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SHORT ARTICLES

LONG ARTICLES

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Anshul Prakash & Deeksha Malik, *Contract Labour Regime in India: The Present, The Future, and All Things in The Interregnum*, 8(2) NLUJ L. REV. 1 (2022).

CONTRACT LABOUR REGIME IN INDIA: THE PRESENT, THE FUTURE, AND ALL THINGS IN THE INTERREGNUM

~Anshul Prakash & Deeksha Malik[*]

ABSTRACT

With an extensive contract labour market in India, the legal regime around regulation and prohibition of contract labour engagement is of crucial concern to industries. The upcoming labour code on working conditions, which is yet to be brought into force through an appropriate notification of the Central Government, will have notable ramifications for all establishments engaging contract labour beyond a certain threshold, considering that the same envisages a more regulated framework vis-à-vis the extant one. However, the lack of clarity on certain concepts, including that of 'core activity of an establishment', may pose some challenges for establishments in terms of aligning their current practices with the new requirements.

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I. INTRODUCTION

India has a massive contract labour industry, and this is evident from the industrial data available in the public domain. Such data reveals that from the period 2001-02 to the period 2017-18, the number of direct workers (*i.e.*, those employed directly by an establishment on its payroll) per factory has been decreasing, while the number of contract workers (*i.e.*, those engaged through third-party manpower service providers) per factory has been rising.[1] Even in non-manufacturing establishments, there is a huge demand for contract labour, especially for miscellaneous operations such as housekeeping, facility management, catering, security, and the like. This demand can be explained by the labour protectionist regime in India, where benefits and protections to on-roll workforce are offered on every facet of employment from onboarding and remuneration to lay-offs and redundancies.

It is argued that the current legal regime does not do much to regulate the ever-increasing contract labour industry. This also forms the rationale for the prohibition on contract labour engagement in core activities under the upcoming Occupational Safety, Health and Working Conditions Code, 2020 [*hereinafter* "**OSH Code**"].[2] However, the prohibition, the exceptions thereof, and other provisions relating to contract labour engagement under the OSH Code do not, in their current

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[1] Ankur Bhardwaj, *India's Industrial Sector: The Rise of the Contract Worker*, CTR. FOR ECON. DATA & ANALYSIS (July 15, 2021) https://ceda.ashoka.edu.in/indias-industrial-sector-the-rise-of-the-contract-worker/.

[2] Occupational Safety, Health and Working Conditions Code, 2020, No. 37, Acts of Parliament, 2020 (India).

form, address several important factors that establishments need clarity on in order to manage their current/future arrangements with manpower service providers. In this paper, the authors navigate through the existing regime, explore the provisions under the OSH Code on contract labour engagement, and put forth the aspects that require clarity in the form of appropriate amendments, rules, and/or notifications.

II. THE CURRENT REGIME

A. UNDERSTANDING THE FUNDAMENTALS

Contract workers are workers who are on the payroll of an entity [*hereinafter* "**Contractor**"] but are deployed at the premises of another entity [*hereinafter* "**Principal Employer**"] to render services to such other entity.[3] The principal legislation governing engagement of contract labour is the Contract Labour (Regulation and Abolition) Act, 1970 [*hereinafter* "**CLRA Act**"],[4] which becomes applicable if the Principal Employer engages the specified threshold number of contract workers. However, this threshold varies from state to state; it is as low as 5 contract workers in Telangana[5] to as high as 50 contract workers in Maharashtra, Haryana, Uttar Pradesh, Gujarat, etc.[6] A bona fide contract labour arrangement is one where the Principal Employer merely gives direction or exercises ancillary supervision

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[3] Ashis Das and Dhananjay Pandey, *Contract Workers in India: Emerging Economic and Social Issues*, 40 INDIAN J. OF INDUS. REL. 242-265 (2004).

[4] Contract Labour (Regulation and Abolition) Act, 1970, No. 37, Acts of Parliament, 1970, § 10(2) (India).

[5] Government of Telangana, *FAQs*, Dept. Of Labour, https://labour.telangana.gov.in/Faqs.do (last accessed on 11 April 2022).

[6] Contract Labour, COMPLIANCE UNCOVERED, https://uncovered.complyindia.com/applicability/contract-labour/ (last accessed on 11 April 2022).

over the work of the contract labour while the ultimate control and supervision rests with the contractor (which is the employer of the contract labour).

As for contract labour, a Principal Employer has limited responsibilities as it is not the employer of such workers. A Principal Employer may be held liable to pay wages or deposit employees' provident fund / employees' state insurance fund contributions only when the Contractor fails to make these payment or contributions.[7] Even in such cases, the Principal Employer is entitled under the law to recover from the Contractor any payments or contributions that it had to make on behalf of the Contractor.[8]

B. STATUTORY AND JUDICIAL SCRUTINY OF CONTRACT LABOUR ARRANGEMENT

The statutory and judicial scrutiny of contract labour arrangement revolves around evaluation of the factual aspects of the arrangement, especially the integration of contract labour in the primary activities of the Principal Employer and/or its systems, controls, and procedures.

Speaking strictly from the perspective of the CLRA Act, contract worker engagement can be abolished only upon a notification to this effect by the government under Section 10(2) of the CLRA Act.[9] The

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[7] Employees' Provident Fund Organization, *FAQs,* Ministry of Labour & Employment, https://www.epfindia.gov.in/site_en/FAQ.php (last accessed 11 April 2022).
[8] Employers Provident Fund Scheme, 1952, No. 19, Acts of Parliament, 1952, § 32(A) (India).
[9] Contract Labour (Regulation and Abolition) Act, 1970, No. 37, Acts of Parliament, 1970, § 10(2) (India).

government, in turn, will look into several factors while proceeding to order for abolition of contract labour system, such as whether the work performed by them is incidental to or necessary for the business of the establishment, whether the work is of a perennial nature, whether the same is ordinarily carried out by the company's regular employees, etc.

Having said the above, it may be noted that the contract workers still have the option outside of the CLRA Act of raising an industrial dispute. In this regard, the Supreme Court of India [*hereinafter* "**Supreme Court**"] observed the following in *Gujarat Electricity Board v. Hind Mazdoor Sabha*:[10]

> "*[I]f the contract is sham or not genuine, the workmen of the so-called contractor can raise an industrial dispute for declaring that they were always the employees of the Principal Employer and for claiming the appropriate service conditions. When such dispute is raised, it is not a dispute for abolition of the labour contract and hence the provisions of Section 10 of the Act will not bar either the raising or the adjudication of the dispute.*"

Over a number of pronouncements, courts have developed several tests which they would employ to determine whether a permanency claim can be sustained. In *Balwant Rai Saluja v. Air India Limited*,[11] the Supreme Court was confronted with the question – whether the workmen engaged in statutory canteens, through a contractor, could be treated as employees

[10] Gujarat Electricity Board v. Hind Mazdoor Sabha, 1995 (5) SCC 27.
[11] Balwant Rai Saluja v Air India Limited, AIR 2015 SC 375.

of the principal establishment. The Supreme Court observed that it would look into whether the entity in question (i) pays salary to the claimants, controls, and supervises the work of the claimants, (ii) has a role in selection and appointment of the claimants, and/or (iii) acts as a disciplinary authority over the conduct and discipline of the claimants.

C. THE UNIQUE CASE OF ANDHRA PRADESH AND TELANGANA

It can be said that under the present Central legal regime, there is no automatic abolition of contract labour arrangement in a certain activity of the Principal Employer. The limited exception to this aspect, however, comes in the form of state-specific amendments to the CLRA Act made by the states of Andhra Pradesh and Telangana. These states introduced the concept of 'core activity of an establishment' and prohibited engagement of contract labour in such activities.[12]

The expression 'core activity of an establishment' is defined to mean any activity for which the establishment is set up, and it is inclusive of any activity which is essential or necessary to the core activity.[13] The amendment, however, clarifies that certain activities would be deemed to be non-core unless an establishment is set up to predominantly carry out such activities. These activities include sanitation, security, loading and unloading, catering, and courier services. Further, an activity will be deemed as non-core despite actually being core, if it is intermittent in nature.

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[12] Contract Labour (Regulation and Abolition) Act, 1970, No. 37, Acts of Parliament, 1970, § 2(1)(dd) (India).
[13] *Id.*

Interestingly, the state amendments as referred to above also allow some exceptions to the prohibition on engagement of contract labour in core activity. These permitted situations are: (i) normal functioning of the establishment being such that the activity is ordinarily carried out through contract labour; (ii) the relevant activity being such that it does not require full-time workers for the major portion of the working hours in a day; and (iii) sudden increase in the volume of work that needs to be completed in a specific timeframe.

III. THE UPCOMING REGIME

A. PROHIBITION ON ENGAGEMENT OF CONTRACT LABOUR IN CORE ACTIVITY AND OTHER CHANGES

The OSH Code reiterates the state amendments to the CLRA Act by Andhra Pradesh and Telangana, as discussed above. Unfortunately, similar to the current position in these states, there are no guidelines set out under the OSH Code or the draft state rules thereunder as regards determination of an activity as core or non-core.

In addition to the above, under the OSH Code, every Contractor is required to intimate the designated authority regarding any work order received by it from an establishment for deployment of contract labour. Under the draft rules released by various state governments, the Contractor is required to intimate about the contract work order within 15 days of its receipt. The intimation will contain details such as the name of the Principal Employer, the address of the Principal Employer's premises, the date of commencement of the work, the number of contract workers deployed,

and the duration of the work order. The intimation would be sent electronically to the licensing authority or submitted on the official portal designated for this purpose. Notably, such intimation requirements are not present under the extant regime, thus allowing flexibility to Principal Employers and Contractors to negotiate on the specifications in the work order from time to time without having to notify any authority.

Another a positive change brought about under the OSH Code is streamlining of the applicability threshold for the chapter relating to contract labour. The CLRA Act applies to establishments engaging 20 or more contract workers and contractors engaging 20 or more workmen, and certain states have varied these thresholds which range from 5 or more workers to 50 or more workers. The OSH Code, while increasing the threshold to 50 or more contract workers, does not contain an express provision unlike the current regime whereby the state government can reduce the threshold for application of the chapter on contract labour.

B. CORE V. NON-CORE: PRELIMINARY ANALYSIS

The jurisprudence around what would be deemed as a core or a non-core activity from the standpoint of contract labour engagement is extremely limited at present. However, the authors' understanding is that in order to assess whether an activity can be considered as a 'core activity', it may have to be seen whether the absence of the same would directly impact the principal activity being carried on by an establishment. For instance, continued manning and supervision of operations is necessary for a

seamless manufacturing process and would, therefore, be covered 'core activity'.[14]

Close integration with the main activity is also an important determinant. For instance, if an establishment has been set up for crushing oil cakes and oil seeds for the purpose of extraction of oil, feeding of cake in the hopper (which would feed the solvent extraction plant) would be a 'core activity' as well.[15] As the authors understand, the test here is the extent to which an activity is directly associated with the basic function of an undertaking. In the words of the Calcutta High Court in the case of *Divisional Railway Manager, Eastern Railway, Asansol Division and Others v. Satyajit Majumdar*:[16]

> "*In case of a railway, it must relate to running of trains and welfare of passengers; in case of telephone authorities, it must relate to the telephone networks themselves or some such other essential item; in case of…industry, the activity must relate to the actual production of the industrial product itself, or to something equally fundamental to the basic organisation of the industry*."

In the context of the term 'manufacturing process' under the Factories Act, 1948, courts have explained that when a manufacturing process is being carried on, everything that is necessary before or after to

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[14] Reference Order of the Government of Andhra Pradesh, G.O.Ms. No. 5 of 2011, Dated 24 January 2011.
[15] Vegoils Pvt. Ltd. v. The Workmen, AIR 1972 SC 1942.
[16] Divisional Ry. Manager, E. Ry., Asansol Div. and Ors. v. Satyajit Majumdar, 1990 SCC OnLine Cal 279.

complete the process would be included within the ambit of 'manufacturing process', as would be the case in the paper printing process where, prior to printing, the types are set on a block prepared for this purpose.[17] These decisions may help establishments in determining what may be deemed as their core activity by authorities.

Another factor that may assume relevance here is that the analysis in relation to what amounts to 'core activity' needs to be establishment specific. Under the labour laws, each branch/unit/office is generally treated to be a separate establishment unless there is a clear functional integrity between two or more branches/units/offices.[18] Courts look into a number of factors to examine if two or more branches can be treated part of the same establishment. These include manner of maintenance of accounts (joint or independent), geographical proximity, community of manpower and of its control, recruitment and discipline, and unity of purpose and functional integrity.[19] Of these, the test that is relied upon the most is the 'functional integrity test'. Functional integrity has been explained by the courts to mean, *inter alia*, such functional inter-dependence that one unit cannot exist conveniently and reasonably without the other.[20]

Accordingly, what may be a non-core activity for one branch/unit/office could be a core activity for another. For instance, while administrative functions may be a non-core activity for a manufacturing

[17] Vishwamitra Karyalaya Press v. Auth., AIR 1955 All 702.
[18] L. N. Gadodia & Sons & Anr. v. Regional Provident Fund Commissioner, (2011) 13 SCC 517.
[19] The Associated Cement Co. v. Its Workmen & Anr., 1959 AIR 967.
[20] Mgmt. of Pratap Press v. Sec'y, Delhi Press Workers' Union, AIR 1960 SC 1213.

unit, the same may be a core activity for an office set up for those very functions. The above understanding, however, is based on the jurisprudence around how a unit can be perceived as an establishment in itself from the standpoint of application of various labour law compliances. Therefore, the possibility of authorities taking a different approach while specifically evaluating the 'core activity of an establishment' cannot be ruled out.

IV. AUTHORS' OBSERVATIONS

A. BUILDING AN ADVISORY MECHANISM FOR DETERMINATION OF CORE ACTIVITY

It cannot be gainsaid that the lack of adequate guidelines under the OSH Code as regards determination of 'core activity of an establishment' may act as an initial roadblock for organisations as they gear up for transition from a relatively flexible regime to a more regulated one. The OSH Code does have a mechanism whereby a question as to whether any activity of an establishment is a core activity or otherwise can be referred to the appropriate government for decision. However, this appears to be a long-drawn process, at least *prima facie*, as the appropriate government may further refer any such question to a designated authority which, on the basis of the material available on record and/or any enquiry conducted for this purpose, shall provide its report to the appropriate government, after which the appropriate government shall decide the question and notify the same to the concerned party.

Interestingly, if one looks at the draft state rules released under the OSH Code for public consultation, it would be noticed that not all states have specified timelines for deciding on the application. Few states, such as Haryana, have also gone on to state that the decision they will provide on the application shall be final.[21] This is, for instance, unlike the advisory mechanism under the Securities and Exchange Board of India (Informal Guidance) Scheme, 2003, wherein the letter issued by a department of the Securities and Exchange Board of India in the form of an advisory is specified as not being a "conclusive decision or determination of any question of law or fact" by the regulatory authority.[22] The finality accorded to the decision of the appropriate government under the OSH Code may deter organisations from reaching out to the relevant authorities.

B. OTHER OBSERVATIONS

Under the CLRA Act, the responsibility to provide welfare facilities, such as canteen to contract workers, is upon the Contractor.[23] It is only when the Contractor fails to provide the welfare facilities that the Principal Employer becomes responsible, and in such a case, the Principal Employer can recover the expenses incurred in providing the amenities from the Contractor.[24] However, the responsibility for providing welfare facilities to contract labour has been placed directly upon the Principal Employer under

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[21] Haryana Occupational Safety, Health and Working Conditions Rules, 2021, Notification No. 02/11/2021-2Lab (India).
[22] Securities and Exchange Board of India (Informal Guidance) Scheme, 2003, § 13.
[23] Contract Labour (Regulation & Abolition) Act, 1970, No. 37, Acts of Parliament, 1970, § 16 (India).
[24] *Id.* § 20.

the OSH Code.[25] Arguably, this may be deemed as moving away from the essential difference between direct employment and engagement of contract labour. When courts assess the genuineness of contract labour engagement, one of the factors they typically assess is whether there is any direct nexus between contract labour and the Principal Employer in terms of payment of wages, provision of work equipment and facilities, etc.[26] In that sense, imposing the responsibility of provision of facilities to contract labour directly on the Principal Employer, without any express provision to recover the expenses thereof from the Contractor, may be deemed onerous by Principal Employers even in situations where the engagement of contract labour is otherwise genuine under the new requirements set out under the OSH Code.

Similar concerns have also been expressed in respect of other upcoming labour codes on the anvil. For instance, under the Code on Social Security, 2020, the term 'employee' includes contract labour even for the purposes of gratuity (contrary to the current regime).[27] Therefore, a bare reading of the provisions indicates the possibility for contract workers to claim unpaid gratuity from the Principal Employer, even though the essence of the provision of gratuity is rewarding an employee for a long period of service in the organisation. Notably, unlike the chapters on employees' provident fund and employees' state insurance fund under the Code on Social Security that contain provisions for recovery of dues from

[25] Occupational Safety, Health and Working Conditions Code, 2020, No. 37, Acts of Parliament, 2020, § 24 (India).
[26] Food Corp. of India v. Pala Ram & Ors., (2008) 14 SCC 32.
[27] Code on Social Security, 2020, No. 36, Acts of Parliament, 2020, § 2(26) (India).

the Contractor in the event the Principal Employer has to bear the responsibility for contributions, the chapter on gratuity does not have a similar provision. Likewise, the draft of the Code on Wages (Central) Rules, 2020 and similar draft state rules provide that where the Contractor fails to pay minimum bonus to the contract workers, the Principal Employer shall, on the written information of such failure given by the contract workers, pay minimum bonus to such contract workers, without any provision for recovery of the amount so paid from the Contractor.[28] It is argued that these provisions are incorporated on the assumption that contractors are dubious middlemen who may shirk away from their responsibilities under the law, whereas in reality, several contractors are reputed organisations with large business presence in various parts of the country and financial capacity as significant as that of the Principal Employers procuring their services.

What is also important to note is that while the said direct linkages are being established between contract labour and the Principal Employer, some other provisions under the codes are now excluding contract labour from the applicable regime. For instance, while the definition of 'worker' under the extant Factories Act, 1948 includes contract workers, the OSH Code (which will replace the regime of occupational safety, health and working conditions under the Factories Act, 1948 upon implementation) excludes contract labour from the ambit of 'worker'.[29]

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[28] Code on Wages (Central) Rules, 2020, § 57 (India).
[29] Factories Act, 1948, No. 63, Acts of Parliament, 1926, § 2(l) (India); Occupational Safety, Health and Working Conditions Code, No. 37, Acts of Parliament, 2020, § 2(zzl) (India).

V. CONCLUDING REMARKS

The OSH Code presented a great opportunity to the Central Government and the state governments to build a legal regime that is more in sync with the ground realities, and which does not *prima facie* see contract labour arrangements in negative light. Through this paper, the authors have identified areas which call for a re-look through an appropriate consultative process with all stakeholders. As the Central Government is undertaking discussions with industry associations/representatives on revisiting some of the provisions in the upcoming labour codes, it is hoped that the above concerns are also taken note of, and the upcoming regime is streamlined in terms of coverage/non-coverage of contract labour *vis-à-vis* various provisions.[30]

[30] The authors have made a representation to the Central Government and the state governments on some of the recommendations set out in this article.

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Shivani Kabra, *From Copyright to Performer's Rights: Ad Libitum Dance Performances in India*, 8(2) NLUJ L. REV. 17 (2022).

FROM COPYRIGHT TO PERFORMER'S RIGHTS: *AD LIBITUM* DANCE PERFORMANCES IN INDIA

~ *Shivani Kabra*[*]

ABSTRACT

It is an understatement to claim that dance performances have been exuberantly prevalent within society. In spite of such prevalence, discussions interlinking intellectual property rights (IPR) – specifically copyright law and performers' rights – with these performances have often been meagre and neglected. Ordinarily, dance performances should be accorded protection as both, a 'dramatic work' under copyright law and a 'performance' for the purposes of performers' rights. However, often dance performances – specifically ad libitum performances – are denied IPR protection on the grounds of unreliability and unpredictability. Hence, the main thrust of this research paper is to rectify the inadequate normative status quo by throwing light on the developing fields of IPR and ad libitum dance performances through an analysis of judicial and legislative developments. For this reason, the paper draws inspiration from foreign jurisprudence and their treatment of ad libitum works such as formats for television programs. In doing so, the paper shapes the discussion within the

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contours of Indian IPR laws, while attempting to apply the learnings of foreign jurisprudence to develop an argument favouring IPR protection for ad libitum performances within India.

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I. INTRODUCTION

It would be pointless to begin this paper without noting that ordinarily dance performances fall within the ambit of "dramatic works" and dancers fall within the ambit of "performers" under the Indian Copyright Act, 1957 [*hereinafter* "**Copyright Act**"].[1] For the purposes of this paper, it is important to be mindful of the broad components of dance performances: (i) choreographed dance sequence, (ii) the (human or non-human) performers, and (iii) the choreographer facilitating the performance. In that respect, Indian jurisprudence lacks comprehensive discourse on delineating the scope of "dramatic works" and "performers" under copyright law. Since jurisprudence has predominantly focused on the role of intellectual property rights [*hereinafter* "**IPR**"] in choreographed dance forms, there is a lacuna in understanding the interrelationship between IPR and *ad libitum* dance performances.

For clarity, it is imperative to note that *ad libitum* performances refer to performances that are not choreographed in their entirety or that use improvised dance steps within their choreography. The growing list and variations of *ad libitum* dance forms in today's age necessitate a clearer understanding of their relationship with IPR laws. One such development in the field of *ad libitum* dance includes performances given by animals. Animal dance performances are typically considered to be extempore performances due to the inability and absent cognitive skills of animal

[1] The Copyright Act, 1957, No. 14, Acts of Parliament, 1957 (India).

performers to deal with sequential information,[2] leading to variations within the choreography. Yet, this premise runs counter to recent scientific studies centred on dance performances rendered by a cockatoo named Snowball.[3] The studies have relevantly concluded that Snowball is capable of not only understanding but also responding to music.[4] While performances by animals[5] – dance or otherwise – are not a novelty in today's society,[6] nevertheless, only in recent times have they become the subject matter for scientific studies.[7]

Accordingly, the increased awareness and evolution within the field of *ad libitum* works, including animal dance performances, raises resultant questions of IPR protection for such works. As the discussion will analyse the broader question of attributing IPR protection to *ad libitum* works, the paper will seek assistance from niche forms of *ad libitum* works, *i.e.*, animal dance performances, to contextualize the discourse.

Pertinently, copyright and performers' rights are two distinct rights provided to individuals/performers under IPR laws. Correspondingly, copyright is awarded to the author of a work, and performers' right to the performer of the performance. Considering the distinct categorization of

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[2] Stockholm University, *"Memory for stimulus sequences distinguishes humans from other animals"*, SCIENCE DAILY (June 20, 2017), www.sciencedaily.com/releases/2017/06/170620200012.html.

[3] Aniruddh D. Patel et al., *Studying Synchronization to a Musical Beat in Nonhuman Animals*, 1169 ANNALS N.Y. ACAD. SCI. 459, 459–60 (2009) ("**Patel**").

[4] *See id.* at 460; Joanne R Jao Keehn et al., *Spontaneity and Diversity of Movement to Music Are Not Uniquely Human*, 29 CURRENT BIOLOGY R621, R621-22 (2019).

[5] For the purpose of this paper, the construction of term "animals" will include birds.

[6] *See* Jeremy Phillips, *A Pet Subject for Copyright?,* THE IPKAT (January 5, 2006) http://ipkitten.blogspot.com/2006/01/pet-subject-for-copyright.html.

[7] See Patel*, supra* note 3.

both the rights, the paper is structured into two parts to understand the theoretical discussions and concerns associated with awarding the aforesaid rights to respective authors and performers of *ad libitum* dance performances.

To that extent, Part III of the paper discusses the scope of protecting *ad libitum* dance performances as 'dramatic works' under the Copyright Act.[8] Accordingly, Part III considers whether the "author" of such *ad libitum* performances, *i.e.*, the creator/choreographer of the performance, can protect their work through copyright law.

Part IV of the paper generally examines the nature of performers that are entitled to performers' rights over their performance. In particular, Part IV discusses if choreographers of *ad libitum* dance performances (such as animal dance performances) can claim performers' rights for the same. The need for a comprehensive discourse on the performers' rights of choreographers in their *ad libitum* performance arises due to the lack of copyright protection awarded to the choreographer for such dance performances (as will be discussed in Part III). Ordinarily, human actors such as dancers are considered "performers" of their performance – whether *ad libitum* or choreographed – for the purposes of performers'

[8] Copyright Act awards copyright protection for several categories of work, namely – literary work, dramatic work, artistic work, musical work, sound recording and cinematographic films. The Copyright Act, 1957, No. 14, Acts of Parliament, 1957, ch. III § 13(1) (India). Considering that "choreographic works" are explicitly considered to be "dramatic work," any analysis regarding animal dance performance must consider whether the same falls within the definitional ambits of "dramatic work" for claiming copyright protection. *Id.* at ch. I § 2(h).

rights.[9] In contrast, courts have zealously refrained from awarding IPR to non-human actors or performers.[10] The seminal judgement on the subject of rights for non-human actors can be traced to the "*Monkey Selfie*" *case* that debated questions of authorial rights over a photograph taken by a monkey.[11] Therein, the court declined to consider the monkey as the author of the photograph on the ground that IP rights (including performers' rights) are only conferred upon human actors.[12] Since the law on IPR protection for non-human actors is settled, Part IV will limit its discussion to human actors, with a specific focus on choreographers. Though, for ease of convenience, this paper will often illustrate its arguments by using the context of animal dance performances, that by their very nature are considered to be *ad libitum* works.

II. HYPOTHESES

Before dwelling further, it is important to note the arguments against IPR protection for *ad libitum* dance performances. Briefly, the case against copyright protection for *ad libitum* performances focuses on the scope of "dramatic works" and the case against performers' rights for such performances focuses on the nature of performer(s).

First, the scope of "dramatic works" is based on – (i) the statutory definition of dramatic work and (ii) the threshold of performability – as will

[9] The Copyright Act, 1957, No. 14, Acts of Parliament, 1957, ch. I §§ 2(q) – (qq) (India).
[10] *See* Naruto v. Slater, 888 F.3d 418, 426 (9th Cir. 2018).
[11] *Id.*
[12] *Id.*

be explained in Part III of this paper.[13] Since choreographic (dance) performances are expressly included within the definition of dramatic work within the Copyright Act,[14] the focus of the paper will be on understanding the second factor regarding the test of performability and its impact on *ad libitum* dance performances. *Second*, the scope of a "performer" hinges on the nature and extent of contribution of the individual claiming to be a performer towards the performance. Arguably, choreographers are denied performers' rights in *ad libitum* dance performances because the quantum of contributions by the choreographer is understood to be incidental to the performance.[15]

In response, this paper hypothesizes that the understanding of IPR law, specifically under the Copyright Act, permits the grant of copyright and performers' rights to choreographers for their *ad libitum* dance performances.

III. COPYRIGHT PROTECTION FOR *AD LIBITUM* DANCE PERFORMANCE

The Copyright Act[16] and its provisions thereunder have been modelled to incorporate India's obligations under international treaties,

[13] *See* Green v. Broad. Corp. New Zealand (1989) 3 NZLR 18 (NZCA) at 19*;* Ukulele Orchestra Great Britain v. Clausen [2015] EWHC (IPEC) 1772 [94–106] (UK).
[14] The Copyright Act, 1957, No. 14, Acts of Parliament, 1957, ch. 1 § 2(h) (India).
[15] *See* Heythrop Zoological Garden Ltd. v. Captive Animals Prot. Soc'y, (2016) EWHC (Ch) 1370 ("***Heythrop Zoological***"); *infra* Part IV of this paper.
[16] The Copyright Act, 1957, No. 14, Acts of Parliament, 1957 (India).

specifically the Berne Convention.[17] The said treaties, however, fail to define or elaborate upon the scope of dramatic work, though they do include the same under the category of "protected works."[18] For this reason, Section 2(h) of the Copyright Act defines dramatic works in an illustrative and inclusive manner for the purpose of copyright law.[19] Though, of all categories of works that are entitled to copyright protection, "dramatic works" have varying definitions under several national legislations and international conventions. This inevitably results in conflicting interpretations regarding the elements that constitute a dramatic work.

To analyse copyright protection for *ad libitum* dance performance as dramatic work, this Part is further divided as follows: Section A introduces the prerequisite criteria needed for claiming copyright protection in India; Section B explores the scope of protecting *ad libitum* dramatic work under foreign and Indian jurisprudences; and Section C applies the conclusions of Section B while discussing IP protection for *ad libitum* dance performances as dramatic work in India.

A. REQUIREMENTS FOR COPYRIGHT PROTECTION IN INDIA

Section 13 of the Copyright Act protects original and fixed work of authorship.[20] This presupposes three crucial conditions that need to be fulfilled for claiming copyright protection. Namely, the work claiming

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[17] Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 828 U.N.T.S. 222 ("**Berne Convention**").
[18] *Id.* at art. 2 ¶ 1.
[19] The Copyright Act, 1957, No. 14, Acts of Parliament, 1957, ch. 1 § 2(h) (India).
[20] The Copyright Act, 1957, No. 14, Acts of Parliament, 1957, ch. III § 13 (India).

copyright protection must fall within the ambit of – (i) standard of originality, (ii) threshold of fixation, and (iii) statutory scope of 'work' as defined under the Copyright Act.

First, the standard of originality in India has long been established in *Eastern Book Company v. DB Modak*.[21] As per the case, for a work to be considered original it must originate from the author. Hence, the test of originality is construed liberally and requires the work to encompass the skill and judgment of the author while containing minimal levels of creativity.[22] Considering the lenient threshold of originality within India, it can be argued that an *ad libitum* dance routine will invariably contain the requisite amount of skill and intellectual creativity of the choreographer needed to satisfy the test of originality.

Second, the standard of fixation requires the work claiming copyright protection to be fixed in a tangible medium such as in writing or otherwise.[23] Globally, the requirement of fixation is applied uniformly across all categories of work.[24] The necessity for such application arises due to the idea-expression dichotomy that precludes copyright protection for ideas, themes, or abstract concepts.[25] The standard for fixation ensures that the work does not remain a mere idea but is manifested through tangible

[21] Eastern Book Company v. DB Modak (2008) 1 SCC 1.
[22] *Id.*
[23] *Id.*
[24] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) ("**TRIPS Agreement**").
[25] *Id.* § 1 art. 9(2).

expression. Significantly, Section 2(h) of the Copyright Act (applicable to the present instance of dance performances) explicitly imposes the requirement of fixation for dramatic works.[26] Though, the Copyright Act precludes dramatic works from being fixed in a cinematograph film.[27]

Third, any work seeking to benefit from copyright protection must fall within the definitional ambit of "works" protected under law.[28] This is attributable to the statutory nature of copyright law that guarantees copyright protection solely within the statutory contours of the Copyright Act.[29] Section 13(1) of the Copyright Act *only* protects original works in the form of – literary work, dramatic work, artistic work, or musical work.[30] Accordingly, it is necessary to determine whether *ad libitum* dance performances fall within the category of work (and subsequently within the category of "dramatic works" as predetermined by Copyright Act).

Throughout this paper, theoretical discussions presuppose the satisfaction of the test of originality and fixation. This is primarily because the foregoing factors have settled positions of law with low thresholds that may be met by most works. Accordingly, deliberations will focus on analysing whether *ad libitum* dance performances – owing to their

[26] The Copyright Act, 1957, No. 14, Acts of Parliament, 1957, ch. 1 § 2(h) (India).
[27] *Id.* ch. I § 2(h).
[28] *Id.* ch. I § 2(y).
[29] The Chancellor, Masters & Scholars of the University v. Rameshwari Photocopy Services, 233 (2016) DLT 279, ¶ 9.
[30] The Copyright Act, 1957, No. 14, Acts of Parliament, 1957, ch. III § 13(1) (India).

extempore nature – can fall within the scope of "dramatic works" under law.

B. UNDERSTANDING THE SCOPE OF DRAMATIC WORKS

International law and treaties have been wanting and ambiguous in determining the definitional scope for dramatic works.[31] For this reason, the scope has remained dependent upon national treatment of the same. To that end, this Section analyses the treatment of *ad libitum* works as dramatic works under foreign and Indian jurisprudence. Overall, the national treatment of dramatic work can be divided into two blocks: the approach taken by the USA, and the approach taken by common law countries.

1) Position in the USA

Copyright law in the USA protects dance performances in the nature of "dramatic works."[32] Per the definition of the category, the subject matter of dance is currently protected under § 102(a)(4) of Title 17 of the U.S. Code, which covers "pantomimes and choreographic works," though it previously qualified as a "dramatic work" prior to 1978.[33] However, such protection is inferred to be qualified and limited by two conditions.

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[31] The two major treaties regarding copyright law are the Berne Convention and the TRIPS Agreement. While the Berne Convention mentions "dramatic works" without defining the term, the TRIPS Agreement does not even venture to mention the term. Berne Convention, *supra* note 17 art 2 ¶ 1. *See generally* TRIPS Agreement *supra*, note 24.

[32] 17 U.S.C. § 102(a)(3).

[33] *Id.* § 102(a)(h); U.S. COPYRIGHT OFFICE, Copyright Registration of Choreography and Pantomime, CIRCULAR NO. 52, 1–2 (2017).

The *first* limitation subjects the choreographic works to the "complexity test" as formulated in the case of the "*Carlton dance*".[34] The specific dance – conceptualized and popularized by actor Alfonso Ribeiro – had previously been denied copyright protection on the ground that it was "too simple" to be awarded copyright.[35] Surprisingly though, the complexity test also finds certain favour in the definitional understanding of choreographic works supported by the US Copyright Office, the House of Representatives and the judiciary. As noted in *Horgan v. Macmillian,*[36] still photographs of a ballet performance can constitute copyright infringement. In deciding so, the Court acknowledged the distinctive nature of dance choreographies and noted that a single photograph has the ability to "*capture a gesture, the composition of dancers' bodies or the placement of dancers on the stage*."[37] While reaching its conclusion, the Court cited multiple US authorities that equate choreographies with 'dance movements and patterns' entailing bodily movement in rhythmic and spatial relations.[38] Accordingly, choreographic works should consist of a 'flow of movements' that *may* convey a story but must necessarily not be commonplace, social, simple or routine movements.[39] Needless to mention, this limitation effectively entails

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[34] Mathilde Pavis, *Dance Dance Dance: Another Episode in the Fortnite Saga,* THE IPKAT (February 27, 2019) http://ipkitten.blogspot.com/2019/02/dance-dance-dance-another-episode-in.html.
[35] *Id.*; Elizabeth A Harris, *Carlton Dance Not Eligible for Copyright, Government Says,* N.Y. TIMES (Feb. 15, 2019) https://www.nytimes.com/2019/02/15/arts/dance/carlton-dance.html.
[36] *See* Horgan v. Macmillan, Inc., 789 F.2d 157, 163 (2d Cir. 1986).
[37] *Id.* at 163.
[38] *Id.* at 161-162.
[39] U.S. COPYRIGHT OFFICE, *supra* note 39 at 3; ANTHEA KRAUT, CHOREOGRAPHING COPYRIGHT, 209 fn. 183 (OUP, 2016).

a stricter qualitative assessment – arguably echoing the US IP clause that obligates the government to develop and strictly facilitate IPR within its territory for the promotion of science and useful arts.[40]

The *second* limitation can be traced to the US Copyright Office itself which has been proactive in eliminating certain dance performances from copyright protection, namely, dance routines that are performed by non-human actors.[41] Therefore, protectable dance choreographies must necessarily be authored and performed by humans.

Preliminarily, by its very nature *ad libitum* performances are improvised and/or contain unscheduled variations. Hence, *ad libitum* dance performances may not satisfy the complexity test laid down under the US jurisprudence. However, considering the need for human performers, choreographers of certain *ad libitum* routines involving non-human actors such as animal dance performances, will necessarily be denied copyright protection for their work.

2) <u>Position in common law countries</u>

This sub-Section focuses on the approach undertaken by common law countries of the UK, New Zealand, and Canada. Even though each jurisdiction employs differing statutory language for copyright law, they

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[40] *See* U.S. CONST. art I, § 8, cl. 8.

[41] U.S. COPYRIGHT OFFICE, *supra* note 39 at 4; Alissia Clarke, *Everybody Dance Now! Actually Don't . . . That Choreography May Be Copyrighted*, TRADEMARK & COPYRIGHT BLOG (September 10, 2018) https://www.trademarkandcopyrightlawblog.com/2018/09/everybody-dance-now-actually-dont-that-choreography-may-be-copyrighted/.

have relied heavily on the others' decisions to articulate a "common approach" towards defining the scope of "dramatic works."

The first substantial decision on dramatic works that shaped the common approach was given in the case of *Green v. Broadcasting Corporation of New Zealand* [*hereinafter* "***Green***"].[42] As per this decision, dramatic works were defined to encompass – (i) sufficient unity and (ii) sufficient certainty – such that they were capable of being performed.[43] For our ease of reference, this definitional interpretation is to be understood as the "test of performability." Accordingly, television formats have been denied copyright protection as dramatic work since they failed to satisfy the test of performability on account of *ad libitum* elements within their format, such as varying dialogues.[44] The test has been further entrenched by the UK courts through *Norowzian v. Arks* [*hereinafter* "***Norowzian***"].[45] As per the courts, dramatic works require a certain performative nature.[46] Therefore, they were defined as "*work[s] of action, with or without words or music, which [are] capable of being performed before an audience*."[47] The *Norowzian* standard has been debated (though ultimately supported) by the UK courts in *Nova Productions v. Mazooma Games*.[48] Therein, the courts followed *Green* and elaborated upon the elements necessary for a dramatic work to be capable of performance

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[42] *Green* (1989) 3 NZLR 18.
[43] *Id.* ¶ 6.
[44] *Id.* ¶ 3.
[45] Norowzian v. Arks Ltd. (No.2) [2000] ECDR 205.
[46] *Id.* at 208.
[47] *Id.* at 209.
[48] Nova Productions Ltd. v. Mazooma Games Ltd. [2006] EWHC 24 ¶ 114.

– chiefly, (i) the element of certainty that requires the work to follow its predetermined plan, and (ii) the element of unity that requires the components constituting the work to be unitary in nature.[49] This strict interpretation of the test of performability has been predominantly followed by the courts to deny *ad libitum* works of all kinds, such as screen displays of video games and television show formats, copyright protection as dramatic works.[50]

It is relevant to note that the initial rationale behind the test of performability was to balance the economic rights of authors with the meritorious rights of other persons by tailoring monopolies.[51] Considering that *ad libitum* works enable variations within a work, the test of performability prevents authors from exercising *excessive* monopolistic rights over the subject matter of their work (and variations thereof) while promoting access and innovation for other persons.

Nonetheless, such strict interpretation of dramatic work disregards the basic skill, judgement, and intellectual creativity invested in creating *ad libitum* or improvised performances. This lacuna was initially discussed in the dissenting judgment of Judge Gallen in *Green.*[52] If one were to place reliance on the test of performability in the context of experimental works of plays that consisted of detailed plotline and characters, but impromptu dialogues, the test of performability would not only decline protection for

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[49] *Id.* ¶ 112–13.
[50] *Id.*
[51] Green v. Broad. Corp. New Zealand, C.A. 40/84, C.A. 95/87, *aff'd* [1989] 3 NZLR 18.
[52] *Green* (1989) 3 NZLR 18 (Gallen, J. dissenting).

such plays but also neglect the substantial intellectual labour, effort, and skill put in the play by the author.[53] The balance sought to be achieved between authorial rights and rights of innovation of other persons would be greatly skewered in favour of the latter. Therefore, Judge Gallen developed the 'test of structural certainty' that granted protection to experimental or improvisational plays as "dramatic work", if the combination of materials seeking protection, *i.e.*, the plotline and character sketch, formed a detailed and recognizable structure despite the *ad libitum* elements, *i.e.*, variations in the dialogues.[54]

It is germane to note that the test of structural certainty has been informally applied by the Exchequer Court of Canada in *Kantel v. Grant*.[55] This case concerned a claim for copyright protection as dramatic work for a radio format that dedicated a section of its programme towards a quotidian and varying reading of children's mail for the purposes of advertising.[56] The courts granted this claim on the ground that the show format involved a "fixed sequence" overarching framework that remained unaffected by the said variations on the show,[57] a clear departure from the test of performability. Recently though, the test of structural certainty has found formal reaffirmation in the case of *Banner v. Endemol* [*hereinafter*

[53] *Id.*
[54] *Id.* ¶ 18.
[55] Kantel v. Grant [1933] Ex. CR 84.
[56] *Id.* ¶ 2–3.
[57] *Id.* ¶ 11.

"***Banner***"].[58] In *Banner*, though the Court ultimately rejected the claim for copyright protection of a television format as a dramatic work, they read down the threshold for the test of performability.[59] Per the Court, the definition of dramatic work did not presuppose an exact replication of the said work but instead required the work to have a detailed and specific 'structure' that is capable of repetition.[60]

The judgement in *Banner* represents a different approach that the courts have started looking towards for protecting fixed, original extempore works that contain substantial intellectual labour and skill. This alternate standard for determining dramatic work has also been reflected in the civil law system through the decision of the Italian Supreme Court in *RTI Reti Television v. Ruvido*.[61] As concluded in the case, dramatic works are required to have logical thematic connections between elements that resulted in a 'structure' capable of repetition - akin to the test of structural certainty.[62]

Therefore, though the test of performability rejects copyright protection for *ad libitum* dance routines, protection for the same can be argued on basis of the test of structural certainty.

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[58] Banner Universal Motion Pictures Ltd. v. Endemol Shine Group Ltd. [2017] EWHC 2600 ¶ 35–39, 46.
[59] *Id.* ¶ 27–32.
[60] *Id.* ¶ 44.
[61] Cass., 27 luglio 2017, n. 18633/17, RTI Reti Televisive Italiane Spa v Ruvido Produzioni Srl, (It.).
[62] Eleonora Rosati, *Italian Supreme Court Confirms Eligibility of TV Formats for Copyright Protection*, 12 J. INTELL. PROP. L. & PRAC. 968, 969 (2017).

3) Position in India

The Indian jurisprudence has had sparse explanations and case laws delineating the contours of dramatic works under the Copyright Act.[63] In turn, the said Act has given an illustrative statutory definition of dramatic works that includes, but is not limited to, choreographic or similar works that are either "fixed in writing or otherwise."[64] The seminal case to discuss dramatic work under the Act is *Academy of General Education v. B. Malini Mallya* [*hereinafter* "***General Education***"].[65] *General Education* established that copyright in the performance of dance would come within the purview of dramatic work.[66] Though the judgement primarily focused upon distinguishing the definition of literary works from that of dramatic works, the complete absence of limitations imposed by the Court in encompassing dance performance within the scope of "dramatic work" suggests an unqualified and absolute inclusion.[67]

It is prudent to also discuss a subsequent decision of the Delhi High Court in *Institute for Inner Studies v. Charlotte Anderson* [*hereinafter* "***Charlotte Anderson***"].[68] Therein, copyright protection was claimed for yoga asanas

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[63] Divij Joshi, *IP Protection for the Manganiyar's Seduction? Throwing Some Light on Copyright in Stage Directions,* SPICYIP (September 18, 2017) https://spicyip.com/2017/09/ip-protection-for-stage-directions-throwing-some-light-on-the-stage-of-the-manganiyar-seduction.html; Shreya Aren, *The Drama in the Definition of 'Dramatic Works',* SPICYIP (August 26, 2010) https://spicyip.com/2010/08/guest-post-drama-in-definition-of.html.
[64] The Copyright Act, 1957, No. 14, Acts of Parliament, 1957, ch. 1 § 2(h) (India).
[65] Acad. of Gen. Educ. v. B. Malini Mallya, AIR 2009 SC 1982.
[66] *Id.* ¶ 14.
[67] *Id.*
[68] Inst. for Inner Studies v. Charlotte Anderson, MIPR 2014 (1) 129.

as dramatic work.[69] While adjudging this claim, the High Court imported the traditional test of performability conceived in *Green* and *Norowzian*.[70] Even though, the High Court agreed that the definition of dramatic works under the Copyright Act was inclusive and "*therefore may include works of the nature prescribed under provisions of the [Copyright] Act*", the common law test of performability was applied to limit this scope.[71] To that point, copyright protection for a dramatic work was made contingent upon: (i) complete certainty of the work to be performed in the manner as conceived initially by the author, and (ii) sufficient unity between the elements comprising the work.[72] Upon applying the test, copyright protections for yoga asanas were denied since they contained *ad libitum* elements and were unable to satisfy the requirements of certainty and unity.[73]

C. *AD LIBITUM* DANCE PERFORMANCES AS DRAMATIC WORKS WITHIN INDIA

Considering that Copyright Act is an antediluvian tool of the colonial ages, it lacked necessary contemporary foresight at the time of its conception. To that effect, the Indian courts have often relied upon the approaches taken by the foreign courts. Section B of the paper has highlighted the two different approaches that foreign jurisprudences have taken while defining the scope of dramatic work. The Section further juxtapositions the said approaches with that of Indian courts. Accordingly,

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[69] *Id.* ¶ 61.
[70] *Id.* ¶ 113-114. *See* discussion *supra* Part III.B.2
[71] *Id.* ¶ 110-114.
[72] *Id.* ¶ 113; *See* KEVIN M. GARNETT ET AL., COPINGER AND SKONE JAMES ON COPYRIGHT (14th ed., 1999).
[73] Inst. for Inner Studies v. Charlotte Anderson, MIPR 2014 (1) 129 ¶ 119.

the objective behind Section C is to explore the feasibility of granting protection for *ad libitum* dance performances as dramatic work under Indian law. Since the foreign approaches can be divided into two blocks, this Section will sequentially consider the applicability of each approach within India.

First, the approach taken by the USA courts is considerably inapplicable due to the differing legal context underlying USA and Indian jurisprudence. Primarily, the restrictive definition by the USA courts necessitates qualitative assessment which is arguably in furtherance of its IP clause.[74] This rationale is further supported by their understanding of dramatic works that require such works to "*convey a story, theme or narrative through a series of dramatic situations*" – thereby imposing a certain artistic or qualitative standard upon the work.[75] In contrast, India lacks similar constitutional provisions that necessitate a meritorious assessment of works. To that end, copyright assessments by courts under Copyright Act have traditionally remained quality agnostic.[76] Not to mention, limiting protectable dance choreographies to human performers seems to have no logical rationale and is myopic of changing developments. Therefore, applying the standard laid down by US courts within the Indian legal sphere will lead to disjunctive results.

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[74] *See* discussion *supra* Part III.B.1 of this paper.

[75] Aristocrat Leisure Indus. v. Pac. Gaming, [2000] FCA 1273, ¶ 62; Seltzer v. Sunbrock, [1938] 22 F. Supp. 621, 629; PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT 106 (3rd ed., 2008).

[76] *See* The Copyright Act, 1957, No. 14, Acts of Parliament, 1957, ch. 1 § 2(c) (India); University of London Press Ltd. V. University Tutorial Press [1916] 2 Ch 601.

Second, the approach taken by the courts of other common law countries has been followed by the Indian courts to a certain extent – as evidenced by the judgment in *Charlotte Anderson*.[77] The test of performability as conceptualized and applied in India requires certainty of performance in accordance with predetermined choreography.[78] For this reason, *ad libitum* works such as *ad libitum* dance performances, yoga asanas or animal dance performances, are/can be denied copyright protection as a dramatic work.[79]

There remains a judicial trend among Indian courts to rely on foreign jurisprudence for interpreting copyright issues. This can result in blind inclusion of principles without due adherence to the Indian statutes. The test of performability applied in *Charlotte Anderson* is suggested to amount to additional judicial restrictions on the definition of dramatic work in absence of supporting statutory language.[80] The statutory wordings of the Copyright Act for the definitional clause of dramatic works impose a sole requirement of fixation.[81] Moreover, the clause gives an illustrative definition that expressly includes *fixed* 'choreographic works and works of similar nature within the definition of dramatic works' – without any reservations.[82] This is unlike the definitional clauses in other common law countries that define dramatic work in a broad, unrestrictive manner. For illustration, the UK Copyright Act, 1988 defines dramatic works

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[77] *See* Inst. for Inner Studies v. Charlotte Anderson, MIPR 2014 (1) 129.
[78] *See* discussion *supra* Part III.B.3 of this paper.
[79] *Id.*
[80] *See* Inst. for Inner Studies v. Charlotte Anderson, MIPR 2014 (1) 129.
[81] The Copyright Act, 1957, No. 14, Acts of Parliament, 1957, ch. 1 § 2(h) (India).
[82] *Id.*

expansively, including works of dance or mime, without imposing any qualifiers for the same.[83]

The excessively broad and flexible nature of statutory language (as in other common law countries) may demand judicial intervention for delineating the scope of dramatic works – contrary to the Indian statute that specifically and explicitly mentions the necessary scope and qualifiers for dramatic works in the statutory clause itself,[84] absolving any need to limit it further through case laws. For this reason, the intervention in *Charlotte Anderson* and consequent application of the common law standard is debatably skewered and not in consonance with the express statutory intention behind Copyright Act. If *ad libitum* dance performances are to be governed by the statutory language and legislative intent, then they should be considered dramatic works so long as they satisfy the requirement of fixation.

Just the same, irrespective of the merits or follies of adopting foreign principles and legislating through judicial intervention, the Indian courts have been inclined towards applying the test of performability over the test of structural certainty. Such inclinations too are misguided, especially in the light of the test of performability being eclipsed by the test of structural certainty through *Banner*.[85] Not only is the test of structural certainty the most recent interpretational standard, but it is also more

[83] Copyright, Patents and Designs Act 1988, c. 48 § 3(1) (UK).
[84] The Copyright Act, 1957, No. 14, Acts of Parliament, 1957, ch. 1 § 2(h) (India).
[85] Banner Universal Motion Pictures Ltd. v. Endemol Shine Group Ltd. [2017] EWHC 2600.

aligned with the fundamentals of copyright principles. Through the test of structural certainty, *fixed ad libitum* works are protected as dramatic works if they have a sufficiently detailed structure such as a comprehensive sequence or format of performance, and varying elements that do not affect the consistent framework.[86] For a practical understanding of this test, the components of animal dance performances (that are de facto *ad libitum* in nature) must be assessed against the aforesaid test. Such performances generally comprise components such as – dance movements, sequence of actions, lightning, costumes, and attached audio and visual graphics – among others. As long as the structure formed through the cohesion of these elements remains certain and capable of repetition, the varying nature of dance movements should not preclude copyright protection.

The underlying reasoning behind protecting these *ad libitum* works is that their structure would remain specific and original to its individual author, such that individual variations within it will be immaterial.[87] Notably, the test of structural certainty does not assess all variations against the same yardstick. Instead, it distinguishes between immaterial variations that may not be sufficiently original to attract copyright protection by itself and substantial variations that *may* lead to independent copyright protection in the form of derivative works.[88] Through such distinction, the test of structural certainty, unlike the test of performability, strikes an accurate

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[86] *Id.*; *see also* discussion *supra* Part III.B.2 of this paper.
[87] Interlego AG v. Tyco Industries, [1988] UKPC 3 (UKPC) (appeal taken from H.K.).
[88] Derivative works are derived from the underlying work such that substantial variations to the underlying work can result in an original derivative work that can be protected under copyright law without it infringing upon the copyright of the underlying work.

balance between the monopolistic rights of the creator with the right of the public to innovate. In essence, the test denies excessive monopolistic rights over a subject matter by protecting minor variations of a work within the work itself while also allowing protection for substantial variations in the form of derivative works. It concurrently rewards creators' skills and efforts in creating *ad libitum* works – compatible with the objective of copyright law. Applying the test of structural certainty thus seems to be more harmonious with the purpose of copyright law.

On that account, the approach of the Indian courts per *Charlotte Anderson* is dated for two primary reasons: (i) it incorrectly intervenes to modify the statutory language of dramatic work, and (ii) it ignores the test of structural certainty in favour of the test of performability. In absence of *Charlotte Anderson*, the opinion of the court in *General Education* and the statutory language of the Copyright Act becomes relevant. Implementing it, along with the test of structural certainty ensures that, *fixed* and *original ad libitum* works, such as animal dance performances, having sufficiently detailed structure and certain non-material varying movements *can* and should be awarded copyright protection in India.

It is prudent to note that copyright protection for such performances faces practical hindrances due to the standard of fixation. Since the Copyright Act expressly precludes fixation of dramatic works in cinematograph films,[89] authors of dramatic works have limited methods of satisfying the said standard. Practically, it may not be feasible to fix *ad libitum*

[89] The Copyright Act, 1957, No. 14, Acts of Parliament, 1957, ch. I § 2(h) (India).

works in devices other than a cinematograph film/video recording since these works do not necessarily follow a predetermined path. Hence, such hindrances highlight the importance for choreographers of *ad libitum* dance performances to receive copyright protection through alternate channels. For the same, the paper dwells on the scope of the performer's rights under Part IV.

IV. PERFORMERS' RIGHTS FOR CHOREOGRAPHERS OF *AD LIBITUM* DANCE PERFORMANCE

Though performers'/performing rights and copyright law can be claimed by an individual over the same work, the administration of the former remains independent and distinct from the latter. Even though the rights *may* overlap, they will not conflict on account of the differing context under which they are claimed: copyright is claimed by the "author" of a work and performers' rights by the "performer" of a work.[90] Within the Indian context, performers' rights were initially introduced through the Copyright (Amendment) Act, 1994 in order to protect the efforts and livelihood of performers in the age of advancing technological developments,[91] and thereafter substantiated vide the Copyright (Amendment) Act, 2012.[92]

As a result, the definitional ambit of "performers" and "performances" have been defined in Copyright Act. Section 2(q) of the

[90] *Id.* ch. VIII § 38–38A; Sushila v. Hungama, CS No. 426/18 ¶ 9.4 (2018) (India).
[91] The Copyright (Amendment) Act, 1994, No. 38, Acts of Parliament, 1994 (India).
[92] The Copyright (Amendment) Act, 2012, No. 27, Acts of Parliament, 2012 (India).

Act defines "performance" broadly to include "any visual or acoustic presentation made by one or more performers".[93] This expansive understanding includes innumerable forms of performances without any limitations – and through inference, *ad libitum* dance performances – within its definition.[94] For this reason, the paper will not be concerned with understanding the definitional clause of "performance." Instead, the crux will be to ascertain the definitional scope of a "performer" to determine if choreographers can claim to be performers of *ad libitum* dance performances.

The need for performers' rights of choreographers arises due to the unpredictable copyright protection accorded to *ad libitum* performances. Generally, the subject matter of both the aforesaid rights differs such that the authored dramatic work forms the basis of copyright law while the individual performances of the performer(s) within the dramatic work form the basis for performers' rights. Interestingly though, due to the role of a choreographer as the author and executor of a dance performance, the subject matters of copyright and performers' rights for the choreographer will inevitably relate to the same dance routine choreographed/authored by them. Further, it is pertinent to note that, as per the Copyright Act, the rights provided under copyright law, and the performers' rights are substantially similar such that both, the copyright holder and performer, have recourses against unauthorized usage of their respective work or

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[93] The Copyright Act, 1957, No. 14, Acts of Parliament, 1957, ch.1 § 2(q) (India).
[94] *See* DAVID BAINBRIDGE, INTELLECTUAL PROPERTY, (10th ed., 2018); *Heythrop Zoological*, *supra* note 15.

performance.[95] Few illustrations of the overlapping rights include the exclusive rights to: (i) reproduce the performance/work; (ii) communicate the performance/work to the public; (iii) issue copies of the work/performance to the public; or (iv) make sound or visual recordings of the work/performance, among others.[96] Considering that *ad libitum* dance performances are presently unprotected as dramatic work in several copyright jurisprudences (including India),[97] performers' rights can provide an alternate solution for choreographers to protect their investment in such performances. However, any arguments for the inclusion of choreographers as performers in India rest on the definitional interpretation of "performer" under the Copyright Act.

Though the Copyright Act fails to unambiguously define a "performer", it provides an illustrative and inclusive list of individuals that are considered performers for the purpose of the Copyright Act including dancers, musicians or individuals making a performance.[98] Further, a brief analysis of foreign jurisprudence elucidates a "performer" to mean "any person giving a performance."[99] Hence, the determinative point is to understand what constitutes "*giving/making*" of performance for a choreographer.

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[95] The Copyright Act, 1957, No. 14, Acts of Parliament, 1957, ch. III § 14, ch. VIII 38–38A (India).
[96] *Id.*
[97] *See* discussion *supra* Part III. B & III.C of this paper.
[98] The Copyright Act, 1957, No. 14, Acts of Parliament, 1957, ch. I § 2(qq) (India).
[99] Shweta S. Deshpande, *Copyright Protection of Performers Rights*, 28 DESIDOC J. LIBRR. & INFOR. TECH. 66, 66 (2008); *Copyright Act 1968* pt IX div 1 s 189 (Austl.); Copyright, Designs and Patents Act 1988, c. 48 pt II § 180 (UK).

Largely, in an *ad libitum* dance performance, the choreographer can contribute their efforts in two ways – (i) the choreographer can perform with the performers before an audience, or (ii) the choreographer can guide the performers through the performance while off stage.

Accordingly, Section A of this Part addresses the circumstance of joint performance and Section B addresses the off-stage presence of the choreographer to determine whether the nature of contributions in both situations is sufficient for awarding performers' rights to the choreographer.

A. NATURE OF CONTRIBUTION BY CHOREOGRAPHERS IN JOINT PERFORMANCE

The instance of joint on-stage performance involves the choreographer engaging in the performance before an audience, alongside the other performers. The recent evolution of performers' rights within the IPR field has resulted in a paucity of legal literature on the same. On that account, the seminal case dealing with performers' rights and contributions of a choreographer during a joint performance is that of *Heythrop Zoological v. CAPS* [*hereinafter* "***Heythrop Zoological***"] which deals with the contribution of animal trainers in a joint performance with animal performers.[100] Per *Heythrop Zoological,* for animal acts executed alongside animal trainers, the trainer can be granted performers' rights in the animal act if their quantum of contribution satisfies a two-fold test – (i) their

[100] *Heythrop Zoological*, *supra* note 15 ¶ 38.

intervention was essential for the performance, and (ii) their intervention made the performance worth watching.[101]

Heythrop Zoological further provides examples of indicative acts that satisfy the two-fold test, such as (i) performances given by animal trainers while introducing animal performers to the audience, and (ii) performances in which the animal trainer instructs the animal throughout the act while on the stage.[102] In addition, the two-fold test for joint performance is arguably supported by the Indian jurisprudence due to the inclusion of "snake charmers" as performers under the Copyright Act.[103] The underlying rationale for the inclusion can be ascribed to snake charmers being an *essential* element for guiding the snake(s) and executing the performance before an audience.

Since animal dance performances fall within the ambit of *ad libitum* works due to the unpredictability and volatility of animal performers, the aforesaid two-fold test can thus be extrapolated to other *ad libitum* dance performances where contributions made by the choreographer fulfil the conditions laid down in *Heythrop Zoological*, to award such choreographers performers' rights in the said *ad libitum* performances.

B. NATURE OF CONTRIBUTION BY CHOREOGRAPHERS FOR OFF-STAGE PERFORMANCE

[101] *Id.* ¶ 38 – 40.
[102] *Id.* ¶ 37–38.
[103] The Copyright Act, 1957, No. 14, Acts of Parliament, 1957, ch. I § 2(gg) (India).

Generally, choreographers can be considered a performer if they perform alongside the performers or are essential for guiding the performers while on the stage – as noted in Section A herein.[104] The pertinent question that then arises is whether choreographers can be deemed to be a performer if they guide their performers while remaining off stage. Hence, the key point is to understand the significance of stage presence in awarding performers' rights.

In the context of animal dance performances, *Heythrop Zoological* agreed with the opinion of Richard Arnold, suggesting that a "*performance by animals should nevertheless be regarded as a performance given by the individual, namely the trainer, notwithstanding that the animals are not individuals. Though this is to stretch the concept of an interpretative performance nearly to breaking point, it is justifiable on grounds of policy.*"[105]

Following this logic, contributions of the choreographers towards the execution and completion of an *ad libitum* performance should not be denied merely on the grounds that such contributions occurred off-stage for the simple reason that such contributions – whether on stage or off stage – are reflected in the executed performance.

The lack of importance attached to on-stage contributions to establish performers' rights is further highlighted through the French

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[104] *See* discussion *supra* Part IV.A of this paper.
[105] *Heythrop Zoological*, *supra* note 15, ¶ 34 (citing RICHARD ARNOLD, PERFORMERS' RIGHTS ¶ 2.33 (4th ed., 2008)).

legislation that qualifies puppet masters as performers.[106] This approach finds corroboration in provisions of certain international treaties. The WIPO Performances and Phonograms Treaty qualifies "interpreters" as performers.[107] Such a qualification is supported by the Rome Convention in the French and Spanish texts, which provides performers' rights for interpreters (*artistes interprètes*) and executants (*artistes exécutants*).[108] The understanding as per the Rome Convention has been discussed in the WIPO Committee of Governmental Experts on Dramatic, Choreographic and Musical Works.[109] The Report by the Committee supports the conclusion that interpreters and executants are 'performers' and should be awarded performers' rights.[110] Interpreters and executants are explained to include conductors and directors – whose role involves "*interpretation of works and the giving of instructions to other artists who directly produce performances*."[111]

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[106] Code de la Propriété Intellectuelle [IPC] art. L212- 1(Fr.); *see also* Mathilde Goizane Alice Pavis, The Author-Performer Divide in Intellectual Property Law: A Comparative Analysis of the American, Australian, British and French Legal Frameworks vol I, 163–66 (March 2016) (Ph.D. dissertation, University of Exeter) https://ore.exeter.ac.uk /repository/bitstream/handle/10871/23692/PavisM.pdf.

[107] WIPO, Performances and Phonograms Treaty, art. 2 (a), Dec. 20, 1996, 2186 U.N.T.S. 203; Antony Taubman, *Nobility of Interpretation: Equity, Retrospectivity, and Collectivity in Implementing New Norms for Performers' Rights*, 12 U. GA. J. INTELL. PROP. L. 351, 383 (2005).

[108] WIPO, Convention Internationale Sur La Protection Des Artistes Interprètes ou Exécutants, des Producteurs de Phonogrammes et des Organismes de Radiodiffusion, art. 2(1)(a), Oct. 26, 1961, 496 U.N.T.S. 43; WIPO, Convención Internacional Sobre la Pbotección de los Abtistas Intébpbetes O Ejecutantes, Los Pboductobes De Fonogramas y Los Obganismos de Badiodifusión, art. 2 ¶ 1(a), Oct. 26, 1961, 496 U.N.T.S. 43; ARNOLD, *supra* note 105 ¶ 2.31. All texts and translations of the convention are said to be equally authentic and credible and uniform in applicability.

[109] UNESCO, Comm. of Gov. Experts on Dramatic, Choreographic and Musical Works, Paris, U.N. Doc. WIPO/CGE/DCM/3 (March 6, 1987).

[110] *Id.* ¶ 62.

[111] *Id.*

In addition, the WIPO guide to the Rome Convention explains "interpreters" to include conductors of instrumental and vocal groups.[112] The inclusion of orchestra conductors as performers is also endorsed by the Australian Copyright law,[113] the Italian Copyright Statute,[114] and the Spanish Author's Right Act[115] which further extends performer's rights for stage directors. The foregoing illustrations attribute performers' rights to human actors who are necessary for the performance even when not visible to audience. Despite their lack of stage presence, these human actors are assigned performers' rights in the performance for executing or contributing to it while off-stage – akin to the test established in *Heythrop Zoological* for qualifying as a "performer."[116]

This classification of interpreters – especially orchestra conductors – as performers is also significant for understanding the impact of stage presence in assigning performers' rights. Orchestra conductors primarily guide performers through the performance with instructions and gestures, while not necessarily being on the stage.[117] Not to mention, several jurisprudences have inclined towards providing performer's rights to artists

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[112] *Id.* ¶ 62, 134.
[113] Copyright Act, 1968 (pt. IX), Div. 1 § 191B (Austl.).
[114] Law for Protection of Copyright and Neighbouring Rights, Law No. 633 of April 22, 1941, Article 82 (Italy) ("**Copyright Protection Law**").
[115] Royal legislative Decree 1/1996 dated 12th April, enacting the Consolidated Text of the Intellectual Property Act, Regularising, Removing Ambiguities and Harmonising the Current Legal Provisions on the Subject, Article 105 (Spain).
[116] *See generally Heythrop Zoological*, *supra* note 15.
[117] THE CAMBRIDGE COMPANION TO CONDUCTING 1-4 (José Antonio Bowen ed., Cambridge Univ. Press 7th edition 2003).

'playing a significant artistic part, even if in supporting role'.[118] For instance, the German Copyright Law is generally understood to extend performers' rights for stage or musical directors, lightning directors or make-up artists[119] – individuals predominantly contributing to a show while off-stage. Hence it is suggested that stage presence *need* not be a mandatory requirement for qualifying as a performer. Instead, the qualifier for determining a choreographer as a performer should be the two-fold test formulated in *Heythrop Zoological* – regardless of stage presence.[120]

The role and nature of contributions by a choreographer while guiding performers through a dance performance, though off-stage, is analogous to that of orchestra conductors. In both events, the mentioned individuals form the basis and impetus for the execution of the performance. It is further posited that the role of choreographers in successfully executing *ad libitum* performances is significantly more essential due to the volatility and improvisations in the performances. Therefore, ideally, choreographers should be awarded performers' rights if they can satisfy the two-fold test of *Heythrop Zoological*. The discourse on the importance (or lack thereof) of stage presence in determining a 'performer' precludes arguments against awarding performers' rights to choreographers

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[118] Copyright Protection Law, *supra* note 114.

[119] PASCAL KAMINA, FILM COPYRIGHT IN THE EUROPEAN UNION 351 (Cambridge University Press 2004).

[120] For clarity, the test requires that (i) the intervention by the performer was essential to performance and (ii) the intervention made the performance worth watching. *See Heythrop Zoological*, *supra* note 15.

executing *ad libitum* performance while off-stage – whether in a joint performance or otherwise.

V. CONCLUSION

While *ad libitum* dance performances are an evolving occurrence, traditional understanding of IPR law has so far been discouraging in affording protection to such works. From the perspective of the choreographer, the said individual expends immense effort, skills, and creativity in authoring the dance routine and ensuring its performance.

For that reason, this research paper has aimed to discuss the relevant status quo of IPR protection in light of developing judicial standards. In doing so, the paper has explored the varied arguments put forth in favour and opposition of such protection – whether through copyright or performer's rights – to draw the most efficient conclusion. At the outset, the paper had set forward two hypotheses which have been proven true throughout the paper. A detailed discussion of the interpretational standards for IPR law followed under foreign jurisprudence and international treaties result in the proposition that the choreographers choreographing the *ad libitum* dance performances can theoretically be accorded copyright (despite practical hindrances) as well as performers' rights for such performances within India. This conclusion is not only the inevitable result of the applicable law but also most aligned with the purpose of IPR law in increasing accessibility while incentivizing innovations.

NLUJ Law Review

Varnika Taya, *Cross-Border Insolvency: Analyzing the enforceability of UNCITRAL Model Law in India*, 8(2) NLUJ L. REV. 52 (2022).

CROSS-BORDER INSOLVENCY: ANALYZING THE ENFORCEABILITY OF UNCITRAL MODEL LAW IN INDIA

*~Varnika Taya**

ABSTRACT

The increase in investments and trade amongst corporate entities is accompanied by substantial growth in their creditors and debtors as well. As a rule of nature, these widespread businesses timely bear risks and failures, leading up to insolvencies in the worst of cases. The situation becomes all the more complex with the involvement of different sovereign states. UNCITRAL has adopted the Model Law on Cross Border Insolvency, 1997 to effectively handle such cases of cross-border insolvency for international entities, with many a country already interpreting and adopting it into their domestic legal systems. In India as well, the Insolvency Law Committee has submitted a report in October 2018 recommending the incorporation of the Model Law on Cross Border Insolvency as Draft Part Z into the Insolvency and Bankruptcy Code, 2016. With the Draft Part Z still in limbo, there have been speculations by different stakeholders on its viability in the Indian context, consequentially giving rise to the need for research on this issue. This paper is, thus, aimed to study the Model Law on Cross Border Insolvency in the form of Draft Part Z as recommended

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by the Insolvency Law Committee, and analyze its enforceability under the Indian legal regime.

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I. INTRODUCTION

The current times have conferred increasing recognition upon the concept of cross-border insolvency, especially in the context of rising transnational commercial transactions.[1] With the gradual increase in the number of corporate entities establishing bases in different jurisdictions, the foundations of some of the most complex network of entities is being laid down. While this wide web of presence is certainly vital for efficiency and quality of business, the transnational engagement of corporate entities is seen to further contribute to the compounding of insolvency proceedings during entities' financial distress.

Generally, states are regulated by their domestic insolvency legal framework, knowledge of which is often not possessed by the foreign stakeholders. While some states follow a similar legal process, foreign creditors have more difficulty in managing the proceedings initiated in countries with legal systems fundamentally different from their own. Under such circumstances, the general principles of private international law no longer suffice in settling the disputes between involved jurisdictions, thereby materially affecting the insolvency proceedings and the interests of the parties.

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[1] Ishita Das, *The Need for Implementing a Cross-Border Insolvency Regime within the Insolvency and Bankruptcy Code, 2016*, 45 VIKALPA: THE J. FOR DECISION MAKERS, 104-114 (2020). ("**Ishita Das**")

A. UNCITRAL MODEL LAW

The United Nations Commission on International Trade Law [*hereinafter* "**UNCITRAL**"] Model Law on Cross Border Insolvency, 1997 [*hereinafter* "**UNCITRAL Model Law**" or "**Model Law**"] addresses this issue and attempts to provide a uniform legal framework to deal with insolvency proceedings beyond the State boundaries. It aims to facilitate a cost-effective, fair, and efficient manner of managing transnational insolvency; subsequently filling a very evident void for a uniform legal framework to comprehensively deal with insolvency proceedings sprawling across States. Respecting the due differences between domestic laws, the Model Law emphasises encouragement and authorization of coordination and cooperation between States, rather than hauling for a blanket unification of their respective laws on cross-border insolvency. It refrains from establishing any mandatory mechanism and seeks to act as mere legislative guidance on the matter of cross-border insolvency. Since it does not entail a mandatory unification of domestic laws, the Model Law is adopted by different States albeit with subjection to modifications and alternations as deemed appropriate.[2]

B. INDIAN LEGAL REGIME ON CROSS-BORDER INSOLVENCY

In India, the laws relating to reorganisation and insolvency resolution of corporate persons are covered under the Insolvency and Bankruptcy Code, 2016 [*hereinafter* "**Code**"], wherein the aspect of cross-

[2] U.N. COMM'N ON INT'L TRADE L., UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, at ¶ 20, U.N. Sales No. E.14.V.2 (2014). ("**UNCITRAL**").

border insolvency is provided under Section 234 and 235 of the Code.[3] These provisions dealing with "*Agreements with foreign countries*" and "*Letter of request to a country outside India in certain cases*", however, are currently proven less than efficient on the issue.[4] The requirement of reciprocity and a case-to-case basis approach for their application is perceived to defeat the very purpose of legislation in regard to cross-border insolvency and is observed leading to unnecessary complications witnessed in the recent matters of *Jet Airways (India) Ltd. v. State Bank of India & Ors.*[5] and *State Bank of India v. Videocon Industries Ltd. & Ors.*[6]

C. INSOLVENCY LAW COMMITTEE REPORT – DRAFT PART Z

Considering the given background, the Insolvency Law Committee [*hereinafter* "**Insolvency Law Committee**" or "**Committee**"] has, in its October 2018 report, recommended, *inter alia*, the inclusion of Draft Part Z [*hereinafter* "**Part Z"** or "**Draft**"], a set of provisions wholly dedicated to the regulation of cross-border insolvency proceedings.[7] This Draft Part Z, largely inspired from the Model Law, is introduced by the Committee with certain modifications in the Indian context, and is interpreted as a

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[3] Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016, §§ 234-235 (India).
[4] *Id.*
[5] Jet Airways (India) Ltd. v. State Bank of India & Ors., [2019] 156 SCL 642 ("**Jet Airways**").
[6] State Bank of India v. Videocon Industries Ltd. & Ors., (2019) SCC OnLine NCLAT 964.
[7] INSOLVENCY LAW COMMITTEE, REPORT OF INSOLVENCY COMMITTEE ON CROSS BORDER INSOLVENCY, (Ministry of Corporate Affairs, Government of India 2018), https://ibbi.gov.in/uploads/resources/Report_on_Cross%20Border_Insolvency.pdf ("**Insolvency Law Committee**").

momentous step reflecting India's approach towards global legal regime on cross-border insolvency.

Given the rapid growth in transnational business activities followed with an equally strong development in the instances of insolvency, the Draft, following the Model Law, is sought indispensable for arming the Indian legal regime for prospective cross-border insolvency proceedings. However, on the same plane, there still prevail certain looming apprehensions around its inspiration, which call upon the UNCITRAL legislative text for its inefficacy and poor adoption rate.

In this regard, it thus becomes imperative to study the Model Law in the form of Draft Part Z and analyse its enforceability in India, so as to facilitate the formulation of suggestions, if any, to enhance the efficiency and comprehensiveness of the concerned Draft.

II. UNCITRAL MODEL LAW

Conceived at the Congress of the United Nations Commission on International Trade Law, through a material proposal made to the UNCITRAL for work in the "*field of international bankruptcy or insolvency*",[8] the UNCITRAL Model Law on Cross-Border Insolvency, adopted in 1997, aims to "*provide effective mechanisms for dealing with cases of cross-border insolvency*".

[8] Proceedings of the Congress of the United Nations Commission on International Trade Law, Uniform Commercial Law in the Twenty-First Century, 158 (1992), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/Colloquia/uniform_commercial_law_congress_1992_e.pdf (last visited Nov 13, 2021).

For the Model Law, cross-border insolvency is "*one where the insolvent debtor has assets in more than one State or where some of the creditors of the debtor are not from the State where the insolvency proceeding is taking place*".[9]

The Model Law propounds four main elements in relation to cross-border insolvency. They are: (i) access, (ii) recognition, (iii) relief (assistance), and (iii) cooperation and coordination. These elements are exhibited in the five chapters of the Model Law, namely, (i) General Provisions; (ii) Access of Foreign Representatives and Creditors in the State; (iii) Recognition of a Foreign Proceeding and Relief; (iv) Cooperation with Foreign Courts and Foreign Representatives; and, (v) Concurrent Proceedings.[10]

Currently, the Model Law is adopted by forty-nine States in fifty-three jurisdictions [*hereinafter* "**States**"] with Brazil and Myanmar as the latest additions in the year 2020. The enacting States of the Model Law represent an interesting mix with developed countries (such as, the United States of America [*hereinafter* "**USA**" or "**US**"], United Kingdom [*hereinafter* "**UK**"] and Canada) and developing countries (such as, Uganda, Chile and Chad) adopting it alike. However, the Model Law still awaits a positive response from major economies and some of the member states of BRICS (Brazil, Russia, India, China, and South Africa), the European Union, and ASEAN (Association of Southeast Asian Nations); the absence of which appears to undermine its utility. Even out of ones accepting the

[9] UNCITRAL, *supra* note 2.
[10] UNCITRAL, *supra* note 2, at ¶ 24.

UNCITRAL Model Law, it is noted that the Model Law instead of being adopted verbatim, is subjected by the States to "*tailor-made changes to foster their economic interests which may be difficult to comply at bi-lateral level.*"[11]

Understandably, UNCITRAL Model Law, like other international instruments, though presents a rather suitable framework, too bears certain drawbacks. Its concerns are observed to range from skewed relation between flexibility and uniformity of framework, unfettered powers of foreign representatives, discretion conferred upon States, and issue of conflict of laws.

III. CROSS-BORDER INSOLVENCY IN INDIA

Cross-border insolvency has been the centre of reorganization proceedings of corporate entities for long with the first recorded Indian case in 1908 in *Re P. Macfadyen & Company Ex parte Vizianagaram Company Limited.*[12] The matter of cross-border insolvency has since been raised for discussions. In 2000, the High Level Committee on Law relating to Insolvency of Companies was formed under the chairmanship of Justice V. Balakrishna Eradi;[13] in 2001, the Advisory Group on Bankruptcy Law was formed under the chairmanship of Dr. N. L. Mitra;[14]

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[11] Himanshu Handa, *Orchestrating the UNCITRAL Model Law on Cross-Border Insolvency in India*, 1(5) INT'L J. L., MGMT. & HUMAN., 1, 8 (2018).

[12] Re P. Macfadyen & Company Ex parte Vizianagaram Company Limited, [1908] 1 KB 67.

[13] Ishita Das*, supra* note 1.

[14] Report of the High-Level Committee on Law relating to the Insolvency and Winding up of Companies, MINISTRY OF LAW, JUSTICE & COMPANY AFFAIRS, (2000), http://reports.mca.gov.in/Reports/24-Eradi%20committee%20report%20of%20the%

and in 2014, the Bankruptcy Law Reforms Committee was formed under the chairmanship of Dr. T. K. Viswanathan.[15]

Indian legislative approach thus has progressed with each round of recommendation as mentioned above, subsequently paving way for Draft Part Z by the Insolvency Law Committee.

A. PREVAILING LEGAL REGIME ON CROSS-BORDER INSOLVENCY

Currently, the aspect of cross-border insolvency is covered under two provisions of the Code, that is, Section 234 and 235, which were notified by Ministry of Corporate Affairs on April 1, 2017,[16] only for corporate persons as corporate debtors and are not applicable to partnerships and individuals at the moment.[17]

The marginal note of Section 234[18] reads, "*Agreements with foreign countries*", wherein it allows the Central Government to enter into an agreement with any foreign government for enforcement of the Code. Furthermore, the provision authorizes the Central Government to notify in the Official Gazette the conditions to which the application of the Code on "*the assets or property of a corporate debtor or a debtor including a personal guarantor*

20high%20level%20committee%20on%20law%20relating%20to%20insolvency%20&%20winding%20up%20of%20Companies,%202000.pdf (last visited Nov 18, 2021).

[15] Morshed Mannan, *Are Bangladesh, India and Pakistan Ready to Adopt the UNCITRAL Model Law on Cross-Border Insolvency?*, 25 INT'L INSOLVENCY REV., 195, 224 (2016).

[16] *See* Notification, S.O. 1005(E), MINISTRY OF CORPORATE AFFAIRS (March 30, 2017), https://ibbi.gov.in//webadmin/pdf/legalframwork/2017/Jul/1Apr17_Provisions_of_Vol_Liquidation_IU_and_Cross_Border_Insolvency_came_into_force.pdf (last visited Nov 11, 2021).

[17] Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016, Preamble (India).

[18] *Id.* § 234.

of a corporate debtor" situated in a foreign country shall be subjected to. The provision therein, thus, stresses on the aspect of reciprocity. It requires an agreement between the Central Government and the foreign government for the enforcement of the Code, which in individual cases may be a long-drawn affair. The possible non-uniformity in the terms of the individual agreements stands to give rise to uncertain implementation with multiple proceedings involving countries falling back on their individual agreements with India to raise their claims.

Similarly, Section 235[19] deals with, "*Letter of request to a country outside India in certain cases*". This provision allows a Resolution Professional, liquidator or bankruptcy trustee to apply to National Company Law Tribunal [*hereinafter* "**NCLT**" or "**Tribunal**"], in the course of a Corporate Insolvency Resolution Process, liquidation or bankruptcy respectively, for the requirement of evidence or action in relation to "*the assets of the corporate debtor or debtor including a personal guarantor of a corporate debtor*" – if in their opinion, the concerned assets are situated in a foreign country with which reciprocal arrangements have been entered into under Section 234. The provision further enables the NCLT to accept or refuse the issuance of letter of request to a court or a competent authority depending on their satisfaction or dissatisfaction with the requirement of such evidence or action in the proceedings. Following Section 234, this provision, too, stresses the aspect of reciprocity. It does not mention any set mechanism of cooperation between the authorities, the absence of which may lead to

[19] *Id.* § 235.

confusion and disparity as regards the individual obligations and process. The provision requires communication of 'letters of request for cooperation' between the authorities of different countries involving the role of diplomatic relations which if not addressed effectively, stands to cause further delay and subsequent detriment of the interests of the parties involved.

It is noted that none of the provisions of the Code deals with foreign creditors and their rights to apply to NCLT for the initiation of the Corporate Insolvency Resolution Process. Although the Hon'ble Supreme Court of India in *Macquarie Bank Limited v. Shilpi Cable Technologies Limited,*[20] confers upon the foreign creditors the same rights as available to the domestic creditors for initiation and participation in insolvency proceedings, the Code, in this regard, does not provide any recourse.

B. JUDICIAL APPROACH ON CROSS-BORDER INSOLVENCY

Given the legislative inadequacies on the issue, the instances of cross-border insolvency have been dealt with in the recent past by the judiciary taking cognizance of individual matter. This judicial approach is well evident in this regard in recent cases.

1) Jet Airways

Jet Airways (India) Limited [*hereinafter* "**Jet Airways**"] is the first Indian company to have undergone the proceedings for cross-border insolvency in 2019, wherein an application under Section 7 of the Code was

[20] Macquarie Bank Ltd. v. Shilpi Cable Technologies Ltd., (2018) 2 SCC 674.

filed by the State Bank of India [*hereinafter* "**SBI**"] in NCLT Mumbai, following which the Bench was apprised of a Dutch bankruptcy petition filed in the Noord-Holland District Court of Netherlands against Jet Airways by two European creditors for claims including a request to seize one of the airline's aircrafts parked at Schiphol airport in Amsterdam.

Subsequently, an application was filed by the Dutch administrator before NCLT Mumbai for recognition of Dutch insolvency proceedings and withholding of Indian proceedings, stating that insolvency proceedings in a competent Dutch court had already commenced and continuance of two parallel proceedings in different jurisdictions stood to vitiate the restructuring process of the entity and have an adverse impact on stakeholders.

On rejection of the recognition application, an appeal was then filed by the Dutch administrator before the National Company Law Appellate Tribunal [*hereinafter* "**NCLAT**" or "**Appellate Tribunal**"], where the impugned order was set aside by the Appellate Tribunal on the assurance that the Dutch administrator would not alienate any offshore assets of Jet Airways. The administrator was further empowered to cooperate with the Insolvency Professional appointed in India, and was encouraged to participate in the meetings of the Committee of Creditors (without any voting rights) for the prevention of any potential overlap of powers.[21]

A cross-border insolvency protocol was then entered into by both, the Insolvency Professional and the Dutch administrator on behalf of their

[21] Jet Airways, *supra* note 5.

respective side of creditors. This protocol was formulated on the principles of the Model Law, and recognised India as the centre of main interests [*hereinafter* "**COMI**"] and the Dutch proceedings as foreign non-main proceedings.[22]

Herein, though following the objectives of Model Law, a "*balance between the relief granted to the foreign representatives and the interests of those affected by such relief*" was established by the NCLAT; the case has certainly underlined the need to incorporate an effective cross-border insolvency framework in the existing Indian law.

2) <u>Videocon Industries (Videocon Group)</u>

In August 2019, the principle of 'substantial consolidation' was recognized by NCLT Mumbai in insolvency proceedings against the Videocon Industries [*hereinafter* "**Videocon**"], wherein the Tribunal allowed consolidation of 13 out of 15 group companies of Videocon. It was the first time when consolidation of group companies for insolvency proceedings was allowed for maximisation of the asset value of the debtor.[23]

In December 2017, an insolvency application was filed by SBI against Videocon at NCLT Mumbai. Once admitted, 'substantial consolidation' of 15 group companies of Videocon was applied for by SBI-

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[22] Varsha Aithala, *Report of the Cross-Border Insolvency Committee, June 2020: A Primer*, THE NLS BLOG (Jan. 17, 2022), https://www.nls.ac.in/blog/report-of-the-cross-border-insolvency-committee-june-2020-a-primer/ (last visited Apr 23, 2022).

[23] State Bank of India v. Videocon Industries Limited and Others, (2019) CP (IB)-02/MB/2018.

led consortium to cover the entities where the consortium members were common creditors. Acknowledging the absence of an express provision in the Code, the matter was decided by the Tribunal in favour of the consortium through the exercise of its equity jurisdiction.[24]

Notably, the second round of group insolvency of Videocon with 4 foreign-based companies was again allowed by the Tribunal in February 2020.[25]

The case has reflected the requirement of NCLT to step in for the legislature and decide the matter basis equity rather than law. This instance, too, like the one above, has sought attention to the concerns surrounding the necessity of coordination and uniformity; and expressed the urgent need for legislation governing the same.

3) SEL Manufacturing Company Limited

Chapter 15 of Title 11 of the US Code [*hereinafter* "**US Code**"] deals with the recognition of foreign insolvency proceedings by US bankruptcy courts. US had adopted the UNCITRAL Model Law in 2005 for the efficient administration of transnational insolvencies by formulating a framework that completely eliminates the possibility of initiating separate insolvency proceedings in different jurisdictions.

Pursuant to the current US cross-border insolvency mechanism, as devised based on Model Law, an Indian insolvency proceeding in the case

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[24] *See id.*

[25] State Bank of India v. Videocon Industries Limited and Others, (2020) CP (IB)-02/MB/2018.

of *State Bank of India v. SEL Manufacturing Company Limited*[26] was, for the first time in November 2019, recognized as 'foreign main proceeding' by US Bankruptcy Court under Section 1502(4) of the US Code.

The Indian insolvency proceedings were recognized by the US Bankruptcy Court as not contrary to the US public policy. It was further highlighted that entitlement of the foreign representative and debtor to all reliefs in conformity of Section 1520 was relevant to ensure "*maximisation of asset value without recklessly disregarding interests of the creditors.*"[27]

IV. DRAFT PART Z

The adoption of UNCITRAL Model Law along with necessary modifications has been recommended by the Insolvency Law Committee in its Report dated October 2018 [*hereinafter* "**Report**"].[28]

Basis a detailed study of the provisions of the Model Law, and multiple rounds of deliberation, the Committee has recommended for the adoption of the UNCITRAL Model Law with necessary modifications.

Pursuant to its recommendations, the Committee has prepared a draft, also known as Draft Part Z, which has been annexed along with the Report as its Annexure II.

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[26] State Bank of India v. SEL Manufacturing Company Limited, (2021) CP (IB) No. 114/Chd/Pb/2017 .

[27] Sefa M. Franken, *Cross-Border Insolvency Law: A Comparative Institutional Analysis*, 34 OXFORD J. L. STUD., 97, 131 (2014).

[28] Insolvency Law Committee**,** *supra* note 7.

Following the pattern of the Model Law, Draft Part Z is divided into six chapters, namely: (i) General Provisions; (ii) Access of Foreign Representatives and Creditors to the Adjudicating Authority; (iii) Recognition of a Foreign Proceeding and Relief; (iv) Cooperation with Foreign Courts and Foreign Representatives; (v) Concurrent Proceedings; and (vi) Miscellaneous.

Herein, Chapter I covers the general provisions of Part Z. Chapter II deals with foreign representatives and foreign creditors seeking assistance through access to the insolvency proceedings held in the State and aims to put them on the same pedestal as the local creditors. Chapter III covers the recognitional aspects of the foreign proceedings followed with reliefs that are accepted so as to save time and resources. Chapter IV empowers the NCLT and foreign representatives or foreign courts to cooperate and communicate with each other. Chapter V deals with concurrent proceedings, that is, insolvency proceedings that exist simultaneously as a local proceeding and a foreign proceeding or as multiple foreign proceedings. Chapter VI covers the remaining miscellaneous aspects of Part Z with the Draft finishing with a Schedule to the end. This Schedule emanates from Clause 1(4) of the Draft Part Z, wherein Part A enumerates the "*countries that have adopted the UNCITRAL Model Law*" and Part B enlists the "*countries with which agreements have been entered under Clause 1(5) of the Draft*".[29]

[29] *Id.* ¶ 69 (Part B, Schedule).

V. ANALYSIS OF DRAFT PART Z

Draft Part Z has been recommended by the Insolvency Law Committee to effectively deal with the issue of cross-border insolvency. The Draft has drawn its origin from the UNCITRAL Model Law which is a comprehensive framework on this aspect in the current times, however, the Draft still bears a few attention-worthy loopholes. These issues relate to – (i) the determination of COMI, (ii) the scope of establishment, (iii) the inclusion of public policy exception, (iv) inclusion of a provision for reciprocity, and (v) omission of provision for interim relief.

A. DETERMINATION OF COMI

A foreign main proceeding is defined under the Model Law[30] and the Draft[31] as a 'foreign proceeding conducted in the jurisdiction where COMI of the corporate debtor lies'. Recognition of a foreign proceeding as a foreign main proceeding empowers the NCLT to grant compulsory reliefs to the creditors and other interested parties in the form of moratorium prohibiting action as enumerated in Clause 17(1) of the Draft. Ascertainment of the COMI thus becomes important to determine a foreign main proceeding for subsequent actions.

Clause 14 of the Draft (corresponding to Article 16 of the Model Law) facilitates this ascertainment. It provides for a rebuttable presumption

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[30] U.N. COMM'N ON INT'L TRADE L., UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, at art. 2(b), U.N. Sales No. E.14.V.2 (2014).

[31] Insolvency Law Committee, *supra* note 7 at 61 (Clause 2(e)).

presuming the corporate debtor's registered office to be the COMI. This presumption, however, is applicable only if the registered office has not been moved to another country in a three-month window prior to the filing of the insolvency application. Herein, the NCLT is mandated to assess the corporate debtor's central place of administration and ensure its determinability by third parties. In case of any issue in the assessment of the COMI basis the abovementioned factors, NCLT is required to conduct the evaluation following the Central Government's prescribed factors.

1) Issues in ascertainment of COMI

It is observed that the factors so provided by the Central Government in the subordinate legislation are only indicative and non-exhaustive, conferring freedom upon the NCLT to consider other factors as well.[32]

Though this flexible approach is rightly adopted to avoid the "*exclusionary effect of a test based on a single factor*", however, the lack of any objective factors incidentally creates confusion regarding the ascertainment of the COMI and further leads to uncertain results.[33]

Registered office versus a place of central administration

Since the Model Law does not establish any mandatory mechanism and provides only legislative guidance to deal with cross-border insolvency, the States adopting it have the discretion to mould the provisions depending on their individual requirements. This results in non-uniformity

[32] *Id.* at 33 (Footnote 87).
[33] *Id.*

regarding a number of aspects, including the weightage of the rebuttable presumption about ascertainment of the registered office of the corporate debtor as the COMI.

It is observed that there appear two different European approaches on this issue – *first*, that strictly follows the presumption; and *second*, advocates for the factor of central administration in ascertaining the COMI.

Herein, the first approach firmly enforces the presumption that COMI of the corporate debtor lies in the place of its registered office. Although it acknowledges the rebuttable nature of the presumption, it does so reluctantly.[34] The application of this approach has been witnessed in a number of cases including *Me Hertsens v. SARL Bati-France*[35] and *Voorlopige Bewindvoerders van de SPRL C v. SPRL C*,[36] where it is observed that the courts hesitate in rebutting the presumption laid down under Article 16 of the Model Law (corresponding to Clause 14 of the Draft), unless the evidence shows the "*statutory seat to be wholly fictitious*".[37] Under this approach, courts tend to rebut the presumption only in instances of 'shell' or 'letterbox' companies that have no other presence in the concerned state apart from the fact of their incorporation in that jurisdiction. The second approach

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[34] *See* Me Hertsens v. SARL Bati-France, (2004) TBH, 811 and Voorlopige Bewindvoerders van de SPRL C v. SPRL C, (2004) TBH, 70.
[35] Me Hertsens v. SARL Bati-France, (2004) TBH, 811.
[36] Voorlopige Bewindvoerders van de SPRL C v. SPRL C, (2004) TBH, 70.
[37] Paul L.C Torremans, *Coming to terms with the COMI concept in the European Insolvency Regulation*, IN INTERNATIONAL INSOLVENCY LAW: THEMES AND PERSPECTIVES 124 (Ashgate, 1st ed. 2008).

gives preference to the place of central administration over the registered office for ascertainment of the COMI, and thus is more open to rebuttal of the presumption. According to it, COMI of a corporate debtor lies in the place of the regular administration of debtor's interests and is ascertainable by other stakeholders as well.[38]

Place of central administration is specifically stated even in the UNCITRAL Guide to Enactment and Interpretation [*hereinafter* "**UNCITRAL Enactment Guide**"][39] as a relevant factor for ascertainment of COMI and is further reflected in Clause 14(3) of the Draft.

Application of this approach is seen in the landmark case of *in Re Eurofood IFSC Limited*,[40] where the European Court of Justice underlined the need to ensure foreseeability, certainty and objectivity in the ascertainment of COMI, observing the concerned presumption to be rebutted if there exists "*compelling objectives and ascertainable factors*" proving the contrary.

A similar test is also laid down in *Interdil Srl (in liquidation) v. Fallimento Interedil Srl,*[41] which states:

> "*Where a company's central administration is not in the same place as its registered office, the presence of company assets and the existence of contracts for the financial exploitation of those assets in a member State other than that in which the registered office is situated cannot be*

[38] *Id.*
[39] UNCITRAL, *supra* note 2, at ¶ 145.
[40] Re Case C-341/04, Eurofood IFSC Limited, 2006 E.C.R. I-3813.
[41] Interdil Srl v Fallimento Interedil Srl, 2011 E.C.R. I-9915.

> *regarded as sufficient factors to rebut the presumption unless a comprehensive assessment of all the relevant factors make it possible to establish, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests is located in that other member State.*"

Owing to this judgment, the legal position is considered to be more or less settled in Europe with the observation that if there are objective factors which are relevant for rebuttal of the presumption and are ascertainable by third parties, the presumption for registered office as COMI shall be rebutted. It is further held that in such a case, "*the onus of proof shall be borne by the person seeking to rebut the presumption*".[42]

Mala fide or malicious relocation of registered office

Article 16(3) of the Model Law, and Clause 14(1) of the Draft follow the rebuttable presumption holding the registered office of the corporate debtor to be its COMI.

However, this presumption, originally included for efficiency and convenience of all the parties, is often maliciously used by many corporate debtors to gain unjust benefit in the insolvency proceedings by way of forum shopping. The Model Law keeps quiet on this issue and fails to provide any statutory provision for its prevention. Although UNCITRAL Enactment Guide states its concern on "*movement of centre of main interests*",

[42] Re Stanford International Bank Limited, [2010] EWCA (Civ) 137 [2010] WLR 941.

however, it too avoids proper redressal by placing the onus on courts to detect such abuse.[43]

The Insolvency Law Committee acknowledges this issue and learning from the Model Law, has provided for a three-month long 'look back period' in the Draft for the NCLT to verify if the registered office has been relocated by the corporate debtor maliciously.[44] In case of any such relocation within the period of three months prior to the proceeding, the interpretation of the Draft is observed to lead to non-application of said presumption with conferment upon NCLT of the power (as mentioned in Clause 14(3) and 14(4)) to determine the COMI basis prescribed factors.

B. SCOPE OF ESTABLISHMENT

A foreign insolvency proceeding is recognized as a foreign non-main proceeding if it is "*a foreign proceeding, other than a foreign main proceeding, taking place in a country where the corporate debtor has an establishment*."[45] Thus, ascertainment of establishment is required for determination of a foreign non-main proceeding.

An establishment is defined under Clause 2(c) of the Draft as "*any place of operations where the corporate debtor carries out a non-transitory economic activity with human means and assets or services*." This definition is taken from the

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[43] UNCITRAL, *supra* note 2, at ¶ 148.
[44] Insolvency Law Committee, *supra* note 7 at 58 (Clause 14(2)).
[45] U.N. COMM'N ON INT'L TRADE L., UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, at art. 2(c) and 2(f), U.N. Sales No. E.14.V.2 (2014).

corresponding Article 2(f) of the Model Law, only replacing the term 'goods' with the term 'assets'.

1) Elements of an establishment

It is observed that the definition of establishment as mentioned in both the Draft and the Model Law consist of two crucial elements of an establishment, namely, "*non-transitory economic activity*" and "*with human means and assets or services*".

According to the Report of the Insolvency Law Committee, the expression "*with human means*" has the potential to exclude from the scope of the definition those corporate debtors that may have a presence in a jurisdiction only through the internet. This expression, as stated by the Committee, curtails the extent of an establishment, and restricts it to debtors carrying activities only with human means.[46] Despite this observation, the Committee has retained the expression "*with human means*" considering the diverse range of international precedents on the issue which include jurisdictions like Singapore[47] and the UK[48] retaining the expression in their respective legislations, and countries like the USA[49] omitting it. The lack of substantial growth of the jurisprudence on interpretation of the term 'establishment' also contributes to the Committee's approach on this aspect as it discourages the omission of the concerned expression.

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[46] Insolvency Law Committee, *supra* note 7 at 20 ¶ 2.4.
[47] Insolvency, Restructuring and Dissolution Act, 2018, Third Schedule, Article 2(d). (Singapore).
[48] The Cross-Border Insolvency Regulations, 2006, Schedule 1, Article 2(e). (UK).
[49] US Code (2018) Chapter 15, Title 11, Section 1502(2) (USA).

2) <u>International jurisprudence on the definition of establishment</u>

As noted above, though there exist no major case-laws on the scope of the term 'establishment', there exist certain significant English and American judgments that lay down the criteria to be followed for ascertainment of a particular place as an establishment.

In this line, the English judiciary supports the interpretation of the term 'goods' as 'assets' so as to cover both intangible property and land.[50] It was observed in the decision of *Re Office Metro*,[51] where the court enumerated certain vital elements of concept while defining establishment as, "*(i) a place where things happen, and (ii) sufficient things (iii) of sufficient quality happening there*".

Similarly, in the case of *Olympic Airways SA*,[52] the England and Wales Court of Appeal held that the answer for establishment depends on "*whether the debtor has a 'place of operations' where 'non-transitory' economic activity is carried on with 'human means and goods', that is, with human and physical operations.*" The Court further clarified that, "*merely having a branch office or a place where the debtor is located is insufficient to classify an asset as an 'establishment'.*"

Basis above, on the question of recognition of a foreign non-main proceeding of a purely internet-based company, the English adjudicating

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[50] NEIL FRANCIS HANNAN, CROSS-BORDER INSOLVENCY: THE ENACTMENT AND INTERPRETATION OF THE UNCITRAL MODEL LAW, 50 (Springer, 1st ed. 2017).
[51] Re Trillium (Nelson) Properties Ltd v Office Metro Limited [2012] EWHC 1191 (Ch).
[52] The Tr. of the Olympic Airline SA Pension & Life Ins. Scheme v. Olympic Airline SA [2013] EWCA (Civ) 643.

authorities are seen to be more inclined to not classify it as an establishment if the same lacks human resources factor.[53]

The US law on this issue paints a slightly different picture. As noted above, the US Code defines 'establishment' as "*any place of operations where the debtor carries out a non-transitory economic activity*".[54] Unlike the Model Law, it does not include the expression, "*with human means and goods or services*". The omission of this expression gives a wider connotation to the concept which has been reaffirmed by the US judiciary.

It has been noted in *Lavie v. Ran (In Re Ran)*,[55] that, "*the United States Congress has lowered the threshold to demonstrate the existence of an establishment of the debtor by deleting the phrase 'with human means and goods and services'*."

Thus, the US law has adopted a rather broad approach in defining 'establishment' so as to cover even those non-transitory economic activities that are conducted with non-human means and assets or services.

Given the jurisprudence, it is observed that the Insolvency Law Committee's decision to replace the term 'goods' (as given in the Model Law) with the term 'assets' exemplifies its foresightedness as the latter term being broader than the former one covers both intangible property and

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[53] RECOMMENDATIONS OF THE COMMITTEE ON ADOPTION OF THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY, MINISTRY OF CORPORATE AFFAIRS REPORT OF INSOLVENCY COMMITTEE ON CROSS BORDER INSOLVENCY, at ¶ 2.4, https://ibbi.gov.in/uploads/resources/Report_on_Cross%20Border_Insolvency.pdf (last visited Nov 12, 2021) ("**COMMITTEE RECOMMENDATIONS**").
[54] US Code (2018) Chapter 15, Title 11, Section 1502(2) (USA).
[55] Lavie v. Ran (Re Ran), 607 F 3d 1017, 1028 (5th Cir, 2010).

land. Further, it is noted that the Committee's observation on the definition of term 'establishment' also stands proved; while the expression "*non-transitory economic activity*" defines the scope of an establishment, the expression "*with human means and assets or services*" works to limit it. However, it is simultaneously opined that the Committee's decision to retain the latter expression definitely results in a restrictive definition, as earlier apprehended by it, and there is a consequent need to expand the scope of the same by omitting the concerned expression of "*with human means and assets or services*".

Inclusion of public policy exception

Clause 4 of the Draft (corresponding to Article 6 of the Model Law) begins with a non-obstante clause and empowers the NCLT to refuse an action authorized under Part Z if it is opined that refusal of such an action is required on the grounds of it being manifestly contrary to the public policy of the country.

The term 'public policy' is not defined in the Draft or the Model Law as such, primarily because the concept of public policy is based in the domestic laws of a state and is likely to differ from jurisdiction to jurisdiction.

Public policy is interpreted by the States depending on the context of application.[56] It is mainly categorized under two instances – one that is

[56] UNCITRAL, *supra* note 2, at ¶ 30.

used in domestic affairs, and the other that is applied for recognition of foreign laws and international cooperation.

UNCITRAL Enactment Guide acknowledges this distinction between the two facets of the notion of public policy and notes that the term 'public policy' is interpreted more restrictively in international context as compared to the domestic one.[57]

The UNCITRAL Enactment Guide further rationalizes the existence of the term 'manifestly' in the definition of public policy in context of the Model Law. It states that the inclusion of the term 'manifestly' as a qualifier of public policy is done to "*emphasize that public policy exceptions should be interpreted restrictively and that Article 6 may be invoked only in exceptional circumstances concerning matters of fundamental importance to the enacting State.*"[58]

The public policy exception as under Article 6 of the Model Law is observed to be implemented by the States depending on their respective requirements. Majorly this exception is enforced in following three ways:[59]

(i) Adopting the language of Article 6 of the Model Law;[60]

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[57] *Id.* ¶ 103.
[58] *Id.* ¶ 104.
[59] Keith D. Yamauchi, *Should reciprocity be a part of the UNCITRAL Model Cross-Border Insolvency Law?*, 16 INT'L INSOLVENCY REV., 145-179 (2007).
[60] (Examples – Australia, England and now possibly India).

(ii) enacting a version of Article 6 that omitted the word 'manifestly' in their public policy exception;[61] or,

(iii) adopting a different, yet related, provision.[62]

3) Status of public policy exception in India

As noted above, Clause 4(1) begins with a non-obstante clause, that is, it holds Clause 4 applicable "*notwithstanding anything contained in Part Z*". The concerned sub-clause confers discretion upon the NCLT for refusal of any action so authorized by Part Z, if its enforcement, in the opinion of the NCLT, is "*manifestly contrary to the public policy*". Clause 4(2) then mandates the serving of a notice by the NCLT to the Central Government for the invitation of submissions before passing of any orders under Clause 4(1). Clause 4(3) provides for *suo moto* initiation by the Central Government and authorizes the Central Government to apply in itself to the NCLT if, in the opinion of the Government, enforcement of any action authorized by Part Z is "*manifestly contrary to the public policy*".

It is noted that following the Model Law, the term 'public policy' is not defined by the Draft, leaving it up to the NCLT to interpret the same on a case-to-case basis.

It observed that a wide scope of discretion is conferred upon the adjudicating authorities to give a way for efficacious administration of the case at hand; however, at the same time the provision is also made prone

[61] (Examples – Canada, Greece, Mexico).
[62] (Examples – Cayman Islands, Japan, Poland).

to inconsistency, uncertainty and unpredictability leading up to a state of utter confusion by the same free-hand approach.

Due to the very nascent stage of insolvency law in the Indian legal system, and the proposed Draft Part Z waiting to be formally passed by the legislature, there exists an impending dearth of available Indian jurisprudence on application of public policy exception in recognition and enforcement of foreign insolvency proceedings, for which it cannot be predicted as to how the exception of public policy would be interpreted by Indian courts in this field in time to come.

The lesson has already been learnt with the witness accounts of diverse and varied interpretations of public policy exception put forth by the Indian judiciary in arbitration law which has more often than not proven to be detrimental to the jurisprudential growth of the field, as they have required subsequent statutory amendments and judicial precedents for reversal of such varying interpretations and narrowing down of the scope of the exception.[63]

Given the context, one infers that it may not be as effective a strategy to leave the provision ambiguous with wide scope for its interpretation as it may open floodgates for varying and often contradicting range of judgments on the exception. Thus, there may be a clear

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[63] Manisha Singh & Varun Sharma, *India: Enforcement of Foreign Judgments Comparative Guide*, MONDAQ, (June 3, 2021), https://www.mondaq.com/india/litigation-mediation-arbitration/989134/enforcement-of-foreign-judgments-comparative-guide (last visited Nov 13, 2021).

requirement in Draft Part Z for better legislative input further strengthening the language of the provision so as to achieve a higher clarity.

Inclusion of provision for reciprocity

Reciprocity is a vital element in international relations. It arises from the notion of interdependency and provides that States should respond with same privileges, advantages or assistance to maintain diplomatic or commercial relations.

Reciprocity is largely used in two major forms, that is, substantive reciprocity and legislative reciprocity.[64]

Clause 1(4) of the Draft lays down legislative reciprocity as a prerequisite for applicability of Part Z on foreign states. It provides for the Part Z to be applicable only to (i) those countries that have adopted the Model Law and are enumerated in Part A of the Schedule, and (ii) any other country that is notified by the Central Government and is enumerated in Part B of the Schedule.

4) International stand on reciprocity

Model Law gives way for reciprocity. It is not a binding legal instrument[65] and thus, confers upon the States the freedom to adopt the

[64] COMMITTEE RECOMMENDATIONS, *Supra* note 53.
[65] Status: UNCITRAL Model Law on Cross-Border Insolvency (1997) | United Nations Commission on International Trade Law UNCITRAL.UN.ORG, https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status (last visited Nov 20, 2021).

Model Law with provisions of legislative reciprocity or without any such requirement.[66]

The UNCITRAL Working Group V: Insolvency Law [*hereinafter* "**UNCITRAL Working Group**"], that worked on consideration of the formulation of a Model Law or a Draft Convention to deal with cross-border insolvency issues, has observed that complete rejection of the reciprocity requirement has never been contemplated by the UNCITRAL Working Group. The same is further evident in the form of formulation of a "Model Law" instead of a "Draft Convention", thereby conferring freedom upon the countries to incorporate or avoid the inclusion of any provisions for the requirement of reciprocity.[67]

It is observed that the global opinion is divided on the requirement of reciprocity provisions. Where on the one hand States such as Romania, Mexico and South Africa have incorporated provisions for reciprocity in their version of the Model Law, jurisdictions such as the USA, UK, Poland and Montenegro have elected to omit it. [68]

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[66] RECOMMENDATIONS OF THE COMMITTEE ON ADOPTION OF THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY, MINISTRY OF CORPORATE AFFAIRS REPORT OF INSOLVENCY COMMITTEE ON CROSS BORDER INSOLVENCY, at ¶ 1.6, https://ibbi.gov.in/uploads/resources/Report_on_Cross%20Border_Insolvency.pdf. (Last visited Nov 12, 2021).

[67] *Id.* ¶ 1.7, 1.8.

[68] UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective (United Nations Commission on International Trade Law 2013) 49, at ¶ 146, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/judicial-perspective-2013-e.pdf (last visited Nov 7, 2021).

5) Position of India with respect to reciprocity

As noted above, legislative reciprocity has been included in Draft Part Z under Clause 1(4). The Insolvency Law Committee has recommended the inclusion of reciprocity provision due to the given stage of infrastructure development, economic development, and the country's position globally.[69]

According to the Committee, the reciprocity provision is required only initially and can subsequently be diluted basis implementation experience and development of sufficient infrastructure.[70]

The Committee has further explained that no provisions of the Code other than the draft Part Z are affected by the requirement of the reciprocity, thereby maintaining that the foreign creditors are still to be eligible to be involved in insolvency proceedings regardless of reciprocity.[71]

However, notably, this requirement of reciprocity has an effect similar to Section 234 and 235 of the Code.[72] As the current framework, the reciprocity provision requires mutuality between India and the foreign state, which has the result of defeating the very purpose behind the adoption of the Model Law.

Indian approach in the form of inclusion of reciprocity provision raises doubts regarding its implications. The scale herein is observed to move between the two extremes of (i) fairness and predictability, and (ii)

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[69] Insolvency Law Committee, *supra* note 7 at 18, ¶ 1.8.
[70] *Id.*
[71] *Id.*
[72] Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India).

protectionism and non-cooperation, either of which if not exercised appropriately stands to affect the domestic interests and international repute respectively. It is observed that there already exists a legislative text, *i.e.*, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 which has been ratified by India[73] with a reciprocity reservation.[74] However, it has been met with rather weak implementation, as evident in the grim figure of less than one-third of the ratified states that have been officially notified by the Central Government for the purposes of recognition and enforcement of foreign awards.[75]

A preliminary look shows more drawbacks in the inclusion of the reciprocity provision as compared to its omission, for the aspect of reciprocity, though initially attractive, has the potential to cause severe consequences. The Report also offers no help as it provides no clarification on the duration of the inclusion of the reciprocity which further adds to the ambiguity with only a statement that the provision shall be diluted with enforcement-related experience and insolvency system-related infrastructure development.

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[73] Contracting States – List of Contracting States, The New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) | NEW YORK ARBITRATION CONVENTION, https://www.newyorkconvention.org/list+of+contracting+states (last visited Apr 23, 2022).

[74] The Arbitration and Conciliation Act, 1996, § 44, No. 26, Acts of Parliament, 2016 (India).

[75] ICC Guide to National Procedures for Recognition and Enforcement of Awards under the New York Convention – India, Digital Library | INTERNATIONAL CHAMBER OF COMMERCE, https://library.iccwbo.org/content/dr/COUNTRY_ANSWERS/CA_3erEd_India.htm?l1=Country+Answers&l2=India (last visited Apr 23, 2022).

The aspect of reciprocity has implications on international trade as well. India shares trading relations with a number of countries. These relations stand to be adversely affected by the provision of reciprocity given that the Model Law is not yet adopted by a majority of India's trading counterparts including the Netherlands, Germany, Bangladesh and Nepal.[76]

The requirement of reciprocity further confines the scope of applicability of Part Z as it is made applicable only to the countries mentioned in the Schedule. This specification arises from reciprocity and seems to work against the Model Law objectives.

Considering all the factors mentioned above, it is noted that the Committee shall contemplate the adoption of the Model Law sans any reciprocity requirement. It should not concern itself with any lack of mechanism against contravention as there exist sufficient checks and balances for prevention of any abuse in Draft Part Z, thus making the requirement of reciprocity redundant with unnecessary implications in the form of restriction on the Draft leading up to its non-application even in cases where rest all requirements are satisfied.

Omission of provision for interim relief

The UNCITRAL Model Law provides for two major kinds of reliefs, that is, interim relief[77] and relief granted upon recognition of the foreign proceeding;[78] where, the former is granted under Article 19 on the

[76] UNCITRAL Model Law, *supra* note 66.
[77] U.N. COMM'N ON INT'L TRADE L.., UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, at art. 19, U.N. Sales No. E.14.V.2 (2014).
[78] *Id.* at art. 21.

filing of an application for recognition of a foreign proceeding and the latter is granted under Article 21 only on recognition of a foreign proceeding as a foreign main proceeding or foreign non-main proceeding.

Under the Model Law, the adjudicating authorities are empowered to grant these reliefs, which are provisional in nature, for "*protection of the assets of the debtor or interests of the creditors.*"[79]

It is noted that Draft Part Z does not mention any provision for interim relief and seemingly keeps quiet on this aspect. The context for the rationale for this omission is traced by the Insolvency Law Committee in the Code, stating that even the Code does not authorise the NCLT to grant interim relief under the domestic insolvency proceedings.[80] This omission is further attributed to the required reduction of the unnecessary discretion available with the NCLT, even before the decision on the application. The reason for this non-inclusion of an interim relief provision by the Committee is also credited to the inefficacy of the provision and is termed as a lesson learnt from the poor example of misuse and delay in cases brought under Sick Industrial Companies (Special Provisions) Act, 1985.[81]

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[79] UNCITRAL Model Law, *supra* note 78.

[80] However, it is noteworthy that the NCLAT vide its judgment dated July 17,2019 in the matter of *NUI Pulp and Paper Industries Private Limited v. Ms. Roxcel Trading GMBH*, Company Appeal (AT) (Insolvency) No. 664 of 2019 has held that, *"an NCLT is empowered to pass the ad-interim order under Rule 11 of the National Company Law Tribunal Rules, 2016" ("**NCLT Rules, 2016**") before admitting any application filed under sections 7, 9 or 10 of the Code"*. Rule 11 of NCLT Rules, 2016, empowers an NCLT to pass any such orders as may be necessary for meeting the ends of justice.

[81] Insolvency Law Committee, *supra* note 7, at 36, ¶ 13.4.

This omission of interim relief in the Draft raises concerns regarding "*protection of the assets of the debtor or interests of the creditors*" which has been catered under the Model Law.[82] Under the current framework, one may apply for injunction order from courts if required,[83] but the NCLT does not have any corresponding power thus, requiring the parties to separately file for injunction resulting in the probable defeat of the very purpose of the interim relief.

Though there is no empirical evidence to show that the interests of stakeholders would necessarily be affected in the instance of such an omission, however, it is worth considering replacing the blanket omission with limited power of the NCLT to grant interim relief under extraordinary circumstances.

VI. CONCLUSION AND SUGGESTIONS

A. CONCLUSION

The instances of cross-border insolvency are on the rise with increasing transnational activities of business and commerce.

In the current times, UNCITRAL Model Law has emerged as the most comprehensive legislative text on cross-border insolvency. It complements the existing domestic legal frameworks of States and acts only as legislative guidance instead of working for a mandatory unification of substantive domestic laws.

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[82] UNCITRAL Model Law, *supra* note 78.

[83] CODE CIV. PROC. Order XXXIX, The Specific Relief Act, 1963, No. 47, Acts of Parliament, pt. III (India).

Based on the four elements of "*access, recognition, relief (assistance) and cooperation and coordination*", the Model Law is adopted by different States with modifications and alternations as deemed necessary in accordance with their respective legal systems. This incidentally has led to a lack of consistency on certain fronts like the ones discussed in the paper (determination of COMI, scope of establishment, inclusion of public policy exception, inclusion of provision for reciprocity, and omission of provision for interim relief), thereby causing apprehension about the legislative text in the legal minds of the remaining States.

Though bearing non-uniformity in certain provisions, it is noteworthy that acceptance of modified universalism is consistently achieved in the individual versions of the Model Law as adopted by the States, and thus despite reflecting a rather poor adoption rate, UNCITRAL Model Law is presented as a worthy alternative available on cross-border insolvency.

In this context, the Insolvency Law Committee appointed by the Ministry of Corporate Affairs has in its Report recommended the incorporation of the Model Law in the form of Draft Part Z of the Code.

It is observed that the Indian version of the Model Law, that is, Draft Part Z, has largely been drafted in consonance with the purpose and objectives of the legislative text, however, there are certain deviations that have been entertained bearing in mind the peculiarities of the Indian legal system.

B. SUGGESTIONS

The analysis of the Draft alongside the Model Law as conducted in the paper has brought forth a few attention-worthy aspects for due addressal for which following suggestions are made:

- Clause 14 of the Draft shall provide a clear approach (with objective criteria) for the determination of COMI in order to replace the ambiguous parameters as mentioned currently.

- The expression "*with human means and assets or services*" shall be removed from the definition of 'establishment' under Clause 2(c), as the concerned expression limits the extent of establishment only to the non-transitory economic activities involving human means and assets or services. The current definition gives a restrictive effect as it excludes a corporate debtor with a purely internet-based presence with no involvement of human or physical operations, and thus requires omission of the expression.

- The public policy exception as covered under Clause 4 of the Draft shall provide a list of factors defining 'public policy', as is done for this exception in other legislations.[84] While it may be difficult to prepare an exhaustive list, at least a list of indicative factors should be included under the clause for clarity and predictability of the exception.

[84] The Arbitration and Conciliation Act, 1996, § 34, 48, 57 No. 26, Acts of Parliament, 2016 (India).

- The provision for legislative reciprocity, as under Clause 1, shall be omitted from the Draft as it defeats the objectives of the Model Law. It limits the applicability of the Draft and restricts the power of the NCLT to evaluate a recognition application purely on the basis of merit. The reciprocity provision further negates the already existent checks for any abuse of law; and has grave implications on the country's international trade since the Model Law is not adopted by a majority of India's trading counterparts.

- Following the Model Law, the Draft shall provide for interim relief for the protection of the interests of the stakeholders. Instead of complete omission, the Committee should consider conferring limited power on the adjudicating authorities to grant interim relief only in extraordinary circumstances, as necessary for assets of the debtor or interests of the creditors.

Given above, the Draft, following the Model Law, is a fundamental legal advancement in the field of cross-border insolvency. Though there are certain deviations in the proposed Draft when compared to the Model Law, these modifications essentially are precautionary steps of prudence made considering the current Indian legal system and past experiences. Though largely positive in a theoretical sense, whether these alterations prove to be advantageous or otherwise, is a matter of practicality to be determined only after the incorporation of Draft Part Z in the Code and its application by the adjudicating authorities, as the decisions basis interpretation of the

Draft will pave way for the development of legal framework on cross-border insolvency.

Akshat Jha & Shubh Sahai, *A Fine Balance: The Relevance of Section 2(2) of the Hindu Succession Act in an Age of Judicial Innovation and Changing Aspirations*, 8(2) NLUJ L. REV. 93 (2022).

A FINE BALANCE: THE RELEVANCE OF SECTION 2(2) OF THE HINDU SUCCESSION ACT IN AN AGE OF JUDICIAL INNOVATION AND CHANGING ASPIRATIONS

*~Akshat Jha & Shubh Sahai**

ABSTRACT

Changing times and an evolving constitutional morality apply continuous pressure on 'ancient' customs to adjust according to evolving notions of righteousness. But tension is created between such evolutionary tendencies and those methods that seek to protect and promote the traditions of the past, many of whom are often discriminatory. A typical example of such tensions is Section 2(2) of the Hindu Succession Act, 1956 (HSA), which protects tribal customs from the general emancipatory and egalitarian undertones of HSA. This paper problematizes this provision and argues against the logic of protecting tribal customs, such customs that entail unequal and inequitable treatment – particularly towards women. Since the colonial experience of codification drastically changed the customs that were subjected to it, tribal customs of present times are generally inauthentic. It is also erroneous to believe that Scheduled Tribes exist in a different epistemic context – one that does not value rights in

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property. Failing all, the courts and modern law are sites of social change and have an emancipatory obligation towards vulnerable groups. An overarching argument for an expansive conception of constitutional morality follows, which must override local considerations of preserving unjust tribal customs.

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I. INTRODUCTION

A perusal of the Constituent Assembly Debates shows the deep concern that the leaders of the newly independent nation had for its tribal populations. The Assembly was cognizant of the treatment and exploitation that had been meted out to tribals under British rule, and so, it overwhelmingly favoured a state policy to protect the traditional cultures and customs of tribes.[1] A paradigmatic example of such protectionist sentiments is Section 2(2) of the Hindu Succession Act, 1956 [*hereinafter* "**HSA**"].[2] The provision of concern provides that:

> "*Nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of Article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.*"

The result of this clause is that in matters of inheritance, members of Scheduled Tribes would continue to be governed by their traditional customary laws. In contrast, for most other Hindus,[3] the HSA replaced customary laws as the governing law on inheritance. Of course, the HSA considers "*Hindus*" as not only those who identify themselves as Hindus but also "*any other person who is not a Muslim, Christian, Parsi or Jew by religion*".

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[1] Speech of Prof. Shibban Lal Saxena, *Lok Sabha Secretariat, Constituent Assembly Debates, Vol. VIII*, 942 (June 16, 1949), https://eparlib.nic.in/bitstream/123456789/763278/1/cad_16-06-1949.pdf (last visited Aug. 29, 2021); INDIA CONST. art. 46.
[2] Hindu Succession Act 1956, No. 30, Acts of Parliament, 1956, § 2(1) (India).
[3] *Id.* § 2(1).

It must be noted that the rhetoric for the HSA (like other Hindu Code Bills) was fashioned as a contest between modernity and traditions. The avowed legislative effort was to overhaul the notoriously discriminatory Hindu traditional customs, and in turn, make way for provisions that were (more) gender equitable. Naturally then, parliamentary debates on the Bill were an acrimonious affair. Then, in so far as Section 2(2) *saves* customary laws, this provision is seemingly antithetical to the rest of the Act. Nevertheless, Section 2(2) was passed without objections, amendments, and debates.[4] No one *even* sought to ask the reason why Scheduled Tribes must be left out of Hinduism's march to equality.

Therefore, the specific legislative objective behind Section 2 of the HSA is not explicitly available. But given the contemporaneous Constituent Assembly Debates, it is difficult to discern a policy objective behind Section 2(2) other than the objective to *preserve* – above all considerations – the traditions and customs of tribals. This paper seeks to question and problematize these protectionist sentiments. The authors argue that no point is served by way of Section 2(2) of the HSA; and in so much as Section 2(2) seeks to preserve inequitable customs, it seemingly elevates itself above the constitutional morality that provides for liberty and equality for all citizens. Privileging customs over such foundational humanist principles is again without reason.

[4] *Hindu Succession Bill—contd.,* LOK SABHA DEBATES, https://eparlib.nic.in/bitstream/123456789/56073/1/lsd_01_12_02-05-1956.pdf (last visited Aug. 29, 2021).

Within this paper, the Part II recounts the problems of colonial codification, and Part III problematizes the logic of Section 2(2). Part IV notes the judicial interpretations of Section 2(2), and the Part V presents a case against it, while Part VI reflects on the dichotomy in constitutional morality. The paper ends with Part VII which provides concluding thoughts and the way ahead.

II. CODIFICATION AND ITS PROBLEMS

As Bernard Cohn observes in his authoritative study of the codification process, initial British administrators, like Warren Hastings and William Jones, perceived ancient *shastric* laws as a system of law comparable to English laws.[5] Consequently, early in the British reign, the colonial government decided that Hindus (and Indians in general) were to be administered by their personal laws.[6] Subsequently, "*in all matters arising out of succession to lands, rent,s and all matters of contract, and dealing between party and party, were to be determined by reference to the local 'laws' of Hindus and Muslims and…other customary usages*."[7]

Immense work has already been done in analyzing the colonial efforts of codification and administering to Indians their '*own'* personal laws, and how these efforts changed the personal laws themselves. It will be fitting here to briefly summarise the existing literature.

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[5] BERNARD S COHN, COLONIALISM AND ITS FORMS OF KNOWLEDGE 58-75 (1996) ("**COHN**").
[6] *See* Warren Hastings' Judicial Plan of 1772, § 23.
[7] UPENDRA BAXI, TOWARDS A SOCIOLOGY OF INDIAN LAW 11-45 (1986) ("**BAXI**").

In the colonial judicial design, although the law to be administered was indigenous, yet it was to be administered by English judges (and) in an English system.[8] This mismatch was grave, not just for those subjects who were to be administered by this hybrid but also for the erudite English judges who had to familiarise themselves with a new system of laws, written in an alien language. While initial recourse was to have Pandits as 'court experts,' however, translating the ancient *sastras* into English was always inevitable.[9] The effect of such translations was disastrous: words were often incorrectly translated, and on many occasions, merely defining indigenous terms in English often changed the underlying structure of rights.[10]

However, notwithstanding the changes due to translations, *shastric* law underwent still more changes when it was administered in colonial courts. This is because the *shastric* law, as traditionally administered, was unsuitable for the British adversarial system. It had historically consisted of a system of 'fire-side equities' where compromises and face-saving mechanisms were more prominent than determinations of guilt.[11] As J.D.M. Derrett observed, "*the sastra…offered the judge, not only in the choice of a [sic] rule of law from permissible alternatives but also in*

[8] Michael Anderson, *Islamic Law and the Colonial Encounter in British India, in* INSTITUTIONS AND IDEOLOGIES: A SOAS SOUTH ASIA READER (Davis Arnold & Peter Robb eds., 1993); COHN, *supra* note 5.
[9] COHN, *supra* note 5.
[10] *Id.* at 68-72.
[11] Marc Galanter, *Displacement of Traditional Law in Modern India*, 24 J. OF SOCIAL ISSUES 4 (1968) ("**Galanter**").

manipulating judicial procedure, e.g., in the admission of witnesses."[12] However, this expansive judicial discretion and flexibility, which lay at the heart of *shastric* law, were intolerable for the British.[13] Additionally, colonial judges in administering personal laws relied extensively on precedents. However, regard for precedents was (again) foreign to the Hindu system. Adherence to the doctrine of *stare decisis* reduced Hindu law's inherent flexibility by ruling out innovations to meet changes in community sentiment.[14] As Galanter notes, with its innovative techniques stripped away, *shastric* law *changed* into a system that was exceedingly rigid and archaic.[15]

The effects of colonial intervention in customary laws were perhaps even more transformative. Ironically, while colonial *intervention* changed the textual *shastric* laws, it was a *lack* of intervention that contributed to the changes in customary laws. Upendra Baxi notes that though official policy explicitly provided for the preservation of customary law, yet in practice, the administration of customary law was illusory.[16] The only exception to this general trend was the Bombay Presidency where customs were given due recognition as an important source of law.[17] However, even this experiment had a short life; and after the unifying measures post-1857, the

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[12] J.D.M. Derrett, *Justice, Equity and Good Conscience*, *in* CHANGING LAW IN DEVELOPING COUNTRIES (J.N.D. Anderson ed., George Allen and Unwin 1963).
[13] COHN, *supra* note 5.
[14] Galanter, *supra* note 11.
[15] *Id.* at 74-77.
[16] BAXI, *supra* note 7.
[17] Flavia Agnes, *Personal Laws*, *in* THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION (Sujit Choudhary et al. eds., 2016) ("**Agnes, *Personal Laws***").

Bombay Presidency's treatment of self-governing groups and customs was brought in line with those of the other presidencies.[18]

Derrett finds practical policy considerations behind the choice of excluding customs. If the colonial government had backed customary law, hundreds of different systems of law would have emerged.[19] But, even when customary law was *sought* to be administered, then just as with *shastric* law, the mere process of applying customs in a common law setting radically transformed it.[20]

In administering traditional laws, the Englishmen faced yet another problem; they could not reconcile local notions of justice and morality with their British sensibilities. Nicholas Dirks finds English newspapers and official communique to be replete with instances of traditional customs being called "*barbarous*."[21] Paradigmatic of this problem is the change in the realm of *stridhan*. For instance, the decisions of the Privy Council granted women only limited rights over their own *stridhan* property, and upon their death, the *stridhan* property was reverted to the male heirs of the husbands.[22] This was in contrast to most scriptural dictates whereby women were provided full ownership over their *stridhan* property, and a separate

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[18] *Id.* at 905.
[19] J.D.M. DERRETT, INTRODUCTION TO MODERN HINDU LAW (1963).
[20] Galanter, *supra* note 11.
[21] Nicholas Dirks, *The Policing of Tradition: Colonialism and Anthropology in Southern India*, 39 COMP. STUD. IN SOC'Y & HIST. 182, 182-185 (1998).
[22] Devi Prasad v. Mahadeo, (1912) 39 LA. 121; Janki v. Narayansami, (1916) 43 IA 207.

line of succession to it through female descendants.[23] As Flavia Agnes observes, "*the British administrators, familiar with the system of denial of property rights to married women in England, could not grasp the complex system of stridhan property and caused great harm to women's rights.*"[24]

Vasudha Dhagamwar notes that the Englishman did not know much about India. He sought to make laws for the country based on general ideas gathered in England. This was, she observes, "*as true of the philosopher recluse Bentham as it was of men of action*."[25] The foregoing discussion posits a contrast to Dhagamwar's observations. In the case of personal laws, the Englishman *did* seek to make laws on what he thought were ideas gathered in India. Nevertheless, what he only ushered in was "*English law as the law of India*."[26]

III. 'AUTHENTIC' TRIBAL CUSTOMS IN THE POST-COLONIAL STATE

The introductory section draws in detail the overriding state policy to protect tribal customs and culture. But contemporaneous with the attempts of the Indian state to protect tribal populations and customs, there also exist numerous accounts that chronicle material dispossession and

[23] Debrati Halder & K. Jaishankar, *Property Rights of Hindu Women: A Feminist Review of Succession Laws of Ancient, Medieval and Modern India*, 24 J. OF LAW & RELIGION 661, 669-673 (2008); *See also* Agnes, *Personal Laws*, *supra* note 17.
[24] FLAVIA AGNES, FAMILY LAWS AND CONSTITUTIONAL CLAIMS (2011).
[25] VASUDHA DHAGAMWAR, LAW, POWER AND JUSTICE: THE PROTECTION OF PERSONAL RIGHTS IN THE INDIAN PENAL CODE (1992).
[26] COHN, *supra* note 5.

forced acquisitions of land, and tales of human trafficking among tribes of post-colonial India. Quite notable has been the migration of tribes from their native lands to industrial settlements and towns in search of economic opportunities.[27] Such changes in material conditions brought about changes in conceptions of private property, nuclear families, and individual-oriented eco-systems. Such changes were accelerated in the post-globalization world, where private capital dictated a change in social structures. M.N. Srinivas observed the decay of caste rituals and traditional customs in cities[28] – an observation that the present paper borrows to depict the changing times in which 'stagnated' customs in Section 2(2) are envisioned. Individual wealth in the modern world has increasingly come to define one's access to social goods and the assumption that 'authentic' customs still serve a social purpose is fallacious. Thereby, Section 2(2) provides a few reasons why such outdated customs must not be changed.

Another factor contributing to the redundancy of Section 2(2) in the status quo is the colonial historical experience. Colonial codification bought along with itself strict procedural and evidentiary requirements. The problem with colonial administration of customary laws is best described in Upendra Baxi's observations about the colonial era, "*customary rules were subjected…to the requirement of the common-law burden of proof: customs to be a source*

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[27] MINISTRY OF TRIBAL AFFRAIRS, REPORT OF THE EXPERT COMMITTEE ON TRIBAL HEALTH: 'TRIBAL HEALTH IN INDIA' BRIDGING THE GAP AND A ROADMAP FOR THE FUTURE 2 (2018) ("**REPORT OF THE EXPERT COMMITTEE ON TRIBAL HEALTH**").

[28] M. N. Srinivas, *Mobility in the Caste System*, *in* COLLECTED ESSAYS 185, 187-199 (M.N. Srinivas ed., 2005).

of law must be proved to be ancient, uniform and invariable."[29] The Colonial codifications changed the "*authentic*" nature of customs to such an extent that the protectionist sentiment of Section 2(2) is at best preserving the '*English law of Tribals*' and not the '*Tribal law*'.

Moreover, regarding changes in customary laws of Scheduled Tribes, numerous studies note that inheritance rights among tribals have historically been equitable – at least for women. However, contemporary studies show that with growing exposure to Hindu ideas (and subsequent efforts to conform to Hindu traditions), previous trends of gender equality have been reversed in numerous tribal communities across India.[30] Accordingly, practices like patriliny, early marriage, widow celibacy, dowry marriage, preferences for male children, low priority for female education, and total economic, political and social dependence of females on males, have found emerged among tribal populations.[31] A similar revival of Hindu customs and religious practices has also been seen among tribal women.[32]

These accounts of tribal customs have at least two important implications. *Firstly*, that tribal cultures and customs are changing and in a constant state of flux. Given this dynamic nature, questions are bound to

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[29] BAXI, *supra* note 7.

[30] CHRISTOPH VON FURER-HAIMENDORF, THE CHENCHUS: JUNGLE FOLK OF THE DECCAN 140 (1943) ("**FURER-HAIMENDORF**"); G.S. GHURYE, THE SCHEDULED TRIBES OF INDIA (1980).

[31] G.D. Brennan, *Sanskritization as Female Oppression in India*, *in* SEX AND GENDER HIERARCHIES (B.D. Miller ed., 1993); *See also* FURER-HAIMENDORF, *supra* note 30.

[32] Aparna Mitra, *The Status of Women Among the Scheduled Tribes in India,* 37 J. OF SOCIO-ECONOMICS 1202, 1202-1217 (2008).

arise about the logic of a policy that seeks to preserve an original state of customs. Is not such a policy against the very customs it seeks to protect? *Secondly*, as the preceding discussion shows, tribal customs, in many instances, are continuously devolving into practices that create new gender inequities. In so far as Section 2(2) may also potentially preserve such new inequitable tribal customs, the merits of a provision like Section 2(2) may be questioned.

But even if it were assumed that certain "*authentic customs*" qualified the need under changing material circumstances, and that these customs have survived the onslaught of colonial codification; nevertheless, Section 2(2) does not protect them in a meaningful sense. It is inherently difficult for Indian courts to adjudicate disputes on the basis of customs, and in the absence of reliable authoritative texts and minimum legal thresholds like fundamental rights. For example, problems arise even on the judicial acknowledgement of tribal custom. It has been held that a custom may, by frequent proof in courts, become so notorious that the courts take judicial notice of them.[33] The result is that such a custom is then essentialized, which reduces the space for pluralism within Tribal law, thereby rendering Section 2(2) of little practical usage. The authors acknowledge such harms are inevitable because when statutory law is applied, the space for pluralism in Tribal law is diminished. However, as the authors argue later in this paper, such a uniform statutory application would be in sync with modern standards of equity and the surrounding changes in material circumstances.

[33] Ujagar Singh v. Jeo, AIR 1959 SC 1041.

Summarily, this Part notes the difficulty in the logic of Section 2(2) given that tribal customs have undergone radical changes in the post-independence era, specifically due to changes in material conditions and the legacy of colonial codification. The Part concludes by acknowledging the diminishing space for pluralism in tribal legal ecosystems but argues that if such diminishing is inevitable in both Section 2(2) and the exercise of "*modern law*", then the latter is preferred because of its benefits in relevance and advantages in equity. As the authors argue later in the paper, even in instances where a custom is proved to be unchanged and continuous, if the custom of concern is discriminatory, then the tribal individuals for whom the custom is discriminatory ought to receive a remedy under equity.

IV. NAVIGATING SECTION 2(2) OF THE HSA

Section 2(2) of HSA provides that the HSA shall not apply to Hindus who are members of the Scheduled Tribes. However, a distinction must be drawn: the Section does not provide that the Scheduled Tribes who followed Hindu law before codification will now necessarily be excluded from HSA; it merely provides that such Scheduled Tribes, who do not follow Hindu law, will have the agency to retain their indigenous arrangements. Here, it is impliedly accepted that the laws of Scheduled Tribes are different since Scheduled Tribes do not share the same structures of family, kinship, and normative values which the corpus of Hindu law embodies.[34] What follows in this Part is a history and analysis of cases on

[34] Bhabananda Mukherjee, *The Structural Feautures of the Tribal Families in India, in* THE FAMILY IN INDIA 75 (George Kurien ed., De Gruyter Mouton 1974); and POONAM PRADHAN SAXENA, 2 FAMILY LAW LECTURES 313 (2019).

the exclusion provisions of Section 2(2). Based on that analysis, the authors aim to trace both, the previous and existing trends on the issue. The final aim of such exercise is to show the evolution of the final rule of constitutional morality.

In *Butaki Bai v. Sukhbati* [*hereinafter* "***Sukhbati***"],[35] the Chhattisgarh High Court was approached to adjudicate upon the inheritance rights of a daughter belonging to the Halba Scheduled Tribes. The Plaintiff/Claimant, Sukhbati, argued that her mother had inheritance rights in her father's ancestral property as they were governed by Hindu Law, and the latter provides for daughters to be coparceners in the ancestral property. This argument was contested by the Defendants who claimed that Halba are Scheduled Tribes, therefore, HSA would be inapplicable to them because of the provisions of Section 2(2) HSA. The High Court accepted the contention of the Defendants and ruled that Plaintiff had no claim on her maternal grandfather's property as her mother herself was not eligible to receive such estate. Moreover, the High Court observed that the parties would be governed by their own customs, which did not provide for daughters to inherit property from their fathers.

Perhaps more interestingly, the learned High Court reasoned that an additional test to determine whether members of a particular Scheduled Tribe are governed by Hindu law, is to ascertain if the tribe had sufficiently adopted "*Hindu customs*" and undergone "*Hindu-isation*".[36] However, the

[35] Butaki Bai v. Sukhbati, AIR 2014 CHG 110.
[36] *Id.* ¶¶ 18-24, 26-27, 30, 38.

High Court also held that it was immaterial whether such *Hindu-isation* had occurred before the passing of the HSA. Seemingly, according to the High Court, the *Hindu-isation* could occur for a tribe that was not following Hindu customs when the HSA was passed (*i.e.*, in 1956) but adopted Hindu customs in a period after the passing of the HSA.

Accordingly, the process of *Hindu-isation* was a question of fact that had to be determined on a case-to-case basis, and no general guidelines could be made. Such observation articulates that parties who are Scheduled Tribes, but "*sufficiently Hindu-ised*", will be governed by provisions of Hindu law (even if they adopted Hindu customs only post-1956). Of course, the explicit text of Section 2(2) itself does not provide for such a provision. Therefore, it is the contention of this paper that judicial innovation had begun to percolate spaces of inheritance law as judges were looking to propound equity even in iron-clad exclusions like Section 2(2).

In *Ramdev Ram v. Dhani Ram*,[37] the Chhattisgarh High Court was again approached to answer a question such as the one in *Sukhbati* (and on similar facts). In a relatively simple verdict, the High Court accepted the ratio of *Sukhbati*. But the High Court, in this case, faced a specific problem. The Defendants in the case had claimed that they followed a specific custom called "*Ghar Jinha*". In the custom of *Ghar Jinha* as claimed by the Defendants, if the son-in-law, along with his wife, lives in the wife's maternal home, then the wife could inherit the estate from her father. But the problem with specific customs like *Ghar Jinha* was that there existed no

[37] Ramdev Ram v. Dhani Ram, AIR 2016 CHG 107.

authoritative text or directives which specified the elements of such customs. A factor that further disparaged customs as primary carriers of equity was the difficulty parties faced while producing evidence regarding the observance (or non-observance) of such custom. Even if the parties agreed to the performance of a custom, its legal effect was often in dispute. A definite lacuna existed in law.

However, two years before *Sukhbati*, the same court had ruled differently in *Sarwango v. Urchamahin*.[38] In the latter case, women belonging to the Gond Scheduled Tribes claimed a share in the estate of their deceased father. They accepted that Gonds were Scheduled Tribes but pleaded that Gonds had long back adopted Hindu customs to the extent that succession within Gonds would be governed by the HSA. The Defendant, on the other hand, contended that since Gonds were Scheduled Tribes, Hindu succession laws would be inapplicable, and that succession would occur in accordance with the customs of the Gonds. Additionally, such customs did not provide for daughters to inherit from their fathers.

But unlike in previous cases, no party could conclusively prove their contentions. It was neither proved that the Gonds followed customs of Hindu law where daughters were allowed to inherit the father's share of the property, nor was it proved that customs of Gond precluded daughters from inheritance. There was also an absence of authoritative texts that could conclusively determine the customs followed by the Gonds. In answering the present question, the learned High Court sought justice,

[38] Sarwango v. Urchamahin, AIR 2013 CHG 98.

equity, and good conscience – in the absence of either party being able to prove the customs, the land would be divided, keeping in mind justice, equity, and good conscience.[39] Accordingly, the daughters were entitled to their father's share following the provisions of HSA. Judicial innovation had peaked again, and the High Court had made a substantive change in its approach in such cases.

In the case of *Sukhbati*, the test of *Hindu-isation* was an additional test that the Court must use to determine the applicable law. That is, if the Claimants could not prove *Hindu-isation*, the Court would exclude the Claimants, virtue of Section 2(2). This was because it was the general assumption that the law of Scheduled Tribes was the norm and *Hindu-isation* a case exception. But the principle in *Sarwango v. Urchamahin*, yielded an opposite balance of power. So, while parties had to demonstrate the presence or absence of a specific custom regarding daughters inheriting an estate, if such exercise was inconclusive, then the Court would apply justice, equity, and a good conscience and grant the daughter rights in the estate. It follows that justice, equity, and good conscience had become the norm, and disputing parties had to prove a custom in Scheduled Tribe law to disallow such inheritance. It is not immediately clear why the High Court in *Ramdev Ram v. Dhani Ram*, when faced with the problem of non-conclusive customs, took to *Sukhbati*, when it could have reaffirmed *Sarwango v.*

[39] *Id.* ¶ 10.

Urchamahin – that in cases of non-conclusive customs parties would need to follow principles of constitutional morality.

In *Bahadur v. Bratiya*,[40] the Appellant-Plaintiffs belonging to the Gaddi Caste contended that daughters could not inherit property as Gaddis were Scheduled Tribes to whom Hindu law was inapplicable, and no custom within the Gaddis allowed for daughters to inherit property from the father. The daughter disputed the contention by arguing that her family belonged to the Rajput Gaddi Caste, and the latter had undergone sufficient *Hindu-isation*. Furthermore, the customs of the Rajput Gaddis allowed daughters to inherit from their fathers. However, none of the parties could conclusively prove their contentions. Considering such facts, the Himachal Pradesh High Court ruled the exclusions of Section 2(2) of HSA would be inapplicable to them. The learned High Court observed that notwithstanding whether the family belonged to the Gaddi Scheduled Tribe, nevertheless, the Plaintiff-Appellants had failed to prove that a custom that disallowed daughters from inheriting a property was prevalent among the Gaddis.

Crystallizing the principle in *Sarwango v. Urchamahin*, the High Court observed that the negation of rights cannot be based on a presumption that such rights do not exist, but that for rights to be negated, their specific non-existence must be conclusively proven in that case. Building on further, customs that disallow such inheritance rights must be essential and

[40] Bahadur v. Bratiya, AIR 2016 HP 58.

continuous, and practices that do not satisfy this criterion shall not be considered as customs that have any legal implication.[41] Accordingly, the Court disallowed the appeal and held that Bratiya could inherit the concerned estate, as the Hindu Succession Act applied to her family.

V. AN EXPANSIVE CONSTITUTIONAL MORALITY AND THE CASE AGAINST SECTION 2(2)

The Himachal Pradesh High Court in *Bahadur v. Bratiya*, in no uncertain words, breached the exclusions of Section 2(2) of HSA by laying stress on the customs followed by tribes – and not merely the fact that the contesting parties belonged to a Scheduled Tribe. This was not the courteous equity, justice, and good conscience of *Sarwango v. Urchamahin* and neither was it the implicit reference to equitable inheritance in Hindu law in *Sukhbati*. It was a decisive break from the past that showed a lasting commitment to equity. However, the Himachal Pradesh High Court had one more reason to rule what it ruled, and here is where the true potential of *Bahadur v. Bratiya* culminates.

The High Court noted the provisions envisioned in Articles 15, 38, 39, and 46 of the Constitution of India [*hereinafter* "**Constitution**"] and the commitment to gender equality and anti-discrimination practices which they embodied. Several equal rights frameworks such as the Convention on the Elimination of All Forms of Discrimination against Women

[41] *Id.* ¶¶ 22-23, 31.

(CEDAW)[42] and the Human Rights Act,[43] were also used by the Court to substantiate its reasoning. In short, the Court used constitutional morality to justify its verdict of holding HSA to be applicable.

But there exists a contortion – in the case at hand, the Court used constitutional morality to guide its verdict when specific customs were not available. However, the Court remained silent on the usage of constitutional morality when such customs were available and proven to be essential and continuous. Due to the nature of constitutional morality and its commitment to equity and justice, there exists a limbo. That is, since constitutional morality is a pervasive test that sets the spirit of the law, it is uncertain how equity may be reconciled with customs that are not equitable but are protected by the exclusions of Section 2(2) HSA.

However, critics of the above-mentioned approach may argue that if constitutional morality were to be applied to the laws of Scheduled Tribes, it is conceivable that tribal customs would be straight-jacketed to resemble the HSA. This outcome is probable as the courts have, in numerous instances in the past, been unable to appreciate the socially persuasive force of local customs.[44] At any rate, as noted in the previous sections, preservation of tribal customs (and hence, prevention from such 'straight-jacketing') was the reason for which Section 2(2) HSA was instituted. The critics would rightfully observe that an expansive interpretation of

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[42] Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.
[43] The Protection of Human Rights Act, 1993, No. 10, Acts of the Parliament, 1993.
[44] WERNER MENSKI, HINDU LAW: BEYOND TRADITION AND MODERNITY 24-25 (2003).

constitutional morality would also wholly deplete the one-way valve devised in *Sukhbati* that allowed Scheduled Tribes to be governed by Hindu law if they were sufficiently *Hindu-ised*, but at the same time, resisted enforcement of Hindu law in case Scheduled Tribes wished to continue with their customary laws. That is, if all customs are subject to constitutional morality, only a few customs will remain.

The response to the critics is that if constitutional morality is not applied, there arises a strange conclusion where the constitutional anti-discrimination guarantees are only available when there are no customs. But in the presence of customs, these constitutional guarantees recede in the background. This paper contends that constitutional morality is not a notion which fills the vacuum of law, but that it defines the bounds within which general laws may exist. Holding constitutional morality as a distant second to customs means inequitable customs take precedence over considerations of justice, an idea that is antithetical to the spirit and purpose of the law. What the Himachal Pradesh High Court meant when they read constitutional morality in *Bahadur v. Bratiya* may perhaps be only clarified by the Hon'ble Court. However, notwithstanding, this paper contends for a more expansive conception of constitutional morality (vis-à-vis tribal customs) for the following reasons:

A. AN ERRONEOUS PRESUMPTION OF AUTHENTICITY

Referencing Part II of the paper, the authors argue that Section 2(2) cannot be treated in a narrow sense and must be subject to constitutional morality – even in the presence of customs. This is because of several reasons. *First*, as noted before, Section 2(2) does not reflect the original and

authentic customs of the Scheduled Tribes. The process of colonial codification of laws, customs, and governance of tribals pervasively altered the 'authentic' customs of the tribals. As was previously sought to be made evident, colonial codification greatly damaged the property and inheritance rights of women, as the primary aim of such exercise was to create instrumentalities of rule and not a genuine code for the rights of Scheduled Tribes. Even if it is assumed that the position of women before colonial codification was uncertain, nevertheless, the process of colonial codification permanently altered the authenticity of the customs of Scheduled Tribes. In this context, there exists no legitimate reason why customs must be shielded from constitutional morality on the presumption of authenticity when the customs in question are greatly tampered with and *inauthentic* to begin with.

B. AN ERRONEOUS PRESUMPTION OF EPISTEMIC CONTEXTS

Secondly, even in the post-Independence era, customs of Scheduled Tribes were excluded from reformation but for the protectionist sentiments that Indian law bestowed upon the identity, customs, and usages of Scheduled Tribes. Exclusions of the type of Section 2(2) are premised on the logical limitations of modern law that were termed by Lon Fuller as "*states of nature*."[45] The term is used to depict a situation in which the force of modern law or law of '*civilization'* becomes unpersuasive as the reasoning behind such law ceases to exist. Section 2(2) may be justified by its proponents as a progressive idea of sorts which protects the Scheduled

[45] Lon L. Fuller, *The Case of The Speluncean Explorers*, 112 HARV. L. REV. 616 (1999).

Tribes from the "*civilizing march of modern law*" and allows marginalized communities to retain control over their identity and structure of society by formulating their own laws. The idea here is that law originates from an epistemic context, and its functions and roles are determined by the circumstances in which it is used and the normative values the epistemic ecosystem desires. Of course, the silent presumption is that '*modern law'* shall be a '*civilizing march'* for the Scheduled Tribes.[46]

However, such presumptions are erroneous for three reasons. *First*, to say that all modern law is a mere '*civilizing march'* is both, simplistic and uncharitable. Modern law brings with itself a stronger commitment to dignity, equality, and anti-discrimination practices. It remains uncontested that the transformative powers of law have greatly helped the causes of the marginalized. An example of such emancipatory powers is the increased inheritance rights accorded to women in 'modern' Hindu law. For the longest time, daughters were denied coparcenary rights, widows only given limited shares post-demise of their husbands, and property rights of mothers were contingent on such factors as the number of sons and whether her husband was alive at the time of partition. It was only through laws such as the Hindu Women's Right to Property Act 1937,[47] the Hindu

[46] BAXI, *supra* note 7.

[47] Hindu Women's Right to Property Act, 1937, No. 17, Acts of Imperial Legislative Council, 1937 (India). The Act entitled a widow to the limited interest over the property of her deceased husband which was termed as the widow's estate.

Succession Act 1956,[48] and the Hindu Succession (Amendment) Act, 2005,[49] and cases such as *Vineeta Sharma v. Rakesh Sharma*[50] that succession among Hindus became relatively equitable in aspects of gender.

Second, Scheduled Tribes do not exist in a fundamentally different epistemic context that warrants protection from modern law. It is submitted in detail how rapid economic expansion into underdeveloped areas and ecosystems during the post-independence period brought several Scheduled Tribes within the fold of the '*modern world*'. Especially since the advent of globalization and rampant increase in private investment and industrial activity, an increasing number of Scheduled Tribes have come to occupy small towns and industrial settlements for work.[51] There is little doubt that, for a sizeable number of Scheduled Tribes, globalization was accompanied by dispossession from native lands and ecosystems. But however much that dispossession may be regrettable, the material damage that resulted from it is – for all practical purposes – irreversible. In a related context, the problems of identifying relevant evidence in tribal property disputes, and the dilemmas faced by the courts in relation to the admission of evidence have already been noted. Moreover, the Courts have also

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[48] Hindu Succession Act 1956, No. 30, Acts of Parliament, 1956, § 14. The Act empowered women to obtain and retain property as an absolute owner, distinct from the earlier position that women only had a limited interest in the property.

[49] Hindu Succession (Amendment) Act, 2005, No. 39, Act of Parliament, 2005 (India). This amendment granted coparcenary rights prospectively to daughters. In divisions of the coparcenary property, the discrimination between daughters and sons was formally ended.

[50] Vineeta Sharma v. Rakesh Sharma (2020) 9 SCC 1. In this landmark case, it was held that the 2005 amendment to the Hindu Succession Act, which gave coparcenary rights to daughters, could be applied retroactively.

[51] REPORT OF THE EXPERT COMMITTEE ON TRIBAL HEALTH, *supra* note 27.

struggled to find the resting phase of specific tribal communities as customs have differed radically across regions.

In that light, because of guaranteed enforceability, definite evidentiary standards, and a clearer description of rights and obligations; perhaps, the most equitable remedies available to such vulnerable populations are under statutory laws. The parties to the dispute, as well as the court, would find it more expedient and efficient if the HSA were applicable to Scheduled Tribes. This is primarily because all concerned parties would be aware of evidentiary requirements vis-à-vis the obligations the statute puts on them. Such an approach was already seen, rather informally, in *Bahadur v. Bratiya*, when the Himachal Pradesh High Court accepted the *prima facie* presumption of tribal women having property rights – and the burden to prove otherwise was cast on the party seeking protection of a custom. And a formal recognition of the High Court's principle – by making HSA applicable to Schedule Tribes – would be beneficial for reasons of efficiency and clarity about the standing position of law.

An assumption of different epistemic contexts is also particularly untrue in relation to women members of Scheduled Tribes for two additional reasons. *Firstly*, the mere fact that a case has come to the court reflects that the litigants are aware of a potential violation of their legal rights and that they view the court as a legitimate entity to remedy the same. *Secondly*, ideas of private property and inheritance are shared between modern law and the laws of the Scheduled Tribes. As evident from the previous Parts, several cases arose in the High Courts, where women from

Scheduled Tribes wished to claim their shares in their father's estate. The fundamental assumption that Scheduled Tribes have different epistemic priorities from 'modern law' collapses here, as we witness an increasing number of tribal women contesting their inheritance rights (and wishing for shares in their fathers' estates). As the inheritance of estates becomes increasingly essential to a capital-oriented society, parallelly, the logic for disallowing women their inheritance rights becomes progressively fickle.

It is also exceedingly important to note that allowing women to inherit property preserves an opt-out mechanism. So, if tribal women do not wish to claim their inheritance rights, they may simply renounce their shares or not approach the courts. But the presumption that tribal women do not wish to inherit because they exist in such different epistemic contexts where the property is unvalued, is unreasoned and fallacious. Then, the wisdom of disqualifying the claims of such women members of Scheduled Tribes, who wish to inherit their ancestral estates, is seemingly indefensible.

C. LAW AS A SITE OF SOCIAL CHANGE

Most important, however, is the observation that inheritance rights of tribal women are overshadowed by customs and only evolve with judicial interventions. Myriad accounts from history provide that possibilities of organic change within social institutions are mostly illusory, for dominant classes lack incentive to distribute power and rights more equitably. Subsequently, it is interventions of modern law that guarantee sustainable conceptions of liberty and dignified life. Particularly, in relation to the

present issue, while modern law had emancipatory effects on inheritance rights of Hindu women,[52] comparatively, recognition of inheritance rights among tribal women remains bleak and unconvincing.

Therefore, courts become indispensable sites of social change which, under considerations of equity, justice, and changing priorities, usher social systems into evolution. Then, the idea that judges must dismiss claims of tribal women, even when such women identify with different epistemic priorities, is principally unreasoned for it proscribes popular conceptions of Scheduled Tribes upon such stakeholders who do not identify with such prescriptions. This paper argues that considerations of justice are inherent to any court, and reflections of that are evident in the cases that were discussed previously. In many of those instances, the High Courts, motivated by proclivities for justice, pierced the veil of Section 2(2) by innovating techniques of statutory interpretation and let constitutional morality guide their verdict to harbours of fairness and equity.

VI. THE RULE AND INTER-JUDICIAL BORROWING

The primary task before the authors now is to consolidate the rule of constitutional morality. Accordingly, two issues are of immediate relevance. The *first* issue concerns the prescribed substantive content of constitutional morality vis-à-vis personal laws and customs. Intimately

[52] Hindu Women's Right to Property Act, 1937, No. 17, Acts of Imperial Legislative Council, 1937 (India); Hindu Succession Act 1956, No. 30, Acts of Parliament, 1956, § 14 (India); Hindu Succession (Amendment) Act, 2005, No. 39, Act of Parliament, 2005 (India). *See also* Vineeta Sharma v. Rakesh Sharma, (2020) 9 SCC 1.

connected with this issue, the *second* issue relates to the extent to which such rules of constitutional morality may be enforced.

With regard to the first issue, it is imperative to briefly describe the relationship between customs and personal laws, and Fundamental Rights embodied in the Constitution. In *State of Bombay v. Narasu Appa Mali* [*hereinafter* "***Narasu Appa Mali***"],[53] the Bombay High Court held personal laws to be outside the ambits of Part III of the Constitution. This was because they did not qualify as "*law in force*" under Article 13 of the Constitution. The decision meant that personal laws could not attract challenges for violations of Fundamental Rights. The High Court reasoned that the Constituent Assembly had wilfully excluded personal laws from Article 13, and the Court found little reason to overturn such consensus. In the years subsequent, the exclusion identified in *Narasu Appa Mali* became the reason for Indian Courts' indifference towards regressive religious practices. The decision of the Supreme Court of India [*hereinafter* "**Supreme Court**"] in *Sri Krishna Singh v. Mathura Ahir*[54] is an example of that trend. Here, in deference to the decision in *Narasu Appa Mali*, the Supreme Court allowed a custom that prohibited a member of the Sudra community from entering an ascetic order.

On the specific question of the customs of tribals, in *Madhu Kishwar v. State of Bihar*,[55] the Supreme Court recognized the numerous precedents

[53] State of Bombay v. Narasu Appa Mali, AIR 1952 Bom 84.
[54] Sri Krishna Singh v. Mathura Ahir, 1980 AIR 707.
[55] Madhu Kishwar v. State of Bihar, 1996 AIR SC 1864.

that had held customs to be law under Article 13. Hence, "*customs inconsistent with or repugnant to the constitutional scheme must always yield to fundamental rights*."[56] Accordingly, tribal women were allowed to succeed to the estates of their male relations. Nevertheless (and crucially), the Supreme Court refused to declare the tribal custom of concern in the case to be inconsistent with Article 14, for doing so "*would bring chaos in the existing state of law*."[57] This reasoning is superficial, for "*chaos*" is no principled reason why a remedy of Fundamental Rights must be extinguished – especially when the Court recognized the merit of such a remedy. Fundamental Rights are conceivably fundamental only when not subjected to the whims of public policy. Additionally, never would a situation arise where a State-imposed change in customs shall not bring "*chaos*". There is thus no logic in upholding discriminatory customs in the present, only so that they may be declared to be violative of Fundamental Rights at some future, more opportune time. This is a colloquial band-aid that must be ripped off at some point.

But whatever the case may be, *Madhu Kishwar v. State of Bihar* identified a new line of reasoning – much different from *Narasu Appa Mali*. However, a dichotomy is present in the idea that the customs which are inconsistent with Fundamental Rights are invalid, but personal laws that regulate identical issues of inheritance are not put to the test of Fundamental Rights. In this context, it is an argument of this paper that the law in *Narasu Appa Mali* must be reconsidered. Such was also the

[56] *Id.* ¶ 30.
[57] *Id.* ¶ 13.

observation of the Supreme Court in *Indian Young Lawyers Association v. State of Kerala* [*hereinafter* "***Sabarimala***"],[58] where the Court disallowed the use of *Narasu Appa Mali* as a persuasive precedent.[59] It was opined that *Narasu Appa Mali* must be reconsidered, especially in light of the ratio in *Shayara Bano v. Union of India* [*hereinafter* "**S*hayara Bano***"].[60] In *Shayara Bano*, the Supreme Court adjudicated on *Talak-ul-Biddat* (or Triple Talaq), a practice in Muslim personal law that was then held to be unconstitutional – and therefore a legally untenable form of divorce. In relevant aspects, *Shayara Bano* may be juxtaposed against *Narasu Appa Mali*. The latter stated that personal laws are not laws for the purposes of Article 13. Then, in comparison, the Supreme Court's verdict in *Shayara Bano* is a logical product of the Court circumventing the observations of *Narasu Appa Mali*. *Shayara Bano* could be considered as a lost opportunity where the courts had a chance to adjudicate personal laws as laws under Article 13, but the Court refrained from answering this question, and gave a judgment on the specific practice of *Talak-ul-Biddat* itself.

In *Sabarimala*, the majority of the Supreme Court, and particularly Chandrachud, J., opined that such discriminatory customs of independent religious denominations that violate Fundamental Rights, are void to the extent of the contravention. The Supreme Court found no compelling

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[58] Indian Young Lawyers Association & Ors. v. State of Kerala, (2018) 8 SCJ 609.
[59] *See* Sruthisagar Yamunan, *Sabarimala Case Gives the Supreme Court the Chance to Set Right Its Inconsistency On Personal Laws*, SCROLL.IN (July 24, 2018) https://scroll.in/article/887626/sabarimala-case-gives-the-supreme-court-the-chance-to-set-right-its-inconsistency-on-personal-laws.
[60] Shayara Bano v. Union of India, (2017) 9 SCC 1.

reasons for the exclusion of personal laws and customs from the definition of Article 13.

However, from the perspective of constitutional theory, the application of constitutional morality to personal laws remains a contested idea. These contests come in two forms, both of which reiterate the logic of Section 2(2) from a constitutional perspective. *Firstly*, as part of the 'essential practices' doctrine under Article 25 of the Constitution. This idea finds a compelling representation in Malhotra, J.'s dissent in *Sabarimala*. In the specific circumstances of the case, Malhotra, J. noted that every religion has a right to formulate its own practices under Article 25.[61] An assertion to the contrary, the dissent specifically argued, denies religious groups the agency to identify with the religion.[62] As a result, only the concerned sect may have a right to define the specifics of its religious practice – subject *only* to the restrictions of Article 25.[63] For example, in those particular facts, the act of allowing menstruating women into the temple would pollute the deity, which would reduce its significance for the worshippers.

Accordingly, for Malhotra, J., challenging practices of Sabarimala, along the lines of constitutional morality, was untenable as the courts were limited from reading rationality into questions of faith.[64] Additionally, the dissent opined that should an aggrieved person from within the religious sect press their claims in courts, only then may the court entertain such

[61] Indian Young Lawyers Association v. State of Kerala, (2018) 8 SCJ 609, ¶ 450.
[62] *Id.* ¶ 450-472.
[63] *Id.* ¶ 457, 461.
[64] *Id.* ¶ 452.

questions.[65] In extending Malhotra, J.'s logic to the present instance, of course, a distinction exists between religious practices and tribal customs, nevertheless, it may be argued, that the questions of agency in both instances remain the same.

However, even if Malhotra, J.'s conception of constitutional morality was true, this paper argues that tribal women, who are faced with discriminatory customs, ought to receive remedy, notwithstanding whether the concerned customs are proven to be essential and continuous. The foregoing Parts provide a sufficient basis for such an argument. Additionally, it is exceedingly important to note that the challenges to discriminatory tribal customs have come from tribal women themselves – that is, from *within* the Scheduled Tribes. Accordingly, tribal customs – at least those of concern in this paper – may be read along with Malhotra, J.'s restrained constitutional morality.

A second objection to expansive constitutional morality challenges the essentiality test under Article 25. Prof. Faizan Mustafa lays great emphasis on the redundancy of the essentiality test, but for, he argues, religion must be evaluated in its entirety. Select practices should not be termed as essential (or non-essential),[66] and he criticizes the Supreme Court for imposing its sensibilities upon the practice of religious freedoms.[67] Prof.

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[65] *Id.* ¶ 445-451.
[66] Faizan Mustafa, *Not a Holy Book*, THE INDIAN EXPRESS (Nov. 1, 2018) https://indianexpress.com/article/opinion/columns/sabarimala-temple-verdict-constitution-of-india-5428002/.
[67] *Id.*

Mustafa provides extraneous justification for such claims – though constitutional morality is a laudable goal, nevertheless, we are not ready for it.[68] At the cost of some repetition, it must be reiterated that the question regarding an appropriate time for establishing an expansive constitutional morality remains unanswered to date.

VII. CONCLUSION AND THE ROAD AHEAD

This paper began with an attempt to highlight the problems of the colonial codification process. It was sought to be demonstrated how, the British, in attempts to preserve traditional customs and personal laws, radically changed the very objects of preservation. Subsequently, changing material contexts and their impact on the relevance of tribal customs were elucidated. The paper then analysed the judicial interpretations of Section 2(2) of the HSA. Thereafter, the authors advocated for tribal customs to be subject to an expansive interpretation of constitutional morality. The central idea throughout was that precluding tribal women from contesting discriminatory inheritance customs is antithetical to considerations of justice, equity, and logic.

The assessments of this paper, however, do not limit their relevance to merely Section 2(2) of the HSA. It is pertinent to note that provisions identical to Section 2(2) also exist in the Hindu Marriage Act, 1955,[69] the

[68] *Id.*
[69] Hindu Marriage Act, 1955, No. 25, Acts of Parliament, 1955, § 2(2) (India).

Hindu Adoptions and Maintenance Act, 1956,[70] and the Hindu Minority and Guardianship Act, 1956.[71] Section 3 of the Indian Succession Act 1925 [*hereinafter* "**ISA**"] similarly provides that a State Government may "*exempt from the operation…of this Act…members of any race, sect or tribe in the State.*"[72] As the form and effect of these provisions and Section 2(2) of HSA are similar, it follows that the central tensions of this paper also extend, coextensively, to discussions about customary law provisions in these other statutes.

Furthermore, though not regarding tribal customs, numerous studies note the effects on Christian women due to the initial exclusion of Keralite Christians from the application of ISA. Cases like *Solomon v. Muthiah*[73] and *D Chelliah Nadar v. G Lalita Bai*[74] are paradigmatic examples of the way exclusion clauses under ISA were used to preserve and enforce local customs that accorded inferior inheritance rights to Keralite Christian women. And though *Mary Roy v. State of Kerala*,[75] by overruling these judgments did bring some equity, yet in striking resemblance with *Madhu Kishwar v. State of Bihar*, the Supreme Court merely provided for supersession of local customs – on the grounds of a technicality. PN Bhagwati, J. categorically declined to go into the merits of arguments based on Article 14. This paper, when suitably extended, takes 'the road not taken' by

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[70] Hindu Adoptions and Maintenance Act, 1956, No. 78, Acts of Parliament, 1956, § 2(2) (India).
[71] Hindu Minority and Guardianship Act, 1956, No. 32, Acts of Parliament, 1956, § 3(2) (India).
[72] Indian Succession Act, 1925, No. 39, Acts of Imperial Legislative Council, 1925, § 3, (India).
[73] Solomon v. Muthiah, (1974) 1 MLJ 53.
[74] D Chelliah Nadar v. G Lalita Bai, AIR 1978 Mad 66.
[75] Mary Roy v. State of Kerala, (1986) 1 SCR 371.

Bhagwati, J., and argues that there exists no merit in preserving local customs that offend sensibilities of equity.

The arguments presented in this paper are similarly relevant for such groups as Khojas and Cutchi Memons, whose customary practices are relatively amorphous, having shades of both Hindu and Muslim customs. The Supreme Court has observed that for Khojas and Cutchi Memons, depending on their place of residence, the community's customary practices hold much weight in the determination of inheritance rights.[76] However, regarding customary practices of the Khojas and Cutchi Memon communities that grant women unequal inheritance rights, the contentions of this paper provide that such customs should not be allowed because they do not accord with fundamental rights.

As courts have often sought to maintain a distinction between customs and personal laws, extending the contentions of this paper into the domain of personal laws is more suspect. Nevertheless, this must not take away from the urgency of imposing a spectre of Fundamental Rights upon personal laws; not least because the distinction between customs and personal laws is that of thin walls, and hence, inequitable customary laws may take the tag of personal laws to escape the scrutiny of Fundamental Rights. At any rate, it must be noted that arguments against interventions of constitutional morality in the sphere of personal laws have often taken support of policy rather than substantive legal logic. However, if the central point of this paper is accepted, then there is seemingly no justification why

[76] Controller of Estate Duty v. Haji Abdul Satta, (1973) 1 SCR 231.

constitutional morality should not also pervade personal laws, and subject them to the spirit of fundamental rights.

In the end, the contentions of this paper must be distinguished from an argument for Uniform Civil Code. Indeed, it must be noted that subjecting customs to Fundamental Rights only unifies all customs in the sense that no custom can be inequitable or unjust. The paper appreciates the role of customs and traditions in community life, however, all that is contended is that such enjoyment must not occur at the cost of another individual's liberty. Therefore, till the Parliament specifically makes an amendment to include Scheduled Tribes as subjects of HSA, it is argued that courts have a legitimate objective in reading constitutional morality into such cases.

NLUJ Law Review

Nikhil Reddy Kothakota, *Implications of Dominance in the Healthcare Provider Sector in India – A COVID-19 Perspective*, 8(2) NLUJ L. REV. 130 (2022).

IMPLICATIONS OF DOMINANCE IN THE HEALTHCARE PROVIDER SECTOR IN INDIA – A COVID-19 PERSPECTIVE

*~Nikhil Reddy Kothakota**

ABSTRACT

With increased reliance on private healthcare infrastructure during public health emergencies such as COVID-19, the most efficient means of regulation that makes sure such services are affordable must be investigated. As an alternative to methods such as price capping, this paper seeks to propose an increased involvement of the Competition Commission of India (CCI) so that that high, inelastic demand and lack of countervailing buyer-power is not misused.

This paper covers the issues faced in delineating relevant markets, followed by an examination of the traditional approaches towards dominance and how they fall short, along with an analysis of its alternate conceptions in EU jurisprudence. Finally, the paper discusses the circumstances under which the abuse of dominance may arise, and the best approach to correct such market failure, fostering a pro-active and vigilant CCI.

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I. INTRODUCTION

The COVID-19 pandemic has exposed the fault lines of India's healthcare system, with the second wave causing an incredible strain on the country's resources unlike any event in the recent past.[1] The need for reconfiguring how to think about the healthcare sector is more evident than ever.[2]

With the rapid rise in the number of cases and lack of adequate public healthcare infrastructure, various state governments had "*taken over*"[3] the facilities of private hospitals, and ordered certain portions of hospital beds to be reserved for the treatment of COVID patients only.[4] More importantly, various charges for treatment (rate to be charged for Personal Protective Equipment [*hereinafter* "**PPE**"] kits, diagnostic tests, ICUs with and without ventilators) had been price capped through various state and central Clinical Establishment and Epidemic Diseases Acts.[5] Private

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[1] Sujita Kumar Kar et al., *Second wave of COVID-19 pandemic in India: Barriers to effective governmental response*, 36 ECLINICALMEDICINE 1, 1 (2021).

[2] Tanzin Dikid et al., *Responding to COVID-19 pandemic: Why a strong health system is required*, 151 INDIAN J. MED. RES. 140, 140-145 (2020).

[3] Ipsita Chakravarty, *Coronavirus: Three states take over private hospitals. What does the fine print say?*, SCROLL.IN (Mar. 30, 2020, 06:30 AM), https://scroll.in/article/957556/coronavirus-three-states-take-over-private-hospitals-what-does-the-fine-print-say.

[4] Express News Service, *80% beds in private hospitals to be reserved for Covid patients*, NEW INDIAN EXPRESS (Apr. 25, 2021, 04:42 AM), https://www. newindianexpress.com/cities/bengaluru/2021/apr/25/80-beds-in-private-hospitals-to-be-reserved-for-covid-patients-2294530.html.

[5] Sharangee Dutta, *Telangana caps cost of Covid-19 tests, treatment at private labs and hospitals*, HINDUSTAN TIMES (Jun. 23, 2021, 06:09 PM), https://www.hindustantimes.com/india-news/telangana-covid-19-tests-treatment-cap-private-labs-hospitals-101624449333033.html. *See also* Neetu Chandra Sharma, *Private hospitals seek revision in prices of covid tests, treatment*, MINT (Apr. 16, 2021, 06:57 AM), https://www.livemint.com/news/india/private-

hospitals were penalized or had their licenses revoked for exceeding the price caps as fixed by their respective governments.[6]

The efficacy of such a solution is questionable. Price caps are applied indiscriminately to large, medium and small enterprises, with the latter two lacking the capacity to cross-subsidize or recover losses arising due to the prices being capped too low. This has the capacity of pushing them out of the market, which would cause additional stress to an already burdened healthcare sector.[7] Such a phenomenon is observed in the pharmaceutical industry as well, wherein price capping of important medicines in certain concentrations results in the proliferation of non-common concentrations (priced high) and exit of medium and small manufacturers.[8] The impact of taking over private operations on efficiency in the allocation of resources and its effect on non-COVID patients who still need regular healthcare access remains to be fully assessed as well.[9]

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hospitals-seek-revision-in-prices-of-covid-tests-treatment-11618513331635.html & Maitri Porecha, *Refusal to treat a patient warrants cancelling of licence, warns govt*, BUSINESS LINE (May 1, 2020), https://www.thehindubusinessline.com/news/national/non-refusal-to-treat-a-patient-warrants-cancelling-of-licence-warns-govt/article31474648.ece

[6] Jamal Ayub, *Government revokes licence of 60 private hospitals in Madhya Pradesh,* THE TIMES OF INDIA (Aug. 1, 2021, 05:32 AM), https://timesofindia.indiatimes.com/city/bhopal/govt-revokes-licence-of-60-private-hospitals-in-madhya-pradesh/articleshow/84937510.cms.

[7] Kathryn Langwell, *Price Controls: On the One Hand… And on the Other*, 14 HEALTH CARE FIN. REV. 5, 5 (1993).

[8] Rhea Reddy Lokesh, *The Anti-Competitive Effect of Price-Controls: Study of the Indian Pharmaceutical Industry,* 43 WORLD COMPETITION L. AND ECON. REV. 283, 283 (2020).

[9] Raju Vaishya, Anupam Sibal & P. Shiva Kumar, *Severe impact of COVID-19 pandemic on non-COVID patient care and health delivery: An observational study from a large multispecialty hospital of India*, 73 IJMS 159, 162 (2021).

In such a scenario, where regulatory mechanisms may harm consumers and the competitiveness of the sector beyond the pandemic, the role that competition law can play needs to be looked into. This paper specifically looks at the issue of dominance within the healthcare provider industry, and the interventions that can be taken up by the Competition Commission of India [*hereinafter* "**CCI**"] in light of extraordinary public health emergencies such as the COVID-19 pandemic, incidents of epidemics and outbreaks (as are increasingly common).[10]

Section 4 of the Competition Act, 2002 [*hereinafter* "**Act**"] provides that for establishing dominance three steps are to be followed: (i) narrowing down the relevant market; (ii) analysing if the enterprise is dominant in that market; and (iii) if the enterprise has abused such dominant position.[11] Hence, this paper shall proceed with reference to foreign jurisprudence for analysis of collective and relative dominance, wherever necessary. However, it should be noted that due to the varying nature of the healthcare systems in leading competition law regimes such as the European Union (Beveridge Model or Bismarck Model or a combination of both)[12] and the USA[13], a direct transposition of their concepts to the Indian system is not possible. With the overall health infrastructure being woefully inadequate, private

[10] Katherine F. Smith et al., *Global rise in human infectious disease outbreaks*, 11 J.R. SOC. INTERFACE 1, 5 (2014).
[11] ABIR ROY, COMPETITION LAW IN INDIA: A PRACTICAL GUIDE 157-224 (Kluwer Law International 2016) ("**ROY**").
[12] Lorraine S. Wallace, *A View of Health Care Around the World*, 11 ANN FAM MED 84 (2013).
[13] GODDARD, *infra* note 44.

infrastructure accounting for more than half of the system,[14] and lack of adequate insurance cover[15] to compensate exorbitant costs, India has a vastly different healthcare delivery sector in comparison to the EU and the USA.

II. ON ASCERTAINING RELEVANT MARKETS

The abuse alleged by the informants before the CCI plays a very important role in the beginning to delineate the relevant market in which dominance of an enterprise is further sought to be proved.[16] It helps kickstart an identification of market substitutes/alternatives as well, based on the "*characteristics, price and intended use*" of the products/services in question.[17]

Therefore, it is important to understand the potential abuse in context of Section 4 of the Act, so that the relevant markets can be delineated. Potential abuse of dominance by healthcare providers may fall under either Section 4(2)(a)(i) or (ii), *i.e.*, "*imposition of unfair conditions in purchase or sale*" or "*unfair price in purchase or sale of goods and services,*" respectively.[18] Commonly reported issues faced, such as compulsory buying of medications (that do not require much quality control), or compulsory

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[14] Christophe Jaffrelot & Vihang Jumle, *Private Healthcare in India: Boons and Banes*, INSTITUTE MONTAIGNE (Nov. 3, 2020), https://www.institutmontaigne.org/en/blog/private-healthcare-india-boons-and-banes.

[15] Kumar Anurag & Sarwal Rakesh, *Health Insurance for India's Missing Middle*, OSF PREPRINTS (Oct. 27, 2021), https://osf.io/s2x8r.

[16] Surinder Singh Barmi v. BCCI, Case No. 61/2010 (CCI).

[17] *Id.* at ¶ 28.

[18] The Competition Act, 2002, No.12, Acts of Parliament, 2003 (India), § 4.

testing in hospital diagnostic centres as a condition to be admitted may potentially fall under Section 4(2)(a)(i). While, excessively charging for PPE kits, hospital beds or rooms, medications, consumables, and tests to be undergone during hospitalisation may fall under the latter.[19] Taking the occurrence of such events during the pandemic as a case study, the relevant product market would be COVID-19 care hospitals.

The CCI also observed multiple times in various mergers/combinations that-

> "…*while primary and quaternary treatments are relatively well defined, the treatments offered at the secondary and tertiary level often cannot be strictly compartmentalised. In this regard, it has been submitted that most hospitals provide comprehensive and integrated healthcare services which include out-patient services, in-patient services, diagnostic services, pharmacy services etc. Therefore, the manner in which healthcare services are provided by hospitals is typically integrated across multiple specialties and services.*"[20]

While primary care deals with the most basic of treatments and diagnoses and are out-patient in nature, secondary care is referred to, by primary care doctors on showing persistent symptoms of the disease or an

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[19] *See infra* notes 99-108 and accompanying text.

[20] Competition Commission of India, Notice under Section 6(2) of the Competition Act, 2002 jointly given by Radiant Life Care Private Limited (Radiant), Kayak Investments Holding Pte. Limited (Kayak), Max Healthcare Institute Limited (MHIL) and Max India Limited (MIL), C-2019/01/629 (Issued on Mar. 6, 2019) ("**Radiant**"). *See also* Competition Commission of India, Notice under Section 6 (2) of the Competition Act, 2002 given by Northern TK Venture Pte. Ltd., C-2018/09/601 (Issued on Oct. 29, 2018).

expected rise in symptoms due to associated co-morbidities, where patients are either to be treated by specialists and/or put under observation. Tertiary care is when further complications arise and there is a need for "*strong diagnostics and clinical support systems,*"[21] such as oxygen beds and ventilators. However, almost all levels of care are integrated in various private hospitals, and such classification is merely conventional in nature. Hence, in light of the potential abuses of dominance in the examples cited above, it would be appropriate to narrow down in-patient care, *i.e.*, in-patient COVID care hospitals as the relevant product market. The integrated and oscillating nature of secondary and tertiary care as well, where patients are frequently shifted back and forth between observation and care by specialists (secondary care) to clinical support such as by ventilators (tertiary care) based on the severity does not allow them to be divided into two distinct product markets.

Now, the question arises – whether only private COVID care hospitals form the product market? While in the case of mergers, the CCI has preferred to keep the contours of the product market open, it acknowledged the submissions of the proposed merger parties, which usually did not differentiate between public and private enterprises unless the former is specifically reserved for a particular section of the community,

[21] Competition Commission of India, Notice under Section 6 (2) of the Competition Act, 2002 filed by Manipal Health Enterprises Private Limited, C-2020/11/789 (Issued on Jan. 8, 2021), ¶ 6.

such as the Economically Weaker Section.[22] Hence, usually, "*market for provision of healthcare services through hospitals*" is proposed.[23]

Further, in the case of *Dr. L. H. Hiranandani Hospital v. CCI,*[24] while the CCI found no abuse of dominance and only contravention of section 3(4)[25], with even the latter being ultimately overturned by the Competition Appellate Tribunal, the arguments presented by the hospital, the opposing party [*hereinafter* "**OP**"] are worth considering. On the allegation that the OP has abused its dominant position and unfairly tied its maternity delivery services with one stem cell banking service only, the Director General [*hereinafter* "**DG**"] established the product market as maternity services offered by super-speciality hospitals.

This was despite the presence of different establishments which offer substitutable services such as maternity homes, other non-speciality private hospitals, nursing homes and municipal establishments. It was of course contended that even on the exclusion of low-end nursing homes, at least establishments other than super-speciality hospitals with comparable price ranges must be considered. But there was nothing to prove this non-substitutability except the vague aversion by the DG that:

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[22] *Radiant*, *supra* note 20, at ¶ 13.
[23] *Id.* at ¶ 12.
[24] Dr. L.H. Hiranandani Hospital v. Competition Commission of India and Ramkant Kini, 2014 SCC OnLine CCI 15 ("***Hiranandani***").
[25] "*Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services.*"

> "*[i]n the present case factors, such as, economic and social strata of the consumer (patient) peer pressure, social perceptions, brand value of the hospital at par with the social status, complication attached with the maternity, other health issues, relation with the doctors, relation of the family with the hospital and doctors etc. matters to the patient and her family in deciding a Super Speciality Hospital. Therefore, one cannot include all sorts of hospitals/clinics in a sweeping manner within one single market as contended by the OP without any regard to the features and pricing of the product in question.*"[26]

In *Shri Vivek Sharma v. Max Super Speciality Hospital* [*hereinafter* "***Max Super Speciality Hospital***"],[27] the hospital was alleged of abuse of dominance by excessively pricing syringes, which were to be compulsorily bought from the in-house pharmacy. Herein, the CCI directed the DG to re-investigate by changing the relevant product market from private multi-speciality hospitals to *all* multi-speciality hospitals in the given area. Thus, given the CCI's experience in determining product markets in the healthcare delivery sector, comparable public enterprises can be taken into consideration.

However, due to the nature of a pandemic (or localized epidemics or outbreaks), such a conclusion immediately brings into question the effect of strained resources in public hospitals and similar enterprises.

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[26] *Hiranandani*, *supra* note 24, at ¶ 20.
[27] Shri Vivek Sharma v. Max Super Speciality Hospital and Ors, Case No. 77/2015 (CCI). ("***Max Super Speciality Hospital***")

Due to the extraordinary strain on the entire healthcare industry as a whole during the second wave in the most affected states such as Maharashtra,[28] public hospitals were at their breaking point. Due to the continued lack of resources and inadequate manpower, there was no other choice but to rely on the private healthcare delivery sector, which as mentioned, already has more than twice the amount of infrastructure as public hospitals.[29] The evidenced lack of manpower and shortage of important facilities in public hospitals drove many to private hospitals, especially those of the super-speciality nature. While dominance due to lack of countervailing buyer power can be noticed at this stage itself, for now, it should be considered if this limits the relevant product market by asymmetric substitution.[30]

For, while the functions of public hospitals can be taken up by private hospitals, one shall be constrained to find public hospitals offering all the services offered by private hospitals.[31] Therefore, in a given geographic market, it is entirely possible that due to lack of appropriate facilities from the very beginning or due to overcrowding for those limited

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[28] Kalyan Ray, *Maharashtra has 8 of top 10 worst Covid-19 hit districts,* DECCAN HERALD (Mar. 11, 2021, 09:47 PM), https://www.deccanherald.com/national/maharashtra-has-8-of-top-10-worst-covid-19-hit-districts-960866.html.

[29] Priya Gauttam et al., *Public Health Policy of India and COVID-19: Diagnosis and Prognosis of the Combating Response*, 13 SUSTAINABILITY 1, 6-9 (2021) ("**Gauttam**").

[30] One product or service might be a substitute for another, but the vice versa is not possible. Hence, relevant market for the former might include the latter as substitute, but when ascertaining the position of the latter, the former cannot form a part of the same relevant market. *See generally*, Commission Decision of 17 April 2002 declaring a concentration to be compatible with the common market and the EEA Agreement (Bayer/Aventis Crop Science), 2004 O.J. (L107) 1.

[31] Gauttam, *supra* note 29.

important resources, private COVID care centres remain the only option. The most appropriate example would be the critical supply shortage of ventilators.[32] When such care cannot be offered by certain enterprises, the question of why the relevant market should not be limited to those which do, arises. At the very least, in such cases, only super-speciality public hospitals (irrespective of their capacity) must be considered as substitutable, and the relevant product market would be super-speciality hospitals for COVID care in the given geographic area.

The precise determination of the product market can only be on a case-to-case basis depending upon the ground situation, the intensity of the health emergency and the amount of infrastructure that can be readily used. But CCI should not be precluded from defining the relevant product market as private in-patient COVID care centres/hospitals *only*.

Such a determination depends upon the delineation boundaries of the relevant geographical market as well, which has been relatively uncontroversial in nature. In mergers, the CCI has left the definition of relevant geographical market open too, but has considered the parties' submissions that the limits be the respective cities and surrounding areas the hospitals are located in.[33] In *Max Super-Speciality Hospital,* the re-investigation was ordered by taking into consideration all super speciality hospitals in Delhi, as compared to only those within a 12-kilometre radius

[32] *Id.*
[33] *Radiant*, *supra* note 20, at ¶ 17.

from the OP hospital.[34] Similar considerations were seen in Rotary Hospital, where "*Vapi and surrounding areas*" was taken to be the geographic market.[35] It should be noted that private hospitals (where abuse of dominance is likely to arise) are heavily concentrated in cities and industrialized areas of districts, with denizens of 'surrounding areas' living in areas of sparse health infrastructure approaching such hospitals. Hence, in such cases, the probability of dominance will be seen in the city/area located and surrounding (mostly rural/peri-urban) areas.[36]

III. THE TRADITIONAL APPROACH TOWARDS DOMINANCE

Post-establishment of the relevant markets as in-patient private and/or super-speciality COVID care hospitals within municipal limits and surrounding areas, the next step is to analyse the dominance of the enterprise through various factors of inquiry as under Section 19(4) of the Act. Under this Section, there is no bright-line distinction between dominant and non-dominant firms depending upon the market share. This is as opposed to some jurisdictions, such as South Africa, where having

[34] *Max Super Speciality Hospital*, *supra* note 27, at ¶ 11.
[35] Shri Tarun Patel v. Haria Lakhamshi Govindji Rotary Hospital, Case No. 49/2015 (CCI).
[36] There is a heavy concentration of private hospitals in metro cities, then Tier I and Tier II cities. *See* Indian Brand Equity Foundation, *Healthcare Industry in India, Indian Healthcare Sector, Services,* IBEF.ORG, https://www.ibef.org/industry/healthcare-india.aspx (last updated Sep. 21, 2021).

more than a 45 percent market share would irrefutably be evidence of dominance.[37]

The Raghavan Committee Report[38] highlighted that defining an arithmetic figure explicitly to establish dominance might allow "*real offenders*"[39] to escape. The Report enumerated that

> "*[…] this ambiguity has a justification having regard to the fact that even a firm with a low market share of just 20% with the remaining 80% diffusedly held by a large number of competitors may be in a position to abuse its Dominance, while a firm with say 60% market share with the remaining 40% held by a competitor may not be in a position to abuse its Dominance because of the key rivalry in the market.*"[40]

This has been reiterated a number of times in foreign jurisdictions such as in the case of *ABG/Oil* (as will be discussed later) and Indian cases such as *Belaire Owners' Association v. DLF Limited* [*hereinafter* "***DLF***"].[41] In this case, it was held that when "*sufficient and undisputed*" data on market shares in a relevant market is not available, or the differences in margins of the

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[37] John Oxenham et al., *COVID-19 Price Gouging Cases in South Africa: Short-term Market Dynamics with Long-term Implications for Excessive Pricing Cases*, 11 J. EUR. COMPETITION L. & PRAC. 524, 524 (2020).
[38] SVS Raghavan Committee, *Report of High-Level Committee on Competition Policy Law*, PLANNING COMMISSION, GOVERNMENT OF INDIA (2007).
[39] *Id.* at ¶ 4.4.5.
[40] *Id.*
[41] Belaire Owners' Association v. DLF Limited, HUDA & Ors., Case No. 19/2010 (CCI). ("***DLF***")

market shares do not disclose the true capacity of an enterprise in acting independent of competitive forces of the market, other corroborative data through factors such as mentioned in Section 19(4) become particularly important.[42]

For example, under Section 19(4)(j), market structure of the healthcare delivery sector should be seen. Here, private hospitals have almost double the infrastructure as public hospitals in many leading hotspots for COVID as in various metropolitan cities.[43] This is the standard mode of operation in various low and middle-income countries [*hereinafter* "**LMICs**"], which has led the likes of Maria Goddard, a health economist, to distinguish between how competition regimes ought to operate in countries with developed competition law regimes, as compared to the LMICs.[44]

The scalability of operations of private healthcare centres and the commercial advantages that they have over other competitors (Section 19(4)(d)) can be advantageous in terms of reduced costs (which are nevertheless covered by public insurance policies) in developed countries.[45] But in LMICs, due to lack of adequate competition from the inadequately equipped public healthcare sector or the private sector itself due to an

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[42] *Id.* at ¶ 12.54.
[43] Gauttam, *supra* note 29.
[44] Maria Goddard, *Competition in Healthcare: Good, Bad or Ugly?,* 4 IJHPM 567, 567-569 (2015) ("**Goddard**").
[45] These were also the reasons cited by the 8th Circuit Court of Appeal in upholding a merger by overturning a District Court judgement that did not approve it by considering low cost hospitals only, in Federal Trade Commission v. Tenet Health Care, 186 F.3d 1045 (8th Cir. 1999). *See* Hiranandani, *supra* note 24, ¶15.

unforeseen glut for demand, there is a high probability of exclusion and disproportionate increase of costs of treatments availed (Section 19(4)(l)).

As evidenced by the CCI's reiteration in the mergers,[46] the healthcare delivery sector is still at a nascent stage in India. Lack of a more stringent and nuanced interpretation of dominance can preclude necessary action to be taken during the times of a public health emergency. Thus, there is a need to move away from an interpretation, which although acknowledges market share as not the only factor in determining dominance, still privileges it.[47]

The asymmetric substitutability for specialized care facilities also helps us understand how the lack of adequate public healthcare facilities skews the market in the favour of private hospitals. As mentioned in the previous Part, dependence of consumers (Section 19(4)(l)) on such hospitals shoots up in such times. A policy note released by the CCI itself points to the asymmetry of information available to consumers, and the proliferation of the "*doctor-hospital nexus*"[48] due to it. Here, consumers should not be looked at as rational choice-makers, as their decisions for the most part rest on the information and suggestions provided by professionals in the field. This lack of proper information to a vulnerable populace, the

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[46] *Radiant*, *supra* note 20, at ¶ 18.

[47] In various cases, while the CCI specifies the market share is not the only criteria for assessing dominance, it still continues to revere it as a major indicator, perhaps as a bid of legitimacy of such regulation. *See DLF*, *supra* note 41.

[48] Policy Note, *Making Markets Work for Affordable Healthcare*, CCI.GOV.IN, https://cci.gov.in/search-filter-details/590 (last visited Jun. 24, 2022) ("**Making Markets Work**").

urgency of hospitalization, and the rapidly diminishing number of available beds in such crises[49] must be considered. Further, while the doctors may be in the best position to decide for the consumer, as the policy notes, the incentives offered by hospitals for referrals is usually very high, thereby negating the assumption of an informed consumer choice even in the best of circumstances.[50]

There is little countervailing buying power (Section 19(4)(i)) in such conditions as well and this is best explained through *DLF* itself – a dominant developer was able to impose unfair one-sided conditions onto thousands of prospective buyers. The latter was essentially reduced to the role of mere "*price-takers*"[51] and did not have any negotiating power with the enterprise.[52] The situation is much more dire in our paradigm example of a health emergency.[53] A cost-benefit analysis done in light of social obligations and social costs (Section 19(4)(k)) would reveal that allowing the enterprise to remain dominant does not serve any long-lasting benefits of efficiency or scalability, as the lack of both in the overall healthcare delivery system itself may render it dominant.

A. DOMINANCE IN THE AFTERMARKET

[49] Mukesh Rawat, *Just before 2nd Covid wave hit India, ICU beds decreased by 46%, oxygen ones by 36%,* INDIA TODAY (May 3, 2021, 4:10 PM), https://www.indiatoday.in/coronavirus-outbreak/story/just-before-2nd-covid-wave-hit-india-icu-beds-decreased-by-46-oxygen-ones-by-36-1796830-2021-05-03 ("**Rawat**").
[50] Michael Porter & Elizabeth Teisberg, *Redefining Competition in Health Care*, HARV. BUS. REV. (2006), https://hbr.org/2004/06/redefining-competition-in-health-care.
[51] *DLF*, *supra* note 41, at ¶ 12.75.
[52] ROY, *supra* note 11.
[53] Rawat, *supra* note 49.

Dominance could also be established through its analysis in the aftermarket/secondary market. *Shri Shamsher Kataria v. Honda Siel Cars India Ltd. [hereinafter* "***Automobile Spare Parts***"][54] is perhaps the most illuminating Indian case. Here, there was a lack of availability of spare parts (for cars already sold in the primary market) in the open market, and those available with the authorized sellers were priced highly. The Original Equipment Suppliers which would supply the parts were prohibited to sell in the open market and had to supply to the authorized Original Equipment Manufacturers only. The CCI held that even if the brand is not dominant in the primary market, such actions can render it so in the secondary market. There was a lock-in effect[55] on the customers, who had no option but to heed to the monopoly of the OP as per Section 19(4)(g), where "*monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise*" is evident of a dominant position. Here, a monopoly over operations in the secondary market was obtained by virtue of the OP's initial agreement with the consumers in the primary market for the sale of automobiles.[56]

This ratio is based on the landmark judgment of the US Supreme Court in *Eastman Kodak Company v. Image Technical Services Inc.*,[57] where Kodak stopped supplying spare parts to its previous agents and asked the

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[54] Shri Shamsher Kataria v. Honda Siel Cars India Ltd, Case No. 03/2011 (CCI). ("***Automobile Spare Parts***")
[55] Laure Schulz, *The Economics of Aftermarkets,* 6 J. EUR. COMPETITION L. & PRAC. 123, 123 (2015).
[56] *See DLF*, *supra* note 41, at R. Prasad Member (Supplementary) ¶ 4.
[57] Eastman Kodak Company v. Image Technical Services Inc, 504 U.S. 451 (1992).

customers to approach the company itself for any after-services, thereby limiting its maintenance and repair services in the aftermarket. The majority opined that while there was no dominance in the primary market, customers were "*locked-in*" the secondary market after initial purchase, with "*switching and information costs*" being "*sufficiently high to expose a number of consumers to exploitation.*"[58] The monopoly obtained by the enterprise in the secondary market cannot be offset by its position in the primary seller market, thus legitimizing the former as the relevant market for antitrust analysis.

Therefore, such a monopoly obtained in the secondary market becomes the relevant market for establishing abuse of dominance. This form of lock-in effect has been observed, along with the delineation of a new relevant market as the product/service's aftermarket. In a case concerning the National Stock Exchange,[59] removing the interface between two separately owned platforms to lock in and force consumers to move from one platform to another was held as abuse by a dominant enterprise. In another similar case,[60] OP (here, a movie theatre) denying consumers from bringing beverages from outside was held to be an abuse of dominance as the only option left was to buy highly marked up beverages offered by the OP. In the primary market, the consumer has a choice to

[58] *Id.* at 465-478.
[59] MCX Stock Exchange Ltd. v National Stock Exchange of India Ltd, 2011 SCC OnLine CCI 52.
[60] Cine Prakashakula Viniyoga Darula Sangham v. Hindustan Coca Cola Beverages Pvt. Ltd, Case No. 26/2011 (CCI).

approach a different establishment and hence the OP is not dominant, but once the consumer becomes privy to the OP, it exercised a dominant (monopoly) position in the secondary market of selling beverages.

In *Max Super-Speciality Hospital* too,[61] the CCI *prima facie* held that even if the hospital was not dominant in the primary market, there is a possibility of it abusing its dominance in the secondary markets of medicines. However quality control over products is an important factor to consider. If such products are required for urgent medical intervention, or requires a high degree quality control, it is reasonable for the enterprise to have monopoly control over it.[62]

Excessive pricing claims can be established nevertheless. But this still leaves many issues of abuses that do not fall under aftermarket dominance such as increased costs of hospital beds/rooms, diagnostic tests, and safety-wear such as PPE kits, all of which are intrinsic to the primary service provided. Another problem we run into is the estimation of dominance over time. While it is logically consistent to hold in the likes of *DLF*, dominance of an enterprise is usually acquired gradually over many years, and not in a "*in a transient moment in time*".[63] Here, the author seeks to establish how in times of distress, a position of dominance can be temporarily and immediately achieved by an enterprise.

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[61] *Max Super Speciality Hospital*, *supra* note 27, at ¶ 9.
[62] *Id.*
[63] *DLF*, *supra* note 41, at ¶ 12.82.

IV. ALTERNATIVE MODELS OF DOMINANCE

There is a need to further solidify our stance for establishing dominance of hospitals in the relevant market, and to prove that transient market power may also give rise to dominance. For this purpose, we turn towards EU Competition jurisprudence.

A. COLLECTIVE DOMINANCE

The concept of collective dominance offers one way in which dominance during exceptional times can be viewed. The behaviour of various enterprises, even if they do not hold sufficient market share individually may point to dominance as per Article 102 of the Treaty of Functioning of the European Union [*hereinafter* "**TFEU**"], where "*any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited.*"[64]

The words "*one or more undertakings*" remained contested for a while, with the EU Courts holding that such enterprises need to belong to a single group until the position was clarified in the *Italian Flat Glass*,[65] which held that:

> "*There is nothing, in principle, to prevent two or more independent economic entities from being, on a specific market, united by such economic links that, by virtue of that fact, together they hold a dominant position vis-à-vis the other operators on the same market.*

[64] Consolidated Version of the Treaty on the Functioning of the European Union art. 102, Oct. 26, 2012, 2012 O.J. (C326) 89.
[65] Cases- T-68/89, T-77/89 and T-78/89, Società Italiana Vetro SpA, Fabbrica Pisana SpA and PPG Vernante Pennitalia SpA v. Commission, 1992 E.C.R. II-01403.

> *This could be the case, for example, where two or more independent undertakings jointly have, through agreements or licences, a technological lead affording them the power to behave to an appreciable extent independently of their competitors, their customers, and ultimately of their consumers.*"[66]

This opened the doors to the idea that there might be a kind of "collusion" between different competitors that might not fall under any definitions of horizontal agreements as there is a lack of one, expressed or implied. The kind of "collusion" referred to here may be something as simple as following the price leadership or price signalling, which will not result in a reduction of prices to consumers as there is no incentive for enterprises to undercut each other. They have a common interest in maintaining the status quo and do so without entering into any form of agreement.

The price set by a single large (if not already dominant) private hospital can set the stage for other hospitals to similarly overcharge consumers (price leadership) due to the inelastic demand. Tacit price signalling can exist when there exists no agreement between two or more enterprises, but they are merely aware of each other's charges and have an incentive to charge non-competitive prices as they estimate that consumers

[66] *Id.* at ¶ 358.

will be willing to take up whatever price proposed.[67] In other words, they expect consumers to be *price-takers.*

This is explained best in *Airtours*[68] by the Court of First Instance in the EU-

> "*A collective dominant position significantly impeding effective competition in the common market or a substantial part of it may thus arise as the result of a concentration where, in view of the actual characteristics of the relevant market and of the alteration in its structure that the transaction would entail, the latter would make each member of the dominant oligopoly, as it becomes aware of common interests, consider it possible, economically rational, and hence preferable, to adopt on a lasting basis a common policy on the market with the aim of selling at above competitive prices, without having to enter into an agreement or resort to a concerted practice within the meaning of Article 81 EC* (now Article 101 of TFEU, similar to Section 3 of the Competition Act) *and without any actual or potential competitors, let alone customers or consumers, being able to react effectively.*"[69]

[67] ROBERT O'DONOGHUE & A JORGE PADILLA, THE LAW AND ECONOMICS OF ARTICLE 102 TFEU 168 (2d ed. 2013) ("**DONOGHUE & PADILLA**").
[68] Case- T-342/99, Airtours plc v. Commission, 2002 E.C.R. II-02585.
[69] *Id.* at ¶ 61.

A checklist for assessing collective dominance was also proposed here and improved upon in *MCI WorldCom/Sprint*,[70] where it was held that, for establishment of collective dominance either jointly (*i.e.*, a merger) or for undertakings (enterprises) acting independently, four criteria have to be fulfilled- (i) there must be incentives for such undertakings to engage in parallel behaviour; (ii) it must be easy to monitor each other's behaviour; (iii) there are disincentives for undertakings to deviate from parallel behaviour; and (iv) it is not possible for demand/consumer behaviour to constrain such behaviour. While these are not airtight conditions, the inability to prove countervailing buyer power as in (iv) is fatal to establishing such a position.

In our paradigm example, hospitals clearly have a reason to engage in such behaviour as the crisis offers them an opportunity to earn extraordinary profits, and hence there is a disincentive to lower their prices. Tracking each other's behaviour is also relatively easy, with the hospitals and hospital associations responding to the price caps imposed by state governments, combined propositions to provide leniency,[71] or simply

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[70] Case- COMP/M.1741-MCI, Commission Decision of 28 June 2000 declaring a concentration incompatible with the common market and the EEA Agreement art. 8(3), Regulation (EEC) No. 4064/89.

[71] Many private hospitals (especially small and medium enterprises) and their associations have passed resolutions and approached governments with regards to the unsustainability of price caps in the long run, and its adverse effects on sustaining their operations. *See* Ridhima Saxena & Thomas Tanya, *Citing losses, private hospitals want Maharashtra govt pricing caps rolled back*, MINT (May 04, 2020, 7:51 PM), https://www.livemint.com/companies/news/citing-losses-private-hospitals-want-maharashtra-govt-pricing-caps-rolled-back-11588601029043.html; Express News Service, *Private hospitals lay out terms as government stands firm on price cap,* NEW INDIAN EXPRESS (Jun. 19, 2020, 07:48 AM),

through publicly available information. And due to inelastic demand and the lack of any countervailing buyer power as in the previous section, hospitals are able to sustain such pricing – thus, fulfilling the most important condition.

An equally important tenant is that the previous establishment of dominant position of a single enterprise in a relevant market does not preclude the later establishment of collective dominance, as was held in *Almelo*.[72] This aligns with how competition can be affected by price leadership, where a dominant enterprise's supra-competitive prices can be endorsed by other enterprises in the market after the latter takes stock of the dire market conditions.[73] Such an analysis is required to ascertain the conduct of enterprises in extraordinary periods of stress and has been suggested for use in the EU as well, with the onset of COVID-19.[74] Therefore, the argument in the Competition Law Review Committee Report that collective dominance provisions in the EU are rarely enforced

https://www.newindianexpress.com/states/telangana/2020/jun/19/private-hospitals-lay-out-terms-as-government-stands-firm-on-price-cap-2158526.html; Shainu Mohan, *Private hospitals up in arms against Kerala government*, NEW INDIAN EXPRESS (May 17, 2021, 03:05 AM), https://www.newindianexpress.com/states/kerala/2021/may/17/pvt-hosps-up-in-arms-against-govt-2303415.html *&* K. Shiva Shanker, *Cap on COVID treatment charges impractical, insensitive,* THE HINDU (Jun. 27, 2021, 07:26 PM), https://www.thehindu.com/news/cities/Hyderabad/cap-on-covid-treatment-charges-impractical-insensitive/article35003648.ece.

[72] Case C-393/92, Municipality of Almelo and others v. NV Energiebedrijf Ijsselmij, 1994 E.C.R. I-01477.

[73] ANTONIO BAVASSO, COMMUNICATIONS IN EU ANTITRUST LAW: MARKET POWER AND PUBLIC INTEREST 163 – 220 (Kluwer Law International 2003).

[74] Giosa, *infra* note 80.

and are not in the European Commission's enforcement priorities falls short.[75]

Similarly, the argument in the Report that there is no need for such a provision in India due to the presence of Section 3(3) does not completely grasp the relevance of collective dominance. Under Section 3, horizontal agreements have to be proven beyond a doubt and are per se violations. As was made certain in *Rajasthan Cylinders and Containers v. Union of India,*[76] mere evidence of parallel pricing is not enough to prove cartelization. Additional evidence (although circumstantial) that makes it very probable is *sine qua non*.

However, in collective dominance there is no such high burden of proof, and the entire market structure is analysed to see if independent enterprises have the capacity to act in such a manner. It is important to note that such a position by itself does not mean abuse, as there is no such presumption. A burden of proof has to be discharged by the competition authorities in showing that lack of counter-vailing buyer power allows for this, followed by proof of abuse. Hence it precludes a Type I error of overregulation as in cases such as *Rajasthan Cylinders and Containers v. Union of India* itself, where an analysis of the market structure would reveal that the sellers tried to match prices to remain in competition in an oligopsony, where there are very few concentrated buyers with disproportionate buying

[75] Competition Law Review Committee, *Report of Competition Law Review Committee*, MINISTRY OF CORPORATE AFFAIRS (2019).
[76] Rajasthan Cylinders and Containers Ltd. v. Union of India, 2018 SCC OnLine SC 1718.

power. This goes against the most important condition for establishing collective dominance.

In order to deal with unprecedented scenarios as COVID-19 pandemic, it is apt to amend the Act by adopting the wording that was proposed in the 2012 amendment, where the new Section 4(1) would read as "*[n]o enterprise or group shall abuse,* jointly or singly *its dominant position*"[77]. This can help overturn the various cases in which the CCI has held that collective dominance is not recognized in Indian competition jurisprudence.[78] This also shows a better understanding of economics in the manner described below. While classical thought righty holds that when enterprises charge excessively, other competitors emerge; considering the skewed market structure, urgency of (inelastic) consumer need, barriers and time taken for entry of new players,[79] it is reasonable to see why the lacuna in the market for affordable services is not filled up immediately.

B. RELATIVE DOMINANCE

While dominance usually has to be observed throughout a certain period of time, competition law experts such as Penelope Giosa[80] have proposed the adaption of the concept of relative dominance (economic

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[77] The Competition (Amendment) Bill, 2012, Bill no. 136 of Parliament, § 4 (India) (Dec. 10, 2012).
[78] Neeraj Malhotra v. Deutsche Post Bank Home Finance, 2010 SCC OnLine CCI 28. *See also* Shri Sonam Sharma v. Apple Inc. USA & Ors., 2013 CompLR 346 (CCI).
[79] Competition Act, 2002, No.12, Acts of Parliament, 2003, § 19(4)(h) (India).
[80] Penelope Giosa, *Exploitative Pricing in the Time of Coronavirus – The Response of EU Competition Law and the Prospect of Price Regulation,* 11 J. EUR. COMPETITION L. & PRAC. 499, 499 (2020) ("**Giosa**").

dependence) as in the *ABG/Oil*,[81] to deal with the exceptional circumstances.

In this case, during the 1973 Oil Crisis, imports to countries such as the Netherlands reduced drastically up to 50 percent, and many suppliers of crude oil decreased production and increased prices substantially. ABG Oil, a buyer, alleged abuse of dominance by various multi-national oil supplier companies, when they did not equitably distribute the scare supplies, discriminated between it and other long-standing customers, and charged it extraordinarily high prices. While the charges of abuse were ultimately overturned on appeal in the European Court of Justice, the European Commission's initial interpretation of relative dominance was not. It was held that due to exceptional circumstances as the shortage of resources, the complete *economic dependence* of ABG Oil put the suppliers in a dominant position *relative* to it:

> "*Economic restrictions such as existed in the Netherlands during the oil crisis can substantially alter existing commercial relations between suppliers who have a substantial share of the market and quantities available and their customers. For reasons completely outside the control of the normal suppliers, their customers can become completely dependent on them for the supply of scarce products. Thus, while the*

[81] Commission Decision of 19 April 1977 relating to a proceeding under Article 86 of the EEC Treaty (IV/28.841 - ABG/Oil companies operating in the Netherlands) 77/327/EEC, 1977 O.J. (L 117) 1, 8.

> *situation continues, the suppliers are placed in a dominant position in respect of their normal customers.*"[82]

The market share of the supplier in question was 26 percent, which might not ordinarily result in the position of dominance. But with ABG Oil having no other supplier to rely on, the enterprise became *relatively* dominant to it.[83] This helps understand how even comparatively small players in a relevant product market can become a dominant crisis, as in Giosa's example of local producers of masks and sanitisers suddenly finding themselves in the position of dominance, which allows them to charge excessively.[84]

There is nothing in Section 4 of the Act that prevents such an interpretation during extraordinary times. The criteria for inquiry into dominance under Section 19(4)(b) and 19(4)(f) – "*size and resource of the enterprise*" and "*dependence of consumers on the enterprise*", respectively – further support it. Excessive charging in hospitals in the relevant market for beds, diagnostic tests, medication, consumables, or PPE equipment can be looked into if it is in a dominant position *relative* to its consumers vying for scarce resources.

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[82] *Id.* at ¶ II(A).
[83] Pranvera Këllezi, *Abuse below the Threshold of Dominance? Market Power, Market Dominance, and Abuse of Economic Dependence, in* ABUSE OF DOMINANT POSITION: NEW INTERPRETATION, NEW ENFORCEMENT MECHANISMS? 77, 77 (Beatriz Conde et al. eds, 2008).
[84] Giosa, *supra* note 80, at 500.

Worries about overregulation can be offset by the fact that this interpretation was not accepted under normal conditions in EU jurisprudence. Such was the decision in *Metro*,[85] wherein a market share of 10 percent was held not indicative of dominance, unless under exceptional circumstances. Therefore, a similar interpretation in Indian competition jurisprudence would not be completely unfounded. At times of exceptional strain on healthcare infrastructure, it is quite easy to see how certain enterprises can become *relatively* dominant to their consumers, with their continued *dependence* resulting in exploitation.

V. ESTABLISHING ABUSE OF DOMINANCE

Any potential abuses are bound to fall within either Section 4(2)(a)(i) and (ii), *i.e.*, "*imposition of unfair conditions in purchase or sale*" and "*unfair price in purchase or sale of goods and services*", respectively. While the former is easier to establish and has more precedence in Indian competition law, it has limited application in our example as was discussed in Part III.

Diagnostic tests cannot be said to be unfairly tied to the treatment provided, since it is intrinsic to the latter, and the hospital needs to exercise a high degree of control over it for utmost care. Specific medications to be given in exact dosages according to a doctor's estimates are also not unfairly tied.[86] The same is with the case of hospital bed/room charges and

[85] Case C-26/76, Metro SB-Großmärkte GmbH & Co. KG v. Commission, 1977 E.C.R. 1875.
[86] *Max Super Speciality Hospital*, *supra* note 27, at ¶ 11.

prescribed diet-specific consumables. This is comparable to the ruling in *Fx Enterprise Solutions India Pvt. Ltd v. Hyundai Motor India Limited*,[87] where cancellation of warranty if the consumer uses non-authorized CNG kits was held to be justified on quality concerns, as otherwise, the OP would have to bear the price of repairs arising out of usage of such lesser quality kits. Imposing the condition of buying only authorized CNG kits is then, only rational. This is why claiming a tie-up arrangement under Section 3(4) are bound to fail as well.

The only option that remains is establishing unfair/excessive pricing. While hospitals can claim quality control as a requirement to disprove unfair conditions even in relatively standardized products such as glucose solutions,[88] a charge of excessive pricing would be harder to disprove. However, the general reluctance to go ahead with excessive pricing cases in various jurisdictions such as India, the EU and the USA needs to be addressed.[89] The common assumption that overcharging would naturally induce competitors into the market, which helps it become self-regulating, does not find much evidence in nascent or undersaturated markets such as the healthcare industry in India. Both supply and demand side factors – high natural and legal barriers to entry[90] and excessive inelastic

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[87] Fx Enterprise Solutions India Pvt. Ltd v. Hyundai Motor India Limited, 2017 SCC OnLine CCI 26.

[88] Nina Bernstein, *How to Charge $546 for Six Liters of Saltwater,* N. Y. TIMES (Aug. 25, 2013), https://www.nytimes.com/2013/08/27/health/exploring-salines-secret-costs.html.

[89] Ariel Ezrachi & David Gilo, *Are Excessive Prices Really Self-Correcting?*, 5(2) J. COMPETITION L. & ECON. 249, 249 (2009) ("**Ezrachi & Gilo**").

[90] In addition to being a heavily capital intensive and high risk enterprise, compliance with at least 20 laws and regulations is to be expected depending upon the state. *See* Indian

demand for a limited set of readily available resources in a given geographical market – prove this hypothesis unlikely. Any new entrants, as rare as they may be, are likely to stay on the "*fringe*"[91], with a limited share of the local market, still allowing major market players to continue charging excessively. Even if the new entrants have an advantage of the scalability of operations resulting in the capture of a comparatively larger market share, it goes against the understanding of collective dominance where both the incumbent and new enterprises have an incentive to keep the prices high in the face of lack of countervailing buyer power.

Hence, strict adherence to this *laissez faire* principle resulting in the reluctance to investigate excessive pricing abuses can cause insurmountable harm. Holding that the goal of a National Competition Authority ought to be focused on preserving competition rather than serving the ends of consumer welfare would preclude observing the structural issues in the market that led to such abuses.

However, there have been some cases that expound how to assess excessive pricing as in the EU. In *General Motors Continental NV v. Commission*,[92] it was held that abuse would exist if a price excessive to the products economic value is charged;. This decision was furthered in *United*

Medical Association, *Clinical Establishment Act Standards for Hospital (LEVEL 1A 1B),* CLINICALESTABLISHMENTS.GOV.IN (Feb. 29, 2016, 01:36 PM), http://clinicalestablishments.gov.in/WriteReadData/147.pdf.

[91] Ezrachi & Gilo, *supra* note 89, at 255.

[92] Case C-26/75, General Motors Continental NV v. Commission, 1975 E.C.R. 1367.

Brands Company v. Commission[93] through a two-step test – (i) what is the profit margin, *i.e.*, if the difference between the costs of production and price charged in excessive?; and (ii) whether the price charged is unfair in nature by itself, compared to other competing products, or over time, or in reference to difference geographical markets (the same product by the dominant firm in a different geographical market)?

This was approved and followed through in later cases,[94] where it was reiterated that mere existence on an excessive price is not abuse in itself. It must be looked into if such a price is unfair by itself – unfair by virtue of the extreme profit margin (ranging from 2000 to 5000 percent in many pharmaceutical company cases)[95], unfair when compared to other (albeit imperfectly substitutable) products (such as with many branded drugs in comparison with generic drugs after the expiry of patents), unfair due to sudden change over time (such as with the cost of face masks before and after the pandemic),[96] or unfair due to excessive variance in the price charged in different geographical locations (prices charged for diagnostic

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[93] Case C-27/76, United Brands Company and United Brands Continental BV v. Commission, 1978 E.C.R. 207.

[94] Case C-226/84, British Leyland Public Limited Company v. Commission, 1985 E.C.R. 3300, 3300-3306. *See also* Case COMP/A.36.568/D3, Scandlines Sverige AB v. Port of Helsingborg, 4 C.M.L.R. 1298 (2006).

[95] *Such as the UK Competition and Markets Authority, which applied the principles in United Brand and held that a margin of 2600 percent is excessive in itself. See* Napp Pharmaceutical Holdings Limited v. Director General of Fair Trading, [2002] EWCA (Civ) 796.

[96] Press Trust of India, *Coronavirus scare grips India: Price of N95 mask shoots up to Rs 500, sanitiser shortage in stores*, THE ECONOMIC TIMES (Mar. 19, 2020, 10:25 AM), https://economictimes.indiatimes.com/magazines/panache/coronavirus-scare-grips-india-price-of-n95-mask-shoots-up-to-rs-500-sanitiser-shortage-in-stores/articleshow/74476650.cms?from=mdr.

testing).[97] Hence, in the *United Brands Company v. Commission* itself, although it was claimed that the price was excessive, in comparison with other competitors it was found to be a mere difference of seven percent and not unfair, precluding abuse. This was adapted in the *Automobile Spare Parts*,[98] where it was found that there was a mark-up of 100 to 5000 percent on the parts as sold to the consumer, which in accordance with the test is excessive pricing.

In our relevant markets, as consumers have devolved into *price-takers,* many private hospitals, for example, had charged excessively for the PPE kits used by their staff.[99] Patients were being charged flat rates of around Rs. 10,000 per day, which would be equivalent to around 27 kits per day, if charged at the wholesale price.[100] The central government's guidelines[101] on rational usage of protective equipment, as well as the FICCI's estimates[102] apportioned the requirement as 3 to 4 kits per patient,

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[97] Economic Survey, *infra* note 108.
[98] *Automobile Spare Parts*, *supra* note 54.
[99] Anjaya Anparthi, *Private hospitals violating government norms on PPE cost, number,* THE TIMES OF INDIA (Sep. 13, 2020, 11:01 AM), https://timesofindia.indiatimes.com/city/nagpur/pvt-hospitals-violating-govt-norms-on-ppe-cost-number/articleshow/78083016.cms.
[100] Anoo Bhuyan, *Higher fees in private hospitals for personal protective equipment; Shortage in government hospitals*, INDIA SPEND (Jun 12, 2020), https://www.indiaspend.com/ppe-priced-high-in-private-hospitals-while-public-hospitals-face-shortage/.
[101] Ministry of Health and Family Welfare, Directorate General of Health Services, *Guidelines on rational use of Personal Protective Equipment*, MOHFW.GOV.IN (Mar. 24, 2020, 04:58 PM) https://www.mohfw.gov.in/pdf/GuidelinesonrationaluseofPersonalProtectiveEquipment.pdf.
[102] Federation of Indian Chambers of Commerce & Industry (FICCI), *FICCI Representation for Costing of COVID-19 beds for Private Sector,* FICCI.IN (Jun. 4, 2020, 02:55 PM), https://www.indiaspend.com/wp-content/uploads/2020/06/FICCI-Representation-on-Costing-of-COVID-19-beds-in-private-sector.pdf.

taking into consideration the shared usage of kits for a given patient load of the entire hospital. Even before the onset of the pandemic, the National Pharmaceutical Pricing Authority found the charges of a single injection to be marked up by over a 1000 percent, from the wholesale price of Rs.13.64 to the hospital charge of Rs. 189.95.[103] Co-ordination with the National Pharmaceutical Pricing Authority would also reveal the markup in prices of scheduled drugs, which in many cases has resulted in excessive profiteering of hundreds of crores.[104] Efforts to charge above the coverage offered by insurance schemes, such as Ayushman Bharat, can also be seen as excessive pricing, with marking up costs of the requisite medicines and beds/hospital rooms,[105] further exacerbated during health emergencies. These are cases of excessive pricing *in itself*.

Additionally, while there has always been a high markup on diagnostic tests, with a variance of around a 1000 percent,[106] there has been

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[103] Priyanka Vora, *Private hospitals are inflating medical bills, says drug pricing authority*, SCROLL.IN (Feb. 20, 2018, 06:39 PM) https://scroll.in/latest/869412/new-drugs-being-made-to-avoid-price-controls-private-hospitals-overcharging-hugely-nppa-report.

[104] National Pharmaceutical Pricing Authority of India (NPPA), Ministry of Chemicals and Fertilizers, Government of India, *Year wise overcharging up to March 2021*, NPPAINDIA.IN https://www.nppaindia.nic.in/en/utilities/overcharging-status/year-2021/ (last updated Aug. 17, 2021).

[105] Kamala Thiagarajan, *Covid-19 exposes the high cost of India's reliance on private healthcare*, 370 BMJ 3506 (2020). *See also* Sunitha Rao R, *Hospitalisation is 6 times more expensive in private sector: Study,* THE TIMES OF INDIA (Jan. 1, 2020, 06:35 AM), https://timesofindia.indiatimes.com/city/bengaluru/hospitalisation-is-6-times-more-expensive-in-private-sector-study/articleshow/73052991.cms.

[106] Economic Survey 2018*, Over 1000% difference in medical test prices across cities: Will govt standardise rates?* THE ECONOMIC TIMES (Jan. 29, 2018, 05:11 PM), https://economictimes.indiatimes.com/wealth/personal-finance-news/over-1000-difference-in-medical-test-prices-across-cities-will-govt-standardise-rates/articleshow/62696175.cms ("**Economic Survey**").

a significant rise in the price of tests such as D-dimer, which are required for regular monitoring of COVID patients.[107] Extreme and sudden price hikes before and after the pandemic, as well as over different geographical locations such as in areas of high stress with a greater number of COVID cases than the national average are also hotspots for such abuses.[108] Along with the information available in the public domain, advocacy efforts[109] to spread awareness would help bring out even more incidents of such abuse.

However, the difficulties in reaching an aggregable methodology to determine excessive pricing have been highlighted in EU Competition jurisprudence,[110] and *HT Media Limited v. Super Cassettes Industries Limited*[111] in India. In this case, a radio station alleged that due to the dominant position of the OP (which had the licencing rights to the most popular music, without which radio stations found fewer listeners tuning in), they were able to levy an excessive price of Rs. 661 per needle hour of music, as compared to its competitors. It was also charging radio stations commitment charges of around 30-50 percent of the revenue arising out of

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[107] Gauttam, *supra* note 29.

[108] Ayshee Bhaduri, *Kerala, Maharashtra continue to top list of worst-hit Indian states,* HINDUSTAN TIMES (Aug. 10, 2021, 04:49 PM), https://www.hindustantimes.com/india-news/covid19-kerala-maharashtra-continue-to-top-list-of-worst-hit-indian-states-101628592618893.html.

[109] United Nations Conference on Trade and Development (UNCTAD), *Competition advocacy during and in the aftermath of the COVID-19 crisis*, TD/B/C.I/CLP/58 (April 28, 2021) available from https://unctad.org/system/files/official-document/ciclpd58_en.pdf ("**UNCTAD**").

[110] DONOGHUE & PADILLA, *supra* note 67.

[111] HT Media Limited v. Super Cassettes Industries Limited, 2014 SCC OnLine CCI 120.

playtime, irrespective of whether the former's music is played. The CCI noted that:

> "*[…] determining whether a price is excessive is an uncertain and difficult task. The opposite party has submitted that cost analysis for setting the license fee is not possible as the cost of a sound recording is reflected in the acquisition price paid as 'royalty' to the owners, whereas if the sound recording is developed in-house, the cost is categorized as 'recording expenses'. As against the said direct costs, the opposite party has various avenues for commercially exploiting the same and it is very difficult to apportion the cost of acquisition of sound recording to different revenue streams. Moreover, certain sound recording may be expensive to acquire but the music may turn out to be a flop, the reverse may also be true. Therefore, the value of a particular sound recording would depend upon its popularity and not its cost.*"[112]

Due to the difficulty in ascertaining the concrete costs incurred by the OP in the production and distribution of the music, along with a variation in cost depending upon the popularity of the music, the CCI held that excessive pricing could not be proved. While the kind of methodology to be used in ascertaining prices (such as whether a calculation of marginal costs, long-term average costs or so on, is appropriate, and whether the scalability of its operations and cross-subsidization must be considered)[113] is an issue that arises with manufacturers/producers charging excessive

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[112] *Id.* at ¶198.

[113] Alla Pozdnakova, *Excessive Pricing and the Prohibition of the Abuse of a Dominant Position under Article 82 EC,* 33 WORLD COMPETITION L. & ECON. REV. 117, 120 (2010).

prices, excessive pricing claims in hospitals as discussed above arise as a result of markup of prices brought from wholesalers/producers.

Therefore, since the means of production does not have to be looked into, apportioning the costs, and assessing how excessive and then unfair they are is relatively easier. This can be done taking into consideration the supply disruptions due to the onset of the pandemic,[114] and the additional wages given to a staff working in such precarious conditions as additional costs.[115] The task becomes even easier in cases where state governments supplied hospitals with the likes of ventilators and PPE kits.[116] While there is no benchmark on what can be held as excessive, taking into consideration the prevailing situation, markups that exceed the usual standards of overall profitability can be determined as abuse. In a majority of excessive pricing cases, the unfair profits ranging from hundreds to thousands of percent were held *ex facie* excessive.[117]

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[114] Anu Sharma et al., *COVID-19: Impact on Health Supply Chain and Lessons to Be Learnt*, 22 J. HEALTH MGMT. 248, 248 (2020).

[115] K. Shiva Shanker, *Corporate hospitals to pay more for COVID duties*, THE HINDU (Jul. 26, 2020, 8:22 AM) https://www.thehindu.com/news/national/telangana/corporate-hospitals-to-pay-more-for-covid-duties/article32194992.ece. *See also* Gulal Salil, *Junior doctors on Covid-19 duty are demanding better pay and work conditions*, SCROLL.IN (Jul. 20, 2021, 1:30 PM), https://scroll.in/article/1000080/junior-doctors-on-covid-19-duty-are-demanding-better-pay-and-work-conditions.

[116] Manoj More, *PCMC donates 35 ventilators to 7 top private hospitals*, THE INDIAN EXPRESS (Apr. 27, 2021, 12:31 AM), https://indianexpress.com/article/cities/pune/pcmc-to-donate-35-ventilators-to-top-private-hospitals-amid-rising-demand-7289667/. *See Also* Legal Correspondent, *10,300 PPE kits given to frontline workers daily,* THE HINDU (Jul. 30, 2020, 12:21 AM), https://www.thehindu.com/news/national/tamil-nadu/10300-ppe-kits-given-to-frontline-workers-daily/article32226082.ece.

[117] Giosa, *supra* note 80, at 504.

Now, onto the question of penalty. While the amount of penalty, directions to stop abusive behaviour, and power to pass compensation to the aggrieved under the residuary power of Section 27(g)[118] of the Act are obvious solutions, two issues arise – (i) it does not resolve the issues present with the market structure that allowed such abuse to take place; and (ii) it is a time-consuming process, much like the different alternatives consumers can pursue such as in consumer fora.

Firstly, the asymmetry of information that reduces the informed choice of the consumer must be remedied. In such crises, real-time approximation of charges per day in terms of differentiated hospital beds such as ICU oxygen and non-oxygen beds, ventilator beds, rooms, diagnostic tests (taking into consideration the past history of treatment of the patients), the wholesale or average prices at which the likes of PPE kits, saline solutions, syringes, medications and consumables are bought by the hospital, should be provided.

In cases where price leadership or signalling is being followed, or even differential but excessive prices are present, enterprises experience a downward pressure to cut prices or undercut each other, now that consumers have information to choose which hospital (as compared to services taken up by word of mouth or limited knowledge).[119] To a lesser

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[118] "*Orders by Commission after inquiry into agreements or abuse of dominant position.—Where after inquiry the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section 3 or section 4, as the case may be, it may pass all or any of the following orders, namely:—(g) pass such other order as it may deem fit.*"

[119] Id.

extent, it can help stabilize rates across different geographical locations as well. Various state governments already maintain databases for the number of vacancies in COVID-19 hospitals.[120] Through competition advocacy and policy efforts,[121] even without reference of a dispute to the CCI, such a system can be actualized.

Secondly, to keep up with the time constraint, motivating enterprises to set lower prices by making available the option of 'commitment decisions' as in the EU should be considered.[122] While not a perfect solution, and should not be used in more severe violations such as in cartelization cases, commitment decisions offer a mid-way between time-consuming litigation to take punitive measures and the need to immediately remove market distortions. Thus, this has been a recent trend in pharmaceuticals in the EU.[123] The European Commission gives the enterprise an option to "self-correct" deviant tactics used, which could otherwise be laid bare if the former continues the investigation. Legally binding undertakings to correct behaviour in exchange for a halt on

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[120] Various states such as Andhra Pradesh, Madhya Pradesh, Karnataka, Kerala Odisha, Meghalaya, Punjab, Rajasthan and so on keep such databases. E.g., Covid-19 Jagartha Hospital/CFLTC/CSLTC Dashboard, NATIONAL INFORMATICS CENTRE KERALA (2021) https://covid19jagratha.kerala.nic.in/home/addHospitalDashBoard (last visited Nov. 2, 2021).

[121] The Competition Act, 2002, No.12, Acts of Parliament, 2003 (India), § 49**.** *See also* UNCTAD, *supra* note 109.

[122] Giosa, *supra* note 80, at 505.

[123] Darach Connolly et al., *Learning the Lessons on Excessive Pricing from Aspen,* KLUWER COMPETITION LAW BLOG (Jun. 1, 2021, 06:10 PM), http://competitionlawblog.kluwercompetitionlaw.com/2021/06/01/learning-the-lessons-on-excessive-pricing-from-aspen/.

investigation takes place, while a violation or inadequacy of efforts to remove alleged behaviour can re-open litigation. Inclusion of collective jurisprudence would certainly be helpful here, as it can serve to bring under the CCI's purview, multiple instances of abuse in a geographical market.

The Competition (Amendment Bill), 2020[124] suggested an explicit inclusion of such commitment decisions into the Act, but the same is still possible by virtue of the aforementioned residuary power of the CCI in Section 27(g), as already upheld by the Madras High Court with regards to similar consent agreements such as settlements.[125] Both these measures also put to rest the worry of heavy-handed interference in the market as is with the case of price capping,[126] sustaining the principle of freedom of trade, and still protecting the interests of consumers.

VI. CONCLUSION

The COVID-19 pandemic has again brought to light, the various ways in which enterprises in healthcare delivery sector may abuse their dominant positions in LMIC markets. While countries with developed public-funded healthcare systems such as the UK and in the EU debate on the extent of competition to be permitted amongst publicly funded undertakings and the level of state aid that ought to be given without

[124] The Draft Competition (Amendment) Bill, 2020 (India), § 48B (Feb. 12, 2020).
[125] Tamil Nadu Film Exhibitors Association v. CCI & Ors, (2015) 2 Comp LR 420 (Mad).
[126] Murali Neelakantan, *Is Competition Law The Analgesic For The Indian Healthcare Sector?,* 27(2) NLSIR 157, 157-167 (2015).

distorting competition,[127] the need for better public healthcare infrastructure is felt in countries like India.

While competition law can offer behavioural (and to a limited extent, structural) remedies in such times of crises, it cannot fill the perennial gap left by inadequate public healthcare, even during non-emergency periods. There is an urgent need to increase resource spending, increase the efficiency and number of public healthcare centres, increase the doctor and nurse to population ratios and so forth.[128] To that extent, taking into consideration this limitation of India's healthcare delivery systems, an attempt has been made to harmonize the extraordinary circumstances of such health emergencies with existing national and international jurisprudence, and expand upon the role of CCI in correcting market distortions.

[127] Goddard, *supra* note 44.
[128] Anup Karan et al., *Size, composition and distribution of health workforce in India: why, and where to invest?*, 19 HUM. RESOURCES FOR HEALTH 39, 39 (2021).