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RV Law Journal is the flagship journal of the RV Institute of Legal Studies. It is published twice a year. The journal carries blind peer-reviewed Articles, Case Comments and Book Review. The Law Journal was launched as a cognizance of the reality that law colleges have obligations closer to the society in which they exist and ought to be a source of information and guidance for the same.

The primary objective behind the inception of the RV Law Journal is to provide a forum to writers, enabling them to voice their opinions about the contemporary legal issues of the Indian society. Apart from that, the RV Law Journal promotes and endeavours to foster a culture of serious academic research and writing amongst the Research Scholars, Academicians and Students. It is the journal's objective to publish articles that inspire thought, challenge the unquestioned norm and demand a change in legal thought that requires such scrutiny. It is the journal's policy to publish articles of relevance to Indian law that have a direct nexus with contemporary issues of economic, political, legal and social significance.

The driving force of RV Law Journal is its Advisory Board and Editorial Committee which is comprised of experts in different field of Law. It is run by a Board of Editors, who report to the Editor-in-Chief, the Principal of RV Institute of Legal Studies. Our First issue, presents a diverse selection of stimulating articles from eminent scholars and a student.

The institution expresses its sincere gratitude to authors who have chosen RV Law Journal to disseminate their research. Further, it would like to thank Patron in chief, Patrons, Editorial Board members and Staff of RVILS for the success of this Journal. The institution is pleased to receive contributions for our next issue from Judges, Advocates, Academicians and Research Scholars to ensure the consistency and the success of the Journal.

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Advancing Maternity Rights in the Indian Workplace: A Framework For Policy and Implementation

*Dr. farzeen Bano**

1. Introduction

Maternity rights form a cornerstone of women's rights and gender equality in the workplace, encompassing a range of legal provisions and protections aimed at ensuring the well-being and empowerment of women during pregnancy, childbirth, and beyond. In recent years, India has witnessed significant strides in advancing maternity rights through legislative reforms and policy interventions. The article provides an overview of recent developments in maternity rights in India, highlighting key legislative changes and the persistent challenges that warrant attention.

Importance of Maternity Rights for Women's Empowerment and Gender Equality

The establishment of the International Labour Organization (ILO) in 1919 marked a pivotal moment in recognizing maternity as a societal responsibility and drafting provisions to safeguard the rights of working women during maternity. Maternity protection is not only a collective obligation but also yields both individual and communal benefits. It is integral to various development and rights agendas, underscoring its significance in promoting women's empowerment and gender equality.

Maternity protection holds paramount importance for several reasons:

- ❖ It is inherent to the fundamental human rights framework, ensuring that women are afforded the necessary support and accommodations during maternity.
- ❖ As a critical component of gender equality efforts, maternity protection aims to level the playing field for women in the workforce, enabling them to balance their caregiving responsibilities with professional pursuits.

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- ❖ Maternity protection initiatives contribute significantly to enhancing the health outcomes of both mothers and children, thereby fostering healthier communities and societies.
- ❖ By facilitating women's participation in the labor market and providing financial stability during maternity, maternity protection contributes to economic growth and poverty alleviation efforts.
- ❖ Maternity rights are intertwined with the broader Decent Work Agenda, emphasizing the importance of dignified and equitable employment conditions for all workers.

Given its multifaceted benefits, maternity protection aligns with the objectives of various international development frameworks, including the Millennium Development Goals (MDGs). It directly contributes to the achievement of MDG 1 by addressing poverty and hunger, MDG 3 by advancing gender equality and women's empowerment, MDG 4 by reducing child mortality rates, MDG 5 by improving maternal health outcomes, and MDG 6 by combating diseases such as HIV/AIDS and malaria.¹

2. Recent Legislative Advances

In recent years, India has witnessed significant legislative advancements aimed at enhancing maternity rights and addressing gender-based discrimination in the workplace. These legislative changes have profound implications for women's rights and workplace dynamics, necessitating a comparative analysis to assess their effectiveness and legal implications.

Analysis of Amendments to the Maternity Benefit Act, 1961: Implementation of Maternity Benefit Act 2017

The Maternity Benefit Act, 1961, underwent substantial amendments in 2017 to align with contemporary needs and promote gender equality in the workplace. The most notable amendment was the extension of maternity leave from 12 weeks to 26 weeks, providing women with more time to

¹ International Labour Organization, *Maternity Protection Resource Package: From Aspiration to Reality for All* (International Labour Office, Conditions of Work and Employment Programme, 2012) <<http://ilo.org> > wcms_242615PDF *Maternity and paternity at work – Law and practice across the world*> accessed 14 May 2024

recover from childbirth and bond with their newborns.² This amendment reflects India's commitment to meeting international standards, such as the International Labour Organization's Maternity Protection Convention, 2000, which recommends a minimum maternity leave of 14 weeks (ILO, 2000). The International Labour Organization's Maternity Protection Convention, 2000 (No. 183), serves as a benchmark for evaluating the adequacy of maternity rights legislation globally. It advocates for a minimum of 14 weeks of maternity leave, with provisions for cash benefits and job security during the maternity leave period.³

According to the International Labour Organization (ILO), there has been a perplexing trend in female labor force participation rates in India over the long term. From 1999-00 to 2011-12, female participation rates decreased from 34.1 percent to 27.2 percent, and significant gender disparities in participation rates continue to exist. The decline in women's labor force participation in India, which ranks among the lowest globally (ILO, 2014), highlights the urgent need for legislative reforms. Despite this concerning trend, the Amendment Act of 2017 marked a significant milestone in addressing longstanding deficiencies in the *Maternity Benefit Act, 1961*. Enacted in August 2016 by the Rajya Sabha and subsequently ratified by the Lok Sabha in March 2017, the amendments aimed to rectify fundamental shortcomings affecting women in the labor market.⁴

India's legal framework for maternity rights has undergone notable transformations in response to evolving societal norms and international standards. *The Maternity Benefit Act, 1961*, which originally provided for 12 weeks of maternity leave, has been subject to significant amendments in

2 Press Information Bureau, 'Maternity Benefit (Amendment) Act, 2017, which Provides for Paid Maternity Leave to Women Workers and Crèche Facility by Establishments Being Implemented' (Government of India, 13 February 2023) <<https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1898874#:~:text=Vide%20Section%205%20of%20the,the%20date%20of%20expected%20delivery>> accessed 10 May 2024

3 International Labour Organization, 'Maternity Protection Convention, 2000 (No. 183)' (International Labour Organization, 2000) <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C183> accessed 2 April 2024

4 Neysa Amber Gomes Desouza, 'Equality and Maternity Benefits for Women in the Labour Force' (2020) ILI Law Review (Winter Issue)

recent years to align with contemporary needs and aspirations of women in the workforce. The most notable amendment came in 2017, when the duration of maternity leave was extended to 26 weeks, positioning India among the countries with the most generous maternity leave policies globally.⁵ In addition to extending maternity leave, the amended Maternity Benefit Act, 2017, introduced progressive measures such as the provision for work-from-home options for women employees and the mandate for creche facilities in establishments with 50 or more employees. These reforms signify a paradigm shift towards recognizing and accommodating the diverse needs of working mothers in the Indian context. These enhancements represent a crucial step towards fostering a supportive work environment for women, facilitating their continued participation in the workforce while fulfilling their caregiving responsibilities.⁶ Looking ahead, the Indian government is considering mechanisms to hold employers of expectant fathers accountable for contributing to maternity benefits. This proposed initiative reflects a growing recognition of the shared responsibility in supporting working parents and promoting gender equality in the workplace.

Overall, the amendments to the *Maternity Benefit Act, 2017*, signify a positive shift towards addressing the challenges faced by women in balancing their professional and caregiving roles. By enhancing maternity rights and instituting supportive policies, the amended legislation seeks to promote women's economic empowerment and contribute to a more inclusive and equitable labor market landscape. The recent legislative advancements in maternity rights reflect India's commitment to promoting gender equality and ensuring the well-being of women in the workforce. However, to fully realize the potential of these legal reforms, continued efforts are needed to address implementation challenges and foster a culture of respect and inclusivity in Indian workplaces.

5 Press Information Bureau, 'Ministry of Labour & Employment to Hold Consultations on the Implementation of the Maternity Benefit (Amendment) Act, 2017' (Government of India, 19 June 2023) <<https://pib.gov.in/PressReleasePage.aspx?PRID=2000712#:~:text=For%20instance%2C%20the%20Maternity%20Benefit,for%20maternity%20benefits%20in%202023>> accessed 30 June 2024

6 Ministry of Labour and Employment, Ministry of Law and Justice (Legislative Department), 'The Maternity Benefit (Amendment) Act, 2017. No.6 OF 2017' (Government of India, 28 March 2017) <<https://labour.gov.in/filesPDFMaternityBenefitAmendmentAct,2017>> accessed 11 May 2024

3. Challenges Faced By Women After Becoming Mothers

The transition to motherhood often brings forth a multitude of challenges for women, especially in the context of returning to the workplace. Despite legislative protections, women frequently encounter discrimination and hurdles in the professional sphere, as highlighted by empirical data.

- a. **Workplace Discrimination:** A considerable proportion of mothers encounter discriminatory treatment during various stages of their maternity journey, encompassing pregnancy, maternity leave, and reintegration into the workforce. Additionally, a separate study published in *People Management* (2023) indicated that 52 percent of mothers have experienced some form of discrimination in the workplace,⁷ with one in five opting to leave their jobs subsequent to encountering negative or discriminatory incidents.⁸
- b. **Negative Impact on Health and Career:** Working mothers encounter a multitude of challenges in achieving a harmonious balance between their professional and familial obligations. The dichotomy between the aspiration for career advancement and the responsibilities associated with family management often poses a significant source of distress for them. This conflict manifests as a perpetual struggle between personal desires and societal expectations. It is commonly acknowledged that working women undertake dual roles, encompassing their primary employment responsibilities and the secondary duties of caregiving and household management. A truly exemplary working mother seamlessly integrates a flourishing career with effective maternal engagement.⁹ However, empirical evidence suggests that a significant proportion of working mothers experience heightened vulnerability to various health ailments, including anxiety, depression, cardiovascular diseases, obesity, sleep disorders, respiratory conditions, musculoskeletal disorders, and

7 Sara Savat, 'Mothers May Face Increased Workplace Discrimination Post-Pandemic, Research Warns: Biased Hiring Practices, Inflexible Schedules Disadvantage Mothers Across Labor Market' (Washington University St. Louis, 20 July 2021)

8 Dan Cave, 'Half of Mothers Experience Discrimination at Work, Study Finds' (*People Management*, 19 July 2023)

9 Dawn S Carlson et al, 'Health and Turnover of Working Mothers After Childbirth via the Work-Family Interface: An Analysis Across Time' (2011) 96(5) *Journal of Applied Psychology* 1045-54 <<https://doi.org/10.1037/a0023964>> accessed 1 May 2024

fatigue. Research findings indicate that approximately 75% of employed women contend with one or more health complications, underscoring the pervasive impact of these challenges on their overall well-being.¹⁰

- c. Work Family Conflict:** The transition to motherhood poses significant challenges for newly mothers as they navigate the complexities of balancing work and family responsibilities. Juggling the demands of a newborn alongside professional obligations can be overwhelming, leading to feelings of stress, fatigue, and uncertainty.¹¹ Newly mothers often grapple with adjusting to their new roles, managing childcare arrangements and maintaining productivity in the workplace. The lack of sufficient support systems and flexible work arrangements exacerbates these struggles, leaving many new mothers feeling torn between their career aspirations and their desire to nurture their family.¹² Despite these challenges, many newly mothers demonstrate resilience and resourcefulness in navigating these dual responsibilities, seeking out solutions such as remote work options, flexible schedules, and supportive childcare arrangements to mitigate the strain of work and family obligations (Grice, Mira M et al. 2008,¹³ Kelloway, E K, and B H Gottlieb, 1998¹⁴).

4. Challenges in Implementation of Laws

Addressing the implementation challenges of maternity rights in the Indian workplace requires an understanding of the cultural, societal, and structural barriers that hinder effective enforcement and compliance. Despite these legislative advancements, challenges persist in realizing maternity rights

10 Seema Sharma, 'Major Health Conditions Affecting Working Moms' (Financial Express, 16 February 2023)

11 Adrienne Cruz, 'Practices and Challenges on the Maternity Protection Convention, 2000 (No. 183) and the Workers with Family Responsibilities Convention, 1981 (No. 156): A Comparative Study' (2012) Bureau for Gender Equality, ILO

12 Jody Heymann and Alison Earle, 'The Work, Family, and Equity Index: How Does the United States Measure Up?' (2013) 152(3-4) International Labour Review

13 Mira M Grice et al, 'Flexible Work Arrangements and Work-Family Conflict After Childbirth' (2008) 58(7) Occupational Medicine 468-74 <<https://doi.org/10.1093/occmed/kqn090>> accessed 1 May 2024

14 EK Kelloway and BH Gottlieb, 'The Effect of Alternative Work Arrangements on Women's Well-Being: A Demand-Control Model' (1998) 4(1) Women's Health 1-18

in practice. Cultural norms and societal attitudes towards women's roles in the workplace and family continue to pose barriers to women's participation and advancement. Moreover, issues related to enforcement, awareness, and accessibility hinder the effective implementation of maternity rights legislation, particularly among informal sector, private sector and marginalized workers.

a. Childcare and Responsibility: The burden of childcare often falls disproportionately on mothers, particularly during the early years of a child's life. The high cost of childcare services in India poses a significant barrier to women's return to work, as many cannot afford to hire caregivers and juggle professional responsibilities simultaneously.¹⁵

b. Lack of Partner Support: Women's ability to re-enter the workforce and advance in their careers is contingent upon the support of their partners. However, not all partners are equally supportive, with some failing to share childcare responsibilities or accommodate flexible work arrangements, hindering women's professional aspirations.¹⁶ Partners can significantly impact the implementation of maternity laws by providing crucial support to pregnant employees. According to a study, partners' support during pregnancy is associated with better maternal health outcomes and higher rates of compliance with maternity leave policies.¹⁷ Additionally, research by Van Lonkhuijzen, R.M., Rustenhoven, H., de Vries, J.H.M. et al., (2023) highlights that partners' involvement in caregiving responsibilities can alleviate the burden on pregnant employees and facilitate their ability to take advantage of maternity leave provisions. Therefore, partners play a vital role in ensuring the effective implementation of maternity laws through their support and involvement during the prenatal and postnatal periods.¹⁸

15 Ankita Verma and Yashwant Singh Negi, 'Working Women and Motherhood – A Review' (2020) 25(1) *Annals of Agri-Bio Research* 170-78

16 Areej Alarifi and Abdulrahman S Basahal, 'The Role of Spousal Support in Working Mothers' Work-Life Balance' (2023) 16(4) *International Business Research Archives*

17 Lynlee R. Tanner Stapleton et al, 'Perceived partner support in pregnancy predicts lower maternal and infant distress' (2012) 26 *Journal of Family Psychology* 453. <<https://doi.org/10.1037/a0028332>>

18 RM Van Lonkhuijzen, H Rustenhoven, JHM de Vries et al, 'The Role of the Partner in the Support of a Pregnant Woman's Healthy Diet: An Explorative Qualitative Study' (2023) 23 *BMC Pregnancy Childbirth* 760 <<https://doi.org/10.1186/s12884-023-06072-9>> accessed 4 May 2024

c. Cultural and Societal Barriers: Social and familial expectations surrounding motherhood can exert significant pressure on women, influencing their decisions regarding career advancement. The fear of judgment and societal scrutiny often dissuades women from pursuing professional opportunities, perpetuating gender disparities in the workplace.

Cultural norms and societal expectations frequently reinforce gender roles and stereotypes, creating significant impediments to the implementation of maternal rights. In many Indian households, conventional gender norms dictate that women are largely responsible for caregiving and housework, while males are viewed as the principal breadwinners.¹⁹ As a result, women may feel pressured to prioritize their familial commitments above their jobs, resulting to reluctance to exercise their maternity rights at work. Furthermore, current cultural views toward parenthood may stigmatise women who prioritize their careers or seek concessions for pregnancy and childcare-related requirements. Discriminatory treatment can discourage employees from pursuing their rights.²⁰

Thus, whereas legislative frameworks exist to protect maternal rights and encourage women's involvement in the workforce, the continuation of discriminatory practices and structural hurdles highlights the need for coordinated measures to bridge the gap between policy purpose and implementation reality. To address these difficulties, stakeholders across sectors must work together to create an enabling climate in which women may prosper professionally and contribute meaningfully to the economy.²¹

d. Lack of Awareness and Compliance among Employers and Employees about metering leave implementation

A significant challenge in ensuring the effective implementation of maternity rights legislation is the lack of awareness and understanding

19 Maribel Delgado-Herrera et al, 'Relationship Between Gender Roles, Motherhood Beliefs and Mental Health' (2024) 19(3) PloS One e0298750 <<https://doi.org/10.1371/journal.pone.0298750>> accessed 20 April 2024

20 Ana Júlia Calegari Torres et al, 'The Impact of Motherhood on Women's Career Progression: A Scoping Review of Evidence-Based Interventions' (2024) 14(4) Behavioral Science 275 <<https://doi.org/10.3390/bs14040275>> accessed 30 April 2024

21 Navneet R, 'Maternity Leave Challenges and Acts' (2020) <<https://www.linkedin.com/pulse/maternity-leave-challenges-acts-navneet-raj>> accessed 4 May 2024

among both employers and employees. Many employers may not be fully informed about their obligations under maternity rights laws or may deliberately flout them due to cost concerns or misconceptions about the impact on productivity.²²

A study conducted by National Commission of Women (NCW) highlight that high awareness among the individuals affected by a law is crucial for its effective implementation. Research on the Maternity Benefit Act reveals that slightly over 50% of employed women are familiar with its existence. This percentage remains consistent across two groups: those who have previously taken maternity leave and those who haven't. These results emphasize the need to enhance awareness of the law, a necessity applicable to both nulliparous and parous women.²³

Similarly, employees, particularly those in informal or low-wage sectors, may be unaware of their rights or may hesitate to assert them due to fear of retaliation or job loss. This lack of awareness can perpetuate a cycle of non-compliance and impunity, undermining the intended protections of maternity rights legislation.²⁴

5. Enforcement Mechanisms And Capacity Building Needs

Effective enforcement mechanisms are essential for ensuring compliance with maternity rights laws and holding violators accountable. However, enforcement mechanisms in India often face challenges such as inadequate resources, capacity constraints, and bureaucratic inefficiencies. Labor inspectors tasked with monitoring compliance may lack the necessary training or resources to effectively enforce maternity rights laws, leading to

22 Amit Prasad, 'Maternity Benefit Act in India: Importance of Compliance for Large Employers' (Sunshine Preschools, 15 May 2023) <<https://www.sunshinepreschools.com/blog/maternity-benefit-act-in-india-importance-of-compliance-for-large-employers>> accessed 6 May 2024

23 Ranjana Kumari, 'Analysis on Effectiveness of the Implementation of the Maternity Benefit Act, 1961' (National Commission for Women, Government of India Centre for Social Research, New Delhi, May 2014)

24 Divya Ravindranath, Antara Rai Chowdhury, Aditi Surie and Gautam Bhan, 'Effects of Social Protection for Women in Informal Work on Maternal and Child Health Outcomes: A Systematic Literature Review' (Indian Institute of Human Settlement, 2021) <<https://doi.org/10.24943/ESPWIWMCHO01.2021>> accessed 1 May 2024

a lack of accountability and impunity for violators. Furthermore, capacity building initiatives aimed at raising awareness and building the capacity of employers, employees, and enforcement agencies are crucial for overcoming implementation challenges. Training programs, workshops, and outreach campaigns can help disseminate information about maternity rights laws, promote compliance, and empower women to assert their rights in the workplace.²⁵

In conclusion, addressing the implementation challenges of maternity rights in the Indian workplace requires a multi-faceted approach that addresses cultural, societal, and structural barriers, enhances awareness and compliance, and strengthens enforcement mechanisms.

a. Strengthening Enforcement Mechanisms and Monitoring Systems:

Effective enforcement mechanisms are essential for ensuring compliance with maternity rights legislation and holding violators accountable. This requires investing in robust monitoring systems, enhancing the capacity of labor inspectors, and streamlining reporting and redressal mechanisms. Moreover, stringent penalties should be imposed on employers found guilty of violating maternity rights laws to deter future misconduct and promote a culture of compliance.

b. Promoting Awareness and Education Campaigns:

Raising awareness about maternity rights laws and promoting gender-sensitive attitudes and behaviors are critical for fostering a supportive work environment. Employers, employees, and stakeholders should be provided with comprehensive information about their rights and obligations under maternity rights legislation through targeted education campaigns, workshops, and outreach programs. Moreover, incorporating gender equality and diversity training into workplace training programs can help challenge stereotypes and biases and promote a culture of inclusivity.

c. Enhancing Supportive Work Environments and Flexible Policies:

²⁵ International Labour Organization, *Maternity Protection Resource Package: From Aspiration to Reality for All* (International Labour Office, Conditions of Work and Employment Programme, 2012) <<http://ilo.org>> wcms_242615PDF *Maternity and paternity at work – Law and practice across the world*> accessed 14 May 2024.

Creating supportive work environments that accommodate the diverse needs of employees, including pregnant and nursing mothers, is essential for promoting gender equality and retention. Employers should implement flexible work policies, such as telecommuting options, flexible hours, and job-sharing arrangements, to facilitate work-life balance.²⁶ Additionally, investing in infrastructure such as on-site childcare facilities and lactation rooms can help remove barriers to women's participation in the workforce and promote their retention and advancement.²⁷ & ²⁸

d. Addressing Intersectional Challenges and Vulnerabilities:

Recognizing and addressing intersectional challenges and vulnerabilities faced by marginalized groups is crucial for ensuring inclusive and equitable access to maternity rights. Policymakers should adopt an intersectional approach that takes into account factors such as caste, class, ethnicity, disability, and migrant status in designing and implementing maternity rights policies. Moreover, targeted interventions and affirmative action measures should be implemented to address the specific needs of vulnerable populations and promote their inclusion in the workforce.

In conclusion, implementing these policy recommendations requires a concerted effort from policymakers, employers, civil society organizations, and other stakeholders. By strengthening enforcement mechanisms, promoting awareness, enhancing supportive work environments, and addressing intersectional challenges, India can take significant strides towards realizing the full potential of its maternity rights legislation and promoting gender equality in the workplace.

26 Press Information Bureau, 'Maternity Benefit (Amendment) Act, 2017, which Provides for Paid Maternity Leave to Women Workers and Crèche Facility by Establishments Being Implemented' (Government of India, 13 February 2023) <<https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1898874#:~:text=Vide%20Section%205%20of%20the,the%20date%20of%20expected%20delivery>> accessed 10 May 2024

27 De Souza, Carolina Belomo et al, 'Breastfeeding Support Rooms and Their Contribution to Sustainable Development Goals: A Qualitative Study' (2021) 9 *Frontiers in Public Health* 732061 <<https://doi.org/10.3389/fpubh.2021.732061>>.

28 Morgan G, Bajpai A, Ceppi P, Al-Hinai A, Christensen T, Kumar S, Crosskey S & O'Regan N, Infrastructure for gender equality and the empowerment of women (UNOPS, Copenhagen, Denmark, 2020) <<http://www.unops.org>>.

6. Stakeholder Engagement

Engaging stakeholders is crucial for effectively implementing maternity rights policies and promoting gender equality²⁹ in the Indian workplace. This section discusses the roles of government agencies, employers, trade unions, and civil society organizations, emphasizing the importance of collaboration and multi-stakeholder partnerships.

a. Role of Government Agencies

Government agencies play a central role in formulating and implementing policies related to maternity rights and workplace gender equality. These agencies are responsible for drafting legislation, enforcing compliance, and providing support services to stakeholders. For example, the Ministry of Labour and Employment oversees the implementation of the *Maternity Benefit Act, 1961*, while the Ministry of Women and Child Development focuses on promoting women's rights and gender equality initiatives.³⁰ Additionally, labor departments at the state level play a vital role in monitoring compliance and providing support to employers and employees.

b. Role of Employers

Employers have a responsibility to comply with maternity rights legislation and create supportive work environments that accommodate the needs of pregnant and nursing mothers. This includes providing maternity leave, facilitating access to childcare facilities, and offering flexible work arrangements. Moreover, employers can promote gender equality in the workplace by adopting non-discriminatory hiring practices, addressing gender pay gaps, and providing opportunities for women's advancement and leadership development.

29 International Labour Organization, *Maternity Protection Resource Package: From Aspiration to Reality for All, Module 4: Maternity Protection at work: Who are the main stakeholders? (Conditions of Work and Employment Programme (TRAVAIL), 2012)* ISBN: 978-92-2-125487-4

30 Press Information Bureau, 'Ministry of Labour & Employment to Hold Consultations on the Implementation of the Maternity Benefit (Amendment) Act, 2017' (Government of India, 19 June 2023) <<https://pib.gov.in/PressReleasePage.aspx?PRID=2000712#:~:text=For%20instance%2C%20the%20Maternity%20Benefit,for%20maternity%20benefits%20in%202023>> accessed 30 June 2024

c. Role of Trade Unions

Trade unions play a critical role in advocating for the rights of workers, including maternity rights. They can negotiate collective bargaining agreements that include provisions for maternity leave, benefits, and workplace accommodations. Additionally, trade unions can raise awareness among their members about their rights under maternity rights legislation, provide support to women facing discrimination or harassment, and advocate for policy reforms to address gaps and shortcomings in existing laws.³¹

d. Role of Civil Society Organizations

Civil society organizations (CSOs) play a vital role in monitoring implementation, providing advocacy, and offering support services to women in the workforce.³² CSOs can conduct research and analysis to assess the impact of maternity rights policies, raise awareness about gender inequalities in the workplace, and mobilize public support for policy reforms (UN Women, 2019). Moreover, CSOs can provide legal assistance, counselling, and training to women experiencing discrimination or harassment in the workplace, empowering them to assert their rights and seek redressal.

e. Importance of Collaboration and Multi-stakeholder Partnerships

Collaboration and multi-stakeholder partnerships are essential for addressing complex challenges and promoting sustainable change. By bringing together government agencies, employers, trade unions, and civil society organizations, stakeholders can leverage their respective expertise, resources, and networks to develop comprehensive solutions and drive collective action. Collaboration fosters dialogue, builds trust, and enhances coordination among stakeholders, leading to more effective policy implementation and greater impact on the ground. Stakeholder engagement

31 Josephine Moeti-Lysson and Henry Ongori, 'Effectiveness of Trade Unions in Promoting Employee Relations in Organisations' (2011) *Global Journal of Arts and Management*, ISSN 2249-2658 (Online): 2249-264X (Print).

32 Tania Afrin Tonny and Jewel Ahmed, *Civil Society's Contribution to Women Empowerment: Bangladesh Perspective (Building Sustainable Communities, 2020)* ISBN: 978-981-15-2392-2

is key to advancing maternity rights and gender equality in the Indian workplace. By recognizing the roles of different stakeholders, fostering collaboration, and promoting multi-stakeholder partnerships, policymakers and practitioners can create an enabling environment for positive change and ensure the rights and well-being of women in the workforce.

7. Conclusion

In conclusion, advancing maternity rights in the Indian workplace is essential for promoting gender equality, empowering women, and fostering inclusive economic growth. This research article has highlighted key findings, policy recommendations, and future directions for policymakers, practitioners, and stakeholders to consider.

Recapitulating the key findings, it is evident that while significant progress has been made in enhancing maternity rights legislation, implementation challenges persist. Strengthening enforcement mechanisms, promoting awareness, creating supportive work environments, and addressing intersectional challenges are crucial steps towards realizing the full potential of maternity rights legislation.

The call to action for advancing maternity rights in the Indian workplace requires collective efforts from government agencies, employers, trade unions, civil society organizations, and other stakeholders. By prioritizing gender equality, investing in supportive policies and programs, and fostering multi-stakeholder partnerships, India can create an enabling environment where women can fully participate in the workforce, contribute to economic growth, and achieve their full potential.

Future Directions

Exploring future directions in maternity rights legislation involves identifying emerging trends, innovations, and potential areas for further research and policy intervention.

i. Emerging Trends and Innovations in Maternity Rights Legislation

As societies evolve and work patterns change, maternity rights legislation must adapt to meet the evolving needs of women in the workforce. Emerging trends include expanding coverage to include non-traditional

forms of employment such as gig work and freelancing, introducing provisions for paternity leave and shared parental leave to promote gender equality in caregiving responsibilities, and incorporating flexible work arrangements to accommodate the diverse needs of employees. Moreover, advancements in technology, such as telecommuting and digital platforms, offer new opportunities for enhancing work-life balance and supporting working parents.

ii. Potential Areas for Further Research and Policy Intervention

There are several areas for further research and policy intervention to strengthen maternity rights and promote gender equality in the Indian workplace. Research can explore the impact of maternity rights legislation on women's labor force participation, career trajectories, and economic empowerment. Additionally, studies examining the intersectional challenges faced by marginalized groups, such as women from low-income households, rural areas, and minority communities, can inform targeted policy interventions to address their specific needs. Furthermore, policy interventions may focus on addressing systemic barriers to women's advancement, such as gender-based discrimination, lack of access to education and training opportunities, and limited representation in decision-making positions.

Is India Ready to Introduce Outcome Related Fee Structure Agreements (ORFSA)?

*Mr. Nihal Raj**

1. Introduction:

Arbitration is an Alternative Dispute Resolution mechanism in India and the same is governed by India under the Act. The 1940 Act was in operation till we were given the 1996 Act which we still follow to this date. To solve the discrepancies in the 1940 legislation the 1996 legislation was drafted. The Act is drafted on the basis of United Nations Commission on International Trade Law Model Law ('UNCITRAL'), it governs both domestic and international arbitration. Under the Act an International Commercial Arbitration is defined as an Arbitration arising from a legal relationship which must be considered commercial, where either of the parties is a foreign national or resident or is a foreign body corporate or is a company, association or body of individuals whose central management or control in exercise in some other country or government of a foreign country.¹ The Act despite being drafted on the UNCITRAL Model Principles required many significant amendments which would make Arbitration a lucrative mode of Alternate Dispute Resolution ('ADR') mechanism and help India evolve as a hub for International hub for Arbitration. The Act underwent significant amendments in the years 2015, 2019, 2020 and 2021. These amendments curtailed judicial intervention in arbitral proceedings, enabled arbitral institutions to appoint arbitrators, creating additional grounds to get a stay on the enforcement of an award and created avenues for foreign arbitrators to preside over arbitral disputes between any two parties. While some would like to believe that the 1996 legislation after undergoing essential amendments has evolved as a suitable Code to govern domestic and international arbitration, the truth is that the Act is far from being counted amongst prominent International Arbitration legislation around the world. The Act is yet to incorporate relevant international standards followed by recognized institutions around the world. The legislation does not include

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1 Arbitration and Conciliation Act 1996, s 2(f).

some essential concepts such as emergency arbitration and third-party funding which are likely to increase the competitiveness of the Indian Arbitral institutions in the International Business Community.

In a recently held Arbitrate in India Conclave 2022 hosted by the Indian Dispute Resolution Center, the prime agenda of the conference was ‘Whether India can grow to becoming a hub for international arbitration like Singapore or Hong Kong?’² In the domain of International Commercial Arbitration, Singapore International Arbitration Center (‘SIAC’) has a track record of providing neutral arbitration services to the global business community and it has been ranked second in the world according to the 2021 International Arbitration survey of Queen Mary University of London and White & Case.³ Also Hong Kong through Hong Kong International Arbitration Center (‘HKIAC’) has made significant contributions to the development of International Commercial Arbitration by playing an active role in promoting and implementing best practice of resolving international commercial land investment disputes.⁴

Arbitration Institutions like the SIAC and HKIAC have proven to be the hub of international arbitration center, because these establishments have made consistent efforts to adopt the modern practices of international arbitration by incorporating technology and facilitating remote proceedings, given the pandemic has created an opportunity to capitalize on virtual proceedings and the practice of revising the rules to ensure they conform with the changing legal system. Amongst many international practices adopted by these institutions one such concept is Outcome Related Fee Structure Agreements.

2 Sheerene Mohamed, ‘Can India Become a Hub for International Arbitration?’ (The Leaflet, 14 June 2022) <<https://theleaflet.in/can-india-become-a-hub-for-international-arbitration/>> accessed 14 September 2022.

3 Asia Business Law Journal, ‘Singapore’s secret recipe’ (Asia Business Law Journal, 23 July 2021) <<https://libguides.swansea.ac.uk/oscola/websites>> accessed 16 June 2022.

4 Matthew Gearing and Joe Liu, ‘The Contributions of the Hong Kong International Arbitration Center to Effective International Dispute Resolution’, in Peter Quayle and Xuan Gao (eds), *International Organizations and the Promotion of Effective Dispute Resolution* (Brill Press 2019)

Institutions like SIAC and HKIAC invited reforms proposals on the recommendations to allow different types of ORFSA as it would help level the playing field for international arbitration in three key aspects:

- i) ORFSA allows parties irrespective of their stature to present their case on an equal footing with better funded opponents where they would suffer from dearth of resources to do so.
- ii) It has increased the competitiveness amongst qualified arbitration practitioners in other jurisdictions that allow for ORFSA.
- iii) Heeding to the significant demands for ORFSA from clients will ensure that Hong Kong and Singapore's continue to remain as leading international arbitration seats.⁵

The inclusion of ORFSA was possible because Singapore's legal system was much ahead in the domain of international arbitration where they had allowed for third party funding for arbitration despite the Singapore courts taking the view that the doctrine of champerty should apply to all dispute resolution proceedings.⁶ When it comes to Hong Kong recently an event was organized by the Department of Justice and the Law Society of Hong Kong on the agenda 'ORFSA A new chapter to Arbitration in Hong Kong'. The panel explored an approach by which the legal system in Hong Kong can adopt the system of third-party funding which was prohibited for quite some time.⁷

This article is going to explore the possibilities of adopting Outcome related Fee Structures for Arbitration in India. The article shall first explain the concept of Outcome Related Fee Structures ('ORFSs') and the types of ORFSs that exist and list out the jurisdictions that have adopted ORFSs,

5 Nils Eliasson & Edward Taylor, 'Levelling the International Arbitration Playing field: ORFS Reform in Hong Kong and Singapore' (2021) *Asian Dispute Review*, < https://www.shearman.com/-/media/files/perspectives/2021/04/levelling-the-international-playing-field_eliasson_taylor_ia_043021.pdf > accessed 14 September 2022.

6 Kathryn Sanger & Briana Young, 'Outcome Related Fee Structures for Arbitration' (2020) *The Law Reform Commission of Hong*, < https://www.hkreform.gov.hk/en/docs/orfsa_e.pdf > accessed 12 August 2022.

7 Michael Grinter, 'Hong Kong to Introduce Outcome Related Fee Structures for Arbitration' (Hong Kong Maritime Hub, 20 May 2022) <<http://www.hongkongmaritimehub.com/hong-kong-to-introduce-outcome-related-fee-structures-for-arbitration/>> accessed 15 September 2022.

from there it will throw light on the default existing legal system in India relating to third party funding, champerty and maintenance, following which it highlights the advantages for India adopting ORFSs and explore the possibility of ORFSs inclusion in Mediation.

2. Orfsa And Types

The term ORFSs is a term used in the Consultation Paper drafted by the Outcome Related Fee Structures for Arbitration Sub-Committee of the Law Reform Commission of Hong Kong. The Sub-Committee, co-chaired by Ms. Kathryn Sanger and Ms. Briana Young of Herbert Smith Freehills analyzed the legal regimes of different jurisdictions and compiled their recommendations on Hong Kong joining the list. The term ORFSs is an agreement between a lawyer and client whereby the Lawyer advises on contentious litigation and arbitration proceedings and the Lawyer receives a financial benefit if those proceedings are successful within the meaning of the agreement.⁸

One of the main reasons why countries choose not to adopt ORFSs is because it is seen as an act of Champerty and Maintenance. Champerty and Maintenance are doctrines of common law jurisdictions, maintenance refers to the intermeddling or interference of a disinterested party to propel a lawsuit. Champerty on the other hand refers to that kind of maintenance where the person agrees to maintain a lawsuit upon a contention that the subject matter of the action is to be shared with him, it can be said that Champerty is an aggravated form of Maintenance.

In the case of *Ram Coomar v. Chunder Canto*⁹ it was stated that just because Champerty and Maintenance do not apply to India, it does not mean that the validity of agreements under the Indian Contract Act cannot be challenged on the technical grounds of Maintenance and Champerty. The Privy Council clearly laid down that although Champerty and Maintenance are not expressed grounds, the agreements entered by the parties must be examined to identify any improper object which as per the *Contract Act 1872* ought to be held invalid.

⁸ Kathryn Sanger (n 8).

⁹ *Ram Coomar Condoo v. Chunder Canto Mukherjee* [L.R.] 2 App. Cas. 186: (1876-77) 4 IA 23.

Types of ORFSA:

There are three types of ORFSA. i) Conditional Fee Agreement (CFA); ii) Damages Based Agreement (DBA); iii) Hybrid Damages Based Agreement.

i) Conditional Fee Agreement ('CFA'): In this arrangement between the client and the lawyer, the lawyer is incentivized only in the event of a successful outcome, which can be an agreed flat fee or a percentage of increase in fee that normally the lawyer would have charged if not for CFA.

With respect to CFAs in Singapore the advocate and solicitor were prohibited from entering any ORFS agreements with their client under the Legal Profession (Professional Conduct) Rules 2015 in the subject matter of litigation or of any other contentious proceedings, for interest or remuneration proportionate to the amount to which may be recovered by the client in the proceedings.¹⁰

Later, in August 2019, the Singapore Ministry of Law issued a Consultation Paper on CFA in Singapore in relation to international and domestic arbitration proceedings. The amendments proposed in this report were intended to align the CFA framework with the third-party funding framework to conform to the needs of commercial parties and their counsels.¹¹

The Consultation proposed the following:

- i) It required the solicitors to disclose the existence of the CFA to the Singapore Court or tribunal and to every other party to those proceedings. The lawyers shall also act in the best interest of his client.
- ii) Any order for costs made in the proceedings against the losing party would not include any part of the success or uplift fee which the successful party might have to pay to its solicitor under the CFA.
- iii) The client must be fully informed of the nature and the operation of CFA which shall be in writing.

¹⁰ Legal Profession (Professional Conduct) Rules 2015, Rule 18.

¹¹ Ministry of Law Singapore, 'Public Consultation on Conditional Fee Agreements in Singapore' <<https://www.mlaw.gov.sg/news/public-consultations/Public-Consultation-on-Conditional-Fee-Agreements-in-Singapore>> accessed 15 September 2022.

iv) The CFA shall contain the definition which will explain what counts as a successful outcome and provide for a cooling off period during which the client may terminate the CFA by written notice.

Even in England and Wales the ban on CFAs was later relaxed upon the introduction of the *Courts and Legal Services Act 1990* ('CLSA'). The section of 58(3) of the CLSA acted as a statutory bar to prevent a CFA from being unreasonable on the grounds of public policy. The CFA scheme was activated by the Conditional Fee Agreements Order 1995, which specified three types of permitted proceedings: personal injury claims, insolvency cases and certain proceedings before the European Court of Human Rights, and it allowed lawyers to claim Success Fees of up to 100% of their normal fees.¹²

ii) Damage Based Agreement ('DBA'): In this kind of arrangement, there are no fees charged by the lawyer during the arbitral proceedings and he is only incentivized when the client obtains a financial benefit.

In England and Wales, DBAs were initially not permitted except in employment matters. In the Jackson Report the recommendation to introduce DBAs was accepted and given a legal force by Section 45 of the Legal Aid, Sentencing and Punishment of Offenders Act, 2012 (LASPO) and The Damages - Based Agreements Regulations 2013 ('2013 DBA Regulations') which permit lawyers to conduct both litigation and arbitration in return for a share of any damages awarded.¹³

DBAs are available only to claimants but not respondents as the definition of payment includes that part of the sum recovered in respect of the claim for damages awarded that the client agrees to pay the representative.¹⁴

2013 DBA Regulations underwent a revamp and included significant changes such as:

i) Adopting a Success fee model by abolishing a ceiling on recoverable costs to which the client is entitled.

12 The Conditional Fee Agreements Order 1995, Article 3.

13 Rupert Jackson, 'Review of Civil Litigation Costs: Final Report' (December 2009). <<https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>> accessed 14 Sept 2022.

14 2013 DBA Regulations, Regulation 1.

- ii) Reduction of maximum caps for recovery from 50% to 40% for claims or proceedings which are neither employment matters nor personal injury matters and 25% to 20% personal injury cases, to avoid over-compensating, the legal team as a result of the introduction of the Success fee model.
- iii) Permitting Hybrid DBAs.
- iv) Clarifying that termination clauses may be included in DBAs.
- v) Addressing cases in which the result will not involve monetary damages by providing a definition for money or money's worth that includes consideration reducible to a monetary value.¹⁵

When it comes to the United States of America the USA Supreme Court recognized the use of DBAs more than CFAs.¹⁶ Unlike England and Wales where they followed a uniformed system for the implementation of DBAs, in the USA the rules for DBAs varied from state to state. Regardless of the state, the American Bar Association's Model Rules of Professional Conduct imposes certain formal requirements when entering a DBA and that DBAs are not sanctioned in criminal cases and in domestic relation matters.

Compared to the legal systems in England and Wales, Canada and most European Countries that follow the costs indemnity rule, the USA does not, the legal system of USA apply the general rule that each party must pay its own costs, unless the litigation is vexatious or on abuse of process.¹⁷ Further, the level of damages awarded in the USA is higher than that is awarded in England and Wales.¹⁸

15 Professor Rachael Mulheron and Nicholas Bacon QC, 'Explanatory Memorandum - The 2019 DBA Reform Project' (October 2019). < [https://www.qmul.ac.uk/law/media/law/docs/research/Doc-3---Explanatory-Memorandum-\(13-Oct-2019\).pdf](https://www.qmul.ac.uk/law/media/law/docs/research/Doc-3---Explanatory-Memorandum-(13-Oct-2019).pdf)> accessed 14 Sept 2022.

16 *Wylie v Coxe* (1853) 56 US 415; Eric M Rhein, "Judicial Regulation of Contingent Fee Contracts" (1983) 48 J. Air L. & Com. 151, at 155 and 157.

17 Australian Law Reform Commission, 'Costs shifting – who pays for litigation' (October 1995). < <http://www.austlii.edu.au/au/other/lawreform/ALRC/1995/75.html>> accessed 14 Feb 2022.

18 Professor Richard Moorhead and Peter Hurst, 'Improving Access to Justice' Contingency Fees – A Study of their operation in the United States of America' (2008) Civil Justice Council < <https://deliverypdf.ssrn.com/delivery.php?ID=73702711100000>

iii) Hybrid Damages Based Agreement: This is a combination of the above two mentioned agreements, where the lawyer charges some fees as usual and a DBA arrangement comes into picture only when in a particular arbitral proceeding, the client receives a financial benefit, a percentage of which is charged by the lawyer as per DBA.¹⁹

Before we investigate the question whether a common law country like India is equipped to adopt the ORFSs, let's first delve into other common law jurisdictions that have successfully implemented various ORFSs in their litigation and arbitral proceedings.²¹

3. Orfsa a New Leaf in Indian Arbitration Regime

The Doctrine of Maintenance and Champerty are not expressly defined in the Indian Laws and they are not applicable to India.

However, Third Party Funding agreements are champertous in India as they are seen to extort the benefit received to a party in a legal proceeding.²⁰ Further, in India there are rules and provisions which govern the conduct of lawyers and advocates with respect to their association with their clients.

Top jurisdictions like Singapore and Hong Kong shared a very similar treatment to that of India with respect to third party funding agreements.

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0611200600150550361100040 111181010751240901080590780760040750010780911
17010050026079075121003026089117113087125093070004102099070075103075089
122074068119106094017&EXT =pdf&INDEX=TRUE> accessed 15 September 2022.

19 Sidley Austin LLP-Friven Yeoh, Sui Hang Hui and Hui Wu, 'Outcome-Related Fee Structures: Lawyers to Have "Skin" in the Arbitration' (Lexology, 1 June 2022) <<https://www.lexology.com/library/detail.aspx?g=dc5d953b-a92a-4986-9c7c-5cf6613c16f2>> accessed 15 September 2022.

20 The American Review of International Arbitration, 'Third Party Funding In Arbitration in India' (March 21 2022). <https://aria.law.columbia.edu/third-party-funding-in-arbitration-in-india/#:~:text=Champerty%20has%20been%20a%20conventional,proceeds%20from%20said%20dispute%20resolution> accessed 20 Dec 2023.

21 Eugene Tan, 'Spotlight On: Third Party Funding in Singapore and Hong Kong - Civil Law - Singapore' <<https://www.mondaq.com/civil-law/672342/spotlight-on-third-party-funding-in-singapore-and-hong-kong>> accessed 15 September 2022.

However, as time passed Singapore and Hong Kong allowed such agreements and fixed rules in place to govern their execution.

The Singapore Parliament passed the Civil Law Amendment Bill which permitted third party funding for international arbitration and related proceedings in Singapore. The Bill provided for regulations in place which go on to govern third party funding agreements in future. The Regulations provide that for a third party to fund dispute resolution proceedings and other related proceedings, they must first qualify as a third-party funder under Regulation four.

To qualify they must fulfill the following requirements:

- a. Third Party funder has his principal business in Singapore or elsewhere and he must not be a party to the dispute.
- b. Such third parties must have access to funds or rather have sufficient financial resources to fund the dispute resolution proceedings in Singapore.
- c. Such funds of third parties must be invested pursuant to a third-party funding contract, to enable a funded party to meet the costs of dispute resolution proceedings.

If a person fails to fulfill the above mentioned conditions he will not be able to enforce his rights under its funding agreements, further, if a person has qualified as a third party funder under these Regulations, but before the arbitral or other proceedings come to an end, his qualification lapses, in such cases he will be disqualified from enforcing his rights under the agreement and would also not be eligible to receive a share of damages upon the claim being successful.²²

When it comes to Legal practitioners, they are still prohibited from entering into such agreements, but the Bill has amended Section 107 of the Legal Profession Act which permit legal practitioners to do the following:

- a. Legal practitioners can very well introduce their clients to third party funders if they do not receive any direct financial benefit from the agreement entered between their client and such qualified third-party funder.

22 Ibid

- b. Legal practitioners are well within their powers to advise, negotiate, draft and represent their client in any dispute that is likely to arise from such a funding agreement.²³

Like Singapore, Hong Kong was also one among the prominent jurisdictions that did follow the common law doctrines of maintenance and champerty and was against third party funding agreements. However, in 2017 with the passing of the Arbitration and Mediation Legislation Ordinance Order No. Six of 2018 the doctrines of maintenance and champerty were steered away from the arbitration and mediation proceedings and paved the way for parties to enter into third party funding agreements.²⁴

While Hong Kong has encouraged the practice of third-party funding agreements, it did not permit any kind of funding to come from a lawyer or legal practitioner acting for the party in arbitration.²⁵ Hong Kong continued to remain strictly against contingency and conditional fees arrangements between the lawyers and the clients. Like Singapore, the Hong Kong government has also traced the definition of a third-party funder. A third-party funder is a person who is a party to a funding agreement for the provision of arbitration funding and who does not have an interest recognized by law in the arbitration other than the funding agreement.²⁶

Along with clearly laying down who qualifies as a third-party funder, the Arbitration Ordinance passed by the Hong Kong Government has given a Code of Conduct which governs the conduct of such third-party funders. The Code of Practice for Third Party Funding of Arbitration which was issued on 7th December 2018 imposed several stipulations on third party funders which include maintaining access to a minimum of HK\$20 million of capital, maintaining capacity to cover all its aggregate funding liabilities under all its funding agreements for a minimum of thirty six months and clearly setting out in the funding agreement the level of involvement of the funder etc.²⁷

23 Ibid

24 Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017 (the Amendment Ordinance).

25 Section 98O of the Amendment Ordinance.

26 Section 98J of the Amendment Ordinance.

27 Irene Lee Wing Yun, 'The Third-Party Litigation Funding Law Review: Hong Kong' (The Law Reviews, 22 November 2021) <<https://thelawreviews.co.uk/title/the-third-party-litigation-funding-law-review/hong-kong>> accessed 15 September 2022.

In India so far there has not been a positive outlook when it comes to Third party funding agreements because of which we lack a regulatory framework in place which ensures the effective and legitimate governance of such agreements. The Bar Council of India ('BCI') has rules in place which not only regulate the lawyer's conduct towards their client, but the court and the opponent as well. The BCI rules on an advocate's duty towards the court requires him not to act or plead in any matter in which he has financial interests. As per the BCI rules an advocate shall fearlessly uphold the interests of his client by all fair and honorable means.²⁸ An advocate should not charge for his services depending on the success of the matter undertaken.²⁹ He shall not charge for his services as a percentage of the amount or property received after the success of the matter. Further an advocate shall not lend money to his client for the purpose of any action or legal proceedings in which he is engaged by such client.³⁰ The above-mentioned rules ensure that lawyers practicing in India are solely committed towards their client's case and are not driven by the motivation to earn a couple of extra bucks.

From an international spectrum, there is the International Bar Association ('IBA') which has provided for International Principles on Conduct for the Legal Profession 2018, which elaborates on significant virtues of Independence and Honesty, Integrity and Fairness. The requirement of independence calls upon the individual practicing lawyer, government and civil society to give priority to the independence of the legal profession over personal aspirations and to respect the need for an independent legal profession. Independence requires that a lawyer act for a client in the absence of improper conflicting self-interest, undue external influences or any concern which may interfere with a client's best interest or the lawyer's professional judgment.³¹ The IBA has given the International Code of Ethics

28 Bar Council of India Rules on an Advocate's duty towards the client: Rule 5 – Uphold the interest of the client

29 Bar Council of India Rules on an Advocate's duty towards the client: Rule 10 – Not charge depending on the success of the matters.

30 Bar Council of India, 'Rules on Professional Standards «The Bar Council of India' <<http://www.barcouncilofindia.org/about/professional-standards/rules-on-professional-standards/>> accessed 15 September 2022.

31 International Principles on Conduct for the Legal Profession 2018, Rule 1 Independence.

which clearly lays down the ethical conduct of the lawyers. It states that lawyers should not acquire a financial interest in the subject matter of a case that they are conducting. It obligates the lawyers of different jurisdictions to which this Code applies to first put the interest of their client before their right to compensation. Further, it also provides that a contract for a contingent fee which is allowed by law should be reasonable and be subject to the supervision of a court.³² It is important to note that the International Code of Ethics per se does not prohibit the incorporation of ORFSA expressly but the underlying message is that the interests of the client should take precedence over the financial incentives of the lawyer. IBA International Principles provides that a lawyer shall take reasonable steps to ensure that those unable to pay or otherwise gain access to justice because of personal circumstances are guided to the best alternatives for such access.³³

It can be postulated that from both International as well as Domestic framework stresses on the aspect that a lawyer should only be motivated by his client's interests and not by anything else. However, for every lawyer to continue and excel in his profession be it in litigation or arbitration, he tends to invest his time, money and efforts towards the interest of his client, having said that in a way the lawyer funds his working capital in every legal proceeding for his client. It is important for him to serve his client properly to build a name in the industry and to stay in business. A lawyer at any point cannot be said to have any financial interests while serving his client, as the financial prospects in his profession are very much oriented by his service towards the client.

Further, with respect to Third Party funding where in return of the funding given by a third party to a client in arbitral proceedings, the third party makes a demand for a financial benefit arising out of the arbitral proceedings, only if the arbitration is successful and the third party funder has no other interest in arbitration.³⁴ In *Bar Council v. A.K Balaji*³⁵

32 International Code of Ethics 1988, Rule 18.

33 International Principles on Conduct for the Legal Profession 2018, Rule 2 Honesty, Integrity and Fairness.

34 Oshin Malpani, 'Making Room for Third-Party Arbitration Funding in the Indian Regime' (IndiaCorpLaw, 19 July 2021) <<https://indiacorplaw.in/2021/07/making-room-for-third-party-arbitration-funding-in-the-indian-regime.html>> accessed 15 September 2022.

35 *Bar Council v. A.K Balaji* (2018) 5 SCC 379.

The Supreme Court substantiated that, “advocates in India cannot fund litigation”, the BCI rules are also clear against the lawyer being involved in any agreement with the client which allows him to charge fees based on the success of arbitration or claim a percentage of any benefit received by the client from the proceedings.

However, the United Nations Commission on International Trade Law (‘UNCITRAL’) recently released its draft policies on Third Party Funding in investor-state dispute arbitration, and these policies open the doors to India taking the first step towards adopting Third Party Funding Agreements and ORFSA down the line.³⁶

The UNCITRAL draft policies for an access to justice model where the provision requires the claimant to demonstrate that it is pursuing the claim in good faith and that, without third party funding, it is not possible to afford to bring its claim. Under the access to justice model, procedural rules for granting permission may need to be prepared. The tribunal must grant permission upon a request by the party seeking to obtain third party funding. Even in an arbitral setting the claimant must make the request in its notice of arbitration and prior to entering into an agreement on or receiving funding. Further, the draft of UNCITRAL provides for some additional provisions to be in place to address the circumstances funding arrangement after the permission is granted and in case the claimant chooses to obtain third party funding despite the tribunal not granting the permission.

The access to justice model seeks to offer a chance of financial assistance to those genuine indigent parties that are unable to initiate their claim before the tribunal without any financial backing to start with. While it’s true that UNCITRAL deals majorly with International Arbitration, however, the researcher is proposing the use of such models for domestic arbitrations as well, having said that it is important to note that the conditions under CFA and DBA structures as applied in an international arbitration should not be applied as rigidly in a domestic arbitration format. Such structures must be adopted flexibly to ensure that necessary modifications can be made to suit the nature of the arbitral proceedings.

In India the lawyers are clearly prohibited from funding any kind of litigation

36 Oshin Malpani (n 36).

proceedings by the BCI rules and *Advocates Act* and third party funding is not actively encouraged, this phenomenon is encouraged across foreign jurisdictions for two main reasons: It provides a level playing field for both parties and ensures that legitimate rights are not compromised due to paucity of financial resources and it provides for a good opportunity for funders to make investments.³⁷ With respect to lawyers who choose to sponsor the legal proceedings of their client, with an intention to earn a return on investment from the proceedings upon winning the case, the researcher believes it should more or less act as a motivation to serve the client's interest in the best possible way. Funding agreements between the lawyers and client should compose of provisions which go on to ensure that a lawyer shall be incentivized only upon the success of the proceeding for which he must bring on his 'A' game and represent the best interests of his client.

Although entering into an agreement of such nature from hindsight should prove to be beneficial both for the client as well as the counsel, it is very important to have a standard set of guidelines which ensure that the agreements entered by the lawyer and the client serve its true purpose.

ORFSA should not contain any clause making the losing party responsible for any success fee premium agreed by a client with its lawyer under ORFSs. The success fee for the lawyer should be fixed. Strict caps have been proposed on CFAs and DBAs. With CFAs having 100% benchmark fee which is consistent with the position in England and Wales and with respect to DBAs lawyers cannot take more than 50% of the financial benefit obtained by the client. These caps have been introduced to give enough room for the parties to maneuver with regards to their finances to their finances in an arbitral proceeding.³⁸

The Act while incorporating or allowing ORFSs should clearly specify the principal grounds upon which an ORFS can be terminated by the lawyer

37 Mayank Mishra and others, 'Third Party Funding – Is India Ready? - Civil Law - India' (Mondaq, 21 July 2021) <<https://www.mondaq.com/india/civil-law/1093690/third-party-funding-is-india-ready>> accessed 15 September 2022.

38 Sophia Li, 'Outcome Related Fee Structures Proposed for Arbitration in Hong Kong' (Kluwer Arbitration Blog, 2 March 2022) <<http://arbitrationblog.kluwerarbitration.com/2022/03/02/outcome-related-fee-structures-proposed-for-arbitration-in-hong-kong/>> accessed 15 September 2022.

before the arbitration concludes, if the client has committed a material breach of the agreement or behaved unreasonably. However, the same right is not offered to the client to terminate the agreement before the conclusion of arbitral proceedings except in cases where there exists an agreement between the client and the lawyer which elucidates the party's autonomy to terminate the agreement.³⁹

The courts should also recognize the validity of such agreements and take up matters in case either party commits a breach of contract against the other party that has come before the court seeking damages.

4. Benefits for india adopting orfsa

Arbitration is turning out to be an expensive affair, conventionally parties are encouraged to go for out of court settlement forums such as an Arbitration to avoid the long and exhaustive cycle of litigation, but lately Arbitration is not turning out to be any better. India is far from becoming a hub for International Arbitration, despite having institutions that provide arbitration services to parties of varied nature, Arbitral Institutions in India have not been listed amongst the top Arbitral Institutions like SIAC, HKIAC and so on. By allowing the local practitioners to fund charge fees as well on outcome related basis, India is taking one in many steps in attracting parties of different nature to resolve their disputes through Arbitration in India.

ORFSA allows the client to have a certain level of flexibility with respect to pricing of fees for lawyers. The lawyers can agree to settle for nominal fixed fee to start with but upon winning the dispute, a reasonable percentage of the benefit received by the client can be given to the lawyer as per the terms and conditions of the agreement. The lawyer shall be motivated to make up for the amount that was not charged on the client by making efforts to win the dispute.

ORFSA being a contract at the end of the day will also be governed by the *Indian Contract Act 1872*. For a contract to be valid, both parties must consent to the Contract and no party should be compelled or coerced to enter into an agreement with another party. Having said that, if the lawyer and the client are voluntarily consenting to enter an ORFSA with each other, they should be free to do so.

³⁹ Ibid

ORFSA will encourage lawyers to take up those matters which have higher possibility of winning because only those cases wherein the lawyer sees a possibility of being incentivized given that he charges a nominal fee to initiate the proceedings. This saves time not only for the lawyer but for the clients who can be relieved from the strain of lengthy legal disputes for nothing.

ORFSA, will help in making the process of arbitration in India more effective to suit the needs and predefined conditions of the parties to a dispute. In India Arbitration proceedings have become more complex with time. Although the Act is designed to simplify the proceedings, which empowers arbitrators to set up a schedule for the parties to follow and settle the disputes in limited time. But the parties and their lawyers quite often derail the momentum of the proceedings by filing extensive and frivolous motions and applications for additional documents.

ORFSA will also ensure that both parties are genuinely involved in the proceedings and not waste the time of the tribunal. By allowing the parties to enter ORFS agreements, the parties can have clauses in place which ensures that the lawyers shall see to it that the party's case is settled without unnecessary delays for which he will either be remunerated or incentivized depending on the outcome of the case. At the same time, in cases where the lawyers have provided funding to the party's case, the agreement shall compel the party to give their full support and on failing to do so, the agreement shall enable the lawyer to either increase his basic fee or the percentage of incentive that he would receive upon arriving at a fruitful outcome in the case.

5. Conclusion

The researcher through this article has explored the possibility of adopting ORFSA in the Indian legal regime. The article begins by giving a historical evolution of the Arbitration legislation over the years. The legislation began its inception in the year 1940 and over a period has emerged as the 1996 legislation which we follow till this date. However, the current legislation has also witnessed significant amendments to rectify the drawbacks of the previous versions of such legislation, despite that it cannot be said that this Act has successfully incorporated the international measures and standards to be recognized among the global leading arbitral statutes governing arbitral proceedings around the world.

Third Party Funding is one such phenomenon which still lacks in the Indian Arbitration statute. Prominent Arbitral institutions like that of Singapore and Hong Kong have decided to allow for third party funding and have encouraged ORFSs to be entered between parties of the disputes being adjudicated in these forums. Countries like England & Wales, Singapore and USA are some of the common law countries that went by the doctrines of champerty and maintenance and initially opposed the idea of having ORFSs in the domain of arbitration but sooner or later they had amendments made to their legislations to allow and make room for the lawyers and their client to enter into such agreements. They began making provisions for three kinds of ORFSs i.e., CFA, DBA and Hybrid DBA. Comparative analysis between these common law jurisdictions shows each country's approach and their determination to emerge as a hub for international arbitration.

Following which the researcher gives his analysis on the adoption of ORFSA in Indian Arbitration Regime. Apropos to the common law countries listed above, India going by the doctrines of champerty and maintenance till this date opposes the incorporation of ORFSA in the arbitration regime, in addition India has developed the BCI rules that go on to govern the conduct of lawyers and advocates towards their client and these rules completely disregard the adoption of any arrangement that is similar or on the lines of ORFSA. In the International domain there are the IBA guidelines which provide for the conduct of lawyers towards in client when handling a dispute. The bottom line of both the guidelines has always been that the interest of the client shall take precedence over the interest of the counsel and that the legal counsel shall not take up any case by being motivated by some financial incentive.

Currently India is at the thirty seventh position as per the International Institute for Management Development World Competitiveness Report 2022⁴⁰ and to go up the ranking, one of the approaches that the researcher believes that India needs to adopt is creating provisions for outcome related fee structures, thereby offering more flexibility and benefits to the lawyers as well as the client. ORFSs can increase the degree of competitiveness

40 International Institute for Management Development, 'IMD World Competitiveness Booklet' (June2022). <<https://imd.cld.bz/IMD-World-Competitiveness-Booklet-2022/4/>> accessed 14 Sept 2022.

among the lawyers with respect to charging fees and thereby encouraging them to work in the best interest of their client.

Having ORFS agreements in place will also ensure that lawyers and their clients are very much involved in the matter at hand and are serious on leaving home with a claim, thereby saving the time of the courts to ponder upon insignificant cases. Further, it is time that parties that can initiate their claims owing to the dearth of finances be given the opportunity to be funded and present their claims before the tribunal. Finally, ORFS agreements could take India one step closer in becoming a hub for International Arbitration in the International Business Community.

Harnessing Artificial Intelligence in the Court of Law: A Global Legal Analysis

*Mr. Abhilash Aggarwal**

1. Introduction

Law enforcement agencies create systems to handle legal matters. Over time, problems are modified to suit the existing solutions. Legal concerns and procedures evolve in response to new difficulties and advancements, resulting in fresh perspectives on situations and individuals. The current correlation between legal procedures and legal difficulties is at a pivotal juncture in history, necessitating a substantive societal reaction and a restructuring of conventional legal systems. The complexities of legal issues have increased in the “age of information, and conventional legal processes may not be keeping pace with the necessary adjustments. Traditional legal institutions are not equipped to effectively handle the complex, widespread, and unpredictable character of modern problems. It is crucial to improve established legal processes by incorporating modern problem-solving methodologies that offer increased complexity and adaptability. Artificial intelligence (AI) provides a range of potent technologies to enhance legal capacities.¹

AI is a phrase coined by Turing in 1950, referring to the science and engineering involved in creating intelligent machines.² Intelligence is the whole mental capacity that includes the ability to “reason, plan, solve problems, think abstractly, understand complicated concepts and learn from experience”.³ The AI frameworks emulate specific aspects of human intelligence, including “reasoning, problem solving, learning, acting, reacting, understanding and language production”.⁴

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1 Barton TD, ‘Artificial Intelligence: Designing a Legal Platform to Prevent and Resolve Legal Problems’ in Liquid Legal (Springer International Publishing 2020).

2 Turing AM, ‘Computing machinery and intelligence’ (1950) 49 Mind 433–460.

3 Gottfredson L S, ‘Mainstream Science on Intelligence: An Editorial with 52 Signatories, History, and Bibliography’ (1997) 24(1) Intelligence 13–23.

4 Gil Y and Selman B, ‘A 20-Year Community Roadmap for Artificial Intelligence Research in the US’ (2019) <<https://arxiv.org/abs/1908.02624>> accessed 16 April 2024.

As we delegate greater decision-making authority to automated devices, it is imperative that we establish mechanisms to hold them responsible for protecting human rights. One example of AI being used for a perceived beneficial purpose yet potentially violating human rights is in the area of human surveillance. Presently, multiple governments are employing novel technologies such as video monitoring and biometric tracking to deter unlawful and perilous conduct, including actions of terrorism. Government operations enhance our security and impede criminal actions. These technologies monitor and follow ordinary persons, violating individual privacy and perhaps leading to discrimination based on religious views, health issues or political viewpoints.⁵

AI has caused a revolution in the legal field, opening up new avenues for opportunity and changing how the legal system and law firms operate. It is not a passing fad; rather, it is a potent technology yet in its infancy that has the potential to significantly alter the legal industry and improve the skills of attorneys. It includes the many uses in the legal field and its significant effects on the legal system, legal companies and the pursuit of justice. AI possesses the capability to enhance legal research, accelerate document analysis, facilitate predictive analytics, optimize e-discovery, enhance contract administration, and allow virtual legal assistants. With the use of sentiment analysis and “Natural Language Processing” (NLP), AI is able to evaluate complicated legal documents and emotions. Furthermore, innovations that enhance the administration of justice include case prediction and courtroom transcription. By making the legal system more accessible and efficient, artificial intelligence seeks to close the gap that exists between the general public and the legal system.⁶ With a global market capitalization of over \$1 trillion, the legal services sector stands to gain greatly from artificial intelligence’s disruptive potential. An AI-powered research tool might do tasks in a matter of seconds that would often take hours or even days for a human lawyer. AI helps both single practitioners and major law firms control the expenses of legal research while maintaining a high standard of quality. Giving

5 Susskind R E, ‘Expert Systems in Law: A Jurisprudential Approach to Artificial Intelligence and Legal Reasoning’ (1986) 49(2) *The Modern Law Review* 168–194.

6 Bahl S, ‘Unleashing the potential: The profound impact of AI in the legal and judiciary landscape’, (Financial Express, 15 July 2023) <<https://www.financialexpress.com/business/blockchain-unleashing-the-potential-the-profound-impact-of-ai-in-the-legal-and-judiciary-landscape-3171568/>>. Accessed 14 April 2024.

attorneys access to effective AI tools can improve their capacity to offer clients wise advice and produce better results.

The use of AI in the legal and judicial sectors is not a far-off idea, but rather a developing reality with significant promise. The legal profession is seeing a paradigm shift as AI's capabilities are embraced, empowering lawyers, judges and clients. To enhance our legal system, we may utilise AI to increase access to justice, expedite legal proceedings, and create opportunities for innovation.⁷ The future of law depends on utilising AI's revolutionary capacity to address upcoming challenges and possibilities. AI is anticipated to have a substantial impact on the future of law firms due to its revolutionary abilities. Law firms can provide exceptional value to their clients through AI-powered legal research, which also fosters innovation and helps them adapt more effectively to the changing legal landscape. Other benefits of AI-powered legal research include support for conducting due diligence investigations, AI-driven data management and analytics, litigation strategy optimization, ethical and regulatory compliance monitoring, enhanced client services through chatbots, virtual consultations, and customized legal advice algorithms and prioritizing cyber security measures to detect and prevent data breaches while maintaining client trust.⁸ Specialised GenAI has been developed by experts and enterprises for the purpose of doing legal research and producing legal documents. The courts consider LLM-based technologies in GenAI as the most notable recent breakthroughs, capable of generating language to fulfil certain requests. GenAI systems employ deep-learning methodologies that depend on neural networks to replicate; "written language, speech, music, or other pattern-oriented media". Typically, these algorithms are trained using large amounts of data provided by humans, which is commonly collected from the internet. The purpose is to develop new content by using the knowledge acquired from the training data. GenAI systems have the capability to be tailored to certain tasks. One way to improve an AI model is to use an artist's previous work to create a large number of new pieces in that artist's style, which might lead to artificial competition overwhelming the market. The

7 Raman M and Talukdar A, 'The role of legislation in the regulation of artificial intelligence (Ai)—New technology—India', (Mondaq, 9 August 2023) <<https://www.mondaq.com/india/new-technology/1353080/the-role-of-legislation-in-the-regulation-of-artificial-intelligence-ai>> Accessed 14 April 2024.

8 cf Bahl (n 6).

fine-tuning can be customized to a particular goal. It is possible to instruct a person who has completed their higher education to produce newspaper editorials that have a particular political inclination.⁹

The increasing impact of AI on the industry and society presents practical and theoretical challenges for the legal system. The research and development of AI and the management of autonomous robots give rise to several practical concerns. The conceptual challenges arise from the intricacies of assigning moral and legal culpability for the damage caused by autonomous machines, as well as from the quandary of accurately delineating artificial intelligence. Certain challenges are specific to AI, whilst others are shared by multiple post-industrial technologies. The findings indicate that the legal system may have difficulties in effectively dealing with the increasing utilization of AI and guaranteeing appropriate compensation for those affected by AI-based systems.

2. Enabling Automation of Judicial Courts of India through AI

More than 30 million cases are outstanding in Indian courts right now, which is causing significant delays in the administration of justice. This conundrum emphasizes the requirement for technological solutions to streamline processes and lighten workloads. By supporting efficient legal research, aiding in document interpretation, and leveraging predictive analytics to support judicial decision-making, AI may improve the judiciary. The Indian judicial system has always relied on antiquated procedures and solutions, showing little sign of technological advancement. India's judicial system is about to undergo a change because to the development of artificial intelligence. The three questions put up to acknowledge the use of AI in Indian legal system were put up the research paper by Vidhi namely; Can machine learning tools assist in intelligent scheduling of case?, Can AI enabled programmes extract the accurate position of law from a mass of precedents?, lastly, Can robots decide the Question of Law?.¹⁰ This paper

9 Grossman R, Grimm MPW and Brown DG, 'Is Disclosure and Certification of the Use of Generative AI Really Necessary?' (2023) 107(2) *Judicature* 69-77.

10 Jauhar A, Misra V, et al. 'Responsible Artificial Intelligence for the Indian Justice System' (Vidhi Centre for Public Policy, 2021) <<https://vidhilegalpolicy.in/wp-content/uploads/2021/04/Responsible-AI-in-the-Indian-Justice-System-A-Strategy-Paper.pdf>> Accessed 16 February 2024.

gave a roadmap to establish an effective AI enable justice system in India based upon the following recommendations:

A. Conceptualizing of AI in the integration in Indian Justice System

- ❖ Enacting a “governance charter” that clearly defines essential principles to safeguard the integrity of due process, constitutional and legal rights, and address concerns related to transparency, bias, and accountability in AI technologies;
- ❖ Ensure comprehensive stakeholder consultation to ensure transparency and foster confidence in the legal community during this process;
- ❖ Promote research on the regulation of artificial intelligence in the legal system to address the substantial challenges presented by AI and Create a strategy to improve capacity by implementing a thorough training program and focusing on skill development.

B. Setting up Operational Support to Enable Integration

- ❖ Enlarging the AI Committee of the Supreme Court to oversee the integration of AI into the justice system;
- ❖ Make publicly available datasets for any notable AI advancements and enhance “public-private partnerships” (PPPs) to create and execute AI technology initiatives.

C. Phase wise deployment of AI in the Indian Justice System

- ❖ Conducting trials of AI interventions, evaluating their advancement, and refining these first technologies in a step-by-step process (SUVAAS and SUPACE);
- ❖ Creating feedback loops and evaluation frameworks to measure effectiveness and the next iteration of AI tools that can influence decision-making processes by integrating advanced technologies like case “*query tools, intelligent analytics, research augmentation, computational tools that aid in judicial decisions and legal robotics*”.

However, with the increasing interest of governments and public institutions worldwide in using the revolutionary capabilities of AI, the discussion around its application and governance has become essential. Introducing

AI technology in the Indian judicial system requires the establishment of a comprehensive legal, regulatory and ethical framework to instill confidence in these technologies.¹¹

3. Efficacy of AI in Court of Law

AI refers to the theories and methods used to develop machines that can mimic human intellect through neural networks for a wide range of applications across different disciplines. AI has numerous applications in LegalTech (LT), which involves the use of technology to create, suggest, or offer products or services connected to law and justice. By 2025, the LT market is projected to exceed US\$25 billion, with the European market accounting for US\$6.37 billion.¹² It would be beneficial to first provide a mapping of the relevant domains which is divided into two branches: one where algorithms replace the judge and another where algorithms support the judge. Each branch possesses unique reasoning and operational capabilities, which give rise to inquiries regarding legality, the judicial system, civil freedoms, and effectiveness. The data obtained from decision support outcomes and judge's substitutes is utilized to revise the matrix by forecasting the automated decisions that are more prone to be challenged.¹³

The intriguing question is, that are human courts merely enduring for a few decades until the AI technology takes over? It is easy to assume that courts would not completely vanish, but the intriguing question is why this is the case, especially considering the widespread impact of AI in various human activities. The AI offers significant advantages in terms of size and enforcement effectiveness compared to the legal system. It can process billions or even trillions of choices in the time it takes a human court to

11 Vempati and Shekhar S, 'India and The Artificial Intelligence Revolution' (Carnegie Endowment for International Peace, 2016).

12 Alsop T, Calio S and Greis P, 'LEGAL TECH: A Statista dossier on the worldwide Legal Tech market (Statistica 2020) <<https://www.statista.com/study/84775/legal-tech>> accessed 4 January 2024.

13 Ashely K and Litman D, 'Ai tools help increase access to justice' (University of Pittsburgh, 2021) <<https://www.research.pitt.edu/ai-tools-help-increase-access-justice>> accessed 21 February 2024.

decide a single case.¹⁴ Furthermore, narrow algorithms can serve as a proactive method of organisation that is not affected by the shortcomings of law enforcement. At various times in Anglo-American legal history, courts have been considered outdated, but they have consistently retained their essential function. Adjudication has unique advantages in social ordering that are challenging to reproduce through other methods.¹⁵ Alternative Dispute Resolution (ADR) was the practice developed for replacing judges with other legal professionals like arbitrators or mediators, which is become more prevalent, especially in fields like commercial or family law. A habit of varied practices is becoming established in society. The enticement of addressing the issue of constrained judicial resources and delays in procedures by employing machines with nearly limitless operational capabilities could prove overwhelming. Certainly, from a human rights standpoint, the use of “robot judges” in criminal law, which has serious implications for the defendant’s life, raises questions about permissibility.¹⁶

Judges are increasingly issuing standing orders that require litigants to disclose their use of GenAI and submit certificates regarding the accuracy of factual statements and legal references made when utilizing GenAI. It is indisputable that judges inherently possess the authority to issue orders and guidelines that regulate the activities of parties engaged in the cases before them. As in *Standing Order Re: Artificial Intelligence (“AI”) In Cases Assigned To Judge Baylson on June 6, 2023* the U.S District Court on Pennsylvania stated that, “If any attorney for a party, or a pro se party has used Artificial Intelligence (“AI”) in the preparation of any complaint, answer, motion, brief, or other paper filed with the Court, and assigned to Judge Michael M. Baylson, MUST, in a clear and plain factual statement, disclose that AI has been used in any way in the filing, and CERTIFY, that each and every citation to the law or the record in the paper, has been verified as accurate”. On June 8, 2023, Judge Stephen Alexander Vaden from the U.S. Court of International Trade issued a standing order requiring

14 Wu T, ‘Will Artificial Intelligence Eat The Law? The Rise Of Hybrid Social-Ordering Systems’ (2019) 119(7) *Columbia Law Review* 2001–2028.

15 Lon L. Fuller, ‘The Forms and Limits of Adjudication’ (1978) 92 *Harvard Law Review* 353, 357.

16 Kaspar J, Harrendorf S, et al, ‘Artificial Intelligence and Sentencing from a Human Rights Perspective’, In *Artificial Intelligence, Social Harms and Human Rights. Critical Criminological Perspectives* (Palgrave Macmillan, 2023).

the disclosure of any GenAI software used for drafting. Furthermore, it was necessary to check that utilising the application did not result in disclosing confidential or proprietary information to unauthorised parties. There is a paucity of guidance on how to use artificial intelligence in the court system. The rationale for enacting these standing rules is evident and commendable, although there may be tangible disadvantages. Some instructions have been ambiguous and lacking precision in relation to the technology they cover. Some AI applications are too vague, as they do not generate completed work and lack GenAI's tendency to produce inaccurate output through "hallucinations". These guidelines may breach attorney work output and discourage the implementation of technologies that could improve access to justice and reduce costs.¹⁷

AI technology has become increasingly involved in supporting judges in making decisions in US Courts over the last ten years. "Pre-trial Risk Assessment Algorithms" (PTRAA) are used to assess the risk level before trial to determine the length of detention, likelihood of conviction, and decision on bail in the criminal justice system. The variables influencing the decision of PTRAA include age, sex, family, occupation, socio-economic status and neighbourhood crime rate. In the US criminal courts, judges receive a "Presentencing Investigative Report" (PSI) that is prepared based on the PTRAA briefing regarding the accused's background and risk of reoffending. In *State v. Loomis*¹⁸, the Wisconsin Supreme Court judgement upheld the lower court's decision which was based upon the PSI developed through an AI software COMPAS (Correctional Offender Management Profiling for Alternative Sanctions). This algorithmic risk assessment software depicted the risk of commission of crimes in future by the accused through bar charts, taking upon due consideration the "criminal involvement, relationships/lifestyles, personality/attitudes, family, and social exclusion" of the individual.¹⁹

In Netherlands the '*Systeem Risico Indicatie Act, 2013*' (SyRI Act) was passed with an aim to detect benefit fraud in poor socio-economic

17 Weiser B, 'Here's What Happens When Your Lawyer Uses ChatGPT' (N.Y. Times, 27 May 2023) <<https://www.nytimes.com/2023/05/27/nyregion/avianca-airline-lawsuit-chatgpt.html>> accessed on 20 February 2024.

18 881, N.W.2d 749, 7532.

19 Greenstein S, 'Preserving the rule of law in the era of artificial intelligence (AI)' (2022) 30 Artificial Intelligence Law 291–323.

communities. The SyRI algorithm was employed to survey entire low-income communities without any prior indication of fraudulent activities. This Act allowed the system to collect data from “multiple public databases, including information on income, property ownership, benefits, address, family connections, debts and water and energy usage”. This data was analysed by an algorithm to produce a score, with the highest score indicating a need for further investigation. Several negative aspects of this system included privacy violations, discrimination and stigmatisation.²⁰ A Dutch court rendered a verdict in 2020 regarding a legal dispute concerning the digital welfare fraud detection system, SyRI. In contravention of the European Convention on Human Rights’ provision on the right to privacy, the court declared the SyRI legislation to be unlawful. A court has, for the first time, determined that a benefit fraud detection system infringes upon an individual’s right to privacy. As such, this verdict is momentous. The decision serves as a poignant reminder to policymakers regarding the imperative nature of conducting fraud detection in a manner that safeguards data protection principles and the right to privacy. Additionally, the ruling validates the importance of transparency in the handling of personal information.²¹

The allure of an automated choice can be intricate, particularly when seeking a human who can clearly articulate the procedures to be followed, even if they are well-versed in doing so.

4. Errors and Risk of Interference by AI

Digital technologies interfere with the legal process beyond just artificial intelligence. This issue predates the topic of how this new technique is being integrated into the legal world or serving the legal environment. The concerns presented are general and particular to artificial intelligence. The subjects discussed below regarding access to law and adherence to the adversarial process are general because they involve automation and AI. AI introduces specific concerns regarding network and data architectures, data quality, and neutrality. The emerging applications, such as deep learning,

20 Van Eck M, ‘Risk profiling Act SyRI off the table’ (Leiden University, 2020) <<https://www.universiteitleiden.nl/en/news/2020/02/risk-profiling-act-syri-off-the-table>> accessed on 20 February 2024.

21 Van Bekkum M & Borgesius F Z, ‘Digital welfare fraud detection and the Dutch SyRI judgment’ (2021) 23(4) *European Journal of Social Security* 323-340.

exacerbate the conflict between the demand for impartiality in judicial rulings and the protection of civil freedoms.²²

Current AI systems are classified as narrow or weak, indicating their purpose is to address specific tasks. With the anticipated surge in technical progress in the coming decades, we can expect the emergence of powerful and comprehensive artificial intelligence. This advanced AI is designed to possess the full spectrum of human cognitive abilities, making it a highly sophisticated system. Some experts imagine Superintelligence as an artificial intelligence that exceeds all human abilities, surpassing even the capabilities of AGI.²³

• *Algorithm Prejudices*

In modern nations, duties and choices that used to be performed by people are now being given to algorithms, which can provide guidance or even make decisions on how data should be analysed and what steps should be taken. Algorithms are increasingly involved in social processes, corporate transactions, governmental decisions, and shaping our perceptions, understanding, and interactions with ourselves and the environment. Discrepancies between algorithm design and operation and our comprehension of its ethical repercussions can lead to significant impacts on individuals, groups, and entire society.²⁴ There is currently no well-developed ethical framework specifically for algorithms due to the wide scope of software and information systems that fall under the term ‘algorithm’. However, despite this constraint, certain themes surfaced in the literature suggesting how ethics might be effectively addressed when examining algorithms, regardless of domain-specific research. Applying these themes to the suggested prescriptive framework has been useful in distinguishing the many ethical concerns raised by algorithms, which are frequently unclear in the literature. Epistemic and normative topics are frequently grouped together. This is comprehensible, given the various concerns are interconnected inside a complex network.²⁵

22 Ulenaers J, ‘The impact of artificial intelligence on the right to a fair trial. Towards a robot judge?’ (2020) 11 Asian Journal of Law and Economics, article number: 20200008.

23 Bostrom N, *Superintelligence: Paths, Dangers, Strategies* (Oxford University Press 2014).

24 Floridi L, ‘The method of levels of abstraction’ (2008) 18(3) *Minds and Machines* 303–329.

25 Mittelstadt B D, Allo P, et al., ‘The ethics of algorithms: Mapping the debate’ (2016) 3(2) *Big Data & Society*, <https://doi.org/10.1177/2053951716679679>.

Equality is connected to non-discrimination, representing positive and negative aspects of the same value. Equality refers to the principle of treating all individuals or situations in the same manner, without any form of bias or favoritism. On the other hand, non-discrimination aims to prevent any biased or unfair treatment in cases where it is justified or reasonable. All human rights agreements defend the principle of equality, and thus artificial intelligence technology has the potential to jeopardize equality due to the presence of ‘algorithmic biases’. The “Robodebt” case demonstrates that algorithms are not only used in legal proceedings but also in other activities having legal consequences. The possibility of AI making errors in its predictions is the exact rationale for establishing points of vigilance. The decisions that preconceive the design of current instruments create ethical problems rather than technical ones. Reconsider these factors by rejecting the notion that society will be helpless in dealing with AI’s mysterious operations. The tools used in the justice realm are not impartial.²⁶

• *Rule of Law and Notion of Accessibility*

An essential aspect of the rule of law is the accessibility of laws to enable individuals to comply with them and understand the expectations placed upon them, with predictability being of utmost importance. Accordingly, scholars such as Fuller argue that the notions of publication and comprehensibility are essential for maintaining the rule of law. The lack of accessibility caused by AI undermines the fundamental principles of the rule of law. The complex nature of AI renders it ill-suited for human comprehension, discernment, or clarity. AI functions according to the principles of mathematics and statistics. Furthermore, these norms are concealed within a proprietary ‘black box’ or obscured to the point where they are incomprehensible, unreadable, undiscussable, unanalysable and unreasoned. Traditionally, the rule of law has relied on natural language for its structure, involving governance by natural language rather than algorithmic governance.²⁷

26 Chereni S, Sliuzas RV and Flacke J, ‘An extended briefing and debriefing technique to enhance data quality in cross-national/language mixed-method research’ (2020) 23(6) *Int. J. Soc. Res. Meth.* 661–675.

27 Suksi M, ‘On the openness of the digital society: from religion via language to algorithm as the basis for the exercise of public powers’ In *Transparency in the Future: Swedish Openness 250 Years* (Ragulka Press, 2017).

• *Financial Autonomy of Corporates*

AI could indeed have significant macroeconomic impacts. Political and institutional backing for LegalTech entities as a well-planned instrument for global leadership can be endorsed. This represents an ongoing conflict spanning multiple centuries among legal systems worldwide. However, it is uncertain if these justifications are significant enough to warrant ongoing support for technical arbitrations that are recognised as biased. The issue is that although the implementation costs are identified, the advantages for parties other than the tool proponents are uncertain, encompassing both operational and financial aspects. While the potential financial benefits of these implementations are often talked about, there is a significant dearth of facts on the actual profits. Transparent economic impact studies should be used to assess the cost/benefit trade-off to see if systematisation in this sector will truly be effective in optimising resource use, particularly public judiciary monies. Although AI has the potential to enhance assistance in the legal process, it remains uncertain whether it can be regarded as a comprehensive tool for achieving justice.²⁸

• *Existential Risk and Legal Liability*

There seems to be a point at which the principles of the legal system and artificial intelligence are on a direct collision path. At this juncture, we bestow upon machines the power to make decisions about humans, even if humans do not fully understand how these machines operate. Government operations can be optimized by automating public services and utilizing algorithms. When using complex and incomprehensible opaque technology, our reliance on it is solely due to our inability to comprehend it. Adopting a market-oriented method may involve AI system developers and operators buying insurance from licensed carriers for their AI systems. This would allow the unrestricted market to more accurately assess the potential danger presented by AI systems. An additional concept to consider is the implementation of a structure similar to corporate personhood, which would allow AI systems to own assets and be subject to legal liability. AI systems can be regarded as autonomous legal entities, shielding their owners and operators from liability

28 Wachter S, Mittelstadt B and Russell V, 'Why fairness cannot be automated: Bridging the gap between EU non-discrimination law and AI' (2021) 41 *Computer Law & Security Review* 105567.

for unintentional mistakes, unless the AI possesses substantial financial resources or the court decides to disregard the AI's legal status. An effective strategy entails setting salary benchmarks for AI systems engaged in jobs typically executed by people, through the establishment of a minimum wage that allows for the consideration of projected expenses. Legislatures have the authority to enact "AI sunshine laws" that would mandate AI developers and operators to publicly reveal the code and specifications of AI systems. This would allow the general public to identify possible concerns, similar to how Wikipedia allows users to point out flaws in its pages.²⁹

5. Regulatory Framework and Legislative Protection on AI

India lacks formal legislation, statutory norms, or laws that govern the utilization of AI. Creating a structure to oversee AI is essential for providing guidance to several stakeholders involved in the ethical governance of AI in India. AI has been acknowledged to be promoted and utilized by specialized frameworks tailored for different industries. In January 2019, the Securities and Exchange Board of India (SEBI) issued a circular to companies in the banking sector, specifying the necessary reporting obligations for applications and systems based on AI and Machine Learning (ML). The "National Digital Health Mission" (NDHM) initiative in the healthcare industry aims to establish norms and standards to guarantee the dependability of AI systems in healthcare. The Ministry of Electronics and Information Technology (MEITY) proposed on June 9, 2023, to implement regulations on artificial intelligence (AI) in India, similar to how other developing technologies are regulated, in order to safeguard digital consumers. According to MEITY, the present task-oriented AI systems lack the advanced sophistication and human-like cognitive abilities required to rapidly replace professions.³⁰

The "Draft Ethics Guidelines for Trustworthy AI" were formulated by a group of specialists in December 2018. The European Commission

29 U Scherer M, 'Regulating Artificial Intelligence Systems: Risks, Challenges, Competencies And Strategies' (2016) 29(2) Harvard Journal of Law & Technology 353-400.

30 Aulakh G, 'India will regulate AI to ensure user protection' (LiveMint, 9 June 2023) <<https://www.livemint.com/ai/artificial-intelligence/india-will-regulate-ai-to-ensure-user-protection-11686318485631.html>> accessed 14 January 2024.

released a statement that emphasized the risks associated with AI, while also recognizing its substantial advantages and underscoring the significance of a human-centered approach to AI. Ensuring the dignity and freedom of persons is only possible through this particular system, which grants them the perpetual authority to supervise machines. The Council of Europe recently issued a warning over the possibility of “social discrimination” resulting from algorithms.³¹

In April 2021, the European Commission unveiled the inaugural “EU regulation on AI”. This regulation establishes a comprehensive legislative framework for overseeing AI and aligns with the EU’s objective of establishing global technology regulation standards. In a collaborative effort with the Council of the European Union and the European Commission, the European Parliament reached a final decision on the proposed AI Act on June 14, 2023. The objective is to reach a consensus before the end of this year. Operators could potentially be subject to regulation if they establish clear standards and conduct thorough compliance assessments, starting from the latter part of 2024. The main goal of the AI Act is to ensure that AI systems used in the EU market comply with safety standards and align with existing legislation on fundamental rights and EU values. The AI Act presents a risk-based framework for governing the use of AI in both business and public sectors. It classifies hazards into three categories: applications with unacceptable risk, high-risk applications, and applications that are not explicitly prohibited. Artificial intelligence is not allowed to be used in crucial services that could potentially harm people’s livelihoods or promote harmful actions, according to the law. Nevertheless, it permits the application of artificial intelligence in other sensitive domains like healthcare, subject to comprehensive assessments of safety and effectiveness. The AI Act primarily impacts AI system sellers located in the European Union(EU) or a non-EU country who introduce AI systems to the EU market or use them within the EU. This also extends to individuals who utilize AI systems within the European Union.³²

31 Cataleta M S, ‘Humane Artificial Intelligence: The Fragility of Human Rights Facing AI’ (East-West Center 2020).

32 Gans-Combe C, ‘Automated Justice: Issues, Benefits and Risks in the Use of Artificial Intelligence and Its Algorithms in Access to Justice and Law Enforcement’ In *Ethics, Integrity and Policymaking* (Springer 2022).

AI is advancing quickly and being rapidly incorporated into society. Regulating AI is necessary to mitigate potential hazards to systems and society. Regulating AI has numerous problems, which can make the effort appear insurmountable. Historically, the law has struggled to adapt to advancements in technology. If regulators get a deep grasp of the technology behind AI and incorporate system and societal factors, they may be able to develop thorough and impactful AI regulation. India can take inspiration from the legislation of the EU regarding this matter. Legislation plays a crucial role in ensuring the smooth and equitable integration of AI into society and technology.

6. Conclusion & Suggestions

The U.S. Department of Transportation is currently engaged in efforts to enhance public safety by conducting research, developing, and evaluating autonomous traffic accident detection using video technology. The aim is to ensure secure and efficient commuter transportation across diverse locations and under varying weather, lighting, and traffic circumstances. AI algorithms are employed in the medical area to analyze radiological pictures, potentially influencing the realms of criminal justice and medical examination by aiding in the identification of the cause and manner of death. Furthermore, they have undergone scrutiny in various other fields of forensic investigation, such as DNA analysis. Artificial intelligence is rapidly emerging as a vital method for detecting fraud. Companies such as PayPal employ vast amounts of data to train their fraud detection algorithms in order to anticipate and identify abnormal behaviors, as well as adapt to evolving trends. The growing interest of governments and public organisations worldwide in using the transformative possibilities of artificial intelligence has made the discussion on its use and governance crucial. The implementation of AI technology in the Indian judicial system necessitates the development of a thorough legal, regulatory, and ethical framework to instill confidence in these technologies. Even the judges of the Supreme Court of India, particularly Justice Hima Kohli, have acknowledged the significance of AI in the legal field as a transformative force rather than a danger. Human intellect and advanced technology have opened up new possibilities in the digital era within the realm of AI.

The primary objective of AI is to create technology that can effectively cater to the needs of humanity. This will require advancements beyond

the basic components of general intelligence. Intelligence might not fully capture the technological needs for advancing society. Understanding the profound impact of wisdom on various aspects of life, including well-being, pleasure, health and potentially even longevity, is of great importance. Future technology demand is shifting towards artificial intelligence. Human wisdom is a scientific idea that has been developed via study undertaken over the last 45 years. The idea is defined scientifically, has validated measuring scales, is supported by neurology and genetics, and has a distinct link to ageing compared to human intelligence. Artificial Wisdom (AW) would utilize human knowledge to enhance our comprehension of wisdom by elucidating the mechanics or psychological foundations. Developing artificial wisdom necessitates the collaboration of “computer scientists, engineers, neuroscientists, mental health specialists and ethicists” to ensure that it improves and sustains human existence.

Contemporary technology, like AI, is becoming common in society. Progress in Machine Learning techniques is improving the capacities of AI systems, which are more and more assisting human decision-makers in various fields. Expect that as these technologies advance in decision-making support, they will assume more control and responsibility. New technologies are undermining the traditional principles of the rule of law, and it is necessary to acknowledge this. One important aspect to consider regarding the adverse effects of AI on the rule of law is its potential to impede human progress. Although not typically considered the primary association with the concept of the rule of law, it is crucial to acknowledge that human agency is regarded as a fundamental component of society. An upcoming challenge will be to harness the advantages of AI for society while simultaneously safeguarding society from its negative effects, by fostering innovation but also taking into account societal concerns. One challenge will be determining which values to prioritise in regards to technology. The principles supported by the rule of law are considered a strong basis for influencing the organisation of any community. It is clear that protecting the rule of law from AI technologies is crucial.

Culture, Community and Crime Redressal: Locating the Roots for Restorative Justice with Special Reference to India

*Ms. Akanksha Marwah**

1. Introduction

Punishment in criminal laws is the natural consequence after the offence has been committed, if only the accused is found guilty. It is surely preventive in nature as well, even without specifically saying that ‘no man should be killed’. Because there is no need to say that. Human conscience, guided by the universal morality, clearly establishes that no man is to be hurt. Every human is to enjoy their space while not interjecting another’s. Hence, when crime is committed, it just does not result in the violation of law, but also the underlying embedded promise of peaceful co-existence.

Crime while today has been made a pure question of law, what is mostly forgotten are ruptured relationships between people constituting the society and the trust upon which it is built. Formal criminal justice system neglects the needs of the victims and society. These are the needs that arise out the harmed relationships. This is primarily due to the limited understanding of justice. The institutionalized form of justice understands justice only as ‘punishment’ meted out to the harm-doer.

Today, criminal justice systems around the world are moving towards a more peaceful form of conflict resolution, which is not State-driven but is community-oriented. And restorative justice provides a promising approach as it takes care of the needs of all the stakeholders involved. It bridges the gap between the justice which is ‘done’ and justice which is ‘felt’ by enabling a dialogue to mend the relationships. Even though the term ‘restorative justice’ was first introduced in contemporary criminal justice in 1970s, various traditions and cultures did display the essence of restorative justice. In fact, even before that, India’s glorified past was enriched with political, legal, and economic thoughts that provided with significant insight into how a State should carry on its affairs, reflecting innovative ways of how crime should be dealt with. *Mahabharat, Dharmashastras,*

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Niti-shashtras or the science of statecraft and *Arthashashtras* are only some of the glimpses of India's valued culture.¹

Through ages, there has been a distinguished sense of Dharma, which is way beyond how justice is understood today. As often misunderstood, justice is not English equivalent of Dharma. Dharma is considered as a moral and social obligation of everyone as an individual as well as a member of the society. It comes from the conception that everyone, as a member of the society, owes a duty towards others. These duties traverse moral, legal, social, religious, sphere inter alia. Dharma resembles the highest order of righteousness, justice, goodness, and purpose. It encompasses all the eternal values that span over time and transcend over spaces. Santi Parva in Mahabharata gives a clear etymological definition of Dharma as, "*that which binds fast all beings, each to each with bonds of rights and duties; binds these together, in the unfailling law of Action and Reaction, from whence Reward arises for good and Punishment for ill and thus preserves mankind.*"²

Indian societies, since ages, have embraced joint family systems or multi-generational homes, i.e., generations of family living together under one roof. The essence here lies in close-knit relationships. But with more urbanisation, nuclear families are increasingly becoming a phenomenon. With the ever-evolving politico-legal environment and changing social dynamics, social relationships are lost in the quagmire of money-making and fame-earning. Breaking down of fundamental human-to-human relations, as shall be discussed in the coming sections, is becoming one of the prominent causes of increasing crime.

In today's world, when we are trying to re-build a stronger society inspired from collective conscience and community justice, the approach of 'Restorative Justice' offers a promising future. And it would not be out of place to put forth the observation that the values Indian societies have cherished for long resemble those promoted by restorative justice. It is a set of principles based upon community-driven idea of justice for strengthening community relationships while rendering justice.

1 A. Lakshminath, "Criminal Justice in India: Primitivism to Post-Modernism", 48(1) JILI 26, 27 (2006).

2 K. Krishna Murthy, "Dharma- its Etymology", 21(1) THE TIBET JOURNAL, 84, 85 (1996).

It has been contended by various authors that restorative justice has been in existence throughout human history and the philosophy is embedded in the Greek, Arab, and Roman civilizations and in Hindu, Buddhist, and Confucian traditions.³ The objective of this paper is to locate the roots of restorative justice in different cultures and traditions and trace them back to Indian philosophy. The focus is to understand its induction in India and the values that it possesses in terms of its administration, idea of justice and rights, duties, and the involvement of stakeholders. It deliberates upon how States were developed and their relationship with its people through the lens of organic theory. The article involves a focus on the evolution of restorative justice around the globe and its essential components as a philosophy of justice. There is a discussion on the various values existing in the Indian philosophy pertaining to justice, community values, family system, and peaceful dispute resolution to substantiate the use of restorative justice practices in the Indian criminal justice system. It specifically involves a discourse on identification of restorative justice during different periods in Indian history.

2. Value-system of Restorative Justice

The Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters⁴ define Restorative process as *“any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator. Restorative processes may include mediation, conciliation, conferencing, and sentencing circles.”*⁵

It essentially means a system that involves the stakeholders in the transaction of crime, i.e., victim, responsible party, and the affected community, to sit together and discuss the harms caused by the crime and the obligations arising from them. The objective of this discussion is to identify the peaceful and sustainable solutions to the conflict that has

3 R. Thilagraj & Jianhong Liu, *Restorative Justice in India: Traditional Practice and Contemporary Applications*, xii (Springer, 2017).

4 ECOSOC Resolution 2002/12 available at: Microsoft Word - Document1 (un.org) (Jul. 6, 2021, 10:00 AM).

5 Id. art. 2.

arisen. Hence, harms and obligations, accountability of responsibility, and participation of all stakeholders are three pillars of this approach.⁶

It is worth noticing that restorative justice is not a new concept in entirety. It is, in fact, seen as rediscovery of the past practices to deal with crime, which were simpler, local, informal, and more effective, the practices which existed in the indigenous societies to control delinquent behaviour without any control of the outsiders. It is like old wine in a new bottle.⁷ It gives more importance to communitarian justice and, thus, involves community in resolving conflicts arising out of commission of criminal wrong. It treats crimes as a private matter like a civil wrong and resents the State to take up the action on behalf of the victim without addressing the harms done to the latter.

It offers justice beyond what is offered by formal criminal justice administration. The pedantic approach, which is ingrained in the existing system, fails to render a holistic justice to the parties involved. As opposed to this, restorative justice is adorned by the following ideals:

a. Reparations

Reparation or restoration or restitution forms the essence of a restorative justice process. It amounts to recompensing the losses incurred and correcting the harms done, as much as possible. William Ian Miller identifies redressal as the fundamental mechanism to maintain social relationships amongst human beings.⁸ He derives it from the obligation of every being to reciprocate the treatment whether it is good or bad. This reciprocity is not only about social obligations but also justice. He says, *“Honour is rooted in a desire to pay back what we owe, both the good and the evil. The failure to reciprocate, unless convincingly excused, draws down our accounts of esteem and self-esteem”*. He says that we *‘feel bound*

6 Howard Zehr & Ali Gohar, *Little Book of Restorative Justice* 21 (Good Books, US, 2002).

7 Albert Eglash, “Creative Restitution- A Broader Meaning for an Old Term” 48(6) *THE JOURNAL OF CRIMINAL LAW, CRIMINOLOGY, AND POLITICAL SCIENCE* 621 (1958). (Eglash calls it ‘New Wine in Old Bottle, but the authors believe that restorative justice is an old concept in a new attire.)

8 Gerry Johnstone & Daniel W. Van Ness, *Handbook of Restorative Justice* 24 (Willian Publishing, UK, 2007).

to return kindness and we feel frustrated when we are prevented from returning wrongs."⁹

Reparations have multiple purposes to solve. First, it aims at restoring and preserving the value of something that was lost. Second and one of the most important factors is that it vindicates the victim. It acts as a moral statement to the community that the victim was right and responsible party committed a harm.¹⁰ Third, reparation also locates the responsibility of the entire event of harmful act. Howard Zehr, at this point, mentions that, "When you commit a crime, you create a certain debt, an obligation, a liability that must be met. Crime creates an obligation- to restore, to repair, to undo."¹¹ Lastly, it helps victims in regaining the equilibrium lost after commission of crime.

Victims feel at the loss of control over their affairs, their autonomy is taken away and they find their physical, mental, or emotional well-being disrupted. Besides this, there can be other after-effects of crime as well like loss of confidence, reduced academic performance, inefficiency at work, depression, substance use, etc.¹² These are not taken care of in the formal justice delivery mechanisms. Thus, restorative justice also intends to heal these neglected multi-layered injuries.

Reparations do not only mean material compensation but also include symbolism. The latter can, especially, address the harms that cannot be redressed like permanent injury or death. In fact, it sees the prospects in the harm-doer for a positive and constructive change. By making amends, genuine transformation is seen in them. Formal criminal justice system cannot provide the encouragement to making of amends because it is primarily punitive in nature.

b. Crime as a social and moral wrong

It is said, it takes a village to raise a child. It depicts how society is intricately associated with each other. In addition to this, there is a duty of every human towards other to control their actions so as not to harm others

9 Ibid.

10 Howard Zehr, *supra* note 6 at 75.

11 *Id.* at 79.

12 Gerry, *supra* note 8 at 29.

by virtue of social contract. Further, criminal harms stand on the premise that it affects the peace and security of entire society. Hence, crime is more about the social wrong than being just a violation of law. Furthermore, criminal wrongs are inherently considered as immoral acts or omissions as they betray the entire idea of peaceful co-existence. As a corollary to this, criminal justice should also be social justice. Even though experts in criminal law keep focussing to keep moral and crime apart, they do share some common grounds.

Morality as a concept is difficult to be put in a straight-jacket framework. An illustrative formula, however, can still be drawn. Moral values include respecting every human being, their dignity, and maintaining sound and healthy relationships. In the events of any harms, morality promotes owing up to the mistakes and making of amends. The same is the idea promoted by the restorative justice approaches in the criminal justice system. Making amends refers to the culture where apology is offered and accepted. Acceptance of apology is, however, the discretion of the victim and cannot be forced upon them. As far as crimes are concerned, universal moral principles guide that the criminal harms must be healed by involving all the stakeholders (victim, harm-doer) and addressing communal needs. This ensures social advancement, peace, and justice.¹³

c. Social Justice and Socialization of Justice

Social justice as existing in the Preamble of the Constitution of India is used more in the sense of associational justice.¹⁴ It concerns itself with how people should behave in the society and maintain relations in the society. Crime, in restorative justice, is understood as a generator of harm, which ruptures the relationships in society. As a result of this, there arises needs and obligations that can be addressed by encouraging interaction between victim and harm-doer. This involves an active dialogue amongst victim, harm-doer, and the affected community.

Restorative justice creates a link between social justice and criminal justice. Criminal justice is made to look like a system that deals only with crime, harm-doer, and punishment. Restorative justice adds a social perspective

13 Id. at 619.

14 Saroj Bohra, "Social Justice and Indian Constitution" 2(1) International Journal of Law and Legal Jurisprudence Studies, accessed 27 July 2021, 10:03 PM.

to this problem. Protection of society is the ultimate goal of every criminal law. Acceptable behaviour in the society and general disapproval to any wrongful act must be determined under the social settings so that society can also deal with the consequences of crime and play a role in reducing the effects and recidivism.

Restorative justice, hence, is a social movement that brings together different stakeholders in the crime who are, of course, the part of the society with an object to regain social peace and security. In fact, it is criminal justice embedded in social context.¹⁵

d. Collective responsibility

Societies, historically, can be divided into two categories: acephalous and State. Former, are the earliest human aggregations that are characterised by diffuse structure, kin-based organization, and strong adherence to group values.¹⁶ They believed in resolution of conflict within the society without the involvement of any institutional force of the State. Using the force of collective responsibility, they were able to control the deviance.

One such society that has been studied is Ifugao of Northern Luzin in the Philippines. While studying this, historian Roy Franklin Barton claimed, *“The kin of each party were anxious for a peaceable settlement, if such could be honourably be brought about...Neighbours and co-villagers did not want to see their neighbourhood torn apart by internal dissension. Instead of feuding, claims and counterclaims were relayed by the monkalun (the go-between/mediator) until a settlement was achieved.”*¹⁷

The interaction between victim and harm-doer in the restorative justice process is personal in nature and it often leads to reduction in deviant behaviour by working on the conscience of the responsible party and building up of stronger bonds between the parties. There was an active participation of victim and harm-doer, and the role of mediator was taken up by the representatives of the community.

15 R. Thilagraj, supra note 3 at 174.

16 Theo Gavrielides, “Restorative Practices: From the Early Societies to the 1970”, Internet Journal of Criminology (2011)

17 Ibid.

Restorative justice acknowledges that ‘We’ are all responsible for peaceful co-existence. We are co-creators of our collective social life, hence, we all have a duty to fulfil for remedying the situation that arises after commission of crime. Pain and suffering of one, it believes, is worthy of attention of all.¹⁸

Later, when the acephalous societies were replaced by the ‘State’, the power that initially resided in the community to heal was gradually taken over by the State while community became the passive observer of the ‘care management’ function.¹⁹ By taking over the property in the conflict, the State destroyed indigenous, communal competencies.

3. Roots of Restorative Justice around the Globe

Restorative justice practice finds its association with the indigenous cultures of countries like Australia, New Zealand, and Canada. The Maori tradition of Australia and New Zealand and Peace-making Criminology of America are some of the inspirations. Earlier, people were closely bound in social groups and restorative methods of dispute resolution were popular.²⁰ Restitution was the primarily used mechanism to deal with conflict and punishment only came in when the State assumed the role of authority delivering justice, which was relatively recent.²¹

The Navajo culture, followed by the USA’s largest federally recognized Indian indigenous community, is an example of rejuvenation of indigenous law related to peace-making. The healing process involved in this aims at restoring good relations amongst people. It focuses on “deep emotions of respect, solidarity, self-examinations, problem-solving, and ties to the community.”²² Navajo peace-making processes are quintessential forms of restorative justice because they involve community in restoring the harms done by criminal conduct. These perspectives are derived from the long-held values where people collaborate to meet the needs of all. It believes that if any wrong is not corrected, then the community shall not be able to evolve.

18 Gerry, *supra* note 8 at 5.

19 Gerry, *supra* note 8 at 10.

20 Gerry, *supra* note 8 at 114.

21 *Ibid.*

22 *Ibid.*

Restorative justice also draws its roots from ‘ubuntu’. Ubuntu means “humanity, humanness or even humaneness”.²³ It articulates respect and compassion for others. It has been recognized by 1997 South African Governmental White Paper for Social Welfare as:

*“The principle of caring for each other’s well-being...and a spirit of mutual support...Each individual’s humanity is ideally expressed through his or her relationship with others and theirs in turn through a recognition of the individual’s humanity. Ubuntu means that people are people through other people. It also acknowledges both the rights and the responsibilities of every citizen in promoting individual and societal well-being.”*²⁴

In different jurisdictions, the indigenous cultures do embrace the values of peaceful co-existence, duty towards each other, genuine apology, and collective conflict resolution. Navajo philosophy explains that people harm others because they have no personal foundations. They are disengaged from people in their lives. And thus, the best way to heal the harm caused by crime is to heal the relationships that have been broken. For this, sometimes, the relatives of responsible party are called to re-connect with the latter and come forth to help them in living within the community. Navajo people call this process of ‘connection and re-connection peace-making’.²⁵ Based upon this, we today have Family Conferencing circles, Community Circles, and other models that involve members of the affected community. The idea behind this is to encourage making of amends and making things right.

In this culture, conflict resolution involves Hozhooji meaning ‘living in right relationship’.²⁶ Whenever a person is harmed, they approach the responsible party to compensate by asking for nalyeeh. It is also a demand for correcting the relationship. If this demand fails, the leader of the community is approached to commence the peace-making process. In this process, the family and clan members are engaged in a non-confrontational process to arrive at a solution for the conflict.

23 Gerry, supra note 8 at 161.

24 Available at: <<http://www.welfare.gov.za/Documents/1997/wp.htm>> accessed 27 July, 2021.

25 Dennis Sullivan & Larry Tift, Handbook of Restorative Justice 1 (Routledge, London, 2006).

26 Id. at 28.

Similarly, history has also seen healing circles, sentencing circles, restorative conferencing, family youth conferences, family unit meeting, police conferencing, and community conferencing involving restorative justice processes.²⁷

4. Organic Theory of Justice and Saptanga Theory

Relations between the State and its individuals have been looked by different jurists differently. Some argue that individuals have no independent existence of their own but derive their identity from the State of which they are autonomous units and are dependent on each other. This is called the monistic theory of the State or the Absolutist theory of the State. Monastic theory, as opposed to this, states that society is an aggregation of individuals. These individuals can sustain themselves independently and flourish without the aid of the State. Compromise between these two extreme theories is the dualistic theory, wherein every individual is entitled to lead their own life, but dependent upon the others for their welfare. They are not entirely isolated from the existence of others.²⁸

Apart from these theories, there is a theory describing the organic nature of the State. This considers the State as an organism working biologically. It creates an analogy between the individuals who come together to form a State and the parts of a living being's body. This further supports the idea that a nation is a living being and it lives via its people. With Plato comparing the State to a man of great stature and Cicero's observation of State's head resembling spirit that runs human body, the organic theory was strengthened.

By the 19th century, there were scientific developments made in the theory, especially, by Herbert Spencer. By comparing the ever-evolving nature of the State to the biological evolution of the animals, it was revealed that there is a similarity in their process of development from the stages of similarity and simplicity to those of dissimilarity and complexity.²⁹

27 Id. at 29.

28 The Organic Nature of The State - Political Science (politicalscienceview.com) accessed 27 July, 2021.

29 Ibid.

The core lies in the fact that there is an inter-dependence of all the parts on each other and collective smooth functioning of all the parts is inevitable for the body to function. It was more of a moral-ethical philosophy that was worked upon to establish connections between politics and institutions of State/society.³⁰

Closest to the organic theory, in India, there is Kautilya's Saptanga theory. Saptanga literally means 'seven limbs', which when combined constitute State as an organism. The seven fundamental (primary) concepts/categories mentioned in the political literature of Hindus are Swamin (the sovereign), Amatya (the councillors or ministers), Janapada (the people and the territory), Durga (the fort), Kosha (the treasury), Danda (the army or the force), and Mitra (the ally).³¹

People are not just 'governed', but they also govern through their representatives. Laws are made to formally establish the relationships between the people and their representatives. Involvement of people in governance increases their faith in the working of State institutions. In criminal matters, especially, the interest of entire society is at stake. Their participation in the process can strengthen the foundations of the society and the work on the actual causes of crime commission.

5. Restorative Justice and Indian Roots

India has largely been a rural society in the past. Joint family system and involvement of family and community in various matters influenced the working of justice system. Elders of the family and village would sit together to find solutions for the problem as they already know about the history of the parties, their affairs, and had an interest in peaceful resolution of the dispute.

Hindu sociology focusses on a morally disciplined social order, which works without coercive power of positive law.³² Take for an example, a

³⁰ Ibid.

³¹ Kiranjit Kaur, "Saptanga Theory of State", 71(1) *The Indian Journal of Political Science* 59, 60 (2010).

³² K.P. Mukherji, "Fundamental Categories of Hindu Political Theory", 11(2) *The Indian Journal of Political Science*, 1, 10 (1950).

dispute between husband and wife. Instead of directly filing a case for divorce, the elders of both the sides of family sit together to address the issues bothering the couple and find a way to matrimonial home back. That is how social institutions work in India.

Indian culture has developed with religions as its basis. The magnificent land of 'Bharat' has seen emergence of confluence various religious. However, it is believed that all the religions germinate from one single source of power, Dharma. Dharma encompasses the sacred law to abide by the duty of oneself in the light of justice, morality, and righteousness. Dharma as justice after criminal actions was aimed at social progress to maintain harmony between different parts of society.³³

It deals with behaviour, justice, repentance, and atonement. Law has often been related to originating from religion. It seems to have relation to fundamental belief in God as a god of judgment, of justice, and of law. Morality is embedded in the concept of reparations to correct the harm done by the responsible party and to offer it for right reasons. Accountability, repentance, forgiveness, compassion, and reconciliation are basic tenets of every religion.

a. Indigenous Justice System in India

The formal justice system that we currently have in India has no 'Indianness'. It is based upon the westernized concept of justice. It has been evolved to include Indian values post-independence. Before Britishers colonized India, we had our system of justice, which had caste discriminations and provided for different penalties based upon varna system. Instead of working upon and removing the defects, colonizers replaced the system in entirety.³⁴

The idea of Varnashrama Dharma in the Hindu sociology conveys an idea similar to that conveyed by the combined Platonic doctrine of subordination (of individuals to the community) and the Aristotelian principles of

33 Priyanka Pandey, "Elements of Political Science in Ancient India: Reflections on Mahabharata and Manusmriti", 4(1) International Journal of Advanced Research 1657 (2016).

34 R. Thilagraj, supra note 3 at 44.

relativity (of the good or desirable) or of proportion (between ends and means).³⁵ A society based on justice or dharma is not conceivable unless the different groups and individuals in the different stations of life perform their respective duties.³⁶

Further, Kautilya's Arthashastra provides a valuable sneak peek into the legal system that existed in ancient India. From treatment of parties in courts, behaviour of judges, methods of identifying witnesses indulging in falsehood, and punishment of harm-doers, commendable work has been done. While the world was indulging in 'eye for an eye' approach and barbaric forms of punishment, the system in India followed a rational system of justice on the basis that there exists an intimate relationship between sin and sinner and that the kings (who were the judges then) were to decide upon the guilt and punishment after assessing if the offending party had any remorse for their deeds. Sentences were commuted if harm-doer acknowledged their wrongdoing and undertook accountability. The one who atones is forgiven is the belief we have revered. It was believed that the harm-doer could be rehabilitated if allowed and supported to be the part of society.

b. Socio-religious Methods in India

There are three institutions in Karnataka that deserve mention whenever there is a search for impressions of restorative justice in Indian dispute resolution. First one is Dharmasthala, which is managed by Heggades, a well-known Jain family. People of all religions visit this place. It is also famous for dispute resolution in the presence of Lord Manjunath by Heggade. The decision given by him is final. There is a religious belief that Annappa, who is demon servant of Lord Shiva, will punish those who tell lies. Justice, as people believe, which is rendered here is divine in nature. Matters brought here are related to marital discord, partition of property, succession and inheritance, child custody and maintenance, giving up bad habits, group clashes, etc.

Second, there is Sirigere Math, which is a major Lingayath monastery in Karnataka. The followers of this Math take their dispute to the head of this Math who decides the dispute in the presence of all disputants. The claims are decided after hearing all the parties and going through all

³⁵ K.P. Mukherji, *supra* note 32.

³⁶ *Ibid.*

the evidence. Disputes relate to property matters, marital problems like divorce and separation, maintenance and child care, group clashes, electoral representations in local bodies, failure of minor contracts, and the like.

Lastly, there is Hinchigere Math famous amongst Lingayats. However, this Math has remained controversial in current times due to the use of violent means for securing adhering to its decisions like abducting the parties if they do not agree to settle the disputes as per its decision.

c. Panchayat System

India has a strong tradition of local self-government for administration of disputes at village level. Panchayat signifies a group of five (i.e., panch) persons, generally the elderlies in the village. They are vested with the sacred and with judicial and executive powers in the village. They work as custodians of social harmony in the village and within their jurisdiction falls civil and minor criminal cases.³⁷ Nyaya Panchayats, then, existed to separate executive functions from judicial ones.

Panchayats were also seen as courts in ancient India where people could approach in case of conflict. In Vedic times, there were two institutions Sabha and Samiti. Sabha referred to the house of elders or an assembly of villagers, while samiti referred to the assembly of the whole people. In sutras age, there were parishads, which were assemblies of learned men who knew law and who resolved conflicts on the interpretation of Vedic texts. The issue was to be solved unanimously or was referred to arbitration. In Brihadaranyaka Upanishad, disputes were heard by village councils (kulani), corporation (sreni), and assemblies (puga). There were arbitral tribunals that worked as panchayats.

Today, many states have Nyaya Panchayats created under Article 40 and 50 of the Constitution of India. Members who are appointed take an oath to adhere to the Constitution of India and its Part IV-A. It has a duty to amicably lead to the settlement of disputes. Every party is given a chance to represent itself. Two panchas are nominated by the Nyaya Panchayat to participate in the conciliation process. It is participatory in nature, people-oriented, and has features similar to restorative justice.³⁸

37 R. Thilagraj, supra note 3 at 3.

38 R. Thilagraj, supra note 3 at 11.

d. Dialogue Culture in Nagas

In the history related to the conflict between Nagaland and India, resolution by ‘dialogue’ has been often emphasised. Dialogue has been defined by Hal Sanders of the International Institute for Sustained Dialogue and the Kettering Foundation. It means,

“a process of genuine interaction through which human beings listen to each other deeply enough to be changed by what they learn. Each makes a serious effort to take others’ concern into her or his own picture, even when disagreement persists. No participant gives up her or his identity, but each recognizes enough of the other’s valid human claims that he or she will act differently toward the other (Broome and Hatay 2006, p. 649).”³⁹

Dialogue essentially involves inclusiveness of all the stakeholders; joint ownership in the process; listening and learning to the issues at stake and adapting one’s behaviour for inclusive and pluralistic living; bridging the gap between self and others; understanding the context; maintaining transparency and keeping a vision for the future.⁴⁰

6. Conclusion

Restorative justice involves the horizontal form of institutions where individuals at the same level are involved to heal and focus on feelings, harms, and needs. As opposed to this, formal criminal justice system works as a vertical institution where the objective is to find who is right and who is wrong based on the rules formed by some authoritarian institution. Adjudication is impersonal while restorative justice actively engages people. Justice can be sustained only if it is independent from the established institutions of the State and not forced or imposed. It will be long-lived if community accepts it and that is possible if it is understood not as a solution for violation of law but as a violation of them.

From Shree Krishna in Mahabharata attempting mediation between Pandavas and Kauravas to present day, even though we have become a

39 Id. at 20.

40 Id. at 21.

significant part of global village, we still hold on to our values. These values are reflected through the legislations like *the Gram Nyayalaya Act, 2008*; *the Code of Criminal Procedure, 1973*; *the Motor Vehicles Act, 1988*; *the Carriage by the Air Act, 1972*; *the Merchant Shipping Act, 1958*; *the Workmen's Compensation Act, 1923*; *the Consumer Protection Act, 2019*; and the institutions like Lok Adalats, Family Courts, Probation, Consumer Courts, Arbitration, Nyaya Panchayats, Gram Panchayats, victim compensation schemes that provide for mediation, and other peaceful methods of resolving conflicts.

We believe in therapeutic form of justice based upon the reformation and re-integration of the harm-doers back into the society to fulfil the promise of fraternity as existing in the Constitution of India. To support the fellow being in their conditioning falls within the domain of restorative justice.

Spill-over or spill-out? scrutinizing and broadening the g20 spill-over tax proposal 2023

*Ms. Tejaswini Kaushal**

1. Introduction

The aftermath of the Covid-19 pandemic has witnessed a rekindling of interest in private participation in infrastructure endeavors.¹ Despite this positive momentum, a prolonged stagnation spanning eight years remains, suggesting an impending expansion of the infrastructure investment deficit.² This gap is poised to widen considerably, particularly when aligned with the ambitions of the Sustainable Development Goals ('SDGs').³ The inadequacy of relying solely on public-sector intervention becomes evident, necessitating innovative solutions.⁴ As India assumes the Group of Twenty ('G20') presidency for 2023,⁵ the opportunity to make a profound global impression in this domain presents itself, positioning the nation to shine on the international stage and extend its propositions for enhanced collaborations with foreign nations. A recent policy brief, unveiled in anticipation of the G20 summit, 2023, introduces a proposal for a collaborative framework to allocate spill-over tax responsibilities

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1 Private Participation in Infrastructure (PPI) Report, 2022, WORLD BANK GROUP (2023), <https://ppi.worldbank.org/content/dam/PPI/documents/PPI-2022-Annual-Report.pdf>.

2 Innovative Infrastructure Financing through Value Capture in Indonesia, ASIAN DEVELOPMENT BANK (May 2021), <https://doi.org/10.22617/SPR200093-2>.

3 Varanasi development ministerial meeting "G20 2023 action plan to accelerate progress on the sdgs", G20 (June 12, 2023), https://www.g20.org/content/dam/gtwenty/gtwenty_new/document/G20%202023%20Action%20Plan%20for%20SDG.pdf.

4 Innovating the Public Sector: from Ideas to Impact, OECD, <https://www.oecd.org/innovating-the-public-sector/Background-report.pdf>.

5 Ministry of External Affairs, G-20 and India's Presidency, PIB (Dec. 10, 2022), <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1882356>.

(‘proposal’).⁶ This proposal envisions a partnership between governmental bodies and stakeholders invested in infrastructure, fostering a conducive environment for private-sector engagement.⁷ The focal objective is to bolster the confidence of private investors and operators, thereby enhancing the overall feasibility of forthcoming infrastructure projects.⁸

This article aims to scrutinize the proposal, pinpoint potential technical and viability gaps, and offer recommendations to enhance this proposal’s implementation within the Indian context. In Section II, the article dissects the rationale underpinning the proposed spill-over tax mechanism and systematically breaks down the mechanism’s structure. Section III recommends adopting a broader approach in light of the international taxation system, providing a broadened understanding of “spill-overs” and shedding light on current practices. Section IV evaluates the recommendation’s potential implications, with particular emphasis on India’s position as a developing country amidst other countries. Section V addresses the recommendation’s challenges in implementation and structural viability. In Section VI, the article proposes strategic remedies to effectively manage spill-over dynamics to integrate the recommendation into the proposal for a spill-over tax mechanism. It offers a forward-looking perspective on elevating the mechanism’s effectiveness and adeptly navigating the complexities of international tax spill-overs.

2. Assessing the proposal: justifications and motivations

A. Unveiling the Motivations: Reasoning behind the Tax Spill-Over Proposal

The Covid-19 pandemic has left behind enduring economic impacts, deeply affecting nations’ finances. Asian Development Bank (‘ADB’) data from 2022 reveals that many developing Asian countries experienced double-digit fiscal deficits in 2020, continuing into 2021.⁹ Amid mobility

6 Tifani Husna Siregar et al, Bridging the Infrastructure Investment Gap: Proposal for a Spillover Tax Sharing System, THINKTWENTY (T20) INDIA 2023 (July 2023), <https://t20ind.org/research/bridging-the-infrastructure-investment-gap/>.

7 Id, at 1.

8 Supra, note 6 at 1.

9 Basic Statistics 2022, ASIAN DEVELOPMENT BANK (2022), <https://www.adb.org/publications/basic-statistics-2022>.

restrictions, robust public infrastructure proved essential for uninterrupted daily life.¹⁰ However, limited private investment challenges infrastructure development.¹¹ Global Infrastructure Outlook 2023 estimates a \$15 trillion gap between projected investment (\$79 trillion) and needs (\$94 trillion) by 2040.¹² Bridging this gap is vital to meet Sustainable Development Goals as envisioned in the G20 Agenda 2023.¹³ Private sector investment has stalled, and public-private partnerships ('PPPs') have declined from 36% (2010) to 28% (2019) of private infrastructure investment.¹⁴ Successful land value capture strategies exist, yet infrastructure spill-overs extend beyond land value appreciation.¹⁵

A silver lining here is demonstrated in a study by Yoshino and other researchers, highlighting the positive impact of infrastructure on government tax revenues.¹⁶ For instance, a one percentage point increase in mobile subscribers raised annual state tax revenues per capita in India by INR 134.¹⁷ Similar findings were observed in Vietnam, where expressway operations led to increased income tax revenues.¹⁸ The proposed spill-over taxation aims to bolster private sector involvement by sharing spill-over tax revenues, addressing profitability concerns, and fostering sustainable partnerships.¹⁹

10 Id, at 2.

11 Supra, note 9 at 2.

12 Global Infrastructure Outlook, A G20 INITIATIVE (Mar. 22, 2023), <https://outlook.gihub.org/>.

13 Supra, note 3 at 1.

14 EITI Standard 2023, EITI (Mar. 23, 2023), <https://eiti.org/collections/eiti-standard>.

15 Id, at 3.

16 Yoshino et al, Innovative Measures of Infrastructure Investments: Illustrating Land Trust Scheme and Spillover Effect, ASIAN DEVELOPMENT BANK - ADBI WORKING PAPER SERIES, NO. 1053 (Dec. 2019), <https://www.adb.org/sites/default/files/publication/543341/adbi-wp1053.pdf>.

17 Id, at 3.

18 Supra, note 16 at 3.

19 Marie Lam-Frendo, Do we need private investment to fund recovery?, GLOBAL INFRASTRUCTURE HUB - A G20 INITIATIVE (Feb. 12, 2021), <https://www.gihub.org/articles/do-we-need-private-investment-to-fund-recovery/>.

B. A Closer Inspection: Deconstructing and Expanding the Proposed Structure

i. The Four-Step Approach

This policy brief advocates for a spill-over tax-sharing mechanism between governments and the private sector, with a structured approach involving the following.²⁰

a. Step 1: Develop a Tax-Sharing System

The proposal focuses on instituting a tax-sharing system between governments and the private sector, directing the entire generated infrastructure value, including business, income, and sales tax revenues, to private sector investors, in synergy with the existing land value capture framework.

b. Step 2: Obtain Multilateral Involvement

Multilateral institutions' involvement is crucial to guarantee the efficiency and longevity of the spill-over tax-sharing system, providing oversight, accountability, and transparency, which is especially vital for infrastructure projects traversing various administrations and boundaries.

c. Step 3: Initiate a Pilot Project

This phase involves starting with a scalable pilot project, such as transforming strategically located land into interchange hubs, encompassing multi-story parking, bus interchanges, and retail spaces, feasible in densely populated urban regions.

d. Step 4: Expand and Optimize

Upon generating spill-over tax revenues and insights, the approach extends to additional regions, emphasizing ongoing tax-sharing system refinement based on lessons from pilot projects, fostering a sturdy framework for future infrastructure undertakings.

20 *Supra*, note 6 at 1.

ii. Understanding the Proposed Implementation

The G20 has consistently prioritized infrastructure development, culminating in establishing the Global Infrastructure Hub ('GI Hub') in 2014.²¹ The GI Hub serves as a nexus for data-driven insights, fostering collaboration across sectors, public-private partnerships, academia and international bodies.²² Its role extends to assessing spill-over effects from diverse infrastructure investments and gauging potential returns for private investors.²³ To implement the spill-over tax proposal's recommendations, the G20, via the GI Hub, can further provide credible comparative analyses, quantitative and qualitative assessments, and capacity building.²⁴ The proposal's central proposal of a spill-over tax-sharing system demands substantial capacity building at various levels, a role that the GI Hub can facilitate and evaluate effectively.²⁵

3. Expanding the Proposal: Through the International Taxation Lens

A. Recommending a Broadened Horizon through Intra-G20 Collaborations

While the proposed policy holds promise, it is recommended that its implementation should not be confined within national borders alone ('recommendation'). Collaborative endeavors and structured multilateral or bilateral treaties are advisable to amplify the positive spill-over effects. It is crucial to view this proposal through a wider lens, not only to enable the transfer of additional revenue from governments to private entities but also to foster cross-border cooperation among governments of the G20 nations, considering the international taxation framework.

One way to achieve this is by focusing on corporate taxation imposed on entities within a country. By establishing multilateral and bilateral agreements, surplus tax revenues can be redirected to nations facing deficits. Developing countries, including India, stand to gain significantly from such

21 Infrastructure Monitor 2022, GLOBAL INFRASTRUCTURE HUB (2022), <https://cdn.gihub.org/umbraco/media/5262/gih-infrastructure-monitor-2022-report-may-2023.pdf>.

22 Id, at 4.

23 Supra, note 21 at 4.

24 Supra, note 6 at 1.

25 Supra, note 6 at 1.

initiatives, Illustrated by the case study of ADB’s Cost-Benefit Analysis (‘CBA’) concerning spill-over tax revenues from the high-speed rail project in Taipei, China.²⁶ Strengthened treaties and enhanced communication through international agreements will enable India to participate in global dialogues and facilitate the exchange of enriching ideas.

This approach builds upon established international practices, as similar mechanisms have been previously employed in various countries.²⁷ However, spill-overs in international corporate taxation encompass multiple dimensions. The corporate tax base fluctuates due to real and profit-shifting responses, while strategic spill-overs result from tax-setting incentives.²⁸ These spill-overs influence global financial dynamics, pricing, and strategic tax competition.²⁹ Diverse factors, including network externalities, mismatches in national rules, and tighter Controlled Foreign Company (‘CFC’) regulations, can all contribute to spill-over effects.³⁰ Understanding and addressing these intricate spill-over dynamics involves not only addressing existing arbitrage opportunities but also considering the overall international tax framework and its collective impacts. The subsequent sections will delve deeper into this recommendation, shedding light on potential implications, potential shortcomings, and suggestions to execute it seamlessly, particularly within the context of the G20 framework.

B. Expanding the Meaning of “Spill-overs” for this Proposal

Tax “spill-overs” under international taxation have a broader scope than mentioned for the proposal and pertain to the influence of one jurisdiction’s

26 Cost–Benefit Analysis of Spillover Tax Revenues of High-Speed Rail in Taipei,China, ASIAN DEVELOPMENT BANK (2023), <https://www.adb.org/publications/cost-benefit-analysis-spillover-tax-revenues-high-speed-rail-taipeichina>

27 Patrick Blaggrave et al., The Importance of Macroeconomic and Policy Conditions in Transmission, IMF (Oct. 2017), <https://www.imf.org/-/media/Files/Publications/SpilloverNotes/SpilloverNote11.ashx>.

28 Id, at 5.

29 Supra, note 27 at 6.

30 Alexander Klemm and Li Liu, The Impact of Profit Shifting on Economic Activity and Tax Competition, IMF ELIBRARY, <https://www.elibrary.imf.org/downloadpdf/book/9781513511771/ch009.xml>.

tax regulations or practices on others.³¹ These ‘fiscal externalities’ can emerge from various aspects of national tax systems, even those confined to domestic domains.³² For instance, alterations in excise taxes on specific goods’ consumption can profoundly sway foreign producers of said goods. However, our focus lies on transnational repercussions stemming from corporate-level taxation for the recommended approach.

This perspective neglects personal income tax concerns related to multinational earnings, instead honing in on the crux: the magnitude and international distribution of corporate tax payments. Spill-overs wield noteworthy macro-level implications through diverse channels.³³ Decisions on a nation’s global taxation can impact other countries by influencing actual and financial flows.³⁴ This influence might extend through Foreign Direct Investment (‘FDI’) and corporate financial structures, potentially impacting economic growth and overall macro stability.³⁵

C. Current Practices in International Taxation

The international corporate tax framework relies on domestic laws and treaties, lacking a unified structure like trade regulations.³⁶ Taxing business profits involves defining their ‘source’ and the company’s ‘residence.’³⁷ ‘Source’ is where investment and production occur, often determined by physical presence, triggering tax in that country.³⁸ However, sales location

31 European Commission, Toolbox spill-over effects of EU tax policies on developing countries, TAXATION AND CUSTOMS UNION (Oct. 18, 2017), https://taxation-customs.ec.europa.eu/system/files/2017-11/toolbox_dtas_spill_overs_en.pdf.

32 *Id.*, at 6.

33 *Supra*, note 31 at 6.

34 *Supra*, note 31 at 6.

35 Kalyan Kolukuluri et al., The Impact of Domestic Economic Policy Uncertainty on Trade and Investment Within the G20, THINKTWENTY (T20) INDIA 2023, <https://t20ind.org/research/the-impact-of-domestic-economic-policy-uncertainty/>.

36 Johannes Becker & Clemens Fuest, Source versus residence based taxation with international mergers and acquisitions, 95 JOURNAL OF PUBLIC ECONOMICS 28 (2011), <https://doi.org/10.1016/j.jpubeco.2010.10.001>.

37 *Id.*, at 7.

38 *Supra*, note 36 at 7

does not establish a ‘source.’ Territorial taxation taxes profits only in the country of origin.³⁹

‘Residence’ identifies the central location of corporate taxpayers, often through incorporation or management.⁴⁰ Worldwide taxation asserts global profit taxation based on domestic residence. Double taxation is mitigated through foreign tax credits or treaties.⁴¹

In practice, countries combine worldwide and territorial taxation. A worldwide basis often defers tax on foreign profits until repatriation, resembling source taxation. Controlled Foreign Corporation (‘CFC’) rules immediately tax passive foreign income for worldwide countries and exempt only active income for territorial ones.⁴² However, inaccuracies arise in identifying income ‘source’ due to intra-firm transactions and intangibles.⁴³ The digital economy further complicates matters in cross-border transactions. The notion of ‘residence’ also remains unclear, subject to change at companies’ whims.⁴⁴

Balancing source and residence taxation, hence, becomes pivotal. The system struggles to allocate taxing rights, especially for low-income ‘source’ countries.⁴⁵ Double taxation treaties and the arm’s length principle further contribute to base erosion on which tax is levied.⁴⁶ The debate over ‘fair’ international tax allocation persists, risking unilateral measures and eroding the system’s coherence and streamlined principles.⁴⁷

39 Frank Strobel, International tax arbitrage and residence vs. source-based capital income taxation, 66 RESEARCH IN ECONOMICS 391 (2012), <https://doi.org/10.1016/j.rie.2012.07.003>.

40 Id, at 7.

41 Supra, note 39 at 7.

42 How Controlled Foreign Corporation Rules Look Around the World: United States of America, TAX FOUNDATION (June 24, 2019), <https://taxfoundation.org/blog/controlled-foreign-corporation-rules-around-the-world-united-states/>.

43 Id, at 7.

44 Supra, note 36 at 7.

45 Supra, note 36 at 7.

46 Ruud A. de Mooij et al, Chapter 8 Are Tax Treaties Worth It for Developing Economies?, IMF (Feb. 26, 2021), <https://www.elibrary.imf.org/view/book/9781513511771/ch008.xml>.

47 Id, at 8.

4. Comprehending the ripple effects of the recommendation: potential impacts explored

A. Impact of International Corporate Tax Spill-overs on Macroeconomic Performance

Capital movements have been seen to demonstrate the positive influence of tax considerations.⁴⁸ While tax factors are not the sole explanation, they play a crucial role in comprehending FDI patterns, impacting both individual nations and the global landscape.⁴⁹ This impact extends beyond revenue, affecting welfare distribution among nations.⁵⁰

B. Distinctive Effects on Developing Nations

Since the early 1980s, FDI stock in developing countries relative to their GDP has tripled to around 30%.⁵¹ This change spotlights the importance of tax policies for their fiscal health. Individual tax planning cases now often involve tens or hundreds of millions of dollars, significant for developing nations—especially in extractive sectors.⁵² Despite their seemingly small scale, these cases can accumulate substantial revenue impacts.⁵³ Interestingly, the prevalent tax incentives criticized for reducing revenue in developing countries might result from other nations' policies, creating a tax competition scenario.⁵⁴ Notably, corporate income tax ('CIT') matters more for low and upper-middle-income countries than advanced economies, and India, alongside other developing countries, is set to gain in this exchange.⁵⁵

48 Frédéric Panier et al, *Capital Structure and Taxes: What Happens When You (Also) Subsidize Equity?*, BROOKINGS (Dec. 2015), https://www.brookings.edu/wp-content/uploads/2016/06/09_effects_income_tax_changes_economic_growth_gale_samwick.pdf.

49 *Id.*, at 8.

50 *Supra*, note 48 at 8.

51 Khondoker Abdul Mottaleb & Kaliappa Kalirajan, *Determinants of Foreign Direct Investment in Developing Countries*, 4 MARGIN: THE JOURNAL OF APPLIED ECONOMIC RESEARCH 369 (2010), <https://doi.org/10.1177/097380101000400401>.

52 *Id.*, at 8.

53 *Supra*, note 51 at 8.

54 *Supra*, note 51 at 8.

55 *Tax Policy Reforms in Low and Middle-Income Countries*, OECD (2022), <https://www.oecd.org/tax/tax-policy/tax-policy-reforms-in-low-and-middle-income-countries-policy-brief.pdf>.

5. Tax Troubles: Addressing the Hindrances and Constraints of Implementing the Recommendation

A. Dissecting the Key Constraints to the Recommendation

Tax policies of one country can affect other nations' CIT bases by influencing real activities and profit shifting.⁵⁶ While real investments align with tax bases, profit shifting undermines the idea that profits should be taxed where generated. Evidence shows extensive profit shifting, with over 42% of U.S. affiliates' net income in 'tax havens.'⁵⁷ Estimating exact losses is challenging, but figures indicate substantial revenue declines, like the \$60 billion loss in the U.S. and USD 160 billion from trade mispricing in non-advanced countries.⁵⁸

Research on base spill-over effects reveals their significance in real activities and profit shifting.⁵⁹ An empirical study analyzed CIT bases in 103 countries (1980-2013) and their statutory rates domestically and abroad.⁶⁰ Results suggested sizable spill-over effects through real activities, especially from larger economies. Profit shifting spill-overs were also substantial, driven by cross-country tax rate differences and ease of exploitation. The research's evidence of significant profit shifting and base spill-over effects underscores the G20's need to obtain a multidimensional approach in the international tax framework for its vulnerability to exploitation and erosion of national tax revenues.

56 *Supra*, note 36 at 7.

57 Spillovers In International Corporate Taxation, IMF POLICY PAPER (May 9, 2014), <https://www.imf.org/external/np/pp/eng/2014/050914.pdf>.

58 *Id.*, at 9.

59 Ernesto Crivelli et al, Base Erosion, Profit Shifting and Developing Countries, IMF WORKING PAPER (WP/15/118) (May 2015), <https://www.imf.org/external/pubs/ft/wp/2015/wp15118.pdf>.

60 Alex Cobham & Petr Janský, Global distribution of revenue loss from corporate tax avoidance: re-estimation and country results, 30 JOURNAL OF INTERNATIONAL DEVELOPMENT 206 (2018), <https://doi.org/10.1002/jid.3348> (last visited Aug. 20, 2023).

B. Exclusive Concerns for Developing Countries

i. Deductibility of Interest

In many developing countries, shifting profits through intra-group loans is a pressing issue. Multinational corporations employ corporate tax planning tactics to transfer profits from regions with higher tax rates to regions with lower tax rates or places with negligible or no taxation, where minimal economic activity occurs. This process diminishes the tax foundation of the higher-tax regions through deductible payments like interest or royalties and is referred to as “base erosion.”⁶¹

India has been a victim of this phenomenon for the past decade. In December 2021, the government disclosed that a significant number of foreign companies and their subsidiaries, totaling 2,783, had halted operations in India from 2014 to November 2021.⁶² Prominent names among these departures encompass Cairn Energy, Holcim, Daiichi Sankyo, Carrefour, Henkel, Harley Davidson, and Ford.⁶³

To combat this, countries are considering limits on interest deductions to counter profit-shifting. India, too, has implemented a fresh tax approach since 2021 aimed at redistributing the tax burden away from corporations.⁶⁴ A study reveals that the effective tax rate for the nine-month period ending in December 2021 was 22.7%, compared to 24% in the same period in FY21 and 30.7% in FY20.⁶⁵

While questions arise about allowing deductions for interest paid to related parties, various nations are also adopting strategies like debt/equity ratios

61 *Supra*, note 59 at 9.

62 Decoding the mystery of MNC exits from India, *BUSINESS TODAY* (Aug. 4, 2022), <https://www.businesstoday.in/opinion/columns/story/decoding-the-mystery-of-mnc-exits-from-india-343768-2022-08-04>.

63 *Id.*, at 10.

64 Ruth Mason, *The Transformation of International Tax*, 114 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 353, XXXX (2020), <https://doi.org/10.1017/ajil.2020.33> (last visited Aug. 20, 2023).

65 Lokeshwarri SK, *New corporation tax regime off to flying start*, *BUSINESS LINE* (May 22, 2022), <https://www.thehindubusinessline.com/opinion/new-corporation-tax-regime-off-to-flying-start/article65360060.ece>.

or net interest payment criteria.⁶⁶ While these rules mainly apply to larger firms, some countries are implementing comprehensive restrictions on interest deductions exceeding a portion of a company's income.⁶⁷ These measures are practical and especially valuable for protecting tax revenues in developing countries. However, the lack of such provisions exposes many nations within the G20 to potential tax base erosion.

ii. Treaty Shopping

Developing countries face intricate hurdles in international taxation, with one pressing concern being the practice of 'treaty shopping,' whereby tax treaties are strategically utilized to minimize tax liabilities.⁶⁸ Cautionary steps are recommended in forming treaty agreements to guard against such exploitation. These countries must establish safeguards against tax avoidance related to capital gains from natural resources and assets, especially in low-tax jurisdictions.⁶⁹ The challenge of profit shifting through borrowing tactics persists, underscoring the need for simplified and transparent transfer pricing regulations.⁷⁰ While addressing these specific challenges is pivotal, it is imperative not to lose sight of broader tax reform objectives. Balancing the adoption of anti-avoidance measures with fostering an attractive investment environment is essential. Research on the impact of tax treaties on investment yields mixed findings, but the issue of 'treaty shopping' is increasingly garnering attention due to its potential revenue loss.⁷¹ Therefore, a cautious approach is advised before entering into bilateral tax

66 V. Sundararajan, Debt-Equity Ratios of Firms and Interest Rate Policy: Macroeconomic Effects of High Leverage in Developing Countries, 32 STAFF PAPERS - INTERNATIONAL MONETARY FUND 430 (1985), <https://doi.org/10.2307/3866806>.

67 *Id.*, at 11.

68 Sunghoon Hong, Strategic Treaty Shopping, 2014 SSRN ELECTRONIC JOURNAL, <https://doi.org/10.2139/ssrn.2436679>.

69 *Id.*, at 11.

70 *Supra*, note 68 at 11.

71 Svetozara Petkova, Treaty Shopping? The Perspective of National Regulators, 32 INTERTAX 543 (2004), <https://doi.org/10.54648/taxi2004085>.

treaties, and the implementation of ‘limitation of benefit’ provisions offers a promising layer of protection against abuse.⁷²

iii. Arm’s Length Pricing

The Arm’s Length Principle (‘ALP’) lies at the core of international tax frameworks, aiming to value intra-firm transactions based on market-equivalent prices.⁷³ This principle allocates income within multinational corporate groups and across countries while maintaining fairness between these entities and independent operations.⁷⁴ ALP’s self-assessment nature requires taxpayers to ensure their internal transfer prices align with market rates, subject to scrutiny by tax authorities.⁷⁵ However, ALP has faced criticism for complexity and permissiveness, leading to the concentration of profits in low-tax jurisdictions.⁷⁶ Challenges arise from valuing intangible asset transfers and risk reallocation among affiliates.⁷⁷ Developing nations encounter particular difficulties due to limited administrative capacity.⁷⁸ Strengthening the ALP application involves implementing appropriate transfer pricing rules, offering detailed guidance, enhancing data availability, and capacity building. Nonetheless, these efforts shouldn’t overshadow the crucial task of fortifying domestic tax systems.

iv. Taxing Indirect Transfers of Interests

The intricate tax treatment of gains from indirect transfers of assets holds significant implications for many developing nations. This issue revolves

72 BEPS Action 6: Preventing The Granting Of Treaty Benefits In Inappropriate Circumstances, OECD (Apr. 11, 2014), <https://www.oecd.org/tax/treaties/comments-action-6-prevent-treaty-abuse.pdf>.

73 Evelyn Korn & Stephan Lengsfeld, Duoplistic Competition, Taxes and the Arm’s Length Principle, 2005 SSRN ELECTRONIC JOURNAL, <https://doi.org/10.2139/ssrn.871219>.

74 *Id.*, at 12.

75 *Supra*, note 73 at 12.

76 Chongwoo Choe & Charles E. Hyde, Multinational Transfer Pricing, Tax Arbitrage, and the Arm’s Length Principle, 2004 SSRN ELECTRONIC JOURNAL, <https://doi.org/10.2139/ssrn.600881>.

77 Jiří Jakoubek, Arm’s Length Principle in Intangible Assets Valuation, 2013 *ESKÝ FINANČNÍ A ÚČETNÍ ASOPIS* 70, XXXX (2013), <https://doi.org/10.18267/j.cfuc.353>.

78 *Id.*, at 77

around the potential exploitation of capital gains on assets, such as telecom or mineral licenses, through intricate corporate chains that lead to sales in low-tax jurisdictions. In these scenarios, host countries may miss out on substantial revenue even as sizable gains are realized within their borders.⁷⁹ Several low-income countries have recently grappled with this concern, particularly regarding resource discoveries. While there are debates on whether taxing such gains is appropriate, most countries seek to do so. Strengthening domestic tax laws is crucial to tackling this challenge, demanding clear definitions of concepts like ‘immovable property’ and extended tax jurisdiction across multi-tier corporate structures. Tax treaties could provide safeguards, although many existing agreements lack clarity on this matter. Implementing effective taxation proves complex, as it involves tracking transactions and collecting taxes, especially from non-residents.⁸⁰ Addressing these issues may require notifications of relevant authorities about indirect disposals and the exchange of tax-related information between countries.⁸¹ Furthermore, challenges in tax collection from non-residents can be tackled through innovative measures such as involving residents’ liability and imposing non-tax penalties.

v. Negative Spill-over Effects of Domestic Tax Rates

The negative spill-over effects are another concern, with the European Union (‘EU’) serving as a case study.⁸² The EU’s lower tax rate implementation and incorporation of gaps and loopholes can escalate the risk of such adverse impacts.⁸³ Evaluated through the Comparative Tax Haven Index (‘CTHI’), which converts qualitative data into numerical scores, the analysis gauges the degree of corporate tax haven

79 IMF OECD UN and World Bank, Options for Low Income Countries’ Effective and Efficient Use of Tax Incentives for Investment, G-20 DEVELOPMENT WORKING GROUP (Oct. 15, 2015), <https://www.oecd.org/tax/tax-global/options-for-low-income-countries-effective-and-efficient-use-of-tax-incentives-for-investment.pdf>.

80 *Id.*, at 13.

81 *Supra*, note 79 at 13.

82 Joint Research Centre, Statistical Audit of the Corporate Tax Haven Index, EUROPEAN COMMISSION (2020), https://publications.jrc.ec.europa.eu/repository/bitstream/JRC121296/jrc121296_cthi_jrc_technical_report_erhart_2020_final_1.pdf.

83 *Id.*, at 13.

attributes.⁸⁴ While the EU's average lowest applicable corporate income tax rate surpasses that of developing countries, considering the EU and its dependencies holistically reveals an amplified risk of negative spill-overs.⁸⁵ Remarkably, the EU fares better in certain categories like tax holidays and economic zones when compared to developing nations.⁸⁶ Yet, the overall assessment suggests that the EU's responsibility for negative tax spill-overs aligns with that of G20 countries but outstrips the risk posed by developing economies. Addressing these spill-overs through tax reforms could contribute to Sustainable Development Goals by augmenting public revenue retention and bolstering domestic resource mobilization.⁸⁷

Developing nations clearly face amplified tax base spill-overs. There are case studies where single instances significantly impact revenue, particularly in extractive industries and African telecoms.⁸⁸ Econometric evidence underscores the relevance of tax spill-overs for developing countries, necessitating tailored solutions to address challenges.⁸⁹ Addressing spill-over effects by the G20 requires anti-avoidance measures, clear arm's length principle guidance, improved data availability, capacity building, and strengthening domestic tax systems.

6. Prospects for mitigating spill-over effects and strengthening reform initiatives

A. Countering the Spill-outs with Strategic Spill-overs

Unveiling a compelling narrative of strategic dynamics in tax policy, robust evidence highlights the substantial impact of strategic spill-overs

84 *Supra*, note 82 at 13.

85 *Supra*, note 82 at 13.

86 PricewaterhouseCoopers LLP, *The Impact of Taxes on the Competitiveness of European Tourism*, EUROPEAN COMMISSION (Oct. 2017), <https://www.europarl.europa.eu/cmsdata/130660/The%20Impact%20of%20Taxes%20on%20the%20Competitiveness%20of%20European%20tourism.pdf>.

87 *Id.*, at 14.

88 COVID-19 and Africa: Socio-economic implications and policy responses, OECD (May 7, 2020), <https://www.oecd.org/coronavirus/policy-responses/covid-19-and-africa-socio-economic-implications-and-policy-responses-96e1b282/>.

89 *Supra*, note 86 at 14.

on the global tax landscape. Over the past three decades, a remarkable decline in statutory CIT rates, particularly pronounced in Europe and Central Asia, has garnered attention.⁹⁰ This trend extends to the pervasive adoption of IP boxes, emblematic of strategic spill-overs targeting the most mobile elements of the tax base.⁹¹ A growing body of empirical analysis confirms that this phenomenon is not accidental, mirroring a deliberate competitive stance among policymakers.⁹² For instance, research reveals that when one country lowers its statutory CIT rate by one percentage point, others, on average, respond with a reduction of 0.7 percentage points.⁹³ Developing nations similarly exhibit this trend, tailoring their incentives to align with neighboring countries.⁹⁴ An evident ‘race to the bottom’ is observed among special regimes, notably in Africa, where tax burdens have dwindled drastically.⁹⁵ Though strategic responses counteract direct revenue implications of base spill-overs, the essence of these effects persists. While a one percentage point reduction in global statutory rates erodes the typical country’s CIT base by around 6.5 percent, the resultant strategic adjustments yield a net base loss of 2.5 percent, accentuating the intricate balance between rate reductions and revenue implications.⁹⁶ Collaborative and mutually-determined taxation rate decisions among G20 countries could

90 United Nations, *Inequality In A Rapidly Changing World*, WORLD SOCIAL REPORT 2020 (2021), <https://desapublications.un.org/file/558/download>.

91 *Id.*, at 14.

92 *Supra*, note 89 at 14.

93 Sacchidananda Mukherjee & Shivani Badola, *Macroeconomic Implications of Changes in Corporate Tax Rates: A Review*, 2022 AUSTRALIAN ECONOMIC REVIEW, <https://doi.org/10.1111/1467-8462.12497> (last visited Aug. 20, 2023).

94 *Id.*, at 15.

95 Junhyung Park et al, *A Partial Race to the Bottom: Corporate Tax Developments in Emerging and Developing Economies*, IMF (Jan. 1, 2012), <https://www.imf.org/en/Publications/WP/Issues/2016/12/31/A-Partial-Race-to-the-Bottom-Corporate-Tax-Developments-in-Emerging-and-Developing-Economies-25675>.

96 Parthasarathi Shome, *Recent Tax Policy Trends and Issues in Latin America*, INTERNATIONAL MONETARY FUND, <https://www.elibrary.imf.org/downloadpdf/book/9781557755179/ch06.pdf>.

97 Sebastian Beer et al, *International Corporate Tax Avoidance: A Review of the Channels, Magnitudes, and Blind Spots*, IMF - WP/18/168 (2018), <https://www.imf.org/-/media/Files/Publications/WP/2018/wp18168.ashx>.

mitigate the likelihood of reducing domestic tax rates within a competitive framework. This approach would assist all nations in securing corporate tax revenues without embarking on a frenzied race to allure most corporations. This strategy ultimately inflicts self-inflicted damage, as meager tax rates tend to lead to tax spill-outs rather than augmented revenues.

B. Restructuring Tax Architecture

The extent and character of spill-over effects are shaped by elements of international tax systems beyond current remedial efforts. Mitigating avoidance does not erase spill-overs, which stem from tax rules influencing business decisions and government tax strategies.⁹⁷ These incentives vary with the broader global tax framework, such as worldwide versus territorial taxation—a distinction not currently addressed by ongoing initiatives.⁹⁸ Although immediate significant changes might be impractical, the interest in restructuring the tax architecture is noteworthy. While universally accepted principles for efficient international tax structures are limited, proposed alternatives often react to perceived challenges and equity concerns rather than being firmly grounded in efficiency and cross-country equity goals. Bringing uniformity in this structure requires a five-step process by the G20 nations:

i. Step 1: Enhancing Aspects of Global Taxation

A notable shift has been witnessed in recent years, moving away from worldwide taxation systems towards territorial models. Notably, in the Organization for Economic Cooperation and Development (‘OECD’), 17 countries have substantially transitioned to territoriality since the 1990s, resulting in territorial nations exporting nearly twice the capital compared to worldwide-taxing peers.⁹⁹ While the United States remains the principal OECD country upholding worldwide taxation, major emerging markets like Brazil, Russia, India, China, and South Africa (‘BRICS’) continue to

⁹⁸ Id, at 15.

⁹⁹ Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, OECD/G20 BASE EROSION AND PROFIT SHIFTING PROJECT (Oct. 2021), <https://www.oecd.org/tax/beps/brochure-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf>.

embrace it.¹⁰⁰ Amidst these shifts, the rationale for adopting territorial regimes is multifaceted, driven by concerns of competitive disadvantages for domestically-based firms abroad, addressing revenue risks from corporate inversions, foreign tax credit complexities, and disincentives for earnings repatriation tied to deferral.¹⁰¹ While territoriality may boost certain economic aspects, it can also amplify profit shifting and tax competition, particularly concerning developing economies.¹⁰² This poses a distinct challenge, as the allure of lower taxes in foreign destinations can lead to intensified competition for investments and profit shifting. Adopting worldwide taxation without deferral, or a territorial approach bolstered by firm, controlled foreign corporation regulations by G20 nations, could alleviate spill-over effects, though not eliminate them, and mitigate the pressures to cut tax rates strategically to protect tax bases. Such a system, however, will have to be backed by defining tax liability based on residence, posing practical and conceptual challenges as the formal tax residence of multinationals becomes increasingly detached from their intricate global activities and ownership structures.

ii. Step 2: Establishing Base-Level Compulsory Domestic Taxation

A strategy to strengthen developing nations' corporate income tax base involves adopting a minimum tax ('MT').¹⁰³ This approach entails taxing factors like turnover, book earnings, or assets, which are less manipulable than taxable income.¹⁰⁴ The MT ensures that tax payment is higher than what is due under it or the standard CIT.¹⁰⁵ With over 30 countries employing corporate MTs, their schemes vary, posing complexities and

100 Id, at 16.

101 Supra, note 99 at 16.

102 Li Liu & Dominika Langenmayr, Home or Away? Profit Shifting with Territorial Taxation, 2022 IMF WORKING PAPERS 1 (2022), <https://doi.org/10.5089/9798400216992.001> (last visited Aug. 20, 2023).

103 Minimum corporate taxation, TAXATION AND CUSTOMS UNION (Dec. 12, 2022), https://taxation-customs.ec.europa.eu/taxation-1/corporate-taxation/minimum-corporate-taxation_en.

104 Id, at 17.

105 Supra, note 103 at 17.

distortions.¹⁰⁶ However, MTs have proven practical in safeguarding domestic tax bases and could also counter aggressive international tax planning linked to inward investments.¹⁰⁷ As recognized by experts, they might offer the G20 a simplified means to address heightened limitations on cross-border payment deductibility from developing countries.

iii. Step 3: Introducing Destination-Based Corporate Taxation

A bold proposition for improved implementation in the G20 is shifting to destination-based corporate taxation, excluding exports from the tax base and disallowing import deductions.¹⁰⁸ In its simplest form, this tax operates on a cash flow basis, aligning with value-added and labor subsidy concepts.¹⁰⁹ While challenges exist, like addressing services and World Trade Organisation ('WTO') regulations,¹¹⁰ the appeal lies in minimal cross-border spill-overs. This proposition suggests redistribution of the tax base to countries with concentrated sales, aligning with value-added tax ('VAT') reliance trends.

iv. Step 4: Deploying Formula Apportionment ('FA') for Tax Base Allocation

Formula apportionment ('FA'), a method long employed at sub-national levels and proposed by the European Commission as a 'Common Consolidated Corporate Tax Base' ('CCCTB') for the EU, suggests allocating a multinational enterprise's tax base on a consolidated basis across its corporate group and then distributing it among jurisdictions using formulaic principles based on factors like sales, assets, payroll, and employees.¹¹¹ FA's appeal lies in sidestepping the need to assess intra-group transactions, thereby curbing profit shifting.¹¹² This approach aligns

106 Spillovers in International Corporate Taxation, 14 POLICY PAPERS (2014), <https://doi.org/10.5089/9781498343367.007>

107 Id., at 17.

108 Alan J. Auerbach et al., Destination-Based Cash Flow Taxation, 2017 SSRN ELECTRONIC JOURNAL, <https://doi.org/10.2139/ssrn.2908158>.

109 Id., at 17.

110 Supra, note 108 at 17.

111 Michael P. Devereux & Simon Loretz, The Effects of EU Formula Apportionment on Corporate Tax Revenues, 29 FISCAL STUDIES 1 (2008), <https://doi.org/10.1111/j.1475-5890.2008.00067.x>.

112 Id., at 18.

tax payments more closely with economic realities and gains traction in subnational contexts, indicating its potential efficacy for firms operating within integrated economies.¹¹³ Particularly intriguing for developing nations due to their susceptibility to profit shifting, FA introduces challenges surrounding formula weights.¹¹⁴ The distribution of revenue across countries hinges on these weights, yielding substantial effects and potentially redistributing up to 50 percent of current CIT revenue for certain nations.¹¹⁵ Although FA offers promise, its global adoption remains unlikely due to entrenched legal and institutional structures supporting current tax frameworks. However, its potential in smaller multilateral groups like the G20 has the required potential for disruption.

There are some accompanying riders to its adoption. Definitions of factors like sales, their origin or destination, and the inclusion of intra-group sales significantly influence outcomes, making precise definitions pivotal by G20 nations. Furthermore, G20 must acknowledge and resolve the valuation, avoidance, and strategic tax-setting issues under FA, which would otherwise complicate implementation.

v. Step 5: Exploring Dynamic Approaches

The G20 must adopt more dynamic methods to accommodate diverse countries' dynamic demands sufficiently. The 'formulary profit split' ('FPS') is a fruitful method offering offers potential progress.¹¹⁶ This method, consistent with current transfer pricing arrangements, entails the division of profits based on transactional residual profit, combining formulaic and arm's-length methods.¹¹⁷ This hybrid approach could calculate the tax base on a unitary basis, using straightforward arm's-length methods for certain transactions and adopting a formula akin to FA to allocate

113 *Supra*, note 111 at 18

114 *Supra*, note 111 at 18.

115 *Supra*, note 111 at 18.

116 Reuven S. Avi-Yonah et al., Allocating Business Profits for Tax Purposes: A Proposal to Adopt a Formulary Profit Split, 9 FLORIDA TAX REVIEW (2022), <https://doi.org/10.5744/ft.2009.1052>.

117 *Id.*, at 19.

residual profits after arm's-length transactions.¹¹⁸ The FPS approach builds upon current strengths while addressing some of its limitations.¹¹⁹

Meanwhile, a radical proposition calls for shifting corporate taxation to a destination basis, effectively excluding exports from the base and eliminating import deductions. Operating on a cash flow basis, this model combines VAT and labor subsidy mechanisms, ensuring minimal cross-border spill-overs and reducing tax benefits for underpricing.¹²⁰ While unresolved issues and potential implications exist, this approach aligns with increasing VAT reliance and labor tax reduction.¹²¹ These innovative methods pose essential questions about the role of corporate income tax that merit thorough examination within the ongoing discourse.

C. Addressing Coordination Dilemmas

Addressing spill-overs in international taxation through coordination has proven challenging. While some question the need for coordination due to political economy considerations, even if the harm caused by spill-overs is acknowledged, agreeing on effective coordination measures remains difficult.¹²² Countries have divergent interests, especially between low and high-tax nations, which makes agreement elusive.¹²³ For instance, capital-exporting countries prioritize the interests of their residence country, while resource-rich nations emphasize source rights. Despite these differences, mutually beneficial coordination is possible. Minimum effective tax rates, for example, can benefit low-tax countries by inducing increases in their rates and others, leading to collective gains.

118 *Supra*, note 116 at 19.

119 *Supra*, note 116 at 19

120 *Coordinating Taxation Across Borders*, IMF (Apr. 2022), <https://www.imf.org/-/media/Files/Publications/fiscal-monitor/2022/April/English/ch2.ashx>.

121 *Id.*, at 19.

122 Michael Wallerstein & Adam Przeworski, *Capital taxation with open borders*, 2 *REVIEW OF INTERNATIONAL POLITICAL ECONOMY* 425 (1995), <https://doi.org/10.1080/09692299508434328>.

123 *Id.*, at 20.

124 *Supra*, note 122 at 19.

However, diversity complicates the agreement process.¹²⁴ Unlike international trade, there is no comparable institutional framework, though Business Tax Treaties ('BTTs') touch on some corporate tax aspects.¹²⁵ Proposals for a 'World Tax Organization' akin to the World Trade Organization lack traction, largely due to the absence of guiding principles like those for free trade.¹²⁶ Smaller countries wield significant influence in taxation, necessitating broad participation in agreements.¹²⁷ While 'harmful tax practices' remain unclear, efforts to identify them have centered on preferential regimes by most multilateral organizations.¹²⁸ Nevertheless, this approach is problematic, as aggressive competition for mobile tax bases might be preferable to milder competition on a broader front.¹²⁹

Partial coordination poses further challenges.¹³⁰ Regional coordination, while feasible, can expose participating countries to pressures from lower-tax jurisdictions.¹³¹ While such coordination does not necessarily harm participants, seeking engagement with non-participants could benefit the G20. Coordinating selectively on certain aspects can exacerbate distortions, potentially encouraging more aggressive profit-shifting tactics if treaty abuse is curbed. A comprehensive approach, such as the Base erosion and profit shifting ('BEPS') Action Plan,¹³² is crucial to effectively tackling spill-overs in international taxation.

125 Elena Fernández Rodríguez, *Corporate Tax Burden from a Worldwide Perspective*, 37 *INTERTAX* 670 (2009), <https://doi.org/10.54648/taxi2009068>.

126 *Id.*, at 20.

127 *Supra*, note 125 at 20.

128 Eckhard Janeba & Michael Smart, *Is Targeted Tax Competition Less Harmful than its Remedies?*, 2001 *SSRN ELECTRONIC JOURNAL*, <https://doi.org/10.2139/ssrn.288944>.

129 John Meadowcroft, *TAX, EQUITY AND REDISTRIBUTION*, 27 *ECONOMIC AFFAIRS* 90, XXXX (2007), <https://doi.org/10.1111/j.1468-0270.2007.00721.x>.

130 *Supra*, note 122 at 19.

131 *Supra*, note 125 at 20.

132 *Supra*, note 72 at 12

D. Undertaking Rigid Norm Evaluation Exercises

Consider adopting qualitative evaluation as a potent tool for comprehending the intricate landscape of global economic dynamics.¹³³ Traditional measurement systems often struggle to capture such complexity, while qualitative assessment can provide nuanced insights.¹³⁴ Building on insights from international benchmarking, it is essential to recognize that evaluating national policies inherently carries normative assumptions, essentially engaging in a form of ‘norm evaluation.’¹³⁵ As India contemplates the future of spill-over analysis, it is crucial to define its purpose—a holistic vision of an improved international tax system with its constituent norms.¹³⁶ India must propose creating a minimally normative tax spill-over framework to address this. This approach is grounded in identifying and discouraging policies causing harm to other states is paramount within an effective international moral harm convention. This proposition addresses the need for pragmatic country-level spill-over analysis and introduces fresh methodological pathways. By amalgamating reformist and revolutionary perspectives, it will underline reputational risk as a catalyst for curbing harmful tax competition. This can be implemented through risk grading and reporting mechanisms. Embracing this approach by the G20 aligns with the evolving demands of international governance and provides a comprehensive understanding of the global tax landscape.

7. Leading the journey ahead: seeking the best of both worlds

In the dynamic world of international taxation, which the G20 aims to harness towards domestic and collaborative growth, the challenges of spill-over effects and their multifaceted implications have demanded innovative and thoughtful solutions. As we navigate the complexities of tax competition, profit shifting, and strategic interactions, it becomes evident

133 Robert A. McLean, Factors Driving Global Economic Integration, 31 CFA DIGEST 53 (2001), <https://doi.org/10.2469/dig.v31.n4.972>.

134 *Id.*, at 21.

135 David M. Gordon, Taxation of the Poor and the Normative Theory of Tax Incidence, 62 THE AMERICAN ECONOMIC REVIEW 319 (1972), <https://www.jstor.org/stable/1821558>.

136 *Id.*, at 21.

that a comprehensive approach is essential. The evolving landscape calls for a synergy of qualitative evaluation and established measurement systems to capture the true essence of global economic phenomena. The proposal of expanding the spill-over tax proposal's application by involving an international collaborative spill-over of taxes through careful consideration of normative assumptions and a systemic vision of an ideal international tax system will take the global economy to new heights. Balancing reformist and revolutionary perspectives, it will transcend traditional paradigms to pave the way for a more equitable and sustainable global tax environment by identifying and mitigating policies that harm other nations. As India stands in chairmanship and is at the crossroads of international tax reform, this integrated approach offers a roadmap toward achieving a fair and effective international tax regime that benefits all nations.

The proprietary pantheon: a paradigmatic analysis of Intellectual property in the tapestry of mergers & acquisitions

*Mr. Aaditya Bajpai & Ms. Shreya Bajpai**

1. Introduction

The global economy is in a state of flux. As a consequence of globalisation and rapid technological advancements, the business landscape is always shifting, hence, the flux.¹ This has led to intense competition in the market, and companies now have to constantly engage in business restructuring.² Two separate concepts come together to form the phrase “business restructuring”.³

Referring to the term ‘business’, it includes trade, commerce, manufacturing etc., while the word ‘restructuring’ means rearranging affairs. Therefore, corporate restructuring is the action of companies changing their structure. Business reorganization is essential because by utilizing it companies are developing core competency for global as well as domestic competitiveness and technological advancement via cooperation and joint venture, divesting non-profitable firms, and shutting down non-operating companies.⁴ Corporate firms to retain a dominant position over the long term have to constantly change their strategies to better serve their competition while

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1 Satish Kumar Lalit K. Bansal, ‘The impact of mergers and acquisitions on corporate performance in India’, (2008) 46 Mang. Decision 1531, 1532.

2 Holly Threlfall, ‘Why would a business restructure?’, (Wilson Browne Solicitors, May 23 2023) <<https://www.wilsonbrowne.co.uk/news/business/why-would-a-business-restructure/>> accessed May 26 2024.

3 Ben Loveday, ‘How Restructuring Your Business Can Help You Protect Your Assets’, (Haines Watts, November 2 2021) <<https://www.hwca.com/accountants-reading/opinion/how-restructuring-your-business-can-help-you-protect-your-assets/>> accessed May 26, 2024.

4 David R. King, Olimpia Meglio, Luis Gomez-Mejia, Florian Bauer & Alfredo De Massis, ‘Family Business Restructuring: A Review and Research Agenda’, (2021) 59 JMS 197, 200.

also exploring new areas in which they may have a comparative advantage.⁵ Corporations reorganize by making structural and operational changes,⁶ and by reorganizing their finances.⁷ Stock market surges encourage mergers and acquisitions as businesses seek to capitalize on soaring share prices.⁸ There are several scenarios in which a company's monetary requirement might be loosened.⁹

There may be cases of deteriorating financial situation, when the settlement's borrowing capacity may be reduced if the outcome does not match up with its intentions, and in such cases, the business is hampered, because having a solid financial foundation is essential for the continued success of an organization.¹⁰ With reorganized finances, the business may eventually have the ideal capital structure in such cases.¹¹ Hence, reorganization aids in maintaining cash flow, letting management concentrate on expanding the firm.

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- 5 Frederick W. Gluck, Stephen P. Kaufman & A. Steven Walleck, 'Strategic Management for Competitive Advantage', (Harvard Business Review, July 1980) <<https://hbr.org/1980/07/strategic-management-for-competitive-advantage>> accessed on May 26, 2024.
 - 6 Martin Reeves & Mike Deimler, 'Adaptability: The New Competitive Advantage', (Harvard Business Review, July 2011) <<https://hbr.org/2011/07/adaptability-the-new-competitive-advantage>> accessed on May 26, 2024.
 - 7 Alexandra Twin, 'Restructuring: Definition, Meaning, Process, and Example', (Investopedia, 31 July 2023) <<https://www.investopedia.com/terms/r/restructuring.asp>> accessed 26 May 2024.
 - 8 Ben White, 'Big Deals, Big Firms Rule Picks', (The Washington Post, January 1 2005) <<https://www.washingtonpost.com/archive/business/2005/01/02/big-deals-big-firms-rule-picks/6c02efd8-7582-45c3-8d4d-210635a7a279/>> accessed May 26, 2024.
 - 9 Frances X. Frei, 'The Four Things A Service Business Must Get Right', (Harvard Business Review, April 2008) <<https://hbr.org/2008/04/the-four-things-a-service-business-must-get-right>> accessed May 26, 2024.
 - 10 Catherine Cote, 'Why is Budgeting Important In Business? 5 Reasons', (Harvard Business School, July 6 2022) <<https://online.hbs.edu/blog/post/importance-of-budgeting-in-business>> accessed May 26, 2024.
 - 11 Steven Gjerstad, 'Reorganization of Failing Financial Firms: A Capital Structure Solution', (Cato Journal, 2018) <<https://www.cato.org/cato-journal/winter-2018/reorganization-failing-financial-firms-capital-structure-solution>> accessed May 26, 2024.

Corporate financial restructuring comprises reorganizing a business's assets and obligations to better meet its cash flow requirements, with the goals of increasing profitability, facilitating expansion, and benefitting the company's creditors, owners, and other stakeholders. Hence, corporations globally have often seen significant changes in organizational structure. Businesses opt for restructuring as an inorganic growth strategy which may include expansion through mergers and acquisitions, strategic alliances, joint ventures, contraction, corporate control, or making changes in the ownership structures, such as going private.

While there are several forms of business restructuring, mergers and acquisitions (M&As) are by far the most prominent approach when it comes to gaining an edge over the competition. The value of acquisitions has risen considerably over the years. While the year 2022 saw a decline in M&A deals in the global market owing to financial challenges,¹² such as a pullback in leveraged finance, a possible recession, et cetera, the current trends conclude that the same is set to witness an increase in 2023. India, however, has witnessed record growth¹³ in overall M&A deals in 2022,¹⁴ which is set to increase even further in 2023.¹⁵ Mergers and acquisitions are crucial to a thriving economy by serving to boost production capacity, open up new markets, increase market dominance, introduce cutting-edge technology, and diversify intellectual property, among other benefits.¹⁶

12 Kristin Broughton, 'M&A Is Expected to Pick Up in 2023 as Companies Adapt to Tougher Conditions', (The Wall Street Journal, 5 January 2023) <<https://www.wsj.com/articles/m-a-is-expected-to-pick-up-in-2023-as-companies-adapt-to-tougher-conditions-11672874676>> accessed 26 May 2024.

13 Priyal Mahтта, 'India's M&A Activity To Remain Buoyant Amid Global Slump', (VCC Circle, 31 January, 2023) <<https://www.vccircle.com/indias-m-a-activity-to-remain-buoyant-amid-global-slump>> accessed on 26 May 2024.

14 The Economic Times, 'India M&A deal size hit record levels, up to 139%: Bain & Co', (The Economic Times, 31 January 2023) <<https://economictimes.indiatimes.com/news/company/corporate-trends/india-ma-deal-size-hit-record-levels-up-139-bain-co/articleshow/97501849.cms>> accessed 26 May 2024.

15 Malvika Maloo, 'India M&A Momentum To Remain Strong in 2023, Says Report', (VCC Circle, 14 February 2023) <<https://www.vccircle.com/indiam-a-momentum-to-remain-strong-in-2023-says-report>> accessed 26 May 2024.

16 'The Vth NLSIR Symposium on Corporate Mergers and Acquisitions in India - A Transcription', (2013) 24 NLSIR 89.

In mergers and acquisitions, the acquiring business gains access to several rights and assets from the target company. One such important right is the acquired company's intellectual property rights, for sometimes the value of the acquired company and the access to its intellectual property rights acts as the primary motivation for a merger.¹⁷ The rise is not limited to domestic mergers and acquisitions but also extends to cross-border mergers and acquisitions.¹⁸

One of the methods to quickly expand the business into overseas markets, and owing to the liberalised legal and regulatory system cross border mergers and acquisitions have also gained traction.¹⁹ *The Companies Act* of 2013 makes provisions for easier, more efficient and safer mergers and acquisitions. Furthermore, these provisions also take into consideration factors affecting the intellectual property rights framework, to maintain a harmonious balance between the legal regulations and foreign ties.²⁰

How do intellectual property rights form a nexus with cross-border mergers and acquisitions, one may ask? And a connection does exist, exactly what it is remain unclear. This uncertainty is ought to be explained in this article. The article deals with the nexus between intellectual property laws and the laws governing mergers and acquisitions with a mention of cross-border mergers and acquisitions. The article analyses the concept of cross-border mergers and acquisitions and nuances revolving around the laws governing the process. The article then moves to the concept of intellectual property and the due diligence conundrum while taking into consideration mergers and acquisitions. The article concludes by elaborating upon how Intellectual

17 Ade Candra, et. al., 'Literature Review on Merger and Acquisition', (2021) 39 *Estudios de Economia Aplicada* 1, 7.

18 Wen-Hong Chiu, et. al., 'Merger and Acquisitions Integration, Implementation as Innovative Approach Toward Sustainable Competitive Advantage: A Case Analysis From Chinese Sports Brands', (National Library of Medicine, April 26 2022) <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9088679/>> accessed May 26, 2024.

19 S. Vishal Varma, 'Regulation of Cross-Border Mergers and Acquisitions in India, UK and USA', (Enhelion Blogs, July 12 2023) <Regulation of Cross-Border Mergers and Acquisitions in India, UK and USA> accessed May 26, 2024.

20 Kritika Rastogi, 'Mergers and Acquisitions in New Era of Companies Act, 2013', (Mondaq, April 22 2021) <<https://taxguru.in/company-law/mergers-acquisitions-era-companies-act-2013.html>> accessed May 26, 2024.

property rights give a competitive advantage in merger and acquisition deals.

2. An odyssey On Cross Border Mergers And Acquisitions

The term ‘mergers’ or ‘amalgamations’ is not expressly defined under any law, but is usually understood as “an arrangement by which the transfer of undertakings is effected”,²¹ and when the companies arranging the transfer of undertakings are located in different locations, the same is referred to as cross-border mergers.

The Hindu Business Line reported on September 11, 2022, the boom in cross-border mergers and acquisitions, titled “Regulating the boom in cross-border M&As”.²² The year 2021 saw a 69 per cent increase in the amount earned from cross-border merger deals in comparison to the year 2020.²³ The policy framework in the early 1990s following liberalisation led to a substantial expansion in outward foreign direct investments from 2000-2007.²⁴ The whooping increase in merger and acquisition deals is, therefore, a result of the existing laws and regulatory framework surrounding such deals as well as the constant actions of the government to evolve the existing framework to attract more involvement in the mergers and acquisitions arena.

While the laws governing mergers and acquisitions are intricate owing to the legalities involved when a corporation acquires another and integrates all of the target company’s assets, and financial aspects, among others. However, in cases of cross-border mergers and acquisitions, the complexities increase two-fold due to the legal compliances of the two countries, the accounting mechanism and the tax considerations, to name a few.

21 Vikramjit Reen, ‘An Overview of the Legal Regime Governing Mergers and Acquisitions in India’, (1996) 8 Stud. Advoc. 142, 142.

22 Prashant Kataria, ‘Regulating the boom in cross-border M&As’, (The Hindu Business Line 11 September 2022) <<https://www.thehindubusinessline.com/business-laws/regulating-the-boom-in-cross-border-mas/article65878888.ece>> accessed May 26, 2024.

23 Id.

24 Geeta Rani Duppati & Narendar V. Rao, ‘Cross-border mergers and acquisitions: Mature markets v. emerging markets – with special reference to the USA and India’, (2015) 2 Cogent Business & Management 1, 1.

The process of regulating mergers and acquisitions is essentially referred to as ‘merger control’ and is predominantly governed by Company laws and Antitrust laws in India. However, there are several other regulations governing such deals, namely,

- ❖ SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011
- ❖ Insolvency and Bankruptcy Code 2016
- ❖ Income Tax Law, 1961
- ❖ The Indian Stamp Act, 1899
- ❖ The Transfer of Property Act, 1882
- ❖ Foreign Exchange Management Act, 1999
- ❖ Securities Laws of India

Under the earlier regime,²⁵ only inward mergers were allowed, and the transferee companies were defined as a company formed under the Indian Act rather than foreign business.²⁶ The provisions governing mergers and acquisitions were later discussed by the Expert Committee on Company Law, headed by Dr. JJ Irani which submitted its report in 2005.²⁷ The Committee deliberated on the lengthy process which has to be initiated through common agreement in case of a legal problem, the process governing mergers and acquisitions being court driven, hence, needed a reform.²⁸ The Committee also recommended that another one of the issues leading to complicated delays in proceedings regarding mergers and acquisitions was that under the 1956 Act, along with the provisions relating to the process other provisions were also attracted adding to the complexities of the cases.²⁹

Particularly dealing with cross-border mergers and acquisitions, the Committee noted that along with the changes proposed to the *Companies*

²⁵ The Companies Act, 1956, No. 1, Acts of Parliament, 1956.

²⁶ Id., at § 394(4).

²⁷ J.J. Irani Report of the Expert Committee on Company Law, (Ministry of Company Affairs) <<https://ibbi.gov.in/uploads/resources/May%202005,%20J.%20J.%20Irani%20Report%20of%20the%20Expert%20Committee%20on%20Company%20Law.pdf>> accessed 26 May 2024.

²⁸ Id. at 113.

²⁹ Id. at 114.

Act of 1956, necessary changes should also be brought to the tax laws, foreign exchange laws, and securities laws in order to enable mergers of Indian companies with foreign entities. The recommendations of the Committee were taken into consideration by the Central Government, and finally, the provisions were amended with the passage of the *Companies Act of 2013*. Through this act, no restrictions were placed on domestic mergers so long they were approved by the Reserve Bank of India, however, cross-border mergers were allowed with countries that have already been alerted by the Central government.³⁰ For clarification, the 2013 act, defined ‘foreign company’ as the one incorporated outside India irrespective of it having a place of business in India.³¹ The Act of 1956, conferred the High Courts with the power to authorise a merger and acquisition scheme, which made the process lengthy and tedious. This was remedied by the 2013 Act, by allowing the National Company Law Tribunal “NCLT” to assume the authority of the High Courts.

Whether the merger is following the rules of the market, is to be determined according to the antitrust laws. Since the rise of a monopoly is possible following certain mergers, the *Competition Act of 2002* regulates competition and regulates mergers and acquisitions to prevent such a situation from arising. Alongside making provisions for anti-competitive agreements and situations of abuse of dominance, the Act also provides for ‘merger review’ as an ‘ex-ante’ remedy in order to stop a merger before the deal is signed through the ‘rule of reason’ approach. The latest amendment bill proposes to introduce a fixed deal value threshold in cases where both parties have substantial business operating in India, as well as the option of settling cases through negotiation with the Competition Commission of India.³²

With the vast number of laws governing mergers and acquisitions, the foreign party would want assurances that all the regulations have been complied with and that there is complete transparency regarding any areas in which it has not. These issues are being solved by the Indian government through constant updating of the legal regime governing such deals.

30 The Companies Act, 2013, No. 18, Acts of Parliament, 2013, § 234.

31 Id.

32 The Competition (Amendment) Bill, 2022, Bill No. 185 of 2022.

In the case of mergers and acquisitions, often companies' primary marketing strategy involves the transfer of intellectual property, a novel technology, or a trade secret, thereby making an attractive proposition for the buyers. Intellectual property, therefore, acts as a driver of several merger and acquisition deals owing to the surge in the concept of intellectual property. For instance, Michael Kors bought the Italian fashion label 'Versace' to expand into new markets by utilising Versace's well-established brand and intellectual property.³³ Intellectual property is essential for the strategic growth of any company for it represents the firm's ability to innovate, the value of its products, and the reputation of its brand.³⁴

During a merger and acquisition deal, the process of conducting an inquiry into the target company to ascertain its financial stability, legal standing, and economic viability is referred to as due diligence. The practice of conducting separate due diligence for intellectual property assets of a target company is largely being followed in the present years, owing to the increase in intellectual property innovations, and given its intangible nature.³⁵

3. The Intellectual Property Alchemy: The IP Asset Paradox In Mergers & Acquisitions

Mergers and Acquisitions are very complex in nature, irrespective of what appears on the periphery. When two companies come together, there arises a paradox which is usually termed as the IP Asset Paradox. The parties so involved in a merger or acquisition possess various IP assets which can be both a boon or a beacon for negativity.³⁶ To successfully navigate this paradox and maximize the value and minimize the risks corresponding to

33 Rupert Neate, 'Michael Kors buys Versace in \$2.1bn deal', (The Guardian, 25 September 2018) <<https://www.theguardian.com/fashion/2018/sep/25/michael-kors-buys-versace-capri-donatella>> accessed 26 May 2024.

34 V. C. Ozioko, 'The Relevance of Intellectual Property in Mergers and Acquisitions', (2022) 4 IJOCLLEP 45, 47.

35 Lee Tsai, 'Intellectual property issues for foreign enterprises acquiring Chinese companies', (Lexology, November 29 2021), <<https://www.lexology.com/library/detail.aspx?g=1c67e9dd-7651-4c29-817e-9183c1e93c82>> accessed May 26, 2024.

36 Martin Douglas Hendry, 'IP Is Often An Afterthought In Acquisitions And Mergers', (Virtuoso Legal) <<https://www.virtuosolegal.com/faq/the-role-of-ip-law-in-business-acquisitions-and-mergers/>> accessed May 26, 2024.

IP assets, thorough due diligence, strategic planning, and seamless post-merger integration are essential. In today's fuelled by knowledge economy, effective M&A transactions hinge on the parties' ability to identify and resolve the IP Asset Paradox.

A. The Due Diligence Conundrum

*“Deal making seems glamorous, but due diligence is not”.*³⁷ There are real life incidents which are lessons in disguise for any party involved in a M&A deal to understand the importance of performing a sound due diligence to avoid any such issues which might later hamper their growth and development. In 1998, the German automobile giants Volkswagen were transacting to acquire Rolls Royce assets, wherein the valuation of the transaction was almost \$9 Crores.³⁸ It was after the closure of the deal when Volkswagen found out that the said acquisition of the IP assets of Rolls Royce and Bentley Motors did not include the trademark rights of the same as well. There existed a prior agreement which allowed BMW to have those rights and hence Volkswagen lacked the required rights to brand their manufactured product as a Rolls Royce, because of non-conducting a sound due diligence.³⁹ Viacom Inc., a media conglomerate, ran into an identical situation when Google took over YouTube. YouTube was discovered to have violated Viacom's rights, something Google apparently glossed over while acquiring the company. Although the parties negotiated a consensual settlement and no damage was done, the buyers might have been in dire straits because of Google's lack of conducting a proper due diligence.⁴⁰ Another major incident happened in the 1990s when the

37 Efrat Kasznik, 'IP due diligence in M&A transactions: how to avoid another Rolls Royce', (Insight, May 21 2014) <<https://www.iam-media.com/article/ip-due-diligence-in-ma-transactions-how-avoid-another-rolls-royce>> accessed 26 May 2024.

38 Terence Lau, 'Caveat Emptor: Lessons from Volkswagen's Lemon Purchase', (2004) 60 Management And Marketing Faculty Publications University Of Dayton 3, 4.

39 Carole Ayugi, 'Protecting Intellectual Property In M&A Transactions: Why Conduct A Proper Due Diligence', (Chambers and Partners, April 24 2017) <<https://chambers.com/articles/protecting-intellectual-property-in-ma-transactions-why-conduct-a-proper-due-diligence>> accessed May 26 2024.

40 Lucy Walker, 'When M&A goes bad: Overlook IP due diligence at your peril', (Barker Brettell, January 19 2023) <available at <https://www.barkerbrettell.co.uk/20007-2/>> accessed May 26 2024.

consumer products company named Clorox acquired PINESOL trademark from American Cyanamid. However, the acquisition of these trademarks was contingent upon the terms of a trademark settlement agreement signed with the LYSOL trademark holder over three decades ago. The agreement limited the sale to certain types of cleaner products. After every facet of the settlement deal were finalized, Clorox lost an exorbitant antitrust lawsuit in the United States. Clorox was able to keep operating, but not grow as rapidly as planned, which drastically reduced the value of the transaction.⁴¹ When it comes to cross border mergers and acquisitions, there is an increased necessity of a sound due diligence. In 2012 Apple Inc. acquired the trademark for iPad from a Chinese Manufacturing Company named Proview. However, it was later claimed and held by the Chinese Courts that Apple Inc. did not acquire rights to assign trademark in China and hence Chinese resellers were ordered injunction from selling iPads in China. This saga came to an end with Apple settling with Proview for USD 60 Million.⁴² Due diligence is an important aspect of mergers and acquisitions, because this is a legal process, which in the case of IP assets, has the goal to take inventory of a company's tangible assets and to determine whether there are any risks, prior agreements, or complexities attached or associated with the assets concerned. In order to inspect the intangible assets of a business, including verifying the existence and breadth of the intellectual property rights that may be applicable to such assets, is broadly what constitutes the IP due diligence process.⁴³ IP due diligence is important also because it gives a broader idea to the buyer about the prospective and existing lacunae in the asset which might probably lead to a future predicament. Due diligence on the intellectual property helps establish an approach for addressing intellectual property rights, assesses the risk associated with the

41 Rodney Cruise, 'The importance of due diligence in IP: Lessons from Volkswagen, Apple, and Clorox Company', (Phillips Ormonde Fitzpatrick, April 20 2018) <<https://www.pof.com.au/importance-due-diligence-ip-lessons-volkswagen-apple-inc-clorox-company/>> accessed May 26 2024.

42 Id.

43 Suneeth Katarki & Aditi Verma Thakur, 'Intellectual Property Due Diligence', (Mondaq, December 3 2015) <<https://www.mondaq.com/india/trademark/448686/intellectual-property-due-diligence>> accessed May 26 2024.

target's IP assets, and formulates a strategy for resolving any concerns that may surface.⁴⁴

Specifically with regards to cross-border mergers & acquisitions, IP due diligence also possess a goal of analysing the relevant jurisdiction's IP laws. For instance, an example of Canada's IP laws could be taken wherein the notion of "work for hire" doesn't exist, and hence, all the moral rights are retained with the creator. Then another example can be taken of India, wherein the IP Laws with respect to software come under the ambit of copyright only, i.e., the same cannot be patented.⁴⁵

B. The IP Valuation Voyage

A major factor which contributes to a successful due diligence in case of a merger or acquisition is IP Valuation. As the name itself indicates. IP valuation refers to the process of recognising the value of the IP assets. There are three major methods through which IP valuation is generally done, namely, Income method, Market Method and Cost Method. This value is essentially determined on the basis of the rights of exclusivity so possessed by the asset owner. There are certain major factors which establish the importance of IP asset valuation, i.e., for enforcement of rights, for internal IP management and several other financial procedures.⁴⁶ All intellectual property rights should be considered during an IP valuation. The future worth of the assets must be taken into account in addition to the current value. Let's say the value of an intellectual property right could plummet in three years, but the corporation may reap enormous profits from a currently underutilized asset in the same time frame.⁴⁷

44 Colin McCall, 'The Importance of IP Due Diligence', (Taylor Wessing) <https://www.taylorwessing.com/synapse/ip_duediligence.html> accessed May 26 2024.

45 Sajai Singh & Sarah Gatti, 'Intellectual Property Due Diligence in Mergers & Acquisitions', 20th March, 2023, (American Bar Association, March 20 2023) <<https://businesslawtoday.org/2023/03/intellectual-property-due-diligence-mergers-acquisitions/>> accessed May 26 2024.

46 'Valuing Intellectual Property Assets', (WIPO) <<https://www.wipo.int/sme/en/ip-valuation.html>> accessed May 26 2024.

47 Yetunde Okojie, 'The Importance of IP Due Diligence in Mergers and Acquisitions', (Mondaq, September 28 2018) <<https://www.mondaq.com/nigeria/patent/740668/the-importance-of-ip-due-diligence-in-mergers-and-acquisitions>> accessed May 26 2024.

There was a time when Jet Airways was India's second largest international airline brand, following Air India, but the future wasn't set so bright for them. Because eventually the sword was taken off their hand, and they had to suffer defeat in the form of bankruptcy. However, a relevant story associated with the same was that the trademark of the airline was registered in the name of Naresh Goyal, the founder of Jet Airways,, rather than the company itself. So, eventually when the company decided to launch an IPO, then the non-ownership of the trademark in their name was seen as a predicament, and hence, Jet Airways decided to purchase the trademark from Naresh Goyal's Jet Enterprises. Furthermore, the agreement so drafted had mandated Jet Airways to register the trademark and had to obtain license was using the same in other nations. The entire saga was because of the need to purchase the said trademark, and the IP valuation here costed them about USD 7.5 Million.⁴⁸

C. The IP Licensing Enigma

IP licensing refers to the procedure which results in the granting of permission to use and explore one's IP asset, i.e., the party having the license shall be immune to any kind ramifications related to IP infringement. IP Licensing enigmas are complex and have far reaching consequences on the parties involved. The solidity and profitability of M&A Transactions are gravely hampered if IP licensing concerns are not taken into account. This is true not only in terms of the deal's financial sustainability, but also in terms of the effectiveness of the consequences and the veracity of the experts in the drivers' seat of the M&A Transactions. Now, IP licensing, typically finalised through a licensing agreement, may also be put to bed statutorily. Another aspect is the transferability of IP licenses, however, those are subjected to the black text of the agreement.⁴⁹

48 Corporate Bureau, 'Jet in \$7.5 m trademarks, IPR deal', (Business Standard, June 14 2013), <https://www.business-standard.com/article/companies/jet-in-7-5-m-trademarks-ipr-deal-105021801071_1.html> accessed May 26 2024.

49 Similoluwa Oyelude & Ibrahim Haroon, 'Intellectual Property in Mergers & Acquisitions', (2023) 14 *The Gravitas Review Of Business & Property Law* 55, 56-62.

50 QAD Inc. v. Shepparton Partners Collective Operations Pty. Ltd., [2021] FCA 615 (8 June 2021) (Austl.).

It is very essential for the purchaser party to analyse the licensing issues during the due-diligence stage itself, in order to avoid the prospective issues, in M&A transactions. A major case which could be cited here is the Australian Case of *QAD Inc. v. Shepparton Partners Collective Operations Pty. Ltd.*, wherein the plaintiff was the owner of the concerned IP of a software, which was licensed to Coca Cola Amatil. Now, Coca Cola Amatil sold all its assets to the Defendant here which is Shepparton in 2019, and these assets also consisted QAD's IP. Now, defendants were well aware of the fact that there exists a licensing agreement between CCA and QAD, but still they chose to let the butterfly fly away, i.e., to ignore the same, even though QAD was demanding a licence transfer fee for the same. Nevertheless, the agreement rendered the license non-transferable, but the defendants kept on exploring the IP, pre & post M&A transactions. Eventually, QAD brought the matter before the court, wherein the decision landed in their favour, in appeal as well. The ruling so inflicted found Shepparton guilty of copyright infringement and mandated them to pay more than USD 1 million to QAD.

As the world is heading forward, the spirit of capitalism is on the rise, wherein the market is majorly trafficked by corporate entities. Mergers & Acquisitions are happening every now and then, with companies aiming to expand their own grounds. Therefore, the due diligence process in the same as described above is highly important because the same can make or destroy the bed for these companies. Any sort of ignorance, in licensing, valuation and due diligence procedures, shall put the liability genie out of the bottle and it would be very difficult to put that back in.

4. Mitigating The Labyrinthine Terrain: The IP-M&A Risk Mitigation

The present trend of globalization has posed severe challenges in the corporate world, and the sector has heavily relied upon mergers and acquisitions as a means of corporate transformation.⁵¹ Now, intellectual property rights are the most crucial aspect of such transactions because it confers in itself the transfer of one's exclusive rights to someone else. A huge chunk of M&A transactions are carried out with the sole motive of acquiring IP assets of another company for better market standing.

51 Mila Lazarova, et. al., 'Global work in a rapidly changing world: Implications for MNEs and individuals', (2023) 58 JWB 1, 7.

Warner Lambert and American Home Products had agreed for a merger in 1999, wherein their deal was estimated at USD 67 Billion. However, in order to stop this merger from happening Pfizer issued a merger with Warner Lambert, by presenting a hostile bid of USD 72 Billion. The saga concluded with Pfizer getting the win because their final offer had a figure of USD 90 Billion. Pfizer acquired the deal solely for the company's scientific staff, expertise, patent portfolio, and research facilities, all of which may be leveraged to develop a wide variety of innovative pharmaceuticals. Many pharmaceutical and biotechnology firms are now engaged in a frenetic competition to find and patent novel, market-dominating medications.⁵²

There is possibly no greater illustration of the ancient adage warning against putting the cart before the horse than the intentional use of an intellectual property right that one does not possess. It goes without saying that an ingredient of the due diligence phase should be evaluating the entire and legitimate transfer of all relevant rights, but, since nothing is perfect, hence, no due diligence examination can be comprehensive.⁵³ A major issue which is often overlooked at the time of IP due diligence, is the overlooking of potential litigation issues or liability associated with the concerned IP. A major example of the same can be taken from the case of *Forest Labs, Inc. v. Pillsbury Company*⁵⁴ wherein the defendant was accused of misappropriation of plaintiff's trade secret. This particular trade secret was disclosed by the plaintiff to a third party, whose assets were later acquired by the defendant. Post-acquisition, defendant began using the trade secret, because they were under the apprehension that the same is subjected to confidentiality. However, the court in this case ruled that no record could be found to establish that defendant had made any specific payment for the trade secret so concerned here, and hence, defendant was held liable for misappropriation.

52 Melody Petersen, 'Pfizer Gets Its Deal to Buy Warner-Lambert for \$90.2 Billion', (The New York Times, February 8 2000), <<https://www.nytimes.com/2000/02/08/business/pfizer-gets-its-deal-to-buy-warner-lambert-for-90.2-billion.html>>accessed May 26 2024.

53 B. Delano Jordan & Andrea Hence Evans, 'IP Issue Spotting for M&A Deals', (Jordan IP Law, April 2010) <https://www.jordaniplaw.com/files/IP_Issue_Spotting_Article.pdf> accessed May 26, 2024).

54 *Forest Labs Inc. v. Pillsbury Company*, 452 F.2d 621 (7th Cir. 1971).

It is pretty much evident from the above discourse that the acquiring company should be very careful with regards to IP due diligence in order to avoid hassles. An example of the same could be taken from the infamous Kingfisher and Deccan Airlines merger. This particular airline was popular for its low cost and pocket friendly nature for the middle class of India. However, a major issue here arose was that this merged company was named Kingfisher Red. They entirely diluted the trademarks of the parties involved, and hence there was no clear distinction made between Kingfisher and Kingfisher Red in the minds of the public, which led to huge losses and the reputation of Kingfisher plummeted further.⁵⁵

Profitable agreements are attained when parties undertake exclusive intellectual property due diligence during mergers and acquisitions.⁵⁶ The only method to demonstrate the worth of the targets' assets and to insulate themselves from possible accountability from subsequent claims by adversaries or other parties is to undertake exhaustive due diligence.⁵⁷ IP due diligence incorporates a broad spectrum of variables, including but not limited to timeframe, identity, sufficiency, ownership, license, extant IP transactions, liens and impediments, cross-border transactions, authenticity inspections, and so on.⁵⁸ Considering not all IPRs are discoverable via registries and there are many stakeholders, it is necessary to do a sound risk assessment. However, if you prioritize your time and do a thorough, well-organized review, you can close the deal, smoothly.⁵⁹

55 Sindhu Bhattacharya, 'The inside story of Vijay Mallya's tumble: He bought Deccan with eyes closed', (First Post. April 16 2014) <<https://www.firstpost.com/business/corporate-business/the-inside-story-of-vijay-mallyas-tumble-he-bought-deccan-with-eyes-closed-1967877.html>> accessed May 26 2024.

56 Phanish Puranam, Benjamin Powell, Harbir Singh, 'Due Diligence Failure As A Signal Detection Problem', (2006) 4 Strategic Org. 319, 330.

57 Wilson Chu, 'Cross Border M&A: Avoiding Surprises Through Due Diligence', (1997) 6 Business Law Today 8, 10.

58 Abou Naja, 'IP Due Diligence – Importance and How To Conduct', (Abou Naja, February 20 2024) <<https://www.abounaja.com/blogs/ip-due-diligence>> accessed on May 26, 2024.

59 Simona Fabrizi & Steffen Lippert, 'Due Diligence, Research Joint Ventures, and Incentives to Innovate', (2012) 168 JITE 588, 600.

5. Conclusion

*"I win, that's what I do."*⁶⁰ Now, to have that as the outcome of any transaction concerned with mergers and acquisitions, one needs to be proactive in the due diligence process. Due Diligence, as stated in the discourse above, could be understood as the foundational stone for a successful merger or acquisition. When it comes to mergers and acquisitions, the principal marketing strategy of many organizations is the transfer of intellectual property, a unique technology, or a trade secret. This makes the proposal an appealing one for potential purchasers. As a result of the recent spike in interest in the idea of intellectual property, it now plays a role as a driving force behind a number of merger and acquisition agreements.

With this regard, the due diligence, and its aspects like dispute and liability identification, IP valuation, etc. need to be given utmost regards in order to ascertain the conduct of a smooth IP-M&A process. IP is as sensitive as a butterfly's wings. The importance of assessing all risks and mitigating them is huge because in a due diligence process, the companies involved are seen sharing a huge blend of data with one another, and if in case the merger doesn't go through, the other company's negotiating staff will have access to all the confidential content that was shared throughout the process.

The law with regards to mergers and acquisitions in India is still subject to a lot of improvement, however, the companies act 2013 still provides a strong base for better transaction results. Across the globe, there have been major IPR reforms specially since the passing of TRIPS Agreement. However, these reforms have been subjected to both sides of the coin, i.e., positive and negative feedback, still there is a long way to go in this regards. It's unambiguous that strengthening safeguards for intellectual property may encourage this kind of endeavours and benefit the corporations involved. Transactions regarding mergers and acquisitions, as well as commerce and licensing, are likely to be influenced by IPRs regimes. For this reason, the potential impact of these choices and their repercussions for nations in terms of inventiveness, dissemination of technology, and economic growth should be included in the design of IPR systems.

60 Harvey Specter, SUITS.

Hence, with the help of the above discourse, this paper has laid down the entire image as to how the corporate sector has increasingly being dependent on M&A transactions, for coping with the ever widening globalization, and that IP has specifically been a strong source or beacon for attracting the initialisation of such transactions. Hence, a proper due diligence, licensing check, dispute and liability identification, IP valuation and other major variables, should be ensured in order to attain a smooth and sound M&A transaction.

Alternative dispute resolution in the criminal justice system is uncommon

*Mr. Tanniru Venkatsaran & Ms. Gowthami.M**

1. Introduction:

Alternative Dispute Resolution is the best suggestion in current civilisation as a simple method to get justice. Because of the huge pendency of suits, the intricacy of legal justice and time-consuming formal procedures, legality is hardly a promise. There is a saying

‘Justice hurried; justice buried’. The scenario in India, Bangladesh, Pakistan etc. are developing and underdeveloped countries where ADR is not upto the mark compared to other countries. Eventually, adr has been used by traditional communities for a lengthy time period. Because access to the judiciary is more costly, difficult and takes a lot of time, people started using the Alternative Dispute Resolution over validated judiciary. Communities are always bothered about resolving the disputes and issues to reduce the complications.¹

There is a wide range of understanding by the people that law acts as a caretaker and looks after the disputes of the people in the society. Besides, the judiciary is always substantive and procedural. People come and approach the court in different matters such as litigation, property, crime, family matters etc. Among the above mentioned matters, leaving behind crimes, others are dispute matters.

Apart from legal action, Alternative Dispute Resolution (ADR) is a unique technique of settling issues and disputes. A third party must settle the dispute without any bias by utilising processes such as arbitration, negotiation, mediation, and conciliation. The court will not be involved in resolving the dispute when the above mentioned processes are in action.

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1 Kazi Akib Hossain, Alternative dispute resolution in Indian criminal justice system, https://www.researchgate.net/publication/357429577_ADR_in_Criminal_Justice_System_in_India [Published on December 2021].

Irrespective of civil law, criminal law necessitates much care in the process of interpretation, as well in execution just a small mistake that will lead to a great loss of law and order. Alternative Dispute Resolution gives few distinctive ways of solving many types of offences even though there are other possibilities.²

2. Alternative Dispute Resolution in India :

Judiciary being one of the oldest legal systems in the world, courts in India having many unsolved cases making the legal system in India increasingly ineffective in handling litigations which are pending. Over hundreds of fast track courts are established to minimise the huge pendency of cases because of the rise of unresolved litigations in the country. The ways of resolution of the dispute are as follows such as arbitration, mediation, negotiation, conciliation and Lok Adalat, all of these are offered by Alternative Dispute Resolution. However, the Indian judiciary did not recognise counselling between the parties itself which is referred to as negotiation. Articles 14 and 21 of the fundamental rights of the Constitution of India, deals with equality before the law which is Art-14 and the right to life and personal liberty which is Art -21, these two are additionally the foundations of Alternative Dispute Resolution in India. Political, economical and social justice will be achieved by ADR as it is the main purpose and mentioned in its preamble which also protects or defends the integrity of society. Article 39-A which is to ensure access to equal justice and free legal representation of the Directive Principles of State Policy (DPSP) of Part - IV of the Indian constitution has also been ensured by Alternative Dispute Resolution as an additional goal to it.

The process of Alternative Dispute Resolution is extracting fame in recent times. Alternative dispute resolution will not restore the litigations and resolves the dispute matter between the parties using many other ways mentioned in the Alternative Dispute Resolution. Alternative Dispute Resolution in the simplest way means solving the disputes without the intervention of the court. Alternative Dispute Resolution can also be practised in various forms in many countries. In a country like India, the

2 Vishwa Badrinath, Alternative Dispute Resolution in the Indian criminal justice system, <https://www.legalbites.in/adr-in-the-indian-criminal-justice-system/> [Published on 8 July 2021 11:19 AM].

usage of arbitration and mediation is most often. Diversity of proficiency is circumscribed by Alternative Dispute Resolution.

Hence, ADR necessitates the best process or outline which suits the respective dispute and also the parties in dispute, not only the various methods to resolve disputes.³ Few modes of ADR are as follows :

Arbitration : Dispute resolution which takes place at the international level mainly takes the form of arbitration over disputes between parties in certain circumstances of the case. The arbitrator decides on the case and the decision is either binding or non-binding on the parties according to the situation. As a form of dispute settlement, arbitration is a process in which an independent third party examines a dispute and listens to both parties in order to reach a decision binding on both parties. Arbitrators can enforce their decision when necessary.

Mediation : In contrast to arbitration, mediation is a much easier process to handle. There will be a third party involved in mediating between the two parties in a mediation. In the case of individual matters mediation is preferred at maximum in India. Issues will be resolved between the parties by the way of mediation, the parties will arrive at a decision through the assistance of a third party. The decision which is made through a mediator is not dischargeable like an arbitral award.

Conciliation : A neutral person helps the person to arrive at a negotiated settlement through the method of conciliation of resolving the disputes. A decision can not be enforced by a conciliator because he/she does not have power to do so.

Negotiation : Negotium is a latin word and the word negotiation is derived from it. This process will not consist of a formal approach between the parties itself or their legal representatives. This is the fastest and cost friendly form of solving the dispute. There is no third entity overseeing the affected persons' decisions, no process begins until all participants meet, and no parameters or regulations exist for the process. Negotiating is the process the parties use to reach agreements with each other, whether

3 Supra note 1.

it's an agreement reached between the parties themselves or their legal representatives like bargainers.⁴

The Need for Alternative Dispute Resolution :

Alternative Dispute Resolution (ADR) may be an excellent tool for dealing with such cases. It allows parties to resolve a dispute that is acceptable to all parties. The demand to resolve problems through Alternative Dispute Resolution is high in the present judicial wing both in India and other countries. And especially in civil matters, these problems are often resolved through Alternative Dispute Resolution in order to reduce the time consumption.

For e.g., investigation of a crime may take approximately 3-4 years, where partition suits may take a decade. Adjudication by alternative dispute resolution means that courts are streamlined; cost reduction may be achieved by less use of lawyers [and may involve, thereby, saving on not only legal fees but also that for related services]

This process results in a shortened dispute resolution process and the ability to assess several documents without the danger of losing them as well as filing the dispute. Alternative Dispute Resolution enables parties to have the ability to state out their needs more transparently.⁵

3. Criminal trials in India :

Alternative Dispute Resolution procedures have become much more widely used in the Indian judicial system as a result of the advantages they offer. It enables a swift trial, is a private process, and is a cost-effective way to resolve conflicts. As a result, it circumvents the vast majority of difficulties brought up by litigation as a settlement process.

In an effort to lessen the massive backlog of cases in Indian courts, the Malimath Committee conducted a study of the judicial system. In its report,

4 STA law firm, Comparative Analysis Of ADR Methods With Focus On Their Advantages And Disadvantages,<https://www.mondaq.com/arbitration-dispute-resolution/777618/comparative-analysis-of-adr-methods-with-focus-on-their-advantages-and-disadvantages> [Published on 5th February 2019].

5 Supra note 2.

the Committee proposed that the Indian Criminal Justice Mechanism implement a plea negotiation mechanism in order to improve case disposition, lighten the load on the courts as well as it avoids the time and money consumption and guarantee that at least all people receive justice.⁶

4. Use of alternative dispute resolution in criminal justice system :

Although the term out of court settlement or Alternative Dispute Resolution is rarely used in criminal law yet there are some forms of ADR that are increasingly accepted and utilised. Plea Bargaining is the criminal law practice of concluding cases without a full trial. Hon'ble Justice Mr. Shivraj V.Patel has addressed the issue of plea bargaining. The Law Commission suggested this plea bargaining. Additionally, it was suggested by other Committees. In addition, plea bargaining is a practice that can be found in other nations. However, we are attempting to implement the Law Commission's recommendations. However, it is challenging for us to take into account all of the suggestions and implement them.

The Criminal Law Amendment Act of 2005 added plea bargaining to Chapter XXI A of the 1973 *Criminal Procedure Code*. The Code's Sections 265A to 265 L refer to plea bargaining. The process of the wrongdoer seeking a lesser sentence or a compromise to pay for the damages caused by the offence is known as plea bargaining.⁷

a. Inclusion of Plea Bargaining :

Both civil and commercial lawsuits can be settled through alternative dispute resolution methods. These mechanisms should not be used in criminal justice because of the varying degrees of severity of violations in criminal cases. In fact, plea bargaining is a novel approach to criminal justice. The criminal justice system is made up of government policies and organisations that work to keep social control, stop crime, and make it less common. Corrections, legal execution, and law enforcement are the three fundamental components of the system. Plea bargaining is a legal agreement between the prosecution and defence in which the accused agrees to plead guilty rather than not guilty in a criminal case.

6 Supra note 1.

7 Supra note 2.

Plea bargaining can be described as a pre-trial conference in which the accused pleads guilty in order to receive concessions from the prosecution. Plea bargaining is successfully practised in many jurisdictions around the world. However, the following judgments demonstrate that the Supreme Court was not always in favour of incorporating plea bargaining into Indian criminal law -

- ❖ The Hon'ble Supreme Court did not support the notion of plea bargaining in *Murlidhar Meghraj Loya v. the State of Maharashtra* because it violates the basic right of a person accused of an offence not to be forced to be a witness against themselves.⁸

b. Plea Bargaining as Alternative Dispute Resolution :

This method has a number of advantages over the conventional trial system. The aforementioned strategy is not applicable to all types of criminal proceedings and is only adaptable in a small number of instances.

The first benefit of the new method is that it helps the court manage its workload, which reduces the number of cases in the backlog; Another advantage is that it takes the burden off of the magistrate to prepare a thorough verdict.

Second, this approach is advantageous to Public Prosecutors because it frees them from the burden of questioning weak and vulnerable witnesses like children and household members.

Thirdly, there is a greater chance that the court will accept the guilty plea; The judge will not reject the accused's plea on minor issues, which is significantly preferable.

Lastly, rather than a costly and time-consuming trial, it aids in the offender's rehabilitation by accepting responsibility for their actions and willingly presenting themselves before the law.

Request dealing isn't planned to remunerate routine guilty parties or laid out hoodlums; instead, it aims to assist newcomers. To plead guilty, the accused

⁸ Abhishek Taneja and Abhinav Aggarwal, Alternate dispute resolution in criminal jurisprudence, https://blog.ipleaders.in/alternate-dispute-resolution-criminal-jurisprudence/#Inclusion_of_plea_bargain [Published on 18th August 2020].

must be willing; If the intention is not voluntary, the plea is probably going to be rejected right away. In the field of criminal law, the idea of plea bargaining is regarded as a type of alternative dispute resolution.

However, it is not like mediation or arbitration. It is merely lessening the burden placed on both the victim and the accused. As an alternative to litigation, it is in use in a variety of settings.

- ❖ The casualty can stay away from the drawn out legal interaction, with less cash and tedious.
- ❖ Avoiding lengthy judicial procedures is advantageous to the accused, and parties can receive a reduced sentence or be placed on probation or admonition.
- ❖ It ensures justice by ensuring that no one is influenced by the verdict in his favour, that the accused's admission cannot be used for anything other than plea bargaining, which saves money and time, and so on.⁹

5. International perspectives of Alternative Dispute Resolution in different countries :

America

An in-depth examination of the international situation pertaining to the Alternative Dispute Resolution (ADR) mechanism reveals the widespread acceptance of its use in various nations. The early Dutch and British colonial eras in New York City are where Alternative Dispute Resolution got its start in the United States. The Alternative Dispute Resolution found a place in a number of applications shortly after independence.

For instance, the Patent Act of 1790 includes provisions for an arbitration system for patent claims that are at odds.

Special agencies like the Federal Mediation and Conciliation Service (FMCS) were established to handle employment-related negotiations, and Congress organised the mediation process for collective bargaining disputes in the late 19th century. Alternative Dispute Resolution (ADR) was a form of alternative dispute resolution in the early 20th century. From that point forward, a few

⁹ Supra note 1.

Mediation regulations were sanctioned including a government related, the bureaucratic Intervention act. Alternative Dispute Resolution (ADR) gained traction at the state and federal levels after the American Arbitration Association was established in 1926 to provide guidance to arbitrators and establish guidelines for a civilised approach to arbitration throughout the 20th century. The American Bar Association demonstrated in the 21st century that the majority of law schools offered extracurricular competitions and alternative dispute resolution programs. Arbitration is now available to individuals and businesses at all levels of the American legal system as a means of alternative dispute resolution. As a result, the United States has established Alternative Dispute Resolution as a legal system.¹⁰

Japan

Mediation was the primary means of conflict resolution in Japan. During the Court settlement, judges frequently intervened. This has the force of statutory law because every Japanese judge expects both litigants and the law to move a case toward settlement. At least 40 percent of the cases end in a settlement. After deciding to move from a mode of litigation to one of settlement, the Judge removes his robe and acts as a mediator.

China

The theory of alternative dispute resolution in China is very different from the legal system in Western countries. Despite the fact that China now has a similar independent alternative dispute resolution institution. Under the People's Republic of China (PRC) legal system, the general concept of alternative dispute resolution is actually incorporated into the hearing portion of the judicial or arbitration process. According to the facts, the People's Meditation System, which is the formal form of alternative dispute resolution for Chinese parties, has received high praise from international judicial circles for its oriental experience. In China, alternative dispute resolution is typically handled by the same court or tribunal during or after the hearing as opposed to by a separate entity prior to the hearing. The less agonistic nature of such Intervention techniques can likewise assist with saving the business connection between the questioning gatherings.

10 K. Rajeev Reddy, Critical Analysis of ADR in different countries & their Methods, <https://thelawcommunicants.com/critical-analysis-of-adr-in-different-countries-their-methods/> [Published on 30th March 2021].

France

In Francophone Europe, legal recognition of mediation began in France at the beginning of the 1990s. One important factor in the rapid introduction of mediation into civil law procedures was a significant increase in the number of divorces in the 1980s and public authorities' concerns about the costs of these procedures. Law officially recognized mediation. Under mediation, a judge hearing the case can appoint a third party for up to three months with the consent of both parties. If the mediator requests it, the appointment can be extended for an additional three months. The new Code of Civil Procedure's Sections 1442–1491 are primarily responsible for organising arbitration in commercial and civil disputes. Similar to regular magistrates, arbitrators are allowed to establish procedures and follow instructions.

Russia

The out-of-court dispute resolution method is receiving a lot of attention in Russia. As a result, the realisation by society of the necessity to establish a parallel system of non-formal jurisdiction and legislative tendencies toward the development of alternative forms and improvement of proceedings are two of the most significant determinants of the current position of alternative dispute resolution in Russia. The current flurry of such practices and the emergence of the so-called public movement for alternative dispute resolution reflect the long-held need for alternative spheres in Russian society.

Alternative Dispute Resolution options do not exist in Russia. The most common type of alternative dispute resolution, arbitration, is actively utilised in commercial dispute resolution. In addition, a specific category of reconciliatory proceedings has been established as a kind of claim order for the resolution of disputes, friendly negotiations, and mediation directly initiated by the parties to a legal dispute.¹¹

These countries are much advanced in the ADR mechanism. India must take some inputs from the above mentioned countries for the betterment of ADR in India.

¹¹ *ibid.*

6. Conclusion :

The Indian Criminal Jurisprudence has moved on from not recognizing the idea of alternate dispute resolution in criminal cases to incorporating the idea of plea bargaining into the Criminal Procedure Code (CrPC) and establishing guidelines to recognize mutually agreed-upon dispute resolution in cases that are not of a serious nature and do not have an impact on society as a whole. As an exception to traditional court procedures, alternative dispute resolution (ADR) ought to be utilised more extensively and frequently to alleviate court workload. Accordingly, such external court settlements are vital to diminish the over the top weight on the courts and ought to likewise become ordinary.

In conclusion, it is extremely challenging for the average citizen to obtain administrative justice under an organised criminal regime. Therefore, it is always preferable to settle the dispute jointly outside of administration if there is a chance to obtain minimal justice. In fact, in this legal field, alternative conflict resolution mechanisms are highly valued not only for reducing court case backlogs but also to guarantee access to justice. Alternate Dispute Resolution also offers a viable and inviting alternative to not taking action against injustice for those seeking justice. When a criminal deserves harsh punishment, a plea bargain may appear to be nothing more than monetary compensation for the offence and a compromise of justice. However, from the victim's (or defendant's) perspective, criticising the wrongdoer is far more effective because a court imposes a fine.¹²

7. Suggestions :

- ❖ Parallel ADR institutions must substantially expand across the nation. They need to be set up at remote levels in the same way that courts of law were set up.
- ❖ There must be centres for arbitration and mediation in every court. This would guarantee that the ADR forum would first handle any disputes that could be resolved through ADR. The matter should only be taken to the courts if the parties are unable to reach a settlement.

¹² Supra note 8.

- ❖ The majority of the commercial disputes handled by the Arbitration and Mediation Centres and Institutions in India currently exist. Either new private bodies for non-commercial disputes (such as family disputes) must be established.
- ❖ Without the public's awareness and enthusiasm for ADR over the courts, the country's establishment, empowerment, and legal recognition of ADR bodies would be useless.
- ❖ By regularly performing street plays, weaker and less fortunate groups can be taught about ADR options. Such execution must be made in the nearby tongue and language of individual regions.
- ❖ Measures must be taken to encourage the use of ADRs on a more voluntary basis until ADR becomes a mechanism that functions in parallel to the legal system.
- ❖ The Indian Constitution's promise of justice to the people is at risk. In point of fact, mechanisms represent the hope of realising the Constitution's promises. ADR is a promising option for ensuring nationwide access to justice due to its simplicity, lack of technicality, privatisation and speed. Instead of proceeding to a formal court decision, civil litigants should be encouraged to investigate whether their dispute can be resolved by agreement, either directly or with the assistance of a third party mediator or conciliator.
- ❖ ADR must be incorporated into the civil justice system because it is a crucial means of expanding citizens' access to individualised justice in appropriate circumstances. The legal system must enthusiastically embrace changes.

An appraisal of *R. Muthukrishnan v. Union of India*: Professional liberties of an advocate lock horns with the defensive capacity of a litigant

*Ms. Shivangi Mishra**

1. Introduction

The niceties of courtroom procedure ordain the litigant (assuming a defensive stance) and the advocate (undertaking a proactive role) to adopt diverging courtly disposition(s) while appearing before the court of law. This distinction is orchestrated by virtue of the difference in the allegiance, the two capacities owe towards the court. However, in instances where a single entity decides to defend her own cause, pressing questions that evoke judicial scrutiny spring up as happened in the case, *R. Muthukrishnan v. Union of India*.¹ The chief question prompting deliberation was, ‘whether an advocate who, at the same time, happens to be a contesting party, be permitted to defend her case while donning the robes of an advocate?’ It is imperative to understand that ‘robes’ signify professional license in the court of law. And therefore, when a party to a proceeding, decides to contest the case while donning robes, she gives primacy to the professional role of a representative/advocate as against the defensive capacity of a contestant/defendant. Inferably, in legal parlance, ‘robes and gowns’ are assigned metaphorical connotations that indicate the professional clout wielded by an advocate, whether in the form of liberties or obligations. This article employs a purely doctrinal approach to address the dilemma caused by the dual role of a representative and a contestant when assumed by a single entity while retaining qualities of both capacities. The present research seeks to strike a balance between the two through reliance on judicial pronouncements, academic writings and collected records.

Throughout the course of this article, the legal implications of a scenario where a single entity assumes the dual role of an advocate and a contesting party in the same proceeding, are studied, questioned and synthesised keeping in mind eclectic legal stances taken and premises proposed,

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1 W.P. No.4843 of 2014.

thereby ensuring that an inclusive approach is adopted. Bearing this scenario in mind, it shall be an endeavor to glean, in legal terms, which capacity would gain precedence, whether the license accorded by virtue of professional allegiance to the court shall be allowed to subsist as permitted legal behavior, or should the limitations concomitant with the capacity of a litigant come into play to delimit courtly behavior?

2. An advocate to be regarded as a litigant when defending her own cause: removal of robes signify removal of professional liberties of an advocate?

In the present segment, we shall study the dimensions of the legal problem at hand, and analyse the legal recourses taken by the Court of law to deal with such exigencies appurtenant to legal niceties and courtly decorum.

The Court was posed with a similar question in the case, *T.Venkanna v. The Hon'ble High Court of Mysore*², where the petitioner, a practicing advocate, who had enlisted himself for recommendation to be appointed as a district judge, filed a writ petition on not being called for interview. The advocate, who also happened to be the petitioner in the present case, decided to argue his own cause. The division bench, which was hearing the matter asked the petitioner to remove the robes that are worn in the capacity of a counsel. Since the petitioner was appearing in the capacity of a contestant who was permitted to defend his own cause, and not exclusively as an advocate representing the case of a party, the Court informed him that he shall be allowed to address the Court only after he takes off the robes. However, the petitioner persisted on being heard without being required to remove his gown and filed a writ petition contending that he be allowed to contest the case while donning the robes. The Division Bench responded by dismissing the petition and remarked,

“The petitioner being an advocate in his own cause, he is not entitled to exercise the privilege of an advocate and address the Court from ‘the Bar’.”

The petitioner filed an application to recall the said order thereby posing the Court with the question,

² AIR 1973 Mysore 127.

“Whether an advocate appearing as a litigant in person would be entitled to argue with his robes on from the advocates’ table?”

It was clarified that Section 34(1) of the *Advocates Act, 1961*³, empowers the High Court to formulate rules which lay down conditions that delimit an advocate’s conduct in the court of law subject to which the advocate shall be permitted to practice in the High Court and the Courts subordinate thereto. The rules⁴ so formulated under section 49(1)(gg) of the *Advocates Act*⁵ prescribe the dress to be worn by advocates appearing before the High Court and subordinate courts, however, there is no provision under the Act or the Rules that caters to a scenario where an advocate who decides to argue his own case before a Court be made to remove his gown. To this point of statutory silence, the Court opined that it might not be a plausible inference to aver that in the absence of such a rule, the petitioner has the right to wear his advocate’s robes when he argues his own case.

Despite the fact that Indian statutes are silent on the aforementioned legal scenario, the Division Bench fleetingly addressed the situation where the professional capacity of an advocate locks horns with the defensive stance of a contestant or litigant and highlighted that “the universal practice in Indian and English Courts has been that where an advocate or barrister appears before the Court as a litigant in person, he must not address the Court from the advocates’ table or in robes, but from the same place and in the same way as an ordinary member of the public.”⁶ It is squarely inferable that, in the instant verdict, the Court gave primacy to the capacity of a litigant over the professional liberties granted to an advocate in a situation where the two capacities are pitted against each other with a single individual assuming both the roles before a Court of law.

The Supreme Court, in *R. Muthukrishnan’s* case, established that even an advocate, while defending or representing his or her cause, is to be treated singularly and primarily as a litigant, and hence there lies no question of a probable coexistence or deadlock between the two capacities, and there exist no further possibilities of the professional liberties of an advocate

3 The Advocates Act, 1961, § 34(1).

4 Bar Council of India Rules, Part VI, Chap. IV.

5 The Advocates Act, 1961, § 49 (1) (gg).

6 *Supra* at 2.

(the liberty as well as obligation to wear robes and address the Court from the advocate's table) locking horns with the limited defensive stance of a litigant. Therefore, in *Muthukrishan's case*, the Supreme Court displayed no hesitation in contending that the petitioner, who is an advocate appearing as a litigant in person is not practising his profession and he cannot be permitted to argue with his robes on.

3. Clear demarcation in operation of the two capacities: averting overlap between the role of an advocate and capacity of a litigant

The Court further took recourse to the book 'Barrister-at-law'⁷, wherein it has been stated that "barristers cannot be heard in court as advocates unless they are robed"⁸. Further, it was clarified that a barrister who is a litigant cannot appear both as counsel and as litigant and he must elect either to conduct the case entirely as litigant in person or to abandon the case entirely to his counsel. There is a clear identifiable difference drawn by English courts between the role of a counsel and the capacity of a litigant. This distinction is prominent in two ways,

Firstly, the incapacity of a client and counsel to enter into a contract in English law signifies that there exists a clear demarcation between the role of a counsel and capacity of a litigant for want of professional niceties and courtesies that uphold the viewpoint that the "employment of a barrister is a purely honorary one in the sense that it confers on him no legal right to remuneration for the legal services he offers to his client." It is by virtue of this reason that the remuneration of a barrister is called honorarium as opposed to *merces*⁹. Vernam further propounded that no binding contract can be entered into between counsel and client in respect of the services of counsel, and hence as a necessary consequence, on the one hand, it follows that a counsel cannot sue his client for fees, and the client, on the other hand, has no legal remedy against his counsel for non-attendance or negligence as was averred in the case *Turner v. Phillips*¹⁰. Moreover, it is settled that a client cannot sue his counsel for any breach of duty that falls shy of fraud, collusion,

7 JAMES ROBERT VERNAM MERCHANT, BARRISTER-AT-LAW, 51 Alpha Editions (ed., 2019).

8 Ibid.

9 Ibid.

10 (1792) Peake, N.P. 122.

betrayal of secrets, undue influence, or for using the position of counsel in order to gain some collateral advantage for himself to the detriment of his client¹¹. There is no denying the fact that the position of English law on the point that a counsel cannot sue his client for fees and similarly, a client has no legal remedy available against his counsel for negligence, is a deviation from the general rule of law that a “person who is employed for reward to do work for another has a right of action to recover his reward for such labour.”¹² Notably, there exist two exceptions to the general rule, firstly, physicians/medical practitioners when prohibited by a bye-law from bringing about a suit, shall have no rightful claim to sue their clients for remuneration, and secondly, in the legal profession, a counsel cannot, through a legal action, recover fees from his client. In *Morris v. Hunt*¹³, it was emphatically laid down by the Court that the reason that prompts the establishment of the rule that a counsel cannot maintain an action for his fees is to ensure that the dignity, dedication and commitment put in by the counsel in his client’s case should never be allowed to flicker with the outcome of the case. Similarly, the fees to be paid by a client to his counsel and the faith he reposes in the counsel should not depend upon the event of the cause or the outcome of the case. It was discerned by Justice Bayley in the instant verdict that the emoluments awarded to a counsel must not waiver whether the concerned case be successful or unsuccessful, and it is for this primary reason that they are to be paid beforehand.¹⁴ While enunciating this verdict, the Court starkly outlined the disparate spheres of operation of the capacities of a counsel and a client. It was established that a counsel and client are mutually incapable of entering into any contract of hire in reference to the services of counsel, and therefore, the Court does not recognise any other relationship between the two distinct capacities apart from the one ensuing from rendering services by the counsel to her/his client. The “honorary” services rendered by a counsel to his client are symmetrical to that of a college of physicians as has been underpinned in the preceding segment, the common denominator in the two employments being “integrity and professionalism¹⁵” towards their clients.

11 Supra at 3.

12 Ibid.

13 (1819) 1 Chitt. 546, 550.

14 Ibid.

15 Supra at 13.

Secondly, it has been pronounced time and again by English Courts that a counsel cannot share the conduct of a case with his client whether in the form of courtly burdens or professional liberties. Deliberating upon the distinct role of a counsel that is markedly separate from that of a client/litigant, the English Court in *Moscatti v. Lawson*¹⁶ clarified that in cases where the counsel is instructed by the client, he still ought to be at the head of the case and conduct it throughout, thereby the verdict ensured a divergence in the two roles and at the same time, it was indicated that a certain degree of independence has to be awarded to the counsel in the conduct of the case.

A perusal of the stance taken by the English and Indian Courts alludes that it has been a conscious effort to avoid all instances of a possible convergence of the two capacities. Moreover, professional rules pertaining to the integrity of a counsel have been carved out in order to supplement the dichotomy between the two roles, as was enunciated in the case, *Strauss v. Francis*¹⁷ wherein the Court opined that it would be unbecoming for a counsel to submit to any limitation in respect of the counsel getting instructed by his client or to take a subordinate position in the conduct of a case. Taking up a comparatively dissonant aspect for defining the difference between the role of a counsel and a client, and further elaborating on the forbidden overlap between the two, the Court elucidated that when a litigant decides to conduct his case in person, and examines and cross-examines witnesses, the counsel will not be allowed to address the court¹⁸, and similarly, when the counsel examines and cross-examines witnesses, the litigant will not be allowed to address the Court¹⁹. Hence, a clear demarcation is drawn in order to dispel the possibility of a fusion of the two capacities by ensuring that, at a given time, only either of the two capacities would operate. It has been made crystal clear that no concurrence in their operation shall be entertained. Accordingly, Lord Ellenborough, C.J., while avoiding a possible concurrence in operation of the two roles/capacities, allowed in *Rex v. White*²⁰, the counsel alone to suggest questions for the defendant who

16 (1835) 1 Moo. & Rob, 454.

17 (1860) L.R. 1Q.B. 381, 383.

18 Supra at 3.

19 Shuttleworth v. Nicholson (1835), 1 Moo. & Rob. 254.

20 (1811) 3 Campb. 98.

was being tried for misdemeanour and to argue points of law at his behest, but not the defendant to subsequently put questions to witnesses being examined or to address the jury.

Treading in line with the stance taken by the English Courts, it was further observed by the Court in *T. Venkanna* that the advocate-petitioner cannot be heard to address the Court either after or before his counsel. A litigant, even when defending his cause as a counsel, shall observe the niceties of a litigant and not assume the role of an advocate to enjoy the liberties concomitant with the position of an advocate. It was observed that a barrister appearing in person has no more rights than any other complainant and he only differs from any other member of the public when he is instructed by a solicitor on behalf of a client. The Division Bench took recourse to the decision of the House of Lords in the case of *New Brunswick and Canada Rly. and Land Co. Ltd. v. Conybeare*²¹, wherein the House of Lords did not accede to the request of a barrister to permit him to appear as junior counsel and be heard in his own behalf by holding that the barrister must argue his own case in person or appear by counsel.

A similar matter came up before consideration of the Hon'ble Supreme Court in *Vidya Verma v. Shiv Narain*²², in which a petition was filed by an advocate (Mr. Mani) on behalf of Vidya Verma under Article 32 of the Constitution for issuance of a writ of '*habeas corpus*'. While appearing before the Hon'ble Supreme Court, the advocate was duly robed. On being asked to clarify his position and capacity in which he was appearing, the advocate contended that though he had no power of attorney to represent Vidya Verma, he contended that he was representing her claims in a private capacity as a next friend. Considering the private capacity in which he was appearing before the Court as a "next friend," he was asked to address the Court without his robes. On the adjourned hearing, the advocate appeared unrobed as directed, however, an advocate on record sat by his side as he sought the Court's permission to begin the address. In its wisdom, the Hon'ble Supreme Court declined to hear his cause, unless he discharged the advocate on record. Ascribing the refusal to allow the advocate to proceed with his address, to "the practice in India has been that where an Advocate

21 (1862) 31 LJ Ch 297.

22 AIR 1956 SC 108.

is himself a litigant and appeared as a litigant in person, he must not address the Court from the advocates' table or with robes on, but from the same place and in the same way as an ordinary member of the public", the Court in Vidya Verma's case gave primacy to the limited role played by a litigant in a case where a single entity (Mr. Mani in the present case) assumes the role of an advocate and a litigant, while defending his/her claims.

4. Deadlock between sections 30 and 34, advocates act, 1961: two statutory rights pitted against each other

The pronouncement in *Vidya Verma's case* is noteworthy as it serves a two-fold purpose, firstly, it brings to rest the dilemma surrounding the merger of capacities of an advocate and a litigant in a single person, and secondly, bearing the aforementioned merger in mind, it resolves the deadlock where two provisions of the *Advocates Act, 1961* are pitted against one another, that is, when the liberties concomitant to Section 30²³ are up against the permissible limits carved by the High Court under Section 34²⁴.

Taking into account these provisions of the *Advocates Act, 1961*, the Division Bench elucidated that while Section 30 of the *Advocates Act* empowers every advocate, whose name is entered in the common roll to practise throughout the territory to which the Act extends, in all courts including the Supreme Court, on the other hand, the rules framed by the Court under Section 34 of the Act prescribes the mode of dress for advocates appearing before the Court as a precondition to their legal practise. While elaborating on the essence of these provisions, the Court clarified that by no means are these provisions at loggerheads as in a case where a single individual assumes the dual role of a counsel and litigant, the role of a litigant prevails, and hence there remains no question of the right under Section 30 of the Act of 1961 to be exercised.

Thus, when an advocate whose name is entered in the rolls of the Bar Council appears before the Court as a litigant in person, he is not exercising any right under Section 30 of the Act. Accordingly, the Division Bench held that there is no question of the right of the petitioner being infringed and hence no right conferred under the Act of 1961 has been denied to him. The

23 The Advocates Act, 1961, § 30.

24 The Advocates Act, 1961, § 34(1).

Court further made it crystal clear that,

“The word ‘practise’ means ‘the exercise of a profession’ and when an advocate is a litigant- in-person, he does not practise his profession and therefore cannot be permitted to argue with his robes on from the advocates’ table and he can address the Court from the same place and in the same way as an ordinary member of the public.”

5. No Possibility Of A Dual Role: Capacity Of A Litigant Presides

In the case of *Major K.Mathews (Retd.) v. Registrar General, High Court of Judicature at Madras & Ors.*²⁶, an identical question came up before the Court. The petitioner appeared as a party-in-person and filed a writ petition to declare that an ordinary member of the public like him who is defending his own cause is entitled to be seated in the Court and to make use of the table available in the Court room. He further contended that he stands entitled to the enjoyment of liberties that flow from the position of an advocate and even asserted that such liberties and licenses must not be interfered with or questioned by members of the Bar. Justice P. Sathasivam, relying on the pronouncement by the Division Bench of the Mysore High Court in the verdict, *T.Venkanna*²⁷, held that,

“The litigant/party appearing-in-person before the Court for their own causes cannot claim the same privileges/rights being given to the members of the Bar/Advocates, and they cannot occupy/use the chairs, tables provided for the Advocates.”

While elucidating the issue at hand, the Court remarked that even when chairs and tables earmarked for the professional roles essayed by advocates are unavailable for advocates-appearing-as-litigants, they (parties appearing in person) are “entitled to be provided with a convenient place to address the Court.”

In, the *High Court on its Own Motion v. N.B.Deshmukh*²⁸, the subject

²⁵ Ibid.

²⁶ AIR 2003 Madras 411.

²⁷ Supra at 2.

matter of the case were suo-moto contempt proceedings initiated against the respondent/contemner, who also happened to be an advocate. The contemner, being an advocate, contended that he shall be permitted to appear in person while donning the robes of an advocate. However, the respondent/contemner was informed that since he was appearing pursuant to the show-cause notice issued to him for having committed criminal contempt, it would be desirable that he appears as an ordinary litigant, that is, without the robes. The contemner declined to abide by the suggestions of the Division Bench and asserted that he was a practising advocate of the Court, and hence, it was well within his rightful sphere of rights to appear in robes. Moreover, he asserted that a failure to appear in robes would result in initiation of disciplinary proceedings against him for having failed to abide by the dress code prescribed by the Bar Council. On such contention being advanced, the Division Bench of the Bombay High Court heard the State Bar Council of Maharashtra and Goa, and took a categorical stand that since the respondent/contemner was facing show-cause notice for having committed criminal contempt, he is obligated to appear as any other ordinary litigant and he cannot appear in robes. The string of verdicts enumerated hereinabove have put to rest the uncertainty surrounding the coexistence of the two capacities, that is, the litigant and the advocate in a single proceeding, in a single entity.

Moreover, in *N.B. Deshmukh's case*, the Court in thumping approval of previous verdicts on similar questions and merits, enunciated that,

“A person cannot claim any privileges available to advocates appearing for the litigants before the Court and cannot be permitted to appear in robes before the Court.”

Furthermore, in the instant verdict, the Court refuted claims put forth by the petitioner that placed heavy reliance on rules framed by the Bar Council regarding dress regulation to be followed by empaneled advocates.

In instances wherein an advocate decides to defend her own cause, the defensive capacity of a litigant has been elected over the proactive role of an advocate by the Courts. Quite palpably, the role of an individual as an advocate does not subsist when he or she is appearing before the Court in

28 2011 (2) Mh.L.J., 273.

the capacity of a litigant. It was, in a resounding fashion, laid down in N.B. *Deshmukh's case* that in a scenario where a single entity appearing before the Court, assumes the dual role of a litigant and an advocate, decides to represent her own cause, the capacity of an advocate and its entailing liberties get subsumed by the role of a litigant, and in all such cases, the individual is to be treated singularly and primarily as a litigant, leaving asunder the professional requirements whether in the form of licenses or obligations. Rightly so, the Court gave primacy to the capacity of a litigant and opined that while appearing as a litigant before the Court, the advocate is neither entitled by virtue of Section 30, *Advocates Act, 1961* to wear the robes of an advocate nor to address the Court from the advocates' table under Section 34 of the Act of 1961. The Court remarked that,

“We have no hesitation to hold that the petitioner himself is the litigant and he shall not be entitled to any rights and privileges as an advocate while appearing in person for his own cause.”

The High Court of Gujarat in the case of *Vinayakrao S. Desai v. Interlink Petroleum Ltd., & Ors.*²⁹, took a similar view by resorting to the case of *T.Venkanna*³⁰, and *Vidya Verma v. Shiv Narain*³¹ and averred against a possible fusion of the two capacities. The verdict retorted against the appearance of a person before the court in a dual capacity, one as party and other as an advocate and if an advocate is appearing as party-in-person, he should in order to maintain the norms and decorum of the legal profession, appear before the Court of law as party in person putting off the band and robes prescribed for legal practitioners³²

Reverting to the verdict premised on the research question under scrutiny, the Madras High Court in *R. Muthukrishnan v. Union of India*³³, explained that the petitioner's claim to address the court and defend his cause while wearing the robes of an advocate, his chief contention extracted primarily from Section 30, *Advocates Act, 1961* is infructuous. It has been rendered

29 (2001) 3 GLR 2649.

30 Supra at 2.

31 Supra at 22.

32 Ibid.

33 Supra at 1.

clear that the petitioner himself does not dispute the fact that he has filed this writ petition designed as a Public Interest Litigation, as an individual, given the fact that he is aggrieved by the policy of the Union of India with regard to the 'Direct Benefit Transfer Scheme for Liquefied Petroleum Gas' and several others are also affected as positioned in the situation of the petitioner. The Court has concretely expounded that when that be the case (that is, when the advocate petitions as an aggrieved individual), "the petitioner pleading his own cause though under the garb of a Public Interest Litigation cannot seek recourse to the provisions of the Advocates Act."

More so, Section 30 of the *Advocates Act* cannot be invoked as in the present state-of-affairs, no question has arisen as with respect to the rights of an advocate under the provisions of the Advocates Act. Moreover, no rights conferred upon an advocate under the Act has been denied to his capacity as an advocate while he is appearing in person. The Court clarified that "the term 'practice' connotes exercise of a profession and when the petitioner, an advocate appears in the capacity of a litigant in person, he does not practice his profession and therefore, he is not entitled to argue his case with his robes."

In light of the above discussion and the law laid down in the above cited decisions, the Courts in India have established that there is no question of the operation of a dual capacity when an advocate appears as a litigant as in such a scenario he is not practicing his profession, but merely exercising the rights of an aggrieved litigant. Furthermore, treading in line with the judicial stance taken by the Karnataka High Court in *T. Venkanna v. The Hon'ble High Court of Mysore*, it was emphatically affirmed in *Vinayakrao S. Desai's case*, that when an advocate whose name features in the common roll of advocates, appears before the Court of law in the capacity of a litigant, neither is he exercising any right envisaged under Section 30, *Advocates Act*, nor is he entitled to any of the rights couched in the *Advocates Act, 1961*. As a corollary to the aforesaid proposition advanced by the Court, it can by no stretch of imagination be conceived that any right under the *Advocates Act*, that did not accrue to the claimant in the first place, has been encroached upon. Congruently, what has not been conferred upon, cannot be denied at all.

In *Vinayakrao S. Desai*³⁴, the Court concretely addressed the legal controversy regarding the dual role assumed by an advocate while appearing party-in-person before the Court. It was elucidated that a dual capacity in such a scenario cannot subsist before the court of law. Primacy was given to the capacity of a litigant even when an advocate appears as a litigant, as the role of an advocate gets subsumed by the capacity of a litigant owing to the fact that while representing his own cause as a litigant, the advocate is not “practising” his profession under Section 30 of the *Advocates Act, 1961*. As a passing remark, the Court deliberated upon the reasons prompting bifurcation in the two capacities. It was deciphered that in a case where the counsel/ advocate is personally “interested” in its outcome, the conduct of the case would fail to qualify the yardsticks of dispassion and professional detachment.

However, in *Salil Dutta v. T.M. And M.C. Private Ltd*³⁵, the Supreme Court’s verdict reflected a divergence in opinion from the pronouncements delivered in *R. Muthukrishnan* and *T. Venkanna* in as much as the carved difference in the roles of a counsel and a client and their separate spheres of operation seemed to coalesce with the Supreme Court enunciating that the advocate being regarded as the agent of the party (his client), his acts and statements made within the limits of authority given to him shall be considered as the acts of the principal, that is, the party that engaged him. The Court asserted that,

“The advocate is the agent of the party. His acts and statements, made within the limits of authority given to him, are the acts and statements of the principal i.e., the party who engaged him.”

This verdict appears as an anomaly in the backdrop of the legally accepted stance where the sole foundation that binds a counsel and his client is strictly professional in nature. Moreover, if the counsel were to function as an agent of the party who engaged him, the degree of independence to be exercised by the counsel while representing the interests of the client in the court of law, would be, to a great measure, jeopardised, and so would the conduct of the case as was underpinned in the case, *Moscatti v. Lawson*³⁶.

34 Supra at 29.

35 1993 SCR (1) 794, 1993 SCC (2) 185.

36 Supra at 16.

6. Conclusion

There is no gainsaying that the Advocates Act, 1961 entitles a common litigant who is oblivious of legal technicalities and procedural nuances to defend her own cause. In the present research endeavour, we have legally appraised a situation where an advocate, well-versed with the intricacies of law and technicalities of procedure, whilst involved in a legal action persists on representing and defending her case in the capacity of an advocate while exercising the entailing liberties and immunities. However, a string of pronouncements on the subject under scrutiny adduce the fact that while representing her own case or defending her own cause, an advocate is not “practicing” her profession as enumerated in Section 30 of the *Advocates Act, 1961* that confers upon practicing advocates a wide array of liberties and concomitant immunities. Having enunciated that the capacity of an advocate shall cease to subsist when brought parallel to the defensive stance of a litigant, Indian as well as English Court have remarked that while representing her own case, the liberties, privileges and immunities of an advocate get subsumed by the defensive capacity of a litigant, and in such a scenario, the advocate leaves behind her robes and the advocate’s table to step into the shoes of a litigant. Thereupon, neither the professional role of an advocate is being exercised nor the services of a counsel are being rendered.

It is imperative to note that the two capacities operate in complete isolation to each other with separate spheres having been carved out for each. With the incapacity of a client and counsel to enter into a contract in English law, the first instance is marked where a clear demarcation between the role of a counsel and capacity of a litigant for want of professional niceties exists.

Secondly, it has been pronounced time and again by English Courts that a counsel cannot share the conduct of a case with his client whether in the form of courtly burdens or professional liberties. Deliberating upon the distinct role of a counsel that is markedly separate from that of a client/litigant, it has been clarified that in cases where the counsel is instructed by the client, he still ought to be at the head of the case and conduct it throughout, thereby the verdict ensured a divergence in the two roles and at the same time, it was indicated in the verdict that a certain degree of independence has to be awarded to the counsel in the conduct of the case. A perusal of the stance taken by the English and Indian Courts

alludes that it has been a conscious effort to avoid all instances leading to a possible convergence of the two capacities. Moreover, professional rules pertaining to the integrity of a counsel have been ascribed to supplement the dichotomy between the two roles.

A fastidious study of the legal position on the deadlock between the two capacities indicates that such a dual existence is a mere sham in the legal arena. Taking into account these provisions of the *Advocates Act, 1961*, it was elucidated that while Section 30 of the *Advocates Act* empowers every advocate, whose name is entered in the common roll to practise throughout the territory to which the Act extends in all courts including the Supreme Court, on the other hand, the rules framed by the Court under Section 34 of the Act prescribes the mode of dress for Advocates appearing before the Court. While elaborating on the essence of these provisions, the Court clarified that by no means are these provisions at loggerheads as in a case where a single individual assumes the dual role of a counsel and litigant, the role of a litigant prevails, and hence there remains no question of the right under Section 30 of the Act of 1961 to be exercised.

Most importantly, it must be appreciated that the robes of an advocate carry metaphorical connotations that indicate the clout wielded by an advocate in the form of legal liberties, immunities and privileges. Therefore, it is discerned that when an advocate embraces the defensive stance of a litigant, she must, in compliance with professional courtesies and as a mark of respect to the Court of law forego the liberties of an advocate, and hence must refrain from wearing the robes of an advocate that are emblematic of legal privileges. Moreover, it is ascertainable at this juncture that the chief point of difference between the roles of an advocate and an ordinary litigant when they address the Court is that while the advocate who is well-versed and mindful of legal processes and the entailing attributes of dispassion, principality, legal precision and niceties, strives to uphold them and looks askance any such conduct that may impinge upon the sanctity of courtly practice by virtue of him being a part of the legal fraternity, an ordinary litigant, on the other hand, is oblivious of legal technicalities and courtly courtesies and hence is exclusively driven by self-interest and assertion of his stance. It is proposed that even though judicial pronouncements have flagrantly debunked a possible overlap between the two capacities, an overtly technical viewpoint that disregards the finer rights of the litigants

must not be adopted. Hence, a synthesis must be struck that allows the litigant to effectively and efficaciously assert her claims and a balance must be contrived that permits an advocate-litigant to concretise her defensive stance while adhering to the Court's dictum of removing advocates' robes that are emblematic of legal clout.

Examining the Concept of Bare Arbitration Clause through the lens of K.V.C. Rice Intertrade Co Ltd v Asian Mineral Resources Pte Ltd : A Case Analysis.

1. Introduction to the concept of Arbitration

The concept of arbitration can be defined as a mode of settling dispute outside the court system. According to the Section 2(1) (a) of the *Arbitration and the Conciliation Act* it is defined as arbitration means any arbitration whether or not administered by permanent arbitral institution.

In contradiction to that of litigation which is costly, time taking. The law provides for a alternative mode of dispute resolution broadly categorised as the alternative dispute resolution system. This system encourages the parties to settle the disputes in more private and quick method. This can be done through mutual understanding or with the help of third person. Arbitration can also be understood as the form of mediation with a set of rules and regulation. A mutual submission by both the parties to a judge or a third party formally known as arbitrator.

The arbitrator for that fact is the neutral third party impartial judge who decides the case or dispute between the parties which is judicially binding on the parties. The arbitrator takes use of model law which acts as a rules and regulation for the conduct of the arbitration proceeding, collection of evidences and pronouncement of the award. The arbitrator is expected be a neutral person having no references to the either party and should hold good command on the dispute subject. His function is considered as quasi-judicial in nature.¹

The scope of arbitration in general remains wide such that of sale, purchase ,banking ,building construction, engineering, patent, trademark, insurance, In crux any contract having a commercial nature attracted to it would be deemed to a scope of the arbitration.

¹ HSF Legal Updates, 'Bare arbitration clauses and the extent to which the Singapore Court may assist' (Herbert Smith Freehills, 9 March 2017) <https://hsfnotes.com/arbitration/2017/03/09/bare-arbitration-clauses-and-the-extent-to-which-the-singapore-court-may-assist/> accessed 31 March 2024.

There are many advantages of Arbitration over court's proceedings. One of them is the concept of finality and the binding nature of the award. There are limited options on which arbitration award can be challenged. Another advantage had been that these awards are enforceable and recognizable in many countries than what it is as compared in national court. It goes without going that neutrality and privacy remains as a important feature of the arbitration. There is oppournity for both the parties to decide the place of arbitration, the model law to be used in the arbitration proceedings, preferred language. Another features been the concept of confidentiality these proceedings are held in private and are not open for public therefore big companies and corporate houses prefer arbitration over court proceedings.

Any International Commercial Arbitration Agreement should mention the type of dispute, the seat or place of arbitration and the details with regard to the arbitral tribunal These written form of agreement help the parties to solve there disputes in a amicable and structured matter, but improper agreement often leads to failure of the arbitration agreement .

2. The Concept of Bare Arbitration Clause

Another form of arbitration proceedings is the Bare Arbitration Clause, these clause are the ones which do not provide for the place of the arbitration, the seat of the arbitration, the model law applicable and the method of establishing the arbitral tribunal.² These lacks of important information causes hindrances' in the arbitration proceedings. In these type of cases the failure in appointment of the arbitrator and also in the absence of the place of the arbitration, the court also is confined to the position that it can't help the parties in order for the appointment of the arbitrator, therefore in such cases the claimant needs to approach the court on the basis of arbitration agreement been null and void or been incapable to being performed.³

2 'Bare arbitration clauses under the UNCITRAL Model Law on International Commercial Arbitration' (The Bristol University Law School Blog, 2017) <https://legalresearch.blogs.bris.ac.uk/2017/06/bare-arbitration-clauses-under-the-uncitral-model-law-on-international-commercial-arbitration/> accessed 17 March 2024.

3 How should bare arbitration clauses be enforced by the courts?' (Kluwer Arbitration Blog, 11 April 2017) <https://arbitrationblog.kluwerarbitration.com/2017/04/11/how-should-bare-arbitration-clauses-be-enforced-by-the-courts/> accessed 31 March 2024.

3. The Case Analysis of KVC Rice Intertrade Co Ltd Vs Asian Mineral Resources Pte Ltd ⁴

One of the most important cases in this regard is the case before the Singapore High Court is the *KVC Rice Intertrade Co Ltd Vs. Asian Mineral Resources Pte Ltd* (2017) SGHC 32.

4. Facts of the Case

The facts of the case provided that there was a purchase of rice in which there were two sellers but the buyer was the same person. Both of these sellers sold rice to the same buyer. The plaintiff KVC Rice and Tanasan Rice (Plaintiff) agreed to sell around 5000 metric ton to the defendant Asian Mineral Resource (Defendant). The reason of dispute was that both the contracts were identical to each other and one word in the arbitration clause which led to the dispute. It was alleged by the defendant that the plaintiff offered a 15% discount to the defendant as a result the defendant didn't provide for the payment for the fifth consignment of the supply of the rice. The Plaintiff denied to give this discount to both of these defendants and claimed to have provided the fifth consignment to the defendant. On the contrary the defendant didn't make any type of payment to the Plaintiff even on the discounted rate and alleged that the fifth consignment was not delivered.⁵

For the better understanding of the arbitration clause both the KVC Rice Contract and the Tanasan Rice Contract is reproduced below

KVC Rice Contract

“The Seller and the Buyer agree that all disputes arising out of or in connection with this agreement that cannot be settled by discussion and mutual agreement shall be referred to and finally resolved by arbitration as per Indian Contract Rules.”

⁴ KVC Rice Intertrade Co Ltd Vs Asian Mineral Resources Pte Ltd [2017] SGHC 32

⁵ Ibid.

⁶ Ibid.

Tanasan Rice Contract

“The Seller and the Buyer agree that all disputes arising out of or in connection with this agreement that cannot be settled by discussion and mutual agreement shall be referred to and finally resolved by arbitration as per Singapore Contract Rules.”

It is worth mentioning that the Arbitration Clause was silent on the matter of Seat of Arbitration and the law governing the arbitration agreement, the mode of arbitral tribunal. Also the Clause did not provide for the law governing the contract.

5. Issues Raised

- 1) Court faced the issue of deciding the conditions while passing a favourable order of a Bare Arbitration Clause?
- 2) Does the Singapore be the place of Arbitration with reference to the Article 11(3) of the Model Law when the Arbitration Agreement is silent on the same?

6. Legal Provision Involved

The Plaintiff on the onset tried to pursue arbitration which the defendant rejected therefore the plaintiff moved to the Singapore court stating that the clauses were unenforceable as it doesn't mentioned the place or the law of arbitration. Therefore ought to stay of the court proceeding in favour of the arbitration. The Plaintiff contented that the Singapore contract rules and the Indian contract rules was not referred to any procedural rules. On the other hand the defendant was of the view that the arbitration clause was functional because both the party agreed to the terms of the arbitration agreement and if any issues arises the same can be solved by the mutual understanding of both the parties.⁷

An arbitration agreement must meet several requirements in order to be enforceable under Singaporean law. These standards could include formal

⁷ June (Junghye) Yeum, 'Pathological Arbitration Clause Revisited' (Clyde & Co LLP Singapore, 27 March 2017) <https://www.lexology.com/library/detail.aspx?g=88611c87-7fdf-4602-a547-85b3a324f7fe> accessed 16 March 2024.

requirement compliance, agreement on key words, and intent clarity. Should the arbitration language in the contract have been interpreted as a “bare arbitration clause,” the court would have had to examine its enforceability and validity.⁸

7. Courts Decision

The court decision with regard to the Bare Arbitration Clause was considered to be valid and binding on the parties as far as the parties are able to co-operate with regard to the appointment of the arbitrator. The Bare Arbitration Clause remains no obstruction for the proper functioning of the arbitration tribunal. The appointed arbitrator can decide the place of the arbitration and also the framework of the tribunal. The court in case if maybe can act as the supervisor making sure the arbitration proceeding is been carried out in the proper manner.

The Court’s ruling was based on the belief that, as long as the parties have “evinced a clear intention to settle any dispute by arbitration,” “a bare arbitration clause which merely provides for submission of disputes to arbitration. Remains a valid and binding agreement”. This is true even in cases where the location or procedure for establishing the arbitral tribunal is not specified. The Court determined that these barriers to the Arbitration Clauses’ viability could be eliminated because, even in cases where the arbitration location was “unclear,” the SIAC could still “step in to make the necessary appointment if parties are not able to agree on the sole arbitrator or presiding arbitrator” in accordance with Section 8 of the IAA and Article 11(3) of the Model Law.⁹

Additionally, the Court determined that in cases where there was truly no other way to prevent injustice, it had the authority to retain “residual jurisdiction to assist with the appointment of arbitratorsto ensure that the parties’ intention to have their dispute settled by arbitration is not destroyed

Therefore the Hon’ble court rejected the petitioner argument that the arbitration clause is been incapable of been performed and directed the

8 Ibid.

9 Darius Chan, ‘How Should “Bare” Arbitration Clauses be Enforced by the Courts?’ (Ascendant Legal LLC, Singapore Law Gazette, 2017) <https://v1.lawgazette.com.sg/2017-04/1825.htm> accessed 19th March 2024.

parties to the arbitration. Therefore in lieu of the same both the parties were given three options to choose from. First been that both the parties could mutually appoint a arbitrator, secondly appointment of the arbitrator by the SIAC President and lastly if both the option of appointment fails the arbitration would fail and litigation between the petitioners and the defendant in the court would continue. In either of the way the intention of the parties mattered the most. If the parties intended to apply the arbitration clause the bare arbitration clause would not come in between for the successful arbitration proceedings.¹⁰

The other points of judgements were as follows:

- 1) That under Article 11(3) there exists a prime facie case that the Singapore is the place of the arbitration therefore the president of the SIAC could exercise the statutory power.
- 2) Second, there is a prima facie case that the President of the SIAC Court can nevertheless function as the “statutory appointing authority” in cases when the arbitration location is uncertain or not yet decided, notwithstanding the silence in the IAA and Model Law.
- 3) Thirdly Article 11(3) prevents the President of the SIAC Court from taking action in cases where it is obvious that Singapore is not the arbitration’s location. However, in situations when the location of arbitration is uncertain or has not yet been decided, the President of the SIAC Court need not be helpless.¹¹

8. Conclusion

The bare or inconsistent arbitration agreement was deemed fit by the Singapore court. The court made sure that the lack of vital information in the agreement doesn’t come in the way of the arbitration proceedings taking place. This could have been quite different if the place of jurisdiction would have been out of Singapore. But this is not the case as always there is conflicting opinion on the agreement of the bare arbitration agreement. If one of the parties to the agreement do not come in the agreement to

¹⁰ Ibid.

¹¹ Supra Note 8.

establish the tribunal then in those cases the court do not have much options left but to continue the legal proceedings. This may turn more complex as the bare arbitration agreement leave the court with the option to refuse to entertain the proceeding's as the entire agreement is incomplete. Therefore it is in the best interest of the parties not to get into the complexity of the court proceedings and create an arbitration agreement keeping in mind all the crucial information such that of the place of the arbitration, law governing the arbitration agreement so that any dispute regarding the agreement doesn't occur in the near future.