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A WORLD WITHIN A WORLD: NAVIGATING COMPETITION LAW IN INDIA IN THE CONTEXT OF METAVERSE

~Pushpit Singh & Pamidi Swetha[*]

ABSTRACT

Today, leading technology companies such as Meta, Roblox, Microsoft, and Woozworld are researching and developing their own Metaverses for gaming, buying and selling Non-Fungible Tokens, socializing, and hiring and recruiting. The concept of "Metaverse" was popularized in 2021 when Meta (earlier known as Facebook) decided to build its Metaverse. However, even before this, the concept of the "Metaverse" was first introduced in 1992 by Neal Stephenson in his sci-fi novel "Snow Crash." With companies like IKEA and Flipkart entering the Metaverse market, it is lucid that Metaverse is not just for technology corporations but any company that knows how to utilise technology. Thus, the entry of multinational corporations in the Metaverse translates to a high likelihood of various competition law issues in India because of an absence of explicit and inclusive legal frameworks to curb anti-competitive issues in digital spaces like that of the Metaverse. In this research article, first, the Authors analyze India's current competition law framework and compare it to the United Kingdom's recently introduced Digital

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Markets Unit to assess the ability of Indian competition law to address and curb anti-competitive issues in the Metaverse. Second, the Authors analyse the impact of the current jurisprudence given by international Courts on competition law issues in the Metaverse. Lastly, the Authors give specific recommendations to resolve anti-competitive issues in the Metaverse such as the updation of the Indian Competition Act, 2002, giving power to the Competition Commission of India to address and regulate anti-competitive issues in the Metaverse, and other similar recommendations.

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I. INTRODUCTION

Before defining Metaverse and discussing its functions, it is imperative to note that currently, there are no specific laws or policies that define 'Metaverse' and its functions. Due to this, we are currently forced to rely on its generic definition and functions. Metaverse has been defined as: "*…to move from a set of independent virtual worlds to an integrated network of 3D virtual worlds or Metaverse that constitutes a compelling alternative realm for human sociocultural interaction*."[1] This means that Metaverse is an integration of independent 3D virtual worlds that allows individuals to interact. Now, this interaction can be in terms of daily human activities like buying and selling virtual assets, co-working spaces, entertainment, sports, recreational activities, and other similar activities.[2] Transactions generally take place in the Metaverse through Non-Fungible Tokens ("**NFTs**") and cryptocurrencies.[3] For example, the game "Second Life" lets users do almost everything they would do in real life, from shopping to showering.[4] Another recent example of the use of Metaverse in India was a wedding reception held in Tamil Nadu where the wedding took place in the physical world, but the reception was attended by the attendees in the Metaverse.[5]

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[1] John David et al., *3D Virtual Worlds and the Metaverse: Current Status and Future Possibilities*, 5(5) ACM COMPUTING SURVEYS 2, 1-43 (2011).

[2] John Herrman & Kellen Browning, *Are We in the Metaverse Yet?*, THE NEW YORK TIMES (Oct. 29, 2021), https://www.nytimes.com/2021/07/10/style/metaverse-virtual-worlds.html.

[3] EUROPEAN PARLIAMENTARY RESEARCH SERVICE, METAVERSE OPPORTUNITIES, RISKS AND POLICY IMPLICATIONS (2022).

[4] Herman & Browning, *supra* note 2.

[5] Sanya Jain, *Inside A Tamil Nadu Couple's Wedding Reception In Metaverse*, NDTV (Feb. 08, 2022), https://www.ndtv.com/offbeat/metaverse-wedding-inside-a-tamil-nadu-couples-wedding-reception-in-metaverse-2753509.

In this Metaverse wedding reception, the couple hosted the reception and created a 3D avatar of the bride's demised father. Thus, this leads us to the fact that Metaverse is beyond being a mere video game with pre-installed/existing characters. It is imperative to note that there are multiple Metaverse platforms within the Metaverse.[6] Currently, there are more than 160 companies operating in the Metaverse.[7]

The activities mentioned above are made possible in the Metaverse due to its four primary features:

(i) **Realism –** This feature allows Metaverse users to fully feel and experience the Metaverse in an immersive manner[8] using Augmented Reality ("**AR**") and Virtual Reality ("**VR**") technology.

(ii) **Ubiquity –** This feature allows Metaverse users to easily access Metaverse across all devices by ensuring that their virtual identity is maintained regardless of their transition from one device/system to another.[9]

(iii) **Interoperability –** 3D objects include virtual identity, virtual assets, and other similar possessions of Metaverse users in the Metaverse. The interoperability feature allows the creation and movement of such 3D objects anywhere in the Metaverse by ensuring that such creation and movement is throughout

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[6] David et al., *supra* note 1, at 8.
[7] Martin Boyd, *Regulating The Metaverse: Can We Govern The Ungovernable?*, FORBES (May 16, 2022), https://www.forbes.com/sites/martinboyd/2022/05/16/regulating-the-metaverse-can-we-govern-the-ungovernable/?sh=56d0927b1961.
[8] David et al., *supra* note 1.
[9] *Id.*

"seamless" and "uninterrupted." In other words, such creation and movement of 3D objects should not be hampered by the need to change login credentials or constantly create new virtual identities (avatars) in different platforms within the Metaverse.[10]

(iv) Scalability – This feature enables the Metaverse system to accommodate multiple users while maintaining both system efficiency and user experience.[11]

Thus, it is with the help of the features mentioned above that users can freely interact and undertake various activities in the Metaverse. It is due to the existence of the features mentioned above that various companies can enter the Metaverse or create their own Metaverses, causing various anti-competitive issues. These issues can include the following without being limited to:

(i) Major gaming companies/giants can create their own singular Metaverse and enter into horizontal agreements wherein they will be free to directly and indirectly determine the purchase and/or sale prices of virtual commodities. This is because they will be in a dominant position in the Metaverse. Such horizontal agreements shall be void as per Section 3(1) and (3)(a) of the Competition Act, 2002 ("**2002 Act**").

(ii) One major gaming company can create a Metaverse in collaboration with a major clothing company. In this Metaverse, the gaming company can create entry barriers for new users by

[10] David et al., *supra* note 1, at 22-23.
[11] *Id.*

mandating them to purchase a Metaverse membership alongside a product sold by the clothing company. This would be a vertical agreement, specifically a tie-in arrangement, and void as per Section 3(1) and 3(4)(a) of the 2002 Act.

However, the problem with the aforementioned anti-competitive issues is that it is unclear whether the 2002 Act would apply to the Metaverse or not. Even if the 2002 Act is applicable to the Metaverse, it is unclear as to how exactly will the provisions of the same will be applicable to the Metaverse as the 2002 Act's provisions primarily deal with physical markets and not digital markets. Thus, there still exists a gaping hole in Metaverse in terms of its legal regulation in India that shall be subsequently dealt with.

II. THE INTERPLAY BETWEEN COMPETITION LAW REGIME IN INDIA AND THE METAVERSE

The Monopolistic and Restrictive Trade Practices Act, 1969 was replaced by the 2002 Act primarily to prevent those practices which have or are likely to have an adverse and significant effect on competition.[12] Further, the 2002 Act was introduced to ensure that competition in markets is promoted and sustained while protecting the consumers' interests at the same time. Lastly, the 2002 Act also aims to ensure that the competition in the markets mentioned above is achieved by allowing and ensuring the freedom of trade by other market participants in India, i.e., ensuring that there are multiple market participants in a specific market without having

[12] The Competition Act, 2002, preamble, No.12, Acts of Parliament, 2002.

one or a few players dominating the entire market and creating entry barriers. Considering these objectives of the 2002 Act, it is imperative to note that such objectives were framed while keeping the nature of market practices in mind, i.e., physical trading of goods, products, and services. This means that the 2002 Act was not formulated to cover and encapsulate market activities that happen or are bound to happen in the virtual sphere, i.e., the Metaverse.

Considering that the Metaverse is a virtual sphere of AR and VR wherein there is no physical and tangible exchange of goods, products, or services, it becomes of quintessence importance for us to scrutinise the 2002 Act's efficacy in the context of market activities that happen or are bound to happen in the Metaverse.

A. NO BOUNDARIES IN THE METAVERSE: UNCERTAINTY OF "RELEVANT GEOGRAPHIC MARKET"

According to Section 2(s) of the 2002 Act, "Relevant Geographic Market" ("**RGM**") requires two components:[13]

(i) The market should be comprised of an area where competition conditions are distinctly homogenous compared to neighboring market areas. In other words, the competition conditions in the RGM should be similar but not the same as those in neighboring market areas.

(ii) The competition conditions in the RGM should be distinguishable from those in the neighboring market areas.

[13] The Competition Act, 2002, § 2(s), No.12, Acts of Parliament, 2002.

From the definition and composition of an RGM, it is evident that for a market area to be categorized as an RGM, there should be neighboring market areas with similar but distinguishable competition conditions. However, the problems that arise regarding Metaverse are as follows.

First, the possibility of neighboring market areas existing in the Metaverse is blurry and unclear because Metaverse is a virtual world with no other virtual world as a competitor. This means that there are no neighboring market areas with similar but distinguishable market competition conditions, thereby making the Metaverse a single market area with a fixed type of market competition conditions.

Second, even if we assume that the different Metaverse platforms [within the Metaverse] would constitute different market areas, it remains unclear how they will be categorized as market areas as such Metaverse platforms do not have defined physical geographical boundaries in the Metaverse. In a 2014 case,[14] the Competition Commission of India ("**CCI**") held that for the application of Section 4 of the 2002 Act, i.e., a provision related to what constitutes an abuse of dominant position, the RGM is and must generally be India (or any part of it) and it cannot be global. This means that for an RGM to be defined and categorized, the physical geographical boundaries must be in India. This need for the existence of "physical geographical boundaries" for defining and categorizing an RGM is evident from the bare reading of the definition of RGM that consists of the word "geographical." This means that the market area must be

[14] Sai Wardha Power Company Ltd. v. Coal India Ltd., 2014 SCC OnLine CCI 133. *See also* Bharti Airtel Limited v. Reliance Industries Limited, 2017 SCC OnLine CCI 25.

physically definable with the help of latitudes and longitudes. However, the absence of latitudes and longitudes in the Metaverse makes it even more difficult to define boundaries virtually geographically.

Last, this need for physical geographical boundaries for defining and categorizing an RGM is also evident from the *Coal India case*, wherein the CCI observed that RGMs are generally "located" in specific geographical and physical areas such as Hyderabad, Delhi, and so on. Thus, this means that RGMs must have a "physical location," which does not seem possible in the Metaverse as it is a virtual space with no physical locations.

B. APPLICABILITY AND ENFORCEABILITY OF SECTION 4 OF THE 2002 ACT: A ROADBLOCK BY METAVERSE

From the preceding layers of analysis, it is evident that defining and categorizing RGMs in the Metaverse is highly vague and ambiguous. This leads us to the following conundrum: due to the inability to define and categorize market areas in the Metaverse as RGMs, the applicability of Section 4 of the 2002 Act is severely hampered.[15] This is because, to scrutinize whether firms in the Metaverse are in a dominant position and are abusing the same, the relevant market must be defined and categorized as per Section 4 of the 2002 Act which generally prevents the abuse of dominant position in the Relevant Market. However, the relevant market in the case of the Metaverse would be the RGMs, and as earlier argued, it is difficult to define and categorize market areas in the Metaverse as RGMs.

[15] The Competition Act, 2002, §4(s), No.12, Acts of Parliament, 2002.

This adds another layer of difficulty because now, it becomes difficult to assess the abuse of dominant position by a firm in the Metaverse as the RGMs are not defined and categorized in the Metaverse, which is a requirement under Section 4 of the 2002 Act. This, in turn, means that firms in the Metaverse in India would be able to dominate the market without being categorized as having a dominant position in the market because of the incomplete and inadequate coverage given to such firms in the Metaverse under Section 4 of the 2002 Act. This would essentially lead to the firms obtaining a dominant position in the Metaverse and abusing the same. The same can be comprehended with the following illustration.

Illustration: Suppose there are multiple companies in the fashion industry, but only Company A can gain access to the Metaverse due to state-of-the-art technology, infrastructure, and funds as compared to other companies in the fashion industry. Company A is also one of the market leaders in the fashion industry. Company A established its Metaverse platform and can interact with users/consumers daily (through the Metaverse), wherein such users have virtual avatars in the Metaverse. These virtual avatars can be dressed as per the users/consumers' tastes and preferences, wherein Company A stores such user/consumer preferences in its database.

In the illustration mentioned above, there are multiple competition-related issues. *First*, Company A can utilize the user/consumer preferences in the fashion industry obtained from the Metaverse and analyze the same. This would essentially lead to Company A producing and selling clothing items that are more in demand as Company A was able to receive an edge

to obtain consumer preferences data way earlier than other companies in the fashion industry. After receiving such an edge, Company A could sell its goods, products, and services faster than other companies, thereby increasing its sales and profits. This leads to Company A obtaining a dominant position and abusing the same in the physical market. *Second*, other companies in the fashion industry were disadvantaged from having access to such consumer preferences data because such companies did not have the requisite state-of-the-art technology, infrastructure, and funds to enter the Metaverse. This inherently leads to the creation of a problem of lack of accessibility in the Metaverse that can disadvantage the majority of the firms in the market. *Third*, it is difficult to apply and enforce Section 4 of the 2002 Act on Company A as it is difficult to assess whether Company A has a dominant position in the Metaverse due to the inability to define and categorize RGMs in the Metaverse. This means that Company A will be able to continue abusing its dominant position in the market without legal accountability and corrective measures, thereby putting other companies in the fashion industry at a disadvantageous and unfair market position.

C. GATEWAY TO ANTICOMPETITIVE AGREEMENTS: HOW METAVERSE ACTS AS A CATALYST FOR ANTICOMPETITIVE PRACTICES

Section 3 of the 2002 Act defines anticompetitive agreements as those that cause or are likely to cause an "Appreciable Adverse Effect on

Competition" ("**AAEC**") within India.[16] According to Section 3(3) of the 2002 Act,[17] this AAEC is caused by anticompetitive agreements when such agreements have the effect of directly or indirectly determining the purchase or sales prices; limiting or controlling the production, supplying, technical development, investment, or provision of any service; sharing the market or the source of production or provision of services through allocating a specific geographical market area; or directly or indirectly resulting bid-rigging or collusive bidding.

The question arises is that how an agreement is determined to have an AAEC under Section 3 of the 2002 Act. The answer to this lies in Section 19(3) of the 2002 Act[18] which outlines various "guiding factors"[19] that the CCI must consider while determining whether an agreement has an AAEC under Section 3 of the 2002 Act. According to Section 19(3) of the 2002 Act, the CCI must consider all or any of the following factors such as the agreement creating market barriers for new entrants; driving out existing market competitors; causing foreclosure of competition; causing specific benefits or harm to the consumers; causing any improvements in the production or distribution or provision of goods or services; or promoting the economic, scientific, and technical development through production, distribution, or provision of goods or services.

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[16] The Competition Act, 2002, §3, No.12, Acts of Parliament, 2002.
[17] *Id.* at § 3(3).
[18] *Id.* at § 19(3).
[19] Ajay Devgn Films v. Yash Raj Films Private Limited, Case No. 66 of 2012, ¶4.

Additionally, in *Ajay Devgn Films v. Yash Raj Films Private Limited*,[20] the CCI examined through the facts of the case as an example to show: (*i*) what is "appreciable adverse effect"; and (*ii*) how "appreciable adverse effect" is not caused in the present case. In essence, the CCI stated that, if a distributor of mega-starrer films books single-screen theatres for the release of the films during a specific period of festivities, such an act does not cause appreciable adverse effects for namely three reasons: (*i*) the theatre owners have the free choice to agree or deny the screening of the requested films as other mega starrer films compete with each other; (*ii*) the single-screen theatres do not hold a significant position in the market; and (*iii*) the market cannot be restricted to certain periods of time but must be considered for the overall year to determine whether there is an appreciable adverse effect or not. Although this case was appealed before the Competition Appellate Tribunal ("**COMPAT**"), the Appellate Tribunal dismissed the appeal stating that there was no merit in the appeal and that the CCI was correct in holding that there was no AAEC.[21]

However, in the intersectional context of Metaverse and Section 3(3), the factors that cause or are likely to AAEC are likely to remain hidden from the CCI authorities because of two primary reasons:

(i) **Anonymity in blockchain transactions -** Metaverse operates on blockchain technology wherein users can store their data in end-to-end encryption and pseudonymous forms. This data that can now be anonymously stored may include

[20] *Id.* at ¶5.
[21] Ajay Devgn Films v. Yash Raj Films Pvt. Ltd., Appeal No. 130 of 2012 with IA No. 264 of 2012.

communications related to bid-rigging, tie-in arrangements, and other anti-competitive-related practices and conduct as mentioned in Section 3 of the 2002 Act. This means that the user who stores data in the Metaverse will remain anonymous and hidden from the CCI authorities. In other words, neither the true identity of the anticompetitive firm nor the evidence of anticompetitive practices and conduct will be found. This is because such information can primarily be accessed by users [anticompetitive firms] who have the permission of the blockchain owner [anticompetitive firms], thereby blocking out the CCI authorities [who do not have the permission to access such information from the blockchain owner] from accessing such evidence and punishing such anticompetitive conduct. It is imperative to note that this is directly in contrast to the physical world wherein the CCI authorities can choose to raid the anticompetitive firms' physical facilities to obtain evidence. The same type of conduct by the CCI authorities is not possible in the Metaverse due to blockchain technology. This essentially leads to difficulty pinpointing legal liability on the anticompetitive firm. Even if the identity is found, the communications, documents, and other evidence related to the anticompetitive practice and conduct will not be found as it is end-to-end encrypted. It may be argued that such evidence on the blockchain can be decrypted; however, decrypting such massive amounts of data would take enormous amounts of

computing power, which is not currently available in India or any other country. Lastly, it is also noteworthy to mention that even if the identity and communications of the anticompetitive firm are found by the CCI authorities, proving AAEC with the same will still be arduous because such AAEC should or be likely to happen in India. However, Metaverse does not have a specific location as it is a virtual space. Due to this, pinpointing and proving that AAEC is happening or is likely to happen within India becomes another conundrum.

(ii) **Smart contracts in blockchain and how they cause collusive behavior -** When we discuss smart contracts, we comprehend that they are "…*an agreement entered into between parties through machine-readable code. This code is integrated into a decentralized blockchain, which automatically executes the smart contract based on pre-determined 'trigger-events'. The terms of the smart contract are thus coded in an 'if-then' format – if the trigger event occurs, then the smart contract shall automatically execute a certain action*."[22] In the Metaverse context, such smart contracts act as a breeding ground for collusive practices. This is because collusive firms in a cartel can now enter into smart contracts with deviant firms. Deviant firms are those firms that are likely to deviate from pre-agreed conduct. Once the collusive firms in a cartel enter into a smart contract with deviant firms, one of the agreed

[22] Deepti Pandey & Harishankar Raghunath, *Stationing Smart Contract as A 'Contract': A Case for Interpretative Reform of the Indian Contract Act, 1872*, 13(4) NUJS L. REV. 1, 5 (2020).

conditions/trigger events in the smart contract would be the following:

- ***If condition*** = If the smart contract is breached.
- ***Then condition*** = Then there would be an automatic deposit of money to the other Party who has suffered the breach.

This breach is likely to happen because a deviant firm is likely to deviate from its pre-agreed conduct which can be due to multiple reasons such as inability to perform the terms and conditions of the smart contract because of the deviant firm's limited capability to handle production, daily operations, and technological requirements regardless of having the access to resources and funding.

The question arises is that: what is the incentive for deviant firms to enter into such smart contracts? The answer to this lies in the characteristics of the collusive firms. We understand that collusion generally happens in the competitive market wherein two firms enjoy a certain position/power which they intend to exploit by joining hands. This means that collusive firms will have access to increased resources, networks, and capacity to survive in the competitive market. Now, such collusive firms are likely to share this access with deviant firms with an ulterior motive to put such firms at a disadvantageous position wherein the collusive firms can extort significant sums of money from these deviant firms. The deviant firms are likely to accept the same because such access to increased resources, networks, and capacity gives them

a chance to survive and grow in a competitive market like the Metaverse wherein technological giants are already developing their technology.[23]

Thus, when such collusive practices and conduct happen between collusive and deviant firms, the smart contracts are encoded on the blockchain,[24] are end-to-end encrypted,[25] and are pseudonymous.[26] This, in turn, means that formulation and execution of such collusive smart contracts are kept hidden from the radar of the CCI authorities as such contracts would be anonymous and encrypted from the CCI authorities due to blockchain technology utilized by collusive smart contracts.

Thus, it is evident from the aforementioned reasons that the AAEC caused or likely to be caused by the anticompetitive and collusive firms' conduct in the Metaverse is likely to remain hidden from the CCI authorities, thereby allowing such firms to evade the purview of the 2002 Act. Even if such conduct is found, the applicability of the 2002 Act in the Metaverse remains highly ambiguous and vague. Therefore, this means that even if an attempt is made to apply and enforce the 2002 Act in the Metaverse, it would reap little to no benefit owing to the multiple

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[23] Jack Kelly, *Battle Between Tech Giants Google, Apple, Microsoft And Meta To Build Virtual And Augmented Reality Headsets*, FORBES (Jan. 21, 2022), https://www.forbes.com/sites/jackkelly/2022/01/21/the-metaverse-set-off-a-battle-between-tech-giants-google-apple-microsoft-and-meta-to-build-virtual-and-augmented-reality-headsets/.

[24] Shafaq Naheed Khan et al., *Blockchain smart contracts: Applications, challenges, and future trends*, 14 PEER-TO-PEER NETW. APPL. 2901, 2901 (2021).

[25] *Id.* at 2909.

[26] *Id.* at 2911.

ambiguities surrounding the 2002 Act in the context of a virtual marketplace, i.e., the Metaverse.

III. CHARTING THE COURSE FOR THE METAVERSE IN AN INTERNATIONAL CONTEXT: EVALUATING JUDICIAL INTERPRETATIONS AND THE UK'S APPROACH TO ENSURING COMPETITION IN THE DIGITAL MARKETS AND METAVERSE

A. HOW THE UK REGULATES (OR PLANS TO REGULATE) COMPETITION IN THE DIGITAL MARKET

United Kingdom's ("**UK**") Competition Act, 1998 ("**1998 Act**")[27] prohibits anti-competitive behavior and the abuse of dominant position in the physical market under Chapters I[28] and II.[29] Further, in 2002, the Enterprise Act, 2002 ("**Enterprise Act**")[30] was introduced in the UK to establish offices for fair trade and competition tribunals for the protection of interests of consumers and disqualification of those enterprises entering into anti-competitive agreements.[31] In 2013, the office of fair trade and competition commission merged to form the Competition and Market Authority ("**CMA**").[32] The CMA draws its powers and functions from the

[27] The Competition Act, 1998 (UK).
[28] *Id.* at Chapter I; Id. at § 2.
[29] *Id.* at Chapter II; Id. at § 18.
[30] The Enterprise Act, 2002 (UK).
[31] *Id.* at Preamble.
[32] *Id.* at §5, 6, 7, 8A; Thomas Pope and Dan Goss, *Competition and Markets Authority*, INSTITUTE FOR GOVERNMENT (July 25, 2022), https://www.instituteforgovernment.org.uk/explainer/competition-and-markets-authority#footnoteref2_dh3hbqh.

1998 Act and the Enterprise Act respectively.[33] CMA protects people against unfair trade practices and takes actions against those individuals who indulge in cartels or anti-competitive behavior. However, it is important to note that this is limited to the physical markets and the question arises: how is competition regulated in the UK's digital markets? Recently, the UK Government set up a Digital Markets Unit ("**DMU**") within the CMA to promote and regulate competition in digital markets "*by addressing both the sources of market power and the economic harms that result from the exercise of market power.*"[34] Presently, the DMU has no statutory backing and works under the aegis of the CMA.[35]

According to the UK government,[36] once a new statutory competition regime for digital markets is introduced, DMU shall have the statutory power to:

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[33] Practical Law Competition, *CMA powers to enter and search premises*, THOMSON REUTERS PRACTICAL LAW, https://content.next.westlaw.com/practical-law/document/I8cf1f411e82f11e398db8b09b4f043e0/CMA-powers-to-enter-and-search-premises?viewType=FullText&transitionType=Default&contextData=(sc.Default); Competition & Markets Authority, *Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8*, CMA GOVT. OF UK (Jan. 31, 2022), https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases.

[34] Secretary of State for Digital, Culture, Media & Sport and the Secretary of State for Business, Energy and Industrial Strategy, *A new pro-competition regime for digital markets* (2021), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1003913/Digital_Competition_Consultation_v2.pdf.

[35] *Id.*

[36] Department for Digital, Culture, Media & Sport and The Rt Hon Oliver Dowden CBE MP, *Government Unveils proposal to increase competition in UK digital economy*, UK GOVT. PRESS RELEASE (July 20, 2021), https://www.gov.uk/government/news/government-unveils-proposals-to-increase-competition-in-uk-digital-economy.

(i) Suspend and block any unfair terms and conditions or changes in algorithms which breach the mandatory code of conduct and pass any such orders to make enterprises comply with this code.

(ii) Tackle any anti-competitive practices in the digital markets.

(iii) Implement measures to promote interoperability to ensure a smooth transition between multiple digital platforms within a single Metaverse or multiple Metaverses.

DMU's powers mentioned above are specifically beneficial in the Metaverse as Metaverse can now be recognized under the concept of "digital markets". This is because "digital markets" have been defined as, "*…to broadly encompass markets where digital technologies are a core component of the business models of firms active in those markets. The term 'digital firms' refers to the firms that produce or trade products and services in digital markets.*"[37] In the context of Metaverse, digital technologies like AR and VR are the core components of the business model of the Metaverse as it is built and marketed around these digital technologies, thereby bringing it under the banner of "digital markets". Further, there will now be a specific regulatory authority to curb anti-competitive practices and promote competition in digital markets like the Metaverse in the UK.

Additionally, DMU is responsible to allot certain enterprises the tag of Strategic Statutory Marketing ("**SMS**"). DMU intends to allot this SMS tag based on the revenue that each enterprise generates.[38] Once the enterprises are allotted the SMS tag, they will be expected to follow certain

[37] Secretary of State*, supra* note 35.
[38] Secretary of State*, supra* note 35.

mandatory stringent codes of conduct that will be enforceable by law and practice pro-competitive activities in the digital markets.[39] This is to ensure that such enterprises do not abuse their dominant position in the digital markets. Thus, the use of this tag is beneficial to Metaverse as major enterprises that would be operating in the Metaverse are likely to be assigned this tag because Metaverse can now be categorized under "digital markets". In other words, the applicability of SMS tag allows regulation of major enterprises in Metaverse.

When we come to the discussion of India, the only competition regulatory authority is the CCI which draws its powers from the 2002 Act. CCI has the power to promote and maintain competition, remove anti-competitive practices, and ensure "freedom of trade".[40] Although the workings of the DMU and the CCI look similar at a glance, they vastly differ especially in the context of digital markets.

First, as discussed in the previous chapter, the 2002 Act is silent on any provisions for the regulation of competition in the Metaverse/digital markets. In other words, the CCI and the outdated 2002 Act have dealt with anti-competitive conduct in online marketplaces on a highly varied basis without a fixed standard due to the lack of an appropriate definition and regulation for "digital markets" in the Indian competition law regime.[41] This severely limits the ability of the CCI to investigate the

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[39] *Id.*

[40] *The Commission,* COMPETITION COMMISSION OF INDIA, https://www.cci.gov.in/contents/institutional-framework.

[41] Simran Dhir et al., *Digital Markets Must Be Defined Well For Competition Regulation*, MONDAQ (May 20, 2022), https://www.mondaq.com/india/antitrust-eu-competition-/1194564/digital-markets-must-be-defined-well-for-competition-regulation.

Metaverse/digital markets and impose fines and grant remedies. Further, it limits the ability of various businesses in the Metaverse/digital markets to approach the CCI or any other Courts to stop anti-competitive practices by other businesses. To the contrary, this is not the case in the UK as it has formed the DMU and is currently deliberating upon a new competition law regime to help curb anti-competitive practices in the digital markets.

Second, there is no statutory authority designated for digital markets in India. On the contrary, in the UK, the Government has introduced the DMU to identify and investigate the present requirements for governing and regulating digital markets/Metaverse. This identification and investigation by the DMU shall be done through the collection of evidence. Based on such evidence, DMU shall have the power to give its opinions and suggestions for formulating the requisite regulatory provisions for regulating digital markets. On the other hand, in India, the power of the CCI to investigate and collect evidence related to digital markets/Metaverse and provide suggestions to the government regarding the same for amendment of competition laws remains unclear. In fact, CCI has not even briefly discussed Metaverse in any of its studies or decisions. It was only in a '2022 CCI Keynote Address' that Metaverse was briefly mentioned in a speech as follows: "[I]*n fact, many expect the battle for the metaverse globally will be between a few companies. Others may just have to reconcile with aligning with one or more of these giants*."[42] This lethargic attitude of the CCI for its failure to

[42] Competition Commission of India, *Regulating competition in an era of tech giants*, CCI (Mar. 4, 2022), https://cci.gov.in/images/economicconference/en/keynote-address-of-7th-national-conference-on-economics-of-competition-law-2022-delivered-by-mr1652350019.pdf.

accordingly update the 2002 Act and promptly deal with the rapidly evolving business market in terms of digitization raises a serious doubt regarding its competency and power to regulate anti-competitive behavior in the digital markets/Metaverse.

Third, the UK Government plans to increase the ease of doing business in the digital markets as one of the powers of the DMU is to implement measures to promote interoperability. This allows various businesses to develop their technology in the Metaverse and transfer it with ease between multiple digital platforms within a single Metaverse or multiple Metaverses and give the best consumer experience. At the same time, the UK Government proposes to induce stringency in the digital markets through the introduction of the SMS tags. Thus, having lenient laws to operate in the digital markets/Metaverse that, at the same time, stringently penalize contraventions, and enable growth and development in the digital markets/Metaverse while protecting the consumers' needs and interests. However, on the other hand, the Indian competition law framework does not discuss digital markets and interoperability as it is still heavily reliant on the outdated 2002 Act which does not provide for the regulation of competition in the digital markets. Due to such lapse, ease of doing business and regulation and promotion of competition in the Metaverse remains within the grey area.

B. JURISPRUDENTIAL BACKGROUND FOR METAVERSE: HAVE THE COURTS HELPED?

The jurisprudential background for Metaverse is still in its nascent stage because the courts have not widely discussed the same in the context

of competition law. As of now, there are approximately 5 cases that explicitly discuss or briefly describe Metaverse. However, 2 out of these 5 cases are not in the context of competition law.[43]

In the context of competition law, the 2021 case of *Epic Games, Inc. v. Apple Inc*[44] is the most substantial case for the development of Metaverse. This is because the US Court dealt in-depth with the concept of Metaverse. In this case, the Complainant alleged that the Defendant had a monopolistic control over the Internal Operating System ("**IOS**") App Store. The major point of dispute was as to what constituted the "Relevant Market." For this, the US Court held that the Relevant Market was not gaming in general and not Apple's IOS App Store. The Relevant Market was held to be "digital mobile gaming transactions". To arrive at this Relevant Market, the US Court began by defining "video game" as follows:

> "*Some of Epic Games' fact witnesses suggested in their testimony that Fortnite was much more than a video game: it is a metaverse. The Court previously discussed Mr. Sweeney's sincere beliefs as to Fortnite and the metaverse. A metaverse is a virtual world in which a user can experience many different things—consume content, transact, interact with friends and family, as well as play. According to Mr. Sweeney, game play need not be a part of a user's metaverse*

[43] Hermes Int'l v. Rothschild, 22-CV-384 (JSR) (S.D.N.Y. May. 18, 2022); Dfinity Found. v. Meta Platforms, Inc., 22-cv-02632-CRB (N.D. Cal. Nov. 10, 2022).
[44] Epic Games, Inc. v. Apple Inc., 559 F. Supp. 3d 898 (N.D. Cal. 2021).

> *experience, which is more to mimic the reality of life than to present game play*."

This need to define a video game and club it with the definition of Metaverse as observed above was quintessential to enable the Court to scrutinize whether California's "Unfair Competition Law" ("**UCL**") can be applied to the Complainant's product – Fortnite. In other words, if the Complainant's product was not defined as video game but strictly under Metaverse, applicability of UCL would have become a grey area. For this, the US Court *first* observed that it is not necessary to conclusively define what is a "video game" or "game" as Fortnite is a "video game" by all means. According to the US Court, this was because Fortnite was marketed to the public as a video game and promoted in video game-related events. *Second*, the US Court observed that there is no evidence or opinion that Fortnite is accepted in "parts". In other words, there is no evidence or opinion that shows some game modes within Fortnite are considered as a part of the Metaverse and while other games modes are considered as a part of Fortnite. Instead, it is the full video game in and of itself, inclusive of all game modes, that is considered as Fortnite. *Third*, the US Court observed that the general video game market does not recognize the Metaverse and the corresponding game modes in Fortnite as anything "separate and apart" from the video game market. In other words, the general video game market recognizes the Metaverse and the corresponding game modes in Fortnite as a singular part of the video game market.

After this, the US Court went on to hold that although the Defendant had considerable market share of over 50% and enjoyed

substantial profit margins, it was not sufficiently shown by the Complainant as to how the Defendant was an antitrust monopolist. However, the US Court did hold the Defendant violative of anti-competitive behavior for its anti-steering provisions (which are not related to the Metaverse). Thus, this case essentially shows that products like Fortnite which are capable of being defined under "Metaverse" can be defined under their conventional definition to apply competition laws and regulate competitive behavior of such products. However, this is only a temporary measure as Metaverse and the laws around it are still undeveloped.

Second is the 2022 case of *Doe v. Roblox Corp.*[45] In this case, the Defendant owned and operated a Metaverse. In this Metaverse, the users were allowed to create an avatar of themselves, purchase in-game currency, and utilize this currency to purchase virtual items for the avatars. The Complainant alleged that the Defendant deleted these virtual items without giving any warning to the users and this is violative of California's UCL. The Defendant argued that there was no economic injury as losing of virtual items does not constitute an economic injury. However, the US Court held that: "*Doe has adequately alleged an economic injury: she purchased Robux that she alleges was done without adequate warning that she would fruitlessly spend them on items that would be unjustly deleted.*" Thus, it is imperative to note here that, although the US Court applied competition law to Metaverse, it failed to explain how exactly competition law is applicable to the Metaverse. The US Court did not follow the pattern of the *Epic Games case* as the Court failed to club Defendant's Metaverse (Roblox) under the conventional definition of a

[45] Doe v. Roblox Corp., 3:21-cv-03943-WHO (N.D. Cal. May. 9, 2022).

video game. Due to this, the rubrics of applicability of competition law to Metaverse become a grey area.

Third is the 2022 case of *FTC v. Meta Inc. & Mark Zuckerberg.*[46] FTC brought a lawsuit against Meta Inc. as it believes that the latter is trying to eliminate every competition in the Metaverse by buying them out instead of fairly competing against them. FTC believes that this wholly goes against the anti-trust laws. The report released by FTC[47] states that all the acquisitions that Meta is making (Instagram, WhatsApp, and other companies) are killing competition which would, in turn, reduce the innovations in the Metaverse. FTC is of the opinion that acquiring/buying out competitors is part of the plan of Meta Inc. to become a monopoly in the Metaverse. The Complaint states, "*As Meta fully recognizes, network effects on a digital platform can cause the platform to become more powerful – and its rivals weaker and less able to seriously compete – as it gains more users, content, and developers.*"[48] Currently, this case is still pending in the US District Court. However, it is evident that Meta Inc. is planning to take an aggressive stand in the Metaverse which the FTC plans to halt as the same would constitute monopolistic practices, thereby promoting healthy competition in the virtual space and protecting the consumers' best interest.

Therefore, from the judgments and pending case mentioned above, it is evident that the questions of how exactly competition law is applicable

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[46] *FTC v. Meta Inc., Mark Zuckerberg & Within Unlimited* Inc., FTC (Oct. 7, 2022), https://www.ftc.gov/legal-library/browse/cases-proceedings/221-0040-meta-platforms-incmark-zuckerbergwithin-unlimited-ftc-v.

[47] *Id.*

[48] *Id.*

to the Metaverse and to what extent remain unanswered to a large extent. Clubbing modern concepts like Metaverse with conventional concepts like video games means restricting the capability of Metaverse because it can undertake tasks way beyond mere video games. If Metaverse is restricted to such conventional concepts, it can prove counterproductive because it limits the applicability of competition laws to conventional concepts like that of a video game and fails to embrace and apply competition law to modern concepts of VR and AR in the Metaverse. This failure leads to lack of protection for the consumers in the digital market and inability to regulate and control anti-competitive behaviors in the Metaverse that traverse beyond mere video games.

IV. CONCLUSION

Although the development of the Metaverse and its technology is moving at a slower pace, several people are still actively engaging in the Metaverse in its current phase. The competitors in the Metaverse are keenly working on developing the technology, yet India's laws for the Metaverse are absent. A few countries around the world are developing their existing laws to suit the future of the internet such as the European Union[49] and the UK. However, India is yet to develop or modify its laws for the same. These regulations are the need of the hour as the Metaverse opens numerous new doors, both good and bad, since it proposes to be the digital version of the real world, where people can eventually conduct business and live. Such

[49] RESOLUTION ON COMPETITION POLICY — ANNUAL REPORT 2021, EUR. PARL. DOC. C 465/124 (2022).

rapid development without proper regulations would result in fraud and abuse of technology. Thus, this renders it necessary to regulate the Metaverse like the real world. Such regulation can be done with the help of the following recommendations:

(i) The 2002 Act must be updated wherein its confines, definitions, and scope are expanded beyond the physical trading of goods, products, and services to cover the virtual trading of goods, products, and services that can happen in the Metaverse or any other virtual world/digital market. This would also give the requisite powers to the CCI to investigate and collect evidence and pass requisite Orders for anticompetitive conduct in the digital markets/Metaverse, obviating the need to create a separate body like the DMU, and increasing accessibility and simplicity to legal remedies in the digital markets/Metaverse. Additionally, this updation of the 2002 Act will allow the courts to develop a standard for testing the provisions of competition law in the Metaverse and prevent divergent views.

(ii) Metaverse must be "virtually" defined with geographical boundaries in the form of 3D coordinate systems. This will allow the application of Sections 3 and 4 of the 2002 Act because both Sections mandate the defining and categorizing of RGMs. Additionally, this would allow CCI authorities to pin down its investigation on anticompetitive enterprises.

(iii) A significant concern in the current scenario is the method of buying out competition instead of tackling them in the market

fairly and competitively. Such killer mergers make specific competitors highly dominant in the digital markets. India must consider introducing reforms to manage killer mergers/acquisitions in the digital markets/Metaverse. For instance, Meta Inc. is a dominant player already in the Metaverse, whose position is only strengthened by the acquisition of WhatsApp and Instagram. Without a law regulating such mergers, the Metaverse will be built on the data collected from all the merged companies, targeted advertisements, and other coercively collected data. The EU is already deliberating upon developing existing laws and reforms to tackle this problem.[50] Similarly, India must commence with such deliberations.

(iv) Interoperability will provide great freedom to various businesses to develop in the Metaverse as it allows various enterprises to operate in different Metaverses, allowing to grow and develop their digital businesses. However, the scope of abusive practices is high because enterprises might collude and share consumer data such as their tastes and preferences, buying patterns, search history and other similar data. This will allow such collusive enterprises to form a dominant position in the Metaverse and abuse the same by violating consumer privacy. It also restricts consumer choices because now collusive

[50] *Metaverse: Opportunities, risks and policy implications*, EUROPEAN PARLIAMENT (June, 2022), https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733557/EPRS_BRI(2022)733557_EN.pdf.

enterprises are likely to only develop those goods and products which the consumer is likely to buy. However, the other enterprises with whom such data is not shared are likely to lose out on their sales because the likelihood of their goods and products being purchased by the consumer is lesser as it does not serve their tastes and preferences. Due to such tailored development of goods and products to consumers' choices by very few specific enterprises, the overall option for the consumers drastically reduces and causes them to choose between fewer options in the market. Thus, interoperability within multiple Metaverses must be promoted and appropriately regulated for healthy competition and consumer protection.

Therefore, considering the above discussion, it is evident that the Metaverse is a very challenging virtual space that needs to be tackled in a highly strategic manner to regulate the Metaverse and its activities.

Abhyudaya Yadav & Anshita Dave, *Dilating the Scope of Oppression and Mismanagment under the Companies Act, 2013: A Measure to Fortify Corporate Governance,* 9(2) NLUJ L. REV. 33 (2023).

DILATING THE SCOPE OF OPPRESSION AND MISMANAGEMENT UNDER THE COMPANIES ACT, 2013: A MEASURE TO FORTIFY CORPORATE GOVERNANCE

~Abhyudaya Yadav & Anshita Dave[*]

ABSTRACT

*Corporate governance is essential for ensuring the stability of all stakeholders in a corporation. One key aspect of this is the remedies against oppression and mismanagement, which are designed to protect the interests of shareholders. However, in today's fast-changing business environment, corporations are expected to play a multi-dimensional role, and the interests of other stakeholders such as creditors, employees, board of directors, and society at large cannot be ignored. The current legislative approach in India, which focuses solely on protecting the interests of shareholders, falls short in addressing the concerns of these other stakeholders. Additionally, the integration of Environmental, Social and Governance ("**ESG**") considerations in corporate governance*

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is increasingly being recognized as crucial for long-term sustainability and value creation for all stakeholders.

This paper takes a critical stand against the restrictive approach of the legislature in India by confining the ambit of remedies against oppression and mismanagement to protect the interests of only shareholders. The paper argues that by stretching the provisions of these remedies and incorporating ESG considerations, the Indian model of corporate governance can be made more robust and inclusive, and better aligned with global ESG standards and larger stakeholder perspective. The authors delve into the provisions on the subject and the issues embattling the Indian model of corporate governance as it still relies on the conventional shareholder model. As mitigating solutions, the authors propose certain policy changes in the extant system, to make the Indian model of corporate governance more robust and ironclad to protect the interest of every stakeholder involved.

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I. INTRODUCTION

In order to afford protections to minority shareholders from majority rule, as propounded in *Foss v. Harbottle*,[1] the corporate laws have provided provisions for remedies against oppression and mismanagement. The remedies against oppression and mismanagement were incorporated under Indian Law for the first time in 1951 by an amendment in the 1913 Companies Act which was further transposed in the Companies Act, 1956.[2] Now, Chapter XVI of the Companies Act, 2013, lays down the remedies against oppression and mismanagement.[3] The provisions for oppression and mismanagement emanate from equitable relief under Common Law.[4] In the 18th century, in all likelihood, equity courts would grant these kinds of equitable reliefs to other stakeholders of the company as these courts run on the principles of good faith, justice and good conscience without strictures of legislation.[5] However, the contemporary company statutes in Common law jurisdictions provide this remedy only to shareholders.

In a democratic world where governments are aspiring towards achieving immaculate corporate governance standards and best practices,[6]

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[1] Foss v. Harbottle, [1843] 2 Hare 461.
[2] 3 A. RAMAIYA, GUIDE TO COMPANIES ACT 3879 (Lexis Nexis 2014).
[3] *Id.*
[4] Prof. R K Verma, *Prevention of Oppression and Mismanagement*, UNIVERSITY OF LUCKNOW (Dec. 11, 2022), https://www.lkouniv.ac.in/site/writereaddata/siteContent/20200428203536324 9rkverma_Company_Law_1.pdf.
[5] David Williams, *Court of Equity- A brief history*, PRESTO SERVERS (Dec. 12, 2022), https://prestoservers.com/blog/courts-of-equity-a-brief-history/.
[6] *Indian Inc. Needs to Follow Global Standards of Corporate Governance: Kumar Mangalam Birla*, BLOOMBERG QUINT (Dec. 17, 2019), https://www.bloombergquint.com/business/india-inc-needs-to-follow-global-standards-of-governance-kumar-mangalam-birla-on-indian-economy.

the provisions for remedies against oppression and mismanagement seem to be outdated and antiquated to confine the ambit of protections offered merely to shareholders. Unlike a sovereign state, a company has stakeholders other than its members, the protection of whose interests is the paramount role of corporate regimes. Whenever corporate democracy is discussed in India, it is mostly discussed in the reference to the rights of shareholders while voting for the selection of directors and not in reference to the rights of other stakeholders of the company.[7] The corporate governance mechanism of India is still unable to provide adequate protection to these other stakeholders and, to an extent, also to its members.

The remedies against oppression and mismanagement operate as derivative actions by shareholders, if board fails to bring an action against the company. In changing dimensions of corporate governance models, Indian corporate regime has witnessed the transition from Corporate Social Responsibility ("**CSR**") to Environmental, Social and Governance ("**ESG**"). Oppression and Mismanagement can lead to lack of accountability and transparency within a company, which can result in negative impacts on environment and society. Additionally, companies that engage in oppression and mismanagement may not be in compliance with laws and regulations related to environmental and social issues, leading to additional risks. ESG risks can also negatively impact a company's financial performance, making it concern for potential investors.

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[7] Vaibhav Sonule & Prof. Bindu Ronald, *The Eclipse of Corporate Democracy in India*, 6 IJGSSI L. REV. 1, 5 (2017), http://www.ijhssi.org/papers/v6(7)/Version-3/A0607030108.pdf .

The legislative policy as consolidated under Section 166(2) of the Companies Act, 2013 indicates that there exists positive obligation on the directors of the company to take business decisions keeping in mind the interests of various stakeholders. Boards are expected to consider ESG matters regardless of their financial implications. However, owing to the overarching enforcement conundrum of the director's duties to ensure ESG compliance, the question arises as to whether a shareholder can initiate a derivative action for the breach of director's duty on the account of stakeholders' interest even in cases where shareholders' rights are unaffected, if so, then whether they will? Contemporary legal scholarships assert that any form of expansion of the *locus standi* for claims under a derivative action can-not be ruled out.[8]

Recently in the Tata-Mistry dispute when Cyrus Mistry was unfairly ousted from the post of Director and Interim Chairman of the Tata Group, it was the Shapoorji Pallonji family who filed a petition before National Company Law Tribunal ("**NCLT**") concerning the case of oppression and mismanagement. Nonetheless, the Apex Court decided the case in favor of Tata group. The incident, however, shed light on corporate governance issues since, although the alleged oppressive act was committed against Mr. Mistry in his capacity of Director, it was the minority group Shapoorji Pallonji who knocked on the doors of NCLT in their capacity of being a

[8] UMAKANT VAROTTIL, THE LEGAL AND REGULATORY IMPETUS TOWARDS ESG IN INDIA: DEVELOPMENTS AND CHALLENGES (NUS Law, Working Paper No. 2023/003, January 2023), https://law.nus.edu.sg/wp-content/uploads/2023/01/03_UmakanthVarottil.pdf.

shareholder. Had the Shapoorji Pallonji group not approached the NCLT and instead the Supreme Court for the interests of Mr. Cyrus Mistry, he would have arguably been left remediless under the existing legal framework.

Against this backdrop, this piece attempts to point out certain policy flaws in the Companies Act, 2013 *vis-a-vis* the chapter on oppression and mismanagement under the Companies Act. *Firstly*, the author has traced the legislative history of the remedy of oppression and mismanagement under English and Indian law. *Secondly*, the author critically analyses the chapter on the prevention of oppression and mismanagement by exposing the flaws in the approach of the lawmakers in granting protection only to the shareholders or members and not to other stakeholders of the company. *Thirdly*, the paper discusses how other stakeholders are incapacitated from filing a petition under this chapter, thereby frustrating the whole idea of ideal corporate governance. *Fourthly*, this piece examines the issues and challenges grappling the corporate governance mandate due to outdated and antiquated provisions owing to a restrictive approach, inclination towards shareholder primacy theory, the role of power dynamics in corporate houses in the Indian corporate environment and a paradigm shift of the corporate profit maximization theory. *Lastly*, the authors have proposed certain policy changes in the chapter governing oppression and mismanagement for effective corporate governance to protect the rights and provide remedies to each stakeholder of the company.

II. EVOLUTION OF CORPORATE DEMOCRACY AND MINORITY PROTECTION: A HISTORICAL ANALYSIS OF MAJORITY RULE AND REMEDIES AGAINST OPPRESSION AND MISMANAGEMENT

Similar to a sovereign democracy, a corporate democracy is operationalized at the will of the greater part of stockholders, the majority stockholders.[9] The majority rule was first laid down in the 19th century by the Court of Chancery in United Kingdom ("**UK**") in the case of *Foss v. Harbottle*.[10] This rule in its original form states that courts generally would not intervene in the management and internal administration of the company at the instances of shareholders, so long as it has been acting within the power conferred upon it by the Articles of Association and the law of the land.[11] Moreover, it was held that a company has its own separate legal entity, distinct from its members, and it is only the company that can institute a suit against wrongdoers and shareholders as such do not have *locus standi*.[12]

The rule whose foundation was laid down in the aforementioned case was re-affirmed in subsequent judicial pronouncements of *Edward v. Halliwell*[13] and *Mac Dougall v. Gardiner*.[14] Lord Mellish in the latter case went

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[9] UMAKANT VAROTTIL, UNPACKING THE SCOPE OF OPPRESSION, PREJUDICE AND MISMANAGEMENT UNDER COMPANIES ACT, 2013 (NUS Law, Working Paper no. 20, July 2020), https://ssrn.com/abstract=3659751.
[10] Foss v. Harbottle, [1843] 2 Hare 461.
[11] *Id.*
[12] GK KAPOOR & SANJAY DHAMIJA, COMPANY LAW AND PRACTICE 752 (Taxman, 24th ed. 2019).
[13] Edwards v. Halliwell, [1950] 2 All ER 1064.
[14] Macdougall v. Gardiner, [1875] 1 ChD 13.

on to explain the principle in its widest amplitude by stating, "*A thing complained of is a thing which, in substance, the majority of the company is entitled to do or, if some irregularity persists which majority is entitled to ratify or something has been done illegally which majority is entitled to do legally, no cause of action will arise*."[15] Minority shareholders endured significant injustice for more than a century as a result of this rule and the lack of an efficient remedy.

A. DEVELOPMENTS CONCERNING MINORITY PROTECTION IN ENGLAND

In 1943, the English government set up the Cohen Committee for amendments in the company law of England.[16] One of the major issues placed before the Cohen Committee was to devise more effective measures, for the protection of minority shareholders against the oppression by the majority, than available under the then-existing law of England.[17] Two instances were taken into consideration in the final report, *firsly* the 'Restriction on transfer of shares', where the Cohen Committee observed that the provisions which were inserted in the articles of the private company for the restriction on transferability of shares have caused hardship, especially when the legal representatives of the minority shareholders have to raise money to pay estate duties because the directors of the company, who are principal shareholders of the company, refuse to

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[15] *Id.*

[16] COHEN COMMITTEE, REPORT OF COMMITTEE ON COMPANY LAW AMENDMENT, 1945, 30 (UK). *See also* Shanti Prasad Jain v. Kalinga Tubes Ltd., (1965) 2 SCR 720.

[17] BHABHA COMMITTEE, REPORT OF COMPANY LAW COMMITTEE, ¶199, (1952), http://reports.mca.gov.in/Reports/22-Bhabha%20committee%20report%20on%20Company%20law%20committee,%201952.pdf.

register the shares of the company to outsiders.[18] And *secondly*, the abuse caused due to absorption of an undue portion of profits of the company in remuneration of their services after which nothing or a meager amount was left for the dividends.[19]

The Cohen Committee acknowledged that the two examples above are merely illustrative in character since it is not possible to design suggestions that address every potential circumstance that may oppress the minority.[20] It was further contended that in many of the cases the winding up of the company will not benefit minority shareholders primarily due to the fact that the break-up value of assets would be so small or possibly that the purchaser available would be the majority whose oppression has driven the minority to seek redressal before the court. [21]

Consequently, in order to resolve this issue, the Cohen Committee recommended that in addition to the power of winding-up the company, the courts must have the power to impose upon parties to the dispute whatever settlement that the court considers just and equitable,[22] so as to put an end to the act of oppression by majority.[23]

As a result, Section 210 was inserted in the English Companies Act, 1948. As per the aforementioned provision, on the petition of aggrieved member or class of members if the court is satisfied that affairs of the

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[18] *Id.* at 59.
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] Shreyas Jayasimha and Rohan Tigadi, *Arbitrability of Oppression, Mismanagement and Prejudice Claims in India: Need for Re-Think,* 11 NUJS LAW REV. 547, 563 (2018).

company is being conducted in a manner that are oppressive to minority shareholders and an order of winding-up would not do justice to such member or class of members, which in ordinary course is just and equitable to do so, the court may make an order as it deems fit. The order of court in such cases may include provisions for exit opportunities to such member or class of members or regulation of affairs of company in a certain manner or any other mode that the court would deem fit.[24]

B. WHOLESALE ADOPTION OF ENGLISH LAW IN INDIA

Mirror imaging English model was not a new phenomenon, we can simply trace the evolution of corporate laws in India being modelled on parallel developments in England. Colonial linkages and legal transplantations of corporate laws have resulted into great reliance of Indian corporate regime on English laws, at least in the initial decolonization period.[25] To freshly review the pre-existing Indian Companies Act, 1913, the Bhabha Committee was set up in 1951 by the Government of India. The Bhabha Committee in its report recommended that the provisions of English law can not only be suitably adapted but its scope must also be amplified in order to cover not only the cases of oppression of minority shareholders but also the cases of gross mismanagement.[26] The Bhabha Committee further recommended in explicit terms that the law in India must provide a remedy for the

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[24] Companies Act 1948, 11 and 12 Geo 6, c.38, § 210 (UK).

[25] UMAKANTH VAROTTIL, THE EVOLUTION OF CORPORATE LAW IN POST-COLONIAL INDIA: FROM TRANSPLANT TO AUTOCHTHONY (NUS Law, Working Paper 2015/001, January 2015), https://law.nus.edu.sg/wp-content/uploads/2020/04/001_2015_Umakanth_Varottil.pdf.

[26] Bhabha, *supra* note 17, ¶198-200.

oppression of minority shareholders on the lines of Section 210 of the UK Companies Act, 1948.[27]

Consequently, the provision for remedy against oppression was materially incorporated in the Indian Companies Act, 1913 by the way of an amendment and subsequently in the Companies Act, 1956 in addition to the provision concerning cases of mismanagement. Later on, when the Companies Act, 1956 was repealed and succeeded by the Companies Act, 2013, the provisions in respect of remedy for oppression and mismanagement were adopted under Chapter XVI of the 2013 Act with minor modifications.

III. EXAMINING THE MEMBER-SPECIFIC REMEDY FOR OPPRESSION AND MISMANAGEMENT UNDER THE COMPANIES ACT, 2013: AN EXPLORATION OF JURISPRUDENCE

Sections 241 and 244 of the Companies Act, 2013 outline the remedies against oppression and mismanagement. The aforesaid provisions accord the courts overarching powers and constitute a complete code in itself for evaluating whether a claim for oppression and mismanagement lies.[28] In this part, authors shall extensively deal with the jurisprudence revolving around the subject so as to explicate the ambit of the provisions.

A. "OPPRESSION"

[27] *Id.*
[28] Gopal Shamser v. Jagadish Chandra, 1981 TaxLR (NOC) 151(Cal).

Section 241(1)(a) of the Companies Act, 2013 ("**the Act**") addresses the complaints regarding the affairs of the company being oppressive to a member or members.[29] To make an order under Section 241 of the Act, court must adopt a threefold test. *Firstly*, the facts of the case must justify that affairs of the concerned company are being conducted in a manner oppressive to any member or class of members.[30] *Secondly*, the facts of the case must justify making of an order of winding-up.[31] *Thirdly*, the order of winding up would unfairly prejudice the applicant.[32]

By not expressly defining the term 'oppression', the Act gives a very wide discretion in the hands of the courts to determine the facts and circumstances of each case.[33] Since the Indian Company law regime finds its jurisprudential underpinnings in the English law, Indian courts have not been hesitant in adopting the broad tests emanating from English precedents.[34]

The Hon'ble Supreme Court in *Shanti Prasad Jain v. Kalinga Tubes Ltd.*,[35] attempted to define the term *'oppression'* relying on leading English and Scottish authorities. In this case, court found that issuance of new shares by the majority shareholders to their friends or outsiders (in the absence of any express right under articles of the company regarding right to first refusal) would not amount to oppression. The Court then referred

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[29] 3 A RAMAIYA, GUIDE TO COMPANIES ACT 3978 (Lexis Nexis 2014).
[30] *In Re:* Five Minutes Car Wash Service Ltd., (1966) 1 All ER 242: (1966) 2 Comp LJ 68.
[31] *Id.*
[32] *Id.*
[33] Jayasimha & Tigadi, *supra* note 23.
[34] Varottil, *supra* note 9.
[35] Shanti Prasad Jain v. Kalinga Tubes Ltd., (1965) 2 SCR 720.

to the *Harmer case,*[36] the term *'oppression'* was explained as something burdensome, harsh and wrongful. Lord Cooper has stated that for claiming the remedy against oppression, "*the circumstances of the case must suggest an inference that there had been, at least an unfair abuse of powers and an impairment of confidence in probity with which the affairs of the company are being conducted.*"[37]Further, English case of *Elder v. Elder & Watson*,[38] has established that the phrase 'Oppressive of some part of members' suggests that the conduct complained of must involve, at lowest, a visible departure from the standards of fair dealing and a violation of condition of fair play on which a shareholder has entrusted his money.

After having an exhaustive discussion on these leading authorities, the Court in *Shanti Prasad Jain*[39] has affirmed the law laid down in these cases and explained the jurisprudence in following words, *"It is not enough to show that there is just and equitable cause for winding up the company, though that must be shown as preliminary to the application of Section 397 (Section 241 of the Companies Act, 2013). It must further be shown that the conduct of the majority shareholders was oppressive to the minority as members and this requires that events have to be considered not in isolation but as a part of a consecutive story. There must be continuous acts on the part of the majority shareholders, continuing up to the date of petition, showing that the affairs of the company were being conducted in a manner oppressive to some part of the members. The conduct must be burdensome, harsh and wrongful and mere lack of confidence between the majority shareholders and the minority shareholders would not be*

[36] *In Re:* H R Harmer, (1958) 3 ALL ER 689.
[37] *Id.*
[38] Elder v. Elder & Watson, 1952 Scottish Case 49.
[39] Shanti Prasad Jain v. Kalinga Tubes Ltd., (1965) 2 SCR 720.

enough unless the lack of confidence springs from oppression of a minority by a majority in the management of the company's affairs, and such oppression must involve at least an element of lack of probity or fair dealing to a member in the matter of his proprietary rights as a shareholder." Hence, a mere loss of confidence and resentment on the part of the minority in a deadlock situation would not come within the purview of oppression.[40]

Efforts were also made by the judiciary in subsequent cases, to expand the scope of remedy against oppression. In *Needle Industries (India) Ltd.,*[41] Hon'ble Supreme Court held that in order to get relief under this provision "*a conduct which lacks exercise of his legal and proprietary rights as a shareholder*" must be shown to exist. Subsequently, in *TN Raghunath (Dr.) v. Lake Side Medical Centre Ltd*,[42] it was held that legality or illegality, in the affairs of the company, shall not be examined but only its probity and fairness toward shareholders. Hence, illegality is not a *sine qua non* for oppression.[43]

B. MEMBER RESTRICTIVE APPROACH OF THE REMEDY

One fundamental issue that always remained unaddressed in the academic discussions governing remedies against oppression is that such remedy is available to petitioners only in their capacity of being a member

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[40] *Id. See also* M.S.D.C. Radharamanan v. M.S.D. Chandrasekara Raja, (2008) 143 Com Cases 97.
[41] Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holding Ltd., (1981) 3 SCC 333.
[42] TN Raghunath (Dr.) v. Lake Side Medical Centre Ltd., (2007) 137 Com Cases 741.
[43] Mohanlal Ganpatram v. Shri Sayaji Jubilee Cotton and Jute Mills Co. Ltd., AIR 1965 Guj 96.

or shareholder of the company.[44] In the *Harmer case*,[45] it was held that oppression dealt under this Section is only restricted to the oppression of members. It is in such and only in such a capacity that a person can invoke the remedy. Thus, oppression of a person in any other capacity distinct from a member, a director for instance, is outside its purview.[46] Similarly, in *Needle Industries Ltd.*[47], it was held that to get relief, conduct which lacks exercise by a shareholder of his legal, proprietary and equitable rights, or other legitimate expectations must be shown to exist.

The legislative background of this remedy stems from shareholder or member-oriented locus, more specifically minority shareholders, as discussed previously. Due to this, the remedy against oppression is unavailable to other stakeholders of the company. Through passage of time, however, the scope of oppression has been explored, expanded and supplanted, to a certain extent by the courts. Yet, the approach seems to be restrictive and bereft of any legitimate justification in modern legal landscape.

In *Rashmi Seth v. Chemin Ltd.,*[48] it was held that illegal issuing of shares to turn majority shareholders into a minority is oppressive in itself justifying the invocation of Section 241 by the majority shareholders. A

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44 K.R.S. Narayana Iyengar v. T.A. Mani, AIR 1960 Mad 338.
45 *In Re:* H R Harmer, (1958) 3 ALL ER 689.
46 Ramaiya, *supra* note 29, at 3783. *See also* VM Rao v. Rajeshwari Ramakrishnan and Ors., (1987) 61 Comp Case 20 (MAD).
47 Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holding Ltd., (1981) 3 SCC 333.
48 Rashmi Seth v. Chemin Ltd., (1992) SCC OnLine CLB 6. *See also* Piercy v. Mills & Co. (1920) 1 Ch 77.

similar ruling was given in *Jaladhar Chakraborthy*[49] wherein it was held that an increase and decrease in the capital of the company shall not be termed oppression unless it alters the 'Pattern of Shareholding' and turns majority into minority. Further, it was held by the Kerala High Court[50] that the provisions of remedy against oppression are intended to protect the interest of the minority. Ordinarily, the majority is sufficiently empowered to protect its interest but in cases where the majority is prevented from so doing and turns into an artificial minority, then it is entitled to seek protection under this provision. Subsequently, the Delhi High Court[51] and Punjab & Haryana High Court[52] have also held that a petition preferred by the majority against the minority under this Section, is maintainable.

Although, the scope of Section 241 has been expanded by diluting the distinction between minority and majority shareholders, the fundamental issue remains to be unaddressed. Thus, the approach has remained restricted in not including other stakeholders of the company to enable them to file petition for oppression in any capacity distinct from a member or shareholder.

C. MISMANAGEMENT

[49] Jalandhar Chakraborthy v. Power tool and appliance Ltd., (1994) 79 Comp Cas 505 Cal.
[50] Dr. V. Sebastian v. City Hospital (P) Ltd., 1982 SCC OnLine Ker 236.
[51] Radhe Shyam Gupta v. Kamal Oil & Allied Industries Limited, 2005 SCC OnLine Del. 617: (2005) 82 DRJ 530.
[52] Amit Gupta v. J.K. Gupta, [2002] 38 SCL 112.

Remedy against mismanagement provided under Section 241 of the Act is peculiar to India[53] and has no English counterpart.[54] The expressions 'oppression' and 'mismanagement' have been left undefined by the lawmakers,[55] however the attributes of mismanagement can be ascribed by the phraseology used in the provision. While interpreting the scope of 'Remedy against mismanagement', authors and commentators, have restricted its scope by limiting the source of law to only Section 241(b). However, Section 241(1)(a) of the Act has correspondence to Sections 397(1) and 398(1) of erstwhile Companies Act of 1956 and hence, it would mean that the aspect of mismanagement is inherent under Section 241(1)(a) of the Act.

It is pertinent to note that the term 'mismanagement' does not find mention in the title to Section 241 which is "*Application to Tribunal for relief in cases of oppression, etc.*". The legislative drafting policy of the Act, regrettably, does not elucidate the legislative intent behind such omission, therefore left us bereft of any insights regarding rationale behind such deliberate legislative action.[56] In the opinion of the authors, legislative enactment, as consolidated under Sections 241(1)(a) & (b), presumes the incorporation of the essence of mismanagement thereby negating the hypothesis of 'mismanagement' falling only under Sections 241(1)(b) of the Act.

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[53] Shreyas Jayasimha and Rohan Tigadi, *Arbitrability of Oppression, Mismanagement and Prejudice Claims in India: Need for Re-Think*, 11 *NUJS LAW REV*. 547, 563 (2018).
[54] Ramaiya, *supra* note 29, at 4097
[55] Palghat Exports Private Ltd. v. T.V. Chandran, 1993 SCC OnLine Ker 441.
[56] Varottil, *supra* note 9.

The conditions for maintaining a petition against an act of mismanagement[57] are that the affairs of the company are conducted in a manner prejudicial to public interest[58] or, that the affairs of the company are being conducted in a manner prejudicial to the interest of company[59] or, that due to any material change which has taken place in the management and control of the company in the manner set out in the section and due to that reason it is likely that affairs of company will be conducted in a manner prejudicial to the interest of company and prejudicial to member or members.[60] As per the Bhabha Committee Report, provisions prescribing remedy in cases of mismanagement was to be made to protect the interest of the company[61] and not its members. It is through subsequent developments in the law that the interest of shareholders or class thereof was incorporated within the ambit of mismanagement.[62]

Although, the remedy for mismanagement in India has no English counterpart, the object of this remedy, as envisaged by the Bhabha Committee Report, has been frustrated. Primarily due to the aforementioned reasons, besides the power to file a petition against mismanagement in NCLT has been given only to members of the company (as specified under Section 244 of the Act).[63] It is obvious that even when the grounds for considering the case of mismanagement have been

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[57] GK KAPOOR & SANJAY DHAMIJA, COMPANY LAW AND PRACTICE 752 (Taxman, 24th ed., 2019).
[58] Suresh Kumar Sanghi v. Supreme Motors Ltd., 1981 SCC OnLine Del. 199.
[59] Companies Act, 2013, § 244, No. 18, Acts of Parliament, 2013.
[60] *Id.*
[61] Bhabha, *supra* note 17.
[62] *In Re:* Five Minutes Car Wash Service Ltd., (1966) 1 All ER 242: (1966) 2 Comp LJ 68.
[63] Companies Act, 2013, § 244, No. 18, Acts of Parliament, 2013.

expanded to protect the interest of the company and the public, if only members are entitled to approach the court then the company's interest and public interest would most likely be member-interest driven. Although, government is empowered to file a petition before the NCLT against such cases, the question here arises as to how far the government will go for protecting the public interest. The government will, perhaps, intervene only in certain high-profile cases whereas, in many cases, stakeholders will be left remediless.

D. PREJUDICE CLAIMS

Companies Act, 2013 introduced a new ground for invoking Section 241 of the Act, as per which members can approach NCLT if the affairs of company have been conducted in a manner prejudicial to member or class thereof.[64] This remedy was absent from provisions of the erstwhile Companies Act of 1956. The question which needs to be determined here is that whether the remedy of prejudice is to clarify, explicate or substantiate the already existing remedy of oppression or it operates on standalone basis *de hors* oppression.[65] It is quite evident from the phraseology used in this provision that the remedy of prejudice stands on its own footing distinct from the remedy of oppression.

In order to determine the scope of this remedy, it is expedient to explore its genesis. The legislative intent behind incorporating such remedy is still unknown.[66] However, *prima facie* it seems that it is inspired by

[64] Companies Act, 2013, § 241(1), No. 18, Acts of Parliament, 2013.
[65] Ramaiya, *supra* note 29.
[66] Ramaiya, *supra* note 29.

developments in the English Company Law.[67] After two decades of the Cohen Committee Report, the England Government set up a new committee under the chairmanship of Lord Jenkins in order to evaluate the functioning of the English Companies Act, 1948. The Jenkins Committee observed that the remedy of oppression has not produced expected results[68] and the term 'oppressive' is too strong to be appropriate in all cases.[69] Consequently, the remedy of oppression prejudice was devised to overcome the inefficiencies of the remedy of oppression.

Despite having similar legislative intent, the scope of remedy in both the jurisdictions, i.e. India and England, is not *pari materia*. The legislative policy of England incorporates the phrase 'Unfairly Prejudicial'[70] while the Indian law only incorporates the term 'Prejudicial' and does not expressly mention the term 'Unfair'.[71] While determining the scope of this remedy, English Court *In Re: Saul D. Harrison & Sons plc.,*[72] has held that the conduct must be both prejudicial and unfair. A conduct may be prejudicial but not unfair and similarly it may be unfair but not prejudicial. However, to claim the remedy, it must satisfy both the tests.

The term 'Unfair Prejudice' was first considered by the House of Lords in *O' Niell v. Phillips,*[73] wherein Lord Hoffman after relying on *Re Saul D Harrison & Sons Plc*, held that unfairness may consist in breach of the

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[67] Bhabha, *supra* note 17.
[68] JENKINS COMMITTEE, REPORT OF COMPANY LAW COMMITTEE, ¶ 74 (June 1962).
[69] *Id.*
[70] Companies Act, 2006, § 994, c. 46 (UK).
[71] Companies Act, 2013, § 241(1), No. 18, Acts of Parliament, 2013.
[72] *In Re:* Saul D. Harrison & Sons plc., [1995] BCLC 14.
[73] O' Niell v. Phillips, [1999] UKHL 24.

rules or using of rules in a manner that would distort the principles of equity. Equitable consideration is the criterion which makes it unfair for those conducting the affairs of the company to rely upon their strict legal powers.

Till now no Indian case has determined the scope of this remedy in Indian context. Recently, in *Cyrus Investment Pvt. Ltd. v. Tata Sons Ltd. & Co.*,[74] the aspect of this remedy has been taken into consideration however no discussion took place in this regard.[75]

IV. CORPORATE GOVERNANCE IN TRANSITION: ADDRESSING THE ISSUES AND CHALLENGES OF STAKEHOLDER PROTECTION

Corporate governance includes a set of mechanisms which ensures that companies are redirected and managed in a way so as to create maximum value for their owners and simultaneously fulfilling their responsibility towards other stakeholders.[76] In this changed scenario, corporations must be fair and transparent towards their shareholders and other stakeholders.[77] As noted by the Kumar Mangalam Birla Committee,[78]

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[74] Cyrus Investment Pvt. Ltd. v. Tata Sons Ltd. & Co., Company Appeal No. 254/2018.
[75]Prateek Kumar Singh, *Indian Company Law making way for unfair prejudice remedy*, RMFRL (June 2021, 11:45 PM), https://www.rfmlr.com/post/indian-company-law-making-way-for-unfair-prejudice-remedy.
[76] Onyekachi .E. Wogu, *Corporate Governance: The Stakeholders Perspective*, 4 IJBMR 45, 48 (2016), https://www.eajournals.org/wp-content/uploads/Corporate-Governance-The-Stakeholders-Perspective.pdf.
[77] Prof. Mamta Sawakar, *Corporate Governance in India- Evolution and Challenges*, 6 IJCRT 1, 6 (2018), https://ijcrt.org/papers/IJCRT1893330.pdf.
[78] KUMAR MANGALAM BIRLA COMMITTEE, REPORT OF KUMAR MANGALAM BIRLA COMMITTEE ON CORPORATE GOVERNANCE, 1999, ¶4.1.

corporate governance has several claimants like shareholders and other stakeholders including suppliers, customers, creditors, bankers, employees of the company, government, and society at large. Good corporate governance mechanisms help to ensure that corporations take interest of larger constituents and communities within which they operate.[79]

The role of national corporate statutes is to protect the interest of every stakeholder of a corporation. As discussed in previous chapters, the remedy against oppression, mismanagement and prejudice has been restricted to shareholders. Though, it is the cardinal principle of corporate governance that an organization is duty-bound to provide just and equitable treatment to its shareholders,[80] however, while protecting the rights of internal stakeholders (who are mostly shareholders), external stakeholders (stakeholders other than shareholders) of such organization cannot be ignored with due consideration to their rights as well as their impact on the activities of the organisation.[81] The primary reason for the aforementioned issue is the inclination of legislature towards shareholder primacy, non-judicious transplantation of English laws, ESG risks and dysfunctional role of power dynamics in corporate governance.

A. NAVIGATING THE CORPORATE GOVERNANCE DIVIDE: A COMPARISON OF SHAREHOLDER PRIMACY AND STAKEHOLDER THEORY IN UK, US AND INDIA

[79] NR NARAYAN MURTHY COMMITTEE, REPORT ON THE SEBI COMMITTEE ON CORPORATE GOVERNANCE, 2003, ¶1.1.5.
[80] Lai Oso and Bello Semiu, *The Concept and Practice of Corporate Governance in Nigeria: The need for Public Relations and Effective Corporate Communications*, 3 JOU. OF COMM. 1, 5 (2012), https://www.researchgate.net/publication/321204620.
[81] Singh, *supra* note 75.

Shareholder primacy is one of the cardinal principles of English Corporate law. [82] This theory is based on the widely accepted proposition that the primary objective of a company is the maximization of shareholders' profit.[83] The broad canvas in this paradigm affirmatively expounds the corporation as wealth producing socio-economic legal construct that should profit shareholders. This theory espouses a shareholder-centric approach which focuses on maximizing shareholders' value before considering the interests of other stakeholders.[84] Whereas, the stakeholder theory, as the words suggests, goes a step ahead and takes into consideration the interests of other stakeholders, unlike shareholder primacy whose primary objective is profit maximization and protection of interests of the shareholders. Advocates of this theory suggest that the management of the corporation owes a duty towards both shareholders and other stakeholders who have contributed to the wealth creation of such corporation.[85]

If we closely examine the corporate governance regime in UK, it reveals that the participation of stakeholders can be facilitated by empowering stakeholders in their role as shareholders.[86] Despite having a

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[82] P. L. DAVIS & SARA WORTHINGTON, GOWER & DAVIES: PRINCIPLES OF MODERN COMPANY LAW 560 (Sweet & Maxwell, 9th ed. 2012).

[83] Robert J. Rhee, *A Legal Theory of Shareholder Primacy* 102 (Minnesota Law Review, Working Paper 2017), https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1004&context=working.

[84] *Id.*

[85] James E. Post, Lee E. Preston & Sybille Sachs, *Managing the Extended Enterprise: The New Stakeholder View*, 45 CAL. MANG. REV. 6, 45 (2002).

[86] Katharine Jackson, *Towards a Stakeholder-Shareholder Theory of Corporate Governance: A Comparative Analysis,* 7 HAST. Bus. L. J. 309, 347 (2011), https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1165&context=hastings_business_law_journal.

close resemblance with its American counterpart, a major difference between the corporate governance regime of Unite States ("**US**") and UK is that UK affords much power to its shareholders than other stakeholders.[87] UK corporate laws still maintain the shareholder primacy tradition.[88]

Contrastingly, UK's commitment to stakeholder protection is arguably as vigorous as that of Germany, which follows a stakeholder-oriented model of governance.[89] It is this commitment to social welfare which accounts for differences in the models followed by UK and US.[90] The divergence between the protective devices in protecting interest of investors (shareholders) arises from the different manner in which their external regulatory mechanisms relate to its protective mechanisms, affecting the relationship among stakeholders in a corporate enterprise.[91] Illustratively, protections afforded to employees in social safety laws and employment protection laws are strong enough to diminish the need of including their voice in corporate governance.[92] Therefore, UK sets a new example as to how the interests of stakeholders can be accommodated in a shareholder centric corporate governance regime.[93] Nonetheless, a critical evaluation of 'Enshrined Shareholder Value' suggests the inference that

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[87] *Id.*
[88] Kingsley O. Mrabure & Alfred Abhulimen-Iyoha, *Corporate Governance and Protection of Stakeholders Rights and Interests*, 11 BEJ. LAW REV 292, 297 (2020).
[89] Christopher M. Bruner, *Power and Purpose in the 'Anglo-American' Corporation, 50* VIR. J. INT'LL. 579, 609 (2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1575039.
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*

other stakeholders of the company have not been granted the same status as that of a shareholder and hence no considerable change has been effected from what existed prior to 2006.[94]

Consequently, much like US and UK, the right of stakeholders in enforcing their claims is missing in Indian laws as well.[95] One such instance can be recorded in the recommendations given under the JJ Irani Committee Report[96] wherein it was stated that the protections afforded to the minority against oppression and mismanagement are sufficient.[97] Furthermore, it was recommended that terms 'minority' and 'majority' should be defined so as to make 'minority', a qualification for initiating action against affairs of the company in cases of oppression and mismanagement.[98] Similarly, a number of committees have been set up in order to study the corporate governance norms in India. It is pertinent to note that most of the recommendations of these reports are driven by shareholders' interest.

In 1999, Birla Committee, recognized the fact that the issue of corporate governance involves protection besides the shareholders, of all other stakeholders. However, the recommendations of the Committee looked at the issues essentially involving shareholder interest, since shareholders form the *raison d'etre* of corporate governance and the chief

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[94] Shubhra Wadhawant, *Upholding Stakeholder Interest: What way is best way- A comparative analysisacross diverse jurisdiction*, SCC ONLINE (Oct. 23, 2022), https://www.scconline.com/blog/post/2019/06/14/upholding-stakeholder-interest-what-way-is-the-best-way-a-comparative-analysis-across-diverse-jurisdictions/.
[95] *Id.*
[96] JJ IRANI COMMITTEE, REPORT OF COMPANY LAW COMMITTEE (May 2005).
[97] 3 A RAMAIYA, GUIDE TO COMPANIES ACT 3856 (Lexis Nexis 2014).
[98] *Id.*

constituents of SEBI.[99] Similarly, committees studying the aspects of corporate governance norms in India majorly focus on the interests of shareholders exclusively. One such inference can be drawn from the Uday Kotak Committee on corporate governance, 2017, where the report explicitly stated that well governed companies need to focus on fulfilling two major roles, *firstly*, focusing on long term value creation and *secondly*, protecting the interest of shareholders by applying proper care, skills and diligence in business decisions.[100] If we peruse the recommendations of given by the Kotak Committee, we barely find any of the recommendations concerning protection of any other stakeholders.

On meticulous examination of all these reports on corporate governance, we would find that they majorly focus on resolving agency problem and maintain the tradition of shareholder primacy in the Indian context. Therefore, legislative instrumentalities have also been molded in systemic bottlenecks of shareholder primacy thereby undermining the larger stakeholder perspective. Authors firmly believe that shareholders are primary stakeholders of the company however, considering the changing dimensions of corporate governance norms where corporations have multi-dimensional role, departure from shareholder primacy is imperative.

B. IMPACT OF OPPRESSION AND MISMANAGEMENT ON ENVIRONMENT, SOCIAL AND GOVERNANCE RISKS IN COMPANIES

[99] KUMAR MANGALAM BIRLA COMMITTEE, REPORT OF THE KUMAR MANGALAM BIRLA COMMITTEE ON CORPORATE GOVERNANCE (2000).

[100] UDAY KOTAK COMMITTEE, REPORT OF THE COMMITTEE ON CORPORATE GOVERNANCE (October 2017).

Oppression and mismanagement within a company can have wide ranges of negative impacts. For example, when management is not accountable to shareholders and other stakeholders, it can lead to lack of transparency in the company's operations, including its environmental and social practices. This can result in negative environmental impacts, such as pollution or deforestation, and negative social impacts, such as human rights violations. Additionally, when a company is engaging in oppression and mismanagement, it is more likely to be in non-compliance with laws and regulations related to environmental and social issues, which may lead to imposition of fines, legal actions, and reputational loss.

When it comes to ESG risks, some examples of risks that can arise due to oppression and mismanagement include:

(i) **Environmental risks**: poor management of environmental risks may result into accidents, spills, and other incidents that can harm the environment and people living nearby. It can also lead to non-compliance with environmental regulations, resulting in fines and other penalties.

(ii) **Social risks**: mismanagement of social risks can lead to labor disputes, human right violations, and community conflicts. It may also lead to non-compliance with laws and regulations related to human rights, labor rights, and other social issues.

(iii) **Governance risks**: oppression and mismanagement can be a cause for poor corporate governance, which might result in lack of transparency and accountability. This can further give rise to

difficulties for investors and other stakeholders in assessing the company's performance and making informed decisions.

Oppression and mismanagement can lead to a wide range of ESG risks for companies, which can negatively impact the environment, society, and company's financial performance as well. Therefore, it is important for companies to address and manage these risks. Doing so will minimize negative impacts and improve their overall sustainability.

C. INDIAN COMPANY LAW: LEGAL TRANSPLANTATION GONE WRONG?

The contemporary legal scholarship emphasizes on the influence of 'legal origin' while discussing comparative corporate laws.[101] Genesis or Source of corporate law in any legal system plays a significant role in its evolution and relative success.[102] While the concept of legal transplantation of corporate laws has been received affirmatively, it has been viewed with caution.[103] In this backdrop, learned author Konrad Zweigert has rightly pointed out that, mere importation of a legal rule or legal system without proper adaptation of such rule or system to find compatibility with the local needs is susceptible to failure.[104] This is due to the fact that social, economic and geo-political situations may not be present in the host country in

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[101] UMAKANTH VAROTTIL, THE EVOLUTION OF CORPORATE LAW IN POST-COLONIAL INDIA: FROM TRANSPLANT TO AUTOCHTHONY (NUS Law, Working Paper 2015/001, January 2015), https://law.nus.edu.sg/wp-content/uploads/2020/04/001_2015_Umakanth_Varottil.pdf.

[102] *Id.*

[103] Pierre Legrand, *The Impossibility of Legal Transplant*, 4(2) MJECL 111, 117 (1997), https://doi.org/10.1177/1023263X9700400202.

[104] See K. ZWEIGERT & H. KOTZ, AN INTRODUCTION TO COMPARATIVE LAW (3rd edn, Oxford University Press 1998).

identical manner or even if present it may substantially vary which might impair the success of the legal transplant.[105]

As stated earlier, the provisions concerning remedies against oppression and mismanagement emanate from an adopted idea which reflects the colonial continuity in Indian corporate laws. This is due to over-insistence and over-reliance of the Indian parliament on British laws. Despite the transition of Indian corporate law regime from legal transplant to autochthony in the past two-three decades, the provisions relating to oppression and mismanagement find its allegiance to the British laws and that too with inconsistencies. The inconsistency with the British laws and ambiguities in present Companies Act, 2013 have perplexed the legal scholarship.

As mentioned earlier, the Jenkins Committee in 1962 recommended the replacement of the term 'Oppression' with 'Unfairly Prejudicial' in English law.[106] Thus, the remedy of 'Unfairly prejudicial' in English jurisdiction has been incorporated in place of the remedy of oppression while in India the remedy of prejudice has been incorporated to supplement the existing remedy of oppression.[107] The English law was changed in the 1960s whereas the Indian regimes still carry 'oppression' in their company statutes. Analogous to the other two remedies of oppression and mismanagement, the incorporation of this remedy also suggests the inference that legislative policy is confined to the protection of shareholders

[105] Varottil, *supra* note 101.
[106] Jenkins, *supra* note 68.
[107] Varottil, *supra* note 9.

primarily due to the fact that the remedy of prejudice is introduced to widen the scope of shareholder protection.

In addition to this, the Companies Act, 2013 has induced the concept of "*class action suit*", however, the same has still not been notified yet. It is pertinent to note that India has borrowed the concept of "*class action suit*" from US which is more or less similar to the remedies against oppression and mismanagement. However, the ambit of "*class action suit*" is little wider than the remedies for oppression and mismanagement as it empowers depositors in addition to members to file a petition if the affairs of the company are being conducted in a manner prejudicial to the interest of the company or depositors.

However, that is not the issue, it is pertinent to note that legal transplants are ubiquitous and not so unique, at least, in common law countries. The efficacy of these legal transplantations varies across jurisdictions on account of differentiated social, political, and economic factors.[108] The efficacy of corporate regulatory regime does not rely merely on how efficiently its company laws have been enacted. There are external regulatory factors that act as a catalyst in the smooth functioning. Such external factors may include the interplay and effectiveness of its labour, environmental and insolvency laws. Nexus theorists argue that stakeholder interests are best addressed through external contracts and negotiations, however, if this English approach is to be followed then the corporate landscape is going to be in dire traits. One such instance that best illustrates this remark is the plight of the creditors in this country.

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[108] Varottil, *supra* note 101.

D. REJUVENATING CREDITOR MONITORING SYSTEM

Creditors have an intrinsic preference for financial prudence and ability of the company to not only make timely repayment of debts but also to maintain predictable and stable credit risk profile.[109] Credit monitoring is a routine task of creditors to mitigate risks of default[110] however infirmity of credit monitoring system in India is reflected through ever rising Non-Performing Assets. Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ("**RDDB&FI Act**") and the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("**SARFAESI Act**") have attempted to secure the right of creditors, albeit both of them remained overly inadequate. Consequently, with the enactment of Insolvency and Bankruptcy Code, 2016 ("**the Code**"), Indian business landscape has entered into new age of creditor governance. The Code attempts to balance the interests of shareholders and creditors and thus enhances creditor governance in Indian context.[111]

However, it is pertinent to note that the Code is in nature of *ex post* regulatory regime as opposed to *ex ante* regulations which essentially means that creditors will come into play only after default has occurred. When we

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[109] Dallas G., *The Role of the Creditor in Corporate Governance and Investor Stewardship*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (13 Nov 2022), https://corpgov.law.harvard.edu/2019/10/09/the-role-of-the-creditor-in-corporate-governance-and-investor-stewardship/.

[110] Tomas Jandik and William R. McCumber, *How Creditors affect Corporate Governance,* THE CLS BLUE SKY BLOG, (29 September 2022), https://clsbluesky.law.columbia.edu/2018/08/13/how-creditors-affect-corporate-governance/.

[111] Gireesh Chandra Prasad, *Bankruptcy code has balanced rights of creditors and debtors,* LIVE MINT (Dec. 21, 2020), https://www.livemint.com/news/india/-bankruptcy-code-has-balanced-rights-of-creditors-and-debtors-11608515416489.html.

talk about provisions of remedies against oppression and mismanagement, it is in the nature of *semi- ex ante* regulations which means that aggrieved party may approach for judicial reliefs either before the commission of act/omission which will take place in future or for act/omission that already took place and has potential to fall within the contours of Section 241 of the Act. Thus, if the provisions of remedies against oppression and mismanagement are stretched to protect creditor rights pre-maturely (i.e. before the default), it will significantly enhance the credit monitoring system *vis-à-vis* the insolvency regime in India.

E. ROLE OF POWER DYNAMICS OF CORPORATION IN DISRUPTING CORPORATE GOVERNANCE

It has been pointed by corporate experts that power dynamics play a significant role in market efficiency while at the same time certain other thinkers have criticized today's form of capitalism which has been proved to be problematic at many levels.[112] The challenge before corporate governance in India is its conventional dominance of majority stakeholders which are individual-family dominated,[113] which disturbs the distinct ownership-control structure of a corporation.[114] In most of the cases,

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[112]Emily Vogels, Lee Rainie & Janna Anderson, *Power Dynamics Play a Key Role in Problems and Innovation*, PEW RESEARCH CENTRE: INTERNET AND TECHNOLOGY (Sept. 29 2022) https://www.pewresearch.org/internet/wp-content/uploads/sites/9/2020/06/PI_2020.06.30_digital-innovation_REPORT.pdf.

[113] Pankaj Kumar Gupta and Singh Shallu, *Evolving Legal Framework of Corporate Governance in India – Issues and Challenges,* 4 JURIDICAL TRIB 239, 249 (2014), http://www.tribunajuridica.eu/arhiva/An4v2/20%20Gupta.pdf.

[114] Shruti Nandwana, *A Need for Stricter Accountability of Promoters in Corporate Governance Regime in India: In the Context of Majority Shareholing of Promoters*, 9 ILI LAW REV. 1, 2 (2020), https://ili.ac.in/pdf/sn.pdf.

promoters make their way up to the management of the company. Thus, holding of shares in majority and management in the affairs of company gives immense power to affect the decisions of the company.[115] Martin Gelter argues that shareholder centrism and excessive corporate stakeholder protections are interrelated, however, he concluded that the pre-existing ownership structure in any given country will ultimately determine the fate of the legal regime which is to be adopted.[116]

The control of promoters can be portrayed through a pattern of shareholding. In a family-dominated corporate landscape like India, promoters are dominant shareholders and hence they have the power to influence the board. Promoters become emotionally attached with the company and decide to manage the affairs of the company for their personal interests which are often prejudicial to the interest of company and of other stakeholders and hence lead to failure of corporate governance.[117] As a result, India's corporate environment is more prone to abuse where promoters of the company prioritize their interests over the interests of other stakeholders of the company.[118] The contemporary example of Tata-Mistry dispute highlights the instance of oppression and mismanagement due to such shareholding structures.

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[115] *Id.*
[116] Martin Gelter, *The Dark Side of Shareholder Influence: Managerial Autonomy and Stakeholder Orientation in Comparative Corporate Governance*, (2009) 50(1) HARV. INT'L L.J. 129, 135 (2009), https://core.ac.uk/download/pdf/144231823.pdf.
[117] Nandwana, *supra* note 114.
[118] Nandwana, *supra* note 114.

V. BEYOND SHAREHOLDER PRIMACY: A STAKEHOLDER-CENTRIC APPROACH TO CORPORATE GOVERNANCE AND OPPRESSION AND MISMANAGEMENT REMEDIES

At the outset, it is evident from the above discussion that the corporate governance model that India has adopted prioritizes the protection of the interest of shareholders, albeit not ignoring, the interests of other stakeholders. As noted earlier, apart from shareholders there are other stakeholders who, by investing their resources, contribute to the wealth of the corporation.

In a corporation there are board members, employees, workmen, and other stakeholders including creditors, depositors and society at large. Acts or omissions of certain nature may prejudicially affect its stakeholders in any form, illustratively, not providing a proper work culture to employees and workmen can also be considered oppression. Turning decisions of the company in order to defraud its creditors by legal means is also a form of oppression on creditors. Unjust removal of directors is oppression on directors, conducting affairs of the company in a manner prejudicial to its employees, workmen and board members due to which their salaries are not credited is also a form of oppression.

All these instances severely affect the interests of such stakeholders requiring redressal. The justification behind the above-mentioned arguments is primarily the inefficiency of laws which are alternative remedies in such instances. However, the law does not provide remedy under the provisions of oppression and mismanagement.

A. INCAPACITY OF EXTERNAL STAKEHOLDERS TO MOVE UNDER SECTION 244 OF THE COMPANIES ACT, 2013: PARADOX OF QUALITATIVE AND QUANTITATIVE PARAMETERS

Section 244 of the Companies Act, 2013 prescribed certain qualifications for filing a petition under Section 241 of the Act. This Section provides for qualitative and quantitative restrictions with regards to the capacity of the applicant to file a petition on the grounds enumerated under Section 241 of the Act. When we read Section 244, in conjunction with Section 241 of the Act, it results into two-folded qualitative restrictions. *Firstly*, that the affairs of the company must justify that order for winding up and that such order would unfairly prejudice the applicant. *Secondly*, the application under Section 244 of the Act is filed by a member or class of members. Thus, when a non-member filed a petition under Section 244 of the Act, NCLAT in *India Awake for Transparency v Hasham Investment and Trading Company Pvt. Ltd.*[119] held that the proviso only enables dispensing with the eligibility requirement but does not dispense with the requirement that the person seeking waiver must be a member.

Quantitative restrictions, in this regard, envisage the numeric threshold enumerated under Section 244 of the Act. It states that in case of a company having share capital, not less than 100 members of the company, or not less than $1/10^{th}$ of the members of the company, or member or members having not less than $1/10^{th}$ of the issued share capital, and in the

[119] India Awake for Transparency v. Hasham Investment and Trading Company Pvt. Ltd., (2018) SCC OnLine NCLAT 583.

case of company not having share capital, not less than $1/5^{th}$ of total members may file an application under Section 244 of the Act.

In essence, it can't be again said that one simply can't find its locus unless it satisfies, both qualitative and quantitative, parameters and that's where the problem lies. In the changing dimensions of corporate governance, the interests of external stakeholders are, though not identical, at par with the internal stakeholders. It would be imperative if we dilate the scope of remedies against oppression and mismanagement to provide greater protection to external stakeholders of the corporations. However, such a step would have theoretical and pragmatic ramifications as it is easier to propound qualitative and quantitative parameters for limited class (i.e., shareholders), primarily because of shareholders' quantifiable pecuniary stake. Thus, if we somehow boiled down to the qualitative parameters, quantitative parameters will still persist.

Illustratively, in case certain actions of management of the company result in unfairly prejudicing the interest of employees of the company. It is indisputable fact that employees are also stakeholders of the company, however, in such situations there will exist a functional overlap of labor laws and company law. In addition to this, it would also be difficult to provide for numeric threshold as currently exists for shareholders.

B. INCORPORATING A WIDER STAKEHOLDER PERSPECTIVE IN THE PROPOSED CORPORATE GOVERNANCE REGIME: A ROADMAP FOR CHANGE

This paper proposes modifications in the provisions for remedies against oppression and mismanagement to effectuate the concerns raised herein. The proposed regime shall be elucidated in following manner:

(i) **Altering Qualitative Criteria for Oppression and Mismanagement Claims**: it is pertinent to note that remedies against oppression and mismanagement are a kind of derivative action where members are considered as class. There is an imperative need to whittle down qualitative parameters from the provisions of oppression and mismanagement. Thereby, the requirement that affairs of the company must justify the order of winding up may be dispensed with. Instead, the only qualitative requirement in this regard shall be that the affairs of the company are being conducted in a manner that is "*unfairly prejudicial or oppressive*". Thus, if the affairs of the company are conducted in a manner that is "*unfairly prejudicial or oppressive*" to any person or class of persons, they may file a petition for reliefs, if they have significant stake in the company and the alleged conduct substantially affects such interest.

(ii) **Modifying quantitative parameters for Oppression and Mismanagement Claims**: quantitative parameters should still be relevant in the proposed regime, since it is a significant funneling technique to filter petty applications whose recourse may be taken in alternative remedies. In the existing framework only a specific number of members are capable of filing a petition under Section 244 of the Act. The proposed regime envisages the ability of non-

shareholder members to file a petition. Thus, for members, creditors, depositors or any class of stakeholders whose pecuniary relationship with the company is based on a financial instrument of like nature, the quantitative parameters in existing framework are sufficient and may be adopted in the proposed regime.

Furthermore, for protection of environment and consumers, the members of society or targeted consumer base whose interests may prejudicially be affected due to such affairs of the company may file a petition, if it exceeds 100 members. However, for board members, employees and workmen, if affairs of the company are conducted in a manner which is unfairly prejudicial and oppressive to aforementioned persons, a threshold of $2/5^{th}$ of total number of such persons, creating a class, would suffice. The reason for higher numeric threshold is that these classes of stakeholders are lesser in number as compared to members, creditors or depositors, or for that matter, members of society or consumers. Thus, $2/5^{th}$ of such class would be entitled to file a petition in such cases.

(iii) **Onus of proof** - The onus of proving the fact that affairs of the company are being conducted in a manner which is prejudicial to the petitioner lies on such petitioner. The petitioner has to place such evidence on record to the subjective satisfaction of the tribunal.

(iv) **Interpretation of the term "*Unfairly prejudice and oppressive*"** - In deciding the petitions, the Tribunal shall be guided by the jurisprudence developed so far, in this regard. The tribunal shall

maintain neutrality in interpreting "*unfairly prejudicial and oppressive"* which, so far, has been interpreted with shareholder centric approach. The dimensions of the terms may differ on facts and context of every case. Thus, Tribunals should be cautious and decide the cases accordingly. The tribunal shall aspire to develop the jurisprudence keeping in mind larger stakeholder perspective.

(v) **Provisions for frivolous and malicious petitions** - In the existing regime, there are no provisions for dealing with frivolous and malicious petitions. The only recourse that the Tribunal may opt for is to dismiss the petition. However, the enlarged scope of the proposed regime will lead to floodgates of petitions, majorly in instances where petitions are filed by members of the society. Such frivolous and malicious petitions must be dealt with iron hands. Therefore, the regime proposes the provisions for penalties and fines in cases where petitions have been brought forward with ulterior motives for securing personal interests.

VI. CONCLUSION: THE WAY FORWARD

The recent shift in focus upon ESG risks has highlighted the need for a more inclusive and dynamic approach to corporate governance. The traditional shareholder primacy model, which prioritizes the interests of shareholders over those of other stakeholders, is struggling to keep up with the changing business landscape and the need to balance the interests of

multiple stakeholders.[120] In order to address this, lawmakers must find a way to reconcile the interests of shareholders with those of other stakeholders, such as employees, creditors, and the society at large, in order to create a more integrated and inclusive corporate governance model.

The incorporation of ESG considerations in corporate governance mechanisms has become increasingly important in recent times. ESG risks can have a significant impact on a corporation's operations and financial performance, and failure to properly address these risks can lead to negative consequences for shareholders and other stakeholders. By amending the provisions of remedies against oppression and mismanagement, corporations can be held liable for failing to properly address ESG risks. This will serve as a powerful incentive for companies to integrate ESG considerations into their decision-making processes and operations. Additionally, by providing a legal remedy for stakeholders affected by a corporation's failure to address ESG risks, the proposed amendments will help to promote greater accountability and transparency in corporate governance through enhanced risk management mechanism.

One of the key mechanisms for protecting the interests of stakeholders in a corporation is the remedy against oppression and mismanagement. However, the legislative approach to this issue has typically been confined to the protection of shareholders only, with relatively less attention paid to the interests of other stakeholders. In light

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[120] Lyudmila Plamenova Petkova, *From Shareholder Primacy Towards Stakeholder Primacy: Why Corporate Governance Needs to Change its Focus in Order to Survive Modern Business Environment*, TILBURG UNIVERSITY (MAY 2019), https://arno.uvt.nl/show.cgi?fid=149464.

of this, it is necessary to revisit and expand the scope of these remedies in order to provide greater protection to other stakeholders.

One way to achieve this is through the introduction of "*class action suits,*" a mechanism commonly used in the US to allow a group of shareholders to bring a legal action on behalf of the company. The concept of class action suits has been adopted by India; however, the provisions are yet to be notified. Instead of introducing a new mechanism, India can amend the existing provisions of remedies against oppression and mismanagement to include matters that would typically fall under class action suits. This would provide a wider scope for these remedies and allow for greater protection of other stakeholders.

In addition to this, the legislature can also amend the provisions to afford protection to other stakeholders from ESG risks. As the statute does not define the terms 'oppression' and 'mismanagement', the judicial determination of these terms is very general in nature. Therefore, an expansion in the scope of these remedies would not make the provisions ambiguous and would instead contribute to the evolving jurisprudence of company law. Through dilating the scope of remedies against oppression and mismanagement, we can hold management of the company liable if it fails to tender ESG risks, thereby bridging the enforcement gap. The *ex-ante* nature of the remedy will essentially inculcate the enhanced protection mechanism and thus will attempt to protect the plight of other stakeholders.

Abhay Raj & Ajay Raj, *Striking at the 'One-Kick-At-The-Can' Character of Arbitration Through the Appellate Arbitration Mechanism,* 9(2) NLUJ L. Rev. 76 (2023).

STRIKING AT THE 'ONE-KICK-AT-THE-CAN' CHARACTER OF ARBITRATION THROUGH THE APPELLATE ARBITRATION MECHANISM

~Abhay Raj & Ajay Raj[*]

ABSTRACT

Should things go south, arbitration is a distinctive dispute resolution mechanism as opposed to litigation for the former's feature of the finality of arbitral awards. By design, a court review of arbitral awards is permitted only on overly limited grounds pertaining to enforcement or set-aside applications. This leave parties with no recourse at the 'one-kick-at-the-can' character of arbitration, particularly when there exist obvious errors in arbitral awards. For instance, a party could not appeal against an apparent error committed by the arbitral tribunal in the calculation of damages. If an appellate arbitration

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mechanism would have existed, these errors, inter alia, could have been (perhaps) rectified by the appellate tribunal upon request of either party. A few national systems (e.g., United States, United Kingdom, France) and arbitral institutions (e.g., the Conflict Prevention and Resolution Appeal Procedure, the JAMS Arbitration Procedure, the European Court of Arbitration Rules) have, however, attempted to cure this lacuna. This article intends to identify if there is a need for an appellate arbitration mechanism. It encourages a discourse on devising an efficacious appellate arbitration mechanism, taking guidance from the existing appellate review mechanis.

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I. INTRODUCTION

'*For the reasons set out above, the Arbitral Tribunal rejects Claimant's (or Respondent's) claims and* […].' A similar statement ensues after a time consuming and complex arbitration. It is undisputed that this statement is made after extensive deliberation by the arbitral tribunal, where they considered *inter alia* the submissions made by the parties, evidence, and parties' witnesses. However, the award containing this statement is circumscribed by the widely-accepted principle of international arbitration — finality of the arbitral award[1] — which restricts the competence of courts to review the arbitral award.

It is only in exceptional circumstances, such as non-compliance with the arbitration agreement, deprivation of the parties' right to be heard, incapacity of a party, or violation of public policy, among others,[2] that a party may raise a challenge before a national court to annul the arbitral award. In so doing, the courts cannot probe into the merits of the dispute, since substantive review of arbitral awards remains virtually absent in arbitration laws.[3] The rationale behind such absence was delineated in *Hall Street Associates L.L.C. v. Mattel Inc.*,[4] wherein it was held that expanding the scope of judicial review would be in dissonance with the tenet of finality; in

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[1] GARY B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 8 (2nd ed. Kluwer Law International 2012).

[2] Arbitration and Conciliation Act, 1996, § 34, No. 26, Acts of Parliament, 1996 (India); Arbitration Act 1996, § 67 and 68, Ch. 23 (UK).

[3] Hans Smit, *Contractual Modifications of the Arbitral Process*, 113(4) PENN STATE LAW REVIEW 995 (2009); Born, *supra* note 1.

[4] Hall Street Associates L.L.C. v. Mattel Inc., 552 U.S. 576 (2008).

turn, contravening the intent behind resorting to arbitration—for its features like confidentiality and neutrality.[5]

The absence of an appeal process leaves parties without recourse to challenge such errors. For instance, parties cannot appeal against errors made by the arbitral tribunal in calculating damages. The existence of an appellate arbitration mechanism could potentially rectify such errors upon request, as will be discussed below. For that purpose, in Part I, the commercial need of an appellate arbitration mechanism in international commercial arbitration is discussed, and thereafter, whether the appellate mechanism will be beneficial or not is elaborated upon in Part III.

Further, this article addresses the following concerns. *First*, visibly the New York Convention is the preeminent tool for the enforcement of arbitral awards, with 168 contracting parties, including the hubs of arbitration such as the United Kingdom, Singapore, and Paris, among others.[6] Thus, for an appellate arbitral award to be enforceable, it should interact with the Convention affirmatively. This question is addressed in Part IV. *Second*, the potential criticisms to the appellate mechanism *inter alia* the legitimacy discourse (achievement of high error correction in appeals), the threshold for review and the procedure for constituting the appellate tribunal are charted. With the criticisms and recommendations in Part V,

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[5] Born, *Supra* note 1; Carreteiro Mateus Aimoré, *Appellate Arbitral Rules in International Commercial Arbitration*, 33(2) J. INT'L ARB. 185 (2016).

[6] New York Arbitration Convention, *Contracting States*, NEW YORK CONVENTION https://www.newyorkconvention.org/countries.

an attempt is made to improve the overall efficacy of appellate arbitration, thereby leading us to conclude in Part VI.

II. THE COMMERCIAL REQUIREMENT FOR HAVING AN APPELLATE ARBITRATION MECHANISM

Commercially, i.e., in the interests of the parties, there are compelling arguments in favor of having a mechanism for substantive review of arbitral awards. To clarify, consider that in a complex arbitration, damages worth $24 million have been claimed by the Claimant against the Respondent. The arbitral tribunal granted damages worth $9.12 million (i.e., 38% of the claimed amount) to the Claimant. A brief perusal of the award however shows that the tribunal has committed an 'obvious error'[7] (herein, obvious error manifests (mis)application of the evidence or the law) in granting the damages.

Rather, there emanates two possibilities; *one*, either damages worth $16.8 million (i.e., 70% of the claimed amount) should have been awarded; or *two*, less or no damages should have been awarded. In such a case, the rights of the either party gets prejudiced. Strictly speaking, at present, neither of them has a remedy of appeal as the courts cannot embark on an assessment of the merits of the case. This is not a mere hypothetical situation. A similar situation arose in *Westerbeke Corp v. Daihatsu Motor Co Ltd.,* wherein the Second Circuit Court concluded that *"our standard of review*

[7] James M. Gaitis, *International and Domestic Arbitration Procedure: The Need for a Rule Providing a Limited Opportunity for Arbitral Reconsideration of Reasoned Awards*, 15(9) AM. REV. INT'L ARB. 25 (2004).

constrains us to affirm an arbitrator's judgment even if a court is convinced he committed serious error."[8]

What recourse do either party have in such a situation? The answer is to suffer the atrocities of a likely obvious/serious error committed by the arbitral tribunal. However, this should not be the ideal case, and it is at this juncture that an appellate arbitration mechanism becomes pertinent. An appellate arbitration mechanism provides the parties with an opportunity to conduct another arbitration proceeding in order to resolve the error if any. Both the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**") and the UNCITRAL Model Law on International Commercial Arbitration ("**Model Law**") do not recognise appellate arbitration procedure.[9] However, in the existing scholarship, the concept of arbitration appeal has been explored in numerous ways.

An attempt has been made to discern the pros and cons of this concept. For example, on the one hand, it has been put forth that arbitration appeals are "*costly and time-consuming two-tiered proceedings that begin with private procedures but give way to public do-overs*."[10] In this sequel, it has also been argued that having such a mechanism goes against the interests of

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[8] Westerbeke Corp. v. Daihatsu Motor Co. Ltd., 304 F3d 200 (7th Circ 2000).
[9] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, *entry into* force June 7, 1959, art. V; United Nations Commission on International Trade Law ('UNCITRAL') Model Law on International Commercial Arbitration (as Amended in 2006), June 21, 1985, art. 35(1).
[10] Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration's Finality through Functional Analysis*, 37 GA. L. REV. 123, 181-182 (2002).

neutrality, cost, duration, and finality of the award.[11] On the other hand, concerns have been raised for ensuring a *fair* resolution of dispute rather than a *final* resolution.[12] The indelible principle of party autonomy also vouches for appeals in arbitration.[13] Both the viewpoints are equally forceful.

The exigency to settle the debate is also evident from a recent survey,[14] where the arbitration community self-engaged in answering the issues on appellate arbitration.[15] The survey raised the following concerns broadly:

(i) Whether a right to appeal against an arbitral award is desirable;[16]

(ii) Whether the respondents would prefer an internal right of appeal offered by an arbitral institution to an appeal to a national court. If yes, what are the desired features of such an internal mechanism?[17]

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[11] JAN PAULSSON, THE IDEA OF ARBITRATION 291 (Oxford University Press 2013).
[12] Caroline Larson, *Substantive Fairness in International Commercial Arbitration: Achievable through an Arbitral Appeal Process*, 84(2) INT'L J. ARB. MED. D. MGMT. 104 (2018).
[13] GAILLARD E ET. AL., FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 726 (Kluwer Law International 1999).
[14] Bryan Cave Leighton Paisner, *A Right of Appeal in International Arbitration – A Second Bite of the Cherry: Sweet or Sour?*, ANNUAL ARBITRATION SURVEY (May 2020) https://www.bclplaw.com/images/content/1/8/v2/186066/BCLP-Annual-Arbitration-Survey-2020.pdf.
[15] *Id.*
[16] Paisner, *supra* note 14.
[17] *Id.*

The results of the survey are enthralling. About 50% of the respondents had, in their experience, encountered an 'obviously wrong' decision given by a tribunal. Notwithstanding the foregoing, 71% of the respondents claimed that they do not intent to pledge the tenet of the finality of arbitral awards with appellate arbitration mechanism. Not only this, but they also claimed that a decision to have appellate mechanisms will make arbitration a less favourable dispute resolution mechanism. Similarly, 62% stated that the arbitration process would become lengthy and 60% felt that it would make arbitration an expensive affair.

In contrast, 51% claimed that without an appellate process, an incorrect decision would cause serious deprivation to the parties. Several other revelations were made in this survey - for example, 88% of the respondents desire the appellate arbitration process, if developed, to be winded up within a period of 6 months.[18] Owing to the varied opinions in the arbitration community, it is now imperative to settle the debate.

III. THE PURPOSE OF AN APPELLATE ARBITRATION MECHANISM

Over time, several scholars have remarked on the advantages and disadvantages of the appellate arbitration mechanism. However, in my opinion, it is arduous to establish the same without having the mechanism in existence. Thus, to understand the purpose of an appellate arbitration

[18] *Id.*

mechanism from a more practical viewpoint, this article takes a cue from the existing mechanisms or the reforms that have been proposed.

A. POTENTIAL APPELLATE REVIEW MECHANISM REFORM IN INVESTOR-STATE DISPUTE SETTLEMENT

Since 2017, the UNCITRAL Working Group III commenced reforming the Investor-State Dispute Settlement ("**ISDS**").[19] They made two systematic reform proposals: (i) the creation of an appellate review mechanism; and (ii) the formation of a multilateral investment court.[20]

Before delving into the arguments for ISDS reform, a caveat is essential. Essentially, investment arbitration and international arbitration are two substantially different models. This is because international arbitration is transposed as a 'dispute resolution model,' while investment arbitration is a 'public value model.'[21] Nevertheless, like international arbitration, similar concerns pertaining to an ISDS appeal mechanism have been raised. For example, legitimacy concerns (cost, duration, lack of consistency, and others) and the need to ensure an efficacious investment arbitration procedure persists. Thus, it is imperative to juxtapose the benefits that could be achieved in investment arbitration *vis-à-vis* international arbitration.

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[19] Margie-Lys Jaime, *Could an Appellate Review Mechanism "Fix" the ISDS System?*, KLUWER ARBITRATION BLOG (Feb 2021) http://arbitrationblog.kluwerarbitration.com/2021/02/11/could-an-appellate-review-mechanism-fix-the-isds-system/.

[20] *Id.*

[21] Irene M. Ten Cate, *International Arbitration and the Ends of Appellate Review*, 44 INT'L LAW AND POLITICS 1109, 1114-1123 (2012).

i. Lack of Consistency and Uniformity

As commentators have noted, as the investment arbitral tribunals are not bound by the precedents, inconsistent decisions have been rendered.[22] In contrast to domestic court systems and other types of arbitration, investment arbitration grants tribunals greater leeway in their decision-making process, without the obligation to establish binding precedents that would serve as guiding principles for future cases. This heightened flexibility has the potential to result in varying understandings of legal principles and produce inconsistent outcomes in similar cases. An appeal mechanism could however provide for **consistency** in the decisions of the tribunals. Indeed, in commercial arbitration, the concept of 'binding' precedential value system does not apply as commercial disputes do not add to law-making.

However, as Kauffman-Kohler has observed, the concept of 'persuasive precedent' applies in commercial arbitrations.[23] Moreover, it has been suggested that a demarcation should be drawn between the decisions that entail a rule – which may be used in resolving future disputes – as opposed to a specific factual matrix dispute.[24] To demonstrate the implications of lack of consistency in international arbitration, reliance must

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[22] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, October 14, 1966, Art. 53(1).

[23] Gabrielle Kauffmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse*, 23(3) ARB INT'L 357, 374 (2007).

[24] Francois Perret, *Is there a Need for Consistency in International Commercial Arbitration?, in* PRECEDENT IN INTERNATIONAL ARBITRATION (Emmanuel Gaillard, Yas Banifatemi (eds.), Int'l Arb Inst 2008).

be placed on the façade of *Putrabali v. Rena*,[25] which is viewed as an autonomous decision with essentially no forum of justice in respect to the enforcement of an international arbitral award as an 'international decision of justice.'

In yet another illustration concerning the determination of the proper law of an arbitration agreement, the inconsistency is highlighted. The England and Wales Court of Appeal ("**EWCA**") in *Sulamérica v. Enesa* (2012) had concluded the three-stage test to determine the governing law of the Arbitration Agreement.[26] It enunciated that the courts or tribunals must inquire into (1) express choice-of-law, (2) implied choice-of-law, and (3) 'closest and most real connection' test.[27] This decision has been recognised by several jurisdictions including Singapore,[28] the hub of arbitration.[29]

However, in 2020, the EWCA itself in *Kabab-Ji v. Kout Food* increasingly focused on the first stage i.e., the express choice-of-law, wherein the Court embarked on assessing the implied intentions of the parties.[30] This clearly indicates the lack of consistency in international

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[25] Société PT Putrabali Adyamulia v. Société Rena Holding et Société Moguntia Est Epices 05-18.053 Cour de cassation 2007.
[26] Sulamérica Cia Nacional De Seguros S.A. and Ors. v. Enesa Engenharia, S.A. [2012] EWCA Civ 638.
[27] *Id.*
[28] BNA v. BNB, [2019] SGCA 84.
[29] Jane Croft, *Singapore takes top arbitration slot along with London for the first time*, FINANCIAL TIMES (May 6, 2021) https://www.ft.com/content/7942f589-8b73-4e51-aad9-7780e9fab2c0.
[30] Martin Kwan, *Kabab-Ji: Determining the Governing Law for the Arbitration Agreement Under English Law, The Emerging Focus on the Express Choice of the Parties,* KLUWER ARBITRATION

arbitration. Consequently, there is a lack of uniformity as well in international arbitration.[31] An appeal mechanism by conclusively reviewing the dispute could allow the arbitration regime to be more consistent and uniform.

ii. Accuracy

The second aspect of appeals in the ISDS is **accuracy**. Proponents have argued that in investment arbitration, an appeal procedure could succeed in eliminating error in the award.[32] Accuracy *alias* fairness is an essential tenet for international arbitration too.[33] Thus, to eliminate errors and to have an efficacious resolution of the dispute, an appeal mechanism is required.

Furthermore, from the ISDS experience, an issue that often remains a controversial point to debate upon is investor's bias. This is because of the limited pool of investors. In a similar vein, arbitrator's bias is a prevalent concept. For example, although there is strict scrutiny for appointing the party-nominated arbitrators, biasness has not been curtailed. Evidence of the debate on the subject matter of bias is the recent decision of the UK Supreme Court in *Halliburton v. Chubb*,[34] where it was held that

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BLOG, http://arbitrationblog.kluwerarbitration.com/2020/02/24/kabab-ji-determining-the-governing-law-for-the-arbitration-agreement-under-english-law-the-emerging-focus-on-the-express-choice-of-the-parties/.

[31] William H. Knull III & Noah D. Rubins, *Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option?,* 11 AM. REV. INT'L ARB. 531 (2000).

[32] *Id.,* at 531.

[33] Larson, *supra* note 12, at 106.

[34] Halliburton Company v. Chubb Bermuda Insurance Ltd., [2020] UKSC 48.

there exists a duty of disclosure for arbitrators in English law. To eliminate **biasness,** which transposes as a serious risk to the error in an award, and to swiftly pave the way for **efficiency** is the third objective behind the proposal of an appeal mechanism in investment arbitration.[35]

B. JURISDICTIONAL TOUR D'HORIZON

'Commercial expediency' and the intrinsic tenet of 'finality' over 'legal accuracy' has always remained a comprehensive issue of debate in the English arbitration regime. However, the legislation, while enacting the 1996 Act, intended that right to appeal should not be abolished, and instead, should be limited.[36] In this manner, a compromise could be established between party autonomy that confers parties the discretion to adopt a procedure that suits their needs and a need for adjudication on obvious errors.[37]

In consonance with the above-laid view, the English experience offers a limited review of the awards on a *question of law* pursuant to Section 69 of the Arbitration Act, 1996.[38] It is further imperative to recognise that the head of Section 69 is entitled as 'a right of appeal on a question of law';

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[35] Audley Sheppard & Hugo Warner, A*ppeals and Challenges to Investment Treaty Awards: Is it Time for an International Appellate System?*, TRANSNATIONAL DISPUTE MANAGEMENT 2 (2005).
[36] Rowan Platt, *The Appeal of Appeal Mechanisms in International Arbitration: Fairness Over Finality?,* 30(5) J. INT'L ARB. 531, 535 (2013).
[37] *Id.,* at 536.
[38] Arbitration Act 1996, § 69, Ch. 34 (UK).

however, a mixed question of fact and law, where investigation of fact is essential can be considered.[39]

In the author's opinion, while the cogency of the English framework is not established, it certainly aims to achieve a compromise between finality and accuracy by coining a new term of **relative finality**, which can be transposed as a tool for having 'realistic' finality by reducing the number of challenges for setting aside the award under the very limited grounds. Similarly, internal arbitral appeals, as a phenomenon of arbitration jurisprudence, is not an isolated concept in other jurisdictions as well. For instance, jurisdictions such as Austria, South Africa, and France provides for appellate arbitral review of the awards.[40] A further insight reveals that Spain, in its 2011 Spanish Arbitration Rules, provides for an internal appellate full review on merits of the case.[41]

C. THE OPTIONAL APPELLATE RULES

A cue, for this article, can be taken from the existing optional appellate rules. Indeed, the American Arbitration Association ("**AAA Rules**"), the Conflict Prevention and Resolution Appeal Procedure ("**CPR Procedure**"), the JAMS Arbitration Procedure ("**JAMS Procedure**"), and the European Court of Arbitration Rules ("**ECA Rules**") are based on the

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[39] Northwest Host Construction Ltd. v. Co-operative Wholesale Society Ltd., [1998] EWHC Tech 339.

[40] Erin E. Gleason, *International Arbitration Appeals: What Are We So Afraid Of?,* 7(2) PEPPERDINE DIS. RES. J. 269, 287 (2007).

[41] The Spanish Arbitration Rules, 2011, art. 39.4, 39.5, Act 60/2003 of 23 Dec. on Arbitration (2013) (Spain).

idea of providing a *"basic procedural framework with stand-alone procedural supplements, which the parties could adopt on an 'opt-in' basis."*[42]

CPR Procedure, *for example*, provides that without an appellate process, the arbitration, in itself, leads to additional costs for the reason that party, to avoid probabilities of error, tries to appoint a larger tribunal.[43] At the same time, it also provides that intervention of court uncertainties such as confidentiality, the autonomy of the parties, and unnecessary delays and costs make arbitration jurisprudence a paradox.

The author acknowledges that one of the primary concerns against the appellate procedure is duration and costs. However, interestingly, the optional appellate rules provide for a robust mechanism for ensuring integrity and efficiency. As will be discussed, the appellate arbitration rules serve two purposes: (i) **minimalistic pervasion of the court uncertainties**, and (ii) the **integrity** of the proceedings by ensuring timely adjudication of the appellate dispute.

D. THE CAS REGIME

Finally, it becomes exigent to appraise the archetype of **transparency** in the international dispute resolution jurisprudence through its *de novo* internal appellate procedure, i.e., the CAS regime. The CAS Appeal Division provides for a full review in case of an appeal on the point

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[42] William Park, *The value of rules and risks of discretion: arbitration's protean nature*, ARB. INT'L BUSINESS DISP. 528, 533 (2012).

[43] *International Institution for Conflict Prevention and Resolution,* RATIONALE (1999) https://www.cpradr.org/resource-center/rules/arbitration/appellate-arbitration-procedure.

of the law or the facts from the first instance decision.[44] The idiosyncratic feature of CAS is that it serves two purposes: (i) full review of a **procedural error** on point of the law or the facts, and (ii) prevents the **sanctity of the due process**, which would otherwise be violated due to the first instance decision.[45]

Considering the pattern set above, the author, in summary, appeals in favour of the appellate arbitration mechanism. The three main arguments advanced against arbitral appeals are (i) finality, (ii) the difference between litigation and arbitration where arbitration is considered as 'get it right' in the first instance, and (iii) the potential inefficiency of an appeal mechanism.[46]

Firstly, in high-stake disputes, a party may be dubious of the commission of an error by the tribunal. As we know, *"[c]ritics … express concerns about the quality of legal reasoning in arbitration, even though conventional wisdom … suggests that international arbitral awards reflect relatively robust reasoning that is often on a par with that of decisions rendered by commercial courts*."[47] It will be pertinent to draw an analogy to claim that if concerns can be raised for legal reasoning, the same can concern merits as well. At this juncture, it is only

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[44] The Code of Sports-related Arbitration, January 1, 2019, art. R57; Platt, *supra* note 36, at 556.

[45] *Id.*, at 556; Hoch v. Fédération Internationale de Ski & International Olympic Committee CAS 2008/A/1513 (2009).

[46] Noam Zamir & Peretz Segal, A*ppeal in International Arbitration – an efficient and affordable arbitral appeal mechanism*, 35(1) ARB. INT'L 79, 84 (2019).

[47] S.I. Strong, *Empirical Research on Legal Reasoning in Commercial Disputes – Then and Now*, KLUWER ARBITRATION BLOG, http://arbitrationblog.kluwerarbitration.com/2018/02/03/legal-reasoning-international-commercial-arbitration/.

relevant to demonstrate that in the CPR Survey, almost half of the respondents claimed that the arbitration without an appeal mechanism becomes too risky.[48] In such cases, it becomes indispensable to have an appeal mechanism in place. One may also consider the limited review of award for procedural fairness by almost all the jurisdictions.[49]

Secondly, arguably, the minimalistic intervention of litigation in international arbitration regime could form one of the most cogent reasons for devising an appellate mechanism. The consensual nature of international commercial arbitration would lose its essence if at a later stage, for the purposes of setting aside the award, the parties resort to the pool of uncertainties posed by litigation, such as lack of confidentiality, etc.

Thirdly, ardent critics of this mechanism may argue that the due process paranoia has a strong effect in international arbitration. The author believes that the sanctity of these principles would be preserved for two reasons. *One*, the concept of due process has been interpreted wrongly on the ground that increase in duration and cost would undermine the process. However, for example, international arbitrators often ameliorate proceedings by exercising their procedural discretion to sanction the unreasonable procedural requests of extension of the period of the parties, which, as a result, might lead to delays and costs.

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[48] Thomas Stipanowich, *Reflections on the State and Future of Commercial Arbitration: Challenges, Opportunities, Proposals*, 25 AM. REV. OF INT'L ARB 297 (2014).
[49] Larson, *supra* note 12, at 108.

A question which emanates here is whether the sanction would be in dissonance with the 'due process paranoia'. The answer herein lies in the negative since in order to conduct proactive arbitral proceedings, a possible due process violation challenge should be no ground to deny the essential procedural grants.[50] Instead, a 'requisite mix of fairness and firmness' needs to be utilised.[51] Analogously, an appeal mechanism would be a product of 'fairness and firmness' and not a threat of violation of the due process of law.

To conclude, the concept of 'efficiency' is certainly misinterpreted for incorporating only time and cost. In contrast, as per the iron triangle, efficiency is a fusion of time, cost, and quality.[52] Here, quality can be understood as an award free of errors and which is enforceable.

IV. INTERACTION OF THE APPELLATE ARBITRATION WITH THE NEW YORK CONVENTION

The last word, in the preceding section, is 'enforceable'. Most obviously, the aforementioned advantages would be of no use if the appellate arbitral award is unenforceable. While this issue has received

[50] Klaus Peter Berger & J. Ole Jensen, *Due Process paranoia and the procedural judgment rule: a safe harbor for procedural management decisions by international arbitrators*, 32(2) ARB. INT'L 415 (2016).
[51] *Id.*, at 435.
[52] Jennifer Kirby, *Efficiency in International Arbitration: Whose Duty is it?,* 32(6) J. INT'L ARB. 689, 690 (2015).

attention in investment arbitration,[53] it has paradoxically remained a niche area in commercial arbitration.

To answer that question, *firstly*, a determination of the current legal regime that governs the existing appeal mechanisms in the arbitration is imperative. Generally speaking, the enforcement of foreign awards is governed by the New York Convention (**"NYC"**) and the setting aside is governed by the national laws.[54] Having said that, the three existing appeal mechanisms are (i) appeals in national arbitration law, (ii) the optional appellate rules, or (iii) the internal appeal mechanisms.

i. **Appeals in national arbitration law:** Assuming that the appeal mechanism in international commercial arbitration is governed by the national arbitration law, the enforcement would be subject to NYC. Is this assumption tenable? For instance, in Britain, section 69 of the English Arbitration Act, 1996 allows an appeal on a question of law.[55] In Australia, as well, a limited right of appeal is available in its domestic arbitration law.[56] Generally, these awards are enforceable in

[53] Albert Jan Van den Berg, *Appeal Mechanism for ISDS Awards: Interaction with the New York and ICSID Conventions,* 34(1) ARB. INT'L 156 (2019).
[54] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, *entry into* force June 7, 1959, art. V(1)(e); Berg, *supra* note 53, at 168.
[55] The Arbitration Act 1996, § 69, Ch. 23 (UK).
[56] The Commercial Arbitration Act, 2010, § 34, No. 61 (Australia). *See also* Westport Insurance Corp. v. Gordian Runoff Ltd., (2011) H.C.A. 37 (Gordian).

their jurisdiction.[57] However, in other jurisdictions, finality is still supreme.[58] Will the award be enforceable?

ii. **Optional appellate rules:** The optional appellate rules recognize the issue of setting aside and enforcement of the arbitral award. For instance, the AAA Rules provided that once an award is rendered, the state laws would govern the setting aside of the award on the very limited grounds.[59] Similarly, the enforcement of the award can be made as per the states own set of laws, herein, the NYC.[60] However, will the award be enforceable rendered in consonance with the AAA Rules in the UK, which does not recognize it?

iii. **Internal appeal mechanisms:** As provided, the Spanish Arbitration Act provides for internal appeals.[61] The Act provides for enforcement of the award; however, it does not recognize the enforcement of the first-instance award. By contrast, the 2011 Arbitration Rules of Paris, which also recognizes provisional enforcement of the first instance award.[62] Then, will there be a provision for interim enforcement of the first instance award under the NYC?

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[57] *Id.*
[58] Kirby, *supra* note 52, at 127.
[59] Hamilton v. Navient Solutions LLC, (2019) U.S. Dist. Lexis 23312 (US).
[60] *Id.*
[61] The Spanish Arbitration Rules, 2011, art. 39.4, 39.5, Act 60/2003 of 23 Dec. on Arbitration (2013) (Spain).
[62] The Chambre Arbitrale de Paris Rules, 2011, art. 43-48.

Thus, taking the cue from the interaction of investment arbitration appellate mechanism with the NYC as provided by Professor Albert Berg,[63] the *third* purpose of this part is as follows:

A. ARBITRAL AWARD

As per the *lex arbitri*, i.e., the national law of the place of arbitration, the arbitrator's discretion to decide the content of the arbitral award varies.[64] Surprisingly, there is no straitjacket definition of an arbitral award. Typically, an arbitral award refers to the recording of the merits of the arbitration. Thus, at this point, it is imperative to distinguish between an arbitral award and an arbitration result. *For example*, in the *Centrotrade* decision, the court held that an appeal would lie from the 'arbitration result' given by the first-instance tribunal.[65] The second consideration is *finality* as provided in the UK's case of *K v. S*, where the court held that for the decision to be an arbitral award, the decision should be the final determination by the tribunal.[66] On the contrary, in cases of an arbitral appeal, it is obvious that the decision of the first-instance tribunal is not

[63] Berg, *Supra* note 53.
[64] BERNARDO M. CREMADES, *The Arbitral Award, in* THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION (Lawrence W. Newman, Richard D. Hill (eds.), Juris 2014).
[65] M/s Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd., 2020 SCC OnLine SC 479.
[66] K v. S, [2019] EWHC 2386 (UK).

final. Thus, in an appellate arbitration mechanism, one should be careful enough to demarcate between an arbitral award and a decision.[67]

B. PUBLIC POLICY

The NYC provides that *"[t]he recognition or enforcement of the award would be contrary to the public policy of that country*.".[68] A bare perusal of the provision reveals that public policy challenges are to be interpreted as per the public policy of the enforcing state. Interestingly, the idiosyncratic feature of the national laws of arbitration is that they interpret the threshold of public policy differently. However, such an interpretation has not acted as an impediment to enforcement for two reasons: *one*, domestic public policy is interpreted narrowly, and *two*, with respect to the foreign award, states have adopted a fusion of domestic and international public policy since the international public policy is looked through the state's standards.[69]

Would an appellate award fall under this challenge? An Indian example would be relevant here. India deciphered that vis-à-vis a two-tier mechanism, the public policy challenge would not stand.[70] This is for two

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[67] BERND EHLE, *Criteria Qualifying a Decision as an Arbitral Award*, *in* THE NEW YORK CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, COMMENTARY 34-5 (Reinmar Wolff (eds.), 2012).

[68] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, *entry into* force June 7, 1959, art. V(2)(b).

[69] Margaret Moses, *Public Policy: National, International and Transnational*, KLUWER ARBITRATION BLOG, https://arbitrationblog.kluwerarbitration.com/2018/11/12/public-policy-national-international-and-transnational/.

[70] M/s Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd., 2020 SCC OnLine SC 479.

reasons: *one*, respect to party autonomy,[71] *two*, it is a narrow concept concerned with 'fundamental notions of a particular legal system', i.e., morality, justice, etc.[72] While it is appreciated reasoning, *alternatively*, an attempt should be made to include it in future models, or the parties should choose the jurisdictions for appellate arbitration wisely.

C. BINDING AWARD

Would enforcement of the first-instance award while appeal pending be enforceable? Article V(1)(e) of the NYC provides that the enforcement of an award may be refused if "*the award has not become binding on the parties*."[73] Professor Albert provides for two interpretations of the term: one, an autonomous interpretation where leave is required by the courts for enforcement as per the agreement, and pending appeal, such request would not be granted; and *two*, in failure to reach an agreement, the award would become binding only if there is no appeal on merits.[74]

In an Ontario's Court decision of *Popack v. Lipszyc*, where a new claim was brought for a reduction in the award, the court noted that as soon as the award is pronounced, it becomes binding on the parties.[75] However, the court based this decision on the fact that the arbitration agreement did

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[71] *Id.*
[72] RICHARD KREINDLER, *Standards of Procedural International Public Policy*, *in* INTERNATIONAL ARBITRATION AND PUBLIC POLICY (Devin Bray, Heather L. Bray (eds.), Juris 2014).
[73] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, *entry into* force June 7, 1959, art. V(1)(e).
[74] Berg, *Supra* note 53, at 184.
[75] Popack v. Lipszyc, (2018) ONCA 635 (Ontario).

not permit any appeal or review.[76] An English decision also evidences that a 'final, binding and conclusive award is not necessarily immune from challenge'.[77] Thus, for placing procedural safeguards in international commercial arbitration, these two interpretations are of relevance. In other words, provisional enforcement of the first-instance award would not be tenable.

D. WAIVER OF THE GROUNDS UNDER THE NYC

Can the party's contract to waive the grounds of enforcement under the NYC for the appellate award? Surprisingly, this issue has received less attention. We know that Article V of the NYC is demarcated in a two-fold manner: (i) the five procedural grounds which 'may be refused at the request of the party against whom it is invoked', and (ii) the defences of non-arbitrability and public policy, for which no reference is made in terms of if a party may refuse the grounds.[78] In light of this, it can be construed that the parties can contract for a waiver of the five grounds under the garb of party autonomy but not the fundamental notions of public policy and non-arbitrability.[79] Thus, it is textually possible for the parties to waive the defences for the five procedural grounds and not the mandatory rules.

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[76] *Id.*
[77] Shell Egypt West Manzala GmbH and Shell Egypt West Qantara GmbH v. Dana Gas Egypt Limited (formerly Centurion Petroleum Corporation), [2009] EWHC 2097 (UK).
[78] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, *entry into* force June 7, 1959, art. V.
[79] Albert Jan van den Berg, *Enforcement of Annulled Awards?*, 9(2) ICC INT'L CT. ARB. BULL. 15 (1998).

Here, it is imperative to analyse the wordings 'right to any form of appeal, review or recourse' as provided by the London Court of International Arbitration Rules ("**LCIA Rules**"), among others. However, as has been argued, the same is wrongly worded. To corroborate, one may take the cue from the International Chambers of Commerce Rules ("**ICC Rules**") which provides that generally, the parties would be deemed to have waived their right in case the parties agree otherwise.[80] In summary, the author submits that an amelioration of the mechanism in interaction with NYC is imperative because although it would not act as an impediment to enforcement, it is complex and multifaceted.

V. THE CRITICISMS AND IMPROVEMENTS

For achieving the advantages and abiding by the purpose of the mechanism charted in Part II, it is clear that detailed scrutiny of the criticisms is indispensable too. Thus, this part aims to offer a comprehensive viewpoint on the criticisms and how to tackle them.

A. THE THRESHOLD FOR REVIEW

Paradoxically, the threshold for review of the arbitral awards has remained a matter of concern. The existing regime has adopted different thresholds for review. The existing thresholds for appellate review of arbitral awards, which vary across (i) national arbitration laws, (ii)

[80] The International Chambers of Commerce Arbitration Rules, March 1, 2017, art. 34(6).

institutional rules, (iii) optional appellate mechanisms, and (iv) the CAS rules are as follows:

i. **Appeals in the national arbitration laws**: The English Arbitration Act, 1966 under Section 69 and 70 provides for a review on the questions of law.[81] In a similar vein, the Commercial Arbitration Act (Australia), 2017 also provides for a review on the questions of law.[82] What is intriguing here is the threshold adopted for granting the leave for appeals. This includes public interest, obvious errors, substantial prejudice to the rights, and the criteria of just and proper determination of the question.[83]

ii. **Institutional appellate review:** The Spanish Arbitration Act provides for a full review on the merits.[84] In case the appreciation of evidence is necessary, it encapsulates that as well.[85] The same is the situation for the Paris provision of appeal.[86]

iii. **Optional appellate rules:** The AAA Rules and the CPR Procedure provide for a review on both the law and the facts;

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[81] The Arbitration Act, 1996, § 69, Ch. 23 (UK).
[82] The Commercial Arbitration Act, 2010, § 34, No. 61 (Australia).
[83] *Id.*
[84] The Spanish Arbitration Rules, 2011, art. 39.4, 39.5, Act 60/2003 of Arbitration (2013) (Spain).
[85] *Id.*
[86] Rowan, *supra* note 36.

however, the error should be material and prejudicial.[87] In contrast, the ECA Rules offer a full review of the award on the facts, the merits, and the admissibility, and the JAMS Procedure provides a review based on the standards applied in a trial court decision, i.e., litigation.[88]

iv. **The CAS rules:** In this, the archetype of transparency, the CAS provides for a full review of the law and the facts.[89]

As can be seen from the above-mentioned existing thresholds, the threshold for reviewing the underlying award has high deference. If this is the case, then what difference lies between the deference provided by judicial appeals or arbitration appeals? As Carreterio advances, the judicial appeal transposes as the 'legitimacy of the process' while the appellate arbitration mechanism considers both the 'substantive correctness' and 'legitimacy of the process'.[90] With this reasoning, one may also consider the general purpose of appeals in arbitration: *one*, having a mechanism contrary to the limited review of awards; and *two*, error correction for fairness.[91]

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[87] American Arbitration Association Appellate Rules, November 1, 2013, rule A-10; Conflict Prevention and Resolution Appeal Procedure, rule 8.2.

[88] European Court of Arbitration Rules, rule 28.4; JAMS Comprehensive Arbitration Rules and Procedures, June 2021, rule (D).

[89] The Code on Sports-related Arbitration, January 1, 2019, art. R57.

[90] Carreteiro, *supra* note 6, at 206, citing SCHREUER-MALINTPPI-REINISCH-SINCLAIR, THE ICSID CONVENTION: A COMMENTARY (2009) 890.

[91] Ajay Raj, *Appellate Arbitration Mechanism in India: An (Un)baked Reform, Arbitration and Corporate Law Review,* ARBITRATION AND CORPORATE LAW REVIEW, https://www.arbitrationcorporatelawreview.com/post/appellate-arbitration-mechanism-in-india-an-un-baked-reform.

So, what should be the threshold of admitting the appeal for error correction? An error may be of law, facts, apparent errors, ministerial errors, or contingent errors.[92] However, considering these would infringe the efficiency and increase the employment of dilatory tactics in the mechanism. Moreover, the high deference in case of appellate arbitration should not be misconstrued with the limited grounds of court review.[93] The UK and Australia regime also provide that the obvious error should cause *substantial* prejudice to the party.[94] Therefore, even if there is an obvious error, but the same is of minuscule amount, no challenge should lie.

An improvement in light of the above arguments, therefore, could be an adoption of a fusion of the AAA Rules/CPR Procedure with the UK/Australian regime. With this, two purposes will be served: *one*, a full review on the merits such as in ECA could lead to a completely different award due to rehearing and application of different standards. This goes against the objective of achieving efficiency and not complexity. *Two*, there would be no intervention of judicial standards as in the case of JAMS Procedure.

B. CONSTITUTION OF THE TRIBUNAL

The rules for the constitution of the tribunal have been provided in the existing scholarship. For instance, the ECA Rules provide that the

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[92] Cecilia M. Di Ciy, *Dealing with Mistakes Contained in Arbitral Awards*, 12(1) AMERICAN REV. OF INT'L ARB. (2002).
[93] Carreteiro, *supra* note 6, at 206; Gleason, *supra* note 39.
[94] The Arbitration Act, 1996, § 69, Ch. 23 (UK); The Commercial Arbitration Act, 2010, § 34, No. 61 (Australia).

members of the first-instance tribunal should not adjudicate as there will be a threat to impartiality and independence of the arbitrators.[95] It has also been provided that the appointment should be of an experienced and impartial tribunal for error correction and for this reason, the tribunal should not be constituted by parties.[96] However, the threshold for challenges to an arbitrator in appeals is not discussed.

It is the author's argument that the standard of assessing the impartiality should be on the understanding of the World Trade Organisation's ("**WTO**") dispute settlement and not on the threshold of justifiable doubts as provided by the IBA Guidelines on Conflict of Interest.[97] This is because the inclusion of justifiable doubts standard in the appellate mechanism could potentially 'exclude capable and highly-qualified arbitrators from an already small pool of experts.'[98] On the contrary, the threshold provided by Article 17 of the WTO's Dispute Settlement Understanding ("**DSU**") should be applied in appellate commercial arbitration.[99] The DSU aims to 'eliminate conflict of interest and ensure that

[95] The European Court of Arbitration Rules, rule 28.5.
[96] Carreteiro, *supra* note 6, at 204.
[97] The London Court of International Arbitration Rules, October 1, 2024, art. 5.4; The IBA Guidelines on Conflict of Interest in International Arbitration, October 23, 2014, part II.
[98] Joshi, *The Threshold for Challenges in ICSID Arbitration: Interpreting the 'Manifest Lack' Standard,* KLUWER ARBITRATION BLOG, http://arbitrationblog.kluwerarbitration.com/2020/05/07/the-threshold-for-challenges-in-icsid-arbitration-interpreting-the-manifest-lack-standard/.
[99] Understanding on Rules and Procedures Governing the Settlement of the Disputes, WTO Agreement, January 1, 1995, art. 17.

highly qualified individuals with requisite experience are appointed.[100] In other words, the challenges should be based on evidence and not on the objective standard applied by international commercial arbitration.

C. CORRECTION OF ERROR AS A POLICY EXERCISE AND LEGAL REASONING

Caroline has noticed 'error correction as a systematic, policy-based exercise' by the appellate courts, and juxtaposes it with the arbitration.[101] In doing so, it is provided that arbitration is not bound by systematic constraints, and resultantly, arbitrators, using their discretion, their level of understanding, and their expertise or legal background, decide the error which needs correction.[102] However, with this, achieving the high error correction objectives remain a dark concept because, in the lack of a definitive rule, appellate review result would be a product of the speculations made by the tribunal,[103] and may or may not result in substantive fairness.

Further, as had been previously argued, due to the discretionary application of conventional wisdom, the reasoning provided in an award is sometimes not in coherence with the objectives of fairness. In this case, it becomes difficult to identify if the case contains an obvious error. Precisely because arbitral tribunals are mandated to include findings and conclusion in the award, and this underlying reasoning may, at times, render an

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[100] Riddhi, *supra* note 98.
[101] Caroline, *supra* note 12, at 118.
[102] *Id.*, at 118-122.
[103] Irene, *supra* note 22, at 1138.

incorrect or unconvincing decision.[104] Thus, a straitjacket formula to decide wrongly decided cases should be incorporated into the model. *Prima facie*, a decision can be based on the UK and the Australian regime depicted in this article, which clarifies the threshold for obtaining the leave of the court for appeal: (i) substantial injustice, (ii) just and proper to determine the question, (iii) issue that was earlier not determined, among others.

In achieving the same objective, a duty also lies on the arbitrators of the second-instance tribunal to base their decisions on sound principles and reasoning. Without this, the parties would be still in a conundrum regarding the legitimacy and error correction. Not only this, but an application can be also filed for the remission of the second-instance tribunal award (which is the now the arbitral award) on the ground of inadequate reasons.[105] For this, I consider three options which are alternatives to each other, preferable:

First, on a logical conclusion, the parties resorting to the appellate mechanism are convinced that there would be no error in the second-instance tribunal award. Thus, in a similar line, the new model should incorporate a statement, for example, in case an application for the remission of the award is filed on inadequate reasons, it would be rejected outrightly except in cases where substantial prejudice appears. Professor

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[104] Stephen Hochman, *Judicial Review to Correct Arbitral Error – An Option to Consider* 13(1) OHIO STATE JOURNAL ON DISPUTE RESOLUTION 106 (1997).

[105] *See* Jordan Tan & Andrew Foo, *Challenging Arbitral Awards before the Singapore Courts for a Tribunal's Failure to Give Reasons (Part 2 of 2)*, KLUWER ARBITRATION BLOG, http://arbitrationblog.kluwerarbitration.com/2018/03/14/challenging-arbitral-awards-singapore-courts-tribunals-failure-give-reasons-part-2-2/.

Albert has also noticed that in case of an annulment action 'two rounds of dispute settlement would seem to suffice.'[106] Therefore, to not allow dilatory tactics of the parties, the award of an appellate body should not be challengeable in any manner.

Second, a 'one-size-fits-all' standard for the requisite reasoning conception can be devised. This practice has been adopted by the courts of New Zealand.[107] Thus, a standard of requisite bases on which the decision has been given should be explicitly laid down to leave no room for confusion. This would ultimately prevent the dilatory tactics of the losing party.

D. INSTITUTIONAL REVIEW

Carreterio argues that there is a potential of the interaction of two contradictory institutional rules. For this, an argument is advanced in light of the contradiction of ICC's institutional scrutiny of the award and the appellate award by AAA.[108] On similar lines, a potential contradiction may arise in cases where the first-instance award is conducted by, for example, Singapore Arbitration Law, and the second-instance award by the LCIA Rules. Now, although the domestic policy is interpreted narrowly, a peculiar possibility for contradiction lies between the two.

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[106] Albert, *supra* note 52.
[107] Jordan Tan & Andrew Foo, *Challenging Arbitral Awards before the Singapore Courts for a Tribunal's Failure to Give Reasons (Part 1 of 2)*, KLUWER ARBITRATION BLOG, http://arbitrationblog.kluwerarbitration.com/2018/03/12/challenging-arbitral-awards-singapore-courts-tribunals-failure-give-reasons-part-1-2/.
[108] Carreteiro, *supra* note 6, at 209.

As a result, what would have been enforceable in the first instance after correction as per the Singapore Law itself would not be subject to challenge in Singapore due to the standards applied in light of the LCIA Rules.[109] For improving this quagmire, one may place reliance on the institutional review of the awards, through which the same rules would apply in both the instances.[110]

E. VIRTUAL HEARINGS

At the outset, it has been proposed that skype or conference call should be used for appellate arbitration which will save travel costs.[111] The author concurs this proposal. The said proposition also finds approval in the ICC Rules which provides for video or telephonic hearings.[112] Resultantly, a balance could be created between duration and costs.

F. TIME-LIMITS

Factually, the existing appellate arbitration regime provides for an efficacious framework for striking a balance between expeditious adjudication in appeals and the intrinsic tenets of arbitration so as to preserve its sanctity. The concerns over time-limits are three-fold: (i) time limit to file an appeal and cross-appeal; (ii) completion of the appellate process; and (iii) the time limit for drafting the award.

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[109] Raj, *supra* note 91.
[110] Rowan, *supra* note 36, at 548-552.
[111] Zamir, *supra* note 46, at 91.
[112] The International Chambers of Commerce Arbitration Rules, January 1, 2012, appendix IV.

For the *first* consideration, a robust strategic framework is offered by the JAMS, AAA, and the CPR Procedure. For instance, the AAA Rules and the CPR Procedure contemplates the time limit of 30 days to file an appeal from the first instance award, and the JAMS Procedure sets the time limit of 14 days.[113] In line with Article 34 of the Model Law, the said period should commence from the date the party had received the underlying award.[114] Similarly, a cross-appeal mechanism is provided by the optional appellate rules which provide that in case the appellee finds that the losing party is employing dilatory tactics by filing an appeal, a cross-appeal may be filed within seven days after the commencement of appellate arbitration.[115]

For the *second* consideration, again, the optional appellate rules provide an efficient mechanism. A cue can therefore be taken from them. For instance, the AAA Rules provide for a time limit of three months to complete the process, the JAMS Procedure as 21 days, while the ECA Rules contemplates a period of six months and in case appraisal of evidence is imperative, the time limit is nine months.[116]

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[113] American Arbitration Association Rules 2013, *opened for signature* October 1, 2013, rule A-3(a)(i); JAMS Comprehensive Arbitration Rules and Procedures, June 2021, rule (b)(i); Conflict Prevention and Resolution Procedure, 2007, November 1, 2007, rule 2.

[114] The UNCITRAL Model Law on International Commercial Arbitration, June 21, 1985, art. 34.

[115] American Arbitration Association Rules 2013, *opened for signature* October 1, 2013, rule A-3(c); JAMS Comprehensive Arbitration Rules and Procedures, June 2021, rule B(ii); Conflict Prevention and Resolution Procedure, 2007, November 1, 2007, rule 2.2.

[116] American Arbitration Association Rules 2013, *opened for signature* October 1, 2013, introduction; JAMS Comprehensive Arbitration Rules and Procedures, June 2021, 2003, introduction; European Court of Arbitration Rules, rule 28.7.

Finally, for the *third* consideration, the time limit for drafting the award should be restricted for a particular period of time. A cue can be taken from the ICC's institutional scrutiny time limit for reduction of arbitrator's salary after the period is over.[117] Compliance with these strict deadlines would ensure a compromise between the tenet of expeditious adjudication and the aim to achieve error correction akin fairness.

VI. CONCLUSION

It has been twenty years when the concept of appellate arbitration first appeared.[118] Regrettably, the fruits of fairness, the objective of attractiveness, and ensuring minimalistic intervention of the courts, among others, have not been achieved yet. Part III of the article, through an illustrative trajectory, assess the possible objectives that the appellate mechanism could achieve. The cogency of these objectives has been established through the existing regime of appeals in other arbitration and national court forums. However, nothing comes without paying a high price. Throughout the article, a demarcation has been made between finality and the advantages of the appellate arbitration mechanism.

Nevertheless, it is also imperative to not completely rule out that finality concerns have a cogent stand in the enforcement of the award. For this reason, the article attempts to anatomize whether the existing appellate

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[117] ICC, Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration, 2016, ¶¶ 92, 94.

[118] Rowan, *supra* note 36, at 540, citing G. Hartwell, *Settling Disputes on a Shrinking Planet*, 7 GENEVA GLOBAL ARB. FORUM (1998).

arbitration mechanism, which may take the form of a model in future interactions with NYC. Through this engagement, it is clear that ideally no prejudice would be caused to the enforcement of a second-instance arbitral award despite the fact that their interaction is complex or rather multifaceted.

Subsequently, the article in part V attempts to devise a robust framework for striking off the 'one-kick-at-the-can' character of international arbitration with relatively no review of the awards except the limited review before the national courts. While in the existing scholarship, a few of the criticisms have been targeted, this article draws an analogy with the *legitimacy* discourse and an *operative* discourse of the appellate arbitral awards. For instance, the threshold for hearing the challenges of impartiality in appellate arbitration, a case for virtual hearing in light of the contemporary standards, the dilapidated concept of policy-based exercise, and time-limits, etc.

It is important to note, as has been demonstrated, that the objectives of achieving high error correction and fairness might face technical challenges in the future. However, the concept of appellate arbitration in practice is not an established concept, and for this reason, it is not possible to rule out these minuscule requirements in long run at this juncture. In summary, this article has not sought to assess the appellate arbitration mechanism from a case *for* appellate arbitration, but rather, to demonstrate how the appellate arbitration mechanism would in practice achieve the fictional objectives through the existing regime of appeals. A

final point. The spirit of arbitration should be preserved if the parties agree on having appeals in arbitration

Rakshit Agarwal, *Addressing Ableism: The Abortion of a Differently-Abled Foetus,* 9(2) NLUJ L. Rev. 115 (2023).

ADDRESSING ABLEISM: THE ABORTION OF A DIFFERENTLY-ABLED FOETUS

~*Rakshit Agarwal*[*]

ABSTRACT

The right to abortion is sacrosanct to a woman's bodily autonomy, reproductive autonomy, and privacy. While the Supreme Court of India has been proactive in granting women, irrespective of marital status, the right to abortion, there have been shortcomings on the part of the three branches of government in addressing the inherent ableism propagated in society in considering the abortion of a differently-abled foetus permissible. At the outset, this paper clarifies that it does not advocate for a pro-life approach. It merely recognises the need to eliminate a social wrong while retaining the pro-choice framework that has been laid down in India. This article addresses this issue by highlighting that disabilities are a social construct, and the continuance of such abortions propagates the ableism inherent in society. It also examines whether restricting such abortions from taking place would stand the well-established test of proportionality laid down by the Supreme Court. In conclusion, it lays down a framework that balances the rights of a woman and the benefit received from the larger social goal of substantive equality.

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I. INTRODUCTION

Although the right to abortion has been constitutionally recognised in the judgment of *Suchita Srivastava v. Chandigarh Administration*,[1] it is prudent to note that it is not absolute. As held in *Z v. State of Bihar*,[2] the state has a compelling interest in protecting the life of the unborn foetus. In furtherance of this interest and the state's desire to eradicate stigma against groups that have been subject to discrimination, both foreign,[3] and Indian legislatures have denied sex-selective abortions,[4] and race-selective abortions,[5] as they propagate a social wrong.

However, abortions on the grounds of differential abilities ("**DA**") have been normalized by society.[6] While it has been banned in a few states in the United States[7] and in countries such as Poland,[8] the practice of aborting a foetus with DA has gained wide legal acceptance in the world. As a matter of fact, the very term "*disabled foetus*" is a misnomer and

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[1]Suchita Srivastava v. Chandigarh Administration, (2009) 9 SCC 1.
[2]Z v. State of Bihar, (2018) 11 SCC 572.
[3]Emma Green, *Should Women Be Able to Abort a Foetus Just Because It's Female,* The Atlantic,(May 16, 2016), https://www.theatlantic.com/politics/archive/2016/05/should-women-be-able-to-abort-a-fetus-just-because-its-female-contd/623996/.
[4]The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994, § 5(2), No. 57, Acts of Parliament, 1994 (India).
[5]Emma Green, *supra* note 3.
[6]Sally Sheldon and Stephen Wilkinson, *Termination of Pregnancy for reason of foetal disability: Are there grounds for a special exception in Law?*, 9 MED LAW REV. 85-86, 85-109 (2001).
[7] Tori Gooder, *Selective Abortion Bans: The Birth of a New State Compelling Interest*, 87 UNIV CINCINNATI LAW REV 545 (2018).
[8]Amnesty International, *Poland: Regression on abortion access harms women*, (Jan. 26, 2022), https://www.amnesty.org/en/latest/news/2022/01/poland-regression-on-abortion-access-harms-women.

highlights the stigma associated with differential abilities. This is because the presence of DA or deviations from the socially-accepted normal are considered as "*disabilities*". There is little to no analysis or thought on the manner in which such stigma contributes to the further stigmatization of the community. Drawing from the ban on the abortion of differently-abled foetuses such as in the United States, this article examines the legality of the grounds for abortion prevalent under the Medical Termination of Pregnancy Act 1971 ("**MTP Act**") that allows for the same. The ultimate goal is to determine whether a ban on the abortion of a differently-abled foetus will be constitutionally permissible in India.

This paper will be divided into two sections. The first section will analyse the current position of the law on this issue in India before delving into a comparative analysis of different foreign jurisdictions on this issue. The second section will then test the constitutionality of prohibiting the abortion of a differentially-abled foetus through the proportionality test. It will argue that amending the act to restrict abortions carried out on the sole ground of the DA will stand constitutional scrutiny.

II. DIFFERENTIAL ABILITIES AS A GROUND FOR ABORTION

Before this paper begins the discussion on DA as a ground for abortions, it would like to highlight that the right to abortion in India is not absolute. It is allowed only when there are severe foetal anomalies or the

mother's life is at risk.[9] Further, the MTPA Act carves out exceptions where abortions may be allowed where there has been a contraceptive failure or pregnancy due to rape, thus ensuring that the mental health of the mother can be conserved.[10] It is thus concluded that abortions are the exception to the general rule in India. This conclusion can be similarly reached, considering that abortion is an offence under Section 312 of the Indian Penal Code 1860 even today, despite the fact that the MTP Act exists as a legislation recognizing and regulating abortions. Despite the introduction of a new amendment to the MTP Act that furthers the reproductive autonomy of a woman by extending the time limit for abortion from 20 to 24 weeks, the law on DA as a ground for abortion remains unchanged. It allows abortions to be carried out if "*there is a substantial risk that if the child were born, it would suffer from any serious physical or mental abnormalities as to be seriously handicapped*".[11] The issue in this regard, however, is what constitutes a serious foetal anomaly.

While debating the amendment to the MTP Act in Parliament, the members were generally of the opinion that the extended time limit for aborting the foetus would serve a useful purpose in helping to detect foetal anomalies.[12] However, members such as Dr Rajashree Mallick, a member of the Lok Sabha from the state of Odisha, opined that the extension of

[9] Medical Termination of Pregnancy Act, 1971, § 3(2)(b), No. 34, Acts of Parliament, 1971 (India).
[10] *Id.*
[11] *Id.* at §3, §3(2)(b)(ii).
[12] *Lok Sabha Debates* (Seventeenth Series, Vol VIII, 17 March 2020).

the time for aborting the foetus will enable doctors to detect whether the foetus is suffering from "*Down Syndrome, congenital malformation or any other abnormalities*".[13] This highlights the intent of certain members to give the foetal anomalies clause a broad interpretation, including a large number of DA's within its ambit. The Supreme Court, however, has denied abortions pleaded for on the grounds such as Down Syndrome. In *Savita Sachin Patil*,[14] the Supreme Court forbade an abortion from taking place in the 26th week of pregnancy when a plea for the same was raised, even though the foetus was likely to have mental or physical challenges.[15] Considering that there was no risk to the mother's life and that the challenges to the foetus were not poised to be serious, the Court found no merit in permitting the abortion.

In the case of *Sheetal Shankar Salvi v. Union of India*,[16] the unborn foetus was poised to have "*severe physical anomalies*" at birth due to a cardiac anomaly he was suffering from. Although the baby would have to undergo either some surgeries before turning one year old and subsequent surgery after that, abortion was not granted in the 27th week of pregnancy. This was also because the pregnancy did not cause grave physical or mental injury to the mother in question. Furthermore, considering that the baby was likely to survive for a considerable time, the Court denied the abortion.[17]

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[13]*Id.* at 306.
[14]Savita Sachin Patil v Union of India, (2017) 13 SCC 436.
[15]*Id.* at 7.
[16]Sheetal Shankar Salvi v Union of India,(2018) 11 SCC 606.
[17]*Id.* at 6.

While the approach of the Court may be termed an attack on a woman's reproductive autonomy, this paper believes that denying abortions carried out solely for the child's DA will stand constitutional scrutiny.

The aforementioned cases highlight that the Supreme Court has generally looked at something more than a foetal anomaly when granting abortions. It has looked at related factors, such as the health of the mother. While the Indian courts may have adopted a restrictive approach to defining "*severe foetal anomalies*", the position of the law in foreign jurisdictions is not uniform. The principle governing law in England, namely the Abortion Act 1967, provides for abortion in this regard in the same manner as in India.[18] However, English law has given substantial foetal anomalies a wide and liberal interpretation when compared to India. Pre-natal tests showing that the foetus has Down Syndrome give a woman an opportunity to carry out an abortion in almost all cases.[19] Similarly, if a foetus is detected to have haemophilia, the mother can abort the child. Thus, English law permits abortions of those foetuses whose condition is perfectly compatible with a fruitful and complete life.[20]

Similarly, South African law provides for such abortions in its principal governing law, the Choice on Termination of Pregnancy Act 1996.[21] It similarly allows for abortions as in India. German law goes one step ahead of the other laws in presuming that DAs create a state of mental

[18] The Abortion Act 1967, c.87 §1(1)(d) (Eng.).
[19] Sally Sheldon, *supra* note 6 at 95.
[20] *Id.* at 95-96.
[21] Choice of Termination of Pregnancy Act 92 of 1996 § 2(1)(b)(ii) (S. Afr.).

anguish and agony for the mother, which is sufficient to constitute a ground for abortion.[22] Countries including Ireland however, allow abortions of a differently-abled foetus to take place where it is likely to die *in utero* or twenty-eight days after being born.[23] Such a qualified ground ensures that the mother does not have to suffer from the postpartum separation, which will be grave to her mental and physical health.[24] The suitability of such a condition will also be demonstrated in the next section of the paper.

On the contrary, countries including Poland and certain states in the United States have a blanket ban in place on such abortions.[25]In Poland, the Constitutional Tribunal declared the relevant provision that allowed for abortions on the grounds of DA unconstitutional. The Court reasoned that outlawing such a provision would protect differently-abled babies from the disruptive use of eugenics.[26] It held that the provision correlated the child's state of health with its ability to live, thereby constituting direct discrimination.[27]

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[22] Mary Ann Case, *Abortion, the Disabilities of Pregnancy, and the Dignity of Risk,* UNIVERSITY OF CHICAGO LAW SCHOOL, (2019), https://chicagounbound.uchicago.edu/public_law_and_legal_theory/797/#:~:text=German%20law%20presumes%20women%20carrying,effect%20on%20their%20mental%20health.

[23] Health (Regulation of Termination of Pregnancy) Act, 2018, §11(1), No. 31 of 2018 (India).

[24] Shashi Rai et al., '*Postpartum Psychiatric Disorders: Early Diagnosis and Management*', 57 Indian Journal of Psychiatry, 216 – 221 (2015).

[25] Amnesty International, *supra* note 8.

[26] The Life Institute, *Abortions in Poland drop 90% after disability abortions outlawed,* THE LIFE INSTITUTE, (Aug 25, 2022), https://thelifeinstitute.net/news/2022/abortions-in-poland-drop-90-after-disability-abortions-outlawed.

[27] *Id.*

This paper asserts that, *firstly,* the Irish law on this aspect should be adopted in the Indian context. This is because if a woman is denied the opportunity to abort a child that is likely to die *in utero* or immediately after its birth, the postpartum separation will be grave enough to cause her severe mental agony to her.[28] Thus, it should be a ground for abortion. This has been the interpretation of the Supreme Court in cases such as *Tapasya Umesh Pisal v Union of India*,[29] where the Court allowed the petitioner to abort the foetus because its congenital malformations were likely to cause its death a short while after being born.[30] In a similar case where a child suffering from cardiac disorders was supposed to undergo several surgeries after birth,[31] the Court observed that the risk of mortality was imminent in these surgeries. It thus permitted the abortions.[32] This paper believes that taking such a position balances the rights of the mother with the ultimate purpose it strives to achieve, the latter of which will be explained in the next section.

Secondly, beyond this exception, abortions carried out on the sole ground of the child's DA must be prohibited. It is prudent to note that this paper does not advocate for a blanket ban on abortions for DA in the fashion done by Poland. As argued above, there may be certain instances where aborting a differently-abled foetus should be permitted. Although the prohibition of abortions on the ground of DA is a normative

[28] Shashi Rai, *supra* note 24.
[29] Tapasya Umesh Pisal v. Union of India, (2018) 12 SCC 57.
[30] *Id.* at 8-9.
[31] Sarmishtha Chakrabortty v. Union of India, (2018) 13 SCC 339, ¶5.
[32] *Id.* at 13.

proposition that this paper puts forth, it goes a step further in establishing the constitutionality of doing so. The balance shown between the measure under consideration and the reproductive autonomy of the mother will be shown through the test of proportionality in the next section.

III. THE TEST OF PROPORTIONALITY

Having highlighted the legal position surrounding the abortion of a foetus with DA, this paper will use the test of proportionality to show that restricting abortions on the sole ground of DA will be constitutional.

The doctrine of proportionality has been adopted by Indian courts to examine whether a measure that infringes on an individual's constitutional rights is proportionate to the aim sought to be achieved by the measure in question. The four-pronged structured test was first adopted in the case of *Modern Dental College*[33] and has now been adopted in subsequent cases such as *Justice K.S. Puttaswamy v. Union of India*[34] and *Anuradha Bhasin v. Union of India*[35] to assess state action for the violation of fundamental rights. Under the test of proportionality, once the *prima facie* infringement of a fundamental right has been established, the burden of proof shifts to the state to justify why the measure is proportionate to the goal sought to be achieved by it.[36] If the same is not shown, the measure is

[33] Modern Dental College and Research Centre v. State of Madhya Pradesh, (2016) 7 SCC 353.
[34] Justice K.S. Puttaswamy v. Union of India, (2018) SCC OnLine SC 1642.
[35] Anuradha Bhasin v. Union of India,(2020) 3 SCC 637.
[36] AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS Chapter 16 (Cambridge University Press 2012).

struck down. As highlighted in the case of *Anuradha Bhasin*, "*a decision which curtails fundamental rights without appropriate justification will be classified as disproportionate*."[37]

The Indian Supreme Court has adopted a structured test of proportionality that entails the satisfaction of four prongs.[38]*Firstly*, there must be a 'legitimate purpose' that the restriction seeks to achieve. This purpose is such that it can override a constitutionally guaranteed fundamental right. *Secondly*, there must be a 'rational nexus' between the limitation imposed and the ultimate object. More importantly, the restriction in question should further the purpose. *Thirdly*, there should not be a 'less restrictive alternative' that substantially achieves the same goal. *Lastly*, there should be a 'proper balance' between the harm caused and the benefits of the purpose.[39] The fourth prong, known as the balancing prong, ensures that the rights-restricting measure does not disproportionately impact the right holder. It ensures that the benefits outweigh the costs. Ultimately, a failure to satisfy even a single prong of the test shows that the rights-restricting measure is unconstitutional.

The test of proportionality can be used when it is shown that a constitutionally-guaranteed right has been infringed by the law in question. Furthermore, the right infringed must be one that can be tested under the proportionality test. The first step in establishing this is bringing in a law

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[37] Anuradha Bhasin v. Union of India,(2020) 3 SCC 637.
[38] Justice K.S. Puttaswamy v. Union of India, (2018) SCC OnLine SC 1642.
[39]Aparna Chandra, *Proportionality in India: A Bridge to Nowhere?,* 3 U OXHRH J 55, 75-76 (2020).

that violates a right. While this paper recognises that the mother's interests trump those of the foetus,[40] it does not push for a framework that reverses the hierarchy. This is because recognition of the same would go beyond the scope of the paper by arguing that all foetuses have an inherent right to life. It would mean arguing that the MTP Act violates a foetus's rights. Keeping in mind the reproductive autonomy of a mother, this paper tests a hypothetical amendment to the law that nullifies the current position of the law. The paper ultimately seeks to test whether this amendment to the law would stand constitutional scrutiny.

Having established that there exists a law; the next step is proving that a right would be violated by the law. The restriction in question infringes on the right to reproductive autonomy granted to a woman as a facet of her right to life and personal liberty enshrined under Article 21 of the Constitution of India.[41] As observed in *Suchita Srivastava*, the reproductive autonomy of a woman is a facet of the right to life and personal liberty enshrined under Article 21. This is because a woman would be forced to give birth to such a child despite her objections and personal choices. It violates her right to health, dignity, privacy, and bodily autonomy enshrined under Article 21.[42]

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[40]High Court on its Own Motion v. State of Maharashtra, 2017 Cri LJ 218.

[41] See Suchita Srivastava, *supra* note 1.

[42] Krishnadas Rajagopal, *SC allows Kolkata woman to abort her over 20-week-old foetus with abnormalities*, THE HINDU, (Jul 3, 2007), https://www.thehindu.com/news/national/sc-allows-kolkata-woman-to-abort-her-over-20-week-old-abnormal-foetus/article19203268.ece.

As established in *Justice KS Puttaswamy v. Union of India*, proportionality can be applied in an Article 21 inquiry.[43] In this case, the court tested the provisions of the Aadhar Act 2016 under the anvil of proportionality to assess whether an individual's right to privacy protected under Article 21 was violated or not.[44] In addition, the case of *Maneka Gandhi v. Union of India* has held that restrictions can be imposed on Article 21 if they are just, fair, and reasonable.[45] Several Article 19 inquiries, such as that in *Modern Dental College* have used the word reasonable as a qualifier to apply the test of proportionality.[46] Since an Article 21 restriction needs to be reasonable, as evident from the decision in *Maneka*, the same justification used in *Modern Dental College* can be used to include Article 21 within the ambit of the test.

Considering that an Article 21 inquiry has to be tested under proportionality and that reasonable restrictions on the right are permissible, the test can be used to assess the constitutionality of the law in question. Having laid down the four prongs of the test and establishing that the test has to be applied, this paper will now proceed to assess the constitutionality of the Amendment so proposed before concluding that the Amendment satisfies all four prongs of the test and is thus constitutional.

A. LEGITIMATE PURPOSE:

[43] Justice K.S. Puttaswamy v. Union of India, (2018) SCC OnLine SC 1642.
[44] *Id.*
[45] Maneka Gandhi v. Union of India, (1978) 1 SCC 248.
[46] Modern Dental College and Research Centre v. State of Madhya Pradesh, (2016) 7 SCC 353.

The purpose of this prong is to ascertain whether the MTPA Act limiting the fundamental right has a rationale or purpose behind it.[47] Its purpose is to merely examine whether it is significantly legitimate to restrict a constitutionally-guaranteed fundamental right. At this stage, the court is not concerned with the practicality of the goal or whether it is achieved by the restriction in question.[48]

The primary purpose behind preventing abortions solely for DA is to remedy a social wrong. It seeks to achieve the goal of ending discrimination against a section of society. The attitude towards differently-abled individuals reinforces negative stereotypes about their capabilities and negates their accomplishments.[49] Furthermore, the reason for such abortions can be attributed to pregnant women wishing to have an able-bodied child.[50] It thus becomes imperative to ensure that such negative outlooks on a certain class of individuals can be transformed, thus ensuring that differently-abled individuals can also be seen as contributing members of society.[51] It is prudent to deviate from an ableist notion of society to one that accommodates everyone, irrespective of differences.

While it may be argued that a parent's desire to abort such a child stems from their desire to not subject it to the unavoidable pain and

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[47] Aparna Chandra, 'Limitation Analysis by the Indian Supreme Court' in Mordechai Kremnitzer and others (eds) *Proportionality in Action: Comparative and Empirical Perspectives on the Judicial Practice* (CUP 2020) 505.
[48] Barak , *supra* note 36, at 246-247.
[49] Marsha Saxton, 'Disability Rights and Selective Abortion' in Lennard Davis (eds) *The Disability Studies Reader* (4th edn., Routledge 2013) 87.
[50] *Id.* at 93.
[51] Tori Gooder, *supra* note 7 at 562.

hardships brought out by the DAs, it is prudent to note that it is society portrays these differences as disabilities. This is also known as the social model of disabilities, wherein DAs are primarily frowned upon by society due to its own biases.[52] While it may be argued that a differently-abled person faces additional hindrances in some situations, parental experience has highlighted that there are unconscionable burdens, direct or indirect, created by a society on the conducive well-being and sustenance of differently-abled individuals.[53] The majority ableist society has created a world suited to its needs without any consideration for those with differences.[54] For instance, escalators, and other inventions such as stairs are premised on the assumption that an individual can walk. The society has only selectively accommodated those with differential abilities as in the case of those wearing glasses. Even the access to ramps and elevators is not as widespread as it ought to be. Most others with DA's have been left behind.

The pessimistic attitude of society normalizes looking at death as a suitable alternative to DA.[55] The advent of Pre-natal testing and the manner in which it permits DAs to be discovered before birth also contribute to the stigma. It imposes a responsibility on parents to avoid the birth of

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[52] Andreas Petasis, 'Discrepancies of the Medical, Social and Biopsychosocial Models of Disability; A Comprehensive Theoretical Framework' (2019) 3(4) International Journal of Business Management and Technology 42, 44-48.
[53] SMITHA NIZAR, THE CONTRADICTION IN DISABILITY LAW, 99-100 (Oxford University Press 2016).
[54] Kavana Ramaswamy, Addressing Ableism: Lessons from the Problem of Female Feticide in India, 27 TRANSNAT'L L. & CONTEMP. PROBS. 1, 10 (2017).
[55] Nizar, *supra* note 53.

unborn children with DA.[56] Medical professionals and health officials also promote the abortion of such individuals to end their tragedy and suffering.[57] The assumed inferiority of the differentially-abled is *prima facie* a social construct. Jurist John Finnis has laid down seven basic goods of life that, according to him, contribute to a fulfilling life. It is pertinent to note that the differently-abled can reap the benefits of all seven goods, namely, life, knowledge, friendship and sociability, recreation and enjoyment, aesthetic experiences, practical reasonableness, which includes the ability to make decisions and solve problems, and religion.[58] While society may not have been the most conducive in ensuring that the differently-abled could avail of some of these goods, an effective legal intervention that brings forth a transformation in outlook is the first step in addressing this societal stigma.

The stigma associated with the DA community has been normalized by law as well. A chilling example of the same is the cases filed by the parents of such a child claiming compensation for their wrongful birth.[59] While not common in India, the same can be found in countries such as the United States.[60] In these cases, a parent of a DA individual files a case for damages from the doctor alleging negligence, in that he permitted

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[56] *Id.*
[57] *Id.*
[58] John Finnis, 'Natural Law: The Classical Tradition' in Jules Coleman & Scott Shapiro (Eds.), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2002) 1-45.
[59] Sofia Yakren, *"Wrongful Birth" Claims and the Paradox of Parenting a Child with a Disability*, 87 FORDHAM LAW REV. 583, 583 (2018).
[60] *Id.*

the birth of the DA individual and the birth defects he was born with.[61] The primary argument in this regard is that the doctor could have informed the parents of the child about the same to prevent its birth. Such claims have unfortunately succeeded as well, as evinced by cases such as *Smith v. Cote*,[62] where the state recognised a parent's cause of action for a wrongful birth.

The controversial aspect of this lawsuit is that it places the cause of action on the child's existence.[63] The presence of such lawsuits highlights the deplorable way in which DAs are thought about and imagined. It impacts the psychological well-being and acceptance of the differently-abled community at large by imposing a survival of the fittest mindset.[64] It puts forth the image that a person's impairment determines their life and value. There needs to be a transformation in the attitude towards the DA community which is possible only when abortions that perpetuate ableism are legally prohibited.

While a potential argument may be that a measure cannot be introduced in favour of an unborn entity, it is pertinent to note that the state has already adopted such an approach in sex-selective abortions. In a country with a dark past of female infanticide, the legislature took a progressive decision by prohibiting sex identification before birth.[65] The

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[61] *Id.*
[62] Smith v. Cote 128 N.H. 231, 513 A.2d 341 (1986).
[63] Wendy Fritzen Hensel, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*, 40(1) HARV. CIV. RIGHTS-CIV. LIB. LAW REV. 141, 143 (2005).
[64] *Id.*
[65] *See* the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act 1994.

main goal of such a measure was to put forth the message that a girl child was not less desirable.[66] This decision has also been upheld in the case of *Vijay Sharma v. Union of India*.[67] Thus, it prevented these abortions in a country that promoted essentialism by looking at the girl child as weak and burdensome.[68] Consequently, the state possesses the power to enact legislation that protects the rights of those with DA's. Additionally, it is prudent to emphasize that this proposal aims to safeguard the constitutional rights to life and dignity of individuals with DA's, currently alive and a core component of society. These rights encompass the assurance of a life devoid of prejudice and unfair treatment. The mere fact that the law is designed for a foetus does not detract from its overall purpose of ending socially-sanctioned discrimination. Considering that the purpose is legitimate, the first prong of the test is satisfied.

B. SUITABILITY:

The second prong examines whether the restriction in question is capable of effectively advancing the object aimed to be achieved.[69] The nexus needs to be direct and proximate. The burden is thus to establish that these restrictions on abortions can advance the social welfare of the differently-abled.

The presence of such a law permitting abortions for differential abilities reflects a pessimistic attitude that acts to the detriment of the

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[66] Nizar, *supra* note 53.
[67] Vijay Sharma v. Union of India AIR 2008 Bom 29.
[68] Nizar, *supra* note 53.
[69] Chandra, 'Proportionality: A Bridge to Nowhere?', *supra* note 39.

differently-abled community. The task undertaken by the state in limiting the scope of the clause surrounding abortions on DA changes the notion surrounding differences. It moves away from an ableist society that inadvertently discriminates against these individuals to one which facilitates inclusion and accommodation. It will further the underlying interest of the state in preventing discrimination against a particular community. This change in legislative standing goes a long way in instilling in the people the need to be accommodating to those with differences.

A similar rationale was applied by the legislature in banning sex-selective abortions. In an attempt to end the stigmatization and negative outlook towards the female sex, the legislature imposed a legitimate restriction on the reproductive autonomy of women to achieve a larger societal good. The larger benefits of the same can be seen in the current age. It is now estimated that the measure would protect 6.8 million girls from being aborted until 2030.[70] A similar goal can be achieved by eliminating such abortions in the case of the DA community.

It is prudent to note that at this stage, the concern is merely whether there exists a rational nexus and not whether it is the least restrictive measure. The burden is thus to establish that the law can help achieve such a goal. According to Roscoe Pound, the purpose of the law is to reconcile conflicting interests in an attempt to bolster cohesion and bring about

[70] S*elective abortion in India may lead to 6.8 million fewer girls being born by 2030: Study*, THE INDIAN EXPRESS (Aug. 31, 2020), https://indianexpress.com/article/india/selective-abortion-in-india-may-lead-to-6-8-million-fewer-girls-being-born-by-2030-study-6577395/.

much-needed change in society.[71]A law prohibiting abortions is thus a suitable means to achieve the outcome, considering the role it plays in effecting social change. There thus exists a rational nexus between the amendment to the law that prohibits the abortions of the differently-abled and the overarching goal of ending discrimination.

C. NECESSITY:

The third prong of the proportionality test examines whether there is a less restrictive alternative that substantially achieves the goal in question. This test seeks to examine the availability of possible alternatives to the restriction in question that substantially achieve the same goal without compromising on the rights of the citizens.[72]Furthermore, the restriction ought to be narrowly tailored.[73] This implies that the rights-restricting measure should place as few restrictions as possible on fundamental rights.

A less restrictive alternative that preserves the rights of women would entail spreading awareness and facilitating the inclusion of individuals while permitting abortions. These will not achieve the goal of reducing stigma in society, at least in the short to medium term. The argument used is that absence of facilities, "*it is better if they never get born in this world*".[74] It is, however, pertinent to note that there would be a slower development of facilities supporting the differently-abled if there are no

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[71] ROGER COTTERRELL, THE SOCIOLOGY OF LAW 74 (OUP, 2nd ed. 2007).
[72] Chandra, 'Proportionality: A Bridge to Nowhere?', *supra* note 39.
[73] Chandra, 'Limitation Analysis', *supra* note 47 at 524-529.
[74] Nizar, *supra* note 53 at 190.

differently-abled individuals in the world. [75]It is problematic and unfeasible to accept this argument because it propounds a view that the life of a differently-abled individual is not worth living. It also highlights the disruptive manner in which eugenics can be used to create a perfect society.

This amendment to the law seeks to stop the discrimination against the differently-abled community right at childbirth. While it may be argued that accommodating such individuals within society will sufficiently achieve the purpose laid down, permitting such abortion sends forward a chilling message of the wrong nature – that the entire life of an individual is dependent on one single trait.[76] It establishes a threshold that a foetus needs to reach before being born. The purpose behind restricting such abortions is striking at the base of the problem – the entrenchment of an ableist society. In the absence of efforts to transform the hostile structure within society, it is highly improbable that the welfare of the differently-abled can be looked after. Permitting such abortions fundamentally discriminates against the community, its dignity, and its status in society.[77]

In the case of sex-selective abortions, discriminating against a female foetus was held to be discriminatory against women and their dignity.[78] Drawing from this analogy, the discrimination against a particular class of foetuses discriminates against the community by reinforcing their

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[75] *Id.* at 190.
[76] *Id.* at 96.
[77] Vijay Sharma v. Union of India AIR 2008 Bom 29, ¶25.
[78] *Id.* at 25.

hardships and inferiority.[79] Legislations,[80] international covenants such as the International Convention on the Rights of Persons with Disabilities,[81] and constitutional obligations of non-discrimination[82] cast a positive obligation on the state to look after their welfare. For instance, the permissibility of such abortions infringes Article 41 of the Constitution which imposes a duty on the state to look after the welfare of those with DA. Retaining such abortions is paradoxical to the betterment of the differently-abled. It is thus imperative to end abortions based on DA considering that the social stigma against the same is so deeply entrenched in society.

The discourse surrounding this issue focuses on getting rid of those who are undesirable to society. However, the complete elimination of disabilities within society is not scientifically possible. The current framework merely eliminates a small fraction of the total disability that can be detected *in utero*.[83] Moreover, such actions raise pressing and important questions regarding the harmful use of genetics. Currently, science focuses on creating a society with perfect bodies and perfect minds.[84] The law could use pre-natal tests to focus on accommodating and providing families with

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[79] Nizar, *supra* note 53 at 94.
[80] The Rights of Persons with Disabilities Act, 2016, Act No. 49 of Parliament, 2016 (India).
[81] UN General Assembly, Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106, https://www.refworld.org/docid/45f973632.html.
[82] INDIA CONST. Art.15, 41, *amended* by The Constitution (Eightieth Amendment) Act.
[83] Adrienne Asch, *Prenatal Diagnosis and Selective Abortion: A Challenge to Practice and Policy*, 89 AM. J. PUBLIC HEALTH, 1649, 1652 (1999).
[84] Nizar,*supra* note 53 at 138.

necessary monetary support during medical treatment.[85] It rather uses it to eliminate a section of society it considers undesirable.[86] The use of genetics to create a perfect society highlights the intolerance against the differently-abled community. It sends us down a perilous path, where elimination methods are used to control the quality of individuals being born in society.[87] The danger in doing so is evident from the use of eugenics in the Holocaust, where people with DA were persecuted ruthlessly.[88] Sadly, abortion has been an unfortunately effective tool in achieving the same to date.

It is argued that the restriction is narrowly-tailored. This restriction is restricted to abortions that are carried out solely based on DA. In such a case, the compelling interest in favour of eradicating discrimination can trump the reproductive autonomy of a woman.[89] It will not cover cases where the child's condition is incompatible with life due to the severe mental agony the same brings about to the mother. The Supreme Court has upheld this interpretation in the case of *Mamta Verma v. Union of India*.[90] In this case, the foetus's condition was not compatible with life as it could not survive without a skull. Keeping in mind the circumstances of the case coupled with the mental anguish the mother would suffer; the Court

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[85] Tom Shakespeare, *Choices and Rights: Eugenics, genetics and disability equality*, 13 DISABIL SOC 665, 679 (1998).
[86] The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994, §4(2), No. 57, Acts of Parliament, 1994 (India).
[87] Nizar, *supra* note 53 at 88.
[88] *Id.* at 88.
[89] Gooder, *supra* note 7 at 560.
[90] Mamta Verma v. Union of India, 2017 SCC OnLine SC 1150.

permitted the abortion.[91] The restriction is thus narrowly-tailored and restricted to certain circumstances alone.

Considering that such abortions reinforce negative stereotypes against people with DA, it is of utmost importance for such abortions to be eliminated to achieve social inclusion and welfare. Keeping in mind that the restriction is narrowly-tailored, the third prong of the proportionality test is satisfied.

D. BALANCING:

The final prong of this test seeks to examine whether the gains received through the imposition of the restriction outweigh the harms caused as a result of the restriction of the right.[92] The court considers the actual impact of the restriction and also assesses the urgency and likelihood of the object ultimately being realized by the measure. In examining the benefits and the harms of the restriction, the court will strike down the law if it does more harm than good.

As established in the previous arguments that this paper has made, the primary goal of such a measure is the elimination of discrimination against a section of society. Considering that there still exists widespread stigma with DAs, there is an urgent and pressing need to instil in the minds of others the need to be accommodative.

The measure in question focuses on redressing the disadvantage that an oppressed group has faced in the past, which also continues into

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[91] *Id.* at 6-7.
[92] Barak, *supra* note 36 at Ch.12.

the present. This is done by prohibiting the abortions at birth itself. As highlighted by the social model of disabilities, the primary disadvantage that accrues to individuals from the community is society's negative outlook towards their status. Eminent scholar Sandra Fredman has put forth four dimensions of the principle of substantive equality, namely "*redressing disadvantage*, *countering stigma, stereotyping and humiliation based on a pre-determined characteristic*, *enhancing voice and participation*, and *accommodating differences as well as achieving structural change*."[93] It is argued that the proposed measure satisfies all four of these principles and is thus in furtherance of the principle.

The first two prongs of this test have been dealt with in depth in the initial parts of this paper in A. *Legitimate Purpose*; and B. *Rational Nexus*. The latter two prongs focus substantially on the element of participation of the group. It is argued that the measure cannot be achieved in a complete manner unless the abortions of the differently-abled are stopped right at birth. As long as there exists a society that privileges one kind of person over another, the effective participation of the differently-abled cannot be ensured. The notion surrounding the differently-abled individuals needs to undergo a social transformation, keeping in mind the importance of community in the life of an individual. This is a move in furtherance of full-fledged structural changes, which are contingent on the attitudes of society towards the differently-abled. As argued by Nizar, the society would think about supporting facilities only if there are individuals present in it who

[93] Sandra Fredman, 'Substantive Equality Revisited', 14 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 712, 712, 727-734 (2016).

require such facilities.[94] Thus, the presence of those with DA will enhance their participation and bring about structural changes as facilities built to accommodate them will ensure that they do not suffer social barriers that hinder their participation in the social or political spheres of live.

However, there are two major counter-arguments against bringing in the proposed amendments that highlight the harms of implementing the same. They are (1) A lack of supporting facilities; and (2) Financial Constraints. It was these two overarching concerns that led to the United Kingdom Courts dismissing a petition that argued for eliminating the relevant clause dealing with the same issue of aborting a foetus with DA.[95] An added concern is whether conditions creating a vegetative state, where no amount of state support can ensure a better quality of life, will be exempt from this framework. This paper will address these arguments before establishing a framework that adequately balances the rights of the mother and the larger social goal aimed to be achieved.

At the outset, I will first address the argument pertaining to whether conditions creating a vegetative state, where no amount of state support can ensure a better quality of life, will be exempt from this framework. I propose the ban on abortions for the sole basis of disability. When disabilities combine with other factors, such as immediate death *in utero* or death within 28 days or a vegetative state, there is a very persuasive argument that can be made for the mental health of the mother and the

[94] Nizar, *supra* note 53 at 190.
[95] Heidi Crowter v Secretary of State for Health and Social Care, [2021] EWHC 2536 [125].

postpartum separation that eschews from the same. Thus, since there is a grave danger to the mental health of the mother, considering the absolute absence of facilities and no other suitable solution to creating a better quality of life, such abortions should be permitted. Thus, the condition of the sole ground of disability has been very categorically used.

One of the main reasons associated with the stigma towards those with DA is the lack of facilities that can assist parents. The society has structured its environment in an ableist manner, thereby bringing about the need for additional facilities.[96] Consequently, there is severe mental trauma associated with the birth of a differently-abled as the entire onus of raising such a child lies on the parents of the child who are devoid of any additional support. This mental agony is reason enough to carry out abortions under section 3(2)(b)(i) of the Act. Any attempt to restrict such abortions needs the unconditional support of the state and related actors. As held in the case of *Anuj Garg*,[97] the onus was on the state to ensure the safety and security of women without curbing their freedoms under Article 19. In this case, a legislation that forbade women from working at bars was struck down on the simple grounds that the vulnerabilities of the woman were not reason enough to carry out protective discrimination. The Supreme Court held that it was the duty of the state to ensure their safety while permitting them to carry out their professions. It thus becomes imperative for the state and society to facilitate the inclusion of individuals in society.

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[96] Nizar, *supra* note 53 at 109.
[97] Anuj Garg v. Hotel Association of India, (2008) 3 SCC 1, ¶37-38.

This inclusion is in furtherance of the Rawlsian difference principle, wherein, those who are disadvantaged for any reason whatsoever are provided additional resources to bring them at the same pedestal as the others.[98] Having launched the Accessible India Mission, the state has sought to promote inclusivity and accessibility among the differently-abled.[99] For instance, 71% of government schools are now friendly to those with DAs.[100] The Indian legislature has enacted the Rights of Persons with Disabilities Act 2016 which eschews the principles of equality and non-discrimination,[101] protection and safety,[102] and accessibility to a wide array of activities.[103] Moreover, the Act creates provisions for social security,[104] healthcare,[105] insurance,[106] and rehabilitation,[107] and creates a separate fund to support those differently-abled who require additional support.[108] This is

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[98] John Rawls, 'Justice as Fairness' in Robert E. Goodin and Philip Pettit (eds) *Contemporary Political Philosophy: An Anthology* (3rd edn., Wiley Blackwell 2019).
[99] Accessible India Campaign, GOVERNMENT OF INDIA MINISTRY OF SOCIAL JUSTICE AND EMPOWERMENT, (November 8, 2022) https://disabilityaffairs.gov.in/content/page/accessible-india-campaign.php#:~:text=What%20is%20Accessible%20India%20Campaign,Ministry%20of%20Social%20Justice%20%26%20Empowerment.
[100] Ambika Pandit, Around 71% of govt schools across country made disabled friendly: Ministry Data, THE TIMES OF INDIA (Jun 7, 2022 12:43 AM), https://timesofindia.indiatimes.com/india/around-71-of-govt-schools-across-country-made-disabled-friendly-ministry-data/articleshow/92045921.cms.
[101] The Rights of Persons with Disabilities Act 2016, §3, No. 49, Acts of Parliament, 2016 (India).
[102] *Id.* at §8.
[103] *See Id.* at §11.
[104] *Id.* at §24.
[105] *Id.* at §25.
[106] *Id.* at §26.
[107] *Id.* at §27.
[108] *Id.* at §§86-88.

a progressive effort in the right direction that seeks to normalize DAs rather than stigmatize them.

However, there is plenty that is yet to be accomplished on this front. The stigma towards the differently-abled is sadly still widespread in society. If we consider Court complexes alone, it is estimated that 67% of complexes are not friendly to those with DA despite there being a Supreme Court judgment that mandates structural changes to court complexes to make them so.[109] Furthermore, the differently-abled are denied access to education, mobility, and employment.[110] It is a recent judicial intervention that has sought to propound their rights of equality and non-discrimination. Recent judgments of the Indian courts have facilitated the reasonable accommodation of differently-abled individuals, enabling them to come to par with other people.

In the case of *Vikash Kumar*,[111] a petition was filed because the petitioner was denied the use of a scribe during the conduct of the UPSC exam as he could not produce a disability certificate. In his verdict, Justice Chandrachud held that the principle of reasonable accommodation was a key facet of the principles of equality and non-discrimination under Articles 14 and 15.[112] The state was thus obligated to provide facilities and additional

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[109] Dhananjay Mahapatra, *67% of Court Complexes not Disabled Friendly,* THE TIMES OF INDIA (*May* 2, 2022 9:07 AM), https://timesofindia.indiatimes.com/india/67-of-court-complexes-not-disabled-friendly/articleshow/91243369.cms.

[110] N Janardhana and Others, *Discrimination against differently abled children among rural communities in India: Need for action*, 6 J NAT SCI BIOL MED 7 (2015).

[111] Vikash Kumar v. UPSC, (2021) 5 SCC 370.

[112] *Id.* at 44, 62.

support to the differently-abled in an attempt to facilitate their complete participation. Furthermore, the principle was a manner of recognizing the inherent dignity and equal worth of every individual by removing social barriers that prevented effective participation.

In addition, the judgment of *Jeeja Ghosh*[113] lays down a key aspect about the dignity of the differently-abled. It was a petition filed against the inhumane act of lifting differently-abled people using wheelchairs without their consent. Similarly, users of prosthetic callipers and limbs were forced to remove the same for security checks. The Court highlighted the need for the differently-abled to be treated by the state with dignity.[114] Similarly, the case of *Disabled Right Group v. Union of India*[115] cast a duty on the University Grants Commission to formulate guidelines to facilitate the inclusivity and increase in accessibility of college campuses to the differently-abled community.

Thus, the judgments of the Supreme Court have repeatedly cast upon the state and related entities an obligation to facilitate the inclusion and simultaneously uphold the dignity of the differently-abled. It is in furtherance of the principle of substantive equality, which entails bringing disadvantaged individuals at an equal footing in reality. The elimination of the stigma through these means is a pre-condition that needs to be fulfilled before the proposed law can come into force. In the absence of any

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[113] Jeeja Ghosh v. Union of India, (2022) 1 SCC 202.
[114] *Id.* at 6.
[115] Disabled Right Group v. Union of India, (2018) 2 SCC 397, ¶35.2.

hindrances, there is little doubt that individuals would approach physicians to enquire if their child would be born with DAs.[116] The argument that abortions ought to be allowed due to the lack of facilities is a bleak and weak one. The state ought to use resources and rapidly-developing technology to empower those with DA rather than diminish their value by denying them equality before the law.

The second hurdle that needs to be overcome is the provision of financial support. The argument put forth in support of abortions of the differently-abled is that resolving the impairment of the foetus may require medical expenditures to be undertaken. This is often an argument of the biological model of disabilities, wherein it is argued that disabilities are a health condition. Moreover, it perceives the group as weak and incapable due to the DA.[117] Such a model is extremely reductionist in that it promotes the image of a perfect ableist body and looks at differential abilities as a curable disorder. The alleged functional barriers are a by-product of the ableist construction of society itself. A transformation of societal perception is the first step to establishing that this school of thought is premised on a problematic assumption that DAs are an impediment to effective functioning. Although this model is rightly the subject of criticism, this paper recognises that surgeries and medication may be imminent at

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[116] *If abortion based on gender is wrong so is abortion based on disability: U of C prof*, CBC RADIO, (Apr 15,2016), https://www.cbc.ca/radio/the180/abortions-for-some-but-not-all-left-footed-braking-and-regret-over-raising-a-secular-child-1.3536556/if-abortion-based-on-gender-is-wrong-so-is-abortion-based-on-disability-u-of-c-prof-1.3536619.

[117] Petasis, *supra* note 48 at 42-44.

certain points in a foetus' life. An inability to meet the costs of the same due to financial constraints constitutes mental agony under the MTP Act.

In the case of *Suparna Debnath*, the Court allowed a woman to get an abortion for several factors, one among them being that the costs of surgeries that the child would require during its life were extremely high. In the absence of any financial support from the state, the court held that the pregnancy contributed to severe mental anguish for the mother.[118] Eliminating stigma and bringing in the proposed amendment thus needs to take into account such financial constraints faced by parents.[119] It thus becomes important for the state to ensure financial support to the mother to protect the interests of a differently-abled foetus.[120] The framework thus laid down depends on the continuous support of the state and related actors in facilitating inclusion and increasing access to financial resources.[121]

Although it may be argued that such measures impose a high burden on the state and that any meaningful change is not imminent, there are three arguments to rebut the same. *Firstly*, it is pertinent to note that a differently-abled person's potential has been curbed by social barriers. There are simple facilities such as scribes, walking ramps, or wheelchair-friendly buses that are seldom provided to facilitate the inclusion of the community in society. More often than not, these have been the subject of

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[118] Suparna Debnath v. State of West Bengal, 2019 SCC OnLine Cal 9120, ¶¶ 20,21.
[119] High Court on its Own Motion v. State of Maharashtra, 2017 Cri LJ 218.
[120] Ramaswamy, *supra* note 54 at 14.
[121] *Id.* at 29-30.

legal disputes.[122] If these hindrances are eliminated, their participation in society will increase. Subsequently, their contributions will increase and thus be equal to those of others.[123] The costs are thus overrun by corresponding gains. Furthermore, it is pertinent to note that any assumptions about the abilities of a differently-abled individual cannot be judged or inferred from a society that is structured around ableism. The very same society has denied them the opportunity for effective participation. It is only once meaningful change and subsequent participation are achieved that inferences about the same can be made.

Secondly, the underlying premise behind the costs approach is the creation of a society founded on the principle of reciprocity. This approach ensures that society consists of individuals who can give material goods and services back to the economy. As highlighted by theorists such as Anita Silvers, the contemporary structure of the social contract not only excludes differently-abled people from governance but actively dismisses their participation in the same.[124] This is because they are not able to reciprocate or contribute back to society in a similar fashion as an able individual. There is an urgent and pressing need to move away from a bargaining approach founded on reciprocity because of how it negatively impacts those who are not able-bodied individuals. It is prudent to note that bargaining does not have to be the sole precondition to interpersonal cooperation. An

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[122] Vikash Kumar v. UPSC, (2021) 5 SCC 370.
[123] Nizar, *supra* note 53 at 100-108.
[124] Anita Silvers and Leslie Pickering Francis, 'Justice Through Trust: Disability and the "Outlier Problem" in Social Contract Theory', 116 ETHICS 40 (2005).

alternative to this is a trust-based approach, wherein society can take steps to facilitate the inclusion of individuals and the provision of facilities without any thought of reciprocity in mind.[125] Such an approach promotes a sense of belongingness and ensures that individuals can help each other.

Thirdly, the high costs of facilitating gender equality and the impossibility of achieving it immediately were not barriers for the state to imposing bans on sex-selective abortions.[126] If we consider the long-run impact of this measure, there was a significant improvement in the sex ratio at birth in a short-period of seven years from the enactment of the legislation that forbade the same.[127]

The elimination of such abortions also goes a long way in supporting people who acquire differences at a later stage in life. For instance, a ramp built to accommodate a single wheelchair may be used in the future to facilitate and help every individual who has an illness or a fractured leg.[128] The sensitization of society towards those with DA facilitates the accommodation and inclusion of an able individual who acquires DA later in his life as well. The facilities and services can be provided to these members of society, thus preventing additional expenses from being incurred on the same. Keeping in mind the overarching goal of substantive equality achieved by the amendment despite the restriction on

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[125] *Id.* at 70.
[126] Ramaswamy, *supra* note 54 at 30.
[127] Arindam Nandi and Anil B. Deolalikar, '*Does a Legal Ban on Sex-Selective Abortions Improve Child Sex Ratios? Evidence from a Policy Change in India*', ONE HEALTH TRUST (2013) https://onehealthtrust.org/wp-content/uploads/2017/06/ssrn-id2200613_8-1.pdf.
[128] Nizar, *supra* note 53 at 190.

reproductive autonomy, this paper believes that the benefits outweigh the harms. The restriction is, therefore, proportional to the object sought to be achieved.

IV. CONCLUSION

The Constitution in its essence promotes the principles of equality and non-discrimination. The courts have also upheld the right to dignity in various judgments as an important facet of the right to live. While the current policy ignores those with DA rather than addressing their concerns, there is an urgent and pressing need to move away from the same. The abortion of a differently-abled foetus entrenches a singular ableist view of society that promotes a view of the inferiority of such a community at large. It is thus important for society to be accepting of differences for its overall betterment.

Although the right to reproductive autonomy is sacrosanct and deserves to be upheld at all costs, there are some circumstances where the overarching social goal of the state can prevail over the right. In an attempt to promote equality of opportunity guaranteed under Article 14 and ensure the right to live with dignity under Article 21, this amendment to the law ensures that the discrimination against the differently-abled community can be ended. This paper has highlighted the inherent discrimination faced by the differently-abled community by permitting the abortion of a foetus who will be born with DA. It distinguished a blanket ban followed by Poland and qualified circumstances where the abortion of a foetus with DA will be

permissible. Having tested the hypothetical amendment to the law on the anvils of proportionality, this paper believes that the restriction on abortions solely based on such DA will nonetheless be desirable, but more so, valid in law.

Madhav Goel, *Arbitration of CIRP Initiation Applications Under Section 9 of the Insolvency and Bankruptcy Code, 2016: Impact of 'Indus Biotech',* 9(2) NLUJ L. Rev. 151 (2023).

ARBITRATION OF CIRP INITIATION APPLICATIONS UNDER SECTION 9 OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016: IMPACT OF '*INDUS BIOTECH*'

~Madhav Goel[*]

ABSTRACT

The decision of the Hon'ble Supreme Court in Indus Biotech (P) Ltd. v. Kotak India Venture (Offshore) Fund & Ors. has potentially allowed arbitration of disputes that arise in applications to initiate the corporate insolvency resolution process under the Insolvency and Bankruptcy Code, 2016 by dismantling the hurdle of non-arbitrability of insolvency disputes. This article explores the nature of disputes that arise in applications by operational creditors to initiate the corporate insolvency resolution process of a corporate debtor, and analyses the applicability of the decision in Indus Biotech to such disputes. It argues how and why arbitration can help adjudication of such applications and highlights the need for mandating arbitration of disputes that arise during such adjudications. Due to the complex and mixed questions of law and facts involved, these applications take a substantial time to be decided by the National Company Law Tribunals, thus delaying

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the process and defeating a core objective of the Insolvency and Bankruptcy Code, 2016, i.e., time bound resolution of commercial insolvencies. It proposes a broad alternative framework whereby arbitration can be used/mandated to adjudicate an application under Section 9 of the Insolvency and Bankruptcy Code, 2016, along with the necessary safeguards.

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I. INTRODUCTION

Jurisprudence on the amenability of insolvency disputes to arbitration has always leaned towards a negative, anti-arbitrability view. The Hon'ble Supreme Court has repeatedly held such disputes to be unamenable to arbitration, relying on the conventional jurisprudence that insolvency disputes involve adjudication of *'rights in rem'* and not *'rights in personam'*. Generally speaking, disputes involving the former are not considered suitable for arbitration as they involve the determination of rights of the parties not merely amongst themselves, but also against all persons at any time claiming any interest(s) in the subject matter of the dispute.[1] This is the most fundamental test of arbitrability.[2]

This is because an arbitral tribunal derives its powers and jurisdiction by mutual consent,[3] and non-signatories to an arbitration agreement cannot be bound by its decision as they have not consented to submit to its jurisdiction, and have thus not agreed to be bound by its decision.[4] Consequently, disputes such as insolvency disputes which have an *erga omnes* effect, i.e., affecting rights and liabilities of those other than the parties to the dispute, are generally considered unsuitable for arbitration.[5]

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[1] Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532.
[2] Vidya Drolia v. Durga Trading Corporation, (2021) 2 SCC 1.
[3] KK Modi v. KN Modi, (1998) 3 SCC 573.
[4] Sukanya Holdings Private Limited v. Jayesh H. Pandya, (2003) 5 SCC 531.
[5] Ajar Rab, *Defining the Contours of the Public Policy Exception - A New Test for Arbitrability in India*, 7 IJAL 161 (2019).

However, the decision of the Hon'ble Supreme Court in *Indus Biotech (P) Ltd. v. Kotak India Venture (Offshore) Fund & Ors.*[6] ("**Indus Biotech**") may have opened carved out an exception to conventional jurisprudence, as far as adjudications under Section 7 and Section 9 of the Insolvency and Bankruptcy Code, 2016[7] ("**the Code**" or "**IBC**") for initiation of the Corporate Insolvency Resolution Process[8] ("**CIRP**") of a Corporate Debtor are concerned.[9]

This article analyses the nature of adjudications under Section 9 of the Code and whether they have an *erga omnes* effect. It analyses the reasoning of the Hon'ble Supreme Court in *Indus Biotech* to assess whether disputes under Section 9 of the Code are arbitrable.[10] Finally, it proposes a framework that could be implemented to arbitrate such disputes whilst ensuring that necessary safeguards are in place, and the benefits thereof.

II. DO ADJUDICATIONS UNDER SECTION 9 OF THE CODE HAVE AN *ERGA OMNES* EFFECT?

It is important to analyse whether disputes under Section 9 of the Code have an *erga omnes* effect. This provision deals with an application filed by an operational creditor(s) to initiate the CIRP of a corporate debtor. In an application under Section 9 of the Code, the Adjudicating Authority, i.e.,

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[6] Indus Biotech (P) Ltd. v. Kotak India Venture (Offshore) Fund & Ors. (2021) 6 SCC 436.
[7] Insolvency & Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India)
[8] *Id.* at Chapter II, Part II.
[9] *Id.* at §3(8).
[10] Indus Biotech (P) Ltd. v. Kotak India Venture (Offshore) Fund & Ors. (2021) 6 SCC 436.

the National Company Law Tribunal ("**NCLT**"), has to assess whether the application is complete, whether the payment of the operational debt has been made pursuant to the notice under Section 8 of the Code, whether the said notice under Section 8 of the Code was delivered to the corporate debtor, and whether there exists a pre-existing dispute with respect to the debt claimed to be due and payable by the operational creditor.

This adjudication is a mixed question of facts and law which has to be determined on the basis of the evidence put forth by the parties as to the transaction entered into by them, as well as evidence pertaining to the repayment of the alleged debt. If the Adjudicating Authority is satisfied with respect to the above parameters, it is obligated to admit the application.[11] In that sense, it is fairly similar to the procedure followed in cases of applications under Section 7 of the Code where the Adjudicating Authority has to assess whether the application is complete and whether there is a default as claimed by the financial creditor, and thereafter exercise its discretion to admit or reject such an application.[12]

At this stage of adjudication, the dispute is *inter-partes* and only involves determining mixed questions of fact and law that affect the rights of the two parties concerned, i.e., the operational creditor and the corporate debtor. The adjudication relates to whether the corporate debtor owes an undisputed debt to the operational creditor, and whether there is a default in the repayment of that debt. Therefore, it is clear that the adjudication, while taking place in an insolvency proceeding, is one dealing with *rights in*

[11] Mobilox Innovations (P) Ltd. v. Kirusa Software (P) Ltd., (2018) 1 SCC 353; Vidarbha Industries Power Ltd. v. Axis Bank Ltd., 2022 SCC OnLine SC 1339.
[12] Vidarbha Industries Power Ltd. v. Axis Bank Ltd., 2022 SCC OnLine SC 1339.

personam, i.e., the rights and liabilities of the parties amongst and against each other, and not dealing with *rights in rem*, i.e., not dealing with their rights and liabilities against the world at large.

However, it is important to note a long line of judicial decisions that have repeatedly held that insolvency disputes are not arbitrable as they involve adjudication of *rights in rem* and not *rights in personam*. The logical corollary to this, considering the fact that the first stage of adjudication under Section 9 of the Code deals with *rights in personam* of the operational creditor and the corporate debtor against each other, is that at some point in the process the adjudication under Section 9 of the Code is converted from one dealing with *rights in personam* to one dealing with *rights in rem*. The exact stage at which this happens can be understood by referring to the decision of the Hon'ble Supreme Court the decision in *Indus Biotech*.[13]

III. THE DECISION IN INDUS BIOTECH (P) LTD. V. KOTAK INDIA VENTURE (OFFSHORE) FUND & ORS.

In *Indus Biotech*,[14] the Hon'ble Supreme Court was determining the nature of interplay between the Code and the Arbitration and Conciliation Act, 1996 ("**ACA**").[15] An application under Section 7 of the Code was filed by the Respondents claiming that the Appellant owed them a financial debt under the share subscription and shareholder agreements executed between them. The cumulative effect of these agreements was that the Respondents

[13] Indus Biotech (P) Ltd. v. Kotak India Venture (Offshore) Fund & Ors. (2021) 6 SCC 436.
[14] *Id.*
[15] Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India).

had subscribed to equity shares and optionally convertible redeemable preference shares of the Appellant. Thereafter, certain disputes arose pertaining to the calculation and conversion formula by which the preference shares would be converted to equity shares.

The Respondents filed an application under Section 7 of the Code, contending that as per the option exercised by them under the said agreements to cover their preference shares into equity shares, the Appellant owed them about Rs. 367 Crore which they had not paid. On the other hand, the Appellant filed an application under Section 8 of the ACA for referring the parties to arbitration, contending that since there was a dispute as to the calculation and conversion formula by which the Respondents' preference shares would be converted to equity shares, there was no debt due and payable by them. It thus sought a reference of the dispute to arbitration, as per the terms of the agreements, in order to first determine whether there actually was a debt due and payable by the Appellant, a *sine qua non* for initiating the CIRP under the Code.

While analysing the interplay between the Code and the ACA, the Supreme Court noted that the NCLT, while adjudicating an application under Section 7 of the Code, has to first assess whether the debt as claimed by the financial creditor has become due and payable. It held that if on the basis of the evidence and the law, the Adjudicating Authority concludes that there is no default, then it shall reject the application. However, if the Adjudicating Authority concludes that there has been a default and thereafter proceeds to admit the application, then the CIRP of the corporate debtor is deemed to have been commenced. Up until this point,

i.e., up until the NCLT decides to admit the application, the proceedings are confined to determining whether the debt has become due and payable between the parties involved.

The Supreme Court held that once the CIRP has been initiated,[16] by imposing the moratorium,[17] issuing the public announcement of the initiation of the CIRP,[18] and appointing the Interim Resolution Professional,[19] it becomes a proceeding *in rem*, and thereafter the issues involved would not be arbitrable. The Apex Court thus held that the cutoff point for determining when the proceeding actually becomes one *in rem* from one *in personam* is the point at which the application under Section 7 of the Code is admitted and the CIRP of the corporate debtor has commenced, and not the point at which the application is filed. Once the application is admitted and the CIRP commences, third party rights are affected and that is the point at which the *erga omnes* effect becomes applicable.[20]

The Hon'ble Apex Court referred the parties to arbitration, and held that the adjudication of the dispute as to the calculation and conversion formula was one involving *rights in personam* and not *rights in rem*. Since the CIRP had not been triggered, the same could be referred to

[16] Insolvency & Bankruptcy Code, 2016, §13, No. 31, Acts of Parliament, 2016 (India).
[17] *Id.* at §14.
[18] *Id.* at §15.
[19] *Id.* at §16.
[20] Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17; Vallal RCK v. Siva Industries & Holdings Ltd., (2022) 9 SCC 803; MINISTRY OF CORPORATE AFFAIRS, GOVERNMENT OF INDIA, REPORT OF THE INSOLVENCY LAW COMMITTEE (Government of India, 2018).

arbitration to determine whether there was a debt that was actually due and payable.

IV. IMPLICATIONS OF INDUS BIOTECH ON APPLICATIONS UNDER SECTION 9 OF THE CODE?

The decision of the Hon'ble Supreme Court in *Indus Biotech* has significant implications for applications under Section 9 of the Code.[21] In particular, the observations and reasoning given by the Hon'ble Apex Court are pertinent for deciding arbitrability of disputes that arise when an application for initiating CIRP is filed by operational creditors. Unlike applications by financial creditors, applications by operational creditors under Section 9 of the Code have greater scope of disputes given the nature of the transaction and evidence presented by the parties. Typically, financial debt and the default are well documented and easier to establish and adjudicate upon, as opposed to operational debt.

Practical experience shows that undisputed and unpaid operational debt is often difficult to establish because numerous defences are raised by corporate debtors. These include, but are not limited to, showing the existence of a pre-existing dispute, the debt being barred by limitation, disputes as to the method of accounting, disputes about the very transaction itself, disputes about whether the demand notice under Section 8 of the Code was delivered, etc.

[21] Indus Biotech (P) Ltd. v. Kotak India Venture (Offshore) Fund & Ors. (2021) 6 SCC 436.

Every application by an operational creditor under Section 9 is resisted using numerous defences by the corporate debtor, and due to the issues highlighted above, the dispute about whether there exists an undisputed debt due and payable on the part of the corporate debtor takes significant time to adjudicate. As a consequence, a significant portion of limited judicial time is spent on deciding these disputes that are mixed questions of fact and law, i.e., whether the corporate debtor owes an undisputed debt to the operational creditor that has become due and payable.

These disputes have to be adjudicated at the time of deciding whether to admit the application of the operational creditor under Section 9 of the Code, i.e., prior to the initiation of the CIRP of the corporate debtor. They are limited to deciding inter-party disputes, and at this stage are not concerned with the rights of any third party. The adjudication is singularly limited to determining whether the corporate debtor owes an undisputed debt to the operational creditor that has become due and payable, thus dealing with *rights in personam* and not *rights in rem*. This is where arbitration can have significant impact on improving the efficiency of the Code and the Adjudicating Authority.

Increasingly, commercial transactions have provisions for resolving disputes through arbitration. Such arbitration clauses, often widely worded, cover within their ambit issues that have a direct bearing on whether the debt is due and payable as per the contract, whether there is a pre-existing dispute, whether there is any issue with the accounting, whether the debt is barred by limitation, etc. Given this situation it is possible to have a

legislative framework that supports and/or mandates arbitration of such disputes rather than leaving it solely to the already overburdened NCLTs to adjudicate. These disputes are mixed questions of law and fact that involve *rights in personam* as opposed to *rights in rem*, and do not have a 'social welfare' element either, thus satisfying the tests of arbitrability laid down by the Supreme Court in *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd.*[22] and culminating in *Vidya Drolia v. Durga Trading Corporation.*[23]

V. PROPOSED ALTERNATIVE FRAMEWORK FOR ARBITRATING APPLICATIONS UNDER SECTION 9 OF THE CODE

Currently, it is the exclusive jurisdiction of the NCLTs to adjudicate all disputes that arise in an application under Section 9 of the Code. As highlighted above, these are disputes that are not concerned with the rights of any third party since they only involve the determination of whether one party owes a debt to the other party that is undisputed and has actually become due and payable under the law. Furthermore, the decision of the Supreme Court in *Indus Biotech*[24] may have removed the jurisprudential hurdle in arbitrating such disputes, thus affording the legislature an opportunity to let arbitration enter insolvency dispute resolution.

This article proposes that the provisions of the Code should be suitably amended to mandate arbitration in respect of certain nature of disputes arising in an application under Section 9 of the Code in order to

[22] Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532.
[23] Vidya Drolia v. Durga Trading Corporation, (2021) 2 SCC 1.
[24] Indus Biotech (P) Ltd. v. Kotak India Venture (Offshore) Fund & Ors. (2021) 6 SCC 436.

allow and encourage arbitration of disputes that arise in such the adjudication process of such applications. A provision, akin to Section 8 of the ACA, can be inserted in the Code, whereby the NCLT will be obligated to refer the parties to the application under Section 9 of the Code to arbitration. Herein, reference to arbitration will be done in case there is a dispute raised by the corporate debtor about whether it owes an undisputed debt to the operational creditor that has become due and payable. Once referred by the NCLT, a framework similar to that of the ACA would govern the dispute resolution process.

The principles governing the arbitration framework of insolvency disputes could be similar to that under the ACA, prioritising party autonomy, flexibility, efficiency, minimal court interference, etc. However, certain features would have to be tailored to the specific need of insolvency disputes. Given that these arbitral proceedings would not render an executable award but a mere determination of whether the corporate debtor owes an undisputed debt, that has become due and payable, to the operational creditor, the amount of Court interference can be even lesser than that under the ACA.

Therefore, unlike the current situation where the NCLT adjudicates on these mixed questions of law and fact, it will be the arbitral tribunal that will be tasked with this exercise. The arbitral tribunal would be responsible for determining the issues in dispute and giving a final finding on whether the corporate debtor actually owes an undisputed debt to the operational creditor that has become due and payable. Consequently, the advantages of arbitration as a speedy dispute resolution mechanism will be infused into

the insolvency framework, thereby helping expedite the adjudication of CIRP initiation applications. This is where the mandate of the arbitral tribunal would end.

Once the proceedings culminate in a final award, the NCLT vested with the jurisdiction over the original application can proceed to admit/reject the application basis the final findings of the arbitral tribunal. If the award establishes that the corporate debtor owes an undisputed debt to the operational creditor that has become due and payable, then the NCLT can initiate the CIRP, appoint the Interim Resolution Professional, and impose the moratorium under Section 14 of the Code.

VI. BENEFITS OF ARBITRATING APPLICATIONS UNDER SECTION 9 OF THE CODE

Speedy resolution is an important element as far as commercial disputes is concerned, and even more central as far as the Code and the CIRP are concerned. It has been repeatedly noted that speedy resolution is the essence of the CIRP,[25] and that the provisions of the Code ought to be interpreted and applied in a manner that contributes towards the faster conclusion of the CIRP so that the resolution is done in a manner that does not lead to erosion of the corporate debtor's.[26]

While the 330-day time limit for the CIRP commences from the day the application under Section 7 or 9 of the Code is admitted and the

[25] Innoventive Industries Ltd. v. ICICI Bank, (2018) 1 SCC 407; Kridhan Infrastructure (P) Ltd. v. Venkatesan Sankaranarayan, (2021) 6 SCC 94; Vidarbha Industries, Vidarbha Industries Power Ltd. v. Axis Bank Ltd., 2022 SCC OnLine SC 1339.
[26] Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17.

CIRP is commenced,[27] and not from the day the aforesaid application is filed,[28] one has to be mindful of the need to adjudicate the admission of such applications expeditiously. The Code itself provides a 14-day time limit for the NCLTs to decide on whether or not to admit an application under Section 9 of the Code.[29]

However, these applications take months, if not years, to be decided for myriad reasons. The increasing number of applications being filed under the Code, inadequate infrastructure, judicial vacancies, complex nature of issues involved, voluminous documentary evidence, etc. are some of the reasons contributing to this delay. Consequently, NCLTs end up spending considerable judicial time deciding a handful of CIRP initiation applications under Section 7 or Section 9 of the Code, leaving little time to decide other substantive disputes arising out of the Code.

The other consequence is that the corporate debtor is able to stave off the initiation of CIRP for prolonged periods, despite being insolvent and unable to clear its liabilities towards its creditors. The longer the delay, the greater the erosion of an already diminishing asset base of the corporate debtor, leaving little that can be rescued by a resolution applicant to keep it running as a going concern. This, in turn, results in resolution applicants valuing the corporate debtor at lower prices, thus often making the resolution plan an unattractive option for the Committee of Creditors of the corporate debtor, who end up favouring liquidation.

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[27] Insolvency & Bankruptcy Code, 2016, §12, No. 31, Acts of Parliament, 2016 (India).
[28] Vidarbha Industries Power Ltd. v. Axis Bank Ltd., 2022 SCC OnLine SC 1339.
[29] Insolvency & Bankruptcy Code, 2016, §9, No. 31, Acts of Parliament, 2016 (India).

Eventually, the corporate debtor either enters liquidation, which is the last resort outcome as per the Code,[30] or the resolution plan results in creditors having to take significant haircuts on their recovery. Both consequences run contrary to two key objectives of the Code, i.e., timely resolution of the corporate debtor as a running/going concern and maximisation of the economic value of the assets of the corporate debtor to ensure maximum recovery by all creditors.[31]

Arbitration can help address these issues. Due to its procedural flexibility, the dedicated nature of arbitral tribunals to a particular dispute, and the greater availability of arbitrators, it can be expected that CIRP initiation applications under Section 9 of the Code will be decided more expeditiously. With the increasing support being provided to arbitration as a means of commercial dispute resolution, it is slowly emerging as a preferred means of resolving complex commercial-legal issues. Disputes arising in applications under Section 9 of the Code can be one of the types of disputes that the Indian arbitration framework resolves.

VII. NECESSARY SAFEGUARDS FOR THE PROPOSED ALTERNATIVE FRAMEWORK

Given that the aforesaid framework proposes that arbitration (a private, non-sovereign dispute resolution mechanism) has a direct bearing on *in rem* proceedings like insolvency, there ought to be necessary safeguards in place to ensure just outcomes. At the same time, it has to be

[30] K.N. Rajakumar v. V. Nagarajan, (2022) 4 SCC 617.
[31] Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17.

ensured that such a framework does not give either party avenues to engage in dilatory tactics that unnecessarily extend the time taken to adjudicate applications under Section 9 of the Code, as that will defeat the entire purpose for introducing arbitration to CIRP admission applications.

Since arbitration proceedings pursuant to applications under Section 9 of the Code will not result in an executable award but will only determine whether the corporate debtor owes an undisputed debt to the operational creditor that has actually become due and payable, the scope of interference by the NCLT while the arbitral proceedings are ongoing can be and will have to be minimal. It is thus proposed that the framework only allow petitions to the NCLT for grant of interim relief(s) so that the operational creditor's application does not become infructuous.

Second, the framework should have short timelines for the appointment and completion of arbitral proceedings, keeping in mind the necessity of adjudicating these applications efficiently. A one-to-three-month timeline would be most appropriate, with the NCLT having limited jurisdiction to extend the same. Given that the arbitral tribunal will be dedicated to deciding a single question, it is fair to expect that it will be able to resolve the dispute expeditiously within this timeline. Furthermore, there can be stringent, mandatory penalties that discourage either party from adopting dilatory tactics, and the incentive structure for the arbitrators can also be tailored to ensure they are motivated to decide disputes referred to them within the prescribed timelines.

As far as the procedure for challenging the award is concerned, a course similar to that under Section 34 of the ACA can be adopted, with

certain modifications. First, certain grounds can be removed, such as those encapsulated under Section 34(2)(b) of the ACA, thus restricting the scope of challenge only on procedural and jurisdictional grounds. Alternatively, the ground to challenge the arbitral award based on jurisdiction can be removed if the NCLT is mandated to take a final, binding, and non-appealable view at the stage of referring the parties to arbitration on whether the arbitral tribunal would have jurisdiction to decide the disputes involved.

Second, the provision of an appeal as provided under Section 37(1)(c) of the ACA against an order setting aside or refusing to set aside an arbitral award under Section 34 ACA can also be removed in order to prevent unnecessary appeals and consequent delays in deciding the issues raised in an application by the operational creditor to initiate the CIRP. Third, a provision like Section 36 of the ACA can be abolished, as the arbitral award in this context will not have to be enforced at all. Under this framework, the arbitral tribunal will automatically forward its findings to the concerned NCLT, which will then be expected to take a decision, based on these findings, to either admit or reject the application under Section 9 of the Code, and consequently initiate or decline to initiate the CIRP of the corporate debtor.

This framework can attain the balance of ensuring that the arbitration process under the Code is lean and efficient, while also ensuring that necessary safeguards to protect the rights of the parties involved are present. It will also help ensure that while there is minimal interference by

the in the arbitration process, supervisory jurisdiction is still exercised so that the process has the required legal sanctity.

VIII. CONCLUDING REMARKS

Until recently, insolvency disputes were considered in-arbitrable. *Indus Biotech* has possibly changed the landscape and potentially overcome a jurisprudential hurdle towards arbitrability of admission applications under Section 7 and Section 9 of the Code. It is possible, theoretically and practically, to refer CIRP initiation applications to arbitration for determination of whether the corporate debtor owes a debt to the creditor that has become due and payable, and thereafter refer the issue to NCLT.

A possible framework can be developed, along the broad contours suggested above, such that it balances the interests and concerns of all stakeholders involved, while helping infuse efficiency and ensuring time bound adjudication of CIRP initiation applications under the Code. Infusing arbitration into insolvency disputes will help reduce the burden on NCLTs, which is already saturated with various disputes under the Code and the Companies Act 1956/2013. This measure, by promoting time bound adjudication of CIRP initiation applications, will help effectuate one of the central objectives of the Code. It will also help in affording the parties the necessary procedural flexibility that aids the adjudication of complex commercial disputes.

Similar to other commercial disputes, arbitration has the potential of reforming the adjudication process of CIRP initiation applications under Section 9 of the Code. The Hon'ble Supreme Court having removed the

jurisprudential hurdle in *Indus Biotech*,[32] the legislature has a golden opportunity to suitably amend the Code and introduce mandatory arbitration of CIRP initiation applications under Section 9 of the Code.

[32] Indus Biotech (P) Ltd. v. Kotak India Venture (Offshore) Fund & Ors. (2021) 6 SCC 436.

NLUJ Law Review

Pravertna Sulakshya, *Guessing the Temporary: Injunction or Injustice? Analysing the Position of Temporary Injunctions in IPR Matters,* 9(2) NLUJ L. Rev. 171 (2023).

GUESSING THE TEMPORARY: INJUNCTION OR INJUSTICE? ANALYSING THE POSITION OF TEMPORARY INJUNCTIONS IN IPR MATTERS

~Pravertna Sulakshya[*]

ABSTRACT

*As the society advances in technology, protection of intellectual property rights ("**IPR**") becomes a necessity to promote innovation and competition. At first blush as well, when a courtroom witnesses an IPR injunction matter, the Civil law comes in handy with not only its inscribed, but also with judge-made jurisprudence. However, if one may embark upon the statistics concerning the grant of temporary injunctions in IPR matters specifically, it becomes evident that India's justice-disposal is problematic for being caught up with delay, inadequate addressal, and pushes a clear saga of injustice. Thus, the main thrust of the present analysis is to identify the reasons behind such delay and explore a possible redressal.*

The paper begins with part I, which lays bare the position of IPR injunction in the Indian legislative bedrock. Against that backdrop, part II sheds light on the objectives of granting such injunctions and draws inspiration from international jurisprudence to connote the same. Then emerges the Triple Test, which is explained in depth impart III. Part IV

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then critically analyses the jurisprudence by relying on statistics and practical application of the law. Lastly, part V proposes solutions to the identified problems, and concludes the article.

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I. UNDERSTANDING IPR INJUNCTIONS

A. INJUNCTION: MEANING AND APPLICABILITY

As the Latin phrase "*Ubi jus ibi remedium*" suggests, "*where there is a right, there must be a remedy.*"[1] In the world of intellectual property ("**IP**"); copyrights, trademarks, and patents are the major forms of rights available to an inventor or creator, whereby, he generates value and recognition for his own idea and business, and prevents others from using it in their own name. However, infringement of such rights remains inevitable; thus, in accordance with the cardinal legal principle, major jurisprudential regimes provide both civil and criminal remedies in order to avoid IPR infringement. One of such civil remedies is in the form of injunctions,[2] which is defined as "*a judicial process which compels a party to do, or to refrain from doing an act, until the Court conducts the trial or makes any other relevant order.*"[3] An injunction can be granted against acts only *in personam*, and it can be pursued by either the plaintiff or the defendant, but not by a third party or stranger.[4] An injunction aims to "*maintain the status quo*" of circumstances and prevent a future possible injury to cause "*irreparable damage towards the subject matter of the dispute*" until the trial is disposed.[5]

It is pertinent to note that injunctions have the following bifurcation: first, "a *temporary or a preliminary injunction, that is issued once the*

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[1] DR. ASHOK K. JAIN, CODE OF CIVIL PROCEDURE (Ascent Publications, 3rd ed. 2012).
[2] *See* THOMAS F. COTTER, COMPARATIVE PATENT REMEDIES: A LEGAL AND ECONOMIC ANALYSIS (Oxford University Press, 13th ed. 2013).
[3] C. K. TAKWANI, CIVIL PROCEDURE 360 (EBC, 9th ed. 2021).
[4] *Id.* at 362.
[5] *See* Shiv Kumar v. Municipal Corporation, Delhi, (1993) 3 SCC 161.

institution of suit is confirmed," and second, a *"permanent or final injunction issued after the trial.*"[6] A temporary or interim injunction is regulated under Order XXXIX of the Code of Civil Procedure, 1908 ("**CPC**") and compels a party at any stage of the suit to "*restrain from doing a specific act until disposal of suit or till further orders of the court*." It "*can be granted only if the person seeking injunction has a concluded right, capable of being enforced by way of injunction*,"[7] while a permanent injunction, on the other hand, is governed by Sections 38 to 42 of the Specific Relief Act, 1963 ("**SRA**"), and "*restrains the party for ever from doing an act and can be granted only on merits at the conclusion of the trial after hearing both the parties in the suit*."[8] With regards to the present article, discussion shall be relevant only to temporary or interim injunctions.

B. INJUNCTION IN IPR SUITS IN INDIA: LEGISLATIVE BEDROCK

In India, major IPR suits seeking interim injunctions revolve around patents, which allow the inventor to "*prevent third parties, who do not have his consent, from the act of making, using, offering for sale, selling or importing*"[9] their invention. Section 108 of the Patents Act, 1970 ("**Patents Act**") provides recourse remedies in cases of infringement.[10] The section reads: "*The reliefs which a court may grant in any suit for infringement includes an injunction (subject to such terms, if any, as the court thinks fit) and, at the option of the plaintiff,*

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[6] TAKWANI, *supra* note 3.
[7] Yogesh Pai, *Patent Injunction Heuristics in India*, K.L.I. 1,10-11 (2019); *see also* The Specific Relief Act, 1963, No. 47, Acts of Parliament, 1963, §37 (India).
[8] JAIN, *supra* note 1.
[9] The Patents Act, 1970, No. 39, Acts of Parliament, 1970, §48 (India).
[10] *Id.* at §108.

either damages or an account of profits."[11] The court has two levels of discretion to decide whether to issue an injunction-one, "*whether or not an injunction should at all be granted; two- if the court indeed grants and injunction, it may subject it to 'such terms, if any, as the court thinks fit.*"[12]

Rules 1 to 5 of Order XXXIX of the CPC regulate the concerned procedure in several parts. Rule 1(a) specifically allows the court to "*grant an injunction wherein any property in dispute is in danger of being wasted, damaged or alienated by any party to the suit.*"[13] Rules 2(2) of Order XXXIX allows the court to grant injunctions "*on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise, as the Court thinks fit*."[14] In a way, this gives the court the authority to order the plaintiff to pay the defendant's damages.

Rule 3 requires that "*the Court before granting an injunction must give notice of the injunction application to the opposite party*," while also creating an exception wherein "*if the Court is of the opinion that the object of granting the injunction would be defeated by delay, a court may grant an injunction without giving notice to the other party.*"[15] Moreover, there are safeguards provided by Rule 3. First, the court must give grounds for believing that the delay would defeat the purpose of granting the injunction. A second safeguard is the requirement that the "*applicant deliver a copy of the application, the plaint, and all relied-upon documents to the opposing party and file an affidavit to support that delivery on the same day or the*

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[11] *See* Mahesh Gupta v. Tej Singh Yadav, (2009) 41 PTC 109.
[12] Pai, *supra* note 7.
[13] *Id.*
[14] The Code of Civil Procedure, 1908, No. 5, Acts of Parliament, 1908, Order XXXIX, Rule 2(2) (India).
[15] *Id.* Order XXXIX, Rule 3.

following day" that any such *ex parte* injunction is obtained. In addition, the defendant under, Rule 4 has the right to ask the same court to overturn the injunction after it has been granted. It mandates that courts set aside *ex parte* orders obtained through false or deceptive statements, and that "*an ordinary injunction granted after hearing both parties can only be revoked in cases where a change in circumstances has put the party in question through hardship*."[16] Additional protection has also been granted in the form of Rule 3A, which requires that "*once an ex parte injunction has been granted, the Court should dispose-off the application within 30 days and record its reasons in case of failure to resolve the dispute.*"[17] However, the court's power is not limited to Order XXXIX. Section 151 of the CPC, provides for "*inherent powers of the Court to grant injunctions in cases not covered by these Rules*."[18] Furthermore, Section 94(c) and (e) of the CPC empowers to court to grant interlocutory reliefs in the form of interim injunctions and other interim orders to prevent the ends of justice from being defeated as may appear to the court to be just and convenient in the given circumstances.[19]

II. OBJECTIVE FOR GRANTING TEMPORARY INJUNCTIONS

Due to the constantly evolving nature of new inventions in the high-technology sector, complex products with multiple components have been designed and developed (e.g., a laptop, a smart phone, a complex gas

[16] *Id.* Order XXXIX, Rule 4.
[17] *Id.* Order XXXIX, Rule 3A.
[18] Tanusree Basu v. Ishani Prasad Basu, (2008) 4 SCC 791.
[19] Pai, *supra* note 7.

turbine). The availability of the entire product on the market may be affected by the granting of an injunction prohibiting the sale or use of such complex products based on an alleged violation of a few patents that may be relevant to a component (accounting for a small portion of the entire product). Thus, even though the infringement has not yet been established, such an injunction may have a significant impact on consumers and the companies that make such complicated products. A study of the requirements/standards for establishing each ground for granting injunctions has taken on significant importance in light of the suitability of injunctions for such complex products.

A. SHEDDING LIGHT ON THE JURISPRUDENCE

The case of *American Cyanamid Co. v. Ethicon Ltd.* ("***American Cyanamid* case**") constitutes the cornerstone of the law upon injunctions and is being followed by the Indian courts time and again. The Court stated that the objective of granting injunctions was to protect the plaintiff against any injury, which damages would possibly fail to compensate, if the case favoured him at the end of the trial. However, the defendant's legal rights are also to be balanced against such protection, so as to avoid him an injury if he was to be favoured in finality.[20] The Court also stated, "*if damages in the measure recoverable would be [an] adequate remedy and the defendant would be in a financial position to pay them, no interim injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage.*"[21]

[20] American Cyanamid Co. v. Ethicon Ltd., [1975] AC 396.
[21] *Id.*

In *Gujarat Bottling Co. Ltd v. Coca Cola Company*, the Supreme Court, setting out the objective for granting an interim injunction, emphasised that "*(a) grant of interlocutory injunctions is at the discretion of the courts and (b) that there has to be a balanced approach in granting such interlocutory injunctions.*"[22]

B. PEGGING THE PARAMETERS

Accordingly, various jurisdictions have enunciated three common parameters, also known as the "Triple Test," that are required to be proved by the plaintiff in order to get interim injunction against the other party:[23]

> "*(i) whether the plaintiff has a prima facie case; (ii) whether the balance of convenience is in favour of the plaintiff; and (iii) whether the plaintiff would suffer an irreparable injury if his prayer for interlocutory injunction is disallowed.*"[24]

A fourth parameter of 'public interest'[25] has also been added by the Indian courts to their jurisprudence on injunctive relief. Notably, none of these three principles are explicitly mentioned in Order XXXIX of CPC.

III. ANALYSING THE TRIPLE TEST FOR GRANTING TEMPORARY INJUNCTIONS

A. THE PRIMA FACIE STANDARD

i. *The Jurisprudence*

[22] Gujarat Bottling Co. Ltd. v. Coca Cola Co., AIR 1995 SC 2372.
[23] Hybritech Inc. v. Abbott Labs, 849 F.2d 1446, 1451; American Cyanamid Co. v. Ethicon Ltd.,[1975] AC 396.
[24] *See* Gujarat Bottling Co. Ltd. v. Coca Cola Co., AIR 1995 SC 2372; American Cyanamid Co. v. Ethicon Ltd.,[1975] AC 396.
[25] F. Hoffmann La Roche Ltd. v. Cipla Limited, (2008) 148 DLT 598.

A prime facie case is one of the most crucial requirements when it comes to the grant of temporary injunction in the case of IPR matters. The wisdom of the House of Lords gave birth to this standard in the *American Cyanamid* case, which stated that "*all that an applicant needs to prove a prima facie case was that 'the claim was not frivolous or vexatious: in other words, that there was a serious questions to be tried.*"[26] The precedential legacy has been followed by the Indian courts ever since,[27] and has bifurcated itself into the relative assessment test and the triable issue test.[28]

The *American Cyanamid* case leaned towards the relative assessment standard, which relatively assessed the cases of each party, and "*determine if the plaintiff is more likely to win*."[29] Lord Diplock supported the lower threshold of this standard by emphasising that "*a temporary injunction phase is not inherently suited to a rigorous assessment of arguments and evidence and that any such effort could risk converting the interim proceeding into a mini trial.*"[30] A *bonafide* contention notwithstanding a pre-judgement against the case became the only requirement.[31]

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[26] American Cyanamid Co. v. Ethicon Ltd.,[1975] AC 396.
[27] *See* Gobind Pritamdas Malkani v. Amarendranath Sircar, [1980] 50 Comp. Cas 219; Amal Kumar Mukherjee v. Clarian Advertising Service Ltd., [1982] 52 Comp. Cas. 315; Amar Talkies v. Apsara Cinema, (1982) JLJ 812.
[28] Shamnad Basheer, Jay Sanklecha, Prakruthi Gowda, *Pharmaceutical Patent Enforcement: A Developmental Perspective*, SSRN (Dec. 14, 2011), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2535763.
[29] *See also* J.T. Stratford & Sons Ltd. v. Lindley, (1965) A.C. 269 (H.L.) 331.
[30] American Cyanamid Co. v. Ethicon Ltd.,[1975] AC 396.
[31] Kashi Nath Samsthan v. Shrimad Sudhindra Thirtha Swamy, (2010) 1 SCC 689.

Hence, the concept of establishing a "*prima facie*" case emerged, which required a showing of "*a probability that the plaintiff is entitled to relief*".[32] It meant that "*he has a case which is not liable to be thrown at the out-set but which requires to be given consideration*".[33] Similar notion was propounded in the case of *Martin Burn Ltd. v. R.N. Banerjee*,[34] where the Supreme Court of India observed*: "While determining whether a prima facie case has been made out the relevant consideration is whether on the evidence led it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could be arrived at on the evidence*."[35]

Prima facie case became a *sine qua non* for the grant of temporary injunction,[36] and the burden to satisfy the Court by leading evidence or otherwise to have prima facie case in one's favour leaned on the plaintiff.[37] If plaintiff fails to prove the same, other requirements cannot follow the examination, and no temporary relief shall be granted.[38]

Nevertheless, certain judges felt the lower threshold to go against the rule of justice and circumvented the standard by creating a new one - the triable issue standard. The triable issue standard, as Lord Denning proposed, was inclined to "*scrutinize the issues more carefully in order to determine which party had a stronger probability of winning at trial*," by establishing the evidence via affidavit, and the court analysing the pleadings and documents

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[32] Preston v. Luck, (1884) 27 ChD 497 CA.
[33] American Cyanamid Co. v. Ethicon Ltd., [1975] AC 396.
[34] Martin Burn Ltd. v. R.N. Banerjee, AIR 1958 SC 79.
[35] *Id.*
[36] Nawab Mir Barkat Ali Khan v. Nawab Zulfiqar Jah Bahadur, AIR 1975 AP 187.
[37] Dalpat Kumar v. Prahlad Singh, (1992) 1 SCC 719.
[38] Kashi Nath Samsthan v. Shrimad Sudhindra Thirtha Swamy, (2010) 1 SCC 689, 692.

on record[39] since the *"interim stage was dispositive and settled the matter once and for all*."[40] However, it may be noted that the latter standard is more likely to turn the interim proceeding into a mini-trial, which robs the proceeding of its purpose of providing speedy remedy. This makes the paper lean to favour the relative assessment threshold, which shall be analysed in later part of the paper.

ii. ***Application in IPR Matters***

Given the relatively younger development of IPR enthusiasm and legal support, courts in India often incline towards avoiding time-consuming proceedings that destroyed the very ratio of temporary injunctions. Therefore, in matters of temporary injunction against patents, grant of patent by the Indian Patent Office ("**IPO**") itself became an acceptable notion to lean in favour of rejecting an injunction.[41]

In *K. Ramu v. Adyar Ananda Bhavan and Muthulakshmi Bhavan*,[42] the court observed that "*the certificate of patent in favour of the plaintiff was found adequate for the establishment of a prima facie case. Mere production of a certificate of Patent as the satisfaction of the requirement for establishing a prima facie case*."[43] Similarly, in *Gandhimathi Appliances Limited, Kelambakkam, Kacheepuram*

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[39] *See* Shiv Kumar Chadha v. Municipal Corporation of Delhi, (1993) 3 SCC 16; Uniply Industries v. Unicorn Plywood, (2001) 5 SCC 95.
[40] Followes & Son v. Fisher, (1976) Q.B. 122, 132-134.
[41] *See* Rajesh Kumar v. Manoj Jain, (1998) 47 DRJ 353; Prasanta Kumar Ganguly v. Ashir Chandra Sen, 2012 SCCOnline Cal 10192; Supreme General Films v. Durgaprasad, 1984 AIR (Bom.) 131.
[42] K. Ramu v. Adyar Ananda Bhavan and Muthulakshmi Bhavan, 2007 (34) PTC 689 (Mad.).
[43] *Id.*

District, Tamil Nadu v. L.G.Varadaraju and others, and *CTR Mfg Industries Ltd. v. Sergi Transformer Explosion Prevention Technologies Ltd. I.A.*, it was observed that a plaintiff is "*always entitled, at a prima facie stage, to rely on the secured patent as prima facie proof of validity*," and puts a *"burden of proof on defendant to prove the vulnerability of the same in regard of denying a prima facie case of the plaintiff.*"[44]

However, another line of judicial determination has emerged such as in *Novartis AG and Anr. v. Mehar Pharma and Anr.*, that "*... the settled law appears to be that in relation to a patent, the Court will not grant an interlocutory injunction unless satisfied that (a) there is a real probability of the plaintiffs succeeding on the trial of the suit, and (b) where the patent is of a recent date, no interim injunction should be granted.*"[45] Thus, "*the mere grant of a patent is not in and of itself sufficient to warrant interim relief*,"[46] and brings the defendant into the witness box with a burden to prove the vulnerability of the plaintiff's patent.

B. THE IRREPARABLE INJURY TEST

i. The Jurisprudence

Though the establishment of a *prima facie* case is a condition precedent, let alone it being proved does not induce the applicant's entitlement to relief.[47] A second condition that follows the court's scrutiny

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[44] Gandhimathi Appliances Limited v. L.G.Varadaraju and others, (2000) 3 MLJ 85 (Mad.).
[45] Novartis AG and Anr. v. Mehar Pharma and Anr., 2005 (3) Bom C.R. 191.
[46] Strix Limited v. Maharaja Appliances Limited, I.A. No.7441 of 2008 in C.S. (OS) No.1206 of 2008 Del. (10th Sept. 2009).
[47] Dalpat Singh v. Prahlad Singh, 1 SCC 719; *see also* CCE v. Dunlop India Ltd., (1985) 1 SCC 260; Transmission Corporation of AP Ltd. v. Lanco Kondapalli Power (P) Ltd, (2006) 1 SCC 540; State of Karnataka v. State of A.P., (2000) 9 SCC 572; Best Sellers Retail v. Aditya Birla, (2012) 6 SCC 792.

is that of 'irreparable injury,' whereby, the plaintiff needs to prove two things: first, "*that he will suffer irreparable injury if the injunction as prayed is not granted*," and second, "*that there is no other remedy open to him by which he can protect himself from the consequences of apprehended injury*."[48] It was further explained by the Delhi High Court in *Shenzen OnePlus Technology Co. Ltd. v. Micromax Informatics Ltd.*, that when deciding whether to grant a temporary injunction, it is essential to maintain a delicate equilibrium between the plaintiff's rights and the defendant's rights. Only if the court determines that the harm is severe, irreparable, and cannot tolerate even the slightest delay, alongside a strong preliminary case, would it be appropriate for the court to issue a temporary injunction.[49] Here, it is pertinent to note that the term 'irreparable injury' signifies a material injury that cannot be adequately compensated by damages or any specific or fixed pecuniary measures, unlike any other "*physical possibility of repairing the injury*".[50]

ii. ***Application in IPR Matters***

In the IPR regime, the test of irreparable harm has forever been a subject of great debate. The reason falls back to the fundamental point that "*every loss caused to the patentee-plaintiff can be compensated through damages*".[51] However, the Delhi High Court has judiciously argued against the premise stating that denying an injunction solely based on the possibility of

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[48] *See* American Cyanamid Co. v. Ethicon Ltd., [1975] AC 396; *see also* Attorney General v. Hallett, 153 ER 1316.
[49] Shenzen OnePlus Technology Co. Ltd. v. Micromax Informatics Ltd, No. 3761 of 2014.
[50] *See* Manohar Lal Chopra v. Seth Hiralal, AIR 1962 SC 527; Cotton Corpn. Of India v. United Industrial Bank Ltd., (1983) 4 SCC 652.
[51] Pai, *supra* note 7.

compensating financial losses upon patent owner success is unjustified. Closer examination reveals that certain damages can be irreparable, highlighting the third principle: allowing infringers to operate during trial can lead to price reductions and increased profit, while patent owners face risks. Furthermore, even if the patent owner wins and recovers financially, prices may not fully rebound. Thus, the patent owner's victory should yield tangible, not symbolic, outcomes.[52]

On the same lines, patent cases concerning pharmaceutical matters have seen a trend that a temporary injunction not only stops a company from operating for a significant duration but also prevents the public from accessing affordable and essential medicines. Now envisioning a security bond that requires the party requesting the injunction to deposit a sum upfront, covering potential harm caused to the defendant's business and, importantly, potential damages to the public interest not only offers some redress to the defendant if an interim injunction is wrongfully imposed but also serves as a check to ensure that plaintiffs only seek such injunctions when genuinely necessary.[53]

It is in consonance with Rule 2(2) of Order 39 of the CPC, which prescribes for "the discretionary power of courts to put in place terms on the grant of an injunction, including keeping accounts, giving security, or any other manner" the court thinks fit, and has been reaffirmed by the Apex Court in *Raunaq International Ltd. v. I.V.F Construction Ltd.*, that "*the party at*

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[52] Merck Sharpe and Dohme v. Glenmark Pharmaceuticals, (2013) 201 DLT 126.
[53] *See* Swaraj Paul Barooah, *Interim Injunctions: What's the Damage? – Part II*, SPICYIP (Sep. 8, 2020), https://spicyip.com/2020/09/interim-injunctions-whats-the-damage-part-ii.html.

whose instance interim orders are obtained has to be made accountable for the consequences of the interim order. … the petitioner asking for interim orders, in appropriate cases should be asked to provide security for any increase in cost as a result of such delay, … in consequence of an interim order. Otherwise public detriment may outweigh public benefit in granting such interim orders. Stay order or injunction order, if issued, must be moulded to provide for restitution."[54] Another recourse opted has been to deny the temporary injunction if it is visible that "*the defendant could not be adequately compensated through a cross-undertaking in damages*."[55]

C. BALANCE OF INCONVENIENCE AND PUBLIC INTEREST

i. The Jurisprudence

The third and final condition required to be satisfied in order to claim interim relief is the 'balance of convenience' being in favour of the plaintiff/applicant. Herein, the Court requires to get satisfied that "*whether the refusal or grant of an injunction will cause an adverse impact on any of the parties before the court; and whether or not comparative mischief or inconvenience will be caused to any of the party either by granting or denying the injunction*."[56] As observed in the *Dalpat Kumar* case, "*if on weighing conflicting probabilities, the court is of the opinion that the balance of convenience is in favour of the applicant, it would grant injunction, otherwise refuse to grant it*."[57] In a nutshell, the Court weighs the need of one party against the other, and determines where the 'balance of convenience'

[54] Raunaq International Ltd. v. I.V.F Construction Ltd., (1999) 1 SCC 492.
[55] Hindustan Pencils v. India Stationery Products, AIR 1990 (Del.) 19.
[56] Pai, *supra* note 7.
[57] Dalpat Kumar v. Prahlad Singh, (1992) 1 SCC 719.

shall lie.[58] Public interest, "*whether the fact that the accused infringer's product was being sold at a price significantly lower than the price at which the patentee was apparently making available the said patented technology through its own products*"[59], has also sought its genesis within the test of comparative convenience, and is now ascertained simultaneously.

ii. ***Application in IPR Matters***

As seen in *Roche v. Cipla*, a pharmaceutical patent dispute, the applicant sought an injunction against a life-saving drug. The Court observed that the "*stark price difference between competing medications and the public interest in ensuring that people have access to life-saving medications would tip the scales in favour of the defendant*."[60] However, later in *F. Hoffmann-La Roche Ltd. v. Cipla*, the division bench chose to focus on the element of "*irreparable harm being caused to several lives*."[61]

An interim injunction is granted to "*lessen the risk of injustice to the plaintiff while the case is ongoing*," the Supreme Court noted when discussing the balance of convenience.[62] The defendant must be protected from the harms brought on by an injunction that "*prevents him from exercising his own legal rights because he cannot be adequately compensated for those injuries*," so this injustice must be balanced against that need. The Court must therefore

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[58] American Cyanamid Co. v. Ethicon Ltd., [1975] AC 396.
[59] Pankhuri Agarwal, *Understanding the Public Interest Element of the Injunction Analysis in Patent Infringement Cases*, SPICYIP (May 30, 2018), https://spicyip.com/2018/05/understanding-the-public-interest-element-of-the-injunction-analysis-in-patent-infringement-cases.html.
[60] F. Hoffmann-La Roche Ltd. v Cipla, (2009) 159 DLT 243.
[61] *Id.*
[62] Hindustan Petroleum Corp. Ltd. v. Sriman Narayan, (2002) 5 SCC 760.

consider these elements when deciding the balance of convenience. As a result, this decision is highly fact-specific and unique in each instance.

IV. CRITICAL ANALYSIS

While there seems to be a rhetorical affirmation that the injunction jurisprudence has strong pillars to deal with IPR matters, the reality does not translate the same.

A. SPEAKING "STATS"

As indisputable as it is, the IPR regime in India has juvenile roots, and applications for patent registration, and grants are only rising.[63] The Indian Patent Office only suffers from a chronic shortage of specialised and well-trained officers.[64] Patent offices are further burdened with corruption charges and "*cosy linkages between patent agents and patent examiners/controllers*."[65] This reflects institutional infirmities that Indian offices work upon, such as found in the PTC Journal for 2016-19, "*of the 13 patent cases heard in the High Courts in this period, interim injunctions were granted in 5*."[66] Furthermore, if one combs through 143 patent injunction suits filed between 2005 and 2015, the data suggests grant of mere 5 judgements, underscoring major

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[63] Annual Report 2015-16, *Intellectual Property India the Office of Controller General of Patents, Designs, Trademarks and Geographical Indication India*, IPINDIA (Mar. 31, 2015), https://ipindia.gov.in/writereaddata/Portal/IPOAnnualReport/1_71_1_Annual_Report_2015-16_English__2_.pdf.

[64] Peter Drahos, *Trust Me: Patent Offices in Developing Countries, Centre for Governance of Knowledge and Development Working Paper*, SSRN (Nov. 9, 2007), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1028676.

[65] BHAVEN SAMPAT, INSTITUTIONAL INNOVATION OR INSTITUTIONAL LIMITATION? THE IMPACT OF TRIPS ON INDIA'S PATENT LAW & PRACTICE (2010).

[66] Barooah, *supra* note 53.

procedural delay by High Courts of Delhi, Madras, Gujarat, Bombay, and Calcutta.[67] While Justice Katju ordered in *Bajaj Auto Ltd. v. TVS Motor Company Ltd.*, that such trials must conclude within 4 months,[68] research shows that the delay extends for a couple of years at times.[69]

B. THE PRIMA FACIE "PROBLEM"

As already noted, the triable issue test stands more problematic as compared to the relative assessment threshold. The reason behind such bent is found in the statistical evidence on institutional infirmities that Indian offices work upon.

As per Professor Dr. Ramakrishna Thammaiah's empirical study on prima facie case establishment and the consequent grant of injunctions,[70] it is notably found that in 69% cases where permanent injunctions were not granted, in 60% of cases, interim injunctions were granted.[71] It raises an eyebrow at the fact that interim measures are granted swiftly, while they later turn towards a different road of conclusion.

The reason can be found as two sides of the same coin discussed above— on one, a plaintiff is not automatically entitled to an injunction simply because he has a patent that has not yet been invalidated; on the

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[67] Prashant Reddy, *143 patent infringement lawsuits between 2005 and 2015: Only 5 judgments*, SPICYIP(June 5, 2017), https://spicyip.com/2017/06/143-patent-infringement-lawsuits-between-2005-and-2015-only-5-judgments.html.
[68] Bajaj Auto Ltd v. TVS Motor Company Ltd., (2009) 41 P.T.C. 398 (S.C.).
[69] Barooah, *supra* note 53.
[70] Prof. Dr. Ramakrishna Thammaiah, *An India Perspective on Establishing a Prime-Facie Case in Patent Suits*, SSRN (Oct. 4, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3047057.
[71] *Id.*

other hand, a defendant cannot disprove an injunction claim by merely stating that the validity of the patent is proposed to be challenged; instead, they must prima facie show vulnerability. The practice holds three key issues. *Firstly*, given the institutional infirmities of the offices granting patents, either test falls short of approval. *Secondly*, the practice of granting a temporary injunction based on the certificate of patent also disregards the law as noted in *Bishwanath Prasad RadheyShyam v. Hindustan Metal Industries*, that "*it is noteworthy that the grant and sealing of the patent, or the decision rendered by the Controller in the case of opposition, does not guarantee the validity of the patent, which can be challenged before the High Court on various grounds in revocation or infringement proceedings. It is pertinent to note that this position, viz. the validity of a patent is not guaranteed by the grant, is now expressly provided in Section 13(4) of the Patents Act, 1970.*"[72]

The plaintiff (or the person requesting an injunction) must demonstrate the veracity of the allegations or averments made in the application in order to establish a prima facie case. The criteria for proving a *prima facie* case, however, are not made explicit.[73] Therefore, when examining patent infringement lawsuits, it is crucial to either (a) define a suitable standard for establishing a prima facie case or (b) establish a new process for granting injunctions while taking into account the relative interests of a plaintiff patentee and a defendant. It is rational and instinctive to: (a) first credibly demonstrate that the patent is legitimate and (b) then

[72] Bishwanath Prasad Radhey Shyam v. Hindustan Metal Industries, (1979) 2 SCC 511.
[73] Power Control Appliances v. Sumeet Machs Pvt. Ltd., (1994) 2 S.C.C 448.

convincingly set up that the alleged item is encroaching the instant patent in order to determine an acceptable standard for constructing a prima facie case. The conclusion is precisely that "*grant of a patent by itself should NOT be considered as a strong ground for granting an ex-parteorinterim injunctions*."[74]

Thirdly, there is absolutely no question that patent owners should be entitled to fair compensation for their hard work, and they should even be paid if someone else uses their patent without their permission. However, injunctions do not accomplish this. Temporary injunctions in favour of a patentee will actually harm innovation, competition, and consumers if the courts do not take the time to fully comprehend the case.

C. (DIS)BALANCING THE INCONVENIENCE

Although the practise of balancing of inconvenience leans towards serving both parties and the public, certain thorns in the rose need deliberation.

Patent seekers do not simply come for a single-component plastic item, but a multi-component product, such as a mobile device or a medicine composed of different chemicals. It appears that the granting of preliminary injunctions to halt the sale of multi-component products based on a patent lawsuit brought by a patentee with one or two active patents equates the worth of one or two patents to numerous thousands of patents embodied in a product and, consequently, to the worth of the entire product itself. While the legal remedies for single component and multi-component

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[74] *Standard Essential Patents: How Do They Fare?* RPX CORPORATION, https://www.rpxcorp.com/wp-content/uploads/2014/01/Standard-Essential-Patents-How-Do-They-Fare.pdf.

product remains same, the patent infringement assessment is not different for each; leading only to irregularities in the assessment.

Furthermore, while denying an injunction, the court often ignores the multiple "indirect parties" not limited solely to the consumer public, in the injunction matter. These can be stakeholders such as the producers, manufacturers, and workmen involved in the process. Since temporary injunctions are more *in personam* specific, the same requires reconsideration, as noted by the Delhi High Court as: "[*s]tultification of defendants investment, loss of employment, public interest in the product (such a life-saving drug), product quality coupled with price, or the defendant being smaller in size, may go against the plaintiff*."[75] While the courts rhetorically consider the public interest when granting an injunction, but if the case involves, for example, access to medications used to treat diabetes, a disease that is very common in India, courts may occasionally disregard the public interest in favour of preserving the integrity of the patent system itself, preventing the distortion of a legitimate monopoly.

D. IRREPARABLE HARM AND THE RELEVANT ISSUES

Another significant problem with granting temporary injunctions without considering the case's merits is that it encourages the plaintiff patentee who has an injunction granted in his favour (against the defendant) to decide against taking the matter to trial. Even before the case is decided on its merits, there is significantly less incentive to move the case forward to the trial phase, and the defendant continues to experience the hardship

[75] Franz Xaver Huemer v. New Yash Engineers, AIR 1997 (Del.) 79.

of the interlocutory injunction. It goes against the caution raised in *Bajaj Auto Ltd v. TVS Motor Company Ltd*, that "*In our opinion, in matters relating to trademarks, copyright and patents the proviso to Order XVII Rule 1(2) C.P.C. should be strictly complied with by all the Courts, and the hearing of the suit in such matters should proceed on day to day basis and the final judgment should be given normally within four months from the date of the filing of the suit.*"[76]

However, it must also be noted that patent disputes are complex and require high scientific scrutiny. Although such scrutiny can be avoided at a ripe stage as that of an injunction, door to errors shall never be closed if blindly disregarded, and at the later stage of trial, a grave miscarriage of justice shall be present. Thus, only while rectifying the errors in other parameters in granting temporary injunctions, time limit factor can be focused upon.

Furthermore, tipping on the point of accused infringer selling the product on a lower price should not be the point alone for ignoring a valid patent. This way, companies are likely to set lower price differentials than their competitors to rescue their litigation, and later increase the price, causing the loss of both the applicant and the consumers. Focusing on utility of item should be a more rigorous approach since it will cover not just pharma products, but also other commodities on the grounds of patentable inventions under the relevant law,[77] rather than focusing merely on the price differentials as done in *Roche v. Cipla.*[78]

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[76] Bajaj Auto Ltd v. TVS Motor Company Ltd., (2009) 41 PTC 398 (SC).
[77] *See* The Patents Act, 1970, No. 39, Acts of Parliament, 1970,§§3, 4 (India).
[78] F. Hoffmann-La Roche Ltd. v. Cipla, (2009) 159 DLT 243.

V. CONCLUSION

The present article has aimed to address the fundamental meaning and objective of temporary injunctions and how they apply in IPR matters. By conducting a step-by-step analysis of the triple test, the paper seeks to conclude by providing the following suggestions:

- Proper standards for assessment of the triple test must be elucidated.
- Grant of Patent certificate should not be construed as a perfected prima facie case.
- Temporary injunctions should reckon the initial object of fostering innovation and competition, rather than adjusting damages between the parties albeit them being the main point of contention.
- Public interest is a crucial factor for recognition; however, it shall also not infringe upon the inventor, distributor, manufacturer, and other relevant indirect *in personam* parties to the case.
- Different modes of assessments must be deduced for single and multi-component patents, so as to avoid harm to producers involved against a product.
- While keeping in mind the technical and scientific scrutiny of the patent product, time limit favouring the very nature of temporary injunctions must be valued.
- Instead of focusing on price differentials, utility of the product must be considered.

Injunctions, being discretionary and equitable reliefs and not available as a matter of right, must be granted with a spirit of judicial activism intended to further the ends of justice.

Prakhar Ganguly & Udita Ghosh, *Locating Paradoxes in the Indian Supreme Court's Rendition of Gender Justice – An 'Opportunity Creation' Analysis Post the Charu Khurana Judgment,* 9(2) NLUJ L. Rev. 197 (2023).

LOCATING PARADOXES IN THE INDIAN SUPREME COURT'S RENDITION OF GENDER JUSTICE – AN 'OPPORTUNITY CREATION' ANALYSIS POST THE CHARU KHURANA JUDGMENT.

~Prakhar Ganguly & Udita Ghosh[*]

ABSTRACT

The Supreme Court of India in Charu Khurana v. Union of India (2015) 1 SCC 192. shattered a 100-year-old glass ceiling which prevented women from participating as make-up artists in the Bombay film industry. The judgment is posited under Cornell University's Women and Justice section. However, no real socio-economic analysis of the judgment has taken place. The judgment has been criticised as being an exercise in 'end without means'. While these criticisms are called for, does the judgment represent a classic liberal paradox which ends up doing

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more harm than good for the people it wishes to liberate? While Charu Khurana has gone ahead to prepare the likes of Shah Rukh Khan the residual impact of her upliftment, at least normatively, has not been analysed in depth. This paper aims to explain the impact of the much-hailed decision of the Supreme Court by deploying paradoxes of liberty, labour economics and scholarship on barriers to entry for women in the market. It challenges the basic presumption that seemingly beneficial legislation that prima facie uplifts the status of women should always render progressive outcomes for all women.

"How many more women there are who silently cherish similar aspirations, no one can possibly know; but there are abundant tokens how many would cherish them, were they not strenuously taught to repress them as contrary to the properties of their sex."

~ John Stuart Mill (On The Subjection Of Women)

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I. INTRODUCTION

John Stuart Mill ("**Mill**") in his classic work titled 'On Subjection of Women' presents some interesting thoughts. He claims that only if marriage is governed by the ideas of justice and equality that the society of humans shall benefit from the institution of marriage.[1] Prior to claiming that the very idea of infusing the relationship of man and woman in marriage with elements of equality is an end in itself, he scales out two benefits to the society at large in case women are no longer subjected to limitations of thought and can participate in the free engagement of their faculties - the influx of intellect to a supply deficit labour market and the degrading impact the relationship of superiority in marriage has on the man.[2] In a free market based on free individual participation, the benefits reaped are manifold - the society is not bereft of the intellect of one-half of humanity.[3] Mill explained that this would cure the deficit supply of intellect in the market and, of course; men shall no longer be able to take as granted, on the premise of their privilege, what they should earn - respect. Where there is, thus, one person to benefit mankind there will then be two.[4]

Therefore, in an anti-liberal structure, it is with force, if not brute, that they are kept beyond participation in markets either as labourers or as commodities. There is no denying this idea or anticipated reality.

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[1] John Stuart Mill, *The Subjection of Women,* THE PENNSYLVANIA STATE UNIVERSITY ELECTRONIC CLASSIC SERIES, (1869).
[2] *Id.* at 91.
[3] *Id.*
[4] Mill*, supra* note 1 at 119.

Furthermore, free and fair competition is the citadel of the liberal worldview - that there should be no embargoes on the free movement of goods, services and people. In doing so, the liberal perspective has often categorised government intervention as an embargo on the free exchange of commodities. In particular, these scholars have written extensively against the industrial protection of labour in poor countries as being based on beliefs that are based on rubbish.[5] For the classical economic liberal, any form of intervention in the market reduces the standards of objectivity that the system boasts of. For some like Milton Freidman, the scope of the government must be limited.[6] It is this economic stance that the political liberal might not agree with. The latter would want some basic protection for the working class (or classes which are generally considered to be backward) even at the risk of being branded paternalistic.[7] Thus, according to classical political and economic liberals, it would be unjust to prevent women from participating in markets solely because they are women. However, the economic liberal should have a problem with the government intervening in the protection of a woman worker who is facing harsh working conditions or discrimination at work. For them, she would choose a different employer in case either persists. She is free in a sense to choose her servitude. The political liberal, on the other hand, would take a position

[5] JAGDISH N. BHAGWATI, IN DEFENSE OF GLOBALIZATION (Oxford University Press, 2004).
[6] MILTON FRIEDMAN, CAPITALISM AND FREEDOM 2 (The University of Chicago Press, 40th anniversary ed., 2002).
[7] *See* John Rawls, '*Political Liberalism*.' 47, THE REVIEW OF METAPHYSICS, 585–602 (1994).

that favours intervention by the state to protect certain basic rights of dignity, life, liberty, privacy, etc. in some or all spheres of her life.

Mill's work was cited in the landmark judgment of *Charu Khurana*.[8] The trade union, in this case, prevented women from engaging in a particular trade. This restriction was essentially in practice for the past hundred years. The concerned trade union allowed women to work as hairdressers but prevented them from practising makeup art - the latter being reserved for male members of the trade union. Justice Dipak Mishra has quoted a specific line from Mill's classic,

in 1869, 'In Subjection of Women' Mill stated, "*the subordination of one sex to the other ought to be replaced by a principle of perfect equality, admitting no power or privilege on the one side, nor disability on the other*."

The judgment has been criticised by some as being not sufficient enough - an end sought without the means employed.[9] It conforms to the classical liberal paradox which calls for an ideal world order but know no means to attain the same. However, there were some positive reinforcements - that the year 2014 presented the Supreme Court as the site of the campaign for sex equality primarily owing to its decision in *NALSA*[10] and *Charu Khurana*.[11] Perhaps, it is time to measure progress and identify the

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[8] Charu Khurana v. Union of India, (2015) 1 SCC 192.

[9] Samarth Nayar, *Ends without Means or Reasons: Charu Khurana v/s Union of India*, LEGAL SERVICE INDIA, (4 March 2022) https://www.legalserviceindia.com/legal/article-2714-ends-without-means-or-reasons-charu-khurana-v-s-union-of-india.html.

[10] National Legal Service Authority (NALSA) v. Union of India, AIR 2014 SC 1863.

[11] Jayna Kothari, *Rights Protection in 2014: A Review of the Indian Supreme Court*, *Oxford Human Rights Hub*, 29 January 2015, (March 4, 2022), https://ohrh.law.ox.ac.uk/rights-protection-in-2014-a-review-of-the-indian-supreme-court; *Khurana and Others v. Union of India and Others*, LEGAL INFORMATION INSTITUTE, (4 March 2022)

remaining challenges that women face in attaining decent work in the film industry specifically in the context of the said judgment.[12] Does this judgment promote developments within the specific labour market which would ensure that similar levels of progress are brought to women in general? Promoting gender justice in the realm of work would essentially mean removing barriers to entry.[13] However, the real question is how has the judgment impacted the lives of the people engaged in the trade it wished to liberate from the 'hundred-year-old embargo'. Any new gender policy approach calls for a broader framework for labour market information and analysis.[14] Are judgments of similar kinds capable of making substantial improvement in the life of women attached to this category of work? For any legal solution to work, it ought to survive, at the bare minimum, an economic analysis.[15] This article takes the judgment and its intended impact to the task. By employing basic economics of demand and supply this paper shows how a lack of understanding of the principles of gender and labour markets results in courts failing to improve gender equity in labour markets. While the judgment as a one-time rescue attempt by the Supreme Court is acceptable, does it enable the removal of entry barriers for women? This does not mean that this article supports an anti-Mill stance on the

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https://www.law.cornell.edu/women-and-justice/resource/charu_khurana_and_others_v_union_of_india_and_others.

[12] WOMEN IN LABOUR MARKETS: MEASURING PROGRESS AND IDENTIFYING CHALLENGES, (Bureau international du travail ed., 2010).

[13] *Id.* at xii.

[14] *Id.* at xiii.

[15] Jennifer Ring, *Mill's The Subjection of Women: The Methodological Limits of Liberal Feminism*, 47 REV POL 27 (1985).

subordinating relationship between men and women. As an end in itself, women and men ought to have equal opportunities to livelihood. But does this end itself justify the means? The means have to be assessed not by the end but by the means itself. The means utilised by this paper are simple.

In the *first* part, the paper presents a brief background, foreground and facts of the case. It draws the broader arguments taken by parties to the judgment and deduces the ratio decidendi. The *second* part explains the normative ideas forwarded by Mill in his classic - 'On Subjection of Women' and why the context in which it is employed by the court is fundamentally problematic. Both these parts explain why board liberal discourse on women's upliftment remains a 'ends without means' discourse. The *last* part presents the economics of a judgment. It questions, by employing basic demand and supply laws, whether in the long run such judgments are capable to emancipate the class it intends to emancipate. What are we to expect from this analysis? Each and every individual is owed justice by each individual. On the contrary, each individual is owed to justice. True justice must be put to the test and taken to task. The hypothesis forwarded is also the fundamental fulcrum of feminist methodology - challenging seemingly beneficial provisions of law as being rather detrimental to women.[16]

II. THE CHARU KHURANA JUDGMENT – THE FACTS, THE FACTUAL AND THE CONTEXTUAL

[16] *See generally* Joanne Conaghan, *Labour Law and Feminist Method*, 33 I.J.C.L. 93 (2017).

The International Labour Organisation ("**ILO**") has identified cultural norms, institutions, income level, etc. as one of the fundamental reasons why the levels of workforce participation by women is abysmally low and much progress has not been made.[17] One such instance is this. The Supreme Court had to declare trade union rule, which prevented women from being occupied as make-up artists in the Mumbai film industry, as unconstitutional and illegal. The rule stated that in order for any person to practise in the industry they had to be a member of the trade union. Membership of the said union could only be obtained through residency in the state of Maharashtra for at least a period of five years. The Bollywood film industry is unorganised. The nature of the market is such that it thrives on the basis of mostly oral contracts which concretises into written ones as one moves up the ladder. Most workers who are at the bottom of the pyramid are daily wage or pro rata workers. Unions have a stronghold in matters concerning who is to be employed, how the work is to be distributed, etc. Furthermore, if the member was a male they could only practise as a make-up artist and in case the member was female then they could only be a hair-dressers. Outrightly, this is a direct case of a discriminatory institutional and cultural practise engaged by the trade union and creates barriers to free entry for women in the labour market.

The Supreme Court voyaged in search of voices in history which were raised in favour of women's rights of employment and

[17] WOMEN IN LABOUR MARKETS, *supra* note 12. at 16.

representation.[18] It quoted Lord Denning's position on women's clarity of thought process, Kofi Annan's speech at the United Nations, Charles Fourier's work, etc.[19] The judgment goes on to emphasize the importance of the Convention on Elimination of Discrimination Against Women ("**CEDAW**") and India's status post-ratification. It claims that in a political economy based on equality and the absence of discrimination against women a rule that prevents women from freely engaging in any profession or trade is inherently violative of fundamental rights and cannot be justified on any count. To this array of allegations, the position taken by the concerned union has been that the said rule was for the betterment of the association of workers.[20] Understandably, the court accepted no justification for the said rule.[21] The Court premised its attempt to emancipate women from economic discrimination by premising its judgment on the guidelines laid down in the *Vishakha* judgment which involved the rape of a social worker at her workplace.[22] In this case, women makeup artists would be harassed in case they chose to work without a union-certified identity card.[23] To this array of allegations, the union furthered their cause by claiming that the practice of not issuing an identity card of a make-up artist to a woman was to ensure that the male counterparts are not deprived of their livelihood.[24] While the petitioner had

[18] Charu Khurana v. Union of India, (2015) 1 SCC 192, ¶199.
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *See generally* Vishakha v. State of Rajasthan, AIR 1997 SC 3011.
[23] Charu Khurana v. Union of India, (2015) 1 SCC 192, ¶205.
[24] Charu Khurana v. Union of India, (2015) 1 SCC 192.

no objection to men seeking employment as hair-dressers and women seeking employment as either, the union had an objection to women seeking employment as make-up artists. It wanted women to work only as hair-dressers. Both the restrictions placed by the union have to be read together - one had to be a resident of the state of Maharashtra for a minimum duration of 5 years to be a member of the union and a male member shall be able to get X work and a female union member shall be able to get Y work. This was a classic case of restrictive distribution in a surplus labour market. Trade unions themselves are institutions that impose restrictive conditions of work. The restriction imposed by the first rule imposes an initial hurdle while the second distributes the opportunities among those who have crossed the hurdle. The position taken by the plaintiff was clear - both rules had to go.[25] The Court obliged.

The Court also focused on the importance of trade union rules confining within the tenants of the constitution. In other words, when a trade union is constituted under the Trade Union Act 1926, it has to adhere to its rules and owing to unions being constituted and subjected to the Constitution of India, there can be no rules that promote discrimination.[26] There were references to universal principles and statements made by scholarly figures in history or in the recent past.[27] It quotes fundamental rights from the Indian Constitution, refers to the directives as the soul of the constitution and places reliance on fundamental duties - specifically on

[25] *Id.*
[26] *Id.*
[27] *Id.*

scientific temper and humanism. The reference to the directives displays the tendency of the courts to go beyond the language of the statute.[28] This kind of interpretation is often visible in disputes concerning labour, minority rights, etc. and has aided these backward social classes to secure the protection of rights. With constant reference to abstract principles in the Constitution, these kinds of judgments writing often indicate the Court's attempt at justifying a final outcome that may not be legally sound but is aimed at doing greater justice. In cases concerning the absorption of contract labour in regular service of the employer, this kind of interpretation has aided the courts to read into the legislation rights which were not originally enshrined in the Act itself.[29] In this method of interpretation the judge often finds within the directives and other abstract principles a mandate to do complete justice. If analysed closely, the rule as it was, concerned with questions of participation of women in the labour market and easing barriers of entry for women in the specific market. The judgment removed these barriers by declaring the rule to be bad and unconstitutional. However, has the judgment been able to stand up against its broad criticism as being a 'means without ends' discourse? What are the methodological limitations of such judgments and are these limitations akin to the limitations of any discourse of liberal feminism?

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[28] *Id.*

[29] *See generally* Air India Statutory Corporation and Others v. United Labour Union, AIR 1997 SC 645.

III. MILL AND MISHRA: CLOSE BEDFELLOWS IN METHODOLOGY AND IDEOLOGY?

This judgment specifically catered to an upper-middle class woman who, as of now, runs her own academy and has courses that may reach up to rupees one lac.[30] *Charu Khurana* has gone on to prepare the stalwarts of the Bollywood film industry. She has had her training in makeup from the West and is an educated woman from the middle or the upper-middle class in Indian society. Is it mere coincidence that the court cites Mill or are there deeper methodological connections and limitations associated both with Mill's work and the underlying thought process in this judgment? Mill's work is often taken as an inspiration to destroy any anti-women social norm or law or custom. It is a remarkable document for its time.[31] This is irrespective of the fact that his work is riddled with methodological paradoxes - his argument is riddled with preconceptions to which he does not want to admit.[32] 'On the Subjection of Women' was one of the most significant anti-institution pleas on the participation of women in occupation, education and their suffrage.[33] It was written in a specific time frame, about a specific institution and had a context to it. Mill's work was on the despotic institution of the Christian family and how it affected the mental predicates of the man in marriage. It targeted the institution of the

[30] CHARU KHURANA, http://www.charukhurana.com/advanced-make-up (**Khurana**).
[31] Mary Lyndon Shanley, *Marital Slavery and Friendship: John Stuart Mill's The Subjection of Women*, 9 Political Theory 229 (1981).
[32] Ring, *supra* note 15 at 32.
[33] Ring, *supra* note 15 at 27, 35.

Christian family with a specific purpose - the emancipation of women. It located the precise reason why women are restricted outside their four walls - it being the source of all kinds of domination inside them.[34] In other words, women are institutionally dominated outside the family for the male to dominate them inside of it.[35] Men simply could not comprehend a world where they had to survive with equals.[36] This form of domination enables the man to take the role of a despot with absolute power over his subjects thereby disabling the woman. How is the man endowed with such enormous power? Simply by being born![37] Mill justifies the incorporation of justice in this institution of Christian marriage both as a means and an end. As the latter, Mill would suggest that justice is due to each individual and, as the former, he suggests that liberation of women from the despotic husband would necessarily mean the incorporation of half of the human population into the labour force and the market. This has, as Mill states, its benefits as competition would increase. This would generally benefit women and citizens would owing to greater availability of services and intellect.[38] The average supply-deficit labour market would be booming because men alone shall not be entitled to provide services. In order to justify this, Mill destroys the popular beliefs held against women - of them being mentally inferior,[39] or that of religiosity in the wife's obedience to the

[34] Mill, *supra* note 1.
[35] *Id.* at 58.
[36] Ring, *supra* note 15 at 236.
[37] *See generally,* Mill, *supra* note 1.
[38] *Id.* at 91.
[39] *Id.* at 58.

husband![40] The broader perceptions of what women were and what women were not, as he writes, are nothing but mere perceptions.[41] Mill furthers this proposition by mostly taking those attributes, like greater nervous susceptibilities, which were believed to be shortcomings of women and showing that these were considered to be advantages when men showcased them.[42] Mill premises all of this on the conditions of the marriage contract - which is the destiny for all women unless she is ugly![43] His analysis of the Christian marriage contract leads him to conclude that the wife is a slave to a greater length than a slave is towards the master.[44] The marriage allows the man to nurture his baser (and true) characteristics because all other social institutions prevent him from doing so.[45] Mill's work was fundamentally about the corruption of male-female relationships in marriage with the hope to establish friendship within this institution.[46] It challenged the Victorian notion that marriages were essentially based on consent wherein he claimed that such consent derived from the 'natural' way of domination and subversion creates much more troubles for the society at large. For Mill, the woman in a Christian marriage represented a chattel in multiple ways - the legal personality merged with that of the husband, the absence of choice when it came to not marrying and the

[40] *Id.* at 36.
[41] *Id.* at 58.
[42] *Id.* at 70.
[43] *Id.* at 36.
[44] *Id.*
[45] *Id.*
[46] Ring, *supra* note 15 at 27, 35.

abuses of human dignity in the institution of marriage itself.[47] This kind of domination is perpetuated by the fact that under common law the wife could not refuse the husband the 'last familiarity' and she had no right to judicial separation even if she had a useless husband.[48] He understands that this amount of negation of a woman might lead some to perceive that seeking power is the solution. He warns of such radicalism as he writes - the absence of justice cannot justify the clamouring for power for that would lead to similar conclusions only that the roles would be reversed.[49] Albeit, Mill concluded that there is a possibility, where two individuals in the institution of Christian marriage hold justice to each other, of a marriage based on free consent. Mill's work is radical to the extent that it suggests that this kind of marital structure diminishes the ability of the man to participate in vibrant public debates.[50]

Justice Dipak Mishra's understanding of the issue in question was similar. He traced lone and vocal voices in history, who had protested in favour of gender equality, similar to how Mill had relied on women's role in history.[51] Bereft of an economic analysis, the reference to the principles of the constitution envisions the limitations of any liberal feminist approach – that it cannot go beyond any form of empiricism and analyse the actual costs of a judgment. Critiques of Mill have placed serious reservations on how he relied on empiricism thereby grounding his theory and his inability

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[47] Ring, *supra* note 15 at 231.
[48] *Id.* at 233.
[49] Mill, *supra* note 1 at 36.
[50] *Id.* at 239.
[51] Charu Khurana, *supra* note 8 at 198.

to go beyond it.[52] Thus, for Justice Mishra, any understanding of gender justice has to be comprehensible within the existing framework of the constitution, legislations, international conventions and judicial precedents. In referring to various precedents Justice Mishra points out at the social utility of gender equality. He quotes Valsamma Paul[53] and other judgments which indicate the social, political and economic context of human rights. The importance lies in the fact that they are inalienable, integral and are needed for the full development of the personality of women.[54] This is similar to Mill's understanding of gender quality as well - that a gender-equal society would enable greater services to be generally available.[55] Justice Mishra's reliance on empiricism in ideology is bolstered when he writes that the facts of this specific case have to be scrutinized in the backdrop of this ideological understanding of gender justice.

To the extent Mill tried to come out with a solution, he suggested that a true union of individuals based on friendship is the key! Furthermore, in a society of equals the ruler and the ruled can be altered. Mill's ideas were different because others at the same time around were suggesting the natural subjection of women whereas he suggested that there was no real basis as the highest predicates of women and men were no different.[56] Mill's means were problematic - he seems to suggest that in case, out of friendship

[52] Ring, *supra* note 15 at 27.
[53] Charu Khurana v. Union of India, (2015) 1 SCC 192; *see also* Valsamma Paul v. Cochin University, (1996) 3 SCC 545.
[54] *Id.*
[55] Ring, *supra* note 15 at 40.
[56] *Id.*

between two equal individuals, the woman chose to take responsibility for housework and the man for earning there would be no better arrangement.[57] To some this kind of criticism is unfounded as Mill never suggested this partition of responsibilities as a one-size fits all solution as it was a proposition made by him subject to demonstration as a working principle.[58] This kind of feminism is problematic in itself owing to its reliance on rationality as the basis for participation in non-private life.[59] Justice Mishra's understanding of gender justice was similarly limited in methodology. To the extent he intended on removing barriers of entry he was spot on but his reliance on existing norms disabled him to actually looking into the impact of the solution he provides. Can the outcome of the judgment pass the felicific calculus? Does it do the greatest good for greatest numbers?

IV. ANALYSIS OF 'OPPORTUNITY-CREATION' POST THE CHARU KHURANA JUDGMENT – ANOTHER BRICK IN THE WALL?

It seems that to the extent Mill's reliance on empiricism has been criticised or liberal feminism, in general, has been criticised, the same holds true for *Charu Khurana* - it caters to educated middle-class or upper-class women. Liberalism, in general, is premised on the rational individual and

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[57] *Id.* at 240.
[58] *Id.* at 242.
[59] *See generally* EISENSTEIN, ZILLA R, THE RADICAL FUTURE OF LIBERAL FEMINISM (Northeastern University Press, 1993).

thus *Charu Khurana* in this case fits the bill. But how does this judgment impact the general working-class women in the Bollywood film industry- the ones left behind? A judgment that removes barriers to entry for women to a specific trade ought to raise their conditions of work and economic stability in general. There ought to be an increase in opportunities available to women make-up artists post this judgment. This is examined through an analysis in probability to securing the job pre and post judgment.

The law of demand states the following:

"*Ceteris paribus, with an increase in price, there shall be a fall in demand and with a decrease in price, there shall be a rise in demand*". Contrary to this, the law of supply states:

"*Ceteris paribus, with the increase in price, there shall be a rise in supply and with a decrease in price, there shall be a fall in the quantity supplied*".

Labour, in the market, is treated as a factor of production in a world *as it is* and, thus, labour operates through the basic laws of demand and supply. Where there is surplus supply of labour i.e., more than what has been demanded, there would be a downward pressure on its price i.e., wages. The contrary also stands true. The economics prior to the judgment can be written down in simple terms:

f(d)L: f(w, n…)

Where 'w' represents wages, 'L' represents quantity demanded for labour and 'n' represents other factors like price of substitutes, taste preferences, etc. Following the function, assuming there were 30 vacancies for the position of make-up artists and 15 for the position of hairdressers. Furthermore, assuming that there were 60 males applying and 30 females

applying, the total number of unemployed would be 30 men and 15 women. Here the union is strict about its rules and continues to regulate the supply of labour by not being generous while granting licences to professionals who have not stayed in the state of Maharashtra for at least a period of 5 years. Here, because of rights-distribution, a portion of women's right to livelihood is guaranteed. Men and women have distinct demand and supply curves which does not overlap. The probability of women having a job is much higher. However, this would inevitably call for a ban on their participation in the makeup industry.

Probability of women getting the job =	$\frac{\text{Total number of positions available}}{\text{Total number of women applying}}$
P(w)	$=\frac{15}{30}= ½$

Meaning that each woman stands a 0.5 chance to secure a job as a hairdress5er with respect to other competitors who are women. In reality, if presumptions on market participation of women is considered,[60] the number of women applying for the position of hairdresser would be much lesser and result in an upward push on wages. The aforementioned assumption of numbers is based on basic socio-economic presumptions on surplus labour market participation in general and scanty participation of

[60] Sudipa Sarkar et al., *Employment Transitions of Women in India: A Panel Analysis*, 115(C) WORLD DEVELOPMENT, ELSEVIER, 291-309 (2019).

women in the labour market, that they are not visible in labour market participation owing to social constructs, and more specifically in the unorganised sector.[61] Their roles are mostly limited to reproduction or reproduction of domestic roles in the public sphere of employment.[62] They are inevitably concentrated at the bottom of the triangle.[63] The unorganised sector, of which the film industry is a part, represents a triangle. At the top one finds a greater concentration of men in comparison to women. There are relatively better conditions of work with some semblance of formal contracts. Progression from the top to the middle and eventually to the bottom displays an increase in the concentration of women doing work in the absence of a formal contract and dealing with greater perishable commodities at the bottom.[64]

The judgment substantially alters the function of demand for labour and the equation changes. There is no longer a distinction between hairdressers and make-up artists as the 'gendered' distribution is lifted. There are now 45 vacancies. The total number of women and men applying, and this is still when the union is strict about its 'resident of Maharashtra' rule, remains the same i.e., 90. In such a case, both men and women can apply to any position they want. The scenarios developed from this are:

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[61] *Id.* at 2.
[62] Jayati Ghosh, *Women's work in the India in the early 21st century*, SEMANTIC SCHOLAR (2013), https://www.semanticscholar.org/paper/Women-'-s-work-in-the-India-in-the-early-21-st-Ghosh/22b503210c638b528ea3acd1d6bffaa1f08dd2cd#citing-papers.
[63] *See generally* Martha Alter Chen, *Rethinking the informal economy: linkages with the formal economy and the formal regulatory environment*, LINKING THE FORMAL AND INFORMAL ECONOMY 75 (Basudeb Guha-Khasnobis et al. eds., 1 ed. 2006).
[64] *Id.*

a. The probability of a total number of unemployed individuals now ranges between 15 men and 30 women (scenario A) and 0 women and 15 men (scenario B).
b. In scenario A, among the 45 vacancies, all of them go to men and in scenario B, 30 women secure 30 positions and the rest 15 go to men.
c. In case, more individuals wish to pursue either of the two occupations (suppose hairdresser), there will be more concentration of labour supplied there and this would inevitably push the wages down. Conversely, there shall be an acute shortage of labour supplied in the other occupation (makeup) resulting in abnormally higher wages in the latter.

Now, the situation changes. The probability of each individual getting the job has to be analysed. The formula remains the same. Each individual still has a 0.5 chance of getting the job because the total vacancies are just half of the total supply of labour (including men and women). But how many of these individuals shall be men and women? There are two extremes pointed out in 'a.' In a survey conducted by the ILO it was empirically shown that women are more likely to be unemployed than men.[65] The survey relied on unemployment rates in 113 countries and found that it was higher for women. The actualities in the labour market are already structured in a manner wherein women face structural

[65] WOMEN IN LABOUR MARKETS, *supra* note 13. at 28.

discrimination at various stages of employment.[66] In about half of the countries surveyed by the ILO, the share of informal workers in total employment is higher for women than for men. Therefore, in an already sexist, anti-feminine and misogynistic world, the likelihood of (B) happening is much higher. The only outcome from which women can stand to benefit is when there are too many applicants (both men and women) for either of the jobs (say hair-dresser) and there are few women for the other occupation (makeup artist)- a quasi-reservation like situation, albeit transient in nature. But the probability of this situation happening in reality would have to pass greater complexities and not rest on theoretical assumptions by a professor of law and his laptop. These numbers still represent an ideal situation where the probability of each individual prior to and post the judgment remains unchanged. The equation alters in case the actualities the world of work and its perilous condition, like a greater number of men being available in the market for labour than women owing to the conflict between work and family,[67] are considered. Women would be present, generally, in much lesser numbers as their participation in economic activity in the market is still skewed. It is highly likely that among the total number of applicants, in the post-judgment liberalized setup, the number of women remains considerably low and relatively lower than men applicants whose numbers may be much higher than 60. Their overall probability of securing a job would be much higher than women where the

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[66] *Id.*

[67] Esteban Ortiz-Ospina et al., *Women's employment*, OUR WORLD IN DATA (5 March 2022), https://ourworldindata.org/female-labor-supply.

latter's probability of securing a position shall be much lower. Furthermore, assuming the number of women applications to be at par with the number of vacancies, i.e., 15 - the total number of unemployed women is 0. The probability of each woman to get the position is 1 i.e., highly probable. This is possible only if these fifteen positions were reserved for women. As the judgment lifts the bar imposed by the trade union, the total number of vacancies remains unchanged i.e., 45. The total number of applicants now is 75 among which there are sixty men and fifteen women. Each applicant has a probability of .6 which is lesser than the probability per individual, let alone women, prior to the judgment. The probability of a woman candidate getting the job prior to the liberal emancipation propounded by Justice Mishra was much higher. This, however, does not mean that the trade union rule could be justified.

Would mankind not be better off if women were free?[68] Of course, there is no denying this fact. Unfreedoms have caused enough hindrance to growth. However, any means employed to liberate ought to withstand higher standards of scrutiny than the end itself. *Charu Khurana* is one such example where the mandate of liberation could have and should have been subjected to basic economic analysis. The judgment ends up doing more harm to women at the cost of protecting the rights of one upper class woman. There is, of course, another way of looking at it – this industry being as inaccessible as it is, one woman fighting a battle to practise a trade shall go a greater distance than the trade union preventing them from

[68] Mill, *supra* note 1 at 114.

practising at all. While the union rule could not have been defended, it seems that under the restrictive distribution setup women were better off. The definition of trade union itself includes "...*imposing restrictive conditions of work*...".[69] It is not disputed that these restrictive conditions cannot violate principles of equality enshrined under the Constitution of India. Charu Khurana has a makeup academy and she charges around one lac for one of her advanced make up course.[70] Her basic makeup course costs around fifty thousand Indian rupees.[71] These are in no way accessible numbers when it comes to Indian standards of income and expenditure. This creates barriers for women who belong to women who are doubly backward *vis-à-vis* class and caste. These women concentrate themselves in this labour market owing to relatively lower entry costs compared to the formal labour market.

V. CONCLUSION

On a closer analysis, it is realised that not all progressive judgments may have their intended effects. The union restrictively distributes the sources of livelihood among its members. There are social costs to this system - the livelihood of so many other more talented workers gets hampered owing to the geographic restriction. The distribution of a higher paying job (make-up artist) with that of a lower paying job (hair-dresser) among men and women can be called sexist and not be defended! However, judgments like *Charu Khurana* may only be able to answer complex socio-

[69] Trade Unions Act, 1926, No. 16, Acts of Parliament, 1926, § 2 (lndia).
[70] Khurana**,** *supra* note 30.
[71] *Id.*

economic questions to a specific extent. As the realities of globalization disperse economic growth differently for different classes of society, greater participation of women is needed owing to it having an important bearing on her own upliftment and intra-household allocation of resources.[72] Women's labour force participation and access to decent work are pillars for an inclusive and sustainable model of growth for nations like India. It can be argued that simply by removing or washing away backwards practises by capitalist progress all forms of socio-economic discrimination shall be done away with.[73] Capitalism can have multiple layers to it and each such layer should be analysed before hailing any document or judge as the champion of women's rights. Divisions and categories are not independent of capitalism but rather they allow for more surplus extraction and repeat multiple levels of oppression for members of classes who find themselves at the bottom ranks of the triangle.[74] Improper legal debates and judgments on gender and labour have proliferated since the 20th century. The recourse to law, to enhance the upliftment of women, has been bewildering. Law has only been able to make the subjection of women worse. The absence of proper socioeconomic analysis of issues of gender in the last decade may have contributed to the revival of conservative economic thought which justifies different choices made by the two genders by taking recourse to inherent differences in the biology and psychology of the two sexes.

[72] Sarkar, *supra* note 60 at 21.
[73] Ghosh, *supra* note 62 at 15.
[74] *Id.*

Debates like these are endless and recourse should be taken to economics to analyse the real cost of various policies and judgments.