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Tarun Jain, *Promissory Estoppel: A Fading Enigma in Fiscal Space*, 7(1) NLUJ Law Review 1 (2020)

PROMISSORY ESTOPPEL: A FADING ENIGMA IN FISCAL SPACE?

Tarun Jain[*]

ABSTRACT

Promissory estoppel is an equitable doctrine which has found roots in the Indian jurisprudence. Its application has witnessed a passionate contest in the discourse regarding the Government's power to curtail or deny fiscal exemptions promised to the citizens. The article attempts to sketch the five-decades of judicial opinion, which reveals a flip-flop and discordant treatment meted to the doctrine. On one hand, we have decisions such as Indo-Afghan, Motilal Padampat, Nestle, Manuelson Hotels, etc., which mark the high points of the doctrine's delineation and highlight its expansive scope. Conversely, the decisions in Kasinka Trading, Shrijee Sales, and more recent ones, such as Unicorn Industries, VVF, etc., reveal how the 'public interest' test overwhelmingly interjects and arrests the pragmatic application of this doctrine. This sketch also manifests the current trends which point towards dwindling fortunes of the doctrine. The underlying objective of the article is to picturise the struggles of a commentator attempting a coherent description of this doctrine and its concomitant variables. Presenting the prevailing dichotomy in the judicial approach to this doctrine, the article reinforces the imminent need for a categorical enunciation, lest the doctrine fades into obsolescence.

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I. INTRODUCTION: SETTING THE CONTEXT

It is an elementary proposition of law that a contract requires an exchange of promises between the parties. Unilateral promises, where consideration is not reciprocated by the other party, are not typically recognised as contracts. Does this imply that unilateral acts by one party do not carry any consequence for the other? The legal position on this aspect is unclear, for the formulation of this response depends upon the satiation of a variety of variables. Was the act uninspired, i.e., carried out without a shade of motivation by the other party? Was it a gift, a donation, or an act of charity? Was the benefit of the act perceived and enjoyed by the other party? Was the doer of the act persuaded, by act or omission of the other party, into the act? As evident, all these questions carry a subjective standard of appreciation, and more critically, from a legal standpoint, have distinct implications.

The Indian law treats statutory enforcement of contractual commitments *vis-à-vis* equitable claims differently. It is indeed true that certain equitable propositions have been legislated into enactments, such as the law governing gifts,[1] the codification of the quasi-contract doctrines,[2] the rule of estoppel,[3] etc., yet the realm of equity largely remains contingent upon judicial indulgence, being pedestal on common law standards and judicial precedents. This paper explores one such variant of the equity-

[1] The Transfer of Property Act, No. 4 of 1882 INDIA CODE (1882), § 122.
[2] The Indian Contract Act, No. 9 of 1872 INDIA CODE (1872), § 70.
[3] The Indian Evidence Act, No. 1 of 1872 INDIA CODE (1872), § 115.

driven response of the legal system, i.e., the doctrine of promissory estoppel and even within that space, a specific subset, i.e., application of the doctrine of promissory estoppel to governmental action in fiscal space.

The aim of this paper is manifold. *First*, given that there is no statutory basis for its application and instead that the doctrine of promissory estoppel has its *sui generis* paradigm, the paper traces the judicial exposition of this doctrine and its contours in the Indian fiscal context. *Second*, shaped by decades of disjointed and often conflicting judicial opinions, the paper attempts to highlight the varying judicial treatment meted to this doctrine in the last five decades. *Third*, the paper in its survey of judicial opinion sketches a position which is perhaps best described as a conundrum. The point at hand is the inconsistency in the judicial thought. On the one hand, it is espoused that there is no equity in tax[4] whereas in equal breath the doctrine of promissory estoppel, which is a quintessential equitable doctrine, is applied in fiscal space. *Fourth*, the paper juxtaposes the variables which arrest the application of the doctrine, thereby delineating its scope, coverage and limitations. Besides these larger objectives, in equal measure, the key underlying intent is to delineate the legal position on the subject and cull out the current standing of the doctrine of promissory estoppel in fiscal space in India.

At the outset, it is clarified that this paper does not undertake a comparative appraisal. Instead, the exposition of the judicial standard is

[4] Lakshmi Kant Jha v. Commissioner of Wealth Tax, (1974) 3 SCC 126 (India).

confined to the appreciation of Indian jurisprudence, that too only of the Supreme Court of India. The main reason for this approach is that, as would be evident, dissected from the perspective of the principles that emanate therefrom, virtually each decision adds a contrasting nuance to the doctrine such that it resembles a palimpsest with ill-defined contours and eluding a precedential setting. Perhaps, for this reason, the paper can also be characterized as a critique of the judicial disposition, which is singularly responsible for both, the birth and demise of this branch of law.

II. *INDO-AFGHAN* AND *MOTILAL PADAMPAT*: BIRTH OF THE PROMISSORY ESTOPPEL DOCTRINE IN FISCAL JURISPRUDENCE

The decision of the Supreme Court in *Union of India v. Indo-Afghan Agencies Ltd.* [*hereinafter* referred to as "***Indo-Afghan***"][5] is credited as the first decision to introduce the promissory estoppel doctrine in the tax jurisprudence.[6] In this case, the Court was concerned with an export promotion scheme which granted incentives to exporters of woollen goods and which was specifically extended to exports to Afghanistan. Despite such a scheme, the entitlement certificate was not issued to the Respondent for the full amount as specified in the scheme. This was challenged before the High Court which directed issuance of the entitlement certificate for the entire amount.

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[5] Union of India v. Indo-Afghan Agencies Ltd., (1968) 2 SCR 366 (India).
[6] I.C. Saxena, *The Twilight of Promissory Estoppel in India: A Contrast with English Law*, 16 J. INDIAN L. INST. 187 (1974).

In an appeal before the Supreme Court, it was, *inter alia*, contended by the Government that the scheme was 'administrative' in character and thus, "*it created no rights in the public generally or in the exporters who exported their goods in pursuance of the scheme and imposed no obligations upon the Government to issue the import certificates*". Another plea was made that the "*import and export policy of the Government is based on availability of foreign exchange, requirement of goods of foreign origin for internal consumption, economic climate in the country, and other related matters, and has in its very nature to be flexible, and on that account the power of the Government to modify or adjust it as the altered circumstances necessitate, cannot be restricted on the ground that promises made by the Government in different situations are not carried out, however amoral that claim may appear to be*".[7]

Rejecting the claims made by the Government to absolve it from the obligations, the Supreme Court found itself "*unable to accede to the contention that the executive necessity releases the Government from honouring its solemn promises relying on which citizens have acted to their detriment*". Elevating the rationale, and declaring that "*[u]nder our constitutional set-up no person may be deprived of his right or liberty except in due course of and by authority of law*", the Court declared that it is "*competent to grant relief in appropriate cases, if, contrary to the scheme, the authority declined to grant a licence or import certificate or the authority acted arbitrarily*".[8] In *Indo-Afghan*, the Supreme Court concluded that "*the claim of the respondents is appropriately founded upon the equity which arises in their favour as a result of the representation made on behalf of the Union of India in the Export Promotion Scheme, and the action taken by the respondents acting upon that*

[7] Union of India v. Indo-Afghan Agencies Ltd., (1968) 2 SCR 366 (India).
[8] *Id.* ¶ 17.

representation under the belief that the Government would carry out the representation made by it".[9]

This decision was essentially based upon the doctrine of fair-play in Government action, which is a long-standing concept under the aegis of an administrative law inquiry. Nonetheless, the decision in *Indo-Afghan* is crucial from the perspective that it approved earlier decisions of the High Courts to build upon an estoppel doctrine, which was different from the estoppel as a legislated rule[10] of evidence. To this effect, it was, *inter alia*, observed in this decision that there was clear authority to conclude "*that even though the case does not fall within the terms of Section 115 of the Evidence Act, it is still open to a party who has acted on a representation made by the Government to claim that the Government shall be bound to carry out the promise made by it, even though the promise is not recorded in the form of a formal contract as required by the Constitution*".[11]

This premise was further developed by the Supreme Court in its decision in *Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh* [*hereinafter* referred to as "***Motilal Padampat***"],[12] which is considered as the path-breaking moment introducing the promissory estoppel doctrine in the fiscal realm. In this case, the Supreme Court chose to frame for itself the question "*[h]ow far and to what extent is the State bound by the doctrine of promissory*

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[9] *Id.* ¶ 20.
[10] The Indian Evidence Act, No. 1 of 1872 INDIA CODE (1872), § 115.
[11] Union of India v. Indo-Afghan Agencies Ltd., (1968) 2 SCR 366 (India).
[12] Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh, (1979) 2 SCC 409 (India).

estoppel" to acknowledge that this "*doctrine [is of] comparatively recent origin but it is potentially so fruitful and pregnant with such vast possibilities for growth that traditional lawyers are alarmed lest it might upset existing doctrines which are looked upon almost reverentially and which have held the field for a long number of years*".[13] This decision, pragmatically, tested the bounds of executive action and the self-incurred obligations which may accrue to the Government *vis-à-vis* its dealings with the citizens.

The factual position in *Motilal Padampat* was that on the assurance of a three-year tax holiday to all new units established in the State, a hydro-generation plant was set-up. Initially, the State Government extended confirmation of entitlement but later resiled from the commitment. This action led to a challenge before the High Court of Allahabad but was rejected, which led to an appeal before the Supreme Court. Noting that the doctrine, which is[14] "*variously called 'promissory estoppel', 'equitable estoppel', 'quasi estoppel' and 'new estoppel' … a principle evolved by equity to avoid injustice … [is] neither in the realm of contract nor in the realm of estoppel*", the Supreme Court opined that the "*basis of this doctrine is the inter-position of equity [where e]quity has always, true to form, stepped in to mitigate the rigours of strict law*"[15]. Traversing through the judicial opinion, elucidating the English law and American law on the subject, the Supreme Court noted that it was in *Indo-Afghan* that "*the*

[13] *Id.* ¶ 1.
[14] Central London Property Trust Ltd. v. High Trees House Ltd., (1956) 1 All ER 256 (U.K.).
[15] Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh, (1979) 2 SCC 409 (India).

doctrine of promissory estoppel found its most eloquent exposition".[16] In *Motilal Padampat*, the Supreme Court declared that "*[t]he law may, therefore, now be taken to be settled as a result of this decision, that where the Government makes a promise knowing or intending that it would be acted on by the promisee and, in fact, the promisee, acting in reliance on it, alters his position, the Government would be held bound by the promise and the promise would be enforceable against the Government at the instance of the promisee, notwithstanding that there is no consideration for the promise and the promise is not recorded in the form of a formal contract as required by Article 299 of the Constitution*". The decision of the Supreme Court in *Motilal Padampat* carries certain observations of seminal importance which require reproduction, undertaken hereafter;[17]

> "*It is indeed difficult to see on what principle can a Government, committed to the rule of law, claim immunity from the doctrine of promissory estoppel. Can the Government say that it is under no obligation to act in a manner that is fair and just or that it is not bound by considerations of 'honesty and good faith'? Why should the Government not be held to a high 'standard of rectangular rectitude while dealing with its citizens'? There was a time when the doctrine of executive necessity was regarded as sufficient justification for the Government to repudiate even its contractual obligations; but, let it be said to the eternal glory of this Court, this doctrine was emphatically negatived in the Indo-Afghan Agencies case and the supremacy of the rule of law was established. It was laid down by this Court that the Government cannot*

[16] *Id.* ¶ 22.
[17] *Id.* ¶ 24.

> *claim to be immune from the applicability of the rule of promissory estoppel and repudiate a promise made by it on the ground that such promise may fetter its future executive action. If the Government does not want its freedom of executive action to be hampered or restricted, the Government need not make a promise knowing or intending that it would be acted on by the promisee and the promisee would alter his position relying upon it. But if the Government makes such a promise and the promisee acts in reliance upon it and alters his position, there is no reason why the Government should not be compelled to make good such promise like any other private individual. The law cannot acquire legitimacy and gain social acceptance unless it accords with the moral values of the society and the constant endeavour of the Courts and the legislature, must, therefore, be to close the gap between law and morality and bring about as near an approximation between the two as possible. The doctrine of promissory estoppel is a significant judicial contribution in that direction.*" *(emphasis supplied)*

Having regard to the above and considering the constitutional declaration that the decisions of the Supreme Court are final and binding on all in the country,[18] one would be led to believe that through this decision the doctrine of promissory estoppel was firmly engrained in the tax jurisprudence to dislodge any mid-way retraction of commitments extended by the Government. This was, however, not the position, particularly in

[18] INDIA CONST., art. 141.

view of the *caveat* which was found to be rather elaborately set out in the decision in *Motilal Padampat* itself, as we discuss in the next section.

III. THE CAVEAT IN *MOTILAL PADAMPAT* AND THE CONSEQUENT FLIP-FLOP IN JUDICIAL OUTCOMES

After instituting the promissory estoppel doctrine as a relevant consideration in fiscal disputes, the Supreme Court in *Motilal Padampat* itself qualified the declaration by elaborating the situations where the doctrine, which was an outcome of equity, would find itself displaced. The touchstone warranting the dilution of the promissory estoppel doctrine was identified in *Motilal Padampat* as the 'public interest' test which purportedly rested on the premise that a citizen cannot be made to override a larger good. Though qualified and jointed with certain limitations, perhaps to ensure that the exception does not overwhelm the main principle, the Supreme Court in *Motilal Padampat* elucidated this exception in the following terms:[19]

> "*But it is necessary to point out that since the doctrine of promissory estoppel is an equitable doctrine, it must yield when the equity so requires. If it can be shown by the Government that having regard to the facts as they have transpired, it would be inequitable to hold the Government to the promise made by it, the Court would not raise an equity in favour of the promisee and would not enforce the promise against the Government.*

[19] Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh, (1979) 2 SCC 409 (India).

The doctrine of promissory estoppel would be displaced in such a case because, on the facts, equity would not require that the Government should be held bound by the promise made by it. When the Government is able to show that in view of the facts as have transpired since the making of the promise, public interest would be prejudiced if the Government were required to carry out the promise, the Court would have to balance the public interest in the Government carrying out a promise made to a citizen which has induced the citizen to act upon it and alter his position and the public interest likely to suffer if the promise were required to be carried out by the Government and determine which way the equity lies. … If the Government wants to resist the liability, it will have to disclose to the Court what are the facts and circumstances on account of which the Government claims to be exempt from the liability and it would be for the Court to decide whether those facts and circumstances are such as to render it inequitable to enforce the liability against the Government. Mere claim of change of policy would not be sufficient to exonerate the Government from the liability: the Government would have to show what precisely is the changed policy and also its reason and justification so that the Court can judge for itself which way the public interest lies and what the equity of the case demands. … The burden would be upon the Government to show that the public interest in the Government acting otherwise than in accordance with the promise is so overwhelming that it would be inequitable to hold the Government bound by the promise and the Court would insist on a highly rigorous standard of proof in the discharge of this burden."

From the above passage in *Motilal Padampat* decision, a number of inferences can be drawn which translate into legal propositions on the scope of the promissory estoppel doctrine.

- *First*, no matter the heightened role of equitable considerations, the promissory estoppel doctrine is a test to assess the validity of Government action rather than an unequivocal jurisprudential proposition.
- *Second*, because the doctrine of promissory estoppel is equitable in nature, its application is subject to the usual considerations and limitations which are attendant to such equitable considerations. Thus, its application requires a subject and a fact-driven inquiry before assuming centre-stage in a contest.
- *Third*, which is perhaps a natural extension of the above, the determination as to whether special equities exist in a fact-scenario which oblige the Government to perform its promise or, instead, whether the circumstances are such that the Government is justified in breaking-free of the obligations, is the determination to be made by the court in every case.
- *Fourth*, even though expressed as the sole limitation to the doctrine, the public interest exception is overwhelmingly wide such that it is beyond an exhaustive delineation. Thus, the limitation on the application of the promissory estoppel doctrine is indeed a wide one.

As a consequence, notwithstanding the decision in *Indo-Afghan* or the elaborate enunciation of its equitable foundations in *Motilal Padampat*,

the doctrine of promissory estoppel could, in hindsight, never attain a *sui generis* disposition capable of an axiomatic application. The subsequent decisions discussed in this part reveal how even the Supreme Court struggled in ensuring an unwavering application of the doctrine of promissory estoppel, as evident from a constant flip-flop and a fact-based enunciation. To exemplify, the Supreme Court in *State of Punjab v. Nestle India Ltd.* [*hereinafter* referred to as "***Nestle***"][20] culled out two of its limitations:

> (i) "*[S]ince the doctrine of promissory estoppel is an equitable doctrine, it must yield when the equity so requires*"; and
> (ii) "*If the statute does not contain a provision enabling the Government to grant exemption, it would not be possible to enforce the representation against the Government, because the Government cannot be compelled to act contrary to the statute.*"[21] *Thus, the competence of the Government in extending a fiscal benefit was also subsequently added as a mandatory test to be satisfied.*"

The decision in *Nestle* is particularly relevant for our inquiry. It was a reaffirmation of the doctrine of promissory estoppel which had, subsequent to *Motilal Padampat*, found its fortunes dwindling. In this case, the Supreme Court was required to address the claim for purchase tax exemption by milk producers who claimed, invoking, *inter alia*, the doctrine of promissory estoppel, that the Government had decided to abolish such

[20] State of Punjab v. Nestle India Ltd., (2004) 6 SCC 465 (India).
[21] *Id.* ¶ 30.

tax basis by relying upon the speech of the State Finance Minister. The Supreme Court went on to revisit the varying decisions on the subject post *Motilal Padampat* to acknowledge that there was indeed a subsequent "*aberrant note*"[22] in the application of the doctrine but that divergence had been disapproved subsequently.[23] The summation of the *Nestle* decision also indicates the legal position prevailing at that time. Here, the Supreme Court recounted the decision of *Bakul Cashew Co. v. Sales Tax Officer* [*hereinafter* referred to as "***Bakul Cashew***"][24] as an instance wherein relief on account of promissory estoppel doctrine was denied owing to the failure to establish that any prejudice was caused by acting upon the Government's representation. It was, however, underscored that the declaration in *Motilal Padampat* was not dead, and instead the application of the doctrine of promissory estoppel was extended even to other branches of law, such as the service law.[25] It was also recalled in *Nestle* that a number of decisions had indeed given effect to the doctrine of promissory estoppel in the fiscal realm.[26]

The decision in *Nestle* is also significant as it can be considered as a titling point, weighing the scales in favour of the promissory estoppel doctrine despite a clear acknowledgement by the Supreme Court that there

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[22] Jeet Ram Shiv Kumar v. State of Haryana, (1981) 1 SCC 11 (India).
[23] Union of India v. Godfrey Phillips India Ltd., (1985) 4 SCC 369 (India).
[24] Bakul Cashew Co. v. Sales Tax Officer, (1986) 2 SCC 365 (India).
[25] Surya Narain Yadav v. Bihar State Electricity Board, (1985) 3 SCC 38 (India).
[26] State of Madhya Pradesh v. Orient Paper Mills Ltd., (1990) 1 SCC 176 (India); Delhi Cloth and General Mills Ltd. v. Union of India, (1988) 1 SCC 86 (India); Sharma Transport v. Government of Andhra Pradesh, (2002) 2 SCC 188 (India); State of Orissa v. Mangalam Timber Products Ltd., (2004) 1 SCC 139 (India).

were indeed various decisions that had ruled against the application of this doctrine.[27] It is now firmly entranced in the Indian jurisprudence that in case of divergence of opinion against various earlier decisions, the differences must be referred to a larger bench of the Supreme Court for an authoritative pronouncement which would dispel the doubts by settling the law.[28] While the decision in *Nestle* duly acknowledged the cleavage in the judicial opinion as regards the application of the doctrine, instead of referring the issue for a categorical delineation by a larger bench of the Supreme Court, the decision in *Nestle* adopted a curious approach. It was concluded in *Nestle* that the Supreme Court would rather follow the decision of an earlier larger bench,[29] and therefore, the doctrine of promissory estoppel was considered as unreservedly applicable in terms of the principles laid out in *Motilal Padampat*.

In hindsight, a reference was apposite in *Nestle* for it would have quelled all doubts on the contours and continued relevance of the doctrine of promissory estoppel. As the subsequent decisions reveal, the inability of the Supreme Court to categorically adjudge the position of this doctrine in the judicial discourse led to flip-flop reflections. This trend continues till

[27] Kasinka Trading v. Union of India, (1995) 1 SCC 274 (India); Shrijee Sales Corporation v. Union of India, (1997) 3 SCC 398 (India); Sales Tax Officer v. Shree Durga Oil Mills, (1998) 1 SCC 572 (India); Amrit Banaspati Co. Ltd. v. State of Punjab, (1992) 2 SCC 411 (India); ITC Bhadrachalam Paperboards v. Mandal Revenue Officer, (1996) 6 SCC 634 (India).

[28] Central Board of Dawoodi Bohra Community v. State of Maharashtra, (2005) 2 SCC 673 (India); Union of India v. Raghubir Singh, (1989) 2 SCC 754 (India); National Insurance Co. Ltd. v. Pranay Sethi, (2017) 16 SCC 680 (India); Dr. Shah Faesal v. Union of India, (2020) SCC Online SC 263 (India).

[29] Union of India v. Godfrey Phillips India Ltd., (1985) 4 SCC 369 (India).

date notwithstanding the decades which have passed since the manifestation of the doctrine in the *Motilal Padampat*.

Post *Nestle* as well, the doctrine was held to apply in certain cases to hold that the fiscal exemption promised by the state actors would be available to the citizens.[30] However, an almost equal number of decisions held to the contrary denying similar claims.[31] A few years after *Nestle*, the issue regarding the application of the promissory estoppel doctrine and its concomitant legitimate expectation principle was indeed referred to a larger bench for consideration.[32] It was noted "*that there seems to be some difference of opinion in the various decisions by different Benches of this Court. Hence the matter needs to be decided by a larger Bench of this Court, on the issue as to whether the principles of promissory estoppel and legitimate expectation are applicable in this case. The larger Bench may also consider whether the undertaking given by the appellants acts as an estoppel against them*". This reference, however, did not yield the desired result

[30] State of Rajasthan v. J.K. Udaipur Udyog Ltd., (2004) 7 SCC 673 (India); Mahabir Vegetable Oils Pvt. Ltd. v. State of Haryana, (2006) 3 SCC 620 (India); MRF Ltd., Kottayam v. Assistant Commissioner (Assessment) Sales Tax, (2006) 8 SCC 702 (India); Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector, (2007) 5 SCC 447 (India); U.P. Power Corporation Ltd. v. Sant Steel & Alloys Pvt. Ltd., (2008) 2 SCC 777 (India); Pepsico India Holdings Pvt. Ltd. v. State of Kerala, (2009) 13 SCC 55 (India); State of Rajasthan v. Basant Agrotech India Ltd., (2013) 15 SCC 1 (India); SVA Steel Re-rolling Mills Ltd. v. State of Kerala, (2014) 4 SCC 186 (India); Devi Multiplex v. State of Gujarat, (2015) 9 SCC 132 (India).

[31] A.P. Steel Re-Rolling Mills Ltd. v. State of Kerala, (2007) 2 SCC 725 (India); Kusumam Hotels Pvt. Ltd. v. Kerala State Electricity Board, (2008) 13 SCC 213 (India); Shree Sidhbali Steels Ltd. v. State of Uttar Pradesh, (2011) 3 SCC 193 (India); Kothari Industrial Corporation Ltd. v. Tamil Nadu Electricity Board, (2016) 4 SCC 134 (India).

[32] Kothari Industrial Corporation Ltd. v. Tamil Nadu Electricity Board, (2010) 14 SCC 615 (India).

as the decision of the larger bench[33] was confined to the facts of the instant case instead of a declaration of the legal position capable of resolving all ambiguities on the scope and contours of the doctrine.

This takes us to the decision in *Manuelsons Hotels Pvt. Ltd. v. State of Kerala* [*hereinafter* referred to as "***Manuelsons Hotels***"][34] which marks a significant event in the continuous evolution of the flip-flop trend and perhaps the last decision of the Supreme Court where the doctrine has been granted judicial reaffirmation. In this case, the question before the Supreme Court was the interplay of a Government Order issued by the State of Kerala which, *inter alia*, stated that eligible industries would be entitled to exemption from 'building tax'. Based on approvals granted to it, the Appellant began construction of a hotel within the State. Subsequently, the Government denied exemption to the Appellant stating that the statutory provisions did not permit grant of exemption. Emphatically re-endorsing its basis, the Supreme Court reaffirmed the underlying cause for the application of the doctrine to observe that "*we must never forget that the doctrine of promissory estoppel is a doctrine whose foundation is that an unconscionable departure by one party from the subject-matter of an assumption which may be of fact or law, present or future, and which has been adopted by the other party as the basis of some course of conduct, act or omission, should not be allowed to pass muster*".

[33] Kothari Industrial Corporation Ltd. v. Tamil Nadu Electricity Board, (2016) 4 SCC 13 (India).
[34] Manuelsons Hotels Pvt. Ltd. v. State of Kerala, (2016) 6 SCC 766 (India).

The decision in *Manuelsons Hotels* is crucial from the perspective that it unreservedly concluded that the application of the doctrine of promissory estoppel did not depend upon the establishment of 'prejudice' by one party from acting upon a representation of the other party, and it was enough to demonstrate that a representation did exist and was acted upon. Referring to a decision of the Australian High Court,[35] the Supreme Court in *Manuelsons Hotels* declared the legal position, *inter alia*, in the following terms:

> "*The above statement, based on various earlier English authorities, correctly encapsulates the law of promissory estoppel with one difference—under our law, as has been seen hereinabove, promissory estoppel can be the basis of an independent cause of action in which detriment does not need to be proved. It is enough that a party has acted upon the representation made. The importance of the Australian case is only to reiterate two fundamental concepts relating to the doctrine of promissory estoppel—one, that the central principle of the doctrine is that the law will not permit an unconscionable departure by one party from the subject-matter of an assumption which has been adopted by the other party as the basis of a course of conduct which would affect the other party if the assumption be not adhered to. The assumption may be of fact or law, present or future. And two, that the relief that may be given on the facts of a given case is flexible enough to remedy injustice wherever it is found. And this would include the relief of acting on the basis that a future*

[35] Commonwealth of Australia v. Verwayen, (1990) 170 CLR 394 (Aus.).

assumption either as to fact or law will be deemed to have taken place so as to afford relief to the wronged party." *(emphasis supplied)*

Adverting to the factual paradigm before it, the Supreme Court in *Manuelsons Hotels* decided against the State Government. The Supreme Court concluded that denial of exemption despite having represented to the citizens "*was an arbitrary act of the Government which must be remedied by the application of the doctrine of promissory estoppel … [t]he ministerial act of non-issue of the notification cannot possibly stand in the way of the appellants getting relief under the said doctrine for it would be unconscionable on the part of the Government to get away without fulfilling its promise*". The decision, therefore, reaffirmed that the promissory estoppel doctrine was indeed alive and kicking, and had not been exorcised from the judicial discourse. This aspect becomes acutely relevant considering that the decision in *Manuelsons Hotels* is fairly recent and confirms that the Supreme Court would indeed grant indulgence to enforce equitable remedies against the Governments resiling from their solemn assurances.

IV. THE ACCENTUATING ROLE OF 'INDUSTRIAL POLICY' AND 'PUBLIC INTEREST' TENETS: COMPETING AS HARBINGER VERSUS NEMESIS OF PROMISSORY ESTOPPEL DOCTRINE?

A. CONTEXTUALIZING THE TENETS

The debate on the doctrine of promissory estoppel would be incomplete without reference to the two variables which often, respectively, heighten or recede its flow. The state policy or industrial policy contentions

have often increased the chances of a claim based on promissory estoppel to be upheld wherein the doctrine has often found itself in adversary in an overriding public interest contention. It is, therefore, appropriate to address their respective roles.

The state policy or industrial policy perspective is based upon certain decisions that have refused to examine the claim for promissory estoppel versus the Government's prerogative to withdraw exemptions as a unidimensional debate. In such decisions, the Supreme Court has examined the larger paradigm to note the very basis on which such exemptions were extended and if there was a change in circumstances warranting their withdrawal. In other words, in this class of decisions, the Supreme Court refused to turn a blind eye to the fact that grant and withdrawal of exemptions was a mere policy prerogative of the Government and instead went on to adjudge the avowed intent of Government action manifested from their public policy pronouncements in the form of such state or industrial policies.

B. EXPOUNDING THE 'INDUSTRIAL POLICY' PERSPECTIVE

One of the leading decisions on this proposition is *State of Bihar v. Suprabhat Steel Ltd.* [*hereinafter* referred to as "***Suprabhat Steel***"][36] wherein the issue was similar, i.e., claim to fiscal exemption basis the representation of the Government. However, instead of relying upon the promissory estoppel doctrine, the claim was based upon the state industrial policy itself

[36] State of Bihar v. Suprabhat Steel Ltd., (1999) 1 SCC 31 (India).

which extended these exemptions. The Supreme Court opined that the power of the Government to act in individual cases, i.e., determining whether the exemption was available to a particular unit, was circumscribed by the policy which limited both the discretion as also the ability of the Government to deny benefit to the citizen.

The decision in *Suprabhat Steel* in itself did not turn the wheels for the emergence of an equitable doctrine. It was the subsequent decision in *State of Jharkhand v. Tata Cummins* [*hereinafter* referred to as "***Tata Cummins***"][37] wherein the Supreme Court propounded the proposition that where a citizen "*is promised with a tax exemption for setting up an industry in the backward area as a term of the industrial policy, we have to read the implementing notifications in the context of the industrial policy. In such a case, the exemption notifications have to be read liberally keeping in mind the objects envisaged by the industrial policy and not in a strict sense as in the case of exemptions from tax liability under the taxing statute*". Thus, without formally invoking the promissory estoppel doctrine, the Supreme Court did read its underlying rationale while upholding a claim based on the state policy contention.

Subsequent decisions of the Supreme Court in *State of Bihar v. Kalyanpur Cement Ltd.* [*hereinafter* referred to as "***Kalyanpur Cement***"][38] and *Lloyd Electric & Engineering Ltd. v. State of Himachal Pradesh* [*hereinafter* referred

[37] State of Jharkhand v. Tata Cummins Ltd., (2006) 4 SCC 57 (India).
[38] State of Bihar v. Kalyanpur Cement Ltd., (2010) 3 SCC 274 (India).

to as "***Lloyd Engineering***"][39] further refined this principle. The latter decision carried a remark which went beyond the regular considerations. In *Lloyd Engineering* it was observed that "*[t]he State Government cannot speak in two voices. Once the Cabinet takes a policy decision … the Notification … having been issued by the Department concerned viz. Department of Industries, thereafter, the Excise and Taxation Department cannot take a different stand. What is given by the right hand cannot be taken by the left hand. The Government shall speak only in one voice. It has only one policy. The departments are to implement the government policy and not their own policy. Once the Council of Ministers has taken a decision to extend the 2004 Industrial Policy and extend tax concession beyond 31-3-2009, merely because the Excise and Taxation Department took some time to issue the notification, it cannot be held that the eligible units are not entitled to the concession till the Department issued the notification*". Thus, at least conceptually, the rationale for the decision in *Nestle* was reinforced by the Supreme Court in *Lloyd Engineering*, albeit without formally invoking the doctrine of promissory estoppel.

C. THE 'PUBLIC INTEREST' STANDPOINT

A related dimension of the promissory estoppel based claims was reliance placed in such contests upon the principle of legitimate expectation, which also received affirmation in various decisions of the Supreme Court.[40] However, even this principle, along with the

[39] Lloyd Electric & Engineering Ltd. v. State of Himachal Pradesh, (2016) 1 SCC 560 (India).

[40] Commissioner of Commercial Taxes v. Dharmendra Trading Co., (1988) 3 SCC 570 (India); Bannari Amman Sugars Ltd. v. Commercial Tax Officer, (2005) 1 SCC 625 (India); Bhushan Power and Steel Ltd. v. State of Orissa, (2012) 4 SCC 246 (India); Monnet Ispat and Energy Ltd. v. Union of India, (2012) 11 SCC 1 (India); State of Jammu & Kashmir v. Trikuta Roller Flour Mills Pvt. Ltd., (2018) 11 SCC 260 (India).

considerations attendant to the promissory estoppel doctrine, has been countered by the 'public interest' test. As discussed above, the origin of this exception to the promissory estoppel doctrine was well engrafted in *Motilal Padampat* decision itself. The leading decision in which this aspect was exemplified is *Kasinka Trading v. Union of India* [*hereinafter* referred to as "***Kasinka Trading***"][41]. This requires a closer examination in the wake of the widespread reliance placed upon it in the subsequent decisions.

The *lis* in *Kasinka Trading* concerned premature roll-back of a notification by the Government in terms of which certain exemptions were extended under the customs law. It was urged before the Supreme Court that such roll-back was impermissible in the wake of the promissory estoppel doctrine citing the fact that the Appellant had placed orders for import of the exempted goods on the assumption that the Government would honour the exemption contained by the notification. The Supreme Court referred to the well-settled position that the "*doctrine must yield when the equity so demands if it can be shown having regard to the facts and circumstances of the case that it would be inequitable to hold the Government or the public authority to its promise, assurance or representation*". This proposition is beyond cavil as it was even expounded in *Motilal Padampat*. The Supreme Court in *Kasinka Trading*, however, went much beyond.

In *Kasinka Trading*, it was emphasized that the exemption flowed from a notification issued by the Government, not in the exercise of its

[41] Kasinka Trading v. Union of India, (1995) 1 SCC 274 (India).

executive power, but instead by carrying out the legislative function of extending (and withdrawing) exemptions in the provisions of the customs law. The Supreme Court also gave due credence to the fact that the relevant statutory provision mandated that the Government exercised its power under 'public interest'. This was translated to mean that the exercise of the power under this provision could not be construed as a representation so as to create an inducement to any so as to be governed by the promissory estoppel doctrine. It was further added that there was an inherent element of public interest underlying the issuance and withdrawal of such notifications which overrides any equitable considerations constituting as the basis for invoking the promissory estoppel doctrine. These aspects emanate from the following observations in *Kasinka Trading*:

> "*21. … Notification No. 66 of 1979 in our opinion, was not designed or issued to induce the appellants to import PVC resin. Admittedly, the said notification was not even intended as an incentive for import. The notification on the plain language of it was conceived and issued on the Central Government 'being satisfied that it is necessary in the public interest so to do'. Strictly speaking, therefore, the notification cannot be said to have extended any 'representation' much less a 'promise' to a party getting the benefit of it to enable it to invoke the doctrine of promissory estoppel against the State. It would bear repetition that in order to invoke the doctrine of promissory estoppel, it is necessary that the promise which is sought to be enforced must be shown to be an unequivocal promise to the other party intended to create a legal relationship and that it was acted upon as such by the party to whom the same was made. A notification*

> *issued under Section 25 of the Act cannot be said to be holding out of any such unequivocal promise by the Government which was intended to create any legal relationship between the Government and the party drawing benefit flowing from of the said notification. It is, therefore, futile to contend that even if the public interest so demanded and the Central Government was satisfied that the exemption did not require to be extended any further, it could still not withdraw the exemption.*
>
> …
>
> *23. The appellants appear to be under the impression that even if, in the altered market conditions the continuance of the exemption may not have been justified, yet, Government was bound to continue it to give extra profit to them. That certainly was not the object with which the notification had been issued. The withdrawal of exemption 'in public interest' is a matter of policy and the courts would not bind the Government to its policy decisions for all times to come, irrespective of the satisfaction of the Government that a change in the policy was necessary in the 'public interest'. The courts, do not interfere with the fiscal policy where the Government acts in "public interest" and neither any fraud or lack of bona fides is alleged much less established. The Government has to be left free to determine the priorities in the matter of utilisation of finances and to act in the public interest while issuing or modifying or withdrawing an exemption notification under Section 25(1) of the Act." (emphasis supplied)*

The aforesaid extract clearly establishes that the Supreme Court equated 'policy decisions' with 'public interest'. This aspect, as the later

decisions will reveal, was to be further extrapolated, giving additional leeway to the Government, and thus, an upper hand to it so as to tilt the balance against the citizens in a promissory estoppel claim.

The reasoning in *Kasinka Trading* was confirmed by a larger bench of the Supreme Court in *Shrijee Sales Corporation v. Union of India* (*hereinafter* referred to as "***Shrijee Sales***")[42] which declared that there was no incongruity in the ratio emanating from *Kasinka Trading* contrasted from the *Motilal Padampat* declaration. Thereafter, the decision in *Kasinka Trading* was regularly followed to reject claims pivoted on the promissory estoppel doctrine, unsurprisingly, without a discussion on whether public interest actually existed in the factual matrix before rejecting such claims.[43]

There were indeed certain decisions wherein the application of the implied public interest principle in the context of statutory notifications emanating from the *Kasinka Trading* decision was indeed halted.[44] However, their occurrences were occasional. Consequently, there was no unifying

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[42] Shrijee Sales Corporation v. Union of India, (1997) 3 SCC 398 (India).

[43] Union of India v. Godhawani Brothers, (1997) 11 SCC 173 (India); Union of India v. Bharat Commerce & Industries Ltd. (1999) 107 ELT 582 (SC) (India); State of Himachal Pradesh v. Kundan Lal Ahuja, (2000) 10 SCC 559 (India); Union of India v. Victory Plastics Pvt. Ltd., (1996) 8 SCC 41 (India); Darshan Oils Pvt. Ltd. v. Union of India, (1995) 1 SCC 345 (India); State of Rajasthan v. Mahaveer Oil Industries, (1999) 4 SCC 357 (India); Union of India v. Indian Charge Chrome, (1999) 7 SCC 314 (India); Sharma Transport v. Government of Andhra Pradesh, (2002) 2 SCC 188 (India); Kothari Industrial Corporation Ltd. v. Tamil Nadu Electricity Board, (2016) 4 SCC 13 (India).

[44] Pawan Alloys & Castings Pvt. Ltd. v. Uttar Pradesh State Electricity Board, (1997) 7 SCC 251 (India); Dai-Ichi Karkaria Ltd. v. Union of India, (2000) 4 SCC 57 (India); Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector, (2007) 5 SCC 447 (India); Tamil Nadu Electricity Board v. Status Spinning Mills Ltd., (2008) 7 SCC 353 (India).

pattern or coherence in later decisions. As highlighted in the earlier section, *Nestle* and *Kothari Industrial Corporation Ltd. v. Tamil Nadu Electricity Board* [hereinafter referred to as "***Kothari Industrial***"][45] were lost opportunities to reconcile the varying notions and competing principles by referring the issue to a larger bench of the Supreme Court, and obtain a categorical pronouncement of the legal position. As the next section shows, the failure of the Supreme Court to enunciate the exact status of the promissory estoppel doctrine and the contours of its exceptions have led to a considerable diminution of the practical significance and erosion of the doctrine's sheen in contemporary jurisprudence.

V. TRENDS EMANATING FROM RECENT DECISIONS OF THE SUPREME COURT

A survey of the contemporary jurisprudence will reveal that the promissory estoppel doctrine may seem to have lost the benevolent indulgence of the Indian courts. An account of three recent decisions of the Supreme Court manifests such a trend.

The first is a rather elaborate decision rendered in the context of fiscal benefits available under India's Foreign Trade Policy. The Supreme Court in *Director General of Foreign Trade v. Kanak Exports* [*hereinafter* referred to as "***Kanak Exports***"][46] examined the contention whether the fiscal

[45] Kothari Industrial Corporation Ltd. v. Tamil Nadu Electricity Board, (2016) 4 SCC 134 (India).
[46] Director General of Foreign Trade v. Kanak Exports, (2016) 2 SCC 226 (India).

benefits already accorded could be taken back with retrospective effect. The Court addressed the issue, in the context of the promissory estoppel doctrine, in two parts. In the first stage, it held that the benefits could indeed be withdrawn where such withdrawal was a policy decision of the Government based on public interest.[47] On the second aspect, however, the Supreme Court in *Kanak Exports* concluded that the rights which had already become 'vested' in the citizens could not be taken away retrospectively absent a legislative enactment,[48] though the Court supplied additional legal reasons to conclude such.[49]

The decision in *Kanak Exports*, however, did not find the invocation of the promissory estoppel doctrine as the key issue before it. What laid at the periphery of consideration came to be tested as the main proposition in a subsequent decision in *Union of India v. Unicorn Industries* [*hereinafter* referred to as "***Unicorn Industries***"].[50] In this case, the sole issue framed by the Supreme Court was "*whether, by invoking the doctrine of promissory estoppel, can the Union of India be estopped from withdrawing the exemption from payment of excise duty in respect of certain products, which exemption is granted by an earlier notification; when the Union of India finds that such a withdrawal is necessary in the public interest*". This was answered in the negative. Opining that there was a larger public interest underlying the withdrawal of exemptions, it was concluded that the doctrine of promissory estoppel could not be invoked. Perhaps the same

[47] Kasinka Trading v. Union of India, (1995) 1 SCC 274 (India); Shrijee Sales Corporation v. Union of India, (1997) 3 SCC 398 (India).
[48] R.C. Tobacco Pvt. Ltd. v. Union of India, (2005) 7 SCC 725 (India).
[49] Commissioner of Income Tax v. Vatika Township Pvt. Ltd., (2015) 1 SCC 1 (India).
[50] Union of India v. Unicorn Industries, (2019) 10 SCC 575 (India).

considerations which were invoked by the Supreme Court in its earlier decisions to invoke the doctrine were relied upon in this decision to opine otherwise, *inter alia* observing thus:

> "*… this Court has clearly held that the doctrine of promissory estoppel cannot be invoked in the abstract and the courts are bound to see all aspects including the objective to be achieved and the public good at large. It has been held that while considering the applicability of the doctrine, the courts have to do equity and the fundamental principle of equity must forever be present in the mind of the Court while considering the applicability of the doctrine. It has been held that the doctrine of promissory estoppel must yield when the equity so demands and when it can be shown having regard to the facts and circumstances of the case, that it would be inequitable to hold the Government or the public authority to its promise, assurance or representation.*"

In *Unicorn Industries*, the Supreme Court went on to categorically affirm that from the earlier precedents it was now well established that "*where public interests warrants, the principle of promissory estoppel cannot be invoked*".[51] This trend was taken further in the 2020 decision of the Supreme Court in *Union of India v. VVF Ltd.* [*hereinafter* referred to as "***VVF***"][52] wherein, again, the sole issue for consideration was the extent of the promissory estoppel doctrine as a restriction on Government's prerogative

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[51] Kasinka Trading; Indian Oil Corporation Ltd. v. Kerala State Road Trading Corporation, (2018) 12 SCC 518 (India).
[52] Union of India v. VVF Ltd., (2020) SCC OnLine SC 378 (India).

to withdraw an exemption granted earlier. For this reason, and also because this is the latest decision of the Supreme Court on the subject, the *VVF* decision requires a detailed appraisal.

The *lis* in *VVF* related to the central excise exemption extended by the Government as a measure to promote industrial activity in the earthquake-affected areas of Gujarat. Complete exemption for ten years was granted by way of statutory notification issued in 2001 by the Government. By a 2008 notification, the Government limited the exemption up to 34% of value addition made by the eligible industry. The High Court accepted a challenge based on the claim that the curtailment of the exemption violated the promissory estoppel doctrine, only to find its decision reversed by the Supreme Court.[53]

In its decision in *VVF*, the Supreme Court placed extensive reliance upon the observations in *Kasinka Trading* and other decisions[54] to conclude, *inter alia*, that the very nature of the statutory power extending the exemptions is such that it "*is susceptible of being revoked or modified or subjected to other conditions*" wherein the 'public interest' element was predominant. The decision in *VVF* went on to add another layer of exception to the promissory estoppel doctrine.

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[53] VVF India Ltd. v. Union of India, Special Civil Application No. 4418 of 2014 (India).
[54] Shrijee Sales Corporation v. Union of India, (1997) 3 SCC 398 (India); Sales Tax Officer v. Shree Durga Oil Mills, (1998) 1 SCC 572 (India); State of Rajasthan v. Mahaveer Oil Industries, (1999) 4 SCC 357 (India); Shree Sidhbali Steels Ltd. v. State of Uttar Pradesh, (2011) 3 SCC 193 (India).

It was concluded in *VVF* that the 2008 notification was 'clarificatory' as it sought to quell the doubts over the scope of the 2001 notification. Consequently, the Supreme Court gave a retrospective effect to the 2008 notification. This conclusion was justified by the Supreme Court relying upon the claim of the Government that complete exemption in terms of the 2001 exemption "*had prompted certain unscrupulous manufacturers to indulge in different types of tax evasion tactics*". This conclusion was based on the following reasoning:

> "*On a fair reading of the earlier notifications/industrial policies, it is clear that the object of granting the refund was to refund the excise duty paid on genuine manufacturing activities. The intention would not have been that irrespective of actual manufacturing/manufacturing activities and even if the goods are not actually manufactured, but are manufactured on paper, there shall be refund of excise duty which are manufactured on paper. Therefore, it can be said that the object of the subsequent notifications/industrial policies was the prevention of tax evasion. It can be said that by the subsequent notifications/industrial policies, they only rationalizes the quantum of exemption and proposing rate of refund on the total duty payable on the genuine manufactured goods. At the time when the earlier notifications were issued, the Government did not visualize that such a modus operandi would be followed by the unscrupulous manufacturers who indulge in different types of tax evasion tactics. It is only by experience and on analysis of cases detected the Excise Department the Government came to know about such tax evasion tactics being followed by the unscrupulous manufacturers which prompted the*

> *Government to come out with the subsequent notifications which, as observed hereinabove, was to clarify the refund mechanism so as to provide that excise duty refund would be allowed only to the extent of duty payable on actual value addition made by the manufacturer undertaking manufacturing activities in the concerned areas. The entire genesis of the policy manifesting the intention of the Government to grant excise duty exemption/refund of excise duty paid was to provide such exemption only to actual value addition made in the respective areas. As it was found that there was misuse of excise duty exemption it was considered expedient in the public interest and with a laudable object of having genuine industrialization in backward areas or the concerned areas, the subsequent notifications/industrial policies have been issued by the Government.*" *(emphasis supplied)*

From the aforesaid, it is clear that the Supreme Court in *VVF* was persuaded to restrict the scope of exemption on account of the instances revealing abuse of the underlying intent which prompted the Government to grant such exemption. This aspect merits a critical appreciation from variety of perspective enumerated below.

First, the Supreme Court failed to advert to the fact that abuse or misuse of exemptions and existence of unscrupulous elements is not a new phenomenon. Such instances have always existed. Thus, it was incumbent upon the Government to incorporate anti-abuse provisions and requisite safeguards in the original law itself. By permitting the Government to retrospectively modify the provisions the Supreme Court permitted the

Government to get over its failure without having to pay any price. Conversely, a number of genuine persons would suffer on account of the change of law notwithstanding that they would have satisfied all necessary conditions.

Second, the *VVF* decision amounts to holding that the conduct of other parties is relevant to determine the correctness of the Respondent's claim. Thus, the Supreme Court equated unscrupulous elements with honest citizens thereby denying them the benefit of the 2001 promise of complete exemption to only one-third of the promised amount.

Third, the Supreme Court in *VVF* also failed to observe that the claim for promissory estoppel could have been built only by genuine industries that would have been able to justify satisfaction of the conditions under the 2001 notification whereas the tax evaders were not even eligible to raise the claim of promissory estoppel.

Fourth, by permitting retrospective curtailment of the 2001 exemption in the year 2008, the Supreme Court in *VVF* not just followed *Kasinka Trading* principle in diluting the application of the promissory estoppel doctrine but went beyond to permit retrospective denial of the promised benefits. The endorsement of the practice to retrospectively modify the conditions of exemptions may come to haunt the Governments from time to time as investors would be forever sceptical in gauging the availability of exemptions. In other words, this judgement may have a

negative impact on all stakeholders, who would be hesitant about these exemptions being rolled back in the near future to their detriment.

Whether the *VVF* decision is correct on the point of retrospectivity forms a subject-matter of a different debate altogether, one which requires an interplay of various distinct jurisprudential inquiries, such as, the competence of the Government to issue notifications with retrospective effect,[55] the doctrine of fairness which guards against implied retrospectivity of fiscal instruments,[56] strict construction of exemption notifications,[57] etc. These aspects are beyond the scope of the present inquiry. Nonetheless, for our purpose, it would suffice to conclude that the declaration in *VVF* that the promised exemption could not only be taken away but also be taken away with retrospective effect marked a further downslide of the promissory estoppel doctrine. Thus, there is another compelling reason to revisit the exact scope and contours of the promissory estoppel doctrine in the fiscal space, lest the doctrine fades into obsolescence.

VI. BEYOND PROMISSORY ESTOPPEL: IS THERE AN ALTERNATIVE WAY TO BOLSTER TAX INCENTIVE CLAIMS?

The gradual erosion of the foundational tenets of the promissory estoppel doctrine compels one to explore newer horizons in the quest to

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[55] Tarun Jain, *Monetary Limits of Appeals: Retrospectivity of Departmental Instructions*, 400 INCOME TAX REP. 44-59 (2018).
[56] Tarun Jain, *Doctrine of 'Fairness': Countering 'Implied Retrospectivity' of Fiscal Enactments*, 397 INCOME TAX REP. 21-35 (2017).
[57] Tarun Jain, *Fiscal Incentives and Exemptions: Reflections on the New Interpretation Standard*, 5(2) NLUJ L. REV. 1 (2018).

validate the proposition that the Government must be held responsible for its representations and made accountable for the prejudice caused to others by relying on such representations. To this end, one may find an unexplored avenue in the Indian contract law wherein certain equitable propositions have been codified as statutory law.

Section 70 of the Indian Contract Act, 1872 [*hereinafter* referred to as "**ICA**"] stipulates that the doer of a non-gratuitous act is bound to be compensated by one who enjoys the benefit of such an act.[58] This is a facet of the principle of restitution and the doctrine of unjust enrichment as it now stands judicially approved that a "*claim for compensation by one person against another under Section 70 is not based on any subsisting contract between the parties; its basis is that something has been done by one party for the other which the other party has voluntarily accepted*".[59] Furthermore, the fact that this provision applies only where a contractual relationship does not exist between the parties reflects that the provision incorporates an equitable principle engrafted in the statute itself.[60] The effect of this provision is pervasive for it can be invoked even to oblige the State to compensate notwithstanding the lack of constitutional stipulations[61] necessary for a formal contract to

[58] The Indian Contract Act, No. 9 of 1872 INDIA CODE (1872), § 70.
[59] POLLOCK & MULLA, INDIAN CONTRACT AND SPECIFIC RELIEF ACTS, 1377 (12th ed., 2001).
[60] State of West Bengal v. B.K. Mondal & Sons, AIR 1962 SC 779 (India).
[61] INDIA CONST., art. 299.

come into existence; thereby Section 70 prevents unjust enrichment even by the State.[62]

The Supreme Court, expounding the underlying tenet of this provision[63] has observed that "*in cases falling under Section 70 the person doing something for another or delivering something to another cannot sue for the specific performance of the contract nor ask for damages for the breach of the contract for the simple reason that there is no contract between him and the other person for whom he does something or to whom he delivers something. All that Section 70 provides is that if the goods delivered are accepted or the work done is voluntarily enjoyed then the liability to pay compensation for the enjoyment of the said goods or the acceptance of the said work arises. Thus, where a claim for compensation is made by one person against another under Section 70, it is not on the basis of any subsisting contract between the parties, it is on the basis of the fact that something was done by the party for another and the said work so done has been voluntarily accepted by the other party*".

The limitation of Section 70, however, is that its application presupposes the other party to enjoy the benefit of an act carried out by its doer. This limitation is compounded by the fact that, where Section 70 applies, the obligation of the recipient is to compensate the doer or return/restore the benefit. In a pragmatic realm, therefore, as the decisions relating to its application also reveal, this provision has generally been

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[62] New Marine Coal Co. (Bengal) Pvt. Ltd. v. Union of India, AIR 1964 SC 152 (India); POLLOCK & MULLA, INDIAN CONTRACT AND SPECIFIC RELIEF ACTS, 1383, 1386 (12th ed., 2001).

[63] Union of India v. Sita Ram Jaiswal, (1976) 4 SCC 505 (India).

applied where goods have been delivered by a person and whose benefit has been enjoyed by the recipient. In such cases, perhaps because it is comparatively easier to adjudge, the recipient is obliged to compensate for the benefit arising from the consumption of such goods. Conversely, where the doing of the act or delivery is difficult to establish, such as in case of intangibles or oral assurances, and where it cannot be established with certainty that another has indeed been benefitted by the act, Section 70 does not come to the rescue of the doer.[64]

To exemplify, the Supreme Court has declared that "*[t]he three ingredients to support the cause of action under Section 70 of the Indian Contract Act are these: First, the goods are to be delivered lawfully or anything has to be done for another person lawfully. Second, the thing done or the goods delivered is so done or delivered 'not intending to do so gratuitously'. Third, the person to whom the goods are delivered 'enjoys the benefit thereof'. It is only when the three ingredients are pleaded in the plaint that a cause of action is constituted under Section 70 of the Indian Contract Act. If any plaintiff pleads the three ingredients and proves the three features the defendant is then bound to make compensation in respect of or to restore the things so done or delivered*".[65]

The transposition of this principle in the context of fiscal incentive claims, therefore, is a factual exercise in which it must be established that (i) the person claiming the fiscal exemption (i.e., the claimant) carried out certain actions for the Government, (ii) such actions were lawful and not

[64] *Id.*
[65] *Id.*

gratuitous, and (iii) the Government enjoyed the benefit of such actions. It is only when these conditions can be satisfied that the Government would be obliged to compensate the claimant. In respect of these questions, it may be relatively expedient to establish that the claimant carried out certain acts by evidencing that it made investments and undertook other activities being persuaded by the fiscal incentive announced by the Government. For that matter, even a claim pedestaled on the promissory estoppel doctrine rests upon the factual foundation of such an assertion. It may also be relatively easier to demonstrate that the claimant's actions are lawful and non-gratuitous. For this purpose, the claimant would effectively be establishing (i) the rationale for making investments, (ii) the fact of carrying out business activities outlined in the Government announcements as the pre-condition for availing the fiscal benefit, and (iii) demonstrative that investments would not have been made and activity not carried out without the inducement of such benefits.

The issue, however, arises in establishing that the Government enjoyed the benefit of the actions of the claimant. This is because judicial opinion has established that for Section 70 to apply, the "*benefit must be direct and not indirect, i.e. directly derived by the person for whom the work is done*" meaning thereby that, for example, "*[w]here certain works done by a railway company benefitted owners of land and building, it could not be said that the municipality was benefitted merely because it recovered taxes from the owners or occupiers of the property*".[66] Transposing this requirement in our context implies that the claimant

[66] POLLOCK & MULLA, INDIAN CONTRACT AND SPECIFIC RELIEF ACTS, 1401 (12th ed., 2001).

would have to establish that by its act of making the investment, generating employment or undertaking such activity which was the precondition for availing the fiscal benefit, the Government has indeed obtained a direct benefit. To this end, the eligibility certificate issued by the Government may be relied upon as documentary evidence to establish that the Government has also acknowledged the receipt of the benefit on account of which it has endorsed the availability of the fiscal benefit to the claimant. Nonetheless, these are factual questions as it is the subjective determination of the court whether the Government 'enjoyed' the benefit of the claimant's activities.

It may be contended that the Government is merely the representative of the citizens and therefore the benefits enjoyed by the citizens (on account of increase in industrial activity, employment generation, etc., being the attainments identified in the Government's policy itself) could be considered as benefits enjoyed by the Government itself. This proposition may be further developed by drawing upon the modern jurisprudential trends which do not view Government in isolation from the citizenry. This aspect may particularly apply to those exemptions which are linked towards the attainment of societal welfare objectives, and thus the benefits could be considered as enjoyed by the Government where the society benefits at large.

Subject to the above factors being established, obviously based on documentary evidence, a claim under Section 70 may very well turn out to be a potent ground for a claimant to sue the Government for failure, whether partial or in full, to abide by its commitment of the fiscal

exemption. Indeed, if the elementary conditions stand satisfied, the Government would be 'bound to' compensate the claimant in the event it is not in a position to 'restore' the benefit to the claimant. Such relief is similar to what has been secured by the citizens by successfully invoking the promissory estoppel doctrine.

The difference, however, would be that while a claim for promissory estoppel has traditionally been made by way of a writ petition before the High Court, the claim under Section 70 would have to be pursued like regular civil proceedings. Thus, the trappings of civil litigation, such as, the requirement to serve notice before initiating the suit against the Government,[67] the territorial and other limitations of the civil courts unlike the unrestricted and untrammelled extraordinary jurisdiction of the High Court, etc., would have to be factored while manoeuvring the contest. Nonetheless, these are only practical aspects which neither influence the merit of the claim nor dilute the potency of Section 70 challenge to actions of the Government withdrawing the fiscal benefit.

VII. CONCLUSION

Five decades of judicial opinion set the context of the promissory estoppel doctrine in the Indian fiscal space. The doctrine, seeking to obviate the hardships to the citizens arising on account of flip-flops in executive policy and the varying economic priorities of the Government, saw a modest start in the *Indo-Afghan* decision in the late 1960s. It received firmer

[67] The Code of Civil Procedure, No. 5 of 1908 INDIA CODE (1908), § 80.

elocution in *Motilal Padampat* in the late 1970s to be instituted as a *sui generis* equitable force shielding the citizens from the wrath of the State withdrawing from its prior fiscal commitments. The contemporary relevance of the doctrine, however, cannot be stated with such precision.

Multiple caveats, expansive interpretation of what constitutes 'public interest', greater latitude to the Government in framing policies, limited judicial review of such policies and their impact on the past assurances extended to the citizens, etc., have relegated the status of this doctrine from an overriding consideration at some point to a mere variable in the zone of consideration of the *lis*. The inconsistent judicial treatment meted to the doctrine also does not assist in an attempt to unequivocally ascertain its status. A categorical elucidation by a larger bench of the Supreme Court being overdue also does not help such attempts.

The recent trend reveals that the effectiveness of this doctrine is dwindling and its contours failing to equip the citizens in their quest to hold Governments accountable and enforce the performance of their promises. If this trend is a guide, it would not be long before the citizens seek to abandon their reliance on such equitable pivots for their claims and instead seek to explore statutory remedies, such as the Section 70 remedy under contract law discussed above. One would, however, hope that this crucial doctrine, which seeks to draw parity between the citizens' entitlement *vis-à-vis* the Government by way of its equitable stance, is not lost in the process, for it is too important to be forgotten that it is equity which mitigates the harshness of the law.

Sejal Chandak, *Artificial Intelligence and Policing: A Human Rights Perspective*, 7(1) NLUJ Law Review 43 (2020)

ARTIFICIAL INTELLIGENCE AND POLICING: A HUMAN RIGHTS PERSPECTIVE

Sejal Chandak[*]

ABSTRACT

Police forces around the world are utilizing various Artificial Intelligence systems to assist the human-decision processes. There are several human rights concerns that are being raised with increasing deployment of AI systems in different sectors. It is pertinent to understand that embracing AI in policing will have different and far severe consequences to human rights due to the inherent power of police to detain, arrest or sometimes even use deadly force.

Governments around the world are formulating AI strategies for governance and administration without due consideration over their impact on human rights. Undoubtedly, technology has to be utilized for efficiency in every sector, including policing, but there is an urgent need to understand the ramifications of the use of AI and to make policies to eliminate the harm caused by it. The risk assessment is to be done prior to the implementation of these intrusive AI tools. The author will discuss the various implications on human rights due to the use of AI in policing and make suggestions to fill the legal lacunae present in the deployment of AI.

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I. INTRODUCTION

"*Without algorithmic justice, algorithmic accuracy/technical fairness can create AI tools that are weaponized.*"

- Jay Buolamwini

The Fourth Industrial Revolution has led to the development and usage of the powerful technology of artificial intelligence [*hereinafter* referred to as "**AI**"] in our democratic societies. The intrusive nature of AI has undoubtedly raised concerns with the increasing use of this technology in public and private spaces. AI, as a technology, has the potential to bring revolutionary changes in the world. Experts have only just begun to grapple with the effects that AI can and will have in any society. Intriguingly, there is no precise definition of AI yet. The term AI was coined by John McCarthy in 1956, who defined it as "*the science and engineering of making intelligent machines*".[1] Another founding scholar, Marvin Minsky defined it as "*the science of making machines do things that would require intelligence if done by men*".[2] Mathias Risse defines "intelligence" as "*the ability to make predictions about the future and solve complex tasks (…) ability demonstrated by machines, in smart phones, tablets, laptops, drones, self-operating vehicles or robots that might take on tasks ranging from household support, companionship of sorts, to policing and warfare*".[3]

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[1] John McCarthy, *What is Artificial Intelligence*? STANFORD EDUCATION (Nov 12., 2007), http://jmc.stanford.edu/articles/whatisai/whatisai.pdf.

[2] *Human Rights in the age of Artificial Intelligence*, ACCESS NOW, https://www.accessnow.org/cms/assets/uploads/2018/11/AI-and-Human-Rights.pdf (last visited Sept. 4, 2020) (*hereinafter* "**Human Rights & AI**").

[3] Mathias Risse, *Human Rights and Artificial Intelligence. An Urgently Needed Agenda,* 41 HUM. RTS. Q. 1-16 (2019).

Broadly speaking, AI refers to machines that can mirror human reasoning while making any choice,[4] and thus, automate decisions that are made by people.[5] AI is not one technology, rather it is considered more of a field and has many subfields such as machine learning, robotics, language processing and deep learning.[6]

By analyzing complex data sets, AI aims to improve and assist in decision making. From companies utilizing AI for efficient managerial decisions[7] to judges utilizing AI to set bail bonds,[8] this technology is increasingly being used by both state and non-state actors. It is a powerful tool in the hands of many entities. AI technology is not free from risks. Where authoritarian regimes can misuse technology, unintended harm can be caused by AI in democratic societies as well.[9] To illustrate, AI can cause harm through breach of privacy, unaccountability of results and embedded bias in the system.[10] Governments around the world are now formulating AI strategies to introduce and include AI in different administrative and executive domains. Alarmingly, neither do these strategies discuss the

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[4] Eileen Donahoe & Megan Metzger, *Artificial Intelligence and Human Rights*, 30(2) J. OF DEMOCRACY 115, (2019) (*hereinafter* "**Donahoe & Metzger**").
[5] Chris Smith et al., *The History of Artificial Intelligence*, UNIVERSITY OF WASHINGTON (Dec. 2006), https://courses.cs.washington.edu/courses/csep590/06au/projects/history-ai.pdf.
[6] Human Rights & AI, *supra* note 2.
[7] CATHY O'NEIL, WEAPONS OF MATH DESTRUCTION, (Penguin Publishing, 2017) (*hereinafter* "**O'Neil**").
[8] *Id.*
[9] Donahoe & Metzger, *supra* note 4.
[10] Filippo Raso et al., *Artificial Intelligence & Human Rights: Opportunities & Risks*, BERKMAN KLIEN CENTER (Sept. 25, 2018), https://cyber.harvard.edu/sites/default/files/2018-09/2018-09_AIHumanRightsSmall.pdf (*hereinafter* "**Raso**").

implicit harm that this technology is capable of causing, nor do they provide for any remedies for such harm. For instance, the word "*human rights*" appears only once, and only in relation to "*instituting data privacy-legal framework*" in the discussion paper released by NITI Aayog in 2018 on AI.[11] In their rush to use AI, many governments have not yet anticipated the implications of AI on human rights and their responsibility towards the same. AI technology is unquestionably beneficial but efforts must be taken to analyze and understand the harm that it can cause. Furthermore, remedies have to be brought in place towards such harm before implementing the technology.

II. ARTIFICIAL INTELLIGENCE IN POLICING

Governments have witnessed the benefits of AI in various sectors, such as finance, healthcare, insurance and transport. With the rapid decline in the cost of computer processing,[12] they are now implementing AI strategies in policing to combat crimes and terror activities in their territories.[13] Many police departments around the world are already using AI softwares in predicting crimes and identifying suspicious persons.[14] These softwares run algorithms on large data sets to assist the police work

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[11] *National Strategy for Artificial Intelligence #AIForAll,* NITI AAYOG, (June 2018), https://niti.gov.in/writereaddata/files/document_publication/NationalStrategy-for-AI-Discussion-Paper.pdf.

[12] William Isaac, *Hope, Hype, and Fear: The Promise and Potential Pitfalls of Artificial Intelligence in Criminal Justice*, 15 OHIO ST. J. CRIM. L. 543 (2018).

[13] WALTER L. PERRY ET AL., PREDICTIVE POLICING THE ROLE OF CRIME FORECASTING IN LAW ENFORCEMENT OPERATIONS, (RAND Publications, 2013).

[14] Elizabeth Joh, *Policing by Numbers: Big Data and the Fourth Amendment*, 89 WASH. L. REV 35 (2014).

and sometimes even replace it.[15] Since it is humanly impossible to work with humungous and complex data, the implementation of AI does not only increase the efficiency of police work but also provides significant insight from data and assists in tackling crime and enforcing law and order.[16] Today, we have databases that share information about crimes with different police departments, such as the Crime and Criminal Tracking Network and Systems as part of the Indian Digital Police initiative.[17] Further, we have also developed software that can predict crimes, such as the CompStat software used by New York City Police Department in United States of America,[18] and technology that can be used for facial recognition, like the CCTV surveillance system deployed in Pembrokeshire in the United Kingdom.[19] We are witnessing an increase in the use of AI in policing. At times, this efficiency comes at the cost of undermining human rights, and this is a cost that we as a society may not be willing to pay.

A. PREDICTIVE POLICING

Understaffed and budget-strapped police departments have started utilizing AI systems that can assist in the prediction of crimes. For instance, the PredPol software, implemented by the Reading Police Department,

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[15] Elizabeth Joh, *Artificial Intelligence and Policing: First Questions*, 41 SEATTLE U. L. REV. 1139 (2018).
[16] *Id.*
[17] *Crime and Criminal Tracking Netork & Systems (CCTNS)*, DIGITAL INDIA INITIATIVES (Apr. 29, 2019), https://digitalindia.gov.in/content/crime-and-criminal-tracking-network-systems-cctns.
[18] NewYork City Police Department, *Crime Statistics*, NYC, https://www1.nyc.gov/site/nypd/stats/crime-statistics/compstat.page (last visited Sept. 4, 2020).
[19] David Grundy, *Planned Dyfed-Powys Police CCTV Switch On in Early 2018,* BBC (Aug. 2017), https://www.bbc.com/news/uk-wales-south-west-wales-40930112.

Pennsylvania collects and processes historical crime data and predicts by calculating where crimes were most likely to occur.[20] With such predictions in hand, the police department can take decisions to increase patrolling in such geographical areas which would ultimately lead to a reduction in crimes.[21] The predictive programs also classify suspects at a low, medium or high risk of recidivism in future by gathering and calculating historical offence data, an example of which is the HART (*abbreviated* for Harm Assessment Risk Tool) utilized by the Durham Police Department in the United Kingdom.[22] These AI programs base their predictions on evidence led assumption that the crimes would re-occur at the same geographical areas or would be repeated by the same offenders. This greatly increases the efficiency of the police in tackling crimes in their jurisdictions.

B. FACIAL RECOGNITION

The next major AI program used in policing is the Facial Recognition Technology [*hereinafter* referred to as "**FRT**"]. FRT is a subfield in pattern recognition research and technology, and uses statistical techniques to detect and extract patterns. In this case, a set of discernible pixel-level patterns.[23] FRT allows automatic identification of an individual

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[20] O'neil, *supra* note 7.
[21] *Id.*
[22] Chris Baraniuk, *Durham Police AI to help with custody decisions*, BBC News (May 10, 2017), https://www.bbc.com/news/technology-39857645.
[23] Lucas Introna & Helen Nissenbaum, *Facial Recognition Technology: A Survey of Policy and Implementation Issue*, LANCASTER UNIVERSITY WORKING PAPER (2009), http://www.research.lancs.ac.uk/portal/en/publications/facial-recognition-technology-a-survey-of-policy-and-implementation-issues(43367675-c8b9-464490f286815cc8ea15).html.

by matching two or more faces from digital images.[24] FRT compares any footage that has been obtained from video cameras (drone cameras or CCTVs) against the database of facial images. Several governments have installed[25] or are in the process of installing[26] numerous cameras in public spaces in order to identify and penalize criminals. FRT is also used as a powerful tool to help identify and find missing persons.[27] Numerous law enforcement departments are also experimenting with live facial recognition - a technology that detects and identifies persons of interest in real-time.[28] This AI program is a revolutionary change in policing and has given wide powers to law enforcement agencies to detect, identify, and apprehend persons who may be suspected of committing a crime.

C. PRE-TRIAL RELEASE AND PAROLE

AI is used in the criminal justice system during the pre-trial phase and to determine the terms of parole for an offender. These AI systems assess the risk of flight of an accused, and whether an offender should be

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[24] *Facial Recognition Technology: Fundamental Rights Considerations in the context of Law Enforcement*, FRA FOCUS PAPER, EUROPEAN UNION AGENCY FOR FUNDAMENTAL RTS. (2019), https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-facial-recognition-technology-focus-paper-1_en.pdf (*hereinafter* "**FRA**").

[25] Emily Feng, *How China is using Facial Recognition Technology*, NPR NEWS BEIJING, (Dec. 16, 2019), https://www.npr.org/2019/12/16/788597818/how-china-is-using-facial-recognition-technology.

[26] Reuters News Agency, *Privacy concerns as India readies facial recognition system*, ALJAZEERA (Nov. 08, 2019), https://www.aljazeera.com/news/2019/11/privacy-concerns-india-readies-facial-recognition-system-191107152951428.html.

[27] Kathleen Walch, *The Growth of AI adoption in Law Enforcement*, FORBES (Jul. 26, 2019), https://www.forbes.com/sites/cognitiveworld/2019/07/26/the-growth-of-ai-adoption-in-law-enforcement/#6ab8bf70435d.

[28] Kelvin Chan, *UK police use of facial recognition tests public's tolerance*, ABC NEWS (Jan. 2020) https://abcnews.go.com/Technology/wireStory/uk-police-facial-recognition-tests-publics-tolerance-68321764.

released on parole by analyzing complex data sets. These data sets are created using historical data like crime data, as well as, personal information gathered from an individual.[29] For instance, the US Criminal Justice System uses COMPAS (*abbreviated* for Correctional Offender Management Profiling for Alternative Sanctions) for basic risk assessment to determine the terms of parole for an individual.[30] These systems assist in efficient and quick decision making in the courts of law.

AI promises that the assistance it provides is more efficient than humans as this technology is free from any human errors. However, further reading reveals that this promise has rather morphed into a nightmare for the human rights regime.

III. A HUMAN RIGHTS PERSPECTIVE

The growth of AI along with implementing the technology in core areas has been so rapid that the laws have lagged behind. This technology is being created and utilized without analysing and understanding its effects on human rights. One can argue that the opaqueness and complexity of the technology have rather become a veil behind which results are given authoritative backing. Lack of digital literacy and the inability to question the results of this AI technology has raised numerous issues pertaining to

[29] Daniel Faggella, *AI for Crime Prevention and Detection,* EMERJ (Feb. 02, 2019), https://emerj.com/ai-sector-overviews/ai-crime-prevention-5-current-applications/.
[30] *Id.*

human rights.[31] AI has given a tool, so powerful, in the hands of states that total surveillance states are no more a work of fiction. The over-reliance on this technology without appropriate remedial measures has led to many human rights and technology groups demanding changes in law at the global level.[32] These groups are working tirelessly to bring up the human rights violations that are impliedly associated with this technology. Interestingly, these violations are not nation specific but rather technology specific, and hence, one can correctly presume that if a technology is violating human rights in nation 'A', the same technology when utilized in nation 'B' will have the same results. Therefore, the need of the hour is to understand how this technology violates the fundamental human rights and what measures should be taken to tackle the same so that the benefits of the technology can be maximized.

One has to understand that the implications of the use of AI in policing are vastly different due to the inherent powers of the police to detain, arrest and even use deadly force in certain circumstances. This rationalises the concerns being raised globally against the use of AI in policing. Unchecked AI in law enforcement can become tools in the hands of authoritarian regimes to undermine human rights, and this implies that the use of AI in policing has to be scrutinized to a higher degree as compared to any other sector.

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[31] Laura Stanila, *Artificial Intelligence and Human Rights: A Challenging Approach on the Issue of Equality*, J. E. EUROPEAN CRIM. L. 19 (2018).

[32] Toronto Declaration on Protecting the Rights to Equality and Non-Discrimination in Machine Learning Systems, (2018), https://www.accessnow.org/cms/assets/uploads/2018/08/The-Toronto-Declaration_ ENG_08-2018.pdf.

A. DISCRIMINATION: THE EMBEDDED BIASNESS

The foremost risk that AI presents is the discrimination that perpetuates due to biased algorithm. AI tech developers have always argued that as the algorithm works on data, it is beyond any human bias and thus, the results are absolutely unbiased and do not lead to any kind of discrimination.[33] This argument has now been refuted by many international human rights and technology groups.[34] AI inherently carries with itself the risk of perpetuating and amplifying the existing social biases. The reason behind this is the data, as AI systems are trained to analyse and then replicate the pattern that they learn from the data.[35] Herein lays the problem – when AI replicates the past pattern, it will inherently perpetuate the existing social biases as well.[36] This will consequently result into what is popularly called data bias. Unfortunately, biased data is the rule rather than an exception, which leads to perpetuating and amplifying the biasness in the society.[37]

As far as AI systems that are predictive in nature are concerned, there are two kinds of such crime prediction systems at present. *First*, which identifies the geographical area where crimes are likely to occur. *Second*, which predicts individuals that are likely to commit crime. For instance, the

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[33] O'neil, *supra* note 7.
[34] Anna Bacciarelli, *Artificial intelligence: the technology that threatens to overhaul our rights*, AMNESTY INTERNATIONAL (June 2017), https://www.amnesty.org/en/latest/research/2017/06/artificial-intelligence-thetechnology-that-threatens-to-overhaul-our-rights/.
[35] Erini Ntoutsi et al., *Bias in data-driven artificial intelligence systems—An introductory survey*, 10(3) WIREs DATA MINING KNOWL DISCOV. 1-14 (2020).
[36] Raso, *supra* note 10.
[37] Human Rights & AI, *supra* note 2.

PredPol and HART predictive software used by police departments utilize historical data of past crimes and then, by analysing the pattern, provide prediction to police.[38] Critics argue that this data is already biased because, historically, the police is more likely to target the minority population. The biasness that is perpetuated against African-Americans in the USA can illustrate this point. The USA policing system has historically been racist, and police data show that African-Americans are more likely to be stopped by police and police is more likely to use force against them.[39] Furthermore, African-Americans are charged[40] and incarcerated at a higher rate as compared to the Whites.[41] Such criminal records feed the data needs of the AI system and create a pernicious feedback loop which results in stigmatising individuals and groups.[42] Such neighbourhoods and such individuals are now at the risk of being flagged as high risk compared to another neighbourhood or individual against whom such historical data is unavailable. The effect of high incarceration and this data impacts the

[38] Ellen Huet, *Server and protect: predictive policing firm PredPol promise to map crime before it happens*, FORBES (Mar. 02, 2015), https://www.forbes.com/sites/ellenhuet/2015/02/11/predpol-predictive-policing/#3cad3f1c4f9b.

[39] Darwin Bong Graham, *Black people in California are stopped far more often by police, major study proves*, THE GUARDIAN (Jan. 03, 2020), https://www.theguardian.com/us-news/2020/jan/02/california-police-black-stops-force.

[40] Timothy Williams, *Black People Are Charged at a Higher Rate Than Whites. What If Prosecutors Didn't Know Their Race*?, THE NEW YORK TIMES (June 12, 2019), https://www.nytimes.com/2019/06/12/us/prosecutor-race-blind-charging.html.

[41] Ashley Nellis, *The colour of justice: Racial and ethical disparity in State prisons*, THE SENTENCING PROJECT (June 14, 2016), https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/.

[42] Albert Meljer & Martijn Wessels, *Predictive Policing: Review of Benefits and Drawbacks*, 42(12) INTER. J. OF PUBLIC ADMINISTRATION, 1031-1039 (2019).

economic opportunities available to such groups[43] and leads to high recidivism due to the social, cultural and economic circumstances.[44]

The criminal justice system has also started utilising AI for pre-trial release and parole granting. COMPAS is one such AI being utilized by many courts in the US. This software again relies on the historical data and like predictive policing programs, the historical data is also biased, which in turn leads the AI to perpetuate this biasness further.[45] ProPublica, a non-profit investigative news reporter, found this software discriminating against the African-Americans and misclassifying them as "high risk" at twice the rate of Caucasians.[46]

It is important to note here that the criminal justice system comprising of police departments and courts is the most potent institution through which the democratic nations restrict a person's enjoyment of human rights. AI is likely to have a positive impact in ensuring that this system is saved, from any human bias, which will also have a significant positive impact on the society as a whole.[47] However, we have seen that the biasness of algorithms is the rule rather than an exception and this infringes the right to equality guaranteed to every human under the International Bill

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[43] *Criminal Justice Fact Sheet*, NAACP, https://www.naacp.org/criminal-justice-fact-sheet/.
[44] Randy Rieland, *Artificial Intelligence is now used to predict crime. But is it biased?*, SMITHSONIAN MAGAZINE, (Mar. 05, 2018), https://www.smithsonianmag.com/innovation/artificial-intelligence-is-now-used-predict-crime-is-it-biased-180968337/.
[45] Julia Angwin et al., *Machine Bias*, PROPUBLICA (May 23, 2016), https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing (*hereinafter* "**ProPublica**").
[46] *Id.*
[47] Raso, *supra* note 10.

of Human Rights, as well as, under the constitutions of the majority of nations.[48] When police departments and courts are allowed to rely on the biased decisions of AI, they infringe the right of a person to be treated equally with every other citizen.[49]

Democratic societies work on the basis of the principle 'innocent until proven guilty' but biased AI systems flag people as "*high risk*" due to the historical data and thereby it goes against the basic tenet of our criminal justice system. It is now being argued that the use of AI infringes the right of an accused for a free and fair trial.

The AI algorithms are firstly protected under the intellectual property regime which makes it impossible for an accused to question or challenge the results.[50] This 'black-box' paradox creates an opaque and complex system.[51] Moreover, for these AI algorithms to work the software has to deal in big data sets that are created using many parameters that might not have a direct correlation with the crime that one is accused of.[52] This results in undermining the transparency and fairness in the decision making and infringement of the right to a fair trial.[53] Furthermore, due to the 'black-box' paradox, the person relying on results of these AI tools may

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[48] *Id.*
[49] ProPublica, *supra* note 45.
[50] Robert Brauneis & Ellen P. Goodman, *Algorithmic Transparency for the Smart City*, 20 YALE J.L. & TECH. 103 (2018).
[51] Yavar Bathaee, *The Artificial Intelligence Black Box and the failure of intent and causation*, 31(2) HARV. JOUR. OF L.& TECH. (2018).
[52] O'neil, *supra* note 7.
[53] Donahoe & Metzger, *supra* note 4.

not even understand the basis on which the algorithm makes its decisions, which when relied upon is arbitrary.[54]

Another human right that we have secured is freedom from arbitrary arrest and detention. However, when the police or courts rely on some AI systems to analyse data and accordingly classify a person, it may be argued that, that it is arbitrary.[55] Human Rights Watch has recently reported that China's predictive policing is enabling officials to arbitrarily detain people in Xinjiang.[56] In a case of the Wisconsin Supreme Court in the United States,[57] the petitioner claimed that his right to due process was violated as the court had employed the COMPAS software for risk assessment. Though the Supreme Court ruled in favour of the State, interestingly the judges held that appropriate warning needs to be given before courts employ such predictive tools. The court further concluded that "*constitutional concerns required it to 'circumscribe' the use of the COMPAS risk assessment at sentencing*" and stressed that "*the risk scores may not be used as the determinative factor*". After concerns were raised about the biasness and algorithms of these predictive tools, a sentencing commission has been formed by the Department of Justice of the United States to study the risk assessment tools and their proper role in the criminal justice system.[58]

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[54] Raso, *supra* note 10.
[55] Karen Hao, *AI is sending people to jail-and getting it wrong*, MIT TECH. REV. (Jan. 21, 2019), https://www.technologyreview.com/2019/01/21/137783/algorithms-criminal-justice-ai/.
[56] Maya Wang, *China: Big data fuels crackdown in minority region*, HUMAN RTS. WATCH (Feb. 26, 2018), https://www.hrw.org/news/2018/02/26/china-big-data-fuels-crackdown-minority-region.
[57] State v. Loomis, 881 N.W.2d 749 (Wis. 2016).
[58] Loomis v. State of Wisconsin, 137 S.Ct. 2290 (2017).

This leads us to another question on the accountability of such systems. Who do we hold accountable when the police or courts rely on a system that is supposed to be unbiased and works purely on data rather than any human bias or emotion? When there is an over-reliance on AI, it involves a loss of respect for human rights, fairness and transparency in name of effectiveness.[59]

With one of the worst police to person ratio in the world,[60] AI is providing a rather miraculous solution to India.[61] AI has made inroads in the Indian police department. Various state police are now armed with AI tools. The Rajasthan police department has tested an AI based app-ABHED in their criminal investigations.[62] The Uttar Pradesh police department is now utilising the app Trinetra to track criminals.[63] The Andhra Pradesh government has launched its AI platform e-Pragati which

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[59] *Artificial Intelligence in Society*, OECD (June 11, 2019), https://www.oecd-ilibrary.org/sites/eedfee77en/1/2/1/index.html?itemId=/content/publication/eedfee77en&_csp_=5c39a73676a331d76fa56f36ff0d4aca&itemIGO=oecd&itemContentType=book (*hereinafter* "**OECD**").

[60] Sriharsha Devulapalli & Vishnu Padmanabhan, *India's police force among the world's weakest*, LIVE MINT (June 19, 2019), https://www.livemint.com/news/india/india-s-police-force-among-the-world-s-weakest-1560925355383.html.

[61] Vikram Sharma, *Indian Police to be armed with big data software to predict crime*, THE NEW INDIAN EXPRESS (Sept. 23, 2018), https://www.newindianexpress.com/nation/2017/sep/23/indian-police-to-be-armed-with-big-data-software-to-predict-crime-1661708.html.

[62] IANS, *Alwar police testing AI-based app to register criminal offences*, BUSINESS STANDARD (May 29, 2017), https://www.business-standard.com/article/news-ians/alwar-police-testing-ai-based-app-to-register-criminal-offences-1170529011711.html.

[63] *Now, UP police to use criminal tracker 'Trinetra' app*, HINDUSTAN TIMES (Dec. 28, 2018), https://www.hindustantimes.com/lucknow/now-up-police-to-use-criminal-tracker-trinetra-app/story-Hm9S8Sw83oxYfM1j2SdH4M.html.

integrates information across the government departments.[64] The Delhi police is now using CMAPS to identify crime hotspots.[65]

Unfortunately, if AI is implemented without providing for a procedure to establish transparency and robustness in the system, we can expect similar results in India due to the biased system. India has an opportunity to turn this nightmare operation into an effective system if it learns lessons from other nations that have failed to safeguard human rights in their jurisdiction. In the United Kingdom, the West Midlands police's ethics committee has raised concerns over privacy and implicit police bias. The project NDAS utilises data on 'stop and search' which as noted by the ethics committee would also include information about people who were stopped but nothing was found with/on them.[66] In the United States, investigations have proved the racial bias of the system.[67] In China's Xinjiang, where 1.8 million Uighurs are detained, predictive tolls are used to constantly surveil the population.[68]

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[64] *Naidu launches e-Pragati core platform*, THE HINDU (July 28, 2018), https://www.thehindu.com/news/national/andhra-pradesh/naidu-launches-e-pragati-core-platform/articl e24465768.ece.

[65] Karn Singh, *Preventing crime before it happens: How data is helping Delhi Police*, HINDUSTAN TIMES (Feb. 28. 2017), https://www.hindustantimes.com/delhi/delhi-police-is-using-precrime-data-analysis-to-send-its-men-to-likely-trouble-spots/story-hZcCRyWMVoNSsRhnBNgOHI.html.

[66] Sarah Marsh, *Ethics committee raises alarm over 'predictive policing' tool*, THE GUARDIAN (Apr. 20, 2019), https://www.theguardian.com/uk-news/2019/apr/20/predictive-policing-tool-could-entrench-bias-ethics-committee-warns.

[67] ProPublica, *supra* note 45.

[68] Yuan Yang, *The role of AI in China's crackdown on Uighurs*, FINANCIAL TIMES (Dec. 11, 2019), https://www.ft.com/content/e47b33ce-1add-11ea-97df-cc63de1d73f4.

India is already facing privacy issues with its Aadhaar project.[69] Furthermore, bias against scheduled tribes, scheduled castes and other minorities bog down Indian criminal system.[70] The Andhra Pradesh government's e-Pragati is already being criticised for creating a surveillance state.[71] India is in the phase of developing a national strategy for AI,[72] and the experiences of other nations can help India in implementing a human-rights respecting AI project.

B. SURVEILLANCE: NOT JUST THE LOSS OF PRIVACY

The next potent AI technology is the FRT. Around the world, countries are in the process of installing CCTVs to facilitate FRT in their territories. FRT is actively being used by the law enforcement agencies at various places and has been deployed at the border to surveil migrants, at airports to monitor commuters, and in cities to monitor citizens.[73] FRT aims at assisting the police to compare and identify a person based on his digital image. However, the mass surveillance program implemented by

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[69] Sandeep Shukla, *Aadhaar verdict: Why privacy still remains a central challenge*, THE ECONOMIC TIMES (Sep. 27, 2018), https://economictimes.indiatimes.com/news/politics-and-nation/aadhaar-verdict-why-privacy-still-remains-a-central-challenge/articleshow/65970934.cms?from=mdr.

[70] Maja Daruwala, *Fair and unbiased policing still a far cry in India*, THE WIRE (June 04, 2018), https://thewire.in/society/fair-and-unbiased-policing-still-a-far-cry-in-india.

[71] Gopal Sathe, *How Andhra Pradesh built India's first police state using Aadhaar and a census*, HUFFINGTON POST (July 23, 2018), https://www.huffingtonpost. in/2018/07/23/how-andhra-pradesh-built-indias-first-police-state-using-aadhaar-and-a-census_a_23487838/.

[72] *National Strategy for Artificial Intelligence #AIForAll,* NITI AAYOG, (June 2018), https://niti.gov.in/writereaddata/files/document_publication/NationalStrategy-for-AI-Discussion-Paper.pdf.

[73] Shirin Ghaffary & Rani Molla, *Here's where the US government is using facial recognition technology to surveil Americans*, VOX (Dec. 10, 2019), https://www.vox.com/recode/2019/7/18/20698307/facial-recognition-technology-us-government-fight-for-the-future.

People's Republic of China through large scale use of FRT by installing CCTVs has led to many discussions over the human rights violation in China, particularly in profiling certain ethnic minorities.[74] These claims are not unfounded as with FRT, law enforcement agencies have a tool in its hands through which it can easily monitor and profile any individual or group. These concerns have also been raised in 2019 by Special Rapporteur to the United Nations Human Rights Council.[75]

First, there are concerns about the accuracy of the technology. FRT has been proven to inaccurately identify people.[76] An American federal study has confirmed the racial bias present in the FRT.[77] The bias is embedded in the technology due to the lack of diversified data. This again leads to discrimination and violation of human rights.

The next concern relates to discriminatory profiling. FRT can be utilized not just to surveil but also identify and subsequently target certain communities. Such profiling, at first instance, can be a tool in the hand of an authoritarian regime to systematically discriminate against certain

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[74] Simon Denyer, *China's watchful eye*, THE WASHINGTON POST (Jan. 07, 2018), https://www.washingtonpost.com/news/world/wp/2018/01/07/feature/in-china-facial-recognition-is-sharp-end-of-a-drive-for-total-surveillance/.

[75] *Surveillance and human rights: Report of Special Rapporteur on promotion and protection of the rights of Freedom of Opinion and Expression*, Human Rights Council, A/HRC/41/35 (2019), https://digitallibrary.un.org/record/3814512?ln=en.

[76] Matthew Wall, *Biased and wrong? Facial recognition tech in the dock*, BBC (July 08, 2019), https://www.bbc.com/news/business-48842750.

[77] Drew Harwell, *Federal study confirms racial bias of many facial-recognition system, casts doubts on their expanding use*, WASHINGTON POST (Dec. 20, 2019), https://www.washingtonpost.com/technology/2019/12/19/federal-study-confirms-racial-bias-many-facial-recognition-systems-casts-doubt-their-expanding-use/.

communities. Simultaneously, it may also interfere with the freedom of expression and freedom of association and assembly. These fundamental rights are actively utilized by citizens while expecting a reasonable level of anonymity. People may be discouraged from voicing their opinions and demonstrating or participating in any assembly due to the fear of being identified and targeted for exercising such rights.[78]

The major concern relates to the loss of privacy. The right to privacy is essential to human dignity. It includes both a legitimate expectation to respect private life as well as private data. The term 'private life' is not susceptible to an exhaustive definition but embraces multiple aspects of a person's social identity.[79] The ease of surveillance through FRT and subsequent loss of privacy often leads to infringement of other fundamental rights such as freedom of expression and association. Implementing and utilizing of FRT leads to unreasonable searches and maybe even subsequent arrests, leading to the infringement of the right to privacy.[80] FRT involves biometric processing of facial images.[81] These images may be taken in public places and can subsequently be saved in

[78] FRA, *supra* note 24.
[79] *Id.* at 23.
[80] Kristine Hamann & Rachel Smith, *Facial Recognition Technology: Where will it take us?*, AMERICAN BAR ASSOCIATION (2019), https://www.americanbar.org/groups/criminal_justice/publications/criminal-justicemagazine/2019/spring/facial-recognitiontechnology/.
[81] Joss Fong, *What facial recognition steals from us*, VOX (Dec. 10, 2019), https://www.vox.com/recode/2019/12/10/21003466/facial-recognition-anonymity-explained-video.

databases that can be utilized later for identification purposes.[82] Such retention and utilization of biometric data infringe a person's right to privacy as well as the right to protect personal data.[83] When we talk about the protection of personal data, AI systems are trained to access and analyze big data sets. FRT creates a databank of personal biometrics data without the consent of a person.[84] This data, in the absence of stringent protection laws, can be misused by the AI systems.

Facial recognition system has already been deployed by various states in India. Punjab police department has deployed its AI powered FRT – PAIS.[85] The Indian government has rolled out a nationwide Automated Facial Recognition System [*hereinafter* referred to as "**AFRS**"] and the National Crime Records Bureau [*hereinafter* referred to as "**NCRB**"] has been authorised to implement AFRS.[86] NCRB had opened bids for private

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[82] Prasid Banerjee, *Success of facial recognition depends on data*, LIVE MINT (Jan. 02, 2020), https://www.livemint.com/technology/tech-news/success-of-facial-recognition-tech-depends-on-data-11577986675080.html.

[83] FRA, *supra* note 24.

[84] Jon Schuppe, *Facial Recognition gives police a powerful new tracking tool. It's also raising alarms*, NBC NEWS (July 30, 2018), https://www.nbcnews.com/news/us-news/facial-recognition-gives-police-powerful-new-tracking-tool-it-s-n894936.

[85] Gopal Sathe, *Cops in India are using artificial intelligence that can identify you in a crowd*, HUFFPOST (Aug. 16, 2018), https://www.huffingtonpost.in/2018/08/1 5/facial-recognition-ai-is-shaking-up-criminals-in-punjab-but-should-you-worry-too_a_2 3502796/?gucounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAETdQnufGIWrQvbsIKkXqIX0pIz7OcRbOoqWqE2EtHNOmrdhJpBq5ICDiKfVW4LVpQ76Jd7Y8CE5kjhtY7cg634bIZdRjA-Rm2vE9Yhl fGsBn1UuQ7pQOJcGH94Dksygj8-u8qli6j9AYIWSUNR0CNUp6PJYCrL0 2a71Ezhq7XTF.

[86] Bharti Jain, *NCBR authorised to use facial recognition to track criminals, MHA informs Rajya Sabha*, THE TIMES OF INDIA (Mar. 04, 2020), https://timesofindia.indiatimes.com/india/ncrb-authorised-to-use-facial-recognition-to-track-criminals-mha-informs-rajya-sabha/articleshow/74481284.cms (*hereinafter* "**Bharti Jain**").

companies to develop this FRT in the country.[87] Critics argue that this would be the world's biggest facial recognition system.[88] Apart from concerns over privacy, this move can effectively make India, a surveillance state. It is important to note here that there has been no statute passed by the Parliament for implementing AFRS. NCRB claims that a Cabinet Note of 2009 legalises this step but a Cabinet Note is not a law passed by the Parliament.[89]

India as of now, does not have a data protection law, which makes this technology even riskier to be implemented. The Personal Data Protection bill that was introduced in the Parliament[90] is already being heavily criticised. The bill allows the government to exempt any of its agencies from the requirements of this legislation,[91] and allows it to decide what safeguards would apply to their use of data.[92] These provisions will arguably constitute a new source of power for national security agencies to conduct surveillance.[93] India already allows surveillance through various

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[87] *Request for proposal to procure national automated facial recognition system,* NCRB, MINISTRY OF HOME AFFAIRS, GOVERNMENT OF INDIA (2019), https://ncrb.gov.in/sites/default/files/tender/AFRSRFPDae2206220UploadedVersion.pdf.

[88] Julie Zaugg, *India is trying to build the world's biggest facial recognition system*, CNN BUSINESS (Oct. 18, 2019), https://edition.cnn.com/2019/10/17/tech/india-facial-recognition-intl-hnk/index.html.

[89] *NCRB finally responds to legal notice on facial recognition, we promptly send a rejoinder*, INTERNET FREEDOM FOUNDATION (Nov. 08, 2019), https://internetfreedo m.in/the-ncrb-responds/.

[90] The Personal Data Protection Bill, No. 373 of 2019 (India).

[91] *Id.* Chapter VIII, cl. 35.

[92] Bharti Jain, *supra* note 85.

[93] Anirudh Burman, *Will India's proposed Data Protection Law Protect Privacy and Promote Growth?*, CARNEGIE INDIA (Mar. 09, 2020), https://carnegieindia.org/2020/03/09/will-india-s-proposed-data-protection-law-protect-privacy-and-promote-growth-pub-81217.

laws, such as the Indian Telegraph Act[94] and the Information Technology Act.[95] Deploying an intrusive technology such as AFRS will certainly increase the state of surveillance in India and infringe the right to privacy guaranteed by the Indian constitution.[96]

IV. SAFEGUARDING HUMAN RIGHTS

AI is a revolutionising technology which has the potential to assist in economic as well as social growth. While it holds enormous power to benefit humanity, the technology has to be trained to respect human rights.[97] We cannot have tunnel vision when it comes to AI and we need to be proactive to maximize the benefits of this technology while safeguarding our fundamental rights against the abuse. Contemplations for developing ethical AI have already begun. The European Commission has issued guidelines for the development of ethical AI.[98] The guidelines aim to promote a structure of trustworthy AI which has three components: (i) AI should be lawful (ii) AI should be ethical and (iii) AI should be robust.[99] Although these guidelines are not legally binding, they are an important step

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[94] The Indian Telegraph Act, No. 13 of 1885 (India).
[95] The Information Technology Act, No. 21 of 2000 (India), Vipul Kharbhanda, *Policy paper on surveillance in India*, THE CENTRE FOR INTERNET & SOCIETY (Aug. 03, 2015), https://cis-india.org/internet-governance/blog/policy-paper-on-surveillance-in-india.
[96] Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1 (India).
[97] OECD, *supra* note 59.
[98] High-Level Expert Group on Artificial Intelligence, *Ethics Guidelines for Trustworthy AI*, EUROPEAN COMMISSION (April 2019), https://ec.europa.eu/digital-single-market/en/news/ethics-guidelines-trustworthy-ai.
[99] *Id.* at 2.

forward. The following could be a few steps that can be taken to ensure that we safeguard human rights:[100]

- Every nation should establish a legal framework which would carry out a human rights impact assessment on the AI system before they are developed/acquired or deployed. Along-with such assessment it should be ensured that the users are AI-literate and are be able to understand and interact with the system.[101]
- AI systems should be deployed with human oversight. A machine should not be given the power to make decisions, and the system should always have human oversight. Human intervention and monitoring should be carried out at every stage of AI system. This will ensure that the AI systems work in a regulated framework and respect human rights.[102]
- A comprehensive data protection legislation that can anticipate, mitigate and provide remedies for any human rights risks should be enforced. AI accesses personal data and such legislation should provide for a citizen's right to own their data and subsequent requirement for consent to access such data.

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[100] *Unboxing Artificial Intelligence: 10 steps to protect Human Rights*, COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RTS. (May 2019), https://rm.coe.int/unboxing-artificial-intelligence-10-steps-to-%20protect-human-rights-reco/1680946e64.

[101] *EU guidelines on ethics in artificial intelligence: context and implementation*, EUROPEAN PARLIAMENT (Sept. 2019), https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/640163/EPRS_BRI(2019)640163_EN.pdf (*hereinafter* "**EU Guidelines**").

[102] *Id.* at 16.

The legislature has to define narrowly the legitimate purposes when such data can be accessed.[103]

- There is a need to build a transparent information system. The public must have knowledge and information on the deployment of such systems. Furthermore, the results of such systems have to be made transparent where an individual understands how such a decision was reached and verified.[104]
- Every person who has been impacted by any AI-related decision should have the recourse to challenge the same. This requires the nations to establish independent agencies that have the power to investigate and adjudicate such matters.[105]
- Discrimination due to embedded biasness has to be prevented. Data diversity has to be ensured with strict non-tolerance to any AI system that perpetuates bias. Framework for due diligence should be created and human rights impact assessments should be carried out regularly.
- The UN Guiding Principles on Business and Human Rights should be implemented. These guidelines provide for businesses to prevent, address and remedy any human rights abuses committed in their operations.[106] This would establish a structure where the private sector will be under an obligation

[103] Human Rights & AI, *supra* note 2.
[104] EU guidelines, *supra* note 101.
[105] *Id.*
[106] Office of the High Commissioner, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UNITED NATIONS, HR/PUB/11/04 (2011).

to respect human rights and prevent their infringements. These principles will ensure the development of ethical AI.

- Lastly, there is a need to promote AI literacy. Implementation of AI without requisite AI literacy will lead to violations of human rights. Efforts must be taken to promote AI literacy in every institution utilizing AI.

There is an urgent need to assess the harm and mobilize resources towards the legal lacunae that exist in the AI ecosystem. Without due process of law, the AI systems will lead to disintegration of the human rights regime that has been built, painstakingly post the world wars. This technology creates new challenges and thus, requires immediate proactive actions by governments around the world to tackle and prevent such disintegration and make efforts for effective utilization of the technology for the betterment of humankind.

V. CONCLUSION

It is essential to create a safe environment for the deployment of AI and to understand the harm before implementing this technology. For instance, the European Commission is considering a temporary ban on FRT so that regulators can get time to study and work out plans to prevent the technology from being abused.[107] The state of California has become

[107] Daniel Boffey, *EU eyes temporary ban on facial recognition in public places*, THE GUARDIAN (Jan. 17, 2020), https://www.theguardian.com/technology/2020/jan/17/eu-eyes-temporary-ban-on-facial-recognition-in-public-places.

the third state to ban facial recognition software and they have banned it for next three years to protect the right to privacy of the US citizens.[108] Due to protests by its employees, Google has decided to not work on AI systems that could improve the target drone striking[109] and has issued guidelines on responsible AI.[110] These are a few positive steps and are welcomed.

Big tech companies such as Google and Facebook are willing to work to develop guidelines and laws for development of ethical and legal AI. There is a need to assess the impact and bring in policies to prevent the harm that this technology could unleash on the human rights regime. The technology can and will maximize the benefits only when efforts are made to minimize the damage that this intrusive technology could create.

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[108] *California moves to ban facial recognition on police body cameras*, ALJAZEERA, (Sept. 13, 2019), https://www.aljazeera.com/news/2019/09/california-moves-ban-facial-recognition-police-body-cameras-190913014509067.html.

[109] Scott Shane & Daisuke Wakabayashi, *'The business of war': Google employees protest work for Pentagon*, THE NEW YORK TIMES (Apr. 04, 2018), https://www.nytimes.com/2018/04/04/technology/google-letter-ceo-pentagon-project.html.

[110] Sunder Pichai, *AI at Google: Our Principles*, GOOGLE THE KEYWORD (June 07, 2018), https://www.blog.google/technology/ai/ai-principles/.

Anand Kumar Singh, *Arbitrability of Disputes in India: The Changing Landscape of 'Exclusive Jurisdiction' Discourse*, 7(1) NLUJ Law Review 70 (2020)

ARBITRABILITY OF DISPUTES IN INDIA: THE CHANGING LANDSCAPE OF 'EXCLUSIVE JURISDICTION' DISCOURSE

Anand Kumar Singh[*]

ABSTRACT

The principle of arbitrability is fundamental to the progression of an arbitration regime in any country. The success of arbitration rests on the aid and assistance accorded to it by the courts. In such a scenario, the role of the judiciary in providing an extensive and expansionist interpretation of arbitrability becomes crucial. However, such support and protection are often found missing in jurisdictions characterized by a conservative judiciary. Arbitration in India seems to suffer from the same malady. Several tests of arbitrability exist but their narrow interpretations have allowed an intrusive judiciary to superimpose itself on the arbitral process. One such test, which has presented itself as a major challenge, is the test of exclusive jurisdiction. The purpose behind this test was to limit the excessive judicial intervention thereby providing the necessary impetus and assistance to the arbitration process in the country. Instead, it seems to have become a tool to subvert the cherished principle of party autonomy. The confusion emanating from the unnecessary invocation and inconsistent interpretation of the test has raised questions on its utility and efficacy in the promotion of arbitration in India. This paper attempts to examine the ambiguity surrounding scope and test of arbitrability, particularly the test of exclusive jurisdiction, in India through a catena of judicial decisions. It highlights the

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failure of judicial appreciation of the profound impact of its myopic understanding of 'arbitrability' and the restricted application of the test. The article suggests a purposive shift in the judicial approach towards 'arbitrability' from deep-rooted mistrust to being pro-arbitration through reconciliation of principles of public interest and party autonomy.

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I. INTRODUCTION

When will mankind be convinced and agree to settle their difficulties by arbitration?

- Benjamin Franklin[1]

The progression of arbitration law from an "*alternate*" to a preferred and thriving mode of dispute resolution has been remarkable. Although the courts remain firmly placed in their role as 'guardians of justice', arbitration allows the parties to overcome the frustrations of litigation.[2] It is this alternate mechanism to courts which is not only considered neutral, speedy, and flexible, but also ensures the considerations of being confidential, and cost-efficient.[3] Thus, arbitration contributes immensely in "*maintenance of social stability and order*"[4] by supplementing and not supplanting the courts in the dispensation of justice.

In our own backyard, the Indian judiciary cautiously opened up towards this global trend.[5] In a bid to promote alternate dispute resolution [*hereinafter* referred to as "**ADR**"] mechanisms, the courts started adopting

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[1] Letter from Benjamin Franklin to Joseph Banks (July 27, 1783), in 1 THE PRIVATE CORRESPONDENCE OF BENJAMIN FRANKLIN 132, (3 ed., 1818).

[2] Michael Pryles, *Assessing Dispute Resolution Procedures*, 7 AM. REV. INT'L ARB. 267, 268 (1996).

[3] Vinay Reddy and V. Nagaraj, *Arbitrability: The Indian Perspective*, 19 J. INT'L ARB. 117, 149-150 (2002) (*hereinafter* "**Vinay**").

[4] Donald L. Carper & John B. LaRocco, *What Parties Might Be Giving Up and Gaining When Deciding Not to Litigate: A Comparison of Litigation, Arbitration and Mediation*, 63 DISP. RESOL. J. 8, 49 (2008).

[5] *See,* Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532 (India); Guru Nanak Foundation v. Rattan Singh & Sons, AIR 1981 SC 2075 (India).

a pro - arbitration approach as is evident in the matter of *Afcons Infrastructure Ltd. v. Cherian Varkey Constructions*,[6] wherein the Supreme Court laid down effective guidelines for the courts to enforce the mandate of Section 89 of the Civil Procedure Code, 1908 [*hereinafter* referred to as "**CPC**"][7] which promotes parties to adopt ADR mechanisms, and directs courts to uphold such will of the parties. This position was strengthened through a series of judgments, such as *Bharat Aluminium Company and Ors. v. Kaiser Aluminium Technical Service, Inc. and Ors.*,[8] wherein the court curtailed its powers to intervene in foreign seated arbitrations. Further, in the case of *Shri Lal Mahal Ltd. v. Progetto Grano Spa*,[9] the court went ahead and significantly watered down the ambit and scope of 'public policy' exception to be raised as a defence against enforcement of arbitral awards.

Unfortunately, the judiciary failed to fully embrace and respect the most sacrosanct principles arbitration, viz. party autonomy and *kompetenz – kompetenz*.[10] Owing to this, the judicial 'pro-arbitration' stance transformed into 'conservative' and, ultimately, reneged to 'regressive'. Although the legislature made several attempts in circumscribing the judicial overreach but failed miserably. Therefore, in spite of the relentless pursuit of the

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[6] Afcons Infrastructure Ltd. v. Cherian Varkey Constructions, (2010) 8 SCC 24 (India).
[7] The Code of Civil Procedure, No. 5 of 1908 INDIA CODE (1908), § 89.
[8] Bharat Aluminium Company and Ors. v. Kaiser Aluminium Technical Service, Inc. and Ors., (2012) 9 SCC 552 (India).
[9] Shri Lal Mahal Ltd. v. Progetto Grano Spa, (2014) 2 SCC 433 (India).
[10] *See*, NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 347, (5th ed., 2009); DICEY, MORRIS AND COLLINS, THE CONFLICT OF LAWS 740 (2006). (The Doctrine of Kompetenz-Kompetenz indicates that an Arbitral Tribunal is empowered and has the competence to rule on its own Jurisdiction, including determining all jurisdictional issues, and the existence or validity of an Arbitration agreement.)

policymakers to promote the country as a "*global arbitration hub*",[11] India is still considered as an arbitration agnostic state. The arbitration regime in India has been lamented to be on a reverse track as instead of "*becoming mature, advanced and confident, it seems to have become weak and unduly defensive*"[12].

This paper attempts to draw a careful insight into arbitration to examine the issue of 'arbitrability' in India. The *first part* of the paper undertakes an understanding of arbitrability by tracing its evolution and progression to its current state internationally as well as in India. In the *second part*, the author examines the complexity in the intertwined relationship between arbitrability and arbitration agreement. It explores the effect of invalidity of an arbitration agreement on the arbitrability of disputes and *vice versa*. The *third part* of the paper explores the parameter and threshold of the judicially evolved test of exclusive jurisdiction of public forums with respect to the arbitrability of disputes. It endeavours to trace the trend of Indian judiciary in the application of the test. It seeks to map the extent and impact of the digression of Indian courts from the internationally accepted principles with respect to the protection of exclusive jurisdiction of public forums. It also examines a progressive change in the attitude of the Indian judiciary towards arbitration with the help of recent judicial pronouncements. The *fourth part* analyses the

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[11] Shri Narendra Modi, Honourable Prime Minister of India, Valedictory Speech on *"National Initiative towards Strengthening Arbitration and Enforcement in India"* at Niti Aayog's Global Conference (Oct. 23, 2016).

[12] Nidhi Gupta, *Saving Face Or Upholding 'Rule Of Law': Reflections On Antrix Corp Ltd. v. Devas Multimedia P. Ltd. (Arbitration Petition No. 20 Of 2011, Decided On May 10, 2013)*, 2(2) IND. J. ARB. L. 6-81, 69 (2014).

justifications and limitations of the doctrine of public policy in the context of progression of the arbitration regime in India. It discusses the shrinking space of public policy in arbitrability discussions across jurisdictions and the response of the Indian judiciary on this delicate yet crucial issue. In the end, the paper suggests a middle approach that must be followed to calibrate the balance between judicial intervention and judicial restraint. It recommends an interpretative role for the Indian judiciary which is in consonance with the spirit of helping India become a 'global arbitration hub'.

II. UNDERSTANDING 'ARBITRABILITY'

To put it simply, '*arbitrability*' refers to the ability of a dispute to constitute the subject matter of arbitration.[13] It pertains to the jurisdictional aspects of a dispute. It goes beyond the preliminary determination of the legal validity of the arbitration agreement and tries to ascertain whether the dispute is capable of being adjudicated by a private forum instead of courts.[14]

There are two kinds of arbitrability, one being '*objective arbitrability*',[15] which determines as to what kinds of issues can be submitted to arbitration

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[13] William W. Park, *Arbitrability and Tax in* ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES*,* 179*,* (L. A MISTELIS & S. BREKOULAKIS, 2008) (*hereinafter* "**Park**"); ALEXIS MOURRE, ARBITRABILITY OF ANTITRUST LAW FROM THE EUROPE AND US PERSPECTIVE, EU AND US ANTITRUST ARBITRATION: A HANDBOOK OF PRACTITIONERS, (3rd ed., 2011).

[14] Assimakis P. Komninos, *Arbitration and EU Competition Law* 7 UNIV. COLL. LONDON, DEP'T OF LAW 1-49 (2009).

[15] LEW ET AL., COMPARATIVE INTERNATIONAL AND COMMERCIAL ARBITRATION, 187, (Kluwer Law Int'l, 2003); *see also* EMMANUEL GAILLARD AND JOHN SAVAGE, FOUCHARD

(also known as the '*non-arbitrability doctrine*') and whether certain disputes have been exclusively reserved for adjudication by public fora.[16] Another category of arbitrability is '*subjective arbitrability*' (or '*ratione personae*') which examines as to who all can submit their disputes for arbitration. The paper is restricted to the concept of objective arbitrability only.

The concept of arbitrability owes its origin to the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927 [*hereinafter* referred to as "**Geneva Convention**"] which through its expression "*capable of settlement by arbitration*" prescribed it as a necessary pre-condition for enforcement of a foreign award in a State.[17] Under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 [*hereinafter* referred to as "**New York Convention**"],[18] the arbitrability can be dealt with by the national courts either at the time of reference of the dispute to arbitration or at the time of enforcement of a foreign arbitral award.[19] It allows the States to recognize and enforce the arbitration agreement of "*subject matter capable of settlement*".[20] Moreover, it also empowers the States to refuse the recognition and enforcement of an arbitral award if the domestic legal regime of such States prohibits the

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GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, 123, (Kluwer Law Int'l, 1999).

[16] ALAN REDFERN AND MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 22, (2nd ed., 1991) (*hereinafter* "**Hunter et al**").

[17] Geneva Convention on the Execution of Foreign Arbitral Awards art. I(2)(b), Sept. 26, 1927, 301 U.N.T.S. 92.

[18] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.

[19] *Id.* art. II and art. V.

[20] *Id.* a conjoint reading of art. II (1) and art. II (3).

settlement of the subject matter of the award by way of arbitration on grounds of public policy.[21] A similar view is also endorsed under the UNCITRAL Model Law on International Commercial Arbitration[22] [*hereinafter* referred to as "**Model Law**"] where the States are at liberty to shape their arbitration regimes through their public policies.[23] Importantly, the Model Law echoes the position of the New York Convention on the issue of refusal of recognition and enforcement of the award on grounds of non-arbitrability.[24] It also allows the domestic courts of the enforcing State to set aside an award if the subject matter of the award is incapable of being settled through arbitration under the domestic laws of such State.[25]

III. THE INDIAN SCENARIO

The utter dissatisfaction with the archaic and outdated Arbitration Act of 1940[26] coupled with the clarion call of the business community and legal experts to formulate a dispute settlement mechanism that was in sync with best international practices marked the dawn of a new era of arbitration laws in India. The enactment of the Indian Arbitration Act, 1996[27] was done with the dual intention of, *first*, consolidation of arbitration

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[21] *Id.* art. V(2)(a) .
[22] UNCITRAL, Model Law on International Commercial Arbitration, U.N. Doc. A/40/17, 24 I.L.M. 1302 (1985), with amendments adopted on July 7, 2006 (*hereinafter* "**Model Law**").
[23] *Id.* art. 1(5).
[24] *Id.* art. 36(1)(b)(i).
[25] *Id.* art. 34(2)(b)(i).
[26] The Arbitration Act, No. 10 of 1940 (India).
[27] The Arbitration and Conciliation Act, 1996, No. 26 of 1996 INDIA CODE (*hereinafter* "**Arbitration Act**").

laws in India, and *second*, to bring it in sync with the Model Law.[28] The ambition was to develop an alternate mode of dispute settlement which would be quick, efficacious, and amicable, especially towards commercial disputes, and which could keep pace with the economic progression of the country. Therefore, the legislature had succinctly laid down its three most important features: *first*, fair, just, and swift resolution of disputes; *second*, the concept of party autonomy; and, *lastly*, minimal judicial intervention.[29] It is the last two features which are often regarded as 'key foundational stones' towards ensuring the success of an arbitration regime.[30] However, the excessive or intrusive interventions by the courts present a serious threat to the progression and development of arbitration in India.

In the spirit of recognizing the principle of 'party autonomy' and ensuring minimal judicial intervention, Section 89 was introduced in the CPC by way of an amendment.[31] It was the formal acknowledgment of court-annexed alternate dispute resolution mechanisms in India. The Arbitration Act does not specify any category of disputes which are excluded from its applicability.[32] Thus, in principle, the general mandate of this Act is to allow all kinds of civil disputes, "*whether contractual or not*"[33] to

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[28] Promod Nair, *Surveying a Decade of the 'New' Law of Arbitration in India*, 23 ARB. INT'L 699, 701 (2007).
[29] The Arbitration and Conciliation Bill, Bill of 1995, Statement of Objects and Reasons.
[30] Ajay KR Sharma, *Judicial Intervention in International Commercial Arbitration: Critiquing the Indian Supreme Court's Interpretation of The Arbitration and Conciliation Act, 1996*, 3(1) IND. J. ARB. L. 6, 69 (2014).
[31] The Code of Civil Procedure, No. 5 of 1908 INDIA CODE (1908), § 89.
[32] A. Ayyasamy v. A Paramasivam, (2016) 10 SCC 386 (India); Aftab Singh v. Emaar MGF Land Ltd., (2017) SCC Online NCDRC 1614 (India).
[33] The Arbitration and Conciliation Act, No. 26 of 1996 INDIA CODE (1996), § 7(1).

be settled through arbitration. However, the Arbitration Act does prescribe a general 'exclusionary' clause according to which if a dispute is prohibited from being settled through arbitration by virtue of any other law in force, then such a prohibition would prevail over the general mandate of the Arbitration Act.[34] This restricts the otherwise overriding effect of the Arbitration Act over other legislations, due to the non-obstante clause.[35] More importantly, this also preserves the exclusivity of jurisdiction vested in national courts and tribunals by such special legislations.

The question of arbitrability of a dispute is often raised as a defence either at the time of arbitration proceeding or when the enforcement of the arbitral award is sought. Therefore, the issue of arbitrability can arise at the *initial or pre-reference* stage of the proceeding.[36] Furthermore, the question of arbitrability can also be raised, before a court, *after* the arbitration proceedings have culminated in an arbitral award.[37] This can result in the award being set aside by the court if it was to conclude that either the subject matter of award is non-arbitrable under the existing law or the award falls foul of the public policy of the country. The Arbitration Act allows for a similar recourse as well as fate to the foreign awards.[38] Thus, arbitrability can also be a ground for non-enforcement of an arbitral award at the *post-proceedings stage*.

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[34] *Id.* § 2 (3).
[35] *Id.* § 5.
[36] *Id.* §§ 8 and 45.
[37] *Id.* § 34 (2)(b)(i).
[38] *Id.* §§ 48 (2)(a) and (b).

The idea of arbitrability, in India, took its current shape and form through numerous decisions of courts. The Supreme Court in the landmark case of *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd.* [*hereinafter* referred to as "**Booz Allen**"[39] accorded enormous power to the judicial authorities over arbitral tribunals by explicitly declaring that:

> "*where the issue of 'arbitrability' arises in the context of an application under section 8 of the Act in a pending suit, all aspects of arbitrability have to be decided by the court seized of the suit, and cannot be left to the decision of the Arbitrator. Even if there is an arbitration agreement between the parties, and even if the dispute is covered by the arbitration agreement, the court where the civil suit is pending, will refuse an application under Section 8 of the Act, to refer the parties to arbitration, if the subject matter of the suit is capable of adjudication only by a public forum or the relief claimed can only be granted by a Special Court or Tribunal.*" *(emphasis supplied)*

This ruling has had the most devastating impact on another hallmark feature of arbitration, i.e., the principle of *kompetenz - kompetenz*, in India.[40] On another occasion, the court did acknowledge the need to keep the scope of judicial intervention to minimal but, nonetheless, reserved to

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[39] Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532 (India), ¶ 33.

[40] The Arbitration and Conciliation Act, No. 26 of 1996, INDIA CODE, § 16 (The doctrine of *kompetenz - kompetenz* indicates that an arbitral tribunal is empowered and has the competence to rule on its own jurisdiction, including determining all jurisdictional issues, and the existence or validity of an arbitration agreement).

itself the power to undertake an inquiry on the issue of objective arbitrability.[41]

Therefore, an examination of objective arbitrability necessitated a relook into the utility and merit of exclusive jurisdiction of public forums through the lens of public policy. That is how all these concepts became intertwined adding to the prevailing confusion and ambiguity surrounding the understanding of arbitrability.

IV. RELATIONSHIP BETWEEN ARBITRABILITY AND ARBITRATION AGREEMENT

Arbitrability of the subject matter is an essential precondition without which even a valid arbitration agreement would not allow the parties to settle their disputes amicably through arbitration. It separates the different types of disputes that may be resolved through arbitration and the ones that are reserved to be exclusively dealt with by the courts.[42] Some authors consider arbitrability to be a question of jurisdictional in nature, based on the subject matter of the dispute.[43]

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[41] A. Ayyasamy v. A Paramasivam, (2016) 10 SCC 386 (India), ¶ 25 ("*While dealing with such an issue in an application under Section 8 of the Act, the focus of the Court has to be on the question as to whether the jurisdiction of the Court has been ousted instead of focusing on the issue as to whether the Court has jurisdiction or not.")(emphasis supplied*).

[42] Park, *supra* note 13.

[43] Agnish Aditya and Siddharth Nigotia, *Semantic and Doctrinal Restructuring of 'Arbitrability': Examining Brekoulakis' Arguments in the Indian Context*, 33 ARB. INT'L (2017) (*hereinafter* "**Agnish**").

It is pertinent to note that the non-arbitrability of the subject matter does not affect the validity of the arbitration agreement. Stavros Brekoulakis observes that although one may find the concepts of arbitrability and validity of the arbitration agreement to be closely related, there does exist a fine yet important difference between the two.[44] *First*, most arbitration legislations distinguish between arbitrability and invalidity through the insertion of separate provisions governing them at different points of the arbitral process. In India, for instance, the Arbitration Act clearly provides for invalidity of an arbitration agreement under Section 34(2)(a)(ii), disputes falling beyond the scope of agreement under Section 34(2)(a)(iv) and inarbitrability under Section 34(2)(b)(i) as separate grounds for vacatur.[45] *Second*, arbitration agreements, despite being basically a type of agreement, differ from most with respect to their validity criteria in as much as they are only required to satisfy a bare minimum threshold of *consensus as idem*, *party capacity*, and *other requirements laid out in arbitration statute* to be valid. The imposition of arbitrability as an additional pre-condition of validity on the arbitration agreements would place them at a disadvantageous position *vis-à-vis* other types of agreements.

Further, it has been argued that inarbitrability and invalidity have different jurisdictional results. Brekoulakis presents an argument that inarbitrability only precludes the tribunal's jurisdiction to deal with certain

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[44] Stavros Brekoulakis, *On Arbitrability: Persisting Misconceptions and New Areas of Concern in* ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES, 19 (L. A MISTELIS & S. BREKOULAKIS, 2008) (*hereinafter* "**S. Brekoulakis**").

[45] Agnish, *supra* note 43.

kinds of inarbitrable claims but exercise jurisdiction over other kinds of arbitrable claims. However, in the case of *Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya and Anr.* [*hereinafter* referred to as "**Sukanya Holdings**"][46] the apex court has categorically denied the possibility of any bifurcation of disputes into arbitrable and inarbitrable claims. It is this restriction on the bifurcation of claims where Brekoulakis's argument fails in India.

V. TEST OF EXCLUSIVE JURISDICTION: PROTECTIONIST OR UNNECESSARY IMPEDIMENT

A fundamental challenge that confronts the policymakers during the formulation of an arbitration policy is to strike a balance between two conflicting considerations. On one hand the principle of party autonomy[47] must be adequately protected and promoted for it is one of the most critical and hallmark features of arbitration. On the other hand, one must also be mindful of the inherent dangers of this private arrangement which, therefore, warrant States to circumscribe and tailor arbitration regime in accordance with its public policy.[48] It is on the swinging scale of these two factors that the fate of arbitrability delicately hangs.[49]

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[46] Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya and Anr., (2003) 5 SCC 531 (India).
[47] *See* Volt Information Sciences Inc. v. Leland Stanford University 489 US 468 (Sup. Ct., 1989). In accordance with this principle, the parties are free to structure their arbitration agreement.
[48] GARY B. BORN, NON-ARBITRABILITY AND INTERNATIONAL ARBITRATION AGREEMENTS, *in* INTERNATIONAL COMMERCIAL ARBITRATION 943, (2nd ed., 2014).
[49] *See generally* Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532 (India); Food Cooperation of India v. Indian Council of Arbitration & Ors., (2003) 6 SCC 564 (India).

'Jurisdiction' has been held to be a "*word with many hues…. whose colour must be discerned from the setting in which it is used*".[50] The above statement highlights the complexity surrounding the determination of the 'jurisdiction' of forums over certain types of disputes. National laws of most countries earmark certain kinds of disputes for public forums established under special laws. This 'exclusivity' serves as a limitation on the arbitrability of such disputes.

The courts have devised certain kinds of tests to ascertain the arbitrability of a subject matter.[51] The Indian Supreme Court in *Booz Allen* observed that certain categories of disputes could only be resolved through adjudication by public forums.[52] This marked the advent of the *test of exclusive jurisdiction of public forums*. The Bombay High Court firmly cemented this test in the arbitrability debates while pronouncing its verdict on arbitrability of disputes under the Industrial Dispute Act, 1947 [*hereinafter* referred to as "**Industrial Disputes Act**"][53] According to the court, the test of exclusivity emanates from and is deeply rooted in the doctrine of public policy. However, to the astonishment of many,[54] the court in a bid

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[50] National Thermal Power Corp. Ltd. v. Siemens Atkeingesellschaft, (2007) 4 SCC 451 (India), ¶ 18.

[51] Sai Anukaran, *Scope of Arbitrability of Disputes from the Indian Perspective*, 14(1) ASIAN INT'L ARB. JOURNAL 77 (2018); Shreyas Jayasimha & Rohan Tigadi, *Arbitrability Of Oppression, Mismanagement And Prejudice Claims In India: Need For Re-Think?*, 11 NUJS L. Rev. 4, 17 (2018).

[52] Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532 (India), ¶ 35.

[53] Kingfisher Airlines Ltd. v. Prithvi Malhotra Instructor, (2013) (1) AIR Bom R 255 (India).

[54] Payel Chatterjee & Simone Reis, *Private Enforcement Of Competition Issues, Competition Commission Of India Vis-À-Vis- Alternate Forums – Is It Actually An Option?*, NISHITH DESAI

to over-protect the exclusivity of the public forums made observations that sought to narrow the mandate of the apex court in *Booz Allen*. It declared that if the legislature, on grounds of public policy, has conferred exclusive jurisdiction on public forums with respect to certain kinds of disputes then such disputes cannot be settled through arbitration *irrespective of the nature of rights involved therein*.[55] Does that mean that the establishment of specialized public forums is the litmus test for determining the arbitrability of, otherwise perfectly arbitrable, disputes?

The court, in answer to the foregoing issue, observed that the correct approach is to discern the reason behind the conferment of such 'exclusivity'. This, in turn, would make it necessary to examine and analyse "…*the object as well as the broad scheme*"[56] of the legislation. With respect to the facts of that case, it opined that the Industrial Disputes Act,[57] *being a beneficial legislation* is committed towards "*amelioration of the conditions of workers, tempered by a practical sense of peaceful co-existence, to the benefit of both-not as in a neutral position, but with restraints on laissez - faire and concern for the welfare of the weaker lot.*"[58] The Court observed that although the Industrial Disputes Act allows

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ASSOCIATES (Jan. 03, 2013), https://www.nishithdesai.com/fileadmin/userupload/pdfs/Research%20Articles/Private%20Enforcement%20of%20Competition%20Law%20Issues.pdf.

[55] The Supreme Court, in Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532 (India), has expressly declared disputes with respect to rights *in personam* and subordinate rights *in personam* arising from rights *in rem*, to be amenable to arbitration.

[56] Kingfisher Airlines Ltd. v. Prithvi Malhotra Instructor, (2013) (1) AIR Bom R 255 (India), ¶ 13.

[57] The Industrial Disputes Act, No. 14 of 1947 INDIA CODE (1947).

[58] Life Insurance Corporation of India v. D.J. Bahadur, (1981) 1 SCC 315 (India); *see also*, Rajesh Korat v. Innoviti Embedded Solutions Pvt. Ltd., (2017) SCC OnLine Kar 4975 (India).

for 'voluntary arbitration'[59] of disputes, it prescribes a separate and specific procedure for it. This is indicative of the scheme of the Act which treats an otherwise private dispute between an employer and employee differently.[60] The reason for such a differential treatment lies in the nature of the relationship between the parties to dispute and the profound impact the dispute will have on other employees and consequently the whole industry.[61] The court also noted that the tribunal created under the Industrial Disputes Act was significantly different from the civil courts.[62] Therefore, the test of exclusive jurisdiction would limit the arbitrability of a subject matter arising out of a legislation, only if:[63]

1. The legislation creates special rights and obligations, not pre-existing under common law; and

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[59] The Industrial Disputes Act, No. 14 of 1947 INDIA CODE (1947), § 10A.

[60] Kingfisher Airlines Ltd. v. Prithvi Malhotra Instructor, (2013) (1) AIR Bom R 255 (India), ¶ 15.

[61] *Id.* ¶ 18.

[62] *See also,* Dhulabhai v. State of Madhya Pradesh, AIR 1969 SC (India) (The court observed that the Tribunal established under the Act are, not tied with elaborate procedures, layers of appeal and revision, meant to provide prompt, inexpensive and effective forum of dispute settlement. "*It is, therefore, always in the interest of the workmen that disputes concerning them are adjudicated in the forums created by the Act and not in a Civil Court. That is the entire policy underlying the vast array of enactments concerning workmen. This legislative policy and intendment should necessarily weigh with the Courts in interpreting these enactments and the disputes arising under them*.")

[63] Significant to this discussion is another doctrine which the courts resort to while interpreting and examining the validity of jurisdiction ouster clauses under any legislation- the *Doctrine of Uno-flatu* (implied repeal). *See, e.g.,* Dhulabhai v. Madhya Pradesh, AIR 1969 SC 78 (India); Premier Automobiles Ltd. v. Kamlakar Shanatram, AIR 1975 SC 2238 (India); M/s. Kamala Mills Ltd v. State of Bombay, (1966) 1 SCR. 64 (India); Maya Devi v. Inder Narain, AIR 1947 All 118 (India); Shri Panch Nagar Parak v. Puru Shottam Das, AIR 1999 SC 3071 (India).

2. The legislation, as a matter of public policy, provides for a special and distinct remedy and specialized forum for adjudication of disputes involving such rights and obligations.

This position got reaffirmed through the supplementing opinion of Justice Chandrachud in the landmark case of *A. Ayyasamy v. A Paramasivam* [*hereinafter* referred to as "**Ayyasamy**"][64] observing that where the legislature, on grounds of public policy, confers exclusive jurisdiction on special forums, to the exclusion of jurisdiction of an ordinary civil court, over certain categories of disputes then such disputes cannot be resolved through arbitration. It went on to discuss a few cases where a similar position had been upheld by the courts on account of public policy goals.[65] Thus, the test has now become two-pronged: *first*, all disputes in the nature of or involving adjudication of rights *in rem* are not arbitrable due to the *Booz Allen* test, and *second*, all disputes involving in-personam rights can be arbitrated unless they have not been reserved for adjudication 'exclusively'

[64] A. Ayyasamy v. A Paramasivam, (2016) 10 SCC 386 (India), ¶ 38.

[65] *Id.* ¶¶ 36-38; Natraj Studios (P) Ltd v. Navrang Studios, (1981) 2 SCR 466 (India) (declaring that rent legislations are welfare legislations thereby recognizing the exclusive jurisdiction of special courts under such legislations); Skypak Courier Ltd. v. Tata Chemical Ltd., (2000) 5 SCC 294 (India); National Seeds Corporation Ltd. v. M. Madhusudhan Reddy, (2012) 2 SCC 506 (India) (observed that Consumer Protection Act has a social objective and therefore, consumer disputes cannot be subject matter of arbitration). *See generally*, K Kishan v. M/s Vijay Nirman Co. Pvt. Ltd., (2018) 10 SCALE 256 (India) (holding that Insolvency & Bankruptcy Code, 2016 is a special legislation which would have an overriding effect over Arbitration Act, 1996 due to Section 238 of the Code.); Vimal Kishore Shah v. Jaynesh D. Shah & Ors., (2016) 8 SCC 788 (India) (Trusts Act, 1882 provides for a specific remedy. Therefore, trust related disputes would not be amenable to arbitral proceedings).

through a public forum (for example - courts, tribunals, commissions, etc.) by the legislature on grounds of public policy.[66]

However, the focus of this test seems to be somewhat misplaced. The test, in its present form, does not delve into the possibility of the parties mutually agreeing to choose arbitral tribunals over such specialized tribunals. It is at this point that the principle of 'party autonomy' is ousted by the doctrine of 'exclusive jurisdiction'. It is this limitation of the test which raises serious doubt over its utility and therefore must be immediately addressed by courts. One such opportunity presented itself before the High Court of Delhi in the matter of *HDFC Bank v. Satpal Singh Bakshi* [*hereinafter* referred to as "**HDFC**"][67] The court was to decide whether disputes, which fall within the exclusive scope and jurisdiction of Debt Recovery Tribunals [*hereinafter* referred to as "**DRT**"] established under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 were arbitrable? The court observed that the creation of a specialized tribunal "*only ousts the jurisdiction of the civil courts*" and does not act as a limitation on the freedom of parties to choose an alternative forum.[68] It emphasized that the principle of "*party autonomy is recognized as paramount*" in the Indian judicial system so much so that "*even the intervention by the Courts is restricted and is minimal*".[69] The court held that the "*tribunalization of justice*" should make no difference to

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[66] *See generally* NOMANI MZM, INTELLECTUAL PROPERTY RIGHTS & PUBLIC POLICY 20, 2019; Tanya Choudhary, *Arbitrability Of Competition Law Disputes In India – Where Are We Now And Where Do We Go From Here?*, 4(2) IND. J. ARB. L. 69, 78 (2016).
[67] HDFC Bank Ltd. v. Satpal Singh Bakshi, 2012 SCC OnLine Del. 4815 (India).
[68] *Id.* ¶ 7.
[69] *Id.* ¶ 10.

the above mentioned position of law. It referred to the *Booz Allen* ratio to hold that a dispute must be with respect to a 'right *in personam*' which is "*capable of adjudication and settlement through arbitration*".[70] Thereafter, the court laid out the scheme and methodology of the test of 'exclusive jurisdiction'. It held that any dispute which is devoid of any element of public interest and is essentially a claim *in personam* is capable of being settled through arbitration. Thus, the court, while holding the DRT disputes to be arbitrable, declared that the creation of specialised tribunals to adjudicate disputes under a legislation would not automatically render every dispute non-arbitrable.[71]

It is extremely important that the scope and methodology as proposed in the *HDFC* case and the *Kingfisher* case is the governing yardstick of the test of 'exclusive jurisdiction'. Many scholars are of the opinion that the judicial approach towards the applicability of this test must be extremely narrow and restrictive so as provide necessary protection and impetus to arbitration proceedings in a country.[72] This would also be in favour of another sacrosanct principle of arbitration: principle of *kompetenz - kompetenz*.[73] The underlying objective behind this principle is to check the anathema of excessive judicial intervention in arbitration proceedings. This statutorily recognised principle has been upheld by the Indian Courts on

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[70] *Id.* ¶ 12.
[71] *Id.* ¶ 14.
[72] Eric A. Schwartz, *The Domain of Arbitration and Issues of Arbitrability: The View from the ICC*, 9(1) ICSID REV. FOREIGN INV. L. J. 17 (1994).
[73] The Arbitration and Conciliation Act, No. 26 of 1996 INDIA CODE (1996), § 16.

several occasions.[74] Moreover, the judicial intervention has been limited to only "*prima facie examination of issue…leaving the parties to a full trial either before the arbitral tribunal or before the court at post-award stage*".[75]

The Law Commission sought to expand the power of arbitral tribunal by proposing various amendments in the Arbitration Act.[76] Most importantly, it proposed an amendment in Section 16 which would empower it to decide disputes involving "*serious question of law, complicated questions of fact or allegations of fraud, corruption, etc.*".[77] Read along with the amended Sections 8 and 11, it would have conclusively settled the supremacy of arbitral tribunals over arbitration proceedings. It would have also narrowed the scope and ambit of the test of 'exclusive jurisdiction'. However, that was not to be as the proposed amendment did not find place in the subsequent amendment.[78] Thus, a golden opportunity was squandered and the jurisprudence on arbitrability continued its ordeal with vague and regressive tests of arbitrability.

Interestingly, some positive and encouraging developments have taken place in this area. Through a series of recent judgements, the Indian

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[74] *See generally*, Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd., (2020) 2 SCC 455 (India); SBP & Co. v. Patel Engineering Ltd., (2005) 8 SCC 618 (India); Gas Authority of India Ltd. & Ors. v. Keti Constructions Ltd. & Ors., (2007) 5 SCC 38 (India); IOCL v. S.P.S. Engg. Ltd., (2011) 3 SCC 507 (India); Today Homes & Infra. Pvt. Ltd. v. Ludhiana Improvement Trust & Anr., (2014) 5 SCC 68 (India).

[75] Shin Etsu Chemicals Co. Ltd. v. Aksh Optifibre, (2005) 7 SCC 234 (India), ¶ 105.

[76] *Amendments to The Arbitration and Conciliation Act*, *1996*, (Report No. 246) LAW COMMISSION OF INDIA (Aug. 2014) (*hereinafter* "**Report No. 246**").

[77] *Id.* at 50.

[78] The Arbitration and Conciliation (Amendment) Act, No. 3 of 2016 INDIA CODE (2016) (*hereinafter* "**Arbitration Amendment Act**").

judiciary has started responding favourably towards arbitration. Recently, the Court embraced the legislative intent behind the amended Section 8 with full vigour by declaring that mere allegation of fraud by recalcitrant parties to obstruct arbitration would not render disputes inarbitrable.[79] The decision upheld the amended interpretation of Section 8 thereby breaking free the jurisprudence on arbitrability from the restrictive approach prescribed in *Sukanya Holdings* which did not allow for bifurcation of the subject matter.[80]

On another occasion, the Indian Supreme Court held that if a statute, when read as a whole, does not expressly or by necessary implication oust arbitrability of disputes arising under it, then such disputes are amenable to arbitration.[81] The court looked into the 246th Law Commission Report on the amended Sections 11(6A) and 16 (*kompetenz - kompetenz*) of the Arbitration Act, to limit its scope of power to the mere ascertainment of the existence of an arbitration agreement. The growing trust in arbitral proceedings was reflected when the Court declared an offence simpliciter (fraud) that does not vitiate the validity of arbitration agreement and which is a private dispute without any element of public interest, to be arbitrable.[82] However, the big moment came when the Court expressly declared its pro-arbitration bias by observing that:

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[79] Ameet Lalchand Shah & Ors. v. Rishabh Enterprises & Ors., (2018) 15 SCC 678 (India).
[80] Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya and Anr., (2003) 5 SCC 531 (India).
[81] Vidya Drolia & Ors. v. Durga Trading Corporation, (2019) SCC OnLine SC 358 (India), ¶¶ 26-32.
[82] Rashid Raza v. Sadaf Akhtar, (2019) 8 SCC 710 (India).

> "*Once parties have agreed to refer disputes to arbitration, the court must plainly discourage and discountenance litigative strategies designed to avoid recourse to arbitration. Any other approach would seriously place uncertainty on the institutional efficacy of arbitration. Such a consequence must be eschewed. The Arbitration Act must be interpreted in a manner consistent with prevailing approaches in the common law world. Jurisprudence in India must evolve towards strengthening the institutional efficacy of arbitration. Deference to a forum chosen by parties as a complete remedy for resolving all their claims is but part of that evolution. Minimising the intervention of courts is again a recognition of the same principle*".[83] (*emphasis supplied*)

VI. PUBLIC POLICY AND ARBITRABILITY: AN UNRULY HORSE IN CHINATOWN?

The New York Convention deals with the recognition and enforcement of foreign arbitral awards. Article II(1) provides that an international arbitration agreement shall be recognized if it "*concern(s) a subject matter capable of settlement by arbitration*".[84] Further, it provides that a foreign award may not be recognized or enforced if, "*the subject matter of the difference is not capable of settlement by arbitration under the law of the country where recognition and enforcement are sought*" or where such recognition or "*enforcement*

[83] Swatantra Properties Pvt. Ltd. v. Airplaza Retail Holdings Pvt., 2019 (1) ALJ 409 18 (India).
[84] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 art. II (1).

of the award would be contrary to the public policy of the country".[85] It is evident that these three aforesaid provisions contained within them the concept of non-arbitrability of disputes.[86]

The arbitration statutes recognize party autonomy in resolving civil disputes through arbitration. Although the parties are free to opt-out of the conventional mode of dispute settlement (i.e., litigation) under a contractual arrangement, the State restricts or limits the exercise of this right over a few subject matters in accordance with its economic and social policy.[87] Therefore, the idea of arbitrability is deeply rooted in and around the doctrine of public policy of a State.[88]

The question of arbitrability of a dispute is different from public policy, which is a separate ground for rejection of enforcement of an arbitral award by the court. It is this question of non-arbitrability doctrine which has had various forms in different legal systems. In one commentator's words:

> "*All jurisdictions put limits on what can be submitted to arbitration. Customary law in Homeric Greece as in modern Papua Guinea would allow a dispute arising from a killing to be settled by arbitration;*

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[85] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 art. V(2)(a) and (b).
[86] Ajar Rab, *Defining the Contours of The Public Policy Exception – A New Test for Arbitrability in India,* 7 IND. J. ARB. L 161, at 163 (2019) (*hereinafter* "**Ajar Rab**").
[87] HUNTER ET. AL., *supra* note 16.
[88] Ajar Rab, *supra* note 86.

but…not sacrilege in Greece, nor adultery in parts of Papua New Guinea…or in Rome."[89]

It is important that the concept of public policy must be construed very narrowly because it is a term of very wide meaning. The term must be used only in exceptional circumstances, because it is an acknowledgement of the right of the state courts to exercise their ultimate control over any arbitral process, restricting the recognition and enforcement of any arbitral award(s).[90] It should be used as a defence, available only when the "*enforcement would violate the state's basic notion of morality and justice*".[91]

Historically, public policy considerations have been seen as a restriction on arbitrability, however, it has been increasingly recognized that the relevance of public policy in relation to arbitrability is diminishing.[92] Laws of many jurisdictions are delineating the inarbitrability on the basis of the criteria of the public policy.[93] It is contended that "*relevance of public policy*

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[89] D. Roebuck and B. De Fumichon, *Roman Arbitration,* 26(3) J. OF LEGAL HIST. 104 (2004); *see also* D. ROEBUCK, MEDIATION AND ARBITRATION IN THE MIDDLE AGES: ENGLAND 1154 (2012).

[90] ILA COMM. ON INTER'L COMMERCIAL ARBITRATION, *Public Policy as a Bar to the Enforcement of International Arbitral Awards*, London Conference Report (2000), 2. The final Report was presented at the 2002 New Delhi conference and published in the 2002 Proceedings and at <www.ila-hq.org>.

[91] *Parsons and Whittemore Overseas Co, Inc v. Société générale de l'industrie du papier (RAKTA)*, 508 F. 2d 969, 974 (2nd Cir., 1974).

[92] Stavros L. Brekoulakis, *Third Parties in International Commercial Arbitration, in* 21 OXFORD INT'L ARB. SERIES, (1st ed., 2009) (*hereinafter* "**Brekoulakis - II**").

[93] S. Brekoulakis, *supra* note 44 (*"In the USA, the Arbitration Fairness Act of 2007 constitutes as the latest legislative effort to severly restrict the scope of arbitrability on public policy grounds. There are other jurisdictions such as Belgian Judicial Code that provides that arbitration laws that define inarbitrability on the basis that the dispute is "permissible to compromise".*)

to the discussion of arbitrability is essentially very limited, and therefore, the scope of in-arbitrability should not be determined by reference to public policy".[94]

It is important that we understand public policy because it is nothing but a double-edged sword, helpful as a tool, and dangerous as a weapon.[95] This is because there exists no clear understanding of the wide - ranging scope of public policy. Public policy addresses "*the most basic norms of morality and justice*"[96] of a State, whose violation "*would be clearly injurious to the public good or, possibly … would be wholly offensive to the ordinary reasonable and fully informed member(s) of the public, on whose behalf the powers of the State are exercised*".[97]

It is imperative to state that the standard of public policy is very vague, without defining its proper contours, basing the test of arbitrability on it is not fair. The public policy exception does not mandate oust of arbitral tribunal's jurisdiction by the creation of a specialized forum.[98] It is only "*specific matters or specific legislations with a social or economic objective*"[99] that would fall within the public policy exception.

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[94] Brekoulakis - II, *supra* note 92, at 34.
[95] Loukas Mistelis, *Keeping the Unruly Horse in Control or Public Policy as a Bar to Enforcement of (Foreign) Arbitral Awards* 2 INT'L. L. FORUM DROIT INT'L. 248-253 (2000).
[96] The Arbitration and Conciliation Act, No. 26 of 1996, INDIA CODE (1996), § 48.
[97] Seutsche Schachtbaund Tiefbohrgesellscaftmbh v. Ras Al Khaimah National Oil Company, 2 Lloyd's Rep 246, 254 (England and Wales, Court of Appeal).
[98] HDFC Bank Ltd. v. Satpal Singh Bakshi, 2012 SCC OnLine Del. 4815 (India), ¶ 14.
[99] Natraj Studios Pvt. Ltd. v. Navrang Studios & Anr., (1981) 1 SCC 523 (India).

Furthermore, the Arbitration Act states that enforcement of an arbitral award may be refused if it violates the public policy.[100] Further, the Explanation to the section reads that an award may be in conflict with public policy, if:

> *(i)* "*The making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or 81 of the Arbitration Act;*
>
> *(ii)* *It is in contravention with the fundamental policy of Indian law;*
>
> *(iii)* *It is in conflict with the most basic notions of morality and justice*."[101]

Therefore, in view of the above, public policy covers procedural as well as substantive aspects. It was in the case of *Renusagar Power Co. Ltd.* v. *General Electric Company*[102] that the Supreme Court clarified the contours of public policy stating that it cannot be equated with the law of India, "*something more than the violation of the law must be established*".[103]

In *Booz Allen* case, it was held that any matter which can be decided by a civil court can also be dealt with by an arbitral tribunal. However, this one decision has not seen many changes and litigants continue to knock the doors of the courts with matters of all dimensions and character.[104]

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[100] The Arbitration and Conciliation Act, No. 26 of 1996 INDIA CODE (1996), § 48(2)(b).
[101] *Id.* Explanation 1 to § 48.
[102] Renusagar Power Co. Ltd. v. General Electric Company, AIR 1994 SC 860 (India).
[103] *Id.*
[104] Aaliyah Siddiqui, *Making of A Model Procedure of Institutional Arbitration for Domestic Commercial Disputes in India*, 2 CONTEMP. L. REV. 310, 340 (2018).

It is important to consider why is there such disagreement on getting issues involving the concept of public policy not resolved by arbitration. Well, the answer is due to the following three objections:

(i) **Due Process concerns**: It is alleged that the arbitration proceedings are not as intensive in terms of fact-finding or less rigorous in evidential proceedings. It was held in the case of *Alexander v. Gardner-Denver*[105] that usually in the arbitral proceedings, the rules of evidence do not apply and therefore, the record of the arbitral proceedings is never complete;

(ii) **Limited or lack of reasoned arbitral awards**: It was the dissenting opinion of Justice Douglas in the case of *Scherk v. Alberto-Culver*[106] that, "*arbitral award can be made without explication of reasons and without development of a record, so that arbitrator's conception of our statutory requirement may be absolutely incorrect yet functionally unreviewable*".

(iii) **No process for appeal**: It was the dissenting opinion of Justice Stevens in the case of *Mitsubishi v. Soler,* in which the judge stated characteristically that, "*arbitration awards are only reviewable for manifest disregard of the law…. And the rudimentary procedures which make arbitration so desirable in the context of a private dispute often mean that the record is so inadequate that the arbitrator's decision is virtually unreviewabl*e".

[105] Alexander v. Gardner-Denver, 415 US 36, 94 Sup. Ct. 1011.
[106] Scherk v. Alberto-Culver, 417 US. 506 (US Sup. Ct., 1974).

It is understood that though arbitration proceedings have different procedures than practiced by the national courts, yet, stating point-blank that arbitration is a compromised dispute resolution mechanism in terms of due process or unfit to deal with public policy disputes is not absolutely correct. It is important to conclude this issue right here that arbitration being a confidential and private method of dispute resolution has its unique procedural characteristics and does not produce any uncompromised proceedings. Another set of argument(s) dealing with the capability of arbitrators is a flawed presumption, resting on flawed and faulty assumptions.

VII. ANALYSIS AND CONCLUSION

The story of India's push for structural reforms in the dispute resolution area has caught much attention from investors worldwide.[107] From being a jurisdiction where the term 'dispute' meant complex litigation procedures, confusion, and ambiguity surrounding the jurisdictional issues, a huge backlog of cases, etc., to an investment destination which has undertaken important steps towards improving quality of the judicial process and vows to effectively reduce time and cost of enforcing a contract.[108] The most significant and promising development has been the

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[107] Anurag K. Agarwal, *Resolving Business Disputes Speedily*, 41 ECON. & POL. WKLY. 2417, 2418 (2006).

[108] Amitabh Kant, *Effective Arbitration Process Can Make India A Sought After Business Destination*, THE ECONOMIC TIMES, (July 2019), https://economictimes.indiatimes.com/news/economy/policy/view-how-properarbitration-mechanism-can-make-india-a-sought-after-businessdestination/articleshow/70368747.cms?from=mdr (*hereinafter* "**Amitabh**").

monumental change in approach and outlook of the government towards the promotion of alternate dispute resolution mechanisms which is reflective of its ambition of advancing India as a preferred seat of arbitration.[109] The establishment of the New Delhi International Arbitration Centre,[110] an independent and autonomous regime meant to boost institutionalized arbitration in the country is one such step. A big leap in Ease of Doing Business Index is an attestation of the changing perception amongst the international investor community.[111] Therefore, the role of national courts in the advancement of the arbitration regime becomes all the more important.

Arbitration can intuitively compliment an overburdened justice delivery mechanism in India. However, a lot would depend upon the attitude of parties and the critical support from the judiciary through its display of bias towards arbitration agreements. The concept of arbitrability is a cornerstone of arbitration policy and framework. It gives the courts the power and authority to refuse the enforcement of an otherwise valid arbitration agreement on policy grounds. It is to be borne in mind that ordinarily, the presumption is in favour of arbitrability of disputes.[112] All disputes are arbitrable until it is proven that the legislative intent is to oust

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[109] Several amendments to The Arbitration & Conciliation Act 1996, No. 26 of 1996 INDIA CODE (1996), in a span of few years; Introduction of mediation in Companies Act 2013; Compulsory Mediation in Commercial Courts Act, 2015; Establishment of New Delhi International arbitration Centre act, Report of The High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India, 2017 (*Justice Sri Krishna Report*).

[110] The New Delhi International Arbitration Centre Act, No. 17 of 2019, INDIA CODE (2019).

[111] Amitabh, *supra* note 108.

[112] Magma Leasing & Finance Ltd. v. Potluri Madhavilata, (2009) 10 S.C.C. 103 (India).

the contractual freedom of parties to settle their disputes through arbitration, or that there exists such fundamental conflict between the subject matter of dispute and the current understanding of public policy. An excessive interventionist and intrusive approach by the judiciary can lead to failure of the arbitration process. It has been well argued *that* "*being over-protectionist and labelling all subject matters governed by a specialized legislation as inarbitrable provides for a slippery slope*".[113] The courts must allow the parties to reap the benefits of such an alternate mechanism instead of summarily rejecting it so as to preserve the jurisdiction of public forums. It is the duty of the court to impart a sense of business efficacy to commercial understanding.[114]

The test of 'exclusive jurisdiction', in its present form, appears to be in direct conflict with the principle of *kompetez - kompetenz*. In the wake of this, it is imperative that the courts conservatively apply the test, if not completely abandon it. The judiciary in India must adopt a pro-arbitration bias by increasing the threshold of the test. This would help calibrate a balance between judicial intervention and judicial restraint and act as "*partners, not superiors or antagonists*".[115]

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[113] Kashish Sinha & Manish Gupta, *Arbitrability of Consumer Disputes: Excavating the Hinterland*, 7(1) IND. J. ARB. L. 131 (2013).
[114] A. Ayyasamy v. A Paramasivam, (2016) 10 SCC 386 (India), ¶ 48.
[115] O.P. MALHOTRA, Foreword to LAW AND PRACTICE OF ARBITRATION, (1st ed., 2002) quoted in Report No. 246, Shin Etsu Chemicals Co. Ltd. v. Aksh Optifibre, (2005) 7 SCC 234 (India), ¶ 20.

This test proposes an interesting and compelling understanding of the arbitrability of disputes. The test is applaudable for not committing the mistake of "*seeing every arbitration agreement as some catch-all, encyclopaedic repository for the entirety of the universe of disputes between parties*".[116] It is also attentive towards significant undercurrents such as the asymmetry in bargaining power which is predominant in disputes under the Industrial Disputes Act or socio-welfare objectives of public policy in some legislations. This is resonated in numerous judgments which have laid down, in the most unequivocal manner, the necessity of preserving exclusive jurisdictions of public forums for certain kinds of disputes.[117]

However, there is a growing consensus on the waning relevance and importance of public policy in the arbitrability debates.[118] Across

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[116] Rakesh Malhotra v. Rajinder Kumar Malhotra, (2014) S.C.C. OnLine Bom 1146 (India), ¶ 81.

[117] National Textile Corp. & Ors. v. The Rent Control Appellate Tribunal & Ors., RLW 2011 (4) Raj. 2803 (India) (The Rent Tribunal shall have exclusive jurisdiction dispute between landlord and tenant); Natraj Studios Pvt. Ltd. v. Navrang Studios, (1981) 1 SCC 523 (India) (even though the exclusive jurisdiction is not conferred on any special court it is not open for the parties to contract out of the exclusive jurisdiction of a court established under a social welfare legislation like Rent Control Act, 1947); Big Shoppers Supermarkets Pvt. Ltd. v. K.M. Trading & Agencies Pvt. Ltd., 2009 (3) DNJ (Raj.) 1579 (India) (Rajasthan Rent Control Act, 2001 has an overriding effect over Arbitration Act, 1996); Central Warehousing Corporation v. Fortpoint Automotive Pvt. Ltd., 2010 (1) Bom CR 560 (India) (the exclusive jurisdiction conferred on Small Causes Courts with respect to disputes between licencee and licensor under the Presidency Small Causes Courts Act, 1882 cannot be ousted by an agreement between the parties); ITPO v. Int. Amusement Ltd., 2007 Arb LR 17 (Delhi) (Division Bench); Fortune Grand Management Pvt. Ltd. v. Delhi Tourism & Transport Development Corp., 2016 (4) Arb. LR 325 (Delhi) (Disputes arising under Public Premises Act, 1971 cannot be a subject matter of Arbitration).

[118] *See generally* Patrick M. Baron and Stefan Liniger, *A Second Look at Arbitrability: Approaches to Arbitration in the United States, Switzerland and Germany*, 19(1) ARB. INT'L 27, 38 (2003); Edouard Fortunet, *Arbitrability of Intellectual Property Disputes in France*, 26(2) ARB. INT'L 281, 293 (2010).

jurisdictions, the judiciary has responded favourably to a growing clamour for a transition, from protecting the exclusive jurisdiction of special forums, towards preserving party autonomy by extending the domain of arbitration to areas of economic activities involving significant public interest.[119] In our own backyard, the Courts have held that the Arbitration Act must be interpreted in a way "*that is consistent with prevailing approaches in the common law world. Jurisprudence in India must evolve towards strengthening the institutional efficacy of arbitration. Deference to a forum chosen by parties as a complete remedy for resolving all their claims is but part of the evolution. Minimizing the intervention of courts is again are recognition of the same principle*".[120]

In this context, the courts in India must take a cue from the seminal decision of the United States Supreme court in *Henry Schein* where it declared in the most unequivocal terms that "*gateway issues of arbitrability must only be decided by the arbitral tribunals and not courts*" under any circumstance.[121] One must be mindful of the fact that majority of tribunals "*with all the trappings of the court*" are essentially resolving the disputes which earlier fell within the exclusive domain of civil courts and High Courts.[122] Therefore, the legislative policy and intent of speedy disposal of cases through

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[119] *See* Mitsubishi Motors Corp v. Soler Chrysler Plymouth Inc, 473 U.S. 614 Sup. Ct 3346 (1985) (in context of antitrust claims); Ganz v. Nationale des Chemins de Fer Tunidiens (SNCFT), (1991) Rev. Arb. 478 (in context of matters pertaining to fraud); Labinal v. Mors, (1993) Rev. Arb. 645 (in context of competition claims); Eco Swiss China Time v. Benetton Int., (1999) ECR I 3055 (with respect to competition claims); Fincantieri-Cantieri Navali Itaiani & Oto Melara v. M and Arb. Tribunal, (1995) XX YBCA 766 (with respect to claims arising out of illegal activities).

[120] A. Ayyasamy v. A Paramasivam, (2016) 10 SCC 386 (India), ¶ 53.

[121] Henry Schein Inc., et al. v. Archer & White Sales Inc. 586 US (2019).

[122] HDFC Bank Ltd. v. Satpal Singh Bakshi, 2012 SCC OnLine Del. 4815 (India), ¶ 11-12

specialized tribunals must not be interpreted to hold such disputes as *per se* non-arbitrable. Additionally, the mandate of the *Kingfisher* case and the *HDFC* case must be the yardstick in the test of 'exclusive jurisdiction'. The Indian judiciary must also be considerate of the falling and failing relevance of doctrine of public policy in arbitrability across jurisdictions.[123]

It is the right time for the judiciary to break away from its over-protectionist mould and to intervene only to facilitate the arbitration process. There entails a great responsibility on the courts to interpret in a spirit that helps advance the legislative intent. The courts, while deciding the issue of arbitrability, must be considerate towards a growing clamour for further relaxation of arbitrability norms (by an economy bolstered by an adventurous investment policy of the executive), on one side, and the wisdom of a cautious approach that mandates economic progression to be reflective of and in tune with the socio - economic realities of its time and must be assessed on the constitutionally guaranteed objective of securing distributive justice. In view of the above, it is of utmost importance that only limited disputes are categorized as non-arbitrable. It would be the most appropriate step to remind ourselves of the cue or *mantra* that "*even if different forums are provided, recourse to one of them which is capable of resolving all their issues should be preferred over refusal of reference to arbitration*".[124]

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[123] *See generally* Patrick M. Baron and Stefan Liniger, *A Second Look at Arbitrability: Approaches to Arbitration in the United States, Switzerland and Germany*, 19(1) ARB. INT'L 27, 38 (2003); Edouard Fortunet, *Arbitrability of Intellectual Property Disputes in France*, 26(2) ARB. INT'L 281, 293 (2010).

[124] Chloro Controls (India) Pvt. Ltd. v. Severn Trent Water Purification Inc. & Ors., (2013) 1 SCC (India).

It would be not wrong to say that the courts have started responding to this urgency with utmost sincerity by adopting a more pragmatic, efficient, and pro-arbitration interpretation of arbitration clauses in tune with the legislative intent reflected through recent amendments.[125] However, this pro-arbitration leaning is not without challenges and is still far from being a settled notion.[126]

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[125] *See generally* Ameet Lalchand Shah & Ors. v. Rishabh Enterprises & Ors., (2018) 15 SCC 678 (India); Vidya Drolia & Ors. v. Durga Trading Corporation, (2019) SCC OnLine SC 358 (India); Rashid Raza v. Sadaf Akhtar, (2019) 8 SCC 710 (India); HDFC Bank Ltd. v. Satpal Singh Bakshi, 2012 SCC OnLine Del. 4815 (India), ¶ 14 (observing that mere institution of a special tribunal only to ensure speedy disposal of cases meant that subject matter falling within the scope and jurisdiction of debt recovery Tribunal were arbitrable).

[126] *See, e.g.* Central Warehousing Corporation v. Fortpoint Automotive Pvt Ltd., 2010 (1) Bom CR 560 (India); Smt. Veena v. Seth Industries Ltd. & Ors., 2011 (1) Mh LJ 658 (India) (It was held that the exclusive jurisdiction conferred on Small Causes Courts with respect to disputes between licencee and licensor under the Presidency Small Causes Courts Act, 1882 cannot be ousted by an agreement between the parties *as it would be violative of the public policy* [*emphasis supplied*]); REDFERN & HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION, (4th ed., 2004) argue that in-arbitrability is in essence a matter of public policy; *see also* Y. Fortier, *Arbitrability of Disputes* in GLOBAL REFLECTIONS ON INT'L. LAW, COMMERCE AND DISPUTE RESOLUTION: LIBER AMICORUM IN HONOUR OF ROBERT BRINER (Gerald Aksen et. al., eds., 2005); K..H BOCKSTIEGEL, PUBLIC POLICY AND ARBITRABILITY 177 (P. Sanders ed., 1987); T. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION, (2nd ed., 2007).

Anukriti Rawat & Srajika Gupta, *Old is Gold: Protection, Preservation and Promotion of Traditional Cultural Expressions through a sui generis Legislation in India*, 7(1) NLUJ Law Review 106 (2020)

OLD IS GOLD: PROTECTION, PRESERVATION AND PROMOTION OF TRADITIONAL CULTURAL EXPRESSIONS THROUGH A *SUI GENERIS* LEGISLATION IN INDIA

Anukriti Rawat[*] *& Srajika Gupta*[+]

ABSTRACT

Recently, the protection of Traditional Cultural Expressions (TCEs) has garnered the attention of the international community and has become a practical concern for national-policy makers in many countries. India, being one of the oldest societies of the world, has a very large repository of literature, music, art forms, designs, marks, etc. This article addresses the lack of debate on TCEs, which is a great economic and cultural asset of the country and analyses the adequacy of the present legal framework to protect TCEs. The article presents case studies of Banarasi Saree, Warli painting and Bhojpuri folk-music as examples of limitations of copyright law, and how grossly each has been commercially appropriated and exploited. The article further discusses the need for a sui generis legislation of an intellectual property nature by presenting the example of sui generis legislations of developing countries like Kenya, Philippines, and Panama. As an overall outcome, it is concluded that a sui generis legislation of an intellectual property nature

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would be able to protect TCEs in a diverse & culturally rich country like India and it further suggests some modifications to the Traditional Knowledge Bill, 2016 in order to be more effective.

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I. INTRODUCTION

'Traditional cultural expressions' [*hereinafter* referred to as "**TCEs**"] or 'expressions of folklore' [*hereinafter* referred to as "**EoF**"] refer to artistic or cultural expressions that form part of the identity and heritage of a traditional or indigenous community and are passed on from generation to generation.[1] The TCEs are "*the only form of intellectual property for which protection has been sought under human rights framework as well*".[2] There have been many attempts at the international level to grant protection to TCEs within Intellectual Property Rights [*hereinafter* referred to as "**IPR**"], beginning from Berne Convention[3] in 1971 followed by the Paris Act[4] and Tunis Model.[5] In 1999, World Intellectual Property Organisation's [*hereinafter* referred to as "**WIPO**"] Roundtable on Intellectual Property and Traditional Knowledge [*hereinafter* referred to as "**TK**"] changed the focus from copyright law to other areas of IP law; these discussions have continued since 2001 through the work of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions [*hereinafter* referred to as

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[1] *Traditional Cultural Expressions*, WORLD INTELLECTUAL PROPERTY ORGANISATION, https://www.wipo.int/tk/en/folklore/ (last visited July 16, 2020).

[2] Ruchira Goswami & Karubakee Nandi, *Naming the Unnamed: Intellectual Property Rights of Women Artists from India*, 16 AM. U. J. GENDER SOC. POL'Y & L. 257 (2008) (*hereinafter* "**Goswami et al**").

[3] Berne Convention for the Protection of Literary and Artistic Works 1971, art. 15 cl. (4), Sep. 9, 1886, 25 U.S.T. 1341, 1161 U.N.T.S. 3.

[4] WORLD INTELLECTUAL PROPERTY ORGANISATION, GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS (PARIS ACT, 1971) 39 (1978).

[5] UNESCO AND WIPO, TUNIS MODEL LAW ON COPYRIGHT (FOR DEVELOPING COUNTRIES) (1976).

"**IGC**"].[6] The recent work of IGC attempts to analyse "*gaps*" that already exist at the international level to provide protection for TCEs.[7] However, till date, no international consensus has been achieved to grant protection to TCEs.

Moreover, there is no internationally settled or accepted definition of 'indigenous' or 'folklore' or 'traditional cultural expressions' even after more than 50 years of working[8] toward an international framework to provide protection to TCEs. WIPO considers it as one of the most fundamental challenges associated with the protection of TCEs.[9] The WIPO draft does not seek to suggest a particular definition because of the different views of the countries. However, it summarises certain important characteristics to distinguish or identify TCEs of a community.[10]

TCEs include a wide range of tangible, intangible and mixed forms of creative expression and these forms are not exhaustive and may include any other form and elements of the intangible cultural heritage of a community.[11] Development in digital technology and media has further

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[6] *Intergovernmental Committee*, WORLD INTELLECTUAL PROPERTY ORGANISATION, https://www.wipo.int/tk/en/igc/ (last visited July 16, 2020) (*hereinafter* "**Intergovernmental Committee**").

[7] Meeting on Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Thirty-Eighth Session, WIPO/GRTKF/IC/38 (December 2018), https://www.wipo.int/meetings/en/details.jsp?meeting_id=46446 (*hereinafter* "**WIPO**").

[8] Berne Convention for the Protection of Literary and Artistic Works 1971, art. 15 cl. (4), Sep. 9, 1886, 25 U.S.T. 1341, 1161 U.N.T.S. 3.

[9] WIPO, *supra* note 7.

[10] *Id.* ¶ 5.

[11] Intergovernmental Committee, *supra* note 6.

made it easy for commercial exploitation and appropriation. India is one of the oldest societies in the world and one of the largest repositories of literature, music, art forms, designs, marks, etc., including a wide range of TCEs. Such knowledge and resources are often misappropriated and exploited by industries that have recognized the potential of such resources. India is the only country to implement the necessary designation under Article 15(4) of Berne Convention[12] which mandates States to vest work of unknown author or group of authors in a national authority, subject to a declaration made to WIPO.[13] Despite this field having a great economic and cultural significance for the country, it presently lacks the requisite attention of the Government. The Protection of Traditional Knowledge Bill, 2016 [*hereinafter* referred to as "**TK Bill, 2016**"] [14] was introduced by Dr. Shashi Tharoor in an attempt to protect TCEs. The introduction of the TK Bill, 2016 is applaudable as it is a major step in the direction of protection of traditional knowledge resources and addresses the lack of discussion and a comprehensive system to protect TCEs. However, even though the TK Bill, 2016 is a stride in the right direction, it carries various lacunae.

[12] Berne Convention for the Protection of Literary and Artistic Works 1971, art. 15 cl. (4), Sep. 9, 1886, 25 U.S.T. 1341, 1161 U.N.T.S. 3.
[13] *Berne Notification No. 108: Berne Convention for the Protection of Literary and Artistic Works*, WORLD INTELLECTUAL PROPERTY ORGANISATION (February 1984), https://www.wipo.int/treaties/en/notifications/berne/treaty_berne_108.html.
[14] The Protection of Traditional Knowledge Bill, No. 282 of 2016 (2016).

At the national level, countries have developed various systems for the protection of TCEs.[15] Majorly, the countries try to protect TCEs by bringing it within the purview of existing intellectual property rights[16] or by enacting a *sui generis* law.[17] The TK Bill, 2016 argues that TCEs cannot be considered as 'intellectual property', hence a *sui generis* legislation of non-intellectual property nature is drafted. Thus, the article examines the adequacy of the existing intellectual property regime to protect the TCEs in India and analyses the sufficiency of the TK Bill, 2016. Part I of the article analyses the adequacy of present mechanisms for the protection of TCEs in India. It briefly describes how the present regime is inadequate for the protection of TCEs. Part II specifically focuses on copyright law and present three specific cases of TCEs in India and the exploitation suffered by each one of them. The first is the case of Banarasi saree known for their intricately woven designs in luxurious silk cloth; the second case study is about Warli art, a cultural and religious tradition of Warli people which is now commercially appropriated to feed present consumer demands; and the third case study presents the inadequacy of present copyright law to protect intangible medium of expression in the area of folk music through the example of Bhojpuri folksong. Part III discusses the need for a *sui generis* law in India by assessing the *sui generis* legislation of Kenya,

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[15] Daphne Zografos, *The Legal Protection of Traditional Cultural Expressions: The Tunisian Example*, 7 J. WORLD INTELL. PROP. 229 (2004).

[16] Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Third Session, WIPO/GRTKF/IC/3/10, 40 (June 21, 2019), https://www.wipo.int/meetings/en/details.jsp?meeting_id=50424.

[17] The Special System for the Collective Intellectual Property Rights of Indigenous Peoples Act, No. 20 of 2000 (Panama); The Protection of Traditional Knowledge and Cultural Expressions Act, No. 33 of 2016 (Kenya); The Indigenous Peoples Rights Act, No. 8371 of 1997 (Phil.).

Philippines and Panama. In conclusion, the article analyses the TK Bill, 2016 and suggests that a *sui-generis* legislation of intellectual property nature would be more suited to India and discusses certain measures that can make the legislation more effective.

II. CURRENT LEGAL & INSTITUTIONAL FRAMEWORKS IN INDIA

India's heritage is vast and diverse, owing to a plethora of communities and indigenous people living in various parts of the nation. Deliberations have been made to put a separate legislation in place for the protection of traditional cultural expressions, which have been dealt with in the latter part of the paper. In this part, the author throws light over the existing legal framework in India for governing the TCEs.

A. CONSTITUTION OF INDIA

The Constitution identifies the protection of interests of minorities in Article 29 under Part III of the Constitution. Article 29(1) of the Constitution of India reads as "*[a]ny section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of their own shall have the right to conserve the same*". The provision does not refer to any religion per se, but protects interests of those minorities who have a distinct language, script or culture, even if they are practising different religions.[18] Furthermore, Article 51A(f)[19] bestows a fundamental duty on every citizen of India to value and preserve the rich heritage of our composite culture as their fundamental duty.

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[18] T.M.A. Pai Foundation v. State of Karnataka, (2002) 8 SCC 481 (India), ¶ 89.
[19] INDIA CONST. art. 51A cl. f.

Therefore, while the Indian Constitution confers rights on the minorities to protect and conserve their traditions, it cannot be effectively protected unless there is an appropriate legislation in place which ensures such protection of their cultures and traditions.

B. GEOGRAPHICAL INDICATION

India enacted a sui generis legislation for the protection and preservation of Geographical Indications [*hereinafter* referred to as "**GIs**"] with the enactment of Geographical Indications of Goods (Registration & Protection) Act, 1999.[20] It was intended to bring the Indian intellectual property law framework in consonance with the Trade-Related Aspects of Intellectual Property Rights [*hereinafter* referred to as "**TRIPS**"] Agreement which mandated all its signatories to provide legal means to ensure the protection of GIs and to prevent misleading of the public as to the origin of such GIs.[21] So far, 370 GIs have been successfully registered,[22] but that does not leave these products out of the challenges that plague this field of Intellectual Property Rights. However, there are a lot of fallacies in the GI Act, which makes it insufficient for TCEs. The fallacies are:

i. Registered Proprietor

[20] The Geographical Indications of Goods (Registration & Protection) Act, No. 48 of 1999 INDIA CODE (1999).

[21] Agreement on Trade Related Aspects of Intellectual Property, World Trade Organization art. 22, cl. 2, Apr. 15, 1994, 1869 U.N.T.S. 299.

[22] OFFICE OF THE CONTROLLER GENERAL OF PATENTS, DESIGNS & TRADE MARKS, Registered Geographical Indications, http://www.ipindia.nic.in/writereaddata/Portal/Images/pdf/GI_Application_Register_10-09-2019.pdf (last visited July 16, 2020) (*hereinafter* "**OFFICE OF THE CONTROLLER GENERAL**").

According to the Act, the registered proprietor of a GI in India has to be an "*association of persons or producers or any organisation*".[23] This requires collective action, thereby requiring reorganization and governance of supply chains.[24] In order for a GI to be successfully implemented, it is necessary that there is cooperation amongst all the actors along the supply chain. Therefore, any opportunistic behaviour on the part of a single producer in respect of degrading quality in order to increase their profit margins would have an impact on the collective reputation of that GI.[25]

ii. Foreign Registration

Another problem with the GIs is that of foreign registration as the Indian legislation only affords protection to GIs in India. The WTO Secretariat[26] has classified the diverse means of protection available for GIs in different WTO member nations into three categories.[27] Regardless of the kind of protection available in foreign countries, all these types of protections are most of the times unaffordable means for the registered

[23] The Geographical Indications of Goods (Registration and Protection) Act, No. 48 of 1999 INDIA CODE (1999), § 2.
[24] Dwijen Rangnekar, *The Socio-Economics of Geographical Indications: A Review of Empirical Evidence from Europe,* UNCTAD-ICTSD PROJECT ON IPRS & SUSTAINABLE DEVELOPMENT, (May, 2004).
[25] Kasturi Das, *Prospects and Challenges of Geographical Indications in India*, 13(2) J WORLD INTELLECT PROP. 148, 156 (2010) (*hereinafter* "**Das**").
[26] WTO Secretariat, *Review Under Article 24.2 of the Application of the Provisions of the Section of the TRIPS Agreement on Geographical Indications*, WORLD TRADE ORGANISATION (Nov. 24, 2003), https://www.wto.org/english/tratop_e/trips_e/ta_docs_e/5_3_ipcw253rev1_e.pdf.
[27] Kasturi Das, *Select Issues and Debates around Geographical Indications with Particular Reference to India*, 42(3) J. WORLD TRADE 461 (2008).

proprietor.[28] In Europe for instance, a one-time effort for GI Protection can cost around the US $20,000.[29]

iii. Cheap Imitations

GIs in India also suffer from gross misuse and poor and cheaper counterfeits. This can be demonstrated through 'Banarasi Brocades and sarees',[30] which have suffered due to Chinese imitations and poor quality imitations in the Indian market, costing only one-tenth of the price of an original 'Banarasi' saree.[31] Therefore, such acts make vigilance on standard quality GIs much more cumbersome.

Another task posed with GIs in developing countries is to build consumer perceptions through effective marketing and promotional efforts. In a country where poverty is a major issue, it becomes a herculean task to vouch for products that guarantee quality over economical pricing.[32] The downside of stringent standardization and quality control of GIs to avoid counterfeit is that it hinders innovations and experimentations with changing technology and consumer taste.[33] It is also observed that stricter

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[28] Das, *supra* note 25, ¶ 158.
[29] Wagle, S., *Geographical Indications as Trade-Related Intellectual Property,* UNDP REGIONAL CENTRE (Colombo, Sri Lanka) (2007).
[30] Ministry of Textiles, *List of Craft Registered under Geographical Indication Handicrafts*, Government of India, http://handicrafts.nic.in/pdf/LIST_OF_CRAFT_REGISTRED_UNDER_GEOGRAPHICAL_INDICATION_HANDICRAFTS.pdf (last visited July 16, 2020).
[31] Das, *supra* note 25, ¶ 159.
[32] *The World Bank, Data: India*, THE WORLD BANK, https://data.worldbank.org/country/india (last visited July 16, 2020).
[33] Das, *supra* note 25, ¶ 168.

laws have failed to benefit Indian producers, despite the registration of GIs under the relevant legislation.[34]

iv. Ownership of GIs

Another shortcoming of GI is that the ownership generally belongs to the traders of such handicrafts and handloom products. Most of the Asian countries include traders in the definition of producers within the legislations concerning GIs and allow them to be treated as owners of such GI products.[35] Since traders tend to have more capital and also greater market power in most traditional industries, ownership is usually attributed to such traders.[36] As a result, the ordinary artisans, who weave the fabric, are left in poverty and destitution and are exploited for menial wages by the traders.[37]

Therefore, while the registration of GIs is praiseworthy, this legal mechanism alone is not sufficient.[38] There is a need for more active involvement of the quasi-public institutions that work for the welfare and preservation of such age-old traditions in the form of handicrafts and artisanal products. Moreover, GIs only work for tangible creations that indicate the source of origin and significance of such goods in that region.

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[34] Kasturi Das, *Socio-economic Implications of Protecting Geographical Indications in India*, (August 2009) http://wtocentre.iift.ac.in/papers/gi_paper_cws_august%2009_revised.pdf (*hereinafter* "**Das II**").
[35] Gopalakrishnan, N.S. et al, *Exploring the Relationship between Gis and TK: An Analysis of the Legal Tools for the Protection of Gis in Asia*, ICTSD PROGRAMME ON INTELL. PROP. RTS. & SUSTAINABLE DEV. (2007).
[36] *Id.*
[37] N. Ahmad, *Globalization and the Indigenous Artisan Economy: A Case Study of the Varanasi Silk Sari Industry*, ALL IND. ARTISANS & CRAFTWORKS ASS'N (2007).
[38] Das, *supra* note 25, ¶ 179.

This leaves out intangible traditions which have been passed on in the form of oral expressions. Hence, it is insufficient for the protection and preservation of TCEs.

C. TRADITIONAL KNOWLEDGE DIGITAL LIBRARY

Tradition Knowledge Digital Library [*hereinafter* referred to as "**TKDL**"] is an initiative by the Indian Government to protect Indian medicinal knowledge and prevent its misappropriation at the International Patents Office.[39] This initiative was introduced to counter the acts of other countries granting patents to wound-healing properties of plants such as turmeric and neem[40] which have been part of India's traditional medicinal knowledge since time immemorial. Although it seems like a viable solution for traditional knowledge related to patents and Ayurveda, it still remains far from the protection of traditional cultural expressions, and is problematic on many fronts. TKDL ensures accessibility only by patent offices that sign non-disclosure agreements. This defies the purpose of the objective of TKDL which was "*to translate and digitise knowledge that existed in the form of written scriptures and hymns*".[41]

Therefore, while TKDL is very narrow in the sense that it only protects traditional knowledge with respect to traditional medicinal

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[39] About Traditional Knowledge Digital Library, http://www.tkdl.res.in/tkdl/langdefault/common/A bouttkdl.asp?GL=Eng (last visited July 16, 2020).

[40] BBC News, *India Wins Landmark Patent Battle*, (Mar., 2005) http://news.bbc.co.uk/2/hi/science/nature/4333627.stm.

[41] Swaraj Paul Barooah, *Questioning the Fallacy of a Closed-Access TKDL*, SpicyIP (Jan., 2015), https://spicyip.com/2015/01/guest-post-questioning-the-fallacy-of-a-closed-access-tkdl.html.

knowledge, its implementation and practical implications are a failed venture.

Some civil societies and NGOs, such as the Indian National Trust for Art and Cultural Heritage[42] and the National Folklore Support Centre, have been fundamental in raising awareness of tangible and intangible heritage. They have also been integral in the documentation of these TCEs. However, they have not been so sufficient to preserve, protect and promote these traditional cultural expressions.

D. COPYRIGHT

The various institutions that govern IPR apart from copyright law have been discussed above along with their failure in providing protection to TCEs. There is certainly a lack of proper representation from indigenous communities at the international level to address their concern as they do not constitute 'State'. However, in 1994 an effort was made by indigenous people at an international platform to draft an International Covenant on the Rights of Indigenous Nations to which sought protection under IPR, within which they considered copyright laws to be best suited to protect TCEs.[43] The present article further illustrates that how even copyright law is ill-suited to grant protection to TCEs in India despite the fact that the international covenants and many other nations have expanded the scope

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[42] *Mission,* IND. NAT'L TRUST FOR ART & CULTURAL HERITAGE, http://www.intach.org/about-mission.php (last visited July 16, 2020).

[43] Terri Jenke, *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions,* WORLD INTELLECTUAL PROPERTY ORGANISATION (2003) (*hereinafter* "**Jenke**").

of copyright law to accommodate the work of indigenous people. The further discussion elucidates that the present copyright regime in India is inadequate to protect TCEs and it, per se, cannot be the solution for giving protection to the TCEs.

There have been long debates over philosophical underpinnings of copyright law.[44] Copyright law can be primarily seen as striving to achieve an optimal balance between fostering incentives for the creation of literary and artistic works and the optimal use and dissemination of such works.[45] The most significant doctrine limiting the copyrightability of works is that it protects expression over any idea or theme and form over any substance. The major shortcomings present under the copyright regime for granting protection to TCEs have been discussed below through the case studies of Banarasi sarees, Warli painting, and Bhojpuri folksongs.

i. Authorship & Ownership

The concept of copyright protection is based on individuality as opposed to a collective one.[46] In the case of TCEs however, attribution of a particular expression cannot be associated with an individual author or a group of authors. This is because TCEs are communally created[47] which is contradictory to the attributes required for a work to be protected under copyright law in India. The provision of "*joint authorship*"[48] in Indian

[44] ROBERT P. MERGES ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 495 (4th ed., Aspen Publications 2007).
[45] *Id.*
[46] WIPO, *supra* note 7.
[47] Intergovernmental Committee, *supra* note 6.
[48] The Copyright Act, No. 14 of 1957 INDIA CODE (1957), § 2.

copyright law also does not provide any remedy to the situation, as one of the main characteristics of TCEs is that it is passed on from one generation to another reflecting community's cultural and social identity. Moreover, according to customary indigenous laws, a work created by one member is usually owned by the entire tribe or group, through operation of collective ownership.

The issue of authorship and ownership of TK and TCEs has also become more crucial due to the cultural misappropriation of such works. There has been a rampant misuse of many Indian traditional handicrafts such as the Kashmiri Pashmina Shawls and the Banarasi brocades and sarees. For the purpose of this paper however, we will focus only on the Banarasi sarees that has its roots embedded in the sacred city of Banaras (now known as Varanasi). The Banarasi silk sarees have been famous for centuries for their intricately woven designs in luxurious silk cloth. This rich handicraft has suffered misappropriation and abuse from within as well as outside the country. Chinese imitations of these sarees have flooded the Indian market in the past few decades as these power loom produced imitations costs only one-tenth of the price of the original Banarasi saree thereby giving tough competition to the indigenous craftsmen.[49] Poor quality imitations are also being produced within India in the Surat region of Gujarat.[50] Objects are considered to be ethnographically authentic if "*they*

[49] Das, *supra* note 25, ¶ 25.
[50] *Id.*

accurately represent a bounded, named culture, cultural group, or cultural identity".[51] These non-regional imitations and power-loom made products threaten the cultural and regional significance of such TCEs and also pose serious threats to the survival of the local artisans that are the true custodians of these arts and expressions. "*Banarasi is what the people of Banaras do"*.[52] The essence of the Banarasi saree lies in the region in which it is produced and the texture that is created out of the silk fabric. Therefore, this kind of abuse exploits the Banarasi saree artisans who, due to the unrecognised authorship, fail to protect their interest and enjoy the economic rights flowing out of such work.

Another shortcoming of ownership in the copyright law regarding TCEs is that the ownership generally belongs to the traders of such handicrafts and handloom products. Thus, under the existing copyright legislation, these artisans are powerless and unaware of their rights to claim ownership over their traditional cultural expressions and are instead exploited economically for stingy wages.

ii. Originality

The requirement of originality has been emphasized as "*sine qua non*" to grant protection of copyright.[53] The Indian Copyright Act, 1957 [*hereinafter* referred to as "**Indian Copyright Act**"] provides copyright

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[51] L. Field, *Four Kinds of Authenticity? Regarding Nicaraguan Pottery in Scandinavian Museums*, 36(3) AM. ANTHROPOL. 507 (2009).
[52] Amit Basole, *Authenticity, Innovation, and the Geographical Indication in an Artisanal Industry: The Case of the Banarasi Sari*, 18 J. WORLD INTELL. PROP. 127 (2015).
[53] Feist Publications, Inc. v. Rural Telephone Service, 499 U.S. 340 (1991).

protection to "*original literary, dramatic, musical and artistic works*".[54] The term "*originality*" has not been defined in the statute; however, it has been settled in the case of *E.B.C. v. DB Modak*[55] that originality entails independent work of an author created by his own labour, skill and investment of capital featuring a certain degree of creativity. The work should not be creative in the sense that it is novel or non-obvious, but at the same time, it should not be merely a product of labour and capital.[56]

To fulfil the requirement of 'originality', a minimal degree of creativity is required in the work to get copyright protection.[57] The salient feature of folklore is that it passes on from one generation to another. TCEs are fundamentally based on and gain value from the previous generations. Therefore, the present set standard cannot be applied in the case of TCEs because of its hereditary nature which encourages new iterations of prior creative works. This shortcoming can be best explained with the example of Warli art which has lost its essence and origins because of heavy commercialisation by the industries.

In India, Warli painting is an art form that symbolises the actual beliefs and consciousness of Warli people.[58] The Warlis have lived long along with other tribes in Thane, Maharashtra. The origin of Warlis is little

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[54] The Copyright Act, No. 14 of 1957 INDIA CODE (1957), § 13 cl. 1.
[55] Eastern Book Company & Ors. v. D.B. Modak & Anr, (2008) 1 SCC 1 (India).
[56] *Id.* ¶ 57.
[57] Eastern Book Company & Ors. v. D.B. Modak & Anr, (2008) 1 SCC 1 (India).
[58] Nisha Khandekar, *Globalisation and Its Effects on the Warli Art*, 5(2) J. OF SOCIAL INCLUSION STUDIES (February 2020) (*hereinafter* "**Khandekar**").

known "*except that they had fled from the north, southwards*".[59] According to the census of 1972, there were about two lakh fifty-thousand Warlis in the Thane area, mostly dispersed in the districts of Dhanu and Talaseri.[60] Unfortunately, most of them are now travelling to other places for education and in search of jobs.[61] The Warli area consists of *chawks*, a sacred area where all the ritual are performed, made by woman artists or *sahvasinis*.[62] Warli paintings were originally made on the walls made of bamboo sticks and were painted with mud and rice paste on huts of Warli community. Presently, the medium of paintings has changed from rice paste and bamboo twig to poster colour and brush. The major appropriation of Warli art today can be seen on textiles. Interestingly, Bata used the motifs of Warli paintings on its slippers while stating "*prints on your company footwear are Warli painting, which is a famous traditional art of tribal people of Maharashtra*".[63] The Warli painting which was known for its simplicity and reflected true culture and tradition of the community is now made according to feed the present consumer demands by introducing new motifs of airplane, car, school building and factory.[64]

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[59] Yashodhara Dalmia, *The Warli Chawk: A World-View*, 11(4) I.I.C.Q. 79, 5 (1984) (*hereinafter* "**Dalmia**").
[60] *Id.*
[61] Khandekar, *supra* note 58, ¶ 3.
[62] Dalmia, *supra* note 59, ¶ 7.
[63] Adiwasi Yuva Shakti, *Appropriation and insult of tribal culture: BATA uses Warli art on its footware*, ADIVASI RESURGENCE (2018) http://www.adivasiresurgence.com/appropriation-and-insult-of-tribal-culture-bata-uses-warli-art-on-its-footware/ (last visited Feb. 19, 2020).
[64] Khandekar, *supra* note 58, ¶ 3.

Unfortunately, the Warlis have lost the originality and essence over their paintings because of the urban influence and is being commercially appropriated at the whims and fancies of traders and private entrepreneurs. The ignorance of the Indian Government towards recognition of TCEs is costing heavily to indigenous people. Because of the 'originality' requirement with a certain degree of creativity in the author's work, the copyright protection, under the present statute, cannot be extended to the Warli paintings which are iterations of previous work of their tribe. Hence, despite GI being given to the Warli paintings,[65] it is being exploited and the present copyright regime is insufficient to protect the interest of Warli community from incessant copying by the industries.

In an Australian case of John Bulun,[66] where the Petitioner was a leading Aboriginal artist had his bark painting altered and copied on a fabric, imported into Australia and sold nationally. The Court held it as an infringement of copyright as a substantial part of the painting was copied on the fabric design. Moreover, the Judge used a remedy based on rules of equity by recognising the fiduciary obligation of the individual artist to the community for the spiritual lore from which the art was developed.[67] However, in terms of copyright, the Bulun case has its limitation as a precedent in the case of TCEs as the author of the painting, Mr. Bulun was recognised as the owner of his painting and it incorporated his imagery, and depicted an original art form, thereby, keeping his work within the purview

[65] OFFICE OF THE CONTROLLER GENERAL, *supra* note 22.
[66] Bulun Bulun & Anr. v. R & T Textiles Pty. Ltd. (1998) 3 A.I.L.R. 547 (Austl.).
[67] Jenke, s*upra* note 43.

of the Australian Copyright Act[68]. Whereas in the present case of *Warli* art or similar traditional art forms, attribution can't be made to a single or group of artisans as it is usually copied from previous generations.

iii. Fixation and Moral Rights

The characteristics defined by WIPO of TCEs clearly states that it can be in tangible, intangible and mixed forms.[69] Indian Copyright Act sets 'fixation' as a pre-requisite to providing copyright protection to oral works.[70] Considering the wide range and evolving nature of TCEs which include tangible, intangible and mixed forms of expressions, it is not possible to have it in any fixed form. The problem of fixation requirement in the present copyright regime can be best presented through the example of folksongs. International Folk Music Council in 1954 identified three factors that determine the tradition of folk music: firstly, continuity of the present with the past, secondly, variation emanating from the creativity of the individual or group, and lastly, selection by the community that determines the forms in which the music develops.[71]

Folk songs are mostly region specific and they spread from one region to another. Folk songs are ever-evolving but this change is supposed to be brought by the community itself. Folk songs are an expression of the sentiments, aspirations, culture, fears and belief of the community. The best

[68] The Copyright Act, No. 63 of 1968, § 35 (Austl.).
[69] Intergovernmental Committee, *supra* note 6.
[70] The Copyright Act, No. 14 of 1957 INDIA CODE (1957), § 2.
[71] GOSWAMI ET AL., *supra* note 2, ¶ 15.

example of commercial transformation of folk songs is the Bhojpuri music industry which has expanded its horizons to cinema as well.

The name of the dialect 'Bhojpuri' has been taken from the name of the town Bhojpur, in the District of Shahabad in Bihar.[72] The town had the honour of being the capital of the Ujjaini Rajput Kings in ancient times.[73] The Bhojpuri songs are famously sung during various Hindu rites and traditions. For example, *Gauna* and *Sohar* are sung during marriage and birth respectively, *Juhumar* songs are sung in chorus by female members for dance in functions and *Gauna* represents the inner sentiments of parents at the departure of their daughter after marriage. Similarly, there are various songs sung according to the various seasons of the Hindu calendar like *Kajali, Falgun or Fag, Jhals and Ghanto.* There are also songs like *Birha* and *Dusadhas,* reflecting inner sentiments of the depressed caste of the community. [74] In fact, a new form of folk song tradition, *Bidesia,* developed when a huge population of Bhojpuri people left the Indian shores to work in Caribbean countries owned by Europeans.[75] *Bidesia* songs reflected the pain and sufferings of mother and wives when migrant workers left their native land during the British Raj.[76] Bhojpuri songs also use certain instruments, like *dholak, harmonium, kartaal, manjra, jhanjh, naal* etc., to give it

[72] Krishna Deva Upadhyaya, *An Introduction to Bhojpuri Folksongs and Ballads*, 7(2) Midwest Folklore 85, 2 (1957).
[73] *Id.*
[74] GOSWAMI ET AL., *supra* note 2 at 15.
[75] Neha Singh, *Addressing pain of women through folk culture: A case study of Bhojpuri diaspora in Mauritius*, 2(12) I.J.A.R. 523 (2016).
[76] *Id.*

a rural flavour.[77] Presently, the Bhojpuri cinema and music industry has affected the content and performance of original Bhojpuri songs in rural Bhojpuri region which were purely devoted to day to day happenings and sentiments of people.

There are both producers and consumers of vernacular Bhojpuri music industry in the metropolitan cities of Mumbai and Delhi. Today, around Rs. 80 lakhs to Rs. 1 crore is spent on a Bhojpuri movie.[78] A big Delhi based company may release 5,00,000 CDs more in comparison to a company in Patna, Bihar escalating the commercial appropriation.[79] The journey of folksongs has moved from rural landscape to the commercial stage of CDs, YouTube, cassettes and mobile phones. Hence, folksongs are blatantly commercially misappropriated without giving any due recognition to the community.

Folksongs can be protected under the Indian Copyright Act if it is performed or audio/video-recorded.[80] However, the essence of these folk songs lies in the original performance by the community itself during various rites, activities and traditions. Moreover, these songs are often created by the whole community rather than an individual. Therefore, these cannot be fixed to a tangible medium and attributed to a single author

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[77] GOSWAMI ET AL., *supra* note 2, ¶ 15.
[78] Kamal Narayan, *Bhojpuri film industry may shift base,* THE HINDUSTAN TIMES, (Nov. 02, 2008), https://www.hindustantimes.com/patna/bhojpuri-film-industry-may-shift-base/story-u6pD6D4SMJCAmlOIY4wHgJ.html.
[79] Ratnakar Tripathy, *Music Mania in Small-town Bihar: Emergence of Vernacular Identities*, 47(22) ECON. POL. WKLY. 58 (2012).
[80] The Copyright Act, No. 14 of 1957 INDIA CODE (1957), § 14.

reflecting the shortcoming of 'fixation' of the present copyright act. Hence, folksongs are commercially misappropriated by industries which have recognised its commercial worth and mass appeal.

After the economic compensation comes to the issue of moral rights. An author is said to have the moral right to control her work. Moral rights protect the personal, reputational and monetary value of a work.[81] Moral rights are very crucial for avoiding any kind of mutilation, distortion or debasement of cultural works. The present Indian Copyright Act grants moral right composite of paternity, integrity and modification rights of the author. Because of the existing shortcomings of the present copyright regime, moral rights cannot be attributed to the traditional communities.[82] There exists gross misappropriation of acknowledgement and economic returns to the community. It is hard, if not impossible to locate specific recipients of a community whose TCEs have been constantly misappropriated to give economic compensation or due recognition, for which no efforts have been made in India. The heavy commercialisation of Bhojpuri songs itself portrays a picture of how expressions of traditional communities that represent their culture are being distorted and misrepresented without being given any due recognition. TCEs hold economic as well as cultural value, hence, it is particularly important that along with monetary compensation, their work should be duly recognised. Therefore, protection of moral rights is significant to prevent distortion or

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[81] Betsy Rosenblatt, *Moral Rights Basics*, HARVARD LIBRARY (March 1998), https://cyber.harvard.edu/property/library/moralprimer.html.
[82] The Copyright Act, No. 14 of 1957 INDIA CODE (1957), § 57.

mutilation and to maintain the essence and authenticity of the expressions of the traditional communities.

iv. Duration

As discussed above, considering the nature of TCEs, granting a finite term would be inadequate for their protection. The present copyright regime provides protection for the lifetime of the author and sixty years counted from the year following the death of the author.[83] By implication of this provision, once the term of sixty years ends, the work will fall under the category of 'public domain', making it more vulnerable for further exploitation as it is passed on from generation to generation. Therefore, once the protection expires, such TCEs fall an easy prey to enterprising persons who may use these without constraints or limitations.

This restriction may render the indigenous communities dispossessed of their work which are created through thousands of years of accumulated knowledge. Folklore is passed from generation to generation in an unfixed form and even if it is fixed in a tangible medium, the present requirement will prevent providing copyright protection, considering the evolving nature of the TCEs as the expressions may change with time. Hence, because of the existing limitation of the copyright, the original cultural expressions of traditional communities, such as the *Banarasi* sari, *Warli* art and *Bhojpuri* folksongs are diminishing and are being heavily commercialised and misappropriated without attributing any due recognition to the community. Therefore, from the above discussion, it is

[83] *Id.* §§ 22-29.

clear that the present copyright regime in India fails to provide adequate protection to TCEs.

III. INITIATIVES BY DEVELOPING COUNTRIES ON PROTECTION OF TCES

As previously discussed, we feel that the protection of traditional cultural expressions is an independent issue as the current IPR regime in India fails to serve the purpose. Therefore, in this part, we seek to look at some of the *sui generis* legislations that developing countries such as Kenya, Philippines and Panama have introduced and how the specific legislations on TCEs have helped them in protecting the rights of their indigenous people [*hereinafter* referred to as "**IPs**") and indigenous cultural communities [*hereinafter* referred to as "**ICCs**"].

A. KENYA

Kenya introduced the 'Protection of Traditional Knowledge and Cultural Expressions Act' in 2016 through Article 11 of their Constitution, which necessitated them to enact a legislation to promote culture and cultural heritage of the nation.[84] The Act comprises of the key legal framework which is drafted to protect as well as to promote traditional knowledge and traditional cultural expressions.[85]

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[84] KENYA CONST. art. 11 cl. 3.

[85] Mathlide Pavis, *Kenyan Reform on Traditional Knowledge and Traditional Cultural Expressions: Two Year On,* IPKITTEN, http://ipkitten.blogspot.com/2019/02/kenyan-reform-on-traditional-knowledge.html (last visited July 14, 2020).

The legislation has been carefully drafted to define terms such as community, cultural expressions (both tangible and intangible expressions), cultural heritage (both tangible and intangible heritage), customary laws and practices, derogatory treatment, exploitation and other terms and phrases which are required to ensure proper protection of their cultural heritage, expressions, traditional knowledge and genetic resources.[86] The Act sets up a concrete system to make sure that the rights are effectively protected and criminalizes[87] the misuse and exploitation[88] of TK and TCEs. This Act was enacted to prevent excessive exploitation of the culture of the indigenous Maasai community, which had become widespread in the last two decades.[89]

This Act puts the onus on the Central Government through the Kenya Copyright Board to establish and maintain a 'Traditional Knowledge Digital Repository' (TKDR), that shall contain information relating to tangible and intangible TK and TCEs registered by the Government.[90] The registration process shall be undertaken willingly by the owners of the TK and TCEs,[91] which shall not be subjected to public disclosure and the exclusive rights of authorization of such TK are given to the communities.[92] The Act also confers moral rights to the owners of TK or TCEs.[93] The

[86] The Protection of Traditional Knowledge and Cultural Expressions Act, No. 33 of 2016 (Kenya), § 2.
[87] *Id.* § 37.
[88] *Id.* §18.
[89] Edward B. Bruner & Barbara Kirshenblatt, *Maasai on the Lawn: Tourist Realism in East Africa*, 9(4) Cultural Anthropology 435 (1994).
[90] The Protection of Traditional Knowledge and Cultural Expressions Act, No. 33 of 2016 (Kenya), § 4, cl. 1 and § 8, cl. 3.
[91] *Id.* §§ 7, cl. 3 and 15, cl. 3.
[92] *Id.* § 10, cl. 1.
[93] *Id.* §§ 21-24.

process of authorization is also subject to strict scrutiny along with necessary documentation required under the rules framed for this Act.

Although this Act is not wholesome, however, it is a brilliant attempt and provides a structured framework that could benefit the Maasai community, if it is implemented properly. [94] For the Act to be fully realised, it will require continuing organization within the Maasai community and cooperation at the local level.

B. PHILIPPINES

The Philippines consists of 7,107 islands and islets spanning 1,854 kilometres from north to south ensuring that this archipelago is endowed with abundant natural resources, diverse cultures, rich history and numerous ethnolinguistic communities.[95] Of the 102.9 million population, about 10-20% of them are IPs and ICCs[96]. Therefore, it was imperative on the part of the Government to introduce Indigenous Peoples' Rights Act, 1997 [*hereinafter* referred to as "**IPRA**"]. Although this Act primarily focuses on recognizing, protecting and promoting the rights of the ICCs, it has enumerated provisions regarding protection and preservation of TK and TCEs. One of the declarations of State policies stated that the "*State shall recognize, respect and protect the rights of Indigenous Peoples to preserve and develop their*

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[94] Naomi Lanoi Leleto, *Maasai Resistance to Cultural Appropriation in Tourism*, 5(1) I.P.J.L.C.R. 21, (2019).

[95] Jose Mencio Molintas, *The Philippine Indigenous Peoples' Struggle For Land and Life: Challenging Legal Texts,* ARIZONA JOURNAL, http://arizonajournal.org/wp-content/uploads/2015/11/Molintas.pdf (last visited July 14, 2020).

[96] IWGIA, *Indigenous Peoples in Philippines*, https://www.iwgia.org/en/philippines (last visited July 14, 2020).

cultures, traditions and institutions" and "*shall consider these rights in the formulation of national laws and policies*".[97] It also puts an obligation on the State to take measures to guarantee respect for their cultural integrity.[98]

The provisions relating to their intellectual property rights are contained in Chapter VI and the Rules framed under the IPRA.[99] This includes community intellectual rights,[100] right to indigenous knowledge systems and practices to develop their own sciences and technologies,[101] and the norms regarding access to biological and genetic resources. IPRA also necessitates free and prior informed consent of the communities in consonance with their customary laws in order to safeguard the rights of Ips/ICCs to their indigenous knowledge systems and practices. The Rules define free and prior informed consent as "*consensus of all members of the indigenous communities to be determined in accordance with their customary laws and practices*".[102] "*It must be free from all external manipulations, interference, and coercion and must be obtained after fully disclosing the intent and scope of the activity.*"[103]

Throughout the provisions of the IPRA, the predominance of the community as the owner of various rights under the Act is reflected

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[97] The Indigenous Peoples' Rights Act, No. 8371 of 1997 (Phil.), § 2 cl. C.
[98] *Id.* § 2, cl. e.
[99] The Indigenous Peoples' Rights Act, No. 8371 of 1997 (Phil.).
[100] *Id.* § 32.
[101] *Id.* § 34.
[102] P.V. Valsala G. Kutty, *National Experiences with the Protection of Expressions of Folklore/Traditional Cultural Expressions: India, Indonesia and the Philippines*, WORLD INTELLECTUAL PROPERTY ORGANISATION (1999), https://www.wipo.int/edocs/pubdocs/en/tk/912/wipo_pub_912.pdf. (*hereinafter* "**Valsala**")
[103] *Id.*

effectively and in clear and unambiguous terms.[104] An exemplary feature of the Act is that it places importance on the customary laws of ICC/Ips, which shall be the determining reason for the protection and management of rights bestowed upon them under the Act. For the implementation of the Act, the National Commission on Indigenous Peoples (NCIP), an independent agency under the Office of the President,[105] acts as the primary government agency.[106]

With the introduction of the IPRA, the Republic of Philippines has fortified their objective to recognize, respect, and promote the rights of the indigenous cultural communities/indigenous people. ICCs/Ips have been granted recognition of full ownership, not only over their land but also over their intellectual property rights related to cultural heritage and tradition[107].

C. PANAMA

Panama enacted a *sui generis* legislation for TK and TCEs in 2000. 'Special System for the Collective Intellectual Property Rights of Indigenous Peoples'[108] was enacted to protect the collective intellectual property rights and traditional knowledge of indigenous peoples as well as

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[104] *Id.*
[105] The Indigenous Peoples' Rights Act, No. 8371 of 1997 (Phil.), § 40.
[106] *Id.* § 38.
[107] Valsala, *supra* note 102.
[108] The Special System for the Collective Intellectual Property Rights of Indigenous Peoples Act, No. 20 of 2000 (Panama); The Protection of Traditional Knowledge and Cultural Expressions Act, No. 33 of 2016 (Kenya).

traditional forms of artistic expressions through a special system to register and promote their rights and to ensure social justice for them.[109]

The registration of collective rights is unlimited in time, and neither requires any payment nor any lawyer.[110] The protection by collective rights is granted upon registration with the National Copyright Office of the Ministry of Education or where applicable, the Directorate General of the Register of Industrial Property (*hereinafter* referred to as "**DIGERPI**").[111]

This legislation focuses on making the recognition of existing customary law of indigenous communities mandatory, after the approval of either the DIGERPI or the National Copyright Office. In substance, the protection, which consists of exploitation rights regarding the TCEs, based on the culture and tradition of the indigenous peoples must be governed by the regulation of each Indigenous Community.[112] This obligation may also be questioned since customary laws of these indigenous communities are also evolving with time and might suffer by being stagnant in a register.[113]

This law does not offer a reprieve in a case where there is a conflict in the relationship between customary law and intellectual property law.[114] Moreover, establishing a register can be a lengthy process as indigenous

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[109] The Special System for the Collective Intellectual Property Rights of Indigenous Peoples Act, No. 20 of 2000 (Panama), art. 1.
[110] *Id.* art. 8.
[111] *Id.* art. 4.
[112] *Id.* art. 15.
[113] WIPO, *supra* note 7.
[114] WIPO, *supra* note 7.

people are required to understand the importance of such registration, which necessitates a series of workshops and conversations to demonstrate the advantages of such registration.[115]

While the enactment of the law was a breakthrough, the Government of Panama had to take up initiatives to ensure successful implementation of this law. Between 2006 and 2008, the Department of Collective Rights and Folklore Expressions developed a program known nationally as "*Project Rescue*" to encourage collective rights records.[116] During this period, the Project carried out intensive work with indigenous communities and conducted various trainings, workshops, events and meetings with the objective of safeguarding the intangible heritage of traditional cultures and providing technical support for the cultivation of natural fibres used in traditional handicrafts and other cultural items.[117] The outcome of this Project was quite successful as it yielded excellent results in various local and indigenous communities who were interested in recording and registering their traditional knowledge.[118]

Thus, a *sui generis* legislation along with initiatives at the local level helped Panama to protect, preserve and promote the traditional cultural expressions and biodiversity of indigenous communities.

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[115] Yahelys Arenas, *Project Rescue: Protecting Traditional Knowledge and Biodiversity in Panama*, 4(2) Biores (2010).
[116] *Id.*
[117] *Id.*
[118] *Id.*

IV. CONCLUSION

In India, groups and communities described as 'indigenous tribes' have been enumerated at over 104 million as per the 2011 Census of India. They constitute 8.6 per cent of the total population of the country.[119] However, India still refuses to recognize them as 'indigenous' and holds to the colonial usage of the category 'tribe', a category that has now been widely discredited over the world.[120] Therefore, the introduction of The Protection of Traditional Knowledge Bill, 2016[121] is applaudable as it is a major step in the direction of protection of traditional knowledge resources and addresses the lack of discussion and a comprehensive system to protect TK/TCEs. However, the Bill had lapsed after the 16th Lok Sabha was dissolved and after that, no discussion or debate has taken place to date to protect the rights of the indigenous communities by the Government.

The Bill has tried to make an effort to recognize the contribution of specific local communities by giving them rights in consonance with Mataatua Declaration on the Cultural and Intellectual Property Rights of Indigenous Peoples recognising human rights of the indigenous communities.[122] The Bill also needs to be lauded for creating databases at

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[119] Virginius Xaxa, *The Global Indigenous Peoples Movement: It's Stirring in India*, 2 J.L. Prop. & Soc'y (2016).
[120] *Id.*
[121] The Protection of Traditional Knowledge Bill, No. 282 of 2016 (2016).
[122] *The Mataatua Declaration on the Cultural and Intellectual Property Rights of Indigenous Peoples*, WORLD INTELLECTUAL PROPERTY ORGANISATION (19-30 July 1993), https://www.wipo.int/export/sites/www/tk/en/databases/creative_heritage/docs/mataatua.pdf (*hereinafter* "**Mataatua Declaration**").

state and national level to manage traditional knowledge resources[123] and to make an attempt to actively involve the consent of the custodians of the traditional knowledge in the use of their resources.[124] It has also created a National Authority and State Authority vested with the power of civil courts to settle disputes regarding the communities as custodians of traditional knowledge.[125] The Bill also talks about the establishment of Traditional Knowledge Docketing System (TKDS) along with the TKDL that would contain the details of the registered communities with their respective traditional knowledge.[126]Although the Traditional Knowledge Bill, 2016 paves way for the protection of TCEs as well but there are still some lacunae left in the Bill which are required to be addressed by the Government in any future legislation in order to be effective, which are as follows;

a) *First,* the Bill should be taken to be a *sui generis* scheme within the scope of IPR. The statement of objects and reasons of the Bill specifies that they do not consider this Bill as a school of IPR. However, the authors are of the opinion that TK/TCEs are well within the scope of IPR as Intellectual Property refers to creations of the mind, "*such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce*".[127]

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[123] The Protection of Traditional Knowledge and Cultural Expressions Act, No. 33 of 2016 (Kenya), § 2, cl. xii and xiii.
[124] *Id.* § 4, cl. 4, § 35 and § 37, cl. 3 and cl. 6.
[125] *See* Mataatua Declaration, *supra* note 122, § 23, cl. 1 and § 34, cl. 44.
[126] *Id.* § 2, cl. xiii.
[127] *What is intellectual property?*, WORLD INTELLECTUAL PROPERTY ORGANISATION, https://www.wipo.int/about-ip/en/ (last visited July 14, 2020).

b) *Second*, there is no distinction between TK and TCEs and the latter is left to be construed within the meaning of the former. The law exploring TCEs should be expanded and addressed holistically under a different chapter which focuses on preservation through innovative approach in the evolution of TCEs.[128]

c) *Third*, the Bill does not mention the need for compensating the communities who have suffered cultural misappropriation while their cultural expressions are feeding the greed of capitalists. Basole[129] has highlighted that in the case of handicrafts, similar to the case of Banarasi sarees, the traditional methods can only be reinforced and power looms are excluded when the TCEs are used to safeguard the livelihood of the craftsmen and weavers.[130]

d) *Last*, the legal regime should be a voluntary code wherein the Government should not be made a custodian of the TK/TCEs and it should be left on the discretion of the communities to register their TK/TCEs. The Government should also ensure that the registration process is not a cumbersome task for the communities. This will ensure the fluidity of these traditional forms where the communities have the power to determine the status (public/private) of their TK/TCEs. Moreover, the Government should specifically delineate authorities each for the promotion, preservation and protection of TK/TCEs.

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[128] Surinder Kaur Verma, *Protecting Traditional Knowledge: Is a Sui Generis System an Answer*, 7 J. WORLD INTELL. PROP. 765, 800 (2004).
[129] Feist Publications, Inc. v. Rural Telephone Service, 499 U.S. 340 (1991).
[130] Das, *supra* note 25.

For any legislation to be effective, it must have a viable enforcement mechanism. In India, considering the socio-economic background of indigenous communities, the Government must ensure that the legislation is implemented as it is laid down. Hence, there should be a monitoring system to closely observe the effectiveness and implementation of the proposed *sui generis* legislation. There should be a sensitization scheme in place which makes the communities aware of the rights they possess concerning TCEs. This sensitization must include workshops, which help them in preserving, promoting as well as marketing the TCEs in the right manner if it is agreeable to the whole of the community. Besides taking into account these suggestions, the legislature also needs to actively involve the representatives of the indigenous communities in the process of formulation of the policy, as this would ultimately affect the culture and customs of the indigenous people. Presently, a necessary political will is required to take into account, the deteriorating state of the cultural expressions of the indigenous lives in India. A *sui generis* legislation on TCEs is the need of the hour to ensure the preservation, protection and promotion of the cultural and traditional assets of these indigenous communities.

Virendra Ahuja, *International Legal Regime on Nuclear Disarmament: Contemporary Developments*, 7(1) NLUJ Law Review 142 (2020)

INTERNATIONAL LEGAL REGIME ON NUCLEAR DISARMAMENT: CONTEMPORARY DEVELOPMENTS

Virendra Ahuja[*]

"*A nuclear war cannot be won and must never be fought*"
- Ronald Reagan and Mikhail Gorbachev[1]

ABSTRACT

The Hiroshima-Nagasaki bombings shook the conscience of the entire international community as it not only brought untold sorrow to the people of Japan, but also trans-generational effects on the succeeding generations. It was wished that similar incidents should never happen again and this brought the issue of nuclear disarmament to the attention of the international community. The General Assembly of the United Nations adopted a resolution as early as 1946 which focused on the elimination of atomic bombs. Subsequently, many more resolutions were adopted by the General Assembly and the Security Council. The first binding instrument to ban nuclear weapon testing, i.e., Partial Test Ban Treaty was adopted in 1963. This Treaty did not provide for a comprehensive ban on the testing of nuclear weapons. In 1968, the Treaty on the Non-Proliferation of

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[1] The agreed statement made by both the leaders of nuclear super-powers towards the end of the cold war. *See Securing Our Common Future: An Agenda for Disarmament,* OFFICE FOR DISARMAMENT AFFAIRS, UNITED NATIONS (New York, 2018).

Nuclear Weapons was adopted to prohibit the rapid increase in the number of nuclear weapons. In 1996, Comprehensive Test Ban Treaty was adopted to ban nuclear testing comprehensively. In addition, five Nuclear-Weapon-Free Zones ["NWFZs"] were created by various treaties at regional levels.

The regulatory framework so established, coupled with the NWFZs, the Advisory Opinion of International Court of Justice of 1996, and various resolutions of the General Assembly and the Security Council created a positive environment to achieve the goal of nuclear disarmament. Finally, the Treaty on the Prohibition of Nuclear Weapons, 2017 ["TPNW"] was adopted aiming to achieve the aforesaid goal. The TPNW seems to be a promising treaty. This article discusses the international legal regime with respect to nuclear disarmament, particularly the obligations of State Parties under TPNW.

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I. INTRODUCTION

The dropping of atomic bombs by the United States on Hiroshima and Nagasaki in Japan in 1945 brought untold sorrow to humanity as a whole and the Japanese in particular. Hundreds and thousands of people were killed, wounded, and maimed. There is no clear-cut figure of the dead and wounded. As per one estimate, the atom bomb killed around 2,37,000 people in Hiroshima alone, either directly or indirectly through its effects, which included radiation sickness, burn injuries and cancer.[2] The death toll by the atom bomb effect at Nagasaki was around 80,000.[3] The United Nations has also estimated the deaths to be around 3,00,000 in the two places.[4] Such nuclear weapons could not make a distinction between combatants and non-combatants. They imposed sufferings of the most horrible kind on the people. The impact of the atomic bomb, like any other nuclear weapon, did not remain confined only to that generation but also moved on to the succeeding generations through trans-generational effects. There seem to be two major reasons for the United States to have used atomic bombs: (i) to force Japan to surrender and end World War-II, and (ii) to establish its supremacy in the power game. Regardless of the reasons, the United States could not be justified in using atomic bombs, as the cumulative effect of the blast, the firestorm, and the radiation made it a highly dangerous act of an unprecedented magnitude.

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[2] Curtis LeMay and Paul Tibbets, *Bombings of Hiroshima and Nagasaki – 1945,* ATOMIC HERITAGE FOUNDATION, https://www.atomicheritage.org/history/bombings-hiroshima-and-nagasaki-1945 (last visited July 15, 2020).

[3] *Id.*

[4] *Securing Our Common Future: An Agenda for Disarmament,* OFFICE FOR DISARMAMENT AFFAIRS, UNITED NATIONS (New York, 2018), ¶ 15 (*hereinafter* "**UNODA**").

It is a matter of great satisfaction that in the last 75 years, no nuclear weapon has been used by any State. However, the lust to become nuclear capable has continued among States. Some of the States manufactured nuclear weapons and stockpiled them, some conducted nuclear weapon tests, some proliferated nuclear technology and some modernised their nuclear arsenals in order to get "*new military capacities*" and to lower the "*threshold for their battlefield use*".[5] Since 2006, North Korea has conducted six nuclear tests to make itself a nuclear capable State.[6] As of May 2020, there are 13,410 nuclear weapons possessed by 9 countries: Russia–6,370; the United States–5,800; China–320; France–290; the United Kingdom–195; Pakistan–160; India–150; Israel–90; and North Korea–35. It is noteworthy that when the Cold War was going on in 1986, this number was around 70,300.[7] It is also noteworthy that Ukraine, Kazakhstan and Belarus repatriated the nuclear weapons, which came in their possession on the disintegration of the Union of Soviet Socialist Republics [*hereinafter* referred to as the "**USSR**" or "**Soviet Union**"]. South Africa dismantled its nuclear weapons unilaterally, whereas France and the United Kingdom also took steps to minimize their nuclear weapons.[8] However, the aforesaid nine States continue to have an urge to retain their nuclear weapons.

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[5] *Id.* ¶ 17.

[6] *North Korea*, NUCLEAR THREAT INITIATIVE, (last updated July, 2020), https://www.nti.org/learn/countries/north-korea/.

[7] Hans M. Kristensen and Matt Korda, *Status of World Nuclear Forces*, FEDERATION OF AMERICAN SCIENTISTS, (April, 2020) https://fas.org/issues/nuclear-weapons/status-world-nuclear-forces/.

[8] UNODA, *supra* note 4.

The concept of nuclear disarmament is not to eradicate the nuclear technology, as the technology is also required for peaceful purposes, such as to generate power, for medical and industrial purposes, etc. Broadly speaking, nuclear disarmament is basically the idea of "*zeroing the nuclear weapons*". Further, nuclear disarmament is not only confined to the elimination of nuclear weapons, but also to the production of "*weapon-grade uranium*".[9] There is an important issue of "*nuclear terrorism*". A country like India, which shares its border with China and Pakistan, must be cautious. While both, China and Pakistan, are nuclear powers, Pakistan is also a State notorious for promoting cross border terrorism. There is always an apprehension that the terrorists may get possession of nuclear weapons. India, therefore, has to be vigilant in this regard. However, if there is complete nuclear disarmament, the issue of nuclear terrorism will also come to an end.[10]

The issue of nuclear disarmament got attention in the year following the Hiroshima-Nagasaki bombings. The General Assembly of the United Nations [*hereinafter* referred to as "**General Assembly**"] adopted a resolution as early as 1946 wherein it focused on the elimination of atomic bombs. Subsequently, many more resolutions were adopted by the General Assembly and the United Nations Security Council [*hereinafter* referred to as "**Security Council**"]. Three binding multilateral international instruments

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[9] Aatif Rahnuma and Aman Tenguria, *Nuclear Hegemony and the Indian Project*, 1(1) J. OF INT'L L. & COMITY 22 (2020); *see also* Omkar Upadhyay and Ujjawal Dixit, *From Past to Present: India's Nuclear Narrative*, 1(1) J. OF INT'L L. & COMITY 42 (2020).

[10] For information on "nuclear terrorism", *see* Kalyani Rathi, *Pre-emptive Nuclear Agenda: Strategies and Challenges*, 1(1) J. OF INT'L L. & COMITY 32-41 (2020).

were adopted to ban nuclear weapon testing and proliferation of nuclear weapons. These instruments consisted of – (i) the Partial Test Ban Treaty, 1963 [*hereinafter* referred to as "**PTBT**"];[11] (ii) the Treaty on the Non-Proliferation of Nuclear Weapons, 1968 [*hereinafter* referred to as "**NPT**"];[12] and the Comprehensive Test Ban Treaty, 1996 [*hereinafter* referred to as "**CTBT**"].[13] Together, they established a regulatory framework. Besides, five Nuclear-Weapon-Free Zones [*hereinafter* referred to as "**NWFZs**"] were created by various treaties at regional levels.

The regulatory framework so established, coupled with the NWFZs, the Advisory Opinion of International Court of Justice [*hereinafter* referred to as "**ICJ**"] of 1996, and various resolutions of the General Assembly and the Security Council, created a positive environment to achieve the goal of nuclear disarmament. Finally, the Treaty on the Prohibition of Nuclear Weapons, 2017 [*hereinafter* referred to as "**TPNW**"][14] was adopted aiming to achieve the aforesaid goal. The TPNW seems to be a promising treaty. This article discusses the international legal regime with respect to nuclear disarmament, particularly the obligations of State Parties under TPNW. It will also discuss whether nuclear powered

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[11] Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer space and under water, Aug. 5, 1963, 14 U.S.T. 1313, 480 U.N.T.S. 43.
[12] Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968 21 U.S.T. 483, 729 U.N.T.S. 161.
[13] Comprehensive Nuclear Test Ban Treaty, Sept. 24, 1996, S. TREATY DOC. NO. 105-28 (1997), 35 I.L.M. 1439.
[14] Treaty on the Prohibition of Nuclear Weapons, Treaty on the Prohibition of Nuclear Weapons, July 7, 2017, 729 UNTS 161.

States would like to be bound by it or instead find excuses for not becoming Parties to the same.

II. NUCLEAR DISARMAMENT: HISTORICAL BACKGROUND

The issue of nuclear disarmament, as already stated, was taken up for the first time by the General Assembly back in 1946. The ICJ while referring to the General Assembly Resolution of 1946 in its Advisory Opinion on "*Legality of the Threat or Use of Nuclear Weapons*",[15] stated that even the first resolution of the General Assembly, which was adopted on January 24, 1946, proposed to set up a commission to make a specific proposal for the elimination of nuclear weapons and other weapons of mass destruction.

Subsequently, in another resolution adopted in 1954, the General Assembly re-emphasised that States must reach to an agreement on a proposal which was comprehensive enough to be included in a draft international disarmament convention, providing for the complete prohibition of manufacture and use of nuclear weapons and also all other weapons of mass destruction. The General Assembly also required that nuclear weapons stocks which then existed should be converted for peaceful purposes.[16] In 1963, the first multilateral treaty, PTBT, was adopted to regulate the testing of nuclear weapons.

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[15] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226 (July 8, 1996).
[16] *Id.* ¶ 264.

A. PARTIAL TEST BAN TREATY (PTBT), 1963

The Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water (also known as the Partial Test Ban Treaty) was signed on 5 August 1963 and it came into force on October 10, 1963. The United States, the United Kingdom and the USSR were referred to as the "*Original Parties*" under the PTBT. The principal aim, as proclaimed by the parties in the Preamble, was to achieve an agreement on complete nuclear disarmament at the earliest under a system of stringent international control. Further, the parties sought that there should be a complete discontinuance of nuclear weapons test explosions.

The PTBT is a short treaty consisting of just five Articles. Under PTBT, the Parties undertook that they shall prohibit, prevent and shall not carry out test explosion of nuclear weapons at a place which is under its control or jurisdiction – (i) either in atmosphere or beyond its atmospheric limit at a place which may include outer space; or (ii) underwater which may include territorial sea as well as high seas. Such a test explosion is also prohibited for the Parties in an environment if it is likely to cause radioactive debris outside its territorial limits.[17] The PTBT, thus, prohibits nuclear weapon test prohibition only in atmosphere, outer space and underwaters. It does not prohibit such testing underground. It is for this reason that it is called as 'Partial' Test Ban Treaty.

[17] Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer space and under water, Aug. 5, 1963, 14 U.S.T. 1313, 480 U.N.T.S. 43, art. I.

As aforesaid, the PTBT is the first multilateral treaty to regulate the nuclear weapon test explosions. Though it does not ban nuclear weapon test explosions in a comprehensive manner, it definitely refers to the aim of achieving nuclear disarmament. Thus, the PTBT paved the way for the international community to go ahead with the objective of banning nuclear weapon testing completely and ultimately achieving complete nuclear disarmament.

B. TREATY ON THE NON-PROLIFERATION OF NUCLEAR WEAPONS (NPT)

After PTBT, another treaty, namely the Treaty on the Non-Proliferation of Nuclear Weapons was adopted in 1968 to prevent the proliferation of nuclear weapons. The NPT was adopted "*believing that the proliferation of nuclear weapons would seriously enhance the danger of nuclear war*"[18]and "*to undertake effective measures in the direction of nuclear disarmament*".[19] It was also desired by NPT that efforts should be made to bring to an end the manufacturing of nuclear weapons, liquidation of the existing stockpiles, and the elimination of nuclear weapons. All this should be done in pursuance of a treaty which may provide for total disarmament under an international system of control which is effective and strict at the same time.[20]

[18] Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968 21 U.S.T. 483, 729 U.N.T.S. 161.
[19] *Id.*
[20] *Id.*

The NPT made it prohibitory for the nuclear weapon State Parties to transfer either the nuclear weapons/devices or control over them in any manner either directly or indirectly.[21] Not only that, but the NPT also prohibited nuclear-weapon State Parties from assisting, encouraging or inducing non-nuclear-weapon States to acquire or manufacture such weapons or devices in any manner. It is also prohibitory for nuclear-weapon State parties to make non-nuclear-weapon State get control over aforesaid weapons or devices.[22]

A similar obligation has also been created by the NPT for non-nuclear-weapon State Parties. They also undertake not to receive the transfer of nuclear weapons/other nuclear explosive devices or of their control, directly or indirectly. They further undertake not to manufacture/acquire/seek/receive any assistance in the manufacture of nuclear weapons or devices.[23] Further, they also undertake to "*accept safeguards*" as set forth by International Atomic Energy Agency [*hereinafter* referred to as "**IAEA**"].[24] "*The inalienable right of all … to develop research, production and use of nuclear energy for peaceful purposes*" shall remain intact under the NPT.[25]

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[21] Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968 21 U.S.T. 483, 729 U.N.T.S. 161, art. IX.
[22] *Id.* art. I.
[23] *Id.* art. II.
[24] *Id.* art. III.
[25] *Id.* art. IV.

The NPT not only obligates the Parties to prevent nuclear proliferation but also to pursue negotiations to achieve nuclear disarmament. Article VI makes it obligatory to bring to an end the nuclear arms race at the earliest and also the nuclear disarmament. For this purpose, the Parties are required to negotiate on effective measures in good faith. They are required to pursue negotiation on a disarmament treaty providing for an international system of control which is effective and strict at the same time.

Article VI creates an obligation on all Parties whether they possess nuclear weapons or not. It does not lay down any specific time limit for bringing nuclear arms race to an end. Further, this provision may be understood as "*considering the obligation as one of erga omnes nature*".[26]

In order to ensure complete nuclear disarmament in regions, States are entitled to conclude treaties at regional basis. The NPT does not affect the rights of States in this regard. This is quite reasonable because the goal of complete nuclear disarmament is to be achieved globally and for this purpose, States should be encouraged to make their regions nuclear weapons free. All regional treaties on nuclear disarmament should be encouraged by the entire international community, so that the other regions may also take the similar initiatives on disarmament.[27]

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[26] Daniel Rietiker, *Background Note*, 1(1). J. OF INT'L L. & COMITY IV (2020).
[27] Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968 21 U.S.T. 483, 729 U.N.T.S. 161, art. VII.

Originally, the NPT was adopted as an interim measure to prevent the dissemination of nuclear weapons. However, after achieving "*near universal status*", it came to be regarded as a "*key pillar of the international security architecture*".[28] Initially, it was adopted for 25 years,[29] but was extended indefinitely on 11 May 1995.

The NPT has been successful only in limited manner, as the five permanent members of the Security Council did not come forward wholeheartedly to dismantle their nuclear arsenals despite the fact that non-nuclear-weapon States performed their obligations well under the Treaty.[30] Unfortunately, the NPT is discriminatory in the sense that it allows the nuclear-weapon States to continue holding their nuclear weapons. This ultimately results in a setup which facilitates "*a nuclear-technological monopoly instead of serving to achieve substantive disarmament*".[31] It is noteworthy that in 1965, India strongly advocated a nuclear non-proliferation treaty which was "*just, equitable and non-discriminatory*", however, it parted ways the moment NPT took final shape as it was not in accordance with India's views.[32]

C. COMPREHENSIVE TEST BAN TREATY (CTBT)

[28] UNODA, *supra* note 4, ¶ 18.
[29] Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968 21 U.S.T. 483, 729 U.N.T.S. 161, art. X (2).
[30] Aastha Ananya and Aparna Tiwari, *Rewriting India's Nuclear Strategy: A Path to Reset the Global Order*, 1(1) J. OF INT'L L. & COMITY 3 (2020).
[31] *Id.* ¶ 10.
[32] Astha Nahar and Shirin Jaiswal, *Nuclear Ambivalence: Addressing India's Disarmament Fault Lines*, 1(1) J. OF INT'L L. & COMITY 54 (2020).

The CTBT was adopted on 10 September 1996. It bans "*all nuclear explosions*" whether for "*military*" or for "*peaceful purposes*".[33] In its Preamble, the CTBT noted the aspirations expressed in PTBT "*to seek to achieve the discontinuance of all test explosions of nuclear weapons for all time*".[34] Further, emphasis is made on the need to make continuous efforts for the reduction of nuclear weapons, keeping in mind the ultimate goal that those weapons have to be eliminated from the Earth. It is also emphasised that there is a need for complete nuclear disarmament which should be done under the international control which is strict and effective. It is also stated in the Preamble that the nuclear testing can be brought to an end by concluding a 'comprehensive nuclear test ban treaty' which is universal in nature and effectively verifiable at the same time.

Article I of the CTBT lays down "*basic obligations*" for the State Parties. It prevents the State Parties from carrying out any nuclear explosion or any test explosion of nuclear weapons. It also obligates them "*to prohibit and prevent any such nuclear explosion at any place under its jurisdiction or control*".[35] The State Parties are duty bound not to cause, encourage or participate in any manner in the conduct of nuclear explosion or test explosion of nuclear weapons. The provision makes it clear that no nuclear weapon test

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[33] *Multilateral agreements in nuclear energy*, NUCLEAR ENERGY AGENCY, https://www.oecd-nea.org/law/multilateral-agreements/comprehensive-test-ban-treaty.html#:~:text=The%20CTBT%20bans%20all%20nuclear,for%20military%20or%20peaceful%20purposes (last visited Aug. 31, 2020).

[34] Treaty on the Prohibition of Nuclear Weapons, Treaty on the Prohibition of Nuclear Weapons, July 7, 2017, 729 UNTS 161.

[35] *Id.* art I.

explosion/other nuclear explosion is allowed for the State Parties under any circumstances.

The CTBT established the Comprehensive Nuclear-Test-Ban Treaty Organisation [*hereinafter* referred to as "**CTBTO**"] at Vienna. The object and purpose of the CTBT is to be achieved by the Organisation. The Organisation is also to ensure the implementation of the CTBT provisions, which include international verification of compliance. For the purpose of consultation and cooperation, it is also to provide a forum. All the State Parties to the CTBT are members of the aforesaid Organisation. Three organs of the Organisation have been established – (i) the Conference of the States Parties; (ii) the Executive Council; and (iii) the Technical Secretariat, which includes the International Data Centre. The State Parties are required to "*cooperate with the Organization in the exercise of its functions*".[36]

As the CTBT provides for cooperation between the UN and the CTBTO, the General Assembly adopted the Agreement to Regulate the Relationship between the United Nations and the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization in 2000, to enable the CTBTO to work in relationship with UN to achieve the objectives of the CTBT.[37]

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[36] *Id.* art. II.
[37] G.A. Res. 54/280 (June 30, 2000).

Article III obligates the State Parties to take "*necessary measures to implement its obligations*" under CTBT. Article IV lays down detailed provisions with respect to the verification of compliance under the CTBT.

The CTBT was a good initiative by the international community banning all nuclear explosions. The Treaty went a step further by establishing CTBTO, which is mandated to achieve the objectives of CTBT. The CTBTO is to ensure not only the implementation of the CTBT provisions, but also international verification of compliance. The Agreement between the UN and the CTBTO gives an additional strength to CTBTO to achieve its objectives and to ensure that there is no violation of CTBT provisions by any State Party. The flaw in the CTBT is that there is no commitment from the nuclear-weapon States that they would eliminate their nuclear weapons in a time-bound manner. This formed one of the bases for India for not joining the CTBT.[38]

D. OTHER TREATIES

In 1974, the United States and the USSR signed the Treaty on the Limitation of Underground Nuclear Weapon Tests. The purpose of the Treaty, *inter alia*, was to bring to an end the nuclear arms race, reduce strategic arms and achieve nuclear disarmament under an effective system of control.[39] The Treaty is popularly known as "Threshold Test Ban Treaty"

[38] Treaty on the Prohibition of Nuclear Weapons, Treaty on the Prohibition of Nuclear Weapons, July 7, 2017, 729 UNTS 161.
[39] Treaty on the Limitation of Underground Nuclear Weapon Tests, U.S.-U.S.S.R., July 3, 1974, 13 I.L.M. 906 (*commonly known as* Threshold Test Ban Treaty, Preamble, 1974).

[*hereinafter* referred to as "**TTBT**"]. Under TTBT, both the Parties undertook "*not to carry out any underground nuclear weapon test having a yield exceeding 150 kilotons at any place under its jurisdiction or control*" after 31 March 1976.[40] Thus, the TTBT established a nuclear 'threshold', as it prohibited the Parties from conducting tests which had a yield exceeding 150 kilotons. Militarily, this threshold is important as the possibility of nuclear weapons testing, which crosses the "*fractional-megaton range*", is removed.[41]

Another Treaty was adopted between the United States and the USSR, called the Treaty on Underground Nuclear Explosions for Peaceful Purposes [*hereinafter* referred to as "**PNE Treaty**"] in 1976.[42] Under the PNE Treaty, both the Parties agreed that they would not carry out certain activities – (i) no nuclear explosions which had a yield of more than 150 kilotons, (ii) no group explosion which had a yield of more than 1500 kilotons in aggregate, and (iii) no group explosion which had a yield of more than 150 kilotons in aggregate unless the individual explosions in that group were identifiable and measurable. It was also agreed between them that they would be free to conduct nuclear explosions in other countries for peaceful purposes if so requested by them. However, such explosion was to be conducted in compliance with the PNE Treaty obligations keeping in mind the yield limitations and also in accordance with the NPT.[43]

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[40] *Id.* art. I.
[41] *Threshold Test Ban Treaty*, FEDERATION OF AMERICAN SCIENTISTS, https://fas.org/nuke/control/ttbt/intro.htm (last visited June 1, 2020).
[42] Treaty on Underground Nuclear Explosions for Peaceful Purposes, U.S.-U.S.S.R., May 28, 1976, 15 I.L.M. 891 (1976), 1714 U.N.T.S. 387.
[43] *Id.* art. III.

The TTBT and the PNE Treaty were a self-imposed restriction by the United States and the USSR on the conduct of nuclear tests and nuclear non-proliferation. Certain provisions of these treaties including, *inter alia*, provisions for "*data exchanges, national technical verifications and on-site visit for confirmation*" ultimately contributed to the transparency with respect to nuclear possession.[44]

III. ADVISORY OPINION OF ICJ OF 1996

Before referring to the Advisory Opinion of ICJ on the *Legality of the Threat or Use of Nuclear Weapons*[45] of 8 July 1996, it will be appropriate to refer the dissenting opinion of Judge Weeramantry in the *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case* of 1995.[46] Judge Weeramantry emphasised on the duty of the ICJ to protect the rights of future generations. He stated that when New Zealand complained that its rights were affected, it did not mean that those rights were related only to the rights of people living at that moment, it also included the rights of "*unborn posterity*". He further stated that those were the rights which "*a nation is entitled, and indeed obliged, to protect*".[47] He also quoted the work of Brown Weiss, who wrote that "*each generation is both a custodian and a user of our common*

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[44] *See* Tenzin Jangchup Khampa, *The Legal instruments on Eliminating Use of Nuclear Weapons: Confronting Power Game Play through Equipped Weapon Technology and Prohibiting its Use as Warfare/Warheads*, 5(1) LEXIGENTIA 36, 42 (2018).
[45] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226 (July 8, 1996).
[46] [1995] ICJ Rep 288.
[47] Nuclear Tests (NZ v. Fr.), Judgment, 1995 I.C.J. Rep. 228 at 341 (Dec. 20, 1995) (Weeramantry, J., dissenting).

natural and cultural patrimony. As custodians of this planet, we have certain moral obligations to future generations which we can transform into legally enforceable norms".[48]

In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* also, the ICJ stated that the nuclear weapons have the characteristics of releasing "*not only immense quantities of heat and energy, but also powerful and prolonged radiation*", which make them "*potentially catastrophic*". Thus, the Advisory Opinion noted that nuclear weapons may destroy the civilisation as well as the ecosystem on the Earth. They cause serious harm to the future generation including genetic defects in them.[49]

The General Assembly sought an advisory opinion from the ICJ on the question: "*Is the threat or use of nuclear weapons in any circumstance permitted under international law?*" in December 1994. The ICJ decided to give its Advisory Opinion on the request of General Assembly and replied in the following manner:[50]

(i) The ICJ replied unanimously that regarding the use or threat of nuclear weapons there was no specific authorisation either in the customary international law or conventional law.

(ii) At the same time, the ICJ also stated by 11:3 votes that there was no comprehensive and universal prohibition of the use or

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[48] E. BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY AND INTERGENERATIONAL EQUITY 21 (1989).
[49] *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226 ¶¶ 243-44.
[50] *Id.* ¶ 265.

threat of nuclear weapons in customary international law or convention law.

(iii) The ICJ unanimously replied that any use or threat of nuclear weapons which was contrary to Article 2(4) of the UN Charter and which also failed to meet Article 51 requirements was not lawful.

(iv) The ICJ unanimously replied that it is necessary that there is a compatibility between the use or threat of nuclear weapons and international law related to armed conflict, more particularly international humanitarian law along with other treaties obligations and undertakings regarding nuclear weapons.

(v) The ICJ continued stating that generally the use or threat of nuclear weapons would be contrary to aforesaid laws. However, it could not conclude in a definite manner whether the use or threat of nuclear weapons would be unlawful or lawful in a situation where the action was required in self-defence in an extreme circumstance where survival of such State was at stake. This reply was made by "*seven votes to seven*", and the President gave the deciding vote.

(vi) The ICJ unanimously replied that an obligation existed for the international community to pursue and conclude negotiations which should lead to nuclear disarmament under a system of international control, which was effective and strict at the same time.

The Advisory Opinion of the ICJ created more confusion than solutions. Since the Court did not prohibit the use of nuclear weapons completely, it was a blow to the efforts of the international community to achieve complete nuclear disarmament. Some of the replies, particularly the (v) point above, was delivered by seven votes to seven with the deciding vote of the President. This shows how the judges were divided in their opinions on the matter. Unfortunately, this was a case of missed opportunity for the ICJ.

However, there was one good thing in the Advisory Opinion – the reiteration by the Court about the obligation of States to negotiate a regime which may lead to nuclear disarmament. The Court made the following observations with respect to the obligations laid down in Article VI of the NPT:

> "*The legal import of that obligation goes beyond that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise result - nuclear disarmament in all its aspects - by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith*".[51]

The Court further stated that the "*two-fold obligations*", i.e., "*to pursue*" and "*to conclude negotiations*" concern all State Parties to the NPT, which are 182 in number and constitute "*vast majority of the international community*". "*Virtually the whole of this community appears moreover to have been involved when*

[51] *Id.* ¶ 263.

resolutions of the United Nations General Assembly concerning nuclear disarmament have repeatedly been unanimously adopted".[52]

The Security Council also in its Resolution of 1995 urged every State, as provided in NPT Article VI, to pursue negotiations regarding nuclear disarmament and to work effectively for a treaty on complete disarmament.[53]

The Court had very rightly emphasised on the need of negotiating an effective binding regime to achieve the goal of nuclear disarmament. After the Advisory Opinion by the ICJ in 1996, many more resolutions were adopted in which the international community was reminded of its obligation under Article VI of the NPT. However, the breakthrough came only in 2017 with the adoption of TPNW, which has been discussed later. The adoption of TPNW took 21 years from the adoption of CTBT as well as the delivery of Advisory Opinion (both in 1996).

IV. NUCLEAR-WEAPON-FREE ZONES

The NWFZs are welcome steps at the regional level as they are established with an objective, *inter alia*, to strengthen global nuclear non-proliferation and disarmament norms and consolidate international efforts towards peace and security.[54] The NPT also supports the rights of States to

[52] *Id.* ¶ 264.
[53] S. C. Res. 984, (Apr. 11, 1995).
[54] *Nuclear Weapon Free Zones*, OFFICE OF DISARMAMENT, UNITED NATIONS, https://www.un.org/disarmam ent/wmd/nuclear/nwfz/ (last visited Aug. 18, 2020).

conclude regional treaties in order to assure the total absence of nuclear weapons in their respective territories.[55]

An NFZW is defined by the General Assembly as any zone recognised by it which has been established by a group of States through a convention or treaty, whereby the statute of such zone and the procedure for its delimitation is defined. Further, there should be establishment of an "*international system of verification and control*" which is to guarantee compliance of the obligations arising out of the aforesaid statute.[56]

Till date, five NWFZs have been established by – (i) Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean, 1967, which is also known as 'Treaty of Tlatelolco'; (ii) South Pacific Nuclear-Free Zone Treaty, 1985, which is also known as 'Treaty of Rarotonga'; (iii) Treaty on the Southeast Asia Nuclear-Weapon-Free Zone, 1995, which is also known as 'Treaty of Bangkok'; (iv) African Nuclear-Weapon-Free Zone Treaty, 1996, which is also known as 'Treaty of Pelindaba'; and (v) Treaty on a Nuclear-Weapon-Free Zone in Central Asia, 2006. The NWFZs are also considered as an effective step towards achievement of the goal of complete nuclear disarmament at the international level.

In addition to NWFZs, there are other treaties which deal with the "*denuclearization of certain areas*". These are – (i) Antarctic Treaty, 1959; (ii)

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[55] Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968 21 U.S.T. 483, 729 U.N.T.S. 161, art. 7.
[56] *See* G.A. Res. 3472 (XXX) B.

Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, 1967; (iii) Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, 1979; and (iv) Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof, 1971.[57]

V. TREATY ON THE PROHIBITION OF NUCLEAR WEAPONS (TPNW)

The Treaty on the Prohibition of Nuclear Weapons was adopted in 2017 by 122 votes in favour, one against and one abstention. The TPNW negotiations aimed at achieving a legally binding instrument to prohibit nuclear weapons, leading towards their total elimination.[58]

The TPNW in its Preamble has shown concern over "*the slow pace of nuclear disarmament*". It recognises that for a nuclear-weapons-free world, there should be a prohibition of nuclear weapons which is legally binding. It reaffirms that there should be an effective implementation of the NPT in its entirety, which is the cornerstone of the non-proliferation regime and nuclear disarmament. It also recognises the significant importance of the CTBT and its verification regime which is an essential element in this

[57] Nuclear Weapon Free Zones, *supra* note 54.
[58] *Treaty on the prohibition of nuclear weapon*, OFFICE FOR DISARMAMENT AFFAIRS, UNITED NATIONS, https://www.un.org/disarmament/wmd/nuclear/tpnw/ (last visited June 2, 2020).

regard. The TPNW, however, recognises the alienable right of State Parties regarding nuclear energy for peaceful purposes.

A. PROHIBITED ACTIVITIES

The TPNW lays down certain prohibited activities for the Parties to the Treaty. Article 1 of the TPNW obligates every Party to the treaty to undertake not to do the following seven acts under any circumstances whatsoever; the State Parties are prohibited from developing, testing, producing, manufacturing, acquiring, possessing or stockpiling nuclear weapons/devices. They are also prohibited from transferring or receiving nuclear weapons/devices or control over them in any manner. Further, they are prohibited from using or threatening to use nuclear weapons/devices. Assisting, encouraging or inducing someone, or seeking or receiving any assistance from someone in any manner whatsoever to engage in prohibited activity is also prohibited under TPNW. In addition, allowing any stationing, installing, or deploying of nuclear weapons/devices in the State Party territory or any place which is under the jurisdiction or control of such State Party is also a prohibited activity.

The prohibited activities, therefore, are very comprehensive and include in relation to nuclear explosive devices, the prohibition of their development, test, manufacture, acquisition, possession, etc.; their transfer; their receiving; their use or threat to use; to assist someone to engage in prohibited activity; to seek or receive any assistance; and to allow their stationing, installation or deployment in their territories.

B. OBLIGATION TO MAKE DECLARATION

Every State Party is obligated under the Treaty to submit a declaration to the UN Secretary General [*hereinafter* referred to as "**UNSG**"] within 30 days from the date of coming into force of that Treaty for the concerned State Party.

In the declaration, every State Party is obligated to declare the nuclear weapons/devices it "*owned, possessed or controlled*" prior to the TPNW. It shall also declare the information with respect to elimination of its "*nuclear-weapon programme*". This will include information relating to nuclear-weapons-related facilities and their elimination or irreversible conversion. Every State Party is also obliged to make declaration with respect to nuclear weapons/devices it is owning, possessing, or controlling. The State Parties are also to declare whether any nuclear weapons/devices owned, possessed, or controlled by a State are present in their territory or in any other place which is under their jurisdiction.[59]

The declarations so received are transmitted to the States Parties by the UNSG.[60]

C. OBLIGATION TO MAINTAIN SAFEGUARDS.

The TPNW obligates State Parties to maintain its IAEA safeguards obligations. The State Parties are further obligated to conclude "*a comprehensive safeguards agreement*" [*hereinafter* referred to as "**CSA**"] with

[59] Treaty on the Prohibition of Nuclear Weapons, Treaty on the Prohibition of Nuclear Weapons, July 7, 2017, 729 UNTS 161.
[60] *Id.* art. 2(2).

IAEA. For the purpose of CSA, negotiations are to commence "*within 180 days*". Within 18 months, such agreement is to enter into force. The State Parties are required to maintain such obligations thereafter. These obligations, however, will be "*without prejudice to any additional relevant instruments that it may adopt in the future*".

D. COMPLETE ELIMINATION OF NUCLEAR WEAPONS

Article 4 of the TPNW[61] lays down comprehensive provisions towards the total elimination of nuclear weapons. All those State Parties that were owning, possessing or controlling nuclear weapons/devices and had eliminated after 7 July 2017 their nuclear-weapon programme, which also include the elimination or irreversible conversion of their facilities which were related to nuclear weapons, prior to the coming into force of TPNW, are also required to cooperate with the designated international authority for the purpose of verification. They are also required to enter into a 'safeguard agreement' with the IAEA providing assurance that they did not divert declared nuclear material from the nuclear activities which were meant for peaceful purposes.[62] The rules relating to CSA above with respect to negotiation and entering into force shall be applicable *mutatis mutandis* to the Safeguard Agreement.

Every State Party which is in possession or control of nuclear weapons/nuclear explosive devices is required to remove them from operational status immediately and also destroy them at the earliest in

[61] *Id.* art. 4.
[62] *Id.* art. 3.

accordance with Article 4(2) of TPNW. The plan in this regard is to be submitted by such State Party to other State Parties or to a designated international authority. The plan, thereafter, shall be negotiated for approval.

It is, however, noteworthy that the States Parties shall bear the cost which is related to the verification measures and destruction of nuclear weapons/devices and elimination of nuclear facilities.[63]

Such State Party is required to "*conclude a safeguards agreement*" with IAEA regarding non-diversion of nuclear material from peaceful nuclear related activities. The agreement shall also provide for the "*absence of undeclared nuclear material*".

In a situation where nuclear weapons or devices are lying with a State Party under its control or jurisdiction but belong to some other State, the former is required to remove them from their jurisdiction at the earliest. Once such weapons/explosive devices are removed by the State Party, then that State Party is obligated to submit to the UNSG a declaration in this regard.

E. OBLIGATION OF STATE PARTY FOR NATIONAL IMPLEMENTATION

Article 5 of the TPNW[64] obligates State Parties for the national implementation of the provisions arising out of the TPNW. In order to

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[63] *Id.* art. 9(3).
[64] *Id.* art. 5.

prevent any prohibited activity in their territories which has been undertaken by any person, the State Parties are required to take all measures which are appropriate including legal, administrative or others. The aforesaid necessary measures may also include "*penal sanctions*".

As a principle of international law, the States are duty bound to make or amend their domestic/national laws to bring them in conformity with the provisions of the treaty/convention to which they have become parties. Article 5 obligates the State Parties to make new laws or amend their existing laws or otherwise ensure that prohibited activities do not take place in their jurisdiction. They must ensure that prohibited activities are prevented by all appropriate measures which may include legal, administrative or others including penal sanctions. The purpose of Article 5 is that the State Parties cannot remain mute spectators if one is undertaking any of the prohibited activities in their jurisdiction; they are duty bound to prevent it through all means.

F. OBLIGATIONS WITH RESPECT TO "VICTIM ASSISTANCE" AND "ENVIRONMENTAL REMEDIATION"

Article 6[65] imposes obligations on the State Parties with respect to two issues – (i) to provide assistance to people affected by use of testing of nuclear weapons; and (ii) to do environmental remediation of areas which became contaminated due to testing or use of nuclear weapons. All those individuals who have been affected by testing or use of nuclear weapons

[65] *Id.* art. 6.

are to be provided assistance which may include medical assistance, rehabilitation of such people and psychological support by the State Parties in accordance with Article 6. They are also obligated to "*provide for their social and economic inclusion*". The assistance is to be provided to affected individuals "*in accordance with applicable international humanitarian and human rights law*".

In addition, they are also required to take measures which are necessary and appropriate for the purpose of environmental remediation of areas under their jurisdiction or control which has become contaminated due to the testing or use of nuclear weapons/other nuclear explosive devices.

Article 7(6), which practically is an extension of Article 6, fixes the responsibilities of the State Party with respect to victim assistance and environmental remediation of other affected State Parties, where it is testing or use of nuclear weapons/other nuclear explosive devices has adversely affected the territory of another State Parties. It therefore provides that it is the responsibility of the State Party to provide adequate assistance, to other State Parties which have been affected by the use of testing of nuclear weapons/devices by the former. This is required for the purpose of "*victim assistance*" and "*environmental remediation*". This obligation is in addition to its obligations which may arise under the international law.

It is noteworthy that the international law on state responsibility shall also be applicable to the State who has done wrong to others. The law

on state responsibility is applicable to all the states irrespective of the fact whether they are parties to the TPNW or not. The codification and progressive development of international law on state responsibility is contained in International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001.[66] The draft articles as such are not binding as it is not a binding instrument but its provisions may be binding to the extent of being customary in nature.[67] The responsibilities laid down in Article 7(6) are additional responsibilities meant for the State Party who has adversely effected the territory of another State Party.

G. INTERNATIONAL COOPERATION AND ASSISTANCE UNDER TPNW

The TPNW under Article 7[68] makes it obligatory for every State Party to "*cooperate with other States Parties to facilitate*" its implementation. Further, "*in fulfilling its obligations*" under TPNW, every State Party is entitled "*to seek and receive assistance, where feasible, from the other states parties*". Every State Party which is "*in a position to do so*" is required to "*provide technical, material and financial assistance to the state parties affected by nuclear-weapons use or testing, to further the implementation*" of the TPNW. Further, such State Party is also required to "*provide assistance for the victims of the use or testing*" of nuclear weapons/devices. The assistance may also be provided through various organisations or institutions such as UN system, organisations which may

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[66] INTERNATIONAL LAW COMMISSION, DRAFT ARTICLES ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS (November 2001).
[67] V. K. AHUJA, PUBLIC INTERNATIONAL LAW, 101 (1st ed. 2016).
[68] Treaty on the Prohibition of Nuclear Weapons, Treaty on the Prohibition of Nuclear Weapons, July 7, 2017, 729 UNTS 161, art. 7.

be national, regional or international, NGOs, Red Cross, etc. It may also be provided on a bilateral basis.

H. MISCELLANEOUS

The TPNW seeks to achieve the goal of universality. For this purpose, the State Parties are obligated to encourage the non-State Parties to become a party to the TPNW to achieve the goal of universal adherence of all States to the TPNW.[69] The TPNW does not allow States to make reservations to its provisions. Therefore, the States will have to accept all the obligations under the TPNW without any reservations.[70] The TPNW which is of "*unlimited duration*", allows State Parties to withdraw from it. Ordinarily, such withdrawal will be effective only after 12 months. However, in a case where a State Party withdrawing itself from the TPNW is a party to an armed conflict at the expiry of 12-month period, it will continue to be bound by its obligations until it is no longer party to an armed conflict.[71]

The TPNW will come into force 90 days after getting ratification by 50 states. As on 20 July 2020, there are 40 States Parties to the TPNW, meaning thereby that it has not come into force. Not to talk of ratification, none of the 9 states who possess the nuclear weapons had even signed the TPNW. Nevertheless, the TPNW is considered to be an expression of a new generation of treaty, human-centric, equity based and very democratic,

[69] *Id.* art. 12.
[70] *Id.* art. 16.
[71] *Id.* art. 17.

initiated in large part by civil society.[72] To sum up, the efforts of international community over the last 70 years have culminated in the adoption of TPNW which intends to maintain a "*nuclear weapon free*" world. Undoubtedly, it is a commendable effort of the international community towards the realisation of the goal of nuclear disarmament.

VI. CONCLUSION

The PTBT, the NPT and the CTBT laid down the foundation of a regulatory regime on nuclear non-proliferation and testing of nuclear weapons and other devices. The ICJ also got an opportunity to give its advisory opinion on the legality of the uses of nuclear weapons. The ICJ emphasised the need of achieving the goal of nuclear disarmament. In addition, the creation of five NWFZs at regional level was also a step aimed at global nuclear disarmament. However, the cumulative effect of the aforesaid treaties, the Advisory Opinion and the NWFZs could not bring a desirable result for the nuclear disarmament at international level. Nuclear disarmament which was one of the top priorities of the United Nations could not be achieved as the efforts to achieve this objective remained in a state of severe crisis.

As far as the use of nuclear weapons is concerned, the time has come when the use of nuclear weapons must be considered contrary to the customary rules of international law as they are weapons of mass

[72] Daniel Rietiker, *Background Note*, 1(1) J. OF INT'L L. & COMITY XIV (2020).

destruction and their use will be contrary to laws of war and international humanitarian laws. Further, there is a near-universal acceptance in the international community in this regard. There is now a state practice of 75 years concerning non-use of nuclear weapons. The legally binding instruments also prohibit the testing and proliferation of nuclear weapons. Further, widespread support may also be found in the General Assembly regarding elimination of nuclear weapons.

The latest development is the adoption of TPNW which was negotiated with an aim to achieve the goal of complete nuclear disarmament. It is a commendable initiative of the United Nations. It is, however, to be noted that the TPNW will remain a mere piece of paper unless all the nuclear powers become party to it, leaving behind their vested interests. It is appropriate to refer the Final Document of the Tenth Special Session of the General Assembly dated 28 June 1978, where it was stated that all the nuclear-weapon states had a special responsibility to achieve the goal of nuclear disarmament.[73] Unfortunately, the nuclear-weapon states are yet to show their will and to come forward for this noble cause and eliminate their nuclear arsenal to make the world free of nuclear weapons. For this purpose, they will have to leave their hegemony and work honestly and in a transparent manner towards the nuclear disarmament. With respect to nuclear weapons, the world cannot be divided into two groups – haves and have-nots. It is expected of nuclear-powered states that they will not use nuclear weapons; not develop advanced techniques in this regard; not

[73] *See* G.A. Tenth Special Session Supplement no. 4(A/S-10/4) at 48 (May 23 - June 30, 1978) https://www.un.org/disarmament/wp-content/uploads/2017/05/A-S10-4.pdf.

have their operational readiness; establish the system of transparency regarding their nuclear programmes; ensure that there is mutual trust and confidence building among them; and finally eliminate the nuclear weapons completely. However, only time will tell how long they will take to come out of the power game leaving behind their supremacy and embrace this treaty. Unless they become Parties to the TPNW and comply with their obligations, nuclear disarmament will remain a distant dream.

Swaril Dania, *Revisiting Justification Theories for Protection of Intellectual Property: Contemporary Perspectives*, 7(1) NLUJ Law Review 177 (2020)

REVISITING JUSTIFICATION THEORIES FOR PROTECTION OF INTELLECTUAL PROPERTY: CONTEMPORARY PERSPECTIVES

Swaril Dania[*]

ABSTRACT

The conflict between recognition of individual effort in creation of any intellectual work, guaranteed by the protection of intellectual property rights, and the considerations of social welfare in the free dissemination of intellectual works has long been a point of academic discussion. To further the claim for a regime for intellectual property rights, several justification theories have been put forward. These range from the Lockean justifications to utilitarian arguments and personhood theories. The Lockean justification is based on viewing intellectual work as an embodiment of one's labour and thus one's private property. On the other hand, utilitarian arguments are centred around the utility of such a regime for promotion of cultural and scientific progress. Apart from these, there are personhood theories, which view the work as an extension of the self of the creator. Since the prescriptive power of these theories is severely limited, to justify all aspects of the existing IPR regimes, more pragmatic and economic justifications have also been put forward utilising models such as of the Nash Equilibrium and Game Theory. Any framework of intellectual property protection must be grounded in sound

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juristic principles. This is crucial for the framework to enjoy full moral and political allegiance. Thus, in the wake of the discussion as to the extension of intellectual property protection to new subjects such as traditional knowledge, traditional cultural expression and gene patenting, this article would be indulging in an important task of revisiting and analysing these justification theories as well as the contemporary and pragmatic approaches.

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I. INTRODUCTION

The word 'property' as it appears in the term 'intellectual property' refers to 'non-physical' property. This property is created by one's intellect. It arises as a result of expending the cognitive process of man. Compared to the prevalent traditional legal sense in which the term 'property' is understood, i.e., having a tangible connotation and some intrinsic value and rights associated with it, the word 'property' contained herein is intangible and is considered to derive value from the expenditure of one's intellect and creative process. Thus, unlike the general rights of ownership and possession which exist in relation to the physical property itself, the rights in intellectual property do not vest in the abstract non-physical entity such as the idea. It is the physical manifestation of that idea or the expression of that idea in the form of a 'work' which is regarded as an embodiment of the ingenuity and labour, which is supposed to carry value and deserves protection under a legal framework of rights and obligations.

Thus, one expects that the grounds for justification for rights arising out of intellectual property would be somewhat different from that of physical property. "*The non-exclusive character of intellectual property objects and the restriction on the free flow of information*",[1] which the intellectual property rights [*hereinafter* referred to as "**IPR**"] protection regimes entails, has presented interesting challenges before advocates of the regime for IPR protection. Moreover, while attempting to justify these regimes, issues

[1] Edwin C. Hettinger, *Justifying Intellectual Property*, 18 PHIL. & PUB. AFF. 31, 34-36 (1989) (*hereinafter* "**Hettinger**").

have always been raised as to conflicting interests between individual recognition and social welfare promotion. In response to this, several justification theories have been propounded to explain the rationale behind the need for IPR protection regimes, such as property based Lockean arguments, utilitarian theories, personhood theories, etc. Despite numerous attempts at the same, none of these justification theories have proved to be comprehensive, sufficient or adequate to explain all the features of the existing IPR protection regimes. Further, none are capable of a universal application.

Modern times are being described as marked by an intellectual property land grab, as can be seen from the alarming rush to patent even the human DNA.[2] In such a scenario, when "*intellectual property rights are starting to be viewed as state created entities used by the privileged and economically advantaged to control information access and consumption*", a re-assessment of the justification theories becomes an indispensable exercise.[3] The present paper attempts this assessment.

II. THE LOCKEAN THEORY

The starting point of the discussion as to the justification of IPR regime is often centred around the classical theory of John Locke which

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[2] Adam D. Moore, *Intellectual Property: Theory, Privilege, and Pragmatism*, 16 CAN. J.L. & JURIS. 191 (2003) (*hereinafter* "**Theory, Privilege, and Pragmatism**").

[3] ADAM D. MOORE, INTELLECTUAL PROPERTY & INFORMATION CONTROL: PHILOSOPHIC FOUNDATIONS AND CONTEMPORARY ISSUES 9 (Transaction Publishers ed. 2001).

has been discussed by him in the 'Second Treatise of Government'.[4] This may thus be called the 'Lockean' tradition. The better description of this cluster of arguments would be 'proprietarianism'.[5] Proprietarian arguments are based on the view that "*all enforceable moral rights are moral property rights*" (rights over things). Such arguments are based on the premise that property rights exist in the creations of intellectual works of the authors and these rights are grounded in 'natural' or 'moral law', rather than looking at these rights as something which deserves protection by positive law.[6]

According to the Lockean theory, if a person exerts his labour upon resources which are either unowned or "*held in common*", it gives rise to a natural property right which vests in such person. This right over the fruits of one's efforts deserves protection by the State and enforcement of this natural right is the obligation of the State.[7] According to Locke, "*every man has a property in his own person*" and that "*the labour of his body, and the work of his hands are properly his*".[8] The Lockean justification is thus based on the idea of one's natural possession of one's own body and one's own labour. To quote specifically:

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[4] JOHN LOCKE, LOCKE: TWO TREATISES OF GOVERNMENT (Peter Laslett ed. 1988) (*hereinafter* "**Locke**").
[5] *See* Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L. J. 287, 287-366 (1988); HETTINGER, *supra* note 1; Adam D. Moore, *A Lockean Theory of Intellectual Property*, 21 HAMLINE L. REV. 65, 65-108 (1997).
[6] William Fisher, *Theories of Intellectual Property* in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 168-200 (Stephen Munzer ed., 2001).
[7] *Id.*
[8] LOCKE, *supra* note 4.

> "*Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature placed it in, it hath by this labour something annexed to it, that excludes the common right of other men.*"[9]

The appropriative ability as discussed above however is not unlimited. Locke had been wise to formulate the condition subject to which the appropriation can be made. According to Locke's theory, "*the mixing of one's labour only creates a property right where there is enough, and as good left in common for others.*" The ambiguity of this proviso has led to much intellectual discourse and there is much contestation as to the correct interpretation of it. It is at times vehemently argued that since ideas are non-rivalrous in nature, are not consumed by their use, and are open to simultaneous appropriation, intellectual property protection is justified since it very well satisfies this proviso. Further, there is another proviso called as the 'no-waste proviso' which provides that appropriated resources must be used and not wasted, otherwise they would become common again.

To sum up the Lockean theory, we see two main constituent elements. *First*, the act of appropriation of previously unowned resources through mixing of one's labour with them. This act gives rise to a right to exclusive ownership to the product of such mixing. *Second,* the condition

[9] *Id.*

that such appropriation must not leave anyone else worse off. It must leave enough and as good in common for others without wastage. Justification of intellectual property regimes based on Lockean theories can be captured in Justin Hughes' writings wherein he bases the IPR protection in these three propositions.

> "*First of all, that the production of ideas requires a person's labour; secondly, that these ideas are appropriated from a "common" which is not significantly devaluated by the idea removal; and thirdly, that ideas can be appropriated without breaking the 'enough and as good' and 'non-waste' conditions.*" [10]

The theory though regarded by some scholars to be the strongest justification theory is objected by some who question how far and to what extent these above propositions are fulfilled in the case of intellectual property. The following section discusses some of these objections.

A. OBJECTIONS AGAINST LOCKEAN THEORY

i. Why Private Property Must Exist At All? (Difficulties with the Lockean Justifications of Exclusive Property Rights)

Locke developed a theory of private property on certain assumptions about the need for the existence of private property. He

[10] Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L. J. 287, 287-366 (1988) as cited in Theo Papaioannou, *Human Gene Patents and the Question of Liberal Morality*, 4 GENOMICS, SOC., & POL'Y 64, 64-83 (2008).

reasoned that man needs to consume to sustain himself. Thus, the basic notion underlying the need for private property to exist is self-preservation. Since in order to survive, man must eat and drink for which he needs to utilise natural resources, it is necessary that he makes them his exclusive property. However, arguments remain as to the soundness of this principle since subsistence provides for a weak ground to establish any general justification of exclusive property rights. It may justify consumption and that too in respect of a limited range of goods.[11]

Exclusive property rights are further justified on the ground that in order to pursue long-term life plans and welfare means, the same is needed since by means of exclusive property rights over goods, one can derive the ability to utilise those goods in any manner as needed for fulfilment of one's welfare goals. Thus, exclusive rights should exist. This justification is slightly broader than the one based on simple subsistence.[12]

Moreover, exclusive property is sometimes defended on the ground that it avoids "*tragedy of commons*" as has been explained by

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[11] *See* Daniel Attas, *Lockean Justifications of Intellectual Property* in INTELLECTUAL PROPERTY AND THEORIES OF JUSTICE 31, 31-32 (A. Gosseries et al. eds., 2008) [*hereinafter* "**Attas**"]. He argues, "*Though it seems reasonable that food and drink must exclude others in the process of their consumption, it is far from clear that this implies a property right in any interesting sense. For a property right includes not merely use, but also control, management and the right to transfer. Yet these incidents do not apply in the case of a chewed, swallowed and digested apple, for example. If what I am permitted to take from nature is what I need to eat and drink, then I may do just that. Of course, in a slightly more advanced economy I may want to specialise in apples, say, and trade them for your eggs. Exclusive property rights are certainly required to allow a division of labour to develop and for the possibility of trade, but it does not follow that these are necessary for subsistence*."

[12] *See* Loren Lomasky, "*persons have a natural interest in having things*" as cited in ATTAS, *Id.* ¶ 11.

economist Garrett Hardin wherein he argues that common ownership of assets would lead to individuals overusing the asset and under-maintaining it.[13] However, the theory though appeals to logic, has floundered when tested on the basis of empirical evidence. Economist Elinor Ostrom has in her Nobel Prize winning work busted the myth of exclusive property rights being essential to manage natural resources and has argued for models of collective ownership and management.[14]

Thus, the main premise which forms the basis for exclusive rights to property in material goods appears to be flawed. It is interesting to see how a theory which falters at justifying private ownership even of material goods, could serve to be a good justification guide for ownership of intangible, intellectual property.

ii. Ideas as Individual Creation?

It has been argued by some scholars, such as D.G. Richards that ideas are not individual creation, rather ideas arise as a result of social creation.[15] There is a distinction between labour that is expended by a person while creating an intellectual work and the physical labour that he may perform. Unlike physical labour, such form of intellectual labour is to be conceived as a special labour which is based on interaction and learning

[13] Garett Hardin, *The Tragedy of the Commons*, 162 SCIENCE, 1243-1248 (1968).
[14] ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 1 (James E. Alt et al. eds., 1990).
[15] D.G. Richards, *The Ideology of Intellectual Property Rights in the International Economy*, 9 REV. OF SOC. ECON. 521, 521-541 (2002) as cited in Theo Papaioannou, *Human Gene Patents and the Question of Liberal Morality*, 4 GENOMICS, SOC., & POL'Y, 64-83 (2008).

within society.[16] Thus, a Lockean justification on the premise of rights over the fruit of one's labour seems to be unsuitable in the case of intellectual property. Moreover, questions have been raised as to how much ownership one has over one's own body. It is argued that even in the creation of one's own body, there is expenditure of significant labour and effort of others, perhaps of the parents or guardians. Thus, one may say that if ownership of one's self and of one's labour is in question, then the underlying premise of the Lockean argument is challenged and the significance of the theory seriously undermined.

iii. Ideas are Non-Rivalrous

In relation to ideas, it is emphasised time and again, that they are non-exclusive in nature. So, unlike tangible material resources which are rivalrous in nature, in the sense that use/consumption of the good by one disallows the other the use of the same good, ideas are not 'consumed' or 'destroyed' by their use. Also, physical goods undergo erosion due to which they suffer a depreciation in value over time with wear and tear. However, the same is not true for ideas. Ideas though may be rendered devalued because of the coming up of better technologies and innovation, yet it is only when other ideas succeed them, that they lose their entire worth.[17]

Closely related to the premise of ideas being non rivalrous goods, is the issue of the marginal cost at which the intellectual object can be

[16] *Id.*
[17] Attas, *supra* note 11, ¶ 33.

made available to an additional user. For the communication of the intellectual work to a new user, this cost which may be called as marginal cost, is almost zero. This is so because with the modern communication and information technology, any intellectual work can be disseminated among large groups at a very low cost.[18] "*This characteristic of intellectual objects grounds a strong prima facie case against the wisdom of private and exclusive intellectual property rights. Why should one person have the exclusive right to possess and use something which all people could possess and use concurrently?*" [19]

Further, ideas being non rivalrous goods, cannot be consumed in the same manner in which material goods can, and moreover, are not subject to physical deterioration. Thus, the argument based on the 'tragedy of commons' that is offered in relation to material goods, offers little valid justification here as ideas cannot be overexploited or undermaintained. In fact, it is the contrary – if there is free exchange of ideas, it may lead to proliferation of innovation and creativity. Such an exchange would add to the common pool of resources rather than depleting it. However, Adam Moore points out in his work that this view is sometimes rebutted by some who argue that in a no-protection regime, individuals and companies would seek to protect their intellectual efforts by keeping them a secret.[20] This secrecy would lead to a different kind of tragedy in the sense of a loss

[18] Hettinger, *supra* note 1.
[19] Balew Mersha G. & Hiwot Hadush, *Justifying Intellectual Property*, ABYSSINIALAW (Apr. 2, 2012), https://www.abyssinialaw.com/component/k2/item/469.
[20] Adam D. Moore, *Intellectual Property and the Prisoner's Dilemma: A Game Theory Justification of Copyrights, Patents, and Trade Secrets*, 28 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 831, 831-869 (2018) [*hereinafter* "**Moore**"].

of potential value since this would hinder dissemination of information. Thus, the tragedy in case of a "*no-protection rule*" is secrecy, restricted markets, and lost opportunities and not the commonly known issue of overuse/over exploitation.[21]

iv. Problems with Metaphor of 'Mixing One's Labour'

It has been pointed out by some scholars that the idea of mixing one's labour is incoherent.[22] They question if actions can ever be mixed with objects. Also, it is argued that why does mixing what one owns (i.e., one's labour) with what he doesn't own, doesn't imply losing what one originally owns rather than gaining what he doesn't? Robert Nozick gives an example and asks if he empties his can of tomato juice into the ocean, would that imply that he would come to hold the property rights in the whole ocean since what he possessed has been mixed with the resource?[23] In relation to intellectual property, as we are moving towards creation of more and more digital content, this requirement of mixing of labour with the resource/object is problematic. The mixing of labour with something like clay, an object, as a sculptor sculpts a statue is easier to be imagined but similar mixing of labour is not possible in relation to several other intellectual works in the digital domain.

v. Problems with the Lockean Proviso

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[21] *Id.* ¶ 850.
[22] Jeremy Waldron, *Two Worries about Mixing One's Labour*, 33 PHIL. Q. 37, 37–44 (1983) as cited in MOORE, *supra* note 20.
[23] ROBERT NOZICK, ANARCHY, STATE AND UTOPIA (1974) as cited in Moore, *supra* note 20.

The Lockean proviso as discussed above is quite ambiguous. Taken literally, the original Lockean proviso appears overly demanding in relation to material resources. With limited resources at our disposal, any appropriation would necessarily worsen the position of others by diminishing the stock of resources available for them, thus it would never be left 'as enough' and 'as good' in common for others. This would imply that any acquisition could never be justified. However, the proviso appears to be easily fulfilled in the case of intellectual property since ideas being non-rivalrous goods, use of ideas by one, leaves 'enough' and 'as good' in common for others. Though the argument seems appealing, scholars have been quick to point out that the same interpretation is probably due to the difficulties with adoption of baselines of comparison. The following discussion would make it clear.[24]

Intellectual appropriation is regarded as fulfilling the Lockean proviso by Moore because as per him, "*the number of ideas, collections of ideas, or intangible works available for appropriation is practically infinite*".[25] Before transposing Locke's arguments here, it is essential that corresponding to the Lockean notion of 'commons', correct analogy is drawn and the identification of the 'commons' in the realm of intellectual property is

[24] The idea expressed here has been presented in Maxime Lambrecht, *On water drinkers and magical springs: Challenging the Lockean proviso as a justification for copyright*, 28(4) RATIO JURIS 504, 504-520 (2015) (*hereinafter* "**Lambrecht**") wherein he discusses Nozick's revised version of the proviso alongside the original proviso. A complete analysis of the Lockean proviso and its varying interpretations is out of the scope of this paper.

[25] ADAM D. MOORE, INTELLECTUAL PROPERTY AND INFORMATION CONTROL: PHILOSOPHIC FOUNDATIONS AND CONTEMPORARY ISSUES 114 (Transaction Publishers ed., 201) as cited in LAMBRECHT, *supra* note 24.

done carefully. How does one define these 'commons'? Would that imply "*a set of all possible ideas/all factually existing ideas/the set of reachable ideas/set of all ideas and expressions*"?[26] Since these are questions to which there are no certain answers, Moore's account seems deficient.

Deriving the same conclusion through a different argument is Hughes who relies on the idea-expression dichotomy in copyright law. He states that "*because creating property rights in an idea never completely excludes others from using the idea, it need not be justified by Locke's legerdemain that increases in privately produced goods necessarily benefit the commonwealth*".[27]

Hughes' argument appears to have a circular reasoning fallacy. It excludes expression from its definition of the "*common*" relying on the idea-expression dichotomy, and then uses this as evidence that the appropriation satisfies the Lockean proviso. As pointed out by Lambrecht in his paper, "*if one defines the set of what shouldn't be depleted and the set of what can be appropriated in a way that they do not intersect, it is not surprising that the proviso appears to be necessarily satisfied*".[28]

Moving on to another sort of reasoning, we have Nozick's interpretation wherein he contends that "*an inventor's patent does not deprive others of an object which would not exist if not for the inventor*".[29] Thus, he argues

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[26] LAMBRECHT, *supra* note 24.
[27] Justin Hughes, *The Philosophy of Intellectual Property,* 77 GEO. L. J. 287 (1988) as cited in LAMBRECHT, *supra* note 24.
[28] LAMBRECHT, *supra* note 24.
[29] ROBERT NOZICK, ANARCHY, STATE AND UTOPIA. 181(1974).

that without the author, the work would not have been created and thus, in the absence of the work itself, there could be no question of depriving others in any way. By appropriating something that would otherwise not have existed, one does not deprive anyone. This reasoning ignores the possibility of there being independent creation by different individuals of a remarkably similar work. It is a real possibility that an almost identical creation can be made independently by two different individuals and this may happen even simultaneously. Thus, it can be argued that the situation of potential independent creators is worsened off by the appropriation, in that they could have otherwise used their creation and no longer can.

vi. Right to Property as a Natural Right – Distinguishing it from a Consequentialist Justification

It is important to highlight that a Lockean justification based on the natural right approach is based on the notion of entitlement, a direct right and not any contractual right.[30] A contractual right would imply the right to be consequential in the sense that it arises out of any agreement subject to conditions attached to selling of a material object that embodies the idea. Natural rights are rights in perpetuity and thus, it becomes interesting how this aspect would be reconciled with the 'limited in duration' protection given to intellectual property in regimes under copyright and patent.[31] Since Locke's theory was originally used to justify property rights in material things, why should these rights be limited by time? This poses a significant difficulty as most forms of intellectual

[30] Attas, *supra* note 11, ¶ 30.
[31] *Id.*

property today are durational. Thus, it is sometimes argued that the Lockean theory fails to account for this aspect of intellectual property rights.

However, as a counter-argument, some may argue that since the Lockean theory does not permit one to harm others (based on the Lockean proviso of leaving as good and as enough), the placing of limits on the right is capable of a justification and fits perfectly in the theory. Having said that, one needs to also point out how such an argument may seem paradoxical. For the private right in intellectual work to come into existence, the complete satisfaction of the Lockean conditions with the two provisos is mandatory. Since serious objections as to the satisfaction of the Lockean proviso remain, the very idea of the accrual of the private right in the intellectual work in the first place, comes under contestation. The 'existence of the right' under the Lockean theory is a pre-requisite to offer justifications for the 'nature of the right' (whether it should be perpetual/limited) using the provisos of the same theory. Attempts at justifying the nature of the right using the Lockean proviso, when the right itself is not established owing to the non-satisfaction of the proviso, would be akin to putting the cart before the horse.

III. THE CONSEQUENTIALIST / UTILITARIAN THEORIES

Contrary to the labour theory which is based on the 'natural right' of man to fruits of his labour, "*Anglo-American systems of intellectual property*

are typically justified on utilitarian grounds".[32] The US Constitution grants limited rights to authors and inventors of intellectual property "*to promote the progress of science and useful arts*".[33] As per the utilitarian justifications, the rationale for protection of intellectual property is the maximisation of scientific and cultural progress through creation of devices such as copyright and patent to adequately recompense the creators/inventor before the information created by them is diffused in public.[34] Devoid of such mechanisms, it is argued, that the incentive to create would be lost. Rational agents would not create the same amount of work without IPR protection. Further, the more the intellectual creation in any society, the more social progress we have. Thus, the IPR regime is justified on utilitarian grounds. To use William C**.** Robinson' s words:

> "*…institution of patent protection is fully justified because, in general, adopting such a system leads to good consequences for society as a whole: The granting of a patent privilege at once accomplishes three important objects; it rewards the inventor for his skill and labour; it stimulates him,*

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[32] Adam D. Moore, *Intellectual Property, Innovation, and Social Progress: The Case against Incentive Based Arguments*, 26 HAMLINE L. REV. 602, 602-630 (2003) [*hereinafter* "**Intellectual Property, Innovation, and Social Progress**"].

[33] US CONST. art. I §1 cl. 8.

[34] S. Chesterfield Oppenheim, *A New Approach to Evaluation of the American Patent System*, 33 J. PAT. OFF. SOC. 555 (1951); Tom *G.* Palmer, *Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects*, 13 HARV. J. L. & PUB. POL'Y 817 (1990); Leonard G. Boonin, *The University, Scientific Research, and the Ownership of Knowledge, in* OWNING SCIENTIFIC AND TECHNICAL INFORMATION: VALUE AND ETHICAL ISSUES 253, 257-60 (Weil and Snapper ed.1989); Edwin C. Hettinger, *Justifying Intellectual Property, in* INTELLECTUAL PROPERTY: MORAL, LEGAL, AND INTERNATIONAL DILEMMAS 17, 30-33 (Adam Moore ed. 1997) as cited in INTELLECTUAL PROPERTY, INNOVATION, AND SOCIAL PROGRESS, *supra* note 32.

> *as well as others, to still further efforts in the same or different fields; it secures to the public an immediate knowledge of the character and scope of the invention. Each of these objects, with its consequences, is a public good, and tends directly to the advancement of the useful arts and sciences.*" [35]

Thus, the justification is based on the premise that if IPR rights are conferred on authors and innovators, it incentivizes the production of intellectual works. The premise though intuitively appealing is not free from contestation. Adam Moore in his work questions the truth of this premise.[36] Following the same line of thought, Seana Valentine Shiffrin develops an elaborate argument against the 'incentive' based justification wherein she contends that for many artists, the motivation to create is independent of pecuniary rewards.[37] Similarly, it can be said that necessity rather than any pecuniary motivation has been the propelling force behind many significant inventions. Daniel Attas while giving certain examples in this regard writes, "*Many of the most valued discoveries and works of art were produced and developed without the protection of intellectual property. To name the most obvious: the wheel, the alphabet, the Bible, the works of Homer, Archimedes, Shakespeare, Guttenberg, Bach, Leonardo, Newton, and so on*".[38] Though there exists a basic interest to recoup at least the investment costs, it is noted that "*the primary interest is often just in their art and in the process of creation, and*

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[35] INTELLECTUAL PROPERTY, INNOVATION, AND SOCIAL PROGRESS, *supra* note 32, ¶ 610.
[36] *Id.*
[37] Seana Valentine Shiffrin, *The Incentives Argument for Intellectual Property Protection*, 4 J.L. PHIL. & CULTURE 49, 49-58 (2009) [*hereinafter* "**Shiffrin**"].
[38] Attas, *supra* note 11, at 48.

for many, in its wide dissemination to others".[39] An elaboration on this argument is provided in the next section.

A. OBJECTIONS AGAINST THE UTILITARIAN THEORIES

Seana Shiffrin argues that in order to justify IPR regimes on incentive based arguments, one needs to advance the argument beyond merely claiming that creators need funding to recoup creation and labour costs, and because of cheaper ways of copying available to infringers, the funds needed by the creator would usually exceed what they would be able to secure in an unprotected market for their creations. She proposes a critique of the incentive argument on both evaluative and justificatory grounds, pointing out *firstly*, how it is extremely difficult to empirically support the claim that such incentives foster intellectual creations. *Secondly*, even if it is established that incentive-based regimes lead to more content creation, is it justified to act on the idea that such incentives are necessary to promote optimal cultural production?[40] Incentive-driven arguments may imply that such attempts to reward the creator/inventor by granting monopoly rights may ultimately lead to industry-monopolisation. However, such monopolistic regimes are rarely in the best interest of the society and would in fact, run contrary to the whole utilitarian premise of maximising social progress through such protection.

Shiffrin in her work goes on to derive an analogy from the Rawlsian theory of justice and tries to apply it in the framework of

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[39] Shiffrin, *supra* note 37, ¶ 51.
[40] *Id.* ¶¶ 55-56.

intellectual property. She notes that in Rawlsian theory, distribution of social primary goods must be on principles of equality in a just society. There can be no derogation from this principle except when introducing an inequality in the system serves to be to the maximal advantage of the least well-off. If by introducing unequal distribution, the position of those enjoying the smallest allotment of social primary goods is made better off, Rawls argued that it may be justified, even required, to distribute resources unequally. Specifically weaving the argument in context of copyright protection, Shiffrin argues that the society has a commitment to freedom of speech and expression, and thus free and equal access to and use of expressive materials. According to the incentive argument then, it is only if unequal access to cultural materials "*produces a richer array of such materials that benefit everyone, particularly those whose use is more restricted, that restrictions on speech necessary for such incentives may be justified*".[41]

Drawing upon G.A. Cohen's arguments,[42] she observes that there is a need to distinguish between the different incentives and motives before the content creator. She stresses that the mere fact that an incentive is required for production does not necessarily mean that its provision is justified or that the conditions that make it requisite are justified. One needs to question why the incentive is required. Incentives to create in the form of IPR protection may be needed in order to make creators able to

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[41] *Id.* ¶ 56.

[42] G.A. Cohen, *The Pareto Argument for Inequality*, 12 SOC. PHIL. & POL'Y 160 (1995); G.A. Cohen, *Where the Action Is: On the Site of Distributive Justice*, 26 PHIL. & PUB. AFF. 3 (1997) as cited in Seana Valentine Shiffrin, *The Incentives Argument for Intellectual Property Protection*, 4 J.L. PHIL. & CULTURE 49, 56 (2009).

recoup their investment costs. If the incentive is required because the extra production is especially taxing or time-consuming, that would be one thing. However, if incentives are demanded by people as a way of 'ransoming' their talents, wherein they withhold their creations only in order to seek greater compensation, then these motives are not in line with the motives of a just person.

Motives as described above, other than seeking a just compensation for their investment, are inconsistent with the idea that inequalities are justified only if they are to the advantage of the worst off because in that situation, the inequality to access would be created for a selfish gain. The creator could be just as productive and accept an equal share of the surplus.

In the Rawlsian theory, it is accepted that social and natural talents as well as one's market position are arbitrary. Thus, one's original position is arbitrarily decided. Basing one's argument on that assumption, it will create a conflict if one justifies accrual of a private advantage by demanding premiums for some productive work merely because of the possession of their 'talent' which is purely coincidental and arbitrary. To use Shiffrin's words:

> " *.. a just citizen accepts that social and natural talents as well as one's market position are arbitrary from a moral point of view. One could not accept these tenets and also use one's happenstance command over socially useful talents for private advantage by demanding premiums for an*

> *especially productive work. This would be to treat one's talents and market position as morally relevant, which is inconsistent with believing they are morally arbitrary.*" [43]

Focusing next on the State responding to the demand for incentives for creation of intellectual product, she raises the question that if such incentive demands are inherently unjust, new questions of justice emerge about whether this response of State, amounts to acquiescing in, endorsing or encouraging injustice?

Thus, an analysis of these arguments suggests that merely asserting the incentive argument is not sufficient and there is a need to further inquire as to the reason for which the incentive is required and as to the motives of those who demand the incentive.

Further, it requires us to look for better ways, or equally good ways, of stimulating production without granting private property rights to authors and inventors.

IV. PERSONHOOD THEORIES

The personality/personhood theories are attributed to G.W. Hegel and there are different formulations of the same. The core idea underlying this theory is that "*an individual enjoys an exclusive moral claim to the acts and*

[43] Shiffrin, *supra* note 37, ¶ 56.

content of his or her personality".[44] One's personality is considered to be constituted of one's character traits, preferences, experiences, predispositions and knowledge. One has a rightful claim over the attributes of one's personality. Such a claim would extend to cover situations where expenditure of these personality traits leads to creation of a product. This theory is somewhat similar to the Lockean theory of ownership over one's bodies and its activities. Except instead of labour as the owned substrate that is mixed with an external thing in the traditional Lockean account, one's will or personality is seen to be mixed with or manifested in an external thing in personality theory.[45] In the words of Justin Hughes, the creation of intellectual content "*materializes*" the dimensions of personality.

If one looks at the rights accorded in the copyright regime in certain countries, not only do we have economic rights which secure to the author/creator rights such as of reproducing the copy of his work, allowing for adaptations, etc., which yield an economic benefit to him, but there has been an inclusion of 'moral' rights as well which include rights of paternity, right of disclosure, withdrawal and integrity. These rights assure the author that he shall be allowed the perpetual use of the title of author in connection to his work, and has a right to restrict the mutilation/destruction of the work which in anyway impairs the integrity of his work. These moral rights are justified because creative works are

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[44] Kenneth Einar Himma, *The Justification of Intellectual Property: Contemporary Philosophical Disputes*, 59 J. AM. SOC'Y. FOR INFO. SCI. & TECH. 1155 (2008).

[45] Michael A. Kanning, *A Philosophical Analysis of Intellectual Property: In Defense of Instrumentalism* (Mar. 21, 2012) (unpublished Graduate Theses and Dissertations, University of South Florida) (on file with Scholar Commons, University of South Florida).

understood to be an extension of one's personality. A piece of work is regarded as an integral part of creator's personality.

Immanuel Kant's account of this theory has also been significant. According to Kant, the words and thoughts of a person constitute an integral part of one's personality. Thus, an exclusive ownership of the same by the author is warranted.[46] Since intellectual property rights are seen as a medium through which the expression of an individual's personality is facilitated in the community, they can be regarded as moral rights. Personality theories seem to offer the best explanation for intellectual property practices surrounding literary and artistic work since it is seen as a natural extension and expression of one's self. However, they may not be suited to apply to all kinds of works. The following section discusses these difficulties with this theory.

A. OBJECTIONS AGAINST THE PERSONALITY THEORY

As discussed above, the personality theory is regarded to be particularly effective while justifying certain types of intellectual property, specifically literary, artistic, musical, or dramatic work. In such works, it is relatively easy to imagine one's personal attributes being reflected in the work and thus to see the work as an embodiment of the traits of the artist. But it is difficult to support with the same degree claims for justification of protection in relation to works such as industrial processes, computer

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[46] *See* IMMANUEL KANT, THE METAPHYSICS OF MORALS (1797); Immanuel Kant, *On the Wrongfulness of Unauthorized Publication of Books* in IMMANUEL KANT, PRACTICAL PHILOSOPHY 23 (Mary J. Gregor ed., 1996).

software etc., things which are not seen as direct expressions of individual 'will' or personality. So, the question arises that "*if personality is manifested in varying degrees in different objects, how do we know that an IP creation embodies more personality than another? Should more personality imply more protection of IP? What about those IP products which reflect little or no personality from their creators?*"[47]

Interesting questions come up in cases such as in relation to a work which an author has created which is about, say, the adventures/ biography of a famous person. Though copyright protection is accorded based on the concept of 'who clothes the idea into expression enjoys the copyright', the right would be difficult to be explained in such case on personhood theories. Some may argue that the personality of both the writer and the 'famous person' are embodied in the work. In such cases, theories based on labour would grant the right to the writer/author. On the other hand, proponents of personhood theories might prefer granting the right to the person whose life is portrayed in the work, since it is his personhood that is reflected in the work. Such arguments indicate that these theories are of limited help while attempting an understanding of the rationale behind all the features of the IPR regime.

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[47] Theo Papaioannou, *Human Gene Patents and the Question of Liberal Morality*: *Department of Development Policy and Practice*, 4 GENOMICS, SOC'Y., & POL'Y 64, 64-83 (2008) [*hereinafter* "**Theo Papaioannou**"].

V. NEW APPROACHES – GAME THEORETICAL EXPLANATION

Game theoretical explanations for intellectual property protection have also been offered in recent times.[48] The model utilises the classic 'prisoner's dilemma game'[49] to illustrate how without an IPR regime there would be sub-optimal results for all.

The game can be modelled as between two IP creators, A and B, each having two options, either to copy the intellectual creation of the other or not. The best situation for each player is that they get to copy the creation of the other while their own work is not copied. This is the best situation for the 'copier' and worst for the player who does not copy. The player who copies has a positional advantage. He has access to more content compared to the other player. This leaves him with more options of recouping research and development costs through selling, trading, or bartering with the other player. On the other hand, the non-copier does not enjoy these possibilities. Thus, this becomes the worst payoff for the non-copier. If both do not copy, each will avoid the worst outcome, as both will be left with the option of exchanging their content to recoup investment costs. This appears to be an 'okay' payoff. This is better than the position where the person does not copy while his work is copied by the other person. However, this is less rewarding than the 'best' option as

[48] This section presents the game theoretical model as developed by Adam D. Moore in his paper cited as MOORE, *supra* note 20.
[49] For an explanation of the concept, *see* MOORE, *supra* note 20.

discussed above, where one gets to copy while his own work is not copied by the other player.

A third situation arises if both players copy the work of each other. In such a situation, both have additional content. Thus, none is at a positional disadvantage. However, the possibility of exchange of content between them for money/barter is lost in this situation. So, this may be called as a 'bad' payoff.

If we summarise the three situations in terms of payoffs, the following conclusions emerge.

1. When both copy, the outcome is 'bad' for both the players.
2. When both don't copy, the outcome is 'okay' for both the players.
3. When one copies and the other does not, the outcome is 'best' for the copier and the 'worst' for the non-copier.

The following payoff matrix represents these three situations.

A ⬇ **B** ➡	**COPY**	**DON'T COPY**
COPY	Bad Bad	Best Worst
DON'T COPY	Worst Best	Okay Okay

Fig. 1 Prisoners' Dilemma Game (With No IP Protection Framework) [Source: Adam D. Moore, Intellectual Property and the Prisoner's Dilemma: A Game Theory Justification of Copyrights, Patents, and Trade Secrets, Fordham Intell. Prop. Media & Ent. L.J. 843 (2018).]

An analysis of the choices available to both, A and B shows that the dominant strategy in this game is of copying. If A analyses the options available to him, he will reason in the following manner:

When B doesn't copy, the best option available for A is to copy since it gives the best payoff as explained above. When B copies, A would not have the chance to trade off his research with B. So, the most he can do to slightly better his condition is to himself copy, since that will leave him more content. Similarly, B would reason in an identical way, and thus for both the players copying is the dominant strategy.

The above model can serve to be a justification for the need to prevent copying. Since both the content creators are aware of the possible scenario involved, neither would find it prudent to engage in creative pursuits if they are not ensured that their work would be protected from being copied. Whatever costs A would have incurred have been avoided by B when he copies. Thus, B has a comparative advantage over A and can outsell him by offering the same good at a lower price. Further, complications to the model can be added if we attempt a more realistic experiment where the research and development costs of both the creators are not identical. In such a situation say if A has incurred higher costs, then

B by copying it, has a significant advantage. B by selling off the content created by A, which has higher investment costs, could recoup investment costs incurred in development of his product sooner than A who copies B's content, whose development cost is merely a fraction of that of A's content. After B has recouped his investment and made good enough profit, he may in fact offer his content for free which would completely destroy the income capacity for A. The above game captures the situation involving two content creators. A situation may be imagined where there are two actors, one a content creator and the other a content consumer. Here the content consumer has nothing to lose since he isn't incurring any research and development cost, while the content creator has no incentive to engage in research if he is not assured that his content would not be copied.

Adam Moore, in his work, remodels the same situation with a regime for IPR protection in order to explain how the changed payoffs will affect the content creation in the society.[50] In this model, consider A and B again playing a prisoner's dilemma game. Both have the same option of copying other's work and are determining their best possible choice. In this new game, the wilful infringement of a copyright results in a $150,000 penalty and up to five years in jail. With these sanctions, the payoffs change, and the dominant strategy becomes to not copy.

[50] *Id.* ¶ 863.

A ↓ B →	**COPY**	**DON'T COPY**
COPY	150K Fine 150K Fine	150 K Fine Bad
DON'T COPY	Bad 150K Fine	Okay Okay

Fig. 2 Prisoners' Dilemma Game (With IP Protection Framework) [Source: Adam D. Moore, Intellectual Property and the Prisoner's Dilemma: A Game Theory Justification of Copyrights, Patents, and Trade Secrets, Fordham Intell. Prop. Media & Ent. L.J. 863 (2018).]

Thus, by putting IPR regime in place, one can avoid the possibility of sub-optimal results. However, the question arises as to why copyrights, patents and trade secrets, and not some other alternative. What is needed is any efficient mechanism which changes the payoffs, and it is not the case that the same can be performed only by the existing institutions of copyright, patent, and trade secret. These institutions may be sufficient to perform this function, but they clearly are not the only means available to ensure collective optimality. Nothing necessitates the systems to exist in their present form. In order to incentivize creation of intellectual work and to dissuade copying, other legal/societal instruments can also be explored. However, it would be impractical to demand a complete repeal of the system. There could be tweaks suggested in the system but a complete

shift would imply massive costs, and to advocate such a strategy would be rather imprudent.

VI. CONTEMPORISING THE JUSTIFICATION THEORIES

An analysis of some of the popular justification theories makes it amply clear that the prescriptive powers of all these is severely limited. None perhaps can provide for an explanation for all features of our existing IPR regimes. This has given rise to a new kind of approach which is based on economic pragmatism, wherein as opposed to any 'grand theory' which provides a foundation for systems of intellectual property, the systems are seen as mechanisms protecting certain economic interests. Thus, there appears to be a divide between the 'theorist' and the 'economic pragmatist'. "*Pragmatic theories do not require any underlying principle guiding or justifying it, the agent does what works without being limited by theory or principle. To be economically pragmatic would be to do what works in an economic sense*".[51] There is a debate as to the desirability of one approach over the other but such an analysis is beyond the scope of this paper.[52]

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[51] THEORY, PRIVILEGE, AND PRAGMATISM, *supra* note 2, ¶ 193.

[52] For a detailed debate, *see* THEORY, PRIVILEGE, AND PRAGMATISM, *supra* note 2, ¶ 193; wherein Moore argues that "*pragmatic considerations, doing what works economically, in terms of wealth enhancement, for everyone affected-will only be appropriate when theory gives no guidance and advocates… Institutions of intellectual property ruled by economic privilege and group pragmatism cannot be embraced with conviction. It has been argued that legal pragmatism, whether radical or moderate, is unstable. While privilege and group economic pragmatism have shaped systems of copyright, patent, and trade secret this need not be so and we can revise our institutions of intellectual property to eliminate or weaken such influences*".

What this work attempts at pointing out is that revisiting the theoretical and jurisprudential underpinnings from time to time, is important in order to assess if the existing regime and the new developments in the regime, such as arguments for protection of traditional knowledge, gene patenting, etc., are deserving of our moral and political allegiance.

For instance, the claims of protection of traditional knowledge can hardly be covered by justification under the labour theory since traditional knowledge cannot be seen as the result of individual labour. Since labour theory is based on the premise of reward to the last person who laboured on the work, it would necessarily eliminate the traditional community from any reward. Similarly, incentive theory too would offer little help. However, "*traditional knowledge protection could possibly benefit from the personality theory since the knowledge is so closely connected to the cultural and spiritual life of the holders of the traditional knowledge*".[53]

Further, if one considers the case of gene patenting, it is argued that DNA sequences are not something that can be produced by human labour, it is a natural phenomenon. Thus, the naturally existing DNA sequences cannot be privately owned. This raises questions as to the moral justification for patents of diagnostic tests and research tools. Moreover, the question of satisfying the Lockean proviso seems absurd in such a case. Personality theories too fail to explain it since these are natural phenomena

[53] M. Du Bois, *Justificatory Theories for Intellectual Property Viewed through the Constitutional Prism*, 21 POTCHEFSTROOM ELEC. L. J. 2 (2018).

and not artificial creations and rather than reflecting one's personality, they depict interactions between biological and environmental factors. There are doubts as to the feasibility of application of utility theory as well in this regard.[54]

The above examples only go on to show that our existing framework of theories may not prove to be adequate in dealing with contemporary challenges. However, that must not automatically imply that one must discard these theories as merely academic. As Moore argues, "*institutions of intellectual property, and legal systems in general, must be grounded in and constrained by our best theories*".[55]

These theories at times can be effective starting points in ascertaining the relative value of an intellectual property right wherein conflicting interests such as fundamental right such as the right to health, education or freedom of expression are involved. Attempts at balancing these interests devoid of a theoretical understanding would have a weak foundation, and thus it is needed that one engages with the different justification theories while dealing with modern-day developments.

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[54] *See* THEO PAPAIOANNOU, *supra* note 47.
[55] THEORY, PRIVILEGE, AND PRAGMATISM, *supra* note 2, ¶ 216.

Akilesh Menezes & Priyanshi Vakharia, *To Practice What is Preached: Constitutional Protection of Religious Practices vis-à-vis Reformative Secularism,* 7(1) NLUJ Law Review 211 (2020)

TO PRACTICE WHAT IS PREACHED: CONSTITUTIONAL PROTECTION OF RELIGIOUS PRACTICES VIS-À-VIS REFORMATIVE SECULARISM

Akilesh Menezes[*] *& Priyanshi Vakharia*[+]

ABSTRACT

In light of India's commitment to reformative secularism, both implicitly and explicitly, the essential religious practices test evolved by the Supreme Court, is problematic. It allows the State unfettered control over any kind of practice that courts consider to not be 'essential'. In application, 'essentiality' of a practice to a religion is decided inconsistently, and total State control over 'non-essential' practices is allowed. This article suggests an alternative, juxtaposing a two-stage deferential test that ensures a wider constitutional protection to religion while allowing for social reform as envisioned in Indian secular philosophy, compared to the current essential religious practices test. The alternative combines an inclusive constitutional protection with a substantive second-stage enquiry on the State restriction, along the lines of ones used to test infringement of other fundamental rights. Adopting this alternative alleviates many of the legal and practical difficulties in the current religious freedom regime. By analysing the essential religious practice test

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through the lens of secularism, and suggesting an alternative which is not only grounded in an international context, but also tailored to suit the peculiarities of Indian society, the authors have attempted to delineate the issues which arise from the ambiguity of the essential religious practices test.

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I. INTRODUCTION

Religious freedom in India has always been a controversial matter, despite the introduction of 'secularism'. Secularism was read into the Constitution of India [*hereinafter* referred to as "**Constitution**"] long before its insertion into the Preamble by the Constitution (Forty Second Amendment) Act, 1976.[1] The principles of secularism had already been envisaged through Articles 25 and 26 of the Constitution.[2] Article 25 protects an individual's freedom of religion and conscience, subject to public order, morality, health, and other people's fundamental rights. Article 26 extends this by protecting the rights of religious denominations to manage their own affairs, subject to public order, morality, and health. By guaranteeing individuals' freedom of conscience and religion,[3] and protecting the rights of religious denominations,[4] the Constitution showed a secular philosophy from its very inception. General attitudes indicated that the Constitution was no less committed to secularism and the explicit addition of the word 'secularism' by way of the Constitution (Forty Second Amendment) Act, 1976, did not make it more secular.[5] Nevertheless, explicit addition of 'secularism' into the Constitution was further

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[1] INDIA CONST., preamble, *amended by* The Constitution (Forty-Second Amendment) Act, 1976.
[2] *Id.* art. 25, 26.
[3] *Id.* art. 25.
[4] *Id.* art. 26.
[5] S.P. SATHE, SECULARISM: LAW AND THE CONSTITUTION OF INDIA WITH SPECIAL REFERENCE TO JUDICIAL ACTIVISM (1999) *reprinted in* SELECTED WORKS OF S.P. SATHE VOLUME 3: SOCIAL JUSTICE AND LEGAL TRANSFORMATION 117, 126 (Sathya Narayan ed., 2014).

strengthened by its inclusion as part of the Constitution's 'basic structure', inhibiting the State's power to act contrary to its spirit.[6]

The theory of secularism in India is rather unique. Although the practice and propagation of religion were initially sought to remain beyond the pale of the State, in a postcolonial, post-Independence India, secularism was not a concept to be copy-pasted from the annals of its Western tradition. Indian secularism differed because it had to account for the peculiar socio-religious culture of its people, as well as the intricacies of the diverse religions India sustained. In essence, Indian secularism was to comprise three aspects:

(i) As a non-discriminatory state, religion was to play no role in the relationship between the State and the individual. As such, the State was not to determine the rights of individuals on the basis of their religion;

(ii) The non-interventionist nature of the State was intended to allocate equal religious freedom to all by ensuring that the State played no role between an individual and his/her religion;

(iii) State intervention was to redefine the scope of religion, whereas non-intervention on behalf of the State was to make religious organisation free from State intervention.[7]

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[6] S. R. Bommai v. Union of India, (1994) 3 SCC 1 (India), ¶¶ 77-79.

[7] S.P. SATHE, SECULARISM, LAW AND THE CONSTITUTION OF INDIA (1991), *reprinted in* SELECTED WORKS OF S.P. SATHE VOLUME 3: SOCIAL JUSTICE AND LEGAL TRANSFORMATION 35, 39-40 (Sathya Narayan ed., 2014) (*hereinafter* "**SATHE, 1991**").

State intervention was deemed necessary because religions covered within their fold the entire social behaviour of the Indian people, as a result of which secularism could only exist when some line was drawn between what was religious and what was temporal.[8] Such intervention was not merely negative in nature. For instance, Article 290A of the Constitution envisaged positive State intervention for the protection of religion by providing for a sum to be paid out of the Consolidated Funds of the States of Kerala and Tamil Nadu towards the maintenance of Hindu temples and shrines in their respective states, as transferred from the princely state of Travancore-Cochin.[9]

Contemporaneously, the Supreme Court of India developed another crucial doctrine which determined the relationship between religion and the Constitution, and if a practice is essential to a particular religion, it cannot be regulated or restricted by the State. This proposition formed the root of what later evolved into the 'essential religious practice test'. This left two approaches open to the courts – the *first* was where the religion itself determined what was or was not essential practice as per their religious texts and manuscripts. The *second* was for the courts to play social reformer and distinguish the religious aspects of life in India from the temporal. The Supreme Court formulated the essential religious practices test in the case of *The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* [*hereinafter* referred to as

[8] *Id.* ¶ 38.
[9] INDIA CONST., art. 290A.

"***Shirur Mutt***"],[10] noting that freedom of religion in the Constitution was not confined to religious beliefs only, rather it is extended to religious practices and subjected to the restrictions laid down in the Constitution.[11]

The Supreme Court has not definitively adopted one of the two approaches, often fluctuating between the two. Several cases give the religion the responsibility of determining essentiality, while others vest that responsibility with the courts themselves. The issue that arises with the former approach is the possibility of religions unreasonably labelling every activity as 'essential', leaving little scope for any State-sanctioned reform. This furthers divisive politics organised around religious lines, as fragmented groups promote political action backed by religious agendas. With the second approach, there exists the concern that courts might not be equipped to adjudicate social reform in religious contexts as matters of religion in India often veer towards policy-related concerns. This has led to significant confusion with the essential religious practices test being applied differently in different situations. In the context of reformative secularism and its importance in the Constitution, it is prudent to analyse the origins of the test through the lens of secularism.

The objective of this paper is to propose an alternative to the essential religious practices test which juxtaposes wider constitutional protection to religion with the reformative secularism envisioned in the

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[10] The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Shri Shirur Mutt, (1954) SCR 1005 (India), ¶ 20.
[11] *Id.*

Constitution. The essential religious practices test came up in 1954[12] and has continued to evolve over the decades. Despite its ambiguity, the test relies on a court-made determination of essentiality. The authors submit that the test is problematic for several reasons, such as, it is judge-centric, it denies individuals/groups self-determination, and it assigns the courts the rather thankless duty of defining what does or does not form an essential religious practice. As a result, an alternative to the test becomes necessary. By adopting a deferential approach, over a definitional one, the horizons of religious freedom are considerably widened. This is fundamental to the reformative nature of secularism in India. Further, when combined with the legitimate state interest test and the proportionality test, the alternative to the essential religious practices test is found to be already inhered in the Constitution.

In this paper, Part II analyses the considerable jurisprudence in India which makes up the essential religious practices test and highlights inconsistencies across cases. Part III begins with critiquing the concept of 'essential' religious practices and goes on to provide an alternative to the essential religious practices test keeping in mind the peculiarities of the Indian secularism. Part IV concludes by highlighting the necessity of introducing an alternative to the essential religious practices in India.

[12] *Id.*

II. ESSENTIAL RELIGIOUS PRACTICES IN INDIA

Articles 25 and 26 of the Constitution, in outlining the freedom of religion, inherently embody the concept of secularism. However, they lay out an ambiguous framework for the exercise of religious freedom. For instance, they do not indicate the extent of judicial powers in determining social welfare or reform, or the extent to which legislations may override religious freedoms. Similarly, there is little to suggest what happens in cases where a sect is not 'Hindu' and is therefore not subject to the social reform exception under Article 25(2)(b), or where a particular temple claims not to have 'public character'.[13] Indian jurisprudence on religious freedom finds itself largely in one of two camps: *first*, cases which involve State intervention in the management of temples, dargahs, gurudwaras and mutts, and *second*, cases which involve practices or relationships between the members of religious communities.[14] Creating a distinction between the religious and the secular was the approach of the courts in the first set, while the essential religious practices test was evolved for the second.[15] Yet the essential religious practices test has been significantly complicated over the years with bits and pieces of the test coming together much after the test was first crystallised in 1954.

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[13] Gautam Bhatia, *Individual, Community, and State: Mapping the terrain of religious freedom under the Indian Constitution*, IND. CONST. L. & PHIL. (Feb. 7, 2016), https://indconlawphil.wordpress.com/2016/02/07/individual-community-and-state-mapping-the-terrain-of-religious-freedom-under-the-indian-constitution/.

[14] *Id.*

[15] *Id.*

A. THE ESSENTIAL RELIGIOUS PRACTICES TEST: THE ORIGINAL VERSION

The Supreme Court first crystallised the essential religious practices test in *Shirur Mutt,* while considering a challenge to the Madras Hindu Religious and Charitable Endowments Act, 1951, which empowered a statutory commissioner to frame and settle a scheme if they had a reason to believe that the religious institution was mismanaging funds. The Petitioner, a superior of the mutt, argued that this interfered with his right to manage the affairs of his monastery under Article 26(b). Justice Mukherjea in that regard questioned what exactly matters of religion entailed.[16] The Supreme Court noted that the guarantee under the Constitution protects not only freedom of religious opinion, but also all such acts done in pursuance of such religion, as was indicated in Article 25.[17] The Court upheld that the freedom of religion guaranteed by the Constitution applies to freedom of both religious belief and practice, and while distinguishing between the religious and the secular, the Court has to look to the religion itself for the analysis of what constituted 'essential' aspects of religion.[18]

B. THE COURT DETERMINES ESSENTIALITY…OR DOES IT?

The next application of the essential religious practices test explores the aspect of essentiality. This meant that the Supreme Court could determine what constitute 'essential' religious practices, rather than leaving

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[16] The Commissioner, Hindu Religious Endowments, Madras v. Shri Lakshmindar Thirtha Swamiyar of Shri Shirur Mutt, (1954) SCR 1005 (India).
[17] *Id.*
[18] *Id.*

this to the religion in question, as was originally envisioned in *Shirur Mutt*. In *Sri Venkataramana Devaru v. State of Mysore*,[19] the Supreme Court itself determined whether the practice of religious exclusion of Dalits from a denominational temple founded for the Gowda Saraswath Brahmins was essential instead of permitting the religious denomination to do so. Effectively, the Court established that although it would take into account the views of a religious community in determining essentiality, such views would not be determinative. This established a precedent which was followed for decades.

The predicament with the Supreme Court deciding what is 'religious' or 'essential' is that it impinges upon the subjectivity and self-determination of a religious community. The Court must only determine whether a religious practice or belief can be restrained under the Constitution.[20] In *Durgah Committee, Ajmer v. Syed Hussain Ali*,[21] while hearing a challenge to the Durgah Khawaja Saheb Act, 1955, which barred the *Khadims* of the *Soofi Chishtia* religious order from managing the *Durgah*, the Court observed that when religious practices arose from superstitious beliefs, they did not merit the protection of Article 26, as they were not essential and integral to the religion itself.[22] This shifted the focus of the Supreme Court from analysing religious scriptures to scrutinizing the practice to see if it was based on some superstition. This has been observed

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[19] Sri Venkataramana Devaru v. State of Mysore, (1958) SCR 895 (India), ¶¶ 17-19.
[20] Jaclyn L. Neo, *Definitional imbroglios: A critique of the definition of religion and essential practice tests in religious freedom adjudication,*16 INT'L. J. CONST. L.574, 576 (2018) (*hereinafter* "**Neo**").
[21] Durgah Committee, Ajmer v. Syed Hussain Ali, (1962) 1 SCR 383 (India), ¶ 33.
[22] *Id.*

to be antonymous to *Shrirur Mutt,* and substitutes the view of the Court for that of the denomination on a matter of religion.[23] After all, 'superstition' to one section may well be a matter of fundamental religious belief to another.[24]

The Supreme Court categorically opined in *Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan & Ors.*[25] that the question of essentiality would have to be determined by the Court itself. This effectively did away with a religion's ability to determine essentiality. The Court justified this by reasoning that if conflicting evidences were produced for competing practices by rival contentions between different sections of the same religious community, the Court would not be able to resolve the dispute by blindly applying the formula of communities determining their own integral practices.[26] However, given that the rights under Article 25 & 26 are themselves subject to Part III of the Constitution,[27] even if a community was allowed to define its own practices, any competing interests between it and another sect or individual could be balanced against each other, following the principles laid down in the text of the Constitution itself.[28]

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[23] H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA 1269 (Universal Law Publishing, 4th ed., 1993) (*hereinafter* "**Seervai**").
[24] *Id.*
[25] Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan and Ors., AIR 1963 SC 1638 (India), ¶ 57.
[26] *Id.*
[27] *See id* ¶ 55; INDIA CONST., art. 25, 26.
[28] SEERVAI, *supra* note 23.

In *Indian Young Lawyers Association & Ors. v. The State of Kerala & Ors.* [*hereinafter* referred to as "***Sabarimala***"][29] the essential religious practices test was used to determine if barring the entry of women into the Sabarimala temple dedicated to *Lord Ayappa* was integral to the practice of the religion. The Supreme Court suggested that the essential religious practices test instilled certain limitations in order to balance competing rights and interests.[30] Further, in her dissent, Justice Malhotra returned to the initial exposition of the essential religious practices doctrine in *Shirur Mutt*, finding that the determination of essentiality of the religious practice of excluding women must be left to the religious community itself.[31] The Court has kept review petitions on the matter pending until a larger constitutional bench determines the exact scope of rights under Articles 25 and 26 and how they exist within the essential religious practices doctrine.[32]

C. OPTIONALITY: AN ADDITION TO THE ESSENTIAL RELIGIOUS PRACTICES TEST

The Supreme Court included optionality as a relevant factor in *Hanif Quareshi v. State of Bihar*,[33] while deciding whether laws banning cow slaughter infringed upon the religious freedoms of certain Muslim devotees to offer sacrifice of a cow during the festival of *Bakr-Id*. The Court observed that since the scriptures called for either the sacrifice of a goat for one

[29] Indian Young Lawyers Association v. State of Kerala, (2019) 11 SCC 1 (India), ¶ 7, *per* Dipak Misra, CJI.
[30] *Id.* ¶ 49, *per* D.Y. Chandrachud, J.
[31] *Id.* ¶ 10.13, *per* Indu Malhotra, J.
[32] Kantaru Rajeevaru v. Indian Young Lawyers Association and Ors., (2020) 3 SCC 52 (India).
[33] Hanif Quareshi v. State of Bihar, (1959) 1 SCR 629 (India), ¶¶ 11, 13.

person, or a camel or cow for seven persons, it was not obligatory for a Muslim to sacrifice a cow alone.[34] As a result, the claim for essentiality of the religious practice was denied as the Court denied the obligatory nature of the practice itself.[35] Similarly, in *Dr. M. Ismail Faruqui v. Union of India* [*hereinafter* referred to as "***Faruqui***"],[36] the Supreme Court held that a mosque was not an essential aspect of religious aspect in Islam, as the *namaz* or prayer could be offered from anywhere, and not necessarily from a mosque. The Court held that while prayer in itself was an essential religious practice, its offering at every location could not be considered essential unless the place in itself held special significance for that religion.[37] This view of optionality, however, is unsustainable in a religiously pluralistic society like India. A large number of religious practices across faiths would be precluded from constitutional protection if this formula were to be universally applied. In fact, where the reasoning of the Court were to be turned on its head, a Hindu's right to visit a temple during *Diwali*, or the reverence towards the cow, is also optional, and thus is not subject to constitutional protection.[38]

D. DEFINITIONAL COMPLEXITIES IN THE ESSENTIAL RELIGIOUS PRACTICES TEST

Despite the broadening of the essential religious practices test, definitional complexities in its application soon crept in. In *Sardar Syedna*

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[34] *Id.* ¶ 13.
[35] *Id.*
[36] Dr. M. Ismail Faruqui v. Union of India, (1994) 6 SCC 360 (India), ¶ 418.
[37] *Id.*
[38] A. CHANDRACHUD, REPUBLIC OF RELIGION: THE RISE AND FALL OF COLONIAL SECULARISM 21 (Penguin Viking, 2020) (*hereinafter* "**CHANDRACHUD**").

Taher Saifuddin Saheb v. The State of Bombay,[39] the Supreme Court, while considering if the practice of excommunication could be prohibited by legislation, held that barring excommunication on religious grounds could not be considered to promote social welfare and reform, and legislation for the same did not fall under Article 25(2)(b) as it could not be a measure of social welfare and reform. Quite paradoxically, the Supreme Court found that just as Article 25(2) did not encompass essential religious practices, the saving provision of Article 25(2)(b) was not intended to cover the basic essentials of the creed of a religion protected by Article 25(1).[40]

This rendered the social reform exception in the first part of Article 25(2)(b) completely redundant. If only essential religious practices were constitutionally protected, then all other non-essential practices could be freely restricted by the State, regardless of their nature or the reformist intention of the State. With this ruling, the alternative became just as extreme. Once a practice was determined an essential one to a religion, the State would no longer be empowered to socially reform it. The classifications of Article 25(2) would serve no purpose, and it could not possibly have been the intention of the Drafting Committee to include a purposeless clause in the Constitution. This sort of variance in the interpretation of Article 25 creates difficulty in understanding not only

[39] Sardar Syedna Taher Saifuddin Saheb v. The State of Bombay, AIR 1962 SC 853 (India), ¶¶ 60-61.
[40] *Id.* ¶ 61.

when a religious practice has constitutional protection, but also when the State can restrict religious practices.

E. RECENCY: A DISPUTED ADDITION TO THE ESSENTIAL RELIGIOUS PRACTICES TEST

The lack of a clear, holistic definition of an essential religious practice and what it might possibly encompass, has led to a fluctuating standard in determining essentiality of a religious practice. Until 1984, the Supreme Court had not considered recency of a religious practice to be a criterion for essentiality. However, in *Acharya Jagdishwaranand Avadhuta and Ors. v. Comm. Of Police Calcutta and Ors.* [*hereinafter* referred to as "***Avadhuta***"],[41] while holding that the *Tandava* dance could not be considered an essential religious practice for the *Ananda Margis,* the Court reasoned that it was only introduced as a religious rite in 1966, whereas the *Ananda Margis* order itself was established in 1955. Thus, the Court introduced the recency of a religious practice as an aspect of the essential religious practices test. When the case came before the Supreme Court again, Justice Lakshmanan dissented with the inclusion of recency in the fold of the essential religious practices test, by declaring that if such practices have been accepted by the followers of a religion as a method of achieving their spiritual upliftment, the mere fact that the practice was recently introduced, could not make it any less a matter of religion.[42]

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[41] Acharya Jagdishwaranand Avadhuta and Ors. v. Comm of Police Calcutta and Ors., (1983) 4 SCC 522 (India), ¶ 533.

[42] The Commr. of Police and Ors. v. Acharya Jagdishwaranand Avadutha and Anr., (2004) 12 SCC 770 (India), ¶ 793.

The opacity of the essential religious practices test has led to contradictory strains of legal thought within Indian jurisprudence. In *Shayara Bano v. Union of India,* [*hereinafter* referred to as "***Shayara Bano***"],[43] the Supreme Court, by a narrow 3:2 split, found the practice of *triple talaq* to be legally invalid. Justice Kurien Joseph, in his majority opinion, has noted that the freedom of religion in India is absolute in nature, except to the extent it was restricted by Article 25. However, he did not find *triple talaq* to be a practice integral to the religion, stating that, "*merely because a practice has continued for long, that by itself cannot make it valid if it has been expressly declared to be impermissible*".[44] This runs somewhat counter to the rationale of the Court in *Avadhutha*, wherein a religious practice was denied protection under Article 25 because it was too recent.[45] In *Shayara Bano*, the time period for which a practice ran added no weight to the final determination of its essentiality.

Adopting the same test as in *Avadhuta*, Justice Nariman found that the fundamental nature of the Islamic religion did not change through the singular practice of *triple talaq*.[46] He referred to the degrees of obedience attributed to human action in the Islamic faith to determine that the practice of *triple talaq* fell at best into the third degree of *jaiz* or *mubah* (permissible actions to which the religion is indifferent), or more squarely into the fourth

[43] Shayara Bano v. Union of India, (2017) 9 SCC 1 (India).
[44] *Id.* ¶ 53.
[45] Acharya Jagdishwaranand Avadhuta and Ors. v. Comm of Police Calcutta and Ors., (1983) 4 SCC 522 (India).
[46] Shayara Bano v. Union of India, (2017) 9 SCC 1 (India), ¶ 69.

degree of *makruh* (actions reprobated as unworthy).[47] As a result, the practice formed no part of Article 25(1). It is pertinent to note that while observing this, reference was made only to Mulla's Principles of Mahomedan Law by Hidayatullah, J., a secondary source which is legal, rather than sociological, in nature. The usage of secondary sources is considered to be problematic, especially when this selective use of sources overrides evidence of a particular practice having a strong presence locally.[48]

With Justices Khehar and Nazeer's dissent, there comes another predilection. Having upheld *triple talaq* to be an essential religious practice, Chief Justice Khehar elevated personal law to the stature of a fundamental right.[49] This is problematic because Article 25 protects an individual's right to religion, not the institution of religion in itself. Chief Justice Khehar observed that *triple talaq* was essential, simply because it was sanctioned by the Muslim faith.[50] This was vastly different from all previous applications of the test, which required the religion to have mandated the practice under consideration and not to have simply sanctioned it.[51] He also recorded an observation that in various judgments of High Courts, the position regarding irrevocable *talaq* was affirmed.[52] He further observed that each of the judges who authored the judgments was in fact a *Sunni* Muslim of the *Hanafi* school, and their understanding of their own religion could not be

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[47] *Id.*
[48] Neo, *supra* note 20.
[49] Shayara Bano v. Union of India, (2017) 9 SCC 1 (India), ¶¶ 250-251.
[50] *Id.* ¶ 296.
[51] Acharya Jagdishwaranand Avadhuta and Ors. v. Comm of Police Calcutta and Ors., (1983) 4 SCC 522 (India); Shayara Bano v. Union of India, (2017) 9 SCC 1 (India).
[52] Shayara Bano v. Union of India, (2017) 9 SCC 1 (India), ¶ 241.

considered an outsider's view.[53] Although he disclaimed the same as inconsequential and as never forming a relevant consideration, it is interesting that he nevertheless chose to record such an observation. Such a reading of the law (even as a dissenting opinion) indicates how flexible the essential practices test really is. Depending on the sort of order that a judge may wish to pass, they could rely upon any kind of sources to hold that the practice is either essential or non-essential, while completely disregarding the submissions put forth by the religions themselves.

Despite the path the essential religious practices test has traversed over the years, perhaps its' time is up. Justice Chandrachud in his concurring opinion, vocalized the need for a test better suited than the essential religious practices test. He observed that the Court lacked both the legitimacy and the competence to decide the essentiality of a religious practice, and that in doing so, it imposed an external point of view which was inconsistent with the autonomy of faith and belief as envisioned by the Constitution.[54]

III. ALTERNATIVES TO RELIGIOUS FREEDOM ADJUDICATION

A. ISSUES WITH THE ESSENTIAL RELIGIOUS PRACTICES TEST AS A 'DEFINITIONAL TEST'.

The essential religious practices test is pernicious for several reasons, some of which its past application already demonstrates. However,

[53] *Id.* ¶ 129.
[54] *Id.* ¶ 110, *per* D.Y. Chandrachud, J.

the larger issue lies with it being in variation of the traditional 'definitional' test. The essential religious practices test defines the scope of religion and decides which religious practices are to be protected.[55] Constitutional courts, such as the Supreme Court of India, have to contextualise the test in the pluralistic society of their country, to create a workable legal definition. Such a definition is required to be sufficiently comprehensive, provide for an international interpretative diversity, include local particularities, avoid dominant socio-cultural attitudes and include socio-cultural attitudes towards minority religions.[56] Given the complexity of these parameters, courts often lack the necessary qualities to make such a determination, as it requires a high level of dynamic theological and sociological understanding.

Moreover, even in situations where courts do formulate a workable definition, it denies religious individuals or groups self-definition.[57] Definitional tests and their variants, heavily influence the dynamics between religious majorities and minorities in pluralistic societies. Definitional tests place the burden of proving the essentiality of their respective religious practices on the individual or groups themselves. There is a certain communal strain created when courts use tests like the essential religious practices test to deny religious practices of a religious minority constitutional protection, or to impose theological explanations on their

[55] Neo, *supra* note 20, ¶ 576.
[56] *Id.* ¶ 579.
[57] *Id.* ¶ 588.

beliefs or practice, more so, when the judges themselves may not belong to such minority.[58]

Definitional tests are practiced in several South Asian legal systems and are not particular to India alone,[59] although the essential religious practices test has been uniquely developed to suit the peculiarities of Indian society and to accommodate the reformist ideology of Indian secularism. The Federal Court of Malaysia reviewed the Indian essential religious practices test in *Meor Atiqulrahman bin Ishak v. Fatimah bte Sihi*[60] and pointed out that it led to one of two extreme outcomes – if a practice is found to be integral to a religion, any restriction or limitation, even regulatory, can be deemed unconstitutional, but if the practice is not found to be integral, it can be prohibited completely.

B. THE ALTERNATIVE TO THE ESSENTIAL RELIGIOUS PRACTICES TEST

The essential religious practices test is a constitutional complication. As seen in Part I of this paper, the Constitution of India already provides for a constitutional mechanism to protect religious freedoms. This paper advances the notion that in addition to those mechanisms, the Constitution also inherently provides for the adjudication of questions of religious

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[58] *Id.* ¶ 589.

[59] *See* WEN-CHEN CHANG ET AL., JIUNN-RONG YEH, CONSTITUTIONALISM IN ASIA: CASES AND MATERIALS 831 (Hart Publishing, 1st ed., 2014) (*hereinafter* "**CHANG ET AL**").

[60] Meor Atiqulrahman bin Ishak v. Fatimah bte Sihi, [2006] 4 MLJ 605 (Malaysia); *see also* CHANG ET AL., *supra* note 59, ¶ 831.

freedom, to the effect that the essential religious practices test is rendered unnecessary.

Indeed, in the same judgment where the Federal Court of Malaysia raised issue with the essential religious practices test, a broader, overarching test for religious freedoms was used which depends upon existence rather than essentiality.[61] It was observed that the essentiality of a religious practice is only one factor which affects religious freedom. After establishing that the practice was indeed one of the religion, further considerations are also required to looked into, such as the seriousness of the problem created, the extent of the prohibition of religious freedom sought, and the circumstances under which the said prohibition was made.[62] Similarly, the Supreme Court of Japan, in *Saiko Saibansho*, suggested using a set of well-defined holistic factors, not only limited to the external aspects of religious procedure, but also including factors like place of the activity, whether the average person viewed it as a religious act, the intent, purpose, and degree of religious consciousness, and its effects on the average person, to adjudicate claims of religious freedom.[63]

Professor Jaclyn L. Neo proposed a two-stage deferential alternative to the definitional essential religious practices test, which combined an inclusive definitional test based on self-definition and a substantive second-stage enquiry, which includes a test of determining

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[61] *Id.*
[62] *Id.*
[63] Saiko Saibansho [Sup. Ct.] July 13, 1977, Hei 31 no.4, [MINSHU] 533 (Japan).

whether it is based on balancing, proportionality type analysis, or a compelling interest requirement.[64] This falls more in line with what the Supreme Court of India envisioned in *Shirur Mutt,* where religious communities were afforded the right of determining what was or wasn't essential to them. Self-definition, in Professor Neo's alternative, allows religions to use a certain degree of subjectivity in protecting their traditions and practices, while still allowing the courts to check their motives and balance against competing interests, as compared to the current test, where a religious practice may be denied protection from the very outset.

The two-stage test, therefore, acts simply like other tests of constitutionality against individual rights. At the first stage, the court presumes that a group's self-definition of their religious practice is protected unless there is a compelling reason not to do so.[65] At the second stage, the court balances a person's right to religious freedom against a competing state or public interest, by using a legitimate aim and proportionality analysis.[66]

i. Self-Definition of What is 'Essential'

In the first limb of the test, the court accepts a group's self-definition. Of course, the power to self-define cannot be unlimited, as that would create a potential for abuse. Therefore, the court should have the leeway to deny a self-definition if there is a compelling reason to do so. The

[64] Neo, *supra* note 29, ¶ 592-93.
[65] *Id.* ¶ 591.
[66] *Id.*

compelling reason must not be rooted in the actual nature of the practice itself, but instead in the petitioner's *bona fides*. This allows the courts to prevent abuse of the fundamental right to religious freedom, while still distancing themselves from the substance of the religious practice. Reasons that may be compelling enough to deny self-definition would include insincerity of the petitioner, fraud or ulterior motive.[67]

Professor Neo's reliance on the sincerity of religious belief, as a check on self-definition, has also been the view of the European Court of Human Rights [*hereinafter* referred to as "**European Court**"] in several cases dealing with religious freedoms. The European Court, instead of dealing with essentiality or nature of the practice, simply focused on the sincerity of the individual applicant before them.[68] This sincerity of religious belief can be questioned in cases where applicants seemed to cite religious belief simply to earn some benefit or the Court refused to acknowledge the sincerity of such alleged beliefs.[69] For instance, the European Court, in *Kosteski v. The Former Yugoslav Republic of Macedonia*,[70] found that the Applicant had merely converted to Islam in order to claim extra religious holidays, when in fact he ignored the basic tenets of Islam and always celebrated Christian holidays instead. The usage of the same in India would strengthen the courts' ability to check the *locus standi* of individual petitioners claiming violations of their religious freedoms.

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[67] *Id.*
[68] Skugar and Ors. v. Russia, App. no. 40010/04, Eur. Ct. H.R. (2009).
[69] *See* Kosteski v. the former Yugoslav Republic of Macedonia, App. no. 55170/00, Eur. Ct. H.R. (2000).
[70] *Id.*

The authors further argue that the usage of fraud or ulterior motive as a check changes the approach of the court while assessing whether an individual has a genuine claim under Article 25. Rather than undertaking a theological dive, wherein the court has the arduous task of assessing the tenets of the religion, historical and cultural contexts, and customs and traditions, the court would instead check if the claim is not meant to provide some ulterior benefit to the petitioner(s). While the sincerity test would check an individual petitioner's *locus standi*, the ulterior motive test would test the standing of denominational claims and public interest litigations. The Supreme Court has recently taken a stand against PILs filed by members of one religious community against another,[71] and adoption of such a test would provide a footing in Common Law against such frivolous litigation.

This type of broad test would allow the Supreme Court to limit its assessment in petitions under Articles 25 and 26, and not become an arbiter of religious disputes. It also significantly reduces subjectivity of each Bench, and would help in making judicial decisions on religion more consistently across the board. As far as reformative secularism goes, rather than outrightly denying the protection to the religious practices as a fundamental right, the Supreme Court will now shift the focus to the State action restricting the practice. This gives the Court greater power to scrutinise

[71] Live Law News Network, *SC Dismisses Hindu Mahasabha's Plea for Allowing Muslim Women's Entry In Mosques*, LIVE LAW, (July 8, 2019), https://www.livelaw.in/top-stories/sc-dismisses-hindu-mahsabhas-plea-for-allowing-muslim-womens-entry-in-mosques-146162.

whether the State action is actually reformative or not. It is pertinent to note that the Supreme Court itself has observed in *A.S. Narayana Deekshitulu v. State of A.P*,[72] the difficulties of a definitional approach by stating that it would be difficult to devise a definition of religion which would be regarded as applicable to all religions or matters of religious practices. Although the Court, in the same case, has held that essentiality of a practice must be viewed in its context,[73] the authors submit that the most effective solution would indeed be to change the test altogether.

ii. Legitimate State Interests and Proportionality

With regards to the second stage of the test, we can find the compelling/legitimate state interests and proportionality tests prevalent in both international and domestic jurisdictions. The International Covenant on Civil and Political Rights [*hereinafter* referred to as "***ICCPR***"] (to which India is a State Party) protects the freedom to manifest religion under Article 18 and allows to impose restrictions, if any, necessary for a legitimate state interest.[74] It is pertinent to note that these legitimate state interests are similar to what is mentioned under Article 25(1) of the Constitution. Limitations under Article 18(3) of the ICCPR must be proportionate to the specific need on which they are predicated.[75]

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[72] A.S. Narayana Deekshitulu v. State of A.P, (1996) 9 SCC 548 (India), ¶ 593.
[73] *Id.* ¶ 594.
[74] UN Human Rights Committee (HRC), *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, CCPR/C/21/Rev.1/Add.4, (July 30, 1993).
[75] *Id.*

The legitimate state interest and proportionality tests also feature in regional human rights forums. The European Court, for example, determines whether the measures taken at the national level are justified in principle and are proportionate,[76] and that there must not exist any other means of achieving the same end, which would interfere less seriously with the fundamental right concerned.[77]

In this regard, the burden of essentiality is done away with entirely, as the European Court has protected even those traditional practices which do not make up the core tenets of a religion, but which are nonetheless, heavily inspired by such religion with deep cultural roots.[78] In *Hamidović v. Bosnia and Herzegovina*, a Muslim man's desire to wear a skullcap was protected despite it not being a strict religious duty because it had such strong traditional roots that it was thought to constitute a religious duty.[79] This sort of wider interpretation of religious practices is preferable to the narrow construction taken by the Indian courts.[80]

Nevertheless, one might hesitate to adopt a test which is based on its westernized effects alone, given the vast socio-religious differences between Asia and the West. To this, we present a two-pronged counter: the *first*, is the exposition given by the Supreme Court of Philippines which

[76] Leyla Şahin v. Turkey, App. No. 4474/98, Eur. Ct. H.R. (2005).
[77] Biblical Centre of the Chuvash Republic v. Russia, App. No. 33203/08, Eur. Ct. H.R., ¶ 58 (2014).
[78] Osmanoğluet Kocabaş v. Switzerland, App. No. 29086/12, Eur. Ct. H.R. (2017).
[79] Hamidović v. Bosnia and Herzegovina, App. No. 57792/15, Eur. Ct. H.R. (2018).
[80] Dr. M. Ismail Faruqui v. Union of India, (1994) 6 SCC 360 (India).

presented a more liberal adoption of the test, to fit the peculiarities of pluralistic Asian societies. The *second*, is that the legitimate state interest test is more familiar in Indian jurisprudence, and its usage in the context of religious freedoms is appropriate given its stringency.

The Supreme Court of Philippines, in *Alejandro Estrada v. Soledad S. Escritor*,[81] interpreted the strict form of American secularism in a far more liberal manner and in claims of religious freedom, benevolent neutrality or accommodation was found to be the spirit underlying the provisions of the Constitution of Philippines, and the compelling state interest test was applied to ascertain the limits of the exercise of religious freedom. Benevolent neutrality, unlike a 'wall of separation',[82] recognises the significance of religion in society, as a result of which it was observed that there was no constitutional requirement in the Philippines which required the Government to oppose religion and curtail its spread.[83] Even if a government action was intended to be secular, it may still burden the free exercise of religion. The objective was to accommodate religion with governmental action to enable individuals and groups to exercise their religions without trouble.[84] In furtherance of the same, the Filipino courts also follow a 'compelling state interest test'.[85] The Indian secularism follows the Filipino reasoning more so than the American understanding of

[81] Alejandro Estrada v. Soledad S. Escritor A.M. No. P-02-1651 (S.C., June 22, 2006), (Phil.) (*hereinafter* "**Estrada**").
[82] *See* Zorach v. Clauson, 343 U.S. 306 (1952).
[83] *Estrada*, *supra* note 81.
[84] Chang et. Al., *supra* note 59.
[85] *Estrada*, *supra* note 81.

secularism. Even though the Constituent Assembly initially proposed a draft with a 'non-establishment' clause, which forms the basis of the wall of separation between Church and State in America, the clause was dropped from the final draft.[86]

Meanwhile, in India, a similar test of proportionality has been developed in *Modern Dental College and Research Centre v. State of Madhya Pradesh*.[87] This is a comprehensive four-stage test, which assesses the legitimacy of the State's aim, the suitability of the means employed, possible alternative measures, and balancing the effect on the holder of the right. Interestingly, the SC further expanded these principles in the *Justice KS Puttaswamy v. Union of India*,[88] by calling for a deeper focus on the necessity stage of the test, and by using established 'bright-line' rules as a standard to determine the balancing stage. The concept of a legitimate state interest test has also found its way into recent Indian jurisprudence on the fundamental right to privacy, as being grounds for restriction of the right.[89] Such legitimate state interests can be found within the provision itself such as freedom of religion includes public order, morality, health, other fundamental rights, social welfare and reform, and throwing open of Hindu religious institutions.[90]

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[86] CHANDRACHUD, *supra* note 38, ¶ 88.
[87] Modern Dental College and Research Centre v. State of Madhya Pradesh, (2016) 7 SCC 353 (India), ¶¶ 412-413.
[88] Justice KS Puttaswamy and Anr. v. Union of India and Ors., (2019) 1 SCC 1 (India), ¶¶ 123-124, *per* Dipak Misra, CJI.
[89] Justice KS Puttaswamy v. Union of India, (2017) 10 SCC 1 (India), ¶ 504.
[90] INDIA CONST., art. 25, 26.

In light of the fact that legitimate state interests and proportionality serve as appropriate tests for the restriction of religious freedom across jurisdictions, as well as the fact that the Indian constitutional jurisprudence also recognizes these tests, the authors submit that it would be appropriate to employ the usage of these tests in religious freedom claims as well. However, the adoption of this test would not fit the Indian secularism system unless it allows for social reform by the State. The view taken by the Indian Courts in the past is that social welfare and reform stands at a higher footing than religious beliefs and practices.[91] However, the Supreme Court excluded essential religious practices from the ambit of 25(2)(b) in the aforementioned *Saifuddin* case,[92] thereby preventing the State from being able to reform a religious practice that is essential, no matter how unjust or inhumane. If the two-stage test were to be adopted, and this observation in *Saifuddin* was to be disregarded, the State could invoke social reform under Article 25(2)(b) as a legitimate state interest, and employ State social reform on all types of religious practices, essential or otherwise. Thus, there would be no legal hurdles in the exercise of religious freedom, as well as in its social reform, as per the reformative secular doctrine in India.

To summarise, the proposed alternative test, based on the deferential approach adopted by Professor Neo, would function in the following manner where a state action has restricted its free exercise: *firstly*, the Court would make a presumption in favour of the constitutional protection of the religious practice being restricted. It should, however,

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[91] State of Bombay v. Narasu Appa Mali, AIR 1952 Bom 84 (India), ¶ 28.
[92] Sardar Syedna Taher Saifuddin v. State of Bombay, AIR 1962 SC 853 (India).

satisfy itself as to whether the representation made before it is based on a good faith. *Secondly*, the Court would then test the proportionality of the impugned state action, along the same lines as in the case of *Justice KS Puttaswamy v. Union of India*, by testing if there is a legitimate aim for the action, whether the action is appropriate and proportionate to achieve the aim, and whether the action is the least intrusive action to achieve the said aim. The state action in this case could refer to a legislative or executive restriction, or even a judicial or quasi-judicial interference on grounds of a competing interest.

From the many benefits of the two-stage test proposed, the most important one would be the shift of the legal burden from the individual to the State. It would now primarily become the government's responsibility to justify the restriction of freedom of religion, instead of the individual's burden to show that they have a constitutional protection in the first place.[93] This falls in line with the adjudication of claims under other rights in Part III of the Constitution, and would be more appropriate even in the case of Article 25. Indeed, the question of essentiality may still arise at this stage, especially in the case of State social reform, but only to determine the weight attached to a particular practice and the threshold the Government would need to satisfy under the second stage of the test.[94]

[93] Neo, *supra* note 29, ¶ 593.
[94] *Id.*

IV. CONCLUSION

The objective of suggesting an alternative to the essential religious practices test is two-fold. *First*, the test expands and contracts in a manner inconsistent with the stability of constitutional protection which fundamental rights deserve. *Secondly*, in order to better implement the reformative secularism that the constitution envisions, an alternative system would allow for broader protection of religion as well as broader state reform.

The reformative secularism envisioned by the Constitution is starkly different from the western idea of secularism, which succeeded a religious renaissance of sorts. Western secularism heralded a separation of religious and temporal areas of behaviour, as a result of which religion and religious life could be confined to its own personal sphere.[95] In India, an individual's daily life was heavily influenced by their religion, and all their personal and familial law are governed by the religious doctrine. Thus, the State's role was not to be completely non-interventionist but to involve itself in the religious lives of people insofar that it was promoting social reform and eradicating abhorrent practices.[96] The non-discriminatory and interventionist aspects of the State were to protect the individual from the State while the non-interventionist aspect was calculated to allow the religion as well as the individual to be free.[97] Admittedly, it is this antithetical

[95] SATHE 1991, *supra* note 7, ¶ 38.
[96] P.K. Tripathi, *Secularism: Constitutional Provision and Judicial Review*, 8 JILI 1 (1966).
[97] SATHE 1991, *supra* note 7, ¶ 35.

role given to the State which has complicated the approach to religious freedom in India. For instance, the American wall of separation doctrine, where the state has nothing to do with religion,[98] cannot be sustained in a state as religiously ordered as India. The non-interventionist element of the Indian state came from a desire to promote an individual freedom of conscience, rather than to separate the State from religion.[99] Unlike its American counterpart, the Indian Constitution does not entertain a general prohibition against legislation in respect of 'establishment of religion'.[100] As a result, there exist constitutional provisions which ensure that no tax is imposed on any person for the maintenance or promotion of any religion, or no religious instruction is imparted in any State-maintained institution.[101]

As a result, the essential practices test alone is insufficient to cater to the vastly changing needs of religious freedoms across groups and practices. The essential religious practices test serves only to define which practices are included or excluded within a particular religion. This is often difficult to contextualise in a pluralistic society, insufficient in making a comprehensive determination, and denying of self-definition for religious groups and individuals.

By adopting a deferential approach, the courts would significantly broaden the horizons of the scope of religious freedom. When combined

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[98] U.S. CONST., amend. I.
[99] SATHE 1991, *supra* note 7, ¶ 39.
[100] *Id.*
[101] INDIA CONST., art. 27, 28.

with the legitimate state interests and the proportionality test, the approach to the right to religious freedom is much more in tune with other fundamental rights. More importantly, it provides the State with the ability to undertake reform as a legitimate interest, not only in carrying out the will of the framers of the Constitutional but also in upholding the values of a progressive State.

Ultimately, it is the amalgamation of liberal constitutional values and reformative secularism that seeks to protect the religious freedom of individuals and groups from unnecessary interference from the State, as long as the religious freedom in question does not conflict with a pressing state interest.