are the raw material or base material for making a downstream product that is a finished product. If the upstream technology is patented, developing a downstream product is difficult, and the manufacturers go for licensing from the upstream technology holder, which makes an additional cost. This is similarly applicable to the drug industry as well. The upstream technology holder tries to limit his proprietary technology among selected ones, or they can issue an exclusive license that limits further spreading of the technology required for the downstream industries.

Patents over the upstream gene sequence may block further downstream research and adversely affect drug discovery and impede innovation.[25] Blocking patents[26] has been pointed out as one of the main problems in developing new drugs in the biopharmaceutical industry.[27] The patent

[20] *Ibid.,* p.1566.

[21] Case Summaries on Patent Law, https://www.scribd.com/doc/45566875/10/In-re-Brana-51-F-3d-1560-Fed-Cir-1995-230, (last updated July.05, 2020).

[22] (US Patent 6,048,850).

[23] *The University of Rochester v. G.D. Searle & Co.*, Case No. 03-1304; 358 F.3d 916 (Fed. Cir. 2003) (314):http://www.fedcir.gov/opinions/03-1304.doc>, (last updated July.05, 2020).

[24] In April 2000, on the day the '850 patent was issued, Rochester University sued Pfizer, alleging that sale of Pfizer's COX2 inhibitors celecoxib (Celebrex) and valdecoxib (Bextra) infringed the '850 patent.

[25] Shamnad Basheer, *Block me Not: How Essential are Patented Genes,* 1 JOURNAL OF LAW TECHNOLOGY AND POLICY, 55 (2005). See also Jean O. Lanjouw, *A Discussion on Off Patents and Genes: Flows of Knowledge and Intellectual Property Rights* by Claude Henry, Remarks at the World Bank ABCDE Conference 3 (May 16, 2003), *available at* http://wbln0018.worldbank.org/eurvp/web.nsf/Pages/Paper+by+Lanjouw/$File/lanjouw.pdf., (last updated July.05, 2020).

[26] A blocking patent is a patent owned by someone else that prevents a patentee from exploiting its invention without a license to the other's patent. Without such licenses, both are prevented from practicing other parties claimed invention; both are potentially liable for patent infringement if they do so. See http://www.patentcommons.org/publications/OSDL_Whitepaper_Final_final_4-12-06.pdf, (last updated July.05, 2020).

[27] See Arti K. Rai, *Fostering Cumulative Innovation in the Biopharmaceutical Industry: The Role of Patents and Anti-trust*, 16 BERKELEY

commons concept[28] requires numerous property rights to be put together as building blocks for research and development. If the negotiations between these property owners fail, further developing the drug based on these patents will be stalled. There should be a correlation between upstream research and downstream product development.

On the other hand, too many owners can block each other in anti-commons and underuse the scarce resources.[29] Thus, there must be a balance between patenting a research tool and product development at the downstream level. A non-exclusive license can solve the problem on nominal terms to the downstream industry.[30] However, a limited, non-exclusive license with anti-competitive market provisions will impede accessibility to medicines in developing countries.

The invention of polymerase chain reaction (PCR) is considered one of the most important scientific advances of the 20th Century.[31] It is an easy way to create unlimited copies of DNA from just one original strand. The copied DNA can then be used reliably in various tests to diagnose or monitor diseases or for basic molecular biology research.[32] Even though Roche widely licensed the technology to many downstream industries, which complained that Roche charged between $100000 to $500000 as a license fee and a 15 percent royalty at the initial state, enormous as the downstream industries are concerned. However, in the year 2000, a US Federal Judge ruled that a key patent for an enzyme used in a DNA analysis technique is invalid and was obtained by fraud.[33] The patent '818 Taq patent' covers the native and recombinant forms of *Taq* DNA polymerase, a thermostable enzyme critical in a polymerase chain reaction and gene sequencing owned by Hoffmann-La Roche.[34] It was alleged that 40 United States universities and government

TECHNOLOGY LAW JOURNAL, 58 (2001).

[28] A commonplace for innovators who can come together and share their patents for further innovation.

[29] **Michael A. Heller, Rebecca S. Eisenberg,** Can Patents Deter Innovation? The Anti-commons in Biomedical Research, 280 SCIENCE 5364, 698 – 701 (1998).

[30] For example, the Cohen-Boyer recombinant DNA developed at Stanford University and the University of California. Recombinant DNA (rDNA) products provided a new technology platform for a range of industries, resulting in over US$35 billion in sales for an estimated 2,442 new products. Throughout the life of the patents (they expired in December 1997), the technology was licensed to 468 companies, many of them fledgling biotech companies who used the licenses to establish their legitimacy. Over the 25 years of the licensing program, Stanford and the University of California system accrued US$255 million in licensing revenues (to the end of 2001), much of which was subsequently invested in research and research infrastructure. http://www.genome.duke.edu/centers/cpg/case-histories/seminal-genomic-technologies/cohen-boyer/, (last updated July.05, 2020).

[31] PCR was awarded the 1993 Nobel Prize in Chemistry.

[32] http://molecular.roche.com/pcr/Pages/History.aspx, (last updated June.05, 2020).

[33] D. Steinberg, *Patent wars: Judge voids Taq patent*, 14 *THE SCIENTIST 1*, (January 10, 2000).

[34] Eric Niiler, *Roche's Taq Patent Invalid*, 18 Nature Biotechnology 7, (2000). http://www.nature.com/nbt/journal/v18/n1/full/nbt0100_7a.html, (last updated July.05, 2020).

laboratories and 200 individual scientists had been named infringers of Roche's patents. This case raises some critical questions to draw a line between non-infringing academic use of a patented invention and infringing commercial use of the same patent.[35] If multinational companies sue the research community for violating platform technologies, it will end research in Universities and Research Institutions. This decision also throws light on the standard of integrity in research and innovation.[36]

In the *CellPro* case,[37] it was alleged that the patentee was Johns Hopkins University, and the license holders Becton-Dickinson and then Baxter Healthcare Corporation tried to block the development of cumulative system technologies.[38] In this case, a small startup CellPro faced with an infringement suit from the licensors. [39] It was argued in the petition that government action is required to alleviate the country's health needs under the Bayh-Dole Act 1980, which governs the commercialization of government-funded technology.[40] Initially, the jury gave the judgment in favor of CellPro, but on appeal,[41] the Judge ruled in favor of Baxter and imposed a fine of $7.6 million and $8 million on legal fees. The result was the bankruptcy of the CellPro and shelving of the cancer-curing device. Later new and better technologies were developed as alternates by rival companies. Stem cell research is helping in biomedical research in fighting against cancer and other life-threatening diseases. The lessons from the CellPro show that the broad interpretation of platform technology patent claims will prevent others from developing innovative technologies and bringing products to the market. Blanket patenting of such researches will end up in infringement litigations and the death of innovations.

Some examples pointed out that those patents related to genomes hinder further research in drug development in pandemics like Cancer and HIV/AIDS, and COVID-19. Nevertheless, in general, gene patenting raises many questions of enormous public interest and concern to

[35] Robert Finn, *Ongoing Patent Dispute may have Ramifications for Academic Researchers*, 10 *THE SCIENTIST 20*, (October 14, 1996). Paper available on http://www.the-scientist.com/?articles.view/articleNo/18099/title/Ongoing-Enzyme-Patent-Dispute-May-Have-Ramifications-For-Academic-Researchers/, (last updated July.05, 2020).

[36] *Promega Files New Motion Against Hoffman La Roche in Taq Law Suit*, 6 MOLECULAR BIOTECHNOLOGY 1, 90 (1996). http://link.springer.com/article/10.1007/BF02762329, (last updated July.05, 2020).

[37] *John Hopkins University v. CellPro,* 931 F.Supp.303 (D.Del.1996).

[38] Barbara M. Mc Garey and Annette Levey, *Patents, Products and Public Health: An Analysis of the CellPro March-in Petition,* 14 BERKELEY TECHNOLOGY LAW JOURNAL 3, (1999).

[39] http://www.nih.gov/news/pr/aug97/nihb-01.htm, (last updated July.05, 2020).

[40] Gretchen Dunbar, *Real as Pro Wrestling: John Hopkins University v. CellPro and the Federal Court's Power of Review in Patent Infringement Actions*, 18 SANTA CLARA HIGH TECHNOLOGY LAW JOURNAL 2, (2001).

[41] *John Hopkins University v. CellPro,* 152 F. 3d. 1342 (Fed.Cir. 1998).

the medical community. The nine-bench Panel of the US Supreme Court held that genes extracted from the human body were not eligible to be patented. However, it is unclear whether other naturally occurring informational molecules, such as polypeptides (proteins) or polysaccharides, will also be excluded from patents.[42]

Recently, Australian Federal Court in Sydney ruled against the US Company *Myriad Genetics* and *Genetic Technologies*. It was held that "one may distinguish between the discovery of a piece of abstract information without the suggestion of a practical application to a useful end, on the one hand, and a useful result produced by doing something which has not been done by that procedure before, on the other."[43] This judgment has long-lasting implications for genetic testing, the medical community, and ordinary people.[44] This decision permitted the patenting of mutation of the breast cancer gene in Australia. However, a similar case was held against the same company in the US.[45]

Scientists expect to develop a new generation of therapies that will attack diseases like cancer at the level of genes and cells with genomics' help.[46] Moreover, the licensing between public-funded Universities and private companies has been increasing in the past, and most universities are deviating from fundamental research to applied research. This helps the Universities get fabulous royalties from these companies. Private pharmaceutical companies are getting patented technologies at a lower price from universities that otherwise cannot be produced by themselves.[47] However, academia believes that University and government-funded scientists as not-for-profit researchers should be entitled to free access to research tools, essential platform technologies.[48] The research tools have a social value, and at the same time, more commercial value for the companies develop it. If the retail value out-weight the social value, then it is a burden on society, and the social cost

[42]http://www.nature.com/nbt/journal/v31/n12/full/nbt.2755.html, (last updated March.05, 2020).

[43]http://www.abc.net.au/news/2014-09-05/court-dismisses-gene-patent-appeal/5722202, (last updated March.05, 2020).

[44]http://theconversation.com/australian-federal-court-upholds-gene-patents-31350, (last updated March.10, 2020).

[45]http://news.sciencemag.org/people-events/2013/06/u.s.-supreme-court-strikes-down-human-gene-patents, (last updated July.05, 2020).

[46] Lee Clifford ET AL., *A New Prescription For Your Portfolio*, FORTUNE, July 23, 2001, p. 5.

[47]Collaborations Between Biotechnology Companies and Universities/Non-Profit Institutions BIO WORLD FINANCIAL WATCH, October 22, 2001, p.7. These agreements can take the form of licenses, collaborations, sponsored research agreements, and development partnerships, among others, and contain different funding arrangements.

[48] The experimental use exception can be invoked for this purpose. Most of the domestic Patent Laws allow experimental use of patented technologies to further enhance the knowledge without infringing the patents. This provision is TRIPs compliance, like 35 U.S.C. §271(e) in the US and Section 107A of the Indian Patent Act.

cannot be compensated by granting a patent in basic research.

PATENTABILITY OF PLATFORM TECHNOLOGIES

The idea of patenting genes is still inherently counterintuitive to some people. When isolated and purified from the chromosomes where they reside, they can be patented as chemical compounds.[49] However, naturally existing things cannot be patented. The utility threshold of gene patents is also debatable.

In *re Fisher*[50] addresses this very question. In Fisher, the court discussed the standard of usefulness for patentable inventions under 35 U.S.C. § 101 as applied to Express sequence tags (ESTs).[51] The court considered whether ESTs corresponding to an unknown function's genes could satisfy the utility requirement. The court ultimately found that the claimed ESTs lacked specific and substantial utility because they were "only tools to be used along the way in the search for a practical utility" and, therefore, lacked an "immediate, well-defined, real-world benefit" requisite to a finding of "substantial" utility considered mandatory under 35 U.S.C. § 101. 3.[52] The court observed that Brana's ESTs would amount to a "Hunting License."

The Supreme Court created the utility test in 1966, in its decision in *Brenner v. Manson.* In Brenner, the Court addressed whether the utility of a compound produced by a chemical process is an essential element of establishing a *prima facie* case for that process's patentability. The Court construed 35 U.S.C. § 101 narrowly in its application for method patents and held that utility is required for the product or process and the process itself.[53] A patent should not be used as a general hunting license of all available products but as a reward for successful innovation. In platform technologies, a higher threshold of utility criteria should be fixed to exclude generic patents capable of further product development.

In *Madey v. Duke*, the Federal Circuit Court put a severe limitation of the experimental use doctrine, wherein even non-profit and educational research is infringement when a distant commercial purpose exists.[54] However, in *Laboratory Corp. of America Holdings v. Metabolite Laboratories, Inc.*, the Supreme Court held that one could not patent "laws of nature, natural phenomena, and abstract ideas."[55] The patent law must always avoid overprotection and under protection

[49]http://www.scientificamerican.com/article.cfm?id=talking-gene-patents, (last updated July.05, 2020).
[50] *In re* Fisher, 421 F.3d 1365 (Fed. Cir. 2005).
[51]An EST is simply a copy of one part of a gene. Since proteins play crucial roles in diseases and genes code for proteins, using ESTs to identify genes is a powerful method of studying diseases.
[52]Lillian Ewing, *In Re Fisher: Denial of Patents for ESTs Signals Deeper Problems in the Utility Prong for Patentability*. 8 MINN. J.L. SCI. & TECH 2, 645-680, (2007).
[53]Brenner, 383 U.S. at 519.
[54] Madey v. Duke Univ., 307 F.3d 1351 (Fed. Cir. 2002).
[55]Quoting Diamond v. Diehr, 450 U.S. 175, 185 (1981).

to prevent a non-incentivization to real innovation. The system will then be inefficient, and there is enormous potential for rent-seeking that property rights would create….[56] The upstream technology holder cannot become a shylock and extract money from those who want to develop new pharmaceutical products based on upstream technologies.[57]

In the *Harvard Onco Mouse* case,[58] researchers at Harvard Medical School in the early 1980s produced a genetically modified mouse that was highly susceptible to cancer by introducing an oncogene that can trigger tumors' growth. The invention[59] was conceived as a valuable means for furthering research.[60] This research result and US Patent granted was exclusively licensed to DuPont, which funded the project to the tune of $6 million. Subsequent patents broadly claimed an entire class of transgenic nonhuman mammals and the methods used to produce them. The patents claimed transgenic mice expressing the particular gene in question and any nonhuman mammal that expresses any cancer-causing transgene.[61] The wide veracity of claims helped DuPont to negotiate for higher royalties from other institutions researching the area later. It also approached some Universities claiming that Universities must take a license from DuPont; otherwise, their research will be considered infringing DuPont patent rights. The EPO initially rejected the patent application because the living animal cannot be patented but allowed partially in appeal in 1992. This case opened a new door to the research community but raised a lot of suspicion and concerns on life forms' patenting.

Stem Cell Research is another area of concern that involves the University of Wisconsin and its biologist researcher James Thompson who first isolated the embryonic stem cell in 1998, and a broad patent was issued. The patent was exclusively granted to one Geron, who funded the project. Later Johns Hopkins University also gave an exclusive license on stem cell technology to Geron. Geron tried to extract high royalty on the patents for further research on stem cells by private companies but agreed to permit government and research institutions for non-commercial purposes. Even though the University wants to issue a broader license, they are restrained by Geron. This is only to control further research in stem cell technology. In June 2004, Santa Monica - a California-based Consumer Watchdog challenged the patent on human embryonic stem cells. However,

[56]W. LANDES & R. POSNER, *The Economic Structure of Intellectual Property Law*, (Harvard University Press: Harvard), 305 (2003).
[57]S. Peter Ludwig & Jason C. Chumney, *No Room for Experiment: The Federal Circuit's Narrow Construction of the Experimental use of Defense,* 21 NATURE BIOTECHNOLOGY, 453 (2003).
[58] EPO, T 0019/90, 1990.
[59] USPTO Patent no. 4,736,866 of 1988.
[60]http://www.wipo.int/wipo_magazine/en/2006/03/article_0006.html, (last updated June.05, 2020).
[61]http://1degreebio.org/blog/?bid=165, (last updated June.05, 2020).

the court dismissed the petition and held the patent is valid.[62] This decision is a derogation from the famous *Myriad Genetics* case in 2013. This decision will prevent the researchers from coming out with final products based on the patent after its expiry in 2015 due to several related patents held by the patentee, the Wisconsin Alumni Research Foundation.[63]

In *Myriad Genetics*, case[64] a US Court held that patents covering breast cancer gene, BRCA1, and BRCA2 are invalidated. Together with the University of Utah Research Foundation and the Myriad holds U.S. patent Nos. 5747282 and 5710001 on the isolated DNA coding for a BRCA-1 polypeptide and a screening method. In 1997, together with the Centre de Recherche du Chul in Canada and the Cancer Institute of Japan, they received patent protection on an isolated DNA sequence, asserting rights over many mutations in the gene (U.S. Patent 5693473). Further patent applications were filed on the second gene, BRCA-2, in the U.S. and other countries (US Patents 5837492 and 6033857).[65]

The American Civil Liberties Union (ACLU) and the Public Patent Foundation at the Cardozo School of Law in New York City asserted that Myriad Genetics (which charges about $3,000 to uses its specialized diagnostic tests to look for mutations on the *BRCA1* and *BRCA2* genes) had an unfair monopoly.[66] The New York District Court considered the question "are isolated human genes and the comparison of their sequences patentable? The USPTO has granted patents to "isolated DNA" in the past. This is based on the presumption that DNA should be treated no differently from a chemical compound.

Judge Robert Sweet held that "DNA's existence in an "isolated" form which alters neither the fundamental quality of DNA as it exists in the body nor the information it encodes. Therefore, the patents at issue directed to "isolated DNA" containing sequences found in nature are unsustainable as a matter of law and are deemed un-patentable."

This company was accused of demanding excessive royalties covering 20 patents on a cancer gene. This incident raises many questions and companies' real intentions in acting against societal interests by misusing patent rights by blocking further research on the subject.[67] The European

[62]http://news.sciencemag.org/biology/2014/06/u-s-federal-court-dismisses-challenge-stem-cell-patent, (last updated July.05, 2020).
[63]http://www.bloomberg.com/news/2014-01-06/gene-patent-case-fuels-u-s-court-test-of-stem-cell-right.html, (last updated July.05, 2020).
[64] Association for Molecular Pathology & Another v. USPTO & Another, The United States Southern District Court of New York, 9 Civ. 4515.
[65]WIPO MAGAZINE, available on http://www.wipo.int/wipo_magazine/en/2006/04/article_0003.html, (last updated June.05, 2020).
[66]Catherine Harmon, *District Court Overturns Patents on Breast Cancer Genes*, SCIENTIFIC AMERICAN OBSERVATIONS, March 30, 2010.
[67]Jordan Paradise, *European Opposition to Exclusive Control Over Predictive Breast Cancer Testing and the Inherent Implications for U.S.*

Patent Office (EPO) has invalidated a patent over BCRCA1 by Myriad on the lack of novelty.[68] These developments discourage companies from going with ambitious plans on patents and thus making hindrance to further research.

The Supreme Court of Canada also ruled in 2002 that higher life forms were not patentable because they were not a "manufacture or composition of matter within the meaning of invention" of the Patent Act.[69] In Canada, the patent examiner initially rejected claims to transgenic animals because they were not included in the definition of an invention but allowed claims on the process for obtaining the Onco mouse.

The *Myriad* case proves that gene patenting does more to block competition and discourage promising new technologies than spur innovation. The scientific community and investors agree that owing to the lead time and costs entailed, integration of technology platforms, focused targets, and ultimately therapeutic drugs that have been through clinical trials and are approved for commercial marketing remains years away. The life cycle of the innovations is significantly less for companies to extract their investments and profits while also providing reasonable access to platform technology for research.

THE BOLAR PROVISION, VOLUNTARY LICENSING, AND PATENT POOLS, COMPULSORY LICENSING

The bolar provision[70] in the TRIPs agreement can be used to understand or improve the patented product or process but not to enable it to be used. Article 30 of TRIPs allows researchers to use a patented invention to understand more. This position was confirmed by the WTO Dispute Settlement system in *Canada — Patent Protection for Pharmaceutical Products case.*[71] However, experimentation to use technology is not permitted. The dependency licensing system prevails in many countries allows a researcher to improve on an invention and, if the improvement is genuinely substantial, obtain a reasonable royalty license to use the invention. The researchers could be guaranteed that they

Patent Law and Public Policy: A Case Study of the Myriad Genetics' BRCA Patent Controversy, 59 FOOD AND DRUG LAW JOURNAL 1, (2004).

[68] See http://www.managingip.com/default.asp?Page=9&PUBid=198&ISS=13072&SID=484586, (last updated June.05, 2020). The opposition proceedings led to the revocation in 2004 of European Patent 699754, which covered a diagnosis method. The proceedings found that the original patent application's errors had not been corrected until the gene sequences were in the public domain. According to patentability criteria, the invention had not been fully disclosed in the application as originally filed; and was not novel by the time the invention was fully described in the amended application.

[69] Harvard College v. Canada (Commissioner of Patent) 2002 SCC 76.

[70] It is popularly known as research exemption or regulatory exemption provision under the TRIPs Agreement.

[71] http://www.wto.org/english/tratop_e/trips_e/factsheet_pharm02_e.htm, (last updated June.21, 2020).

would not be blocked from applying the technology; simultaneously, the inventor would obtain a reasonable return. Such an approach will be ideal for developing countries. It says that biological inventions include gene engineering technologies as well. Private and public sector partnership is suggested as another solution to the problem by specific license arrangements between research institutions in developed and developing countries.[72]

Voluntary licensing and patent pools are the need of the hour to fight against pandemics like COVID-19. In his Proclamation on the World Intellectual Property Day, 2020, the US President said, "The importance of intellectual property law has never been more apparent than now." "Patents 4 Partnership," a new platform, started to bring new products and technologies related to the COVID-19 treatment. This is a common platform for patents and applications available for license or sale.[73] However, this platform did not talk about licensing terms or non-exclusive licenses for developing countries.

PATENT POOLS

Patent pools are agreements between two patent holders to license their patents to each other or third parties. Medicines Patent Pool (MPP) is a group that was created in 2010, promotes any technology for voluntary licensing, which could contribute to the global response to COVID-19.[74] MPP facilitates licensing could accelerate innovation and access to medicines for the pandemic. There is no medicine invented so far for licensing for the treatment of COVID-19. In May 2020, WHO, Costa Rica, 30 countries, and other international institutions constituted COVID-19 Technology Access Pool or C-TAP to make vaccines tackle the present situation and subsequent licensing.[75] The countries joined in this pool are Argentina, Bangladesh, Belgium, Belize, Bhutan, Brazil, Chile, Dominican Republic, Ecuador, Egypt, El Salvador, Honduras, Indonesia, Lebanon, Luxembourg, Malaysia, Mexico, Mongolia, Mozambique, Norway, Oman, Pakistan, Panama, Peru, Portugal, South Africa, Sri Lanka, Sudan, the Netherlands, Tomor, Uruguay, and Zimbabwe. However, many countries are not joined with this group; they are France, the United Kingdom, China, Russia, India, Germany, Canada,

[72] Enriqueta C. Bond, *Public/Private Sector Partnership for Emerging Infections,* http://www.cdc.gov/ncidod/eid/vol7no3_supp/bond.htm, (last updated June.22, 2020).

[73] https://www.uspto.gov/sites/default/files/documents/patents4partnerships20200501.pdf, (last updated July.18, 2020).

[74] https://medicinespatentpool.org/what-we-do/disease-areas#pills-COVID-19, (last updated July.18, 2020).

[75] https://www.who.int/news/item/29-05-2020-international-community-rallies-to-support-open-research-and-science-to-fight-covid-19 (Last updated February 19, 2021).

and Saudi Arabia. The notable absence is the US, which objected to such patent pools, which may side-line the multinational pharmaceutical companies. Even the US threatened to pull out of the WHO against how it dealt with COVID-19. In November 2020, 18 generic companies pledged to work with MPP to facilitate access to medicines.

COVID – 19 VACCINES AND PRICES

Presently many companies are come out with vaccines for the pandemic, and the first and second doses have been served in many parts of the world to frontline fighters of the pandemic like health workers and other volunteers. The below table analyses the presently available vaccines, their producers, and possible prices.

Table – 1

Efficacy and Prices of COVID-19 Vaccines

Sl No	Name of the Vaccine	Company	Efficacy	Price per dose
1	CoronaVac	Sinovac Biotech	50.38% to 91.25%	$60
2	Sinopharm Vaccine	Sinopharm		$77
3	Moderna Vaccine	Moderna	94.5%	$32-$37
4	Pfizer-BioNTech	Pfizer	95%	$19.50
5	NVX-CoV237	**Novavax**	89.3%	$16
6	JNJ-78436735	Johnson & Johnson	66%	$10
7	Sputnik	Gamaleya Centre	91.4%	$10
8		AstraZeneca and University of Oxford	60-90%	$3-$4
9		**CanSino Biologics**	65.7%	Unknown
10	Covishield - India	**Serum Institute (**AstraZeneca and University of Oxford)	70.4%	$2.75
11	Covaxin - India	**Bharat Biotech**	Not Available	$3

Source: https://www.biospace.com/article/comparing-covid-19-vaccines-pfizer-biontech-moderna-astrazeneca-oxford-j-and-j-russia-s-sputnik-v/. (Last updated February 19, 2021).

From the above table, it is clear that only Indian vaccines are the cheapest globally, and India can only supply this to developing countries at an affordable price. The high prices raise many questions about vaccines' accessibility and affordability in the least developed and developing nations. COVAX – run by the WHO and other voluntary organizations- is working to provide equitable access to the vaccine worldwide. The vaccine-producing countries are not so generous to distribute vaccines to poor countries on a "sharing and caring" basis. Indian and South African proposals to waive patent rights for all Covid-19 vaccines got support from 120 WTO member countries, including the US. However, Germany and Russia opposed the waiver of patent rights for the vaccines. Waiving the patent rights is only the beginning of the process. There is no discussion on the transfer of technology and know-how for the production of vaccines. Now the second wave of the pandemic is at its height, including India. We are not even halfway on the decision, and it is essential to take an urgent decision at the TRIPs Council so that precious human life can be saved all over the world. India has already exported 66 million doses of vaccines to other countries till May 2021. It is interesting to note that India is the only country that exported vaccines to developing and least developed countries use and developed countries are refusing to assist the world with vaccines. The move of WTO without tech transfer is not going to find success in developing countries.[76]

COMPULSORY LICENSING

Many developing countries are thinking of issuing a compulsory license for Remdesivir, a patent owned by Gilead Sciences. It issued non-exclusive licenses to limited companies like India and given marketing approval in 127 countries. The CL can be defined as granting a government license to a third party to use a patent without the patent holder's authorization. CLs are an essential government instrument to intervene in the market and limit patents and other intellectual property rights to correct market failures.[77] Article 31 of the TRIPS sets out the framework for national laws on use without the patent owner's authorization. The Doha Declaration on Public Health 2001 recognized the problems of developing countries and least developed countries. Paragraph 5(b) of the Declaration explicitly maintains the WTO Member countries' right to grant compulsory licenses and the freedom to determine the grounds upon which such licenses are granted. Each member countries have the freedom to decide what constitutes "a national emergency" or "extreme urgency." Implementation of paragraph 6 of the Doha Declaration was

[76]https://theprint.in/diplomacy/even-if-wto-waives-patent-rights-no-country-can-start-making-a-covid-vaccine-immediately/653905/. (last updated May. 11, 2021).

[77]See htttp://www.cptech.org, (last updated July.18, 2020).

implemented through the Decision of the General Council of August 30, 2003.[78] Paragraph 7 of the 2003 decision emphasized the transfer of technology in the pharmaceutical industry. In the present situation, developing and least developed countries are justified in issuing compulsory licensing under the TRIPs Agreement.

Earlier experience in issuing compulsory licenses shows the difficulties faced by countries like Brazil, Thailand, and India when implementing the decision due to heavy pressure from multinational companies and their governments. Many countries are not recourse to compulsory licensing due to fear of soaring bilateral relations or compulsions under free trade agreements to protect intellectual property at a higher level than TRIPs. In March 2020, Israel issued compulsory licenses to import a generic version of lopinavir/ritonavir to fight the COVID-19 pandemic against AbbVie's Kaletra company. Canada, Chile, and Ecuador made the legal ground for issuing compulsory licenses.[79] Compulsory licensing is a strong tool to deal with a pandemic situation. Unfortunately, no country is thinking of using this option against the TRIPs leverage against patented COVID-19 vaccines.

THE INDIAN SCENARIO

Patenting of gene sequences is controversial at national levels.[80] Many countries provide patents for isolated genetic extracts and materials. An artificially isolated gene sequence has inventive use as a tool. These tools cannot be made patentable; the consequence of such patenting is that such patents will prevent the use of such genes for the invention of new drugs. These tools are lacking the patentable criteria of novelty. Real inventions using such tools may be made patentable; uses of such gene sequence, in general, cannot be made patentable.[81] The genomic databases are not patentable in India; instead, they can only be copyrighted. However, gene sequences are patentable if functions have been ascribed to that gene sequencing.[82] Indian Patent Office has issued guidelines for the examination of biotechnology patent applications in 2013.[83]

The Kolkata High Court, in a historic decision in *Dimminaco AG v. Controller*

[78] WTO General Council Document N0. WT/L/540 and Corr.1.

[79] http://www.jogh.org/documents/issue202001/jogh-10-010358.htm, (last updated July.19, 2020).

[80] Bhavishyavani Ravi, *Gene Patents in India: Gauging Policy by an Analysis of the Grants Made by the Indian Patent Office*, 18 JOURNAL OF INTELLECTUAL PROPERTY RIGHTS, 323-29, (2013).

[81] World Health Organization, *Patent Issues Related to Influenza Viruses and their Genes*, Working Paper, Document A/PIP/IGM/3, (2007).

[82] H.S.Chawla, *Patenting of Biological Material and Biotechnology*, 10 JOURNAL OF INTELLECTUAL PROPERTY RIGHTS, 44-51 (2005).

[83] http://www.ipindia.nic.in/whats_new/biotech_Guidelines_25March2013.pdf, (last updated June.05, 2020).

of Patents,[84] it was held that "a new and useful art or process is an invention, and where the end product (even if it contains living organism) is a new article, the process leading to its manufacture is an invention."

In the same year, the Patent (Amendment) Act 2002 was passed to include biochemical, biotechnological, and microbiological processes under the scope of chemical processes for patents granted. The definition of the invention also changed to "invention," which means a new product or process involving an inventive step and capable of industrial application and deleted the earlier word "manner of manufacture" as mentioned in the previous Act.[85] The Patent (Amendment) Act 2005[86] facilitated the grant of product patents in the field of technology, including biotechnology. The Act also made provisions for the deposition of biological materials with depositories under the Budapest Treaty, which India joined in 2001.[87] Section 3(c) prohibits the patenting of any discovery of living or non-living substance occurring in nature. Section 3(i) also does not permit the patenting of the method of treatment and diagnosis.

On the other hand, the availability of patent protection for research tools has undoubtedly motivated valuable private sector investments in developing, validating, and disseminating many critical research platform technologies to the benefit of the private and public sectors.[88] There is a strong argument that gene patenting may prevent incremental innovations and final product development. The DNA sequence discoveries with encoded therapeutic proteins were started patenting by the NIH in the US as chemicals. Free access to scientific information and the method of using any platform technology is essential for product development, especially drug development. Asserting patent rights over research tools on the academic community is severely criticized by civil society organizations and developing countries facing a severe threat from pandemics. The high royalty levels for the platform technology will directly affect the drugs developed for treating severe diseases. The patenting of platform technologies may have a direct impact on the dissemination of research tools. The research exemption provision in the TRIPs agreement can be used to supply research tools for further developing drugs that are not conventional, like Malaria, Tuberculosis, and the new pandemic COVID-19.

Another possible defense that can argue is the patentability of these platform technologies themselves. The patentability criteria itself require the

[84] Judgment on 15.01.2001.
[85] Section 2(j).
[86] http://ipindia.nic.in/ipr/patent/patent_2005.pdf, (last updated July.05, 2020).
[87] Budapest Treaty on the International Recognition of the Deposit of Microorganisms for Patent Procedure, 1980.
[88] Rebecca S. Eisenberg, *Commentary*, 77 ACADEMIC MEDICINE 12, 1383 (2002).

invention should be new and have a practical utility. The invention must be considered not obvious to one of ordinary skill in the art. Patent protection can be given to technological breakthroughs that revealed "a flash of creative genius."[89] The judicial standard would be high in interpreting the non-obvious criteria of platform technologies so that trivial claims on functions cannot be patented. In the early days of gene patenting, the process of cloning the gene required considerable creativity and skill, but later it becomes a routine matter. Thus, the patent can be rejected on a partial amino acid sequence that had been previously disclosed or in the public domain.[90] In the case of *In Re Deuel*, the court held another way round that:

(a) Combination of prior art reference teaching method of gene cloning, together with reference disclosing partial amino acid sequence for a protein that stimulated cell division did not render claims prima facie visible;

(b) Conceived method of preparing some unidentified DNA does not define it with the precision necessary to render it obvious over protein it encodes; and

(c) Patent claims generically encompassing all DNA sequences encoding human and bovine proteins to stimulate cell division were not invalid as obvious.[91]

Gene patenting in the initial days was interpreted very broadly by the US Supreme Court in *Diamond v. Chakrabarty*.[92] DNA was considered chemical even though it is a physical substance and storehouse of biological information for patenting purposes. The court in *Amgen v. Chugai*,[93] it was held that "A gene is a chemical compound, albeit a complex one." This DNA was used as a chemical compound to produce recombinant drugs and vaccines.[94] The exclusive licensing clauses on future discoveries by using proprietary platform technologies are a problem for researchers. It prevents the subsequent

[89] Cuno Engineering Corp. v. Automatic Devices Corp., 314 U.S. 84, 90 (1941).

[90] *Ex parte* Deuel, 1993 Pat. App. LEXIS 22 (Bd.Pat. App. and Interf. 1993).

[91] The inventors filed a patent application directed to DNA and cDNA molecules that encoded the heparin-binding growth factor (HBGF). The examiner rejected the claims as obvious, and the Board of Patent Appeals and Interferences affirmed. The examiner cited two prior art references. The Bohlen references provided a partial amino acid sequence of HB GF and did not address the enzyme's DNA coding. The Maniatis reference disclosed the method of gene cloning that the applicants had used. See also *In re Bell*, 991 F.2d 781 (Fed. Cir. 1993);

[92] 447 U.S. 303 (1980). In this case, it was held that alive; the human-made microorganism is patentable subject matter under section 101. Respondent's microorganism constitutes a "manufacture" or "composition of matter" within that statute. Mr. *Chakrabarty* filed a patent application relating to his invention of a human-made, genetically engineered bacterium capable of breaking down crude oil, a property possessed by no naturally occurring bacteria.

[93] Amgen v. Chugai, 927 F.2d 1200 (Fed. Cir.1991).

[94] Roger D Klein, *Gene Patents, and Genetic Testing in the United States*, 25 *Nature Biotechnology*, 989-990 (2007).

inventor from independently produce new drugs that can fight against pandemics.

Recently, there have been more platform technology transactions between big pharma companies to access a broad spectrum of new technologies, including vaccine-related, bioprocessing, genomics, and aptamer platforms.[95] Around 23 biotech companies are responded to the Coronavirus spread in 2019 with existing patented medicines for developing a new vaccine.[96] Hydroxychloroquine sulfate and Chloroquine phosphate, another drug Remdesivir have FDA approval. Seven Indian companies, including Bharat Biotech, Serum Institute, Zydus Cadila, Panacea Biotech, Indian Immunologicals, Minwax, and Biological E. Bharat Biotech has developed Covaxin, and human trials have been started. Astra Zeneca, Serum Institute, has in the III state of the trails. Other companies are also at various stages of trials.[97]

CONCLUSION

Patenting of platform technologies in biomedical and allied research areas has been controversial for downstream industries, especially in developing countries. Sometimes the platform technology holders do not want to grow the downstream sectors, and they refuse to license the patented technologies. Patent litigation is another strategy of platform technologies to deter downstream users. If a research tool is critical for the industry, there is no other choice to license that technology from the upstream researcher. Allowing non-exclusive licenses and liberal licensing regimes are another antidote from misusing the upstream technology. The research exemption (bolar) provision is to be strengthened under the TRIPs Agreement and domestic laws to facilitate the Universities and Research Institutions to research the area further. Simultaneously, many companies are reluctant to initiate actions against universities as far as their research is non-commercial. Companies rarely enforce patent infringement suits vigorously against universities. This is mainly due to the company's forbearance towards non-profit research. Companies' method is to send the study offshore where the technology is not filed for a patent. The court decisions in many cases are not consistent, and the rich jurisprudence does not guarantee any relief. However, in most of the findings and the last one in the series, the Myriad Genetics decision is

[95] 1856 transactions between October 2008–September 2009. Nature Reviews Drug Discovery 8,923(December2009), http://www.nature.com/nrd/journal/v8/n12/full/nrd3065.html, (last updated July.05, 2020).

[96] https://www.bio.org/policy/human-health/vaccines-biodefense/coronavirus, (last updated July.20, 2020).

[97] https://www.livemint.com/news/india/7-indian-firms-in-race-to-develop-covid-19-vaccine-where-do-we-stand-now-11595218500024.html, (last updated July.20, 2020).

a trendsetting one, and the courts held that research tools are non-patentable. India follows the same way, and research tools cannot be allowed to patent in India.

Interestingly, Gilead Sciences issued a non-exclusive license to Indian companies for manufacturing and marketing Remdesivir in 127 countries. More than seven Indian companies are in the process of human trials to fight against COVID-19. Only two vaccines are approved so far by the Government of India. A nonexclusive license is not an answer to the pandemic like COVID-19; instead, the compulsory license is the legal remedy prescribed under the TRIPs Agreement. These countries should go for voluntary licenses with the WHO arrangements COVAX. The WTO waiver of patents on Covid-19 vaccines may be in the right direction and spirit of access to medicines in developing countries.

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PLIGHT OF WATER WIVES: A HUMAN RIGHT CONCERN IN INDIA

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ABSTRACT

Nations, minor and significant, developed and developing, all of them face concerns relating to water quality, quantity, affordability and access. These matters require impending and proficient elucidations because of the dire prominence of water to human health, life, and dignity. This article focuses on the plight of the households located in a village named Denganmal, 150 km from Mumbai, Maharashtra. The adversities faced by the people due to lack of accessibility of fresh drinking water has reached to a magnitude in these remote areas that men are often obligated to remarry. Having two or even three wives is not at all unusual in these areas. These men only have children with their first wives, while the other's lone objective is to gather water for the family, in exchange for a place to live and the societal status of wife. They are called as Paaniwaali Bais or water wives. Water is necessary to human life and it also has a social and cultural meaning. Water should be sufficient for human dignity, and shall not be merely considered as an economic good. In this study an endeavor will be made to examine such predicaments under the light of Human Right Laws and various statutes in India. Safe drinking water and sanitation are requisite to sustain life and health, and fundamental to the dignity of every human being and hence this attempt particularly focuses on indigenous people and local minority crowds whose access to drinking water and land has been thwarted by governments and other multinational enterprises, depriving them of their basic rights.

Keywords: *Human Rights, Right to clean Environment, Right To Water, Water Pollution, Water Wives.*

INTRODUCTION

Drinking water is fundamental for human life. Despite of that even when water has not only supported life in our world but also led to development of civilization focusing around the same, the legislatures enacted to protect the sanctity of water has always been limited, unimplemented and irregular. At the domestic stage, provincial and primitive enactments predominantly focused on the commercial exploitation of water. In last few years, increase in water contamination and diminishing per capita accessibility of water have prompted the introduction of different legislative steps, for example, water quality guideline and an accentuation on water as a mode of conveyance, especially in urban communities, just as climate related measures. However, water law remains to a great extent sectorial till date.[1]

While water has existed on this planet since the origin of the world, the acknowledgement of water resource as a basic human right is a recent event. Since the Cold War, prominent jurists in Western countries have vigorously explored complex legal areas that had been chiefly overlooked before because of national safety concerns. One of these aspects is human rights, precisely the basic privilege to claim basic right over water in the perspective of financial, social, and cultural rights. These rights had been more emphasized in the Soviet Union and Global South nations. Although commercial, societal, and cultural rights offer new influences for social justice, some of the Western constitutions and legislations such as, the Constitution of the United States do not even spot these moralities. Numerous expanses such as education, health, labor and employment, food, water, housing and progress, which were conventionally regarded as benefits delivered by states are now loomed from the perception of human rights.

In fact, water also has a social and cultural connotation. In various instances in both developing as well as developed nations we have observed that the indigenous group of people are often being associated with water to carry out their daily activating cantering water which is symbolizing their tradition and culture.

WHO ARE WATER WIVES?

The trouble of scarcity of water has taken deep impact in village named Denganmal in India. The village is located 150 km from Mumbai, Maharashtra. Denganmal is a unremarkable hold of mud houses with balconies and thatched roofs and shelter to more than 100 Adivasi families.

It was found that there are around eight thousand odd drought inflicted villages in the city of Maharashtra, one of the mostly

[1] Maike Gorsboth, *Identifying and Addressing Violations of the Human Right to Water Applying the Human Rights Approach*, BREAD FOR THE WORLD (2nd revised and updated ed. 2008), https://www.aaas.org/sites/default/files/s3fs-public/violations-of-the-Human-Right-to-Water.pdf (last visited May 29, 2021).

effected area is a village named Denganmal. The small village of Denganmal is infrequent since the predominant Basta river that provides water to Mumbai is merely located 8 km away from it. In fact, if we closely observe we can also find a dam located 3 kilometers from the village whose reservoir has abundant supply of water. But most of the pipes are towards Mumbai, so there is no pipeline towards the village.[2]

Few years ago, the villagers made an understanding for their water afflictions i.e., to get married to a second wife whose primary duty will be making continual tramps faraway to the dam in order to fetch water for the family. This is what a paniwali bai is supposed to do on a daily basis, irrespective of the prevalent weather and climatic situations. In exchange for their service, it is the responsibility and obligation of the in-law family to take care of her wellbeing and treat her with the proper dignity of a wife. But at the same time, she is not allowed to share the family property nor can have marital relationships with that of the husband as long as the man's first marriage is subsisting. In the light of these understandings, if has been observed in various scenarios that the second wife with whom he has only wedded to make her fetch water is neglected and only given a roof to live in and societal recognition of a matrimonial bond.

It is found that on a daily basis the Paniwali bai's of Denganmal Village walks in the scorching heat for over three kilometres to bring 100 litres of water. Apart from that she is also responsible to supervise the household chores such as, milking cows, preparing and serving meals to other members etc. The household works of each wife within a family is segregated so that that they don't overlap and the chances of conflict between them can be minimized. [3] As observed, it can be found that first marriage usually takes places keeping in mind the caste and status of the parties but when the second marriage is concerned there is no such strict practice in their society.[4]

Paaniwali Bai's Human Right Concern-

To be a paaniwali bai is arduous. Commonly the temperature in this region of Maharashtra is around 42 degrees. In such circumstances they are found walking to the dam, located over 3 km away with aluminum containers hanging on their heads.[5] The subsisting drought has transformed the traditional means of livelihood in these regions. A close look through Denganmal village reveals

[2]Haima Deshpande, *The Water Wives*, OPEN-THE MAGAZINE, (Apr. 02, 2015) https://openthemagazine.com/features/india/the-water-wives/ (last visited May 29, 2021).

[3] *The Water Wives of India Live Only to Fetch Water for Their Families,* ODDITYCENTRAL (May 25, 2015) https://www.odditycentral.com/news/the-water-wives-of-india-live-only-to-fetch-water-for-their-families.html#more-45668 (last visited May 29, 2021).

[4] Deshpande, *supra* note 2.

[5] *Id.*

unattended children roaming around, most of these children tirelessly anxious for their mothers to return back from the water fetching tricps so that they can get their food and affection from them. Undernourishment is observed to be steep and so is the infant mortality rate. Majority of this daily working womens of this village is having poor hemoglobin levels. They are also found to be suffering from diseases like anaemia, miscarriages, shifted fertility and menstrual cycles, along with usual back and neck cramps. Scarcity of water is also reflected in their household schedules for washing clothes in the village. The everyday clothes are washed on weekly basis while bed sheets and other clothes even goes unwashed for over a month. Such practices greatly impact the hygiene standards and well-being of residents of these villages.

INDIA'S APPROACH TO RIGHT TO WATER

Over a billion of people on a daily basis face the issue of shortage of water supply across the globe which makes it difficult to arrange for fresh water to cook, wash or even have personal hygiene.[6] Lack of disinfected water and sanitation issues are commonly spotted even among the kids. Due to such ill effects of water, it causes various diseases which ultimately leads to exhaustion of monetary resources and harm in continuing with education as well. The least fortunate are especially influenced by the absence of safe water since a greater amount of them survive on water which are coming from unreliable or unattended sources making them liable to be a danger towards their wellbeing.

Such matters are hence vital to be discussed under the human rights aspect as well. It focuses over all the duty of a state, to ensure the supply of water across various areas in a convenient manner so that everyone can claim their right over it without any discrimination. However, if states do not fulfil their obligation, the human rights approach holds them answerable. Availability to sufficient water is considered as an ethical obligation as well as a political and legitimate case. The basic liberty to water has progressively picked up consideration through this methodology. Common society bunches the world over use it to uncover political disappointments and to guarantee better water administration. In India, water law is made of various segments. It incorporates worldwide arrangements, government and state acts. It additionally incorporates various fewer proper plans, including water constantly related arrangements just as standard principles and guidelines.

[6] *See* Meeting the MDG drinking water and sanitation target: a mid-term assessment of progress / WHO/UNICEF JOINT MONITORING PROGRAMME. GENEVA: WORLD HEALTH ORGANIZATION, https://apps.who.int/iris/handle/10665/43021 (last visited May 29, 2021).

EXISTING LEGISLATIVE FRAMEWORKS

In respect of statutory progress, irrigation laws instituted in our country historically is the most urbanized segment of legislature concerning water. This is mostly because the British administration found the establishment of enhanced irrigation facilities qualifies to be the main objective. It also indicates the necessity to announce a supervisory guideline in this region. The principles which are made applicable in the current legislature are referred mainly from the previous irrigations acts which were implemented in the past. The previously incorporated Northern India Canal and Drainage Act, 1873 looked after the regulation of hydression, navigation and drainage related issues prevalent over Northern India. This is one of those acts which had sanctioned the government to "*use and control for public purposes the water of all rivers and streams flowing in natural channels, and of all lakes*".[7] This legislation also abstained state from declaring proprietorship over ground waters. Yet, this enactment is a breakthrough as it avowed the governmental bodies to regulate the usage of water for the benefits of the people living in those areas. The philosophy used by this legislation was increasingly underwired. Hence, the Madhya Pradesh Irrigation Act, 1931 which was introduced ensured the rights of the state governments as well over the existing water bodies. The act stated that, "*All rights in the water of any river, natural stream or natural drainage channel, natural lake or other natural collection of water shall vest in the Government*". [8]

The laws which were passed during the British rule are still relevant and significant in this sector because various laws like that of the Madhya Pradesh Irrigation Act of 1931 is still in use. Along with that in the state the Madhya Pradesh again, the Guidelines of Waters Act, 1949 reaffirmed that "all rights in the water of any natural source of supply shall vest in the Government".[9] In fact the current Bihar Irrigation Act, 1997 enumerates the contention that the vital rights regarding to the usage of water resources must be in the hands of the government only.[10]

The various laws related to water in our nation are an admixture of colonial laws and recent enactments. These embrace laws on ridges, supply of clean drinking water, drainage, flood management, tools for conservation of water, prevention of water pollution, convalescence of emigrants and expatriate persons etc.

[7] Preamble, The Canal and Drainage Act, 1873 No. VIII, Acts of Parliament, 1873.

[8] §26, The Madhya Pradesh Irrigation Act, 1931, No. 3, Acts of Parliament, 1931.

[9] §3, The Madhya Pradesh Regulation of Waters Act, 1949, No. 37, Acts of Parliament, 1949.

[10] § 3a, The Bihar Irrigation Act, 1997, INDIA CODE DIGITAL REPOSITORY OF STATE ACTS, STATE GOVERNMENT OF BIHAR,https://www.indiacode.nic.in/handle/123456789/5140?view_type=browse&sam_handle=123456789/2488 (last visited May 30, 2021).

In general, water laws are mostly state centred. This is mainly due to the constitutional arrangement, as pronounced by the Government of India Act, 1935, which has conferred power over that of the states to decide upon these matters. Thus, the states have the special power to moderate "water supplies, irrigation and canals, drainage and embankments, water storage, hydropower and fisheries".[11] Few limitations associated with the custom of flow of rivers covering different states and water bodies.[12] Further, even the Union is enabled to enact on certain matters. Such as, shipment and navigation on various national waterways along with authorities to regulate the use of water resources.[13] The Constitution of India also allows the center to intervene and regulate various settlement concerning inter-state water divergences.[14] Parliament of the nation also endorsed the River Boards Act, and provided a background for the formation of river boards by the Central Government to recommend state government regarding the ruling or progress of an inter-state river or river valley. River boards can recommend state governments on a number of areas like, preservation, mechanism and optimal consumption of water resources, the preferment and manoeuvre of arrangements for irrigation, supply of fresh water or drainage or the mechanisms used for flood control.[15]

Even though the involvement of the union in case of utilization of water resources is restricted by the provisions of the Indian Constitution, the prominence of domestic parameter in water is found to be existing in several areas. Hence, regarding the issue of water pollution, Parliament did espouse a law in 1974, commonly known as the Water Act. In fact, the Water Act pursues to thwart and curb the issue of water pollution and ensures the purity of water. It enables control towards water boards to pronounce ethics and principles for avoidance and control of pollution of water. Along with the existing laws on protection of water in India the common law principles also plays a vital role in ensuring access to water among the common people as most of the laws are having its origin in these riparian principles. It ascertains rights of those lands upon whom the river water is flowing through and impacting the life of the dwellers of those regions.[16] In current times, the riparian right doctrine has progressively been forbidden as the suitable basis for passing judgments on right to water. Along with that common law principles, privileges and rights must be interpreted in the perspective of the acknowledgement that water resource is considered to be a public trust.[17] In case

[11] IND. CONST. sch. 7, list 2, entries 17 and 21.
[12] IND. CONST. sch. 7, List 1, entry 56.
[13] IND. CONST. sch. 7, List 1, entries 24, 25 and 57.
[14] IND. CONST. art. 262.
[15] §13, The River Boards Act, 1956, No. 49, Acts of Parliament, 1956.
[16] Hanuman Prasad v. Mendwa, AIR 1935 All 876.
[17] M.C. Mehta v Kamal Nath, (1997) SCC OnLine SC 388.

this doctrine is efficiently used in the upcoming times, it will have significant impressions on the variety of privileges and freedoms that may be appealed over use of surface water resource.

The current legal structure regarding water resource is supplemented by a universal human rights outlook. While the Indian Constitution do not particularly state about fundamental right to water, the court pronouncements enlighten the understanding that such a right to be roundabout in the wide scope of Article 21.[18] In fact the basic right to clean water can be interpreted under the umbrella of right to a clean and pollution free environment. In the landmark case of Subhash Kumar v. State of Bihar (1991 AIR 420), the Apex Court pronounced that "the right to life includes the right of enjoyment of pollution free water and air for full enjoyment of life".[19] Subsequently In the case of Sardar Sarovar commonly known as Narmada Bachao Andolam, the Apex Court stated that "water is the basic need for the survival of the human beings and is part of right of life and human rights as enshrined in Article 21 of the Constitution of India".[20]

The common belief that arises is an assortment of standards and rules, a variety of legislatures and the absence of a general system. Although some basic standards have stayed consistent up to this point, such as the affirmation of the state's entitlement to utilize surface waters for the benefit of public, there have been various alteration over the years in the fundamental arrangement of water under the public trust convention. One common practice, which can be featured, is the steady reinforcement of water law. Much of the time, this has had the impact of dislodging or dousing existing nearby guidelines and courses of action.

JUDICIAL APPROACHES TOWARDS EVOLUTION OF THE RIGHT

It has been observed in several situations that human right to water has evolved as an outcome of landmark judgments pronounced by the courts than that of legislations that are existing in the current times. The strict interpretation of Article 21 of Constitution of India ensures not only right over healthy clean environment but also clean and pure supply of water for ensuring a dignified life to the citizen.

The prolonged prospect of Article 21 been construed to ensure clean environment and safe drinking water to all the people in our nation. In the case of A.P. Pollution Control Board II v. Prof. M.V. Nayudu[21] the Indian Apex court stated that access to safe drinking water is the vital for a nation. The court denoted here that

[18] S. Muralidhar, *The Right to Water: An Overview of the Indian Legal Regime*, EIBE RIEDEL & PETER ROTHEN EDS., THE HUMAN RIGHT TO WATER, 65 (2006).

[19] Subhash Kumar v. State of Bihar, AIR 1991 SC 420.

[20] Narmada Bachao Andolan v. Union of India, (2000) SCC OnLine SC 664.

[21] A.P. Pollution Control Board II v. Prof. M.V. Nayudu, (1999) SCC OnLine SC 718.

"India's contribution to the UNO water symposium and discoursed that, the Right to admittance to safe drinking water is fundamental to human life"[22]. The court also declared that as per the Article 21 of the Constitution the government is entrusted with the duty to ensure clean and safe water to its citizen. In the case of Narmada Bachao Andolan Vs. Union of India, the Apex Court discussed regarding the responsibility of the government to construct over three thousand dams on the Narmada River to ensure that the people are getting proper access to clean water, it stated that "water is the basic need for the survival of the human beings and is part of right of life and human rights as enshrined in Article 21 of the Constitution of India"[23]. In the decision of the case of M.C. Mehta vs. Kamal Nath (1997) the apex court spoke about our founding structure being taken from the English laws of public trust doctrine and how is it reflected on the current laws. The state is supposed to look after the allocation of resources in a way that it meets with the basic necessities of the common people. In the case of Vellore Citizen Welfare Forum vs. Union of India[24] (1997) the Apex Court explicitly stated that "the constitutional and statutory necessities defend a person's right to clean air, fresh water and pollution less environment and habitant".

In the year 1984 through the case of Bandhua Mukti Morcha vs. Union of India (1984) the apex court pronounced that the right of citizens to obtain safe and clean drinking water is a vital part of the right to life ensured under Article 21[25]. Also, through the significant judgment pronounced in the case of Voice of India vs. Union of India[26], Supreme Court speaks about the issue that even after so many years of Indian Independence the government has not been able to supply access to pure water to various regions across the nation. [27]

ANALZING THE ISSUES THROUGH SIMILAR CASE STUDIES

The basic human right to water encompasses the right that every person is entitled to sufficient, clean, suitable, physically available and reasonable water for domestic and commercial practices. This concept reveals 3 notable characteristics or rudiments of the human associated with water which is significant for its consumption. They are availability, accessibility, and quality of the water.

1. **Availability:** The principle of availability majorly focuses on the idea that every member of the society must get adequate amount of water to meet his basic requirement of domestic used. It consists of water which can be utilized for drinking,

[22] *Id.*
[23] Narmada, *supra* note 20.
[24] Vellore Citizen Welfare Forum vs. Union of India AIR 1996 SC 2715.
[25] Bandhua Mukti Morcha v. Union of India & Ors., (1997) 10 SCC 549.
[26] Voice of India vs. Union of India, (2002) 4 SCC 356.
[27] *Id.*

cleaning cooking etc. These fundamental needs of humankind must be fulfilled for obtaining a better standard of living.

2. **Accessibility:** This very principle speaks about the issue that unless the water resource which is present can be made accessible to the common people, there cannot be a fruitful utility of the existing resources. Construction of spring wells and damns makes it easier for people staying I a particular locality to access the water and utilize it for their needs. Similarly, significantly individuals can pay the costs identified with utilizing the water. On the off chance that the water isn't moderate, at that point actual access may be acknowledged however not monetary access.

3. **Quality:** Along with the above points it must be understood that the water must be clean and hygienic for human consumption. Hence not only the supply of water to the people must be there but process of filtration, sterilization and other mechanisms to kill the germs from water must be set up to ensure that no harm is caused to the people who are using it.

Groundwater Pollution and Exhaustion of water by a Coca Cola bottling plant located in Plachimada, South India:

The continuous exploitation and discharge of waste by that of a Coca cola plant caused severe contamination and loss of ground water in the Plachimda region which not only affected the health and livelihood of the villagers but also impacted the quality of crops produced on their fields. The women who used to look after the household works had to travel several kilometers on a regular basis to get access to clean water for their daily needs.[28]

The basic human right to access to clean water of many communal fellows is greatly violated in this scenario. Not only the quality of water but the quantity of water available in that region was impacted due to the factory because there was no nearby source of clean water accessible by that of the common population who were residing in that area. It can be found that as per the Article 44 of the Indian Constitution "the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties" along with right to life which is ensured by the Article 21 of the Constitution of India which inherently embraces the privilege to clean water.[29] The Apex court of India mentioned that "(the) right to life

[28] Gorsboth, *supra* note 1.
[29] Narmada, *supra* note 20.

guaranteed in any civilized society implies the right to food, water, decent environment, education, medical care and shelter."[30] Hence if the government finds that the practices of coca cola company is effecting the livelihood of the people of that area, they have the responsibility to take appropriate measures to ensure and protect the rights of those peoples under the Constitution. Along with that India is also a signatory to the International Covenant on Economic, Social and Cultural Rights, and as per its direction the people of India must be protected from the unfair intrusion done by entities like Coca Cola company.

The issue of Scarcity of clean drinking water in Meerut, India:

The town of Meerut is situated in Uttar Pradesh, India. The Jaibheem Nagar of Meerut is a congested slum locality situated on the banks of the Kali Ganga River. It is regarded as the residential area of that of thousands of Dalits, who are often socially and parsimoniously beleaguered in the society and were even considered untouchables in the past. Despite of having a councilor to whom they can address their grievances, they are not provided with proper supply of consumable water.[31]

The factories and industries present on the bank of the river exploit not only the ground water but also pollute the river water by discharging the harmful chemicals and untreated wastes into the river water. Poisonous pesticides and insecticides percolate into the underground water and contaminates the same. In fact, the bio medical discharges from the Government sponsored Medical College located on the side of Kali Ganga River is a major source of water pollution in that region.[32]

In the recent times, the government of Uttar Pradesh has observed that due to these practices people of this region are facing severe health hazards and often the women have to travel several kilometers to fetch clean water. In the light of this issues the government has come forward with the plan of constructing overhead tanks for accumulation of clean water which these people can access and they no longer shall have to depend on the unhygienic ground water.

[30] Chameli Singh & Others v. State of Uttar Pradesh, 1996 2 SCC 549.

[31] *Clean drinking water Ensuring survival and improved outcomes across all outcomes for every child.* UNICEF, INDIA https://www.unicef.org/india/what-we-do/clean-drinking-water (last visited May 30, 2021).

[32] Bandhu, *supra* note 25.

CONCUSION

In India, no parent desires that daughter should marry a man and live in a drought-stricken area, especially if they themselves inhabit in irrigated parts of the nation. But due to the crisis faced in Denganmal area of Maharashtra, the villagers have no choice but to marry more than once to shelter a girl from a draught hit area. The former as well as the later wives are often relinquished and even deprived of their marital rights. The sole objective of this arrangement is to fetch water for the family.

It has also been found that a water tanker with a capability of 1,000 liters approaches into Denganmal every five days, and the queues formed by the women around it to collect water often gets ugly. Water wives know that every few extra liters they can protect them from arduous trip to the far away water source, so they try to collect as much of it as possible at that time. Because of this, when the tanker arrives the women often gets involved into verbal and physical abuse towards each other and try to collect maximum water for their household. Such life full of crisis and hardship is against the dignity of human life.

In India citizen having human right to water stem out of international law obligation, as India being a signatory to International Covenant on Economic, Social and Cultural Rights (ICESCR). The various chemical and hazardous discharges from the industries and factories that pollute the water disregards the basic right of clean water which every citizen is entitled to. It is the utmost responsibility of the governments to look after the needs and unrestricted flow of clean water to its citizen. Failure to do so, can be viewed as breach of their duty to look after the welfare of the people and ensuring them with the fundamental rights guaranteed by the Indian Constitution. Even today, while walking through the roads with huge pots of aluminum perched on their heads, in 40 degrees Celsius, these Paaniwali Bai's of our nation, hopes that their daughters will have an easier life the Government lays pipes from nearby dams to their villages and irradiate this menace that they are facing over these years.

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RESEARCH TRENDS IN COMMERCIAL SEXUAL EXPLOITATION (CSE) IN SOUTH-ASIA; ESPECIALLY INDIA

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ABSTRACT

South-Asia is identified as an endangered region for human trafficking due to its gigantic population and poverty. Statistics reveal that if every year 1-2 million men, women, and children are trafficked worldwide then 225,000 of them are trafficked from the South-Asian region i.e., India, Nepal, Pakistan, Bangladesh, Sri Lanka, Maldives, Afghanistan, Bhutan etc. India, with its strategic location, as well as, poverty-stricken socio-economic condition, provides a fertile ground for the vulnerability and consequent exploitation. The present paper aimed at assessing the research activity in the field of commercial sexual exploitation in South-Asia, especially India. The authors tried to evaluate the research trends in the mentioned area to expose whether there is an under-representation with regard to any criminal, legal, or social aspect.

Keywords: *Commercial, Sexual, trafficking, child, human, India*

1. BACKGROUND

Human trafficking is a ubiquitous concern and every year about 20-65 million victims are trafficked throughout the world; India being one of the prominent source, transit and destination for the same.[1] Following trafficking in arms and drugs, human trafficking is considered as the third largest form of organized crime wherein 90% of the victims are either trafficked into India from some neighboring country or within India from one State to another (inter-State); while, the remaining 10% are trafficked out of the country (inter-country).[2] Social studies experts opine that over a period of time, the difficulties in having access to resources have degraded the social norms and values leading to vulnerabilities and marginalization, and, a specific sector have become the exploiter while the other, exploited.[3] Human trafficking is possibly the most horrible form of human exploitation and a modern day equivalent to slavery.

The term "human trafficking" comprises of a variety of offences dealing with the recruitment, transfer and ultimately the unlawful control over another person. However, the essence of the understanding of trafficking, as aptly defined by the United Nations is, the movement or transportation of a person by means of compulsion or deceit and subsequent exploitation through way of commercialization.[4]

It is necessary to acknowledge that trafficking is a regional issue in addition to being a national and international one because the prime number of women and children are trafficked within or from the South-Asian region.[5] Among the South-Asian countries, India faces escalating rate of sex trafficking and it is claimed that the culturally tyrannical attitude towards women and the under-resourced criminal justice system has led to the growth of this industry.[6] The crime experts anticipate that in the next 10 years, human trafficking in and from India would transcend drugs and arms trafficking mainly because of the monopolistic competitive nature of the business.[7] International organizations identify 3 major reasons behind trading in persons, viz: sexual exploitation, labor

[1]Roshni Patel, *The trafficking of women in India: A four dimensional analysis*, 14 GJGL, 159, 159-160, (2013).
[2]Eira Mishra, *Combating human trafficking: a legal perspective with special reference to India*, 1(4) S&A, 172, 172-173, (2013).
[3]Jaffer Latief Najar, *Human trafficking in India*, RESEARCH GATE, (June 1, 2018, 10 pm), https://www.researchgate.net/publication/303276513_Human_Trafficking_in_India.
[4]Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 15th Nov., 2000, Art-3, Para-3.
[5]Nicola Piper, *A problem by a different name? A review of research on trafficking in South-east Asia & Oceania,* 43(1/2) IM, 203, 205, (2005).
[6] Kristen Marie Ribich, *A look into the cultural and legal factors that cause and perpetuate sex trafficking of females,* (May, 2011), (unpublished PHD Thesis, University of Arizona).
[7] Elizabeth M Wheaton et al., *Economics of human trafficking*, 48(4) IOM, 106, 114, (2010).

exploitation and organ removal.[8] However, new forms of trafficking like, skin trafficking, solicitation of sex workers through internet, trafficking for forced surrogacy are also being widely reported. A study conducted by the Coalition of Organ Failure Solutions (COFS) shows that while organ trafficking benefits the foreign patients, the consequences of the victims are gross and long lasting.[9] Solicitation of sex workers through the internet has also raised important socio-legal questions pertaining to their risk behaviors, mode of trafficking, accountability of the traffickers and the type of institutions associated therein.[10] In addition to trafficking of solid organs (like kidney, liver etc.), trafficking for skin has become a booming trade. Victims are skinned alive with or without consent to respond to the needs of the Indian and global plastic surgery markets. In the year 2017, an investigation by an Indian news website[11] revealed that the skin trade between Nepal and India is facilitating the pathological labs in performing a series of aesthetic surgical procedures.[12] Of these, however, commercial sexual exploitation (hereinafter, CSE), or sex trafficking, in general, remains the most prevalent, yet the worst form of violation of human rights.

In pursuance of the Constitutional mandate of prohibiting all sorts of human trafficking under Art.23 of the Constitution of India, to fight the escalating rate of commercial sexual exploitation of children and women, Indian legislature has taken various initiatives over the years.[13]From Suppression of Immoral Trafficking, 1956, to the Immoral Traffic Prevention Act, as amended in 1986, in consonance with the International Convention for the Suppression of Immoral Traffic in Persons and Exploitation of the Prostitution of others, the law has come a long way in prosecution and penalization of offenders. Very recently, the Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018 was introduced in the Lok Sabha by the Ministry of Women and Child Development with an endeavor to give a comprehensive law to deal with trafficking, and providing proper care,

[8] Piper, *supra* note 5, at 234.

[9] Debra A. Budiani-Saberi et al., *Human trafficking for organ removal in India: A victim-centered, evidence-based report*, 97(4) NCBI, 380, 381, (2014).

[10] Scott Cunningham et al., *Prostitution 2.0: The changing face of sex work*, 69 JUE, 273, 274, (2011).

[11] "*Youth Ki Awaaz represents young India's voice on critical issues shaping our world. A platform built for and by the people, Youth Ki Awaazdemocratises the media by putting people at the center of it"*
YKA, (Oct. 30, 2018, 11:15 pm), https://www.youthkiawaaz.com/about/.

[12] Soma Basu, *How Nepali women are forced to sell their skin to make rich Indians beautiful*, (Oct. 30, 2018, 12 pm), https://www.youthkiawaaz.com/2017/03/how-women-from-nepal-are-trafficked-to-india-and-disfigured-to-make-rich-men-and-women-beautiful/.

[13] "*Traffic in human beings and beggar and other similar forms of forced labor are prohibited…*"
See THE CONSTITUTION OF INDIA, 1950, Art. 23.

protection and rehabilitation to the victims thereof.

However, these have not yielded the intended results. Given the fact that "*the government did not meet the minimum standards in several key areas; overall victim identification and protection remained inadequate and inconsistent and the government's conviction rate and the number of investigations, prosecutions, and convictions were disproportionately low relative to the scale of trafficking in India*;"[14] it is revealed that India is descending rearwards in its enforcement of sex trafficking laws, in spite of its efforts.[15] By virtue of this, now and again, the US Department of State has warned India that international sanctions would be imposed if India fails to address and curb the dangers of trafficking.[16]

Under these circumstances, a holistic review of the existing literature on commercial sex trafficking in South-Asia, especially India, is taken up by the researchers to assess the research activities and trends. This in turn helped the researchers identify a research gap in the mentioned pool of literature.

2. LITERATURE REVIEW

The researchers have conducted the literature review in three stages. In the first stage, from the widespread literature available on human trafficking and human sex trafficking, relevant literature was collected from standard legal databases. Thereafter, the researchers have divided the relevant literature on the basis of narratives and jurisdiction and appraised the same. Finally, in the third stage, the researchers attempted to scrutinize the gap in the existing pool of literature, which in turn defined the future scope of work. A snapshot of the literature review is discussed herein:

I. Problem of Trafficking with special focus on sex trafficking

Authors indicate that there was no internationally accepted definition of sex trafficking until the year 2000, but with the adoption of the United Nations Convention against Transnational Organized Crime and Palermo Protocol and its consequent adoption by 146 States, uniformity could be reached in understanding the definition of trafficking.[17]While analyzing the history of anti-trafficking interventions in the international forum, focus was deployed on the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons and the Trafficking Victims Protection Act enacted by United

[14] U.S. Department of State, *Office to Monitor and Combat Trafficking in Persons, India: Tier 2*, (Aug. 29, 2018, 11 am), https://www.state.gov/j/tip/rls/tiprpt/countries/2017/271205.htm.

[15] Sarah Montana Hart, *Destinations: A comparison of sex trafficking in India and the United States*, 83 UCLR, 1150, 1163, (2012).

[16] *Ibid*.

[17] Michelle Madden Dempsey et al., *Defining sex trafficking in international & domestic law: Mind the gaps,* 26 EILR, 137, 140, (2000).

Nations State Congress.[18]Five primary factors were identified which have led to the development of the Palermo Protocol viz: lobbying by NGOs, increase in traffic victims, worldwide view of trafficking as a transnational organized crime, Governments' problem with prosecuting trafficking cases due to deficiency of trafficking laws and inadequacy of a common international tool to combat trafficking.[19]

However, given the obligations of the State parties under Art-3 and 5 of the Palermo Protocol, one would be expected to find prevalent consistency in the definitions of trafficking in the domestic criminal laws of the States, nevertheless, there were significant discrepancies.[20] It has been argued that giving a meticulous definition is a major step to concede, clarify and comprehend a crime as complicated as human trafficking, but in reality, human trafficking not only misses a common definition, but is fused due to the existence of a broad spectrum of competing theories and models of explanation.[21]A case study on United States and Canada revealed that the definitions of human trafficking in these two countries were both confusing and contradictory.[22]Authors have clarified the difference between prostitution and sex trafficking;[23] and urged the policy-framers not to merge the terms since by doing so; the agency of sex workers would be ignored.[24]

In the international arena, human trafficking is understood as a monopolistically competitive industry;[25] and as a component of the bigger problem of organized crime.[26] It is believed that within the next ten years, human trafficking would outdo drugs and arms trafficking.[27]Moreover, trafficking in women for purposes of sexual exploitation is regarded as a sub-part of international sex trade in women, [28]whose origins are in the international capitalist market system. Here, the supply side consists of women of third worlds or exotic Asian women and the demand side includes men from industrialized as well as developing countries.[29]An equilibrium model of

[18]Uchechukwu Enwereuzor, Human trafficking: International regulatory problems & solutions, paper-155, Seton Hall University, (2013), (unpublished manuscript) (on file with author).
[19]Kelly E. Hyland, *The impact of the Protocol to prevent, suppress & punish trafficking in persons, especially women & children,* 8(2) HRB, 30, 31, (2001).
[20]Dempsey, *supra* note 17, at 142.
[21] John A. Winterdyk, *Combating trafficking in human beings: Moving towards an integrated theory,* 8(1) KIITJLS, 29, 30, (2019).
[22]Nicole Macinnis, *Human trafficking: The complexities of a global definition,* 1(1) BSUJ, 1, 7 (2015).
[23]Kate Butcher & John Snow, *Confusion between prostitution & sex trafficking,* 361 TL, 1983, 1984, (2003).
[24]*Ibid*.
[25]Elizabeth M. Wheaton, *Economics of human trafficking,* 48(4) IM, 114, 116, (2010).
[26]RaimoVayrynen, *Illegal immigration, human trafficking & organized crime,* 1(2) PIIA, 143, 149, (2005).
[27]*Ibid*.
[28]Andrea Marie Bertone, *Sexual trafficking in women: International political economy & the politics of sex,* 18(1) GI, 4, 7, (1999).
[29]*Ibid*.

prostitution has been explained where the sex workers or prostitutes and their respective clients opt to demand and supply sex under three legal regimes: regulation, laissez-faire, and prohibition.[30] The case study was based on empirical data collected from Italy where the author analyzed the effect of different policies on the equilibrium quantity of prostitution therein.[31]

Empirical studies on experiences of sex traffic victims and the victims' frustration with the legal system show that in countries where prostitution is not legal, the victims fear police officials due to their legal status and there is lack of human rights and policy implementation.[32]In another study, conducted with traffickers, the author has given information on trafficking passages. Additionally, the insider's angle on why trafficking industry is still a booming business was analyzed. In fact, it was pointed out why the trafficked victims themselves continue to support this illegal business (Stockholm syndrome).[33] Moreover, it was advanced that a complex social problem like human trafficking should be approached from a comprehensive perspective which is all inclusive of the mosaic of interactions between the actors and their behaviors in both the systems of criminal justice and human trafficking.[34]However, it is indicated that producing reliable data on human trafficking is very difficult because even though various agencies around the world provide victim assistance to the survivors of human trafficking; a handful of these systematically analyze and interpret the information they rack up.[35]In similar lines, attention was drawn towards the fact that sex traffic victims, traffickers and illegal migrants are a part of the hidden population and it is very difficult to draw a sample frame and make it representative of the population.[36]Also, since past researches say very little about the methods used to collect and analyze data it becomes further more difficult, [37]and there is a dire need to study internal trafficking inside particular countries.[38]It is also identified that certain macro-level claims with regard to human trafficking are not evidence-based and there is a dire need of micro-level research which is inclusive of both quantitative and qualitative study and better suited for

[30]G. Immordino & F.F Russo, *Regulating prostitution: A health risk approach,* 121 JPE, 14, 17, (2014).
[31]*Ibid*.
[32]Tetiana Sukach, *Experiences of female sex trafficking survivors: A phenomenological analysis,* 23(6) TQR, 1422, 1430, (2018).
[33]E.I Troshynski& J.K. Blank, *Sex trafficking: an exploratory study interviewing traffickers,* 11 TOC, 30, 31, (2007).
[34]Marcel van der watt & Amanda van der Westhuizen, *(Re) configuring the criminal justice response to human trafficking: a complex-systems perspective,* 18(3) PPR, 218, 220, (2017).
[35]Frank Laczko& Marco A. Gramegna, *Developing better indicators of human trafficking,* 10(1) BJWA, 179, 180, (2003).
[36]Frank Laczko, *Data & research on human trafficking,* 43(1-2) IOM, 5, 11, (2005).
[37]*Ibid.*
[38]*Ibid.*

formulating policy and enforcement responses.[39]

While addressing the question on how to develop apt measures to tackle trafficking in women, based on a study of trafficking between the Philippines and Belgium, it was argued that there is no single solution to human trafficking, since it is influenced by a complex set of factors.[40]An analytical framework was given on the basis of a study on United Kingdom to understand specific changes in the sentencing provisions of the anti-trafficking legislations.[41]It was suggested that economic penalties for human trafficking offences must be increased, trafficking laws should be enforced more proactively and well-resourced law enforcement investigation should be implemented, including human rights protections for survivors;[42] and an effective approach towards their psycho-physical needs.[43]

II. Sex trafficking in South-Asia

Authors specify that South Asia is gullible to human trafficking because of its vast population and poverty.[44] There lies high level of intra-regional migration including disparity in economic, employment, and education opportunities;[45] which results in trafficking of 150,000 people (approximately) in a year within South Asia.[46] Here, most of the traffic victims are women and children who are exploited for labor and sexual slavery.[47]

To understand the magnitude of the problem, empirical researches were conducted on sex tourism, migration of South-Asian women through human trafficking networks, methods used by underworld gangs to lure these women in sex trade, problems relating to smuggling of unskilled foreign workers across borders etc.[48]Since migration in Asia takes place through unchecked channels, the concept of trafficking here is dynamic and complex.[49] Also, labor migration flows in Asia has a certain pattern,[50]because trafficking in these regions occur due to the aspiration of better economic opportunity and an improved quality of life.[51]

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[39]Ronald Weitzer, *New directions in research of human trafficking,* 653 TAAA, 6, 7, (2014).
[40]Kristof Van Impe, *People for sale: The need for multidisciplinary approach towards human trafficking,* 38(3) IM, 113, 117, (2002).
[41]Siddharth Kara, *Designing more effective laws against human trafficking,* 9(2) NJIHR, 120, 122, (2011).
[42]*Ibid.*
[43]Jordan Greenbaum, *Child sex trafficking & commercial sexual exploitation,* 65 AIP, 55, 56, (2018).
[44]S. Huda, *Sex trafficking in South East Asia,* 94(3) IJGO, 374, 377, (2006).
[45]Jacqueline Joudo Larsen, *The trafficking of children in the Asia Pacific,* 415 TIICCJ, 1, 3, (2017).
[46]Md. Rahman, *Human trafficking in South Asia (special preferences on Bangladesh, India & Nepal),* 20(3) IOSR JHSS, 1, 2, (2018).
[47]*Ibid.*
[48]SupangChantavanich, *Recent research on human trafficking in mainland South-East Asia,* 4 KRSEA, 1, 2, (2003).
[49]June JH Lee, *Human trafficking in East Asia: Current trends, data collection & knowledge gaps,* 43(1/2) IM, 165, 169, (2005).
[50]*Ibid.*
[51]Larsen, *supra* note 44, at 2.

Women in South-Asia are mainly trafficked for sexual exploitation, forced marriage, and domestic work, while men are more likely than women to be recruited for commercial fishing and working in hazardous employments or trafficked in armed conflicts.[52]Also, relation has been established between the development of the tourist industry and prostitution in the third worlds.[53]It is further argued that so long as countries in Asia maintain their policies of restrictive immigration, trafficking will increase since there is increasing rate of demand for labor at various skill levels.[54]

Although the SAARC Convention on human trafficking is an important step forward, most of the countries in the region do not have an effective anti-trafficking legislation.[55]A study undertaken by Wuiling reveals that the existing criminal law adopted by ASEAN countries do not sufficiently shield trafficked victims, nor does it effectively break the loop of trafficking.[56]

III. Sex trafficking in India

Among the South-Asian countries, India confronts soaring rate of sex trafficking because of the region's culturally tyrannical attitude towards women and the under-resourced criminal justice-system.[57] The problem is aggravated due to dire lack of resources, ineffective policies, increased Government corruption, lack of the political will, serious deficit of alliance among the various Government departments like police, welfare, health, women and children, and non-conformity with the minimum standards for abolition of trafficking etc.[58] Hart in her paper compared sex-trafficking in United States and India and identified the common factors propelling sex trafficking in the region, viz., i. the sexual demand of the community is not met by the existing people in the business, ii. Sex trafficking is much more lucrative than the legal alternatives for pimps, and, iii. The victims are allured with ideas of better life and thus they give assent to travel with traffickers.[59]

[52]Cathy Zimmerman & Ligia Kiss, *Human trafficking and exploitation: A Global Health Concern,* 14(11) PLOS Med., 1, 5, (2017).
[53]Ronald Skeldon, *Trafficking: A perspective from Asia,* 2000/1 IM, 7, 8, (2002).
[54]*Ibid.*
[55]Nicola Piper, *A problem by a different name? A review of research on trafficking in South-east Asia & Oceania,* 43(1/2) IM, 203, 205, (2005).
[56]CheahWuiling, *Assesing criminal justice & human rights models in the fight against sex trafficking: A case study of ASEAN region,* 3(1) EHRR, 46, 47, (2002).

[57]Kristen Marie Ribich, Sex trafficking in India: A look into the cultural & legal factors that cause and perpetuate sex trafficking of females, (May 2011), (Unpublished manuscript) (on file with author); See also, Christine Joffres et al., *Sexual slavery without borders: trafficking for commercial sexual exploitation in India,* 7(22) IJEH, 1, 7, (2008).
[58]Biswajit Ghosh, *Trafficking in women and children in India: nature, dimension and strategies for prevention,* 13(5) IJHR, 716, 718, (2009); see also, Alison Brysk & Aditee Maskey, *Rethinking trafficking, patriarchy, poverty &private wrongs in India,* 14(2) GD, 1, 6, (2012).
[59]*Ibid.*

Authors pointed out that 80% of the trafficked persons end up into commercial sex work and inter-State trafficking within India as well as trafficking to the Gulf States and South-Asia is very high.[60] The claim is backed by a study which consisted of 42 participants from India who were forced into sexual-servitude; wherein a co-relation was established between sex trafficking and gender bias.[61] It was pointed out that the open border between India and Nepal, poverty, and, an organized trafficking network, are the main reasons behind the menace.[62] Qualitative studies have established the co-relationship between "marriage of convenience" (wherein a woman is sold into wedding against her wishes) and bride trafficking,[63] and it was indicated that the problem is prevalent in West Bengal, Bihar, South Haryana, Rajasthan, and Uttar Pradesh.[64]

Authors contended that although India is a party to various international agreements on the rights of women and there exists ample domestic legislations, but, protection of the human rights of the sex workers has been a failed attempt.[65] They advocate for the de-criminalization of sex work to empower sex workers;[66] contending that the business can be swung into a sorted-out structure to help economic development on one hand and disintegrate mal-practices on the other hand.[67]

IV. Anti-trafficking intervention in India- From a legislative, policy-based and community-based approach

Authors have examined the primary causes of trafficking of women and children within and into India.[68] To do so, the existing legal structure and the endeavor of the Government to fight the menace of trafficking were studied.[69]Sexual gratification of men has forced countless girls in an age of innocence into the flesh trade in India and though there are anti-trafficking laws, but tougher and sincere implementation is lacking; adding up to the existing vicious circle.[70]It is further pointed out that

[60] *Ibid.*
[61] NairrutiJani & Thomas P Felke, *Gender bias & sex trafficking in Indian society,* 60(4) ISW, 831, 832, (2017).
[62] P. Datta, *Trafficking & illegal female nepali migration to India,* 2(1) IJAAS, 34, 36, (2011).
[63] Navtika Singh, *Trafficked bride: Whether a dream from hell to heaven or a reality of sexual exploitation: A study,* 2(1), IJIR, 283, 286, (2017).
[64] *Ibid.*
[65] Geetanjali Mishra et al., *Protecting the rights of sex workers: The Indian experience,* 5(1) HHR, 88, 111, (2000).
[66] *Ibid.*
[67] Anup Srivastava et al., *Sex trade as a part of emotional sales in unorganized sector & its legalization in India,* 2(8) NMIJMS, 39, 41, (2015).
[68] Roshni Patel, *The trafficking of women in India: A four dimensional analysis,* 14 GJGL, 159, 182, (2013).
[69] Kiran Bhatty, *A review of the immoral traffic prevention Act, 1986,* CPR, 1, 3, (2017).
[70] Poonam Pradhan Saxena, *Immoral Traffic in women and girls: need for tougher laws and sincere implementation*, 44 (4) JILI, 504, 508, (2016); See also, Sarfaraz Ahmed Khan, *Human trafficking: Justice verma committee report & legal reform: A unaccomplished agenda,* 56(4) JILI, 567, 570, (2014); See also, Oppong S, *Trafficking women & children for sexual exploitation: India policy & recommendations for policy improvement,*

Immoral Traffic Prevention Act, 1956 only covers one aspect of trafficking, i.e. Commercial Sexual Exploitation, and there exists anomalies in the law itself; such as, lack of consensus in the definition, lack of clarity on the rights of victims, weak punitive measures against perpetrators, and poor enforcement mechanisms leading to low conviction rates of traffickers in India.[71]Thus, legislations fail to indicate that all sex workers or prostitutes may not be victims of human trafficking.[72] The existing legislations though do not criminalize sex work per se, but, criminalizes activities adjacent to sex work, thus de facto criminalizing sex work.[73]Also, while the Immoral Traffic Prevention Act focuses on the eradication of commercial sex, it does not provide guidelines for intrusion or law enforcement and ends up criminalizing the victims.[74]Authors discuss different models of criminalization and de-criminalization of sex work and record that the anti-sex work criminal law to criminalize demand is a failed attempt in India.[75]It is further contended that if prostitution in India is decriminalized, then the civil rights of the sex workers can be better protected; [76] but, on the contrary, criminalization of the clients would result in a situation where the clients as well as the sex workers will not appear at the usual places for fear of arrest, and the entire trade will go underground.[77] On the basis of an empirical research conducted in Sonagachi, West Bengal, it was advanced that both the beliefs that decriminalization can empower sex workers and strictly enforced criminal laws can abolish the sex work market are problematic.[78]

Some case studies proved that Indian sex workers' mobilization against trafficking through self-regulating boards in red-light areas was more effective regulatory mechanism than conventional anti-trafficking strategies.[79]Case studies were conducted on 61 repatriated women and girls who reported being trafficked into sex work and were receiving services at an NGO in Mysore, India, wherein it was concluded that sex trafficked women are rendered vulnerable to HIV infection.[80]

31(1) AJ, 70, 71, (2014); See also, Himika Deb & Dr. Tanmoy Sanyal, *Human trafficking: An overview with special emphasis on India & West Bengal,* 22(9) JHSS, 76, 77, (2017); See also, Tameshnie Deane, *Cross-border trafficking in Nepal & India-Violating women's rights,* 11 HRR, 491, 492, (2010).

[71]*Ibid.*

[72]Patralekha Chatterjee, *Anti-human trafficking law sparks debate in India,* 371 WR, 975, 976, (2008).

[73]Saloni Jain, *Constitutionality of law on sex work in India,* 3 (4) IJHRCS, 1, 5, (2015).

[74]KG Santhya et al., *Trafficking of minor girls for commercial sexual exploitation in India: A synthesis of available evidence,* 1 PC, 1, 21-22, (2014).

[75]*Ibid.*

[76]M Abishek & M. Kannappan, *An empirical study on legality of prostitution in all States of India,* 119 (17) IJPAM, 1073, 1075, (2018).

[77]Chatterjee, *Supra* note 72, at 974.

[78]Prabha Kotiswaran, *Born unto brothels-Towards a legal ethnography of sex work in an Indian red light area,* 33(3) LSE, 579, 600-601, (2008).

[79]Prabha Kotiswaran, *Beyond sexual humanitarianism: A post-colonial approach to anti-trafficking law,* 4(1) UCILR, 353, 360, (2014).

[80]Jhumka Gupta et al., *HIV vulnerabilities of sex trafficked Indian women & girls,* 107 IJGO, 30, 31,

Survey studies were conducted on South-Asian women and girls rescued from brothels in Mumbai, India, and it was revealed that 51.9% of them were trafficked as minors.[81]

However, the extent of trafficking still remains very little delved into in the Indian context,[82] and there is a serious deficit of studies on the antecedents of sex trafficking as well as interception model for trafficking prevention.[83]The inefficacy of policy vocabulary around sex work in India leaves scope for re-assessing the pertinence of law in all its forms.[84]

V. Commercial sexual exploitation victims (CSE) in India vis-à-vis the Criminal Justice System

Sparse literature could be found on the satisfaction of the sex trafficking victims with the criminal justice system, and their confidence on the Indian Judiciary, police and other adjudicatory mechanisms thereof.

Jayashree in her study of Kerala, based on situation analysis, found that most of the anti-trafficking interventions, even rescue and rehabilitation, either victimize or criminalize sex workers and thus sex workers reject the raid-rescue-rehabilitation model as a solution.[85]Another study points out that according to the secondary data sources from the US Dept of State, 2014, police officials in Kerala and Delhi were involved in sex trafficking networks in India.[86]Additionally, it was forwarded that since police has both the legal ability and social supremacy to impose at their own will the rules or exception on the sex workers; it has led to an imbalance in the existing regulatory system.[87] These pose real questions on the existing anti-trafficking interventions in India.

A study, based on action-research methodology, gave an insight into the attitude of the police and Judiciary towards traffic victims and the status of the enforcement of anti-trafficking laws. This singular study which is referred herein was conducted by ISI, New Delhi in 2005. In this study, the States under survey were Tamil Nadu, West Bengal, Rajasthan, Andhra Pradesh, Uttar Pradesh, Delhi, Bihar, Meghalaya, Karnataka, Maharashtra and Goa.[88] Crimes registered in these States under

(2009).

[81]J.G Silverman et al., *Experiences of sex trafficking victims in Mumbai, India,* 97 IJGO, 221, 223, (2007).

[82]Siddhartha Sarkar, *Rethinking human trafficking in India: Nature, extent & identification of survivors,* 103(5) CJIA, 483, 485, (2014).

[83]SonalPandey et al., *Antecedents & re-integration of sex trafficked victims in India: A conceptual framework,* 8(1) IJCJS, 47, 50, (2013).

[84]PrabhaKotiswaran, *Beyond sexual humanitarianism: A post-colonial approach to anti-trafficking law,* 4(1) UCILR, 353, 356, (2014).

[85]A.K. Jayasree, *Searching for justice for body & self in a coercive environment: Sex work in Kerala, India,* 12(23) RHM, 58, 61, (2004).

[86]Siddhartha Sarkar, *Rethinking human trafficking in India: Nature, extent & identification of survivors,* 103(5) CJIA, 483, 487, (2014).

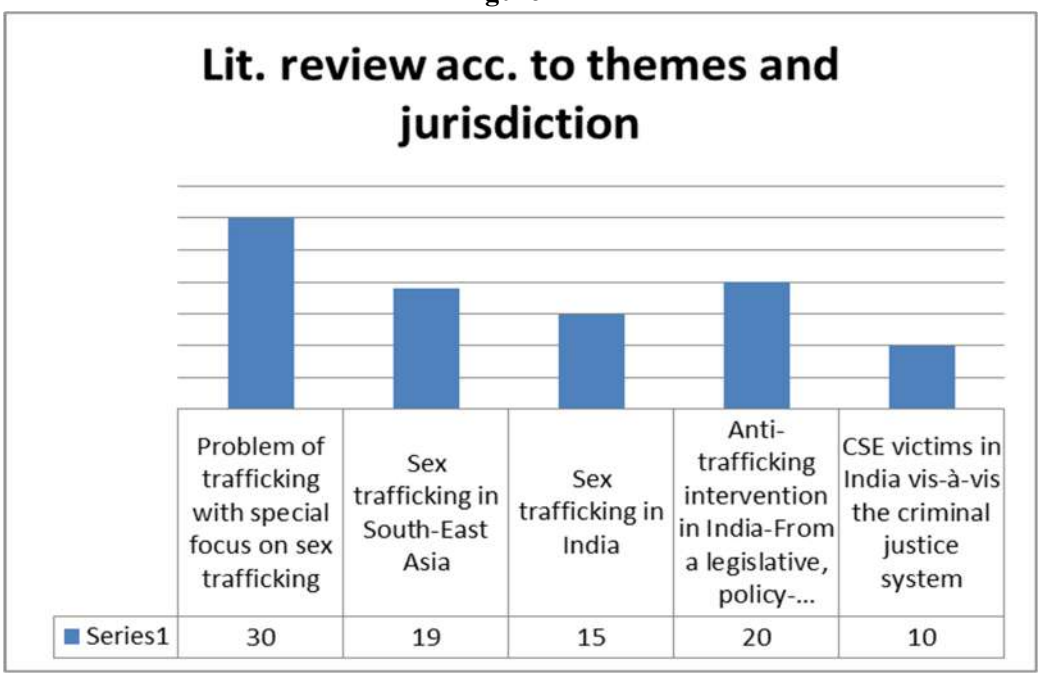
[87]*Ibid.*

[88]P. M. NAIR & SANKAR SEN, TRAFFICKING IN WOMEN AND CHILDREN IN INDIA, 21-22, (1st ed., Orient Longman Private Limited, India, 2005).

Immoral Traffic Prevention Act, 1956 and the Indian Penal Code, 1860 during 1997 to 2001 were examined in minute detail, including the pattern of registration of cases, charge-sheeting rate, pattern of arrest, conviction rate etc.[89]Furthermore, on the basis of a qualitative analysis of some cases under the Immoral Traffic Prevention Act, 1956, the approach of the Honorable Supreme Court towards the traffic victims was criticized on the grounds of being prejudicial and discriminatory towards sex traffic victims.[90]Studies revealed that the approaches the sex workers advocate use to manipulate police behavior is challenging.[91]

Other than these, no micro-level qualitative or quantitative study could be traced which gives an insight on the enforceability of the existing anti-trafficking laws in India.

Figure-1



[89]*Ibid.*

[90]Kumar Regmi, *Trafficking into prostitution in India & the Indian Judiciary,*1 IHRLR, 373, 375, (2006).

[91]Monica Rao Biradavolu et al., *Can sex workers regulate police? Learning from an HIV prevention project for sex workers in Southern India,* 68 SSM, 1541, 1542, (2009).

3. RESEARCH GAP

From the appraisal of the literature review it is apparent that most of the studies on trafficking for commercial sexual exploitation in India are conducted at macro-levels to either identify the magnitude of the problem, the socio-economic or political causes thereof, or to analyze the existing legal framework to combat the menace. Though authors have talked about the inadequacy of laws, prejudicial attitude of the court towards trafficked victims, misinterpretation of the anti-trafficking laws by the law enforcement agencies, lack of implementation of anti-trafficking laws; few of these claims are based on secondary data; while others are neither verifiable nor evidence-based. This is because no micro-level in-depth study has been conducted to analyze the legal and procedural implementation of sex trafficking laws; specifically, with regards to the victims. Thus, a literature gap is noticed in the area of implementation of sex trafficking laws in India; specifically, with regards to the criminal adjudication process vis-à-vis the CSE victims.

4. FUTURE SCOPE OF WORK

India's attempt to combat all forms of trafficking has remained a distant goal. In recent times, sex trafficking has taken alarming proportions and although India had made its anti-trafficking intervention very early, with the inclusion of anti-trafficking legislations, and signed the United Nations Protocol to Prevent, Suppress and Punish trafficking, yet, the problem continues.[92] One of the principal explanations that has been offered for the inapt human trafficking responses in India is the low number of prosecutions and convictions of human trafficking cases. Owing to that, the US Department of State has put India on the 'Tier Two Watch List' for the eighth consecutive year.[93] Moreover, the 2019 Trafficking in Persons Report[94] indicates that investigations, prosecutions, and convictions for all forms of trafficking, including bonded labor is inexplicably low in India compared to the number of incidents that take place. There exists substantial deficiency in investigation of the reported cases and lack in adequate sentencing of perpetrators.[95]

This contention is further corroborated by reports of the National Crime Records Bureau (NCRB) which reveal a rising trend in trafficking cases over the years with an abysmal conviction rate. For example, there were 8132 human trafficking cases in India in 2016 against 6877 in 2015,[96] which implies 15.43

[92] SonalPandey et al., *Antecedents & re-integration of sex trafficked victims in India: A conceptual framework,* 8(1) IJCJS, 47, 49-50, (2013).

[93] *Ibid.*

[94] *Trafficking in Persons Report of June 2019-Tier Placements and Regional Maps*, US DEPARTMENT OF STATE 235, (Sept 6, 2020, 10 am), https://www.state.gov/wp-content/uploads/2019/06/2019-Trafficking-in-Persons-Report.pdf.

[95] *Ibid,* at 235-36.

[96] India's human trafficking data masks reality of the crime, campaigners say, THE NATIONAL, (Jan 9, 2019, 9 am),https://www.thenational.ae/world/asia/india-s-human-trafficking-data-masks-reality-of-the-crime-

percent increase in the number of cases. Data from the 2016 NCRB report further reveal that out of the reported cases, merely 2403 were charge-sheeted and ultimately, 163 cases resulted in conviction.[97] The acquittal rate was as high as 93 percent. Similarly, though there has been a drop in number of recorded cases from 8132 to 2854 in 2017, merely 5.7 percent (or 164) of those cases resulted in conviction.[98] Thereafter, the conviction rates have remained steady over the years, ranging anywhere between 5-8%.

In similar lines, various literatures indicate that the legal fight against human trafficking in India is not adequate; [99]there is a lack of enforcement in the anti-trafficking laws;[100] and the prejudicial attitude of the judiciary towards the sex traffic victims contribute to the auxiliary marginalization of the existing problem.[101]Adding to the complexity, while the Immoral Traffic (Prevention) Act, 1956 focuses on the elimination of commercial sex, it does not provide guidelines for intervention and ultimately

Table-1: Trafficking Cases-Disposal by police and courts*

Year	Cases reported	Cases charge-sheeted	Trials completed	Cases Convicted	Cases Acquitted/ Discharged
2015	6877	4573	2075	824	1251
2016	8132	2403	587	163	424
2017	2854	2060	669	164	505
2018	2465	1910	687	202	485
2019	2260	1606	782	172	538

*National Crime Records Bureau Data 2015-2019 (Note: It is just a conservative estimate of the actual incidents)

campaigners-say-1.681488.

[97] Crime in India 2016 Statistics, NCRB, MINISTRY OF HOME AFFAIRS 512-513, (Sept 14, 2020, 4 pm), http://ncrb.gov.in/StatPublications/CII/CII2016/pdfs/NEWPDFs/Crime%20in%20India%20-%202016%20Complete%20PDF%20291117.pdf.

[98]Crime in India 2017 Statistics, NCRB, MINISTRY OF HOME AFFAIRS 974-981, (Sept 14, 2020, 4:15 pm), https://ncrb.gov.in/sites/default/files/Crime%20in%20India%202017%20-%20Volume%203.pdf.

[99]Sanyal, *Supra* note 70, at 79.

[100]Deane, *Supra*note 70, at 509.

[101]*Ibid.*

ends up criminalizing the victims.[102] However, hardly any evidence-based micro-level qualitative or quantitative study could be found which examines the reasons behind such low conviction rate of the traffickers in India. Under such context, a systematic analysis is necessary of the law and procedure as applicable in sex trafficking; and, procedure vis-à-vis the victim experience. It is essential to assess the stance of the stakeholders in the criminal justice system viz: the police, prosecution and judiciary towards the sex trafficked victims, the reasons behind anomalies in the existing law, and the causes behind low conviction rate of the traffickers. Evaluating the underpinnings of the working of our criminal justice system from the lens of victim's experiences will help us determine whether the present criminal justice system is attuned to the primary and secondary needs of the trafficked survivors.

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[102]Santhya, *Supra* note 74, at 18-19.

THE EVOLVING CONCEPT OF COMPENSATION TO THE VICTIMS OF TERRORIST ATTACKS IN INDIA

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ABSTRACT

The concept of compensation to victims of crime has made its entry into the criminal jurisprudence of India in 2008 through an amendment of the Code of Criminal Procedure (India), 1973. Under the amended law, the victims of general crimes can avail of financial assistance under Section 357A of the Code of Criminal Procedure, 1973. However, it is opined that the above general provisions of criminal procedure are not adequate to all the victims of crimes as all the victims of crimes are not homogeneous. For instance, victims of terrorist attacks can always be differentiated from the victims of any other crimes, on considerations of nature of violence and injury suffered. In the absence of a specific law for the victims of terrorist attacks, the Central Government has framed the specific Assistance Scheme in 2008 and reframed it in 2016 for providing financial support. However, the implementation of the above Assistance Scheme raises several pertinent issues. After considering the above facts, the paper aims to ascertain the initiative made in the international sphere in the development of the concept of support to the victims of terrorist attacks. The key purpose of the work is to trace the development of the concept of compensation to the victims of terrorism and the contemporary issues in the Indian legal framework. The paper analyzes the Indian statutes and judicial decisions concerning the financial help to the victims of terrorist attacks. The paper also appraises the Assistance Schemes made by the Government of India for the compensation to the victims of terrorist attacks. Based on the study, this paper suggests a specialized robust legal framework towards compensatory justice to the victims of terrorist attacks in India.

Keywords – *Victims of Crime; Victims of Terrorism; Compensation to the Victims; Criminal Justice System in India.*

1. INTRODUCTION

The fundamental objective of criminal jurisprudence is to bring offenders to the justice process. In the traditional criminal justice system (CJS) punishing the wrong-doer is considered as justice for the victims. Moreover, theories of crime and punishment suggest that punishing the offender give satisfaction to a certain extent to the vengeful mind of the victim.[1] It is also true that punishment also instils the fear of punishment which acts to deter the people from committing a crime in society. But, only punishing the offender will not heal the mental and physical injury of the victims but providing compensation and rehabilitation to the victims will some extent relieve the pains and sufferings. However, the traditional adjudication system of the State had made the victims a third party in the criminal trial and hence, the victim's rights and rehabilitation have become secondary to the CJS.[2]

With the advent of victims'-oriented study, the perspective towards justice to the victims is gradually changing. The concept of compensation to victims of crime has made its entry into the criminal jurisprudence of India in 2008 through an amendment of the Code of Criminal Procedure (India), 1973. Though, developments in recognition and protection of victims in the CJS are remarkable but not significant. Incorporating a general provision for all the victims will not be sufficient to address every impediment to giving justice to all categories of the victims.[3] All the victims are not homogeneous and their need is also not the same. Special care needs to be given to some of the critical victims like victims of rape, victims of terrorism or victims of other violent crime.[4]

The victims of terrorism are the worst sufferers because of the nature of injuries they have suffered. In addition to that, the very purpose of the terrorist attacks is to make mass victimization and spread fear and threat in the minds of common people. In India, though there is a long history of framing anti-terrorism legislation to tackle the crime of terrorism it lacks a specific law to support the victims of terrorism. Although the Government of India has formulated an Assistance scheme to provide financial help to the victims of terrorism, it is suggested that a concrete step for compensating and rehabilitating the victims of terrorism is the need of the hour

[1] Newman, G. (2017). *The punishment response*. 25-26, 2d ed Routledge.

[2] G. S. Bajpai (1997), *Victim in the Criminal Justice Process: Perspectives on Police and Judiciary*, 45-52 Uppal Publishing House. New Delhi.

[3] M. Sumanta and S. Gaurav (2017), *The Restorative Justice to the Victims of Terrorist attacks in India*, Journal of the Indian Law Institute, Volume 59, Issues 4, and page. 383-396, Nov-Dec.

[4] *Ibid*

2. THE CONCEPT OF VICTIM OF CRIME IN INDIA

2.1. Development of the concept of victims of crime in India

During the 1980s, the Supreme Court of India has expressed its concerns for victims of crime and suggested that there should be legislation for the victims of crime.[5] In fact, a proactive role played by the Judiciary in the introduction of victims' oriented approach in the CJS.[6] Considering the pro-victim judicial pronouncements by the Indian Judiciary and the "UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power", 1985 the legislature and executive of India also have started focusing on the victims of crime. Also, the 154th Report of Law Commission has emphasized the need for the victims focused justice system and the rights of the victims starting from the investigation to the conclusion of the criminal trial process.[7] The Report also recommended the payment of compensation to crime victims by the State's Funds. The Report noted that "at present, the victims are the worst sufferers in a crime and they do not have any role in the court proceedings. They need to be given certain rights and compensation so that there is no distortion of the CJS".[8]

Subsequently, Justice Malimath Committee Report has examined the system of crime victim's compensation as well as the participation of victims at different steps of the trial procedure in leading countries. It had also advocated the expansion of compensatory jurisprudence to victims of crime.[9] Based on the study, the Committee observed that:

"Two types of rights are acknowledged in many jurisdictions for the most part in continental countries in respect of victims of crime. They are, the victim's right to take part in criminal proceedings (right to be impleaded, right to know, right to be heard and right to assist the court in the pursuit of truth) and the right to seek and receive compensation from the court itself for injuries suffered as well as suitable interim reliefs in the course of

[5] Rattan Singh v. State of Punjab (1979) 4 SCC 719 (Justice Krishan Iyer expressed his concern as: "It is a weakness of our jurisprudence that the victims of the crime, and the distress of the dependents of the prisoner, do not attract the attention of the law. Indeed, victim reparation is still the vanishing point of our criminal law. This is a deficiency in the system which must be rectified by the Legislature.")

[6] The victims-oriented study has been gradually developed through the various Supreme Court judgments; see generally. Rattan Singh v. State of Punjab (1979) 4 SCC 719; Hussainara Khatoon & Ors v. Home Secretary, State of Bihar AIR 1979 SC 1360, Rudal Shah v. State of Bihar and Anr 1983(3) SCR 508; Sebastian M. Hongray v. Union of India 1984 AIR SC 1026.

[7] Law Commission of India, 154th Report on 'The Code of Criminal Procedure, 1973' Chapter XV pp. 57 - 65 available at http://lawcommissionofindia.nic.in/101-169/Report154Vol1.pdf.

[8] *Ibid.*

[9] Malimath Committee Report 'Committee on Reforms of Criminal Justice System' pp. 75- 84 available at https://mha.gov.in/sites/default/files/criminal_justice_system.pdf pp. 75-84 accessed on 20 December, 2018

proceedings."[10] These recommendations of the Malimath Committee were incorporated through the amendment of the Criminal Procedure Code in 2008.

2.2. Definition of the term 'victims' in Indian criminal jurisprudence

The formal definition of the term 'victim' does not find its place in the Indian CJS until 2008. The UN "Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985"[11] plays a vital role in the assimilation of the concept of victims in Indian criminal jurisprudence. Para 1 of the Declaration defined the term 'victims' as; *"*the term 'Victims' means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that violate criminal laws operative within the Member States, including those laws proscribing criminal abuse of power."[12] This definition is helpful for many countries to incorporate a legal definition of the term 'victims' in their domestic law.

In the Indian context, Justice Malimath Committee Report has also suggested the meaning of the term 'victims' in the following words *"*Victims mean the person or persons who have suffered financial, social, psychological or physical harm as a result of an offence, and includes, in the case of any homicide, an appropriate member of the immediate family of any such person." The statutory definition of the term 'victims' was found in Section 2 (wa) of the Criminal Procedure Code (Amendment) Act, 2008. It has defined 'victims' as "a person who has suffered any loss or injury caused because of the act or omission for which the accused person has been charged and the expression 'victim' includes his or her guardian or legal heir."

The meaning of the 'victim' under the UN Declaration is wider than the definition of the victim codified under Section 2(wa) of the Code. For this reason that the definition of the victims under the UN Declaration covers both the victims of crime and victims of abuse of power. While the first category covers those cases where the injury is inflicted by any other person, the second category of victimization is a result of State action. However, the Code focuses only on the victims of crime. The UN Declaration describes the term 'victim' in the context of the person who has suffered the harm (physical, physiological, emotional suffering or economic loss) and also includes those persons who have undergone harm by interceding to assist victims in anguish or to prevent victimization. Moreover, according to the UN declaration, the victims are recognized even if the perpetrator was not identified, apprehended, prosecuted or

[10] *Ibid* p. 76
[11] General Assembly Resolution 40/34 of 29 November 1985
[12] *Ibid,* para 1

convicted.[13] However, under the Code, the aggrieved person will not be treated as a victim unless the perpetrator is charged for the action which resulted in such victimization. Furthermore, the expression 'victim' is limited to the legal representative and guardian of the victim.

2.3. Development of victims of terrorism in Indian criminal jurisprudence

D.P Sharma in his book "victims of terrorism" has discussed the contemporary issues of the victims of terrorist attacks.[14] In this work he has emphasized the position of the victims of terrorist attacks which have been neglected by the Government and Judiciary.[15] Dr Sharma has brought to light the negative living conditions of the victims of terrorist attacks and called for its possible prevention He has also suggested the restoration of the lives of affected persons by giving compensation to the victims of the terrorist attacks.

In the landmark case of Smt. Kamala Devi v. Government of NCT of Delhi & Anr,[16] the Delhi High Court had adopted a victim-oriented approach by pronouncing the compensation to the victims of the terrorist attacks. It had emphasized the fair and just treatment of the victims in the Judicial Process. The High Court has delivered several guiding principles for the restoration of the lives of the victims of terrorist attacks and in particular,[17] it had issued directions to the Government to establish a compensation scheme for the Victims of terrorist attacks.

The victims of terrorist attacks are recognized as those persons who have been distressed due to the loss or injury caused by the terrorists' attack. In India, in the absence of a direct definition of the term 'victim of terrorist attacks,' it is interpreted by combining the meaning of 'victims' as defined in the Code of Criminal Procedure, 1973 and the term 'terrorism' as defined in the Unlawful Activities (Prevention) Act, 1967.[18] Accordingly, victims of terrorism are understood as those persons who have suffered any loss or injury caused by the terrorists' attack.

However, in the "Central Scheme for Assistance to Civilian Victims/Family of Victims of Terrorist/Communal/LWE Violence and Cross Border Firing and Mine/IED Blasts on Indian Territory,"[19] the Central Government has defined the

[13] Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985, para 2

[14] D. P. Sharma (2003), *Victims of Terrorism* 174-179, APH Publishing.

[15] *Ibid*

[16] Smt. Kamala Devi v. Government of NCT of Delhi & Anr, (2004) 114 DLT 57

[17] *Ibid* , para 21

[18] *Supra* note 15

[19] "Central Scheme for Assistance to Civilian Victims/Family of Victims of Terrorist/Communal/LWE Violence and Cross Border Firing and Mine/IED Blasts on Indian Territory"

https://mha.gov.in/sites/default/files/OMCentralSchemeForCivilVictimes_290816.PDF Accessed on 24 November 2018.

term 'Victims of terrorism' as "a civilian person, who has suffered loss or injury as a result of the acts/omissions of terrorist Violence including militancy, insurgency, and communal/Left Wing Extremist, Cross Border Firing and Mine/IED blasts on Indian Territory. In the case of his/her death, the expression 'victim' shall mean to include his or her guardian or Legal heir or Next of Kin (NoK)"[20]

3. INITIATIVES OF THE UNITED NATION TO SUPPORT THE VICTIMS OF TERRORISM

Under the international sphere, it is very difficult to trace down the actual definition of the "victims of terrorism" because the diverse geopolitical condition of the world makes a hindrance to giving a consensual definition of the term "terrorism". Though, some endeavours have been made to categorize victims of terrorism without drawing on the definition of the term terrorism. The UN Human Rights Council through its Special Rapporteur[21] categorized the victims of terrorism as direct, secondary, indirect and potential victims based on the physical and psychological impacts upon the victims.[22] The victims of terrorism can also be understood by interpreting the general definition of the term "victim" by taking into account the different kinds of terrorist activities.[23]

These initiatives for the support to the victims of terrorism has started only after the framing of the "Global Counter-Terrorism Strategy". By 8th Sept. 2006, the UN General Assembly has framed and adopted a plan for counter-terrorism and protection of human rights which is called as Global Counter-Terrorism Strategy.[24] It is relevant to note that in the Strategy, support to Victims of terrorism is highlighted under Pillar I and Pillar IV. To support these two Pillars, the Strategy seeks to "promote international solidarity in support of victims", and "promote and protect the rights of victims of terrorism and their families as well as facilitate the normalization of their lives." It also identified "dehumanization of victims of terrorism".[25]

On 18th December 2009, the UN General Assembly has adopted Resolution No. 64/168 which urges all the Member-States of the UN and other international community including the United Nations Office on Drugs and Crime (UNODC) to assist the Member-states for the advancement and execution of programs regarding the support to the victims of terrorism in accordance with appropriate

[20] Section 3(g) of "Central Scheme for Assistance to Civilian Victims/Family of Victims of Terrorist/Communal/LWE Violence and Cross Border Firing and Mine/IED Blasts on Indian Territory"

[21] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, A/HRC/20/14, 2012

[22] *Ibid*

[23] Carlos Fernández de Casadevante Romani (2012), *International Law of Victims*, Springer Sci & Bus Med.

[24] A/RES/60/288

[25] A/RES/70/291

national legislation. The different approaches of the domestic CJSs towards the victims of terrorism have analyzed in the book "The Criminal Justice Response to Support Victims of Acts of Terrorism". The book is published by the UNODC and it has demonstrated the summary of the comparative approach of the different legal provisions at the national level for the awareness of the States in relating to proposed changes that may be incorporated in the CJS for assistance and support to victims during the trial.[26]

In April 2017, UN Human Rights Council has adopted a resolution and encouraged the States to deliver suitable assistance to victims of terrorism in accordance with the national laws from within available resources.[27] In October 2017, the UN General Assembly has adopted a resolution to declare 19th August as the "International Day of Remembrance of and Tribute to the Victims of Terrorism."[28]

4. THE VICTIMS OF CRIME AND COMPENSATORY JUSTICE IN INDIA

4.1. The present scenario of compensating the victims of crime under Indian Criminal Procedure

In India, the old Criminal procedure also had a provision for compensating the victims of crime.[29] Under Section 357, a Trial court has powers to grant monetary compensation to the victims. However, the main lacunae in the above provision are that it is beneficial to the victims only upon effective conviction. The provision operates on the assumption that suspects must be identified, prosecuted and convicted. It is not cover the cases where the suspects acquitted, or in cases where a closure report or summary report is filed by the Police, disclosing the non-commission of the offence, but that such an offence has not been committed by the accused who is sought to be prosecuted, or that the accused has not yet been identified. In these instances, the courts cannot exercise their powers under Section 357 for compensating the victim.

Further, the convicted person has to pay the quantum of compensation awarded to the victim but it depends on the financial position of the convict. The provision imposes entire liability on the convict, the Government escapes from the responsibility to provide reparation to the

[26] The United Nations Office on Drugs and Crime (2012), "*The Criminal Justice Response to Support Victims of Acts of Terrorism"* Rev Ed. Vienna: United Nations.
[27] Resolution of the UN Human Rights Council, UN Doc. A/HRC/RES/34/8 7 April 2017.
[28] A/C.3/72/L.24

[29] Sections 357 of the Code of Criminal Procedure, 1973

victims. The provision does not even provide for the apportionment of liability between the State and the convict. Subsection (2) of Section 357 additionally states that no compensation shall be given, if the order imposing fine is subject to an appeal, until either on the expiry of the period of limitation for filing an appeal or when the appeal is finally disposed of. This marks financial problem to the victim who may incur immediate expenditure for recovery from harm or injury. The provision does not contemplate a contingency wherein emergencies, interim compensation might be required by the victim. Further, the provision does not outline the timeline for the payment of the compensation. Moreover, there is no alternative legal provision to get compensation from the State. However, to support the provision of compensation to the victims of crimes Law Commission Reports are also presented to the Parliament.[30]

4.2. Justice Malimath Committee Report on Compensation to the Victims of Crime

The Malimath Committee's Report played an important role in the 2008 amendment to Cr. PC.[31] While reconsidering the substantive and procedural law the committee has submitted a report to the Government of India. Regarding the rights of the victim, the Report observed that;

"What happens to the right of the victim to get justice to the harm suffered? Well, he can be satisfied if the State successfully gets the criminal punished to death, a prison sentence or a fine. How does he get justice if the State does not succeed in so doing? Can he ask the State to compensate him for the injury? In principle, that should be the logical consequence in such a situation; but the State which makes the law absolves itself of such liability. Not only the victim's right to compensation was ignored except a token provision under the Cr.PC but also the right to participate as the dominant stakeholder in criminal proceedings was taken away from him. He has no right to lead evidence, he cannot challenge the evidence through cross-examination of witnesses nor can he advance arguments to influence decision-making."[32]

Though the idea of victims compensation has been accepted long back by the law, it was merely acknowledged as a nominal relief rather than as a considerable remedy. The law provides that the victims will be given some portion of the money out of the fine amount imposed on the convict. The compensation to the victims

[30] 152nd Report of the Law Commission, *incorporation of the term victims*, p.18, (1994); 154th Report of the Law Commission, *insertion of proposed section 357 (A) in Cr.P.C*, (Vol. II), p.19, (1996).

[31] Malimath Committee Report 'Committee on Reforms of Criminal Justice System' pp. 75- 84 available at https://mha.gov.in/sites/default/files/criminal_justice_system.pdf pp. 75-84 accessed on 20 December, 2018

[32] *Ibid*

depends upon proof of the charges against the accused. Furthermore, the Committee has explicitly elaborated that the victims were the ultimate sufferers of the offence for that they need to be given certain rights and compensation.

4.3. Compensation Scheme under Section 357A of the Cr. PC.

Finally, in the year 2008, the Cr.PC, 1973, was amended and a fresh provision has been introduced in form of Section 357A to make a compensation scheme for the victims of crime.[33] This new provision of the Cr.PC directs every State to create a compensation scheme in coordination with the Central Government to provide compensation to the aggrieved or his dependents who require rehabilitation.[34]

The Court has to recommend the "District Legal Service Authority" or "State Legal Service Authority" under section 357A to decide the quantum of compensation to be awarded to the victims. After getting the recommendation or application from the victims, the "District Legal Service Authority" or "State Legal Service Authority" has to prepare a report within two months from the date of application and recommendation and submit it to the concerned Court. After being satisfied with the recommendation, the Court awards compensation to the victims of the crime.

Under Section 357A of the Cr.PC, all States (29) and Union Territories (7) have formulated the Victim Compensation Scheme for the victims of crime.[35] In 2014 the central Government created a Central Victims Compensation Fund to provide financial assistance to the victims of crime with an initial capital of 200 Crore.[36]

However, several problems affect the implementation of the victim's compensation provision under Section 357A. Though the legislation has enacted section 357A, the problems lie in the allocation of liability between the State Government, DLSA or any other organization for its implementation. There is a dilemma in upholding the responsibility. In addition to the above issue, another problem persists as there is no uniformity in respect of allocation of funds to compensate the victims most states tend to forego the notification of a dedicated Victim Compensation Scheme under Section 357A since they place reliance on other relief funds that compensate victims. Lack of proper notification of a pragmatic and effective Victim Compensation Scheme under Section 357A is the major problem in realizing nationwide accessibility of compensating the victim. Further, there is

[33] The Code of Criminal Procedure (Amendment) Act, 2008

[34] Section 357a of the Code of Criminal Procedure, 1973

[35] Please refer to the Table No.1 of this Chapter (Page)The data collected on April 2017,

http://ncpcr.gov.in/showfile.php?lang=1&level=2&&sublinkid=1274&lid=1506 website visited on 05 January 2018.

[36] Ministry of Home Affairs No. 24013/94/Misc./2014-CSR.III

a discrepancy in respect to the amount of compensation awarded by different states for different crimes. Also, due to the lack of objective interpretation of the ground of compensation, there is a disparity in the award of compensation. Also, in terms of distribution, there is ambiguity on the stage when compensation can be awarded including the lack of provision as to payment of interim compensation and the recurring expenses by the victim.

The Victim Compensation Schemes have been notified by every State but there is either a lack of awareness as to the existence of such schemes among the general public,[37] or a failure of the state machinery to provide compensation because of poorly planned budgetary allocation.[38] This lack of awareness also results in the non-filing of applications in eligible cases due to the applicability of the period of limitation.

5. POSITION OF THE VICTIMS OF TERRORIST ATTACKS

In India, there is no specific law for awarding compensation to the victims of terrorist attacks. In the absence of a specific statute, the general rule of victims of crime is applicable for all kinds of victims of crime including the victims of terrorist attacks. Section 357 of the CrPC is applicable for awarding compensation to the victims of terrorist attacks, but this provision comes to the picture only after the conviction of the terrorist accused. In most cases, the terrorists are unidentified or they flew away immediately after the commission of the terrorist attacks or killed during the counter-insurgency operations. In these cases, it will be an impossible task for the judiciary to prosecute the perpetrator and award compensation. Moreover, even in the likely event of the conviction of the terrorist-accused and the award of compensation to the victims, in some cases, it is challenging to realize the compensation amount as most often the terrorists are foreign nationals or their property cannot be identified.

Another general provision for compensation to the victims of crime that also apply to the victims of terrorist attacks is Section 357A of the CrPC. The Assistance Scheme which is formulated under Section 357A by the State Government is also applicable to the victims of terrorist attacks. All the State Government under section 357A has formulated an Assistance Scheme to

[37] IANS (September 1 2017), *Lack of awareness on victim compensation scheme: SC*, Business Standard, "The Supreme Court on Friday said lack of public awareness about the victim compensation scheme was the reason the money allocated under the Nirbhaya fund was not being utilised"; see also, Staff reporter, '*Create awareness of Victim Compensation Scheme'*, The Hindu, January 10, 2019 "a public interest litigation petition filed before the Madurai Bench of the Madras High Court on Wednesday sought a direction to the State to publicise the scheme"

[38] Krishnadas Rajagopal (February 07, 2017), *Nirbhaya Fund lies unused*, SC told, The Hindu,; it is also noted that, the Centre allotted Rs 1,000 crore in Budget 2014-15, and it was cut down to Rs 550 crore in 2016-17 and 2017-18. The fund, however, has seen a very casual utilization over the years. It is important to note that the fund is a non-lapsable corpus."

support victims of crime including terrorism with financial support. In fact, the Assistance Schemes of all the States are providing compensation of 3 Lakhs to 5 Lakhs to the victims of crime. Apart from the assistance schemes of the State Government, the Central Government has also formulated an Assistance Scheme specifically for the victims of terrorist attacks.[39] Under the Central Government Assistance Schemes, the victims of terrorist attacks and their family are provided with the financial support of 5 Lakh rupees.

5.1. New Legislative proposals for a specific law on victims of terrorism

Apart from the schemes provided under section 357A of the Cr.PC, several attempts have been made to bring a specific law for compensation to the victims of terror attacks.[40] "The Victims of Terrorism (Compensation and Rehabilitation) Bill, 2004" was introduced by the Rajya Sabha member Mr Raj Kumar Dhoot[41] in form of a Private Members' Bill on 3rd December 2004 in the Upper House.[42] In this Bill, the Legislator had suggested establishing a National Commission for Victims of Terrorism to whom the victims will approach to claim their compensation and the Commission's decision shall be binding on the appropriate government. This was followed by another legislative proposal, known as the "Victims of Terrorism (Compensation and Miscellaneous Provisions) Bill" was introduced by Mr Gireesh Kumar Sanghi[43], a member of Rajya Sabha in the form of a Private Members' Bill on 19th December 2008.[44] Under this Bill, the legislator has suggested that the appropriate Government should formulate a rehabilitation package for the victims of terrorism by way of providing employment, vocational training, and such other measures as that Government may deem fit and necessary for the Bill. Again, in 2012, "The Victims of Terrorism (Provision of Compensation and Welfare Measures) Bill, 2012" has been introduced in the Lok Sabha by the parliamentarian Shri Chandrakant Khaire.[45] In this 2012 Bill, the Legislator has suggested that the Central Government has to bear all the expenses of the victims and make provision for their rehabilitation.

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[39] Central Scheme for Assistance to Civilians Victims/Family of Victims of Terrorist, Communal and Naxal Violence, 2008

[40] The Victims of Terrorism (Compensation and Rehabilitation) Bill, 2004; The Victims of Terrorism (Compensation and Miscellaneous Provisions) Bill, 2008; The Victims of Terrorism (Provision of Compensation and Welfare Measures) Bill, 2012

[41] He belonged to the Shiv Sena.

[42] See the website http://rsdebate.nic.in/handle/123456789/65089 visited on 06 January 2018.

[43] He belonged to the Indian National Congress party.

[44] See the website: http://rsdebate.nic.in/handle/123456789/227973 visited on 06 January 2018.

[45] See the database of the Lok Sabha http://164.100.47.194/Loksabha/Debates/Result15.aspx?dbsl=8473 visited on 07 November 2018. He is a member of the Shiv Sena.

Again in 2017, another Lok Sabha member Shri Shivaji Adhalrao Patil[46] has also introduced "The Victims of Terrorism (Compensation and Miscellaneous Provisions) Bill, 2017" in the Lok Sabha (29 December 2017).[47] The objective set out in the bill was "to provide for the financial compensation, relief and rehabilitation to the victims and their dependents affected by terrorist violence of Naxalites, Maoists and other terrorist outfits operating in various parts of the country including those supported, sponsored and financed from across the borders through employment and other means." Even recently in December 2018, the Lok Sabha Member Shri Ramesh Bidhuri[48] tabled "The Victims of Terrorism (Provision of Compensation and Welfare Measures) Bill, 2018" on the floor of the Lok Sabha (3rd December 2018).[49] The aim of the bill was "to provide for the payment of compensation to and provision of certain welfare measures for the victims of terror attacks." The bill introduced but not passed will lapse or dead after the dissolution of the Lok Sabha.[50] Though, the bills are listed for the business of the parliament but failed to reach for the discussion.[51]

5.2. Indian Compensation scheme for the victims of terrorism

Apart from the above State Compensation Schemes the Central Government also framed a specific compensation scheme for the victims of terrorist attacks or other violent crime. "The Central Scheme for Assistance to Civilians Victims/Family of Victims of Terrorist, Communal and Naxal Violence" has been framed in 2008 to provide support to the victims of terrorist attacks in India.[52] Initially, a three lakhs amount has been fixed to give compensation to the family of the deceased or the permanently incapacitated person under this scheme. Subsequently, several changes have been made to the Assistance Scheme.[53] However, the Government of India has revised the Assistance Scheme in 2016 and changed its title to "Central Scheme for Assistance to Civilian Victims of Terrorist/ Communal/Left Wing Extremist, Cross Border Firing and Mine blasts on Indian Territory" (shortly as, Central

[46] He belonged to Shiv Sena.

[47] The Victims of Terrorism (Compensation and Miscellaneous Provisions) Bill, 2017 http://164.100.47.4/billstexts/lsbilltexts/asintroduced/2637LS%20As%20In.pdf accessed on 16 January 2019

[48] He belonged to the Bhartiya Janata Party.

[49] The Victims of Terrorism (Provision of Compensation and Welfare Measures) Bill, 2018 http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/1389LS.pdf accessed on 16 January 2019

[50] Kashyap Subash C (2006), *Parliamentary Procedure Law Privilages Practive & Precedents*, 267-268, 2nd ed. Universal Law Publication co. Pvt. Ltd.

[51] *Ibid*, p. 189

[52] Central Scheme for Assistance to Civilians Victims/Family of Victims of Terrorist, Communal and Naxal Violence, 2008

[53]. The Amount of the compensation increased from 3 Lakhs to 5 Lakhs, the Scheme include the civilian victims of cross border firing See the website: http://pib.nic.in/newsite/PrintRelease.aspx?relid=149190 website visited on (January 08, 2018).

Government Assistance Scheme) and increased the amount of compensation from rupees three lakhs to five lakhs.

Table No. 1 furnishes the State-wise details of the number of persons who received compensation under the "Central Scheme for Assistance to Civilian Victims of Terrorist/ Communal/ Naxal Violence" during 2009-10 to 2012-13 and the data of 2013 to 2017 has mentioned in the Table No. 3.

Table No. 1[54]

Name of State	Number of Persons who received Compensation				Total
	Year				
	2009-2010	2010-2011	2011-2012	2012-2013	
Andhra Pradesh	-	-	-	7	7
Assam	76	43	15	-	134
Chhattisgarh	1	24	33	6	64
Delhi	5	24	-	-	29
Diu & Daman	1	-	-	-	1
Goa	-	1	-	-	1
Jharkhand	-	-	15	4	19
Karnataka	4	2	-	1	7
Madhya Pradesh	-	6	1	-	7
Meghalaya	-	-	-	2	2
Maharashtra	47	16	82	22	167
Manipur	1	46	20	13	80
Orissa	17	14	11	2	44
Uttar Pradesh	-	-	1	-	1
West Bengal	-	-	88	100	188
Total	152	176	266	157	751

[54] Government of India, Ministry of Home Affairs has answered the question put in the Lok Sabha regarding assistance to the victims' terrorist attacks on the 23rd April, 2013. https://mha.gov.in/MHA1/Par2017/pdfs/par2013-pdfs/ls-230413/4824.pdf accessed on 28 December 2018.

Table No 2 provides the State-wise details of Total Expenditure Incurred under the "Central Scheme for Assistance to Civilian Victims of Terrorist/ Communal/ Naxal Violence" (from 2008-09 to 2012-13).

Table No. 2[55]

Name of State	Expenditure Incurred					Total Rs.
	Year					
	2008-2009 Rs.	2009-2010 Rs.	2010-2011 Rs.	2011-2012 Rs.	2012-2013 Rs.	
Andhra Pradesh	15,00,000/-	-	-	-	21,00,000/-	36,00,000/-
Assam	-	2,28,00,000/-	1,29,00,000/-	45,00,000/-	-	4,02,00,000/-
Chhattisgarh	-	3,00,000/-	72,00,000/-	99,00,000/-	18,00,000/-	1,92,00,000/-
Delhi	-	15,00,000/-	72,00,000/-	-	-	87,00,000/-
Diu & Daman	-	3,00,000/-	-	-	-	3,00,000/-
Goa	-	-	3,00,000/-	-	-	3,00,000/-
Gujarat	3,00,000/-	-	-	-	-	3,00,000/-
Jharkhand	-	-	-	45,00,000/-	12,00,000/-	57,00,000/-
Karnataka	-	12,00,000/-	6,00,000/-	-	3,00,000/-	21,00,000/-
Madhya Pradesh	24,00,000/-	-	18,00,000/-	3,00,000/-	-	45,00,000/-
Meghalaya	-	-	-	-	6,00,000/-	6,00,000/-
Maharashtra	81,00,000/-	1,41,00,000/-	48,00,000/-	2,46,00,000/-	66,00,000/-	5,82,00,000/-
Manipur	-	3,00,000/-	1,38,00,000/-	60,00,000/-	39,00,000/-	2,40,00,000/-
Orissa	90,00,000/-	51,00,000/-	42,00,000/-	33,00,000/-	6,00,000/-	2,22,00,000/-
Uttar Pradesh	-	-	-	3,00,000/-	-	3,00,000/-
West Bengal	-	-	-	2,64,00,000/-	3,00,00,000/-	5,64,00,000/-
Total	2,13,00,000/-	4,56,00,000/-	5,28,00,000/-	7,98,00,000/-	4,71,00,000/-	24,66,00,000/-

[55] Government of India, Ministry of Home Affairs has answered the question put in the Lok Sabha regarding assistance to the victims' terrorist attacks on the 23rd April, 2013. https://mha.gov.in/MHA1/Par2017/pdfs/par2013-pdfs/ls-230413/4824.pdf accessed on 28 December 2018

The Union Minister of Home Affairs in answer to a question put in the Lok Sabha on 6th December 2016 disclosed the following State-wise details of the total expenditure incurred towards the financial assistance to civilian victims of terrorist violence under the "Central Assistance to Civilian Victims/ Family of Victims of Terrorists/ Communal/Left Wing Extremism (LWE) Violence and Cross-Border Firing and Mine/IED Blasts on Indian Territory".

Table No 3[56]

Year	Name of the state	No. of cases	Amount (In Rs.)	Year of incident
2013-2014	Delhi	03	6,30,000	2008
2014-2015	Delhi	20	42,00,000	2011
2015-2016	Assam	10	21,00,000	2008
		34	71,40,000	2009
		03	6,30,000	2010
		01	2,10,000	2011
		40	84,00,000	2012
		88	1,84,80,000	2014
	Meghalaya	02	4,20,000	2012
		02	4,20,000	2013
		02	4,20,000	2014
	Total	182	3,82,20,000	--
2016-2017	Assam	13	27,30,000	2008
		07	14,70,000	2009
		03	6,30,000	2010
		01	2,10,000	2011
		01	2,10,000	2012
		02	4,20,000	2013
		41	86,10,000	2014
	Total	68	1,42,80,000	--

[56] State-wise details of total expenditure incurred for the financial assistance to civilian victims of terrorist violence under the "Central Assistance to Civilian Victims/ Family of Victims of Terrorists/ Communal/Left Wing Extremism (LWE) Violence and Cross-Border Firing and Mine/IED Blasts on Indian Territory". https://mha.gov.in/MHA1/Par2017/pdfs/par2016-pdfs/ls-061216/3429.pdf Accessed on 05 January 2019

Table No. 1, Table No. 2 and Table No. 3 depicts the State-wise details of the number of victims and the total expenditure incurred for the financial assistance to civilian victims of terrorist violence under the Central Government Scheme from 2009 to 2017. However, the table clearly shows that there is very poor disbursement of money among the victims and this also reflects the poor implementation of the victim compensation scheme. A huge amount of money has sanctioned by the Central Government for financial assistance to the victims but as the amount has not been utilized properly the Government reduce the amount in the budgetary allocation.

5.3. Procedure for grant of compensation under the Central Government Scheme

According to the Assistance Scheme, the victims have to apply in the prescribed form within three years of the incident to get the benefits under the scheme. After filling the application, a District-level Committee has to be formed under the chairmanship of the District Magistrate or Deputy Commissioner of Police. After the identification and verification, the District Committee would, so far as possible, make its recommendation within 15 days of receipt of the application claiming the assistance. However, the process of application and the recommendation of the committee should be completed within three weeks. A sanction order will be issued by the District Magistrate or Deputy Commissioner on behalf of the State Government. A photocopy of the approval letter will be sent to the Home Department of the concerned State Government. A copy of the sanction order will be endorsed by the Union Ministry of Home Affairs. Finally, the Chairman of the District-level Committee will issue the cheque in the name of the beneficiary. Although, the Assistance Scheme has prescribed the time limit for the application process and the recommendation of the Chairman, the time taken for the sanctioning of the money was not demarcated.

Also, following the above Assistance Scheme, the victims of terrorist attacks can avail of health care under the projects of "Rashtriya Arogya Nidhi"[57] and "National Trauma Care Project"[58], both functioning under the Union Health Ministry. Further, children of the victims of terrorist attacks are also entitled to get assistance under the 'Project Assist. The Project Assist is being implemented by the National Foundation for Communal Harmony of the Ministry of Home Affairs, Government of India.

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[57] The Ministry of Health and Family Welfare, Government Of India, framed the "Rashtriya Arogya Nidhi" to provide the health care, https://mohfw.gov.in/major-programmes/poor-patients-financial-assistance/rashtriya-arogya-nidhi (accessed on 30 March, 2018)

[58] Directorate General of Health Services, Ministry of Health & Family Welfare, Government Of India, framed the National Trauma Care Project,

http://dghs.gov.in/content/1360_3_TraumaCarefacilitiesGovernmentHospitals.aspx (accessed on 30 March, 2018)

5.4. Judicial decisions for support to the victims of terrorism

The Supreme Court and the High Courts have played a vital role to provide compensation to the victims of crimes. In *Sarwan Singh v. the State of Punjab*,[59] the Apex Court of India has interpreted the legislative intent behind Section 357 of the Cr.PC empowers the Court to award compensation to the victims of crimes. In this case, the Supreme Court has explained that "*while awarding compensation under Section 357, the Court must consider the gravity of the crime and injury of the victims and justness of the claim for the monetary compensation to the aggrieved*". In the case of *Hari Singh v. Sukhbir Singh*, the Supreme Court has stated that the award of compensation under Section 357 is not ancillary and on the other hand, it is in additions to the punishment.[60] However, if the victims cannot find the desired compensation, an alternative remedy under Section 482 of CrPC can be exhausted by the aggrieved party.[61]

Subsequently, in the case of *Smt. Kamla Devi v. Government of NCT of Delhi & Anr,*[62] the Delhi High Court has awarded monetary compensation to the victims of terrorist attacks. The High Court has accused "the State for the failure to protect the citizens; and held that public law demands, as distinct from private law and tort remedy, a victim of crime has to be given compensatory relief even in no-fault situations by State, as it is the breach of constitutionally guaranteed right under Article 21 of the Constitution."[63] The Court further evaluated the State's responsibility and stated that

"Let us see who the persons responsible for the wrong? Primarily, it is the terrorist who was assembling the bomb. Next, it is the State as it failed in living up to its guarantee that 'no person shall be deprived of his life and personal liberty; except according to procedure established by law.' The State failed to prevent the terrorist from harming innocent citizens. Terrorism itself is indicative of the inability of the State to curb resentment and to quell fissiparous activities. Social malaise in itself is a reflection of the State's inefficiency in dealing with the situation in a proper manner. Apart from the general inability to tackle the volatile situation, in this case, the State agencies failed in their duty to prevent terrorists from entering Delhi. It was their responsibility to see those dangerous explosives such as RDX were not available to criminals and terrorists. The incident occurred as there was a failure on the part of the State to prevent it. There was a failure of intelligence they did not pick up the movement of this known and dangerous terrorist."[64]

[59] *Sarwan Singh v.State of Punjab* AIR 1978 SC 1525
[60] *Hari Singh v. Sukhbir Singh* [1988]4 SCC 551.
[61] *Palanippa Gounder v. State of Tamil Nadu* (1977) 2 SCC 634
[62] *Smt. Kamla Devi v. Government of NCT of Delhi & Anr*, (2004) 114 DLT 57
[63] *Ibid.* para 21
[64] *Ibid* para 5.

Several legal issues have cropped up in respect of schemes of central government and they were raised before higher courts. In the case of *Gopinath Ghosh v. State of Jharkhand & Ano*,[65] the Jharkhand High Court has expressed the opinion that the compensation amount fixed by the Government is not adequate for the rehabilitation of the victims of the terrorist attacks. Also, in the case of *Leesha v. The Secretary, Department of Home Affairs Government of Karnataka and Ors*,[66] while hearing a writ petition filed by Miss Leesha, who suffered 50 per cent permanent incapacitation in the 2013 Bomb blasts in Bangalore, Justice A.S. Bopanna observed that "the State should show sensitivity to at least comfort its citizens by reasonably compensating or rehabilitating, without driving such victims to litigation." Noting that there is a gross delay in the awarding of compensation to the victims of the terrorist attacks, the Court has issued a direction to the State to provide compensation to the victims within six months from the date of the incident.

6. CONCLUSION

The victims of terrorist attack need quick and prompt support from the government. Although there is a general victims' compensation provision in the Indian legislative framework; however, this is insufficient to encompass all the victims of crime. Moreover, the steps were taken by the Indian Government by way of the executive order, though significant, yet may not be adequate for the rehabilitation of the victims of terrorist attacks. As already noted, the compensation scheme made by the Central Government for the financial assistance to the victims of terrorist attacks has several loopholes,

Further, the procedural delay for providing compensation makes the Assistance Scheme less effective as victims of terrorist attacks need timely support to restore their lives. The position of the victims remains unaddressed as there is no specific law for compensation and rehabilitation. Accordingly, the present situation demands specific legislation to provide restorative justice to the victims of terrorist attacks. It is gratifying to note that the Indian courts are taking a very active role in the recognition of the rights of victims of crime and have devised new remedies which unfortunately are not explicitly enumerated in any substantive law in India. The Indian courts have to adopt a restorative approach towards the victims of terrorism to meet the ends of justice.

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[65] *Gopi Nath Ghosh v. The State of Jharkhand & Anr.* MANU/JH/0200/2014

[66] *Leesha v. The Secretary, Department of Home Affairs Government of Karnataka and Ors*. MANU/KA/2458/2016

INTERPLAY OF ARBITRATION LAW AND PROCEDURAL LAW FOR EXECUTION OF ARBITRATION AWARD IN INDIA

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ABSTRACT

The concept of dispute is as old as human civilization itself and it will be foolish and impractical to think that we can done away with disputes, however we can certainly minimize them by resolving the pertinent issues in a logical, reasonable manner. In today's world complexity and multitudes of disputes are at all time high and thus it's absolutely necessary to acknowledge that one single dispute resolution forum might not be able to conclusively bring a dispute to an end. As a matter of fact, it might not even be able to satisfy the desire of the parties Involved and in this backdrop the system of appeal, review, revision lies. In this context enforceability, legality, validity and finality (until and unless challenged) of the conclusion to a dispute resolution often get blatantly ignored. This problem in the backdrop of an arbitration process is more real than ever as in present days very often we see a party dishonouring an arbitral award by abusing this existing system on the pretext of challenging the finality of a dispute. This paper seeks to address and analyse various stages of executing an arbitral award. In the first part the authors intend to find out the answer to the principal question of which law governs the execution of an arbitral award. The second part will bring forward the distinction and the individual characteristics of "decree" and "deemed decree" in accordance with the domestic legislatures of India along with the series of case laws that followed. The third part will expand upon the courts' jurisdiction to entertain an application for execution of an arbitral award and will be dealing with all the prominent issues that plague the determination of proper jurisdiction. In the fourth part the authors have examined relevant provisions of several domestic (Indian) legislations which have facilitated the execution of domestic as well as foreign arbitral award. Fifth part of this paper will touch upon the enforcement of arbitral award and establish the integral and close relation that exists between enforcement and execution. Lastly, this paper will highlight challenges which are faced by the parties in our legal system while trying to execute an arbitral award and provide potential remedies and suggestions which can be implemented to achieve the ends of justice.

Keywords: *Execution of Award, Deemed decree, Jurisdiction, Civil Procedure* Code

INTRODUCTION

Rapid growth in trade and commerce has also brought the issue of dispute in it. As globalization makes this world a small place, trading relationships between countries and individuals are increasing day by day along with fostering the economy. The traditional method for dispute resolution has been rendered outdated in this paradigm shift. India has been hit by this tidal wave to change as stagnant justice system in the awake of overburdening courts with cases and the consequential delay coupled with expensive cost for litigation has forced an aftermath of adverse psychological impact. Severe criticism by the Indian Society of its Litigating mindset has shifted the reliance to ADR mechanism for dispute resolution. The most popular tool of ADR undoubtedly is arbitration. The procedure for execution in India is ruled by The CPC while questions related to enforcement of arbitral awards are fundamentally governed By the Arbitration & Conciliation Act, 1996 (hereinafter referred to as "The act").

PART-I

RELEVANT LAW FOR EXECUTION OF ARBITRAL AWARD IN INDIA

The act clearly portrays that an arbitral award will be considered as a deemed decree and when it comes to execution of such deemed decree, the intervention of domestic procedural law, i.e., CPC is Mandated and legitimized. The accepted procedure when it comes to the execution of domestic Award is that the commercial courts will have the jurisdiction which exercise such jurisdictional Power that would ordinarily lie before any principal civil court of original jurisdiction in a District and also the commercial division of the high court in the exercise of its ordinary original Civil jurisdiction. The jurisdiction for the execution of an arbitral award of an international Commercial Arbitration will be with the commercial division of those high courts, in whose Jurisdiction, the assets of the opposite party shall lie ; provided the seat is situated outside India and the subject matter of that foreign award is money.

PART- II

CONCEPT OF DEEMED DECREE IN REFERENCE TO EXECUTION OF ARBITRAL AWARDS

The focal point of this research is 'execution' of arbitral awards be it domestic or foreign, that is to say that this paper is concerning mostly into the procedural aspects on how arbitral awards passed by an arbitrator(s) or an arbitral tribunal are given effect or practically implemented by the courts of our country. On studying the act, it can be identified that the provisions namely section 36[1] and 49[2] which by way of legal fiction provide

[1]The Arbitration and conciliation act of India,1996, §36,No. 26, Act of Parliament 1996 (India)
[2]The Arbitration and conciliation act of India, 1996, §49, No. 26, Act of Parliament 1996 (India)

both domestic and foreign arbitral awards a status of "Deemed decree."

The concept of deemed decree is an amalgamation of two terms 'deemed' and 'decree' thus, both these terms must be understood in exclusivity first to draw out the true essence. The term "decree" has been elaborately defined in the CPC under section 2(2), which lays down that a "decree" is an adjudication which has been formally expressed by a court, it must determine in conclusively all or any matter which is in controversy in the suit and may either be expressed preliminarily or in finality.[3] Further scrutinizing the aforementioned definition, it can be noted, essentials which build up a decree must include:

(i) "A formally expressed adjudication"- an adjudication according to Black Law's dictionary refers to "A legal process of resolving a dispute"

(ii) "A court" making such an expression- we refer to civil courts of the nation.

(iii) "Institution of a suit"- The word suit though has not been defined by the code, but the Privy Council in the case of "*Hansraj Gupta V. Official Liquidators of the Dehradun-Mussoorie Electric Tramways Co. Ltd".*[4]deciphered the meaning of a suit to be a "civil Proceeding instituted by presentation of a plaint" hence a proceeding which has been initiated by institution of a plaint and not by any other means will only be considered to be a suit. [5]

(iv) Finally, all or any matter in dispute or controversy to be conclusively determined by the court includes a preliminary as well as a final decree.

Having understood the essence of what a decree is we now proceed towards the concept of the term "Deemed", according to oxford dictionary, deemed is synonymous with the term "consider," so in layman's terms something which is "considered to be a decree" is a "deemed decree." The code has not expressly defined the term "deemed" but there have been various cases in India where the courts have construed the meaning of deemed as well as deemed decree. In the case of "*The Commissioner of Income-Tax vs The Bombay Trust Corporation"*[6]The Bombay High Court dived into the meaning of deemed, according to the learned bench, "when a person is "deemed to be" something, the only meaning possible is that whereas he is not in reality that something the Act of

[3]Code of Civil Procedure of India, 1908, §2(2), No.05 of 1908

[4]Hansraj Gupta V. Official Liquidators of the Dehradun- Mussoorie Electric Tramways Co. Ltd. AIR 1933 PC 63

[5] S. Choudhary, Understanding the term Decree, Order, Judgement and Mesne Profit, Legal Services India (April 4th, 2021, 6:30 P.M.), http://www.legalservicesindia.com/article/1783/Understanding-of-the-term-Decree,-Order,-Judgment-and-Mesne-Profit.html

[6]The Commissioner Of Income-Tax vs The Bombay Trust Corporation , (1930) 32 BOMLR 361 (India)

Parliament requires him to be treated as if he were."[7]

East End Dwellings Co. Ltd. V. Finsbury Borough Council[8]was another case where the court held that "deemed" is used in general to give "legal or statutory fiction" in order to outstretch the meaning which is not expressly covered by it.[9]

Therefore, it is safe to conclude that anything, which does not meet the essential requirements for qualifying as a decree laid down by the CPC, but is conferred such status by the legislature by way of legal or statutory fiction, is construed to be a "deemed decree".

An arbitral award has been legally construed by the act to Be a deemed decree, as there are significant differences which prevent an arbitral award from Being likened as a decree passed by a civil court, neither can an arbitral tribunal can be Likened to a Court so that it can execute its own award, thus for the purposes of execution of Arbitral award the fiction of deemed decree is necessary.

"Goyal Marg Gases Pvt. Ltd. Vs SBQ Steels Ltd.(2016)"[10]is an important case which drew out The reasons as to why an arbitral award should not be construed as a decree of a civil court. In this case the Hon'ble Supreme Court of India, was of the clear opinion that a "decree" Which is a result of a "suit" filed in and tried by a "civil court" was an entirely different Species of proceeding from an arbitral proceeding, the court further held that the initiation of A suit must be with a "plaint" and its culmination in a "decree." An arbitral award negatives all the requirements of a decree. It is not rendered in a suit nor is an arbitral proceeding Commenced by the institution of a plaint. This difference drawn by the Court hammers nail on the fact that an arbitral award is a deemed decree executable under the CPC.[11]

It is important to note that arbitral award as a deeming faction in Indian legal scenario has been a recent development with the introduction and enforcement of the 1996 Act by way of section 36 and section 49 respectively for domestic and foreign awards. Earlier the courts used to scrutinize the arbitral award on its merit and had the power to modify or correct the same under section 15[12]of the Arbitration Act, 1940 (hereinafter referred to as "Arbitration Act, 1940") and subsequently could pronounce a Decree under section 17[13] of Arbitration Act, 1940. Only such arbitral award in the form of a decree passed under section 17 was executable in accordance with the provisions of the Code.[14]

[7]*Id.*
[8]East End Dwellings Co. Ltd. V. Finsbury Borough Council [1952] AC 109
[9]*Id.*
[10]Goyal Marg Gases Pvt. Ltd. Vs SBQ Steels Ltd.(2016)Arb.A.No. 41/2015
[11]*Id.*
[12]The Arbitration Act of India, 1940,§15, No. 10 of 1940
[13]The Arbitration Act of India, 1940, §17, No. 10 of 1940
[14] Tanya Tiwari and Adhip Kumar Rai, India: Issue of Jurisdiction And Execution Of Arbitral Awards, Singh & Associates (April 4th, 2021, 7:30 P.M.),

EXECUTION OF FOREIGN ARBITRAL AWARDS

It has already been discussed in length about deemed decree and construction of arbitral awards as such by the act, which lead to their Execution under CPC. In case of a domestic award, section 36 provides that such award is considered to be a deemed decree when after the award has been passed the time allotted for making application to set aside such award under section 34 of the act expires.[15] But in case of a foreign arbitral award, such award needs to satisfy a competent national court of its enforceability, only after which it can acquire the status of deemed decree under section 49 and is ready to be executed.[16]

Though the legal position in regards to domestic awards has been clear and unambiguous but such has not been the position for the foreign arbitral awards, there has been complexities as to when a foreign arbitral award is ripe for execution under section 49 of the 1996, Act or when the fiction of deemed decree is conferred upon it. This has been settled by our Hon'ble Apex Court in the case of "*Fuerst Day Lawson Ltd v. Jindal Exports Ltd"*[17] and the precedent laid down in this case has been observed by the Madras High Court in the recent case of *"M/S.Perfint Healthcare Pvt. Ltd vs California Institute Of Computer"* [18], the learned division bench held that,

"There are four stages for enforcement and execution of foreign award. The first one is filing An application under Section 47 of the Act, 1996 by the party having an award in its favour, The second one is refusal of enforcement of foreign arbitral award, if the opposite party Satisfies any of the grounds mentioned in Section 48 of the Act, 1996 for its non- Enforceability, the third one is the Courts satisfaction about the enforceability of The award under Section 49 and only thereafter, the award shall be deemed to be a decree of The court and the fourth stage is execution of the arbitral award."[19]

This scheme of going through different stages should take place within the same proceeding i.e., from establishing the enforceability of such award as if it were a decree of the court to taking efficacious steps towards execution of the award.

PART- III

ISSUE OF JURISDICTION WITH RELEVANCE TO EXECUTION OF ARBITRAL AWARD

Jurisdiction of courts, in brief is the magnitude of authority to draw legal decisions and provide judgments. To

https://www.mondaq.com.

[15]The Arbitration and Conciliation Act,1996,§36, No. 26, Act of Parliament 1996 (India)

[16]The Arbitration and Conciliation Act,1996,§49, No. 26, Act of Parliament 1996 (India)

[17]Fuerst Day Lawson Ltd v. Jindal Exports Ltd (2001) 6 SCC 356

[18]M /S.Perfint Healthcare Pvt. Ltd vs California Institute Of Computer Application Nos.1633 and 1634 of 2018 of Madras High Court

[19]*Id.*

establish the relevance of jurisdiction for the purpose of execution of arbitral award, it is of utmost importance to decide and determine the appropriate court to apply to, for the enforcement as well as execution of his arbitral award. An analysis of the following sections of the act dealing with the concept of Jurisdiction is done hereinbelow to Explain all the pertinent issues in play.[20]

Chapter VIII of the act deals with decisiveness and enforcement of the award. Section 36 of the act annotates that the arbitral award is to be executed in accordance with the domestic procedural law i.e., CPC; as the arbitral tribunal does not have the authority per se to enforce the arbitral award. So here it is to be executed as if it is a decree of a court. It is clear from the word stated in the section 36 of the 1996 Act that, there is no decree in real, but it is to be deemed or it is decree by fiction which is to be executed. To further proceed with the execution, issue of jurisdiction comes into picture. Part II of the Code hand out the execution of decrees. Section 38 of CPC prescribes the court which may authorize execution of decree, prior to which it is important to appreciate the surroundings of an arbitral award. With this it is to be kept in mind that the above provision shall be used by preserving the legislative intent behind the making of section 36 of the Act which is to permit unwrinkled enforcement of arbitration awards.

So, this part of the paper seeks to elucidate how the deeming fiction as laid in section 36 of the act, set off to discover the territorial jurisdiction of a court with relevance to the execution of arbitral award and with this it aims to retort if a court which drills jurisdiction over the seat of the arbitration, can execute an arbitral award when an award debtor or its property lies outside the limits of the court?[21]

PROVINCIAL EXECUTION OF THE ARBITRAL AWARD

In order to realize the concept, It shall be noted that in a case of "*Eskay Engineers, Mumbai V. Bharat Sanchar Nigam Ltd"*[22], where the court dealt with the perplexity with relation to the term 'Court' stated in section 34 as well as in section 36 of the Act and came up with a solution that the expression 'court' used in both the above sections cannot be acknowledged differently as it would defeat the very intention of the legislation behind ratifying the act. But here it could not resolve the affair that if anyhow court possesses concurrent jurisdiction to

[20]Dipen Sabharwal, Aditya Singh and Sindhu Sivakumar, Arbitration in India, White and Case LLP- Lexology(April 5th, 2021, 3:00 P.M.), https://www.lexology.com/library/detail.aspx?g=72bcbbe3-c139-46f2-b9ce-086394161f41

[21] SC expounds: Execution of an Arbitration Award can be only to the extent what has been awarded/decreed and not beyond the same. Read Judgment , Latest Law(November 9th, 2020, 4:15 P.M.), https://www.latestlaws.com/latest-news/sc-expounds-execution-of-an-arbitration-award-can-be-only-to-the-extent-what-has-been-awarded-decreed-and-not-beyond-the-same-read-judgment/

[22]Eskay Engineers, Mumbai V. Bharat Sanchar Nigam Ltd (2009) 5 Mh.L.J. 565 (India)

appreciate execution application (ruling out the term 'court' stated in section 34). By referring and relying on the ratio set by the above-mentioned case, the Hon'ble Karnataka High Court in the following instance of "*I.C.D.S Limited V. Mangala Builders Pvt. Ltd. And ors"*[23] concluded that only under section 34 of the Act, court can adjudicate the subject relating to administration of arbitral award. The upshot stance i.e., only the courts are authorized to entertain the upset regarding the administration of arbitral award was ratified. Later the court was of the outlook that the court[24] within whose dominion award was credited; the same court shall be scrutinized as the competent authority for the purpose of section 38 of the code. As per the amendment, section 36(1) of the act, it was wielded in case[25] and was of opinion that the word 'Court' shall be used instead of lower case 'court' as stated in Section 2(1)(e) of the Act. Hence it was held that whichever court having the dominion over the seat of the arbitration, execution application recognizes the authority of the same court.[26] It can well appreciate from above cases that earlier courts were of view that execution application is to be filed in the principal civil court which were competent to decide the subject matter of the arbitration and adhered to above rule. But again, Allahabad High[27] Court came up with a contradicting statement that application for the execution shall be filed within the particular jurisdiction where judgment debtor resides or has a business. With this court commented on section 38 and 39 of the code that the sections are not applicable while enforcing an award.

SECTION 42 AND ITS DILEMMA

Section 42 commences with a non-withstanding ruling that where a party has filed an application with respect to the arbitration agreement, the successive proceedings shall be dealt by the same court. Hon'ble Supreme Court[28] specified that the terms 'with respect to an arbitration agreement' used in section 42 of the act is a broader concept which would embrace all applications which are filed before, throughout and after the conclusion of such proceedings. It extends its administration for the application made under part one for adjudicating all the matters arising out of the same agreement which may be before, during and after the award has passed. Hence section 42 and 36 of Act overlapped each other in case of filing for execution of award. again, Bombay High Court came up with a different verdict in "*SE Investments Ltd.*

[23]I.C.D.S Limited V. Mangala Builders Pvt. Ltd. and ors AIR 2001 Kar 364 (India)

[24]*L&T Finance Ltd. v. Abhishek Talwar & Anr* 2015 SCC OnLine Bom 1489 (India)

[25]Nandbala Nathala Mayani v. Jaswantrai Chagganlal Mayani and Ors 2018 SCC OnLine Bom 1752 (India)

[26]Saarthak Jain, Where to File for Execution of an Arbitral Award? SC settles the Debate, India Corp Law (November 9th, 2020, 5:10 P.M.), https://indiacorplaw.in/2018/02/file-execution-arbitral-award-sc-settles-debate.html

[27]G.E. Money Financial Services Ltd. v. Mohd. Azaz (2013) 100 ALR 766 (India)

[28]State of West Bengal v. Associated Contractors (2015) 1 SCC 32 (India)

v. Arch Pharmalabs & ors"[29]and argued that the place of the decree holder shall determine jurisdiction for execution of arbitral award. Further it questioned the status of Section 42 and stated that its role comes to an end with the finality of the award. This raised a lot of questions and created an enormous challenge in respect to execution of the award.

CAN THE EXECUTION BE FILED IN A DIFFERENT PLACE OTHER THAN THE LOCATION OF JUDGMENT DEBTOR AND ITS ASSESTS?

To answer this important dilemma and other subsequent questions two-judge bench in Supreme Court came up with a solution in a landmark case of "S*undaram Finance Limited v. Abdul Samad and Anr"*[30]. It changed the whole aspect of the process of execution. It held that execution can be applied in anywhere in the country irrespective of the location or presence of assets of the judgment debtor. Decree can be executed anywhere where such decree was effective to be implemented, there was no need of transfer of decree*[31]*. For clarification with respect to section 42, it simplified that the above section is not applicable in case of execution application. It only confines to arbitral proceedings and following application emerging from the agreement. But execution is an altogether different concept which neither means the application during the proceedings nor application emerging from the agreement.*[32]* Section 32 of the act makes it crystal clear that final arbitral award comes when proceedings come to an end and execution is the later process after stating the final arbitral award. Order XXI of the CPC which is the primary rule for execution of a decree has no relation with the delusive nature of arbitral award as it has to be treated as a final decree for the resolution of execution.[33] It contradicted its previous judgment, but well clarified a disputed question of law. If at all section 36 states that arbitral award is to be as a decree and it shall be implemented in the same manner that does not create a monarchy of the court over it. Section 42 of the act restricted the scope section 9, Section 34 and section 36 (2) and (3) as it had to be filed only in section which led to inappropriate results and defeated the

[29]SE Investments Ltd. v. Arch Pharmalabs & ors. (2017) 4 AIR Bom R 317 (India)

[30]Sundaram Finance Limited v. Abdul Samad and Anr (2018) 3 SCC 622 (India)

[31]Lexis PSL Arbitration, India—Supreme Court rules on jurisdiction of courts in execution of arbitral awards (Sundaram Finance v Samad)(November 9th,2020, 7:45 P.M.), http://nishithdesai.com/fileadmin/user_upload/pdfs/NDA%20In%20The%20Media/News%20Articles/180319_A_Sundaram-Finance-v-Samad.pdf

[32]Indialaw Research Team, Supreme Court Settles Jurisdictional Issues In Execution Of Arbitration Awards, India Law(November 10th, 20203:30 P.M.), https://www.indialaw.in/blog/blog/supreme-court-settles-jurisdictional-issues-execution-arbitration-awards/

[33] Recognition and Enforcement of Arbitral Awards: The New York Convention, Dispute Settlement, International Commercial Arbitration, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, UNCTAD/EDM/Misc.232/Add.37, https://unctad.org/system/files/official-document/edmmisc232add37_en.pdf

legislative intent and purpose of the Act[34]. Hopefully this place will be settled in the later judgments. But the recent judgment[35]acted as a key to the question of law which created confusion by different contradicting judgments of the high courts. This decision was crucial as it upheld the true spirit of arbitration, by making it more flexible and removing the concoction with code.

PART- IV

ROLE OF CIVIL PROCEDURE CODE (CPC) AND OTHER STATUTES IN THE EXECUTION PROCEDURE OF THE ARBITRAL AWARD

Arbitration in India is primarily governed by the act and the procedure for execution is governed by the CPC. Section 36 of the act prescribes that the domestic award shall be executed and enforced in the same manner as the decree of the Court. Second Part of the Act which deals with foreign award directs such award to be executed as deemed decree under sec. 49. This part will illustrate and critically analyse the application procedure of order XXI of CPC and the other statutes while executing the foreign award in India.

EXECUTION CORRESPONDED TO ORDER XXI AND OTHER PROVISIONS OF CIVIL PROCEDURE CODE (CPC)

Both foreign and domestic awards are considered as Deemed decree in India; hence their modes of execution are also common and are subjected to order XXI of CPC. [36] CPC is one of the oldest codes of India and despite several amendments still most of the rules are not the up to date in the sense that arbitration is a contemporary and ever evolving phenomenon and thus it will be a fallacy to conduct the process of execution of arbitral awards by adhering to the exact wordings of CPC. For example, especially in regards to execution or arbitral award e-communication or production of evidence through electronic modes is much more efficient than the traditional evidence gathering procedure and this essence of adaptability is the key has been asserted by the Hon'ble courts through a series of judgment.

Being the prior stage to execution, enforcement of the foreign award plays a crucial role for an execution of arbitral

[34] Apoorva Gupta, EXECUTION PROCEEDINGS FOR ENFORCEMENT OF ARBITRAL AWARD, Classic Law(November 10th, 2020, 5:10 P.M.), https://www.inhousecommunity.com/wp-content/uploads/2018/03/Clasis-Online-Article-Execution-proceedings-for-enforcement-of-arbitral-award.pdf

[35]Ajay Bhargava, Arvind Kumar Ray and Karan Gupta, Supreme Court clarifies the appropriate jurisdiction for enforcement of an arbitral award, Khaitan & Co.- Lexology(November 10th, 2020, 6:30 P.M), https://www.lexology.com/library/detail.aspx?g=b3528ae5-ddf0-4074-9c22-d3da27d374ce

[36]Payal Chatterjee, Moazzam Khan, Shweta Sahu; Enforcement of Arbitral Awards and Decrees in India (Domestic and Foreign); Nishith Desai Associates(April 6th, 2021, 8:30 A.M.), http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Enforcement_of_Arbitral_Awards.pdf,

award's eventual success or failure. It is further to keep in mind that the for the execution proceeding the principle of Natural Justice is applied.[37] When it is a foreign award the party in whose favour the award is issued needs to follow a three-step process for the enforcement. Firstly, the party shall make an application under section 47 of the act and shall produce Documents and evidence along with the application . Secondly, the other party is to raise a defense as per section 48 of the act with evidence and thirdly, the court, if it is satisfied with the evidence produced by the parties, decide on the enforceability of the award and enforce it under section 49 of the Act.[38]

The concept of virtual hearing has been prevalent in International Commercial Arbitration for decades by now. Academicians have always supported the fact that hearing in person or changing documents directly might not be a great method to carry on in future. In an arbitration proceeding it is possible to have one hearing per week. People tend to travel across continents to attend one hearing, that too only for a few hours. So, academicians have always been in favour of using virtual methods in case of International commercial arbitration.[39] But in case of domestic arbitration in India it started quite late. Being one of the latest developments, arbitration ideally requires several documentation formalities prior to the commencement of its proceeding to be done through the virtual methods.[40] Whereas the exchange of the document under CPC mostly takes place through the postal services or through direct delivery to the parties, when it comes to arbitration, such an effort is nothing more than waste of time and money and therefore must be done through e-communication in accordance with section 27 of the act. In pursuance of this discussion reference to order V rule 9 of CPC must be drawn which prescribes the method of serving summons. Recently in its decision in the case of "*Tata Sons Limited & Ors vs. John Doe(s) & Ors"*[41]the Delhi High court allowed the serving of summons and other documents through WhatsApp or by E-mail. This welcoming decision of the Hon'ble Delhi High Court will have far reaching consequences as the ongoing global pandemic of Covid-19 has made work from Home a necessary part of new normal lifestyle and therefore made the use of electronic media as an accepted norm for the purpose of exchanging documents. In fact, the Supreme Court of

[37]Krishnendra Joshi, Procedure for Execution of the Order of Arbitral Tribunal, Ipleaders (Intelligent Legal Solution)(November 11th, 2020, 4:35 P.M.), https://blog.ipleaders.in/procedure-execution-order-arbitral-tribunal/,

[38]*Id.*

[39] Paul D Carrington, Ohio State Journal of Dispute Resolution, 15:3 669, 671-672 (2000).

[40] Ihab Amrao, Online Arbitration in Theory and in practice : A comparative study between civil law and common law countries; Kluwer Arbitration Blog(November 11th,2020, 5:40 P.M.), http://arbitrationblog.kluwerarbitration.com/2019/04/11/online-arbitration-in-theory-and-in-practice-a-comparative-study-in-common-law-and-civil-law-countries/

[41]Tata Sons Limited & Ors vs. John Doe(s) & Ors, CS(COMM) 1601/2016

India, allowed all the documents to be exchanged through fax, E-Mail and through other electronic modes.[42] This in a way has promoted the use of old statues with a contemporary practice.

There are some certain basic steps that need to be followed while the execution of the award takes place. Firstly, order XXI of CPC, 1908, provides detailed provisions for making an application for execution of a decree and the manner by which such applications will be entertained, dealt with and decided. Mostly, the court which passes the decree is the Court for the execution of the award.[43] A big portion of the execution procedures under CPC has been modified when it comes to the arbitral award. But despite the modification through judicial decision, still the execution procedure remains unchanged with respect to certain aspects.

EXECUTION OF AWARD PERTAINING TO OTHER STATUTES

The act has not stated all the steps of the execution nor did CPC. With respect to the limitation aspect, it has largely remained silent. Hence, to address the questions of limitations the limitation Act of 1963 (Hereinafter referred to as Limitation Act, 1963) plays a major role in the process of executing an arbitral award. Twelve years has been prescribed by the limitation act, 1963 as the period for completion of execution process.[44] Different views Have been expressed by the courts while interpreting the foreign award, some deeming it as a decree and thereby applied the statutory mandate of limitation of twelve years period as per the limitation act, 1963. On the other hand, some courts are of the opinion that as there is no express provision under the limitation act, 1963 for making any application for execution of a foreign award, hence applicability of such provision will not come into picture.

In regards to whether non-payment of stamp duties on arbitral award would render such award invalid or non-enforceable in cases of domestic arbitration under part I of the act, a plethora of differing jurisprudence has been developed.[45] A domestic award

[42]Japnam BindraCovid-19 impact: SC allows summons, notices to be served through digital medium, Live Mint (November 11th, 2020, 6:15 P.M.), https://www.livemint.com/news/india/covid-19-impact-sc-allows-summons-notices-to-be-served-through-digital-medium-11594390079508.html

[43]Tania Tiwari and Adhip Kumar Ray, Issue of Jurisdiction and Execution of Arbitral Award, Mondaq Blog (Connecting Knowledge and people) (November 11th, 2020, 7:50 P.M.), https://www.mondaq.com/india/arbitration-dispute-resolution/691498/issue-of-jurisdiction-and-execution%20of-arbitralawards#:~:text=Execution%20under%20Arbitration%20Act%20%2C%201940,drawn%20as%20per%20the%20judgment

[44]The Limitation act of India 1963, Art.136, No. 36, Act of Parliament 1963(India)

[45]Sushil Kumar Antal, Stam Duty on Arbitration Award, Tax Guru (November 13th, 2020, 10:35 A.M.), https://taxguru.in/corporate-law/stamp-dutyarbitralaward.html#:~:text=Stamp%20Duty%2

which is not stamped sufficiently is inadmissible[46].The stamp duty amount varies from state to state depending upon the place of execution. Also, The Registration Act, 1908 under section 17 mandates the registration of an award in case it is affecting the immovable property. Otherwise, it will be considered as invalid. The Supreme Court held that a foreign award does not need to be stamped for gaining validity. Although the act is one of the recent Statutes to deal with the arbitration proceedings in India still it is silent on various aspects which are crucial for the execution. Therefore, to overcome those lacunas other statues walk hand in hand with CPC to make it holistic.

PART- V

CHALLENGES WHILE EXECUTING ARBITRAL AWARD IN INDIA

INTERLINK BETWEEN EXECUTION AND ENFORCEMENT

In today's world the complexity and multitudes of disputes are on a hike and thus it's absolutely necessary to acknowledge that a single dispute resolution forum might not be able to conclusively bring a dispute to an end or might not be able to satisfy the needs and demands of the parties involved and in this backdrop the system of appeal, review, revision lies. Without going into the legal jargons; to put it simply, this above-mentioned system is a way or tool(s) available to the parties to exhaust in order to meet ends of justice and though this system can usually be linked with litigation increasing use of appeals from an arbitral award has also put the system in limelight in respect to arbitration proceeding.

Under section 34 of the act, 1966 the court has Power to set aside an arbitral award, however the catch is in section 36 which prescribes that that if an application has been filed under section 34 then the arbitral award in question will be stayed until and unless such petition under section 34 of the act is being rejected by the court. This aspect of automatic stay of arbitral award created a lot of trouble and it was further intensified with the Apex court's judgment in the case of "*National Aluminum Company Ltd. v. Pressteel & Fabrications Ltd*"[47]. The 2015 amendment to the act brought relief as the amendment act did away with the provision of automatic stay under Section 36. Another series of judgment followed this to determine the effect of such amendment which is to say whether such amendment will have retrospective or prospective effect. But the significant Development in this saga came in 2019 in

0on%20Arbitral%20Award,duties%20on%20an%20arbitral%20award.&text=The%20Indian%20Stamp%20Act%201899,instruments%20with%20specific%20stamp%20duties

[46] The Indian Stamp Act 1899, §34, No. 02 of 1899

[47]Muskan Arora, Indian Supreme Court Strikes Down Automatic Stay Provisions for good, Kluwer Arbitration Blog(November 14th, 2020, 6:15 P.M.), http://arbitrationblog.kluwerarbitration.com/2020/02/15/indian-supreme-court-strikes-down-automatic-stay-provisions-for-good/

the form of another amendment in the act which inserted Sec 87 and thereby allowed automatic stay on all arbitral awards which were given on an arbitration proceeding before October 23, 2015.[48]This Amendment was challenged in the landmark case *of "Hindustan Construction Company Ltd. v. Union of India"* and the Hon'ble apex court answered the challenge in positive. The learned Bench was of the opinion that the insertion of section 87 through the 2019 amendment act even after deletion of section 26 of the 2015 amendment act is "manifestly arbitrary" and thereby is in direct violation of Art 14 of Indian constitution.[49]

This was a welcoming judgment and one that brought the Indian domestic legislature at par with the international standard more specifically the New York convention (1954) which deals with the enforcement and recognition of foreign arbitral awards. India has immense potential to become a global hub for arbitration and it must be encouraged in all costs considering the immense pressure that the Indian judiciary is acing presently. Justice delayed is justice denied, this proposition has to be realized in its totality along with the introspection that an outcome of a dispute undoubtedly needs supervision but that shouldn't in anyway dilute the legality, eligibility and enforceability of such outcome.

CONCLUSION

Arbitral award is the fruit of an arbitration proceeding and execution of arbitral award is the means to realize such end. While prima facie it will seem that the hardest part is to have a proper, efficient arbitration proceeding specifically keeping in mind the pro-litigation mindset in India, the authors will humbly like to differ and assert that the hardest part begins once the arbitration process ends. The whole point of an arbitration proceeding will get vitiated if the party holding the arbitral award doesn't get the opportunity to realize the same through execution and it is in this backdrop one of the simplest concepts of execution becomes one of the most crucial aspects of the entire arbitration ordeal. To put things into perspective Indian judiciary has time and again asserted that the party's actual trouble begins once he or she has attained the decree emphasizing the importance of execution of a decree along with the steep challenges that follows. The authors have tried to classify the challenges in regards to execution of an arbitral award broadly into two

[48]Arpan Chaturvedi, Section 87: Supreme Court Strikes Down Provision Granting Automatic Stay On Arbitral Award, Bloomberg|Quint(November 15th, 2020, 5:10 P.M.), https://www.bloombergquint.com/law-and-policy/section-87-supreme-court-strikes-down-provision-granting-automatic-stay-on-arbitral-award,

[49]Prachi Bhardwaj, Section 87 of the Arbitration and Conciliation Act, 1996 struck down. Here's why, SCC Online The SCC Blog(November 15th, 2020, 6:45 P.M.), https://www.scconline.com/blog/post/2019/11/27/section-87-of-the-arbitration-and-conciliation-act-1996-struck-down-heres-why/

heterogeneous classes, one being the challenges which are solely associated with an Arbitration proceeding or in other words flows from there and the other being the challenges Which are common to all the execution proceedings in connection to any or every civil cases.

In this regard the author has observed that it is time to revise the age-old CPC. While it is commendable that till this day in regards to execution of a decree CPC is the most relevant law which nonetheless showcases its extreme adaptability and it is from that flexibility, adaptability only the code has to evolve to be able to smoothly function in regards to execution of an arbitral award. While the judiciary has time and again stressed upon the fact that in regards to a civil proceeding in connection with arbitration, plaints and even summons can be exchanged and served online, a clear addition of such as rules through an amendment under the relevant order of CPC will be much more beneficial. This can further be observed in regards to time limit. CPC doesn't prescribe time limit to conclusively conclude a proceeding for execution of an arbitral award which is problematic by all account as this might lead to the same cycle of tireless litigation which a party wants to avoid and thereby opted for arbitration at the first place and in this regard an amendment is also necessary.

The second important observation is in regards to the arbitration and conciliation act. The fact that India being a developing country is still trying to grasp the idea of arbitration is not being helped by the fact that a party to execute a foreign arbitral award in India is required to make an application before the competent court of India and therefore to prove before such court that the particular award in question is enforceable in India and that being satisfied only to end up having such foreign award being recognized as a deemed decree for the purpose of execution in India. This is honestly discouraging. A quick reference to Japan's approach towards the same issue will further expose the underlying problem. Japan's domestic legislation on arbitration instantly recognizes a foreign arbitral award as a decree subject to its public policy therefore it is not an exaggeration to claim that a party having option to execute a foreign arbitral award in India or in Japan will always choose Japan over India because of its simplistic approach. Henceforth to truly make India an arbitration hub a revision and necessary amendments to Arbitration and Conciliation Act, 1996 is the call of the hour. Lastly, it is to assert that even though Indian judiciary is taking the right step in the right direction to make arbitration a household commodity; Nonetheless Indian arbitration scene still has a long way to go to effectively reach its pinnacle.

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