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# NMIMS STUDENT LAW REVIEW

Volume IV  
May 2022

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NMIMS  
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Volume IV  
May 2022

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## FROM THE DEAN'S DESK

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This publication is a step towards our journey to institutionalise research by students. Our attempt is to openly welcome good quality research articles from research scholars objectively. Though students publish quality research in highly acclaimed journals, it was felt that the culmination of ideation can only begin when nurtured from our level. 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 and comments. 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 Student 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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The launch of the Law Review, under the guidance of our Dean and Faculty In-Charge, was a moment of pride for us. Since then, the Journal has received such an overwhelming response from authors and all budding young professionals. We take it as 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 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 Fourth 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**



## ACKNOWLEDGMENT

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This Fourth Issue of NMIMS Student Law Review has been a collective effort right from the moment we conceptualised its theme. We extend our gratitude to our Hon'ble Vice Chancellor, NMIMS University for his constant support and encouragement, and the Dean of NMIMS Kirit P. Mehta School of Law Dr. Alok Misra for entrusting us with this responsibility of editing the fourth issue of NMIMS Law Review on Contemporary issues. We hope that this issue will be unprecedented in terms of the breadth and depth of the theme being covered. We could not have carried through this project successfully without his encouragement.

We thank the Registrar of NMIMS University for her continued support. We would also thank the administrative department; our Board of peer reviewers for their time and close reading of the articles; our faculty colleagues who have always provided the intellectual space and friendship that help sustain projects like these and make them a happy affair. We must also thank our contributors who so encouragingly responded to our call for papers, were very cooperative with keeping deadlines, and thought of us as a worthy venue for publishing their scholarship. It is your work that makes this special issue special.

Our team also deserves a very special mention: Our Student Head Ms. Anvita Sinha, Student Co-head Soumya Singh, Student

Editor-In-Chief Aashirwa Baburaj, Co-Editor in-Chief Purna Hegde, along with the whole team of Associate Editors have been absolutely fantastic to work with. Their dedication and professionalism are reasons why we have been able to pull this issue through to fruition. Last but not the least, thank you to our Mentor Mr. Harshal Shah for his inspiration and provocations that always ensured that we do not compromise on theory, and never suspend criticality. Your intellectual engagement and scholarship forms an essential foundation of this special issue.

- **Prof. Richa Kashyap**

**Faculty-In charge and Editor-in-Chief**

## STUDENT'S MESSAGE

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The NMIMS Student Law Review has always sought to contribute to the broader discourse of the times, with a focus on promoting ideas which pervade the sharp boundaries of a particular discipline. This inter-disciplinary approach grows ever more pertinent in the uncertain and fast-evolving world that we find ourselves in. It hopes to be the thread that ties seemingly distinct ideas together, thereby making sense of the changing contours of legal discourse and the world at large.

It is this hope that law students invariably lend to the pages of the NMIMS Student Law Review when they associate themselves with it as authors. The association with law students has been intentional since the inception of the journal- an aim to provide for a perspective that is often found missing in mainstream academic discourse. The mantle of providing a platform for this perspective is also carried by students, in the form of the student editorial board.

The fourth volume of the NMIMS Student Law Review strengthens this hope that was implanted in 2019. It is a testament to the strength of the editorial board and their determination to bring this edition to fruition in the face of odds, both internal and external. My heartiest congratulations to the editors on painstakingly curating a remarkable volume. It has been gratifying to witness the NMIMS Student Law Review grow from strength to strength, led by an exceptionally bright editorial board.

The publication of the current volume also speaks to the guidance and foresight of Prof. Richa Kashyap, who has now successfully spearheaded four volumes of the NMIMS Student Law Review. Her insight at each stage of the editorial process was invaluable during my tenure, and I am hopeful that the current editorial board has been able to reap the benefits of the same.

I am confident that the NMIMS Student Law Review will continue to scale peaks- not only in terms of readership and access, but more importantly in terms of its contribution to legal discourse.

- **Sampurna Kanungo**

**Head, NMIMS Law Review 2020-2021 (Volume III)**

## FOREWORD

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It gives us immense pleasure in publishing this fourth volume of the NMIMS Student 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. Sarfaraz Ahmed Khan and Aditi Moral, in their paper titled "*A Compelling Case for Why Police Reforms Matter*" embark on an insightful analysis of the colonial traditions that govern the state of policing to this date and argues for an urgent need of implementing the pending police reforms. The authors argue that issues such as shortage of manpower, obsolete machinery, inadequate training, and lack of basic amenities like safe and affordable housing, sanitation, access to clean drinking water et cetera hinder the performance and welfare of the police personnel. The authors conclude with emphasis on the need for transparent mechanisms to ensure accountability and incentives for a satisfied police force

In their paper titled "*The Antitrust Implications Of Online Restaurant Aggregators And Food Delivery Platforms: Tough To Digest?*", Richa Phulwani and Sarab Lamba delve into the implication of the unparalleled growth of online food tech sector that has led to an economic quagmire for the brick-and-mortar restaurants in India. The article sheds light into the current propositions of law with respect to delineation of relevant market in the online sector, the hesitancy of recognising the concept of Collective Dominance, the heavy discounting practises which characterise this sector among others

In "*Navigating SPACs through a Cross-Border Lens – What can the Indian Regulators Learn?*", Khushi Dua and Tapamoy Ghose discuss

the analyse the history of SPAC and how it has become a prominent player in the international market, including the Indian capital market. The authors carry out a comparative study by taking into account the regulatory framework of SPACs in different capital markets such as Malaysia, the United States, Italy, Canada and Singapore to address the shortcomings in the legal framework of India.

In her article titled *“International Investment Arbitration And The Conundrum Engendered By ‘Double-Hatting’”*, Ananya Dutta has explained how the practice of ‘double hatting’ in international investment has been condemned by practitioners and parties alike on grounds of legitimacy concerns like lack of impartiality and independence of adjudicators performing multiple roles. She has further analysed the general idea of double-hatting, the problems arising out of it, its double-edged impact on the diversity in international arbitration, the existing mechanisms to deal with this issue, and other potential sui generis solutions for the same.

Naga Sai Srikar in his article titled *“Information Intermediaries in Commercial Arbitration: Towards Evidential Integrity and Speedy Redressal?”* has critically analysed and compared the existence of surveillance state in the 21st century with the essence of the Panopticon as envisioned by Bentham. In addition to a contemporary aspect in the paper, the author has further argued the ideology from both the sides by using contemporary judgements and incidents. Lastly the author has expressed his ideas on how the two concepts and ideologies can be collated and resolved.

In a concluding special note by Raghav Pathak in his article *“The Obstacles to Effectuate Awards in Investor-State Disputes”*, the focus is on the issues and obstacles an investment entity, whether it is private or state-owned legally faces in arbitration cases. This is reflected throughout the article in form of case laws from various countries.

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 and persistent efforts and dedication to facilitate the publication of quality legal literature.

**Board of Editors**

At Mumbai, MH

April 2022

LONG

ARTICLES



## A COMPELLING CASE FOR WHY POLICE REFORMS MATTER

- Dr. Sarfaraz Ahmed Khan & Aditi Morale\*

### ABSTRACT

*Being the first line of defence in the country, the local police forces serve as the face of the state, a state machinery with maximum visibility in the eyes of public. From investigating crimes to enforcing law and order, the police officers form the backbone of our criminal justice system. However, the existing policing system is rife with maladies. Unbridled political interference, rampant police excesses, lack of accountability, inaction, corruption, and criminal complicity have tainted the face of the Indian Police. The paper identifies the colonial traditions that govern the state of policing to this date and argues for an urgent need of implementing the pending police reforms.*

*Issues such as shortage of manpower, obsolete machinery, inadequate training, and lack of basic amenities like safe and affordable housing, sanitation, access to clean drinking water et cetera hinder the performance and welfare of the police personnel. This makes comprehensive police reforms more important than ever. Despite a long history of attempts at police reforms, the compliance by the political leadership seems to be dissatisfactory on all counts. This paper, therefore, sets out to make a compelling case as to why the police reforms matter and what should be*

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\* Dr. Sarfaraz Ahmed Khan, Former Director and Professor at Symbiosis Law School, Hyderabad.

Aditi Abasaheb Morale, V<sup>th</sup> Year, B.A., LL.B. (Hons.), Maharashtra National Law University, Mumbai.

*done to ensure ameliorations that go beyond the Supreme Court directives in the landmark Prakash Singh judgement. The need for transparent mechanisms to ensure accountability and incentives for a satisfied police force is also addressed through this paper.*

**Keywords:** Police reforms, political interference, colonial traditions, accountability, incentives

## 1. INTRODUCTION

India, the world's largest democracy gained its status as the "Republic of India" post-independence, rightfully presenting itself as the sovereign deriving its power from the will of the newly liberated populace. Most institutions that we see today find their origins in the democratic aspirations of these vanguards of modern India.

The systems of policing, on the other hand, remind one of the colonial traditions of securing law and order. A democratic society, much like ourselves demands democratic ways of policing. To actualize this vision, the political leadership at the Centre along with the local governments will have to pick up the gauntlet and bring about the much-awaited police reforms.

This paper explores the history of police reforms in India while setting the tone for an urgent need to expedite these impending reforms. Further, while arguing for transparent and public-partnered systems of accountability to tackle with the police excesses, the paper also identifies that a welfare-oriented approach is crucial to achieve comprehensive police reforms.

The following subsection shall deal with the timeline for police reforms that begins from the pre-Independence India and spans over more than 150 years.

### *1.1 The Colonial Past*

One of the earliest recorded attempts at police reforms<sup>1</sup>, the Madras Torture Commission of 1855, was a mere façade in the name of a reform. The Commission offered a racially insensitive

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<sup>1</sup> Akun Sabharwal et al., *Internal and External Impediments to Police Reforms in India*, SARDAR VALLABHBHAI PATEL NATIONAL POLICE ACADEMY, (2015), [https://www.svpnpa.gov.in/images/npa/pdfs/CompletedResearchProject/6\\_inter\\_nalandextimpedencetopolice.pdf](https://www.svpnpa.gov.in/images/npa/pdfs/CompletedResearchProject/6_inter_nalandextimpedencetopolice.pdf) (last visited: May 28, 2021)

explanation for the horrors that ensued under the pretext of revenue collection. It disingenuously achieved that effect by demonizing the native cadre of servants and further exploiting the stereotype that “oriental is barbaric”.<sup>2</sup> The reform was unsuccessful in addressing the issue of widespread brutality and use of disproportionate force by the Company officials but the British regime somehow managed to use the reform to pose as a progressive or a liberal government<sup>3</sup>.

The Police Act, 1861 followed the Madras Torture Commission Report and was introduced in the backdrop of the Sepoy Mutiny of 1857. Agitated by the mutiny, the British formulated this Act to crush dissent or any movement demanding self-governance with an apparent intention of controlling the masses by use of brute force.<sup>4</sup>

“In sharp contrast to their Bobby, a celebrated symbol of citizen cooperation, the Indian police constable was deliberately made a symbol of the British Raj”, observes a former IPS Officer<sup>5</sup> while talking about the remnants of the colonial police administration and thoughtless adoption of the 1861 legislation by the sovereign state of India.

Ironically, the Police Acts enacted by most states of independent India are based on this very Act and continue to govern the police officials to this day despite their colonial roots and the underlying intention to suppress democratic remonstrations.

This is exactly why the discourse related to police reforms in India necessarily begins with the substitution of the State legislations

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<sup>2</sup> Anuj Bhuwania, “*Very wicked children*”: “*Indian torture*” and the Madras Torture Commission Report of 1855, 10 SUR - INTERNATIONAL JOURNAL ON HUMAN RIGHTS 7, 9 (2009), <https://sur.conectas.org/en/very-wicked-children/>.

<sup>3</sup> *Ibid.*

<sup>4</sup> DAVID ARNOLD, POLICE POWER AND COLONIAL RULE: MADRAS, 1859-1947 (Oxford University Press 1986).

<sup>5</sup> Arvind Verma, *National Police Commission in India: An Analysis of the Policy Failures*, 71(3), THE POLICE JOURNAL 226, 227 (1998).

based on the Police Act, 1861 with the Model Police Act in all States/UTs, a major reform that the executive has failed to implement in both its letter and spirit to this date.

### *1.2 Post-independence reforms:*

This paper primarily focuses on the post-independence reforms aimed at reviving the state of policing in India. The following subsections discuss the committees formed to look into the matters of police reforms as well as the contribution through judicial activism.

#### 1.2.1. The National Police Commission

The National Police Commission was formed in the year 1977 by the Janata Government to look into the police reforms especially in the backdrop of abuse of power and involvement of the police<sup>6</sup> in suppression of democratic processes in the country during the state of Emergency imposed from 1975 to 1977.

The National Police Commission (NPC) produced eight reports between 1979 and 1981. It sought to make arrangements for impartial inquiry into the complaints against police in ways that must be acceptable to the civil society in general and suggested an independent authority in the form of state level Police Complaint Boards for grievance redressal.<sup>7</sup>

The Commission also recommended judicial intervention<sup>8</sup> in cases of custodial rape, death or grievous hurt caused in police custody and death of two or more persons resulting from police firing while dispersing unlawful assemblies. This recommendation manifested later in the amended section 176(1A) of the Code of

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<sup>6</sup> *Ibid.*

<sup>7</sup> NATIONAL POLICE COMMISSION, *First Report*, (1979).

<sup>8</sup> *Ibid.*

Criminal Procedure, 1973, an important provision, the implementation of which is unfortunately still not commonplace<sup>9</sup>.

To minimize the threat of illicit transfers or suspensions, the Commission recommended institution of a State Security Commission (SSC)<sup>10</sup> in each state so as to put a check on the unwarranted superintendence exercised by the State governments on their respective police forces. It also prescribed a fix statutory tenure of service for the Chief of police<sup>11</sup> and laid down guidelines for the recruitment process.

Other major recommendations by the NPC include institution of a state level special investigation cell<sup>12</sup> to monitor the cases of atrocities against the marginalized communities, enactment of a new Police Act,<sup>13</sup> a Central Police Committee,<sup>14</sup> separation of investigation and law and order,<sup>15</sup> an All India Police Institute<sup>16</sup> along with certain proposed amendments in the Code of Criminal Procedure (CrPC) including withdrawal of protection from prosecution<sup>17</sup> granted under sections 132 and 197 of the said Act.

### 1.2.2 Ribeiro Committee

In 1996, two former senior police officers filed a PIL before the Supreme Court seeking implementation of the recommendations made by National Police Commission. In response, the Hon'ble Court directed the government to set up a committee to review the

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<sup>9</sup>Sukanya Shantha, *Most States Have Flouted Mandatory Judicial Inquiry into Custodial Deaths for 15 Years*, THE WIRE, (Jul. 07, 2020)

<https://thewire.in/rights/custodial-death-judicial-inquiry-crpc>

<sup>10</sup>NATIONAL POLICE COMMISSION, *Second Report* (1979).

<sup>11</sup>*Ibid.*

<sup>12</sup>NATIONAL POLICE COMMISSION, *Third Report* (1980).

<sup>13</sup>NATIONAL POLICE COMMISSION, *Eighth Report* (1981).

<sup>14</sup>NATIONAL POLICE COMMISSION, *Seventh Report* (1981).

<sup>15</sup>NATIONAL POLICE COMMISSION, *Sixth Report* (1981).

<sup>16</sup>*Supra* note 13.

<sup>17</sup>*Supra* note 12.

NPC's recommendations, known as the Ribeiro Committee. Under the leadership of a former chief of police, J.F. Ribeiro, the Committee sat over 1998 and 1999 and produced two reports<sup>18</sup>.

The Ribeiro Committee is said to have rejected the powerful recommendations by the National Police Commission on the grounds of "practicability"<sup>19</sup> implying that the political elite of the nation would not submit to the recommended institutions. While the Committee chose to call the State Security Commission, the "Police Performance and Accountability Commission", it did not strive to ensure its autonomy and utility and in fact, suggested that it be a "non-statutory, advisory and recommendatory"<sup>20</sup> body unlike the robust mechanism suggested by the NPC.

The Committee also sought for implementation of other reforms spelt out by the NPC such as separation of investigation and law and order, fixed tenure and fair selection procedure for Director General of Police (DGP), establishment of Police Establishment Board and District Police Complaints Authority (albeit non-statutory and recommendatory<sup>21</sup>).

### 1.3 Other Committees

Apart from the National Police Commission and the Ribeiro Committee, many other committees have extensively contributed to

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<sup>18</sup> COMMONWEALTH HUMAN RIGHTS INITIATIVE, POLICE REFORM DEBATES IN INDIA 3 (2011).

<https://humanrightsinitiative.org/publications/police/PRDebatesInIndia.pdf>.

<sup>19</sup>Report of the Ribeiro Committee on Police Reforms: A Critical Analysis,

COMMONWEALTH HUMAN RIGHTS INITIATIVE,

[https://humanrightsinitiative.org/programs/aj/police/india/initiatives/analysis\\_ribeiro.pdf](https://humanrightsinitiative.org/programs/aj/police/india/initiatives/analysis_ribeiro.pdf) (last visited: Aug. 21, 2020).

<sup>20</sup> COMMONWEALTH HUMAN RIGHTS INITIATIVE, POLICE REFORM DEBATES IN INDIA – SELECTED RECOMMENDATIONS 21 (2007)

[https://www.humanrightsinitiative.org/publications/police/police\\_reform\\_debates\\_in\\_india.pdf](https://www.humanrightsinitiative.org/publications/police/police_reform_debates_in_india.pdf).

<sup>21</sup>Supra note 19 at 23.

the cause of reforming the face of Indian police. Attempts at reforms from as early as 1949 when the Kerala Police Reorganisation Committee paved way for other Police Commissions in different States of India<sup>22</sup> show that discussions on police reforms are not novel. The Working Group on Police by the Administrative Reforms Commission in 1966 followed by the Gore Committee on Police Training in 1971 that made important but often neglected recommendations regarding inclusion of sensitization, communication skills and development of service-oriented attitudes in police training programmes,<sup>23</sup> *inter alia*, indicate the presence of an ongoing series of attempts at police reforms albeit with less success.

Several High-Powered Committees such as the Padmanabhaiah Committee constituted in 2000, the (Malimath) Committee on Reforms of Criminal Justice System (2001-03), the Second Administrative Reforms Commission (2005-08) and the 2005 Soli Sorabjee Committee (also known as the Police Act Drafting Committee) which gave us the Model Police Act for India in 2006 have been created for the purpose of reforming the status of policing in India.

#### ***1.4 Judicial contribution:***

Even the judiciary has significantly contributed in formulation of police laws and has time and again issued court orders to ensure compliance towards the suggested reforms. The landmark judgement of *Prakash Singh versus Union of India* was one such attempt by the judiciary at formulating comprehensive and uniform police reforms.

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<sup>22</sup> *The Padmanabhaiah Committee on Police Reforms: A Critical Analysis of Some Important Recommendations*, COMMONWEALTH HUMAN RIGHTS INITIATIVE, [https://humanrightsinitiative.org/programs/aj/police/india/initiatives/analysis\\_padmanabhaiah.pdf](https://humanrightsinitiative.org/programs/aj/police/india/initiatives/analysis_padmanabhaiah.pdf) (last visited: August 29, 2021).

<sup>23</sup> *Ibid.*



The PIL filed by retired IPS officer Prakash Singh and others was decided on by the Supreme Court in 2006, a decade after it was initially brought before the Court. This case marks the watershed moment in the history of police reforms in India.

The Apex Court, after having closely studied the recommendations from several reports by various Committees, issued definitive directions to be complied with by the State Governments, Union Territories and the central Government to ensure proper implementation of the pending reforms.

The Court allowed the states to choose from the following three models for constitution of the State Security Commission: The NHRC Model, the Ribeiro Committee model and the Sorabjee Committee Model. A balanced composition of members with the inclusion of Home Minister or the Chief Minister as the Chairman representing the incumbent government, the Leader of Opposition for diversity in opinions, a sitting/retired judge representing the impartial Judiciary, Director General of Police (DGP) as Ex-officio Secretary and 3-5 independent members to represent the civil society was ensured.

It is evident that the Supreme Court envisaged the State Security Commission as a force to reckon with, a powerful watchdog body entrusted with the responsibilities of drafting broad policy guidelines, evaluating the performance of the police and insulating the police force from the unfettered political control by regular scrutiny through annual reports to be tabled before the legislature. It emphasized on making its recommendations binding, so that the governments do not circumvent the suggestions of the SSCs.

Even for the selection of DGP, the State Governments are to only choose from the three seniormost officials empaneled by the Union Public Service Commission for promotion on the basis of experience and caliber. Arbitrary termination of the DGP or any officer on field

duty such as the Inspector General of Police or the Superintendent of Police goes against the said directives.

The Supreme Court in this landmark judgement issued highly specific directives with respect to the recommended institutions, the nature of their work, powers, composition etc. along with directions for selection procedure of the DGP among other reforms, leaving little to no scope for non-compliance. The Court even cited the *Vineet Narain case*<sup>24</sup> and placed on record that strict compliance of the issued directives was to be observed until they are replaced by suitable legislations in respective states.

Despite such constant efforts by retired officials, civil society organizations, several Government-formed Committees and Commissions coupled with the historic 2006 Judgment,<sup>25</sup> the delayed and improper implementation of police reforms in the nation is very disheartening.

## 2. Reluctance to comply

### 2.1 Dismal state of compliance

September 22, 2020, marked 14 years since the Supreme Court issued the aforementioned seven directives in the *Prakash Singh case*. However, none of the states have been found “fully compliant” of all the directives towards implementation of police reforms<sup>26</sup>.

So far, 17 states have amended their police acts<sup>27</sup> through legislations or executive orders to show compliance. However, these

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<sup>24</sup>*Vineet Narain v. Union of India*, (1998) 1 SCC 226 (India).

<sup>25</sup>*Supra* note 24

<sup>26</sup> *Government Compliance With Supreme Court Directives on Police Reforms: An Assessment*, COMMONWEALTH HUMAN RIGHTS INITIATIVE, 1 (Sept., 2020) <https://www.humanrightsinitiative.org/publication/government-compliance-with-supreme-court-directives-on-police-reforms-an-assessment-2020>

<sup>27</sup> *Status of Compliance with the Supreme Court's Directives on Police Reform in the Prakash Singh and Ors. vs. Union of India and Ors. Part I: States with Police Acts/Amendments*, COMMONWEALTH HUMAN RIGHTS INITIATIVE, 1-42 (Sept., 2020)

legislations/orders are rife with anomalies and provisions that seek to undermine the functional autonomy of their respective police forces due to which most of the defaulting states are marked “non-compliant”.

Similarly, 26 out of 28 states have constituted an SSC, either through Police Acts or government orders<sup>28</sup>. However, deviations such as advisory nature of the body, non-inclusion of Leader of opposition, lack of clarity in procedure of selection of independent members of the SSC, absence of the provision for submitting annual performance reports or for tabling the said reports to the legislature, lack of diversity on the board, et cetera have reduced the said attempts at reform to no more than mere lip service. Same goes for the compliance with other directives in the *Prakash Singh* Judgement<sup>29</sup>.

According to a study by the CHRI,<sup>30</sup> none of the Union Territories are compliant with the seven directives which indicates that the Central Government is equally responsible for the poor state of compliance. The Centre could have kick-started police reforms in UTs, thus creating a moral responsibility on states to comply. One of the seven directives in *Prakash Singh case* also includes the constitution of a National Security Commission responsible for appointment of Chiefs for the Central Police Organizations (CPOs) and a task of general evaluation and scrutiny.

However, apart from a brief response<sup>31</sup> by the Ministry of Home Affairs, stating that a committee called the “Committee on National

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<https://www.humanrightsinitiative.org/publication/compliance-chart-supreme-court-directives-on-police-reform-part-1-states-with-police-actsamendments>

<sup>28</sup>*Supra* note 27 at 7.

<sup>29</sup>*Ibid.*

<sup>30</sup>*Ibid.*

<sup>31</sup>Statement of H.G Ahir, RAJYA SABHA DEBATES, 1 (Jan. 3, 2018)

<https://www.mha.gov.in/MHA1/Par2017/pdfs/par2018-pdfs/rs-03012018/1843.pdf> (last visited: Aug. 1, 2021)

Security and Central Police Personnel Welfare (CNS & CPPW)” is being formed in pursuance of compliance with the said directive, no other information exists in the public domain.

This atmosphere of complete indifference towards police reforms poses a serious question as to whether the delay in proper implementation of reforms an outcome of a sheer lack of political will is just or if it is a conscious act of non-compliance.

## 2.2 Contempt of Court Orders

Even after the fine judicial pronouncement in the *Prakash Singh* case, the Indian Constitutional Courts have time and again sought to ensure compliance with the aforementioned seven directives. Two years after the landmark judgment in May 2008, a three-membered monitoring committee was set up by the Supreme Court to inquire into the status of implementation of the court’s directives.<sup>32</sup> Based on the report submitted by this committee, the Court even sent notices to non-compliant states demanding clarifications for non-implementation.

Yet again, in March 2013, the Supreme Court took *suo moto* cognizance of two incidents of police brutality and disproportionate use of force by police and has since issued many notices to errant states on different occasions<sup>33</sup>. Despite several warnings of *suo moto* contempt proceedings by the judiciary<sup>34</sup> and constant censure<sup>35</sup> of

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<sup>32</sup> COMMONWEALTH HUMAN RIGHTS INITIATIVE, STATE SECURITY COMMISSIONS: A STUDY OF POLICE OVERSIGHT IN INDIA, 10 (Dec., 2019) <https://www.humanrightsinitiative.org/download/1590655230State%20Security%20Commission%202020.pdf>

<sup>33</sup> *Ibid.*

<sup>34</sup> Mohamed Imranullah S., *HC warns govt. of suo motu contempt proceedings*, THE HINDU, (Jul. 13, 2020), <https://www.thehindu.com/news/national/tamil-nadu/hc-warns-govt-of-suo-motu-contempt-proceedings/article32072317.ece>

<sup>35</sup> *State panel: Contempt case adjourned*, TELANGANA TODAY, (Feb. 4, 2020), <https://telanganatoday.com/state-panel-contempt-case-adjourned>; *Supreme Court to hear contempt plea against Karnataka Chief*, BANGALORE MIRROR, (Apr. 24, 2018)

non-compliance by errant states, the state of compliance by the concerned governments remains dissatisfactory.

Due to the indifference towards implementation of police reforms, an atmosphere of despair and inertia has unfortunately clawed its way into the courtroom,<sup>36</sup> evident from the time when a bench led by Justice J. S. Khehar complained, “Police reforms are going on and on. Nobody listens to our orders”.<sup>37</sup>

### 3. Executive Interference

Police is a state subject.<sup>38</sup> The political control over police also finds its legitimacy through the Police Act of 1861<sup>39</sup> and subsequent acts modelled on this legislation. Hence, such superintendence is warranted by the law itself. However, this arrangement has historically manifested itself in a culture of unchecked executive interference in the working of police. From running errands for politicians<sup>40</sup> to deploying police to suppress democratic processes under the pretext of law and order crisis,<sup>41</sup> the police force has

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[https://bangaloremirror.indiatimes.com/bangalore/others/supreme-court-to-hear-contempt-plea-against-karnataka-chief-minister-siddaramaiah/articleshow/63886416.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](https://bangaloremirror.indiatimes.com/bangalore/others/supreme-court-to-hear-contempt-plea-against-karnataka-chief-minister-siddaramaiah/articleshow/63886416.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst)

<sup>36</sup> Gaurav Vivek Bhatnagar, *Police Reforms Order: SC Lax in Clamping Down on Non-Compliant States*, THE WIRE, (May 10, 2018), <https://thewire.in/law/police-reforms-order-sc-lax-in-clamping-down-on-non-compliant-states>

<sup>37</sup> *SC refuses urgent hearing on plea for police reforms*, PRESS TRUST OF INDIA, (Mar. 1, 2017), [http://www.ptinews.com/news/8456205\\_SC-refuses-urgent-hearing-on-plea-for-police-reforms-](http://www.ptinews.com/news/8456205_SC-refuses-urgent-hearing-on-plea-for-police-reforms-)

<sup>38</sup> INDIA CONST. sched. 7, list II, entry 2.

<sup>39</sup> The Police Act, 1861, §3, Act No. 5 of 1861 (India), <http://indiacode.nic.in>

<sup>40</sup> Beatrice Jauregui, *If the Constable Could Speak: Notes on a Continuing Failure to Secure the Masses and Reform the Police in India*, CENTER FOR THE ADVANCED STUDY OF INDIA, (Dec. 7, 2009) <https://casi.sas.upenn.edu/iit/Jauregui>

<sup>41</sup> PTL, *Heavy police deployment in various parts of Delhi amid protests calls against Citizenship Act*, THE NEW INDIAN EXPRESS, (Dec. 27, 2019), <https://www.newindianexpress.com/cities/delhi/2019/dec/27/heavy-police->

consistently been used as a personal cohort for the politicians and their connections.

To address and rectify this anomaly, numerous committees along with the judiciary through its 2006 judgement have demanded formation of SSCs to insulate the police force from abuse by its political leadership. However, this directive has not been sufficiently implemented in many states and UTs.

Politicians wield significant power over the police forces. Illegitimate transfers, bribery, desired postings in return for favours and similar pliant behaviour makes the officials susceptible to punishment. The state governments have the option of exercising excessive control over its police force through express actions and even enacting legislative provisions or passing executive orders that institutionalize and facilitate illegitimate political interference.

For example, some states have used sweeping provisions to get away with dilution of the directives such as the Tamil Nadu Police Act that allows the DGP to be removed from service “*on other administrative grounds*”.<sup>42</sup> Similarly, the Police Act<sup>43</sup> allows the State Government to transfer any police personnel found “*guilty of dereliction of duty*” before completion of two years of their tenure. In the same section,<sup>44</sup> the Chief Minister can transfer an IPS officer and the Home Minister is empowered to transfer officers of and above the rank of Sub-inspector in “*exceptional cases*”. Introduction of

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deployment-in-various-parts-of-delhi-amid-protests-calls-against-citizenship-act-2081588.html

<sup>42</sup> The Tamil Nadu Police (Reforms) Act, 2013, §3(3)(e), No. 22, Acts of Tamil Nadu Legislative Assembly, 2013(India), <http://indiacode.nic.in>

<sup>43</sup> The Maharashtra Police (Amendment and Continuance) Act, 2014, §22N(1), No. 24, Acts of Maharashtra Legislative Assembly, 2014(India), [https://www.maharashtra.gov.in/Site/Upload/Acts%20Rules/English/adhiniyam%2024%20pol%203\\_11072014.pdf](https://www.maharashtra.gov.in/Site/Upload/Acts%20Rules/English/adhiniyam%2024%20pol%203_11072014.pdf) (last visited: August 1, 2021).

<sup>44</sup> *Id.*, at §22N(2).

such ambiguity in law makes it susceptible to misuse as is evident from numerous examples.<sup>45</sup>

An average of 18% of Senior Superintendents of Police (SSPs) and Deputy Inspector Generals of Police (DIGs) at an all-India level have been transferred in less than two years from 2007 to 2016, according to a report by the Centre for the Study Developing Societies (CSDS).<sup>46</sup> Countless corroborations by police personnel across the ranks<sup>47</sup> indicate a positive correlation between such arbitrary transfers and political interference.

It is also pertinent to note, that executive interference effectively serves as a hindrance in on-ground implementation of the reforms despite ostensible legal protection indicating compliance to that effect.

For instance, the state of Maharashtra constituted<sup>48</sup> and empowered<sup>49</sup> the Police Establishment Board (PEB) in 2013 to handle

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<sup>45</sup> Mohamed Thavur, *Three days on, Maharashtra govt revokes transfer order of 10 DCPs*, THE INDIAN EXPRESS, (Jul. 6, 2020),

<https://indianexpress.com/article/cities/mumbai/three-days-on-maharashtra-govt-revokes-transfer-order-of-10-dcps-6491740/>

<sup>46</sup> COMMON CAUSE AND LOKNITI - CENTRE FOR THE STUDY DEVELOPING SOCIETIES (CSDS), STATUS OF POLICING IN INDIA REPORT 2019: POLICE ADEQUACY AND WORKING CONDITIONS, (2019)

[https://www.commoncause.in/uploadimage/page/Status\\_of\\_Policing\\_in\\_India\\_Report\\_2019\\_by\\_Common\\_Cause\\_and\\_CSDS.pdf](https://www.commoncause.in/uploadimage/page/Status_of_Policing_in_India_Report_2019_by_Common_Cause_and_CSDS.pdf)

<sup>47</sup> Rishikesh Bahadur Desai, *Political interference is the biggest issue, say police personnel*, THE HINDU, (Jun. 04, 2016),

<https://www.thehindu.com/news/national/karnataka/Political-interference-is-the-biggest-issue-say-police-personnel/article14383531.ece>

<sup>48</sup> Home Department, Government of Maharashtra, Government Resolution No.: NPC 1008/2/CR-6/Pol-3 (Issued on Jul. 15, 2013),

<https://www.maharashtra.gov.in/site/Upload/Government%20Resolutions/Marathi/201307151136271729.pdf> (last visited: July 5, 2021)

<sup>49</sup> Home Department, Government of Maharashtra, Government Notification No.: MIS-513/C.R.217/ POL-5B, (Issued on Jul. 15, 2013),

<https://www.maharashtra.gov.in/Site/Upload/Government%20Resolutions/English/201307151134557029.pdf> (last visited: July 5, 2021)

the matters related to transfer of police officials, in accordance with the Prakash Singh directives. However, an RTI query revealed that the then Chief Minister of Maharashtra transferred 47 IPS officers between January 1, 2016 and August 31, 2017 without there being such recommendations from the PEB.<sup>50</sup> It was in fact found that the PEB revised its own recommendations in almost nine cases. Even the number of executives among the members in many SSCs across India indicate political dominance and hinder execution of police reforms.

Such toothless bodies largely defeat the purpose of suggested reforms. Hence, mere formation of these supervisory bodies is not enough but ensuring maximum transparency and functional autonomy for these institutions is just as important.

#### 4. “Politicization” of the Police

The famous Aristotelian quote that “*man is a political animal*” is generally accepted as a truism.<sup>51</sup> The people that constitute public institutions or state machineries are no exceptions to this general rule either. However, it is also important to moderate the extent of political motivation driving public servants for complete antipathy to politics is as pointless as political partisanship is detrimental.

Here, a clear distinction has to be made between “apolitical” and “neutral” individuals. While the former lacks a sense of general politics or is unfazed by its impact on the society, the latter knowingly prefers to dissociate their political affiliations from their

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<sup>50</sup> Mohamed Thaver and Srinath Rao, *Despite police board, government retains grip on transfers*, THE INDIAN EXPRESS, (Dec. 12, 2017), <https://indianexpress.com/article/india/despite-police-board-government-retains-grip-on-transfers-4978618/>

<sup>51</sup> R. G. Mulgan *Aristotle's Doctrine That Man Is a Political Animal* 102(3) HERMES, 438–445 (1974), [www.jstor.org/stable/4475868](http://www.jstor.org/stable/4475868)



work in a manner that such a divorce ensures a judicious performance of their duties.

The goal of police reforms, henceforth, should not just be limited to insulation of the force from the executive branch but should also include adequate training, sensitization programmes and improved curriculum for aspiring candidates aimed at fostering a neutral law enforcement agency.

This chapter studies the colonial past responsible for a structure that enables politicization of the police force and delves into some of its impacts such as poor relations with minorities, corruption and a criminal nexus between the police, criminals, and politicians.

#### *4.1 Colonial roots and aversion to dissent*

##### *4.1.1 A force foundationally politicized*

The modern police organization established in London after the adoption of the Metropolitan Police Act in 1829 was based on the Robert Peele's principles of policing such as democratic governance, community policing, separation of powers, eradication of crimes through prevention rather than punishment and persuasion to demand compliance instead of use of physical force or restraint.<sup>52</sup>

However, the same liberal principles were not extended to the police forces formed elsewhere in commonwealth countries. The model behind the Royal Irish Constabulary that helped the British crush the *Fenian resistance* and maintain imperial hegemony, was

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<sup>52</sup>*Sir Robert Peel's Nine Principles of Policing*, THE NEW YORK TIMES, (Apr. 15, 2014), <https://www.nytimes.com/2014/04/16/nyregion/sir-robert-peels-nine-principles-of-policing.html>

incorporated in other British colonies including the Indian subcontinent.<sup>53</sup>

Studies on colonial policing system in India uncover countless accounts of state-sponsored police brutality such as regular public floggings and humiliations,<sup>54</sup> suppression of dissent through incarceration of activists,<sup>55</sup> criminalization of natives<sup>56</sup> and subsequent profiling by the police along with close to no avenues for redressal against police excesses.<sup>57</sup>

This was made possible due to the inherent structure of a force that had a militaristic proclivity for violence and was institutionally designed to be subservient to its rulers.<sup>58</sup> This is the same system that was later on inherited by Indian administrators without much reform. For example, the Indian Police Act of 1861 is still *effectively* in force in most Indian states even after Independence.

It is commonly argued that the communal violence and political unrest following partition and the years after form part of the reason why the subsequent governments did not want to reform the existing policing system<sup>59</sup> that is best known for its disproportionate

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<sup>53</sup> Dilip K. Das and Arvind Verma, *The armed police in the British colonial tradition: The Indian perspective*, 21(2) POLICING: AN INTERNATIONAL JOURNAL OF POLICE STRATEGIES & MANAGEMENT 354-366 (MCB University Press,1998).

<sup>54</sup> *Id.*

<sup>55</sup> Robyn Wilson, *Inside Cellular Jail: the horrors and torture inflicted by the Raj on India's political activists*, INDEPENDENT, (Aug. 11, 2017), [https://www.independent.co.uk/news/long\\_reads/cellular-jail-india-integral-country-fight-freedom-independence-british-colony-andaman-and-nicobar-islands-port-blair-sushil-dasgupta-a7883691.html](https://www.independent.co.uk/news/long_reads/cellular-jail-india-integral-country-fight-freedom-independence-british-colony-andaman-and-nicobar-islands-port-blair-sushil-dasgupta-a7883691.html)

<sup>56</sup> Criminal Tribes Act, 1871, No. 27 of 1871[Repealed] <https://ccnmtl.columbia.edu/projects/mmt/ambedkar/web/readings/Simhadri.pdf> (last visited: July 21, 2021).

<sup>57</sup> *Supra* note 54.

<sup>58</sup> *Supra* note 40.

<sup>59</sup> *Supra* note 54.

use of force and maintenance of law and order crises at the cost of infringement of rights of civilians.

Best described in a paper about an apparent “crisis of governability” in India,<sup>60</sup> the increasing dissatisfaction with successive governments and widespread public agitation coupled with communal rifts make maintenance of law and order look like the first priority of the police rather than ensuring active protection of human rights of the citizens.

Therefore, apologists for the violence perpetrated by internal security forces get the opportunity to paint such untoward incidents as “necessary state action” under the pretext of threats to national security. This leads to further politicization of the police force that is manipulated and used for crushing dissent and serving ruling powers instead of acting as a people-friendly force.

#### 4.1.2 Silencing dissent or maintaining law and order?

State-sponsored repression of remonstrances and aversion to any form of dissent go against the very ethos of a democracy. The Indian Courts have time and again held this right to dissent in a peaceful manner as one of the most basic democratic functions, a right traced back to the fundamental freedom that is guaranteed under Articles 19(1)(a), 19(1)(b) and 19(1)(c) of the Constitution.<sup>61</sup> The Supreme Court has categorically ruled that a dissenter cannot be implicated or held guilty of unlawful for peaceful dissent.<sup>62</sup>

Commenting on the role played by the police in suppression of freedom of speech and expression, the Court has said, “*They [the police] cannot arrogate to themselves the authority to be willing allies in the*

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<sup>60</sup>Atul Kohli, *Democracy and Discontent: India's Growing Crisis of Governability*, CAMBRIDGE UNIVERSITY PRESS, (1990),

<https://www.princeton.edu/~kohli/docs/democracy> (last visited: May 12, 2021).

<sup>61</sup> Anita Thakur v. State of J&K, (2016) 15 SCC 525 (India).

<sup>62</sup> Rajat Gangwar v. State of U.P., (2020) 139 ALR 571 (India).

*suppression of dissent and obstruction of speech and expression.*"<sup>63</sup> Even in the case of an unruly crowd, the Supreme Court says, the police officials should use force only when absolutely necessary and the police personnel should receive appropriate crowd control related training to deal with violence and challenge to their authority.<sup>64</sup>

Despite such clear guidelines/laws in place which prescribe minimum use of force,<sup>65</sup> politicization of the police force manifests itself in more ways than one. An obvious rise in targeted crackdown on dissenters in the recent times, selective arrests and usage of the police machinery to silence dissent<sup>66</sup> is one such effect. Where the police machinery is supposed to be a non-partisan law enforcement agency, instances of police departments making clearly political statements<sup>67</sup> is not only indicative of the rising polarization in

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<sup>63</sup> *Indibly Creative Pvt. Ltd. v. Govt. of West Bengal*, 2019 SCC OnLine SC 564 (India).

<sup>64</sup> *Supra* note 62

<sup>65</sup> Code Crim. Proc. § 130. *See also*, Ministry of Home Affairs, Code of Conduct for the Police in India, Letter No. VI-24021/97/84-GPA.1 (Issued on Jul. 4, 1985 & Jul. 7, 1985) <https://police.py.gov.in/MHA%20-%20Model%20Code%20of%20Conduct%20-%20Indian%20Police.pdf> (last visited: June 8, 2021) [hereinafter *Code of Conduct*].

<sup>66</sup> Betwa Sharma, *Anti-CAA Protesters Exposed In UP Police Hoardings Terrified About Their Safety*, HUFFINGTON POST, (Mar. 6, 2020), [https://www.huffingtonpost.in/entry/anti-cao-protesters-up-police-hoarding\\_in\\_5e61fc7ac5b647a5bd2fb50c](https://www.huffingtonpost.in/entry/anti-cao-protesters-up-police-hoarding_in_5e61fc7ac5b647a5bd2fb50c); Kai Schultz and Suhasini Raj, *'Activists in Shackles': Indians Denounce Arrests as Crackdown on Dissent*, THE NEW YORK TIMES, (Aug. 30, 2018), <https://www.nytimes.com/2018/08/30/world/asia/india-activists-arrests.html>; Hannah Ellis-Petersen and Shaikh Azizur Rahman, *'I'll destroy your family': India's activists tell of false arrest and torture in custody*, THE GUARDIAN, (Feb. 1, 2020), <https://www.theguardian.com/world/2020/feb/01/uttar-pradesh-india-activists-false-arrest-torture-custody-citizenship-amendment-act>

<sup>67</sup> *CAA protest: Police 'parroting' govt.'s political position in charge sheet, says DU professor*, THE HINDU, (Sept.13, 2020), <https://www.thehindu.com/news/cities/Delhi/cao-protest-police-parroting-govts-political-position-in-chargesheet-says-du-professor/article32592405.ece>; Raghav Ohri, *Anti-CAA protests work of 'Enemy Foreign Nations', says Delhi Police*, THE ECONOMIC TIMES, (Jun. 25, 2020)

general but is also typical of a force heavily controlled and misused by the political leadership.

This issue calls for three reforms- the first being resorting to the “democratic model of policing” followed by special training for riot management with higher focus on protection of human rights and lastly separation of law and order wing from the investigative wing.

As the renowned pioneer in police research, David H. Bayley puts it, democratic policing can be summarized as “accountability to law; safeguarding of human rights, especially those required by democratic political processes; external accountability; and giving priority to the safety needs of individuals rather than government”.<sup>68</sup> This model of policing emphasizes on minimum use of force, efficient prevention of crime and maintenance of law and order without comprising life or property of any individual, all of this contributing towards a force that respects democratic principles and obeys the rule of law. To work towards this model of democratic policing, the police personnel have to be trained and sensitized to deal with cases of riots and/or protests.

And lastly, one of the seven directives of the *Prakash Singh judgement*, which is separation of law and order wings from investigative wings, needs to be implemented. The implementation of this directive will reduce the work load of police personnel and induce transparency in investigation of sensitive cases such as riots. For example, recently the Delhi police was accused of biased investigation and of protection of police officers complicit in

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[https://economictimes.indiatimes.com/news/politics-and-nation/anti-caa-protests-work-of-enemy-foreign-nations-says-delhi-police/articleshow/76632853.cms?utm\\_source=contentofinterest&utm\\_medium=ext&utm\\_campaign=cppst](https://economictimes.indiatimes.com/news/politics-and-nation/anti-caa-protests-work-of-enemy-foreign-nations-says-delhi-police/articleshow/76632853.cms?utm_source=contentofinterest&utm_medium=ext&utm_campaign=cppst)

<sup>68</sup> David H. Bayley, *Police Reform as Foreign Policy*, 38(2) AUSTRALIAN AND NEW ZEALAND JOURNAL OF CRIMINOLOGY 206-215 (2005)

violence.<sup>69</sup> In cases like this, separation of law and order wing from the investigation wing would make sure that the erring police personnel, if found complicit in instigating riots, shielding perpetrators, or found aiding violence and destruction of property, will not be investigated by immediate peers or control investigation directly linked to them.

This shall ensure a system of internal accountability which if coupled with robust Police Complaints Authorities as external accountability mechanisms could give effect to fair investigation and appropriate forums for grievance redressal against police excesses.

#### ***4.2 Police and marginalized communities***

According to the Code of Conduct devised for Police in India, the police personnel should continuously strive to rise above personal prejudices and transcend religious, linguistic, or sectional barriers and should respect the rights of women and disadvantaged sections of society.<sup>70</sup> The role of police personnel as envisioned in the Model Police Act, 2006 is similar.<sup>71</sup> However, this ideal expectation is far from the reality.

The nation witnessed the harsh reality of police excesses during the targeted violence of the 1984 anti-Sikh riots, the Hashimpura massacre of 1987, communal riots in the aftermath of Babri Masjid demolition, the 2002 Gujarat carnage, the 2013 Muzaffarnagar riots

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<sup>69</sup> Soibam Rocky Singh, *Independent inquiry sought into police brutality on Jamia students*, THE HINDU, (Aug. 4, 2020), <https://www.thehindu.com/news/cities/Delhi/independent-inquiry-sought-into-police-brutality-on-jamia-students/article32271993.ece>

<sup>70</sup> *Code of Conduct*, *Supra* note 66, at Principle 13.

<sup>71</sup> A draft Police Act by the Committee set up by Ministry of Home Affairs, The Model police Act, 2006, §58(d) (Submitted on Oct. 30, 2006) [https://www.mha.gov.in/sites/default/files/ModelAct06\\_30\\_Oct\\_0.pdf](https://www.mha.gov.in/sites/default/files/ModelAct06_30_Oct_0.pdf) (last visited: June 2, 2021)

or even the anti-CAA demonstrations, most of which could actualize due to the deep-seated prejudices of police officers.

“At best they [the police] were passive observers, and at worse they acted in concert with murderous mobs and participated directly in the burning and looting of Muslim shops and homes and the killing and mutilation of Muslims”, observed a survivor while talking to the Human Rights Watch<sup>72</sup> that closely documented the bloodcurdling events of the 2002 Gujarat Riots.

Even in the recent times, instances of police brutality and complicity<sup>73</sup> during the widespread unrest over newly passed Citizenship Amendment Act have yet again testified to the fact that the police forces in the nation are not immune to communal hatred and are rather prone to abuse the minorities.

Such communal attitudes exhibited by public servants then in turn reflect in poor perception of police in India. Where the officers themselves believe Muslim localities to be a den of criminals or terrorist activity,<sup>74</sup> members of this community find themselves

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<sup>72</sup> “WE HAVE NO ORDERS TO SAVE YOU” *State Participation and Complicity in Communal Violence in Gujarat*, 14 No.3 (C) HUMAN RIGHTS WATCH: INDIA 5 (2002) <https://www.hrw.org/reports/2002/india/gujarat.pdf>

<sup>73</sup> Kai Schultz and Sameer Yasir, *As India Violence Gets Worse, Police Are Accused of Abusing Muslims*, THE NEW YORK TIMES, (Jan. 2, 2020), <https://www.nytimes.com/2020/01/02/world/asia/india-protests-police-muslims.html>; Jayshree Bajoria, *India’s Police Found Complicit in Anti-Muslim Mob Violence: Independent Report Highlights Police Inaction in February’s Delhi Attacks*, HUMAN RIGHTS WATCH, (Jul. 17, 2020), <https://www.hrw.org/news/2020/07/17/indias-police-found-complicit-anti-muslim-mob-violence>; Soutik Biswas, *Delhi riots: How Muslims’ homes were targeted and burnt*, BBC NEWS, (Mar. 4, 2020) <https://www.bbc.com/news/world-asia-india-51719204>; Reuters Staff, *Indian minorities panel faults police role in Delhi riots targeting Muslims*, REUTERS, (Jul. 17, 2020) <https://www.reuters.com/article/us-india-citizenship-report-idUSKCN24I1JA>

<sup>74</sup> COMMONWEALTH HUMAN RIGHTS INITIATIVE, *MUSLIM VOICES: PERCEPTIONS OF POLICING IN INDIA*, 9 (2018), <https://www.humanrightsinitiative.org/download/1548414445Muslim%20Voices%20Perceptions%20of%20Policing%20Jan%202019.pdf>

shrouded in a constant state of suspicion and paranoia further damaging the relations with the police.

Since the force is made up of individuals from all ranks of the society, it mirrors the social ills such as the all-pervasive caste-based segregation and the resultant discrimination as well. Instances of violence and wanton discrimination by the police personnel against the caste minorities,<sup>75</sup> practices reinforcing the ideas of “purity and pollution” within the force,<sup>76</sup> a harmful trend of wrongfully implicating the victims’ kin<sup>77</sup> and many such discriminatory

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<sup>75</sup>Maharashtra: IPS officer ‘brags’ of filing false cases against Dalits, Muslims in video, THE INDIAN EXPRESS, (Dec. 4, 2018), <https://indianexpress.com/article/india/mumbai-ips-officer-brags-of-filing-false-cases-against-dalits-muslims-in-video-5477136/>; Gujarat: Probe ordered into ‘police brutality’ on Dalits during lockdown, THE INDIAN EXPRESS, (Mar. 30, 2020), <https://indianexpress.com/article/india/gujarat-police-brutality-on-dalits-during-lockdown-6339140/>; Deep Mukherjee, *Barmer Dalit custodial death: ‘I could hear my brother screaming ... when we went in, he was lying there, dead’*, THE INDIAN EXPRESS, (Feb. 29, 2020), <https://indianexpress.com/article/cities/jaipur/rajasthan-barmer-dalit-custodial-death-jitendra-khatik-6291846/>; Anger over video of Indian police attacking Dalit couple, BBC NEWS, (Jul. 16, 2020), <https://www.bbc.com/news/world-asia-india-53434716>; Kavitha Muralidharan, *For the Kuravars of Tamil Nadu, Custodial Violence is a Way of Life. And Death*, THE WIRE, (Jul. 01, 2020), <https://thewire.in/caste/for-the-kuravars-of-tamil-nadu-custodial-violence-is-a-way-of-life-and-death>; Mini P Thomas, *Jailed, raped, tortured*, THE WEEK, (Jul. 03, 2016), <https://www.theweek.in/theweek/cover/tribal-woman-naxalism.html>; Sushmita, *Police Brutality against UP Adivasis: NHRC assures action after CJP intervention*, CITIZENS FOR JUSTICE AND PEACE, (Jun. 04, 2020), <https://cjp.org.in/police-brutality-against-up-adivasis-nhrc-assures-action-after-cjp-intervention/>; Anand Teltumbde, *Khairlanji and Its Aftermath: Exploding Some Myths*, 42(12), ECONOMIC AND POLITICAL WEEKLY, 1019-1025 (2007)

<sup>76</sup>S.K. Darapuri, *The Police in India Is Both Casteist and Communal*, THE WIRE, (Sept. 9, 2020) <https://thewire.in/caste/police-casteist-communal>

<sup>77</sup>Pavan Dahat, *Hathras: Lawyers, Activists Explain How Blame Is Shifted To Victim’s Family In Caste Crimes*, THE HUFFINGTON POST, (Oct. 9, 2020) [https://www.huffingtonpost.in/entry/hathras-lawyers-activists-explain-how-blame-is-shifted-to-victim-s-family-in-caste-crimes\\_in\\_5f7f3d4cc5b6da9ba1ee0995](https://www.huffingtonpost.in/entry/hathras-lawyers-activists-explain-how-blame-is-shifted-to-victim-s-family-in-caste-crimes_in_5f7f3d4cc5b6da9ba1ee0995); Urmila Pullat, *The political capture of the police in India*, MINT, (Apr. 19, 2018) <https://www.livemint.com/Opinion/GHQrTiUfvD9RnYLLUPsKyI/The-political-capture-of-the-police-in-India.html>



practices have all further aggravated and aided the systemic discrimination against minorities in India.

Falling representation of SCs, STs and OBCs and lack of any clear legal provisions for ensuring representation for Muslims despite the disproportionately high levels of incarceration,<sup>78</sup> add to the existing problem of a general sense of mistrust and estrangement from police.

Even the gender-based representation in police forces is inadequate. For a force that is notorious for being gender insensitive, the percentage of women officers, although increasing over time, still constitutes just 7.28% of the police (as of 2016), with 90% of the women serving as constables and less than 1% in supervisory positions.<sup>79</sup> Refusal to believe survivors, delayed action or outright refusal to file FIR in cases of gendered violence, custodial rapes and sexual harassment meted out to female inmates highlight the need for stronger representation in the police for women along with gender-sensitivity training for the recruits.

Better representation and access to requisite resources for people of different sexual orientations and gender identities along with carefully planned and effectively implemented sensitization programmes cannot be excluded from the purview of comprehensive police reforms at any costs.

As opposed to traditional police training, that mainly focuses on technicalities, a human rights-based curriculum that sensitizes the police officials in various systems of discrimination including

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<sup>78</sup> NCRB data shows Muslims, Dalits, Tribal population in prisons disproportionate to their numbers outside, FIRSTPOST, (Sept. 02, 2020),

<https://www.firstpost.com/india/ncrb-data-shows-muslims-dalits-tribal-population-in-prisons-disproportionate-to-their-numbers-outside-8775161.html>

<sup>79</sup> Uttam Sengupta, *Increase number of women and Dalits in the police to make women safer*, NATIONAL HERALD, (Oct. 3, 2020),

<https://www.nationalheraldindia.com/opinion/increase-number-of-women-and-dalits-in-the-police-to-make-women-safer>

matters of caste, religion, sexism, marginality, et cetera, needs to be introduced for officers at all ranks.<sup>80</sup>

### 4.3 *The Criminal Nexus*

One of the obvious effects of politicization of police is the subsequent criminalization of the local police forces. In a study, the Association of Democratic Reforms (ADR) analyzed 539 Members of Parliament and found as many as 233 of them, i.e., a 43% with criminal charges filed against them.<sup>81</sup> The police officers who have to deal with these politicians are most evidently affected by this criminal ecosystem.

Extortion, tampering with evidence, manipulating investigation, moderating the language of an FIR, framing of charges, putting up challans, presenting bogus witnesses, collecting bribes, et cetera are the known avenues of money making for policemen.<sup>82</sup> Many of the times, political pressures are involved in such crimes, including electoral crimes even. At the higher levels, this same collusion leads to a network of criminals, drug syndicates, gun runners and such involved in organized crimes and even “multinational crimes” at times.<sup>83</sup>

And unlike other executive wings of the government, the police have maximum visibility in the society and thus their petty corruptions are largely sensationalized and exposed in comparison

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<sup>80</sup>*Supra* note 47.

<sup>81</sup> 43% newly-elected Lok Sabha MPs have criminal record: ADR, THE HINDU, (May 26, 2019) <https://www.thehindu.com/elections/lok-sabha-2019/43-newly-elected-lok-sabha-mps-have-criminal-record-adr/article27253649.ece>

<sup>82</sup>K S Subramanian, *Are the Indian Police a Law Unto Themselves? A Rights-Based Assessment*, 3 SOCIAL WATCH INDIA PERSPECTIVE SERIES (2011), [https://www.socialwatch.org/sites/default/files/swindia/Perspective-3\\_SWIndia\\_Indian-Police.pdf](https://www.socialwatch.org/sites/default/files/swindia/Perspective-3_SWIndia_Indian-Police.pdf)

<sup>83</sup> *Ibid.*

to systemic corruptions carried out by other branches of the state.<sup>84</sup> This further tarnish the public image of the police forces where the erring personnel become the symbol of the entire organization.<sup>85</sup>

As Heston and Kumar contend that the inherent lack of incentives coupled with a deeply entrenched *culture* encourages corruption at all scales,<sup>86</sup> Verma argues that the solution can only arrive in the form of a cultural transformation within the police organization.<sup>87</sup>

In an interesting approach taken by Hubert Williams,<sup>88</sup> he accounts for the shootings or killings by a police officer along with similar human rights violations as “corruption” as against the traditional definition of corruption limiting itself to abuse of power for monetary gains. For him, such abuse of authority subsists by the virtue of a police subculture that defies the official standards of accountability.

According to him, the aspects of training, recruitment methods, incentives such as pay and promotion, systems of accountability within departments supported by the courts and the cultural traditions that obstruct the development of professional police standards are all responsible for this rampant corruption in police departments. And if the menace of corruption and crime plaguing the police forces has to be effectively dealt with, then the culture of

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<sup>84</sup> K V Thomas, *Corruption in Indian Police*, THE SARDAR VALLABHBHAI PATEL NATIONAL POLICE ACADEMY JOURNAL, 4 (2004)

<https://www.svpnpa.gov.in/images/npa/acjournals/2004janjun.pdf>

<sup>85</sup> *Ibid.*

<sup>86</sup> Alan Heston and Vijay Kumar, *Institutional Flaws and Corruption Incentives in India*, 44(9), JOURNAL OF DEVELOPMENT STUDIES, 1243–1261, (2008)

<sup>87</sup> Arvind Verma, *Cultural roots of police corruption in India*, 22(3) POLICING: AN INTERNATIONAL JOURNAL OF POLICE STRATEGIES & MANAGEMENT, 264-279(MCB University Press, 1999)

<sup>88</sup> Hubert Williams, *Core Factors of Police Corruption Across the World*, 2(1) FORUM ON CRIME AND SOCIETY, 86 (2002)

[https://www.unodc.org/documents/treaties/publications/core\\_factors.pdf](https://www.unodc.org/documents/treaties/publications/core_factors.pdf)

criminal complicity backed by a lack of accountability has to be addressed at all costs.

## 5. The Need For Accountability

### 5.1 Why do we need accountability in policing?

Nearly 5 deaths occurred in custody every day for 10 years measuring up to March 2020,<sup>89</sup> some of them died within 24 hours of arrest.<sup>90</sup> Despite a COVID-19 induced lockdown (partial and otherwise) for two years, 236 cases of torture and 100 deaths in police custody have been reported in 2020-21, as informed by the Home Ministry in the written reply to a question put before Loksabha in August of 2021.<sup>91</sup>

Despite several judicial pronouncements<sup>92</sup> that have highlighted the need to curb the menace of custodial violence and issued guidelines to ensure protection of human rights while performing duties as a police official, the culture of violence and torture is nowhere near an end. Torture is so endemic to our system that even

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<sup>89</sup> Shreehari Paliath, *5 Deaths In Police/Judicial Custody Every Day Over 10 Years, But Few Convictions* INDIASPEND, (Aug. 6, 2020), <https://www.indiaspend.com/5-deaths-in-police-judicial-custody-every-day-over-10-years-but-few-convictions/>

<sup>90</sup> Raja Bagga, *60% custodial deaths within 24 hrs of arrest; most in Maharashtra, Gujarat*, BUSINESS STANDARD, (Oct. 6, 2020), [https://www.business-standard.com/article/current-affairs/60-custodial-deaths-within-24-hrs-of-arrest-most-in-maharashtra-gujarat-120102600115\\_1.html#:~:text=Every%20death%20in%20police%20custody,NHRC%20guidelines%20on%20custodial%20death](https://www.business-standard.com/article/current-affairs/60-custodial-deaths-within-24-hrs-of-arrest-most-in-maharashtra-gujarat-120102600115_1.html#:~:text=Every%20death%20in%20police%20custody,NHRC%20guidelines%20on%20custodial%20death)

<sup>91</sup> Bharti Jain, *348 died and 1,189 tortured in police custody in 2018-19, 2020-2021: home ministry*, THE TIMES OF INDIA, (Aug.3, 2021), <https://timesofindia.indiatimes.com/india/348-died-and-1189-tortured-in-police-custody-in-2018-19-2020-21-home-ministry/articleshow/85005287.cms>

<sup>92</sup> *Joginder Kumar v. State of Uttar Pradesh*, (1994) 4 SCC 260 (India); *Yashwant & Others v. State of Maharashtra*, (2018) 4MLJ (Crl)10 (SC) (India); *D.K. Basu v. State of West Bengal*, 1997 (1) SCC 416 (India); *Munshi Singh Gautam v State of Madhya Pradesh*, Appeal (Crl.) 919 of 1999 (India).

the law presumes such abuse of power by the police; for example, confessions made to a police officer not admissible as evidence.<sup>93</sup>

Enforced disappearances, illegal detentions, extrajudicial killings, custodial violence and instances of other human rights violations at the hands of officials, are all sad realities of policing in India. “Encounters” or extra-judicial executions, arbitrary arrests, malicious prosecutions, et cetera are normalized.

The abuse of power and disproportionate use of force is present even in the methods of crowd control adopted by the police. This is evident from the police brutalities during the protests over the newly enacted Citizenship law as well as from the dehumanizing state response seen during the handling of migration and other crises during the lockdown enforced due to a global pandemic in the last year.<sup>94</sup>

In the face of rampant police excesses across the country, the need to instill a sense of responsibility in the police officers and ensuring accountability so the perpetrators are punished is highly felt.

### *5.2 Who should the police be accountable to and how?*

A report by the CPLR talks about three modes enforcing accountability in policing: Judiciary-based scrutiny, Police Complaints Authority, and the National Human Rights Commission.<sup>95</sup> While the judiciary and the Human Rights Commissions have been scrutinizing the cases of police excesses and

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<sup>93</sup> The Indian Evidence Act, 1872, §25, §26, No.1 of 1872, India Code (1993)  
<http://indiacode.nic.in>

<sup>94</sup> COMMONWEALTH HUMAN RIGHTS INITIATIVE “RESPECTING HUMAN RIGHTS WHILE ENFORCING THE LOCKDOWN: GUIDELINES FOR POLICE” 2 (2020),  
[https://humanrightsinitiative.org/download/CHRI%20Guidelines%20to%20the%20Police\\_Lockdown\\_31%20Mar2020.pdf](https://humanrightsinitiative.org/download/CHRI%20Guidelines%20to%20the%20Police_Lockdown_31%20Mar2020.pdf)

<sup>95</sup> Sudhir Krishnaswamy, *Legal Accountability of the Police in India*, CENTRE FOR LAW & POLICY RESEARCH, (Jun. 4, 2014), <https://clpr.org.in/publications/legal-accountability-of-the-police-in-india/>

ruling to protect the fundamental rights of citizens, the police excesses are still not being sufficiently dealt with.

While conceptualizing accountability Schedler opines, that accountability implies subjecting unrestricted forms of power to sanctions in cases of abuse, mandating transparent ways of manifesting power and lastly compelling the authority to justify its acts publicly.<sup>96</sup> Accountability has to involve a system of internal and external checks and balances to ensure there is no abuse of power and to re-build public confidence and legitimacy. That is why, the Second Administrative Reforms Report on “Public Order” advocates for “strong and verifiable systems of accountability”.<sup>97</sup> It quotes the Patten Commission<sup>98</sup> to remark that accountability is wider concept and police are not just accountable to the law but also to the society at large and that all government functionaries have citizen centered accountability.

The Police Complaints Authority (PCA), if formed as per the Supreme Court directives without any discrepancies related to membership or with respect to the binding nature of recommendations, is an effective way of bringing about citizen-partnered accountability mechanisms. The PCAs will not just provide an effective grievance redressal mechanism at different levels of governance but will also help analyze the trends of police abuse.

At the state-level, the PCAs inquire into allegations of “serious misconduct” including death, grievous hurt and rape in custody.

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<sup>96</sup> ANDREAS SCHEDLER, *Conceptualizing Accountability* in THE SELF-RESTRAINING STATE: POWER AND ACCOUNTABILITY IN NEW DEMOCRACIES 14 (Andreas Schedler et al eds., 1999), [https://works.bepress.com/andreas\\_schedler/22/](https://works.bepress.com/andreas_schedler/22/)

<sup>97</sup> SECOND ADMINISTRATIVE REFORMS COMMISSION, PUBLIC ORDER, 62 (2007) [https://darp.gov.in/sites/default/files/public\\_order5.pdf](https://darp.gov.in/sites/default/files/public_order5.pdf) (last visited: Aug. 20, 2021)

<sup>98</sup> *Id* at 63.

The district level complaints authority is even authorized to inquire into allegations of extortion, land grabbing and serious abuse of power.<sup>99</sup> This is one of the many reasons why implementation of the directives in Prakash Singh judgement are so crucial for an overall development of our criminal justice system.

#### *5.4 Other modes and mechanisms to ensure accountability*

Through many cases,<sup>100</sup> the courts have tried to ensure that the protection under sections 197 and 132 of the CrPC are not extended to cases of abuse of power or criminal misconduct. However, lower conviction rates of police officers despite widespread police excesses demonstrate a need for stronger legal framework to deal with cases of torture and police excesses of different forms. The same can be achieved by :-

- (a) making new laws to hold guilty officers accountable and instill deterrence: For example, ratification of the UN Convention against Torture or Other Cruel, Inhuman, or Degrading Treatment or Punishment (UNCAT) and further legislating on the matter could substantially make a difference. Even introduction of the Indian Evidence (Amendment) Bill, 2016 that proposes section 114 B that presumes death or injury is caused by the custodian considering the circumstances of death. This could enforce higher standards of accountability and professionalism. Even provisions (such as section 32 of Kerala Police Act<sup>101</sup>) that outrightly spell the liability of police officers to justify their acts contribute positively in terms of language of the law and culture of accountability.

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<sup>99</sup> *Supra* note 24.

<sup>100</sup> *Rajib Ranjan v. R. Vijaykumar*, (2015) 1 SCC 513 (India); *Subramanian Swamy v. Manmohan Singh*, (2012) 3 SCC 64 (India).

<sup>101</sup> The Kerala Police Act, 2011, §32, No. 8, Acts of Kerala Legislative Assembly, 2011 (India), <http://indiacode.nic.in>

(b) by ensuring the existing legal protections are sufficiently used and enforced.

Even modernization, as usually contended,<sup>102</sup> can be the key to bring in more transparency and accountability in the way of policing. Digitization of records, videography of the crime scene and putting up cameras in interrogation rooms as per the Supreme Court's orders,<sup>103</sup> can prove to be one of the many ways in which technological innovations can ensure accountability.

## 6. Working Towards A Contented Force

While the ubiquitous police excesses are closely documented, erring officers and associated governments publicly censured and rightly so, the attempts at police reforms cannot achieve the desired effect if it were to dehumanize the very policemen that form a major part of the structure that needs to be remodeled.

Both the approaches to police reforms – accountability oriented and welfare oriented – are not mutually exclusive and rather complement each other. Thus the need to monitor ways of policing would gradually lessen with incentivization and welfare schemes.

### 6.1 Infrastructural inadequacy and lack of incentives

It is common knowledge that the Indian police personnel are already underpaid, understaffed, overworked and lack basic

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<sup>102</sup> K.T.S. Tulsi, *Police Modernisation is the Key: Technology Can Bring Transparency*, 36(4), COMMON CAUSE, 7-8, (2017) <https://www.commoncause.in/pdf/journal-24-1-18.pdf>

<sup>103</sup> *Paramvir Singh Saini v. Baljit Singh & Ors.*, SLP (CrI.) 3543/2020 (India); *Shafhi Mohammad v. State of Himachal Pradesh*, (2018) 5 SCC 311(India).



amenities.<sup>104</sup> Appallingly low salaries in the lower ranks of police officers, excessive workload, long hours of duty, fewer avenues of promotion, lack of access to hygienic, safe and affordable housing,<sup>105</sup> inadequate technological support, equipment and weaponry coupled with absence of a conducive work environment are all major factors that leave police officers dissatisfied and thus unmotivated for work.<sup>106</sup>

Despite the Modernisation of Police Forces (MPF) scheme, underutilisation of funds poses an issue.<sup>107</sup> From 2013 to 2017, only 48% of the total modernisation budget of Rs 28,703 crore was utilised.<sup>108</sup> In the year 2020-2021, Rs. 784.53 crore has been sanctioned for modernization of state police (Rs. 155.26 crore less than what was spent in 2019-2020) with the capital expenditure on police training and forensic science being just Rs 21.69 crore and Rs. 15.41 crore respectively.<sup>109</sup>

Under such circumstances, it is no wonder that many police stations do not have wireless devices, telephones and some even lack

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<sup>104</sup> Atman Mehta, *Overworked, understaffed, underpaid! Do our police deserve this?* SIFY, (Oct. 23, 2019), <https://www.sify.com/news/overworked-understaffed-underpaid-do-our-police-deserve-this-news-analysis-tkxn76jhcjbi.html>; *Police are overworked and underpaid*, TIMES OF INDIA, (Feb. 11, 2008), [http://timesofindia.indiatimes.com/articleshow/2772174.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](http://timesofindia.indiatimes.com/articleshow/2772174.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst)

<sup>105</sup> Shreya Raman, *In Mumbai, much of the police force lives in tiny crumbling apartments*, SCROLL, (Oct. 8, 2019), <https://scroll.in/article/939727/in-mumbai-much-of-the-police-force-lives-in-tiny-crumbling-apartments>

<sup>106</sup> *Supra* note 41.

<sup>107</sup> Vinayak Krishnan, *Modernisation of Police Forces*, PRS LEGISLATIVE RESEARCH, (Oct. 3, 2017), <https://www.prsindia.org/theprsblog/modernisation-police-forces>

<sup>108</sup> Atman Mehta, *Why India's police forces lack weapons and communications equipment*, SCROLL, (Aug. 26, 2019), <https://scroll.in/article/935008/why-indias-police-forces-lack-weapons-and-communications-equipment>

<sup>109</sup> Praveen Swami, *The Budget has taken another brick out of the walls protecting Indians from anarchy*, CNBC TV 18, (Feb. 04, 2020), <https://www.cnbctv18.com/views/the-budget-has-taken-another-brick-out-of-the-walls-protecting-indians-from-anarchy-5202791.html>

access to vehicles.<sup>110</sup> Functional infrastructure, adequate telecommunications networking along with other modern technological setup to facilitate real-time sharing of intelligence are non-negotiable for the security forces that are entrusted with multifarious responsibilities.

As discussed earlier, training is an essential factor to ensure a skilled and sensitive police force. However, according to a report,<sup>111</sup> merely 6.5 % of the total police force has received training from 2012 to 2016, with only 1.26 % of the total annual police expenditure spent on police training during these five years. In fact, even among the officers that receive training, senior police officers are the ones that mostly receive such in-service training than the constables.<sup>112</sup>

### ***6.2 Forgotten foot soldiers: extending the police reforms to the Indian constabulary***

86% of the state police comprises of constabulary.<sup>113</sup> Most of those who die on duty are constables too.<sup>114</sup> However, their contribution to policing often goes unrecognized. Cases of harassment by senior police officers meted out to those in the subordinate ranks are common news.<sup>115</sup> K.S. Subramanian even goes on to describe the Indian constabulary as *a neocolonial minority*,<sup>116</sup> a vast mass of citizens

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<sup>110</sup> *Supra* note 47.

<sup>111</sup> *Ibid.*

<sup>112</sup> *Ibid.*

<sup>113</sup> Anviti Chaturvedi, *Police Reforms in India*, PRS LEGISLATIVE RESEARCH, (2017) [https://www.prsindia.org/sites/default/files/parliament\\_or\\_policy\\_pdfs/Police%20Reforms%20in%20India.pdf](https://www.prsindia.org/sites/default/files/parliament_or_policy_pdfs/Police%20Reforms%20in%20India.pdf)

<sup>114</sup> NAVAZ KOTWAL MAJA DARUWALA, COMMONWEALTH HUMAN RIGHTS INITIATIVE, *101 Things You Wanted To Know About The Police But Were Reluctant To Ask*, (2018) <https://www.humanrightsinitiative.org/publication/101-things-you-wanted-to-know-about-the-police-but-were-too-afraid-to-ask-english-2018>

<sup>115</sup> COMMON CAUSE AND LOKNITI - CENTRE FOR THE STUDY DEVELOPING SOCIETIES (SUB), STATUS OF POLICING IN INDIA REPORT 2018: A STUDY OF PERFORMANCE AND PERCEPTIONS (2018) <https://www.commoncause.in/pdf/SPIR-2018-c-v.pdf>

<sup>116</sup> *Supra* note 83.

that are made to suffer like they are inferior human beings, deprived of respect, basic amenities and hounded by senior officials and politicians alike.

Even the language of the law enforces this rigid hierarchy and power dynamics that are meant to keep the constabulary subservient which is evident from Section 7 of the Police Act of 1861 that still uses the terminology “inferior officers” for police officers of subordinate ranks.

To add insult to injury, the constables are typically promoted only once during their service, and normally retire as head constables which then weakens their incentive to perform better.<sup>117</sup> Thus, the authors argue that keeping the constabulary at the center of reforms is the only way to go forward.

### *6.3 Ensuring mental well-being of police officers: need of the hour*

As opposed to the United Nations standard that is 222 police per lakh persons, India’s sanctioned strength is 181 police personnel per lakh persons.<sup>118</sup> But the actual police strength in India is at 137 police personnel per lakh persons.<sup>119</sup> According to a 2019 report,<sup>120</sup> the police in India currently works at 77 % or just 3/4th of its required capacity which clearly indicates how understaffed our police forces are.

In addition to that, the police personnel do not even have fixed hours of duty. A police officer is considered to be “always on duty”.<sup>121</sup> Due to such long hours of work, lack of sleep and rest coupled with the dangerous nature of work, the emotional

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<sup>117</sup>Supra note 116.

<sup>118</sup>Ibid.

<sup>119</sup> *The Big Picture: SMART Policing*, RAJYASABHA TV (Oct. 5, 2019)

<https://www.youtube.com/watch?v=DeSCO9h7DeM> (last visited: July 26, 2021)

<sup>120</sup> Supra note 47.

<sup>121</sup> Supra note 40.

confrontations and the political pressures, police officers are very likely to be suffering from depression, anxiety, and other mental health issues.

A clinical psychologist, Dr. Mitra, who has worked with patients from the police forces talks about how such long hours of duty, stress and fatigue affect the families of the police personnel isolating the officers from their families.<sup>122</sup> He even recalls a story about his patient, “Every morning, as soon as he got up, he had to count rapes, murders, robberies and other heinous crimes in his jurisdiction”.<sup>123</sup>

The taxing nature of work exposes the distressed police personnel to various mental health problems and is likely to make them prone to suicide. According to the data presented by Union Minister of State for Home Affairs in February, 2019, over 930 police personnel, including the police personnel in civil and armed forces, have committed suicide from 2014 to 2018.<sup>124</sup> This disturbing reality of policing goes on to show just how important it is to normalize counselling and therapy and to make mental health care accessible to all ranks of police personnel.

The state has to realize that if the police forces are under constant stress, experience fatigue and excessive work pressures all the time, they are not very likely to be productive or empathetic even while on duty.

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<sup>122</sup> Chayyanika Nigam, *How stress is driving Delhi cops to suicide*, INDIA TODAY, (Dec. 15, 2019), <https://www.indiatoday.in/mail-today/story/how-stress-is-driving-delhi-cops-to-suicide-1628366-2019-12-15>

<sup>123</sup> *Ibid.*

<sup>124</sup> PTI, *Over 930 police personnel committed suicide in last 5 years: Govt*, INDIA TODAY, (Feb. 13, 2019), <https://www.indiatoday.in/india/story/over-930-police-personnel-committed-suicide-in-last-5-years-govt-1455395-2019-02-13>.

Hence, fixing long hours of work and rationalizing it into three shifts,<sup>125</sup> separating law and order wings to reduce workload, giving sufficient holidays, creating conducive work environments and dealing with shortage of personnel have to be prioritized if better performance is to be expected from the local police forces.

Adoption of the Model Police Act, that along with other progressive suggestions calls for fixed worked hours not more than eight hours a day,<sup>126</sup> has to be achieved to ensure all-round development of our policing system.

## 7. Conclusion

The unholy nexus between miscreants, police personnel and the ruling executive and the resultant ecosystem of criminal complicity compelled the formation of various committees in Independent India with an aim to restructure the role of the police as an impartial law enforcement agency and as an institution expected to protect the citizenry against multitudinous security threats. The landmark case of *Prakash Singh v. Union of India* passed crucial directives with the same intent back in 2006. However, the governments across the nation have been highly reluctant in properly implementing these police reforms. The state governments need to realize that implementation of the orders of the courts needs to be carried out *nolens volens* without altering the essence or the core of the judgment

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<sup>125</sup> Sugandha Indulkar, Interview with Meera Chadha Borwankar, "Politician-police-criminal nexus flourishes because politicians decide on posting of officers at police stations" TIMES OF INDIA (Jul.17, 2020, 7:54 AM) <https://timesofindia.indiatimes.com/blogs/the-interviews-blog/politician-police-criminal-nexus-flourishes-because-politicians-decide-on-posting-of-officers-at-police-stations/> (last visited: July 20, 2021).

<sup>126</sup> *Supra* note 72 at §18.

so pronounced. In addition to that, the police reforms need to go beyond the Supreme Court directives.

In a democratic society, a police force founded on colonial traditions of policing will only skew the dynamics between the state and its subjects and perpetuate long-standing issues. In order to actualize the idea of a desirable police force, comprehensive reforms have to be undertaken. These include the adoption of principles of democratic policing, insulation of the forces from polarization and politicization, ensuring robust accountability mechanisms along with effective measures to secure emotional, social and financial well-being of the police officers that form the backbone of our criminal justice system. Transforming the institutional culture that encourages corrupt behaviour by failing to provide resources, adequate training and conducive work environment as well as the system that supports criminality more than it does honest policing have to be transformed.

It is evident that the image of the policing system as an ecosystem rife with corruption, inefficiency, violence and sycophancy has taken the place of a desired image for the Indian police and it is highly imperative that the public perception be bettered in order for people to trust the institution and be able to cooperate with it. The writers of this paper realize that to achieve this effect, the police personnel will have to be held accountable through mechanisms that demand utmost transparency. For the police personnel to be motivated and receptive to the needs of the citizens, incentivization and modernization of the forces need to be undertaken.

In conclusion, the authors of this chapter believe that only lawful policing is the right kind of policing and to have that, the system must enable police forces that serve the interests of the people, focus on human rights-based and judicious policing and abide by the rule of law. A satisfied and motivated police force that has enough

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incentive to work for the society, is empathetic towards the struggles of the common citizenry and genuinely believes in democratic ways of policing must be the focus of any and all police reforms.

**THE ANTITRUST IMPLICATIONS OF ONLINE RESTAURANT  
AGGREGATORS AND FOOD DELIVERY PLATFORMS:  
TOUGH TO DIGEST?**

- **Richa Phulwani, Sarab Lamba\***

**ABSTRACT**

*The unparalleled growth of online food tech sector has led to an economic quagmire for the brick-and-mortar restaurants in India. Although this sector is still at a formative stage, its dynamic nature has attracted various anti-trust and competition implications with regard to its alleged anti-competitive behaviour and abuse of its position. The authors of this article attempt to study these implications along with the pre-eminent problems in order to assess whether the existing competition law framework in India really suffices the needs of this sector or if there is a need for sector-specific guidelines to come into place. The article sheds light into the current propositions of law with respect to delineation of relevant market in the online sector, the hesitancy of recognising the concept of Collective Dominance, the heavy discounting practises which characterise this sector among others. It is also noted that the nascent stage of the industry calls for cautious intervention so as to not impede the development and growth of this sector.*

**Keywords:** anti-trust implications, dominance, relevant market, abuse of dominant position, collective dominance

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## I. INTRODUCTION

An online food tech industry has seen an unprecedented growth in India in the past demi-decade. It is set to become a USD 8 billion industry by the end of the year 2022.<sup>127</sup> This revolution has been a result of easy availability of a diverse range of cuisines coupled with the choice of having them anytime and anywhere. Mobile applications like Zomato and Swiggy have gained threshold in these times of increased digitization and reliance on e-commerce. India's food tech industry has finally transcended the boundaries of urban areas and is no longer just a metropolitan phenomenon. In fact, in 2019, the e-commerce food sector in non-metro cities grew seven times faster than their metro counterparts.<sup>128</sup>

While the advent of on-demand food delivery ventures has caused great convenience to the consumers, its relationship with the offline sector is far from ideal. The offline restaurateurs routinely argue that these online aggregators, often backed and financed by multinational companies, abuse their dominant position and indulge in anti-competitive practices.<sup>129</sup>

Considering the meteoric rise of this industry, there exists a growing need to harmonize these online and offline channels. After all, the same will ultimately benefit the consumer and in turn boost the economic prowess of the industry.

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<sup>127</sup> Somdatta Saha, *Indian Online Food Industry to hit 8-billion-dollar mark by 2022*, NDTV FOOD (Jan. 29, 2020), <https://food.ndtv.com/news/indian-online-food-delivery-industry-to-hit-8-billion-dollar-mark-by-2022-report-2171615>.

<sup>128</sup> IN TRANSFORMING INDIAN AGRICULTURE- INDIA 2040: PRODUCTIVITY, MARKETS AND INSTITUTIONS 273-294 (Marco Ferroni ed., Sage Publication 2012).

<sup>129</sup> Ratna Bhushan, *Amazon & Flipkart, now Swiggy, Zomato face the ire of small businesses*, ECONOMIC TIMES (Jan 3, 2019) <https://economictimes.indiatimes.com/small-biz/sme-sector/small-eateries-say-food-delivery-companies-misusing-dominant-position/articleshow/67359653.cms>.

Keeping in mind the unique nature of the digital industry, one cannot help but ask whether the existing legal framework really suffices the dynamic needs of this market or, would the sector be better off if tailor-made rules are adopted for it. This article attempts to study the various anti-trust and competition issues that arise in the online food delivery sector and the potential way forward.

### **I. How Do These Applications Work?: Business Model of Online Food Delivery Platforms**

To an outsider, the business archetype of the online food delivery applications may appear to be simple and straight forward. However, delve deeper and you shall find that such businesses are in fact a complex structure of innumerable activities, all working in tandem to deliver fast, fresh and obviously delicious food.

In order to move forward with the pre-eminent problems between the online and offline sector, it is essential to understand the functioning of the online sector through their business model. These can be mainly classified into four types-

#### **A. Order-only Model**

Under this model, the online venture acts as a limited aggregator between the offline restaurant and the customer. The order-only venture firstly provides the customer with a listing of restaurants and gives them the option of browsing through various cuisines, verifying and comparing the prices, reviews and ratings and accordingly placing their order. Once the order is placed by the customer, the venture connects the order with the concerned restaurant. The said order is then delivered by the team of the restaurant itself. During this process, the online enterprise gains a fixed amount of fee for each order value and some of them also charge a separate fee for listing. Food Panda is an example of order-only business model.

## **B. End-to-End Model**

Under the end-to-end model, the entire value chain is handled by the food delivery partner which is the offline restaurant itself. From step one, which is cooking to the last step of delivery, the entire operation is initiated and executed by the restaurant via its own website or software application. Dominos and McDonalds identify under this model and in order to control the entire value chain, have introduced personalised online applications for its customers. The customer can directly place an order through such an application which will be delivered by the team of the restaurant itself. This model ensures a flexible and independent structure. To encourage customers into using these personalised applications, the restaurants provide beneficial offers.

## **C. Aggregator Model**

Under this model, the aggregator functions vis-à-vis the offline restaurant. By acting as aggregators, the e-commerce platform not only takes the food order but also delivers it to the customer. The aggregator provides a listing of restaurants and cuisines on its platform and allows the users to browse and compare the options to be able to choose and place an order. Once the order is confirmed by the customer, the aggregator passes it to the restaurant and delivers it as well. The aggregator is specifically responsible for collecting the order from the restaurant and delivering it to the customer. Zomato and Swiggy, examples of aggregator model, have delivery teams to carry on the operation efficiently. The restaurant can choose to partner with one or more delivery platforms according to their requirement. The aggregators charge a commission for their delivery service which is usually fixed in accordance with the value of each order and some of them separately charge a fee for providing listings and advertisements of the restaurants on their website.

## **D. Cloud Kitchen**

Cloud Kitchens are the most important trend in the food tech industry. Cloud kitchens could be described as pseudo food-joints. They have a centralised kitchen for a number of brands/food items with no store fronts. Cloud kitchens have become a source for low-budget development into having various cuisines simultaneously. This is to attract and deliver to the customers easily, various food options from a single kitchen. The trend of cloud kitchen has been dynamic; it has not only caught up with the big players in the food tech sector but has become a growth frontier for them as well. As per National Restaurant Association of India (hereinafter referred to as 'NRAI') report, between the FY 2016-2019, the delivery marketplaces raised 90 percent of the total funding, while the remaining proportion was equally split between cloud kitchen and other business models in the food tech industry.<sup>130</sup> 'The good bowl', owned by Swiggy is an example of cloud kitchen. Food giants like 'FreshMenu' partner with restaurants for a centralised delivery-only kitchen whereas on the other hand enterprises like 'Eatsome' and 'Faasos' have given a private label to their cloud kitchen facilities.

While the Cloud kitchen model has been lucrative for the food tech sector, there are several new inclusions that unequivocally point towards the progress of this industry. Table booking websites and applications have also gained momentum in recent time; Mobile applications like 'DineOut' and 'Eazydiner' are the market players in this subject. Food delivery sector has also been able to satisfy the customer's demand for home-made food delivery as well. Metropolitan cities are now able to get the benefit of fresh home-made food with local-run applications that allow the users to sell and buy cooked food in and around their neighbourhoods. Online platforms have also not hesitated in providing ancillary services to

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<sup>130</sup> Bhumika Khatri, *CCI Delves into Discounting, Anti-Competitive Practices in Foodtech*, INCH42 (Jan 10, 2020) <https://inc42.com/buzz/cci-delves-into-discounting-anti-competitive-practices-in-foodtech-food-delivery-in-india/>.

the offline restaurants such as advertising their products, uploading their food photographs, packaging, uploading menus on their applications etc.

## II. Antitrust Implications of the Conduct of Online Food Delivery Services

In January 2019, around 500 restaurants filed a petition<sup>131</sup> before the Competition Commission of India (hereinafter referred to as 'CCI') alleging anti-competitive practices including deep discounting and abuse of dominance by food delivery applications like Zomato, Swiggy, UberEats etc. This was followed by NRAI's widely popular 'LogOut Campaign' in August 2019 wherein about 2,000 restaurants opted out of "1+1" deals under Zomato Gold and the 50 percent discounts schemes on food and drinks. The campaigners alleged that the food aggregators were indulging in unfair practices and the restaurant owners had to face huge losses for the same. The restaurateurs *inter alia* alleged that food giants like Zomato, DineOut etc. abuse their dominant position by indulging in anti-competitive practices.

S. 4 (2) of the Competition Act, 2002 (hereinafter referred to as the 'Act') defines abuse of dominant position. There are two main kinds of abuse envisaged under the act. *First* relates to actions taken by an incumbent dominant firm to exploit its position of dominance by charging higher prices, limiting supplies etc. This is a kind of *Exploitative* abuse.<sup>132</sup> The *second* relates to actions protecting its position of dominance by making it difficult for new potential

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<sup>131</sup> RATNA BHUSHAN, *supra* note 3.

<sup>132</sup> ALISON JONES, BRENDA SUFRIN AND NIAMH DUNNE, *EU COMPETITION LAW* (7th ed. 2019).

entrants to pierce the market by acts of predatory pricing, loyalty rebates etc., thus practising *Exclusionary* abuse.<sup>133</sup>

For an inquiry into an allegation of contravention under S. 4, a sequential three step method is followed. *Firstly*, there shall be delineation of the relevant market in which the enterprise is alleged to be dominant. *Secondly*, it shall be investigated if the enterprise is indeed dominant in that relevant market using the parameters laid down under the Act. Only once these two factors are established do the Competition authorities proceed to investigate whether the conduct of the enterprise amounts to Abuse as laid under the Act or not.

Further, S. 3 of the Act prohibits all agreements between parties that cause or are likely to cause Appreciable Adverse Effect on Competition (hereinafter referred to 'AAEC') in India. This section classifies anti-competitive agreements into two categories, namely-

- (i) *Horizontal* agreements between enterprises that are at the same stage of production chain and operate in the same market. Such agreements are presumed to have AAEC.<sup>134</sup>
- (ii) *Vertical* agreements between enterprises which are at different stages of production chain. Such agreements are not *per se* void but are decided under 'rule of reason'.<sup>135</sup>

While the CCI is yet to take cognisance of the petition forwarded by the restaurateurs, the authors try to lay down the potential anti-trust concerns and the obstacles that could arise in the course of investigation.

### **A. Delineation of Relevant Market**

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<sup>133</sup> Official Journal of European Union, 2009, 52 OJ C 45/7, 20.2.2009 p. 7-21.

<sup>134</sup> Uniglobe v. TAFI, (2011) CCI 64.

<sup>135</sup> Mahindra & Mahindra v. Union of India, (1979) 2 SCC 529.

The pivotal enquiry in a case of alleged abuse of dominance is whether, the accused party is in a dominant position in the relevant market.<sup>136</sup> The concept of relevant market under the Act includes the *relevant product market* – all products or services that are regarded as being substitutable by consumers, by reason of characteristics, prices and intended use, and the *relevant geographic market* – an area in which the conditions of competition are distinctly homogeneous.<sup>137</sup>

### **i. Relevant Market in Online Services**

Delineation of relevant market in case of online services has been a conundrum for the Competition authorities. The expansive web of e-commerce forces the authorities to consider various factors and then decide whether online services are a separate, relevant market on their own or whether they are in the same market as that of their brick-and-mortar counterparts. To determine the “relevant product market”, the Commission should take into account all or any of the following factors mentioned under S. 19(7) of the Act viz., physical characteristics or end-use of goods, price of goods or service, consumer preferences, exclusion of in-house production, existence of specialized producers and classification of industrial products.<sup>138</sup>

The CCI, in multiple cases, has held the online and offline services as part of the same relevant market. It observed that buyers tend to weigh the options available to them in offline and online markets before making a final decision, taking into account the differences in discounts and shopping experience. A significant increase in price in one segment causes the buyer to shift to the other segment. This is a classical economic model to assess the demand substitution, called the SSNIP (Small but Significant and Non-

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<sup>136</sup> S.M. DUGGAR, GUIDE TO COMPETITION LAW 499 (7ed. 2018).

<sup>137</sup> The Competition Act, 2002, § 19, No. 12, Acts of the Parliament, 2003 (India).

<sup>138</sup> Saint Gobain v. Gujarat Gas Co., (2013) CCI 49.

transitory Increase in Price) Test.<sup>139</sup> Therefore, *“these two markets are different channels of distribution of the same product and are not two different relevant markets.”*<sup>140</sup>

In a case where it was contended that if a particular book was exclusively distributed through an e-commerce platform, it was not substitutable by another book sold by a physical bookstore. Thus, the books do not form part of the same relevant market. The CCI rejected this argument, holding that individual products cannot be construed as a relevant market by themselves.<sup>141</sup>

In a case filed by the Real Estate Brokers’ Association of India against online platforms like MagicBricks, 99acres etc., it was held that these online platforms and the offline traditional brokers offer similar services to customers and are merely alternative channels of delivering the same product and hence form part of the same relevant market.<sup>142</sup>

Contrary to this, the CCI has delineated “the market for online search advertising in India” as the relevant market in its prima facie evaluation of the cases filed against Google alleging abusive conduct in advertising. Here, the Commission distinguished the online search market from the offline modes of advertising.<sup>143</sup>

The Commission has also held ‘radio cabs service’ to be a relevant market by itself, on the ground that its peculiar characteristics like *“convenience in terms of time saving, point-to-point pick and drop, pre-booking facility, ease of availability even at obscure places, round the clock availability, predictability in terms of expected waiting/journey time etc.”*

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<sup>139</sup> C-85/76, Hoffmann-La Roche v. Commission, C-85/76 1979 E.C.R 461.

<sup>140</sup> In Re: Ashish Ahuja and Snapdeal.com & Anr., (2014) CCI 22.

<sup>141</sup> In Re: Mohit Manglani and Flipkart India & Ors., (2015) CCI 7.

<sup>142</sup> In Re: CREBAI and Magicbricks.com & Ors., (2016) CCI 19.

<sup>143</sup> In Re: Albion Infotel and Google Inc & Ors., 2014 SCC Online CCI 145.



*are not substitutable with other modes of road transport.*<sup>144</sup> However, in another case<sup>145</sup> filed by Meru cabs against Uber alleging anti-competitive practices in the city of Kolkata, the CCI changed its stance and concluded that radio taxis and yellow cabs were indeed part of the same relevant market.

Taking into account the inconsistent approach by the CCI in its various decisions, it is uncertain as to how the CCI will delineate the relevant market in the present case. Considering all the factors laid down, in the food industry, where brick-and-mortar restaurants are also listed online and are available to the viewer or buyer of food items, the two kinds of enterprises could be said to function in the same relevant market under particular circumstances. Food delivery as a service is what should constitute the relevant market, notwithstanding whether the service providers are offline or online.

### **B. Assessing Dominant Position**

Dominance in general term means ‘power or influence over the other’. Under Competition law, dominance is contemplated under S. 4 of the Act as a position of strength enjoyed by an enterprise in a relevant market, which enables it to:

- i. Operate independently of the competitive forces prevailing in the relevant market; or
- ii. Affects its competitors or consumers or the relevant market in its favour.<sup>146</sup>

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<sup>144</sup> In Re: Fast Track Call Cab & Anr. v. ANI Technologies, 2017 SCC Online CCI 36.

<sup>145</sup> In Re: Meru Travel Solutions Pvt Ltd. and ANI Technologies & Ors., 2018 SCC Online CCI 46.

<sup>146</sup> The Competition Act, 2002, § 4, No. 12, Acts of Parliament, 2003 (India).

Dominance or monopoly power is basically defined on the basis of the ability of an enterprise to operate independently of competition or the ability to raise or control the prices.<sup>147</sup>

Further, whether an enterprise enjoys dominant position in a relevant market depends upon a number of factors. Market share of an entity is one of the leading factors for deciding the dominant position of an enterprise.<sup>148</sup> An undertaking with high market share over a long period of time constitutes an important preliminary indication of the existence of a dominant position.<sup>149</sup> However, the threshold for market share to constitute dominance is not defined nor is market share determinative of dominance on its own. CCI has recognised certain internationally accepted principles in this regard. In *Schott Glass Case*,<sup>150</sup> CCI recognised the *Akzo principle of dominance* which was established in one of the judgements<sup>151</sup> under the EU Competition law. The principle states that there is a presumption of a company being dominant if it holds a market share of 50 percent or more.

It is important to understand that market power or dominance of an enterprise in a marketplace is not prohibited by the Competition Act, 2002, neither is it held wrongful like the Monopolies and Restrictive Trade Practices Act, 1969. S. 19(4) of the Competition Act now lays down a number of factors other than market share which need to be given due consideration while assessing the dominant position of an enterprise, like size and resources of an enterprise and the competitors, barriers to entry, dependence of consumers, etc. However, with rights come responsibilities and therefore, where an enterprise enjoys dominant position in a market place, it owes a

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<sup>147</sup> C-27/76, *United Brands Co. v. Commission* 1978 E.C.R 207.

<sup>148</sup> 2 S.M. DUGGAR, *GUIDE TO COMPETITION LAW* 504 (7ed. 2018).

<sup>149</sup> T-228/97, *Irish Sugar plc v. Commission* 1999 E.C.R II-02969.

<sup>150</sup> *Kapoor Glass v. Schott Glass*, (2012) CCI 14.

<sup>151</sup> C-550/07, *P Akzo v. Commission* 2010 E.C.R I-08301.

special responsibility<sup>152</sup> to not allow its conduct to impair the genuine competition of that market place.

The food-tech industry is also currently engaged in a battle of the titans. As per reports, due to the recent Zomato-UberEats merger, Zomato now has a market share of approximately 55 percent, while Swiggy has a 60 percent revenue share.<sup>153</sup> Maintenance of large market shares puts the enterprise in a position of strength and makes it an unavoidable trading partner - classic features of being dominant.<sup>154</sup>

It is thus abundantly clear that Zomato and Swiggy are the major players in this market, effectively creating a duopolistic market. No other player comes close to this duo in terms of size or consumer preference. Both these platforms also have foreign investors infusing large capital regularly. A leading undertaking with 'deep pockets' will be able to utilise this capital in order to protect itself from its competitors and act independently of prevailing market forces.<sup>155</sup>

But the dilemma faced by the Competition authorities in the course of investigation will be recognition of dominant position. Effectively, both Zomato and Swiggy have captured the market and are in a position of strength to indulge in the alleged practices, but

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<sup>152</sup> T-191/98, T-212/98, T-214/98, *Atlantic Container Line v. Commission* 2003 E.C.R II-03275; C-202/07 P, *France Telecom v. Commission* 2009 E.C.R I-02369.

<sup>153</sup> Sanchita Dash, *Swiggy says it's the most loved brand and doesn't need discounts*, BUSINESS INSIDER (Jan. 24, 2020) <https://www.businessinsider.in/business/startups/news/swiggy-top-executive-says-it-doesnt-need-discounts/articleshow/73575887.cms>.

<sup>154</sup> *In Re: Arshiya Rail v. Ministry of Railways & Anr.*, (2012) CCI 52; C-85/76, *Hofmann v. Commission* 1979 E.C.R 00461.

<sup>155</sup> BARRY J RODGER AND ANGUS MACCULLOCH, *COMPETITION LAW AND POLICY IN THE EC AND UK* 132 (5 ed. 2014).

Indian law does not recognise *collective dominance*. In the case of Meru Travels<sup>156</sup>, the question of *collective dominance* was raised. It was contended that Ola and Uber *collectively* held dominant position in the radio service taxi marketplace. The Commission rejected this argument by holding that the concept of collective dominance is not sanctioned in India. Even in the case of Flipkart, the CCI was of the view that none of the e-commerce platforms were individually dominant and therefore there was no need for an investigation into the alleged abuse of dominance by these firms.<sup>157</sup>

This raises pertinent issues about whether it is possible for more than one firm to be dominant in a relevant market, a question that is particularly relevant in the context of network industries that are largely dominated by a few big players. Most jurisdictions around the world recognise collective dominance and firms have been held to be collectively dominant where the oligopolistic nature of the market is such that they behave in a parallel manner, thereby appearing to the market as a collective entity even in the absence of any agreement or links between them.<sup>158</sup>

Hence, unless collective dominance is recognised under Indian law, it is virtually impossible to determine the dominant position of enterprises in digital oligopolistic markets.

### C. Predatory Pricing Vis-a-Vis Deep Discounting

The petition<sup>159</sup> filed before the CCI *inter alia* alleged that the online food delivery sector indulges in predatory pricing by offering deep discounts to its customers thus foreclosing the market for small restaurateurs who cannot provide such appealing discounts.

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<sup>156</sup> In Re: Meru and ANI, *supra* note 19.

<sup>157</sup> In Re: Mohit Manglani and Flipkart, *supra* note 15.

<sup>158</sup> C-416/06, Bertelsmann v. Commission 2008 E.C.R, I-4951.

<sup>159</sup> RATNA BHUSHAN, *supra* note 3.

The concept of deep discounting as an anti-competitive practice has been an enigma in the sphere of e-commerce and so for the online food delivery sector. Brick-and-mortar restaurants have time and again raised the possibility of getting wiped off from the market due to the excessive discounts offered by online food delivery platforms. These discounts, as alleged by the physical restaurants are so much so that the online food sphere suffers loss at the cost of luring customers and building network. The 'LogOut Campaign' was a result of one such incident of deep discounting.

When the effects of conduct of an enterprise adversely affect the customers, that conduct can be termed as abusive. For example- through prices charged directly or indirectly; through conduct that reduces the intensity of existing competition or potential competition.<sup>160</sup> Predatory pricing is defined to mean the provision of goods or services, at prices below cost, with a view to reduce or eliminate competition.<sup>161</sup> Therefore, the main essence of the section is not pricing below cost, but that the conduct should be such that it could lead to the exclusion of other players, hindering competition in that market.

The CCI has determined three conditions that have to be satisfied to ascertain whether the practice of a dominant firm constitutes predatory pricing, namely-

- i. The price being offered for the goods or service should be lower than the average cost of production of the product or acquisition of service.
- ii. Such kind of manipulation in the price of the product was done with the intention of wiping out competitors from the market.

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<sup>160</sup> 2 S.M. DUGGAR, GUIDE TO COMPETITION LAW 537 (7edn 2018).

<sup>161</sup> The Competition Act, 2002, § 4(2)(a)(ii), No. 12, Acts of Parliament, 2003 (India).

- iii. A substantial plan exists with a motive of recovering or to recoup the losses incurred due to dropping the prices by jacking the prices high again after eliminating the competitors from the market.<sup>162</sup>

Thus, while considering the allegations of brick-and-mortar restaurateurs against the online platforms for aggressive pricing, the main question is whether the conduct of online platforms is intended to wipe off the physical restaurants from the market or to secure a place for themselves

The CCI released 'Market Study on E-commerce in India' (hereinafter referred to as '**the Study**') in January 2020. This study was a product of the need to identify the various Competition law issues plaguing the e-commerce sector. The study was primarily carried out in three sectors- food, accommodation and lifestyle. It was observed in the study that 83 percent of physical restaurants have an online presence with online sales accounting for nearly 29 percent of their overall revenue. Quick service restaurants and casual diners are most common amongst others since their growth and survival is significantly dependent upon the online services.<sup>163</sup> Keeping in mind these statistics, it is clear that the online platforms are mainly composed of offline restaurants. Additionally, the traditional restaurants are now largely dependent upon online services for advertisements, customer visibility and receiving reviews and ratings. It will thus be correct to state that both the modes i.e., online and offline are interdependent for their survival and strategic development. This makes it clear that the practice of predatory pricing by online mode cannot *per se* exclude the offline players as they are mainly a platform for these restaurants and private labels.

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<sup>162</sup> In Re: Transparent Energy Systems and TECPRO, (2013) CCI 45.

<sup>163</sup> COMPETITION COMMISSION OF INDIA, MARKET STUDY ON E-COMMERCE IN INDIA - KEY FINDINGS AND OBSERVATIONS (2020).

Another intriguing element while discussing predatory pricing is the revenue collection of these food applications. In FY 2019-20, Swiggy reported a six-fold rise in its annual losses i.e., Rs. 2,363 crores compared to Rs. 397 crores in the previous FY, even when its revenue grew three-fold to Rs. 1,128.3 crores from Rs. 417 crores.<sup>164</sup> Meanwhile, Zomato reported a loss of Rs. 1,001 crores on revenue of Rs. 1,397 crores in FY 2019.<sup>165</sup> These statistics certainly raise eyebrows as to the business plan of these food platforms. With losses exceeding multi millions, one may question the economic rationale behind providing deep discounts to the consumers.

Selling below average variable cost does not hold any economic rationale except in special circumstances like recession, trying to establish a foothold in a new market, etc. In case of a dominant player, these conditions do not apply and the only discernible reason is that they are suffering losses to drive out the competitors from the market. It is perhaps what they may consider 'collateral damage' in the long run, as once these food applications capture the market and foreclose it for other competitors, they will be in a position to recuperate all losses due to lack of competitive forces in the market and be the ultimate winner. The discounts are mostly purportedly funded by platforms for consumer on-boarding.

On the other hand, it is also interesting to understand that online delivery platforms are usually based on internet-backed marketing concepts like providing food at a very low price as compared to the physical restaurants in order to get momentum in the market at their nascent stage. In addition to this, most of the start-ups have private equity funds and investors and hence are able to afford giving such heavy discounts. The industry is particularly technology driven and

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<sup>164</sup> Chitranjan Kumar, *Swiggy's parent firm reports Rs 2,363 crore loss in FY19*, BUSINESS TODAY (Dec. 16, 2019)

<https://www.businesstoday.in/current/corporate/swiggy-parent-firm-reports-rs-2363-crore-loss-in-fy19/story/392155.html>.

<sup>165</sup> Id.

promotes innovation and utilisation of artificial intelligence which should also be considered while looking at the cost effectiveness model of the industry *vis à vis* its offline counterparts, which allows it to undertake innovative pricing strategies.

Even in the market study, *inter alia* 'deep discounting' has been listed as one of the major issues hindering the pro-competitive potential of e-commerce. Although the study failed to lay down a strict definition of the term 'deep discounting', it was successful at identifying the extent to which the practice of deep discounting is harmful in competition. In order to assess the issue of aggressive discounting, it has to be viewed from the perspective of whether higher discounts are offered as an incentive to forge exclusive contracts and to curb multi-homing by service providers. There is an apprehension amongst sellers that platforms use discounts as a discriminatory device. For instance, the exclusive partners were believed to be receiving higher discounts on their products. This creates unfavourable conditions for the other sellers. Secondly, when intermediary platforms offer discounts over and above the price set by the seller, the seller loses control over the final price that is being offered to the customer, which also affects price and sales through other channels. As per the market study, the sellers also have no control even when they are themselves funding the discounts as it is the platforms that reportedly determine the structure and scheme of these discounts.<sup>166</sup>

The CCI has made a considerable shift in recognising whether excessive discounting comes under the ambit of anti-competitive practices. In a recent order, *In Re: Delhi Vyapar Mahasangh and Flipkart Internet Pvt. Ltd. & Ors*<sup>167</sup>, CCI ordered investigation against Internet giants, Flipkart and Amazon on accounts of deep discounting,

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<sup>166</sup> MARKET STUDY, *supra* note 37.

<sup>167</sup> *Delhi Vyapar Mahasangh v. Flipkart*, 2020 SCC OnLine CCI 3.



exclusive agreements and related issues. Previously, CCI had dismissed investigation against Flipkart for similar anti-competitive practices stating that the nascent stage of e-commerce market necessitates any intervention to be carefully tested.<sup>168</sup> The Competition Commission can evaluate such vertical agreements under S. 3(4) of the Act to decide whether such discounts lead to unhealthy competition. Further, in case an enterprise is dominant in a given marketplace, discriminatory discounts could be assessed under S. 4(2) of the Act.

Decisively, the essence of deep discounting as an anti-competitive practice lies in the nature of the discounts, the intention of the food delivery platforms and the effect of the same on the competition which depends upon the facts of each case. It is important that legitimate price competition is not hindered under the garb of anti-competitive discounting. The Competition Law is not a law of equalisation of the competitors but only a law to curb any anti-competitive practices.<sup>169</sup>

#### **D. Unfair Contractual Terms**

The contractual agreements between the online platforms and the restaurants are also a major cause of concern. It has been alleged by the restaurateurs that the platforms determine and revise the terms of engagement unilaterally, causing harm to the business interest of the service providers.<sup>170</sup> The terms of the contract are also allegedly unfair and discriminatory. S. 3 of the Act regulates anti-competitive agreements and as previously mentioned, it governs both vertical and horizontal agreements. Another compelling effect of the delineation of relevant market will be its effect on the type of agreements between the platforms. If the offline restaurants and

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<sup>168</sup> All India Online Vendors Association v. Flipkart, 2018 SCC OnLine CCI 97.

<sup>169</sup> ARSHIYA RAIL, *supra* note 28.

<sup>170</sup> MARKET STUDY, *supra* note 37.

online platforms are considered to be a part of the same relevant market, considering the fact that both provide similar service of delivery of food and are substitutable, any agreement between them will be a horizontal agreement and will be *per se* illegal. However, if both are placed in separate relevant markets in different stages of the production chain, the restaurant being the producer and the online platform being the service provider (delivery agent), the agreements between them will be vertical, determined on a rule of reason basis. Some of the unfair terms of contracts as alleged by the restaurants, are:

**i. Exclusive Agreements and Refusal to Deal**

Online food delivery applications list down a few restaurants that are available exclusively on their platform alone. This is a result of the Exclusive Distribution Agreement signed between the platform and the restaurant.

Exclusive Distribution Agreements are governed under S. 3(4) read with S. 3(1) of the Competition Act, 2002. As per S. 3 (4)(c) of the Act, “exclusive distribution agreement” includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods.<sup>171</sup> In order to bar an exclusive distribution arrangement, it must be shown that the arrangement causes an Appreciable Adverse Effect on Competition.

When a manufacturer indulges in the practise of exclusive dealing, his competitor is prevented access to that market and the dealers are denied the freedom to handle competing products. In this process, the consumer is also restricted in his choice among the number of competing products.<sup>172</sup>

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<sup>171</sup> The Competition Act, 2002, § 3(4)(c), No. 12, Acts of Parliament, 2003 (India).

<sup>172</sup> S.M. DUGGAR, GUIDE TO COMPETITION LAW 381 (7ed. 2018).

An exclusive distribution agreement entered into between a vendor and the e-commerce platform has generally been considered to not cause an AAEC on account of it not leading to any entry barriers within the market.<sup>173</sup> In case of online food delivery services, restaurants enter into these agreements when exclusivity is incentivised by platforms by way of offering better terms of engagement, such as lower commission/service fee charged and business assurance. For example, when a Restaurant 'X' enters into a contract with Zomato agreeing to not list its restaurant on any other food delivery application, Zomato either reduces the subscription fees to be paid by the restaurant or favourably displays the restaurant on its software application. This creates barriers in inter brand competition.

## ii. Bundling of Services

The other unfair contract term found in the food service segment is the mandatory bundling of delivery service with listing service. This requires the restaurants who wanted to list on a platform to also necessarily register for the platform's delivery services. The courts have held<sup>174</sup> the following conditions essential in respect of anti-competitive contractual tie-in arrangement under S. 3 (4)(a) namely:

- a. Presence of two separate services capable of being tied;
- b. Sufficient economic power of the seller with respect to the tied service to restrain free competition in the market;
- c. The arrangement must affect a 'not insubstantial' amount of commerce.

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<sup>173</sup> In Re: Mohit Manglani and Flipkart, *supra* note 15.

<sup>174</sup> Sonam Sharma v. Apple Inc & Ors., (2013) CCI 19.

Since, Zomato and Swiggy are the biggest players in the market with an ascendancy that allows them considerable sway over the market, the restaurateurs have no option but to avail the tied in services of these platforms in order to increase their visibility and business.

### iii. Data Masking for In-house Kitchens/Cloud Kitchens

It has been alleged that while restaurants are required to pay huge tariffs to get their products listed, the food applications prominently display their own private labels and cloud kitchens on their platforms. Swiggy has started its own in-house kitchen, 'The Bowl Company', while Zomato introduced 'Zomato Kitchen'. It is claimed that the applications unethically divert customers to their own kitchens. As a result of being the platform owner, these brands have critical customer data which is not shared by the platforms with restaurants, while the same is mined for launching and promoting the platforms' own cloud kitchens. This amounts to "misusing the customer database" and raises severe concerns about platform neutrality.

The dual role played by platforms creates an inherent conflict of interest between the platform's role as an intermediary on one hand and a market participant on the other, giving them the incentive to leverage their control over the platform in favour of their own/preferred vendors to the disadvantage of other sellers.<sup>175</sup> It is averred that platform owned labels and some other preferred sellers are constantly given preferential treatment in terms of order of ranking, listings and ratings as compared to the other.

### E. Acquisition of UberEats By Zomato

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<sup>175</sup> MARKET STUDY, *supra* note 37.

In January 2020, Zomato acquired UberEats for USD 350 million.<sup>176</sup> The CCI recently ordered a probe into this transaction to gauge its possible anti-competitive effects.<sup>177</sup>

Acquisitions, amalgamations and mergers of enterprises under certain circumstances are defined as Combination under S. 5 of the Act. The need to regulate combinations arises from the premise that the company emerging as a result of the combination has the potential to abuse the power and market share it acquires and eventually eliminate competition in the relevant market. Horizontal mergers have the most potential to directly curtail competition in the market since the number of competing firms reduce and the emerging company exercises more effective control over the market.<sup>178</sup> Combinations that are likely to have an AAEC on competition within India are void by virtue of S. 6 of the Act.

Now, with the elimination of UberEats, competition has stifled to majorly two players and the customers of the company will shift to either of the two dominating entities. This would virtually create a situation of duopoly. These platforms will then have the power to abuse their dominant position and provide appealing discounts to the consumers thereby creating huge barriers for entry of new companies in the food delivery sector. This will confer great control of market price on the existing platforms and they may choose to reduce the discounts and offers, being aware that there are not many competitors in the market that the consumers can switch to. While two strong players ensure competitiveness in the market, it has been

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<sup>176</sup> Aditi Shrivastava, *Zomato acquires Uber Eats in an all-stock transaction*, THE ECONOMIC TIMES (Jan. 22, 2020), <https://economictimes.indiatimes.com/small-biz/startups/newsbuzz/zomato-acquires-uber-eats-in-an-all-stock-transaction/articleshow/73465982.cms>.

<sup>177</sup> *Trouble for Zomato: CCI Probes Possibly Anti-Competitive Uber Eats Acquisition*, NEWS18 (May 23, 2020), <https://www.news18.com/news/tech/trouble-for-zomato-cci-probes-possibly-anti-competitive-uber-eats-acquisition-2632713.html>.

<sup>178</sup> RICHARD WHISH AND DAVID BAILEY, COMPETITION LAW 810 (7ed. 2012).

observed that in such a market, rivals are interdependent and are bound to match one another's marketing strategy. As a result, price competition between them will be minimal or non-existent.<sup>179</sup>

In addition to the consumers, the combination will also have an adverse impact on the restaurants as consolidation of this market will further reduce the little bargaining power held by the restaurants. Since the online orders account for a major percentage of their revenue, they will be forced to adhere to the conditions of these platforms.

Hence, the acquisition of UberEats by Zomato prima facie shows AAEC and must be subjected to the scrutiny of the Competition Commission.

#### **F. Renewed Foreign Direct Investment E-Commerce Policy, 2018**

The renewed FDI Policy which laid down conditions for ecommerce platforms, came into effect from February 2019. The policy sets out guidelines in order to provide a fair playing field to all vendors of an e-commerce marketplace platform and prevent distortionary effects through means of price, inventory or vendor control.

The policy demarcates what constitutes a marketplace model and an inventory-based model. Inventory based model of e-commerce is an e-commerce activity where inventory of goods and services is owned by e-commerce entity and is sold to the consumers directly.<sup>180</sup> Marketplace based model of e-commerce means providing of a

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<sup>179</sup> Rajasthan Cylinders v. Union of India, (2018) SCC Online SC 1718.

<sup>180</sup> Ministry of Commerce & Industry, Department of Industrial Policy & Promotion, Press Note No. 2 (2018 Series) (Dec. 26, 2018).

platform by an e-commerce entity on an electronic network to act as a facilitator between the buyer and seller.<sup>181</sup>

As per the policy, foreign investment is allowed in the 'marketplace' model alone. Hence, an e-commerce platform which has foreign investment cannot exercise ownership or control over the inventory sold on its platform.<sup>182</sup> This raises questions over the conduct of food platforms like Zomato and Swiggy which despite having significant foreign funding, indulge in selling their own products on the platform through their private labels and cloud kitchens.

The most remarkable feature of this policy is that it bans e-commerce marketplaces from directly or indirectly influencing the sale price of goods or services and mandates them to maintain a level playing field.<sup>183</sup> This is in sharp contrast to the acts of the food tech platforms wherein these platforms have majority control over the discounting policy and schemes.

Further, e-commerce marketplace entities also cannot mandate any seller to sell any product exclusively on its platform only, which again renders the 'Exclusive' restaurants on these platforms in contravention of this policy.

While it has been over a year since the policy was implemented, food tech platforms have not conformed to these regulations, citing uncertainty regarding whether this policy applies to the food delivery services or not as there is still an on-going debate whether they fall under the literal definition of the term 'e-commerce marketplace' or not.

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<sup>181</sup> Id.

<sup>182</sup> Id.

<sup>183</sup> Id.

## I. The Way Ahead

The NRAI president, Mr. Rahul Singh aptly encapsulated the essence of the issue, stating that technology has to be seen as an enabler of privileges, and not a privilege itself.

It is indeed understood that food delivery applications and e-commerce in general are at a nascent stage in India. Thus, any intervention must be with caution so as to not stifle innovation and growth of the digital era. However, it is also equally important that these online platforms compete with the traditional offline sector in a level playing field and not in a catbird seat. What is also evident is that the current competition law framework and regulations are not ideally equipped to deal with the peculiarities and the issues of the online economy.

The delineation of relevant market in the e-commerce sector needs a uniform set of parameters and guidelines based on the degree of substitutability with its offline counterparts. The discounting mechanism of the online sector, which has been the most contentious issue, deserves cogent and unambiguous adjudication by the authorities. Collective dominance as a concept too needs the attention of the authorities and its applicability in India should be reconsidered. Until then a substance over form analysis ought to be preferred while investigating potential abuse practices.

The food tech industry should take the lead in becoming an enabler and not an obstructor in creating a free and fair market for all.



## NAVIGATING SPACs THROUGH A CROSS-BORDER LENS – WHAT CAN THE INDIAN REGULATORS LEARN?

- Khushi Dua & Tapamoy Ghose\*

### ABSTRACT

*The capital markets worldwide have seen a recent surge in the usage of Special Purpose Acquisition Companies. In this regard, an attempt has been made to analyse the history of SPAC and how it has become a prominent player in the international market, including the Indian capital market. Despite the increase in growth and acceptance of SPACs on the market, there seems to be a lack of any legislative framework. Considering this spectacular growth, the International Financial Services Centres Authority has come out with a draft framework to regulate SPACs in India. However, the proposed draft has certain shortcomings. To address such shortcomings, a comparative study is carried out by taking into account the regulatory framework of SPACs in different capital markets such as Malaysia, the United States, Italy, Canada and Singapore.*

**Keywords:** SPAC, IFSCA Draft, Recent trend, Cross Border Jurisdiction

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## I. INTRODUCTION

The Throughout history, we have seen that Initial Public Offerings ( “IPOs”) have been used as a mode of raising funds by companies. However, it is a lengthy, cumbersome and expensive process, making it difficult for new-age start-ups with high growth prospects to go public through IPO. After facing the challenges associated with IPOs, start-ups are trying to explore alternative methods to go public. In this regard, the concept of Special Purpose Acquisition Companies ( “SPACs”) has started to gain popularity. A SPAC is an investment vehicle that is created for the purpose of pooling funds for future acquisitions, with an objective to take a private company public.<sup>184</sup>

In this paper, the authors attempt to analyse the relatively unchartered but rapidly expanding wheel of the investment vehicles in the field of private equity, i.e. SPACs. The authors believe that before looking into the legal framework of SPAC in India and across the globe, it is pertinent to understand the reasons behind the origin and development of the SPAC investment model. Therefore, this article begins with a brief discussion on the history of SPACs and their feasibility over traditional IPOs. The article highlights the recent trend of SPAC in capital markets across the globe. In this regard, an attempt has been made to provide statistical data, which indicates that the SPAC is becoming a popular mode of investment among sponsors and investors globally. Furthermore, this article specifically analyses the present regulatory framework concerning SPACs within India. Lighthas been thrown upon various specific provisions mentioned under the recently proposed consultation paper by International Financial

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<sup>184</sup> Natasha Dailey, *SPACs are taking over the stock market. Here’s an easy guide to the journey they take from start to finish*, BUSINESS INSIDER (Apr. 1, 2021), <https://www.businessinsider.com/how-do-spacs-work-get-created-costs-guide?IR=T>.

Services Centres Authority ("IFSCA").<sup>185</sup> In this regard, the authors adopt an approach guided by comparative law. This approach has been taken by comparing certain ambiguous provisions within the draft with that of the well-defined legislative framework adopted in other jurisdictions such as BursaMalaysia, United States ( "US"), Canada, Singapore and Italy. Additionally, the authors will suggest certain specific measures practised in other jurisdictions that India can adopt to make any upcoming regulatory framework more comprehensive.

### 1. History of SPACs

The origin of SPACs can be traced back to the US capital market when David Nussbaum created the first-ever SPAC in 1993.<sup>186</sup> The era of 1980s saw a massive surge in trade at the US capital market.<sup>187</sup> Though the number of securities firms increased at the US Stock Exchange, the number of frauds in the penny stock market had reached "epidemic proportions" by the end of the 1980s.<sup>188</sup> The abuse was attributed to non-registration, lack of information about stocks with investors and lack of regulatory framework for penny stocks in the US market.<sup>189</sup> All these factors contributed to the emergence of the blank check companies<sup>190</sup>

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<sup>185</sup> International Financial Services Centres Authority, *Consultation Paper on Proposed International Financial Services Centres Authority (Issuance and Listing of Securities) Regulations 2021*, <https://ifsc.gov.in/Viewer/ReportandPublication/9>, Ch. VI.

<sup>186</sup>Amrith Ramkumar, *SPAC Pioneers reap the awards after waiting nearly 30 year*, THE WALL STREET JOURNAL (Aug. 28 2021, 9:01 PM), <https://www.wsj.com/articles/they-created-the-spac-in-1993-now-theyre-reaping-the-rewards-1161528580>.

<sup>187</sup>Carol Boyer and Glenn Baigent, *SPACs as Alternative Investments: An Examination of Performance and Factors that Drive Prices*, 11 THE J. OF PRIVATE EQUITY 8, 8-15 (2008).

<sup>188</sup>Brandon Schumacher, *A New Development in Private Equity: The Rise and Progression of Special Purpose Acquisition Companies in Europe and Asia*, 40 NW. J. INT'L. L. & BUS. 391, 396-397 (2020).

<sup>189</sup> David S. Ruder, Address at Twenty-First Annual Rocky Mountain-State-Federal Provincial Securities Conference (Oct. 21, 1988) in U.S. SEC WASHINGTON D.C. 20549.

<sup>190</sup>Blank check companies refer to companies with no operating history, few employees, few or no discernible assets, and often no legitimate likelihood of future success. See, Tim Castelli, *Not Guilty by Association: Why the Taint of Their "Blank Check"*

which further perpetuated the abuse. Since the usage of blank check companies such as Onix had increased which came into existence for defrauding investors, Congress passed the Securities Enforcement Remedies Act<sup>191</sup> and Penny Stock Reform Act of 1990<sup>192</sup> to control unscrupulous practices.<sup>193</sup> In response to the Penny Stock Act, the US Stock Exchange Commission ( "SEC") issued Rule 419 that lays down escrow and rescission provisions to ensure that the funds raised by blank check companies through IPO could not be misused by the company's management.<sup>194</sup> The strenuous regulatory requirements by Congress and SEC made it materially impossible for blank check companies to complete business transactions. Therefore, the strict enforcement mechanism and disclosure requirements to protect investors' interests under these acts led to the downfall of blank check companies.

In the mid-1990s, the SPAC management started to voluntarily comply with all the restrictions imposed under the Penny Stock Reform Act and Rule 419 with the hope of reviving the investor confidence in the blank check companies. This was thwarted due to penny stock market frauds.<sup>195</sup> This has led to the emergence of SPACs, which came to be known as descendants of blank cheque companies. Thus, SPACs are similar to blank check companies as they also do not have operations, assets or revenues of their own but have special features such as investors' protection that make them less prone to the abuses

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*Predecessors Should Not Stunt the Growth of Modern Special Purpose Acquisition Companies*, 50 B.C.L. REV. 237, 239 (2009).

<sup>191</sup> Securities Enforcement Remedies Act, 1990 (USA).

<sup>192</sup> Penny Stock Reforms Act, 1990 (USA).

<sup>193</sup>The intention behind legislations was not to ban blank check offerings but to reduce fraudulent activities and ensure a protective mechanism for investors.

<sup>194</sup> Securities Act of 1933 Rule 419(a), 15 U.S.C .

<sup>195</sup>Daniel S. Riemer, *Special Purpose Acquisition Companies: SPAC and SPAN, or Blank Check Redux*, 85 WASH. U. L. REV. 931, 932-947 (2007).

associated with the blank check companies.<sup>196</sup> Unlike blank check companies, they come into existence for the specific purpose of raising capital through initial public offering with the intention of making the targeted company listed by the modes of acquisition, reverse merger or buyout.<sup>197</sup>

## 2. SPAC v. Traditional IPO: Why SPAC is more viable?

It is imperative to understand the working of SPAC before indulging into the viability of SPACs over IPOs. When an individual or a firm, known to as the sponsor, files a registration document with the regulatory authorities, a SPAC is formed. When a SPAC raises money on the day of its IPO, the money is put into an interest-bearing trust account. This money can only be used to complete a target company acquisition or to refund the funds to the target business's shareholders if no acquisition is completed by the closing date. A SPAC usually has two years to execute a transaction before it is liquidated. In some situations, portion of the trust's interest can be used to fund the SPAC's operations. A SPAC is normally listed on one of the main stock exchanges after it has been acquired.<sup>198</sup>

The recent surge in SPAC usage can be attributed to some edge it has over traditional IPOs.<sup>199</sup> For example, financial statements for SPAC can be prepared in a short span of time as it does not require comprehensive

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<sup>196</sup> Carol Boyer and Glenn Baigen, *supra* note 3.

<sup>197</sup>Oshin Malpani, *A Chance for SPACs in India: From Wall Street to Dalal Street*, IRCCL (Aug. 28 2021, 8:01 PM), <https://www.ircl.in/post/a-chance-for-spacs-in-india-from-wall-street-to-dalal-street>.

<sup>198</sup> Ramey Layne and Brenda Lenahan, *Special Purpose Companies: An Introduction*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (Aug. 25 2021) <https://corpgov.law.harvard.edu/2018/07/06/special-purpose-acquisition-companies-an-introduction/>.

<sup>199</sup> *EY Global IPO Trends 2021 Q1*, ERNST & YOUNG (April 13, 2021), [https://assets.ey.com/content/dam/ey-sites/ey-com/en\\_gl/topics/ipo/ey-global-ipo-trends-2021-q1-v1.pdf](https://assets.ey.com/content/dam/ey-sites/ey-com/en_gl/topics/ipo/ey-global-ipo-trends-2021-q1-v1.pdf).

financial statements, and the regulatory requirements are minimal compared to that of traditional IPOs.<sup>200</sup> As a result of the same, a SPAC IPO process can be completed in just 2-3 months, compared to a traditional IPO process which takes around 6-12 months.<sup>201</sup> Further, one cannot discount the price factor in this regard as well. The price of an IPO is dependent on the market condition at the time of listing, which is highly unpredictable, whereas, in a SPAC, the price can be negotiated and fixed before the business transaction closes. Thereby, in a SPAC, the effect of fluctuating market conditions can be navigated more easily than that of a traditional IPO.<sup>202</sup>

Even on a cost basis, a SPAC IPO performs better than that of a traditional IPO.<sup>203</sup> If one considers the underwriting fees which the investment banks charge (which is the single largest cost associated with an IPO), on an average, the cost will be around 3.5% to 7%. The below illustration depicts the situation comprehensively-

<b>Deal ranges</b>	<b>value</b>	<b>Average Underwriting fees</b>	<b>Average investment banks on a deal (including underwriters and co-managers)*</b>
\$25m to \$99m		7.0%	4
\$100m to \$249m		6.8%	6

<sup>200</sup> Brandon Schumacher, *supra* note 6.

<sup>201</sup> *Supra* note 17; see also, Max H. Bazerman & Paresh Patel, *SPACs: What you need to know*, HARVARD BUSINESS REVIEW (Aug. 2021), <https://hbr.org/2021/07/spacs-what-you-need-to-know>.

<sup>202</sup> John Lambert, *Why Companies are choosing SPACs over IPOs*, KPMG ADVISORY (Mar. 1, 2022 11:34 PM), <https://advisory.kpmg.us/articles/2021/why-choosing-spac-over-ipo.html>.

<sup>203</sup> Pranav Sayta, *SPAC and its growing relevance in India*, ERNST & YOUNG (May 10, 2021), [https://www.ey.com/en\\_in/tax/spac-and-its-growing-relevance-in-india](https://www.ey.com/en_in/tax/spac-and-its-growing-relevance-in-india).

\$250m to \$499m	6.1%	9
\$500m to \$1bn	5.4%	12
Greater than \$1bn	3.5%	16

\*study undertaken by PwC<sup>204</sup>

From the table above, one can infer that the costs associated with traditional IPOs are quite excessive. However, in the case of a SPAC IPO, the process is cost-effective, though the structure is a bit unusual. The basic discount structure is 2% of the gross proceed, which is to be paid at closing of the IPO, with another 3.5% being deposited in a trust account, to be paid to the underwriter when the De-SPAC transaction closes. Moreover, if the De-SPAC transaction does not occur, the said discount must not be paid but can be used to redeem public shares with the rest of the trust account balance (where the discount was deposited initially).<sup>205</sup>

Due to these underlying rationales, corporations such as BuzzFeed,<sup>206</sup> Nikola Corp,<sup>207</sup> and various other start-ups are opting for SPACs over traditional IPOs. A closer look at the global capital market would reveal that the trend is very much in favour of SPACs. The trend would be substantiated through the statistical data that is provided subsequently.

### 3. The recent global trend of SPACs

<sup>204</sup>Considering an IPO? First understands the Cost, PwC, <https://www.pwc.com/us/en/services/deals/library/cost-of-an-ipo.html>.

<sup>205</sup>Ramey Layne and Brenda Lenahan, *supra* note 16.

<sup>206</sup>Jessica Bursztynsky, *Buzz Feed announces plan to go public via SPAC, targets \$1.5 billion valuations*, CNBC (June 24, 2021), <https://www.cnbc.com/2021/06/24/buzzfeed-announces-plans-to-go-public-via-spac.html>.

<sup>207</sup> Reuters Staff, *Nikola Corp to go public at over \$3.3 billion valuations*, REUTERS (Mar. 3, 2020), <https://www.reuters.com/article/us-nikola-corp-vectoiq-idUSKBN20Q1J5>.

*Though SPACs emerged in the early 1990s, they started to wane over a period of time. However, 2020 and 2021 proved to be the renaissance period for SPACs, which is evident from the fact that the SPAC IPOs have completed more deals and have raised more proceedings in the first quarter of 2021 alone than that of the entire 2020 or other preceding years, as presented in figure 1.*

<b>Year</b>	<b>No. of SPAC deals</b>
2018	18
2019	31
2020	152
2021(January and February)	150.5

\*Data taken from Statistia.com<sup>208</sup>

The sudden surge in SPAC transactions globally, as discussed above, can be attributed to various factors such as the looming uncertainty and instability over the capital market, owing to the pandemic. Additionally, the ease associated with the usage of SPAC over the traditional mode of IPOs as an investment vehicle has attracted a lot of big players in the private equity capital market, which in turn enhanced the trust of the investors in SPAC as a mode of investment.<sup>209</sup> This is evident from the fact that the top venture capitalists such as Soft Bank Group and hedge

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<sup>208</sup>Jennifer Rudden, *Value of Special Purpose Acquisition Company (SPAC) M&A Deals completed worldwide from March 2018 to February 2021*, STATISTA, (May 7, 2021), <https://www.statista.com/statistics/1232014/value-spac-acquisitions-global/>.

<sup>209</sup>Tim Castelli, *Not Guilty by Association: Why the Taint of Their "Blank Check" Predecessors Should Not Stunt the Growth of Modern Special Purpose Acquisition Companies*, 50 B.C.L. REV. 237 (2009).



fund manager Bill Ackman have come up with a SPAC raising \$280 million and \$4 billion, respectively, in the beginning of 2021.<sup>210</sup>

Talking about the presence or growth of SPACs in different jurisdictions, they have not yet taken off at an equal pace. In some jurisdictions such as the US and Europe, SPACs are used more commonly as a mode of raising funds, whereas, in some Asian countries, it is at a nascent stage due to a lack of regulatory framework. However, the slower growth of SPACs in some countries does not indicate that it has not occurred yet. In fact, the current statistical data suggest that explosive growth in SPAC acquisitions has also been seen in Asian markets.<sup>211</sup>

Seeing the spectacular growth of the SPAC transactions globally, the moot point is whether it is a transitory trend in a capital market that will fade away or will continue to flourish? In this regard, Dr Panton has stated that '*we are only in the beginning of the SPAC era*' that will continue to flourish.<sup>212</sup> To support his claim, he reminded listeners that some years ago, it was believed that private equity would fade away; however, it did not happen. In fact, private equity has become an attractive source of investment.<sup>213</sup> Similarly, SPAC will also become a commonly used investment vehicle, especially by small companies, due to the less cumbersome procedure involved in raising funds. In this regard, a recent survey by a US-based firm named Katten is of particular interest. In March 2021, Katten conducted a survey with 100 investment

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<sup>210</sup>Himanshu Dubey & CS Ajay Kumar, *A overview of SPACs and related concerns in India*, VINOD KOTHARI CONSULTANT, (Mar. 2021), <https://vinodkothari.com/wp-content/uploads/2021/03/An-overview-of-SPACs-and-related-concerns-in-India.pdf>.

<sup>211</sup>Saheli Roy Choudhury, *The SPAC frenzy may be heading to Asia- experts say clear rules are needed*, CNBC, (Mar. 26, 2021), <https://www.cnbc.com/2021/03/26/spacs-growing-interest-in-asia-toward-blank-check-companies.html>.

<sup>212</sup>*What is SPAC and why are they so popular*, EXCELSIOR CAPITAL, <https://www.excelsiorgp.com/resources/what-is-a-spac-and-why-are-they-suddenly-so-popular/>.

<sup>213</sup>*Id.*

professionals who have at least taken part in one SPAC transaction (as sponsors, investors, advisers or underwriters). Out of them, 72% who have taken part in a SPAC transaction agreed that IPOs through SPAC would continue to be strong till at least 2022 (out of the 72%, 44% strongly agreed about the growth of the SPAC model). Further, 69% of the respondent in the survey felt that SPACs would provide favourable investment opportunities moving forward.<sup>214</sup> This survey by Katten is a glaring indication that any misapprehension amongst investors about SPACs has been resolved, as they now see SPAC as a viable and feasible alternative to traditional IPOs.<sup>215</sup> Analysing the abovementioned data, there is no doubt that the recent trends in the capital markets are moving towards a SPAC based investment model.

#### 4. Indian Context

Given their impressive run globally, SPACs seem to be the future of the Indian capital market as well.<sup>216</sup> However, the Indian regulatory framework does not consist of any special legislation governing SPACs. Lack of regulatory framework on SPACs in India poses challenges for Indian companies and often forces Indian companies such as Videocon, Yatra etc. to get listed in the USA through SPAC.<sup>217</sup> Recently, BYJUs is

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<sup>214</sup>The first round of the survey was conducted in March 2021 by Katten. It consisted of 80 investment professionals who have at least taken part in one SPAC transaction (as sponsors, investors, advisers or underwriters). Out of all the professionals, 75% was of the opinion that raising funds through SPAC would increase throughout 2022. The second round of the survey was conducted in May 2021 with 100 investment professionals.

<sup>215</sup>. Katten, *SPAC to The Future: Despite Slowdown, SPACs Continue to Be Viewed as Favorable Investment Opportunities* (2021)

[https://katten.com/files/1095501\\_spacs\\_survey\\_report\\_may\\_2021\\_final.pdf](https://katten.com/files/1095501_spacs_survey_report_may_2021_final.pdf).

<sup>216</sup>Pranav Sayta, *SPAC and its growing relevance in India*, ERNST & YOUNG (May 10, 2021), [https://www.ey.com/en\\_in/tax/spac-and-its-growing-relevance-in-india](https://www.ey.com/en_in/tax/spac-and-its-growing-relevance-in-india).

<sup>217</sup> Iqbal Tahir, *Supportive SPAC regulations can unlock significant value for companies*, MONDAQ (May 26, 2021), <https://www.mondaq.com/india/corporate-and-company->

also actively engaged in negotiations with Churchill Capital and NASD Acquisition Corp to go public via SPAC model in the NASDAQ.<sup>218</sup> Considering this, recently, a Consultation Paper on Proposed International Financial Services Centres Authority (Issuance and Listing of Securities) Regulations 2021as been introduced by International Financial Services Centres Authority ( “**Draft**”), which proposes, under Chapter VI, provisions pertaining to the issuance and listing of securities through SPACs.<sup>219</sup> Under Chapter VI, although an attempt has been made in the said draft to propose a regulatory framework for SPACs, certain provisions have been left open-ended and ambiguous by the drafters, which will lead to rampant misuse of provisions. It will, in turn, diminish the confidence of the stakeholders in the Indian capital market and discourage them from using domestic SPACs for business combinations. Therefore, to avoid the ambiguity that can arise from the draft, the authors will strive to analyse certain similar cross-jurisdictional SPAC provisions that India can adopt to ensure effective regulatory compliance.

### 5. Lessons to learn from other jurisdictions

The current pandemic has surpassed international boundaries blurring the borders between states, leading to a surge in investment through SPACs globally, which warrants a comparative analysis of cross-border regulatory measures that can be relied upon by the Indian regulators. In this regard, attention would be drawn to analyse certain balanced provisions adopted in other jurisdictions to protect both investors and sponsors.

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law/1072796/supportive-spac-regulations-can-unlock-significant-value-for-indian-companies.

<sup>218</sup> Saritha Rai, *Byju’s Aims for SPAC Merger Agreement Within a Month*, BLOOMBERG (Jan. 31, 2022) <https://www.bloomberg.com/news/articles/2022-01-31/byju-s-is-said-to-aim-for-spac-merger-agreement-within-a-month>.

<sup>219</sup> *Supra* note 4, Ch. VI.

### 5.1 The issue of warrants: A study of the Bursa Malaysian approach

Since the search for a future target company to acquire begins after completing the IPO in the SPAC transactions, the stakeholders involved in such transactions cannot predict the target company's market value or future growth before issuing the IPOs. The only asset in the SPAC is the management team, as investors are not provided with any financial data to calculate the risk involved in an investment. Such a scenario leads to various issues such as asymmetric information, moral hazard and fraud etc. Similarly, the recent draft consultation paper also requires SPACs to disclose only general information in the offer document under Chapter VI.<sup>220</sup> The provision substantiates the authors claim that the investors mostly have asymmetric information (general information) about the risks involved in their investment, thereby putting them in a disadvantageous position.

To allow the investors to make an informed decision and reduce the risk of asymmetric information, SPACs are mostly issued in units consisting of shares and warrants. The issuance of warrants along with the issuance of shares has become a common practice in other jurisdictions such as Bursa Malaysia, Singapore, Canada and the USA.

A warrant is a contract that gives the holder the right to purchase a certain number of additional shares from the prospected company in future at an already determined discounted price in the warrant agreement.<sup>221</sup> In the case of SPACs, the warrant agreement allows the investors to buy additional shares in the future Target Company, which guarantees the investors that the SPAC acquisition will take place. It

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<sup>220</sup> *Id.*, Cl. 71(d).

<sup>221</sup> US Securities and Exchange Commission, *What you need to know about SPACs- Updated Investor Bulletin*, SEC (May 25, 2021), <https://www.sec.gov/oiea/investor-alerts-and-bulletins/what-you-need-know-about-spacs-investor-bulletin>.

would also increase the trustworthiness of the sponsors by assuring that they are not operating opportunistically but is investing in a profitable business. Thus, the codification of the practice of issuing warrants at the time of issuing IPO mandatorily would minimise the risks for the investors connected to the asymmetric information. Therefore, providing warrants to the investors would give a sense of security to the investors that business can be profitable and earn more return from the additional shares that they get before acquisition.<sup>222</sup>

### **5.2 Need to impose a limit on price determination power- A Bursa Malaysia Approach**

In the case of SPACs, it is common practice that sponsors purchase shares at a nominal price before the issuance of IPOs, which is more commonly known as a private placement. Even during the SPAC transaction, sometimes the management meets additional capital requirements by offering additional shares to the sponsors through private placement. Generally, the existing sponsors or management determine the price at which shares will be offered to sponsors. Similarly, under Clause 73 of the Draft, powers have been vested with the sponsors to determine the prices of the shares offered to all the stakeholders.<sup>223</sup> The provision has given excessive price determination powers to the sponsors without imposing restrictions on the price limit of shares. This open-ended provision allows management to offer shares to sponsors at a highly discounted rate which can be fundamentally different from the price offered to investors in IPO or other investors in an open market.<sup>224</sup> Therefore, to avoid the possibility of abuse by

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<sup>222</sup>Daniele D'Alvia, *SPAC: a comparative study under US, Asia and Italian corporate framework*, QUEENS MARY UNIVERSITY.

<sup>223</sup> Consultation Paper on Proposed International Financial Services Centres Authority (Issuance and Listing of Securities) Regulations, 2021, Cl. 73.

<sup>224</sup> Anushri Uttarwar, *India's Attempt to Regulate SPACs: Sponsors in the spotlight*, INDIA CORP LAW (Apr. 23, 2021), <https://indiacorplaw.in/2021/04/indias-attempt-to-regulate-spacs-sponsors-in-the-spotlight.html>.

sponsors, the regulatory framework of Bursa Malaysia can be borrowed in this regard which secures the interest of the investors by fixing the price limit of the securities within the statute.

In Bursa Malaysia, the minimum price of securities issued to the management team must be at least 10% of the price at which IPO shares is issued.<sup>225</sup> Any discount given to the management must be in alignment with the interest of investors. A similar limitation should be incorporated in the Indian scenario to avoid abuse of excessive powers given to the sponsors under Clause 73 of the draft. To determine price limit on sponsors' shares through private placement, an inspiration can be drawn from the provisions related to the private placement for listed companies under the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) ("SEBI ICDR") Regulations, 2018. Under the SEBI ICDR Regulations, the placement of equity shares has to be made at a price not less than the average of the weekly high and low closing price of the securities during the last two weeks. However, a discount of more than 5 percent can be given subject to shareholders' approval.<sup>226</sup> Thus, there is a need to amend Clause 73 of the draft to include a price cap for the shares issued through private placement.

### **5.3 Need to restrict the exercise of conversion right- The US approach**

Under Clause 82(2) of the draft, the shareholders can exercise their right of converting shares on a pro-rata basis of the amount deposited in an escrow account in case of dissent on the proposed acquisition.<sup>227</sup>

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<sup>225</sup> Equity Guidelines SC-GL/EG 2009 (R2-2018), Reg. 6.10 (Malaysia).

<sup>226</sup> Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements), 2018, Gazette of India Part III Section IV (Sept. 18, 2018), regulation 176(1).

<sup>227</sup> *Supra* note 4, cl. 82(2).

This provision does not lay down any qualifications for investors as to who is eligible for exercising the conversion right in the case of SPAC transactions.<sup>228</sup>

The authors assume that the drafters' intention behind not imposing any limitation on who can exercise the conversion right under clause 82(2) is to protect even the minority investors in the SPAC transactions. However, the unconditional provision deters the sponsors from entering into SPAC transactions as this provision is unconditional. It allows even an investor holding a negligible percentage of shares to exercise conversion right, thereby causing a procedural delay in completing the proposed business transaction. Therefore, a balanced approach should be incorporated within the provision to protect the broader interest of the SPAC contract (or sponsors) from the speculative behaviour of certain shareholders.

In this regard, the Indian regulators can draw inspiration from the approach taken by the US regulators wherein investors can exercise conversion right *"only if it does not hold less than 10% of the shares together with any affiliate of such shareholder or any person with whom such shareholder is acting as a 'group'"*.<sup>229</sup> Similarly, in India, an appropriate percentage can be adopted for exercising the conversion right to avoid derailment of the proposed transaction procedure.

#### **5.4 Redemption right of dissenting shareholders: The approach in the US, Italy and Canada**

The emergence of SPAC as an investment model can be attributed to various investment protection features that it entails, such as escrow

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<sup>228</sup>*Id.*, 'if a shareholder (other than sponsors) votes against a proposed acquisition, he shall have the conversion right for converting its securities into a pro-rata portion of the aggregate amount deposited in the escrow account'.

<sup>229</sup>New York Listing Company Manual, Rule 102.06(b) (2008); NASDAQ Company Listing Rulebook, Rule 5101-2(d) (2009).

account, conversion right and redemption right etc. In all the jurisdictions (US, Italy and Canada), the shareholders have been provided with the redemption right under the statutory framework of SPAC. However, the IFSCA draft does not include any provision concerning the redemption right of shareholders. The SPAC framework to be adopted in India should provide redemption rights to the shareholders while balancing the sponsors' interests.

<https://venturebeat.com/2011/07/04/demystifying-the-vc-term-sheet-redemption-rights/>Redemption right grants the shareholders the right to put their shares back to the company in certain specified instances, thereby allowing the shareholders/investors to protect their interest when the portfolio company is going astray.<sup>230</sup> The effect of such a rule would be to give choice to the investors to exit the company in case business plummets. Therefore, it allows investors to require a company to purchase their shares for cash after a certain period of time when prospective business seems to be unprofitable and unattractive.

The exercise of redemption right is a common practice in various jurisdictions such as the US, Italy and Canada. In the US, both NASDAQ listing rules and New York Stock Exchange Company Guide lay down statutory provisions concerning redemption right, i.e. *'until the completion of a business combination the company shall provide all shareholders with the opportunity to redeem their shares for cash equal to their pro-rata share of the aggregate amount held in the escrow account'*.<sup>231</sup>

After looking into the provision, we must say that the open-ended provision adopted in the US confers the shareholders an absolute right

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<sup>230</sup> D'Alvia Daniele, *The international financial regulation of SPACs between legal standardised regulation and standardisation of market practices*, 21 J. OF BANKING REGULATION 107 (2019).

<sup>231</sup> New York Listing Company Manual, Rule 102.06(c) (2008); NASDAQ Company Listing Rulebook, Rule 5101-2(e)(2009).



to exercise the right to redemption in any circumstances. Additionally, the provision gives a leeway to speculative investors holding a negligible percentage of shares to wriggle out the procedure of the proposed business combination.

To balance the interest of both investors and sponsors, it is prudent to rely upon the Italian legal framework to avoid the absolute exercise of the right to redemption. According to Section 2437 of the Italian Civil Code, the dissenting shareholders can exercise their redemption rights only if significant modification takes place in the corporate purpose of the SPAC contract (for example: if investors proposed to acquire a software firm but ended up acquiring non-banking financial institution).<sup>232</sup> The said provision has been incorporated to avoid any risk associated with the non-completion of transactions due to the absolute exercise of the redemption right.

Alternatively, the regulators can also adopt the approach taken by Canadian regulators. According to Section 1008(a) of the Toronto Stock Exchange Company Manual, shareholders can exercise redemption right only if they hold a minimum 15% of the shares sold in the IPO.<sup>233</sup> The inclusion of such a limitation protects the sponsors from the unpredictable behaviour of the investors. A similar provision can be incorporated within the Indian legal framework, making SPACs in India more investment-friendly and secured.

### **5.5 Prohibition of Debt Financing for additional funding- The Canadian Approach**

In the case of SPACs, there can be a situation where sponsors need additional funds to complete the proposed business combination. There can be two ways to meet the funding requirements – equity financing

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<sup>232</sup> Italy Civil Code, 1942, § 2437 (Italy).

<sup>233</sup> Toronto Stock Exchange Company Manual, § 1008(a) (Canada).

and debt financing. Unlike other registered corporations, SPACs do not have operating businesses of their own. They come into existence for the sole purpose of raising funds through IPOs for future business combinations. The authors believe that the success rate of SPAC transactions is low and relying on debt financing for additional funding without investors' consent leads to an additional burden. It leads to an additional burden as debt financing is a liability that has to be paid before equity investors. If SPAC fails, investors won't be getting a refund before creditors, thereby putting their interest at jeopardy without their consent. Therefore, equity financing should be preferred over debt financing, keeping in mind investors' interests.

In the draft, there is no provision pertaining to raising additional funds to meet working capital requirements after the issuance of IPO. In this regard, India can borrow the Canadian legal framework to raise capital for SPACs. In this framework, equity financing is allowed only to raise funds. Section 1009 of the Toronto Stock Exchange Company Manual prohibits debt financing and states that the sponsors can rely on debt financing only when mentioned explicitly in the IPO Prospectus.<sup>234</sup> Additionally, sponsors can raise only 10% of the escrowed funds through debt instruments, and the debt financing cannot have recourse to the escrow amount. Likewise, provision should be adopted in India wherein recourse to debt financing should not be allowed absolutely.

### **5.6 Restriction on excessive discretionary powers of the regulators- A multi-dimensional jurisdictional approach**

Under Clause 68 of the draft, the regulators have been vested with absolute discretionary powers to accept or reject the application for the proposed listing of a SPAC on a case-by-case basis.<sup>235</sup> It does not lay

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<sup>234</sup> *Id.*, § 1009.

<sup>235</sup> *Supra* note 4, cl. 68.

down any factors for making such a determination. It is significant to note that under Section 1002 of listing rules on SPACs in Canada, certain factors such as track record of sponsors or management, the nature and extent of management compensation and gross public proceeds have been laid down for making such a determination to avoid the absolute exercise of discretion by regulators.<sup>236</sup> A similar provision can be found in Bursa Malaysia<sup>237</sup> and New York Stock Exchange Listing Regulations<sup>238</sup>. Therefore, the aforementioned factors can be incorporated under clause 68 of the draft or in any upcoming regulations regarding SPACs to overcome the existing ambiguity within the provision.

### **5.7 Discretionary power in deciding the moratorium period- The Singapore and Bursa Malaysian Approach**

In some instances, the sponsors or management sell their shares immediately after the acquisition when the Target Company is not commercially viable and leave the investors in a pell-mell situation. Thus, the imposition of a moratorium on the sponsors' or management shares in the target company post-acquisition has been promulgated as a device in the international capital market to keep a check on sponsors' or management's opportunistic behaviour. The legislative intention behind such a provision is to ensure that the sponsors or management would not leave the deal until the Target Company starts generating income or becomes beneficial for investors.

Under Clause 89(3) of the draft, the drafters intended to codify this practice by imposing a 'lock in' period on sponsors' shares in the target company post-acquisition for a period of 180 days.<sup>239</sup> Although the

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<sup>236</sup> Toronto Stock Exchange Company Manual, § 1002 (Canada).

<sup>237</sup> Equity Guidelines SC-GL/EG 2009 (R2-2018), Reg. 6.13; 6.13A (Malaysia).

<sup>238</sup> New York Listing Company Manual, Rule 102.06(c) (2008).

<sup>239</sup> *Supra* note 4, cl. 89(3).

inclusion of provision is in accordance with the international norms, the blanket provision of 180 days seems arbitrary. The specific period of 180 days does not ensure that the company will start generating any income. There can be instances where a company can take less or more than 180 days to generate income.<sup>240</sup> In this regard, it is prudent to rely upon Singapore's approach, which is more similar to that of India. Initially, the Singapore Stock Exchange proposed to impose a post-acquisition moratorium period of a minimum of 6 months.<sup>241</sup> However, later on, they made it flexible depending upon the prevailing circumstances. Therefore, a more open-ended approach is needed wherein the moratorium period must be decided on a case-by-case and extended whenever needed under clause 83(2) of the draft to maintain a balance between the sponsors' and the investors' interests.

Alternatively, we can also look into the Bursa Malaysia approach wherein a moratorium period for 1 year will be imposed only when the assets of the company are not yet income-generating.<sup>242</sup> This approach seems to be more sponsors friendly as it gives them an opportunity to sell shares immediately after acquisition if a business transaction is generating income from the beginning.

## 6. Conclusion

Through this paper, the authors attempted to explore one of the fastest emerging investment vehicles, SPAC. In India also, the acceptance of SPAC is becoming common amongst investors and

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<sup>240</sup>Anushri Uttarwar, *India's Attempt to Regulate SPACs: Sponsors in the spotlight*, INDIA CORP LAW (Apr. 23, 2021), <https://indiacorplaw.in/2021/04/indias-attempt-to-regulate-spacs-sponsors-in-the-spotlight.html>.

<sup>241</sup>Consultation Paper on Proposed Listing Framework for Special Purpose Acquisition Companies, 2021, § 2 (Singapore).

<sup>242</sup>Equity Guidelines SC-GL/EG 2009 (R2-2018), Reg. 5.29 (Malaysia).

sponsors. Earlier, Companies such as Videocon, Yatra etc<sup>243</sup> have used the foreign SPAC model to get listed. The same was an early signal that SPAC transactions are proliferating in India to raise funds. A look at the Indian capital market in 2021 clearly shows that the early signal has come true as nearly \$1.7bn has been raised so far through SPACs.<sup>244</sup> Therefore, the popularity of SPAC transactions is likely to continue, given the recent trend in the PE industry toward alternative, more flexible fund-raising arrangements.

Till now, India does not have any concrete regulation governing SPACs. For this reason, for the first time, a valiant attempt has been made towards bringing out a sophisticated framework by IFSCA. However, the same suffers from various drawbacks as identified by the authors through this paper. Thus, there is an imminent need to relook and compare the draft with specific cross-border provisions specified earlier. Any potential cross-border provision, which has the potential to reduce investment risk, must be considered and adopted. In this regard, the authors urge Indian regulators to consider the suggestions mentioned above before passing comprehensive regulations on the SPAC transactions within the Indian scenario. Such suggestions would incentivise the sponsors to indulge in profitable acquisition and simultaneously protect investors' interest by incorporating safety valves within the regulatory framework.

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<sup>243</sup>Iqbal Tahir, *Supportive SPAC regulations can unlock significant value for companies*, MONDAQ (May 26, 2021), <https://www.mondaq.com/india/corporate-and-company-law/1072796/supportive-spac-regulations-can-unlock-significant-value-for-indian-companies>.

<sup>244</sup>Brijesh Kalesh, *SPACs look to India for next wave of acquisition targets*, BUSINESS STANDARDS (Mar. 4, 2021), [https://www.business-standard.com/article/markets/spacs-look-to-india-for-next-wave-of-acquisition-targets-says-nomura-121030400295\\_1.html](https://www.business-standard.com/article/markets/spacs-look-to-india-for-next-wave-of-acquisition-targets-says-nomura-121030400295_1.html).

SHORT  
ARTICLES

## INTERNATIONAL INVESTMENT ARBITRATION AND THE CONUNDRUM ENGENDERED BY 'DOUBLE-HATTING'

- Ananya Dutta\*

### ABSTRACT

*In the recent years there has been a growing trend in international investment arbitration of arbitrators also acting as counsels, a practice commonly known as 'double-hatting' or 'dual-hatting.' However, this practice has been condemned by practitioners and parties alike on grounds of legitimacy concerns like lack of impartiality and independence of adjudicators performing multiple roles. There have been calls for new and stricter rules prohibiting the counsel who represent parties in arbitrations from simultaneously serving as arbitrators in other cases. This paper analyzes the general idea of double-hatting, the problems arising out of it, its double-edged impact on the diversity in international arbitration, the existing mechanisms to deal with this issue, and other potential sui generis solutions for the same.*

**Keywords:** Investment Arbitration, Double-hatting, Legitimacy concerns, Diversity in international arbitration, Sui generis.

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## I. INTRODUCTION

*“It is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.”*

- Lord Hewart

Interim To understand the above statement better, we need to understand why there has been an age-long debate regarding the prevalence of ‘dual’ or ‘double’ hatting in the International Arbitration. In the recent years, arbitration has earned the status of a primary dispute resolution mechanism in the field of international investment disputes between investors and sovereign states. However, such a rise has been accompanied by a synchronous rise in the practice of double-hatting as well.

‘Dual-hatting’ or ‘double-hatting’, in literal terms means ‘to wear two hats.’ This idiomatic expression of wearing two hats is in reference to the hats worn by two different uniforms or responsibilities. It underlines the practice whereby an individual juggles two or more distinct roles/positions under a system which may give rise to conflict of interests and an apparent perception of bias coupled with other institutional legitimacy issues.<https://jodr.org/wp-content/uploads/2021/08/3.-Hang-up-the-Double-Hat-Adhiraj-Lath.pdf><sup>245</sup> This is a controversial practice and is interdisciplinary and hence, it can be witnessed to be prevalent in various fields; one of them being the International Arbitration system. Double-hatting in arbitration happens when an individual plays the role of both an arbitrator and a legal counsel, simultaneously in different cases.

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<sup>245</sup>Adhiraj Lath, *Hang Up The Double Hat: Safeguarding Legitimacy in Investment Arbitration*, 1 NUJS JODR 23, 23 (2021) .



This practice has sparked a heated debate amid criticism based on the view that performing multiple and often overlapping roles can affect the arbitrator's ability to act impartially and without bias.<sup>246</sup> There have been calls to put a blanket ban on such practice simply based on a presumption that the arbitrator's ability to act freely would be compromised, an example of the same being the ICSID and UNCITRAL Draft Code of Conduct. The code under its Article 6 raises the question of limiting the multiple roles played by the arbitrators. However, it must be noted here that double-hatting is an age-old practice and such a step would have widespread repercussions, as explained by the draft code of conduct by the European commission "*an outright ban may tend to exclude a greater number of people than necessary to avoid the conflicts of interest and would further interfere with the freedom to choose the adjudicators and counsels by States and investors*". Hence, reforms in this system must be brought in even without such extreme measures. This paper seeks to explore the concept of double-hatting i.e. the issues it brings up and also why it is an inimical tool to attain justice through International Arbitration. Further, it looks into the reforms done till date for the same, whilst simultaneously suggesting other solutions as well.

### **I. Double-hatting and its problematic issues**

Double-hatting primarily raises an alarm regarding legitimacy issues when it is practiced for issues which are no more merely commercial and have transpired into public issues, including the states i.e. the Investor-State Dispute Resolution ("ISDS"). When there is the involvement of international treaties, the participation of states and intermixing of complex domestic issues of public policy, an onerous task

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<sup>246</sup> Clarissa Coleman & Louise Bond, *Two Heads Are Better Than One: Double Hatting And Its Impact on Diversity In International Arbitration*, 10 NATIONAL LAW REVIEW(2020), [https://www.natlawreview.com/article/two-heads-are-better-one-double-hatting-and-its-impact-diversity-international#google\\_vignette](https://www.natlawreview.com/article/two-heads-are-better-one-double-hatting-and-its-impact-diversity-international#google_vignette)

to exhibit the neutrality and impartiality of an arbitrator is created.<sup>247</sup> It is on these lines that the British and French Arbitrator, Philippe Sands attacked this practice of double-hatting and called it out for being absolutely ‘unacceptable’.<sup>248</sup>

Of all the challenges posed by double-hatting the most perplexing one is the issue of ‘issue conflicts’. Issue conflicts are deemed to be a serious concern in investment arbitrations since it usually involves the interpretation of bilateral investment treaties (“BITs”) containing similar or identical provisions. Thus, similar or identical legal issues are often raised over and over again in such cases.<sup>249</sup> An ‘issue conflict’ in arbitration can be defined as:

the existence of an actual or apparent bias on the part of the arbitrators stemming from their previously expressed views on an issue that influences the very outcome of the case to be decided. It denotes the arbitrator’s relationship to the subject matter of the dispute, and his or her perceived capacity to adjudicate with an open mind.<sup>250</sup>

This ultimately gives rise to the question of impartiality i.e., whether a pre-existing relationship on an issue on which the arbitrator has decided and ruled upon can cloud the arbitrator’s facility to be impartial and neutral while deciding the dispute. Since the final goal of an arbitrator is to deliver consistent opinions,<sup>251</sup> the parties seeking

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<sup>247</sup>Noah Rubins and Bernhard Lauterburg, *Independence, Impartiality and Duty of Disclosure in Investment Arbitration* in INVESTMENT AND COMMERCIAL ARBITRATION – SIMILARITIES AND DIVERGENCES (Christina Knahr et. al. ed. Eleven International Publishing 2010).

<sup>248</sup>Philippe Sands, *Reflections on International Judicialization*, 27 EUR. J. INT. L. 885 (2017).

<sup>249</sup>Dennis H. Hranitzky&Eduardo Silva Romero, *The ‘Double Hat’ Debate in International Arbitration*, NYLJ, June 14, 2010.

<sup>250</sup>Anthony Sinclair & Matthew Gearing, *Partiality and Issue Conflicts*, 5 TRANSNATIONAL DISPUTE MANAGEMENT, July 2008, <https://www.transnational-dispute-management.com/article.asp?key=1284>

<sup>251</sup>Nathalie Bernasconi-Osterwalder, Lise Johnson&Fiona Marshall, *Arbitrator Independence and Impartiality: Examining the dual role of Arbitrator and Counsel*,

decisions to similar effects can appoint an arbitrator on this consideration- and go on a path of similar reasoning as delivered at an earlier ruling in a parallel issue. On similar lines, when counsels are appointed as arbitrators in related cases, they too thread on a path of similar reasoning applied in the other cases, causing a perception of bias.

Hence, even though the notions of impartiality and bias may be more apparent than real, it still sullies the idea of natural justice i.e., “not only must justice be done, it must also be seen to be done.”<sup>252</sup> This issue is not merely of theoretical relevance, the emergence of cases like *Vivendi Universal v. Argentina*<sup>253</sup> and *Telekom Malaysia v. Ghana*<sup>254</sup> highlight the practical relevance of this issue. Although the International Bar Association, hereafter called IBA, has created and revised Guidelines on Conflicts of Interest in International Arbitration (“**IBA Guidelines**”)<sup>255</sup> to deal with the issue in question, they are mere guidelines and are not backed by legal obligations; which is not enough to ensure the smooth functioning of a system involving multiple parties and complex laws.

Other concurrent issues which crop up with double-hatting are-lack of transparency in the selection of arbitrators. In investment arbitration, a potential concern could be indirect influence through party appointment or a direct influence through the interference of the parties,

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INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT, 3 (Apr. 14, 2011), [https://www.iisd.org/system/files/publications/dci\\_2010\\_arbitrator\\_independence.pdf](https://www.iisd.org/system/files/publications/dci_2010_arbitrator_independence.pdf)

<sup>252</sup>R v. Sussex Justices, ex parte McCarthy [1924] 1 KB 256.

<sup>253</sup>Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic, ICSID Case No ARB/97/3 Decision on the Challenge to the President of the Committee (Oct. 3, 2001), 6 ICSID Rep. 327-72 (2001).

<sup>254</sup> Telekom Malaysia Berhad v. Republic of Ghana, UNCITRAL, PCA Case No 2003-03, UNCITRAL, Decision (District Court of the Hague, (Oct. 18, 2004), [https://www.italaw.com/sites/default/files/case-documents/ita0857\\_0.pdf](https://www.italaw.com/sites/default/files/case-documents/ita0857_0.pdf)

<sup>255</sup>IBA Guidelines on Conflicts of Interest in International Arbitration, INTERNATIONAL BAR ASSOCIATION(2014), [https://www.ibanet.org/MediaHandler?id=e2fe5e72-eb14-4bba-b10d-](https://www.ibanet.org/MediaHandler?id=e2fe5e72-eb14-4bba-b10d-d33dafee8918#:~:text=(a)%20The%20arbitrator%20is%20in,firm%2C%20if%20any%2C%20and%20the)

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or it could be a combined effect produced when arbitrators act as legal counsel in other cases due to the practice of 'double-hatting',<sup>256</sup> third party-funders<sup>257</sup>- in the case of *Canepa V. Spain*, the court noted that a third party litigation fund's involvement (even if only an apparent one) in funding the investor-State disputes can be a circumstance that might drive a party to question the arbitrator's reliability for an independent judgment or impartiality and law firm-driven litigation<sup>258</sup>- law firms are not affected by the social costs of double-hatting i.e. lack of impartiality and independence and only care about their profits. Further, there is the creation of elitism in which a small group of people dominate the scenario. The practice of double-hatting facilitates lawyers to act as counsels and arbitrators simultaneously. This in turn has paved the paths for quick quid pro quos in which the arbitrators passing an award in favour of one party are in turn rewarded by a favourable award in another case when the roles of the counsel and the arbitrator are reversed. They are also called as "power brokers" and foster the saying that International Arbitration is dominated by a 'pale, male and stale' character (i.e. the arbitrators are overwhelming older white men)<sup>259</sup>.

Therefore, it is of utmost necessity to look for better ways to deal with double-hatting since not only does it pose legitimacy threats but

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<sup>256</sup>See Chiara Giorgetti, *Who Decides Who in International Investment Arbitration*, 35 UNIV. PA. J. INTL. L. 431 (2014); Sergio Puig, *Blinding International Justice*, 56 VA. J. INTL. L. (2017).

<sup>257</sup> Catherine Rogers, *Gamblers, Loan Sharks and Third-Party Funders in ETHICS IN INTERNATIONAL ARBITRATION* (Catherine Rogers ed., Oxford University Press, 2014).

<sup>258</sup> Pia Eberhardt & Cecilia Olivet, *Profiting from Injustice: How Law Firms, Arbitrators, and Financiers are Fueling an Investment Arbitration Boom*, CORPORATE EUROPE OBSERVATORY (Nov. 2012), <https://www.tni.org/files/download/profitfrominjustice.pdf>

<sup>259</sup>See, e.g., Lucy Greenwood & C. Mark Baker, *Getting a Better Balance on International Arbitration Tribunals*, 28 ARBITR. INTL. 653 (2012); Susan Franck et al., *'The Diversity Challenge: Exploring the "Invisible College" of International Arbitration'*, 53 COLUM. J. TRANSNAT'L L. 429 (2015); Gus Van Harten, *The (Lack of) Women Arbitrators in Investment Treaty Arbitration*, 59 COLUM. FDI PERSPECTIVES (Feb. 6, 2012) [https://ccsi.columbia.edu/sites/default/files/content/docs/publications/FDI\\_59.pdf](https://ccsi.columbia.edu/sites/default/files/content/docs/publications/FDI_59.pdf)

also causes diversity issues and slows down a system known for its swift disposal of cases when questions are raised regarding the impartiality and independence of the process of arbitration.

## II. Contemporary attempts at Reform

It is imperative that to uphold its legitimacy in the eyes of its users and the public in general, international arbitration must ensure that the parties involved in it are perceived as trustworthy and free of any bias. There are several existing mechanisms which seek to bring transparency and foster legitimacy in International Arbitration. Some of them are as follows-

In Articles 14 and 40(2) of the International Council for Settlement of Investment Disputes, hereafter called the ICSID Convention, the arbitrators have been termed as “persons of high moral character and recognized competence and that, they may be trusted to exercise independent judgment.” Article 6(2) of ICSID’s Arbitration Rules further requires that arbitrators must affirm their independence and impartiality, providing a statement of past and professional business and other relationships which might raise questions on their reliability for independent and impartial judgment, whilst simultaneously imposing a continuing disclosure requirement for the same.<sup>260</sup>

Other arbitration institutions also follow similar rules. For instance, the United Nations Commission on International Trade Law, (“**UNCITRAL Arbitration Rules**”), governing many non-ICSID IIDS cases is a common alternative to the ICSID Rules,<sup>261</sup> calls for disclosure of the obligations of an arbitrator to disclose any situation which may raise ‘justifiable doubts’ regarding their ethical integrity. The prime tool

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<sup>260</sup>See ICSID, Rules of Procedure for Arbitration Proceedings (Arbitration Rules)Rule 6 (2), in ICSID CONVENTION, REGULATIONS AND RULES106-07 (2006) [hereinafter ICSID Arbitration Rules]

<sup>261</sup>UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, G.A. Res. 68/109, U.N. Doc. A/RES/68/109 (Dec. 10, 2014) art. 11.[hereinafter UNCITRAL Rules on Transparency].

applied to test the independence and impartiality under the UNCITRAL Arbitration Rules is the “justifiable doubts” test<sup>262</sup> which has been relied upon to challenge the award of arbitrators. Failure in such disclosure may warrant a challenge under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (“**New York Convention**”).<sup>263</sup> Other steps have also been taken to curb this practice of double-hatting which have been discussed below.

It was the Statute of the International Court of Justice (“**ICJ**”), which paved the path for institutions like the Court of Arbitration for Sports (“**CAS**”), to explicitly bar the practice of double-hatting. The ICJ issued directions according to which any individual practicing the role of a judge and a counsel at the same time is incompatible; stating that such practice goes against the sound administration of justice.<sup>264</sup>

The CAS, then amended their rules<sup>265</sup> based on similar grounds in 2009, explicitly prohibiting the “double-hat counsel/arbitrator role and justified it by stating that, the parties can, in all probability believe that arbitrators might favor lawyers before whom they are to appear in future for other cases. On parallel lines, Rules of the European Court of Human Rights (“**ECHR**”) also dictated that the Judges of the ECHR “shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office.”<sup>266</sup> More instances include The European Commission which

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<sup>262</sup>Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic, ICSID Case No ARB/97/3 Decision on the Challenge to the President of the Committee ¶ 20-21 (Oct. 3, 2001), 6 ICSID Rep. 327-72 (2001).

<sup>263</sup>Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 art. V, cl (2)(b).

<sup>264</sup>*Practice Directions*, INTERNATIONAL COURT OF JUSTICE, <https://www.icj-cij.org/en/practice-directions>

<sup>265</sup>Code: ICAS Statutes, CT. ARB. FOR SPORT S18, <https://www.tas-cas.org/en/icas/code-icas-statutes.html>

<sup>266</sup>EUROPEAN COURT OF HUMAN RIGHTS, Judges, Rule 4 in EUROPEAN COURT OF HUMAN RIGHTS, RULES OF THE COURT 3 (2021) [hereinafter ECHR Rules of the Court].

advocated for the establishment of a 'Multilateral Investment Court'<sup>267</sup> for ISDS in the year 2017. The proposal planned to prohibit double-hatting in a similar fashion to the CAS Rules by appointing arbitrators serving "full-time, long-term and non-renewable positions, without outside activities"<sup>268</sup> which imputes attributes similar to that of judiciary in a court-like model. Such provisions, on the face of it turn arbitration to 'litigation by another name' but are significant steps in curbing the numerous issues engendered by the practice of double-hatting as discussed above. The negotiations for the same are still going on.

However, the primary control mechanism of the international arbitration system is that practically all rules potentially applicable to the IIDS, include some challenge procedure through which a party can seek to remove an arbitrator based on justifiable doubts about the arbitrator's capability to judge independently or impartially.<sup>269</sup>

The ICSID is the principal institution which is to be held accountable while dealing with the issues cropping up with double-hatting. However, the existence of this spirited debate regarding the prohibition of double-hatting leads one to believe that the soft laws created by it are not enough. This inaction has prompted the other parties to come up with different solutions, specific to their individual needs.

For instance, the European Union ("EU")-Canada Comprehensive and Economic Trade Agreement ("CETA") has categorically prohibited double-hatting as a means to foster increased independence and impartiality in dispute settlement.<sup>270</sup> Similarly, the EU-Singapore Free

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<sup>267</sup>Issam Hallak, *Multilateral Investment Court: Overview of the reform proposals and prospects*, EUROPEAN PARLIAMENTARY RESEARCH SERVICE, 1, 3, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/646147/EPRS\\_BRI\(2020\)646147\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/646147/EPRS_BRI(2020)646147_EN.pdf)

<sup>268</sup>*Id.*

<sup>269</sup>See CHALLENGES AND RECUSALS OF JUDGES AND ARBITRATORS IN INTERNATIONAL COURTS AND TRIBUNALS (Chiara Giorgetti ed., Brill Nijhoff 2015)

<sup>270</sup>*Annex 29-B – Code of conduct for arbitrators and mediators: Text of the Comprehensive Economic and Trade Agreement – Annex 29*, GOVERNMENT OF CANADA,

Trade Agreement, also stipulated that the arbitrator shall disclose any issue that might raise concerns “likely to affect his or her independence or impartiality, or that might reasonably create an appearance of impropriety or bias in the proceedings.”<sup>271</sup> Further, the Netherlands released its own Model Investment Agreement (“**Dutch Model**”), which can potentially serve as a forerunner for transforming the ISDS arrangement.<sup>272</sup> It contains a provision prohibiting the practice of double-hatting in addition to a bar on party-appointed arbitrators. However, this only proves that stringent actions need to be taken at an institutional level to create a more unified arbitration system.

There have been calls to prohibit this practice altogether. However, it can potentially cause more harm than good especially, concerning the existing lack of diversity in International Arbitration, which has been discussed below.

#### *A. The Dilemma of Diversity caused by Double-hatting*

When discussing ways to do away with the practice of double-hatting in International Arbitration, it is of vital importance that we explore its widespread impact on diversity in International Arbitration.

Double-hatting is a double-edged sword in this regard. It has created ‘power brokers’ consisting an overwhelming number of older white males. On the other hand, eliminating this practice completely would further deepen the existing gap between the overrepresented older

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<https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/29-A.aspx?lang=eng>

<sup>271</sup>*Annex 14-B: Code of Conduct for Arbitrators and Mediators*, EUROPEAN COMMISSION 655 (Nov. 14, 2019), [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22019A1114\(01\)&from=EN#page=655](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22019A1114(01)&from=EN#page=655)

<sup>272</sup>Andrew Cannon et. al., *The new draft Dutch BIT: What does it mean for investor mailbox companies?* HERBERT SMITH-FREEHILLS, (May 30, 2018), <https://hsfnotes.com/arbitration/2018/05/30/the-new-draft-dutch-bit-what-does-it-mean-for-investor-mailbox-companies/#more-9555>



while males and other underrepresented ethnicities and women. What is more, the seemingly convenient thing to do is to put an absolute ban on this practice, however, some other restrictions need to be considered to foster diversity and check the growing number of 'power brokers' in international investment arbitration. To do so, the three potential ways, as stated below, in which diversity can be affected due to a complete ban on double-hatting need to be understood.

- Gender Diversity-

In a survey it was found that of 353 registered ICSID cases from 2012-2019, out of 1,055 appointments only 152 appointments were of women i.e., just 14.4%. More abysmal is the fact that, of all the individuals appointed across all cases, only 35 were female with merely two female arbitrators and together they comprised 45.3% of all appointments of women.<sup>273</sup>Hence, the above-mentioned data distinctly implies that the underrepresentation of women in investment arbitration is alarming. Such an outright ban on double-hatting would drastically reduce the pool of arbitrators to choose from and would serve as a barrier for women/new entrants to enter into this field. This would further limit the already small number of women in arbitration.

- Regional Diversity-

There is data showing that, "although about 85% of ICSID cases are brought by an investor from a developed country against a developing country only about one-third of the arbitrators come from the developing countries."<sup>274</sup>A survey undertaken by an international law firm suggests that "the majority of men appointed,(the women appointed are very small in number) are white men of advancing years and other minority candidates of a non-Western geographic origin are

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<sup>273</sup> Harten, *supra* note 16.

<sup>274</sup> Giorgetti, *supra* note 12, at 459.

abysmally underrepresented, and the same goes for younger practitioners as well."<sup>275</sup>

Due to such lack of ethnic and geographic diversity, parties are curtailed when it comes to selecting arbitrators having similar backgrounds. An outright ban would, therefore, inadvertently serve as a hindrance to party autonomy when it comes to appointing arbitrators who recognize the parties' legal, cultural, and socio-political background. This restriction in turn, adversely affects the goal of reaching decisions taking the said understanding and context into account.

- A barrier for second generation arbitrators-

An outright ban may bother new entrants (one of the key ways through which diversity can be increased) who lack the financial ability to abandon all their lucrative counsel work upon receiving their nomination as an arbitrator. Hence, most ICSID arbitrators would choose the financially better alternative of being a counsel over an arbitrator, since "not all arbitrators can afford to make a living from exclusively being arbitrators alone."<sup>276</sup> Another reason why banning the said practice of double-hatting is undesirable is that, it also tends to help the newcomers to gain experience and learn the nuances of arbitration, if/when allowed to sit alongside the senior advocates.

It is for these reasons that an outright ban on double-hatting could potentially deepen the divide between the all-white male list and the individuals from underrepresented areas, coupled with the rising gender inequality in the field of International Arbitration. To deal with the issue in question, the decision makers must consciously commit

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<sup>275</sup>*International Arbitration Survey: Diversity on Arbitration Tribunals: Are We Getting There?*, BERWIN LEIGHTON PAISNER, (Jan. 12, 2017), <https://www.bclplaw.com/images/content/1/5/v2/150194/FINAL-Arbitration-Survey-Report.pdf>

<sup>276</sup>See Günther J. Horvath & Roberta Berzero, *Arbitrator and Counsel: The Double-Hat Dilemma*, 4 TRANSNATIONAL DISPUTE MANAGEMENT 13 (2013).

themselves to putting diversity at the forefront of their decision-making process and making the system more inclusive. Some form of restriction could help to shake up the composition of the dominating pool of individuals (power brokers) acting at the top level of dispute resolution, rather than taking an extreme step of putting a blanket ban on this age-old practice of double-hatting solely based on the presumption that it is “easier to implement”.<sup>277</sup>

### III. Potential Solutions and a Way Forward

To uphold its legitimacy and impartiality, reforms are needed in International Arbitration. This can be done in ways other than an absolute ban on the said practice of double-hatting. The very existence of a debate regarding double-hatting serves as an indicator that it is not enough and modern reforms, keeping in mind the dynamic world of International Arbitration are needed. Following are some of the ways to achieve that:

*Transparency and Self-Regulation through the ISDS Draft Code:* In May 2020, the ICSID and UNCITRAL secretariats jointly published the much awaited Draft Code accompanied with a commentary for public comment and a second version of the code was recently released in April 2021. It contains detailed stipulations, conditions along with applicable principles and definite standards for adjudicators. It proposes a code that is binding and lays down concrete rules rather than mere directions or guidelines. A salient feature of this Draft Code is the regulation it imposes on the practice of dual-hatting under Article 6, titled: “Limit on Multiple Roles.”<sup>278</sup>

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<sup>277</sup>*Draft Code of Conduct for Adjudicators in Investor-state Dispute Settlement Version One* ¶67, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, 17(1 May 2020), [https://icsid.worldbank.org/sites/default/files/amendments/Draft\\_Code\\_Conduct\\_Adjudicators\\_ISDS.pdf](https://icsid.worldbank.org/sites/default/files/amendments/Draft_Code_Conduct_Adjudicators_ISDS.pdf)

<sup>278</sup>*Draft Code of Conduct for Adjudicators in Investor-state Dispute Settlement Version One*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, 16 (1 May 2020),

It does not prohibit double-hatting altogether, citing the reason that it would exclude some of the finest minds and their valuable contributions by making them choose. As a softer solution, it proposes disclosure obligations or recusal as solutions to curb double-hatting. It warrants the disclosure or recusal by an adjudicator in prior cases involving the same parties/ facts as already dealt by them or when the adjudicator has previously participated in the proceedings involving the same treaty.<sup>279</sup> It highlights the need for an adjudicator to refuse competing obligations at any point of time, i.e., once they are appointed or before accepting any such appointment. Hence, this is a kind of 'self-regulation' and 'self-policing' wherein the adjudicators must disclose any conflict of interest accompanied, bringing an enhanced transparency in the appointment of arbitrators.<sup>280</sup>

*Separate bars:* UK-French arbitrator, Philippe Sands QC stressed upon the need to effectuate new standards which prohibit the "practice of arbitrators serving as counsel" by setting-up "separate bars" for counsels and arbitrators in a similar token to that of the CAS Rules. However, as already discussed above, this move of completely doing away with double-hatting may add to the existing lack of diversity in international arbitration. Another converse argument to this method is that it might "deprive the international arbitration community of some of its most talented arbitrators who, if forced to choose, might go for the more financially beneficial role of a counsel."<sup>281</sup>

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[https://icsid.worldbank.org/sites/default/files/amendments/Draft\\_Code\\_Conduct\\_Adjudicators\\_ISDS.pdf](https://icsid.worldbank.org/sites/default/files/amendments/Draft_Code_Conduct_Adjudicators_ISDS.pdf)

<sup>279</sup>Ayca Bengu Koksal, *ICSID Sets New Ethical Standards For Adjudicators*, MONDAQ, (21 July 2020), <https://www.mondaq.com/turkey/international-trade-investment/967392/icsid-sets-new-ethical-standards-for-adjudicators>

<sup>280</sup>Malcolm Langford, Daniel Behn & Runar Hilleren Lie, *The Ethics and Empirics of Double Hatting*, 6 ESIL REFLECTIONS, July 2017, at 11.

<sup>281</sup>Adhiraj Lath, *Hang Up The Double Hat: Safeguarding Legitimacy in Investment Arbitration*, 1 NUJS JODR 23, 23 (2021).

*Institutional Appointment:* Investment arbitration has, over the years become relevant enough to be asserted as the *de facto* [judiciary](#)<sup>282</sup> in international investment disputes. The law, in general, bars a judge from acting as a legal counsel. This leads to the parties not having any autonomy to appoint judges and they have to appear before the judge allotted by the administration. If the ICSID decides to tread on a path similar to the above mentioned practice, it can curb the problem of elitism and bias, since the power brokers will be included in the judges' roster; successfully ending the double-hatting practiced by them.

*Reforming Institutional rules:* In late 2009, the Court of Arbitration for Sport ("CAS") amended section 18 of the Code of Sports-related Arbitration to prohibit CAS arbitrators to act as counsel for any other party appearing before the CAS. Such a step, taken by any institution, indicates a reasonable perception of bias. However, this approach by CAS, fails to prevent a CAS arbitrator or counsel from switching roles before another tribunal. This is a loophole which needs to be dealt with.

Satisfactory safeguards should be focused upon by the institutions across the board. However, in the absence of an overarching coordinating organization that could serve as an enforcing body for conflict of interest rules globally, any such solution seems unworkable.<sup>283</sup> Hence, there is a vital need for an overall coordinating body and active steps must be taken towards creating the same.

To sum up, although there have been proposals to out rightly prohibit the practice of double-hatting, there is little evidence that it is the only way to deal with the problems arising out of double-hatting. As stated above, reforms can be brought in through other moderate measures. What is more, in the presence of cost-effective and less time

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<sup>282</sup>Langford, Behn&Lie, *supra* note 37, at 11.

<sup>283</sup>*Id.* at 1.

taking measures, it is difficult to justify an absolute departure from a time-honored practice of double-hatting.

#### **IV. Conclusion**

With the growing importance of Arbitration to resolve disputes, the need for transparency and impartiality-both real and apparent, also grows. In order to keep up with the spirit of arbitration which is a dynamic system known for its speedy disposal of cases, solutions need to be found for the complications arising out of double-hatting.

While a blanket ban on the same is not desirable due to diversity issues among other things, other mechanisms must be relied upon and a unified system with a central institution enforcing the rules must be created, since even though institutions like IISD Model International Agreement on Investment for Sustainable Development exist, not much success in this area has been seen and there is a need for better institutions dealing with the matter in question. Further, it is imperative that the decision makers evaluate whether the soft laws created are enough to deal with the issue in hand and accordingly come up with reformed and stricter guidelines for the same.

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**INFORMATION INTERMEDIARIES IN COMMERCIAL  
ARBITRATION: TOWARDS EVIDENTIAL INTEGRITY AND  
SPEEDY REDRESSAL?**

- Naga Sai Srikar HK\*

**ABSTRACT**

*Economies across the globe have turned interdependent with cross-border commerce taking the centre stage. Hence, an effective dispute resolution mechanism has become the need of the hour. One such mechanism is arbitration. It promised to quicken the dispute resolution among parties thereby incentivizing corporate entities and investors across the globe to enter into commercial transactions without having second thoughts. Over time, however, this purpose has been defeated. One such method has been to present fraudulent documentary evidences or claim forgery before the tribunal. This often leads to examination of evidential integrity before the original dispute is adjudicated leading to delay in declaration of arbitral award.*

*In light of the above, this paper seeks to analyse the possible role of information intermediaries in resolving concerns of evidential integrity. The paper shall also draw a parallel to the existing framework of 'information utility' under the Insolvency and Bankruptcy Code, 2016 wherein the concept was conceived to iron out information asymmetry in insolvency proceedings. The author argues that a similar information asymmetry exists in commercial arbitral proceedings, which involves voluminous documents to be presented before the tribunal. Hence, this paper shall moot on the proposition to establish and extend existing information intermediaries to the arbitration landscape in India.*

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## I. INTRODUCTION

Bentham's Arbitration as a form of alternative dispute resolution mechanism has become the preferred choice for parties across the globe. With prominent arbitral institutions administering an increased number of cases year-on-year,<sup>284</sup> a need arises to strengthen the existing mechanism and recognize the shortfalls thereof. It is generally agreed that arbitration is a particularly suitable method for the resolution of disputes arising out of business relationships.<sup>285</sup> It is therefore not a surprise that commercial arbitration is one of the most popular and widely subscribed type of arbitration. Supplementing the above notions are features including the private nature of proceedings, flexibility, simplicity, cost-effectiveness and speedy disposal.<sup>286</sup> This paper focuses only on the 'speedy-disposal' of arbitral proceedings and seeks to argue and suggest a model to combat the menace of fraudulent evidence and delayed arbitral proceedings.

### 1. Commercial Arbitration: Losing its objective?

Speedy disposal stands as one of the main objectives of an arbitration proceeding. Arbitration is a process where, by mutual agreement, parties to a contract submit any differences or disputes that may arise from such contract for the consideration and decision of one or more independent persons.<sup>287</sup> Therefore, corporate entities

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<sup>284</sup> See *ICC Arbitration figures reveal new record for awards in 2018*, INTERNATIONAL CHAMBER OF COMMERCE (Nov. 6, 2019), <https://iccwbo.org/media-wall/news-speeches/icc-arbitration-figures-reveal-new-record-cases-awards-2018/>; LONDON COURT OF INTERNATIONAL ARBITRATION, ANNUAL CASE REPORT (2018).

<sup>285</sup> ALAN REDFERN & MARTIN HUNTER, *LAW & PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 17 (4th ed. 2004).

<sup>286</sup> SUSAN BLAKE & JULIE BROWN, *THE JACKSON ADR HANDBOOK* 14, 21 (2nd ed. 2016).

<sup>287</sup> HAROLD CROWTER, *INTRODUCTION TO ARBITRATION* 1 (Informa Law ed., Routledge 1998).



prefer arbitration for quick settlement of disputes in the interest of time and to compensate for economic losses. Arbitration regimes, both across States and arbitral institutions, have realized the strategic importance of this professed advantage<sup>288</sup> and have incorporated the same into their framework.

## 2.1 Time-bound mechanism in Municipal Laws

The UNCITRAL Model Law on International Commercial Arbitration, 1985 stands as the model law for arbitration that States across the world may adopt and incorporate into their municipal laws. While it was agreed that the model law should neither set a time-limit nor deal with the legal consequences of the expiry of a time-limit stipulated by the parties considering the varied circumstances in international commercial arbitration,<sup>289</sup> some States have set deadlines for declaration of award. For instance, Peru prescribes that an award shall be made within twenty days after the stage of presentation of proof.<sup>290</sup>

In India, the regime to set a deadline for grant of an award began with the Arbitration and Conciliation (Amendment) Act, 2015 which inserted Section 29A and 29B. The said provisions mandated that the award was to be made in general arbitration matters within twelve months with the option of extending it by an additional six months, and within six months if the parties had expressly agreed to resolve their disputes by virtue of a fast-track procedure. Further, the Arbitration and Conciliation (Amendment) Act, 2019 was enacted

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<sup>288</sup> *Making the Award and Termination of Proceedings*, United Nations Conference on Trade and Development 17,

[https://unctad.org/en/Docs/edmmisc232add41\\_en.pdf](https://unctad.org/en/Docs/edmmisc232add41_en.pdf) (last visited Jun. 24, 2021).

<sup>289</sup> U.N. Commission on International Trade Law, *Report of the Working Group on International Contract Practices on the work of its third session*, ¶74 U.N. Doc. A/CN.9/486 (Jan. 9, 2001).

<sup>290</sup> PERUVIAN ARBITRATION LAW (Law No. 1071/2008), art. 48 (Peru).

which mandated the statement of claim and defence to be completed within a period of six months, awards other than international commercial arbitration to be made within a period of twelve months, and awards in case of international commercial arbitrations an endeavour must be made to dispose the matter within twelve months.

## 2.2 Time-bound Mechanisms in Arbitral Institutions

Prominent arbitral institutions across the globe have realized that timely-disposal of cases acts as a great incentive for commercial entities to adopt arbitration for dispute resolution. Arbitral institutions can be broadly categorized into three types based on the mechanism provided for timely disposal of cases.

Arbitral Institutions that expressly mandate the grant of an award within a set period of time fall under the first category. For instance, ICC Rules of Arbitration<sup>291</sup> under Article 31 provides “[t]he time limit within which the arbitral tribunal must render its final award is six months”.<sup>292</sup> The Arbitration Institute of the Stockholm Chamber of Commerce also provides a six-month time frame for declaration of the final award.<sup>293</sup>

The second category of institutions are those that provide for expedited procedures that the parties may opt for, for example the Singapore International Arbitration Centre (SIAC)<sup>294</sup> and the Mumbai Centre for International Arbitration<sup>295</sup> mandate awards to be made within six months under the expedited procedure.

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<sup>291</sup> See ICC Rules of Arbitration, <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/> (last visited Jun. 30, 2021).

<sup>292</sup> ICC Rules of Arbitration (2017), art. 31.

<sup>293</sup> The Stockholm Chamber of Commerce Arbitration Rules (2017), art. 43.

<sup>294</sup> Singapore International Arbitration Centre Rules (2016), rule 5.2(d).

<sup>295</sup> Mumbai Centre For International Arbitration Rules (2016), rule 12.3(d).

The last category comprises of institutions that do not provide for any express time-frame and merely mandate final award to be made as soon as reasonably possible, for example the London Court of International Arbitration.<sup>296</sup>

### 2.3 Documentary Evidence: Scope for misuse?

Documentary evidence remains one of the two principles modes to prove one's case.<sup>297</sup> Similar to the position in civil law countries, international arbitration tribunals rely first and foremost on documentary evidence.<sup>298</sup> Therefore, proving the veracity of such documents presented before the tribunal becomes pertinent for parties to succeed in their cases. Although arbitral tribunals are not bound by any State's civil procedure laws, it is imperative for them to adopt rules of procedure that satisfy the tests of reasonableness and the principles of natural justice.<sup>299</sup>

Commercial transactions involve a substantial number of contracts. The inspection and admissibility stage stand crucial for any time-bound mechanism to succeed. For instance, the International Bar Association (IBA) Rules of Evidence, 2010 which incorporates the principles, is one of the most common rules of evidence used by arbitrators and parties across the world.<sup>300</sup> Article 3 of the said Rules provides for procedures to be followed for production of documentary evidence. It stipulates for a certain time period to be given to each party to request documents from the

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<sup>296</sup> London Court of International Arbitration Rules (2014), rule 15.10.

<sup>297</sup> FREDERIC G SOURGENS ET AL., EVIDENCE IN INTERNATIONAL INVESTMENT ARBITRATION 176 (2018).

<sup>298</sup> See CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE 428-429 (3d ed. 1998).

<sup>299</sup> Austin I. Pulle, *Securing Natural Justice in Arbitration Proceedings*, 20 ASIA PAC. L. REV. 63 (2012).

<sup>300</sup> JAY E GRENIG, INTERNATIONAL COMMERCIAL ARBITRATION 179 (2015).

opposite side. The time-period is inclusive of objections (if any) raised by the parties.

Further, Article 7 and Article 9 grants the Arbitral Tribunal the powers to inspect and determine the admissibility/ weightage of the said evidence. However, it is a general practice that the abovementioned powers are exercised only when the opposite party makes a claim challenging the authenticity of the documents produced and provides reasons for the same.<sup>301</sup> It is to be noted that to a much larger extent than it is generally realised, the rate of progress of an arbitration is in the control of the parties<sup>302</sup> and it is the claim making process that the author argues to be the primary cause of delay in arbitral proceedings.

#### **2.4 Landmark Instances of Fraudulent Evidence in International Commercial Arbitration**

The case of *I&I Beheer B.V. v. Bolivarian Republic of Venezuela*<sup>303</sup> before the International Centre for Settlement of Investment Disputes is a landmark case which brought the issue of fraudulent behaviour in arbitral proceedings to the forefront. Here, enforcement of certain promissory notes issued by Venezuela was the primary contention. Venezuela challenged that the said promissory notes were forged as a part of an international conspiracy. After two years of prolonged proceedings, the Claimant abandoned its claims and the proceedings were ultimately dismissed.

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<sup>301</sup> JEFFREY WAINCYMER, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION 829 (2012).

<sup>302</sup> JOHN TACKABERRY & ARTHUR MARRIOTT, BERNSTEIN'S HANDBOOK OF ARBITRATION AND DISPUTE RESOLUTION PRACTICE 19 (4th ed. 2004).

<sup>303</sup> ICSID Case No. ARB/05/4 (28 December 2007), <https://www.italaw.com/cases/3598>.

In *European Gas Turbines S.A. (EGT) v. Westman International Ltd. (Alsthom)*,<sup>304</sup> the International Chamber of Commerce had rendered an award in favour of the Respondent. This was later challenged in the Paris Court of Appeal on the grounds of the award being based on a fraudulent report submitted by one of the parties.<sup>305</sup> Similarly, in *AJU v. AJT*<sup>306</sup> the decision of the Singapore International Arbitration Centre was overturned by the Singapore Court of Appeal for being against public policy. The Court found merit in the claims of forgery and illegal documents being presented before the arbitral tribunal, and thereafter declared it to be contrary to public policy.

## 2.5 Scenario in India

The 246<sup>th</sup> Report of the Law Commission of India observed that *ad hoc* arbitrations were primarily subscribed to by Indian parties to arbitrations, and such proceedings eventually followed the format of a regular civil court hearing thereby rendering them a futile exercise.<sup>307</sup> In most cases, either of the parties have principally challenged the authenticity of the arbitration agreement itself and have sought a stay on the arbitral proceedings.

For instance, in the case of *Bharat Rasiklal Ashra v. Gautam Rasiklal Ashra*<sup>308</sup> the Hon'ble Supreme Court of India set aside the appointment of an arbitrator by the Bombay High Court on

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<sup>304</sup> Paris Court of Appeal, *Revue de l'Arbitrage* 359-379 (1994).

<sup>305</sup> TERESA GIOVANNINI & ALEXIS MOURRE, *WRITTEN EVIDENCE AND DISCOVERY IN INTERNATIONAL ARBITRATION* 179 (2009).

<sup>306</sup> [2011] SGCA. 41.

<sup>307</sup> See Law Commission of India, *Amendments to the Arbitration and Conciliation Act 1996*, 246<sup>th</sup> Report at (Aug., 2014), ; Also See Bibek Debroy, *Strengthening Arbitration and its Enforcement in India – Resolve in India*, (Jul. 15, 2021, 4:33 PM), [http://niti.gov.in/writereaddata/files/document\\_publication/Arbitration.pdf](http://niti.gov.in/writereaddata/files/document_publication/Arbitration.pdf).

<sup>308</sup> (2012) 2 SCC 144 (India).

allegations of forgery of the agreement that contained the arbitration clause. The Hon'ble Court also ordered the High Court to decide the question whether the said agreement was forged or fabricated. However, in the landmark case of *A. Ayyaswami v. A. Paramasivam*<sup>309</sup> the Hon'ble Supreme Court clarified the role of the Courts in cases of forgery of arbitration agreement and held the following:

*“It is only in those cases where the Court, while dealing with Section 8 of the [Arbitration and Conciliation] Act, finds that there are very serious allegations of fraud which make a virtual case of criminal offence or where allegations of fraud are so complicated that it becomes absolutely essential that such complex issues can be decided only by civil court on the appreciation of the voluminous evidence that needs to be produced, the Court can side-track the agreement by dismissing application Under Section 8 and proceed with the suit on merits”.*<sup>310</sup>

The Hon'ble Court distinguished between mere allegations of fraud and serious allegations of fraud. In the latter case, the Court's intervention was possible and a stay on the arbitral proceedings could be entertained. However, the judgement is only a band-aid to the situation and cannot be considered as a complete solution.

For instance, questions of fraud/ forgery could *prima facie* be dismissed by the High Court as being mere allegations of fraud, yet such questions are bound to be adjudicated upon by the arbitrator. Similarly, the judgment brings into its jurisdiction the allegations of fraud/ forgery against the arbitration agreement which forms the basis for arbitration. Any allegation of fraud/ forgery against the arbitration agreement will continue to attract the trappings of a Civil Court's procedures. Thus, the scope to challenge the award based on forged/ fraudulent documentary evidences can continue to be

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<sup>309</sup> (2016) 10 SCC 386 (India).

<sup>310</sup> *Id.* at 390.

misused by unscrupulous parties to arbitration to delay the enforcement of an adverse arbitral award.

## 2. Information Intermediaries: The Solution?

From the above discussion, information asymmetry between the parties and the arbitrator on the aspect of documentary evidences can be ascertained as the primary reason for prolonged adjudication on the authenticity of documents. Therefore, a need arises to bridge the information asymmetry through information intermediaries.

Naturally, questions arise. Who are information intermediaries? What is their role in an arbitral proceeding? The Oxford Reference defines an information intermediary to consists of individuals and groups who obtain, analyse, and interpret information, and communicate their findings to others.<sup>311</sup>

### 3.1 The Information Utility Experiment

The Insolvency and Bankruptcy Code, 2016 envisaged the idea of an information utility. A central repository of information was required for effective retrieval facilities for Insolvency Professionals, the Debt Recovery Tribunal, and the National Company Law Tribunal to enable proceedings to be completed in a time-bound manner.<sup>312</sup> The Code lists the obligations of an information utility to include:

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<sup>311</sup>Information intermediaries, OXFORD REFERENCE, <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100003398> (last visited Aug. 13, 2021).

<sup>312</sup> Ashish Rukhaiyar, *NeSL gets final nod to become India's first Information Utility*, THE HINDU (Sept. 27, 2017, 10:48 AM), <https://www.thehindu.com/business/Economy/nsl-gets-final-nod-to-become-indias-first-information-utility/article19761236.ece>.

- a) *Create and store financial information in a universally accessible format;*
- b) *Accept electronic submissions of financial information from persons who are under obligations to submit financial information;*
- c) *Accept, in specified form and manner, electronic submissions of financial information from persons who intend to submit such information;*
- d) *Meet such minimum service quality standards as may be specified by regulations;*
- e) *Get the information received from various persons authenticated by all concerned parties before storing such information;*
- f) *Provide access to the financial information stored by it to any person who intends to access such information in such manner as may be specified by regulations;*
- g) *Publish such statistical information as may be specified by regulations;*
- h) *Have inter-operability with other information utilities.*<sup>313</sup>

The Code provides for an exhaustive definition of financial information as records of the debt of the person; records of liabilities when the person is solvent; records of assets of person over which security interest has been created; records, if any, of instances of default by the person against any debt; records of the balance sheet and cash-flow statements of the person; and/ or such other information as may be specified.<sup>314</sup>

Similarly, the Code mandates for financial creditors and operational creditors to submit such financial information to the

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<sup>313</sup> Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India) § 214.

<sup>314</sup> *Id.*, § 3(13).



information utilities.<sup>315</sup> The said scheme ensures that all important information is collated and authenticated by respective parties. The authentication guarantees integrity and does not leave any scope for parties to later on challenge such information presented before the tribunal during insolvency proceedings. Speed is of the essence in insolvency resolution process. This is only achieved if the electronic records contained in the information utilities are considered as conclusive evidence.<sup>316</sup> The positive results of the Code, are encouraging<sup>317</sup> and cannot be isolated from the role of information utilities in such proceedings. Therefore, a similar architecture could be adopted in the Indian arbitration framework.

### 3.2 The Contractual Intermediary Proposition

The concept of Contractual Intermediaries was brought to the forefront of discussion by Prof. Garey Ramey and Prof. Joel Watson in their paper titled Contractual Intermediaries.<sup>318</sup> The paper proposes a theoretical model wherein third-party intermediaries enforce a contract. The overall contracting is divided into three phases viz. negotiation, enforcement and production phase. The proposed model seeks to involve such third-parties (including Courts, Arbitrators, Attorneys etc.) in all three phases.

Since a third-party tends to participate throughout the transaction, it is argued that information cost is reduced, if not nil,

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<sup>315</sup> *Id.*, § 215.

<sup>316</sup> *Report of the Working Group on Information Utilities* 24, <https://ibbi.gov.in/wg-04report.pdf> (last visited Aug. 24, 2021).

<sup>317</sup> *See* World Bank Report on Ease of Doing Business - 2018 131 (Aug. 30, 2021, 7:55 PM),

<https://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB2018-Full-Report.pdf>.

<sup>318</sup> Garey Ramey & Joel Watson, *Contractual Intermediaries*, 18 J. LAW. ECON. ORGAN. 362-384 (2002).

due to the completely verified nature of information. With full verifiability, dispute resolution costs are optimally zero and cooperation can be sustained by directly punishing a party who breaches a contract.<sup>319</sup>

The proposed model is impractical in India as Courts are already overburdened with pending cases. Similarly, involving arbitrators and attorneys will lead to a non-institutionalized approach which could hamper the attainment of the objective.

This paper does not seek to involve third-parties throughout every transaction leading to the contract and proposes to limit the participation of such third-parties to documentary evidences in a commercial arbitration. Unlike the model proposed in the paper Contractual Intermediaries which included within its ambit courts, arbitrators, attorneys etc. as third-party intermediaries, this paper seeks to limit the ambit of third-parties with only private/ public funded institutions, such as National E-Governance Services Limited (NeSL),<sup>320</sup> participating in the authentication of documentary evidences.

### 3.3 Technology and use of Blockchain

With the emergence of new technology, scope arises for implementation in arbitral proceedings. One such proposal is the use of blockchain i.e. open ledger of information that is distributed and verified across a peer-to-peer network<sup>321</sup>, and smart contracts i.e.

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<sup>319</sup> *Id.* at 377.

<sup>320</sup> NeSL is India's first Information Utility to have received its final approval on 26<sup>th</sup> September, 2017. It is registered with the Insolvency and Bankruptcy Board of India (IBBI) under the aegis of the Insolvency and Bankruptcy Code, 2016 (IBC).

<sup>321</sup> *Pascal Asselot, In a Nutshell: Blockchain and IP (Aug. 30, 2021, 8:39 PM)*, <http://iprhelphdesk.eu/ip-highlights/ip-special-blockchain/blockchain-in-a-nutshell>.

contracts embedded on such blockchain. The decentralized functioning of the technology along with instantaneous enforcement has been the key selling points of smart contracts.

However, blockchain and allied technologies are not free from problems. The very decentralized nature which otherwise is considered an advantage of blockchain acts as a disadvantage for commercial contracts. Due to decentralization, the data contained in such blocks in a blockchain is open-access for everyone. This transparent nature blocks confidentiality, which is the touchstone of arbitration.<sup>322</sup>

Similarly, there arises a proposition that smart contracts do not fit the domain of law because they represent a *de facto* technological alternative to the legal system due to automated enforcement.<sup>323</sup> Therefore, it is argued that neither blockchain nor smart contracts can solve the issue of information asymmetry in without violating the very premise of confidentiality at the crux of arbitration. Only an institutionalized information intermediary can guarantee evidential integrity.

### 3. The Practical Hurdles

In spite of being the perfect solution to the issue of information asymmetry two major hurdles may arise for information intermediaries could face. First: Concerns of confidentiality; and second: Documents required to be authenticated.

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<sup>322</sup> Francisco Uribarri Soares, *New Technologies and Arbitration*, 7 INDIAN J. ARB. L. 84 (2018).

<sup>323</sup> See Sai Agnikhotram & Antonios Kouroutakis, *Doctrinal Challenges for the Legality of Smart Contracts: Lex Cryptographia or a New, Smart Way to Contract*, 19 J. HIGH TECH. L. 300 (2019).

#### 4.1 Privacy Concerns

Confidentiality concerns that loom with the use of blockchain technology could arise with use of information intermediaries as well. However, the same could be limited by law or regulated. The major drawback of involving a third-party in a commercial contract is the free-flow of confidential information to such third-parties. Therefore, every time an arbitration agreement is called for authentication by an information intermediary between the parties, the third-party gains access to such confidential information and could store it for future arbitration purposes.

Similar concerns arise with information utilities under the Insolvency and Bankruptcy Code, 2016. However, the said law tactically deals with such concerns by placing strict restrictions through the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017 upon information utilities for the authentication and storage of data collated.

For instance, certain technical standards are to be complied by information utilities while handling data collected under the framework.<sup>324</sup> Similarly, a risk management framework is required by every utility for reliable and secure storage of data.<sup>325</sup> Therefore, adopting a similar framework would establish trust among arbitrating parties to subscribe to such intermediaries.

#### 4.2 Documents required to be authenticated

Commercial transactions generally tend to be voluminous in nature. Therefore, a serious question arises as to whether all documents, irrespective of the nature and importance, utilized in

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<sup>324</sup> See Insolvency and Bankruptcy Board of India (Information Utilities) Regulations 2017, reg. 13.

<sup>325</sup> *Id.* reg. 33.

such transactions are to be authenticated. Bluntly, authenticating every document of a commercial transaction is next to impossible. At the same time, it is difficult to define the ambit of documents that are required to be authenticated by such information intermediaries.

It is therefore opined that at least commercial agreement containing the arbitration clause should be made mandatory for authentication by information utilities. Claims of forgery/fraudulent agreement can be effectively dealt since the authentication itself stands as conclusive evidence. Similarly, it is opined that an inclusive list (non-exhaustive) containing types of documents that are most important for the transaction is to be formulated and made mandatory for authentication by intermediaries. Although, the scope of such documents could always raise ambiguity and is limitless, it is still opined that deliberations upon the same can be made to make sectorial specific list of most important documents.

#### **4. Conclusion and Suggestions**

The robust growth of arbitration as a mechanism for dispute settlement across the globe is a great indicator of its popularity. However, several challenges are encountered by the said mechanism one of which is evidential integrity and misuse of the same to delay the arbitral proceedings. Such a delay not only demolishes the main objective of arbitration but at the same leads to a zero-sum game for parties.

It is therefore suggested to incorporate and expand the scope of information intermediaries that authenticate and store information pertaining to commercial transactions for future arbitration purposes. In this regard, a model similar to that of information utilities as established under the Insolvency and Bankruptcy Code, 2016 can be adopted in the arbitration framework. It is suggested

that the said Code be amended to expand the scope of information utilities such as NeSL and permit the sharing of information authenticated with arbitral proceedings since currently, such utilities are permitted to share information only with the stakeholders of an insolvency proceeding.

As it is often regarded, incentives matter in tuning the behaviour of individuals.<sup>326</sup> One of the major characteristics of law being incentivization,<sup>327</sup> it is suggested that the authentication of a defined set of documents be made mandatory with such information intermediaries and amendments to the Arbitration and Conciliation Act, 1996 be made in that regard.

Similarly, the concerns of privacy can be countered by providing a structural framework to such intermediaries through a separate legislation or by way of an amendment to the existing laws thereby limiting the use of such data and providing risk mitigation. Keeping in mind the expanse and rising popularity of arbitration, the role of information intermediaries becomes detrimental in continuing the said popularity and enable arbitration truly attain its mandate.

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<sup>326</sup> Uri Gneezy et al., *When and Why Incentives (Don't) Work to Modify Behavior*, 25 J. ECON. PERSPECT. 191, (2011).

<sup>327</sup> Paul H. Rubin, *Law and Economics*, <https://www.econlib.org/library/Enc/LawandEconomics.html> (last visited Sept. 03, 2021).

## THE OBSTACLES TO EFFECTUATE AWARDS IN INVESTOR- STATE DISPUTES

- Raghav Pathak\*

### SPECIAL NOTE

Investment arbitration, often known as Investor-State Dispute Settlement or ISDS, is a mechanism for resolving disputes between international investors and host countries. It recognizes the right of an international/ foreign investor to sue a host state, as well as the promise that, in the event of a disagreement, the foreign investor will have access to autonomous and erudite arbitrators who will reconcile the dispute and promulgate an enforceable decision. This particular article will focus on the issues and obstacles an investment entity, whether it is private or state-owned legally faces in arbitration cases. This is reflected throughout the article in form of case laws from various countries.

Arbitration's ultimate goal is to have arbitral judgments enforced. From start to end, legislation has been created to address commercial arbitration procedures and award administration and execution across the world. Given the sheer ubiquity of commercial arbitration in today's business world, a considerable body of law on the enforcement of judgments has emerged through time in a number of jurisdictions. In the case of investment treaty arbitration, there are some peculiar instances. The participation of sovereign States, the nature of the State measures under dispute, and the impact of an unfavorable decision on a State's public finances, among other things, increase the chances of preventing the implementation of investment treaty awards. India is in a unique

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situation. It is one of the most appealing foreign direct investment locations. Inflows of foreign direct investment into India have increased significantly, from \$6 billion in 2001 to \$82 billion in 2021.<sup>328</sup> Liberalization, solid macroeconomic policies, and a growing network of bilateral investment treaties have opened the way for more investment and, as a result, more investor-State conflicts.

The types of challenges and issues arbitration faces when enforcing awards in investor-state disputes are discussed below:

### *Expropriation*

The larger part of investment accords and conventions forbid a host state from expropriating the investments of safeguarded foreign investors unless it is carried out in the public domain, on a fair and equitable basis, in adherence with due process of law, and with recompense. In *Anglia v. the Czech Republic*,<sup>329</sup> the plaintiff claimed that the respondent State had indirectly expropriated the plaintiff's "contractual rights to damages," which were ordered to be paid by the plaintiff's former business partner, Kyjovan, following an arbitral decision in the plaintiff's favor in 1997. Kyjovan went insolvent before the award could be implemented, reportedly due to excessive delays in Czech courts. The plaintiffs argued that the award's worth had been taken away from it. The expropriation contention was denied by the tribunal. It was recognized that the claimant had been able to collect about 77% of the award's primary amount and so had not been excluded from the award's value. Furthermore, despite the plaintiff's difficulties and delays in the Czech courts, the tribunal was "not reassured that the inefficiencies in the administration undertakings could be said to

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<sup>328</sup> Remya Nair, *\$97 mn in 1991 to \$82 bn in 2021 — how reforms made India a go-to destination for FDI*, *The Print*, (22 July, 2021 9:07 am IST), <https://theprint.in/economy/97-mn-in-1991-to-82-bn-in-2021-how-reforms-made-india-a-go-to-destination-for-fdi/699786/>.

<sup>329</sup> *Anglia Auto Accessories Ltd v. The Czech Republic* (SCC Case No. 2014/181).



be methodically attributable to the Czech Courts," but was, in a number of cases, attributable to the plaintiff's own litigation considerations.

### *Not maintaining explicit treaty languages*

The respondent State contended in *Bear Creek Mining v. Peru* that the panel lacked jurisdiction under the Canada–Peru Free Trade Agreement (2008) because the plaintiff had not established a legitimate investment in the host State.<sup>330</sup> Peru claimed that the treaty did not need to specifically obligate the investment to be undertaken in line with host State legislation, citing many previous arbitral judgments. Instead, the defending state claimed that such a need stemmed from universally defined and applicable public international law norms. The panel disagreed, ruling that the investment must be "lawfully formed under Peru's legislation" under the FTA. The tribunal confirmed its jurisdiction over the disputes, holding that it could not "import a condition that restricts its jurisdiction where such a limit is not indicated by the parties." The panel stated that its decision "does not rule out the possibility of impropriety or bad faith on the merits".

### *The problem of seat and venue in arbitration*

The terms 'Seat' and 'Venue' are extremely important in any arbitration process since they establish not only where the arbitration will take place, but also the supervisory jurisdiction of courts and the curial legislation (*lex arbitri*) that will regulate it. The 'seat' of arbitration is the 'situs' of arbitration, the location of the arbitration. The seat of arbitration dictates the arbitration's curial/procedural law, as well as which tribunal will have supervisory authority over the arbitration. For example, except as

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<sup>330</sup> *Bear Creek Mining Corporation v. the Republic of Peru* (ICSID Case No. ARB/14/21).

otherwise agreed, an arbitration procedure held in Mumbai shall be regulated by the Arbitration and Conciliation Act, 1996, and any appeal contesting an arbitrator's decision (Sections 34 and 37) will be heard by the Bombay High Court.<sup>331</sup> The idea of "seat" takes on more relevance in international arbitrations since it serves as a marker for both curial and supervisory law. The 'Venue' of arbitration, on the other hand, only describes the geographical location where the arbitration is held and has nothing to do with curial law or judicial jurisdiction.

The ideas of Seat and Venue have sparked a lot of debate in the courts. BGS-SGS Soma has ultimately and perhaps brought an end to the matter of absolute jurisdiction of courts at the seat.<sup>332</sup> The Supreme Court has made a huge leap in resolving the ambiguity caused by para 96 of BALCO, which was followed by Antrix Corporation and other similar decisions.<sup>333</sup> As stated in BGS-SGS Soma, the BALCO assessment supplemented in Antrix Corporation can have pointless ramifications, for illustration, consider where a contract is operated throughout other numerous jurisdictions, an entity can lodge a ruling in a distant district in Uttarakhand although the contract stipulates the seat to be New Delhi or Mumbai.

#### *Abuse of rights*

The abuse of rights theory/doctrine is used in modern international investment law to constrain nationality planning. In investor-state arbitration, nationality planning is prevalent. Nationality planning, in its broadest sense, refers to any actions made by an investor solely with the goal of changing the nationality of a company. Nationality is important in the field of international

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<sup>331</sup> Arbitration and Conciliation Act, 1996, §, 34 & 37, No.26, Acts of Parliament, (India).

<sup>332</sup> Bgs Sgs Soma Jv v. Nhpc Ltd., (2019) SCC OnbLine SC 1585.

<sup>333</sup> CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. India, (PCA Case No. 2013-09).

investment law since it only protects investments made by people of a certain nationality.<sup>334</sup> Investors might seek the best bilateral investment treaty circumstances by changing the country of their business.<sup>335</sup> In general, investors would demand better safeguarding for fundamental company rights and decision-making institutions with the greatest certainty. If tribunals implement international investment law in a quantifiable fashion, they will behave predictably. The International Centre for Settlement of Investment Dispute Tribunals, for example, use the Salini test to establish what constitutes an 'investment,' but UNCITRAL Tribunals simply look at the description of 'investment' under the relevant BIT.<sup>336</sup>

## Conclusion

With distinct rules, jurisdictional constraints, and pragmatic factors guiding the sovereign's litigation strategy and incentives to pay unfavorable judgments, enforcement against a sovereign offers a kind of "*sui generis*" problem. Award creditors, on the other hand, have a range of options at their discretion to aid recovery and should be aware of them at all times during the dispute. It can certainly be concluded by some individuals in the field of arbitration law that the equilibrium of power in investor-state contracts advantages investors more because investors are provided with excessive coverage, states are penalized severely, and states' local objectives and concerns are not accorded adequate traction. The State is not

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<sup>334</sup> CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. India, (PCA Case No. 2013-09).

<sup>335</sup> Andrés Rigo Sureda, *Investment Treaty Arbitration: Judging under Uncertainty*, Cambridge University Press (2012), <https://www.cambridge.org/core/books/investment-treaty-arbitration/299E5162A398A31F9ACCC8B80DE10B78>.

<sup>336</sup> Michael Feldman, *Setting Limits on Corporate Nationality Planning in Investment Treaty Arbitration*, Vol. 27(2) ICSID Review, 281- 285 (2012).

powerless, as evidenced by India's recent plan of action in the Devas-Antrix conflict. It can either depend on multiple tested and proven legal measures to safeguard its objectives, or it can be more daring and incorporate creative techniques to competently defeat allegations or endure enforcement proceedings.

Negotiating a post-award mediation might be one of the strategies utilized by the winning investor to prevent any potential hurdles during the arbitral award's enforcement level/process. Because this settlement may profit all these interested parties from diverse viewpoints, such as saving resources for the investor and paying a portion of the award or even swapping currency/cash remittance with alternative benefits for the losing state, it is contended in this article that it would be very beneficial for any winning investor to undertake a post-award payout deal or arrangement rather than pursuing a pre-award settlement.

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