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NLUJ Law Review

TABLE OF CONTENTS

ARTICLES

Aparna Tiwari & Ayushi Choudhary*, From 1993-2019: Has collegium over-lived its utility?*, 6(1) NLUJ Law Review 1 (2019)

FROM 1993-2019: HAS COLLEGIUM OVER-LIVED ITS UTILITY?

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ABSTRACT

The issue of judicial appointments by the collegium system has been in the news recently. The January 2019 resolution to elevate Justice Khanna and Justice Maheshwari to the Supreme Court has left the nation perplexed about the grounds on which the resolution of December 2018, to elevate Justices Menon and Nandrajog, had been rescinded.

The Collegium System emerged as a procedure to appoint judges to the higher judiciary in the famous Second Judges' Case. In 2015, the SC struck down the 99th Constitutional Amendment which sought to amend the procedure of appointments to the higher judiciary in India. The presence of the Law Minister in the commission appointing judges was held to be an unacceptable interference of the executive with the independence of the judiciary.

The collegium system, so introduced is a product of 'judicial activism' and a process of 'self-selection.' The Supreme Court is the guardian of 'rule of law' and it has a

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responsibility to be free from self-prejudices and biases. This paper seeks to analyse the journey of the collegium system up till now and concludes with measures to be taken to improve the transparency in the appointment of judges to higher judiciary in India

TABLE OF CONTENTS

I. INTRODUCTION

With the recent controversy of elevation of Justice Khanna and Justice Maheshwari to the Supreme Court [hereinafter "**SC**"] by a collegium headed by Chief Justice Ranjan Gogoi, the enigma which surrounds the higher judicial appointments in India has resurfaced once again. The seniority convention was not followed, and the collegium did not present any justification for doing so. This is yet another example of the lack of transparency and accountability in the method of appointing judges in India.

The method of appointment of judges to higher judiciary has always been soaked with its fair share of doubts and reservations. When the SC declared National Judicial Appointments Commission [hereinafter "**NJAC**"] unconstitutional and upheld the Collegium System in 2015, it seemed like the storm shall rest now but it has only aggravated. The manner in which the collegium operates, and the present-day misadventures have ignited the debate of whether or not the collegium should exist all over again, and the country is forced to reconsider the confidence that it vests in its judiciary. The collegium system, as has been vehemently argued by the SC in a catena of judgments, protects the 'independence of the judiciary.'

The Supreme Court is regarded as the guardian of the Constitution.[1] Despite the responsibility it is entrusted with, the SC has been rather impervious to an issue which requires its urgent surveillance.

[1] A.K. Gopalan v. State of Madras, AIR 1950 SC 27 (India).

In the last of the famous Judges cases, Justice Lokur himself enunciated the fact that steps will have to be taken to improve the working of the collegium system and to increase its transparency. The fallacies which inherently smeared this system have now started to reflect on the Indian judicial institution itself. The courts in India are entrusted with the enforcement of the rights and liberties of the citizens and are, therefore required to be above all sorts of suspicion.

This article seeks to establish that the collegium system has miserably failed the objective it originally sought to achieve. The article has been divided into three major parts. Part I deals with an analysis of how Article 124[2] has been misinterpreted repeatedly and how the principle of 'independence of the judiciary' has been molded by the SC to justify its own whimsical analogies. This part is further divided into five sub-parts, each of which individually deliberate on various rationales provided by the SC in favour of the collegium system, and it ends with explaining that the SC has actively forwarded a kind of 'judge-made legislation,' encroached on the sacrosanct principle of 'separation of powers' and over-augmented the contours of 'judicial independence.'

Part II deals with the deep-rooted problems associated with this system at length. Finally, Part III lists an ideal method to adopt for higher judicial appointments in order to maintain transparency in the system. This method is suggested with due regards given to the preservation of judicial independence. It also seeks to restrict the nepotism in judicial

[2] INDIA CONST. art. 124.

appointments and maintains a system of checks and balances, better-equipped to bring transparency and accountability in the system.

II. COLLEGIUM, CONSTITUTION, AND INDEPENDENCE OF THE JUDICIARY

The famous French philosopher Montesquieu first propounded the idea of an independent judiciary. In India, independence of judiciary has flown from the theory of separation of powers, which is a part of the basic structure of the Indian Constitution [hereinafter "**Constitution**"].[3] The Judiciary was envisioned to be independent of the other two organs of the state by the Constitution makers themselves.[4] In *Supreme Court Advocates-on-Record Assn. v. Union of India*,[5] the majority struck down the Ninety-Ninth Constitutional Amendment on the pretext of preserving this independence from any sort of executive influence and yet, the analogy with which it was done seems to lack the logical premise.

A. INDEPENDENCE OF THE JUDICIARY DOES NOT MEAN PRIMACY OF JUDICIARY IN JUDICIAL APPOINTMENTS.

Firstly, let us deliberate upon the actual interpretation of the phrase, "independence of judiciary." *Shetreet* explains judiciary as an organ of the government which is not a part of the executive or the legislature;

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[3] Kesavananda Bharti v. State of Kerala, (1973) 4 SCC 225 (India).

[4] *Constituent Assembly Debates (Proceedings) – Volume VIII (May 23, 1949)*, CENTRE FOR LAW AND POLICY RESEARCH (February 2019), *available at* https://cadindia.clpr.org.in/Constitution_assembly_debates/volume/8/1949-05-23.

[5] Supreme Court Advocates-on-Record Assn. v. Union of India, (2015) 6 SCC 408 (India).

which is not subject to personal, substantive and collective controls and which performs the primary function of adjudication.[6] It follows that no outside interference is allowed within the realm of adjudication. The function of judiciary to uphold the rule of law, therefore, should not be affected by any outside prejudices.

Justice Bhagwati has emphasized that rule of law excludes arbitrariness and unreasonableness and there should be an independent judiciary to protect the citizen against the excesses of executive and legislative power.[7] Justice Khanna observed that rule of law is the antithesis of arbitrariness, and a balance between the opposing notions of individual liberty and public order can only be attained by the existence of independent courts.[8] This is why our Constitution aims at securing an independent judiciary which is the bulwark of democracy.

The independence of judiciary, thus, has never meant to be the primacy of the Chief Justice's opinion in judicial appointments. The rationale behind merging the two entirely different concepts together has not been explained by the SC in NJAC judgment. None of the majority opinions outrightly take up this issue or even remotely deliberate on it. Instead, the judgment is full of old rhetoric and misplaced ideologies.

B. INDEPENDENCE OF THE JUDICIARY IS ENSURED BY A NUMBER OF FACTORS.

[6] SHIMON SHETREET, JUDICIAL INDEPENDENCE: NEW CONCEPTUAL DIMENSIONS AND CONTEMPORARY CHALLENGES, JUDICIAL INDEPENDENCE: THE CONTEMPORARY DEBATE 597-598 (Shetreet, Deschenes eds. 1985).
[7] Bachan Singh v. State of Punjab, AIR 1982 SC 1325 (India).
[8] A.D.M. Jabalpur v. Shivkant Shukla, AIR 1976 SC 1207 (India) at 1254, 1263.

We have a written Constitution and the need for a separate organ to rightly interpret it was realized by the drafters at an early stage itself. The Constitution does not mention a collegium system in its provisions.[9] However, since its advent, it has guaranteed an independent judiciary through the following provisions.

The judges have been granted the security of tenure.[10] A judge of the SC can be removed only if his removal is supported by a majority of the total membership of both the houses and by a majority of not less than two-thirds of the members present and voting.[11] The privileges, rights, and allowances of the judges cannot be altered to their disadvantage after appointment.[12] The SC and the High Courts can recruit their respective staff and frame rules.[13] The salaries and allowances of the judges are charged to the Consolidated Fund of India or of their respective states.[14] This means that their salaries cannot be put to vote in any of the legislatures.[15]

Furthermore, the judges of SC are debarred from pleading after retirement in any of the court proceedings.[16] The conduct of the judges of SC or HC in the discharge of their duties shall not be discussed in the

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[9] Amarendra Kumar Mishra, *Presidential Power to Transfer the High Court Judges: A Critique*, JOURNAL OF CONSTITUTIONAL AND PARLIAMENTARY STUDIES 124, 135 (2001).
[10] INDIA CONST. art. 124, cl. 2; art. 217, cl. 1.
[11] INDIA CONST. art. 124, cl. 4.
[12] INDIA CONST. art. 125, cl. 2; art. 221, cl. 2.
[13] INDIA CONST. art. 145; art.146; art. 229.
[14] INDIA CONST. art. 112, cl. 3; art. 202, cl. 3.
[15] INDIA CONST. art. 113, art. 203.
[16] INDIA CONST. art. 124, cl. 7.

legislature except if it is an address of impeachment.[17] The state is obligated to keep the judiciary separate from the executive in the matters of public services.[18] In addition to all of this, our judiciary is vested with the power of judicial review, which has also been held to be a part of the basic structure and thus, cannot be taken away.

Therefore, the judiciary is made independent by pooling in a number of provisions in the Constitution, all of which ensure the self-sustaining working of the judiciary. Even if the absolute control over judicial appointments is taken away from the judges, the independence of the institution will still survive. The Universal Declaration on the Independence of Justice says that participation of executive in judicial appointments is consistent as long as the appointments are made taking into account the opinions of members of the judiciary.[19]

The judges, through the collegium system, own the entire turf of judicial appointments and there exists no mechanism with which one can question their decision. The SC has asserted on numerous occasions that all power under the Constitution is subject to judicial review. Despite this, the actions of the Chief Justice under the collegium have not been brought under the ambit of judicial review. This implies that a judge who has been overlooked for elevation without citing any satisfactory reasons for the same cannot question the authority of Chief Justice. In the quest of preserving its independence, the judiciary has become tyrannical.

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[17] INDIA CONST. art. 121.
[18] INDIA CONST. art. 50.
[19] Universal Declaration on the Independence of Justice, 1983 [Montreal Declaration], art 2.14, cl. b.

C. APPOINTMENT OF JUDGES BY JUDGES DOES NOT NECESSARILY CONSTITUTE A BASIC FEATURE OF THE CONSTITUTION.

It is pertinent here to delve into the aspect where the current method of judicial appointments has been interpreted to be a basic feature of the Constitution. Independence of the judiciary forms a part of the basic structure of the Constitution and the appointment procedure of judges is merely a component of this independence. If the power to appoint judges is absolutely vested in the executive, then the judges in order to please the deciding entity, would be inclined to pronounce judgments favoring the government. This will be a hurdle in the path of justice. However, as discussed above, there are a number of factors which ensure this independence and thus, the appointment procedure isn't the sole criterion to preserve it. The independence shall be hampered only if the power is vested 'absolutely' in the executive.

The NJAC was held to be unconstitutional because it violated the basic structure of the Constitution. This commission prescribed a six-member body which would recommend the names of judges for appointment in the higher Judiciary. The body was comprised of the Chief Justice, two senior-most judges, the Law Minister, and two eminent persons. The executive couldn't successfully recommend a name if two members from the judicial branch or one member from the judicial branch and one eminent person together oppose such a nomination. The judicial members could not successfully go through with a name unless at least one person from non-judicial block supports the nomination. This

procedure of 'collective concurrence' was held to be invalid because it did not give primacy to the opinion of Chief Justice; practically, a veto as the collegium gives.

It was said that the primacy of Chief Justice is a lynchpin to the appointment procedure as the same ensures the independence of the judiciary, which is a part of the basic structure. The nexus drawn is preposterous. The Constitution says that for any such appointment, the President has to 'consult' the Chief Justice.[20] The judiciary in the *Second Judges'* case,[21] while overruling *S. P. Gupta*,[22] held that this 'consultation' means 'concurrence.' It also introduced collegium in the same judgment and strengthened its composition in the Presidential Reference of 1998.[23] In the 2015 judgment, it reinstated the collegium and struck down the Ninety-Ninth Amendment.

However, in the whole process, it never became lucid as to when the primacy of Chief Justice's opinion became the independence of the judiciary itself. The SC is empowered to interpret the provisions of the Constitution but with this, it practically rewrote the Constitution. Due deference and regard for the other branches of the government is expected of the judiciary and this judgment explicitly fell outside its domain. Extreme judicial activism is never desirable in a country like India where the democracy is guided by the principles of separation of powers.

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[20] INDIA CONST. art. 124, cl. 2.
[21] Supreme Court Advocates-on-Record Assn. v. Union of India, (1993) 4 SCC 441 (India).
[22] S.P. Gupta v. Union of India, (1981) Supp. SCC 87 (India).
[23] Special Reference No. 1 of 1998, In re, (1998) 7 SCC 739 (India).

Notably, our SC has been termed as one of the world's most powerful courts,[24] and is well-known for its judicial activism.

D. INDEPENDENCE OF THE JUDICIARY IS THE INDEPENDENCE OF JUDGES FROM THEIR OWN PREJUDICES.

It is noteworthy that in NJAC judgment, the Supreme Court said that our civil society is 'not evolved enough' to make any kind of meaningful contribution.[25] It was also said that both the Law Minister and the civil society might be influenced by the extraneous considerations; therefore implying that all the judges are absolutely immune from all prejudices and personal biases. It becomes necessary here to point out a statement made after *Navtej Johar*,[26] which was pronounced by Justice G. S. Singhvi, who wrote the *Suresh Koushal* judgment.[27] He said that he had seen a lot of child pornography during the deliberations on *Suresh Koushal* which led him to believe that all homosexuals are pedophiles. Thus, his judgment was affected by his personal beliefs. This proves that judges too are fallible and at times, they let their personal notions take the better of them.

There are a number of other factors such as post-retirement appointments which have proven to be a dangerous threat to the independence of the judiciary. Arun Jaitley, while he was the Leader of

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[24] S. P. SATHE, JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS (Oxford University Press 2002).
[25] Raju Ramachandran, *A Case of Self-Selection: Judicial Accountability and Appointment of Judges*, DAKSH STATE OF THE JUDICIARY REPORT 6 (2016).
[26] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (India).
[27] Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1 (India).

Opposition in 2012, had pointed out that pre-retirement judgments are influenced by a desire for a post-retirement job.[28] However, the SC does not seem to be intimidated with this and no steps have ever been taken to protect the independence of the judiciary in this aspect.

The judges have been characterized as hermits who have no desire or aspirations of their own.[29] In the majority opinion of *K. Veeraswami v. Union of India*,[30] it was held that, "*A judge must keep himself absolutely above suspicion; to preserve the impartiality and independence of the judiciary and to have the public confidence thereof.*" B.R. Ambedkar recognized that a conduct so ideal is not always possible when he said,

> "*With regard to the question of the concurrence of the Chief Justice, it seems to me that those who advocate that proposition seem to rely implicitly both on the impartiality of the Chief Justice and the soundness of his judgment. I personally feel no doubt that the Chief Justice is a very eminent person. But after all, the Chief Justice is a man with all the failings, all the sentiments and all the prejudices which we as common people have; and I think, to allow the Chief Justice practically a veto upon the appointment of judges is really to transfer the authority to the Chief*

[28] Manu Sebastian, *Giving Jobs to Judges As Soon As They Retire Helps Government Influence Courts*, THE WIRE (July 13, 2019), *available at* https://thewire.in/law/giving-jobs-to-Judges-as-soon-as-they-retire-helps-government-influence-courts.
[29] High Court of Judicature of Rajasthan v. Ramesh Chand Paliwal, (1998) 3 SCC 72 (India) at 87.
[30] K. Veeraswami v. Union of India, (1991) 3 SCC 655 (India).

> *Justice which we are not prepared to vest in the President or the Government of the day*."[31]

In regards to the collegium system, V.R. Krishna Iyer, J. has observed that, "*The Nine Judges Bench, in a mighty seizure of power wrested authority to appoint or transfer judges from the top executive to themselves by a stroke of adjudicatory self-enthronement.*"[32] The independence, impartiality, and integrity of the judiciary, amongst other things, also depend on the boundaries they seek to identify when it comes to exercising their judicial power. Power tends to corrupt and absolute power corrupts absolutely. The abuse of legislative and executive power can be curtailed by judiciary but nothing can police the judiciary when it abuses its position and this is what has led to such corruption in appointments.

E. SEVERAL COUNTRIES RECOGNIZE AN INDEPENDENT JUDICIARY WITHOUT A COLLEGIUM-LIKE-SYSTEM TO APPOINT JUDGES.

The need for an independent judiciary is recognized all over the world. It is pertinent to mention here that India stands at the 53rd position in the Judicial Independence (World Economic Forum) Index, 2018,[33] where other countries such as Finland ranks 1st, the United Kingdom

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[31] The Argumentative Indians excerpt series, *"The Chief Justice Is…": Members of Constituent Assembly Discuss Judges' Selection*, THE CARAVAN (Mar. 21 2019) *available at* https://caravanmagazine.in/vantage/Judges-selection-constituent-assembly.

[32] V. R. KRISHNA IYER, A CONSTITUTIONAL MISCELLANY 278 (2nd ed., 2003).

[33] *Judicial Independence*, World Economic Forum (July 2019), *available at* http://reports.weforum.org/pdf/gci20172018scorecard/WEF_GCI_2017_2018_Scorecard_EOSQ144.pdf.

ranks 6th, Australia ranks 8th, Canada ranks 9th and the United States ranks 25th. The method of judicial appointments in all these countries has been discussed below.

Finland is a parliamentary democratic republic and the appointment of judges is done by the President on the advice of the Minister of Justice, who acts on the recommendation of the Judicial Appointments Board.[34] The Judicial Appointments Board is comprised of judicial members, but three members come from non-judicial backgrounds. One is a public prosecutor, one is an advocate, and the third is an academic appointed by the Ministry of Justice.[35]

In the U.K., the Supreme Court is the highest court of the land. It is the final court of appeal for all criminal cases from England, Wales and Northern Island and for all civil cases. The appointments are made by the Crown on the recommendation of the Prime Minister, who only recommends those candidates whose names have been forwarded by the Lord Chancellor. The Lord Chancellor only notifies those names which have been selected by the Selection Commission comprising of the President and the Deputy President of the SC (two senior-most judges if their position is vacant/under consideration) and one member each from the judicial appointment bodies of England & Wales, Scotland and Northern Island.

[34] Act on Judicial Appointments 2000, § 6.
[35] Act on Judicial Appointments 2000, § 7.

Australia is a federal state in which the highest appellate court is the High Court of Australia. The Judges are appointed by the Governor-General in Council who acts on the advice of the federal Cabinet. The Attorney General is the responsible Cabinet member, who consults with the Attorney General of each state in case of a vacancy prior to recommending a candidate's name to the Governor-General.[36]

Canada has a Constitutional monarchy and the Supreme Court of Canada is the highest court of the Canadian federal court system. The appointments are made by the Governor-General who acts on the advice of the Cabinet.[37] The Cabinet implies the Minister of Justice in case of all the judicial appointments except that of the Chief Justice, who is appointed on the advice of the Prime Minister. The Office of the Federal Commissioner for Judicial Affairs screens applications and nominations for vacancies on statutory criteria on behalf of the Ministry of Justice.[38] Once the screening is done, it passes a list of the eligible candidates to Judicial Advisory Committees for further screening and then, the list is forwarded to the Ministry of Justice. The entire process is the object of policy documents.

The United States is a representative democracy in which the President nominates the Chief Justice and the Judges of the Supreme Court, the highest court of the land and such nominations are further

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[36] High Court of Australia Act 1979, § 6.
[37] Supreme Court Act, R.S.C. 1985, c S-26 § 4, cl. 2 (Can.) [*hereinafter* "Supreme Court Act"].
[38] *Id.* at § 5.

approved by the Senate.[39] The same procedure is followed for the appointment in (Federal) Courts of Appeal.[40]

All of the aforementioned countries have acquired a higher status as compared to India in securing an independent judiciary for themselves and yet none of them have a system where judges appoint judges, and the independence of their judiciary is certainly not adversely affected. This is because the penchant of the judges towards impartiality is the most important factor of judicial independence and as long as the judiciary has a significant (not absolute) role to play in the process of appointments, this independence is not curtailed.

III. FALLACIES IN THE COLLEGIUM SYSTEM

In 2015, instead of dwelling upon the possibility of a system such as the NJAC, the SC struck it down, bringing back its 'autonomy' over the entire procedure. The decision has been criticized badly ever since and even the Judges who pronounced the majority judgment called the collegium a non-perfect way for the selection of the Judges. H. M. Seervai, for example, wrote that "*never has a majority judgment of the Supreme Court reached a lower level of judicial incompetence.*"[41]

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[39] U.S. CONST. art II, § 2, cl. 2.
[40] U.S. CONST. art III, § 1.
[41] Prashant Bhushan, *NJAC: Independence does not mean that judges must appoint judges*, BAR & BENCH (July 11, 2019), *available at* https://barandbench.com/njac-independence-does-not-mean-that-judges-must-appoint-judges-prashant-bhushan/.

The fallacies of this system are not hidden, and they have been brought up time and again to the public domain[42] but to no avail. A lot of issues have been deliberated upon at length by the SC but this issue is still not being paid any attention. One of the senior-most advocates, who appeared in favour of the collegium system in the 1993 decision, regrets his win and explicitly mentions the same in his autobiography, calling this system a provider of an unchecked 'card or power' which is being abused by the judges today.[43] Former Attorney General Mukul Rohatgi also showed his dissatisfaction with the collegium system saying that judges appointing good judges is a myth. The continuance of a procedure with so many loopholes merely because we don't have any other alternative available will cause the disruption of the entire system.

It's high time for the legislature, who so far has just contributed as a mute spectator, to intrude in and put forth the Memorandum of Procedure which is being reviewed by the Law Minister since September 2018 in the next assembly and deliberate upon the same. Undoubtedly, the judgments should be independent, but it is the right of every citizen to be rightly informed about the merits of the judges who would be deciding their cases and playing an important role as the protectors of their life and liberty. Lord Cooke of Thorndon also criticised this judgment in an essay

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[42] DR. DEVINDER SINGH, APPOINTMENT OF JUDGES IN HIGHER JUDICIARY 284 (2017) [*hereinafter* "Singh"].
[43] FALI S. NARIMAN, BEFORE MEMORY FADES 390 (2014).

that borrowed its title from Alexander Pope's famous words, "*fools rush in where angels fear to tread*."[44]

The following apparent inconsistencies in the present collegium system have made it urgent to change the method of judicial appointments.

A. OPACITY

The collegium system has afforded its members to work in a cabal completely enjoying their non-accountable freedom. They are not required to justify their disregard towards the seniority factor or their rejection of a name in one meeting while accepting the same in the other or their decision to arbitrarily replace the names decided earlier with a judge who is 31st in the rank of seniority. Keeping the people and their representatives completely shut out of the appointment process is one of the most critical issues with the collegium system. There are no rules to maintain even a hint of credibility and legitimacy in the collegium. Precisely, this system is a well-kept secret with no written manual for functioning, no prescribed qualifications for selection, and no publication of the records of the meetings giving an absolutely unbalanced power to its members.

B. NEPOTISM AND PERSONAL PATRONAGE

The monopoly of a few families in the judiciary is rampant, wherein the successor is decided by choices rather than merits. Since no

[44] ZIA MODI,10 JUDGEMENTS THAT CHANGED INDIA (2013).

one knows the criteria for the appointment process, the judges are blatantly abusing their discretion in the matter as a result of which the judiciary is reeking with self-selection and in-breeding. Descendants of the judges tend to be the popular choices for judicial roles. Consequently, the judges are capable of not just enjoying the privileges of their profession themselves but also of securing the same for their kith and kin.

Gaining and returning favours have become an integral part of the collegium system. Factors such as integrity, competence and work records are often neglected over the liberty of choosing whoever one wants to choose. The injustice is inevitable in a system equipped with such auspices. For example, Justice A.P. Shah was kept out of the Supreme Court because Justice S.H. Kapadia was averse to him. Justice Sanjay Kishan Kaul suffered the ignominy of not making it to the Supreme Court in time because he did not recommend the name of Justice T.S. Thakur when he was in Delhi HC and Justice T.S. Thakur returned the favour during his time.

Even the judges have raised this issue from time to time. For example, in 2010, Justice Shukla Kabir Sinha was elevated to the Calcutta HC in spite of Justice Bhaskar Bhattacharya opposing the idea. He even went on to the extent of writing a letter to the then President and the Prime Minister complaining that it was because of his strong objections during the elevation of Justice Altamas Kabir's sister that he was never appointed to the SC.[45]

[45] Singh, *supra* note 42.

C. SENIORITY

The backbone of this system is flawed when it comes to co-relating a judge's merit and competence with his/her age.[46] Majority of the issues raised in India so far with relation to the functioning of the collegium system is due to not following the seniority list. This criterion is, therefore, causing a hindrance in the selection of young judges who are meritorious and capable of bringing stability into the judicial system.[47]

Changing the personnel at a frequent pace is disadvantageous for a court which is determining and affecting the law of the land in general. This raises questions on the two most important or rather fundamental requisites, i.e., certainty in law and continuity in the approach, essential in the interest of judicial administration throughout the country. Undoubtedly, being a watchdog of the independence of the judiciary, who has the responsibility to satisfactorily administer law & justice in the country is not a job of a year or two.

D. DIVERSITY

Diversity has always been an important and integral issue in determining the credibility of the system and it needs to be infused as a norm and a practice. Gender diversity is one of those talked about issues which need a quick redress. The existing collegium system has no woman judge as its member. This puts a question mark over the merit and representation of the women in the system. Due to the sheltered process

[46] ABHINAV CHANDRACHUD, THE INFORMAL CONSTITUTION 264 (2014).
[47] Singh, *supra* note 42.

of these appointments, there is no veracity left, unlike the one present in countries like US and UK where the process of the appointment being an exposed one, the public has a chance of questioning the representation of women.[48]

E. PUBLIC CONFIDENCE IN THE SYSTEM

Abraham Lincoln says, "*Democracy is a government of the people, for the people and by the people.*"[49] As a democracy, it seems anomalous that we continue to have a judiciary whose essence is determined by a process that is evidently undemocratic**.** The reforms are urgently needed as the participation of the government in the selection process will reaffirm the faith of the people in the system. In a speech last year, Justice Gogoi said noisy judges and independent journalists were democracy's first line of defence,[50] and the judiciary seems to have shattered this defence on its own years ago when it introduced a system which lacks any form of public representation, direct or indirect, in the appointment of judges.

The influence of external factors in the selection procedure is noticeable, leading to the loss of confidence in the judiciary and making it nothing but a sham. In a country like ours where democracy is the guiding

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[48] Melody E. Valdini & Christopher Shortell, *Women's Representation in the Highest Court: A Comparative Analysis of the Appointment of Female Justices*, 69 POLITICAL RESEARCH QUARTERLY (December 2016).

[49] PRESIDENT ABRAHAM LINCOLN, IN THIS FIERY TRIAL: THE SPEECHES AND WRITINGS OF ABRAHAM LINCOLN 184 (William E. Gienapp ed. 2002).

[50] C. Raj Kumar, *Future of Collegium System Transforming Judicial Appointments for Transparency*, ECONOMIC AND POLITICAL WEEKLY (2015).

factor in determining almost everything affecting people's lives, the judiciary should not be kept aloof of it.

IV. CONCLUSION

It has now become clear as to why from time to time, the bedlam to bring an amendment to the present collegium system arises. A significant number of the most dynamic judges that the Indian Judiciary has witnessed have adorned the judiciary before 1993, i.e., before collegium, for example, Justice Subba Rao, who has written the highest number of dissenting opinions; Justice Krishna Iyer, who is revered for transforming the Supreme Court into People's Court; Justice H.R. Khanna, who voiced a dissent during the zenith of Emergency and Justice P.N. Bhagwati, who pioneered the cause of Public Interest Litigation in India.

Therefore, the following recommendations are hereby suggested for enhancing accountability in the system of appointment of Judges:

A. 'SENIORITY' AS A REQUIREMENT MUST BE DONE AWAY WITH.

The explicit mention of seniority as a criterion for the selection of judges is flawed and needs to be done away with. This is because the absolute transparency that we aspire for is to be certain of the fact that the appointment of a judge of any age is bona fide. Integrity would then be the sole requisite and a deserving candidate would not be required to first grow old and have only a couple of years in his hands to bring some

notable changes.[51] Whenever a certain collegium digresses from the seniority convention, it gives way to an unnecessary furore. The uproar is more because of one's inability to ascertain the criteria with which a senior judge's name has been disregarded than because of the digression itself. The collegium hardly forwards any explanation for its actions and has not been made answerable to anyone. In such circumstances, seniority 'seems' to be the only way for people to believe that they do know, to an extent, the process with which the judges are appointed when in reality, this belief is only a facade. Therefore, this is particularly evident that the seniority convention is neither facilitating the quality of the judiciary nor paving a way for people to participate in the appointment process. The appointments, thus, should be made on the basis of merit and merit alone.

B. A COMMISSION FOR JUDICIAL APPOINTMENTS SHOULD BE BROUGHT BACK.

Before suggesting a commission to appoint judges to higher judiciary in India, it is pertinent to mention here that a long-lasting solution can only be achieved if the advisory opinion of the SC is sought by the government under Article 143[52] on how to replace the present collegium system with a new appointment panel (a commission). The SC may then adjudicate objectively upon the collegium system as it stands today and be a part of the new policy so devised for appointments. This way, there at least lies a fair chance that both the SC and the government

[51] P.P. RAO, INDEPENDENCE OF THE JUDICIARY AND ACCOUNTABILITY OF JUDGES 19 (2014).
[52] INDIA CONST. art. 143.

may see eye to eye with respect to the issue of appointments of judges to higher judiciary. Since the opinion is not binding,[53] the opinion may be neglected if the opinion seems to be serving the biased interests of the judiciary.

Nevertheless, the terrific opportunity that the SC missed in 2015 should not be neglected anymore and a commission for appointment of judges should be reintroduced with the required changes made in its composition. The composition of the Commission should be such where the judiciary has an upper hand but its power is still checked and balanced by the presence of members from the other organs.

Therefore, a commission consisting of the Chief Justice, two senior-most Judges of the SC, Law Minister and one eminent person should be introduced. In case of HC nominations, those judges of the SC, other than the Chief Justice should be involved who either have been a part of that particular HC in the past or come from that particular state itself. The Chief Justice will be the chairperson and the ex officio member. This commission will keep a check on the pervasive nepotism in the appointments and will ensure diverse representation to a great extent.

C. THE PROCEDURE OF APPOINTMENT MUST BE DIVIDED INTO VARIOUS STAGES.

The judicial appointments should go through a proper screening process involving various stages. Whenever there is a vacancy, the Law

[53] Keshav Singh v. Speaker, Legislative Assembly, AIR 1965 SC 745 (India).

Minister must propose a list of prospective candidates to fill up the position and the members of the Commission will then deliberate on each name and select one name for elevation. For a name to pass, first, the majority must agree to it and second, at least one member from the afore-mentioned majority must be from the non-judicial block. No name can pass if only judicial members support such a nomination. This way the judicial block will not have a veto in the selection but still, it will have a necessary role to play in the appointments.

D. A FINAL REPORT MUST BE PREPARED.

After finalising one name, the Commission should then prepare a report citing all the reasons behind choosing the person for the vacancy. This may include the rationale given by each member individually or collectively. The reasons may include the landmark judgments that a judge has pronounced, his professional competence, experience & social awareness, the time a judge takes to decide a particular case, the novelty, and inclination towards people's interests, and potential impediments to his appointment, etc. The report, along with the selected name should then be forwarded to the President for his approval.

In such a set-up, the President may send back the nomination for re-consideration by giving reasons for his disapproval. However, if after 'due deliberation' the name comes again, he must accept it. This will ensure that the President also has an important say in the appointments as the Constitution originally envisaged.

E. THE ENTIRE PROCESS MUST NOT BE A SECRET FOR THE REST OF THE COUNTRY.

To ensure transparency and accountability in the process of appointments, the afore-mentioned report must be made accessible under the 'Right to Information' once a name is finalised. The citizens will then be aware of the entire process and the public confidence shall increase effectively as the public shall know what happens in the cabal and what sort of records has led to a particular elevation.

The judges, who have not been so elevated, will be aware of the merits taken into account for filling up a vacancy. Their grievances will have an explanation, unlike today when an aggrieved has no way to question the authority of the collegium. However, this does not mean that the appointment can be challenged in a court of law. This is because the merits of judges for selection or non-selection cannot be adjudicated upon and we are proposing this model in order to thwart such questions only. The judges become judges in India because they are competent to be the judges; it is the current process of elevation which is creating the entire ruckus.

F. ROLE OF THE LAW MINISTER.

The burden to divulge and bring a vacancy to the notice of the commission falls upon the Law Minister and he must do it sincerely and regularly without fail. For the position of a judge who is going to retire shortly, the proposal to fill up this vacancy must be proposed at least two

months before such retirement. This will ensure expediency in appointments. As a result, the vacancies will be timely filled, and the judiciary will have a proportionate number of judges to deal with the infamous backlog of cases in India. The burden of pendency can then be expected to debilitate to some extent. This, in the long run, will work in favour of public interest. Every other appointment aside, the Chief Justice of India shall still be the senior-most judge of the Supreme Court. This is because the Chief Justice of India is and will always be, by tradition, the 'first amongst the equals.'

The constant commotion between the judiciary and the executive is leading to the loss of confidence and faith in the collegium; a system which has obtrusively over-lived its utility. It is time for the collegium to go. It is time for the judiciary to regain its grandeur and march ahead with integrity and righteousness.

Sanjini Jain & Jennifer Lenga Long, *Validity of the mandatory Arbitration agreements under the U.S. Federal Arbitration Act*, 6(1) NLUJ Law Review 30 (2019)

VALIDITY OF THE MANDATORY ARBITRATION AGREEMENTS UNDER THE U.S. FEDERAL ARBITRATION ACT

JENNIFER LENGA LONG[+] & SANJINI JAIN[*]

ABSTRACT

The United Nations Forum on Business and Human Rights had from 27-29 November, 2017 convened in Geneva and the central theme for discussion was on "Access to Effective Remedy." With the growing importance of the UN Guiding Principles on Business and Human Rights, a working group of people specializing in international law had proposed to make arbitration the means through which human right abuses in businesses could be addressed. This paper argues that though international arbitration could be a good way of solving disputes of this nature, one cannot ignore the ill effects it could have on the victims. It discusses briefly about the History of the Federal Arbitration Act in the United States of America. It also examines the approach taken by the Judiciary both at the federal and state level in America and how has their interpretation paved way for the recent legislative developments in the 115th Congress. Furthermore, it discusses the importance of consent

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between the parties when entering into employment agreements and how could it affect the rights of the workers.

With the increasingly globalized world that we live in, these disputes do not necessarily arise in all the parties residing and belonging to the same jurisdiction. The paper will conclude with plausible solutions will be offered to address the loopholes present if the international arbitration mechanism is used in its current form.

TABLE OF CONTENTS

I. INTRODUCTION

The right to remedy is a core tenet of the international human rights system, and the need for victims to have access to an effective remedy is recognized in the UN Guiding Principles on Business and Human Rights.[54] This right has also been accepted in other internationally recognized legal instruments like Article 8 of the Universal Declaration of Human Rights which states: "*Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law*."[55] What is imperative therefore is recognition of the importance of access to legal remedy to victims.

With the advent of globalization, there has been an enormous rise in the transactions across the globe. When parties conduct business beyond their territorial jurisdiction, they increasingly prefer to rely on a neutral party to solve their disputes. Over the course of arbitration's history in the United States, it was first embraced as the preferred mechanism to resolve labour relations disputes, principally arising under collective bargaining agreements in the work place. The flood of such disputes in the post-WWII industrial age would have drowned any judicial system in a tsunami of work place disputes, had arbitration not sailed to the court's rescue.[56] As arbitration wove its way into the fabric of many

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[54] Office of the High Commissioner, *OHCHR Accountability and Remedy Project: Improving accountability and access to remedy in cases of business involvement in human rights abuses*, U.N. HUMAN RIGHTS (August 2019), *available at* https://www.ohchr.org/EN/Issues/Business/Pages/OHCHRaccountabilityandremedyproject.aspx [*hereinafter* "OHCHR Accountability and Remedy Project"].

[55] G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

[56] 86 Am. Jur. Trials, §111 (2002).

other commercial disputes (i.e., construction, securities, international, pension, no-fault insurance, patent, real estate and more), the courts began to infuse the essence of their labour arbitration holdings into court cases involving other claims. By the beginning of the 21st Century, judicial holdings in widespread commercial disputes began to mimic, with surprising similarity, the decisional logic once limited to the labour relations arena. In viewing the judicial intervention in arbitration, the major sea change that has affected nearly every arbitration outside the public sector is the near pre-emptory effect of the Federal Arbitration Act. The U.S. Supreme Court has vehemently upheld the validity of the mandatory arbitration agreements under the U.S. Federal Arbitration Act.

A judicial proceeding could be time consuming, expensive and could also lead to a biased decision if the proceeding is taking place in the territory of one of the parties to a transaction. However, a blanket ban on the parties' right to litigation and enforcing mandatory arbitration agreements even in situations when such a forum becomes unavailable or when the collective rights of one class of parties is at risk, can have significant effect on the rights of the parties. The article examines the effect that the mandatory arbitration clauses have on the rights of the litigants especially when unequal bargaining power exists between the parties.

II. HISTORY OF THE FEDERAL ARBITRATION ACT

The Federal Arbitration Agreement [hereinafter "**FAA**"] was passed in 1925 by the Congress as a measure to reduce the hostility of the

judiciary towards the arbitration agreements.[57] The Federal Arbitration Act was enacted in the United States of America in 1925 to ensure the validity and enforcement of arbitration agreements in any "*maritime transaction or ... contract evidencing a transaction involving commerce[.]*"[58] The legislative history of the Act suggests that Congress intended it to serve two purposes: first, to affirm the validity of arbitration agreements as binding contract provisions in their own right; and second, to curb costly and time-consuming litigation that was clogging federal and state dockets in the wake of the Industrial Revolution.[59]

While the FAA came into force over 90 years ago, only recently have federal courts and state courts started universally applying the FAA to all disputes involving interstate commerce in whatever court they may be filed.[60] Section 2 of the Federal Arbitration Act, which is at the heart of the Act provides;

> *[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and*

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[57] Anjanette H. Raymond, *It Is Time the Law Begins to Protect Consumers From Significantly One-Sided Arbitration Clauses within Contracts of Adhesion*, 91 NEB. L. REV. 666, 668 (2013).
[58] Federal Arbitration Act, 9 U.S.C. § 2 (2006) [*hereinafter* "Arb Act"].
[59] Benjamin D. Tievsky, *The Federal Arbitration Act After Alafabco: A Case Analysis*, 11 CARDOZO J. CONFLICT RESOL. 675, 678 (2010).
[60] *Id.*

> *enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.*[61]

The genesis of the discussion on the validity of mandatory arbitration in U.S.A. can be traced back to the case of *Red Cross Line v. Atlantic Fruit Co.*[62] where the Court had discussed about the Arbitration law of New York (Consol. Laws, c. 72), enacted on April 19, 1920 (Laws 1920, c. 275), and amended on March 1, 1921 (Laws 1921, c. 14), which declares that a provision in a written contract to settle by arbitration a controversy thereafter arising between the parties "*shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.*"[63] The court in this case had mandated arbitration in a dispute related to a maritime contract. The Court's decision in *Red Cross Line v. Atlantic Fruit Company* is believed to have opened the door for federal legislation that recognized the validity of arbitration agreements.[64]

Though the Courts have agreed that the arbitration clause essentially forms the subject matter of contract law[65], the Court has been proactive in taking a pro-arbitration approach by applying Section 2 of the Federal Arbitration Act.[66] The U.S Supreme Court made it clear that the Federal Arbitration Act has made it explicit through its policy that

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[61] Arb Act, *supra* note 57.
[62] Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 124 (1924).
[63] *Id.* at 264.
[64] JON O. SHIMABUKURO & JENNIFER A. STAMAN, CONG. RESEARCH SERV., R44960, MANDATORY ARBITRATION AND THE FEDERAL ARBITRATION ACT (2017) [*hereinafter* "Shimabukuro"].
[65] Am. Exp. Co. v. Italian Colors Rest., 570 U.S. 1 (2013) [*hereinafter* "Am. Ex."].
[66] Arb Act, *supra* note 57.

disputes of all kinds should be preferably settled through the medium of arbitration.[67]

III. RELEVANCE OF MANDATORY ARBITRATION AGREEMENT IN LIGHT OF THE INTEGRAL TEST

In light of the Supreme Court's pro-arbitration approach, the Seventh Circuit in *Green v. U.S. Cash Advance Illinois, LLC*,[68] held that an arbitration agreement between the consumer and lender would have to be enforced in the event of dispute. The arbitration agreement in this case had made National Arbitration Forum to be the forum in case of dispute between the parties. National Arbitration Forum due to an agreement with the Minnesota Attorney General had stopped taking consumer disputes.[69] Though the forum had made this agreement with the Attorney General prior to the loan taken by consumer, the parties had not amended the language of the arbitration agreement. In spite of the non-availability of a forum, the court still held that the arbitration agreement between the parties should be enforced. In its opinion, the majority rejected what is known as the Integral Part Test, which has been used by the Third, Fifth and Eleventh circuits in cases involving similar facts.[70] The Eleventh, Ninth, and Third Circuits have held that Section 5 of the FAA allows a court to appoint substitute arbitrators when the specified, unavailable forum is not 'integral' to the arbitration agreement. The Second and Fifth

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[67] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).
[68] Green v. U.S. Cash Advance Illinois, LLC, 724 F.3d 787 (7th Cir. 2013) [*hereinafter* "Green"].
[69] *Id.* at 789.
[70] *Id.* at 791.

Circuits have also recognized that this Section 5 allows a court to appoint substitute arbitrators unless the unavailable forum was 'integral' or 'central' to the arbitration agreement.

However, the Second and Fifth Circuits, unlike the Eleventh, Ninth, and Third Circuits, have found unavailable forums to be integral or central to the arbitration agreement and have refused to appoint substitute arbitrators in some instances. Adding another dimension to the split among the courts, the Seventh Circuit recently rejected using the standard of whether the forum was integral to the parties' agreement and held that Section 5 enables the court to appoint substitute arbitrators when "*for any reason something has gone wrong.*"[71]

Justice Hamilton in the *Green* case also didn't agree with the Integral Test and opined that if the arbitration forum that is specified in the arbitration agreement becomes unavailable, it renders the agreement void and the parties should be permitted to proceed with litigation. He also contended that the practicality of the majority opinion is that, a court might use the Federal Arbitration Act to authorize a 'wholesale re-write of the parties' contract' when there was a mistake by both the parties to a substantial term of the contract.[72]

What is essentially meant by being integral to an agreement by the parties is a highly contested issue since establishing the understanding of

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[71] Christopher J. Karacic & Howard S. Suskin, *When the Arbitration Forum Is Unavailable: What Happens Next?*, AMERICAN BAR ASSOCIATION (Feb 06, 2014), *available at* https://www.americanbar.org/groups/litigation/committees/jiop/art icles/2014/when-arbitration-forum-is-unavailable-what-happens-next/.

[72] Green, *supra* note 68 at 793 (Hamilton, J. dissenting).

the parties with respect to the disputed integral term in the contract is extremely difficult. Therefore, the chances of mandatory arbitration agreements being misused given the pro-arbitration approach being taken by the Supreme Court increases. It is difficult to imagine how arbitration could be mandated if the very forum becomes unavailable. Not letting the parties proceed with litigation also in a sense shows that the fact that courts might actually decide the manner in which the contract would take place without letting the parties decide the terms of the contract will follow some economic implications for the parties too.

IV. CONFLICT BETWEEN THE FEDERAL ARBITRATION ACT AND OTHER FEDERAL LAWS

A. CONFLICT BETWEEN FEDERAL ARBITRATION ACT AND NATIONAL LABOUR RELATIONS ACT

The U.S. Supreme Court on May 21, 2018 in *Epic Systems Corp. v. Lewis*,[73] upheld the validity of employment contracts in which employees give up their right to collective litigation against their employer.[74] The Court dealt with the conflict between two federal statutes namely the Federal Arbitration Act and the National Labour Relations Act. Section 7 of the NLRA guarantees that "*[e]mployees shall have the right to self-organization . . . and to engage in other concerted activities for the purpose of collective bargaining or*

[73] Epic Systems. Corp. v. Lewis, 138 S. Ct. 1612 (2018).
[74] *Epic Systems Corp v. Lewis*, 132 HARV. L. REV. 427, (Nov. 2018), *available at* https://harvardlawreview.org/2018/11/epic-systems-corp-v-lewis/ [*hereinafter* "Epic Systems"].

other mutual aid or protection"[75] whereas Section 2 of the Federal Arbitration Act states that the arbitration agreements "*shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.*"[76] However, the Federal Arbitration Act does not require enforcement of an agreement that waives a person's substantive rights guaranteed by another statute, nor does it require arbitration of a statutory claim if the statute giving rise to that claim expresses a 'contrary congressional command.'[77] The primary question that has been addressed in this case is whether the workers had a right to collective litigation against their employers if their employers had made them a party to arbitration agreements that waived their right to collective litigation.

The Supreme Court held that:

- Federal Arbitration Act's (FAA) saving clause did not provide a basis for refusing to enforce arbitration agreements waiving collective action procedures for claims under the FLSA and class action procedures for claims under state law; and
- the provision of National Labour Relations Act (NLRA), which guarantees the workers their right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, does not reflect a clearly

[75] National Labor Relations Act, 29 U.S.C. § 157 (2012).
[76] Arb Act, *supra* note 57.
[77] Epic Systems, *supra* note 74.

> expressed and manifested congressional intention to displace the FAA and to outlaw class and collective action waivers.[78]

Therefore, the employment contracts requiring the employees to give up their collective litigation rights and mandating arbitration were held to be valid.

B. CONFLICT BETWEEN FEDERAL ARBITRATION ACT AND FEDERAL ANTITRUST LAWS

The Supreme Court in *American Express Co. v. Italian Colors Restaurant*,[79] had considered whether a contractual waiver of class arbitration is enforceable under the Federal Arbitration Act when the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery.[80]A group of merchants that had accepted the American Express card had challenged a class arbitration waiver on the ground that it contravened the policies of federal antitrust law.[81] The respondents had brought a class action against petitioners for violations of the federal antitrust laws. According to respondents, American Express used its monopoly power in the market for charge cards to force merchants to accept credit cards at rates approximately 30% higher than the fees for competing credit cards. This tying arrangement, respondents said had violated the federal antitrust law. Supreme Court observed that the enforcement of an arbitration agreement pursuant to the Federal

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[78] Epic Systems, *supra* note 74.
[79] Am. Ex, *supra* note 65.
[80] *Id.* at 2307.
[81] *Id.* at 2306.

Arbitration Act may be overridden by a 'contrary congressional command' against arbitration.[82] However the Supreme Court noted that the federal antitrust law's legislative intent was not to override the Federal Arbitration Act and held that the cost of individually pursing arbitration should not be seen as a violation of rights of respondents under the federal antitrust laws. The Court explained: "*[t]he fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy*."[83]

The Supreme Court has predominantly taken an arbitration friendly approach in dealing with the conflict of the Federal Arbitration Act and other Federal Laws. While arbitration has been an effective means of resolving dispute, a blanket ban on the collective rights of the consumers/merchants can lead to a hostile environment in the economy. Such an approach can also lead to misuse of contracts by employers who usually possess better bargaining powers vis a vis the employees. They are at a greater risk of being forced into accepting the contract and its terms laid down by the employee. For workers with relatively weak financial status, this not only means being forced to sign employment contracts on the terms of the employers, but also weaker rights during the course of their employment. What could be termed as consent of the employee might actually not be the case given their circumstances. Mandatory arbitration agreements therefore do not necessarily imply a positive and cost reducing affair for the parties involved.

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[82] Am. Ex, *supra* note 65 at 2309.
[83] *Id.* at 2311.

V. PRE-EMPTION OF THE FEDERAL ARBITRATION ACT OVER THE STATE LAWS

The Court has repeatedly held that the FAA will displace state laws or judicial rules that prohibit the arbitration of a particular kind of claim. In one of the first of its FAA pre-emption cases, *Southland Corporation v. Keating*, the Court held that the Act superseded a state provision that effectively compelled resolution of a dispute exclusively through the courts.[84] In a 7-2 opinion written by Chief Justice Burger, the Court reversed the lower court, concluding in relevant parts that the FAA applied in state courts, pre-empted the state statute's prohibition on the arbitration of claims. The Court stated that "*in enacting §2 of the [FAA], Congress declared a national policy favouring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims"* that the parties choose to resolve through arbitration.[85]

The court has also discussed in various cases about the 'saving clause' in section 2 of the Federal Arbitration Act which states that an arbitration agreement may be invalidated "*upon such grounds as exist at law or in equity for the revocation of any contract*."[86] Supreme Court in the case of *AT&T Mobility LLC v. Concepcion*,[87] had held that the saving clause does

[84] Shimabukuro, *supra* note 64 at 7.
[85] *Id.*
[86] Arb Act, *supra* note 57.
[87] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011).

not "*preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives*."[88]

The court also has held that the Federal Arbitration Act might pre-empt even laws governing contracts in state as held in *Kindred Nursing Centers Limited Partnership v. Clark*,[89] where the state law of Kentucky required that an individual when executing a power of attorney agreement had to mandatorily waive its right to trial. The U.S. Supreme Court held that such a mandatory requirement "*singles out arbitration agreements for disfavoured treatment*."[90] The U.S. Supreme Court in this case had reversed and vacated the judgement given by the Supreme Court of Kentucky. The Apex Court had held that Kentucky's laws had placed arbitration agreements on the same footing with other contracts which were in violation of the Federal Arbitration Act.[91]

Supreme Court in *Doctor's Associates, Inc. v. Casarotto*,[92] held that the state law conditioned enforcement of an arbitration agreement on compliance with a notice requirement that was inapplicable to contracts generally, the Court concluded that the FAA overrode the state requirement.[93] What is clear based on various judgements given by the U.S. Supreme Court is that the manner in which arbitration agreements can be used by the states is limited. While there might be state laws that will regulate the arbitration agreement and its validity, enforceability and

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[88] *Id.* at 343.
[89] Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 137 S. Ct. 1421 (2017).
[90] Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 137 S. Ct. 1421 (2017) at 1425.
[91] *Id.* at 1426-27.
[92] Doctor's Assocs., Inc. v. Casarotto, 116 S. Ct. 1652 (1996).
[93] *Id.*

revocability, if state laws impose requirements that do not favour the arbitration agreement or are inconsistent with the intent and policy of the Federal Arbitration Act, then the state laws will be pre-empted by the federal act. Also as discussed in the *Concepcion Case*, it can also be seen that Courts also possess the powers to render certain arbitration agreements invalid under the saving clause of the Federal Arbitration Act. What still remains undecided however is how legitimate it is to render an arbitration agreement invalid considering that at the heart of an arbitration agreement essentially lies the will of the parties. However, establishing how freely the parties entered into a transaction is a question dependent on evidence and case to case basis.

VI. ANALYSIS OF THE RECENT FEDERAL AND LEGISLATIVE DEVELOPMENTS IN LIGHT OF THE SUPREME COURT'S PRO-ARBITRATION APPROACH

In light of the Supreme Court's pro-arbitration approach and the pre-emption of the Federal Arbitration Act which limits the powers of the state to render invalid mandatory arbitration agreements, some federal agencies have taken steps to regulate the manner in which arbitration agreements are mandated under certain circumstances. The Consumer Financial Protection Bureau on July 19, 2017 issued a final rule which made the insertion of arbitration clauses in agreements before dispute for certain financial products and services, mandatory.[94] This rule was issued

[94] Arbitration Agreement Regulation for Bureau of Consumer Financial Protection, 82 Fed. Reg. 33, 210 (July 19, 2017).

by the Bureau after Section 1028 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which had given Consumer Financial Protection Bureau the authority to a study related to the arbitration agreements between the consumer and financial institutions, also gave the Bureau the power to limit or prohibit the mandatory arbitration agreement if it finds that such a an agreement will be against the public interest and consumer protection.[95] In the Press Release of the U.S. Senate Committee on Banking, Housing, and Urban Affairs, Senators File Resolution Disapproving of CFPB Arbitration Rule of July 20, 2017, some Congress Members can be seen opposing the powers given to the Bureau suggesting that this would harm the consumers who would prefer expedited mechanism of dispute resolution.

A second development was seen in 2016 when the Centre for Medicare and Medicaid Services which is a part of the Department of Health and Human Services had issued a rule in relation to the participation of nursing homes and other long term facilities in Medicare and Medicaid.[96] One requirement of the new rule that received considerable attention was a prohibition on a covered facility entering into a binding arbitration agreement with a resident (or the resident's representative) prior to a dispute arising between the parties.[97] Pursuant to this rule, there was a long litigation against the Centre for Medicare and Medicaid Services with the plaintiffs contending that the Centre did not

[95] Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5518 (2015).
[96] Reform of Requirement for Long-Term Care Facilities for Department of Health and Human Services, 81 Fed. Reg. 68, 688 (Oct. 4, 2016).
[97] *Id.* at 68, 790.

possess the authority to limit the usage of arbitration as a means of dispute resolution in light of the Federal Arbitration Act.[98] However the Centre had later revised its approach to be consistent with, reducing unnecessary costs for the residents.

VII. IMPORTANCE OF CONSENT BETWEEN THE PARTIES WHEN ENTERING INTO EMPLOYMENT AGREEMENTS

International Treaties and Domestic Laws of countries have consistently required consent between the parties as a prerequisite to entering into any contract. Thus, a party can only bring its dispute to arbitration – and bar either party from invoking the jurisdiction of otherwise competent courts – where there is an agreement to arbitrate.[99] According to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (also popularly known as the New York Convention), a written arbitration agreement or an arbitration clause should be present within the agreement concerned. This signifies that there should be proof of consent amongst the parties concerned in order to enforce the arbitral award.[100] The UNCITRAL Model Law on International Commercial Arbitration also states that if the parties were under some incapacity while entering into the arbitration agreement, or if the agreement does not adhere to the law of the country where the award

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[98] Am. Health Care Ass'n v. Burwell, 217 F.Supp.3d 921, 925 (N.D. Miss. 2016).

[99] Benson Lim and Adriana Uson, *Relooking at Consent in Arbitration*, KLUWER ARBITRATION BLOG (February 12, 2019), *available at* http://arbitrationblog.kluwerarbitration.com/2019/02/12/relooking-at-consent-in-arbitration/.

[100] United Nations Convention on the Regulation and Enforcement of Foreign Arbitral Awards art. II (1), II (ii), V, June 10, 1958, 330 U.N.T.S. 243.

was made, the recognition and enforcement of the arbitral award may be refused.[101]

The Supreme Court in United States of America discussed the importance of consent in agreements in *Volt Information Sciences v Leland Stanford, Jr. University*,[102] and stated that "*[a]rbitration under the [Federal Arbitration Act] is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit*…" In the *Astro v. Lippo* dispute, *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v. Astro Nusantara International BV* appeal,[103] the Singapore Court of Appeal grappled with the question of whether an unsuccessful party to an international arbitration award rendered in Singapore (a domestic international award) can choose to wait and invoke a passive remedy only in response to enforcement proceedings at the seat.[104] The Court of Appeals stated that "*[a]n arbitral award binds the parties to the arbitration because the parties have consented to be bound by the consequences of agreeing to arbitrate their dispute. Their consent is evinced in the arbitration agreement*." The Supreme Court of India in the case of *Kerala State Electricity Board and Anr. vs. Kurien E. Kathilal and Anr.*[105] held that jurisdictional pre-condition for reference to arbitration is that the parties should seek a reference or submission to

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[101] UNCITRAL Model Law on International Commercial Arbitration, Art. 35, 36, June 21, 1985, 24 ILM 1302.
[102] Volt Information Sciences v Leland Stanford, Jr. University 489 U.S. 468 (1989).
[103] PT First Media TBK v. Astro Nusantara International BV, 226 SGCA 57 (2013).
[104] Ben Jolley, *Astro v. Lippo: Singapore Court of Appeal Confirms Passive Remedies to Enforcement Available for Domestic International Awards*, KLUWER ARBITRATION BLOG (November 29, 2013), *available at* http://arbitrationblog.kluwerarbitration.com /2013/11/29/astro-v-lippo-singapore-court-of-appeal-confirms-passive-remediestoenforcement-available-for-domestic-international-awards/?print=pdf.
[105] Kerala State Electricity Board. v. Kurien E. Kathilal, (2000) 6 SCC 293 (India).

arbitration. In the absence of an arbitration agreement, a court can refer parties to arbitration only with the written consent of the parties by way of a joint application; and oral consent given by the counsels for parties without a written memo of instruction does not fulfil the requirements under Section 89 of the Code of Civil Procedure, 1908.[106] When there was no arbitration agreement between the parties, without a joint memo or a joint application of the parties, the High court should not have referred the parties to arbitration.

While it is clear that the international treaties and judiciaries in various parts of the world do see consent of the parties in arbitration agreements as of paramount importance, however there has been increasing concern over seeing this consent as forced consent.[107] The Supreme Court of United States of America in 1889 defined an unconscionable contract as "*one that 'no man in his senses, not under delusion, would make, on the one hand, and which no fair and honest man would accept on the other*." That definition has changed over time because it does not address today's unconscionable contracts, where individuals and even companies have little choice but to accept what they would not, in their 'senses,' otherwise accept because they will not be able to conduct the business, get the loan or credit card or, especially in today's economy, the job, unless

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[106] Siddharth Ratho, Kshama Loya Modani & Vyapak Desai, *Referring parties to Arbitration? Oral consent between Counsels not enough, holds Supreme Court of India*, NISHITH DESAI ASSOCIATES (April 02, 2018), *available at* http://nishithdesai.com/information/news-storage/news-details/article/referring-parties-to-arbitration-oralconsentbetween-counsels-not-enough-holds-supreme-court-of-i.html.

[107] David S. Sherwyn, *Because it Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication*, BERKELEY JOURNAL OF EMPLOYMENT AND LABOR LAW, 24(1). 1-69 (2003).

they agree to it. Yet powerful corporations today freely draft contracts that no honest man would accept.[108]

These 'take it or leave it' mandatory arbitration agreements fit the classic hornbook definition of an unlawful contract of adhesion,[109] because employers offer them on a take-it-or-leave-it basis. It is interesting to note that Supreme Court of United States of America did not hold such agreements to be unlawful contracts of adhesion. In *Circuit City Stores, Inc. v. Adams*,[110] though employees working in the transportation industry were excluded from the application of contracts providing mandatory arbitration clauses, however validity and enforceability of such mandatory arbitration clauses under the Federal Arbitration Act was upheld.[111]

However, with the increasing knowledge amongst the workers about their rights, there have been instances of multinationals being forced to revamp their employment terms. Most recently, Google after facing protests from thousands of workers announced that it will no longer require its employees to sign forced arbitration agreements which at its heart target the rights of workers and prevent them from

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[108] Andrea Doneff, *Arbitration Clauses in Contracts of Adhesion Trap Sophisticated Parties Too*, J. DISP. RESOL. (2010) 246, 269, *available at* https://scholarship.law.missouri.edu/jdr/vol2010/iss2/2.

[109] Law Journal Editorial Board, *Mandatory Arbitration Clauses are Contracts of Adhesion*, NEW JERSEY LAW JOURNAL, (November 2018), *available at* https://www.law.com/njlawjournal/2018/11/02/mandatory-arbitration-clausesarecontracts-of-adhesion/.

[110] Circuit City Stores, Inc. v. Adams, 279 F.3d 889 (9th Cir. 2002).

[111] The case was remanded back to the Ninth Circuit which held that under the Californian Law, the mandatory arbitration agreement was not valid. Adams was therefore allowed to file a lawsuit in the Courts of California.

approaching court if they suffer injuries, harassment or other consequences arising out of working at a company. Company officials said that the new policy would go into effect on March 21, and it would apply to all of its workers around the globe. However, the new policy would not apply to claims that have already been settled by arbitration, according to an Axios report. Workers will also still have the option of going to arbitration if they wish to do so.[112] That corporations are powerful and their behaviour is sometimes detrimental to human rights and therefore it becomes imperative for the state to intervene and protect the rights of the victims.

VIII. LEGISLATIVE DEVELOPMENTS IN THE 115TH CONGRESS

Due to growing concerns over the ill effects of the mandatory arbitration agreement on the employees/workers, the following advancements have been made in the 115th Congress:

Arbitration Fairness Act, 2017: This bill prohibits a pre-dispute arbitration agreement from being valid or enforceable if it requires arbitration of an employment, consumer, antitrust, or civil rights dispute. The validity and enforceability of an agreement to arbitrate shall be determined by a court, under federal law, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement. This bill excludes arbitration

[112] Christopher Maynard, *Google to end forced arbitration agreements for employees*, CONSUMER AFFAIRS (February 2019), *available at* https://www.consumeraffairs.com/news/google-to-end-forced-arbitration-agreements-for-employees-022219.html.

provisions in a contract between an employer and a labour organization or between labour organizations, except that no such arbitration provision shall have the effect of waiving the right of an employee to seek judicial enforcement of a right arising under the U.S. Constitution, a state constitution, a federal or state statute, or related public policy.[113]

Restoring Statutory Rights and Interests of the States Act of 2017: This Bill has been introduced to restrict the use of pre-dispute arbitration agreements. This bill seeks to amend Section 2 of the Federal Arbitration Act to invalidate arbitration agreements between parties in certain commercial contracts or transactions if they require arbitration of a claim for damages or injunctive relief brought by an individual or a small business arising from the alleged violation of a federal or state statute, the U.S. Constitution, or a state constitution, unless the written agreement to arbitrate is entered into by both parties after the claim has arisen and pertains solely to an existing claim.[114] The Bill also seeks to amend the saving clause of the Federal Arbitration Act and proposes that the grounds upon which a contract with an arbitration agreement is revocable shall include federal or state statutes or court findings that prohibit an agreement to arbitrate if the agreement is unconscionable, invalid because there was no meeting of the minds, or otherwise unenforceable as a matter of contract law or public policy.[115] The Bill also proposes that a

[113] Arbitration Fairness Act of 2017, H.R. 1374, 115th Cong. § 3 (2017).
[114] Restoring Statutory Rights and Interests of the States Act of 2017, S. 550, 115th Cong. § 3 (2017) [*hereinafter* "Statutory Rights"].
[115] *Id.*

court, rather than an arbitrator, shall determine whether an arbitration agreement is enforceable.[116]

Safety Over Arbitration Act of 2017: This bill would permit arbitration as a means to resolve a dispute when there are 'alleging facts relevant to a hazard to public health or safety' only if all parties consent to arbitration in writing after the dispute arises. In cases when arbitration is chosen, the arbitrator must provide a written explanation of the basis for any award or other outcome.[117]

Court Legal Access and Student Support (CLASS) Act of 2017: This Bill has been introduced to address the availability of arbitration in college enrolment disputes. If this bill becomes a law, provisions of the Federal Arbitration Act which promote the enforcement of arbitration agreements would not be applicable to the enrolment agreements between students and institutions of higher education.[118]

Since 2014, the Office of the UN High Commissioner for Human Rights (OHCHR) has also led a project entitled the Accountability and Remedy Project (ARP), which is aimed at supporting more effective implementation of the Third Pillar of the UNGPs.[119] It was launched with a view of contributing to a fairer and more effective system of domestic

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[116] Statutory Rights, *supra* note 114.
[117] Safety Over Arbitration Act of 2017, S. 542, 115th Cong. § 2 (2017).
[118] Court Legal Access and Student Support (CLASS) Act of 2017, S. 553, 115th Cong. § 2 (2017).
[119] OHCHR Accountability and Remedy Project, *supra* note 54.

law remedies in cases of business involvement in severe human rights abuses.[120]

IX. CONCLUSION

It is important for any country to promote its economy, foreign investment and employment for its citizens to have a well-established mechanism for dispute resolution. Due to the growing number of cases, it is also not possible for the courts to provide speedy decisions. Therefore, reliance on Arbitration, an alternative form of dispute resolution is imperative. It is imminent that the judiciary in United States of America has upheld the validity of mandatory arbitration agreements under the Federal Arbitration Act across varied nature of disputes. Therefore, importance of arbitration cannot be ignored. However, when a very one-sided approach is taken by the judiciary regarding upholding the validity of the mandatory arbitration agreements, the very purpose of preferring an alternative mode of dispute resolution is defeated. At the very heart of an arbitration proceeding, lies the will of the parties to let a neutral third party decide about their dispute. Arbitration is preferred over litigation since litigation is not only time consuming but also costly and hampers the economic status of all the parties involved. In light of the same, I feel that the bills that have been introduced in the 115th Congress to restrict the usage of mandatory arbitration agreements is a natural extension in response to the judiciary's staunch one-sided view. Justice delivery and free consent of the parties is at the heart of all economic transactions. A

[120] OHCHR Accountability and Remedy Project, *supra* note 54.

judicial atmosphere that promotes arbitration might be good, but in light of the cases discussed, also has ill implications especially when workers' rights are concerned. Whether its arbitration or litigation, what is ultimately important is that justice is delivered, the rights of the weaker sections of the society are protected, they do not face adversities due to their status in the society and their collective rights are respected.

Therefore, the efforts to restrict the usage of mandatory arbitration agreements in my opinion is the correct way forward. Further ensuring that right at the genesis of the agreements, if parties have equal bargaining powers and are not coerced into agreeing to the companies' terms, the ill effects of mandatory arbitration agreements can be solved to a larger extent. It is also important to note that both arbitration and litigation share a complementary approach. Importance of both forms of dispute resolution cannot be undermined. However, it is important that care is taken by the legislature and the judiciary to ensure that there is not a univocal strategy to mandate only one form of dispute resolution. Mandating one style would ultimately lead to graver disputes which would lead to multiplicity of cases and hinder the crux of efficient dispute resolution.

Amlan Mishra, *The prejudiced need not apply: Challenging the discriminatory effects of private transactions in India*, 6(1) NLUJ Law Review 56 (2019)

THE PREJUDICED NEED NOT APPLY: CHALLENGING THE DISCRIMINATORY EFFECTS OF PRIVATE TRANSACTIONS IN INDIA

AMLAN MISHRA*

ABSTRACT

This paper seeks to question the philosophical and constitutional basis of the 'freedom to discriminate' of private parties under private laws of India. To that end, it situates this issue in the Rawls-Nozick debate of libertarian vs. egalitarian conceptions of property rights. It probes the stand of India's equality code in this debate and teases out its unique contribution to the Rawlsian idea of 'justice as fairness'. But the roadblocks in horizontal application of non-discrimination rights remain a pressing concern. Reliance is placed on contemporary theories of non-discrimination to solve this problem. Lastly, the possible concrete ways of ensuring non-discrimination in private law are discussed, and the best negotiated path is identified.

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TABLE OF CONTENTS

I. INTRODUCTION

There is a consensus among liberals that personal autonomy should be secured in liberal democracies. One of the critical ways of doing it is by engaging in transactions in the free market. However, given the historical social structure, disadvantages accrue to 'individuals' because of their membership in certain groups and markets are known to perpetuate this discrimination.[121] Jurists like John Rawls have sought to alleviate this *'liberty-diminishing'* aspect of free-market based transactions, but have stopped short of entering the *'private realm'*. Other egalitarian philosophers extend Rawls to the private realm and argue that personal autonomy can only be upheld by this interference.

This paper situates this debate in the issue of housing discrimination in India. The Indian context is particularly rife with caste, religious and gender based structural inequalities and therefore, a great place for theorising about these issues. The constitutional jurisprudence of equality and discrimination is adequately evolved to see how these issues play out.

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[121] Vikram Pathania and Saugato Datta, *For whom does the phone (not) ring? Discrimination in the rental housing market in Delhi, India*, UNU-WIDER WORKING PAPER (2016), *available at* https://www.isid.ac.in/~epu/acegd2015/papers/VikramPathania.pdf; *See*, United Nations, Press Statement by UN Special Rappoteur on the right to non-discrimination (April 2016), *available at* https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19861&LangID=E; *See also,* Rina Chandran, *No Muslims, No Single Women: Housing Bias turning cities into ghettos*', REUTERS (January 23, 2017), *available at* https://in.reuters.com/article/india-cities-ghettos/no-muslims-no-single-women-housing-bias-turning-indian-cities-into-ghettos-idINKBN157266.

In Part I, I go into some detail of the jurisprudential questions underlying property rights, as an extension of liberty. Nozick and Rawls and their differing approaches have been highlighted. Both, as I point out, agree on individual distinctiveness and need for personal autonomy (**the liberal consensus**). I rely on AT Kronman to extend Rawls' principles to private law and challenge the philosophical foundations of property rights. The inevitable role of the state's interference in this process is also highlighted. In Part II, I summarise India's equality jurisprudence to show how, like Rawls, it secures equality as an important facet of autonomy. Here, I also identify how this understanding permeates into private law and horizontal application of non-discrimination rights. Kronman's idea that status quo provides 'illegitimate advantage to certain groups in private transactions' proves a useful tool here to show how infringement of Article 15(2) violates freedom of contract. I assess the wrongness of the Supreme Court in *Zoroastrian Housing Society v. District Registrar* [hereinafter "**Zoroastrian Case**"],[122] a decision which allowed alienation of property made to the exclusion of other religious groups. The Zoroastrian Case is particularly problematic because till today it serves as the precedent to justify housing discrimination in the courts of law. In Part III, I rely on Prof. Tarunabh Khaitan's work to show that the navigation of this public-private divide without infringing private liberties will need placing of anti-discrimination duty on some 'public' persons. Kronman's idea can be given concrete shape using Prof. Khaitan's work. In Part IV, I will tackle issues of addressing discrimination in private laws in India. I will also

[122] Zoroastrian Cooperative Housing Society v. District Registrar, (2005) 5 SCC 632 (India) [*hereinafter* "Zoroastrian Case"].

ascertain various ways of doing distributive justice over and above the tools available in the present Indian legal scenario.

II. PROPERTY LAW: CHANGING PHILOSOPHICAL UNDERSTANDING FROM LIBERTARIANISM TO EGALITARIANISM

In this part, I seek to provide a jurisprudential basis for non-discrimination in private transactions. This must mean a shift from the Nozickian conception of rights to the Rawlsian conception. More importantly, I will rely on the work of AT Kronman to show how Rawls' ideas can be extended, even to private law.

A. NOZICK

Robert Nozick in his book 'Anarchy, State and Utopia'[123] presents the strongest contemporary defence of property rights, which underlies much of our philosophy of property law. Nozick starts with the assumption that individuals own themselves and therefore, their produce, which is an outcome of their labour, is nothing but an extension of themselves.[124] For any transaction to happen consent becomes very important. Thus, property can be held if three principles are satisfied: justice in acquisition, justice in transfer and justice in rectification.[125] Principles of acquisition determine the circumstances in which someone can acquire property rights in formerly un-owned resources. Principles of transfer determine the way in which ownership of resources may be

[123] ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 120-232 (1974) [*hereinafter* "Nozick"].
[124] *Id.* at 173-182.
[125] *Id.* at 151.

transferred from one person to another. The principle of rectification provides that an unjust transaction can be corrected only if it falls foul of the aforementioned principles.

It is significant to note that much of modern-day property law begins from the idea of the distinctiveness of persons. Any infringement of property by the state, which violates the aforesaid principles, therefore violates the liberty of an individual. Notice that no comment is made about the 'consequence' of the perpetuation of these 'procedurally just' transfers on the larger community or on the disadvantaged sections of the society. In fact, if the state were to propose a scheme to distribute property or wealth it would be unjust. Property law, therefore, relies on 'historic entitlement to property' and 'procedural laws' (laws which lay down how acquisition and transfer should happen) to test the justness of any transaction.[126]

Among contract and private law scholars, this understanding dominates. There is a nearly universal agreement that private law has three legitimate functions: first, to specify which agreements are legally binding and which are not, second, to define the rights and finally, to indicate the consequences of an unexcused breach.[127] Thus, according to dominant contact law, changes in the existing property regime or correcting structural restrictions should not be done by restricting private law transactions.

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[126] Nozick, *supra* note 123 at 150 and 153.

[127] *E.g.*, Chapter I-III of the Indian Contracts Act, 1872 deal with legally binding agreements; Chapter IV-V explore relationships created by contracts and Chapter VI explores breach of contract.

B. RAWLSIAN OBJECTION

Nozick, as we saw, relies on 'self-ownership' and 'historical entitlement', to make the case for property rights, even against state interference. However, the basis for building this theory of property is his belief in the 'distinctiveness of persons', i.e., the idea that individuals own themselves and owe little to the collective. A partial attack to this comes from Rawls who while accepting 'liberty rights' delinks property rights from it. Rawls says that individuals are who they are as a result of a 'lottery of births' and we have done nothing to deserve the talents, wealth and the timing of our births.[128] If that is so then we have no 'moral right' over wealth or property we produce. Then a rational choice maker, who is unencumbered by his position in the society (veil of ignorance/original position), must choose two principles: fair equality and the difference principle.[129] Fair equality provides equal access to everyone who has equal talents in the society, i.e., it seeks to make the societal structure more accessible. The Difference Principle is re-distributive as it provides that inequality in society will only be tolerated if it 'benefits the least advantaged'. Least advantaged people are unable to form conceptions of good life for lack of access to primary goods. Their social goods include civil and political rights, liberties, income, wealth and the social basis for self-respect.[130] It may be noted that access to these social goods is restricted based on historical injustices and affect pursuits of life.

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[128] JOHN RAWLS, A THEORY OF JUSTICE 63-64 (1972) [*hereinafter* "Rawls"].
[129] *Id.* at 47.
[130] *Id.* at 78.

Rawls who is called an 'egalitarian liberal' is, therefore, trying to balance liberty with equality, by recognising the vast inequality in wealth and talents amongst individuals and groups (something which Nozick completely ignores). Rawls, like Nozick, wants people to develop their own personal conception of 'good life' but he realises that most people are just unable to exercise their liberties to pursue their goals. Thus, he seeks to redistribute wealth and improve access to better aid each person's pursuit of the good life. Minimum wage laws, unemployment allowance, taxation, etc., are the real ways of achieving the difference principle.[131] Affirmative action, free education and healthcare are ways of achieving 'fair equality' conditions.[132]

C. RAWLS CONCEDES TO THE PUBLIC-PRIVATE DIVIDE

Interestingly, even Rawls shies away from applying his principle to everyday private transactions. He provides that the state should redistribute wealth, but the application should only extend to the 'basic structure of the society' and not to individual transactions.[133] Scholars have speculated about why Rawls would do so. Simmonds argues that this is an acknowledgement on Rawls' part that the patterned theory of justice must respect the moral importance of market transactions.[134] That is to say, Rawls does this because he feels that any measure which would interfere in private transactions of the market necessarily violates 'liberty'.

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[131]Rawls, *supra* note 128, at 245-251.
[132] *Id.*
[133] JOHN RAWLS, POLITICAL LIBERALISM 257 (Expanded ed., 2005) [*hereinafter* "Rawls Liberalism"].
[134] NIGEL E. SIMMONDS, CENTRAL ISSUES IN JURISPRUDENCE: JUSTICE, LAW AND RIGHTS 32-62 (Indian Imprint, 2003) [*hereinafter* "Simmonds"].

It is only through markets that differing wants and preferences of people be co-ordinated and is, therefore, an important forum for preserving liberty.[135] So, the preservation of these liberty maximizing wants and needs warrants preservation of the market.[136] Free disposition of property is for many, a major constituent of their idea of the good life, and even Rawls' egalitarian theory of redistribution respects it.

It is not justified, therefore, to interfere in individual transactions to better redistribute wealth, because the end goal is not to have a society where everyone has 'equal wealth'. The end goal is the same as that of a libertarian: ensuring each person's freedom and ability to pursue the good life (I will call this '*the liberal consensus*'). Market based transfer of property which are 'procedurally and historically just' thus uphold that core idea of liberty (***the liberal consensus***). In fact, in his book 'Political Liberalism', Rawls seems to present a great defence of pluralism, i.e., allowing religious faiths to 'flourish in their own way' and develop their own conception of good.[137] A strict boundary between public discourse based on public reason, evidence, logic, etc., (the domain of the political)[138] and comprehensive views (religious views) which 'are different' have been drawn in Rawls' liberalism. The religiously diverse people consent to this thin 'political realm' of democratic liberalism because they consider it reasonable.[139] The constitutional values of liberalism should be such that

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135 Ronald Dworkin, *What Is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283, 283-84 (1981).
136 Simmonds, *supra* note 134 at 58.
137 Rawls Liberalism, *supra* note 133 at 435.
138 *Id.* at 217.
139 *Id.* at 439.

religious communities should be able to consent to it, in addition to their beliefs in religious precepts.[140] Most people will not consider an encroachment into religious views as tenable. Now, if the property holding mechanism of an affluent religious community (say Hinduism) is exclusionary to some members (say on caste lines), Rawlsian liberalism may, in fact, allow it. We see that Rawls is not prepared to tread into contentious issues of the private realm in order to effect 'equality' in the society. Sadly, it is exactly in these private transactions that the worst of discrimination still permeates.

Now, we must examine why Rawls stopped there. Can Rawls' 'concession' or 'acknowledgement' be challenged, while still being consistent with the 'liberal consensus'? **[Q1]** If yes, is Rawls' application of his principles only to 'basic structure of society' more liberty securing than application to private law transactions? **[Q2]**. We must turn to A.T Kronman for answers.

D. ANTHONY KRONMAN AND DISTRIBUTIVE JUSTICE IN PRIVATE LAW

In an influential article, Professor Anthony Townsend Kronman [hereinafter "**Kronman**"] provocatively argues that consistency forces libertarians to accept equality in private transactions.[141] Kronman in making his argument relies on two crucial premises of Rawls' theory. First, he agrees with the 'liberal consensus' of individuality/distinctiveness of

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[140] Rawls Liberalism, *supra* note 133, at 199-200.

[141] Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 472-97 (1980) [*hereinafter* "Kronman"].

persons and their freedom to pursue their conception of the good life. Secondly, he agrees with Rawls' 'difference principle', as a tool to offset the 'inability of several people' in the status quo to pursue their good life. He seeks to modify Rawls' 'difference principle' and apply it to private transactions by the 'doctrine of paretianism'.

Q1: Applying Rawlsian principles in private transactions does not violate the 'liberal consensus'

Liberals accept 'freedom to contract' as the central tenet of their principles of liberty in a private transaction. For this private transaction to be 'just', it should not be coerced. Coercion may take many forms like fraud, undue influence, huge imbalance in technical know-how between the parties, etc. Thus, illegitimate 'advantage-taking' by the dominant party (say seller who knows the defects of the land and a buyer who doesn't) is impermissible if it proves detrimental to the other person. Let us recall that Rawls' challenges the 'moral dessert' of advantages that are conferred on people by the 'lottery of births'. This makes natural and inherited advantages in the society contestable. Similarly, to justify this inequality of arbitrary advantage-taking between parties, something similar to the 'difference principle' must be introduced into private transactions.

Rawls uses the veil of ignorance to arrive at distributive principles which would justify the existing inequalities.[142] Similarly, Kronman argues that we will have to come to a conclusion about principles which would 'justify' the 'morally arbitrary advantages' available to parties in private

[142] Rawls, *supra* note 128 at 15-19.

transactions.[143] Given the liberal consensus on personal autonomy, 'utilitarianism', i.e., the principle of maximising overall happiness, at the cost of individual freedom cannot be justified.[144] Which principle would then offset inequality yet preserve freedom in private transactions? The principle which Kronman proposes is 'paretianism'. It states that 'advantage taking' in private transaction will only be tolerated if those who are disadvantaged at present will benefit in the long run.[145] But if every transaction was to be subjectively interfered with by the state or the courts to see if both parties are on an equal pedestal, a huge inconsistency would be created.[146] Not to mention it would do violence to precedents and established law.[147] Therefore, Kronman's version of interference allows a particular form of 'advantage-taking' when doing so will increase the long-run welfare of most people who are in a disadvantaged position [Group Paretianism (hereinafter "**GP**")].[148] This way each transaction will not have to be interfered with. A broad baseline principle of distribution may be laid down which would regulate most transactions. Kronman argues, in case of private transactions, the baseline condition is that the advantage must either be shared with everyone or everyone must be uniformly denied the use of the advantage [hereinafter "**baseline condition**"].[149] That is to say the possessor of an advantage may only use it if those not

[143] Kronman, *supra* note 141.
[144] *Id.* at 485-86.
[145] *Id.* at 486.
[146] *Id.* at 497.
[147] *Id.* at 489.
[148] *Id.*
[149] *Id.* at 491-92.

possessing it are made better off by its use.[150] This paretian prohibition applies to all talents and assets, including strength, intelligence, wealth, and information in which no one, not even the person who possesses the advantage has any prior claim. An example which Kronman gives to drive home the point is this: if 'A' comes up with an intellectual property right by using his social capital and the access to resources (which he does not morally deserve), he can make use of it only if he agrees to share it with the rest of the world and benefit them.[151] Thus, he can retain possession of it as long as 'disadvantaged people benefit in the long run'. Notice that this example translates in the Indian context to the weakening of copyright laws for access to literature in public universities[152] and thus, embodies Kronman's paretianism. Education is an essential social good whose access is restricted by excessive pricing which is a consequence of copyright. This is a form of unfair advantage to the privileged. Thus, copyright laws will remain as long as the exception allows for access to education.

This means that all property or skills which are the subject of private transactions belong actually to a common pool of resources.[153] The only way in which the present custodians of this property or skill will be allowed to retain them is through the aforesaid principle. Another crucial observation is the role of the state under Kronman's idea: it must, therefore, interfere in favour of the disadvantaged sections, even in the

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[150] Kronman, *supra* note 141 at 487.
[151] *Id.* at 492.
[152] University of Oxford v. Rameshwari Photocopy Services, 2016 (68) PTC 386 (Del) (India).
[153] Kronman, *supra* note 141.

private sphere so that they do not suffer disadvantage.[154] The doctrine of paretianism is a test of when the state is to interfere in private transactions, to ensure that 'illegitimate advantage' does not vitiate private transactions and make the disadvantaged sections worse off in the long run. Thus, we see that this line of argumentation opens up the scope of the extension of Rawlsian principles into private transactions.[155]

Q2: Applying Rawlsian Principles to property rights does not curtail more liberty than its application to the basic structure of society

The second argument of Kronman is perhaps less convincing. He makes the case that the scheme he mentions is not more liberty-curtailing than Rawls' application of fair equality to the basic structure of the society. He begins by acknowledging that Rawls stopped short of intervening in private law because he thought it would infringe liberty. Kronman tries to show that even taxation (which Rawls proposed) has the capacity to substantially limit my pursuit of happiness in materialist ways and equally discriminate.[156] Secondly, Kronman counters the objection that extending Rawlsian idea in private law will continuously infringe liberty. He does this by saying that these principles are to be made applicable to 'contract rules' and not individual cases, and therefore, will not require constant interference. In any case, continuous infringement,

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[154] Matthew H. Kramer & Nigel E. Simmonds, *Getting the Rabbit out of the Hat: A Critique of Anthony Kronman's Theory of Contract*, 55 CAMBRIDGE LJ. 358, 365-66 (1996) [*hereinafter* "Kramer"].
[155] Kronman, *supra* note 141.
[156] *Id.* at 498-501.

he argues equally happens in sales tax where tax is levied on each transaction.[157]

In summary, beginning with the premise that a libertarian endorses voluntary exchanges and prohibits involuntary ones, Kronman arrives at the conclusion that a libertarian must use paretian principles to restrain the use of talent and wealth in exchanges and must favour using contract rules to redistribute wealth from rich to poor.

E. SOME CONCERNS ABOUT KRONMAN'S THEORY: INCONSISTENCY AND INANITIES

Scholars have expressed concern about this theory and its excessive sacrifice of liberty in the dissemination of private wealth. Kramer and Simmonds call it a 'communitarian' theory which claims to be 'egalitarian' to highlight such a Faustian bargain.[158] The dubbing of all advantages of wealth, etc. as part of a 'common pool of resources'[159] which need to be regulated by the paretian principle, perhaps highlight some truth in this criticism. This criticism does not sufficiently appreciate contexts like India, where private transactions are the worst sites for perpetuation of discrimination. Ambedkar's notion of 'fraternity' was fashioned exactly to collapse such virulent personal discrimination which limits life chances of the weaker sections.[160] Appreciation of these contexts, in my opinion, calls for redefining equality as a crucial facet of

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[157] Kronman, *supra* note 141 at 501-05.
[158] Kramer, *supra* note 154.
[159] Kronman, *supra* note 141.
[160] Aravind Narain, *What Would An Ambedkarite Jurisprudence Look Like?*, 29 NLSIR 1, 17 (2017).

freedom and not in opposition to it, just as Ambedkar did. He opined that *"Liberty cannot be divorced from equality; equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity."*[161]

Other concerns presented by scholars point out the unworkability of such a baseline condition and the inanities it might lead to if it were applied by judges or applied for making public policy.[162] Some of these concerns include difficult questions: deciding what exactly qualifies as 'advantage-taking' and which group is to be considered in judging, or calculating whether 'long term benefit' accrues to them. While these concerns are important for academic discourse, they don't take away from the thrust of Kronman's argument, they merely speculate on the difficulty of doing distributive justice in private law. Above all, Kronman's argument provides us with a lens not just to change contract law and make it more equitable, but also to understand the philosophical foundation of existing regimes of distributive justice. The point of this article is not so much to provide a framework for anti-discrimination laws. It is to tease out from a Kronmanian lens, the Indian Constitution's perspective on distributive justice and to critique the inadequacy of Indian laws. Therefore, this nuanced criticism of Kronman's theory need not detain us.

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[161] Parliament of India, Constituent Assembly Debates (Proceedings), vol. XI (25 Nov. 1949), *available at* http:// parliamentofindia.nic.in/ls/debates/vol11p11.htm.

[162] William K.S. Wang, *Reflections on Contract Law and Distributive Justice: A Reply to Kronman*, 34 HASTINGS L.J. 513, 522-26 (1982).

III. INDIAN COURTS' APPROACH TOWARDS THE EQUALITY AND PUBLIC-PRIVATE DIVIDE

In this Part, I seek to analyse how the Indian Constitution's equality code, reconciles individualism, i.e., the 'liberal consensus' with equality and non-discrimination. In so doing, I will try to show how the horizontal application of the equality code to individuals over and above the state, reflects Kronman's doctrine of paretianism. I will pick up one concrete case of property law 'the Zoroastrian case' which has been criticized for not reflecting this transformative vision. Other precedents, however, will show that the Zoroastrian case is wrongly decided. The collapsing of the public-private divide in the Indian private laws will be shown to reflect Kronman's idea of paretianism.

A. THE INDIAN EQUALITY CODE: RECONCILING LIBERAL AND EGALITARIAN IDEAS

i. The equality code

Liberals, unlike radical egalitarians, agree on the 'liberal consensus' that everyone should be allowed to form their own conception of the good life. Underlying this idea is the respect for personal autonomy of each person to develop their own conceptions. Recollect that Rawls told us that in order to have that conception we need to possess certain 'social primary goods' which the most the 'disadvantaged sections' lack. Social goods include civil and political rights, liberties, income and wealth and

the social basis for self-respect.[163] Our ability to form a conception of the good life stands heavily impaired if access to these goods is curtailed. It is exactly that which Rawls sought to mitigate.[164]

The Indian Constitution similarly provides the right to personal liberty (Article 21), and also the right to equality and the right against discrimination (Article 14 and Article 15 respectively). Over the years, the Supreme Court has acknowledged that equality cannot be cabined into Article 14, it has to be read with Article 21.[165] This means that the discriminatory government actions necessarily hinder our ability to exercise our personal autonomy. A reading of the Constituent Assembly debates shows us that much like the US fourteenth amendment, our due process clause (embodied in Article 21) and equal protection clause (Article 14) existed as one unified article during the drafting phase.[166] Several judgments have acknowledged this interplay between equality and liberty in reading human rights not as silos, but as overlapping on each

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163 Rawls, *supra* note 128 at 92.

164 *Id.*

165 Maneka Gandhi v. Union of India, (1978) 1 SCC 248 (India) [P.N. Bhagwati, J., concurring; noting that "*It is indeed the pillar on which rests securely the foundation of our democratic republic. And therefore, it must not be subject to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all-embracing scope and meaning, for, to do so would be to violate its activistic magnitude.... Equality is a dynamic concept with many aspects and dimensions, and it cannot be imprisoned within traditional and doctrinaire limits.*"]

166 B. SHIVA RAO, INDIAN INST. OF PUB. ADMIN., THE FRAMING OF INDIA'S CONSTITUTION: SELECT DOCUMENTS 118 (2015); *See*, Gautam Bhatia, *Equal moral membership: Naz Foundation and the refashioning of equality under a transformative constitution*, 1 INDIAN L. REV. (2017) (noting that Bhatia argues that we must understand Equality in the Indian Constitution not in the sense of formal equality but as a principle which allows each person irrespective of his ascribed status to realise his goals) [*hereinafter* "Bhatia"].

other.[167] This suggests that the Constitution recognises that inequality in access to basic goods from the state necessarily flows into the idea of not letting a person realise his full personal liberty to define his life.

Scholars have read *Naz Foundation* v. *Union of India* [hereinafter "**Naz Foundation**"] as the sanest and transformative explanation of the equality code.[168] The discrimination based on the five grounds of Article 15(1), i.e., of religion, race, caste, sex or place of birth was noted to be infringement on 'personal autonomy'. Thus, a law like Section 377 of the Indian Penal Code, 1860 which did not explicitly name the LGBT community but 'indirectly' discriminated against them fell afoul of the equality code because it violated autonomy to pursue 'conception of good life' by the following reasoning:

> "*The grounds that are not specified in Article 15 but are analogous to those specified therein will be those which have the potential to impair the personal autonomy of an individual. As held in Anuj Garg, if a law discriminates on any of the prohibited grounds, it needs to be tested not merely against "reasonableness" under Article 14 but be subject to "strict scrutiny"... Section 377 IPC in its application to sexual acts of consenting adults in privacy discriminates a section of people solely on the ground of their sexual orientation which is analogous to prohibited ground of sex.*"[169]

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[167] Maneka Gandhi v. Union of India, (1978) 1 SCC 248, 278 (India).
[168] Bhatia, *supra* note 166, at 37.
[169] Naz Foundation v. NCT of Delhi, 160 DLT 277 (2009) ¶ 112-113 (High Court of Delhi) (India); *see*, Tarunabh Khaitan, *Reading Swaraj into Article 15: A New Deal for the*

Notice that inequality according to Naz Foundation is wrong because it curbs personal autonomy. Citing the Planned Parenthood case,[170] the case explained the necessity of personal autonomy:

> *"These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."*

Thus, the reading together of liberty as equality and equality as liberty likens the Indian regime of distributive justice to the key tenets of Rawls' and Kronman's theories.

ii. Horizontal application of rights: An equality code which created a civic duty

Article 15(2) in India extends the 'liberal consensus' to private transactions. Article 15(2) provides that no disability shall accrue to any person in their access to shops and other public places based on the aforementioned five grounds. The word 'shops' read in light of the Constituent Assembly Debates can be read liberally and interpreted to include private transactions of housing and services, i.e., items which have a resemblance to Rawlsian 'social primary goods' and are open to the

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Minorities, 2 NUJS L. REV. 419, 485 (2009) [noting that Khaitan shows how at the core of these 5 protected attributes is the idea that they are sites for curtailing individuals 'swaraj', i.e., personal autonomy].

[170] Planned Parenthood v. Casey, 505 U.S. 833 851 (1992).

public.[171] Article 15(5) provides that seats can be reserved for weaker sections even in private colleges with the goal of doing social justice. Notice that in making private institutions sites of distributive justice, this article collapses the public-private divide.

In *IMA* v. *Union of India,*[172] the Supreme Court relying on Ambedkar's statement in the Constituent Assembly extended Article 15(2): 'non-discrimination in access to public places and shops' to include all service providers, including providers of higher education in schools. In doing so, the Court took notice of the historical disadvantage several disadvantaged groups faced in the country for centuries, which marred their access to basic economic transactions and thus, limited access to basic goods.[173] In the case of *Pramati Educational Trust* v. *Union of India,*[174] there was a clash of rights between freedom of occupation vis-a-vis policy of reservation in private universities and the right to education. The petitioners were challenging the mandatory reservation in private colleges and mandatory reservation of seats in schools under RTE Act, 2005 as violative of their freedom of occupation as universities/schools. The Court reasoned that the freedom of occupation of private parties must yield to policies made to further visions of social justice given in the

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[171] Gautam Bhatia, *Exclusionary Covenants and the Constitution- IV: Article 15(2), IMA v. Union of India, and the Constitutional Case against Racially/Religiously Restrictive Covenants*, INDIAN CONST. L. & PHIL. BLOG (Jan. 14, 2014), *available at* https://indconlawphil.wordpress.com/2014/01/14/exclusionary-covenants-and-the-constitution-iv-article152-ima-v-uoi-and-the-constitutional-case-againstraciallyreligiously-restrictive-covenants/ [*hereinafter* "Bhatia blog"].

[172] Indian Medical Assn. v. Union of India, (2011) 7 SCC 179, 259 (India).

[173] *Id.* at 276; *see*, Bhatia blog, *supra* note 171.

[174] Pramati Educational & Cultural Trust v. Union of India, (2014) 8 SCC 1 (India).

Constitution.[175] Thus, we see that in matters of 'education', which is an essential social good, the Court read the Constitution as doing social justice, even at the expense of curtailing private freedoms of universities/schools. In *NALSA* v. *Union of India* [hereinafter "**NALSA**"],[176] the Court has drawn a more direct link between 'historic and systemic disadvantages' in access to privately owned places described in Article 15(2) and the State's duty to bring down its power to stop it. Holding that discrimination has continued against the transgender community, despite the mandate of Article 15(2), the Court said that this created a duty on the State to give them reservations and affirmative action.[177] Affirmative Action in India has been understood as a policy decision and not a matter of right. But this case recognizes that in an event of State failure to stop discrimination in civil society a 'right' to affirmative action arises. Thus, there is no public-private divide in India's social justice jurisprudence. The State has an active role to regulate discrimination everywhere.

We see that Kronman's idea of mitigating inequality in private transactions is reflected in the Indian court's reading of Article 15 in recognising that even the private sphere is a legitimate place for the state to do distributive justice. Phrasing this as a state's 'constitutional duty' and a 'constitutional promise' suggests that in the absence of this, the present civil society and its arbitrary distribution of wealth won't be justified. We

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[175] *Id.* at 51.
[176] National Legal Services Authority v. Union of India, (2014) 5 SCC 438, 489 (India).
[177] TARUNABH KHAITAN, A THEORY OF DISCRIMINATION LAW 215 (2015) [*hereinafter* "Khaitan"].

have seen in Part I(d) that liberals who think undue advantage-taking is against freedom of contract, will be forced to see much of the present benefits of the societal structure as 'illegitimate advantage'. Owners can remain custodians of property and transfer it only if they adhere to the principle of paretianism. Read this way, Article 15(2) and Article 17 seek to do distributive justice while still preserving the 'liberal consensus'.

We must now examine to what extent courts have adopted a similar reasoning in applying Rawls' egalitarianism to private law.

B. CASES FROM PROPERTY, TORTS AND OTHER PRIVATE LAWS

In *Bhau Ram* v. *Baijnath Singh*[178] [hereinafter "**Bhau Ram**"], the question before the Court was whether the right to pre-emption of a property can be provided on the ground of *inter alia* vicinage. The Court categorically held that given the existence of provisions to the contrary in the Constitution, it won't be permissible:

> *"But the Constitution now prohibits discrimination against any citizen on grounds only of religion, race, caste, sex and place of birth or any of them under Art. 15...the law of pre-emption based on vicinage was really meant to prevent strangers i.e. people belonging to different religion, race or caste, from acquiring property. Such division of society now into groups and exclusion of strangers from any locality cannot be considered*

[178] Bhau Ram v. Baij Nath Singh, AIR 1962 SC 1476 (India).

> *reasonable, and the main reason therefore which sustained the law of pre-emption based on vicinage in previous times can have no force now…"*[179]

Thus, the Court has in the past, read down a law allowing the transfer of property to members of the same caste and religion. However, we must notice that these laws had explicitly legitimised vicinage, thereby clearly making it a clear case of 'state-sponsored' discrimination, which could not pass muster. Under the next sub-heading we will see that when such an 'exclusion' is not explicitly legitimised by the statute but remains a probability under the ostensibly neutral wordings of the statute, the court has refused to read it down.

C. ZOROASTRIAN CASE AND THE PUBLIC-PRIVATE DIVIDE

In the Bhau Ram case, we saw that laws which explicitly allow discrimination will not pass muster. But what about laws, which are not per se discriminatory but under whose ambit discriminatory covenants can be enforced. It is here that the 2005 decision in the Zoroastrian case suggests that there are wholly limits to the impact of fundamental rights in this area of private law. In doing so it has deviated from the aforementioned cases. In this case, involving a private litigation concerning the buying and selling of land subject to a restrictive covenant, the Court upheld the enforceability of the Zoroastrian Cooperative Housing Society's by-law preventing the sale of the respondent's land to a non-member of the Parsi religion. The Court rejected the claim that the Gujarat Cooperative Societies Act 1961 and, in particular Section 4 which

[179] *Id.* at 7.

provided that a cooperative society shall not be registered if, in the opinion of the Registrar, its working is likely to be in contravention of 'public policy', must be interpreted in light of the constitutional values of equality contained in Article 14 and non-discrimination on the ground of religion contained in Article 15. Thus, we see that the Court steered away from interpreting into the Section a constitutional safeguard of non-discrimination:

> *"So long as there is no legislative intervention of that nature, it is not open to the court to coin a theory that a particular by-law is not desirable and would be opposed to public policy as indicated by the Constitution. The Constitution no doubt provides that in any State action there shall be no discrimination based either on religion or sex. But Part III of the Constitution has not interfered with the right of a citizen to enter into a contract for his own benefit and at the same time incurring a certain liability arising out of the contract.*[180]
>
> *It is true that our Constitution has set goals for ourselves and one such goal is doing away with discrimination based on religion or sex. But that goal has to be achieved by legislative action and not by the court coining a theory that whatever is not consistent with the scheme or a provision of the Constitution, be it under Part III or Part IV thereof, could be declared to be opposed to public policy by the Court."*[181]

[180] Zoroastrian Case*, supra* note 122.
[181] *Id.* at 661-62.

Here we see that the Court shies away from applying the Constitution to the scheme of the Act. It is submitted that this is a clear violation of the precedent in Bhau Ram. It appears that courts have made a distinction between direct discrimination apparent on the face of the statute, like in the cases of Bhau Ram (discrimination legitimised by private law) and discrimination which the legislature did not explicitly provide against, such that a discriminatory private covenant can be made inside the ambit of the statute (discrimination tolerated by private law). I will try to take down this distinction below.

D. JUSTICE AS FAIRNESS: A CRITIQUE OF THE ZOROASTRIAN CASE

The Zoroastrian case, as has been highlighted elsewhere, is defensible under Rawls' theory.[182] This is because Rawls does not consider the private realm a good place to do distributive justice. In fact, his thin theory of good allows associations and religious beliefs to coexist, despite being antithetical to the values of a liberal state. Notice that Rawlsian liberalism would not support *discrimination legitimised by private law*. A concern for individual rights under the first Rawlsian principle of liberty would lead him to this conclusion. But he would be 'neutral' towards individual or group 'conceptions of good' which may be discriminatory, so long as the state does not legitimise and impose this conception of

[182] Gautam Bhatia, *Exclusionary Covenants and the Constitution – III: Zoroastrian Cooperative and Political Liberalism,* INDIAN CONST. L. & PHIL. BLOG (Jan. 13, 2014), *available at* https://indconlawphil.wordpress.com/2014/01/13/exclusionary-covenants-and-the-constitution-iii-zoroastrian-cooperative-and-political-liberalism/ [*hereinafter* "Bhatia covenants"].

good. In this Part, I shall show how the Indian Constitution and the Indian court's jurisprudence does not support Rawlsian plural liberalism. In fact, they go a step ahead and seeks to do distributive justice by going beyond the limits which Rawls sets for his theory and by adopting perhaps a Kronmanian version of Rawls' theory. Even *discrimination tolerated by private law,* will not pass muster under the Constitution.

i. Discriminating by enforcing the covenant

While falling foul of the constitutional safeguard, the Court in the Zoroastrian case seems to have taken the view that a contract law between private parties is not amenable to the application of a constitutional mandate. Even if it be conceded that courts are not 'State' for the purposes of Article 12, the statutory authority instructed to enforce the contract is definitely a State. Therefore, can it be said that even the state by bringing its power to enforce a discriminatory covenant is itself indulging in discrimination? The case of *Shelly* v. *Kraemer*[183] in the US has taken a similar line of reasoning. Arguing that enforcement *by the State* would violate the fourteenth amendment, it was noted that:

> *"These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or colour, the*

[183] Shelley v. Kramer, 334 U.S. 1 (1948).

enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell."

That meant that the racially biased housing contract could continue to exist; only the state would refuse to enforce a racially restrictive covenant. Notice that this is contrary to the Indian state's approach to distributive justice as we saw in Part II (a). Under the Indian constitution, the rights apply horizontally against individuals and what is more, the State has an active responsibility to alleviate discriminatory practices. Whereas in *Shelly* v. *Kraemer*, the State remains a neutral observer, merely refusing to do anything which would perpetuate discrimination, but does not affirmatively seek to help the disadvantaged. The difference between the Indian and the US Constitution in this regard is clear. The US Fourteenth Amendment provides for 'equality before law and equal protection of law' by the State and does not consider the private realm a good place to do distributive justice. A slew of cases starting from Civil Rights cases[184] has held that private discrimination is not restricted by the US Constitution. But even the slightest State aid (even if to enforce a contract) to discriminatory practices is unconstitutional.[185]

Rawls would agree with the American standpoint and apply distributive principles only to the basic structure, i.e., the public law and the Constitution. Therefore, as *Shelly v. Kramer* shows us, the Zoroastrian

[184] *In re* Civil Rights Cases, 109 U.S. 3 (1883) [note that a group of five cases in which the Supreme Court of the United States held that the Thirteenth and Fourteenth Amendments did not empower Congress to outlaw racial discrimination by private individuals].

[185] Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); *Griffin v. Maryland*, 378 U.S. 130 (1964).

case is not good law even by Rawlsian standards. Next, we shall see how application of Kronmanian standards shows the wrongness of the Zoroastrian case.

ii. Can associations and religions discriminate?

Another argument which found favour with the Court in the Zoroastrian case was the right to religion and association of members of the community to restrict membership in their fold.[186] To secure these rights, the Court held that the bye-law of exclusion should be allowed to stand.[187] Have seen closely, it appears to be creating an island of religious and associational rights, where conformity to the 'non-discrimination' clause is not necessary. Recall that Rawls had said that the application of the three principles should apply only to the basic structure of the society. Thus, Rawls allows for a penumbra inside the modern state where these principles do not apply. This is in consonance with his idea of 'political liberalism' and 'pluralism'.[188] A strict boundary between public discourse based on public reason, evidence, logic, etc. (the domain of the political) [189] and comprehensive views (religious views) which 'though not unreasonable are different' has been drawn in Rawls' liberalism. Religiously diverse people consent to this thin 'political realm' because they consider it reasonable. Most people will not consider encroachment into religious views as tenable. Thus, an idea of pluralism emerges which allows diverse groups and their belief systems to coexist. We can see that

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[186] Zoroastrian Case, *supra* note 122 at 9.
[187] Zoroastrian Case, *supra* note 122 at 10.
[188] Bhatia covenants, *supra* note 182.
[189] Rawls Liberalism, *supra* note 133 at 217.

Rawls' belief in the liberal consensus leads him to this idea of pluralism of allowing all conceptions of goods life to exist alongside thin 'thin theory of good', i.e., distributive justice.

This means that a politically liberal state which protects the 'liberal consensus' should not infringe the right of minorities or cultural groups to define their good life for themselves. For Parsis, therefore, living together as a cultural group should not be interfered with by the state. But can we rely on AT Kronman and the 'freedom of contract' to question this form of liberalism? We have seen in Part I that Kronman does this by showing how 'illegitimate-advantage' accrues to people based on their position in the society. The threshold condition of non-discrimination will have to be met. The Indian Constitution similarly is a transformative document which does not merely provide political rights but seeks to annihilate caste and change those social practices which limit access to political and legal equality.[190] On application of this principle through Articles 15(2) and 17, which as we saw in Part II(a) have been read as 'anti-exclusion' principles, associations and religious societies cannot discriminate on the basis of prohibited grounds.

iii. Public policy: backdoor entry of the Constitutional mandate

Under Section 23 of the Indian Contract Act, violation of 'public policy' makes the contract illegal. However, the Court ignored its obligation in the Zoroastrian case by saying that public policy has to be

[190] GAUTAM BHATIA, THE TRANSFORMATIVE CONSTITUTION 114-141 (2019).

seen from within the four corners of the Act.[191] Such a characterization of 'public policy' by courts is again reflective of Rawlsian liberalism, where 'distributive justice' remains confined to the basic structure of the constitution and does not leak into private law. This becomes problematic because it stops the courts from taking into account basic constitutional morality while examining contracts. In India, as in Kronman's theory, the 'constitutional morality' of distributive justice permeates the public-private divide. In *DTC* v. *DTC Mazdoor*,[192] the Court has explicitly made constitutional principles applicable through the doctrine of public policy. The court reasoned that the Rule of law must govern parties under a contract and arbitrary bargains which violate Article 14 could not be sustained.[193]

The observation of the Court in the Zoroastrian case that the constitution does not form part of 'public policy' stands contrary to the established line of cases[194] which led to *DTC* v. *DTC Mazdoor*.

IV. RETHINKING PROPERTY LAW IN NAVIGATING THE PUBLIC-PRIVATE DIVIDE

Over the previous part of this paper, we have discussed 'advantage-taking' by morally arbitrary factors, especially those which determine how we exercise our personal autonomy (caste, gender,

[191] Zoroastrian Case, *supra* note 122 at 13.
[192] Delhi Transport Corporation v. Delhi Transport Corporation Mazdoor Congress, 1991 Supp (1) SCC 600, 705-706 (India).
[193] *Id.*
[194] Central Inland Water Transport Corporation Ltd. v. Brojo Nath Ganguly, (1986) 3 SCR 156 (India); O.P. Bhandari v. Indian Tourism Development Corporation Ltd., (1986) 4 SCC 337 (India); N.C. Dalwadi v. State of Gujarat, (1987) 3 SCC 611 (India).

position etc.). Kronman says that this is not justified. We have seen the Indian equality code, and how in imposing a duty on the civil society to not discriminate and the state to ensure non-discrimination, it asks the state to interfere into private transactions with the end goal to make the system 'fair'. The threshold condition of Kronman's 'paretianism' and the Indian equality code have a stark resemblance. But to concretise this theory and secure its praxis we must see: How the state must interfere? Is there precedent to think about a particular form of interference?

A. WHO BEARS THE DUTY TO NOT DISCRIMINATE?

How then do we identify, the players who exercise this 'illegitimate-advantage' in private transactions, so as to impose a non-discrimination duty on them? We do this by seeing how their position gives them more power to influence the transaction. It is important to keep in mind that the transactions often time like housing transactions, are about access to basic goods, and private transactions can exclude access to these basic goods. To ensure that the disadvantaged sections are happier in the long run (the equivalent of Rawls' difference principle in private law) non-discrimination duty must be imposed on those who control access to these basic goods.

Tarunabh Khaitan in his book the Theory of Discrimination[195] has discussed on whom an anti-discrimination duty should be imposed. He identifies similar goods whose access is threatened by discrimination: (a) a set of goods which will adequately satisfy one's biological needs; (b)

[195] Khaitan, *supra* note 177 at 115.

negative freedom, i.e., freedom from unjustified interference by others in one's person, projects, possessions, relationships, and affairs; (c) an adequate range of valuable opportunities to choose from; and (d) an appropriate level of self-respect.[196] Two factors should be taken into account while deciding who should bear the anti-discrimination duty: the publicness of the individual and the capacity of this individual to effect access to public goods.[197] Khaitan keeps the 'liberal consensus' in mind so as to make the least restrictive imposition of this duty. Therefore, 'publicness of a transaction' is an important determinant because in liberal societies the state should not normally infringe on a person's liberty.[198] At the same time, there is an immense check on the liberty of the state. This is because the state has immense power which should not be exercised arbitrarily.[199] Whereas the coercive power an intimate friend may exercise is miniscule. Therefore, private persons have negative liberty against state control of their actions, however, discriminatory.[200] These are two extremes of a private individual and the state, with most private agencies falling somewhere on the spectrum.[201] Some private players yield almost as much power as the state and therefore, fall on a spectrum closer to the state.[202] It is these players that must be checked. That is to say, if you refuse to invite lower caste friends to a party, that is not a subject that discrimination law should tackle, but if the same party is thrown by an

[196] Khaitan, *supra* note 177 at 95.
[197] *Id.* at 195.
[198] *Id.* at 201.
[199] *Id.* at 201.
[200] *Id.* at 203.
[201] *Id.* at 203.
[202] *Id.* at 213.

employer who doesn't invite lower caste colleagues then it becomes a subject of discrimination law.[203] The employer by virtue of his power has a responsibility to act fairly. Secondly, some positions like employers, landlords and service-providers affect our access to basic goods.[204] Employers determine our 'income and wealth', housing and access to other such resources which form the societal basis for the 'self-respect'. Thus, a duty is imposed on 'public gatekeepers of these basic goods'.[205] An examination of Article 15(2) as explained by *IMA v. Union of India* (See Part II(a)), has a similarly philosophical import and seeks to control transactions where access to these goods (education in that case) is under threat by a person acting in his public capacity.

V. CONCLUSION AND WAY FORWARD

A. THE ILLS OF CODIFICATION OF PRIVATE LAW

In India, caste and religion-based discrimination has a chequered history. Indicators suggest that caste and religion remain strong indicators of backwardness and exclusion from institution.[206] Most Indian laws on private transactions are colonial statutes and now perhaps it is time to disentangle Indian private law from the codificatory constraints of such Acts and allow courts to explore the diversity of ethical and constitutional

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[203] Jack & Mae Nathanson Centre on Transnational Human Rights, Crime and Security, *Tarunabh Khaitan on "The Public-Private Divide in Discrimination Law"*, YOUTUBE (Jan. 12, 2016), *available at* https://www.youtube.com/watch?v=tv6sCVCA8SY.
[204] Khaitan, *supra* note 177 at 209.
[205] Khaitan, *supra* note 177 at 209.
[206] All India Survey on Higher Education, Ministry of Human Resource Development (2018), *available at* https://mhrd.gov.in/sites/upload_files/mhrd/files/statistics-new/AISHE2015-16.pdf.

values and normative commitments that it may be capable of producing in true common law fashion.[207] I have tried to show that the conception of private law in India has stuck to the 'libertarian property owning tradition' without acknowledging the transformative vision of the Constitution. The codification of the Acts seems to be one reason why the courts are unwilling to go beyond the text or read the text in light of constitutional values. Courts, as we saw in Zoroastrian case, have been reluctant to upset the settled expectations of a contract by taking into account constitutional values.

B. THREE APPROACHES TO HORIZONTAL RIGHT AGAINST DISCRIMINATION

In India, three approaches to horizontal application of discrimination are possible to give the constitutional provisions real shape. Firstly, it can be done by creating a direct anti-discrimination duty on individuals who have a public character, alongside a direct remedy to approach constitutional courts in event of any discrimination.[208] Given India's public law torts jurisprudence, which allows individuals to move the courts for significant tortuous violations,[209] this does not seem a far-cry. In the absence of a proactive anti-discrimination legislation, Tarunabh

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[207] Shyamkrishna Balganesh, *Codifying the Common Law of Property in India: Crystallization and Standardization as Strategies of Constraint,* 63 AM. J. OF COMP. L. 33, 74 (2015).

[208] Stephen Gardbaum, *Horizontal Effect,* THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 601-602 (Sujit Choudhry et al. eds., 2016) [*hereinafter* "Gardbaum"].

[209] *E.g.*, Indian courts have created torts of 'strict liability' and 'destruction of public property' etc; *See*, Association of Victims of Uphaar Tragedy v. Union of India, (2003) 2 ACC 114 (India); *see also*, *In re* Destruction of Public and Private Properties, (2009) 5 SCC 212 (India).

Khaitan has proposed this path. A tort against discrimination is a real possibility which the courts can explore.[210] Secondly, it can be done by imposing a duty on the state to ensure that discrimination does not take place.[211] This would mean legislation on this issue which provides an institutional mechanism to settle discrimination claims like an 'Anti-Discrimination Commission'. In the absence of such laws, guidelines can be framed by courts to fill the void. Thirdly, this can be achieved by reading private laws in light of the principles of non-discrimination.[212] This would mean that with successive cases, the courts strike down bargains which are discriminatory and read down laws which seem to allow discriminatory practices.

C. A NEGOTIATED CONCLUSION

Ideally, the state should follow the second path and legislate in such matters (like realisation of Article 21A by Right to Education Act, 2009) to secure the right against exclusion of its citizens. Limited remedy exists in the status quo for Scheduled Castes and Scheduled Tribes in the form of SC and ST (Prevention of Atrocities) Act, 1989. But even this Act is ill-equipped to handle indirect and systemic discrimination. In 2017, a private-member's bill introduced by Dr. Shashi Tharoor with assistance from Prof. Tarunabh Khaitan was much debated.[213] But lack of political

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[210] Tarunabh Khaitan, *Reading Swaraj into Article 15: A New Deal for the Minorities*, 2 NUJS L. REV. 419, 429 (2009).
[211] Gardbaum, *supra* note 208.
[212] Gardbaum, *supra* note 208.
[213] *Congress MP Shashi Tharoor introduces Anti-Discrimination Bill in Lok Sabha [Read the Bill]*, LIVELAW (March 15, 2017), *available at* https://www.livelaw.in/congress-mp-shashi-tharoor-introduces-anti-discrimination-equality-bill-lok-sabha/.

will has stalled the process of its adoption. In the absence of laws, it remains open to the courts to frame guidelines (like they did in *Vishakha* v. *State of Rajasthan*.)[214]

The other two routes namely constitutionalisation of discrimination claims or reading constitutional values into statutes are chaotic processes, which may create inconsistencies. Some normative objections like doctrinal manipulation of the text of the law and upsetting the settled expectation of the law remain.[215] Similarly, constant interference by courts to realise equality may obfuscate the corrective nature of private laws, which are considered to do restorative justice and not distributive justice.[216] Not to mention, it would create new constitutional remedies which could be exploited by busybodies.[217] The burgeoning PIL route and its over-expansion present a sorry example of importing foreign jurisprudence into Indian laws without doctrinal clarity.[218]

Thus, well thought out guidelines by constitutional courts seem to be the best-negotiated option when no legislative intervention is forthcoming. These guidelines must put constitutional duty of non-

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214 Vishaka v. State of Rajasthan, AIR 1997 SC 3011 (India).
215 Shyamkrishna Balganesh, *The Constitutionalisation of Indian Private Law,* THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 699 (Sujit Choudhry et al. eds., 2016).
216 *Id.*
217 Shyam Diwan, *Public Interest Litigation,* THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 935 (Sujit Choudhry et al. eds., 2016).
218 Arun K. Thiruvengadam, *In Pursuit of 'The Common Illumination of Our House': Trans-Judicial Influence and the Origins of PIL Jurisprudence in South Asia,* 2 INDIAN J. OF CONST. L. 67 (2008).

discrimination on such 'duty-bearers' as identified in Part III. These guidelines will ensure clarity and consistency in application which will limit the harms like doctrinal manipulation of private law and upsetting of contractual expectations.

Shweta Sivaram, *Reintroducing dual-class shares to India*, 6(1) NLUJ Law Review 95 (2019)

REINTRODUCING DUAL-CLASS SHARES TO INDIA

SHWETA SIVARAM*

ABSTRACT

The legal framework associated with the issue of dual-class shares in India prohibits public listed companies from issuing shares with superior rights as to voting and dividends. Although the Companies Act was amended in 2000 to permit the issue of dual-class shares, concerns regarding the interests of investors compelled SEBI to significantly narrow down the scope of issue of shares with differential rights, in 2009, to the point of economic unviability. Earlier this year, SEBI released a consultation paper proposing a new framework for the issue of dual-class shares, that broadens the scope of the 2009 amendments to allow the issuance of such shares in limited cases. In light of the proposed framework, it is necessary to review the detrimental impact that the issue of shares with differential voting rights may have on corporate governance and decision-making, as well as, highlight the benefits accruing to certain companies by virtue of such shares. The author argues, that blanket permission for all public listed companies to issue shares with differential voting rights or dividend payments would serve as a striking departure from the standards of corporate governance that have become the norm in Indian corporate law. By examining the operations of companies in jurisdictions that permit the issue of dual-class shares, the author shows that shares

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with differential rights compromise the interests of minority shareholders and lead to corporate mismanagement, by separating voting rights from economic interest and consolidating decision-making power in the hands of the company's promoters and management personnel. However, the author also contends that the issue of dual-class shares can be beneficial for companies at their early-stages, a blanket ban would be counter-effective to the incentives provided for the creation of start-ups. The author further argues that SEBI's proposed framework for the issuance of dual-class shares reaches the right balance between corporate governance and protecting the interests of promoters.

TABLE OF CONTENTS

I. INTRODUCTION

A recent consultation paper[219] released by the Securities and Exchange Board of India [hereinafter "**SEBI**"] proposing a new framework for the issue of shares with Different Voting Rights [hereinafter "**DVRs**"] necessitated a review of both, the detrimental effects of issuing dual-class shares on the interest of minority shareholders' and corporate management, as well as the benefits that may accrue to certain companies by virtue of these shares. To clarify, a dual-class share structure refers to the issue of two or more distinct shares, by a company, distinguishable on the basis of different voting rights or dividend payments associated with each class. Companies that structure their equity into different categories tend to issue a 'normal stock', wherein one share corresponds to one vote, and a class (or classes) of shares with DVRs, which sever the bundle of rights that are associated with a share by separating voting rights from capital promoters. The aim behind such a separation is to consolidate control in the hands of the founders of a company while simultaneously allowing companies to raise capital from the public, by either issuing a class of shares with 'superior' voting rights to the promoters (Google, for example, issued Class A shares comprising one vote per share to the public, and Class B shares with ten votes per share to their executive chairman and founders),[220] or

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[219] Securities and Exchange Board of India, "*Consultation Paper on Issuance of shares with Differential Voting Rights",* (March 20, 2019), *available at* https://www.sebi.gov.in/reports/reports/mar-2019/consultation-paper-on-issuance-of-shares-with-differential-voting-rights_42432.html.

[220] Floyd Norris, "*The Many Classes of Google Stock",* THE NEW YORK TIMES (April 2, 2014), *available at* https://economix.blogs.nytimes.com/2014/04/02/the-many-classes-of googlestock/?mtrref=undefined&gwh8367A429A7762097AE57495B9424AB3F&gwtpa.

issuing a class of shares with 'inferior' voting rights to the general public (in 2008, for instance, Tata Motors issued a class of securities with one-tenth the voting rights of a normal share to the public, incentivising people to invest by offering a 5% additional payment of dividend.)[221]

Dual-class shares were conceptualised as a means of consolidating the governance of a company in hands of individuals who have a long-term interest in the company's growth. Resultantly, the issue of shares with DVRs accords promoters or management personnel voting rights that are disproportionate to their economic interests in the company. This separation of interests makes it easier for decision makers to consider factors other than shareholder wealth maximisation, owing to their own minimised economic interests, resulting in a lack of alignment between the principles guiding corporate decision making and the interests of stakeholders with larger economic investments in the company's equity. The impact of the issue of dual-class shares on minority shareholder interests and corporate management, hence, need to be examined in greater detail. The last decade of Indian corporate law has emphasised upon the importance of corporate governance procedures that balance the rights of all interested parties and reintroducing dual-class shares would be a departure from this newly-established and welcome norm.

However, the issue of shares with differential voting rights and the consequent concentration of voting power in the hands of promoters and

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221 Parvatha Vardhini C, "*Why shares with differential voting rights have failed*", THE HINDU: BUSINESS LINE (November 14, 2016), *available at* https://www.thehindubusinessline.com/companies/why-shares-with-differential-voting-rights-have-failed/article9345804.ece. [*hereinafter* "Vardhini C"].

key managerial personnel can be beneficial for companies at their early-stages and start-ups, where the issuance of such shares would allow the company to raise public funding, without the promoters having to divest their ownership or voting rights, thereby allowing them to retain their ability to control corporate decision-making in the nascent stages of the company's growth. An ideal framework for the issuance of dual-class shares would thus be, the one that strikes a balance between the concerns of corporate governance, and the interests of promoters during the company's initial years after conception. This paper argues that the proposed framework outlined in SEBI's 2019 consultation paper, which permits the issuance of shares with superior rights that allow voting or dividend only in primary issues, subject to a sunset clause, reaches a middle ground that prevents long-term promoter concentration and subjective corporate decision-making, while simultaneously allowing companies at early-stages to have control over their initial growth.

Part II examines the history of dual-class shares in India. The beginning of the 21st century saw legislative changes that paved the way for companies to issue stocks with DVRs, only for these rules to be changed significantly by SEBI for public listed companies almost a decade later. This section traces the issue of shares with DVRs by Indian companies in this 9-year period and examines their legal standing post 2009. Part III highlights the contention in support of issuing shares with DVRs, and shows that any harms that dual-class shares seek to protect against are already mitigated by other regulatory frameworks in status quo. Further this section explains how issuing shares with differential rights

compromises the management of a company by reducing checks on corporate mismanagement, and impacts minority shareholders by negating their control in the company and deprioritising their economic interests. The section concludes by considering the benefits that shares with DVRs can have for companies in the early stages of their growth, despite their detrimental impacts on corporate decision-making in the long-term. Ultimately, Part IV examines the proposed framework for the issuance of shares with differential voting rights, as outlined in SEBI's recent consultation paper. To conclude, the author argues that while dual-class shares are incompatible with principles of corporate governance, it is beneficial to permit companies to issue such shares to promoters in the initial stages of a company's growth, and that SEBI's newly proposed framework addresses these concerns successfully.

II. DUAL CLASS SHARES IN INDIA

A. HISTORY

Section 86 of the erstwhile Indian Companies Act, 1956 [hereinafter "**the 1956 Act**"] in its original form envisioned two kinds of share capitals – equity share capital and preference share capital. In 2000, the Section was amended[222] to read as follows –

> *"Section 86 - The share capital of a company limited by shares shall be of two kinds only, namely: -*
>
> *(a) equity share capital –*

[222] Companies (Amendment) Act, 2000, § 38.

(i) with voting rights; or

(ii) with differential rights as to dividend, voting or otherwise *in accordance with such rules and subject to such conditions as may be prescribed;*

(b) preference share capital"[223] *(emphasis added)*

Supplemented by the Companies (Issue of Share Capital with Differential Voting Rights) Rules [hereinafter "**ISCDVR Rules**"], 2001,[224] the newly-inserted Section 86(a)(ii) provided a legal framework for companies to issue dual-class shares. It is pertinent to state that Section 86(a)(ii) allows for the issue of equity shares with differential rights as to dividend, voting, or *otherwise*. Differential rights need not, thus, be restricted to voting power or dividend payments – any similar rights (such as, for instance, pre-emptory rights) may also be allotted on a differential basis. The foundation of the current legal framework for the issue of dual-class shares is found in Section 43 of the Indian Companies Act, 2013, the language of which is identical, *mutas mutandis*, to that of Section 86. Rule 4 of the Companies (Share Capital and Debenture) Rules, 2014 [hereinafter "**SCDR**"], like Rule 3 of the ISCDVR Rules, 2001, outlines the conditions under which companies may issue dual-class shares. Although the current legal framework allows for companies to issue equity share capital with differential rights, the scope of dual-class shares was significantly

[223] Companies Act, 1956, § 86.
[224] Companies (Issue of Share Capital with Differential Voting Rights) Rules 2001, *available at* http://www.mca. gov.in/Ministry/actsbills/rules/TCIoSCwDVRR2001.pdf.

narrowed down by way of a SEBI amendment to the Listing Agreement, as will be discussed subsequently.

Post the introduction of Section 86(a)(ii) to the 1956 Act in 2000, companies were permitted to issue shares with DVRs. However, the first instance of a company issuing shares with differential rights came as late as 2008, when Tata Motors issued a class of securities with inferior voting rights of 1 vote per every ten shares and superior dividend payments at an additional 5%.[225] Initially, investors showed a lack of interest in these stocks, resulting in Tata Motors' promoters having to subscribe to the unsubscribed equity. With time, the option of receiving a higher dividend grew more attractive, and investors began purchasing the shares with DVRs, reducing the proportion of the shares owned by promoters from 84.3% in 2008 to 9.1% in 2011.

In the following few years, Pantaloon Retail (Future Enterprises), Gujarat NRE Coke, and Jain Irrigation joined Tata Motors to become the only four Indian companies that have issued shares with differential voting rights. Pantaloon Retail issued a class of shares with DVRs structured similarly to Tata Motors', carrying one-tenth the voting rights and an additional 5% dividend, in February 2009.[226] In 2010, Gujarat NRE Coke issued a class of securities with inferior votes (one-hundredth

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[225] Vardhini C, *supra* note 221.

[226] Rahul Oberoi, "*How to benefit from shares with differential voting rights",* BUSINESS TODAY: MONEY TODAY (March, 2013), *available at* https://www.businesstoday.in/moneytoday/stocks/how-to-benefit-from-shares-with-differential-voting-rights/story/192706.html [*hereinafter* "Oberoi"].

the voting rights of an ordinary shares).[227] Jain Irrigation in 2011 issued shares with one-tenth the voting rights of an ordinary share.[228]

An analysis of the shares with inferior voting rights issued by the four companies reveals that, shares with differential rights have not performed as well in Indian markets as they have in foreign markets. Dual-class shares often sell at a discounted price compared to ordinary shares. In foreign markets, this difference tends to be between 10-12% in ordinary cases, with some shares trading at an even lesser discounted price or at premiums.[229] The greater awareness about shares with DVRs in foreign markets incentivises investors to purchase these shares and gain through capital appreciation when the discount between ordinary shares and the shares with differential rights reduces. In India, however, the discount between shares with differential rights and ordinary shares is extremely sharp. Tata Motors has reported discounts of as great as 50%, while Pantaloon Retail and Gujarat NRE Coke have seen discounts of 25-35%.[230]

Dual-class shares have, thus, been largely unsuccessful in India. The reasons for this are manifold. At a primary level, it is suggested that the lack of knowledge amongst investors about the nature of instruments

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[227] Oberoi, *supra* note 226.
[228] *Id.*
[229] Vijay Gurav, *"Investor snub makes DVRs issued by Tata Motors, Pantaloon Retail and Gujarat NRE Coke a losing proposition",* THE ECONOMIC TIMES (February 21, 2012), *available at* https://economictimes.indiatimes.com/markets/stocks/news/investor-snub-makes-dvrs-issued-by-tata-motors-pantaloon-retail-and-gujarat-nre-coke-a-losingproposition/articleshow/11969515.cms?from=mdr.
[230] *Id.*

with differential rights serves as a disincentive for investment.[231] The companies issuing shares with DVRs failed to market them successfully enough to compensate for the lack of understanding that investors had about dual-class shares. In addition to this, the legal framework itself created hindrances for companies in issuing dual-class shares. Rule 3 of the ISCDVR Rules, 2001, laid down numerous conditions that companies had to meet before they could issue equity share capital with differential rights. For example, only companies with distributable profits in the three financial years preceding the year of issue could issue dual-class shares, resulting in the creation of a track-record system. These strict entry barriers prevented many companies from allotting shares with differential voting rights. While most of these rules remain intact, some of them have since been watered down. For instance, Rule 3 of the ISCDVR Rules, 2001, prevented companies that have been convicted of any offence under the SEBI Act, the Securities Contracts (Regulation) Act, and the Foreign Exchange Management Act, from issuing shares with differential voting rights.[232] In contrast, Rule 4 of the SCDR, 2014, restricts only those companies that have been penalised in the 3 years prior to the issue from adopting a dual-class share structure. [233]

Although investors considered shares with differential rights to be unattractive, the issue of shares with superior dividend rights or voting rights was permissible under the legal framework. In 2009, only a year

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[231] Oberoi, *supra* note 226.
[232] Companies (Issue of Share Capital with Differential Voting Rights) Rules, R 3(5) 2001.
[233] Companies (Share Capital and Debenture) Rules, R 4(1)(h) 2014.

after Tata Motors issued shares with DVRs in India, the issue of shares with differential rights was challenged before the Company Law Board, Delhi [hereinafter "**CLB**"]. Although the CLB upheld the issue of such shares,[234] only months after its ruling, SEBI amended the Listing Agreement – i.e., the contract between a stock exchange and companies listed on it – to limit the scope of such issue. This is discussed in greater detail in the following sub-section.

B. THE SHORT LIFE OF *ANAND PERSHAD JAISWAL V. JAGATJIT INDUSTRIES* (2009) – SEBI'S AMENDMENT TO THE LISTING AGREEMENT

In early 2009, the Company Law Board, Delhi, heard before it a matter[235] concerning the allotment of shares with superior voting rights (in contrast to Tata Motors, Pantaloon Retail, Gujarat NRE Coke, and Jain Irrigation, all of whom issued shares with inferior voting rights). The promoters of Jagatjit Industries had issued to themselves shares with superior voting rights – each share carried with it 20 votes. This resulted in their voting rights increasing to 62% while their shareholding remained at 32%. The minority shareholders of Jagatjit Industries saw this allotment as minority oppression and claimed that the promoters were using shares with superior voting rights as a tool to increase their own control and power. A group of minority shareholders representing 11.5% of the issued share capital of Jagatjit Industries filed a petition under Sections 397 and 398 of the 1956 Act alleging mismanagement and oppression.

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[234] Anand Pershad Jaiswal v. Jagatjit Industries, 2010 (1) Comp. LJ 509 (2009) (India).
[235] *Id.*

In March 2009, the CLB upheld the allotment of shares with superior voting rights to the promoters of Jagatjit Industries. The bench held there to be no merit in the challenge against the issue of shares with differential rights, as such an issue was permissible under Section 86 of the 1956 Act, read with the ISCDVR Rules. Hence, the CLB approved the issue of dual-class shares, provided that they complied with the existing legislative framework.

A few months after this judgment, in July 2009, SEBI issued a circular[236] whereby it amended the Equity Listing Agreement with the aim of protecting the interests of investors. By way of this amendment, Clause 28A was inserted to the Listing Agreement. The Clause reads as follows –

> "*28A. The company agrees that it shall not issue shares in any manner which may confer on any person,* ***superior rights*** *as to voting or dividend* ***vis-à-vis the rights on equity shares that are already listed.***" *(emphasis added)*

Three things must be noted of this amendment. Firstly, as the amendment was made to the Listing Agreement, it only bound public listed companies from refraining from issuing shares with superior rights as to voting or dividend. Private companies and public unlisted companies, therefore, have greater freedom to structure their equity share capital and can issue shares with superior rights.

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[236] Securities and Exchange Board of India, *Circular on Amendments to the Equity Listing Agreement,* (June 21, 2009), *available at* https://www.sebi.gov.in/legal/circulars/jul-2009/amendments-to-the-equity-listing-agreement4367.html.

Secondly, the amendment does not prevent the issue of shares with differential rights – rather, it prohibits public listed companies from issuing shares with *superior* rights as to voting or dividend. A company can, therefore, still issue shares with inferior voting rights without higher dividend payments, or shares with lower dividend payments without superior voting rights, post the amendment. It is unlikely, however, that such shares would be profitable, as they provide investors with no incentive to purchase these shares – although legally permissible, they have no practical viability.

Thirdly, Clause 28A clarifies the scope of the term 'superior', by stating that companies may not issue shares with superior rights as to voting or dividend vis-à-vis the rights on equity shares that are already listed. This implies that the understanding of 'superior' is not normative and does not necessarily refer to any voting or dividend rights greater than the typical ratio of one vote to one share for a 'normal share'. Rather, it sets a *relative* standard, by prohibiting shares that confer upon the shareholder rights that are superior to the rights on equity shares that are already listed. This raises several interpretative questions. If the shares already listed by a company are shares that confer superior voting rights or dividend payments (say, a share that confers 10 voting rights per share, or offers an addition 5% dividend payment), do these shares operate as the benchmark, thereby allowing public listed companies to continue to issue these superior shares? Taking this further, can companies issue stocks that confer 5 voting rights per share? While these shares may

confer greater voting rights than normal stock, the voting rights are not superior to the already-listed shares conferring 10 voting rights per share.

Similarly, if the shares already listed by a company are shares with inferior voting rights (say, shares that possess one-tenth the normal voting rights), does this mean companies cannot issue shares that follow a one vote per share ratio, as these would confer rights superior to those associated with the inferior shares already listed? A purposive approach to interpreting Clause 28A leads us to the conclusion that the amendment to the Listing Agreement was not intended to prevent companies who have listed shares with inferior voting rights from issuing normal shares. The question of whether a company that has already listed shares with superior rights as to dividend or voting may continue to issue similar shares, or shares with voting rights intermediate to these superior shares and normal shares, remains unanswered.

To summarise, the result of the developments between 2000 and 2009, is that companies may issue shares with differential voting rights, subject to the condition that public listed companies cannot issue shares with superior rights as to voting or dividend. Whether allowing the issue of such shares is desirable remains to be seen. The next section will examine the impact of dual-class shares on corporate management and the interests of minority shareholders, to conclude that allowing the issue of such shares is antithetical to the culture of corporate governance that has shaped most of the legislative change in India in the last decade, but an exception should be carved out for companies raising capital from the public for the first time.

III. DUAL CLASS SHARES AS A DEPARTURE FROM STANDARDS OF CORPORATE GOVERNANCE

A. COMMON ARGUMENTS IN SUPPORT OF ISSUING SHARES WITH DIFFERENTIAL RIGHTS

Before examining the impact of dual-shares on standards of corporate governance, it is worthwhile to analyse the most common arguments in support of issuing shares with differential rights. Firstly, it is contended that the concentration of voting power in the hands of the promoters regardless of the corresponding economic interest protects companies from sudden takeovers - since the accumulation of equity in the company no longer provides corresponding decision-making power, companies remain protected from takeovers due to the issue of shares with differential rights. This argument based on the desirability of dual-class shares rests on the presumption that shares with differential rights are the *only* way to protect companies from takeovers – or, rather, that companies cannot be shielded from takeovers without the issue of dual-class shares. The development of strong regulatory frameworks such as the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 [hereinafter "**Takeover Code**"] renders this argument unviable. The Takeover Code was established to regulate the acquisition of equity in a public listed company, thereby ensuring that the interests of investors and members are not jeopardised by sudden takeovers. The issue of dual-class shares to prevent against takeovers is, thus, unnecessary.

Proponents of dual-class shares also argue that shares with differential rights allow for voting power to be concentrated in the hands of the promoters or founders of a company who have long-term interests in the growth of the company. It is however unclear, why the interests of promoters should be prioritised over the interests of shareholders. Economic investment in a company is sufficient basis for the interests of shareholders to be considered in corporate decision-making. As will be discussed in greater detail subsequently, adopting the perspective that voting power must be concentrated in the hands of the promoters, sidelines minority shareholder interests and is a departure from the emphasis of corporate governance processes on the protection of minority shareholder interests. The concession that must be made, however, is that concentrating voting power in the hands of the promoters of a company, thereby allowing them to make all major decisions concerning the company's growth and direction while simultaneously generating capital from the public, is desirable in the case of start-ups. The benefits of allowing companies to issue shares with differential voting rights in the initial years of their growth will be discussed later in this section.

An analysis of these justifications for the issue of dual-class shares leads us to the conclusion that there is no compelling principled benefit allowing the issue of shares with differential rights. An examination of the dual-class shares issued thus far in India, by Tata Motors, Pantaloon Retail, Gujarat NRE Coke, and Jain Irrigation shows that the economic benefits accruing from issuing shares with DVRs are minimal. As discussed earlier, the primary reasons for the lack of attractiveness

associated with shares with differential rights, was a dearth of investor understanding and strict regulations preventing a large number of companies from issuing dual-class shares. Although investor awareness may have increased in the last decade, or can be increased through better marketing strategies from companies intending to issue shares with differential rights, the regulatory mechanisms cannot be worked around. Rule 4 of the SCDR, 2014, lays down an extensive list of conditions that companies must meet to be eligible to issue shares with differential rights. These conditions are likely to exclude a number of companies – especially start-ups – from issuing dual-class shares. Hence, such shares appear to have limited economic viability in India, in status quo.

The lack of economic viability or any principled justification for the issue of shares with dual-class rights leads us to believe that such shares offer no concrete benefits. The analysis in the subsequent section shows that the issue of dual-class shares in fact leads to mismanagement and harms minority shareholder interests, hence justifying the prohibition on public listed companies issuing shares with superior voting rights and dividend payments.

B. DUAL-CLASS SHARES – COMPROMISING MANAGEMENT AND MINORITY SHAREHOLDER INTERESTS

That minority shareholders are side-lined in the corporate decision-making process, and that their interests are deprioritised by promoters or larger shareholders, has been sufficiently established. Most countries have witnessed developments in corporate law jurisprudence

tailored at rectifying the imbalance between larger shareholders and minority shareholders, clothing the latter with some layers of protection. The Indian Companies Act, 2013 [hereinafter "**Companies Act**"], has incorporated such principles of corporate governance. The JJ Irani Committee, in its 2005 report[237], emphasised the need to strike a balance between the 'rule of the majority and the rights of the minority'[238], dedicating an entire chapter of the report to the protection of minority shareholder interests[239]. This balancing principle runs through the 2013 Act. For instance, minority shareholders dissenting in a vote to change the objects of the prospectus of a company are statutorily required to be provided with exit options,[240] upon the fulfilment of certain conditions[241]. Similarly, shareholders may file an application for relief before any Tribunal when they feel that the affairs of the company are being conducted in a manner that is prejudicial and oppressive to their interests.[242] The protection of minority interests is, thus, an integral principle that runs through the Companies Act, 2013.

In a similar fashion, the Companies Act has been drafted with the intention of improving corporate management. Section 149 of the Act, for instance, requires one-third of the members of the board of any

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[237] JJ Irani Committee, *Report on Company Law,* MINISTRY OF CORPORATE AFFAIRS (May 31, 2005), *also available at* http://www.primedirectors.com/pdf/JJ%20Irani%20Report-MCA.pdf.
[238] *Id.* at 41.
[239] *Id.*
[240] Companies Act, 2013, §§ 27(2), 13(8).
[241] SEBI (Issue of Capital and Disclosure Requirements), Schedule XX (2018).
[242] Companies Act, 2013, § 241.

company to be independent directors[243], to improve corporate credibility and standards of corporate governance. The Act also mandates internal audits for some companies[244] and the setting up of audit committees.[245] Efficient corporate management thus constitutes an essential component of the Companies Act.

The introduction of the Companies Act and its corresponding rules have created well-established corporate governance procedures that emphasise the protection of minority shareholders' rights and efficient corporate management. This section argues that the issue of shares with differential rights as to voting or dividend would serve as a departure from the norm of good corporate governance. An analysis of companies with dual-class structures in other jurisdictions leads to the conclusion that the issue of shares with differential rights is undesirable in India.

The deprioritization of minority shareholder interests is common to all companies, regardless of how their equity share capital is structured. In companies with a dual-class structure however, the separation of voting power from economic interest makes it harder to maintain checks over corporate mismanagement and minority shareholder oppression. Take, for instance, the appointment of CEOs, CFOs, and other key personnel in a firm. The phenomenon of 'separation of ownership and control'[246] describes the position of most public listed firms, wherein the company is

[243] Companies Act, 2013, § 149(4).
[244] Companies Act, 2013, § 138.
[245] Companies Act, 2013, § 177; Companies (Meetings of Board and its Powers) Rules, R6-7 (2014).
[246] ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 4 (1933).

owned by numerous shareholders and no single shareholder manages the operations of the corporation. In this situation, the shareholders vote to elect a Board of Directors, who in turn appoint the management personnel of a company. This process of separating ownership and control has become an integral component of efficient corporate governance. In companies with dual-class shares, however, the promoters and founders are the largest shareholders and hence have the greatest say in electing the Board of Directors, their votes are cast with the aim of appointing a Board that will, in turn, appoint them to key managerial positions. The lines between ownership and control eventually blur, and minority shareholders' votes become redundant. Due to the control that CEOs and CFOs can exercise over the appointment of the Board of Directors of a company, directors have an incentive to appoint the people who elect them to key positions, and vote in alignment with the majority shareholders. This consolidation of voting power and resultant control over the Board of Directors ensures that CEOs will continue to hold their positions, even when they have performed poorly.

Consider Facebook, in 2018, the social media company was embroiled in controversy. Amidst the Cambridge Analytica data breach, allegations that the platform was facilitating Russian interference in American democratic processes, further New York Times reported[247] that Facebook provided companies like Netflix and Spotify with users'

[247] Gabriel J.X. Dance, Michael LaForgia & Nicholas Confessore, *As Facebook Raised a Privacy Wall, It Carved an Opening for Tech Giants*, THE NEW YORK TIMES (December 18, 2018)**,** *available at* https://www.nytimes.com/2018/12/18/technology/facebook-privacy.html.

personal messages and other personal data, CEO Mark Zuckerberg's leadership over the company was called into question. In a single-stock company with a correlation between economic interest and voting power, it is, perhaps, unlikely that a CEO under whom share prices tanked by almost 40% from their peak in the span of 4 months[248] would retain control over the operation of the company.[249] Facebook, however, structures its equity share capital into two classes – Class A shares, issued to the public, carry single votes, while Class B shares, controlled by Zuckerberg and a handful of other individuals, carry ten votes per share. As a result of his ownership of these Class B shares, Zuckerberg, while owning only 16% of Facebook's issued share capital, possesses 60% of the voting rights.[250] As he has the final say in all matters that are voted upon by shareholders, any resolutions that pose a challenge to his position as CEO will never succeed – nor did they, in 2018, when Facebook's shareholders, justifiably, questioned his leadership.[251]

Similarly, Rupert Murdoch possessed a majority of the voting rights in News Corporation, despite owning only 12% of the company's

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[248] Salvador Rodriquez, *Here are the scandals and other incidents that have sent Facebook's share price tanking in 2018*, CNBC (November 20, 2018), *available at* https://www.cnbc.com/2018/11/20/facebooks-scandals-in-2018-effect-on-stock.html.
[249] Emily Stewart, *Mark Zuckerberg is essentially untouchable at Facebook* VOX (December 19, 2018), *available at* https://www.vox.com/technology/2018/11/19/18099011/mark-zuckerberg-facebook-stock-nyt-wsj [*hereinafter* "Stewart"].
[250] *Facebook and the Meaning of Share Ownership*, THE ECONOMIST (September 30, 2017), *available at* https://www.economist.com/business/2017/09/30/facebook-and-the-meaning-of-share-ownership.
[251] Stewart, *supra* note 249.

equity.[252] Shareholder attempts to remove various members of Murdoch's family from positions of power in the company, after news broke of the phone-hacking scandal that Murdoch was implicated in, were successfully thwarted because of Murdoch's control in the company. News Corporation structured its equity into two classes – Class A shares with no voting rights which were issued to the public, while Class B shares with voting rights were, for the most part, allotted to Murdoch and an ally. By employing a dual-class share structure, Murdoch was able to consolidate his voting power, and protect his and his family members' roles in the company against shareholder action, despite his involvement in a scandal that cost the company several billions in share value.[253] In companies with single-class shares, however, shareholders are able to exercise more control over the appointment and removal of management personnel, in a manner proportionate to their ownership of the company, thereby creating a system of checks that ensures efficient management. The consolidation of voting power in the hands of these key personnel, made possible by the issue of dual-class shares, allows CEOs to abuse their positions with no consequences.

The concentration of voting rights in the hands of the promoters in companies that structure their equity share capital into dual classes also ensures that minority shareholders cannot ever change the capital structure to a single class of stocks, as promoters are unlikely to vote

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[252] Ed Pilkington, *Investors call on News Corp to loosen Murdoch family's grip*, THE GUARDIAN (December 22, 2011), *available at* https://www.theguardian.com/media/2011/dec/22/news-corp-investors-shares-murdoch [*hereinafter* "Pilkington"].
[253] Pilkington, *supra* note 252.

against the system of capital structuring that benefits their interests. In 1999, shareholders of Tyson Foods attempted to change the company's dual-class structure, arguing that the concentration of voting power in the hands of the founding family had resulted in the company consistently underperforming for years. The vote was defeated due to the voting rights that the Tyson family possessed.[254] Hence, efforts to restructure the capital of companies with a dual-class structure into a single-class of shares are futile. Minority shareholders are left with no say in capital restructuring in companies that issue dual-class shares for the benefit of the promoters.

Even when the dual-class structure of a company is unified into a single class of shares, the holders of the shares with superior voting rights or dividend payments are offered huge pay-outs to allow their shares to be converted into normal stock. Consider the example of Canadian company Magna International. When the company decided to collapse its dual-class structure into a single class of shares, the founder of the company, who possessed a majority of the shares with superior voting rights, received almost $900 million in shares and $300 million in cash in return for giving up his shares, with a number of Magna International's institutional shareholders labelling this deal 'unreasonable' and 'fundamentally unfair'.[255] Hence, shareholders of a company that issues shares with

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[254] Bill Mann, *Dual-Class Shares, Second-Class Investors*, MOTLEY FOOL (April 14, 2004), *available at* https://www.fool.com/investing/general/2004/04/14/dualclass-shares-secondclass-investors.aspx.

[255] *Court Approves Magna Payment to Stronach*, THE NEW YORK TIMES: DEAL BOOK (August 18, 2010), *available at* http://dealbook.nytimes.com/2010/08/18/magna-payment-to-stronach-approved.

differential rights are left to choose between retaining a dual-class share structure, or restructuring the company's equity share capital by paying promoters large amounts in exchange for their controlling shares – a lose-lose situation for the shareholders.

While one clear consequence of the disproportionate voting rights that promoters and key management personnel have is the mismanagement of the company's operations and affairs and a lack of accountability of CEOs and CFOs to shareholders, the concentration of voting power also reduces the say of minority shareholders in the management of the company, despite their economic interests. When promoters have most of the voting power through the issue of shares with superior voting rights, the votes of minority shareholders who are also owners of the company, are rendered redundant. Corporations with a dual-class structures recognise this. When Google decided to issue a class of shares with no voting rights, it held an annual meeting for shareholders to vote on the proposal, that they themselves acknowledged as being nothing more than perfunctory – speaking of the company's executive chairman and founders, Google's general counsel wrote in a letter to the shareholders announcing the vote, "Given that Larry, Sergey and Eric control the majority of voting power and support this proposal, we expect it to pass."[256]

[256] Andrew Ross Sorkin, *Stock Split for Google That Cements Control at the Top*, THE NEW YORK TIMES: DEAL BOOK (April 16, 2012), *available at* https://dealbook.nytimes.com/2012/04/16/stock-split-for-google-that-cementscontrol-at-the-top.

The separation of voting powers from economic interest when companies adopt a dual-class structure through which they allot shares with superior voting rights to promoters or shares with inferior voting rights to the general public also results in a deprioritization of minority shareholders' interests. It is important to remember that members of the public who invest in companies do so with the intention of making returns. Hence, their interests in the company are largely economic. As owners of the company who have invested in its growth, these are interests that they are entitled to, and that form the basis of the relationship of obligations between a company and its shareholders. Some commentators view companies as agents of the shareholders – as the company is using the investors' money, it must do so with the aim of providing the greatest returns to the shareholders.[257] Companies must, therefore, place the economic interests of its shareholders on a high pedestal.

In companies with a single class of stocks, shareholders are able to vote on resolutions and direct corporate decision-making to proceed in a manner that prioritises economic returns, as they have voting rights commensurate to their ownership in the company. In companies with a dual-class share structure, however, the parties with vested economic interests do not possess voting rights that are proportionate to their ownership. Rather, the parties with significant voting rights, namely the promoters, founders, or key management figures, are those with fewer

[257] Milton Friedman, *The Social Responsibility of Business is to Increase its Profits,* THE NEW YORK TIMES MAGAZINE (September 13, 1970), *available at* http://umich.edu/~thecore/doc/Friedman.pdf.

economic interests compared to their voting power. As a result of their disproportionate economic interests, their voting decisions are often guided by factors other than shareholder wealth maximisation, which is the primary interest of most shareholders. By allowing interests other than those that are central to the investors of a company to guide its actions, companies falter in their obligations to their shareholders. A dual-class share structure reduces the checks that prevent decision-making from being guided by principles other than maximising economic returns. Thus, minority interests are often compromised upon in companies that issue shares with differential rights.

As discussed at the beginning of this section, an emphasis on corporate governance processes that balance the rights of the company and its shareholders while striving for efficient management of companies has guided the creation of the new corporate law regime in India. In a welcome development, these standards of corporate governance have become the norm in Indian corporate law. The issuing of dual-class shares leads to corporate mismanagement and deprioritises minority shareholders – it is, thus, incompatible with principles of corporate governance.

C. THE ISSUE OF DUAL-CLASS SHARES BY EARLY-STAGE COMPANIES

An argument often made by proponents of dual-class shares is that these shares and the superior voting rights that they carry can serve as a beneficial tool for promoters to control the growth of a company in its

initial stages. The promoters of new ventures are often forced to choose between retaining control over the affairs of the company and being able to raise money from the public to allow for the continuation of their day-to-day operations. As both strategic decision-making and funding are crucial to the success of a company in its early stages, this places promoters in an impossible situation. Studies show that 90% of Indian start-ups fail within five years of their inception[258] - one of the biggest reasons cited for this high failure rate is the lack of funding received by early-stage companies. Allowing founders of new ventures to raise capital from the public without divesting their ownership in the company and retaining the power to make critical corporate decisions incentivises the creation of start-ups and encourages early-stage ventures to go public. In a developing country like India, boosting the entrepreneurial eco-system can go a long way towards job creation, technological innovation, and economic growth. Hence, allowing start-ups to issue shares with differential voting rights would be a positive step.

The question that arises next is, what happens when a start-up becomes commercially advanced, and enough time has passed that it can no longer be considered an early-stage company? If promoters are permitted to retain shares with superior voting rights in perpetuity, the corporate governance concerns discussed previously arise. After a certain point in a company's existence as a public entity, when its operations are profitable and it has generated a name and reputation for itself, it ceases

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[258] *90% Indian start-ups fail within 5 years of inception: Study*, MONEY CONTROL (July 9, 2018), *available at* https://www.moneycontrol.com/news/business/90-indian-startups-fail-within-5-years-of-inception-study-2689671.html.

to be legitimate to compromise concerns of corporate decision-making and minority oppression, or protect promoter ownership of the company. Hence, it has been argued by opponents of shares with differential voting rights that when start-ups are permitted to issue such shares, they should have a sunset clause – i.e., after a pre-decided period of time has passed, shares with superior voting rights will be converted to 'normal' shares. The proposed framework outlined in the SEBI consultation paper released in March 2019 adopts such a model. As will be discussed in the next part, SEBI's recommendations reach a balance between allowing start-ups to harness the benefits of shares with differential voting rights and preventing the misuse of the power that is consequently concentrated in the hands of promoters.

IV. THE 2019 SEBI CONSULTATION PAPER

In the decade since SEBI amended the Listing Agreement to prevent companies from issuing shares with superior rights as to voting or dividend – a ban that also finds a place in the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015[259] – opinion has been divided as to the attractiveness of shares with differential voting rights. Some argued that promoter control can be beneficial for a company, some called for exceptions to the ban to be made for companies at an early-stage, while some argued that a complete ban on dual-class shares with no exceptions was required to maintain standards of corporate governance and protect minority shareholder. In December 2018, SEBI

[259] SEBI (Listing Obligations and Disclosure Requirements) Regulations (2015), Regulation 41(3).

chairman Ajey Tyagi announced that a committee had been set up to analyse the viability of allowing public listed companies to issue dual-class shares.[260] The consultation paper released by the committee in March 2019 proposes a framework that reaches a balance between concerns of corporate governance and promoter interests.

SEBI's proposed framework would permit two kinds of shares with differential voting rights – shares with superior voting rights, which confer upon a shareholder voting rights in excess of one vote per share, and shares with fractional voting rights, which confer upon a shareholder voting rights less than one vote per share. The issue of shares with superior voting rights would only be permitted for unlisted companies going public for the first time, while shares with fractional voting rights could be issued during secondary listings. Upon listing, a company may no longer issue shares with superior voting rights. Shares with superior voting rights can only be issued to the promoters of the company. These shares would be locked-in, thereby preventing promoters from transferring. They would, further, be subject to a sunset clause – after five years, shares with superior voting rights would be converted to normal shares. This period of five years may be extended by a further five years through a special resolution of all the shareholders of the company, with each shareholder voting in a 1:1 ratio relative to their shareholding. Additionally, SEBI has proposed that FR shares cannot confer lower

[260] Reena Zachariah, *SEBI sets up panel to look into issue of DVRs*, THE ECONOMIC TIMES (December 19, 2018), *available at* https://economictimes.indiatimes .com/markets/stocks/news/sebi-sets-up-panel-to-look-into-issue-ofdvrs/articleshow/6 7156164.cms.

voting rights than one vote for every ten shares, and that SR shares cannot confer higher voting rights than ten votes per share.

If such a framework were to be adopted, companies listing for the first time would be permitted to raise capital without promoters having to divest their ownership in the company – at the same time, these promoters would be prevented from maintaining their superior voting rights after a certain period of time has passed. The author believes that the proposed framework offers sufficient protection to minority interests and corporate decision-making, while simultaneously benefiting early-stage companies and incentivising the growth of start-ups. However, as many have argued, SEBI should have introduced higher corporate governance standards for companies issuing shares with superior voting rights, to prevent the misuse of the concentration of voting power in the hands of promoters of the company.

V. CONCLUSION

India has had a legal framework in place for the issue of dual-class shares since the Companies (Amendment) Act, 2000, inserted Section 86(a)(ii) to the Companies Act, 1956. In the decade that followed before SEBI narrowed down the scope of the issue of shares with differential rights to the point of economic unviability for public listed companies, the development of dual classes of securities was extremely slow. Only four Indian companies opted to issue shares with differential rights, with these shares quoting at sharp discounts in contrast with the company's normal shares. The lack of attractiveness of shares with DVRs in India has been

attributed to both a lack of investor awareness and a regulatory framework that prevented some companies from being able to issue such stocks.

In 2009, the Company Law Board, Delhi, upheld the issue of shares with superior voting rights, only for SEBI to amend the Listing Agreement a few months later to prohibit public listed companies from issuing shares with superior rights as to voting and dividend. The plaintiffs in Anand Pershad Jaiswal v. Jagatjit Industries[261] argued that the issue of shares with differential rights amounted to minority oppression; a few months later, the SEBI circular announcing the amendment to the Listing Agreement cited the protection of investor interests as the rationale behind prohibiting the issue of shares with superior rights for public listed companies. An analysis of companies in jurisdictions whose legal frameworks allow for the issue of dual-class shares reveals that SEBI's concern is well-founded. Shares with differential rights pave the way for the deprioritization of minority interests by promoters, and render minority shareholders' votes redundant to the extent that such investors are unable to assert their own interests. In addition to failing to protect minority interests, the issue of dual-class shares results in the mismanagement of corporate affairs and operations, and vitiates the system of checks that holds key personnel accountable. These shares prove beneficial, however, to start-ups and companies in their nascent stages of growth and development.

[261] Anand Pershad Jaiswal v. Jagatjit Industries, 2010 (1) Comp. LJ 509 (2009) (India).

The last decade has witnessed a shift in approach in Indian corporate law jurisprudence. The Companies Act, 2013, represents the new norm of corporate governance that emphasises the interests of all the shareholders of a company. Allowing the issue of shares with superior voting rights as to dividend and voting would have been a stark departure from these standards. Instead, SEBI has proposed that only companies listing for the first time be permitted to issue shares with superior voting rights to their promoters, subject to a sunset clause. By permitting promoters to hold shares with superior voting rights only for a fixed period of time after the company has been listed, the proposal allows for promoters to make decisions concerning the growth of a company without factoring in the short-term interests of investors, while simultaneously considering the impacts on minority shareholders' interests and corporate decision-making that allowing promotors to retain control over the company in perpetuity despite holding a correspondingly smaller number of shares would have. The implementation of such a framework would adhere to established principles of corporate governance and protect minority interests, while simultaneously incentivising the creation of start-ups, and would be a welcome change to the regulatory framework for the issue of the dual-class shares in India.

Anuradha Maheshwari, *The Commerce and Economics of Fantasy*, 6(1) NLUJ Law Review 129 (2019)

THE COMMERCE AND ECONOMICS OF FANTASY

ANURADHA MAHESHWARI*

ABSTRACT

The biggest moment in TV history of this century ended with the curtains closing on the extremely popular Game of Thrones [hereinafter "GoT"] television series. Home Box Office [hereinafter "HBO"] states that the episode titled "The Long Night," delivered 17.8 million viewers, making it the most-watched episode in the show's history. Wagers and bets of all kinds were floated and placed on the outcome of the finale, followed by a myriad of reactions worldwide. GoT has taken the world by storm, and although I have not watched a single episode of this epic fantasy drama, I was nevertheless intrigued with all the brouhaha and bustle surrounding it. The principal purpose of this paper is to study and scope out from various accessible secondary data what made the series a rage like no other, the intellectual properties (created, generated and acquired) that it rode on, and the values generated by this ever-popular franchise in terms of the revenues and profits unleashed by it and their exploitation thereby. In essence, this paper intends to examine the intellectual properties created in this franchise and how it enabled wealth and asset generation for the principal players and others linked to the show.

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TABLE OF CONTENTS

I. INTRODUCTION

George RR Martin (known as the American Tolkien) is credited to be the person from whom and where it all began. His moment of creative actualization was when he, enthused and kindled by JKR Tolkien's The Lord of the Rings', began to write the **'Song of Fire and Ice**' book series in 1991 in the same spirit. Many of his works went on to hit the New York Times bestseller list, with the acclaimed author winning many domestic and international awards and accolades in the best fantasy novel and best science fiction genre. Predictably, and riding on the mammoth success of his fantastic book series, one thing led to another and the rest, as they say, is history.

HBO Productions purchased the television rights for A Song of Ice and Fire book series, and David Benioff and D. B. Weiss of HBO began airing the fantasy serial drama on their US premium cable channel in 2011. Martin's incredible and fantastic ideas found voice and expression in his fabled (though unfinished book series) that made both him and HBO richer beyond their dreams. Each one of the eight seasons was received with overwhelming public enthusiasm, response and record viewership from an ever-widening, passionate, and international fan base. The amount of print dedicated to the 73 episodes in the digital and real media was/is flattering and enormous. The series went on to win 47 Emmy Prime Time awards and many other prestigious awards like the

Golden Globe, Hugo and Peabody awards.[262] This year, it had a record 32 nominations at the Emmys.[263]

The HBO – Martin collaboration went on to spawn many enterprises across the globe that has generated colossal wealth for many involved in the making of the GoT serial. In fact, with the last season, HBO has marched ahead of Martin and has created episodes on their own. An illustrative flavour of Martin's earnings only from various royalties, and which are not very recent, is tabulated below:*

YEAR	ROYALTIES EARNED	AMOUNT
2016	George R.R. Martins publications	$ 10,000,000
2016	HBO Series Game of Thrones	$ 15,000,000
2015	Sale of A Song of Ice and Fire novels (25 M copies)	$ 19,500,000
2013	Sales of Game of Thrones mass-market paperbacks	$ 1,300,000

**Complied by Lex Mantis from various sources in public domain*

Martin's chimerical imagination, ingenuity and resourcefulness have not only hugely captivated the masses but as is obvious, people were queuing up to pay the price he demanded for his works.

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[262] George R.R. Martin, *Fire and Blood: Category Archives: Book News,* GEORGE R R MARTIN.COM (April 25, 2018), *available at* http://www.georgerrmartin.com/fireandblood/.

[263] Sarah Whitten*, Game of Thrones' nabs record 32 Emmy Award nominations, including best drama series, in final season,* CNBC, (Jul. 16, 2019), *available at* https://www.cnbc.com/2019/07/16/game-of-thrones-nabs-record-32-emmy-awardnominations.html.

II. COPYRIGHTS

A. MARTIN-HBO COLLABORATION

In 2007, Martin sold the 'television rights' in his book series to HBO, who then broadcast this tele-drama for the first time on April 17, 2011. Selling the television rights essentially meant that Martin had transferred his adaptive rights in the book that he owned by virtue of his exclusive copyrights therein, to HBO for a price. It further meant that Martin would have contractually conveyed to HBO a tranche of rights, which made it possible for the network to adapt his novels into television screenplays. It further allowed HBO to transform those adapted screenplays into cinematic, audio-visual formats to be telecast, exclusively as its television program. GoT's USP lay not only in the creation of a dark fantasy saga, but also in the creative expressions of its many mythical creatures like the dragons, dragon glass, dire wolves, giants, mammoths, ravens, unsullied (army of eunuchs), witches, faceless man, white walkers, valerian steel, etc.

Without having any access to the contract between Martin and HBO, one can probably surmise that Martin as an original copyright owner would have given limited rights to HBO. He would perhaps have retained other adaptive rights like publication rights or other broadcast rights (stage rights, radio rights, etc.) or other related copyrights (rights to

characters under varying degrees of exclusivities. Detailed rights purchase agreements help avoid unforeseen legal problem further down the road.[264]

From various sources, it is gleaned that HBO invested a total amount of $1,460,600,000 (1.46 billion) into bringing Martin's fantasy alive and has been fiercely guarding all its intellectual properties in and around it ever since. In 2016, HBO sent thousands of copyright infringement notices to infringing internet users who were downloading GoT episodes illicitly, but without asking them for damages. This practice not only lent itself to substantially reduce the extent of the piracy of the series but also generated more goodwill in encouraging people to subscribe to the channel instead of illicitly downloading its content.

B. COPYRIGHTS IN UNPUBLISHED WORKS

With spoilers and predictions about each episode inundating the Internet, it was noticed in a particular instance in 2016 that a prolific Spanish YouTuber, Jose Senaris *alias* Frikidoctor and media knick named Spanish Spoiler, was posting his predictions about every new episode of the 6th season about to be aired. Specifically, his third video consisted of him wearing a costume and airing his predictions, but importantly, without any scenes from GoT. HBO on getting wind of his activities used the Digital Millenium Copyright Act, 1998 [hereinafter "**DMCA**"] to force him to take down the videos, but it raised hackles on how HBO could enforce its copyright on another's action, when none of the actual

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[264] Cathy Jewell, *From Script to Screen: What Role for Intellectual Property?*, WIPO (August 23, 2019), *available at* https://www.wipo.int/pressroom/en/stories/ip_and_film.html.

"work" was actually being displayed through the allegedly infringing action.[265]

To HBO's credit, the prudent decision it took to pursue the YouTuber could have been spurred by the holdings of the judgement in the landmark case of *Harper & Row Publishers, Inc. v. Nation Enterprises*, in which a similar issue of copyrights in unpublished works had arisen. In the case, Nation Enterprises who was the publisher of 'The Nation' magazine, had obtained an unauthorized copy of the unpublished memoirs of the former US President, Gerard Ford. The former President had contracted exclusively with the well-known Harper & Row Publishers to publish his memoirs. Harper and Row, through a paid contract, subsequently engaged with Time magazine to release the excerpts of the memoirs to them, a few days before the book release. Days before the excerpts were to be released, 'The Nation' published a 2,250-word article, of which at least 300-400 words constituted verbatim quotes taken from the manuscript, and clearly indicated that the said memoirs had been leaked to Nation Enterprises. Following the unauthorised disclosure of the memoirs, Time magazine cancelled its agreement with Harper & Row, and the publishers sued Nation for infringement. The US Supreme Court, taking into account the various arguments and counter-arguments placed before it, held that "*Nation's taking of copyrighted expressions exceeded that necessary to disseminate the facts, and infringed the copyright holders' interests in the*

[265] Russell Brandom, *Can you get kicked off YouTube for spoiling Game of Thrones?*, THE VERGE (May 10, 2016), *available at* https://www.theverge.com/2016/5/10/11650986/youtube-game-of-thrones-spoilers-frikidoctor-dmca.

confidentiality and creative control over the first public appearance of the work."[266] It was also held that "*once a copyright holder establishes a causal connection between the infringement and loss of revenue, the burden shifts to the infringer to show that the damage would have occurred had there been no taking of copyrighted expression.*"[267] The judgement took into account the importance and merits of the confidentiality aspects of 'to be' published works and how unfair disclosures of such works can destroy the IP value of the content therein.

The above case helped to establish some principles of confidentiality in unpublished works. Since every prediction of the Spanish Spoiler turned out to be true, it meant that he was privy to undisclosed information from some source within the studios on what would transpire in each of the next episodes, presumably for a price, and which he was enjoying in revealing to the public through his spoilers.[268] HBO used their 'right of first publication' to stop him from cutting into their viewership and revenues, even though he did not display any of the actual content.[269] It is important to mention at this juncture that the infringing action was not really impacting HBO's revenues for the show, as HBO does not belong to the tribe of telecasters supplementing and generating incomes from advertisements (the episodes do not have a

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[266] Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985).
[267] *Id.*
[268] Kim Refron, *Is leaking the plot of every new 'Game of Thrones' episode on YouTube - and HBO is trying its best to stop it*, BUSINESS INSIDER (May 8, 2016), *available at:* https://www.businessinsider.in/Someone-is-leaking-the-plot-of-every-new-Game-of-Thrones-episode-on-YouTube-and-HBO-is-trying-its-best-to-stopit/articleshow/52170546.cms.
[269] Anastasios G. Gabris, *Game of Thrones Copyright Infringement*, GABRIS LAW LLC (May 11, 2016), *available at* www.garbislaw.com/game-thrones-copyright-infringement.

single advertisement), which in turn are driven heavily by viewership linked TRPs. HBO's revenues were derived from their channel and streaming subscriptions only.

C. DOCTRINE OF FAIR USE

The *Harper & Row Publishers* judgement is widely cited, mainly because of its ratio on Fair Use (called 'Fair Dealing' in India) wherein section 107 of the DMCA's four-factor test as enunciated to determine Fair Use, was relied upon; being:

> *"(1) The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;*
>
> *(2) The nature of the copyrighted work;*
>
> *(3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and*
>
> *(4) The effect of the use upon the potential market for or value of the copyrighted work."*

Fair Use is a doctrine developed by the courts in the US to encourage and foster learning, research, teaching, news reporting, commentary, criticism, etc. without being hampered by rigid applications of copyright laws. In essence, it is legally permissible to copy from copyrighted material for specific purposes only, designed to nurture scholarship and originality, and fulfil the goals of copyright law for

'promoting the Progress of Science and the useful Arts.'[270] It allows one to use and build upon prior works in a manner that does not unfairly deprive prior copyright owners of the right to control and benefit from their works.[271] However, whether a use is fair or not is always a mixed question of law and facts and ultimately remains a subjective conclusion. Amount of material infringed is not as important as the impact of the infringement, and Fair Use is not a permission to plunder the works of the original authors without paying the customary price.[272]

In the context of Fair Use, a cause of serious concern has been the indiscriminate use of copyrighted images and other content in memes, and whether such memes are a fair use or copyright infringement . Needless to say, images used in GoT are the exclusive copyrighted property of the producers/network alone, and hence any meme that uses images appropriated from copyrighted sources would be a sitting duck for copyright infringement. However, given their satirical nature, they are thus presumed to be more for personal and social use rather than commercial use and may lack all the necessary elements for copyright infringement. It is often argued that such memes ought to be protected under Fair Use, as the copyrighted work would not be substantial therein. For example, if a picture of Ned Stark from GoT is used with the words 'Brace Yourself'

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[270] U.S. CONST. art. I, § 8, Cl. 8.
[271] Office of the General Counsel, Copyright and Fair Use: A Guide for the Harvard Community (August 23, 2019), *available at* http://ogc.harvard.edu/pages/copyright-and-fair-use.
[272] Warner Bros. Entertainment Inc. and J.K. Rowling v. RDR Books, 575F. Supp. 2d 513 (2008).

on the upper portion of the meme with 'XXX is Coming' written below, it may pass off for Fair Use.[273]

However, it ought to be also noted that memes are often used to advertise products and merchandise. In such cases, memes cannot be defended under Fair Use, as they go beyond the realm of personal use and mere humour into a definitive zone of use for commercial gains of the advertiser. "*Humor is not an iron-clad legal defence to either copyright or trademark infringement -- or for that matter libel.*"[274] An added perspective is that such memes tend to undermine the producers' copyright by affecting the potential market of the show and leads to an infringement that cannot be protected or defended by fair use.

D. 3-D PRINTING AND FAIR USE

Another emerging area of IP infringement is the facility of 3-D printers, which makes it very easy to copy designs and copyrighted material. They are a powerful new tool for experimenting with the designs of the physical world. The iron throne in the GoT Series is made entirely from swords and is a much-infringed design. Even though the artistic work of the throne is copyrighted, it is suspected that its makers would have also sought a design patent or industrial design protection on it.

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[273] Aishwaria S Iyer and Raghav Mehrotra, *A Critical Analysis Of Memes And Fair Use*, 4.1 RLR (2016) *available at* http://dspace.jgu.edu.in:8080/jspui/bitstream/10739/1443/1/A%20Critcal%20analysis%20of%20meme.pdf.

[274] Lloyd J. Jassin, *How to Use Trademark Law to Create Multiple Passive Income Streams & Avert Legal Battles*, COPY LAW (2010), *available at* www.copylaw.com/new_articles/titles.html.

Recently,[275] in 2016, it came to light that a design entrepreneur from Orlando, Florida, introduced a 3-D printed 'iPhone dock' modelled on the GoT throne, as a merchandise for sale on his website. HBO on learning about it shot off a 'cease and desist' letter claiming both copyright and trademark violations. He tried offering to take the design on license from HBO, which they refused.[276] As a result, he had to return all the money he earned, to the customers who bought the throne iPhone dock from him.[277]

III. GoT Trademarks

A. Names & Titles

Analysing the triumph of the novels and the franchise, it is evident that a large part of their success should be attributed to the unique, distinctive and exceptional names or terms that have been assigned to the characters, places and the beasts in the plots. Martin says in an interview

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[275] Definition: "design" means only the features of shape, configuration, pattern, ornament or composition of lines or colours applied to any article whether in two dimensional or three dimensional or in both forms, by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye; but does not include any mode or principle of construction or anything which is in substance a mere mechanical device, and does not include any trade mark as defined in clause (v) of sub-section (1) of section 2 of the Trade and Merchandise Marks Act, 1958 or property mark as defined in section 479 of the Indian Penal Code or any artistic work as defined in clause (c) of section 2 of the Copyright Act, 1957.

[276] Nathan Hurst, *HBO Blocks 3-D Printed Game Of Thrones iPhone Dock*, WIRED ((Feb. 13, 2013) *available at* https://www.wired.com/2013/02/got-hbo-cease-and-desist/.

[277] Jim Edwards, *Here's The 3D-Printed 'Game Of Thrones' iPhone Dock That's Banned By HBO*, BUSINESS INSIDER (Aug. 14, 2013), *available at* https://www.businessinsider.in/heres-the-3d-printed-game-of-thrones-iphone-dock-thats-banned-by-hbo/articleshow/21812682.cms.

that he was inspired by the ancient and medieval English history which he had studied, when combined together with his creative genius, fanciful imagination and the relevance of a character or plot to the story line, helped in designing and coining names that today have become a hit with the masses and even enjoy a cult following. The names/titles of the characters, episodes or places have captured the world's fancy that many of them are known today as a part of the colloquial vocabulary, like "Dracarys" that commands dragons to breathe fire; or catchphrases used in the show like "Winter is Coming" or "White Walker," the name of ice demons, creatures of ice and cold that raise the dead and came eight thousand years ago; "Children of the Forest" who are supernatural creatures and not really children;[278] "Three-Eyed Raven," a supernatural, mythical being who can see into the past and whose brain has access to the entire history of Westeros; and many such other examples.[279] What is more interesting is the fact that many of the names have acquired a metaphorical connotation and are being used in a variety of ways to signify or make different statements, including via memes.

Besides, HBO has created names and characters that have become exceedingly popular like 'Night King', who does not actually exist in Martin's books. The names used in GoT have become extremely popular as babies are being named after the characters like Khaleesi and Arya;

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[278] Shannon Carlin, *A Cheat Sheet Of Game Of Thrones Words & Terminology You Need For Season 8,* REFINERY 29, (Apr. 13, 2019), *available at* https://www.refinery29.com/en-us/2019/04/228859/game-of-thrones-words-dictionary.

[279] Bill Donahue*, Game Of Trademarks: How 'Thrones' Shields Its Brand*, LAW360 (May 16, 2019), *available at* https://www.law360.com/articles/1157943.

along with being mentioned as names for drinks, alcoholic beverages, gaming products and merchandise. A known fact which has been exploited to the hilt by film and movie merchants is that fans like to proclaim their preferences and wear their hearts on their sleeves to celebrate their favourite shows, films, characters or actors by wearing/carrying merchandise in those names. There is one website, which proclaims "*85 all -new GoT baby names for boys and girls.*" Recognizing the intellectual property value in the names and titles of/in such films/series/episodes, more so as potential brands, merchandise and/or merchandising opportunities, protection of these names and titles assume paramount importance; lest they are misappropriated, misused, become generic or fall by the wayside.

However, the Copyright Law in India or the US, like in many other jurisdictions in the world does not protect names or titles of books and films (works) which are copyrighted.[280] While registering copyrights in any expression or content in India, is one of the required particulars, which have to be entered in the Form XIV under Section 44, it is also the literary title[281] of the work along with the work itself and the relevant names and addresses of the authors, publishers and owners of the copyright. Given that any copyrighted work will obviously be identified and recognised by its name/title, it stands to reason therefore that the commercialisation and leveraging (trading) of that content through sales and licenses, will also take place through its titles. What follows as a

[280] Kanungo Media (P) Ltd. v. Rgv Film Factory, 138 (2007) DLT 312 (India).
[281] J. THOMAS, MCCARTHY, TRADEMARK AND UNFAIR COMPETITION (3rd ed. vol.1, 1995).

logical next step is that intellectual property protection for names/titles are best sought under the trademark laws of the land and hence filing trademarks for titles is a common phenomenon for big entertainment franchises. An important judgement in this regard would be the one recently held 2015 in *Krishika Lulla and Ors vs Shyam Vitharao Devkutta*[282] where the SC expressly pronounced that copyrights do not subsist in the titles of literary works which include movies and the protection for the same can be granted only by way of trademarks. Generally, title trademark applications are made in Class 41, which includes services for education, training and various sporting and cultural activities according to the international system of trademark classification and the Trademarks Act of India, 1999.[283]

B. REGISTRATION OF FILM/SERIAL TITLES

It also needs to be pointed out as recently held in *Kanungo Media (P) Ltd vs. RGV Film Fact*ory, that the law with respect to protection of movie titles under trademark laws in India, similar to the Trademark laws in the US, does not allow stand-alone titles of literary work or cinematic expressions to be registered unless the titles/names are designated for a series of works or the singular titles have acquired a '**secondary'** meaning among the public at large. The test of secondary meaning for literary titles is basically to determine whether, in the minds of a significant number of

[282] Krishika Lulla v. Shyam Vithalrao Devkatta, (2016) 2 SCC 521 (India).
[283] The Trademark Rules, 2002, Class 41, Schedule IV; Nice Classification-11th ed. (2019).

consumers, the title in question is allied with a single source of the literary work. The Court held in the above case that,

> "*title of the film falls into two categories, firstly, titles of series of films and secondly titles of single copyrighted works. Protection is certain as regards titles of series of film, and such titles enjoy standard trademark protection. However, the Court found that in order to extend this protection to the title of a single copyrighted work, it must be proven that such title has acquired a wide reputation among the public and the industry that is, has acquired a secondary meaning. Therefore, in order to obtain an injunction, the onus is on the plaintiff to establish that its film title has acquired a secondary meaning.*"[284]

A case in point for a series title would be the famous 'Chicken Soup', 'Harry Potter' and the Marvel Comics super hero series.

The rationale behind protecting the titles of book or film/tele series and franchises, emanates from the fact that once the title of a series gets established, each work in the series serves to reinforce that it comes from the same source as the others and becomes identified in the public's mind with a particular author or publisher. Therein, lays the value of a sound intellectual property strategy and the justification for the current drift of publishers and film makers in promoting and pushing for copyrighted works in series. The criticality surrounding a title can be well understood from the fact that in India, the various trade associations like

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[284] Kanungo Media (P) Ltd. v. Rgv Film Factory, 138 (2007) DLT 312 (India).

Indian Motion Pictures Producers' Association (IMPAA), Producers Guild of India, Indian Film and TV Producers' Council (IFTPC), Screen Writers Association etc. allow film producers and directors to register their film/series title with them as a preparatory step, even before the film hits the floors, to pre-empt and prevent others from unauthorizedly using or usurping the same title.

Title registration preferably under the Trademark laws not only helps film producers to build, strengthen and reinforce a certain title into a brand, but also protects them against consumer confusion by distinguishing their titles from competing for entertainment and information platforms. Being an author or publisher of a serial, is today considered as one of the key secrets of successful publishing and affords all the creators involved in such series, many opportunities in valuable sequels and adaptation rights in best-selling books and hit movies. Hence, titles of stand-alone works, of a book, periodical, song, movie, or television program, normally will *not* be protected under trademark law.

C. GoT Trademarks

It is no surprise then that HBO today has more than 100 registered trademarks, and has filed more than 100 applications for "Thrones"- related trademarks, including those on highly specific elements of GoT that have garnered positive public responses in the US and other countries of the world. HBO has also lodged dozens of oppositions to perceived similar trademark applications and not the least of which have been making their displeasure with the President of the

United States known, for his memes and using GoT names and trademarks. In May 2016, just two days after a highly appreciated episode explaining the origins of a character named "Hodor", before killing him off, HBO applied to register the name for T-shirts and mugs in that name.[285]

The owners of "Lord of the Rings," "Star Wars" and the Marvel comics universe, have similarly registered dozens of fictional elements having great potential for merchandising, as trademarks**.** So apart from the copyrights in the story, plot, screenplay, film etc. a wealth of intellectual property lies in the very distinctive names chosen for plots/episodes, characters, places etc. to the extent that they each have acquired distinct trade identities. After all, trademarks can live forever and the GoT trademarks will certainly outlive the series and will always remain a pipeline for HBO revenues.

D. TRADEMARK BATTLES OF SPIRITS

A UK based brewery, Wadworth and Company filed a UK trade mark application for a figurative mark in 2017, which included a graphical depiction of stones (configured in a similar manner to Stonehenge) located above the words: "Wadworth" and "Game of Stones", covering ales and flavoured beers. The application was opposed by HBO on grounds of close similarity with their trade marks. HBO alleged that

[285] Bill Donahue, *Game Of Trademarks: How 'Thrones' Shields Its Brand*, LAW360 (May 16, 2019), *available at* https://www.law360.com/articles/1157943.

'Game of Stones' would inevitably 'ride on the coattails'[286] of their longstanding reputation and goodwill and would cause a misrepresentation, leading to consumers thinking the two were linked. However, these arguments and the opposition were rejected by the UKIPO who pointed out that though the marks shared some identical goods and the common word 'game of', it was not enough to constitute infringement. They held that there were very little visual or conceptual similarities between the marks and no misrepresentation and hence 'Game of Stones' was allowed to proceed.[287]

Similarly, in another case, one Maanmohan Singh applied to register the trade mark "Game of Vapes" in April 2017 in respect of goods in Class 34 (Tobacco, Smokers' articles: Matches) which application HBO opposed on the basis of its earlier EU trademark "Game of Thrones", registered *inter alia* for goods in that class.[288]

While HBO presented similar lines of arguments as mentioned above, it also submitted evidence related to the licensing and various other activities it undertakes with respect to its GoT marks, to prove their substantial commercial use. HBO also argued that consumers recognize

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[286] Explanation: Coattails are the lower flaps on the back of a man's jacket. To ride on someone's coattails is an idiom in the English language and means to become successful by attaching yourself to another's success. The idea behind ride someone's coattails is of someone holding onto the back of someone's jacket in order to be pulled along without exerting any effort of his own. A person who rides someone's coattails is usually considered unable to attain success on his own.

[287] Mathilde Pavis, *HBO fails in attempt to protect Game of Thrones trademarks,* THE IPKAT (April 02, 2019), *available at* http://ipkitten.blogspot.com/2019/04/hbo-fails-in-attempt-to-protect-game-of.html [hereinafter "Pavis"].

[288] *Id.*

well, the licensing or authorised merchandising of goods in relation to its marks.

However, the UKIPO decision in the case is thought provoking and must be quoted here, in the elucidation of the points made above. It ruled that,

> "*The marks owned by HBO were considered to be visually and aurally similar to Singh's mark, but only to "a medium degree" (para 23 & 24). The UKIPO considered that the difference in concept was significant and would inevitably lead the consumer to understand "Game of Vapes" to be a "comedic play on Game of Thrones" (para 53). Moreover, it was held that "Game of Vapes" was not a "natural brand extension" of "Game of Thrones", because no range of "game of..." trademarks exists. Although a consumer may be reminded of the earlier trademarks [owned by HBO], it would only amount to a mere association, not indirect confusion. As a result, the opposition failed in its entirety.*"[289]

As of 2018, HBO has sued Teechip.com for selling GoT knockoff merchandise on its site since July 2016 without their consent. It sued Teechip.com for both, copyrights and trademarks infringement and claims that despite it being notified by HBO to take down pirated ware it continued with the violations. The network has claimed damages paid from the profits of the knockoff merchandise, as well as triple the amount

[289] Pavis, *supra* note 287.

in damages "*for wilfully and intentionally, directly and/or indirectly, using a mark or designation, knowing such mark or designation is a counterfeit.*"[290]

In a surprising turn of events from HBO suing others to protect its IP, Franciscan Vineyards of Napa Valley, California, owning trademarks Ravenswood, Ravens and a drawing of three ravens (Ravenswood wine bottles) used by Ravenswood Vinery, opposed in 2015, HBO's trademark application for 'three eyed raven' trademark on grounds of fraudulent use. The three eyed raven has today acquired a popular symbolic relevance of mystery and power to guide people out of trouble. HBO sought the trademark for alcoholic and carbonated beverages, energy drinks, mixers and fruit drinks and had contracted with Ommegang Brewery in Cooperstown, New York to sell Three Eyed Raven Dark Saison Ale. The Brewery had previously introduced four such GoT inspired beers.

IV. GoT Multiplier Effect

A. GoT subscription revenues

The makers of the show were without a doubt, financial wizards who realizing the merits of great content of "Fire and Ice' and its success, could project from the income potential that lay in televising the novel

[290] The Blast Staff, *HBO Unleashes Legal Dragons Over Bootleg 'Game of Thrones' Merch*, BLAST (May 28, 2018), *available at* https://theblast.com/c/game-of-thrones-merchandise-lawsuit.

and telecasting it globally. The revenues that HBO has earned from GOT are as follows: [291]

SEASONS	EARNINGS/EPISODES (USD)	EARNINGS /SEASONS (USD)
1.	19 M	171,541,501.98
2.	24 M	240,711,462.45
3.	38M	378,498,023.72
4.	40M	396,343,873.52
5.	42M	419,169,960.47
6.	53M	533,300,395.26
7.	65M	453,754,940.71
8.	88M	525,691,699.60
Total	**369 M**	**3,119,011,857.71**

The above example illustrates the rich dividends that HBO reaped from backing Martin and investing in this television Serial. Interestingly, it

[291] *How Much Money Has HBO Made From Game Of Thrones?*, FINANCE MONTHLY (May, 20, 2019), *available at* https://www.finance-monthly.com/2019/05/how-much-money-has-hbo-made-from-game-of-thrones/.

is also observed that HBO earned the most during Season 6 of GoT. HBO's subscriptions charges are about $10 per month and if there are 50 million subscribers, who subscribe for the duration of a season (two and a half month) the math is plain and evident. As culled from different sources of information, it is believed that the top stars/cast/performers of the show too, have ranked handsomely, on an average USD 1.1 million, besides a percentage of syndication payments when the show is aired over 170 countries and that the network makes approximately $168 million in form of CD sales and $132 million in total from merchandise sales. Each set of the complete Series (up to seven seasons) is available in India for INR 5000/- and if 1 million people were to buy that, it would be INR 500 crores, straight into HBO's pockets.

On the other hand, the true reflection of HBO earnings can only be in the context of the kind of colossal investment it has made in GoT.

B. REVENUES FROM SPIRITS AND BEVERAGES

It is certainly noteworthy that different groups of people, industries, jewellery designers, fabricators and even places have benefited from the GoT franchise. An interesting dimension to have emerged with the GoT franchise is its clever brand extension into alcoholic beverages, ales and beers, creating thereby another stream of revenues. Back in 2013, HBO partnered with Ommegang Brewery to release a "Game of Thrones"-inspired beer called Iron Throne Blonde Ale, which was a runaway success. It was followed by others like Black, a stout; Fir and Blood, a red ale; Three Eyed Raven, a dark Saison; Seven Kingdoms, a

hoppy wheat ale and Valar Morghulis and Valar Doaheris, a dubbel and tripple ale, including "Milk of the Poppy," an obscure medicine referenced in "Thrones," as a trademark for alcoholic beverages. Ommegang Brewery website also has a dedicated page on GoT inspired beers and ales like, For The Throne, Mother Of Dragons, Queen Of The Seven Kingdoms, King In The North and Hand of The Queen, Bend the Knee Golden Ale and Winter is Here.

C. GoT AND TOURISM

Departing completely from issues of GoT content *per se*, a much talked about the phenomenon has been the magical tale of economic transformation in Iceland and Croatia and in particular, The Northern Ireland, these are the destinations in whose scenic locales many of the episodes were filmed. The Serial was also filmed on locations in Spain, Morocco and Malta. With GoT pilgrims and fanatics swarming these countries where the fantasies were woven, tourism has received a huge boost and the countries have benefited immensely. GoT has contributed hundreds of millions of dollars to the Northern Ireland economy with a total estimated benefit to be above $240 million over the past decade, bringing in $40 million annually to the local economy with 120,000 visitors a year.[292] It is believed that from a land of strife and violence, Northern Ireland's economic landscape has altered dramatically to a thriving one, with more than 900 full-time and 5,700 part-time jobs in the

[292] Kiko Itasaka, *For Northern Ireland, 'Game of Thrones' is much more than a popular TV show*, CNBC NEWS (May 19, 2019), *available at* https://www.nbcnews.com/news/world/northern-ireland-game-thrones-much-more-popular-tv-show-n993771.

process and bustling tourism.[293] Belfast's filmmaking industry has gone from a sleepy endeavour to a powerhouse and "*Game of Thrones* changed everything," says Richard Williams, chief executive of Northern Ireland Screen Agency (NIS),[294] which has invested $ 18.28 million in the show. Likewise, in Iceland, as many as 250 crew members, actors and extras work on the show, according to Pegasus, a production company contracted by HBO in that country.

D. GoT Costumes and India

However, the bit of information that had us excited the most, was the discovery that India too has played a big role in the production of the tele serial and has benefitted greatly from it. An entrepreneur from Dehradun, Capt. Saurabh Mahajan, an ex-army man supplies the armour for GoT, specifically Jon Snow's legendary Longclaw. In 2005 he set up a 100% export unit called as Lord of the Battle and focused on manufacturing and supplying battle gear, armours, costumes, and weaponries and other medieval artefacts to production companies/film studios, stage productions and re-enactment companies all across the globe. On being queried about the specifics of his contract, Mahajan declared that he is bound by a 20-page non-disclosure agreement about his deal with HBO and could not, therefore, divulge details about the item

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[293] Andrew, *How Game of Thrones brought jobs and a PR rebrand to Northern Ireland*, THE BIG ISSUE (Nov. 27, 2016), *available at* https://www.bigissue.com/culture/game-thrones-brought-jobs-pr-rebrand-northern-ireland/.

[294] Jeremy, *How Game of Thrones put Northern Ireland on the filmmaking map: 'It is basically night and day'*, INDEPENDENT (Apr. 12, 2019), *available at* https://www.independent.co.uk/news/long_reads/game-of-thrones-northern-ireland-film-location-set-got-belfast-tv-hbo-a8860561.html.

he manufactures. However, he informed that it was made of a variety of high carbon steel making it malleable and break-resistant. The reason why Mahajan is preferred over his many global competitors is that his products are handcrafted, speaking volumes thus about the craftsmen he employs and who are incidentally better off economically today, because of him and GoT.[295]

Another Dehradun connection with GoT surfaced in our research, that of an R.S. Windlass & Sons, who are the licensed manufacturers of GoT clothing and garments. Their textile mill in Noida specializes in period clothing and replicas of costumes used in Hollywood movies.[296]

V. CONCLUSION

The research into Game of Thrones has been a huge revelation; for the more we dug, the more we found that there is a story within a story and every frame of GoT was seeped in intellectual properties, making it a veritable feast for human eyes and mind and certainly for HBO's pockets. Therein lay the worth and merit of true creativity and originality of the content that spawned a thousand deals of commercial value.

From the US to Great Britain to Europe and Asia, GoT has traversed the globe in every sense, has kept the masses thrilled with

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[295] G Sampath, *This manufacturer crafts the armour for 'Game of Thrones'*, THE HINDU (Mar. 07, 2019), *available at* https://www.thehindu.com/entertainment/movies/medieval-battles-made-in-india/article18306503.ece.

[296] Asad Ali, *Windlass*, HINDUSTAN TIMES (Oct. 10, 2015), *available at* https://www.hindustantimes.com/brunch/windlass/story-bMNXpg32h1dx0v5oMDLrtL.html.

exciting entertainment and can truly be considered a developmental story, transforming lives, livelihoods, countries and the entertainment industry. The long list of credits at the end of each GoT episode/Series told quite another story of the army of people, beginning with David Benioff and D.B. Weiss, involved in creating them and the kind of complex, collaborative exercise it was. Right from the story/script of GoT to its screenplays, the direction; the grand visuals, cinematography and special effects; the soundtrack and music; the characters and every single element of drama conceptualised and expressed through costumes, backdrops and props; the digital and technological innovations through the length and breadth of the production; the production, distribution and the actors/performers rights; trademarks and merchandise; the confidential marketing and distribution strategies; the development of tourism in the beautiful locales where GoT was shot, all constituted the diverse and varied intellectual properties that went into the making of a single Got episode, not mention a Series and the entire Serial.

The latest drama that HBO has had to contend with is that over 7,50,000 fans disappointed with the GoT finale have petitioned HBO online to remake the episode, which they claim were not based on Martin's novels, were "ruined beyond repair" and were instead written in-house. It is indeed fascinating to note that in the 21st century, in a world driven by content, whether digital or print, visual or audio, or real or virtual; the lure of ancient folklores, dragons and witches, phantoms and ghosts never loses its sheen, never fails to fascinate or to fire up the child and the adult equally and grip the imagination of all regardless. Perhaps

the value and potential of a well-stocked IP stable is best explained when one looks into the Five hundred and Twenty-One (521, one mark has not been renewed) registered 'Harry Porter' marks owned by Warners Bros. and fourteen other pending applications. Nothing sells better than a great story and nothing succeeds like success and we are fortunate to witness every day everywhere the giant strides and March of the media and entertainment industry with their story tellers, especially with the great revival of fairy tales and we are inspired to follow their suit in creativity.