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REGULATION OF THE FEDIVERSE: THE MULTIVERSE OF SOCIAL MEDIA

~Nikhil Mahadeva & Sharath Chandupatla[*]

ABSTRACT

The Government of India has been persistent in its efforts to regulate big tech companies. In February 2021, it issued regulations imposing various obligations on social media, the use of which is of particular concern to the government, for a multitude of reasons. However, social media is constantly evolving. Mark Zuckerberg recently explained his vision for the future of social media with the change of Facebook's name to Meta -- a virtual reality 'metaverse'. While this metaverse is little more than a concept currently, there already exists something with a similar moniker - the 'Fediverse,' formed from a collection of Federated Social Networks, an overlooked type of social media that gives its users the right to exercise choice and protect their privacy by decentralising social media. The recent push by the European Union for interoperability and community-led platforms, both core features of Federated Social Networks, makes the Fediverse an important topic of discussion, as a possible representation of the future of social media. This is especially true given how its unique features present several

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difficulties in relation to its regulation. This paper intends to analyse the applicability of the current laws to this overlooked type of social media. First, it explains what a federated social network is and how it works. Second, it explains the laws which could conceivably be applied to them and the difficulty in enforcing those laws. On a concluding note, it moots the question of whether federated social networks should be regulated at all and if so, how?

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I. INTRODUCTION

India has recently enacted new rules for the regulation of intermediaries, with a specific focus on 'Social Media Intermediaries' ("**SMIs**") (Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 ("**IT Rules**" or "**the Rules**"). The Rules were enacted in the wake of a disagreement between the Government of India and Twitter over a denial to take down tweets from its platform.[1] The move is part of a greater strategy to regulate speech on typical social media platforms, by putting their protected intermediary status at risk in cases of non-compliance.[2]

The prevailing presumption is that the Government has defined 'social media intermediaries' widely enough to have the ability to enforce these regulations in their current form on all kinds of social media platforms[3], and even possibly other services unrelated to social media.[4] Through this article, we seek to prove that this presumption is flawed when placed in the greater context of the different forms social media is taking, in contrast to what social media is popularly known to be.

Prima facie, States find it difficult to regulate and control the internet; it transcends control by any individual State because it does not represent a singular, definable entity but a larger collective outside of the reach of

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[1] Soutik Biswas, *The Indian Government's war with Twitter,* BBC (Feb. 12, 2021), https://www.bbc.com/news/world-asia-india-56007451.

[2] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, G.S.R. 139, (India) Rule 7 (*hereinafter* "**IT Rules**").

[3] Shrey Fatterperkar, *IT Rules 2021 explained: Non-compliance will expose WhatsApp, Facebook, Twitter to significant liability,* FIRST POST May 27, 2021), https://www.firstpost.com/india/it-rules-2021-explained-non-compliance-will-expose-whatsapp-facebook-twitter-to-significant-liability-9661461.html.

[4] *X v. Union of India*, 2021 SCC OnLine Del 1788 (India).

unitary control. This sort of unitary control and regulation is, however, exercised by conventional social media (like Facebook and Twitter). These platforms, through their Terms of Service and Community Standards,[5] let users use them in a certain permitted manner while retaining control in the hands of the singular provider. Users are simply renters of a platform - they do not personally exercise any control. These platforms have 'centralized' control. This 'centralization' feels especially stark in the current paradigm, where a private individual like Elon Musk unilaterally owns and controls a massive conventional social media network like Twitter.[6]

It is immensely important to consider what the future of social media looks like at this juncture, as Governments across the globe are discussing how to mitigate the power conventional social media exercises. The typical manifestation of this is in antitrust actions, such as the case arguing for the breaking up of Meta.[7] However, another method that is seeing growing support is 'adversarial interoperability'.[8] Adversarial Interoperability is where a platform does not explicitly want third parties to be able to connect to or work with them, whether for reasons of revenue or maintaining a 'walled garden', but third parties are still able to do so.[9]

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[5] Terms of Service, *Facebook*, https://www.facebook.com/terms.php; Twitter Terms of Service, *Twitter,* https://twitter.com/en/tos; Snap Inc. Terms of Service, *Snap Inc,* https://snap.com/en-US/terms.

[6] Sheila Dang & Greg Roumeliotis, *Musk begins his Twitter ownership with firings, declares the 'bird is freed',* REUTERS, (Oct. 28, 2022), https://www.reuters.com/markets/deals/elon-musk-completes-44-bln-acquisition-twitter-2022-10-28/.

[7] Rebecca Heilweil, *Why the US government wants Facebook to sell off Instagram and WhatsApp,* VOX (Dec. 09, 2020), https://www.vox.com/recode/221664.

[8] Cory Doctorow, *Adversarial Interoperability*, ELECTRONIC FRONTIER FOUNDATION, (Oct. 02, 2019), https://www.eff.org/deeplinks/2019/10/adversarial-interoperability.

[9] Shawn Wang, *Notes on Adversarial Interoperability,* SWYX (Sep. 13, 2020), https://www.swyx.io/adversarial_interoperability.

Adversarial interoperability is the reason cars can be fixed with parts made by someone other than the original manufacturer, or third party ink can be used in a printer. Crucially, it can be forced by lawmakers by enacting laws. For example, legislators can mandate Facebook to allow a Twitter user to post on Facebook, or vice versa. In fact, in its most recent move to regulate big tech companies, the European Union has passed the Digital Markets Act, a part of which mandates interoperability between messaging platforms such as WhatsApp, iMessage, Telegram, etc.[10] In the same vein, experts on social media regulation strongly recommend a shift of focus, from building platforms to building protocols.[11]

To add to this, the European Parliament also commissioned the Greens/EFA group to submit a report on community led platforms, in comparison to conventional social media platforms.[12] The study report made several recommendations in relation to content moderation on social media platforms, suggesting that they democratise platforms' terms of services, have community led content moderation and support community led platforms which will help in building a healthy social media space, in comparison to the authoritative style of content moderation employed by conventional social media platforms.

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[10] Morgan Meaker, *Europe's Digital Market Act takes Hammer to Big Tech*, WIRED (Mar. 25, 2022), https://www.wired.co.uk/article/digital-markets-act-messaging.

[11] Mike Masnick, *Protocols Not Platforms: A Technological Approach to Free Speech,* KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY (Aug. 21, 2019), https://knightcolumbia.org/content/protocols-not-platforms-a-technological-approach-to-free-speech.

[12] BEN WAGNER ET AL., REIMAGINING CONTENT MODERATION AND SAFEGUARDING FUNDAMENTAL RIGHTS A STUDY ON COMMUNITY-LED PLATFORMS, The Greens/EFA (2021).

This is where decentralised social media comes in. While conventional social media platforms centralise power with the company which created them, decentralised social media, also known as 'Federated Social Networks' ("**FSN**"), do the exact opposite.[13] They give power to individual users and exercise minimal power themselves.[14] They represent a manifestation of everything mentioned above - they are interoperable by design, community led, and built on protocols that are open source and platform agnostic. Knowingly or unknowingly, the measures and discussions mentioned above all lead to making conventional social media more like FSNs. However, these platforms already exist, and are growing in popularity. The acquisition of Twitter by Elon Musk, for example, has led to a mass exodus of users from Twitter to Mastodon, giving Mastodon an additional 2 million monthly active users since the acquisition was finalized.[15] Whether it is in their existing form, or when conventional social media is eventually forced to take on all of their requisite features, we argue that they represent the future of social media: private, flexible and user-centric.[16]

Currently, no country in the world specifically regulates or has legislated on FSNs. The discussion on whether they need to be regulated

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[13] Adi Robertson, *How the Biggest Decentralized Social Network is dealing with its Nazi Problem,* THE VERGE (Jul. 12, 2019), https://www.theverge.com/2019/7/12/20691957/mastodon-decentralized-social-network-gab-migration-fediverse-app-blocking.
[14] Richard Esguerra, *An Introduction to the Federated Social Network,* EFF.ORG (Mar. 21, 2011), https://www.eff.org/deeplinks/2011/03/introduction-distributed-social-network.
[15] Jay Peters, *More than two million users have flocked to Mastodon since Elon Musk took over Twitter*, THE VERGE (Dec. 20, 2022), https://www.theverge.com/2022/12/20/23518325/mastodon-monthly-active-users-twitter-elon-musk.
[16] Tulane University, *What You Need to Know About Decentralized Social Networks,* SOPA - TULANE UNIVERSITY (Dec. 20, 2022, 12:01 PM), https://sopa.tulane.edu/blog/decentralized-social-networks.

or not, and how that may be achieved, is sparse (with the exception of the above-mentioned report) despite their growing popularity. The intention of this article is to raise the question of how FSNs are treated under the law currently, and how they ought to be in the future. The rapid development and virality of technology regularly out-paces legal regulation. Thus, it is imperative that we address the issues a new technology may present sooner rather than later, so action can be more expedient when it inevitably becomes necessary. The lessons learned from the failure to regulate conventional social media until recently serve to underscore this point.[17] If the nature of social media is inevitably to change, then FSNs may prove to be the natural next step in that evolution, whose regulation needs to be discussed now given the user privacy and data autonomy they offer to users.

As of now, the Indian Government's only response to the discussion on regulating any kind of social media is the IT Rules. Through the IT Rules, the Government intends to seize power over speech from conventional social media.[18] Experts opine that *"[t]hese Rules are another tool in the hands of the government to use law enforcement agencies and other means to go after individuals who express opinions which run contrary to its ideas and interests*".[19] Yet, the existence of FSNs raises the question of how a government can

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[17] Andrew Arnold, *Do We Really Need To Start Regulating Social Media?,* FORBES (Jul. 30, 2018) https://www.forbes.com/sites/andrewarnold/2018/07/30/do-we-really-need-to-start-regulating-social-media/?sh=69cac1a2193d; Michael A. Cusumano, Annabelle Gawer, and David B. Yoffie, *Social Media Companies Should Self-Regulate. Now.,* HARVARD BUSINESS REVIEW (Jan. 15, 2021), https://hbr.org/2021/01/social-media-companies-should-self-regulate-now.

[18] Raghav Tankha, *The Information Technology Rules 2021: An assault on Privacy as we know it,* BAR AND BENCH (Mar 09, 2021) https://www.barandbench.com/columns/the-information-technology-rules-2021-an-assault-on-privacy-as-we-know-it.

[19] *Id.*

take power away from an entity that does not have any effective regulatory powers in the first place, and how enforcement under the new IT Rules is going to impact these platforms.

This article will attempt to address these concerns. *First*, we explain what an FSN is, and how it works; Second, we examine whether an FSN falls under the definition of an intermediary and/or an SMI under the existing law; Third, we discuss how these laws may become applicable to such platforms and the issues that would arise from attempting to enforce them; Finally, we moot whether FSNs should be regulated at all, and if so, how?

A. NATURE AND FUNCTIONING OF FSNs

FSNs are functionally similar to conventional social media networks; most permit you to share statuses, message friends, and upload content, among other things. Mastodon is a good example of an FSN - it is built to be parallel to Twitter. There is a feed, on which one can see 'toots' (the Mastodon equivalent of tweets), which can be 'boosted' (retweeted), or 'favourited' (liked). Similarly, messages can also be sent. Overall, the interface is quite similar.[20]

However, being an FSN, Mastodon has a significantly different structure than Twitter. On Twitter, all activity is carried out on Twitter's servers, and all information remains stored on those servers.[21] On an FSN, users do not all go through a single server or a single provider to use these

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[20] Mastodon, *What is Mastodon?*, YOUTUBE (Mar. 23, 2018), https://youtu.be/IPSbNdBmWKE.

[21] Twitter, *How to Access your Twitter Data*, (last visited Oct. 18, 2021) https://help.twitter.com/en/managing-your-account/accessing-your-twitter-data.

features.[22] Instead, the provider here, like Mastodon, gives an individual access to their software. This software is open source, and an individual can use it to host information on their own server or choose to register with a server hosted by someone else. In the example of Mastodon, these servers are called 'instances.'[23]

These 'instances' can then, through the software, communicate with any other server running the same or similar technology.[24] The key here however, is that the FSN has no control over any of the user's information - they simply provide a software framework for these functions to happen and for these instances to be connected.[25] The actual information is stored not by the FSN, but by the user on their own private instance, or on an instance they choose to register with, hosted by someone else. Though FSNs are technically 'public' in nature, these instances are usually tight-knit communities with limited intake; this can depend on factors like capacity or a unifying characteristic like a specific interest. These communities are governed by themselves or the persons who host them - not by the FSN itself.

While a user's information is on a single instance, they can still communicate with the potentially infinite other instances on the greater

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[22] Esseguara, *supra* note 14.

[23] Divya Kala Bhavani and Naresh Singaravelu, *What is Mastodon, the new social media kid on the block,* THE HINDU (Nov. 08, 2019), https://www.thehindu.com/sci-tech/technology/internet/what-is-mastodon-the-new-social-media-kid-on-the-block/article29924482.ece.

[24] *Id.*

[25] David Thomas, *Distributed Social Networks and Federation: Why They're Important For Privacy and Online Safety,* SABAI TECHNOLOGY (Oct. 9, 2020), https://www.sabaitechnology.com/blog/distributed-social-networks-and-federation-why-theyre-important-for-privacy-and-online-safety/.

'network' of instances operated by others. This means a user's information is in their control, but they can still connect with other people as they would normally on a social media network.[26] They can post a message across instances, or choose to make it as private as possible, and the distinction would be far more meaningful as it is not just the viewability of the information being changed, but the dissemination of it across actual servers.[27] This is of course not discounting the ability to freely communicate within a user's own instance, should it be one with other people.

While we have used Mastodon as an example, it is only one of many FSNs. Just as with conventional social media, there are many other FSNs with different features. Another example is PixelFed,[28] made by the same developers behind Mastodon. PixelFed is an Instagram alternative focused on image sharing. Similarly, there are Diaspora,[29] Friendica,[30] Peertube[31] (an alternative to YouTube), Plume,[32] and a multitude of others.

The presence of so many alternatives lead us to another central function of FSNs: the connection between services. Not only can instances communicate within the network of the software they are using, but also, to some extent, with servers running other FSN software.[33] This is achieved by using common communication protocols across software – meaning a person using Mastodon could communicate with another person using

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[26] Esseguara, *supra* note 14.
[27] *Id.*
[28] PixelFed, https://pixelfed.org/ (last visited Oct. 19, 2021).
[29] JoinDiaspora, https://joindiaspora.com/ (last visited Oct. 19, 2021).
[30] Friendica, https://friendi.ca/ (last visited Oct. 19, 2021).
[31] PeerTube, https://joinpeertube.org/ (last visited Oct. 19, 2021).
[32] Plume, https://joinplu.me/ (last visited Oct. 19, 2021).
[33] Bertel King, *What is the Fediverse and Can It Decentralize the Web?,* MUO (Aug. 13, 2021), https://www.makeuseof.com/what-is-the-fediverse-and-can-it-decentralize-the-web/.

Friendica – all without ever leaving their instances, sharing information with either Mastodon or Friendica, or having to use a different service. This system is aptly called the 'Fediverse.'[34]

The advantages of this system are apparent. It ensures maximum user privacy and data autonomy, while not compromising on the core purpose of social media – communicating with others and/or having a wide audience. That being said, FSNs currently enjoy far fewer users compared to conventional social media networks. However, we argue that it is only a matter of time before the technology is more widely adopted. Mastodon currently boasts almost 12,000 instances, and over 4 million active users spread across these instances.[35] The largest instance has over 1 million users, and is operated by the founders of Mastodon. That instance (known as mastodon.social) is connected to over 50,000 instances in the Fediverse – the vast majority of those on Mastodon but also a large number of instances running other FSN software like PixelFed, Friendica, PeerTube, etc.[36] The Fediverse as a whole has over 4.5 million known users as of late 2021.[37]

These numbers may not seem impressive in comparison to conventional social media, but they are still significant - Mastodon had 1

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[34] James Holloway, *What on Earth is the fediverse and why does it matter?,* NEW ATLAS (Sept. 18, 2018), https://newatlas.com/what-is-the-fediverse/56385/ ; Fediverse, *About Fediverse* https://fediverse. party/en/fediverse (last visited Oct. 19, 2021).

[35] The Federation, https://the-federation.info/#projects (last visited Feb. 01, 2022); Fediverse, https://fediverse.party/en/mastodon/ (last visited Feb. 18, 2023).

[36]Mastodon Instances, https://instances.social/list/advanced#lang=&allowe=&prohibited=&min-users=&max-users= (last visited Mar. 01, 2023).

[37] Kiernan Christ, *What on Earth Is the Fediverse?,* LAWFARE (May. 9, 2022, 11:02 AM), https://www.lawfareblog.com/what-earth-fediverse.

million users by 2017 (a year after release),[38] 2.2 million by 2019[39] and was at 3.7 million by April 2022.[40] This shows a definite pattern of growth. Further, this was achieved despite the adoption of FSN technology not being nearly as easy as signing up on Facebook; a potential user would need to either know how to set up an instance, which involves significant technical knowledge,[41] or how to find and register with one. Both involve significantly more effort than a simple sign up on a single website. As tech literacy and privacy concerns grow, or as governments or bodies such as the EU push for interoperability and other functions uniquely served by FSNs, it can be expected that this number will increase. Further, while ease of access may be a barrier to a regular person, it is quite the opposite for persons with the requisite technical skills or the means of finding them - FSNs being open source allows for any person to use the software to create their own social network within the Fediverse.

A recent example of this is Truth Social, created by former President Donald Trump. Truth Social is an FSN,[42] built on Mastodon's

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[38] *Id.* at 34.
[39] Tyler Cave, *What is Mastodon and why is everyone talking about it?,* ANDROID AUTHORITY (Nov. 8, 2019), https://www.androidauthority.com/what-is-mastodon-1052151/.
[40] Richard MacManus, *The Fediverse Points to Our Social Media Future, Post-Musk,* THE NEW STACK (Apr. 29, 2022, 8:13 AM), https://thenewstack.io/the-fediverse-points-to-our-social-media-future-post-musk/.
[41] Mastodon, *Running Your Own Server*, https://docs.joinmastodon.org/user/run-your-own/ (last visited Feb. 01, 2022).
[42] Jon Porter, *Trump's new social media app launches on iOS,* THE VERGE (Feb. 21, 2022, 6:54 PM), https://www.theverge.com/2022/2/21/22944179/truth-social-launch-ios-donald-trump-twitter-platform.

code,[43] a fact admitted to by its own makers.[44] Truth Social is thus part of the Fediverse, and interoperable with every other FSN by virtue of this.[45]

All of these factors only serve to show how FSNs, and the underlying technologies that they are based on, are on the rise. How then will the laws apply to them? The Government of India has shown that it is adamant in its goal of regulating social media, but the nature of FSNs make this regulation far more difficult compared to regulating conventional social media. These differences also bring us to the first question we have to ask when considering the applicability of Indian laws related to Intermediaries as they stand with regard to FSNs: Do they even qualify as 'Intermediaries' and, by extension, as 'Social Media Intermediaries'?

B. THE DEFINITION OF 'SOCIAL MEDIA INTERMEDIARIES' AND FSNS

The IT Act, 2000, defines an intermediary as the following:

> *"with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes."*[46]

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[43] Eugen Rochko, *Trump's new social media platform found using Mastodon code*, MASTODON (Oct. 29, 2021) https://blog.joinmastodon.org/2021/10/trumps-new-social-media-platform-found-using-mastodon-code/.

[44] Michael Kan, *Trump's social media site quietly admits it's based on Mastodon,* MASHABLE (Dec. 02, 2021), https://mashable.com/article/trump-social-media-mastodon.

[45] Max Eddy, *Trump's Truth Social Can Only Make Mastodon Stronger,* PCMAG (Feb. 16, 2022), https://www.pcmag.com/opinions/trumps-truth-social-can-only-make-mastodon-stronger.

[46] Information Technology Act, 2000, No. 21, § 2(1), Acts of Parliament, 2000 (India) (*hereinafter* "**IT Act**").

It is from this definition that the IT Rules derive their definition of SMIs as a subcategory of intermediaries. The IT Rules employ the following definition:

> *"An intermediary which primarily or solely enables online interaction between two or more users and allows them to create, upload, share, disseminate, modify or access information using its services"*[47]

The third and final definition relevant to this discussion is for a subcategory of SMIs, known as 'Significant Social Media Intermediaries' ("**SSMIs**"), which are defined in the IT Rules as follows:

> *"a social media intermediary having number of registered users in India above such threshold as notified by the Central Government"*[48]

For the definition of SSMIs, the threshold number of users notified by the Government is currently 5,000,000.[49]

Conventional social media services such as Facebook and Twitter are covered under all three of these definitions, but the lines become slightly blurred with FSNs. At the outset, the initial definition of an intermediary does not seem to cover the operation of an FSN – while a conventional social media service does in fact receive, store, and transmit electronic records on behalf of people, and provides services in relation to such records, FSNs ostensibly do none of these things themselves. The FSN itself is functionally just providing a framework to receive, store and transmit electronic records to the end user, or to other individuals who may

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[47] IT Rules, Rule 2(1)(w).
[48] IT Rules, Rule 2(1)(v).
[49] Ministry of Electronics and Information Technology, S.O. 942(E) https://www.meity.gov.in/writereaddata/files/Gazette%20Significant%20social%20media%20threshold.pdf (last visited Oct. 19, 2021).

operate an instance. The FSN does not control the use of any of these functions and does not actually carry them out themselves.[50] Hence, the alternative interpretation leads to absurd conclusions. Considering an FSN as an intermediary would be equivalent to considering the creator of an operating system as an intermediary – they simply provide a framework for computing, which may include activities in the nature of being an intermediary. The creator of an operating system cannot conceivably be held responsible for every action taken by a user of their software.

This disconnect carries forwards into the definition of SMIs as well. The definition in the IT Rules begins with the premise that the SMI is an 'intermediary' as per the IT Act definition, and narrows it down to an intermediary which primarily or solely enables online interaction and sharing of information using its services.[51] It could certainly be said that an FSN, in providing a software framework, enables online interaction and the sharing of information. It is slightly more debatable whether one could be interpreted to be doing this using the FSN's services if the activity is being conducted on a private server, but such an interpretation may not be entirely unrealistic. The problem, however, is that these criteria are prefaced with the requirement of being an 'intermediary', which, as we have seen, is questionable in the context of FSNs.

Even presuming that an FSN could be considered an intermediary, and no other issues arise, the definition of an SSMI also raises a notable concern – When tabulating the number of users, are we to evaluate an FSN

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[50] Prasid Banerjee, *Moving to Mastodon? You may have missed the social network's point,* LIVEMINT (Nov. 08, 2019), https://www.livemint.com/technology/tech-news/moving-to-mastodon-you-may-have-missed-the-social-network-s-point-11573222761247.html.
[51] IT Rules, Rule 2(1)(w).

on the basis of its overall user base, i.e., including the users of every known instance within its network, or are we going to evaluate each individual instance as its own independent existence? While an FSN overall may have well over 5 million users, individual instances can have as little as 1.

This question also encapsulates the issue of defining an FSN as an intermediary in the first place. While an FSN does not engage in the handling of electronic records itself, the persons who create and operate instances do, having been enabled by the FSNs software. Do we then evaluate the FSN as a whole, or do we evaluate every instance of that FSN on its own? If the goal is to bring FSNs under these definitions, and by extension under regulation, which approach is more viable?

The former possibility is fundamentally impractical. FSN software is open source; the makers do not have control over who may use it to create an instance, much less control over how it is used within an instance. An example of this is the migration of the users of far-right social network Gab from their original software to a version of Mastodon.[52] The founders of Mastodon released press statements denouncing Gab and its users but could not prevent them from using Mastodon. Ultimately, they managed to convince the major instances and their operators to block interaction with instances in the network related to Gab.[53] It is important to note however, while they did manage to effectively isolate Gab, they did so solely because

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[52] Copia Institute, '*Decentralized social media platform Mastodon deals with an influx of Gab users,* TSF (Jan 13, 2021) https://www.tsf.foundation/blog/decentralized-social-media-platform-mastodon-deals-with-an-influx-of-gab.

[53] TechDirt, *Content Moderation Case Study: Decentralized Social Media Platform Mastodon Deal With an Influx of Gab Users,* TECHDIRT (Mar. 03, 2021), https://www.techdirt.com /articles/20210303/14474346357/content-moderation-case-study-decentralized-social-media-platform-mastodon-deals-with-influx-gab-users-2019.

of the willing support of the operators of the major instances and apps facilitating access to Mastodon instances – by no means could they have forced any person to do so.[54] In differing circumstances, the founders of Mastodon may well have only been able to denounce the migration, as without the support of the users themselves, they are constrained from taking any actual measures. It is worth noting that Gab still operates on Mastodon, even if their servers are isolated.[55] As such, applying any standard in the above definitions to the FSN as a whole would have no impact or meaning since the FSN cannot exercise enough power to fulfil any kind of substantive legal obligation, except perhaps facilitating the necessary software features.

That leaves us with the latter possibility, which seems more tenable, if undesirable (as we will discuss when considering substantive obligations). Instances with multiple users and their operators can be said to both actively fulfil the requirements of the definitions in the Act and IT Rules and have sufficient control over their instances to make substantive obligations possible to fulfil, at least in principle. They are technically handling electronic records and enabling communication, in what is arguably in the nature of service as their operators employ their own private servers to enable others.

However, in the case of instances set up by a single user for themselves, it is arguable whether they could be considered an SMI. This may not be a concern in regular circumstances, as any attempt at communication by an individual would most likely be posted on another

[54] Robertson, *supra* note 13.
[55] TechDirt, *supra* note 53.

instance that has more users (which does fall under the definition and can thus be regulated). However, what happens if the individual has a following? In that case, users from other instances can view what they may be posting on their private instance. Can this be considered an interaction between two or more persons? Is the individual providing themselves with a service? Or can the sharing of their thoughts and making them accessible be considered a service to others? The issue of such instances is notably greyer. We are of the opinion that it would be unreasonable to hold that these individuals are providing themselves or someone else a 'service' simply by creating a space for them to express an opinion on the internet. The viewing of their posts, on the other hand, could be considered an interaction. The greatest issue however is the same as with the FSNs themselves - they are not handling the electronic records of another person in this situation, and thus missing a core ingredient of an intermediary.

In conclusion then, the current law only reasonably provides for instances of an FSN with multiple users to be recognized as SMIs or SSMI (in the event an instance has greater than 5 million users). These instances would all independently bear this status. While the Government of India may not have intended this outcome, and would prefer a wider ambit of accountability, reality remains that this is the reasonable construction of the legislative framework in its current form; this omission is not surprising considering that FSNs were never in consideration when the IT Rules were formulated to govern SMIs, but the lacuna will become problematic should their popularity grow.

The difficulty in governing FSNs could lead to the Government of India taking the stance they did with cryptocurrency;[56] making them outrightly illegal. However, that would be an action with no basis in law - no feature of an FSN is barred under law, and the inability to fit the FSN provider into a workable definition of an SMI is a legislative fault, not a legislative prohibition. Similarly, interpreting the FSN provider into existing law without an appropriate amendment would be an unreasonable expansion of the definitions as they are, and would ultimately serve no functional purpose due to their inherent lack of power.

Having addressed how far FSNs are covered under the current laws in India and to what extent they can be considered SMIs, we arrive at the second question relevant to this discussion: Applying this understanding, what rules become applicable to FSNs and what problems would arise in their enforcement?

C. THE ENFORCEMENT OF SUBSTANTIVE OBLIGATIONS ON FSNS

Assuming that instances with multiple users qualify as intermediaries, and by extension, as SMIs or SSMIs, they face a host of obligations. While the nature and content of these obligations are established and not unique to them in any way, the impact and outcomes of these obligations will vary greatly from a typical intermediary or SMI.

It is important at this juncture to remember that FSN instances are often operated by private persons - they derive no commercial benefit from doing so. Instead, such persons incur costs to run an instance as they

[56] Reserve Bank of India, Prohibition on dealing in Virtual Currencies (VCs), RBI/2017-18/154 (Issued on April 16, 2018).

operate one independently.[57] They may split the maintenance costs with the users in their instance, or they may bear it themselves for the sake of the community they have built. It is also important to note that when we discuss instances with multiple users, as few as 2 users would qualify as 'multiple'.

These considerations are important because the laws are evidently drafted from the perspective of regulating companies, who derive profit from their activities as intermediaries or SMIs, and who have a certain degree of capital available to them. These presumptions fundamentally fail in the context of FSNs, and raise several issues in the process.

Keeping that in mind, obligations on FSN instances arise from the IT Act, 2000, the Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011 ("**SPDI Rules**"), and the IT Rules. We will address these in order:

1) *IT Act*

The relevant obligations under the IT Act are Sections 67C, 69, 69A, 69B and 70B.[58] Sections 69 and 69A obligate compliance with requests by the Government for access to information, or to block access to information. Section 67C contains the obligation to maintain information for a period and Section 70B prescribes obligations during a data breach. Most of these obligations (such as Sections 69 and 69A) only arise where there is a threat to the sovereignty, integrity or security of India.

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[57] Mastodon, *Running your own server,* https://docs.joinmastodon.org/user/run-your-own/ (last visited Feb. 01, 2022); Andrew Kvalheim, *Personal Mastodon instance,* GITHUB https://gist.github.com/AndrewKvalheim/a91c4a4624d341fe2faba28520ed2169 (last visited Feb. 01, 2022).

[58] IT Act, §§ 67C, 69, 69A, 70B.

However, compliance with Sections 69, 69A, 69B and 70B of the IT Act would require the operator of the FSN instance to have the technical ability to follow through on monitoring, decryption, blocking and so on. Setting up an instance is an activity that requires a degree of technical skill, but ultimately the software used is not created by the operator themselves - there exists a distinct possibility that their familiarity with its operation is insufficient or that the software itself is not amenable to these requirements and will need modification. It is also of significant concern that all these obligations bear penal consequences. If they lack those skills, they face the risk of imprisonment[59] (whose punishment ranges from three to seven years of imprisonment), as it is unlikely, they may be able to comply even if they are willing.[60]

Any hard-line enforcement of these obligations will then result in dissuading private individuals from making the foray into operating an FSN instance if they lack these skills, raising the barrier to entry and making the technology less accessible, unless developers find a way to make the fulfilling of these obligations easier for potential operators.

2) ***2021 IT Rules***

Part 2 of the 2021 IT Rules comprises the primary obligations on SMIs and SSMIs, and the bulk of what FSN instances would be expected to comply with. Rule 3 covers the obligations relevant to SMIs.[61] Rule 4 is

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[59] *Id.*
[60] IT Act, §§ 69, 69A.
[61] IT Rules, Rule 3.

unlikely to apply to any instances at this point, as no instance has more than 5 million users.[62]

Several clauses of Rule 3 may be unviable for a large cross section of FSN instances. For example, responding to a take-down order within 36 hours.[63] An operator may not comply with this for a multitude of reasons, ranging from as simple as their internet connectivity failing for that period, to as complicated as bugs in their instance preventing them from doing so. Another example is the obligation to not modify the software to circumvent any law – this may well be outside of the operators' control for a period, as the software is not made by them.[64] While operators can modify software themselves, most will employ the official releases of the open source FSN software they are using, and migrating data to a different software or otherwise rectifying a situation where the open source FSN software violates this obligation may take time.

Other obligations also present challenges. For example, maintaining the data of deleted users and other taken down data for 180 days represents a cost in the form of storage. This may not be an insignificant cost for a private individual who makes no money from operating an instance.[65] Similarly, complex legal documents such as privacy policies may be beyond the ability of most to make themselves, thus requiring engaging a lawyer and bearing that cost as well.[66] Providing information to the Government

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[62] IT Rules, Rule 4.
[63] IT Rules, Rule 3(1)(d).
[64] IT Rules, Rule 3(1)(k).
[65] IT Rules, Rules 3(1)(g), 3(1)(h).
[66] IT Rules, Rule 3(1)(a).

and assisting their investigations within 72 hours may also be untenable for the same reasons as complying with a takedown order in 36 hours.[67]

Possibly the most egregious would be the obligation to appoint a Grievance Officer who must respond within 24 hours of complaints of obscene material featuring the complainant, and who must acknowledge any other complaint within 24 hours and act on them within 15 days.[68] This may well comprise a full-time job for the appointed individual depending on the size of the instance. Appointing a person to this role full-time would most likely prove prohibitively expensive for the vast majority of operators, as they derive no commercial benefit from their operating of an instance.

If an instance was to ever become an SSMI with more than 5 million Indian users, the requirements become even harsher. A Chief Compliance Officer and Resident Grievance Officer need to be hired. They must publish compliance reports, create automated tools for identifying certain objectionable material, maintain a physical address in India, and bear a host of other obligations and requirements to operate, all of which represent a cost.[69]

The consequence of non-compliance, in either case, is the stripping of protections afforded to them by the intermediary status and making them liable to criminal action under the Indian Penal Code.[70] Many operators have full-time jobs and bear the hosting costs of an instance solely because of their interest in creating a community. These requirements are a deterrent to FSN instances operating in India or foreign FSN instances

[67] IT Rules, Rule 3(1)(j).
[68] IT Rules, Rule 3(2).
[69] IT Rules, Rule 4.
[70] IT Rules, Rule 7.

accepting Indian users, as these requirements represent a cost and time investment that such an individual may be unable or unwilling to make.

3) *SPDI Rules*

The SPDI Rules have general obligations regarding security and the management of personal data.[71] However, the SPDI Rules apply only to 'body corporates,' as defined in Section 43A of the IT Act, 2000:

"'*body corporate' means any company and includes a firm, sole proprietorship or other association of individuals engaged in commercial or professional activities*"[72]

This makes it unlikely for these rules to apply to most FSN instances as they are rarely operated by companies or commercial entities; most instances are operated by individuals or informal groups of persons with no real commercial interest. That being said, it is not impossible for a company to operate an instance.

In the event that a company does create an instance, the obligations under the SPDI Rules for the handling of personal data and security are largely possible to comply with, depending on the FSN software used. Regardless, a company may have better means than an individual to modify software for their purposes. Similarly, an individual may be hard-pressed to appoint a Grievance Officer, but a company may be capable of doing so.

4) *The Problem with Enforcement*

We have presumed so far in this discussion of the obligations on FSN instances that they would choose, or at least try, to comply. Another issue that arises, however, is that it is functionally difficult to attempt to

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[71] Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011, G.S.R. 313(E) (India).

[72] *Id.* at Rule 2(1)(c).

enforce these obligations on instances should they choose not to comply. If an instance is hosted in India, action may be taken against them, but what about an instance hosted outside India?

Conventional social media most often operates for-profit. India is a large user base from whom they collect data which they monetize in various ways. They have employees to pay, shareholders to satisfy, and targets to meet. All of these represent interests which the Government can act against, obstruct, or otherwise regulate using the law, in order to control how these companies, behave. None of this is true of FSNs.

FSN software is open source. Any person may operate an instance for any reason, and is highly unlikely to be deriving any kind of monetary benefit from doing so. Should the operator be outside India, they have no reason to comply with Indian law - they do not need to collect data from Indian users, nor are they likely to have any interest in India for the Government to use against them. Any kind of action against such instances would be untenable since there is simply no way to enforce any negative outcome on them. Realistically, the Government could only block Indian users from accessing such services.

This is hardly a solution. It would deny Indian users the benefit of FSN technology. Conventional social media is not a merit good which we seek to promote, with the scope for abuse being established by past events.[73] FSNs represent a viable solution to maintaining the merits of social media, while removing the aspects of conventional social media that users need to be protected from, such as the abuse of their data. The core

[73] Morgan Meaker, *supra* note 10.

tenet of FSNs is privacy and control over one's own identity. By decentralising control, you prevent the kind of abuse the law attempts to address.

However, because the law presumes the existence of SMIs with commercial interests and corresponding resources and capital, it creates a framework where only an SMI with commercial interests and the corresponding resources could conceivably operate. This leaves a vast majority of FSN instances with two choices: expensive compliance for no actual gain or wilful non-compliance. Neither of these outcomes is ideal, and the only loser is the Indian user who may well have benefited from the privacy afforded by FSNs. Instead, the users are forced to use conventional social media, which will inevitably be operated by monetizing their data, and thus, warranting government protection.

This brings us to the last question we must answer: How do we regulate FSNs?

II. THE REGULATION OF FSNS

While FSNs may not be as amenable to regulation, that does not mean they should not be regulated at all. Rather, the approach to FSNs should be one of guiding their development, as opposed to the control method adopted with conventional social media. One of the primary ways the Government of India could engage with the Fediverse is by influencing the technical specifications of FSN software itself. There is a long history of governments influencing the development of technology through means

such as funding research, for example.[74] They could similarly invest in FSN technology, backing developers and researchers working on it and thereby influencing the nature of the technology.[75] For example, FSNs rely on a common 'social networking protocol' in order to communicate with each other;[76] funding research into improved protocols could come with the benefit of ensuring that these protocols are better equipped to enable compliance. This does not happen in the status quo because the law is focused on the intermediaries themselves – the developers of FSN software are not intermediaries, as we have established. Therefore, the burden to adapt is placed on operators of instances who may not have the required skills. This is not a problem for the developers, who can make these adaptations, and are more equipped to do so when engaged with and supported by the Government.

However, given the likely preference of FSN developers to remain removed from governmental interference (given the nature of their work) and the possibility of that kind of interference pushing FSNs away from decentralisation due to the presence of governmental interests, exercising such a macro level of influence may not be wholly viable or desirable.

That being the case, on a more micro level, the Government could simply contribute their own work, such as in the form of plugins[77] that help

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[74] Jon Pietruszkiewicz, *What are the Appropriate Roles for Government in Technology Deployment? A White Paper with Author's Response to Comments*, NATIONAL RENEWABLE ENERGY LABORATORY (Dec. 1999), https://www.nrel.gov/docs/gen/fy00/26970.pdf.
[75] *Id.*
[76] Matteo Zignani, Sabrina Gaito & Gian Paolo Rossi, *Follow the "Mastodon": Structure and Evolution of a Decentralized Online Social Network*, in PROCEEDINGS OF THE TWELFTH INTERNATIONAL AAAI CONFERENCE ON WEB AND SOCIAL MEDIA, 543, 541-550(2018).
[77] Cambridge Dictionary, Plug-in, https://dictionary.cambridge.org/dictionary/english/plug-in (last visited Feb. 01, 2022).

enable quick compliance with Indian law, or even just enable easier content moderation. Singapore has recently launched the AI Governance Testing Framework and Toolkit providing a means for companies to measure and demonstrate how safe and reliable their artificial intelligence (AI) products and services are.[78] It also launched a Data Anonymisation tool to help organisations better comply with privacy laws.[79] By facilitating the creation of tools for that kind of oversight in FSN software, operators can better comply with take-down notices or other concerns. For example, plugins that facilitate automated flagging of certain types of content (as the Government requires of SSMIs in the IT Rules).[80] In the same vein, automated grievance redressal tools akin to the Online Dispute Resolution (ODR) technology implemented by UPI could make compliance with Rule 3(2) significantly easier.[81] Conventional social media can create such tools for themselves due to their resources (for example, Facebook uses PhotoDNA technology to detect child abuse material on its platform),[82] which FSN operators or even developers may lack, and the Government is uniquely positioned to fill in that gap without necessarily acting as an

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[78] PDPC, *Launch of AI Verify – An AI Governance Testing Framework and Toolkit*, https://www.pdpc.gov.sg/news-and-events/announcements/2022/05/launch-of-ai-verify---an-ai-governance-testing-framework-and-toolkit (last visited Feb. 02, 2022).

[79] PDPC, *Data Anonymisation Tool Now Available*, https://www.pdpc.gov.sg/news-and-events/announcements/2022/05/data-anonymisation-tool-now-available (last visited Feb. 02, 2022).

[80] IT Rules, Rule 4(4).

[81] Jaspreet Kaur, *NPCI Orders Banks, Payment Service Providers, Others To Set Up Online Dispute Resolution System,* INC42 (Apr. 14, 2022), https://inc42.com/buzz/npci-orders-banks-payment-service-providers-others-to-set-up-online-dispute-resolution-system/.

[82] Ernie Allen, *Facebook to Use Microsoft's PhotoDNA Technology to Combat Child Exploitation,* MICROSOFT (May 19, 2011), https://blogs.microsoft.com/on-the-issues/2011/05/19/facebook-to-use-microsofts-photodna-technology-to-combat-child-exploitation/.

investor or overseer or in some other capacity that may be seen as motivated or adverse.

Beyond this, the more logistically demanding requirements can be slightly relaxed in order to better suit this context; for example, perhaps permit for extensions of timelines given appropriate circumstances, or limit requirements around grievance redressal and compliance officers. As mentioned, these requirements currently envision compliance by a for-profit entity with significant resources. An individual, even with improved tools, may find it difficult to meet a demand for information under Rule 3(1)(j) within the prescribed 72 hours, or to dispose of a complaint within 15 days.[83] By placing more realistic requirements on operators of FSN instances, you increase the likelihood that they can and will comply. The alternative would discourage the operation of FSNs by anyone without the ability to devote the time and resources to achieve the same degree of compliance required of large companies.

Another avenue is to take the same approach as Mastodon did with Gab – regulate the connections within the Fediverse. Instead of placing complex obligations on individual operators such as retention periods and grievance redressal, the Government can instead focus on roping off problematic parts of the Fediverse, such as those featuring illegal material or facilitating criminal activities. Any operator of an instance chooses the range of other instances they are connected to; ordering operators to avoid a certain subsection of instances would be feasible with the existing tools, and effective at curbing concerns regarding content. This is a fairly simple

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[83] IT Rules, Rule 3(2)(j).

requirement to place on instances, and the consequence need only be geo-blocking of URLs[84] of non-compliant instances if they are not based in India, or using legal means if they are.

This would be in line with how FSNs tend to govern themselves. Mastodon has what it calls the 'Mastodon Server Covenant'[85], which requires instances to commit to active moderation against racism, sexism, homophobia, and other objectionable content. While it cannot force instances to comply, they refuse to list non-compliant instances on their server listings,[86] limiting their reach. Wider implementation of this kind of 'Covenant' as a common understanding between FSN platforms is a valid self-regulatory model that could address some concerns regarding content moderation, but ultimately falls short. Firstly, this approach would require a common understanding of what would constitute objectionable content or problematic instances - which is difficult to reach for a collection of platforms that may well have distinctly different priorities. Truth Social, for example, may not see fit to follow something akin to the Mastodon Server Covenant. Secondly, the lack of enforceability of any kind of 'good faith' standard is exacerbated with FSNs, where there is no profit imperative or other motivation that can be inconvenienced to incentivise compliance.

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[84] Kushaghra Singh et al., *How India Censors the Web,* CENTRE FOR INTERNET AND SOCIETY (May 30, 2020), https://cis-india.org/internet-governance/how-india-censors-the-web-websci; Anisha Mathur, *Explained: Indian and UK laws on pornography as Kundra case has a London link,* INDIA TODAY (Jul. 21, 2021), https://www.indiatoday.in/india/story/explained-indian-and-uk-laws-on-pornography-as-kundra-case-has-a-london-link-1830918-2021-07-21.

[85] Mastodon, *Mastodon Server Covenant*, https://joinmastodon.org/covenant (last visited Feb. 01, 2022).

[86] Eugen Rochko, *Introducing the Mastodon Server Covenant*, MASTODON (May 16, 2019) https://blog.joinmastodon.org/2019/05/introducing-the-mastodon-server-covenant/.

III. CONCLUSION

The Fediverse and FSNs represent the future of social media – one where we can connect with other people through technology, without the pitfalls of monetization and corporate abuse. Of course, no system is free of issues, and any system can be abused by those motivated enough to do so. However, FSNs lower the scope for this to happen by giving people agency over their data, allowing them to keep their online identities in a space they deem safe as opposed to trusting it to an entity which views them as a product.

For this reason alone, it is important that the Government of India adapts to the growth of FSNs. Controlling the power of vast corporations over our freedom of speech is a losing battle, for as much as we regulate them, we continue to let them grow and exert more power and influence. Decentralisation is the key to breaking this power up and restoring it to individuals and communities rather than monolithic entities.

At the highest level, the Fediverse would be a vast network of individuals operating their own private instances, representing their personal identities on the network. This kind of implementation is far off, but it represents the pinnacle of privacy in social media – the online equivalent of in-person interaction, and a worthwhile future to work towards.

Kushagra Yadav, *A Game of Plea Bargains: How Game Theory Explains Plea Bargaining and its Shortfalls in India, the U.S. and Around the Globe*, 9(1) NLUJ L. REV. 33 (2022).

A GAME OF PLEA BARGAINS: HOW GAME THEORY EXPLAINS PLEA BARGAINING AND ITS SHORTFALLS IN INDIA, THE U.S. AND AROUND THE GLOBE

~Kushagra Yadav[*]

ABSTRACT

Now and then plea-bargaining is thrown under the spotlight, sometimes as a silver lining for systems like India, where there is a dire need of speedy disposal of cases, and sometimes as a plague haunting the west. The most recent examples include the case of Benjamin Netanyahu; and of the Tablighi Jamaat, both generating mixed reactions. It is, therefore, to be analysed if and how plea-bargaining adds to the criminal justice system and what threats it presents. Plea-bargaining is a key area of intersection between criminal law and economics, and the answers can be explored through game theory. For evaluating strategies in practical scenarios, an empirical study has been carried out parallelly to know a player's decisions. It is presented that every player – the prosecutor, defendant as well as judge – indeed consider their interests but at the same time are bound by their duties due to societal influences. While the process has been relatively ineffective in India, it is necessary to consider the issues it faces in this

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jurisdiction. Additionally, the analysis of the procedure can help evaluate plausible solutions to the broader threats and disadvantages it brings to the system. Only that can help in envisioning a holistic implementation.

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I. INTRODUCTION

The COVID-19 pandemic highlighted unexplored fault lines in the criminal justice systems of most, if not all, nations. Not only was the need for expeditious amendments felt, but it was worsened by the challenges raised on the existing rules and procedures. Undeniably, it can be said that the law witnessed changes in all areas that it could have.

Under a similar scenario, the COVID-19 cases around the Tablighi Jamaat sprouted with a tint of controversy. Many attendees were allowed to go back to their respective nations after employing the system of plea bargains.[1] However, notably, this generated mixed reactions which is an indication of how plea bargains in India has been a complex affair.

When looking at the procedure of plea bargaining various mediating factors that can affect the application of such a bargain are required to be held in question. These factors could include the public backlash due to a feeling that justice has not been done, the caseload of courts, the essence of retributive 'vengeance' of victims which criminal suits are often laden with, the will and information of defendants and presence of other criminal procedures. In the aforementioned cases above, the court fined the attendees of the Jamaat after the guilty pleas, however, sentencing and charging pleas are not always this simple as the crimes get graver and the retributive feeling of the victims gets stronger.[2] Yet plea bargains hold an important position in law, especially in criminal procedure of the United

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[1] ANI, *Delhi court completes plea bargaining process in Tablighi Jamaat cases, trial to begin from Aug 10*, ASIAN NEWS INTERNATIONAL (Jun. 12, 2022), https://www.aninews.in /news/national/general-news/delhi-court-completes-plea-bargaining-process-in-tablighi-jamaat-cases-trial-to-begin-from-aug-1020200724124216/.

[2] *Id.*

States of America (U.S.A.), where a vast majority of cases are settled through plea bargains.[3]

Therefore, it is important to declutter the application of plea bargains in criminal procedure to ratify it as a procedural success in India too. This can be done by analysing the efficiency of these bargains in light of the aforesaid factors that affect the willingness of the participants and the bargaining power of the parties.

Plea bargains, as the name suggests, employ extensive negotiations before a decision can be reached. Such negotiations and bargains have been an extensive field of study in game theory, especially in the economic and financial discipline called the bargaining theory. Game theory is a tool for studying strategies employed in bargaining, negotiating and decision-making between two or more individuals who are assumed to be 'rational'. Such study is aimed at reaching better negotiation terms. It highlights the point that both parties in a bargain come out of it better off from their original position. Therefore, in a situation like that of plea bargains, using game theory can be helpful in recognizing the interests of both parties in the bargain. There is a stark difference between the effects of plea bargaining in India and in the U.S.A. This difference arises not only due to the difference in procedures of plea bargaining in both nations, but also due to the different influences they face. These include the impact of different procedural laws, the society and the criminal justice system at large, in both nations, and the influence these exert on those individuals who may wish to choose the option of plea bargaining. Thus, we analyse these influences

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[3] K.V.K. Santhy, *Plea Bargaining in US and Indian Criminal Law Confessions for Concessions*, 7 NALSAR LAW REVIEW 1, 85, 87 (2013).

alongside the procedural differences of both nations to study the efficiency (or lack of it) of plea bargains for achieving their intended objective, i.e., increasing the conviction rates and fastening the disposal of cases.

For the purpose of studying the aforesaid subject, a few authorities have been referred to, and in parallel, certain necessary generalisations have been made in the course of applying the principal elements of game theory. For a more practical approach, an empirical study has also been carried out to see the practical application of the bargaining game the individuals are involved in. Respondents were included in a game situation similar to a bargain for a plea like a guilty plea. However, there still needs to be a qualitative analysis of the procedural systems, to sum up the effects and correlate them to the results of the empirical study. Since India borrowed a skeletal idea of plea bargains from the U.S.A, by referring to the American Model, it is important to read them in parallel.[4]

II. UNDERSTANDING PLEA BARGAINS

Plea bargaining as a formal judicial practice, was first legalised in the U.S.A. by their Supreme Court[5] and was then incorporated in various nations thereafter.[6] However it has been visible through the history of law and criminal systems. The idea of plea bargain rests upon two fundamental goals; *firstly*, removing illegal mediation processes between the victim and the accused and regulating the process under the law itself, and *secondly*, to

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[4] LAW COMMISSION OF INDIA, 142ND REPORT ON CONCESSIONAL TREATMENT FOR OFFENDERS WHO ON THEIR OWN INITIATIVE CHOOSE TO PLEAD GUILTY WITHOUT ANY BARGAINING, 1 (1991).

[5] Brady v. United States 397 U.S. 742 (1970).

[6] Cynthia Alkon, *Plea Bargaining as a Legal Transplant: A Good Idea for Troubled Criminal Justice Systems*, 19 TRANSNAT'L L. & CONTEMP. PROBS. 355, 390 (2010).

reduce the possibility of burdensome and sluggish case disposal. Since a number of cases can be settled in pre-trials, the courts can have high conviction rates and low caseload, resulting in lesser or no delay in cases. In the case of *Hussainara Khatoon v Home Secretary, State of Bihar,* the Supreme Court highlighted its disappointment towards delay in cases, the court discerned,

> *"Even a delay of one year in the commencement of the trial is bad enough: how much worse could it be when the delay is as long as 3 or 5 or 7 or even 10 years. Speedy trial is of the essence of criminal justice and there can be no doubt that delay in trial by itself constitutes denial of justice."*[7]

For a victim, a delayed trial can induce stress incurred over the trauma of the crime itself. The court, in the same judgement, also touched on how speedy trial is a constitutional guarantee in the U.S.A. under the Sixth Amendment.[8] Moreover, the U.S.A. has been quite successful in the disposal of criminal cases without much delay as well. A substantial part of this success does come from the plea-bargaining process. After World War II, disposals through plea bargains and dismissals made up 80% of all the cases discharged[9]. Today, this number is far higher as an even lesser number of cases reach and are disposed of by the jury (only around 2% of federal criminal cases are disposed of in trial by juries by 2018 in the U.S.).[10]

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[7] Hussainara Khatoon v. Home Secretary, State of Bihar 1979 AIR 1369 (India) ¶179.
[8] *Id.* ¶180.
[9] Jed S. Rakoff, *Why Innocent People Plead Guilty,* N.Y. REV. BOOKS (Jun. 12, 2022),). https://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/?lp_txn_id=1359216.
[10] Jeffrey Q. Smith and Grant R. MacQueen, *Going, Going, But Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does it Matter?* 101 JUDICATURE 4, 3 (2017), https://judicature.duke.edu/wp-content/uploads/2020/06/JUDICATURE101.4-vanishing.pdf.

Plea bargaining is a process of waiving certain constitutional rights (often the right to a public trial) by pleading guilty (or not contending the prosecution) in exchange for a shortened sentence, lesser charges or, conciliated punishment by the court. The process, however, needs to be voluntarily applied for by the accused, which is followed by bargains between the accused and the prosecution. Thus, it can be simplified as admitting a crime in exchange for a lenient punishment. It is in the interest of the convict as his punishment gets tweaked in his favour, as well as the prosecutors, victims, and courts, as time and public expense are protected alongside a quick disposal mechanism. It is commonly visible in forms of bargaining of charges (where certain charges can be dropped to shorten sentences), sentence bargaining (where the prosecutor prays a lower sentence duration than the maximum prescription), count bargaining (where the accused pleads for lower counts) or fact bargaining (where the prosecution regulates certain facts that can lessen the punishment's length or nature).

Indeed, there have been mixed reactions to the increase of plea bargaining in the U.S.A. criminal system. As the of the U.S. District Court for the District of Massachusetts – Judge William G. Young penned,

> *"Today, our federal criminal justice system is all about plea bargaining. Trials — and, thus, juries — are largely extraneous."*[11]

Where, on one hand, such pleas are touted as an important instrument for maintaining speedy trials, on the other, they are condemned

[11] William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 76 (2006).

for inhibiting 'proper' justice and said to put forward a possibility of framing innocents.[12]

Somewhere, these factors were also pondered upon while adopting the plea bargaining process in Indian criminal procedure, thereby, shaping the procedure differently from the process followed in the U.S.A.

A. U.S.A. AND PLEA BARGAINING

Plea bargaining is seen not just as a process of the flexibility of trials, as it has been presented as a process that is a social essentiality. Offering defendants incentives for their responsibility and cooperation is just one side of the coin. The American procedure considers it an important instrument in justice to the victim as they do not need to go through the pain of trials and also an opportunity for flexible and creative jurisprudence to be developed out of courts in new and emerging fields of crime.[13] The idea of pleas finds its origin within the principle of Nolo Contendere, which means "I do not wish to contend," and particularly refers to the charges brought against an individual. These can be taken as an implied admission of guilt but does not rule out the discretion of courts as these are not pleas of guilt. *Fox v. Schedit*[14], started with permitting such Nolo Contendere claims as an agreement between the government and the accused in lieu of his charges to be taken as true admission for a case. With the passage of time, this principle has been a right of individuals beyond the consideration of the court's acceptance or rejection.

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[12] Raymond I. Parnas & Michael B. Salerno, *The Influence behind, Substance and Impact of the New Determinate Sentencing Law in California*, 11 U.C.D. L. REV. 29, 36 (1978).
[13] STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY? § 14-1.8 (AM BAR ASS'N 1997).
[14] Fox v. Scheidt, 84 S.E.2d 259 (N.C. 1954).

The guilty pleas are a waiver of the rights in the Fifth Amendment[15] and the Sixth Amendment[16] of the U.S.A. The Fifth Amendment is protection from self-incrimination while the Sixth Amendment prescribes the right to trial by jury (a criminal trial) in furtherance of which the defendant can confront the witnesses against them under due process of law. These both are bypassed if a plea is made on inducement of a lenient punishment resulting in non-requirement of trial and appeal. Thus, its constitutional position was in jeopardy which got cleared in *Bordenkircher v. Hayes*[17], where the U.S. Supreme Court accepted the constitutionality of such plea bargaining. The rationale was that the parties receive the mutual benefit while upholding the tenets of justice and equity. In *Brady v. United States* it was presented,

> *"Desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged"*[18]

This distinguishes it from the offence of compounding of felony where the individual mediates by paying the victim illegally. It can be seen that the development was purely by the courts of justice, thus, grey areas keep emerging and getting rectified by way of precedents too.

B. INDIA'S PLEA-BARGAINING PROCEDURE

India, on the other hand, opted for codifying plea-bargaining under its Criminal Procedure Code (CrPC) after thorough research by the Law

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[15] U.S. CONST. AMEND. V.
[16] U.S. CONST. AMEND. VI.
[17] Bordenkircher v. Hayes, 434 U.S. 357 (1978).
[18] Brady v. United States, 397 U.S. 742 (1970).

Commission of India while seeking inspiration from the American procedure.[19] The Law Commission presented plea bargaining for experimentation through its 142nd report. The same prescribed a manner that restricted plea bargaining to offences punishable with imprisonment of less than 7 years, paving the way to inculcate it into the statutory legislation[20]. The 154th report (and then the 177th report)[21] reiterated it as a tool for fastening the judicial procedures that can help in reducing delays in cases[22].

From here plea bargaining found its way into the CrPC in Chapter XXI-A, explaining the procedure, exceptions and limitations of it at length from Sections 265A to 265L. While the requirement of voluntariness stays essentially the same, a stark difference came after factoring in its criticism and the Law Commission's appeal regarding 'experimenting' with the process before accepting it completely. So, plea bargaining could only be used in the event of offences not punishable by death, life imprisonment, or a sentence of more than seven years in jail in India. Moreover, such bargains are not available for crimes concerning the country's socioeconomic situation or crimes against women and children under the age of 14[23]. This rules out certain acts notified in legislations like the Dowry

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[19] LAW COMMISSION OF INDIA, 142ND REPORT ON CONCESSIONAL TREATMENT FOR OFFENDERS WHO ON THEIR OWN INITIATIVE CHOOSE TO PLEAD GUILTY WITHOUT ANY BARGAINING, 6 (1991).
[20] *Id.*
[21] LAW COMMISSION OF INDIA, 177TH REPORT ON LAW RELATING TO ARREST, 111 (2001).
[22] LAW COMMISSION OF INDIA, 154TH REPORT ON THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974), 51 (VOL. 1 1996).
[23] The Code of Criminal Procedure, 1973, § 265-A, No. 2, Acts of Parliament, 1974 (India).

Prohibition Act, 1961,[24] the Commission of Sati Prevention Act, 1987,[25] the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989,[26] the Cinematograph Act, 1952,[27] the Cable Television Networks (Regulation) Act, 1995[28] etc. notified by the government.[29] The U.S.A. by far has notified minimum punishments for most punishable acts however, the case is not the same in India.[30] In India minimum punishment is not usually prescribed, admonition and probation are covered under §265-E of the CrPC.[31] Moreover, after hearing, if minimum punishments are prescribed, then ½ of the punishment has been taken as a standard.[32] When minimum punishments are not notified ¼ of the maximum punishment is taken as the standard for the purpose of bargaining.[33]

To sweeten the deal, the courts can provide compensation to the victims at their discretion[34] and the time that has passed since the accused has been in custody can be set off and included in the sentence of imprisonment.[35] Another essential point is the discretion of judges being

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24 The Dowry Prohibition Act, 1961, No. 28, Acts of Parliament, 1961 (India).
25 The Commission of Sati (Prevention) Act, 1987, No. 3, Acts of Parliament, 1987 (India).
26 The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, No. 33, Acts of Parliament, 1989 (India).
27 The Cinematograph Act, 1952, No. 37, Acts of Parliament, 1952 (India).
28 The Cable Television Networks (Regulation) Act, 1995, No. 7, Acts of Parliament, 1995 (India).
29 The list of Acts affected under sub-section (1) of section 265A of Cr.P.C. Central Government Notification by S.O. 1042(E), dated 11th July, 2006.
30 Milton Heumann & Colin Loftin, *Mandatory Sentencing and The Abolition of Plea Bargaining: The Michigan Felony Firearm Statute*, 13 LAW & SOCIETY, 393, 394 (1979).
31 The Code of Criminal Procedure, 1973, § 265-E (b), No. 2, Acts of Parliament, 1974 (India).
32 *Id.* § 265-E (c).
33 *Id.* § 265-E (d).
34 *Id.* § 265-E.
35 *Id.* § 265-I.

limited in comparison to the prosecutor and being restricted by sentencing guidelines to reject the pleas in the U.S. This has been flagged as a potential loophole that can be used to coax innocents.[36] India too does not hold the discretion of the judge but the judge may deny the application for plea bargaining altogether.[37] This might be needed to be changed in course of time as a judge may play as a mediator in the proceedings of negotiation removing the threat of coercion or undue influence.

The burden of making any such updates and rectifications has to be borne by the legislators as the usage of plea bargains in a trial has been minimal in India, to provide any help in developing jurisprudence regarding it. It has been almost 18 years since the process was introduced in India. However, the peak we have touched on regarding the cases being disposed of by the use of this process is around 0.27% (in 2018) of all criminal cases[38] in India in comparison to around 95-97% of the U.S.A.[39]

III. HOW GAME THEORY APPLIES TO PLEA BARGAINS

Plea bargaining is a sophisticated process in itself. It is also important that the accused understand the gravity of his acts and the nature of the offence. The proceedings are also to be carried out in accordance with the due process defined by law. Although what goes on in the bargain is out of the control of law, and that's where individuals' rationality and

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[36] L Devers, *Research Summary: Plea and Charge Bargaining*, BUREAU OF JUSTICE ASSISTANCE, 2 1-6 (2011).
[37] The Code of Criminal Procedure , 1973, § 265-B, No. 2, Acts of Parliament, 1974 (India).
[38] Apurva Vishwanath, *Why hasn't plea bargaining taken off in India*, MINT (Aug. 31, 2016), https://www.livemint.com/Politics/otm5XvV7DTZJ9KaKScbJ4H/Why-hasnt-plea-bargaining-taken-off-in-India.html..
[39] K.V.K. Santhy, *Plea Bargaining in US and Indian Criminal Law Confessions for Concessions*, 7 NALSAR LAW REVIEW 1, 85, 87 (2013).

strategies for decision-making play their roles. In a bargain, it is hard that both parties are in the same position due to the influences of multiple factors. Similarly, in a plea bargain, as the offer is placed by the prosecutor, they are already in the driving seat. The prosecutor along with the ability to push charges (like in the U.S.A.) which may be accepted by courts if they apply marginally to the case, also has higher bargaining power as the defence lawyers may persuade the clients to accept poor bargains for maintaining their good relations with the prosecutor As Judge Jed S. Rakoff of the United States District Court for the Southern District of New York expressed,

> *"Although under pressure to agree to the first plea bargain offered, prudent defense counsel will try to convince the prosecutor to give her some time to explore legal and factual defenses; but the prosecutor, often overworked and understaffed, may not agree."*[40]

There seems to be an ultimatum presented to the defendants to accept or lose out on the opportunity of the bargain. This adapts closely to the ultimatum game in game theory, as discussed subsequently. Although it can be said such bargains may not always be so discrete, it is safe to say that the prosecutor, with higher bargaining power, can exert enough pressure to get his offer taken as final. Although there can be counter-offers that may add changes to the terms placed by the prosecutor,, the final terms will rest in the hands of the prosecutor and will require their approval.

Thus, a case of such a bargain can be explained from the viewpoint of a discrete ultimatum game. The Ultimatum Game provided by John

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[40] Rakoff, *supra* note 9.

Harsanyi[41] was initially for the strategies of decisions regarding splitting a sum (of returns) between 2 players. In recent times, the model has transgressed into a far larger ambit including bargains, rather than becoming the primary game for explaining strategies around a bargain. In a discrete Ultimatum Game, a proposer offers certain terms and the responder has only two options, either to accept the terms or to reject the terms, and there is no option to present a counter-offer. If the terms are rejected, both parties get nothing while if there is acceptance, the bargain solidifies as per the terms of the proposer. The proposer may offer a fair or an unfair proposal. However, in an Ultimatum Game, the experimental evidence contradicts the equilibria right at the end. For example, in a game of splitting around 100 units between two parties, the most rational choice for the proposer is to offer 1 unit and keep 99 units. Here, the most rational response by the responder should be accepting the bill since 1 unit is still better than 0. Thus, the responder, on accepting, enters the Nash equilibrium (a place from where they cannot employ any better strategy to make terms more favourable to them). However, the experimenters Werner Güth, Ralf Schmittberger and Bernd Schwarze presented that in practical situations, people mostly offer a fair proposal which equally benefits both parties and offers below 30% are rejected[42]. It reiterates that humans are not actually always rational individuals. The same can be helpful in explaining the threat plea bargains present to innocents.

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[41] Harsanyi, J.C., *On the rationality postulates underlying the theory of cooperative games*. 5(2) JOURNAL OF CONFLICT RESOLUTION , 179, 180 (1961).

[42] Werner Güth, Ralf Schmittberger and Bernd Schwarze, *An Experimental Analysis of Ultimatum Bargaining*, 3 J. ECON. BEHAV. ORGAN. 367, 383-384 (1982).

Although, what first is to be understood is how the bargains in ultimatum games actually work.

Certain assumptions have been taken into consideration. Firstly, it has been proposed that both the prosecutor and the judge wish to reduce their caseload. Secondly, it is assumed that both the society including NGOs and social groups exert pressure on the judiciary while they regulate the sentences and charges after plea bargaining. Thirdly, and as provided, it is said that all the participants do not always take rational decisions while negotiations are underway.

As aforesaid, the prosecutor here acts as the proposer and the defendant acts as the responder. The defendant (whether with or without counter-offers) is left with two options, either acceptance or rejection.

A hypothetical illustration can be presented, where Mr. X of an imaginary state has committed a certain crime, say 123, against Ms. Y and got accused of the same in the court of law. He applied for a plea bargain. The maximum punishment for the offence of 123 in the state is 40 years. The prosecution has also pulled charges of offences of 987 and of criminal conspiracy with a maximum punishment of 20 years and 10 years, respectively. Thus, there are high chances of Mr. X getting sentenced for the three offences for a maximum of 70 years if the trial goes forward. Here, for him, accepting any offer for punishment under 70 years is a rational choice.

An important factor to consider are the social consequences of the decision of the plea, if it is accepted, that gives Mr. X a lenient punishment but it cannot be any lesser than a reasonable degree. It is presented that there exists a criticism that justice has not been met, which is an argument

already being made in other states like the U.S.[43] Moreover, Ms. Y as a victim holds certain retributive feelings owing to their losses against Mr. X. Thus, the prosecution is also under some pressure to maintain a surplus that can be termed as reasonable justice. Assuming the minimum punishment for 123, 987 and criminal conspiracy is 5 years, 1 year and 6 months respectively. Thus, the prosecution has a range of sentencing years to choose from starting from 0.5 (6 months) to 69 years which can shorten the punishment of Mr. X. The prosecutor also understands if the offer is rejected the trial will need to go on and it will result in more time and expenses to be incurred, and moreover, add to his and the caseload of the nation.

Empirical evidence presents that most people when playing as the prosecutor in a similar case tend to offer fair terms whereas, some go to the extent of reducing sentences and dropping charges to make the deal unfair to the victim in order to incentivize a quick acceptance. Very few of them dare to give an unfair deal that can result in counter-offers and elongate the processes. Although the accused in the study, knowing that they have committed a crime, wish to accept all offers even if it is unfair and may reject only when an offer is very unfair (such as a punishment of 70 years shortened by 1 year), those who reject also prefer to have the option of counter-offers that sees them presenting a fairer deal or even a deal unfair to them but with slightly better terms. This may be owing to their lower bargaining power in the game and the fact that even if a lenient punishment

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[43] Fair Trails NGO, *Young minds, big decisions*, 28 (2022).; Daniel Boffey, *Rise of plea-bargaining coerces young defendants into guilty pleas, says report,* THE GUARDIAN (Oct, 6 2022), https://www.theguardian.com/law/2022/oct/06/rise-of-plea-bargaining-coerces-young-defendants-into-guilty-pleas-says-report.

is only marginally more favourable, it can be of their use to save a large period of time.

Thus, assuming in the aforementioned case, the prosecutor, being an experienced campaigner, deviates from the empirical results and presents an offer marginally unfair to Mr. X, he in all likelihood is likely to accept as that is the only rational response and it is still the response that gets him into Nash equilibrium.

Here the prosecutor cannot offer: -

(i) a deal unfair to the victim owing to the retributive feeling they carry in the bargaining and the social pressure;

(ii) a deal unfair to the accused as they can counter-offer to elongate the bargaining process, after which the prosecutor might need to come to a fairer deal.

Therefore, the prosecutor offers a deal by dropping the charges of 987 and criminal conspiracy in lieu of admission of guilt. This approach satisfies both, the victim and the social pressure, while also saving time for the prosecutor. This somewhere does present the elements of Rubenstein's bargaining as the prosecutor tries to save time and therefore, their best situation would be where the quickest offer is accepted.

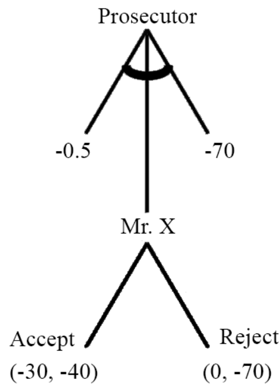

Fig 1: Game Tree of Plea Bargaining

Here the game tree is taking the values in negative as the responding party is eventually losing out on the crucial time of their lives through the payoff. The first value in the brackets presents the split received by the proposer (proposer's payoff) while the second presents the responder's fate (responder's payoff). The payoff for the prosecutor is also negative. The acceptance results in a certain surplus left with the proposer, this is although payment consideration for saving the court's time and expenses and stopping an increase in caseload, both these factors (time and caseload) are indifferent to its amount.

So, the proposer's payoff is negative because the prosecutor too is trying to maximize his surplus. A lower surplus will result in a high probability of social outrage and the victim's dissatisfaction, leading to higher criticism and lowering the image of the court and judiciary. For example, if the prosecutor waived 69.5 years and sentenced for .5 years his

surplus would have gone lower to -69.5 since the society would have reacted abrasively to such a decision. Similarly, a surplus of -20 will be more acceptable to society and reduces the possibility of criticism, therefore, making the prosecutor even better off from the position of -30. Therefore, both the prosecutor and the defendant are trying to minimize their losses to achieve benefits. Although due to this tedious and complex process issues may crop up.

A. HOW INNOCENTS MAY PLEAD GUILTY

The pleas have a wide scope of being misused too. The major reason behind this stems again from an unequal bargaining position to start with. The prosecutor's position is capable of creating enough pressure in itself to constitute a coercive fear that can force someone in a bargain to concede. Judge Rakoff also presented that "*a defendant's decision to plead guilty to a crime he did not commit may represent a "rational," if cynical*," choice due to the situation he's placed where he is uncertain of the result of the (jury) trial.[44] This is partially true as a defendant may base his strategy on uncertainty and pressure but moreover, this rather presents the irrationality of humans again.

In a normal situation where the accused knows that he's innocent, the rational choice in this situation would be of not going towards a plea bargain or outrightly rejecting the bargain. This is as, in case of the individual having perfect knowledge of their chances, he will know that the probability of facing penalty [$p_{(pen.)}$] is much lesser than the probability of

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[44] Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Feb. 05, 2023). https://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/?lp_txn_id=1359216.

being acquitted in the case after being proven not guilty[$p_{(i)}$]. Therefore, when,

$$\mathbf{P_{(i)} > P_{(pen.)}}$$

the payoff for the accused in case of rejecting a bargain would be 0. In the case of Mr. X, if he was innocent and knew that his chances of being proven not guilty outweighed the chances of being convicted, then his payoff matrix in case of rejecting the bargain would have been 0 instead of -70 in terms of the years of punishment.

Therefore, a game in this situation of "rational" individuals would look like the following:

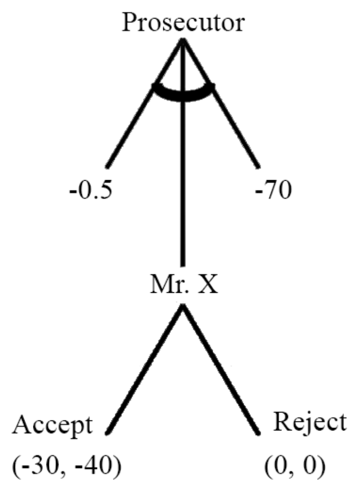

Fig 2: Ultimatum Game in case of Mr. X is Innocent and has Perfect Knowledge

Moreover, the prosecution will be investing time and public expenses in the trial and adding to the caseload, thus, they will be at working

against their best interests. Thus, rejecting or not opting for a bargain is the rational option.

However, it is an open secret that rational choices are not made. This may be due to the unequal bargaining power and the defence lawyers persuading the defendants for pleading guilty to save time, and maintain healthy relations with the prosecution or due to the unavailability of proper counter-evidence and investigation.[45] The persuasion and pressure of the situation force the innocent defendant to make an irrational estimate about his own chances to be proven guilty or not. Knowledge of probability in the eyes of the defendant may shift to

$$\mathbf{P_{(i)} = P_{(pen.)}}$$

or

$$\mathbf{P_{(i)} < P(_{pen.)}}$$

$$\textbf{And Pen.} = \mathbf{O_{cp} + O_m P_a P_c}$$

$$\textbf{Since Bargained Pen.} = \mathbf{(O_{cp} - X) + (O_{cm} - X) P_a P_c}$$

$$\mathbf{\Rightarrow \text{Pen.} > \text{B. Pen}}$$

Where,

- X is the bargaining payoff for defendant;
- O_{cm} equals the monetary opportunity costs of conviction;
- O_{cp} equals the psychological costs of conviction;

[45] *Id.*

- P_a equals the probability of arrest; and
- P_c equals the probability of conviction.

Therefore, a plea bargain is the rational choice over the expected penalty effect for a person assuming his possibility of getting penalised is higher (or equal) than of being ruled innocent.

That again brings the defendant back to the original Ultimatum Game where he feels that the best interest lies in pleading guilty or else, he faces the threat of a higher punishment.

As more and more nations adopt the procedure, it is becoming necessary to solve this issue. If innocents keep getting into prisons through plea bargains, even in a small percentage, it can translate into a huge number in nations like India which have enormous populations.

B. Why Plea Bargains do not have a commanding force in India?

The criminal system in India is still far behind its American counterpart in enforcing plea bargaining procedures. The clear discernible cause can be that the application of bargains is only restricted to a few criminal acts. Moreover, there are multiple facets to this too, the most prominent of which is the bargaining power of the prosecutor is not as great as their American counterparts. The prosecutors in India are not a direct part of investigations as the prosecutors are provided with the information regarding a case by the police and the police bring charges against the defendant on the advice of the victim and thus, do not have a

large differential advantage over the defence lawyers.[46] Additionally, since their cases are not attached to the duty of investigation, quick disposal is not their prime concern. Thus, although the police authorities do work in consonance with the prosecutors, the prosecutors might not necessarily lobby defendants into disposing of the case with bargains.

Furthermore, the social stigma attached to prison sentences is huge, since the defendants also have the option to compound their offences (applicable to the compoundable offences given in the Criminal Procedure Code[47]), and prevent prison time by paying compensation to the victim, they will definitely pick that over plea bargains if they wish to mediate with the victim through a simple cost-benefit analysis. Since, under § 265-E of the CrPC the court may even grant compensation to the victim, here the costs of plea bargaining clearly outweigh the costs of compounding offences.[48]

A more paradoxical standpoint can be that where these plea-bargains in India were brought to remove the delay in disposal of cases, it might not even be considered as an option due to the same delay in cases. It is to be understood that since bails are the rightful norm, and there exists a prolonged delay in cases alongside a healthy acquittal rate, any defendant simply prefers bail over the task of going the extra mile to plead guilty and get convicted when they can use the presumption of innocence to their advantage due to the delay in trials for a long period of time.

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[46] LAW COMMISSION OF INDIA, 197TH REPORT ON PUBLIC PROSECUTOR'S APPOINTMENTS, 13 (2003).
[47] The Code of Criminal Procedure , 1973, § 320, No. 2, Acts of Parliament, 1974 (India).
[48] *Id.* § 265-E.

These reasons are not certainly all bad. Since there is a lower bargaining power of the prosecution, coercive pleas might be lessened too although this might not completely eradicate them. Solutions to other problems can help plea bargains to be effective through minor tweaks in the procedure. When it comes to the issue of innocents pleading guilty, India cannot be afraid of experimentation in the system.

IV. SOLVING THE UNNECESSARY EVILS OF PLEA BARGAINING

Plea bargaining has been a huge factor not just in the American criminal system, but also in various systems around the world. It would be safe to say that the procedure cannot be outrightly uprooted for it does present some merits, and a sudden dissolution will flood the criminal systems around the world with caseloads they do not have the necessary infrastructure to absorb. It is a question of economics on how the criminal systems in the U.S.A. need seven times their current strength to clear the cases if plea bargains are omitted[49]. Moreover, with the increased transplant of the procedure to various nations, plea bargains are here to stay. What needs to be amended is its 'double-edged' effect of creating a threat to the innocents who are accused of crimes. Not only does this threaten all ethos of justice but it attacks the principal argument of criminal systems which is to give all accused an opportunity to present their side of the story. Overcoming this blockade is even more important for a nation like India as it challenges the essence and base of its criminal system – Blackstone's

[49] Jed S. Rakoff et al., *Why Innocent People Plead Guilty: An Exchange*, N.Y. REV. BOOKS (Jun. 15, 2022). https://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/?lp_txn_id=1359216.

Ratio stating *"the law holds that it is better that 10 guilty persons escape, than that 1 innocent suffer"*.[50]

Through the ultimatum game, it is known that the root of this issue is the unequal bargaining power of the power that dictates the terms for the defendant. Thus, the solutions need to circle around either removing this inequality or bringing it to a position where it cannot influence the decision of the defendant. For the same, a good mechanism can be the power of a supervisor over these procedurally daunting tasks. Here, judges can act as great equalisers. A certain equaliser becomes more quintennial in India if plea bargains are to boom in the future, not only due to slow disposal rates but also due high rate of wrong detentions without a compensation mechanism to the exonerees.[51] Through this route, India, alongside a comprehensive plea-bargaining process, can target the issue of low conviction rates[52] but also mend the problems faced by under trails innocents under supervision of the judge creating a sense of pretrial without an actual trial.

A. HIS LORDSHIP, THE DETER, THE SUPERVISOR, THE REVIEWER

From an economic standpoint plea bargains are considered rights in exchange for rights (as one party waives a right against self-incrimination but receives a speedy disposal). Therefore, the judge holds no discretion whatsoever, in marshalling the defendant whether to accept or reject the

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[50] 2 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS, (J.B. LIPPINCOTT CO. 1893).
[51] Karan Tripathi, *Guilty Until Proven Innocent: The 'Price' of Wrongful Prosecution,* THE QUINT (Jul. 27, 2021), https://www.thequint.com/news/law/the-price-of-wrongful-prosecution.
[52] Divya Shukla, *An analytical study of decreasing rate of conviction in India*, 4 INTERNATIONAL JOURNAL OF LAW 2, 91, 94 (2018).

guilty pleas. However, the presence of this discretion can be a game changer, especially in case of guilty pleas by the innocent. Exoneree Compensation is touted as a mechanism to give justice to innocents who have been implicated falsely or pleaded under the garb of coercion and got sentenced to imprisonment.[53] However, the goal should be of minimising the possibility of such coercive pleas in the first place.

The answer can lie if the judge is allowed to point his discretion in validating the pleas. Here, it is notable that the judge merely needs to validate that the plea is not inaccurate and made under coercion. Neither does the judge, in this case, present that the defendant is guilty or innocent, they just present whether the plea is coercive or not. This can work as a review mechanism. The judge trying to find a hint of *mens rea* if the defendant pleads guilty. If the review does not satisfy, the court may move forward into the trial. This initial step can be used as an experimental process, and that gradually solidifies its position in the system. The idea of how a review can be done was presented by Christopher Sherrin where he pointed out that such reviews are not supposed to be lengthy processes that counteract the goals of the plea bargain itself.[54] Rather this review can be through the acknowledgement of the correctness of the supporting facts. This can be through judging whether the accused can give an account of the happening and commission of the criminal act. Therefore, the judge will

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[53] Mungan, M.C. and Klick, J., Reducing false guilty pleas and wrongful convictions through exoneree compensation. THE JOURNAL OF LAW AND ECONOMICS, *59*(1), 173, 173 (2016).

[54] Christopher Sherrin, Guilty Pleas from the Innocent, 30 WINDSOR REV. LEGAL & SOC. ISSUES 1, 27 (2011).

be looking to obtain assurance by assessing whether *mens rea* was present. An example he presents is,

> *"In the average assault case, it would usually be sufficient to hear the accused admit to the nonaccidental application of force in circumstances not raising any issue of self-defence. In other cases more will be required, but the presiding judge would retain broad discretion to control the exercise and ensure that it is directed towards the relevant issues."*[55]

There is indeed room for evasive arguments made by the defendant but the process can indeed expose the gaps in arguments and reduce the instance of false pleas at least by some degree. Moreover, a review might not burden the courtroom but can act as a deterrence against defence lawyers trying to persuade innocents for personal gains and coercion by prosecutors. A more discretionary model has been successful in Germany where the German Criminal Procedure gives the judges a supervisory role in the bargaining process that allows them to go beyond police investigation and alter charges at their discretion, if charges presented by the prosecution do not fit accurately to the events of commission of the criminal act, by filing a notice.[56] Although the prosecutors enjoy higher flexibility in smaller crimes, the judges' approval is usually necessary when a prosecutor declines charges. Moreover, a prosecutor cannot make commitments on a particular term of the sentence as it is based on the discretion and supervision of the judge. Coming close to the German model may need an overhaul of the entire system but it does present a point that the aforementioned plea-

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[55] *Id.* at 26.

[56] STRAFPROZEßORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE] §§ 214, 238, 241, https://www.gesetze-im-internet.de/stpo/ (Ger.).

bargaining process can be successful even with higher judicial involvement. Moreover, India can incorporate some features from the Inquisitorial System just like other Adversarial nations like Australia and the United Kingdom as stated by the Malimath Committee.[57] Conclusively, the review process here presents a lighter route without high judicial intervention but still an effective one.

B. THE CONNECTICUT EXAMPLE

The American federal system offers high variability in the criminal procedure that can help find innovative solutions to the issue. Changes in Connecticut are an example of the same.[58] The judge intervenes as an observer in the case and offers his merits to the parties on the advice of the case. They are on the pre-condition that they will not be allowed to adjudicate on the matter if and when the case leads to a trial on the failure of the plea bargain. Jenia I. Turner informs about a survey on the Connecticut system that explains that all parties including the judge, prosecutors and defence lawyers believe that such an intervention has 'enhanced' fairness in the plea-bargaining process.[59]

Subsequently, the American Bar Association recommended a more passive existence of the judge which has been adopted by Florida.[60] This gives the parties the option to reach out to the judge to explain the terms of the plea conditions. Although there may be hesitancy that may render it

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[57] DR. JUSTICE V.S. MALIMATH, COMMITTEE ON REFORMS OF CRIMINAL JUSTICE SYSTEM, 27 (2003).
[58] Conn. R. Evid. § 4-8A (2000).
[59] Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. LAW 1, 199, 253 (2006).
[60] STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY? § 14-3.3(d) (AM BAR ASS'N 1997).

not as effective as other options, the existence of such provisions does offer a mixture of strategies to be employed for judicial intervention. An example can be the existence of a review mechanism as presented by Christopher Sherrin attached to Connecticut's method of removing the judge if the plea fails to remove biases.[61].

C. THEORETICAL DERIVATIVE OF JUDICIAL INTERVENTION IN A GAME SITUATION

MODEL / **PARAMETER**	Review	German	Connecticut	American Bar Association (Florida)
Period of Intervention	Ex-Post	Ex-Ante	Ex-Ante	Ex-Ante, optional on part of the defendants
Factual Probe	After Bargain, Liberal Discovery	Full Investigative File	Liberal Discovery, during bargain	Liberal Discovery, on option of the defendants
Method	Oral Presentation	Full Investigative File,	Oral Presentation and Summary	Oral Presentation and Summary

[61] Christopher Sherrin, *Guilty Pleas from the Innocent*, 30 WINDSOR REV. LEGAL & SOC. ISSUES 1, 27 (2011).

		Altercation in Charges	of Incidences (PC Affidavit*)	of Incidences (PC Affidavit*)
Discretion	Active, capability of rejection	Active, changes in charges and sentences	Passive, advisory	Passive, advisory

Comparison of Judicial Scrutiny Strategies

*PC Affidavit – Probable Cause Affidavit

Judicial intervention in plea bargains brings in a moderator in form of the judge to the game. The judge has a duty of being bipartisan due to their obligations of social welfare and justice. However, it is to be noted that the judge and the court do have similar interests in the success of a plea bargain like that of the prosecution. As it is in their best interest that there is not much caseload in their dockets, in a game of rational choices, the judge, therefore, has to be balanced towards both parties.

1) ***In an Ex-Post Review***

There will not be a misuse of powers of moderation, supervision or review by rejecting all the pleas haphazardly as the judge would be cautious in his analysis and only rule out those cases where they feel there has been coercion or misrepresented inducement to get the bargain done. This is as the judge themselves does not want an increase in caseload. Moreover, the judge will also be cautious in accepting all the pleas without any reasoned judgement as multiple social organisations keep tabs on the incarceration

of innocents and the responsibility after the judicial intervention has shifted from the prosecutor to the hands of the judge. Moreover, with the option of exoneree compensation and post-conviction relief to challenge the guilty pleas (and the judge's review) present to the defendants, the judges have to maintain a cautious and reasoned approach to prevent these kinds of cases from coming back to the caseloads of the judiciary under trials for exoneree compensation.

2) *In an Ex-Ante Supervision*

The Judge's role here has to be more related to deterrence over defence lawyers and less related to the analysis of the pleas. With intervention between the bargain, if the judge gets in with the power of altering charges and counter-advising the defendant in case the judge assesses misrepresented influence over him, they work in offsetting the differences in the bargaining power of the prosecutor and the defendant.

Although both these methods with additions, subtractions and innovations derived from the success of systems like Germany, Connecticut and Florida. There needs to be a mixture of schemes run as pilot tests as it is true that there cannot be 100% rational outcomes, although judicial scrutiny can at least to some degree reduce the incarceration of innocents through plea bargains as evidenced by the aforesaid systems which can then move forward to trials to prove not guilty.

V. To Get Pleas in the Mainstream in India's Criminal System

India has already partaken in experimenting with Plea Bargains, introducing processes of judicial scrutiny that need to be phased out in a

similar manner. The first step to popularise plea bargains is by building the confidence of the users of the bargain right from the beginning of the procedure. CrPC's mechanism is already laden with incentives to get into bargains ranging from compensation to including a custody period in the sentence. What is missing is awareness about such projects. From the empirical evidence, it is presented that a high majority has only heard of plea bargains but do not know about the specifics and the procedure, many laymen have never heard of it and only a minority of people know about the option.

Moreover, as mentioned before, people prefer bail due to the slow disposal and indeed that's the rational option. For tackling such issues, it is essential that the restrictions on the plea bargains in terms of the criminal acts they are applicable to, get loosened. For instance, these pleas procedures can be progressively spread to criminal acts that hold life imprisonment and the death penalty as a punishment. The rate of awarding the death penalty is on the rise in India. 2021 saw a 21% hike in the number of people on death row.[62] The deterrence of a rise in the death penalty can prompt defendants in getting into plea bargains. Through a simple cost-benefit analysis, it is evident that a defendant would prefer incarnation be it life imprisonment without parole over the death penalty. One of the most prominent examples is James Earl Ray, who pleaded guilty to the murder of Martin Luther King Jr to avoid the death penalty[63] in exchange for life imprisonment for 99 years. There are 12 offences in the IPC and 25 non-

[62] Project 39A, National Law University, Delhi, ANNUAL STATISTICS REPORT 2021, 7 (2022).
[63] Anthony Burton, *James Earl Ray pleads guilty for the assassination of Martin Luther King Jr.*, DAILY NEWS(March 11, 1969).

IPC offences that permit the death penalty. These are criminal acts like murder, dacoity with murder, kidnapping for ransom and rape with injury that causes death or a vegetative state etc. that sadly occupy a large amount caseload in India. Murder alone for instance had 29,193 registered cases in 2020.[64]

Indeed, this change cannot be radical and needs testing. Pilot tests can be engaged on offences punishable with the death penalty (For example, Kidnapping for Ransom). Gradually, upon the success of the pilots, it can be widened to similar offences which are punishable with life imprisonment (e.g., Kidnapping or abducting in order to murder). It can then be widened to cover an entire class of crime (e.g., Kidnapping). The essential is studying the practical application of plea bargain in this phased manner; the pre-requisite is adding procedure for judicial intervention in the bargaining process. This can help in not only streamlining pleas but also reducing instances of putting criminals on death row and stripping them of their right to life cynically. Focus can especially be attributed to non-compoundable offences.

[64] 1 NATIONAL CRIME RECORDS BUREAU, CRIME IN INDIA 2020, 2 (2021).

Crime Head	**Registered Cases in 2020**
Murder	29,193
Rape (Murder with rape/ Gang Rape)	28046 (226)
Kidnapping (for Ransom)	84805 (485)
Rape – Children	2655

Crime Heads Occupying Large No. of Cases in India (Punishable with Death Penalty)

Source NCRB – Crime in India 2020.

Conclusively, both these goals require rigorous analysis to understand what best fits. This has to be done while keeping the intent of the legislators, their preferences of whether they wish for a passive or active involvement as well as the situation of the prevalence of plea bargains at every step of making amendments.

VI. CONCLUSION

Plea Bargains have been a huge transformative force in multiple nations around the world. Updating and amending the procedure to better absorb its transplant is also a continuous process for these nations.

Moreover, procedures, as such, become more important for nations like India which have an enormous number of cases to dispose of. Plea bargaining, if it attaches to the ideals of fairness, can become a tool that can drive India towards a position where it upholds the right of speedy trial as a fundamental requirement. Thus, this requires the effort of the authorities to amend-assess-analyse and solidify the process. As pointed out by the Supreme Court of India "*the right to a speedy trial is not an expressly guaranteed constitutional right in India but is implicit in the right to a fair trial*".[65] It is upon the authorities to uphold it by balancing the bargaining power of the prosecutors and the defendants.

This fair trial can come through appropriate strategies by the players of the game. The best game strategies come only when the bargains are fair to start with. Plea Bargains, as game theory tells us, are an activity timidly balanced on unequal bargaining power. At the same time, it reemphasises the shaky rationality of people when exposed to such unequal bargains. The game itself presents the solution, the solution of supervisory authority, governed by the rationality of the game itself. The application of the changes depends upon how the authorities move their pieces in the game

[65] Hussainara Khatoon & Ors v. Home Secretary, State Of Bihar, AIR 1979 SC 1360 (India).

Aditya Singh & Vipashyana Hilsayan, *Sealing the 50% Ceiling: Assessing the Foundations of the Numerical Upper Limit in Reservations*, 9(1) NLUJ L. REV. 69 (2022).

SEALING THE 50% CEILING: ASSESSING THE FOUNDATIONS OF THE NUMERICAL UPPER LIMIT IN RESERVATIONS

~Aditya Singh & Vipashyana Hilsayan[*]

ABSTRACT

*There exists reservations regarding reservation policies. They have historically been regarded as a charity that stands in conflict with the ideals of equality and merit. The discourse surrounding the two ideals was rekindled in the recent judicial pronouncements on the reservations for the Maratha Community in 2021, underlining the equality debate and further in light of the merit issue in National Eligibility cum Entrance Test's ["**NEET**"] examinations case in 2022. These two judgments have crafted a meaningful locus for reservations in contemporary India. In this jurisprudential context, the 50% reservation ceiling is observed as a right move towards curbing the extent of reservation. However, in actuality, it is more detrimental. The first part of the article sets the background of how the concept of affirmative action came into existence and its implications while briefly delving into the contemporary legal issues presented by the two judgments. The second part describes the origin of the ceiling and argues*

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that it is judicial creation and constituent assembly did not set any numerical cap. The authors argue that an objective cap on reservation is an inadequate answer to a subjective problem. The last part of the article debunks the myth that reservation affects merit and efficiency - illustrating that there is no concrete evidence that efficiency dwindles because of reservation. The authors argue that the ceilings are protecting the traditional definition of merit. However, merit must be interpreted as overcoming the obstacles rather than mere numerical merit, as also observed by Justice D. Y. Chandrachud in the case challenging reservations in NEET examinations.

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I. INTRODUCTION

India has a scarring history of caste-based atrocities being inflicted on individuals. Such atrocities often involved attacks on opportunities of educational progress and on meaningfully engaging in the employment landscape thus, directly inhibiting the social mobility of the individual. Certain caste groups have been systematically discriminated against for centuries because of their alleged "polluted" status, and they are by any measure among the most deprived people in India. In view of this, our founding fathers envisaged a provision for compensatory discrimination in the form of reservations. It is an attempt to correct the past injustices suffered by those at the lowest pedestal of India's four-tier caste hierarchy.[1] There has been much debate on how to address the question of the extent of affirmative action is required to bring equality. The system acts in response to the twin demands of the backward classes pursuing equity and the general class seeking equality and the state is required to locate and fix itself at a point of equilibrium between these two opposing claims.

The equality issue resurfaced in 2021 in the Maratha reservation case, where a five-judge Constitution Bench of the Supreme Court, while adjudicating upon the case observed the 50%, ruled to deny reservation to the Maratha community.[2] This led to emergence of the question as to whether the said rule needs reconsideration. The issues raised in the judgment revolved around the provision of 16% reservation to the Maratha community. As per the court, the requirement of an 'extraordinary

[1] E.J. Prior, *Constitutional Fairnessor Fraud on the Constitution? Compensatory Discrimination in India,* 28 CASE W. RES. J. INT'L 63, 65-66 (1996).
[2] Jaishri Laxmanrao Patil v. The Chief Minister And Ors, (2021) 4MLJ 305 (India).

situation' to carve out an exception to the 50% limit was not satisfied by the contentions of the Gaikwad Commission constituted by the Maharashtra government, the Bombay High Court judgment in Shri Sanjeet Shukla v. The State of Maharashtra or the Socially and Educationally Backward Classes ("**SEBC**") Act, 2018. More recently, the Court while upholding the constitutional validity of reservations provided to Other Backward Classes ("**OBCs**") in the National Eligibility cum Entrance Test, conferred depth to the notion of merit. The judgment called for a "deeper scrutiny" of the idea of merit while sustaining the reservations in the All-India Quota ("**AIQ**") scheme of 1986.[3] This scheme empowers the central government to provide domicile free admission to candidates pan India.[4] Democratising the concept of merit to incorporate inherent inequalities, the Court asserted that "reservation is not at odds with merit" as substantiated by the implications of caste privileges on a candidate's basic opportunities and odds of success in such an open examination. The two judgments thus invigorated the questions of the validity of the numerical ceiling in the context of the common understanding of merit and equality in this discourse.

We shall seek to examine how the equilibrium between merit, equality and rights of backward classes is reached and whether such equilibrium is effective.

II. ORIGIN OF RESERVATIONS

A. LADDER CALLED CASTE

[3] Neil Aurelio Nunes and Ors v. Union of India, (2022) 4SCC 95 (India).
[4] *Id.*

The Indian society, when viewed in a crude sense, has been classified into four ranks on the basis of members' occupation, which played a decisive role in getting access to wealth, power and other pleasures of life.[5] This scheme of classification is termed the 'caste system, ' which Ambedkar rightly described as the system of "ascending scale of reverence and a descending scale of contempt".[6] Due to the rigid compartmentalisation, the lower castes were subject to animalistic existence and were derisively discriminated against in matters of opportunity. As a result of centuries of systematic oppression, the lower strata of society were left backwards educationally, socially and economically. As society progressed, technological development also advanced. The caste which was higher on the ladder of social structure benefited from technological advancement, but not all strata of the society could integrate with the technological development with the same intensity as the upper caste.[7]

It is essential to construct affirmative action as a set of policies intended to surpass the preliminary objective of non-discrimination with an overarching goal of enhancing the quality of life of depressed classes by improving education, employment, economic condition, and overall growth.[8] The justifications for affirmative action are two-fold. Firstly, it serves as compensatory justice which is a belief that society must

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[5] Anand Teltumbde, *Debating Dalit Emancipation*, 42(42) ECON & POL WKLY 4229, 4230 (2007).
[6] BAWS (2019c): B.R. Ambedkar, Philosophy of Hinduism, Babasaheb Ambedkar: Writings and Speech, Ministry of Social Justice and Empowerment, Vol 3, pp. 48.
[7] K.S. CHALAM, CASTE BASED RESERVATIONS AND HUMAN DEVELOPMENT IN INDIA 37 (Sage Publications 2007).
[8] Holzer, Harry J. & David Neumark, *Affirmative Action: What Do We Know?,* 25 JOURNAL OF POLICY ANALYSIS AND MANAGEMENT 463, 466-467 (2006).

compensate for oppression and ostracism that continues to burden that community.[9] Secondly, it promotes distributive justice which hints towards the idea that a just and fair society should provide opportunities to all its citizens.[10]

The principal purpose of affirmative action, which can be gathered from caste studies and jurisprudence, is to break free from the vicious cycle of discrimination and provide opportunities to the past sufferers who were denied opportunities unjustly.[11]

The earliest attempt to integrate backward classes into mainstream society was made during British rule. The said attempt largely involved reserving seats in public service and universities for Muslims and other minority communal groups.[12] However, in the authors' opinion, virtually no attempts were made to ameliorate the conditions of the caste groups constituting the lowest strata of society. Many viewed it as an extension of the divide-and-rule policy to help remain a dominant force in the country. In 1943, the Government ordered to reserve 8.5% of vacancies for SC communities. In 1946, it was increased to 12.5% so that it could be consistent with the total population of the country.[13]

In order to advance the ideals of justice and equality and reduce social inequalities, reservation as a method of compensatory discrimination

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[9] Penelope E. Andrews, *Affirmative Action in South Africa: Transformation or Tokenism*, 15 LAW CONTEXT: A SOCIO-LEGAL J. 80, 85 (1999).
[10] *Id.*
[11] Canadian National Railway Co v. Canada (Canada Human Rights Commission), [1987] 1 SCR 1114 AT 1143 (Can.).
[12] PARMANAND SINGH, EQUALITY, RESERVATION AND DISCRIMINATION IN INDIA 82 (1982).
[13] Rao, J. Laxmi Narasimha, *Affirmative Action In India: Emerging Contours,* 69(3) THE INDIAN J. OF POL. SCI. 483, 484-486 (2008).

was best suited to the nation's contemporary socio-political requirements.[14] Reservations were engineered to further social justice practically and procedurally undo the centuries of neglect suffered by the victims of such a system.[15] Pursuant to this, the Constitution of India guarantees equality and social justice to its citizen. Articles 14, 15, 16 and 17 expressly provided to ensure equality and advancement of the underprivileged.[16] Article 15(1) prohibits discrimination on grounds *"only of religion, race, caste, sex or place of birth"*.[17] Article 16(1) guarantees to all citizens *"the equality of opportunity in matters relating to employment or appointment to any office under the state"*.[18] A prima facie reading of Article 15(1) and Article 16(1) suggests that the classification on certain lines is also not allowed. However, a close reading of Article 16(4) suggests that it does not hinder the state from *"making any provision for the reservation of appointments or posts in favour of any backward class of citizens which in the opinion of the state is not adequately represented in the services under the state."*[19]

Before the first amendment, the issue of reservations was examined through the lens of Article 15 and Article 16 in the case of *State of Madras v. Champakam Dorairajan*,[20] where a government order allocated seats amongst various castes according to their numerical strength for entrance into

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[14] Marc Galanter, *The "Compensatory Discrimination" Theme In The Indian Commitment To Human Rights,* 13 INDIA Q. 77, 78 (1986).
[15] Om Prakash Sharma, *Right to Reservation as an Emerging Fundamental Right: A Study under the Indian Constitution*, 4 INDIAN J.L. & Just. 124, 124-125 (2013).
[16] V.D. MAHAJAN, CONSTITUTIONAL LAW OF INDIA 104 (7th ed. 1991).
[17] INDIA CONST. art. 15, cl.1.
[18] INDIA CONST. art. 16, cl.1.
[19] INDIA CONST. art. 16, cl. 4.
[20] The State of Madras v. Champakam Dorairajan, 1951 AIR 226 (India).

Government medical and engineering in a given proportion.[21] The court held that such allocation by the government order, which relied solely on caste barring some other factors for considering the backwardness, is a violation of Article 15.

Pursuing mechanisms that could potentially stand parallel to the idea of reservations, in 1953, the President appointed the first Backward Classes Commission (also referred to as 'Kaka Kalelkar Commission') under Article 340(1)[22] to examine new approaches to ameliorate the condition of socially and educationally backward classes.[23] The commission submitted its report in 1955, in which it came up with different factors in identifying a class as backwards. This included traditional occupation or profession, social standing that the community holds in the caste system and percentage of literacy or general educational advancement.[24] This was a response to the claim of violation of Article 15 of the Constitution, by envisaging a system that was not exclusively circling caste. Further, it is also essential to understand what kind of equality Article 16 seeks to introduce in society.

B. FORMAL EQUALITY V. SUBSTANTIVE EQUALITY

The idea of formal equality was put forth by Aristotle, wherein he believed in a binary model that envisaged that equals must be treated equally

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[21] *Id.*
[22] INDIA CONST. art. 340, cl.1.
[23] Wood, John R, *Reservations in Doubt: The Backlash Against Affirmative Action in Gujarat,* 60(3) India Pacific Affairs 408, 412-413 (1987) (*hereinafter* "**Wood**").
[24] Kaka Kalekar, REPORT OF THE BACKWARD CLASSES COMMISSION, Vol. 1 (1953).

and unequals unequally.[25] Aristotle argued that *"when two persons have equal status in at least one normatively relevant respect, they must be treated equally with regard to this respect."*[26] However, this sort of equality promotes means equality in a moral and strictly physical sense as it does not tackle the fact that some men are born and treated differently than the rest. For this, there has been a departure from interpreting equality formally to account for the differences in human beings. Substantive equality requires the state to undertake positive action to improve the situation of disadvantaged groups.[27] If Article 16(1) reflected the view of formal equality, then Article 16(4) becomes an exemption to this doctrinaire rule. However, if Article 16(1) in the first place guarantees substantive equality, then Article 16(4) becomes an extension of this rule.

III. INTRODUCTION OF CEILINGS

Justice Gajendragadkar was the first to point out the problem of maximum reservation. While giving the majority opinion, he opined that reservation under Article 16(4) aspires to provide adequate representation.[28] It cannot be used to disturb the genuine interest of other people. Equilibrium must be struck between the needs of backward classes and the claims of other employees to maintain the level of efficiency in the

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25 Monica Diggs Mange, *The Formal Equality Theory in Practice: The Inability of Current Antidiscrimination Law to Protect Conventional and Unconventional Persons,* 16 COLUM. J. GENDER & L. 1, 3 (2007).

26 ARISTOTLE, NICOMACHEAN ETHICS, V.3. 1131 a10-b15.

27 Ontario (Human Rights Commission) v. Ontario (Ministry of Health), [1987] 1 SCR 1114 AT 1143.

28 The General Manager, Southern Railway and Anr. v. Rangachari, 1962 SCR (2) 586 (India).

administration.[29] However, the conundrum of the extent of the reservation was not directly answered in this case.

A. EXCEPTION OR FACET?

The issue was directly addressed in the case of *M.R. Balaji v. State of Mysore* ("**Balaji**").[30] The state provided reservations up to 68% in engineering, medical and other specialised institutions. The petitioner argued that the state is not barred by any limitation in providing the quantum of reservation and could provide for 100% reservations if the issue of backwardness in the state requires so. Furthermore, Article 15(4) should be read with Article 46, and steps must be taken to address the inequality of backward classes, Schedule Castes and Schedule Tribes.[31] While agreeing that Article 46 and Article 15(4) must be construed harmoniously, the Court rejected the argument that the reservations can be provided up to 100%. The advancement of one class cannot be at the expense of the rest of society.[32] In the case of *Balaji,*[33] it was held that providing 68% reservation would be incoherent with the provision of Article 15(4) and Article 16(4) and a "*fraud on the constitution.*" [34] The court held that Article 15(4) is an exception to Article 15(1) and this provision must be construed rationally and within a reasonable limit. While it imposed a 50% reservation ceiling so that excessive reservations do not engulf the ideals of non-discrimination and equality, it did not explain why this

[29] *Id.*
[30] M.R. Balaji v. State of Madras, 1963 Supp (1) SCR 439 (India).
[31] INDIA CONST. art. 46.
[32] M.P. JAIN, INDIAN CONSTITUTIONAL LAW 1381 (5th ed. 1998).
[33] M.R. Balaji v. State of Madras, 1963 Supp (1) SCR 439 (India).
[34] *Id.*

number is fixed at 50%. The reasoning was followed in a number of cases that followed after the Balaji judgment. For example, in the case of *R. Chitralekha v. State of Mysore*,[35] the court held that the reservation ceiling must be capped at 50%; however, a little relaxation is permissible. It should not be "*excessive and societally injurious*".[36]

The major takeaways from the reasoning of the court pertinent to our discussion are that:

1) There should be compelling circumstances where the state can depart from the principles of equality of opportunity to achieve justice;
2) Since the provisions of Article 15(4) and Article 16(4) are an exception to the general rule of equality that is why it is imperative to interpret them in the strictest sense. The court was wary that unchecked and unlimited reservations would impair the idea of equality.

The Constitution framers had an identical view that formal equality would be inadequate in bringing the much-necessary transformation in the country. In the view of Dr. BR Ambedkar, the addition of sub-clause (4) was a step towards acknowledging that formal equality enunciated in sub-clause (1) would be insufficient for the needs of the disadvantaged people and proper coordination between the two clauses is needed.[37] This

[35] R. Chitralekha v. State of Mysore, AIR 1964 SC 1823(India).
[36] Chebrolu Leela Prasad Rao and Ors v. State of A.P. and Ors, (2021) 11 SCC 401.
[37] Parliament of India, Constituent Assembly Debates, Vol. VII, 30th November 1948 (Speech of Dr. BR Ambedkar), https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-30.

demonstrates that sub-clause (4) was seen as an exception by the framers of the Constitution as well.[38]

Moreover, in the case of *N.M. Thomas,*[39] the court shifted gears and questioned the reasoning employed in the Balaji judgment. In the majority opinion, Chief Justice Ray observed that Article 14 and Article 16(1) would not be violated if a rule ensures equality of representation for the unrepresented class after catering to the rudimentary needs of efficiency in the administration.[40] It was held that Article 16(4) is not an exception to Article 16(1) but "*one of the methods of achieving equality embodied in Article 16 (1).*"[41] If one considers that Article 16(1) is an exception to Article 16(4), then it is implied that no classification can be made under this article. Further, an exception is required to make a reasonable classification. Article 16 (1) helps us achieve one of the many goals envisaged by Article 14.

The court considers Article 16(1) a part of a larger design to guarantee equality which has been embodied in Article 14 and Article 15.[42] Justice Fazal Ali observed that the state is empowered to make reservations as per the express provision of Article 16(4), provided three conditions are satisfied.[43]

1) The class for which reservation is made must be socially and educationally backward;
2) The class for which the reservation is made is not adequately represented in the services; and

[38] *Id.*
[39] State of Kerala v. N.M. Thomas, (1976) 2 SCC 330 (India).
[40] *Id.*
[41] *Id.*
[42] *Id.* at 21.
[43] *Id.*

3) The reservation should not be too excessive to destroy the tenet of equality. [44]

What constitutes excessive should be decided on a case-to-case basis, and no arithmetic limit of reservation ceiling can be placed. The percentage limit of 50% placed in Balaji is a rule of caution.[45] The only rider is that the objective of this provision is to provide adequate reservations. However, it cannot come at the cost of sacrificing efficiency in the administration.[46] Mathew J. did not explicitly deal with the question of the 50% reservation ceiling rule but from his discussion on proportional equality, it was clear that he did not accept the rule. He adopted the concept of proportional equality from the Supreme Court of the United States of America in the case of *Harper v. Virginia Board of Election,*[47] where the constitutionality of a law which barred citizens from voting if the payment of poll tax exceeds USD 1.50 was challenged. The court held that the state is required to take different circumstances of a class of citizens into consideration so that they can enjoy essential rights. It is important to note that substantive equality discussed above is not different from proportional equality but is a component of it.[48] Where proportional equality is a concept that focuses more on merit and virtue, on the other hand, substantive

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[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] Harper v. Virginia Board of Election, (1966) 383 US 663.
[48] Catharine A. MacKinnon, *Substantive Equality: A Perspective*, 96 MINN. L. REV. 1, 4–6 (2011) (*hereinafter* "**Catharine**").

equality aims at race, gender or social standing in identifying the person's disadvantageous position in society.[49]

B. RULE OF CAUTION?

The matter was put to an end in the case of *Indra Sawhney (Mandal Commission case)*,[50] where the court held that the 50% ceiling enunciated in the Balaji case is not a mere rule of caution. The power conferred on the state by Article 16(4) must be administered judicially and within reasonable limits.[51] In this case,[52] the Supreme Court scrutinized the validity of 27% reservation in government services for socially and educationally backward classes granted through a government order.[53] The government order was based on the recommendation of the Mandal Commission (Second Backward Classes Commission) which was set up in 1979 to decide the basis for identifying SEBC.[54] Finally, the committee concluded that 52% of the population was under the SEBC category.[55] The government order passed by the V. P. Singh Government to reserve seats on the basis of the report submitted by the committee led to cases of violence.[56] In the majority

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49 MARI J. MATSUDA, PUBLIC RESPONSE TO RACIST SPEECH: CONSIDERING THE VICTIM'S STORY, IN WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT, (Routledge 1993).
50 Indra Sawhney Ors. v. Union of India and Ors., AIR 1993 SC 477 (India).
51 *Id.*
52 *Id.*
53 *Id.*
54 Durgaprasad Bhattacharya, *The Mandal Commission in a Historical and Statistical Perspective*, 51 Proceedings of Indian History Congress 641, 641-642 (1990).
55 *Id.*
56 SMITA NARULA, BROKEN PEOPLE: CASTE VIOLENCE AGAINST INDIA'S "UNTOUCHABLES" 38 (Human Rights Watch 1999).

opinion of the court, the reservation cannot exceed more than 50% barring "exceptional circumstances."[57]

IV. JUSTIFICATION OF CEILING BASED ON EQUALITY?

The concept of equality of opportunity in public employment, which was originally contained in Article 10 of the draft constitution, which later became known as Article 16 contemplated reservation to be restricted to a 'minority seats'. Even Dr Ambedkar stated:

> "*…therefore the seats reserved, if the reservation to be consistent with sub-clause (1) of Article 10, must be confined to a minority of seats. It is then only that the first principle could find its place in the constitution and effective in operation… we have to safeguard two things, namely, the principle of equality and at the same time satisfies the demand of communities which have not had so far representation in the state…*"[58]

A. PREVAILING LEGAL REGIME ON CROSS-BORDER INSOLVENCY

Article 16(4) of the Constitution reflects upon reservations for classes that have not been adequately represented.[59] The appointment of SCs/STs or any other backward classes must be made so as to preserve efficiency in administration. The phrase "adequate representation" cannot be interpreted as "proportional representation." As mentioned above, Dr. Ambedkar did not consider the idea of proportional representation but only representations confined to minority seats.[60] Perusing the Constituent

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[57] Indra Sawhney Ors. v. Union of India and Ors., AIR 1993 SC 477 (India).
[58] Parliament of India, Constituent Assembly Debates, Vol. VII, 30th November 1948 (speech of B.R. Ambedkar), https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-30 .
[59] INDIA CONST. art. 16, cl.4.
[60] Indra Sawhney Ors. v. Union of India and Ors., AIR 1993 SC 477 (India).

Assembly debates, it can be seen that nobody pitched in the idea that Article 16 (4) should not be confined to minority seats. The constituent assembly members were aware that this provision had the potential to be used for political reasons. Thus they left the soundness of these actions in the constitutional structure to the courts. The usage of speech by Dr. Ambedkar has been used by multiple judgments to highlight the need for a 50% reservation cap to protect equality. However, the speech has not been construed in the context that it was made. Dr Ambedkar was referring to the need to add the word 'backward' so that both clauses can be harmoniously interpreted.[61] If there were a need felt by the assembly members, then a numerical cap would have been fixed. This shows that the 50% reservation ceiling is a judicial tool to inhibit the extent of reservation. Further, for the reasons of lack of statistical backers and geographical inconsistencies, one can examine the shortfalls of an arithmetic ceiling.

In arguendo, even if one is to accept the argument that Dr. Ambedkar was referring to curb the extent of reservation, it must be kept in mind that ideas that drive social change cannot be kept static and must be modified to our needs. For instance, the Constitution drafters debated and consciously kept out the 'due process' model and adopted a 'procedure established by law' while drafting Article 21.[62] However, the courts, while

[61] Gautam Bhatia, *Equality of Opportunity, Group Subordination, and the Directive Principle: State of Kerala vs. N.M. Thomas,* SSRN, (2017), https://ssrn.com/abstract=3071903, (last visited 13 July 2021).
[62] INDIA CONST. art. 21.

interpreting it in the case of *Maneka Gandhi*,[63] glossed over this, indicating that the Constitution is an organic document which must keep evolving.[64]

The numerical value of 50% cannot be understood as it does not have scientific backing. The court simply mentioned 50% is the reasonable limit to which reservation can be extended. The court stated:

> "*Just as every power must be exercised reasonably and fairly, the power conferred by clause (4) of Article 16 should be exercised in a fair manner and within reasonably limits- and what is more reasonable than to say that reservation under clause (4) shall not exceed 50% of the appointments or posts, barring certain extraordinary situations as explained hereinafter.*"[65]

The court has tried to bring competing claims of equality between backward classes and forward classes to equilibrium by setting a limit at 50%. However, it fails to explain the origins and dynamics of the magical number. If clause (4) is truly a facet of clause (1) that guarantees substantial equality, then fixing a limit is unnecessary. In that case, the extent of reservation must be decided on a case-to-case basis rather than cementing the extent of reservation.[66]

B. GEOGRAPHICAL DETERMINATION: DECONSTRUCTING THE PAST STATISTICS

In India, as geography dictates, the population of the backward classes does not reside in a few states but is distributed throughout the

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[63] Maneka Gandhi v. Union Of India, AIR 1978 SC 597 (India).
[64] Gautam Bhatia, *Critique of the Supreme Court's Maratha Reservation Judgment-I: Equality* , INDIAN CONST. L. & PHIL. (July 4, 2021, 3:18 PM), https://indconlawphil.wordpress.com/2021/05/06/a-critique-of-the-supreme-courts-maratha-reservation-judgment-i-equality/ .
[65] Indra Sawhney Ors. v. Union of India and Ors., AIR 1993 SC 477 (India).
[66] *Id.*

country. The spatial distribution becomes a quintessential factor of analysis. There can be a possibility wherein one state the population of classes that require the benefit of reservation is more than the others. For example, in State 'A', where only 30% reservation would have been sufficient, is given 50% reservation, and in State 'B', where 70% reservation is needed, is capped at 50%. Nevertheless, the court has decided that the ceiling of 50% can only be penetrated in extraordinary circumstances which arise due to the vivid diversity in the country.[67] There might be a possibility that a certain percentage of the population is outside the mainstream national life, living in a remote area which would require relaxation in the 50% rule.

In the recent judgment by the Supreme Court on the Maratha reservation, the relaxation provided to the 50% rule was dissected. Justice Bhushan held that "extraordinary circumstances" such as "remote or far-flung areas" is "illustrative but indicative." The court has negated the idea that this is a geographical test but has considered it a social test.[68] The court refused to recognise that the Maratha caste was a backward class and in need of reservation.[69]According to the 2011 census, half of India's scheduled caste population lives in 4 states.[70] The first state is Uttar Pradesh (20.5%), followed by West Bengal (10.7%), Bihar (8.2%), and lastly, Tamil Nadu, with 7.2% of the total scheduled caste population.[71] This shows that the population of the depressed class is not uniform around the country

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[67] *Id* at 810.
[68] Jaishri Laxmanrao Patil v. The Chief Minister And Ors, (2021) 4MLJ 305 (India).
[69] *Id.*
[70] B. Sivakumar, *Half of India's dalit population lives in 4 states*, THE TIMES OF INDIA (July 11, 2021), https://timesofindia.indiatimes.com/india/Half-of-Indias-dalit-population-lives-in-4-states/articleshow/19827757.cms (last visited 11 July 2021).
[71] *Id.*

and is disproportionately spread across the states.[72] If the beneficiaries of reservation are not spread uniformly across the states, then the need for a uniform 50% reservation ceiling is not required and must be based on individual cases. Hence, it is paramount that the court must earnestly reconsider the 50% reservation ceiling.

In order to determine a model for arriving at a workable ceiling figure or to eliminate it, viewing the caste demographics of different states becomes critical. The pertinent demographics are substantiated in an extensive report published by the Planning Commission (now Niti Aayog) in 2005.[73] It presents figures from the 2001 Census covering Scheduled Castes and Scheduled Tribes data, primarily. Herein, it is important to state two lacunae at the very outset. Firstly, the Census of 2001 lacked data on Other Backward Classes (OBCs). Secondly, the caste data of 2011 (which is the latest Census) remains contentious and full of discrepancies making it unreliable as mentioned by the Union Government in a statement.[74] Thus, the Planning Commission Report of 2005, produced based on the 2001 Census, is sufficient and significant in carving out trends.

1) ***Scheduled castes***

As per the 2001 Census data, the population of Scheduled Castes in India (exclusive of the population of certain areas of Manipur) is 166,635,700 persons. In totality, this amounts to 16.2 per cent of the

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72 *Id.*

73 NITI AAYOG, REPORT OF THE TASK GROUP ON DEVELOPMENT OF SCHEDULED CASTES AND SCHEDULED TRIBES, (March 2005).

74 Anand U, 2011 *Caste Census Data Unusable: Centre to Supreme Court,* HINDUSTAN TIMES (September 24, 2021), https://www.hindustantimes.com/india-news/2011-caste-census-data-unusable-centre-to-supreme-court-101632429422444.html (last visited September 29, 2021).

country's population. These population figures (2001) have unquestionably remained absent in the determination of the 50% ceiling figure, which puts into question its validity.

It is proposed that the reservation ceiling should be in tandem with the proportion of reserved categories in each state. This distribution of the SC population, when viewed with respect to the rest of the categories itself, is highly mottled. The data shows that the largest concentration (proportion of Scheduled Castes population to total State population) is found in Punjab (28.9 per cent), followed by Himachal Pradesh (24.7 per cent) and West Bengal (23 per cent). The proportion of the Scheduled Castes population in most states is inconsistent with the national average of 16.2% which constitutes the theoretical basis of the 50% ceiling. In merely three states, i.e. Karnataka, Andhra Pradesh, and Pondicherry the population proportion of Scheduled castes matches the national average (as per 2001 caste data). On the other end of the spectrum lie the states where the Scheduled Castes population stands way below the national average of 16.2%. These are the North-Eastern tribal States, namely, Mizoram wherein interestingly the Scheduled Castes population is as low as 272 persons. Followed by, Meghalaya with only 0.5 per cent and Arunachal Pradesh with 0.6 per cent.[75]

From an alternate perspective; more than 57 per cent of the total population of Scheduled Castes up till 2001, resided in just five States-Uttar Pradesh (with 21.1 per cent) which has the largest percentage of Scheduled Castes population with respect to the total SCs population of the country,

[75] Neil Aurelio Nunes and Ors v. Union of India, (2022) 4 SCC 95 (India).

followed by West Bengal (11.1 per cent) and Bihar (7.8 per cent), Andhra Pradesh (7.4 per cent) and Tamil Nadu (7.1 per cent).[76]

Marking 1961 Census as the reference point,[77] the following table lays down the proportion of the Scheduled Castes population in India.

Census year	Total population (in million)	Scheduled Castes population (in million)	Proportion of SCs population
1961	439.2	64.4	14.7
1971	547.9	80.0	14.6
1981#	665.3	104.8	15.7
1991 @	838.6	138.2	16.5
2001 $	1028.6	166.6	16.2

Table 1.1: Trends in Proportion of Scheduled Caste Population

(# Excludes Assam in 1981 @ Excludes Jammu & Kashmir in 1991 $ The figures excludes Mao-Maram, Paomata and Purul sub-divisions of Senapati district of Manipur).

There is an increase in the proportion of the Scheduled Castes population from 1961 to 2001. The proportional shift solely in this one reserved category elucidates how even holding inadequate caste data as a base for the ceiling of 50% is arbitrary and, resultantly an inefficient mode of administering reservations. Fixating on the reservation ceiling results in defeating the core purpose of reservation.

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[76] *Id.* at 3.

[77] *Id.* at 4.

2) *Scheduled Tribes*

As per the same census data, the overall Scheduled Tribes population was 84,326,240 persons. Scheduled tribes constituted 8.2 per cent of the total population.[78]

Typically, North-Eastern states and islands have high-density clusters of Scheduled Tribes population in India. Such states with the highest proportion of the Scheduled Tribes to the total population of the States/Union territories are Mizoram (94.5 %) with the same percentage as Lakshadweep (94.5 %), followed by Nagaland (89.1 %), and Meghalaya (85.9 %).[79] Statistics of the mainland highlight that the highest proportion claiming reservation of Scheduled Tribes population are in Chhattisgarh (31.8%), followed by Jharkhand (26.3%) and Orissa (22.1%). The prevalence of Scheduled Tribes appears to be shrinking from the statistics of states like Uttar Pradesh (0.1 %), Bihar (0.9 %), Tamil Nadu (1.0 %) and Kerala (1.1%).[80]

In an overall sense, the highest percentage of Scheduled Tribes population to total Scheduled Tribes population of the country is found in Madhya Pradesh, which accounts for 14.5 per cent itself. This goes way beyond the percentage limit fixed for Scheduled Tribes in India. Illustratively, a Scheduled Tribes member from Madhya Pradesh claiming reservation would be automatically put at a disadvantageous position in cases of employment and education as compared to someone from states like Bihar, U.P. or Tamil Nadu. Sixty-eight per cent of the country's

[78] *Id.* at 6.
[79] *Id.*
[80] *Id.*

Scheduled Tribes population was concentrated in just seven states (including Madhya Pradesh). Six other states with a sizeable concentration of Scheduled Tribes to total Scheduled Tribes population are Maharashtra (10.2 per cent), Orissa (9.7 per cent), Gujarat (8.9 per cent), Rajasthan (8.4 per cent), Jharkhand (8.4 per cent) and Chhattisgarh (7.8 per cent).[81]

The proportion of total Scheduled Tribes population with respect to the total population is given in the following table,[82] fixing the Census of 1961 as the reference point:

Census year	Total population (million)	Scheduled Tribes population (million)	Proportion of SCs population
1961	439.2	30.1	6.9
1971	547.9	38.0	6.9
1981#	665.3	51.6	7.8
1991 @	838.6	67.8	8.1
2001 $	1028.6	84.3	8.2

Table 1.2 : Trends in Proportion of Scheduled Tribe Population Census Year.

Excludes Assam in 1981 @ Excludes Jammu & Kashmir in 1991 $ The figures exclude Mao-Maram, Paomata and Purul sub-divisions of Senapati district of Manipur.

The Census data elucidate the apparent fault lines in following the Doctrine of Adequacy as propounded in *Indra Sawhney*'s judgment and calls

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81 *Id.*

82 *Id.*

for a shift towards the Doctrine of Proportionality.[83] Each state with varying caste composition and representation dynamics should be provided with a newly designed reservation model with customised ceilings suiting the demographics of the respective areas. Although this requires a total revamp of the caste-based data collection framework, it is bound to eliminate the over-representation and under-representation of reserved caste groups at a central level.

C. Heading Towards A Solid Statistical Groundwork: Caste Census

Census and statistical inadequacies form another stream of apparent issues. A strong reason for reconsidering the aforementioned ceiling is that the Mandal Commission which identified 52% of the population as backward, was based on statistics from the 1931 Census. There is a dire need for a revision in that list because the population of Schedule Castes, Schedule Tribes and Other Backward Classes must have risen over 90 years.[84]

The 1931 Census, a colonial legacy, was inherently flawed because of a superficial British understanding of 'jaatis', their reliance on oriental literature and the Brahmanical perspective of Varna classification,[85] which masked the subaltern discourse. The existence of 'fuzzy communities',[86]

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[83] Catharine, *supra* note 48.

[84] Shoiab Daniyal, What justifies /an arbitrary 50% cap on reservations – when upper caste numbers are so much smaller?, SCROLL.IN (5 November 2017) https://scroll.in/article/856462/what-justifies-an-arbitrary-50-cap-on-reservations-when-upper-caste-numbers-are-much-smaller (last visited 11 July 2021).

[85] Ram B. Bhagat, *Census and Caste Enumeration: British Legacy*, 62 GENUS 119, 121 (2006) (*hereinafter* "**Bhagat**").

[86] Moses MS, *Moral and Instrumental Rationales for Affirmative Action in Five National Contexts,* 39 EDUC. RESEARCHER 211, 211 (2010).

fluid social identities and overlapping social groupings based on religion, dialects, and occupations further disoriented the census. Although caste, tribe and race were not definitively defined, attempts were made to classify Indians into mutually exclusive groups which disregarded the fact that caste had remained a highly dynamic and mobile category of the social fabric. [87]

The ambiguity surrounding the actual count of the OBC population, the unanswered question of "how many" after answering "who all"[88] (through the National Commission for Backward Classes under the National Commission for Backward Classes Act, 1993) further weakens the validity of the 50% figure which boils down to 27% for OBCs. In the absence of a recent base population figure (the presence of an obsolete 52% figure), the applicability of the 27% figure amounts to tokenism in the garb of a false 'adequacy'.

The reality is that the courts have overemphasised the need for a numerical limit of the reservation to such an extent that this judicial invention has been assumed as a part of the basic structure.[89] Justice Bhushan observed:

> "*To change the 50% limit is to have a society which is not founded on equality but based on caste rule. Democracy is an essential feature of our constitution and part of our basic structure. If the reservation goes above the 50% limit which is reasonable, it will be a slippery slope, the political pressure make it hardly to*

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[87] Bhagat, *supra* note 85

[88] Amar Pattnaik, *Breaching Quota Ceiling and Need for Caste Census*, THE NEW INDIAN EXPRESS (September 20, 2021) https://www.newindianexpress.com/opinions/columns/2021/sep/20/breaching-quota-ceiling-andneed-for-caste-census-2361021.html (last visited September 29, 2021).

[89] Alok Prasanna Kumar, *On Maratha Reservations Judgment: Part- I,* 56 ECON.& POL. WKLY 10, 12 (2021).

reduce the same. Thus, the answer to the question posed is that the percentage of 50% has been arrived at on the principle of reasonability and achieves equality as enshrined by Article 14 of which Article 15 and Article 16 are facets."[90]

The above observation gives the impression that the 50% reservation ceiling is a part of the basic Constitution since equality is considered a part of the basic Constitution.[91] After analysing the constitutional pronouncements, and geographical distribution of caste groups and examining the arguments of equality and representation that the applicable ceiling professedly maintains, it is clear that the 50% ceiling does not do justice to such ideals.

Moving on, the other pool of arguments emanates from the fact that reservation is an antithesis to the idea of merit. However, the conception of merit itself is flawed. By defeating the common stand on reservation's impact on merit one can establish that the endorsement and application of this reservation cap is unjustified.

V. RESERVATION AS BUTCHER OF MERIT?

While constructing merit in its rudimentary sense, it can be construed as a form of validation rendered by examination outcomes which are devised to determine the knowledge or aptitude of a candidate. The assumption is that more the marks a candidate scores, the higher their merit. There are two major reasons for glorifying merit as a concept; the first is efficiency and the second is fairness.[92] It can be considered a logical system

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[90] Jaishri Laxmanrao Patil v. The Chief Minister And Ors, (2021) 4 MLJ 305 (India).
[91] *Id.*
[92] MICHAEL J. SANDEL, THE TYRANNY OF MERIT *WHAT'S BECOME OF COMMON GOOD?*, 35 (2020).

to allocate jobs and opportunities and can be seen as the capacity of a person to perform.[93]

A. CONSTITUTIONAL DISCOURSE ON MERIT

The most fundamental argument that comes forth for opposing reservations is that of merit and efficiency. This stems from Article 335[94] which focuses on finding a balance between the claims of SCs and STs and efficiency in administration. The Constitution does not specify what efficiency in administration means. Because of this ambiguity, there is a need to interpret these provisions liberally and make them inclusive so that efficiency and claims of representation can be balanced.

The case of *General Manager, Southern Railway v. Rangachari,*[95] first brought forth the need to maintain efficiency in administration while providing reservations under Article 16(4). It contended that the factor of competence could not be neglected while providing reservations.[96] The need to preserve efficiency in administration is of cardinal importance, and it is derived from the benefit of the common good rather than a small section of society.[97]

In the case of *Janki Prasad Parimoo v. State of Jammu Kashmir*[98] the court was of the view that reservation is in itself antithesis to merit, as it

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[93] Sturm, Susan & Lani Guinier, *The Future of Affirmative Action: Reclaiming The Innovative Ideal,* 84(4) CAL.L. REV. 953, 953-958 (1996).
[94] INDIA CONST. art. 335.
[95] The General Manager, Southern Railway and Anr. v. Rangachari, 1962 SCR (2) 586 (India).
[96] Jagadish Saran v. Union Of India, AIR 1962 S.C. 36 (India).
[97] A.B.S.K. Sangh (Rly) v. Union Of India, AIR 1981 SC 332 (India).
[98] Janki Prasad Parimoo v. State of Jammu and Kashmir, 1973 AIR 930 (India).

prefers a less meritorious candidate to a more meritorious candidate. This view was reflected in the *Balaji* case, where it was supposed to be *anti-merit*.[99]

The advocates of meritocracy also believe that merit is a personal accomplishment and does not depend on factors of caste or gender.[100] However, this depends on how merit is defined. The definition of merit is volatile and has a different connotation. According to Rhodes, "Merit is a social construct that reflects a range of factors over which individual has no control, including natural talent, family background, educational environment, economic role and gender-role socialisation."[101] Thus, merit is determined by the objectives set by society. Since it is contingent on societal values, the fulfilment of the objective is the end, and merit is the means.[102] Amartya Sen observes that the concept of merit derives from our understanding of a good society.[103] Notably, if merit is confined to only statistical meritocracy, then the reservation will always be considered at odds with merit. Merit will be more meaningful if constructed as the determination to overcome impediments. Discrimination based on caste is an inherent obstacle for an individual who is at the receiving end and defeating such an obstacle in itself is a certificate of potential and hence evidence of individual merit.[104]

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[99] Wood, *supra* note 23.
[100] John E. Morrison, *Colorblindness, Individuality, And Merit: An Analysis of the Rhetoric Against Affirmative Action*, 79 IOWA L. REV. 313, 330 (1994).
[101] DEBORAH L. RHODES, JUSTICE AND GENDER 186 (1989).
[102] M.P. Singh, *Jurisprudential Foundation of Affirmative Action: Some Aspects of Equality and Social Justice*, 10 &11 DELHI L. REV. 41, 43-44 (1983-84).
[103] AMARTYA SEN, MERIT AND JUSTICE, IN MERITOCRACY AND ECONOMIC INEQUALITY (2000).
[104] Margaret Y. K. Woo, *Reaffirming Merit in Affirmative Action*, 47 J. LEGAL EDUC. 514 (1997).

The court has also rejected the argument of reservation being anti-meritian. This is evident from the divergent view of Subba Rao J. where he observed that it would be wrong to say that lowering the standard to some extent makes reservations anti-merit.[105] Conclusively, it can be said that the reservation of seats is not a compromise of merit by admitting less meritorious candidates. It is, in fact, the inclusion of those candidates who have been chained in the swamp of destitution and neglect.

B. EFFICIENCY IN ADMINISTRATION VIS A VIS MERIT

The myth that Schedule Caste and Schedule Tribe candidates are less efficient is a reflection of social prejudice which is ingrained in society.[106] This view was also shared by Dr. B.R. Ambedkar, who believed that the upper castes enjoy privileges of social advancement not because of merit but solely based on their birth.[107] According to him, the argument put forth by the upper caste of "efficiency of administration" is to preserve their interests and maintain their monopoly.[108] He differentiated "efficiency of administration" from "good governance" and observed that a mark of an exemplary government not only lies with efficiency but also with representation. An administration that does not encourage representation cannot be considered a good administration.[109]He further asserted that

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[105] T. Devadasan v. The Union of India And Another, 1964 AIR 179 (India).
[106] B.K Pavitra & Ors v. Union of India, AIR 2019 SC 2723 (India).
[107] Babasaheb Ambedkar: Writings and Speeches, (2019b): B.R. Ambedkar, What Congress and Gandhi Have Done To The Untouchables, Ministry of Social Justice and Empowerment, Vol.9. (*hereinafter* "**BAWS**"*)*.
[108] *Id.*
[109] BAWS (2019c): B.R. Ambedkar, Manu and the Shudras, Babasaheb Ambedkar: Writings and Speeches, Ministry of Social Justice and Empowerment, Vol 12, pp. 723-724.

"efficiency in administration" was a colonial creation and must not be used to oppose reservation.[110]

The meritocracy arguments that glorify merit inducing stakeholders to prioritise merit are disastrous as, resultantly, the knowledge and power will be concentrated in the hands of the few. At the same time, a large section of society suffers. There are three main ingredients that help a candidate produce good results in a competitive exam which also satisfies the scale of merit.

a) Economic resources;
b) Social and cultural resources; and
c) The ability of the candidate to work hard;[111]

The critics of reservation take for granted the first two ingredients in achieving good results in an examination. Reservation seeks to mitigate the effect of the first two ingredients on the third so that a level playing field can be ensured. It is, therefore, not a murderer of merit but only an attempt to alleviate the extraneous factors affecting it. Holding it as an opposite force has its own problems.

It is also essential to understand how efficiency in administration and merit are connected. A conjecture by the critics has been that high merit leads to high efficiency in administration. Administrative efficiency comes from the person occupying the post after the selection rather than the selection process itself. There is no quantifiable data available to show that

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[110] Anurag Bhaskar, *Reservation, Efficiency, and the Making of Indian Constitution,* 56 ECON.& POL. WKLY 42, 44(2021).
[111] MARC GALANTER, COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES IN INDIA, 212 (1984).

administrative efficiency is tied to the selection process. In the case of *KC Vasanth Kumar v. State of Karnataka.*, it was observed that scoring extraordinarily well in an examination is not a yardstick for a good administrator.[112] If the state had not mandated some minimum qualifications for the candidates applying, then the argument for efficiency of administration could have been compromised. For example, when the Madhya Pradesh government completely obliterated the minimum qualification for admission of SC and STs in admission to the medical courses, the court held the Government's order as inconsistent with efficiency of administration.[113] This is true for other fields as well. Best doctors and engineers are not produced by measuring their aptitude in a test.

Another argument that connects merit and efficiency is that the candidate clearing the cut-off marks in a standardised test in a standard format supposedly segregates "meritorious" from "non-meritorious". This reflects an over-emphasis on the role of merit in administrative efficiency. It also shows that merit is equated with numbers, and is purely a "numerical meritocracy". This numerical meritocracy has its flaws. The first flaw is that candidates are from different backgrounds and do not necessarily have equal access to education. Secondly, high scores in an examination may reflect a good academic performance and show a particular level of preparation for the exam but do not measure the potential of the candidate to overcome obstacles which should be an accurate benchmark of merit.

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[112] K.C. Vasanth Kumar & Another v. State of Karnatka, 1985 AIR 1495 (India).
[113] State of M.P. v Nivedita Jain, 1982 SCR (1) 759 (India).

Hartigan and *Wigdor* in their study of the General Aptitude Test Battery ("**GATB**")[114] in 1989, examined affirmative action's role in aiding the equalisation of circumstances for the development and perpetuation of talent. GATB tests and individual's cognitive, motor and perceptual skills and has been deployed by the U. S. Government since 1947 to screen employment applications. The study focused on examining whether the extensive use of GATB is a detriment for low scorers, especially minority job seekers. They established that equating merit merely with conventional measures is unfair. As resultantly, various individuals would be denied opportunity, massively hampering their prospects unjustly.[115]

The social system of Hindu society is fragmented into castes, and merit cannot be cultivated individually without considering the social reality. In the Indian scenario, the reservation is seen by the upper caste as a hindrance to leading a comfortable life. However, the lower strata consider it as a tool to bring social progress.[116] Social justice must be the bigger meritorious gesture.[117] The Courts have considered the conventional definition of merit and efficiency to justify the ceiling of 50% and linked Article 16(4) with Article 335 to support their contention.[118] Constituent Assembly Debates show that constitution-makers did not link Article 16(4)

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[114] FAIRNESS IN EMPLOYMENT TESTING: VALIDITY GENERALIZATION, MINORITY ISSUES, AND THE GENERAL APTITUDE TEST BATTERY (John A. Hartigan., & Alexander K. Wigdor eds., 1989).

[115] Michele M. Moses, *Moral and Instrumental Rationales for Affirmative Action in Five National Contexts,* 39 EDU. RESEARCHER 211 (2010).

[116] Satish Despande, *Exclusive Inequalities: Merit, Caste and Discrimination in Indian Higher Education Today,* 41 ECON.& POL. WKLY 2438, 2440-2444(2006).

[117] Rajat Roy, *Does 'Merit' Have a Caste*, THE WIRE (June 28, 2021, 6:40 AM), https://thewire.in/education/merit-caste-maroona-murmu.

[118] Alok P. Kumar, *Revisting the Rationale for Reservation*, 51 ECON.& POL. WKLY 10, 11 (2016).

to Article 335.[119] This is evident from the clarification of Pandit Hidray Nath Kunzru, who was a member of the Constituent Assembly, where he made a distinction between Article 335 and Article 16(4). He contended that, under Article 16(4), it is not essential to discuss the reservation of posts by the Union or State Government with the Public Service Commission.[120] The power to reserve posts under Article 335 is discretionary, and can be exercised by the state; however, under Article 16(4), the state has been conferred with this power explicitly. Kunzru's explanation of both the provision shows that reservation under Article 16(4) is not dependent on efficiency mentioned under Article 335. The former has a macroscopic view and is unrestricted by any other provision in the Constitution. In contrast, Article 335 is a directive to the government.[121] Thus, setting a cap on the reservation does not make sense because the provision of Article 16(4) is broader in nature, and the argument of "efficiency of administration" cannot be brought to put a numerical cap on reservation.

Even if we concede to the argument that Article 16(4) is connected to Article 335, there is nothing to show that reservation exacerbates administration efficiency. In fact, a study showed that reservation in the Indian railways did not harm efficiency but only showed positive results in efficiency in some areas.[122] Most importantly, there is no data to support

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[119] Anurag Bhaskar, *Reservation, Efficiency, and the Making of Indian Constitution,* 56 ECON.& POL. WKLY 42, 44(2021).

[120] Parliament of India, Constituent Assembly Debates, Vol. XI, 14th November, 1949 (speech of H.N. Kunzru), https://www.constitutionofindia.net/constitution_assembly_debates/volume/11/1949-11-14 (last visited 30 June 2021).

[121] BAWS, *supra* note 109.

[122] Ashwini Despande & T.E. Weisskopf*, Does Affirmative action reduce productivity? A case study of the Indian Railway*, 64 WORLD DEV. J. 169, 174-175 (2014).

that the 50% reservation ceiling is preserving merit and efficiency in administration. Considering the example of Tamil Nadu, where 69% of seats are reserved as per the Tamil Nadu Reservation Act, 1993,[123] is still amongst the most advanced state in relation to innovation and human development. In Sustainable Development Goals India Index and Dashboard, Tamil Nadu was ranked among the top 5 states.[124] Tamil Nadu ranks at third position in India Innovation Index, 2020.[125] Thus, if the court wishes to restrict reservation to any numerical limit, then it must be based on quantitative data. Even if there is inefficiency in administration, there is a lack of data to blame reservation for it. Thus, limiting the reservation to preserve merit and efficiency would be barking at the wrong tree.

This discourse on efficiency and meritocracy results in grave social stigma around reservation. The competence of a person benefitting from an affirmative action policy is deemed to be considered inherently low.[126] Students from the depressed caste have been victims of a new sort of discrimination because they are utilising the reservation policies to seek admission to colleges and employment and they are branded as incompetent.[127] One study proves that because of fear of social stigma, there is a lack of utilisation of affirmative action. This is defeating the

[123] Tamil Nadu Backward, Scheduled Castes and Scheduled Tribes (Reservation of Seats in Educational Institutions and of Appointments or Posts in the Services under the State) Act, 1993, No. 45, Acts of Tamil Nadu State Legislative Assembly, 2004.
[124] NITI AYOG, SDG INDIA INDEX & DASHBOARD, (2020-2021), https://niti.gov.in/writereaddata/files/SDG_3.0_Final_04.03.2021_Web_Spreads.pdf.
[125] NITI AYOG, INDIA INNOVATION INDEX, (2020), https://niti.gov.in/sites/default/files/2021-01/IndiaInnovationReport2020Book.pdf.
[126] Madeline E. Heilman, Caryn J. Block & Jonathan A. Lucas, *Presumed Incompetence? Stigmatization and Affirmative Action Efforts*, 77(4) J. OF APPLIED PSY. 536, 538-540 (1992).
[127] Ashwini Despande, *Double Jeopardy? Stigma of Identity and Affirmative Action,* 46(1) THE REVIEW OF BLACK POLITICAL ECONOMY 38, 50-55 (2019).

purpose of the policies since they aim to bring forward those castes which have been historically marginalised.[128] There is a need for change in the outlook that students utilising reservation as less hardworking and incompetent because the data shows that there is negligible difference in the hours of hard work put in by students claiming reservation and general castes in studies.[129] There is a disproportionate gap in the educational status of the castes which shows that social factors are at play rather than their inability to put in hard work.[130]

VI. CONCLUSION

The issue of reservation has always been a bone of contention among beneficiaries of reservation policies and upper-middle classes. A reservation ceiling is seen as a solution to that, but the solution is doing more harm than good. There is no need to curb the extent of reservation. However, the extent of reservation must not be curbed through a numerical limit but with the help of quantifiable data, which will help the state recognise the backwardness of a community. The Maratha reservation verdict was an alarm in this regard. As previously mentioned, reservations exceeding 50% should not make it excessive but should be evaluated on a case-to-case basis. Importantly, the policy of reservation neither hinders equality nor merit but on the contrary, seeks to promote it.

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[128] *Id.*

[129] *Id.*

[130] MINISTRY OF STATISTICS AND PROGRAM IMPLEMENTATION, KEY INDICATORS OF HOUSEHOLD SOCIAL CONSUMPTION ON EDUCATION IN INDIA, (November 2019), http://mospi.nic.in/sites/default/files/publication_reports/KI_Education_75th_Final.pdf .

Rohan Dembani, *Has Common Shareholding Become a Commonplace in CCI's Assessment: Unveiling the Development of Common Shareholding in India*, 9(1) NLUJ L. REV. 105 (2022).

HAS COMMON SHAREHOLDING BECOME COMMONPLACE IN CCI'S ASSESSMENT: UNVEILING THE DEVELOPMENT OF COMMON SHAREHOLDING IN INDIA

*~Rohan Dembani**

ABSTRACT

In any part of the world, businesses observe evolution. The competition law strives to assure a level playing field for businesses and therefore, must evolve alongside. With the development of businesses, originates new tactics to impair competition in their favour. One of the most prevalent means to get incentivized from impairment of competition is cartelization. With businesses, cartelization has also evolved and now includes a mechanism wherein companies invest in each other and establish a shareholding relationship. As a result, they can meet or share information without raising suspicion of cartelization. It is essential for any competition authority to integrate such a mechanism into its examination. The paper analyses the development of common shareholding as a concept under the competition regime of India. As opposed to the common belief, it is found that the Competition Commission of India has led to significant development of

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common shareholding through its ex-post as well as ex-ante examinations. The paper further argues that referring to the Meru Case as the only point of reference for assessing the development of common shareholding is based on indifference. The paper highlights how the concept has developed in a veiled fashion. With regards to ex-post examination, the paper shall be deliberating on multiple cases wherein the Commission has applied the concept without even referring to the formal terminology. As for ex-ante examination, the paper shall be analyzing what relevance the Combination Regulation and the CCI attribute to the concept of common shareholding. The paper also deliberates on the challenges forthcoming in these examinations. The paper shall conclude that the competition law of India is witnessing the development of common shareholding in a veiled fashion.

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I. INTRODUCTION

Competition law in India is witnessing an age of evolution. At this stage, the Competition Commission of India ("**CCI**") stands in a precarious as well as advantageous position. It has the advantage of taking cues from the matured jurisdictions but at the same time, the CCI must be cautious of its decisions. Any decision that the CCI adopts today would hold fundamental significance and become the primary source of reference for years to come.

The competition regime of India is remarked as being less mature when compared with its counterparts of the European Union ("**EU**") and the United States ("**US**").[1] The regime has been subject to candid criticism as scholars tend to draw comparisons with the so-called matured jurisdictions.[2] The critics fail to realize that like any other competition law in history, the Indian competition regime is developing at its own pace.

Although it is advisable to draw references from other jurisdictions, such references must not become a primary source of law. Competition law is formulated as per the peculiar needs and wants of a particular nation's markets and more importantly, economy. The regimes of the EU and the US are substantially different yet are considered equally mature.[3] It is

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[1] Vikas Kathuria, *Vertical restraints under Indian Competition Law: whither law and economics*, 10 JOURNAL OF ANTITRUST ENFORCEMENT, 194–215 (2022).
[2] Aditya Bhattacharjea, *India's New Competition Law: A Comparative Assessment*, 4 JOURNAL OF COMPETITION LAW & ECONOMICS, 609 – 638 (2008).
[3] Ioannis Apostolakis, *Book Review: Resale Price Maintenance and Vertical Territorial Restrictions: Theory and Practice in EU Competition Law and US Antitrust Law (New Horizons in Competition Law and Economics)*, WORLD COMPETITION LAW AND ECONOMICS, 517-519 (Wolters Kluwer 2016).

reckoning why the Indian regime is advised to imitate other regimes whilst it can become of its own and mature at the same time.

The paper highlights a key development that the Indian competition regime is observing without drawing reference from international jurisdictions – the development of the concept of common shareholding. The concept of common shareholding refers to a shareholding relationship that broadly includes two scenarios: (a) When one entity holds shares of its competitor belonging to the same market and (b) When one entity holds shares of two competitors making itself a common shareholder.[4] These scenarios are also referred to as horizontal shareholding and cross-ownership respectively.[5] A common shareholder may facilitate an anti-competitive agreement between the companies it has invested in i.e., portfolio companies.[6] Therefore, the presence of common shareholding is to be duly considered in determining an anti-competitive agreement.

The Indian competition regime can be categorized as *ex-post* regulation and *ex-ante* regulation. The difference between these regulations is the timeline of intervention of the CCI. In *ex-post*, the CCI intervenes after the anti-competitive activity is alleged to have been completed. Such an activity could be in a form of an anti-competitive agreement or abuse of dominant position. In *ex-ante*, the CCI previews the notifiable transaction or combinations with the primary aim to prevent the occurrence of any

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[4] Alec J. Burnside & Adam Kidane, *Common ownership: an EU perspective*, 8 JOURNAL OF ANTITRUST ENFORCEMENT, 456 - 510 (2020) (*hereinafter* "**Burnside & Kidane**").
[5] Einer R Elhauge, *Horizontal Shareholding*', 129 HARVARD LAW REVIEW, 1267 (2016).
[6] José Azar, Sahil Raina & Martin C. Schmalz, *Ultimate Ownership and Bank Competition,* (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2710252.

anti-competitive effect that could arise out of such combination.[7] Given the built-in categorization, the paper is bifurcated to categorically explore the development of common shareholding in both of these regulations.

Part I of the paper argues that the CCI is applying the concept in a veiled fashion. The CCI seems to be applying the concept subconsciously while examining cartels. Through cartel cases, the paper traces the origination of the application of the concept. It will be demonstrated that in examining cartels, the CCI follows a general practice of analyzing the relationship between cartel members. This practice has steered the CCI to take cognizance of common shareholding as the same is no less than a relationship that exists between the parties. The paper concludes that as a result of such practice, common shareholding has made its place as circumstantial evidence in the determination of anti-competitive agreements. In the latter section of this part, the current challenge in the *ex-post* examination is highlighted.

Part II of the paper analyses the relevance of common shareholding in the assessment of combinations. In examining combinations, the prime concern of the CCI is to assess whether the combination would be likely to cause anti-competitive effects in the market. The paper argues that the laws governing combination afford a preemptive opportunity to the CCI for preventing anti-competitive effects arising out of shareholding relationships including common shareholding. In this regard, the CCI ascertains whether the notifying parties have any horizontal overlap i.e., producing identical or substitutable products. This leads the CCI to

[7] KK Sharma, '*Ex-ante and Ex-post Regulation',* (Competition Commission of India) http://164.100.58.95/ex-ante-and-ex-post-regulation.

conclude whether they belong to the same market. The paper shall establish that in arriving at such a conclusion, the CCI implicitly determines whether the combination would create a relationship of common shareholding between the notifying parties. Once such a determination is made, the CCI diminishes any assistance that common shareholding could provide for forming an anti-competitive agreement. The paper concludes that in any stage of assessment of combinations, the laws governing combinations and the CCI in its decisional practice have observed due consideration to common shareholding. In the last segment, the key development forthcoming in *ex-ante* regulation is deliberated. Part IV concludes the paper.

II. TRACING THE DEVELOPMENT OF COMMON SHAREHOLDING FROM *EX-POST* PROVISIONS

The CCI undertakes *ex-post* examination when anti-competitive conduct is alleged to have been committed. The objective is to determine the existence of alleged conduct and order its cessation. Under *ex-post* examination, case laws can be categorized as Section 3[8] and Section 4[9] cases. In this part, the origination and development of the concept of common shareholding are traced from these cases. Further, a new challenge that poses to cause a halt in the development is highlighted in the latter section.

A. UNTRACEABLE DEVELOPMENT FROM SECTION 4 CASES

[8] The Competition Act, 2002, No. 12, Acts of Parliament, 2002 (India) §3.
[9] The Competition Act, 2002, No. 12, Acts of Parliament, 2002 (India) §4.

Section 4 cases appear to have scarcely contributed to the development of the concept of common shareholding. Section 4 proscribes unilateral conduct by an enterprise, which constitutes an abuse of dominant position. A dominant position refers to the market power which enables an enterprise to act independently of consumers and competitors.[10] Abuse of dominant position is committed when an enterprise practice conducts such as predatory pricing, deep discounting, leveraging, etc. It is important to note that only those anti-competitive conducts that are committed unilaterally are prohibited. For abuse to be characterized as unilateral conduct, only a single enterprise is required to undertake an anti-competitive activity.

The major reason behind Section 4 cases failing to contribute to the development of common shareholding is its inapplicability in cases where two entities have committed abuse. Section 4 does not apply to those scenarios wherein two dominant entities are practising anti-competitive conduct because the provision does not inculcate collective dominance. Collective dominance refers to a scenario where two or more enterprises collectively hold dominant positions.[11] As the concept of common shareholding requires the presence of at least two enterprises to have shares in common and since Section 4 is restricted to cases of single dominant firms, it is consequential that Section 4 cases have not contributed to the development of the concept of common shareholding in India.

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[10] United Brands Company and United Brands Continental BV v. Commission of the European Communities [1978] ECR II- 207.

[11] Boris Etter, '*The Assessment of Mergers in the EC under the Concept of Collective Dominance: An Analysis of the Recent Decisions and Judgments—by an Economic Approach*', 23 JOURNAL OF WORLD COMPETITION, 103-139 (2000).

In *In Re: Delhi Vyapar Mahasangh and Flipkart Internet Private Limited*, [12] abuse of dominant position was alleged in light of common shareholders. In this case, the informant alleged that the opposite parties were practising deep-discounting through their common investors and thereby abusing dominant positions which they collectively hold in the market. The CCI reiterated its stance that collective dominance cases are untenable under Section 4. Thus, in Section 4 cases, the CCI has not entertained the arguments based on common shareholding since the CCI dismisses the cases of collective dominance (or where two dominant parties are involved) at face value.

B. TRACEABLE DEVELOPMENT FROM SECTION 3 CASES

Conversely, Section 3 cases have immensely contributed to the development of the concept of common shareholding. Section 3 appertains to two types of agreement, namely horizontal agreement and vertical agreement. A horizontal agreement whereby the competitors agree to determine prices, control supplies or engage in collusive bidding is prohibited.[13] A vertical agreement whereby the enterprises forming part of the same supply chain, tie their products, engage in exclusive agreements, and refuse to deal or maintain a resale price is also prohibited.[14] Evidently, the concept of common shareholding has been mostly applied in cases of bid-rigging. As defined in the explanation, 'bid-rigging' refers to any agreement between enterprises engaged in identical or similar production,

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[12] In Re: Delhi Vyapar Mahasangh And Flipkart Internet Private Limited, Case No. 40 of 2019 (*hereinafter* "**Flipkart**").

[13] Abir Roy, *COMPETITION LAW IN INDIA: A PRACTICAL GUIDE,* 43-156 (Kluwer Law International 2016).

[14] *Id.*

whereby they have colluded to bypass competition in the bidding or selection process.[15]

Sections	Number of cases wherein common shareholding/management was deliberated by the CCI (***at least***)
3(3)(d) Bid-rigging	7[16]
3(4)(e) Resale Price Maintenance	1[17]
3(4) R/W 3(1) and 4(2) R/W 4(1) Deep discounting through Agreement	2[18]

[15] The Competition Act, 2002, No. 12, Acts of Parliament, 2002 (India) §3.
[16] Emami Power Limited v. NTPC Limited, 2018 SCC OnLine Del 6525 (India) (*hereinafter* "**Emami**"); In Re: Alleged bid-rigging in tenders invited by department of printing for printing, packaging, and dispatch of confidential documents Chandra Prabhu Offset Printing Works Pvt. Ltd. and Ors., 2021 SCC OnLine CCI 9 (India) (*hereinafter* "**Chandraprabhu**"); Delhi Jal Board v. Grasim Industries Ltd, 2017 SCC OnLine CCI 48 (India) (*hereinafter* "**Grasim**"); Jindal Steel & Power Ltd. v. Steel Authority of India Limited, 2011 SCC OnLine CCI 8 (India) (*hereinafter* "**SAIL**"); Rajasthan Cylinders & Containers Ltd. v. Union of India, (2020) 16 SCC 615 (India) (*hereinafter* "**Rajasthan Cylinders**"); In Re: Sugar Mills, 2011 SCC OnLine CCI 105 (India); In Re: Cartelization by public sector insurance companies in rigging the bids v. National Insurance Co. Ltd. and Ors., 2015 SCC OnLine CCI 192 (India).
[17] Shri Shamsher Kataria v. Honda Siel Cars India Ltd., (2014) SCC OnLine CCI 95 (India).
[18] *See* Flipkart, *supra* note12, at 12; Meru Travel Solutions Pvt Ltd v. Uber India Systems Pvt Ltd., 2016 SCC OnLine CCI 12 (India) (*hereinafter* "**Meru**").

The said agreements are entered into behind closed doors and hence, are difficult to chase through direct evidence. Therefore, reliance is placed on circumstantial evidence.

1) ***Relevance of Circumstantial Evidence in Determination of Anti-competitive Agreements***

The circumstances favoring or opposing the existence of the cartel are known as circumstantial evidence. In other words, circumstantial evidence as the name suggests refers to pieces of evidence derived from circumstances that exist in the market and includes the conduct of market participants.[19] In *Rajasthan Cylinders v UOI*,[20] the Supreme Court observed that as cartels are formed surreptitiously, direct evidence may not be present and thus, the standard of proof for determining agreement is of the preponderance of probability. In weighing up probabilities, the CCI compares relevant circumstances that indicate the existence of a cartel with those that suggest otherwise.[21]

A circumstance becomes relevant in the finding of an anti-competitive agreement when it constitutes a 'plus factor'. The term 'plus factors' is referred to those circumstances or aspects that indicate the existence of a cartel.[22] Pertinently, these factors are indicators and not determinants of anti-competitive agreement. Essentially, the plus factors include parallel behaviour, meeting of the parties, and exchange of price-

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[19] In Re: All India Tyre Dealers' Federation And Tyre Manufacturers, 2012 SCC OnLine CCI 65 (India).
[20] Rajasthan Cylinders, *supra* note 16, at 16.
[21] *Id.*
[22] *Id.*

sensitive information.[23] It is apparent that common shareholding would become part of the CCI's *ex-post* examination when it constitutes a plus factor.

2) *Does the Circumstance of Common Shareholding Constitute a Plus Factor?*

Common shareholding being a kind of circumstance would be a plus factor for the CCI when it indicates the presence of an anti-competitive agreement. In this segment, it will be demonstrated that as per its decisional practice, the CCI has regarded common shareholding as a plus factor when it somehow provides an opportunity for the entities to share commercially sensitive information. As stated earlier, common shareholding can be an outcome of (a) the entities being horizontally or vertically connected, holding shares of one another or (b) one entity owning shares in two entities which are horizontally or vertically connected.[24] The CCI has paid due regard to such scenarios in its assessment of the anti-competitive agreement.

It is derivable from *Meru Travel Solutions Pvt. Ltd v. M/S ANI Technologies & Ors.*[25] ("**Meru Case**") that the CCI regards the presence of common shareholding or common ownership as a plus factor. In this case, two horizontal competitors were alleged of forming an anti-competitive agreement through their common investor. In the aforementioned case, the CCI stated that *"common ownership of firms with related and competing commercial*

[23] Stefan Thomas, *Harmful Signals: Cartel Prohibition and Oligopoly Theory In The Age Of Machine Learning*, 15 JOURNAL OF COMPETITION LAW & ECONOMICS, 159-203 (2019).
[24] Burnside & Kidane, *supra* note 4.
[25] Meru, *supra* note 18.

interests may increase the risk of exchange of sensitive information which may facilitate price-collusion or restrain capacity and volumes." It can be construed from the statement that as per the CCI, in the presence of a common owner, there is a higher risk that the horizontal competitors may share price-sensitive information and facilitate an anti-competitive agreement.

This observation signifies that common ownership is relevant to the CCI insofar as it may facilitate sharing of information and stem price collusion as a result thereof. After framing such observation, the CCI went on to scrutinize whether the common owner had facilitated an anti-competitive agreement. However, when the CCI found no evidence on record to suggest the presence of an anti-competitive agreement, it dismissed the case.[26] In determining the presence of an anti-competitive agreement, the CCI's assessment was considerably based on the presence of a common owner. The *Meru Case* demonstrates that the CCI regards common shareholding as a plus factor.

The *Meru Case* is not the single case wherein the CCI deliberated on the circumstance of common shareholding, rather it is the only case where the CCI explicitly made such deliberation. Further, though the *Meru Case* is regarded as a landmark case for a common shareholding in competition law of India, the CCI never determined an anti-competitive agreement on basis of common shareholding in the said case. To consider the *Meru Case* as the point of reference for the development of common shareholding would be a consideration based on indifference. Apparently, the cases wherein the CCI did determine anti-competitive agreements based on

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[26] *Id.*

common shareholding are overlooked. The paper argues that the CCI integrates scenarios of common shareholding whenever required and thereby, has led to the development of common shareholding.

3) *The CCI's Integration of Common Shareholding into the Assessment of Anti-competitive Agreements*

In the case of *Delhi Jal Board v Grasim Industries Ltd.*[27] ("**Grasim Case**"), two entities belonging to the same group had a common shareholder. Along with common shareholding, the CCI also took account of the presence of common management by group entities. the CCI found that the group entity was responsible for deciding tender prices. This further led to the conclusion that the group entity set prices on behalf of the concerned entities to manipulate the bidding process. Seemingly, the group entity acted as common management and facilitated collusive bidding. The CCI held these entities liable under Section 3(3)(d) which prohibits collusive bid-rigging.

Interestingly, the opposite parties are becoming wary of what relevance do factors such as common shareholding and common management hold before the CCI. In *Jindal Steel and Power Ltd v Steel Authority of India*[28] ("**SAIL Case**"), the opposite parties alleged of forming an anti-competitive agreement were found to have been under the common control of the Government of India. Anticipating that being in common control would not help their case, the opposite parties argued that they operated independently. Seemingly, the parties tried to establish that they

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[27] Grasim, *supra* note 16.
[28] SAIL, *supra* note 16.

did not operate under the common management to dodge the suspicion that the government department might have facilitated an agreement between them. The *Meru Case* has further spelt out the relevance of control or influence of a common shareholder. This will be discussed in the latter section of this part.

Apart from the *Grasim Case* and the *SAIL Case*, in *In Re: Chandraprabhu Offset Printing Works Pvt. Ltd*[29] ("**Chandraprabhu Case**") as well, the CCI took notice of the presence of common shareholding without referring to the term "common shareholding". In this case, the CCI used the term "*inter-se shareholding*" which is one of the facets of the concept of common shareholding.[30] The *inter-se shareholding* means a scenario wherein entities hold shares of each other. While commenting on such a shareholding pattern, the CCI found that the shareholding or linkage between the entities explains why they had been transacting with each other. However, the CCI dismissed this case when it found no evidence tracing to manipulation of the bidding process.

In the *Chandraprabhu Case* or the *Meru Case*, the CCI never determined an anti-competitive agreement even though there was common shareholding.[31] In this regard, as stated earlier, the presence of a plus factor is merely an indicator and does not necessarily determine the existence of an anti-competitive agreement. Like other plus factors, common shareholding is not considered as a determinant of an anti-competitive agreement but is treated as an indicator.

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[29] Chandraprabhu, *supra* note 16.
[30] Burnside & Kidane, *supra* note 4.
[31] Chandraprabhu, *supra* note 16; Meru, *supra* note 18.

Pertinently, the concept of common shareholding seemed to have reached the sight of Indian courts as well. The Delhi High Court in *Emami Power Ltd v. NTPC Ltd*[32] ("**Emami Case**"), gave due consideration to the scenario of common shareholding while ascertaining the violation of the Act. In the said case, Emami and OSAPL were bidding in the selection process of solar power developments. Emami was found to have been holding 49.99% shares in OSAPL. The Court gave categorical consideration to the question – whether the shareholding structure can be categorised as that of common ownership. The Court held that although some common shareholding was present, the anti-competitive agreement was not derivable from the evidence on record.[33]

In all the aforementioned cases, the concept of common shareholding was applied without referring to the terminology "common ownership" or "common shareholding". This has led to the misconception that the *Meru Case* is the only case covering the concept. The only reason that the *Meru Case* is better known for common shareholding is because of the overt usage of the terms "common shareholding" and "common ownership" which was absent in the *Grasim Case*, *SAIL Case* and *Chandraprabhu Case*.[34]

It is evident from the aforementioned cases that without referring to the term, the CCI subconsciously applies the concept of common shareholding.

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[32] Emami, *supra* note 16.
[33] *Id.*
[34] Grasim, *supra* note 16; SAIL, *supra* note 16; Chandraprabhu, *supra* note 16.

4) *The Rationale behind the Subconscious Application of the Concept of Common Shareholding*

The CCI's subconscious application of the concept could be owing to its general practice of assessing the relationship between the opposite parties alleged of engaging in an anti-competitive agreement. In particular, the CCI takes into account whether parties have a principal-agent relationship[35], parent-subsidiary relationship[36] or whether they constitute a single economic entity[37], etc.

Moreover, in *In Re: M/s Sheth & Co.*[38] ("**Sheth Case**"), the CCI paid due consideration to the familial relationship between the competing entities. It was found that the members of the same family were holding managerial positions at the helm of affairs of the horizontal corporations. Thus, the CCI applied the '*principle of mutual understanding and benefit*'. Based on the principle, the CCI concluded that price parallelism coupled with the presence of family members indicates the existence of an anti-competitive agreement to manipulate the bidding process.

In the said case, the CCI did not delve into the shareholding relationship between the opposite parties and derived such a conclusion from the presence of family members in the management. The *Sheth Case* might not be relevant for the concept of common shareholding but it exhibits the vigilance of the CCI towards peculiar facts and circumstances

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[35] Justickets Pvt. Ltd. v. Big Tree Entertainment Pvt. Ltd., 2017 SCC OnLine CCI 14 (India).
[36] UltraTech Cement Limited v. Jaiprakash Associates Limited, 2018 SCC OnLine CCI 20 (India).
[37] Exclusive Motors Pvt Limited v. Automobili Lamborghini, 2012 SCC OnLine CCI 69 (India).
[38] In Re: M/s Sheth & Co. & Ors., 2015 SCC OnLine CCI 93 (India).

of a case. The presence of family members in the management can be construed as a plus factor since such a fact assisted the CCI in reaching the determination of an anti-competitive agreement.[39]

The CCI refrained from using the terms "common shareholding" and "common ownership" for the simple reason that such usage was not required. Without referring to these terms, the CCI subconsciously applied the concept as a result of its general practice of looking out for a nexus between the parties. Consequently, through Section 3 cases, the concept of common shareholding has developed in a veiled fashion i.e., without explicit application.

Currently, the concept is taking newer turns. As will be demonstrated in the subsequent segment, through the *Meru Case*, the CCI seems to have restricted the application of the concept to only those cases wherein there is the highest level of control. This has led to a conundrum in *ex-post* cases.

C. THE CONTROL CONUNDRUM: A NEW CHALLENGE BEFORE THE CCI TO PONDER

In the Meru Case, the CCI ascertained whether the common shareholder had the potential to facilitate an anti-competitive agreement. This potential was estimated based on certain yardsticks. Relying on international jurisprudence of common shareholding, the CCI stated that "*Control can be in the form of de facto control, controlling interest (de jure control) as*

[39] *Id.*

well as material influence".[40] In the *In Re: Ultratech Cement Limited,* the CCI explained that *de jure* control is present when the common shareholder has a majority stake in the portfolio companies.[41] As opposed to this, *de facto* control is considered to be present when the common shareholder does not have the majority of voting rights but exercises control over half of the votes that are cast.[42] Material influence stands at the lowest in the hierarchy of control and as the name suggests, implies the presence of 'materials' or 'factors' that enables a common shareholder to influence the affairs of the portfolio companies' business. With respect to *de facto* control and material influence, the CCI observed that their presence does not significantly contribute to the competition assessment. This stance of the CCI reduces the relevance of common shareholding to only those circumstances wherein *de jure* control or controlling interest is present.

Analyzing the level of control based on these yardsticks might be relevant for assessing whether the common shareholder had control over the management of affairs; however, the absence of a higher level of control must not be taken to mean that the common shareholder could not have facilitated an agreement. The common shareholder is not the only party who would benefit from cartelization and it could be the case that the affiliated companies or horizontal competitors are also inclined towards forming an anti-competitive agreement. In other words, the proposal to form an anti-competitive agreement can come from the companies (or horizontal competitors) of which the common shareholder has bought

[40] Meru, *supra* note 18.
[41] UltraTech Cement Limited, In re, 2018 SCC OnLine CCI 27 (India).
[42] *Id.*

shares. In such a scenario, the common shareholder does not need to convince or exercise its influence over the horizontal competitors.

By subjecting the relevance of common shareholding to the level of control, the CCI has limited the application of the concept. Consequently, the cases wherein the potential of a common shareholder is not required to form an anti-competitive agreement would be given leeway. Even in the absence of potential, the common shareholder can become a medium of sharing sensitive information between the parties and thereby, cause an agreement. Thus, the CCI must revert to its former stance wherein it used to examine whether a common shareholder has assisted in facilitating an anti-competitive agreement, rather than examining whether he had the potential to form the agreement.

III. RELEVANCE OF COMMON SHAREHOLDING IN EX-ANTE COMPETITION REGIME

The ex-ante examination is undertaken by the CCI to assess whether a notifiable transaction is likely to cause an Appreciable Adverse Effect on Competition ("**AAEC Case**"). A transaction is considered to be 'notifiable' when it breaches the thresholds stipulated under Section 5[43] and thereby, qualifies for becoming a combination. These thresholds are based on the number of assets and turnovers of the resultant entity (an entity created as a result of the merger) and that of the notifying parties jointly or singly, as the case may be. Sections 5 and 6 have synchronized application.

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[43] The Competition Act, 2002, No. 12, Acts of Parliament, 2002 (India) §5.

Whenever a transaction qualifies for becoming a combination as per thresholds under Section 5, it will have to be notified under Section 6.[44] Further, Section 6 has no application to transactions that do not constitute combinations. Such transactions are free from the CCI's intervention.

This part is divided into four segments. The first segment highlights that the *ex-ante* regulation affords the CCI a preemptive opportunity to prevent the formation of anti-competitive agreements through common shareholding. The *ex-ante* regulation can be broadly bifurcated into two stages: Filing of Notification and Assessment of the CCI. Hence, the second segment evaluates what relevance the law governing the combinations attributes to common shareholding. And, the third segment evaluates the relevance that the CCI attributes to common shareholding in combination assessment. In the last segment, the paper deliberates on the new development in *ex-ante* regulation.

A. PRE-EMPTIVE PREVENTION OF FORMATION OF ANTI-COMPETITIVE AGREEMENT THROUGH COMMON SHAREHOLDING

Interestingly, the objective of Sections 3, 5 and 6 is similar i.e., to cease or prevent AAEC. Under Section 3, the CCI aims at ceasing the continuation of the agreement that caused or was likely to cause AAEC.[45] The CCI undertakes such cessation after the formation of an anti-competitive agreement and thus, the provision falls under *ex-post* examination.

[44] The Competition Act, 2002, No. 12, Acts of Parliament, 2002 (India) §6.
[45] Alleged anti-competitive conduct in the Beer Market in India v. United Breweries Limited and Others, 2021 SCC OnLine CCI 53 (India).

On the other hand, Sections 5 and 6 constitute part of *ex-ante* examination because they aim at preventing the occurrence of AAEC even before an anti-competitive agreement is formed. Apparently, Section 3 can be taken as a cure for AAEC; whereas, Sections 5 and 6 implicate the prevention of AAEC. In other words, the role of Section 3 comes after an anti-competitive agreement is formed and that of Sections 5 and 6 before its formation.

Under ex-*ante* examination, the CCI ascertains the likeliness of AAEC as an outcome of the combination. Primarily, the CCI contemplates whether, upon approval, the transacting parties would be engaging in an anti-competitive agreement that is likely to cause AAEC. For instance, if the acquirer holds shares in the target's competitor; then, the prime concern of the CCI would be whether, after the approval, the acquirer would be in a position to facilitate an anti-competitive agreement between the target and its competitor. In another instance, if the acquirer is a horizontal competitor of the target, then upon approval, they can engage themselves in forming an anti-competitive agreement. These instances are no different from the ones discussed earlier i.e., cross-ownership and horizontal shareholding respectively.

Pertinently, such transacting entities can manage to form an anti-competitive agreement even without entering into a transaction or acquisition; however, the decisional practice of the CCI demonstrates that the entities with common shareholding are more likely to form such agreements. The decisional practice will be deliberated on in the latter section. As stated earlier, common shareholding can aid parties in forming anti-competitive agreements and thus, constitutes a plus factor. It was also

observed that a common shareholder can act as a common route for sharing information between the entities. The relationship of common shareholding is known to aid entities in forming anti-competitive agreements.[46]

However, notifying parties of the combination will get aid from common shareholding or common shareholders only if the CCI approves of such shareholding in its combination assessment. If the CCI estimates that the transacting parties could cause AAEC by forming an agreement, then the CCI will not approve the transaction or acquisition. Alternatively, the CCI can lessen the aid from common shareholding. This will be analyzed along with the decisional practice in the latter section. Therefore, the *ex-ante* examination gives the CCI an opportunity to pre-emptively prevent the formation of the anti-competitive agreement through common shareholding and AAEC resulting thereof.

Furthermore, for the CCI to effectively contemplate AAEC as an outcome of common shareholding, it would require certain details, significantly being whether the transacting parties operate in the same market. Thereafter, the CCI would be able to determine whether the parties are horizontally or vertically connected. Additionally, if such a connection is established, then the parties could enter into a horizontal or vertical anti-competitive agreement likely to cause AAEC. In order to analyze whether the parties are bound to disclose the said detail, the law governing the combinations requires to be evaluated.

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[46] Azar, Raina & Schmalz, *supra* note 6.

B. EVALUATION OF THE RELEVANCE THAT THE REGULATION ATTRIBUTES TO COMMON SHAREHOLDING IN FILING OF NOTIFICATION

In India, the combinations are governed by the CCI (Procedure In Regard To The Transaction of Business Relating to Combinations), Regulations 2011 (Regulation).[47]As per the Regulation, reviewing notifiable transactions can be bifurcated into two phases. In Phase I, the CCI delves into forming a *prima facie* opinion as to whether the combination is likely to AAEC. In this regard, the CCI ascertains the market landscape to apprehend whether the AAEC has been resulted and if not, the CCI assesses the likeliness of such a result as an outcome of the Combination.[48] If the CCI forms such an opinion, the case transmits to Phase II wherein the CCI may ask notifying parties to file additional information.[49] Further, in Phase II, if the CCI concludes that the transaction is likely to cause AAEC then it either imposes conditions or accepts the commitments offered by the parties.[50] The CCI can also dismiss the transaction when it is not appeased by the commitments offered by the parties. The CCI approves the combination only upon satisfaction that the concerned transaction is not likely to cause AAEC.

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[47] The Competition Commission of India (Procedure in Regard to the Transaction of Business Relating to Combinations) Regulations, 2011 No. 1-1/Combination Regulations/2011-12/CD/CCI (India) (*hereinafter* "**Regulation**").
[48] Abir Roy, *supra* note 13.
[49] The Competition Commission of India (Procedure in Regard to the Transaction of Business Relating to Combinations) Regulations, 2011 Reg. 19. No. 1-1/Combination Regulations/2011-12/CD/CCI.
[50] *Id.* Reg. 25.

Combinations being notifiable transactions, are required to be notified to the CCI by filing forms as specified in Schedule II of the Regulation.[51] Schedule II includes four types of forms in which, parties can file a notice in either Form I or Form II.[52] Further, if the acquirer is a financial institution, then notification has to be made in Form III.[53] Last of all, Form IV is solicited from the parties by the CCI when it makes a *prima facie* observation that a formerly sanctioned combination has caused or is likely to cause AAEC.[54]

Between Forms I and II, the choice of form is at the discretion of the parties. However, the Regulation advises parties dealing in similar goods or working at different levels of the supply chain to file the notice in Form II because it is more detailed.[55] The provision applies to those entities who are or upon approval, will be horizontally or vertically connected. It stipulates two scenarios: (a) when the notifying parties are engaged in production, distribution, or trade of similar or identical or substitutable goods or services and combined market shares of the combination are more than 15% and (b) when the parties are engaged in different level of supply chain and the resultant market shares of combination is more than 25%.[56]

Pertinently, the Regulation only exhibits the preference of the CCI towards the filing of the notice in Form II in the aforementioned scenarios. However, even if parties do not act upon advice expressed under the regulation and choose to file a notice in Form I, the parties will be required

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[51] *Id.* Schedule II.
[52] *Id.* Reg. 5.
[53] *Id.* Reg. 6.
[54] *Id.* Reg. 22.
[55] *Id.* Reg. 5.
[56] *Id.* Schedule II.

to specify the existence or possibility of horizontal overlap and vertical overlap under Part VI of Form I. Form III also has a similar requirement for financial institutions. As for Form IV, since it is called upon by the CCI from parties who previously received approval and they must have filed notification in either of Forms I or II.

Therefore, irrespective of the type of forms the parties are filing, the Regulation ensures that they specify details pertaining to the production of similar, identical or substitutable products. Further, if the parties fail to notify a combination[57] or abstain from furnishing any material information[58], then they shall be inviting a penalty under the respective provisions of the Act.

Therefore, the Regulation is sufficiently efficient on its part to ensure that parties do not escape from providing the details pertaining to identical or substitutable products, if any.

After filing the forms, it is for the CCI to examine the relevant product markets and look for the possibility of common shareholding resulting in AAEC through an anti-competitive agreement. Knowledge with respect to identical products is of material to the CCI since only then it would be able to contemplate whether the case would be of horizontal shareholding or cross-ownership. As a result, the CCI would be able to take the required actions to ensure that the transaction will not be likely to cause AAEC. In this regard, the decisional practice of the CCI is required to be analysed.

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[57] The Competition Act, 2002, No. 12, Acts of Parliament, 2002 (India) §43a. This provision penalizes upon failure to notify combinations under Section 6.

[58] The Competition Act, 2002, No. 12, Acts of Parliament, 2002 (India) §44. This provision penalizes upon omitting to disclose material information.

C. <u>Evaluation of the Relevance that the CCI Attributes to Common Shareholding in Combination Assessment</u>

As stated earlier, while assessing a combination, the CCI foresees whether it has the potential to cause AAEC and if so, the CCI nullifies such possibilities by accepting commitments from the parties or imposing conditions. In *Canary Investments/Intas Pharmaceuticals*,[59] the CCI observed that the affiliated company of the acquirer, ChrysCapital had a stake in the target's competitor, Mankind. The Commission concluded that ChrysCapital's common interest in these companies will enable it to cause AAEC through bid-rigging, price arrangement or allocation of markets. In its assessment, the CCI perceived the possibility of violating Section 3 of the Act by facilitation of agreement through the common shareholder. In order to eliminate such possibilities, ChrysCapital offered multiple commitments such as limiting the exercise of veto rights and removal of its director in Mankind.

A similar course of circumstances occurred in *ZF Friedrichshafen AG/WABCO Holdings*[60] wherein the acquirer held a 49% stake in the target's competitor, Brakes India. Based on such stake, the CCI found that the combination is likely to cause AAEC in the market. Thus, the acquirer offered to divest its entire stake in Brakes India and a commitment to never re-acquire such shares. It is evident that the CCI's prime concern was the

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[59] Canary Investments Limited And Link Investment Trust II, Combination Registration No. C-2020/04/741.

[60] ZF Friedrichshafen AG And WABCO Holdings Inc, Combination Registration No. C-2019/11/703.

acquirer becoming a common shareholder of two horizontal competitors and thus, it approved the combination only after the acquirer committed to divest the whole of its stake in Brakes India.

Further, in *Northern TK/FHL,*[61] along with holding shares, the acquirer had a director in the target's competitor. The CCI was concerned that the acquirer could trigger sharing of commercially sensitive information between the horizontal competitors. In order to address such concerns, the acquirer committed to never sharing any commercially sensitive information and also, to adopt a punishment mechanism model in case any sharing is undertaken by its employees.

Interestingly, like *ex-post* cases, the presence of a common shareholder has turned out to be a plus factor in *ex-ante* cases as well. In the aforementioned cases, the CCI's assessment of the likeliness of causing AAEC was considerably based on the acquirer becoming a common shareholder of horizontal competitors. In all these cases, the CCI approved the combinations after accepting the commitments offered by the parties. In many other combination cases as well, the CCI has integrated the assessment of common shareholding in a similar fashion.[62]

Therefore, the CCI's assessment of combinations ensures that the common shareholding resulting from the transaction does not aid the parties in forming an anti-competitive agreement. Pertinently, like the *ex-post* cases, in *ex-ante* cases, the CCI did not refer to the terminologies like

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[61] Northern TK Venture Pte. Ltd and Fortis Healthcare Limited, Combination Registration No. C-2018/09/601.

[62] Outotec OYJ and Metso OYJ, Combination Regulation No.-2020/03/735; Claymore Investments (Mauritius) Pte. Ltd And IndiaIdeas.com Limited, Combination Registration No. C-2018/12/623; Etihad Airways PJSC, In Re, 2013 SCC OnLine CCI 92.

"common shareholding" and "common ownership" and observed the implicit application of the concept.

The Regulation brings any possibility of horizontal overlap to the attention of the CCI. The horizontal overlap is one element short of horizontal shareholding i.e., one party does not hold any stake in another. The notification is filed to acquire such stake and upon approval, transform the relationship into horizontal shareholding. The CCI is conscious of this phenomenon. As observed above, upon finding likeliness of AAEC resulting from horizontal overlap, the CCI aims at reducing the power of the acquirer to eliminate the possibility of the formation of an anti-competitive agreement. Such reduction is caused either through divesture or removal of a director. Acceptance of commitments and imposition of conditions fulfil the purpose of *ex-ante* regulation by preemptively preventing the AAEC likely to arise out of combinations.

D. NO FURTHER LEEWAY TO INSTITUTIONAL INVESTMENTS: A NEW DEVELOPMENT IN THE PIPELINE.

The *ex-ante* examination is limited to those transactions that amount to combinations. Seemingly, the laws governing combinations are based on the assumption that the transactions that do not constitute combinations are not likely to hamper competition and therefore, are kept out of the CCI's scrutiny. The recent trends of institutional investments could disabuse this assumption. With the knowledge that passive investments need not be notified to the CCI, the institutional investors buy shares of the portfolio companies belonging to the same market. This investment

strategy has caused higher prices in the airline and the banking industries.[63] The passive investments by institutional investors have turned out to be a new challenge before the CCI.

Economic theories suggest that common shareholding has become all the more prevalent in institutional investments.[64] Financial institutions tend to buy a minority stake in multiple companies that belong to the same market. The minority stake might seem minor in respect of the number of shares but it could not be so in terms of the level of concentration. For instance, an institutional investor can hold as much as 8% shares in an entity but could still be the largest shareholder.

The Regulation states that passive investment wherein the acquirer buys less than 10% of shares solely for the purpose of investment need not be notified to the CCI.[65] This provision ends up giving leeway to institutional investors who can candidly invest in any number of competitors insofar as their investments are under 10%. Therefore, the CCI has launched a market study of the private equity sector specially dedicated towards common ownership resulting from institutional investments. The CCI aims at finding answers to two questions: whether an institutional investor can derive benefit from stifling competition between portfolio companies and whether institutional investors can influence the decision-

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[63] Jacob Gramlich and Serafin Grundl, *Testing for Competitive Effects of Common Ownership*, FINANCE AND ECONOMICS DISCUSSION SERIES, 029 (2017).
[64] Eric A. Posner, Fiona M. Scott Morton & E. Glen Weyl, *A Proposal to Limit the Anti-Competitive Power of Institutional Investors*, 81(3) ANTITRUST LAW JOURNAL, 660 (2017).
[65] Regulation Schedule I

making process of such companies.[66] The study is one of a kind in India. It is to be seen whether the CCI would amend the Regulation or find the answers to these questions in the negative.

IV. CONCLUSION

Part I demonstrates that for both the provisions under *ex-post* regulation, the integration of common shareholding has been subject to their jurisprudence. Had Section 4 ingrained collective dominance, the CCI would have integrated the concept of common shareholding into the examination of the abuse of dominant position. On the other hand, under Section 3, had the CCI restricted itself to direct evidence, it would have never included or given evidentiary value to the circumstance of common shareholding.

The paper further established that since the CCI appreciates circumstantial evidence in the ascertainment of cartels, common shareholding has made a place as a circumstance in the CCI's assessment of anti-competitive agreements. Common shareholding as a circumstance constitutes a plus factor when it hints at the existence of an anti-competitive agreement. The application of the concept has become so prevalent that the parties seemed to have realized that common shareholding is a plus factor and thus, they tend to disassociate themselves from each other as observed in the *SAIL Case*.[67] Part I establishes that the development of the concept has stemmed out of the ordinary course that the CCI follows. The

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[66] Deeksha Manchanda & Vishnu Suresh, '*Competition law and problems of common ownership,*' INDIA BUSINESS LAW JOURNAL, https://law.asia/competition-law-problems-common-ownership/ (Last accessed: March 21, 2023).
[67] SAIL, *supra* note 16.

CCI tends to look for any possible connection between the parties as an outcome, and consequently, it started taking cognizance of common shareholding. The concept has further developed to include *inter-se* shareholding and also, corroborates with the presence of common management as observed in the *Chandraprabhu Case* and the *Grasim Case* respectively.[68]

In Part II, the paper revealed that for combinations, the origin of common shareholding is within the supervision of the CCI. This confers a pre-emptive opportunity for the CCI to prevent occurring of AAEC as a result of common shareholding. The governance of combinations is known to be suspensory and mandatory.[69] This means that a combination cannot come into existence without the former approval of the CCI. The paper established that the Regulation ensures that while seeking approval, the parties provide details pertaining to the products they produce and similarity if any. Thereupon, the CCI determines the possibility of any horizontal or vertical overlap leading to common shareholding. The CCI further examines whether the common shareholder holds sufficient control to cause an anti-competitive agreement. Lastly, if any such control is found, the CCI reduces it by accepting commitments or imposing conditions. Consequently, the likeness of AAEC rising from common shareholding is wiped out. Through the application of Regulation and acceptance or imposition of conditions, the CCI efficiently utilizes the pre-emptive

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[68] Grasim, *supra* note 1; Chandraprabhu, *supra* note 16.

[69] Avaantika Kakkar & Vijay Pratap Singh Chauhan, *'India: Merger Control',* Global Competition Review https://globalcompetitionreview.com/review/the-asia-pacific-antitrust-review/2022/article/india-merger-control.

opportunity of preventing the occurrence of anti-competitive agreements and AAEC resulting therefrom.

The paper concludes that the competition law of India is witnessing the development of common shareholding in a veiled fashion.

Parnil Yodha, *Land To The Dalits*, 9(1) NLUJ L. REV. 139 (2022).

LAND TO THE DALITS

~Parnil Yodha[*]

ABSTRACT

The ownership of agricultural land determines the social status of a person or a community in a rural agrarian society. The high incidence of landlessness amongst Dalits is a consequence of historic injustice. This article is a comparative constitutional law study. It argues for the insertion of an enabling constitutional provision under Part III (Fundamental rights) of the Constitution of India for the redistribution of land to Dalits along the lines of a similar provision that exists in the Constitution of Nepal (2015).

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I. INTRODUCTION

Being 'landless', particularly in rural areas, means being below the bottom rung of the socio-economic ladder, bereft of any social status and political influence.[1] An analysis of the 70th Round of the Land and Livestock Holdings Survey by the National Sample Survey Office ("**NSSO**") conducted in 2013 shows that about 58.4 per cent of rural Dalit[2] (the term used in the Constitution of India is 'Scheduled caste'; however, the term Dalit is now being used by the community itself as an expression of their identity. This paper uses the term Dalit because it is the term that has been used in the Constitution of Nepal) households are landless, much higher than those in any other social group. The incidence of landlessness among Dalits is more severe than overall landlessness. In Haryana, for instance, the proportion of landlessness among Dalits is more than double the overall landlessness in the state. Gujarat is next in line, with landlessness among Dalits being 1.7 times the total landlessness across all social groups.[3]

Comparing the ownership of non-homestead land in rural areas with the percentage, it is found that Dalits constitute 20 per cent of the population but own only 9 per cent of the non-homestead land, whereas the so-called upper castes constitute 23 per cent of the population and own 32 per cent of the land. As far as Other Backward Classes (OBCs) are concerned, they own a whopping 45 per cent of the land; it seems almost

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[1] GRANVILLE AUSTIN, WORKING A DEMOCRATIC CONSTITUTION 119 (1st ed. Oxford University Press 1999) (*hereinafter* "**GRANVILLE**").
[2] Ishan Anand, *Dalit Emancipation and the Land Question*, 51(47) EPW 12-14, (Nov. 25 2016), https://www.epw.in/journal/2016/47/commentary/dalit-emancipation-and-land-question.html?0=ip_login_no_cache%3Df0cd731a70caf6b6785933af8aa936b8.
[3] *Id.*

compatible with their population share though which is 44 per cent.[4] As per the Agriculture Census (2015-16), 36.7 per cent of Dalits own less than 1 hectare of land.[5] Due to such a high incidence of landlessness, most Dalits work as agricultural labourers on the land owned by the dominant castes.

Post-independence, certain land ownership reform laws were enacted by many states including Bihar, Uttar Pradesh, Madhya Pradesh, Rajasthan, Andhra Pradesh, West Bengal, Kerala, Orissa Punjab, Maharashtra, Gujarat, Assam and Tamil Nadu. Some of the principles underlying the legal reforms were the abolition of tax intermediaries, the end of the *zamindar*'s extortionate relationship with the tenant, security of tenure to the tenant, reduction in the size of large landholdings (through land ceilings) and the redistribution of the excess lands to tenants and the landless.[6] However, the caste factor was not properly deliberated upon during the law-making process, even though most of the landless people were Dalits and Adivasis, and the cause of their land deprivation was the direct outcome of the social hierarchy created by the caste system. The result was that, despite the allotment of land, the Dalits were not allowed to take possession of the land by the dominant castes.[7]

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4 NATIONAL STATISTICAL SURVEY, HOUSEHOLD OWNERSHIP AND OPERATIONAL HOLDINGS IN INDIA, 70th Round January-December, Ministry of Statistics and Programme Implementation, Government of India (2013).

5 DEPARTMENT OF AGRICULTURE, COOPERATION & FARMERS WELFARE, ALL INDIA REPORT ON NUMBER AND AREA OF OPERATIONAL HOLDINGS, Ministry of Agriculture & Farmers Welfare, Government of India (2019).

6 GRANVILLE, *supra* note 1.

7 Nihar Gokhale, *Across India, Dalits are still fighting to claim lands promised to them*, SCROLL, (Dec. 27 2021), https://amp.scroll.in/article/926264/across-india-Dalits-are-still-fighting-to-claim-lands-promised-to-them.

Moreover, even after *Zamindari* was abolished on paper, the possession of lands was retained and ceilings were evaded by the former Zamindar by declaring the land to be reserved for personal cultivation[8] (because limits on land holdings were not provided in the land reform laws of many states), or by *benami* transactions. The laws were so inapt in many cases that they divested the former Zamindar "*only of his uneconomic fragments*".[9] Consequently, a few fortunate 'landless' (agricultural labourers as well as sharecroppers) got only tiny plots of land.[10]

It is important to point out here that *"more than 75 lac hectares of excess land is available for redistribution, with a ceiling limit of eight hectares. Of the excess land, 94 per cent belongs to the caste Hindus (OBC–General category). Dalit households have no excess land in any state other than Rajasthan.*"[11] This is when the calculation of the excess land seems to be an underestimation.[12]

II. REASONS FOR THE LANDLESSNESS AMONGST DALITS

The caste system leads to the creation of a hierarchy headed by a dominant landholding caste on which the people of other castes become dependent.[13]

The obstacles to the Dalit ownership of land have been multi-faceted. Historically, in some cases, the impediments have even been in the

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[8] INDIA CONST. art. 31A, cl. 1(b).
[9] *Granville*, *supra* note 1, at 120-121.
[10] *Id.* at 121.
[11] Ishan Anand, *Dalit Emancipation and the Land Question*, 51(47) EPW 12-14 (Nov. 25 2016) https://www.epw.in/journal/2016/47/commentary/dalit-emancipation-and-land-question.html?0=ip_login_no_cache%3Df0cd731a70caf6b6785933af8aa936b8.
[12] *Id.*
[13] Awanish Kumar, *B R Ambedkar on Caste and Land Relations in India* , 10(1) RAS (2020), http://ras.org.in/9537f8b9e25675f8de579ef0e1db6beb.

form of legislative acts such as the Punjab Alienation of Land Act (1900) under which only the castes that were classified as "agricultural tribes" could buy agricultural land[14]. Dr. B.R. Ambedkar said:[15]

"*In an agricultural country, agriculture can be the main source of living. But this source of earning a living is generally not open to the Untouchables.*"[16]

Ambedkar then mentions reasons for the same, the first being that the purchase of land is beyond their means. And the second being that even if a Dalit had the money to purchase land he still could not because in most parts of the country the caste Hindus would resent a Dalit coming forward to purchase land, trying to become the equal of the class of Hindus, and such an act of daring on the part of a Dalit would not only be frowned upon but might easily invite punishment. Thirdly, in some provinces like Punjab, Dalits were disabled by law from purchasing land. For instance, in Punjab, the Land Alienation Act specified which communities could purchase land, and the Dalits were excluded from the list. The result was, for the most part, that the Dalits were forced to be landless labourers. As labourers, they could not demand reasonable wages. They had to work for the upper caste Hindu farmer for such wages as their masters chose to give.[17]

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[14] *Id.*

[15] B.R AMBEDKAR, DR. BABASAHEB AMBEDKAR, WRITINGS AND SPEECHES 23 (Secretary Education Department, Government of Maharashtra, 1st ed. Vol. 5. 1979).

[16] Here Dr. Ambedkar is using the word 'Untouchables' for Dalits.

[17] B.R AMBEDKAR, DR. BABASAHEB AMBEDKAR, WRITINGS AND SPEECHES 23 (Secretary Education Department, Government of Maharashtra, 1st ed. Vol. 5. 1979).

III. CONSTITUTION OF NEPAL

The Constitution of Nepal (2015) is secular and federal, much like the Indian Constitution. The majority of the population of Nepal is Hindu. The feudal Hindu caste system is well entrenched in Nepalese society, as it is in Indian society.[18] In Nepal, "*those who view Dalits on the basis of caste consider them to be part of the Hindu caste system and at the bottom-most rank in the caste hierarchy*." They treat the caste hierarchy to be the cause of their economic, social, educational, and political backwardness.[19] The untouchable status of Dalits even in Nepal is largely considered to have arisen from the Hindu ideology of the *varna* system.[20] Dalits have been systematically deprived of several social and economic opportunities due to the practice of untouchability.

In Nepal, the ownership of both irrigable and dry land is highest among the caste Hindus and the lowest amongst the Dalits.[21]

The Constitution of Nepal (2015) has a provision specifically dedicated to the rights of the Dalits, including the right to the land of the landless Dalit, under the Fundamental Rights chapter. Article 40 of Part-3 (Fundamental rights and duties) states:

> *"40. Rights of Dalit: (1) The Dalit shall have the right to participate in all bodies of the State on the basis of the principle of proportional inclusion. Special provision shall be made by law for the empowerment, representation and*

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[18] UNITED NATIONS DEVELOPMENT PROGRAMME, REPORT: THE DALITS OF NEPAL AND A NEW CONSTITUTION (2008) (*hereinafter* "**UNDP**").
[19] AMAR BAHADUR BK, THE STIGMA OF THE NAME MAKING AND REMAKING OF DALIT IDENTITY IN NEPAL 18 (1st edn, Himal Books 2013).
[20] *Id.* at 7.
[21] UNDP, *supra* note 18.

participation of the Dalit community in public services as well as other sectors of employment.

(2) Provision of free education with scholarship, from primary to higher education, shall be made by law for the Dalit students. Special provision shall be made by law for the Dalit in technical and vocational education.

(3) Special provision shall be made by law in order to provide health and social security to the Dalit community.

(4) The Dalit community shall have the right to use, protect and develop their traditional occupation, knowledge, skill and technology. The State shall accord priority to the Dalit community in modern business related with their traditional occupation and provide skills and resources required therefore.

(5) The State shall once provide land to the landless Dalit in accordance with law.

(6) The State shall, in accordance with law, arrange settlement for the Dalit who do not have housing.

(7) The facilities conferred by this Article to the Dalit community must be distributed in a just manner so that the Dalit women, men and Dalit in all communities can obtain such facilities proportionately."[22]

[22] NEPAL CONST. art. 40.

Thus, Article 40(5) makes it obligatory for the State to provide land at least once to the landless Dalit. Further, since Article 40 has been put under Part 3 which is subject to Article 46[23] (which provides for constitutional remedies for enforcement of the rights provided under the said Part), it gives Dalit's right to land a very high pedestal. Even though the Nepalese Constitution makes the right to property a fundamental right, an exception has been carved by virtue of its clause (4) in favour of land reforms.[24]

A possible reason for the Nepalese Constitution makers to give so much importance to the redistribution of land to Dalits was to curb social unrest and the Maoist insurgency, which was further exacerbating political unrest.[25] The failure of the past land reforms in redistributing land is reckoned by some scholars to be one of the reasons for the stronger support from Dalits and landless people for the Maoists.[26] A study in the western part of Nepal also found that Dalits were though land-poor, but they were more productive farmers compared to non-Dalits.[27] To put it simply, "*land redistribution in Nepal is linked with several important issues such as equity in distribution, efficiency of production, and minimizing the possibility of political and social unrest*".[28]

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[23] NEPAL CONST. art 46.
[24] NEPAL CONST. art.25.
[25] JEETENDRA P. ARYAL & STEIN T. HOLDEN, CASTE DISCRIMINATION, LAND REFORMS AND LAND MARKET PERFORMANCE IN NEPAL (Palgrave Macmillan, London. 2013) ("**CASTE DISCRIMINATION**").
[26] *Id.*
[27] JEETENDRA P. ARYAL AND STEIN T. HOLDEN, *Caste, Land and Labor Market Imperfections, and Land Productivity in Rural Nepal*, Working Paper No. 06/11 CLTS, (2011), http://www.umb.no/statisk/clts/papers/CLTS_WP6_2011.pdf.
[28] CASTE DISCRIMINATION, *supra* note 25.

IV. INDIAN CONSTITUTION

Land reforms are considered one of the principal instruments for the creation of an egalitarian rural society. This is in tune with the socialistic spirit of the Constitution of India, as reflected by the Preamble, the Directive Principles of State Policy and the Ninth Schedule.[29]

Article 39 of the Indian Constitution is headed as follows: "*Certain principles of policy to be followed by the State.*" Clause (b) of the same article says, "*That the ownership and control of the material resources of the community are so distributed as best to subserve the common good.*" It is a general provision that deals with the entire population and is not specific to the historically oppressed social groups that have a higher incidence of landlessness. A provision that specifically deals with Dalits is Article 46.[30]

Both articles, Article 39 and Article 46, have been placed under the Part IV of the Constitution which has been titled as follows: "**Directive Principles of State Policy**." These are guidelines for the State, and are, thus, unenforceable.[31] It is right to say that these are neither constitutional rights, nor do they legally oblige the State to make a law to implement them.

The article that enables the State to make land reform laws is Article 31A.[32] The said article begins with an overriding clause in respect of Article 13 (judicial review vis-à-vis the fundamental rights). Land is a state subject. The exact language that has been used in **List II of the Seventh Schedule** is "*Land, that is to say, right in or over land, land tenures including the relation of*

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[29] B.B.Mohanty, *Land Distribution among Scheduled Castes and Tribes* 36(40) EPW 3857-3868 (2001).
[30] INDIA CONST., art. 46.
[31] Minerva Mills Ltd. v. Union Of India, 1980 AIR 1789 (India).
[32] INDIA CONST., art. 31A.

*landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonizatio*n." The first proviso to clause (1) of Article 31A makes it pretty much clear that the assent of the President (actually, 'Central government' because the President cannot act without the aid and advice of the council of ministers, as per Article 74[33]) is required in case such law is made by any of the states for such law to receive the protection of Article 31A.

V. IMPORTANCE OF CONSTITUTIONAL PROTECTION

Dalits have been given reservation, a form of affirmative action, in higher public education and public employment under laws made in pursuance of Article 15(4)[34] and Article 16(4)[35], respectively. But these have been beneficial more for the urban Dalits than their rural counterparts because, in a rural society, which is largely agrarian, the main source of earning is land, a resource that was not open to purchase to Dalits for centuries, and the obstacles to Dalits owning land were beyond economic in nature.[36] It is pertinent to note here that most agricultural land still is hereditary in nature in Indian society; thus, if the ancestors of Dalits did not have any land, how could their successors be expected to own any?

Dr. B.R. Ambedkar was of the view that the economic dependence of Dalits on the upper caste Hindus made it difficult for Dalits to defend themselves or take legal action against them in case of criminal acts

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[33] INDIA CONST., art. 74.
[34] INDIA CONST., art. 15(4).
[35] INDIA CONST., art. 16(4).
[36] Awanish Kumar, *B R Ambedkar on Caste and Land Relations in India,* 10(1) RAS (2020), http://ras.org.in/9537f8b9e25675f8de579ef0e1db6beb.

perpetrated against them by the caste Hindus.[37] This holds true for rural India all the more. This has been, recently, pointed out by the Delhi High Court's[38] judgment in the *Mirchpur* case as well. Mirchpur is a village in the Hissar District of Haryana. A minor altercation had broken out between boys of two communities, and as a punishment, the milk supply to Balmiki (a Dalit community) families was cut off by the dominant caste. The milkman, on whom the Balmiki were dependent for the supply of milk, was beaten up by the Balimikis. In retaliation, on 21st April 2010, a mob of the dominant caste torched the houses of people belonging to the Balmiki community causing an old man and his specially-able daughter to be burnt to death. Many Dalits suffered injuries and loss of residential property. Besides, over two-hundred Balmiki families had to flee in the aftermath due to the fear of violence. During the trial, some witnesses to the violence belonging to the Balmiki community were not deposed by the prosecution and the trial took this as an adverse fact against the case of the prosecution. The High court of Delhi acknowledged the fact that the members of the Balmiki community earned their livelihood working as daily wage labourers in the fields of the *Jat* community (dominant caste). Acknowledging the dependence of the Dalits upon the dominant caste for survival, the court said:

> "*The trial Court should have been alert whilst perusing this kind of evidence, particularly after it had noticed that many Balmiki witnesses had been won over by the dominant Jat community even before the trial began.* ***It is clear that the Balmikis who stayed back in Mirchpur had to buy***

[37] *Id.*
[38] Kulwinder v. State (NCT Of Delhi), 252 (2018) DLT (India).

> ***peace. There is no way that they could have gone back to their homes and continued to live in the village as if nothing had happened after deposing against the Jats in the Court.*** *The trial Court noticed that many of them were accompanied by the accused when they came to the Court to depose...*"[39]

The experience shows that constitutional protection turns the discourse in favour of affirmative action and gives citizens a legal justification for pressurising the government to not only make laws, but also implement them strictly. The same is likely to happen in respect of the land reform laws made in favour of Dalits if a constitutional provision in this regard is put in the fundamental rights chapter (Part III) of the Indian Constitution.

Constitutional protection also makes the laws made in pursuit of the constitutional provision less open to judicial discretion when their validity is challenged in the courts of law. For instance, the U.S. Constitution does not expressly legitimize affirmative action or "benign preferences." The constitutional validity of affirmative action relies upon an implied justification for such benign classifications under the Equal Protection Clause.[40] And this has resulted in every affirmative action policy and law being challenged in court, and has made the validity of each affirmative action policy or law dependent upon judicial discretion.

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[39] *Id.*

[40] M. Varn Chandola, *Affirmative Action in India and the United States: the Untouchable and Black Experience*, 3(101) IND. INT'L & COMP. L. REV (1992); *See also* Brown v. Board of Education of Topeka 347 U.S. 483 (1954); Regents of the University of California v. Bakke 438 U.S. 265 (1978).

VI. CONCLUSION

To be 'landless' in a rural society in India means to be 'powerless' – socially, economically as well as politically. The ownership of agricultural land is the chief factor that determines the socio-economic status of a person or a community in a rural agrarian society. Historically speaking, Dalits were prevented from owning any agricultural land not just by the social hierarchy and untouchability, but also through legislation. Most agricultural land still is hereditary in nature in Indian society; thus, if the ancestors of Dalits did not have any land, how could their successors be expected to own any? As a result, most Dalits are forced to work as labourers on the land of the caste Hindus for survival, and thereby become economically dependent on the caste Hindus. The effect is, Dalits are scared to raise their voice against the injustices and atrocities committed against them dreading a boycott by the caste Hindus.

The Constitution of Nepal (2015) is secular and federal, much like the Indian Constitution. The majority population of Nepal is Hindu. Caste discrimination is as entrenched in Nepalese society as it is in Indian society. The source of caste hierarchy in Nepal is the same as that in India. The Constitution of Nepal puts the Dalits' right to land on a very high pedestal by putting it in the chapter of Fundamental Rights, a chapter under which the rights are justiciable through the right to constitutional remedies. As discussed earlier, "*land redistribution in Nepal is linked with several important issues such as equity in distribution, efficiency of production, and minimizing the possibility of political and social unrest*".[41] Thus, an enabling constitutional provision under

[41] CASTE DISCRIMINATION, *supra* note 25.

the fundamental rights chapter in the Nepalese Constitution was essential to assuage Dalits, pull them away from Maoists and win over their support for the new constitutional civilian government.

On the other hand, the Constitution of India has no provision specifically dealing with the Dalits' right to land. The reason can be that no such urgency to have such a provision in the Indian Constitution existed, as it existed in the context of Nepal where social and political unrest was rampant. There is a general provision which is only an enabling provision. Moreover, this general provision enabling land reform laws that makes 'personal cultivation' an exception has generally been misused by the landlords since many state land reform laws did not provide exactly how much land could be retained under the said exception. The Constitution of India should have a provision similar to article 40(5) of the Constitution of Nepal. The proposed provision may look like this: *The State shall at least once provide land to a landless Scheduled caste person in accordance with law.*

The experience shows that constitutional protection turns the discourse in favour of affirmative action and gives the citizens a legal justification for pressurizing the government to not only make laws, but also implement them strictly. The same is likely to happen in respect of the land reform laws made in favour of Dalits if a constitutional provision in this regard is put in the fundamental rights chapter (Part III) of the Indian Constitution. Besides, the constitutional protection limits the scope of judicial review in respect of the laws made in pursuit of the concerned constitutional enabling provision when their validity is challenged in the court of law.

Aamir Hussain, *Standard Form Contracts in the Health Sector: The Plague of Exclusion Clauses and Unconscionability*, 9(1) NLUJ L. REV. 154 (2022).

STANDARD FORM CONTRACTS IN THE HEALTH SECTOR: THE PLAGUE OF EXCLUSION CLAUSES AND UNCONSCIONABILITY

~Aamir Hussain[*]

ABSTRACT

The health sector is conventionally regarded as an important facet of human development and every person's life is invariably linked to it. In the performance of its services, hospitals usually require the patients or their kin to sign an undertaking, usually in the form of a 'Standard Form Contract'. Such contracts are unilaterally set by the hospitals wherein the patient has no bargaining power vis-à-vis the substance of the contract, regardless of how unfair the terms might be. Albeit such unfair terms are usually considered within the domain of consumer law in India, this paper tries to approach this issue through a contractual lens. Such hospitals often incorporate sweeping exclusion clauses in their contracts which exclude them from all liability. This paper problematises the issue with such unilaterally set contracts while bearing in mind the nature of the medical practice. It borrows from the jurisprudence of the United States, in terms of how they have dealt with such broad exclusion clauses, and submits remedies in contract law to tackle this issue.

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I. INTRODUCTION

A 'standard form contract' contains a uniform set of conditions that have been prefixed by one of the parties in a contractual agreement.[1] Such contracts can be used for contracting with numerous persons as it provides a general template that is open to acceptance by anybody who wishes to enter into such a contract.[2] This significantly reduces the amount of money and time spent on drafting a separate contract for every new transaction, thereby making the whole process more feasible.[3] Hence, such types of contracts have gained traction in modern times.[4]

Standard form contracts are essentially "take it or leave it" contracts, which implies that there is no room for negotiation *vis-à-vis* the terms of the contract.[5] The terms of the agreement are pre-determined and there is no scope to change the same.[6] The contract that arises out of this is binding on both the parties even if they have not read the terms of the contract, or are unaware of its legal implications.[7] Such contracts are also called "contracts of adhesion" as the individual has no other choice but to adhere to the terms of the contract.[8] The entire jurisprudence of Indian law

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[1] M.P. Ram Mohan et. al., *Indian Law on Standard Form Contracts,* 62(4) J. INDIAN L. INSTITUTE 2, 2 (2020) (*hereinafter* "**Mohan**").
[2] *Id.*
[3] JACK BEATSON, ANDREW BURROWS, JOHN CARTWRIGHT, ANSON'S LAW OF CONTRACT 171 (Oxford University Press 6th ed. 2020).
[4] *Id.* at 171-172.
[5] Sachin Kumar Sharma, *Standard Form Contracts- A Comprehensive Analysis,* 2(6) IJARIIE 1159, 1159 (2016) (*hereinafter* "**Sharma**").
[6] *Id.*
[7] Mohan, *supra* note 1, at 3.
[8] Sharma, *supra* note 5, at 1159.

on the subject of standard form contracts has evolved through judicial pronouncements over the years.[9]

In this paper, the author contends that hospitals should not have an unfettered right to exclude liability through exclusionary clauses in hospital contracts. *Firstly,* the paper delves into the question of whether the relationship between a hospital and a patient or a doctor and a patient is subject to the provisions of the Indian Contract Act, 1872 ("**ICA**") and what is the nature of this relationship. *Secondly*, the paper deals with the problems associated with adhesive contracts in the medical sector – unfair terms, inequality of bargaining power and exclusion clauses. *Thirdly*, the paper looks into the jurisprudence of the United States of America to see how they have dealt with the question of the enforceability of exclusion clauses through their judicial pronouncements. *Lastly*, the author concludes the paper and submits remedies that can be incorporated to counter the problem posed by unfair terms and sweeping exclusion clauses in hospital contracts.

II. THE EXISTENCE AND NATURE OF A CONTRACTUAL RELATIONSHIP?

It was held by the Hon'ble Supreme Court in *Indian Medical Association v. V.P. Shantha* ("**V.P. Shantha**") that the relationship between a medical practitioner and a patient is a "*contract for personal service.*"[10] Therefore, the relationship between a doctor and a patient is contractual in nature. Similarly, hospitals are also liable for the negligence of doctors

[9] Mohan, *supra* note 1, at 3.
[10] Indian Medical Association v. V.P. Shantha, (1995) 6 SCC 651 (India), ¶ 56.

working under them as per the doctrine of *respondeat superior,* which holds the hospital vicariously liable for its employee's negligent acts.[11] Furthermore, the hospital can also be held liable under the doctrine of *ostensible agency,* even if there is no employer-employee relationship between the hospital and the doctor, i.e., when the doctor is an independent contractor.[12]

A contract for medical treatment could either be expressed or implied. Most contracts between a doctor and a patient are implied contracts, except for consent forms.[13] It has also been held by the Supreme Court that by offering medical treatment, a doctor "*impliedly undertakes that he is possessed of skill and knowledge*" necessary for such treatment.[14] Similarly, hospital contracts, more specifically the consent forms signed by patients, are a form of an express contract between the hospital and the patient. The terms of such a contract are unilaterally dictated by the hospital, which makes it a standard form contract.

As per the ICA, a contract will be valid only if there is free consent of both parties while entering into said contract. For any service discharged by a medical practitioner, he has to obtain consent from the patient. Section 13 of the ICA defines "consent" as when "*two or more persons agree on the same thing in the same sense.*"[15] Additionally, the significance of consent is also highlighted under the Code of Medical Ethics, which are guidelines laid

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[11] GANEEV KAUR DHILLON, ET. AL., LAW OF BUSINESS CONTRACTS IN INDIA, 218 (SAGE Publications 2009).
[12] *Id.*
[13] *Id.* at 217.
[14] Indian Medical Association v. V.P. Shantha, (1995) 6 SCC 651 (India), ¶ 32.
[15] Indian Contract Act, 1872, §13. No. 9, Acts of Parliament, 1872 (India).

down by the Medical Council of India ("**MCI**").[16] Regulation 7.16 necessitates that consent should be acquired from the "*husband or wife, parent or guardian in the case of minor, or the patient himself*" in written form prior to the operation.[17] Obtaining such consent is a standard practice in the Indian medical sector.[18] However, the Supreme Court has recognised an exception to this in the case of an emergency, wherein it is the mandatory obligation of a doctor to discharge medical aid owing to the patient being incapable of giving consent.[19]

This paper, however, shall focus on written consent forms in the health sector concerning non-emergency procedures wherein the patients (or their authorised agents) have to sign the contract to receive medical treatment. Patients who enter into such contracts usually have the mental faculty to read, understand and negotiate (albeit theoretically) an agreement with the hospital.[20] However, the problem here is that the patients face an adhesive contract that contains a myriad of perplexing terms and the patients do not have any power to negotiate the terms of such a contract.[21] In such a case, the patient has no other alternative than to sign on the dotted line.

[16] Indian Medical Council (Profession Conduct, Etiquette and Ethics) Regulations, 2002, Gazette of lndia, pt. lll sec. 4 (Apr. 6, 2002).
[17] See *id.,* Reg. 7.16.
[18] Omprakash V. Nandimath, *Consent and medical treatment: The legal paradigm in India,* 25(3) INDIAN J. UROLOGY 343, 344-345 (2009).
[19] Pt. Parmananda Katara v. Union of India, (1995) 3 SCC 248 (India), ¶ 3.
[20] George A. Nation III, *Contracting for Healthcare: Price Terms in Hospital Admission Agreements,* 124(1) DICKINSON L. REV. 91, 136 (2019).
[21] *Id.*

III. HURDLES AND EXCEPTION CLAUSES

A. COMPLICATED TERMS AND UNEQUAL BARGAINING POWER

The central problem that arises in such hospital-contracts is that due to unequal bargaining power, it is the hospital that determines the terms of the contracts, no matter how unreasonable or unconscionable these might be. The problem with such a contractual relationship is that because one party has weaker bargaining power, its consent cannot be considered unequivocal, even if it is genuine.[22] In fact, in such a scenario, the patient has no bargaining power. They either have to accept the terms of the contract, or they will be denied health services. Therefore, the scales tilt in favour of the stronger party, i.e., the hospitals. This ultimately becomes a lose-lose scenario for the patient since they would either have to accept a contract wherein, they have no bargaining power, or, if they refuse to adhere to the contractual terms, then it would lead to them not receiving medical treatment.

Another issue that is associated with these contracts is that the terms of the contract might use lots of complicated legal and/or medical jargon that could render the contract unintelligible for a layperson. Furthermore, the terms and conditions of such contracts are often lengthy and the common masses are not in a habit to read such terms. Therefore, even if a person accepts the terms, he might not be aware of the terms, or the legal implications of what he is consenting to.[23] Such problems are

[22] Tasveera Ramkaran, A Critical Analysis of Exclusionary Clauses in Medical Contracts (Dec. 2013) (Unpublished LL.M. thesis, University of KwaZulu Natal) (on file with author) (*hereinafter* "**Ramakaran**").
[23] Sharma, *supra* note 5, at 1163.

further compounded by the use of fine print and exclusionary clauses.[24] It might be argued that a summary can be attached to the front of the document which the people can read and understand before entering into the contract.[25] Although this might solve the problem of legal literacy while contracting, the problem that lingers is that the patients, albeit informed, are still the weaker party and do not have the power to change or negotiate the terms of the contract.

The ICA has remedies to protect the weaker party from components of procedural unconscionability such as protection against undue influence and coercion. This essentially refers to unconscionability that results from improprieties in the formation of a contract.[26] Section 16 of the ICA read with Section 19A renders the contract entered into under undue influence voidable on the option of the influenced party.[27] However, there is no provision to hold the terms of a contract void owing to its unfairness or unconscionability.[28]

The Privy Council and some High Courts in India have warned that inequality in bargaining power cannot be considered a general doctrine for setting a contract as void unless there is a violation of procedural elements such as undue influence.[29] This has been supplemented by the Supreme Court by noting that, if the parties in a commercial contract have entered

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24 LAW COMMISSION OF INDIA REPORT NO. 199: UNFAIR (PROCEDURAL AND SUBSTANTIVE) TERMS IN CONTRACTS, at 54 (2006) (*hereinafter* "**Law Commission of India Report**").

25 Sharma, *supra* note 5, at 1163.

26 LAW COMMISSION OF INDIA REPORT, *supra* note 24, at 188.

27 Indian Contract Act, 1872, § 16, 19A, No. 9, Acts of Parliament, 1872 (India).

28 LAW COMMISSION OF INDIA REPORT, *supra* note 24, at 16.

29 Mohan, *supra* note 1, at 11.

into an unconscionable bargain wilfully, they cannot seek any remedy for the same.[30] The Court went on to affirm that a contract will be interpreted based on its wording, and that it is not for the court to make a new contract, no matter how reasonable.[31] The term *caveat subscriptor* – "let the signer beware" – applies and it is assumed that the signatory has read the terms and is hence bound by them.[32]

The author will not get into the debate of whether this position of the Court is justified or not, however, it would not apply to a contractual relationship between a hospital or doctor and a patient. This can be better understood by undertaking a textual analysis of Section 16, which defines "undue influence".[33] Section 16(2) states the condition where a party can be in a position to dominate the will of the other; here clause (a) states that such a position can exist in the case of a fiduciary relationship between the parties.[34] A doctor, by virtue of their qualification, possesses special knowledge in the area of medicine, which puts them above patients who are largely unaware of various illnesses and their ramifications.[35] Since the relationship between a doctor and a patient is based on trust, therefore, there exists a fiduciary relationship between them.

Additionally, clause (b) of Section 16(2) avers that such a position can also exist when the mental capacity of the consenting party is affected

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[30] S.K. Jain v. State of Haryana, (2009) 4 SCC 357 (India), ¶ 8.
[31] General Assurance Society Ltd. v. Chandmull Jain, AIR 1966 SC 1644 (India), ¶ 11; S.K. Jain v. State of Haryana, (2009) 4 SCC 357 (India), ¶ 10.
[32] Ramkaran, *supra* note 22, at 15.
[33] Indian Contract Act, 1872, § 16, No. 9, Acts of Parliament, 1872 (India).
[34] Indian Contract Act, 1872, § 16(2)(a), No. 9, Acts of Parliament, 1872 (India).
[35] Cameron Stewart, Andrew Lynch, *Undue influence, consent and medical treatment,* 96 J. ROYAL SOCIETY OF MEDICINE 598, 598 (2003) (*hereinafter* "**Stewart and Lynch**").

because of "*illness, or mental or bodily distress*."[36] More often than not, a patient would fall under this category as it could be the very reason, they might seek medical treatment; with the exception of cosmetic procedures. This can be better understood by considering Lord Donaldson's judgement in the English case of *Re T (Adult: Refusal of Treatment)*.[37] Herein, he noted that the capacity of an individual to enter into a contract could be impeded owing to temporary factors such as confusion, pain, severe fatigue, or drugs being used to treat them which could make the patient susceptible to influence.[38]

Therefore, by virtue of the relationship that exists between a hospital or doctor and a patient, they are not only in a position of higher bargaining power but can also exercise undue influence on the weaker party. However, as per Justice Shaw's judgement in the case of *Raghunath Prasad v. Sarju Prasad*, the presumption of unconscionability is also contingent on whether undue influence has been exercised by the dominating party or not.[39] After the determination of this issue, a third point of "*onus probandi*" emerges.[40] Accordingly, the burden of proof is upon the dominating party to show that the contract was not induced by undue influence, and is also given under Section 16(3) of the ICA.[41] Therefore, the burden of proving that a *prima facie* unconscionable contract signed by a patient has not been induced by undue influence ought to lie upon the doctor or the hospital.

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[36] Indian Contract Act, 1872, § 16(2)(b), No. 9, Acts of Parliament, 1872 (India).
[37] Re T (Adult: Refusal of Treatment), [1992] 4 All ER 649 (India).
[38] *Id.* at 662.
[39] Raghunath Prasad v. Sarju Prasad, (1924) 26 BOMLR 595 (India), ¶ 11.
[40] *Id.*
[41] *Id.*; Indian Contract Act, 1872, § 16(3), No. 9, Acts of Parliament, 1872 (India).

B. Exclusion Clauses in Medical Contracts

Exception clauses are beneficial contractual arrangements drafted by either of the parties in anticipation of contingencies that could arise in the future preventing or hindering performance or consequences stemming from "non-performance, part performance or negligent performance" of a contract.[42] One of the primary reasons for the widespread use of such clauses is that organisations can use them to protect themselves from any prospective liability. Within the medical contract, such clauses can be incorporated by hospitals to completely absolve themselves from any liability that might arise. Exclusionary clauses can either exclude partial or complete liability; however, the author shall primarily focus on sweeping clauses that are intended to completely exclude all liability.

Such exclusionary clauses are of the nature that favours one of the parties to a contract, in the present context, the hospitals.[43] Exclusion clauses are recognised by the ICA based on the idea of "freedom of contract."[44] However, the traditional characteristics of freedom to contract and *consensus ad idem* are often absent in such contracts.[45] However, owing to the difference in bargaining power between the hospitals and the patients, these clauses are often misused by the former.[46] The participation of the patient in such cases is therefore limited to mere adherence to the

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[42] M.P. Ram Mohan & Anmol Jain, *Exclusion Clauses Under the Indian Contract Law: A Need to Account for Unreasonableness,* 13(4) NUJS L. REV. 1, 2 (2020) (*hereinafter* "**Mohan and Jain**").
[43] Ramkaran, *supra* note 22, at 15.
[44] Mohan and Jain, *supra* note 42, at 5.
[45] LAW COMMISSION OF INDIA REPORT, *supra* note 24, at 54.
[46] Mohan and Jain, *supra* note 42, at 7.

unilaterally drafted contract and the exclusion clause precludes the possibility of the hospital being held liable for its actions.

The admission forms of St. George's Hospital in Port Elizabeth and the Sandton Medi-Clinic illustrate the general form such exclusion clauses can take in medical contracts. The exclusion clause states: "*Therefore, by signing this consent to operation form, a patient and any person who signs this form on behalf of such patient, indemnify the Medi-Clinic Group of Companies, as well as their employees, officials and agents against all liability to such patient and to the person.*"[47] Such sweeping exclusion clauses put the already weaker party, i.e., the patient in a rather precarious position. They are at a disadvantage from the very outset, even before the contract is concluded with the hospital.[48] The institutional nature of hospitals enables them to adopt the requisite legal infrastructure to draft such clauses whereas the individual patients agreeing to this have no knowledge of its implications and are left with no recourse.

The author submits that such sweeping exclusion clauses in medical contracts should be considered unlawful and legally unenforceable. The *V.P. Shantha* case talks about the duty of care that needs to be taken by a doctor and the possession of the required "*skill and knowledge*" to discharge medical service.[49] Therefore, it does not follow that exception clauses could be drafted that can render the contravention of this standard to be non-

[47] Henry Lerm, *A Critical Analysis of Exclusionary Clauses in Medical Contracts* (July 2008) (Unpublished LL.D. thesis, University of Pretoria) (On file with Author) 1085-1086.

[48] Darragh Douglas Meaker, *Standard Form Contracts and Exemption Clauses for Medical Procedures in South Africa: A Consumer's Narrative,* 23 (LL.M. thesis, University of Pretoria, 2018), https://repository.up.ac.za/bitstream/handle/2263/69917/Meaker_Standard_2018.pdf?sequence=1&isAllowed=y.

[49] Indian Medical Association v. V.P. Shantha, (1995) 6 SCC 651 (India), ¶ 31; Dr. Laxman Balkrishna Joshi v. Dr. Trimbak Bapu Godbole (1969) 1 SCR 206 (India), ¶ 11.

justiciable. Such exclusion of liability will not withstand the scrutiny of the 'theory of fundamental breach'. This doctrine provides that a party cannot exclude themselves from the liability of a "fundamental" breach, wherein they have failed in performing the 'core' or fundamental obligation in the contract.[50] Since a patient's consent to the overbroad possibility of harm is antithetical to the object of entering into a medical contract, therefore, such clauses shall fail the scrutiny of the aforementioned doctrine.

Regulation 1.1.2 and Regulation 1.2.1 state that the object of the medical profession is to render "*service to humanity*" and the financial aspect is a secondary consideration.[51] Furthermore, the act of advertising by a medical practitioner or a hospital is considered unethical under Regulation 6.1.[52] These regulations indicate that the nature of the contractual relationship in the medical sector is different from commercial contracts undertaken by other institutions.

Two additional factors are relevant here to support the above submission. *Firstly*, as highlighted above, the doctor-patient relationship is of a *fiduciary* nature. This has relevance to the nature and interpretation of a contract, holding the person receiving a service at the end of an informational asymmetry at a higher standard. This is most commonly seen in insurance agreements, where by virtue of the fiduciary relationship and the information asymmetry, the client is held to a higher scrutiny because of the *uberrima fides* obligations arising out of a fiduciary relationship.[53] This

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[50] Sharma, *supra* note 5, at 1160.

[51] Indian Medical Council (Profession Conduct, Etiquette and Ethics) Regulations, 2002, Gazette of lndia, pt. lll sec. 4 (Apr. 6, 2002), *supra* note 16, Reg. 1.1.2, 1.2.1.

[52] See *id.,* Reg. 6.1.

[53] Life Insurance Corporation of India v. Asha Goel (Smt.), (2001) 2 SCC 160 (India), ¶¶ 12, 14.

is evidently applicable here, where the medical practitioner has the benefit of the information asymmetry in the fiduciary relationship as discussed earlier. Therefore, contested interpretations in such cases must favour the patient.

Secondly, there is an inherent disparity between the position of a patient, as against a doctor or a hospital. As the author has indicated above, this exists due to the special knowledge that a doctor possesses and the coercive institutional power of hospitals as opposed to an individual patient, leading to disparity in bargaining power.[54] This is different from the first rationale offered in the sense that here the focus is on the differential bargaining power arising out of institutional and knowledge-differential conditions, while the first point is specifically about the special duty arising in a fiduciary relationship.

Lastly, the object of a medical contract also merits a look. Barring cosmetic procedures, patients mostly visit doctors for the treatment of their ailments.[55] As discussed earlier, this could lead to a greater risk of undue influence being exercised over patients while entering into medical contracts. Furthermore, in the case of commercial contracts, a party could decide not to avail of a particular service altogether if the terms of the contract are not amenable to them. However, a patient does not have the same choice since a refusal of treatment could lead to serious ramifications on their health or even death. Therefore, it follows that exception clauses

[54] Mohan, *supra* note 1, at 3.
[55] Stewart and Lynch, *supra* note 35, at 598.

in medical contracts should be subject to a higher test of scrutiny and cannot be granted the same leeway as in the case of commercial contracts.

C. PUBLIC POLICY

Unlike commercial contracts, medical contracts are mostly centred around health. The Supreme Court has held the right to health as an important facet of the right to life under Article 21 of the Indian Constitution.[56] Additionally, under Article 47, one of the duties of the State is to "improve public health".[57] This highlights that health is an important element of public policy and therefore, medical contracts cannot be seen as comparable to those in the commercial sphere.

Additionally, the author contends that medical contracts with sweeping exclusion clauses should be held void to the extent of such clauses, as they are contrary to public policy under Section 23 of the ICA.[58] Section 23 of the ICA states that a contract that is immoral and contrary to public policy shall be held void. In the case of *Central Inland Water Transportation Corporation Ltd. v. Brojo Nath Ganguly* ("**Brojo Nath**"), the Supreme Court held that in standard form contracts wherein a party with superior bargaining power contracts with those with inferior or no bargaining power, then any "unconscionable, unfair, and unreasonable" terms in the contract will be considered against public policy.[59] The court

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[56] Consumer Education and Research Center v. Union of India, AIR 1995 SC 636 (India).
[57] INDIA CONST., art. 47.
[58] Indian Contract Act, 1872, § 23, No. 9, Acts of Parliament, 1872 (India).
[59] Central Inland Water Transport Corporation Ltd. v. Brojo Nath Ganguly, (1986) 3 SCC 156 (India), ¶ 91; *see also* Lilly White v. R. Munuswami, (1965) 1 MLJ 7 (India).

goes on to say that public policy is not limited to a matter of policy decisions taken by the government, but also matters that are of public interest.[60]

By virtue of the public policy element of healthcare and the implied duties of a medical practitioner as laid down in *V.P. Shantha*,[61] sweeping exclusion clauses will be unreasonable and considered antithetical to public policy under Section 23 of the ICA. A counter to this contention could be that doing so would impinge on the right of freedom of contract of the parties. There have been several cases where the Supreme Court has upheld the validity of 'limitation of liability' clauses.[62] However, the principle of freedom of contract is a "*reasonable social ideal*" insofar as equality of bargaining power can be assumed between the contracting parties.[63] This essentially means that carefully drafted exclusion clauses in case of commercial contracts among equal parties will not attract Section 23 of the ICA.[64] In the ace of standard form contracts though, the party opposing the exclusion clause could argue on the unconscionability of the clause owing to unequal bargaining power among the parties.[65] Therefore, the hospitals should not have an unfettered right to exclude liability and any contractual term that seeks to exonerate the hospital and its staff from such

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[60] *Id.* ¶ 92.
[61] Indian Medical Association v. V.P. Shantha, (1995) 6 SCC 651 (India), ¶ 56.
[62] Bharathi Kinitting Company v. DHL Worldwide Express Courier Division of Airfreight Ltd., (1996) 4 SCC 704 (India), ¶ 6-7.
[63] Delhi Transport Corporation v. D.T.C. Mazdoor Congress, 1991 Supp (1) SCC 600 (India), ¶ 279.
[64] Aditya Mehta, et. al., *Do parties have an unfettered right to exclude or limit their liability for breach of contract? – Part II*, INDIA CORPORATE LAW: CYRIL AMARCHAND BLOGS (Jan. 6, 2023), https://corporate.cyrilamarchandblogs.com/2020/06/do-parties-have-an-unfettered-right-to-exclude-or-limit-their-liability-for-breach-of-contract-part-ii/.
[65] *Id.*

liability will be substantively unfair, i.e., when the terms are in themselves unfair.[66]

IV. UNITED STATES' JURISPRUDENCE

Exclusion clauses (or exculpatory agreements) in the United States of America are largely considered to be invalid in hospital contracts.[67] The courts employ the common law where they find that public interest has been undermined, and the medical profession and practices fall largely within the domain of public interest.[68] Additionally, unconscionability in contracts is also subject to a test of unenforceability under the Uniform Commercial Code of 1977 ("**UCC**").[69] Section 2-302 of the UCC states that the court may refuse to enforce a contract with an unconscionable clause or enforce the remainder of the contract without the unconscionable clause.[70]

One of the leading cases American on the matter of exclusion clauses is *Tunkl v. Regents of University of California* ("**Tunkl**") wherein the plaintiff brought a suit challenging a clause that absolved all liability of the hospital for any future acts of negligence while treating patients.[71] The clause read that "*the patient or his legal representative agrees to and hereby releases The Regents of the University of California, and the hospital from any and all liability for the negligent or wrongful acts or omissions of its employees, if the hospital has used*

[66] LAW COMMISSION OF INDIA REPORT, *supra* note 24.
[67] Ramkaran, *supra* note 22, at 24.
[68] *Id.*
[69] LAW COMMISSION OF INDIA REPORT, *supra* note 24, at 77.
[70] The Uniform Commercial Code, U.C.C § 2-302 (Am. Law Inst. & Unif. Law Comm'n 1977).
[71] Tunkl v. Regents of University of California, 60 Cal.2d 92 (Cal. 1963).

due care in selecting its employees."[72] The Supreme Court of California held this clause to be legally unenforceable and stated that such clauses exculpating the hospitals from negligent acts are contrary to public interest.[73] In coming to its decision, the court propounded six criteria for the validity of such a clause that has been explained in the following paragraph.

The court held that such contracts should pertain to a business that merits public regulation and that is engaged in providing a service of great salience to the public, having an element of practical necessity attached to it for the public.[74] The court also held that such a party holds themselves out as willing to perform the aforementioned service to almost any member of the public.[75] Owing to the essentiality of the service and the economic context of the transaction, the party with the greater bargaining power has an undue advantage that it exercises to preclude protection of the purchaser from the party's negligence.[76] This essentially puts the purchaser in a precarious position wherein they are subject to the carelessness of the seller or their agents.[77]

These six criteria were reaffirmed and heavily relied on by the Supreme Court of Tennessee in the case of *Olson v. Molzen*.[78] The court, in coming to its decision, considered the inequality of bargaining power

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[72] *Id.*
[73] Kevin F. Harrison, *Taking the Tort out with a Contract: Liability Release Contracts in California*, 15(2) WESTERN STATE UNIVERSITY L. REV. 785 (1988).
[74] Tunkl v. Regents of University of California*,* 60 Cal.2d 92 (Cal. 1963), ¶ 1.
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] Olson v. Molzen, 558 S.W.2d 429 (Tenn. 1977).

between the hospital and the patient while rejecting the exculpatory clause.[79] However, this test of enforceability of exculpatory clauses was extended only to contracts of professional services.[80] Medical practice, by virtue of being a professional service, therefore falls under this category. Subsequently, this question of the validity of exclusion clauses also arose in *Copeland v. HealthSouth/Methodist Rehabilitation Hospital* wherein an elderly man entered into a contract with a medical transportation company with a clause excluding the company from liability in case of negligence on its part.[81] The Supreme Court of Tennessee held that such a clause is unenforceable and that the validity of exculpatory clauses in professional or non-professional service contracts will be contingent on the relative weight given to the following factors — relative bargaining power of the parties, comprehensibility of language in exculpatory clauses, and public policy implications.[82]

V. CONCLUSION AND WAY FORWARD

Through this paper, the author has highlighted that the contractual relationship between a doctor or hospital and a patient is innately different from the one which exists in other commercial contracts. As held in the *V.P. Shantha* case, doctors have an implied responsibility to employ a reasonable duty of care and to apply the requisite "*skill and knowledge*"

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[79] Daniel J. Adomitis, *Torts - Medical Malpractice - Limitation of Liability,* 45 TENNESSEE L. REV. 791, 793 (1977-1978).

[80] Holden Branscum, *Enforceability of Exculpatory Clauses: Judicial Declarations of Public Policy as a Means to Promote Freedom of Contract in Tennessee,* 51 UNIVERSITY OF MEMPHIS L. REV. 811, 813 (2021) (*hereinafter* "**Branscum**").

[81] Fredrick Copeland v. HealthSouth/Methodist Rehabilitation Hospital, 565 S.W.3d (Tenn. 2018).

[82] Branscum, *supra* note 80, at 818.

required while discharging any medical service.[83] Furthermore, there exists an inherent inequality of bargaining power between the hospital, which is an institution, and the patient who is an individual.

Additionally, the healthcare sector is intrinsically tied to public policy by virtue of being a matter of public interest as has been argued in this paper. Therefore, sweeping exclusion clauses in hospital contracts that give a free rein to hospitals to exonerate themselves of all liability seem to be grossly repugnant. Hospitals should not have unfettered freedom to contract out of the "duty of care" that they owe to patients and to exclude liability for negligence on their part. Hence, it follows that such sweeping clauses should be held void under Section 23 of the ICA as being opposed to public policy.

This intrinsic connection between the field of medical practice and public policy is equally visible in the United States, as it is in India. Therefore, the author submits that exclusionary clauses in hospital contracts in India should be subject to a similar test as laid down by the Supreme Court of California in the *Tunkl* case. As highlighted earlier, one limitation of the statutory framework in India is that it does not deal with the question of unfair terms in contracts, i.e., substantive unfairness. Certain other countries, for instance, the United Kingdom have tackled this issue by enacting a separate statute. Under the UK Unfair Contract Terms Act, 1977 ("**UCTA**") exclusions clauses are subjected to a 'test of reasonability' under Section 11, and the matters with regards to the requirement of reasonableness have been stated in Schedule 2 of the Act.[84]

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[83] Indian Medical Association v. V.P. Shantha, (1995) 6 SCC 651 (India), ¶ 56.
[84] Unfair Contract Terms Act, 1977, § 11, sch. 2 (Eng.).

Similarly, the UCC in the United States prescribes that unconscionable clauses in contracts should be subject to a test of enforceability and shall be held invalid to the extent of such a clause.[85]

Although, sweeping exclusion clauses might be opposed to public policy, however, there might be other unconscionable clauses in hospital contracts that are *prima* facie unfair. The ICA does not propose any provision proscribing substantive unconscionability, save for a public policy exception under Section 23.[86] Therefore, the author contends that India should have a crystallised statutory position that deals with the enforceability of exception clauses, subjecting it to a test of reasonability. This can be achieved by adopting the recommendation of the 103rd Law Commission Report given under Chapter 6. The insertion of a new chapter and section has been proposed, combining the elements of the UCTA and the UCC:[87]

"Section 67A : (1) Where the Court, on the terms of the Contract or on the evidence adduced by the parties, comes to the conclusion that the contract or any part of it is unconscionable, it may refuse to enforce the contract or the part that it holds to be unconscionable.

(2) Without prejudice to the generality of the provisions of this section, a contract or part of it is deemed to be unconscionable if it exempts

[85] The Uniform Commercial Code, U.C.C § 2-302 (Am. Law Inst. & Unif. Law Comm'n 1977).
[86] Mohan, *supra* note 42, at 10.
[87] LAW COMMISSION OF INDIA REPORT NO. 103, UNFAIR TERMS IN CONTRACT, at 9 (1984).

any party thereto from—(a) the liability for wilful breach of the contract, or (b) the consequences of negligence."[88]

Another problem that could foreseeably arise is that despite such remedies being incorporated into the Indian jurisprudence, they would only serve as curative remedies as they would come into force only after the breach of duty has taken place. It is submitted that there should also exist a preventive remedy to protect the interests of the patients even before they enter into the contract. Here, the author submits that the role of a regulatory authority can be instrumental in the medical sector to oversee hospital contracts.

Several regulatory authorities, such as the Insurance Regulatory Development Authority ("**IRDA**") and the Telecom Regulatory Authority of India ("**TRAI**") regulate contracts between companies and individuals.[89] They have numerous clauses in their statutes ensuring that no company in these sectors can benefit unreasonably at the cost of the consumers.[90] As per the author, similar regulatory authorities should also be set up by the States since health falls under the "State List" as per the Constitution.[91] These regulatory authorities could lay down the broad stipulations that ought to be adhered to by hospitals while drafting their standard form contracts for the patients.

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[88] *Id.* at 9.
[89] ARIJEET SHUKLA & PRAKHAR AGARWAL, CONTRACTS, AGREEMENTS AND PUBLIC POLICY IN INDIA 186 (National Law School of India University 2015).
[90] *Id.* at 186.
[91] INDIA CONST, art. 246, sch. VII.

Additionally, regional authorities can be set up within this framework in order to regulate the "terms and conditions" offered to the patients, akin to what is provided by Section 14(2)(i) of the IRDAI Act for the insurance sector.[92] This would enable and empower these regulatory bodies to strike down any unfair or unconscionable terms that exist in such hospital contracts. These bodies can undertake periodical assessments, similar to what has been envisaged under the Clinical Establishments (Registration and Regulation) Act, 2010,[93] in order to ensure that any unconscionable term or a sweeping exclusion clause is vitiated and retracted. This would protect the patients from being on the end of an unfair bargain and ensure that hospitals cannot preclude liability by incorporating overbroad exclusion clauses in their contracts.

[92] Insurance Regulatory & Development Authority Act, 1999, § 14(2)(i), No. 41, Acts of Parliament, 1999 (India).
[93] Clinical Establishments (Registration and Regulation) Act, 2010, § 5(c), No. 23, Acts of Parliament, 2010 (India).

NLUJ Law Review

Pranav Kumar, *Automatism and Section 84, IPC A Proposed Amendment*, 9(1) NLUJ L. REV. 177 (2022).

AUTOMATISM AND SECTION 84, IPC: A PROPOSED AMENDMENT

*~Pranav Kumar**

ABSTRACT

India does not have a statutory framework for dealing with cases of automatism: the state of total loss of control over one's actions. Over the years, this has culminated into the judiciary utilising Section 84 of the IPC (unsoundness of mind) to deal with the conviction or acquittal of automatons. In this piece, the author argues that a new statutory framework is necessary. The author first looks at the problems with approaching automatism under the unsoundness framework, before drafting the new amended Section 84A that aims to encompass the defence of automatism. The author suggests phraseological changes to the unamended Section 84 that they then justify through the course of their paper. The argument is such: Section 84 needs to be amended to include automatism, and the paper proposes an amendment to that end.

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I. PREFACE

It was deep into the night when bright lights attacked her fatigued eyes, and a loud splash disturbed her sleep. Bewildered, she quickly roused her husband from his slumber. They looked around to realize, that the lights in Pappathi Ammal's home were shining in full glory. The two immediately reached Ammal's residence, only to discover that both Ammal and her son were nowhere to be seen. Caught in fright, they combed the entire neighbourhood trying to find the missing mother and child. Not a trace anywhere.

Just as they were about to give up, something unexpected caught them off-guard - a shallow noise near the well. As curiosity took over fear, the couple walked to the well and peeped inside. To their horror, Pappathi Ammal stared back at them with passionless eyes. Beside her, a life-less child floating over the water's surface. An investigation followed the inquest, and Ammal was charged with murdering her own son.

II. INTRODUCTION

In the aforementioned case of *Pappathi Ammal v. Unknown,*[1] the accused took the defence of somnambulism or sleep-walking, to argue that she was not in control of the events that took place, giving the court a classic opportunity to explore the contours of automatism. However, the court not only ignored the opportunity, but also failed to include automatism in its judgement. Such lacklustre is not unique to this case

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[1] In Re: Pappathi Ammal v. Unknown, AIR 1959 Mad 239 (India).

alone, and various other Indian cases too,[2] end up not discussing automatism in cases which require its application. On the other hand, the cases that do discuss automatism tend to push it into the insanity framework enshrined under Section 84 of the Indian Penal Code ("**IPC**"), effectively morphing the true nature of automatism for the worse[3].

In this Article, the author argues against reading automatism into Section 84, for it portrays a shallow understanding of automatons by declaring them insane. Instead, the author proposes an amendment (Section 84A) to the IPC, that attempts to paint a more complete picture of automatism, and also rid the present jurisprudence of the confusion caused (both, medical and legal) by treating automatism as a facet of insanity. To that end, the author shall *firstly,* summarily discuss automatism as a defence. The rest of the article shall be spent justifying Section 84A.

III. DEFENCE OF AUTOMATISM

Automatism is invoked when one portrays a total loss of control over one's actions. It denies the existence of *actus-reus* by arguing that the offence was carried out involuntarily.[4] That is, pleading automatism may completely acquit the accused, if they were not under conscious control of their actions while committing the offence. In the words of Justice Winn,

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[2] *See* State v. Gulzari Lal, 1979 SCC (Cri) 526 (India); Madhya Pradesh v. Ahmadullah, (1961) 3 SCR 583 (India); Patreswar Basumatary v. State of Assam, 1988 SCC OnLine Gau 31 (India).

[3] CHAN ET. AL., CODIFICATION, MACAULAY AND THE INDIAN PENAL CODE: THE LEGACIES AND MODERN CHALLENGES OF CRIMINAL LAW REFORM, (Ashgate Publishing, 2011), Chapter 10 (*hereinafter* "**CHAN, WRIGHT AND YEO**")

[4] John Jennings, *The Growth and Development of Automatism as a Defence in Criminal Law*, 2 OSGOODE HALL L. J. 370 (1962).

automatism involves *"an involuntary movement of the body or limbs of a person, (following) a complete destruction of voluntary control."*[5]

On the other hand, Section 84 states, that *"nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law."*[6] As mentioned, Indian courts have forced automatism into Section 84, effectively confusing automatism with the realm of unsoundness of mind. There are multiple arguments against this rigid approach. This Article discusses the three primary contentions – (a) absent nexus; (b) absent theoretical justification; and (c) failures under common law.

A. ABSENT NEXUS

Even the most common causes of automatism, which include somnambulism, epilepsy, hypoglycaemia etc, have no inherent element of mental disorder, insanity or unsoundness.[7] Automatons, as various authors and cases argue, may be of absolutely sound nature.[8] In fact, some argue, that being of sound mind is one of the primary requirements to invoke the automatism defence;[9] since only then the "conscious mind of the defendant has ceased to operate [and] his actions [are] solely controlled by his

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[5] Watmore v. Jenkins, [1962] 2 QB 572, p. 587.
[6] Indian Penal Code, 1860, §84, No. 45, Acts of the Parliament,
[7] UK LAW COMMISSION, INSANITY AND AUTOMATISM: A SCOPING PAPER, (2012); People v. Martin, 87 Cal. App. 2d 581 (1948); People v. Hardy, 33 Cal. 2d 52, 198 P.2d 865 (1948); RICHARD ROSNER & CHARLES SCOTT, PRINCIPLES AND PRACTICE OF FORENSIC PSYCHIATRY 275 (R Bluglass and P Bowden ed. 1990) (*hereinafter* "**Defence of Automatism**").
[8] *Id.*
[9] Patricia Gould, *Automatism: The Unconsciousness Defense to a Criminal Action,* 15 SAN DIEGO L. R., 839 (1978).

subconscious or subjective mind."[10] Thus, it makes little sense to label them as insane or unsound. Not only does such a label trivialize the issue of automatism itself, but it also rests the whole defence on a shaky presumption that insanity is an element of causation of automatism. Even through the lens of legal procedure, it makes no sense to use arguments, precedents and defences unique to insanity, to acquit/convict an automaton. The nature of automatism as a disorder is shielded by forcing it to exist under the shadow of Section 84.

B. ABSENT THEORETICAL JUSTIFICATION

Under the insanity framework, conviction leads to the emergence of strong control over the individual's liberty once they are declared insane. Criminal theory justifies this, by perceiving such persons as threats: something that society ought to be shielded from.[11] As has been incessantly argued, the function of criminal law is to administer just punishment.[12] According to this viewpoint, the rules of evidence and criminal procedure aid in administering appropriate punishment while limiting the risk of unjustified punishment. The requirement and quantum of such punishment are a function of societal views on morality. Though the rules of substantive criminal law assist in providing a fair warning to potential offenders that they may face punishment, it is never to say anything about *what* the justification of punishment is.

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[10] People v. Martin, 87 Cal. App. 2d 581 (1948), ¶ 8.

[11] Benjamin B. Sendor, *Crimes as Communication: An Interpretive Theory of the Insanity Defense and the Mental Elements of Crime*, 74 GEO. L. J. 1371, 1427-1428 (1986).

[12] MICHAEL S. MOORE, PLACING BLAME: A THEORY OF THE CRIMINAL LAW (Oxford University Press, 2010).

In the case of insanity, the justification is simply, as stated above, that such people are a threat, and endanger society; since their actions cannot be perceived or understood by civil society, it makes them unfit to live in the same.[13] Thus, convicts under this section are sent to state facilities or asylums in an attempt to keep them afar from 'normal' society.

However, such an approach fails to justify the bringing of automatism under the framework of insanity. In most, if not all, instances, the risk of reoccurrence of the automaton state is minimal.[14] Ergo, the risk of re-commission of the offence in such a state, is almost nil. For example, the risk to society posed by a man suffering from dissociative identity disorder, is nowhere close to the risk posed by a person acting as an automaton due to a muscle spasm from an external physical blow. Such difference in risk is not only intuitive, but also well-accepted in automatism scholarship.[15] Accordingly, one also finds no justifiable reason to exercise continued state supervision over such a person or label such a person as insane, for it would unnecessarily burden the actor with societal stigma and unwarranted state control.

C. LEARNING FROM THE FAILURES OF COMMON LAW

English law distinguishes between non-insane and insane automatism. As per the law, the former does not attract the defence of insanity, while the latter does.[16] Such classification is based on whether the

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[13] Defence of Automatism*, supra* note 7, pg. 2
[14] CHAN, WRIGHT AND YEO, *supra* note 3.
[15] Defence of Automatism, *supra* note 7, at ¶3.25-27.
[16] *Hennessy* [1989] 1 WLR 287; *DPP v. Desmond* [2006] IESC 25; *Sullivan* [1984] AC 156.

cause of automatism is external or internal, i.e., if the cause is internal, then insanity is the defence; if external, then simple automatism.

Since the presence of any 'internal' factor constitutes insane automatism, this distinction leads to a large pool of individuals having no mental unsoundness being labelled insane. This label extends not only to the patients of diabetes and epilepsy, but also to sleepwalkers as courts consider somnambulism to be caused by something *internal*.[17] Additionally, the distinction between internal and external automatism has also given rise to confusion, which often leads to unfair decisions. For example, diabetics may suffer from both, hyperglycaemia and hypoglycaemia, and both could be caused by external (excessive insulin intake) as well as internal factors (prolonged starvation). In the case of *Hennessy,*[18] the defendant pled insanity, simply because he forgot to take his prescribed insulin dose that morning.

Thus, the introduction of automatism into the insanity framework has not only diluted the defence of automatism, but has also muddled the jurisprudence concerning 'insanity' in common law. One must note, that a limited speck of automatism not tainted by the insanity jurisprudence was retained in common law under 'non-insane automatism'. If India were to concretely read automatism into Section 84, which is a provision specifically pertaining to the unsoundness of mind, even the limited thread of non-insane automatism would be lost, and all cases would fall under the framework of insanity.

Nevertheless, the purpose of this Article is not to argue why Section 84 should not take automatism under its ambit, but to propose an

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[17] *Defence of Automatism*, *supra* note 7, at ¶2.23.
[18] *Hennessy* [1989] 1 WLR 287.

amendment introducing it into the Indian Penal Code. To do so, we must first discard the distinction of 'insane' and 'non-insane' automatism, but instead adopt, what the author calls 'solus v. non-solus automatism'.

IV. ALTERNATE DRAFTING

A. SOLUS AND NON-SOLUS AUTOMATISM

Instead of identifying the origin of the cause of automatism, we must see if the absence of that cause would have negated the possibility of automaton behaviour completely. Additionally, such enquiry must also factor in the possibility of uninitiated reoccurrence of said behaviour. For this, the author aims to create a distinction between solus and non-solus automatism, as opposed to internal or external automatism that is found in common law.

The Oxford dictionary defines the word 'solus' as "alone or unaccompanied".[19] Thus, solus-automatisms would be those, where the advent of automaton behaviour would occur even if the accused were unaccompanied or alone, with substantial contributing factors posing a probable risk of uninitiated reoccurrence. While, non-solus automatism would consist of those situations, where the automaton behaviour requires the presence of a contingency external to the automaton himself, and substantial contributing factors pose minimal risk of uninitiated reoccurrence. For example, it is more accurate to posit, that a hypoglycaemic man, in such a state, is mentally impaired or incapable, than to undertake the adjudication under Section 84 and declare him unsound

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[19] WILLIAM LITTLE, OXFORD ENGLISH DICTIONARY 2.0 929 (*5th Ed,* Oxford University Press, 2003)

or insane. On the other hand, a person being hit by a stick in the head and suffering from temporary automaton behaviour would be considered a non-solus automaton, as there is little risk of reoccurrence (unless he is hit again in similar circumstances). Thus, in the latter case, the substantial contributing factors are external to the automaton himself.

The easiest way to understand this distinction is to see whether the automaton behaviour could reoccur when the actor is *in solus,* or isolated. One must understand, that said distinction cannot be uniformly imposed on a particular physical or mental condition - that is, it cannot be generalised, for example, that a hypoglycaemic man would always be a solus automaton. Such determination is dependent on the factors unique to the particular case. This marks a major point of departure from the common law distinction of internal and external automatism, where hypoglycaemia would always be considered a cause of internal automatism. It is possible, that hypoglycaemia in one case may result in the determination that the actor was a solus automaton, while in another, the courts may declare him a non-solus automaton.

An illustration would make the point crystal. A hypoglycaemic man who has himself induced low blood sugar by manipulating his course of medication, without any external stimuli, forcing him to do so can be considered a solus automaton, as certain subjective processes have prompted him to undertake said decision in solus. There is no stimulus external to the actor, and thus, substantial contributing factors could pose a probable risk of uninitiated reoccurrence. In contradistinction, if a third party induces hypoglycaemia in the automaton by forcefully or deceitfully

administering insulin, that would amount to non-solus automatism, as the substantial contributing factors are external to the actor himself.

In other words, automaton behaviour induced by such hypoglycaemia would not reoccur when the actor is in solus.[20] Thus, while the distinction drawn between solus and non-solus automatism, akin to external and internal automatism, seeks to analyse the *cause* of automaton behaviour, it does so not by looking at whether the effect of such behaviour is caused by internal or external *processes*, but by internal or external stimuli. Moreover, it also factors in the risk of reoccurrence, unlike the common law distinction.

The next sections would discuss the alternate wording of certain key phrases in Section 84, which would inhibit the section from blanketly treating all automatons under the framework of 'unsoundness'. While the unamended Section 84 has been produced above, the amended Section 84A is as follows:

B. SECTION 84A – DEFENCE OF AUTOMATISM

(1) Non-Solus Automatism: *Nothing is an offence in the absence of a willed or conscious act/ omission occurring from a loss of control over one's action, if such act:*

a. resulted from third-party action, with substantial contributing factor(s) being involuntary to the actor, and

b. poses no risk of uninitiated reoccurrence.

(2) Solus Automatism: *Nothing is an offence done by a person who, at the time of committing the act, suffered from a mental-incapability leading to loss of control over one's action, to the extent that the person:*

a. did not appreciate the consequences of his act

b. could not control his conduct or its uninitiated reoccurrence.

[20] Defence of Automatism, *supra* Note 7, at 47, 50, 52.

Explanation: mental-incapability excludes impairment from temporary intoxicators. If the intake of such intoxicants were involuntary, Section 84A(1) shall apply, and if not, Section 85 or Section 86 would apply.
The next sections elucidate and justify the prime changes made above.

C. REPLACING 'INCAPABLE OF KNOWING' WITH 'COULD NOT APPRECIATE'

Inspired from Section 16 of the Canadian Criminal-Code, that states '*no person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong'*.[21], Section 84A(2) replaces 'incapable of knowing' used in Section 84 with 'could not appreciate'. This makes the most sense, as the automaton is not acting from an incapacity of knowledge. The use of 'knowledge' indicates the existence of *mens rea*, even if to the minimum extent of 'bare awareness'.[22]

Such a presumption is erroneous, since it is possible that an automaton's faculties of bare awareness do not comprehend the act he/she attempts to commit. This completely negates the purpose of adjudicating the existence of knowledge, for, if one is put in a state where his faculties could not have *accessed* the knowledge, we presume they have and act according to what that 'knowledge' says, there lies little logic in punishing them for contravening it.

In such cases, the purpose of presuming knowledge falters; even bare awareness cannot be logically attributed to the automaton. On the

[21] Criminal Code, RSC 1985, c C-46 (1985) (Canada), §16(1).
[22] Jai Prakash v. State (Delhi Administration), 1991 SCR (1) 202 (India).

other end, there are multitudes of situations where the automaton would be well capable of *knowing* that his actions could have drastic consequences, but at the time of committing the act, could not *appreciate* or *understand* the nature of his act. In other words, an automaton may or may not lack the capacity of knowing, but more often, lacks only the capacity of acting on such knowledge. This makes it necessary to replace 'incapable of knowing' with 'could not appreciate'.

D. Replacing 'nature' with 'consequence'

The controversial phrase '*nature of the act'* is used in both, M'Naghten's rules and Section 84 ('*incapable of knowing the nature of the act'*).[23] Since Section 84 does not clarify or define the meaning of the 'nature of the act', it provides excessive scope for judicial manoeuvring and interpretation. This creates problems, as it is unclear whether 'knowing the nature of the act' is limited to knowing/appreciating the act itself, or also extends to knowing/appreciating its *consequences*. If the latter is untrue, then the defence of automatism is not complete, as an automaton may be thoroughly capable of *knowing* the nature of what he is doing, but incapable of *appreciating* the *consequences* of such action (e.g., notwithstanding her somnambulistic (sleepwalking) state, it is possible that Pappathi Ammal knew she was drowning her child, but could only appreciate the consequences of such action when not fully-awake, but fully-moving. Thus, replacing 'nature' with 'consequence' would represent the automaton's state of mind better, and also limit judicial interpretation.

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[23] M'Naghten [1843] UKHL J16.

E. REMOVING 'WRONG OR CONTRARY TO LAW'

Section 84 states, that a person must be 'incapable of knowing' that his actions are '*either* wrong or contrary to law'. The usage of 'either' and 'or' would hint that 'wrong' and 'contrary to law' have varying meanings. Since 'contrary to law' could only mean illegal, 'wrong' could only refer to actions deemed morally wrong. Thus, the accused could use Section 84 if the accused knows that his act would be deemed wrong, either legally, or morally. However, the court in *Geron Ali v. Emperor,*[24] held that Section 84 cannot be invoked unless the actor knew his actions were wrong, *both* legally and morally. In contradiction, the latter case of *Ashiruddin Ahmed v. King* held that knowing only the former (that the act is contrary to law), is sufficient to invoke Section 84.[25]

By removing the phrase 'either wrong or contrary', Section 84A(2) circumvents this whole issue of statutory interpretation. Moreover, the clause 'morally wrong' would have a redundant presence in cases of automatism; since it does not matter if the automaton understands the wrongness in his act (be it legal/moral). As mentioned, it is very well possible for an automaton to understand the nature of his act, know it is contrary to law, and still be unable to control himself, while it is also possible, that he is stripped of his bare stage of awareness. Thus, adjudicating whether he understands the act or not, as mentioned above, is irrelevant.

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[24] Geron Ali v. Emperor, AIR 1941 Cal 129 (India).
[25] Ashiruddin Ahmed v. King, 1949 CriLJ 255 (India).

V. CONCLUDING REMARKS

Section 84A also saliently supports two modern initiatives: *first,* the move towards declaring voluntariness a prerequisite to criminal liability and *second,* the stress on having subjective analysis at the centre of criminal adjudication.

It would take considerable amounts of judicial ingenuity and legal gymnastics to read voluntariness and automatism into the IPC.[26] Instead, it is efficient if the legislature introduces amendments incorporating the principle of voluntariness into the code. Section 84A is a step towards the same.

Derived from Justice Winn's judgement in *Watmore v Jenkins*, the phrase 'loss of control over one's actions' repeats itself in both sub-sections, highlighting the crucial facet of voluntariness, hitherto absent under the unamended Section 84.[27] Nevertheless, if such involuntary condition arises from voluntary acts of the actor, or his own fault (e.g., uncontrolled inebriation), he shall not be acquitted, as the 'substantial contributing factor' would not be 'involuntary to the actor' anymore under Section 84A(1)(a).

Secondly, the move towards having a subjective-centric approach to criminal adjudication[28] is also reflected in Section 84A(2)(a) through the usage of the words 'did not'. Such phrasing inherently requires a subjective approach, as it does not ask whether the subject *could not* understand the consequences, or if he had no *knowledge* of the same. It simply pushes the

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[26] CHAN, WRIGHT AND YEO, *supra* note 3, Chapter 10, 11.
[27] Watmore v. Jenkins [1962] 2 QB 572.
[28] THOMAS WEIGEND, SUBJECTIVE ELEMENTS OF CRIMINAL LIABILIT, OXFORD HANDBOOK OF CRIMINAL LAW (Oxford University Press, 2014).

accused to prove, that *he did not* appreciate the consequences of his action, and not that any other man in his shoes *could not have* appreciated the consequences.

Thus, this paper attempts to draft Section 84A - a proposed amendment to Section 84 of the Indian Penal Code to introduce automatism as a defence into the code. Such an addition would save an accused, to whom no moral fault can be imputed, from the unhappy choice of pleading insanity, or pleading guilty.

Renuka Mishra & Avishek Mehrotra, *Section 29A Of The Indian Insolvency Regime: Aid Or Impediment To Corporate Governance?*, 9(1) NLUJ L. REV. 193 (2022).

SECTION 29A OF THE INDIAN INSOLVENCY REGIME: AID OR IMPEDIMENT TO CORPORATE GOVERNANCE?

~Renuka Mishra & Avishek Mehrotra[*]

ABSTRACT

The Insolvency and Bankruptcy Code, 2016 was introduced to act as a single legislation for dealing with insolvency issues. It safeguards the interest of all stakeholders related to the corporate debtor as well as ensures good returns to the creditors. The code also focuses on the management of the corporate debtor post-resolution. The key provision in this respect is Section 29A of the Code, which prevents the promoters, incumbent management of the corporate debtor as well as certain other undesirable persons, from taking over the corporate debtor, so that charge can be taken by better management. While the intent behind the legislation was bonafide, there appears to be a lack of foreseeability on the part of the legislature on the far-reaching consequences of Section 29A. Through this piece, the authors aim to address the gap between the legislative intent and the actual effect of the provision, which might not aid but diminish corporate governance. For doing so, this article would firstly elaborate upon corporate governance and its interlink with IBC, with emphasis on Section 29A of the

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Code. It then brings to the fore the intention-outcome asymmetry in the impugned provision. The article then focuses on the non-alignment of Section 29A with certain key objectives of the Code. The authors point out that the scheme of Section 29A is broad enough to exclude even genuine promoters and incumbent management. Accordingly, the authors advocate for narrowing the ambit of Section 29A to prevent the exclusion of genuine promoters and incumbent management from submitting a resolution plan. Finally, the authors suggest a middle path preventing the blanket ban on incumbent management and promoters as well as other desirable persons while still achieving the objectives of the Code.

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I. INTRODUCTION

The Insolvency and Bankruptcy Code, 2016 ("**the Code**" or "**IBC**") was enacted with the intention to rehabilitate a distressed company while maximizing the value of its assets.[1] The Code protects the value of a distressed company by continuing its functioning as a going concern.[2] When the Corporate Insolvency Resolution Process ("**CIRP**") commences, the management of the distressed corporation is taken over by its creditors.[3] The Code follows a creditor-in-possession model, which resembles the process of insolvency administration in the UK.[4] The creditors, forming part of the Committee of Creditors ("**CoC**") are given primacy in decision-making for the approval of the resolution plan with little scrutiny from the adjudicating authorities.[5] Thus, the creditors themselves have to decide the plan most suitable in terms of the financial viability and future administration of the distressed corporation. By doing so, the Code seeks to protect the interest of all stakeholders involved in the process while also bearing in mind the future administration of the Corporate Debtor ("**CD**"). This aids in ensuring good corporate governance during the entire process.

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[1] *Understanding the IBC: Key jurisprudential and practical considerations*, IBBI (Nov. 18, 2019), https://ibbi.gov.in/uploads/whatsnew/e42fddce80e99d28b683a7e21c81110e.pdf. (*hereinafter* "**IBBI Paper**"); Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India).

[2] Pratik Datta, *Value Destruction and Wealth Transfer under the Insolvency and Bankruptcy Code, 2016*, NATIONAL INSTITUTE OF PUBLIC FINANCE AND POLICY, WORKING PAPER NO. 247 (2018), at 20.

[3] IBBI paper, *supra* note 1, at 14.

[4] The Insolvency Act, 1986, c 45, sch. B1 (U.K.).

[5] Kalpraj Dharamshi v. Kotak Investment Advisors Ltd., 2021 SCC OnLine SC 204; Ghanashyam Mishra & Sons Pvt. Ltd. v. Edelweiss Asset Reconstruction Co. Ltd. through the Director, 2021 SCC OnLine SC 313.

The rationale behind following the creditor-in-possession model is derived from the skepticism by which the incumbent management of the CD is viewed.[6] Moving a step further, the Code even restricts the incumbent management from regaining possession of the CD post-resolution by way of Section 29A.[7] While the aim of the said provision was to prevent the incumbent management and promoters responsible for the CDs' insolvency as well as certain other undesirable persons from retaining control,[8] the contours of the section go much beyond the targeted persons. The authors, through this piece, aim to address the gap between the legislative intent and the actual effect of the provision, which essentially might not aid but diminish corporate governance.

For doing so, Part I of this article would elaborate upon corporate governance and its interlink with IBC with an emphasis on Section 29A of the Code. Part II – brings to the fore the intention-outcome asymmetry as exists with respect to the impugned provision. Part III – focuses on the non-alignment of Section 29A with certain key objectives of the Code. Part IV – advocates for the exclusion of genuine promoters and incumbent management from the scheme of Section 29A. Part V – provides feasible suggestions for issues highlighted in this article. Part VI – the authors present their concluding remarks.

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[6] Genard McCormack, *Control and Corporate Rescue: An Anglo-American Evaluation*, 56 ICLQ 515, 515 (2007).

[7] Insolvency and Bankruptcy Code, 2016, §.29A, No. 31, Acts of Parliament, 2016 (India).

[8] AKAANT KUMAR MITTAL, INSOLVENCY AND BANKRUPTCY CODE: LAW AND PRACTICE 751 (EBC, 1st ed. 2021) (*hereinafter* "**AKAANT MITTAL**").

II. IBC And Corporate Governance

The Cadbury Committee defined corporate governance as "the framework by which organizations are coordinated and controlled ".[9] The corporate governance of an entity determines its method of decision-making and the distribution of rights amongst various stakeholders. It impacts the framing and planning of the corporate entity's goal and monitoring thereof.[10] The significance of good corporate governance lies in the fact that it aids in bringing transparency in the functioning of the corporate setup, thereby preventing fraudulent practices; it helps in building a positive image amongst the masses, making the business more sustainable.[11]

When it comes to a corporate entity, one of the cardinal principles associated with it is its perpetuity.[12] But the reality starkly differs from the perceived notion. As per a study published by the Royal Society, half-life of a listed company is about 10 years.[13] It is imperative to keep a company alive, as the company, with its capital, generates value and shares the same with various stakeholders, through its corporate governance framework. On these lines, the Organisation for Economic Co-operation and Development ("**OECD**") has advocated for an effective insolvency regime

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[9] Bhumesh Verma and Himanshi Singh, *Evolution of Corporate Governance,* SCC ONLINE (Nov. 13, 2019), https://www.scconline.com/blog/post/2019/11/13/evolution-of-corporate-governance-in-india/.

[10] OECD, G20/OECD PRINCIPLES OF CORPORATE GOVERNANCE, OECD PUBLISHING (2015), https://www.oecd.org/daf/ca/Corporate-Governance-Principles-ENG.pdf (*hereinafter* "**OECD PRINCIPLES**").

[11] *Id.*; SECURITIES AND EXCHANGE BOARD OF INDIA, REPORT OF THE KUMAR MANGALAM BIRLA COMMITTEE ON CORPORATE GOVERNANCE (1999).

[12] Andrew A. Schwartz, *The Perpetual Corporation*, 80 GEO-WASH-L.REV 764, 766 (2012).

[13] Daepp MIG, Hamilton MJ, et. al., *The Mortality of Companies,* 12 JRSI 106 (2015).

to complement corporate governance.[14] The IBC aids in keeping an organization alive by facilitating debt resolution and avoiding liquidation. The Code gains further eminence as the rights of all stakeholders of the CD like its employees, suppliers, contracting parties, etc. are solely dependent on the resolution plan approved by the adjudicating authority per the provisions of the Code.[15]

It is the IBC regime that decides the showrunners of the re-incarnated company. It is *sine qua non* to have strong and professional management that can restore the company to its previous glory or take it further by following good corporate governance practices. To ensure the capability of the management, determination of both who can and who cannot be put in charge of the company is quintessential. To ascertain the latter, Section 29A has been included within the Code.

III. THE SCHEME OF SECTION 29A

As discussed above, the resolution plan forms a very crucial aspect of debt resolution under IBC. In its original form, a resolution plan was defined by the legislature as "a plan proposed by any person for insolvency resolution of the corporate debtor as a going concern".[16] There was no restriction upon anyone from being a resolution applicant. As innocuous as this may seem, instances surfaced where the liberty was being misused by the defaulting management to regain control of the company by paying a

[14] OECD PRINCIPLES, *supra* note 10.
[15] MS Sahoo, *Here's how IBC 2016 has taken corporate governance to new heights*, FINANCIAL EXPRESS (Feb.13, 2020), https://www.financialexpress.com/opinion/heres-how-ibc-2016-has-taken-corporate-governance-to-new-heights/1866199/.
[16] Insolvency and Bankruptcy Code, 2016, §.29A, No. 31, Acts of Parliament, 2016 (India).

minuscule portion of the total debt owed by them.[17] Recognizing this vulnerability of the Code, *inter alia,* Section 29A was added through the IBC (Amendment) Act, 2017.[18] Further, post the amendment, the definition of resolution applicant has been clamped down from "any person" submitting the resolution plan to only those who are invited by the resolution professional pursuant to invitation under Section 25(2)(h) to submit such resolution plan. Another beneficial effect of this change is the permissibility to jointly submit a resolution plan with any other person, which might facilitate the acquisition of larger stressed assets.[19]

Under Section 29A, several classes of persons and those "*acting jointly or in concert with such persons"* are not eligible to submit the resolution plan.[20] Some of such ineligibilities are linked to default in payment of dues namely - an undischarged insolvent, a willful defaulter and those having control over the Non-Performing-Asset ("**NPA**") account for a period exceeding one year at the time of commencement of the CIRP. Additionally, the guarantor of the CD against whom insolvency resolution application stands admitted and the guarantee on being invoked remains unpaid also falls under this category.[21] Other disabilities are linked to personal antecedents determined by commercial laws. These ineligibilities

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[17] Edelweiss Asset Reconstruction Company Ltd v. Synergies Dooray Automotive Ltd., 2018 SCC OnLine NCLAT 845 (India).

[18] Insolvency and Bankruptcy Code(Amendment) Act, 2017, No. 8, Acts of Parliament, 2018 (India).

[19] Insolvency and Bankruptcy Code, 2016, §.29A, No. 31, Acts of Parliament, 2016 (India) §.5(25).

[20] Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, §. 2(o), No. 54, Acts of Parliament, 2002 (India).

[21] Insolvency and Bankruptcy Code, 2016, §.29A, No. 31, Acts of Parliament, 2016 (India) §.29A (a), (b), (c), (h).

include a bar from trading or accessing the securities market by the Securities and Exchange Board of India, those disqualified to be directors under the Companies Act, 2013 and those convicted for an offence punishable with imprisonment of a minimum of two years (for offences specified under schedule 12) or seven years (any other offence).[22]

Besides the persons explicitly subject to the above disabilities, persons related to or connected with such persons are also subject to the same.[23] However, exceptions have been carved out for certain persons under the said provision.[24] The rationale behind its inclusion is to further the public interest and corporate governance.[25] Through this, it would be ensured that the company goes into the hands of persons who would be better suited for the company's future prospects post-resolution.

IV. SECTION 29A: A CLASSIC CASE OF INTENTION – OUTCOME ASYMMETRY

In the case of Edelweiss Asset Reconstruction Company Ltd. v Synergies Doorey Automotive Ltd.[26], Edelweiss being one of the financial creditors of Synergies Doorey Automotive Ltd. ("**Doorey**") had preferred an appeal against the order of National Company Law Tribunal ("**NCLT**") Hyderabad approving the resolution plan of Synergies Castings Ltd.

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[22] Insolvency and Bankruptcy Code, 2016, §.29A, No. 31, Acts of Parliament, 2016 (India) §.29A (d), (e), (f).

[23] Insolvency and Bankruptcy Code, 2016, §.29A, No. 31, Acts of Parliament, 2016 (India) §.29A(j) r.w. Explanation 1.

[24] Insolvency and Bankruptcy Code, 2016, §.29A, No. 31, Acts of Parliament, 2016 (India) §.29A.

[25] Chitra Sharma v. Union of India, (2017) 143 SCL 680 (India).

[26] Edelweiss Asset Reconstruction Company Ltd. v. Synergies Dooray Automotive Ltd., 2018 SCC OnLine NCLAT 845 (India).

("**SCL**") The successful resolution applicant was a related party of the corporate debtor. Interestingly, the majority portion of the debt was also owed to SCL. This debt was assigned to a third-party Millennium Finance Limited ("**MFL**") by SCL through an assignment deed. While SCL being a related party was barred from being a part of the Committee of Creditors ("**CoC**"), MFL got a seat with more than 75% of the voting share. The appellant alleged that the assignment was illegal as it had been done with the ulterior motive of giving a seat to a related party in the CoC thereby ensuring the outcome of the process. The allegations were turned down on the grounds that *firstly*, the assignments were fairly executed and *secondly*, MFL was not a related party of the corporate debtor.

Although legally viable, the legislature was triggered by the unscrupulous management regaining control of the corporate debtor at a heavy discount. This can also be evident from the speech of then Finance Minister Mr. Arun Jaitley while introducing the ordinance on the floor of the house from the use of phrases such as "*who are in management and on account of whom*" and "*discounted rate*".[27] To address this issue urgently and prevent its misuse in all pending resolutions, Section 29A of the Code was introduced.[28] The ulterior motive behind the introduction of Section 29A appears to be the achievement of better corporate governance of the resurrected debtor.

[27] Statutory Resolution Re: Disapproval of Insolvency and Bankruptcy (Amendment) Ordinance, 2017, LOK SABHA, http://loksabhadocs.nic.in/debatestextmk/16/XIII /29.12.2017.pdf (*hereinafter* "**Statutory Regulation**").
[28] M.S. Sahoo, *Dooray paved Doorway,* IBC LAW REPORTER, https://ibclawreporter.in/wp-content/uploads/2020/07/dooray-paved-doorway-in-publication-insolvency-and-bankruptcy-code-a-miscellany-of-perspectives.pdf (2020).

In its current form, the prohibition under Section 29A does not merely single out the responsible management and promoters but spreads a wider net to filter out other undesirable persons from submitting the resolution plan. The restrictions extend to four layers of persons.[29] *Firstly* the ineligible person, *secondly* persons connected to the ineligible person, *thirdly* persons related to the ineligible connected person and *lastly* persons acting jointly with or in concert with the ineligible person. The nature of restrictions is such that it excludes almost all promoters and the incumbent management irrespective of the fact that they had any role in leading the company to insolvency or not.[30] This is problematic due to the fact that instead of fulfilling the objective of better corporate governance of the company post-resolution and reaping fair values to the creditors, the wide nature of restrictions might hamper these objectives.

The absence of attention to detail regarding the effects of Section 29A can well be attributed to the urgency with which the provision was thought of and drafted.[31] Although the drafters made their best efforts to achieve their objective without having to exclude all the promoters, they ended up not only doing what they sought to avoid but also overlooking some key objectives of the IBC regime in their endeavour while not essentially achieving their end objective.

A. THE WIDE CONTOURS OF SECTION 29A

[29] AKAANT MITTAL*, supra* note 8, at 752.
[30] M.P. Ram Mohan and Vishakha Raj, *Section 29A of India's Insolvency and Bankruptcy Code: An Instance of Hard Cases Making Bad Law*?, IIMA WORKING PAPER NO. 2021-07-01 JOURNAL OF CORPORATE LAW STUDIES.
[31] INJENTI SRINIVAS, THE STORY BEHIND SECTION 29A of IBC in INSOLVENCY AND BANKRUPTCY REGIME IN INDIA - A NARRATIVE 100 (Insolvency and Bankruptcy Board of India 2020).

1) Ousting incumbent management and promoters

As mentioned, the bar under Section 29A was primarily intended to target the incumbent management and promoters, responsible for the insolvency of the CD.[32] Quite interestingly, the concern regarding its much wider reach began to surface at the stage of its introduction in the House itself. Minister Jayadev Galla, opined and rightly so that the ousting of persons holding accounts classified as an NPA for a period of more than a year is unjustified.[33] In a similar vein, the Insolvency Law Committee ("**ILC**"), suggested an increase in the designated time period.[34] The reason behind these concerns was the fact that downturns in businesses usually extends to a period beyond one year,[35] which leads to effectively barring almost all the promoters and incumbent managements of any CD holding an NPA account. However, none of the above was paid heed to. Additionally, the Apex Court in *Swiss Ribbons v Union of India,* concurred with the Code and also stated that a period of one year in addition to the elapse of 90 days needed before an asset is classified as an NPA was sufficient to clear the dues.[36]

The authors are in concurrence with the views staged by the Hon'ble Minister and the ILC. As the restriction is very broad and overlooks the fact that an organization subjecting itself to insolvency, in all probability will have NPA accounts. This leads to an exclusion of almost

[32] Insolvency and Bankruptcy Code (Amendment) Bill, 2017, No. 280 of 2017 (India), Statement of objects and reasons of the bill.
[33] Statutory Resolution, *supra* note 27.
[34] MINISTRY OF CORPORATE AFFAIRS, REPORT OF THE INSOLVENCY LAW COMMITTEE, at 50 (2018) (*hereinafter* "**ILC REPORT**").
[35] *Id.*
[36] Swiss Ribbons v. Union of India, (2019) 4 SCC 17 (India).

every management and promoter of the CD notwithstanding any intention or antecedents bringing into question the credibility of the person submitting the resolution plan. Thus, it goes contrary to the intent of restricting only unscrupulous management and promoters.

2) Extending reach to remotely related parties

The contours of the impugned provision extend to persons far beyond the intended reach. Besides covering the management and promoters of almost all CDs, it also extends to bona fide resolution applicants. The use of the phrase "*persons acting jointly or in concert with such person*" at the beginning of Section 29A increases its scope of exclusions.[37] The term has not been defined within the Code and borrows its meaning from the definition provided under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.[38]

Further, no indication is provided as to whether the ambit of the term is limited to those acting in concert with the CD or even extends to the connected party of the CD.[39] The ambiguity around the application of the term has the potential to cover several persons despite being remotely related to the CD.[40] This curative step is a rather bit too harsh.

Illustratively, if one A has been barred from acting as a director, and B is a director of one of the subsidiary companies of which A was a director. Then technically, C, the wife of B's male cousin would also be excluded as

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[37] Insolvency and Bankruptcy Code, 2016, §.29A, No. 31, Acts of Parliament, 2016 (India) §.29A.
[38] SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, Gazette of India, pt. III reg. 2(1)(q) (Sep. 23, 2011) (India).
[39] ILC REPORT, *supra* note 34, at 48.
[40] *Id.*

a result of being a 'connected party' of the person acting in concert. This would be an absurd result and might exclude a capable prospective applicant. In this regard, the ILC has suggested omitting the impugned phrase and limiting the scrutiny of Section 29A to expand the pool of applicants.[41]

B. Reducing Haircuts

The major purpose behind Section 29A was to minimize the trend of promoters regaining control of the CD at substantial haircuts[42] i.e., at a much lower price than the total claim. Albeit the provision has successfully eliminated the promoters but has that resulted in fewer haircuts by ensuring the submission of plans by genuine resolution applicants, is a point to consider. The average amount the creditors are able to retrieve is 24%,[43] while instances still frequently surface where substantial amounts of haircuts are taken.[44] In some of these instances, the promoters were paying substantially more than the eventually approved resolution plans but were excluded due to the embargo created by the said provision.[45] The wide range of exclusions also poses a hindrance to competitive bidding by

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41 *Id.*

42 M.S. Sahoo, *Getting the perfect haircut from the IBC,* THE INDIAN EXPRESS (August 8, 2021), https://indianexpress.com/article/opinion/columns/getting-the-perfect-haircut-from-the-ibc-7460418/.

43 TT Ram Mohan, *Bankruptcy process needs a re-look*, THE BUSINESS STANDARD (July 8, 2021), http://www.business-standard.com.iima.remotexs.in/article/opinion/bankruptcy-process-needs-a-re-look121070801514_1.html.

44 PTI, *Videocon insolvency: Creditors to take 96% haircut on dues; NCLT requests increase in pay-out*, ECONOMIC TIMES (June 16, 2021), https://economictimes.indiatimes.com/news/company/corporate-trends/videocon-insolvency-creditors-to-take-96-haircut-on-dues-nclt-requests-increase-in-pay-out/articleshow/83561586.cms?from=mdr.

45 R.C. Dhandapaani v. Vengarai Seshadri Sowrirajan, 2018 SCC OnLine NCLAT 1061 (India); R. Vijay Kumar v. Kasi Viswanathan, 2019 SCC OnLine NCLAT 227 (India).

reducing the pool of prospective resolution applicants often giving the resolution professional very limited (in some cases none) options to choose from.

This trend is a setback to corporate governance. The businesses especially at the initial stages are in a dire need of capital, which is often provided by the creditors. This capital aids in the proper functioning and day-to-day operations of the business towards its vision. Fewer rates of recoveries are a predicament as it has the potential to reduce the confidence of the creditors in recovery mechanisms, which might deter them from lending funds.

V. DEPARTING FROM THE FUNDAMENTAL OBJECTIVES OF IBC

Besides non-alignment with the objectives behind its introduction, Section 29A poses a challenge to some of the key objectives of the Code itself.

A. MORE TOWARDS LIQUIDATION THAN RESOLUTION

One of the foremost objectives of the Code is to give primacy to resolution over liquidation.[46] This is owed to the fact that liquidation puts the life of the corporation to an end and destroys the capital of the organization. Also, on liquidation the claim of the stakeholders is met only to a small extent, while most of them have to take a heavy haircut; others have to bear their entire debt given as a loss.

[46] Vishnu Tandi, *Resolution v. Liquidation: The Real Spirit of Insolvency and Bankruptcy Code, 2016*, TAX GURU, (Sep. 30, 2018), https://taxguru.in/corporate-law/resolution-liquidation-real-spirit-insolvency-bankruptcy-code-2016.html.

Better corporate governance of an indebted corporation is another central objective around which, the Code is built. For this reason, Section 29A holds much significance as it furthers this very objective.[47] However, there would be no question of improving a company's governance post-resolution, if there is no resolution at all and the company ends up in liquidation. Due to this, post the introduction of the Code, it seems that rarely would the company undergo liquidation as it is more of a double-whammy for the company as well as its creditors. However, the reality starkly differs - as of September 2022, out of the total 3946 CIRPs closed, a meagre of 553 have ended in approval of resolution plans while 1807 have ended in orders for liquidation.[48] With the low rate of resolutions, such wide prohibitions as under Section 29A might further worsen the rate of resolutions.

B. INHIBITING TIME-BOUND RESOLUTION

The importance of time-bound resolution has been emphasized by the Supreme Court in *Innoventive Industries Ltd. v. ICICI Bank and Anr.*[49] There is a limit to which a company can sustain itself without proper leadership and management. While undergoing the resolution process, the progress of the company is at a standstill and no significant decisions are made as the control of the organization shifts from the CD to the creditors. Thus, time becomes of the essence for the resolution of the debtor. Delay

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[47] Chitra Sharma v. Union of India, (2017) 143 SCL 680 (India).
[48] THE QUARTERLY NEWSLETTER OF INSOLVENCY AND BANKRUPTCY BOARD OF INDIA JULY-SEPTEMEBR 2022, Vol. 24, https://ibbi.gov.in/uploads/publication/f3ddc90d7391bcae84ef2f87f793eb3c.pdf (2022).
[49] Innoventive Industries Ltd. v. ICICI Bank, (2018) 1 SCC 407 (India).

in all probability leads to liquidation of the CD while also depreciating the value of its assets.

Since a person can only be a resolution applicant if he falls/it is outside the wide gauge of Section 29A, the resolution professional is under an obligation to scrutinize every resolution applicant to ensure compliance with the said provision. This means ensuring that the person is not disqualified in India as well as any other jurisdiction. This inevitably is a time taking process, which might detrimentally impact the CD and the value of its assets in the event of liquidation.

VI. MAKING A CASE FOR GENUINE PROMOTERS

The Bankruptcy Law Reform Committee Report ("**BLRC report**") comprehensively captures the nature and elements that the framers wanted to imbibe in the Code.[50] *Inter alia*, the drafters enumerated the elements that a "sound bankruptcy law" can achieve. One such key element is to separate malfeasance from business failure.[51] The BLRC report cautions against the stereotypical trend of attributing business failure to the malfeasance of the promoters. The effect of such an assumption would deter the businesses from taking risks, as any business failure on account of the risk would be linked to the promoters. This hampers the economy and diminishes the principle of limited liability, which protects the stakeholders of the company from being held personally liable whenever anything goes wrong with the company/ in any and every event of default.[52] Even in the UK,

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[50] TK VISHWANATHAN ET. EL., THE REPORT OF THE BANKRUPTCY LAW REFORMS COMMITTEE – VOLUME 1: RATIONALE AND DESIGN, at 22-23 (2015).
[51] *Id.* at 23.
[52] *Id.*

sales to connected parties though viewed with a cynical perspective, have not been completely barred.[53]

The losses incurred by a business cannot always be attributed solely to its incumbent management and/or promoters. There are multiple external factors like changes in the market, technological changes, and government policies which can lead to the downfall or excessive losses in a business and push the entity to the verge of insolvency.[54] Around the year 2011, there were bans on iron ore mining imposed by the Courts, leading to a significant reduction in iron ore shipments.[55] Such a blow to the downfall in production adversely impacted companies like Essar Steel and Bhushan Steel which were albeit prepared for the future demand but turned insolvent due to factors much beyond the control of the management of the entity itself.[56]

Going by the rationale of Section 29A, the bankruptcy of public sector undertakings such as Air India should also be attributable to malfeasance on the part of the government, which is not the case. Thus, it is safe to say that holding all promoters and/or incumbent management liable for the insolvency of the corporate is inherently fallacious. On the contrary, the incumbent management of the CD, with its vision and

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[53] TERESA GRAHAM, GRAHAM REVIEW INTO PRE-PACK ADMINISTRATION: REPORT TO THE RT HON VINCE CABLE MP, At 26 (2014) (UK).

[54] Shailesh Menon and Rakhi Mazumdar, IBC Ordinance: *End of the road for dishonest promoters, but has anyone thought of the collateral damage?*, ECONOMIC TIMES (Nov. 30, 2017), https://economictimes.indiatimes.com/news/economy/policy/ibc-ordinance-end-of-the-road-for-dishonest-promoters-but-has-anyone-thought-of-the-collateral-damage/articleshow/61856357.cms.

[55] *Id.*

[56] *Id.*

expertise of the enterprise is often the best judge for determining the way out for the corporate entity from insolvency.[57]

Additionally, the provision fails to permit the promoters and the incumbent management to put forth a resolution plan even if that leads the company to liquidation or forces the creditors to take massive haircuts. For instance, when the resolution professional did not receive any resolution plan except the promoter of the debtor, the tribunal preferred to liquidate the company than accept the resolution plan which was proposed by the promoter.[58] Similarly, in *R. Vijay Kumar v. Kasi Viswanathan*, the promoters were willing to offer Rs. 30 crore as opposed to Rs. 3 crore which was receivable on liquidation. The resolution plan of the promoter was still not accepted.[59] These cases testify to the fact that the embargo created by Section 29A goes against the spirit of the Code itself which promotes resolution over liquidation and value maximization. Thus, it can be deduced that the remedy against the incumbent management taking over the CD at a lower price, has led to more harm than good.

VII. ADDRESSING THE PREDICAMENTS UNDERLYING SECTION 29A

Due to the multi-fold impacts of the exclusionary nature of Section 29A, there is an ardent need to rethink the contours of the said section. The ILC in its wisdom has recommended the submission of affidavits from the

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[57] V.S. DATEY, GUIDE TO INSOLVENCY AND BANKRUPTCY LAW (TAXMANN, 9th ed. 2020).
[58] Chandra Kalian Parkash v. Rajeev Mannadiar*,* 2018 SCC OnLine NCLAT 372 (India).
[59] R. Vijay Kumar v. Kasi Viswanathan, 2019 SCC OnLine NCLAT 227 (India).

resolution applicants confirming their eligibility.[60] However, this may not be a viable solution keeping sight of the fact that irrespective of the submission of such an affidavit, the resolution professional would have to verify each resolution applicant regarding their eligibility. It has also been opined that a body on the lines of the pre-pack pool as exists in the UK can be established that would be bestowed with the responsibility to review the purchases related to the promoters and connected party.[61] In the opinion of the authors, the need for having an additional body for the purpose may be superfluous.

To find a feasible suggestion, we must first reflect upon the issue that gave rise to the need for such exclusions. The issue was the taking over of a corporation by the incumbent management at the cost of the creditors by only paying a small portion of their debts. Taking from this the authors are of the view that while the restriction under Section 29A should exist, its reach should be restricted to the resolution applicant only and not connected parties. While further ineligibility should be decided based on the facts and circumstances of each case, which may involve scrutiny of factors like a position of authority that the CD enjoys due to their relationship or the existence of any agreement or transaction (mala-fide or coercive), etc. Further, the ambit of Section 29A should be curbed down by inculcating the recommendations given by the ILC regarding NPA

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[60] ILC REPORT, *supra* note 34 at 53.

[61] Rudresh Mandal and Hardik Subedi, *Insolvency under Section 29A: Pre-Pack Pools & Independent Review of Connected Party Sales,* (April 3, 2018), https://indiacorplaw.in/2018/04/insolvency-section-29a-pre-pack-pools-independent-review-connected-party-sales.html.

account holders and omitting the phrase person acting jointly or in concert with.[62]

The authors accordingly propose that the resolution professional should only reject the plans when the resolution applicant directly falls under the ambit of Section 29A (post inclusion of ILC's recommendations), having regard to the circumstances leading to the failure of the business or when *malaise* on part of the resolution applicants other than those directly impacted by Section 29A is *prima facie* evident. Before moving to the role of CoC it is pertinent to take note of the fact that CDs have shown reluctance in filing for insolvency due to – fear of exclusion under the wide gamut of Section 29A, better resolution plans from external bidders, and the non-approval of any plan leading to liquidation.[63] The second reason here holds much significance. So, the CoC on receiving the resolution should merely focus on the financial viability of a plan and approve the best plan accordingly. This in all probability would exclude the non-genuine persons seeking to regain the corporate entity at a significantly discounted price.

Whereas even if connected persons of those responsible are able to provide significantly better value than liquidation value or other plans, then it should be preferred. Inculcation of this process would aid in fulfilling the objective of excluding non-genuine and malicious plans. It would aid in increasing the pool of resolution applicants, retrieving the best possible value of CDs, and aid in ensuring time-bound completion of CIRP.

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[62] ILC REPORT, *supra* note 34 at 50, 48.

[63] MINISTRY OF CORPORATE AFFAIRS, REPORT OF THE INSOLVENCY LAW COMMITTEE ON PRE-PACKAGED INSOLVENCY RESOLUTION PROCESS (2018).

VIII. CONCLUDING REMARKS

As discussed above, Section 29A in its current form threatens the exclusion of several potential applicants, the objects of value maximization and time-bound resolution. The cumulative effect of all these is to force the company into liquidation rather than its resolution. As a result, the corporate governance that the provision aims to behold also suffers a setback, as without resolution there can be no question of corporate governance of the CD. To resolve this anomaly, the authors suggest the pavement of a middle path that advocates against the blanket ban on incumbent management and promoters as well as other desirable persons while still achieving the objectives sought by the Code.