THE NATIONAL UNIVERSITY OF ADVANCED LEGAL STUDIES

KOCHI, INDIA

ESTABLISHED BY ACT 27 OF 2005 OF THE KERALA STATE LEGISLATURE

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A PEER-REVIEWED PUBLICATION OF THE STUDENTS' COUNCIL, NUALS

EDITORIAL

"*The good things, that belong to prosperity, are to be wished; but the good things, that belong to adversity, are to be admired*"

Sir Francis Bacon (Of Adversity – quoting Seneca)

A year has passed us by. With no end in nigh, pestilence continues to suffocate the human race, claiming more lives in its wake. But, the human spirit for enquiry still endures and this issue of our Journal stands testimony to this fact.

Academic Writing is perhaps an activity that demands the unwavering attention of the human consciousness. To will one's ideas and solutions into words and to frame them constructively for reference is no simple task. In the context of these tumultuous times, exerting one's will in this direction is harder. When constantly tested by extraneous situations created by the pandemic, the human brain behaves no different from that of our primitive "lizard-brain" ancestors – to focus on survival. No more, no less. Possibly, in this fashion, I believed that our contributors would be inhibited by this obstacle, but, I was fortunate to be wrong. In an unprecedent wave, we had record-high submissions this issue. To pass an appropriate comment on the event, I shall subscribe to another of Sir Bacon's writings in his essay *Of Fortune*, "*It cannot be denied, but outward accidents conduce much to fortune*". And so it did, and the journal is now all the more richer through their contributions.

However, I opine, that being an editor, perchance, is doubly hard. My apologies to the reader, if my words sound priggish. While our authors and contributors have my gratitude alike, this is possibly the first Editor's note in

the history of the Journal to acknowledge and appraise the good work that our editors put in, to bring forth a work of academia that is worth reading. Without exception, every Editor in this Board, amidst professional setbacks, personal losses and the ever-pervading air of cynicism, displayed a commitment to uphold the "virtue of adversity" – fortitude.

I do not wish to recount the setbacks of an online tenure which were mentioned in the Editorial Note of our previous issue. Added to those difficulties, our usual publishing schedule became considerably constricted due to University exams and a new editorial policy, both of which exacerbated uncertainty in our workings. Nevertheless, while wrestling with trepidations of their own and of a restricted timeline, our editors refused to yield to adversity and became examples for editors in the years to come.

As for me, with my entire tenure being restricted online, my only regret is that I was unable to witness the display of such fortitude in person. I am the first Editor-in-Chief to have run the relay entirely online and I cannot help but feel a tinge of sadness to end my tenure in this way. But, by extrapolating from the words of Sir Bacon which mark the beginning of this note, I have realized that the adversity that we had encountered together shall, apart from serving as precedent for my successors, also be the subject of greater admiration and of fond memory.

Prudence, justice, fortitude, and temperance. These are the virtues that form the basis of everything that is good. In hindsight, all that can change has changed. But the commitment of our authors and our editors to these virtues continues to remain strong. It is perhaps prudent to observe that nothing has really changed.

It is my utmost pleasure to present to you the 2nd Issue of the 15th Volume. My sincere thanks to the University, the Board, the professors and especially to our Authors who have been constant pillars of support. I wish good health and prosperity to my successors and to all our readers.

On behalf of the Board of Editors,

Antony Moses C.
Editor-in-Chief

May 2021

CITE THIS VOLUME AS

15 NUALS L.J. <page no.> (2021)

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Traversing the Digital Intellectual Property Realm on Social Media: An Abyss of Exploitation

Kushagra Gupta* & Anjuri Saxena**

Abstract

The consumption of the Internet has become a ubiquitous phenomenon, almost akin to breathing. Social Networking Sites (SNSs) like Instagram, Twitter, Facebook, etc., which are a by-product of this technology, are one such thing that latches on to the people of every age group. Contemporaneously, a common problem exists because of this ever-growing use of SNSs. The fact is that routine users do not understand the implication of sharing someone's protected works (IPRs). Another entity other than the users, which is constantly infringing on the incorporeal rights of the users and creators alike, are the SNSs themselves. These sites, by way of their unfair contracts, bait the users into an extremely exploitative agreement, all under the pretext of providing a free platform. The focal point of this research paper is to traverse through the various ways in which a person's IPRs get exploited by various entities and bring forth the lacuna in law in relation to the same. This paper unravels the interplay between the contours of intellectual property law and digital platforms. It aims to create a holistic understanding of the legality of unregulated activities on the SNSs vis-à-vis Intellectual Property Law. Further, the paper analyses the numerous ways these SNSs exploit its users to create a bigger base for further exploitation, namely by sub-licensing, royalty-free contracts, and unauthorized dissemination of protected works. The study is substantiated by the Indian legal framework, along with global jurisprudential trends. In conclusion, this paper lays out the possible solutions

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which would be instrumental in creating an environment that benefits both the intellectual property owners and the users.

I. Introduction

"*Artistic expression does not exist in a vacuum and is inextricably linked to, and reflective of, the social climate it is born out of. As society evolves and shifts, so too does its art and so must the law.*"[1]

With the advent of technological advancement, human beings have managed to reach heights of creativity and success. Technology has seeped into our lives in ways we are not even consciously aware of. One such invasion in our lives is that of Social Media/Networking Sites **[SNS]**. In simple terms, a Social Media Site may be defined as an Internet-based application that helps consumers share opinions, insights, experiences and perspectives.[2] The boom of technology in India is manifested through a base of 504 million (30% of the population) online users, majorly from rural areas, as of 2020.[3] This creates an insurmountable dichotomy of personality extrapolated by users in an online and offline identity, each being a distinct expression.[4]

On the other hand, the Intellectual Property Rights [**IPRs**] trend in India has witnessed a surge in Trademark, Copyright, and Patent registrations increasing

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[1] Jessica Lewis, *With Love and Kisses: Nothing Lasts Forever: An Examination of the Social and Artistic Antiquation of Moral Rights*, 23 INT'L J. CULT. PROP. 267, 288 (2016).
[2] *See*, W. Glynn Mangold & David J. Flaud, *Social Media: The New Hybrid Element of the Promotion Mix*, 52 BUS. HORIZONS 357, 358 (2009); Andreas M. Kaplan & Michael Haenlein, *Users of the World, Unite! The Challenges and Opportunities of Social Media*, 53 BUS. HORIZONS 59, 61 (2010).
[3] TN Tech Desk, *India has 504 million active internet users; rural India users outpace urban users for the first time*, TIMES NOW (May 9, 2020) https://www.timesnownews.com/technology-science/article/india-has-504-million-active-internet-users-rural-india-users-outpace-urban-users-for-the-first-time/589174.
[4] Morgan Johnson, Going offline: Personality and its effects on the transition of online relationships to the offline world (2013) (honors program theses, University of Northern Iowa).

by 236%, 233%, and 41%, respectively in 2018 through online applications.[5] However, this piece shall specifically aim to study the inter-linkages between IPRs and SNS, where effortless storage and distribution mechanisms, coupled with a lack of cognizance by the users, exposes IPRs subsisting in User-Generated Content [**UGC**] to infringement and reproduction by users, with or without knowledge of the author/owner.[6]

Incidents ranging from actor Ranveer Singh being served legal notices for 'paraphrasing' a famous quote in a tweet,[7] to the copyright lawsuit against singer Gigi Hadid for posting her 'own' picture on image-sharing platform Instagram,[8] highlight complex issues concerning the convoluted aspects of user ignorance, free speech, and digital recognition of IPRs. Owing to this unregulated culture of constantly sharing/re-sharing pictures, videos, films, dialogue, etc., the Intellectual Property Office of the UK termed them as a 'haven' for counterfeits.[9] These platforms, under the garb of a free platform, take away more than they contribute towards user privacy and incorporeal

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[5] Mudit Kapoor, *India sees huge surge in Intellectual Property rights applications*, BUSINESS TODAY (July 9, 2018), https://www.businesstoday.in/buzztop/buzztop-feature/india-sees-huge-surge-in-intellectual-property-rights-applications/story/280092.html#:~:text=Trademarks%2C%20copyrights%20and%20patent%20registrations,per%20cent%20respectively%20since%202016.andtext=India%20has%20witnessed%20a%20huge,in%20the%20last%20five%20years.

[6] Megha Nagpal, *Copyright protection through digital rights management in India: A non-essential imposition*, 22 J. INTELL. PROP. R. 224, 237 (2017).

[7] Press Trust of India, *Ranveer Singh gets legal notice from WWE star Brock Lesnar for use of phrase*, INDIA TODAY (June 21, 2019), https://www.indiatoday.in/movies/celebrities/story/ranveer-singh-gets-legal-notice-from-wwe-star-brock-lesnar-for-use-of-phrase-1552989-2019-06-21.

[8] Xclusive-Lee, Inc., v. Jelena Noura "Gigi" Hadid,19-cv-520 (PKC) (CLP) (E.D.N.Y. Jul. 18, 2019).

[9] *See generally*, Dennis Collopy, *Share and Share Alike: The Challenges from Social Media for Intellectual Property Rights*, UNIVERSITY OF HERTFORDSHIRE (2017), https://uhra.herts.ac.uk/handle/2299/19470.

property rights.[10] The complexity in the discourse snowballs further when views suggest that internet piracy is trivial or *de minimis* compared to theft in the physical 'real' world.[11] In the authors' opinion, to discount the actualities of the internet would only take us farther from the 'reality' we aim to protect. Thus, this piece aims to uncover the complex web entangling the nuances of SNS and their interplay with IPRs, in the digital realm. The paper shall therefore, be divided into 5 chapters (including this brief), characterized by an immersive analysis of complex questions of law and fact, complemented by global case law, to substantiate the hypothesis postulating a digital revolution and its convoluted governance.

The analysis would involve establishing that the 'works' in digital form are 'protectable', to address concerns raised by a lack of jurisprudence in India **(II)**; These shall be uncovered in light of the practice of exploitation by SNS operators, masked in their unconscionable 'Terms of Service', which thrive on UGC to earn profits by sub-licensing data to third parties without actually providing adequate royalty to its creator. The authors' shall further critique the invocation of the 'Intermediary' defense to escape responsibility/negligence in the dissemination of protected works **(III)**; Furthermore, this paper shall lay out the possible solutions which would be instrumental in creating a more user-friendly and secure online environment which respects digital IPRs, as was intended by the WIPO internet treaties[12] and the Copyright Amendment

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[10] Dennis Collopy, *Social Media's Impact on Intellectual Property Rights* in HANDBOOK OF RESEARCH ON COUNTERFEITING AND ILLICIT TRADE (Peggy E. Choudhary ed., 2017).
[11] Szde Yu, *Digital Piracy and Stealing: A Comparison on Criminal Propensity*, 5 INTL. J. CRIM. JUST. SCI. 239, 250 (2010).
[12] WIPO Performances and Phonograms Treaty, Dec. 20, 1996, 2186 U.N.T.S. 203; 36 I.L.M. 76 (1997).

Act of 2012.[13] **(IV)**; The analysis shall be concluded with a brief recapitulation and the way forward towards perceiving digital IPRs (**V**).

II. The Digital Intellectual Property Regime

The ambiguous relationship between UGC and IPRs has been a consistent cause of concern and conflicted discourse in academia.[14] The divergent views arise due to a lack of universal mechanisms which govern digital discourse, leading to observations by some like Mr. Shinen, an American Attorney, who consider the existence of this relationship to be a rather far-fetched possibility.[15] Thus, this Chapter shall evaluate the jurisprudence on the 'digital rights intercourse', its legal characterization in the Indian scenario, and characterise the 'market' which governs the economic interaction of all participants on an abstract, unregulated platform.

A. The Social Net-web

Facebook, Instagram, YouTube, TikTok, Twitter and Snapchat are commonly heard of and used platforms boasting around 2.6 billion (1.6 billion active

[13] Copyright (Amendment) Act, 2012, No. 27, Acts of Parliament, 2012 (India) [hereinafter, Copyright Act]; Parliamentary Standing Committee on Human Resource Development, Two Hundred Twenty-Seventh Report On The Copyright (Amendment) Bill, 2010, Observations, ¶22 (Nov. 23, 2010).

[14] Diane Leenheer Zimmerman, *Copyright and Social Media: A Tale of Legislative Abdication*, 35 PACE L. REV. 260 (2014); Patricia Aufderheide, *Journalists, Social Media and Copyright: Demystifing Fair Use in the Emergent Digital Environment*, 9 J. BUS. AND TECH. L. 59 (2014) ; Jane C. Ginsburg and Luke A. Budiardjo, *Embedding Content or Interring Copyright: Does the Internet Need the "Server Rule"?*, 42 COLU. J. L. ARTS, 417 (2019).

[15] Brock Shinen, *Twitterlogical: The Misunderstandings of Ownership*, SHINEN L. CORP. (2009), http://www.webcitation.org/5ovHZMUQR.

daily)[16], 1 billion (500M active daily)[17], 2 billion,[18] 800 million,[19] 321 million,[20] and 229 million daily active users,[21] respectively. This amounts to roughly 7 billion user accounts in total on 6 SNS, not seeming too far from the 'real world' total of 7.7 billion.[22] This incarnates a system of personified social instincts where interactions are forged at the behest of those who benefit from such interactions, creating a perplexing web of intercommunication and data.[23]

On the basis of this social function and user-experience, SNS can be described as,

"*a web-based service which allows individuals to construct a semi-public profile within a bounded system, articulating list of other users which share a connection in such a system and which view and traverse these lists of connections with those made by others within the system."*[24]

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[16] *Facebook Reports First Quarter 2020 Results*, FACEBOOK INVESTOR RELATION (Apr. 29, 2020), https://investor.fb.com/investor-news/press-release-details/2020/Facebook-Reports-First-Quarter-2020-Results/default.aspx.

[17] *Tell your brand story your way with Instagram*, FACEBOOK FOR BUSINESS, https://www.facebook.com/business/marketing/instagram# (last visited June 15, 2020).

[18] *Youtube for Press*, YOUTUBE ABOUT, https://www.youtube.com/about/press/ (last visited June 15, 2020).

[19] Maryam Mohsin, *10 TikTok Statistics That You Need to Know in 2019 [Infographic]*, OBERLO (May 22, 2020), https://www.oberlo.com/blog/tiktok-statistics.

[20] Hamza Shaban, *Twitter reveals its daily active user numbers for the first time*, WASHINGTON POST (Feb. 7, 2019), https://www.washingtonpost.com/technology/2019/02/07/twitter-reveals-its-daily-active-user-numbers-first-time/.

[21] *Snap Inc. Announces First Quarter 2020 Financial Results*, SNAP INC. (Apr. 21, 2020), https://investor.snap.com/news-releases/2020/04-21-2020-210949737.

[22] United Nations, World Population Prospects 2019: Highlights, Department of Economic and Social Affairs, Population Division ST/ESA/SER.A/423 (2019).

[23] FRED H. CATE, PRIVACY IN THE INFORMATION AGE 14-15 (Brookings Institution Press, 1997); Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1195,1199 (1998).

[24] Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History and Scholarship*, 13 J. COMPUTER-MEDIATED COMMC'N 210-211 (2008).

Inference is drawn from the fact that SNS offer certain features like creating a profile, publishing content, re-sharing images (Instagram, Snapchat, Pinterest) and videos (YouTube), microblogging (Twitter), commenting, 'liking' or expressing approval/disapproval, stories, image editing/tweaking, etc., in order to gain more users online.[25] It is through these features that expression of ideas is facilitated digitally, and this established expression avails protection as 'property'.[26]

B. A Legal Case for Protection?

The 'protection' mentioned in the above analysis grants the user an exclusive right over the use of such content and also a right against other users copying the same.[27] However, a majority of users on social media express opinions on the weather, political scenario, etc., which is no more than an expression of fact.[28] If every expression were to be protected, there would be no available area where creators would be able to express freely.[29] The authors recognize this and outline the specific cases where such protection is embodied. Thus,

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[25] J. W. Treem et al. , *What We Are Talking About When We Talk About Social Media: A Framework for Study. Sociology Compass,* 10 SOCIO. COMPASS 775 (2016).
[26] Designers Guild Ltd v. Russell Williams (Textiles) Ltd [2000] 1 W.L.R. 2416; WIPO Copyright Treaty, 2186 U.N.T.S. 121; 36 I.L.M. 65 (1997) ; Akbar Ismanjanov, *Creativity Oriented Originality in Non-Protection of Ideas: Inter-Compliance of Originality and Idea-Expression Dichotomy* 5 INTELL. PROP. R. 191 (2017).
[27] Denis de Freitas, *The Main Features of Copyright Protection in the Various Legal System*, 28 JILI 441-443 (1986); Convention of Berne Concerning the Creation of an International Union for the Protection of Literary and Artistic Works, July 24, 1971, 828 U.N.T.S. 221; §14, Copyright Act.
[28] Stephanie Teebagy North, *Twitter Right: Finding Protection in 140 Characters or Less*, 11 J. HIGH TECH. L. 333,339 (2011); Hoehling v. Universal City Studios, Inc. 618 F.2d at 979 (1980).
[29] *Id.*

the expression has to be qualified to be granted protection and the standards of such qualification vary significantly.[30]

The foregoing section shall entail a qualified case for the recognition and extension of IPRs to UGC, except in those rights which subsist only through registration, as the authors proceed on the assumption that majority of users on social media would not necessarily be aware of the legal intricacies during their interactions online.[31]

Thus, the authors rely primarily on the copyright law as registration is not a precondition to initiate action against copyright infringement of works in the nature explained hereunder.[32] This process would involve an inductive legal analysis, where support would be taken from the bare compartmentalised provisions of the Copyright Act to ascertain the level of protection which may possibly exist for UGC on SNS. Therefore, UGC would be divided into various forms in which they exist, and these forms are consequently evaluated with the lens of copyright law in India to establish a doctrinal case for prospective protection of those compartments, which is yet to be fully recognised.

i. ‘Original’ Literary, Musical or Dramatic Work

The Copyright Act and general jurisprudence grant protection only to ‘original’ work, which is not defined by the statute(s) and is thus interpreted

[30] University of London Press Ltd v. University Tutorial Press Ltd. [1916] 2 Ch 60; Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991); CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 (1) SCR 339 (Canada).
[31] L. J. Thornton, *The Photo is Live at Applifam: An Instagram Community Grapples with how Images Should be Used*, 21 VISUAL COMMUNICATION 72–82 (2014).
[32] Nav Sahitya Prakashan v. Anand Kumar, AIR 1981 All 200.

by courts.[33] The purpose behind originality is not in relation to a 'novel' criterion or invention but to ensure that the work in question is not copied from another work.[34] Since the provisions of the Copyright Act under §14 create distinctive scopes of protection between 'literary' and 'artistic' works, the authors have chosen to divide the foregoing analysis accordingly.

The basic principle of copyright law was to restrict the reaping of benefits from the work of another's skill, labor, and expense; coining the '*sweat of the brow'* standard.[35] Consequently, any mechanical process would be granted a copyright, making the standard susceptible to exploitation by a handful of individuals, discouraging creativity and obtaining copyright over facts through individual entries in compilations, without necessary justification.[36] Thus, the United States Supreme Court in the case of *Feist Publications Inc.* v. *Rural Telephone Services Co.,*[37] while rejecting the above doctrine held that the 'independence' of a creation is an equally relevant factor to determine copyright and thus regardless of effort, expense and skill, a minimum *'modicum of creativity'* must be exhibited to justify protection. It was however argued that the *sweat of the brow* had a threshold too low, whereas the *Modicum of Creativity* established a very high subjective standard.[38]

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[33] §13(1)(a), Copyright Act; University of London Press Ltd v University Tutorial Press Ltd [1916] 2 Ch 60.
[34] Agarwala Publishing House v. Board of High School and Intermediate Education and Anr., AIR 1967 All 91; Walter. v. Lane [1900] AC 539 (HL).
[35] Walter v. Lane, [1900] AC 539 (HL).
[36] Miller v. Universal City Studios, Inc., 650 F. 2d, at 1372; Harper And Row, Publishers Inc. v. Nation Enterprises, 471 U.S. 539, 556 (1985).
[37] Feist Publications Inc. v. Rural Telephone Co., 499 U.S. 340 (1991).
[38] CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 (1) SCR 339 (Canada).

In light of this, the Supreme Court of India in *Eastern Book Company* v. *D.B. Modak*,[39] while relying on the aforementioned decision of the Canadian Supreme Court, held that originality is dependent on the degree of *skill and judgment* involved in creating such work. Thus, excluding protection to trivial variations without a *distinguishable* flavor. This is the contemporary *qualifying criteria* for "work" to be original.[40]

It is pertinent to clarify that while the Supreme Court mentioned the '*substantial variation and distinguishability'* standard, the Canadian Supreme Court defined the aspects of the *Skill and Judgment test*[41] by noting that any work, which exhibits the author's 'skill' - suggestive of one's acquired knowledge or ability- and their judgement, i.e. a process of evaluating different possible discernable options in producing such work; is qualified to be an 'original work'.

Before moving to the specific categories of the work, certain definitional aspects of 'work' mentioned need to be clarified. The Delhi High Court, while comprehensively relying on varied Supreme Court jurisprudence, held that any work expressed in 'writing', irrespective of its quality or presentation, falls within the umbrella of a "*literary work*".[42] Further, when it comes to "*dramatic* works", apart from general acting or theatre performances, even dance steps have been held to fall within their purview.[43] Further highlighting

[39] Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1.
[40] Dart Industries Inc. v. Techno Plast, 2017 SCC OnLine Del 7436.
[41] CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 (1) SCR 339 (Canada).
[42] Giant Rocket Media and Entertainment Pvt. Ltd. vs. Priyanka Ghatak and Ors., 2020 SCC OnLine Del 52.
[43] Academy of General Edu., Manipal and Ors. v. B. Malini Mallya, (2009) 4 SCC 256; §2, Copyright Act.

the compound nature of a single work, the Calcutta High Court observed that a lyric in a song is a *literary* work, whereas the 'musical notation' is the *musical work* and the actual performance by the singer is an *artistic work.*[44] The authors argue that the application of the aforementioned principles could extend to social media in the situations highlighted hereunder.

a) Short Words, Titles, and Text

The situation of short words is rather controversial owing to their subject matter falling within the claws of two prominent doctrines, namely *de minimis non curat lex* and *scène à faire*. The former pertains to a defense against protection if the average audience would not notice the infringement.[45] The latter repudiates protection when an idea can be presented only in a specific way, ascertaining inseparability between ideas and their expression.[46] To put this in perspective, it has been argued that, 'tweets' (the abridged form of communication on the SNS Twitter) are too short and insignificant to be granted protection.[47]

However, *prima facie*, the arguments are refuted by Twitter's policy document, "*How to Tweet",* which suggests that tweets are limited to 280 characters in text (70-100 words) which can be expressed in 40 different languages along with options of displaying 4 pictures and a GIF image within

[44] Sankar Biswas v. Salil Chatterjee, (1992) 96 CWN 540 (High Court of Calcutta).
[45] Fisher v. Dees, 794 F.2d 432 (9th Cir.1986); Newton v. Diamond, 388 F.3d 1189, 1193 (9th Cir. 2004).
[46] Joshua Ets-Hokin v. Skyy Spirits Inc., 225 F.3d 1068 (9th Cir. 2000); NRI Film Production Associates v. Twentieth Century Fox Films, ILR 2004 KAR 4530, ¶ 22.
[47] Consuelo Reinberg, *Are Tweets Copyright Protected?*, WIPO MAGAZINE (July, 2009), https://www.wipo.int/wipo_magazine/en/2009/04/article_0005.html (last visited May 11, 2021).

the tweet.[48] Thus, neither is the word limit insignificant nor is the mode of expression linguistically limited, refuting the arguments above. This argument is also contrary to express practices of certain intellectual property offices which recognize the rights subsisting in tweets.[49] The primary reason for such a proposition lies in the fact that tweets, regardless of their length, can be the original work of its author and the copyright rests with them, especially when tweets by way of threads can take the form of blogs.

Nevertheless, most domestic courts apply a range of distinct criteria to determine originality.[50] The courts have in multiple cases held that short unelaborated statements[51]; arrangement of form and manner of expression[52]; *titles*[53]*;* idiosyncratic phrases (6 words)[54]; sentence-based concept notes[55]; clever arrangement of words and language in quotes[56]; very short textual work- a word, sentence or stanza;[57]and *Haikus* (three liner poetry)[58] are all protected by copyright since the author's genuine skill and judgment (ability

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[48] Selena Larson, *Welcome to a world with 280-character tweets*, CNN BUSINESS (Nov. 7, 2017), https://money.cnn.com/2017/11/07/technology/twitter-280-character-limit/index.html.

[49] Executive Agency for Small and Medium-sized Enterprises, *Intellectual Property and Social Media*, IP HELPDESK (Jan. 23, 2020) https://intellectual-property-helpdesk.ec.europa.eu/news-events/news/intellectual-property-and-social-media-2020-01-23_en.

[50] Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1.

[51] Beyond Dreams Entertainment Pvt. Ltd. and Ors. v. Zee Entertainment Enterprises Ltd. and Ors., 2015 SCCOnLine Bom 4223.

[52] R.G. Anand v. Delux Films and Ors., (1978) 4 SCC 118.

[53] Krishika Lulla and Ors. v. Shyam Vithalrao Devkatta and Ors., (2016) 2 SCC 521; Francis Day and Hunter Ltd. v. Twentieth Century Fox Corporation Ltd. and Ors., 1939 SCC OnLine PC 50.

[54] Heim v. Universal Pictures co., 154 F.2d 480 (2d Cir. 1946).

[55] Fraser v. Thames Television Ltd., (1983) 2 ALL E.R. 101.

[56] Brilliant v. W.B. Productions Inc,. Civ. No. 79-1893-WMB (S.D. Cal. 1979).

[57] Stern v. Does, 978 F.Supp.2d 1031 (C.D. Cal. 2011).

[58] Religious Technology Center v. Netcom On-Line Communication Services, Inc., 907 F. Supp. 1361 (N.D. Cal. 1995).

to form opinion) guide such creations. Thus, as per the foregoing analysis, the *Inverse Length* test applies.[59] The concerned exception to the general rule of ascribing originality to length suggests that shorter sentences might, in certain cases, even suggest higher degrees of originality in light of apparent distinguishing aspects of conciseness, cleverness, and a pointed observation.[60]

b) Captions, Jokes, Compilations and Music

Captions are a medium of descriptive expression accompanying an artistic work.[61] It is evident that longer pieces of work engage higher levels of creativity. Thus, courts have similarly ruled that copyright subsists in: compilations[62]; headnotes of judgments (which are now usually available online)[63]; Captions describing other works[64]; Poetry[65]; A song's tune[66]; Written Letters[67] and; Jokes.[68] Tweets can even be compiled using the "Threads" feature online to narrate a coherent chain of thought through an electronically connected feed.[69] As was held in the appeal against an

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[59] Brilliant v. W.B. Productions, Inc. Civ. No. 79-1893-WMB (S.D. Cal. 1979).
[60] *Id.*
[61] *Can Instagram posts help characterize urban micro-events?*, in 19th International Conference on Information Fusion (FUSION), https://ieeexplore.ieee.org/document/7527880 (last visited July 15, 2020).
[62] Gangavishnu Shrikisondas v. Moreshvar Bapuji Hegishte and Ors., ILR (1889) 13 Bom 358.
[63] N.T. Raghunathan and Anr. v. All India Reporter Ltd., AIR 1971 Bom. 48.
[64] Rediff.Com India Ltd. v. E-Eighteen.Com Ltd., (2013) 55 PTC 294 (Del).
[65] Sasken Communication Technologies Ltd. v. Joint Commissioner of Commercial Taxes,2011 SCC Kar 4379 V. Govindan v. E.M. Gopalakrishna, AIR 1955 Mad 391; Reiss v. National Quotation Bureau, Inc., 276 F. 717 (S.D. NY 1921).
[66] Mohamed Imranullah S, *Madras HC stops release of Marathi 'copy' of Dhanush's VIP*, THE HINDU (July 02, 2018), https://www.thehindu.com/news/cities/mumbai/madras-hc-stops-release-of-marathi-copy-of-dhanushs-vip/article24308360.ece.
[67] British Oxygen Co. v. Liquid Air Ltd., 1925 Ch 383.
[68] Foxworthy v. Custom Tees, Inc., 879 F. Supp. 1200 (N.D. Ga. 1995).
[69] Teebagy, *supra* note 28.

infringement by singer Katy Perry, a copyright can only subsist in case the musical notes are unique, original and do not reappear in various compositions becoming common/popular notations.[70] Thus, the aspects of "commonality" and "access" also influence the qualification of any work for protection.[71]

ii. Artistic Work

An 'artistic work' is inclusive of any drawings, paintings, photographs, or any other form of craftsmanship, irrespective of the 'artistic quality' exhibited in the work.[72] Pictures are a frequently used yet highly vulnerable form of UGC on social media; due to the ease of employing snapshotting and reproduction mechanisms online.[73] Screenshots of videos may entail an action of infringement of the picture involved.[74]

Considering the magnitude of pictures and the intricacies imbibed in each of them, various jurisdictions have aimed to devise an objective standard to determine the scope of an 'artistic work'. For instance, the Court of Justice of the European Union **[CJEU]** suggested that the usage of filters, stamps, angles and other techniques add a creative *personal touch*, strengthening the copyright claim.[75] This analysis suggests that works have to reek of originality

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[70] Anisha Shenai-Khatkhate, *A "Dark Horse" Victory for Katy Perry: Central District of California Overturns $2.8M Copyright Verdict*, NAT'L L. REV. (Mar. 30, 2020), https://www.natlawreview.com/article/dark-horse-victory-katy-perry-central-district-california-overturns-28m-copyright.
[71] Gray v. Perry, 2019 U.S. Dist. LEXIS 113807
[72] A.G.A. Medical Corporation v. Faisal Kapadi, 2003 (26) PTC 349 (Del); §2(c), Copyright Act.
[73] *See generally* Risto Sarvas & David Frohlich, From Snapshots to Social Media – The Changing Picture of Domestic Photography (London, Springer 2011).
[74] Spelling Goldberg v. BPC Publishing, [1979] F.S.R. 494.
[75] Painer v Standard VerlagsGmbH, CJEU C-145/10 (2011).

or at least reflect some degree of deference which can be identifiable to the owner of such a picture.

On the other hand, the Danish Courts have even recognized "*minimalist, calm and harmonious expressions*" in pictures as copyrightable, where advertising the same on Instagram has been acknowledged to accrue *brand identity* in the *digital* market.[76] This proposition moves away from the rather high standards of evaluating a 'personal touch', and focuses more on the subjective aims that an expression aims to achieve. Even the Delhi High Court, without devising any descriptive test, granted relief against the misuse and infringement of photographs on Facebook by a defendant; marking the recognition of copyright in general pictures of a hotel posted online. Consequently, multimedia graphics in the form of *'memes';* combining multiple forms of *'work'* - where the text of the graphic would be a 'literary work' and the graphic itself would be an 'artistic work' - may also seek protection.[77] The intention behind protection of artistic work therefore, is to recognize imagination and creativity even if the photograph is for informational purposes.[78]

iii. Moral Rights

Under IPR Law, the legal remedy pertaining to protection of an author's moral rights extends beyond the protection of the IPR, and is an inalienable right i.e. it cannot be waived/assigned despite any agreement assigning the original

[76] Anne Black v. Ronald A/S Case BS-1498/2016-SHR (Neth.).
[77] Charles Schmidt and Christopher Orlando Torres v. Warner Bros Entertainment, 2:3-cv-13-02824 (C. D. Cal. 2013).
[78] Mathieson v. Associated Press, 1992 WL 164447 (S.D.N.Y. June 25, 1992).

ownership in the work.[79] These rights encompass the *attribution* to owners for their work, in addition to active protection against distortion, mutilation or modification of their work, prejudicial to their honor or reputation.[80] Therefore, the extent of this analysis is closely related to a safeguard on exploitative practices discussed in the subsequent chapters of this piece.

For instance, while hinting at the recognition of *celebrity rights*, the Delhi High Court restrained exhibition of a film which violated the privacy of the plaintiff and was liable for causing indignity, despite an alleged license to portray the story.[81] The courts have extended the ambit of such rights to the *right to integrity*, when the person in question is not and was never the '*owner'* of the work.[82] The most relevant development in the interplay between moral rights and digital property, comes from Japan, where the Intellectual Property High Court ruled that, '*retweeting*' of infringed content/work without the permission of the author constituted a violation of the author's moral rights since the modifications by HTML processes violates the right against divulgation/distortion of the work.[83]

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79 Robert C. Bird and Lucille M. Ponte, *Protecting Moral Rights in the United States and the United Kingdom:*
Challenges and Opportunities Under the U.K.'s New Performances Regulations, 24 B.U. Int'L L.J. 213, 214, 251 (2006).

[80] §57, Copyright Act; Convention of Berne Concerning the Creation of an International Union for the Protection of Literary and Artistic Works, July 24, 1971, art.6 *ibis*, 828 U.N.T.S. 221; Maria A. Pallante, et al, *The Importance of Moral Rights to Authors, in Symposium Transcript, Authors, Attribution, and Integrity: Examining Moral Rights in the United States*, 8 GEO. MASON J.INT'L COM. L. 87, 91 (2016).

[81] Phoolan Devi v. Shekhar Kapoor, 1995 (57) DLT 154.

[82] Amar Nath Sehgal v. Union of India (UOI) and Ors., 2005 SCC Del 209.

[83] X v. Twitter Inc.,Chiteki-Zaisan Kōtō-Saiban-Sho [Japan Intell. Prop. H. Ct.] Apr. 25, 2018, 2016 (Ne) 10101 (Japan).

III. Veiled Exploitation

The novel regime conceptualized above is susceptible to its own perils.[84] Currently there are more than 100 SNS breeding on UGC as their market and its source.[85] Therefore, in the present section, the authors move on to a categorical explanation of digital exploitation, by both the major service providers (enablers) like Facebook, YouTube, Instagram, etc. and even other users on the internet. While the forms of exploitation of IPR may vary in online and offline platforms, they nevertheless result in the deprivation of the real value subsisting in a user's incorporeal property.[86] Globally, the threats posed by these platforms have been recognised by the intelligentsia, yet the jurisprudence remains scanty.[87] Thus, this chapter analyses the manifested forms of exploitation, the liabilities arising and the consequent responsibilities evaded.

A. Validity of Terms of 'Use'

In a breakthrough, the Paris High Court while deciding three distinct cases on similar grounds held that the *Terms of Use* [**TOS**] agreement of Twitter,[88]

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[84] Sonia Livingstone, *Taking risky opportunities in youthful content creation: teenagers' use of social networking sites for intimacy, privacy and self-expression*, 10 NEW MEDIA AND SOC. 393-411 (2008).
[85] Andrew N. Smith, Eileen Fischer and Chen Yongjian, *How Does Brand-Related User-Generated Content Differ Across YouTube, Facebook, and Twitter?*, 26 J. INTERACTIVE MKTG.102-113(2012).
[86] Christine Greenhalgh and Mark Rogers, *The value of intellectual property rights to firms and society*, 23 OX. R. ECO. POLICY. 541-567 (2007).
[87] Leah C. Grinvald, *Social Media, Sharing and Intellectual Property Law*,64 DEPAUL. L. REV.1070-1075 (2015).
[88] Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Aug. 7, 2018, No. 14/07300 (Fr.).

Facebook[89] and Google[90] to be violative of copyright laws for being unfair, abusive and against consumer interests. The TOS offered by SNS govern the 'boundaries' the platform operates on, and define user relationships internally and with other users.[91]A feature of *contradiction*, common across the terms of famous platforms like Facebook (Instagram), Twitter, etc., is that while they recognize the user's ownership of the IP subsisting in the UGC, the sites claim a '*non-exclusive, transferable, sub-licensable, royalty-free, worldwide license*' to use any content covered by intellectual property rights that the user posts on the platform.[92] The authors express serious apprehension towards the validity of such agreements on certain conceivable grounds of law and public policy in India as elaborated hereunder.

i. Take it or Leave it Character

These TOS are usually characterized by a clause where the user has no option but to either accept or decline the contract, with declination leading to a suspension/deletion of account services.[93] The users thus continue, considering the wide social standing of SNS, its effect on socio-economic relationships and their directive human instinct.[94] This *standard form contract*,

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[89] Tribunal de grande instance [TGI] [ordinary court of original jurisdiction]Paris, Apr. 9, 2019,No. 14/07298 (Fr.).

[90] Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Feb. 12, 2019, No.14/07224 (Fr.).

[91] CORINNE TAN, REGULATING CONTENT ON SOCIAL MEDIA: COPYRIGHT, TERMS OF SERVICE AND TECHNOLOGICAL FEATURES 98-137 (London: UCL Press, 2018).

[92] *Id.*

[93] Nicole Cocozza, *Instagram Sets a Precedent by an 'Insta' Change in Social Media Contracts and Users' Ignorance of Instagram's Terms of Use May Lead to Acceptance By a Simple '*Snap', 15 J. HIGH TECH. L. (2015).

[94] Robert Ackland andTanaka Kyosuke, *Development Impact of Social Media*, WORLD DEVELOPMENT REPORT (2015), http://documents.worldbank.org/curated/en/373231467994583078/Development-impact-of-social-media.

operating on a 'take it or leave it' basis, without imparting a *real opportunity to bargain* to the weaker party(consumer), is termed as a contract of adhesion.[95] Therefore, a typical contract of adhesion is reflective of a more 'unilateral' approach towards an 'agreement' where one party constructs the contract, and the other party by mere 'adherence' to the same, is bound by such a contract; irrespective of their knowledge or willingness, since there is an absence of mutual deliberations.[96]

For instance, the Snapchat user agreement in specific, even grants the company and its affiliates the right to use a user's name, likeness and even *voice*.[97] The complicatedly worded and unfair TOS are coupled with a lack of education among users with respect to legal usage.[98] These complexities muddle further when interacting with general human psyche where, as Bosher and Yeşiloğlu note, the user's *social* benefit in availing these SNS overrides their concerns over the infringement of their prospective IPRs - the knowledge of which is generally absent - vested in their content.[99] Additionally, the reservation to terminate accounts or change terms unilaterally breeds uncertainty.[100]

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[95] BLACK'S LAW DICTIONARY 83 (5th ed. 1981).

[96] *See generally*, Albert A. Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 COLUM. L. R 1072, 1072-1090 (1953).

97 Snap Inc. Terms of Service, https://www.snap.com/en-US/terms#terms-row (last visited June 15, 2020).

[98] Brittany Curtis, *Copyright vs. Social Media: Who Will Win?*, 20 INTELL. PROP. L 1, 9 (2017); Ellen Wauters, Eva Lievens and Peggy Valcke, *Towards a Better Protection of Social Media Users: A Legal Perspective on the Terms of Use of Social Networking Sites*, 22 INTL J. L. INFO. TECH. 254–294 (2014).

[99] H. Bosher and S. Yeşiloğlu, *An analysis of the fundamental tensions between copyright and social media: the legal implications of sharing images on Instagram*, 33 INTL REV. L. COMP. TECH. 164-186 (2019).

[100] CORINNE TAN, REGULATING CONTENT ON SOCIAL MEDIA: COPYRIGHT, TERMS OF SERVICE AND TECHNOLOGICAL FEATURES 98-137 (London: UCL Press2018)..

Since there is an absence of deliberations, reflecting qualified consent, standard form contracts are interpreted more strictly in India to protect the weaker party against generally unfair terms which may not be individually consented to.[101] The Law Commission of India in its 103rd Report on 'Unfair Terms in Contract' noted that the lack of negotiating power to change the terms at will, is a matter of concern; and the absence of legislative protection of the same is worrisome.[102] Therefore, the doctrine of 'unconscionability' or unreasonableness is invoked by the weaker parties to invalidate such contracts by evaluating individual contractual terms and their overall impacts on the fairness of such contracts.[103] In certain situations, even a lower degree of opportunity for *negotiation* in such contracts renders them to be '*unconscionable'.*[104]

A careful scrutiny of such terms is against the mandate of law, for want of reasonability and fairness.[105] Due to absence of *consensus ad idem* alone, these terms could be declared unenforceable.[106] Furthermore, dominant positions reflected by SNS are also characteristic of exercising 'undue influence', rendering the contracts (TOS) to be voidable at the instance of users.[107] Nevertheless, the authors aim to systematically prove how these TOS are unenforceable on two counts- i.e. *firstly*, on parameters of 'unconscionability'; to establish the same authors rely on the decision of the Indian Supreme Court

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[101] Law of Business Contracts in India 187 (Sairam Bhatt ed., 2009).
[102] MP Ram Mohan & Anmol Jain, *Exclusion Clauses under the Indian Contract Law: A Need to Account for Unreasonableness*, 13 NUJS L. R. 1, 8 (2020).
[103] *Id.* at 189.
[104] Bragg v. Linden Research, Inc 487 F. Supp. 2d 593 (E.D. Pa. 2007).
[105] Superintendence Company of India v. Krishan Murgai, (1980) 3 S.C.R. 1278.
[106] D.T.C. v. D.T.C. Mazdoor Congress, (1990) 1 S.C.R.Supl. 142; Indian Contract Act, 1872, No.9, Acts of Parliament, 1872, §10 (Hereinafter, 'Indian Contract Act') .
[107] §16 & §19, Indian Contract Act.

in *Central Inland Transport Corporation Limited* v. *Brojo Nath Ganguly*[108], which noted that unfair and unreasonable terms, coupled with unequal bargaining powers between parties may render a contract to be unconscionable and hence, unenforceable. *Secondly*, the authors shall additionally highlight the inconsistency of the TOS with Indian Law in various spectrums, to establish that the same are against 'public policy' for having 'unlawful objects' and hence, void under contract law.[109]

ii. Statutory Shortcomings

There are certain additional characteristics subsisting within these terms which render them void under Indian law due to excessive exploitation of consumer interests and substantive inconsistencies, as shall be explored hereunder.

a) The Vitiation of Consent

TOS are usually enforced by an *implied* acceptance of the user by availing the services.[110] This fact is usually mentioned in the lower corners of the screen where it is not apparent or noticeable.[111] American jurisprudence suggests that failing to stop using the SNS depicts that the user has accepted the changes by implication.[112] However, in India, the assignment of IPR by implication is an impermissible exercise.[113] Implication overshadows the qualified and

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[108] (1986) 3 SCC 156, ¶¶80-100.
[109] §23, Indian Contract Act.
[110] Robert Terenzi, Jr., *Friending Privacy: Toward Self-Regulation of Second-Generation Social Networks*, 20 FORDHAM INTELL. PROP. MEDIA AND ENT. L.J. 1049,1076 (2010).
[111] Woodrow Hartzog, *Privacy and Terms of Service, in* SOCIAL MEDIA AND THE LAW: A GUIDEBOOK FOR COMMUNICATIONS STUDENTS AND PROFESSIONALS, 71-73 (Daxton R. Stewart ed., 2013); Feldman v. Google, Inc., 513 F.Supp.2d 229 (E.D. Pa. 2007).
[112] Rodriguez v. Instagram, LLC, C 12-06482 WHA (N.D. Cal. Jul. 12, 2013).
[113] Thankappan (P.K.) v. Vidhyarambham Press And Book, (1969) ILLJ 323 Ker.; K.A. Venugopala Setty v. Dr. Suryakantha U. Kamath, AIR 1992 Kant 1.

informed consent of a user, as the notice is not reasonably presented to them ; leading to a situation where the user does not actively participate in the process of assignment, and yet is responsible for 'inquiring' about a contract they are already 'bound' by without fulfilling the statutory requirements of 'signing' the agreement, the consequences of which shall be discussed further.[114] Moreover, at times, the user is even unable to witness the agreement and its documentary nature becomes *otiose*.[115] Where good faith requires a party, benefiting from a clause, to be duty bound to clarify all terms and conditions of that contract to the other party; SNS omit to comply with the same.[116] Thus, SNS exploit the users' vulnerability in light of the social benefit they are receiving and their lack of understanding pertaining to legalese, to lead them into implied contracts, which are not effectively presented to the users in order to make an informed choice.[117]

Even if we presume that such notice was given, in the absence of requisite safeguards, the ease with which consent is manifested online makes doubtful the identity of the signatory who actually '*clicked the button*'.[118] Nevertheless, while a contract may be formed without signature requirements, the '*license*'

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[114] *See*, Woodrow Hartzog, *Privacy and Terms of Service, in* SOCIAL MEDIA AND THE LAW: A GUIDEBOOK FOR COMMUNICATIONS STUDENTS AND PROFESSIONALS, 71-73 (Daxton R. Stewart ed., 2013).

[115] Specht v. Netscape, 306 F.3d 17 (2d Cir. 2002); Windsor Mills, Inc. v. Collins and AikmanCorp., 101 Cal. Rptr. 347 (Cal.Ct.App.1972); Accord Lawrence v. Walzer Gabrielson, 256 Cal. Rptr. 6(Cal.Ct. App.1989); Cory v. Golden State Bank, 157 Cal. Rptr. 538(Cal.Ct.App.1979).

[116] Thornton v. Shoe Lane Parking Ltd. [1971] QB 163.

[117] Ellen Wauters, Eva Lievens and Peggy Valcke, *Towards a Better Protection of Social Media Users: A Legal Perspective on the Terms of Use of Social Networking Sites*, 22 INT'L J. L. INFO. TECH.254–294 (2014).

[118] Deputy Director of Income Tax(IT)-3(1) v. Gujarat Pipavav Port Ltd., 2017 SCC OnLine ITAT 2058.

in the terms is a permission to use IPR of owners and is construed as a deed of assignment/license.[119]As per law, all licensing agreements accordingly have to be in writing and *signed* by the authors/owners or their agent.[120] While the requirement for a *signature* is discounted (per the amendment to §30), the notice of the agreement and consequent identification of users, continues to be a gray area.

The government has resolved this issue by introducing '*electronic signatures'*.[121] An electronic signature can be procured only through an application to the certifying authority.[122] SNS recognize this distinction between Electronic Signatures and other modes of consent yet do not utilise such modes for the registration of users, implying a voluntary omission to take informed and authorized consent.[123]

b) Escaping Mandatory Royalty Payment

The terms forming a 'license' have to fulfill strict requirements to ensure validity.[124] The TOS does not specify the duration of the license which is thus, presumed to be 5 years, under §18 of the Copyright Act.[125] Hence, in the absence of notification pursuant to 5 years of use, the license lapses for regular and long-standing users, raising concerns on the validity of continual usage.

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[119] §19, §30, Copyright Act; TAN, *supra* note 93.
[120] Indian Performing Right Society Ltd. v. Eastern Indian Motion Pictures Association and Others, (1977) 2 SCC 820; §19(1), Copyright Act.
[121] Information Technology Act, 2000, No. 21, Acts of Parliament, 2000, §2(ta), §2(p) and §3A (India). (Hereinafter, 'IT Act').
[122] *Id.*, §21, §35; Information Technology (Certifying Authority) Rules, 2000.
[123] *What information do I need to include in a copyright report to Instagram?*, INSTAGRAM (June 15, 2020, 9:47 PM), https://help.instagram.com/454257084652404.
124 Dabur India Limited v. Shree Baidyanath Ayurved Bhawan Pvt. Ltd., AIR 2012 (Del.) 2946; §18, Copyright Act.
[125] S.M. Ashokan v. Raj Television Net Work Ltd., (2016) 5 LW 881; §18, Copyright Act.

Further, the TOS reserves a '*royalty-free*' license, while they grant themselves all rights to exploit UGC.[126] This waiver is invalid as §18 of the Copyright law expressly bars the waiver of royalties and; §19(3) mandates specification of the amount of '*royalty payable'* while carrying out assignment, the provisions of which apply to licenses *mutandis mutandi*.[127] The pre-amendment §19(3) succeeded royalty by the words '*if any*' but the same were omitted in the 2012 Amendment with the legislative intent to protect authors from exploitation.[128] Copyright law protects precious independent talent from suffering owing to a lack of due recognition and monetary incentives for their works.[129] Contracting out of statutory requirements is impermissible under law.[130] Thus, payment of royalties is a *sine qua non* for any valid license; rendering the existing terms to be void.[131]

c) Impermissible Delegated Sub-Licensing

The *Sinclair*[132] case before the New York District Court is a turning point in digital IPR perception and impediments surrounding consent. In the present case, UGC on Instagram was embedded elsewhere, even after *express denial* by the owner who sued for infringement. The court reasoned that the user *agreed* to Instagram's terms outlining a 'transferable' and 'sub-licensable'

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[126] TAN, *supra* note 91.
[127] §30, §18 and §19, Copyright Act.
[128] The Copyright (Amendment) Act, 2012, No. 27, Acts of Parliament, 2012; Parliamentary Standing Committee on Human Resource Development, Two Hundred Twenty-Seventh Report On The Copyright (Amendment) Bill, 2010, Observations, ¶22 (Nov. 23, 2010).
[129] Myspace Inc. v. Super Cassettes Industries Ltd. ¶62, 236 (2017) DLT 478 (India).
[130] M Siddalingappa v. T Nataraj, 1969 SCC OnLine Kar 94.
[131] Agi Music SdnBhd and Ors. v. Ilayaraja and Ors., AIR 2019 (T.N) 2435; Copyright Act, §19(8).
[132] Sinclair v. Mashable Ziff Davis, LLC and Mashable, Inc., 18-cv-790 (KMW) 64319 (S.D.N.Y. Apr. 13, 2020).

arrangement of IPRs, which covered and allowed such reproduction within the sub-license thus, dismissing the suit. *Sub-licensing* would therefore imply that SNS have the power to grant subsequent licenses of proprietary rights to any entity at their behest.[133]

On the contrary, Indian jurisprudence suggests that only the owners or their agent can license rights and a licensee (SNS) cannot be deemed to be an agent.[134] Moreover, only copyright societies are allowed to commence a business of issuing licenses, barring all other individuals/entities except the owner of copyright.[135] The licensees cannot have ownership rights as they are '*personal rights'* distinct from assignment.[136] The owner's consent is of prime importance in matters of licensing.[137] This analysis is substantiated further by §51(a) which postulates that the exercise of any exclusive right without a "*license granted by the* ***owner*** *of copyright*" embodies infringement.[138] The Indian Supreme Court, while differentiating between a 'licensee' and an 'assignee', held that no ownership can be transferred to the former as a license only constitutes a permission for use.[139] SNS, by voluntarily recognizing the ownership of users over their work, forgo the competence to grant any valid

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[133] Peter H. Kang and Jia Ann Yang, *Doctrine of Indivisibility Revived - Ninth Circuit Confirms Copyright Exclusive Licensee Has No Right to Transfer License Absent Owner's Consent: Gardner v. Nike, Inc.*, 18 SANTA CLARA HIGH TECH. L.J. 365 (2001).
[134] Shakti Sugars Limited v. Union of India and State Trading Corporation of India,1980 SCC OnLine Del 289.
[135] §33, Copyright Act.
[136] Deshmukh and Co. Ltd. v. Avinash Vishnu Khandekar, (2005) 3 Mah LJ 387; Photo Drama Motion Picture Co. v. Social Uplift Film Co., (1914) 213 Fed 374 (SONY).
[137] John Wiley and Sons Inc. v. Prabhat Chander Kumar Jain, (2010) 170 DLT 701 (Del).
[138] §51(a), Copyright Act.
[139] International Confederation of Societies of Authors and Composers (ICSAC) v. Aditya Pandey, (2017) 11 SCC 437.

licenses in the eyes of law.[140] Thus, sub-licensing in India is illegal for want of ownership and the vitiation of author's consent, as elucidated in the foregoing sections.[141]

d) Exploitation of Minors

SNS restrict users only below the age of 13 thus, subjecting all others, i.e. those above the age of 13 to the same terms.[142] This is evident from the fact that 3/4th of the total Europeans aged 13-16 using the internet have their own social media profile.[143]Even in India, till 2019, there existed almost 71 million internet users aged 5-11 and more than 433 million internet users above the age of 12.[144] As per the same report, social networking/chatting was the most frequented activity on the internet with every 9 out 10 individuals using the internet. Inadvertently, leading to the conclusion that a large portion of the user base of the SNSs are minors.

In India, the age of majority determining the competency of an individual to enter into contracts, is fixed at 18 years .[145] Thus, all persons below the age of 18 are barred from concluding any contracts.[146] However, the existing laws do

[140] CORINNE TAN, REGULATING CONTENT ON SOCIAL MEDIA: COPYRIGHT, TERMS OF SERVICE AND TECHNOLOGICAL FEATURES 98-137 (London: UCL Press 2018).
[141] §16, Copyright Act; M/s. Ambey Pershad Ram Nath v. M/s Devki Nandan and Sons, S.A.O. No. 481/1968 (Apr. 30, 1969).
[142] TAN, *supra* note 93.
[143] Sonia Livingstone et al., *Risks and safety on the internet: The perspective of European children*, LSE RESEARCH ONLINE, (June 15, 2020, 9:47).
[144] *Digital in India 2019 – Round 2 Report*, INTERNET AND MOBILE ASSOCIATION OF INDIA (May 5, 2020) https://cms.iamai.in/Content/ResearchPapers/2286f4d7-424f-4bde-be88-6415fe5021d5.pdf.
[145] §11, Indian Contract Act; §3, Indian Majority Act, No.9 of 1875, Acts of Parliament.
[146] §11, Indian Contract Act.

not imply any restrictions on the age of acquiring IPRs.[147] Thus, any minor's expression of original work, is by implication of the aforementioned provisions, shall be their intellectual property.

Since minors are not legally competent to conclude contracts, all TOS and allied licenses they enter into would be deemed void. Furthermore, there lies no safeguard through which a minor's expression of original work can be protected from violations on SNSs, especially copyright infringement, a right which vests with the author since the inception of their original work Owing to this contradiction, the continued use of the minors' work under the TOS would be a perpetual violation of their IPRs until attainment of majority, since till then their consent is invalid. Thus, the TOS which minors give their consent to stands to be unenforceable and the continued use of minors' original work leads to perpetual exploitation. Resultantly, the historical challenges to online contracts by minors are justifiable especially when SNS include paid applications, privacy requests, and varied indulgences beyond the competence of minors.[148]

e) Unconscionability

Even if an isolated clause may seem valid, a culmination of factors identified - including unequal bargaining power; discounting user consent; directly violating provisions of the Indian Copyright Act; and exploiting minor rights- would reflect on the oppressive, unfair and illegal nature of the TOS

[147] Lisa P. Lucose, *Minor's Rights under Intellectual Property Rights Laws: A Myth or Reality?*, 18 J OF INTELL. PROP. RTS. 174-180 (2012).
[148] I.B. ex rel. Fife v. Facebook, Inc., 905 F. Supp. 2d 989, 996 (N.D. CA. 2012).

establishing *unconscionability*.[149] Thus, as per the dictum in *Brojo Nath*[150], which was recently affirmed in the case of *SBI* v. *Radhey Shyam Pandey*[151], the TOS are unlawful, unfair, unreasonable and against principles of public policy to prevent exploitation. The TOS therefore, contradict public conscience, hence reflecting prospects of being struck down as unconstitutional and void.[152]

B. Licensed Commercial Exploitation

Assuming the validity of the TOS, the practical implications which flow from them reflect on the systematic exploitation and chaos in the IP realm, as deconstructed hereunder.

i. One-way street

The hypocrisy of SNS can be found on Instagram's TOS asserting,

"*If you use content covered by intellectual property rights that we have and make available in our Service (for example, images, (...) we retain all rights to our content (but not yours).*"[153]

Thus, clearly implying that the inequitable TOS imposed on users are exclusively for users and not themselves, exemplifying the exploitative nature of their terms. So, when users post pictures or videos on Instagram, the

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[149] M.A. Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 752 (1982).
[150] Central Inland Transport Corporation Limited v. Brojo Nath Ganguly, (1986) 3 SCC 156, ¶91.
[151] Assistant General Manager, State Bank of India v. Radhey Shyam Pandey, 2020 SCC OnLine SC 253.
[152] Life Insurance Corporation of India v. Consumer Education and Research Centre and ors., 1995 SCC (5) 482 ;§23 & §24, Indian Contract Act; Lilly White v. R. Munuswami, AIR 1966 Mad 13.
[153] *Terms of use,* INSTAGRAM, https://help.instagram.com/478745558852511 (last visited May 13 , 2021).

platform does not claim any ownership over such content but retains the rights akin to an owner's.[154] The IPR owned by Instagram can only be used by following the brand guidelines or with prior written permission[155], something which Instagram itself doesn't comply with during licensing. Furthermore, it creates a conflict for application developers who work in conjunction with Instagram.[156]

Facebook also follows this path of hypocrisy and has similar TOS restricting its users from creating or sharing Facebook's content.[157] Similarly, Snapchat lays down that without consent, one cannot "*use the Services, tools provided, or any content on the Services for commercial purposes.*"[158] Through the medium of these measures, SNS continue exerting their exploitative dominance with minimal consequences.

ii. Username Squatting Battles

Cybersquatting is defined as "the deliberate, bad faith, and abusive registration of Internet names in violation of the rights of trademark owners."[159] SNS are considered to be the preferred mode of communication tools used by brands to influence consumers and thus, use such platforms for marketing in the form of creating an account.[160] However, the practice of registering official,

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[154] *Id.*
[155] *Id.*
[156] Bosher and Yeşiloğlu, *supra* note 99.
[157] *Terms of Service*, FACEBOOK, https://www.facebook.com/terms.php (last visited May 13, 2021).
[158] *Snap Group Limited Terms of Service*, SNAP INC. https://www.snap.com/en-US/terms#terms-row (last visited June 15, 2020).
[159] H. Brian Holland, *Tempest in a Teapot or Tidal Wave -Cybersquatting Rights and Remedies Run Amok*, 10 J. TECH. L. AND POL'Y 301 (2005).
[160] Pin Luarna, Jen-Chieh Yang & Yu Ping Chiu, *The Network Effect on Information Dissemination on Social Network Sites*, 37 COMPUTERS IN HUM. BEHAV. 1-8 (2014).

trademarked brand names by people who are not its owners in the form of *'usernames'* seems to be a common practice on social media platforms. People register themselves under famous brand names causing confusion amongst the consumer base[161] as to whether such accounts are actually associated with the official brand or a famous personality.

Donald Trump had also fallen into this confusion trap and sent '*Ivanka Majic'*, a council worker from Brighton, a message meant for his daughter.[162] Username squatting deprives the actual trademark owner a potential market, leading to impairment[163] and dilution of the trademark.[164] Although SNS now verify the identity of users, this practice still poses a problem for brands, especially for small-scale brands that do not have the resources to fight trademark battles. Therefore, the onus is on the SNS to enforce adequate policies, which curb infringement of trademarks and protect brand integrity.

It is widely known that many brands have fallen victim to username infringement and cybersquatting on Twitter.[165]As a result, Twitter announced a Username Squatting Policy [**USP]**, explicitly discouraging username squatting.[166] Under its Trademark Policy, it recognises a violation when an

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[161] Thomas J. Curtin, *The Name Game: Cybersquatting and Trademark Infringement on Social Media Websites*, 19 J. L. AND POL'Y 355 (2010).
[162] Mark Molloy, *How 'username squatting' became a digital real estate nightmare for brands and celebrities*, TELEGRAPH (Mar. 30, 2018), https://www.telegraph.co.uk/technology/2018/03/30/username-squatting-became-digital-real-estate-nightmare-brands/.
[163] Clean Flicks, Inc. v. Daniel Dean Thompson, 2:08-cv-0086-PMW (D. Utah Feb. 1, 2008).
[164] Molloy, *supra* note 162.
[165] Willis Wee, *10 Brands Claimed by Twitter Cybersquatters,* PENNOLSON (Sept. 21, 2009), http://www.penn-olson.com/2009/09/21/10-brandsclaimed-by-twitter-cybersquatters/.
[166] *Username squatting policy*, TWITTER, https://help.twitter.com/en/rules-and-policies/twitter-username-squatting#:~:text=Username%20squatting%20is%20prohibited%20by,in%20cases%20of%20trademark%20infringement (last visited July 15, 2020).

account uses "protected materials in a manner that may mislead or confuse others with regard to its brand or business affiliation".[167] Twitter suspends those accounts which show a clear intention of violation, and in the cases where it is unintentional, Twitter asks the user to either review it or forfeit it to the trademark owner[168], like the case of JPMorgan Chase where they paid a five-figure to get the @chase handle.[169] There also lies a caveat in its USP, stating that "if an account has had no updates, no profile image, and there is no intent to mislead, it typically means there's no name-squatting or impersonation."[170] *Prima facie*, this exception seems fair; however, the flaw subsides within inactive accounts, acting as dead weight.[171] When an account is practically defunct, why should a trademarked brand be denied to get an official handle on Twitter? Apart from being absurd, this takes away an extremely lucrative opportunity from a brand that could have strengthened its consumer base through social media; instead, it goes to the living dead. Though Twitter recently issued a statement regarding a 'cleanup of

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[167] *Trademark policy*, TWITTER, https://help.twitter.com/en/rules-and-policies/twitter-trademark-policy (last visited July 15, 2020).

[168] Max Nisen¸ *The complete guide to getting the Twitter handle you want*, QUARTZ (Apr. 16, 2014), https://qz.com/197227/complete-guide-to-twitter-handles/.

[169] Garett Sloane, *Getting a handle on @Twitter branding*, N.Y. POST (Sept. 25, 2013), https://nypost.com/2013/09/25/getting-a-handle-on-twitter-branding/.

[170] *Username squatting policy*, TWITTER https://help.twitter.com/en/rules-and-policies/twitter-username-squatting#:~:text=Username%20squatting%20is%20prohibited%20by,in%20cases%20of%20trademark%20infringement (last visited July 15, 2020).

[171] Jeff Gibbard, *Something Stupid: Twitter's Username Squatting Policy*, JEFF GIBBARD (Feb. 4, 2016), https://jeffgibbard.com/something-fucking-stupid-twitters-username-squatting-policy/.

usernames' and deletion of inactive users[172], nothing seems to have materialized yet.

Even Instagram has a trademarks policy, but the TOS are construed in a way that only seems to make the prevention of trademark infringement more difficult. Instagram simply lays down that, "Instagram usernames are provided on a first-come, first-served basis, and may not be reserved."[173] Thus, if you, as a brand owner, famous or not, are not the first ones to register your official username, it is effectively gone. Furthermore, if the already registered username on Instagram "is used in a different context or if Instagram decides that the username will not cause brand confusion, the site may allow the existing user to keep infringing on your rights".[174] Not only this, Instagram wants to wash off any liability as, unlike Twitter, it does not provide an efficient internal redressal mechanism to prevent such infringement. Rather, it encourages trademark owners to settle a dispute with the third-party infringers.[175] The platform, while recognizing the problem, does nothing to improve the situation, but rather works on its whims and fancies. As an anecdote of autocracy, the username '@sussexroyal' got changed to '@_sussexroyal_' to let Duke and Duchess of Sussex launch their official Instagram account without any prior notification[176] or following a due process

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[172] Chris Welch, *Twitter will remove inactive accounts and free up usernames in December*, THE VERGE (Nov. 26, 2019), https://www.theverge.com/2019/11/26/20984328/twitter-removing-inactive-accounts-usernames-available-date.

[173] *What if an Instagram account is using my registered trademark as its username?*, INSTAGRAM, https://help.instagram.com/101826856646059 (last visited July 15, 2020).

[174] *Instagram Trademark Infringement*, INSTAGRAM, https://www.mandourlaw.com/instagram-trademark-infringement/(last visited July 15, 2020).

[175] *Id.*

[176] Katie O'Malley, *Instagram User 'Annoyed' After Meghan Markle and Prince Harry Take His Username*, INDEPENDENT (Apr. 4, 2019), https://www.independent.co.uk/life-style/meghan-markle-instagram-prince-harry-duchess-sussex-royal-account-a8854861.html.

mentioned in its guidelines. A new entrant, TikTok, which was the most downloaded non-gaming app worldwide by October, 2020 ,[177] is already witnessing impersonation of famous official brand accounts[178], exposing vulnerabilities towards trademark infringements on SNS.

Parallelly, this approach might be considered restricting freedom of speech and expression, however US Courts have held that this freedom "protects an individual's right to speak out against a mark-holder, but it does not permit an individual to suggest that the mark-holder is the one speaking."[179]

Thus, in comparison, Twitter stands to be at a better footing, for it addresses the problem and aims to handle it. Instagram on the other hand has left its users at the mercy of third-party negotiations. To make Instagram less exploitative, firstly, an internal mechanism needs to be formulated which will help in active prevention of username squatting and also, help its users in cases of infringement. Secondly, a uniform approach needs to be taken by Instagram, so that it's not partial to the wealthy and powerful. Instagram also needs to address the fact that many brand impersonators turn out to the ones to register the impersonating brands on its platforms first, which in all probability leads to unwarranted confusion amongst users, thus, *a first-come, first-served basis*

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[177] *TikTok continues to be the most downloaded app globally*, HT TECH(May 09, 2020), https://tech.hindustantimes.com/tech/news/tiktok-continues-to-be-the-most-downloaded-app-globally-71604940737134.html .

[178] Tim Lince, *Brand protection on TikTok: what rights holders need to know about the fast-growing social media platform*, WTR (May 20, 2019), https://www.worldtrademarkreview.com/anti-counterfeiting/brand-protection-tiktok-what-rights-holders-need-know-about-fast-growing.

[179] SMJ Group, Inc. v. 417 Lafayette Restaurant LLC, 439 F. Supp. 2d 281, 285-86, 291 (S.D.N.Y. 2006).

for username registration isn't the most prudent practice for such a well-known platform.

iii. Inefficacious internal redressal system

Due to the increased intensity of interactions between users and content circulation, it becomes imperative that SNS take responsibility and implement a mechanism that protects its users who actualize their goodwill. However, even after having numerous policies in place, SNS have failed at implementation. The foremost reason is attributed to a lack of transparency. Even after reporting an IP infringement, the process is completely withheld from the actual stakeholder(s).[180] Though Facebook states that on submission of an infringement claim it may result in [the removal of] the reported content from Facebook,[181] there are no parameters laid down to evaluate or verify such exercise. Analysis of Twitter's policy brings forth that Twitter will delete any content which violates the copyright of any person, without prior notice, at [its] sole discretion, and without liability.[182] But it provides a better resolution mechanism by stating that it will "notify the account holder and provide them a copy of the takedown notice and guide them to file a counter-notification."[183]While the policies are *bona fide*, the actual takedown of infringing content has been very erratic. For instance, a photographer sued

[180] Daniel Doft, Facebook, Twitter, and the Wild West of IP Enforcement on Social Media: Weighing the Merits of a Uniform Dispute Resolution Policy, 49 J. MARSHALL L. REV. 959 (2016).
[181] *Reporting Trademark Infringements*, FACEBOOK, https://www.facebook.com/help/440684869305015/ (last visited July 15, 2020).
[182] *Twitter Terms of Service*, TWITTER https://twitter.com/tos (last visited July 15, 2020).
[183] Doft, *supra* note 180.

Twitter for its inaction on the 28 DMCA takedown notices sent[184]; in another case, Twitter removed the infringing content only after a lawsuit was filed.[185]

Instagram has suffered the same fate. The content on Instagram primarily revolves around pictures, videos and their re-shares, usually without any attribution to the original creator. When one joins SNS - the premise of which is sharing - arguing against the same becomes quite banal. It is to be understood that sharing of copyrighted material online without the permission of its owner, is still infringement. For instance, a famous global company 'Marie Claire', reposted a picture without getting permission or attributing the actual photographer and when the photographer tried to call-out the company by commenting on the picture, Instagram's censorship stopped him from doing so, taking away the instant and effective recourse available to him.[186] Users with a large following tend to repost or misuse the work of a lesser-known user.[187] What is even more appalling is that the screenshots of Instagram pictures are also reaching galleries for sale without permission or any monetary compensation.[188] Thus, the lack of permission before the reproduction of a copyrighted work seems to be the bone of contention here.

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[184] Michael Zhang, *Photographer Sues Twitter for Not Removing Photos Despite DMCA Requests,* PETAPIXEL, (Jan. 16, 2016), https://petapixel.com/2016/01/16/photographer-sues-twitter-for-not-removing-photos-despite-dmca-requests/.

[185] John Brodkin, *Artist who sued Twitter over copyright declares victory— via settlement*, ARS TECHNICA (Nov. 3, 2012), http://arstechnica.com/tech-policy/2012/11/artist-who-sued-twitter-over-copyri ght-declares-victory-via-settlement/.

[186] James Jollay, *Copyright and Censorship on Instagram: How Marie Claire Stole My Photo*, PETAPIXEL (Apr. 21, 2017), https://petapixel.com/2017/04/21/copyright-censorship-instagram-marie-claire-stole-photo/.

[187] Maddie Wagnr, *Set Your Settings on Private? Copyright in Era of Social Media Usage*, 9 CYBARIS 1,17 (2018).

[188] Jeff John Roberts, *Art or Theft? Famous Artist Sells Instagram Shots for $100K*, FORTUNE (May 26, 2015), http://fortune.com/2015/05/26/instagram-copyright-art/.

To stop the same, no effective measure such as an anti-screenshotting measure or notification to the original creator/copyright holder is in place, making SNS more vulnerable than usual.

Though the internal redressal mechanisms of the aforementioned platforms fail at various instances, YouTube amongst all the SNS, seems to be the one with the most effective redressal mechanism in place, that can also act as an inspiration to other platforms. The mode of YouTube's effective functioning and the tool through which infringing material is taken down, has been discussed in Part IV of this paper.

iv. Reproduction, Embedding and Privacy Violations

The validity of the TOS, paves way for subsequent concerns arising out of user gullibility and protection of their rights online. Copyright law grants the author an exclusive right to communicate their work to the public.[189] Through the advent of SNS, online sharing technologies have witnessed a manifold increase in accessibility, leading to limitless dissemination of information and UGC, threatening the protection subsisting in such works.[190] Further, a general sentiment shared by the youth is that online copyright infringement does not violate moral or ethical considerations. Thus, such an exercise of sharing is instead facilitated as a culture rather than being curbed.[191]

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[189] Justin Koo,The Right of Communication to the Public in EU Copyright Law 53, 54 (Hart Publishing, 2019) ; §2(ff), §51(a)(ii), Copyright Act.
[190] Robert Levine, Free Ride: How the Internet is Destroying the Culture Business and How it Can Fight Back (Bodley Head, 2011); Ian Hargreaves, Digital Opportunity: A Review of Intellectual Property and Growth (London: Intellectual Property Office, 2011).
[191] David Bahanovich and Dennis Patrick Collopy, *Music Experience and Behaviour in Young People: Winter [2011 National Survey]*, INT'L ASSO. MUSIC BUS. RES. (2013).

It is a common practice for users to screen grab images from their feed and repost it, distorting the image without crediting the owner.[192] SNS on one hand restricts users from posting third party content without permission, but on the other, encourages users to share their own and others' content through sharing tools and 'linking', resulting in exploitation arising out of ambiguous contradictions.[193]

The confusion and lack of awareness is evident from the current trend in litigating online copyright disputes. Litigations range from the legal action against Khloe Kardashian for posting her own picture on Instagram which was owned by Xposure Photos, [194] to the Infringement claims against copying an image of Donald Trump posted by a user on Instagram by an online newspaper.[195] Further, the screen grab mechanism, facilitating locally storing stills, falls under the garb of reproducing the images, attracting claims of infringement.[196] This is owing to the fact that screenshots reproduce the entire image, implying a substantial copy of the work.[197] For any *lay observer*, the reproduced image would appear to be a highly similar, infringing copy of the original image.[198] The notorious implications of screen grabs were exhibited in the lawsuit against Richard Prince, who printed screenshots and sold them

[192] Eugenia Georgiades, *The Limitations of Copyright: Sharing Personal Images on Social Networks*, 40 Euro. Int'l Prop. R. 230-242 (2018).
[193] Jean G. Vidal Font, *Sharing Media on Social Networks: Infringement. By Linking?*, 3 U. P.R. Bus. L.J. 255 (2012).
[194] Xposure Photos (UK) Ltd., v. Khloe Kardashian, 2:17-cv-03088 (C. D. Cal. 2017).
[195] Otto v. Hearst Commc'ns, Inc., 345 F. Supp. 3d 412 (2018).
[196] Spelling Goldberg v. BPC Publishing, [1981] FSR 280.
[197] Escorts Construction Equipment Ltd. v. Action Construction Equipment Pvt. Ltd., AIR 1999 Del. 73; Ladbroke (Football) Ltd. v. William Hill (Football) Ltd. [1964] 1 All E.R. 465.
[198] Associated Electronic and Electrical Industries (Bangalore) Pvt. Ltd. v. Sharp Tools, AIR 1991 Kant 406.

under his name for profit.[199] Even otherwise, the 'storage' of protected works in the electronic form, as screenshot, would constitute reproduction and subsequent infringement.[200] Moreover, these mechanisms are not restricted to *public* profiles and extend to even *private* profiles, which do not subscribe to the TOS completely but face infringement and a compromised sense of privacy owing to stranger views on private information generated by the publication of the personal content.[201]

To add to this, SNS offers downloading of works available on their platform to developers and "business partners" for use.[202] Concerns of SNS trading data for *targeted marketing are* prevalent.[203] While users can choose to adjust their privacy settings to avoid such use, the options are rather obscurely placed and require an *active* effort to discover settings, which are neither directed, nor notified in SNS by default or even at the time of joining them.[204] A maneuvered abuse of this system culminated in a recent research by Cornell University, where the researchers could procure 100 million pictures from Instagram's Application Programming Interface [**API**], interlaced with

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[199] Graham v. Prince, 265 F. Supp. 3d 366 (S.D.N.Y. 2017).

[200] WIPO Copyright Treaty,Agreed statements concerning Art. 1(4), WIPO Doc.CRNRIDC/94 (Dec. 20, 1996).

[201] David Rosenblum, *What anyone can know: The privacy risks of social networking sites* 5(3) IEEE SECURITY AND PRIVACY 40–49 (May 2007).

202 Data Policy, INSTAGRAM, https://help.instagram.com/519522125107875?helpref=page_content (last visited Jul. 15, 2020).

[203] Stefanie Olsen, *At Rapleaf, your personals are public*, CNET (Aug. 31, 2007), https://www.cnet.com/news/at-rapleaf-your-personals-are-public/.

[204] Ralph Gross & Alessandro Acquisti, *Information revelation and privacy in online social networks*, WPES '05:PROCEEDINGS OF THE 2005 ACM WORKSHOP ON PRIVACY IN THE ELECTRONIC SOCIETY 71–80 (2005).

geolocative indicators and facial recognition abilities.[205] The pictures procured were not only downloaded and published, but also run through different automated software to enable facial recognition and analyze clothing attributes, at the cost of user privacy. The exploitation, failing to cease, emancipates into further threats where users have collectively experienced and confronted the (mis)use of their names and pictures to promote products and services on Facebook, under the garb of a "Sponsored Stories" program.[206] This practice especially was detrimental to minors who, in *E.K.D.* v. *Facebook,*[207] were incompetent to consent for commercialization of their identity. The only platform merciful to consider user interests and privacy is YouTube since it mandates an author's permission to be a prerequisite for downloading UGC.[208]

Lastly, SNS have enforced mechanisms that overshadow user content through the unique *embedding* process. The process was deliberated upon at length in the *Goldman*[209] case. It was elaborated that webpages are made up of HTML instructions that govern the arrangement of text and images retrieved by the browser from different *servers*. *Embedding* was defined as an intentional act of a coder to incorporate an image hosted on a third-party server onto a webpage. Most SNS provide codes to these coders and web designers to enable embedding of pictures on their webpages.[210] According to the Court,

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[205] Kevin Matze, Kavita Bala and Noah Snavely, *StreetStyle: Exploring world-wide clothing styles from millions of photos*, ARXIV (2017).
[206] Fraley v. Facebook Inc., 966 F. Supp. 2d 939, 940 (N.D. CA. 2013).
[207] E.K.D. ex rel. Dawes v. Facebook, Inc., 885 F. Supp. 2d 894, 897-98 (S.D. Ill. 2012).
[208] Hanna V Kolisnykova & Oksana V Lekhkar, Copyright Protection on YouTube and Instagram, 1 SCH. J. APPL. SCI. RES. 68-68 (2018).
[209] Goldman v. Breitbart News Network, LLC, 302 F. Supp. 3d 585 (S.D.N.Y. 2018).
[210] Goldman v. Breitbart News Network, LLC, 302 F. Supp. 3d 585 (S.D.N.Y. 2018); Platform Policy, INSTAGRAM,

this incorporated an active effort by the defendants, which constituted an infringement of display rights and digital rights information system, in the Court's wisdom, emphasizing that liability should not lapse solely on invisible and technical processes imperceptible to a viewer. A similar analysis was pursued in the *Haitian Photos case,*[211] where the New York District Court not only found that copying pictures from SNS amounted to infringement, but also declared that the TOS on Twitter (similar to other SNS) only extended to intra-twitter activity and did not permit exploitation by commercially licensing UGC beyond the platform's scope.

However, this position was contradicted by the same Court in the *Sinclair*[212] judgment, where the user's express refusal to use the UGC was overlooked over the TOS containing a provision for embedding. Nevertheless, even discounting the aspects of licensing or display, a user's moral right against modification would still subsist in embedding as the application of HTML codes alters not only the size and location but also the digital information encapsulated in the content embedded.[213] The CJEU in the *Fashion ID*[214] decision, unveiled that SNS and the *embedder*, through embedding, exercise decisive influence over collection and transmission of personal data oriented towards reaping commercial benefits. In addition to the callous TOS, the privacy and property of a user are vulnerable to abuse by the oblivious

https://help.instagram.com/325135857663734/?helpref=hc_fnav&bc[0]=Instagram%20Help&bc[1]=Privacy%20and%20Safety%20Center (last visited May 13, 2021).

[211] Agence France Presse v. Morel, 934 F. Supp. 2d 547 (S.D.N.Y. 2013).

[212] Sinclair v. Mashable Ziff Davis, LLC andMashable, Inc., LEXIS 64319 (S.D.N.Y. Apr. 13, 2020).

[213] X v. Twitter Inc., Chiteki-Zaisan Kōtō-Saiban-Sho [Japan Intell. Prop. H. Ct.] Apr. 25, 2018, 2016 (Ne)10101 (Japan).

[214] Fashion ID GmbH and Co.KG v. Verbraucherzentrale NRW eV, CJEU C-40/17 (2019).

activities of fellow users, not just on their preferred SNS but on the entire internet.

C. Intermediary Deception

Systematic exploitation of the nature elaborated upon clearly warrants action. But against whom? An objective determinism would direct action against the infringer, absolving the facilitator of all duties and responsibilities arising out of them. Overlooked liabilities under these blurred lines threaten an aggravated exploitation of user rights. With systems of sub-licensing and discounted user consent, there would be no (protection against) infringement but an oligarchic hegemony of digital intellectual property by SNS. By diluting the rights subsisting in user expression, the intricacies of the Digital realm contrast with the prerogatives of technological advancement. Thus, it is imperative to outline the liability and extent of responsibility the SNS owe to the users in relation to facilitating infringement.

In India, SNS are largely governed by the IT Act, which lays down guidelines, rules and liabilities for transmission of data digitally and the following consequences. The IT Act, amended in 2009, through §2(1)(w) recognized SNS as *intermediaries,* and are defined as:

"*any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that recorder provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes*"[215]

[215] §2(1)(w), IT Act.

Extending this recognition, the legislation under §79 bestows these *'intermediaries'* with an umbrella protection against any liability in cases of mere facilitation or hosting of Data and Information, provided that they remain in constant compliance with the guidelines issued by the government.[216] This garb of protection only extends to cases where the responsibility arises out of not making distinctions between legal and illegal content without actual knowledge of the same.[217] This umbrella is akin to the *'safe harbour'* provision, provided for in the Digital Millennium Copyright Act **[DMCA]** in the United States, which limits the liability of an intermediary in cases of any infringement by users, so long as the former performs transitory functions.[218]

A combined reading of the act, along with allied rules and the recently formulated Code of Ethics,[219] demonstrates the exceptions to intermediary liability in cases where they: only transmit the data or store it *temporarily*; neither *initiate* nor select the receiver for a transmission, nor select or *modify the information*[220]; observe *due diligence* while discharging duties[221] and; upon receiving knowledge of any unlawful activity remove access to such content.[222] Any act, contrary to the above guidelines, attracts liability for these intermediaries. The scope of this protective veil is further limited by §81 of the Act which aborts this protection against claims arising under the copyright

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[216] §79,IT Act.
[217] Mark A. Lemley, *Rationalizing Internet Safe Harbors* 6 J. TELECOMM. AND HIGH TECH. L. 101, 102-105 (2007).
[218] §79, IT Act; Online Copyright Infringement Liability Limitation Act, 17 U.S.C. § 512 (2006).
[219] Information Technology (Intermediary Guidelines) Rules, 2011, Gen.S.R. 314(E) (India) [Hereinafter, 'Guidelines']; Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, G.S.R. 139(E) (India) [Hereinafter, 'Code of Ethics'].
[220] §79(2)(b), IT Act.
[221] §79(2)(c), IT Act.
[222] §79(3)(b), IT Act.

law.[223] Further, the liability under copyright law is undeterred by §79 since the amendment to §81 of the IT Act carved an exemption towards copyrights, implying no blanket immunity.[224] A harmonious construction of §79 and §81 is therefore imperative to avoid curtailment of rights of copyright holders.[225]

Thus, the role of intermediaries becomes relevant in this analysis to determine their contributory liability in cases of infringement, if any.[226] Though the role and liability of intermediaries was discussed extensively by the Supreme Court in *Shreya Singhal v. Union of India*[227], it was in the case of *Myspace Inc. v. Super Cassettes Industries Ltd*[228] that the Delhi High Court precisely evaluated the position of intermediaries in the context of IPR violations. The essential test of *knowledge* or active awareness with respect to the infringing act was propounded to be the threshold for determining intermediary liability. Accordingly, providing a free platform for users to upload videos constitutes *'knowledge'* of infringing content, unless the process of verification is *automated*. This analysis was extended in the *Louboutin*[229] case where the court held that, due diligence required intermediaries to not host infringing content. Any form of *active contribution* by intermediaries would thus, consequently remove this *ring of protection.*[230] Moreover, in the case of *X v. Union of India*[231], the Delhi High Court imbibed upon the intermediaries an

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[223] §81, IT Act.
[224] Myspace Inc. v. Super Cassettes Industries Ltd., 236 (2017) DLT 478, at ¶47 .
[225] Vodafone India Limited v. M/S. R.K. Productions Pvt. Ltd and Ors., 2012 SCC OnLine Mad 4164.
[226] T. Kahandawaarachchi, *Liability of service providers for third party online copyright infringement: A study of US and Indian Laws*, 12 JOUR. INTELL. PROP. RTS. 556 (2007).
[227] Shreya Singhal v. Union of India, (2013) 12 S.C.C. 73
[228] Myspace Inc. v. Super Cassettes Industries Ltd., 236 (2017) DLT 478, at ¶32.
[229] Christian Louboutin SAS v. Nakul Bajaj and Ors.,(2018) 253 DLT 728.
[230] Christian Louboutin SAS v. Nakul Bajaj and Ors., (2018) 253 DLT 728, at ¶68.
[231] 2021 SCC OnLine Del 1788.

additional obligation to effectuate 'automatic takedown' in light of mass infringing content, and any defence of 'inability to remove infringing content' would further disqualify the intermediary from availing protection under §79 of the IT Act. Thus, the legal regime for take-downs is extremely comprehensive to prevent intermediaries from claiming lack of knowledge, even when Court proceedings have effectuated and resulted in orders of removal. However, the aforementioned cases only deal with situations of inter-user violations. It is therefore essential to understand the nature of legal incongruence established by intermediaries, as shall be discussed hereunder.

Permitting any place to be a medium in transmitting infringed publications to the public for profit, makes that entity liable for copyright infringement except in the absence of awareness regarding the nature of such publications.[232] Increased engagements online are determined by multiplying UGC which further attract marketers to invest in SNS through advertisements and shareholdings.[233] In some SNS, the data is stored even after deletion of account or expiry of the license, going beyond '*transient storage',* suggesting impermissible permanent storage of information.[234] The permanent storage and on-demand retrieval of UGC by intermediaries not only dissipates the protection granted to them but also culminates into primary infringement by the reproduction of work.[235] Further, by providing facilities of embedding and

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[232] §51, Copyright Act.

[233] Ioannis Antoniadis, Symeon Paltsoglou and Vasilis Patoulidis, *Post popularity and reactions in retail brand pages on Facebook*, 2 INT'L J. RETAIL AND DISTRIBUTION MGMT. (2019).

[234] Anaëlle Idjeri, *Unfair terms and personal data: Twitter sentenced by a French court*, SOULIER AVOCATS (Sep. 28, 2018), https://www.soulier-avocats.com/en/unfair-terms-and-personal-data-twitter-sentenced-by-a-french-court/.

[235] Jatindra Kumar Das, *Protection of right to reproduction in internet under copyright law*, 6 FORENSIC RES. & CRIMINOLOGY INT J. 352–359 (2018).

downloading, intermediaries circumvent and modify the Right Information System, attracting liability under §65A and §65B of the copyright law.[236]

Moreover, SNS promotes a culture of sharing content to attract more users, generating advertising revenue.[237] Instagram in its TOS declares that *anyone* can access, reshare or even download information using third-party services or APIs, provided by the platform.[238] Linkages between the market and UGC are recognized by platforms when they develop policies for monetization to users[239]and regulating harmful advertisements[240] in specific circumstances. This symbolizes the active role SNS play in regulation and dissemination of UGC, contrary to the principles of due diligence mandated under the intermediary guidelines[241]. This exercise of *manual human control* by intermediaries, dissolves the layer of protection due to and affixes possibilities of contributory liability for infringement.[242]

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[236] Diane M. Barker, *Defining the Contours of the Digital Millennium Copyright Act: The Growing Body of Case Law Surrounding the DMCA*, 20 BERKELEY TECH. L. J. 47-63 (2005).
[237] Bosher and Yeşiloğlu, *supra* note 99.
[238] Data Policy, INSTAGRAM, https://help.instagram.com/519522125107875?helpref=page_content (last visited July 15, 2020).
[239] Ashley Carman, *Instagram will share revenue with creators for the first time through ads in IGTV*, THE VERGE (May 27, 2020), https://www.theverge.com/2020/5/27/21271009/instagram-ads-igtv-live-badges-test-update-creators.
[240] Matt Southern,*Instagram Has New Rules for Publishing Branded Content*, SEJ (Dec. 18, 2019), https://www.searchenginejournal.com/instagram-has-new-rules-for-publishing-branded-content/340933/.
[241] Rule 3, Intermediary Guidelines.
[242] Yash Bagal, *Contributory Copyright Infringement in Music Industry: Technological Implications*, 24 J. INTELL. PROP. RTS. 28-34 (2019).

In the *Sinclair*[243] judgment, it was Instagram's API which provided users with the opportunity to *embed* a picture without verifying if permission for the same was granted. Further, not only was Instagram absolved, but the liability of the infringer was also discharged under the garb of a *sub-license* drawn by Instagram itself. This becomes relevant in the Indian context as the authors argue, even sub-licensing by SNS are illegal, opening up possibilities for a direct infringement by SNS through embedding and API.[244]

The reaping of *financial benefits* by intermediaries has been a determining factor in vicarious liability for infringement.[245] The test lies on a lower threshold where '*any'* financial link can be established with the infringing activity, regardless of the substantial nature of such benefit.[246] Application of this doctrine was also extended under CJEU jurisprudence in the *Sanoma*[247]case which held that posting of hyperlinks for profit raises a *presumption* that compulsory preceding verifications have been carried out, constituting *knowledge* of the nature of work used and a possible lack of consent ensued in it. Any exemption of liability of intermediaries is limited to the technical process of operations without obtaining any data based on any use of the information. Thus, any manual interference by intermediaries attracts liability.[248] Failure to act 'expeditiously' shall render the exemption ineffective, raising concerns over the liabilities of Instagram in the *Sinclair*

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[243] Sinclair v. Mashable Ziff Davis, LLC and Mashable, Inc., LEXIS 64319 (S.D.N.Y. Apr. 13, 2020).
[244] §51(a)(ii), Copyright Act.
[245] MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005).
[246] Ellison v. Robertson, 357 F.3d 1072 (9th Cir. 2004).
[247] HR September 2016, O. J. 2016, 402/7 m. nt. (Media BV/Sanoma Media Netherlands BV, Playboy Enterprises International Inc.)(Neth.).
[248] C-236/08, Google France SARL, Google Inc. v. Louis Vuitton Malletier SA and Ors. 2010 E.C.R. I-2417. (hereinafter, 'Google France').

judgment.[249] The CJEU, in a landmark judgment, established that by *embedding* a Facebook plugin, a decisive influence was exercised and hence purpose was jointly determined by both parties.[250] Recently, a District Court in India held YouTube to be liable for infringement when it earned advertisement revenue through an infringed video published on its platform.[251] This aspect of revenue management constituted an indicative factor of the platform's knowledge which fulfilled the criteria of permitting the use of the platform as a place for communication to the public, for profit.

In light of the continued discussion, the aspects of *Financial Enrichment, Knowledge, Material Contribution,* as well as *Supervisory Control,* are catalysts to affixing liability on intermediaries for infringement.[252] The guidelines, through rule 3(2)(d) and (e), direct intermediaries to not violate provisions of any laws and protect proprietary rights in intellectual property. However, the intermediaries with oppressive TOS and innovating medium for appropriation, threaten such ideals. All of these activities, ranging from providing options for downloading UGC, to facilitating non-consensual embedding, help SNS reap profits at the cost of user ignorance. In response to this, the courts have evolved safeguards to lift the veil and protect user interests. However, further systematic changes in the form of lucid legislations clarifying Intermediary liability, internal redressal mechanisms, and redefined responsibility relationships, are exigent to preserve the digital realm.

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[249] L'Oreal SA and Ors. v. eBay International AG and Ors., [2008] EWHC B13 (Ch).
[250] Fashion ID GmbH and Co.KG v. Verbraucherzentrale NRW,CJEU C-236/08 (Mar. 23, 2010).
[251] M/s Shree Krishna International v. Google India Pvt. Ltd., CS/1358/2014 (Sep. 27, 2020).
[252] A and M Records, Inc. v. Napster, 239 F.3d 1004, (9th Cir. 2001).

IV. Solutions

A. Digital Legal Overhaul

The generality of the problem exists at a wider spectrum than what handful of solutions could address.[253] The authors, therefore, take this opportunity to suggest certain systemic changes, which, if not solved, might aid in achieving a synthesis.

i. Uniform intermediary law

Inter-sharing among platforms is a common practice which is often a source of publicity and also infringement.[254] The current law on intermediaries restricts itself to violations digitally, but a descriptive effort must be made to clarify and recognise concepts like *embedding, squatting,* etc., and affix liability on specifically defined parameters. While existing legislations like DMCA[255]and ECD[256] could be relied on at a nascent stage, an overhaul of the legal framework is required to meet the needs of evolutionary technology and IPR exploitation.[257]

It may be argued that the recently constructed 'Code of Ethics' for intermediaries might address the concerns raised in this paper. The Code mandates intermediaries to clearly prevent users from using any information they don't either have a right over or which infringes another person's

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[253] EJAN MACKAAY, THE ELECTRONIC SUPERHIGHWAY: THE SHAPE OF TECHNOLOGY AND LAW TO COME (Kluwer Law International, 1995).
[254] Edward Lee, *Developing Copyright Practices for User-Generated Content* 13 J. INT. L. 1, 19 (2009).
[255] The Digital Millennium Copyright Act, H.R. 2281, 105th Cong. §6 (1997).
[256] Directive on Electronic Commerce 2000/31, O. J.(L 178) (EC).
[257] Das, *supra* note 235.

copyright.[258] It is also incumbent upon such intermediaries to periodically inform users of their privacy policy/TOS[259] and establish grievance redressal mechanisms.[260] Further, a designated 'significant social media intermediary' has a specialised obligation to,

"(...) make information clearly identifiable to its users as being advertised, marketed, sponsored, owned, or exclusively controlled (...)" in cases where the intermediary provides any transmission or service for financial benefit or to which it owns a copyright, or has an exclusive license.[261]

Despite these developments, the rules fail to establish guidelines which govern the formation and bargaining power in the TOS. The Code also omits in addressing the issues of the nuanced licensing agreements, and the consequences of infringing a user's content (especially by the intermediary). Without touching upon technical aspects of embedding, digital rights management systems, username squatting, watermarks, etc.; the rules are reduced to be generic tools to establish normative control, which are prioritised towards regulating issues of national security, obscenity, and other social acts[262], as opposed to user content infringement. By mandating individual redressal mechanisms for each intermediary, the issues of cross-infringement across platforms is also further diluted, for want of effective unbiased adjudication. While the Code of ethics is far from establishing a

[258] Rule 3(1)(b), Code of Ethics.
[259] Rule 3(1)(f), Code of Ethics.
[260] Rule 3(2), Code of Ethics.
[261] Rule 4(3), Code of Ethics.
[262] Raghav Tankha, *The Information Technology Rules 2021: An assault on Privacy as we know it*, Bar & Bench (Mar. 09, 2021), https://www.barandbench.com/columns/the-information-technology-rules-2021-an-assault-on-privacy-as-we-know-it.

uniform intermediary law, certain ideas suggested - including 'tracing of first originator' of communication[263], and prospectively issuing identifiable information with respect to copyright subsisting in UGC through non-exclusive licenses - may be developed upon further to prevent exploitation.

Regulation for exchange of inter-platform data is impending, considering user account overlaps and concerns arising henceforth. Inspiration is drawn from the EU's directive on establishing a digital market where liability of infringement is shifted on Service Providers, providing for rules on the transmission of user content.[264]An authority, specializing in IPR and Digital know-how, needs to be established to address this conundrum. This authority shall be instrumental in *implementing* the Digital Rights Management systems enshrined in the copyright legislation.[265] The authority shall also initiate dialogue and spread awareness on digital piracy as a further layer of protection from exploitation. Guidelines may also be laid to govern grants, qualifications and scrutiny of *works* on the Internet in a precise and defined manner. The establishment of this authority with policing powers was also endorsed by the Parliamentary Committee while scrutinizing the Copyright Bill.[266] Amendments to the law must also include a clear outline of the rights and liabilities of intermediaries in the online sphere, including uniform rules to regulate transmission across platforms. The implementation of this mechanism could be in the form of a Uniform Social Media Intellectual

[263] Rule 5(2), Code of Ethics.
[264] Council Directive (EU), 2019/790, 2019 O. J. (L. 130/92) .
[265] §65B, Copyright Act.
[266] Parliamentary Standing Committee on Human Resource Development, Two Hundred Twenty-Seventh Report On The Copyright (Amendment) Bill, 2010, Observations, ¶22 (Nov. 23, 2010).

Property Policy (**USRP**), administered by the authority established above.[267] This shall not only resolve contractual disputes but also govern the course of transmission online, homogeneously.

ii. A Fair License

As demonstrated in the preliminary sections of Chapter-III, the TOS are unconscionable, inequitable, and contrary to public interest. State intervention is therefore imperative to recognize aspects of contract law and their interaction in the IPR realm. The legislative incorporations for Standard Form Contracts and Unfair terms in the UK[268], EU[269], and the US[270], may act as an impetus towards the recognition of such phenomenon, the uncertainty surrounding adhesion and remedies by administration. For instance, Section 11 of the Unfair Contract Terms Act 1977 (UK) statutorily requires contracts to be 'reasonable' and 'fair' for parties, in compliance with the pillars of rule of law. Similarly, Regulation 3 of the European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995; recognises 'significant imbalance in rights and obligations under the contract' as an unfair term, and Regulation 5 further, provides for interpreting such non-individually negotiated advanced contracts in a manner which favours the consumer, in cases of doubt.

Tweaks to the Indian consumer law, in order to include online services (without monetary consideration) under its ambit of operation, will assist users

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[267] Daniel Doft, *Facebook, Twitter, and the Wild West of IP Enforcement on Social Media: Weighing the Merits of a Uniform Dispute Resolution Policy*, 49 J. MARSHALL L. REV. 959 1102-1103 (2016).
[268] Unfair Contract Terms Act 1977, c. 50 (Eng.).
[269] The European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995, SI 1995/27 (Eng.).
[270] Charles Bunn, *Freedom of Contract Under the Uniform Commercial Code*, 2 B.C.L. REV. 59 (1960).

in availing established consumer mechanisms for speedy and independent redressal.[271] Further, clarity on the recognition of 'unfair' terms and remedies thereof, shall provide more certainty to realisation of rights and establish balanced contracts with equitable bargaining power to prevent exploitation. Reliance on the 199th Law Commission Report (in the background of the 103rd Report on Unfair Terms) may be placed to formulate legislative incorporations, - for instance, the recommended 'Unfair (Procedural and Substantive) Terms of Contracts Act, 2006'- which shall aim to achieve a balanced statutory resolution against exploitative practices.[272]

The payment of royalties has to be mandated considering legal and creative affairs.[273] The authors have no intention to restrict or suggest mechanisms to regulate the basis of such royalty. The authors contend that royalty must be paid on an equitable basis, even if it is minimal, since every user contributes to SNS' revenue.[274] Further, Sub-Licensing, if allowed, should be governed on legal limitations to avoid dilution of UGC. Finally, guidelines for usage by Minors and their IPRs should be elucidated to confer protection and fill the lacuna between Law and Practice.

B. User Empowerment

What started as a simple activity of sharing thoughts, pictures, and videos with other people online has now become a lucrative business model where on one

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[271] The Consumer Protection Act, No. 35 of 2019, Acts of Parliament, 2019 (India).
[272] *See*, Law Commission of India, Report on Unfair (Procedural and Substantive) Terms in Contract, Report No.199, 228-240 (August, 2006).
[273] Peter Drahos, *Developing Countries and International Intellectual Property Standard-Setting*, 5 J. WORLD INTELL. PROP. 765-89 (2002).
[274] Tina P. Singh & Dr. Ratna Sinha, *The Impact of Social Media on Business Growth and Performance in India*, 4 INT'L J. RES. MGMT. AND BUS. STUD. 36, 37 (2017).

side, platforms like Instagram generate revenue of $20 Billion in advertising (2019)[275], while the contributing users are inadequately compensated. It was only in 2020 that Instagram made an *effort* to pay its users or rather, just the digital creators.[276] Thus, it becomes imperative that users are provided effective measures to protect their incorporeal rights on these platforms voluntarily. The founding principles of copyright law are enshrined in encouraging the spread of information and incentivizing intellectual innovation.[277] Therefore, user empowerment is imperative to ensure a growing trajectory for the digital IPR regime.

i. Changes in the internal redressal system

The primary stakeholders in SNS are the intellectual property owners since they are most affected. The ideal solution would be a system which is effective and inexpensive in taking down the infringing material. SNS do not provide a comprehensive and transparent mechanism. The best possible model that is able to curb IP infringements today is YouTube's '*Content ID' system*. Though it's not flawless, it's the most reliable system available.

Content ID scans videos uploaded on YouTube "against a database of files that have been submitted to us by content owners."[278] If someone's video is

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[275] Ellen Simon, *How Instagram Makes Money*, INVESTOPEDIA (Feb. 2, 2021), https://www.investopedia.com/articles/personal-finance/030915/how-instagram-makes-money.asp.

[276] Taylor Lorenz, *Instagram Wants Its Influencers to Make More Money*, THE NEW YORK TIMES (May 27, 2020), https://www.nytimes.com/2020/05/27/style/instagram-influencer-monetization-live-igtv.html.

[277] Neil Weinstock Netanel, *Copyright and Democratic Civil Society*, 106 YALE L.J., 283 (1996).

[278] *How Content ID works*, YOUTUBE, https://support.google.com/youtube/answer/2797370?hl=en# (last visit July 15, 2020).

flagged by a copyright violation, the claimant has the option to either ask for a removal of the video, get it muted, monetise it, or leave the uploaded video.[279] To cope with unnecessary claims by copyright holders, YouTube altered its policy in 2019 wherein they "will forbid copyright owners from using our tool to monetize creator videos with very short or unintentional uses of music."[280] Another feature that YouTube has launched is the Copyright Match Tool which "finds full reuploads of your original videos on other YouTube channels. Once a match has been identified, users can review it in YouTube Studio and choose which action to take."[281] YouTube prohibits this tool's misuse and, in case of wrongful use, can terminate YouTube partnership and access.[282] Content ID is not available to every copyright holder, but "is only granted to companies that 'own exclusive rights to a substantial body of original material that is frequently uploaded to the YouTube user community'."[283] Though this poses a major challenge, it can be reformed by including more copyright holders. Contemporaneously, other SNS should take precedence from YouTube and fight IP infringement.

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[279] *What is a Content ID claim?*, YOUTUBE, https://support.google.com/youtube/answer/6013276?hl=en (last visit Jul. 15, 2020).

[280] Andrew Hutchinson, *YouTube Updates Content ID Claim Policies to Better Protect Creators*, SOCIAL MEDIA TODAY (Aug. 16, 2019), https://www.socialmediatoday.com/news/youtube-updates-content-id-claim-policies-to-better-protect-creators/561048/.

[281] *Copyright Match Tool*, YOUTUBE, https://support.google.com/youtube/answer/7648743?hl=en (last visit July 15, 2020).

[282] *Copyright Match Tool*, INSTAGRAM, https://support.google.com/youtube/answer/7648743?hl=en (last visit May 11, 2021)

[283] Chris Cooke, *US Congress asks why YouTube Content ID is not more widely available to copyright owners*, COMPLETE MUSIC UPDATE (Sept. 9, 2019), https://completemusicupdate.com/article/us-congress-asks-why-youtube-content-id-is-not-more-widely-available-to-copyright-owners/.

A hypothetical framework would be wherein, an automatic request is sent to the copyright holder asking for permission to share or repost their content, giving the user the option to deny or accept the request, while knowing who is reproducing their content. This proposition seems restrictive in a world where we communicate by sharing pictures. Another strategy would be the hash tagging of pictures, similar to Mac's campaign where the pictures shared on Instagram with a hashtag #macyslove were directly stored on Macy's photo gallery, which helped understand that consent had been given to the company.[284] There needs to be a concerted effort by social media platforms in the form of "improved copyright strategy that involves educational content, a notice and takedown service, amendments to their terms of service"[285] to curb IPR infringements. Further, the controversy regarding embedding could be resolved by giving users the power to choose if they want to allow embedding for certain content or not. A similar policy is adopted by YouTube, which allows users to set permissions for embedding content which is owned (licensed) or even claimed (UGC) by the user.[286]

To balance the interests of commercial consideration and privacy concerns, the authors suggest a differential mechanism be established to secure online presence. The SNS could enforce a *subscription* model, where users can choose to pay a fee and opt-out of TOS or data storage protocols. This provides users more power and control to regulate inter-personal affairs online. The

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[284] Debbie Miller, *Instagram Etiquette for Businesses: The Art of Reposting*, AGORAPULSE (Mar. 24, 2020), https://www.agorapulse.com/blog/instagram-etiquette-ugc.
[285] Bosher and Yeşiloğlu, *supra* note 99.
[286] *Restrict embedding*, YOUTUBE, https://support.google.com/youtube/answer/6301625?hl=en (last visited July 15, 2020).

model suggested is non-exhaustive and left to individual SNS as per their discretion and requirements.

ii. Anti-Screen grab mechanism

Screen grab, commonly known as the screenshot, is "an image that you create by capturing and copying part or all of a display at a particular moment."[287] Screenshots raise copyright infringement alarms and several privacy concerns. When a screenshot of copyrighted material is taken, the creator has no cognizance, except when on Snapchat. This is a feature that every SNS should adopt. A UK Minister stated, "Under UK copyright law, it would be unlawful for a Snapchat user to copy an image and make it available to the public without the consent of the image owner."[288] In the US, a man was sued by CBS Broadcasting for sharing screenshots of an episode of *Gunsmoke* which was aired by the plaintiff.[289] Anti-Screen shot methods have been incorporated by platforms like Netflix, which involve visualization technologies inculcated in a secure operating system (app) to control electronic operations.[290] Screen Grabbing should be restricted by providing the user the decision to enable such a feature or not. Alternatively, a mechanism similar to Snapchat's

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[287] COLLINS COBUILD ADVANCED AMERICAN ENGLISH DICTIONARY (Harper Collins, 2nd ed. 2016).

[288] Bosher and Yeşiloğlu, *supra* note 101 ; E. Vaizey, Department for Culture, Media and Sport. Social Networking: Photographs (Oct. 19, 2015) https://questions-statements.parliament.uk/written-questions/detail/2015-10-19/12484.

[289] Aatif Sulleyman, *Posting Screenshots From Old Tv Shows Could Land You In Court, As Man Is Sued For Sharing Images From 59-Year-Old Gunsmoke Episode*, INDEPENDENT (Oct. 31, 2017), https://www.independent.co.uk/life-style/gadgets-and-tech/news/cbs-broadcasting-piracy-rules-copyright-infringement-gunsmoke-dooley-surrenders-episode-jon-tannen-a8029971.html

[290] *A security architecture for preventing data breaches*, in International Conference on Parallel, Distributed and Network-Based Processing, https://www.researchgate.net/publication/224226373_TrustBox_A_Security_Architecture_for_Preventing_Data_Breaches (last visited May 11 2021).

notification system is also viable. A copyright holder should be given the opportunity to notify a copyright infringement to the person who has taken the screenshot. This would also discourage notorious artists like Richard Prince from monetizing other people's content.[291]

iii. Technological Protection Measures

Under §65A and 65B of the Copyright Law, intermediaries are empowered to enact Technological Protection Measures [**TPMs**] to prevent violation of or modifications to the Right Management Information and protection of works from digital copying and downloading.[292] The Right Management Information [**RMI**] includes the title for identifying the work, the name of the author, the terms and conditions regarding use and any code representing the information.[293] TPMs are processes which prevent access to protected works in the digital form and usually involve access and copy control measures.[294] The adoption of these measures is in compliance with the provisions of the Berne Convention and WCT.[295] However, the legislation, by restricting the scope of application to criminal activity alone, makes it ineffectual.[296] Thus, civil remedies against circumvention are imperative to implement these provisions.

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[291] Hannah Jane Parkinson, *Instagram, an artist and the $100,000 selfies – appropriation in the digital age*, THE GUARDIAN (July 18, 2015), https://www.theguardian.com/technology/2015/jul/18/instagram-artist-richard-prince-selfies.
[292] §65A, §65B, Copyright Act.
[293] §2(xa), Copyright Act.
[294] Arathi Ashok, *Technological Protection Measures and the Indian Copyright (Amendment) Act, 2012: A Comment*, 17 J. INTELL. PROP. RTS.521-531 (2012).
295 Zakir Thomas, *Overview of Changes to the Indian Copyright Law*, 17 J. OF INTELL. PROP. RTS. 324-334 (2012).
[296] Megha Nagpal, *Copyright protection through Digital Rights Management in India: A non-essential imposition*, 22 J. INTELL. PROP. RTS. 224-237 (2012).

The preceding sections delve in detail on how the actions of intermediaries circumvent and modify the RMS on a daily basis. This information is stored in the form of *metadata*, which is documented, stored and interpreted in formats unique to the intermediaries, leading to unstandardised and haphazard regulation of the same.[297] A prospective solution could be driven by block chain technology, which stores data on a decentralized server in a uniform format across the internet.[298] Thus, in addition to establishing data protection and registration methods, the authors recommend that intermediaries across the internet should collaborate in pioneering a uniform database which stores metadata worldwide and assists in ascertaining deviations from the same to affix liability.

V. Conclusion

At this juncture, it's pertinent to quote Justice Manmohan, J., "there is no logical reason why a crime in the physical world is not a crime in the digital world especially when the Copyright Act does not make any such distinction."[299] Using this study as a medium, the authors construct a hypothesis asserting the existence of a Digital IP Realm in its nascent stages. The authors have duly evaluated comprehensive literature to pave the way for capacity and capability measures to address the concerns of a world where the distinctive factors between the '*Material*' and '*Digital*' world are thinning with each passing day. Though SNS provides innovative platforms to users to

[297] Yash Bagal, *Contributory Copyright Infringement in Music Industry: Technological Implications*, 24 J. INTELL. PROP. RTS 28-34 (2019).
[298] AARON WRIGHT &PRIMAVERA DE FILIPPI, BLOCKCHAIN AND THE LAW: THE RULE OF CODE 117 (Harvard University Press, 2018).
[299] UTV Software Communication Ltd. and Ors. v. 1337X to and Ors., 2019 SCC OnLine Del 8002.

express themselves, the nature of these platforms is exploitative on numerous grounds, as has been enumerated above. As a summary analysis, the authors conclude:

A. Intellectual Property, regardless of the form or medium, subsists in the intellectual creation of its authors and the SNS are widening the dichotomy between the principles of IP realm and social media by misleading its users.

B. There is general nescience with respect to the existence of this IP in the digital realm and the rights ensuing with it. A concerted effort is needed on part of these platforms to introduce education tools to disseminate pertinent knowledge about IP conflicts to its users.

C. The SNS operate a cartel built on UGC and advertisements, albeit subject to judicial scrutiny; they carry out consistent and systematic exploitation of its users and evade huge amounts of responsibilities.

D. Finally, an overhaul of laws and inter-platform rules is required to balance competing interests in the ideals of IPR and its perception at a digital pedestal.

This research paper has conceptualised the conflict arising between IP laws and social media behaviour. The area of research is in its nascent stage and the outcome of various cases is awaited, which would act as a guiding light for this emerging area. Furthermore, though this paper concerns particularly the jurisdiction of India, the legal principle elucidated and the cases cited are applicable globally.

The Conundrum of Economy and International Taxation in the Digital Era: Elucidation of the Business Model of Uber

Amisha Raghuvanshi* & Vidushi Keshan**

Abstract

This article provides an illustration of the various inconsistencies that have occurred in recent times due to the materialization of technology in almost all spheres of life. With the advancement of technology, especially in international business transactions, the pre-existing problem of non-uniformity in international taxation has been exacerbated. In this context, we seek to discuss the traditional methods of taxation of business models by tax jurisdictions before the expansion of technology, and how States have been adversely affected due to tax avoidance by multinational companies after technological developments in B2B transactions. The article further posits upon the unilateral measures taken by States to curb tax avoidance by companies that render services remotely and gain profits internationally, as a coherent and coordinated global response to tackle the challenge of taxing the digital economy has been lacking. The article lays focus on one such multinational corporation that has been operating in the global digital market, namely, Uber and the strategies it has adopted for reducing its tax liability particularly in jurisdictions levying higher taxes. In addition to the aforementioned, a few suggestions for States to collectively take effective measures against elements which enable digital companies to evade tax liability are also put forth by the authors.

I. Introduction

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From reading e-books on Kindle; downloading music on Spotify; streaming movies, documentaries, and TV-series on Netflix; booking a cab for travel on Uber; to placing orders for apparels, groceries, and the like on Amazon, technology has changed the way things function in our everyday lives. The digital economy is increasingly asserting predominance in the world, and has begun to profoundly influence consumer choices. This is chiefly due to recent advancements in the digital market, which has made it far more convenient than it used to be for consumers and service providers to connect in a fraction of a second.

In the digital economy, there exist two main categories of business structure, which are, aggregators, and electronic commerce entities.[1] These are the most commonly used approaches by multinational companies to avoid taxation. It is pertinent to note that at a time when states were already struggling to form a grip over a structure pertaining to cross-border business transactions, another hindrance came their way in the form of digitization of the international economy. Such digitization, along with a restructuring of the supply chains of businesses also posed a significant challenge to taxation as they defied the traditional methods of taxation itself.[2]

[1] Thomas Fetzer & Bianka Dinger, *The Digital Platform Economy and Its Challenges to Taxation,* 12 TSINGHUA CHINA L. REV. 29, 42 (2019).
[2] Ann-Marie Schrie Pinkney, *Taxation of the Digital Economy: The Challenges of Distinguishing Business Income from Royalty*, 10 QMLJ 157, 159 (2019).

This article seeks to critically introspect the various obstacles that States have been facing in taxing the digital economy, particularly due to the lack of a uniform approach globally. Further, the article will also delve into certain unilateral measures implemented by States to tax economic transactions occurring in the digital economy. Moreover, the article also seeks to enhance the understanding of tax avoidance in the digital economy by focusing on the business model of one of the global business giants operating in the digital economy: Uber Technologies, Inc. The mere presence of Uber in most of the countries has resulted in the company gaining massive profits from foreign markets. The scope of this article also includes how such an aspect of the said company has had an effect on the taxability of its profits, in the light of existing tax regulations across jurisdictions. Finally, the article concludes by putting forth some suggestions that States may use in their strategies to effectively tax and regulate businesses in the digital economy.

II. The Interplay Of Digital Platforms And Taxation: The Need For A Robust Mechanism

A. General

If the Twentieth Century was the predominant era of 'Liberalization, Privatization and Globalization' in terms of economic policy and commerce, the Twenty-First Century has been characterised by the widespread application of technology in all its spheres, including business. In the contemporary world, globalization is enhanced by digitization, making all human wants and needs just a click away. However, this convenience comes with its fair share of problems in the legal arena, one of the most significant problems being how companies doing business digitally can be taxed.

With the proliferation of activities in the digital economy, there has been an easy flow of Big Data from one territory to the other, often without much regulation. The business models of the most profitable internet companies like Google, Amazon, and Facebook are based on generating, gathering, and capitalizing Big Data.[3] Big data refers to a broad and diverse set of unstructured and structured data which is created when organizations convert their data from analog to digital. It is the new basis on which organizations must build their business strategies in order to survive and move forward in an increasingly quantified world.[4] For instance, E-Commerce and cloud computing giant Amazon, Inc. has access to massive amounts of data with almost 300 million active customers. This data includes names, addresses, payments, buying patterns, and search history, all stored in one of their internal databases, and used to improve their customer relationships and provide the right products to their customer, by means of customised, targeted advertisements.[5] Therefore, Data is the driving force of the digital economy,[6] although it does have certain shortcomings such as security issues, issues in data localization, privacy concerns, and consumer rights.[7]

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[3] *Top 13 Best Big Data Companies Of 2021*, SOFTWARE TESTING HELP (May 4, 2021), https://www.softwaretestinghelp.com/big-data-companies/.

[4] C S Pavan Kumar & Dhinesh Babu L D, *Review on Big Data and Its Impact on Business Intelligence*, INFORMATION SYSTEMS DESIGN AND INTELLIGENT APPLICATIONS 93-109 (Springer, 2018).

[5] Caleb Danziger, *How Amazon Used Big Data to Rule E-Commerce*, INSIDE BIG DATA, (Nov. 30, 2019), https://insidebigdata.com/2019/11/30/how-amazon-used-big-data-to-rule-e-commerce/.

[6] Dennis D Hirsch, *The Glass House Effect: Big Data, the New Oil, and the Power of Analogy* 66 ME. L. REV. 373, 390 (2014).

[7] Bruce Schneier, *Risks of Data Reuse*, SCHNEIER ON SECURITY (Jun. 28, 2007), https://www.schneier.com/blog/archives/2007/06/risks_of_data_r.html.

The digital economy is not restricted to online websites anymore. Its canopy spreads over to the availability of digitized products like proprietary software, various online services, cloud storage services, internet advertisements, and on-demand media streaming services. It even extends to facilitating transactions as an intermediary similar to the activities undertaken by Uber and Airbnb.[8]

The difficulty that arises here is that multinational corporations in general have enormous profits round the year despite not having a significant presence in the country where their incomes are sourced from. The question at this juncture is, how are taxes to be imposed on multinational companies having a mere digital presence in a State's territory?[9] In actual practice, the profits so generated are not generally taxable as such businesses find loopholes in existing tax regimes in their interests. This is largely a result of outdated and redundant tax regimes as well as the non-existence of any uniform international taxation system which specifically seeks to regulate taxing the digital economy.[10] Due to the lack of an international consensus, several jurisdictions like India and France have enacted their version of a digital services tax. Moreover, the Organisation for Economic Co-operation and

[8] European Commission, Proposal for a Council Directive Laying Down Rules Relating to the Corporate Taxation of a Significant Digital Presence, COM (2018) 147 final (Mar. 21, 2018), Art. 3 (5), at 14-15.
[9] Pinkney, *supra* note 2, at 158.
[10] Eli Hadzhieva, *Tax Challenges in the Digital Economy*, DIRECTORATE GENERAL FOR INTERNAL POLICIES, POLICY DEPARTMENT: A ECONOMIC AND SCIENTIFIC POLICY (Jun., 2016), https://www.europarl.europa.eu/RegData/etudes/STUD/2016/579002/IPOL_STU(2016)579002_EN.pdf.

Development (OECD) has since long been trying to forge international consensus among countries on taxing players in the digital economy, even though they may have only a virtual presence in countries. This will be discussed in the subsequent chapters.

B. Delineating the Facets of Calibrating International Taxation

Any business that involves two or more countries, or entails a cross-border transaction is said to be involved in an international business transaction.[11] With international borders increasingly becoming porous, it has become easier for individuals and businesses in one state to import and export goods and services from other states.[12] The profits accrued by businesses involved in foreign trade are always subjected to international taxation, where tax liability is often determined by domestic laws of different countries, or on the basis of international aspects of countries' domestic tax laws. The following are the two prime considerations for assessing taxes that international companies are required to pay:

i. Characterization of Income

The most important criterion for the assessment of international taxation has been its determination either as business income or as royalty, both being the most common denominations.[13] Such characterization is significant keeping in mind that tax rates applicable to a non-resident on its business income is

[11] RONALD A. BRAND, INTERNATIONAL BUSINESS TRANSACTIONS FUNDAMENTALS (Wolters Kluwer, 2nd ed. 2019).
[12] *Id.*
[13] Pinkney, *supra* note 2, at 159.

higher than those on royalty incomes. For example, a non-resident having a Permanent Establishment ('PE') in India is taxed at the rate of 40% under Section 9 of the Indian Income Tax Act, 1961.[14] On the other hand, income in the nature of royalty is taxable in the hands of a non-resident at a lower rate of 10% or 15% (as per the rate prescribed under the relevant Double Taxation Avoidance Agreement between India and the resident jurisdiction).[15] Moreover, taxability of royalty income in the hands of a Non-resident is not dependent on whether or not such non-resident has any PE in India.[16] Thus, the rate of taxes against an income would always be proportional to its characterization as a certain form.

ii. Significance of Permanent Establishment

International taxation is founded on the principle of source taxation, whereby multinational corporations are subjected to taxation in the country from where their incomes are generated, referred to as the 'source country.'[17] In other words, the key nexus for levying taxes is value creation, that is, countries where companies make profits are the ones that have the competence of taxing them.[18] Therefore, this principle is based on the criterion of the physical

[14] Income Tax Act, 1961, § 9(1)(i), No. 43, Acts of Parliament, 1961 (India).
[15] Income Tax Act, 1961, § 9(1)(vi), No. 43, Explanation 2, Acts of Parliament, 1961 (India).
[16] *Id*.
[17] DIETER BIRK ET AL., TAX LAW 402 (21st. ed. 2018).
[18] *Commission Staff Working Document - Impact Assessment Accompanying the Document Proposal for a Council Directive Laying Down Rules Relating to the Corporate Taxation of a Significant Digital Presence and Proposal for a Council Directive on the Common System of a Digital Services Tax on Revenues Resulting from the Provision of Certain Digital Services*, EUROPEAN COMMISSION (Mar. 21, 2018), https://ec.europa.eu/transparency/regdoc/rep/10102/2018/EN/SWD-2018-81-F1-EN-MAIN-PART-1.PDF.

presence of a company in the source country,[19] either as a holding company, or an associate company, or a subsidiary company.

The advent of international business transactions without any uniform taxing regime was already a loophole that states were trying to solve. Before any system could be agreed upon by the states, the international arena has been posed with another challenge, that is, taxing a digital economy, which defies the common principles on which the international tax model was based to avoid Double Taxation.

C. Conceptualizing a Regime for Taxing the Digital Economy

The global economy is propelled on the notion of 'business goes global, taxes stay local.'[20] With the digitalization of the global economy, it has become easier for multinational enterprises to evade the international tax system through astute planning.[21] Consequently, it has become arduous for tax authorities to denominate tax accrued out of the profits of the companies having a digital presence to the characterization augmented in the traditional form of economy.[22]

Before going further into taxation of the digital economy, it is important to shed light upon the fundamentals of the digital economy. The Organization for Economic Co-operation and Development (hereinafter referred to as 'OECD') is an international organization having 37 member countries across the world,

[19] Birk et al., *supra* note 17.
[20] Fetzer & Dinger, *supra* note 1, at 31.
[21] *Id*.
[22] Pinkney, *supra* note 2, at 158.

with an objective of working alongside governments, policy makers and citizens to establish evidence-based international standards and find solutions to a range of social, economic and environmental challenges.[23] It has worked vigorously to reform international tax rules which led the OECD to launch the Base Erosion and Profit Shifting (hereinafter referred to as 'BEPS') Project, in partnership with the G20 group of nations. This project aims to ensure that the international tax rules do not facilitate the shifting of corporate profits away from where the real economic activity and value creation are taking place.[24] The OECD in Action Plan 1 of its project, BEPS defined digital economy as those contributions that are made by the digital 'inputs' to the gross economic output.[25] Furthermore, digital 'inputs' refer to the digital applications, digitized infrastructures, skills and policy involving the digital age, and those conditions that enhance the use of technologies to facilitate substantial efficiency and development.[26] It is the digital economy that is itself taking the form of the entire global economy and it will be testing for states to draw boundaries in order to stop its bombardment from the economy, in general, for the purpose of taxation.[27]

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[23] OECD Work On Taxation, OECD (2021), https://www.oecd.org/tax/centre-for-tax-policy-and-administration-brochure.pdf.
[24] *Id.*
[25] Marcel Olbert and Christoph Spengel, *International Taxation in the Digital Economy: Challenge Accepted?*, WORLD TAX JOURNAL 3, 44 (2017).
[26] OECD, *Tax Challenges of Digitalisation: Comments Received on the Request for Input-Part II*, OECD PUBLISHING (Oct. 25, 2017),
https://www.oecd.org/tax/beps/tax-challenges-digitalisation-part-2-comments-on-request-for-input-2017.pdf.
[27] OECD, *Addressing the Tax Challenges of the Digital Economy, Action 1 - 2015 Final Report*, OECD/G20 BASE EROSION AND PROFIT SHIFTING PROJECT, OECD PUBLISHING (2015),

As the tax regimes were initially formulated keeping in mind the traditional brick and mortar economy, it is heavily dependent on the physical presence of the business establishment in the source country for taxing purposes.[28] Nevertheless, the digital economy did not do away with the concept of tax base in the value-creation territory for taxation, but rather it gave rise to a series of strategies by the digital companies that resulted in an erosion of taxation in the country of residence, leading to avoidance of tax in both residence as well as value-creation jurisdictions.[29] The foremost barrier in the taxation of digital enterprises is to determine the character of their income. This is because the digital economy consists of intangible goods and services like software, servers, and digital algorithms, whereby their ownership cannot be normally separated from the business activities.[30] Hence, as classification of income varies from country to country, characterization also varies with regards to domestic laws of the country applying distributive rules.[31]

Furthermore, the OECD Model Tax Convention is a model for countries looking to formulate bilateral tax treaties that play a crucial role in removing tax-related barriers to cross-border trade and investment. It requires constant

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https://www.oecdilibrary.org/docserver/9789264241046en.pdf?expires=1593262065&id=id&accname=guest&checksum=C7DCC7FCBF288B38E1C70ADEA3C48B8F.

[28] OECD, BEPS Action 7: Additional Guidance on Attribution of Profits to Permanent Establishments, OECD PUBLISHING (2017), www.oecd.org/tax/transfer-pricing/beps-discussion-draft-additional-guidance-attribution-of-profits-to-permanent-establishments.pdf.

[29] OECD, *supra* note 26.

[30] Pinkney, *supra* note 2, at 160.

[31] ALEXANDER RUST, *"Business" and "Business Profits"* in THE MEANING OF "ENTERPRISE," "BUSINESS" AND "BUSINESS PROFITS" UNDER TAX TREATIES AND EU TAX LAW 85 (Guglielmo Maisto, 2011).

review to address the new tax issues that arise in connection with the evolution of the global economy, and the most recent update was published in 2017 that reflects upon consolidation of treaty-related measures.[32] In order to classify any income as royalty arising out of intangible assets, the definition under Article 12(2) and its explanatory notes of the OECD Model Tax Convention states that: [33]

> "*…payment of any kind received for the use of any copyright of literary, artistic or scientific work including cinematograph films, any patent, trademark, design or model, plan, secret formula or process, or for information concerning or scientific experience.*"

Tax authorities most certainly deduce that royalties under Article 12(2) of the Model includes in its ambit software programs whereby the payment accrued out of royalties will be subjected to withholding tax,[34] unlike business profits where withholding tax is irrelevant. Moreover, Article 12(3) of the United Nations Model of Taxation is a replica of Article 12(2) of the OECD Model that characterizes software programs as befalling under royalties for the purposes of taxation.[35]

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[32] Model Tax Convention on Income and on Capital: Condensed Version 2017, OECD (Dec. 18, 2017), https://www.oecd.org/ctp/treaties/model-tax-convention-on-income-and-on-capital-condensed-version-20745419.htm.
[33] Articles of the Model Convention with Respect to Taxes on Income and on Capital (OECD), Art. 12(2).
[34] *Id.*
[35] Srut Chongbanyatcharoen, *Software Payments as Royalties Under Article 12*, Prepared for the 15th Session of the United Nations Committee of Experts on International Cooperation in Tax Matters, UNITED NATIONS, (Oct. 5, 2017),

The OECD/G20 Inclusive Framework on BEPS keeping up with the contemporary changes adopted the Programme of Work ('PoW') in 2019 with a global membership consisting of about 70% non-OECD as well as non-G20 members from diverse geographical locations.[36] It furnishes the development of two pillars trying to arrive at a consensus of taxing the digital businesses in the coming years.[37] Pillar One of the said framework provides for a 'Unified Approach' focusing upon 'consumer-facing businesses' encompassing highly digitalized and profitable business models interacting with consumers.[38] The Approach facilitates a new nexus thereby ensuring that a company is taxable in the market jurisdiction if its sale surpasses a certain threshold even without having a physical presence in that jurisdiction.[39] Thus, the 'Unified Approach' imparts a mechanism for reallocation of taxing rights so as to guarantee tax certainty.[40]

Nevertheless, countries that are importers of digital goods and services are at the brim of tremendous loss in the form of tax revenues as digital services, having no physical presence or representatives in the source country, are generally not taxed in the importing jurisdiction. In a recent survey conducted by the European Commission, it was found that in comparison to an effective

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https://www.un.org/esa/ffd///wp-content/uploads/2017/10/15STM_CRP25_Royalty-Royalties.pdf.

[36] OECD, *OECD Invites Public Input on the Secretariat Proposal for a "Unified Approach" under Pillar One*, OECD PUBLISHING (Nov. 15, 2019), https://www.oecd.org/tax/beps/oecd-invites-public-input-on-the-secretariat-proposal-for-a-unified-approach-under-pillar-one.htm.

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

tax rate accounting for 23.2% for traditional business models, the digital economy is taxed only at the rate of 9.5%.[41] Therefore, it is high time that all states come together to formulate a system of taxation that is efficient as well as corroborative to the digitised businesses.

D. Guiding Principles for Uniform Taxation of Web Economy

The digital economy is an amalgamation of various websites, applications, and storage facilities varying only on the basis of their peculiar features.[42] The backbone of the digital economy is based on hyper connectivity relating to the growing interconnectedness of people, machines, and organizations that stem from mobile technology, the internet, and the internet of things (hereinafter referred to as 'IoT').[43] It is not only Big Data and digital platforms that determine digital transformation but also how those advanced technologies can be utilized to maximize opportunities for innovation, smart products and services, and new business models and processes.

IoT connects both the digital and physical worlds to predict and automate business processes by collecting, measuring, and analysing data, thereby enabling businesses to analyze data on physical objects generated by sensors in a world of intelligent devices.[44] This data helps in the transformation and

[41] European Commission, Communication from the Commission to the European Parliament and the Council: Time to Establish a Modern, Fair and Efficient Taxation Standard for the Digital Economy, COM(2018) 146 final (Mar. 21, 2018), at 4.
[42] Fetzer & Dinger, *supra* note 1, at 33.
[43] *What is digital economy? Unicorns, transformation and the internet of things*, DELOITTE, https://www2.deloitte.com/mt/en/pages/technology/articles/mt-what-is-digital-economy.html.
[44] *Id.*

development of businesses by revealing hidden consumer patterns and insights that can help them make more informed choices and take action more quickly. Thus, an organization can operate with precision that was previously unimaginable, particularly when it can understand its physical and digital asset inventory at any given moment, paving the way for it becoming the ultimate Lean Enterprise.[45]

For instance, the digital transformation of Asia has had a massive impact on the region's economies. Its e-commerce transactions account for 25% of the world's business to consumer market, wherein the People's Republic of China (PRC) tops the list and Chinese companies like Alibaba and Tencent have been growing at a very rapid pace. The transaction volume of the retail e-commerce market of PRC has increased from CNY 1.32 trillion in 2013 to CNY 5.33 trillion in 2016, with an estimated increase to CNY 7.57 trillion in 2017.[46]

Digital platforms act as an intermediary for the end-users of one side to interact with the end-users of the other side, benefitting both of them in terms of efficiency, and costs.[47] As the platform acting as an intermediary is often profited out of agency fees or by supplying user data without having to pay taxes,[48] it is essential to formulate a fair taxation model in the digital economy.

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[45] *Id.*
[46] *Understanding the Digital Economy: What Is It and How Can It Transform Asia?*, ABD INSTITUTE (Feb., 2018), https://www.adb.org/news/events/understanding-digital-economy-what-it-and-how-can-it-transform-asia.
[47] Marshall W. Van Alstyne et al., *Pipelines, Platforms, and the New Rules of Strategy*, HARV. BUS. REV. 54, 56 (2016).
[48] Fetzer & Dinger, *supra* note 1, at 34.

The European Commission has come up with two primal approaches for taxing in the age of digital businesses that have proved to be a stalwart in the international digital taxation:

i. Digital Presence Replacing Permanent Establishment

The first approach by the European Commission extends the nexus of permanent establishment for the purpose of taxation in order to include notable digital presence.[49] If any business, in whole or in part, disburses digital services through any website, application, including mobile applications,[50] it is said to have a 'significant digital presence.'[51] Further, for a significant digital presence in any country, the company shall either exceed an annual revenue of seven million euros or should have more than one lakh users in a given year or should have more than 3000 business-related contracts with such users in a given taxable year.[52] Thus, in contrast to the traditional view where importance was given to the country of value-creation, this approach positions the country with the highest demand as a factor for characterization of income.[53]

ii. Digital Service Tax

The other approach taken up by the European Commission is the introduction of digital service tax in order to generate expeditious revenues for those states that are not effectively taxed by means of the existing regime, irrespective of

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[49] *Supra* note 8, at 7.
[50] *Id.*, Art. 3(2) at 14.
[51] *Id.*, Art. 4(3) at 16.
[52] *Id.*, Art. 4(3), at 16.
[53] Fetzer & Dinger, *supra* note 1, at 36.

the size or residence of the business.[54] The objective behind the introduction of such a tax is to make the digital business pay in accordance with the contribution made by the end-users for value-creation.[55] However, the imposition of digital service tax has to be qualified only by those companies that have a notable presence in the digital footprint of a state, that is, a company shall have an annual global revenue amounting to 750 million euros and that of 50 million euros in the European Union annually for an enterprise to pay digital service tax.[56]

Therefore, the European Commission is one of the first international organizations to take a major leap in the taxation of the digital economy. Although various approaches have been proposed by several international organizations to deal with this new age difficulty of taxation,[57] no concrete steps have been taken for its implementation. It is for the same reasons that states have now unilaterally taken some measures to curb the losses that they face in the form of tax-avoidance, which will be discussed in detail in the following section.

III. Tackling Tax-Avoidance In New Economy: Unilateral Manoeuvres Embodied By States

[54] European Parliament, Proposal for a Council Directive on the Common System of a Digital Services Tax on Revenues Resulting from the Provision of Certain Digital Services, COM(2018) 148 final (Mar. 21, 2018), at 7 et seq [hereinafter 'EP Common System'].
[55] Fetzer & Dinger, *supra* note 1, at 37.
[56] EP Common System, *supra* note 54, Art. 4(1), at 25.
[57] Marcel Olbert & Christoph Spengel, *International Taxation in the Digital Economy:Challenge Accepted?,* WORLD TAX JOURNAL 3, 3 (2017).

A. Prefatory

Multinational corporations working mainly through digital servers are causing a breakdown in the economy by engaging in various tax avoidance methods. Brobdingnagian companies like Amazon and Google have to pay a huge chunk of their profits as corporate tax.[58] But, there has been a bifurcated opinion on the imposition of stringent measures to tax these companies as countries like the United States of America and the United Kingdom benefit out of the surplus spawned by the e-commerce enterprises[59] as the present form of taxation is typical of the countries where such companies are headquartered and not where the value is created.

Though it is universally acclaimed that a consensus at the international level will help to eradicate the hurdle of tax evasion by digital businesses, various states have devised their measures to address the problem in the digital economy unilaterally.[60] Thus, this part of the article will present some of the incipient measures taken by world economies post the recommendation made by the OECD in its peregrination for a digital tax agreed globally.

B. Approaches to Avert Tax Evasion in the United Kingdom

[58] Sophie Ashley, *The Digital Economy is Creating a PE Conundrum*, 24 INT'L TAX REV. 34, 34 (2013).
[59] *Id.*, at 34.
[60] Rav P. Singh & Vinti Agarwal, *Taxation of Digital Economy in India*, VIDHI CENTRE FOR LEGAL POLICY (March, 2019), https://vidhilegalpolicy.in/wp-content/uploads/2019/05/DesignedReport_TaxingDigitalEconomyinIndia-TheWayForward.pdf.

In the United Kingdom (hereinafter referred to as 'UK'), the Finance Act of 2015 introduced the concept of 'diverted profit tax'. It taxes all those profits made by the companies that were generally being diverted to other jurisdictions in an accounting year.[61] The primary objective behind the introduction of the 'diverted profit tax' is to dissuade multinational companies not having a permanent establishment or making such disposition to lack significant economic substance[62] (that is, companies placing their assets in tax haven economies or low tax jurisdictions to artificially escape the tax payment), from diverting the profits, earned in the UK to other jurisdictions.

The tax is applicable to non-UK companies with no economic substance or the existence of a Permanent Establishment.[63] It is also applicable to UK companies which lack significant economic substance in the UK.[64]

This tax is attributed against the amount of diverted tax profits at a rate of 25% as issued by Her Majesty Revenue and Customs (hereinafter referred to as 'HMRC') officer by way of notice.[65]

It is pertinent to note that the tax is applied to the profits in accordance with the corporate law of the land in the same manner as it applies to all those companies having verified permanent establishment in the UK.[66] However, the taxpayer can ask for the waiver of diverted profit tax if the company has

[61] Finance Act, 2015, § 77, No. 2, Acts of Parliament, 2015 (United Kingdom).
[62] Finance Act, 2015, § 99, No. 2, Acts of Parliament, 2015 (United Kingdom).
[63] Finance Act, 2015, § 81, No. 2, Acts of Parliament, 2015 (United Kingdom).
[64] Finance Act, 2015, § 80, No. 2, Acts of Parliament, 2015 (United Kingdom).
[65] Finance Act, 2015, § 79, No. 2, Acts of Parliament, 2015 (United Kingdom).
[66] Finance Act, 2015, § 86, No. 2, Acts of Parliament, 2015 (United Kingdom).

paid corporation tax either in the UK or in some other jurisdiction on the basis of 'just and reasonable cause'[67] but cannot be debited or acknowledged adjacent to any disparate tax.[68] Also, in a provisional guidance report released by HMRC, it was brokered that diverted profit tax though applies to all those entities that capitalize from the tax treaties, there existed no such obligation on these companies under international law,[69] as this tax is not covered under the ambit of the double taxation treaty in the UK.[70]

Consequently, the government of the UK published a position paper on 'Corporate Tax and Digital Economy' in 2018 providing long and interim solutions for taxing digital businesses.[71] It looked for ways to tax the non-resident e-commerce platforms in accordance with the value created based on their usage by the residents of the UK.[72] The same was to be done by modifying Articles 5, 7, and 9 of the Model Convention by OECD and basing it on the user-based participation as a criterion for permanent establishment.[73]

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[67] Finance Act, 2015, § 100, No. 2, Acts of Parliament, 2015 (United Kingdom).
[68] Ashley, *supra* note 58, at 34.
[69] *Diverted Profits Tax: Guidance*, HM REVENUE & CUSTOMS, DPT 1690 (Dec., 2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/768204/Diverted_Profits_Tax_-_Guidance__December_2018_.pdf.
[70] *Presentation on the Diverted Profits Tax,* HM REVENUE & CUSTOMS (Jan. 8, 2015), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/400340/Diverted_Profits_Tax.pdf.
[71] *Corporate Tax and the Digital Economy: Position Paper Update*, HM TREASURY (Mar. 2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/689240/corporate_tax_and_the_digital_economy_update_web.pdf.
[72] *Id.*, at 20.
[73] *Id.*

In addition to the long-term solution, the interim measure proposed by the government is a tax based on revenue of the business characterized specifically by the assessment of the value drivers[74] of a particular business, or imposition of tax on the receipts of businesses by defining the user participation in certain businesses that derive the value from such participation,[75] or by expounding the categorization of the profits of certain digital economies to tax them.[76] Thus, the government has brought in various approaches, but it poses challenges in implementation , as it can only be an amalgamation of all these approaches that could prove to be effective in taxing the digital era.[77]

C. Anti-Avoidance Measures in Australia

Australia is one of the few nations that took unilateral measures to tax the digital economy. The Australian government, in order to combat tax avoidance by multinational digital companies, has brought changes in the form of two majors laws:

i. Multinational Anti-Avoidance Law

The Australian government incorporated the Multinational Anti-Avoidance Law (hereinafter referred to as 'MAAL') by bringing about the Taxation Law Amendment (Combating Multinational Tax Avoidance) Act, 2015 to bring under its ambit the digital enterprises functioning in Australia that are involved

[74] *Id.*, at 25.
[75] *Id.*, at 25.
[76] *Id.*, at 25.
[77] *Id.*, at 25.

in tax avoidance.[78] However, the said provision is applicable only in the following situations:

a) When any non-resident multinational company having 'significant global entity' supplies to Australian consumers, that is, the annual income of such an entity is $1 billion or more or if it is determined by the commissioner as such;[79] and

b) The activities of supply are directly managed in Australia; and

c) The Australian Permanent Establishment of any foreign entity manages some of the functioning but is largely dependent on its foreign counterpart for commercial purposes; and

d) The foreign entity is liable for the revenue of such supplies; and

[78] Schedule 2, Sec. 4, Tax Laws Amendment (Combating Multinational Tax Avoidance), 2015, No.170, Acts of Parliament, 2015 (Australia).
[79] Schedule 1, Sec. 960-555, Tax Laws Amendment (Combating Multinational Tax Avoidance), 2015, No.170, Acts of Parliament, 2015 (Australia) [hereinafter 'Tax Avoidance Australia'].

e) The Australian permanent establishment is not liable for all or some of the revenue receipts; and

f) Such an arrangement is primarily made to acclaim tax benefits by its avoidance.[80]

After the enactment of MAAL, in a survey conducted by the government, it was concluded that almost 31 multinational corporations have responded to the amendment by restructuring their business models and 18 out of these 31 companies have made an annual return on sale accounting for more than $6.4 billion.[81] Moreover, in Budget 2018, the application of MAAL was extended even to foreign partnerships and trusts by the government to make their structure compatible with the tax laws.[82]

ii. Diverted Profit Tax

The government brought further changes in Budget 2016-17 to strengthen the anti-tax avoidance techniques that the digital corporations indulge in by introducing the imposition of a new form of tax called, diverted profit tax,

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[80] Tax Avoidance Australia, *supra* note 78.

[81] *Combating Multinational Tax Avoidance- A Targeted Anti-Avoidance*, AUSTRALIAN TAXATION OFFICE, AUSTRALIAN GOVERNMENT (Aug. 10, 2017), https://www.ato.gov.au/Business/International-tax-for-business/In-detail/Doing-business-in-Australia/Combating-multinational-tax-avoidance---a-targeted-anti-avoidance-law/#:~:text=The%20Multinational%20Anti%2DAvoidance%20Law,the%20profits%20earned%20in%20Australia.

[82] *Toughening the Multinational Anti Avoidance Law*, THE TREASURY, AUSTRALIAN GOVERNMENT (Feb. 12, 2018), https://treasury.gov.au/consultation/c2018-t261444#:~:text=The%20Government%20announced%20in%20the,a%20taxable%20presence%20in%20Australia.

effected from 1st July 2017 at the rate of 40%.[83]. Apart from the above-mentioned primary approaches, the Australian government in Budget 2017-18 also instituted a 'Tax Avoidance Taskforce' to trace tax avoidance as well as to increase transparency in the economy.[84] The taskforce facilitated making liabilities worth $3 billion and $1.8 billion against multinational corporations and private groups respectively in 2017-18.[85] Thus, the Australian government has been continuously striving to achieve a corroborative measure to resist tax avoidance by corporations not having any physical representation in the country.

D. Taxing of Digital Enterprises in Italy

The Italian government in the year 2018 formulated two measures to contend with the problems regarding tax avoidance in a digital economy, making it one of the first countries of the European Union to do so. The following are the approaches of the government:

i. Web Tax

[83] *Diverted Profits Tax*, AUSTRALIAN TAXATION OFFICE, AUSTRALIAN GOVERNMENT (Jul. 8, 2019), https://www.ato.gov.au/Business/International-tax-for-business/In-detail/Doing-business-in-Australia/Diverted-profits-tax/?=redirected_DPT#:~:text=aims%20to%20ensure%20that%20the,through%20arrangements%20involving%20related%20parties.

[84] Tax Avoidance Taskforce, AUSTRALIAN TAXATION OFFICE, AUSTRALIAN GOVERNMENT (Oct. 21, 2019), https://www.ato.gov.au/general/tax-avoidance-taskforce/.

[85] *Tax Avoidance Taskforce Highlights 2017–18*, AUSTRALIAN TAXATION OFFICE, AUSTRALIAN GOVERNMENT (Oct. 8, 2018), https://www.ato.gov.au/General/Tax-avoidance-taskforce/2017-18-Taskforce-highlights/.

The government in Budget Law 2018 introduced a new form of tax called, Web Tax[86] which was applicable to certain digital businesses at a rate of 3%[87] of the value of transactions conducted to be affected from January 1, 2019.[88] Any digital transaction to be taxed shall have the following features:

a. The services are provided by the means of electronic platforms like the internet or such other networks that have minimal or no human intervention in the supply of such service.[89] The Ministry of Economy and Finance by a decree is entitled to identify the said services;[90]

b. It involves both Italian residents as well as non-residents having Italian Permanent Establishments;[91] and

c. A taxpayer is required to have more than 3000 units of transactions in a given year.[92]

A peculiar feature of this tax is that web tax is applicable only on B2B digital transactions whereby the purchaser has to collect the tax at the time of payment

[86] Budget Law, 2018, Art.1(1011), Law of 27/12/2017 No. 205 (Italy).
[87] Budget Law, 2018, Art.1(1013), Law of 27/12/2017 No. 205 (Italy). [hereinafter 'Budget Law (1013')]
[88] Budget Law, 2018, Art.1(1017), Law of 27/12/2017 No. 205 (Italy).
[89] Budget Law, 2018, Art.1(1011) and Art.1(1012), Law of 27/12/2017 No. 205 (Italy). [hereinafter 'Budget Law (1011)'].
[90] Budget Law, 2018, Art.1(1012), Law of 27/12/2017 No. 205 (Italy).
[91] Budget Law (1011), *supra* note 89.
[92] Budget Law (1013), *supra* note 87.

for consideration, for it to be later paid to the government by sixteenth day of the concerned month following such payment.[93]

ii. Meaning of Permanent Establishment

Another measure taken by the Italian government in Budget Law 2018 was the amendment of Article 162 of the Consolidated Income Tax, which defines Permanent Establishment.[94] It was after such an amendment took place that the definition of Permanent Establishment became inclusive of the terms 'significant and continuous economic presence.'[95] Moreover, the amendment also restricted the exceptions to the established place of business consisting of a permanent establishment in the nature of the preparatory or supplementary activity.[96] Thus, the amendment aids in certain measures that the companies have to comply with irrespective of being a resident of Italy or not, to tax all those entities falling under the criterion of closely related entities.

E. Paving the Way for Taxation of Digital Platforms in India

India is ranked by the Mobile Association of India, as one of the countries, having the largest number of internet users only after China.[97] Indian economy is largely dependent on the digital businesses having said to double its users to 840 million by 2023.[98] As the digital economy is expeditiously rising, the

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[93] Budget Law, 2018, Art.1(1014), Law of 27/12/2017 No. 205 (Italy).
[94] Italian Income Tax Code, 1986, Art.162, Presidential Decree no. 917 of 22/12/1986.
[95] Italian Income Tax Code, 1986, Art.162(f-bis), Presidential Decree no. 917 of 22/12/1986.
[96] Italian Income Tax Code, 1986, Art.162(4-bis), Presidential Decree no. 917 of 22/12/1986.
[97] *Top 20 Countries With The Highest Number Of Internet Users*, INTERNET WORLD STATS (Dec. 31, 2019), https://www.internetworldstats.com/top20.htm.
[98] Noshir Kaka et al., *Digital India: Technology To Transform A Connected Nation*, MCKINSEY GLOBAL INSTITUTE (Mar. 27, 2019),

Indian government aspires to make effective taxation policies in the digital sector. The most recent development to tackle the taxation challenge was the institution of the Akhilesh Ranjan Committee in the year 2016 to tax electronic commerce.[99] The Committee aimed to scrutinize the relevant tax issues in a digital economy based on 'Action 1 of BEPS Project' concluded by the OECD.[100]

Furthermore, the committee analyzed the three major concepts in the BEPS Project, viz., Equalization Levy, Significant Economic Presence and Withholding Tax on Digital Transactions. The Committee concluded that for the incorporation of significant economic presence and withholding tax, subsequent changes have to be made in the tax treaties for it to be effective.[101]

i. Equalization Levy

It is a tax that is imposed not on the revenue arising out of digital transactions but rather is a levy on the consideration that the non-residents receive out of digital transactions.[102] The objective of this tax is to equate the taxation burden by extending it to the foreign owners who otherwise have an upper hand as compared to their Indian counterparts providing similar services.[103] The

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https://www.mckinsey.com/business-functions/mckinsey-digital/our-insights/digital-india-technology-to-transform-a-connected-nation#.

[99] Singh & Agarwal, *supra* note 60, at 29.

[100] *Id.*

[101] *Proposal for Equalization Levy On Specified Transactions, Report of the Committee on Taxation of E-Commerce formed by the Central Board of Direct Taxes*, Department of Revenue, MINISTRY OF FINANCE, GOVERNMENT OF INDIA (Feb., 2016), https://incometaxindia.gov.in/News/Report-of-Committee-on-Taxation-of-e-Commerce-Feb-2016.pdf.

[102] *Id.*, at 81.

[103] *Id.*, at 84.

Finance Act of 2016 states that an equalization levy of 6% will be imposed on the amount received as consideration by non-residents in India proffering certain service without having any permanent establishment.[104] It is significant to note that this tax is presently prevalent for advertisement services only but can be extended even to additional services as and when notified by the Central Government.[105]

There are also certain exemptions provided by the government for this levy, that is, any non-resident in India either with a permanent establishment, or if the aggregate amount that is paid as consideration for any service is not more than one lakh rupees in the previous accounting year, or if such a specified service was not carried out for business purposes, then no equalization levy can be charged.[106] Thus, any person making a payment to a non-resident shall subtract the equalization levy against the consideration to be paid for the concerned service.

ii. Significant Economic Presence

India was amongst the first few countries to put in place the concept of significant economic presence after the inception of the equalization levy in the year 2016. The Income Tax Act of 1961 defined the concept of significant economic presence and the Finance Act of 2018 furthered it by expanding the

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[104] Explanatory Notes To The Provisions Of The Finance Act, 2016, F. No. 370142/20/2016-TPL, Circular No.-3/2017, MINISTRY OF FINANCE, DEPARTMENT OF REVENUE, GOVERNMENT OF INDIA (Jan. 20, 2017), https://www.incometaxindia.gov.in/communications/circular/circular03_2017.pdf.
[105] Finance Act, 2016, § 164(f), No. 28, Acts of Parliament, 2015 (India).
[106] Finance Act, 2016, § 165(2), No. 28, Acts of Parliament, 2015 (India).

purview of business connection that would now also include non-resident enterprises having a significant economic presence in India as enhanced by Explanation 2A of Section 9(1)(i).[107]

iii. Tax Implications of proposed Data Localization Laws

The digital economy functions on the basis of remote servers located in tax haven countries, thereby, making their taxation in the source country difficult. However, if the non-resident corporation has its servers located in the source country, then it would be graded under its taxation regime. For the same reasons, the following three measures have been proposed in India for any e-commerce to function in the country:

a. The Reserve Bank of India, being the Central bank of the country stated that the data of all the users in India is required to be stored in the country itself by the payment system operators in order to ensure data security and protection;[108]

b. The Draft National Policy on e-commerce made it mandatory for the websites and networking firms to host servers exclusively in India that collect consumer information making them fall under the taxing regime;[109]

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[107] Finance Act, 2018, § 4, No. 13, Acts of Parliament, 2018 (India).

[108] *Storage of Payment System Data*, RBI/2017-18/153, DPSS.CO.OD No. 2785/06.08.005/2017-2018, RESERVE BANK OF INDIA (Apr. 6, 2018), https://rbidocs.rbi.org.in/rdocs/notification/PDFs/153PAYMENTEC233862ECC4424893C558DB75B3E2BC.PDF.

[109] Reuters, *Government Looks To Compel E-Commerce Companies To Store Data Locally*, INDIA TODAY (Jul. 30, 2018), https://www.indiatoday.in/business/story/government-looks-to-compel-e-commerce-and-social-media-companies-to-store-data-locally-1300246-2018-07-30.

c. Finally, it was Justice B.N. Srikrishna Committee Report that proposed the Data Protection Bill of 2018 making it compulsory for every foreign entity storing customer data to have the copy of such data in at least one server located in India.[110] The server, thus, located in India will act as a permanent establishment of the non-resident entity making it taxable.

Even though there have been measures taken by a few countries unilaterally to regulate the taxation of the digital economy, it is not pragmatic to enforce them as it would give rise to the problem of double taxation. There should be a conscious attempt by the international forums to yield fruitful results in taxing the digital businesses. Thus, with the intermingling of globalization and digitalization, multinational corporations like Uber are still able to avail transfer pricing as a means to minimize their income allocated in jurisdictions having higher tax rates[111] which will be dealt in the following chapter.

IV. Steering Through The Regulations On Uber Economy: Reverberations Of Its Crafty Tax Model

A. Exordium

Innovations in technology have not only bolstered the global economy but are also reshaping the world we live in, so much so that even the way people travel today is driven by technology. It was only a few decades ago that cabs and smartphones were not so intrinsically linked to each other as they are today,

[110] Personal Data Protection Bill, 2018, § 40 (India).
[111] Duff & Phelps, Guide to International Transfer Pricing 70, 73 (2015).

and outstretching an arm on the streets to call for a taxi was not only normal but also an accepted norm.

It was in 2008 when Garrett Camp along with Travis Kalanick, attendees at the LeWeb Technology Conference in Paris, could not find a ride back home on a snowy evening, that they discussed bringing in a mobile application aimed at linking passengers with drivers the moment they requested it.[112] Their novel idea later led to the birth of Uber, which was released in 2009 as 'UberCab,'and was subsequently renamed as 'Uber' in 2010.

Despite the success of Uber over the last decade, the company continues to face numerous challenges. Besides seemingly threatening the livelihoods of traditional cab drivers, prompting a backlash, Uber has been at the end of numerous employment-related lawsuits, prompting greater regulation both by courts and governmental authorities. Additionally, the company has also been banned from functioning in certain countries[113] and is under the purview of several legislations owing to tax-related issues[114] and many of its drivers have

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[112] *The History of Uber*, UBER NEWSROOM, https://www.uber.com/en-IN/newsroom/history/ (last visited Feb. 6, 2021).

[113] Reuters, *Legal Troubles — Including 173 Lawsuits in the US — Threaten Uber's Global Push*, Business Insider (Oct. 5, 2015), https://www.businessinsider.com/r-legal-troubles-market-realities-threaten-ubers-global-push-2015-10?IR=T.

[114] Edward Helmore, Uber Braced for Bumper Tax Bill as Authorities Begin Examination, THE GUARDIAN (June 4, 2019), https://www.theguardian.com/technology/2019/jun/04/uber-tax-investigations-us-uk-netherlands-india.

raised claims[115] claiming overtime payment and reimbursement, seeking the status of an 'employee' instead of an 'independent contractor.'

B. Transnational Regulatory Framework on Uber: An Eye for an Eye Approach

The establishment of Uber and its equivalents has prompted a paradigm shift in the transportation sector, and consequently have effected two notable changes.[116]

Firstly, the novel technology has reduced the transactional value of a ride since the apps establish a framework that matches drivers and riders at the click of a button, thereby diminishing the 'search costs'[117] associated with looking for a taxi. In addition to it, the payment for the trip can be conveniently made through a credit card account linked with the application, hence making the ride cashless.[118]

Secondly, there has been a change in the taxi industry concerning the industry's organization.[119] Antecedently, the taxi industry has been 'significantly fragmented' in a majority of places as taxi operators associated themselves with a particular city providing only a little crossover across

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[115] Robert Booth, Uber Drivers' Fight for Workers' Rights Reaches UK Supreme Court, THE GUARDIAN (July 21, 2020), https://www.theguardian.com/technology/2020/jul/21/uber-drivers-fight-for-workers-rights-reaches-supreme-court.
[116] Brishen Rogers, *The Social Costs of Uber*, 82 U. CHI L. REV. 85, 88 (2015).
[117] *Id.*
[118] *Id.*
[119] *Id.*

towns.[120] For instance, in the New York City, regulations have bifurcated the sector into medallion taxis that cater to riders through street approach and by prior arrangement;[121] and 'green taxis' that can serve riders both via street approach and prior arrangement in Northern Manhattan and the outlying boroughs only.[122]

Contrarily, Uber is an integrated set-up in the taxi arena with operations not restricted to just cities. With drivers willing to serve riders in various cities, Uber has gained considerable momentum since its inception but the regulatory framework for Uber and similar entities have not been avant-garde.[123]

After the 2013 rulemaking by the California Public Utilities Commission, a category named as 'Transportation Network Company' was incorporated for regulating services such as Uber.[124] Other jurisdictions followed suit to regulate app-based taxis and placed them under the umbrella term of 'Transportation Network Company.'[125] Some jurisdictions including the New York City have not instituted a distinct regulatory system for app-based

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[120] Katrina M. Wyman, *Taxi Regulation in the Age of Uber*, 20 N.Y.U. J. LEGIS. & PUB. POL'Y 1, 9 (2017).
[121] John Giuffo, *NYC's New Green Taxis: What You Should Know*, FORBES (Sept. 30, 2013), https://www.forbes.com/sites/johngiuffo/2013/09/30/nycs-new-green-taxis-what-you-should-know/#6ebfc08d32a2.
[122] Wyman, *supra* note 120.
[123] *Id.*, at 11.
[124] California Public Utilities Commission, Decision Adopting Rules And Regulations To Protect Public Safety While Allowing New Entrants To The Transport Industry, COM/MP1/avs (Dec. 20, 2012), at 20, 21.
[125] Comm. For Review of Innovative Urban Mobility Services, Transport Research Board, Between Public & Private Mobility: Examining The Rise Of Technology-Enabled Transportation Services, Special Report No. 319 (2015), at 52, 53.

taxis,[126] thereby, causing them to fall under the pre-existing framework with slight modifications as per contemporary requirements.

It is pertinent to note that Uber is experiencing an inimical relationship with regulators globally. For instance, in 2014, the company introduced the 'Greyball' program aimed at programming its application to escape the purview of law in cities such as Paris, Boston, and Las Vegas where its services were abridged or banned by the regulators.[127] These and other similar tactics have invited collective pushback to Uber from governments and legislations around the globe.

Moreover, in 2017, the European Court of Justice, contrary to Uber's stance of it being a technology company, ruled that it is a transport company.[128] Uber had its rationale for wanting to be viewed as a technology company since transport companies attract stringent regulations across countries worldwide. This technique is most prominently used by Uber to easily shift large portions of profits to other countries by assigning intellectual property rights to subsidiaries abroad making evasion of taxes easier.[129]

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[126] Wyman, *supra note* 120, at 17.
[127] Julia Carrie, Greyball: *How Uber Used Secret Software to Dodge the Law*, THE GUARDIAN (Mar. 4, 2017), https://www.theguardian.com/technology/2017/mar/03/uber-secret-program-greyball-resignation-ed-baker.
[128] Bill Chappell, *European Court Says Uber is a Transport Company, in a Win For Taxi Drivers*, NPR (Dec. 20, 2017), https://www.npr.org/sections/thetwo-way/2017/12/20/572214229/european-court-says-uber-is-a-transport-company-in-a-win-for-taxi-drivers.
[129] Erik Sherman, *Uber Could Save Billions in Taxes With This Little-Noticed Move*, FORTUNE (Sept. 9, 2019), https://fortune.com/2019/09/09/uber-tax-breaks-losses/.

Restrictions and regulations such as these are hampering the growth of Uber where it is being forced to withdraw from some of its most profitable markets.

C. Unfolding the Convoluted Arrangements: Is Uber Paying the Requisite Amount of Taxes?

Uber has faced significant allegations of tax-evasion across various jurisdictions, since its exponential growth. In 2013, the company augmented its valuation from USD$330 million to $3.5 billion.[130] Consequently, the company formulated a convoluted business regime along with a taxation structure to minimize its liabilities through an arrangement known as the 'Double Dutch' tax model.[131] Uber formulated various Dutch subsidiaries like Uber International C.V., and Uber B.V.,[132] to successfully shield every slice of its ride-sharing income not generated in the United States of America from both domestic and foreign taxes. [133]

At the top of the hierarchy stands the parent company, Uber technologies with its headquarters in San Francisco.[134] In Europe, Uber Technologies has established itself as Uber International C.V., which though incorporated in the Netherlands is headquartered in Bermuda as a law firm with no employees.[135] A cost-sharing deal was created between Uber Technologies and Uber C.V. to

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[130] Brian O'keefe & Marty Jones, *How Uber Plays the Tax Shell Game*, FORTUNE (Oct. 22, 2015), http://fortune.com/2015/10/22/uber-tax- shell/.
[131] Brittany V. Dierken, *Uber's International Tax Scheme: Innovative Tax Avoidance or Simple Tax Evasion*, 46 SYRACUSE J. INT'L L. & COM. 223, 230 (2018).
[132] O'Keefe & Jones, supra note 130.
[133] *Id.*
[134] Dierken, *supra* note 131, at 231.
[135] O'Keefe & Jones, *supra* note 130.

provide the latter with the right to benefit, outside the United States, from the intellectual property of Uber Technologies in exchange for a royalty of 1.45% of its net revenue in future.[136]

Second in line comes Uber B.V. among other local subsidiaries of Uber. Uber B.V. is situated in the Netherlands as a limited liability private company, which hires its employees to process transactions that take place in Europe.[137] Additionally, local subsidiaries of Uber, for instance, the Uber London Limited, which was incorporated in the UK, exist in the nations where the company operates.[138]

Uber B.V. retains payment from the passengers for every Uber trip outside the United States of America and keeps to itself, 20% of the value of the fare.[139] As per the agreement between Uber C.V. and Uber B.V., 1% of the said 20% goes to Uber B.V. as its income and the rest of the profits, that is, the 19% vests with Uber C.V. as a royalty fee for usage of the intellectual property of Uber Technologies.[140] Subsequently, Uber C.V. pays 1.45% of the royalties to Uber Technologies.[141]

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[136] Dana Olsen, *Uber by the Numbers: A Timeline of the Company's Funding and Valuation History*, PITCH BOOK (Nov. 20, 2017), https://pitchbook.com/news/articles/uber-by-the-numbers-a-timeline-of-the-companys-funding-and-valuation-history.
[137] Nino Sichinava, *How to Lose Friends and Alienate People. Five Lessons From Uber*, POL. CRITIQUE (Sep. 21, 2017), http://politi-calcritique.org/world/2017/how-to-lose-friends-and-alienate-people-five-lessons- from-uber/.
[138] O'Keefe & Jones, supra note 130.
[139] Sichinava, *supra* note 137.
[140] Dierken, *supra* note 131, at 231.
[141] O'Keefe & Jones, *supra* note 130.

Lastly, Uber brings into play another subsidiary, the Rasier Operations B.V., which reverts the 80% of the initial fare to the concerned Uber driver.[142] Consequently, Uber C.V., Uber B.V., among other transnational subsidiaries, are linked with the parent company, Uber Technologies, through numerous internal contracts amongst them.

As has been discussed before, Dutch subsidiaries process Uber's UK fares due to which revenues and profits from the UK company which might otherwise be liable for corporation tax, end up in the Netherlands.[143]

It can, therefore, be deduced that Uber has been benefiting from incorporation in tax havens like Bermuda and the Netherlands as these countries offer minimal tax liability to foreign individuals and business and do not require them to operate out of their country to receive tax benefits

Moreover, despite meeting the pre-requisite criteria for payment of taxes, Uber fails to do so in numerous jurisdictions.[144] For instance, the European Union, particularly the UK, has blamed Uber for disrupting the traditional framework of taxation, specifically the value-added tax, commonly known as the 'VAT.'

In determining the application of 'VAT' in the United Kingdom, the following elements must be fulfilled: Firstly, Uber must provide goods or services;[145] secondly, the place of provision of such goods or services must be in the

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[142] Dierken, *supra* note 131, at 231.
[143] Oscar Williams-Grut, *Uber Funnelled all its UK Revenues Through a Dutch Subsidiary that had Zero Employees*, BUSINESS INSIDER AUSTRALIA (Feb. 4, 2016), https://www.businessinsider.com.au/uber-tax-europe-dutch-zero-employees-2016-2.
[144] Helmore, *supra* note 114.
[145] Value Added Tax Act, 1994,§ 1, c. 23, Acts of Parliament, 1994 (United Kingdom).

UK;[146] and thirdly, that Uber constitutes a taxable entity earning over £85,000 of taxable revenue a year.[147] Uber satisfies all these requisite conditions and is henceforth, currently being sued for an unpaid tax amount of £1.5 billion in the UK.[148] Uber has been successful in avoiding these taxes since they have long argued that theirs is a platform that brings drivers and riders together, rather than a transport business. Consequently, as per Uber, individual drivers are liable to pay VAT on any rides instead of the company itself. However, since the threshold for VAT is only for individuals earning more than £85,000 a year, none of the drivers need to charge it.[149]

Similarly, since its inception in India, Uber has denied paying taxes on the grounds that its drivers, and not the company, is liable to pay as it only provides services through a mobile application and has no physical presence.[150] However, rather than collecting taxes from individual drivers, the authorities in India advocated for a mechanism where, through a reverse charge medium, the company pays taxes to the government after collecting it from its drivers.[151] After battling a ban on its operations in various cities in

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[146] Value Added Tax Act, 1994,§ 7A, c. 23, Acts of Parliament, 1994 (United Kingdom).
[147] Value Added Tax Act, 1994,§ 3, c. 23, Acts of Parliament, 1994 (United Kingdom).
[148] Jane Wharton, *Uber Faces £1,500,000,000 Bill for Unpaid VAT*, METRO (Dec. 4, 2019), https://metro.co.uk/2019/12/04/uber-faces-1500000000-bill-unpaid-vat-11270422/.
[149] *Id.*
[150] Deepshikha Sikarwar, *Uber Passes Service Tax Burden on to Cab Drivers*, THE ECONOMIC TIMES (Oct. 14, 2014), https://economictimes.indiatimes.com/uber-passes-service-tax-burden-on-to-cab-drivers/articleshow/44808917.cms?from=mdr.
[151] Deepshikha Sikarwar, *Tax Authorities Say Uber Liable for Service Tax, Seek Information From India Subsidiary*, THE ECONOMIC TIMES (Oct. 9, 2014), https://economictimes.indiatimes.com/small-biz/entrepreneurship.

India, Uber ultimately accepted its service tax liability.[152] With recent changes in the taxation regime and composition of the Goods and Services Tax ('GST') in the year 2017, Uber is now liable to pay 18% GST on 'convenience fee' forming a part of business auxiliary services.[153]

Unfortunately, tax evasion is not all that Uber is alleged of committing but the billion-dollar company along with tarnishing economies worldwide has also been adding to the woes of drivers it hires in a myriad of ways. Thus, Uber has been shattering the 'promised' dreams of governments worldwide and its own people, the cabbies by disorienting their employment status.

V. Conclusion

The digital economy has grown exponentially over the last two decades. The world as we perceive it today moves forward with digital transformation as its principal driver. At the foundational level, transformation in the digital arena is not restricted to 'unicorns' but also involves every single company contributing to the digital space. That being said, the digital economy has benefited consumers and certain economies, but has equally resulted in various other issues, especially the evasion of taxes.

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[152] Deepshikha Sikarwar, *Battling Violations List, Uber Agrees to Pay Service Tax in India*, THE ECONOMIC TIMES (Dec. 9, 2014), https://economictimes.indiatimes.com/news/politics-and-nation/battling-violations-list-uber-agrees-to-pay-service-tax-in-india/articleshow/45422655.cms?from=mdr.

[153] Shishir Sinha, *Cab aggregators will have to deposit GST on fares, rules AAR*, THE HINDU BUSINESS LINE (Aug. 14, 2018), https://www.thehindubusinessline.com/economy/policy/cab-aggregators-will-have-to-deposit-gst-on-fares-rules-aar/article24692801.ece#.

Owing to the fast-paced changes in the way businesses are operated in today's world, the taxing of the digital economy assumes significant importance. The OECD, being the torchbearer to countries for the formulation of a 'Unified Approach' in its 'Inclusive Framework' to tax digital economy, is at risk due to the COVID-19 pandemic.[154] The global consensus has been delayed, thereby, resulting in the continuation of unilateral measures by jurisdictions for taxation of digitalized economies while the world awaits an international solution.[155]

Moreover, apart from countries taking initiatives to tax digital economies and suggesting methods for curbing tax evasion, the onus falls on regulators to adopt strategies particular to the business models of digital companies operating remotely in doing so, taxing of the digital economy at the global level and subsequent mechanism for avoiding tax evasions thereof can be systematically achieved.

One such company, the focal point of this article, is Uber. The debates revolving around Uber and similarly placed companies have been extensive for more than half a decade. Among jurisdictions that have legalized app-based taxis including Uber, many of them have come up with a different category of regulation through which restrictions on them are lighter as compared to their traditional equivalents. Whether it be jurisdictions that have

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[154] Hamza Ali & Isabel Gottlieb, *Pandemic Delays Global Agreement on Digital Tax to Fall (2)*, BLOOMBERG TAX (May 5, 2020), https://news.bloombergtax.com/daily-tax-report-international/pandemic-delays-global-agreement-on-digital-tax-rewrite-to-fall.

[155] *Id.*

placed distinct regulations or those continuing with the existing ones, taxi regulators, in general, do not seem to be re-thinking regulations pertaining to taxis but are rather working on an ad-hoc basis in response to the arrival of entrants in the field.

Furthermore, yet another issue that persists here is the claim made by Uber that they are a 'technology' rather than a 'transportation' company. Uber has been doing so to avoid stringent regulation from legal regimes as transportation companies are highly regulated, compared to the latter. It ought to be emphasized here that Uber is just one among the many companies that use technology in their endeavours and the mere fact that it does so, does not afford it the status of a 'technology' company.

To tackle issues such as these and meet the lacuna in the law, it becomes vital for governments worldwide to enact laws specifically directed towards Uber and other digital companies, instead of regulating them through insufficient existing legislations. A consequence of the same would be an all-round victory for regulators, employees of these entities and consumers alike.

Differential Voting Rights in India: A Need for Reforms in the Shareholding and Enlistment Directives

Darshana Paltanwale*

Abstract

In a shareholding structure with Differential Voting Rights (DVRs), different classes of equity shareholders of the same company retain disproportionate voting powers. These shares have been controversial since their inception in the United States in the late nineteenth-century. Despite their contentious past, they've gradually been accepted across most major jurisdictions of the world, much to the chagrin of shareholder activists and corporate governance proponents. This paper elucidates the reasons behind the growing acceptance of this structure, and analyses the rationale behind Indian regulatory bodies sanctioning the issue of such shares recently, despite abstaining to do so for years. Furthermore, while this structure does, prima facie, seem to marginalize shareholders who have fractional (or diminished) voting rights (FRs), this paper presents a framework as to how its benefits can be reaped by established companies, start-ups and shareholders alike. In doing so, the paper sheds light on the advantages that this model offers over the traditional "one share, one vote" model, proposes the mechanisms through which the detrimental effects of this structure can be counteracted, and proposes further recommendations to the regulatory changes that the SEBI Consultation Paper on Issuance of Shares with Differential Voting Rights has recently propounded.

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I. Introduction

Dual Class Shares (DCSs) have prevailed in the West for over half a century[1], with companies like Ford Motors issuing them way back in the 1960s in the United States.[2] Ford continues to retain this dual class stock structure, which has, since then, been incorporated by other major companies like Alphabet Inc., Berkshire Hathaway, Facebook Inc., Alibaba Group Holding Limited etc.[3] DCSs differentiate and classify shares into categories based either on the economic powers of the shareholders, or on the weightage of their votes.[4] Classification based on economic grounds is founded on factors such as differences in dividend payouts.[5] On the other hand, companies that issue shares with Differential Voting Rights (DVRs) subscribe to a weighted voting system in their decision making process, by creating different classes of shares with different values assigned to each voting class.[6] For instance, a Class B share has 10 times the voting power of a Class A share.

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[1] Groves v. Rosemound Improvement Association, Inc., 413 So.2d 925, 927 (La. App. 1982) (U.S.A); Shapiro v. Tropicana Lanes, Inc., 371 S.W.2d 237, 241-42 (Mo. 1963) (U.S.A); Roberto Tallarita, *High Tech, Low Voice: Dual-Class IPOs in the Technology Industry*, Harvard Law School Discussion Paper No. 77, 10-12 (2018), http://www.law.harvard.edu/programs/olin_center/fellows_papers/pdf/Tallarita_77.pdf.

[2] Douglas C. Ashton, *Revisiting Dual-Class Stock*, 68 ST. JOHN'S L. REV. 863, 894 (1994).

[3] Zohar Goshen & Assaf Hamdani, *Corporate Control and Idiosyncratic Vision*, 125 YALE L. J. 560, 563 (2016).

[4] Dorothy S. Lund, *Nonvoting Shares and Efficient Corporate Governance*, University of Chicago Law School, Coase-Sandor Working Paper Series in Law and Economics 9 (2017), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2503&context=law_and_economics.

[5] Dov Solomon, *The Importance of Inferior Voting Rights in Dual-Class Firms*, 2019 BYU L. REV. 533, 535 (2019).

[6] CFA Institute, *Dual-Class Shares: The Good, the Bad, and the Ugly*, 1 (2018) https://www.cfainstitute.org/-/media/documents/survey/apac-dual-class-shares-survey-report.ashx.

In shares with DVRs, the economic stake of an investor is not directly proportional to their voting rights. Therefore, a class of shareholders retains greater control over the company as compared to its total equity stake.[7] Usually, shares with the highest voting power are retained by the founders, promoters or directors of the company. Their primary aim through such a shareholding structure is to acquire capital without having to dilute the leadership's control over the company's operations and decision making.[8] These shares remain controversial, primarily because they challenge the general norm of a democratic and equitable public company structure that allows one vote per share.[9] However, in recent years, they are increasingly being vouched for, by several companies, and have been accepted and enlisted on several stock exchanges that were once reluctant to this approach.[10] This trend soon took over the once reluctant Asian markets, with major exchanges like the Hong Kong Stock Exchange (HKEX) and the Singapore Stock Exchange (SGX) sanctioning the listing of shares with DVRs.[11]

However, in India, DCSs were acknowledged long ago, when the Companies (Amendment) Act, 2000 was introduced.[12] This amendment was made to

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[7] Solomon, *supra* note 5, at 535.
[8] Kobi Kastiel, *Executive Compensation in Controlled Companies*, 90 IND. L.J. 1131, 1133 (2015).
[9] Joel Seligman, *Equal Protection in Shareholder Voting Rights: The One Common Share, One Vote Controversy*, 54 GEO. WASH. L. REV. 687, 693 (1985).
[10] *See generally* Chris Brummer, *Stock Exchanges and the New Markets for Securities Laws*, 75 U. CHI. L. REV. 1435 (2008).
[11] *Id.*
[12] Companies (Amendment) Act, No. 53 of 2000 (2000) [hereinafter 'Companies Amendment'].

Section 86 of the Companies Act, 1956[13], which had once restricted any new issue of share capital to two kinds only, which were- (a) equity share capital and (b) preference share capital.[14] DVRs were not mentioned prior to the amendment. However, after the amendment, DVRs were included within the category of equity share capital under Section 86. But due to India's stance as a democracy leaning towards socialism, India was reluctant to accept DCSs as a category of securities at the time, as they severely diminished the voting power of a large number of common investors, and permitted the often affluent top management of corporations to retain absolute control over the equity invested by these general investors. Therefore, restrictions were placed on the issue of shares that could tip the scales against the common investors. These restrictions precluded companies and investors from exploring a viable option, which could be undertaken by all parties voluntarily, upon careful consideration of associated risks.

DVRs are considered a viable option, as they offer a simple solution to companies that operate on asset-light models, i.e. companies that are unable to provide any security to acquire debt.[15] The DVR structure is ideal for companies that do not prefer, or are unable to acquire funds through debt, but

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[13] Companies Act, No. 1 of 1956 (1956) § 86 [hereinafter 'Companies Act'].

[14] This amendment introduced differential rights as to voting, dividends or any other kind, to be included under the category of "equity share capital", which shall be discussed in detail in Part III.

[15] Securities and Exchange Board of India (SEBI), *Framework for Issuance of Differential Voting Rights (DVR) Shares*, 1, (2019), https://www.sebi.gov.in/sebi_data/meetingfiles/aug-2019/1565346231044_1.pdf; Ministry of Corporate Affairs, Notification regarding the applicability of certain provisions of the Companies Act, 2013, G.S.R. 464(E) (5 June 2015); Council of Institutional Investors (CII), *Multi-Class Stock and Firm Value Executive Summary* (10 May 2017).

also fear dilution of control through equity funding.[16] Consequently, this model can be especially beneficial to companies with highly technical pursuits, which require in-depth knowledge of the industry that a common shareholder would not ordinarily understand. This could benefit small, private companies in India with the aforementioned background, or Indian startups in need of capital, to pursue the option of an Initial Public Offering (IPO) without the apprehension of dilution of their control over the operations of the company. This article seeks to bolster this possibility.

Part II begins with the historical development of DVRs, starting with their origin in the U.S., and tracing their subsequent proliferation across different jurisdictions. It also analyses the current stance of regulatory bodies in the U.S. and Asia through a comparative approach. Part III traces the evolution of DVRs in the Indian securities law regime, from the initial reluctance of our statutory bodies towards DVRs, to the recent developments, where the Securities and Exchange Board of India (SEBI) released a Consultation Paper on Issuance of Shares with Differential Voting Rights[17], advocating the use of DVR shares, and promulgating necessary provisions to implement this plan. It also asserts the reasons as to why we should accept this model, and proposes measures that ought to be undertaken to counter its detrimental impacts. These

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[16] Tian Wen, *You Can't Sell Your Firm and Own It Too: Disallowing Dual-Class Stock Companies from Listing on the Securities Exchange*, 162 U. PA. L. REV. 1495, 1498-1500 (2014).

[17] Securities and Exchange Board of India, *Consultation Paper on Issuance of shares with Differential Voting Rights* (20 March 2019), https://www.sebi.gov.in/reports/reports/mar-2019/consultation-paper-on-issuance-of-shares-with-differential-voting-rights_42432.html. [hereinafter 'SEBI Consultation Paper']

arguments shall be presented with a special focus on how they will impact Indian investors, startups, and established companies. Conclusively, the article presents a critical analysis of this framework, along with the recommended position India could take, in the author's opinion.

II. The Historical Development of Differential Voting Rights Internationally

The democratic framework of "one vote per share" is as old as the concept of shareholding itself.[18] The distinction between control and ownership was examined in the 1800s in the United States, as corporate charters granted by the legislature began weighing share values against voting rights.[19] Some charters allowed one vote per share, while others allowed one vote per shareholder, irrespective of the shareholder's contribution to the capital. However, gradually, the one vote per share system emerged as a rule by default, and became normative.[20] The first instance of deviating from this norm occurred when the International Silver Company issued 9 million preferential shares and 11 million shares with no voting rights in 1898, thereby incorporating a DCS structure.[21] Following suit, issuers increasingly began to alter the structure of their shareholding classes by the beginning of the 20th

[18] *See generally* Eric Hilt, *When Did Ownership Separate from Control? Corporate Governance in the Early Nineteenth Century*, 68(3) J. ECON. HIST. 645 (2008); Peter Simmons, *Dual Class Recapitalization and Shareholder Voting Rights*, 87(1) COLUM. L. REV. 106 (1987).
[19] *Id.*
[20] *Id.*
[21] W. H. S. Stevens, Stockholders' Voting Rights and the Centralization of Voting Control, 40 Q. J. ECON. 353, 355 (1926).

century to retain greater control over companies.[22] These deviations from the standard norm caused a revolutionary change in the outlook that all stakeholders in capital markets had had up until then.

Before the Stock Market Crash of 1929, American corporations increasingly began to issue shares that did not hold voting rights at all, in order to raise capital without losing control of the company's decision making power.[23] One of the most prominent instances of this was when the Dodge Brothers Inc. listed nonvoting common stock in the New York Stock Exchange (NYSE) in 1925.[24] The control over the company was retained by an investment banking firm, which owned all the stock with voting rights, with the nonvoting stock going to the public.[25] The nonvoting stock and bonds issued by Dodge raised $130 million, and the firm which actually retained all the voting rights and control of the company, only had a stake of $2.5 million in it.[26]

Concerns regarding the rights of shareholders to be informed and heard were being raised increasingly, and were ultimately addressed by the NYSE[27], which then urged the Listing Committee to carefully evaluate voting rights and control of shareholders while considering listing applications by

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[22] Ronald E. Seavoy, *The Public Service Origins of the American Business Corporation*, 52 BUS. HIST. REV. 30, 59 (1978).
[23] S.M. Bainbridge, *The Scope of the SEC's Authority over Shareholder Voting Rights,* 1, 6 (U.S.A. Securities and Exchange Commission, 2007).
[24] Abhishek Nath Tripathi & Uttam Maheshwari, *Shares with Differential Voting Rights: A Legal and Economic Analysis*, 15 STUDENT B. REV 74, 83 (2003).
[25] *Id.*
[26] Vivien R. Goldwasser, *Differential Voting Rights and the Super Share - In Search of an Accommodation on the Merits*, 7 CORP. & BUS. L.J. 205, 210 (1994).
[27] William Ripley, MAIN STREET AND WALL STREET 86-89 (1927); *Supra* note 21, at 353.

companies.[28] The increasing number of concerns regarding disenfranchisement of shareholders, coupled with the Stock Market Crash of 1929, led to growing distrust amongst people with respect to stock markets and companies.[29] This forced the regulating authorities to address this issue and formulate rules that were to be applied stringently.[30] In furtherance of the same, the NYSE officially barred any non-voting stock from being listed or traded in 1940.[31]

Over a period of time, the effects of the Crash and the distrust of investors faded away. The regulations imposed by exchanges relaxed as the U.S. economy prospered, and the corporate takeover era began.[32] With that, the possibility and demand for non-voting and differential voting classes of stocks re-emerged. The National Association of Securities Dealers Automated Quotations (NASDAQ) stock exchange had not restricted issuers from enlisting differential voting classes. Therefore, the issuers who wished to enlist securities with DVRs, flocked to NASDAQ instead of NYSE.[33] As a consequence, stock exchanges (including NYSE) which had not permitted the

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[28] Seligman, *supra* note 9, at 697.
[29] Blair Nicholas & Brandon Marsh, *Dual-Class: The Consequences of Depriving Institutional Investors of Corporate Voting Rights*, Harvard Law School Forum on Corporate Governance (17 May 2017), https://corpgov.law.harvard.edu/2017/05/17/dual-class-the-consequences-of-depriving-institutional-investors-of-corporate-voting-rights/.
[30] Daniel Wells, *Shareholder Inequity in the Age of Big Tech: Public Policy Dangers of Dual-Class Share Structures and the Case for Congressional Action*, Northeastern University Law Review (21 January 2021) https://nulawreview.org/volume-13-issue-1-articles/wells.
[31] *Id.*
[32] Seligman, *supra* note 9.
[33] OECD Steering Group on Corporate Governance, *Lack of Proportionality Between Ownership and Control: Overview and Issues for Discussion*, 37, (Nov. 14, 2020), https://www.oecd.org/daf/ca/40038351.pdf.

listing of securities with DVRs, had to relax their restrictions against differential class voting shares[34] to compete with NASDAQ.[35] Almost similar to the previous attempts to do so, this was followed by a public outcry, but the securities continued to be traded until NYSE caught up with NASDAQ in the late 1980s.[36] However, the U.S. Securities and Exchange Commission (SEC) intervened at this juncture and took measures to limit DVRs by adopting the SEC Rule 19c-4.[37]

But this restriction was short lived, as this provision was struck down by the Court of Appeals of the District of Columbia, in the *Business Roundtable v. SEC* case[38] in 1990, on the grounds that the SEC had exceeded the powers granted to it by the Congress in promulgating this rule, thereby allowing dual-class structure of securities to exist as long as such a structure was already in place at the time of the Initial Public Offering (IPO) of such shares. This then led to the formulation of increasingly liberal and diverse policies in the U.S.

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[34] New York Stock Exchange Listed Company Manual § 313.00 (May 1985), https://nyseguide.srorules.com/listed-company-manual/document?treeNodeId=csh-da-filter!WKUS-TAL-DOCS-PHC-%7B0588BF4A-D3B5-4B91-94EA-BE9F17057DF0%7D--WKUS_TAL_5667%23teid-99.

[35] *Id.*

[36] Lucian Bebchuk & Kobi Kastiel, *The Untenable Case for Perpetual Dual-Class Stock*, 103 VA. L. REV. 585, 596-597 (2017); Douglas C. Ashton, *Revisiting Dual-Class Stock*, 68(4) ST. JOHN'S L. REV. 863, 895 (1994), https://core.ac.uk/download/pdf/216994218.pdf; CFI, *Dual-Class Stocks*, (2021), https://corporatefinanceinstitute.com/resources/knowledge/finance/dual-class-stocks/.

[37] Fed. Sec. L. Rep. (CCH) ¶ 84,247, adopted pursuant to Release 34-25891 (7 July 1988) (U.S.A), mandates that the voting rights of shareholders could not be diminished by companies that already had a 'one-share, one-vote' structure in place. Therefore, by virtue of this rule, companies whose shares were already being traded in the market, could not take any action to nullify or reduce the voting rights of their shareholders or adopt a dual-class shareholding structure.

[38] Business Roundtable v. SEC, 905 F.2d 406 (D.C. 1990) (U.S.A).

with respect to its capital markets across different stock exchanges, including not just NASDAQ and NYSE, but also the American Stock Exchange (AMEX).[39] The markets also increasingly liberalized their viewpoint on foreign based issuers seeking to enlist their securities with U.S. based stock exchanges by permitting them to enlist such securities through SEC, as long as they conformed to American regulations and policies.[40] Since then, with a snowball effect in place, an increasing number of companies based not just in the U.S., but also in other countries, rushed to enlist their securities with DVRs at stock exchanges based in the U.S.[41] Notably, the Alibaba Group based in China preferred listing with NYSE over the HKEX, because the latter did not permit DVRs at the time.[42] As a consequence of this, Asian stock exchanges began reconsidering their anti-DVR structure listing policies, in order to prevent the domestic companies from listing abroad.[43]

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[39] Katie Bentel & Gabriel Walter, *Dual Class Shares*, at the Global Research Seminar in cooperation with the University of Pennsylvania Law School 22 (2016).

[40] Roberta S. Karmel, *The Future of Corporate Governance Listing Requirements*, 54 S.M.U. L. REV. 325, 333 (2001); John C. Coffee, Jr., *Racing Towards the Top?: The Impact of Cross-Listings and Stock Market Competition on International Corporate Governance*, 102 COLUM. L. REV. 1757, 1758-66 (2002).

[41] Pierre Schammo, *Regulating Transatlantic Stock Exchanges*, 57 INT'L & COMP. L.Q. 827, 828 (2008).

[42] Thomas J. Egan et al., *The Revival of Dual Class Shares*, Baker McKenzie, 3, (2020), https://www.bakermckenzie.com/-/media/files/insight/publications/2020/03/the-revival-of-dual-class-shares.pdf.

[43] Benjamin Robertson & Andrea Tan, *Asia Embraces Dual-Class Shares, and Investor Activists Smolder*, Bloomberg (Aug. 07, 2018), https://www.bloombergquint.com/business/asia-embraces-dual-class-shares-and-investor-activists-smoulder.

In India, the debate regarding this structure had gained traction in 2009, after Tata Motors tried to issue shares with DVRs in 2008.[44] During this period, several corporate frauds and scams carried out by the top management of companies were surfacing, and there was increasing concern amongst stakeholders and regulatory bodies to contain this trend.[45] Investors were wary of investing in securities, as they posed a greater risk of loss with little guarantee of returns. This was a matter of grave concern for SEBI, which acknowledged the need for reforms, and began recuperating the securities market mechanism.[46] In light of these developments, shares with DVRs would have opened a floodgate for other promoters and directors aiming to alienate shareholders from partaking in the decision-making process, leading to greater risk and distrust that had already existed at the time. Therefore, much like other Asian countries at the time, India refrained from fully embracing this structure.

A. The Current Inclination of Stock Exchanges Across the World

As stated before, in recent times, authorities governing securities and trading across different countries grew concerned, as companies flocked to the stock exchanges based in the United States, instead of listing with their regional or national stock exchanges. While it was essential to protect the rights of shareholders, it was also important to keep up with other stock exchanges

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[44] Deeksha Gabra & Shivam Gupta, *Shares with Differential Voting Rights: A New Life?*, The CBCL Blog (27 July 2019), https://cbcl.nliu.ac.in/company-law/shares-with-differential-voting-rights-a-new-life/.

[45] *See generally* Klynveld Peat Marwick Goerdeler (KPMG), *India Fraud Survey Report 2010* (2010).

[46] *Tata Motors' Rights Issue Gets Warm Response*, The Economic Times (25 September 2008, 2:29 AM), https://economictimes.indiatimes.com/markets/stocks/news/tata-motors-rights-issue-gets-warm-response/articleshow/3524044.cms?from=mdr.

across the world to persevere in a globalized economy.[47] Asian markets woke up to this harsh reality with the Alibaba IPO listing on NYSE (which became the biggest IPO in history[48]) in the United States, despite being a successful Chinese e-commerce conglomerate. States began to realize that they needed to amend their obsolete regulations to prevent their companies from listing in U.S.-based exchanges.

For them to achieve the same, they recognized the need to incorporate shares with DVRs or Weighted Voting Rights (WVRs) as a part of the securities permitted to be enlisted. This was because there were numerous benefits that the issuers could avail through this structure that would be unavailable to them through the traditional form of securities and issuance.[49] Therefore, the competition amongst stock exchanges across the world and the gravitation of companies towards DCS structures is majorly why DVRs/WVRs are becoming more commonplace, with stock exchanges and investors choosing to observe the benefits of the new structure over the traditional listing standards and regulations.[50]

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[47] Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L. J. 2359, 2419-22 (1998).
[48] Flora Huang, *New York vs. Hong Kong- A Burst of Regulatory Competition: The Listing of Alibaba*, University of Leicester School of Law Research Paper No. 15022 5 (2015).
[49] HKEX, *Listing Regime Reforms for Dual-Class Share Structure and Biotech Industry*, 7-9 (15 November 2018), https://www.hkex.com.hk/-/media/HKEX-Market/News/Research-Reports/HKEx-Research-Papers/2018/CCEO_DualClass_201811_e.pdf?la=en.
[50] *Id.*

i. Current market orientation in the U.S.

The Silicon Valley Revolution in the U.S. triggered a chain of developments in the Information Technology (IT) sector across the world.[51] With innovators setting up high-growth corporations in this sector, the DCS structure made a comeback, as the founders wanted to retain control over their companies. The founders, directors, and promoters increasingly felt that stockholders, who did vote during such meetings, did so without any foresight for long term growth of the company, and without any technical knowledge of the infotech sector and the capital markets.[52] They understood that the stockholders are bound to prioritize short term gains over long term goals to maximize their returns, which, in turn, adversely affected the long term vision that the founders had for the company.[53]

In 1994, NYSE, NASDAQ and AMEX decided to finally align their incongruent policies with respect to DCS structures through a series of reforms initiated by the SEC Commission for a unified policy on the listing of companies with such a structure.[54] They conclusively determined that companies could not restrict or revoke the voting rights of existing shares that had already been issued, but could issue new shares with DVRs. This paved a

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[51] Annie Gaus, *Tech IPOs With Dual-Class Shares Start to Face Meaningful Pushback*, the Street (8 April 2019) https://www.thestreet.com/investing/silicon-valley-ipos-unicorns-dual-class-governance-14918723.

[52] *See generally* S.W. Bauguess et al., *Large shareholder diversification, corporate risk taking, and the benefits of changing to differential voting rights*, 36(4) J BANK FINANCE 1244 (2012).

[53] Lund, *supra* note 4, at 716-22.

[54] Securities and Exchange Commission of the U.S. (SEC), *The SEC Digest* (Issue 94-238, 15 December 1994); S.M. Bainbridge, *Revisiting the One-Share/One-Vote Controversy: The Exchanges' Uniform Voting Rights Policy*, 22 SEC. REG. L.J. 175, 178 (1994).

way for several companies seeking to incorporate this structure to enlist themselves across all major stock exchanges in the country through IPOs, to broaden their outreach.

By the beginning of the 21st century, upcoming tech giants like Google had also opted for DCS structures, and this trend continued until an astounding 34.1% of all the IPO funds raised in the U.S. belonged solely to DCS structured company issues.[55] This number has only increased in recent times. However, with Snap Inc.'s controversial DCS structured IPO with three categories of shares, which included shares with no voting rights[56], this controversy garnered more attention than ever.[57] The IPO application was filed under the Jumpstart Our Business Startups (JOBS) Act[58], and allowed the founders to retain the 'super-voting shares' with a majority voting power, allowed pre-IPO investors shares with some voting power, and post-IPO shares no voting power whatsoever.[59] This process was also severely criticized because the JOBS Act allows companies to disclose negligible information

[55] Stevens, *supra* note 21, at 440-50.
[56] Securities and Exchange Commission of the U.S. (SEC), *Amendment No. 3 to Form S-1 Registration Statement of Snap Inc. under the Securities Act of 1933*, Registration No. 333-215866 (2017) [hereinafter 'SEC'].
[57] Ken Bertsch, *Remarks to the SEC Investor Advisory Committee: Unequal Voting Rights in Common Stock*, (Council of Institutional Investors (CII), 9 March 2017).
[58] The Jumpstart Our Business Startups Act, 126 Stat. 306, Pub. L. §§ 112–106 (2012).
[59] Kurt Wagner, *One way Snapchat's IPO will be unique: The shares won't come with voting rights*, Vox (21 February 2017) https://www.vox.com/2017/2/21/14670314/snap-ipo-stock-voting-structure.

about their financial performance, managerial detail, executive pay, etc. to the public, despite opting to go public.[60]

Another IPO which has garnered a significant amount of controversy and attention recently, is the Palantir Technologies Inc. IPO.[61] The company itself operates a controversial business- providing security and surveillance data analytics, primarily to the law enforcement agencies of the U.S.[62] Palantir developed a convoluted shareholding structure for its direct listing to become publicly traded.[63] It has *four* tiers of stock[64]-

i. Class A Stock- Shares that fall in the Class A category have 1 vote per share.

ii. Class B Stock- Shares that fall in the Class B category have 10 votes per share.

iii. Class F Stock- Shares that fall in the Class F category would together have 49.999999% of the company's shareholding power at all times. The

[60] R. Christopher Small, *The JOBS Act and Information Uncertainty in IPO Firms*, Harvard Law School Forum on Corporate Governance (20 August 2014), https://corpgov.law.harvard.edu/2014/08/20/the-jobs-act-and-information-uncertainty-in-ipo-firms/.
[61] Richard Waters, *Palantir goes public but founders will have control for life*, Financial Times (30 September 2020), https://www.ft.com/content/27eddb59-1770-4ad8-a07f-6a940e20e00c.
[62] Beth Kindig, *Palantir IPO: Deep-Dive Analysis*, Forbes (29 September 2020, 11:17 PM), https://www.forbes.com/sites/bethkindig/2020/09/29/palantir-ipo-deep-dive-analysis/#7ff036741a14.
[63] Jeremy Owens, *The Palantir non-IPO: 5 things to know about the (formerly) secretive software company's direct listing*, MarketWatch (Sept. 29, 2020, 5:00 AM), https://www.marketwatch.com/story/the-palantir-non-ipo-5-things-to-know-about-the-formerly-secretive-software-companys-direct-listing-11601351442.
[64] Securities and Exchange Commission of the U.S. (SEC), Form S-1 Registration Statement under the Securities Act of 1933, Palantir Technologies Inc., Registration No. 333- (2020).

shares will be held by a voting trust established by the founders, which will control the votes made through the stock, pursuant to the Founder Voting Trust Agreement. These shares will have variable voting powers as per whatever is decided under this agreement, at the choice of the holder.

iv. Preferred Stock- These shares have a higher claim over the assets and the dividend than the common stock, but do not have voting rights in the company.

The first three classes of shares have identical rights, except for voting power, transfer, and conversion. However, the public investors will only be able to buy Class A shares. Through this structure, the founders- Alexander Karp, Stephen Cohen, and Peter Thiel, who retain all of the Class F shares through the Founder Voting Trust Agreement, and have some Class A and Class B shares as well, retain effective control over the company for a foreseeable future.

Palantir has disclosed all of this information and the risks associated with it to the SEC, and to the public. Although this IPO has garnered a significant amount of controversy, it is important to note that it takes into account the choices of the founders, the objectives of the company, as well as the right of the investors to make an informed decision. However, it does pose a significant risk of sidelining investors down the road. Furthermore, it does not suffice to merely caution the investors of the risks associated with being a shareholder. Companies must also actively take steps to protect their interests.

It will be serviceable to the companies in the long run, since, this way, they won't merely be a tool in the hands of a few individuals who may make decisions to the detriment of the company, and the people involved with it. Through this criticism, it is evident that even though the promotion of innovative startups and companies through DVRs is essential, the interests of other stakeholders cannot be compromised.

ii. The Asian Capital Markets

With several companies preferring to choose the DCS structure, and choosing to explore international listing alternatives for lack of domestic authorization, Asian capital markets and regulatory bodies began reevaluating their shareholding and enlistment directives.[65] HKEX evaluated the risks of incorporating shares with DVRs or WVRs in its market, and ultimately, allowed the listing of such securities from April 2018, based on certain qualifying factors.[66] The qualifying factors include the innovation and uniqueness of the company, its growth trajectory, external validation through a significant third-party investment, etc.[67] These qualifying attributes allow the regulator to determine which companies are reliable enough to receive investment from the public, despite the fact that the shareholders will have to relinquish the voting rights that would have ordinarily been available to them.

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[65] Hong Kong Stock Exchange (HKEX), *Weighted voting rights: Angel or evil to investors?* (19 July 2019), https://www.hkex.com.hk/-/media/HKEX-Market/News/Research-Reports/HKEx-Research-Papers/2019/CCEO_WVR_201907_e.pdf?la=en.
[66] HKEX Guidance Letter (HKEX-GL93-18), *Suitability for Listing with a WVR Structure* (HKEX-LD43-3) (April 2018), https://www.hkex.com.hk/-/media/HKEX-Market/Listing/Rules-and-Guidance/Interpretation-and-Guidance-Contingency/Guidance-Letters/Guidance-Letters-for-New-Applicants/gl93_18.pdf?la=en.
[67] *Id.*

Therefore, these criteria allow the regulatory bodies to weigh the benefits of this structure against its risks, on a case-to-case basis.

Taking into account the probable consequences of this change, the HKEX has also announced that it will be taking measures to curtail the detrimental effects of this model, and will formulate and enact rules and regulations in accordance with the rights and requirements of shareholders, investors, and companies, while keeping in mind corporate governance and effective management of the company.[68] One of these regulations include the limit placed on the issuer to not issue shares with voting power of more than 10 times that of an ordinary share. However, despite allowing shares with DVRs to be enlisted, HKEX still encourages the traditional "one share, one vote" policy.[69]

In Singapore, at one point in time the DCS structures were prohibited in their entirety. However, in 2011, the companies were permitted to issue WVR shares on a conditional basis, before finally allowing public companies to issue DCSs after the Listings Advisory Committee suggested the SGX to permit the same.[70] Similar to HKEX, the conditions for listing new issuers include evaluation of the company's growth, contribution by reputed third party investors, contribution of shareholders who will be delegated the power of multiple votes, etc. Furthermore, SGX also prohibits the listing of shares with voting power of more than 10 times that of an ordinary share. It also provides for conversion of multiple voting shares to ordinary shares upon sale, or if a

[68] HEX, *supra* note 49.
[69] HKEX, *supra* note 66.
[70] Singapore Exchange Securities Trading Limited (SGX-ST), *Consultation Paper on Possible Listing Framework for Dual Class Share Structures* (Feb. 16, 2017).

director holding the shares ceases to be a director. These provisions curtail unbridled power of an individual, or a group of individuals, over a company, and prevent a conflict of interest from arising in the future. Additionally, both ordinary and multiple voting shareholders are mandated to observe a lock-in period of 12 months. SGX also provides for other constraints to prevent sudden alterations in voting patterns and rights, such as preventing the issuance of shares with multiple votes post listing, with the exception of rights issue, or corporate actions specified in the framework.[71]

A common thread in these policies is the consistent effort to prevent a future, where a self-regarding 'Corporate Royalty' dominates the market. However, as reluctant as it may be, acceptance of shares with DVRs is gradually becoming a norm across stock exchanges internationally, which SEBI aims to draw level with.

III. DVRs and Indian Securities Law

A. Development of DVRs in India

Despite its initial scepticism, much like other jurisdictions in Asia, India also warmed up to the concept of DVRs. Back in 2000, the Companies (Amendment) Act, 2000[72] amended Section 86 of the Companies Act, 1956[73], to introduce differential rights regarding voting, dividends etc. under the category of "Equity Share Capital". Additionally, Companies (Issue of Share

[71] *Id.*
[72] Companies Amendment, *supra* note 12.
[73] Companies Act, *supra* note 13.

Capital and Differential Voting Rights) Rules, 2001[74] also permit the issue of shares with DVRs. It is pursuant to these, that companies like Tata Motors and Pantaloons Retails issued shares with DVRs.[75] These companies offered to pay a 5% higher dividend to shareholders of the newly issued shares with only 1/10th of the voting rights as that of ordinary equity shares.[76]

However, this move was questioned by several minority shareholders, who feared it would lead to corporate autocracy, especially in light of the increasing number of frauds in the investment regime in India at the time. But the legality of shares with DVRs, was upheld by the Company Law Board under Section 86 of the Companies Act, 1956, in *Anand Pershad Jaiswal and Ors. v. Jagatjit Industries.*[77] To assuage the investors who were wary of these developments, SEBI issued *Amendments to the Equity Listing Agreement*[78] in 2009, which prohibited listed companies from issuing shares with superior voting or dividend rights, as compared to the regular equity shares that have already

[74] Companies (Issue of Share Capital and Differential Voting Rights) Rules, 2001, G.S.R.167(E) (2001).

[75] Akila Agrawal, *Shares with Differential Voting Rights – SEBI's Sequel Trumps the Original*, India Corporate Law Blog (May 14, 2019), https://corporate.cyrilamarchandblogs.com/2019/05/shares-with-differential-voting-rights-sebi/#more-2847.

[76] Rahul Oberoi, *How to Benefit from Shares with Differential Voting Rights*, Business Today (March 2013) https://www.businesstoday.in/moneytoday/stocks/how-to-benefit-from-shares-with-differential-voting-rights/story/192706.html#:~:text=DVR%20shares%20are%20priced%20lower,more%20dividend%20than%20ordinary%20shareholders.

[77] Anand Pershad Jaiswal and Ors. v. Jagatjit Industries, Company Petition No. 60 Of 2007 (New Delhi) [hereinafter Anand Jaiswal].

[78] Securities and Exchange Board of India (SEBI), *Amendments to the Equity Listing Agreement* (SEBI/CFD/DIL/LA/2/2009/21/7) (July 21, 2009).

been issued by the company.[79] Therefore, companies could issue DVRs only if the shares had lower voting rights than its regular equity shares, along with the same dividend rights.

When Companies Act, 2013[80] came into effect, Section 47 provided for all shareholders of a company limited by shares to have the right to vote on every company resolution.[81] However, Section 47 is subject to Section 43[82], which allows capital acquired through shares with DVRs to form a part of equity share capital. This further paved the way for shares with DVRs to be issued in the Indian markets. However, a DVR share issue is contingent upon two prerequisites-

i. That the issuing company must have a consistent record of distributable profits for the last 3 years; and

ii. That the shares with DVRs do not exceed 26% of the total post-issue capital.[83]

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[79] *Id.*, at cl. 28A of the Listing Agreement, which states: "The company agrees that it shall not issue shares in any manner which may confer on any person, superior rights as to voting or dividend vis-à-vis the rights on equity shares that are already listed."
[80] Companies Act, No. 18 of 2013 (2013).
[81] *Id*, at Section 47.
[82] *Id*, at Section 43:
"The share capital of a company limited by shares shall be of two kinds, namely—
(a) equity share capital— (i) with voting rights; or (ii) with differential rights as to dividend, voting or otherwise in accordance with such rules as may be prescribed; and
(b) preference share capital: Provided that nothing contained in this Act shall affect the rights of the preference shareholders who are entitled to participate in the proceeds of winding up before the commencement of this Act."
[83] SEBI Consultation Paper, *supra* note 17.

In 2014, *Rule 4* of the *Companies (Share Capital & Debentures) Rules, 2014*[84] laid down additional conditions for issuing shares with DVRs. These were that:

i. The articles of association of the issuer must authorize the issue of shares with DVRs;

ii. Such an issue must be authorized by the passing of an ordinary resolution at a general meeting of shareholders;

iii. The issuing company must not have defaulted in filing financial statements and annual returns for the last three financial years;

iv. It must not have a subsisting default in the payment of declared dividends, repayment of matured deposits, redemption of preference shares or debentures, or payment of any interest;

v. It must not have defaulted in repayment of a loan from a public financial institution, state level financial institution, or a scheduled bank. It must also not have defaulted in any statutory payments directed towards its employees.

vi. It must not have been penalized by any court or tribunal, in respect of any

[84] Companies (Share Capital and Debentures) Rules, G.S.R 265(E) Rule 4(5) (2014).

> offenses under the statutes prescribed in the rule[85] for the last three years.

However, there was a distinction made between DVRs and superior voting rights, given that the former could denote both, rights superior or inferior to the regular equity shares of the company that had already been issued.[86] Issue of shares with superior voting rights was prohibited under Regulation 41(3) of the SEBI (Listing Obligations and Disclosure Requirements) Regulations (LODR)[87] and therefore, DVRs could only be issued with inferior rights of voting.[88] However, in doing so, two issues arose. Firstly, the ordinary equity shares would still have superior voting rights than the shares with lower voting rights. Therefore, even if SEBI precluded the issue of superior voting rights, the ordinary equity shareholder still had greater voting authority than those who had shares with lower voting rights. Therefore, the problems arising from inequality of voting rights remained unresolved. Secondly, no comprehensive measures were established to protect the rights of the shareholders with lower voting rights, or to sustain corporate governance in the dual-class share structure.

Section 48 of the Companies Act, 2013, deals with variation of shareholders' rights. It holds that the rights of a class of shareholders may be varied if 3/4th

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[85] *Id.*, Rule 4 mentions- the Reserve Bank of India Act, 1934, the Securities and Exchange Board of India Act, 1992, the Securities Contracts Regulation Act, 1956, the Foreign Exchange Management Act, 1999 or any other special Act, under which such companies are being regulated by sectoral regulators.
[86] Securities and Exchange Board of India (SEBI), *SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015* (SEBI/LAD-NRO/GN/2015-16/013) (2 September 2015).
[87] *Id.*, at Regulation 41(3).
[88] *Id.*

of the holders of the issued shares of such class consent to such variation in writing. Another way in which this can be done is when a special resolution is passed at a meeting of such shareholders, in case the provision with respect to such variation is contained in the memorandum or articles of the company, *or* if it isn't expressly prohibited by the terms of issue of the shares of that class. However, if the variation of one class of shares affects the rights of another class of shareholders, the consent of 3/4th of the affected class of shareholders must also be taken. If at least 10% of the holders of the issued shares object to such variation, they can approach the National Company Law Tribunal to have it cancelled. The variation will not come into effect till the point where the Tribunal makes a decision with respect to it. Such a decision will be binding.

Additionally, the Securities Contracts (Regulation) Rules, 1957 (SCRR)[89] prescribe the requirements of minimum subscription and dilution for each individual class of equity share, under Rule 19(2)(b). They also lay down the requirement that all classes of equity shares must be listed together, including the shares with DVRs. No class can be excluded during an issue. However, SEBI recognized that this requirement might not be feasible, and has sought to do away with it.

In light of these issues, SEBI acknowledged the need for a comprehensive document to address the debate regarding DVRs, and issued a consultation paper (the paper) on 20th March, 2019.[90] The paper created a distinction

[89] Securities and Exchange Board of India (SEBI), *Securities Contracts (Regulation) Rules, 1957 (SCRR)*, (Notification No. SRO576) (21 February 1957) last amended in 2015 via G.S.R. 125(E).
[90] SEBI Consultation Paper, *supra* note 17.

between shares with superior voting rights (SRs), and shares with fractional or inferior voting rights (FRs), both of which together constitute the category of shares with DVRs.[91]

The paper also proposed separate provisions for companies whose equity shares had already been listed with a stock exchange, and those which had *proposed* to go public, but hadn't listed their shares with any exchange. But in both the cases, issue of shares with DVRs must be authorized in the articles of association of the company and sanctioned by a special resolution (unlike the requirement of an ordinary resolution in the Companies (Share Capital & Debentures) Rules, 2014) at the general meeting of shareholders. These must be accompanied with relevant information regarding such issue, including the ratio of difference between the shares with DVRs and regular shares, the size of the issue, coat-tail provisions etc.[92]

In case of companies which already have regular equity shares listed, FR shares can be issued through rights issue or bonus issue *pro rata* to all equity shareholders, or through a follow-on public offer, which would allow existing shareholders, as well as the public to subscribe to such shares. Furthermore, the company may also issue other instruments that can convert to FR shares under the prescribed rules. However, the ratio of the weightage of votes must be expressed as whole numbers, and must not exceed 1:10, i.e. one regular equity share must not have the voting power of more than 10 FR shares.[93]

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[91] *Id.*
[92] *Id.*
[93] *Id.*

Additionally, the pricing of FR shares is to be within the ambit of regulatory considerations, and their face value must be the same as that of its ordinary equity shares. But the company may provide additional dividends to FR shareholders, which is often a norm undertaken in an attempt to compensate shareholders with reduced voting power.[94] The company also has an obligation towards all shareholders to inform them of all implications of introducing another class of shares with FRs. It is also mandatory that the company only have one class of FR shares at any point in time.

On the other hand, companies that haven't listed their equity shares, but plan to do so, can issue any number of SR shares. However, they can only issue them to the promoters of the company.[95] This provision was made upon keeping in mind the benefits that the DCS structure could bring to startups and young companies, who wished to acquire capital while retaining their control over the company.[96] However, the precondition to permitting a public issue, is that the promoters must hold their SR shares for at least a year before making the issue. Additionally, the company cannot issue SR shares to anyone (including the promoters) once the regular equity shares have been listed.

This provision curtails the possibility of excessive concentration of power in the company. But FR shares can be issued to the public, subsequently, subject to all the aforementioned regulations regarding FRs.[97] Once the company

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[94] Lund, *supra* note 4, at 12.
[95] SEBI Consultation Paper, *supra* note 17.
[96] Vanita D'Souza, *SEBI Eyeing 'SnapChat Model' To Attract Startup Listing on the Stock Exchanges*, Entrepreneur (July 14, 2018), https://www.entrepreneur.com/article/316795.
[97] SEBI Consultation Paper, *supra* note 17.

decides to list other shares to issue them to the public, it has to disclose the particulars of the SR shares (including the number of shares issued, the voting power ratio, names of all the holders of SR shares, other rights that these particular shareholders have, etc.) in the offer document. This is to ensure that all potential investors make an informed decision when they subscribe to the shares of the company. The shareholders with SRs also cannot change the terms of their shareholding to their advantage, once the IPO has been made. This is to ensure that the other shareholders are not isolated after their investment is made based on the original IPO terms.

Furthermore, to ensure that there isn't an abnormal difference in the voting powers of SR shareholders, FR shareholders and ordinary equity shareholders, it was determined that SR shares can have the maximum voting ratio of 10:1, and are to be permanently locked in upon allocation. Furthermore, creation of third-party interest over SR shares by way of lien, pledge, non-disposal undertaking, etc. is to be prohibited. This is because the rationale behind creating a separate class of shares is to allow the promoters to retain greater control over the functions of the company, and preclude third-party interference to the detriment of the company's long-term objectives.[98] Therefore, surrendering SRs to a third-party, defeats the very purpose behind this arrangement.

SR shares are eligible for the same amount of dividend and same types of rights as an ordinary equity share, except for their voting power. Therefore,

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[98] Andrew William Winden, *Sunrise, Sunset: An Empirical and Theoretical Assessment of Dual-Class Stock Structures*, 2018 COLUM. BUS. L. REV. 852, 897-98 (2018).

unlike FR shares, they are not entitled to a higher dividend amount. Coat-tail provisions are also laid down to ensure that the SRs aren't put into effect in a manner that is detrimental to corporate governance and the *bona fide* objectives behind the DCS structure. They enlist a series of conditions, which, if they're met, would lead to the SR shares being treated as ordinary equity shares, and will have no superior voting rights. These conditions include voluntary winding up of a company, change in control, initiation of voluntary resolution plan, etc.[99]

However, one of the most important provisions mentioned is the sunset clause.[100] A 'sunset clause' prescribes the precondition that a provision will cease to apply upon the occurrence of an event, or when a certain period of time has lapsed. It lays down that SR shares will automatically convert to regular equity shares on the fifth anniversary of listing such regular shares, unless a five-year extension period is approved through a special resolution.[101] However, the SR shareholders may convert their shares to regular equity shares any time before that. But they cannot engage in inter-se transfer amongst promoters, even if it is consensual. This is to prevent concentration of power in the company.

[99] SEBI Consultation Paper, *supra* note 17.
[100] Winden, *supra* note 98 at 869.
[101] SEBI Consultation Paper, *supra* note 17.

B. Implications on Key Stakeholders

i. Listed and Established Companies

DVRs offer several advantages to well-established companies that are already listed with stock exchanges.

Firstly, it allows the company to follow a long-term growth, and innovation-oriented plan.[102] This makes it possible for the companies to undertake risks that regular shareholders would be too apprehensive to take. It highlights the importance of a company as a business organization with perpetual succession, rather than an entity aimed at furthering the interests of a few individuals over a short span of time. Even the 'Agency Theory'[103], which asserts that shareholders have the supreme right over a company by virtue of being its owners, does not address the fact that they are not legally obligated to promote the long-term growth and interests of the company, and can focus on short-term dealings that may yield larger dividend portions.[104]

As a consequence, in a structure where the top management is obligated to deliver greater returns in shorter periods of time while following risk-free agendas, companies lose sight of creative solutions, long-term decision-

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[102] Sara L. Terheggen, *Dual-class stock: Will innovation Trump Concern?*, Daily Journal (28 February 2017), https://media2.mofo.com/documents/170228-dual-class-stock.pdf.
[103] Michael C. Jensen, *Self-interest, Altruism, Incentives and Agency Theory*, 7(2) J. APPL. CORP. FINANCE 1, 13-14 (1994); Kathleen M. Eisenhardt, *Agency Theory: An Assessment and Review* 14(1) ACAD. MANAG. REV. 57, 58-59 (1989).
[104] Joseph L. Bower & Lynn S. Paine, *The Error at the Heart of Corporate Leadership*, HARV. BUS. REV., May-Jun. 2017, at 50, 61-63 (2017) https://hbr.org/2017/05/managing-for-the-long-term.

making, and innovation.[105] This leads to weaker companies following the same rehashed plans found across markets, and debilitated economies that adversely impact our social fabric in the long run.[106] Shareholding structures following DVRs solve this problem, along with acknowledging that not all shareholders can be treated as 'one owner', and require a strong management at the top to converge their diverse goals with the company's ambitions.

Secondly, it offers the companies protection from proxy contests initiated by short-term or institutional investors.[107] Proxy contests are often initiated to displace the incumbent management, in order to gain control of the company.[108] Several instances of proxy contests over the past, have been a cause of concern for companies.[109] These include the clash over Cyrus Mistry's removal from the board of Tata Motors[110], the near displacement of

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[105] *See generally* Michael C. Jensen, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FINANC. ECON. 305-360 (1976).
[106] Bower & Paine, *supra* note 104.
[107] Ronald C. Lease et al., *The Market Value of Differential Voting Rights in Closely Held Corporations*, 57 J. BUS. 443, 458 (1984); Uma V. Sridharan & Marc R. Reinganum, *Determinants of the Choice of the Hostile Takeover Mechanism: An Empirical Analysis of Tender Offers and Proxy Contests*, 24 FINANC MANAGE 57, 58 (1995).
[108] Lucian Bebchuk & Oliver Hart, *Takeover Bids vs. Proxy Fights in Contests for Corporate Control*, The Harvard John M. Olin Discussion Paper Series, Discussion Paper No. 336 10/2001, 1-2, (2001), https://oconnell.fas.harvard.edu/files/hart/files/proxyo.pdf.
[109] Joseph E. Gilligan et al., *Preparing for Proxy Contests: Practical Steps Every Company Should Consider*, Hogan Lovells (Feb. 24, 2014), https://www.hoganlovells.com/~/media/hogan-lovells/pdf/publication/q00281-bna-article-04cm_pdf.pdf.
[110] P.R. Sanjai & George Smith Alexander, *Tata Motors Emerges as Key Battle in Biggest Indian Proxy Fight*, BLOOMBERG QUINT (Dec. 15, 2016), https://www.bloombergquint.com/markets/tata-motors-emerges-as-key-battle-in-biggest-indian-proxy-fight.

Deepak Parekh from the HDFC board of directors[111], the attempted takeover of Jagatjit Industries Limited by Mr. Karamjit Jaiswal's relatives[112] etc. SR shares with the promoters will preclude such instances from occurring. It also forestalls any attempts of hostile takeovers, which usually begin with large-scale equity takeovers to acquire a substantial voting power in the company.[113] However, in a DCS structure where the promoters retain SR shares, even if a bidder acquires a sizable number of equity shares, they will still not have enough voting rights to topple the existing leadership.

Thirdly, issue of shares with DVRs allows the funding of large-scale capital acquisitions without control dilution.[114] For instance, Tata Motors had issued DVR shares for the Jaguar-Land Rover acquisition.[115] In its Board Meeting in June 2019[116], SEBI also laid down additional requirements for a company with SR shares to issue regular shares through an IPO. *Firstly*, this provision regarding issuing will be applicable to tech companies. *Secondly*, the issuer must be a part of a promoter group, whose net worth does not exceed INR 500 crores. *Thirdly*, SR shares will only be allowed to be issued to founders or promoters holding executive positions in the company. *Conclusively*, the

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[111] Sajeet Manghat, *Uday Kotak Wants India To Regulate International Proxy Advisers*, BLOOMBERG QUINT (Aug. 6, 2018), https://www.bloombergquint.com/business/uday-kotak-wants-india-to-regulate-international-proxy-advisers.
[112] Anand Jaiswal, *supra* note 77.
[113] David F. Larcker et al., *The Big Thumb on the Scale: An Overview of the Proxy Advisory Industry*, Harvard Law School Forum on Corporate Governance (June 14, 2018), https://corpgov.law.harvard.edu/2018/06/14/the-big-thumb-on-the-scale-an-overview-of-the-proxy-advisory-industry/.
[114] SEBI Consultation Paper, *supra* note 17.
[115] SEBI Consultation Paper, *supra* note 17.
[116] Securities and Exchange Board of India (SEBI), *The SEBI Board Meeting* (PR no. 16/2019, 27 June 2019).

shares must have been held for at least 6 months prior to the Red Herring prospectus, with a minimum voting ratio of 2:1, and a maximum ratio of 10:1.

However, concerns regarding this structure have been raised. One of the primary issues that have been raised is the excessive power that the management retains by virtue of their superior rights, leading to managerial entrenchment. In these situations, managers begin to use their position to further their own interests, instead of working towards the company's objectives.[117] They do so by evading the discipline required of them through corporate governance and control mechanisms, such as board monitoring, threat of dismissal or takeover etc.[118] If they retain SR shares, even those which are limited by a term, the long-term impact on the company due to the entrenchment would be severe.[119] In the same vein, concerns regarding poor corporate governance and obstruction of legitimate participation by other shareholders, are also valid.

However, these concerns can be addressed through external control mechanisms prescribed in Part IV, that play the part of a "Watchdog Mechanism", in that they only interfere when there's a malfunction, and allow the system to work independently at other times.

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[117] Philip G. Berger et al., *Managerial Entrenchment and Capital Structure Decisions*, 52(4) J. FINANCE 1411, 1411 (1997).
[118] *Id*.
[119] Randall Morck et al., *Corporate Governance, Economic Entrenchment and Growth*, 43 J. ECON. LIT. 655, 657 (2005).

ii. Indian Startups

One of the primary reasons that DVRs are now being promoted in India, is the gradual increase in the promotion of entrepreneurship over the years.[120] This has culminated into the present day scenario, where, although investor welfare and corporate democracy is still a concern, it is no longer achieved at the cost of innovation and initiative. Instead, with the Consultation Paper, SEBI has attempted to strike a balance between both.

One of the key changes SEBI decided to make was with respect to *Regulation 6* of the SEBI (Issue of Capital and Disclosure Requirements) Regulations 2018 (ICDR)[121], which deals with the eligibility requirements of an IPO. The Regulation provides that only those companies which have a consistent track record of distributable profits for the last 3 years, net tangible assets equivalent to INR 3 crores, average profits of at least INR 15 crores and net worth of INR 1 crore can issue DVRs. However, for startups that focus on growth and expansion in their initial years, these criteria would be impossible to fulfil. Additionally, the requirement for having tangible assets valued at INR 3 crores at least, is a difficult feat for certain types of companies (such as IT companies) to achieve, as they may not require tangible infrastructure valued up to that amount, as a startup.[122] The Consultation Paper proposed an amendment to do away with these requirements, noting that the benefits of the DVR structure

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[120] *See generally* Suresh Bhagvatula et al., *Innovation and Entrepreneurship in India: An Overview*, 15(3) MANAG ORGAN. REV. 467 (2019).
[121] Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018 (SEBI/LAD-NRO/GN/2018/31, Sept. 11, 2018).
[122] Vijay Govindarajan et al., *Should Dual-class Shares be Banned?*, HARV. BUS. REV. (Dec. 3, 2018), https://hbr.org/2018/12/should-dual-class-shares-be-banned.

aimed at aiding the growth of startups would not reach the target demographic if these regulations remained as they were.

Furthermore, the Ministry of Corporate Affairs (MCA) stated that it has amended the Companies Act to raise the cap on DVRs to 74% from 26%, which will aid startups and promising high growth technology companies (HGTCs) in raising equity capital from global investors without relinquishing their control over the company.[123]

A major advantage of the promoters of a startup retaining SR shares, is that it nips hostile takeovers in the bud.[124] Furthermore, IT sector startups often fear shareholders meddling with their plans and operations, and feel hesitant to take their companies public for this reason.[125] This has resulted in a decline in IPOs.[126] However, DVRs can allow them to pursue this option without fearing either of the aforementioned consequences of going public. It also helps startups avoid short-term, financial market-oriented motivations of institutional investors, which might deviate them from their plans and

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[123] *Boon to start-ups: Centre Raises Cap on Differential Voting Rights*, FINANCIAL EXPRESS (Aug. 17, 2019), https://www.financialexpress.com/industry/sme/boon-to-start-ups-centre-raises-cap-on-differential-voting-rights/1677748/#:~:text=In%20a%20significant%20development%2C%20the,raise%20equity%20capital%20from%20global.

[124] Rongeet Poddar, *Lessons from L&T's Takeover of Mindtree: Can Differential Voting Rights Aid Promoters in Peril?*, IndiaCorpLaw (11 July 2019), https://indiacorplaw.in/2019/07/lessons-lts-takeover-mindtree-can-differential-voting-rights-aid-promoters-peril.html.

[125] D'Souza, *supra* note 96.

[126] Vijay Govindarajan et al., *Why We Shouldn't Worry About the Declining Number of Public Companies*, HARV. BUS. REV. (Aug. 27, 2018), https://hbr.org/2018/08/why-we-shouldnt-worry-about-the-declining-number-of-public-companies.

objectives. This makes DVRs especially important for organizations which value independence of news, or technological innovation and creativity.[127]

iii. Shareholders and Potential Investors

As elucidated above, DVRs promote long-term growth and innovation of companies, and therefore are beneficial to investors in the long run. Additionally, adoption of DCS structures has led to improved corporate values and reduced agency costs[128], which leads to greater returns for shareholders (empirically, 23.11%).[129] This, in turn, leads to greater and consistent dividend payouts, busting the myth that DCS structure sideline the interests of shareholders. Due to the increase in shareholder activism that takes different paths, and is driven by different agendas (social, political, environmental, or private)[130], the company administration driven solely at value-creation and well-informed decision-making has been deemed to be a better option empirically.[131] Therefore, a model where the decision-making is *au courant* with the technicalities of the market and the operations of the company, but which also simultaneously operates within the ambit of external and internal

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[127] Vijay Govindarajan & Anup Srivastava, *Reexamining Dual-Class Stock*, Tuck School of Business Working Paper No. 3023323 (Aug. 21, 2017), https://ssrn.com/abstract=3023323.
[128] Kosmas Papadopoulos, *Dual-Class Shares: Governance Risks and Company Performance*, Harvard Law School Forum on Corporate Governance (June 28,2019), https://corpgov.law.harvard.edu/2019/06/28/dual-class-shares-governance-risks-and-company-performance/.
[129] *See generally* B.D. Jordan et al., *Corporate payout policy in dual-class firms*, 26 J. CORP. FINANCE 1 (2014).
[130] Milton Harris & Artur Raviv, *Control of Corporate Decisions: Shareholders vs. Management*, 23 REV. FINANCE STUD. 4115, 4116-22 (2010).
[131] *See generally* Martin Gelter, *The Dark Side of Shareholder Influence: Managerial Autonomy and Stakeholder Orientation in Comparative Corporate Governance*, 50 HARV. INT'L L.J. 129 (2009).

governance mechanisms, is preferred by the management, over the absolute discretion of shareholders.

The argument against DVRs is that they violate the basic principle of corporate democracy, which is that whoever provides capital has the right to have a say in what happens to their investment, and DVRs diminish that right. However, the decision to forfeit the voting rights in a company is also a right in itself, which should be made available to the shareholders. It is exclusively their prerogative and discretion to invest in a manner that suits their interests and investment ambitions. In order to protect the larger interests of the shareholders, SEBI has proposed that in major decisions regarding the company, that can directly affect the shareholders, such as, in the case of mergers and acquisitions, or when the promoters sell or transfer their shares, the shares will be converted to regular equity shares.[132]

The past few decades have seen an increase in the preference of pooled investments in return for greater benefits.[133] However, this comes along with the demand for non-interventionist supervision, which the investors deem necessary to protect their investments without having to be informed of every detail of the company's functions.[134] More often than not, this aims at experts supervising the investment of the capital by taking up the roles of company

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[132] SEBI Consultation Paper, *supra* note 17.

[133] Larry Harris, *Investment Vehicles*, The CFA Institute (2014), https://www.cfainstitute.org/-/media/documents/support/programs/investment-foundations/14-investment-vehicles.ashx?la=en&hash=5EAC60626C6439B462AED93EBA3D341EAB2E5FE4.

[134] John Armour et al., *What Is Corporate Law?*, in THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 1, 12-15 (3rd ed., 2017).

executives, and allocating the company resources in the right direction.[135] This is where regulated DCSs can be advantageous to all stakeholders.

Even though this structure has certain drawbacks, those can be counteracted through the reforms undertaken by the state, and the recommendations prescribed by the SEBI Consultation Paper. However, apart from these, additional reforms are required to be made to the shareholding and enlistment directives, to create a hybrid model of DVR shareholdings, that allows the stakeholders to extract the benefits of the model, without having to compromise on corporate governance and the rights of the shareholders.

IV. Recommended Reforms

To address the concerns arising from the debate over DVRs, proper definitions of FR, SR, DVRs and regular equity shares must first be laid down in the Companies Act, to clarify the nomenclature at the outset. Furthermore, since this structure is argued to be prone to misuse, internal and external corporate governance mechanisms must be put in place. Internal mechanisms include measures that are taken within the company itself, such as managerial incentive mechanisms, control by board of directors, etc.[136] On the other hand, external control mechanisms are implemented by the state and legal authorities as a check on the company's operations, decisions and policies.[137] Given that

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[135] *See generally* Marcia W. Blenko et al., *The Decision-Driven Organization*, HARV. BUS. REV., June 2010, at 1 (2010), http://cegllcstrategies.com/pdfs/The_Decision_Driven_Organization_1.pdf.

[136] Diane K. Denis & John J. McConnell, *International Corporate Governance* 1, 2 (European Corporate Governance Institute, Working Paper No. 5, 2003), https://ssrn.com/abstract=320121.

[137] *Id.*

the promoters will largely retain the decision-making power through DVRs in a company, a Risk Evaluation Committee must be appointed as a part of the internal corporate governance mechanism, which would independently scrutinize and manage the risks associated with the framework and policies formulated by the promoters.

As a part of the external control mechanisms, SEBI has proposed changes in the statutory framework through its Consultation Paper. However, the framework needs additional safeguards to ensure transparency, accountability and the interests of all stakeholders involved. To ensure this, companies must be mandated to disclose information regarding their functions, the allocation of capital, profit trends and margins, innovative projects undertaken, etc. to avoid the criticism received by JOBS Act of the U.S., as elucidated in Part II(A)(1). The holders of the SR shares must be demonstrably responsible for the growth and innovation of the company. This can be objectively evaluated based on the reports of the company, including corporate governance reports, appraisals by the risk evaluation committee, and other compliance mechanisms. Furthermore, the risks associated with the structure should be displayed in investor communication materials, such as the listing documents (including the prospectus), quarterly and annual reports, as well as other circulars, notifications, and announcements.

Failure to make such disclosures should attract a suitable penalty, and allow shareholders to withdraw from the company, if they wish to. SEBI may also incorporate the policy of monetary damages payable by directors and officers holding shares with DVRs, upon breach of their fiduciary duty towards shareholders. This will create a deterrence against any misuse of authority by

the promoters. Holders of SR shares must also be mandated to have a minimum economic interest in the company, to ensure that they have a personal stake in the company, and thus feel obligated to operate the company in a responsible manner.

Apart from the aforementioned methods to ensure adherence to corporate governance principles, a document establishing shareholder rights could be compiled, much like the Shareholder Rights Directive (SRD) of the European Union[138], for promoting and protecting the interests of the shareholders, even if they relinquished their voting rights in part. Additionally, since these shares will be new to the market, a unique symbol should be mandatorily displayed alongside the name of the stock, in order to help investors differentiate DCS companies from those with regular voting structures. With the aforementioned reforms, the Indian capital markets will be better equipped to handle the changes that the DVR shareholding structure will bring.

V. Conclusion

Despite the initial skepticism of regulatory bodies across the world regarding this structure, DVRs are gradually being inculcated into securities law. It is historically proven that DCS structure, if designed to accomplish the objectives of all stakeholders, provides effective results.[139] For this reason, it is submitted that DVRs must be promoted in a manner that is in furtherance of securing long-term interests of all market stakeholders. The analysis in this

[138] *Shareholder Rights Directive (SRD) of the European Union*, Directive (EU) 2017/828 of the European Parliament and of the Council (2017).
[139] Winden, *supra* note 98, at 905.

paper demonstrates that the benefits of this structure can be derived while establishing robust provisions to keep its adverse effects in check.

The recommendations put forth by the author do not attempt to negate the arguments against DVRs, but rather, propose a hybrid model, where the benefits of this structure can be extracted without compromising on the transparency and accountability mechanism that corporate governance aims to establish. The proposed model aims to achieve a trade-off between entrepreneurial freedom and investor welfare. In doing so, it follows a multi-pronged strategy to build upon the protection offered by the recent amendments to the Companies Act, the rules made thereunder, as well as the SEBI Consultation Paper. While other stock exchanges across Asia have embraced this structure to compete with the stock exchanges in the U.S., India must also focus on revamping its legislation to put itself on the map as an appealing option to companies internationally. While SEBI has managed to initiate this process by promoting the acceptance of DVRs, the proposed developments to the DVR regime must be put into motion soon, to reassure investors who are actively looking to tap the Indian markets in the present time.

Establishing Industrial Self-Governance in India: Reforming the Labour Arbitration Regime

Ojaswa Pathak* & Mayank Kataria**

Abstract

The system of collective bargaining aims at ensuring increased worker participation in industrial relations. It had gained legislative recognition in the USA and India coincidentally at around the same period. However, only the USA was able to create an effective system of collective bargaining in its economy. The strength of their robust collective bargaining system was partly attributable to the success of its voluntary labour arbitration regime which had effectively supplemented collective bargaining and evolved it into a system of industrial self-governance. Similarly, India had also adopted a labour arbitration regime but it could not gain traction and proved to be an ineffective mode of industrial dispute resolution owing to several structural and systemic flaws. Recently, India reformed its industrial laws by adopting the Industrial Relations Code, 2020, but its labour arbitration scheme remains an old wine in a new bottle. This paper aims to initially describe the legal framework for voluntary labour arbitration in India and compare it with the 'successful' labour arbitration regime of the USA. The paper will then highlight the reasons which led to the failure of labour arbitration in India. Accordingly, the article will provide legislative and administrative solutions for reforming the labour arbitration scheme and consequently establishing industrial self-governance.

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I. Introduction

After gaining legislative recognition in the United States of America, collective bargaining as a tool saw increased usage in industrial relations around the world, to ensure increased participation of workers in the negotiations conducted with their employers on the terms of their employment. The trade unions that democratically represented these workers ensured cordial industrial relations by charting out a collective bargaining agreement clarifying and mandating the terms of the employment of the workers in the plant or industry.[1] This prompted a need for an effective dispute resolution mechanism and the said need was filled by voluntary labour arbitration. Consequently, the continuing negotiation and arbitration of collective bargaining agreements in factories led to the establishment of '*a private rule of law'* which was applicable to that particular plant and at the same time, established a mode of resolving those disputes at the plant-level itself.[2] This system of voluntary labour arbitration supplemented the whole collective bargaining system and created an ecosystem of 'industrial self-governance' in the USA.[3]

In India, the genesis of labour legislation was rooted in the British Raj. Nevertheless, the industrial law after Independence did not follow this trend

[1] Alberto Odero et al., Collective Bargaining: ILO Standards and the Principles of the Supervisory Bodies 189 (2000).
[2] Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1007 (1955).
[3] United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).

and evinced more affinity with its American counterpart.[4]However, Indian industrial relations were always characterized by a weak collective bargaining ecosystem and a flawed labour arbitration scheme. However, the Industrial Relations Code, 2020, which envisages to reform the industrial law of India does little to address this concern. The scheme of labour arbitration remains unchanged and flawed to a great extent.

The existing scholarship has criticised and pointed out the defects which led to the failure of the Indian voluntary labour arbitration scheme. However, this paper shall attempt to recommend the legislative and administrative solutions which may rectify the flaws which led to the failure of labour arbitration in India. Accordingly, this paper in the second section shall explain the existing law and policy of labour arbitration in India. The third section shall comparatively assess the scheme of labour arbitration in the USA. The fourth section shall highlight the reasons for the failure of this scheme which will help in identifying the underlying legislative and administrative problems. The fifth section shall recommend suitable legislative and executive solutions to reform the labour arbitration scheme and establish industrial self-governance by strengthening and supplementing the collective bargaining system.

[4] Bruce Kaufman, *Labor Law Reform in India: Insights from Tangled Legacy of Sidney & Beatrice Webb*, 50 THE INDIAN J. IND. RELAT. 2, 5 (2014).

II. Labour Arbitration Regime in India

A. Scheme under the Industrial Disputes Act, 1947

Section 10A of the Industrial Disputes Act provides for the regime of labour arbitration in India. This regime is excluded from general commercial arbitration and is considered a 'self-contained code' on the law of labour arbitration.[5] This part shall explain the regime of labour arbitration by delineating it into the following heads –

i. History of Voluntary Labour Arbitration

In 1951, the ILO recommended voluntary conciliation and arbitration as a mode suitable for resolving and preventing industrial disputes.[6] Soon, India adopted a labour arbitration regime under Section 10A of the existing Industrial Disputes Act, 1947. Furthermore, the government sought voluntary arbitration as a replacement to the existing industrial adjudicatory system.[7] This eagerness of the government in ensuring the success of labour arbitration was evident when the National Commission on Labour in 1966 recognized the interlinked nature of collective bargaining and voluntary labour arbitration and set up the National Arbitration Promotion Board to ensure the same.[8] This

[5] Rajesh Korat v. Innoviti, 2017 SCC OnLine Kar 4975; *See also* The Engineering Mazdoor Sabha v. The Hind Cycles Ltd, 1963 AIR 874.

[6] International Labour Organisation, R092 - Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92), Recommendation R092 - Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB%3A12100%3A0%3A%3ANO%3A%3AP12100_ILO_CODE%3AR092 (last visited May 10, 2021).

[7] PLANNING COMMISSION, *Third Five-Year Plan* (1961-1966), Chapter 15, ¶11.

[8] Report of the National Commission on Labour 324 (1969) [hereinafter 'Labour Report'].

Board would promote labour arbitration by preparing panels of labour arbitrators inter alia.[9] However, all of these efforts fell short of achieving its objectives and labour arbitration headed towards a state of oblivion for use as a mode of resolving industrial disputes.[10] Nonetheless, the concept of labour arbitration was endorsed by the Second Labour Commission,which had recommended compulsory arbitration of disputes "*in case of socially essential services like water supply, medical service, sanitation, electricity and transport*".[11] Therefore, it is evident from this discussion that the policy of labour arbitration has always been supported by the Indian government yet this intent could not fructify in the form of an effective dispute resolution mechanism.

ii. Procedural and Substantive Requirements before referring a dispute to Arbitration

The Act has laid down two requirements for referring an industrial dispute to arbitration. Firstly, there must be a valid arbitration agreement which must refer only an 'industrial dispute' to the arbitration.[12] Secondly, the reference must be made before such a dispute has been referred to adjudication under the special industrial tribunals established under the Act.[13] Furthermore, the

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[9] *Id*.
[10] Suresh Chandra Srivastava, *Voluntary Labour Arbitration: Law and Policy*, 23 J. IND. L. INST. 349, 357 (1981).
[11] Report of the Second National Commission on Labour 310 (2002).
[12] The Act defines an industrial dispute as any dispute between employers and workmen, or between workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person. *See* Industrial Disputes Act, 1947, § 2(k).
[13] The Industrial Disputes Act, 1947, § 10A (1).

Act also stipulates certain procedural requirements regarding the form of the arbitration agreement. It is mandated that the agreement must be in writing and must expressly state the names and qualifications of the arbitrators composing the arbitral tribunal.[14]The government regulations made under this legislation, provide that the agreement must be in a prescribed format.[15]

However, there is a conflict of judicial opinion on whether the aforementioned regulations are mandatory or directory for the parties to follow. The High Court of Patna has interpreted the aforementioned provision as being mandatory. [16] In contrast, the Delhi High Court[17] and Orissa High Court[18] have taken the view that the provision is a directory provision and have stressed for only a substantial compliance of the requirements and format provided in the Rules.

Additionally, the Act also mandates that the agreement shall have to be sent to the government which shall publish it in the Official Gazette within one month.[19] This provision is aimed to ensure that the employers and workers who are not parties to the arbitration agreement but are concerned with the industrial dispute being arbitrated are duly notified of the ensuing arbitration so that the arbitration does not remain private in nature.[20] However, the Supreme Court has interpreted this provision in a way which ensures that the

[14] The Industrial Disputes Act, 1947, § 10A (2).
[15] The Industrial Disputes (Central) Rules, 1957, Rule 7.
[16] K.P. Singh v. S.K. Gokhale, (1970) ILLJ 125 MP.
[17] Mineral Industry Association v. Union of India, AIR 1971 Del 160.
[18] North Orissa Workers' Union v. State of Orissa, **(**1971) IILLJ 199 Ori.
[19] The Industrial Disputes Act, 1947, § 10A (3).
[20] Moorco (I) Ltd v. Govt. of Tamil Nadu, 1994 (68) FLR 157.

government is not temporally restricted to publish the arbitration agreement within thirty days and is only obliged to publish it before the arbitral tribunal considers the merits of the case.[21] This puts the commencement of arbitration at risk of being trapped in bureaucratic impediments involving the publication of the arbitration agreement in the Official Gazette of the government, thus hindering the arbitral process.

iii. Jurisdiction of the Arbitral Tribunal

It is a settled principle of law that the jurisdiction of the arbitral tribunal is restricted to the contractual mandate of the arbitration agreement.[22] This means that the labour arbitrator has the authority to adjudicate the industrial dispute but does not have the jurisdiction to adjudicate on any "*matters incidental*" in contrast to the broad mandate given to other specialised industrial tribunals established under the Act.[23] Furthermore, the courts have clarified that the conduct of the labour arbitrator must evince impartiality and he/she is bound by the principles of natural justice in conducting the arbitration proceedings.[24]

As regards the question if the award should be a speaking order, there have been diverging opinions on the same. Some High Courts have implicitly

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[21] Karnal Leather Karamchari Sangathan v. Liberty Footwear Co, 1989 SCR (3) 1065.
[22] Raza Textile Labour Union v. Mohan, (1964) 2 L.L.J. 65 (All.); Rohtas Industries Ltd. v. Workmen of Rohtas Industries Ltd, AIR 1967 Pat 224.
[23] Rohtas Industries Ltd. v. Brijnandan Pandey, 1956 SCR 800.
[24] Air Corporations Employees' Union v. D. V. Vyas, (1962) 1 L.L.J. 31 (Bombay); Management of National Project Construction Corporation Ltd. v. Their Workmen, (1970) 3 Lab. I. C. 907 (Patna); Hindustan Construction Company v. All India Hindustan Construction, (1974) IILLJ 212 Ker.

endorsed the proposition that the arbitrator must give reasons for the award to ensure that it is open and liable to judicial scrutiny.[25] However, a few High Courts have differentiated their opinion in stating that an award with reasons is highly desirable but have not gone to the extent of terming an award devoid of any reasons as *ipso facto* invalid.[26] Therefore, the matter remains unsettled to an extent. Furthermore, for enforcing the award herein, it has to be sent to the government which shall publish it within 30 days of the receipt of the award.[27] The enforcement of the award is only permitted 30 days after its publication. This impedes the enforcement of the award by making it subject to bureaucratic laxity.

iv. Appointment of Arbitrators

The labour arbitration regime in India gives autonomy to the parties in appointing their arbitrators and further provides that an umpire shall be appointed by the government if the parties have appointed an even number of arbitrators. Then the award of the umpire shall be treated as final for the purposes of the arbitration. The law authorizes the party to select an arbitrator of their own choice yet, the trends reveal that most of the appointed arbitrators are either labour commissioners, labour court judges or High Court judges.[28] This trend has been termed as undesirable considering that these officers would likely govern the arbitral process like a formal adjudication and can

[25] Rohtak Delhi Transport (P) Ltd. v. Risal Singh, AIR 1963 P H 472; M.G. Panse v. S.K. Sanyal, 1980 Lab IC 524.
[26] Mgmt. of Daily Aljamiat v. Gopi Nath Aman, 1971 Lab IC 1353 (Del), per Avadh Behari Rohatgi J; Rohtas Industries Ltd v. Workmen, AIR 1967 Pat 224, per Dutta J.
[27] The Industrial Disputes Act 1947, § 17A.
[28] Srivastava, *supra* note 10, at 361.

defeat the very purpose of arbitration.[29] However, if academicians, economists, industrial relations experts or even clergymen are touted as arbitrators, it is likely that they make better decisions as their award would not be confined to the legal aspect of the dispute and would also cover the industrial realities.[30] The reason for the prevalent choice of parties in choosing retired judges as arbitrator has been stated as the fees and confidence reposed in the member of a high office.[31] It has even been suggested that the government can subsidise the fees of the arbitrators to ensure diverse and experienced arbitral tribunals.

v. Judicial Review

In commercial arbitration, there cannot be a remedy in the writ jurisdiction such as *certiorari* or prohibition against the private arbitrator. This is because the award of the arbitrator is a result of the contractual mandate of the parties and is only liable to be set aside on limited grounds, without any kind of appellate review on its substantive merits.[32] However, such restrictions do not apply under statute-mandated arbitrations.[33] In India, the Supreme Court has

[29] *Id.*
[30] Z. M. SHAHID SIDDIQI, MOHAMMAD AFZAL WANI, LABOUR ADJUDICATION IN INDIA 36 (Indian Law Institute 2001).
[31] Srivastava, *supra* note 10, at 361.
[32] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V, Jun 10, 1958, 21 UST 2517, 330 U.N.T.S. 38. *See* REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS 529 (Oxford University Press 1996).
[33] Statute-mandated arbitrations refer to the arbitrations which are provided by certain statutes for dispute resolution of the claims arising out of that statute. *See* Regina v. Disputes Committee of Dental Technicians, [1953] 1 All ER 327.

interpreted the labour arbitrator as a 'statutory arbitrator'.[34] Therefore, the award of the labour arbitrator becomes liable to broad judicial scrutiny under the writ jurisdiction which would also involve a substantive review of the merits of the award.[35]

B. Proposed Regime under the Industrial Relations Code, 2020

The recently enacted Industrial Relations Code, 2020 replaces the Industrial Disputes Act among various other labour legislation, attempting to reform the industrial relations law of the country. This Industrial Relations Code adopts a voluntary labour arbitration scheme but the same can only be described as old wine in a new bottle.[36] This is because the only slight modification under this new regime is that an industrial dispute can now be referred to arbitration even if it has already been referred to a labour court as established under the Act.[37]

III. Labour Arbitration Regime in the USA

A. History of Voluntary Labour Arbitration

The use of alternate dispute resolutions in resolving labour disputes in the USA can be traced to the latter half of the nineteenth century.[38] The National Labor Relations Act 1935 made a significant change in industrial relations by

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[34] Engineering Mazdoor Sabha v. Hind Cycles Ltd, AIR 1963 SC 874; *See* also Rohtas Industries v. Workmen AIR 1976 SC 425; Rajinder Kumar Kindra v. Delhi Administration, (1984) 2 LLJ 517 (SC); Gujarat Steel Tubes Ltd. v. G.S.T. Mazdoor Sabha, 1980 AIR 1896.
[35] INDIA CONST. art. 226.
[36] The Industrial Relations Code, 2020, §42(8).
[37] The Industrial Relations Code, 2020, § 42.
[38] Edwin E. Witte, *Historical Survey of Labor Arbitration* (Philadelphia, University of Pennsylvania Press, 1952) 4.

recognizing and promoting collective bargaining to manage the industrial relations and ensure industrial peace.[39] This resulted in the growth of voluntary labour arbitration because the collective bargaining agreements had arbitration clauses inserted into them during drafting.[40] This was followed by the American Arbitration Association giving its patronage to the labour arbitration mechanism through institutional support.[41] Another systemic encouragement to labour arbitration came during the Second World War wherein, the government had to ensure the productivity of the American industry by preventing strikes. Therefore, it promoted arbitration of labour disputes to ensure a seamless production for the national war effort. This culminated in a tremendous acceptance of resolving labour disputes through arbitration and took the name of grievance arbitration.[42]

The legal sanctity of labour arbitration was traced to Section 301 of the Labor Management Relations Act. [43] The purpose of this provision was to give federal district courts jurisdiction over suits for breach of a collective bargaining agreement between an employer and a trade union, and ensured a mechanism for enforcing such agreements.[44] The Supreme Court of USA while ruling on the constitutionality of the aforementioned legislation, held that the provision mandates the courts to develop a federal substantive law of

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[39] National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 US 1 (1937).
[40] Paul M. Herzog & Morris Stone, *Voluntary Labour Arbitration in the United States*, 82 INT'L. LAB. REV. 301, 308-309 (1960).
[41] *Id.*
[42] *Id.*
[43] The Labor Management Relations Act, 1947, § 303(d).
[44] *Section 301(a) and the Federal Common Law of Labor Agreements* 75 Yale L.J. 877, 877(1966).

collective bargaining agreements and, considering that an arbitration clause can be a part of that agreement, it would be binding and enforceable by a decree of specific performance.[45] This gave assurance to the trade unions and managements in arbitrating their disputes, and resulted in the growth of labour arbitration.[46] Furthermore, this federal common law of labour arbitration was later refined and clarified by the notable Steelworkers Trilogy decisions by the US Supreme Court, consequently providing a ringing endorsement to the labour arbitral process.[47]

B. Substantive and Procedural Requirements of Referring a Dispute to Arbitration

The patronage of the American Arbitration Association had resulted in labour arbitration not only being provided institutional support but also recommended the insertion of a standard labour arbitration clause.[48] Furthermore, after the Supreme Court in *Textile Workers v. Lincoln Mills* endorsed the legality and enforceability of an arbitration clause in a collective bargaining agreement, there was little concern for parties referring their labour dispute to arbitration. Additionally, in *United Steelworkers of America v. American Manufacturing Co.*[49], the court had essentially established a primacy of the labour arbitration clauses by holding that a court, while

[45] Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957).
[46] Morton Gitelman, *The Evolution of Labor Arbitration*, 9 DEPAUL L. REV. 181, 193-195 (1960).
[47] Theodore J. St. Antoine, Labor and Employment Arbitration Today: Mid-Life Crisis or New Golden Age?, 23(1) OHIO ST. DISP. RESOL. 1, 1(2017).
[48] AAA-ICDR Clause Drafting, AMERICAN ARBITRATION ASSOCIATION (Oct. 11, 2020), https://www.adr.org/Clauses.
[49] United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960).

interpreting a collective bargaining agreement with an arbitration clause, should not delve into the merits of the dispute and refer it to arbitration. This further prompted the Supreme Court, in *United Steelworkers v. Warrior & Gulf Navigation, Co.*, to rule that an arbitral tribunal is competent in ruling on its jurisdiction, thereby answering the question of whether the dispute is subjectively arbitrable.[50] This was because the question can only be answered after interpreting the collective bargaining agreement which the tribunal was already tasked with.[51] This was the federal common law governing the arbitration agreement and reference of the dispute to arbitration in the USA. Apart from this, no procedural limitations or government intervention was required herein.

C. Appointment of the Arbitral Tribunal

The institutional patronage of the American Arbitration Association was quite helpful in finding technically competent arbitrators and forming panels from which parties could appoint them.[52] This aided parties in arranging the most suitable individuals for arbitrating their disputes. Among them, the popularity of academicians who were experts in law, industrial engineering, industrial relations or economics, as arbitrators was evident considering that they patently evinced impartiality owing to their academic background and were

[50] United Steelworkers v. Warrior & Gulf Navigation, Co., 363 U.S. 574, 582−83 (1960).
[51] *Id.*
[52] Herzog & Stone, supra note 40 at 317-319 .

also able to take into account the relevant industrial relations factors into the arbitral award apart from interpreting the law.[53]

D. Jurisdiction of the Arbitral Tribunal

Initially, the jurisdiction of the labour arbitrator was restricted to the strict interpretation of the written word of the collective bargaining agreement.[54] This viewpoint was criticised by noted labour jurists stating that certain practical considerations were socially imperative to be considered in the award, despite their omission from the fine text of the collective bargaining agreement.[55] Accordingly , a collective bargaining agreement hardly reflected a complete meeting of minds between the parties. and the approach of providing a broad jurisdictional mandate to the labour arbitrator was subsequently endorsed by the American Arbitration Association and reflected in practice.[56]

E. Judicial Review

In the final Trilogy case of *United Steelworkers v. Enterprise Wheel & Car Corp.*[57], the US Supreme Court ruled on the aspect of permissible judicial review of the labour arbitral award. The court restricted the court to review the merits of an arbitral award and set it aside as long as it "*draws its essence from*

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[53] *Id*.
[54] J. Noble Braden, *Labor Arbitration Practices and Techniques*, 9 MO. L. REV.,145 (1948).
[55] George W Taylor, *Effectuating the Labor Contract through Arbitration*, 21 LABOUR RELATIONS REPORT 19, 21; Benjamin Aaron, *Some Procedural Problems in Arbitration*, 10 VAND. L. REV. 733, 734 (1957).
[56] Herzog & Stone, s*upra* note 40 at 314. *See also* Code of Ethics and Procedural Standards for Labor-Management Arbitration, Labor Arbitration Reports, Vol. 15, pp. 961-966.
[57] United Steelworkers v. Enterprise Wheel & Car Corp, 363 U.S. 593, 596 (1960).

the collective bargaining agreement".[58] Therefore, judicial review on factual or legal ambiguities of the award was not permitted.[59] This process ultimately culminated in the form of a judicial deference to labour arbitral awards.[60] This standard of judicial review was later refined, when it was observed by the Court that the award can be overturned if the enforcement has serious public policy concerns.[61] Additionally, in a recent judgment, the Supreme Court alluded that refusal of enforcement of the award can be permitted on grounds such as procedural inequities in the arbitration such as dishonesty by the arbitrator and violation of the principles of natural justice.[62] This concern was initially highlighted by Prof. Benjamin Aaron wherein, he proposed that the award should be set aside if the arbitrator displayed dishonesty, and/or had denied procedural due process or a fair trial to any of the parties.[63] Nonetheless, it can be argued that a very limited scope of judicial review is being made available to the American court while reviewing labour arbitral awards. This serves the following purposes, firstly, the labour disputes often require specialist knowledge to adjudicate in a manner that maintains the harmony of the industrial relations. Therefore, when an award is open to a judicial scrutiny then there is a great chance that not only the time involved in resolving the dispute would increase but the court which views the matter

[58] *Id.* at ¶ 597.
[59] *Id.* at 599.
[60] Mitchell H. Rubenstein, *Altering Judicial Review of Labor Arbitration Awards*, 2 MICH ST. L. REV. 235, 259 (2006).
[61] United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29 (1987).
[62] Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504 (2001).
[63] Benjamin Aaron, *Judicial Intervention in Labor Arbitration*, 20 STAN L. REV. 41, 53 (1967-1968).

through generalist's lens might hamper with the award which otherwise might not be very legally accurate but be very suitable in the backdrop of that particular factory.

IV. Reasons for Failure of Labour Arbitration in India

Labour relations experts and eminent labour lawyers have listed various factors for the failure of labour arbitration in India.[64] Some of these factors are attributable to structural defects in the labour arbitration regime, while others can be attributed to systemic shortcomings in the Indian industrial relations.

First, the structural defects of the labour arbitration regime are the legal technicalities and cumbersome procedures of the process. Herein, owing to the requirements of the arbitration agreement to be in a specific format along with the publication requirements of the arbitration agreement before the arbitration can commence, the time and costs of the arbitration increases, thereby keeping it susceptible to bureaucratic laxities. The same can be said of the cumbersome process of publishing the labour arbitral award without which it cannot be enforced.

Second, owing to the restricted jurisdiction of the labour arbitrator in India, the arbitration process sacrifices an important aspect of bringing industrial realties into the arbitral award. Therefore, such a situation is undesirable for

[64] Srivastava, *supra* note 10, at 351; Debi Saini, *Arbitration of Industrial Disputes: Shadows of Compulsory Adjudication* Dec. PUNJAB UNIVERSITY LAW REVIEW 1,3-11 (1992); Siddiqi & Wani, *supra* note 30, at 27-36.

making arbitration a preferred mode of labour dispute resolution and also as a supplement to collective bargaining in making an industrial self-government.

Third, the labour arbitral awards in India are liable to a broad judicial review under the writ jurisdiction of the High Courts of India which authorizes these courts to review these awards on the substantive merits of the award. This defeats the entire purpose of arbitration by increasing the amount of impediments and appeals in resolving an industrial dispute. [65] Indian courts have defended this broad judicial review of labour arbitral awards by ruling that the labour arbitrator under the Act is a statutory arbitrator which is different from a commercial arbitrator. This argument is neither logically sound nor labour-friendly. It is conceded that labour arbitrator is different from the commercial arbitrator considering that the former's role is for industrial peace and is not just confined to dispute resolution[66] especially considering that collective bargaining agreements are not ordinary commercial contracts and do not anticipate every aspect of the ever evolving industrial relations.[67] Labour arbitrators are surrogate for the parties to interpret their collective bargaining agreement.[68] The labour arbitral process is considered a part and parcel of the ongoing process of collective bargaining.[69]Therefore, it would be incorrect to open such awards to a broad judicial review considering that the

[65] Engineering Mazdoor Sabha v. Hind Cycles Ltd, AIR 1963 SC 874; *See also* Rohtas Industries v. Workmen, AIR 1976 SC 425; Rajinder Kumar Kindra v. Delhi Administration, (1984) 2 LLJ 517 (SC); Gujarat Steel Tubes Ltd. v. G.S.T. Mazdoor Sabha, 1980 AIR 1896.
[66] United Steelworkers of Am. v. Warrior & Gulf Navigation, Co., 363 U.S. 574, 578 (1960).
[67] *Id.*
[68] Stead Motors v. Automotive Machine Lodge, 886 F.2d at ¶ 1206.
[69] United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987).

arbitrator's use the knowledge of the custom and practices of a particular factory or of a particular industry to solve these disputes must be respected along with the contractual freedom of parties to arbitrate their dispute. Lastly, the lack of suitable arbitrators has been considered as the primary factor which is inhibiting the growth of arbitration.[70]

Apart from these, the systemic shortcomings plaguing labour arbitration revolve around the infirm state of collective bargaining in India. This *inter alia,* is evinced by many factors including the lack of trust between the labour and management in amicably arbitrating their disputes. Furthermore, the non-availability of suitable arbitrators who command the confidence of both the parties despite government efforts to promote arbitration shows that voluntary arbitration has not flourished owing to the general discontent with the collective bargaining process, due to rampant corruption in Unions, slow and ineffective adjudicatory process, etc.

Therefore, reforming the labour arbitration regime would be paramount in curing the inherent structural defects. This will pave the way to counter the infirmity of collective bargaining by instilling trust between the parties and will ensure industrial self-governance. However, it is important to note that reforming the labour arbitration regime would require legislative action and systemic reform of industrial relations, including strengthening of the collective bargaining systems. The following section would be recommending

[70] Saini, *supra* note 64 at 15.

the suitable legislative and executive actions required for reforming the Indian labour arbitration regime.

V. Reforming the Indian Labour Arbitration Regime

As has been described in the previous sections, it is clear that the Indian model of labour arbitration has not achieved success despite the Indian law's recognition of the system of collective bargaining system. However, American law on labour arbitration ensures not only a speedy and flexible dispute resolution mechanism but also supplements the process of collective bargaining in its industrial relations. This section would be taking cues from American labour arbitration regime to reform the Indian labour arbitration regime. As has been pointed out earlier, the solutions can be categorized as administrative and legislative. The legislative solutions aim to cure the inherent flaws in labour arbitration and the administrative solutions are focused on fixing the systemic flaws in the Indian industrial relations that prevents voluntary arbitration from flourishing.

A. Legislative Solutions

i. Arbitration Agreement

The first recommendation as regards the arbitration agreement should be that the requirement of putting the arbitration agreement in a specific form as mandated by the Industrial Disputes (Central) Rules, 1957, should be removed. Courts in India have been divided on the proposition of the mandatory nature of this rule. However, the appropriate legislative solution in this regard would be to remove such requirements as it can be fairly assumed that most of the parties are wise enough to draft a suitable arbitration

agreement as in the commercial arbitration. Removing a government-mandated form of drafting arbitration agreement will not only provide the necessary autonomy to the parties and could also reduce the costs, time and unnecessary government stipulations in the arbitration proceedings which are supposed to be as flexible and autonomous. Nevertheless, the government can recommend a Model Arbitration Clause to be inserted in the collective bargaining agreement which would not be mandatory to follow. A concern can be fairly raised in this recommendation is that, in giving complete contractual autonomy to the parties in drafting the arbitration clause it would make it difficult for the courts to evaluate whether a valid arbitration agreement exists or not. The answer to this would be that the legislature can expressly lay down the mandatory requirements of a valid arbitration agreement which will guide the parties in making an arbitration agreement and will help the courts in assessing the validity of the arbitration agreement as present in general commercial arbitration.[71]

ii. Mandatory Reference to Arbitration

Under general commercial arbitration, if two parties have entered into an arbitration agreement for a dispute arising out of a contract, then the courts are prohibited to entertain any suits concerning that claim.[72] This ensures that the

[71] The essential elements of an arbitration agreement under Indian law are as follows, firstly, there must be a present or a future difference in connection with some contemplated affair. Secondly, there must be the intention of the parties to settle such differences by a private tribunal. Thirdly, the parties must agree in writing to be bound by the decision of such tribunal and lastly, the parties must be ad idem. *See* Bihar State Mineral Dev. Corporation v. Encon Builders (I) P Ltd., (2003) 7 SCC 418.

[72] The Arbitration & Conciliation Act, 1996, § 8.

contractual agreement to arbitrate is honoured. This practise is followed in the American labour arbitration regime wherein courts compel arbitration of the labour claims arising out of a collective bargaining agreement having an arbitration clause.[73] However, the legal position in India concerning this is distinctly absurd considering that the labour arbitration is given a "*step-motherly*" treatment in comparison to adjudication before the labour courts established under the Act.[74] This is because the law permits arbitration of labour disputes only before reference to the labour courts ergo if such a dispute has been referred to the labour courts or the other statutory tribunals established by the Industrial Disputes Act, then the arbitration can no longer be resorted to and the arbitration agreement becomes of no value or use. This also opens the door for dilatory tactics to be adopted by the employers while deciding the forum for resolving the dispute. This position is bound to change under the new Industrial Relations Code wherein such a condition has been omitted from the labour arbitration regime.[75] However, such omission would only be a half measure. To solve this problem, the law must clearly prohibit any court interference in interpreting and enforcing a collective bargaining agreement with an arbitration clause. Furthermore, even in cases where there is no arbitration clause, the labour courts must permit arbitration or any other mode of alternate dispute resolution during the proceedings.

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[73] United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960).
[74] SIDDIQI & WANI, *supra* note 30, at 33.
[75] The Industrial Relations Code, 2020, §42(8).

iii. Reducing Government Interference in Commencement of Arbitration Proceedings

The current Indian labour arbitration regime provides for a supervisory role of the government in the whole arbitration proceeding. This is because the arbitration cannot commence unless the arbitration agreement has been forwarded to the government and published in the Official Gazette within 30 days after it has been received by the government. The object of this provision is purportedly to duly notify the employers and workmen who are not a party to the arbitration yet are concerned with the dispute. Such an overly paternalistic approach must be substituted for an approach that allows autonomy to the parties in negotiating and arbitrating their collective bargaining agreement. However, the new Industrial Relations Code has omitted the temporal limitations of this process which will further ensure that bureaucratic laxities prevent the arbitration from getting started and concluded in an efficient manner. .

This procedure costs both time and money to the parties which can be well spent on resolving the dispute and the practical importance of such a procedure can be called into question if we consider that the American labour arbitration regime does not have such a procedure of publishing the arbitration agreement in the Official Gazette. Such a scheme, if removed in India, would ensure a timely dispute resolution. It is agreed that it is aimed at a benign motive of ensuring that none of the labourers are left out in the arbitration. However, such a detailed and time-consuming procedure which has the potential of being mired in bureaucratic laxities is hardly a solution. Therefore, the removal of such a procedure would be a step towards ensuring an efficient and

timely dispute resolution and also giving autonomy to the industries in establishing their 'industrial self-government'. Lastly, to cater to the concerns of any unrepresented labourers in the arbitration it can be mandated that the trade union which would be arbitrating the dispute on behalf of the labourers would have a due diligence obligation to notify the commencement of such arbitration in the plant through necessary oral or written communication to all workers of the plant or that industry.

iv. Appointment of Arbitrators

As has been mentioned earlier, the labour arbitration regime in India gives autonomy to the parties in appointing their arbitrators but provides for a government appointed umpire to avoid the deadlocks in the arbitral tribunal. The American labour arbitration regime is composed of federal common law and is silent on the subject of appointment of arbitrators, yet the American Arbitration Association which is at the forefront of labour arbitrations in the USA has provided for a unique procedure to appoint suitable arbitrators.[76]

Herein, it would be appropriate to legislate parallel to the commercial arbitration regime.[77] It must be ruled, therefore, that all arbitration clauses should have an odd number of arbitrators. Furthermore, if two party-appointed arbitrators have to mutually decide on the presiding arbitrator, herein there should be a provision akin to the general commercial arbitration regime wherein the government shall appoint the third arbitrator in case of a persisting

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[76] *Labor Arbitration Rules*, AMERICAN ARBITRATION ASSOCIATION (Oct. 11, 2020), https://www.adr.org/sites/default/files/Labor%20Rules.pdf.
[77] The Arbitration and Conciliation Act 1996, § 11.

deadlock of more than 30 days.[78] The Conciliation Officer can be bestowed with this duty to appoint the presiding arbitrator in such cases.[79]

v. Jurisdiction of the Arbitral Tribunal

In India, the law considers the labour arbitral tribunal as a creature of the contract of the collective bargaining agreement and considers the authority of the arbitrator within the four corners of that document.[80] However, this restrictive approach would not be suitable considering that the arbitrator should be adopting an 'administrative' approach when resolving the labour disputes.[81] This helps the arbitrator in not being restricted in a legalistic interpretation of the agreement and enables him/her to account for the industrial realities in the award.[82] Such an approach is more suitable for an industrial self-government model and therefore should be adopted as in the USA.

vi. Judicial Review of the Arbitral Award

In India, the award of a labour arbitrator is open to the scrutiny of a High Court under Article 226 of the Constitution of India. Article 226 of the Constitution of India provides original jurisdiction of the High Courts in matters concerning the enforcement of a writ. Therefore, the judicial review of the arbitrator's

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[78] *Id*.
[79] The Conciliation Officer is tasked with the general duty of mediating and promoting the settlement of industrial disputes. *See The* Industrial Relations Code, 2020, §43.
[80] Raza Textile Labour Union v. Mohan, (1964) 2 L.L.J. 65 (All.); Rohtas Industries Ltd. v. Workmen of Rohtas Industries Ltd, AIR 1967 Pat 224.
[81] Frank Schmidt, Disputes Settlement Procedures In Five Western European Countries 65 (Benjamin Aaron ed. 1969).
[82] Saini, *supra* note 64 at 3.

award is open to a judicial review on factual and legal aspects revolving around the merits of the case which will defeat the very purpose of the arbitration. Meanwhile, in the USA the judicial review of labour arbitral award is extremely limited. As explained earlier, it is only when the arbitral award is 'manifestly infidel' to the arbitration agreement[83], violating a public policy[84], or on gross procedural inequities in the arbitration that the Court can refuse to enforce an award.

There are strong reasons for keeping a limited review of labour arbitral awards. Firstly, as has been highlighted above most industrial disputes require specialist knowledge to resolve the dispute in a manner that is not only legally correct but also maintains the harmony of the industrial relations. This is easily ensured through appointing a suitable name for arbitrating the dispute that arises in a particular factory. However, when an award is open to a judicial scrutiny then there is a great chance that not only the time and costs of the arbitration would increase but the judge which views the matter through generalist's lens might hamper with the award on grounds that the award is not legally accurate. Such an approach of the court fails to see that labour disputes have to be understood and resolved in a manner different to that of an ad-hoc arbitrator ergo long-term interest of the parties and factory has to be given effect for which the labour arbitrator has to be given adequate discretion.[85]

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[83] United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).
[84] United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29 (1987).
[85] Aaron, *supra* note 55 at 733- 741.

Accordingly, the courts must be prohibited from interfering with the labour arbitral awards to ensure seamless voluntary arbitration and collective bargaining in the industry. Therefore, it must be legislated that the courts would not be authorized to set aside or refuse enforcement of the labour arbitral award except on the following grounds. First, the award or the arbitration was not in accordance with the arbitration agreement. Second, the arbitration did not comply with principles of natural justice in its proceedings. Third, the award being contrary to the public policy of India. Therefore, limiting the judicial review on such grounds would go a long way in ensuring the efficient arbitrations and industrial self-governance.

vii. Reducing Government Interference on Publication of the Award

In India, after an award is passed by the arbitral tribunal it has to be forwarded to the government, who shall publish that award within 30 days of the receipt of the award.[86] The Supreme Court has held that the aforementioned provision is mandatory considering the publication of the award paves way for the enforcement of the award under Section 17A. However, the temporal limitation of publishing this award has not been held as mandatory.[87] This creates a situation wherein, due to bureaucratic laxities, an arbitration award might not get published within 30 days and would result in an obstruction to the enforcement of the award. The situation under the new legislation is the same wherein the award has to be communicated to the government and only after 30 days of this communication, shall the award be liable for

[86] The Industrial Disputes Act, 1947, §17A.
[87] Remington Rand of India Ltd. v. The Workmen, 1970 AIR 1421.

enforcement.[88] In the American model of labour arbitration, there is no such intervention or supervision by the government for the publication and enforcement of the labour arbitral awards which helps in making the process smooth and less time-consuming. The authors recommend that such provisions in Indian law which provides for excessive and futile government intervention in the enforcement of the labour arbitral award should be removed and the parties should be at their free will to ensure enforcement of award by simply filing a suit for the enforcement of the arbitral award.

B. Administrative Solutions

i. Empanelment of Arbitrators

One of the major reasons for the success of labour arbitration in the USA was the patronage of the American Arbitration Association which had extensive experience in carrying out commercial arbitration. This patronage was complemented with easy availability of skilled professionals as arbitrators in labour disputes and proved to be a big incentive for arbitrating these disputes. In India, the government tried to promote labour arbitration through Code of Discipline in 1958 and establishment of National Arbitration Promotion Board in 1967.[89] However, the same could not fructify because of the inherent defects in the scheme of labour arbitration. This can be addressed by creating a system wherein there is easy availability of arbitrators. This can be ensured through entrusting the same to the Arbitration Council of India, which is designated to be the independent government body tasked with the promotion of alternate

[88] The Industrial Relations Code, 2020, §55.
[89] Labour Report, *supra* note 8.

dispute resolution mechanisms in India.[90] This Organisation can be additionally entrusted with the responsibility of shortlisting and empanelling suitable candidates for labour arbitrators. Furthermore, there has been an increasing trend in India of appointing legal professionals as arbitrators.[91] This can result in the arbitration being mired in excessive legal formalities. However, the appointment of industrial relations experts or academicians as arbitrators can be beneficial because he/she will act as a problem solver and will keep a holistic view of the industrial relations in mind while giving the award. Therefore, the government has to actively participate in recommending and empanelling suitable labour arbitrators. This will go a long in way in establishing trust in the parties.

ii. Subsidizing Arbitrator's Fees

The government can also provide certain subsidies on the fees of the arbitrator to ensure that arbitration becomes a cheaper, flexible and effective mode of industrial dispute resolution. Apart from reducing the costs of the arbitration it can also result in the arbitral tribunals being more diverse and experienced.[92] Hence, if we consider the social and public interest involved in resolving these labour disputes it would be apt to recommend that the government should finance the arbitrator's fees to a modest extent.

[90] The Arbitration & Conciliation (Amendment) Act, 2019, §43D.
[91] Srivastava, *supra* note 10, at 361.
[92] *Id.*

VI. Conclusion

Correcting the structural defects of the voluntary labour arbitration regime would be a step in the right direction and would essentially require us to 'truly arbitrate' our labour disputes. This will give the necessary autonomy to the trade unions and the employers in resolving their disputes by not only reducing the government interference in the arbitral process but also limiting the judicial review of the ensuing arbitral award. This would increase the attraction of labour arbitration as a mode of dispute resolution and would also reduce the judicial backlog of cases in the labour courts. Accordingly, the abovementioned recommendations if adopted can play a pivotal role in achieving this objective. However, while emulating the successful American model of labour arbitration, it should be kept in mind that a slavish copy of the American regime might not be the solution. India has to recreate its own unique industrial dispute resolution mechanism which will supplement and strengthen its infirm collective bargaining system and establish a model of industrial self-governance. Industrial self-governance would be a significant step towards our broader goal in creating a self-reliant India. However, considering that the new Industrial Relations Code has already been passed, it would be apt to adopt a suitable amendment to the Code reforming the labour arbitration regime. However, administrative solutions such as empanelment of suitable candidates for arbitrators and creating the acceptance of arbitration among stakeholders is also an equally important task with which the government has to be entrusted and would require bureaucratic proactiveness.

The Harmless Error Approach: An Exception to Traditional Wills Formalities and a way for E-wills

Heramb Mishra*

Abstract

Recent literature concerning wills formalities has focused on allowing electronic wills without questioning the usefulness of traditional wills formalities. This Note recognises that the debate around electronic wills allows policymakers to re-assess the effectiveness of traditional wills formalities. Further, it argues that assessing the effectiveness of traditional formalities helps determine whether electronic wills should be allowed. The Note questions whether the requirements specified under Section 63 of the Indian Succession Act ('ISA') fulfil any of the functions that wills formalities are supposed to serve. It argues that traditional wills formalities do not perform protective and cautionary functions, considering that Indian courts place a burden of proof on proponents to address any suspicious circumstances. Further, since traditional requirements are prone to malpractice during execution, solely relying on their fulfilment increases the risk of false positives. Additionally, there is no trade-off between error and decision costs because courts place the burden of proof on proponents to address any suspicious circumstances regardless of compliance with wills formalities. Based on this analysis, the Note argues that the legislature should enact a harmless error provision through an amendment to the ISA. This approach reasonably balances various considerations concerning factors like transaction costs and the implications of excusing non-compliance with wills formalities from an ex-ante perspective. Lastly, this Note argues that the legislature should not enact a full-fledged e-wills statute. Allowing all types of e-wills would be premature since there is hardly any empirical research on

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the effects of wills formalities on and the technological robustness of e-wills. Instead, the harmless error provision should be used to allow e-wills on a case-by-case basis.

I. Introduction

The increasing use of digital technology and the internet has affected numerous aspects of daily life. Testamentary succession is no exception to this trend. While various online platforms advertise services that supposedly allow people to create online wills,[1] the law concerning succession and evidence does not allow such wills to be admissible in evidence. Some have argued for relaxing traditional wills formalities to allow electronic wills or e-wills.[2] This Note determines whether such an approach is appropriate.

First, I question whether the requirements specified under Section 63 of the Indian Succession Act ('ISA') fulfil any of the functions that wills formalities are supposed to serve. I argue that traditional wills formalities do not serve the protective and cautionary functions considering that Indian courts place a burden of proof on proponents to address any suspicious circumstances.

Further, since traditional requirements are prone to malpractice during execution, solely relying on their fulfilment increases the risk of false positives. Additionally, there is no trade-off between error and decision costs

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[1] *See* Sakina Babwani, *Writing a will goes hi-tech with video, online and digital wills*, THE ECONOMIC TIMES (Apr. 30, 2012), https://economictimes.indiatimes.com/analysis/writing-a-will-goes-hi-tech-with-video-online-and-digital-wills/articleshow/12910799.cms?from=mdr. *See also* Jigar Pathak, *Want to make a Will? Go online*, DNA INDIA (Jul. 18, 2018), https://www.dnaindia.com/personal-finance/report-want-to-make-a-will-go-online-2638486.

[2] *See, e.g.*, Lira Goswami, *Time to ease execution of wills in India*, THE TIMES OF INDIA (Oct. 27, 2020), https://timesofindia.indiatimes.com/blogs/voices/time-to-ease-execution-of-wills-in-india/.

because courts place the burden of proof on proponents to address any suspicious circumstances regardless of compliance with wills formalities.

Based on this critique of traditional will formalities, I argue that the legislature should enact a harmless error provision through an amendment to the ISA. This approach reasonably balances various considerations concerning factors like transaction costs and the implications of excusing non-compliance with wills formalities from an *ex ante* perspective.

Second, I argue that the legislature should not enact a full-fledged e-wills statute. Allowing all types of e-wills would be premature given that there is hardly any empirical research on the effects of wills formalities on and the technological robustness of e-wills. Instead, the harmless error provision should be used to allow e-wills on a case-by-case basis.

II. Strict Compliance with Wills Formalities

The current Indian law on the execution of wills has English roots. The Statute of Frauds 1677 required agreements concerning the transfer of land, among other types of agreements, to be made in writing. The writing had to be signed by the transferor or by someone at the direction of the transferor in the transferor's presence. Further, the writing had to be attested and subscribed by the transferor in the presence of credible witnesses.[3] The UK Wills Act of 1837[4] largely incorporated a procedure for execution of wills—disposing of both real and personal property—that was similar to the one required to

[3] An Act for Prevention of Fraud and Perjuryes, 1677, 29 Car. 2, c.3 (Eng.).
[4] Wills Act, 1837, § 9, 7 Will. 4 & 1 Vict., c 26 (Eng.).

transfer land under the Statute of Frauds. It required that the will had to be in writing, signed at the end by the testator or someone at the testator's direction in the latter's presence. The will had to be attested and signed by two or more attesting witnesses in the testator's presence at the same time.

Section 63 of the Indian Succession Act[5] essentially reproduces the provisions concerning execution in the UK Wills Act with certain modifications. Textually read, the provision requires that the testator, or someone else at the testator's direction, sign the will. Instead of specifying the place where the signature should be placed, clause (b) requires that the signature's place show that the testator intended to give testamentary effect to the writing.[6] Although there is no explicit clause mentioning the requirement that the will should be in writing, clause (b) implicitly refers to writing as a material form to give effect to testamentary intent.[7] The last clause requires that two or more witnesses should attest the will.[8] The witnesses should have seen the testator sign the will, or seen someone else sign in the presence and at the direction of the testator, or received a personal acknowledgement of the signature from the testator.[9] This means that the witnesses do not necessarily have to be in the presence of the testator when the latter signs the will. Further, the attesting witnesses have to sign the will in the testator's presence, and unlike the original UK Wills Act, the witnesses do not have to sign at the same time.[10]

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[5] Indian Succession Act, 1925, § 63, No. 39, Acts of Parliament, 1925 (India).
[6] *See id.* § 63(b).
[7] *Id.*
[8] *See id.* § 63(c).
[9] K KANNAN, PARUCK THE INDIAN SUCCESSION ACT, § 63.16 (LexisNexis 2019).
[10] *Id.*

Strict compliance with wills formalities has traditionally been justified because formalities serve certain functions that ensure that the testator's freedom of disposition is adequately protected and given effect. In *Consideration and Form*,[11] Lon Fuller distinguished between form and substance in law and considered the functions that legal formalities could serve. He established three important functions of legal formalities. These were the evidentiary, cautionary, and channelling functions.[12] Legal formalities serve these functions by preserving written records, inducing the transferor to seriously consider the transaction, and helping the transferor take actions in a format that would be understandable in a court of law.[13] This analytical framework was then applied to wills formalities by Gulliver and Tilson in the seminal article *Classification of Gratuitous Transfers*.[14] They evaluated the strict compliance approach to wills formalities to determine the purposes that this approach served. According to them, the signature requirement served a ritual function—their idea of the cautionary function that Fuller proposed—because the requirement of multiple formalities could be argued to correlate with deliberation and intentionality.[15]

The wills formalities also served an evidentiary function insofar as a written will, the presence of witnesses, and the testator's signature can prove the testator's motivation. While examination of an attesting witness(es) can

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[11] Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941).
[12] *Id.* at 799-801.
[13] *Id.*
[14] Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE. L. J. 1 (1951).
[15] *Id.* at 4.

increase the likelihood of establishing testamentary intention.[16] If one or all of the attesting witnesses can testify that the document was untampered and the testator executed the will with testamentary intent, strict compliance with wills formalities serves the evidentiary function. Gulliver and Tilson conceptualised another function—in addition to those proposed by Fuller—that they thought courts considered strict compliance with wills formalities served.[17] Courts consider that strict compliance with wills formalities serves a protective function in that some of the requirements safeguard the testator at the time of execution against any wrongdoing such as fraud or undue influence.

In essence, any proponent of the strict compliance approach would argue that the writing, signature, and attestation requirements serve essential functions, i.e., cautionary, protective, and evidentiary. According to this view, courts assume that wills formalities ensure that the testator takes the execution process seriously, is protected from wrongdoing by other parties, and executes a document that can be identified as a will. If a proponent of a will proves strict compliance with these formalities, the court can grant probate without further inquiry. Therefore, strict compliance with wills formalities is argued to be an independent reason for granting probate. However, this view of strict compliance is untenable when considering cases where following strict compliance alone would have resulted in false positives.

[16] *Id.* at 8.
[17] *Id.* at 4.

III. Strict Compliance and Suspicious Circumstances

Courts in India have strictly enforced compliance with traditional wills formalities as a minimum requirement for granting probate. The formalities under Section 63 are mandatory, and non-compliance with them invalidates any will in question.[18] But a closer look at case law indicates how courts have modified traditional strict compliance, and this approach indicates the ineffectiveness of traditional wills formalities.[19]

Consider the requirements of signature and attestation. The requirement of a signature is mandatory[20], but the interpretation of this clause by the courts indicates otherwise. In a case where the testator attempted to sign but could not sign before their death, the court did not invalidate the will straight away.[21] It held that in such a case, the proponent of the will must show, first, that the testator was capable of executing the document and approved of its contents. Second, what the testator wrote was intended to be their signature. Third, the will was attested.[22] Strict compliance with wills formalities would have rendered this will invalid, resulting in a false negative. The fact that the court

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[18] *See* KANNAN, *supra* note 9, § 63.2 ("The prescribed essentials of a valid execution and attestation of a will under the Act are mandatory in nature, so much so that any failure or deficiency in adherence thereto would be at the pain of invalidation of such document/instrument of disposition of property.").

[19] *See* James Lindgren, *Abolishing the Attestation Requirement*, 68 N. C. L. REV. 541 (1990) (arguing that writing and signature are the only essential wills formalities and that attestation should be abolished). *See also* David Horton, *Wills Without Signatures*, 99 B.U. L. REV. 1623 (2019) (mentions that the policy that a missing signature is irrefutable proof that the testator did not approve of the will's contents is naïve).

[20] Indian Succession Act, 1925, § 63(a), No. 39, Acts of Parliament, 1925 (India).

[21] *See* KANNAN, *supra* note 9, § 63.4.1.

[22] *Id.*

laid down this rule indicates that the genuineness of a will can be proved in the absence of a complete signature. A complete signature is not essential to prove the authenticity of a will if there is some writing that the testator *intended* to be their signature.

The requirement of attestation is justified based on its protective and evidentiary functions. But the standard of suspicious circumstances has been mostly applied to remedy the failure of attestation to serve these functions. The standard lays down that if the circumstances surrounding the execution seem suspicious, the propounder must explain these circumstances to the court's satisfaction.[23] Courts have unconstrained discretion to determine what constitutes a 'suspicious circumstance' because the definition provided by the Supreme Court is broad and vague. A circumstance is suspicious "when it is not *normal* or is not *normally* expected in a *normal* situation or is not expected of a *normal* person."[24] Essentially, courts have the discretion to determine suspicious circumstances on a case-by-case basis.

Consider the Supreme Court's decision in *H Venkatachala Iyengar v. BN Thimmajamma,*[25] where the Court invalidated a will even when the proponent had proved that the will had been signed, attested, and registered. The testator had fallen ill while attending a marriage and executed a will with the proponent's help.[26] The attesting witnesses had testified before the Court to

[23] *See* KANNAN, *supra* note 9, § 63.52 ("Where there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the court before the court accepts the will as genuine.").
[24] *See* KANNAN, *supra* note 9, § 63.52.
[25] H. Venkatachala Iyengar v. B.N. Thimmajamma, AIR 1959 SC 443.
[26] *Id.* at ¶ 8.

establish that the will was validly executed.[27] The Court held that the detailed dispositions that justified each bequest constituted a suspicious circumstance because these dispositions were "artificial and unnatural."[28] The fact that the testator's daughter and grandchildren were given a small amount was also considered a suspicious circumstance.[29]

Further, the accounts in the proponent's plaint and his testimony had one stark difference concerning the time when the testator gave instructions to the proponent. In his testimony, the proponent alleged that he had received instructions from the testator a year ago, but this fact was missing from the original plaint.[30] The Court held this addition to be an afterthought and did not accept it as accurate.[31] The Court also rejected the contention that the testator had given instructions that were recorded on a draft. It noted that the draft was missing, and this constituted a suspicious circumstance.[32] In the light of these circumstances, the Court held that the will was not executed with testamentary intent because the proponent could not establish that the will was read out to the testator and that she understood its contents.[33]

Note that this will was duly signed, attested, and even registered. In *Venkatachala*, traditional wills formalities did not serve the cautionary and protective functions that they supposedly serve. The will was written and

[27] *Id.* at ¶ 11.
[28] *Id.* at ¶ 25
[29] *Id.* at ¶ 26
[30] *Id.* at ¶ 37.
[31] *Id.* at ¶ 39.
[32] *Id.* at ¶ 38.
[33] *Id.* at ¶ 39.

signed, but neither did the testator understand the contents of the will nor did she sign it with testamentary intent. In other words, these requirements did not correlate with deliberation and intentionality.[34] The Court established a lack of testamentary intent by relying on the standard of suspicious circumstances. The will was also duly attested by two witnesses, but they could not ensure that the process of execution was not affected by any wrongdoing. Therefore, the attestation requirement did not serve the protective or cautionary functions.

It can be argued that the attestation requirement served the evidentiary function. The Court relied on the vague testimonies of the attesting witnesses to hold that the will was not executed with testamentary intent. However, it is important to emphasise that the Court considered their testimonies in the light of the suspicious circumstances surrounding wills formalities. Further, the Court also relied on testimonies of other witnesses who had no role in the will's execution. The testimonies of more than just the attesting witnesses were considered to establish the lack of testamentary intent. Therefore, the attestation requirement *partially* and not *conclusively* satisfies the evidentiary function.

This case is not an outlier, and there are several cases where the standard of suspicious circumstances has been used to decide whether a will incorporates testamentary intent.[35] The line of cases concerning suspicious circumstances

[34] *See* Gulliver and Tilson, *supra* note 14.
[35] *See* Kavita Kanwar v. Pamela Mehta, AIR 2020 SC 2614; Shivakumar v. Sharanabasappa, AIR 2020 SC 3102; S.R. Srinavasa v. S. Padmavathamma, MANU/SC/0285/2010; Jagdish Chand Sharma v. Narain Singh Saini, (2015) 3 MLJ 879 (SC); Raj Kumari v. Surinder Pal Sharma, 2020 (141) ALR 738.

constitutes a substantial part of wills formalities jurisprudence in India.[36] This indicates that strict compliance with wills formalities without the standard of suspicious circumstances can lead to false positives. The issue surrounding traditional wills formalities has usually been framed to indicate that it leads to invalidation of wills due to innocuous errors. While the risk of false negatives exists, it is important to determine whether traditional wills formalities serve any function at all. *Prima facie*, the answer is in the negative. Therefore, determining an alternative to strict compliance is essential. The following section questions whether incorporating a harmless error provision can serve as a viable alternative to the strict compliance approach. Analysing these approaches will also help in formulating a framework for allowing electronic wills.

IV. Harmless Errors and the Dispensing Power

After Langbein's substantial compliance proposal,[37] South Australia's legislature went a step further and amended its wills statute to include a dispensing power provision.[38] The provision allowed courts to grant probate if there was no reasonable doubt that the deceased intended a document to be their will. Langbein had initially proposed that documents that expressed testamentary intent and whose form sufficiently approximated Wills Act formalities should be accepted as valid wills.[39] After considering South

[36] *See* KANNAN, *supra* note 9, § 63.52.
[37] John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489 (1975).
[38] *See S. Austl. Wills Act Amendment Act (No. 2) 1975* (SA) s 9, *amending Wills Act of 1938* (SA) s 12(2).
[39] *See* Langbein, *supra* note 37, at 489, 513.

Australia's dispensing power provision, he determined that its approach was better than substantial compliance.[40] He argued that using the harmless error approach, courts excused most signature or attestation requirements[41] and that South Australia's approach suggested that 'writing' was the only essential formality.[42]

Since South Australia adopted the dispensing power, each Australian jurisdiction has enacted its dispensing power provision.[43] Australian courts apply the dispensing power provisions to allow defective wills on the fulfilment of three requirements.[44] First, there must be a document. Second, the document must express the deceased's testamentary intentions. Third, the deceased must have intended the document to be their will. Courts have interpreted 'document' to include audiotapes, print-outs, and electronic documents in several instances.[45] It is important to note that interpretation statutes in Australia include these objects as 'documents.' Australian courts have especially used the dispensing power provisions in cases where the deceased was in an emergency or close to dying[46] and dealt with the document

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[40] John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1 (1987).
[41] *Id.* at 16-18.
[42] *Id.* at 52.
[43] Wills Act 2000 (NT) s 10; Succession Act 1981 (Qld) s 18; Wills Act 1936 (SA) 12(2); Wills Act 1968 (ACT) s 11A; Succession Act 2006 (NSW) s 8; Wills Act 1997 (Vic) s 9; Wills Act 1970 (WA) s 32.
[44] Francois du Toit, *Testamentary rescue: An analysis of the intention requirement in Australia and South Africa*, (2014) 23 Australian Property Law Journal 56.
[45] *Id.* at 61.
[46] *See Newman v Brinkgreve*, [2013] NSWSC 371 (the deceased wrote instructions to amend his will while hospitalised); *National Australia Trustees v Fazey*, [2011] NSWSC 559 (the deceased who was suffering from a terminal illness wrote instructions on a notepad

in question before their death. According to courts, this expresses a finality of intention with respect to the document.[47]

Therefore, the important questions are whether the harmless error approach can serve the protective, cautionary, and evidentiary functions, whether the approach will lead to an increase in decision costs in India, and whether the adoption of this approach would affect litigant behaviour *ex ante*. There has been considerable debate on the implications of adopting a harmless error provision. Some have argued that it will lead to a higher risk of wrongdoing, higher administrative costs, and encourage testators to disregard wills formalities.[48] Others argue that the harmless error approach gives due recognition to testamentary freedom, will not lead to higher litigation costs, and will continue to function as an exception to traditional wills formalities.[49] In fact, some even argue that the harmless error rule does not sufficiently recognise the freedom of disposition.[50]

Determining whether India should do away with the traditional formalities requires more empirical research. However, a harmless error provision must be enacted through legislation as a minimum. Arguments against its adoption can be addressed by analysing two cases. Consider *Nichol v Nichol*, where the Supreme Court of Queensland dealt with the application of the state's

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concerning the division of her estate and nomination of executors). *See also*, Toit, supra note 44, at 81.

[47] *See* Toit, supra note 44, at 74.

[48] Peter T. Wendel, *Wills Act Compliance and the Harmless Error Approach: Flawed Narrative Equals Flawed Analysis?*, 95 OR. L. REV. 337 (2017).

[49] Bridget J. Crawford, *Wills Formalities in the Twenty-First Century*, 2019 WIS. L. REV. 269 (2019).

[50] James Lindgren, *Abolishing the Attestation Requirement*, 68 N.C. L. REV. 541, 561 (1990).

dispensing power provision.[51] The deceased had died by suicide and left an unsent text message on his phone.[52] This text contained several dispositions. It also had an abbreviation that matched the deceased's initials, his date of birth, and "my will" typed at the end.[53] After holding that the first two requirements for exercising the dispensing power had been fulfilled,[54] the Court examined extrinsic evidence to determine whether the deceased intended the document to operate as his will and whether he had testamentary capacity.[55] The Court extensively discussed the arguments and testimonies of the applicant and the respondents. This evidence primarily concerned his relationships with the applicant and the respondents and his mental health while typing the unsent text. The Court granted probate after holding that the evidence, on a balance of probabilities, indicated that there was testamentary capacity and the deceased intended the document to be his will.[56]

In *Yazbek v Yazbek*,[57] the Supreme Court of New South Wales dealt with another case of a contested will where the testator had died by suicide. The deceased had left a document on his computer titled "Will.doc." It had personal messages to family members and several dispositions.[58] The Court examined the metadata related to the document and, consequently, affirmed

[51] Re Nichol; Nichol v Nichol, [2017] QSC 220.
[52] *Id.* at ¶ 3.
[53] *Id.* at ¶ 13.
[54] *Id.* at ¶ 41 (first requirement). See also Id. at ¶ 43 to ¶ 46 (second requirement).
[55] *Id.* at ¶ 47.
[56] *Id.* at ¶ 57 (establishing testamentary capacity). Id. at ¶ 59 (analysis of facts with respect to the third requirement).
[57] Yazbek v Yazbek, [2012] NSWSC 594.
[58] *Id.* at ¶ 25.

that the deceased had created the document.[59] Further, the Court extensively examined extrinsic evidence that indicated that the deceased intended the document to be his will.[60]

These cases indicate that courts, when dealing with an informal will, consider extrinsic evidence to determine if the deceased intended a document to be their will. Critics of the harmless error rule argue that such case-by-case consideration of extrinsic evidence will lead to higher decision costs, i.e., litigation and administrative costs. For example, Wendel argues that Wills Act formalities were formulated, in part, to minimise administrative costs.[61] The wills formalities were formulated because they reduce the risk of fraud and other misconduct, and introducing the legal doctrines of undue influence, fraud, duress, and the like, would increase administrative costs.[62] He argues that when traditional formalities are reasonably interpreted and applied, limiting administrative costs is reasonable.[63] But this argument assumes that wills formalities effectively serve the functions that they are supposed to serve. As indicated by the discussion in the last section, courts in India have developed a standard to compensate for the failure of statutory formalities to serve these functions.[64] Cases concerning the standard of suspicious circumstances are not few and far between but constitute a substantial portion

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[59] *Id.* at ¶ 26.
[60] *Id.* at 30 (analysing whether the deceased intended the document to constitute his will).
[61] *See* Wendel, *supra* note 48, at 382 ("one of the important public policy considerations served by the Wills Act is to help control the costs of administration associated with giving effect to testator's intent").
[62] *See* Wendel, *supra* note 48, at 389-90.
[63] *See* Wendel, *supra* note 48, at 387.
[64] *See* KANNAN, *supra* note 36. *See also supra* note 35 and accompanying text.

of the case law concerning the execution of wills.[65] Consequently, the critique of the harmless error rule on this ground is untenable.

Some argue that introducing a harmless error provision would lead testators to exercise a lower level of care when drafting and executing a will.[66] We need empirical research to answer this question. But it is important to consider whether a testator would intentionally draft and execute an instrument carelessly because it can be validated regardless of its defective execution.[67] This is because proper care during execution can ease litigation since courts closely examine extrinsic evidence when using its dispensing power.[68] Further, any level of care during the execution of a will does not necessarily increase or decrease decision costs since courts consider extrinsic evidence surrounding the execution of wills regardless of strict compliance with wills formalities.[69] While decision costs may be independent of testators' behavior, adopting a harmless error provision would certainly decrease the cost of making a will. This can widen access to testamentary succession. Lastly, in the Indian context, there might not be a fundamental trade-off between error costs and decision costs. In India, decision costs might not necessarily increase due to a harmless error provision, while false negatives could decrease due to an increase in the validation of wills with minor execution defects.

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[65] *Id.*
[66] Pamela R. Champine, *My Will Be Done: Accommodating the Erring and the Atypical Testator*, 80 NEB. L. REV. 387, 439 (2001).
[67] John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. PA. L. REV. 521 (1982).
[68] *Id.*
[69] *See supra* Section II.

Therefore, a harmless error provision should be incorporated in the Indian Succession Act. In the next section, I determine whether electronic wills should be allowed and argue that the proposed harmless error provision should explicitly include electronic documents.

V. Electronic Wills as Harmless Errors

Electronic wills have been the subject of considerable academic discourse in the United States. On the contrary, there has been little to no academic research on e-wills in India. The existing literature takes no cognisance of the ineffectiveness of traditional wills formalities while formulating an approach for allowing e-wills.[70] Regardless of their descriptive and uncritical approach to the question of e-wills, these articles do not argue for enacting e-will legislation.[71] Ghatak explicitly argues that courts should exercise dispensing powers to allow e-wills on a case-to-case basis.[72] However, Ghatak does not formulate a harmless error rule and does not lay down requirements for its use. The legislature will need to specify the prerequisites for courts to exercise the dispensing power, the types of documents that will be considered under the provision, etc. For example, whether electronic documents would be allowed under the provision and whether writing would be the only material form of a document and not voice or video recordings. A harmless error provision would

[70] Chandni Ghatak, *Leaving My Legacy Online – Weighing the Viability of Recognising Digital Wills in India*, [2018] 7.2 N.U. L. J. 93, 104; *See also* Naman Anand & Dikshi Arora, *Where There is a Will, There is No Way: COVID-19 and a Case for the Recognition of E-Wills in India and Other Common Law Jurisdictions*, 27 ILSA J. INT'L & COMP. L. 77 (2020).
[71] *See* Ghatak, *supra* note 70, at 104 (arguing for adopting the harmless error rule and not a full-fledged e-wills legislation). *See also* Anand & Arora, *supra* note 70, at 92-93.
[72] *See* Ghatak, *supra* note 70, at 105.

also require legislative intervention for two reasons. First, there is a statutory bar on electronic wills.[73] Second, the legislature will need to address issues concerning the admissibility of electronic wills.[74]

In the preceding section, I argued that a harmless error provision should be incorporated in the ISA through an amendment. That approach will presumably address concerns about the definitions of 'writing' and 'document.' Further, electronic wills are not entirely secure, and several challenges need to be addressed before they can be allowed wholesale. For instance, electronic records disintegrate faster than paper records, and rapid development in word- and data-processing formats (for example, RTF and DOCX) renders older ones obsolete and unreliable.[75] Some have argued that qualified custodians will be the most reliable from an evidentiary perspective.[76] Nevertheless, given that many of these custodians are small businesses or start-ups, we cannot be sure they will operate over a long period. Targeted hacking of these firms is another cause of concern. Given the sensitive nature of the information in wills, issues such as privacy infringement and ransomware could arise.[77]

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[73] The Information Technology Act, 2000, § 2(4), No. 20, Acts of Parliament, 2000 (India).
[74] *See* Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal (2020) 7 SCC 1 ¶ 34 (The Court held that a certificate under Section 65B of the Indian Evidence Act would not be required if a computer's owner proves ownership or control of the computer on which the original document is stored. This will present challenges in cases where the electronic document is stored on the testator's personal computer.).
[75] Gerry W. Beyer & Claire G. Hargrove, *Digital Wills: Has the Time Come for Wills to Join the Digital Revolution?*, 33 OHIO. N. U. L. REV. 865, 893-95 (2007).
[76] *Developments in the Law—More Data, More Problems*, 131 HARV. L. REV. 1714, 1790-811 (2018).
[77] *See* Computer Security: Why Everything is Hackable, THE ECONOMIST, Apr. 8, 2017.

Apart from technological issues, other functional concerns will pose considerable challenges. Testators might not inform people around them about their e-wills. In cases of qualified custodian e-wills, the e-will firm might not receive the news of the testator's death. Offline and online electronic wills can also be at risk of accidental loss and might not be discovered in the first place. Moreover, as in the case of qualified custodian wills, if parties have access to the testator's devices, offline and online electronic wills face a higher risk of fraud. Further, instances of fraud are at risk of going undetected in cases of e-wills since metadata can be used to detect changes to a document only when changes are being tracked. Hirsch has described this as a word-substitution problem.[78]

Given that e-wills can create more problems than they can solve, allowing e-wills through specific legislation would be premature. Further, the approach of leaving courts to allow e-wills through a harmless error rule without legislation is based on a misconception of what the harmless error rule is—a statutory exception. Therefore, allowing e-wills in limited circumstances using a harmless error provision is a cautious first step. It is important to make sure that e-wills do not increase administrative costs while increasing the risk of error costs at the same time. Given the challenges that e-wills pose, this two-fold increase in costs seems to be an imminent possibility.

To address these issues, the legislature can allow electronic wills in limited circumstances of imminent danger of death or other exigent circumstances.

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[78] Adam J. Hirsch, Technology Adrift: In Search of A Role for Electronic Wills, 61 B.C. L. REV. 827, 864 (2020).

Hirsch provides data to show that most cases where Australian courts allowed e-wills using their dispensing powers, including the two discussed in the previous section, were cases where the testator died by suicide.[79] This approach addresses concerns about fraud and data loss. Exigent circumstances would be determined by courts on a case-by-case to reduce uncertainty *ex ante* because a rule specifying the number of days before death would lead to greater uncertainty. A rule could also increase litigation costs if the date on which the testator created the emergency e-will is unclear.

However, a harmless error provision would be a simpler way of tackling issues concerning e-wills. A harmless error rule will presumably affect events *ex post*. If the legislature incorporates a harmless error provision, as suggested above, it will not lead testators to execute wills carelessly.[80] This is because, usually, remedial rules do not affect behavior *ex ante*. In fact, proponents of e-wills legislation argue that incorporating a harmless error provision does not encourage the adoption of e-wills.[81] Lastly, jurisdictions in Australia and Canada have relied on harmless error provisions to allow e-wills over enacting either emergency e-wills or full-fledged e-wills legislation.[82] Considering these factors, allowing e-wills through a harmless error provision is the better approach.

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[79] *See* Hirsch, *supra* note 78, at 882.
[80] *See supra* Section III.
[81] *See* Paige Hall, Welcoming E-Wills into the Mainstream: The Digital Communication of Testamentary Intent, 20 NEV. L. J. 339 (2019).
[82] *See* Hirsch, *supra* note 78, at 893 ("Canadian and Australian jurisdictions have favoured this "middle ground" approach").

VI. Conclusion

The legislature must enact a harmless error provision in the Indian Succession Act. Traditional wills formalities, especially the signature and attestation requirements, do not serve the functions that have been the basis of their importance. The high transaction costs involved in complying with these requirements do not allow widespread adoption of testamentary succession. In their effort to reduce misallocation costs using the standard of suspicious circumstances to remedy the uselessness of traditional formalities, courts end up considering extrinsic evidence. Given this, proponents of the strict compliance approach cannot argue that enacting a harmless error provision would lead to higher decision costs. Further, a harmless error provision would allow courts to dispense with traditional wills formalities in cases of testamentary documents with execution defects.

Lastly, the functional challenges posed by electronic wills have not been comprehensively addressed, let alone resolved. Electronic wills are woefully inadequate to deal with issues of privacy and data security. Therefore, enacting a full-fledged e-wills statute will be premature. However, letting courts decide on the validity of e-wills without enacting a harmless error provision will lead to greater uncertainty and raise more questions. Because, first, electronic wills are statutorily barred. Second, a statutorily enacted provision would lead to greater certainty by defining keywords such as ‘document’ and ‘writing.’ Therefore, the proposed harmless error provision should allow courts to probate electronic document.

Missteps In Managing the Menace of Multiplicity in Ad-Hoc Arbitral Proceedings: Gammon India v. NHAI, 2020

Romit Sahai*

Abstract

In an attempt to make Ad-Hoc Arbitration a conducive environment for dispute resolution in India, authorities have often kept a distance from meddling too much in the process, leaving much of its control to the parties themselves. While this has instilled confidence in the parties, it has come at the cost of unfettered abuse of the mechanism; that is undoing arbitration's calibre. One such instance is that of the laden multiplicity in the arbitration process that has overstepped the boundaries of public policy. While the Delhi High Court took notice of this practice and relegated passive directions to counter the same, its reluctance to address it directly has rendered all its efforts futile. This article will be highlighting the preliminary reasons behind the existence of multiplicity in proceedings and illustrating through the case how it sets the entire arbitration process at naught. Subsequently, it will showcase how the court, through its verdict in Gammon India v. NHAI tried to tackle the issue, albeit with hesitance, rendering its corrective measures moot. Lastly, it would explore how multiplicity can be managed by arguing a defence for how regulation of the ad-hoc arbitration process to a certain extent is in complete tandem with its guiding principles and object.

I. Introduction

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The hallmark of Alternative Dispute Resolution (hereinafter "A.D.R.") mechanisms is its flexibility as against the traditional formality of court procedures. In A.D.R, matters are quickly disposed of with finality within an environment that is oriented towards the preferences of the parties.[1] This pro-party temperament ensures that the confidentiality of matters is maintained and that the settlement process is feasible in terms of time & money.[2] This chief leg-up of speedy resolution with finality is the benchmark of an ideal A.D.R. machinery.[3] Ad-Hoc arbitration is one of the most prevalent modes of A.D.R in India. But lately, it has been grappling with the problem of multiplicity of proceedings.[4] Multiplicity simpliciter is multiple invocations or references for matters that are substantially and in essence the same in notion.[5] Multiple references in arbitration occur when two or more arbitration proceedings are initiated between the same or similar parties in relation to either the same or an identical contract or set of contracts.[6] While multiplicity is its byproduct, i.e., multiple arbitral tribunals, multiple-challenges, multiple-

[1] Law Commission of India, Report No. 222 Need for Justice Dispensation Through A.D.R., ¶ 1.32-1.45 (2009).
[2] Gianna Totara, *Avoid Courts at All Costs*, AUSTRALIAN FINANCIAL REV., https://www.afr.com/companies/professional-services/avoiding-court-at-all-costs-20081114-j8es2 (2008).
[3] Todd B. Carver and Albert A. Vondra, *Alternative Dispute Resolution: Why It Doesn't Work and Why It Does*, 72 HARVARD BUSINESS REV. 120 (1994).
[4] Ashima Obahn and Shivam Patanjali, *Solution to Multiplicity of Arbitral Tribunals*, Mondaq (July 23, 2020), https://www.mondaq.com/india/trials-appeals-compensation/968910/solution-to-multiplicity-of-arbitral-tribunals.
[5] *Multiplicity simpliciter*, Black's Law Dictionary (10th ed. 2015).
[6] Gammon India Ltd. & Anr. v. National Highways Authority of India, AIROnline 2020 Del. 881 (India).

awards due to multiple references, it is this multiplicity that sets the entire arbitration process at naught.[7]

This multifold increase in arbitration references is largely due to the lack of any legislation regulating the arbitration process and inadvertence on the part of practitioners in refraining from multiple references. This has resulted in the clogging-up of the Arbitration mechanism with the same disputes that have been stretched endlessly. More and more conflicting awards are being passed because of multiple proceedings, creating confusion, slowdown and surge in costs of settling disputes.[8]

II. Multiplicity, A Double-Edged Sword - Is It A Matter Of Convenience Or Confusion?

Multiple arbitration references are not just contemplated but also permitted in the Arbitration & Conciliation Act, 1996 (hereinafter "the Act")[9]. The use of the words '*all or certain disputes which have arisen or may arise*'[10] in the provisions, for when references can be made, clearly denotes that arbitration can be invoked for present as well as future issues. Further, when these are read with the provisions regarding commencement of arbitration, the words *'commences in respect of a particular dispute'*[11] clearly highlight that

[7] *Id.* ¶ 28.
[8] Ankoosh Mehta, Siddharth Ratho & Ria Lulla, *Multiplicity of Proceedings Defeats the Purpose of Alternate Dispute Resolution: Delhi High Court*, India Corporate Law (July 17, 2020), https://corporate.cyrilamarchandblogs.com/2020/07/multiplicity-of-proceedings-defeats-the-purpose-of-alternate-dispute-resolution-delhi-high-court/.
[9] Arbitration & Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India) [hereinafter A&C Act].
[10] *Id.* § 7(1).
[11] *Id.* § 21.

proceedings commence on the date when disputes are brought to the tribunal. It can safely be inferred that multiple disputes can be brought in arbitration at different times, and that multiple proceedings can be commenced for each of them. The Apex-Court also reaffirmed that once arbitration is invoked, the parties cannot be barred from making a subsequent reference for other future issues,[12] and that invocation for present issues cannot prevent future invocation for other issues that may arise later.[13] In protracted contracts which are long-term contracts spanning multiple years, different issues may arise at different times in the contract's extended lifetime, and the same cannot be raised altogether in a single reference at the end of the contract due to the operation of Limitation Law, thus necessitating multiple references. But the Apex-Court also resounded its discontentment with such practices due to the enormity of confusion in passing awards and the financial burden.[14] Thus, whilst such practice is permissible, it ought not to be utilized unless necessary.

Multiplicity is thus a necessary evil, especially for the purposes of bolstering the object of A.D.R., i.e., expediency, as multiple-proceedings enable parties to have references for different issues simultaneously. In an ordinary Court of Law, separate proceedings for overlapping issues would be stayed, and adjudicated either together or after the former suit is decided.[15] But arbitration

[12] Dolphin Drilling Ltd. v. ONGC, (2010) 3 SCC 267, ¶ 5-6 (India).
[13] Parsvnath Developers Limited & Anr. v. Rail Land Development Authority, AIROnline 2020 Del. 724 (India).
[14] Dolphin Drilling, *supra* note 12, ¶ 7.
[15] Gammon India, *supra* note 6, ¶ 26.

dodges this protocol for a more pro-party approach[16] as the provisions of the C.P.C[17]are not followed in a strict sense for speedy settlements. But this attempt to preserve the genesis of speedy resolution through multiple-proceedings can also turn this into a tediously long, confusing & expensive process.

This very 'other side' of tedious & confusing arbitral proceedings due to multiplicity transpired in *Gammon India Ltd* v. *NHAI*[18] wherein three different arbitration tribunals were constituted. In the first tribunal the award was passed for all but one of the claims of the contractor, because it was not specifically raised as an issue before the tribunal at the time of reference.[19] Thereafter, a second tribunal was constituted for further claims that had arisen and after getting leave of the court, the previously rejected claim was also raised with those claims.[20] Subsequently, a third tribunal was constituted for a third set of claims.[21] The second arbitration concluded, wherein the contractor's contentions were rejected and the previous claim was not awarded by the second tribunal. This was followed by the conclusion of the third arbitration where the contractor had made the same submissions as that in the previous

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[16] Lara Pair, *Efficiency at all Cost – Arbitration and Consolidation*, KLUWER ARBITRATION BLOG ¶ 9 (Mar. 14, 2014), http://arbitrationblog.kluwerarbitration.com/2014/03/14/efficiency-at-all-cost-arbitration-and-consolidation/#:~:text=Consolidation%20of%20multiple%20disputes%20into,all%20related%20parties%20and%20disputes.

[17]Code of Civil Procedure, 1908, Order II, rule 2 read with § 11, Explanation IV, No. 5, Imperial Legislative Council, 1908 (India) [hereinafter 'CPC'].

[18] Gammon India, *supra* note 6.

[19] *Id.* ¶ 6.

[20] *Id.* ¶ 9.

[21] *Id.* ¶ 13.

arbitration. However, in this instance, the third tribunal had accepted those submissions, and, placing reliance on the same, passed an award for its other claims.[22] Considering the contradictory findings of the second and third tribunals, the second award was challenged, alleging that it should be decided based on the findings of the third award.[23]

The premise of the entire controversy rests on the complications owed to the multiplicity of arbitration proceedings. The contractor had failed to raise the claim in question in his first reference, which in an ordinary court of law would amount to waiver of that claim and would be prohibited from raising it in the future. Further, the leave of the court to raise the same claim in a later reference is also irregular and opposed to public policy. The contractor also challenged the rejection of his claim based on the findings in a different reference, a conflict that is avoided in formal courts by preventing two disputes on the same subject matter from being determined concurrently. Thus, the question to be answered is whether the claim, not raised in the first invocation, allowed to be raised in subsequent references, would be against the principle of *res judicata*. And if multiple decisions on the same issue are to be allowed, then what should the effect of an inconsistency between the previous and the subsequent award be? Should the different findings in a subsequent decision annul the previous decision? Lastly, what should be the approach towards the constitution of multiple-tribunals for coherently similar issues and to what extent should this malpractice be allowed?

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[22] *Id.* ¶ 38.
[23] *Id.*

III. Leasing the Multiplicity of Proceedings - Analysis of Delhi High Court's Counter Measures

To tackle the various complications of multiplicity, the court in the present case, attempted to provide a comprehensive solution to each of the protruding issues. At the outset, the verdict begins by vindicating the position of multiple proceedings. It affirmed the premise that while it is permitted, the parties ought to refrain from resorting to the same.[24] It suggested that arbitration clauses should be drafted by incorporating a mutual waiver of limitation-law. Consented waiver of the limitation period is a valid supposition; and while courts and tribunals have a duty to look into the application of limitation, they are not bound to deliberate upon it when there exists such an agreement,[25] as it merely amounts to waiver of a ground for defense which is lawfully binding.[26] Consensual waiver of limitation is, and has been, an indissoluble valid undertaking[27] in English Courts, and even more so in International Arbitration,[28] which leans towards a pro-party adjudication based more on a contractual agreement than the law.[29] However, this pitching of incorporating mutual-waiver in arbitration clauses was not mandatory and was rather left to

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[24] *Id.* ¶ 35.
[25] Badrinath Srinivasan, *Can Parties Give Up Limitation by Consent*, LINKEDIN PULSE (Mar. 5, 2019), https://www.linkedin.com/pulse/can-parties-give-up-limitation-consent-badrinath-srinivasan.
[26] Gopalakrishna Pillai v. K.M. Mani, (1984) 2 SCC 83, ¶ 31 (India).
[27] Oxford Architects Partnership v. Cheltenham Ladies College, [2006] EWHC (TCC) 3156 (Eng.).
[28] International Chamber of Commerce, ICC Rules of Arbitration, art. 40 (2021); *see also* Craig Miller & Laura Danysh, *The Enforceability and Applicability of a Statute of Limitations in Arbitration*, 32 FRANCHISE L J 26, 26-29 (2012); *see also* B.G. Group PLC. v. Republic of Argentina, 665 F.3d 1363, 7-8 (2014).
[29] Badrinath, *supra* note 25, ¶ 21.

the parties by the Delhi High Court, and while the suggestion would indeed help to a certain threshold, it certainly will not root out those abusing the system if there is no mandate or scope for enforcement.

The next impetus of the Delhi High Court was on the splitting up of claims, i.e., the tactic of raising a few claims alone and purposely leaving some for future references.[30] Successive arbitration cannot be done away with, but it certainly should not be opted for disputes that had already arisen and should have been a part of a prior, then ongoing, reference.[31] This is an established practice in suits[32] and the extension of the same was implied by the apex-court as well, in the *Dolphin Drilling* case[33] which noted that multiple arbitration references are not just a matter of continence but also a balance between the parties and public interest. The Delhi High Court has also relied on the notion of constructive *res-judicata*[34] and mandated that parties ought to refer all disputes already in existence on the invocation date of arbitration, and that any claim not so raised will be deemed relinquished and barred in subsequent invocations and held that the leave allowing the claim to be raised in a subsequent reference as impermissible.[35] However, for arbitration tribunals, the determination of *res-judicata* was left to their discretion; to see whether there exists a sustaining reason for failure to raise such claims or to even follow this practice at all. Here the court again, hesitant to dabble in party-

[30] Gammon India, s*upra* note 6, ¶ 34.
[31] *Id.* ¶ 35.
[32] CPC, s*upra* note 17, Order II, rule 2.
[33] Dolphin Drilling, s*upra* note 12, ¶ 17.
[34] CPC, s*upra* note 17, § 11, Explanation IV.
[35] Gammon India, s*upra* note 6, ¶ 35.

determined procedure, made the directions voluntary. This however, can expose arbitrators who choose to follow this rule from not being considered for future arbitrations by the parties just because it is an inconvenience to them. Afterall, it is the parties who usually decide upon the arbitrators, keeping in mind their interests, and since these directions restrict their ability to raise claims, the parties who find this cumbersome would simply not opt for arbitrators adhering to these rules, thus discouraging arbitrators from applying these directions.

The court also deliberated upon the formation of multiple arbitral tribunals and opined that references should be reserved to a single tribunal. The consequences of multiple tribunals are not just the possibility of contradicting awards, but also the overburdening of the system because of the need to adduce evidence again, scrutinize facts and to re-evaluate merits that have already been decided by a different tribunal.[36] Such practice is only for parties who seek to benefit from the mischief of redetermination of their dispute in angst of a favorable decision. The court disapproved of the leave granted for referring the claim to another tribunal and concluded that the approach must be that references have to be made to the same tribunal.[37]It cited that the apex court[38] and High Courts[39] have ordinarily made second references to the former tribunals and the same must be adopted by all courts when any appointment of an arbitrator is sought. Further, parties, when making an

[36] Gammon India, s*upra* note 6, ¶ 28.
[37] Gammon India, s*upra* note 6, ¶ 31.
[38] Indian Oil Corporation Ltd. v. S.P.S. Engineering Ltd., (2011) 3 SCC 507 (India).
[39] M/s. Sam India Built Well (P) Ltd. v. Union of India and Ors., (2017) Arb. P. 106/2017; *see also* Parsvnath Developers v. Rail Land Development Authority, (2020) Arb. P. 710/2019.

application for an appointment, must disclose if any tribunal had been constituted earlier.

The scope for multiple tribunals having been actively reduced, the apex-court enlarged the domain of a single tribunal to adjudicate disputes of three separate agreements as part of a single reference.[40] Disputes from different agreements between different parties can be, and should be consolidated, to avoid convolution as long as there is a common denominator[41] in the transaction. 'Common Denominator' here refers to issues or claims that are same or similar for multiple parties or contractual obligations.[42] These overlapping issues can exist in all industries and commercial transactions but are often most encountered in the energy or transport sector, large construction projects and contracts, joint-ventures and investment deals.[43] In such commercial undertakings it is common for multiple disputes to be commenced by several parties to the contract along with its sub-contractors for different claims arising out of a single transaction.[44]

Given the growing complexities in modern day contracts and transactions; disputes and claims are bound to overlap with each other and consolidation may be possible in many such instances, but there still exists cases where consolidation of proceedings may not be possible.[45] There are wide reaching

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[40] Global Infonet v. Lenovo and Ors., (2019) C.S. (Comm.) 658/2017 (2019) (India).
[41] P. R. Shah v. B. H. H. Securities, (2012) 1 SCC 594 (India).
[42] Vasilis Pappas et al., *When Consolidation Fails: The Challenges of Parallel Arbitral Proceedings*, LEXOLOGY ¶ 1 (Nov. 10, 2020), https://www.lexology.com/library/detail.aspx?g=a543c89d-bb57-449c-b34e-e49f9d6e5081.
[43] *Id.* ¶ 2.
[44] *Id.* ¶ 3.
[45] *Id.* ¶ 7.

ramifications on the parties when proceedings are consolidated.[46] Firstly, because consolidation is characterized as an administrative act that creates a tribunal's jurisdiction, it takes away the right of the parties to challenge the so created jurisdiction of the consolidated tribunal as any challenge to it will denude the consolidation for which the jurisdiction was created in the first place.[47] Moreover, the decision to consolidate proceedings often come at the sole discretion of the tribunals as per the principle of *kompetenz-kompetenz* and as such, unlike an award, these decisions often have no requirement of reasons to be provided nor any procedure to set-aside as per the decided seat of law, so these decisions become forced in a mechanism that boasts to be party-oriented.[48] Any decision of a consolidated tribunal will also come at the peril of a forced waiver of the parties' right to designate an arbitrator and waiver of the right to challenge the consolidated award if any.[49] Another issue that is faced is that in case of cross-border transactions, it becomes difficult, if not impossible, to rightly determine where the consolidated tribunal is to be and what law is to govern it, as cross-border contracts often span different countries because of the different locations of various parties. To add to this, the separate agreements between different parties usually have different consented seats of law for disputes based on the differing location and

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[46] Eunice Chan Swee En, *Consolidation of Arbitral Proceedings and its Ramifications on a Party's Right to Challenge the Jurisdiction of the Tribunal and the Arbitral Award*, KLUWER ARBITRATION BLOG (Mar. 21, 2018), http://arbitrationblog.kluwerarbitration.com/2018/03/21/consolidation-arbitral-proceedings-ramifications-partys-right-challenge-jurisdiction-tribunal-arbitral-award/.
[47] *Id.* ¶ 2.
[48] *Id.* ¶ 3.
[49] *Id.* ¶ 11-12.

convenience of different parties, and any consolidation in such instances cannot be possible without it being detrimental to the parties' agreement and autonomy.[50] The third issue that arises in consolidation is the absence of consent of all the parties involved in the said common transaction.[51] Generally, the major parties of a project would further enter into more contracts with various other sub-parties who may not have an arbitration agreement.[52] In such cases, arbitration proceedings cannot be consolidated without vitiating the consent of some parties.

However, the Supreme Court of India had observed in a rare instance that consolidation can be done irrespective of there being different arbitration agreements or even non-signatories to the agreement.[53] However, this too is not an imposition on arbitral tribunals, nor is there any explicit provision for consolidation of any degree in the Act. The apex-court had inferred this rule by applying the '*Group of Companies Doctrine*'[54] which in essence makes the non-signatories of an arbitration agreement in a mutual matter, to still be bound by it as if they are a single entity and not separately involved in one composite transaction.[55] The object of this doctrine is that matters of similar nature, even when between separate entities, as long as there is one 'mother' or 'principal' agreement for whose facilitation all the other separate agreements exist, the entire mother agreement including its integral separate

[50] *Id.* ¶ 9.
[51] Pappas, *supra* note 42, ¶ 7.
[52] *Id.* ¶ 8.
[53] Chloro Controls v. Severn Trent, (2013) 1 SCC 641.
[54] *Id.* ¶ 21.
[55] *Id.* ¶ 133.

agreements will be construed as one composite agreement.[56] Any disputes that may arise in connection with the mother agreement can bind even non-signatories to arbitration, if there is any clause providing settlement through arbitration between some parties in regards to the inter-connected matters,[57] and any such dispute should be consolidated as one for the efficient working of the legal resolution machinery.[58] The court, in its 2017 order[59] while refraining from consolidation of proceedings clarified its position in *Chloro Controls* citing that before non-signatories can be bound by an agreement, what has to be seen is whether the mother agreement's arbitration clause is wide enough to include the inter-connected agreements or not.[60] The court in this case however did not deliberate upon the aspect of consolidation because of an amendment confining the scope of courts to only determine the existence of an arbitration agreement,[61] which has since then been deleted.[62] So while the Courts seemingly still retain their power to make rules in regards to

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[56] *Id.* ¶ 140.
[57] *Id.* ¶ 167.
[58] Ashima Obahn and Shivam Patanjali, *Binding Non-Signatories to an Arbitration Through the Group of Companies Doctrine*, MONDAQ (Sept. 9, 2019), https://www.mondaq.com/india/arbitration-dispute-resolution/843512/binding-non-signatories-to-an-arbitration-through-the-group-of-companies39-doctrine#:~:text=The%20group%20of%20companies%27%20doctrine%20has%20been%20regarded%20as%20a,arbitration%20to%20resolve%20the%20dispute.
[59] Duro Felguera S.A v. Gangavaram Port Ltd., (2017) 9 SCC 729.
[60] *Id.* ¶ 40.
[61] The Arbitration & Conciliation (Amendment) Act, 2019, § 11(6A), No. 33, Acts of Parliament, 2019 (India).
[62] Dr. Amit George, *Has Section 11(6A) Been Deleted from the Arbitration Act?*, BAR & BENCH (Mar. 10, 2021), https://www.barandbench.com/columns/policy-columns/has-section-116a-been-deleted-from-the-arbitration-act#:~:text=One%20of%20the%20significant%20changes,of%20an%20arbitration%20agreement%20alone.

arbitration proceedings,[63] and thereby effect consolidation, the silence of the provisions of the Act inhibits the Arbitral Tribunals from doing the same. They cannot consolidate proceedings of a mutual cause due to it not being stated as one of its powers. Ad-Hoc arbitration is confined to the spheres of what the Act states and the parties determine; thus, consolidation is not an endeavor that can be undertaken by tribunals within their powers on paper. The hands of Arbitral Tribunals are tied, as even if they were to apply the principles the apex-court had taken into consideration in Chloro Controls for the overlapping references, it still lacks the inherent power to stay or consolidate such references to thwart multiplicity.

Consolidation is one of the inherent powers of the court, meaning that causes can be enjoined by them for expediency.[64] The apex-court had ventured into the inherent powers of arbitral tribunals and had observed that every tribunal is endowed with ancillary powers to discharge its functions and regulate its administrative process.[65] The apex court in its observation also noted that just because the provisions of the Act states that Arbitral Tribunals are not bound by the provisions of C.P.C,[66] it cannot be construed to mean that tribunals lack the power to incorporate any of its provisions in its proceedings,[67] thus, impliedly also enabling arbitral tribunals to inherit the inherent powers of a

[63] A & C Act, *supra* note 9, § 82.
[64] CPC, s*upra* note 17, § 151; *see also* Anurag & Co. and Anr. v. Additional District Judge and Ors., AIR 2006 Raj. 119.
[65] Srei infrastructure Finance Ltd. v. Tuff Drilling Pvt. Ltd., (2018) 11 SCC 470, ¶ 23-26.
[66] A&C Act, *supra*, note 9, § 19.
[67] Srei Infrastructure Finance Ltd., *supra* note 65, ¶ 15.

Civil Court as per the C.P.C[68] which includes the power to consolidate proceedings.[69] The scheme of the Act and its provisions[70] is to facilitate effective dispute resolution, and so, a mere pro-party approach of arbitration cannot denude tribunals from having such powers. This ratio of the Court was in the context of the inherent power of the tribunal to reinitiate proceedings. However, it can be seen that the Court made an implication to suggest that tribunals have all the inherent powers of an ordinary court for its proper functioning, including the power to consolidate multiple proceedings, when necessary for efficiency. But this implication has to be more clearly affirmed by the courts, if consolidation by arbitration tribunals is to be enabled, since tribunals cannot assume such powers. They can exercise only those powers which have been declared either by the legislature[71] or the judiciary[72] in consonance with the Act. Thus, consolidation of proceedings has to be explicitly certified before any tribunal can undertake to do the same. It also added that clear intimation has to be made by parties to the courts regarding all concurring and concluded references when an award is challenged, and every challenge made is to be consolidated and proceeded by the courts, only after all references have concluded, so as to avert multiple instances of the matter.

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[68] CPC, *supra* note 17, §15.
[69] Chitivalasa Jute Mills v. Jaypee Rewa Cement, AIR 2004 SC 1687, ¶ 12.
[70] A&C Act, s*upra* note 9, §5.
[71] *Id.* § 84.
[72] *Id.* § 82.

Lastly, the court delved into the evidentiary value of subsequent awards to jettison an award which has already been passed. [73] It relied on an earlier decision of the apex-court[74] where it observed that mere inconsistency with another award is no ground to set it aside, and so concluded that each challenge is to be tested only on those merits which existed at the date of passing of the award.[75] It can be seen that the reasoning of the court has been borrowed from the rules for disposal of appeals. Every appeal when made, is decided only on the basis of the law and facts existing at the time of insinuation. This is to prevent parties from taking advantage of any ground that it had earlier not convened to the prejudice of the other party. It is also to avoid undoing of decided cases by a mere change in the position of law. Further, the provision for challenging awards does not allow courts to entertain any review on merits or erroneous application of law; awards are only to be set aside on substantive grounds when there is contravention of the basic notions of justice.[76] Mere inconsistent arrival on a decision is a difference in application of mind for dispensing justice and not a difference that is prejudicial to justice. Thus, the Delhi High Court rightly refused the challenge on two accounts; the lack of admissibility of subsequent findings and the difference of decision being within the permissible sphere of discretion.

IV. Suggestions

[73] Gammon India, s*upra* note 6, ¶ 43-44.
[74] Vijay Karia and Ors. v. Prysmian Cavi E Sistemi SRL and Ors., Civil Appeal No. 1544/2020.
[75] Gammon India, s*upra* note 6, ¶ 43.
[76] A&C Act, s*upra* note 9, §34 Explanation 1(iii).

If multiplicity is avoided then adjudications would be definitive, confidentiality would be strengthened, the procedure would be less expensive, and arbitrations would not be bottlenecked. But this can only be cured by undertaking a shift from passive to active regulation of Ad-Hoc arbitration,[77] which includes introducing certain degrees of harm to the cornerstones of party autonomy. Institutional arbitration embraces this active regulation of its proceedings to ensure that the efficacy of its mechanism is not thwarted by the manipulation of parties. But the same level of interference in ad-hoc proceedings has been deliberately left out. Even the courts refrained from interfering much to ensure that ad-hoc arbitration maintains the same standards of autonomy as that in other systems. However, there has been a change in attitude; legislators have attempted to bring certain regulations to ad-hoc proceedings such as fixing the timeline for passing an award as well as arbitrators fees,[78] and more needs to be done to prevent the issue of multiplicity.

Tribunals should be endowed to amend a substantial portion of its awards in limited scope in a subsequent reference of the common transaction, so that parties are inclined to make these future references in the same tribunal. The legislature also took a step by incorporating a provision for remittal of awards which mandates the Courts to avoid hearing challenges and instead refer them back to the same tribunal via amendment;[79] intervention should only be when

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[77] Gammon India, s*upra* note 6, ¶ 45.
[78] Venancio D'Costa and Astha Ojha, *Institutional vis-à-vis Ad-Hoc Arbitration in India*, MONDAQ ¶ 5 (June 24, 2020), https://www.mondaq.com/india/arbitration-dispute-resolution/957706/institutional-vis-a-vis-ad-hoc-arbitrations-in-india.
[79] A&C Act, s*upra* note 9, §34(4).

there is a gross miscarriage of law or justice. Consolidation, which is already recognized in International Arbitration,[80] should also be made a more explicit practice when common questions and facts are involved. A presumption should be carried that parties always intend to refer their matters to the same tribunal, and when different tribunals are sought to be constituted, the leave of court should be sought first, and the same should be tested on the grounds of reasonability.[81] A proviso should be inserted to section 7[82] whereby all claims in arbitration will not be barred by limitation - unless the said claim is explicitly stated in the agreement to be affected by the operation of limitation. Further, all claims not so barred, should only be raised in a single reference at the completion or termination of the legal relationship. The legislature should also undertake to establish and encourage institutional arbitration in India such as the New Delhi International Arbitration Centre (NDIAC).[83] NDIAC is an attempt to promote institutional arbitration by designating specific arbitration centers and chambers that are maintained by a regional branch which would determine and regulate the working and process of its arbitration proceedings to ensure quality and efficiency.[84]

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[80] Hong Kong International Arbitration Centre, Hong Kong International Arbitration Centre Administered Arbitration Rules, art. 28 (2018); *see also* Singapore International Arbitration Centre, Singapore International Arbitration Centre Arbitration Rules, rule 8 (2016).
[81] Fiona Trust & Holding Corporation v. Privalov, (2007) UKHL 40 (Eng.).
[82] A&C Act, s*upra* note 9.
[83] D'Costa and Ojha, *supra* note 53, ¶ 8.
[84] Shiv Sang Thakur, *Institutional Arbitration Post the Arbitration and Conciliation (Amendment) Act, 2019*, THE ARBITRATION WORKSHOP BLOG (Oct. 21, 2020), https://www.thearbitrationworkshop.com/post/institutional-arbitration-post-the-arbitration-and-conciliation-amendment-act-2019; *see also* Palash Taing & Prateek Khanna, *The New Delhi International Arbitration Centre Bill, 2018: Creating An Ecosystem For International Arbitration Centre In India*, MONDAQ (Apr. 12, 2018),

V. Conclusion

It is evident that despite the precarity of multiplicity, the court refrained from overstepping the boundaries of arbitration. This can be seen from the fact that, while deciding the issues it kept a pro-party notion in its closed fist. The regiment of arbitration is its autonomy, and the court was careful while treading on the protruding issues so as to not disturb this sanctum of arbitration by keeping judicial intervention to a minimum. But this cautious approach is laden with the predicament that the outreach of this *volenti-verdict* will not be sufficient to curb this malpractice. A narrow embracing of regulation is not enough when abuse is written in the intention of parties going for arbitration and the need for a more dynamic involvement in regulating such practices is all the more felt to counter such mischief and uproot the multiplicity of proceedings. A balance has to be struck between non-interference and regulations if both the object of easement and efficacy is to prevail in arbitration.

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https://www.mondaq.com/india/arbitration-dispute-resolution/691444/the-new-delhi-international-arbitration-centre-bill-2018-creating-an-ecosystem-for-international-arbitration-centre-in-india.