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Editor-in-Chief,
National Law University Delhi - Journal of Legal Studies
National Law University Delhi, Sector-14,
Dwarka, New Delhi- 110078
www.nludelhi.ac.in
email: nludslj@nludelhi.ac.in
Tel. No : 011-28034255
Fax No: 011- 28034254

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From The Editor's Desk

When you're tasked with publishing a law journal during a pandemic and its painful human cost, you find yourself questioning its very role. What kinds of questions should a law review be engaging with? This past year we have seen the Law be so full of promise while simultaneously being a contributor to the failure of the many projects articulated in its name. This dual quality of the legal doctrine ought to make us question what we classify as "rigorous" scholarship. If there is no such thing as a right or wrong question, what makes writing subversive? Is it simply about addressing "gaps" in literature, applying new methodology to an existing field, or forcing the scholar to move beyond their disciplinary training? While we need to meaningfully deliberate on this, we do believe that this volume brings together authors who have provided unique insights on topics that range from intellectual property law to feminist data collection practices.

Now, the adverse effects of the pandemic on scholarly work have been unevenly distributed across the scholarly community, in distinctly gendered ways and for all we know, this might have affected what our table of contents looks like. The question is whether it is possible for us to address this through the policies of the journal? Inviting an equal number of female and male scholars for the article contributions is too easy but simply not enough. For one, it completely ignores the people who don't fall within the binary. I don't have any answers, but I hope that highlighting this encourages greater reflection and motivates those in positions of academic authority to create conditions that help people with care responsibilities. Perhaps, this might also call for greater reflection on what we value in academia.

Further, we acknowledge the convenience that comes with rarely questioning the nature, processes, and products of authorship. Despite the fantasy of individual, original work, no one walks alone. We recognise the inextricability of theory from lived experience and that scholarly endeavours are embedded in a community. We also have immense gratitude to our peer reviewers who make significant contributions to the published work despite peer-reviewing being a thankless job in today's lamentable state of quantitative academic appointments and promotions which invisiblizes the ways in which various people pay an enormous service to the scholarly community. A big thank you to the various people who helped us in different capacities throughout the year- Shrutanjaya Bharadwaj, Sagnik Das, Nidhi Singh, Asaf Lubin, Akshay Shandilya, Vivan Sharan, Alok Gupta, Shweta Kabra, Anushka Shah, Ishaan Duggal, Abiha Zaidi. Without your efforts our Journal would not be able to maintain the excellent standards to which we strive. If nothing else, you serve as excellent reminders that scholarship is a collective effort (acknowledged or not).

I would be remiss if I did not acknowledge the NLUD administration, particularly our Vice Chancellor, Professor (Dr.) Srikrishna Rao and our faculty advisers, Sarvjeet Singh and Professor Anil Rai for believing in our team and our processes and extending their enthusiastic support and patronage in every way possible. You are reason our journal continues to remain open access. At a time when the SciHub litigation is sub-judice before the Delhi High Court, an issue that affects the vast majority of researchers and students in India, this commitment to remaining open access is something we truly value.

Finally, journals often give the impression that we're the arbiters of qualitative objectivity. While we do try to treat our responsibility with utmost seriousness, this is simply not true. We're truly very grateful to all those who sent us their submissions which we could not publish for a variety of reasons, and we hope that the dialogue you had with us, however limited, was productive.

I wish every success to future Editorial Boards of the Journal with the firm belief in their ability to realise the vision behind its creation and take it to new heights of scholarship. Most importantly, we hope that this volume is as engaging and enriching an experience for the readers as it has been for us.

Shubhangi Agarwalla
Editor-in-Chief

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THE GENDERED CONTAGION: PERSPECTIVES ON DOMESTIC VIOLENCE DURING COVID-19

Aradhana Cherupara Vadekkethil*

Centre for Women and Law's book, The Gendered Contagion, is a compilation of student essays, articles, transcripts of interviews with grassroot activists, and field notes from neighbouring countries. This book delves into an intersectional enquiry to understand the impact of domestic violence on various marginalised identities, and how the inequalities present in the society get further exacerbated during the pandemic. It meticulously analyses the shortcomings of the current legal frameworks and lays down a crucial foundation which can positively inform future law and reform policies. This book review assesses the structure and methodology of the book and critically evaluates the prominent themes that emerge in this book.

Keywords*: pandemic; lockdown; domestic violence; women; children; gender diverse persons; intersectional violence; gender-sensitive response.*

I. Introduction

The latest numbers from United Nations ('UN') indicate that globally, even before the COVID-19 pandemic, almost one in three women, i.e. an estimated 736 million women, 'have been subjected to intimate partner violence, non-partner sexual violence, or both at least once in their life'.[1] Emerging data reveals that violence against women and girls, especially domestic violence has intensified due to the COVID-19 outbreak.[2] The UN termed this exponential rise in domestic violence a 'shadow pandemic.'[3] In India, the

* Aradhana is a doctoral candidate at the Faculty of Law, University of Oxford.

1 UN Women, 'The Shadow Pandemic: Violence against Women during COVID-19' <https://www.unwomen.org/en/news/in-focus/in-focus-gender-equality-in-covid-19-response/violence-against-women-during-covid-19> accessed 12 June 2021.

2 UN Women 'COVID-19 and Ending Violence Against Women and Girls' (2020) <https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2020/issue-brief-covid-19-and-ending-violence-against-women-and-girls-en.pdf?la=en&vs=5006> accessed 12 June 2021.

3 UN Women 'The COVID-19 shadow pandemic: Domestic violence in the world of work: A call to action for the private sector' (2021) <https://www.unwomen.org/en/digital-library/publications/2020/06/brief-domestic-violence-in-the-world-of-work> accessed 12 June 2021.

Prime Minister declared the first nation-wide lockdown on 24 March 2020, and within a fortnight of this declaration, the National Commission for Women suggested an almost 100% increase in domestic violence incidents.[4] Between 1 March 2020 and 18 September 2020, the National Commission for Women received 4350 domestic violence complaints through emails, phone, and the dedicated WhatsApp helpline.[5] But this could just be the tip of an iceberg: there may be a massive under-reporting of cases because of lack of access to resources and/or safe spaces. In this context, the Centre for Women and Law's book – The Gendered Contagion, which offers perspectives on domestic violence during the COVID-19, is an important and timely contribution.

II. Methodology and Structure

This compilation is the product of a finely balanced mixture of articles, interview transcripts, and field notes. The articles delve into a theoretical enquiry to understand how domestic abuse is exacerbated in situations like a pandemic. Through an intersectional lens, they seek to examine the structural barriers that constrain the choices open to victims of domestic violence and how these barriers get further intensified during a pandemic. The compilation contains interviews with activists working at grassroot levels. These interviews are enriching and highlight the practical barriers being faced by victims of domestic violence. The field notes draw attention to the situation in neighbouring countries and pave the way for a comparative and dialogical enquiry.

The contributions are grouped under four key headings: The Shadow Pandemic, The Dysfunctional State Protection, Queer Vulnerabilities, and Notes from the Neighbourhood. I found this structuring a bit disorderly at certain places. While the aim of the first section 'The Shadow Pandemic' is to chronicle the disparate impact of the lockdown and to explain how these experiences are mediated by intersectional markers, such as religion, caste, ability etc., it is not clear why the disparate impact on queer people was not included within this section. If the aim of the first section was to focus only on 'women,' then, it is unclear as to why it includes a chapter on the impact of the pandemic on children. Stuti Srivastava and Khushali Mahajan's student essay which proposes a new framework, i.e., to treat domestic violence as a health-related issue, sits oddly with the rest of the chapters in this section. As this essay deals with how the state could have addressed this issue in a different manner, it may have read better as the concluding chapter under the second section ('The Dysfunctional State Protection'). The second section is titled aptly and highlights the various ways in which the state has failed to provide any protection to victims of domestic violence. The third section titled 'Queer Vulnerabilities' is divided into articles discussing the impact of the pandemic on gender and sexual minorities and articles examining the shortcomings of the legal framework. I think the former set of articles would

4 Shermin Joy, '4,300 cases of domestic violence reported with NCW since March' *Deccan Herald* (New Delhi, 27 September 2020) <https://www.deccanherald.com/national/4300-cases-of-domestic-violence-reported-with-ncw-since-march-893807.html> accessed 12 June 2021.

5 ibid.

have read better under the first section and the latter set of articles under the second section. The fourth section, 'Notes from our Neighborhood' is structured and titled appropriately. Another weakness is the lack of a concluding chapter. A concluding chapter could have connected the various themes that emerged from the different sections.

III. Understanding and Analysing the Prominent Themes

a. Questioning the notion of 'home as a safe space'

'Stay home, stay safe' has been the global mantra advocated by governments grappling with the myriad challenges posed by the pandemic. One of the central themes of this compilation has been to question the idea of 'home' as a safe space for all.

Across the compilation, the authors[6] argue that the lockdown resulted in the reinforcement of gender stereotypical roles and had a disparate and unequal impact on women, who have had to bear the burden of additional household and caregiving responsibilities. The severe curtailment of physical mobility during the lockdown massively reduced the opportunities available for women to step away from violent spaces and left them with little or no recourse to seek support from friends, family, public spaces, legal institutions, and the police.[7]

In the section on 'Queer Vulnerabilities', the authors stress that many LGBT+ persons continue to conceal their sexual or gender identities from their families. Financial vulnerability and financial dependence on their families may have resulted in their confinement in abusive households. Being homebound may have put such persons in perpetual surveillance, making it difficult for them to report any kind of violence to the authorities as they may not have been allowed to leave the house or may not have had access to resources to contact the helpline numbers.[8]

Thus, 'safe home' is a myth for many and 'staying safe' by 'staying home' is a luxury. These articles help in highlighting how the 'home' can be a deeply unequal space and/or a site of violence, and how during a pandemic, these difficulties get further exacerbated. Different authors have drawn from different sources to make this argument, for example,

6 Ayushi Agarwal, 'Why Women Can't 'Stay Home, Stay Safe': Domestic Violence in the times of Lockdown' in Sarasu Esther Thomas and others (eds), The Gendered Contagion: Perspectives on Domestic Violence During Covid – 19 (Centre for Women and the Law 2020) (Gendered Contagion); Beenish Zia and Nida Ali, 'Field Note: Domestic Violence Crisis Response in Pakistan during COVID-19' in Gendered Contagion; Surbi Karwa, 'Moving Mountains, Moving Machinery: Documenting experiences of AALI during pandemic: An interview with Renu Mishra and Shubhangi' ' in Gendered Contagion.

7 Pinki Mathur Anurag, '"Stay Home, Stay Safe?" in Lockdown with Abuser' in Gendered Contagion (n 6).

8 Aqsa Shaikh, 'Home Sweet Home?' in Gendered Contagion (n 6); Parth Maniktala, 'The Blind Spot in our Domestic Violence legislation: Analysing the exclusion of sexual and gender minorities' in Gendered Contagion (n 6); Pawan Dhall, 'No Lockdown on Domestic and Community Violence against Queer People during Coronavirus Pandemic' in Gendered Contagion (n 6).

while the grass root activists, lawyers, and civil society members rely on their field and work experiences, researchers use the data available from United Nations, National Commission for Women etc. to make this argument. While I found the interviews and field notes enlightening, I found some of the essays written by students or researchers lacking in rigour. These essays make cursory reference to the literature available on this theme and largely ignore prominent literature. Several studies[9] highlight that violence has always been strongly predicted in situations of isolation, i.e., in situations wherein the intimate partner succeeded in limiting and restricting the contact of their partner with friends and family. Many prominent scholars[10] argue that domestic violence and abuse is often part of a programme of 'coercive control'[11] and such coercive control thrives in isolation. It is important to first understand this dynamic between control and domestic abuse, only then can one truly understand how this can perpetuate during the pandemic.

b. An Intersectional Enquiry

This compilation is an intersectional enquiry into how class, caste, religion, gender identity, sexual orientation, disability, age, and geography can lead to overlapping discrimination and marginalization. Herein, the domestic violence is not just related to the masculine behaviour of the spouse, but it is also attributed to caste or religion or class hegemony.

Across this compilation, the authors note that even in normal situations, many Dalit women, disabled women,[12] Muslim women, women belonging to Tribal communities[13] face unique obstacles as the legal system is designed keeping in mind an upper-caste, Hindu, able-bodied woman. These inequalities are further perpetuated during the pandemic. For example, during the pandemic, many Muslim women faced the unique and additional threat of divorce, triple-talaq, or polygamy, after incidents of domestic violence.[14] Owing

9 Helen Reece, 'The End of Domestic Violence' (2006) 69(5) Modern Law Review 770; Rebecca Emerson Dobash and Russell Dobash, *Violence against Wives: A Case against the Patriarchy* (Open Books 1980).

10 Mary Ann Dutton, 'Understanding Women's Response to Domestic Violence' (2003) 21 Hofstra Law Review 1191; Evan Stark, 'Commentary on Johnson's "Conflict and Control: Gender Symmetry and Asymmetry in Domestic Violence"' (2006) 12 Violence against Women 1019; Jonathan Herring, 'The Severity of Domestic Abuse' (2018) 30 (1) National Law School of India Review 37-50.

11 Evan Stark, *Coercive Control: The Entrapment of Women in Personal Life* (Oxford University Press 2007).

12 Shruthi Venkatachalam, 'Tracing the Intersectional Silence on Understanding and Addressing the Violence in the lives of Disabled Women' in Gendered Contagion (n 6).

13 Monalisa Mintz, 'Domestic Violence within Tribal Communities: Challenges and possible remedies in the wake of COVID-19' in Gendered Contagion (n 6).

14 Akshat Aggarwal and Prannv Dhawan, 'Muslim Women and the Silent Pandemic: of Relief, Domestic Violence and Advocacy during the Pandemic: An interview with Zakia Soman, founding member, Bhartiya Muslim Mahila Andolan' in Gendered Contagion (n 6); Iram Khan, 'Call for Safe Space: Intersectional experiences of Minority Women facing Domestic Violence during Coronavirus Pandemic in India' in Gendered Contagion (n 6).

to their weak economic position, many Muslim women did not want to get divorced.[15] The authors[16] draw attention to the fact that many domestic violence complaints from Dalit women would not have reached the National Commission for Women as many do not have access to internet, having been mostly excluded from the digital revolution. In addition, the domination of non-Dalits in the health services meant that Dalit women may have been subjected to hostile, discriminatory, and patronizing setups that are unlikely to prioritize their needs.

Another vulnerable group that has been focused upon in this compilation is that of 'children'. Childline, a helpline for children, received around 92,105 calls for protection against abuse during the first week of the lockdown.[17] Extended school closures have led to an interruption in the supply of Mid-day meals and sanitary napkins[18] and can lead to an exponential increase in child labour and forced or child marriages.[19] The pandemic has brought to the fore the massive gender gap between girls and boys – girls are more likely to be enrolled in government schools, which have been impacted by the pandemic more than private schools, whereas boys are more likely to be enrolled in private schools, which have been able to shift to digital learning faster; girls are also less likely to have access to digital learning resources than boys.[20] The burden of additional caregiving and household responsibilities that arose during the pandemic, is also more likely to fall on the girls than the boys.[21]

The authors have coherently argued that the pandemic has brought to the fore the underlying inequalities and the existing unaddressed abuse of women, children, and gender diverse persons at home. During a pandemic when many are already struggling for getting their basic needs met, the conversation on violence, in general, occupies less space. Now, for women belonging to marginalized communities, gender-diverse persons, and children, who already suffer from the absence of adequate and appropriate support which caters to their unique and specific needs, it has become even more difficult to talk or report about their experience of violence. Thus, to understand the nature, intensity, and the impact of violence, it is crucial to understand the profound role played by intersectional and

15 ibid.

16 Manisha Arya and Vani Sharma, 'Caste, Domestic Violence and the Pandemic – Interview with Kiruba Munusamy' in Gendered Contagion (n 6); Ishan Bhatnagar, 'The Dalit Woman and the Pandemic: Exploring Domestic Violence from an Intersectional Perspective' in Gendered Contagion (n 6).

17 Press Trust of India, 'Coronavirus lockdown: Govt. helpline receives 92,000 calls on child abuse and violence in 11 day' *The Hindu* (New Delhi, 8 April 2020).

18 Adrija Bose, 'How the Coronavirus Pandemic disrupted Children's lives' in Gendered Contagion (n 6).

19 Vani Sharma, Prannv Dhawan and Manisha Arya, 'In Conversation with Prof. (Dr.) Asha Bajpai: Child Rights in abusive households during COVID-19: A Blindspot' in Gendered Contagion (n 6).

20 Adrija Bose (n 18).

21 ibid.

interlocking markers like caste, class, religion, gender identity, sexuality, age, disability, geography etc. A pandemic deepens the inequalities already present in the society and hence, while devising any policy or response to domestic violence, it is essential to pay attention to the multiple marginalised identities. The intersectional enquiry conducted in this compilation sets a necessary foundation which can be used by policy makers to design a comprehensive Covid response or recovery plan, which is sensitive to the various intersectional markers identified above.

c. The Failures of the State

A common argument that flows through all the articles, interviews and field notes is that the state failed to provide any clear and coherent guidelines on how to tackle domestic violence. A common criticism has been that the state failed to categorise the support mechanisms available for victims of domestic violence, such as, shelter homes, counselling services etc. as essential services; the state, also, failed to declare Protection officers as essential workers.[22] Thus, many women were left with little or no recourse, especially during the early phase of the lockdown in 2020.

While women suffered during the pandemic due to the state's failure in recognizing the importance of continuing legal support mechanisms in place for those facing domestic violence, gender diverse persons continued to suffer from a total lack of civil legal remedies. The Protection of Women from Domestic Violence Act seeks to protect only 'women' and thus, crucial civil remedies such as, protection orders, residence orders or compensation orders are not available to gender diverse persons, even in normal times.[23] Therefore, a lengthy and arduous criminal law process remains the only recourse for LGBT+ victims of domestic violence, and that too only provides remedies in case of physical violence and fails to recognize other types of violence such as, mental, emotional, financial violence etc.[24]

Many authors[25] in this compilation argue that the government's policy which prioritised the re-opening of liquor shops, was passed without any consultation and despite the prevalence of data suggesting a strong link between alcohol consumption and domestic violence. This contributed to a further rise in incidents of domestic violence. Locating this

22 Ujwala Kadrekar, 'Implementation of the Protection of Women from Domestic Violence Act 2005 during Lockdown' in Gendered Contagion (n 6); Iram Khan (n 14); Stuti Srivastava and Khushali Mahajan, 'The Urgency of Treating Domestic Violence as a Healthcare Issue' in Gendered Contagion (n 6).

23 Gowthaman Ranganathan, 'Law and Violence: Gender-diverse Persons in Lockdown' in Gendered Contagion (n 6); Parth Maniktala (n 8).

24 ibid.

25 Adrija Bose, 'How the Coronavirus Pandemic disrupted Children's lives' in Gendered Contagion (n 6); Ayushi Agarwal, 'Why Women Can't 'Stay Home, Stay Safe': Domestic Violence in the times of Lockdown' in Gendered Contagion (n 6); Vatsal Raj, 'Stay Home Stay Safe: The Violent Fallout of a Gender-blind COVID-19 Response' in Gendered Contagion (n 6).

argument within broader literature, several studies similarly suggest a strong association between alcohol consumption and violent behaviour among intimate partners.[26] However, one of the authors argue that liquor, which was otherwise a cheaply and easily available commodity in the tribal community, became a rare commodity due to the closure of liquor shops during lockdown. According to this author, this sudden lack of access to liquor contributed to an increase in domestic violence in the tribal community. As the author does not make any citations while making this argument, it is unclear if they are relying on field or work experience. Thus, this argument is weak and unconvincing and conflicts with the argument put forth by other authors.

Overall, the authors succinctly put forth the argument that the state failed to address the rise in domestic violence during the pandemic and did not invest in a gender-sensitive response and recovery. This theme finds resonance in the field notes from Pakistan, Nepal, Maldives, Bangladesh, and Sri Lanka. A comparative enquiry reveals that there was a lack of state effort in acknowledging and addressing domestic violence in most of these countries. Many suggestions have been put forth in this compilation on how the states can provide a better response, such as, by declaring organisations catering to victims of domestic violence as essential services, by sending a clear political message that domestic violence will not be tolerated, by tailoring a gender-sensitive public health response, and by recognizing and acknowledging that domestic violence is intersectional and imagining a legal redressal system keeping in mind these various intersectional markers of vulnerability.

IV. Concluding Thoughts

This compilation sets out to offer diverse perspectives on domestic violence during the pandemic and it delivers on its promise. By engaging with various stakeholders, such as lawyers, activists, researchers, it successfully manages to highlight how patriarchy combines with marginalizing factors like religion, caste, class, gender, sexuality, geography, disability etc., and aggravates the risk of experiencing violence. Such an intersectional enquiry will help in evaluating the lacunae present in the existing legal policies, which in turn, will help identify workable solutions and can positively inform future policy and legal reform efforts.

26 World Health Organization, 'Preventing violence by reducing the availability and harmful use of alcohol' (Geneva 2009) <https://apps.who.int/iris/bitstream/handle/10665/44173/9789241598408_eng.pdf?sequence=1&isAllowed=y> accessed 12 June 2021; Marlene J. Berg and others, 'The Effects of Husband's Alcohol Consumption on Married Women in Three Low-Income Areas of Greater Mumbai' (2010) 14 AIDS and Behaviour 126 <https://pubmed.ncbi.nlm.nih.gov/20544380/> accessed 12 June 2021; Joseph Boden, David Fergusson and John Harwood, 'Alcohol misuse and violent behavior: Findings from a 30-year longitudinal study' (2012) 122 (1-2) Elsevier 135; Carla Ferreira de Paula Gebara and others, 'Patterns of domestic violence and alcohol consumption among women and the effectiveness of a brief intervention in a household setting: a protocol study' (2015) BMC Women's Health <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4582621/> accessed 12 June 2021.

PASL V. GE: A BITTERSWEET END

Ashutosh Kumar*

This article analyses the Indian Supreme Court's recent decision in the case of PASL Wind Solutions Pvt. Ltd. v. GE Power Conversion India Pvt. Ltd, which conclusively held that Indian parties can opt for arbitration seated outside India in light of the principle of party autonomy. While this provided much needed clarity on the issue, the judgment creates confusion and controversy in relation to four crucial issues: (1) the tests for determining the seat of arbitration and distinguishing between the seat and the venue of arbitration; (2) the scope of the proviso to section 2(2) of the Arbitration and Conciliation Act, 1996; (3) the application of the public policy principle that Indian parties cannot derogate from Indian substantive law in respect of relationships between themselves; and (4) the relevance of the notification requirement under section 44(b) of the Arbitration and Conciliation Act, 1996. This article identifies this confusion while highlighting possible solutions to effectively address each of these issues. It concludes by advocating for legislative intervention and the Supreme Court's cognisance of the controversies created by the PASL decision, and notes that arbitration law can dynamically evolve to meet the expectations of users only via a process of timely review and reform.

Keywords: *arbitration, seat of arbitration, venue of arbitration, party autonomy, public policy, foreign arbitral awards, closest connection test, PASL, the New York Convention, Indian Arbitration and Conciliation Act.*

I. Introduction

Can Indian parties opt for arbitration seated outside India? If yes, then is an award rendered in such arbitration enforceable as a foreign award? These ostensibly modest questions had vexed the Indian courts for a long time. In *PASL Wind Solutions Pvt. Ltd.*

* Principal, AnchayilKumar – Advocates | Advocate (India) | Non-Practising Solicitor (England and Wales) | B.A., LL.B. (Hons.) (NLSIU) | LL.M. (Columbia Law School). The author thanks Anjali Anchayil (Senior Associate, J. Sagar Associates) for her invaluable comments and suggestions.

v. GE Power Conversion India Pvt. Ltd. ('*PASL*'),[1] the Supreme Court unequivocally answered these questions in the affirmative. The decision provided much needed clarity and reinforced the primacy of party autonomy under Indian law. It also affirmed the pro-arbitration stance of the Supreme Court. Predictably, the decision has been widely appreciated by lawyers and arbitration users.[2]

While the decision in *PASL* settled all doubts over Indian parties opting for arbitration seated outside India, it nonetheless created confusion and controversy in relation to certain crucial issues. This article examines these issues to identify the confusion and controversy created by the decision in *PASL* and offers possible solutions to effectively address the same. This article, however, begins by briefly examining the decision in *PASL* in relation to the issue of Indian parties opting for arbitration seated outside India to provide a more complete perspective.

II. Addressing The Issue of Indian Parties Opting for Arbitration Seated Outside India

The decision in *PASL* was preceded by a period of rampant confusion over the issue of Indian parties opting for arbitration seated outside India. Different High Courts had adopted opposing positions based on one of two conflicting views expressed by the Supreme Court. On the one hand, the Madhya Pradesh High Court in *Sasan Power Ltd. v. North American Coal Corporation India Pvt. Ltd* ('*Sasan I*'),[3] the Delhi High Court in *GMR Energy Ltd. v. Doosan Power Systems India Pvt. Ltd. & Ors* ('*GMR*')[4] and the Gujarat High Court in *GE Power Conversion India Pvt. Ltd. v. PASL Wind Solutions Pvt. Ltd.*[5] had followed the view expressed by the Supreme Court in *Atlas Export Industries v. Kotak & Co.* ('*Atlas'*),[6] and held that Indian parties could opt for arbitration seated outside India. On the other hand, the Bombay High Court in *Seven Islands Shipping Ltd. v. SAH Petroleums Ltd.* ('*Seven Islands*')[7] and *Addhar Mercantile Pvt. Ltd. v. Shree Jagdamba Agrico Exports Pvt. Ltd.*

1 *PASL Wind Solutions Pvt. Ltd. v GE Power Conversion India Pvt. Ltd.* Civil Appeal No. 1647 of 2021.

2 See Shaneen Parikh, Shalaka Patil, and Surya Karan Sambyal, 'Party Autonomy Reigns Supreme: The Indian Supreme Court Rules that Two Indian Parties Can Choose a Foreign Seat of Arbitration' (*Kluwer Arbitration Blog*, 19 May 2021) <http://arbitrationblog.kluwerarbitration.com/2021/05/19/party-autonomy-reigns-supreme-the-indian-supreme-court-rules-that-two-indian-parties-can-choose-a-foreign-seat-of-arbitration/> accessed 10 August 2021.

3 *Sasan Power Ltd. v North American Coal Corporation India Pvt. Ltd.* 2015 SCC OnLine MP 7417.

4 *GMR Energy Ltd. v Doosan Power Systems India Pvt. Ltd. & Ors.* 2017 SCC OnLine Del 11625. See *Dholi Spintex Pvt. Ltd. v Louis Dreyfus Company India Pvt. Ltd.* 2020 SCC OnLine Del 1476.

5 *GE Power Conversion India Pvt. Ltd. v PASL Wind Solutions Pvt. Ltd.* MANU/GJ/1345/2020.

6 *Atlas Export Industries v Kotak & Co.* (1999) 7 SCC 61.

7 *Seven Islands Shipping Ltd. v SAH Petroleums Ltd.* MANU/MH/1874/2012.

('*Addhar*')[8] had followed the view expressed by the Supreme Court in *TDM Infrastructure Pvt. Ltd. v. UE Development India Pvt. Ltd* ('*TDM*')[9] and held that Indian parties could not opt for arbitration seated outside India since it amounted to derogation from Indian law. In addition to this, Parliament surprisingly failed to address this issue as part of its sweeping reform[10] of Indian arbitration law, and the Supreme Court passed up a convenient opportunity to resolve this question while deciding the appeal[11] from the decision in *Sasan I* – all of which created further confusion.

The decision in *PASL* conclusively resolved this confusion. The Supreme Court affirmed its previous view in *Atlas* and endorsed the decisions in *Sasan I* and *GMR*.[12] It further held that there was no bar under public policy for Indian parties opting for arbitration seated outside India since:

> [T]here is no clear and undeniable harm caused to the public in permitting two Indian nationals to avail of a challenge procedure of a foreign country when, after a foreign award passes muster under that procedure, its enforcement can be resisted in India on the grounds contained in section 48 of the Arbitration Act, which includes the foreign award being contrary to the public policy of India.[13]

Based on the above analysis, the Supreme Court held that Indian parties could opt for arbitration seated outside India in light of the principle of party autonomy which was 'the brooding and guiding spirit of arbitration'.[14] The Supreme Court also held that an award rendered in such arbitration would be enforceable as a foreign award since Chapter I of Part II of the Arbitration and Conciliation Act, 1996 ('A&C Act'), which deals with

8 *Addhar Mercantile Pvt. Ltd. v Shree Jagdamba Agrico Exports Pvt. Ltd.* 2015 SCC OnLine Bom 7752.

9 *TDM Infrastructure Pvt. Ltd. v UE Development India Pvt. Ltd.* (2008) 14 SCC 271. The decision in *TDM* was given by a single judge hearing an application for the appointment of an arbitrator. Such a decision, while being a decision of a judicial authority, is not considered as a decision of a 'court' and does not constitute binding precedent (see *State of West Bengal & Ors. v Associated Contractors* (2015) 1 SCC 32). It may be noted that the Arbitration and Conciliation (Amendment) Act, 2015 has done away with this unusual statutory scheme and all applications are now heard by a 'court' as opposed to a judicial authority.

10 See Arbitration and Conciliation (Amendment) Act, 2015 and the Arbitration and Conciliation (Amendment) Act, 2019.

11 *Sasan Power Ltd. v North American Coal Corporation India Pvt. Ltd.* (2016) 10 SCC 813 ('*Sasan II*').

12 *PASL* (n 1) [27], [28] and [30] (for *Atlas*), [33] (for *Sasan I*), and [36] (for *GMR*). In respect of the decision in *TDM*, the Supreme Court concluded that such decision was not binding precedent since it was a decision given by a single judge (see n 9) and such decision was distinguishable since it was given in the context of deciding jurisdiction in an application for the appointment of an arbitrator (see [33], [36]). As a result, the Supreme Court also overruled the decisions in *Seven Islands* and *Addhar* (see [36]).

13 *PASL* (n 1) [59].

14 ibid [60]-[61].

enforcement of foreign awards under the New York Convention,[15] is 'party-neutral, having reference to the place at which the award is made'.[16]

III. Confusion and Controversy

By prioritising party autonomy, adopting a disciplined understanding of public policy and following the letter and the spirit of the New York Convention, the Supreme Court in *PASL* settled all doubts over Indian parties opting for arbitration seated outside India. However, the decision in *PASL* nonetheless created confusion and controversy in relation to four crucial issues. These issues are: (1) the tests for determining the seat of arbitration and distinguishing between the seat and the venue of arbitration; (2) the scope of the proviso to section 2(2) of the A&C Act; (3) the application of the public policy principle that Indian parties cannot derogate from Indian substantive law in respect of their relationships between themselves; and (4) the relevance of the notification requirement under section 44(b) of the A&C Act. This article shall now examine the above-noted issues to identify the confusion and controversy created by the decision in *PASL* and offer possible solutions to effectively address the same.

(1) Tests for Determining The Seat of Arbitration and Distinguishing between The Seat and The Venue of Arbitration

The first issue pertains to determining the seat of arbitration and distinguishing between the seat and the venue of arbitration. The task of determining the seat of arbitration requires a court or arbitral tribunal to examine the arbitration agreement and the main contract to ascertain whether the parties have chosen the seat of arbitration. For example, consider a contract that contains an arbitration agreement which does not explicitly specify the seat of arbitration, but instead stipulates that 'the courts of Delhi shall exercise jurisdiction'. In such a case, a court or arbitral tribunal must ascertain whether Delhi has been implicitly chosen by the parties as the seat of arbitration. In contrast, the task of distinguishing between the seat and the venue of arbitration requires a court or arbitral tribunal to examine the arbitration agreement to ascertain whether the place identified in the arbitration agreement is the seat or the venue of arbitration. For example, consider a contract that contains an arbitration agreement which stipulates that 'the arbitration proceedings shall be held in Mumbai or wherever convenient for the parties'. In such a case, a court or arbitral tribunal must ascertain whether Mumbai is the seat or the venue of arbitration. The two tasks are notionally distinct, but if the seat of arbitration is disputed on the basis that the purported seat is merely the venue of arbitration, then the two tasks tend to overlap.

In *PASL*, the Supreme Court had to decide whether the arbitral tribunal had correctly ruled that the seat of arbitration was Zurich. The appellant contended that the seat of arbitration had to be determined by applying the 'closest connection' test prescribed in

15 The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.

16 *PASL* (n 1) [25]-[26].

Enercon (India) Ltd. & Ors. v Enercon GmbH & Anr. ('*Enercon*'),[17] as per which the seat of arbitration had to be Mumbai 'since every factor connected the arbitration in the present case to India, with no foreign element involved'.[18] The respondent countered that the 'closest connection' test could be applied only if the seat of arbitration could not be determined otherwise, and this was not the case here since: (i) the arbitration agreement designated Zurich as the seat of arbitration, (ii) the arbitral tribunal had concluded that Zurich was the seat of arbitration, and (iii) both parties had accepted this position.[19]

The Supreme Court accepted the argument of the respondent and decided that the seat of arbitration was Zurich. It adopted a two-step analysis to justify this decision. First, it examined the arbitration agreement[20] and held that the language used therein ('resolved by Arbitration in Zurich… in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce') indicated that the parties had chosen Zurich as the seat of arbitration.[21] In support of this conclusion, the Supreme Court heavily and exclusively relied on its recent decision in *Mankastu Impex Pvt. Ltd. v. Airvisual Ltd.* ('*Mankastu*').[22] It asserted that the language of the arbitration agreement in *Mankastu* ('resolved by arbitration administered in Hong Kong') was comparable to the language of the arbitration agreement in the present case. Therefore the conclusion in *Mankastu,* that Hong Kong was the seat of arbitration, should also be adopted in the present case to conclude that Zurich was the seat of arbitration.[23] It reinforced this conclusion by referring to the fact that both parties had accepted the decision of the arbitral tribunal that Zurich was the seat of arbitration.[24]

Second, it held that the 'closest connection' test could be applied only 'if it is unclear that a seat has been designated either by the parties or by the tribunal', and this was not the case here since 'the seat has clearly been designated both by the parties and by the tribunal, and has been accepted by both the parties'.[25] It asserted that the 'closest connection' test had been applied in *Enercon* 'only because the arbitration clause therein provided that London was the "venue" and not the seat', and therefore, it had been held in *Enercon* that

17 *Enercon (India) Ltd. & Ors. v Enercon GmbH & Anr.* (2014) 5 SCC 1.

18 *PASL* (n 1) [4.8]. It should be noted that the appellant had argued before the arbitral tribunal that Zurich was the seat of arbitration but adopted the opposite position before the Indian courts.

19 ibid (n 1) [5.8].

20 The arbitration agreement provided as follows: 'In case no settlement can be reached through negotiations, all disputes, controversies or differences shall be referred to and finally resolved by Arbitration in Zurich in the English language, in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce, which Rules are deemed to be incorporated by reference into this clause. The Arbitration Award shall be final and binding on both the parties.'

21 *PASL* (n 1) [7].

22 *Mankastu Impex Pvt. Ltd. v Airvisual Ltd.* (2020) 5 SCC 399.

23 *PASL* (n 1) [7].

24 ibid [8].

25 ibid [9].

'given the various factors connecting the dispute to India and the absence of any factors connecting it to England, on the facts of that case, there was no necessity to regard London as the seat when it was, in fact, only the venue'.[26]

While the decision that Zurich was the seat of arbitration is undoubtedly sound, the analysis adopted by the Supreme Court was, with all due respect, deeply flawed. The Supreme Court erred by relying on *Mankastu* and further erred by affirming the 'closest connection' test without considering its suitability as a test for determining the seat of arbitration.

i) Reliance on *Mankastu*

As noted above, the Supreme Court heavily and exclusively relied on *Mankastu* and asserted that the language of the arbitration agreement in *Mankastu* was comparable to the language of the arbitration agreement in the present case. However, the arbitration agreement in *Mankastu* provided that arbitration was to be 'administered' in Hong Kong and contained two separate references to Hong Kong ('resolved by arbitration administered in Hong Kong' and '[t]he place of arbitration shall be Hong Kong'). Thus, the language of such arbitration agreement was clearly not comparable to the language of the arbitration agreement in the present case which did not specify that arbitration was to be 'administered' in Zurich and contained only a single reference to Zurich ('resolved by Arbitration in Zurich').

Further, in *Mankastu*, the Supreme Court held that designating a specific place as the place of arbitration did not by itself indicate that such place had been chosen as the seat of arbitration and further *indicia* were required to demonstrate this.[27] The arbitration agreement in *Mankastu* designated Hong Kong as the place of arbitration ('[t]he place of arbitration shall be Hong Kong') but further stipulated that the arbitration shall be administered in Hong Kong ('resolved by arbitration administered in Hong Kong'). In light of this stipulation, the Supreme Court concluded that the reference to Hong Kong '[was] not a simple reference as the "venue"… [but] for final resolution by arbitration administered in Hong Kong' and such stipulation 'clearly suggest[ed] that the parties have agreed that the arbitration be seated at Hong Kong and that laws of Hong Kong shall govern the arbitration proceedings as well as have power of judicial review over the arbitration award'.[28] It noted that such stipulation 'is an *indicia* that the seat of arbitration is at Hong Kong'.[29] The analysis in *Mankastu* directly contradicts the analysis adopted in *PASL* where the Supreme Court held that designating Zurich as the place of arbitration ('resolved by Arbitration in Zurich') indicated that Zurich had been chosen as the seat of arbitration. If the analysis in *Mankastu* had been applied to the facts in *PASL*, then Zurich would be considered as the

26 ibid.

27 *Mankastu* (n 22) [20]-[22].

28 *Mankastu* (n 22) [21].

29 ibid [22].

venue of arbitration only since there were no further *indicia* to demonstrate that Zurich had been chosen as the seat of arbitration.

Clearly, the Supreme Court erred by relying on *Mankastu* since neither the language of the arbitration agreement nor the analysis in *Mankastu* supported the analysis adopted in *PASL*. However, by relying on *Mankastu* nonetheless, the Supreme Court created confusion over whether designating a specific place as the place of arbitration was sufficient for such place to be considered as the seat of arbitration.

If the analysis adopted in *PASL* is carefully examined, then it becomes apparent that the Supreme Court had in fact followed its decision in *BGS SGS Soma JV v. NHPC Ltd.* ('*BGS*')[30] which held *inter alia* that:

> [I]t may be concluded that *whenever there is the designation of a place of arbitration in an arbitration clause as being the "venue" of the arbitration proceedings, the expression "arbitration proceedings" would make it clear that the "venue" is really the "seat" of the arbitral proceedings,* as the aforesaid expression does not include just one or more individual or particular hearing, but the arbitration proceedings as a whole, including the making of an award at that place. This language has to be contrasted with language such as "tribunals are to meet or have witnesses, experts or the parties" where only hearings are to take place in the "venue", which may lead to the conclusion, other things being equal, that the venue so stated is not the "seat" of arbitral proceedings, but only a convenient place of meeting. Further, *the fact that the arbitral proceedings "shall be held" at a particular venue would also indicate that the parties intended to anchor arbitral proceedings to a particular place, signifying thereby, that that place is the seat of the arbitral proceedings.* This, coupled with there being no other significant contrary indicia that the stated venue is merely a "venue" and not the "seat" of the arbitral proceedings, would then conclusively show that such a clause designates a "seat" of the arbitral proceedings. *In an international context, if a supranational body of rules is to govern the arbitration, this would further be an indicia that "the venue", so stated, would be the seat of the arbitral proceedings.* In a national context, this would be replaced by the Arbitration Act, 1996 as applying to the "stated venue", which then becomes the "seat" for the purposes of arbitration.[31]

In *BGS*, the Supreme Court held that designating a specific place as the place of arbitration indicated that such place was the seat of arbitration – unless there existed 'significant contrary indicia' which indicated that such place was the venue of arbitration.

30 *BGS SGS Soma JV v NHPC Ltd.* (2020) 4 SCC 234.

31 ibid [82] (emphasis supplied).

Therefore, contrary to the analysis in *Mankastu*, there was no necessity for further *indicia* to demonstrate that such place had been chosen as the seat of arbitration. Clearly, the analysis adopted in *PASL* was based on the above analysis in *BGS*.

The key question is – why did the Supreme Court rely on *Mankastu* instead of *BGS*? The answer probably lies in the conflicting views expressed by the Supreme Court in *Union of India v. Hardy Exploration & Production (India) Inc.* ('*Hardy*'),[32] *BGS* and *Mankastu* on the issue of distinguishing between the seat and the venue of arbitration.[33] Each of these decisions was given by a bench of three judges, and therefore, these decisions were binding on the three-judge bench in *PASL*.

In *Hardy*, the Supreme Court held that designating a specific place as the place of arbitration only meant that such place had been chosen as the venue of arbitration and the venue could become the seat of arbitration only if 'something else is added to it as a concomitant'.[34]

Thereafter, in *BGS*, the Supreme Court expressed a different view and held that designating a specific place as the place of arbitration indicated that such place was the seat of arbitration – unless there existed 'significant contrary indicia' which indicated that such place was the venue of arbitration.[35] The Supreme Court prescribed a bright-line test for distinguishing between the seat and the venue of arbitration based on this analysis.[36] It also held that the decision in *Hardy* was *per incuriam* since it failed to follow the '*Shashoua* principle'[37] that had been approved by an earlier five-judge bench decision in *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services* ('*BALCO*').[38, 39]

Finally, in *Mankastu*, the Supreme Court held that designating a specific place as the place of arbitration did not by itself indicate that such place had been chosen as the seat

32 *Union of India v Hardy Exploration & Production (India) Inc.* (2019) 13 SCC 472.

33 Anjali Anchayil and Ashutosh Kumar, 'Choice of Seat or Venue: Supreme Court of India Dithers' (Kluwer Arbitration Blog, 13 May 2020) <http://arbitrationblog.kluwerarbitration.com/ 2020/05/13/choice-of-seat-or-venue-supreme-court-of-india-dithers/> accessed 10 August 2021.

34 *Hardy* (n 32) [35].

35 *BGS* (n 30) [82].

36 ibid.

37 *Roger Shashoua & Ors. v Mukesh Sharma* [2009] EWHC 957 (Comm) (*Shashoua*). In *Shashoua*, the English High Court held that the chosen venue (London) was the seat of arbitration because the parties had not designated any other place as the seat of arbitration, had chosen a supranational body of rules (ICC Rules) to govern the arbitration, and there were no contrary *indicia*. The decision was based on the assumption that London arbitration was 'a well-known phenomenon which is often chosen by foreign nationals with a different law'. This assumption evidently did not apply in the Indian context but the Supreme Court in *BGS* adopted the '*Shashoua* principle' regardless.

38 *Bharat Aluminium Co. v Kaiser Aluminium Technical Services* (2012) 9 SCC 552.

39 *BGS* (n 30) [94].

of arbitration and further *indicia* were required to demonstrate this.[40] The Supreme Court seemed to adopt the analysis in *Hardy* without explicitly disagreeing with *BGS,* and even refused to decide the correctness of the conclusion in *BGS* that the decision in *Hardy* was *per incuriam*.[41] By choosing this convoluted course of action, the Supreme Court neglected to resolve the contradictions between *Hardy* and *BGS* and thereby created much uncertainty about the correct legal position.

Clearly, *Hardy*, *BGS* and *Mankastu* had created an impossible paradox and needed to be reconciled as best possible. In light of this situation, and since *BGS* had already held that the decision in *Hardy* was *per incuriam*, the Supreme Court attempted to reconcile *BGS* and *Mankastu* in *PASL* by adopting the reasoning in *BGS* while ostensibly relying on *Mankastu*. This approach sought to discreetly repair the schism created by *Hardy*, *BGS* and *Mankastu* – albeit by airbrushing their stark contradictions. While it remains to be seen if this approach shall be successful, it appears likely that litigants shall continue to rely on *BGS* and *Mankastu* to support opposing positions notwithstanding the attempted reconciliation in *PASL*.

ii) Affirming the 'closest connection' test

In *PASL*, the Supreme Court held that the 'closest connection' test could be applied to determine the seat of arbitration only 'if it is unclear that a seat has been designated either by the parties or by the tribunal'.[42] It also asserted that the 'closest connection' test had been applied in *Enercon* 'only because the arbitration clause therein provided that London was the "venue" and not the "seat"'.[43]

At the outset, it may be noted that the above assessment of *Enercon* was incorrect. While the arbitration agreement in *Enercon* stated that '[t]he venue of the arbitration proceedings shall be in London', the respondents in that case had argued that London should be considered as the seat of arbitration.[44] The 'closest connection' test was applied to resolve this dispute and the Supreme Court held that London had been designated as the venue of arbitration only and India was the seat of arbitration.[45] Therefore, the 'closest connection' test had been applied to decide *whether* London had been designated as the venue of arbitration and not *because* London had been designated as the venue of arbitration. Clearly, the Supreme Court mistook the outcome of the 'closest connection' test in *Enercon* as the condition for the application of such test.

Regardless of this error, the purpose behind confining the 'closest connection' test to

40 *Mankastu* (n 22) [20]-[22].

41 ibid [13].

42 *PASL* (n 1) [9].

43 ibid.

44 *Enercon* (n 17) [62]-[63], [66].

45 ibid [98].

those cases where 'it is unclear that a seat has been designated' was to carve out its field of operation and thereby avoid overlap with the tests identified in *BGS* and/or *Mankastu*. As a result, the tests identified in *BGS* and/or *Mankastu* had to be applied first, and if such tests indicated that no seat had been designated, only then could the 'closest connection' test be applied.

For example, consider an arbitration agreement stipulating that 'arbitration proceedings shall be held in London'. If the tests identified in *BGS* are applied, then such tests shall indicate that London has been designated as the seat of arbitration. Thus, the 'closest connection' test shall not apply. On the other hand, consider an arbitration agreement stipulating that 'arbitration proceedings may be held in London, Delhi, Singapore or wherever convenient to the parties'. If the tests identified in *BGS* are applied, then such tests shall indicate that no seat of arbitration has been designated. Thus, the 'closest connection' test shall be applied in this scenario to determine the seat of arbitration.

This approach provides much needed clarity and correctly prioritises the interpretation of the arbitration agreement over the identification of connecting factors. It also prudently sidesteps the evident conflict between *Enercon* and *BGS*.[46] However, in spite of this laudable outcome, the Supreme Court erred at a more fundamental level by affirming the 'closest connection' test without considering its suitability as a test for determining the seat of arbitration.

In *Enercon*, the Supreme Court initially applied the 'closest connection' test on the basis that the parties had expressly specified in their arbitration agreement that '[t]he provisions of the Indian Arbitration and Conciliation Act, 1996 shall apply' and thereby chosen the A&C Act as the curial law and India as the seat of arbitration.[47] Thereafter, the Supreme Court separately applied the 'closest connection' test on the basis of the

46 In *Enercon*, the arbitration agreement stated that '[t]he venue of the arbitration proceedings shall be in London' and the Supreme Court applied the 'closest connection' test to conclude that London had been designated as the venue of arbitration. In *BGS*, the Supreme Court followed the '*Shashoua* principle' and held that 'whenever there is the designation of a place of arbitration in an arbitration clause as being the "venue" of the arbitration proceedings, the expression "arbitration proceedings" would make it clear that the "venue" is really the "seat" of the arbitral proceedings, as the aforesaid expression does not include just one or more individual or particular hearing, but the arbitration proceedings as a whole, including the making of an award at that place'. If the analysis in *BGS* is applied to the facts in *Enercon*, then London would be considered as the seat of arbitration and not just the venue of arbitration. Clearly, *Enercon* and *BGS* are in direct conflict and cannot apply simultaneously. This approach relegates the 'closest connection' test to a secondary position and thereby avoids simultaneous application of the tests in *BGS* and the 'closest connection' test.

47 *Enercon* (n 17) [98]. The Supreme Court held: 'Applying the *closest and the intimate* connection to arbitration, it would be seen that the parties had agreed that the provisions of the Indian Arbitration Act, 1996 would apply to the arbitration proceedings… By choosing that Part I of the Indian Arbitration Act, 1996 would apply, the parties have made a choice that the seat of arbitration would be in India'.

'factors connecting the dispute' to India and England.[48] Therefore, the Supreme Court in *Enercon* did not clearly identify the exact basis for applying the 'closest connection' test. The Supreme Court also cited the decision of the English High Court in *Braes of Doune*[49] to justify considering the factors connecting the dispute to a specific place to decide if such place is the seat of arbitration. However, in *Braes of Doune*, the English High Court had actually considered the factors connecting the *arbitration* to a specific place – as opposed to the *dispute*.[50] The Supreme Court erred in its understanding of *Braes of Doune* and adopted an altogether different basis for applying the 'closest connection' test.

In *PASL*, the Supreme Court assumed from the outset that the basis for applying the 'closest connection' test was the factors connecting the dispute to a specific place, and thereafter decided that the 'closest connection' test could be applied to determine the seat of arbitration only 'if it is unclear that a seat has been designated either by the parties or by the tribunal'.[51] As a result, the Supreme Court affirmed the 'closest connection' test but wholly neglected to consider its suitability as a test for determining the seat of arbitration.

If the 'closest connection' test is examined further, it becomes evident that it is unsuitable as a test for determining the seat of arbitration. The test considers the factors connecting the dispute to a specific place to decide if such place is the seat of arbitration.[52] This approach is patently flawed since the seat of arbitration has no inherent connection to the dispute and is chosen specifically to provide a neutral jurisdiction for arbitration. By linking the seat of arbitration to the dispute without proper justification, the 'closest connection' test is likely to produce outcomes that are unexpected or contrary to the intention of the parties.

For example, consider a contract for the supply of goods in India executed by a British company and an Indian company which provides for arbitration but does not designate the

48 ibid [115]. The Supreme Court held as follows: 'If one has regard to the factors connecting the dispute to India and the absence of any factors connecting it to England, the only reasonable conclusion is that the parties have chosen London, only as the venue of the arbitration. All the other connecting factors would place the seat firmly in India.'

49 *Braes of Doune Wind Farm (Scotland) Ltd. v Alfred McAlpine Business Services Ltd.* [2008] EWHC 426 (TCC) ('*Braes of Doune*').

50 ibid [17].

51 *PASL* (n 1) [9].

52 This bears a passing resemblance to the 'closest and most real connection' test under the common law for determining the governing law of a contract in the absence of an express or implied choice by the parties. This test considers the factors connecting the underlying transaction to a given place or system of law. The contract is governed by the law with which the underlying transaction has the 'closest and most real connection'. See A V Dicey, J H C Morris, and Lawrence Collins, *Dicey, Morris & Collins: The Conflict of Laws* (14th edn, Sweet and Maxwell 2006) 1539, para 32-005. The same test (albeit termed as the 'closest connection' test) is applied for determining the governing law of an arbitration agreement in the absence of an express or implied choice by the parties. This test considers the factors connecting the arbitration agreement to a given place or system of law. The arbitration agreement is governed by the law with which the arbitration agreement has the 'closest connection' – that is the law of the seat of arbitration. See *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38 ('*Enka*').

seat of arbitration. If a dispute arises, then such dispute shall be most closely connected to India. Therefore, an application of the 'closest connection' test shall result in India being considered as the seat of arbitration. However, the parties in this scenario are unlikely to have chosen India as the seat of arbitration instead of a neutral jurisdiction. This outcome is unexpected and contrary to the likely intention of the parties.

Clearly, due to its flawed approach, the 'closest connection' test is unsuitable as a test for determining the seat of arbitration. Therefore, instead of affirming this test, the Supreme Court should have rejected this test altogether. It should have accepted the interpretation of the arbitration agreement and the tests identified in *BGS* and/or *Mankastu* as the appropriate basis for determining the seat of arbitration and distinguishing between the seat and the venue of arbitration. Alternatively, if the Supreme Court deemed the 'closest connection' test to be relevant, then it should have clarified that the correct approach under this test is to consider the factors connecting the *arbitration* (not the *dispute*) to a specific place to decide if such place is the seat of arbitration – as done by the English High Court in *Braes of Doune*. In this context, it may be noted that the decision in *Braes of Doune* has been justifiably criticised for disregarding party autonomy and promoting 'forum preference'.[53] These criticisms, by logical extension, are also applicable to the 'closest connection' test.

iii) Possible solution

The decision in *PASL* has created confusion and controversy in relation to the tests for determining the seat of arbitration and distinguishing between the seat and the venue of arbitration. On the one hand, the Supreme Court affirmed the 'closest connection' test for determining the seat of arbitration even though this test is unsuitable due to its flawed approach. On the other hand, the Supreme Court relied on the decision in *Mankastu* to support its conclusion that Zurich was the seat of arbitration, even though neither the language of the arbitration agreement nor the analysis in *Mankastu* supported the analysis adopted in *PASL* – which ostensibly followed the analysis in *BGS*.

The only viable solution to the above issues is for a five-judge bench of the Supreme Court to consider these issues afresh. In that scenario, the Supreme Court could either reject the 'closest connection' test or clarify the correct approach under this test. However, due to the ambiguous scope of this test and the significant possibility of misapplication, the preferable option here would be to reject the 'closest connection' test altogether. Similarly, the Supreme Court could decisively resolve the conflict between *BGS* and *Mankastu* and thereby clarify whether simply designating a specific place as the place of arbitration is sufficient for such place to be considered as the seat of arbitration, or whether further *indicia* are required. The preferable option here would be to follow the analysis in *BGS* since it provides greater certainty and clarity.

53 Jonathan Hill, 'Determining the Seat of an International Arbitration: Party Autonomy and the Interpretation of Arbitration Agreements' (2014) 63(3) The International and Comparative Law Quarterly 517, 530-532.

(2) Scope of The Proviso to Section 2(2) of The A&C Act

The second issue relates to the proviso to section 2(2) of the A&C Act. While section 2(2) of the A&C Act states that Part I of the A&C Act 'shall apply where the place of arbitration is in India', the proviso states:

> [S]ubject to an agreement to the contrary, the provisions of section 9, 27 and clause (b) of sub-section (1) and sub-section (3) of section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognised under the provisions of Part II of this Act.

As a result, section 2(2) of the A&C Act limits the application of Part I of the A&C Act to arbitrations seated in India, but the proviso creates an exception and extends specific provisions of Part I of the A&C Act to an 'international commercial arbitration' where 'the place of arbitration is outside India' and the resulting award is 'enforceable and recognised under the provisions of Part II of this Act'.

The Supreme Court interpreted section 2(2) expansively in *Bhatia International v. Bulk Trading S.A. & Anr.* ('*Bhatia*')[54] and held that Part I of the A&C Act applied even to arbitrations seated outside India unless expressly or impliedly excluded.[55] The decision in *Bhatia* spawned a plethora of decisions analysing whether parties had impliedly excluded Part I of the A&C Act. Eventually, in a five-judge bench decision in *BALCO*, the Supreme Court prospectively overruled *Bhatia* and held that Part I of the A&C Act applied only to arbitrations seated in India. The decision in *BALCO* not only affirmed the critical role of the seat of arbitration under the A&C Act, but also consigned Part I and Part II of the A&C Act to separate impermeable fields. This outcome created serious difficulties for parties pursuing arbitrations seated outside India that required interim relief, etc. in India. The proviso to section 2(2) of the A&C Act was added by the Arbitration and Conciliation (Amendment) Act, 2015 to address these difficulties by extending specific provisions of Part I of the A&C Act to an 'international commercial arbitration' where 'the place of arbitration is outside India' and the resulting award is 'enforceable and recognised under the provisions of Part II of this Act'.

In *PASL*, the Supreme Court considered whether the proviso to section 2(2) of the A&C Act could apply to arbitrations between Indian parties seated outside India despite the use of the term 'international commercial arbitration', which is defined in section 2(1)(f) of the A&C Act as an arbitration involving at least one non-Indian party. The Supreme Court concluded that the proviso to section 2(2) of the A&C Act could apply to arbitrations between Indian parties seated outside India since the term 'international commercial

54 *Bhatia International v Bulk Trading S.A. & Anr.* (2002) 4 SCC 105.

55 ibid [32].

arbitration' used in the proviso to section 2(2) of the A&C Act, in the relevant context of foreign arbitration, only referred to an arbitration seated outside India irrespective of the identity of the concerned parties.[56] The Supreme Court further concluded that since the proviso to section 2(2) of the A&C Act applied to arbitrations between Indian parties seated outside India, a petition by a party under section 9 of the A&C Act was maintainable.[57]

By deciding as above, the Supreme Court purposely expanded the scope of the proviso to section 2(2) of the A&C Act in spite of an explicit statutory constraint. The Supreme Court decided that the term 'international commercial arbitration' should be interpreted, in the relevant context of foreign arbitration, to mean an arbitration seated outside India and the definition of such term in section 2(1)(f) of the A&C Act should not be applied. However, the Supreme Court neglected to examine the specific language of the proviso to section 2(2) of the A&C Act which states that the relevant provisions of Part I of the A&C Act 'shall also apply to international commercial arbitration, *even if* the place of arbitration is outside India…' The use of the phrase 'even if' suggests a deliberate emphasis on the preceding term 'international commercial arbitration' and therefore indicates that Parliament knowingly used the term 'international commercial arbitration' to restrict the scope of the proviso to arbitrations seated outside India involving at least one non-Indian party. This conclusion is reinforced by the fact that the proviso to section 2(2) of the A&C Act does not state that the relevant provisions of Part I of the A&C Act 'shall also apply if the place of arbitration is outside India…' even though Parliament could have easily used such language if it had intended to expand the scope of such proviso to all arbitrations seated outside India.

From this perspective, it is reasonable to assume that Parliament did not intend to expand the scope of the proviso to section 2(2) of the A&C Act to include arbitrations between Indian parties seated outside India. The decision in *PASL* has therefore created a controversy in relation to the scope of such proviso. In terms of a solution to this issue, Parliament could consider enacting a suitable amendment to the proviso to section 2(2) of the A&C Act to clarify its precise scope. The preferable option here would be to expand the scope of the proviso to section 2(2) of the A&C Act to include all arbitrations seated outside India since there is no apparent justification to treat arbitrations between Indian parties differently from arbitrations involving at least one non-Indian party.

(3) Application of The Public Policy Principle That Indian Parties Cannot Derogate from Indian Substantive Law in Respect of their Relationships Between Themselves

The third issue pertains to the public policy principle that Indian parties cannot derogate from Indian substantive law in respect of relationships between themselves. This principle is a key element of the conflict of laws regime in India. The ostensible rationale for this principle is that Indian parties (such as Indian nationals and companies incorporated

56 *PASL* (n 1) [14].

57 ibid [70].

in India) are compulsorily subject to Indian substantive law in respect of relationships between themselves, and therefore, cannot be allowed to derogate from Indian substantive law in respect of such relationships by exercising their freedom of contract.

It may be noted that most jurisdictions impose some restrictions on freedom of contract in the context of the choice of governing law.[58] However, such restrictions are typically limited either to certain types of contracts[59] or to the application of mandatory rules.[60] By adopting the position that Indian parties cannot derogate from Indian substantive law at all in respect of relationships between themselves, India imposes a far more severe restriction on freedom of contract.

The public policy principle that Indian parties cannot derogate from Indian substantive law in respect of relationships between themselves is manifested in certain statutes and has been recognised by caselaw. For example:

(a) Sections 13(c) and 13(f) of the Code of Civil Procedure, 1908 provide that a foreign judgment is not conclusive if 'it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable' or if 'it sustains a claim founded on a breach of any law in force in India'.

(b) Section 28(1)(a) of the A&C Act provides that if the seat of arbitration is in India, and the arbitration is between Indian parties, then 'the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India'.

(c) In *BALCO*, the Supreme Court recognised this principle as the basis for section 28(1)(a) of the A&C Act as follows:

> …As the heading of Section 28 indicates, its only purpose is to identify the rules that would be applicable to "substance of dispute". In other words, it deals with the applicable conflict of law rules. This section makes a distinction between purely domestic arbitrations and international commercial arbitrations, with a seat in India. Section 28(1)(a) makes it clear that in an arbitration under Part I to which Section 2(1)(f) does not apply, there is no choice but for the Tribunal to decide "the dispute" by applying the Indian "substantive law applicable to the contract". *This is clearly to ensure that two or more Indian parties do not circumvent the substantive Indian law, by resorting to arbitrations.*

58 See Rome I Regulation (Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations) ('Rome I Regulation').

59 See Rome I Regulation, arts 6, 7, and 8 which apply to consumer contracts, insurance contracts, and individual employment contracts respectively.

60 See Rome I Regulation, arts 3(3) and 9(2).

> *The provision would have an overriding effect over any other contrary provision in such contract*. On the other hand, where an arbitration under Part I is an international commercial arbitration within Section 2(1)(f), the parties would be free to agree to any other "substantive law" and if not so agreed, the "substantive law" applicable would be as determined by the Tribunal. The section merely shows that the legislature has segregated the domestic and international arbitration. Therefore, to suit India, conflict of law rules have been suitably modified, where the arbitration is in India. This will not apply where the seat is outside India. In that event, the conflict of law rules of the country in which the arbitration takes place would have to be applied...[61]

(d) In *TDM*, the Supreme Court acknowledged the public policy foundations of this principle as follows:

> Section 28 of the 1996 Act is imperative in character in view of Section 2(6) thereof, which excludes the same from those provisions which parties derogate from (if so provided by the Act). *The intention of the legislature appears to be clear that Indian nationals should not be permitted to derogate from Indian law. This is part of the public policy of the country*.[62]

Therefore, this principle is a key element of the conflict of laws regime in India and is generally applicable and not restricted to arbitrations seated in India or court proceedings in India.

In *PASL*, the Supreme Court had to decide whether section 28(1)(a) of the A&C Act prohibited Indian parties from opting for arbitration seated outside India due to its stipulation that Indian substantive law must be applied in arbitrations between Indian parties. The Supreme Court held that section 28(1)(a) of the A&C Act did not apply to arbitrations seated outside India at all and could not be considered 'by some tortuous process of reasoning' as prohibiting Indian parties from opting for arbitration seated outside India.[63] It also relied on *BALCO* and held that if Indian parties opted for arbitration seated outside India, then the substantive law to be applied in such arbitration would be decided based on the conflict of laws rules of the seat of arbitration.[64]

The above conclusions are undoubtedly correct. However, the Supreme Court neglected to consider the application of the above-stated principle in the context of arbitration between Indian parties seated outside India. Even if Indian parties could opt for arbitration seated outside India, such parties could not apply foreign substantive law in such arbitration and

61 *BALCO* (n 38) [118] (emphasis supplied).

62 *TDM* (n 9) [23] (emphasis supplied).

63 *PASL* (n 1) [51]-[52].

64 ibid [54].

thereby derogate from Indian substantive law in respect of their relationship. The Supreme Court neither recognised the above-stated principle nor acknowledged its application to Indian parties opting for arbitration seated outside India.

Instead, the Supreme Court decided that 'it is more than likely that… two Indian nationals will apply the substantive law of India to disputes between them which arise from a breach of contract which takes place in India'.[65] It also pursued a speculative analysis of a notional conflict of laws regime based on the common law to conclude that for a dispute which 'pertains to transactions concluded in India and breach thereof, the substantive law of India will be applied by the arbitrator in accordance with the conflict of law rules of the country in which the arbitration takes place'.[66] It also relied on Dicey & Morris[67] and the House of Lords decision in *Regazzoni v. K.C. Sethia* ('*Sethia*')[68] and held that:

> Where the law of India prohibits a certain act, the conflict of law rules as set down in Dicey's authoritative treatise will take care of this situation in most cases as the arbitrators would then apply these rules on the ground of international comity between nations in cases which arise between two Indian nationals in an award made outside India.[69]

Finally, as a failsafe measure, the Supreme Court held that if Indian parties 'circumvented a law which pertains to the fundamental policy of India, [the resulting] award may then not be enforced under section 48(2)(b) of the Arbitration Act'.[70]

As a result, instead of recognising the above-stated principle, or acknowledging its application to Indian parties opting for arbitration seated outside India, the Supreme Court decided that Indian parties were likely to choose Indian substantive law, that arbitrators would apply Indian substantive law pursuant to the conflict of laws rules of the seat of arbitration, that arbitrators would apply Indian substantive law if it prohibited any transaction 'on the ground of international comity', and that any award obtained by circumventing Indian substantive law which forms part of the fundamental policy of Indian law would not be enforced as per section 48(2)(b) of the A&C Act. These conclusions, although reasonable *per se*, are conjectural in nature and cannot supplant the above-stated principle. From the perspective of Indian law and public policy, the public policy principle that Indian parties cannot derogate from Indian substantive law in respect of relationships between themselves must be applied irrespective of the specific forum chosen by Indian parties. The Supreme Court erred by ignoring this principle in its analysis and thereby

65 ibid [55].

66 ibid.

67 A V Dicey, J H C Morris and Lawrence Collins, *Dicey, Morris & Collins: The Conflict of Laws* (15th edn, Sweet and Maxwell 2012), rule 224.

68 *Regazzoni v K.C. Sethia* [1958] AC 301.

69 *PASL* (n 1) [57].

70 ibid [58].

created controversy over whether this principle applies in the context of arbitration between Indian parties seated outside India.

In terms of a solution to this issue, the Supreme Court could resolve this controversy in a subsequent decision by explicitly recognising the above-stated principle and acknowledging its application to Indian parties opting for arbitration seated outside India. The Supreme Court could also clarify that any breach of this principle by Indian parties would result in the refusal of recognition and enforcement of the resulting award.

(4) Relevance of The Notification Requirement

The fourth issue concerns section 44 of the A&C Act which defines a 'foreign award' for the purposes of Chapter I of Part II of the A&C Act. If an award does not satisfy this definition, then such award is not enforceable as a New York Convention award under Chapter I of Part II of the A&C Act – even if the New York Convention is otherwise applicable. As a result, section 44 of the A&C Act acts as a gateway for the enforcement of New York Convention awards in India.

The definition of a 'foreign award' under section 44 of the A&C Act contains four distinct elements. First, that it be an award made on or after 11 October 1960 in respect of 'differences between persons arising out of legal relationships'. Second, that such legal relationships be 'considered as commercial under the law in force in India'. Third, that it be an award made pursuant to a written arbitration agreement to which the New York Convention applies. Fourth, that it be an award made in 'one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which [the New York Convention] applies'. The last of these elements can be conveniently described as the notification requirement and is found in section 44(b) of the A&C Act.

Even though the New York Convention has been adopted by as many as 168 States as of June 2021,[71] the Central Government has notified only 47 States in the Official Gazette.[72] This creates a serious lacuna in the enforcement of New York Convention awards in India since awards made in non-notified States cannot be enforced as New York Convention awards under Chapter I of Part II of the A&C Act.

In *PASL*, the Supreme Court considered the definition of a 'foreign award' under section

71 United Nations Commission on International Trade Law, List of States Parties to the New York Convention, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) <https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2> accessed 20 June 2021.

72 Indu Malhotra, *Malhotra: Commentary on the Law of Arbitration* (4th edn, Wolters Kluwer 2020) 1113-1114, fn 42 (the list of notified states excludes the most recently notified Republic of Mauritius). The Republic of Mauritius was notified via Ministry of Law and Justice, Notification bearing F. No. 29(5)/2014-Judl in the Gazette of India, 13 July 2015 <https://egazette.nic.in/WriteReadData/2015/164985.pdf> accessed 10 August 2021.

44 of the A&C Act while deciding whether the concerned award made in Switzerland could be enforced under Chapter I of Part II of the A&C Act. However, after taking note of the notification requirement, the Supreme Court curiously held that the notification requirement only meant that 'the arbitration must be conducted in a country which is a signatory to the New York Convention'.[73] It offered no reason at all for this conclusion. It eventually held that the notification requirement had been satisfied in this case since 'the arbitration [was] conducted at… Zurich, being in Switzerland, a signatory to the New York Convention'.[74]

The Supreme Court wholly ousted the notification requirement in favour of a simple and rather obvious condition that arbitration 'be conducted in a country which is a signatory to the New York Convention'. This was contrary to section 44(b) of the A&C Act and amounted to supplanting a statutory prerequisite. Clearly, the Supreme Court did not properly consider the notification requirement and erroneously held that it was sufficient for the enforcement of an award under Chapter I of Part II of the A&C Act that arbitration be conducted in a New York Convention country.

In terms of a solution to this issue, while it may be possible for the Supreme Court to resolve this controversy in a subsequent decision by explicitly affirming that only awards made in notified States can be enforced under Chapter I of Part II of the A&C Act, the preferable solution would be to omit the notification requirement altogether since it has created a serious lacuna in the enforcement of New York Convention awards in India and is evidently inconsistent with the objectives of the New York Convention.

IV. Conclusion

A recurrent theme in the history of arbitration law in India is the tendency of the Supreme Court to render key judgments that take arbitration law two steps forward and yet one step back. The decision in *PASL* is a striking example of this tendency. While it decisively settles all doubts over Indian parties opting for arbitration seated outside India, it creates confusion and controversy in relation to four crucial issues that not only form an essential part of its analysis, but are also issues of significant general importance. From this perspective, the decision in *PASL* has provided a bittersweet end to the controversy over Indian parties opting for arbitration seated outside India. It is hoped that Parliament and the Supreme Court shall take note of the confusion and controversy created by the decision in *PASL* and adopt suitable solutions to address the same. It is only by a process of timely review and reform that arbitration law in India can speedily evolve to meet the expectations of arbitration users.

73 *PASL* (n 1) [21].

74 ibid. It should be noted that Switzerland is a notified State and so this conclusion was not only incorrect and contrary to section 44(b) of the A&C Act but also unnecessary for the outcome in this case. However, the Supreme Court did not take note of Switzerland being a notified State.

WAITING FOR GODOT: THE MUCH-NEEDED OVERHAUL OF INDIAN EXTRADITION LAW

Dayan Krishnan & Sanjeevi Seshadri*

The regime of extradition law in India, requires serious reconsideration, in terms of both legislative amendments and also concerted executive action, in order to make the regime more effective. The present essay argues that the effective implementation of Chapter III of the Indian Extradition Act would create a streamlined and expedited extradition regime which dispenses with the onerous requirement of proving a prima facie case. This apart, it is argued that Chapter III must be amended to replicate some of the features available in the United Kingdom's Extradition Act, 2003.

However, as has been pointed out in this essay, it is insufficient to simply make legislative changes, in the absence of executive competence to apply those legislative changes. In the absence of a serious effort by the executive, to effectively implement even the existing legislative framework, any attempts to make the regime more effective will invariably end up being two strangers, waiting endlessly, for the arrival of Godot.

Keywords*: extradition reform; Extradition Act, 1962; United Kingdom's Extradition Act, 2003; EAW regime; Fugitive Offenders Act, 1881.*

The Extradition Act, 1962 ('Indian Extradition Act') which governs the regime of extraditions in to, and from India, has stood unamended since 1993. The present essay argues that the regime of extradition law in India requires an overhaul with the regime being brought a full circle, and in part at least replicating some of the features available in the United Kingdom's Extradition Act, 2003 ('UK Extradition Act'). However, as is further argued in this essay, it is insufficient to simply make legislative changes, in the absence of executive competence to apply those legislative changes. In the absence of a serious effort by the executive, to effectively implement even the existing legislative framework, any attempts to make the regime more effective will invariably end up being two strangers, waiting endlessly, for the arrival of Godot.

The present essay concentrates on recommending changes and other methods to effectively implement the Indian Extradition Act. This essay does not discuss the substantive

* Mr. Dayan Krishnan, Senior Advocate & Mr. Sanjeevi Seshadri, Advocate.

law of extradition or the contours of the bars to extradition, for they warrant a completely different and in-depth analysis which is beyond the scope of the present essay.

The authors have chosen the UK Extradition Act and the law of extradition in the United Kingdom as the blue print of comparison, for the United Kingdom is undoubtedly one of India's inspirations in so far as the regime of extradition law is concerned. Further, in terms of current priorities, some of the most high profile requests have been made from there.[1] This aside of course the United Kingdom always provides an important, common law comparator and a useful point of reference when it comes to legislation.

The present essay is divided into 4 parts. The first part deals with the historical origins of the Indian extradition regime as it existed prior to Indian independence. The second part deals with the enactment of the Indian Extradition Act, its amendments, as well as its implementation post the amendments. The third part is a comparison of the Indian Extradition Act with the UK Extradition Act and identifies the major features of the latter which are required to be introduced in the Indian Extradition Act. The fourth part includes the concluding remarks and the authors' suggestions on the way forward.

I. In Her Majesty's Name

As is the case in a number of matters, the story of Indian extradition law begins in the United Kingdom i.e. the erstwhile British Empire. Prior to Indian independence, there were essentially two phases of extradition law that are of significance. Phase 1 was the period that the Extradition Act, 1870 and 1873 and the Foreign Jurisdiction and Extradition Act, 1879 were applicable in India whilst Phase 2 was the period that the Extradition Act, 1903 and the Fugitive Offenders Act, 1881 were applicable in India.

A. Phase 1: The Extradition Act, 1870 & 1873 & Foreign Jurisdiction And Extradition Act, 1879

Prior to 1815, it was generally understood that the royal prerogative of the Sovereign extended to the power of surrendering of aliens to foreign states as the power was warranted by the '*practice of nations*'.[2] It was only thereafter, from 1815 onwards, that it was felt that there needed to be a statutory authority to justify such surrender. Before the passing of the Extradition Act, 1870 ('1870 Act') three treaties were executed by the British Government and foreign powers (viz. United States, France and Denmark) between the years 1842 and 1862, the implementation of these treaties was governed by Acts passed specific to those

1 For a detailed explanation on at least two failures of India, in the context of extradition from the United Kingdom, *see*, Dayan Krishnan and Sanjeevi Seshadri, 'The Extraordinary Exoneration of Ravi Shankaran and Raymond Varley: A Comment on India – United Kingdom Extradition' (2018) 5 NLUD SLJ 26.

2 Rt. Hon. Sir Scott Baker and ors, 'A Review of the United Kingdom's Extradition Arrangements' (UK Home Office 2020).

treaties.[3]

However, recognising the various difficulties articulated by these countries as well as the stress upon the regime of law, the 1870 Act was passed by the British parliament[4] "to amend the law relating to the surrender to foreign states of persons accused or convicted of the commission of certain crimes with the jurisdiction of such states".[5] The 1870 Act recognises the duality of extradition law, and provides in Section 2, that where an arrangement has been made with a foreign state, it would be the prerogative of Her Majesty to extend the procedure contemplated under the 1870 Act to requests made by Foreign States, in whatever manner she deems fit.[6] The exceptions to such surrender were effectively limited to the political offence exception and specialty, as also where the fugitive criminal was accused of an offence within English jurisdiction or was otherwise serving a sentence under any conviction in the United Kingdom.[7] The 1870 Act, contemplated in Section 17 when read with Section 26 that the 1870 Act could be extended to any British Possession[8], and this was as a matter of fact done in the context of India, in 1895.[9] The 1870 Act was applied to British India by the Extradition (India) Act, 1895, which conferred on Presidency Magistrates and District Magistrates powers similar to those conferred on Police Magistrates and Justices of the Peace in the United Kingdom under the 1870 Act. [10]

Aside from the 1870 Act, unique to British India, was a situation where extradition was sought from a 'Native State' to the British Empire. This was governed by an Indian Act, entitled the Foreign Jurisdiction and Extradition Act, 1879 ('1879 Act'). The 1879 Act, extended, to the whole of British India, all Native Indians who were subjects of Her Majesty beyond the limits of British India as well as all European British subjects within the dominion of principles states in alliance with the Her Majesty.[11] The 1879 Act was passed to provide for the trial of offences committed in places beyond British India.[12] The 1879 Act was essentially to facilitate the surrender of fugitive criminals, from the Princely States to 'British India'. However, keeping in mind the unique sovereign status of the Princely State, it is generally understood that the 1879 Act extended to the whole of British India as territorial laws and also to the persons specified as a personal law.[13] Therefore the surrender

3 ibid 26.

4 ibid 27-28.

5 Extradition Act 1870, Preamble.

6 Extradition Act 1870, s 2.

7 Extradition Act 1870, s 3.

8 Extradition Act 1870, s 17 and s 26.

9 JN Saksena, 'India: The Extradition Act 1962' (1964) 13 The International and Comparative Law Quarterly 116.

10 Extradition (India) Act 1895, Preamble.

11 Foreign Jurisdiction and Extradition Act 1879, s 1.

12 Foreign Jurisdiction and Extradition Act 1879, Preamble.

13 Mackenzie Dalzell Edwin Chalmers, *The Foreign Jurisdiction and Extradition Act, 1879* (Kessinger Publisher 1896) 5.

facilitated under the 1879 Act could perhaps not be properly labelled 'extradition' as it was not between two full sovereigns and did not create reciprocal obligations.[14]

B. Phase 2: The Indian Extradition Act, 1903 & Fugitive Offenders Act, 1881

In 1901, while Lord Curzon was Viceroy, the Extradition Bill was moved in the Council of the Governor General of India. The introduction of the bill was with the purposes of amending elements of the 1870 Act as applicable in India and also to amend the procedure involved in the Foreign Jurisdiction and Extradition Act of 1879 so as to make it more suitable to administration within British India. The template for these amendments was the Fugitive Offenders Act, 1881 as was articulated by Mr. Raleigh in his speech before the Council:

> …[T]here are at present two laws of extradition in force in British India. The Act of Parliament which was passed in 1870 applies here as it applies throughout the British Empire, except where it has been excluded by the orders of Her late Majesty in Council. On the demand of a Power which has a treaty with the British Government to which the old Act applies, we may be called upon to co-operate in surrendering a criminal who has come into British India, and any such application would involve us in the somewhat difficult task of adapting provisions, which are expressed in the language of the English procedure and are suited directly only to the English Courts to our own Courts in practice.
>
> One object of the Bill which I now ask leave to introduce is to devise a procedure which may, as we hope, be accepted by His Majesty's Government and by the Treaty Powers as an efficient substitute, or rather as the British Indian version of the procedure established by the Imperial Act. We have endeavoured in framing the Bill to preserve the same safeguard for accused persons which is provided for by the Act of 1870, that is to say, that where there is a question of law that ought to be fairly argued before the extradition takes place, we shall provide for the question being raised and for the opinion of a superior Court being taken upon it; we also preserve what is an important feature in the procedure of the Imperial Act, namely, the complete control of the Executive Government over all extradition proceedings at every stage…
>
> The other law of extradition is our own Act of 1879 to which I have referred. Some of the provisions of the Act are, as my predecessor Mr. Chalmers expressed it, remarkable for their vagueness, and with regard to some of the most important of them we are obliged to say that in the

14 Under Section 11 of the Foreign Jurisdiction and Extradition Act, 1879, European British Subjects could not be extradited to the Native States for offences committed there and could only be tried in British India.

> absence of judicial authority no confident opinion can be given as to the occasions on which they were intended to apply. The one merit of the Act is that it has established a convenient procedure which is in common use in cases of extradition between British India and the Native States, to appreciate the necessity of a simple and expeditious procedure in such cases. It is only necessary to look at the map of India; to see how the boundaries of the Native States are interlaced with those of the territories of this Government, and to see especially how lines of railway often cross the political boundaries again and again, so that one may pass into and out of British India several times in the course of a day's journey. That being so, it is necessary, as I say, that we should have a simple and expeditious procedure. and this we have endeavoured to preserve in the provisions of the Bill. We have also taken the opportunity of adapting to our own use the procedure established by the Fugitive Offenders Act of 1881, which was intended by Parliament to regulate the rendition of criminals by the Government of one part of the British Empire for trial or punishment in another part. [15]

The Indian Extradition Act, 1903 ('1903 Act') reiterated much of the 1870 Act, as was promised during the discussion on its bill.[16] The 1903 Act provided a detailed procedure for surrendering fugitives where a request was made by the Government of a foreign state, and provided that the Magistrate trying the matter would have to be prima facie satisfied that a case was made out in support of the requisition.[17] The 1903 Act provided that where the government felt it was necessary and an important question of law was raised, a reference could be made to the High Court and the fugitive would not be surrendered until such question of law had been decided.[18]

The 1903 Act also importantly applied the provisions of the Fugitive Offenders Act, 1881 to British India.[19] In order to give effect to that and reflect the anomalies unique to British India, certain amendments were made to the Fugitive Offenders Act, 1881.[20] The Fugitive Offenders Act, 1881 for its part, was for the purposes of facilitating extraditions within her Majesties Dominion, and provided the endorsed warrant style of extradition.[21]

For context, the endorsed warrant method of extradition, in essence, replaces the extradition request with a warrant that is issued by the Requesting Country and endorsed

15 The Council of The Governor General of India, 'Indian Extradition Bill' (volume XL 1901) 13-16.

16 Indian Extradition Act 1903, s 3.

17 ibid.

18 Indian Extradition Act 1903, s 3(7).

19 Indian Extradition Act 1903, s 19.

20 ibid.

21 Fugitive Offenders Act 1881, ss 3 and 5.

in the Requested Country. The template of the endorsed warrant system was the inspiration of Chapter III of the Extradition Act, 1962 when Her Majesties Dominions eventually transformed into the more politically palatable Commonwealth Nations, a distinction which was retained initially in the Indian Extradition Act, 1962. However, one major change between the Fugitive Offenders Act, 1881 and the Indian Extradition Act, 1962 is that in Chapter III the requirement of a prima facie case has been dispensed with, which was present in the Fugitive Offenders Act, 1881.[22] The modern endorsed warrant method of extradition is invariably more streamlined, as the Requested Country dispenses with an analysis of whether there is a prima facie case in support of the request, and instead accepts the warrant as being a sufficient basis to conclude that the fugitive criminal has a case to answer.

These two acts, viz the 1903 Act and the Fugitive Offenders Act, 1881 remained in force even after Indian independence. However, this was not without confusion as more than one case was brought to the Supreme Court on the validity of the regime,[23] with the Supreme Court eventually holding in the judgement in *State of Madras v. CG Menon*[24] ('*CG Menon*') that the Fugitive Offenders Act, 1881 was no longer applicable in India.[25] The vacuum of law caused as a consequence of the judgement of the Supreme Court in *CG Menon* paved the way for the introduction of the Extradition Act, 1962.[26]

II. The Ghost of Commonwealth Past

A. The Extradition Act, 1962

On August 7, 1961, the then Minister of Law, Shri A.K. Sen, introduced a "bill to consolidate and amend the law relating to the extradition of fugitive of criminals" which bill was thereafter referred to a Joint Committee. This Joint Committee eventually presented its report on November 30, 1961.[27]

The Joint Committee, made mostly drafting changes to the bill, amongst which was

22 ibid.

23 *Dr. Ram Babu Saksena v The State* AIR 1950 SC 155. (The question before the Supreme Court was whether the extradition treaty of 1869 between the Tonk State and the Government of India, was affected by the merger of the Tonk State into the Union. The Supreme Court answered this in the affirmative, holding that the treaty was to be considered ineffective.)

24 *State of Madras v C.G. Menon* (1955) 1 SCR 280.

25 *State of West Bengal v. Jugal Kishore More* AIR 1969 SC 1171. (The judgement strikes a slightly discordant note when read in conjunction with the Supreme Court's decision in *State of Madras v C G Menon* (1955) 1 SCR 280 and at para 20 seemingly endorses the process of renditions by affirming the judgement of the Bombay High Court in *Emperor v Vinayak Damodar Savarkar (1911) 13 BOMLR 296.* Interestingly, this episode of Veer Savarkar's extradition was discussed during the parliamentary debates as being a gross violation of international law. This judgement would require to be reconsidered by the Supreme Court on some appropriate occasion.)

26 Extradition Act 1962, Statement of Objects and Reasons.

27 Lok Sabha, 'Report of the Joint Committee' (C.B. II No. 126 November 1961) 5.

an interesting suggestion to the Government of India, that whilst entering into extradition treaties, a provision should be made that if a surrendered fugitive criminal is not prosecuted within a specified time limit, the accused would be returned to the requested country.[28] Fortuitously, this suggestion appears to not have been taken seriously by the Government for no treaty entered into by India includes such a provision for repatriation in default. A provision of this nature would have invariably cast a reciprocal obligation on India, which keeping in mind the pace of the Indian judiciary, would have resulted in numerous fugitive criminals being returned to the requested country from where they were extradited into India.[29]

In a speech discussing the bill, prior to its reference to the Joint Committee, the Minister introducing the bill, Shri A.K. Sen, explained the scheme of the new bill and the reasons for its introduction as:

> The operation of these Acts has always proved cumbersome. I remember, even before Independence, whenever such matters cropped up, there used to be a good deal of research and racking up of all laws and procedures in order to find out really which law held the field. After Independence, as a result of the decision of the Supreme Court, it was found that the Fugitive Offenders Act, which governed the question of extradition between Commonwealth countries was not in operation any more. That was the decision. Therefore, over a vast area with which we were really physically connected, our people going to and people from those Commonwealth countries coming in, especially from England, in which really the question of extradition was of some importance, it became very difficult. It was felt absolutely necessary that we must amend the law relating to extradition at least to enable our Government to get the criminals who have gone over to Commonwealth countries, especially Pakistan and neighbouring countries, and also those countries to get fugitive criminals coming from their territories to India. Therefore, a comprehensive Bill was drafted and has now been introduced before this House…
>
> … We have divided the territories over which this law will operate. broadly, into three categories: first of all, foreign countries with which we have extradition agreements; secondly, Commonwealth countries with which we have extradition arrangements; thirdly, Commonwealth countries with which we have no extradition arrangements. The

28 ibid 7.

29 See for instance, judgement of the Delhi High Court in *George Kutty Kuncheria v Union of India* 71(1998) DLT 726, where the High Court discharged a fugitive criminal after 8 and a half years in custody, as he had not been conveyed out of the country in terms of section 24 of the Extradition Act, 1962, which requires that a fugitive criminal must be conveyed out of the country within 2 months of his committal.

> operation of the law so far as Commonwealth countries with which we have extradition arrangements we shall have extradition arrangements is, by some process, their own warrants, brought to this country and transmitted by their diplomatic representatives and properly endorsed by the Government, would be executed as if it was a warrant of our own courts. Apart from that, it has prescribed procedures for execution of requests for extradition.[30] (sic)

The speech of the minister left no doubt that the main focus of the Government of India was to deal with extraditions from Commonwealth countries with a specific focus on the endorsed warrants method of extradition. That being said, the distinction between Commonwealth nations and other foreign countries did meet considerable opposition in the Lok Sabha, with numerous speakers opposing this distinction.[31] For instance, Mr. H.N. Mukerjee, pointed out that there appeared to be no specific logic for why the Commonwealth countries are being provided a distinct status. He pointed out the incongruity of giving preferential status to Commonwealth countries "whereas they are more rigid as far as other countries are concerned". He further advocated for no distinction to be made between countries, with all countries being invited to make extradition arrangements with India.[32] Similarly, Mr. B.R. Madhok pointed out that "some of the commonwealth countries are more remote and unfriendly to us than perhaps many other countries with which we have no such relation"[33]; which view was endorsed by Naushir Bharucha.[34] Despite the opposition, the bill was passed maintaining this distinction.

When finally passed by the legislature, the Indian Extradition Act, 1962 was divided into 5 chapters, Chapter I and Chapter V were essentially miscellaneous in nature, with Chapter I providing the definitions[35] and applicability of the Act[36] whilst Chapter V inter alia providing the bail provisions[37] and bars to extradition.[38] Chapter I in the unamended act provided a definition of Commonwealth countries which was to be read with a schedule of Commonwealth countries.[39] Similarly, the unamended act, defined an extradition offence as being either mentioned in the extradition treaty between India and the requesting state, or as being included in Schedule II.

30 Lok Sabha Debates 17 August 1961 vol LVI No 8, 2846.

31 ibid 2856, 2864, 2868, 2874.

32 ibid 2856.

33 ibid 2864.

34 ibid 2868.

35 Extradition Act 1962, s 2 [Unamended Act].

36 Extradition Act 1962, s 3 [Unamended Act].

37 Extradition Act 1962, s 25 [Unamended Act].

38 Extradition Act 1962, s 31 [Unamended Act].

39 Extradition Act 1962, s 2(a) read with Schedule I [Unamended Act].

Chapter V contained the miscellaneous provisions, with Section 31 of the Act providing the standard bars to extradition such as political offence,[40] passage of time,[41] and specialty.[42] Section 32 which is immediately subsequent, was introduced by the Joint Committee as it felt that the bars to extradition should apply to foreign states as well as to a Commonwealth country, regardless of the method of extradition viz. Chapter II or Chapter III.[43] Unfortunately, the Joint Committee has given no inkling as to what propelled it to make this recommendation. One hypothesis is that the Joint Committee felt that all extradition should be within the prism of human rights law and in terms of the constitutional guarantees in India. Alternatively, perhaps it was felt by the Joint Committee that the privileges afforded to the Commonwealth countries must be within reason, and keeping in mind the distrust of the Commonwealth countries expressed, felt that the discretion to refuse extradition by the application of the bars should be retained. Nevertheless, the application of Section 31 to extraditions under Chapter III provides an important safeguard even today.

Chapter II provides the method of extradition where the country is not a Commonwealth country with whom India has an extradition arrangement or is some other foreign country, in which case the Magistrate is required to assess whether a prima facie case is made out in support of the extradition request.[44] The requirement of assessing a prima facie case is in addition to assessing whether the bars of extradition under Section 31 of the Act prohibit the extradition.[45]

Chapter III provides the endorsed warrant system of extradition that is applicable to Commonwealth countries with whom India has extradition arrangements. It is a substantially expedited and streamlined method of extradition that dispenses with the requirement of assessing the existence of a prima facie case and narrows the Magistrate's inquiry into simply whether there is a duly authenticated warrant.[46] However, as was mentioned earlier, whether the bars to extradition apply is a matter of inquiry by the Magistrate even in the endorsed warrant system of extradition.[47]

B. The Amendment Of 1993

In 1993, the Act was substantially amended, with the entire distinction between Commonwealth countries and other foreign countries being foregone. Whilst the debate largely focused on the implementation of the Act and the various failures of the Government

40 Extradition Act 1962, s 31(a) [Unamended Act].

41 Extradition Act 1962, s 31(b) [Unamended Act].

42 Extradition Act 1962, s 31(c) [Unamended Act].

43 (n 28).

44 Extradition Act 1962, s 17 [Unamended Act].

45 Extradition Act 1962, s 32 [Unamended Act].

46 Extradition Act 1962, s 7 [Unamended Act].

47 Extradition Act 1962, s 32 [Unamended Act].

in bringing back offenders, such as Dawood Ibrahim, the Memon Brothers, Win Chadha etc,[48] the ostensible justification put forward by the government of the day for the wide-ranging changes was:

> The Amendments proposed to the Extradition Act, which I am urging this hon. House at this time to consider and pass, are aimed at enlarging the legislative basis and framework of our extradition law to enable us fully and effectively implement the treaties we concluded recently and may conclude in future even with countries adopting different legal systems. These amendments would also enable us to implement obligations we undertake as a party to international and regional conventions.[49]

> I would like to state in this regard that an amendment has been brought to strengthen the earlier Extradition treaty Bill and to bring terrorism and other such activities under its purview. It is a comprehensive Bill. It empowers the Government to make some more addition in the existing treaties and to enter into fresh treaties with other countries with which we do not have any treaty. This is the main intention to bring this Bill.[50]

The 1993 Amendment, for its part, completely obliterated the distinction between Commonwealth and other foreign countries.[51] This substantially amended the structure of the Extradition Act, 1962 and essentially converted the Act, into providing two modes of extradition one being the Magistrate assessing a prima facie case as contemplated in Chapter II and the other being the endorsed warrant method system as contemplated in Chapter III. The 1993 Amendment has thus accepted the distinction between foreign countries and Commonwealth nations as being arbitrary and without reason, which was the criticism levelled against the Act when it was initially introduced in 1962.

As is clear from the debates when this drastic change was pitched to Parliament, it was brought in order to allow the executive greater flexibility in negotiation and to effectively implement international arrangements. Despite the 1993 Amendment granting this longstanding request by the executive, over the years, for reasons best known to it, the Government of India has relegated the endorsed warrant system as contemplated in Chapter III to a vault to which it has lost the keys. Chapter III has been implemented with a mind-numbing lack of imagination over the years, as is explained in the next section.

C. Post Amendment Implementation Of the Extradition Act, 1962

In November 2019, the Indian Government claimed that it had executed extradition treaties with fifty (50) countries and had entered into extradition arrangements with 11

48 Lok Sabha Debates 28 August 1993 vol XXV No 24, 121-128.

49 Lok Sabha Debates 28 August 1993 vol XXV No 24, 120.

50 Lok Sabha Debates 28 August 1993 vol XXV No 24, 132.

51 Extradition (Amendment) Act 1993, s 3.

more countries.[52] Extradition arrangements are essentially the notification of a country as one to which the Extradition Act, 1962 applies.[53] Of these 50 countries, treaties with only 43 countries have been uploaded on the website of the Ministry of External Affairs.[54] Seeing as these are international agreements entered by the Union of India, the fact that they are not immediately available in the public domain is certainly a matter of some concern.

Keeping that aside, this is also an incredibly small number of countries with which extradition treaties have been entered into, with all of 4 new treaties between 2015 and 2018.[55] In comparison, prior to the Bilateral Investment Treaty Model Text of 2015, India had entered into 83 bilateral investment treaties within a 20-year period between 1993 and 2013.[56] Thus the speed at which India has entered into extradition arrangements or treaties has been less than inspiring. The Government would do well to adopt a model extradition treaty so as to facilitate faster diplomatic negotiations and obviate the need for bureaucrats or politicians to reinvent the wheel every time a new extradition treaty is negotiated. There already exists the UN Model Treaty on Extradition which was adopted by the General Assembly Resolution 45/116.[57] However, much like in the case of the Bilateral Investment Treaties, a reference should be made to the Law Commission of India for creating a model treaty that would account for the realities of India.[58]

In any event, out of the 43 countries, the treaties of which are in the public domain, the Government of India has notified only 10 countries to whom Chapter III of the Extradition Act, 1962 applies. Despite having urged Parliament to amend the Act in 1993 so as to provide it with greater flexibility to enter into treaties, the executive appears to have been particularly reticent in using the Chapter III mechanism. A list of the countries notified by India are given below:

S. No.	Country Name	Year of Treaty	Year of Notification
1.	Bhutan (Article 6)	1996	1997

52 Rajya Sabha Debates, Unstarred Question No 1164 (28 November 2019).

53 India has entered into extradition arrangements with 11 countries, of which the basis for agreements with two countries viz. Italy and Croatia is the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (adopted 20 December 1988, entered into force 11 November 1990) 1582 UNTS 95.

54 Ministry of External Affairs, 'Countries with which India has Extradition Treaties/Arrangements' <https://mea.gov.in/leta.htm> accessed 17 August 2021. According to a response received by the authors on 15 September 2020 under the Right to Information Act, 2005, the Ministry of External Affairs is the ministry responsible for administering extradition treaties.

55 Lok Sabha Debates, Unstarred Question No 2528 (26 December 2018).

56 United Nations Conference on Trade and Development, 'International Investment Agreements Navigator: India' (*Investment Policy Hub*, 29 October 2020) <https://investmentpolicy.unctad.org/international-investment-agreements/countries/96/india> accessed 17 August 2021.

57 UNGA Model Treaty on Extradition Res 45/116 (3 April 1991).

58 Law Commission of India, *Analysis of the 2015 Draft Model Indian Bilateral Investment Treaty* (Law Com No 260, 2015).

2.	Bangladesh (Article 10)	2013	2016
3.	Azerbaijan (Article 7)	2013	2017
4.	France (Article 9/10)	2003	2007
5.	Germany (Article 12/13)	2001	2004
6.	Mongolia (Article 10)	2001	2004
7.	Russia (Article 9)	1998	2000
8.	Spain (Article 12)	2002	2003
9.	Turkey (Article 14)	2001	2004
10.	Uzbekistan. (Article 9)	2000	2002

Figure No. 1: List of Countries notified under Chapter III of the Extradition Act, 1962

A review of the 10 countries chosen by the Government of India reveals no discernible logic at first or second glance. These are neither countries from whom India regularly seeks high profile extraditions such as the United Kingdom,[59] the United States, Canada or the United Arab Emirates, nor are these countries that are contiguous to India, such as Nepal or Sri Lanka. For that matter, these are not even Commonwealth countries. Further, the choice of countries does not reveal other commonalities so as to identify a pattern. For instance, there is no commonality of legal values shared between these countries nor is there any uniformity in terms of their status of development.

A request made under the Right to Information Act, 2005 ('RTI') by the authors in 2020 reveals that the Government of India has not collated any data in terms of the number of requests made and received from countries, and the success of those requests. Simply put, the Government does not record the relative success it has vis-á-vis particular countries which means there is no objective record of good and bad extradition partners. This is a rather candid admission that the decision to notify a country to whom Chapter III applies is entirely whimsical and certainly not one driven by logic or rationale. A constitution bench of the Supreme Court in *Justice KS Puttaswamy v. Union of India* has noted the importance of studies, in order to assess ground realities before creating legal regimes.[60] This is advice that the Government would do well to apply itself to.

There are certain basic factors which would appear certainly obvious to any lay observer. One factor would be to notify countries that are the subject matter of regular requests for extradition, such as the United Arab Emirates, the United States and the United Kingdom. Another would be to notify countries which are geographically contiguous with India such Sri Lanka and Nepal. Similarly, countries which have large Indian populations should also be a priority, as they would be obvious choices for people fleeing from law enforcement agencies in India. Naturally, countries with whom diplomatic ties are strained cannot be the subject matter of notification under Chapter III as the status should be seen

59 Lok Sabha Debates, Unstarred Question No 2842 (2 August 2017).

60 (2019) 1 SCC 1 [496].

as a reward for good diplomatic relations. Whilst the factors are seemingly obvious, a pragmatic and dynamic approach by the Government of India is a fundamental requirement to make Chapter III of the Indian Extradition Act effective.

The effective implementation of Chapter III of the Indian Extradition Act would create a streamlined and expedited extradition regime which dispenses with the onerous requirement of proving a prima facie case. Using this new and improved regime as a bargaining tool, the Government of India could negotiate more treaties with foreign countries and also seek enhanced access with existing extradition partners.

III. Keeping Up With The Joneses

Unlike India, the United Kingdom in 2003 had completely rehauled its extradition regime as it felt that extradition in the country was a time-consuming process and often abused by high profile fugitives.[61] As was mentioned in the introduction, the United Kingdom provides an important common law comparison aside from being one of India's inspirations in so far as the regime of extradition law is concerned. In terms of current priorities, the country is the recipient of some of the most high profile requests for extradition by India.[62] Whilst the specifics are largely the same in as much as the bars of extradition are largely reflective of international law, the Extradition Act, 2003 ('UK Extradition Act') provides an important structural guide for the purposes of reorganising the Indian extradition regime.

The UK Extradition Act is divided into two categories viz. Category I countries and Category II countries. The Category I countries are those countries which administer the European Arrest Warrant regime ('EAW Regime') and are all perforce geographically closely located to the United Kingdom.[63] The EAW Regime seemingly replicates the Chapter III method of extradition viz. the endorsed warrant regime.[64] However, it is important to note that the EAW Regime is not described as a regime of extradition in the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between the Member States ('Council Decision')[65] but rather as a system of surrender between judicial authorities.[66]

61 Raj Joshi and Brian Gibbins, 'Reform of United Kingdom Extradition Law' (2003) 51(5) US Attorneys' Bulletin 51.

62 Lok Sabha Debates, Unstarred Question No 2842 (2 August 2017).

63 Home Office, 'Guidance Extradition: processes and review' (Government of UK, 26 March 2013).

64 Joshi and Gibbins (n 61) 51, 52; Colin Warbrick, 'Recent Developments In UK Extradition Law' (2007) 56(1) ICLQ 199, 200.

65 Council Framework Decision 2002/584 on the European Arrest Warrant and Surrender Procedures between Member States (entered into force 13 June 2002) 2002/584/JHA.

66 Charlotte Glaer and Kevin Roberts, 'European Union: UK–EU Extradition Arrangements Post Brexit' (*Mondaq*, 31 August 2020) <https://www.mondaq.com/uk/human-rights/980570/ukeu-extradition-arrangements-post-brexit> accessed 17 August 2021.

Apart from the EAW Regime, the UK Extradition Act also contemplates a Magistrate driven method of extradition for the Category II countries. The Category II countries are further subdivided into Part A and Part B countries,[67] where the Part A countries are not required to show a prima facie case in support of their extradition requests. India at present falls in Part B of the Category II countries and as a consequence is required to establish a prima facie case in support of its extradition requests.[68] The structure of the UK Extradition Act therefore really contemplates three streams for extradition; one, the endorsed warrant system, two, the magistrate assessment without the requirement for establishing a prima facie case and three the magistrate assessment with the requirement for establishing a prima facie case. The overarching rationale for deciding which category a country falls into is 'close diplomatic relations and being trusted extradition partners'.[69]

The EAW Regime has proved to be an incredibly efficient method for extradition. As one commentator has pointed out, under the EAW Regime, it took just over 50 days to extradite Hussain Osman from Italy to the United Kingdom in 2005. In contradistinction, prior to the introduction of the EAW Regime, under the previous extradition laws between the United Kingdom and European Union member states, it took ten years to extradite Rachid Ramda from the United Kingdom to France. Both Osman and Ramda were terror suspects and accused of having planned bombings.[70] Between 2009 and 2017 a total of 82,242 extradition requests were made to the United Kingdom under the EAW Regime, which resulted in 13,390 arrests. Over the same period, the United Kingdom made 2,229 extradition requests under the EAW Regime, leading to 1,411 arrests.[71] It was perhaps this efficiency in the system that resulted in the United Kingdom negotiating an extradition scheme with the European Union post Brexit that mimics the architecture of the EAW Regime with a significant amount of the wording in Part 3 of the EU–UK Trade and Cooperation Agreement ('Trade and Cooperation Agreement') being almost identical to that contained in the EAW Regime.[72]

Although, naturally, the efficiency of the EAW Regime is in part attributable to the unique structure of the European Union, Chapter III can in some part mimic this success if implemented effectively. Importantly, the EAW Regime creates two safeguards that India would do well to import into Chapter III of the Indian Extradition Act. Firstly, that the

67 Warbrick (n 64).

68 For a detailed explanation on the UK Extradition Act 2003, *see*, Dayan Krishnan and Sanjeevi Seshadri, 'The Extraordinary Exoneration of Ravi Shankaran and Raymond Varley: A Comment on India – United Kingdom Extradition' (2018) 5 NLUD SLJ 26, 30.

69 Edward Grance and Rebecca Niblock, *Extradition Law: A Practitioners Guide* (2nd edn, Legal Action Group 2015) 8.

70 Glaer and Roberts (n 66).

71 ibid.

72 Tony Woodcock and Alex Logier, 'Post-Brexit UK / EU extradition arrangements: Business as usual?' (*Lexology*, 15 February 2021) <https://www.lexology.com/library/detail.aspx?g=e58bae6a-2e04-4141-b2ac-dbb6f9376ac7> accessed 17 August 2021.

warrant will only be issued by a judicial authority in the requesting state[73] and second the warrant will be certified for proportionality. The issue of proportionality was a long-standing issue in the context of the EAW Regime and was the only negative articulated in the 2011 Review of the United Kingdom's extradition regime.[74] To remedy this, the National Crime Agency of the United Kingdom has now been entrusted with the responsibility of certifying the warrants for proportionality viz. that extradition for such an offence would not be disproportionate for instance, minor criminal damage such as breaking a window, or minor road traffic or driving offences etc.[75]

IV. Conclusion

Extradition is not merely a matter of political rhetoric; it is a matter of law. Reciprocity in extradition is a fundamental tool. One of the internationally accepted, effective and successful modes of extradition has been the endorsed warrant system that was successfully instituted in the EAW Regime amongst the Category I countries under the UK Extradition Act.[76] The Indian Extradition Act contemplates the endorsed warrant regime, however strangely the same has not been meaningfully implemented. Whilst the authors don't want to attribute motives, to be sure this is only because they are not able to back it up with evidence. It is unclear why a government would spend millions on legal battles for the likes of Shankaran, Mallya, Varley and Nirav Modi when all it required was a notification under Chapter III of the Indian Extradition Act and to seek similar reciprocity from the countries so notified basis diplomatic overtures, thus paving the way for an endorsed warrant system rather than going through the elaborate exercise of establishing a prima facie case.

In order to create a more robust regime of extradition, India needs to make effective choices in terms of its extradition partners. The first and foremost priority of the government should be to increase the number of countries with whom it has extradition treaties. A model treaty which provides a basic format for negotiation will certainly hasten this process. Additionally, effective implementation of the Chapter III regime would allow for it to be used as a bargaining chip so as to diplomatically negotiate access to similarly expedited regimes in partner countries. The second priority is that the Chapter III method of extradition requires to be implemented more effectively, with the Government of India notifying as extradition partners those countries with whom India shares common values inter alia, and from whom extradition is regularly sought such as the United Kingdom and the United Arab Emirates. The third concern is that Chapter III requires greater legislative

73 (n 65) art 6.

74 Home Office, A Review of the United Kingdom's Extradition Arrangements (Review Panel Report, 2011).

75 Edward Grance and Rebecca Niblock, *Extradition Law: A Practitioners Guide* (2nd edn, Legal Action Group 2015) 18. Section 21A of the UK Extradition Act provides a proportionality assessment before the Magistrate as well.

76 The UK Extradition Act 2003 also contemplates Category II countries where the prima facie requirement is dispensed with.

guidance on the meaning of a duly authenticated warrant, so as to allow Magistrates to meaningfully apply the bars to extradition in terms of Section 31 of the Extradition Act, 1962. Fourthly, India must import some of the safeguards that are available in the EAW Regime into Chapter III, viz. that the warrant will be issued only by a judicial authority in the requesting state and that there will be an assessment of proportionality in India to assess whether extradition is warranted in a case of that nature. The assessment of proportionality can even be done by the executive at the stage of endorsing the warrant, however, legislative amendments will be required for that.

The need for a drastic improvement in India's extradition relations cannot be understated. In the context of the United Kingdom, one might be tempted into a false sense of complacency on account of the recent successes in relation to the extraditions of Vijay Mallya and Nirav Modi. That being said, seeing as how neither have in fact been surrendered to India at the time of writing this article, one would advise caution in optimism. In any event, as is clear from recent judgements, India remains subject to the vagaries of the English judicial process and the need to diplomatically negotiate its way into Part of A of the Category II nations a pressing matter.[77] An efficient implementation of Chapter III of the Indian Extradition Act and the notification of the United Kingdom under Chapter III would certainly make India's entry into Part A of the UK Extradition Act's Category II nations easier.

Indian extradition has had a rather elaborate past, stretching more than a century. The Extradition Act, 1962 has itself been around for most of independent India's history, yet the fundamental structural changes required to make its implementation more effective are not even on the horizon of discussion. Any discussions on changing the regime invariably end up being two strangers, waiting endlessly, for the arrival of Godot.

77 *Government of India v Arti Dhir & Anr* [2020] EWHC 200 (Admin).

A CASE FOR TETHERING INTELLECTUAL PROPERTY APPELLATE BOARD CASES TO A DESIGNS ACT-STYLE FRAMEWORK

Eashan Ghosh*

On August 3, the Lok Sabha approved The Tribunals Reforms Bill, 2021. It formalizes an April 2021 Ordinance which reset intellectual property litigation in two important ways. First, it dissolved the Intellectual Property Appellate Board. Second, it redirected cancellation actions against intellectual property registrations to High Courts. This reset was curiously executed. The Ordinance—and now the Bill—make no effort to re-organise cases vacated by the Appellate Board. Instead, they simply substitute the words 'Appellate Board' in the relevant statutes with 'High Court'.

I explain that this is a poor solution for three reasons. First, it erases large swathes of statutory law and Supreme Court case law for no upside. Second, registrations remain interlinked with cancellations and infringement. Simply transferring cancellations to High Courts without a statutory separation from infringement achieves little. Instead, this will, bizarrely, give cancellation courts a veto over the fate of corresponding infringement actions. Finally, this will needlessly entangle litigants in cancellation actions with litigants in infringement actions. Confusion is inevitable, and an alternative is necessary.

This alternative, I argue, comes from the Designs Act. Envisioned to exist outside the Appellate Board entirely, it budgets for both cancellation and infringement impeccably. It directs cancellations to a specialised forum. It permits infringement litigants to contest cancellation issues. It details a comprehensive scheme for transfers to High Courts where appropriate. The stylistic fit for other intellectual property cases is perfect.

To develop this alternative, I advance a three-stage framework. Under it, (i) the Intellectual Property Office holds sole original jurisdiction over cancellations; (ii) designated civil courts entertain infringement

* Eashan Ghosh is a New Delhi-based intellectual property lawyer and seminar faculty at National Law University, Delhi. He is the author of Imperfect Recollections: The Indian Supreme Court on Trade Mark Law (Thomson Reuters 2020).

actions; and (iii) statutes offer a seamless interface between connected cancellation and infringement actions. This framework retains specialised forums, streamlines infringement actions, and efficiently executes transfers. Above all, it enables cleaner, better adjudication in intellectual property cases.

I. Introduction

After years of administrative strife, the Ministry of Commerce & Industry disbanded India's intellectual property tribunal, the Intellectual Property Appellate Board, on April 4, 2021. It did so via the Tribunals Reforms (Rationalization and Conditions of Service) Ordinance, 2021 ('the Ordinance'). The Ordinance terminates the 18-year tenure of the Appellate Board. It also rewrites the rules governing intellectual property cases in two important ways.

First, it concentrates jurisdiction over technical subject matter relating to challenges to the validity of intellectual property registrations ('cancellation actions')[1] at the High Courts. Second, owing in part to the operation of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 ('Commercial Courts Act'),[2] the Ordinance places a considerable administrative burden on High Courts to correctly allocate cancellation, infringement, and other proceedings.

The mechanism by which the Ordinance effects these changes is peculiar. It inserts a series of forum substitutions in the Trade Marks Act, 1999 and Patents Act, 1970. The words 'Appellate Board' appearing in these two statutes have, in the main, been substituted by 'High Court'.[3]

However, the Ordinance stops there. It merely *redirects* the traffic being directed towards the Appellate Board back to High Courts. It does not *reorganise* this traffic, nor merge it into the existing jurisdiction and functions of the receiving forums. The receiving forums have been left to figure out this task on their own.

At the time of writing, this furrow of Indian law is in flux. On July 23, 2021, a Parliament Standing Committee on Commerce published a review of the Indian intellectual property regime that was nine months in the making. Despite the Ordinance being passed while the work of the Committee was ongoing, the Committee recommended, in as many words, that the Ordinance 'should be reconsidered' and that the Appellate Board 'should be re-

1 Post-registration challenges to the validity of intellectual property rights go by varying nomenclature under Indian intellectual property statutes: 'rectification' under trade mark law, 'revocation' under patent law, and 'cancellation' under designs law. These are all referred to under the general term 'cancellation' hereinafter.

2 See, in particular, Commercial Courts Act, s 7, taken up at §4.2 below.

3 See, for instance, Sections 6(f), (k), and (m) of the Ordinance in relation to the Patents Act, and Sections 8(e), (g), (k), (m), (n), (p)(i), (r), and (t) of the Ordinance in relation to the Trade Marks Act.

established'.[4] Five days later, resetting the conversation back the other way, the Finance Minister introduced The Tribunals Reforms Bill, 2021 in the Lok Sabha. The Bill was passed by the Lok Sabha on August 3, 2021. If enacted in its present form, the Bill will set the Ordinance in stone, over the objections of the Standing Committee.[5]

As it stands, therefore, the Ordinance starts as the central government means to go on. Naturally, the act of pulling the rug out from under the feet of the Appellate Board in such an abrupt manner prompts fears of consequences elsewhere in the Indian intellectual property system.

A good illustration of this is provided by Section 124 of the Trade Marks Act. Under it and its predecessor provision,[6] statutory accommodation has been made for an elaborate mechanism for suspending infringement proceedings before a civil court and transferring the cancellation question to the Appellate Board. A settled workflow for proceedings before and after activating Section 124 was confirmed by the Supreme Court in November 2017.[7]

Over on the patents side, meanwhile, there is no such statutory accommodation. In order to overcome this, the Supreme Court, in June 2014, instituted a protocol for forum election in cancellation actions. In effect, it set out the rule that where a cancellation action was pending before both the Appellate Board and an infringement court, the action instituted earlier in time would survive.[8]

By opting simply to replace 'Appellate Board' with 'High Court', the Ordinance threatens to void the spirit and thinking behind large portions of this forum selection law. Giving it full effect would, for instance, riddle provisions such as Section 124 with difficulties.[9] It would also render Supreme Court interventions on this issue essentially

4 Parliamentary Standing Committee on Commerce, *One Hundred and Sixty First Report: Review of the Intellectual Property Rights Regime in India* (23 July 2021) 34-35 <https://rajyasabha.nic.in/rsnew/Committee_site/Committee_File/ReportFile/13/141/161_2021_7_15.pdf> accessed 7 August 2021.

5 The Tribunals Reforms Bill, 2021 <https://prsindia.org/files/bill_track/2021-08-02/The%20Tribunals%20Reforms%20Bill%202021.pdf> accessed 7 August 2021. Sections 13 and 21 of this Bill effect the exactly the same 'High Court' for 'Appellate Board' substitutions as Sections 6 and 8 of the Ordinance. Since the Bill is still in process at the time this goes to publication, all references hereinafter are to the Ordinance. These may be read as references to the Bill, since the relevant provisions are *in pari materiae*.

6 Trade and Merchandise Marks Act 1958, s 111.

7 *Patel Field Marshal Agencies v PM Diesels* 2018 (73) PTC 15 (SC) (*'Patel Field Marshal')*.

8 *Wobben v Mehra* 2014 (59) PTC 1 (SC) (*'Wobben')*.

9 Section 124(1)(b)(ii) of the Trade Marks Act, for instance, allows that if the infringement court is satisfied that the plea regarding cancellation of the trade mark registration raised in the infringement proceedings is *prima facie* tenable, it may adjourn the case for three months "in order to enable the party concerned to apply to the Appellate Board for [cancellation]." In the circumstance that the infringement court is the High Court, then replacing 'Appellate Board' with 'High Court' in Section 124 [as Section 8(r) of the Ordinance mandates] implies that the High Court would adjourn the infringement case to enable the parties to approach the High Court

meaningless.[10]

Fortunately, Indian intellectual property law need not look far to find a template for what a strong post-Appellate Board transition might look like.

The Designs Act of 2000 ('Designs Act') and case law accumulated under it offers a tried and tested path forward for managing this transition. Erstwhile Appellate Board cases involving trade mark and patent disputes will require clarity regarding the role of High Courts in technical proceedings (for cancellation of registrations), civil-commercial proceedings (for infringement of registered rights), and transferring proceedings (for managing the transition between the two categories above). The Designs Act, without the complication of the Appellate Board, already addresses all three.

In this essay, I chart out the path by which the Designs Act deals with these categories of actions. In particular, I examine two important sites of judicial intervention under the Designs Act with post-Appellate Board crossover potential: the separation of cancellation and infringement proceedings, and the power to transfer cases to High Courts. I discuss a December 2020 Supreme Court ruling, the most recent one on the subject, which demonstrates that the operating principles adopted by Indian designs courts can easily be transposed to other categories of intellectual property. Drawing on these learnings, I suggest a three stage framework that can be adopted to ensure that Appellate Board cases are dealt with clearly, reliably and efficiently in the future.

II. Cancellation, Infringement & the Designs Act

A key purpose of securing any intellectual property registration is to earn the right to sue for infringement of that intellectual property. In India, the statutory counter-weight fashioned against this right to sue is that the underlying intellectual property registration remains susceptible to cancellation for the duration of its existence.[11]

For all the judicial criticism[12] and teething problems[13] it has endured, the Designs Act

in cancellation proceedings. This is unclear if not absurd.

10 The Ordinance's shallow substitutions would, of course, most directly compromise the Supreme Court rulings in *Patel Field Marshal* (n 7) and *Wobben* (n 8). However, the question of how best to integrate the expertise of specialist intellectual property forums into cancellation and infringement adjudication is one that has been prominent at least as far back as the February 2010 ruling of the Delhi High Court in *UCB Farchim v Cipla* 2010 (42) PTC 425 (Del). All of this case law is now confronted with instant redundancy.

11 See, for instance, Copyright Act, s 50; Trade Marks Act, ss 47 and 57; and Patents Act.

12 See, for instance, *Jayasingh v MIDHANI*, Civil Suit No. 562/2007 (Madras High Court, 23 January 2014), [227], [249]. The ruling referred to the Designs Act as 'very hollow', stated that the remedies afforded under it 'are all indicated in a confusing manner', that the ground covered by Section 22, the infringement provision, 'is much less than the area of confusion [it creates]', and that, on the comparative, 'the strict rigours contained in the Patents Act…are not to be found in the Designs Act, 2000.'

13 *Faber-Castell v Pikpen* 2003 (27) PTC 538 (Bom) [9]. Here, the Bombay High Court was forced

stacks these two duelling remedies into three clear stages across two Sections.

2.1 Sections 19 and 22 of the Designs Act

Section 19 of the Designs Act addresses cancellation.

It runs as follows:

> *Section 19*: *Cancellation of registration.*—
>
> (1) Any person interested may present a petition for the cancellation of the registration of a design at any time after the registration of the design, to the Controller on any of the following grounds, namely:—
>
> (a) that the design has been previously registered in India; or
>
> (b) that it has been published in India or in any other country prior to the date of registration; or
>
> (c) that the design is not a new or original design; or
>
> (d) that the design is not registrable under this Act; or
>
> (e) that it is not a design as defined under clause (d) of Section 2.
>
> (2) An appeal shall lie from any order of the Controller under this section to the High Court, and the Controller may at any time refer any such petition to the High Court, and the High Court shall decide any petition so referred.

Under Section 19(1), a cancellation petition against a design registration may be brought to the Controller of Patents & Designs (the Controller) on any one of the five substantive grounds.[14] Section 19(2) nominates the High Court as the first appellate authority against any order passed by the Controller under sub-section (1).

Section 22 of the Designs Act addresses infringement.

The proviso to Section 22(2)(b), consistent with other Indian intellectual property

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to rule on the thorny issue of whether a design published outside India (a ground for cancellation under the Designs Act) should be read against a January 1998 design registration, which was otherwise clear of conflicting designs published within India (the corresponding ground for cancellation under the Patents and Designs Act, 1911, the predecessor legislation to the 2000 Act). Digging into the Notes on Clauses accompanying the 2000 Act, the Court read the intention of Parliament to be to 'specifically consider the question of prior publication on [a] global basis', and applied the revised provision to the facts before it.

14 ibid [16]. The guiding principle behind the incorporation of these grounds in the Designs Act is to enable cancellation actions before the Controller to be carried out in a 'better, comprehensive manner'. The substantive grounds are to be read expansively, and there is no time limit on bringing cancellations.

statutes,[15] specifies a District Court as the lowest court that may serve as a court of first instance for a design infringement claim. Adjusted for the requirements of the Commercial Courts Act,[16] this implies that an infringement claim will ordinarily be brought either before the Commercial Division of a District Court or the Commercial Division of a High Court.

Sub-sections (3) and (4) of Section 22 manage the overlap between cancellation and infringement.

These run as follows:

> *Section 22: Piracy of registered design.—*
>
> *...*
>
> *(3) In any suit or any other proceeding for relief under sub-section (2), every ground on which the registration of a design may be cancelled under section 19 shall be available as a ground of defence.*
>
> *(4) Notwithstanding anything contained in the second proviso to sub-section (2), where any ground on which the registration of a design may be cancelled under section 19 has been availed of as a ground of defence and sub-section (3) in any suit or other proceeding for relief under sub-section (2), the suit or such other proceeding shall be transferred by the court, in which the suit or such other proceeding is pending, to the High Court for decision.*

Evidently, Section 22(3) provides that the Defendant in an infringement action or other proceeding may, as part of its defence, invoke any of the five substantive grounds for cancellation set out in Section 19(1). While there was some early confusion on this, it has since been confirmed that this framing is 'undoubtedly a correct reading of the statutory provisions'.[17]

The scheme is rounded out by Section 22(4). It states that, where any of the Section 19(1) grounds for cancellation are invoked by the Defendant as a defence in any suit or other proceeding for relief, then the court of first instance shall transfer the suit or other proceeding to the High Court.

2.2 Implications of the Designs Act Scheme

A few observations may be made at this stage.

The first is that the substantive grounds of challenge to a registration under Section 19(1) serve a dual purpose. These grounds are the foundation of a cancellation action, and

15 Copyright Act, s 62(1);Trade Marks Act, s 134(1); and Patents Act, s 104.

16 Commercial Courts Act, ss 3, 4, 6 and 7.

17 *Selvel Industries v Om Plast* 2016 (67) PTC 286 (Bom).

are also available as defences to infringement. This dual purpose is a feature exhibited in the Patents Act as well,[18] but is not found in other Indian intellectual property statutes.[19]

Interestingly, there was no equivalent to Section 22(3) in the Patents and Designs Act of 1911 (the 1911 Act), which was the legislation preceding the Designs Act. As a result, infringement courts did not entertain Section 19 defences without putting Defendants through the tedious formality of moving separate cancellation actions against Claimants' design registrations.[20] The Designs Act now corrects this inefficiency. It enables substantive grounds to challenge registrations to be raised as grounds of defence to infringement. This permits Defendants to more fully contest claims/reliefs raised by Claimants in design infringement suits.[21]

Another point worth noticing is that the statutory framework of Sections 19 and 22 insists on a clean separation regarding the role of the High Court. In relation to pure cancellation actions under Section 19, the High Court is solely an appellate authority. In relation to infringement, depending on the court of first instance before which the infringement claim is logged, the High Court may either be an appellate authority (against orders by the District Court) or the court of first instance itself (where the High Court has original civil-commercial jurisdiction). In relation to infringement suits or other proceedings in which Section 19 is invoked as a defence, the High Court is the receiving court for such suits or other proceedings. From this point forward, it may deal with these proceedings as if it were a court of first instance.

Further, the phrases 'in any suit or other proceeding for relief' and 'said suit or other proceeding shall be transferred' appearing in Section 22(4) are of interest. Read with Section 19(2), they make clear that Section 22(4) does not apply to cancellation actions already pending before the Controller.[22] This is evidently because, under Section 19(2),

18 Indeed, it has been correctly argued that Sections 19 and 22(3) of the Designs Act are, for this purpose, *in pari materiae* with Sections 64 and 107 of the Patents Act. See *Rotela Auto v Singh* 2002 (24) PTC 449 (Del) [13] ('*Rotela Auto'*). See also *Escorts Construction v Gautam Engineering* 2009 (40) PTC 249 (J&K) [14], [16]-[17], relying on *Low Heat Driers v George* 2001 PTC (21) 775 (Ker).

19 See Sections 25(1), 25(2) and 64 of the Patents Act. See also *Preethi Kitchen Appliances v Baghyaa Home Appliances* 2018 (73) PTC 468 (Mad) [5(ix)].
One of the reasons theorized for the inclusion of Section 22(3) under the 2000 Act in the style of the equivalent provision under the Patents Act is that neither Act acknowledges a registration as *prima facie* proof of validity of the right. By contrast, Section 31 of the Trade Marks Act does recognise registration as *prima facie* proof of validity. A similarly styled (though less consequential) provision also appears in the Copyright Act, under Section 48.
Since registration is less sacrosanct under the Designs Act and the Patents Act, the theory is that it is more acceptable for registrations to be left susceptible to cancellation actions. See *Lupin v Johnson & Johnson* 2015 (61) PTC 1 (Bom)(FB) [38].

20 *Rotela Auto* (n 18) [13], interpreting *Metro Plastic Industries v GalaxyFootwear* 2000 (20) PTC 1 (Del)(FB).

21 *Crocs v Liberty Shoes* 2018 (73) PTC 425 (Del) [22].

22 'If the Legislature wanted that [cancellation proceedings] pending before the Controller were

High Courts sit in appeal of the Controller's jurisdiction over cancellation proceedings. It would make little sense, therefore, to authorize the deployment of Section 22(4) to detonate a statutory appeal provided elsewhere in the Designs Act.

It seems obvious now, but this point proved troublesome to Indian designs law for a long time. The confusion owed itself to the difference between the Designs Act and the 1911 Act it replaced. Under Section 51A of the 1911 Act, a cancellation could be initiated by a Petitioner either before the Controller or a High Court, *even as the High Court retained appellate jurisdiction over cancellations initiated before the Controller*.[23]

As such, the question of whether 'other proceeding' in Section 22(4) could be read to hotshot cancellation proceedings pending before the Controller straight to the High Court remained one on which two reasonable views were possible. It took until January 2010 for the Supreme Court in *Godrej Sara Lee v Reckitt Benckiser*[24] to rule on the issue conclusively. *Godrej Sara Lee* confirmed that original jurisdiction over pure cancellation actions lies exclusively with the Controller. The law has been further settled by recognising that, if a Defendant invokes Section 22(3) while a cancellation action under Section 19 is already pending with the Controller, the High Court receiving the transfer under Section 22(4) should rule on the Section 19 grounds.[25]

Aside from the necessary bar on cancellation proceedings, however, the words 'other proceeding' in Section 22(4) are to be read inclusively. Indian courts have affirmed that the conditions to trigger a Section 22(4) transfer should cover a wide range of claims, both under statute and at common law.[26] Design infringement suits claiming relief such as

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also to be transferred to the High Court… nothing prevented Legislature from making such a provision,' said the Delhi High Court in *Reckitt Benckiser v RB Impex* 2008 (37) PTC 262 (Del) [7].

23 Patents and Designs Act of 1911, ss 51A(1)(a), 51A(1)(b) and 51A(2). A similarly anachronistic set of provisions persists under Sections 47(1) and 57(1) of the Trade Marks Act as well. Taken together, these provisions permit trade mark cancellation actions to be filed either before the Registrar of Trade Marks or before the Intellectual Property Appellate Board (to be replaced by the High Court, per the Ordinance). Despite this option of forums, the Appellate Board/High Court retains first appeal jurisdiction over any orders passed by the Registrar in cancellation proceedings.

24 *Godrej Sara Lee v Reckitt Benckiser* 2010 (42) PTC 417 (SC) [21]-[23]('*Godrej Sara Lee'*). *Godrej Sara Lee* was also instrumental in resolving another topical controversy. It ruled that an appeal against the Controller's ruling on a cancellation action would be taken up by the High Court within whose territorial jurisdiction the cause of action for the cancellation had arisen. This had the helpful effect of setting aside a trend of misdirected reliance on *Gupta v Jain & Co* AIR 1978 Del 146 (FB), which had endorsed bringing cancellation appeals to different High Courts based on the effects of the registration.

25 Sections 19(2) and 22(5) recognise the primacy of the High Court while ruling on cancellation grounds. See, however, *Novartis v Cipla* 2015 (64) PTC 488 (Del) [9].

26 *Astral Polytechnik v Ashirvad Pipes* 2009 (3) KarLJ 623 [13]. See also *Metco Polymers v Madhu Inflatables* (2005) 4 MLJ 294 (DB) [14], extending the meaning of 'other proceeding' under Section 22(3) to interlocutory proceedings.

rendition of accounts or delivery-up of infringing material, for instance, would be amenable to transfer under Section 22(4). Similarly, composite claims for design infringement and passing off would also be transferred as a whole, once Section 22(4) is triggered.[27]

III. Transfer of Proceedings

However, by far the most curious technical feature of the statutory scheme under the Designs Act is the transfer provision under Section 22(4).The conditions for its applicability are fairly straightforward.

After an infringement suit or other proceeding is initiated before a court of first instance, the Defendant is given an opportunity to canvas its defence. In doing so, the Defendant may rely on Section 22(3) to raise substantive grounds for cancellation under Section 19(1) as part of its defence. Once it does so, a transfer of the proceeding to the High Court must occur. A request for such a transfer will typically take the shape of an interlocutory application.[28]

However, the approach of Indian High Courts receiving Section 22(4) transfers has not been unanimous. The Kerala High Court has, notably, insisted that a court of first instance must arrive at a *prima facie* satisfaction that the grounds of defence under Section 22(3) have been substantiated (rather than merely invoked) by the Defendant in order to trigger a transfer under Section 22(4).[29] The idea that there is little scope for exercising judicial discretion with Section 22(4) transfers has been irksome.[30]

On the other hand, the dominant view, endorsed by High Courts at Delhi,[31] Gujarat,[32] Karnataka,[33] Allahabad,[34] and Rajasthan,[35] has been that the transfer to the High Court under Section 22(4) is automatic.

However, even under the latter view, a few wrinkles are apparent.

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27 *Sanghi v Knitpro International* 2019 (79) PTC 209 (Del) [10]. See also *Esdee Industries v Esbee Electrotech* WP No 1217/2020 (Bombay High Court, 14 December 2020) [6].

28 *Daniel v Safiullah* 2004 (29) PTC 62 (Mad) [1], which likened it to the transfer of a civil suit under Section 24(5) of the Code of Civil Procedure, 1908.

29 *Kadambukattil Exports v Nilkamal* 2013 (2) KLJ 598 [17] (‘*Kadambukattil Exports’*), disagreeing with *Astral Polytechnik* (n 26).

30 *Premier Elmech Systems v Guard Industries* 2013 (4) KLJ 448.

31 *Jain v Ayurveda Herbal* 2015 (63) PTC 121 (Del); *Kent RO Systems v Kishnani* CS(COMM) 84/2019 (Delhi High Court, 09 March 2021).

32 *Mehta v Officine Lovato* 2002 (25) PTC 161 (Guj), confirmed in *Mehta v Officine Lovato* 2002 (25) PTC 398 (Guj)(DB) and *Shah v State of Gujarat* (2009) 3 GLR 2688.

33 *Metal Impacts v Impact Metals* ILR 2014 Kar 6639, and *Astral Polytechnik* (n 26) [15]-[16].

34 *Gupta & Co v Action Construction Equipments* 2016 (6) ADJ 102 [26], [29].

35 *Tirupati Sprinklers v Flexituff International* 2017 (69) PTC 414 (Raj) [10]-[12], pointedly stating that ‘the view expressed by the Kerala High Court [in *Kadambukattil Exports* (n 29)] cannot be accepted as correct.’

First, the court of first instance is at liberty to satisfy itself whether a case for design infringement is made out at all. If there is not, the receiving court is under no compulsion to admit the suit, wait for the Defendant to mechanically take up Section 22(3) defence(s), and then transfer a suit that fails to make out a case in the first place.[36]

Second, the court of first instance may proceed with the suit as usual, prior to the Defendant raising defences under Section 22(3). The court of first instance can, therefore, issue or vacate *ex parte* interim injunction orders prior to a Section 22(4) transfer.[37] However, once the Defendant has activated Section 22(3), the court of first instance cannot act on any interim injunction motions.[38] The state of the proceeding before the High Court is less certain. Even so, should the case arrive before the High Court with a pre-transfer interim injunction already in operation, the High Court may extend it while authorizing the transfer.[39]

Finally, a Section 22(4) transfer requires the Defendant to make a clear written pleading invoking at least one ground under Section 19(1). A mere pleading is not good enough; it must be a 'specific pleading…that the registration granted [to] the Plaintiff is liable to be cancelled under Section 19'.[40] If the pleading is clear and specific, the transfer must follow as a matter of course. There is also consensus on the proposition that the infringement court cannot assess the merits of the defence before ruling on a transfer motion under Section 22(4).[41]

3.1 'Registrant on Registrant' Infringement Claims

One of the principal reasons offered in support for the automatic operation of Section 22(4) transfers emerges from an unlikely source. This source is a narrow category of cases where a design registrant files an infringement claim against a subsequent registrant.[42] (To

36 *Kalra v Safeops Surgical Care* 2018 (75) PTC 294 (Del) [8], which entered this observation in the context of the admission of an infringement suit.

37 *Bhiwadi Polymers v Gupta 2019* (77) PTC 290 (Del) [8].

38 *Wim Plast v Symphony* 2016 (67) PTC 244 (Guj) [11].
A Defendant may, of course, move a motion at the High Court immediately after a Section 22(4) transfer to vacate or modify any interim injunction order(s) in operation at the time of the transfer. See, for instance, *Videocon Industries v Whirlpool* MIPR 2016 (1) 99 (DB), [13].

39 *Troikaa Pharmaceuticals v Pro Laboratories* MIPR 2009 (1) 168.

40 *Vidyaa Ayurveda v Vaishali Industries* OP (C) No 2295/2014 (O) (Kerala High Court, 10 February 2017) [9].
However, the 'pleading' itself need not be the formal written statement; it may be any pleading which invokes the grounds of challenge, such as a reply to an interlocutory application. See *Action Construction* (n 34) [25].

41 *Premier Elmech* (n 30) and *Action Construction* (n 34). Equally, it is clear that a Section 22(4) transfer can only be actioned through an interlocutory motion in the infringement proceedings before the court of first instance. It is not open to the parties to use the Writ jurisdiction of the High Court as a shortcut to achieve the transfer. See *Deepthi Trading v Cookwell Domestic Appliances* 2002 (2) KLJ 46 [4].

42 *Hindustan Unilever v Eureka Forbes* CS(COMM) 236/2018 (Delhi High Court, 19 February

be sure, this is a factual whose very maintainability has been tussled over in numerous High Court judgments.[43])

In this scenario, if the Defendant invokes defences under Section 22(3), then an infringement court ruling in either direction would effectively be an adjudication on the validity of a design registration, and would bind the Controller.[44] It would, naturally, make sense for this court binding the Controller to be the High Court. This is because there is warrant for the High Court to sit in appeal of the Controller on cancellation actions, as well as direct the Controller to cancel registrations based on infringement decrees.[45] Conversely, the Act does not endorse any such hierarchy between the Controller and a court of first instance not being a High Court.

Taken in this sense, once the Defendant raises defences under Section 22(3), a transfer under Section 22(4) *cannot but be automatic*.

3.2 Automatic Deprivation of Jurisdiction

In broad terms, therefore, the divergence of judicial opinion on Section 22(4) mirrors a theoretical divide.

The Kerala High Court's view is founded on the logic that, despite the effect of Section 22(4), an ouster of jurisdiction of the court of first instance cannot be inferred.[46] The opposing argument, however, more reasonably gives Section 22(4) its natural effect. Under this view, the act of the Defendant raising a substantive ground of challenge under Section

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2019) [18]-[21], which carries a brief contextual parallel to Section 22(4) in addressing the equivalent question under the Patents Act.

43 A pair of three-judge benches of the Delhi High Court in May 2013 took opposing views on this question. *Micolube India v Kumar* 2013 (55) PTC 1 (Del)(FB); *Mohan Lal v Sona Paint & Hardwares* 2013 (55) PTC 61 (Del)(FB) ('*Mohan Lal*'). *Mohan Lal* rules in favour of the maintainability of an infringement action against a subsequent design registrant, taking apart *Tobu Enterprises v Joginder Metal Works* AIR 1985 Del 244, which had ruled against the right to bring infringement against a registered proprietor.
The controversy was eventually resolved in favour of the *Mohan Lal* view by five judges of the Delhi High Court in *Carlsberg Breweries v Som Distilleries & Breweries* 2019 (77) PTC 1 (Del) (FB) in December 2018.
See also *Kent R-O Systems v Agarwal* 2014 (59) PTC 449 (Cal)(DB) [8]-[9], concluding that if we take Sections 19 and 22 together, it would be difficult for us to 'support the majority view [in *Micolube*], rather the minority view was more appealing'; and *Whirlpool v Videocon Industries* 2014 (60) PTC 155 (Bom) [20]-[21], which had supported the same position well before it was settled by *Carlsberg*.
Though the *Micolube* view on this point has been largely discarded, its characterization that a High Court following a Section 22(4) transfer, functioning as an infringement court, 'would have the trappings of a cancellation court in the limited sense of entertaining grounds of challenge to validity when they are raised as part of the defence', remains an attractive formulation. See *Micolube* [16]-[17].

44 *Mohan Lal*, ibid [26.1], [27].

45 Designs Act, ss 19(2) and 22(5).

46 *Kadambukattil Exports* (n 29) [14]-[15].

22(3) functions as an *automatic deprivation of jurisdiction* for the court of first instance.[47]

IV. The Supreme Court Ruling in *SD Containers*

Several salient elements of the cancellation and infringement scheme under the Designs Act were illustrated by the December 2020 Supreme Court decision in *SD Containers v Mold Tek Packaging*.[48]

4.1 Background

The litigants before the Supreme Court arrived behind a September 2020 decision by the Madhya Pradesh High Court.[49] In it, the High Court had refused to endorse a March 2020 order by the District Court at Indore (in Madhya Pradesh) which had affected a Section 22(4) transfer of a design infringement claim to the High Court.

The Indore Court received the Respondents' design infringement claim as the court of first instance. As part of their defence, the Appellants invoked Section 22(3). This meant that, under the dominant rendition of Section 22(4), the case would, *per force*, have to be transferred to the Madhya Pradesh High Court.

4.2 Commercial Court Complications

The above interpretation presented a challenge specific to the designation of courts under the Commercial Courts Act.

Ordinarily, the language of Section 22(4) would have seen the infringement claim transferred to the High Court. Pressing into service the second proviso to Section 7 of the Commercial Courts Act,[50] however, returns a different outcome. Under it, all claims

47 One of the more emphatic statements on the subject is found in *Action Construction* (n 34) [23], which concludes that, once a Section 19 defence is taken by the Defendant in reply, 'the court shall have no jurisdiction to proceed further and shall have no option but to transfer the case to the High Court.' See also *Astral Polytechnik* (n 26) [15]-[16] and *Escorts Construction* (n 18) [14]-[17], the latter relying on *Lambda Eastern Telecommunication v Acme Tele Power* AIR 2008 UK 38.
See, however, *Esdee Industries* (n 27) [5], which upholds the interpretation of Section 22(4) but states that it 'does not imply that, immediately upon a ground…being availed of as a ground of defence, the court hearing the infringement suit ceases to have jurisdiction in the suit.'

48 2021 (85) PTC 1 (SC). Portions of the discussion in this section and in §5 below are adapted from my December 2020 review of the *SD Containers* Supreme Court ruling, available at Eashan Ghosh, '"Independent, Different and Distinct": The Supreme Court Segregates Design Cancellation Actions in SD Containers v. Mold Tek' (*Medium*, 5 December 2020) <https://medium.com/@EashanGhosh/independent-different-and-distinct-the-supreme-court-segregates-design-cancellations-actions-bbc8d8dd6425> accessed 29 June 2021.

49 *Mold Tek Packaging v SD Containers* 2020 (4) MPLJ 353.

50 In full, this provision reads:
Section 7: Jurisdiction of Commercial Divisions of High Courts.—
All suits and applications relating to commercial disputes of a Specified Value filed in a High Court having ordinary original civil jurisdiction shall be heard and disposed of by the

transferred to the High Court under Section 22(4) '*shall be heard and disposed of by the Commercial Division of the High Court in all the areas over which the High Court exercises ordinary original civil jurisdiction*'.

This complicated the Section 22(4) transfer since the Madhya Pradesh does not have ordinary original civil jurisdiction. Therefore, though the transfer itself was warranted, it raised the question of how the High Court should accommodate such cases.

The gap in jurisdiction had prompted the Madhya Pradesh High Court down an unusual path. Upon receiving the Section 22(4) request, it directed that the District Court itself, as a designated Commercial Court, was competent to adjudicate on the grounds raised by the Defendant under Section 22(3).[51]

Thus, the High Court, tasked with interpreting 'High Court' under the Designs Act, effectively chose the designation of a District Court as a 'Commercial Court' to be a closer approximation of 'Commercial Division of the High Court' over a High Court without a Commercial Division.

4.3 Supreme Court Findings

In its first Section 22 ruling since *Godrej Sara Lee* eleven years previously, the Supreme Court overturned the High Court decision.

The Supreme Court began by restoring the expression 'High Court' under Section 22(4) to its natural meaning.[52] It noted that, while the Commercial Courts Act may have a role in *allocating* claims transferred to the High Court under Section 22(4), it '*does not actually prohibit or permit such transfers themselves*'. That power, under Section 22(4), lies solely with the court of first instance.[53] Once the cancellation grounds are invoked under Section 22(3), the transfer to the High Court ought to be exclusive and immediate.[54]

Commercial Division of that High Court:
Provided that all suits and applications relating to commercial disputes, stipulated by an Act to lie in a court not inferior to a District Court, and filed on the original side of the High Court, shall be heard and disposed of by the Commercial Division of the High Court:
Provided further that all suits and applications transferred to the High Court by virtue of sub-section (4) of Section 22 of the Designs Act, 2000 or Section 104 of the Patents Act, 1970 shall be heard and disposed of by the Commercial Division of the High Court in all the areas over which the High Court exercises ordinary original civil jurisdiction.

51 This was supported by Section 21 of the Commercial Courts Act, a clean-up provision which gives the Commercial Courts Act overriding effect. See *Mold Tek* (n 49) [16].

52 The Supreme Court took up the example of a transfer between an ordinary bench and a Commercial Division bench at the High Court itself, which was a most intuitive one on these facts. See *SD Containers* (n 48) [10].

53 This much is confirmed by the occurrence of the words 'shall be transferred by the court in which the suit or such other proceeding is pending' in Section 22(4).

54 The Supreme Court further discarded the High Court's reliance on Section 21, the overriding provision under the Commercial Courts Act, by simply stating that it 'cannot be said to be inconsistent with the provisions of the Designs Act.' See *SD Containers* (n 48) [11].

On the substance of the power of transfer, the Supreme Court framed Section 22(4) as granting the Defendant in an infringement suit a *right* to seek cancellation of the design, which *necessarily mandates* the transfer. The transfer itself, said the Supreme Court, is a mere 'ministerial act, if there is a prayer for cancellation of the registration'.[55]

It also affirmed a sharp distinction between the two iterations of cancellation actions under the Designs Act: *pure design cancellation actions* under Section 19 (in which Section 22(4) transfers have no role) and *cancellation grounds raised during infringement or other actions* under Section 22(3) (in which Section 22(4) transfers are automatic, with no room for discretion by the transferring court).[56]

Lastly, the automatic operation of the transfer presented the question of *how* the High Court receiving the infringement suit under Section 22(4) should accommodate the transfer. To this, the Supreme Court opted simply to tether the transfer order to *the High Court in whose jurisdiction the cause of action for the infringement has arisen*.[57] This routed the case before it to the Madhya Pradesh High Court (since the cause of action was at Indore) rather than the Kolkata High Court (the design registration at issue was logged in Kolkata).[58]

With this, the Supreme Court plugged the last remaining gap in the role of the High Court in cancellation and infringement schema under the Designs Act. Where a High Court *does* have original civil jurisdiction, the Commercial Courts Act itself makes clear that the court receiving the Section 22(4) transfer would be the Commercial Division of that very High Court.[59] Where a High Court *does not* have original civil jurisdiction, *SD Containers* now makes clear that the court receiving the Section 22(4) transfer would be the High Court regardless, so long as it corresponds to the jurisdiction in which the cause of action has arisen.

V. Lessons from the Designs Act Experience

The urgency for formulating with a workable post-Appellate Board transition is supplied by the fact that the Ordinance has, at a stroke, marooned thousands of pending cases.[60] The future of each case which the erstwhile Appellate Board would have otherwise received

55 This proclamation effectively discards the Kerala High Court cases on the point. See *SD Containers* (n 48) [11] and *Kadambukattil Exports* (n 29).

56 See *SD Containers* (n 48) [14].

57 ibid [19]-[20].

58 ibid [20].

59 Commercial Courts Act, s 7. This point had been set out soon after the Commercial Courts Act came into force in *Novartis* (n 25) [21]-[22].

60 An April 2020 estimate placed the number of pending Appellate Board cases across its trade mark and patent divisions at 3,249 cases. See Prashant Reddy, 'The Case for Shutting Down the Intellectual Property Appellate Board' (*Spicy IP*, 15 April 2020) <https://spicyip.com/2020/04/the-case-for-shutting-down-the-intellectual-property-appellate-board-ipab.html> accessed 29 June 2021.

also hangs in the balance. As the forum of choice for both sets of cases going forward, High Courts must make quick and decisive adjustments to respond to this challenge.

The discussion at §2 and §3 above makes clear that there are two fields of operation where lessons from the Designs Act experience can be readily integrated. These relate to the separation of cancellation and infringement and the transfer of proceedings.

I take these up for discussion now.

5.1 Separation of Cancellation & Infringement

The first area of concern among discarded Appellate Board cases is that neither trade mark law nor patent law in India make a clean statutory separation between jurisdiction over cancellation actions.

As a result, following the Ordinance, both the Registrar of Trade Marks and High Court under the Trade Marks Act will retain parallel jurisdiction over cancellation actions.[61] Under the Patents Act, on the other hand, the Ordinance will see the relevant High Court claim sole jurisdiction over cancellation actions.[62] However, infringement proceedings relying on the underlying patent rights could either be launched at the Commercial Division of a District Court or the Commercial Division of a High Court. Both these courts could be in different jurisdictions from the High Court receiving the cancellation action.

As highlighted at §1 above, the Supreme Court had, in the Appellate Board era, issued a series of adjustments to resolve the overlap between cancellation and infringement jurisdiction.[63]

In sum, these adjustments set out a rule of priority, biased towards the Appellate Board since it was the specialist forum. They gave forum priority to pending cancellation claims instituted prior in time and diverted all new cancellation actions directly to the Appellate Board. The *basis* for this priority, ostensibly, was that parallel cancellation actions at different forums would threaten rulings in opposing directions. However, the *motivation* for it, evidently, was to prioritize the correct forum being granted charge in the first instance of each type of proceeding.

The statutory shakeup affected by the Ordinance now makes these adjustments essentially worthless. The Designs Act, though, has modified its jurisdiction provision over cancellations, so that cancellations lie exclusively with the Controller of Designs under Section 19, and depart from the erstwhile position allowing parallel jurisdiction to both the Controller and the High Court.[64]

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61 Sections 8(e) and (g) of the Ordinance read with Sections 47(1) and 57(1) of the Trade Marks Act.

62 Sections 6(e), (f), (k) and (m) of the Ordinance.

63 *Patel Field Marshal* (n 7) and *Wobben* (n 8).

64 Section 51A of the 1911 Act (n 21). Interestingly, even the branch of Indian case law that disagrees

In this sense, the Designs Act effectively *pre-empted* the corrections issued by the Supreme Court on this subject under trade mark and patent law.

5.2 Problems with the Post-Ordinance Status Quo

The search should, therefore, be for a reasonable way to create a separation in cancellation and infringement jurisdiction, while staying onside with the Ordinance. Unfortunately, this is easier said than done.

The solution most readily presented by the integration of the Ordinance into existing intellectual property statutes would be thus: identify the High Court located in the territorial jurisdiction of the Registrar/Controller issuing the intellectual property registration, and designate that High Court to receive all original cancellation actions. Presumably, an appeal against that Court would then lie to an appellate bench of the same High Court.

However, this creates at least four apparent difficulties.

First, if an infringement proceeding on the same underlying registration is instituted in a different jurisdiction, it would either be before the Commercial Division of a District Court or the Commercial Division of a High Court. In the former scenario, the original jurisdiction for a cancellation proceeding would be before a *higher* forum than the infringement proceeding. (The appeal, presumably, would be one level further above.)

The High Court seized of the cancellation proceeding, should it allow the cancellation, would thus effectively hold a veto over the fate of the infringement action. This is a framework completely alien to Indian intellectual property law. In the latter scenario, original jurisdiction over both cancellation and infringement proceedings would be with equivalent forums but in different jurisdictions. This would keep alive the risk of rulings in opposite directions, which the Supreme Court has been at pains to avoid.[65]

Second, the cancellation and infringement proceedings being lodged in the same territorial jurisdiction would create similar problems.

Where the cancellation is received by the High Court and the infringement by the Commercial Division of a District Court, the same bizarre veto problem highlighted above would persist. Further, on appeal from a District Court infringement ruling, it is possible that two different High Court benches would be seized of cancellation and infringement proceedings relating to the same underlying registration. This is not ideal since conflicting rulings remain possible. A merger of the two proceedings at this stage would, perhaps, be

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with the power of design registrants to bring infringement claims against other registrants is agreed on this point. It has been pointedly affirmed that Section 22 of the Designs Act cannot be used by courts to permit cancellation actions to be combined with infringement actions, no matter how legitimate the frustration with flimsy design registrations issued by the Controller or the delay in deciding cancellation actions by the Controller. See *Micolube* (n 43) [28].

65 *Wobben* (n 6) [24]-[26].

preferable. However, this is neither statutorily mandated,[66] nor naturally accessible as an issue for the litigants to agitate. The only way to access this option with consistency would be for Defendant to also be the Petitioner in the cancellation action *and* raise the same grounds in its infringement defence.[67]

This latter circumstance begets a third major problem with the post-Ordinance arrangement of forums: that cancellation grounds invoked during infringement proceedings must be adequately accommodated.

However, as discussed at §1 above, under the Trade Marks Act, the intervention of the Ordinance on this issue is limited. It merely replaces the words 'Appellate Board' in Section 124 with the words 'High Court'. This does not solve the underlying problem. At best, it introduces the High Court to rule on the cancellation and suspends the infringement suit. However, if the infringement suit itself is before a separate bench of the High Court, the Ordinance is a recipe for confusion and enforced delay.

Under the Patents Act, meanwhile, a cancellation proceeding *must* now be presented before the High Court *only*. The Ordinance leaves open two paths for cancellations to be initiated: either as standalone proceedings before the High Court, or by Defendants raising cancellation grounds as infringement defences and preferring a separate proceeding (known as a 'counter claim') *within* the infringement suit. If a cancellation action is already pending at the time the infringement suit is filed, it is, once again, absent a merger provision, likely to create confusion and opposite rulings.

There is yet another complication.

Cancellation actions do not require any necessary entanglement in infringement proceedings. They can be initiated by aggrieved parties;[68] a threshold that can include any kind of competitive interest against the registration. This means that there is no necessary overlap between Petitioners in cancellation actions and litigants in infringement actions. Therefore, putting the receiving forum for original cancellation proceedings at level or higher pegging to infringement forums could, in theory, cause entities unconnected with an infringement action to control its outcome through the fate of the cancellation action.[69]

66 Contrast this, for instance, with the words 'the Controller may, at any time, refer any such [cancellation] petition to the High Court, and the High Court shall decide any petition so referred' appearing in Section 19(2) of the Designs Act.

67 Once again, the coverage offered by Section 22(3) of the Designs Act, which covers this exact factual, is close to ideal.

68 The *locus standi* for bringing cancellation actions is monitored through the words 'person aggrieved' under Sections 47(1) and 57(1) of the Trade Marks Act, and 'person interested' under Section 64(1) of the Patents Act and Section 19(1) of the Designs Act.

69 To be clear, this is not impossible even if the infringement forum is higher in the judicial hierarchy than the cancellation forum. However, the effect, for instance, of a Registrar/Controller cancelling a registration while an infringement suit relying on that registration is pending in a High Court would simply be that no adverse orders can be passed against the Defendants in the

5.3 A Three Stage Proposal

The solution to these problems must, in my view, look to the example of the Designs Act. A three stage framework would be desirable:

The *first stage* would be to designate the Registrar/Controller or appropriate highest authority at the relevant Intellectual Property Office as having sole original jurisdiction over all cancellation actions.

The *second stage* would be to identify, with the help of the Commercial Courts Act, benches at District Courts and High Courts in each jurisdiction to serve as infringement courts. These courts would then receive proceedings for infringement. They would also permit litigants to raise grounds of challenge to registrations within infringement proceedings.

The *third stage* would be to tie up statutory loopholes in the Trade Marks Act and Patents Act, in the style of the Designs Act. Specifically, this would require the authorization, akin to Section 22(4) of the Designs Act, that infringement proceedings will be transferred from District Courts to High Courts if the registration(s) underlying the infringement or other proceedings are challenged by the litigants. Further, akin to Sections 19(2) and 22(5) of the Designs Act, it would require all appeals against cancellation proceedings to be placed before the High Court, and any infringement decrees impacting registrations to be notified to the Registrar/Controller.

This approach would address each of the problems baked into the post-Ordinance framework.

The institution of cancellation and infringement proceedings based on the same underlying registration(s) in different territorial jurisdictions would cause no conflict. Both sets of proceedings would be carried out in silos. At worst, on appeal under the equivalent of Section 19(2) of the Designs Act, a cancellation action would be presented before a High Court different to the High Court before which infringement proceedings are pending. This is already budgeted for under the jurisdiction rule set out by the Supreme Court in *Godrej Sara Lee*.

In case the connected cancellation and infringement proceedings are instituted in the same territorial jurisdiction, the equivalents of Sections 19(2), 22(2) and 22(3) of the Designs Act would operate in tandem. The net result would be a cancellation action before the Registrar/Controller and an infringement action before either the Commercial Division of a District Court or the High Court. In neither scenario is a conflict between forums inevitable. Importantly, both scenarios would permit litigants, especially Defendants, to freely raise cancellation grounds as defences in infringement or other proceedings before the infringement court.

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suit while the Claimant moves to appeal the cancellation ruling by the Registrar/Controller.

Under the Ordinance, once cancellation grounds are raised in infringement or other proceedings, there is no effort to resolve the conflict between cancellation and infringement jurisdiction in trade mark and patent cases. On the other hand, Sections 22(3) and 22(4) of the Designs Act provide a customized pathway to handle this conflict. Pure cancellation actions already pending before the Appellate Board may simply be laterally transferred to the Registrar/Controller, as appropriate.

Pending cancellations which are at issue in infringement or other proceedings may, in turn, be dealt with in two categories.

The first category is where cancellation actions are pending *but* cancellation grounds have not been raised in an infringement suit. In such cases, infringement proceedings before the Commercial Division of a District Court/High Court, as appropriate, would continue as usual. If cancellation grounds are raised by the litigants, the protocol prescribed by Sections 22(3) and 22(4) of the Designs Act would be followed.

The second category is where cancellation actions are pending *and* those cancellation grounds have been raised in an infringement suit. In such cases, an immediate, Section 22(4)-style transfer to the High Court may be authorised. (The potential lack of original civil jurisdiction of the receiving High Court is, of course, solved for by the Supreme Court ruling in *SD Containers*.)

All told, the template offered by the Designs Act appears to be superior to the post-Ordinance *status quo* in every way.

It confronts the substantive challenges of separating cancellation and infringement proceedings as well as transfer of proceedings head-on. It respects the subject matter expertise necessary to rule on cancellation actions in the first instance, by allocating these from one specialist forum (the Appellate Board) to another (the Registrar/Controller). It offers bespoke solutions to problems posed by the judicial hierarchy in every type of case, at the first instance and the appellate level. Ultimately, it adheres to the objectives underlying the shift towards specialised adjudication of intellectual property disputes.

In summary, it offers a framework of forums and a path to navigate through them that provides clear, efficient and substantively reliable outcomes across all categories of cases.

VI. Conclusion

One of the biggest surprises to come out of *SD Containers* was the zest with which the Supreme Court explained thematic issues under the Designs Act. Notably, the Supreme Court, in as many words, insisted that cancellation actions and the assertion of an infringement Defendant's right to seek cancellation of a Claimant's registration are *independent provisions that present different and distinct causes of action*.[70]

70 *SD Containers* (n 48) [14].

Viewed in this light, the Ordinance offered a golden chance to effect a similar reset in Appellate Board cases.

Unfortunately, apart from substituting the words 'High Court' for 'Appellate Board', the Ordinance does little else. It works with little appreciation, in particular, for the far-reaching consequences of this substitution on the cancellation/infringement separation, and the power to transfer cases. The post-Ordinance position emerges as even more anomalous when set against the substantial recent efforts of the Supreme Court to defer to specialist forums to rule on cancellation actions.

The way forward, therefore, should ideally focus on what is known and reliable. In these circumstances, we need look no further than the Designs Act, 2000 and the body of law accumulated under it. The three-stage approach, sketched out at §5.3 above, offers the clearest workflow with the maximum upside.

Within this approach, there will, naturally, be judicial space to develop intricacies specific to trade mark and patents cases. How, for instance, Indian judges respond to complications arising out of subsisting interim orders in infringement cases pulled up to the higher judiciary, or how receptive they are to the theory of automatic deprivation of jurisdiction, remain to be determined.

Even so, the activation of an Ordinance which seeks to shovel all Appellate Board proceedings to High Courts *en masse* is a deeply troubling one. There is no evidence, either from the existing statutory framework or from the judicial rulings, that the Ordinance would be workable, let alone welcome. On the flip side, the idea that the entire body of case law and governing principles developed under the Designs Act should at once be cast aside, when they were specifically re-tooled to deal with precisely the problems created by the absence of an Appellate Board for design cases, is equally unappealing.

The lessons from the Designs Act experience, highlighted throughout this paper, are instructive. Instead of committing the fate of current and future Appellate Board cases to an unimaginative one-size-fits-all Ordinance, the focus should urgently be on replicating the elements of the law under the Designs Act that have proved to be successful.

The impact of this decision on Indian intellectual property law is likely to be pivotal.

A CASE OF AMBIGUITIES: EXAMINING THE REGULATIONS PROHIBITING MARKET MANIPULATION IN INDIA

Dr. Poornima Advani*

The article maps the SEBI's actions and policy-level changes to investigate and punish fraudulent and unfair trade practices. The author focuses on the PFUTP Regulations, 2003 and subsequent amendments to the same, to highlight market abuse. Adopting an analytical approach, the author reflects on the vagueness and consequent legal complications arising out of the definition of 'fraud' in the PFUTP Regulations. The author emphasizes on how the absence of any definition of an 'unfair trade practice' in the PFUTP Regulations forces the SEBI and other authorities to rely on interpretations of the term made outside the Regulations. This has a widespread impact on the SEBI's function of investigating and punishing any conduct which is detrimental in nature. The author directs the readers' attention to the manner in which the 2018 Amendment to the PFUTP Regulations brings clarity to the idea of unfair trade practices, by removing the loophole relating to the mens rea requirement when investigating market manipulation allegations. The 2020 Amendment builds on this clarity to elaborate the scope of SEBI's powers to launch investigations wherein allegations of any malcontent in financial disclosure are present. The author appreciates the SEBI's technology-driven outlook and concludes with hope of better regulation of the securities market.

Keywords: *securities; unfair trade practices; market manipulation; market abuse, SEBI PFUTP Regulations.*

I. Introduction

In recent years, India's securities market regulator, the Securities and Exchange Board of India ('SEBI') has cracked down on instances of market manipulation in the country. SEBI is empowered to investigate and punish fraudulent and unfair trade practices under section 12A of the SEBI Act, 1992 ('SEBI Act'). In furtherance of prohibiting market abuse

* Dr. Poornima Advani is the Managing Partner of The Law Point (TLP). Prior to founding TLP, she served as the Chairperson of the National Commission for Women.

in the form of manipulative, fraudulent and unfair trade practices, SEBI has also enacted the SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 ('PFUTP Regulations/Regulations'). The PFUTP Regulations do not mention what constitutes 'market manipulation'. However, they do provide a definition for 'fraud'[1] and list activities which are deemed to be fraudulent or amount to unfair trade practices.[2] Thus, prohibition of market manipulation by SEBI entails prohibition of fraudulent or unfair trade practices. In the last two decades, the definition of fraud as related to market manipulation has been the subject of controversy and judicial scrutiny, even leading to amendments in the PFUTP Regulations.[3] This is primarily because the pre-existing definition of fraud was found to be inadequate, ambiguous or simply not stringent enough for SEBI to effectively protect stakeholders against market abuse.

SEBI's Annual Report for 2019-2020 revealed that 35 investigations had been initiated related to market manipulation and price rigging.[4] This is reflective, but is not representative, of the extent of such contraventions in the securities market. As the market relies increasingly on algorithmic trading, the ambiguities surrounding the PFUTP Regulations have exposed the market to vulnerabilities against instances of price rigging and market manipulation. Securities experts across the globe regard manipulation as one of the most difficult violations to prove due to the expansive nature of the term.[5] The focus of this essay is to examine and subsequently analyse the Indian legislative and judicial interpretations of terms pertaining to market manipulation, so as to understand the scope of SEBI's authority when it comes to investigation and punishment. Such an analysis will help in understanding any existing loopholes in the regulations intended to prohibit and prevent market manipulation, and enable the formulation of solutions that will help protect the market against abuse.

II. Market Manipulation as a Subset of Market Abuse

Market manipulation is a form of market abuse, which attempts to interfere with the workings of the market. The Supreme Court of India has discussed the term market abuse:

> Market abuse refers to the use of manipulative and deceptive devices,

1 SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 (PFUTP Regulations), reg 2(c).

2 PFUTP Regulations, regs 3 and 4.

3 Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) (Amendment) Regulations, 2018 (2018 Amendment); Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) (Second Amendment) Regulations, 2020 (2020 Amendment).

4 Press Trust of India, 'Sebi Probed 161 New Cases in 2019-20' *Economic Times* (New Delhi, 12 February 2021) <https://economictimes.indiatimes.com/markets/stocks/news/sebi-probed-161-new-cases-in-2019-20/articleshow/80879699.cms> accessed 17 August 2021.

5 Gina-Gail S Fletcher, 'Legitimate Yet Manipulative: The Conundrum of Open-Market Manipulation' (2018) Duke LJ 479.

> giving out incorrect or misleading information, so as to encourage investors to jump into conclusions, on wrong premises, which is known to be wrong to the abusers. [6]

Thus, the term 'market abuse', as discussed by the Supreme Court, limits itself to fraudulent activities, which is included in the PFUTP Regulations. Market manipulation, together with insider trading, is considered to be prohibited market conduct.[7] Insider trading is explained and dealt with by the Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015, and thus, is not within the scope of this article.

The definition of 'market manipulation' is not available in any Indian statute but rather is alluded broadly to cover the activities prohibited by the PFUTP Regulations. In general, the definition of market manipulation is regarded to be an abstract exercise.[8] Market manipulation has been defined by Palmer's Company Law as:

> Market manipulation is normally regarded as the 'unwarranted' interference in the operation of ordinary market forces of supply and demand and thus undermines the 'integrity' and efficiency of the market.[9]

This definition was approved and referenced by the Supreme Court.[10] However, this definition is wide enough to cause arbitrariness and excessive interventions by regulators in a market that is supposed function on a laissez-faire basis. Investigations cannot be initiated on merely any 'unwarranted interference', but must be based on certain legal criteria. In the following section, the lack of comprehensive legal criteria in Indian law will be demonstrated, proving the need for changes in the law.

III. PFUTP Regulations

When quoting the Palmer's Company Law definition, the Supreme Court observed in *SEBI v. Kanaiyalal Baldev Patel*, that the PFUTP Regulations' object and purpose is to curb market manipulations.[11] To understand the lacunae in dealing with market manipulations, it would be pertinent to first examine the PFUTP Regulations in depth. The PFUTP Regulations are divided into three parts:

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6 *N. Narayanan v. Adjudicating Officer*, *SEBI* (2013) 12 SCC 152 [33].

7 Emilios Avgouleas, *The Mechanics And Regulation Of Market Abuse: A Legal And Economic Analysis* (OUP 2005).

8 Rebecca Söderström, 'Regulating Market Manipulation An Approach to designing Regulatory Principles' (2011) Uppsala Faculty of Law Working Paper 2011:1, 46 <https://www.jur.uu.se/digitalAssets/585/c_585476-l_3-k_wps_2011_1.pdf> accessed 17 August 2021.

9 Francis Beaufort Palmer and Geoffrey Morse, *Palmer's Company Law*, vol 2 (25th edn, Sweet & Maxwell 2010), page 11097 as cited in *N. Narayanan v. Adjudicating Officer*, *SEBI* (2013) 12 SCC 152.

10 *SEBI v. Kanaiyalal Baldev Patel* (2017) 15 SCC 1 (*Kanaiyalal*).

11 ibid [24].

1. Chapter I, the relevant part of which deals with definitions of the term, 'fraud';

2. Chapter II, which is the substantive part of the Regulations, prohibiting certain dealings in securities and manipulative, fraudulent and unfair trade practices;

3. Chapter III deals with powers to investigate such practices and subsequent proceedings.

(I) ***Fraud under the PFUTP Regulations***

The precursor to the PFUTP Regulations, the SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Markets) Regulations, 1995 ('1995 Regulations'), adopted the definition of fraud from the Indian Contract Act. However, the PFUTP Regulations do not have the same definition, adopting a more inclusive definition of fraud and therefore freeing itself of the limitations present in the definition in the Indian Contract Act. This was confirmed by the Court which stated that:

> The definition of 'fraud', which is an inclusive definition and, therefore, has to be understood to be broad and expansive, contemplates even an action or omission, as may be committed, even without any deceit if such act or omission has the effect of inducing another person to deal in securities. Certainly, the definition expands beyond what can be normally understood to be a 'fraudulent act' or a conduct amounting to 'fraud'. The emphasis is on the act of inducement and the scrutiny must, therefore, be on the meaning that must be attributed to the word 'induce'.[12]

Thus, the Supreme Court noted that *mens rea* was not required to prove fraud. Regulation 2(c) defines fraud in two parts. It provides for a general definition at the outset which includes the following elements: [13]

i. any act, expression, omission or concealment committed whether in a deceitful manner or not;

ii. by a person or by any other person with his connivance or by his agent while dealing in securities;

iii. to induce another person or his agent to deal in securities;

iv. regardless of any wrongful gain or avoidance of any loss.

After a thorough perusal of the definition, it can be noticed that the definition does not require either deceit or harm in order for the activity to amount to fraud. This implies that any person dealing in securities, irrespective of whether he commits a fraud, will be

12 *Kanaiyalal* (n 10) [54].

13 PFUTP Regulations, reg 2(c).

considered a miscreant. A simple trading activity like purchasing or selling of securities would also be considered to be a fraudulent activity. However, there have been no case laws in this regard, which have depicted the flaws in the said definition. Thus, it becomes pertinent for SEBI to amend such a vague definition in order to provide more clarity while charging a person guilty of fraud.

The regulation then proceeds to provide nine specific instances of fraud in the following sub-clauses. It excludes comments made (in public or private) in good faith relating to:

i. the economic policy of the government

ii. the economic situation of the country

iii. trends in the securities market;

iv. any other matter of a like nature.[14]

However, these limited and narrow exceptions vis-à-vis the inclusive definition demonstrates that 'fraud' as defined in the PUFTP Regulations is extremely broad. This puts efficient enforcement by authorities at risk, since they may often have little guidance as to how interpret ambiguities surrounding a broad definition. The Supreme Court has made observations to this effect, noting that anti-fraud provisions in security laws are often incompatible with fraud as it exists in common law, 'as common-law fraud doctrines are too restrictive to deal with the complexities involved in the security market'.[15]

(II) ***Unfair Trade Practices under the PFUTP Regulations***

The term unfair trade practice has not been defined in the Regulations. In a SEBI Press Release dated 1995, it noted that the SEBI Act did not define or specify which act would be fraudulent or amount to an unfair trade practice, and thus, there was a need to specify such terms.[16]

Within the PFUTP Regulations, regulation 4(1) (after the 2018 Amendment) prohibits 'manipulative, fraudulent or an unfair trade practice in securities'. Sub-clause (2) of regulation 4 proceeds to include a number of instances that are prohibited. These instances listed are deemed to be 'fraudulent or unfair trade practice if they involved fraud'. Thus, fraud seems to be a central element to the commission of an unfair trade practice. Then, the question that arises is, how does one distinguish between a fraudulent practice and unfair trade practice if both require fraud to have been committed? The loophole left by the legislators when drafting the PFUTP Regulations in not defining an unfair trade practice

14 PFUTP Regulations, reg 2(c).

15 *Kanaiyalal* (n 10) [28] .

16 Consultative Paper issued by SEBI, pursuant to a Press release No. 34/95 dated March 16, 1995 < https://www.sebi.gov.in/media/press-releases/mar-1995/consultative-paper-prohibition-of-frudulent-and-unfair-trade-practices-relating-to-securities-market-regulations-1995_21338.html>.

becomes evident, forcing SEBI and other authorities to rely on interpretations of the term made outside the Regulations. The Supreme Court has supported the borrowing of such interpretations:

> Although unfair trade practice has not been defined under the regulation, various other legislations in India have defined the concept of unfair trade practice in different contexts. A clear-cut generalized definition of the 'unfair trade practice' may not be possible to be culled out from the aforesaid definitions.[17]

It further tried to define the term within the context of the case at hand:

> The said conduct can also be construed to be an act of unfair trade practice, which though not a defined expression, has to be understood comprehensively to include any act beyond a fair conduct of business including the business in sale and purchase of securities.[18]

Attempts to clarify the term were also made in *SEBI v. Rakhi Trading*,[19] wherein the Supreme Court observed:

> Trading is always with the aim to make profits. But if one party consistently makes loss and that too in a preplanned and rapid reverse trades, it is not genuine; it is an unfair trade practice.[20]

Given that the definition of unfair trade practices has been properly clarified neither by the Regulations nor judicial authorities, SEBI's ability to investigate and punish entities/individuals becomes extremely difficult. If the offence itself has an inadequate or ambiguous definition, it is not possible for authorities to successfully prohibit detrimental conduct in the market. Given its reliance on fraud, the distinguishing factor of an unfair trade practice from a fraudulent one necessitates greater legislative clarity.

IV. Inadequacy of and the Ambiguity surrounding the PFUTP Regulations

In early 2021, the US Department of Justice announced that it was considering launching investigations into the rapid rise in stock price of GameStop Corp. and AMC Entertainment Holdings Inc. This was after Reddit users decided to *en masse* buy shares of companies that were considered to be on the decline. Talks of federal investigations ignited discussions on market manipulation – and how, even in the United States, the term is vague and thus hard to prove.[21]

17 *Kanaiyalal* (n 10) [31].

18 *Kanaiyalal* (n 10) [60].

19 (2018) 13 SCC 753.

20 ibid [31].

21 Alex Vuocolo 'Market Manipulation in GameStop Case Hard to Prove, Says Legal Expert' (*Cheddar News* 3 February 2021) <https://cheddar.com/media/market-manipulation-in-

Although a similar situation is not possible in India due to the SEBI's graded surveillance measure which prevents unwarranted price swings and manipulation of stocks with a specified market capitalization (below 250 million rupees), the dilemmas faced by securities regulators in both India and the United States are similar - due to the vague nature of terms like 'manipulation', 'fraudulent' and (in the case of India) 'unfair trade practices', it is difficult to successfully investigate and punish adverse market behaviour. In many cases, due to the broad nature of the term, normal trading which affects the price may also come under the ambit of market manipulation if caution is not exercises, leading to interference in the free market.

Thus, authorities have to examine whether there is scope for market manipulation that may not *prima facie* appear to be covered by the PFUTP Regulations. In this regard, the regulator has had the opportunity to examine what is the exact scope of the Regulations. For instance, in the *Blue Peacock Securities Pvt Ltd. vs SEBI* case,[22] the Securities Appellate Tribunal ('SAT') determined that although there was no legal contravention such as Last Traded Price violations or quantity limit violations, the strategy involving manipulation of order book by placing and deleting orders was termed as 'deceitful'. Accordingly, it found that regulation 3(d) of the PFUTP Regulations was violated.

(I) ***2018 Amendment – Settled Position of the Mens Rea Requirement***

The 2018 Amendment to the PFUTP Regulations was brought about to introduce clarity, specifically in the term 'dealing with securities'. It expanded the scope of the term, to include acts which are knowingly designed to influence trading decisions of investors or any activities undertaken to assist such acts.[23] Significantly, it also added the word 'knowingly' in Chapter III, thus, now requiring that *mens rea* be satisfied in cases of fraudulent, manipulative or unfair trade practice. This is in somewhat contradiction to the Justice Gogoi's judgement in *SEBI v. Kanaiyalal Baldev Patel*, which stated that:

> To attract the rigor of Regulations 3 and 4 of the 2003 Regulations, *mens rea* is not an indispensable requirement and the correct test is one of preponderance of probabilities.[24]

A similar interpretation was given by SAT in *Pyramid Saimira Theatre Ltd. v. SEBI*[25] in which the ratio laid down by Supreme Court in *Chairman, SEBI v. Shriram Mutual Fund*

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gamestop-case-hard-to-prove-says-legal-expert> accessed 17 August 2021; Dave Michaels 'GameStop Mania Is Focus of Federal Probes Into Possible Manipulation' *The Wall Street Journal* (11 February 2021) <https://www.wsj.com/articles/gamestop-mania-is-focus-of-federal-probes-into-possible-manipulation-11613066950> accessed 17 August 2021.

22 [2019] SAT Appeal No. 253 of 2018.

23 2018 Amendment (n 3).

24 *Kanaiyalal* (n 10) [62].

25 [2010] SAT Appeal No. 242 of 2009.

('*Shriram Mutual Fund*'),[26] that *mens rea* is not a *sine qua non* for establishing violation of chapter VIA of the SEBI Act, was extended to all the provisions of SEBI Act and the PFUTP Regulations. It was also observed that the words indicated in the definition of 'fraud' under regulation 2(1)(c) of the PFUTP Regulations; 'whether in a deceitful manner or not', are significant and clearly indicate that intention to deceive is not an essential requirement of the definition of fraud. The decisions in both these cases were rendered on the basis that proceedings initiated by SEBI are civil in nature. Even in *SEBI v. SKDC Consultants Ltd.*[27] and in *SEBI v. Cabot International Capital Corporation*,[28] the Bombay High Court observed that as the imposition of the penalty under the SEBI Act and Regulations is civil in nature and cannot be equated with penal character, *mens rea* is not essential for breaches of provisions of the SEBI Act and Regulations. It is pertinent to note here that the above cases were decided on the basis that the proceeding under SEBI Act and Regulations (except under section 24 of the SEBI Act) are civil in nature and not penal in character. However, in the judgment in *Shriram Mutual Fund*, the Supreme Court stated that even though regulations 3 and 4 invite penal consequences on defaulters, proof beyond reasonable doubt or *mens rea* is not an indispensable requirement. This means that the Supreme Court in the judgment has reached the same conclusion even after applying the opposite reasoning adopted in the above cases.

On the other hand, contradictory positions have also been taken on the requirement of *mens rea* before declaring a person guilty for indulging in synchronized trades. In *Ketan Parekh v. SEBI*[29] and *Subhkam Securities Private Limited v. SEBI*,[30] it has been observed that synchronized trades are not *per se* illegal, and that only when it is proved that synchronized trades were carried out with the intention to manipulate the market the provisions of PFUTP Regulations will get attracted. The 2018 Amendment, by introducing the word 'knowingly', therefore takes care of this contradiction and settles the position that a degree of *mens rea* is required. Subsequently in 2019, in *R.S. Agarwal v. SEBI*, the SAT held that in the absence of any connecting evidence, while dealing with the issue of fraud, SEBI needs to ascertain the motive.[31] Therefore, the 2018 Amendment can be considered to be successful in removing the loophole relating to the *mens rea* requirement when investigating market manipulation allegations. It seeks to simultaneously protect *bona fide* actions of investors from being wrongly investigated under the PFUTP Regulations, therefore reducing the discretion and wide ambit of SEBI.

(II) *2020 Amendment*

In 2020, SEBI passed another amendment that further removed ambiguities relating to

26 (2006) 5 SCC 361.

27 (2004) 61 CLA 406.

28 2005 123 Comp. Case 841 (Bom).

29 (2006) SCC OnLine SAT 321.

30 (2003) 3 CompLJ 301 SAT.

31 [2019] SAT Appeal No. 63 of 2018.

market manipulation. Notably, it added an explanation to regulation 4 as follows:

> Explanation – For the removal of doubts, it is clarified that any act of diversion, misutilisation or siphoning off of assets or earnings of a company whose securities are listed or any concealment of such act or any device, scheme or artifice to manipulate the books of accounts or financial statement of such a company that would directly or indirectly manipulate the price of securities of that company shall be and shall always be deemed to have been considered as manipulative, fraudulent and an unfair trade practice in the securities market.[32]

This Amendment adds additional grounds for SEBI to launch investigations wherein allegations of any malcontent in financial disclosure are present. This has clarified SEBI's scope of powers and provided greater clarity on which conduct amounts to market manipulation. Nevertheless, it is important to note that while such clarifications are welcome, an equally welcome, if not more significant, amendment would be one which clarifies the definitions of central terms in the Regulations, viz., unfair trade practices and manipulative practices.

V. Concluding Remarks

Although the 2018 and 2020 Amendments are promising, the PFUTP Regulations yet remain mired by lacunae. Neither SEBI nor judicial pronouncements have adequately filled these gaps. This inadvertently leads to two scenarios; the first, in which, due to the broad nature of the provisions (for instance, unfair trade practice), investigating authorities will allow certain conduct that in fact, adversely impacts the market and causes loss. The second scenario is that SEBI uses wide discretion and strong arms into the free market, causing undue and unnecessary interference into market operation. Although the former scenario is more likely than the latter scenario, both of these scenarios cause disruptions in the market. Thus, it is important to remove such lacunae.

SEBI has introduced measures to ensure that the former scenario is prevented, with measures such as incorporation of Machine Learning and Artificial Intelligence, and issuing explanatory amendments such as that issued in 2020. In 2021, it also required greater compliance from bourses and entities to prevent fraud[33] and is considering the implementation of a data analytics and data models project to better detect manipulation and abuse in the market. These steps are indicative of SEBI's efforts to keep market abuse in check, even as digital and Artificial Intelligence tools make the stock market more and more susceptible to frauds. Indeed, as compared to 2018-2019, the year 2019-20 saw fewer

32 2020 Amendment (n 3), reg 4.

33 Press Trust of India 'SEBI asks bourses, clearing cos to put in place mechanism to prevent fraud' *Business Standard* (New Delhi, 3 March 2021) <https://www.business-standard.com/article/markets/sebi-asks-bourses-clearing-cos-to-put-in-place-mechanism-to-prevent-fraud-121030301235_1.html> accessed 17 August 2021.

investigations for market manipulation by SEBI, even as it imposed considerable penalties on parties under PFUTP Regulations. However, the road ahead still faces obstacles apart from the broad nature of the Regulations' provisions, such as inadequate transparency by SEBI, selective investigations (which can also be attributed to the discretion granted under the Regulations) and the delayed periods between investigations and announcement of decisions. Until these issues are addressed by the regulator, the Indian securities market will remain to be vulnerable to scams, price manipulation and other forms of market abuse.

SAFEGUARDING PATIENT RIGHTS UNDER THE NATIONAL DIGITAL HEALTH MISSION THROUGH A FEMINIST FRAMEWORK OF EMBODIMENT

Radhika Radhakrishnan*

The datafication of health in India, in the age of Big Data, raises pertinent concerns regarding patient rights. Instead of meaningfully engaging with these concerns, the policy framework of the National Digital Health Mission ('NDHM') fuels the datafication of health by resorting to conceptual frameworks of understanding data that pre-date the digital age. In this paper, I illustrate that NDHM policies conceptualise health data as a disembodied resource and an enabler for economic progress, without fully capturing the risks of the datafication of health upon the bodies and rights of patients. By building upon feminist scholarship on the embodiment of data and the lived experiences of patients within the NDHM ecosystem, I highlight the relationship between people's health data and their bodies. In this context, I analyse the rights of patients regarding consent, choice, privacy, and control over health data within a feminist framework to visibilise the risks of the datafication of health upon the bodies of patients and offer pathways for change to ensure that patient rights are safeguarded in the digital age.

KEY TERMS

- **National Digital Health Mission ('NDHM')** aims to develop the backbone necessary to support the integrated digital health infrastructure of the country.
- **Health ID** refers to a voluntary unique identification number or identifier allocated to individuals to whom the health data relates, to enable them to participate in the NDHM

* Radhika Radhakrishnan is a qualitative researcher currently at the World Wide Web Foundation as a Gender Research Manager. With interdisciplinary academic training in Gender Studies and Computer Science Engineering, her research focuses on understanding the challenges faced by gender-minoritized communities with digital technologies in India and finding entry points to intervene meaningfully using feminist methodologies. This paper is based on a larger research study that was carried out during my employment as a Researcher at the Internet Democracy Project. I am grateful to Dr. Anja Kovacs for supervising and guiding this research, to the Omidyar Network for funding, and to the Anusandhan Ethics Committee for reviewing this study.

ecosystem.[1] With the launch of the NDHM, Health IDs were rolled out in six union territories as part of Phase 1 of the implementation, and are expected to be expanded nationwide in upcoming phases.[2]

- **Personal Health Records ('PHRs')** enable patients to compile, update and keep a copy of their own health records, to help them better manage their care.
- **Data Principal** is an individual to whom the health data relates.[3]
- **Health Information Providers ('HIPs')** are hospitals, diagnostic centres, public health programs, labs, health apps, or other such entities which act as information providers by generating, storing and distributing health records in the digital health ecosystem.[4]
- **Health Information Users ('HIUs')** are entities that are permitted to request access to the personal data of a data principal and can access this data with the consent of the data principal.[5] These could include hospitals, doctors, insurance providers and personal health apps.
- **Data fiduciaries** (trustees) shall facilitate consent-driven interaction (through a consent manager) between entities that generate health data and entities that want to obtain access to PHRs for delivering better services to the individual.

I. Introduction

The promise of the datafication of health is largely held in the belief that using data for decision-making regarding health can potentially lead to better health outcomes. For instance, data from X-ray scans give a more granular understanding of a patient's physiology and help health practitioners better diagnose health issues. However, the past few years have brought crucial changes in the manner in which the datafication of health is taking place. With the advent of Big Data, the availability of large amounts of health data is framed in technological discourse as an unquestionable state of affairs. In reality, this is a key feature of surveillance capitalism, which creates a market where there is both demand for more health data and a promise of profit from this data.[6] In this context, the quantitative explosion in the collection of health data is leading to a shift in the qualitative experience of health, with serious implications for patient rights.

1 Health Data Management Policy (2020), Chapter IV, 10.

2 National Health Authority, Strategy Overview: National Digital Health Mission (2020), 21-23<https://ndhm.gov.in//assets/uploads/NDHM%20Health%20Data%20anagement%20Policy.pdf> accessed 16 July 2021.

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5 (n 2) 4.

6 Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for Human Future at the New* (Profile Books 2019).

Policy frameworks in India play a key role in fueling this datafication of health, such as the emerging framework of the National Digital Health Mission ('NDHM'). Most notably, on 15 August 2020, Prime Minister Narendra Modi officially launched the NDHM with the aim to 'create a national digital health ecosystem that supports universal health coverage in an efficient, accessible, inclusive, affordable, timely and safe manner, that provides a wide range of data, information and infrastructure services, duly leveraging open, interoperable, standards-based digital systems, and ensures the security, confidentiality and privacy of health-related personal information.'[7] Overall, the NDHM ecosystem will provide data principals with a unique Health ID, and then use that Health ID to share personal health data among various stakeholders for different purposes, facilitated by their consent through data fiduciaries.

Despite the ways in which datafication is undergoing changes in the age of Big Data, NDHM policies fall back upon conceptual frameworks that pre-date the digital age. Most importantly, these policies conceptualise health data as a disembodied resource and an enabler for economic progress, without fully capturing the risks of the datafication of health upon the bodies and rights of patients, as this paper will further elucidate. Such an understanding of data can be traced back to the field of cybernetics which conceptualised data as a layer permeating everything while existing independently from the medium carrying it, making it possible to transfer it from one medium to another.[8]

However, in reality, disembodiment of data opens it up to possibilities of human exploitation and manipulation.[9] When health data is viewed as a disembodied resource in the age of Big Data, access to people's health data becomes a form of power, giving those with such control the unparalleled power to influence the governance of people's bodies and lives.[10]

To account for the harms arising from such potential exploitation through data, feminist scholars have foregrounded the relationship between data and bodies to show that data is an extension of people's bodies, and control over data is often experienced by people as control over their bodies.[11,] For example, victims of non-consensual sharing of

7 (n 2).

8 Katherine N. Hales, *How We Became Posthuman: Virtual Bodies in Cybernetics Literature, and Informatics* (University of Chicago Press 1999).

9 Nick Couldry and Ulises A. Couldry, 'Data colonialism: Rethinking big data's relation to the contemporary subject' (2019) 20(4) Television & New Media, 336-349.

10 Radhika Radhakrishnan, 'Health Data as Wealth: Understanding Patient Rights in India within a Digital Ecosystem through a Feminist Approach' (2020) Data Governance Network <https://cdn.internetdemocracy.in/idp/assets/downloads/reports/health-data-as-wealth/Radhakrishnan-Health-Data-as-Wealth.pdf> accessed 29 November 2021.

11 Van der Ploeg, 'The body as data in the age of information' in Kirstie Ball, Kevin & David Lyon (eds), *Routledge Handbook of Surveillance Studies* (1st edn, 2012) 176-183; Anja Kovacs & Nayantara Ranganathan, 'Data sovereignty, of whom? Limits and suitability of sovereignty frameworks for data in India' (2020) Data Governance Network <https://datagovernance.org/files/research/1606371623.pdf> accessed 16 July 2021; Anja Kovacs & Tripti Jain, 'Informed

intimate images often describe their experience in terms of physical violence, not in terms of a data protection violation.[12] When viewed through such experiences, some feminist scholars argue that the line between our physical bodies and our virtual bodies is becoming irrelevant because of the extent to which data is used to determine and control our bodily experiences (Van der Ploeg, 2012)[13]. Applying this embodied understanding to health data raises important questions about patient rights as envisioned by the NDHM policy frameworks, making it crucial to engage directly with regulation around the datafication of health from feminist perspectives.

In this vein, what is most urgently needed is a feminist framework that meaningfully captures and visibilises risks of the datafication of health upon the bodies of patients and offers pathways for change to ensure that patient rights are safeguarded in the digital age. Such a framework is essential to reconceptualise how we fundamentally understand the nature of health data and the rights pertaining to it, and must accordingly be grounded in the notions of embodiment and bodily integrity. In this paper, I attempt to offer a starting point for such a framework by building upon grounded feminist theory and the lived experiences of key stakeholders within the NDHM ecosystem. I argue that the disembodiment of health data within policy frameworks undermines patients' right to healthcare and that recognising this embodiment can empower patients to safeguard and affirm their rights.

After briefly describing the research methodology for this study, in Part II onwards, this paper unpacks the impact of the disembodied datafication of health under the NDHM on the rights of patients. In each part, I analyse one such right, in particular, the right to consent, choice, privacy, and control over health data. This is not meant to be exhaustive, but rather indicative of the ways in which various patient rights are impacted by the datafication of health. With respect to each right, I examine the provisions proposed by the NDHM in its policy framework, the threats to the respective patient right that come to light when we put bodies back into the policy landscape and recommended pathways for change from a feminist perspective of embodiment.

Research Methodology

This research employs a mixed methodology approach, relying upon desk analysis of relevant government policies and documents (to understand the regulatory framework

Consent - Said Who? A Feminist Perspective on Principles of Consent in the Age of Embodied Data' (2020) Data Governance Network, <https://datagovernance.org/files/research/1606371436.pdf> accessed 16 July 2021; Radhika Radhakrishnan, '"I took Allah's name and stepped out": Bodies, Data and Embodied Experiences of Surveillance and Control during COVID-19 in India' (2020) Data Governance Network <https://datagovernance.org/files/research/1606371784.pdf> accessed 16 July 2021.

12 PJ Patella Rey, 'Beyond privacy: Bodily integrity as an alternative framework for understanding non-consensual pornography' (2018) 21(5) Information, Communication & Society 786-791 <https://www.tandfonline.com/doi/pdf/10.1080/1369118X.2018.1428653?needAccess=true> accessed 16 July 2021.

13 Van der Ploeg (n 11).

within which the datafication of health is happening) and interviews conducted during ethnographic fieldwork (to gain a deeper understanding of the implications of policies in the everyday lives of people). I conducted nineteen semi-structured, in-depth interviews (sixteen in-person and three telephonically or online; fifteen in Hindi and four in English) and eight days of ethnographic fieldwork in the Union Territory of Chandigarh where the NDHM programme has been piloted by the government of India.

I interviewed the following key stakeholders in the NDHM ecosystem: grassroots health workers such as ANM workers (Auxiliary Nurse Midwife workers or female health workers based at health sub-centres or Primary Health Centres) and Anganwadi workers (community-based frontline workers of the Integrated Child Development Services program of the Government of India); data entry operators in civic hospitals; senior medical officers, medical interns, pharmacists, multi-purpose workers, and other staff workers at civic dispensaries; members of the National Health Mission ('NHM') Employees Union; persons enrolled in the digital Health ID programme of the NDHM; and subject matter experts on the NDHM ecosystem.

I used purposive and snowball sampling to identify these research participants during fieldwork. I initially contacted members of health worker unions and independently visited community healthcare centres, civic hospitals, and civic dispensaries. From here, I contacted other participants by snowballing. I contacted subject matter experts through purposive sampling.

I have changed some names used in this paper as per the request of the research participants as indicated in their informed consent forms, and I have mentioned the change of names in footnotes for their first usage in the paper.

This research has undergone an independent, rigorous ethics review, and has been approved by the Anusandhan Ethics Committee.

This research is exploratory in nature as many developments under the NDHM are very recent, with some proposed less than a year ago at the time of writing. The analysis offered in this paper is thus an early-stage, grounded critique of these emerging developments.

II. Right to Consent

Under the NDHM, a consent-based framework has been proposed for the collection, processing, and sharing of the personal data of patients.[14] According to this framework, data fiduciaries can collect or process personal data only with the consent of the data principal, and this consent has to be free, informed, specific, clearly given, and capable of being withdrawn.[15] This consent framework also requires all data fiduciaries to give a clear

14 (n 2) 6-10.

15 (n 2) 6.

and conspicuous privacy notice to data principals.[16]

1. Violations

Not only are mechanisms through which consent is usually sought inadequate in many ways,[17] but more importantly, seeking consent through individualistic privacy notices is unlikely to empower people within disempowering structures. Consider the case of Health Information Users ('HIUs') such as health insurance companies. Even if an individual denies consent for their own personal health data to be collected, insurers can make statistical extrapolations about the individual's health through the health data collected of their family members, and set insurance premiums in accordance with family health risk for the individual. This may happen even without the consent of the family members, as I observed during fieldwork.

When an individual is registered for a Health ID, I observed that they are asked to provide not only their own details, but also the details of their family members so as to register Health IDs for the entire family, and in many cases, without their knowledge. This is highlighted in the following conversation with Ms. Narima,[18] an ANM worker in a civic dispensary in Chandigarh (translated from Hindi):

> [Ms. Narima]: Everyone in the family won't come [for Health ID registration]. One family member comes with the date of birth of all members and with one family phone.
>
> [Me]: So then you make IDs for the full family through that one person and one phone?
>
> [Ms. Narima]: Yes.

Through common identifiers—such as common last names, addresses, phone numbers, etc.—an individual's health data can therefore get linked to their family's health data, irrespective of these stakeholders not having consented to it in the free, informed, and specific manner proposed under the NDHM.

In this manner, insurers can now have access to the health records of individuals who have not consented to share their data. Thus, an individual's own consent is not always sufficient to maintain control over their personal health data. Moreover, stakeholders such as insurance companies often wield a lot more power than individual patients which translates to a lack of ability to withhold or withdraw consent due to being at the disadvantaged end of power and information asymmetries and a potentially vulnerable state of mind at the

16 (n 2) 7.

17 Daniel J. Solove, 'Introduction: Privacy self-management and the consent dilemma' (2013) 126(7) Harvard Law Review, 1880-1903 <https://harvardlawreview.org/wp-content/uploads/pdfs/vol126_solove.pdf> accessed 16 July 2021.

18 Name changed.

time—as patients—of giving consent.

This is especially relevant for hereditary diseases such as diabetes that individuals have a risk of inheriting from their families. Without the digital infrastructure provided by the NDHM, this form of data collection and sharing would not be possible unless the individual themselves declared the risk to the insurer. Under the NDHM, insurers can now slot an individual into predictive risk categories based on their family's health data, and either exclude at-risk individuals from their insurance policies or differentially treat them by pricing insurance premiums to account for that risk. These predictions gain credibility due to their medicalised nature, which can further be used to justify such practices of profiling.

More importantly, such practices defeat the purpose of health insurance which is to balance risk in society and protect those most in need, without a strain on their finances. However, the involvement of private insurance providers within the health data ecosystem in the digital age enables them to make predictions about an individual's lives through other individuals' data to pinpoint the riskiest people and discriminate and differentiate more decisively, hitting those who can least afford it the highest.[19] This creates a scenario where these private actors who control the NDHM's digital infrastructure can now exploit patients from afar, rather than having to control their bodies in person,[20] without them necessarily having consented to any of this.

At the core of NDHM's consent-based framework is the understanding of health data as a resource. It is this belief that translates into structural incentives for businesses to monetise this resource and generate value for their businesses. This framework does not focus on patient needs and experiences, and in fact, invisibilises the power relations that keep patients from consenting meaningfully to the usage of their health data. Thus, such a consent framework is unlikely to empower patients unless there is a fundamental change towards our understanding of health data as embodied.

2. Pathways for change

In order to emphasise the relationship between bodies and data, feminist scholars have proposed ways to re-envision consent frameworks.[21] Building upon such feminist scholarship on embodiment and the lived experiences of patients gathered through this research, I propose some fundamental changes to consent frameworks within NDHM to take into account people's social realities in accessing healthcare.

In the case of able adults, consent must always be obtained directly, with possible exceptions made for minors and persons with mental disabilities who may not be able to

19 Cathy O'Neil, *Weapons of math destruction: How big data increases inequality and threatens democracy* (Crown 2016).

20 (n 10).

21 (n 12).

consent themselves. If the health data of other individuals, such as family members, is being used to make decisions pertaining to an individual's health, then the individual's consent must be sought to ensure that control remains in their hands. For this consent to be meaningful, consent should not be a binary yes/no decision, but an ongoing negotiation wherein each party may say no as well as provide input on the terms of agreement.[22] Privacy policies should also be made more accessible through non-written formats and local languages.

III. Right to Choice

The Health Data Management Policy posits that 'participation of an individual in the NDHE [National Digital Health Ecosystem] will be on a *voluntary basis* and where an individual *chooses* to participate, he/she will be issued a Health ID… by the NDHM'[23] (emphasis mine).

1. Violations

Despite the NDHM stating that participation in the digital health ecosystem would be voluntary, I observed that the Health ID has been made mandatory in Chandigarh. In August 2020, the Chandigarh Health Department authorities sent a WhatsApp message to all health workers stating that 'The registration for generating Health IDs is mandatory for all the citizens of our country' (see Figure 1). This was also confirmed by all the health workers I spoke to in Chandigarh.

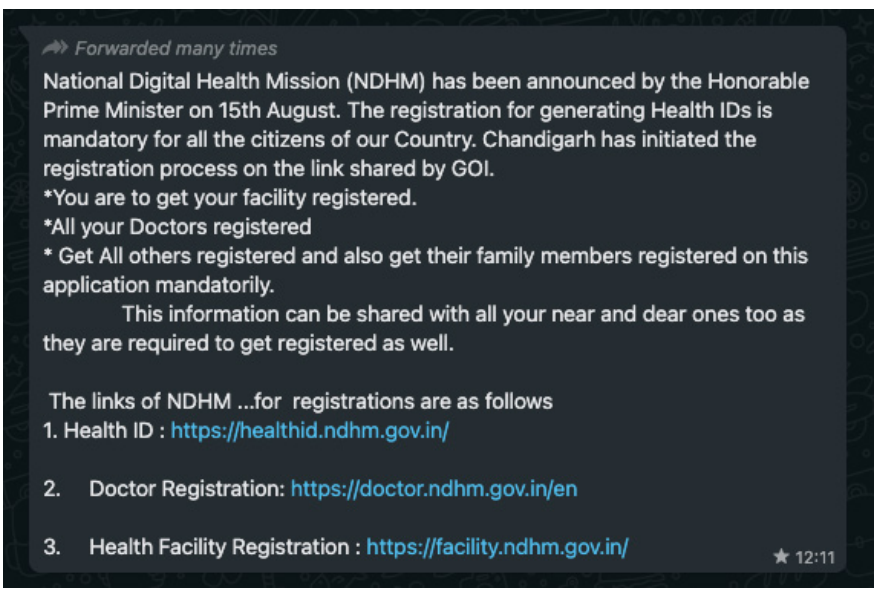

Figure 1: A WhatsApp message sent to health workers in Chandigarh by the Health Department

22 Anja Kovacs & Tripti Jain (n 11).

23 (n 2) 1.

A pharmacist, Mr. Arun,[24] recounted his sister's experience: 'Around 4-5 months ago, my sister, she was pregnant, she went to the hospital…Her [Health] ID was on-the-spot generated at the registration desk' (translated from Hindi). In another case, Dr. Amit,[25] a medical intern with the responsibility of registering the Health ID for patients at a civic dispensary, said that they were not providing medication to patients unless they got a Health ID registered:

> We write on the side of the prescription "health ID and EMR" and... we tell our staff that till I don't sign this [saying] that they [patients] have made a health ID and EMR, you don't give the medication. This is one of the ways to positively influence people. This is a mandated thing for them... It's mandatory because they asked us specifically how many [Health IDs] we made in a day... So they give us targets that this is how much you should achieve in a day. So that's why we have to... force patients or people to make it. So you have to innovate different techniques to tell them this is important.

Besides the lack of a choice in participating in the NDHM ecosystem, there is also a lack of meaningful choice in the digital identification an individual can provide for their enrolment. In the status quo, a Health ID may be registered either through an individual's mobile phone number or through their Aadhaar number. At the same time, most phone numbers are already linked to Aadhaar, and for those phone numbers that are not linked, I observed that this link is being mandated in some places. This happened in the case of Mr. Rizwan,[26] a caterer in Chandigarh who had visited a civic dispensary to get his Health ID made (translated from Hindi):

> Mine [my Health ID] did not get made… Mobile number was not linked to this. [Shows Aadhaar card]... So I did it, ma'am, I went and got it linked just now… When I asked them [health workers], they said if you link your Aadhaar to your mobile number, only then you will get the message for the Health ID on your mobile number.

In some civic dispensaries, the phone number is not even being accepted, with only Aadhaar being permitted for the enrollment. Mr. Jadhav,[27] a multi-purpose worker at a civic dispensary in Chandigarh, explained why this is so (translated from Hindi):

> If you register through an Aadhaar card, the registration form is auto-filled. Because your name, photo, date of birth, address, email ID, mobile number - everything will be saved on Aadhaar, and it will automatically show up in the registration form. But if we register using a mobile

24 Name changed.

25 Name changed.

26 Name changed.

27 Name changed.

> number, all these details have to be manually entered, and many people don't know their own details... It takes me 15 minutes per registration through phone number, and just 5 minutes through Aadhaar. Also, with phone number registration... their Health ID card will not have any photo.

Thus, there are various system-based incentives—which can be conceptualised as structural 'nudges'[28]—to link Health IDs to the Aadhaar, meaning that Aadhaar details in turn get linked to an individual's Personal Health Records ('PHRs') through the Health ID.

Due to the lack of affordable healthcare in India, most patients already do not have a meaningful choice in accessing medical care.[29] Thus, people end up participating in the NDHM ecosystem not because of their willingness to do so, but because of a lack of meaningful choice in accessing quality healthcare if they do not cooperate. Linking healthcare to a digital identification such as Aadhaar furthers this exclusion due to the inequitable nature of digital identification and the existing challenges with Aadhaar's implementation.[30]

The move to mandate participation in the digital health ecosystem reveals the NDHM's understanding of health data to be a 'public good.' In fact, the Economic Survey 2018-19 specifically pitched for data to be treated as a public good in India.[31] Framing data to be a public good is an emerging trend under 'data philanthropy' that has been gaining momentum in recent years after it was introduced by the United Nations Global Pulse.[32] At the heart of this trend is the belief that data sharing through partnerships between private and public entities is a positive act that can be beneficial to the public and can enhance policy action. Since then, various campaigns have been launched globally to promote the philanthropic sharing of personal health information.[33] In a localised context, the NDHM considers health data to be an asset or a resource that can potentially benefit society at large rather than only individuals, and thus may be used to favour the larger national interest of digitising health records over and above an individual's right to choose for themselves. This framework of viewing data as a disembodied public resource is therefore at least partly

28 Daniel Susser, Beate Roessler, Helen Nissenbaum, 'Technology, autonomy, and manipulation' (2019) 8(2) *Internet Policy Review*.

29 Purendra Prasad, 'Medicine, Power and Social Legitimacy: A Socio-Historical Appraisal of Health Systems in Contemporary India' (2007) *Economic and Political Weekly* 3491-3498.

30 Ritika Khera, 'Impact of Aadhaar on Welfare Programmes' (2017) 52 (50) *Economic and Political Weekly* <https://www.epw.in/journal/2017/50/special-articles/impact- aadhaar-welfare-programmes.html> accessed 9 October 2021.

31 Ministry of Finance, Government of India, 'Economic Survey 2018-19' (2019).

32 United Nations Global Pulse, 'Data Philanthropy' (2009 <http://www.unglobal-pulse.org/blog/data-philanthropy-public-private-sector-data-sharing-global-resilience> accessed 9 October 2021.

33 'PatientsLikeMe Launches "Data For Good" Campaign to Encourage Health Data Sharing to Advance Medicine"' (*PatientsLikeMe,* 2014) <https://blog.patientslikeme.com/patient-experiences/patientslikeme-launches-data-for-good-campaign-to-encourage-health-data-sharing-to-advance-medicine/> accessed 9 October 2021.

responsible for its mandate in compulsorily enrolling people into its digital ecosystem.

2. Pathways for change

Voluntary participation and meaningful choice: The participation of individuals in the NDHM ecosystem must remain voluntary. If an individual wishes to get access to healthcare through a specific provider of their choice without their participation in the NDHM, that option must be available to them. Alternatives also need to be made available for accessing health services from other providers that do not require their participation in the NDHM.

Non-exclusion: As seen here, individuals are currently being denied access to medication or doctors if they do not register for a Health ID. To uphold the principle of non-exclusion, strict guidelines relating to the same must be designed and prominently displayed in all health facilities to inform patients about their rights. If there is evidence of denial of health services on the grounds of non-participation in the NDHM, these cases must be independently investigated and institutions found violating this principle must be held strictly liable.

Alternative identification for enrolment of Health ID: Since Aadhaar details are likely to get directly or indirectly linked to the Health ID as analysed here, alternative valid identity proofs such as driving license or passport number—which are not necessarily linked to Aadhaar—should be acceptable for the enrolment of a Health ID. Moreover, system-level 'nudges' that make enrolment through Aadhaar the preferred option must be removed.

All of the above recommendations are grounded in the notion of embodiment and bodily integrity as they recognise the specific harms caused not only to health data but to the bodies and lives of individuals through their health data.

IV. Right to Privacy

An important guiding principle of the NDHM is 'privacy by design' for the protection of a data principal's health data privacy.[34]

1. Violations

Mr. Arun, a member of the NHM Employees Union, pointed out a potential risk to privacy under the NDHM (translated from Hindi):

> [Registering Health IDs] is not the work of any particular post...If you go and tell people that there is a scheme of NDHM, and if you promote it, and if the person is willing to enrol or if you convince him somehow to enrol, then you can also do it... [but] nowadays on social media, TV,

34 (n 2) 14.

> radio, FM etc. they say that if someone asks you for your OTP, don't give it. So fraud [through providing others access to one's private data such as OTP] can happen. We have to be alert.

This cybersecurity risk is aggravated by the poor digital literacy in India: nearly ninety percent of the population are not digitally literate.[35] Ms. Namrata, a data entry operator at a civic dispensary in Chandigarh, shared (translated from Hindi):

> For those [patients] who have bigger phones... I take pictures of the [Health ID] card on their mobile phones and give them… Those with smaller phones get a message. But so many people are illiterate, they don't know how to read the message.

Consider the case of passwords; a password needs to be generated for the Health ID registration when it is through a phone number instead of Aadhaar. Ms. Namrata[36] further added (translated from Hindi): 'Some people find the password difficult to generate... You have to make your own password... After filling it [the form] in fully, there is an option below to provide a password.' Due to the low digital literacy among patients, health workers doing the Health ID registration provide passwords for them. However, these passwords are not protected, as indicated by Dr. Amit, a medical intern:

> We provide a password…. We write the name of the person with the [redacted] as the capital letter and then we use the symbol "@" and then we write the [redacted] of that person as the password. So we tell them this or we write it on the prescription as well that "this is your password". Also once they have their Health ID number they can access it later and change the password according to their convenience.

The patients I spoke to said they did not know how to change this password, nor did they know they were required to, making Health IDs for those lacking digital literacy prone to cyber attacks.

Mr. Arun, a member of the NHM Employees Union, said (translated from Hindi):

> Privacy issues may be there. If someone has some major illness like TB [Tuberculosis] or some contagious disease where the patient does not want to share their history with anyone, then this disease history will go to the doctors. If the doctor's laptop is accessible to anyone, then that information can be passed on to someone else.

In 2015, when the National Aids Control Organisation ('NACO') urged the linkage

35 'A look at India's deep digital literacy divide and why it needs to be bridged' (*Financial Express*, 24 September 2018) <https://www.financialexpress.com/education-2/a-look-at-indias-deep-digital-literacy-divide-and-why-it-needs-to-be-bridged/1323822> accessed 14 July 2021.

36 Name changed.

of Aadhaar numbers of people living with HIV ('PLHIV') to their patient identity cards, many PLHIV began dropping out of antiretroviral programmes for fear of being identified through a breach of their privacy, given the stigma surrounding HIV/AIDS.[37] This incident shows that when people are required to identify themselves to receive healthcare at the cost of their privacy, those with stigmatised health conditions are likely to altogether refuse healthcare. As Mr. Arun points out, this is likely to repeat under the NDHM since patient data is stored in databases accessible to many actors.

Thus, threats to privacy under the NDHM affect not only data, but have wider social consequences for the bodies and lives of people, with the worst affected are individuals living with stigmatised health conditions who are most in need of quality healthcare. A narrow understanding of the right to privacy as being limited to the privacy of data from within a framework that views data as a resource hinders such consequences from coming to light.

2. Pathways for change

Feminist scholars argue that privacy violations are not merely violations of data, but have embodied social consequences leading to violations of people's bodily integrity, autonomy, and dignity.[38] Thus, recommendations for change must consider these broader consequences in the social context of health data.

Cybersecurity protections: Guidelines to ensure that patient data is protected should be created and should include protocols for generating strong, randomised passwords during Health ID registrations if individuals with low digital literacy are unable to do so themselves. There also need to be guidelines devised for how to respond to potential cases of data breach.

Internet access and digital literacy: Since digital literacy and availability of Internet access are key to participation in the NDHM, the baseline digital infrastructure and digital literacy in India need to be strengthened. This would not only help the NDHM's proposed benefits reach communities who are already underserved in the delivery of health services, but also ensure that they can effectively safeguard their digital rights.

V. Right to Exercise Control over Health Data

Under the NDHM, 'true ownership and control of the personal data will remain with data principals.'[39] In other words, the NDHM proposes giving patients the power to exercise control over their own health data through the framework of 'ownership'.

37 Shruti Tomar, 'Linking benefits for AIDS patients to AADHAR triggers privacy concerns' (*Hindustan Times,* 3 April 2017) <https://www.hindustantimes.com/bhopal/linking-benefits-for-aids-patients-to-aadhaar-triggers-privacy-concerns/story-iR6HB8RmqPDaNwkX2Oj5EJ.html> accessed 14 July 2021.

38 (n 12).

39 (n 2) 14.

1. Violations

Most medical officers, health workers, and patients I spoke to in Chandigarh were not aware of what the Health ID is and what benefits they would get from it. Medical officers said that ANMs have received training about the NDHM, but ANMs and Anganwadi workers denied this claim. Ms. Narima, an ANM worker, shared (translated from Hindi):

> We don't know absolutely anything. All this we're all doing by guesswork. That everything is becoming digital, in the future they'll only ask for your Health IDs, then only your treatment will start… That's what we told the public also, that's all we also know about it.

Since community health workers are themselves uninformed, as mentioned by Ms. Narima, local communities are in turn unaware of the proposed benefits of the NDHM. Some health workers are exploiting this information asymmetry by using disinformation to influence patients to participate in the NDHM, as shared by Dr. Amit, a medical intern in a civic dispensary:

> People ask… "what is the use of it [Health ID]? Why am I wasting my time, we are here to just take medicine, let us go", but then we have to tell them something... So we tell them... in the near future for vaccination... this will be required, this will be a mandatory thing to have… I don't think there's any link between the vaccination and Health ID. It's just I think created by the staff to motivate patients to make health IDs... Because there's no reward [or] incentive to the people, or there's nothing that we can provide them for giving their time, so just to make them think that it is worth your time.

Without basic awareness of the nature of their participation in the NDHM, individuals cannot meaningfully exercise any control over their data. In such a scenario, the enrollment of Health IDs to facilitate participation in the digital health ecosystem is reduced to a mere data collection exercise by the state. Mr. Arun, a member of the NHM Employees Union, said (translated from Hindi):

> Government wants to promote this [NDHM] policy. It's a number game... There is government pressure to get a certain number of Health IDs. So it's a number motive to say... "look how many Health IDs we've got generated".

More fundamentally, 'ownership'—as proposed by the NDHM—is not an appropriate framework for data protection because it is embedded in extractive market logics. The reason data ownership is still a popular framework is that policies adopting it understand data to be a resource or capital commodity that can be traded. Such a framework fails to capture the crucial relationships between people's bodies and their data, the power relations governing these relationships, and the centrality of bodily integrity within this

relationship. For instance, data ownership typically entails the right to sell or license data, among other things. This means that by owning something, one can agree to contract or sign away some of one's rights. However, despite data's embodied nature, this is not the way one would think about one's own body—in terms of selling or licensing—indicating that this framework of ownership does not meaningfully capture the realities of how data shapes people's experiences.

2. Pathways for change

People-centric awareness drives, not data collection drives: The state must initiate people-centric awareness drives and provide training to all stakeholders in the NDHM ecosystem instead of focusing on collecting health data of those who are unaware of their participation.

Re-thinking ownership: It would be worthwhile to re-think data ownership in a way that has less to do with capitalist relations of exchange and more to do with feminist thinking of the body. For instance, in sex education, a popular feminist slogan used to teach children about physical boundaries is 'my body belongs to me.' The feminist slogan 'my body is mine' has also extensively been used to oppose sexual violence. In some sense, these slogans indicate a particular form of ownership, one that centres the notion of bodily integrity. As another example, when individuals engage in sexual labour within market logics of commercial sex work, feminists still posit the inviolability of the body as central to that experience. Re-thinking data ownership to move towards more feminist frameworks that value people's experiences and bodily autonomy would benefit patients within digital health infrastructures.

VII. Conclusion

In the era of Big Data, it is pertinent for policy frameworks to meaningfully and critically engage with technological developments more closely. However, for the patient rights discussed in this paper, the NDHM's underlying framework of conceptualising health data as a resource and source of capital is fundamental to why these rights are undermined. In reality, as this paper has shown, harms from data violations deeply impact people's bodies and lives, highlighting the intimate relationship between people's bodies and their data. More importantly, the violations of these rights are not visible when the focus is on market logics that construct data as a tradeable resource. These violations come into picture only when we analytically put bodies back into the policy framework by questioning not only how health data may be harmed, but how people's bodies may be harmed through their data, and how this harm undermines patients' right to healthcare. Failing to recognise the relationship between health data and bodies therefore risks the exclusion and exploitation of patients.

The feminist framework offered in this paper is meant to serve as a starting point for policy discourse around how patient interests may be best served and safeguarded at a

time when they are most threatened in the age of Big Data. Since the developments under the NDHM have been proposed less than a year ago, the recommendations offered here should be trated as an early-stage blueprint for the direction in which we should move if we were to adopt a feminist framework of embodiment. I acknowledge that the practical implementation of these ideas may not always be straightforward and will require further thinking and labour. With these caveats in mind, at the heart of this work remains the firm conviction that the often ignored relationship between our bodies and health data fundamentally challenges our understanding of the datafication of health and influences the policy responses to it. It is my hope that this body of work contributes towards critical thinking about policy frameworks governing health data in the country.

THE CASE FOR AN INDEPENDENT BANK RESOLUTION FRAMEWORK: IDENTIFYING THE FLAWS IN THE CURRENT BANK INSOLVENCY REGIME IN INDIA

Sarthak Sethi and Shashwat Baranwal*

As the COVID-19 financial crisis induces a bank credit contraction of over ₹54,000 crores, and with the RBI issuing a moratorium on Yes Bank deposit withdrawals as a result of insolvency, there is rising panic over the viability of Indian financial market infrastructure, exasperated through the systemic tremors caused by the failure of IL&FS. The introduction of the Insolvency and Bankruptcy Code, 2016, was supposed to ease Non-Performing Asset recovery pressure on banks by creating a time-bound and market-linked resolution mechanism for stressed assets. While the efficacy of the 'new era in Indian insolvency' remains in question, the ratio of gross NPAs continues to rise beyond 12.5%. Keeping cognizance of the precarious position of Indian banking, this paper argues that the risks of bank insolvency are now greater than ever before, while the system in law to contend with such risks continues to remain scattered and ineffective. It is imperative for the Indian economy to construct a new framework and question what would make such a framework effective.

Keywords: *insolvency, banking, liquidation, financial resolution*

I. Introduction

'In a country so dangerous for banking as India, it must be conducted on the safest possible principles'

-John Maynard Keynes[1]

On the 24 July 2020, the Reserve Bank of India's ('RBI') bi-annual Financial Stability Report sent shockwaves through financial markets [2] – It projected a GNPA ratio of 14.7%

* The authors are third-year students at the West Bengal National University of Juridical Sciences, Kolkata.

1 John Maynard Keynes, *Indian Currency and Finance* (Createspace Independent Pub 2011) 201.

2 Reserve Bank of India, *Financial Stability Report Issue No. 21* (Reserve Bank of India, 2020).

for March 2021,[3] Indicative of a cataclysmic rise in stressed-bank assets to the extent of fifteen lakh crore rupees.[4] Stress tests undertaken by the primary regulator of Indian Banking reveal that over five banks may cease to operate as going concerns by the next financial year.[5] This is due to a forecasted inability to meet regulated capital requirements, serving as an acknowledgement of the urgent need for recapitalisation or mergers to increase 'systemic resilience'.[6]

Modern financial and economic systems are structurally dependent on the creation and institutionalisation of healthy banking networks. Commercial banking, capital formation, and the creation of credit lie at the heart of neoliberal economic development.[7] As is explored in subsequent sections of this paper, the highly regulated nature of banking institutions reflects their systemic importance, and the inherent variation in their nature from other commercial business organisations. Banking, simply put, is the process of accepting deposits that are repayable on demand, and using such inflows to lend money and offer other financial services. Commercial banks are banking companies that generate profits from issuing loans, and selling financial products. Banking organisations are critical to an economy – they offer a mechanism to stabilise the demand and supply of credit.

The enforcement of the Capital Adequacy Ratio (under Basel III),[8] the Cash Reserve Ratio and the Statutory Liquid Ratio,[9] as well as the use of Loan Review Mechanisms by the RBI, are all illustrations of *ex ante* approach to risk management in banking.[10] The highly regulated nature of modern banking is reflective of its importance. In India, banks account for over 63% of total assets within the financial system itself – their relative importance to other financial institutions, such as Non-Banking Financial Companies ('NBFCs') or Insurance Companies, cannot be understated.[11]

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3 GNPA Ratio is the Gross Non-Performing Asset Ratio, and is used as a measure of the health of a banking system.

4 ETBFSI, 'Covid – 19 hit: About Rs 15 lakh crore India Inc debt faces stress test' *ETBFSI.com* (31 March 2020) <https://bfsi.economictimes.indiatimes.com/news/industry/covid-19-hit-about-rs-15-lakh-crore-india-inc-debt-faces-stress-test/74906896> accessed 22 December 2020; Govind Bhattacharjee, 'Nip the NPA crisis, now' *The Pioneer* (10 August 2020) <https://www.dailypioneer.com/2020/columnists/nip-the-npa-crisis--now.html> accessed 23 December 2020.

5 RBI (n 2) para 2.16.

6 ibid.

7 Manuela W. Armenta, 'The Financial Sector and Economic Development: Banking on the Role of Human Capital' (2007) 18 Journal of Public & International Affairs 188, 189.

8 Basel Committee on Banking Supervision, *Basel III: A Global Regulatory Framework for More Resilient Banks and Banking Systems* (BIS 2011) 51.

9 Master Circular - Cash Reserve Ratio (CRR) and Statutory Liquidity Ratio (SLR) 2015, RBI/2015-16/98 <https://www.rbi.org.in/Scripts/BS_ViewMasCirculardetails.aspx?id=9905> accessed 13 August 2021.

10 Eva Hupkes, 'Why a special regime for banks?' (2005) 3 Current Developments in Monetary and Financial Law 460.

11 Reserve Bank of India, *Report of the Working Group on Resolution Regime for Financial Institutions* (RBI 2012) para 3.4. 0

Within this very context of fragile financial markets and the innate systemic importance of banking institutions, this paper attempts to argue for the creation of an independent bank insolvency and resolution framework by identifying the flaws of the current regulatory mechanism. In operational terms, insolvency for a bank is an inability to meet financial obligations to creditors, including depositors, and is often characterised as 'bank failure', of which India has an extensive history.[12] The collapse of the Travancore National and Quilon Bank in 1938, a structural collapse in banking in Bengal in the late 1940s, the insolvency of Polai Central Bank, as well as the more recent failure of Global Trust Bank in 2004, all reflect a cyclical history of crony capitalism, inefficient regulation, and reactionary assistance.[13] Despite the global adoption of special regimes in a post-2008 era (such as the American Dodd-Frank Act),[14] bank supervision continues to be viewed through the lens of pre-insolvency/preventive measures. There is limited acknowledgement of the potential insufficiency of these measures, and more importantly, no acknowledgement of post-insolvency resolution measures.

The Insolvency and Bankruptcy Code, 2016 ('IBC 2016') was introduced with the promise of introducing a new era in Indian insolvency, at a time where resolution or liquidation would take 4.3 years on average, and the recovery rate was as low as 14.3% under the SARFAESI Act.[15] A clear creditor hierarchisation and a non-liquidation-based approach through the Corporate Insolvency Resolution Process ('CIRP') has improved both these metrics. CIRP is However, the conceptualisation of the IBC 2016, is centred around corporate debtors, not commercial banks.

The objective of this paper is to build a case for creating a new, comprehensive law that covers bank insolvency. Part II examines the current, scattered regime of bank resolution by analysing the Bank Regulation Act, 1949 ('BRA 1949').[16] After ascertaining its incohesive nature, Part III will not only consider the *de facto* non-applicability of the IBC 2016, but will argue that even if the IBC 2016, is applied to bank insolvency, the legislation will be fundamentally incompatible with the requirements of the banking sector. The paper will then identify the ideal constituting elements of a streamlined resolution mechanism for

12 Julia Kagan and Somer Anderson, 'Bank Failure' (*Investopedia*, 27 May 2020) <https://www.investopedia.com/terms/b/bank-failure.asp> accessed 1 May 2021.

13 Amol Agrawal, 'Banking crises: An Indian history' (*Mint*, 26 February 2018) <https://www.livemint.com/Sundayapp/fjheowjLjiFNsGcjzVZXsO/Banking-crises-An-Indian-history.html> accessed 1 May 2021.

14 Dodd-Frank Wall Street Reform and Consumer Protection Act 2010.

15 Press Trust of India, 'Economic Survey: IBC reduces resolution time to 340 days from 4.3 years' *Business Standard* (New Delhi, 31 January 2020) <https://www.business-standard.com/article/pti-stories/ibc-reduces-resolution-time-to-340-days-from-4-3-years-earlier-eco-survey-120013101463_1.html#:~:text=Economic%20Survey%3A%20IBC%20reduces%20resolution%20time%20to%20340%20days%20from%204.3%20years,-Press%20Trust%20of&text=%22The%20IBC%20proceedings%20take%20340,SARFAESI%20Act%2C%22%20it%20said> accessed 22 December 2020.

16 Banking Regulation Act 1949.

banks by considering the global recommendations of the Financial Stability Board, in Part IV. These principles will then be juxtaposed against the Financial Resolution and Deposit Insurance Bill, 2017. The bill was withdrawn from the floor of parliament.[17] However, the statutory framework it envisaged will be evaluated, considering whether its skeletal structure would operate well in a post-COVID context. Ultimately, the paper seeks to establish the urgent need to introduce a new regulatory system and the precise nature of such a system.

II. The Current Regime

The absence of an actual framework can characterise India's bank resolution 'framework', in its current form; bank insolvency is solved on an *ad hoc* basis, and the regulator is empowered through a network of loosely-connected statutes that enable the central bank's intervention.[18] However, these intervention tools are generalised elements of the regulatory system and are not specifically tailored for resolution of bank insolvency, as will be illustrated below.

The BRA 1949, largely creates generalised provisions, awarding the RBI and Central Government the authority to regulate banking corporations. These generalised provisions include §35A(b),[19] which enables the RBI to 'prevent the affairs of any banking company being conducted in a manner detrimental to the interests of depositors' and §35A(c) allows the RBI to 'secure proper management of any banking company *generally*'.[20]

Reference to insolvency resolution in the statute, however, is made with §35AA,[21] which grants the 'central government the power to authorise the RBI to issue directions to banking companies to initiate the insolvency resolution process'. While §35AA is appropriately tied to the IBC 2016,[22] with 'default' being defined under §3(12), it is not relevant to the scope of this paper.[23] Both §35AA, as well as §35AB are applicable in insolvency proceedings only where the bank is a creditor, not the insolvent party itself.

A. Part III of the Banking Regulations Act, 1949

Part III is titled 'Suspension of Business and Winding-Up Of Banking Companies' and introduces a few provisions for bank insolvency. However, restrictions on the abilities

17 ET Online, 'The Bill that spooked bank customers across India has been withdrawn' (*The Economic Times*, 7 August 2018) <https://economictimes.indiatimes.com/industry/banking/finance/banking/the-bill-that-spooked-bank-customers-across-india-has-been-withdrawn/articleshow/65304709.cms?from=mdr> accessed 1 May 2021.

18 Thomas Galessner and Ignacio Mas, 'Incentives and the Resolution of Bank Distress' (1995) 10 The World Bank Research Observer 53, 57.

19 BRA 1949, s 35A(b).

20 ibid, s 35A(c).

21 ibid, s 35AA.

22 BRA 1949, s 35AA.

23 Insolvency and Bankruptcy Code 2016, s 3(12).

of banking companies to form resolution plans, and a narrow focus on only liquidation or amalgamation, renders Part III dangerously insufficient in contending with the demands of modern insolvency.

As is explored in subsequent parts of this paper, liquidation is only one mechanism to deal with insolvent banking institutions. The presence of systemic risk and the 'too big to fail' phenomenon often require complex resolution of banking groups, as liquidation can result in discontinuity of services, disruption to depositors, and prolonged delays in creditor compensation. The fundamental shortcoming of Part III of the BRA 1949, is its central focus on 'winding down' banking companies, in case of default under §38(1)(a), and 'detrimental' operation to depositors under §37(4). Winding down equates specifically to liquidation, as demonstrated by the appointment of a Court liquidator under §38A, as well as the hierarchisation of creditors under §43A and §45. As demonstrated by the IBC, 2016, which is India's flagship insolvency law, a comprehensive regulation cannot be centred around only liquidation, which frequently results in an erosion of economic value and minimal returns to creditors. Instead, a sustainable insolvency regime must focus on resolution and restructuring schemes, the need for which is amplified in a banking context.

Even within the winding-up mechanism envisaged by Part III, there are significant shortfalls. §42 gives the High Court the power to dispense with meetings of creditors. This is based on the court unilaterally deciding if 'it considers that no object will be secured thereby sufficient to justify the delay and expenses'. §44B further allows the court to place restrictions on the arrangements that have been made between banks and creditors. Cumulatively, therefore, the autonomy of creditors in securing their rights under the BRA 1949, is not achieved and is subject to the discretion of the High Court. The assigned role to the High Court for winding-up banks under Part III can itself can be questioned. All facets of bank operation are subject to special regulation by the regulator. Therefore, it may be intuitive for either the regulator, or a special adjudicatory authority structurally linked to the regulator, to ascertain the potential viability of the bank, and not a bench of the High Court, primarily due to the interconnected nature of the system.

The recognised alternative to liquidation under the BRA 1949, is amalgamation. §44A of the statute lays down the procedure for the amalgamation of banking companies.[24] Historically in India, amalgamation approved (or more frequently enforced) by the RBI has been a crucial means of preventing bank liquidation to sustain operation. When closely analysed, §44A reveals an implicit, yet wholly inadequate, understanding of the need to reconcile shareholder and creditor rights with systemic stability when a bank is insolvent.[25] While the broader stability of our credit systems cannot be threatened, it is significant to reconcile this requirement with the monetary rights of creditors, substantial unsecured creditors, when constructing the resolution or restructuring plan of an insolvent

24 BRA 1949, s 44A.

25 ibid.

bank. §44A is emblematic of this reconciliation, as it requires a draft containing details of the amalgamation of two banks to require the approval of two-thirds of the shareholders of both banks.[26] However, this is the only extent to which such a balance is considered. Fundamentally, therefore, the current regime under Part III chooses to actively ignore the most pressing conflict of bank resolution, which is a balanced recognition of creditor and shareholder rights.[27]

The failure of Yes Bank in March 2020, and the subsequent RBI action that followed, can be used to illustrate further why the BRA 1949, is an insufficient regulatory framework. §45 requires that the Reserve Bank apply to the Central Government, post which it can issue a moratorium in respect of the banking company. It has been frequently noted that prompt action is crucial for successful bank resolution. In the Yes Bank case in March 2020, there was a significant delay in §45 being invoked, resulting in a fall in market capitalisation, consumer distrust, and an erosion in equity value.[28] The two-tiered regulatory model in §45, wherein both the RBI and the Central Government's approval is required to issue a moratorium can potentially diminish prompt regulatory action. The Yes Bank case is also a manifestation of a broader lack of regulatory focus towards the potential dangers of bank insolvency. For over two years, industry experts[29] identified the deteriorating asset quality and liquidity of Yes Bank.[30] However, the absence of a dedicated resolution authority, and the generalised focus of the BRA 1949, prevented the early application of potential resolution measures. This ultimately resulted in a capital infusion to prevent sudden bank failure.[31] The infusion was in-part carried out using State funds, routed through the State Bank of India.

B. Regulatory Tools under the Banking Regulations Act, 1949

The BRA 1949, envisages certain regulatory tools. However, these are not developed for insolvency correction, resulting in a regulatory basket with a combination of tools that are neither diverse nor specifically tailored for resolution. §38A-§50 of the BRA 1949, pertaining to the appointment and functioning of a liquidator.[32] Similarly, §45 of the

26 ibid.

27 Hupkes (n 10) 481.

28 Reserve Bank of India, *Yes Bank Ltd. placed under Moratorium* (Press Release 2019-2020/2022, 2020).

29 Mythli Bhusnurmath, 'The steps that are required to avert another Yes-bank like debacle' *The Economic Times* (16 March 2020) <https://economictimes.indiatimes.com/industry/banking/finance/banking/view-the-steps-that-are-required-to-avert-another-yes-bank-like-debacle/articleshow/74642315.cms?from=mdr> accessed 9 August 2021.

30 CM Vasudev, 'Yes Bank Crisis: Could RBI Have Done This Differently' (*Bloomberg Quint*, 07 March 2020) <https://www.bloombergquint.com/opinion/yes-bank-crisis-could-rbi-have-done-this-differently> accessed 9 August 2020.

31 Reserve Bank of India, *Yes Bank Ltd.: RBI announces Scheme of Reconstruction* (Press Release 2019-2020/2028, 2020).

32 BRA 1949, ss 38A-50.

State Bank of India Act, 1955[33], §57 of the State Bank of India (Subsidiary Banks) Act, 1959[34] and §18 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970[35] allow for the SBI, SBI subsidiaries, and nationalised banks to be liquidated through the central government's order. However, because these provisions are constructed to lend broader regulatory powers and not in the context of a bank resolution, they are not specifically targeted at ensuring continuity of essential functions.[36]

Other tools, including the power to impose a moratorium,[37] the power to supersede bank management,[38] the power to write down debts,[39] and the power to remove directors[40] equip the RBI and central government to place themselves in a position to control decision-making of the bank. However, the lack of reference to how such a decision-making position must be utilised in the resolution process gives birth to an *ad hoc* regulatory framework. The RBI has the authority to intervene based on certain self-identified resolution triggers. The extent and nature of such intervention, however, remains completely undefined. Here, 'extent' implies the degree to which the supervisory body has autonomy in restructuring banks and banking groups, and 'nature' implies the type of resolution processes available to the regulator. This lays the ground for three significant problems.

Firstly, the intrinsic requirement of a competent response to bank insolvency is prompt action.[41] Financial assets, due to their volatile nature, can dissipate rapidly, and a delayed response can lead to a collapse in public confidence, a deterioration in asset value, as well as a bank run.[42] A dilution of decision-making authority by vesting powers within the High Court, as seen under the BRA 1949, can induce time delays that permanently diminish the viability of the resolution process. Even if authority is solely concentrated with the regulator, which is the RBI, the absence of detailed intervention timelines removes the statutory burden for timely action. India's flagship corporate insolvency law, the IBC 2016, has been designed to be inherently structured around a 180-day time frame. This is reflective of the view that any cohesive insolvency law must construct its provisions

33 State Bank of India Act 1955, s 45.

34 State Bank of India (Subsidiary Banks) Act 1959, s 57.

35 Banking Companies (Acquisition and Transfer of Undertakings) Act 1970, s 18.

36 Bank of England Prudential Regulation Authority, 'Ensuring operational continuity in resolution: reporting requirements' (2017) Policy Statement PS10/17 <https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/policy-statement/2017/ps1017.pdf> accessed 13 August 2021.

37 BRA 1949, s 45.

38 ibid, s 10BB.

39 ibid, s 20A.

40 ibid, s 36AA.

41 Tobias M.C. Asser, *Legal Aspects of Regulatory Treatment of Banks in Distress* (International Monetary Fund 2001) 60, 61.

42 Marc G Quintyn and David S. Hoelscher, *Managing Systemic Banking Crises* (International Monetary Fund 2003) 4.

strictly focusing on the need for urgent, rapid resolution.[43]

Secondly, commercial banks, particularly large, systemic banks, carry out several financial operations, and there exists overlapping functionalities of different regulatory bodies, including the RBI, SEBI, the PFRDA, and the IRDAI.[44] As lack of liquidity strikes all operational duties of a financial institute, there is an inevitable requirement to consolidate the action of all regulatory bodies, while maintaining the primacy of the central bank, that is the RBI. There is no statutory recognition of the specific mandates of these market supervisors in case of insolvency, limiting the compounded safeguarding effect that consolidated regulatory action can have. However, it must be identified that there has been recognition of the general need for consolidated supervision of Financial Conglomerates through the formation of the Inter Regulatory Forum ('IRF').[45]

Thirdly, the 2014 'Working Group on Resolution Regimes for Financial Institutions' correctly identified that resolution powers in the current regime apply only to specific categories of licensed financial institutes on a solo basis.[46] The broader holding company of the financial institution or a subsidiary of such institution are excluded. The regulator cannot extend the resolution process to a subsidiary of the regulated entity, or the holding company of the entity, despite their respective regulatory status. Given the interconnected nature of Financial Conglomerates, a comprehensive resolution is effective only when it successfully restructures all limbs of the institution.[47]

Overall, it is identifiable that the current regime for bank insolvency is defined by lacunae that restrict rapid yet sustainable and balanced resolution proceedings. This paper argues that the current regime is centred around generalised regulatory autonomy applied on an *ad hoc* basis. While it may be theoretically argued that the generalised regulatory autonomy can be deployed to plug lacunae in regulation, this paper emphasises that complex insolvency issues can be most optimally resolved through holistic, insolvency-specific provisions. This argument is consolidated in subsequent sections of this paper. However, before considering the construction of an ideal independent regime, this paper will establish the non-viability of the application of the general insolvency regime of the

43 §5(14) and §12 of the IBC 2016 hold that the Corporate Insolvency Resolution Process must be completed in 180-days.

44 The Reserve Bank of India (RBI) is India's Central Bank; The Securities and Exchange Board of India (SEBI) is the regulator of commodity and security markets; The Pension Fund Regulatory and Development Authority; The Insurance Regulatory and Development Authority (IRDA) regulates insurance companies.

45 Reserve Bank of India, *Meeting of the FSDC Sub Committee* (Press Release 2011-2012/1491, 2012); The sub-committee of The Financial Stability Development Council (FSDC) proposed setting up an inter-regulatory forum to improve cooperation in the supervision of Financial Conglomerates.

46 Reserve Bank of India (n 11) 3.23.

47 Reserve Bank of India, *Report of the Working Group on Monitoring of Systemically Important Financial Intermediaries* <https://rbidocs.rbi.org.in/rdocs/PublicationReport/Pdfs/53601.pdf> accessed 9 August 2021.

country, which is the IBC 2016, through the identification of key differences between regular corporate debtors, and banking institutions.

III. Non-viability of the Insolvency and Bankruptcy Code, 2016

An academic dissection of Indian insolvency necessarily requires a study of the IBC 2016, a landmark legislation that instituted a previously absent ecosystem of organised insolvency within the economy. As of May 2020, the data by the Insolvency and Bankruptcy Board of India reveals that over 3,774 cases have been filed, with a closure rate of 43%, resulting in 2,170 unclosed cases crossing the 330-day maximum for resolution or liquidation.[48] Within closed cases, only 14% of proceedings result in a successful resolution under Chapter II of the IBC 2016. It is outside the ambit of this paper to evaluate the broader efficiency of the process laid down under the IBC 2016, itself.[49] However, these figures illustrate the rapid and pervasive deployment of the statutory process under the IBC 2016, since December 2016. Therefore, it becomes pertinent to consider if the IBC 2016, as the dominant 'corporate debtor' resolution system in the economy, holds relevance in a banking context, requiring this paper to answer two sequential questions.

A. Applicability of §227 of the IBC 2016 to Banking Companies

The first question requires identification of whether the IBC, 2016, can be applied to the banking sector at all. §3(8) defines a 'corporate debtor' as a corporate person that owes a debt to any person.[50] This definition requires us to consider further whether a banking organisation is recognised as a legitimate corporate person. §3(7) defines a 'corporate person' as 'any person incorporated with limited liability under any law for the time being in force'.[51] This criteria is dully fulfilled. However, §3(7) is conditional.[52] It excludes financial service providers, requiring us to test banking organisations against the definition of financial service providers ('FSP'), which is found under §3(16)[53] and §3(17).[54] 'A person engaged in the business of providing financial services in terms of authorisation issued or registration granted by a financial sector regulator', is a financial service provider. The ambit of financial services includes 'accepting deposits', 'managing assets consisting of

48 NBCTV18, ' 6% of total and 14% of closed cases find resolution under IBC so far' *CNBCTV18* (20 May 2020) <https://www.cnbctv18.com/legal/6-of-total-and-14-of-closed-cases-find-resolution-under-ibc-so-far-5964301.htm> accessed 23 December 2020.

49 Sreyan Chatterjee, Gausia Shaikh, and Bhargavi Zaveri 'An Empirical Analysis of the Early Days of the Insolvency and Bankruptcy Code, 2016' (2018) 30 National School of India Review 89-110 <https://www.jstor.org/stable/pdf/26743938.pdf?refreqid=excelsior%3Af9ed32ae989dec66431397490bbd4872> accessed 23 December 2020.

50 IBC 2016, s 3(8).

51 ibid, s 3(7).

52 ibid.

53 ibid, s 3(16).

54 ibid, s 3(17).

financial products belonging to another person' or activity related to 'payment instruments or payment services'. Therefore, a bank constitutes a financial service provider and is excluded from being directly subject to IBC 2016 provisions.

However, §277[55] deals with the power of the Central Government to notify financial service providers that may be included within the ambit of the IBC 2016. The Central government is granted with authority to, if it considers necessary, 'notify financial service providers or categories of financial service providers for the purpose of their insolvency and liquidation proceedings, which may be conducted under this Code'. It must be identified that this does not exclude the construction of an alternative regime in reference to a bank. The provision has a qualifier; it is 'notwithstanding any other law for the time being in force'. Therefore, we have established that under §227, the IBC 2016, can be potentially applied to banking institutions.[56] This application is not direct or automatic. Instead, it is indirect and requires the Central Government to deliberately include banking institutions within the ambit of the IBC 2016. This immediately leads to the question of whether the IBC 2016 has been applied to banking institutions. In November of 2019, the central government introduced rules under §227 to bring several categories of Non-Banking Financial Corporations under the ambit of the IBC 2016.[57] This is the only extent to which financial companies have been included within the IBC 2016 and is non-inclusive of banks. However, non-inclusion in the status quo does not imply exclusion in the future. Hence, the IBC 2016, is not currently applicable to banks. Technically, it may be made applicable in the future. It is further argued that if the government chooses to do so, in the future, then such an application would be non-viable and undesirable.

B. Untenable Use of a General Insolvency Law for a Banking Company

The question of applicability of the IBC 2016 to banking institutions is emblematic of a more extensive debate between general insolvency laws, and special regimes for special corporate institutions. A comprehensive analysis of these different systems must be based on what separates banks from other corporate debtors. These differences between regular corporate entities, and banks, subsequently affects the nature of their insolvency and also their regulation.

Primarily, banks produce and commoditise, a distinctly different type of product than other corporate entities. This permeates into all facets of banking operation. Conventional corporate entities produce goods, services or widgets. Banks, however, generate credit and other 'financial widgets'.[58] While a conventional corporate entity can potentially

55 ibid, s 277.

56 ibid, s 227.

57 Ministry of Corporate Affairs, 'Notification S.O. 4139(E)' (The Gazette of India: Extraordinary, 18 November 2019) <https://www.mca.gov.in/Ministry/pdf/NotificationFSPs_18112019.pdf> accessed 24 December 2020.

58 Simon Gleeson and Randall Guynn, *Bank Resolution and Crisis Management: Law and Practice* (OUP 2016) 3.

continue to produce and operate despite insolvency and an inability to pay creditors, for banks, insolvency equates to a fundamental inability to produce financial widgets at all, a phenomena heightened by banking regulation and liquidity requirements. General insolvency laws are premised on this ability to continue as a going concern while insolvency proceedings are ongoing, upto the point of liquidation. This not only allows for possible restructuring or amalgamation but improved collection value on assets even in case of liquidation. This intention is identifiable in §5(26) and §20(1) of the IBC 2016.[59] Banks however cannot continue to produce their products, which are financial liabilities that operate as money, when they are plagued with solvency issues. Moreover, as both bank's operational (depositors) and financial creditors essentially deal with financial credit itself, the distinguishing line between the two is effectively non-existent. This limits the bank's ability to continue drawing from operational creditors to function as a going concern, as a normal company would.[60] More importantly, it must be noted that the entire IBC 2016 framework relies on separating operational and financial creditors. For example, under §5(26)[61] the Committee of Creditors is usually composed of only Financial Creditors, with limited exceptions.[62] A financial creditor files an application under §7, whereas an operational creditor files an application under §9.[63] Deposits by customers form part of the regular 'operations' of a bank and are the 'commodity' the bank offers as a product.[64] However, §5(7) defines a financial creditor as 'any person to whom a financial debt is owed'.[65] This definition necessarily includes depositors and illustrates how the conventional differences between operational and financial creditors, on which the IBC 2016 is based, do not apply to banks, as almost all banking activities are intrinsically financial.

Banks differ from conventional corporate entities because their existence as a going concern depends on public confidence in their ability to exist as a going concern. Public negative sentiment has a compounding effect, causing several depositors to withdraw at once, which induces more depositors to withdraw, breaching a bank's short-term cash reserves in a phenomenon known as a 'bank run'.[66] This also links to the idea of several banks being

59 §20(1) states that the 'interim resolution professional shall make every endeavour to protect and preserve the value of the property of the corporate debtor', and §5(26) refers to an insolvency resolution plan as a 'going concern'. This signifies a statutory intention to maintain operation as a going concern.

60 Gleeson and Guynn (n 58).

61 IBC 2016, s 5(26).

62 C. Scott Pryor and Risham Garg, 'Differential Treatment Among Creditors Under India's Insolvency and Bankruptcy Code, 2016: Issues and Solutions' 94 (2020) American Bankruptcy Law Journal 123, 127.

63 §7(1) allows for a financial creditor to directly file for initiation of the resolution process, while §8 treats operational creditors differently, requiring them to 'deliver a demand notice of unpaid operational debt'.

64 Julia Kagan and Khadija Khartit, 'Bank Deposits' (*Investopedia*, 18 December 2020) <https://www.investopedia.com/terms/b/bank-deposits.asp> accessed 1 May 2021.

65 IBC 2016, s 5(7).

66 Justin Pritchard, 'The Impact of a Bank Run on Banking Institutions' (*The Balance*, 10 March

'too big to fail'. Therefore, while the adverse effects of a conventional insolvent company shutting down through liquidation are limited to shareholder, employee and creditor losses, insolvency resulting in bank failure can be catastrophic for the entire economy. The loss of credit can shake public confidence in banking institutions and financial markets as a whole, resulting in bank runs and cascading insolvencies across the entire system. This systemic effect causes a contraction in credit that diminishes economic output. However, there exist even more potentially dangerous effects. Cumulatively, banking operation is deeply linked to the maintenance and functioning of modern payment systems. A bank failure risks damaging the operation of such payment systems, consequently limiting commercial activity, and production.[67] Therefore, it becomes imperative to consider that general insolvency laws do not account for the dangers of banking insolvency, the effects of which are exponentially greater than the collapse of a singular corporate entity that is not systemically important. The use of public funds to bail out 'too big to fail' institutions is justified on the grounds that the potential damage to the economy, based on multipliers, outweighs the cost of the bail-out.[68] Given that 86% of closed IBC 2016 cases processed through the NCLT involve liquidation, this general insolvency law is not structured to recognise the dangers of bank failure, reflecting the non-viability of its application.

The reasoning in Part III so far has been based on structural differences. We will now analyse how the IBC 2016, is procedurally incompatible with bank insolvencies if it was to be applied. §6, §7, §30 amongst others, are reflective of a creditor-driven approach, formulated around collective action to improve bargaining power and centralised coordination to limit delays.[69] However, this procedure does not naturally lend itself onto bank insolvencies for two reasons. Firstly, conventional corporations tend to have a relatively lower number of creditors. In contrast, banks have millions of depositors who technically qualify as financial creditors under the IBC 2016. This makes centralised coordination, or efficient collective action, a near non-factor in the insolvency process, due to the logistical and logical infeasibility. The second reason is linked to the idea that the market regulator oversees all suspensions, initiations, and restrictions of banking activity. It is in the nature of modern banking to be regulator-driven, and hence it is procedurally incompatible for insolvency initiation or bank resolution powers to be vested with an infinitely diverse creditor base.

There is also the potential discrepancy of the trigger of the insolvency. Under general

2020) <https://www.thebalance.com/understanding-bank-runs-315793> accessed 23 December 2020.

67 ibid.

68 Commission on Growth and Development, 'Globalization and Growth Implications for a Post-Crisis World' <http://documents1.worldbank.org/curated/en/180311468174918324/pdf/Globalization-and-growth-implications-for-a-post-crisis-world.pdf> accessed 01 May 2021.

69 §6 and §7 assign creditors as the persons with authority to initiate the resolution process; §30 vests the power of approval of a resolution plan with the committee of creditors as well, exemplifying a creditor-centric approach.

insolvency laws, including the IBC 2016, the corporate debtor failing to pay creditors can trigger insolvency proceedings, subject to certain minimum monetary standards. This is an incompatible procedural mechanism for banks, as banks are likely to continue paying creditors despite capitalisation issues due to a consistent inflow of deposits by virtue of their financial product positioning. It is the burden of the regulator to monitor a bank's capital and reserves to identify when its balance sheet is in a position that is nearing insolvency or is insolvent. Waiting for a recognisable default to creditors, in bank insolvency, heavily increases the risk of overall failure or liquidation. Therefore, the procedure laid down under the IBC 2016 to trigger resolution proceedings is not optimal for banking institutions.

This paper has extensively addressed the idea of complexity in both banking operation, and regulation. This complexity compounds due to the aforementioned systemic risk. The process of concentrating managerial control with a Resolution Professional under the IBC 2016, is another facet of general corporate insolvency law which is incompatible with banking institutions. The positions of directors in banks are usually reserved for individuals with specific, professional experience in banking and finance. This claim is not just based in common practice; it is mandated as under §10A of the BRA 1949. Resolution Professionals on the other hand, are not trained or required to be experienced with such affairs, specifically.

Overall, therefore, an analysis of the current general insolvency law in the country reveals to us that there is valid authority in law for the IBC 2016 to be enforced for bank insolvencies, through §227. However, even if it is technically permissible, such a paradigm is undesirable. Conventional corporate entities and banks offer distinctly different services, and the financial nature of a bank's 'product' is not accounted for in the IBC 2016, ecosystem. Systemic risk, varied stakeholder positions and incompatible procedure, as explained above, is why it is non-viable to apply the IBC 2016, in a banking context.

IV. Identifying An Ideal Framework

This paper has currently identified the inadequacy of the law currently in force, and has further recognised that the alternative system that can be enforced, which is the general corporate insolvency law, is incompatible with the complex demands of bank insolvency. Given the lacunae and absence of appropriate resolution tools in the current framework, it is intuitive to argue the urgent need for parliament to legislate a new insolvency regime in the banking context. The COVID-19 economic crisis has accentuated the urgency of this need, and the validity of this argument is heightened when it is considered that in 2017, the legislature did introduce a bill to reform financial resolution.[70] This serves as a legislative recognition of the ideas put forward by this paper.[71] Therefore, it is important to consider

70 Financial Resolution and Deposit Insurance Bill 2017.

71 Remya Nair, 'Govt withdraws FRDI bill in Parliament following backlash' (*Mint*, 7 August 2018) <https://www.livemint.com/Industry/Ff29jhSKgcOxZkjkipHY5K/Govt-withdraws-FRDI-Bill-from-Lok-Sabha.html> accessed 23 December 2020.

what principles and core attributes lend to the construction of a good bank insolvency law.[72]

A. Financial Stability Board: Recommendations

In April 2009, in the aftermath of the 2008 subprime-mortgage crisis, the Financial Stability Board ('FSB') was established to create an international body to monitor the global financial system, through coordination of national financial authorities, and more importantly, the development of regulatory policy.[73] In October 2011, following extensive research, and consultation with major G20 economies, the FSB (funded by the Bank for International Settlements) developed the 'Key Attributes of Effective Resolution for Financial Institutions'.[74] This paper places heavy emphasis on the mechanisms proposed by the FSB, as in 2014, the RBI itself recognised the comprehensive nature of the document. In 2014, the 'RBI Working Group on Resolution of Financial Institutions' based its India specific recommendations on the larger framework within the FSB document. There are no strict jurisprudential principles regarding financial system stability, other than a general recognition of the need to create prudential regulation that strengthens the international banking system. Creating effective prudential regulation, in furtherance of the goal of systemic stability, requires an approach specifically tailored to the regulatory demands of each financial issue. Therefore, in the context of bank insolvency, fulfilling the goal of systemic stability requires a tailored focus on bank insolvency principles. Given the nascent stage of development of such principles, the FSB Key Attributes are the central reference point,[75] as illustrated by the fact that several jurisdictions have adopted the FSB recommendations in constructing their-post 2008 laws, effectively justifying this paper's reliance on the same.[76]

Underlying a successful legal framework should be an understanding of what the framework is designed to achieve. A well-designed bank insolvency law must have the objective of resolving banks while trying to limit systemic disruption, ensure continuity of critical services, and recognise the rights of creditors of the banks. The primary attribute to consider is that a good law must apply not only to systemically important, regulated

72 FE Bureau, 'Govt: No decision to reintroduce FRDI Bill' *Financial Express* (28 July 2020) <https://www.financialexpress.com/industry/banking-finance/govt-no-decision-to-reintroduce-frdi-bill/2036781/> accessed 23 December 2020.

73 Financial Stability Board, 'History of FSB' (Financial Stability Board) <https://www.fsb.org/about/history-of-the-fsb/> accessed 23 December 2020.

74 Financial Stability Board, 'Key Attributes of Effective Resolution Regimes for Financial Institutions' (Financial Stability Board, October 2011) <https://www.fsb.org/wp-content/uploads/r_111104cc.pdf#:~:text=The%20objective%20of%20an%20effective,shareholders%20and%20unsecured%20and%20uninsured> accessed 23 December 2020.

75 Financial Stability Board, 'Resolution of Systemically Important Financial Institutions' (Financial Stability Board, November 2012) <https://www.fsb.org/wp-content/uploads/r_121031aa.pdf> accessed 23 December 2020; Following the introduction of its recommendations, several jurisdictions, including the United States of America, Australia, Germany, the United Kingdom, and several others, relied on the FSB when reforming their systems.

76 Financial Stability Board (n 75).

bank institutes. It should have the authority to extend to holding companies, unregulated subsidiaries, or other unregulated entities with a larger financial conglomerate group that the specified banking institution is a part of.

Having understood the scope of the resolution regime, the FSB recommends the adoption of a resolution authority. This paper specifically identifies, however, that in the absence of a cohesive statute to coordinate the overlapping operations of financial regulators in the current regime, such a resolution authority should either be empowered under the ambit of the RBI, or should be intrinsically linked to the RBI, as the RBI is the primary banking supervisor. Post-establishment of the primacy of an RBI-linked Resolution Authority, the statute must clearly identify the degree of authority of other regulatory boards, especially in instances of multi-functional financial conglomerates, where the extent of financial services offered by the corporate group extends beyond just banking services. While transparency, independence, stable governance, adequate funding, etc. are elements of a generally well-functioning institution, their specifics are outside the scope of this paper.[77]

B. Resolution Tools in an Ideal Framework

1) *Liquidation*

A resolution authority must be equipped with the appropriate **tools** for resolution. All tools need to be deployed keeping in mind central objectives – maintaining continuity of core services, limiting creditor losses, and minimising use of public funds. The least complex tool is liquidation itself, involving the closure of the bank, withdrawal of license by the regulator, and a *pro rata* distribution of liquidated assets, based on a specific hierarchy of creditors.[78] It must be acknowledged that despite several regimes emphasising a resolution-first approach, liquidation of a non-viable entity can actually promote health of the financial system. The Financial Sector Legislative Reforms Commission correctly identified that it is not efficient to resolve all bank failures and that in specific circumstances, if systemic stability is maintainable, failure of weak banks is a reflection of market forces and improper management.[79] The regenerative market process can potentially free capital, and the tool of liquidation is a desirable mechanism in such a circumstance. However, a special regime for bank insolvency must identify the tedious, long-drawn nature of liquidation and introduce time-bound measures to prevent asset value erosion.[80]

77 Meetika Srivastava, 'Good Governance – Concept, Meaning and Features: A detailed Study' (2010) SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1528449> accessed 23 December 2020.

78 *Pro rata* signifies a proportionate allocation of costs or resources.

79 Government of India, 'Report of the Financial Sector Legislative Reforms Commission' (*Department of Economic Affairs*, March 2013) 69 <https://dea.gov.in/sites/default/files/fslrc_report_vol1_1.pdf> accessed 23 December 2020.

80 Claire L. McGuire, 'Simple Tools to Assist in the Resolution of Troubled Banks' (2012) The World Bank <http://documents1.worldbank.org/curated/ar/271191468330277052/

2) *Purchase and Assumption*

Another tool in the statutory arsenal of the insolvency regime, as recommended by the FSB and the 2014 Working Group, is of Purchase and Assumption ('P&A'), which differs significantly from liquidation, despite also involving closure of the failed institution.[81] While the primary bank's license is withdrawn, a different bank purchases its assets, and assumes its liabilities. This mechanism can take several forms – a P&A of the entire bank portfolio, a P&A involving specific asset categories, or a P&A involving a put option, amongst others. Irrespective of the specific variation of the P&A, it allows for continuity of services, does not require public funds, allows stronger institutions to absorb risk, and most importantly, maintains access to depositor accounts.

3) *Bridge Banks and Bad Banks*

It is important to consider, however that in several cases, immediate P&A is not viable. Due diligence and asset valuation can be a time-consuming process. The resolution authority can create temporary institutions for the operations of the failed bank to be transferred while the appropriate long-term solution is identified. These temporary institutions are 'bridge banks'.[82] The statute must recognise their ambit and operation and means of funding, as bridge banks are an essential tool in ensuring continuity of services. Another potential mechanism is creating 'bad banks', which are asset restructuring and asset management companies that are set up to acquire non-performing and high-risk assets.[83, 84] This ensures that the balance sheet of the 'good bank' is cleared. Asset management companies of this nature are often ineffective if not State or market-funded, as high liquidity is required for the bad bank to operate, and smaller, private bad banks cannot purchase holdings at a large scale. Inefficient asset management can result in a transfer of bad holdings from one institution to another.[85] There is clear executive and legislative support for creating a

pdf/680200WP0Box360k0Resolution0Toolkit.pdf> accessed 23 December 2020.

81 Federal Deposit Insurance Corporation, 'Purchase and Assumption Agreement All Deposits Among Federal Deposit Insurance Corporation, Receiver of First National Bank Savannah, Georgia Federal Deposit Insurance Corporation and The Savannah Bank, N.A., Savannah, Georgia' (*Federal Deposit Insurance Corporation*, 25 June 2010) <http://documents1.worldbank.org/curated/ar/271191468330277052/pdf/680200WP0Box360k0Resolution0Toolkit.pdf> accessed 23 December 2020.

82 ibid.

83 Dorothea Schafer and Klaus F. Zimmermann, 'Bad Bank(s) and Recapitalization of the Banking Sector' (July 2009) ResearchGate <https://www.researchgate.net/publication/225652160_Bad_Banks_and_Recapitalization_of_the_Banking_Sector> accessed 23 December 2020.

84 Cleartax, 'Asset Reconstruction Companies (ARCs) – Business Model' (*Cleartax*, 5 June 2020) <https://cleartax.in/s/asset-reconstruction-companies arcs#:~:text=An%20asset%20reconstruction%20company%20is,or%20associated%20securities%20by%20itself.&text=The%20ARCs%20take%20over%20a,recognised%20as%20Non%2DPerforming%20Assets> accessed 23 December 2020.

85 HT Correspondent, 'For Raguram Rajan, bad bank for bad loans wasn't a great idea, his new book reveals' *Hindustan Times* (3 September 2017) <https://www.hindustantimes.com/india-news/for-raghuram-rajan-bad-bank-for-bad-loans-wasn-t-a-great-idea-his-new-book-reveals/

national Bad Bank scheme in the 2021 Union budget as well – a recognition of the need to contend with the rapid rise in stressed and non-performing asset holdings.[86]

4) *Bail-In Instruments*

In several instances, statutorily recognised bail-in may be required, which involves converting or writing down debt to equity. While this creates the potential for negligent use of public funds, a healthy resolution regime may prefer bail-in to temporary public ownership. The latter involves the bank continuing as a going concern, but at the cost of the government assuming the insolvent institution's liabilities. A highly concentrated, undercapitalised banking system makes absorption of non-performing assets through P&A or bridge banks difficult, placing a heavy fiscal burden on the State. The State is pressured to ensure continuity of services. Bail-ins are an undoubtedly controversial instrument, and their applicability in developing economies has been questioned as well.[87] The potential idea of 'using' depositor money for recapitalisation generates discomfort. However, they are a powerful alternative to the outright use of taxpayer resources in bail-outs and public ownership. Admittedly, while their use in a banking context in India is unlikely**,** legislators may (and have already) considered the value in the potential use of bail-in instruments.

5) *Contractual Netting and Set-Off*

Complex financial transactions often involve contractual netting and set-off rights, terms for acceleration of the contract, or early rights to terminate.[88] Counter-parties often invoke these contractual provisions in an attempt to solidify their monetary interests.[89] However, this can inhibit the overall resolution process as several resolution tools rely on seamlessly transferring asset groups and liabilities onto purchasers or bridge banks. Therefore, a healthy framework must ensure that the initiation of resolution proceedings does not trigger a chain of contractual netting or set-off transactions by counter-parties. At minimum, the resolution authority should be empowered by the framework to order a temporary stay on contractual netting or early termination rights to ensure a stable initiation of resolution proceedings. However, a difficult balancing act must be achieved here wherein counter-party rights cannot be absolutely ignored; any limitations on counter-

story-12qJsFtYGvLDX3tlf5yWNN.html> accessed 23 December 2020.

86 ET Bureau, 'Why Budget proposal for setting up of a bad bank is a good idea' *The Economic Times* (2 February 2021) <https://m.economictimes.com/industry/banking/finance/banking/why-budget-proposal-for-setting-up-of-a-bad-bank-is-a-good-idea/articleshow/80639840.cms> accessed 9 August 2021.

87 Prasenjit Bose, 'FRDI Bill, 2017: Inducing Financial Instability' (*EPW engage*, 30 December 2017) <https://www.epw.in/engage/article/frdi-bill-2017-issues-and-concerns> accessed 9 August 2021.

88 Vincent R. Johnson, 'International Financial Law: The Case Against Close-out Netting' (2015) 33 BU Int'l LJ <https://www.bu.edu/ilj/files/2015/04/Johnson-The-Case-against-Close-out-Netting.pdf> accessed 01 May 2021.

89 ibid.

party rights must be only to the extent that they aid the resolution process and overall financial stability.[90]

6) *Creditor Hierarchy*

In previous sections, this paper identified that the current framework in law does not balance systemic stability with creditor rights, a dilemma for insolvency regimes acknowledged by the FSB. An ideal resolution framework within the statute itself should clearly distinguish a hierarchy of creditors. Within the hierarchy of claims, losses must be absorbed by equity shareholders first. Departures from such hierarchy should be based on reasoning expressly recognised within the law itself to prevent an *ad hoc* exercise of powers. Resolution tools should be employed in a manner where 'no creditor is worse off than in liquidation', such that creditors have a right to compensation if they do not receive the minimum viable account they would receive from liquidation.[91] This principle of no creditor being worse off than in liquidation ensures that choosing resolution over liquidation should not result in creditor loss in pursuance of systemic stability.

V. Financial Resolution And Deposit Insurance Bill, 2017

Bill No. 165 of 2017 was introduced in the Lok Sabha as the Financial Resolution and Deposit Insurance Bill, 2017 ('FRDI Bill 2017').[92] It served as a comprehensive law designed around the insolvency of financial institutions. Due to political factors and public pressure, the bill was withdrawn.[93] However, this paper will consider the purely legal merits of the bill, its eighteen chapters, and a hundred and forty-six provisions. The bill, despite its withdrawal, was a parliamentary recognition of both the potential, and the requirement, of a new regulatory framework. It is argued that the bill acts as a central reference point when considering the specific applicability of the ideal principles of bank resolution, as identified above. This paper argues that the FRDI Bill 2017, while flawed in its implementation of some aspects of resolution, laid out a more extensive system that was comprehensive, efficient, and built on the appropriate principles of bank insolvency. This comprehensive nature of the 2017 bill is precisely why its skeletal structure can potentially operate as an efficient foundation for a newly introduced legislation by parliament.

90 GlobalCapital, 'Close-Out Netting & Set-Off Under U.S. Banking Insolvency Law' (*GlobalCapital*, 18 August 2003) <https://www.globalcapital.com/article/k65plmtl2nyd/closeout-netting-setoff-under-us-banking-insolvency-law> accessed 23 December 2020

91 Edoardo Martino, 'The Bail-in Beyond Unpredictability: Creditors' Incentives and Market Discipline' (2020) 21 (4) European Business Organization Law Review 805 <https://link.springer.com/article/10.1007/s40804-020-00188-7#:~:text=Market%20Discipline%20and%20Competing%20Policy,liquidated%20(the%20NCWO%20principle)> accessed 23 December 2020.

92 Financial Resolution and Deposit Insurance Bill 2017.

93 Remya Nair (n 71).

A. Merits of the FRDI Bill 2017

The Bill arranges its provisions under eighteen chapters, sequentially covering the formation of the 'Resolution Corporation', the categorisation of systemically important financial institutions, the development of deposit insurance, restoration and resolution plans, viability risks, liquidation, and other miscellaneous provisions. It can be identified, particularly when studying Chapter X, that several elements of the FRDI Bill 2017 are specifically based on the FSB Attributes.[94] The first structural merit of the bill is that it establishes an independent Resolution Corporation, and links it to primary market regulators, by granting an *ex officio* position to RBI members, amongst other regulatory bodies, under §4(2)(b).[95] Under §13(1), the Resolution Corporation can resolve, liquidate, and administer specified service providers.[96] To be able to undertake these functions, the Resolution Corporation is vested with the same powers as a civil court trying a suit, under §13(2).[97] More importantly, the statute centralises the deposit insurance mechanism to the Resolution Corporation by repealing the Deposit Insurance and Credit Guarantee Corporation Act, 1961.[98] Deposit insurance is pivotal to securing depositor rights, especially in instances of liquidation. Consolidation of deposit insurance authority with the Resolution Corporation itself improves the efficiency and pace of bank insolvency resolution. §21(1) also upholds the idea that a healthy insolvency regime minimises exposure of public funds in resolution – deposit insurance premium is to be collected from the insured service providers itself, as well as the 'fees for resolution'.[99]

§36(2)[100] is cognizant of the need to include holding companies, and unregulated subsidiaries of financial institutions, within the ambit of the resolution authority when dealing with large financial conglomerates. §41[101] envisages the appropriate need for annually revising restoration plans, a provision that encourages regulatory flexibility. §47[102] under Chapter IX crucially holds that entry into resolution 'cannot cause early termination of a contract', a safeguard envisaged and recommended by the FSB. Additional safeguards can be found under §55[103], with limitations on collateral arrangements, set-off or netting rights, as well as an express recognition of the 'no creditor worse off' principle. §63[104] allows for an application of liquidation to be filed to the National Company Law Tribunal,

94 Financial Resolution and Deposit Insurance Bill 2017, Chapter X.
95 Financial Resolution and Deposit Insurance Bill 2017, s 4(2)(b).
96 ibid, s 13(1).
97 ibid, s 13(2).
98 Deposit Insurance and Credit Guarantee Corporation Act, 1961.
99 Financial Resolution and Deposit Insurance Bill 2017, s 21(1).
100 ibid, s 36(2).
101 ibid, s 41.
102 ibid, s 47.
103 ibid, s 55.
104 ibid, s 63.

if deemed to be 'the most appropriate method for resolution'. Post-approval, all powers of a liquidator vest with the Resolution Corporation. Several key tools for resolution are recognised under §48[105], including acquisition, amalgamation, bail-in, and bridge banks.

B. Demerits of the FRDI Bill 2017

The FRDI Bill 2017, envisages a sound structure for the health of the Indian banking system. However, it lays down certain procedures that are not optimal, and must be corrected before adoption into a final, ideal resolution system. Chapter VII covers restoration and resolution plans.[106] §39(1)(c) asks the specified service provider to submit a restoration plan inclusive of the 'steps it shall take' to move to a safer risk to viability classification relative to its current position.[107] Similarly, §40 asks the specified service provider to submit a resolution plan, including its 'strategy plan to exit the resolution process'.[108] These provisions present two issues. Firstly, the burden of submitting a resolution or restoration plan with the appropriate steps or strategy is placed on the banking institution. Given the role the management of a banking institution plays in causing insolvency, it is strategically unwise to vest such planning with the banking institution itself, particularly in a time-sensitive situation. While coordination between the banking institution and the regulator or resolution authority is essential, primacy in constructing the resolution plan must lie with the latter. Secondly, in reference to 'restoration' plans, the law does not recognise what the potential steps the bank can, or should, take. This degree of ambiguity reintroduces the risk of *ad hoc* action.

§36(5) creates tiers of 'risk to viability' upon which all resolution activity is based.[109] Effectively, entry into a less desirable risk to viability category is the resolution trigger. Under §36(5)(d), imminent risk to viability is where 'the probability of failure is substantially above the acceptable probability of failure'.[110] Similarly, critical risk to viability is when 'the specified service provider is on the verge of failing to meet its customers' obligations'.[111] The threshold of what is supposed to be the 'acceptable probability of failure' is not defined, but is supposed to be constructed around factors such as asset quality, capital adequacy, and liquidity. While these factors are all extremely relevant, the ambiguity of this characterisation poses two significant problems. Firstly, the absence of an objective determination or threshold for 'acceptable probability' is dangerous, as the entire framework relies on the initiation point of resolution or restoration. Ambiguity, or subjectivity, over the trigger of resolution proceedings, endangers the entire framework for insolvency correction. Secondly, even with an objective determination, a new law must be

105 ibid, s 48.

106 ibid, Chapter VII.

107 ibid, 39(1)(c).

108 ibid, s 40.

109 ibid, s 36(5).

110 ibid, s 36(5)(d).

111 ibid, s 36(5).

cognizant that the entire banking system operates around certain regulatory frameworks, and despite the presence of regulatory standards, the Indian banking system is burdened with stressed assets and liquidity issues. Even with an objective determination of resolution triggers, a successful law must be cognizant of the limitations of our current regulatory metrics. It is advised therefore to create a statutory mechanism, such as an independent review committee, that not only tracks bank solvency, but reviews the very metrics used to track financial health at all, such that resolution triggers can be dynamically evolved as market situations change. Additional lacunae within the now-withdrawn FRDI Bill 2017, include the absence of a clear hierarchy of claims or creditors. The IBC 2016, for example, created a distinct list for the same.[112]

Despite being exclusive legislation for the resolution of Financial Service Providers, the FRDI Bill 2017, failed to devise a comprehensive legal framework for cross-border insolvency. The importance of a cross-border insolvency framework can be understood by the fact that the FSB has endorsed it as one of the core elements for the creation of an efficacious resolution regime.[113] The globalisation of markets has led to an upsurge in transnational business, a system where most of the transactions are getting conducted amongst corporate bodies operating from different territories. Due to this growth in an interconnected network, banking companies have been expanding across the globe. There might be instances where either the insolvent debtor has his assets across multiple jurisdictions, or some of the creditors of the insolvent debtor are not in the country where the insolvency proceedings are undergoing. And in such cases the complexities will get compounded, which will act as a barrier and slow down the resolution process.

Though inadequate, the IBC 2016, still had two provisions that dealt with cross-border insolvency. On the other hand, the FRDI Bill 2017, did not contend with cross-border resolution at all. This makes the resolution process cumbersome as the Indian government will need to enter into a bilateral agreement with other nations, and it might so happen that each country will want to incorporate various provisions in the agreement which will further fragment the cross-border resolution scheme. The legislature desperately needs to bring a framework that holds within it a robust cross-border insolvency framework to create an effective and hassle-free resolution regime for banks.

VI. Conclusion

A post-COVID economic revival for India will be linked to the ability of the banking system to expand credit with steady resilience, as the proportion of stressed and non-performing assets increases to alarming levels. While it is significant for regulators to introspect the operation of the financial system in its entirety, part of such structural re-evaluation will require an honest acknowledgement of the fragile nature of our banks and the legitimate risk of their failure. The lawmakers have already exhibited an understanding

112 IBC 2016, s 53.

113 Financial Stability Board (n 74).

of the incompetence of our current bank insolvency regime in 2017. It is imperative to recognise that our general insolvency law is inherently incompatible with bank insolvency, and no series of special notifications under §227 can correct the same.

However, it has been argued that the mere inefficacy of the current regime does not warrant a complete regulatory overall. This opposing argument has been extended on two counts. Firstly, the occurrence of bank failures in India is relatively infrequent, so substantive systemic risk does not arise. Secondly, that Indian banking is dominated by public sector banks, which do not 'fail' by virtue of being backed by the State. However, both these arguments do not justify precluding the creation of an independent bank resolution framework. Even if we assume that a public sector bank will not fail, there are multiple systemically important private banks in India. These include ICICI Bank and HDFC Bank. Bank insolvency can be examined through the lens of 'fat-tailed events'. The probability of a bank insolvency may be low, however, a single occurrence of a bank insolvency is significant enough to generate large-scale negative economic effects. Therefore, even if the frequency of bank insolvency remains low, the density and depth of systemic and economic effects justifies the creation of a robust resolution system. This proposition is strengthened when we consider the Yes Bank moratorium in 2020. A more proactive regulatory body for resolution, such as the Resolution Corporation in the FRDI Bill 2017, would place Yes Bank in risk categories specifically to determine the risk of insolvency, and hence require Yes bank to prepare a restoration plan, potentially preventing the need for a moratorium, or an erosion in equity of the bank. A robust, proactive, and comprehensive insolvency law lowers the risk of insolvency, and helps mitigate systemic risk in the rare, but actual occurrence of a bank failure.

A potential domino-collapse of systemically important banks is no longer a fantasy in the current paradigm. To grapple with such a grim reality, it is necessary to introduce a truly comprehensive new regime, built on globally-agreed principles. The FRDI Bill 2017, is a truly meritorious starting point, and corrections in its framework to introduce cross-border insolvency and creditor rights, while recognising new metrics of financial health, a vast range of resolution tools, and centralised deposit insurance, is the key combination to secure systemic stability in Indian banking.

REFLECTIONS ON INFORMATION INFLUENCE OPERATIONS AS ILLEGAL INTERVENTION

Sharngan Aravindakshan*

The dust is yet to settle on the issue of the applicability of the United Nations Charter to cyberspace, but international law is already facing its most vexing issue yet in cyberspace – foreign information influence operations. Thrust into focus by the Russian interference into the US elections in 2016, this issue has sparked a furious debate in the international community, with several legal scholars recommending the prohibition on intervention in the internal affairs of States as a tool to regulate this new phenomenon. However, the intervention prohibition is not so easily applied to foreign information influence operations. This article identifies three hurdles to this argument – the coercion criterion, a lack of clarity in States' views and difficulties in attribution. The article also highlights the flaws in current scholarly approaches to the issue and proposes a modified, more suitable version of the deception test for acceptance by States.

Keywords: *disinformation, intervention prohibition, digital age, coercion, illegality*

That the 'fake news' phenomenon has been perplexing governments for a while now can almost single-handedly be attributed to advances in technology.[1] After all, States have been attempting to shift, influence and control narratives in other States for ages now. What has changed?

The advent of the digital age and the increasingly accessible means to disseminate information simultaneously to an audience of millions of people have considerably changed the rules of the game. States are now leveraging computational propaganda,

* Advocate, India. Programme Officer (Technology and National Security) at the Centre for Communication Governance at National Law University Delhi, New Delhi, India. I wish to thank Prof. Sagnik Das (Jindal Global Law School) for comments on an earlier draft.

The author can be reached at sharngan.aravindakshan@nludelhi.ac.in.

1 Sarah Kreps, 'The Role of Technology in Online Misinformation' (Brookings Institute 2020) <https://www.brookings.edu/wp-content/uploads/2020/06/The-role-of-technology-in-online-misinformation.pdf>.

increasing the effectiveness of their foreign influence operations.[2] As Colonel Gary Corn, a former Deputy Legal Counsel to the Joint Chief of Staffs of the United States, aptly put it, it is not that information is being weaponized since that has always been the case, but that novel technologies have amplified the impact of this weaponization to a scale that has become difficult to ignore.[3] The Russian electoral interference operations in the United States in 2016 have thrust the issue of the legality of these operations in international law into focus. More recently, allegedly State-sponsored online disinformation operations aimed at sowing panic and hampering States' efforts to adequately deal with the ongoing Covid-19 pandemic, have also lent urgency to understanding how to regulate these actions in international law.

There is growing scholarly opinion that such operations should be considered as amounting to intervention in the internal affairs of States, prohibited under both customary international law and the Charter of the United Nations, 1945 ('UN Charter or Charter'). In the context of the ongoing battle against Covid-19, at least one scholar has opined that the information operations by Russia are 'covert information campaigns aimed at intervening in and overcoming the free will of the targeted state' by 'disrupting public health efforts', thereby constituting an internationally wrongful act in the form of prohibited intervention.[4] A report by Chatham House also concurs to the extent it argues that the requirement of 'coercion' in prohibited intervention should be interpreted to include disinformation operations by States that have significant consequences in the internal affairs of another State.[5] Somewhat more cautiously, other scholars have chosen to separately examine constituent or component actions of an overall information influence operation through the lens of the intervention prohibition. One such view, for instance, argues that with regard to the overall Russian information operation pertaining to the United States elections in 2016, the hacking and leaking of confidential information pertaining to the Democratic National Party (again presumed Russian) or 'doxfare', should be considered a violation of the non-intervention norm.[6] Noted international law scholar Prof. Michael Schmitt identifies both

2 Samantha Bradshaw and Philip N Howard, 'The Global Disinformation Order - 2019 Global Inventory of Organised Social Media Manipulation' (2019) Oxford Internet Institute Working Paper 2019.2: Project on Computational Propaganda <https://demtech.oii.ox.ac.uk/wp-content/uploads/sites/93/2019/09/CyberTroop-Report19.pdf> accessed 14 July 2021.

3 Colonel (Retired) Gary Corn, 'Punching on the Edges of the Grey Zone: Iranian Cyber Threats and State Cyber Responses' (*Just Security*, 11 February 2020) <https://www.justsecurity.org/68622/punching-on-the-edges-of-the-grey-zone-iranian-cyber-threats-and-state-cyber-responses/> accessed 12 July 2020.

4 Gary Corn, 'Coronavirus Disinformation and the Need for States to Shore Up International Law' (*Lawfare*, 2 April 2020) <https://www.lawfareblog.com/coronavirus-disinformation-and-need-states-shore-international-law> accessed 12 July 2020.

5 *See generally*, Harriet Moynihan, 'The Application of International Law to State Cyberattacks: Sovereignty and Non-intervention' (2019) Chatham House Research Paper <https://www.chathamhouse.org/sites/default/files/publications/research/2019-11-29-Intl-Law-Cyberattacks.pdf> accessed 14 July 2020.

6 *See generally*, Ido Kilovaty, 'Doxfare: Politically Motivated Leaks and the Future of the Norm

the doxfare as well as the use of 'troll farm(s)' by Russia's Internet Research Agency to create fake identities online to spread incorrect information and feigning the source thereof to confound voters as arguably constituting 'unlawful interference'.[7] States, on the other hand, have either been silent or, when breaking their silence, have used terms such as 'violations of established international norms'[8] which broadly convey that such actions are unacceptable, rather than highlight any particular rule of international law that the action has violated in their view.

Part I of this article lays out the content of the intervention prohibition and identifies a growing chorus to invoke the international law prohibition on intervention to regulate these operations. Although attractive, this argument is not perfect and Part II identifies the challenges and hurdles this approach faces, both legal and technological, as well as examines existing State appetite for using the intervention norm for this purpose. Part III briefly highlights the importance of the intervention prohibition in cyberspace in view of emerging interpretations of sovereignty in international law. The article concludes that States may not be quick to embrace the intervention norm with regard to such operations.

The author is cognizant that 'information influence operation' is a loose, umbrella term that could be taken to mean several actions by States, including cyber-attacks and cyber-espionage, that they undertake in their continuously ongoing efforts to achieve strategic and tactical advantages. This article, however, will focus on States' online disinformation operations, especially through social media. Other cyber operations such as doxfare and distributed denial-of-service attacks will be briefly engaged with, as useful examples to illustrate the applicability (or inapplicability) of the intervention prohibition.

The article will also assume that the DNC hack, as well as Covid-19 disinformation campaigns, are attributable to a State or States under international law.

Part I

A. *Understanding the Prohibition on Intervention*

The non-intervention principle involves the right of every State to conduct its affairs without outside interference.[9] The International Court of Justice ('ICJ') has acknowledged the principle as a part and parcel of customary international law, and by virtue of being a corollary of the principle of sovereign equality of States, it is also considered as embodied in

on Non-Intervention in the Era of Weaponized Information' (2018) 9 Harvard National Security Journal 146.

7 Michael N Schmitt, '"Virtual" Disenfranchisement: Cyber Election Meddling in the Grey Zones of International Law' (2018) 19 Chicago Journal of International Law 30, 47.

8 Office of the Press Secretary, 'Statement by the President on Actions in Response to Russian Malicious Cyber Activity and Harassment' (*The White House*, 29 December 2016) <https://perma.cc/3XXD-8K5C> accessed 12 July 2020 (Office of the Press Secretary).

9 *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua. v U.S.) (Merits) [1986] ICJ Rep 14 [202].

the UN Charter despite not being expressly spelled out.[10] Commentators have often drawn its source from Article 2(1) and 2(4) of the Charter.[11] Further, some scholars also specifically point to Article 2(7) of the Charter as evidence of its presence in the Charter, although this provision prohibits intervention by the United Nations (as opposed to its member States) into matters which are part of the domestic jurisdiction of any State.[12] The principle is also acknowledged and reflected in numerous declarations and instruments adopted by States,[13] chief among them being the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the UN ('Friendly Relations Declaration').[14] Prior to this, the 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty also stated that 'no State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State'.[15]

Now turning to the content of the principle, the ICJ in the *Nicaragua* case stated that a prohibited intervention must be one bearing on matters in which each State is permitted, by the principle of sovereignty, to decide freely.[16] These 'matters' have come to be understood as falling within a State's '*domaine réservé*', constituting those areas that are the sole purview of States unregulated by international law,[17] making it the first requirement for a State-action to amount to an intervention. The ICJ in *Nicaragua* helpfully pointed to the 'choice of a political, economic, social and cultural system' as well as the 'formulation of foreign policy' as illustrative of these areas.[18] On a related note, while these areas were traditionally unreservedly within the sole purview of States and untouched by

10 ibid.

11 Sean Watts, 'Low-Intensity Cyber Operations and the Principle of Non-Intervention' (2015) 14 Baltic Yearbook of International Law Online 137.

12 M.N.S. Sellers, 'Intervention under International Law' (2014) 29 Maryland Journal of International Law 1, 6; *See also*, Moynihan (n 5) 26.

13 Charter of the Organization of American States (adopted 30 April 1948, entered into force 13 December 1951) 119 UNTS 3 (OAS Charter) art 3; Charter of Organization of African Unity (adopted 25 May 1963, entered into force 13 September 1963) 479 UNTS 39 (OAU Charter) art III(2); Charter of the Association of South-East Asian Nations (adopted 20 November 2007, entered into force 15 December 2008) 2624 UNTS 223 (ASEAN Charter) art 2(2)(e)-(f)); Final Act of the Conference on Security and Co-operation in Europe (adopted 1 August 1975) (1975) 14 ILM 1292 (Helsinki Final Act) princ VI.

14 Declaration of Principles of International Law, Friendly Relations and Cooperation Among States in Accordance with the Charter of the UN, UNGA Res 2625 (XXV) (24 October 1970) UN Doc A/RES/2625 (Friendly Relations Declaration).

15 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, UNGA Res 2131 (XX) (21 December 1965) UN Doc A/RES/36/103.

16 *Nicaragua* (n 9) [205].

17 Philip Kunig, 'Intervention, Prohibition Of', in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2015).

18 ibid.

international law, critiques of the non-intervention rule point to the shrinking sphere of a State's *domaine réservé* because 'there are hardly any subject-matters or policy areas today that are inherently removed from the international sphere'.[19] A recent paper by Chatham House, however, argues that even if international law has some bearing on the policy area in question, it would still fall within the *domaine réservé* of a State if it retains ultimate authority over the area in question.[20] But in any case, the way a State's political system is structured, the way a government came into power and its provenance (whether military or civilian) are still considered as principally within the *domaine réservé*.[21] This brings a State's democratic processes such as the conduct of its elections unquestionably within such State's *domaine réservé*.

Intervention in another State's *domaine réservé* is wrongful when it uses 'methods of coercion' in regard to choices which must remain free ones.[22] 'Coercion' therefore constitutes the second element to constituting prohibited intervention and, according to the ICJ in *Nicaragua*, it forms the 'very essence of prohibited intervention' and is 'particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State'.[23] The requirement of coercion is meant to distinguish minor interferences or unfriendly acts from more serious acts that can breach the prohibition on intervention.[24] The term itself is undefined in international law but it is generally agreed that it involves an affirmative act designed to deprive the State of its freedom of choice, that is, to force that State to act in an involuntary manner or involuntarily refrain from acting in a particular way.[25]

B. *The Russian Electoral Interference Operation – Calls Begin for Expanding the Intervention Prohibition*

Digital capabilities have enhanced States' abilities to engage in subversive operations against other States without resorting to coercive force, thereby seemingly falling outside the scope of intervention as an internationally wrongful act. An example is the hack-and-dump operation carried out on the Democratic National Congress, allegedly by Russia, significantly influencing the hugely important US presidential elections. Several thousands of emails pertaining to the DNC were leaked through Wikileaks, which contained

19 Katja S Ziegler, '*Domaine Réservé*', in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2013).

20 Moynihan (n 5) 34.

21 Ziegler (n 19).

22 Kunig (n 17) 3.

23 *Nicaragua* (n 9) [205].

24 Moynihan (n 5) 28.

25 *See for instance*, Friendly Relations Declaration (n 14), princ. 3 - 'No State may...coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.'; *see also*, Michael N. Schmitt (ed), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (CUP 2017) 317.

compromising details including the fact that the DNC favoured Hillary Clinton over Bernie Sanders as a presidential candidate, among others.[26] This effectively divided the Democrats, with Sanders' supporters organizing protests against the DNC[27] and ultimately led to the resignation of the chairwoman of the DNC.[28] Additionally, Russian trolls also functioned as agents of polarization by infiltrating left-wing and right-wing groups and posting divisive and controversial content to manipulate public opinion.[29] In December 2016, as President Barack Obama's term was coming to a close, the White House released a statement that squarely identified Russia as having conducted cyber operations against the US elections.[30] The statement referred to 'data theft' and 'disclosure activities' by the Russian government that were clear references to the Russian hack and leaking. The statement also called Russia's information operation 'an effort to harm U.S interests in violation of established international norms of behaviour'.[31] Significantly, the statement did not characterize the kind of violation caused by the Russian hack and leak, whether a prohibited intervention or otherwise, which can only be seen as a mark of the complexity of both the operation as well as the legal rules involved. A significant amount of Russian interference in the form of online disinformation campaigns has also been noted in the Brexit referendum,[32] and to some extent in France[33] as well.

Scholars have expressed a multitude of views on both the legality of as well as the kind of violation these operations amount to. One view is that the hack-and-dump operations or 'doxfare', amount to intervention.[34] 'Doxfare' is defined as 'state-sponsored instructions

26 Tom Hamburger and Karen Tumulty, 'WikiLeaks releases thousands of documents about Clinton and internal deliberations' (*The Washington Post*, 23 July 2016) <https://www.washingtonpost.com/news/post-politics/wp/2016/07/22/on-eve-of-democratic-convention-wikileaks-releases-thousands-of-documents-about-clinton-the-campaign-and-internal-deliberations/> accessed 14 July 2021.

27 Patrick Healy and Jonathan Martin, 'Democrats Struggle for Unity on First Day of Convention' (*The New York Times*, 25 July 2016) <https://www.nytimes.com/2016/07/26/us/politics/dnc-speakers-protests-sanders.html> accessed 12 July 2020.

28 Dan Roberts, Ben Jacobs and Alan Yuhas, 'Debbie Wasserman Schultz to Resign as DNC Chair as Email Scandal Rocks Democrats' (*The Guardian*, 25 July 2016) <https://www.theguardian.com/us-news/2016/jul/24/debbie-wasserman-schultz-resigns-dnc-chair-emails-sanders> accessed 12 July 2020.

29 Policy Department for Citizens' Rights and Constitutional Affairs, 'Disinformation and Propaganda – Impact on the Functioning of the Rule of Law in the EU and Its Member States' (2019) Study conducted by the European Parliament Committee on Civil Liberties, Justice and Home Affairs (LIBE) PE 608.864, 39 <https://www.europarl.europa.eu/RegData/etudes/STUD/2019/608864/IPOL_STU(2019)608864_EN.pdf> accessed 14 July 2021.

30 Office of the Press Secretary (n 8).

31 ibid.

32 Policy Department for Citizens' Rights and Constitutional Affairs (n 28) 41;. *See also*, Digital, Culture, Media and Sport Committee, *Disinformation and 'fake news': Interim Report* (HC 2018, 363) para 2.

33 Gabriel Gatehouse, 'Marine Le Pen: Who's funding France's far right?' (*BBC News*, 3 April 2017) <https://www.bbc.com/news/world-europe-39478066> accessed 14 July 2021.

34 *See generally*, Kilovaty (n 6).

into foreign computer systems and networks to collect bulk, non-public data that are then leaked for public consumption'.[35] The Russian hack-and-dump operation on the DNC is an example of doxfare that is prohibited intervention. Notably, this view discards 'coercion' as a requirement for intervention, while introducing a new, considerably watered down criterion of 'disruption'. The key issue is reframed as 'whether a cyberoperation employing doxfare disrupts the protected internal or external affairs of the victim state'.[36]

Another view is that 'election meddling' could certainly meet the coercive requirement of prohibited intervention.[37] But in the case of the Russian electoral interference operation, only the Russian trolls that spread disinformation by feigning American citizenship and the Russian doxfare operation on the DNC are likely to constitute prohibited intervention.[38] According to this view, the 'deceptive nature of trolling' distinguished it from a mere influence operation to intervention and its covert nature deprived the American electorate of its freedom of choice by creating a situation in which it could not fairly evaluate the information it was provided.[39] As for the doxfare, this view regards it as having 'tainted the electoral process by introducing information that….was acquired by means that are expressly prohibited under US domestic law, as well as the law of most other States…. which is the unlawful penetration and exfiltration of private data'.[40]

Both these views acknowledge and grapple with the difficulties of applying the intervention prohibition to complex operations in cyberspace. Neither makes the broad argument that these operations in general would violate the intervention prohibition.

A recent report by British think-tank Chatham House also makes the case that existing interpretations of the coercion requirement are far too restrictive. It invokes Oppenheim's definition that '….to constitute intervention the interference must be forcible, or dictatorial, or otherwise coercive, in effect depriving the state intervened against of control over the matter in question',[41] and relies on the words 'otherwise coercive' to argue that intervention can consist of actions that are not merely forcible.[42] It deals with *Nicaragua*'s close and comparable treatment of the prohibition on intervention and use of force by pointing to the ICJ's statement in the decision that the court will only define those aspects of the principle which appear to be relevant to the resolution of the dispute.[43] Arguing that *Nicaragua* should not be considered prescriptive in nature as regards the intervention prohibition,

35 ibid 152.

36 ibid 172.

37 *See generally*, Schmitt 'Virtual' Disenfranchisement (n 7).

38 ibid 51.

39 ibid.

40 ibid.

41 Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law* (vol 1, 9th edn, OUP 2008) 432.

42 Moynihan (n 5) 29.

43 *Nicaragua* (n 9) [205].

it calls for acknowledgement that the prohibition can be invoked for a broader range of actions as opposed to only those that were forcible in nature.[44] This report has found support among other scholars such as Col. Gary Corn who rely on it to argue that State action such as Russia's concerted electoral interference operation in the West should fall within the catchment area of prohibited intervention.[45] Since they do not refer to any constituent action of the operation, it is assumed they mean the broad range of actions that constitute the Russian electoral interference operation.

Yet another view is that electoral interference information operations violate the right to self-determination, thereby violating the prohibition on intervention.[46] Also finding it difficult to overcome the high threshold of coercion, both in terms of its nature (forcible or otherwise) as well as in terms of consequences/impact, as far as information operations are concerned, this view turns to the right to self-determination as an essential part of a State's right to freely decide its own political system, and uses that route to reach the intervention violation.[47]

Part II

Clearly, there is a growing demand (atleast in Western academic circles) for States' information operations in cyberspace aimed at influencing outcomes in other States to be considered as violations of the intervention prohibition. Or at the least, for more clarity on the contours of the rule vis-à-vis such operations. This is understandable, given that errant States (common suspects being Russia, China, Iran and North Korea[48]) are cleverly ensuring they are operating in so-called 'grey zones' of international law, thereby succeeding in both securing their desired outcomes in other States, as well as restricting those States' choices of response.

However, arguing that the norm of intervention already prohibits, or ought to prohibit, information influence operations will not be easy. This part discusses the challenges or hurdles that this argument will have to overcome before gaining acceptance.

A. *The Coercion Criterion*

Although the drafters of the UN Charter made it clear that outlawing armed force as an instrument of international policy was foremost in their minds,[49] proponents of expansive

44 Moynihan (n 5) 27.

45 Corn (n 3).

46 *See generally*, Jens David Ohlin, 'Did Russian Cyber Interference in the 2016 Election Violate International Law?' (2017) 95 Texas Law Review 1579, 1597.

47 ibid 1596.

48 The White House, National Cyber Strategy of the United States of America (2018), 2 <https://trumpwhitehouse.archives.gov/wp-content/uploads/2018/09/National-Cyber-Strategy.pdf> accessed 14 July 2021.

49 Ian Brownlie, *International Law and the Use of Force by States* (OUP 1963).

interpretation of the intervention norm can point to the acknowledgement by the ICJ in *Nicaragua* that there could be both direct and indirect forms of intervention[50] as proof that its meaning can evolve. After all, in *Nicaragua*, the ICJ ruled that the US actions of financing, training, supplying arms as well as providing intelligence and logistic support to the rebel *contras* in Nicaragua was a violation of the non-intervention rule.[51] However, it cannot be denied that this is still an extremely high threshold, the direct consequence of these actions being a military uprising within Nicaragua to overthrow the existing government. Indeed, in the context of 'assistance to rebels in the form of provision of weapons or logistical or other support', the ICJ also stated that 'such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States'.[52] In essence, the ICJ effectively considered these coercive acts only a short step from amounting to the use of force itself, which is commonly understood to require measures involving physical force.[53]

The *Nicaragua* decision notwithstanding, the meaning of coercion in international law is still more easily relatable to cases of armed force.[54] However, the bulk of scholarly opinion today is on the side of the view that coercion for the purposes of the intervention prohibition does not necessarily have to involve physical or armed force.[55]

Even so, 'coercion' as an ingredient for prohibited intervention still requires that the victim State be compelled or restrained from a course of action – a do-this-or-else

50 *Nicaragua* (n 9) [205].

51 ibid [242].

52 ibid [195].

53 Brownlie (n 49) 361–368 - 'There can be little doubt that 'use of force' is commonly understood to imply a military attack, an 'armed attack', by the organized military, naval, or air forces of a state'; Oona A. Hathaway and others, 'The Law of Cyber-Attack' (2012) 100 California Law Review 817, 842 - 'Nonetheless, the consensus is that Article 2(4) prohibits only armed force.'; William A. Owens, Kenneth W. Dam and Herbert S. Lin (eds), *Technology, Policy, Law, and Ethics regarding U.S. Acquisition and Use of Cyberattack Capabilities* (National Academies Press 2009) 253 – 'Traditional [law of armed conflict] emphasizes death or physical injury to people and destruction of physical property as criteria for the definitions of 'use of force' and 'armed attack'.

54 Robert J. Art, 'Introduction', in Robert J. Art and Patrick M. Cronin (eds), *The United States and Coercive Diplomacy* (United States Institute of Peace Press 2003) 3, 5 - 'coercive diplomacy is not meant to entail war, but instead employs military power short of war to bring about a change in a target's policies or in its political makeup'; Matthew Waxman and Daniel Byman, *The Dynamics Of Coercion: American Foreign Policy and the Limits of Military Might* (CUP 2002) - '[Coercion is] the threat of future *military force* to influence an adversary's decision making but may also include limited uses of actual force'.

55 For a few examples of this scholarly opinion, *see* Watts (n 11); Nicolas Jupillat, 'From the Cuckoo's Egg to Global Surveillance: Cyber Espionage that becomes Prohibited Intervention' (2017) 42 North Carolina Journal of International Law 933; Moynihan (n 5); Lori Fisler Damrosch, 'Politics Across Borders: Nonintervention and Nonforcible Influence Over Domestic Affairs' (1989) 83 AJIL 1.

imperative.[56] As Oppenheim stated, the intervening State needs to 'deprive the state intervened against of control over the matter in question'.[57] This requirement is still not met through these kinds of disinformation operations. Leaving aside the Russian doxfare operation for a moment, it cannot be stated with any degree of certainty that the Russian online troll farms caused the United States to be restricted or restrained from deciding freely with respect to matters in its domain reserve. Indeed it is an inherent difficulty in dealing with 'fake news' as a phenomenon that its actual impact is extremely difficult to quantify or estimate with any degree of certainty.[58]

Additionally, it is difficult to establish that even widespread disinformation can influence or impact States' decision-making.[59] In their day-to-day manifestations as governments, States have somewhat more privileged access to authentic sources of information which they base their decisions on, as compared to their general public.[60] This makes it even less likely that concerted disinformation campaigns can coerce States.

However, the doxfare operation would still qualify as coercion, since it deprived the US of control over confidential state information, inasmuch as it leaked the said information to Wikileaks which in turn released it into the public domain, and is, therefore, a good contender for violating the prohibition on intervention. An interesting counter-argument here would be that the doxfare operation does not amount to intervention since under the right to speech and expression in international human rights law, notwithstanding relevant exceptions, Wikileaks arguably had the right to disseminate the information and the US public could have a right to receive the said information given the public interest it would serve. However, this may not be relevant insofar as the internationally wrongful act of intervention is concerned since the administration of human rights within its territory also arguably falls within a State's domain reserve.[61] This means that it was still up to the United States government to decide whether or not to release the said information, and to the extent the Russian doxfare took it out of the United States' hands through coercive means, it may constitute prohibited intervention.

The Russian interference in the US elections is not the only example of electoral

56 Katharina Ziolkowski, 'Peacetime Cyber Espionage – New Tendencies in Public International Law' in Katharina Ziolkowski (ed), *Peacetime Regime For State Activities In Cyberspace: International Law, International Relations And Diplomacy* (NATO CCD COE Publications 2013) 425, 433 - 'Scholars assert that illegal coercion implies massive influence, inducing the affected state to adopt a decision with regard to its policy or practice which it would not entertain as a free and sovereign state'.

57 Jennings and Watts (n 41).

58 Alexander Lanoszka, 'Disinformation in International Politics' (2019) 4 European Journal of International Security 227, 233.

59 ibid.

60 Lanoszka (n 58).

61 *See* Michael N. Schmitt, 'Grey Zones in the International Law of Cyberspace' (2017) 42 Yale Journal of International Law 1, 7.

interference operations. In late 2019, as Britain was going to the polls to try and break the Brexit deadlock in their parliament, both of Britain's major political parties, the Conservative Party as well as the Labour Party, were hit with back to back cyber-attacks. A series of three cyber-attacks in quick succession bombarded the parties' digital platforms, including a sophisticated distributed-denial-of-service ('DDOS') attack on the Labour Party's platform.[62] The attacks came in the wake of British security agencies warning that Russia and other countries could attempt to disrupt the vote on December 12.[63]

Let us assume that these operations were conducted by a State. The attacks significantly disrupted the operations of Britain's largest political parties and effectively limited their abilities at a crucial time, just weeks before a significant vote on a major political issue. Firstly, the DDOS attack as well as the other cyber-attacks caused their websites to be flooded with online traffic in an attempt to force them offline.[64] The operations resulted in tangible, physical manifestations on the cyber-infrastructure that restricted the parties' abilities to reach out to their supporters and operate normally, and therefore reached the threshold required to meet the coercion requirement. Their impact was coercive in this sense, unlike most disinformation operations colloquially referred to as 'fake news' whose impact is largely cognitive without being coercive as understood in international law. They may have ultimately not had any impact on the election, but the coercive requirement is satisfied since it *limited* or *restrained* the parties' abilities to reach out to the electorate and function optimally at a vital point in time.[65] This effectively translated to limiting the State's ability to serve its electorate in a very real and tangible sense and therefore sufficiently meets the coercion threshold for the purposes of the intervention rule. That the parties' cyber-infrastructure does not constitute the State's cyber-infrastructure (in a sense, the ruling party's cyber-infrastructure) may not matter, given that during election-time in any country, there is a blurring between the identities of the State, the political parties and the electorate. Secondly, the operations targeted political parties' cyber-infrastructure not long before the people would get together to vote on a major issue pertaining to Britain's political system which being Britain's sole prerogative, fell within its *domaine reserve*. There is thus a strong case to be made that the operations on the Labour and Conservative Parties in Britain amounted to intervention if they were conducted by another State. Russia, to nobody's surprise, has denied the charge.[66]

Much more difficult to characterize are disinformation operations by States that solely disseminate distorted facts, data or information to achieve outcomes. According

62 Jack Stubbs, 'Hackers hit UK political parties with back-to-back cyberattacks' (*Reuters*, 12 November 2019) <https://www.reuters.com/article/us-britain-election-labour-cyber-idUSKBN1XM19I> accessed 23 July 2020.

63 ibid.

64 ibid.

65 Schmitt 'Virtual' Disenfranchisement (n 7) 52.

66 Stubbs (n 62).

to Prof. Schmitt, the Russian fake accounts feigning American citizenship and sowing disinformation among the electorate is a good candidate for prohibited intervention because it ensured that the electorate could not 'fairly evaluate the information provided'.[67] For him, the deception played by the Russian trolls with respect to their identity is what distinguishes their actions from plain interference.[68]

While the focus on this kind of deception is understandable, it is still too broad and stretches the extant understanding of coercion to its limits. Even if Russian trolls were masquerading online as Americans and were busily spreading disinformation under this cover, they were not *restricting access to other sources of information that could be genuine* and therefore, it is difficult to believe they *compelled* or *restrained* the electorate's choice of actions, such as with respect to evaluating the correctness of the disinformation. It is even harder to determine that it impacted the electorate's actual choice of voting. Ultimately, the deception is not forcing anybody to do anything, nor is it preventing authentication of the information through other sources. This approach also calls for disclosure of identity, which comes perilously close to endangering a right to anonymity online, which in today's world is essential to exercising the right to freedom of expression.[69] A potential solution to this problem is discussed in Part IV of the paper.

B. *Lack of Clarity in States' Views*

Customary international law develops from consistent practice of States that flows from a sense of obligation.[70] But proponents of the intervention prohibition applying to subversive information operations in cyberspace will be hard-pressed to point to any state practice for support. Indeed States rarely declare a cyber operation to be illegal or a violation of international law at all. There could be several reasons for this. A State could remain silent for strategic reasons. Often, acknowledging that a cyber operation has occurred could result in revealing the victim State's own cyber capabilities, including its weaknesses. India's initial reluctance in admitting a cyber-malware had infected its nuclear power plant in Kudankulam is an example. The government denied that anything was out of the ordinary with the power plant and only admitted that a malware infection in the plant had been identified after third party cybersecurity experts highlighted the issue on Twitter and the public eye became trained on the authorities seeking information.[71]

67 Schmitt 'Virtual' Disenfranchisement (n 7) 51.

68 ibid.

69 UNCHR 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (2015) UN Doc A/HRC/29/32 para 16.

70 Statute of the International Court of Justice (entered into force 18 April 1946) art 38.

71 Aditi Agrawal and Nikhil Pahwa, 'Lt Gen. (Dr) Rajesh Pant on India's National Cyber Security Strategy, Indo-US Cooperation, End-To-End Encryption And More' (*Medianama*, 2 June 2020) <https://www.medianama.com/2020/06/223-rajesh-pant-interview-national-cyber-security-coordinator/> accessed 15 July 2021; Special Correspondent, 'NPCIL admits malware attack at Kudankulam Nuclear Power Plant' (*The Hindu*, 30 October 2019) <https://www.thehindu.com/news/national/npcil-acknowledges-computer-breach-at-kudankulam-nuclear-power-plant/

Similar was the case with Iran's denial that Stuxnet, a highly sophisticated cyber weapon that was found in Iran's nuclear power plant at its Natanz facility, had anything to do with damage to its centrifuges causing a major setback to its nuclear programme.[72] Admitting the consequences of, or even the occurrence of a cyber operation could be an admission of weakness, both domestically and internationally.

Even when States do speak out, their statements often do not lend much clarity to the understanding of international law in cyberspace. For instance, the US government's statement attributing the infamous Sony hack to North Korea does not identify any particular international obligation that was violated beyond stating that the action fell 'outside the bounds of acceptable state behaviour'.[73] The DNC hack, while vehemently attributed to Russia, was also only termed a 'violation of established international norms of behaviour' by the US government.[74] The DNC example is particularly relevant since according to scholars it is the closest example of a prohibited intervention. But beyond conveying that these kinds of State actions could be violations of international law, the contribution of these statements towards clarifying the applicable norms of international law is questionable.

One reason for this could be that States themselves are unsure of the content and contours of international law in cyberspace and this uncertainty prevents them from clearly identifying an international obligation that is violated by the cyber operation.[75] Another reason could be that identifying specific obligations that cyber operations violate could tie their own hands and restrict the range of options available to them to strategically operate in cyberspace.[76] This is not something States would want. Obviously, these reasons ensure that cyberspace remains inconducive to the proliferation of frequent or consistent State practice, making it all the more difficult to argue convincingly that disinformation operations or the like could violate any international obligation in cyberspace, much less the prohibition on intervention.

At the same time, having acknowledged the need to give body to the nebulous sphere of international law in cyberspace, international fora have begun calling on States to articulate

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article29834644.ece> accessed 30 July 2020.

72 William Yong, 'Iran Denies Malware Connection to Nuclear Delay' (*The New York Times*, 5 October 2010) <https://www.nytimes.com/2010/10/06/world/middleeast/06iran.html> accessed 30 July 2020.

73 Staff Reporter, 'The Interview: North Korea responsible for 'destructive' Sony hack says FBI' (*ABC News*, 20 December 2014) <https://www.abc.net.au/news/2014-12-20/north-korea-behind-sony-hack-says-united-states/5980794> accessed 15 July 2021.

74 Office of the Press Secretary (n 8).

75 *See generally*, Michael N. Schmitt and Liis Vihul, 'The Nature of International Law Cyber Norms' (2014) Tallinn Paper No. 5, Special Expanded Issue <https://ccdcoe.org/uploads/2018/10/Tallinn-Paper-No-5-Schmitt-and-Vihul.pdf> accessed 15 July 2021.

76 ibid 26.

their views on how international law should apply to cyberspace.[77] The mandate of the Open-Ended Working Group requires its member States to submit 'national contributions' in an effort to promote a common understanding on these issues.[78] Independently, States are also slowly articulating and releasing their views on international law and cyberspace. The United Kingdom,[79] the Netherlands,[80] France,[81] Germany,[82] Australia,[83] Iran,[84] Finland,[85] Estonia,[86] New Zealand[87] and Israel[88] are a few examples of States that have released these

77 UNGA Res 73/266 (22 December 2018) UN Doc A/RES/73/266 [3]; Open-Ended Working Group, 'Second 'Pre-Draft' of the report of the OEWG on developments in the field of information and telecommunications in the context of international security' para 74 <https://ict4peace.org/wp-content/uploads/2020/12/200527-oewg-ict-revised-pre-draft.pdf after accessed 15 July 2021.

78 ibid.

79 Jeremy Wright, 'Cyber and International Law in the 21st Century' (Speech at the Chatham House Royal Institute for International Affairs, London, 23 May 2018) <https://www.gov.uk/government/speeches/cyber-and-international-law-in-the-21st-century> accessed 12 February 2020.

80 Appendix to the Letter from the Minister of Foreign Affairs, the Kingdom of the Netherlands, to the Parliament (5 July 2019) <https://www.government.nl/documents/parliamentary-documents/2019/09/26/letter-to-the-parliament-on-the-international-legal-order-in-cyberspace> accessed 21 August 2020.

81 Ministry of Defence, Government of France, 'International Law Applied to Operations in Cyberspace' (2019) <https://www.defense.gouv.fr/content/download/567648/9770527/file/international+law+applied+to+operations+in+cyberspace.pdf> accessed 15 July 2021.

82 Nele Achten, 'Germany's Position on International Law in Cyberspace' (*Lawfare*, 2 October 2018) <https://www.lawfareblog.com/germanys-position-international-law-cyberspace> accessed 21 August 2020.

83 Government of Australia, Department of Foreign Affairs and Trade, 'Australia's International Cyber and Critical Tech Engagement Strategy' (2021) <https://www.internationalcybertech.gov.au/sites/default/files/2021-05/21066%20DFAT%20Cyber%20Affairs%20Strategy%202021%20update%20Internals%201%20Acc.pdf> accessed 15 July 2021.

84 'General Staff of Iranian Armed Forces Warns of Tough Reaction to Any Cyber Threat' (*NourNews*, 18 August 2020) <https://nournews.ir/En/News/53144/General-Staff-of-Iranian-Armed-Forces-Warns-of-Tough-Reaction-to-Any-Cyber-Threat> accessed 21 August 2020.

85 Finland Ministry for Foreign Affairs, 'Finland Published Its Positions on Public International Law in Cyberspace' (*Finnish Government*, 15 October 2020) <https://valtioneuvosto.fi/en/-/finland-published-its-positions-on-public-international-law-in-cyberspace> accessed 2 July 2021.

86 Kersti Kaljulaid, 'President of the Republic of Estonia at the Opening of CyCon 2019' (Speech at the Tallinn Cyber Defence Centre, 29 May 2019) <https://www.president.ee/en/official-duties/speeches/15241-president-of-the-republic-at-the-opening-of-cycon-2019/index.html> accessed 2 July 2021.

87 Government of New Zealand, 'The Application of International Law to State Activity in Cyberspace' (1 December 2020) <https://dpmc.govt.nz/sites/default/files/2020-12/The%20Application%20of%20International%20Law%20to%20State%20Activity%20in%20Cyberspace.pdf> accessed 2 July 2021.

88 Roy Schöndorf, 'Israel's Perspective on Key Legal and Practical Issues Concerning the Application of International Law to Cyber Operations' (Speech on Disruptive Technologies and International Law, US Naval War College, 8 December 2020) <https://www.ejiltalk.org/israels-perspective-on-key-legal-and-practical-issues-concerning-the-application-of-international-law-to-cyber-operations/> accessed 2 July 2021.

explanatory statements so far.

While these official statements are most certainly a positive development which shed some light on States' views on the subject, even their contribution cannot be exaggerated at least as far as the intervention rule is concerned. Expressing the view that 'external, coercive intervention in the matters of government which are at the heart of a state's sovereignty…' are illegal, the UK states that 'the practical application of the principle in this context would be the use by a hostile state of cyber operations to manipulate the electoral system to alter the results of an election in another state, intervention in the fundamental operation of Parliament, or in the stability of our financial system'.[89] The nature of the cyber operations that could cause these effects is left unclarified. Hence it is not clear whether the UK believes that cyber operations that operate solely through cognitive effects (without being coercive) such as social media disinformation campaigns, could violate the intervention rule. The Netherlands also acknowledges the applicability of the intervention prohibition to cyberspace and specifies national elections as falling within the domain reserve of a state. However, the statement also notes the lack of clarity on the meaning of coercion as well as its resultant impact on the meaning of unauthorized intervention.[90] France's statement,[91] while detailed, also does not spell out the circumstances in which it believes the intervention rule is violated, nor does Estonia's,[92] which contains spells out generally the rules of international law applicable to cyberspace. Finland's view is that 'hostile interference by cyber means' may breach the intervention rule provided that it is done with the 'purpose of compelling or coercing that State in relation to affairs regarding which it has free choice'.[93] This does not clarify how either Australia's statement on the issue, first released in the form of an annex to its international cyber engagement strategy, does not even mention the intervention rule.[94] A subsequent document submitted by the Australian government to the OEWG deals with the issue, in which it provides case studies on the application of international law in cyberspace. However, the case study it chooses for the intervention prohibition illustrates it as 'a series of cyber operations that prevent the use of the website and disable government systems of State A's tax office and corporate regulator…As a result [of which] State A is incapable of regulating companies' compliance with the new laws for a substantial period and has no choice but to indefinitely postpone implementation of the new tax reforms'.[95] The document also refers to and supports the

89 Wright (n 79).

90 The Kingdom of the Netherlands, Minister of Foreign Affairs (n 80).

91 Government of France, Ministry of Defence (n 81).

92 Kersti Kaljulaid (n 86).

93 Finland Ministry of Foreign Affairs (n 85).

94 Government of Australia (n 83).

95 Government of Australia, 'Australia Non Paper - Case Studies on the Application of International Law in Cyberspace' (2020) Open-Ended Working Group on Developments in the Field of ICTs in the Context of International Security, 2 <https://www.dfat.gov.au/sites/default/files/australias-oewg-non-paper-case-studies-on-the-application-of-international-law-in-cyberspace.pdf> accessed 15 July 2021.

UK's position that manipulating the electoral system to alter the results of an election in another state, intervention in the fundamental operation of Parliament, or in the stability of financial systems constitutes intervention.[96] Israel's statement also reiterates this view.[97]

Iran has categorically acknowledged that non-forcible information influence operations could violate the intervention prohibition.[98] It clearly states that 'Measures like cyber manipulation of elections or engineering the public opinions on the eve of the elections may be constituted of the examples of gross intervention' and that 'Cyber activities paralyzing websites in a state to provoke internal tensions and conflicts or sending mass messages in a widespread manner to the voters to affect the result of the elections in other states is also considered as the forbidden intervention'.[99] It is important to note, however, that this application of the intervention prohibition is still restricted to election scenarios. Therefore, how far this statement can be extrapolated to non-election scenarios is questionable. According to New Zealand as well, 'coercion can be direct or indirect and may range from dictatorial threats to more subtle means of control', and has cited as an example a 'prolonged and coordinated cyber disinformation operation that significantly undermines a state's public health efforts during a pandemic'.[100] The other examples cited include deliberate manipulation of the vote tally or depriving a significant part of the electorate of the ability to vote in an election.[101] The former example is a clear indication that online disinformation operations can constitute prohibited intervention, but the threshold is less clear.

Nevertheless, notwithstanding the merits of the argument in international law, given States' reticence on these issues, these statements are a welcome addition which informs our understanding on how international law applies to cyberspace.

As is evident, the positions of these States on the contours of the intervention rule in cyberspace are not uniform. They do reflect a propensity among States to consider election interference as intervention, but with the exception of Iran, the forms of election interference that would be considered as intervention are not clear from these statements. In fact, the case study chosen by Australia, if anything, lends support to the argument that coercive intervention in cyberspace needs to entail actual compellance, given the disabling of the website and disabling of government systems. New Zealand's statement comes closest to outlawing disinformation operations by States through the intervention prohibition outside electoral interference, and it will be interesting to see how many other countries feel similarly.

96 ibid 10.

97 Schöndorf (n 88).

98 General Staff of Iranian Armed Forces (n 84).

99 ibid.

100 Government of New Zealand (n 87).

101 ibid.

In any case, the status of these statements in international law is also unclear. Arguably, they constitute *opinio juris*, which by itself is insufficient to create a norm of customary international law. Scholars will therefore have to wait a little more before they can rely on the emergence of a customary norm to argue that information influence operations can violate the intervention rule.

C. *Difficulties in Attribution*

Even if information influence operations could amount to intervention in international law, they will still need to be attributed to a particular State for it to be an actionable internationally wrongful act. Under Article 4 of the Articles on Responsibility of States for Internationally Wrongful Acts, the conduct of a State organ shall be considered an act of that State under international law even if such action was *ultra vires*.[102] Hence, an information influence operation that can be traced to governmental agencies or departments will result in the operation being attributed to the State. However, by their very nature, these influence operations could involve State-owned media. For instance, Sputnik and RT News are Russian controlled state agencies that played a major role in fuelling false news in the Lisa case, a disinformation incident in Germany involving a fake story about a missing Russian-German girl, Lisa, who had reportedly been raped by Arab merchants.[103] The German police were able to confirm that this news was false and that she had been with a friend that night, but Russian outlets extensively amplified the incident promoting speculation and rumour, leading to a Russian government official expressing concern at the competence of the German police, causing diplomatic tensions between Germany and Russia.[104]

Assuming for a moment that the Russian actions in the Lisa case were internationally wrongful, could the actions of Sputnik and RT News be attributed to the Russian government? Although international law recognizes the separate identities of corporates at the national level,[105] if the State is using its ownership interest in or control of a corporation specifically in order to achieve a particular result, the conduct of the corporation can be attributed to the State.[106] If it could be proved that the Russian government was using its control over Sputnik and RT News to deliberately propagate false news in the Lisa incident, then their actions are attributable to the Russian government. But this is likely to be a question of fact and proving it would be no easy task.

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102 International Law Commission., 'Report on the Work of its 53rd Session: Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) UN Doc A/56/10, 26.

103 Stefan Meister, 'The 'Lisa case': Germany as a target of Russian disinformation' (*NATO Review*, 25 July 2016) <https://www.nato.int/docu/review/articles/2016/07/25/the-lisa-case-germany-as-a-target-of-russian-disinformation/index.html> accessed 21 August 2020.

104 ibid.

105 *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Merits) [1970] ICJ Rep 3 [56], [58].

106 *Foremost Tehran, Inc. v Iran* (1986) 10 Iran-USCTR 228; *American Bell International Inc. v Iran* (1986) 12 Iran-USCTR 170.

The question becomes even more fraught when it comes to non-State agencies, such as the use of non-State online trolls in the case of social media influence campaigns. Leaving aside legal attribution, even simply identifying individual identities behind the campaign is not without obstacles, and not just technical ones. Anonymity is taken seriously on these platforms whose models involve their users being able to express themselves online without disclosing their real identities. This can be weaponized and misused with great effect in State-sponsored influence campaigns. Twitter, for example, allows the same person to create and tweet from multiple accounts, whether through aliases or through their real names. A combination of IP spoofing and using a fake account on Twitter could allow a Chinese person in Shanghai to effectively portray himself as a British citizen online. The structure of platforms like Twitter, Facebook and Instagram, allows thousands of these accounts to be able to successfully mask their identities to an extent. Even assuming these accounts can be unmasked, attributing their actions to any State is currently next to impossible. Under extant international law, a non-State actor's actions can only be attributed to a State if it was under the 'effective control' of the particular State. Originally articulated in the *Nicaragua* decision, the ICJ expounded further on this test in the *Genocide* judgement in which it stated that 'it must however be shown that this 'effective control' was exercised, or that the State's instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations'.[107] Obviously, showing that online trolls were instructed by the Russian government to carry out information influence operations is a very tall order.

Of course, these problems are just with the rules of attribution in cyberspace. Even after crossing this hurdle, *proving* the attributed act in any international court or tribunal under the requisite evidentiary thresholds is an entirely different matter. Currently, the only form of evidence available in cyberspace appears to be the circumstantial kind, which is not likely to be accepted by a forum like the ICJ which demands 'clear and convincing' evidence to prove a violation of the prohibition on the use of force under Article 2(4).[108] Given that in *Nicaragua* the ICJ treated the use of force and intervention prohibitions comparably,[109] and the fact that an act of prohibited intervention is a highly serious violation of international law in its own right, the evidentiary threshold is likely to be appropriately high, making it all the more difficult to prove a claim of prohibited intervention in cyberspace.[110]

Additionally, social media companies will also have to play an important role in attributing any State-sponsored or conducted influence operations. Their cooperation

107 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43, 169.

108 *Nicaragua* (n 9) [24], [29], [62], [109].

109 ibid [195].

110 *See generally*, Sharngan Aravindakshan, 'Cyberattacks: A Look at Evidentiary Thresholds in International Law' (2021) 59 Indian Journal of International Law 285-299.

will be vital. Interestingly, apart from disinformation that is especially harmful such as those related to coronavirus and so on, a social media influence campaign (whether State-sponsored or not) can very often violate the platform's own rules or terms of service. Under Facebook's terms of service, this kind of influence operation is called 'coordinated inauthentic behaviour', which according to Facebook, is when 'people…coordinated with one another and used fake accounts as a central part of their operations to mislead people about who they are and what they are doing..'.[111] However, ordinarily, Facebook's response to these operations is merely to take down the posts constituting these operations and not investigate further or enquire into details such as whether they are foreign or domestic.[112]

It is easy to see that attributing information influence operations to any State will present an especially difficult challenge. A recent report by the Intelligence and Security Committee of Parliament in the UK indicates that there was no assessment of Russian attempts at interference post the EU referendum.[113] Scholars have noted that US intelligence agencies attributing the actions of the online trolls and the Internet Research Agency to Russia can only be deemed reasonable at best and was not an exercise in applying the strict legal tests under the law of State responsibility.[114] It is hard enough to attribute a cyber operation that has tangible, physical effects. Even the distributed-denial-of-service attacks that crippled Estonia's networks bringing down banking services, government systems and news agencies, were never officially attributed to Russia even though Kremlin was widely believed to have orchestrated them through non-state hacking groups, on account of lack of proof.[115] This state of affairs is not set to change any time soon, least of all for nebulous, State-conducted influence campaigns in cyberspace.

Part III

Why the Intervention Prohibition?

But why is so much focus being placed on the intervention prohibition in any case? After all, States have agreed by now that their sovereignty extends to cyberspace. The 2015 GGE Report states that 'State sovereignty and international norms and principles that flow from sovereignty apply to the conduct by States of ICT-related activities and to their jurisdiction over ICT infrastructure within their territory'.[116] The OEWG has also

111 Nathaniel Gleicher, 'Removing Coordinated Inauthentic Behavior' (*Facebook*, 8 July 2020) <https://about.fb.com/news/2020/07/removing-political-coordinated-inauthentic-behavior/> accessed 21 August 2020.

112 ibid.

113 Intelligence and Security Committee of Parliament, *Russia* (HC 2020, 632) para 47.

114 Schmitt 'Virtual' Disenfranchisement (n 7) 63.

115 Damien McGuinness, 'How a cyber attack transformed Estonia' (*BBC News*, 27 April 2017) <https://www.bbc.com/news/39655415> accessed 31 July 2020.

116 UNGA 'Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security' (22 July 2015) UN Doc A/70/174 para 27.

noted that 'specific principles of the UN Charter…..includ[ing] sovereign equality' are applicable to cyberspace.[117] If States exercise their sovereignty in cyberspace, surely it means by extension that their sovereignty can be 'violated' and such a violation would be considered an internationally wrongful act? Why resort to other internationally wrongful acts such as intervention?

This view of 'sovereignty' as a primary rule capable of being violated is the basis for the ICJ's ruling in its very first contentious case - the *Corfu Channel* case. In *Corfu Channel*, the ICJ recognized respect for territorial sovereignty of States as an essential foundation of international relations and concluded that the action of the British Navy in question constituted a 'violation of Albanian sovereignty'.[118]

Later in *Nicaragua*, the ICJ again held that 'the assistance to the contras, as well as the direct attacks on Nicaraguan ports, oil installations, etc., . . . not only amount to an unlawful use of force, but also constitute infringements of the territorial sovereignty of Nicaragua, and incursions into its territorial and internal waters'.[119] In this case, the ICJ also ruled that territorial sovereignty is 'directly infringed' by the unauthorized overflight of a State's territory by aircraft belonging to or under the control of the government of another State.[120] Importantly, the ICJ acknowledged in the *Nicaragua* case that a violation of sovereignty was an internationally wrongful act independent of prohibited intervention and use of force, even though the content of the principle inevitably overlaps with the other two internationally wrongful acts.[121]

However, the United Kingdom's Attorney General while setting out the United Kingdom's position on the applicability of international law to cyberspace, questioned the applicability of territorial sovereignty to cyberspace. Despite noting that sovereignty is 'fundamental' to the international rules-based system, he stated that 'I am not persuaded that we can currently extrapolate from that general principle a specific rule or additional prohibition for cyber activity beyond that of a prohibited intervention. The UK Government's position is therefore that there is no such rule as a matter of current international law'.[122] This position is supported and fleshed out by Gary Corn and Robert Taylor who argue that rather than a rule which if violated would entail consequences, sovereignty is a 'baseline principle' that gives rise to binding rules such as the prohibition on the use of force and the intervention prohibition.[123] They dispute that sovereignty is itself a binding rule of international law that precludes any action by one State in the territory of another without

117 Open-Ended Working Group Second 'Pre-Draft' (n 77) para 27.

118 *Corfu Channel Case (UK v Albania)* (Merits) 1949 ICJ Rep 4.

119 *Nicaragua* (n 9) [251].

120 ibid.

121 ibid.

122 Wright (n 79).

123 Gary P. Corn and Robert Taylor, 'Sovereignty in the Age of Cyber' (2017) 111 AJIL Unbound 207.

consent,[124] and does not bar cyber operations that affect cyber-infrastructure within another State, unless the cyber operations rise to the level of a prohibited intervention or use of force.[125] Their main argument for this view is that sovereignty is treated differently in different domains and is not applied as a one-size-fits-all rule. They point to the heavy emphasis of State sovereignty over its airspace, which is treated as highly restricted with no incursions usually being permitted unless it is in self-defence or under authorization from the Security Council, as compared to a lesser emphasis in a State's territorial waters which may be traversed by other States under certain conditions such as a right of innocent passage, and the complete absence of sovereignty in space, which is treated as a 'common heritage of mankind'.[126] They also point to the status of espionage, an act that conventionally involves either the unauthorized presence of the operatives of a foreign State or conduct of unauthorized activities in the territory of another State, which is not regulated by international law, as another example of how there is no operation of any sovereignty 'rule'.[127] As Corn and Taylor were senior legal advisors to the US government at the time their article was published, their view can be assumed to reflect US thinking, if not the US government's official position.

It is equally noteworthy that the Netherlands has openly declared its opposition to this interpretation, and has stated that it considers sovereignty an 'obligation in its own right, the violation of which may in turn constitute an internationally wrongful act'.[128] France[129] and Iran,[130] too, have echoed this view.

A discussion on the merits of this argument is beyond the scope of this article. But it is important to note that accepting the UK's understanding of sovereignty in cyberspace has far reaching implications. In the absence of a treaty or any other regime governing cyberspace, a cyber-attack in another State's territory that does not reach the levels of intervention or a use of force will in essence be permitted in international law. Further, importantly, while conventional espionage is generally accepted as not regulated by international law, the case is very different with cyber-espionage.[131] But if this view is accepted, cyber-espionage can also be considered legal. For context, incidents such as the malware discovered in one of India's nuclear power plants, even if State-sponsored, may

124 ibid 208.

125 ibid 208-209.

126 ibid.

127 ibid.

128 The Kingdom of the Netherlands, Minister of Foreign Affairs (n 80) 2.

129 Przemysław Roguski, 'France's Declaration on International Law in Cyberspace: The Law of Peacetime Cyber Operations, Part I' (*Opinio Juris*, 24 September 2019) <http://opiniojuris.org/2019/09/24/frances-declaration-on-international-law-in-cyberspace-the-law-of-peacetime-cyber-operations-part-i/> accessed 12 August 2020.

130 General Staff of the Iranian Armed Forces (n 84).

131 For a discussion, *see generally*, Russell Buchan, *Cyber Espionage and International Law* (1st edn, Hart Publishing 2018).

very well not fall in the net of international law. The malware in question was a variant of the D-Track virus, known to have data exfiltration capabilities.[132] The United Kingdom and possibly the United States contesting the existence of a rule as basic as sovereignty in cyberspace has not only flown in the face of established ICJ jurisprudence as explained above, but has also thrown a spanner in the development of a common understanding of how international law applies to cyberspace.

This contestation has injected much uncertainty into States' understanding of sovereignty, making the application of a sovereignty rule to State-sponsored disinformation operations difficult to the extent they are conducted in cyberspace. These operations are also unlikely to cross the threshold of the use of force or armed attack, both of which require the causation of significant damage.[133]

Besides sovereignty, other applicable rules that States' disinformation operations potentially implicate are the right to self-determination, particularly in election scenarios, and the right to free speech in international human rights law. The right to self-determination grants a 'people' the right to 'freely determine their political status and freely pursue their economic, social and cultural development'.[134] State-sponsored disinformation operations at the time of elections arguably impede the former, inasmuch as it affects the electorate's ability to impartially elect their own representatives. However, it must be noted that the right to self-determination is best applied to a 'people' who have been denied the right to govern themselves, such as a colonized people, for instance, or indigenous people.[135] It is not clear to what extent it could apply to the citizenry of an independent State that already broadly has this ability and it is even less clear whether it could apply outside of election scenarios. With regard to the right to free speech, Article 19 of the International Covenant for Civil and Political Rights guarantees the right to freedom of expression, both offline and online. Article 19(2) provides that everyone has the right to freedom of expression and that 'this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice'.[136] This right is said to have received customary status, given its inclusion in the Universal Declaration of Human Rights.[137] State-sponsored disinformation operations implicate the public's right to receive information. The public

132 Tech2 News Staff, 'ISRO confirms it was alerted about DTrack Malware during Chandrayaan 2, says it had no impact' (*Tech2 News Firstpost*, 10 November 2019) <https://www.firstpost.com/tech/science/isro-confirms-it-was-alerted-about-dtrack-malware-during-chandrayaan-2-says-it-had-no-impact-7626131.html> accessed 1 September 2020.

133 Schmitt '*Tallinn Manual 2.0'* (n 25) 330.

134 Ohlin (n 46).

135 Schmitt 'Virtual' Disenfranchisement (n 7) 146.

136 International Covenant for Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 19.

137 Emily Howie, 'Protecting the Human Right to Freedom of Expression in International Law' (2018) 20 International Journal of Speech-Language Pathology 12.

undoubtedly has a 'right to know', and therefore has a right to receive 'correct' information from the State.[138] However, it is still heavily contested whether this right is owed to the public by the government of another State. Although the Human Rights Committee's view is that the ICCPR obligations apply extra-territorially,[139] they only do so when a State exercises 'effective control' over the individuals or the foreign territory concerned. This is usually a difficult criterion to satisfy, especially over the internet. Further, as explained previously using bots and trolls to spread disinformation may not always crowd out other sources of correct information. It would perhaps be a different situation if a State targets the media of another State and somehow impedes their ability to disseminate news, or other forms of information to that State's public.

Given these issues, the intervention prohibition still presents a better legal rubric to assess State-sponsored online disinformation operations. Hence, the international law community has turned to the intervention prohibition as a better bet for bringing information influence operations within the ambit of international law.

Part IV

A Tailored Deception Test for the Intervention Prohibition in the case of online disinformation operations by States

The effects of prohibited intervention may be much clearer in cases where certain more trusted, reliable or authoritative sources of information are hijacked, which are then used to purvey disinformation. Consider a State conducting an information operation immediately before an election that, either through unauthorizedly accessing the official social media accounts of senior officials in the US government or impersonating them otherwise online, deliberately spreads incorrect information with the intention of swaying voters one way or another. It may be reasonable to conclude that this amounts to intervention since voters would simply take the information at face value, there being no reason to do otherwise. The likelihood of being influenced by incorrect information also substantially increases in such cases. It may not matter in this case that the transgressing State does not restrict access to genuine sources of information, since by deceptively portraying itself as a genuine source of information, it effectively ensures its intended audience does not feel the need to search out and verify the information from other authentic sources of information. Consider, for instance, if President Trump's Twitter handle was suddenly hacked by State actors just before an election, who then use it to spread disinformation about the Republican party in the United States. Given President Trump's position and that he is uniquely placed to be in

138 'International Standards: Right to Information' (*Article 19*, 5 April 2012) <https://www.article19.org/resources/international-standards-right-information/> accessed 2 July 2021.

139 Ryan Goodman, 'UN Human Rights Committee Says ICCPR Applies to Extraterritorial Surveillance: But is that so novel?' (*Just Security*, 27 March 2014) <https://www.justsecurity.org/8620/human-rights-committee-iccpr-applies-extraterritorial-surveillance-novel/> accessed 2 July 2021.

the know so to speak, voters would reasonably believe this false information which would then influence how they vote in the elections. Even if the deception was quickly identified and the false information denounced, it could be of little relevance since the damage may have already been done.

This tricky issue is exemplified in scenarios other than just elections. Let us consider a scenario Col. Gary Corn posited as an example of intervention – Russian disinformation operations hampering efforts to effectively fight the Covid-19 pandemic. After concluding that the Russian Kremlin's disinformation campaigns about the West needed to be challenged, the European Union set up the East StratCom Task Force as a wing of the European External Action Service ('EEAS'), specifically to raise awareness of as wel as counter Russian disinformation. According to a report from the EEAS, Russia's pro-Kremlin media are propagating conspiracy theories that the novel coronavirus was created by humans and weaponized by Western countries. The report claims that 'the overarching aim of Kremlin disinformation is to aggravate the public health crisis in Western countries, specifically by undermining public trust in national healthcare systems — thus preventing an effective response to the outbreak'.[140] The Global Engagement Centre, an arm of the US State Department aimed at countering foreign disinformation and influence campaigns targeting the US and its allies, also announced findings that there were thousands of Russian-linked social media accounts on Facebook and Twitter spreading disinformation about coronavirus.[141]

Based on these reports, Col. Corn notes the 'potentially deadly effect' that the Russian disinformation operations can have during the ongoing pandemic, and that Russia was undermining legitimate efforts to contain the spread and impacts of the lethal virus.[142] He argues that Russia is 'aiding and abetting the spread of the virus, fully knowing its actions pose a direct threat to people's lives' and calls for the intervention rule to be invoked against Russia.[143] Undoubtedly, ensuring the health of its citizens is a State's prerogative and can reasonably be concluded to fall within its domain reserve. However, the biggest obstacle to Col. Corn's argument is that the effect of these operations, whether Russian or not, is essentially cognitive without being coercive. The Russian linked accounts on Facebook and Twitter, although amplifying false information that could lead to US citizens making undesirable choices in dealing with the novel coronavirus and possibly cause

140 James Frater, Mary Ilyushina and Hadas Gold, 'EU says pro-Kremlin media trying to sow 'panic and fear' with coronavirus disinformation' (*CNN*, 18 March 2020) <https://www.cnn.com/2020/03/18/europe/eu-kremlin-disinformation-coronavirus-intl/index.html> accessed 23 July 2020.

141 Donie O'Sullivan and Kylie Atwood, 'Facebook and Twitter ask to see government report linking coronavirus misinformation to Russia' (*CNN*, 28 February 2020) <https://www.cnn.com/2020/02/28/politics/coronavirus-russia-disinformation-state-department/index.html> accessed 23 July 2020.

142 Corn (n 4).

143 ibid.

interference with US efforts to fight the coronavirus, will still be difficult to qualify as sufficiently coercive as understood in the intervention sense. It is hard to argue that these deceptive accounts, despite being numerous, are crowding out other authentic sources of information that can still be accessed by the people. It is not that the Russian coronavirus disinformation operations are somehow preventing, limiting or restraining its citizenry's ability to access correct facts, data or other information that can help them effectively protect themselves from coronavirus. However, it might be different if these influence operations consisted of illegally accessing the accounts of, or impersonating relevant medical professionals, authoritative news agencies or associated persons, or government officials and then proceeding to dispense false information relating to the pandemic. In such cases, by portraying themselves as authentic, authoritative and reliable sources of information, they are ensuring the dispensing with of the need to have the disseminated information verified. This effectively constrains or hampers the target State's ability to fight the ongoing pandemic.

Focusing on trusted sources such as State or State-affiliated accounts or other prominent figures better fits the intervention prohibition. The influence and reach wielded by these accounts on social media presents a clearer route to effectively intervene in the internal affairs of States. Several of them command hundreds of thousands of followers worldwide on these platforms. By July 2021, the official Twitter handle of India's Prime Minister Narendra Modi had reached 57.9 million followers, becoming the second most followed leader on Twitter, behind only the then President Donald Trump with 81.1 million followers. The large follower count is accompanied by outsized, often direct influence on the everyday lives of their followers. Illustratively, Elon Musk's tweets about Bitcoin and Dogecoin directly impact the cryptocurrency market– when he tweeted a Dogecoin meme inspired by the movie Lion-King, Dogecoin's price rose by more than 50%.[144] These accounts are vested with a certain level of trust, reliance and deference upon which their audience often base their own actions. When State actors or State-sponsored actors gain access to these accounts, either through impersonation or by hacking, they can cause significant damage. Although it is not clear whether it is linked to any State, the recent bitcoin scam on Twitter is indicative of this, in which the hacked Twitter accounts of Barack Obama and Joe Biden, among others, were used to call for bitcoin contributions with a promise of doubling them. In only a short while, the scam managed to rake in over a hundred thousand dollars.[145] It is hard to deny that these particular accounts were targeted because they are far more likely to be believed, than bots or other accounts. This argument is also in consonance with emerging research in this area which indicates that verified accounts have more visibility or

144 Andrew Hayward, 'How Elon Musk's Tweets Move the Cryptocurrency Market' (*The Motley Fool*, 17 June 2021) <https://www.fool.com/investing/2021/06/17/how-elon-musks-tweets-move-the-cryptocurrency-mark/> accessed 2 July 2021.

145 Sneha Saha, 'Twitter hack: What happened and how Twitter tackled the Bitcoin scam' (*The Indian Express*, 18 July 2020) <https://indianexpress.com/article/technology/social/twitter-hacked-what-happened-bitcoin-scam-6508118/> accessed 2 July 2021.

centrality in the spread of information on social media than bots with respect to politically contentious issues.[146]

Social media platforms are already cognizant of the magnitude of influence of these accounts, as measures taken to prevent their misuse indicate. Both Facebook[147] and Twitter[148] have a verified account policy for accounts of public interest, according to which a blue-tick badge is displayed next to the handle or name of the account, indicating that the account is authentic, notable and active. Public figures, including current key government officials and offices and accounts representing prominent organizations, brands and individuals, among others, are conferred this badge.[149] There is an expectation on the part of users that information from blue-ticked accounts can be safely relied upon as being from that particular user.

They are also granted enhanced security measures, in addition to the 'verified' status. Twitter recently announced more stringent safeguards for select accounts including requirements to use a strong password, two-factor authentication and password reset protection for these accounts by default.[150] The measures currently apply to accounts belonging to members of the US executive and legislative branches (members of Congress), governors and secretaries of State, political parties and election candidates.[151] Similarly, Facebook also offers 'Facebook Protect' to 'certain people such as candidates, elected officials or staff', especially during election cycles.[152]

The importance of trusted sources such as government accounts on social media becomes even more important in many countries such as China, where censorship and news regulation mean that the citizenry receives the bulk of its information or news from government sources or State-affiliated media, which have also moved online. Other State actors hijacking these accounts on social media can potentially more easily subvert the internal affairs of these countries. For instance, the high reliance of the Chinese population

146 Sandra González-Bailón and Manlio De Domenico, 'Bots Are Less Central than Verified Accounts during Contentious Political Events' (2020) Proceedings of the National Academy of Sciences <https://papers.ssrn.com/abstract=3637121> accessed 2 July 2021.

147 'How do I request a verified badge on Facebook?' (*Facebook Help Centre*) <https://www.facebook.com/help/1288173394636262/> accessed 2 July 2021.

148 'About Verified Accounts' (*Twitter Help Center*) <https://help.twitter.com/en/managing-your-account/about-twitter-verified-accounts> accessed 2 July 2021.

149 ibid.

150 Andrew Hutchinson, 'Twitter Implements New Security Measures to Protect the Accounts of US Election Candidates' (*Social Media Today*, 17 September 2020) <https://www.socialmediatoday.com/news/twitter-implements-new-security-measures-to-protect-the-accounts-of-us-elec/585453/> accessed 2 July 2021.

151 Stephanie Condon, 'Twitter imposes new security rules for US political accounts ahead of the 2020 election' (*ZDNet*, 17 September 2020) <https://www.zdnet.com/article/twitter-plans-to-protect-high-profile-us-political-accounts-ahead-of-the-2020-election/> accessed 2 July 2021.

152 'Facebook Protect' (*Facebook for Government, Politics and Advocacy*) <https://en-gb.facebook.com/gpa/facebook-protect> accessed 2 July 2021.

on State-media, both online and offline, means that a successful impersonation or hijacking of their State-media with a view to spread disinformation on an issue such as Covid-19 and vaccination could have catastrophic effects, majorly hindering governmental efforts to handle the Covid crisis and ensure citizens' welfare. Note that the emphasis on trusted sources online including government sources is especially heightened now given the spate of general mis- and dis-information prevailing about the novel coronavirus.

Limiting the test of coercive deception to cases where the intervening State impersonates persons of authority such as government officials may be a better route to arguing information influence operations as prohibited intervention. This also addresses the challenge to the right to anonymity, which does not ordinarily extend to governmental presence online.

Conclusion

Tolerance towards State-sponsored or conducted information influence operations is palpably decreasing among the international community. As Col. Corn pointed out, these operations can sometimes even endanger lives, as in the context of online disinformation pertaining to Covid-19. The intervention prohibition is an attractive candidate among the different rules of international law that States can use to regulate information influence operations.

However, as this article argues, the arguments currently made in mainstream scholarship regarding its applicability are not likely to be convincing. Firstly, the understanding of 'coercion' in international law will need to drastically change to accommodate the purely cognitive effects of States' disinformation operations. Secondly, States are still slow to characterize States' disinformation operations as illegal, let alone as illegal interventions, supported by legal justifications, which is what is needed to clarify the content and application of this rule. Thirdly, difficulties in attribution in cyberspace naturally also apply to disinformation operations. Cooperation from social media companies may be vital to States' attribution capabilities with regard to these operations. This article argues that these hurdles will not be easy to cross.

This article also highlights the problems with the overbroad focus on concealment and deception with respect to identity on the part of the intervening State as a route to reach the requirement of coercion. It is somewhat optimistic to believe that simply because an agency such as Russia's RT or Sputnik transparently disseminates false information, people will be less likely to believe such information. In any case, the option of verifying information as authentic remains with the target population whether the purveyor's identity is concealed or not. Accordingly, by questioning and exploring this relationship between deception and coercion, this article proposes that a finding of prohibited intervention be further narrowed down to where the deception is applied vis-a-vis trusted sources and persons of authority in the target State, since they are easily likely to be considered as

authentic sources of information, as opposed to other social media 'bots' or 'trolls' even if they are posing as citizens of the target State. Interdicting the latter will inevitably result in imperilling the right to anonymity online which is essential to exercising the rights to freedom of expression and privacy. A tailored deception test such as the one this article proposes is also more likely to be attractive to States since it appropriately sanctions the actually impactful wrongful action, while at the same time not overburdening States or endangering the right to anonymity.

Cyberspace affords more and more tools to States to achieve strategic outcomes without necessarily resorting to forcible means. Several of these operations such as disinformation campaigns operate solely by impacting the cognitive environment in the target State, something that is not directly regulated by the UN Charter. In this vein, it may be worth further exploring the relation between coercion as understood in international law and the cognitive impact that these operations usually have on the target State. While this is a question for future research, States currently have not reached the requisite level of consensus that information influence operations are without a doubt 'coercive' or otherwise illegal in international law. At best, it can be said that States have currently recognized such operations to be a problem.

PURCHASING PREMISES: ALSO PURCHASING ELECTRICITY DUES?

Tanmay Raj Anand and Chinmay Mehta*

This article pertains to dispute resolution in the highly litigious matters of payments for purchase of property, on which electricity dues are present. No single precedent applies to this issue, and there is no uniform national legislation governing it. Consequently, this article attempts to answer the question of who must pay said dues annexed to a property by discussing cases from the Supreme Court as well as High Courts of Bombay, Delhi, Gujarat Tamil Nadu, Kerala, and Madhya Pradesh. Differing approaches of the courts, as well as other statutes relevant to the issue are discussed. The article offers the conclusion that judicial trends reflect a change in approach from caveat emptor to caveat venditor, especially for properties sold through auction under special legislations such as SARFAESI Act, State Financial Corporations Acts, Recovery of Debts and Bankruptcy Act etc. Distinguishing between fresh connections of electricity and reconnections of existing ones, some High Courts have made distinctions between classes of purchasers/consumers, while others have not. Decisions in such issues also heavily depend on special statutes governing the matter, if any.

Keywords: *Electricity Dues, Electricity Act 2013, Draft Electricity (Amendment) Bill 2021.*

I. Introduction

Electricity supply is a behemoth infrastructure involving huge expenditure and investments. The units are set up and operated continually so as to ensure uninterrupted supply of electricity. The process being complex in nature, there are several intermediaries involved in the process commencing from production of electricity and terminating at receiving payments for the services so offered. Out of the several intermediaries and stakeholders involved in the process of providing electricity, the distributors/suppliers are indispensable ones. Electricity distributors in India range from private, public, private-public-partnership companies and together they serve a large population with an essential

* Tanmay Raj Anand is a final year law student at GNLU and he focuses his study on human rights law. Chinmay Mehta is a final year law student at GNLU and he focuses primarily on the study of insolvency law and commercial disputes.

service. Akin to other industries, the supply of electricity is susceptible to disputes concerning payment for goods and services. One such dispute as to payment arises out of the purchase of property, on which electricity dues are present. This has been a litigious issue for a long time in the Indian legal system. Confusion persists on all levels, thereby resulting in conflicts between retail consumers and discoms, which has led to a large number of pending cases. Due to this pendency and uncertainty of law, the stakeholders face significant losses.

On preliminary understanding, the question can be addressed by resorting to the doctrines of *caveat emptor* and *caveat venditor*? *Caveat emptor* is a Latin maxim which means 'let the buyer beware'. It implies that a buyer of real estate or other goods must exercise due diligence before finalising the purchase. *Caveat venditor,* on the other hand, stands for 'let the seller beware'. However, we find that the issue is much more intricate and there are various technicalities involved in determining who pays the dues of electricity annexed to a property.

There are multiple cases that deal with the issue but there is much variation in the spheres of their operation due to differences arising from new technicalities in succeeding cases. This article attempts to bring some clarity on the matter by discussing relevant cases, different approaches of various High Courts, and also the operation of other statutes *vis-à-vis* this issue.

II. Judicial Developments

There are a host of cases decided by the Supreme Court of India and the various High Courts regarding the issue of the dues in payment of electricity supply. Regardless, there is not a single precedent that applies to all situations and the problem persists because there is no uniform legislation applicable to the whole country.

The legislations that regulate such matters are usually the Supply Codes or the Terms and Conditions of Supply that are delegated legislations, and are made by the Electricity Commissions (erstwhile Boards) and distributors.[1] Various High Courts have interpreted the decisions of the Supreme Court, and in turn, resulted in uncertainty.

The Supreme Court has time and again tried to put to rest the matter. One of the initial questions is about the nature of electricity connection over a premises, whether it is a fresh connection or is it a case of transfer of the electricity connection. Certain delegated legislations require clearance of electricity dues only by the transferees of a premises. This implies that a person seeking fresh electricity connection on a premise need not clear the dues incurred by the previous owner on his own name. The existence or absence of a statute to govern the dues has implications on the decisions of the courts, and if such a statute is present then does it consider electricity dues as a *charge* over the property; some states

1 *Punjab SEB v Bassi Cold Storage* (1994) 3 SCR 33; *Bihar SEB v Parmeshwar Kumar Agrawala* AIR 1996 SC 2214; *M/s Hyderabad Vanaspati Ltd v APSEB & Ors* (1998) 2 SCR 620.

consider electricity dues as a charge over the property and recoverable as arrears of land revenue whereas others do not.

The mode of purchase also has an important role to play. An auction purchase has different characteristics from a regular sale with the former having government bodies involved in the process. For example, sale of any premises under the SARFAESI Act[2], as opposed to a voluntary *inter vivos* sale, is governed by different standards of prior notice of encumbrances and electricity dues. These standards would determine the extent of liability on the purchaser or the seller.

Lastly, any relation between the purchaser and the seller becomes material in determining the liabilities in relation to electricity dues. To illustrate, if the assets of a company are transferred to the relatives of a director with an intention to escape paying the dues of electricity, the courts in this scenario will not shy away to pierce the corporate veil of the seller company and hold the purchaser liable.[3]

III. Supreme Court

The question of outstanding electricity dues came before a three-judge bench of the Supreme Court of India in the case of *Isha Marbles*.[4] In this case, the appellant was an auction purchaser of certain premises auctioned under the State Financial Corporations Act, 1951.[5] When the auction purchaser assumed possession of the premises, the electricity connection had been disconnected by the State Electricity Board due to non-payment of electricity dues by the previous owner. The State Electricity Board required the auction purchaser to clear the dues of electricity charges incurred by the previous owner. This requisition was challenged by the purchaser before the High Court of Patna. The High Court held that the Bihar State Electricity Board was empowered under Section 24 of the Supply Act[6] to put forth such a demand. Isha Marbles challenged the decision of the High Court before the Supreme Court. The Supreme Court held that electricity dues in relation to a property do not constitute charge over a property, thus, liability could not be imposed on the purchaser for the dues of electricity charges by the previous owner. Further, unless there was a specific statutory law to that effect, privity of contract exists whereby the purchaser is a third party who is not liable for the dues incurred by the previous owner. In this case, there was absentia of such a statutory law. Additionally, the dues of the electricity are not annexed to the *property* but are annexed to the *consumer*. The court categorically held that the auction purchaser does not qualify as a 'consumer' or 'occupier' under sub-

2 Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 (SARFAESI Act).

3 *Akanksha International v Maharashtra State Election Distribution Company Ltd* 2007(5) BomCR 481.

4 *Isha Marbles v Bihar State Electricity Board and Ors* (1995) 2 SCC 648.

5 State Financial Corporation Act 1951, s 29(1).

6 The Electricity Supply Act 1948 (repealed), s 24.

section 15 of Section 2 of the Electricity Act.[7] It was also opined that it is the obligation of the distributor to provide electricity within 30 days to any person making a requisition. However, in cases where the defaulter and the purchaser are virtually the same entity, liability can be imposed on the purchaser of the premises.

After-effects of *Isha Marbles*

The major impact of *Isha Marbles* can be seen in various decisions of the Supreme Court as recently as 2020. One early case is *Ahmedabad Electricity Company Ltd v Gujarat Inns Pvt Ltd and Ors*.[8] Here the Supreme Court held that when an auction purchaser makes a requisition for a fresh connection of electricity, they should not be required to clear the dues of the previous owner/occupier unless there's a statutory provision to that effect. Cases involving the transfer of electricity connection were left open for consideration by the court in this case.

The authorities (i.e. Boards and discoms) took cognizance of *Isha Marbles*, and some State Electricity Boards added clauses in their terms and conditions of supply of electricity and other subordinate legislations. These clauses were intended to impose liabilities on the subsequent purchasers. Dakshin Haryana Bijli Vitran Nigam Ltd (discom) introduced Clause 21-(A)[9] in the Terms and Conditions of Supply of Electrical Energy which empowered the discom to refrain from granting fresh connection/transfer of connection until the previous dues were paid by the transferee. Interpreting this clause, a deviation was observed from

7 Electricity Act 2003, s 2(15).

8 *Ahmedabad Electricity Co Ltd v Gujarat Inns Pvt Ltd and Ors (Ahmedabad Electricity)* (2004) 3 SCC 587.

9 Dakshin Haryana Bijli Vitran Nigam, Sales Circular, Recovery of outstanding dues from the defaulting premise, (No D-95/2001) 2001, <https://www.dhbvn.org.in/staticContent/saleregulation/salecircular/circular2001/SC.D-95-2001.pdf> accessed 17 August 2021; Clause 21-(A)(a) reads as follows: '*When there is transfer of ownership or right of occupancy of a premises, the registered consumer shall intimate the transfer of right of occupancy of the premises within 15 days to the Assistant Engineer/Assistant Executive Engineer concerned. Intimation having been received, the service shall be disconnected unless application for transfer is allowed. If the transferee desires to enjoy the service connection, he shall pay the outstanding dues, if any, to the Nigam and apply for transfer of the service connection within 30 days and execute fresh agreement and furnish fresh security. New Consumer number shall be allotted in such cases canceling the previous number.*
(b) Reconnection or new connection shall not be given to any premises where there are arrears on any account to the Nigam unless these are cleared in advance. If the new owner/occupier/allottee remits the amount due from the previous consumer, the Nigam shall provide reconnection or new connection depending upon whether the service remains disconnected/dismantled as the case may be. The amount so remitted will Be adjusted against the dues from the previous consumer. If the Nigam get the full or partial dues from the previous consumer through legal proceedings or otherwise, the amount remitted by the new owner/occupier to whom the connection has been effected shall be refunded to that extent. But the amount already remitted by him/her shall not bear any interest.
(c) The above proposed provisions of Clause 21-A(a) and (b) shall be applicable to existing consumers also where defaulting amount exists against premises occupied by such consumer.'

the previous two cases in *Paramount Polymer.*[10] This case involved an auction purchase and the liability on the auction purchaser to clear the dues of the previous owner/occupier. The High Court of Punjab and Haryana had declared that Clause 21-(A) does not apply to the respondent *i.e.* Paramount Polymers. The application of the fresh connection had been made prior to the introduction of Clause 21-(A) and therefore the respondent could not be made liable to those terms. The Supreme Court, however determined that the High Court had overlooked sub-clause (c) under Clause 21-(A). Despite the fact that Paramount Polymers entered into a contract with the appellant for the supply of electricity connection before the insertion of the clause, they had to comply with the amended terms by virtue of sub-clause (c) as Clause 21-(A) is to be applicable to existing users.[11] Before the High Court, the original petitioners also challenged the validity of Clause 21-(A). The High Court did not delve into the matter and therefore the Supreme Court remitted the question back to the High Court for fresh consideration.[12] The important aspect reiterated by the apex court was that the terms and conditions of supply are not merely contractual but are statutory in nature.[13] Furthermore, the powers under the Punjab Land Revenue Act, 1887 allowed dues of electricity to be recovered as arrears of land revenue, which the High Court had failed to take into account.[14]

Cases with certain variations wound up at the Supreme Court. In *DVS Steels and Alloys,*[15] the Supreme Court had to decide the liability of a purchaser of a sub-divided plot to pay electricity dues. The Supreme Court in clear terms decided that the distributor can stipulate terms subject to which it would supply electricity (in this case, payment of dues of a sub-divided plot was to be made on a pro-rata basis). Further, the distributor can insist on the fulfillment of such pre-requisite terms. This is of course subject to the condition that the distributor had stipulated that dues of electricity charges of the previous owner were to be paid by the new owner/occupier of the premises. The most important part of the decision is about the extent of interference by the Courts *vis-à-vis* the stipulation in form of terms/rules/regulations which are delegated legislation. The apex court clarified that unless the stipulation is arbitrary or unreasonable, the courts must not interfere with them.

Until now, the Supreme Court was dealing with isolated issues and the position of law had not been summarily stipulated. Hence, in *Hanuman Rice Mills*[16] the Court did exactly that in the form of two premises: ***firstly***, that the electricity dues do not constitute a charge over the property, and therefore in general, they are not payable by the transferee of

10 *Dakshin Haryana Bijali Vitran Nigam Ltd v Paramount Polymers Pvt Ltd* (2006) 13 SCC 101.

11 ibid 107-108.

12 ibid 110.

13 *M/s Hyderabad Vanaspati Ltd v Andhra Pradesh State Electricity Board and ors* (1998) 2 SCR 620.

14 Punjab Land Revenue Act 1887.

15 *Paschimanchal Vidyut Vitran Nigam Ltd and Ors v DVS Steel and Alloy Pvt Ltd and Ors (DVS Steel)* (2009) 1 SCC 210.

16 *Haryana State Electricity Board v Hanuman Rice Mills and Ors* (2010) 9 SCC 145, 150-51.

premises. ***Secondly***, where a statute or terms of supply authorize the distributor to recover the dues of electricity from the purchaser of the property before granting fresh connection/ transfer of connection, the distributor may do so. In *North Eastern Electricity Company of Orissa (NESCO) v Raghunath Paper Mills Pvt Ltd*,[17] as per the Orissa Electricity Regulatory Commission Distribution (Conditions of Supply) Code 2004,[18] clearance of dues of electricity by any person seeking restoration of existing connection was required. However, there was no such prerequisite applicable to a purchaser who sought a fresh connection. The respondent, in this case, had purchased the premises in an auction under the State Financial Corporations Act, 1951 from the Official Liquidator. The premises had been purchased on *'as is where is'* and *'whatever there is basis'*. We must note that the Supreme Court again made a reference to all the cases mentioned above and came to a similar coherent conclusion: a subsequent purchaser of premises will not be liable to pay the dues of electricity incurred by the previous owner/occupier when he or she seeks a re-connection or a fresh connection for electricity with the distributor; unless of course there are specific statutory terms and conditions in the supply code that stipulate for the payment of dues incurred by the previous owner by the subsequent purchaser on seeking re-connection or a fresh connection or both. The Supreme Court reiterated that the courts could only interfere with the terms and conditions of supply if they are arbitrary or unreasonable.

In a 2018 case,[19] the Supreme Court relied on the law laid down in *Isha Marbles* and once again disregarded the contention that an auction purchaser who purchased a property on an *'as is where is'* basis is obligated to clear the dues of electricity. The sale, in this case, was conducted to enforce security interest under the SARFAESI Act.[20] The Court also recognised that the auction purchaser had no connection with the defaulting previous owner and therefore, in absence of such nexus and in the absence of a statutory provision, the purchaser did not have to pay the dues in order to seek a fresh connection of electricity. As recently as 2020, in the case of *Telangana State Southern Power Distribution Co Ltd & Anr v M/s Srigdhaa Beverage*,[21] the Supreme Court dealt with the matter again. In this

17 *Special Officer, Commerce, North Eastern Electricity Company of Orissa (NESCO) v Raghunath Paper Mills Pvt Ltd* (2012) 13 SCC 479.

18 Orissa Electricity Regulatory Commission Distribution (Conditions of Supply) Code 2004, r 13(10); It reads as follows: '*Transfer of service connection:*
(*a) Subject to Regulation 8, the transfer of service connection shall be effected within 15 days from the date of receipt of complete application.*
(b) The service connection from the name of a person to the name of another consumer shall not be transferred unless the arrear charges pending against the previous occupier are cleared. Provided that this shall not be applicable when the ownership of the premises is transferred under the provisions of the State Financial Corporation Act.'

19 *Southern Power Distribution Co of Telangana Ltd v Gopal Agrawal and Ors* (2018) 12 SCC 644.

20 SARFAESI Act (n 2).

21 *Telangana State Southern Power Distribution Co Ltd & Anr v M/s Srigdhaa Beverage* (2020) 6 SCC 404.

case, the purchase of a premises was done through an auction, on *'as is where is, whatever there is and without recourse basis'*. The auction notice specifically stipulated details and quantum of outstanding dues of electricity; meaning that the purchaser had sufficient notice. The sale was made *'free from all encumbrances'* and an indemnity was provided by the vendor for any loss arising out of any defect in the title, statutory liabilities, and also litigation expenses arising out of such defects in title. The court held that the purchaser was liable to pay the electricity dues as the statute clearly required, regardless of whether the connection is new or a reconnection. And the distinctive feature of the decision is that it states that in case of an auction, when the auction notice stipulates the quantum of dues for electricity, the same needs to be paid by the auction purchaser. Thus in such specific scenarios pertaining to an auction purchase wherein sufficient notice about arrears of electricity along with a statutory requirement on the purchaser to clear those dues, the Supreme Court has a clear stance.

IV. Interpretations by the High Courts

After the pronouncement of judgment in *Isha Marbles*, the executive has been proactive in formulating statutes or incorporating provisions in existing statutes for imposing liability on the transferees. Due to the distinct provisions in different states, the position of law differs from one jurisdiction to another.

High Court of Judicature at Bombay

The initial approach of the Bombay High Court towards the issue was different from what is practiced at present. Subsequent to the decision in *Isha Marbles*, regulations were amended by the State Electricity Board in Maharashtra to govern the supply of electricity. After disconnection of supply by the distributor under Section 24 of the Electricity Act, 2013,[22] the distributor could recover the dues from the purchasers under Regulation 23 of the Maharashtra Electricity Supply Regulations.[23] A division bench of the Bombay High

22 The Electricity Act 2013, s 24.

23 Maharashtra Electricity Supply Regulations, r 23; It reads as follows: '*23. Assignment or Transfer of Agreement :*
(a) The consumer shall not without previous consent in writing of the Board, assign, transfer or part with the benefit of his agreement with the Board nor shall the consumer in any manner part with or create any partial or separate interest thereunder.
(b) A consumer who commits breach of condition 23(a) above and neglected to pay to the Board any charges for energy or to deposit with the Board amount of security deposit or compensation and the supply of such consumer is disconnected under Section 24 of the Indian Electricity Act, 1910 or under condition No. 31 (e) of these conditions dies, or transfers, assigns or otherwise dispenses of the undertaking or the premises to which energy was being supplied to the consumer, any person claiming to be heir, legal representative, transferee, assignee or successor of the defaulting consumer with or without consideration in any manner shall be deemed to be liable to pay the arrears of electricity charges, security deposit or compensation due payable by the consumer and it shall be lawful for the Board to refuse to supply or reconnect the supply or to give a new connection to such person claiming to be the heir, legal representative, transferee, assignee or successor of the defaulting consumer of such premises, unless the amount of such

Court held in *ETCO Spinners*[24] case that an auction purchaser does not qualify as any of the persons named in Regulation 23, hence is not liable to pay dues to the defaulting owner. It was held that sale in an auction is not in the nature of a voluntary transfer and therefore an auction purchaser who seeks a fresh connection of electricity cannot be made to pay the arrears in absence of a statutory provision which may cover such transferees. A distinction between voluntary *inter vivos* transfer and a non-voluntary transfer was reiterated by the division bench.[25]

Relying on the decision in *ETCO Spinners*, another division bench of the Bombay High Court decided that the Maharashtra Electricity Regulatory Commission (Electricity Supply Code and Other Conditions of Supply) Regulations, 2005[26] clearly imposes liability on the purchaser to clear the dues.[27] The court held that the unpaid dues constitute a charge over the property, therefore the same can be recovered from the transferee of the property. The court clarified that the question of fresh connection versus a transfer of connection has no relevance since Regulation 10.5 covers all such cases.

The Bombay High Court has taken a view based solely on the statutory provision relating to the recovery of dues. This view is in accordance with the law laid down by the Supreme Court and therefore, attracts no criticism or analysis *per se.*

Delhi High Court

In a case before a division bench of the Delhi High Court, it was decided that according to Clause 2.1(iv) of the relevant General Conditions of Supply,[28] a purchaser of property has to clear the electricity dues of the previous consumer.[29] The clause requires any applicant to deposit certain charges including outstanding dues against the premises and/or disconnected connection(s). The High Court distinguished this case from *Isha Marbles* by quoting the presence of a specific statute that was absent in the latter. The court went on to suggest that in their collective wisdom, there exists no distinction between a buyer who is aware of the existence of charges and a buyer who is unaware of such existence.

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charges due and/or the compensation demand from the defaulting consumer, is as the case may be duly paid to or deposited with the Board.'

24 *ETCO Spinners Pvt Ltd and Ors v State of Maharashtra and Ors* 2005 (6) BomCR 351 [Pending SLP(c) 21027/2005].

25 *Aurangabad Industrial Associates v State of Maharashtra* 2001(3) BomCR 554.

26 Maharashtra Electricity Regulatory Commission (Electricity Supply Code and Other Conditions of Supply) Regulations 2005, r 10.5.

27 *Namco Industries Pvt Ltd v State of Maharashtra & Ors* 2011 (113) BOMLR 3479.

28 Delhi Electricity Regulatory Commission, Tariff Order (May 23 2001); It reads as follows: '*General Conditions of Supply:*
2.1 Supply of electricity in all cases is subject to the condition that…
(iv) The applicant deposits development charges, advance consumption deposit and all such charges as may be applicable including outstanding dues against the premises and / or disconnected connection(s).'

29 *Madhu Garg & Ors v North Delhi Power Ltd* 2006 (88) DRJ 595.

This was upheld in the case of *BSES Rajdhani*.[30] The court further opined that there is no relevance of *bona fides* (or *mala fides)* and knowledge of dues (or absence of knowledge) in deciding the liability. Moreover, there is no difference if the requisition for supply is in the form of a new connection or transfer of connection. In cases of voluntary *inter vivos* transfer of the property, the High Court has followed the decision of *BSES Rajdhani* without variation.

It has continued to hold that there is no distinction between a buyer being aware or unaware of the outstanding electricity dues and that it is the liability of the purchaser to satisfy himself that there are no such dues prior to the sale.[31]

The variation from the settled law was seen in *Tata Power*[32] where the Court held that an auction purchaser cannot be obligated to clear the outstanding electricity dues under Regulation 15 of the Code.[33] It requires an applicant, who purchased property with an existing electricity connection, to perform due diligence and to obtain a no dues certificate from the distributor.

Relying upon the decision in *NESCO*[34], *Ahmedabad Electricity Company*[35] , and *DVS Steel,*[36] the High Court held that there is a distinction between a person who purchases property from the previous owner directly (*voluntary inter vivos transfer*) and a person who purchases the property from public auction. A person who purchases a property in a public auction, on *'as is where is'* and *'whatever there is'* basis cannot be reasonably expected to inquire into the existence of electricity dues. Further, no provision treats the outstanding electricity payments as a charge on the property, therefore, an auction purchaser cannot be forced to pay the outstanding dues of electricity.[37]

From the above-mentioned cases, it is clear that unlike the Bombay High Court, the High Court of Delhi has interpreted the statutory provisions subjectively and has created a differentiation amongst different classes of purchasers.

Gujarat High Court

The position of law in Gujarat is far from clear. Initially, in absence of any statutory provision, the High Court held that the purchaser cannot be made to clear the electricity

30 *BSES Rajdhani Power Ltd v Saurashtra Color Tones Pvt Ltd & Ors* AIR 2010 Delhi 14.

31 *Harpreet Singh Bhatia v North Delhi Power Ltd* 2018 ELR (DELHI) 121.

32 *Tata Power Delhi Distribution Ltd v Neeraj Gulati* 2018 SCC OnLine Del 6713.

33 Delhi Electricity Supply Code and Performance Standards Regulation 2007, <http://www.derc.gov.in/sites/default/files/SupplyCode.pdf> accessed 17 August 2021.

34 *NESCO* (n 17).

35 *Ahmedabad Electricity* (n 8).

36 *DVS Steel* (n 15).

37 *Tata Power Delhi Distribution Ltd v Neeraj Gulati* 2018 SCC OnLine Del 6713 [24].

dues of the previous consumer.[38] Against such decisions, special leave petitions are pending before the Supreme Court till date.[39] These pending cases before the Supreme Court affect the decisions of the High Court of Gujarat.

Clause 2 (j) of the Conditions for Supply empowers the distributor to recover dues of defaulting consumers from the subsequent purchaser (in cases of both reconnection and requisition for new connection). This clause under the Gujarat Electricity Board (Conditions and Miscellaneous Charges for Supply of Electrical Energy)[40] was upheld by a division bench of the High Court in the *Sona Cooperative Housing Society* case.[41] Having similar effect as Clause 2(j) of the Conditions of Supply, Clause 4.1.11 was introduced through the Gujarat Electricity Regulatory Commission via an amendment in the conditions of supply,[42] but surprisingly it was struck down by a three-judge bench of the High Court as being *ultra vires* and inconsistent with the Electricity Act, 2013.[43] Therefore, in Gujarat, there are 3 issues that need consideration of the court while deciding the liability of a purchaser to clear outstanding electricity charges. ***Firstly***, that the decision of the apex court is awaited; ***secondly***, Clause 2(j) has been upheld by the High Court; and ***thirdly***, Clause 4.1.11 similar in function to Clause 2(j) has been struck down by the High Court but this decision may be set aside by the apex court. Due to the apparent tentativeness of the law, the Gujarat High Court has opined that the electricity connection to any purchaser-applicant must be given by taking an undertaking that the purchaser would abide by the decision of the apex court made in this regard.[44]

Tamil Nadu High Court, Kerala High Court, and Madhya Pradesh High Court

The approach of the Madras High Court is similar to a certain extent to the Kerala High Court.

38 *Abhisar Developers v Torrent Power Ltd* AIR 2011 Guj 1.

39 *Torrent Power Ltd & etc v M/s Abhisar Developers* SLP (c) 9092-9094/2013.

40 The Indian Electricity Act 1910.

41 *Gujarat Electricity Board v Sona Cooperative Housing Society Ltd & Ors* LPA 1484 of 2004 R/SCA/9032/2002.

42 Gujarat Electricity Regulatory Commission (Electricity Supply Code and Related Matters) (Third Amendment) Regulations 2010, c 4.1.11; It reads as follows: '*An application for new connection, reconnection, addition or reduction of load, change of name or shifting of service line for any premises need not be entertained unless any dues relating to that premises or any dues of the applicant to the Distribution Licensee in respect of any other service connection held in his name anywhere in the jurisdiction of the Distribution Licensee have been cleared. Provided that in case the connection is released after recovery of earlier dues from the new applicant and in case the licensee, after availing appropriate legal remedies, get the full or part of the dues from the previous consumer/owner or occupier of that premise, the amount shall be refunded to the new consumer/owner or occupier from whom the dues have been recovered after adjusting expenses to recover such dues.*'

43 *Sanjay Balvantrai Desai & Ors v Dakshin Gujarat Vij Co Ltd & Ors* AIR 2013 Guj 167.

44 *Sureshbhai Veljibhai Patel v Dakshin Gujarat Vij Co Ltd and Ors* MANU/GJ/0554/2019; *Abhisar Developers v Torrent Power Limited* 2010 (3) Glr 2593.

A division bench of the Tamil Nadu High Court held the dues of electricity are not recoverable from subsequent purchasers of premises.[45] The ratio for holding subsequent purchasers not liable was that Clause 6.10 of the Supply Code[46] applied only to debtors; whereas a purchaser does not fit into such a category. Further, no charge is created over the property by the said clause, and therefore, in *KTV Foods*[47] it was held that Clause 6.10 is not an appropriate provision to make the subsequent purchaser liable for outstanding electricity dues. According to the decisions of the High Court, dues are not recoverable from the purchaser *per se*.[48]

The Kerala High Court now shares the same position as the Tamil Nadu High Court. Earlier, through interpretation of Regulation 15(d) and 15(e) of the Regulations relating to Conditions of Supply of Electrical Energy[49] and the decision in *Isha Marbles,* arrears of electricity were deemed to be a charge on property and a purchaser was required to clear them.[50] Subsequently, a full bench of Kerala High Court decided that the regulations make no distinction between an auction purchaser and any other purchaser, and in absence of such distinction, all persons seeking new connection/reconnection need to clear the dues pertaining to electricity.[51] Even after the Electricity Act, 2003 came into force, the position of law has been constant where the purchaser has to clear the dues of electricity.[52] The position of law has changed after the enactment of the Kerala Electricity Supply Code, 2005[53] and subsequently, by the enactment of the Code of 2014.[54]

Regulation 12 of the 2005 Code and Regulation 40 of the 2014 Code do not require the purchaser of any property to clear the dues of electricity marking a clear shift. Such regulations only require the deposit of the dues until they are recovered from the previous owner or on expiry of three years from the date of purchase. These provisions were held

45 *Shajahan v Superintending Engineer* TNEB 2012 (4) MLJ 763.

46 Tamil Nadu Electricity Board, Terms and Conditions of Supply, 6.10; It reads as follows: '*The Board will refuse to supply electricity to an intending consumer who has defaulted in payment of dues to the Board in respect of any other service connection held in his name.*
In case of services which have been disconnected/dismantled for non-payment of arrears and if the services are to be availed by other parties in the same premises either by purchase or transfer or in auction or on lease basis then in such cases the services will be effected only on clearance of the dues outstanding against such disconnected/ dismantled service by the intending consumers.'

47 *KTV Health Foods Pvt Ltd v Chairman Tamil Nadu Electricity Board* 2014 WritLR 814.

48 *E Balasubramian v Superintending Engineer, Tamil Nadu Electricity Generation and Distribution Corporation (TANGED Co)* 2018 (6) CTC 123.

49 *A. Ramachandran v Kerala State Electricity Board* 2000 (2) KLT 694 [4].

50 *KJ Dennis v Liquidator* 2001 (2) KLJ 75 (SLP Pending); *Seena B Kumar v Asst Executive Engineer* 2003 (3) KLT 987; *A. Ramachandran v Kerala State Electricity Board* 2000 (2) KLT 694.

51 *Suraj KR v The Secretary KSEB and Ors* AIR 2006 Ker 194.

52 *KG Purushothaman v Kerala State Electricity Board and Ors* AIR 2007 Ker 201 (SLP Pending).

53 Kerala Electricity Supply Code 2005.

54 Kerala Electricity Supply Code 2014.

to be consistent with the provisions of the Electricity Act, 2003.[55] Hence, by the literal interpretation of such regulations, in effect, arrears of electricity dues cannot be recovered from the purchaser.[56]

So the dues of electricity are not recoverable from the purchasers in Kerala and Tamil Nadu in the absolute sense. Contrary to such a position, the liability of the purchaser to pay the dues is qualified in Madhya Pradesh. Clause 4.17 of the Madhya Pradesh Electricity Supply Code, 2004[57] (as amended in 2006) requires a transferee to clear the electricity dues in case the transferee himself was the consumer-in-default of the payment, or associated to the person in default as a partner, director, or managing director or as occupier and/or owner of the premises. Clause 4.17 also expressly provides five exceptional cases in which no payment of outstanding dues is required by the transferee of the premises. One such exception is provided under sub-clause (ii) of Clause 4.17 which states that release of new connection shall not be refused in case the property is sold by any government department for the recovery of their dues. In furtherance of such provision, the Madhya Pradesh High Court has decided that the sale performed by the Official Liquidator or any other agent of the government falls within the said exception.[58] Hence, the auction purchaser need not pay the arrears of electricity charges associated with the premises. The judgment was considered a proper law and therefore upheld by a division bench[59] and supported by later decisions of the Madhya Pradesh High Court.[60] The 2004 Regulations in the state of M.P. have been repealed but Clause 4.17 has been retained as Clause 4.12 in the latest regulations of 2013. Hence, the position of law is clear and remains the same in the State of Madhya Pradesh.

High Courts on Electricity dues *vis-à-vis* the SARFAESI Act and the RDB Act[61]

Provisions of the Security Interest (Enforcement Rules), 2004 ('ESI Rules') require the Banks/Financial Institutions to disclose all the information relating to encumbrance and other material information that may assist the purchaser to judge the nature and value of the property.[62] Hence, the ESI Act professes the doctrine of *caveat venditor* which imposes accountability for providing information on the seller. Per contra, several conditions of supply require the purchaser to discharge the outstanding dues of electricity. This inherently creates a conflict in cases where the sale is performed under ESI Rules without disclosing

55 *B Parasmal and Ors v Kerala State Electricity Board and Ors* 2018 SCC OnLine Ker 16443.

56 *Rafeek CA v Kerala State Electricity Board* 2019 SCC OnLine Ker 3010.

57 Madhya Pradesh Electricity Supply Code 2004.

58 *Shobhana Enterprises Pvt Ltd v MP Paschim Kshetra Vidyut Vitran Co Ltd & Ors* AIR 2010 MP 6.

59 *MP Paschim Kshetra Vidyut Vitran Co Ltd v Electricity Consumer Grievance Redressal Forum and Ors* AIR 2009 MP 194.

60 *Rameshwar Ram Patel v MP Madhya Kshetra Vidyut Vitran Co Ltd & ors* 2012 SCC OnLine MP 9345; *Rameshwar Ram Patel v MP Madhya Kshetra Vidyut Vitran Co Ltd & ors* 2012 SCC OnLine MP 10026.

61 Recovery of Debts and Bankruptcy Act 1993.

62 Security Interest (Enforcement Rules) 2004, r 8.

the information of the dues of electricity associated with the previous owner. High Courts have attempted to resolve the conflict between the ESI Rules and electricity regulations but in practicality, have failed to establish uniformity.

Calcutta High Court very recently interpreted sub-regulation 3.4.2. of the West Bengal Electricity Regulatory Commission (Electricity Supply Code) Regulations, 2013.[63] Sub-regulation 3.4.2. empowers the distributor to recover the dues of the *'previous and defaulting consumer'* from the *'new and subsequent consumer'* if both are *'at the time being connected'*. In that case, the acquisition of property was in an auction, hence no connection between the defaulter and the purchaser could be proved by the distributor. This ultimately discharged the purchaser from the liabilities of his predecessor. In addition, it was clarified by the court that an auction purchaser does not qualify as a 'consumer' under Section 2(15) of the Electricity Act; therefore, he/she cannot be held liable under sub-regulation 3.4.2.[64] Even the Madras High Court came to the same conclusion after analysing Section 31-B of the SARFAESI Act which provides priority to the rights of secured creditors.[65] It held that Tamil Nadu does not have a specific statute that puts the distributors above in priority over the other creditors. Hence, no liability could be imposed on the purchasers that the law does not itself impose.

In Chhattisgarh, the Electricity Supply Code of 2011[66] requires the new owner to perform due diligence before the purchase of property and clear the dues in order to receive a fresh supply. The Chhattisgarh High Court took a similar view to that of the Madras High Court and Calcutta High Court. The Court held that the provisions of the SARFAESI Act (and the rules made therein) would be defeated if an auction purchaser is forced to pay the dues of electricity.[67] It clarified that Rule 8(6) of the ESI Rules caused the principle of *caveat emptor* to be replaced by the principle of *caveat venditor*, hence no hidden liability can be imposed post the sale of the property.[68]

Hitherto, the High Courts supported a position in which auction purchasers were not required to clear the dues of previous occupiers. Hence, the general rule that emanates from such decisions is that the sale under the DRT Act and SARFAESI Act will not entail clearance of electricity dues by the auction purchasers. To this general rule, the High Court

63 *Damodar Valley Corporation and Ors v Shree Ramdoot Rollers Private Ltd* MANU/WB/0501/2020.

64 ibid [87].

65 *E Balasubramanian v The Superintending Engineer, Tamil Nadu Electricity Generation and Distribution Corporation Circle (TANGEDCO) and Ors* 2018 (6) CTC 123; *Shahjahan v The Superintending Engineer* AIR 2012 Mad 239*; KTV Health Foods Pvt Ltd v Chairman Tamil Nadu Electricity Board* 2014 Writ LR 814.

66 Chhattisgarh State Electricity Supply Code 2011.

67 *M/s Maheshwari Steels v Chhattisgarh State Power Distribution Co Ltd* WP (C) 2700/2017 (CG HC).

68 *Agrawal Structure Mills Pvt Ltd v Chhattisgarh State Power Distribution Co Ltd* 2019 SCC OnLine Chh 98 [15].

of Bombay and the Gauhati High Court emerge as an exception.

A division bench of the Bombay High Court took a different approach and went into greater inquiry. It interpreted the Maharashtra Electricity Regulation, 2005[69] and the SARFAESI Act acts harmoniously, and also pierced the corporate veil of the purchasing corporation. Since the purchaser was the same family which owned the defaulting unit, the auction purchaser was held liable to clear the dues.[70] The Bombay High Court also explained that the plane of operation of the SARFAESI Act and the electricity regulations are completely different, therefore, non-obstante clause in the SARFAESI Act will be of no avail to the purchasers.

Likewise, the Gauhati High Court interpreted the Assam Electricity Regulatory Regulations, 2004[71] to hold an auction purchaser liable for payment of electricity dues of the previous owner.[72] The reason for such an order was that the regulations require purchasers to perform due diligence before purchasing any property *vis-à-vis* electricity dues. In this case, the distributor had already notified the prospective buyers of their liability through a notice in a newspaper. Hence, it was incumbent upon the auction purchaser to take note of the same. The regulations were also challenged before the High Court as being *ultra vires* but the Court upheld them. Against the High Court's order, a Special Leave Petition is pending before the Supreme Court of India.[73]

In a related but different issue, the Allahabad High Court decided the liability of banks (as auctioneer) for undisclosed encumbrances *viz.* the dues of housing tax and electricity payments.[74] The High Court held that the plea of *caveat emptor* and the immunity on the pretext of *'as is where is'* clause and *'as is what is'* clause cannot be claimed by the banks. Caveat emptor evince that the buyer assumes the risk that the product may have defects. Interpreting Rule 9(6) of the ESI Rules, the High Court evinced that the doctrine of *caveat emptor* is now getting replaced by the doctrine of *caveat venditor*, which means that the buyer is not burdened with unreasonable risks but the burden is on the seller to give all material information. Hence when the auction notice omits to mention relevant information, the banks/financial institutions are liable to pay the charges associated with the property.

69 Maharashtra Electricity Regulation (Electricity Supply Code and other Conditions of Supply) 2005, s 10.5.

70 *Akanksha International v Maharashtra State Election Distribution Company* Ltd 2007(5) BomCR 481.

71 Assam Electricity Regulatory Commission (Electricity Supply Code & Related Matters) Regulations 2004, s 3.6.4.

72 *Carbon Resources v Assam Electricity Regulatory Commission & Ors* AIR 2010 Gau 131.

73 *Carbon Resources v Assam Electricity Regulatory Commission & Ors* SLP (C) No 24502/2010.

74 *Rekha Sahu v UCO Bank & Ors* 2013 SCC OnLine All 13203 [295]-[296].

V. Conclusion

Analysing the decisions of the Supreme Court and the various High Courts, a change in approach from *caveat emptor* to *caveat venditor* can be observed, especially in cases where the property over which electricity connection is sought was sold through auction under special legislation such as SARFAESI Act, State Financial Corporations Acts, Recovery of Debts and Bankruptcy Act, etc. It can be seen that a fresh connection of electricity is distinct from reconnection of existing one. In this regard, some High Courts have made a distinction between the classes of purchasers/consumers, while others have not. The latter lay importance on the terms and conditions of supply and on the sale deed of the property.

Specific statutes governing the matter at hand make a huge difference in how the cases are handled. In absence of any special statute but with a State legislation that considers the dues of electricity as charge over the property, the purchaser may be held liable to pay. But in situations where there is a specific statute that imposes liability on the purchaser of a property, the purchaser must be held liable.

These observations are made after careful consideration of multiple cases and it can be easily seen that they display no overall consistency in terms of a singular clear policy on a national level which has led to multiple Special Leave Petitions arising from States including Gujarat,[75] Maharashtra,[76] Assam,[77] and Kerala[78] are pending before the Supreme Court; and so as an *ad hoc* measure, the States have declared that once there is a clear statute and precedent governing the issue the concerned parties have to comply with the new law. The technicalities and peculiarities arising out of an intersection of the Electricity Act and its supply rules, property law, the law of contracts, SARFAESI Act etc., have undoubtedly led to the plethora of cases pending before our courts.

VI. Comments

Presently, the Electricity Act, 2003 contains provisions which empower the State Electricity Regulatory Commissions to formulate Electricity Supply Codes. Section 50 read with Section 181(2)(x) of the Act empowers the State Electricity Regulatory Commissions ('SERCs') to formulate regulations for recovery of electricity charges. Due to this, varying codes of supply are seen in different States. These variations are a matter of policy over which the SERCs legislate according to the specific circumstances. These state-specific codes of supply have been largely successful in maintaining an effective electricity distribution infrastructure, but the lack of certainty over the subject of payment of dues has led to tedious and lengthy litigations. The case-to-case basis interpretations

75 *Torrent Power AEC Ltd v Shreeji (Rakhial) Commercial Cooperative Housing Society Ltd* SLP (C) No 001083/2007.

76 *Maharashtra State Electricity Board v ETCO Spinners Pvt Ltd* SLP(C) No 21027/2005.

77 *Carbon Resources Pvt Ltd v The Assam Electricity Regulatory Commission and ors* SLP(C) No 024502/2010.

78 *KJ Dennis v Official Liquidator, Kerala & ors* SLP(C) No 001053/2002.

sought from the courts use a lot of public resources. A singular policy on this subject would go a long way to alleviate the burden on the courts, but it may be idealistic to think that it is achievable.

Although on prima facie consideration, the elevation of powers to Central Electricity Regulatory Commission ('CERC') level looks appropriate but is highly impractical. Even the Draft Electricity (Amendment) Bill, 2021[79] does not resolve this issue, and the *status quo* prevails. It would be best to come up with an alternative solution. The Forum of Regulators constituted in pursuance of the provision under Section 166(2) of the Electricity Act, 2003, may provide a solution in the present case. The Forum consists of the Chairperson of the CERC and Chairpersons of the SERCs. The Chairperson of CERC is the Chairperson of the Forum. The Forum convenes frequent meetings to discuss issues in relation to governance of electric energy and deliberates upon highly technical matters. It can be used to achieve larger uniformity in various areas of electricity supply and distribution. In their Model Supply Code,[80] a few clauses provide a clear-cut method of solving the problem of payment of dues in cases of change of occupancy or vacancy over premises is provided, but it is not clear how it can be actually implemented and enforced nationwide. It is therefore incumbent upon the individual State Electricity Regulatory Commissions to adopt the model clauses and bring about uniformity.

79 Draft Electricity (Amendment) Bill 2021.

80 Forum of Regulators, Model Supply Code, c 4.9-4.11 <http://www.forumofregulators.gov.in/Data/study/Final%20Model%20Supply%20Code.pdf> accessed 17 August 2021.

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DELHI
NATIONAL LAW UNIVERSITY, DELHI
Sector-14, Dwarka, New Delhi-110078
Tel. No : 011-28034255, Fax No:011- 28034254
www.nludelhi.ac.in