

# NMIMS LAW REVIEW

Volume I  
May 2021

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Volume I  
May 2021

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## TABLE OF CONTENTS

---

- ◆ FROM THE DEAN'S DESK
- ◆ MENTOR'S MESSAGE
- ◆ FOREWORD
- ◆ SPECIAL CONTRIBUTION BY DR. ALOK MISRA, DEAN, KIRIT P. MEHTA SCHOOL OF LAW, NMIMS, MUMBAI; *ANALYSIS OF FARM BILLS: INDIA'S NEW REFORM*  
*PAGES 1- 11*
- ◆ SPECIAL CONTRIBUTION BY DR. V SHYAM KISHORE, PRINCIPAL IN-CHARGE, RAMAIAH COLLEGE OF LAW, BANGALORE; *SAY WHAT ON PAY?: A COMPARATIVE EVALUATION OF THE IMPACT OF THE REGULATORY REFORMS AND COVID 19 ON EXECUTIVE COMPENSATION IN THE UK, US AND INDIA*  
*PAGES 12- 39*

---

### ARTICLES

- ◆ AN ANALYSIS OF ORIGINALISM AS AGAINST DYNAMISM IN THE INTERPRETATION OF THE NIGERIAN CONSTITUTION REGARDING ABORTION; *GANIAT MOBOLAJI OLATOKUN, HEAD, PRIVATE & PROPERTY LAW , UNIVERSITY OF ILORIN, NIGERIA*  
*PAGES 40- 66*
- ◆ COMPULSORY LICENSE AND PARALLEL IMPORTATION AS A TOOL TO ACCESS MEDICINE; *DR. ANIL GOPAL VARIATH, REGISTRAR, MAHARASHTRA NATIONAL LAW UNIVERSITY, MUMBAI & ANKIT KUMAR, B.A., LL.B. (HONS.), MAHARASHTRA NATIONAL LAW UNIVERSITY, MUMBAI*  
*PAGES 67- 89*

- ◆ COLLECTIVE BARGAIN AT WORKPLACE: A GENESIS OF ALTERNATIVE DISPUTE RESOLUTION; *DEBASIS PODDAR, ASSOCIATE PROFESSOR (LAW), ST. XAVIER'S UNIVERSITY, KOLKATA*  
**PAGES 90- 127**
  
- ◆ AN ANALYSIS OF TRANSFORMATIVE CONSTITUTIONALISM FROM THE PERSPECTIVE OF SOUTH AFRICA AND INDIA; *NEHA TRIPATHI & SAUMYA RAJSINGH, ASSISTANT PROFESSORS, MAHARASHTRA NATIONAL LAW UNIVERSITY, AURANGABAD*  
**PAGES 128- 154**
  
- ◆ PROMOTERS ENRICHMENT IN THE GARB OF RELATED PARTY TRANSACTION IN INDIA; *KAUSHIKI BRAHMA, ASSISTANT PROFESSOR, NATIONAL LAW UNIVERSITY ODISHA*  
**PAGES 155- 179**
  
- ◆ CONFLICT OF LAWS VIS-À-VIS NRI MARRIAGES IN INDIA: AN APPRAISAL; *DR. SHILPA JAIN & SIMARPREET KAUR BILLING, ASSISTANT PROFESSOR, DHARMASHASTRA NATIONAL LAW UNIVERSITY, JABALPUR & RESEARCH SCHOLAR, RAJIV GANDHI NATIONAL UNIVERSITY OF LAW, PATIALA*  
**PAGES 180- 203**
  
- ◆ CRITICAL ANALYSIS OF CROP BURNING IN INDIA: ADVERSE IMPACTS & SUGGESTIONS; *DIVYA MORANDANI, RESEARCH ASSOCIATE, NLIU BHOPAL, INDIA*  
**PAGES 204- 221**

## FROM THE DEAN'S DESK

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Our journey to institutionalise research begins with this publication. Our attempt is to openly welcome good quality research articles from research scholars objectively. I say with pleasure that when review articles were solicited, we were surprised with the huge response from across the country. After due peer-review process, we selected some original research articles. I am sure this will generate appreciation and constructive dialogue from the readers.

Kirit P. Mehta School of Law has received worthy endorsements from the industry, academia, judiciary, bar, law firms, MNC's and regulatory bodies like SEBI. We welcome and thank our esteemed Board of Advisors and Peers who have timely guided this edition to become part of a discourse that generates and challenges existing paradigms of legal jurisprudence. I congratulate the Editor-in-Chief and each member of the Editorial Board for their time and contribution to the growth of NMIMS Law Review. I urge the readers to give wings to the thoughts presented by our contributors.

- **Dr. Alok Misra**

## MENTOR'S MESSAGE

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It was a moment of pride for us when the Law Review was launched, in 2021, under the guidance of our Dean and Faculty In-Charge. That the Journal has received such an overwhelming response from authors, all budding professionals, is a sign that we are going in the right direction. I congratulate all the authors whose works have made it here, after a thorough and lengthy process of review. The experience of researching, writing, formatting, and eagerly waiting for a response from the Editorial Team must be worth the wait. The sense of elation is incomparable.

To those who missed out, I hope that you keep going with your writing endeavours. The experience of researching and writing on the numerous questions of law is in itself a rewarding and enriching experience, and a skillset of immense value in our industry. Unfortunately, the Editorial Team can choose only a handful of articles from the entries received. I am sure they had a hard time choosing which papers edged out the others by the slightest of margins.

To the Editorial Team, I congratulate you on successfully publishing the First Volume, the culmination of a year of planning, waiting, reviewing, editing, proofreading, and piecing together a manuscript that will contribute significantly to the literature of our noble industry. I hope each and every one of you found the experience enlightening, and will go on to play a role in developing the research culture in the field of law.

- **Mr. Harshal Shah**

## FOREWORD

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It gives us immense pleasure in publishing this First Volume of the NMIMS Law Review. We hope our sincere endeavour advances legal scholarship and furthers contemporary academic discourse, for many years to come. We continue on a strong note as in this edition, the authors have addressed wide-ranging legal questions with great profundity and critique.

**Dr. Alok Misra and Prof. Richa Kashyap in their paper titled “*Analysis of Farm Bills - India’s New Reform*”,** embark on an insightful analysis of the history and evolution of agricultural reforms, and critically analyse the pros and cons of the Farm Bill. The authors discuss the Supreme Court’s order to bring about an effective solution to the present stalemate between the protesters and the Government of India; the Court suggested the constitution of a Committee comprising of independent and impartial persons including experts in the field of agriculture but said that it would do so only after hearing all the necessary parties.

**Dr. V. Shyam Kishore in his paper titled “*Say What on Pay? – A Comparative Evaluation of the Impacts of the Regulatory Reforms and COVID 19 on Executive Compensation in the UK, US and India*”,** discuss how the financial crisis of 2008 was a significant milestone in the regulation of executive compensation in public companies. Many countries brought legislative and regulatory reforms in matters relating to executive compensation. The paper traces the Say on Pay reforms that were made in three countries – the United Kingdom, United States and India and makes an assessment as to what these reforms have been able to achieve so far, and what could be done to make the reforms more effective. The paper also then seeks to analyse the impact that the COVID 19 pandemic has had on executive pay in these countries.

**Prof. Ganiat Mobolaji Olatokun** in their paper titled *“An Analysis of Originalism as against Dynamism in the Interpretation of the Nigerian Constitution Regarding Abortion”*, highlight the global debate relating to whether or not the unborn child has a right to life and how it can best be overcome if all nations of the world identify with their beliefs and convictions. They discuss how Nigeria is setting the pace by interpreting the Constitution of the Federal Republic of Nigeria (CFRN) originally.

Originalism connotes interpreting the contents of the constitution based on the original text as understood by the public as well as the intent of the authors of the constitution at the time the constitution was made or ratified. Their doctrinal research is giving absolute credence to traditional and religious norms as reflected in the CFRN in relation to abortion and reaching a tentative conclusion that originality cannot be sacrificed for mere dynamism.

**Prof. (Dr.) Anil Gopal Variath & Mr. Ankit Kumar** in their paper titled *“Compulsory Licence and Parallel Importation as a Tool to Access Medicine”*, discuss how access to medicines is an essential part of the policy which is framed by each country and plays a vital role in promotion of public health. One of the major dimensions to the problem of access to medicine is the impact of the expansion of patent protection to pharmaceutical products. The paper attempts to analyse the concerns regarding pharmaceutical patents *vis-a-vis* the right to access medicine, and examines how effective is the policy of ‘compulsory licensing’ and ‘parallel importation’ in addressing these concerns.

**Prof. Debasis Poddar** in his paper titled *“Collective Bargain at Workplace: A Genesis of Alternative Dispute Resolution”*, analyses how the International Labour Organisation borrowed effective recognition of the right to collective bargaining- taken together as FACB- to construct part of its fundamental principles and rights at work. With cursory adjustment here and there, the original model of

collective bargaining transcended industrial workplaces and got extended to other walks of life with the nomenclature of mediation; as a domain under the larger umbrella of Alternative Dispute Resolution (ADR), and more democratic than arbitration on the count of participation of parties involved therein, than that of third parties, for peaceful settlement of disputes. He also throws light on recent changes, like how imperative dialogue between parties was recognized in the course of criminal justice while the chapter for plea bargaining got enacted by a recent amendment to the Code of Criminal Procedure.

**Ms. Neha Tripathi & Ms. Soumya Rajsingh** in their paper titled *“An Analysis of Transformative Constitutionalism from the Perspective of South Africa and India”*, analyse the concept of transformative constitutionalism, thereby undertaking a study relating to its origin and development within the comparative framework of South Africa and India. The similarities between the constitutional ethos of South Africa and India, makes it pertinent to analyse certain important constitutional developments triggered by the decisions of the Indian judiciary in the recent past. The authors, by undertaking a comparative study, have brought forward the manner in which transformative constitutionalism can play an important role for establishing an equal and a just society.

**Prof. Kaushiki Brahma** in her paper titled *“Promoters Enrichment in the Garb of Related Party Transaction in India”*, analyses the concerns of abusive related party transactions which arise when there is siphoning of funds or diversion of a company’s resources for fraudulent transactions. The abusive transaction represents potential expropriation of resources of the corporation by the controlling shareholders for personal enrichments and which might squeeze out the minority’s profit. The paper discusses the need for an effective legal framework while a company engages in related party transactions with promoter-controlled shareholders or block holders or interested directors in

concentrated ownership structures.

**Dr. Shilpa Jain and Simarpreet Kaur Billing** in their paper titled *“Conflict of Laws vis-a-vis NRI Marriages in India: An Appraisal”*, investigate the milieu of increase in NRI (Non-Resident Indian) marriages due to globalisation and increase in transnational migration. The article analyses the conflict of laws issues in NRI marriages. The authors endeavour to identify the root causes of this problem in the research study, and analyse the recommendations provided by various ministries and organisations, to put forward solutions to address the emerging societal malaise in the form of NRI marriages in India.

**Ms. Divya Morandani** in her paper titled *“Critical Analysis Of Crop Burning in India – Adverse Impact and Suggestions”*, focuses on problems created by delayed process and most importantly, lack of strict enforcement of laws and regulations surrounding the practice of crop burning, despite the presence of various policies initiated by State Governments, environmental legislations, agencies for surveillance, the establishment of the National Green Tribunal (“NGT”) and judiciary. It has been argued by the author that there is a need to consider this practice as an offence and consequently, penalise the same.

Having been reviewed by a panel of established professionals and academicians from the legal fraternity, these articles were subject to informed scrutiny. The entire team behind this edition deserves applause for their tireless efforts and dedication to facilitate the publication of quality legal literature.

**Board of Editors**

At Mumbai, MH

May 2021

## ANALYSIS OF FARM BILLS - INDIA'S NEW REFORM

- Dr. Alok Misra\* & Ms. Richa Kashyap\*\*

*"If agriculture goes wrong, nothing else will have a chance to go right"*

-M. S. Swaminathan

### I. INTRODUCTION

With an intention to liberalise and develop the agricultural sector, the Parliament passed three bills ("**Farm Bills**") to which the India's President gave assent on 27<sup>th</sup> September, 2020, amid various controversies and agitations across the country.<sup>1</sup> The three contentious bills are termed as: "Farmers' Produce Trade and Commerce (Promotion and Facilitation) Bill<sup>2</sup>", "Farmers (Empowerment and Protection) Agreement on Price Assurance and Farm Services Bill<sup>3</sup>" and "Essential Commodities (Amendment) Bill<sup>4</sup>". These bills are projected by the government as major reforms in the agricultural sector and are primarily intended to transform the existing farm laws to make them more advanced and holistic in nature.

Agriculture is one of the most crucial and pertinent sectors of the Indian economy. It roughly employs 45% of the population as

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<sup>1</sup> *President Ram Nath Kovind gives assent to three farm bills passed by Parliament*, THE PRINT, Sep 27, 2020, <https://theprint.in/india/president-ram-nath-kovind-gives-assent-to-three-farm-bills-passed-by-parliament/511744/>

<sup>2</sup> *Farmers' Produce Trade and Commerce (Promotion and Facilitation) Act, 2020*, MINISTRY OF LAW & JUSTICE, Sep 24, 2020, <http://egazette.nic.in/WriteReadData/2020/222039.pdf>

<sup>3</sup> *Farmers (Empowerment and Protection) Agreement on Price Assurance and Farm Services) Act, 2020*, MINISTRY OF LAW & JUSTICE, Sep 27, 2020, <http://egazette.nic.in/WriteReadData/2020/222040.pdf>

<sup>4</sup> *Essential Commodities (Amendment) Act, 2020*, MINISTRY OF LAW & JUSTICE

promulgated by the International Labour Organisation (“ILO”)<sup>5</sup> and further contributes to around 20% of India’s GDP. <sup>6</sup> India has been referred to as an agrarian economy for ages and therefore, there is a substantial need to have an adaptive and progressive legislature for the welfare of the farmers and their crops.

## II. HISTORY & EVOLUTION

Historically, during the British-era, the Indian agriculture sector experienced massive stagnation and corrosion. The British exploited the farmers and extracted enormous profits without ensuring any increase in productivity. One of the significant issues regarding the agricultural produce back then was the land settlement system, chiefly the ‘zamindari system’, which was introduced by the British Government. As per this regressive system, the entire profit of the produce was distributed amongst the zamindars, and ultimately to their colonial rulers, without any recourse to the actual cultivators. Furthermore, small farmers were coerced to produce cash crops, instead of food crops, which fuelled the miseries of these small cultivators. Indian agriculture had therefore collapsed with poor condition of the farmers.

Post-independence, there was an urgent requirement to reform and innovate the agriculture sector to resolve the plight of the farmers. In 1950, with the introduction of the First Five Year Plan, agriculture was given the utmost priority. <sup>7</sup> There were henceforth certain technological advancements and revolutions to improve the situation during the 1950s. However, the farmers continued to be

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<sup>5</sup> International Labour Organization, ILOSTAT, September 2019.

<sup>6</sup> Kapil Shagun, *Agri share in GDP hit 20% after 17 years*, DOWNTOEARTH, Jan 29, 2021, <https://www.downtoearth.org.in/news/agriculture/agri-share-in-gdp-hit-20-after-17-years-economic-survey-75271>

<sup>7</sup> D. R. Gadgil, *Economic Development and Cultural Change*, THE UNIVERSITY OF CHICAGO PRESS, Vol. 1, No. 1 (Mar., 1952), pp. 57-72, <https://www.jstor.org/stable/1151850?seq=1>

exploited by rich land owners and middlemen without any protection offered to them.

As a result, the government enacted and introduced the concept of Agricultural Produce Market Committees (“APMCs”) or *Mandis*, through the Agricultural Produce Market Regulation Act (APMR)<sup>8</sup>. It was considered as a landmark development in the field of agriculture as APMCs ensured fair practices by middlemen and established organised agricultural spaces for farmers to sell their produce without any exploitation in the hands of the traders. Subsequently, Minimum Support Price (“MSP”) was implemented by the government on recommendation of Dr. Frank Parker (adviser of the Ministry of Food & Agriculture) to resolve the farmers plight of low selling prices of the crops.<sup>9</sup> Throughout the years, MSP and APMCs have safeguarded and empowered the farmers to proliferate their agricultural produce and minimised third party exploitations.

However, the shortcomings of the same misbalanced its benefits over the years, as the objectives of the formation of APMCs were lost in the process. Most of these APMCs started to be indirectly controlled by middle men, wherein the farmers were bound to pay a certain amount of interest to sell their produce in these *mandis*. As a result, farmers had to pay a higher amount as transaction cost with very limited profit left with them. Moreover, with shortage in number of APMCs, farmers were forced to sell their produce directly to the traders at cheaper prices, making their bargaining power negligible. Most of the times, such prices were fixed even lower than the MSP, with farmers left exploited and helpless in their distressed situations. The recent shift of global perception from development in agriculture to industrial and service sector further added fuel to the

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<sup>8</sup>[http://lib.unipune.ac.in:8080/xmlui/bitstream/handle/123456789/5042/12\\_chapter%204.pdf?sequence=12&isAllowed=y](http://lib.unipune.ac.in:8080/xmlui/bitstream/handle/123456789/5042/12_chapter%204.pdf?sequence=12&isAllowed=y), Last accessed on 30<sup>th</sup> March, 2021

<sup>9</sup> Damodaran Haish, *The men behind APMC, MSP and procurement*, INDIAN EXPRESS, Sep 27, 2020, <https://indianexpress.com/article/opinion/columns/the-men-behind-apmc-msp-and-procurement-6617277/>

grief of the farmers, as they were left with little protection and safeguards. As a consequence of the problems faced by the agricultural sector, there has been a continuous and significant rise in the number of suicides committed by the farmers.

Therefore, there has been a necessary and critical need to reform the agricultural sector, and the current change has been projected by the government as an attempt to battle such a crisis and henceforth improve the condition of the farmers significantly.

### III. FARM BILLS

The government has enacted three landmark agricultural reforms, to liberalise farmers from strict restrictions on the sale of their produce and to end the monopoly of the traders. The same shall also invite private investors and technologically modernise the current agricultural regime, thereby holistically improving the legislation governing the sector.

1. Farmers (Empowerment and Protection) Agreement on Price Assurance and Farm Services Bill, 2020: This bill aims to provide a framework for the protection and empowerment of farmers regarding the purchase and sale of farm produce through promulgating the concept of 'contract farming'. This will henceforth assist the farmers to get a price assurance of their crop prior to the sowing process. The bill provides for an agreement between the farmers and the buyer before the sowing or production of the produce, wherein the price of the produce shall be pre-determined. The said agreement shall also mandatorily contain a dispute settlement process protecting the farmers from any mistreatment.

2. Farmers' Produce Trade and Commerce (Promotion and Facilitation) Bill, 2020: Through this bill, the government fosters the concept of 'one nation- one market' to facilitate farmers to sell their produce anywhere around the country with no restrictions henceforth. As a result of this bill, the middlemen will be eliminated as farmers will not be obligated to sell their produce in trader-regulated APMC yards. Further to this, state governments shall be prohibited from imposing any charges or fees for such sale, ensuring a better price for the farmers.

3. Essential Commodities (Amendment) Bill, 2020: The bill aims to remove certain crops such as cereals, pulses, oilseed, edible oils, onion and potatoes from the list of essential commodities. Henceforth, restrictions from storage of these products would stand lifted.

#### IV. CRITICAL ANALYSIS

***Pros:*** The bills have been presented to transform and reform the agriculture sector, making the entire system more effective and efficient. The concept of unified market through 'one nation- one market' regime shall positively end the monopolisation of APMCs. One of the major loopholes of the existing system was that it mandated sale of farm produce within the *mandis*, thereby controlling the price and other sale conditions that were offered to the farmers. The farmers had to compulsorily depend on the APMCs and licensed traders, where abuse and mistreatment was a regular practice.<sup>10</sup> Through the modern concept of the Farmers' Produce Trade and Commerce (Promotion and Facilitation) Act, 2020, it shall allow farmers to sell their produce as per their choice and

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<sup>10</sup> *Ideas Explained: How APMC markets went from being a solution to a problem*, INDIAN EXPRESS, Oct 25, 2020, <https://indianexpress.com/article/explained/explained-ideas-how-apmc-markets-went-from-being-a-solution-to-a-problem-6864862/>

independence. Therefore, the critical issue of middlemen, which is one of the major shortcomings of the APMC model, stands eliminated.

Secondly, there have been instances in India, where certain states have surplus of one type of crop while shortage of the other type. With the concept of 'one nation- one market', such gap will be filled and covered, benefiting the consumers, wherein they will be presented with crops from different states at much more affordable prices.

The most noteworthy benefit of the bills is that it shall attract private investments in the agricultural sector. This will reform and improve the agricultural industry considerably as the same will enable modernisation of agriculture to a great extent. Technological advancements shall also ensure better quality and quantity of produce, benefitting both the farmers and the end consumers.<sup>11</sup> Further to this, privatisation will also increase competition between major players in the market to purchase the produce, thereby substantially increasing the prices offered to the farmers.

Contract farming is another significant evolution in this domain introduced through the Farmers (Empowerment and Protection) Agreement on Price Assurance and Farm Services) Act, 2020. It shall assist farmers in fetching them a pre-determined rate or an assured price for the products. The same also mandates a dispute resolution clause, which will solely focus on the protection of the farmers' cause, and therefore ensure that the big players do not play any dominant role in determining such prices.

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<sup>11</sup> Jain Nishant, *Role of private sector in building an efficient agricultural chain*, THE ENERGY AND RESOURCES INSTITUTE, Feb 10, 2017, <https://www.teriin.org/opinion/role-private-sector-building-efficient-agricultural-chain>

Lastly, the Essential Commodities (Amendment) Bill, 2020 shall help in stabilising the prices of the products like pulses, grains, onion etc. This move seeks to liberalise the agriculture sector from the limitations imposed by permits which were originally designed for an era of scarcity. The recent amendment shall facilitate investment into the agriculture sector, particularly in post- harvesting activities. There will be introduction of private investment in the area of cold storages, ensuring better storage facilities of crops with minimum wastage. As a result, a holistic protection and development of farming produce shall be taken care of.

Cons: The bills have been contested and challenged throughout the country, majorly by farmers in Punjab and Haryana. There have been continuous protests and marches against the government to put an injunction to the bills. One of the most criticised points raised by the public at large is regarding the process of passing of the bills, which has been termed as illegal and against the democracy of the country. It is pertinent to note that 'agriculture' falls under List II of the Constitution of India, which is a State List. However, the farm bills were passed by the central government without any consultation with the state governments.<sup>12</sup> Further, farmers, who are the major stakeholders affected through these bills were also not consulted at any stage. To add to the desolation, there was no clear voting conducted in the Parliament, and the bills were passed by mere voice votes. Therefore, the method of passing of these bills has been a matter of huge condemnation.

There has been criticism of the bills, challenging the concept of contract farming, which has proved to be against the farmers in a lot of instances. There have been arguments against the concept, since contract farming shall turn farmers into slaves, forcing them to

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<sup>12</sup> Singh Pritam, *Centre's Agricultural Marketing Reforms Are an Assault on Federalism*, THE WIRE, June 20, 2020, <https://thewire.in/agriculture/agriculture-marketing-reforms-federalism>

produce a certain type of crop benefitting the private bodies rather than the farmers at large. One such prime example is of 'Lays Chips' (Pepsi Co), wherein contract farming exists between the company and the farmers. In pursuance to the contract, certain sizes and quantities of potatoes have to be produced. Year after year, thousands of kilograms (kgs.) of potatoes are wasted, and the cost of the same is borne by the farmers as they do not match the standards as mandated under the agreement.<sup>13</sup> Hence, this adds to the plight of the poor farmers.

There have been arguments against the concept of 'one nation-one market' as well. The same will be detrimental to the interests of the farmers as small farmers shall have to spend a large amount of money to transport their crops instead of the luxury to sell the products at nearby APMCs. Also, with no mention of MSP in the bills, there is a huge concern that if the price is not be regulated by the government, the same shall be controlled by cartels of big business enterprises, putting the farmers at risk of exploitation. One of the principal illustrations is of the state of Bihar, wherein the state abolished the concept of APMCs in 2006. As a result of the same, the farmers started to get lower prices than the MSP, and thereby, it is argued by the experts that instead of introducing private entities in the agriculture sector, it is preferable to strengthen the APMC regime.<sup>14</sup>

Lastly, on the point of essential commodities, it is challenged that the removal of restrictions on storage of such food grains, shall

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<sup>13</sup> *PepsiCo seeks Rs 1 crore from four farmers it sued for patented Lay's potatoes*, BUSINESS TODAY, April 27, 2019, <https://www.businesstoday.in/top-story/pepsico-seeks-rs-1-crore-each-from-four-farmers-it-sued-for-patented-lay-potatoes/story/340858.html>

<sup>14</sup> Himanshu, *Lessons from Bihars abolition of APMC system*, LIVEMINT, Sep 24, 2020, <https://www.livemint.com/opinion/columns/lessons-from-bihar-s-abolition-of-its-apmc-system-for-farmers-11600962615201.html>

instead lead to rise in black hoarding of such grains by big businesses to increase the price artificially.

As a result of such shortcomings and criticism, there is a massive mistrust among the farmers regarding the Farm Bills.

## V. FARMERS AGITATION & SUPREME COURT ORDER

As per the farmers, the Farm Bills symbolize an autarchic effort to open up the agricultural sector to private enterprises, while eliminating the insufficient legal safeguards keeping many farmers afloat. The regulation fails to make any mention of the MSP, a financial safety net for the farmers which promises a minimum price for the produce, even if the market condition is low. Thousands of farmers from across the country henceforth protested, with an estimated 250 million people participating in a 24-hour strike on November 26, 2020, against the reforms, which was probably the largest protest in Indian history.<sup>15</sup>

In a recent Supreme Court order<sup>16</sup>, the Hon'ble 3 judge bench refused to interfere with the ongoing farmers' protest, and stated that the farmers' protest should be allowed to continue without impediment and without any breach of peace, either by the protesters or the police. The court collectively stated that, "*Indeed the right to protest is part of a fundamental right and can as a matter of fact, be exercised subject to public order. There can certainly be no impediment in the exercise of such rights as long as it is non-violent and does not result in damage to the life and properties of other citizens and is in accordance with law.*"

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<sup>15</sup> T.K. Rajalakshmi, *Farmers' agitation: The setback and then the surge*, THE HINDU: FRONTLINE, Feb 26, 2021, <https://frontline.thehindu.com/the-nation/agriculture/farmer-protests-against-farm-laws-2020-the-setback-and-then-the-surge/article33775032.ece>

<sup>16</sup> *Rakesh Vaishnav & Ors. v. UOI & Ors.*, SUPREME COURT OF INDIA, Writ Petition(s)(Civil) No(s).1118/2020

Furthermore, in order to bring about an effective solution to the present stalemate between the protesters and the Government of India, the Court suggested the constitution of a committee comprising of independent and impartial persons, including experts in the field of agriculture, but said that it would do so only after hearing all the necessary parties. The Court has, however, made it clear that the pendency of the matters will not prevent the parties from resolving the issue amicably. As per the order of the Supreme Court, it has asked for the creation of a four-person committee, which shall take into account farmers' grievances and make recommendations.

The ruling of the Supreme Court on the Farm Bills, *"is therefore an interim order that, like Wordsworth's Lucy, has none to praise, and very few to love it."*

## VI. CONCLUSION

*"My government would like to clarify that the rights and facilities that were available before the formation of the three Farm Laws have not been cut short, in fact with these new agricultural reforms the Government has provided new facilities and rights to farmers."*

-President Ram Nath Kovind

Farm Laws are a landmark development introduced by the Government, to transform and modernise the agricultural sector in India. They have been specifically designed to improve the conditions of the farmers and reform their situation positively. However, it is crucial to explain the benefits of the bills to the farmers who are a major stakeholder of the legislation, and have a proper consultation with them as well. The very objective of the implementation of these laws is to remove the farmers from their crisis and henceforth, the same can be only reached by *prima facie* winning their trusts and confidence on the bill. Therefore, in the

opinion of the researcher, it is recommended that the government agree to include MSP within the bills, which is one of the major concerns of the farmers' union, to safeguard and protect their interests. As a result of this, the researcher is of the view that the farmers will understand the major objective of the bills and accept the reformation of the government.

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**SAY WHAT ON PAY? – A COMPARATIVE EVALUATION OF  
THE IMPACTS OF THE REGULATORY REFORMS AND COVID  
19 ON EXECUTIVE COMPENSATION IN THE UK, US AND  
INDIA**

- **Dr. V. Shyam Kishore\***

**ABSTRACT**

*The financial crisis of 2008 was a significant milestone in the regulation of executive compensation in public companies. Many countries brought legislative and regulatory reforms in matters relating to executive compensation. Executive compensation was no longer seen to be merely a private matter between the executive and the company. The reforms in these countries required disclosures of the terms of compensation agreements and at times even shareholder approval of the same. The resolution seeking shareholder approval is popularly referred to as 'Say on Pay'. A decade since the financial crisis of 2008, this paper traces the Say on Pay reforms that were made in three countries – the United Kingdom, United States and India and makes an assessment as to what these reforms have been able to achieve so far, and what could be done to make the reforms more effective. The paper also then seeks to analyse the impact that the COVID 19 pandemic has had on executive pay in these countries.*

**Keywords:** Agency problem, executive compensation, managerial remuneration, say on pay.

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**I. EXECUTIVE COMPENSATION AND THE AGENCY PROBLEM**

An agency problem in its most general sense arises when the welfare of one party – the ‘principal’ depends upon actions taken by another party, termed the ‘agent’<sup>1</sup>. The theory of the agency problem seeks to address the question as to how the shareholders (the principal) of a company can assure themselves that once they invest their funds, the management (the agents) will act in a manner that protects the former’s interest. In other words, the endeavour is to seek how to align the interest of the managers (the agents) with the interests of the shareholders (the principal). Corporate governance codes and much of company law are thus preoccupied with dealing with these agency problems.

One of the methods of dealing with agency problem is by rewarding the agent suitably for the successful pursuit of the principal’s interest. The following passage aptly explains the working of this strategy<sup>2</sup>:

*“The more common form of reward is a sharing rule that motivates loyalty by tying the agent’s monetary returns directly to those of the principal. A conspicuous example is the protection that minority shareholders enjoy from the equal treatment norm, which requires a strictly pro-rata distribution of dividends. As a consequence of this rule, controlling shareholders – here the ‘agents’ – have an incentive to maximise the returns of the firm’s minority shareholders – here the ‘principals’ – at least to the extent that corporate returns are paid out as dividends. The reward mechanism that is less commonly the focus of corporate law is the pay-for-performance regime, in which an agent, although not sharing in his*

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<sup>1</sup> John Armour, Henry Hansmann & Reinier Kraakman, *Agency Problems, Legal Strategies and Enforcement*, DISCUSSION PAPER NO. 644 HARVARD LAW SCHOOL (JULY, 2009),

[http://www.law.harvard.edu/programs/olin\\_center/papers/644\\_Kraakman.php](http://www.law.harvard.edu/programs/olin_center/papers/644_Kraakman.php).

<sup>2</sup> *Id.*, at para 2.2.2.3.

*principal's returns, is nonetheless paid for successfully advancing her interests. Even though no jurisdiction imposes such a scheme on shareholders, legal rules often facilitate or discourage high-powered incentives of this sort. American law, for example, has long embraced incentive compensation devices such as stock option plans, while more sceptical jurisdictions continue to limit them."*

It has also been suggested<sup>3</sup> that managerial ownership can align the interest between the managers and owners and therefore would reduce the agency costs of a company. It is in this light that stock options were included within the scope of executive compensation.

Thus, this theory postulates that periodic performance reviews and incentives in the form of bonuses and stock options can help reduce agency costs. This is presumably so because satisfied managers will be less likely to appropriate organisational resources for self-benefit<sup>4</sup>. This theory has been the subject of many a research. While on the one hand it must be stated that there indeed is a significant positive relationship between performance incentives and company performance or increase in shareholder wealth,<sup>5</sup> on the other hand it must also be conceded that there is no uniformity on the extent to which these incentives influence performance outcomes. For example, Jensen and Murphy<sup>6</sup> suggest that while the

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<sup>3</sup> Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure*, 3 JOURNAL OF FINANCIAL ECONOMICS 4, 306-360 (1976).

<sup>4</sup> Pallab Kumar Biswas & Md. Hamid Ullah Bhuiyan, *Agency Problem and the Role of Corporate Governance Revisited*, SSRN 12 (2008).

<sup>5</sup> Empirical studies that have proved this correlation include *inter alia* Jensen & Murphy, Brian J. Hall & Jeffery B. Liebman, *Are CEOs Really Paid Like Bureaucrats?*, 113 QUARTERLY JOURNAL OF ECONOMICS 3, 653 – 691 (1998); Martin J. Conyon & Joachim Schwalbach, *Executive Compensation: Evidence from the UK and Germany*, 33 LONG RANGE PLANNING 4, 504 – 526 (2000).

<sup>6</sup> Michael C. Jensen & Kevin J. Murphy, *Performance Pay and Top Management Incentives*, 98 JOURNAL OF POLITICAL ECONOMY 2, 225-264 (1990).

relationship between executive compensation and creation of shareholder wealth is statistically significant, it is too weak to provide any assistance as to what constitutes a proper incentive to the chief executive officer. Wallsten<sup>7</sup> in his research comes to the conclusion that executive compensation and performance are strongly linked when the firm's market value increases, but not when the market value decreases. When firms do well, top executives receive large raises that are adjusted depending on how well the firm did, but when the firm does badly, the Chief Executive Officer ("CEO") sees little compensation revision, up or down. Perhaps, this is not entirely undesirable because executives must at least partially be insulated from the downside risk of making big decisions. The other conclusion drawn in the research was that the link between compensation and performance are less strongly linked for those immediately below the top manager or the CEO of the company.

There is also a study which concludes that executive compensation can be analysed not only as an instrument for addressing the agency problem but also as part of the agency problem itself<sup>8</sup>. This is because it was found that managerial power substantially affects the design of executive compensation in companies where there is a separation of ownership and control<sup>9</sup>.

The U.S. financial crisis of 2008 proved to be a significant milestone in the study relating to executive compensation. Executive compensation which was hitherto considered a matter worth discussing in only boardrooms, Annual General Meetings and by

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<sup>7</sup> Scott J. Wallsten, *Executive Compensation and Firm Performance: Big Carrot, Small Stick*, STANFORD INSTITUTE FOR ECONOMIC POLICY RESEARCH (2000).

<sup>8</sup> Lucian A. Bebchuk and Jesse M. Fried, *Executive Compensation as an Agency Problem*, 17 JOURNAL OF ECONOMIC PERSPECTIVES 3, 89 (2003).

<sup>9</sup> *Id.*

academicians, suddenly transformed into a matter of intense public debate and quite often, public condemnation. The collapse of major institutions like the Lehman Brothers, Merrill Lynch, Fannie Mae, Freddie Mac, Citigroup, AIG etc. saw the markets making an epic loss even as various executives who lost their jobs walked away with huge compensation as severance packages. While the cause of the financial crisis itself was widely attributed to the recklessness of the executive management of these institutions, it was ironical that these executives were seen as the only class of people who seemed to have made wealth in the midst of all the financial mess. The clamour for some control over executive compensation thus became louder.

For instance, Walker<sup>10</sup> argues for policymakers to consider regulating the terms of pay while leaving the choice of instrument to individual companies in order to preserve as much efficient diversity in pay arrangements as possible. He<sup>11</sup> points out that performance linked incentives have led managers to focus on short-term gains rather than long-term interests of the company. He talks of<sup>12</sup> 'short-vesting stock options' that cause managers to prefer strategies that increase stock price volatility even if those strategies do not maximise expected returns. The explanation provided for this short-termism included a market myopia, where the investors themselves, particularly the institutional and individual investors, were myopic in being pre-occupied with quarterly earnings forecasts and short-term share price changes<sup>13</sup>; managerial myopia where managers who

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<sup>10</sup> David I. Walker, *The Challenge of Improving the Long-Term Focus of Executive Pay*, 51 BOSTON COLLEGE LAW REVIEW 2, 435 (2010).

<sup>11</sup> *Id.*, at 439.

<sup>12</sup> *Id.*, at 440.

<sup>13</sup> *Id.*

don't see themselves having a long-term relationship with the company having a shorter investment horizon than shareholders<sup>14</sup>.

Managerial myopia has been dealt in a slightly different manner by another author,<sup>15</sup> who classifies managerial myopia into passive and active myopia. Passive myopia is where the agents or managers mainly focus on the short-term activities of the company without doing anything for the long-term objectives of the company. Active myopia on the other hand is where the managers take long-term capital investment decisions with 'short-term signalling intentions' resulting in more adverse consequences for the company than passive myopic behaviour.

Thus, there have been many studies, particularly post the 2008 financial crisis, which call for more regulation of executive compensation<sup>16</sup> in one way or the other. These views coupled with a swelling public perception of managers as being reckless gamblers of public money, managed to pressurize governments into stepping in and trying to regulate executive compensation. The U.S. government consequently sought to restrict, by law, companies that accepted federal bailout funds in relation to paying performance bonuses<sup>17</sup>.

While governmental intervention in regulating executive compensation was seen as a popular view, academicians and other

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<sup>14</sup> *Id.*, at 441; See also Judith F. Samuelson and Lynn A. Stout, *Are Executives Paid Too Much?* (Commentary) THE WALL STREET JOURNAL (FEB. 26, 2009), <http://www.wsj.com/articles/SB123561746955678771>.

<sup>15</sup> Prashant H. Deshpande, *Incentives in the Firm and the Roots of Capitalist Myopia*, SSRN (2002).

<sup>16</sup> Wenqian Zhou, G. Georgakopoulos, Ioannis Sotiropoulos & Konstantinos Z. Vasileiou, *The Impact of Executive Payment on Firm Performance of the Financial Enterprises in China*, 7 ASIAN SOCIAL SCIENCE 8, (2011); *supra* note 10.

<sup>17</sup> Emergency Economic Stabilization Act, 2008, S. 111, S. 302 (United Kingdom).

serious students of corporate law were not entirely convinced of the need for governmental intervention. Samuelson and Stout, referring to the American governmental intervention in the form of legislative restrictions or regulation of executive compensation, had this to say:<sup>18</sup>

*“This punitive measure may be understandable as a reflection of populist fury over bonuses being paid to heads of failing companies that received billions in taxpayer money. But it utterly fails to fix the real problem with executive compensation: short-termism.”*

Similarly, Gagnon and Guenette caution against governmental intervention in the following words<sup>19</sup>:

*“When, under pressure from those critics, governments try to replace supply and demand in setting remuneration by other arbitrary rules, they distort the most important mechanism by which firms can influence the choice of their executives and their overall governance structure. It is in the interests of shareholders to have efficient executive compensation. The best way for governments to allow shareholders to get the executives they want and pay them the optimal amounts is to stop interfering in the market process, not to add more interventions to those that already exist.”*

Many researchers, while not agreeable to the government laying down any cap on executive remuneration, do argue for the government to put in the right system in place whereby the companies can get the right managers at an optimum cost. Samuelson and Stout in this regard argue<sup>20</sup> that it is essential to focus on three strategies. First, is to design a new corporate performance metric where incentive-based pay should be linked to long-term

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<sup>18</sup> *supra* note 14.

<sup>19</sup> Michel Kelly-Gagnon and Jasmine Gu enette, *Is there a Problem With Executive Compensation*, MONTREAL ECONOMIC INSTITUTE (Jan., 2010), [http://www.iedm.org/files/janvier10\\_en.pdf](http://www.iedm.org/files/janvier10_en.pdf).

<sup>20</sup> *supra* note 14.

metrics and not merely one year's profits. Second, it must be ensured that the managers communicate with shareholders not solely about next quarter's expected profits but for a longer period of time, say a year or two or even perhaps a decade. Finally, the compensation structure must be reformed to ensure that not only CEOs but the mid-level executives are also suitably rewarded.

Some researchers also wonder whether the object of executive compensation is truly pay for performance. The following passage illustrates this thought<sup>21</sup>:

*"The contemporary executive compensation debate has two strands. One is the 'pay for performance' strand, which accepts high executive pay if commensurate with performance, but which argues over whether management has in fact extracted compensation far beyond a performance-based measure. The other is the 'social responsibility' strand, which focuses on the social demoralization and economic justice concerns that high levels of CEO compensation may raise. Pay without performance may be especially demoralizing on this view, but performance would be an insufficient basis for current levels of executive compensation, in part because a firm's performance is the result of a team's effort in an environment created by stakeholders."*

Notwithstanding this wide divergence of views on executive compensation, the most popular response to the question of determining executive compensation has been to leave it to the boards of the company to negotiate the terms of compensation and then to hear the views of the shareholders on the negotiated deal. This is popularly referred to as the 'say on pay' vote.

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<sup>21</sup> Jeffrey N. Gordon, *'Say on Pay': Cautionary Notes on the UK Experience and the Case for Shareholder Opt-In*, WORKING PAPER NO. 343 COLUMBIA UNIVERSITY SCHOOL OF LAW (2009).

### *A. The Anglo-American Context to Indian Reforms*

This paper proposes to carry out an analysis of how managerial remuneration has been regulated in India in the context of the evolution of Say on Pay in the United Kingdom and the United States of America. A natural question that might arise is why compare India with the US and the UK given that the contexts are vastly different, especially with respect to concentrated / dispersed share ownership? The answer to this question however is that though India is largely seen to have the characteristic features of the “insider” model of corporate governance, almost all regulatory reforms in the Indian corporate governance scenario have been greatly influenced by the Sarbanes Oxley Act in the US and the Cadbury Committee Report in the UK. In fact, the broad features of the Indian corporate governance norms have been transplanted from other jurisdictions, particularly the US and the UK<sup>22</sup>. While many studies<sup>23</sup> have questioned the effectiveness of this transplantation of the Anglo-American norms to the Indian scenario, a look at the US and the UK approach to regulation of managerial remuneration lays down the context for reforms in India. The purpose of the paper is not to make a judgment on the effectiveness of the reforms in the US or the UK but to merely look at the Anglo-American position to study the trends in those countries so as to set the context for a discussion of the Indian position.

The COVID 19 pandemic that is currently prevalent across the world is bound to have a profound impact on executive compensation, and the response of the shareholders to executive pay will undoubtedly be of significant interest and relevance to this

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<sup>22</sup> Umakanth Varottil, *A Cautionary Tale of the Transplant Effect on Indian Corporate Governance*, 21 NATIONAL LAW SCHOOL OF INDIA REVIEW 1 (2009).

<sup>23</sup> *Id.*; Also Afra Afsharipour, *Corporate Governance Convergence: Lessons from the Indian Experience*, 29 NORTHWESTERN JOURNAL OF INTERNATIONAL LAW & BUSINESS 2 (2009).

paper. However, it is also to be noted that the impact, if any, of COVID 19 on managerial remuneration is more of a disruptive nature and hence, viewing the developments as part of the natural evolution of the rules of Say on Pay would be misleading. Hence this paper seeks to delink the natural evolution of the regulatory reforms on Say on Pay from the developments induced by the pandemic. Therefore, the paper in the first part will compare the regulatory changes brought about in the UK, US and India before the pandemic. This will be followed by the second part which seeks to review the developments on executive remuneration during the period of the pandemic. In doing so, one must also take into account that the pandemic is still to be conquered fully and the data used for analysis in this paper, is to that extent incomplete. But nevertheless, the data used still points to certain definite trends that is useful in the discussions on executive remuneration. One can safely presume that any effect induced by COVID 19 will dissipate and post revival, the developments on executive pay will resume the trajectory from the position that was before the onset of the pandemic.

## **II. SAY ON PAY IN THE UNITED KINGDOM**

The United Kingdom in 2002, through an amendment of the Companies Act, 1985 (“**the Act**”), adopted a mandatory shareholder vote on a firm’s Annual Director’s Remuneration Report<sup>24</sup>. The vote however was only an advisory vote because the rejection of the report did not invalidate the compensation agreement. The initial years after the amendment of the Act saw a flurry of high visibility activity leading to shareholder interventions in about a dozen large firms.<sup>25</sup> In subsequent years however, this enthusiasm fizzled out and the remuneration report was rejected only eight times in the next

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<sup>24</sup> Companies Act, 1985, S. 234 B (United Kingdom).

<sup>25</sup> *Supra* note 21 at 342 – 343.

six years<sup>26</sup>. The Enterprise and Regulatory Act, 2013 enacted in the United Kingdom sought to give the shareholders a binding vote on executive compensation. The Enterprise and Regulatory Act sought to include a provision in the UK Companies Act, 2006 which provides that a company may not make a remuneration payment to a director unless the payment is approved by resolution of the members of the company<sup>27</sup>. A similar provision was also inserted to cover for payments made for loss of office (of the likes of golden parachutes)<sup>28</sup>. Further, it provided that regulations be made that would require the director's remuneration report to specify the company's remuneration policy as a separate part of the report<sup>29</sup>. It also provides that if the shareholders do not approve of a resolution regarding the director's remuneration, loss of office payments or of the remuneration policy, then the company must revert to the last approved resolution regarding such remuneration, loss of office payments or remuneration policy, and the proposed changes to them cannot be implemented. These provisions came into effect on October 01, 2013.

About six years since the binding vote on remuneration policy was introduced, one can say that these reforms have had a definite impact on remuneration policies of UK companies. Research<sup>30</sup> reveals that CEO pay have dropped to below 2014 levels. Average pay for a FTSE 100 CEO had dropped from £5.44 million in 2015 to

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<sup>26</sup> *Id.*

<sup>27</sup> Companies Act, 2006, S. 226 B (1) (b) (United Kingdom); This provision was inserted vide S. 80 of the Enterprise and Regulatory Act, 2013.

<sup>28</sup> Companies Act, 2006, S. 226 C (United Kingdom); This provision was inserted vide S. 80 of the Enterprise and Regulatory Act, 2013.

<sup>29</sup> Companies Act, 2006, S. 421 (2A) (United Kingdom); This provision was inserted vide S. 79 (1) of the Enterprise and Regulatory Act, 2013.

<sup>30</sup> *Executive Pay - Review of FTSE 100 Executive Pay Packages*, CIPD & HIGH PAY CENTRE (Aug., 2017),

<https://www.cipd.co.uk/knowledge/strategy/reward/executive-pay-ftse-100-2020#gref>.

£4.53 million in 2016<sup>31</sup>. Despite this fall, it is also interesting to note that as the research points out, it would take an average UK full-time worker 160 years to earn what an average FTSE 100 CEO could earn in a year<sup>32</sup>.

The last few years have shown that significant shareholder revolts have led to companies downsizing their executive pay policies. For instance, on 02<sup>nd</sup> May 2018, Unilever assured its' shareholders that it would take action to address investor's concerns including capping some awards after nearly 36 per cent of the AGM votes went against the company's remuneration policy<sup>33</sup>. On the same day, UK Satellite company, Inmarsat became the first listed British company in 2018 to lose an AGM vote on its director's remuneration report after nearly 60 per cent of the shareholders voted against the report<sup>34</sup>. While the vote on the report is non-binding, the company has assured shareholders that a new remuneration policy shall be put forward for approval through a binding vote in the AGM scheduled next year<sup>35</sup>. Thus while executive compensation still remains high, increased shareholder activism helped by the legislative reforms mentioned earlier has certainly led to reduction of pay packages of top executives, and it is

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Harry Wilson & Alex Ralph, *Investors revolt over 'excessive' pay awards*, THE TIMES (May 3, 2018), <https://www.thetimes.co.uk/article/investors-revolt-over-excessive-pay-awards-8bvhqccxz>.

<sup>34</sup> Attracta Mooney & Nic Fildes, *Inmarsat loses shareholder vote on pay*, FINANCIAL TIMES (May 2, 2018), <https://www.ft.com/content/93f38c5e-4e14-11e8-a7a9-37318e776bab>.

<sup>35</sup> Paul Sandle, *Update 2-Inmarsat defeated by shareholders over executive pay*, REUTERS (May 2, 2018), <https://www.reuters.com/article/inmarsat-outlook/update-2-inmarsat-defeated-by-shareholders-over-executive-pay-idUSL8N1S91QA>. The Company proposed a new remuneration policy in the next AGM held on 1 May, 2019. See AGM Statement <https://www.investegate.co.uk/inmarsat-plc/rns/agm-statement/201905011214337637X/>.

hoped that through a continuous process of engagement between investors and companies, compensation policies will focus on more long-term compensation that better aligns the interests of the investors and managers.

### III. SAY ON PAY IN THE UNITED STATES OF AMERICA

While the debate on executive compensation was a long drawn one in the United States, the financial crisis of 2008 as mentioned before, led to a state intervention through legislative action. The Emergency Economic Stabilization Act, 2008 required companies that received funds under the Troubled Assets Relief Program (“TARP”) to provide their shareholders with an advisory vote on executive remuneration<sup>36</sup>. This requirement was continued for companies with outstanding TARP debts even under the American Recovery and Reinvestment Act of 2009.

On July 21, 2010, the Dodd- Frank Wall Street Reform and Consumer Protection Act (“**the Dodd-Frank Act**”) came into effect which extended the advisory vote on say on pay to all companies. The Act inserted a provision-14 A in the Securities Exchange Act 1934, which provided for a separate resolution to be subjected to a shareholder vote to approve the compensation of executives.<sup>37</sup> These companies were required to hold a say on pay vote every one, two or three years as determined by the shareholders vote (known as the ‘say on frequency’ vote) on a resolution scheduled once in every six years<sup>38</sup>. In addition, the Securities Exchange Act also required a vote on golden parachute payments in connection with an acquisition, merger, consolidation, sale or other disposition of all or substantially

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<sup>36</sup> Emergency Economic Stabilization Act, 2008, S. 111 (c) (United States of America).

<sup>37</sup> S. 14 A was inserted in the Securities Exchange Act, 2008 vide S. 951 of the Dodd-Frank Act, 2010.

<sup>38</sup> Securities Exchange Act, 1934, S. 14 A (a) (2) (United States of America).

all the assets of an issuer (known as ‘say on parachutes’ vote).<sup>39</sup> The Securities Exchange Act however clarifies that the shareholder votes mentioned above shall not be binding on the issuer or the board of directors of the issuer<sup>40</sup>. The final rules under these provisions were adopted by the Securities Exchange Commission (“SEC”) in January 2011 and came into effect from April 4, 2011.

Another interesting provision contained in the Dodd-Frank Act mandates the Securities Exchange Commission to provide rules which would require a company to disclose the ‘relationship between executive compensation paid and financial performance’ of the company<sup>41</sup>. In a press release on April 29, 2015 the SEC had published for consultation proposed rules that will require certain companies to disclose the relationship between executive pay and company financial performance<sup>42</sup>. The proposed rules would require companies to disclose in a new table the following information:

- (i) Executive compensation actually paid for the principal executive officer, which would be the total compensation as disclosed in the summary compensation table already required in the proxy statement with adjustments to the amounts included for pensions and equity awards. The amount disclosed for the remaining named executive officers identified in the summary compensation table would be the average compensation actually paid to those executives;

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<sup>39</sup> Securities Exchange Act, 1934, S. 14 A (b) (United States of America).

<sup>40</sup> Securities Exchange Act, 1934, S. 14 A (c) (United States of America).

<sup>41</sup> S. 953 of the Dodd-Frank Act, 2010 sought to include the provision at the end of S. 14 of the Securities Exchange Act, 1934.

<sup>42</sup> *SEC Proposes Rules to Require Companies to Disclose the Relationship Between Executive Pay and a Company’s Financial Performance*, SECURITIES AND EXCHANGE COMMISSION (Apr. 29, 2015), <https://www.sec.gov/news/pressrelease/2015-78.html>.

(ii) The total executive compensation reported in the summary compensation table for the principal executive officer and an average of the reported amounts for the remaining named executive officers;

(iii) The company's total shareholder return ("TSR") on an annual basis;

(iv) The TSR on an annual basis of the companies in a peer group, using the peer group identified by the company in its stock performance graph or in its compensation discussion and analysis.

Equally important is the provision that requires the SEC to provide for rules that would require a company to disclose the ratio of the compensation of its Chief Executive Officer to the median of the annual total compensation of all employees of the issuer except the CEO<sup>43</sup>. While the final rules of the relationship between executive pay and company performance is yet to be adopted by the SEC, the final rule regarding the ratio of compensation of the CEO to the median compensation of its' employees was adopted on August 05, 2015.

Professors Thomas and Van der Elst conclude<sup>44</sup> that the study of the impact of say on pay in American corporate governance exhibits certain clear trends. They observe that shareholders of most companies strongly supported pay practices. Further, even in the small minority of cases where the resolution on executive compensation was voted down, they were primarily based on the pay versus performance considerations<sup>45</sup>. These however are very

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<sup>43</sup> Dodd-Frank Act, 2010, S. 953 (b) (United States of America).

<sup>44</sup> Randall S. Thomas & Christoph Van der Elst, *Say on Pay around the World*, 92 WASHINGTON UNIVERSITY LAW REVIEW (2015).

<sup>45</sup> *supra* note 44.

early trends and a clearer picture as to whether these reforms will have a positive role in reducing agency costs will emerge only on passage of time.

As mentioned earlier, the say on frequency vote was adopted by the SEC in January 2011. Following the first say on frequency vote in 2011, most companies implemented an annual say on pay vote<sup>46</sup>. The next say on frequency vote took place six years later in 2017 and the result was again very similar, with an overwhelming majority of companies and their shareholders voting in favour of an annual say on pay vote<sup>47</sup>.

Studies show that the effect of these rules on executive compensation of top officers of American companies have been less dramatic than what can be seen in the United Kingdom. One study<sup>48</sup> shows that the 50<sup>th</sup> percentile CEO pay ratio and median employee compensation changed by less than 3% over the previous year for the Russel 3000 and S&P 500 companies. Nevertheless, it can be definitely said that shareholder concerns have become a credible factor in determining executive compensation and the role of institutional investors in investor's opinion on such matters have become quite apparent<sup>49</sup>.

#### **IV. MANAGERIAL REMUNERATION IN INDIA**

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<sup>46</sup> Elizabeth A. Diffley, Marc A. Leaf & F. Douglas Raymond, *Say on Pay Frequency Increased for 2017*, FAEGRE DRINKER (Feb. 7, 2017), <https://www.drinkerbiddle.com/insights/publications/2017/02/say-on-pay-frequency-revisited-for-2017>.

<sup>47</sup> *Id.*

<sup>48</sup> *Say on Pay and Proxy Results*, SEMLER BROSSY (May 9, 2018), <http://www.semlebrossy.com/wp-content/uploads/SBCG-2018-SOP-Report-05-09-2018.pdf>.

<sup>49</sup> *Id.*, at 7.

The statutory restriction on managerial remuneration is a special feature of company law legislation in India and can be said to be a direct inheritance of the managing agency system.<sup>50</sup> It was in accordance with the Report of the Company Law Committee, 1952 that the Companies Act, 1956 introduced for the first time, the concept of an overall limit on managerial remuneration,<sup>51</sup> as well as the concept of reckoning of net profits for the purpose of determining the percentage which managerial remuneration should bear to the net profits<sup>52</sup>.

### *A. Limits on Managerial Remuneration*

The Companies Act, 2013 lays down the overall limits to managerial remuneration. The Act stipulates that the total managerial remuneration payable by a public company, to its directors including managing director and whole-time director and its manager in respect of any financial year shall not exceed eleven percent of the net profits of that company for that financial year.<sup>53</sup> It further provides that the remuneration payable to any one managing director or whole-time director or manager shall not exceed five percent of the net profits of the company and if there is more than one such director, the remuneration shall not exceed ten percent of the net profits to all such directors and managers taken together.<sup>54</sup> Further the remuneration payable to directors, who are neither managing directors nor whole-time directors, shall not exceed one percent of the net profits of the company if there is a managing

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<sup>50</sup> L. V. V. IYER, GUIDE TO COMPANY DIRECTORS - POWERS, RIGHTS, DUTIES, LIABILITIES & CORPORATE SOCIAL RESPONSIBILITIES 683 (3<sup>rd</sup> ed., LexisNexis Butterworths Wadhwa Nagpur) (2011).

<sup>51</sup> Companies Act, 1956, S. 198 (India).

<sup>52</sup> *Id.*

<sup>53</sup> Companies Act, 2013, S. 197(1) (India).

<sup>54</sup> Companies Act, 2013, S. 197(1)(i) (India).

director, whole-time director or manager, and the limit is fixed at three percent otherwise.<sup>55</sup>

The Act also provides for remuneration of directors where the company does not make any profits. In such a case, the company may provide for remuneration to directors in accordance with the provisions of Schedule V of the Companies Act, 2013 and if the same cannot be complied with, then with the approval of the Central Government.<sup>56</sup> It is also to be noted that where the company is making profits, the company may exceed the afore-mentioned limits if the shareholders of the company authorise such payment in a general meeting.<sup>57</sup> The approval of the Central Government is also necessary in addition to the authorisation by shareholders in the general meeting.<sup>58</sup>

*“The powers vested in the Central Government in this regard is quasi-judicial in nature and hence must be exercised judiciously and with due regard to principles of natural justice. No administrative guidelines could be allowed to interfere with the exercise of the duty to act judicially”.*<sup>59</sup>

It must also be noted that any remuneration for services rendered by a director in any other capacity, for instance, as a technician shall not be included within this limit if the services rendered are of a professional nature and the director possesses the requisite qualification for the practice of such profession.<sup>60</sup> Sitting fees paid for attending meetings of the board or the committees thereof is also

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<sup>55</sup> Companies Act, 2013, S. 197(1)(ii) (India).

<sup>56</sup> Companies Act, 2013, S. 197(3) (India).

<sup>57</sup> Companies Act, 2013, S. 197(1) (India).

<sup>58</sup> *Id.*

<sup>59</sup> *Cibatul Ltd. v. Union of India*, (1980) Comp. Cas. 437; *Mahindra & Mahindra v. Union of India*, (1983) 53 Comp. Cas. 337 (Bom).

<sup>60</sup> Companies Act, 2013, S. 197(4) (India); *Ramaben A. Thanawala vs Jyoti Ltd.*, (1957) 27 Comp. Cas. 105.

excluded in the computation of the limits of managerial remuneration.<sup>61</sup>

### *B. Determination of Remuneration*

It is to be noted that the remuneration of the directors cannot be fixed by the members of the board themselves. The remuneration may be determined either by the articles of the company, or by a resolution of the shareholders in a general meeting or if the articles so require, by a special resolution.<sup>62</sup> The board of directors can only recommend the remuneration and the power to decide on the remuneration rests in the general meeting of the company. Shareholder approval however is not an effective check on excessive remuneration as voting power in Indian companies is dominated by promoters or controlling shareholders who are often themselves key executives in the company.<sup>63</sup> Thus, the board cannot be entirely relied upon to prevent abuses in fixing executive remuneration.

In order to overcome this problem, the Companies Act, 2013 requires every listed company to constitute a Nomination and Remuneration Committee (“NRC”) consisting of three or more non-executive directors out of which not less than one half shall be independent directors.<sup>64</sup> The Companies Act, 2013 mandates the NRC to ensure that while the remuneration to top executives is sufficient to attract, retain and motivate them, the relationship of remuneration to performance is clear and meets appropriate benchmarks.<sup>65</sup> The constitution of the NRC is also mandated by the

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<sup>61</sup> Companies Act, 2013, S. 197(2) (India).

<sup>62</sup> Companies Act, 2013, S. 197(4) (India).

<sup>63</sup> Umakanth Varottil, *Self-regulation is the Way*, ECONOMIC TIMES (July 16, 2007), <https://economictimes.indiatimes.com/self-regulation-is-the-way/articleshow/2205607.cms?from=mdr>.

<sup>64</sup> Companies Act, 2013, S. 178(1) (India).

<sup>65</sup> Companies Act, 2013, S. 178(4) (India).

Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015<sup>66</sup>. Thus, the new company law regime seeks to link remuneration to performance of these executives. The Companies Act, 2013 requires the remuneration to top executives to have a balance between fixed and incentive reflecting short and long-term performance objectives.<sup>67</sup> The statute also seeks to address the problem of the huge gap in pay between the top executives and employees lower in the hierarchy.<sup>68</sup> Every listed company is thus required to disclose in the board's report, *inter alia*<sup>69</sup>:

(i) the ratio of the remuneration of each director to the median remuneration of the employees of the company for the financial year;

(ii) the percentage increase in remuneration of each director, chief financial officer, chief executive officer, company secretary or manager, if any, in the financial year;

(iii) the percentage increase in the median remuneration of employees in the financial year;

(iv) the explanation on the relationship between the average increase in remuneration and company performance;

(v) comparison of the remuneration of the key managerial personnel against the performance of the company and also of each such personnel against the performance of the company;

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<sup>66</sup> Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, Regulation 19 (India).

<sup>67</sup> Companies Act, 2013, S. 178(4)(c) (India).

<sup>68</sup> This problem was discussed earlier in s.2.4.2.

<sup>69</sup> Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014, Rule 5 (India).

(vi) the average percentile increase already made in the salaries of employees other than the managerial personnel in the last financial year and its' comparison with the percentile increase in the managerial remuneration and justification thereof, and to point out if there are any exceptional circumstances for increase in the managerial remuneration; and

(vii) the ratio of the remuneration of the highest paid director to that of the employees who are not directors but receive remuneration in excess of the highest paid director during the year.

When in 2007, the then Prime Minister of India called upon the corporates to resist excessive remuneration,<sup>70</sup> it sparked an intense debate on the desirable extent of executive pay and the manner of regulation of executive pay. The focus of the debate was on whether executive remuneration should be purely market driven or whether some sort of external control should be imposed on the fixation of executive remuneration and if so, what should be the mode and manner of control. It is quite clear that the new company law regime has chosen an inter-mediate path. While the State has stepped in to fix an upper limit on managerial remuneration (as a proportion of the net profits of the company), the actual determination of the remuneration was left to the approval of the shareholders. However, the State has put in safeguards like the constitution of the NRC and the disclosure of the remuneration policy in the board's report to enable the shareholders to take an informed decision on any proposal for managerial remuneration placed before them.

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<sup>70</sup> *Prime Minister's address at CII Annual General Meeting 2007*, ARCHIVE PMO (May 24, 2007), <https://archivepmo.nic.in/drmanmohansingh/speech-details.php?nodeid=529>.

*C. Impact of the Regulatory Reforms on Executive Compensation in India*

At first look, the regulatory regime on executive compensation in India seems to be more restrictive than the mechanism adopted in the US and the UK. Only India has an upper cap on the compensation that can be paid to a director. But a detailed assessment would indicate that the reforms have not been successful yet in rationalizing the pay structure of top executives in Indian companies. One research shows that CEOs of companies listed in India's Sensex Index earn 229 times more than the average worker and this earning gap is the second biggest in the world – next only to the United States where the ratio is 265<sup>71</sup>. This is an indicator of the high pay structures prevalent that perhaps require a certain degree of rationalization.

What is pertinent to note is that the move to rationalize executive compensation in the US and UK has been largely championed by institutional investors. However, the role of institutional investors in Indian companies will be relatively lesser owing to the fact that a vast majority of companies in India display an ownership structure characterised by the presence of a cohesive group of promoters who hold a controlling interest in the company<sup>72</sup>. It is no surprise therefore, that the only major controversy that arose in India with respect to executive compensation, after the new Companies Act, 2013 came into effect, has been a company that had a professional CEO – Infosys Ltd. The issue erupted in 2016 with the board of directors of the company deciding to increase the then CEO, Mr.

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<sup>71</sup> Anders Melin and Wei Lu, *CEOs in U.S., India Earn the Most Compared with Average Workers*, BLOOMBERG (Dec. 28, 2017), <https://www.bloomberg.com/news/articles/2017-12-28/ceos-in-u-s-india-earn-the-most-compared-with-average-workers>.

<sup>72</sup> Umakanth Varottil, *Evolution and Effectiveness of Independent Directors in Indian Corporate Governance*, 6 HASTINGS BUS. L.J. 281, 285 (2010).

Vishal Sikka's compensation by 55 per cent. The resolution presented to the shareholders to this effect could not gather the support of even a quarter of the total promoter votes, thus indicating that the founder members who were also the promoters, led by Mr. N. R. Narayana Murthy, did not favour the hike in compensation, particularly when the IT industry was witnessing large scale lay-offs. The promoters also raised concerns about the salary hike offered to certain other senior executives of the company. Though the board defended their action stating that the decision was compliant with all legal regulations and that full disclosures were made as required by law, the issue did receive significant public attention and ultimately culminated in the resignation of the CEO<sup>73</sup> and certain other senior executives.

As mentioned earlier, Infosys cannot be seen as an indicator of the general trend in India as yet. A recent survey,<sup>74</sup> on analysis of the disclosures made by the BSE 100 companies,<sup>75</sup> excluding the public-sector enterprises, show that on an overall basis the CEO pay increase averaged at about 10.18 per cent. Interestingly, it was observed that the increase in pay of professional CEOs was significantly higher than the promoter CEOs<sup>76</sup>. This is probably because of the need of the company to retain the professional executive. It is quite possible that this higher increase for professional CEOs comes at the expense of other employees of the company, since the study also reveals that the average increase in

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<sup>73</sup> *Why Vishal Sikka quit as Infosys MD: Full Text of his Resignation Letter*, ECONOMIC TIMES (Aug. 18, 2017), <https://economictimes.indiatimes.com/markets/stocks/news/full-text-vishal-sikkas-resignation-letter/articleshow/60113647.cms>.

<sup>74</sup> *Executive Compensation: The Year of Cautious Optimism*, 6 TOTAL REWARDS QUARTERLY 1, Volume 6, 17 (2016).

<sup>75</sup> Top 100 companies by market capitalization listed in the Bombay Stock Exchange.

<sup>76</sup> *supra* note 73.

the salary of employees other than key managerial personnel was higher in companies that had promoter CEOs than those that had professional CEOs<sup>77</sup>.

Another significant detail that the study reveals is the lowering of the fixed pay component in the compensation structure of top executives<sup>78</sup>. The variable component is sought to be aligned with company performance. This brings us to the moot question as to how to assess performance of the executives. It is pertinent to remember that even in the United States, while the SEC was able to adopt the final rule with respect to the pay ratio of top executives with other employees, they have still not been able to adopt the rules regarding the relationship between executive compensation and company performance. Surveys in India<sup>79</sup> also showed low correlation between executive pay increase and other metrics like P/E ratio or market capitalization.

## **V. COVID 19 AND MANAGERIAL REMUNERATION**

The second part of this paper seeks to make an early assessment of the impact of the COVID 19 pandemic on executive compensation policies of companies. The question of executive compensation has truly been not as much a legal problem as it has been a moral issue. Hence the study on executive compensation will not be complete without a peek into the impact or the effects that the onset of the COVID 19 pandemic has had on global businesses in general, and on executive compensation in particular.

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*, Also see Anubhav Gupta, *The Future of Executive Pay in India*, BUSINESS TODAY (Apr. 23, 2017), <https://www.businesstoday.in/magazine/columns/the-future-of-executive-pay-in-india/story/249164.html>.

While a detailed study on whether the shareholders have managed to have a say on executive pay during the COVID 19 period will have to wait till the pandemic is brought fully under control, one can certainly see with the available data as to how companies in the US, UK and India have paid their top executives and key managerial personnel during this period. The fact that many of these companies suffered significant business impact leading to employee pay cuts and even lay-offs mean that as mentioned before, the question on managerial remuneration in these companies is more of a moral question than a legal one.

COVID 19 has had a direct impact on people's lives with access to even basic necessities becoming difficult. This situation has become the principal driver of the moral argument that "boards should be looking at executive compensation plans as an important tool to focus management's efforts on surviving the crisis while at the same time ensuring the health and well-being of all stakeholders: employees, customers, supply chain partners, communities and shareholders"<sup>80</sup>. A necessary corollary of this argument would be that when the company's top line has suffered significantly due to the pandemic and when there have been large scale layoffs, it is only appropriate that the top executives of the company "share the pain"<sup>81</sup>.

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<sup>80</sup> Shai Ganu, Don Delves & Ryan Resch, *Responsible Executive Compensation During Times of Crisis*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (May, 2020), <https://corpgov.law.harvard.edu/2020/05/18/responsible-executive-compensation-during-times-of-crisis/>.

<sup>81</sup> Fleur Bennis, *UK executives should share pain of COVID 19 financial impact*, PINSENT MASON'S (May 5, 2020), <https://www.pinsentmasons.com/out-law/news/investment-association-covid-19-executive-pay>.

An ongoing review<sup>82</sup> of the disclosures made by the Russell 3000 companies in the US, shows some very interesting statistics. Some of the relevant information from the study is recounted below:

(i) About one-fifth of the companies in the Russell 3000 index have announced executive base pay cuts. A majority of these companies are from the hard-hit industries such as hospitality and retail sectors;

(ii) Among those that announced pay cuts, about one-sixth of the CEOs have decided not to collect a base salary. Some executives have also decided to forego the annual executive bonuses for 2020.

In a similar study in the UK among the FTSE 250 companies<sup>83</sup>, the data shows that at least 84 of the 250 companies disclosed some form of temporary pay reduction. While 76 of them disclosed salary reduction, 8 announced only incentive cuts or deferrals without reduction in salary.

Reports emerging from India however do not seem to reflect the trends in the US or the UK as noted above. The Economic Times in a recent report<sup>84</sup> states that there has been very little change in the pay

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<sup>82</sup> Mark Emanuel, Kathryn Neel, Todd Sirras & Matteo Tonello, *Executive and Director Compensation Reductions in the COVID 19 Era*, THE CONFERENCE BOARD, <https://conferenceboard.esgauge.org/covid-19/payreductions>.

<sup>83</sup> Daniel Jarman, *The ESG implications of COVID 19: Executive Pay*, BMO GLOBAL ASSET MANAGEMENT (Oct., 2020), <https://www.bmogam.com/viewpoints/responsible-investment/macro-views/the-esg-implications-of-covid-19-executive-pay/>.

<sup>84</sup> *Salary data reveals even COVID couldn't change corporate India's deep disparity*, ECONOMIC TIMES (Dec. 6, 2020), <https://economictimes.indiatimes.com/news/company/corporate-trends/salary-data-reveals-even-covid-couldnt-change-corporate-indias-deep-disparity/articleshow/78402435.cms>.

of CEOs even as many of these companies had executed pay cuts for other employees or even laid off many of them. The report reveals that the pay ratio<sup>85</sup> of the Nifty 50 companies ranged from 1:752<sup>86</sup> to 1:39<sup>87</sup>. An earlier report in June 2020<sup>88</sup> that analysed executive pay in IT companies reveals that, except for Tata Consultancy Services (TCS) that reported a drop in CEO salary after the company executives took a pay cut<sup>89</sup> owing to the pandemic, most of the other leading IT companies saw an upward movement in the pay package of the CEO<sup>90</sup>.

## VI. CONCLUSION

Executive compensation is about achieving the right balance between the need for attracting, retaining and motivating talent on the one hand and fairness, performance and sustainability on the other. Perception, no doubt plays a significant role in determining whether compensation is adequate or not. The NRC thus has the unenviable task of attaining this balance. For any remuneration policy to be perceived as justiciable, it must have a correlation to performance. It is thus the necessity of time that further researches in the field of executive compensation focus on establishing proper performance metrics that can validate executive pay.

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<sup>85</sup> The ratio of the highest paid employee to that of the median remuneration.

<sup>86</sup> Hero Motocorp; source: *supra* note 84.

<sup>87</sup> Maruti Suzuki; source: *supra* note 84.

<sup>88</sup> FY20 saw remuneration growth for top IT chief executives barring TCS, MINT (June 2, 2020), <https://www.livemint.com/companies/news/fy20-saw-remuneration-growth-for-top-it-chief-executives-barring-tcs-11591071912133.html>.

<sup>89</sup> The managerial remuneration decreased by 15% as compared to the previous financial year; source: *Id.*

<sup>90</sup> *Id.* It is interesting to note that while the CEO pay package in Infosys and Wipro grew in FY 2019-20, the Chairman of Infosys voluntarily chose not to receive any remuneration. Similarly, both the Chairman and the Founder Chairman of Wipro decided not to take profit-linked commissions for the FY 2019-20.

A quick review of the COVID 19 period reveals that while more companies in the US and UK are willing to reduce pay packages for top executives and key managerial personnel in view of the pandemic, the Indian companies have not been as forthcoming. Though it is still early for us to analyse the complete impact of COVID 19, since at the time of writing this paper, the pandemic is far from over and the threat of a second and third wave is still real, the available data nevertheless points to certain trends.

While the review of the regulatory regime suggests a convergence in respect of rules regarding executive compensation, the fundamental difference of the Indian companies being largely run by a family group means, the Say on Pay as envisaged by the Companies Act 2013 has perhaps not been able to deter companies from having large pay disparity between CEOs and Key Managerial Personnel on the one hand and the median remuneration on the other. This also suggests that even after the fight against the COVID 19 pandemic is over, the ability of shareholders in India to control or prevent excessive compensation to executives would be less than desirable levels.

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**AN ANALYSIS OF ORIGINALISM AS AGAINST DYNAMISM  
IN THE INTERPRETATION OF THE NIGERIAN CONSTITUTION  
REGARDING ABORTION**

- **Ganiat Mobolaji Olatokun\***

**ABSTRACT**

*The global debate relating to whether or not the unborn child has a right to life can best be overcome if all nations of the world identify with their beliefs and convictions. Nigeria is setting the pace by interpreting the Constitution of the Federal Republic of Nigeria (CFRN) originally. Originalism connotes interpreting the contents of the constitution based on the original text as understood by the public as well as the intents of the authors of the constitution at the time the constitution was made or ratified. The authors of the primary Constitution of Nigeria are vast in religion and culture. Notable amongst them are, Sir. Abubakar Tafawa Balewa and Sir. Nnamdi Azikiwe, among others. They were visionaries and men of integrity, representing the conscience of the present and future generation of Nigeria, and tasked with the responsibilities of addressing specific challenges facing the nation during their lifetime as well as establishing foundational values that would sustain and guide the new nation of Nigeria into an uncertain future. If this is the background of the authors of the Nigerian Constitution, then a liberal abortion regime in Nigeria, firmly rooted in a dynamic interpretation of the Nigerian Constitution cannot stand, because according to Section 34 of the Constitution of the Federal Republic of Nigeria (CFRN), the sanctity and dignity of all Nigerians born or unborn is recognized. While dynamism is rooted in case law, which gives courts the power to give contemporary meanings to contents of a written constitution, originalism is rooted in the traditional theories of constitutional interpretation relating to legislation's texts and intent. This is a doctrinal research giving absolute credence to traditional and religious*

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*norms as reflected in the CFRN in relation to abortion and reaching a tentative conclusion that originality cannot be sacrificed for mere dynamism.*

**Keywords:** Unborn Child, Dynamic interpretation, Originalist interpretation, Abortion, Cultural and Religious beliefs

## I. INTRODUCTION

The authors, the makers or drafters of the 1963 Constitution (first constitution ever passed by the Nigerian parliament, and consequently, marking the beginning of indigenous constitution making) of our country, Nigeria (notable amongst them are, Sir. Abubakar Tafawa Balewa and Sir. Nnamdi Azikiwe, among others) are men of integrity. Several other constitutions followed the 1963 constitution. All members that partook in the drafting of these subsequent constitutions can also be said to be men of integrity. For instance, the 50-member panel that drafted the 1979 constitution were called the 50 wise men, with Chief F. R. A. Williams (SAN) as the chairman.<sup>1</sup> They are considered as visionaries, well respected and revered as they represent the conscience and hope of the present and future generation of Nigeria. They are tasked with the great duties and responsibilities to address and see to the specific challenges facing the nation during their lifetime, as well as establishing foundational and fundamental principles and values that would sustain, preserve as well as guide the new nation of Nigeria into an uncertain future, like the one we found ourselves today (for no one ever have a thought then, that abortion will ever become a wanted norm in our society). One of such values held in high esteem and respected both by the authors or drafters of the Constitution of the Federal Republic of Nigeria ("CFRN") and the general public as at the time the constitution was drafted and presently, is the respect for the dignity of the unborn child which frowns at abortion.

Presently, abortion in Nigeria is regulated and guided by two separate laws that differs depending on the geographical location. One of the laws is the Penal Code which is applicable in the North of

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<sup>1</sup> Ogugua v. C. Ikpeze, *Constitutionalism and Development in Nigeria: The 1999 Constitution and Role of Lawyers*, 1 JILJ. 227, 228-229 (2010).

Nigeria, and the second law, which is the Criminal Code, is applicable in the Southern Nigeria.<sup>2</sup> These two laws are representing the criminal laws in Nigeria which functions to direct and guide the general public as to which conducts are acceptable and which conducts are forbidden. In which ever law, be it Penal Code or Criminal Code, the only legal way to have an abortion in Nigeria is, if having the child will pose danger and harm to the life of the mother. Any abortion short of the consideration above is visited with heavy penalty in the form of heavy jail term and sentence of up to 14 years imprisonment for the provider of the abortion, and up to 7 years jail term and sentence for the woman. This is according to the provisions of Sections 232 and 235 of Penal Code of Nigeria, 1963 and Sections 228, 229 and 230 of Criminal Code of Nigeria, 1990.

As a result of these restrictive abortion laws in Nigeria, many women and girls seeking abortion illegally patronise unskilled providers, thereby carrying out abortions clandestinely.<sup>3</sup> These unsafe abortions are a major and prominent cause or contributor to the country's high levels and rate of maternal death and morbidity. Nigeria has one of the highest rates of maternal mortality ratio in the whole world.<sup>4</sup>

As a result of the high rate and level of maternal mortality and morbidity which most people within and outside Nigeria attributed to the restrictive abortion laws, some quarters of the Nigerian population felt or believe that there should be room for a liberal

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<sup>2</sup>Akinrinola Bankole et al., *The Incidence of Abortion in Nigeria*, 41 INT PERSPECT SEX REPROD HEALTH. 170, 171 (2015).

<sup>3</sup>Adegboyega O. Oyefabi et al., *Prevalence, Perceptions, Consequences and Determinants of Induced Abortion among Students of the Kaduna State University, Northwest Nigeria*, 18 J MED TROP. 86, 87 (2016).

<sup>4</sup>Boniface Oye-Adeniran et al., *Causes of Maternal Mortality in Lagos, Nigeria*, 7 ANN TROP MED PUBLIC HEALTH. 177, 179 (2014).

abortion law in Nigeria which will permit and allow the termination of pregnancy without any restriction whatsoever. These set of Nigerian population, though in the minority, but very powerful, have constantly and vigorously made several cases for the outright legalization of abortion in Nigeria.<sup>5</sup>

It is important to state here from the onset that the controversies surrounding whether to legalize abortion or not in Nigeria dates as far back as 1982. A 1982 move or campaign to liberalize abortion by the Nigerian Society of Gynaecology and Obstetrics was vehemently and strongly opposed and the Termination of Pregnancy Bill, sponsored and spearheaded by the same society, was defeated gallantly on the floor of the National Assembly because pressure groups all over the country lobbied against it.<sup>6</sup>

Basically, it can be said authoritatively that the pressure groups that lobbied against the bill seeking to legalize abortion in Nigeria did so as a result of their religious and cultural/traditional convictions.<sup>7</sup> Neither the Nigerian Society of Gynaecology and Obstetrics nor the pressure groups can be said to have averted or directed their minds to the constitutional provisions of the Federal Republic of Nigeria relating to abortion.

These constitutional provisions, the way and manner it is interpreted as well as the principles guiding its interpretations is what this work seeks to elucidate in order to bring to fore and limelight the reason why abortion, till date in Nigeria, remains a crime and is forbidden.

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<sup>5</sup> Victor N. Opara, *Re-Characterizing Abortion in Nigeria*, 11 ILSA J. INTL & COMP LAW. 143, 144 (2004).

<sup>6</sup> *Id*

<sup>7</sup> Osaretin J. Odia., *The Relation between Law, Religion, Culture and Medical Ethics in Nigeria*, 25 GLO. BIOETH. 164, 165 (2014).

## II. THE CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA

Section 1(1) of the 1999 Constitution of the Federal Republic of Nigeria (CFRN) provides that:

*“This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria.”*

Section 1(3) provides further:

*“If any other law is inconsistent with the provisions of the Constitution, this Constitution shall prevail and that other law shall to the extent of the inconsistency be void.”*

From the above provisions of the constitution, an insight is thus, provided on how the laws in Nigeria will be interpreted and consequently implies that, the Constitution of Nigeria is supreme. All laws of the National Assembly, subsidiary legislations as well as all other forms of any written law must conform absolutely to the letter and spirit of the Constitution of the Federal Republic of Nigeria.

Be that as it may, and going further by way of explanation and more exposition on the nature of the CFRN, section 36(1) of the Constitution of the Federal Republic of Nigeria provides:

*“Subject as otherwise provided by this Constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty thereof is prescribed in a written law.”*

A written law, by virtue of this subsection can be said to mean or refer to an Act of National Assembly or a State law. It can also mean any subsidiary legislation or instrument under the provisions of the law. Furthermore, the Constitution of the Federal Republic of Nigeria provides under section 17(2) that:

*“The sanctity of human person shall be recognized and human dignity shall be maintained and enhanced’. Going a bit further, section 21 of the Constitution provides and stipulated that; ‘states shall protect, preserve and promote the Nigerian cultures which enhance human dignity and are consistent with the fundamental objectives and directive principles of State policy.”*

Thus, based on the provisions above, it can be seen and deduced that the criminal laws of Nigeria (Criminal Code of the South of Nigeria and Penal Code of the North of Nigeria) are Acts of National Assembly, because they both constitute written laws and contain well defined offences. The criminal laws, being acts of National Assembly must conform in absolute and total terms with the provisions of section 17(2) and section 21 of the Constitution, for it to remain valid and continuously enforceable. Prohibition of abortion under sections 232 and 235 of the Penal Code (Northern Nigeria) and sections 228, 229 and 230 of the Criminal Code (Southern Nigeria) is in consonance with section 17(2) as well as section 21 of the Constitution, which promotes the dignity and sanctity of human persons as well as the Nigerian cultures which are great and absolute respecters of human dignity. Hence, based on the above in-depth analysis, it becomes clearer and more vivid that the issue of abortion in Nigeria is a matter of constitutional provisions, and not an issue that anyone can dictate or interpret at will. The constitutional provisions regarding and relating to abortion must be followed to the later in Nigeria.

The researcher here affirms strongly that, the relationship between criminal law and abortion has been determined by the constitution of the country. The criminal laws of Nigeria, based on this research, is operating within the ambit of the Constitution of the Federal Republic of Nigeria which has been considered to be the supreme law of the land.

Having set down the provisions of the Constitution of the Federal Republic of Nigeria (CFRN), it has become apposite as well as imperative to state categorically that the Nigerian Constitution has been, and have always been interpreted based on the originalist theory of interpretation. As a constitution which has always been interpreted originally, based on the originalist theory of interpretation, it becomes extremely difficult as well as impossible to see the Constitution of the Federal Republic of Nigeria (CFRN) in a different light.

### III. THEORY OF ORIGINALIST INTERPRETATION OF THE CONSTITUTION

Originalism, represents and stands for the view that the constitution should always be interpreted according to its original meaning and no more. This has been a very important and respected principle of constitutional interpretation since the early republic. James Madison (drafter of the American Constitution and the fourth president of the United States of America), the renowned father of the American Constitution wrote:

*"I entirely concur in the propriety of resorting to the sense in which the constitution was accepted and ratified by the nation. In that sense alone it is the legitimate constitution. And if that be not the guide in expounding it, there can be no security for a constituent and stable...exercise of its powers."*<sup>8</sup>

Originalism can be said to refer to the theory of interpretation of legal texts, including the text of the constitution. Constitutional originalism is defined by a commitment to the original meaning of

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<sup>8</sup> Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST COMM. 427, 429-430 (2007).

the letter of the constitutional text. Originalism is the view that the meaning of the constitution remains the same until it is properly changed.<sup>9</sup> Originalists believed and maintained that the constitutional text ought to, and should be given the original public meaning and understanding that it would have at the exact time that it became law.<sup>10</sup>

An originalist can further be said to connote and imply a person who strongly believes that the meaning of the constitution does not, and cannot change or evolve over time, but rather that the meaning of the text of the constitution is both fixed and knowable. Originalism takes as its premise that the original meaning of the constitution is relatively fixed and is committed to identifying an unchanging historically grounded understanding of the text of the constitution.<sup>11</sup> An originalist further believes and ascertains that the fixed meaning of the text should be the sole guide and guiding principle for a judge whenever he is applying or interpreting a constitutional provision. In its various guises, originalism seeks to provide a framework of principles to guide judges and other constitutional interpreters in interpreting the constitutional text.<sup>12</sup>

An originalist can be classified and divided into two viz; a textualist and an intentionalist.

#### IV. TEXTUALIST ORIGINALIST

A textualist is recognized as an originalist who gives primary credence and weight to the actual text and structure of the

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<sup>9</sup> Randy E. Barnett & Evan Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L. J 1, 3 (2018).

<sup>10</sup> Jack M. Balkin, *The Construction of Original Public Meaning*, 26 CONST COMM 71, 74 (2016).

<sup>11</sup> Keith E. Whittington, *Is Originalism too Conservative?* 34 HARV. J. L & PUB. POL'Y 31, 34 (1991).

<sup>12</sup> *Id*

constitution.<sup>13</sup> The text means what it actually would have been understood to mean by an ordinary person as at the time it was written.<sup>14</sup> Textualists are often very sceptical of the ability and wisdom of judges to determine collective “intent”.<sup>15</sup> Justice Antonin Scalia is an example of a textualist.

Justice Scalia was a “public meaning” originalist textualist who identified and recognized the constitution with the exact meaning of its words to a reasonable person at the time of the enactment.<sup>16</sup> As such, he (a reasonable person) is expected to focus primarily on the constitution’s text as well as historical evidence, such as dictionaries and ordinary usage of how its words were defined and used at the relevant time.<sup>17</sup>

In constructing and interpreting the constitution, Justice Scalia made use of structural reasoning and thinking as well as background assumptions to find and locate specific rules in very general text.<sup>18</sup> The erudite judge could also be seen to have made extensive use and utilization of the constitution’s English law background, which he thought formed a crucial and important key to the constitution’s meaning. He also made use of post-ratification practice, which includes remote practices which are outstanding from the time of enactment in order to give meaning to ambiguous and confusing clauses. Lastly, the textual originalist judge appeared to accept the fact that new constitutional rules could arise someday, with new

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<sup>13</sup> MATHEW GUILLEN, *READING AMERICA: TEXT AS A CULTURAL FORCE* 93 (ACADEMIA PRESS BETHESDA 2007).

<sup>14</sup> Balkin, *supra* note 10 at 72.

<sup>15</sup> GUILLEN *supra* note 13 at 93.

<sup>16</sup> Michael D. Ramsey, *Beyond the Text: Justice Scalia’s Originalism in Practice*, 92 NOTRE DAME L. REV. 1945, 1946-47 (2017).

<sup>17</sup> *Id*

<sup>18</sup> *Id*

technologies. However, Justice Scalia consistently and repeatedly reaffirms that none of these sources could ever override unambiguous text, but was forthright in admitting that some text standing alone was very often ambiguous.<sup>19</sup>

Supposedly therefore, textualism shows and reveals the proper deference to what the legislature says and thus, curbs as well as curtails judicial overreach. Again, textualism, in all its ramifications, can be adjudged to be most neutral, very objective, non-ideological, and a simple exercise in rule-of-law judging.<sup>20</sup>

Scalia's agenda and intention is well known, which is curbing as well as curtailing the judicial expansion of constitutionally protected rights through the strict and unbending adherence to the original meaning of the text, while simultaneously rejecting and opposing 'reference to contemporary values as a perversion of the rule of law, democracy and the constitution itself'.<sup>21</sup>

Ultimately therefore, the case for originalism thus, appears and seems to be that of the rule of law. The constitutional text is in fact, the law. If judges do not or, refuse to follow its meaning, then they are promoting and enforcing the rule of judges rather than the rule of law. Only the original meaning in this view and understanding, produces a truly lawful decision.<sup>22</sup>

Originalism has been considered as a necessary tool and machinery for true democracy relating to popular sovereignty,

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<sup>19</sup> Antonin Scalia, *Is there an Unwritten Constitution?* 12 HARV. J. L & PUB. POL'Y. 1, 1-2 (1989).

<sup>20</sup> Joseph Kimble, *Ideological Judging: The Record of Textualism*, THE NAT. LAW J. (2018). <https://www.law.com/nationallawjournal/2018/07/31/ideological-judging-the-record-of-textualism/>

<sup>21</sup> Lael K. Weis, *What Comparativism tells us about Originalism*, 11 INT'L J. OF CONST LAW. 842, 843-844 (2013).

<sup>22</sup> FRANK B. CROSS, *THE FAILED PROMISE OF ORIGINALISM* 7 (STANFORD UNIVERSITY PRESS 2013)

noting that the constitution was ratified through a democratic process and it had no force until this time of ratification. Democracy, on the other hand, implies that democratic actions that eventually becomes the law remain effective until legally repealed. Originalism has been identified to be the only means of interpretation that is faithful and loyal to what people democratically agreed upon. Allowing and permitting any other mode of interpretation of the constitution that will alter or twist that popularity agreed-upon meaning and understanding is to make the justices sovereign, not the people.<sup>23</sup>

## V. INTENTIONAL ORIGINALIST

An intentional originalist on the other hand is an originalist who gives or places primary weight and reliance on the intentions of the framers/drafters/makers, members of proposing bodies and ratifiers of the constitution. Original intent originalism looks and searches for the subjective intents and intentions of the law enactors.<sup>24</sup> One very big problem with this type of approach is identifying the actual and relevant “law-maker” whose intent is being sought. Judge Robert Bork is an intentionalist.<sup>25</sup> Bork admitted that one can easily discern the text’s public meaning by focusing on the ‘ratifiers’ original understanding’.

While making a case for originalism and justifying the same, Justice Robert Bork expressed the strong view that if constitution is the law, then presumably and supposedly, its meaning, like that of

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<sup>23</sup> *Id*

<sup>24</sup> Lawrence B. Solum, *Semantic Originalism* ILLINOIS PUB LAW RESEARCH PAPER No. 07-24 (2008) <https://ssrn.com/abstract=1120244>  
<https://dx.doi.org/10.2139/ssrn.1120244>

<sup>25</sup> STEPHEN M. FELDMAN, *NEOCONSERVATIVE POLITICS AND THE SUPREME COURT* LAW 80-81 (NEW YORK UNIVERSITY PRESS 2013)

all other laws, is the meaning the lawmakers were understood to have intended. If the constitution is law, according to Bork again, then presumably and supposedly again, like all other laws, the meaning the lawmakers intended is as binding upon the judges as it is upon the legislatures as well as the executives.<sup>26</sup> The meaning intended by the lawmakers, by inference, is of course binding on the people as well.

According to Justice Bork, a judge, no matter on what court he sits, may never create and propagate new constitutional rights or destroy the old ones.<sup>27</sup> Anytime he does so, he has violated not only the limits to his own authority but, for that singular reason, has also violated the rights of the legislature and the people.

It appears very important to point out that, this original intent theory is currently a minority view amongst originalists basically because most, if not all the framers or founders of the constitution, did not find it worthwhile to leave behind detailed discussions as to what their intent really was.<sup>28</sup>

Hence, the most robust and widely cited acceptable form of originalism emphasizes on how text would have been understood by a reasonable person in the historical period during which the constitution was proposed, ratified and first implemented.<sup>29</sup>

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<sup>26</sup> Jack L. Landau, *A Judge's Perspective on the Use and Misuse of History in State Constitutional Interpretation*, 38 VAL. U. L. REV. 451, 455 (2004).

<sup>27</sup> Steven G. Calabresi & Lauren Pope, *Judge Robert H. Bork and Constitutional Change: An Essay on Ollman v Evans*, 80 UNIV OF CHIC LAW REV. ONLINE 155, 155-156 (2017).

<sup>28</sup> Tara Smith, *Originalism's Misplaced Fidelity: "Original" Meaning is not Objective*, 26 CONST COMM. 1, 3-4 (2009).

<sup>29</sup> Keith E Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 380-81 (2003).

## VI. THEORY OF DYNAMIC INTERPRETATION OF THE CONSTITUTION

The progressives tend to prefer expansive interpretations that update and upgrade statutes to reflect or portray contemporary values and understandings, whereas, the conservatives believe that the court is an inappropriate forum to pursue social change. Legal theorists who support the progressive judicial interpretations must articulate as well as formulate a theory underlying such activism. Hence, the birth of interpretation using dynamism.<sup>30</sup> Contrary to traditional theories of statutory interpretation, which ground statutes and constitutions in the original legislation's text and intent, legal scholars like William Eskridge argue that statutory interpretation changes in response to new political alignments, new interpreters and new ideologies

The principle of dynamic interpretation of statute can be seen to be firmly rooted in the courts' case law, especially in the United Kingdom and the United States of America.<sup>31</sup> This principle was first applied by the courts in the case of *Tyrer v. United Kingdom*, which was a case decided by the European Court of Human Rights in 1978.<sup>32</sup> The court held, in relation to the European Convention on Human Rights ("ECHR") that, the Convention is a living instrument which, as the commission stressed, must be interpreted in the light of the present-day conditions. In the case now before it, the court cannot but be influenced by the developments and commonly

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<sup>30</sup> Brett McDonnell, *Dynamic Statutory Interpretation and sluggish Social Movements*, 85 CRLIF. L. REV. 919, 920-921 (1997).

<sup>31</sup> Michael P Healy, 'Legislative Intent and Statutory Interpretation in England and the United States: An Assessment of the Impact of *Pepper v. Hart*' (1999) 35 *STAN. J. INT' L* 231, 232-37

<sup>32</sup> *Tyrer v. UK*, (1978) 5852/72 (ECtHR).

accepted standards in the penal policy of the member states of the council of Europe in this field.”<sup>33</sup>

It is worth noting that this principle was evoked 28 years after the drafting of the ECHR.<sup>34</sup> In short, the principle of interpretation applied in the case above indicates that the rights and freedoms set therein in the ECHR must adapt to contemporary society. This statement, to a very large extent contains the quintessence of the dynamic principle of interpretation.<sup>35</sup>

The dynamic principle of interpretation entails the process of constantly updating the contents of written laws, for example, statutes and constitutions to meet the present day thinking and circumstances.<sup>36</sup> The ‘power to up-date’ implied in the Tyrer case was affirmed shortly after in the case of *Marckx v. Belgium*.<sup>37</sup> In this particular case, the European Court of Human Rights expressly departed from the known meaning of the word, ‘family’ under Article 8 of the ECHR at the time it was drafted. At the time of drafting the Convention, there existed a distinction between ‘illegitimate’ and ‘legitimate’ family. However, using the dynamic principle of interpretation in this case, the court held that the ‘illegitimate’ family enjoyed the guarantees of Article 8 ECHR “on equal footing” with the traditional family.<sup>38</sup>

Summarily, in effect, the dynamic principle of interpretation is the power the court has and possesses to give contemporary

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<sup>33</sup> *Id*

<sup>34</sup> Mariamah Crona, *The Principle of Dynamic Interpretation- A Matter of Legitimacy: The ECHR Principle of Dynamic Interpretation from a Constitutional Perspective*, <https://www.duo.uio.no/bitstream/handle/10852/22003/88613.pdf>

<sup>35</sup> *Id*

<sup>36</sup> Daniel Rodriguez, *The Substance of the New Legal Process*, 77 CALIF. L. REV. 919, 936-40 (1989).

<sup>37</sup> *Marckx v. Belgium*, (1979) 6833/74 (ECtHR).

<sup>38</sup> Crona *supra* note 34.

meaning to the contents of any written law, thus resulting in a total and complete departure from the established or historical meaning. Based on this, the court by this principle is taken completely out of the four corners of any written law.<sup>39</sup>

The principle of dynamism in the interpretation of written law can be seen to be embedded with a lot of injustice. For how is it possible and convenient for an individual to plan his or her life in the face of or on the basis of the law-of-tomorrow? Dynamism in the interpretation of any written law has totally disregarded the principle of the rule-of-law in our society, because by its contents, the daily lives and activities of all citizens within the society is in jeopardy. This is simply so because, the courts, while relying on this principle are at liberty and free to use policy considerations to make laws and apply the laws retroactively without any hindrances whatsoever.<sup>40</sup>

Dynamic principle of interpretation is viewed as a strong tool in the hands of the courts. This can be seen in the way and manner civil rights activists focus their wealth and resources to gain favourable statutory interpretations rather than pursuing changes *via* congress.<sup>41</sup> Political progressives frequently go to court to achieve their aims. Since the popular case of *Brown v. Board of Education*,<sup>42</sup> this seems to be a natural strategy. It finds contemporary expression in *Bahr v. Lewis*,<sup>43</sup> the Hawaii same sex marriage case. It is instructive to state here categorically that, instead of the progressives diverting all

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<sup>39</sup> McDonnell *supra* note 30 at 920.

<sup>40</sup> Anthony D'Amato, *The Injustice of Dynamic Statutory Interpretation*, NORTH WEST UNIV SCH OF LAW FAC WORKING PAPER 87. 1, 1-2 (2010).

<sup>41</sup> McDonnell *supra* note 30 at 920.

<sup>42</sup> *Brown v. Board of Education*, (1955) 349 (Supreme Court of U.S.A) 294

<sup>43</sup> *Bahr v. Lewis*, (1993) 852 P.2d 44 (Supreme Court of Hawaii).

their earned resources to going to court seeking favourable interpretations, these resources could be assembled and geared towards lobbying legislators or better still, grass root mobilization.<sup>44</sup>

## VII. MAKING THE CASE FOR NIGERIA ABORTION REGIME AS PERCEIVED BY THE CONSTITUTION IN THE FACE OF ORIGINALISM AS AGAINST DYNAMISM

It is most important to start on the premise that, in Nigeria, as we stand presently today, there are very scanty, if available at all, reported cases on abortion in our various courts.<sup>45</sup> However, it is true that in several hospitals around the country, there are several reported and treated cases of incomplete abortions.<sup>46</sup> This is as a result of the restrictive abortion laws. Since abortion goes on clandestinely, only illegal abortions can be estimated or reported.<sup>47</sup>

The civilization and technological innovations going on around the world in the area of reproductive rights of women to decide on whether or not to carry a pregnancy to term have not been able to penetrate into Nigeria. The African Anti-Abortion Coalition has once reported that the shift in fight by some pro-abortion groups in Nigeria to the Nigerian unborn children will not be allowed to prosper. This, the coalition wrote in a letter to the late president of Nigeria, President Yar'adua.<sup>48</sup> No woman in Nigeria has the right to

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<sup>44</sup> McDonnell *supra* note 30 at 920.

<sup>45</sup> R v. Idiong and Umo (1950) 13 W. A. C. A. 30 Verity C. J, R v. Ororosokode (1960) 5 F. S. C. p. 208, State v Ade-Ojo 12 C. C. H. C. J 27 (1972), Comm'r of Police v Modebe (1980) N. C. R 367, State v Johnson Oke , 9 C. C.H. C. J 1305 (1975). In all these cases the provisions of the penal laws were followed.

<sup>46</sup> Isabella Okagbue, *Pregnancy Termination and the Law in Nigeria*, 21 STUD FAM PLANN. 197, 197-198 (1990).

<sup>47</sup> Kasim Sumaina, *Nigeria Records 2.7m Cases of Abortion in 2018, Says Report*, This Day, September 21, 2018 at <https://www.thisdaylive.com/index.php/2018/09/21/nigeria-records-2-7m-cases-of-abortion-in-2018-says-report/>

<sup>48</sup> See [www.chidicon.com/AAAC.html](http://www.chidicon.com/AAAC.html)

choose abortion except and unless, when her life is in jeopardy.<sup>49</sup> These are the exact provisions of our penal laws representing the criminal laws of Nigeria which must, as a matter of fact be *interdem* with the CFRN.

The outmost concern and respect for the dignity and sanctity of the life of the unborn child can be seen to be the actual reason why abortion is still a crime in Nigeria. The criminal laws in Nigeria can be compared to the criminal law theory as propagated by the erudite scholar, Stephen Schulhofer<sup>50</sup> in one of his famous works.

According to Schulhofer, the criminal law can best be imagined to be a mathematician of fault, whose main and absolute concern is the elegance and consistency of the entire structure. Furthermore, the criminal law can also be taken and viewed to be a monk, suggestive of the fact that principles must, on no account be watered down to permit its stand or position to be tainted by opportunistic acquiescence in what contemporary politics considers to be acceptable or allowed. Being a monk, the purity of criminal law is of utmost essence. The criminal law as a monk is continuously working and aiming to refine an important moral truth and to preserve it for use, in the hope that, a time more receptive to its message will arrive.<sup>51</sup>

In the words of Schulhofer again,

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<sup>49</sup> Sections 232 and 235 Penal Code of Nigeria 1960 and Sections 228, 229, 230 Criminal Code of Nigeria 1990; Ganiat Mobolaji Olatokun, et al., *Guidance and Counselling Unit in Nigerian Hospitals as a Necessary Tool in Curbing the Incessant Rate of Abortion: Findings from a Case Study Research* in CONTEMPORARY ISSUES IN PUBLIC, HUMAN RIGHTS AND ISLAMIC LAW: DISCUSSIONS AND PERSPECTIVES 157 (Lydia A. Nkansah ed., 2020).

<sup>50</sup> Stephen J Schulhofer, *The Mathematician, the Monk and the Militant: Reflection on the Role of Criminal Law Theory*, 88 CAL LAW REV. 705, 708-709 (2000).

<sup>51</sup> *Id*

*“The criminal law can also take and assume the place of a militant whose primary efforts are geared and directed towards maintaining justice and fair play”.*

The criminal law, as a militant is always hoping that his work will be able to shape and remould contemporary debates and impact great influence on those who litigate, decide cases and enact statutes. The militant criminal law hopes to impact the sooner, the better. The criminal law as a militant can also be identified by the fact that a great number of modern constitutions include a reference to fundamental moral values, that is, they (modern constitutions) have explicitly positivized moral contents.<sup>52</sup>

The theories of criminal law as posited by Schulhofer shows and buttresses the exact position the criminal laws of Nigeria are trying to assume as far as abortion is concerned. While being guided by the CFRN, the Nigerian criminal laws derive complete and absolute satisfaction in the consistent nature of the entire structure of the Nigerian laws. This can be seen in the consistency with provisions in the constitution guaranteeing the sanctity and dignity of the unborn child. The Nigerian criminal law is not prepared at all to compromise its stand and position as far as moral truth is concerned. This can also be seen in the way and manner the law has maintained its stand up till today, even in the face of constant pressures as well as agitations mounted on it from all angles to see that abortion is legalized in Nigeria.

It is the view of this researcher that, in order to conform and be in line with the provisions of the CFRN, which is interpreted, and has always been interpreted in line with the originalist theory of interpretation, the criminal laws must assume the position of a mathematician of fault. The criminal laws of Nigeria have

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<sup>52</sup> Jose Anthonio Marina, *Genealogy of Morality and Law*, 3 ETH THEO & MORAL PRAC. 303, 303-304 (2000)

persistently refused to be used by opportunists, who are concerned about their political ambitions as well as western tendencies. By so doing, the criminal laws of Nigeria have reaffirmed and maintained its stand with the CFRN in the area of respect for the dignity of the unborn child, for if it (criminal laws) had allowed opportunist intervention, it will no longer be *interdem* with the CFRN.

The criminal law will constantly be used to refine the moral truth which states that any destruction against the unborn child is a crime, except when done to save the life of the mother. This criminal law position is also in consonance with the CFRN which has been seen to uphold the cultural and religious life of all Nigerians.

The idea that no woman in Nigeria has a right to choose abortion except when her life is in jeopardy, is in line with the cultures and traditions of Nigeria. This idea is the cultural and religious stand in Nigeria to date and all laws must conform and adhere to this belief because, the constitution of Nigeria is supreme.<sup>53</sup>

I want to state emphatically here, that culture is a very important factor as far as Nigeria is concerned. This is mainly because, culture can be seen as an established and accepted pattern of behaviour among a set of people. It can further be said that it is an all-embracing and heterogeneous phenomenon that involve every aspect of man's life, behaviour as well as his experiences.<sup>54</sup> In most cases, it is perceived and regarded as a way of life, a collective and integrated whole as well as comprising every aspect of man's ideas, behaviour,

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<sup>53</sup> Section 1(1) of the 1999 Constitution of the Federal Republic of Nigeria

<sup>54</sup> Adeyinka Ajayi, *The Preservation and Conservation of Nigerian Cultural Heritage: An Impetus for her Development*, 4 THE SOC. SCI. 407, 407-408 (2009).

values, traditions, beliefs and habits acquired by man as a member of a given society.<sup>55</sup>

Having established the place and importance of culture, (which automatically includes religion) to our daily lives in Nigeria, it is apt to add at this juncture, the strong influence which religion, in whatever name it is called in Nigeria, has on majority of Nigerians.<sup>56</sup> The different religions practiced in the country occupy a very important place in the minds and hearts of Nigerians, that it has metamorphosed into a strong social and psychological force capable of influencing the general outcomes of every individual Nigerian's lives from cradle, when born, to grave, when dead. It will surprise no one in Nigeria that majority of people are always influenced by their religion, be it Islam, Christianity or even, African Traditional Religion.<sup>57</sup>

Having set the above analysis on the importance of culture and religion to majority of Nigerians, which mainly dictates the respect given to the dignity and sanctity of life of the unborn, and which actually finds expression in all written laws in Nigeria, I think it is worthy to further give an analysis on the stance and stand of the post-independence Nigeria. The need to give equal consideration and attention to cultural activities as practiced by Nigerians, and the values upheld by these Nigerians in all spheres of their lives, has been fully recognized by the post-independence development of Nigeria.<sup>58</sup> General ideals of Nigerian development were connected

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<sup>55</sup> *Id*

<sup>56</sup> Momoh L. Yesufu, *The Impact of Religion on a Secular State: The Nigerian Experience*, 42 *STUDIA HIST. ECC.* (2016). <http://dx.doi.org/10.17159/2412-4265/2016/255>

<sup>57</sup> Issac T. Sampson, *Religion and the Nigerian State: Situating the De-facto and De-jure Frontiers of State –Religion Relations and its Implications for National Security*, 3 *OXF J. OF L. & REL.* 311, 313-314 (2014).

<sup>58</sup> Ajayi *supra* note 54 at 407.

and attached to well-grounded as well as authentic cultural values.<sup>59</sup> One such cultural value considered as important to majority of Nigerians is the respect for sanctity and human dignity. There is a strong belief that life commences before birth, and not after birth.<sup>60</sup> In the Nigerian sense and heritage, very mighty value is placed on pregnancy and childbirth.<sup>61</sup>

Going in line with the originalist interpretation argument that I am giving to justify the fact that dynamism in the interpretation of the CFRN in relation to abortion cannot hold water, it is right to quickly point out that Chapter 2 of the CFRN, 1999 made provisions concerning the 'fundamental objectives and directive principles of state policy'. Section 17 CFRN provides; "*these principles comprises economic, social and cultural rights for all.*" Furthermore, section 13 CFRN provides:

*"It shall be the duty and responsibility of all organs of government and of all authorities and persons exercising legislative, executive and judicial powers to conform to, observe and apply the provisions of the fundamental objectives and directive principles of state policy."*

The Supreme Court of Nigeria has held that the foregoing sections do not only impose a solemn duty to observe the mandate contained in Chapter 2 on all organs of government and all

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<sup>59</sup> *Id*

<sup>60</sup> Ebunoluwa O. Oduwole, *Personhood and Abortion: An African Perspective*, 21 LUMINA 1, 1-2 (2010).

<sup>61</sup> Remi Akujobi, *Motherhood in African Literature and Culture*, 13.1CLCWeb. 1, 4-5 (2011); Ganiat Mobolaji Olatokun, *Feminists' Body Sensitivity: An Overview of the Western and Nigerian Perspectives*, 10 NAUJILJ 114, 121-122 (2019).

authorities and persons exercising legislative, executive and judicial powers, but also on private individuals as well.<sup>62</sup>

Interestingly, it can be seen that the social structure making up the order is based and founded on the ideals of freedom, equality and justice. Consequently, in the advancement of the social order, section 17(3) CFRN provides; *“the state shall direct its policy towards ensuring that there are adequate facilities for religious and cultural life.”*

Based on the analysis above, it can therefore be said convincingly that the CFRN contains provisions relating to the rights of all Nigerians to develop and promote their cultures and to apply their cultures as an instrument to further the progress of national identity and unity.<sup>63</sup> The legislative list of the CFRN defines the mandate of the federal government, as well as the state and provincial authorities in the field of culture.

It is against this backdrop that I am putting it forth with all force that, dynamism in the interpretation CFRN in relation to abortion will deal a heavy blow on our culture and religion, considering the long-standing history for the respect for the dignity of the yet to be born Nigerians, as emphasized by the constitution of the nation, as well as respected by majority of Nigerians. It has been established that the authors and drafters of the Constitution of Nigeria, which has been amended to date, are men of integrity with a solemn duty to protect the generations of Nigerians born and unborn.<sup>64</sup> The texts contained in section 34 CFRN regarding right to life for all Nigerians are simple and plain, and are well understood and comprehended by the general public as giving dignity to every Nigerian born and

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<sup>62</sup> Attorney-General of Ondo State v Attorney-General of the Federation & 35ors (2002) NWLR (pt 772) 222 at 381.

<sup>63</sup> Section 17 Constitution of the Federal Republic of Nigeria.

<sup>64</sup> Ikpeze *supra* note 1 at 228.

unborn. This is in line with original textualist interpretation.<sup>65</sup> Furthermore, going in line with the original intentionalist interpretation,<sup>66</sup> the intentions of these men of honour (talking about the authors and drafters of the Nigerian Constitution) with regards to section 34 CFRN are still given effect to up till today, despite the fact that they are long dead and gone. This further buttresses the fact that dignity and sanctity of human person relates to both the born and the yet to be born.

This explains and justifies the reason why the dignity of the unborn children in Nigeria is still recognized, bearing in mind the intentions of the fore fathers of our constitution, as well as the meaning the general public attributed to the provision of section 34 CFRN. There have been several failed series of moves, protests as well as agitations by powerful few minorities in Nigeria to see that dignity is withdrawn from the unborn children in Nigeria, so as to have a liberal abortion law.<sup>67</sup>

A dynamic interpretation of the CFRN would have given our courts the power to interpret the CFRN based on the contemporary happenings in the world today.<sup>68</sup> Contemporary happenings in the world today have witnessed episodes of modern world playing around with human life, leading to legalization of abortion in most countries of the world. No more value is seen to be attached to the

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<sup>65</sup> GUILLEN *supra* note 13 at 93

<sup>66</sup> Solum *supra* note 24

<sup>67</sup> Victor N. Opara, *Re-Characterizing Abortion in Nigeria*, 11 ILSA J. INTL & COMP LAW. 143, 144-145 (2004).

<sup>68</sup> Susan A Cohen, *Facts and Consequences: Legality, Incidence and Safety of Abortion Worldwide*, 12 GUTT POL'Y REV. (2009) at <http://www.guttmacher.org/pubs/gpr/12/4/gpr120402.html>

life of the unborn child by several countries that make up the world (Nigeria is an exemption).

In addition, dynamism in interpreting the constitution would have afforded our courts the opportunity to go out of the four corners of the CFRN, to give a sweeping interpretation to section 34 CFRN dealing with human dignity. Since abortion has been legalized in majority of countries of the world,<sup>69</sup> dynamism in the interpretation of the CFRN will definitely expunge human dignity from the unborn children, and once this is done, both the Penal Codes and the Criminal Codes (representing our criminal laws) will be amended in line with the sweeping definition, and we will be faced with provisions seemingly looking like a woman is free and at liberty to terminate her pregnancy at any time once she finds it compelling to do so, without giving due regard to the foetus. This sweeping dynamic interpretation of the CFRN regarding abortion will be against the religious beliefs of the three major religions in Nigeria; Islam, Christianity and African Traditional Religion. According to these religions, life begins from pre-conception.<sup>70</sup>

### VIII. CONCLUSION AND RECOMMENDATION

Dynamic interpretation of section 34 and 17(2) CFRN, having direct relations with abortion will amount to injustice to the yet unborn, the living as well as the dead. Injustice to the unborn because they will be deprived and debarred of the opportunity from coming into the world. Injustice to the living because the law has been thwarted and the rule of law will have no place. Injustice to the dead because the hard work and patriotism of the authors and drafters of the constitution would have been rubbished.

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<sup>69</sup> *Id*

<sup>70</sup> Ajayi *supra* note 54 at 407; Yesufu *supra* note 56.

The CFRN is not a living law as far as section 34 CFRN is concerned. It cannot be interpreted in the light of present day conditions. If this is done, the culture and religion of the Nigerian people will be subverted and there might be no more basis for existence since it has been established and confirmed that culture and religion play a very vital role in the lives of every Nigerian. In order to preserve the life of the unborn children in Nigeria therefore, and in order to ensure that abortion is continuously criminalized, originalism must be upheld while interpreting the texts and contents of section 34 and 17(2) of the CFRN.

Furthermore, since it has been argued and put forward that the relationship between criminal law and abortion has been determined by the Constitution (which has been interpreted using the originalist theory of interpretation) of Nigeria, the criminal law, in order to be able to continuously uphold the sanctity and dignity of the unborn child (which is a vital aspect of culture and religion of Nigeria) should be allowed and left to perform its two important functions.<sup>71</sup> Firstly, the criminal law must be allowed to define as well as establish the conducts which are prohibited, for instance abortion, and secondly, the criminal law must be allowed to continuously and persistently set the minimum condition for, and the extent of liability, which will be performed by adjudication procedure, for instance setting the punishment for the performance of abortion. By so doing, the criminal law, in conforming with the CFRN, is seen as providing guidance and direction to the community as a whole, as to the conducts which must be avoided or not performed. This, is the essence of the cultural and religious

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<sup>71</sup> Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335, 369 (2005).

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beliefs of Nigerians as it relates to upholding the dignity and sanctity of the unborn child.

## COMPULSORY LICENCE AND PARALLEL IMPORTATION AS TOOL TO ACCESS MEDICINE

- Prof. (Dr.) Anil Gopal Variath\* & Ankit Kumar\*\*

### ABSTRACT

*Access to medicines is an essential part of the policy which is framed by each country and plays a vital role in promotion of public health. One of the major dimensions to the problem of access to medicine is the impacts of the expansion of patent protection to pharmaceutical products. An understanding of the nature of patent rights and the patent system helps to explain why the patent system has been particularly implicated in this debate. For an Invention an exclusive right is granted which is patent right, furthermore, it is a process or a product that provides, basically, a unique solution to a problem, or a new way of doing something. When a large amount of time, energy and money are spent in the Research and Development of new medicines, it appears to be quite justified and reasonable to grant the exclusive patent right to the inventor of such medicine or new drugs. On the other hand, such monopoly right also has a tremendous adverse impact on the right to access to medicine of the people, which is a part and parcel of the fundamental right to life under Indian Constitution. There had been heated debates on the issue and the TRIPS as well as our patent law has taken some positive steps to address this issue in the form of 'Compulsory Licensing' and 'Parallel Importation'.*

*The compulsory licensing is imposed and enforced by the state, wherein; appropriate government authority gives license to a 3rdparty or an agency of government to use an invention without the assent of the patent holder. Article 31 of TRIPS establishes a set of standards that must be respected*

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*when a country chooses to allow compulsory licensing under its national laws. 'Parallel Importation' is import of non-counterfeit or genuine products from one country to another without the permission of the IP owner. The present paper attempts to analyse the concerns regarding pharmaceutical patents vis -a - vis, the right to access to medicine and examines how effective are the policy of 'compulsory licensing' and parallel importation in addressing these concerns.*

**Keywords:** Pharmaceutical patent, access to medicine, invention, compulsory licensing, parallel imports.

## I. INTRODUCTION

Access to medicines is an essential part of the policy which is framed by each country as their role is indispensable in the promotion of public health. The COVID-19 pandemic has underlined the importance of developing an effective public health regime. We shall not forget that in spite of all the scientific and technological advancements the world has not been able to take on the pandemic effectively even after a year of its outbreak. In many countries, pharmaceuticals patent protection was unavailable for several years, as it was made too essential to be left at the patent holder's desire. Immense costly operations were done for R&D of new medicine and then forced for the policy change in favour of permitting the protection of pharmaceuticals patents. It was also perceived that a general disclosure of the patent should be done publicly, instead of retaining it as a secret, as it could improve innovation in the pharmaceutical industry. As there is a likelihood that the already invented medicine can be duplicated, patent protection has ensured that it does not happen and so patent protection is important for the pharmaceutical sector.<sup>1</sup> Patent protection grants the right to the inventor, for the detailed disclosure of the invention. The right granted to the inventor is rather a negative rather can be called as patent right, which enables him to restrain others from using the patented invention for a specific duration. So, in order to prevent monopoly abuses, an exceptional policy tool is also been provided i.e. compulsory licensing. This paper is an attempt to deal with the exceptional policy and is divided into two parts, the first part will lay out a conceptual framework of the topic

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<sup>1</sup>Chien, Collen, "Cheap Drugs at What Price to Innovation: Does the Compulsory Licensing of Pharmaceuticals Hurt Innovation?", 18 *Berkely Technology Law Journal* 853 (2003), at pp. 861-862.

in its broader perspective and analyse it accordingly; the second part will be focused on the position of India.

## II. CONCEPTUAL AND ANALYTICAL FRAMEWORK

### A. Access to Medicine

It has been acknowledged that in the debate on access to medicines, commonly the “access” term is applied in such a way that bemuse and obscures difficulties that are distinct by nature.<sup>2</sup> Fundamentally, there is a dearth of literature that is specifically devoted to the advancement of a conceptual understanding of this term. Further, the limited literature that exists<sup>3</sup> has approached the subject, from a perspective of human rights (concerning health) and not from the IP law perspective<sup>4</sup>.

The core provision of the International Human Rights law is stated in Art.12 ICESCR<sup>5</sup>. The Art. 12 of ICESCR acknowledges: “*right of everyone to the enjoyment of the highest attainable standard of physical and mental health*”. According to Art. 12, access to medicine is a censorious particular of the right to health as a treatment for endemic diseases and epidemic diseases and also as part of medical supervision in the happening of any kind of sickness.<sup>6</sup>

The Committee of UN on Economic, Social and Cultural Rights in the General Comment No. fourteen on the “*Right to the Highest*

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<sup>2</sup>Public Health, Innovation and IPR: Report on IPR, 11 (2006), available at <http://www.who.int/intellectualproperty/documents/thereport/ENPublicHealthReport.pdf> (visited 1 Oct, 2019)

<sup>3</sup>Alicea Eli, *Not Just a Tragedy: Access to Medications as a Right Under International Law*, 21 B.U. INT'L L.J., 325.

<sup>4</sup>Phillipe, *Human Rights and IP Protection in the TRIPS Era*, 29 HUM. RTS. Q. (2007) at 414.

<sup>5</sup>International Covenant on Economic Social and Cultural Rights.(hereinafter ICESCR).

<sup>6</sup>*Supra* note 3 at 337.

*Attainable Standard of Health*”, explained that access to goods and services which are connected with health (described to include essential medicines) comprises 3 elements: (a) *physical accessibility*, it means that all sections of the population have physical reach to the goods and services; (b) *economic accessibility* it means the affordability of the goods and services; and (c) *informational accessibility* which calls for the right to receive and provide knowledge and ideas concerning issues and problems related to health.

Consequently, as used in this paper, the term ‘access to medicines’ will be more specifically understood to refer to the physical and economic elements of access which, simply put, refer to accessibility and affordability of medicines.

### ***B. Access to Medicines and the International Regime of Patent***

Although there are many dimensions to the problem of access to medicine,<sup>7</sup> the debate on access to medicine has pointed to the impacts of the expansion of patent protection to pharmaceutical products. An understanding of the nature of patent rights, the patent system, and the latter’s justifications, therefore, helps to explain why the patent system has been particularly implicated. For an Invention, an exclusive right is granted which is a patent<sup>8</sup> right, furthermore, it is a process or a product that provides, basically, a unique solution to a problem, or a new way of doing something<sup>9</sup>. The right is best

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<sup>7</sup>International Intellectual Property Institute, *Patent Protection and Access to HIV Pharmaceuticals: A Report Prepared for the WIPO*, 53 (2000), available at [http://www.wipoint/export/sites/www/aboutip/en/studies/pdf/iipi\\_hiv.pdf](http://www.wipoint/export/sites/www/aboutip/en/studies/pdf/iipi_hiv.pdf), (last visited October 2019)

<sup>8</sup>Craig Allen Nard, *The Law of Patents*, 1 (2008).

<sup>9</sup> Patricia Kameri-Mbote, *Patents and Development*, in *Law and Development in the Third World*, 412, 212 (Yash Vyas et al. eds., 1994).

thought of, not as an affirmative right, but as a right to exclude or a veto which empowers the holder of the patent to stop others from importing, selling, forming or using the invention for the duration of the patent right.<sup>10</sup>

Being an exclusive right, a patent is, therefore a form of a monopoly grant which enables those who hold rights under it to control the output, and, within the limits set by demand, the price of the patented products<sup>11</sup>. So, taking the same context of access to patented medicine, it has for example been argued that the producer of a patented drug may strive to gain a monopoly profit by charging prices which is more than the usual price.<sup>12</sup>

This core conception of a patent right reveals a great deal about why patents are the most basic, the most valuable, and, to others, potentially the most dangerous of all Intellectual Property Rights.<sup>13</sup> Intellectual property regimes, unlike private property regimes created in respect of tangible property, deal with information goods. Specifically, the use, diffusion, and production of information are at the core of the patent system.<sup>14</sup> Unlike tangible property, information goods bear two main characteristics. They are non-rivalrous<sup>15</sup> and non-excludable.<sup>16</sup> The two characteristics, in turn, lead to a free-rider problem in the sense that persons other than

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<sup>10</sup>Richard Gold, *Patents and Human Rights*, Paper prepared for Justice Canada, (2003), available at <http://www.cipp.mcgill.ca/data/publications/00000006.pdf>, (last visited at October 2019).

<sup>11</sup>Edith Penrose, *The Economics of the International Patent System*, 2 (1951) At 2.

<sup>12</sup> United Kingdom's Commission on Intellectual Property Rights, at 31.

<sup>13</sup>William R. Cornish, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, 7 (1999).

<sup>14</sup>*supra note*8.

<sup>15</sup>*id.* at 27

<sup>16</sup>*id.*

the creator of the information could exploit the information without sufficiently contributing to its creation.

Consequently, economists argue that in the absence of appropriate incentives, the information will, therefore, tend to be under-produced or not produced at all. They further argue that the creation of private property rights over information is one of the ways<sup>17</sup> that governments could intervene to induce the production of information goods.<sup>18</sup> The patent system is one such private property rights regime.

Other more specific justifications have been offered in support of the patents system. According to Penrose<sup>19</sup>, the four main justifications are (a) *the natural rights* argument which posits that a person has a natural property right to his ideas and this right should be recognized by the grant of a specific right; (b) the *reward* argument which suggests that society is obligated to reward inventors with an exclusive privilege in the form of a patent since they render useful services to the society; (c) *incentive to disclose secrets* argument which proffers that patents are granted in for a disclosure of the invention and in the absence thereof, the invention would be kept as a secret to the detriment of the society; and (d) *the utilitarian argument* whose upshot is that there would be no inventions, or at least, inventions would be delayed in the absence of patents since firms, wary of copying by competitors, would be unwilling to incur the heavy cost of R&D which is necessary for the creation of these inventions.

To each of these justifications, a corresponding counter-argument has been advanced. It has for example been argued that: (a) the *natural right* argument is unable to consider a fact, that the same idea

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<sup>17</sup>*id.*

<sup>18</sup>*id.*

<sup>19</sup> Edith Penrose, *The Economics Of The International Patent System*, 2 (1951) at 20.

is very commonly generated independently in the minds of different persons and it cannot, therefore, be held to be the property of one and not the others; (b) the *reward* argument fails to recognize that number of patented inventions are irrelevant economically since they remain unexploited, never reach the market and therefore, the owners never extract monopoly income (reward) from the invention, and that patent protection represents a disproportionate reward for the inventor's contribution to the society, especially because there are other alternative rewards; and (c) the *incentive to disclose secrets* argument is not credible since it is nearly impossible to keep important inventions secret for very long and most importantly, patents are applied for only when secrecy is impossible.<sup>20</sup>

In short, whereas it cannot be argued that the patent system lacks any sort of justification. It is, however not as obviously or easily justified as many people think.<sup>21</sup> Since it is almost impossible to offer a completely acceptable rationale of the patent system, therefore, the patent system should not be excused as an acceptable barrier to access to medicines.

### *C. The debate on the International Patent Regime and Access to Medicines*

Historically, the relationship between the international patent regime and medicines has been controversial. The controversy has its root in the divergence on the purview of patent protection between the countries which are advanced technologically and also those which are in the process of industrialization.<sup>22</sup> Whereas

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<sup>20</sup> R. S. Eisenberg, *Patents and the Progress of Science: Exclusive Rights and the Experimental Use*, (2000) 56 CHIL.RE., 1025

<sup>21</sup> E. C. Hettinger, *Justifying Intellectual Property* (1989) 18 Philosophy and Public Affairs Journal, 33-52, at 48

<sup>22</sup> Carlos M. Cor. & A. Yusuf, *Intellectual Property and International Trade: The Trips Agreement*, 4 (1998).

countries falling in the former category seek to have maximum protection of patent rights, those in the latter category often limit the scope of protection granted to patent right owners, usually foreigners, as part of the countries' 'catching up' strategy.<sup>23</sup> Indeed, the mechanisms of parallel importation involuntary licensing are some of the most important strategies for restricting the scope of patent protection.

Perhaps in recognition of this divergence, the 1<sup>st</sup> important international treaty the Paris Convention (Protection of Industrial Property), gave freedom to the countries to legislate in the above-concerned sectors which they have narrowed down for granting intellectual property protection. The outcome is that in the area of medicine, the number of countries mostly excluded from patentability.<sup>24</sup> Where some protection was given, until the mid-1970s, the normal trend in both developing and developed countries has to provide safeguards to the procedures related to pharmaceutical and not on goods.<sup>25</sup>

All this changed in 1995 with the entry into force of the TRIPS Agreement.<sup>26</sup> TRIPS Agreement, being the most thorough international Agreement on IP ever established, was framed to strengthen and harmonize the protection of IPR globally. This goal was achieved by setting a general set of minimum standards for every nation, not only for patents but also for the six other separate areas of IP that the agreement covers. Regarding patent protection, the most important standard may be said to be the requirement that

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<sup>23</sup>*id* at 5.

<sup>24</sup>Pedro Roffe, *From Paris to Doha: The WTO Doha Declaration on the TRIPS Agreement and Public Health*, (Pedro Roffe et al., eds., 2006).

<sup>25</sup> David M. M., *Patents and Exploitation of Technology Transferred to Developing*, (1985) 24 *Industrial Property*, 120.

<sup>26</sup> Agreement on TRIPS, Apr. 15, 1994, 33 I.L.M. 81 (1994).

protection of patent should be provided for 'processes as well as products' and 'in every technological field.'<sup>27</sup>

Under the TRIPS Agreement countries will no longer have the options available under the Paris Convention, concerning patent protection for pharmaceuticals. All WTO member countries which have ratified the TRIPS Agreement and whose Intellectual Property laws do not meet the minimum standards that it establishes have had to revise their laws to bring them into compliance with the Agreement.<sup>28</sup>

After the TRIPS Agreement came into force, there were concerns that the Agreement was adversely affecting the ability of patients in poor countries to access medicines. In the late 1990s, these concerns were validated by the increased inability of these patients to access the medicines needed to manage especially HIV/AIDS. These concerns provoked a global discussion on access to medicines and the TRIPS Agreement which pitted the pharmaceutical companies supported by the developed nations against the poor nation supported by civil society organizations.<sup>29</sup>

The debate revolved around several issues but the notable one was the fact that whereas the TRIPS Agreement sets a minimum standard of protection which shall be complied by all WTO members, it is unable to create a uniform law. It provides members basically in the area of patents, freedom to legislate at national levels up to a certain degree. Yet, the poor countries were not confident that they could exploit this freedom to meet their public health challenges. Consequently, the debate raised issues such as the

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<sup>27</sup>*id* at 27.

<sup>28</sup>art. 65, TRIPS.

<sup>29</sup>Patrick O, Improving Access to Hiv/Aids Medicines in Africa: TradeRelated Aspects of IPR, 2 (2008).

interpretation and purview of the policy exceptions provided in the TRIPS Agreement which can be utilized for access to patented medicines by improving their availability.<sup>30</sup> According to the DOHA declaration, “the members should not be prevented from taking necessary steps to ensure the protection of public health under the TRIPS agreement”<sup>31</sup>. Following the Doha Declaration, countries now have the opportunity to develop appropriate TRIPS-compliant national strategies to attain public health policy goals. One of the important policy aims in the pharmaceutical area is to make sure the efficient access to essential drugs, at a reasonable cost, to complete the real health needs of all the people.<sup>32</sup>

### III. PATENT RELATED MECHANISMS FOR IMPROVING ACCESS TO MEDICINES

#### A. Overview

In enforcing the TRIPS Agreement, members (of the WTO) can take specifications that moderate the effect of exclusive rights, and encourages competition and thereby help in access to medicines. Such measures are usually referred to as ‘TRIPS flexibilities’. There is a broad range of these flexibilities. The mechanisms of parallel importation and licensing have however been hailed as the most important TRIPS flexibilities as well as the most commonly used in Africa.<sup>33</sup>

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<sup>30</sup>Sisule F.Et. Al., Utilizing Trips Flexibilities for the Public Health Protection through South-South Regional Frameworks, 10 (2004).

<sup>31</sup> Doha Declaration, *Id.*, para. 4.

<sup>32</sup> K. Balasubramaniam, *Access to Medicines and Public Policy safeguards under TRIPS: Development Perspectives on Trips, Trade and Sustainability*, 139(Christophe Bellmann Et Al., Eds. 2003).

<sup>33</sup>*supra note*29 at 22.

### *B. Parallel Importation*

Parallel importation arises as a consequence of a doctrine which is known as “exhaustion of right” or doctrine of ‘first sale’.<sup>34</sup> The doctrine holds that upon the 1<sup>st</sup> sale of the physical item which is authorized, the intellectual property owner is adequately remunerated and consequently, some or all of the intellectual property holder’s exclusionary rights are ‘exhausted’ as applied to that physical item. So as the right are exhausted which leads to the occurrence of parallel imports, which comes into existence when any product which is marketed validly under the IP regime in nation X is imported into nation Y in opposition to the desire of Y’s corresponding IP holder.<sup>35</sup> Parallel imports are, therefore, products manufactured in good faith in the purview of the protection of copyright, patent or trademark, set into motion in 1 market, & after that been imported into a 2<sup>nd</sup> market, even though there is no authorization of the local owner of the IP right.<sup>36</sup> Whereas the phenomenon of parallel importation arises in all forms of IPR, parallel importation of pharmaceutical products would however mainly concern patent and trademarks rights holders.<sup>37</sup> Significantly, the disparity between markets of the price at which goods are sold is the economic driver for parallel import activity. There are two main explanations for this disparity. Firstly, from the practice of intellectual property rights holders to establish a separated international market. It is therefore argued that parallel importation interferes with a right-holder potential to set up a

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<sup>34</sup>Graeme B. Din., *Trademarks and Unfair Competition: Law and Policy*, at 695 (2007).

<sup>35</sup> Alexander J, Stack, *TRIPS Patent Exhaustion and Parallel Imports*, 1 *JWIP* 657, 666 (2005).

<sup>36</sup> N. Gallus, *The Mystery of Pharmaceutical Parallel Trade and Developing Countries* 7 *JWIP* 169, 177 (2004).

<sup>37</sup>*supra* note 34, at 696.

differentiated market thereby eroding their potential profits from international sales. Secondly, to achieve specific particular social objectives national price regulations are established which also accounts for the disparity. In this regard, it could be argued that parallel importation defeats the purpose of price regulation as distributors in markets which is more regulated (lower price), retail ship medicines in higher price markets that are less regulated.<sup>38</sup> Parallel importation will, therefore, come into existence when international cost variances more than the cost of selling goods across borders and transporting it across borders.<sup>39</sup>

The benefit of parallel importation, according to Maskus, the consumer is benefitted by lower prices as the competition is expanded which is faced by the original manufacturers. In a view, the disadvantages are, firstly that through cross hauling of goods between the countries the resources are wasted.<sup>40</sup> Secondly, the argument is put advanced that permitting Parallel importation will increase trade in counterfeit and pirated goods and consumer deception.<sup>41</sup> Crucially, the TRIPS Agreement eludes from directing global norms on the legality of parallel importation thereby rendering parallel importation entirely an issue for domestic legal concern. A country can opt for either a system of national, international or regional exhaustion.

The International exhaustion doctrine enables parallel trade while the national exhaustion restricts the parallel trade.<sup>42</sup> Countries seeking to increase access to medicines would, therefore, opt for international exhaustion thereby making it possible for the

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<sup>38</sup>Matyn Hann, *Trade Mark Rights and Parallel Imports in Europe*, 1 JWIP 621, 631 (1998).

<sup>39</sup>Maskus, *supra* note 49, at 1274.

<sup>40</sup>*id.*

<sup>41</sup>*id.*

<sup>42</sup> Keith E. Maskus, *Parallel Imports*, 23 *The World Economy*, 1269, 1271 (2000)

importation of medicine from anywhere in the world and medicines are retailed at a cheaper rate than in their own country.

### *C. Licensing Mechanisms*

#### i. Voluntary Licensing

A detailed framework of Voluntary Licensing is not provided in the TRIPS Agreement. Owners of the patent from the virtue of Article 28(2) of TRIPS have the right to “*assign or transfer by succession, the patent and to conclude licensing contracts*” is the only place where voluntary licensing is referenced in the Agreement. In the absence of an elaborate framework, presumably, the onus is on individual countries to lay out a legislative and policy framework that best serves the voluntary licensing needs of the country.

#### ii. Involuntary Licensing

The TRIPS Agreement article 31 recognizes two modes of involuntary licensing: compulsory; and government use. Below is a description of each mechanism.

#### iii. Compulsory Licensing

The compulsory licensing is imposed enforced by the state, this licensing is not a voluntary agreement between a desiring buyer and an unwilling retailer.<sup>43</sup> Through this licensing, an appropriate government authority can, therefore, license a 3<sup>rd</sup> party or an agency of government to use an invention without the assent of the patent holder.<sup>44</sup> Article 31 establishes a set of standards that must be respected when a country chooses to allow compulsory licensing

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<sup>43</sup> Giana Julian-Arnold, *International Compulsory Licensing: The Rationales and the Reality*, 33 IDEA 349(1993).

<sup>44</sup>*id.*

under its national laws. The most important of these are the requirement of evidence of an unsuccessful prior request for a voluntary license (national emergencies cases are an exception),<sup>45</sup> payment of appropriate remuneration to the patent holder;<sup>46</sup> and the essentials that authorization should be primarily for the supply of the domestic market.<sup>47</sup>

#### iv. Government Use Licensing

The government uses licensing as a domain taking of a license under the patent, and thus not an infringement of the patent.<sup>48</sup> Invoking the government to use right, a government can allocate to its department or agency, or a private company, the right to manufacture a patented product locally, even though there is no permission of the patent holder.<sup>49</sup> This form of licensing is recognized in regards to article 31, to the concept of 'patents used by or for the government' and 'public non-commercial use'. Public use or Government use of patents, though somewhat similar to a compulsory license, is nonetheless a much accurate and less restrictive technique of authorizing involuntary use of a patent.<sup>50</sup>

Under the TRIPS regime, the advantage of pursuing government use licensing as opposed to compulsory licensing is that there is no requirement to have the assent of the patent holder or to hold the negotiations before for a voluntary license with the patent holder, or to tell the holder of the concerned patent before the government use.

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<sup>45</sup> TRIPS, art. 31(b).

<sup>46</sup>*id.* art. 31(h).

<sup>47</sup>*id.* art. 31(f).

<sup>48</sup>Sisule F. Musu.&Ceci.O.,*The Use of Flexibilities by Developing Countries: Can They Promote Access To Medicines?*35 (2006).

<sup>49</sup> James L., *Access to Medicine and Compliance with the WTO TRIPS Accord: Models for State Practice in Developing Countries*,75 (Peter Drahos& Ruth Mayne, eds., 2002).

<sup>50</sup>*id.* at 76

For this reason, this permission can be facilitated without usual negotiations. The required conditions are that appropriate compensation be given to the patent holder and further that the manufacturer is for the non-commercial public purpose<sup>51</sup>.

#### *D. Constraints to Effective Application of the Mechanisms*

The Doha Declaration via its Para 6, appreciates the reality that the members of WTO with zero manufacturing capacities and insufficient in the pharmaceutical sector would tackle the problem while trying to use compulsory licensing effectively under the TRIPS Agreement. The Doha Declaration, therefore, went on to provide the mandate for the establishment of the legal instrument to enable such nations to import from other nations that are competent and are desiring to help them without impediment from the concerned patent holders.<sup>52</sup> Also, existing literature has alluded to other challenges that developing countries may encounter in their attempts to implement licensing mechanisms. The cited challenges include relatively small markets which deny local manufacturers the needed economies of scale in individual countries coupled with low purchasing power on the part of the population;<sup>53</sup> lack of straightforward, simple, clear and well-defined administrative procedures necessary for efficient and coordinated decision-making which is necessary for implementation;<sup>54</sup> absence of awareness and will to

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<sup>51</sup>*supra* note 45, art. 31(h).

<sup>52</sup> Doha Declaration on the TRIPS Agreement and Public Health (30, Aug.2003).

<sup>53</sup>*supra* note 29 at 25.

<sup>54</sup>*id.*

implement the mechanisms on the part of political leaders,<sup>55</sup> and high cost of active pharmaceutical ingredients.<sup>56</sup>

Following the Doha Declaration, the existence of mechanisms which taken together, allows nations to build a very simple and easy way to administer systems for permitting increasing access to medicines is no longer in doubt. In the absence of implementation constraints, the available mechanisms for access to medicines improvisation should lessen the potentially damaging impact of the TRIPS Agreement and the patent regime that it establishes. In the end, however, it is the specific national laws and implementation thereof which will determine the extent to which these mechanisms serve to improve access to medicines.

#### IV. INDIAN PERSPECTIVE

The IPA<sup>57</sup>, had a number of provisions which are discriminatory by nature and in consequence of it, the act disallowed patents on agro, food and medicinal product; it also circumvented the validity duration from fourteen years to 7 years starting from the date of filing or 5 years from the date of sealing of the patent, (the less duration one will be preferred). It also has a clause for automatic licences of right with compulsory licences, so when a patent is not working in the country, the process patent holder will have the burden to prove in cases of infringement of process patents. The main applications that have been documented in the offices of the patent registry were for the procedure and it is with small desire for their abuse via its self-use or through permitting to 3<sup>rd</sup> parties by

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<sup>55</sup>Robert Lewis-Lettington & Peter Munyi, *Willingness and Ability to use TRIPS Flexibilities: Kenya Case Study*, 11 (2004) available at <http://www.who.int/hiv/amds/countries/kenUseTRIPsFlexibilitiesDFID.pdf>, (last Visited October 18, 2019.)

<sup>56</sup>*supra* note 29, at 25.

<sup>57</sup> India Patent Act 1970.

licensing them. Such an exceptionally weakened patent framework in India empowered better access to medication at a reasonable cost. As there is no clause regarding grant of product patent, the Indian organizations were allowed to make & retail the protected medicines which were product patented as far as the valid process patent is not infringed. Helped by a powerful base of chemical technology, only in few years, India became capable to deliver even the most advanced dynamic pharmaceutical intermediates (APIs) or mass medications. Along these lines, from an industry point of view, India turned into a significant provider of APIs to the developing nations as well as the developed nations. Indeed, even major MNCs utilized India as a redistributing centre for their mass medications supply. India is today the third biggest nation delivering pharmaceuticals in volume terms and eighth in value terms. The way that India turned into a significant power in the supply network for pharmaceuticals is obvious from the way that Indian firms today coordinate the local utilization. Not at all like in early days, India today supplies generics and mass actives even to the organizations which are indulged in the innovation of drugs along these lines building up its name as reliable, credible as well as a quality provider. However, on the other hand, the weakening of the patent framework which refused the grant of product patents was regarded to have been significant impediments to interests in much-required medication revelation and advancement programs, even by the enormous Indian organizations. The effect of decreased enthusiasm for innovation programs additionally influenced the innovation of medications for infections of poor people; it is an area which is been frequently ignored by the Research and Development based Multi-National Corporations. Simultaneously, the other developing nations that need them the most neither have the proper resources nor the skills to start Research and Development programs to find, create or discover medicines for illnesses of poor people. Hence, the Indian business got marked as a provider of generic medicines with a small

contribution to the area of new medication discovery and advancement.

*A. Access to Drugs and Compulsory Licences*

In the Patent Act, provisions relating to Compulsory licences for abuse of the protected goods under specified terms and conditions are available<sup>58</sup>. The countries include such as the developed nations long before TRIPS Agreement came into force<sup>59</sup>, while many nations which are still developing issued compulsory licences, mostly for AIDS/HIV medicine; the best utilization of compulsory licenses have been in Thailand which under its generic drugs approach has executed the greatest number. In 2006, 2007 and 2008, Thailand gave seven compulsory licenses, four for cancer, one for cardiovascular sicknesses and two for HIV/AIDS. From multiple points of view, the Thailand model targets expanding the generic challenge to diminish the costs of medications and in this way better access has been utilized by several other developing nations, though less successfully. Experience has indicated that the production and advertising of medications under compulsory licenses extensively lessen the costs of medications and make them increasingly affordable and accessible, provided the licensee has the innovative capacities to use the license. The European and United States pharmaceutical organizations and the patent holders intensely complained about Thailand's policies of compulsory licence, till now there have been no approvals or punishments forced by concerned Governments. A few organizations willingly lower the medication costs in those business markets, some gave the medications at

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<sup>58</sup> Deli Yang, Compulsory licensing: For better or for worse, the done deal lies in the balance, *Journal of Intellectual Property Rights*, 17 (1) (2012) 76.

<sup>59</sup> *Global Access to Medicines Bulletin*, 3 (1 April 2008). 20 Selvaraj S, How effective is India's drug price control regime? [www.hsph.harvard.edu/research/takemi/files/RP256.pdf](http://www.hsph.harvard.edu/research/takemi/files/RP256.pdf) (last visited on 30 October 2019).

concessional costs or at times free of cost and the other outrageous, a few organizations have refused from registering their new goods in those nations.

### ***B. Compulsory Licence for Exporting Patented Pharmaceutical Products in India***

The Patents (Amendment) Act, 2005 inserted section 92A in the Patents Act, 1970 which provides that compulsory licence shall be available for manufacturer and export of patented pharmaceutical products to any country having insufficient or no manufacturing capacity in the pharmaceutical sector for the concerned product to address public health problems, provided compulsory licence has been granted by such country or such country has allowed the importation of the patented pharmaceutical products from India.

On receipt of an application, the Controller shall grant a compulsory licence solely for manufacture and export of the concerned pharmaceutical product to such country under such terms and conditions as may be specified and published by him.

### ***C. Parallel Import in India***

In India, Parallel import is allowed to its fullest and the same has been inserted as a law in the Indian Patents Act, 1970. Till the Amendment Act of 2005, parallel import was allowed with the consent of the patent holder<sup>60</sup>. Section 107A(b)<sup>61</sup> provided that “*the patentee has appropriately authorized the importer to retail and circulate the good.*” This section is aligned with the European law according to which Parallel Import was allowed but the prior condition was there

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<sup>60</sup> Section 107A(b) of the Indian Patent Act, 1970, according to Indian Patent(Amendment) Act, 2002

<sup>61</sup>*id.*

that consent of Patent Holder for importation to be taken<sup>62</sup>. But the situation changed drastically with the amendment of 2005. Despite taking the patent holder's assent, the law was amended to allow parallel imports when the person from whom the imports acquire is one '*who is authorized by the law to manufacture and retail or circulate the product*'<sup>63</sup>. Now, after the amendment of 2005, Section 107A(b) provides that if there has been an "*importation of patented products by any person from a person who is duly authorized under the law to produce and sell or distribute the product*"<sup>64</sup> then there would be no infringement.

## V. CONCLUSION

The connection between access to medication, compulsory licensing and parallel importation, has been a focal issue in the discussion encompassing IPR and objectives of public policy for a long time. The TRIPS Agreement by its adaptable systems, for example, parallel importation, and resistance of patent and compulsory licensing has attempted to adjust the access to drugs or treatment alongside preserving the IPR. These instruments have encouraged and further used as an obstruction to postpone and deny access to cheap drugs. Moreover, we have seen that the pharmaceutical organizations can improvise their technical research in discovering drugs for medical diseases on the off chance that they realize that the benefit for this examination they will get patent protection and can request high prices costs from the patients, government offices and NGO's at first and after the term of patent protection is completed in the long-run number of individuals will

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<sup>62</sup>SengutpaArghya, Parallel Imports in Pharmaceutical Sector: Must India be more liberal,

<http://nopr.niscair.res.in/handle/123456789/269.pdf>

<sup>63</sup>*id.*

<sup>64</sup> Section 107A(b) as after the amendment by Patents (Amendment) Act, 2005.

be able to get the benefit. The augmentation of strong IPR through TRIPS into underdeveloped nations puts the burden on the poor discriminately and they lose access to generic duplicates of medications that are still protected by patent. Then again, this augmentation of IPR may provide some benefit to the poor people in the future, given that extra benefit is being given to address wellbeing needs in developing nations. As per the utilitarian point of view, one may hence contend that the general losses will be low than general advantages. The Pharmaceutical Industry and its negotiators of trade are not supposed to overlook the genuine objective of medication development: sparing lives. Benefit ought to consistently be a way to this end, not the other way around. Just by having this rule in our mind and accomplishing a better understanding of this new world health and medicine circumstance, we would be able to get the guarantee, security, and prosperity of humankind in the twenty-first century and beyond.

Parallel Import is beneficial for developing countries such as India as more than 50% of people are unable to afford the high prices of medicines and by this many people can get the medicine at a lower rate. On the other side countries such as the US which are developed the majority of the people don't have a problem with the high rates of medicines. So, on the one hand, Parallel import is required to limit the monopoly of the Patentee to some extent. But, on the other hand, the parallel import can affect Research and Development as when a party takes away their interest and directly compete with the Patentee, the Patentee will be discouraged and will not try to develop more effective drugs and also engage in such marketing. The Patentee will also limit their research as research and development need a huge amount which they take from the money generated as profit from the sale of earlier products. In this manner, it tends to be viewed as an effective improving law, tackling a discrete issue following the motivations behind adaptability. So, in

this way, it may be said that in a period where the wellbeing of human beings is accepting a transnational character, the significance of global human rights can't be undermined and every nation should guarantee a powerful commitment at the universal level.

Hence, at last, I would like to conclude by saying that Parallel Import and Compulsory licence are important and necessary for developing countries and it will increase and should be used to access to Medicine.

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## COLLECTIVE BARGAIN AT WORKPLACE: A GENESIS OF ALTERNATIVE DISPUTE RESOLUTION

- Debasis Poddar\*

### ABSTRACT

*Albeit least explored, in technical sense of the term, genesis of mediation lies in collective bargaining at workplace out of skewed industrial relations between employers and employees to create bona fide space for dialogue between two otherwise interdependent stakeholders of production- capital and labour respectively- while these are at loggerheads; with intervention of the state apparatus in a way or other as a trustee of the society at large. In the wake of historic Bolshevik Revolution of 1917 in the then Russia, collective bargaining went handy enough for the subsequent labour regime, i.e. International Labour Organization, Geneva (the ILO) under the auspices of the League of Nations to grapple with so-called 'spectre of communism' (to quote from Marx-Engels), for peaceful settlement of industrial disputes. Along with freedom of association, the ILO borrowed effective recognition of the right to collective bargaining- taken together as FACB- to construct part of its fundamental principles and rights at work, more so since the ILO declaration of 1998. With cursory adjustment here and there, the original model of collective bargaining transcended industrial workplace and got extended to other walks of lifeworld with the nomenclature of mediation; as a domain under the larger umbrella of alternative dispute resolution (hereafter ADR) and more democratic than arbitration on the count of participation of parties involved therein than that of third party to peaceful settlement of disputes. Here lies critical crosscutting of collective bargaining*

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*(CB) and mediation inter se; albeit with artefacts of their own. Also, in recent times, imperative for dialogue between parties went recognized in course of criminal justice while chapter for plea bargaining (PB) got enacted by recent amendment to the Code of Criminal Procedure; indeed, with problematic of its own. The genesis, however, lies in mutual bargaining between parties concerned by default; irrespective of getting diversified, e.g. employer and employee, aggrieved and defendant, or prosecutor and accused, as the case may be; all but hypothecated to the FACB genre and tripartite praxis involved therein.*

**Keywords:** Conversation, participation, resolution, mediation, bargain.

“Could a greater miracle take place than for us to look through each other’s eyes for an instant?”

- Henry David Thoreau.<sup>1</sup>

## I. INTRODUCTION

Indeed, a roaring discourse nowadays vis-à-vis alternative dispute resolution, mediation but appears no *de novo* invention. On the contrary, quite unlike popular misperception- that mediation is a recent development- mutual dialogue between disputants themselves to arrive at peaceful settlement of disputes with occasional intervention of a third party has had its genesis in ancient antiquity. For instance, in *the Iliad* and in *the Odyssey*, also, in *the Mahabharata* and in *the Ramayana* alike, respective apocalyptic conflicts went preceded by mediation to get respective disputes settled by peaceful settlement, mediation getting one among them, thereby minimize conflict and consequent casualty of life and property for both sides: the vanquished and the victor alike, in public interest. Besides, in South Asia, so-called *Panchayati Raj* regime is run by an informal discourse under the aegis of traditional popular justice delivery system; indeed a *sui generis* mode of ADR including mediation. Also, despite mainstream administration of justice is meant for adjudication, illustrations are plenty to demonstrate the court itself getting involved in gestation to spearhead ADR within its jurisdiction under the Code of Civil Procedure, 1908.<sup>2</sup> In 2017, Mr. J. S. Khehar, J., the then Chief

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<sup>1</sup> Henry David Thoreau, *Walden; or, Life in the Woods*, Economy 13 (1854) available at: <https://archive.org/stream/waldenorlifeinwo1854thor#page/12/mode/2up/search/miracle> (last visited on June 1, 2018)

<sup>2</sup> The Code of Civil Procedure, 1908, §89:

Justice of India, offered his service as mediator to arrive at peaceful settlement of the protracted *Ram Janambhoomi* dispute.<sup>3</sup> Trajectory of state-run administration of justice- be the same court or tribunal- indulges in no watertight compartmentalization by default. A juridical fiction vis-à-vis vacuum- if not void- between adjudication and means of ADR appear ridden with fallacy since these two otherwise diversified institutions of justice delivery system are porous enough for mutual exchange of dialogue *inter se*, while the same appears imperative. At bottom, both are meant to grapple with justice for public good. Thus, means of ADR went inbuilt well within the given pathology of substantive justice.

On several counts, means of the so called ADR in general and mediation, in particular, are way ahead than adjudicatory dispute governance in general, with adversarial modality in particular, in quest of peaceful settlement of a dispute. For the court, institutional focus concentrates upon who is right while,

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Settlement of disputes outside the Court- (1) Where it appears to the Court that there exists elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of a possible settlement and refer the same for-

- (a) arbitration
- (b) conciliation
- (c) judicial settlement including settlement through Lok Adalat; or
- (d) mediation.

<sup>3</sup> “You (Mr. Swamy) must make fresh attempts to arrive at a consensual decision. If required, you must choose a mediator to end the dispute. If the parties want me (CJI) to sit with mediators chosen by both the sides for negotiations, I am ready,” Chief Justice said.

Krishnadas Rajagopal, *SC calls for out-of-court settlement in Ayodhya case*, THE HINDU, March 22, 2017, available at <http://www.thehindu.com/news/national/ayodhya-row-supreme-court-suggests-out-of-court-settlement/article17551285.ece> (last visited on June 1, 2018)

in ADR, there is a concern for what is right. Thus, in mediation, there is space for understanding the given dispute- along with objectivity- by both sides since none has had a loss of face by getting fixed to the wrong side of the logic. On the contrary, in the court, one side may get proved right at the cost of the reverse side proved wrong. Thereafter, getting upset, the reverse side prefers appeal in higher forum to set aside the given judgment, thereby get proved right and at the cost of reverse side proved wrong; and so on. Consequently, adjudication has had trail of vicious syndrome to mushroom litigation on its own with adverse effect on cost and delay involved therein. Besides vertical extension, adversarial adjudication under the given common law system of dispute governance often than not experiences horizontal expansion of civil dispute to get proliferated into hostile conflict; thereby attract jurisdiction for the administration of criminal justice. Thus, rather than peaceful settlement of the dispute by adjudication, procedural paradox itself plays critical role to get the dispute elevated to fresh conflict; unleashed by judicial process. Therefore, whether and how far the judicial process itself deserves to get considered judicious raises a moot point to this end. The means of ADR are free from the procedural cost and delay involved in course of institutionalized justice out of circumstantial compulsion. Neither there is space for the dispute to have spillover syndrome in the form of either vertical extension or horizontal expansion since disputants themselves engage productive dialogue out of volition on their own and thereby arrive at mutually agreed conclusion followed by default enforcement of the same by themselves. In the course of mediation, the judicious process stands monitored and at times intervened by third party with expertise in law of the

land, the way Gandhi initiated his experiment with truth.<sup>4</sup> Unlike popular misperception, Gandhi thereby earned professional reputation and spiritual emancipation alike. In the given circumstance of adjudicatory governance, while the Apex Court looks forward for alternative discourse sans judicial trapping, ADR appears to have been writing on the wall while, with cutting-edge professional expertise, mediation advocacy is getting visible across the world. Sooner the relevant institutions and the professionals involved therein digest the call of the hour is better for themselves; also, for the disputants toward justice. A reasonable classification may thereby get drawn to identify court birds- who run litigation as a matter of policy with *mala fide* intention, either to safeguard evil interest or to keep the adversary occupied- by compelling to run from pillar to post- with perennial pandemonium of the Bleak House (to quote Dickens); thereby isolate these problematic elements from the temple of justice.

With the given metaphysical background, this effort is but meant to explore the genesis of mediation as a better means of dispute resolution on two counts: (i) Judicial process and consequent adjudication cannot get conceived as dispute resolution since the same is imposition of opinion from adjudicator- a third party however prudent (s)he may be- with

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<sup>4</sup> "I had learnt the true practice of law. I had learnt to find out the better side of human nature and to enter men's hearts. I realized that the function of a lawyer was to unite parties riven asunder. The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my experience as a lawyer was occupied in bringing out private compromises of hundreds of cases. I lost nothing thereby- not even money, certainly not my soul"

Mahadev Desai (tr.), *M. K. Gandhi, An Autobiography, Or the Story of My Experiments with Truth*, Navajivan Publishing House, Ahmedabad 85 (1940), available at <http://library.aceondo.net/ebooks/HISTORY/AUTOBIOGRAPHY-GANDHI.pdf>

endorsement of judicial trapping under the auspices of statecraft. (ii) No one cares whether and how far the party lost in the legal battle is agreed to a judgment of the court or tribunal. Thus, despite the judgment, the dispute often than not keeps on getting extended, at times expanded, since the judicial process may and does fall short of getting judicious to necessarily arrive at resolution between parties themselves. out of epistemic reasoning of its own. The author hereby pleads for a proposition- with juridical arguments advanced out of his lived experience- in favour of collective bargaining as the genesis of mediation in technical sense of the term. While adjudication cannot accomplish dispute resolution between and among individuals, the same appears otiose to accomplish dispute resolution between two rival classes engaged in perennial conflict at workplace; something pregnant with potential to push the fragile public order to peril.

## II. MEDIATION: RESPONSE TO LEFT-WING POLITICS

Mediation in (dis)course of collective bargaining (“CB”) did not fall from the firmament on its own. Instead, it has had a historic context of its own. There is jurisprudential reasoning to hold that genesis of the CB in the Occidental states since the late nineteenth century lies in a response to the then leftwing politics with its call for the working-class movement (read class struggle) to radicalize the industrial workforce toward overthrow of the state; thereby get the same replaced by dictatorship of the proletariat. In the wake of literature generated by Marx-Engels, e.g. Engels’ *Condition of Working Class in England* (1845), Marx’s *Wage, Labour and Capital* (1847), their co-authored masterpiece titled *Manifesto of the Communist Party* (1848), to name few of them, those at the helm of affairs suffered from reasonable apprehension of vulnerability in the



movement may spread in different parts of the world and might create revolutionary condition- appears the single most important compulsion for the ILO to enact all its Conventions and Recommendations, to quote Babu Mathew; a veteran face of the trade union activism in India.<sup>6</sup> In post-revolution Russia, historians experienced the apprehension to have resurfaced with occasional intervals.<sup>7</sup> Before entry to contested world of work endorsed by the ILO, a glance at the decisive class struggle of trade unions through legal battle in few states with the common law legacy as in India- UK, USA, etc.- ought to add value to this effort.

Indeed, in technical sense of the term, FACB finds handy presence in the ILO literature since long back, more so the ILO Declaration of 1998 onward; as if the same constitutes unproblematic discourse for the given international labour

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*the language from a dispute between the former ILO Director-General Edward Phelan and another Irish internationalist, the ILO adopted an orderly, constructive and bureaucratized approach to tackling the organization of social justice"*

Werner Sengenberger, *The International Labour Organization: Goals, Functions and Political Impact*, Friedrich-Ebert-Stiftung, Berlin 15-16 (2013), available at <http://library.fes.de/pdf-files/iez/10279.pdf>

<sup>6</sup> Babu Mathew, *The Political Economy of Labour Law*, Azim Premji University Lecture Series, dated October 19, 2016, available at <https://www.youtube.com/watch?v=y2hIFwNPOqE>

<sup>7</sup> In 1920, Poland invaded Soviet Ukraine, and within weeks Bolshevik counter-offensive was mounted. For three months, until the Red army's offensive was halted by crushing military defeat, the war was seen by Lenin, and by many rank-and-file Bolsheviks- although not by many other party leaders- as an opportunity to spread revolution westwards and bring closer the socialist transformation of Europe. Moscow workers recognized that the war was crucial to the fate of the revolution.

SIMON PIRANI, *THE RUSSIAN REVOLUTION IN RETREAT, 1920-24: SOVIET WORKERS AND THE NEW COMMUNIST ELITE*, 35 (2008), Routledge, New York, available at

[https://libcom.org/files/\[Simon\\_Pirani\]\\_The\\_Russian\\_Revolution\\_in\\_Retreat\\_\(b-ok.org\).pdf](https://libcom.org/files/[Simon_Pirani]_The_Russian_Revolution_in_Retreat_(b-ok.org).pdf)

regime. In practice, however, FACB often than not went fragmented- at times upside down in comparative labour law. For instance, collective bargaining as effective means to maintain industrial relations went legalized by USA way back in the early twentieth century<sup>8</sup> with relevant judgment of its Apex Court to this end.<sup>9</sup> Even in UK, the CB went trendy enough for the legislature to push employers to set aside the archaic legal fiction of so called “freedom of contract” in cases of industrial relations.<sup>10</sup> Even thereafter, trade union activists like

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<sup>8</sup> The Clayton Act of 1914, erroneously called the Magna Carta of American labour, further extended the scope of judicial injunctions and permitted private parties to sue under anti-trust laws. It was only in 1921 that a real break for American labour came through when in the case of *American Steel Foundries v. Tri-City Central Trade Council* the United States Supreme Court recognized labor’s right to strike.

Arjun P. Aggarwal, *Strikes in the United States and India: A Comparative Analysis*, Journal of the 5(2) Indian Law Institute 238 (April-June, 1963), available at, [http://14.139.60.114:8080/jspui/bitstream/123456789/15057/1/017\\_Strikes%20in%20the%20United%20States%20and%20India%20a%20Comparative%20Analysis%20\(237-270\).pdf](http://14.139.60.114:8080/jspui/bitstream/123456789/15057/1/017_Strikes%20in%20the%20United%20States%20and%20India%20a%20Comparative%20Analysis%20(237-270).pdf)

<sup>9</sup> *Union was essential to give laborers opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body in order, by this inconvenience, to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was worth. The right to combine for such a lawful purpose has in many years not been denied by any court. The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital.*

*American Steel Foundries v. Tri-City Trades Council*, 257 U.S. 184 (1921), available at: <https://supreme.justia.com/cases/federal/us/257/184/case.html>

<sup>10</sup> *It is characteristic of the spirit of English legislation that long after “freedom of contract” as the only mode of fixing wages had become discredited, the enforcement of the collective bargain as to wage rates, or of wage rates compulsorily fixed, was indirect, and employers were persuaded by ingenious means to forego voluntarily their freedom of contract. The first of these indirect methods of making the observance of the collective bargain compulsory was the passing by the House of Commons of a resolution which ordered fair wages clause*

B. P. Wadia suffered the wrath of Madras High Court on the occasion of strike in Buckingham Mills in 1920. In the absence of a legislation vis-à-vis trade union in India, the Court refused to recognize freedom of association while collective bargaining set the trend elsewhere. Interestingly enough, the impugned judgment appears jurisprudently enough for the Court with its given instrumentality,<sup>11</sup> yet criticized due to want of cognizance vis-à-vis march of the law in the meanwhile. In the wake of concern over disparity, the Trade Unions Act of 1926 minimized the vacuum- if not void- after the given English tradition to this end. While freedom of association went enacted in India after collective bargaining received legislative status in the West, two decades went to waste before collective

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*to be inserted in all government contracts. The date of this resolution was 10<sup>th</sup> March 1909.*

Frank Tillyard and William A. Robson, *The Enforcement of the Collective Bargain in the United Kingdom*, 17(March 1938, 48(189) *The Economic Journal*, available at <https://www.jstor.org/stable/pdf/2225474.pdf?refreqid=excelsior%3A16cb1134c90d26c8e2bb3e06748c9d24>

<sup>11</sup> It may be observed here that there was no irregularity or illegality in the judgment of the Madras High Court (in Buckingham Carnatik Mills case; on 21 October 1920). As the law then existed, it was possible to obtain an injunction restraining a trade union official or organizer from influencing labourers to break their contract with their employers by striking to obtain an increase of wages. Workmen who had accepted a monetary advance and signed a contract were liable, on leaving work without valid excuse, not only to civil damages but to fine and imprisonment. In England, however, the law in this regard became certain only after 1906. Before 1906 trade unions in England were also held liable for civil conspiracy. ... In order to reverse the *Taffe Vale* decision, the Trade Dispute Act, 1906, was passed to protect trade unions and their officials from civil liability by a breach of contract.

S. N. DHYANI, *TRADE UNIONS AND THE RIGHT TO STRIKE: A COMPREHENSIVE SOCIO-LEGAL STUDY IN LABOUR-MANAGEMENT RELATIONS*, 21-22(year of publication not mentioned), S. Chand & Co. (Pvt.) Ltd, available at: <https://ia801605.us.archive.org/25/items/in.ernet.dli.2015.84182/2015.84182.Trade-Unions-And-Right-To-Strike.pdf>

bargaining went enacted in India under the Industrial Disputes Act of 1947, with statutory provision for conciliation; toward settlement of disputes concerned. In the given industrial regime, conciliation refers to the statutory procedure for conflict resolution; and not conciliation under section 89(1)(b) of the Code of Civil Procedure, 1908 as such.

Whether and how far these statutes serve interest of the labour, however, get contested on several counts since trade unions were registered and thereby caught by accountability for unfair trade practices on the part of labour; despite immunity of their office bearers. Besides legality, FACB brings in legitimacy for the conciliation mutually agreed upon;<sup>12</sup> something that was not available earlier. Therefore, the legal endorsement of these FACB rights has had a flip side of the coin; the way labour welfare provisions of the Factories Act, 1948 get contested by Mathew as protectionism in disguise on the part of colonial power since compliance to the same ought to shoot production cost of manufacturing industry through the roof and in turn create competitive advantage for like products manufactured by the British Industry even after the incidental cost of carriage by sea taken into count.<sup>13</sup> There is

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<sup>12</sup> One of the advantages of union organization is that it promotes employment stability. In this respect, the union effect is larger than what would be explained just by higher wages and fringe benefits. The system on negotiations on collective agreements and regulations on dispute resolution create confidence among those employed that their confidence will be impartially tried and rights connected with security will be respected. Unions represent impartial procedures and this has larger effect on the readiness to stay on in employment that 20 percent higher wages as compared to those at comparable unorganized workplaces would.

Nils Elvander, *Industrial Relations: A Short History of Ideas and Learning*, The National Institute for Working Life 27 (2002)

<sup>13</sup> *Supra*; n. 6.

widespread cynicism on whether and how far these otherwise celebrated statutes are beneficial to the labour in final count. Still, CB is considered milestone in the history of civilization since rights involved therein resemble insignia for structural adjustment in the wake of a class struggle ahead. Here lies the crux of this effort. While the society grapples with disputes, the system has had reliance upon conversation beyond the court; more than confrontation before the court. Argument thereby got advanced with reasoning of its own, that judicial process for dispute resolution looks after convenience of state- rather than that of disputants- to keep them perennially engaged into mutual difference. While critical issues emerge, be the same international relations or industrial relations, the state, in its own interest, but relies upon dialogue between or among parties *inter se* for dispute resolution; and resolve the disputes from within their dialogue. At its furthest, as provided for in Article 51(d) of the Constitution of India, the State prefers settlement of international disputes by arbitration; rather than adjudication. Intra-national disputes, industrial counterpart getting one among them, appear no exception to this end; albeit not mentioned in express letters of the law. Inter-state river water dispute resembles another intra-national dispute where out-of-court settlement is the given trend.

While Article 51(d) provides for arbitration, in the given context of late 1940s while arbitration was only available means of ADR since the Permanent Court of Arbitration, the same ought to be construed as mediation in contemporary context. In a nutshell, as it went mentioned in the Preamble to the UN Charter, 1945, the international community arrived at realization of the futility of such armed conflict; out of the World Wars twice, in 1914 and in 1939 respectively; and thereby got determined to practice tolerance and stay together

in peace; also, to maintain international peace and security.<sup>14</sup> With the given governmentality in practice in the realm of international relations, an argument may get advanced once again that statesmen spearheaded conciliation rather than confrontation in the state of affairs. Likewise, taken valid precedence from international community, interpersonal conciliation ought to get upheld as rule while confrontation as exception, and to get authorized sparingly; if at all. Sooner the talisman is followed appears better for the society. Dispute, if not minimized, has the potential to transcend the threshold of conflict and push the given public order to jeopardy; just like a civil war in disguise. There is widespread hindsight, albeit exceptions apart, about hyperlinks between injustice and dispute as correlatives, by courtesy Martin Luther King, Jr. who traced the same.<sup>15</sup> In the given context, the author advances arguments with reasoning of his own that one germinates another in spiral syndrome of judicial process until the same turns judicious; often than not unlikely with the given procedural pitfalls. Albeit not fault-free, mediation is free from procedure; thereby facilitates space for dialogue between two sides to reduce rivalry and introduce mutually convenient resolution in good faith.

In course of mediation advocacy, the author but reiterates his caution mentioned above: albeit free from formal procedure, mediation is not fault-free to get followed by

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<sup>14</sup> *Vide* Preamble to the Charter of the United Nations, 1945.

<sup>15</sup> *"Injustice anywhere is threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly"*

MARTIN LUTHER KING JR., (16 April 1963) LETTER FROM A BIRMINGHAM JAIL, available at [https://www.africa.upenn.edu/Articles\\_Gen/Letter\\_Birmingham.html](https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html)

default. On the contrary, if not devoid of the given power relations, mediation has had potential to produce more harm than help, thereby push justice to peril. Compared to the given judicial process, mediation is appropriate means of dispute resolution provided the same engages better judicious means to uphold justice, thereby reach satisfaction of disputants sans judicial trapping endorsed by the statecraft. If erratic, in the absence of safeguards, ADR ought to turn inferior to the judicial *inferno* of justice.

### III. MEDIATED BARGAIN IN QUEST OF A MEDIAN

Back to past, even in the wake of capitalism, predecessors were well aware of the tension between competing claims and consequence of the given balance of interest getting tilted to capital; to take production relations at stake. Thus, labour justice attracted the attention of Adam Smith to avoid a void out of rebellion or revolutionary rupture in time ahead.<sup>16</sup> Way

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<sup>16</sup> *“Starting with Adam Smith’s idea of property, liberty, self-interest, division of labour, and divine providence, economic theory worked out a mechanistic proportioning of factors according to laws of supply and demand. If too much of a certain factor is produced its value falls and its producers then shift to other products. If too little its produced its value rises and producers shift to it. Producers led on by an “invisible hand”, are shifting towards the limiting factors whose value is high, and away from the complementary factors whose values are low, thus proportioning the factors by equalizing the incomes of individuals toward a “normal” or “natural” or harmonious standard of wages, interest, or profits for each class.*

*Yet this mechanistic economy of nature, as (Adam) Smith sorrowfully acknowledged, has been greatly interfered with by the collective power of political and industrial governments. Protective tariffs have limited the supply of certain factors and increased their prices. Taxes on property, on income and on commodities have changed prices and the directions of industry. Labor legislation has imposed burdens on employers and changed the direction in which profit is obtained. Great corporations fix prices of commodities or labor, and the individual does not bargain with them- he takes it or leaves it. Labor organizations authorized or permitted by government, have interfered with*

back since late eighteenth century, therefore, space for dialogue between crusaders- of capital and labour respectively- went left wide open with the intent of de-escalation vis-à-vis mutual face-off in cases of emergency;<sup>17</sup> quite similar to means of diplomacy in international relations where vestibules are often than not open to avert the stand-off between otherwise hostile states. In its essence, mediation follows series of devolution-

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*Nature's laws. Had property and liberty developed as Smith hoped, it might have turned out differently. But even his ideas of property and liberty would have required action by government to prevent any individual from holding more property than he could physically use and to prevent individuals associating in corporations and unions"*

JOHN R. COMMONS, LEGAL FOUNDATIONS OF CAPITALISM, 323-324 (1924) The Macmillan Co. available at <https://socialsciences.mcmaster.ca/econ/ugcm/3ll3/commons/LegalFoundationsCapitalism.pdf>

<sup>17</sup> *"Some countries had begun to create tripartite structures to deal with social issues at the national level at the end of the nineteenth century, but the First World War made this type of approach far more urgent. In this new kind of conflict, military success was tightly bound up with the ability of nations to support increasing demands on their economies and to build ever more sophisticated weapons, which demanded concerted industrial efforts. Business and labour had to become involved in policy and cooperate to support the national effort. In France, Albert Thomas, a socialist who was shortly to become the first Director of the ILO, was Minister of Armaments in 1916, and thus in a position to help forge an alliance of trade unions and employers for national defence that resulted in building mutual respect between them. In Germany, meetings between trade unions and employers resulted in an agreement in November 1918, putting an end to revolutionary strikes that had broken out in sympathy with the Bolshevik Revolution in Russia. The agreement provided for generalizing the eight-hour day, systems for conflict resolution, joint placement agencies and other advances. These wartime alliances- which would be reproduced in the Second World War- risked disappearing with the coming of peace, however, leading among other things to their being taken into account in the peace negotiations"*

GERRY RODGERS ET AL, THE INTERNATIONAL LABOUR ORGANIZATION AND THE QUEST FOR SOCIAL JUSTICE: 1919-2009, 13 (2009) International Labour Office, Geneva, available at [http://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms\\_104643.pdf](http://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_104643.pdf)

from collective to individual- to spearhead space for dialogue, thereby plead for reason. Thus, compared to adjudication, arbitration and- thereafter mediation- cover more space in course of international relations, industrial relations and individual relations, all alike, through the route of percolation; as mentioned above. The proposition may get fortified by institutionalized chronicles, e.g. establishment of the Permanent Court of Arbitration in 1899 before the Permanent Court of International Justice in 1922. Also, conversation between capital and labour may get traced back to the wee years of capitalism; way back in the late nineteenth century Europe where industrial relations engaged mutual dialogue:

*“Collaborative problem-solving approach seems to have its origins in developments in industrial relations in the 1960s, when the idea arose that more cooperative interaction between parties could lead to greater increase in productivity than that which ensued from more traditional forms of power bargaining. ... Also, around this time, some peace activists turned their attention to peacemaking activities, and dissatisfaction with the costly, slow and adversarial court system led to the development of what has come to be known as the ‘alternative dispute resolution’ movement.*

*This ‘alternative’ conflict resolution method grew out of the adjudicative legal tradition and maintained the role of a third party to determine the outcome in accordance with prevailing norms. In the 1960s a new approach, focusing on human needs, became more fashionable. In this approach, conflicting parties are brought together to analyze the conflict in a non-bargaining way that looks at its deep-rooted sources so that the conflict can be truly ‘resolved’, rather than creating a situation where merely the manifest dispute is ‘settled’. For simple interpersonal disputes, community or neighbourhood*

*justice centres became popular, providing cheap mediation as an alternative to legal and quasi-legal processes.*

*These developments were gradually moving towards the Gandhian model, and particularly so in the recent non-mainstream approach known as transformative mediation that sees mediation as a process that potentially can change individuals, and through them society, for the better. This approach, very reminiscent of Bondurant's characterization of a Gandhian view of conflict (but again without reference to Gandhi), starts from the premise that conflicts need not be seen as problems in the first place. Instead it suggests that they should be seen as opportunities for moral growth and transformation."<sup>18</sup>*

Albeit arguably, mediation may well get articulated as capitalist response to communism in the wake of the system getting apprehended by labour unrest followed by revolution in Russia during the whirlpool of the World War I while the then capitalist superpowers indulged in mutual loggerheads. While the ILO revived the space for tripartite dialogue through mediation between two perennial rivals, Gandhi revived the space for dialogue through conciliation between judicial disputants taking queue from the cultural heritage after the ancient Indian legacy vis-à-vis *panchayati raj* justice where procedural justice appears more judicious to engage dialogue between disputants. The Gandhian approach to conversation but took time to spearhead the subsequent constitutional trend vis-à-vis dispute resolution. Thus, effort went initiated for

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<sup>18</sup> Thomas Weber, *Gandhian Philosophy, Conflict Resolution Theory and Practical Approaches to Negotiation*, 499(July, 2001), 38(4)Journal of Peace Research, available at <https://www.law.upenn.edu/live/files/5167-weber---2001---gandhian-philosophy-conflict> (last visited on June 1, 2018)

insertion of Article 39-A to official text while access to justice appears essence of the Constitution since beginning of our tryst with destiny. In recent times, however, informal justice went institutionalized by default with statutory recognition of conciliation as means of dispute resolution in rural India.<sup>19</sup> Without overt mention, mediation but constitutes part of the package for informal justice despite getting circumscribed by several limits- local and pecuniary- of its jurisdiction at the mercy of High Court.<sup>20</sup> The modernity thereby makes a merger with the antiquity, by courtesy, Gandhian response to the clarion call for class struggle.

Interestingly enough, cynicism went widespread against institutionalized adjudication and courtroom justice alike in the postmodernity. In particular, absence of conversation between disputants attracted postmodernist attention as absence of party participation- followed by top-down approach with imposition of third party proposition from above- as insignia of cultural specificity involved therein. Thus, ADR in general- and mediation in particular- has emerged as dissatisfaction with the adversary model of the common law legacy spread over across the Commonwealth of Nations; the erstwhile British empire.<sup>21</sup> Consequently, after the regional

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<sup>19</sup> Vide The Gram Nyayalayas Act, 2008 §26 and §27

<sup>20</sup> Vide The Gram Nyayalayas Act, 2008 §3 and §13

<sup>21</sup> "I would prefer that we take the teachings of postmodernism and multiculturalism seriously enough to consider other forms and formats of conflict and dispute resolution- such as employing many-personed and -sided factual presentations and handling disputes with more deliberative and participatory party and fact-finding processes-and begin to evaluate their strengths and weaknesses as we come to develop something of a typology for assessing which cases belong in which ADR process. I believe that each process will need to carry its own ethics-the zeal of the advocate does not play well in mediation and the mediator is both more active and more complex a third-party neutral than the judge who is governed by the Judicial Code of Conduct." To take up a more radical

legacy, mediation appears the default judicious process for dispute resolution. To quote relevant paragraph from the Law Commission literature:

*“If the ADR method is successful, it brings about a satisfactory solution to the dispute and the parties will not only be satisfied, the ill-will that would have existed between them will also end. ADR methods, especially mediation and conciliation not only address the dispute, they also address the emotions underlying the dispute. In fact, for ADR to be successful, first the emotions and ego existing between the parties will have to be addressed. Once the emotions and ego are effectively addressed, resolving the dispute becomes very easy. This requires wisdom and skill of counselling on the part of mediator and conciliator”.*<sup>22</sup>

Even an out-of-court settlement has had statutory endorsement of judicial settlement and, in appropriate cases, the same preempts the judicial process in disputes of civil nature.<sup>23</sup> Thus, otherwise naïve hypothesis- that judicial settlement must necessarily be a product of adversarial

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*strain of postmodernism, our legal processes and ethics are “in play” (or, in the French, “at play”). Our experimentation with ADR and other forms of legal process reflects our collective dissatisfaction, for a wide diversity of reasons, with the traditional adversary model and our current postmodern penchant for “many methods,” when one will not suffice”*

Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 42-32(1996), 38:5 *William and Mary Law Review*, available at <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2757&context=facpub>

<sup>22</sup> Law Commission of India, *Need for Justice-dispensation through ADR, etc.*, Report No. 222 (2009), available at <http://lawcommissionofindia.nic.in/reports/report222.pdf>

<sup>23</sup> *Vide* The Code of Civil Procedure, 1907 §89, read with Rules 1-A, 1-B and 1-C, Order X. Also, refer to relevant provisions of The Legal Services Authorities Act, 1987 and The Arbitration and Conciliation Act, 1996.

struggle and thereafter adjudication by third party alone-stands nullified since pluralist position is apparent in the procedural code itself to bring in ADR means; mediation getting one among them.

#### IV. MEDIATION: IN QUEST OF SOCIAL DIALOGUE

So far as collective bargaining in workplace is concerned, the ILO regime has developed newer tradition to engage social dialogue; thereby generated space for collective bargain between stakeholders of capital and labour. The Marxian talisman of economic justice went supplemented by the capitalist talisman of political justice; something enough to get attention of the working class movement diverted from its focus. The leadership turned obsessed with the given status to bargain claims with the employer across the desk. Also, by otherwise progressive reforms in the then labour law regime, trade union leadership went empowered to face the elite counterpart without fear of prosecution; not to suffer legal atrocities due to incidental activities as they are office bearers of the trade unions duly registered under the Act.<sup>24-25</sup> At bottom,

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<sup>24</sup> §17. Criminal conspiracy in trade disputes.- No office-bearer or member of a registered Trade Union shall be liable to punishment under §120B (2) Indian Penal Code (45 of 1860), in respect of any agreement made between the members for the purpose of furthering any such object of the Trade Union as is specified in §15, unless the agreement is an agreement to commit an offence.

The Trade Unions Act, 1926

<sup>25</sup> The Trade Unions Act, 1926, §18: Immunity from civil suits in certain cases- (1) No suit or other legal proceeding shall be maintainable in any Civil Court against any registered Trade Union or any office-bearer; or member thereof in respect of any act done in contemplation or furtherance of a trade dispute to which a member of the Trade Union is a party on the ground only that such act induces some other person to break a contract of employment, or that it is in interference with the trade, business or

however, collective bargain went played out by the capitalist regime as ploy to bring in the then Marxist militancy into systemic net through registration, etc., thereby bring in institutional accountability into the hitherto outlawed trade unions alike. Consequently, by courtesy documentation of these outfits, the state apparatus went aware of the whereabouts of such otherwise clandestine players with potential to cause topsy-turvy on the spur of moment. With collective bargain, often than not on the count of basic issues, e.g. minimum wage, maximum hours of work, and the like, state came out as beneficiary on the count of security issues, e.g. inventory of who's who of the then working-class movement, their whereabouts, etc. Security apart, trade-off took place to introduce political justice as a hallmark of capitalist philosophy in lieu of economic justice; a socialist counterpart. At the cost of getting legalized, what the working-class movement lost was the potential to bargain and that also with intent to gain the given locus vis-à-vis collective bargain. Indeed, collective bargain took place between stakeholders of capital and labour. There was but little assurance for level play; with the consequence of labour injustice in course of so-called collective bargain since both sides were not similarly situated to negotiate their interests.

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employment of some other person or with the right of some other person to dispose of his capital or of his labour as he wills.

(2) A registered Trade Union shall not be liable in any suit or other legal proceeding in any Civil Court in respect of any tortious act done in contemplation or furtherance of a trade dispute by an agent of the Trade Union if it is proved that such person acted without the knowledge of, or contrary to express instructions given by, the executive of the Trade Union.

Here lies problematic in the praxis of mediation. Since the same is meant to avail space for dialogue, if disputants are not levelled vis-à-vis power relations, the given difference ought to act a default speed-breaker; thereby push informal justice to peril; something beyond apprehension of the Law Commission. In formal justice, institutional safeguards are available in course of procedural discourse; relevant provisions hardly went handy to dishonor of the practitioner was a point apart.

There lies procedural predicament for the plea bargain as well. In the absence of balance of power between parties, there lies an apparent likelihood for travesty of justice since space for dialogue is likely to get manipulated to silence the weak side to disadvantage by might-is-right realpolitik; in practice across the world. Rather than mere plea bargain by parties themselves through negotiation *inter se*, presence of a third party as mediator- with the head and the heart of a judge to strike the balance- is likely to serve the purpose better than the judge since (s)he is not prisoner of procedure in the mediation discourse. Also, parties ought to come out of emotion, ego, and the like.

At bottom, adjudication and ADR represent different ways of dispute governance; one poles apart from another. The former grapples with responsibility to protect- a holy duty cast upon the state to put public order and peace to place. Dispute governance is corollary to the pious onus and the court is endowed with the same. Besides, the latter deals with residual routes to minimize disputes with diversified tools and techniques. Mediation, for instance, getting one among them with potential of its own. In particular, sometimes even with official endorsement of the court- as are the cases dispensed

under section 89 of the Code of Civil Procedure, 1907 or under Chapter XXI-A of the Code of Criminal Procedure, 1973- the state experiments informal routes to serve the given responsibility. All these residual routes taken together, ADR may get theorized as extralegal discourse to supplement to the given dispute governance. In other words, ADR initiates discourse between the disputants beyond official discourse- social dialogue rather than monologue of the law as a social institution and thereby devoid of dialogue between the disputants- to strike juxtaposition between them. The paradigm shift but follows the trend that went set in the domain of industrial relations; by courtesy, the ILO regime.

#### V. MEDIATION: PLOY FOR *STATUS QUO* PEACE

Since long back, long before ADR discourse, the ILO played a trendsetter in the domain of industrial relations through social dialogue- as systemic recourse to minimize rivalry between two hostile stakeholders at workplace- to replace confrontation by conversation, thereby bring in a paradigm shift at workplace. The ILO encouraged routine consultation through negotiation between employers and the workpeople. Also, the ILO provided for consultation through mediation by state in the negotiation during its conference.<sup>26</sup> Thus, technicality apart, bipartite and tripartite consultations have had no qualitative difference between them since an underlying purpose lies in engagement of belligerent stakeholders for dispute settlement.<sup>27</sup> Thus, intention of the ILO appears similar

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<sup>26</sup> *Vide* Constitution of the ILO, Article 3.

<sup>27</sup> While the government is not a partner in the bipartite process, it may provide assistance to the social partners in their bipartite negotiations. The government may also offer conciliation and mediation services should a dispute arise between the social partners. The type and degree of

to one of the League- both getting initiated together- to encourage means and methods for peaceful settlement of disputes.<sup>28</sup> Even before the war, Permanent Court of Arbitration had similar provision<sup>29</sup> and, in the postwar world, the ILO survived- also continued- similar commitment. Even the UN Court followed similar commitment to settle disputes.<sup>30</sup> With the given database, argument may get advanced to contextualize the UN peacebuilding approach worldwide as political project to maintain peace and thereby sustain *status quo* in market economy. The UN-sponsored peace is meant to ascertain prosperity of the given market economy rather than welfare of the global commons; incidental developmental spillover apart. This is apparent from the given trend of international economic institutions, all alike, e.g. World Trade Organization, International Monetary Fund, UN Conference on Trade and Development, to name few among them.

Likewise, in domestic governance, liberal democratic state prefers settlement of disputes; thereby barter public order with the prospect of capitalism. The peacebuilding process in course of dispute governance is meant to maintain *status quo*, something instrumental for the given economy to survive departure from distributive justice. In market economy, peace

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government involvement in the bipartite process is determined by the system of industrial relations in place. Because of this contribution, the borders between tripartite and bipartite social dialogue can sometimes be difficult to define precisely.

*International Labour Office Social Dialogue and Tripartism Unit, National Tripartite Social Dialogue: An ILO Guide for Improved Governance, International Labour Organization, Geneva, (2013) available at: [http://www.ilo.org/wcmsp5/groups/public/---ed\\_dialogue/---dialogue/documents/publication/wcms\\_231193.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/publication/wcms_231193.pdf)*

<sup>28</sup> Article 14 of the Covenant of the League of Nations, read with Article 1 of the Statute of the Permanent Court of International Justice.

<sup>29</sup> The Convention of *The Hague*, 1907, Article 44

<sup>30</sup> Statute of the International Court of Justice, Article 3

process often than not stands played out as means rather than an end in itself. Thus, in course of the given dispute governance, whether or how far such extra-legal dialogue generated by mediation proceeds for desired meeting of minds raises a moot point. What appears worse, in the absence of institutional safeguards, dialogue in course of mediation ought to get reduced to dictate of the strong to detriment of the weak while rule of law is pledged to counterbalance the same. Bargain yields result only in cases of equilibrium between parties. It is never otherwise.

While generating labour jurisprudence, the ILO but avoided this grand norm of bargain. Instead, emphasis is put upon the spirit of conciliation through negotiation, mediation, and the like. Consequently, what relevant literature insists upon is a need for objectivity to appreciate *bona fide* concern of reverse side for settlement of the given trade dispute.<sup>31</sup> The discourse meant for larger public good thereby revolves

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<sup>31</sup> Negotiation is about trying to find an agreement between conflicting interests. It is a central means of social dialogue. And considered one of the core activities of trade unions.

... ..  
Critically, negotiating requires moving oneself: moving away from one's own "most favourable position" towards an acceptable common ground for both employers and workers.

... ..  
An important precondition to reaching an agreement is to focus the negotiation not on opposing, fixed positions, but on the concrete interests and needs that underlie these positions. In this way, both sides can gain from the negotiation by trying to enlarge the zone of converging interests and thus effectively fulfil their own needs.

*Social Dialogue: A Manual for the Trade Union Education*, ITC-ILO, Turin, 54(2012), available at:

[https://www.itcilo.org/en/community/news/ENSocialDialogue\\_AManualforTradeUnionEducation\\_EN\\_WEB.pdf](https://www.itcilo.org/en/community/news/ENSocialDialogue_AManualforTradeUnionEducation_EN_WEB.pdf)

around the great grandeur of philanthropy.<sup>32</sup> The wisdom but went initiated early twentieth century onward; even before the rise of those otherwise recognized as fundamental principles and rights at work by the ILO itself. Not without reason that the ILO commandment vis-a-vis labour justice through consultation fell on deaf ears.<sup>33</sup> During the first quarter century of its existence, the ILO could do little headway for social dialogue due to such problematic proposition. Unlike other contemporary institutions, the ILO survived out of widespread apprehension of “the spectre of communism” (to quote Marx-

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<sup>32</sup> *What is social dialogue?*

*Where the interests of different segments of society do not coincide, it is generally accepted that people affected by decisions should be able to express their needs, participate in decision-making processes and influence the final decisions so that a proper balance of interests is struck by governments and other decision-makers. This basic social principle applies both to the broad political institutions of democracy and to the world of work.*

*Social dialogue is the term that describes the involvement of workers, employers and governments in decision-making on employment and workplace issues. It includes all types of negotiation, consultation and exchange of information among representatives of these groups on common interests in economic, labour and social policy. Social dialogue is both a means to achieve social and economic progress and an objective in itself, as it gives people a voice and stake in their societies and workplaces.*

*Social dialogue can be bipartite, between workers and employers (which the ILO refers to as the social partners) or tripartite, including government. Bipartite social dialogue may take the form of collective bargaining or other forms of negotiation, cooperation and dispute prevention and resolution. Tripartite social dialogue brings together workers, employers and government to discuss public policies, laws and other decision-making that affect the workplace or interests of workers and employers.*

Report VI of the International Labour Conference, titled “Social Dialogue: Recurrent Discussion under the ILO Declaration on Social Justice for a Fair Globalization”, International Labour Office, Geneva, 5(2013), available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_205955.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_205955.pdf)

<sup>33</sup> *Vide* Articles 12.3, 14.2 and 19.7(b)(ii), The ILO Constitution, 1919.



dialogue preceded by perceived fear of ultra-left upheaval. Since social dialogue was the headache of states, parties were recommended by the ILO to initiate groundwork by preparation of their administrative personnel through training, to play mediator in social dialogue.<sup>38</sup> Even in the post-bipolar world, collective bargain has emerged as the maiden principle since the same has had transformative potential to avail democratic space at workplace, thereby strike power balance in the realm of otherwise problematic industrial relations, something networked in combination of plenty of means and methods: collective bargain getting one among them.<sup>39</sup> Even in the so called unipolar world, unlike the

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- (a) determining working conditions and terms of employment; and/or
  - (b) regulating relations between employers and workers; and/or
  - (c) regulating relations between employers or their organizations and a workers' organization or workers' organizations.

<sup>38</sup> *Vide* Paragraph 5, ILO Recommendation, 163: titled Collective Bargaining Recommendations, 1981.

<sup>39</sup> The term "industrial relations" refers to the laws, processes and institutions that regulate employment relations as well as the outcomes. A variety of industrial relations traditions exist across different country contexts. An industrial relations system includes the regulations, institutions (such as the labour administration specialized labour courts and/or mediation and arbitration agencies), actors (trade unions, employers and their representative employers organizations and labour administrations) and social dialogue processes (e.g. collective bargaining or tripartite social dialogue). Sound or productive industrials involve the progressive institutionalization of employment relations. In many developing country contexts, it is thus not sufficient to focus only on institutionalized industrial relations, we also need to consider broader labour relations involving all who work, either in low quality employment or own account work, in the informal economy.

The Global Deal for Decent Work and Inclusive Growth Flagship Report; titled "*Building Trust in a Changing World of Work*", ILO-OECD collaborative publication, Geneva, 17(2018) available at: <http://www.theglobaldeal.com/app/uploads/2018/05/GLOBAL-DEAL-FLAGSHIP-REPORT-2018.pdf>

perceived fear, collective bargain has transcended the treaty jurisprudence to get elevated to custom and, therefore, turns obligatory for one and all irrespective of consent of the state to this end.<sup>40</sup> The new economic order in the globalized world is too competitive and, therefore, fragile to afford the systemic jeopardy out of labour injustice. For instance, despite the absence of child labour clause in the provision for general exceptions of the world trade regime,<sup>41</sup> India finds tough time to defend itself with its otherwise fortified world trade advocacy. Due to want of morality, an otherwise fortified legalistic logic falls short of legitimacy, despite mundane legality behind the same, here lies the lesson. In the midst of mediation, preponderance of power ought to gainsay morality to sabotage the discourse from within. Compared to such ADR, judicial process run by the mainstream court appears lesser evil for the cause of justice.

In a way or other, success of the bargain through mediation lies in its quest for median to get competing and- at times- conflicting claims of rival sides with valid jurisprudence behind the same. Thus, median may get flawed, mathematically imperfect, yet the same is upheld as median since the same has had reasonable defense as resolution of disputes since it is

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<sup>40</sup> The International Labour Conference:  
...(2) declares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subjects of those Conventions, namely:

(a) *Freedom of association and the effective recognition of the right to collective bargaining.*

*The ILO Declaration on Fundamental Principles and Rights at Work, 1998*

<sup>41</sup> The General Agreement on Tariffs and Trade, 1947, Article XX

mutually agreed upon by mutual consensus between parties involved therein. Few major features for mediation may thereby get underscored: (i) application of mind by both sides,<sup>42</sup> (ii) consideration of claims by reverse side,<sup>43</sup> (iii)

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<sup>42</sup> Since consciousness decides, in the alternative manner, which goal to posit and how the causal series required for it are to be transformed into posited ones as a means of realization, there arises a dynamic complex of reality for which no analogy of any kind can be found in nature. It is only here, therefore, that the phenomenon of freedom can be investigated in its ontological genesis. In a first approximation, we can say that freedom is that act of consciousness which has as its result a new being posited by itself. Here, already, our ontological and genetic conception departs from that of idealism. For in the first place, the basis of freedom, if we want to speak meaningfully of freedom as a moment of reality, consists in a concrete decision between different concrete possibilities. If the question of choice is taken to a higher level of abstraction, then it is completely divorced from the concrete, and thus loses all connection with reality, becoming an empty speculation. In the second place, freedom is ultimately a desire to alter reality (which of course includes in certain circumstances the desire to maintain a given situation), and in this connection reality must be preserved as the goal of change, even in the most far-reaching abstraction. Our former considerations have of course also shown how the intention of a decision that is directed, via mediations, towards changing the consciousness of another person, or one's own; also aims at a change of this kind.

David Fernback (tr.), Georg Lukacs, *The Ontology of Social Being*; 3 LABOUR MERLIN PRESS, LONDON 1980, available at <https://thecharnelhouse.org/wp-content/uploads/2017/09/Georg-Luka%CC%81cs-The-Ontology-of-Social-Being-Volume-3-Labor.pdf> (last visited on June 1, 2018)

<sup>43</sup> The time is happily passing when it was the fashion to speak of economic laws as though they were principles of mechanics. Human beings are not mere mechanisms, on their volitional side, at least, and the economics of the competitive system must be more than a mere mechanics of industrial liberty. The acceptance of the principle of collective bargaining implies all this. We dare not trust the laborer's destiny to the unaided workings of competitive laws. In a business age and under a business system where industry is undertaken by businessmen for business ends, and where business strategy is an integral part of the general process, it must be said that, whatever else wages depend on, they also depend on bargaining. Economic laws alone- that is to say, competition,- do not settle the matter. Still less do they act with electrical expedition. Competition, at best, simply sets the limits within which wages, or the other terms of the labor

apposition rather than opposition for arrival at the crossroads of synergy,<sup>44</sup> etc. In the name of peacebuilding, all these are meant to get the erstwhile labour-capital dichotomy diluted and thereby keep the class struggle away. As predicted by trade union veteran, in the wake of automation-mechanization-dehumanization of production relations, collective bargain may experience metamorphosis to leave conventional labour practice like strike behind,<sup>45</sup> thereby usurp newer practice:

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contract, will be fixed. Between the least the workmen will take and the most the employer will give there may be a pretty wide margin. We know there is a very considerable margin between their ideas of what the one should take and the other give. The adjustment of their respective claims to this indeterminate and fluctuating part must be effectuated by bargaining; and that means, looked at from the side of labor, collective bargaining.

A. C. Miller in A. C. Miller *et al*, *Theory of Collective Bargaining: Discussion*, 10(1) 3<sup>rd</sup> Series AMERICAN ECONOMIC ASSOCIATION QUARTERLY 41-42 (April 1909), available at: <https://www.jstor.org/stable/pdf/2635410.pdf?refreqid=excelsior%3A47ea71dcde52d8cd355979b6279a9a64>

<sup>44</sup> Unions are beginning to buy a few shares of stock in the corporations with which they negotiate. This affords a representative of the union an opportunity to attend stockholders' meetings. With the accumulation of large funds in union treasuries- security funds controlled by the union or from dues, initiation fees and assessments- unions may be expected to invest largely in equities, in the stock of the corporations employing their members, thus further tying together the interests of their workers and their union with those of the employing corporations. The worker and their unions will have another direct financial stake in the success of the enterprise.

Frank T. Carlton, *Collective Bargaining and Capitalism*, 12(4) *The American Journal of Economics and Sociology* 395(July 1953), available at: <https://www.jstor.org/stable/pdf/3484214.pdf?refreqid=excelsior%3Ae35afee6d5ffb1e2af0cd63d339eafb4>

<sup>45</sup> Let us not deceive ourselves with exploded theories of profit-sharing and the like; let our legislators endeavor to lose their Indian provincialism and look abroad at what is happening- in Italy with the metal-workers in Great Britain with the builders in their new guild, in Georgia with its new socialist state, in Russia as described by Mr. H. N. Brailsford. In the midst

getting hold on the establishment through possession of share to its credit and thereby exercise the right to self-determination may emerge one, as mentioned above. In a way or other, mediation is played out by the state as a game-changer to trade-off between peace and peanuts and thereby perpetuate the prospect of those in seat of power or those around. The capitalist political economy went ahead to set the workforce free, albeit with empty stomach. A crocodile's cry for freedom of bargain, "Where free unions and collective bargaining are forbidden, freedom is lost,"<sup>46</sup> attracts public attention since his regime is ridden with the welfare retrenchment policy to get millions of the disabled deprived of social security benefits on the count of its austerity.

Cynicism apart, as preventive rather than curative means, mediation has had the potential of its own, something beyond reach of the mainstream court that requires legal dispute to initiate judicial process. The course of adjudication and mediation thereby falls apart to spearhead reverse trends in dispute governance.<sup>47</sup> Thus, despite challenges, mediation but

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of crashing systems is slowly but surely emerging a new order of things economic, in which labour will wield a new power, and its method of collective bargaining will not be by the old use of the strike-weapon.

B. P. Wadia, *Labour in Madras*, S. Ganesan & Co., Madras, . xix-xx preface (1921), available at: <https://archive.org/details/in.ernet.dli.2015.229098>

<sup>46</sup> Ronald Reagan, Address at Liberty State Park, on 1 September, Jersey City, 1980, available at: <http://www.americanrhetoric.com/speeches/ronaldreaganlibertypark.htm>

<sup>47</sup> When differences and disputes arise, any of the following three consequences may follow: (a) the parties may sort out the differences and disputes; (b) the parties may ignore and bury the differences and disputes; and (c) the parties may escalate the differences and disputes, requiring third-party intervention. Such third-party intervention may be through an adjudicatory forum (courts and arbitrations) or by a non-adjudicatory forum (conciliation, mediation, or Lok Adalats). If the underlying cause

appears scribbling upon the wall in time ahead.<sup>48</sup> Mediation is meant to supplement- and not to supplant- the mainstream adjudication since social solidarity revolves around justice

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for the dispute is identified, addressed and dealt with, conflict and disharmony will disappear. The existing adjudicatory fora for dispute resolution do not deal with the causes for the dispute but only adjudicate upon the consequences of the disputes. The adjudicatory form of justice delivery system through courts, even if made more efficient, may not reduce the ills that afflict the society. Adjudicatory dispute resolution is like surgery intended to be curative. Negotiated settlements, on the other hand, may prove to be palliative and curative and, many a time, preventive. R. V. Raveendran, *Mediation- Its Importance and Relevance*, The Practical Lawyer (October 2010), available at [http://www.supremecourtcases.com/index2.php?option=com\\_content&itemid=1&do\\_pdf=1&id=19353](http://www.supremecourtcases.com/index2.php?option=com_content&itemid=1&do_pdf=1&id=19353)

<sup>48</sup> The haphazard beginnings of mediation should be supplanted by orderly arrangements. Mediators are at the call of negotiators, and not infrequently they are called in to help one of the parties in bargaining. A number of mediators from different agencies may all try to handle the same dispute and, thereby, confuse the mediation process. This should be stopped as soon as possible.

Another practice which should be abandoned is to mediate in the midst of collective bargaining. Such mediation can be used to advantage by either a strong union or a dominating employer. To be effective, a mediator must be in a position to deal with the executives of both parties on a basis of equality, and this requires that he shall direct and control the process of mediation.

Minimum procedural requirements are essential to mediation, with the mediator in charge of proceedings. The parties must know that it is their responsibility to present their cases fully and to support them with facts and arguments, much as in arbitration. They must expect the mediator to analyze and question their positions in order to make a constructive contribution toward amicable agreement.

Presidential address by William M. Leiserson before the fourth annual meeting of the Industrial Relations Research Association in Boston, 1951, titled "*The Function of Mediation in Labour Relations*", 277-27(1952), 74(3) MONTHLY LABOUR REVIEW, available at <https://www.jstor.org/stable/pdf/41832592.pdf?refreqid=excelsior%3Aa17bed32a86ed3a45af20d973040125b>

expectancy. Wherever subjects have had justice in public life, there is likelihood of social stability, also, it is vice versa.

In the wake of automation-mechanization-dehumanization vis-à-vis production relations, while the labour suffering from systemic beating in capital-incentive production process, traditional activism ought to get counterproductive to further detriment of the workforce. The trade union veterans, therefore, need introspection- toward intellectual engagement- and thereby work out contemporary means for labour justice in the globalized market.<sup>49</sup> Subject to immunity from power relations, more than the law, mediation as public policy with collective bargain as means to dispense justice with efficiency in cost and delay may bring in prospect to grapple with labour dispute and public dispute alike,<sup>50</sup> irrespective of the variety in head count.

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<sup>49</sup> Society has, indeed, a right to be protected against such incendiary methods on the part of those who undertake the important business of selling blocks of labor for future delivery, and of enforcing "uniform minimum conditions" of employment. The right to organize for the conduct of such important business carries with it the duty of organizing well. The right of any trade union leader or representative or "expert" to bargain with employers for the sale and future delivery of labor is measured by his ability to guarantee the faithful delivery of the goods he sells. Judged by such obvious standards, it must be confessed that trade union structure has less to teach than it has to learn.

Edward Cummings, *A Collectivist Philosophy of Trade Unionism*, 13(2) *The Quarterly Journal of Economics* 162(1899), available at <https://www.jstor.org/stable/pdf/1882198.pdf?refreqid=excelsior%3A605be0a491918cf5eb61e1213b671bb3>

<sup>50</sup> If the state has established as public policy the encouragement of collective bargaining, inclusion of mediation in the bargaining process should logically lead the state to encourage mediation as part of the bargaining process, in an effort to limit the area of conflict through which all bargaining passes before it establishes an area of cooperation. Moreover, if the state's policy of encouraging collective bargaining meets with success, it should logically be driven to extend its own mediatory services in somewhat equal proportions. Similarly, inclusion of mediation within the concept of collective bargaining should encourage the use of

With the given dissonance between the common law legacy and the common crowd of the South Asian subcontinent, the legal system appears stuck to perennial ordeal for dispute settlement, something that sounds oxymoron by default. A legal battle is meant to win the case while mediation is meant to win the mind. Thus, in the former, both get too exhausted to win. Whoever comes out winner feels exhausted otherwise for merrymaking with the same. Also, merrymaking on the occasion of defeat of another appears anathema to mannerism. At the same time, the vanquished is set to do his best to set aside the judgment by appeal in higher forum and, if he succeeds, the scene ought to get upside down for both afterwards. However, in the latter, both ought to win with the mutual consensus between themselves. Since they arrive at peaceful settlement, likelihood of trail of the same dispute comes to naught by default.

## VI. CONCLUSION

The underlying truth resurfaces once again a perennial dichotomy between regulation and resolution. The mainstream administration of justice with procedural nitty-gritty under the common law legacy adjudicates cases for the purpose of regulation of disputes while need of the hour lies in resolution of disputes, something possible with mediation since the same culminates in conciliation with consensus between disputants concerned. To get candid, adjudication requires management

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this strike-restraining procedure by labor leaders who have consistently championed "collective bargaining," and company representatives who have accepted it.

Neil Chamberlain, *The Nature and Scope of Collective Bargaining*, 58 (3) THE QUARTERLY JOURNAL OF ECONOMICS, 384(May, 1944), available at: <https://www.jstor.org/stable/pdf/1882846.pdf?refreqid=excelsior%3A3134b35bdd85938bc87f5225cbae1cd3>

of disputes while conciliation requires settlement of disputes. The former requires commitment to caprice of the administration to clear arrears while the latter requires commitment to justice for disputants concerned. The paradigm shift from adjudicatory regime to conciliatory regime appears imperative to get the court elevated from house of law to that of justice.

At present, the court is the appropriate seat of dispute governance while ADR is named as alternative means of dispute governance. With the proposed topsy-turvy, ADR ought to get renamed as means of appropriate dispute resolution and the court for alternative dispute regulation. In dispute governance, means of resolution-mediation getting one among them- ought to usurp the mainstream justice delivery system. Taken together, they deserve the status of regular mode of dispute governance by default. In the given mode, at its best, the court may get reduced to alternative dispute regulation for the headstrong who deserve the headwind out of cost and delay to get immersed in perennial disputes. Perhaps even this sermon is set to get ended in smoke-the way talisman of Gandhi to get out of courtroom justice did-with his photographic presence in the courtroom premises. The truth personified but raises his voice for informal justice-expedient and inexpensive- that suits best to millions in the queue, except a few, too few. The dispute resolution through conciliation represents the reversal of justice dispensation- from top-down model to bottom-up one- and thereby spearheads justice from below.

Except cases of aberration, e.g. apparent travesty of justice executed by kangaroo court, black magic, witch-hunt, including lynching praxis as newer version of trial- followed

by extrajudicial execution- in the name of public justice, welfare state needs to withdraw from street (read instant) justice until the same is reduced to otiose in public perception. In cases of aberration, the state but cannot afford to play watchdog with ritualist bark. Instead, in appropriate cases, state must bite those playing with the institution of justice, and thereby reclaim its own stake as trustee of the society vis-à-vis delivery of justice. In the given regional settings, therefore, a newer chapter may get inserted to respective statute books of the South Asian states as 'offences against justice', thereby get offenders into the statutory net better than earlier. Here lies utility of regular courts to supplement judicious process of dispute resolution as and whenever such occasions arise to this end, thereby strengthen peaceful settlement of disputes and with regional features of its own. At bottom, same old contents of collective bargain are operative, albeit, in new container.

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## AN ANALYSIS OF TRANSFORMATIVE CONSTITUTIONALISM FROM THE PERSPECTIVE OF SOUTH AFRICA AND INDIA

- **\*Ms. Neha Tripathi & Ms. Soumya Rajsingh\*\***

### ABSTRACT

*Transformative Constitutionalism, traditionally co-related with the South African Constitution has now been at the centre of discourse surrounding pertinent constitutional questions. The idea of transformative constitutionalism, though cannot be subjected to single definition, has emerged to have a global attention, bringing forth the need to undertake a comparative study to adjudge the influences in the jurisdictions of South Africa and India. With the expansion seen in the power of the judiciary in last few decades, the need for analysing the role of courts as a catalyst within the transformative constitutional framework, becomes important. The authors in the paper have analysed the concept of transformative constitutionalism, thereby undertaking a study relating to its origin and development within the comparative framework of South Africa and India. The similarities between the constitutional ethos of South Africa and India, makes it pertinent to analyse certain important constitutional developments triggered by the decisions of the Indian judiciary in the recent past. The authors by undertaking a comparative study, have brought forward the manner in which transformative constitutionalism can play an important role for establishing an equal and a just society. The authors have also maintained that such approach of South African and Indian Courts are in consonance with the objectives envisaged by the constitutional framers; this understanding also supports the traditional understanding of*

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*constitutionalism and the premise that the constitution is meant to endure for ages.*

**Keywords:** Constitution, Transformative Constitutionalism, South Africa, Comparative Constitution.

## I. INTRODUCTION

Constitution can be explained as the fundamental law of the state, containing the principles upon which the government is founded, regulating the division of sovereign powers, and directing to what persons each of these powers is to be confided, and the manner in which it is to be exercised.<sup>1</sup> Constitutions therefore, are meant to organise and control power, ensure human rights, balance the competing claims of social and economic interests on one hand and individual interests on the other, reflects the culture and historical experiences of the country, and operate as a medium for bringing about national progress and unity.<sup>2</sup> A constitution is a living and an organic document, it is meant to endure for ages.<sup>3</sup> Although the term constitutionalism is elusive, yet democratic governance and rights protection are broadly accepted as its essential elements, and judiciaries have traditionally been regarded as its key guardian and protector.<sup>4</sup>

The Constitutional Court of South Africa, in the matter of *S v. Makwanyane*, while referring to the basic tenets of the South African Constitution reiterated that the constitution provides a historic bridge between the past of a deeply divided society and is founded on the future of recognition of human rights without any discrimination.<sup>5</sup> While establishing the existence of transitional

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<sup>1</sup> Cooley, T. M. A, TREATISE ON CONSTITUTIONAL LIMITATIONS 3 (Hindustan Law Book Company, Calcutta, First Indian Reprint 2005). Also see, *India Cements Ltd v. State of Tamil Nadu*, AIR 1990 SC 85 (India).

<sup>2</sup> AUSTIN, GRANVILLE, WORKING A DEMOCRATIC CONSTITUTION (Oxford University Press, New Delhi).

<sup>3</sup> DAVID A. STRAUSS, THE LIVING CONSTITUTION, (Oxford University Press, 2010).

<sup>4</sup> See generally, LOUIS HENKIN, ELEMENTS OF CONSTITUTIONALISM 1, 3-4 (Center for the Study of Human Rights, Columbia University, New York, NY, Aug. 1994). See also, Upendra Baxi, *Constitutionalism as a Site of State Formative Practices*, 21 CARDOZO L. REV. 1183, 1184 (2000).

<sup>5</sup> *S v. Makwanyane*, 1995 (3) SA 391; 1995 (6) BCLR 665.

constitution, the court referred to *S v. Zuma and others* to explain the relevance and the mode of interpretation of the fundamental rights under the Constitution of South Africa.<sup>6</sup> The constitutional court affirmed that the freedoms and the rights recognised by the constitution should be provided a “generous” and a “purposive” interpretation, keeping in view the interests which are meant to be protected. Similarly, even in Indian context, the relevance of fundamental rights and the related discourse with respect to recognition of the interests of the individual in light of growing need for implementation of human rights through domestic forum, needs to be revisited within the framework of transformative constitutionalism, which has emerged distinctively as a Southern paradigm of constitutionalism.<sup>7</sup> Judiciary in India, has often been labelled as “an activist” judiciary, however, even those who levy such criticism against the Supreme Court of India, have rightly appreciated the role of the Supreme Court in ensuring the guarantee of fundamental rights.<sup>8</sup> Thus, the need for analysing the role of the courts within the constitutional framework in South Africa and India, with regard to the discourse related to transformative constitutionalism arises, as the idea of constitutionalism itself entails the idea of limited government. The manner in which the courts have

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<sup>6</sup> *S v. Zuma and others*, 1995 (2) SA 642; 1995 (4) BCLR 401 (SA).

<sup>7</sup> See, *Navtej Singh Johar & Others v. Union of India*, (2016) 7 SCC 485 (India), the Supreme Court of India decriminalised voluntary sexual intercourse among same-sex couple. In *Indian Young Lawyers Association v. State of Kerala*, 2018 SCC Online SC 1690 (India), the Supreme Court of India struck down the prohibition which was put on entry of women of menstruating age in the Sabrimala Temple in the State of Kerala, India.

<sup>8</sup> Shylashri Shankar, *Descriptive Overview Of Indian Constitution And The Supreme Court Of India* 105-134, OSCAR VILHENA, UPENDRA BAXI, FRANS VILJOEN EDS. *TRANSFORMATIVE CONSTITUTIONALISM: COMPARING THE APEX COURTS OF BRAZIL, INDIA AND SOUTH AFRICA* (Pretoria University Law Press, 2013).

played an effective role as a catalyst of transitional change has often intrigued constitutional scholars globally.

Undoubtedly, the idea of transformative constitutions differs from the traditional understanding of constitutions in so much as the transformative constitutions envisages an establishment of a comprehensive constitutional order, which is based on a holistic idea of having a more just and equal society.<sup>9</sup> Realising the goal of transformative constitutions is also based on the understanding of the notions related to judicial review and judicial independence.<sup>10</sup>

A comparison of the constitutions of India and South Africa must take into account certain similarities and differences. Both the constitutions, in terms of transitional changes over a period of time, have similarities in terms of the assertion of fundamental rights being at the centre of the constitutional development. The Indian Constitution can be affirmatively stated to be one of the early instances of transformative constitutions by aiming not just to establish the organs of the government and their powers, but also encompassing a mode of transforming the deeply existing caste divide by ensuring equality, and providing for a mode of reservation for the marginalised groups by imbibing affirmative action within the constitutional framework.<sup>11</sup>

Considering the distinctions between the two constitutions, firstly, the Indian Constitution, which was conceived in the wake of

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<sup>9</sup> Michaela Hailbronner, *Transformative Constitutionalism: Not Only in the Global South*, 65 *The American Journal of Comparative Law*, 527-565 (2017).

<sup>10</sup> Tom Gerald Daly, *The Judiciary and the Constitutional Transitions*, Workshop Report, Hague, 2014.

<sup>11</sup> See, Part III; Right to Equality (Arts. 14, 15, 16, 17 and 18) of the Constitution of India, 1950. Art. 14 provides for Equality before law; Art. 15 provides for Prohibition of Discrimination on grounds of religion, race, caste, sex or place of birth; Art. 16 talks about equality of opportunity in matters of public employment; Art. 17 provides for abolition of untouchability and Art. 18 provides for abolition of titles.

India's independence, was drafted before the adoption of Universal Declaration of Human Rights, 1948 and has been identified with the onset of the contemporary human rights movement.<sup>12</sup> In this light, the South African Constitution of 1996 has been stated to have emerged during the time when discourses related to human rights movement was at its peak, and even after that, when internationally scripted and normative constitutional framework already evolved.<sup>13</sup>

The second factor that accounts for the contrast between the two constitutions, is the radically divergent processes through which they were drafted and enacted. The constitution-making process in India was the ultimate stage of the freedom movement throughout the country, where it has been documented that the drafting process was hugely overseen and undertaken by certain elite members of the society and political parties who were the face of the national movement for guaranteeing freedom and that, due to the prevailing socio-economic and political situation, the process was not hugely democratic and participatory in character.<sup>14</sup> Meanwhile, the South African Constitution is a result of a revolution and has been attributed as a revolutionary document, which undoubtedly emerged from a process that was consciously designed to be a participatory one.<sup>15</sup>

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<sup>12</sup> Also see, Vijayashri Sripati, *Constitutionalism in India and South Africa: A Comparative Study from Human Rights Perspective*, 16 *Tulane Journal of International & Comparative Law* (2007-2008).

<sup>13</sup> See, e.g., DAWID VAN WYK et al. eds, *NAMIBIA: CONSTITUTIONAL AND INTERNATIONAL LAW ISSUES* (VerLoren van Themaat Centre for Public Law Studies, University of South Africa, 1991).

<sup>14</sup> See generally, GRANVILLE AUSTIN, *THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION 2* (Oxford India Paperback, 1996); B. SHIVA RAO, *THE FRAMING OF INDIA'S CONSTITUTION: A STUDY 1* (1968).

<sup>15</sup> See generally, HASSEN EBRAHIM, *THE SOUL OF A NATION: CONSTITUTION-MAKING IN SOUTH AFRICA 240* (OUP South Africa, 1998).

The Constitutional Court of South Africa has always maintained that the South African Constitution is a transformative constitution;<sup>16</sup> the “constitution is a document committed to social transformation.”<sup>17</sup> The constitution is set to sub serve the transformation in the public as well as private spheres by establishing certain constitutional objectives and ethos.<sup>18</sup> One of the foremost reasons for having transformative constitutions is due to the aspirations of the people and also because, constitutions are meant to be a break from the past.<sup>19</sup> The Constitution of South Africa, 1996 embraces aspirations of the people of South Africa with an intention to realise a robust democratic, egalitarian society committed to social and economic justice and self-realisation of opportunities for all, thereby also ensuring effective realisation of natural resources.<sup>20</sup> Similarly, Indian Constitution has also been based on the aspiration of the citizens of the country and is set to ensure fundamental guarantees in the form of equality and justice.<sup>21</sup>

Challenges in terms of poverty, inequality and resource inadequacy are some of the major challenges being faced by both South Africa as well as India in its decades of freedom and democratic establishment. The constitution of both South Africa as

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<sup>16</sup> S v. Makwanyane, 1995 (3) SA 391; 1995 (6) BCLR 665.

<sup>17</sup> Mkontwana v. Nelson Mandela Metropolitan Municipality 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC). Soobranioney v. Minister of Health (KwaZulu-Natal) 1998 1 SA 765 (CC); 1997 (12) BCLR 1696 (CC). A Chaskalson ‘The Third Bram Fischer Lecture: Human Dignity as a Foundational Value of Our Constitutional Order’ (2000) 16 SAJHR 193, 199. Investigating Directorate: Serious Economic Offenses v. Hyundai Motor Distributors (Pty) Ltd; In re: Hyundai Motor Distributors (Pty) Ltd v. Smit NO 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC).

<sup>18</sup> D Moseneke, *Transformative Constitutionalism: Its Implications for the Law of Contract*, 20 Stellenbosch LR 3, 4 (2009).

<sup>19</sup> See, Mark Tushnet, *How do the Constitutions constitute Constitutional Identity?* Volume 8, Issue 3, *International Journal of Constitutional Law* 671–676 (July 2010).

<sup>20</sup> Azanian Peoples Organization v. President of the RSA, 1996 (4) SA 671 (CC); 1996 (8) BCLR 1015 (CC).

<sup>21</sup> See, INDIA CONST., Preamble.

well as India provides for an important mechanism for ensuring that these challenges are addressed by including and recognising them through constitutional detailing and mode of effective remedy in case of state violations.<sup>22</sup> It recognises and lists down a detailed set of socio-economic rights that are based on the assurances related to right to life, health, dignity, access to livelihood, education, sanitation and healthy environment for everyone.<sup>23</sup> Considering the developments in the past few decades and the expansive jurisprudence with respect to right to equality, right to life and recognising the value of socio-economic rights within the welfare mechanism has provided some major relief for the disadvantaged, marginalised and poorer sections of the society.<sup>24</sup> However, there is still a lingering sense of dissatisfaction among a set of scholars and human rights activists who state that the transformative aspects and potential of these rights has not been fully realised in both these countries due to various factors peculiar to these jurisdictions.<sup>25</sup>

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<sup>22</sup>*Id.*

<sup>23</sup> See, Bill of Rights, The Constitution of the Republic of South Africa, 1996. Also see, Part III- Fundamental Rights and Part IV- Directive Principles of State Policy; The Constitution of India, 1950.

<sup>24</sup> See, *State v. Zuma and Others*, 1995 (2) SALR 642 (CC); *State v. Makwanyane and Another*, 1995 (3) SALR 391 (CC); *Ex Parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995*; 1996 (3) SALR 165 (CC) and *Azanian Peoples Organization (AZAPO) and Others v. President of the Republic of South Africa*; 1996 (4) SALR 671 (CC). See, *Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 180, the Supreme Court of India held Right to Livelihood as a part of Right to life under Art 21. Also see, *Minerva Mills v. Union of India*, AIR 1980 SC 1789, the Supreme Court of India held that even though Part IV is non-justiciable still it is equally important for the State to consider it while policy-making to read it as a part of justiciable rights guaranteed under Part III of the Constitution.

<sup>25</sup> Also see, Sandra Liebenberg and Beth Goldblatt, *The Interrelationship between Equality and Socio-Economic Rights under South Africa's Transformative Constitution*, 23 S Afr J on Hum Rts 335 (2007).

## II. THE CONCEPT OF TRANSFORMATIVE CONSTITUTIONALISM

To understand the concept of transformative constitutionalism, it is imperative that the idea of constitutionalism is first analysed. This leads us to a much deliberated question: what is constitutionalism? To answer this, one needs to first determine, what is a constitution? A constitution is “[a] charter of government deriving its whole authority from the governed.”<sup>26</sup> The constitution sets out the form of the government. It specifies the purpose of the government thereby prescribing the powers of each department of the government, it also establishes the state-society relationship, the relationship between various governmental institutions, and the limits of the governmental powers and functions.<sup>27</sup> According to classical liberal theorists, the state and society can be viewed as part of a big social contract. If so, in a liberal democratic country, the constitution has to be perceived as the fundamental part of such social contract; it is a fundamental contract between the state and the society.<sup>28</sup>

Like liberty or democracy, “constitutionalism” is also a word which has a varied understanding, so different people have their own understanding of what constitutionalism means and entails. Sartori perceives liberal constitutionalism to constitute the following elements: “(a) there is a higher law, either written or unwritten, called constitution; (b) there is judicial review; (c) there is an independent judiciary comprising of independent judges dedicated to legal reasoning; (d) possibly, there is due process of law; and, most

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<sup>26</sup> Black’s Law Dictionary, 9<sup>th</sup> Edn.

<sup>27</sup> Graham Maddox, *The Note on the Meaning of ‘Constitution’*, Volume 76, Issue 4, *American Political Science Review* 805-809 (1982).

<sup>28</sup> Paul Lermack, *The Constitution Is the Social Contract So It Must Be a Contract ... Right? A Critique of Originalism as Interpretive Method*, Vol. 33, Iss. 4, *William Mitchell Law Review* (2007). Also, see Voigt, S. *Breaking with the Notion of Social Contract: Constitutions as Based on Spontaneously Arisen Institutions*, 10 *Constitutional Political Economy* 283-300 (1999).

basically, (e) there is a binding procedure establishing the method of law-making which remains an effective brake on the bare-will conception of law.”<sup>29</sup> However, for our purpose, constitutionalism would mean a system of political arrangements in which there is a supreme law “the constitution”, in which all is governed by the supreme law,<sup>30</sup> which is based on the popular will, thereby meaning that only popular will can bring about changes to the constitution, but there would be a rigidity in the process of amendment due to the difficulty of garnering the requisite popular support, and there will be separation of power, checks and balances and an independent judiciary dedicated to legal reasoning to safeguard the supremacy of the constitution.<sup>31</sup>

We can draw several implications from the above explanation attributed to the concept of constitutionalism: First, constitutionalism is undoubtedly, an institutional realization of liberalism. By limiting and regulating the State’s power through a supreme constitution, and by preserving the sovereignty of people

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<sup>29</sup> G. Sartori, *Constitutionalism: A Preliminary Discussion*, Vol. 56, No. 4, *The American Political Science Review* 860 (1962). See, Campbell, Blair, *Constitutionalism, Rights and Religion: The Athenian Example*, *History of Political Thought* 239-73 (1986). Aziz Huq, Tom Ginsburg & Mila Versteeg, *The Coming Demise of Liberal Constitutionalism?*, 85 *University of Chicago Law Review* 239 (2018).

<sup>30</sup> Also see, Chigudu D., *Politics and Constitutionalism: Entrenching the Rule of Law in Africa*, 75 *India Quarterly*, 285-302 (2019). Bellamy Richard And Castiglione Dario, *Constitutionalism and Democracy – Political Theory and the American Constitution*, 27 *British Journal of Political Science* 595 (1997). Fabrice Tambe Endoh, *Democratic Constitutionalism in Post-Apartheid South Africa: The Interim Constitution Revisited*, 7 *Africa Review*, 67-79 (2015).

<sup>31</sup> Oliver Gerstenberg, *Negative/positive Constitutionalism, “fair balance,” and the Problem of Justiciability*, Volume 10, Issue 4, *International Journal of Constitutional Law*, 904–925 (Oct, 2012). Aoife O’Donoghue, *International constitutionalism and the state*, Volume 11, Issue 4, *International Journal of Constitutional Law*, 1021–1045 (2013). Jeremy Waldron, *Constitutionalism: A Sceptical view*, Georgetown University Law Center, 1-45 (2010).

and imposing corresponding obligation on the state, constitutionalism ensures that the government is limited.<sup>32</sup> Second, constitutionalism does not authoritatively recognise the sovereignty of the legislature. Instead, it views the sovereignty of people with a pivotal role to play. Under constitutionalism, no authority is more supreme than the constitution. The organs of the government are creatures of the constitution and are governed by the constitution itself. Hardly, liberal constitutionalism is based on a particular view of liberalism towards human nature, which is based on the idea of realization of universal human dignity and self-interest.<sup>33</sup> One basic premise of liberal constitutionalism, as Stephen Holmes puts it, is the fact that “[a]s ordinary men, rulers too need to be ruled”.<sup>34</sup> Self-interest is basically universal in character, and rulers are no exceptions to it. Because rulers, like ordinary people, are self-interested and motivated with the tendency to over-step their boundaries, rulers most importantly, also need to be disciplined and constrained by the rule of law.<sup>35</sup>

Written constraints in the constitution, however, are not constraining by themselves, they have to be worked out through institutional mechanism. As it is often said that the tyrants will not

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<sup>32</sup>Gabriel Negretto, *Constitution-making and Liberal Democracy: The Role of Citizens and Representative Elites*, Volume 18, Issue 1, *International Journal of Constitutional Law*, 206–232 (2020). Stephen Gardbaum, *Revolutionary Constitutionalism*, Volume 15, Issue 1, *International Journal of Constitutional Law*, 173–200 (2017).

<sup>33</sup> Also see, Richard Stacey, *Constituent power and Carl Schmitt's theory of constitution in Kenya's constitution-making process*, Volume 9, Issue 3-4, *International Journal of Constitutional Law*, 587–614 (Oct, 2011). David T. Butleritchie, *The Confines of Modern Constitutionalism*, 3 *Pierce L. Rev.* 1 (2004).

<sup>34</sup> See, Walker, Graham, *The Idea Of Nonliberal Constitutionalism* 39 *Nomos*, 154–184 (1997). Macedo, Stephen, *Liberal Virtues, Constitutional Community*, *The Review of Politics*, 215–40 (1988).

<sup>35</sup> See, Ocko, Jonathan K., and David Gilmartin, *State, Sovereignty, and the People: A Comparison of the 'Rule of Law' in China and India*, 68 *The Journal of Asian Studies*, 55–100 (2009). Also see, TRS ALLAN, *CONSTITUTIONAL JUSTICE: A LIBERAL THEORY OF THE RULE OF LAW* (Oxford: Oxford University Press, 2001).

become benevolent rulers simply because the constitution tells them to. In order to guard against violations against the letter and spirit of the constitution, there needs to be a set of institutional arrangements which can be achieved through various permutations and combinations related to power dynamics between the organs of the state and the accountability to the ultimate power wielder i.e. the citizens.<sup>36</sup> De Smith views constitutionalism as a western liberal democratic model. It includes observation of rules with procedures to limit legislative and executive acts of the government, curbs arbitrary exercise of discretionary powers and ensures individual liberty, which is achieved through the inclusion of individual freedoms and liberties under the constitution and recognizing the power of judicial review to assert and implement the constitutional assurances against state intrusion.<sup>37</sup>

Constitutionalism includes constraints on both the legislative and executive powers through judicial review.<sup>38</sup> Further, this constrained model constitutionally entrenches rule of law and separation of powers.<sup>39</sup> Indian Constitutionalism is also a

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<sup>36</sup> Also see, Henkin, Louis, *Constitutional Fathers--Constitutional Son*, Minnesota Law Review, 1848 (1976).

<sup>37</sup> DE SMITH, S. A., *THE NEW COMMONWEALTH AND ITS CONSTITUTION* 106 (London: Stevens 1964). Also see, 2 *M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS* [1967].

<sup>38</sup> Also see, Loughlin, M. (2010). What Is Constitutionalism? In P, Dobner & M, Loughlin (Ed.). *The Twilight of Constitutionalism?* New York: Oxford University Press. pg.49. McIlwain, C. H. (1947). *Constitutionalism: Ancient and Modern*. New York: Cornell University Press. pg.38; Grimm, D. (2010). *The Achievement of Constitutionalism and Its Prospects in a Changed World*. In P Dobner & M Loughlin(Ed.). *The Twilight of Constitutionalism?* New York: Oxford University Press. Pg.6.

<sup>39</sup> See, *Indira Nehru Gandhi v. Raj Narain*, AIR 1975 SC 2299; *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225; *Ram Jawaya v. State of Punjab*, AIR 1955 SC 549 and *I R Coelho v. State of Tamil Nadu*, (2007) 2 SCC 1. Rule of Law, Judicial

mechanism which is based on two elements; ends and means.<sup>40</sup> Ends are constitutional objectives and hence, have been provided in terms of constitutional aspirations and goals. Ultimate ends can be traced back to current status and the history behind the enactment of the preamble of the Indian Constitution. They are justice, liberty, equality and fraternity, which further strive to establish a sovereign, socialist, secular, republic and democratic nation. In order to achieve these ultimate goals, the constitutional text lays down specific ends.<sup>41</sup> They are complementary to the ultimate ends. Specific ends are fundamental rights and socio-economic rights incorporated under Part III and Part IV of the Constitution, respectively. For instance, Article 38, as a specific end, states that the State shall endeavor to overcome the concentration of wealth.<sup>42</sup> Other specific ends include elimination of poverty, gender discrimination, caste discrimination, safeguarding of labour rights, etc. All these specific ends converge together to form ultimate ends. For the attainment of the above-mentioned ends, the constitution provides the means. Means are structures or mechanisms in the form of legislature, executive and judiciary that perform the task of realizing constitutional ends.<sup>43</sup> On similar lines, the South African Constitution has also been moulded on the basic tenets of rule of law, judicial independence and constitutional democracy.<sup>44</sup> Rule of law has been firmly established

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Review and Separation of Powers have been held as basic structure of the Constitution.

<sup>40</sup> SUJIT CHOUDHRY, MADHAV KHOSLA, PRATAP BHANU MEHTA (EDS.), THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION (Oxford University Press, 2016).

<sup>41</sup> See, INDIA CONST., Preamble.

<sup>42</sup> Article 38: State to secure a social order for the promotion of welfare of the people.

<sup>43</sup> Supra n. 40

<sup>44</sup> Stephen Ellmann, *The Struggle for the Rule of Law in South Africa*, 60 N.Y. L. Sch. L. Rev. 57 (2015-2016).

as a guiding principle for the courts in South Africa through various judgments over a period of time.<sup>45</sup>

The constitutional framework of any given state is often presented and seen as a scheme of power-sharing or power-balancing between branches of government, or as a theoretical account for ensuring the separation of powers. The concept of judicial review more generally, then, seems to be challenging to the notion of parliamentary sovereignty. When judicial review posits an explicit disagreement or a constitutional debate regarding the compatibility of laws with constitutional provisions and affirmed principles, the courts can then be said to be factually undermining the sovereign authority of the elected branches.<sup>46</sup> In other words, judicial review can be understood as a mechanism with which unelected courts intervene with the basic principles of parliamentary democracy.<sup>47</sup> But, it is often understood to be constitutionally justified in the pretext of checks and balances, because, as it is often understood, separation of powers doesn't entail strict separation but somehow depends on the distribution of functions. If judicial review is understood broadly enough, as a mechanism through which the courts challenge the sovereign authority of the elected branches, we

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<sup>45</sup>Masethla v. President of the Republic of South Africa, 2008 1 BCLR 1 (CC). Also see, United Democratic Movement v. President of the Republic of South Africa, 2002 11 BCLR 1179 (CC); Port Elizabeth Municipality v. Various Occupiers, 2004 12 BCLR 1268 (CC), Fedsure Life Assurance Ltd v. Greater Johannesburg Transitional Metropolitan Council, 1998 12 BCLR 1458 (CC).

<sup>46</sup> See, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). Also see, A K Gopalan v. State of Madras, AIR 1950 SC 27; In Re: The Ex Parte Application Of: The President Of The Republic Of First Applicant South Africa, 2000 (2) SA 674 (CC), Case CCT 31/99. Also see, Du Plessis, Max, *The Legitimacy of Judicial Review in South Africa's New Constitutional Dispensation: Insights from the Canadian Experience*, 33 *The Comparative and International Law Journal of Southern Africa*, 227–247 (2000).

<sup>47</sup> See, In Re: The Ex Parte Application of: The President Of The Republic Of First Applicant South Africa, 2000 (2) SA 674 (CC).

can, for the purposes of political constitutional theory, discern a number of ways in which the intervention takes place in different constitutional jurisdictions around the world. From this point of view of constitutional theory, these arrangements are, however, political in only a limited way because the judiciary still has to exercise its authority within the prescribed constituted limits.<sup>48</sup>

The attempt to strike a balance between authoritarianism, anarchy and discrimination, on the one hand, and tyranny and inequality, on the other, is a key preoccupation and ultimate goal of constitutional ethos, and is at the core of constitutionalism. The primary function of the constitution is to strike this balance by establishing limitations and boundaries for the exercise of power by the state and its related agencies in a manner that ensures that the government is neither too weak nor too despotic in its operation.<sup>49</sup> As discussed earlier, in this manner, the constitutions create state institutions, allocate powers and, most importantly, define the limits of the powers of state entities.<sup>50</sup> In this sense, constitutionalism is the notion of limited government by law. It posits that it is possible and, indeed, desirable, that government should be limited by law, with the constitution being the supreme law.<sup>51</sup> As already discussed, broadly speaking, constitutionalism encompasses a number of elements such as the protection of fundamental rights and freedoms, the concept of separation of powers, independence of the judiciary and judicial review with respect to constitutional validity of

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<sup>48</sup> See, Entin, Jonathan L., *Separation of Powers, the Political Branches, and the Limits of Judicial Review*, Faculty Publications, 367 (1990). Samuel Issacharoff, *Democracy and Collective Decision-Making*, 6 I•CON, 231–266 (2008).

<sup>49</sup> See, Eric Kibet and Charles Fombad, *Transformative Constitutionalism and the Adjudication of Constitutional Rights in Africa*, 17 Afr. Hum. Rights Law Journal (2017).

<sup>50</sup> *Supra* n. 48.

<sup>51</sup> See, Patrick M. Garry, *Liberty through Limits: The Bill of Rights as Limited Government Provisions*, 62 SMU L. Rev. 1745 (2009).

legislative, executive and administrative actions. However, there is no guarantee that these elements automatically guarantee constitutionalism.<sup>52</sup> A mechanism through which citizens can seek redressal and assert their fundamental rights in courts for constitutional violations and to enforce constitutional obligations is necessary to ensure constitutional justice.<sup>53</sup> In this regard, Okoth-Ogendo adds that constitutionalism also entails a culture or commitment by the political elite to respect and abide by constitutional limits, since it is possible, in his words, to have constitutions without constitutionalism.<sup>54</sup>

Constitutions are often based on internal and external goals which are provided within the constitutional design, inclusive of certain key facets like- (a) rule of law; (b) fundamental rights; (c) democracy; (d) separation of powers; (e) judicial review; and (f) judicial independence. Based on these fundamental premises of constitutional governance as discussed above, the constitutions also entail certain aspect of underlying aspirations and commitments toward achievement of a social order and to use this basic fundamental document as a source of bringing about and

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<sup>52</sup> See, Qianfan Zhang, *A constitution without constitutionalism? The paths of constitutional development in China*, Volume 8, Issue 4, *International Journal of Constitutional Law*, 950–976 (2010); Olasunkanmi A. *Constitution without constitutionalism: interrogating the Africa experience*, 2(5) *Art Human Open Acc J.*, 272-276 (2018).

<sup>53</sup> See, Sandra Liebenberg, *Human Development And Human Rights South African Country Study*, Human Development Report 2000 (Apr. 10, 2021, 10:00 a.m.), <https://core.ac.uk/download/pdf/6248724.pdf> See, *Smt. Ujjam Bai v. State of U.P.*, (1963) 1 S.C.R. 778.

<sup>54</sup> Okoth-Ogendo, H. W. O., *Constitutions without Constitutionalism: Reflections on an African Political Paradox*, in DOUGLAS GREENBERG ET AL. (EDS), *CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD* (Oxford and New York: Oxford University Press, 1993).

establishing a just and equal society.<sup>55</sup> To illustrate, one of the key features of the South African Constitution is its commitment to break from the shackles of old order which was understood to be based on the premises of inequality and unjustness, and to establish a new order on the grounds of social, economic and political justice.<sup>56</sup>

This takes us to the need for analysing the concept of transformative constitutionalism. In a work titled *Legal Culture and Transformative Constitutionalism*, Prof. Karl Klare paved way for much debate and discussion regarding transformative constitutionalism. Prof. Klare described South African Constitution as “transformative” in the following way:

*“...long-term project of constitutional enactment, interpretation, and enforcement committed to transforming a country’s political and social institutions and power relationships in a democratic, participatory and egalitarian direction.”<sup>57</sup>*

Justice SM Mbenenge, notably during one of his public lecture delivered in 2018 remarked on Prof. Klare’s definition of transformative constitutionalism stating that:

*“...this definition makes judges, other functionaries and institutions, role-players in transformative constitutionalism. Indeed, judges are custodians of constitutional values such as human dignity, equality and freedom, and bear the obligation to ensure that constitutional provisions are*

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<sup>55</sup> Also see, D Davis, *Adjudicating the Socio-Economic Rights in South African Constitution: Towards “Deference Lite?”* 22 SAJHR 301 (2006).

<sup>56</sup> Also see, OSCAR VILHENA ET AL. EDS., *TRANSFORMATIVE CONSTITUTIONALISM: COMPARING THE APEX COURTS OF BRAZIL, INDIA AND SOUTH AFRICA* (2013).

<sup>57</sup> KE Klare, *Legal Culture and Transformative Constitutionalism*, 14 SAJHR 146 (1998). Van Der Walt, *Tentative Urgency: Sensitivity for the Paradoxes of Stability and Change in the Social Transformation Decisions of the Constitutional Court*, 16 SAPL 1 1-27 (2001).

*applied in ways that 'improve the quality of life of all citizens and free the potential of each person.'*<sup>58</sup>

In pretext of South Africa, the desire to remedy and undo the apartheid-era historical wrongs played an important part in embracing the idea of transformational constitutionalism. In the words of Justice Langa:

*"...this is a magnificent goal for a Constitution: to heal the wounds of the past and guide us to a better future. For me, this is the core idea of transformative constitutionalism: that we must change."*<sup>59</sup>

Further, the transformative power of the constitution, however, is not just viewed as a means to correct historical wrongs, as explained by Justice Langa, the end-goal for transformative constitutionalism is to achieve a more equitable future, beyond mere course correction.<sup>60</sup>

The Indian Supreme Court while dealing with the constitutional validity of Section 497, Indian Penal Code, 1860, which treats men

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<sup>58</sup> Justice SM Mbenenge, *Transformative Constitutionalism: A Judicial Perspective from the Eastern Cape*, *Speculum Juris*, 32(1) University of Fort Hare (2018).

<sup>59</sup> M Pieterse, *What Do We Mean When We Talk about Transformative Constitutionalism?* 20 *SAPL* 155 155-166 (2005); AJ Van Der Walt, *Legal History, Legal Culture and Transformation in a Constitutional Democracy*, 12 *Fundamina* 1 1-47 (2006); S Liebenberg, *Needs, Rights and Transformation: Adjudicating Social Rights*, 17 *Stell LR* 5 5-36 (2006); P Langa, *Transformative Constitutionalism*, 17 *Stell LR* 351 351-360 (2006); S LIEBENBERG, *SOCIO-ECONOMIC RIGHTS: ADJUDICATION UNDER A TRANSFORMATIVE CONSTITUTION* 23-78 (2010).

<sup>60</sup> Justice Pius Langa, *Transformative Constitutionalism*, 17 *Stell LR* 351 (2006). Justice Langa remarked that "...transformation is not a temporary phenomenon that ends when we all have equal access to resources and basic services and when lawyers and judges embrace a culture of justification. Transformation is a permanent ideal, a way of looking at the world that creates a space in which dialogue and contestation are truly possible, in which new ways of being are constantly explored and created, accepted and rejected and in which change is unpredictable but the idea of change is constant".

and women unequally in respect to prosecution of adultery, has also elaborated that:

*“The hallmark of a truly transformative constitution is that it promotes societal change.<sup>61</sup> Further, constitutional values infuse the letter of the law with meaning. True to its transformative vision, the text of the constitution has, time and again, been interpreted to challenge hegemonic structures of power and secure the values of dignity and equality for its citizens.”<sup>62</sup>*

### III. JUDICIAL APPROACHES TO TRANSFORMATIVE CONSTITUTIONALISM IN SOUTH AFRICA AND INDIA

The origin of transformative constitutionalism can be traced to post-apartheid South Africa.<sup>63</sup> Scholars have traced the core of transformative constitutionalism to the preamble of the Constitution of South Africa, which reads:

*“A historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.”<sup>64</sup>*

As far as meaning of the term transformative constitutionalism is concerned, there is no uniform definition, however, one thing which is clear is that the concept of transformative constitutionalism is not merely confined to the South African Constitution.<sup>65</sup> While

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<sup>61</sup>Joseph Shine v. Union of India, 2018 SCC OnLine SC 1676.

<sup>62</sup>*Id.*

<sup>63</sup>Fabrice Tambe Endoh, *Democratic Constitutionalism in Post-Apartheid South Africa: The Interim Constitution Revisited*, 7(1) *Africa Review*, 67-79 (2010).

<sup>64</sup>See, Preamble, The Constitution of the Republic of South Africa, 1996.

<sup>65</sup>See, Michaela Hailbronner, *Transformative Constitutionalism: Not Only in the Global South*, 65 *The American Journal of Comparative Law*, 527-565 (2017); To begin with, transformative constitutionalism is not a project geared only, or even mainly, to combating poverty, even though this is a prevalent theme in many Southern jurisdictions. Transformative constitutions cherish a broader emancipatory

transformative constitutionalism, with regard to its meaning, continues to draw debates in the face of different experiences with respect to constitutional working across the world, key elements that define or differentiates transformative constitutionalism in its operation are the central role of the State, including the courts, in fulfilling the project of emancipation and constant development of the constitutional ideals based on liberty, equality and fraternity.<sup>66</sup> It is these principles on which the society must sustain itself and the State must play an active role in constituting a society based on those principles. In India, the principle has been propounded at various given instances. Reflecting on the need to interpret the Constitution as a transformative document, Justice Krishna Iyer, in *Akhil Bharatiya Soshit Karamchari Sangh v. Union of India*, voiced the need for considering the aspirations, ethos and frustrations of the people who are socially disadvantaged, while interpreting the constitution.<sup>67</sup> Dr B.R. Ambedkar, emphasising on the need of liberty, equality and fraternity, remarked that there is a need for making a political democracy into social democracy. He added that political

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project, which attributes a key role to the state in pursuing change. As a result, transformative constitutionalism as a legal concept is not a distinctive feature of Southern societies, but part of a broader global trend toward more expansive constitutions which encompass positive and socioeconomic rights and which no longer view private relationships as outside constitutional bounds.

<sup>66</sup>See generally, OSCAR VILHENA ET AL. EDS., TRANSFORMATIVE CONSTITUTIONALISM: COMPARING THE APEX COURTS OF BRAZIL, INDIA AND SOUTH AFRICA (2013).

<sup>67</sup> See, *Akhil Bharatiya Soshit Karamchari Sangh v. Union of India*, AIR 1981 SC 298; The authentic voice of our culture, voiced by all the great builders of modern India, stood for abolition of the hardships of the pariah, the mlecha, the bonded labor, the hungry, hard-working half-slave, whose liberation was integral to our independence. To interpret the Constitution rightly we must understand the people for whom it is made – the finer ethos, the frustrations, the aspirations, the parameters set by the Constitution for the principled solution of social disabilities.

democracy cannot survive unless, social democracy is at its core.<sup>68</sup> Chief Justice Langa, in his analysis of the definition of transformative constitutionalism, remarked that the meaning of transformation in juridical terms is as highly contested as it is difficult to formulate. It is perhaps in keeping with the spirit of transformation that there is no single stable understanding of transformative constitutionalism.<sup>69</sup> In terms of the understanding co-related to the idea of transformative constitutionalism, indeed, judges are custodians of constitutional values such as human dignity, equality and freedom, and bear the obligation to ensure that constitutional provisions are applied in ways that “improve the quality of life of all citizens and free the potential of each person.”<sup>70</sup>

Highlighting the relevance of purposive construction of bill of rights in the matter of *Nyamakazi v. President of Bophuthatswana*, the court stated that it is relevant for the courts to take into account various factors other than mere legal rules, thereby recognising that the courts have to be conscious of the impact of the judgment on the existing legal framework.<sup>71</sup>

It is widely acknowledged that both the Indian and the South African Constitutions are progressive and transformative in

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<sup>68</sup>Murlidhar Dayandeo Kesekar v. Vishwanath Pandu Barde, 1995(2) SCR 260; Granville Austin in his “The Indian Constitution’s Seamless Web”, Lecture in Rajiv Gandhi Institute for Contemporary Studies, stated that the founding fathers of the Constitution raised three grand goals for India in the Constitution : (i) Achieving a more equitable society through a transformation they called a social revolution; (ii) Preserving and enhancing national unity and integrity; and (iii) Establishing the spirit as well as the institutions of democracy.

<sup>69</sup> Justice Pius Langa, *Transformative Constitutionalism*, 17 Stellenbosch L. Rev. 351 (2006).

<sup>70</sup>Also see, L Siyo and JC Mubangizi, *The Independence of South African Judges: A Constitutional and Legislative Perspective*, PER Vol.18 N.4 Potchefstroom ( 2015).

<sup>71</sup> See, *Nyamakazi v. President of Bophuthatswana*, 1996 (4) SA 965 (NMS).

character and its aspirations.<sup>72</sup> As the supreme law, the foremost purpose of South African Constitution has been to regulate public power and to frame “an objective, normative value system” in a post-apartheid society.<sup>73</sup> All state actions in pursuance of constitutionally recognised power must conform to its provisions, failing which it is invalid. This system of normative values seeks to fulfil a constitutional imperative to remedy a country’s past and “transform the society into one in which there will be human dignity, freedom and equality”.<sup>74</sup> Similarly, the Indian Constitution seeks to achieve an egalitarian society based on the fundamental ethos of justice, equality and assurance of basic fundamental rights and dignity to an individual.<sup>75</sup> The courts in both South Africa and India have been pivotal in the ever-expanding horizons of basic human rights assured under the constitutional framework. The idea of judicial review and its impact on the expanding powers of the courts in light of judicial activism has been one of the triggering objectives

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<sup>72</sup>Also see, OSCAR VILHENA ET AL. EDS, TRANSFORMATIVE CONSTITUTIONALISM: COMPARING THE APEX COURTS OF BRAZIL, INDIA AND SOUTH AFRICA (2013).

<sup>73</sup> See, *Carmichele v. Minister of Safety and Security* 2001 4 SA 938 (CC) para 54. Also see, Adelman, Sammy, *Some Prospects and Problems of a Post-Apartheid Constitution for South Africa*, 8(6) *Third World Legal Studies* (1989).

<sup>74</sup> Also see, Roberts, Margaret, *The Ending of Apartheid: Shifting Inequalities in South Africa*, 79(1) *Geography*, 53–64 (1994). Hinds, Lennox S., *Apartheid in South Africa and the Universal Declaration of Human Rights*, 24 *Crime and Social Justice*, 5–43 (1985).

<sup>75</sup> See, *Francis Coralie Mullin v. Delhi Administrator*, AIR 1981 SC 746 (India). In *E P Royappa v. State of Tamil Nadu*, AIR 1974 SC 555 (India), the Supreme Court stated “Equality is a dynamic concept with many aspects and dimensions and it cannot be “cribbed cabined and confined” within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch.”

and ideologies governing transformative constitutionalism in both the countries.<sup>76</sup>

The South African Constitution embraces the notions of participatory democracy, affirmations with respect to social, and economic equality, protection of culture, and ensuring openness, and transparency in the operation of the government. As Karl Klare points out, the South African Constitution is in sharp contrast with the classical liberal documents as is traditionally understood.<sup>77</sup> The explanation provides an explicit characterisation of the South African Constitution as transformative, from a political, economic and social perspective. Further, Marius Pieterse has also described the South African Constitution as an essentially social-democratic model, and to be quite distinct from the traditional, liberal model of constitutionalism, and then linked this understanding to aspects, which make the constitution transformative.<sup>78</sup> It has been pointed out by Pieterse that the South African Constitution mandates the achievement of substantive equality and social justice, which involves remedial measures which are fundamental to address the entrenched structures of past oppression by remedying them. Further, the ends are supported by inclusion of 'Bill of Rights' in case of South African Constitution, which supports the legalisation of civil, political, social and economic rights.<sup>79</sup>

Firstly, the South African Constitution mandates the achievement of equality and social justice through the concept of substantive equality, which involves a contextual approach to discrimination and requires remedial measures designed to rectify

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<sup>76</sup> Supra n. 12.

<sup>77</sup> Supra n. 57. The South African Constitution is social, redistributive, caring, positive, at least partly horizontal, participatory, multicultural, and self-conscious about its historical setting and transformative role and mission.

<sup>78</sup> M Pieterse, *What Do We Mean When We Talk about Transformative Constitutionalism?* 20 SAFL 155 155-166 (2005).

<sup>79</sup>*Id.*

the destructive effects of entrenched structures of past oppression. The achievement of substantive equality also necessitates that the material consequences of social and economic subjugation be addressed, which is analogous to the inclusion of 'Fundamental Rights' and 'Directive Principles of State Policy' in case of Indian Constitution.<sup>80</sup>

Socio-economic rights based on the premises of justice have been increasingly used as a tool in constitutional litigation and asserting government's obligations to secure for all members of society, a set of social goods – education, social security, health care, food, water, shelter, access to land and housing.<sup>81</sup> Justiciable socio-economic rights assist in monitoring the State's progressive realisation of its constitutional obligations to the poor, and ultimately holding the state accountable to these obligations.<sup>82</sup> Also, the achievement of political and socio-economic transformation requires a collaboration from the legislature, the executive, the judiciary and all organs of State are all bound by constitutional principles and are obliged to "respect, protect, promote and fulfil" its mandates. This collaborative enterprise is not only an obligation upon the State, but also upon non-State actors.<sup>83</sup>

An analysis of recent decisions of Apex constitutional courts in South Africa and India, can easily bring forth and suggest that constitutions can be interpreted to have a transformed society which is far away from past discrimination and inequality. In India, the

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<sup>80</sup> Supra n. 56.

<sup>81</sup> S Liebenberg, *Needs, Rights and Transformation: Adjudicating Social Rights*, 17 Stell LR 5 5-36 (2006); P Langa, *Transformative Constitutionalism*, 17 Stell LR 351 351-360 (2006); S LIEBENBERG, SOCIO-ECONOMIC RIGHTS: ADJUDICATION UNDER A TRANSFORMATIVE CONSTITUTION 23-78 (2010).

<sup>82</sup> Supra n. 24.

<sup>83</sup> See, Solange Rosa, *Transformative Constitutionalism in a Democratic Developmental State*, (Apr 11, 2021, 10:30 a.m.), <https://core.ac.uk/download/pdf/188223973.pdf>.

Supreme Court has presumed the role of *sentinel on the qui vive*<sup>84</sup> and has been heavily considered as an activist judiciary. Certain decisions of the Supreme Court have acted as a positive catalyst to bring forward and realise the aspirations of the people of the country.<sup>85</sup> In case of *NALSA v. Union of India*,<sup>86</sup> the Supreme Court, recognising the agony, pain and trauma of transgender community, recognised their right to self-determination and guaranteed and affirmed their rights under Arts. 14, 19 and 21 of the Constitution of India. In yet another case relating to decriminalisation of S. 377 of Indian Penal Code, the Supreme Court of India decriminalised voluntary sexual intercourse among same-sex couple.<sup>87</sup> Further, in *Indian Young Lawyers Association v. State of Kerala*, dealing with the prohibition imposed on women of menstruating age from entering into the temple premises, the Supreme Court of India struck down the prohibition on entry of women of menstruating age in Sabarimala Temple in Kerala, on the grounds of it being violative of fundamental rights of an individual.<sup>88</sup> In the judgment Justice D.Y. Chandrachud, offered a vision of the constitution as being transformative in character, in setting up independent institutions of governance and granting the promise of full citizenship to those hitherto deprived and marginalized.<sup>89</sup> In *Justice K S Puttaswamy v. Union of India*, the court affirmed right to privacy as a fundamental right.<sup>90</sup> In *Harsh Mander v. Union of India*, the Delhi High Court decriminalized begging, by declaring several provisions of the Anti-

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<sup>84</sup>State of Madras v. V G Row, AIR 1952 SC 196.

<sup>85</sup>Justice K S Puttaswamy v. Union of India, (2017) 10 SCC 1 (India).

<sup>86</sup>NALSA v. Union of India, AIR 2014 SC 1863 (India).

<sup>87</sup>Navtej Singh Johar & Others v. Union of India, (2016) 7 SCC 485 (India).

<sup>88</sup>Indian Young Lawyers Association v. State of Kerala, 2018 SCC Online SC 1690 (India).

<sup>89</sup>*Id.*

<sup>90</sup>Supra n. 85.

Beggary Act as unconstitutional.<sup>91</sup> Similarly, as stated above, the Supreme Court has played a pivotal role in establishing and expanding jurisprudence related to human dignity, gender justice, environmental justice, affirmative action, education, among other fundamental rights and freedoms guaranteed under the Indian Constitution.<sup>92</sup>

On similar lines, the Constitutional Court of South Africa has also played an important role in laying down and protecting the fundamental human rights entrenched through Bill of Rights in the Constitution. The Court has asserted the relevance of right to life, human dignity, equality and protection against discrimination, right to housing, health care, education, social services among others to establish a constitutional framework in consonance with the basic human right guarantee.<sup>93</sup>

#### IV. CONCLUSION

With the increase in the powers of the State over a period of time, assertion of limitations and affirmation of obligations have become more important than ever. Judicial branch which was traditionally understood to only interpret laws, has now achieved a centre stage

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<sup>91</sup>Harsh Mander v. Union of India, 2018 SCC OnLine Del 10427 (India).

<sup>92</sup> Also see cases like B K Pavitra v. Union of India, (2017) 4 SCC 620 (India), Gita Hariharan v. RBI, Writ Petition (C ) No. 1016 of 1991 (India), M C Mehta v. Union of India, AIR 1987 SC 1086 (India), Vellore Citizens Welfare Forum v. Union of India, AIR 1996 SC 2715 (India), Unnikrishnan v. State of Andhra Pradesh, AIR 1993 SC 217 (India), Madhu Kishwar v. State of Bihar, (1986) 5 SCC 125 (India), Common Cause v. Union of India, 1996 (4) SCC 33 (India).

<sup>93</sup>See, S v. Makwanyane, 1995 (3) SA 391 (CC); Hoffman v. South African Airways, 2001 (1) SA 1 (CC); National Coalition for Gay and Lesbian Equality v. Minister of Justice, 1999 (1) SA 6 (CC), Government of the RSA v. Grootboom and Others, 2001 (1) SA 46 (CC), Soobramoney v. Minister of Health (Kwazulu-Natal), 1998 (1) SA 765 (CC), Section 27 and Others v. Minister of Education and Another, (2012) ZAGPPHC 114.

in the development of constitutional morality and ensuring constitutional justice. State being the creature of the constitution has a limited power and is a medium to bring about effective transformation in the society. Transformative constitutionalism has undoubtedly been seen as an effective tool for undertaking emancipation and eradicating evils like inequality and disparities existing in the society. The courts in South Africa and India, have very well assumed the role for effectuating the changes and bringing forth a more equal, just and orderly society. Having a more realistic touch, in form of substance and element, transformative constitutionalism can very well be utilised to achieve constitutionally guaranteed aspiration. Recent developments have showcased that having elements of transformative constitutionalism also asserts certain basic fundamental tenets like judicial review and judicial independence. It has been very successfully utilised to bring about radical changes with respect to assertion and recognition of rights related to LGBTQ group, women's rights, rights related to marginalised groups and affirmative action, establishing order against various forms of discrimination including gender and racial discrimination, harassment, cruelty, torture and protection against capricious and whimsical actions undertaken by State entities. Thus, transformative constitutionalism can be utilised to interpret constitution as an instrument to reconstitute society by bringing about positive civil, economic and social changes in the society.

## PROMOTERS ENRICHMENT IN THE GARB OF RELATED PARTY TRANSACTION IN INDIA

- Kaushiki Brahma\*

### ABSTRACT

*The concerns of abusive related party transactions arise when there is siphoning of funds or diversion of a company's resources for fraudulent transactions. The abusive transaction represents potential expropriation of resources of the corporation by the controlling shareholders for personal enrichments and which might squeeze out the minority's profit. There has been a global financial crisis because of poor deals of related party transactions. The regulators have strengthened laws to prevent such abusive related parties' transactions by implementing monitoring and disclosure requirements procedures through boards' approval, independent directors' involvement, audit committee supervision. Despite such legislation, there have been financial scams because of the abusive related party transactions for misuse of power in promoter-controlled companies. Recently corporate governance lapses in big blue-chip companies in India like IL&FS (Promoters' stake: 50.42%), Indigo Airlines (Promoters' stake: 74.86%), Fortis Health Care (Promoters' stake: 45.15%) and, Ricoh (Promoters' stake: 73.6%) raised major concerns about related party transactions for manipulating earnings and looting companies in India. The family-owned companies in India guided by their religions and shared values have dominance in controlling the affairs of the companies as they organize themselves to base their decisions on trust. There is a need for an effective legal framework while a company engages in related party transactions with promoter-controlled shareholders or block holders or interested directors in concentrated ownership structures. This paper seeks to examine the recent corporate governance lapses because of abusive related*

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*party transactions in listed companies after enactment of SEBI (Listing Obligations Disclosure Requirements), Regulations 2015, which facilitated abusive related party transactions and analyze the legislative gaps for regulatory reforms.*

**Keywords:** Related Party Transactions, Ownership Structures, Promoter, Family-owned Companies

## I. INTRODUCTION

Related party transactions (“RPTs”) have received considerable attention globally and in India. Earlier Enron, Adelphia and Parmalat scams threw light on the risks of abusive related party transactions that emerged as a tool for financial frauds<sup>1</sup>. There have been various research where RPTs have been positively associated with corporate scams<sup>2</sup>. The related party transactions are abusive when the dominant shareholders expropriate the minority shareholders by selling assets at a reduced price, giving loans without security, borrowing at high-interest rate than the market rate, repayment of loans of controlling shareholders, etc.<sup>3</sup> Abusive RPTs provide opportunities to extract resources from listed companies<sup>4</sup> decreasing minority shareholders’ wealth. RPTs are common in the Asian<sup>5</sup> countries due to concentrated ownership structures and concerns around dominating shareholders to expropriate minority shareholders<sup>6</sup>. In Indian companies, the ownership structures are characterized by promoters (founders or controlling owners) and non-promoters (minority shareholders).

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<sup>1</sup> Carla C.J.M. Millar et al., *Corporate governance and institutional transparency in emerging markets*, 59 J. BUS. ETHICS 163–174 (2005).

<sup>2</sup> Moataz El-Helaly, *Related-party transactions: a review of the regulation, governance and auditing literature*, 33 MANAG. AUDIT. J. 779–806 (2018).

<sup>3</sup> David E. Weinstein & Yishay Yafeh, *On the costs of a bank-centered financial system: Evidence from the changing main bank relations in Japan*, 53 J. FINANCE 635–672 (1998).

<sup>4</sup> SIMON JOHNSON ET AL., *Tunnelling* (2000), <https://www.nber.org/papers/w7523.pdf> (last visited Aug 2, 2019).

<sup>5</sup> OECD CAUTIONARY TALES FOR INVESTORS IN ASIA, <https://www.cfainstitute.org/-/media/documents/article/position-paper/related-party-transactions-cautionary-tales-for-investors-in-asia.ashx>. (January 2009).

<sup>6</sup> Elizabeth A Gordon, Elaine Henry & Darius Palia, *RELATED PARTY TRANSACTIONS AND CORPORATE GOVERNANCE* (2004), [www.sec.gov](http://www.sec.gov) (last visited May 21, 2019). Elizabeth A Gordon & Elaine Henry, *Related Party Transactions and Earnings Management Article in SSRN Electronic Journal* (2005).

RPTs are more prevalent in India because most of the companies are promoter controlled and family businesses<sup>7</sup>. There has been predominance<sup>8</sup> of business group structure or pyramid companies<sup>9</sup>. Abusive related party transaction in India represents potential expropriation of resources of the company by the promoters for private benefits.

For emerging markets like India RPTs are considered beneficial as it reduces the transaction costs<sup>10</sup> through intragroup finance<sup>11</sup>. In, group or pyramid companies the sister firms finance within themselves being part of the same group of companies. The concerns of abusive related party transactions arise when there is siphoning of funds or diversion of a company's resources for fraudulent transactions<sup>12</sup>. RPTs misrepresent company's performance in group companies or divert free cash flow<sup>13</sup> by transferring the investment capital of companies with strong growth potential to companies with weak potential<sup>14</sup>. The conflict of theory<sup>15</sup> assumes RPTs are carried out for self-dealings of directors and efficient transaction theory consider RPTs as sound economic exchanges. To avoid conflict of interest there have been monitoring and disclosure requirements to

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<sup>7</sup> OECD OWNERSHIP STRUCTURE OF LISTED COMPANIES IN INDIA, (2020).

<sup>8</sup> JAYATI SARKAR, *Ownership and Corporate Governance in Indian Firms*, [https://www.nseindia.com/research/content/CG\\_9.pdf](https://www.nseindia.com/research/content/CG_9.pdf).

<sup>9</sup> Rafael La Porta et al., *Investor protection and corporate governance*, 58 J. FINANC. ECON. 3–27 (2000).

<sup>10</sup> Bjorn N. Jorgensen & Julia Morley, *Discussion of "Are Related Party Transactions Red Flags?"*, 34 CONTEMP. ACCOUNT. RES. 929–939 (2017).

<sup>11</sup> Tarun Khanna & Krishna Palepu, *Is Group Affiliation Profitable in Emerging Markets? An Analysis of Diversified Indian Business Groups*, 55 J. FINANCE 867–891 (2000).

<sup>12</sup> ELAINE HENRY ET AL., *The Role of Related Party Transactions in Fraudulent Financial Reporting*, 4 SSRN (2007).

<sup>13</sup> Gordon and Henry, *supra* note 6.

<sup>14</sup> Soo Jin Kim, Woojin Kim & Dong Ryung Yang, *Infant firms in emerging market: An analysis of stand-alones vs. subsidiaries*, 25 EMERG. MARK. REV. 30–52 (2015).

<sup>15</sup> Gordon, Henry, and Palia, *supra* note 6.

prevent RPTs by including the approval of independent directors, audit committee, shareholders' approval, etc. as monitoring mechanisms<sup>16</sup>.

Due to globalization and foreign investments in multinational corporations, many developing countries including India adopted the Anglo-US model of corporate governance irrespective of different cultural environments and conflicts with a pre-existing corporate governance structure to be recognized globally at par with US and UK. The family-owned companies in India are strongly guided by their religions and shared values in controlling the affairs of the companies as they organize themselves to base their decisions on trust. Despite the implementation of the Anglo-US Model in India where legal provisions are introduced regulating the disclosure of RPTs furthering the principles of transparency, accountability, and fairness there has been a high rate of corporate failures. In recent years there have been significant numbers of frauds relating to abusive related party transactions in India. In 2019, IL&FS<sup>17</sup> involved in fraudulent reporting was found running its operations through a complex web of subsidiary companies. They used such subsidiaries for fund diversion from the parent company by the disbursement of loans from group companies to related parties. Even high profile listed companies like United Spirits, Fortis Healthcare, and Ricoh have involved in related party transactions creating concern among the market regulators and other market participants about the monitoring and audit failures of these transactions. Almost a decade after Satyam Scam post-corporate governance reforms, companies

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<sup>16</sup> *Id.*

<sup>17</sup> Shayan Ghosh, *IL&FS subsidiary served as a loan conduit for group firms, related parties*, (Oct, 18, 2018) <https://www.livemint.com/Companies/eNu511FiNlilxGlbByArPI/ILFS-subsidiary-served-as-a-loan-conduit-for-group-firms-r.html> (last visited Jan 20, 2021).

are still struggling with frauds, misconduct, and noncompliance. In Satyam Scam parent company Satyam Computers involved in fraudulent RPTs with its real estate subsidiary Matyas Infra for diverting funds through inter-corporate investments, advances, and loans in various subsidiary companies.

The effective monitoring of related party transactions has become crucial in India. The present regulatory framework Companies Act, 2013 and SEBI (LODR) Regulation 2015 set various approval, review, and disclosure requirement procedures for monitoring abusive related party transactions in listed companies. In 2018 SEBI (LODR) Regulation 2015 mandated to include promoter/promoter related entities holding more than 20% of the listed company's shareholding within the ambit of related parties. This paper seeks to address the legislative loopholes in the regulation of related party transactions in listed companies in India. The second and third section compares regulatory framework of related party transaction in listed companies under erstwhile Companies Act, 1956 along with allied laws (Government Approval regime) and the present regime (Shareholders' Approval regime) under Companies Act, 2013 along with allied regulations. The fourth section discusses recent SEBI orders where promoters have indulged in personal enrichment through abusive related party transactions. The fifth section highlights gaps in the present legislative framework against abuse of related party transactions and recommends legal reforms to prevent abusive related party transactions. The conclusion summarizes the discussion to have an effective monitoring mechanism rather than just laying down laws and procedures.

## II. REGULATORY FRAMEWORK OF RELATED PARTY TRANSACTION IN LISTED COMPANIES UNDER EARLIER REGIME

Related party transactions possess a high risk of fraud, risks of inappropriate accounting, risk of financial misstatements. The detection of abusive related party transactions is difficult because of complex ownership structures, ineffective assessment of transaction, auditor's failure, etc. The "significant related party transactions" ranks the third most important out of the six opportunity risk factors tested<sup>18</sup>. The law relating to related party transactions has constantly reformed with the inclusion of monitoring and disclosure requirement recommendations from various committees: Bhaba Committee Report 1952, JJ Irani Committee Report 2005, Companies Law Committee Report 2016. The regulatory framework of related party transactions in listed companies under the erstwhile Companies Act, 1956 and Clause 49 of Listing Agreement had lesser monitoring and disclosure mechanism compared to the new Companies Act, 2013 and SEBI (Listing Obligations Disclosure Requirements) Regulations, 2015.

### *A. Erstwhile Companies Act, 1956*

The erstwhile Companies Act, 1956 did not define related party transactions but it incorporated several provisions relating to RPTs. The erstwhile Companies Act, 1956 prescribed Central Governments' approval requirements in certain RPTs like inter-  
corporate loans, loans to directors, etc. Section 295 restricted loans to directors with ex-ante approval of the Central Government. The Central Government approval monitoring mechanism led bureaucrats and politicians to engage in "rent-seeking" behavior,

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<sup>18</sup> T. Jeffrey Wilks & Mark F. Zimbelman, *Decomposition of fraud-risk assessments and auditors' sensitivity to fraud cues*, 21 CONTEMP. ACCOUNT. RES. 719-745 (2004).

which undermined the economic efficiency of RPTs. Section 297 mandated the ex-ante board's approval and Central Governments' approval<sup>19</sup> for contractual arrangements<sup>20</sup> with related parties<sup>21</sup>. Section 297(2) also provided for few exemptions from ex-ante approval of board where sale or purchase are undertaken at prevailing market prices or value of the contract is less than 5,000 rupees and in case of transactions entered in the ordinary course of business by banking or insurance companies. Section 299<sup>22</sup> cast responsibility on directors for disclosure of their interest in relation to contracts with related parties to the board of directors. Section 300 prohibited interested directors in the approval process of related party transactions. Section 370<sup>23</sup> mandated ex-ante approval by special resolution on loans, guarantee or security by lending companies to companies under the same management. The lending companies requires maintenance of the register for disclosure of body corporate under same management, details and details of loans, guarantees or securities provided to such body corporates<sup>24</sup>. The boards' approval procedure to scrutinize RPTs was ineffective as majority of board members in India are dominated by family members.

### *B. Clause 49 of Listing Agreement*

Related Party is not defined under Clause 49 of Listing Agreement. The RPTs undertaken by promoter related entities

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<sup>19</sup> The companies with paid-up capital of more than 1 crore.

<sup>20</sup> Related party transactions were restricted to sale, purchase, supply of goods, services and materials.

<sup>21</sup> Related Parties were confined to directors, firm or a private company in which such director or his relative is a partner or a director.

<sup>22</sup> Section 299(1) of Companies Act, 1956.

<sup>23</sup> Additionally, if the aggregate amount of loans provided to all companies under same management exceeds the prescribed limit, then the lending company has to seek prior approval from Central government.

<sup>24</sup> Section 370(1C)

escaped from the scrutiny under Clause 49. Clause 49 mandates monitoring and disclosure requirements i.e., review of RPTs by the audit committee before boards' approval, statement of the audit committee on significant RPTs, reporting of RPTs, disclosure of related party transactions undertaken in the ordinary course of business before audit committee to the board of directors and suggested disclosure of related party transactions to shareholders. Clause 49 had mandated a detailed assessment of RPTs by the audit committee along with reasons and if such RPTs are undertaken in the ordinary course of business, then the listed entity is required to explain the same. Clause 49 mandated disclosure of material RPT which may have potential conflict with the interest of the company in annual reports. Clause 49 of Listing Agreements lacked adequate disclosures of related party transactions.

### *C. AS 18 Related Party Disclosures*

The Accounting Standards 18<sup>25</sup> ("AS 18") mandated disclosure of RPTs in the financial statements<sup>26</sup>. It also provided for definition of related parties including holding company, subsidiary, associate companies or companies under common control. Apart from this it also included individuals having significant influence, KMP and their relatives along with companies controlled by such individuals within the ambit of related parties. But it excluded companies within the ambit of related parties if they have a common director when such director does not affect policies of both the companies. The disclosure requirements under AS 18 mandated disclosure of the name of related parties, nature of relationship irrespective of

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<sup>25</sup> Accounting Standards 18, ¶ 23.

<sup>26</sup> Listed Companies or companies which are in the process of listing, banks financial institutions and insurance companies, enterprise having turnover more than 50 crores, holding and subsidiary company of any of the companies mentioned above.

whether or not any RPTS has been entered with related parties. It further mandated the listed company to disclose the name of a related party, the nature of RPTs, volume and amount of RPTs. Apart from Accounting Standard 18, Auditing Standard 23 cast duty upon auditors for identification and disclosure of RPTs in the financial statements.

### III. REGULATORY FRAMEWORK OF RPT IN LISTED COMPANIES UNDER NEW REGIME

The removal of ex-ante Central governments' approval for RPTs in the new Companies Act, 2013, was a welcome step to reduce discretionary powers of the Government. The approval regime was shifted from Government based approval to Disinterested Shareholder approval regime as recommended by JJ Irani Committee<sup>27</sup>. The latter approach is best suited, as it allows non-interested shareholders being minority investors to decide whether or not RPTs should be undertaken for the benefit of the company. After Section 188 was notified, a separate section VII was notified under Clause 49 of Listing Agreement for governing RPTs in listed companies. In 2015, SEBI (Listing Obligations Disclosure Requirements) Regulations, 2015 were notified which included regulations relating to RPTs in listed companies.

#### *A. New Companies Act, 2013*

Section 188 of the Companies Act, 2013 dealing with related party transactions was notified on 26<sup>th</sup> March 2014. The Companies Act, 2013 prescribed better internal monitoring and disclosure requirements of the related party transactions through mandated boards' approval, audit committee approval, shareholders' approval in material RPTs and disclosures of RPTs. The definition of related

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<sup>27</sup> J.J. IRANI COMMITTEE REPORT ON COMPANY LAW, 2005

party found its place for the first time under section 2(76) of the new Companies Act, 2013. The definition clause incorporated wider ambit of related parties including Key Managerial Personnel, holding company, subsidiary company, associate company. Section 188 provided for board's approval regarding RPTs within the prescribed limits<sup>28</sup>. It further mandated prior approval of shareholder where amount of RPTs is 10% or more of the turnover or net worth of the company<sup>29</sup>. Section 188 also enumerated broader ambit of related party transactions (lease, avail or render of services, appointment of any agent for sale or purchase of goods, services). Section 188 provides ex-post approval<sup>30</sup> which was not in earlier Act. The disclosure requirements of details of RPTs with related parties in boards' report was also introduced under Companies Act, 2013. It also prescribed penalty for listed company with imprisonment up to 1 year or with fine not less than Rs. 25,000 but which may extend to Rs. 5 lakhs, or with both. Apart from Section 188 there are certain other provisions regulating RPTs. Section 177 of Companies Act, 2013 casts a responsibility on audit committee for approval or modification of RPTs (inter corporate loans or investments). Section 185 prohibits loans to directors unless it is provided as part of service agreement. Section 186 prescribes restrictions on lending company not to make investment through not more than two layers of investment companies.

***B. Clause 49 VII of Listing Agreement and SEBI (LODR)  
Regulations, 2015***

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<sup>28</sup> Section 188 of Companies Act, 2013

<sup>29</sup> Rule 15 of Companies (Meetings of Board and its Powers) Rules, 2014.

<sup>30</sup> Where RPTs has been undertaken by a director or employee without obtaining consent of the board or shareholders, such RPTs can be ratified within three months from the date on which RPTs was entered..

Clause 49 Section VII of Listing Agreement provided for broader ambit of RPTs by including transfer of resources, services, or obligations. It also included additional related parties with its definition such as fellow associates, fellow joint ventures, and all entities under common control of a family. It did not distinguish RPTs undertaken in the ordinary course of business. It had adopted lower percentage ratio materiality, which is generally based on total assets or turnover compared to Section 188 of the Companies Act, 2013. It further mandated all RPTs undertaken by listed issuer whether material or not for audit committee's approval.

After the enactment of new Companies Act, 2013, there was a major shift in corporate governance from voluntary to mandatory approach. Thereafter SEBI (Listing Obligation and Disclosure Requirements) Regulations, 2015 was introduced to replace Clause 49 of Listing Agreements as it dealt extensively with corporate governance matters. The aim of SEBI (LODR) Regulations was to provide ease of reference of one set of regulation for all listed companies of different stock exchanges with common obligations and periodic disclosure requirements. It incorporated the basic principles of corporate governance by mandating independent board composition, audit committee composition, periodic disclosure requirements by listed entities. Despite such legislation, there have been financial scams where abusive related party transactions have been linked to misuse of power in promoter-controlled companies. Thereafter in June 2017 SEBI constituted a specialized committee<sup>31</sup> (Kotak Committee) under the Chairmanship of Mr. Uday Kotak to recommend suitable regulatory changes to enhance the efficiency of corporate governance norms for Indian listed entities. The definition clause of RPTs Regulation 2(zc) include both monetary and non-monetary transactions with a related party.

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<sup>31</sup> SEBI Report of the Committee of Corporate Governance October, 2017

It also further bifurcated the materiality threshold based on RPTs exceeding 10% of the consolidated turnover of the listed entity and a transaction involving payments relating to royalty or brand usage exceeding 5% of consolidated turnover. Regulation 23 mandates for ex-ante audit committee's approval of all RPTs whether or not material. Further for recurring RPTs it provided relaxation by omnibus approval by audit committee. In case of material RPTs the approval requirements by disinterested shareholders are required where no related parties whether interested or not can participate in voting<sup>32</sup>.

### *C. Indian Accounting Standards 24 Related Party Disclosures*

The Indian Accounting Standards 24 provided standards for identification of Related parties, RPTs and disclosures of RPTs unlike the previous Accounting Standards 18 confining to disclosure requirements. For better identification of related parties Ind AS 24 has widened the ambit of relatives of related parties by including children or domestic partner. Key Managerial Person of parent company, Group companies, Associate, or joint venture of a member of a group have been added within the ambit of related parties. The disclosure standards have been modified to a great extent. It has mandated disclosure of KMP compensation in different categories<sup>33</sup>, nature of relationship with related party in different categories<sup>34</sup>, amount of transactions (which was not in AS 18) along with outstanding balances with such related parties.

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<sup>32</sup> Regulation 23 of SEBI (LODR) Regulations, 2015

<sup>33</sup> Ind AS 24 Short-term employee benefits, post employment benefits, termination benefits

<sup>34</sup> Parent, subsidiary, joint entities, associates, joint ventures, KMP and other related parties

#### IV. PROMOTERS PRIVATE BENEFITS & ABUSIVE RELATED PARTY TRANSACTIONS

The agency conflict between controlling and minority shareholders in concentrated ownership structures remains a major challenge in ensuring fair treatment for shareholders. In many companies, controlling shareholders resort to non-arm deals with related parties for private benefit, at the cost of minority shareholders<sup>35</sup>. Such transactions lead to liquidation or bankruptcy of companies. Abusive related party transaction in India represents potential expropriation of resources of the company by the controlling shareholders or promoters for private benefits. Lending or advances to related parties is common way in many developed and developing countries to produce private benefits for controlling shareholders<sup>36</sup>. In the concentrated ownership structure, the controlling shareholders, executive directors, and officers expropriate capital against the interests of minority shareholders. The managers or directors are also the dominant shareholders or shareholders, whereby they enter RPTs by expropriating the rights of minority shareholders. In concentrated ownership structures, it is easier for controlling shareholders to collude with the management to expropriate resources through related party transactions.<sup>37</sup> RPTs are also common in group companies where companies finance within themselves being part of the group companies. RPTs also act as a tool to manage results in group companies or diverting free cash

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<sup>35</sup> Mohammad Tareq et al., *Discriminatory related party transactions: A new measure*, 25 INT. J. ACCOUNT. INF. MANAG. 395–412 (2017).

<sup>36</sup>*Id.*

<sup>37</sup> Andrei Shleifer & Robert W. Vishny, *Large Shareholders and Corporate Control*, 94 J. POLIT. ECON. 461–488 (1986).

flow by transferring the investment capital of companies with strong growth potential to companies with weak potential<sup>38</sup>.

In emerging markets like India with concentrated ownership structure, RPTs face tougher regulatory challenges. Thus, in concentrated ownership structures, the monitoring mechanisms of abusive related party transactions are rendered toothless at the expense of the minority shareholders' interests. For private benefits, the controlling shareholders conduct RPTs against the interests of minorities and communities by intra-group transactions. Recently there have been many corporate frauds because of tunneling in India where companies could circumvent the law and expropriate the wealth for their own benefit. Recent SEBI case studies (See Table No. 1) relating to abusive related party transactions are discussed to highlight the loopholes in the existing regulatory framework of RPTs.

#### *A. United Spirits – Mr. Vijay Mallya*

SEBI passed an order dated June 1, 2018, against United Spirits Limited<sup>39</sup> (USL) (see Table No. 1) for diverting funds to other companies within the UB group (including Kingfisher Airlines) by dubious and concealed financial statements or false books of accounts adversely affecting the minority shareholders. Even Kingfisher Airlines Ltd. involved in paying excess sponsorship money to Force India Formula One Team Ltd (related party of UB

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<sup>38</sup> BERTO USMAN, *Ownership Structures, Control Mechanism and Related Party Transaction: An Empirical Study of the Indonesian Public Listed Companies*, 13 INTERNATIONAL JOURNAL OF ECONOMICS AND MANAGEMENT JOURNAL HOMEPAGE (2019).

<sup>39</sup> SEBI (Order in the matter of United Spirits Limited) , [https://www.sebi.gov.in/enforcement/orders/jun-2018/order-in-the-matter-of-united-spirits-limited\\_39165.html](https://www.sebi.gov.in/enforcement/orders/jun-2018/order-in-the-matter-of-united-spirits-limited_39165.html) (last visited May 21, 2019).

group) without disclosing about the transactions to its lenders and the board of Kingfisher Airlines. SEBI directed United Spirits Limited for recovering the diverted amounts. The modus operandi of fund diversion was by giving trade receivables/advances to distributors or project related entities which disclosed as amounts provided for working capital requirement, lease deposits in the books of accounts of United Spirits Limited. The funds diverted from USL and its subsidiary entity to UB Group companies and Kingfisher Airlines.

***B. Fortis Healthcare Limited & Religare Enterprises Limited - Shivinder Mohan Singh and Malvinder Mohan Singh***

The ultimate beneficiaries of fund diversion in Fortis<sup>40</sup> Healthcare Ltd. were Shri Shivinder Mohan Singh and Shri Malvinder Mohan Singh. The Serious Fraud Investigation Office uncovered the amount of diversion over 2000 crores. SEBI directed an order against Fortis to recover 500 crores from the Singh Brothers for fund diversion to the promoter and promoter related entities via routing through 3 unrelated entities. There have been a series of transactions by RHC Holding Pvt. Limited wherein loans were advanced to Dhillon Family members, entities or their associates controlled by them. There were routing of loans from FHsL to RHC through unrelated entities to divert funds to related party transactions by circumventing Clause 32 of the Listing Agreement and Regulation 53(f) of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 and to misrepresent the transactions in the books of FHsL<sup>41</sup>.

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<sup>40</sup> SEBI (Order in the matter of Fortis Healthcare Limited) , [https://www.sebi.gov.in/enforcement/orders/oct-2018/order-in-the-matter-of-fortis-healthcare-limited\\_40755.html](https://www.sebi.gov.in/enforcement/orders/oct-2018/order-in-the-matter-of-fortis-healthcare-limited_40755.html) (last visited May 21, 2019).

<sup>41</sup> *Id.*

In Religare Enterprises Limited<sup>42</sup> (REL) Rs.2315.09 Crores from Religare Finvest Limited, a subsidiary of listed company (REL) routed funds through various group entities ultimately to benefit the promoters and their related entities. Religare Finvest Limited adopted inefficient credit appraisal methodologies to advance loans to group companies with weak financial standing and about improper practices followed by Religare Finvest Limited's use of accounts of various borrowers to route the funds to group companies.

### *C. DHFL- Kapil Wadhawan and Rakesh Wadhawan*

Kapil Wadhawan and Rakesh Wadhawan, being the Chairman and Managing Director of the DHFL Company<sup>43</sup> for the past several years, were involved in the aforesaid manipulation/ falsification in books of accounts and, thereby, misrepresented to the investors and other stakeholders. In DHFL 23,815 crores disbursed to book entities in the accounts of the Company, out of which only Rs. 11,755.79 crores were actually disbursed. The amount (Rs. 11,755.79 crores), was disbursed to 91 entities, but was shown in the books of the company as comprising 2,60,315 home loan accounts. DHFL had disbursed loans and advances of Rs 24,594 to 65 promoter related entities (weak companies) through current outstanding loans and ICDs (inter-corporate deposits). Loans amounting to Rs 7,000 crore

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<sup>42</sup> SEBI (Order in the matter of Religare Enterprises Limited) , [https://www.sebi.gov.in/enforcement/orders/mar-2019/order-in-the-matter-of-religare-enterprises-limited\\_42363.html](https://www.sebi.gov.in/enforcement/orders/mar-2019/order-in-the-matter-of-religare-enterprises-limited_42363.html) (last visited May 17, 2020).

<sup>43</sup> SEBI (Order in the matter of DHFL) <https://www.sebi.gov.in/enforcement/orders/may-2020/adjudication-order-in-the-matter-of-dewan-housing-finance-corporation-ltd-46735.html> (last visited June 20, 2020).

were not classified as non-performing assets (NPAs) by DHFL despite their non-repayments.

***D. CG Power and Industrial Solutions Limited - Gautam Thappar***

CG Power Company had received the sum of 2185.93 Crore as receivable balances from various Promoter Affiliated Companies and other related parties of the CG Power Company. The funds fraudulently transferred to CG Power Promoter Business (amounting to 1223.80 Crore) i.e., Avantha Holdings and Company-related individuals (Avantha International, Acton, Ballarpur International, Mirabelle and Solaris) without the board or audit committee's approval. SEBI directed CG Power to take all appropriate measures to recover the amounts owed to the Company, which were applied, directly or indirectly, to the entities i.e., Avantha Holdings and Company-related/connected individuals, viz. Avantha International, Acton, Ballarpur International, Mirabelle and Solaris expeditiously recover the required interest. The transactions were purportedly carried out by certain Company personnel (both current and past).

**Table No. 1**

Sl No.	Name of the Company	Year of Fraud	Amount Tunneled	Fund Diversion	Nature of Transaction	Persons involved in tunneling
1	United Spirits Limited (USL)	2010-2013	Rs. 655.55 crores as per PWC-UK report and Rs. 1225.24 crores as	Funds were diverted from USL and its subsidiaries to UB Group Companies (including	Advances for business expansion	Vijay Mallaya (Non-Executive Director of USL), Ashok Kapoor (Managing Director of

**PROMOTERS ENRICHMENT IN THE GARB OF RELATED PARTY  
TRANSACTIONS IN INDIA**

**173**

			per E&Y report	Kingfisher Airlines)		USL) and P.A. Murali (Executive Director and CFO of USL)
2.	Fortis Healthcare Limited (FHL)	2013to 2017	473 crores	FHL through its subsidiary, gave Inter Corporate Deposits given to 3 Indian unrelated companies Best Healthcare Fern Healthcare and Modland Wears Private Limited	Inter Corporate Deposits (Loans)	Malvinder Mohan Singh Executive Chairman, and Dr. Shivinder Mohan Singh, Non-Executive Vice Chairman
3.	Religare Enterprise Limited	2014-2015	2315.09 crores	From Religare Finvest Limited (RFL) subsidiary of REL to promoter related entities	Loans	Shivinder Mohan Singh, Malvinder Mohan Singh (individual shareholders) and Mr. Sunil Godhwani (Chairman & Managing Director) were involved.
4.	DHFL	006 2019	14,000 crores	Loans and advances Rs 24,594 crore had been disbursed with inadequate loan	ICDs (inter-corporate deposits) Loans and advances	Kapil Wadhawan and Rakesh Wadhawan, being the Chairman and

				documentation to related entities.		Managing Director
5.	CG Power and Industrial Solutions Limited	016-17	₹2,439.94 Crore	Unauthorized/unapproved banking transactions in the nature of loans (unauthorized transactions/loans) were diverted from CG Power to its Promoter related Companies	Loans	(Gautam Thappar) Non-Executive Directors, KMPs, etc. RPTs

#### V. RELATED PARTY TRANSACTION- NEED OF EFFECTIVE MONITORING MECHANISM

Regulators take a proactive position to enforce legal regulations to ensure that laws are not just "on the books" rules but are implemented in practice<sup>44</sup>. The monitoring of RPTs involves different mechanism such as board approval, shareholders' approval, voting restrictions on interested directors or stakeholders, evaluation of auditors and independent advisors, mandatory and immediate disclosure criteria, public announcements, etc. Despite existing legal framework, many companies have entered fraudulent transactions through abusive related party transactions, leaving it unnoticed by the minority shareholders and independent directors of the company. The following recommendations drawn from the above SEBI case studies (see Table No. 1) seek to address the minimization of risks associated with abusive RPTs (Promoters'

<sup>44</sup> Navajyoti Samanta, *Transplantation of Anglo-American corporate governance and its impact on financial market growth: a comparative analysis of nineteen developing countries 1995-2014*, 19 CORP. GOV. 884-922 (2019).

personal enrichment) which has led many companies to bankruptcy or liquidations.

### *A. Widening the ambit of Related Party*

In concentrated ownership structures, it's easier for controlling shareholders to collude with the management to expropriate resources through related party transactions.<sup>45</sup> Even the external auditors relying upon the information provided to them fails to identify abusive related party transactions.<sup>46</sup> For monitoring abusive related party transactions, the identification of related parties and actual beneficiary of the transaction are very important. Related parties to the company include material or controlling shareholders, key managerial persons, executive, and non-executive directors, an affiliated group of companies, joint ventures, etc. The definition of a related party under SEBI (LODR) Regulations must include promoters (both as an individual or group entities<sup>47</sup>) irrespective of their shareholding. In United Spirits, Fortis Health Care and Religare Enterprises Limited cases promoters despite holding the position of non-executive directors were involved in fund diversion. The subsidiary of listed issuer (company) must be included within the legislative scrutiny. As majority of listed companies escape from the scrutiny as they undertake abusive RPTs through their subsidiaries. Recently, SEBI's Working Group Report on Related Party Transactions 2020 has also recommended that any person or entity

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<sup>45</sup> Shleifer and Vishny, *supra* note 39.

<sup>46</sup> PADMINI SRINIVASAN, *An Analysis of Related-Party Transactions in India, SSRN (2013)*.

<sup>47</sup> Shastri, K. and Kahle, K.M. (2004), "Executive loans", *Journal of Financial and Quantitative Analysis*, Vol. 39, pp. 791-812.

belonging to a promoter or promoter group be included as a related party, irrespective of shareholding.

### *B. Ultimate Beneficiary of RPTs*

The RPTs undertaken by subsidiaries of listed issuer do not fall under scrutiny under SEBI(LODR) Regulations, 2015. Few companies (Fortis Healthcare Ltd. and Religare Enterprises Ltd.) could circumvent the legislation by routing of funds from unrelated to related parties. These companies through the complex web of companies<sup>48</sup> or floating of unrelated shell companies (owned by employees)<sup>49</sup> could enter transactions which would ultimately benefit the promoters. As the transactions by a listed company with unrelated entities will not fall under the category of RPTS, hence they escaped from the scrutiny of audit committee or shareholders' approval requirements. They transferred the transaction amounts from unrelated to related parties by circumventing the law. Therefore, independent audit committee should examine the ultimate beneficiary of the transaction undertaken by listed issuer or its subsidiaries with unrelated parties. Recently the SEBI Working Group<sup>50</sup> on related party transaction has further recommended enhancing the burden of monitoring related party transaction of the listed issuer and its unlisted subsidiaries by audit committee.

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<sup>48</sup> Chang, S.J. (2003), "Ownership structure, expropriation, and performance of group-affiliated companies in Korea", *Academy of Management Journal*, Vol. 46, pp. 238-276

<sup>49</sup> SEBI (Confirmatory Order in the matter of CG Power and Industrial Solutions Limited) , [https://www.sebi.gov.in/enforcement/orders/mar-2020/confirmatory-order-in-the-matter-of-cg-power-and-industrial-solutions-limited\\_46281.html](https://www.sebi.gov.in/enforcement/orders/mar-2020/confirmatory-order-in-the-matter-of-cg-power-and-industrial-solutions-limited_46281.html) (last visited Jun 6, 2020).

<sup>50</sup> "SEBI Report of the Working Group on Related Party Transactions.", 2020.

### *C. Effective Monitoring and Disclosure Requirements of RPTs*

An informed decision-making process and vetting of RPTs are basic components of governance.<sup>51</sup> RPTs are monitored through various measures such as approval of board, boards' statement on fairness, shareholders' approval, voting restrictions on interested director or interested shareholders, auditors' and independent advisers' appraisal, mandatory and immediate disclosure requirements, public announcements etc. Board approval is majorly followed in many jurisdictions<sup>52</sup> specifically for non-material related party transactions to fasten the process of such transactions. The effective internal monitoring mechanism plays a vital role in scrutinizing RPTs. In many countries like China, South Africa and Brazil board members seek help of lawyers and accountants for examining complex transactions.<sup>53</sup> The transactions are examined by independent experts to determine whether such transactions are in the best interest of the company and its shareholders or not. The controlling shareholders' coalition<sup>54</sup> dilutes the fairness in approval mechanism. To protect minority shareholders from RPTs undertaken listed companies should disclose all material information about RPTs beforehand for shareholders' approval. Few

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<sup>51</sup> Moêz Cherif, *Related Party Transactions and Expropriation of Minority Shareholders: Evidence from Tunisia*, 9 J. BUS. STUD. Q. (2017).

<sup>52</sup> Provisions for board approval are common; two-thirds of jurisdictions surveyed require or recommend board approval of certain types of related party transactions, see OECD CORPORATE GOVERNANCE FACTBOOK 2019, (2019), <https://www.oecd.org/daf/ca/Corporate-Governance-Factbook.pdf> (last visited Jul 2, 2019).

<sup>53</sup> *Id.*

<sup>54</sup> CORPORATE GOVERNANCE, FLEXIBILITY AND PROPORTIONALITY IN CORPORATE GOVERNANCE (2018), [https://www.oecd-ilibrary.org/governance/flexibility-and-proportionality-in-corporate-governance\\_9789264307490-en](https://www.oecd-ilibrary.org/governance/flexibility-and-proportionality-in-corporate-governance_9789264307490-en) (last visited May 27, 2020).

developing countries have adopted stringency in disclosure requirements of RPTs. Brazil, China, and South Africa discloses the decision making by the board of directors for RPTs approval to their shareholders. South Africa also provides detailed notice to shareholders for RPTs (before approval) by the listed issuer or its subsidiaries. Such timely and adequate disclosures will provide minority shareholders a fair opportunity to take an informed decision. The SEBI Working group<sup>55</sup> has also recommended to reduce the materiality threshold to 5% for strengthening the shareholders' approval requirements. Majority of the companies escaped from the purview of material RPTs by undertaking transactions within 10% of consolidated turnover of the company.

## VI. CONCLUSION

To thrive in the international market India needs to have effective corporate governance for robust management. There has been a rise in significant number of frauds relating to abusive related party transactions in India. It has been a concern for failures of corporate governance in the listed companies because of abusive related party transactions due to highly concentrated ownership in India. Despite various legislative changes for effective control procedures for managers to have accountability, transparency in decision making process like independent directors, independent audit committee, CEO duality, etc. in India there have been expropriation of minority shareholders' interests. SEBI has strengthened the legal framework of related party transactions by increasing ambit of related party transactions and protection of minority shareholders' rights in related party transactions. But the monitoring and disclosure mechanism adopted are not effective to curb abusive RPTs. The companies need to have robust internal monitoring mechanisms by

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<sup>55</sup> "SEBI Report of the Working Group on Related Party Transactions.", 2020.

including independent expert opinion on RPTs, justifying RPTs to shareholders for approval requirements for material RPTs, audit committee should provide reasonable justification before approving RPTs. The auditor are required to assess the risks associated with RPTs for scrutinizing the related party transactions. In the UK and Ireland as per ISA 315 and 330 standards require auditors to perform risk assessment procedures and further audit procedures to respond to assessed risks for related party transactions.<sup>56</sup> Because of inadequate internal checking system companies indulge in fraudulent practices<sup>57</sup>. SEBI Regulator should take a proactive position to enforce legal regulations effectively to ensure that laws are not just "on the books" rules but are implemented in practice. The related party transactions should be carried out diligently in listed companies or else the amounts will be diverted from listed companies to other entities for the enrichment of the so-called promoters or the controlling shareholders at the cost of the minority shareholders.

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<sup>56</sup> Massimo Laudato, *The audit of related parties and the application of professional scepticism* | ACCA Global, (2015), <https://www.accaglobal.com/in/en/member/discover/cpd-articles/audit-assurance/related-parties15.html> (last visited May 24, 2019).

<sup>57</sup> HENRY ET AL., *supra* note 12.

## CONFLICT OF LAWS VIS-À-VIS NRI MARRIAGES IN INDIA: AN APPRAISAL

- Dr. Shilpa Jain\* and Simarpreet Kaur Billing\*\*

### ABSTRACT

*The increase in Indian diaspora resulted in an increase in the number of transnational marriages. There are various social, legal and cultural issues that have emerged due to increase in overseas marriages. The cross-border marriages are not problem in itself. It is the lack of specific rules which leaves the issues unresolved especially in matrimonial matters. Due to absence of specific laws or the unavailability of easier remedies under foreign law, the problem is further complicated. Conflict of laws is a branch of law which comes into the picture when a domestic court is faced with the involvement of any foreign element. It has been contended that the conflicts of law rules are still in embryonic stage of development in India.*

*This paper shall investigate the milieu of increase in NRI (Non-Resident Indian) marriages due to globalisation and increase in transnational migration. The main objective of this article is to analyse the conflict of laws issues in NRI marriages. We endeavor to identify the root causes of this problem in this research study. This paper intends to analyse the recommendations provided by various ministries and organisations and put forward solutions to address the emerging societal malaise in the form of NRI marriages in India.*

**Keywords:** Transnational Marriage; Transnational Migration; NRI (Non-resident Indian) Marriages; Foreign Law; Conflict of Laws.

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## I. INTRODUCTION

Marriage is an institution which confers mutual obligations of the spouses towards each other. The concept of marriage varies from religion to religion, society to society and country to country. It is a concept which not only involves social but also legal, emotional, economical, spiritual and religious aspects as well. It can be arranged marriage or love/romantic marriage. The definitions and recognition of marriage evolve with change in religion, society and country. For example, in Indian Hindu society marriage is a sacramental affair. The Christians consider marriage as a union of man and woman. For Muslims, marriage is a contract between the spouses. In western countries, the marriage is a personal affair between a man and a woman because their culture is very individualistic. On the other hand, in Indian marriages, this affair is not confined between man and a woman but between two families.

In context of marriages, most of the violations of rights are considered to occur within the four-walls of the home. In India, the diversity of personal laws of different religious communities makes the matrimonial disputes a challenging area for legal intervention. The irony is that the complications get multiplied manifold when the marriage crosses the boundaries of the country. This increase in trans-boundary marriages has caused the creation of the newly problematic area of "NRI (Non-Resident Indian) Marriages". The topic of "NRI marriages" is often considered as a 'maze' in the area of private international law.

In present time, most Indian parents seek an NRI groom for their daughters so that she may settle abroad in future. To fulfil this dream, they marry their daughter to a NRI groom. The marriage with a NRI person is not a problem in itself. The problem is the issues associated with such marriages. In such marriages, abuse, abandonment, torture

is being committed on the bride.<sup>1</sup> It would not be wrong to say that an evil has entered the sacred institution of marriage. It is of utmost importance to understand the problem and issues associated with NRI marriages. The objective of this study is to investigate the milieu of transnational marriages with special reference to NRI (Non-Resident Indian) marriages. Although, there is a long list of social, legal, cultural and other issues associated with such marriages, the main focus will be to analyse the situations of conflict of laws in case of NRI marriages.

## II. CONUNDRUM OF TRANSNATIONAL MIGRATION IN INDIA

When the wave of diaspora touched the land of India, its impact was so immense that Indians are now present in almost every nation of the world. According to a report submitted by United Nations, India was the leading country in international migration with 17.5 million persons living abroad.<sup>2</sup> In present era of globalisation, people are migrating from one country to other for many reasons. The reason for migration can be business, employment, education, tourism, marriage *etc.*

Due to modernisation, globalisation and transnational migration, there emerged a new category of marriage *i.e.* cross-border marriage. When marriage happens between two nationals who belong to different countries, it is a cross-border marriage. In India, marriage has always considered as a sacred union of two people (known as life partners). The earlier mind-set of parents was generally to finding a suitable partner for their children. In the past few years this approach

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<sup>1</sup>S. Anitha, A. Roy and H. Yalamarty, *Disposable Women: Abuse, Violence and Abandonment in Transnational Marriages*, CORE (April 23, 2021, 8:05 PM), [https://eprints.lincoln.ac.uk/20091/7/20091%20Anitha%20et%20al\\_2016\\_Disposable%20women.pdf](https://eprints.lincoln.ac.uk/20091/7/20091%20Anitha%20et%20al_2016_Disposable%20women.pdf).

<sup>2</sup> *At 17.5 million, Indian diaspora largest in the world: UN report*, ECONOMICTIMES.COM (Dec. 4, 2020, 09:56 PM), <https://economictimes.indiatimes.com/nri/nris-in-news/at-17-5-million-indian-diaspora-largest-in-the-world-un-report/articleshow/71179163.cms?from=mdr>.

has changed radically. Now, these trans-national marriages are solemnised due various reasons. On the one hand, Indians living in foreign nations prefer to marry an Indian-cultured bride. On the other hand, the Indian party considers it as a good opportunity to settle abroad. Thus, Indian parents search for NRI bride/bridegroom for their children so that their children may settle abroad in future. Thus, the purpose behind marriage is becoming more money-centric and seen as an opportunity to settle abroad. Both the parties see their own benefits out of this union. These marriages are more or less contractual rather than a union so far as the intent of the parties is concerned. Recently, the Hon'ble Punjab and Haryana High Court made a critical statement on this issue that the marriages with a contractual tinge have acquired the rampant notoriety in State of Punjab.<sup>3</sup> It is important to note that only girls are not victims of it. However, man faces less harassment in such matters. This is the societal aspect of NRI marriages.

The phenomenon of transnational migration of people has achieved new heights in the past few years. With the increase in cross-border marriages, a significant increase in matrimonial disputes is taking place. There has been a large number of Indians who are living aboard in countries like United States, Canada, Australia, United Kingdom and Germany *etc.* Migration in itself is not a big problem but legal problems associated with it are the sources of problems. The advancement in the field of information and technology has increased the celebration of foreign marriages. The courts are confronted with insuperable difficulties in adjudicating disputes when matrimonial dispute arises in cross-border marriages. This is because of the reason that when these couples separate for any reason it is very difficult to

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<sup>3</sup> Meera Emmanuel, *Marriages being relegated to contract for attainment of sinister designs are gaining "rampant notoriety" in Punjab*: P&H HC, BAR AND BENCH (Dec. 25, 2020, 12:47 PM), <https://www.barandbench.com/news/litigation/punjab-haryana-hc-takes-note-marriages-being-relegated-to-contracts-in-punjab>.

ascertain the applicability of the laws. This results in increase in number of conflict of laws issues. Thus, when we look at this problem from a legal perspective, it is clear that the increase in number of inter-country marriages has increased the situations of conflict of laws.

### III. MEANING OF 'NON-RESIDENT INDIAN (NRI)'

In general terms, any citizen of India who stays in foreign country for various reasons such as employment, business, family *etc.* for an uncertain period is considered as NRI (Non-resident Indian). Under Indian laws, no direct and specific definition of NRI is prescribed. However, the 'The Foreign Exchange Management Act, 1999' (FEMA) and 'the Income Tax Act, 1961' have provided definition in this regard. Under Section 2 (v)<sup>4</sup> of the FEMA 1999, the term 'Resident Indian' has been defined. Further, Section 2 (w)<sup>5</sup> of 'The Foreign Exchange Management Act 1999' clarifies that the person who is not covered

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<sup>4</sup> The Foreign Exchange Management Act, 1999(India), § 2(v)- "person resident in India" means-

- (i) A person residing in India for more than one hundred and eighty-two days during the course of the preceding financial year but does not include-
  - (A) A person who has gone out of India or who stays outside India, in either case-
    - (a) For or on taking up employment outside India, or
    - (b) For carrying on outside India a business or vocation outside India, or
    - (c) For any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period;
  - (B) A person who has come to or stays in India, in either case, otherwise than-
    - (a) For or on taking up employment in India, or
    - (b) For carrying on in India a business or vocation in India, or
    - (c) For any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period;
- (ii) Any person or body corporate registered or incorporated in India,
- (iii) An office, branch or agency in India owned or controlled by a person resident outside India,
- (iv) An office, branch or agency outside India owned or controlled by a person resident in India.

<sup>5</sup>The Foreign Exchange Management Act, 1999 (India), § 2(w)- "person resident outside India" means a person who is not resident in India;

under the provided categories will be considered as the 'Non-Resident Indian'. Thus, as per provisions of 'The Foreign Exchange Management Act 1999', a citizen of India who stays abroad for these mentioned purposes will be considered as non-resident: first purpose is employment or to carry a business, second is vocation outside India or third is if stays abroad under circumstances which indicate an uncertain duration of stay abroad intentionally.<sup>6</sup>

Besides this, 'The Punjab Compulsory Registration of Marriages Act, 2012', has also defined 'Non-Resident Indian' as: "a person of Indian origin who is either permanently or temporarily settled outside India for employment, business, vocation or any other purpose indicating an uncertain or determined period of overseas stay."<sup>7</sup> Therefore, an NRI can be summed up as an individual, being a citizen of India or a person of Indian origin who is resident outside the India.

#### IV. IDENTIFICATION OF PROBLEMS IN MIRAGE OF NRI MARRIAGES

The NRI population belongs to different religions like Hindu, Sikh, Muslim, Christian, Buddhism *etc.* and spread across the globe. The trans-national marriage by or with Non-Resident Indian (NRI) is a question of matrimonial law. Thus, it is a difficult task to deliver justice to victims of such marriages due to absence of some specific laws. When married parties are domiciled in different foreign countries, various matrimonial disputes originate as a result of it. These issues originating from transnational migration are destroying family and its

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<sup>6</sup> The Foreign Exchange Management Act 1999(India), § 2, clause (v) and (w).

<sup>7</sup> The Punjab Compulsory Registration of Marriages Act, 2012, § 2(g) "Non-resident Indian" (NRI) means a person of Indian origin, who is either permanently or temporarily settled outside India for any of the following purposes,-

- (i) For or on taking up employment outside India; or
- (ii) For carrying on a business or vocation outside India; or
- (iii) or any other purpose, as would indicate his/her intention in such circumstances to stay outside the territorial limits of India for an uncertain or determined period for fulfilling or completing such purpose;

peace.<sup>8</sup> In absence of sufficient enquiry and requisite precautions in overseas marriages, the marital bond starts turning sour. Eventually, it takes shape of certain issues. The social issues associated with NRI marriages have been discussed over the years as increase in number of fraudulent marriages is alarming. Although, it is a gender-neutral term but the main victims are women in such cases. It would not be wrong to say that abandonment of wives by NRI husbands is increasing rapidly.<sup>9</sup> But there is a vast list of issues associated with such marriages. The main issues in NRI marriages are stated as under:

**a) Abandonment of the wife**

The major issue is abandoning of bride by NRI husbands. Such brides are abandoned after a short honeymoon period. The husband never comes back. There are many instances in which woman gets pregnant but both mother and child are abandoned. Such instances led to a new category of miserable brides known as 'honeymoon brides'<sup>10</sup>.

**b) Domestic Violence**

In some instances, when the brides reach the foreign country, they are brutally abused and tortured both physically and mentally. Sometimes such kind of treatment is extended to the children born out of such marriages.

**c) Dowry Demand**

Dowry is considered as the ultimate purpose of such marriages. In some instances, the bride is asked to pay huge amount of money in order to continue staying in her in-law's family home. But the sad reality is that it is of no use to file any complaint with regard to dowry demands or cruelty done by in-laws' family. The reason is that due to non-availability of

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<sup>8</sup> Y.Narasimha Rao v. Y. Venkata Lakshmi, 1991 SCC (3) 451 (India).

<sup>9</sup> S. ANITHA, A. ROY AND H. YALAMARTY, *supra* note 1.

<sup>10</sup> Cases of 'honeymoon brides' up in Punjab, THE TRIBUNE (Dec. 24, 2020, 2:17 AM), <https://www.tribuneindia.com/news/archive/chandigarh/cases-of-honeymoon-brides-up-in-punjab-672830>.

husband in India, it becomes difficult to fight legal battles in India. In many cases women are taken abroad where they are assaulted brutally, abused, confined by their husbands. The dowry demand is the reason behind such abuse by husband and his family.<sup>11</sup>

**d) Concealment of facts**

In some cases, NRI spouses provide false information about their marital status, job, age, immigration status before marriage. In such cases, the other party also marries without conducting any verification of the background of the person.

**e) Ex-parte Divorce**

In some cases, the groom and his family are aware that they can take advantage of the more flexible divorce grounds available in legal system of the foreign country. They get *ex-parte* decree of divorce through fraudulent representative while the wife remains unaware of it.<sup>12</sup>

**f) Technical and legal complications**

In such cases, wife is denied to provide the maintenance in India on the ground that the marriage has been dissolved by foreign court. There are various other technical and legal complications related to the jurisdiction of courts, limited jurisdiction, service or enforcement of orders in cases where the legal proceeding has already been initiated by the husband in the foreign country.

## V. CONFLICT OF LAW ISSUES IN NRI MARRIAGES

Generally, the term 'Conflict of laws' is used for set of procedural rules that determines which legal system and which jurisdiction apply

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<sup>11</sup> Ministry of External Affairs Government of India, *Marriages to Overseas Indian- A guidance booklet*, 11 (April, 2019), <https://www.mea.gov.in/images/pdf/marriages-to-overseas-indians-booklet.pdf>.

<sup>12</sup> *Id.* at 10.

to a given dispute, when that legal dispute has a 'foreign' element.<sup>13</sup> Thus, conflict of laws can be described as that branch of law which comes into picture when a domestic court is faced with a involving any foreign element, foreign element simply means a contact with any system other than domestic system. The main stages through which any conflict of laws case involving foreign element are: Choice of Jurisdiction, Choice of Law and Recognition of foreign judgments.<sup>14</sup>

India does not have specific legislative measures to deal with matrimonial disputes involving a foreign element. However, English law deals with transnational matrimonial disputes under the category of conflict of laws. That is why; a country like India is facing problems related to NRI marriage due to absence of uniform laws. The problem in NRI marriages is manifold. It is not just limited to dowry demand, abandonment, cruelty, abuse. This problem has many dimensions and each dimension requires special attention. The data available on number of complaints in NRI marriage is self-explanatory of the fact that the number of issues associated with them will be huge.<sup>15</sup>

YEAR	NUMBER OF COMPLAINTS FILED
2015	796
2016	1510
2017 (Until Nov.)	1022
2018	1299

<sup>13</sup> LAWRENCE COLLINS, DICEY AND MORRIS: THE CONFLICT OF LAWS, 3 (13<sup>th</sup> ed.2000).

<sup>14</sup> PARAS DIWAN, PEYUSHI DIWAN, PRIVATE INTERNATIONAL LAW, 36 (4<sup>th</sup> ed. 1998).

<sup>15</sup> Ministry of External Affairs, E-CITIZEN/RTI: PARLIAMENT Q & A: LOK SABHA. (n.d.). (April 23, 2021, 4:05 PM), <https://mea.gov.in/lok-sabha.htm?dtl/32054/question+no688+complaints+of+nri+brides>.

2019 (Until Oct. 31)	991
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The biggest problem with NRI marriages is the easy dissolution of marriage by foreign courts even if the marriage is solemnized under Indian Laws. Since most of the women are non-familiar with foreign laws, it becomes difficult to get appropriate legal help and assistance in such cases.<sup>16</sup> In such situations, it becomes easy for one party to get *ex-parte* decree. To settle the matrimonial disputes in the absence of specific laws, rules and regulations is very challenging. Such conflict of laws, disagreements and contradictions due to absence of comprehensive law may pose threat to delivery of justice.

To exemplify, if a matrimonial dispute between any couple where one party is from Canada and other is from India. Now, the legal position is that Canada only recognizes irretrievable breakdown of marriage as ground for divorce. On the other hand, India does not recognize irretrievable breakdown of marriage as a separate ground of divorce. Now, if courts ignore each other's judgment, then orders issued will be in conflict with each other.<sup>17</sup> The problem of jurisdiction is a major legal challenge when parties belong to different countries and conflicting judgments may be passed by courts. Ultimately, when the marriage crosses the boundaries of any nation, the situation becomes more complex. Although many provisions are available under existing laws to deal with NRI marriages but existence of certain loopholes in domestic laws amplify the issues such as:

<sup>16</sup> Rajana Sheel, *Marriage, Money and Gender A Case Study of the Migrant Indian Community in Canada*, INDIAN JOURNAL OF GENDER STUDIES, 12(2005), [https://www.academia.edu/9649865/Marriage\\_Money\\_and\\_GenderA\\_Case\\_Study\\_of\\_the\\_Migrant\\_Indian\\_Community\\_in\\_Canada](https://www.academia.edu/9649865/Marriage_Money_and_GenderA_Case_Study_of_the_Migrant_Indian_Community_in_Canada).

<sup>17</sup> Priti Rana, *Distant Silences and default judgments: Access to justice for transnationally abandoned women in India*, MANUPATRA (Dec 20, 2020, 10:24 PM), [www.manupatra.in/newsline/articles/Upload/5E7B72BC-EEAB-468A-8000-ADDF2882541C.2-f\\_family.pdf](http://www.manupatra.in/newsline/articles/Upload/5E7B72BC-EEAB-468A-8000-ADDF2882541C.2-f_family.pdf).

**a) Easy divorce under foreign legal system**

In NRI marriages, the issue starts when the foreign party takes advantage of lenient foreign laws to get the divorce decree. The foreign party obtain the *ex-parte* divorce without the knowledge of other party. Thus, due to various technical and legal obstacles the Indian spouse has to confront various issues. In most of the cases, the woman is the victim and she has to fight nasty legal battles for years either to get the divorce or custody of children *etc.*<sup>18</sup>

**b) Issue of Jurisdiction**

In matrimonial disputes, it is very challenging to ascertain whether the Indian court or foreign court has the jurisdiction. In such cases, one party obtains a divorce decree from the foreign court but Indian courts do not recognize the decree and the issues starts emerging.

**c) Issue related to Maintenance or custody of children**

In the absence of well-formulated laws, the conflict arises regarding the applicability of law that whether Indian law will be applicable or foreign law will be applied?

**d) Legality of judgments by foreign courts**

The other question is whether foreign judgments should be recognised or not. When the foreigner spouse gets the divorce decree due to lenient foreign laws, the enforcement and recognition of such judgments are challenged in Indian courts by the Indian spouse.

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<sup>18</sup> Anuradha Chadha, *Plight of abandoned Indian Women in Non-Resident Indian marriages: A critical Analysis*, SSRN (Dec. 3, 2020, 9:39 PM), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2773989](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2773989).

## VI. LEGAL INTERVENTION IN INDIA

*"Law cannot stand aside from the social changes around it."*

- William  
J. Brennan, Jr.

The above quote shows the strong interrelationship between the law and society. The laws of any place are always framed by keeping in mind the social challenges prevalent and emerging in that society. It is always suggested by legal and social experts that the law must evolve with time to ensure the social progress of the nation. In India, the problems associated with NRI marriages are increasing due to increasing number of such marriages. But there is no specific Indian legislation to deal with such cases. Matrimonial dispute is very challenging area for legal intervention especially in country like India where there is plethora of personal laws.

In landmark judgment of *Y.Narsimha Rao vs. Y. Venkata Lakshmi*<sup>19</sup>, the Hon'ble Supreme Court of India observed that internal unity and stability cannot be sacrificed to ensure the uniformity of rules and mutual agreements between the nations. Further the Court referred to the 65<sup>th</sup> report<sup>20</sup> of Law Commission of India and discussed the relevance of Section 13 of Civil Procedure Code, 1908 in context of recognition of foreign judgments in matrimonial causes. The court highlighted the fact that rules of private international law are scattered in different Indian legislative enactments such as CPC 1908, Indian Contract Act, and Indian Succession Act *etc.* Moreover, the Indian law on dissolution of marriage is considered as more stringent as compared to western countries. Probably, this is the reason in NRI marriages,

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<sup>19</sup> *Supra* note 8.

<sup>20</sup> Report 65 by Law Commission of India, *Recognition of Foreign Divorces* (1976), <http://lawcommissionofindia.nic.in/51-100/report65.pdf>.

with the NRI spouse take advantage of the foreign law to get divorce decree.

The relevant provisions are scattered in various legislative enactments. In case of NRI marriages, Indian courts invoke Section 9<sup>21</sup>, Section 13<sup>22</sup>, Section 14<sup>23</sup> and Section 44A<sup>24</sup> of the Civil Procedure Code,

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<sup>21</sup> The Code of Civil Procedure, 1908 (India), § 9. Courts to try all civil suits unless barred- The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

*[Explanation I]*- A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.

*[Explanation II]*- For the purpose of this section, it is immaterial whether or not any fees are attached to the office referred to in Explanation I or whether or not such office is attached to a particular place.]

<sup>22</sup> The Code of Civil Procedure, 1908 (India), § 13, When foreign judgment not conclusive- A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except-

- (a) Where it has not been pronounced by a court of competent jurisdiction;
- (b) Where it has not been given on the merits of the case;
- (c) Where 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;
- (d) Where the proceedings in which the judgment was obtained are opposed to natural justice;
- (e) Where it has been obtained by fraud;
- (f) Where it sustains a claim founded on a breach of any law in force in India.

<sup>23</sup> The Code of Civil Procedure, 1908 (India) § 14, Presumption as to foreign judgments- The Court shall presume upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a court of competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction.

<sup>24</sup> The Code of Civil Procedure Code, 1908 (India) § 44A, Execution of decrees passed by Courts in reciprocating territory- (1) Where a certified copy of a decree of any of the superior courts of \*\*\*\*(words United Kingdom omitted) any reciprocating territory has been filed in a District Court, the decree may be executed in India as if it had been passed by the District Court.

(2) Together with the certified copy of the decree shall be filed a certificate from such superior Court stating the extent, if any, to which the decree has

1908. The section 9 of the Civil Procedure Code, 1908 deals with jurisdiction to try the civil suits. As per this provision, if the marriage takes place in India, performed on Indian soil, spouses lived in India or solemnised according to Indian laws in any part of globe, then Indian courts will have jurisdiction in matrimonial dispute matter.<sup>25</sup>

The Section 13 of the Civil Procedure Code, 1908 concerns with recognition of foreign decree. In case of *Satya v. Teja*<sup>26</sup>, the scope of Section 13 of the Civil Procedure Code, 1908 was discussed. According to Section 13 (a) of CPC 1908, if the foreign judgment has not been pronounced by a court of competent jurisdiction, then it will not be recognised. Further, as per Section 13 clause (b), if the foreign judgment has not given on merits of case, it will not be recognised by the courts in India. As per Section 13 clause (c), if the foreign judgment is based on jurisdiction or ground not by law under which parties were

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been satisfied or adjudicated and such certificate shall, for the purposes of proceedings under this section, be conclusive proof of the extent of such satisfaction or adjustment.

(3) The provisions of section 47 shall as from the filling of the certified copy of the decree apply to the proceedings of a District Court executing a decree under this section, and the District Court shall refuse execution of any such decree, if it is shown to the satisfaction of the Court that the decree falls within any of the exceptions specified in clauses (a) to (f) of the section 13.

Explanation 1.- "Reciprocating territory" means any country or territory outside India which the Central Government may, by notification in the Official Gazette, declare to be a reciprocating territory for the purposes of this section; and "superior courts", with reference to any such territory, means such Courts as may be specified in the said notification.

Explanation 2.- "Decree" with reference to a superior Court means any decree or judgment of such Court under which a sum of money is payable, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty, but shall in no case include an arbitration award, even if such an award is enforceable as a decree or judgment.]

<sup>25</sup> M. Suneel Kumar, NRI marriages- Issues and Challenges with special reference to custody of children, <https://districts.ecourts.gov.in/sites/default/files/SCJSOMPETA.pdf>.

<sup>26</sup> *Satya v. Teja*, (1975) AIR 105 (India).

married, then it will be unenforceable. According to Section 13 clause (d), foreign judgment will unenforceable if it was obtained on the grounds opposed to natural justice. The Section 14 of Civil Procedure Code, 1908 is related to the presumption as to foreign judgments while Section 44A of the Civil Procedure Code, 1908 deals with execution of decrees passed by Courts in reciprocating territory.

The other issue is the problem of securing the presence of the NRI spouse in NRI marriage. It can be made possible by invoking the provisions of the Section 10 of 'Passport Act, 1967' which deals with variation, impounding and revocation of passports and travel documents.<sup>27</sup>

## VII. JUDICIAL APPROACH

Due to absence of specific legislation, the dynamic judicial system of India has been trying to interpret the existing laws to resolve the issues in NRI marriages. It would not be wrong to say that judicial system is the only crutch available in this area of law. The position was made clear by Geoffrey Cheshire by stating that:

*"Private International Law, in fact, presents a golden opportunity perhaps the last opportunity for the judiciary to show that a homogenous and scientifically constructed body of law, suitable to the changing needs of the society, can be evolved with the aid of legislature and though the task must necessarily be performed by the judges....."*<sup>28</sup>

Thus, in absence of uniform laws on this issue, this branch is developing with the help of judicial pronouncements made by our Hon'ble Supreme Court of India and various high courts from time to time. The landmark judgments pronounced by Indian courts have been

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<sup>27</sup>Passport Act, 1967 (India), § 10(3) defines the situations in which passport authority may impound or cause to be impounded or revoke a passport or travel document.

<sup>28</sup> G.C.CHESHIRE, PRIVATE INTERNATIONAL LAW, (Oxford University Press, Oxford, 1<sup>st</sup> edn. 1935).

analysed to understand the approach of judiciary in this regard. The important judgments are discussed as under:

In case of *Y. Narasimha Rao & Others v. Y. Venkatalakshmi*<sup>29</sup>, the marriage between the couple was solemnised under the Hindu Marriage Act. After marriage, the husband returned to USA. In USA (Missouri State), he obtained the decree of divorce. He alleged that before filing the petition, he was resident of Missouri for 90 days. Thus, divorce decree was obtained. The Honb'le Supreme Court of India held that the decree of divorce was not enforceable in India. The reason provided was that the marriage took place under Hindu Marriage Act, 1955 but the jurisdiction and ground of the decree passed was not according to the Act under which marriage was solemnized.

In case of *Dipak Bannerjee v Sudipta Bannerjee*<sup>30</sup>, the husband raised the questioned on the jurisdiction of Indian court to entertain maintenance case by contending that he was U.S citizen and his domicile is followed by the wife. The court observed that in case of conflict of laws, the decision must be made according to Indian Law. The court held that rules of private international law of other countries may not be applicable in Indian courts mechanically.

In another case of *Smt. Anubha v. Vikas Aggarwal*<sup>31</sup>, the case of *Y. Narasimha Rao and Ors. v. Y. Venkata Lakshmi and Anr*<sup>32</sup> was referred by the court. The court held that while recognising the foreign judgment in matrimonial case, the relief should be based on the grounds available under law under which parties are married.

In case of *Harmeeta Singh v. Rajat Taneja*<sup>33</sup>, the wife was deserted by the husband after few months of marriage. A suit for maintenance

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<sup>29</sup> *Supra* note 8.

<sup>30</sup> *Dipak Bannerjee v. Sudipta Bannerjee*, AIR 1987 Cal 491(India).

<sup>31</sup> *Smt. Anubha v. Vikas Aggarwal* AIR 2003 Delhi 175 (India).

<sup>32</sup> *Supra* note 29.

<sup>33</sup> *Harmeeta Singh v. Rajat Taneja* 2003 (102) DLT 822 (India).

under the Hindu Adoptions and Maintenance Act was filed in India. The Delhi High Court placed a restraint order against husband to continue any divorce proceeding in US court. The Court observed that the decree, if obtained, would not be recognised in India unless the jurisdiction of foreign court will be established according to Section 13 CPC. Also, India was decided as the forum of convenience due to the wife's stay in India.

In case of *Sheenam Raheja v. Amit Wadhwa*<sup>34</sup>, Delhi High Court held that when the marriage is solemnized and registered according to the provisions of the Hindu Marriage Act, 1955, it can be dissolved only according to the provisions of the Hindu Marriage Act, 1955.

In case of *Veena Kalia v. Jatinder N.Kalia*<sup>35</sup>, the NRI husband from Canada, got *ex-parte* divorce decree on a ground which was not available in India. The Delhi High Court held that such divorce decree cannot bar wife to file divorce petition in India. Thus, these judicial pronouncements are setting a precedent that matrimonial judgments in derogation with Indian law cannot be recognized.

Further, Indian courts have passed several decisions in the favour of best interest of the child in cases of matrimonial disputes. When any dispute arises between husband and wife, issue which arises is related to the custody of their children. Section 26 of Hindu Marriage Act, 1955 and Section 6 of Hindu Minority and Guardianship Act 1956, deal with the custody of the children. Our Hon'ble Apex court of India through various judicial pronouncements has held that the interest of the child is of paramount consideration because the child is not the property of parents.

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<sup>34</sup> *Sheenam Raheja v. Amit Wadhwa* 2012 (131) DRJ 568 (India).

<sup>35</sup> *Veena Kalia v. Jatinder N.Kalia* AIR 1996 Del 54 (India).

The case of *Marggarate Pulparampil v. Dr. Chacko Pulparampil*<sup>36</sup> was one of the earliest case in which custody of children in NRI marriage emerged. In case of *Kuldeep Sidhu v Chanan Singh*<sup>37</sup>, The high court of Punjab and Haryana allowed the custody of the child to the mother because she was awarded custody by competent court in Canada. This was done in the best interest of the child.

In case of *Syed Saleenmuddin v. Dr. Rukhsana and Ors*<sup>38</sup>, Supreme Court while dealing with a *habeas corpus* petition for custody of minor children, made it clear that if welfare of children requires the change of custody then it should be changed. It was observed that in cases of custody of children, the welfare of children is of paramount consideration. In another case of *Ruchi Majoo v. Sanjeev Majoo*<sup>39</sup>, the Hon'ble Supreme Court of India held that even if the foreign court passed the order in favour of one parent, the Indian courts have jurisdiction in such custodial dispute cases.

### VIII. RELEVANCE OF HAGUE CONVENTIONS

The Hague Conference on Private International Law is working to provide progressive unification of rules to deal with issues related to person, family or other situations where more than one country are involved. It deals with issues such as jurisdiction of courts, choice of law rules and enforcement of judgments and other matters related to marriage *etc.*<sup>40</sup> India is a member of the Hague Conference of Private International Law but it is not a signatory to the various conventions on family law matters.<sup>41</sup> There are several Conventions under Hague

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<sup>36</sup> *Marggarate Pulparampil v. Dr. Chacko Pulparampil*, AIR 1970 Ker 1 (India).

<sup>37</sup> *Kuldeep Sidhu v. Chanan Singh*, AIR 1989 P&H 103 (India).

<sup>38</sup> *Syed Saleenmuddin v. Dr. Rukhsana and Ors*, AIR 2001 (5) SCC 247 (India).

<sup>39</sup> *Ruchi Majoo v. Sanjeev Majoo*, AIR 2011 SC 1952 (India).

<sup>40</sup> A. Dyer, *Hague Convention on Private International Law*, (24 April, 2021, 3:48 PM) [http://www.Hech.net/index\\_en.php?act=text.display&tid=26](http://www.Hech.net/index_en.php?act=text.display&tid=26).

<sup>41</sup> PRITI RANA, *supra* note 17, at 134.

Conference which regulate the matters related in international civil litigation.<sup>42</sup> These include Convention on The taking of Evidence Abroad in Civil or Commercial Matters (March, 1970)<sup>43</sup>, Convention on the Recognition of Divorce and Legal Separation 1970, Convention on the Laws applicable to maintenance obligation, 1973; Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, Convention on celebration and recognition of validity of marriage, 1978 *etc.*<sup>44</sup> Out of these Conventions, India has ratified: Convention on The taking of Evidence Abroad in Civil or Commercial Matters, Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Convention Abolishing the Requirement of Legalisation for Foreign Public Documents. The main legal issues faced in NRI marriages include the issuing service summons, recognition of foreign judgments *etc.* The major issues are covered under the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. However, India has made a few reservations about the Article 10 of the Convention which deals with the methods of service.<sup>45</sup>

#### **IX. INITIATIVES AND SUGGESTIONS PROVIDED BY VARIOUS MINISTERIES/ORGANIZATIONS**

There are some government institutions which are working continuously to protect the victims of NRI marriages: the National Commission for Women (NCW), the Ministry of Women and Child

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<sup>42</sup> *Id.* at 135.

<sup>43</sup> 20<sup>th</sup> Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (24 April, 2021, 5:55 PM), [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=82](http://www.hcch.net/index_en.php?act=conventions.text&cid=82).

<sup>44</sup> Hague Conference on International Private Law (24 April, 2021, 5:58 PM) [http://www.hcch.net/index\\_en.php?act=states.details&sid=101](http://www.hcch.net/index_en.php?act=states.details&sid=101).

<sup>45</sup> Laws relating to NRI Marriages and their impact on women, Kirti Singh and Dr Pam Rajput, Page 45.

Development (WCD), the Parliamentary Standing Committee on External Affairs, and the Law Commission of India.

**a) Formation of Integrated Nodal Agency (INA)**

Ministry of External Affairs is working on the growing problems of NRI marriage and came up with some initiatives to solve the problems. One significant initiative is the formation of Integrated Nodal Agency to discuss the issues on NRI matrimonial disputes on a regular basis.<sup>46</sup> This agency was formed in collaboration with Ministry of Women & Child development and Ministry of Law and Justice as issues of NRI marriages are not limited to one ministry only. The sequential order has been decided under which all disputed cases will be forwarded to National Commission for Women (NCW) by all the ministries, which will be further recommended to INA after due consideration.

**b) The Registration of Marriage of Non-Resident Indian Bill, 2019**

The Ministry of External Affairs, Ministry of Women and Child Development, Ministry of Home Affairs and Ministry of Law and Justice with their collective effort drafted the 'The Registration of Marriage of Non-Resident Indian Bill, 2019'<sup>47</sup>. This bill aimed to fix the problems faced by Indian wives abandoned by NRI husbands by compulsory registration of marriage within

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<sup>46</sup> SUBHASH KUMAR JAIN, *WHETHER THE LAW TO DEAL WITH THE GROWING PROBLEM WITH NRI MARRIAGES IN INDIA IS EFFICIENT*, INTERNATIONAL ACADEMY OF FAMILY LAWYERS, [HTTPS://WWW.IAFL.COM/MEDIA/5041/SUBHAMKUMAR-JAIN\\_-GROWING-PROBLEMS-WITH-NRI-MARRIAGES.PDF](https://www.iafl.com/media/5041/subhamkumar-jain_-growing-problems-with-nri-marriages.pdf).

<sup>47</sup> Ambika Pandit, *Parliamentary panel approves bill on compulsory registration of NRI marriages*, TIMES OF INDIA (Dec 13, 2020, 11:04 PM), <https://timesofindia.indiatimes.com/india/parliamentary-panel-approves-bill-on-compulsory-registration-of-nri-marriages/articleshow/74618373.cms>.

30 days and incorporating passport related details of NRI.<sup>48</sup> The biggest challenge was the serving of summons. Now, as per this bill, in cases where court cannot serve the summons, it may be issued by uploading on specific website designed by the Ministry of External Affairs.

**c) Mediation Cell for case of child custody in NRI matrimonial disputes**

National Commission for Protection of Child Rights (NCPCR) has constituted a Mediation Cell as per the directions of The Women and Child Development Ministry. The primary aim of this Mediation cell is to resolve the disputes here child was taken away by one of the spouse without the permission of the other spouse from foreign country to India or vice versa.

**d) Suggestions by Law Commission of India**

Law Commission of India in 65<sup>th</sup> Report<sup>49</sup> on 'Recognition of Foreign Divorces' (1976) suggested that the recognition of foreign decree of divorce should be based on habitual residence and nationality in addition to basis of domicile.<sup>50</sup> Law commission of India has always recommended the compulsory registration of marriage. It has stated that parliamentary legislation related to compulsory registration of marriage is highly required.<sup>51</sup>

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<sup>48</sup> Exec. Order No. 31/59/2016/-CW-1, 3 C.F.R. 7 (27), <http://www.wcd.nic.in/sites/default/files/SCAN0110.pdf>.

<sup>49</sup> Law Commission of India, *Recognition of Foreign Divorces*, Report No. 65 (1976), <http://lawcommissionofindia.nic.in/51-100/report65.pdf>.

<sup>50</sup> Ibid.

<sup>51</sup> Law Commission of India, *Laws on Registration of Marriage and Divorce: A Proposal for Consolidation and Reform*, Report no.211 (October 2008), pp.34, <https://lawcommissionofindia.nic.in/reports/report211.pdf>.

Further, the 217<sup>th</sup> Report<sup>52</sup> of Law Commission of India suggested the introduction of 'irretrievable breakdown of marriage' as a ground for divorce under the concerned acts. This would provide the equitable terms to NRI spouses and Indian spouse to seek remedy in India.

In its 219<sup>th</sup> report<sup>53</sup>, Law Commission of India suggested appropriate law to solve the problems of NRIs. It gave emphasis to formulate family law legislations for Non-Resident Indians. It suggested registration of marriages should be made compulsory. Further, the irretrievable breakdown of marriage should be introduced as the ground of dissolution of marriage under the concerned laws.

**e) Recommendation provided during workshops on problem relating to NRI Marriages**

The Ministry of Overseas Indian Affairs organized in collaboration with National commission on women organized a regional workshop on 'Problems relating to NRI Marriages and suggested Measures' in Chandigarh on 20<sup>th</sup> and 21<sup>st</sup> of June 2006. The suggestions provided are as follows<sup>54</sup>:

1) Emphasis was given on considering the various International Conventions which are relevant to deal with NRI marriage issues. These conventions include Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Criminal Matters, 1965, Convention on the Recognition of Divorces and Legal Separations 1970 etc.

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<sup>52</sup> Law Commission of India, *Irretrievable Breakdown of Marriage*, Report No. 217 (March 2009), <https://lawcommissionofindia.nic.in/reports/report217.pdf>.

<sup>53</sup> Law Commission of India, *Need for family Law Legislation for Non-resident Indian*, Report No.219 (March 2009), <https://lawcommissionofindia.nic.in/reports/report219.pdf>.

<sup>54</sup> Ministry of External affairs, *Report on the workshop regarding 'Problems relating to NRI marriages and suggested measures'*, (2006), <https://www.mea.gov.in/images/pdf/report-on-regional-semina-in-chandigarh.pdf>.

- 2) To review existing laws and enhance their scope so as to cover the situations of NRI Marriages.
- 3) Registration of marriage should be made compulsory.
- 4) Create awareness through media, websites, programmes related to NRI marriages.
- 5) In cases of child custody, the best interest of the child must be given utmost importance.
- 6) Provisions of Section 20 of the Extradition Act, 2002 must be examined and invoked wherever necessary in such cases.

## X. CONCLUSION AND SUGGESTIONS

It is evident that the problem of conflict of laws in NRI marriage is beyond the limits of one nation. Therefore, it requires solution which would be made applicable at international level. Some effective coordination among the agencies operational at national and international level requires having more coordination. It is rightly said that the prevention is better than cure. The issues relating to NRI marriages have social as well as legal dimensions. The measures taken by government should be of more proactive and coordinated approach.

The need for specific rules on conflict of laws in matrimonial matters is much more in present time. The foreign decrees in cases of matrimonial disputes are the order of the day. The lacunae in prevalent rules need fresh interpretation and conformity with public policy and other important principles. The law needs to be evolved with the changing dimensions of the society. It has been already discussed that this problem is multi-dimensional, so the solution needs to cover all the dimensions. It requires legal, governmental as well social intervention to deal with issues in NRI marriages. State governments should set up "Special cells" in their respective state where the number of such cases are increasing rapidly. There is a need for co-ordination among national and state governments to curb this issue at every level

possible. In present digital era, online access and aware on laws and support services should be provided. The relevant information can be made available in different regional languages as well so as to reach maximum people. Further, an easily accessible and convenient helpline should be provided. In civil society, people should be made aware of precautions they should take before solemnising cross-border marriages. The introduction of compulsory registration of marriage bill is a landmark initiative in this regard. Compulsory registration of marriage along with social marriage will be a great initiative. The victims of NRI marriage issues are mainly women, so special legal aid and advice should be provided to them. The recent introduction and approval of 'The Registration of Marriage of Non-Resident Indian Bill, 2019' is considered as a good initiative to regulate the issues in NRI marriage.<sup>55</sup>

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<sup>55</sup> *Supra* note 47.

## CRITICAL ANALYSIS OF CROP BURNING IN INDIA – ADVERSE IMPACT AND SUGGESTIONS

- Divya Morandani\*

### ABSTRACT

*Agriculture is a dominant economic driven sector in India, with increasing technology in the 21<sup>st</sup> century, we are capable of cultivating a variety of crops in masses. We cannot afford to deplete the rich quality of Indian soil, therefore the task is to conserve it from pollution caused in the agricultural field itself, by burning of crop residue. Due to the lack of incentives, awareness and other socio-economic factors, farmers adopt the practice of crop burning. There is lack of connectivity among government, stakeholders/corporations and farmers, due to factors like inadequate supply of advanced machinery and equipment to farmers by the state government, also there is a delay in clearance of loans by the state's financial institutions. The Multinational corporations tend to buy the crop residue for their business purposes, by providing monetary benefits to the farmers, which does not solve the issue of managing the crop residue in sustainable manner in total but somewhere educates the farmers about other alternatives then burning the residue. Therefore, the exercise of this cycle can provide financial support to farmers and will also lead them to shoulder the responsibility of waste management. This paper focuses on problems created by this delayed process and most importantly, lack of strict enforcement of laws and regulations on practising crop burning, despite the presence of various policies initiated by State Governments, environmental legislations, agencies for surveillance, the establishment of the National Green Tribunal ("NGT") and judiciary. It has been argued by the author that there is a need to consider this practice as an offence and consequently, penalise the same. The author goes on to discuss alternatives to crop burning, such as the production of Biochar,*

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*in-situ crop management, crop diversification, which are practised but need to be effectively and widely implemented in the northern region of India.*

**Keywords:** Crop residue, stubble burning, carbon, smog, environment pollution.

## I. INTRODUCTION

The need to preserve and protect nature has been present since the start of the human era, but the requirement for the same is increasing at a rapid rate due to increasing population and a better standard of living, leading to deforestation, the establishment of industries, uncontrollable pollution which altogether hampers the natural functioning of the environment. One of the factors of environmental degradation is crop burning in some regions of India, and this practice of burning residue after harvesting the crop is practised by farmers in the northern region of India. Clearly, there is a need for balance between the development of states, country, and the world, on one side and conservation of the environment on the other. Moreover, there should be a 'happy medium' that should be sought to be achieved, and the term signifies the use of substituted modes of development and utilisation of resources to exploit technology. Basically, the environment is an integration of resources granted to us by nature, and it's an accepted fact that pollution cannot be avoided altogether but the need of saving the planet should also not be ignored. There are various forms of diversified technologies or green technologies like happy seeder machines, crop diversification, conversion of crop residue or biomass into fuel, direct seeding and in-situ crop management. The objective of these alternatives is to gradually achieve a stage of no-tillage for preparing the agricultural fields after harvesting the particular crop, save the loss of nutrients and prevent environmental pollution due to crop residue burning. At the same time, better enforcement of national laws, penalty provisions for crop burning, and its harmonization with international legislation is need of the hour.

To pose a question-what is the relation between environment and law? There could be a lack of coherence in the answer; law is a set of rules and regulations imposed in order to ensure the systematic functioning of society. Similarly, in order to govern the environment

and our natural resources, there are statutes, regulations, national, district and international legislations and treaties created to conserve the environment from damage, and to enforce legal consequences for the same, which imposes a liability on public or private corporations, or individuals. The issues of what should be the punishment for crop burning, the authority empowered to impose penalties and provide directions for the same, need clarification. The ambit of drafting legislations and numerous policies to prevent crop residue burning are present in India, but to tackle this issue, the enforcement of all laws and regulation should be stern. Moreover, the practice of sustainable management of crop residue and promotion of alternatives should be initiated and executed by the government with the involvement of stakeholders, MNCs and entrepreneurs, investment in different types of machinery.

Crop or stubble burning occurs when any grain or cereal crop is harvested, and the remains of the same are set on fire. Burning is a mode of discarding straw which is a by-product, left after harvesting a crop. Now, here the question that arises is, the need for removing the straw. The field and the soil should be prepared for its first or next cultivation, this practice of maintaining the soil is known as tilling. That means the remains or the residue from the prior crop, is not suited for growing the next grain. To fortify, this practice is the only option to prepare the fields by burning the crop residue i.e., stubble, straw, weed. Subsequently, the primary focus is, why it is practised and what alternatives could be adopted. Then the second issue is the need for considering that crop burning is an offence against the environment and individuals are likely to get injured from that.

Following are the common premises that leads to crop burning in India, and the same are further discussed in the paper.

a) Farmers consider that, burning the waste residue after harvesting is the most economic and fastest mode at the same time.

b) There is a lack of awareness regarding tools and techniques which could have been adopted instead.

c) There could be a bridge between supplies of such techniques by the states to the farmers.<sup>497</sup>

d) The existence of systematic provisions for liability and penalty for burning crop residue in Indian environmental legislation is the need of the hour.

The crop residues which are prone to burning are majorly wheat, rice, pulses, millets which account for the staple food of urban as well as rural areas. Apart from these, cotton and other oilseeds are also burned.

## II. ASSESSING THE IMPACT OF CROP BURNING

### A. *Impact on Environment*

Though the Indian economy is hugely driven by the agricultural sector i.e., sowing and cultivation cycle is always a steady process. Consequently, this leads to the production of biomass waste or residue in excessive amount and to clear it, the residue is burned every year, despite of various regulations issued by the Central Government to State Governments, as burning leads to environmental hazards such as global warming and pollution which leads to the increased percentage of particulate matter in the atmosphere. The generation of particulate matter is due to the emission of Carbon dioxide, Carbon Monoxide, Ammonia, Nitrogen

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<sup>497</sup> Shiv Kumar Lohan et.al. *Burning issues of Paddy residue management in the North-West States of India*, 81 (P1), RSER, ELSEVIER, 693, 694 (2017),

Oxide, Sulphur Oxide, Methane and aromatic hydrocarbons and other volatile and semi-volatile organic compounds which are hazardous for the environment. The effect of such particulate matter is that it decreases the essential nutrients that soil retains so that seed further sowed are unable to be enriched with all the nutrients. Moreover, to provide a comparison, the emission of particulate matter by crop burning is multiple times more than the pollutants emitted from industries or vehicles. Also, particulate matter from stubble burning spreads to other states and cities nimbly due to the formation of smog (brown cloudy appearance) which creates intense pollution when it moves across land.

### *B. Impact on Ozone layer*

Smog affects the ozone layer due to interlinked cause and effects. Smog is formed due to the emission of greenhouse gases generated by burning stubble. Subsequently, this leads to an increase in existing poisonous gases present in the environment such as compounds of Carbon Oxides, Nitrogen, Sulphur with Oxides and Hydrogen and other specific particulate matter emitted due to crop burning. The gases hence deteriorate the fertility of the soil by killing nutrients already present in it and the adverse effect of smog is on human health and the environment including surrounding vegetation, and ultimately on the ozone layer which protects the earth from ultraviolet radiation, as most of the ozone is merged with a stratospheric layer which is not much far from our Earth's surface.

The stubble burning changes the proportion of Carbon – Nitrogen which leads to an increase in temperature of the soil at a high rate. This leads to the regeneration of microbes even after burning. Further, the nutrients such Carbon, Nitrogen, Phosphorus,

Sulphur, Potassium existing in stubble are diminished due to burning.<sup>498</sup>

### *C. Impact on Biodiversity*

There is a foreseeable loss to the biodiversity of the particular state where crop residue burning is practised; along with a clash with the Biodiversity Act, 2002<sup>499</sup> (“**the Act**”) when stubble burning is practised. Under the Act, biodiversity includes all variety of species living in the ecosystem including plants, animals, and genetic material derived from them, except human genetic materials. Now, according to Section 18<sup>500</sup> of the Act, the National Biodiversity Authority can provide suggestions to the Central Government and State Governments on the issues concerned with the conservation of biodiversity, sustainable use and equitable sharing of benefits arising out of biological resources. Section 36<sup>501</sup> of the Act is of prime importance here in relation the prevention of crop burning, as Central Government has two responsibilities; firstly, to form policies and plan to conserve biological diversity, resources derived from it for sustainable use and benefit-sharing, in parallel to this also promote, educate and extend the reach of awareness to farmers and individuals of the particular state. Secondly, to supervise and manage the biological diversity areas and its resources if they are prone, or threatened by the act of overuse, abuse or harmful activity to the environment and its surroundings. It also has the added responsibility of analysing any risk associated with the progress of any project on biological diversity and measure its impact on the environment. If it is adverse and likely to cause harm and threaten

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<sup>498</sup> Amit Awashi, *Study of size and mass distribution of Particulate Matter due to Crop Burning with seasonal variation in rural areas of Punjab, India*, 13, JEM, 1073, 1075

<sup>499</sup> The Biodiversity Act, 2002, No. 18, Act of Parliament, 2003 (India).

<sup>500</sup> The Biodiversity Act, 2002, § 18.

<sup>501</sup> The Biodiversity Act, 2002, § 36.

the biological diversity, immediate steps should be taken to minimise the associated risk.

Therefore, the act of burning crop residue manifests the loss of biodiversity and its resources and further violates the provisions of the Biodiversity Act, 2002. The Central Government should take advisory measures to prevent states from committing the act of burning residue, to maintain the harmony and balance of biodiversity and its resources.

### III. SUGGESTION AND ALTERNATIVES

The reason why Indian farmers and breeders are inclined towards crop burning have already been discussed. There is a need for economic and environmentally friendly alternatives for crop burning.

1. It is a point of contemplation that manual harvesting is not a mode to rely on in northern regions of India. Production of crops is in substantial amounts and therefore to speed up the process, only human labour is not sufficient. So combined harvesting is adopted, but the drawback of it is that after harvesting residue of one crop cannot be cleaned rapidly in order to sow a new crop. Therefore, to save the time duration of harvesting the old crop and sowing a new crop, farmers switch to burning and that too in combined harvested areas. The straw management system can dice the residue to spread it evenly as much as possible, without the requirement of cleaning. This results in reduced weed which is grown, retaining of crop residue in the form of mulch which improves the health of soil naturally, as there is a reduced need of fertilizers to be sprayed by external factors. Another add-on advanced technology to Straw Management System is 'Happy Seeders'. This technology is accessed by a machine attached with tractors and it chops and hoists the rice straw and sows the seeds for cultivation of weed by

spreading the straw as much all over the field.<sup>502</sup> In-situ incorporation and management of crops include 'Happy Seeder technology'. Basically it is a powerful technology which facilitates no disposal of residue, incorporating it back to the soil which reverts the Nitrogen, Phosphorus, Potassium, and other essential nutrients to the soil and in turn increases the fertility. This is more economical and healthier in the long term, as it cuts down tillage cost for a consecutive season. The gist is that in-situ management is environment friendly, as it prevents air pollution and production of microbes, weed and other fungi. Ultimately, adoption of these technologies leads to skipping the tillage process, which could be defined as custom to regulate agriculture in our country; the effects of tillage are gain killer as it reduces moisture from the soil, during and after tillage, Nitrogen, Carbon and other nutrients' level is dropped. Therefore, the minor attributes which are achieved by tillage, required for agriculture, could be replaced by the above and below discussed alternatives. Indian Council for Agricultural Research by Krishi Vigyan Kendras of respective states are consistently working on the adoption of zero tillage culture, as it would amount to less human labour, save time and most importantly improve the quality of the soil. The other highlighted as well as underrated point is, unlike other states, Punjab, Haryana and Uttar Pradesh use less amount of residue for animal fodder. The major reason is, that as these states are rich in cultivation of paddy crops, rice and potatoes, the crop residue for these crops has a high supplement of silica in it, which could not be used as food for animals.<sup>503</sup>

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<sup>502</sup> Ridhima Gupta and E. Somanathan, *Happy Seeder: A solution to agricultural fire in North India, Ideas for India*, (Nov. 12, 2016), <http://www.ideasforindia.in>.

<sup>503</sup> Henry F. Mayland and Glen E. Shewmaker, *Animal health problem caused by silicon and other mineral imbalances*, 54(4), JRM, 441, 441.

2. One alternative to crop burning and utilization of residue is conversion to biofuel. India is a hub for cultivating rice, wheat, maize and other paddy crops. The residue left after the cultivation of such crops is rich in lignin (lignocellulostic biomass) consisting of complex cellulose and hemicelluloses, which is resistant to biodegradation. Now, there is a technique called lignocellulostic biomass pre-treatment, in which microbes are used to remove this lignin layer off the residue by disintegrating cellulose into sugars and monomers which are effective for biomass conversion to fuel. This tends to wipe the impurities of the soil and causes less pollution.<sup>504</sup> According to the report of National Policy for Management of Crop Residue and Intergovernmental Panel for Climate Change,<sup>505</sup> crop residue of rice followed by wheat, oilseeds is burnt in the highest amount. Our focus should be on degrading rice and other paddy crop residue into the production of bio-fuel, as high Methane content required for biofuel conversion could be procured by rice residue. The steps taken by India to diversify management of crop residue, accessorize few other initiatives such as “waste to energy mission”, implanting biogas plants, blending crop residue (in small proportion) with coal to generate energy, would provide financial support to farmers. Another method is not letting carbon get evaporated in atmosphere i.e. it should be secured in soil only. This can be done by burning agricultural waste at a controlled temperature in a little amount of oxygen. The reason of burning in the minute amount of oxygen is, there will be no emission of fumes in the environment, which in turn keeps

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<sup>504</sup> S. Bhuvaneshwari, et.al, *Crop residue burning in India: Policy challenges and Potential solutions*, 16(5): 832, IJERPH, 1, 3.

<sup>505</sup> Ministry of Agriculture, Department of Agriculture and cooperation, National Policy for Management of Crop Residue (NPMCR) (2014)

accumulating in the burning container, and will gradually turn into solid 'black carbon', which could be further used.<sup>506</sup>

3. According to the report of 2019 and 2018<sup>507</sup> on "crop residue management" by the Department of Agriculture, Cooperation and Farmers Welfare, there is an initiative of diversification of cultivating other crops by breaking the monopoly of Paddy (Rice and Wheat) in the northern region. This initiative of diversifying was free of any technology and investment, and farmers were made aware and encouraged to grow vegetables, citrus fruits, oilseeds and other crops which could be grown on Paddy fields, which reduced the dominance of the same. Therefore, this results in a lesser generation of crop residue which needs to be disposed of. Also, it was observed that MNCs like Nestle, Hindustan Lever Ltd., PepsiCo entered in contracts for cultivating potatoes, chillies and tomatoes, all this was possible under integrated efforts of Banks, government initiative – contract Farming Act, 2013,<sup>508</sup> which promoted private corporation to invest, in diversified farming. Initially crop diversification faced some criticism, when it comes to low capital investment in the cultivation of rice and wheat, better stability in terms of income, low maintenance and more demand of rice and wheat. Though changes are difficult to incorporate, at the stake of environment and alternative residue for crop burning, this shift from monoculture (rice and wheat) to high-value horticulture and organic farming should be made a priority.

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<sup>506</sup> Ministry of Agriculture and Farmers Welfare, Annual Report 2018-19, 44.

<sup>507</sup> Ministry of Agriculture and Farmers Welfare, Report of the committee, Review of the Scheme "Promotion of Agricultural Mechanism for In-Situ Management of Crop Residue in States of Punjab, Haryana, Uttar Pradesh and NCT of Delhi, (May 2019).

<sup>508</sup> The Punjab Contract Farming Act, 2013.E

#### IV. ADOPTION OF LEGAL MEASURES

As per the above discussion, any alternative for crop burning should be considered keeping in mind economic friendly technologies. Hence, the equipment which evenly spreads the residue on the field shall be used and such tools can be arranged by special investments done by government or private corporations for eco- friendly agriculture of the state. The suggestive measure to set up this project is by maintaining harmony between Agriculture Research Institutes, government and corporations, so that policies such as national policy for management of crop residue can provide discounts to state governments, who will buy such types of machinery and types of equipment such as 'Happy Seeder' and direct seeding machines in order to avoid tillage which would lead to no crop burning by farmers. The residue collected by the usage of such equipment will be sold to corporations by farmers, which will give them financial support, and corporations will utilise the residue for further conversion into fuel, selling to thermal power plants, for distribution of fodder for animals after extraction of silica.

##### *A. Linking Indian legislations on the environment and crop burning*

It is indisputable according to Section 2 of Air Pollution Control Act, 1981, the act of burning residue falls under the category of pollutant which causes severe pollution and has an adverse impact on the environment and health. Section 19(3) of the Air Pollution Control Act, 1981<sup>509</sup> states that, the State Government with the consultation of the State Board can prohibit the use of unapproved fuel and appliances causing Air Pollution in any area or area declared as Air Pollution Control Area. Also, clause (5) states that "burning of any material other than fuel" causing Air Pollution could be prohibited by the state government. The statement

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<sup>509</sup> The Air Pollution Control Act, 1981, § 19(3).

“burning of any material other than fuel” does not provide an interpretation for burning of what other materials amounts to environmental pollution.

It is predetermined that there is a direct need for penal provisions as there is no specific limit fixed by state governments for the amount of emission by crop burning, which causes air pollution, like it is stated for emission from automobiles and industrial plants. Also, under Section 22A<sup>510</sup> the State Board has the power to make an application to the court for restraining such individual or corporation to carry on the practice of emitting air pollutants in excess of the permissible limit, and subsequently, on examination of application, further steps for inquiry, and investigation are taken. The point to be noted is that as under Section 22, north-western states and Delhi – NCR falls under air pollution control areas, therefore the industries shall strictly abide by the limit permitted by the State Board to emit air pollutant. Moreover, the penalty provided under section 37<sup>511</sup> should include an act of crop burning as an offence, as this practice also violates Section 31A<sup>512</sup>.

The incorporation of the provision for the Central Board will be simpler as there can be no standard limit up to which emission should be allowed; it's a practice which has to be stopped in every region of India as it amounts to an offence for which there should be a penalty.

### *B. Adoption of UNCED principles*

The ‘Earth Summit’ was a global conference held in Rio de Janeiro, Brazil to analyse the impact of human activities on the environment, it also underlined the inter-relation of social and

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<sup>510</sup> The Air Pollution Control Act, 1981, § 22A.

<sup>511</sup> The Air Pollution Control Act, 1981, § 37.

<sup>512</sup> The Air Pollution Control Act, 1981, § 31A.

economic behaviour on our planet and deduced that, the objective to attain sustainable development is possible with contribution of individual and government of every nation. India have various legislations passed on environment protection, somewhere initiated after attending United Nations Conference on Environment and Development (“UNCED”) at Rio De Janeiro, 1992.<sup>513</sup> It inspired States to develop more national laws for enforcing liabilities and compensation for environmental damage for which compensated amount will be credited to an environment relief fund, and also for individuals and communities who are harmed by such violation of restrictions imposed, by the centre and state governments. The status of UNCED is non-obligatory on member states, but we should strive to have a reflection of the principles in environmental legislation of India. The correspondence of following principles of conservation will be very effective if adopted.

Principle 10: State authorities should share every environment related information which could be hazardous and promote non-occurrence of such activities;

Principle 11: Priority shall be given to effective environmental legislation of member nations which should be on friendly terms with other nations;

Principle 13: Environmental injury suffered by victims should be provided with compensation, and liability should be imposed on individuals or group who caused such adverse effect in a particular locality;

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<sup>513</sup> UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPEMENT, & Johnson, S. (1992). *The Earth Summit, the United Nation Conference on Environment and Development (UNCED)*. London, Graham and Trotman/Martinus Nijhoff.

Principle 15: According to the level of pollution caused by various activities in the states, the Precautionary Principle shall be applied in order to prevent excessive damage and restricting the occurrence of such activities.<sup>514</sup>

The common point to comprehend is that lack of access to technology, socio-economic reasons of community and non-awareness should not be entertained or considered as an excuse to take a step towards burning residue. Instead, adoption of scientific principles should be implemented to prevent deterioration of the environment.

India had enacted the Public Liability Insurance Act, 1991<sup>515</sup> which provides immediate relief to persons and the environment from harm faced, either by no fault of the person whose act amounts to injury i.e., neglect or wrongful act is not required to be proved, or by the injury inflicted due to any hazardous substance. National Ambient Air Quality Standard is a regulatory body formed by Central Pollution Control Board, which is required to keep surveillance over all states in India; it can investigate if report received by State Government and State Board is violating vegetation, public health and property.

The ambiguity with regard whether liability should be imposed on farmers or administrative authorities, is still to be simplified, and for deciding liability of an offence intention is an essential factor to be taken into consideration. Farmers are not taking this step of crop burning by choice, but due to the stagnant issue of poverty, and lack of availability of access to alternatives and technologies discussed above. Moreover, lesser time duration for sowing rabi and kharif crops is the influential factor in resorting to burning of crop residue.

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<sup>514</sup> *Id.* at 5 and 6.

<sup>515</sup> The Public Insurance Liability Act, 1991, § 7A.

If at this stage proper tools and techniques are kept ready and made available to farmers by State Governments, they will be less inclined towards this practice. In past rulings of the Supreme Court, Judges strictly directed that it is the responsibility of the state governments and administrative authorities to keep supervision on occurrence of such activities, otherwise the liability lies on concerned authorities. This implies farmers should not be imprisoned and imposed with penalties but should be supported, educated and deserve promotion of alternatives by administrative authorities, and burden of proof shall lie on State Governments.

### *C. Providing education to farmers*

As discussed above, while it is important to implement penal provisions to prevent the act of crop burning, priority at the same time should also be given to educating farmers with regard to the impact on the environment and human health. Awareness could be spread by showing documentaries, speeches and providing training for using advanced equipment and types of machinery as an alternative for burning residue. The main reason to adopt this practice is the minimum number of days available to prepare the field to sow the next crop, after harvesting rice in the month of November or December; therefore the machinery used for clearing stubble or paddy should be readily available in an adequate number, in order to utilise the days for preparing the field and soil for next crop.<sup>516</sup>

Farmers' incentives could be increased by collecting and transferring residue to paper industries, fuel for biogas, mushroom cultivation by using paddy (rice residue after harvest), shifting focus

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<sup>516</sup> PRAMOD KUMAR, SURENDRA KUMAR & LAKSHMI JOSHI, SOCIOECONOMIC AND ENVIRONMENTAL IMPLICATIONS OF AGRICULTURAL RESIDUE BURNING, A CASE STUDY OF PUNJAB, INDIA, 138-139 (2015).

from the rice-wheat rotation to crop diversification by sowing weather-friendly grains and crops after harvesting rice.

Alternatives to burning such as stubble management *via* using mechanical means such as zero tillage and 'Happy Seeder' for collecting mulch and using it in feeding animals, using it as a fuel for biogas plants, preparation of compost for next round of sowing, converting it into organic manure and other usages shall be adopted and promoted.

The crux of the above discussion is, even after the implementation of legislations and policies like: (a) Central sector scheme on "promotion of Agricultural mechanism for in-situ management" of crop residue in the States of Punjab, Haryana, Uttar Pradesh and NCT Delhi for 2018-19, and 2019-20.<sup>517</sup> (b) Central Pollution Control Board with National Remote Sensing Agency (NRSA) implemented surveillance of crop residue management with authority to penalise the farmers for burning residue. (c) The Air (Prevention and Control of Pollution) Act, 1981,<sup>518</sup> (d) The Environment Protection Act, 1986,<sup>519</sup> and (d) establishment of National Green Tribunal - it is imperative to incorporate provisions for the offence of crop burning in the environment legislations and delegate the power of governance to the states, and subsequently effective measures should be taken by state administrative authorities to prevent and ban crop burning.

## V. CONCLUSION

Indian economy and population heavily depend upon agriculture sector, the in-house consumption and export of kharif and rabi crops is a steady process and in this mechanism the time left to prepare the farm

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<sup>517</sup> *Id.* At 10.

<sup>518</sup> The Air Prevention Control Act, 1981.

<sup>519</sup> The Environment Protection Act, 1986.

land to sow wheat crop and harvest rice crop is not sufficient. Apart from all the farming stages management of crop residue is the responsibility to be stabilized. As discussed, the impact of burning residue adversely affects the ecosystem and initiating the adoption of other alternatives such as zero tillage, happy seeder, building biogas plants, in-situ management can eliminate the environmental hazards associated with crop burning. It could be comprehended that boasting advanced machineries is difficult due to large investment and clearance of loan by the financial institutions for the same, but adopting the following economical practices could diminish the act of crop burning: (a) selling the crop residue for animal fodder and to corporations to produce bioenergy, (b) Practicing crop diversification and rotation, (c) educating the farmers about producing biochar and other next best alternatives instead of burning the crop residue.

The Government has the substantial role in abolishing the practice by educating the farmers, spreading awareness about technologies available and moreover by acknowledging it as an offence and taking measures by implementing the provisions stated in the environmental legislations and enforcing the liability on violation of the same.

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