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CONTENT

Right to Mental Health of the Incarcerated: The Need for Reforming the Indian Correctional System

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Introduction

The right to physical and mental health is an internationally recognised human right available for all individuals, including prisoners and othermarginalised sections of society. However, prisoners who are deprived of their liberties are denied proper mental healthcare services. Thus, they languish in jails for years as under-trial prisoners incapable of facing trial or happen to continue in prisons even after recovering from mental illness due to poor criminal justice administration. Though attempts have been made to reorient correctional methods towards reforming the prisoners, the deplorable conditions of jails remain the same becauseofthe half-hearted implementation of laws and policies. Due to the unfavourable conditions in prisons in India, prisoners undergo various psychological disorders. There is a common saying that prison houses the "SAD, MAD, and BAD" of society. SAD indicates that at least 50-75% of the prison population suffer from depression, MAD depicts that at least 30-15% have a mental illness, and BAD suggests that 20-10% are psychopaths[1].

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1 Suresh Bada Math, Pratima Murthy E T. AL., MINDS IMPRISONED: MENTAL HEALTH CARE IN PRISONS 95(2011).

Studies conducted worldwide show that mental health among the general population is constantly decreasing, and it is at an alarmingly high rate among prisoners. Studies have proved that among those previously incarcerated, recidivism rates are also high in persons with mental disorders. Thus, the issue closely correlates with human rights law and the criminal justice system.Against this backdrop, this study aims to identify and understand the relevance of the issue in the Indian context. The study strives to critically analyse measures adopted in India to improve the mental health of prison inmates and aims to suggest measures for ensuring mental healthcare of prisoners during the term they are incarcerated. Secondary sources are reviewed to understand the current statistics of mentally challenged persons languishing in Indian jails.Along with it, all relevant legislative provisions, rules and prison manuals are analysed to identify various welfare schemes implemented to ensure the mental health of prisoners. The study approaches the issue in criminal law and human rights perspectives. The study does not intend to delve into disability laws concerning mentally challenged prisoners beyond discussing the general schemes of disability laws.

Mental Health of the Detained: Statistical Review

The issue of ensuring the mental health of people is a matter of great importance. This is more so in the case ofprisoners, as they are devoid of any entitlements and liberties enjoyed by other citizens. More importantly, the rate of mental disorders is disproportionately higher among prisoners than the general population worldwide. Studies in countries like the U.S., the U.K., France, Brazil, etc., underline the substantial increase in psychological disorders among prison inmates[2]. In India, the general

2 Amy Morin, *The Mental Health Effects of Being in Prison*, (May5,2023,10.30 AM) https://www.verywellmind.com /menta-health-effects-of-prison-5071300;*See*, Graham Durcan, Jan Cees Zwemstra, *Mental health in prison*, (May 1,2023,10.30 AM)https://www.euro.who.int/ __data/assets/pdf_file/0017/249200/Prisons-and-Health,-11-Mental-health-in-prison.pdf; *See*, R. Arnal , M. Spodenkiewicz et.al., *Mental health of jail inmates within the prison of Ducos,Martinique – a cross-sectional descriptive study,*(Jan 27,2023,12.30 PM),https://pubmed.ncbi.nlm.nih.gov/29685697/.

awareness about mental health and related issues is only evolving nowadays. This is more so in the case of prisoners. The criminal justice system pays little attention to addressing the general physical and mental health of prisoners in India. Independent studies and official data to analyse prison health are scanty. However, in a study conducted by the National Institute of Mental Health and Neuro Science (NIMHANS) on 5024 prisoners, around 79.6% have a mental illness or substance use, and around 45% are addicted to drugs or other substances[3]. Psychotic disorders are also prevalent among prisoners in India. The study reported that about 112 prisoners had schizophrenia and other psychotic disorders[4]. Depression is common among prisoners, and the rate is substantially high compared to the general population in India[5]. The study identified 290 inmates with suicidal risk[6]. Most of the prisoners had personality disorders[7].

The prison population has increased significantly in the last two decades. Indian prisons at all three levels (Sub, District and Central) face safety and security issues, unhygienic conditions, overcrowding, etc. The latest Prison Statistics released by the National Crime Records Bureau the 2021 give insights into the Indian prison mental health. It is a detailed study incorporating the deaths and illnesses in prison. Out of the 5,54,034 inmates, 9,180 were reported to have a mental illness, constituting 1.7% of the prison population[8]. Of the 9,180 mentally ill inmates, 41.3% are convicts, and 58.4% are under-trial prisoners[9]. Also, it was reported that out of the 185 unnatural deaths, 150 were suicidal deaths[10]. It is also important to note the mismatch of data projected in the NCRB Report 2021 compared with the

3 Suresh Bada Math, *Supra* note 1 at 7.

4 *Id*. at. 59&60.

5 *Id*. at. 75

6 *Id.* at. 87.

7 *Id*. at. 93-104.

8 PRISON STATISTICS, NATIONAL CRIME RECORDS BUREAU, 2021 at 169.

9 *Id.*

10 *Id*, Chapter 8 at.178.

NIMHANS Report. Though the period and purpose of both reports differ, the NIMHANS report throws light uponthe need to study prison mental health properly at the governmental level. The disproportional increase in mental disorders among prisoners is due to various reasons[11], such as:

- The isolated, overcrowded prisons with limited facilities, inadequate health care service, solitude, insecurity, violence, discrimination, etc.
- Discontinuing medical care due to imprisonment or detention, poor access to mental health services;
- Addiction to drugs and substance abuse;
- The approach of considering prison as a place to lock up people with mental disorders due to a lack of enough mental health services.

Significance of Ensuring Prison Mental Health

Modern prisons are places of custody, care and treatment in contrast to the notion of detention places to punish the prisoners. It aims to reform the inmates by providing essential living conditions and other medical and recreational facilities to reform and bring them back to society as responsible citizens. Thus, treating prisoners with mental disturbances is highly recommended to maintain discipline and a healthy prison environment. The issue is multidimensional, encompassing human rights dimensions (the human rights perspective is discussed separately), and it is a vital aspect of the criminal justice system. It needs to be considered as part of the criminal justice system for two reasons.

First, only by providing proper mental health care can the detainees face the trial and defend their case. As per the provisions of the Code of Criminal Procedure, a trial can be initiated only if the accused is mentally

11 Anastasia Repouliou, *Mental Health in Prisons Around the World*,(Apr.25,2023,12.30 PM),https://pphr.princeton.edu/2016/02/21/mental-health-in-prisons-around-the-world/ .

sound[12]. Indian prison statistics show an alarming increase in the number of under-trial prisoners. Among the under-trial prisoners, more than 50% of them have mental health issues[13]. Thus, delays in identifying and giving proper medical treatment will worsen the situation.

Secondly, one of the fundamental objectives of the correctional system is to reform the prisoners to reduce recidivism. Prisoners with untreated mental conditions have a greater chance of recidivism after their release. Studies have proved that among those previously incarcerated, recidivism rates are between 50% and 230% higher for persons with mental health conditions than for those without any mental health conditions, regardless of the diagnosis[14]. Thus, it is the need of the hour to recognise their right to mental health and devise effective measures to safeguard the mental well-being of prison inmates.

Right to Mental Health of the Incarcerated

The right to enjoy the highest attainable standard of health is a fundamental human right, including mental health. Also, the WHO Constitution defines health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity"[15]. Various instruments protect the right to health at the international level. However, no specific move was adopted exclusively for mental health protection. Later,based on the WHO Report in 2001,the U.N. adopted measures to recognise the importance of mental health and to integrate healthcare services in this direction[16]. Though it is difficult to define mental

12 The Code of Criminal Procedure, No. 2 of 1974, s. 331, 332 (India)

13 PRISON STATISTICS, NATIONAL CRIME RECORDS BUREAU, 2021 at 169.

14 Jennifer M., Reingle Gonzalez, and Nadine M. Connell, *Mental Health of Prisoners: Identifying Barriers to Mental Health Treatment and Medication Continuity* 104 AM. J. PUB. HEALTH 2328 (2014).

15 Preamble to Constitution of the World Health Organisation, 1946, (May,5,2023,11 AM),https://apps.who.int/gb/bd/pdf_files/BD_49th-en.pdf#page=6.

16 The Right to Mental Health, United Nations Human Rights Office of High

health, the new Report 2022 describes it as "the ability to cope with the stress of life, to realise their abilities, to learn well and work well, and to contribute to their communities"[17].The definition of mental health goes beyond the traditional notion of mental illness or psychiatric illness developed genetically or due to particular medical conditions.

In March 2016, 73 countries issued a joint statement highlighting the importance of adopting a human rights perspective on mental health[18]. The Human Rights Council resolution further supported this[19]. In 2020, the Human Rights Council urged the State parties to promote a paradigm shift in mental health and to adopt, implement, update, strengthen or monitor, as appropriate, all existing laws, policies and practices[20].Apart from these initiatives, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights mandate the signatories to ensure prisoners' physical and mental well-being and eliminate all forms of torture and discrimination in prison.

The United Nations Convention on Persons with Disability, which was adopted in 2016, is another essential international instrument to recognise the human rights of differently-abled persons, including the mentally challenged. It was a paradigm shift in disability jurisprudence as it provides measures for the protection and promotion of the human rights of disabled people. It guarantees a broad spectrum of rights, including the right to life[21],

Commissioner,(Jan.3,2023,10.30 AM),https://www.ohchr.org/en/special-procedures/sr-health/right-mental-health .

17 WORLD MENTAL HEALTH REPORT 2022: TRANSFORMING MENTAL HEALTH FOR ALL, WHO, 2022 at 8.

18 *Id.*

19 Human Rights Council, Res.A/HRC/RES/32/18 (2016)(May 8,2023,12.30 PM), https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/156/38/PDF/G1615638.pdf?OpenElement .

20 The Right to Mental Health, *Supra* note 17.

21 United National Convention on Rights of the Persons with Disabilities, 2016, Art. 10.

access to justice[22], the right to health[23], measures for rehabilitation, [24] freedom from torture and inhuman treatment[25]etc. Though it is a Convention drafted explicitly for the protection of disabled persons, the Convention has failed to define the scope and ambit of disability. Thus, conflicting views are in the common parlance against considering mental health issues as a disability[26]. However, based on Art.1 of the Convention, it may be concluded that along-term mental illness can be regarded as a disability. Thus, prisoners with severe mental illness for an extended period are entitled to enjoy the benefits enlisted under the UNCRPD subject to restrictions imposed under the criminal justice system of each country.Since the right to mental health is recognised as a human right, prisoners are also entitled to have adequate facilities to be provided in correctional institutions to identify mental disabilities and operationalise different strategies for such identified prisoners. Since India is a signatory to these International Covenants, it is duty-bound to take measures for the protection of human rights and the mental health of prisoners.

Minimum Standards of Treatment of Prisoners Under International Instruments

Human rights are universal and inherent in every human being, including prisoners. Thus, the international instruments adopted under the U.N. and its subsidiaries have many relevant provisions for protecting the human rights of prisoners. UDHR declares that no one shall be subjected to cruel or inhuman treatment or punishment[27]. The International Covenant on Civil and Political Rights also specifically directs nation-states to prohibit

22 *Id*, art. 13.

23 *Id*, art. 25

24 *Id*, art. 26

25 *Id*, art. 15

26 George Szmukler, *Mental Health Law and the UN Convention on the Rights of Persons with Disabilities*, 34 INT. J. L. PSYCHIATRY 246(2014).

27 The Universal Declaration of Human Rights, 1948, Art. 5.

any form of cruel and inhuman treatment. It also requires that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person[28]". The United Nations Basic Principles for the Treatment of Prisoners'[29] is another essential document with eleven core principles to be followed by member States. It includes provisions for preventing inhuman treatment and discrimination, respect for their right to religion and fundamental freedoms, and recognising their right to participate in cultural activities, remuneration, and healthcare services. A Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment was adopted in 1988 to direct State parties to follow fair procedure for arrest, detention and imprisonment[30].

In addition to the initiatives mentioned above, the Minimum Standard Rules for the Treatment of Prisoners were adopted in 1955 to safeguard the best interests of prisoners. In 2015, the U.N. General Assembly adopted the revised rules and renamed them the Nelson Mandela Rules'[31]. It details the basic rights of prisoners and directs the member states to adopt proper regulations in tune with the minimum standards prescribed. It is generally for ensuring all living conditions, including drinking water, sanitation, nutrition, healthcare, light, ventilation, clean environment, physical exercise, personal hygiene etc., to the prisoners[32]. It mandates medical services, including psychiatric services, for proper diagnosis and treatment of mental illness[33]. It also directs establishing an interdisciplinary health care service

28 International Covenant on Civil and Political Rights, 1966, Art.10.

29 Basic Principles for the Treatment of Prisoners 14 December 1990, Office of High Commissioner of Human Rights,(May 2,2023,10.30 AM) https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-treatment-prisoners.

30 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, General Assembly Res. 43/173 (1988),(Apr.26,2023,11 AM) https://www.ohchr.org/sites/default/files/ Documents/ProfessionalInterest /bodyprinciples.pdf.

31 United Nations Minimum Standard Rules for the Treatment of Prisoner (the Nelson Mandela Rules), 2015, (Apr.26,2023,11AM),https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/443/41/PDF/N1544341.pdf?OpenElement.

32 *Id*. at. Rule 42.

33 *Id*. at. Rules 24 to 35.

system with sufficient qualified medical professionals, including those with expertise in psychology and psychiatry[34]. As per the Rules, a physician or a qualified health care professional shall talk with and examine every prisoner as soon as possible after their admission and,after that, if necessary,to identify signs of psychological or other stress due to fact of imprisonment, the risk of suicide or self-harm and withdrawal symptoms resulting from the use of drugs, medication or alcohol[35]. The physician is also responsible for reporting prisoners' physical and mental health if he considers that the prisoner's physical or mental health has been or will be injuriously affected by continued or any condition of imprisonment[36]. Prisoners needing specialised care may be transferred to appropriate institutions or civil hospitals[37]. It also states that inmates who are determined to be not criminally responsible, who subsequently receive a diagnosis of severe mental illness or other health issues, for whom remaining in prison would worsen their condition, or who are determined to be insane shall not be held in prisons. They shall be taken to mental hospitals[38]. It directs explicitly to ensure psychiatric treatment for all who need the same. Itmandates taking steps to continue the psychiatric treatment even after release andproviding social-psychiatric aftercare[39]. It also provides for ensuring the availability of books[40], freedom to follow religious beliefs[41], freedom to work[42], provision for education and recreation[43] and measures for social care and aftercare[44].

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34 *Id*. at. Rule 25.

35 *Id*. at. Rule 29.

36 *Id*. at. Rule 33.

37 *Id*. at. Rule 27.

38 *Id*. at. Rule 109.

39 *Id*. at. Rule 110.

40 *Id*. at. Rule 64.

41 *Id*. at. Rule 65.

42 *Id*. at. Rule 96.

43 *Id*. at. Rule 104.

44 *Id*. at. Rule 106.

Another ambitious programme supported by WHO was the Health in Prison Programme (HIPP) in 1995. Currently, the Programme is active only in European regions[45]. HIPP was an initiative to provide technical advice on developing prison health systems and issues relating to communicable diseases, illicit drug use and mental health[46]. It works as a platform for information dissemination, networking and good practice sharing in prison health. Since these standards and principles adopted at the international level remain as a basic framework, countries must adopt them at their national level. The nature and level of adoption may vary according to the criminal justice system of each Government.

Mental Health of Prisoners and Legal Protection in India

India has enacted and adopted various laws for the protection of fundamental rights and welfare of prisoners. Two types of legislative provisions exist in India. One set of laws is to ensure that the mentally challenged detainees are fit to face the trial and defend their case during inquiry and trial proceedings. Another category of laws is to ensure the welfare of mentally challenged detainees and prisoners.

A. *Protection of the mentally challenged under the Criminal Law*

The law concerning the detention and trial of unsound persons is spread across different legislations. Since one of the basic premises of criminal liability is *mens rea*, persons of unsound mind are generally exempted from criminal liability under s.84 of the Indian Penal Code[47]. The protection under IPC will be extended to unsound persons only if it is proved that at the time of committing the offence, he was devoid of the cognitive ability to understand the nature of the act done by him[48]. In cases where the defence

45 Prison Health, WHO, Europe,(Jan. 2,2023,10.30 AM),https://www.who.int/europe/health-topics/prisons-and-health .

46 Anastasia Repouliou, *supra* note 11.

47 Indian Penal Code, No. 45 of 1860, S.84.(India)

48 Vageshwari Deswal, *Insanity as a Defense to Criminal Charge – An Analysis*, DELHI

of insanity is averred, the accused is responsible for proving it because the court can presume that everyone is sane as per the provisions of the Evidence Act[49]. The rule of legal insanity and burden of proof has no significant relation with this study because it guides us only to determine the criminal liability of an unsound person. As discussed earlier, this study focuses on the mental health of detainees in prison, irrespective of their criminal liability.

On the contrary, the Code of Criminal Procedure is a piece of legislation that has great relevance as it encapsulates various measures for the protection of lunatic and unsound persons during inquiry and trial proceedings. Sections 328 to 339 are the essential provisions to safeguard the rights of unsound persons during the trial and to ensure only persons fit to face trial are defending their charges. It provides that;

- When a Magistrate or Court holding an inquiry finds that the person against whom the inquiry is initiated is a lunatic or unsound, the Magistrate or Court may postpone the trial and shall cause such person to be examined by the Civil Surgeon. If the Civil Surgeon finds that the accused is of unsound mind or a lunatic, he may refer such person to a psychiatrist or a clinical psychologist[50].
- In the situation mentioned above, the Magistrate or the Court shall release the person on bail subject to the condition that the person does not require in-patient psychiatric care and a friend or relative undertakes to provide regular out-patient psychiatric treatment and prevent him from doing any injury to himself and others[51].

JOURNAL OF CONTEMPORARY LAW,(Oct.5,2023,10.30 AM) https://lc2.du.ac.in/DJCL2/6.%20Dr.%20Vageshwari.pdf#:~:text=Unsoundness%20of%20mind%20is%20an%20absolute%20defence%20to,of%20mental%20incapacity%20who%20does%20a%20criminal%20act .

49 The Indian Evidence Act, No.1 of 1872, s. 105 (India).

50 The Code of Criminal Procedure, No. 2 of 1974, ss.328 &329. .(India)

51 *Id*, s. 330.

- If bail cannot be granted and no undertaking is received, the court shall order the accused to be kept in an appropriate place where psychiatric treatment can be provided[52].
- The Magistrate or the Court may order the release of the accused after considering the nature of the act committed and the extent of unsoundness of the mind or mental retardation[53].
- The Magistrate or the Court can resume the trial only when the accused becomes fit to defend his case[54]. The court shall ensure their competency by verifying the certificates issued by a competent authority[55].
- If the Magistrate or Court acquitted the accused on the ground of insanity must be detained in safe custody or delivered to a family member or a friend[56].
- The State Government may order the release of an accused who is detained in prison if it is certified by the appropriate authority or may be transferred to a public asylum[57].

The provisions under the Code of Criminal Procedure embody definite provisions to ensure the mental stability of detainees, and the court has given the power to ensure that they are facing the trial only when they are medically fit for the same. However, these provisions are least helpful in extending healthcare services to all detainees suffering from mental distress. This is because the identification of mental illness under the CrPC needs to be done by courts only at the trial stage,which bars the possibility of detecting mental issues immediately after the arrest of the person. Though

52 *Id.*

53 *Id*.

54 *Id*,ss.331, 332, 337

55 *Id*,s.337.

56 *Id*, s 335.

57 *Id*, s.338.

the medical examination is mandatory[58], no legal provision in India imposes a duty upon the police to produce the accused before the psychologist or psychiatrist. Additionally, the existing criminal justice framework lacks a reformative approach. The provisions have only limited application, and the mental health of under-trial prisoners and convicted are not covered under it.

B. ***Legislations Ensuring Human Rights and Welfare of Mentally Ill Prisoners***

As there is no specific legislation to deal with the mental health of prisoners in India, the existing laws can be brought under two broad categories: laws applicable to prisoners and prison and laws for the mental well-being of people in general.

- Laws for the Prisoners and Prisons

The welfare measures that exist in India are the ones which were adopted during the colonial period, including the Prisons Act, 1894 and the Prisoners Act, 1900. Though it was adopted during the British era, the Prisons Act provided specific provisions for the health and welfare of prisoners. It provides for establishing hospitals or other proper places for the reception of sick persons[59]. As per the provisions, a Medical Officer will be in charge of the general sanitary matters and the health of prisoners[60]. In any situation the Medical Officer finds that a prisoner is injuriously affected mentally or physically by the discipline or treatment to which he is subject, he shall report that matter to the Superintendent, and with the opinion of the Superintendent, a report shall be sent to the Inspector General[61]. The Medical Officer or the Medical Subordinate may supply medicines or give directions, including changes in the discipline or treatment to which they

58 The Code of Criminal Procedure,No.2 of 1974, ss.53 & 54. .(India)

59 The Prison Act, No.9 of 1894, S.39.(India)

60 *Id*, s.13.

61 *Id,*s.14

are subjected[62]. Another significant colonial contribution was the adoption of the Prisoners Act, 1900. It enables the state government to issue an order of removal of an unsound detainee or imprisoned person to an asylum or other place of safe custody for the remaining period of detention, and on the expiration of the term,he may be retained in such an asylum or any other place of safe custody until he is released from custody in accordance with the law if a medical officer certifies that it is necessary for the protection of the prisoner or others that he should be further detained under medical care or treatment[63].

The above-mentioned colonial legislation imposes statutory obligations on the Government to provide adequate mental health institutions for treating mentally ill prisoners, but a human rights approach is lacking, maybe because it was drafted during colonial days. Also, the scope of these legislations is limited as it focuses only on the mental illness of prisoners rather than mental health. In the present context, a broader approach needs to be developed to reduce recidivism and reform the detainees and prisoners. A new Model Prison Act, 2023, is prepared by the Ministry of Home Affairs to reform and rehabilitate prisoners[64]. However, the Model law is only in the pipeline stage and needs to wait till its adoption to make aproper analysis.

- Law for the care and protection of mentally ill persons

While considering the mental health of people, the Mental Healthcare Act of 2017 (MHA, 2017) is promising legislation that substantially changed the approach towards mentally challenged persons and the scope of healthcare services to the mentally ill. It gives a broad definition for mental illness. It means "a substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behaviour, capacity

62 *Id*, s.37

63 The Prisoners Act, No. 3 of 1900, s.30..(India)

64 Khadija Khan, What is the Model Prisons Act announced by the MHA?, INDIAN EXPRESS, May 26, 2023 (Oct.27,2023,11 AM), https://indianexpress.com/article/explained/explained-law/model-prisons-act-mha-8630225/ .

to recognise reality or ability to meet the ordinary demands of life, mental conditions associated with the abuse of alcohol and drugs, but does not include mental retardation which is a condition of arrested or incomplete development of mind of a person, especially characterised by subnormality of intelligence"[65]. The Act follows a right-based approach as it explicitly recognises the right to mental healthcare from state-run or funded healthcare facilities[66]. The Act ensures affordable and quality healthcare services without any discrimination on the basis of gender, sex, religion, culture, caste etc to persons with mental illness. It makes the State responsible for ensuring the availability, accessibility and quality of healthcare services[67]. More specifically, the State Governments are responsible for providing;

a. Acute mental healthcare services,

b. Half-way homes and accommodations,

c. Mental health services to support the family of mentally ill persons,

d. Hospitals, community and home-based rehabilitation,

e. Child and old age mental healthcare services.

Along with these welfare measures, it guarantees essential rights such as the right to community living[68], protection from cruel and inhuman treatment[69], equality and non-discrimination[70], right to confidentiality[71], information[72], legal aid[73] etc. Apart from these general provisions for protecting the rights of persons with mental illness, some provisions have

65 The Mental Healthcare Act, No. 10 of 2017, s. 2(s)(India)

66 *Id,* s. 18

67 *Id.*

68 *Id*, s. 19.

69 *Id*, s.20.

70 *Id*, s.21.

71 *Id*, s.23.

72 *Id*, s.22.

73 *Id,* s. 27.

been incorporated for prisoners with mental illness. It stipulates to set up mental health establishment in the medical wing of at least one prison in each State and Union Territory, and prisoners with mental illness shall be referred to or cared for in suchinstitutions. S. 103 specifically instructs to properly treat prisoners with mental illness either through the medical wing in prison, or they may be shifted to public mental health care institutions. The Medical Officer in charge of a mental healthcare institution wherein any person of mental illness is detained shall once every six months submit a report regarding the physical and mental conditions of inmates to the authority under whose order such person is detained. It also empowers the medical boards constituted under the Act to visit prisons and jails to assess the mental state of inmates and recommend transferring mentally challenged inmates to mental health establishments if required. It directs the state governments to train medical officers in prisons and jails to provide basic and emergency mental healthcare[74].

Since the Mental Healthcare Act is general legislation, it lacks specific provisions for improving the mental fitness of prisoners and detainees. However, the Mental Healthcare (Rights of Persons with Mental Illness) Rules, 2018 (MH Rules, 2018) comprehensively cover a range of proactive measures to be adopted to ensure the mental health of prisoners. Chapter IV of the Rules provides that the mental health establishments functioning under S.103 of the Act shall conform to the minimum standards and procedures prescribed under the schedule of the Rules[75]. The schedule to Rules sets out minimum infrastructural and professional requirements for screening and treating prisoners with mental illness. It provides in-patient and out-patient services, including counselling for managing psychological stress, detoxification and deaddiction services and aftercare programmes[76]. For providing in-patient care, it mandates a twenty-bed psychiatric facility

74 *Id*, s. 31 (2).

75 The Mental Healthcare (Rights of Persons with Mental Illness) Rules, 2018, Rule 11.

76 *Id*, Schedule

for every 500 patients. The basic requirement for professional services is one doctor for every 500 patients, including the service of specialists such as a psychiatrist, dermatologist, gynaecologist, surgeon and physician. It also mandates two nurses and four counsellors for every 500 patients. Apart from the minimum requirements for infrastructural facilities, it ensures the minimum procedures to be followed when a person is admitted to prison. It provides for initial mandatory screening on the first entry to the prison to determine physical and mental status, urine tests to identify drug abuse, questionnaires for understanding substance abuse and periodic random drug testing[77]. The schedule specifically directs to ensure the availability of all mental health care services, including telemedicine services[78].

The MH Act, 2018 and Rules, 2018, though satisfying the needs of prisoners with mental illness, lacks a comprehensive human rights approach. Many of the rights embodied under the MHA, 2017 are not drafted considering the peculiar situations of prisoners, and the minimum standards provided in the MH Rules, 2018 are procedural measures only. If we consider the minimum requirement specified under the Rules, it lacks proper implementation due to the federal structure in the administration and management of prisons[79]. At present, prison management is a state responsibility; hence, the response to these Rules is not satisfactory. More importantly, though the Mental Healthcare Act was introduced ambitiously to protect the rights of mentally ill persons, Central and State Governments failed in their mission. Due to the unavailability of mental healthcare professionals and insufficient infrastructure, there has not been much progress in mental healthcare services in India even after adopting the Act[80].

Another essential legislation generally applicable for the care and protection of the mentally ill is the Rights of Persons with Disabilities Act,

77 *Id*.

78 *Id*.

79 The CONST. Schedule 7, List II, Entry 4.

80 Richard M. Duffy, Brendan D. Kelly, INDIA'S MENTAL HEALTHCARE ACT, 2017 (Oct.5,2023,10.30 AM), https://doi.org/10.1007/978-981-15-5009-6_11.

2016 (RPD, 2016). The Act was adopted in tune with the U.N. Convention on Rights of Persons with Disabilities, 2006, to ensure equity and human rights for people with disabilities. It defines a person with a disability as "a person with long-term physical, mental, intellectual or sensory impairment which, in interaction with barriers, hinders his full and effective participation in society equally with others"[81]. Similar to UNDRPD, the RPD, 2016 enlists various rights of persons with disabilities. However, as mentioned earlier, there is no direct reference to prisoners, and it only covers persons having long-term intellectual impairment. Nevertheless, for such persons, the State is responsible for providing adequate mental healthcare[82] and rehabilitative services[83]. Thus, prisoners who are suffering from mental conditions having long-term impacts on their lives are entitled to proper mental healthcare services and rehabilitation provisions under the Act.

C. *Model Prison Manual and Recommendations of the National Human Rights Commission*

The Model Prison Manual, 2016, adopted to unify standards for prison management, also ensures medical care and provides for establishing hospitals of different categories with an adequate number of qualified medical, nursing, and paramedical professionals and psychiatric counsellors[84]. Special care programmes areenvisaged under the Manual, including deaddiction programmes for drug addicts and training in yoga and meditation[85]. There are provisions for imparting education, development of skills and vocational training[86]. To ensure the mental health of prisoners, the Manual prescribes screening at the time of admission and prisoners certified as mentally ill will be sent to special institutions, and such patients

81 The Rights of Persons with Disabilities Act, No. 49 of 2016, s. 2(s).(India)

82 *Id*, s.25.

83 *Id*, s.27.

84 MODEL PRISON MANUAL78(2016).(India)

85 *Id*.at. 80.

86 *Id*. Chapter XV.

are entitled to get psychiatric treatment[87]. A proper regular evaluation of prisoners is mandated for the continued social support of the prison department[88]. For the physical and mental engagement of the inmates, it provides for recreational activities, sports, cultural activities, film, music, reading, etc. It also promises psychotherapy and guidance for restoring the inmates' mental health[89]. Along with all these measures, a scheme for aftercare and rehabilitation is also detailed in the Manual[90]. The NCRB Report 2021 also gives insight into the innovative welfare measures adopted by various state governments, such as educational programmes, library facilities, yoga and meditation, vocational training programmes, games and recreational activities, spiritual and cultural activities, de-addiction programmes etc[91].

Though the Prison Manual aims to unify the prison administration and management, there are states yet to adopt it[92]. Only eighteen states and Union Territories have adopted it. Since State Governments are responsible for prison administration, separate laws exist in different States. More importantly, from a legal perspective, the Prison Manual lacks enforceability and stands on a different footing compared to laws and regulations.

The National Human Rights Commission has made serious efforts to reform the prison system, especially for the protection of the mental health of prisoners[93]. The Commission in 2008 recommended the early detection

87 *Id*.at. 178.

88 *Id.* at. 180.

89 *Id.* at. 179 & 180.

90 *Id*. Chapter XXII.

91 Prison Statistics, *Supra* note 14, Chapter 10.

92 Implementation of Model Prison Manual, Ministry of Home Affairs,(Oct 6,2023,11 AM) https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1907161.

93 NHRC's Recommendations on Mentally Challenged Prisoners Accepted by Punjab &Haryana High Court, National Human Rights Commission,(Oct 6,2023,11 AM), https://nhrc.nic.in/press-release/nhrcs-recommendations-mentally-challenged-prisoners-accepted-punjab-haryana-high-court .

of prisoners' mental illness and effective measures to provide treatment for such prisoners[94]. Another set of recommendations was issued in 2014 in connection with the National Seminar on Prison Reforms organised by the NHRC[95]. Similarly, in July 2023, the NHRC issued an advisory to the Governments to implement minimum standards prescribed under the Mental Healthcare (Rights of Prisoners with Mental Illness) Rules, 2018, along with a set of standards prescribed under the advisory[96]. The advisory reiterates the need to provide mental healthcare services and to adopt a gatekeeper model to prevent suicide among jail inmates[97].

Despite all these legislative and policy-level efforts, the healthcare in Indian prisons is far from satisfactory. The deplorable condition in Indian prison experienced by Dr. Kafeel Khan, one who was detained in jail in connection with the Citizenship Amendment Act in 2020, made it clear through the following words

"With just one attached toilet, 125-150 inmates, the smell of their sweat and urine mixed with unbearable heat due to electricity cuts makes life hell over here: A living hell indeed. I try to read but cannot focus due to suffocation. It sometimes feels that I might fall due to dizziness caused by that suffocation. So, I keep on drinking water"[98].

This revelation points towards the deep cleansing required in our prison administration, and existing measures are far from satisfactory.

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94 RECOMMENDATIONS OF NHRC ON DETENTION, National Human Rights Commission, ,(Oct 7,2023,11 AM) https://nhrc.nic.in/press-release/recommendations-nhrcdetention.

95 NATIONAL SEMINAR ON PRISON REFORMS 2014, National Human Rights Commission, ,(Oct 7,2023,11 AM) https://nhrc.nic.in/sites/default/files/recomm_of_NS_on_Prison_Reforms_2014_1.pdf.

96 Advisory to Mitigate Deliberate Self-Harm and Suicide Attempts by Prisoners, NHRC/Adv./01/2023-24 (June 2023).

97 *Id*.

98 Sanchita Kadam, *Does India uphold Prisoners' Right to Health?* (Jan 6,2023,12.30 PM) https://www.sabrangindia.in /article/does-india-uphold-prisoners-right-health/.

Contours of Judicial Pronouncements in Recognising Mental Health of Prisoners

The Constitution of India has no specific provision ensuring prisoners' right to mental health. However, the general protection provided under Art. 14 and 21 are available for prisoners too. Interpreting Art.21, the apex court in *Parmanand Katara* v. *Union Of India & Ors*[99] categorically stated that Art.21 casts the obligation on the State to preserve the life of individuals. It was also held that the patient, whether he be an innocent person or a criminal, is liable to be punished under the law; it is the responsibility of those who are in charge of the health of the community to preserve life in order to protect the innocent and punish the guilty[100]. The right to health of prisoners was also reiterated in *Rasikbhai Ramsing Rana and etc*. v. *State of Gujarat*[101], *Court on its own Motion* v. *The State of Tripura*[102], *In Re Human Conditions 1382 Prison*[103], *Rama Murthy* v. *State of Karnataka*[104], *Vaman Narayan Ghiya* v. *State of Rajasthan &Anr*.[105], *Dr P.V. Varavara Rao* v. *National Investigating Agency and Another*[106], *K. Mujeeb Rahman &Ors*. v. *The State of Kerala*[107].

On multiple occasions, the Supreme Court came down heavily on the ill effects of the correctional system and the plight of prison inmates. Due to improper prison administration, many mentally ill persons languish in jails either as under-trial prisoners because they are not competent to face the trial or are detained illegally in jails even after they come out of their

99 1989 A.I.R. 2039.

100 *Id.*

101 1998 Cri.LJ 1347.

102 Writ Petition (C) No.508/2018.

103 W.P.(Civil) No.406 of 2013.

104 Writ Petition (C) No. 12223 of 1984.

105 Criminal Appeal No. 406 of 2008.

106 Criminal Appeal No.52 of 2021.

107 Writ Petition(C).No.23595 of 2020.

mental illness. The under-trial prisoners remain in prisons without proper medical support and a periodical review of their mental status. In *Veens Sethi v. State of Bihar*[108], the apex court,responding to a letter sent by the Free Legal Aid Committee, Hazaribagh, released prisoners who were detained in prison for more than twenty-five years. The prisoners were illegally detained in the jail evenafter they regained their unsoundness of mind. Thus, the court ended the judgement by observing the possibility of awarding compensation under Art. 21 of the Constitution for illegal detention. Further, the compensatory jurisprudence evolved through the decisions of the Supreme Court in *Rudul Shah v. State of Bihar*[109] and *Sheela Barse v. Union of India*[110] for illegal detention.

Even after repeated judicial pronouncements, the pathetic situation of the jail administration remained the same. *In Re: Illegal Detention of Machal Lalung*[111], a landmark judgement, wherein the Supreme Court issued directions to avoid mentally ill persons languishing in psychiatric hospitals for a long time[112]. In this case, Machal Lalung remained behind bars for 38 years. He was arrested under S.326 of IPC, for which the maximum punishment is ten years. Immediately after his detention, he was sent to a mental hospital, and the jail authorities never responded to the intimation of the hospital that he had recovered from illness[113]. He was released following the intervention of the National Human Rights Commission and died within two years of his release[114]. The court directed the Assam

108 AIR 1983 SC 339

109 1983 AIR 1086

110 (1993) 4 SCC 204

111 Writ Petition (CRL.) NO(s). 296 of 2005.

112 *Id.*

113 Samudra Gupta Kashyap, *He lost 54 years of life in jail- and dies two years after his release*, THE INDIAN EXPRESS (Dec. 27, 2007)(June 23,2023,12.30 PM),http://archive.indianexpress.com/news/he-lost-54-years-of-life-in-jail-and-dies-two--years-after-his-release/254745/.

114 *Id*.

Government to provide free medical treatment and an interim compensation of three lakh Rupees. The court categorically stated the need to ensure proper administration of the criminal justice system and reiterated the safeguards provided under the Code of Criminal Procedure and other statutes. The court also issued the following guidelines in the case of mentally challenged offenders[115]:

1. Whenever an under-trial prisoner of unsound mind is ordered to be detained in any psychiatric hospital/nursing home under Section 330(2) of the Code of Criminal Procedure, a report shall be submitted to the concerned Court/Magistrate periodically.The Court/Magistrate shall also call for such reports if they are not received in time. When the reports are received, the Court/Magistrate shall consider the reports and pass appropriate orders wherever necessary.
2. If an under-trial prisoner continues in jail for more than the maximum period of imprisonment prescribed for the offence for which he is charged, the Magistrate/Court shall treat the case as closed and report that matter to the medical officer in charge of the psychiatric hospital.
3. Under-trial prisoners who are not being charged with offences for which punishment is life imprisonment or the death penalty may be considered for release under S.330(1) of the Code of Criminal Procedure.
4. In the case of under-trial prisoners charged with offences for which imprisonment or the death penalty is the punishment, such persons shall be subject to examination periodically, and the competent authority shall send a report to the court as to whether he is fit enough to face the trial to defend the charge. In such a situation, the Sessions Judge shall commence the trial as soon as it is found that such a mentally ill person is fit to face the trial.

115 Writ Petition (CRL.) NO(s). 296 of 2005.

In another notable decision in *Madhu Bala v. State*[116], the Delhi High Court in 2023, while deciding a question of State responsibility to maintain a mentally ill prisoner after completing her term of imprisonment, the court concurring with the decisions in *Charanjit Singh v. State*[117] and *Rama Murthy v. State of Karnataka*[118], held that State government has constitutional responsibility to take care of a prisoner under Art. 21 even after completing the term of imprisonment if prisoner is continued to be mentally ill. Additionally, the court has taken note of the recommendations submitted by the NHRC. The recommendations cover a wide range of progressive measures, including adequate infrastructural facilities, proper screening and transfer of mentally ill persons, training for jail authorities, and recreational facilities.

In *Shankar Sopan Shikare v. State of Maharashtra*[119], the Bombay High Court invoked S.103 of the Mental Healthcare Act, 2017 while disposing of a bail application. The court,lamenting the sordid state of affairs existing in the State of Maharashtra in implementing the Mental Healthcare Act, 2017, directed the applicant to provide treatment at the regional mental hospital at the expense of State. In another critical case, *X v. State of Maharashtra*[120], the Supreme Court observed that courts could consider post-sentence severe mental illnessas a mitigating factor while sentencing the accused to the death penalty.Reviewing the judicial verdicts, one can easily understand the poor jail conditions prevailing in India. Understanding the importance of reforming the criminal justice administration, the constitutional courts in the first phase recognised the human rights of mentally ill prisonersunder the Indian Constitution. They extended the benefit of compensation under Art. 21 of the Constitution to the victims of

116 2023 SCC OnLine Del 3661.

117 2005 SCC OnLine Del 310.

118 (1997) 2 SCC 642.

119 2020 SCC OnLine Bom 11157.

120 (2019) 7 SCC 1.

illegal detention. In the second phase, courts have given specific directions for the early detection of the mental health of prisoners and to provide mental healthcare of proper quality. The court also made it clear that mentally ill prisoners are entitled to continue at the State's expense in mental health institutions even after release in case they haven't come out of their illness at the time of release.

The Need For a rights-Based Approach and Practical Implications

As per the WHO report, a right-based approach to the highest standard of mental health includes[121] ;

a. the right to be protected from mental health risks;

b. the right to available, accessible, acceptable and good quality care; and

c. the right to liberty, independence and inclusion in the community

At the national level, State parties are responsible for adopting laws and policies to recognise the rights enshrined under various international instruments. Thus, to ensure prisoners' mental health, the essential rights of prisoners need to be encoded in specific statutes, and adequate measures shall be adopted to implementthose statutory provisions. Though India has enacted several laws to deal with the mental health of prisoners, the existing legislation does not comprehensively cover the core issues of prisoners. The MH Rules 2018 must be appreciated for setting out minimum standards of mental health institutions established for prisoners. However, no corresponding prisoners' rights are provided in the MHA 2017 or even in the MH Rules 2018.A rights-based approach to this issuewill only ensurethe availability and accessibility of healthcare services of proper quality through state-run institutions, and the State will be responsible for the violations. In case of denial of mental health provisioning, the State must be made obligated to provide essential services through private agencies. A change

121 World Mental Health Report, *Supra* note 17 at 15.

in the approach of law will also substantially improve the mindset of the administrative officials at various levels and jail authorities. This will help to transform their approach towards the prisoners who are mentally ill.

But such a promising step for the Central and State Governments may take time forvarious reasons. At first, due to federal division powers, the state government are endowed with the power of prison administration and management. The State Governments have different laws for prison management, and even the MH Rules 2018 are not implemented properly. To devise a proper mental healthcare structure for the prisoners, the Governments need to invest heavily in establishing basic healthcare infrastructure and increasing the availability of healthcare professionals. Unfortunately, even in the post-COVID scenario, India spends only a meagre amount towards healthcare, and the case of mental health is more troublesome. The Government's contribution of around 1% of GDP[122] is not adequate for establishing a proper healthcare system, and thus, ensuring the right to mental healthcare for the common man is a distant dream, and that is too far for the prisoners.

Conclusion

The study made a detailed analysis of prisoners' mental health status, and it finds that the rate of mental health issues among prison populations is much higher than in the general population across the globe. In India, reports of prison mental health status are scanty due to the improper screening and reporting of mental health issues of inmates. The mental health issues prisonersrange from simple behavioural disorders to severeillnesses like schizophrenia. In India, the MHA, 2017, MH Rules 2018, and the Model Prison Manual 2016 introduced by the Central Government havesubstantially changed the prison regulation. However, the State governments' repose is not satisfactory for various reasons, and the

122 Economic Survey 2020-21, GOI,(Oct.7,2023,10.30 AM), https://www.indiabudget.gov.in/budget2021-22/economicsurvey/index.php .

plight of prisoners remains the same even after seventy-five years of Indian independence.Thus, the Central Government recently urged all State Governments to adopt the Manual 2016 and declared that a new Prison Act would be adopted to replace the Prison Act of 1894.Also, it required to coduct an in-depth governmental study on the specific mental health issues of prisoners and codify their rights, as most of the rights embodied in the general laws turn futile in respect of prisoners. Along with adopting new regulations for recognising the fundamental rights of prisoners and reforming the prison administration, it is vital to change the attitude and approach of police officials and jail authorities towards prisoners. To develop a better system for ensuring the mental health of Indian prisons the study proposes the following measures to identify and accommodate mental health issues of prison inmates;

- India is still following the colonial rules for prison administration. So, it is high time to enact new legislative mechanisms reflecting on the human rights perspective of prisoners.
- It is necessary to conduct a proper inquiry to understand the current state of affairs in Indian jails at the Governmental level.
- It is essential to unify prison management standards. Though Rules 2018 and Manual 2016 have incorporated prisoners' mental care and welfare provisions, state governments have not implemented them properly.
- Early diagnosis is critical to cure every disease, physical or mental. As far as prisoners are concerned, it is proved that most of them have minor behavioural disorders to severe mental health conditions. Thus, screening at the time of admission shall be mandatory. Though it is expressly provided in the Rules 2018 and Manual 2016, State governments have not yet implemented it. Thus, it is high time to make it mandatory for the screening at the time of admission.
- It is imperative to adopt policies and regulations for the reporting and periodical review of mental health issues of all prison inmates.

- To ensure proper care to all inmates suffering from mental health disorders, adequate infrastructural facilities and qualified mental health professionals shall be made available to the Indian prisons at all levels.
- The Government must invest in the mental health of the general population as it deeply connects with a person's character. Creating public awareness about mental health issues and ensuring the availability mental healthcare institutions to seek help will resolve many mental disorders and ultimately help society and the State in the long run.
- Also, very important to identify substance abuse and drug addictions. The studies have already proved the interrelation between crime and drug addiction. Thus measures shall be taken to determine the illegal use of drugs/substances within and outside the prison to maintain good mental health. Also, steps shall be taken to establish more deaddiction centres to treat prisoners and the general population who are addicted to drugs/substances.
- The approach and attitude of police and jail officials are crucial in reforming an offender. However, no serious efforts have been made to this date to develop the skill and character of jail officials who are in direct contact with prisoners. Thus, training programmes shall be made mandatory to inculcate human rights values in jail authorities and identify prisoners' mental health issues.
- India needs to develop a post-release mental health care programme. The Rules 2018 and Manual 2016 is providing for post-release support. However, a more comprehensive system needs to be designed so that the benefit of mental health care programmes can be extended to all prisoners and detainees in India.
- Rehabilitation of released offenders must also be chalked out to reduce recidivism among released prisoners and to ensure post-release support.
- We need to adopt a technology-supported prison management system and that can reduce the intervention of officials at different levels.

Law on Product Liability in India with a Comparative Perspective

*Dr. Shridul Gupta**

Introduction

The rules of 'strict liability' and 'absolute liability'are exceptions because these rules make an individual liable without his fault. These rules are expressed as 'no-fault liability principle'. Major difference between these two rules is that, while rule of strict liability has few exceptions, rule of absolute liability provides no exceptions at all. These rules were founded by two landmark decisions. First was *Rylands* v. *Fletcher*[1]that established the concept of 'strict liability' i.e., if a person has hazardous substances on their premises and these substances escape, causing harm, the individual in control of the substances is held responsible, regardless of any negligence on their part. The second case, *M.C. Mehta* v. *Union of India*[2]declared the doctrine of 'absolute liability' i.e., has on its premises dangerous goods, and such goods 'escape' resulting in causing damage to any individual as a result of such accident during such activity, then such entity will be held absolutely held liable to compensate all those affected by the accident.

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1 (1868) LR 3 HL 330.

2 AIR 1987 S.C 1086.

Origin of Product Liability Law in India

Law of Product liability enables an aggrieved consumer a legal remedy for injuries suffered from any defective product. The manufacturers and sellers must ensure that their products confirm as per prescribed standards. In earlier product liability cases, the principle adopted was *caveat emptor* which says that let the buyer beware.[3]However, the Consumer Protection Act of 2019 (CPA 2019) introduced concept of the product liability. The evolution of case law surrounding product liability has contributed to the development of general principles in commercial laws.

Warranty can be express or implied and is an essential manifestation about the nature or quality of product that has been purchased. Therefore, if there is any discrepancy or failure to meet the warranty, it can result in a claim by the consumer. Earlier, a person could only sue a negligent party if they were directly involved in the transaction that caused harm. Due to this limitation in contract law's ability to provide adequate protection in product liability cases, courts have relied on tort law principles of negligence and strict liability to safeguard consumers.

Negligence means lack of due or reasonable care, or defective designs, lack of warnings etc. Sellers who fail to exercise due care/caution are held negligent. Nevertheless, there are several defences available to counter a claim of negligence. When warranty given on products failed to protect consumers, the Courts adopted the principle of strict liability wherein if products are injurious and suffer from any defect, then the seller would bear responsibility for any loss or injury pertaining to property or personal well-being. However, it is important to note that this principle may have disclaimers or limitations on the extent of liability or the recoverable economic losses .Consumer Protection Act, 2019 (CPA2019) also envisages certain exceptions to a product liability action.[4]

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3 Don Mayer, Daniel M. Warner, George J. Siedel and Jethro K. Lieberman, *Basics of Product Liability, Sales, and Contracts*. (Apr.3,2022,10.30 AM) https://2012books.lardbucket.org/pdfs/basics-of-product-liability-sales-and-contracts.pdf .

4 Section 87 of the Consumer Protection Act, 2019, s.87 (India).

Jurisprudence on Negligence and Strict Liability in Tort

The case of *Winterbottom* v. *Wright* (1842)[5]upheld the privity requirement in concept of negligence and strict liability in tort. In this case, a coach company entered into a contract for supplying wagons, further taking up the maintenance of these wagons. Plaintiff's driver, who was employed, suffered an injury due to inadequate maintenance. The driver proceeded to sue the coach company for damages. However, no compensation was awarded since he was privy to the maintenance contract.

However , Court did away with the need of privity of contract in *MacPherson* v. *Buick Motor Co* (1916)[6] in matters related to recklessness. In this case, the wooden wheel of the plaintiff's car collapsed, inflicting injuries on MacPherson. Although the wheel was created by a separate manufacturer, the car was created by the defendant, Buick Motor Company. Evidence suggested that a reasonable inspection would have revealed the defect in the wheel, but no such inspection was conducted. The defendant argued that they should not be held liable since the plaintiff bought the car from a dealer rather than from the manufacturer directly. Nevertheless, New York Court ruled that if the company was negligent, they would be held responsible, even without a privity of contract with the victim. This decision marked the first time wherein the concept of "privity of contract" was disregarded, leading to the triumph of tort law over contract law.[7]

Thus, for a claim of negligence in tort, it is necessary to prove negligence by the tort feasor. The plaintiff must show that the defendant didn't act with the appropriate amount of care. Although, establishing the standard of care, breach, and causation of negligence was often challenging. Consequently, in the 20th century, courts recognized the inherent difficulty

5 10 M & W 109.

6 217 N.Y. 382.

7 Werro, franz and Büyüksagis, Erdem, The Bounds between Negligence and Strict Liability (2021), (Apr. 20,2023,10.30 AM) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=37927153110.

for consumers as they must demonstrate serious injury in order to establish negligence against manufacturers or retailers. As a result, they introduced the concept of strict liability, which imposed liability on the defendants without the need to prove negligence.

The Court in *Escola* v. *Coca Cola Bottling Co.*(1944)[8] held that it is important to acknowledge that a manufacturer assumes complete liability when he introduces a good in marketplace knowing the fact that it won't undergo any more testing, and if that product possesses a defect, it can result in harm to individuals. The concept of *res ipsa loquitur*, which literally translates as "the thing speaks for itself," was broadened in order to decrease the plaintiff's burden of proof. In addition, the 1963 decision of *Greenman* v. *Yuba Power Products, Inc*.[9] helped to develop the idea of strict liability for manufacturers. In the present matter, the plaintiff, Greenman, came into contact with a "Shopsmith" device, a multifunctional tool that could be used as a saw, drill, and wood lathe. The plaintiff looked over the manufacturer's literature and saw a salesperson demonstrate how it worked. The 'Shopsmith' item was bought by the plaintiff's wife and given to the plaintiff. Additionally, the plaintiff purchased the tools required to convert the "Shopsmith" into a lathe. He had often used the lathe without experiencing any problems, but all of a sudden, the lathe threw a piece of wood, which struck him in the head and seriously injured him. The plaintiff chose to file a claim against both the manufacturer and the store. The Appellate Court confirmed the lower court's ruling and declared that the consumer has the right to bring a warranty breach claim against the manufacturer. It was found sufficient for the customer to demonstrate both that they were hurt while operating the good as indicated and that the harm resulted from a flaw in the product's manufacturing and design that made it dangerous for the use to which it was put.[10]

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8 24 Cal.2d 453, 150 P.2d 436.

9 (1963) 59 Cal.2d 57.

10 Raffa Mohame, Strict and Absolute Liability in Common Law Practice. (2018), (Apr.15, 2023 ,10.30 AM),https://www.researchgate.net/publication/324415453_Strict_and_Absolute_Liability_in_Common_Law_Practice 3108.

Theory of implied warranty of safety was applied in *Henningsen* v. *Bloomfield Motors, Inc*.(1960)[11] In this case, defendant i.e., a dealer sold a car to the plaintiff. Shortly after the car was delivered, there was a steering malfunction that resulted in an accident causing injury to the plaintiff's wife. The plaintiff sued both the car dealer and the manufacturer. However, dealer argued that a provision in the warranty that the plaintiff had signed released the defendant from any liability for personal harm. The guarantee was clear that damaged components were to be replaced within 90 days or 4000 miles, whichever happened first .Court ruled in favour of Henningsen and granted him damages, stating that there is an inherent expectation of safety with the sale of any item, and the defendant cannot evade liability by arguing that it was Henningsen's wife who sustained the damages. According to the court, the warranty covers all potential users of the product. Therefore, legal principles surrounding product liability evolved, establishing the manufacturer's responsibility for negligence in cases where the end consumer suffered an injury because of a manufacturing flaw, notwithstanding the fact that there is no contractual relationship in between the affected customer and the producer.[12]

In *A.S. Mittal* v. *State of U.P.*[13]Supreme Court examined a crucial issue pertaining to product liability and reached the conclusion that each case's verdict would depend upon its particular facts and circumstances. In the matter of *Airbus Industries* v. *Laura Howell Linton*,[14]a tragic incident occurred during the landing of a flight from Bombay to Bangalore. The aircraft touched the ground well before the runway, colliding with the boundary wall and resulting in the disintegration of the fuselage, wings, and other parts. This led to the unfortunate death of 92 passengers and four

11 32 N.J. 358.

12 See Manubhai Punamchand Upadhya v. Indian Railways, (1996) 1 GLH 347(India); Banyan Tree Holding (P) Limited v. A. Murali Krishna Reddy, (2010) 42 PTC 361(India)

13 A.I.R 1989 SC 1570.

14 ILR 1994 KAR 1370.

crew members, while 54 survivors suffered various degrees of injuries. The appellants brought a claim for compensation against the Indian Airports Authority, the airlines, and the aircraft manufacturer. Respondents argued for Texas court to be considered as appropriate forum for the case, citing the absence of strict product liability laws in Indian courts. The Karnataka High Court, however, denied this argument and determined culpability in accordance with common law doctrines regarding recklessness and causation. Court emphasized that the lack of strict product liability laws in India does not justify denying parties a remedy in such circumstances.

In *Charan Lal Sahu* v. *Union of India*[15] Hon'ble Supreme Court recognized the need for significant amendments to outdated acts or the enactment of a new legislation to address critical situations. Introduction of the new Consumer Protection Act (CPA) of 2019 addressed these concerns by eliminating gaps in India's product liability laws. Under CPA 2019, guidelines pertaining to online commerce were introduced, requiring e-commerce entities to adopt a product liability framework and provide consumers with accurate information to enhance transparency and consumer protection. Product liability laws in India continue to evolve and the Courts have also delivered noteworthy judgments.

Product liability under Consumer Protection Act of 2019

CPA, 2019 provides protection to consumers by adding new provisions. This Act for the first-time defined product liability, as an obligation on the part of a product manufacturer, product seller, or product service provider to provide payment for any harm or injury a consumer suffers as a result of a faulty product or poor service.[16]

By introducing this concept, this Act has put a bar to '*let the buyer beware'* principle and crafted '*let the seller beware*' principle. CPA, 2019 Act has also defined the term 'Harm', encompassing various forms of

15 A.I.R 1990 SC 1480.

16 Consumer Protection Act, 2019, s 2(34) (India)

negative impacts. However, it's important to note that 'harm' excludes damage inflicted on goods.[17]

CPA, 2019 has also defined 'Defect' as any errors, deficiencies, or deficits in the calibre, amount, strength or pureness respectively. This defect may be required to be upheld by applicable laws or contracts, whether explicitly stated or implied, or it can be a claim made by the trader regarding the goods or product in any manner whatsoever.[18]The 2019 Act also recognizes the different responsibilities of product manufacturers, product sellers, and service providers, and it accordingly outlines specific criteria for holding each of them accountable in product liability actions:

(1) ***Responsibility of maker of goods***: As per the act, the term refers to an individual or entity that falls under one or more of the following categories: (a) Who creates a product or its components; (b) Who assembles parts produced by others; (c) Who affixes his own mark on a product made by someone else; (d) Who manufactures a product and engages himself in activities such as selling, distributing, leasing, installing, preparing, packaging, labelling, marketing, repairing, or maintaining the said good; (e) Who acts as a trader of a good and makes the same good.

CPA outlines circumstances in which maker of good may be considered accountable for damages resulting therefrom. These circumstances are as follows:

(a) Manufacturing defect: If the product contains a defect that occurred during the manufacturing process; (b) Design defect: If the product is defective in its design, making it inherently unsafe or unfit for its intended purpose; (c) Non-conformity to manufacturing specifications: If the product does not meet the specifications set for its manufacturing, resulting in a defective or unsafe product; (d)

17 Consumer Protection Act, 2019,s2(22) (India)

18 Consumer Protection Act, 2019,s 2(10) (India)

Non-conformity to express warranty: If the product fails to comply with an express warranty provided by the manufacturer, a claim for compensation can be pursued; (e) Inadequate instructions / caution;

(2) ***Product Service Provider's responsibility***: **'**Product service provider' under CPA 2019 means anyone offering services with respect to goods.[19] It was intentionally included to encompass services like maintenance or repair, where the service itself directly impacts the performance of the product. Section 85 outlines specific situations where provider of a service can be made accountable for damage resulting from af aulty good. These circumstances are as follows: (a) Faulty, imperfect, deficient, or inadequate service: Evaluation is based on the requirements established by current laws and regulations or as stipulated in the contractual agreement; (b) Acts of negligence, omission, or withholding information: The product service provider can be held liable if his actions or omissions, including negligence or knowingly withholding pertinent information, directly contributes to the harm caused by the defective product; (c) Insufficient instructions or warnings: The product service provider may also be held accountable if he fails to provide adequate instructions or warnings that could have prevented the harm associated with the use of such product; (d) Non-conformity with express warranty or contractual terms;

(3) ***Product Seller's responsibility***: As per Consumer Protection Act of 2019, the term product seller refers person who engages in activities such as importing, selling, distributing, leasing, installing, preparing, packaging, labelling, marketing, repairing, maintaining, or any other involvement. This definition encompasses either (a) producer who may also sell products; or (b) provider of a service.

19 Consumer Protection Act, 2019,s. 2(38) (India).

Punishments under CPA 2019

CPA,2019 offers heightened protection to consumers, resulting in the imposition of more rigorous penalties ,as compared to the CPA, 1986. It defines 'unfair contracts'[20]as agreements between a producer, trader, or provider of services and including stipulations resulting in substantial alterations to the consumer's rights. These include: (a) demanding excessive security deposits from consumers; (b) imposing disproportionate penalties on consumers for contract breaches; (c) refusing premature payments on loans; (d) granting one-sided extinguishment of rights; (e) allowing allocation / reallocation of a contract without consumer's consent, which is detrimental to the consumer; and (f) imposing unreasonable charges, obligations, or conditions on the consumer that disadvantage them.

Establishment of Central Consumer Protection Authority (CCPA)

Consumer Protection Act of 2019 contains provisions for formation of CCPA for acting as controlling organization empowered with authority for conduct investigations, inquiries, and take injunctive actions. Central Consumer Protection Authority oversees issues related to the Consumer rights violations, unfair business practises, and fraudulent or deceptive marketing that jeopardises the interests of customers.[21]

Central Consumer Protection Authority possesses the authority to mandate recalling products or ceasing to provide services that are regarded to be risky or harmful.[22]It's empowered to instruct reimbursing the purchase price of goods or services that have been recalled to the respective purchasers.[23]It also has the authority to mandate cessation of practices that are deemed unfair and detrimental to the interests of consumers.[24]

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20 Consumer Protection Act, 2019, s 2(46) (India).

21 Consumer Protection Act, 2019, s 10(1) (India).

22 Consumer Protection Act, 2019, s 20(a) (India).

23 Consumer Protection Act, 2019, (India).

24 Consumer Protection Act, 2019, s. 20(b) (India).

Consumer Protection Authority (CCPA) is equipped with power for enacting regulations and levy fines in response to deceptive advertising. Any manufacturer or service provider found guilty of publishing a false or misleading advertisement that harms consumers' interests can face stringent imprisonment and heavy penalty.[25]

The maker may be subject to fines from the CCPA, starting from rupees ten lakhs, and this penalty can increase up to fifty lakh rupees for repeated violations.[26]Likewise, a publisher or any individual involved in such publication can also face penalties of up to ten lakh rupees.[27]Additionally CCPA also has the power in forbidding endorsers of false or misleading advertisements from endorsing any product or service for a duration that can range up to one year. In the case of repeated violations, this prohibition can be extended to three years.[28]

However, Act offers defenses for endorsers and publishers in specific situations. According to Section 21 of the Act, an endorser is exempt from penalties if he took adequate precautions to ensure that the representations made in the advertisement about the good or service were accurate which he is endorsing.[29]

Section 88 of the Act was implemented to make sure the CCPA's directions were followed which makes it a criminal offense who fails to comply with the CCPA's instructions. This offense carries a penalty of imprisonment for upto 6 months, a fine extending up to twenty lakh rupees, or both.[30]Moreover, the Act also establishes penalties, which may involve imprisonment, fine or both, for engaging in the manufacturing, selling, storing, distribution, or import of products that contain adulterants or counterfeit goods.[31]

25 Consumer Protection Act, 2019, s. 20(c) (India).

26 Consumer Protection Act, 2019, s. 21(1) (India).

27 Consumer Protection Act, 2019, s. 21(4) (India).

28 Consumer Protection Act, 2019, s. 21(3) (India).

29 Consumer Protection Act, 2019, s. 21(5) (India).

30 Consumer Protection Act, 2019, s. 88 (India).

31 Consumer Protection Act, 2019, ss. 90,91 (India).

Possible defenses against a Product Liability Lawsuit

Product liability' emphasizes that to substantiate a claim, the plaintiff must demonstrate the damage brought on through the use of faulty goods. Consequently, absence of defects without substantiating any damage through product usage is undoubtedly defenses in a product liability case. Moreover, Section 87 of the Act outlines additional defenses that can be used in a product liability action including:

(1) A valid defense for a product seller in a product liability claim would be that, the product was allegedly misappropriated, manipulated, or modified by the user during the purported damage.;

(2) When it comes to a claim against a product manufacturer for inadequate warnings or instructions, the following defenses would be considered valid: (i) if the manufacturer of the product had given the employer the necessary warnings or instructions before the employer purchased the product for use in the workplace; (ii) if the maker of the product had given the purchaser of the component or material the relevant cautions or directions and the product was offered as a part or merchandise designed for use in another product. However, the party making the complaint suffered damage as a result of final component's usage; (iii) if the good was designed to be used by or pursuant to guidance of an expert and the maker has taken reasonable steps to give the expert cautions or instructions for using the product;(iv) If the person filing the complaint used the goods while incapacitated by liquor or another medicine that wasn't prescribed to them.

(3) If a user or consumer is aware of a danger that is obvious or is generally acknowledged, or that they should have known, given the nature of the product, the manufacturer is not responsible for failing to offer instructions or warnings about it. When it comes to a product liability claim, prompt action is necessary, initiating with investigation and accompanied with requisite preventive steps. This may involve ensuring sufficient disclosures and implementing recalls if necessary.

Consumer Protection Act of 2019 caters to product liability and strengthens compliance requirements not only for product manufacturers, sellers, and service providers but also for individuals involved in the sales process, such as endorsers, importers, marketers, and repairers. The Motor Vehicles Act also includes provisions for penalties against manufacturers, importers, or dealers of motor vehicles that violate regulations made there under.

Consumer Protection (E-Commerce) Rules, 2020

Digital technology has enabled rapid growth in e-commerce and has created the need for a new legal and regulatory regime to regulate e-commerce, product liability, and trade-related transactions. New product liability legal framework has been enacted under CPA, 2019 for protecting stakeholders. Rules have also been framed thereunder for complimenting emerging e-commerce regime. Objectives include:

(i) ***Compulsory registration***: All e-commerce entities, whether currently engaged in or planning to engage in e-commerce activities, must register and adhere to all prerequisites for conducting e-business;

(ii) ***Responsibilities*:** Sellers will provide comprehensive and transparent information about their e-commerce entities on their portals, including legal names, addresses, contact details, website names, and the products they offer. E-commerce entities will prominently display policies regarding returns, refunds, exchanges, warranties, guarantees, shipment and delivery terms, payment terms, and mechanisms for addressing grievances. They are obligated to ensure that they refrain from displaying false or deceptive advertisements about their products and must clearly present other relevant details, such as health and safety information, security of payment methods, product shelf life, and itemized pricing. E-commerce entities will handle and safeguard personal identification information of consumers in accordance with legal requirements. Additionally, they will unconditionally accept the return of goods that are delivered late

or found to be defective .It will include even counterfeit and wrongly advertised products and provide refund within a reasonable time;

(iii) ***Sale of counterfeit or fake products***: Consumer Protection Act of 2019 provides for penalties for production, sale, storage, distribution, or importation of counterfeit products, including potential imprisonment and the suspension or revocation of trading licenses. The Act ensures that e-commerce entities are responsible for preventing their platforms from facilitating counterfeit activities and guaranteeing the authenticity of goods sold on their platforms. Furthermore, they are required to accept returns of counterfeit or spurious goods and provide a refund of the purchase amount within a reasonable timeframe;

(iv) ***Redressal mechanism***: There's a responsibility on e-commerce entities to designate grievance officers and make their contact information publicly available. They will provide information regarding the process through which consumers can file complaints. Grievance officers are required to resolve complaint within one month from receipt of complaint. Rules also talk about alternative methods of filing complaint via e-mail, telephone or through website.

Product Liability Protection in E-Commerce via Insurance

Online retailers are liable for product liability claims from the customers, but in general these retailers or sellers assume that it is the manufacturer who is solely liable for injuries resulting from dangerous goods. Presently, as per CPA, 2019 retailers are obliged to ensure the safety of the products that they are offering for sale. If retailers disregard their duties and a customer is injured thereby, then retailer could be sued. So, online retailers also need insurance for products liability.

(1) *Dimensions of electronic commerce*?

The term refers to the process of purchasing and trading goods and services, as well as the transfer of funds or data, conducted over an electronic

network, primarily the internet. Online market is a place or a website, where there are many sellers and buyers trading through the same website. An e-commerce company does not necessarily manufacture, sell, or distribute these products. Globally there are more than 160 such e-commerce websites such as Amazon, e-Bay, Walmart, Flipkart etc. engaged in selling various products and services across the world;

(2) ***Meaning of Insurance for Product Liability*?**

It covers various businesses related to the supply chain, including manufacturers, distributors, importers, and retailers, in the event of lawsuits alleging bodily injury or property damage caused by the products they offer to sell. While negligence claims can also be raised in product liability cases, the predominant legal principle used is Strict Liability. Under Strict Liability, the burden of proof rests on the product suppliers, irrespective of negligence or fault. The injured party or plaintiff only needs to demonstrate that there was a defect in manufacturing, design, or instructions/warnings, that has directly caused the injury;

(3) ***E-Commerce & Insurance perspective:***

A customer purchased a replacement battery for her laptop from a seller who is not directly affiliated with Amazon. After few months it exploded and severely burned the customer and she was hospitalized. Another customer bought a toy scooter through a third-party seller on Amazon marketplace from a Chinese company which caused injuries by fire to plaintiff's and his bedroom. There are so many such incidents particularly when world went into lockdown, and traditional shopping became difficult and scary .More and more people shopped online. The COVID-19 pandemic also resulted in a significant increase in e-commerce and expedited the adoption of digital transactions. E-commerce facilitated a more convenient means for individuals to purchase and sell a wide array of products and services without even visiting the physical location. But e-commerce growth also faced challenges and risks;

(4) ***Risks associated with e- commerce and their insurability:***

E-commerce is not different from traditional stores ,both business models have their own risks. E-commerce is cost effective and time saving due to elimination of various intermediaries, saving on fuel and time consumed in travelling for purchasing goods/services. E-commerce has made consumers digitally savvy and more aware of their rights;

(5) ***Are Marketplaces Liable for Product Defects*?**

Answer is that, even retailers like e-commerce businesses are concerned regarding product liability arising from the possibility that any sold product or service be it toys or software, can malfunction and cause injuries or harm. In case of a defective product, manufacturer is liable and in case of online selling besides the retailers, online retailers are equally susceptible, even if they merely provide a platform and manufacturer or seller is using that platform to sell their product. Consumer protection laws in almost all parts of globe are making online retailers as the first point of call for any injury or damage caused by the products sold, irrespective of who made them. Coupled with evolving product liability regulations, liability suits are common in e-commerce business and with exponential increase in the number of manufacturers, exporters and retailers; even the online marketers have become vulnerable to lawsuits. The Consumer Protection Act of 2019 and the Consumer Protection (E-Commerce) Rules of 2020 are relevant to both domestic and international electronic retailers that are registered in India and provide goods and services to consumers within India. CPA, 2019 is applicable to transactions involving the purchase or sale of goods or services conducted through digital/electronic networks, which includes digital products.[32] It also applies to individuals or entities that provide technologies enabling the products to advertise or sell goods/services to consumers. Various stakeholders engaged in e-commerce have been defined in the Act, like a "consumer" refers to an individual who purchases goods

32 Consumer Protection Act, 2019, s.2(16) (India)

or utilizes services online through electronic media,[33] 'Seller' is an electronic service provider who is a product seller and has the same duties, responsibilities and liabilities as a product seller.[34] Similarly, 'Unfair Trade Practice' includes disclosure of any personal information by an electronic service provider which is given to him in confidence by the customer.[35] Therefore, if a consumer has been harmed by a defective product, he has the legal right to file a product liability claim against the manufacturer, service provider, or seller of the goods and seeks financial compensation. Product Liability Insurance is therefore of paramount importance for an e-commerce company;

(6) ***Intellectual Property Rights Insurance:***

It is another risk cover in e-commerce. Despite having insurance coverage for potential infringements such as patent, trademark, copyright, or right of publicity, an e-commerce platform may still be exposed to liability claims if a third-party advertisement hosted on its website infringes upon the intellectual property rights of another party. Lot of money is involved in Intellectual Property infringement lawsuits;

(7) ***Cyber Risks Insurance:***

E-commerce websites collect lots of personal information from customers including their bank accounts, credit card details and process business transactions online. Such activity exposes the customers to risks of hackers and cybercriminals wherein sensitive personal information may be leaked, stolen or used elsewhere;

(8) ***Directors & Officers (D&O) liability Insurance:***

E-commerce company also need to protect its top management against lawsuits resulting from a violation of the responsibility to act in a trustworthy manner;

33 Consumer Protection Act, 2019, s.2(7) (India)

34 Consumer Protection Act, 2019, s.2(37) (India)

35 Consumer Protection Act, 2019, s.2(47) (India)

(9) ***Employees' Compensation Insurance:***

E-commerce company has to employ workers and it is necessary to buy Employees' Compensation Insurance to cover any liability arising due to death ,expenses related to medical treatment and the income loss incurred due to an employee's injury that may occur during work;

(10) ***Marine Cargo Insurance:***

In the event that an e-commerce company possesses a warehouse and depends on a third party to store their merchandise or deliver products directly to customers and other distributors, it becomes than necessary to go for cargo insurance which will provide protection from physical loss.

Comparative Study

The number of legal disputes regarding product liability is on the rise particularly when it comes to products that were designed or manufactured in one country but are later sold and utilized in another country. But legal system on product liability is not the same in all the countries. So, it is important for the e-companies and professionals to understand product liability system of all other countries who sell their product in home country's market. The purpose of comparative study is not to find as to law of which country is better, but for legal understanding.

(1) ***United States Product Liability Law***

United States product liability law involves three theories of liability i.e., negligence, breach of contract/warranty and strict liability. In U.S., strict liability originated in *Greenman* v. *Yuba Power Products, Inc*.[36] In the United States, consumer law holds every party involved in the supply chain accountable for injuries caused by defective products.[37] But earlier US case laws did not address the issue 'whether electronic commerce platforms that

36 (1963) 59 Cal. 2d 57.

37 See MacPherson v. Buick Motor Co., 217 N.Y. 382, 389-90 (1916).

facilitate the third-party vendors who sell goods may be held accountable as either the actual sellers or as one of the elements of the supply chain? U.S consumer protection jurisprudence, till 2019 held that online marketplaces such as Amazon, eBay etc, are similar to shopping malls who simply provide space for retailers to sell their products. They argue that they won't be made accountable for any damages brought on by faulty goods offered by other vendors on their sites .Court in *Carpenter* v. *Amazon.com*[38] declared Amazon not liable for introducing defective hover boards to consumers, as they only filled a gap in the market that would have otherwise been present. In the case of *Eberhart* v. *Amazon.com*[39] it was determined that Amazon was not considered part of the distribution chain for the defective coffeemaker as it did not take ownership of the product. However, since *Bolger* v. *Amazon.com*,[40] US Courts are holding that e-commerce platforms can be held accountable under products liability principles. Recent cases have addressed the issue of attributing liability to these platforms for defective products sold by third parties, ranging from faulty batteries to defective thermostats. California Courts have examined whether e-commerce platforms should be regarded as integral components of the supply chain or whether their involvement is essential for selling faulty goods, thereby imposing products liability on them. A California appellate court reversed a prior decision in August 2020 that held Amazon not liable for an exploding battery. The court determined that Amazon, despite being an online marketplace without any involvement in distribution, manufacturing, or direct sales of the product, could still be held responsible.[41]

The appellate court determined that Amazon played a crucial role in facilitating the sale of the product to the consumer. This was demonstrated by the fact that Amazon owned and kept the products, that they were registered in the Amazon database, and that they were packaged and shipped

38 17-cv-03221, 2019 WL 1259158, at 5 (N.D. Cal. March 19, 2019).

39 325 F. Supp. 3d 393, 398 S.D.N.Y. 2018.

40 267 Cal. Rptr. 3d 601, 604 (Cal. Ct. App. 2020).

41 See Bolger v. Amazon.com, 267 Cal. Rptr. 3d 601, 604 (Cal. Ct. App. 2020).

with the Amazon logo. The court acknowledged that Amazon's business strategy encouraged customers to deal directly with Amazon as opposed to independent suppliers. Amazon was responsible for managing the sales transactions and handling any returns. The Court also acknowledged that under California law, sellers can also be held liable for product defects. The doctrine of strict liability in California allows for compensation to be awarded to plaintiffs injured by defective products, bypassing technicalities. Furthermore, court noted that the name "Amazon" implies a level of safety, and Amazon has the ability to adjust its pricing to account for liability. The court overturned the lower court's decision after finding that Amazon was merely link in goods distribution channel. In December 2020, New York Court's decision in *State Farm Fire & Casualty Co.* v. *Amazon.com Services,*[42]wherein a thermostat put a house on fire, held that Amazon exercised sufficient control over a thermostat in order to be classified as a 'seller', and it was determined that Amazon did not need to have ownership of the products. This classification was based on Amazon's authority to process client's return and prepare the goods ready to be shipped to desired customers. Additionally, Amazon received portion from the gains made and utilized Amazon-branded packaging for shipping. Court held that Amazon enjoys the advantages of a traditional physical store but without assuming the associated responsibilities. Court in *Oberdorf* v.*Amazon.com*[43]and *Oberdorf* v. *Amazon.com*[44] held Amazon as 'seller' with respect to products liability. This decision was based on Amazon's role as the main point of contact for consumers, its influence over sellers, its ability in preventing distribution of faulty goods and being able to share costs. The court further held that Amazon is responsible for introducing defective products into the market and is in a favourable position to handle and allocate the risks associated with them.[45]

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42 137 N.Y.S.3d 884, 887-88 (N.Y. Sup. Ct. 2020).

43 930 F.3d 136, 147-48 (3d Cir. 2019).

44 818 F. App'x. 138, 139 (3d Cir. 2020).

45 See *State Farm Fire & Cas. Co.* v. *Amazon.com*, 390 F. Supp. 3d 964, 973 (W.D. Wis. 2019).

In *Papataros* v. *Amazon.com*,[46] New Jersey district court reached a similar conclusion, stating that Amazon qualifies as a "seller" due to its association with 3rd party vendors and its online marketplace structure, indicating that Amazon's control over products. However, it's important to note that not all state courts hold online business platforms accountable for the transactions made by other vendors for selling faulty merchandise. Illinois Court in *Great N. Ins. Co.* v. *Amazon.com*,[47]determined that a product liability claim would not be valid in a situation where the e-commerce platform never physically possessed the product and the primary control over the product rested with the company responsible for its manufacturing. Consequently, product liability laws in the United States vary from State to State, and different courts have arrived at varying conclusions regarding the extent to which such online platforms are responsible for selling faulty goods on their website.

United States Supreme Court in case of *South Dakota* v. *Wayfair*[48], on 21st June 2018, tackled the issue of whether company be present physically in that State before legally mandating the collection of sales taxes. The Supreme Court's decision concluded that States are allowed to impose sales tax collection requirements on businesses that lack a physical presence within their borders. As a result of this ruling, it is important for e-commerce businesses to prioritize compliance with sales tax laws in all states for two significant reasons. First, many states already have legislation in effect mandating sales tax collection for internet sales. Second, penalties for non-compliance can be significant. For example, Indiana law includes personal liability of company's owners or members for amounts not paid, regardless of any corporate structure intended to shield owners from personal liability. After *Wayfair* decision many states have enacted legislation in response to *Wayfair* that exempts smaller e-commerce businesses from tax collection obligations. Some states have special laws that apply to "marketplace seller."

46 17-9836, 2019 WL 4011502, at 17 (D.N.J. Aug. 26, 2019).

47 19-c-684, 2021 WL 872949, at 4 (N.D. III. March 9, 2021).

48 201 L. Ed. 2d 403.

A marketplace seller is a seller that, instead of launching an independent website, opens a seller account on websites such as Amazon, eBay, or Etsy as a third-party seller. Consumer may buy a product from Amazon's website, but he is actually buying product from "XYZ Third-Party Seller", with Amazon merely facilitating the sale. Many States in U.S have taken different approaches to sales tax collection from marketplace sellers. Few states place responsibility on marketplace facilitators, such as Amazon, to collect sales tax on behalf of the marketplace sellers, while some states treat marketplace sellers exactly in same way as traditional e-commerce sellers, while some states require marketplace sellers to collect sales tax for merely storing inventory within a state. Such laws clearly target a subgroup of Amazon sellers referred to as Fulfilment by Amazon, or FBA sellers. These sellers use a special service provided by Amazon, sending inventory to various Amazon warehouses where it is stored until purchased, with Amazon handling the shipping. For FBA sellers, it is important to ensure compliance with these new sales tax laws because such sellers have no control over where their products are sold or a very limited control as to where their products are stored, leading to significant unintended sales tax liabilities. Many states have legislation for sales tax on internet sales and many states are modifying legislation to comply with *Wayfair*. Therefore, it is important for e-commerce companies to not only be aware of existing laws but also have a system in place to monitor the changes in states' laws.

(2) ***Product Liability in China***

Prior to 1990, the quality of Chinese products was notably low, and there was a prevalence of counterfeit goods. Numerous accidents occurred due to these defective or counterfeit products, yet victims were unable to recover their losses as there was no specific law addressing product liability. However, Article 122 of 'The Principles of Chinese Tort Law' introduced the concept of liability for producers and sellers in cases of physical injury resulting from spurious / faulty goods. With the growing consumer demands for the protection of their legal rights and the need for stricter supervision

and control over product quality, Law of the People's Republic of China on Product Quality' was introduced. Additionally, another law that was also introduced to define liability and safeguard the legitimate rights and interests of users and consumers was the Law of the People's Republic of China on Protecting Consumer's Rights and Interests.'

Defect Identification: Determination of defect in a product is the most difficult problem in a product liability lawsuit. Defect is generally classified into three types: Manufacturing defect, design defect, warning and instruction defect. The term 'Defect' as per Chinese law includes any "unreasonable danger existing in a product which endangers the safety and human life or another person's property, where there are national or trade standards with a view to safeguarding the health of people and safety of human life and property".

(3) ***Comparative Consumer Statutes***

Countries in Federal systems particularly in USA and Canada have different legislations enacted at different levels. In the United States, apart from State legislations, there are several federal statutes that govern consumer laws. The Competition and Consumer Act, 2010 is the most significant piece of consumer protection legislation in Australia. In the United Kingdom, there is a comprehensive single piece of legislation known as The Consumer Rights Act, 2015 but other legislations which supplement it are Consumer Protection from Unfair Trading Regulations, 2008, Consumer Contracts (Information, Cancellation and Additional Charges) Regulations, 2013 and The General Product Safety Regulations, 2005.

(4) ***Definition of "Consumer"***

In USA, there are varied definitions of 'consumer', however "consumer" has been defined in Dodd-Frank Wall Street Reform and Consumer Protection Act encompassing both persons and the agents or representatives operating on their behalf. In contrast, the Fair Credit Reporting Act defines 'consumer' simply as an individual.

According to Section 2(7) of the U.K. Consumer Protection Act, 2019, a "consumer" is a natural person, as opposed to a legal entity, acting mainly for purposes unrelated to their trade, business, craft, or profession. Unlike other definitions, this one excludes both artificial and natural persons, which is a deviation from the norm. Commercial transactions are excluded from the scope of Consumer Protection law, as shown by the definition's latter portion.

An individual is regarded as a "consumer" within the terms of the Australian consumer Law when they buy goods or services for under $40,000. A person is also considered a "consumer" when they purchase products or services beyond $40,000 provided that those goods or services are typically used for personal, domestic, or household purposes.

According to the Consumer Rights Directive of the Commission, the definition of a 'consumer' should encompass individuals who are acting in a personal capacity, unrelated to their trade, business, craft, or profession.

(5) ***Enforcement Agencies for consumer protection***

UK Consumer Rights Act addresses remedies available to consumers in case their statutory rights under a goods contract are not met, while its Chapter 1 of Part 3 contains the enforcement provisions. The enforcement of regulations in the UK is carried out by two main agencies. The first agency is Trading Standard Services, which primarily handles enforcement at the local level, although in certain cases their jurisdiction may extend nation-wide. The Competition and Markets Authority, the UK's top regulatory authority for competition law, is the second organisation. Through the courts, consumers can also actively enforce their rights.

Several federal organisations, including the Food and Drug Administration, Federal Trade Commission, and Consumer Financial Protection Bureau amongst others, are responsible for enforcing consumer protection legislation in the United States. Additionally, many state solicitors are entrusted with conducting investigations and applying these laws in

their respective regions. The advantage of this system is that it allows for specialization and expertise in enforcing consumer protection laws within specific sectors, as the focus is narrowed down to smaller areas.

The Australian Competition and Consumer Commission, which operates at both the federal and state levels, is responsible for upholding the Australian Consumer Law in Australia. Additionally, the respective state and territory consumer protection agencies are responsible for enforcement at their respective levels.While this arrangement offers a single point of contact for all consumer protection issues, it also places the onus of all duties upon a central commission.

In Japan, consumer protection laws are primarily enforced by the Consumer Affairs Agency (CAA), which serves as the central authority. The CAA is responsible for overseeing the enforcement of most consumer protection laws. Additionally, there are various specific bodies under different ministries that are entrusted with law enforcement.

(6) ***Quality assurance of products and services***

To ensure that the products or services offered on the market adhere to certain criteria, consumer protection laws' main goal is to safeguard consumers. Various legislations approach this goal differently, aiming to maintain a certain level of quality and hold traders accountable. In cases where the expected quality is not met, appropriate actions can be taken by the affected consumer.

In India, Chapter VI of the Consumer Protection Act, 2019 outlines regulations for product responsibility. Individuals are now entitled to pursue compensation for damages brought on by defective products thanks to these regulations. The administration of product liability laws varies between the federal and state levels in the United States. While the Uniform Commercial Code normally covers some products, such as food and drugs, other products are typically regulated by central regulation. In the USA, the central government is well-known for its strict enforcement and control.

In Japan, various regulations exist to ensure quality standards and provide redress in case of non-compliance. These include the Households Goods Quality Labelling Act, Food Labelling Act, and other related legislations. These acts establish specific standards for various product categories and outline the appropriate course of action to address any breaches or violations.

Clear and uniform terms that apply to all transactions have been establish both in Australia and the UK. The Australian Consumer Law, for instance, includes the idea of "consumer guarantees," that are certain stipulations relating to the quality of products and services that are automatically binding to every customer transaction. These guarantees ensure a certain level of quality for each product or service received by the consumer and establishes appropriate standards and remedies in case of non-compliance. As a consequence, suppliers have a duty to guarantee that products are fit for use and free of flaws.

The Consumer Rights Act in the UK introduces statutory safeguards that are inalienably incorporated into contracts. These protections ensure that goods must meet satisfactory quality[49]standards and be suitable for their intended purpose[50]. Additionally, traders are obligated to provide specific information about goods when offering them for sale. The provisions in the UK are notably focused on placing responsibilities on traders rather than merely enforcing consumer rights. This approach prevents traders from using irregular defenses for exemption from any liability.

Liability of E-Commerce Entities under t he Consumer Protection Act, 2019

The Consumer Protection Act, 2019 has incorporated specific measures to oversee the operations of electronic service providers and safeguard consumer rights in the realm of online trade. E-commerce is described under

49 UK Consumer Rights Act 2015, s.9 (United Kingdom).

50 UK Consumer Rights Act 2015, s.10 (United Kingdom).

S. 2(16) of CPA as the exchange of goods or services, including digital items, over a digital or electronic network. This comprehensive definition encompasses various forms of online retail services. Typically, online facilitators like Flipkart and Amazon facilitate e-commerce transactions. As a result, these intermediaries are included in the definition of "electronic service providers".[51]

Consumer Protection Act of 2019 establishes online service providers' obligations to customers that use such online platforms. Section 38 states that any online service provider may be required by district commission to submit pertinent information, records, or documents. that are necessary for resolving a consumer complaint. Similarly, State Commission and National Commission are empowered u/s 49 and 59, when acting within the realm of original jurisdiction. Therefore, e-commerce disputes or any other situations where an electronic service provider has access to important data, records, or documentation that are pertinent to a dispute, the Commissions established under the Act have the authority to direct the electronic service provider to provide the required information. Failure to comply with such directives can result in penalties, as the Commissions are endowed with powers similar to courts under CPC. Additionally, u/s 94,to avoid unfair trade practices in e-commerce, Central Government has been given the right to put policies into place.According to Section 101, the Central Government may create regulations on a variety of topics, including ones that aim to stop unfair business practises in e-commerce.

E-Commerce business rules

They have been formulated to support the provisions of Section 94 and Section 101 of the Consumer Protection Act, with the primary aim of preventing unfair trade practices in the e-commerce industry. These Rules are applicable to:

51 Section 2(17) – electronic service provider means a person who provides technologies or processes to enable a product seller to engage in advertising or selling of goods or services to a consumer and includes any online marketplace or online auction sites.

1. E-Commerce entity: This refers to any person or group that administers or runs an e-commerce internet platform. However, it excludes vendors who work with a e-commerce marketplace organisation.
2. E-commerce marketplace entity: This refers to organization that provides online medium for facilitating business. Examples of such organizations include Flipkart, e-bay, Amazon etc. Sellers who operate on these platforms are not considered as E-commerce organizations themselves.
3. E-Commerce inventory entity: This refers to organizations that possessproducts for selling them to customers through an online platform.Inventory E-Commerce firms function as sellers for the goods transacted on their online platform, in contrast to Marketplace E-Commerce entities that provide a platform for sellers and buyers to communicate.

Conclusion

The product liability jurisprudence in India, when examined from a comparative standpoint, reveals a multifaceted landscape that showcases both, the prospective advancements, and key areas for improvement. As India emerges as a significant economic powerhouse, it has witnessed considerable expansion in its consumer market, which has led to a surging demand for comprehensive product liability laws. Ensuring safe products in the market is crucial, not only to safeguard the consumers, but also to foster their trust in the marketplace and promote ethical business practices. In this article, India's product liability legal framework has been assessed by adopting a comparative approach, highlighting its advantages & disadvantages, while drawing insights from legal systems prevalent in other continents .In the recent years, India has taken substantial steps to foster its product liability laws, bringing them more in sync with the international norms .The enactment of the Consumer Protection Act, 2019, marked as a

watershed moment in this context. The Act not only broadened the ambit of rights of the consumers per se, but also instituted strict liability for service providers &manufacturers in cases involving selling of spurious and faulty products.

This move toward a consumer-focused approach is praiseworthy and also corresponds with the international norms. Additionally, the comparative analysis exposed few distinctive elements in India's approach towards the product liability. Unlike the United States, which places significant reliance on litigation for resolution of its product liability disputes, India prioritizes resolution of such disputes via Mediation &Alternative Dispute Resolution (ADR) mechanisms, potentially alleviating the strain on its already overburdened judicial system. Nevertheless, obstacles still persist as the enforcement of the product liability legal regime in India remains embryonic, as the consumers frequently bear an unfair burden of providing evidence for their grievances. Furthermore, there's always a scope for improvising the compensation being provided to victims for their faulty products. To genuinely uphold consumer justice, it is imperative for India to combat these concerns.

On a comparative note, it becomes evident that the U.S, China, E.U amongst others, have firmly established their product liability legal frameworks, offering their citizens a comprehensive consumer protection. To conclude, India has achieved remarkable strides in the field of product liability law, especially with the newly introduced Consumer Protection law. Nonetheless, there's more to be accomplished to guarantee the adequate safeguarding of consumers against the faulty products. After a thorough study of the experiences of other countries and consistently enhancing its legal framework, India has the potential to enhance its standing in the global marketplace by building consumer trust and advocating for product safety. India can further make its position formidable in the international market by building consumer confidence, increasing product safety and by leveraging the valuable wisdom gainedglobally and consequently improvising its legal regime.

Suggestion: A Path Forward

It is evident that India's product liability framework can be further strengthened through implementation of certain strategic enhancements. These include:

1. ***Efficient Enforcement Procedures*:** India should contemplate the creation of dedicated product liability courts or tribunals aimed at expediting the resolution of product liability cases. Implementing this specialized approach can contribute to reducing case backlogs and ensuring affordable, timely & accessible justice for consumers.
2. ***Enhancing Consumer Awareness*:** Efforts should be made to educate consumers, thus enabling them to make informed choices. The Government should also allocate resources for consumer education initiatives. Consumer education regarding their rights and obligations will go a long way in enhancing product safety.
3. ***Improved Compensation System*:** India should re-evaluate its compensation frameworks for individuals affected by defective products. The adoption of a fairer and more generous compensation system can offer increased support to consumers facing any harm resulting from defective products.
4. ***Global Cooperation*:** India should proactively participate in international dialogues and collaborate with Nations &Organizations that have well-established product liability legal regime to gain valuable insights into their best practices. Such cooperation can aid India in fine-tuning its legal framework to align itself with the global standards observed worldwide.
5. ***Continuous Oversight&Enforcement*:** Enhancing regulatory agencies tasked with ensuring product safety is quintessential. Periodic inspections, rigorous quality control, imposing heavy penalties for violations and transparent mechanisms can discourage manufacturers from producing inferior products.

6. ***Effective Reporting Mechanisms*:** Lastly, establishing a robust product safety reporting system, wherein the manufacturers & suppliers are required to report product defects is another crucial aspect. Establishing user-friendly channels for consumers to raise safety concerns can proactively prevent accidents, streamline the product recalls, thus mitigating potential risks & ensuring comprehensive consumer protection.

Therefore, through the adoption of some of these key recommendations, India can strengthen its product liability framework, safeguard consumer rights, and foster a more secure marketplace. By continually enhancing its regulatory framework and practices, India can position itself as a responsible and attractive destination for both domestic and international consumers.

Conservation and Management of Biodiversity in the State of Kerala: An Appraisal of the Role and Functioning of Biodiversity Management Committees

Dr. Aneesh V. Pillai*

Introduction

The State of Kerala is the 9th largest economy in India and which contributes more than 4% of GDP to India and is having a per capita income which is around 60% of the Indian average. There are many reasons for this growth including upliftment of different communities, land reforms, education, etc. In the last few decades Kerala has witnessed several changes in the activities such as transport, constructions, tourism, trade, communication, and developments in different sectors, etc. These changes have made possible for the State of Kerala to achieve progress in the field of economy, health, education, housing etc. This pattern of development is considered as a model for other states and is referred as 'Kerala Model'. However, at the same time the Kerala Model for development is also criticised due to the increasing pressure on the biodiversity of the State. It is to be noted that, the Kerala is considered as one of the unique biodiversity hotspots in the world due to the presence of three biodiversity rich ecosystems such as marine coral reefs; freshwater and brackish water wetlands; and tropical rainforests.

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Being one of the densely populated State and a hotspot for rich biodiversity, it is the bounden duty of the State of Kerala to ensure conservation and sustainable use of its biodiversity. Moreover, the recent flood episodes and other natural disasters have also highlighted the ardent need for effective conservation and management of biodiversity in the State. One of the prominent ways to deal with the issue of conservation and management of biodiversity is the establishment of a proper legal framework and related agencies. Kerala has been very keen in implementing the various legislations and policies framed by the Government of India and moreover, Kerala has also developed its own specific policies for the conservation and management of several components of biodiversity. In tune with the *Biodiversity Act of 2002* the Biodiversity Management Committees[1]were constituted in Kerala in all the panchayats, municipalities and corporations in 2012. The BMC's are vested with a greater role in the conservation and sustainable management of biodiversity. This paper discusses the functioning of BMC's constituted at different level in State of Kerala and identifies the various nuances of the functioning of these BMC's in Kerala.

State of Kerala: Biodiversity Profile

Kerala, is one among the 29 states of India, which is situated in the south-west of India. It lies between 8°17'N to 12°47'N latitude and 74°52'E to 77°24'E longitude[2]. Kerala is the 21st largest State in the country[3] with a geographical area of about 38,852 sq km[4]. It is bordered by the Arabian Sea at its south and west; the State of Tamil Nadu to the east and the State of Karnataka to the north[5]. For the administrative reasons, the State is divided into 14 revenue districts. There are 14 District Panchayats; 6 Corporations;

1 Here in after refereed as BMC

2 *See* for more, (Feb. 02, 2022,10.30 AM), http://www.ecostat.kerala.gov.in/index.php/bs-kerala-glance-malayalam

3 *Id*

4 *Id*

5 Official Website of Local Self Government Department, (Feb. 2, 2022,10.30 AM) http://lsgkerala.gov.in/en/lsgd.

87 Municipalities; 152 Block Panchayats; and 941 Grama Panchayats[6]. As per the Census of 2011, about 33.36 million inhabitants are there in Kerala, and thus as a result population-wise it became the thirteenth largest State in India. Out of the total population of Kerala, about 4.84,839 are belonging to Scheduled Tribes[7].

The total geographical area of Kerala amounts to about 1.18% of the area of India[8] and can be divided into Highland zones, midlands and coastal areas[9]. Hence structurally, Kerala has several hilly areas, forests, marshes, mangroves, ponds, seashores and deltas[10]. Out of about 1800 km's of Western Ghats[11], nearly 450 km's falls in the area of Kerala. The UNESCO has identified 39 sites from the Western Ghats for its World Heritage List in 2012. It is to be noted that, out of this, 19 sites are located in the Western Ghats which falls in the area of Kerala[12]. It has around 590 km of coastal belt[13] and around 28.99% of the area are classified as forest area of the State[14]. So also Kerala is blessed with 44 rivers with its different tributaries

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6 *Id*

7 *See* for more,(Feb.2,2022,10.30 AM) https://censusindia.gov.in/2011census/PCA/PCA_Highlights/kerala/ Exeutive_Summary.pdf.

8 *See* for more,(Feb 3,2022,11 AM) https://forest.kerala.gov.in/index.php/forest/kerala-state-profile.

9 *Id*

10 T.P. Sreedharan, *Biological Diversity of Kerala: A Survey of Kalliasseri Panchayat, Kannur District*, Discussion Paper No. 62, (Feb. 01, 2022, 8:30 PM),http://www.cds.ac.in/krpcds/publication/downloads/62.pdf.

11 It is an area which constitute a range of hills running almost parallel to Arabian Sea through Kerala, Tamil Nadu, Karnataka, Goa, and Maharashtra. See, (Feb. 01, 2022,11 AM) https://forest.kerala.gov.in/index.php/forest/kerala-state-profile,

12 Agriculture Division State Planning Board, *Working Group on Biodiversity Report*, Thiruvananthapuram, March, 2017(Feb.2,2022,10.30 AM) https://spb.kerala.gov.in/sites/default/files/inline-files/1.9Biodiversity.pdf.

13 W. Arisdason& P. Lakshminarasimhan, *Plant Diversity of Kerala State – An Overview*, (Feb 2, 2022,10.30 AM),http://bsienvis.nic.in/files/Kerala_1.1.15.pdf.

14 It includes 98.74% of Reserved Forests and 1.26% of other recorded forest areas, *see* for more, (Feb.2, 2022,10.30 AM),http://www.cds.ac.in/krpcds/publication/downloads/62.pdf.

and branches, backwaters, lakes and ponds across the area of the State[15]. Due to the diverse geographical features, 13 agro-climatic zones were identified in State of Kerala[16].

The diverse forests, grasslands, wetlands, coastal and marine ecosystem are a home for large number of species. The total area of Kerala is a home for about 25.69% of flowering plant species and 26.59% of pteridophytes recorded in India. In this about 15.08% are trees; 15.8% are shrubs; and 50.1% are herbs[17]. In Kerala, there are 5 National Parks; 13 Wildlife Sanctuaries; 2 Tiger Reserves; and One Community Forest Reserve[18]. The biodiversity areas of Kerala are very famous for their rich fauna. It includes about 23.72% of mammals; 38.5% birds; 41.75% of reptiles; 61.16% of amphibians; and 7.9% of fish of total population of these in India[19]. Thus, it can be seen that, though the Kerala holds only 1.12% of the total area of India, it is harbours about 25% of the biodiversity of the country[20]. Kerala due to its scenic beauty and rich biodiversity is often referred to as *"God's Own Country."*

Biodiversity in Kerala: Major Threats

The geographical features of Kerala, has endowed it with a rich and beautiful biodiversity. Though Kerala is blessed with high level of literacy

15 *See* for more, (Feb. 02, 2022,10.30 AM) https://en.wikipedia.org/wiki/List_of_rivers_of_Kerala.

16 *See* for more (Feb 2, 2022,10.30 AM) http://www.kerenvis.nic.in/Database/AgroEcologicalZones_1507.aspx.

17 Agriculture Division State Planning Board, Working Group on Biodiversity Report, Thiruvananthapuram, March, 2017,(Feb.23,2023,11 AM), https://spb.kerala.gov.in/sites/default/files/inline-files/1.9Biodiversity.pdf.

18 *See* for more, (Feb 22,2022,10.30 AM),https://forest.kerala.gov.in/index.php?option=com_content&view=article&id=205&Itemid=162.

19 *See,* Kerala State Action Plan on Climate Change, 2014,(Feb 23,2022,10.30 AM) https://envt.kerala.gov.in/wp-content/uploads/2019/10/Kerala-State-Action-Plan-on-Climate-Change-KSAPCC-2014-August.pdf.

20 *Id.*

and environmental consciousness, the various developmental activities and population density has posed several threats on the existence of biodiversity. The most important threats among them are:

a) ***Encroachments:*** For the purpose of developmental activities large land areas, wetlands, forest areas, water ecosystems are required. Thus the encroachment into these areas in the name of developmental activities poses a severe threat to the rich biodiversity.

b) ***Poaching:*** For the purpose of making several goods and commercial products, certain animals, birds and other wild living forms are necessary. Hence the practice of poaching of wildlife for this purpose poses a threat to the existence of such species.

c) ***Sand Mining and Quarrying*****:** The mining, quarrying and its associated processing operations poses a threat to the land, soil, and water as well as air quality in different ways and hence it adversely affects the biodiversity.

d) ***Industrialisation:*** The development of several industrial units in the State affects the biodiversity in several ways as all these industries cause environmental pollution and degradation by discharging toxic fumes and effluents in the river bodies; on land and in the atmosphere. The industries also utilize biological diversity components as raw materials and thus lead to over-exploitation and reduction of natural resources and biodiversity.

e) ***Other Threats:*** Un-Sustainable Planning; Over-Exploitation; Wild Fire; Cattle Grazing; Unscientific Collection of Minor Forest Produces; Human – Wildlife Conflicts; Tourism; Invasive species; etc. also poses threats to the biodiversity of Kerala.

The undesirable developmental activities along with these threats to the biodiversity have a severe impact on the biodiversity of Kerala. Some of the notable impacts are: loss and degradation of forests; loss of mangrove ecosystems; loss of coastal ecosystems; desertification; depletion in water

resources; reduction of wetlands; reduction of paddy fields; pollution of waters sources; deterioration of rivers and its tributaries; deterioration of air quality; etc. The cumulative result of all these is the degradation and deterioration of biodiversity and in the long run the loss of biodiversity in the State and in severe cases even extinction of biodiversity.[21] It is to be noted that about 1500 species of flowering plants are endemic in nature. About 205 species of vertebrates present in Kerala are listed as threatened in the IUCN Red List[22].

Conservation of Biodiversity: Kerala State Initiatives

The biological richness bestowed by nature to Kerala has made this State a favourite destination for the tourists. Kerala is termed as 'Gods own Country' and every year lakhs of tourists visit different places in Kerala. However, the natural beauty and the biodiversity of this State are encountering several ongoing threats due to the developmental activities. In this context, the Government of Kerala has taken numerous measures for the conservation and maintenance of biodiversity along with the implementation of the various legislations as well as polices framed by the Central Government. All these measures can be classified into three broad categories such as legislations; rules/guidelines/polices; and institutions.

Conservation of Biodiversity: Key State Legislations

Some of the important legislations are: Kerala Forest Act, 1961; Kerala Live-Stock Improvement Act, 1961; The Kerala Cattle Trespass Act, 1961;

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21 Several species were endangered. *See* for more, Rare, Endangered and Threatened (RET) plants of Kerala,(Feb 2,2022,10.40 AM) https://en.wikipedia.org/wiki/Rare,Endangered_and_Threatened_(RET)_plants_of_Kerala,; List of Threatened Mammals of Kerala, ,(Feb 2,2022,10.40 AM) https://www.keralabiodiversity.org/index.php/threatened-taxa-of-kerala/110-threatened-fauna/255-threatened-mammals-of-kerala ; N. Sasidharan, *Red Listed Threatened Tree Species in Kerala: A Review,* (Feb. 02, 2022, 9:00 PM)https://forest.kerala.gov.in/ images/ efl/rettree.pdf.

22 About 23 are Critically Endangered; about 90 are endangered; and 92 are Vulnerable. *See* for more, (Feb. 27, 2022.10.30 AM),https://spb.kerala.gov.in/economic-review/ER2016/chapter02_08.php.

Kerala Land Reforms Act, 1963 and its Amendment in 2005; The Kerala Private Forests (Vesting and Assignment) Act, 1971; Kerala Plant Diseases and Pests Act, 1972; Kerala Marine Fishing Regulation Act, 1980; Kerala Preservation of Trees Act, 1986; Kerala Water Supply and Sewerage Act, 1986;Kerala Panchayati Raj Act, 1994; Kerala Municipalities Act. 1994; Kerala Restriction on Transfer by and Restoration of Lands to Scheduled Tribes Act, 1999; The Kerala Protection of River Banks and Regulation of Removal of Sand Act, 2001; The Kerala Ground Water (Control and Regulation) Act, 2002; The Kerala Forest (Vesting and Management of Ecologically Fragile Lands) Act, 2003; The Kerala Tourism (Conservation and Preservation of Areas) Act, 2005; Kerala Tourism (Conservation and Preservation of Areas) Act, 2005; Kerala Promotion of Tree Growth in Non-Forest Areas Act, 2005; The Kerala Irrigation and Water Conservation (Amendment) Act, 2006; Kerala Monsoon Fishery (Pelagic) Protection Act, 2007; Kerala Conservation of Paddy Land and Wetland Act, 2008; etc.

The Kerala Government has also framed several rules under different legislations for the purpose of conservation and management of different components of biodiversity in the State. Some of the important Rules are: The Forest Settlement Rules, 1965; The Kerala Minor Mineral Concession Rules, 1967;The Kerala Restriction on cutting and destruction of Valuable trees Rules, 1974; The Kerala Forest Produce Transit Rules, 1975; The Kerala Rules for Payment of Compensation to Victims of Attack by Wild Animals, 1980; Kerala Panchayat Raj (Issue of License to Dangerous & Offensive Trades & Factories) Rules, 1996; The Kerala Municipality Building Rules, 1999; The Kerala Captive Elephants (Management and Maintenance) Rules, 2003; The Kerala Forest (Vesting and Management of Ecologically Fragile Lands) Rules, 2007; Kerala Biological Diversity Rules, 2008; Kerala Rules and Regulations of the State Forest Development Agency[23]; Kerala Forest Subordinate Service Special Rules, 2010; Kerala Forest Service Special Rules,

23 *See* for full text (Feb 27,2023,10.30 AM)https://forest.kerala.gov.in/images/abc/sfdarules.pdf.

2010; Kerala Forest (Regulation of Sawmills and Other Wood Based Industrial Units) Rules 2012; etc.

Conservation of Biodiversity: Key Guidelines/ Polices/Programmes

The Government of Kerala has developed several policies for the conservation and management of different components of environment. Most of these polices/programmes etc. are having a significant impact on the conservation and management in different components of biodiversity. Some of the important such initiatives are: Kerala State Water Policy; Kerala Biotechnology Policy; The Kerala Urban Policy; The Kerala Energy Policy; Kerala Fisheries Policy; The Kerala Industrial and Commercial Policy; The Kerala Housing and Habitat Policy; Kerala Biodiversity Strategy and Action Plan (KFRI), 2005; State Environment Policy, 2009; Kerala State Action Plan on Climate Change, 2014; etc. The Government of Kerala has also adopted several programmes with an aim to protect environment. It includes: Food Security Mission; Malinya Mukta Kerala Action Plan; Animal Husbandry; Plantation Development; Housing Schemes; Wetland Eco-restoration Programmes; Rural Water Supply Schemes; Social Forestry Programmes; State Poverty Eradication Mission; Watershed Development Programmes; Fisheries Development Programme; Air Quality Monitoring Programmes; Water Quality Monitoring Programmes; and Awareness Programmes such as 'Paristhithikam' and 'Bhoomitrasena Clubs'; and Haritha Keralam Mission; etc.

Conservation of Biodiversity: Key Institutions

The State of Kerala is one of the first States in India which has established a State Pollution Control Board in 1972 for the purpose of dealing with pollution in the environment. Under the Wildlife Protection Act, authorities including a Chief Wild Life Warden; Wild Life Wardens; Honorary Wild Warden[24]; and State Board for Wild Life[25], were constituted.

24 Sec. 4.

25 Sec. 6.

In 2002, for the purpose of strengthening research and development efforts required in the field of environment, Kerala State Council for Science, Technology and Environment was established. Several other autonomous research and development centres such as the Centre for Earth; Science Studies (CESS); the Tropical Botanic Garden & Research Institute (TBGRI); the Kerala Forest Research Institute (KFRI); the Centre for Water Resources; Development and Management (CWRDM); the Rajiv Gandhi Centre for Biotechnology (RGCB); National Transportation Planning and Research Centre (NATPAC); Agency for Non-conventional Energy and Rural Technology (ANERT), etc. were also established.

In 2005, the Kerala State Council for Science, Technology and Environment, with the support of Ministry of Environment, Forests and Climate Change in Government of India, has started a single-stop web-enabled repository for environmental information's. This repository is *'ENVIS Hub: Kerala'* which contains all details about environment in Kerala. Any person interested to know about the affairs of environment in Kerala can visit this online repository. The Central Government has constituted a State Environmental Impact Assessment Authority (SEIAA) for assisting the State to deal with environmental Clearance for projects falling under category "B" of schedule in EIA notifications 2006.

In 2006, Environment Department was created by delinking the subject Environment from the Science, Technology & Environment Department. Further in 2010, the Directorate of Environment and Climate Change (DoECC) was constituted under the Environment Department. DoECC acts as the nodal agency "for the planning, promotion, co-ordination and overseeing the implementation of Central and State environmental protection and conservation policies and programmes". The Directorate has taken an active role in formulating and implementing several measures for the conservation of environment. It is also taking measures for coordination with various other departments such as Department of Science and Technology, Health and Family Welfare, Forests and Wildlife, Factories

and Boilers, Industries, Mining and Geology and Groundwater, etc. for the purpose of protection of environment.

The Government has also appointed an Environmental Protection Programme Planning Committee (EPPPC) and an Environment Protection, Task Force (EPTF) for dealing with the effective implementation of environment related regulations and other measures[26]. In 2005, the Government of Kerala constituted the Kerala State Biodiversity Board (KSBB) based on the mandate under the Biological Diversity Act, 2002. The constitution of KSBB is a milestone in the history of conservation and management of biodiversity in the Kerala as it is the first institution directly charged with the function of conservation and management of biodiversity. The major functions of KSBB includes advising the State Government on matters relating to conservation and management of biodiversity; measures for sustainable use of biological resources and equitable sharing of benefits arising out of such use; matters relating to commercial utilisation or bio-survey and bio-utilisation of any biological resources, etc[27]. The KSBB has taken an active role in constituting Biodiversity Management Committees (BMC) all over the State. Among the various institutions in Kerala, the KSBB and BMC's established at the different local self-governments are expected to play a significant role in the conservation and management of biodiversity in the State of Kerala.

Biodiversity Management Committee's in Kerala

The Section 41 of the BDA mandates all the local governments to establish a BMC within its jurisdictional area. The BDA is envisaged for, "promoting conservation, sustainable use and documentation of biological diversity including preservation of habitats, conservation of land races, folk

26 Kerala State Environment Policy, 2009, (Feb 2, 2022,10.30 AM)http://www.keralabiodiversity.org/images/pdf/environmentpolicy english.pdf.

27 Kerala State Biodiversity Board (KSBB),(Feb 2,2022,10.50 AM) https://www.keralabiodiversity.org/index.php/about-us/aboutus.

varieties and cultivars , domesticated stocks and breeds of animals and microorganisms and chronicling of knowledge relating to biological diversity" . Every BMC' consists of a Chairperson and not more than 6 members and among the members at least one third should be women and not less than 18 % should belong to SC's/ST's . Every such BMC will function for a period of five years or co-terminus with the concerned local body. In a year, BMC's should meet at least four times in a year normally after a period of three months. The concerned MLA's and MP's will be the special invitees to the meetings of BMC. It is to be noted that the NBA and SBB while taking any decision relating to the use of biological resources and knowledge, having a duty to consult with BMC in whose jurisdiction such resources are occurring. The BMC is empowered to, "levy charges by way of collection fees from any person for accessing or collecting any biological resource for commercial purposes from areas falling within its territorial jurisdiction".

As per the Biodiversity Rules, 2004, the major function of BMC is the preparation of People's Biodiversity Register (PBR) after consulting with the concerned local people. This register contains comprehensive information's about availability and knowledge of local biological resources, its medicinal and other uses and the traditional knowledge associated with the biological resource. The BMC is also mandated to, "specify the form of the People's Biodiversity Registers, and the particulars it shall contain and the format for electronic database". BMC is the custodian of PBR and the entries will be validated by concerned BMC. The NBA and SBB will provide the required guidance and support for the preparation of PBR. The BMC is also having an advisory function on the matters specifically referred to it by SBB and NBA in connection with the approval, and data about the local *vaids* and practitioners using the biological resources. The BMC's are also to maintain, "a Register giving information about the details of the access to biological resources and traditional knowledge granted, details of the collection fee imposed and details of the benefits derived and the mode of their sharing".

In order to ensure effective functioning of BMC's at local level, in 2013, the NBA has developed the Guidelines for Operationalization of Biodiversity Management Committees (BMCs). As per these Guidelines, the BMCs should also focus their work to ensure the following:

a) Conservation and sustainable utilization of biological resources

b) Eco restoration of the local biodiversity

c) Proper feedback to the SBB in the matter of IPR, Traditional Knowledge and local Biodiversity issues, wherever feasible and essential feedback to be provided to the NBA.

d) Management of Heritage Sites including Heritage Trees, Animals/ Micro-organisms etc., and Sacred Groves and Sacred Water bodies.

e) Regulation of access to the biological resources and/ or associated Traditional Knowledge, for commercial and research purposes.

f) Sharing of usufructs arising out of commercial use of bio-resources

g) Conservation of traditional varieties/breeds of economically important plants/animals. Biodiversity Education and Awareness building.

h) Documentation, enable procedure to develop bio-cultural protocols.

i) Sustainable Use and Benefit Sharing

j) Protection of Traditional Knowledge (TK) recorded in PBR".

k) The BMC's are also supposed to prepare an Action Plan focusing on conservation of bio-resources; training needs; list of potential items for consideration of registration as Geographical Indicators; and a micro plan for sustainable use of local biodiversity including medicinal plants and associated TK".

The BMC's among the other agencies under Biodiversity Act is the most important agency for the implementation of Biodiversity Act. These Committees are vested with enormous responsibilities in connection with biodiversity and the fulfillment of these responsibilities is the keystone to

realize the solemn objectives of ensuring conservation and sustainable use of biodiversity in India.

In exercise of the powers conferred under Section 63 of the Biodiversity Act, 2002, the Kerala Government has formulated Kerala Biodiversity Rules (KB Rules) in 2008[28]. The Section 41 of the Biodiversity Act, Rule 22 of Central Biodiversity Rules and Rule 20 of the KB Rules, provides for the constitution of Biodiversity Management Committee (BMC) at every local body, i.e. at all Corporations; Municipalities; and Gram Panchayats. In 2008, the Department of Local Self Government, Government of Kerala has issued an order mandating the constitution of BMC's at different local bodies. During 2012, with the efforts of Kerala State Biodiversity Board, all the then existing 6 Corporations, 87 Municipalities and 941 Grama Panchayats were constituted BMC's. Subsequently, the KSBB has taken initiatives for the constitution of BMC's ate district level and block panchayat level and accordingly BMC's were constituted at 14 districts and 152 block panchayats. At present there are 1200 BMC's functioning at State of Kerala.

Three Joint Biodiversity Committees were established for the purposes of Sasthamkotta Lake conservation; Pampa River conservation; and Periyar River conservation. The reason for this joint action is that the subject matter of conservation is present in the local jurisdiction of different local self-institutions and hence a joint effort was necessary[29].The coordination of

28 *See* for full text, (Feb. 02, 2022,10.30 AM) http://www.keralabiodiversity.org/images/act/ksbb_rules-2008.pdf.

29 *See,* Kerala State Biodiversity Glimpses, (Feb. 02, 2022,10.30 AM) https://www.keralabiodiversity.org/images/pub/glimpses_ of_ksbb.pdf.; T. Nandakumar, *Sasthamcotta Conservation Project to be Made a Model*, THE HINDU, Oct. 7, 2015, (Feb. 02, 2022,8.30 PM))https://www.thehindu.com/news/national/kerala/sasthamcotta-conservation-project-to-be-made-a-model/article7732924.ece.; KSBB, *Biodiversity Conservation of River Pampa*, (Feb. 02, 2022, 9 PM)https://www.keralabiodiversity.org/images/2020/Reports/PAMPA_PROJECT.pdf.; K. S. Sudhi, *Joint Biodiversity Panel to Conserve Periyar*, THE HINDU, Aug.3, 2017; (Feb. 02, 2022 9PM)https://www.thehindu.com/news/cities/Kochi/joint-biodiversity-panel-to-conserve-periyar/article19412968.ece.

BMC's at different levels is entrusted with the District Coordinators of Biodiversity appointed by the KSBB[30].

Table 3 : Total number BMC's constituted in Kerala[31]

Sl. No.	District	No. of BMCs constituted at Panchayat Level (GPs + BPs + DPs)*	No. of BMCs constituted in Urban bodies (M + C)**	Total no. of BMCs constituted
1	Thiruvananthapuram	73 + 11 + 1	4 + 1	90
2	Kollam	68 + 11 + 1	4 + 1	85
3	Pathanamthitta	53 + 8 + 1	4 + 0	66
4	Alappuzha	72 + 12 + 1	6 + 0	91
5	Kottayam	71 + 11 + 1	6 + 0	89
6	Idukki	52 + 8 + 1	2 + 0	63
7	Ernakulam	82 + 14 +1	13 +1	111
8	Thrissur	86 + 16+ 1	7 + 1	111
9	Palakkad	88 + 13 + 1	7 + 0	109
10	Malappuram	94 + 15+ 1	12 + 0	122
11	Kozhikode	70 + 12 + 1	7 + 1	91
12	Wayanad	23 + 4 + 1	3 + 0	31
13	Kannur	71 + 11 + 1	9 + 1	93
14	Kasaragod	38 + 6 + 1	3 + 0	48
	Total	**941 + 152 + 14**	**87 + 6**	**1200**
*GPs- Grama Panchayats; BPs-Block Panchayats; DPs-District Panchayats; **M-Municipalities; C-Corporations				

30 *See* for the list of District Coordinators,(Feb. 02, 2022, 9 PM), https://www.keralabiodiversity.org/index.php/2015-03-02-10-01-45/2021-03-16-11-31-22.

31 *See,* Official Website of KSBB, (Feb. 02, 2022, 9 PM) https://www.keralabiodiversity.org/images/2021/January/Details_BMCs_ constituted_Kerala.pdf.

Composition

Every BMC constituted as per the provisions of Biodiversity Act and the Kerala Biodiversity Rules consists of a Chairperson and not more than six other members. Out of these members not less than one-third shall be women and one should be from SC/ST. These members must be resident of concerned local body and their name should be there in the voters list. Such members should include those herbalists, agriculturists, Non-Timber Forest Produces collectors/traders, fisher folk, representatives of user associations, community workers, academicians and any person/ representative of organization, on whom the local body trusts that they can significantly contribute to the mandate of the Biodiversity Management Committee[32]. Further, the concerned local body should nominate six special invitees from forest, agriculture, animal husbandry, livestock, health, fisheries and education departments[33]. The Chairperson of the concerned local body will ipso facto become the Chairperson of the BMC. The Secretary of such local body will be the Member Secretary of such BMC and is vested with the duty of maintaining all the records. The MLA's and MP's of the concerned locality will be the special invitees to the meetings of the BMC's at different levels. In order to support the BMC, the KSBB has established a Technical Support Group consisting of experts from the field of biodiversity[34]. The term of every BMC is co-terminus with the concerned local government. In 2012 based on Rule 32 of KBD Rules, a Biodiversity Fund (Non-Lapsable) was constituted[35].

Powers and Functions of BMC's

According to the KSBD Rules, the major mandate of BMC is to ensure conservation, utilization and equitable sharing of benefits from the biodiversity.

32 Rule 20.

33 *Id.*

34 *See* for more, (Feb. 02, 2022 ,9.300 PM) http://www.keralabiodiversity.org/images/pub/jan2013.pdf.

35 *See* for more, (Feb. 02, 2022 9.30 PM) https://www.keralabiodiversity.org/images/2019/November/BOOKS/BMC_BOOK.pdf.

The BMC will also facilitate the preparation of People's Biodiversity Registers (PBR's) at Grama Panchayat/ Municipality/ Municipal Corporation levels. The BMC's are also having several other functions including:

a) To provide advice to KSBB or NBA on any matter referred to it by them for the purpose of providing approval under the Act.

b) To maintain data about the local Vaidya's and practitioners using biological resources.

c) The BMC's shall strive to mainstream biodiversity conservation concerns in the development planning process at local level.

d) The BMC's should validate and maintain the PBR's.

e) It is the duty of the BMC's to determine the terms and conditions on which grant of access to biological resources and other traditional knowledge can be made. It can decide about the levy of charges way of collection fees from any person for accessing or collecting any biological resources for commercial purposes in accordance with the guidelines issued by KSBB in this regard.

f) BMC's should maintain a register consisting of all the details about grant of access to traditional knowledge and biological resources. Also the mode of sharing; the collection of fee imposed and details of the benefits derived are to be maintained in a register.

g) BMC's should prepare a Biodiversity Management Plan using output from People's Biodiversity Register and in consultation with the KSBB, and will be responsible for or participate in its implementation[36].

h) Conservation of Biodiversity Heritage Sites (BHS).

i) To establish and maintain Biodiversity Local Fund

j) To perform the function as Environmental Watch Group to prevent local environment depletion[37].

36 Rule 20.

37 Go No. 04/03/Envt. dated 13.05.2013, (Feb. 02, 2022 8:30 PM)https://www.keralabiodiversity.org/images/bmc/bmc_ brochure.pdf.

k) To setup an office for BMC with the support of concerned Local Self Government[38].

l) To evaluate scientifically the existing PBR's and identify the gaps and to upgrade it covering all different ecosystems and bio resources present in the jurisdictional area.

m) To identify and conserve the endemic and threatened species in the locality.

n) To prepare a Strategic Local Action Plan suitable to the different locality of the jurisdictional area based on its significance.

o) To constitute Local Technical Support Group (LTSG) consisting of 10 members including teachers and professors having expertise in Zoology/Botany, Environmentalists, Researchers, representatives of NGO's and other institutions having expertise in identification of species.

p) To establish Biodiversity Clubs in all Government Schools within the jurisdiction of BMC's for ensuring the participation of student communities in the conservation activities.

r) To suggest to the concerned Local Self Government for the implementation of developmental projects considering the benchmark of PBR's

s) To take measures for creating awareness about conservation of biodiversity[39].

BMC's in Kerala: Activities and Success Stories

Currently 1200 Biodiversity Management Committees were constituted at different levels in State of Kerala. Information was collected from 100 Grama Panchayat level BMC's, 25 Block Panchayat level BMC's, and 20

38 KSBB's Guidelines of BMC's, (Feb. 02, 2022 8:30 PM) https://www.keralabiodiversity.org/images/bmc/bmc_brochure.pdf.

39 *See* for more, (Feb. 02, 2022 8:30 PM)https://www.keralabiodiversity.org/images/bmc/bmc_brochure.pdf.

Municipality level BMC's. These BMC's were randomly selected based on their geographical distributions and biodiversity richness in that area. Information was also collected from 14 District Panchayat level BMC's and 6 Corporations level BMC's. The information was collected regarding the activities of all these BMC's upto December 2021. Interview Method was used for the collection of necessary information from the representatives of BMC's, District Coordinators of KSBB; and from other stakeholders. Based on the information collected, it was considered that the following are the major activities of BMC's in Kerala:

1) ***Preparation of People's Biodiversity Register (PBR)***

Documentation of biological resources available is one of the most effective tools for the conservation and management of biodiversity. Hence, one of the important functions of BMC's is the preparation of People's Biodiversity Register for the concerned local jurisdiction. As per Section 41 of the Biodiversity Act, the BMC's are charged with the function of documenting biological diversity present within its local jurisdiction. Rule 22 of the Biodiversity Rules emphasise that, one of the major function of BMC is to prepare a PBR in consultation with local people. This Register contains comprehensive information about availability and knowledge of local biological resources, their medicinal or any other use or any other traditional knowledge associated with them[40]. Further Rule 20 of KBD Rules also mandates that BMC should facilitate preparation of PBR's at the Panchayat, Municipality and Corporation level. For the preparation of PBR, the NBA has issued a detailed guideline in 2009 and subsequently it was revised in 2013[41]. Though the Act and Rules mandates the SBB and BMC's to prepare PBR's, there was reluctance on the part of several States across India in fulfilling this mandate. In this context, in the case of *Chandra Bhal*

40 Rule 22 (6)

41 *See* for more (Feb. 02, 2022 8:30 PM), https://biodiversity.tripura.gov.in/sites/default/files/Modified%20PBR%20Guidelines%20 Format.pdf.

Singh v. *Union of India & Ors.*[42], the National Green Tribunal has given a deadline to all States to prepare PBR's within 31st January, 2021.

The BMC's in Kerala have successfully completed the task of preparing PBR's in their respective jurisdiction by December, 2020. All the local bodies such as 941 Gram Panchayats; 87 Municipalities, and Six Corporations had prepared PBR's in their respective jurisdiction and hence a total of 1,034 PBR's were prepared in Kerala. It is to be noted that, the PBR's contains comprehensive information's about the biological resources, traditional knowledge, utilisation, users, benefits to local communities, etc. As per the information from BMC's, most of the BMC's have started their work to create an e-PBR database. This database will allow the local people or community to update the information using mobile applications. So also several BMC's were also actively involved in updating and validating the existing PBR's.

Table 4: District Wise Total Number of PBR's Prepared in Kerala43

Sl. No.	District	Total no. of PBRs prepared (GPs* + M** + C***)
1	Thiruvananthapuram	73 + 4 + 1
2	Kollam	68 + 4 + 1
3	Pathanamthitta	53 + 4 + 0
4	Alappuzha	72 + 6 + 0
5	Kottayam	71 + 6 + 0
6	Idukki	52 + 2 + 0
7	Ernakulam	82 + 13 + 1
8	Thrissur	86 + 7+ 1

42 *See* for more, (Feb. 02, 2022 8:30 PM), https://www.keralabiodiversity.org/images/2019/November/NGT_Order_dt__09-08-2019.pdf.

43 Official Website of KSBB, (Feb. 02, 2022 8:30 PM) https://www.keralabiodiversity.org/images/2021/January/Details_PBR_preparation .pdf.

9	Palakkad	88 + 7 + 0
10	Malappuram	94 + 12 + 0
11	Kozhikode	70 + 7 + 1
12	Wayanad	23 + 3 + 0
13	Kannur	71 + 9 + 1
14	Kasaragod	38 + 3 + 0
	Total	**941 + 86 + 6 = 1034**
*Grama Panchayats;	**Municipalities;	***Corporations

2) *Model BMC Projects*

In order to ensure conservation and management of various biological resources and other components of biodiversirty, the different BMC's submitted various project proposals. The most important among them have been selected by KSBB as 'Model BMC Projects' and the KSBB has given financial assistance for the successful implementation of these Model BMC Projects. During the 2016-17 period, 11 such projects; during 2017-18 period, 20 projects; and during 2019-20 period, 28 such projects were approved as the Model BMC Projects. All these projects were intended for conservation and management of different aspects of biodiversity including restoration of bamboo forest in the river bank; soil erosion prevention measures; introduction and conservation of mangroves; conservation of sacred groves; conservation and promotion of use of native varieties of rice; conservation of indigenous varieties of mango trees; conservation of traditional tuber varieties; establishment of biodiversity garden; establishment of butterfly park; establishment of Nakshatravanam; establishment of medicinal garden; establishment of biodiversity park; conservation of Ponds and Canals; creation of bio-fencing, etc.[44]As

44 *See* for the year wise list of BMC Model Projects and its Status, (Feb. 2, 2022 8:30 PM) https://www.keralabiodiversity.org/ index.php/activities/conservation-programme/model-bmc.

per the information collected from different BMC's it is found that the BMC's which have received the Model Project, are in the process of completing the project works and other BMC's are in the process of preparing new proposals to the KSBB.

3) ***Identification of Biodiversity Heritage Sites (BHS)***

The Biodiversity Heritage Sites are, "well defined areas that are unique, ecologically fragile ecosystems - terrestrial, coastal and inland waters and, marine areas having rich biodiversity comprising of any one or more of the following components: richness of wild as well as domesticated species or intra-specific categories, high endemism, presence of rare and threatened species, keystone species, species of evolutionary significance, wild ancestors of domestic/cultivated species or their varieties, past pre-eminence of biological components represented by fossil beds and having significant cultural, ethical or aesthetic values and are important for the maintenance of cultural diversity, with or without a long history of human association with them"[45]. The major significance of identifying and declaring an area as BHS is, "to strengthen the biodiversity conservation in traditionally managed areas and to stem the rapid loss of biodiversity in intensively managed areas. It is to be noted that such areas need special attention. Further, such areas also often represent a positive interface between nature, culture, society, and technologies, such that both conservation and livelihood security are or can be achieved, and positive links between wild and domesticated biodiversity are enhanced".

The Guidelines for Selection and Management of the Biodiversity Heritage Sites, 2011 issued by the NBA provides the criteria and procedure for the declaration of BHS's[46]. As per this BMC's can submit proposals for

45 Guideline No.3 of Guidelines for Selection and Management of the Biodiversity Heritage Sites, 2011, See for the full text: (Feb. 2, 2022 9 PM) http://nbaindia.org/uploaded/ut/Final%20BHS%20guidelines%20approved%20in%20the%2019 th%20Authority.pdf.

46 Full text, (Feb. 24, 2022, 8:30 PM) http://nbaindia.org/uploaded/ut/Final%20BHS%20guidelines%20approved%20in%20the%2019th% 20Authority.pdf.

declaring an area which satisfies the criteria's mentioned in the Guideline to SBB's for the declaration of it as BHS. On receiving the proposals from BMC's, SBB can consider the proposal and by following the procedures prescribed in the Guideline can approve it. The declaration of BHS will be made by the concerned government departments as per the recommendation of SBB's. Once an area is declared as BHS's thereafter its management is the duty of such BMC in whose local jurisdiction it is.

As per the information gathered from the BMC's in Kerala, several BMC's have identified BHS and have submitted the proposal to KSBB. In 2019, the Asramom Mangroves situated on the banks of Ashatamudi Lake at Kollam was declared as the First Biodiversity Heritage Site of Kerala[47]. As of now KSBB has approved 12 sites as 'Local BHS' in Kerala[48]. With respect to several other areas, the declaration processes are in progress. Some of those areas which are identified by BMC's are Ramassery (Palakkad District); Pulikunnumala (Idukki); Old Building used by British Officers and Surrounding areas; Old Collector Bungalow and its area beside MSP camp; Mangrove Forest in the Estuary of Bharathapuzha (Malappuram); An area at Azhiyoor Panchayat (Calicut); Madayipara (Kannur District); Kottillam; Chain Tree (Wayanad); Maniyanthramudi, Kallorkadu Panchayat; Athipuzha thuruthu, Karumaloor Panchayat (Ernakulam); An area Pallikara Panchayat; Paranmel Parakkula, Kayoor- Cheemni Panchayat; An Old Tree at Uduma Panchayat (Kasaragod); Kalashamala (Thrissur); etc.

4) ***Biodiversity Awareness Programmes***

From the information collected from different BMC's it is revealed that, several awareness programmes like seminars, talks, pamphlet

47 Ignatius Pereira, *State's First Biodiversity Heritage Site in Kollam*, THE HINDU, Jul, 28, 2017, (Feb. 24, 2022 8:30 PM); https://www.thehindu.com/news/national/kerala/states-first-biodiversity-heritage-site-in-kollam/article19373028.

48 For the list: https://www.keralabiodiversity.org/images/2020/November/Proceedings_Local_BHS_ approval .pdf, (Feb. 24, 2022 8:30 PM); &https://en.wikipedia.org/wiki/List_of_Biodiversity_Heritage_Sites_of_India.

distribution, poster display, etc. were organised by different BMC's in their local jurisdiction to create awareness about biodiversity conservation and the laws. So also they have done several activities in connection with biodiversity clubs at different schools. In Idukki District with the effort of BMC's, BNC clubs were constituted in private schools also. Moreover, several of BMC members have attended training programmes and awareness programmes organised by KSBB and Local Self Governments about the functioning of BMC's, their statutory responsibilities, etc. In certain places the BMC's have identified a group of farmers and other enthusiastic individuals and given training for them. For example 'Farm School' programme in Wayanad District wherein farmers were selected and given adequate training and made the torch-bearers for the conservation of biodiversity.

So also in Idukki District, several people where selected and given training for the purpose of '*Cherutheneecha Valarthal*' (Honey Bee Farming); *Uzhavumadukalde Samrakashanan* (Conservation of Animals useful for Agriculture). The awareness programme like '*Puzha Nadatham*' (River Walk) for creating awareness about river conservation; '*Oru veetil Oru Maram*' (One House one Tree); *Jaiva Vaividhya Pradharshanam* (Biodiversity Exhibition); etc. were organised in different districts by several BMC's. It is reported that, under the leadership of BMC's every year several programmes are organised to commemorate environment related days such as International Day for Biological Diversity; World Wildlife Day; World Water Day; World Environment Day; etc.

5) ***Biodiversity Park (Jaiva Vaividhya Park*)**

One of the most effect ways of conservation of biodiversity is the conversion of those areas which are very rich in biodiversity and contain large number of varieties of plants and animal species. These areas are designated as Biodiversity Parks. Several BMC's have created biodiversity parks at their local jurisdiction. As per the information received from different BMC's, several biodiversity parks have been established in every

district of Kerala and are being maintained by the BMC's. Also in several areas, the said park is in its developmental stage and has received financial support for the same. It is reported that, certain schools have also joined in hands with BMC's to establish such parks.

6) ***Biodiversity Garden (Jaiva Vaividhya Udyanam)***

Several BMC's reported that, they have established Biodiversity Gardens and are maintaining these biodiversity Gardens in their local jurisdiction. It includes several indigenous species of shrubs, trees, fruit bearing trees, etc. The projects like Theerathanal Projects (Planting trees on the banks of river and other water bodies); Avenu Plantations (Pathayora Thanal Vrikshangal Naduka); Santhisthal (A protected manmade forest in educational institutes suppoted by KSBB for conservation of rare and endangered species); etc are actively being carried out and are being managed by different BMC's across the State of Kerala.

7) ***Medicinal Plants Garden (Oushadha Sasyathottam)***

It is reported that, several BMC's have created Medicinal Plants Garden to conserve indigenous varieties and to preserve the traditional knowledge. In this connection several BMC's were actively involved in various projects like, creation and maintenance of Nakshatravanam; Vanavalkaranam; Bamboo Forest Creation; Mapping of Endemic Trees; Conservation of Tuber Crop Diversity; Conservation of Herbs in Tribal Areas; etc.

8) ***Conservation of Native Varieties***

Another major initiative of BMC's in Kerala are the measures taken for the conservation of native varieties of rice, mango, banana, fruit bearing trees, etc. Conservation of native breeds of Goats (Malabari, Attapady black); Cow (Cheruvally and Vechur); Pig (Angamali);as well as High Range dwarf cattle; etc. were also being actively done by different BMC's.

9) ***Significant Interference***

It is reported that, several BMC's interfered with the issues of pollution, illegal encroachment and trespass to river banks, illegal extraction of sand and land mining, wet lands conservation, water bodies conservation etc. In these initiatives, the BMC will approach concerned authorities against such practices and thereby obtained favourable orders. For example, in Pathanamthitta District, several interventions were made by BMC's for illegal cutting of bamboos in river banks and sand mining. Likewise in Wayanad, there were significant interventions made by BMC's for the over exploitation of certain plant produce and for conservation of water channels. In Idukki, BMC's interfered with the destruction of several components of biodiversity like 'Neelakurinji' Plants. In Malappuram, interventions were made for the purpose of protecting sea turtle eggs at the seashore. In Calicut district, BMC's have taken initiatives for disposal of wastes from chicken and other meat stalls. In several other districts, the BMC's have taken initiatives for the effective disposal of plastics and other wastes in collaboration with 'Harthakarma Sena'.

10) ***Several Other Activities***

From the information gathered from different BMC's and other stakeholders the following are the other major activities of BMC's in Kerala.

Some of the major initiatives include encouragement of Biodiversity Clubs in Schools; River Restoration (Nadhi Punrujeevanam); Honey Bee Farming (Theneecha Valarthal); Eco Restoration Plan; Prevention of Unsustainable Fishing using; Prohibition of Monsoon Floodplain Fishery (Oothapiditham); Water Bird Census; Monitoring of Waterfowl Population; Conservation of Pond; Greening of Rain Shadow Regions; Levy of Fees; Conservation of Lake; Conservation of Ponds and Marshes (Chira/Thodu Samrakshanam); Restoration and Renovation of Traditional Water Sources; Prohibition and Control of Sand Mining; Conservation of River Bank; Conservation of Indigenous Fish Diversity; Conservation of Native Inland

Fishes; Prevention of Tresspass and Removal Encrochments in Public Lands; Rice and Pokkali Cultivation; Setting up of Biodivesity Exhibition Centre; Wetland Mapping; Sea Turtle Conservation; Mangrooves Conservation; Rain Water Harvesting Programmes (Mazhakkuzhi); Energy Conservation Programmes; Kottillam (Bird sanctuary spot) Project; Pulimuttu Construction; Mango Tree Planatation; Promotion of Organic Farming; Malinya Nirmarjnam (Waste Disposal); Landslide Prevention Measures; Fish Seeds Distribution; Biodiversity Art Gallery; Conservation of Local Banana Varieties; Kaavu (Sacred Grooves) Conservation; Planting Local Fruit Trees along road side; Propagation and Planting of Traditional Fruit Plants; Conservation of Fruit Trees and Crops; Bio-Fencing; Conservation of Traditional Knowledge; Prevention and Control of Pollution; etc.

Functioning of BMC's in Kerala: Challenges and Difficulties

The interaction with several BMC's and other stakeholders at different levels of local self-governments in State of Kerala has revealed that, the BMC's in Kerala are playing a significant role in the conservation and management of biodiversity in its local jurisdiction. It is to be noted that, in 2018, Eraviperoor BMC of Pathanamthitta District has received best BMC award and the Meenangadi BMC of Wayanad District has received a special mention from the National Biodiversity Authority[49]. Thus, the BMC's are performing a significant role in the conservation and management of biodiversity in their local jurisdictions by themselves and also in collaboration with other agencies and institutions. However, these BMC's are also facing several challenges and difficulties which poses a hurdle to the BMC's in achieving their goal of biodiversity conservation. As per the BMC's some of the most important challenges or difficulties faced by the BMC's and other stake holders are as follows:

49 *See* for more, (Feb. 24, 2022 8:30 PM) https://www.keralabiodiversity.org/images/2020/february/books/annual_report_english_18_19. pdf.

1) ***Strength of BMC***

Currently only 8 members are there in BMC's in most of the Panchayats in Kerala having more than 8 Wards. Hence, there is no representation from each Ward. Moreover, in every Panchayat, there are several interested individuals who are not getting a chance to be part of BMC. Hence, the current strength of only 8 members is not adequate for a body like BMC, wherein maximum local participation and support is necessary.

2) ***Political Interference***

The members of BMC are recommended by political parties in power In most of the cases such members are least bothered about the cause of biodiversity and hence they will continue as member only for name sake in BMC's.

3) ***Non-Inclusion of Interested Persons***

It is reported that, though BMC can constitute volunteers groups from each Panchayat ward, very few BMC's have constituted and taken the service of such volunteers. Being a grass root level institution, its success would always depend upon the cooperation and support of local people. However, most of the BMC's have not been serious in creating such volunteer groups.

4) ***Training Programmes for Members***

It is to be noted that, KSBB has taken several measures for ensuring training to BMC members and also produced literature for reading. However, many of the members never attend these training programmes. The awareness about the law, rules, regulations, guidelines, etc. are necessary for performing the role of a member in a BMC, and thus it is a necessary requirement to undergo such trainings. However, it is revealed that, a large number of members haven't attended any of such training programmes and thus do not have the requisite knowledge or concern about the biodiversity conservation.

5) ***Voluntary Nature of BMC's Decisions***

BMC's will always take decisions for the purpose of conservation and management of biodiversity. However such decisions are subject to the ratification of concerned Local Governments. Hence, in most of the cases, though the BMC's will suggest measures which are highly necessary for the biodiversity conservation, due to its voluntary nature, the Local Governments in many cases will not give much value to their decisions. This adversely affects the functioning of BMC's and also acts as a hurdle against achieving its solemn objectives.

6) ***Indifferent Attitude of Members***

It is reported that, several members of BMC's are just for name sake and not interested in attending meetings and other activities of BMC's. At present there is no mechanism to remove such members. Since the members are the backbone for the successful functioning of BMC's it is necessary to ensure that, the BMC members are active and performs their role effectively.

7) ***Dormant BMC's***

It is reported that, though the BMC's are constituted at all levels of Local Bodies, in most of the Districts, several BMC's are not active and have not taken the matter of biodiversity conservation as a serious issue. Thus it can be seen that, though statutorily, the BMC's are constituted at different levels, the purpose of such constitution is not yet achieved properly.

8) ***Annual Working Reports***

It is to be noted that, the submission of annual report is one of the important mechanism to appraise the functioning of BMC's. The KSBB has been provided with a format for submitting an annual report about the functioning of BMC's. However, such format contains only objective type questions. Hence, it is easy for BMC's to submit the report by filling it. Moreover, it is reported that, large number of BMC's are not submitting

their annual reports. Further, there are no consequences provided for non-submission of annual reports.

9) ***Non-Representation of BMC Members***

At different levels of local governments, it is mandatory to constitute a Standing Committee for Development. This Standing Committee is in charge of dealing with the subjects of planning of development; soil conservation; agriculture; fisheries; animal husbandry; irrigation; etc. Hence, several of their decisions have an impact over the biodiversity. However, BMC members are not involved in any such committees. Hence, in most of the cases the decisions of Standing Committee for Development will fail to consider the subject of biodiversity conservation.

10) ***Appraisal of BMC's Functions***

There is a mechanism for collecting annual reports from BMC's, however there is no mechanism for appraisal of the functioning of the BMC's. This absence is ironically like a blessing for those BMC's who were in dormant stage. As many BMC's do not submit the reports and there is no consequence for non-submission of the reports, the appraisal of the BMC's is also affected and is not satisfactory. Though, the introduction of awards for best BMC's is a positive measure in this regard ,the absence of a proper mechanism to supervise the working of BMC's is a serious lacuna and challenge.

11) ***Awareness among the Public about BMC***

It is reported that, there are several Panchayats where common people are unaware about the scope and significance of BMC's. The public support is one of the essential requirements of the successful functioning of any BMC. However, the lack of awareness among the common public about the BMC, will adversely affect the effective functioning of such BMC's. Moreover, though BMC is constituted in every Local Bodies, in certain places, the local people are unaware about the members of these Committees.

Though a few BMC's are in the forefront for organising awareness programmes for the common public; a large number of BMC's are not actively involved in creating awareness among the public.

12) ***Vested Interests of Parties***

In every area there are some parties who have an interest over several biological resources, and they will torpedo the decisions of BMC's by influencing the Local Governments. Hence, in such cases, though the BMC's emphasise and stand for the conservation of biodiversity, the decisions and activities will be affected and may not be highly successful due to vested interests of some parties.

13) ***Local Biodiversity Management Plan***

It is one of the duties of every BMC to prepare a Local Biodiversity Plan in accordance with the PBR. Several BMC's especially Municipality level and Corporation level have developed an action plan. However, most of the Grama Panchayat level BMC's have not yet prepared a Management Plan. The absence of a proper plan will always be detrimental to the functioning of BMC's.

14) ***Poor understanding about ABS***

One of the major purposes of Biodiversity Act is to regulate the access and benefit sharing arising out of the use of biological resources. However, it is revealed that most of the BMC's are unable to understand the process of access and benefit sharing and the related matters. Since the BMC's have a greater role in dealing with access and benefit sharing as well as levying fees, the poor understanding about this process will adversely affect the functioning of BMC's.

15) ***Conservation of Traditional Knowledge***

There are some BMC's working in connection with tribal areas and other areas. They are concerned about the conservation of traditional

knowledge and in some places under the leadership of BMC's certain groups were formed for the protection of traditional knowledge. However, it is reported that, only few BMC's are concerned about conservation of traditional knowledge and several BMC's were not actively involved in the process of conservation of traditional knowledge.

16) ***Delay in Disposal of Requests/Recommendations***

It is reported that, there is always inordinate delay in getting response from Local Governments about the requests/suggestions and recommendations of BMC's. For the effective functioning of BMC's it is necessary that, the Local Governments should respond immediately to their requests.

17) ***Lack of Coordination with other Agencies***

In most of the areas several other agencies like Haritha Karma Sena; Certain Clubs; NGO's; Environmentalists; etc. are working for the protection of different components of environment. However, it is reported that, there is a lack of coordination among these agencies and BMC's are not actively collaborating with these agencies.

18) ***Private Ownership***

It is reported that in most of the cases biodiversity conservation will interefere with those areas which are under the ownershp of private individuals, temple administrations and other organisations. It is to be noted that, mostly the biodiversity rich areas such as sacred groves, wetlands and barren lands are under the control of private parties. Hence, dealing with those areas and implementing decisions of BMC's are not that easy.

19) ***Poor Awarness about Environmental Watch Group***

One of the important roles of BMC's in Kerala is to act as an 'Environmental Watch Group' in the area of their local jurisdiction. Unfortunately, it is reported that, most of the BMC's were unaware about

their role as an Environmental Watch Group in their locality and hence has not taken any initiatives in this regard.

20) ***Lack of Enthusiasm in updating and Validating PBR***

In State of Kerala, the process of preparation of PBR is completed in December, 2020 and it is currently in the process of digitalising as ePBR's. However, it is reported that, several BMC's are not actively involving in the process of validating and updating the existing PBR's.

21) ***Lack of Financial Support to BMC's***

It is reported that, one of the major difficulty faced by BMC's are the lack of financial assistance to their activities.

22) ***Lack of involvement by MLA's, MP's & Gram Sabha's.***

It is reported that, there is no much involvement of MLA's and MP's of concerned areas in the functioning and meetings of BMC's. Moreover, in most of the places BMC's are not coordinating with Gram Sabha's in the matter of conservation of biodiversity.

Conclusion

The Biodiversity Act, 2002 mandates that all the local bodies in the country should constitute BMC's in their different level. Further the Biodiversity Rules and Kerala Biodiversity Rules, has provided the details of its composition, powers and functions. Hence, in State of Kerala at all local governments i.e. at all Corporations, Municipalities, District Panchayat's, Block Panchayat's and Grama Panchayat's level, the BMC's were constituted. Though the Kerala Developmental Model poses several threats to the biodiversity in the State, the functioning of BMC at different level has succeeded in overcoming most of those threats.

It is to be noted that, the BMC's across the State of Kerala have been doing wonderful initiatives for the conservation of biodiversity in their local

area of jurisdiction including activities such as river restoration; removal of land and river bank encroachments; conservation of native varieties; wetlands; establishment of biodiversity parks; gardens; medical parks; bio-fencing; butterfly parks; etc. The working of BMC's in Kerala for the last one decade also underscores the key position of BMC's in dealing with the issues relating to biodiversity conservation. However, the information gathered from different BMC's and other stake holders, reveals that, the BMC's are also facing several practical difficulties and challenges. Hence, considering the strategic position of BMC's as a crusader for the conservation of biodiversity at local level, it is necessary to overcome those difficulties and challenges. The following pragmatic solutions are offered for overcoming the various difficulties and challenges and thereby strengthening the functioning of BMC's in Kerala in more fruitful manner:

1) ***Increasing of BMC's Strength***

Currently, the BMC's consist of only 8 members including the Chairperson and Member Secretary. Though in every locality several persons are interested in the cause of biodiversity they will not get chance to be involved in BMC due to this limitation. Hence, if the number is increased, all those persons can be accommodated and the BMC's can perform their function very well. So it is suggested that that the membership should be increased up to minimum 18 besides the Chairperson and Member Secretary. At least one should be selected from each Wards of the concerned Panchayat.

2) ***Formation of BMC***

It is necessary to develop a mechanism to form BMC's with such members who are committed to the cause of environment and biodiversity conservation. Political interference in the way of nominating members who are least bothered of conservation is to be curbed.

3) ***BMC Volunteers***

It is necessary to set up BMC Volunteers in each Ward of Panchayat so that interested persons can be accommodated as a part of the official structure. If a person is designated as a BMC Volunteer, it will be encouraging for him to become active at his own level and support the activities of BMC.

4) ***Training of Members***

As BMC's can perform a multitude of functions in connection with the conservation of biodiversity, the members should be properly trained and equipped with the sufficient knowledge about concerned law, polices, action plans, strategies and other measures. The role of BMC's as an Environmental Watch Group in their locality should also be explained well and a guideline in this regard is a welcome step. It is to be made mandatory that immediately within one month of the constitution of BMC. The members should attend the training programme, and the District Coordinators should make sure that, such training programs are conducted successfully and all the members attend the same.

5) ***Official Status of BMC***

The BMC should be given a mandatory status rather than being a voluntary group for protection of biodiversity. The decisions of BMC's should have a binding effect and the local governments should not be allowed to reverse the decision. In case of any dispute between, the BMC and Local Government, the matter should be referred to KSBB and the decision of KSBB should be considered as final in this regard.

6) ***Attendance and Removal of Members***

It is necessary that, all the members of BMC's should attend the meetings and in case of continuous absence for more than three meetings, such members should be removed and replaced with other interested persons.

7) ***Number of Meetings of BMC's***

Currently, the rules prescribe at least four meetings in a year, instead of this, the frequency of meeting should be increased in such a way that at least one meeting is conducted in every month. It will encourage the BMC members and public to participate actively and involve in biodiversity conservation related activities. Since all the members of BMC's are from the locality, monthly meetings will not be a difficult task and the committee will be vibrant in this way.

8) ***Dissolution of BMC's and Reconstitution***

Due to several reasons the BMC's may not able to convene meetings regularly and take measures for the conservation. If there is a continuous default in conducting three meetings, the District Coordinators should report the matter to KSBB and accordingly the concerned BMC's should be dissolved. As far as possible the BMC's should be reconstituted with new members, with immediate effect.

9) ***Report to District Coordinators***

The BMC's should submit the minutes of each meeting to the District Coordinators within seven days of each meeting. In case of continuous default in such submissions, the KSBB has to direct the concerned Panchayat to reconstitute the BMC's with new members. Moreover, there should be appropriate rule which makes the submission of annual reports mandatory and in case of default such BMC's should be dissolved.

10) ***Reappointment of Members***

A person can be appointed any number of times if he is committed to the cause of biodiversity. However, in case of wilful default on his part in attending the meetings and performing other functions assigned to him by the BMC, he should be replaced with another person and subsequently he should not be included in the BMC for at least next 10 years.

11) ***Inclusion of BMC Representatives in Standing Committee for Development***

In every local body, the Standing Committee for Development is the primary body dealing with the matters of development and therefore their decisions will have a direct impact on the biodiversity. Hence, a BMC representative should be included in every such Standing Committee so that the concerns of biodiversity can be introduced in the discussion of such Standing Committees.

12) ***Appraisal of BMC's Functions***

An annual appraisal mechanism for the functioning of BMC's is necessary to encourage the effective functioning of BMC's. Based on the annual reports, every year the District Coordinators should give an appraisal report about the working of BMC's and those BMC's which fails to secure a minimum grade should be encouraged to perform better in coming years. The appraisal repost of District Coordinators should be made available to the public through the web portal.

13) ***Awareness about BMC***

The support of common public is an essential requirement for the successful functioning of BMC's and the conservation and management of biodiversity. Hence, it is necessary to create awareness among the general public about the functioning of BMC and its various activities. The names and other details of BMC's should be made available in the website of all local bodies.

14) ***Authority to Approach KSBB***

The BMC should be given the statutory authority to approach KSBB against the decisions of Local Governments. This will help the BMC to implement those decisions for the conservation of biodiversity and to prevent the interference and influence of the parties with vested interests.

15) ***Local Biodiversity Management Plan***

Preparation of a Management Plan is one of the essential requirements for the effective functioning of BMC's. Hence, adequate support should be provided by KSBB for developing a Management Plan by the BMC's.

16) ***Training for ABS***

The BMC's should be given adequate training for dealing with the matters relating to commercial use, access and benefit sharing of biological resources. The KSBB has to ensure that, at least few members in BMC's have a clear understanding about the matters about ABS.

17) ***Conservation of Traditional Knowledge***

The BMC's should be given proper training and awareness about the conservation of traditional knowledge and its use. So also BMC's should be encouraged to identify and preserve the traditional knowledge present in their local jurisdictions.

18) ***Speedy Disposal of Requests/Recommendations***

The requests/recommendations of BMC's should be considered at the earliest and be disposed of ,in keeping the object of biodiversity conservation. It is appropriate to formulate necessary rules which mandate the Local Governments to deal with the requests/ recommendations of BMC's.

19) ***Coordination with other Agencies***

It is necessary that to ensure BMC's should work in hand with other agencies that are also into the field of protection of environment in one way or other way. It is to be noted that, a joint and coordinated efforts can do wonder to the conservation of biodiversity in the State.

20) ***Private Ownership***

The private ownership of biodiversity rich areas poses a hindrance to the effective conservation of biodiversity. Hence, it is necessary that to formulate appropriate policies for conservation of biodiversity in those areas under the private ownership.

21) ***Validation and Updation of PBR***

PBR is the base document for preparation of Management Plan and other conservation efforts at the concerned local areas. Hence, an appropriate monitoring should be made by the KSBB about the role and activities of BMC's in connection with the updation and validation of PBR's.

22) ***Yearly Presentation of Biodiversity Status***

Every year along with the budget presentation of Local Government, a status report of biodiversity in such area should also be presented. So also the future plans for the conservation of existing biodiversity should be outlined.

23) ***Financial Support to BMC's***

It is necessary to provide adequate financial assistance for the effective functioning of BMC's.

24) ***Involvement by MLA's, MP's & Gram Sabha's.***

The MLA's and MP's of the concerned areas should actively participate in the meetings and other activities of BMC's as far as possible. Since they are influential persons among the common public, their participation will have lot of significance. So also BMC's should coordinate with Gram Sabha's in connection with the activities relating to conservation and management of biodiversity.

The threat to biological diversity arises from various sources and hence apart from legal framework, the governments, judiciary, industries, civil

society and individuals should also play a decisive role at their own level. The civil societies must recognise and acknowledge the significance of biodiversity and adopt eco-friendly patterns and way of life. The three R's-i.e. Reduce, Re-use and Recycle, must be adopted in the daily life in order to reduce the pressure on natural resources and biodiversity and to reduce the environmental degradation and pollution. Such a comprehensive and holistic approach can curb those practices which have an adverse impact on the biodiversity and thereby ensure effective conservation and sustainable use of biodiversity. We must remember here: "To restore stability to our planet, therefore, we must restore its biodiversity, the very thing which we have removed. Restoration of biodiversity is the only way out of this crisis that we ourselves have created. We must modify and change our activities for protection and conservation of biodiversity"[50].

50 David Attenborough, *A Life on Our Planet*, (Feb 24,2022,9 PM)www.attenboroughfilm.com.

Contractarian Defense of Humanitarian Intervention: Outlook of John Rawls and Jurgen Habermas

Shivangi Singh*

Introduction

> "We tried war, we tried aggression, we tried intervention. None of it works. Why don't we try peace, as a science of human relations, not as some vague notion - as everyday work.As diplomacy, as respect, as understanding the essential inter-connectedness of all people, that we're really one. This dichotomous thinking that causes us to think of people as others instead of aspects of undivided human unity is what causes our dilemma." — *Dennis Kucinich*[1]

The world is rarely witnessing war in today's era but does that imply there are less injustices or conflicts happening in world today. Actually, the opposite is the reality. Thousands of individuals are becoming victims of civil wars, regional armed hostilities, genocides etc lately unlike in the past. It's a desperate time worldwide. Its unforgettable how millions of people, mostly innocent civilians' non-combatants lost their lives in conflicts in the 20th century. The only individuals who are really broken-down in these conflicts are innocent people, possibly a million of innocents in Iraq who

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1 *'Why Don't We Try Peace?': An Interview With Dennis Kucinich*, THE NATION, (Jun. 26, 2023, 20:09 PM),https://www.thenation.com/article/archive/why-dont-we-try-peace-interview-dennis-kucinich/.

are dead and thousands many whose lives are so damaged that it is now beyond any repair or improvements. We should not forget about the country which is just lying down ruined and thousands of American soldiers who died or became permanently disabled and their desperate families.

Ken Follet in his novel, *The Fall of Giants* pictures how countries slip into war. The world is unknowingly sliding into a very big war. The nations believe that the wars are not happening but the reality is nations need to suspend their disbelief and accept the reality that when you prepare for war, you get war. The author doesn't want to predict that there will be a war but the author believes we've done it all wrong. At this point, we need to stop acting that nations are getting ready for war and start communicating that we are preparing towards peace.

There is an uncertain amount of disagreement among the international community on how to react towards the gross human rights violations which are result of the 'new wars'.[2] Few stress that it is a unquestionable duty for the UN while others argue that for maintaining international peace, the essential condition is unrestrained national sovereignty .Despite unending debates, foreign interventions are seen as appropriate response to these kind of domestic armed conflicts. The emergence of an intense widespread debate over doctrine of 'responsibility to protect' is the current assertion in this direction. This doctrine seeks to justify humanitarian intervention in cases of gross human rights violations.[3]

John Rawls and Jurgen Habermas have developed theories of just international relations which have its roots in Kant's doctrine of 'perpetual peace' among nations. 'Perpetual Peace Model' of Kant was one of the

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2 Mary Kaldor, NEW AND OLD WARS: ORGANIZED VIOLENCE IN A GLOBAL ERA (1999).

3 *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignity,2001,*GCR2P(June. 26, 2023, 20:09 PM),https://www.globalr2p.org/resources/the-responsibility-to-protect-report-of-the-international-commission-on-intervention-and-state-sovereignty-2001/.

initial peace ventures. John Rawls played a big role in reviving the contract tradition. John Rawls and Kant led cosmopolitan school presents an unconventional model of 'world governance' which provides for better human right protection. The outlook of Rawls along with Jurgen Habermas tends to justify the theory of Human Rights and Humanitarian Intervention as a political instrument to re-establish peace and justice by building an imaginary concept of 'global governance'.

Rawls and Habermas endorse two different theories of legitimate humanitarian military intervention, i.e., ideal theory of intervention and non-ideal theory of intervention. As per Rawls, the well-ordered societies have high levels of legitimacy which gives them the entitlement to fight a 'just war' against the criminal states. However, Habermas concern is over devolution of arbitrary world politics wherein a self-proclaimed powerful democracy decides wars and peace. Habermas states that humanitarian intervention can be legitimized only if they are in consonance with procedures of international law. Thus, both thinkers consider 'outlaw states' and tyrannical leaders as constitutive ingredients for legitimization of humanitarian intervention. It is intriguing here to note that Rawls straight away wants to resort to military intervention to deal with 'outlaw states' whereas Habermas, on the other hand, considering Kantian distinction of law and morality, seeks to resort to military intervention only in cases of gross human rights violation by criminal states and thereby, excluding the word 'outlaw states' from his interpretations.

View Point of John Rawls

Human Rights and Humanitarian Intervention

Rawls in his seminal work 'Law of People' has given his outlook on humanitarian intervention and his concept of human rights. Following are the human rights prescribed by John Rawls:[4]

4 Samuel Freeman, RAWLS 435(1st ed. 2008).

- Rights protecting Life and Integrity, including means necessary for subsistence
- Rights protecting Liberty (freedom of movement, servitude, forced employment, hold property, etc.)
- Right to Equality and assured protection of Rule of law (due process, fair trials, etc.)
- Freedom of thought and expression
- Liberty of conscience
- Freedom to form association.

It is obvious from the above enumerated rights that Rawls' list of human rights includes the basic civil liberties. According to him, enslaving people, letting them starve, and unfair prosecution renders individual incapable of social cooperation and exercising their rational good. People who are denied of basic human right are like slaves who do not cooperate unless compelled and manipulated.

Samuel Freeman has portrayed the idea of Rawls on human rights and humanitarian intervention in following words:

Within Rawls 'Law of Peoples', the main role of human rights is to set boundary over the exercise of immeasurable powers of government. Sovereignty cannot work as a defense, if a government violates the human rights of its people. In cases wherein government violates the human rights of its people consistently, the government automatically loses its right to rule and right to represent people whose interests were violated by the very own government which sworn for its protection.

In this regard, the government is an 'outlaw' regime possessing no immunity under the Law of People from intervention of some other people. If the violation of human rights is gross, other people are free to dispose and substitute the outlawed government.

The government that respects the human rights and common interests of the people can wage war against other government only in self-defense or to defend the human rights of people whose rights are violated by their very own or other government.[5]

Rawl's 'Law of the People' is delivered on the promise of contraction account of law of nations. John Rawls follows Kant on many accounts but in his work, he has expanded the horizons of humanitarian intervention, exclusive of his arguments on global justice. 'Law of People' is part as well as an extension of liberal political concept of justice.

As per Rawls principles,attributes of a just government is enumerated as follows:

i. Respect Human Rights
ii. Respect freedom of people
iii. Observe treaties and undertakings
iv. Observe duty of non-intervention
v. Respect for equality of persons in agreements and relation
vi. Wage war against another government only in self-defense and protection of human rights of persons unjustly attacked
vii. Assisting persons who are burdened and living in unfavorable conditions to prevent their harm in a just social regime.[6]

The principle behind the Rawl's argument is based on a second original position, wherein well-ordered liberal peoplecollect to figure out their terms of cooperation unaware of which society they are representing. All of them concur to rules of Law of People which is covered by a veil of ignorance hiding all realistic information about their own society and others. First position being, the position which is connected to his outlook on theory of

5 Samuel, *supra* note 4, at 437.

6 Samuel, *supra* note 4, at 427.

justice, wherein rational people enter into a contract unaware of their status in a society.

Rawls' Ideal Theory v. Non-Ideal Theory

John Rawls through his classical treatise 'Law of People' in 1991 has applied his own theory of international law and world politics. He declared his proposal was a 'realistic utopia'.[7] In order to increase the practicability of his treatise, Rawls formulated 'Law of peoples' in two parts. The 'ideal theory' part upholds the law of peoples. Exactly, it reasserts the moral principles which helps in the assessment and interpretation of present laws and formulation of a new law. On the other hand, the 'non-ideal' theory part focusing on how ideal principles are to be applied and supported by people who for various causes are unwilling to respect the law of peoples.

As per his ideal theory, there are two levels in which it proceeds. Initially in the first step, liberal citizens of democratic societies justify the principles for law of people. Rawl's work 'Theory of Justice' in 1971 envisaged 'first original position' as providing representation to citizens at the national level. In the domestic original position, moral duties agreed to by individuals are owed to world at large, not only to members of their own societies. Hence, it can be said that law of nation extends the natural duties with the responsibility of defining the nature and scope of their duties. In the second step, 'second original position' is applied at the international level.

In International theory, Rawls determines two major players, i.e., democratic states and non-democratic states, making an important classification in legitimacy of government forms. There exists a double legitimization process within well-ordered societies and between well-ordered and hierarchical states, wherein the high standards norms of legitimacy are modified and adjusted to non-democratic states. Here, Rawls focuses on the hierarchy of legitimate models of government. Rawls sees democracies as most just and legitimate form of government entities as seen

7 John Rawls, THE LAW OF PEOPLES (1999).

in Kant's theory of Perpetual Peace. Democracy have certain rights and obligations that make them different from other societies. Democracies because of their nature have more rights than non-democracies The normative superiority of democratic society empowers them to exert pressure on defective tyrannical societies to become democratic. This is why Habermas believes that democracies can conduct 'just war' against 'outlaw states'.

Rawls had distinguished 'just society' from a decent society and then distinguished both from an 'outlaw society'. As defined by Rawls, a society which is peace-loving and non-expansionist, the one guided by justice and common good with a decent consultation hierarchy, honoring the basic human rights of its members is a decent hierarchical society.[8]

The above-mentioned outlook seems similar to Kant's in 'Perpetual Peace' and even Rawls is of the view that liberal societies have responsibility to non-liberal ones. However, this duty does not call for intervention. In this regard, Rawls view is completely different with that of Kant. Rawls urges for humanitarian intervention in words of Samuel Freeman:

Rawls duty of non-interference implies a duty of non-assistance to states undergoing democratic liberation movements. Rawls has invited many objections on this view. However, duty of interference allows assistance to tyrannical and outlaw regimes. Duty of non-interference prohibits giving assistance of democratic resistance to decent hierarchical regimes only. This allows a possibility for assisting democratic resistance which is possible to turn out effective. A decent non-liberal society is seen as different because it is considered capable to self impose democracy on its own.[9]

Dealing with the 'outlaw' States

Both Rawls and Habermas were influenced by Kant's idea of 'Perpetual Peace' and developed different theories. However, both of them supported military humanitarian intervention as a political instrument to re-establish peace

8 *Id* at 97.

9 SAMUEL, *supra* note 4, at 433.

and justice. Rawls says, 'well ordered societies' with high legitimacy levels are empowered have to engage 'just war' against tyrannical criminal states.[10]

As per ideal theory of Rawls, peoples is internally a well ordered society and externally a well behaved state in which law of people is respected.[11] But all societies are not well behaved society. That's when we look at non-ideal theory wherein Rawls discusses strategies to create 'Society of well ordered people' i.e., the societies which lack the ideal of justice. Rawls then, describes the three types of defective societies:[12]

a. Burdened societies are societies which are non- aggressive or non-expansive but are short of political and cultural conditions, know-how, labour force along with material and technological resources internally to become well-ordered societies despite their aspirations. For instance, Russia, Vietnam, Angola and Tanzania stand first in queue to cross the line and become 'Society of Well ordered People'.[13]

b. A society with benevolent absolutism, which respects human right, is non-aggressive in nature and has material and technical resources for development but does not afford its citizens with right to self-determination. For instance, U.A.E., Jordan or Khartoum are different from decent hierarchical societies as they do not give their citizens any meaningful role in political self-determination.[14]

c. Outlaw states ,internally infringes basic human rights of people and are unwilling to act externally in accordance with law of peoples.[15]

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10 Regina Kreide, *Preventing Military Humantarian Intervention? John Rawls and Jurgen Habermas on a just Global Order,* GERMAN L. J. 94(2009).

11 Rawls, *supra* note 7 at 35.

12 O´Donnell, *On the State, Democratization and Some Conceptual Problems. A Latin American View with Glance at Some Post"Communist Countries,*21 WORLD DEVELOPMENT, 1355 (1993).

13 Rawls, *supra* note 7, at 106.

14 Rawls, *supra* note 7, at 92.

15 Samuel, *supra* note 4, at 29.

> Rawls, tries to distinct between two types of outlaw states, firstly states which are externally non-expansionist but internally repressive and secondly, the states which are both internally repressive and externally expansionist.

Thus, according to Rawls 'outlaw States' have their own definite territory and government but lack the basic characteristics of a legitimate state. In words of Regina Kreida, outlaw State lack a considerable constitution that guarantees basic human rights, rule of law, ensures transparency and accountability in the regime and maintain a cooperative relation with foreign states. As per Rawls, " peoples are states but not all states are peoples.[16] Likewise, all peoples are societies but neither all societies are peoples, nor all states are societies."

Rawls proposes a 'confederate center' that symbolizes'common opinion and policy' of well-ordered societies with regard to non-well-ordered societies in the public eye. "The center alone exposes the human right violation of oppressive regime, a kind of naming and shaming to the name of the 'Society of well-ordered'."[17]Simultaneously, he advises neither institutional arrangement nor any further ways of communicating. Presuming that for Rawls, Iraq qualifies as an outlaw state, the only option left for democracies is military conflict.[18] Irrespective, whether the state is expansionist or non-expansionist it seems to be true.

As per Rawls suggestion, if outlaw states want to participate in regimen of social cooperation, it is impossible without adherence to human rights. When the UN sanctions do not work, military intervention is the last resort left.

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16 Henry Shue, RAWLS AND THE OUTLAWS, POLITICS, PHILOSOPHY & ECONOMICS 307- 308 (2002).

17 Rawls, *supra* note 7, at 93.

18 Samuel, *supra* note 4, at105.

Rawls 'Duty of Assistance'

John Rawls incorporated 'duty to assist others' into the "fundamental charter of the Law of Peoples".[19]Rawls believes that independent democratic states have a duty to assist burdened societies to digest them in law of peoples. The burdened societies lacking necessary infrastructure should be helped by world community to help them for proper assimilation in global order. Only those societies are to be assisted which have non- aggressive foreign policy, lack political culture and material and technological resources to become a well-ordered society.The objective of material and technical assistance should be to establish just democratic institution. It is seen as a significant step in promoting global justice. This portrays that Rawls understands that a specific standards of living is essential for people. Here, Rawls becomes aware of menace of global poverty. The duty to assist will improve living standards of people to different extents. Indeed, "Right to assistance" will lead to the institutionalized guarantee of political rights, equality of opportunity and a difference principle.

Samuel Freeman summed up his idea:

"Rawls duty of assistance is not a charitable duty rather it is a duty of justice that well-ordered people owe to burdened people existing under unfavorable circumstances. The duty of assistance is as a much a duty of justice as is the domestic duty to save for future generation. Like the just savings principle, the duty of assistance too should aim 'to secure a social world that makes possible a worthwhile life for all.' The duty of assistance also resembles individual's natural duty of mutual aid; it extends this duty of individuals to peoples." [20]

Interestingly, Rawls had excluded people living in outlaw regime from the benefit, since their leading body does not intend to establish a fair social structure. As per the author, such kind of restrictions are not adequate which

19 Rawls, *supra* note 7, at 37.

20 Samuel, *supra* note 4, at 441.

leave citizens fearing to raise voice against the tyranny. Their circumstances are such that they should be the actual beneficiaries.

However, the situations have changed in today's era. The norm of 'Responsibility to Protect' is now broke to incorporate the principle of 'duty to assistance'. A new concept of 'Responsibility to rebuild' can be seen explicitly incorporated in idea of Rawls. The emergence of significant concept of 'State Building' and conveyance of 'conflict management' with 'humanitarian intervention' has boosted a shift to progressive regime.

Outlook of Jurgen Habermas

Constitutionalisation in the Making

On the other hand, Habermas provides a diverse approach to the problem. He has taken into account Kant's 'Perpetual Peace' as a conceptual understanding. Habermas focuses on foundation of democratic constitution state, similar to Rawls. Unlike Rawls, Habermas seems unsure about the utopian idea of 'world republic'. Harbermas realized from his understanding of multi-leveled system that there is need of 'Constitutionalisation' of International Law. His visions on 'world republic' is the result of this realisation which seems to be borrowed from the Kant's viewpoint of 'World State' from which states are free to withdraw voluntarily. [21]

He had introduced constitution notions on international level that complement each other. In his view, the formation of democratic will in an organized federalist multi-tiered system is fragmented and works in various channels of community, country, state, provincial, intercontinental and supranational level in a parallel way.[22]

Additionally, Habermas explores the array of possibilities amid individualistic federal world republic legal state and global society. The

21 Jurgen Habermas, KANT'S IDEA OF PERPETUAL PEACE, WITH THE BENEFIT OF 200 YEARS HINDSIGHT(1997).

22 Samuel, *supra* note 4, at 100.

institutions and procedures for global governance are reserved by global society for states only.

According to Regina Kreide, there are two approaches of world citizen. First approach starts with the world citizen before realizing on the supranational level, moving towards member states with full-fledged rights. In this approach, there is materialization of justice through peace and human rights politics of the global structure. The second notion, considers citizens firstly part of their respective nations and then of transnational organizations like UN, WTO etc.[23]

The approach of Habermas can be described as the 'Constitutionalisation in making' as well as developments of democratic governance on transnational and supranational level. Unlike, Rawls he has not build his theory on stratification of states. Habermas has proposed a leveled notion of legitimacy which leads to a just world order wherein a well-ordered states tops the ranking. Rather, its the legitimacy of setting processes of law that is leveled as per the criteria. Habermas believes that the legitimate juridification leads to a just world order whereas Rawls believes that political processes are directed by justice. Their different understanding of role of morality and politics makes their opinions contrary to each other with respect to military humanitarian intervention.

Political Involvement of 'Outlaw' States

The debate on Habermas 'constitutionalisation of international relations' provides the readers an understanding as to why "outlaw states" stay behind in the discussion of political theory. Preferably, military humanitarian intervention needs to be a police action that is lead by a international executive institution against a government which conducted criminal offense on its own people. The approval of UN Security Council is necessary to consider a police action legitimate. It should be carried as per the approved procedure.[24] Therefore, a military humanitarian intervention

23 *Id*. at 101.

24 Giovanna Borradori, PHILOSOPHY IN A TIME OF TERROR: DIALOGUE WITH JURGEN HABERMAS AND JACQUES DERRIDA 39 (2003).

is not actually directed against the whole state but against the despotic government with a view to bring responsible individual offenders against the International Criminal Court.

Based on previous discussions, it becomes clear that Habermas and Rawls have different conceptualization about humanitarian intervention. Except for certain exception, Rawls asserts that the right to self-determination of sovereign should not be violated by third party even during war with another state or civil war. For Rawls, the exceptions can be cases of gross human right violations. The democracies are entitled to decide whether they want to exercise their right to intervene or not in such exceptional cases. Whether or not well-ordered societies intervene and carry on their corresponding duties depends on various factors like cost involved, urgency of matter, success rates, pressure of general public, etc.

Habermas suggests the human rights must be saved from a tyrannical regime and in absence of government for the world community. The individual right holder demands the realization of his rights in a situation of emergency in presence of a tyrannical government. He considers military humanitarian intervention as a police action and demands that the individual executor be subject to international criminal court as a result of his idea of 'constitutionalisation of international relations.'[25] Therefore, it can be said that Habermas suggests the right tobe saved from tyrannical regime rather that giving states with the right to intervene.

Habermas focus on 'individual right holder' can be the reason why Habermas supported the NATO attacks on Yugoslavia. He argued that these attack could have stopped Milosevic regime from committing crimes against humanity. As per Habermas, NATO's actions were legitimised through implied authority of being a world citizen community.[26] However, Habermas concludes that the NATO's intervention was not perfectly legal even though it was legitimate. Habermas says that even if it is fully justified moral claim,

25 *Id.*at 105.

26 Habermas, *supra* note 21, at 35.

it can never be an appropriate reason for humanitarian intervention. Every occasion of humanitarian intervention must have a juridical remedy to avoid a chance of arbitrary international politics.

Habermas states that the rights of a person towards the global community defends citizens from oppressive polity. Even though justice is founded on moral grounds, it is impossible to realize it without a juridical process within nation or beyond. It is impossible for political processes to get over mistrust, misunderstandings and conflicting interests among political players, if they alone have a purpose of political inclusion.In the 'deliberative approach' there are institutional measures for cooperation between democratic and non-democratic societies below military humanitarian intervention. In contrary, as per Rawls theory the value-based hierarchies are primarily supported by political and communicative processeswhich are the outcome of the original positions contractual agreements. This leads to forming a purpose of military humanitarian intervention wherein democratic societies can intervene to restore peace between states and secure basic human rights of citizens.

Habermas Utopian Approach to Global Justice

The proposal of Habermas for a 'world domestic politics' offers a double-edged conception of supranational justice. One notion believes in a minimal realist view of 'world domestic politics' wherein the purpose of justice is to secure human rights and prevent wars. This notion prioritizes peace keeping above everything else.[27] The other notion is utopian in nature which proposes for a global executive institution that will guide world domestic politics as per principles of global justice.[28]

Habermas believes that international organisations like UN, WHO, WTO etc. should promote social and cultural human rights.[29] For example,

27 Habermas, *supra* note 21, at 143.

28 Habermas, *supra* note 21, at 406.

29 Habermas, *supra* note 21, at 335.

fighting with the menace of AIDS worldwide demands for a non-functional engagement by WHO at a global level. In the ambitious approach, poverty can be seen as a unquestionable issue of global justice. Poverty reduction should be dealt as a human rights issue. More people die from curable diseases because of poverty than people that are killed in war.[30] The reason alone is enough to fight this issue at the supranational level. International institutions making financial and economic decisions about loans and offering military and development aid should look out for people in poor countries.

Habermas suggests a negative notion of justice which assumes negative notion of duties which hopes to create a thin but stable agenda of the state community.[31]Principles of global justice are the basis of a global basic structuree at the domestic, regional, transnational or world level. Principles of justice includes wide array of human rights like access to resources for subsistence and political participation. Principles of justice aims to avoid arbitrariness. International rules can seem just only if those people who are affected by such rules form part of establishing those rules. This permits people to move to a just global political order, political participation in itself being an indispensable condition for a just public order. This also leads to legitimization of human rights.

However, Habermas provides a very narrow interpretation of his concept of supranational justice which is not convincing and neither is humanitarian duty of democratic states to assist the not yet democratic societies. In order to address the justice of a global political order, it is essential that global justice should be founded on an institutional approach.

Conclusion

Kant's Perpetual Peace Model is the hallmark which considers humanity and democracy as most essential part of a liberal global culture. However, it has been argued that the merits of humanitarian intervention

30 Thomas Pogge, WORLD POVERTY AND HUMAN RIGHTS: COSMOPOLITAN RESPONSIBILITIES AND REFORMS (2002).

31 Habermas, *supra* note 21, at 143.

outweigh it demerits. Thomas asserted the concept of state that cannot be pierced but Rawls, Habermas, Kant and other exponents have pierced the veil through their arguments.

The radical interpretation of Kant's Perpetual Peace model has been made in this paper. The author tries to show that the Kant's idea of non-intervention can now be interpreted for supporting humanitarian intervention. The development of 'Responsibility to Protect' doctrine has moved this idea from a mere utopian model to reality.

The viewpoint of Rawls and Habermas holds equal importance. Rawls encourages humanitarian intervention for scattering of democracy and Habermas advocates for criminal prosecution at the global stage. These ideas were advocated to strengthen the doctrine of responsibility to protect with the help of tools of responsibility to react and to prevent.

Rawls 'Law of People' asserts that any government which threatens the survival of its citizen is unreliable and illegitimate regime. According to him, human rights are the basic guarantees for individuals to participate in the public sphere for which he has enumerated eight rights. The violation of these basic human rights questions the very validity of legitimacy of the state. If the basic human rights cannot be guaranteed by state and its population is left to exposure of massacre by opposite man-made forces which is deliberately perpetrated, the last resort left is humanitarian intervention in international law. 'Human Security' is the basic denominator.

The theories of Rawls and Habermas, on military humanitarian intervention, have brought forth two propositions for preventing military intervention. Firstly, there is need of continuous efforts to integrate the states that show aggressive nature. This might put public pressure on them and they might strategically improve from their unilateralism, for instance, like the United States. Secondly, poverty reduction strategy to prevent humanitarian intervention as a means of assistance to non-democratic states is not enough for alleviating poverty. International institutions like the UN must put their emphasis on social human rights and poverty reduction

strategies. In author's view, these international institutions should provide incentives for the formation of democracy and states which intend to overthrow such states and set up a tyrannical regime, their costs should be hiked. Even if it is successful, this certainly is not making military humanitarian intervention redundant, but it seems possible to connect ideal and non-ideal theory. This will hike the outset for expensive non-humanitarian interventions.

The Merger Control & IRP for Distressed Firms in reference to Notice of Combinations: Addressing the Conundrum of Intersection between Insolvency & Competition Laws

Suhail Khan*

Introduction

The major utility of the insolvency laws is to ensure that the credit goes back to the market if it is allowed to stay there, it can impact the whole economic system adversely and offend the interests of various stakeholders in that prospect. The competition law, whereby, gives the freedom to operate to business entities and regulate the competition in the market and insolvency laws allow the distressed firms the freedom to exit the market and thus put an end to the erratic operation in the market and thereby concluding the IRP under the IBC, 2016[1]. The major focus of this research forms the point of intersection between the IBC and the Competition Act, 2002[2] on the area whereby the merger control and insolvency resolution are dealt with and the regulation of combinations has to conform to the norms provided under sections 5 and 6 of the Competition Act, 2002[3]. This insolvency resolution

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1 The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India).

2 The Competition Act, 2002, No. 12, Acts of Parliament, 2002 (India).

3 *Id.* at 5, 6.

had to be approved by the two authorities, viz. National Company Law Tribunal ('NCLT') and Competition Commission of India ('CCI'). Now, under section 31 of the IBC[4] there is a prospect of approval of the resolution plan which is employed to carry out the insolvency resolution of the distressed firm, this has to be seen in the context of testing the *Failing Firm Defence (FFD)* viability in that regard and the need to determine whether a firm is insolvent or not arose from the time when the losses were being made, in that sense, the test of the failing firm is very necessary to determine, but in Indian legal context, the necessary framework for the same appears to be largely missing and hence there exists a need to lay it down. The *green-channelling*of the firms on the same issue under the Regulation 5A of the Combination Regulations[5] is also not employed a lot in the practice which can turn out to be a very feasible solution to solve this conundrum. Since the very outset, there has been a lack of clarity concerning the interface between the competition law and insolvency law regarding finalising timelines regarding seeking approval, what would qualify as binding agreements, the process of notification before approval etc., through the 2018 Amendment[6] clarified on some points but there existed deep anomalies in the intersection that remained unanswered as there is a lack of merger guidance in India, it was the moot point as to how the combinations would now be determined whether they are having an AAEC or not. The point of whether the nature of approval given by the CCI is a directory or mandatory under proviso to S. 31(4), IBC[7] is still unanswered as such. The timeline is 180 days which is doing more harm than good, makes the system more complicated as the ousted members indulge in litigation and the matters

4 The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016, s.31 (India).

5 The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011, No. 3, 2011, Regulation 5A.

6 The Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, No. 26, Acts of Parliament, 2018 (India).

7 The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016, s.31(4) (India).

that are sub judice take time to be settled and hence it becomes difficult to deal with it, the point whereby the approval application has to be filed before the approval of *Committee of Creditors (CoC)* created under IBC, or after. The position where a firm, if it wants to undergo a combination in a situation where its approval is pending with the CCI, whether it can do so or not, is also unclear, as if the IRP under the section 33[8] of the Code, is not approved by adjudicating authorities, it would undergo liquidation, so covering these issues and prospects, this research tries to focus on interface of IBC and Competition Act, by underlining genesis and origin of the intersection, analysing the legislative framework by various stages of resolution plan under the IBC, merger control under Competition Act, comparative study of failing firm defence and its viability, green channelling of the firm, situations of the intersection of both the laws before and after 2018 Amendment, First and Second Insolvency Committee Reports'[9] suggestions and recommendations, how far they are being modelled into the law and what is the viability of incorporation of the rest, judicial response in the selected cases and possible suggestions and recommendations.

Origin and development of the interface between the insolvency and competition laws

The origin and development of the interface can be traced by the evolution of the IBC, 2016 and the legislative history of the law, where it would be clear on the fact as to how and why the intersections of both laws even start. The IBC was a resultant effect of defunct law, known as the Sick Industrial Companies Act (SICA), 1985[10] but its functionality was limited as it only applied to sick industrial companies. So, there had to be an all-inclusive law for the effective mechanism of dealing with credit and

8 The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016, s.33 (India).

9 Government of India, Report of the Insolvency Law Committee (2020).

10 The Sick Industrial Companies (Special Provisions) Act, 1985, No. 1, Acts of Parliament, 1985 (India).

insolvency. The Competition Act, of 2002 on the other hand is just a complementary law in theory as far as the relationship with IBC is concerned but its roots lie in its actual legislative intent and shift of the focus from restriction of monopolies to managing the competition in the market and thereby making it free.

a) Insolvency and Bankruptcy Code, 2016

The legislation dealing with Insolvency matters in the Indian landscape, is the IBC that was passed in the year 2016. It is important to examine certain dimensions regarding the same:

i. Shortcomings of the pre-IBC regime

Before the enactment of the IBC, the Act that laid down the working and functioning of insolvency, bankruptcy and allied matters was the SICA (Sick Industrial Companies Act, 1985) which found its goal in discovering the disorder of the industrial unit and whether the potentially practical units could work or not; the motive was also to find out the various companies that had undertakings that were practically sick.[11] Now, the major drawback of this Act which was its stark feature that it applied only to the sick industrial companies and kept away the non-industrial companies and the other companies that dealt with trading, services or other activities. Around that time, the Companies Act, 1956[12] appeared and provided the much needed shape to the corporate field by adding various provisions that could curb the fraudulent practices and working along with the processes like winding up but this Act never had any explanations with regard to insolvency or bankruptcy and had no power howsoever to deal with the situation of pendency of debts, in spite of the Act being the ultimate piece of legislation for adjustment of corporate bankruptcy[13].

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11 *Historical Evolution of IBC*,(Apr.23,2023,10.04 AM) https://bhattandjoshiassociates.com/the-insolvency-and-bankruptcy-code-2016/ .

12 The Companies Act, 1956, No. 1, Acts of Parliament, 1956 (India).

13 EVOLUTION OF THE INSOLVENCY AND BANKRUPTCY LAWS IN

ii. The transitional period

The period in the early 2000s and 2008, wherein the Indian economy had attained a status of the boom, legitimately justifies the extensive lending of the public sector banks to the corporate. Very soon, with the global economic slowdown, the profits of organisations at stake were being done away with. The same reason did not provide a reasonable opportunity for the companies to pay back their debts.

iii. Scattered and lopsided debt recovery mechanism

The bad debt recovery mechanism was dealt with under various legislations and none of them were one-stop solutions for the remedy of the same. Hence now there was a need to have a consolidated law which required to deal with the same problem. Earlier, before the enactment of the IBC, this problem was remedied according to the norms of:

- SARFAESI Act, 2002[14]
- The Presidency Towns Act, of 1909[15] and The Provincial Act, of 1920[16]
- Companies Act, 2013[17]
- The Recovery of Debts Act, 1993[18]
- The Sick Industrial Companies Act, 1985
- CDR/SDR/S4A schemes

INDIA,(Apr.26,2023,10.30 AM) https://ibclaw.in/wp-content/uploads/2021/05/EVOLUTION-OF-INSOLVENCY-AND-BANKRUPTCY.pdf .

14 The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002,No. 54, Acts of Parliament, 2002(India).

15 The Presidency- Towns Insolvency Act, 1909, No. 3, Acts of Parliament, 1909 (India).

16 The Provincial Insolvency Act, 1920, No. 5, Acts of Parliament, 1920 (India).

17 The Companies Act, 2013, No. 18, Acts of Parliament, 2013 (India).

18 The Recovery of Debts and Bankruptcy Act, 1993, No. 51, Acts of Parliament, 1993 (India).

iv. The oncoming of IBC

The IBC seeks to create an all-inclusive framework for debt recovery and consolidated all the laws for examining the matters of insolvency and bankruptcy as such. The legislative intent behind the IBC was to give an effective resolution of the insolvency proceedings thus by not making it an unnecessarily lengthy and economically viable arrangement for the same, a strong system of the laws was needed to be made which cuts down the cost and timings the liquidation process, it thereby protects investors' interests and makes the commercial aspects and business very efficient and full of ease. In its inception, it was made with the idea of simplifying and expediting the process of Insolvency and Bankruptcy proceedings and leaving a scope of provision dealing with negotiations between debtors and creditors thereby removing the problem of debt and default information.[19]

b) Competition Act, 2002

The intersection of both the laws can be best understood by analysis of a background of the Competition Act and how it interacts with the IRP and so on:

i. Pre-Competition Act era

The MRTP Act, of 1969[20]was considered to be not adequate and obsolete in the light of international developments in the realm of competition law. The rationale to be put forth with this was the free market economy to be established whereby it allows the buyers to make the best purchase and maximize self-interest and hence limiting the role of market power and monopoly and other types of concentration was very much required to be in place.[21]

19 Vijay Kumar Singh, *Modern Corporate Insolvency Regime in India: A Review* 7NAT'L L.S.BUS.L.REV.6, 7-8(2021).

20 The Monopolies and Restrictive Trade Practices Act, 1969, No. 54, Acts of Parliament, 1969 (India).

21 Md. Zafar Mahfooz Nomani, COMPETITION LAW 15 (2019).

ii. Shift from 'restriction of monopolies' to 'free market competition'

The cardinal principles of the competition law include the common objectives of the promotion of market economy and the laying down of the under the scheme of which the rival businesses can compete on fairgrounds. This is very essential to create a market responsive to consumer preferences and effective allocation of resources.[22] Keeping these considerations in mind, the Competition Act, of 2002 was enacted.

iii. Enactment of Competition Act, 2002

The Indian economy needed to be opened up by removing controls and resorting to the liberalisation model, the competition from within the country and that from the outside had to be taken care of, this was followed by ensuring fair competition and establishment of a quasi-judicial body to ensure the practices that have an appreciable adverse effect on competition are kept at bay and anti-competitive agreements, abuse of dominant position and regulation of combinations that needed to be taken care of so that the appreciable adverse effect on competition does not form a part of the existing economic scenario.

c) Point of Intersection of Insolvency Law and Competition Law

Under the IBC, under S. 31, whereby the approval of the resolution plan has to be considered, when the adjudicating authority has enough grounds to believe that the approval of the committee of creditors has been done under S. 30(4)[23] and the requirements under the S. 30(2)[24] have been fulfilled and then the approval shall take place which would be binding on the various functionaries under the IBC. If the resolution plan has to work

22 Competition Commission of India v. Steel Authority of India Ltd. and Ors., (2010) 10 SCC 744 (India).

23 The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016, s.30 (India).

24 *Id.,* s. 30(2).

then the applicant filing for resolution shall obtain approvals that are necessary from any other law that continues to be enforced and thereby within a period of one year from the time when the resolution plan has been filed.[25] The proviso to the s. 30(4) also states that before requiring the necessary approvals from the Committee of Creditors, there has to be an approval from the CCI under S. 5[26] whereby when the resolution plan contains a combination, there have to be prior approvals from the aforementioned authority and based on the thresholds of the combinations, there would be the grant of such combination to function according to the S. 6 of the Act.[27]

This sums up the intersection of both the laws and this research would further build upon this interaction and interface. But, at the very outset, it is very necessary to find out what statutory framework is dealt with this regard and the theoretical basis of determination of failing firm defence and green-channelling under the competition laws so the succeeding segments would cover these aspects and therefore would give us the idea as to how they can be applied in the Indian legal regime to obtain the results that would favour these contentions of the distressed firms that are insolvent and hence give us an idea as to how to study this intricately by filling the lacunae of the particular laws.

Statutory Framework of IBC and Competition Act

The statutory framework would give us an idea as to how the stages of resolution are dealt with under the insolvency resolution plan of the IBC along with the control of mergers under the Competition Act, which will transpose us to the part whereby the notice of a combination has to be sent to the appropriate authority and what is the concept of binding document and what is its legal validity in the backdrop of both the laws.

25 *Id.,* s.24.

26 The Competition Act, 2002, No. 12, Acts of Parliament, 2002, s.5 (India).

27 *Id.,* s.6.

a) Stages of Resolution in Insolvency Resolution Plan

Whenever a corporate debtor enters the IRP, the CoC would provide them with a professional, who by appointment, would lead the whole process by his expertise.[28] Through a resolution, professional invites the resolution plan from the resolution applicants of the corporate entity that undergoes insolvency. S. 30 of the Code provides a mechanism whereby the insolvency resolution plan can be submitted. Various applicants try to send the insolvency resolution plan to the resolution professional[29] and then the resolution professional examines whether the plans that are proposed by various applicants are in line with the statute or not[30]. When this process is complete, the resolution professional then sends the IRP to the CoC for their approval as such[31] and then the CoC determines whether to pass it on applicable grounds in the prospect[32] and with this view it is submitted by the CoC to the Adjudicating Authority[33] which further decides upon the fact whether it has to be approved or not, based on the requirements of the IBC.[34] Now if there is a possibility that the resolution plan also calls for a combination and if it is likely to create an AAEC on the market, then a notice has to be sent to the CCI for approval by the resolution applicant[35]. This has to be read in consonance with the S. 6(2) of the Competition Act, which thereby declares what has to be a plan of action ,whereby the enterprise which ascertains to be a part of the combination and furnish a notice to the CCI and this provision cannot be done away with as it attracts

28 The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016, s.22 (India).

29 *Id.*, s.30(1).

30 *Id.*, s.30(1)(a) – 30(1)(f).

31 *Id.*, s.30(3).

32 *Id.*, s.30(4).

33 *Id.*, s.30(6).

34 *Id.*, s.31(1).

35 The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process For Corporate Persons) Regulations, 2016, Reg. 37(l).

penalty if there is no compliance of this section ,as mentioned in the case of *SCM Solifert Ltd. v. CCI*[36] where it was held that S. 6(2) has to be complied with while regulating the combination.

b) Merger Control in India

The competition law regime in India involves the application of the Competition Act, of 2002 which includes the regulation of anti-competitive agreements[37], abuse of dominant position[38] and finally the scrutinising of mergers under Ss. 5 and 6 of the Act. S. 5 deals with certain thresholds that need to be kept in consideration where it is determined what is a combination as per the legal sanction of the Act; these thresholds also keep changing from time to time. On the other hand, there is S. 6 which prohibits the combinations which can have anAAEC on the competition and thus declares them to be void[39]. The notification to CCI has also to be given thereby before the combinations are implemented[40]. The CCI determines the AAEC on the market by considering the various elements which keep differing on a case-to-case basis, the factors include the persisting and potential levels of competition that exist in the market, the extent to which the market is concentrated, concentration levels in market etc. There is also one possibility of a failing business[41] that can be brought under these criteria.

c) Notice of Combinations in Competition Law

As discussed above, the S. 6 of the Competition Act, deals with the regulation of combinations whereby there is a prospect of a combination which is that may or is causing AAEC should give notice to CCI within a period of thirty days of:

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36 SCM Solifert Ltd. v. CCI,(2018) 6 SCC 631.

37 The Competition Act, 2002, No. 12, Acts of Parliament, 2002, s.3 (India).

38 *Id*., s.4.

39 *Id.,* s.6(1).

40 *Id.,* s.6(2).

41 *Id., s.*20(4)(k).

- The approval to proposal that relates to the merger or an amalgamation that is by the board of directors that are related to such enterprises concerned with these mergers or amalgamations;
- Any agreement being executed or other such document that is necessary for the acquisition.

It is an established rule of competition law, that a combination cannot come into effect until 210 days have passed from the date of the notice or when the CCI orders under Section31, whichever is earlier[42]

Failing Firm Defence

The failing firm defence serves as the exception that stands to the general norm that is of the control of mergers, a merger will be prone to failing and thus would have to be prohibited if the competitiveness that exists in the pre-merger time of the market is worse than the competitiveness that exists post the merger. This defence can be used to separate the state of the market that exists post-merger from when the actual merger takes place. It has to be shown that the market condition would be worsening to an equal extent if the firm that was targeted could not be acquired and thus thereby given a nod to exit the market.

a) Failing Firm Defence in the Indian legal context

The CCI has resorted to the defence of failing firm in only one combinations as of now which involved the IRP[43] in the acquisition of *Asian Colour Coated Ispat Limited by JSW Coated Steel Products* but no detailed explanation was provided for the same. The CCI only relied upon the 'imminent failure of the firm' which sets out to be the very first tests which state that the failing firm defence needs to be applied as there was no AAEC attributable to the merger, there was a very brief explanation of

42 The Competition Act, 2002, No. 12, Acts of Parliament, 2002, s.6(2A) (India).

43 Combination Registration No. C-2019/03/650 (Apr. 9, 2019)

the same. The failing firm defence warrants its application in those times where the deterioration in the competition must be found, but when it is not found, there is no application of defence to have the merger approved. The 'possibility of failing business'under the Competition law, indicates that it has become a part of the Indian legal regime. However, since there are no case laws on the development of this legal position, there exists an anomaly whereby there are no particular reasons to apply the test. This problem is further supplemented by the absence of adequate guidance on mergers on the topic and thus it becomes an aggravated issue. The CCI has no merger guidance on the topic aforementioned but there is a Competition Advocacy Booklet[44]that does not serve as a binding set of rule, though it helps a lot in understanding the position whereby the law relating to it would apply to the competition.

b) Failing Firm Defence in the European Union

To establish this defence in the European Union (EU) there has to be compliance with the three tests thereof:

- Whether the constraints that exist in financial realm would drive the firm outside the framework of market;
- Whether there is an existence of an alternative purchase which is less anticompetitive or a transaction which has the abilityto save the firm;
- Whether or not the assets that a firm holds would make an exit from the market in absence of a merger.

These three tests to ascertain the defence were laid out by the European Commission in the *Kali und Salz*[45] and ever since they have been adopted

44 Competition Commission of India, *Provisions Relating to Combinations,* ADVOCACY SERIES (Apr.24,2023,10.30 AM) https://www.cci.gov.in/sites/default/files/advocacy_booklet_document/combination.pdf .

45 Case No. IV/M.308,Kali+Salz/MdK/Treuhan, 1993 O.J. (L 186) 38.

as the EU Merger Guidelines[46] which has been used in various other cases. In another case known as *Saint Gobain*[47] where there was the evaluation by the EC of a merger which was about to create a total of 60 per cent market concentration in the relevant domain of silicon carbide, the EC had applied the three tests that are mentioned above which were so enunciated but there was no conclusion of the same. Development was made in the *BASF/ Euridol/Pantochim*[48] case wherein the merger would have resulted in a 70 per cent concentration of the market, the EC discovered that the firm in question was most likely to withdraw from financial dealings in the market due to difficulties on financial front and they had no option left for an alternative purchaser, the EC found out that there cannot be an application of the test where there exists no duopoly and hence BASF could not be expected to absorb all the shares.

- Failing Division Defence

The above-mentioned defence of failing firm has its subset under defence of failing division under its premises. This test must be made applicable to a single division of the firm that is in question instead of applying to the whole firm. The burden of proof is comparatively high as it is possible to show the same division of the firm failing even when it is not failing, as the companies can get rid of their failing divisions[49]. In the case of *Aerospatiale,*[50]there was a consideration of the acquisition of a division of Boeing operating in Canada, called Aerospatiale and the merger that was in question would have increased the concentration of the market

46 European Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2004 O.J. (C 31) 3.

47 Case No. IV/M.744, Saint Gobain/Wacker-Chemie/NOM, 1997 O.J.(L 247) 1.

48 CASE NO. COMP/M.2314, Basf/Euridol/Pantochim, (Apr.25,2023, 11 AM) https://ec.europa.eu/competition/mergers/cases/decisions/m2314_en.pdf .

49 *The Failing Firm Defence*, 11-12 (1995),(Apr. 25, 2023,11 AM) https://www.oecd.org/competition/mergers/45810821.pdf .

50 Case IV/M.053, Aerospatiale-Alenia/De Havilland, 1991 O.J. L (334) 42.

that was susceptible .It contended that if the merger would not have taken place, the division would exit the market but the EC found out it was not possible as the good quality aircraft and rise in prices enabled to be sold to other purchasers.

c) Failing Firm Defence in Canada

This head discusses Canada's stance on the defence of failing firm and how it incorporates the same in its regimes:

- Under the Competition Act

The test for review of the merger under the Canadian Competition Act, 1985 is the proposition which depends upon the fact that it has to prevent or lower down the competition in a substantial manner[51]. Section 93 of the Act states the non-exhaustive list of factors that may be relevant in determining the competition assessment. Under paragraph 93(b) one of the consideration is "whether the business or part of the business, of a party to the merger or the proposed merger has failed or is likely to fail"[52].

- Under the Merger Enforcement Guidelines

The Bureau which is responsible for governing the competition law issues in Canada, as expressed in the 2004 Merger Enforcement Guidelines[53] takes on added importance in understanding how the Bureau deals with the claims that are required for the approach to the failing firm analysis. There are two broad issues:

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51 Competition Bureau Requests A Stay Of Proceedings Challenging The Merger Between Cast.
North America Inc. And C.P. Limited, (Apr. 25, 2023, 10.30 AM), http://www.cb-bc.gc.ca/eic/site/cb-bc.nsf/eng/00681.html.

52 *Failing Firm Analysis In Canadian Merger Review*, (Apr. 25, 2023, 10.30 AM) http://www.cba.org/cba/cle/PDF/SpComp09_Elliott_paper.pdf.

53 *Merger Enforcement Guidelines*, (Apr. 26, 2023, 10.30 AM), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01245.html.

- Whether there is likely business failure and exit of assets from the relevant market; and
- Whether there is any alternative to any merger which would be likely to lead to a higher level of competition in a material sense.

Green-Channelling of the Firm

For the application of the green channelling of the firm, it has to be seen whether the combinations are likely to cause AAEC and IRPs should also be brought within the protection of the green channel. The Competition Law Review Committee Report[54] was instrumental in making the Amendment in the Combination Regulations of 2011, thereby inserting Regulation 5A that dealt with the green channelling of the conglomerate mergers. This was very much required as previously, the CCI have had a high approval rate of mergers and IRPs, which usually had various vertical and horizontal overlaps.[55]

As per Regulation 5A(1) the parties which belong to certain categories of the combination can give a self-declaration that their combination does not cause an AAEC in the relevant market and when it makes such a declaration it is deemed to be approved by the CCI under the Regulation 5A(2). The insolvency law and competition law may find themselves overlapping each other as in the acquisition of *Bhusan Power by JSW Steel*[56] where NCLAT has identified that CoC has a statutory mandate to ensure value maximisation where it may invite and consider improved financial offers.

54 Injeti Srinivas, REPORT OF THE COMPETITION LAW REVIEW COMMITTEE (July, 2019).

55 *Merger Control for IRPS: Do Acquisitions of Distressed Firms Warrant Competition Scrutiny?,(*Apr. 26, 2023,11 AM), https://www.ibbi.gov.in/uploads/publication/dc195510e9141a689e41ad181ab66cea.pdf.

56 Tata Steel Limited v. Liberty House, (2019) SCC OnLine NCLAT 13 (India).

Concept of Binding Document

As the progression of IRP is done, the resolution plan which is the fittest for insolvency, attains the status of a binding document and gets approval by the Adjudicating Authority[57]. The binding document in the Competition Act is like a proposal for a combination and the determination of the combination is done to check if the combination is having appreciable adverse effects on the market or not.[58]

- Binding document in the IBC

In the IBC, the plan that is given the sanction by Adjudicating Authority is held to be binding in nature on the debtors in corporate dealings and the other functionaries associated with it. The position is such that the resolution plan is to be considered a final and binding document whereby the scope and interference of the courts are limited. In the case of *K. Sashidhar*[59] it was stated that the document has to be treated as final and binding and thus ,the court did not interfere with it. It has to be noticed that the document attains finality when it is approved by the Adjudicating Authority.

- Binding document in the Competition Act

The concept of a binding document under S. 6(2) of the Act, is very different. The notice of the combination that is sent to the CCI when the proposal is sent to them is accompanied by executing agreement or any other document for the control in the case of acquisition .[60]The 2011 Regulations[61]elaborate on the term 'other document' that is used in the s. 6 of the Act, and which is further explained by Regulation 8 which deals

57 The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016, s.31(1) (India).

58 The Competition Act, 2002, No. 12, Acts of Parliament, 2002, s.6(2) (India).

59 K. Sashidhar v. Indian Overseas Bank, (2019) 12 SCC 150 (India).

60 The Competition Act, 2002 (Act 12 of 2003), s.6(2)(b) (India).

61 The Competition Commission of India (Procedure regarding the Transaction of Business relating to Combinations) Regulations, 2011.

with the conveying of an agreement or decision to control, shares, voting rights or the assets.

The 2018 IBC Amendment

The 2018 Amendment of IBC provides for a stipulation that is mandatory at the stage at which the approval of the CCI must be taken for the combinations arising out of the resolution plan. It is very important to note the situation before the 2018 IBC Amendment, the reason why the amendment became necessary and the situation after it.

- Situation before the IBC Amendment

The requirement of the CCI approval was initially provided under Regulation 37(1) of the 2016 Regulations[62], which included the necessary approvals from the State Government and Central Government and other authorities. The approval from CCI was to be done with the general approvals for the resolution plan and no time limit was prescribed for these approvals. The regulations were recommended for the CCI approvals and they were made to be distinct from the other statutory approvals under the S. 31 of the IBC. A fast-track mechanism for the approval of CCI was agreed upon which gave a timeline of 30 days.

- Need for the 2018 Amendment

Before the 2019 Amendment[63]if a resolution plan is not considered feasible by the Adjudicating Authority and not approved by it, then within 270 days of the initiation of the IRP, it would be considered to be liquidated[64]. If the CCI does not give approval or require modifications in

62 The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2016.

63 The Insolvency and Bankruptcy Code (Amendment) Act, 2019, No. 26, Acts of Parliament, 2019 (India).

64 The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016, s.12. (India).

the resolution plan, then the applicant would have to go back to filing a fresh resolution plan and submit it before the CoC for its approval. Now this would frustrate the strict timelines set up by the IBC and hence make the whole process very cumbersome as it was held in the case of *Swiss Ribbons Ltd. v. Union of India*[65] along with this there would be a lower realisation in the liquidation process[66]. However, it is pertinent to note that no law covered the position wherein it could be found out that when the resolution plan is pending before the CoC, it has to be notified to the CCI if it includes a combination whether before or after applying to the CoC.[67] This problem has raised a lot of issues and consequences as seen in the acquisition of *Electrosteel Steels Limited by Vedanta Limited*. Here Vedanta's resolution plan was accepted by the NCLT during the review process of CCI[68] because of the reason that the will of CCI was not known at that time, it could have led to two very peculiar situations like the disqualification of Vedanta and liquidation of Electrosteel thereby and the potential implementation of the merger or acquisition before the prescribed time under the law.

- The 2018 Amendment

The uncertain regime about the statutory approvals of the resolution plan was sorted out with the insertion of S. 31(4)[69]. The mandatory requirements of the approval were shifted from the Regulations under the

65 Swiss Ribbons v. Union of India (2019) 4 SCC 17 (India).

66 The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016, s.12. (India).

67 Anshuman Sakle*, Second Amendment To Insolvency And Bankruptcy Code, 2016 — Addressing The Conundrum Around Cci Clearance,* THE SCC ONLINE BLOG, (Apr. 26, 2023,12.30 PM).https://www.scconline.com/blog/post/2019/06/04/second-amendment-to-insolvency-and-bankruptcy-code2016-addressing-the-conundrum-around-cci-clearance/

68 State Bank of India v. Electrosteels Limited*,* W.P.(T). No. 6324 of 2019 (India).

69 The Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, No. 26, Acts of Parliament, 2018 (India).

IBC to the IBC itself and it made clear the point whereby the statutory approval was required. Under S. 31(1) also, it was held that the necessary approvals from any law if it is in force for the time being, were to be seen from the point of view that they had to be completed within one year of the approval from the adjudicating authority or within such period as provided under the law whichever is earlier. The S. 31(4) proviso, however, required the CCI to give approval of combinations which was referred to under the S. 5 of the Competition Act prior to the approval from the CoC.

Proviso to S. 31(4): Whether Directory or Mandatory

If we take a close look at the practice that is generally preferred by the parties we can conclude that the procedure whereby it is stated that the approval of CCI has to be taken before the CoC approval, then by the perusal of the combinations such as the *CVI CVF IV Master Fund II LP &Ors*[70] the filing of the notice to the CCI was after the approval granted by CoC. In another similar instance too the combination of *NBCC (India) Limited*[71] was done post the CoC approval. This brings us to a very important question for consideration as to whether the practice that was stated under the amendment and the one recommended by the Insolvency Committee reports were of a directory nature or of a mandatory nature whereby it had to be adhered to in all instances, which actually was not the case.

The departure from the dictate of law has to be now seen in consonance with the rights of the corporate debtor who applies for the IRP. Now this can be substantiated by the case of *Essar Steel Limited*[72] where the 2019 IBC Amendment was widely discussed in the light that the mandatory nature of the completion of IRP within the 330 days under S. 12 was done upon extension and due to the default of this deadline, there had to be mandatory

70 C-2019/04/659.

71 C-2019/12/711.

72 Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta, (2020) 8 SCC 531 (India).

liquidation[73]. The word 'mandatorily' under the law was taken down by the court as being arbitrary under Art. 14[74] and also seen as an unreasonable and arbitrary curtailment of the person to continue their business vide Art. 19(1)(g)[75]. The reason exactly why this was done was to ensure the debtor that there was a right that he could claim if the CCI took more time than he was granted to find out whether the combination is within the permissible standards mentioned in the Competition Act and he would not be subjected to the liquidation process as it was not his fault. But this timeline and practice had only to be relaxed in extraordinary circumstances and not to be made a norm otherwise it would be serving as a tool for the corporate debtor to jump the gun and it had to be only given when there was the right of the corporate debtor at stake.

The Judiciary's trend to see the proviso to S. 31(4) as of a directory nature was maintained and in this context it would be useful to look at another case by the name of *Arcelor Mittal India Pvt. Ltd. v. Abhijit Guhathakurta*[76] wherein the notice of combination to the CCI was sent after the IRP was approved by the CoC. Here, the court had itself looked at the aforementioned provision as being of directory nature and not of mandatory nature and thus it had to be established that the interpretation accorded to the provision was not to be of a strict nature but it had to be watered down as being of a directory nature. It was further opined by the court that it had to be the CoC which had to assess and examine for the feasibility, reasonability, and commercially viable nature of the IRP to make it work.

In the case of *Vishal Vijay Kalantri v. Shailen Shah*[77] the CCI approval was not taken as the combination was below the threshold limit and for the contention that it was violating the provisions under the S. 31(4) proviso as it was

73 The Insolvency and Bankruptcy Code (Amendment) Act, 2019, No. 26, Acts of Parliament, 2019, ,s.4 (India).

74 INDIA CONST. art. 14.

75 *Id.*, art. 19, s.1, cl. (g).

76 Arcelormittal India Pvt. Ltd v. Abhijit Guhathakurta, Company Appeal (AT) (Insolvency) No. 524 of 2019 (India).

77 Vishal Vijay Kalantri v. Shailen Shah, CIVIL APPEAL NO.2228 OF 2021 (India).

mandatory, it was held that it was not to be taken as mandatory as it would have fraught consequences as the corporate debtor would then have to face mandatory liquidation for a situation in the law where it was not him who was at the fault and thereby his IRP would not see the light of the day. Now, it is very important to peruse this judgment on the ground that where the threshold limit of the combination did not even fall within the category of those mentioned in the Competition Act , the question of CCI approval did not even arise at all and further if ,the provision was to be seen in the light of being mandatory then the corporate debtor would face liquidation as the consequence to it.

The trend to treat this provision as directory and not mandatory continued as a practice and was seen in the case of *Makalu Trading Ltd. v. Rajiv Chakraborty*[78] Here a notice was sent to the CCI before the approval of the CoC .However the CoC approved at a time when it was pending before the CCI. Now at the stage where the plan needed to be approved by the Adjudicating Authority, it had to be seen, whether the CCI approval had been taken or not was seen as the accompanying action and the CoC approval was seen as the main action and it was held that the accompanying action could deviate to ensure that the main action is done properly.

Suggestions and Recommendations

- The inadequacy of the merger control guidelines of the Indian regime shall be given the utmost care and hence there has to be a definite tool for merger guidance to determine the 'possibility of failing business', the concentration of market and the AAEC on the competition. Thus making of a binding merger guideline in the Indian context is very necessary.
- The viability of the green channel approvals within the Regulation 5A of 2011 Regulations[79]should also be brought about to take a self-assessment of the combinations arising out of the IRPs and their

78 Makalu Trading Ltd. v. Rajiv Chakraborty, Company Appeal (AT) (Insolvency) No. 533 of 2020 (India).

79 The Competition Commission of India (Procedure regarding the transaction of business relating to combinations) Regulations, 2011.

determination of eligibility thus granting the firm an autonomy to determine and make a declaration in this regard.

- The practical problems arising in the IRPs like the stepping in of a higher bidder while the IRP was still pending approval from the CoC whether it can still stand a chance to bring within its garb, another insolvent company, to be seen in the context of its existence and decided as it would only serve the bigger purpose of solving the problem of insolvency which is the legislative mandate of the IBC.
- A liberal approach by the CoC and the Adjudicating Authority on the point as to whether the timeline of the 270 days is to be observed or not shall be there once the IRP is rejected on the grounds of a supervening possibility and hence it should be done in the interest of the firm to avoid liquidation.
- The proviso to S. 31(4) of the Code should be seen as being directory in nature and not in the strictest practices as it would put the firm into the scare of liquidation where they would not be at fault in the light of procedural inadequacies and hence there has to be a liberal approach as we have observed in the judicial trend
- The feasibility of a business that is failing under the Competition Act has to be given importance whereby there has to be seen that if a firm is not capable of running its business then it can be given the chance to come in an engagement of a combination and hence realize that there business can be protected and for this to happen, inspiration can be taken from the EU and Canadian regimes of failing firm defence whereby applying that test it could be found out whether there is a possibility under S. 20(4)(k) of the Competition Act to initiate the same.

Conclusion

The interface between the insolvency laws and competition laws on the point whereby the IRP has to be made privy to the resolution applicant by giving notice to the CCI and hence on that ground it has to be decided

if the IRP involves the making of a combination that it has an AAEC on the market or not. The provisions that include S. 31(4) of the Code, give it expressly in the proviso that it has to be within the specified timeline and according to the approval that needs to be given from the end of CCI. The CCI decides based on ss. 5 and 6 of the Competition Act, that there has to be an adherence to the cardinal principles of the same otherwise the combination would be void. Now the strictness of the timelines as provided in the letter of law should be eased down and thereby it has to be seen in the regard of liberal construction and it needs to be maintained in the same fashion. The lack of merger guidance in India is more of a problem when it has to be decided that a particular combination is exercising AAEC and is capable of disrupting the IRP so it has to be remedied, the amendments in the light of Insolvency Resolution have contributed a lot to the subject matter and thereby fixing the timelines and remedying the questions at stake. The viability of the green channel under Regulation 5A has to be maintained and checked to whether it can provide the missing link in the decision of the failing firm and hence a combination is possible or not. The clarity on the point of whether the combination has to be notified before or after the CoC approval should be seen regarding what is more necessary to the firm from keeping it from liquidation and hence saving it, the cause has to be reasonable and thus the requirement of the statute which is on paper, mandatory can be done away with and give a chance to push away the externalities from the subject. Another proposition can be made from the research which includes the point that within the garb of S. 33 of the Code if the resolution plan is not approved by the Adjudicating Authority it would undergo liquidation but if there are other entities which can join the combination by bids to save the firm from failing and thereby becoming a subject of liquidation then such a situation can be remedied by the statute and the judiciary as providing the opportunity to the highest bidder and including it in the combination would only serve the purpose of the legislative mandate.

Navigating Digital Goods in the 21st Century: Exploring the Ownership v. License Dichotomy and the Path to a Digital First Sale Doctrine.

Anina Varghese*

Introduction

From spears and fire to the most complicated and modern technologies, man has created, innovated, and invented to survive and progressively develop into what they have become today. We live in a world driven by technology. Our daily lives now heavily rely on digital products, which have digital equivalents in practically every tangible good. A Few years ago, we had to go to a movie store to buy a CD. You could bring it to a friend's home and watch it, lend it, sell it, or listen to it without being concerned about copyright infringement. Now, CDs and DVDs have been superseded by digital media. You can quickly purchase any song or movie, regardless of genre, from online digital stores like Amazon Cloud Player, iTunes, etc. Instead of keeping data on hard drives or compact discs, we can store information on phones or computers.

Over the past few years, there has been a significant rise in internet usage. Depending on our preference, we can buy a hardcover book or an electronic book. The majority of us believe that this is a decision based on

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our personal preferences, such as whether we like having digital books that we can carry with us wherever we go or the feel and scent of actual books on our hands. But it turns out that there is considerably more at stake than just personal preferences when deciding between these two patterns. There is a widening gap between consumers' rights who purchase physical items like hard covers or paperbacks and those who purchase digital goods like e-books or mp3 music. A tangible asset you purchase is added to your personal property portfolio. For instance, after purchasing a pair of shoes, you can lend, sell, or destroy it. But consumer rights differ dramatically when it comes to digital goods. When you buy an e-book from Amazon or songs from iTunes, you don't become the owner but only a licensee. [1]In the field of intellectual property law, the process of exhaustion is used to describe all the rights you acquire when you purchase a physical item. Exhaustion means that once a copyright holder sells a product to a consumer, their right to control how that product is used downstream is exhausted. In copyright, it is known as the first sale doctrine. To invoke this doctrine, one must be a lawful owner of a copy of the original work. This doctrine cannot be invoked by licensees, borrowers, or people who otherwise access copyrighted works. The doctrine of exhaustion only applies when a person becomes the lawful owner of that copy and there must be a lawful sale of that copy. It won't apply to license agreements. To understand the difference between digital property and its physical antecedents, we should consider it through business and legal sense. Netflix can be taken as an example.

On September 18, 2011, Rees Hastings, CEO of Netflix announced a company split. DVD-by-mail service would be renamed "Qwikster" while Netflix would only be used for watching films online. These two will operate as separate entities. As a result, one million users terminated their subscriptions to Netflix, and the stock price of the company dropped by more than sixty percent in a short period of time. Later on, Hastings decided

1 We are only buying a license to play that track or album, and that license comes with an extremely limited set of rights.

to abandon the concept of Qwikster, and Netflix remained the only option for customers interested in streaming media and DVDs.[2] This was characterized as a "corporate debacle"[3] by the journalists, but the industry commentators believe that the decision of Hastings was a consequence of the relationship between Netflix and the movie copyright owners.[4]When it comes to corporeal and digital property, movie copyright owners and secondary-market businesses such as Netflix take opposing stances. The first sale doctrine gives leverage to companies in the secondary market that deal with tangible assets. If no reasonable agreement has been reached between the copyright owner and the secondary market businesses, the businesses can buy the property elsewhere and then lend or rent it. However, as the first sale doctrine does not extend to digital assets, movie copyright owners hold considerable leverage in negotiations over the license agreements reached with secondary market businesses. If the copyright owner and the secondary market enterprises are unable to strike an acceptable license arrangement, there is no other option than to lend or rent it. This creates critical imbalances.

The first sale doctrine originated from the common law and is claimed to have an "impeccable historic pedigree."[5] In *Kirtsaeng* v. *John Wiley & Sons*[6], Court referred to "the 17th-century treatise by Lord Coke, In that treaty, he explains that a seller of a chattel is not permitted to control the buyer's alienation of the chattel because it would violate Trade and Traffic, as well as bargaining and contracting between individuals. Lord Coke stressed the importance of the freedom of the buyer to decide whether to

2 Reed Hastings, DVDs Will Be Staying at Netflix.com, NETFLIX (June 20,2023,10.30 AM),http://blog.netflix.com/20 11/1 0/dvds-will-be-staying-at-netflixcom.html.

3 Curt Finch, Netflix Kills Qwikster After 1 Million Subscribers Leave, INC. (June 20,2023,10.30 AM) http://www.inc.com/tech-blog/netflix-kills-qwikster-after-1-million-subscribers-leave .html.

4 *Id*.

5 Kirtsaeng v. John Wiley & Sons, 568 U. S.[2013], at 17, citing Coke, [1628].

6 *Id*

resell or dispose off the property." The doctrine of the first sale evolved in *Bobbs-Merrill Co*. v. *Strauss*[7], the Supreme Court held that; "The publisher imposes no restrictions on the price at which future retailers may sell the publisher's book.[8]" The court stated that "One who has unrestrictedly sold a copy-protected work has forfeited all control over its resale."[9] However, in this case, Supreme Court observed that there is no contract limitation or a license agreement that controls the sale of the book[10]. When a copyright owner sells his copy of copyrighted work to someone, she also exchanges permanent possession of that copy. He doesn't own it anymore and he cannot control how to use it. It is to be noted that even before a hundred years ago, the importance of mentioning whether a customer has purchased a book through a license agreement or he has obtained ownership through sale has been recognized because in both cases, the rights of the customer will be different. Today, we have digital goods. If you want to buy something from iTunes, you can see the iTunes license. What does this tell us? do we own the things that we are paying for? The law here in large part has been ambiguous because of the inconsistent and competing standards merely reciting reservation of title saying, "You are going to pay for this but we insist that we still own it." If it says so on their license agreement, the court will also agree to that. Sometimes the court will look into the mechanics of the transaction and figure out whether or not the title has been passed or control of the object has been passed. But the takeaway is, what used to be a really simple question has turned into complicated and difficult to predict. Courts need to settle on a framework for answering this really basic question, "when I pay for something, do I own it or not?". We might expect to have a clear answer to this question but it turns out that; 'we don't. In this digital era, where the consumption and distribution of creative works have increasingly shifted towards digital formats, the need for a robust framework that protects consumer rights is more crucial than ever.

7 Bobbs-Merrill Co. v. Strauss, 210 U.S. 339 [1908].

8 *Id*.

9 *Id.*

10 Kirtsaeng v. John Wiley & Sons, 568 U. S.[2013].

On this note, I argue that when someone purchases digital goods, he should be given the same rights as someone who has purchased a physical object. This article explores the problems of the first sale doctrine in the digital era and the need for the expansion of this doctrine into the digital world. Part II of this article gives an overview of the legal limitations of the first sale doctrine in the U.S. and India, highlighting the important cases. Part III provides for the need for expansion of the first sale doctrine into the digital sphere which makes way to part IV which explores the problems of the current marketplace. Part V provides a roadmap through computer program to expand this doctrine into the digital sphere and propose ways to modernize the doctrine for constructing a digital first-sale doctrine. Finally, part VI concludes the discussion.

Seeing through the kaleidoscope of law

Many sections of the copyright law were only focused on the physical embodiments and it becomes difficult to apply it to the changing technologies. The scope of copyright protection is limited by national laws to the subject matter identified as 'work'. "Original literary, dramatic, musical, and artistic works, cinematographic films, sound recordings, and computer programs generally qualify for copyright protection[11]." Copyright owners have the exclusive right to reproduce, distribute, perform, adapt, and translate the work. However, these rights are not unconstrained. There are certain limitations set on these rights which act as a tool to balance the copyright owner's interest and public interest. It is possible to characterize the doctrine of the first sale as a restriction placed on the right of the distribution held by the owner of the copyright. Once a copy of an original copyrighted work is purchased by a consumer, he must not be put into trouble by having to seek permission from the owner each time they initiate a further transfer of that copy. The first sale doctrine restricts the copyright holder's exclusive distribution rights. Therefore, a consumer who purchases

11 The Copyright Act, 1957, s.2(y).

a copy of the work is not required to follow any conditions which are attached by the owner, the consumer can lend, sell or destroy it.

It was in the case of *Bobbs-Merrill Co*. v. *Straus*,[12] the first sale doctrine was first established in the U.S., where the Court held that "no limitations on the price at which future retailers could sell the publisher's book be imposed by the publisher"[13]. After a year, the first sale doctrine was codified under the Copyright Act of 1909. It was recodified in 1947 using the virtually same language as the Copyright Act of 1909. The contemporary first sale theory that is currently used in the United States was anticipated by the Copyright Act of 1976.[14] As codified, copyright protection extends to "original authorship compositions established in any physical medium of expression, currently known or later invented, from which they can be observed, reproduced, or otherwise communicated, either directly or with the assistance of the machine or device."[15]However, these privileges are limited in scope. Copyright holders' distribution rights are constrained under Section 109, which states; *"Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord."* Because it denies the copyright owners the ability to regulate the works once they are sold to customers, the exhaustion principle is an exception to copyright infringement.

The Supreme Court reinforced the first sale doctrine in *Quality King Distributors, Inc*. v. *L Anza Research International, Inc*.[16] The Court observed that "the first sale doctrine allowed lawful owners of copyrighted

12 Bobbs-Merrill Co. v. Strauss, 210 U.S. 339 [1908] (United States).

13 *Id.*

14 The Copyright Act of 1976, 17 U.S.C. s.106 (United States).

15 The Copyright Act of 1976, 17 U.S.C. s.102(a) (United States).

16 Quality King Distributors, Inc. v. L 'Anza Research International', Inc,523 U.S. 135 [1998] (United States).

hair care products to import and resell them without obtaining permission from the manufacturer." It was explicitly said by the court that "the whole point of the first sale doctrine is that once the copyright owner places a copyrighted item in the stream of commerce by selling it, he has exhausted his exclusive statutory right to control its distribution."[17] But, the Court distinguished owners from licensees when it observed that "the first sale doctrine would not provide a defense to any non-owner such as a bailee or a licensee" like in *Bobbs-Merrill* , where the Court reiterated that the first sale doctrine makes a distinction between owners and licensees. For many years and until today, people have disagreed about whether the first sale doctrine should apply to digital content. In 1998, one of the most significant Acts, the Digital Millennium Copyright Act of 1998 (DMCA)was enacted as a part of Congress's effort to implement WIPO treaties. Section 104 of the DMCA requires the Registrar of Copyrights and the Assistant Secretary for Communication and Information of the Department of Counsel to submit a joint report to Congress regarding "the development of electronic commerce and associated technology on the operations of U.S.C. Sections 109 and 117" and "the relationship between existing and emergent technology and the operation of Sections 109 and 117."The U.S. Copyright Office did not consider the similarity between transfers of digital transmission and physical things to be particularly persuasive in its report, hence it advised against applying Section 109 to digital contents.[18]It claimed that allowing users to move digital content through voluntary deletion or automatic deletion systems increases the possibility of piracy and cheating, and itlabeled this as "unworkable."As claimed by the report, there are far too many differences between online digital transmissions and the transfer of physical items for the first sale concept to be applied to digital information.

We must look into the fact that these legislations were made over a decade ago, and the digital landscape today has changed drastically. The

17 *Id.*

18 U.S. COPYRIGHT OFFICE, DMCA SECTION 104 REPORT 97 (2001), (June 21,2023,10.30 AM) http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1 .pdf [http://perma.cc/KP79-V87L].

DMCA report could never anticipate the extent that digital content would be controlled by licensing agreements that impose significant restrictions on the consumer's right to alienate purchased digital content. In this digital era, where the consumption and distribution of creative works have increasingly shifted towards digital formats, the need for a robust framework that protects consumer rights is more crucial than ever.

In India, the exhaustion concept is accepted to strike a compromise between the public interest and the exclusive right of the copyright holder. Section 14 of the Indian Copyright Act, of 1957 envisages the range of economic rights available to the owner of a copyrighted work such as the right to reproduction, distribution, adaptation, and communication to the public. There is no express recognition of the principle of exhaustion in the Act, it must be gathered from the spirit of the provision. The Indian Copyright Act, of 1957 states in Sections 14(a)(ii), (b)(i), and (c)(iii) that the owner of the copyright of a literary, dramatic, musical, artistic, or computer program has the only authority to distribute copies of the work to the public that are not already in circulation.[19]For the purposes of section 14, a copy that has already been sold once shall be understood to be a copy in circulation, according to further explanation of this provision.[20]These clauses uphold the idea that after a work has made its first legitimate sale, the copyright owner's authority over subsequent distribution of the work has been exhausted.

The statute has exempted computer programs under Section 14(b) separately and is not a generalized exception for digital works. Section 14(d) and (e), which deals with the rights of the copyright owner of cinematographic film, and sound recordings, didn't adopt the phrase, "not being copies already in circulation". This indicates that the principle of exhaustion is inapplicable to these works. The copyright holder for cinematographic works and sound recordings has the sole authority to sell, give on rent, or offer for

19 Indian Copyright Act 1957, s.14 (India).

20 *Id.*

sale or rent any copy of the movie or sound recording, regardless of whether such copy has already been sold, rented, or given on rent.[21]

Additionally, Sections 65A and 65B of the Copyright (Amendment) Act of 2012, which guarantees the protection of technological security measures, were added. Section 65A stipulates that; "*who circumvents an effective technological measure applied for the purpose of protecting any of the rights conferred by this Act, with the intention of infringing such rights shall be punishable with imprisonment which may extend to two years and shall also be liable to fine*".Due to this impending problem, it will be impossible to construct a legitimate secondary market for digital content. In an increasingly digital world, it is crucial to adapt copyright laws to reflect the realities of the digital marketplace and protect consumer rights.

Need for expansion of the first sale doctrine

The first sale doctrine was created and is still recognized to achieve a balance between the monopolistic exercise of rights by the copyright holder and the public interest. Scholars have recognized some advantages of the first sale doctrine, they are: "access, preservation, privacy, and transactional clarity." Professor Aaron Perzanowski and Jason Schultz have suggested two more benefits which are increased innovation and platform competition.

There is a need to expand the first sale doctrine into the digital sphere because of the benefits it provides and also for four other reasons. Firstly, the requirement of a physical embodiment is no longer a sufficient justification for not applying this doctrine. We live in a world driven by technology and technology creates new consumer demands. The non-applicability of this doctrine to the digital sphere will overthrow the decades of precedents that have supported the economic and public benefits of secondary markets. Secondly, infinite digital copies can be made without loss of quality which will enable affordability. Thirdly, digital transfer enables the free movement of goods. Fourthly, the doctrine if applied will

21 The Copyright Act, 1957, ss. 14(1)(d)(ii) and (e)(ii) (India).

bridge the discrimination between the rights of consumers who own tangible goods and intangible goods.

Current market problems.

"Let the buyer beware"

This contract law principleis acting as a threat to the First sale doctrine in the digital age. Some of the major problems of today's digital environment concerning the first sale doctrine are:

a) ***The deceptive 'buy now' button***.

Courts have redefined ownership in digital content in a way that allows the copyright owners to avoid the consequences of exhaustion. Copyright owners resort to the commercial practice of 'licensing' rather than 'selling', thus, circumventing the application of the first sale doctrine in digital content. The first sale doctrine is applicable only when a person owns a copy of a copyrighted work. The practice of licensing has been increasingly used for copies that are made available online with no supporting physical embodiment including music, e-books, etc. Most people think that they become the owners of the songs that they buy on iTunes. Very few people take the time to read the lengthy terms and conditions before purchasing a song from iTunes. iTunes protects all its contents by End User License Agreement.[22] The agreement states that the contents the consumers buy are not sold to them but only licensed. Only limited access is granted to the users of iTunes by this agreement. Furthermore, this limited license is non-transferrable in nature. The 'buy now' button on the online websites makes us believe that we are really buying that product but their license agreements convey a different story.

22 Terms and Conditions of iTunes, APPLE, (June 23,2023,11 AM) http://www.apple.com/legal/internetservices/itunes/us/terms.html.

b) ***Infringement of the reproduction rights of the copyright holder.***

The Copyright owner's exclusive right to reproduce her work is one of the core functions of copyright. The copyright owner has the exclusive right to reproduce her work and to exclude others from reproducing the work. It also extends to reproduction for the purpose of storing copyrighted work in any medium by electronic means. the first sale doctrine limits only the distribution rights of the copyright holder and not the reproduction rights. The problem with the transfer of contents in digital space is that every use or transfer of work in the digital space inevitably creates a copy. Distribution of work in digital space cannot happen without creating a copy. In *UsedSoft GBMH* v. *Oracle International*[23], CJEU emphasized that "for the doctrine of first sale to apply, the original acquirer reselling their copy of the computer software must make their own copy unusable, otherwise the reseller would infringe the exclusive reproduction right of the computer software copyright holder." However, in the U.S. in the case of *Capitol Records, LLC* v *ReDigi Inc*.[24], even though ReDigi has taken all the steps to ensure that the digital music file is being deleted after the transfer, Court held that ReDigi has infringed Capitol Records' copyright.

c) ***First sale doctrine: A limitation only to the distribution rights of the copyright owner.***

The exclusive right of the owner to sell, lease or otherwise transfer copies of the work to the public is called the distribution right of the copyright owner[25]. The purchase of digital content is only a license to use and not to sell. Therefore, the sale, rental, or lease of these without authorization will constitute infringement. In *A&M Records, Inc* v *Napster Inc*.,[26] the court held that "transmission and retention of digital audio files

23 UsedSoft GBMH v. Oracle International, C-128/11,[2012] OJ C 287, Para 70.

24 934 F. Supp. 2d 640, 655 [S.D.N.Y. 2013].

25 Black's Law Dictionary [7th ed., 1999].

26 A&M Records, Inc v Napster Inc 239 F.3d 1004 [2001].

by Napster users is an infringement of A&M Record's copyrights and Napster was held secondarily liable for facilitating such infringement of copyright holder's exclusive rights of reproduction and distribution." A person who owns digital goods is not allowed to resell, transfer or lend them whereas a person who owns tangible goods retains these rights.

d) ***The thorny question of physical embodiment.***

The prevailing view is that when copies of Copyrighted works are distributed online without physical embodiment, the copyright owner's exclusive right to distribute is exhausted. Even if the exhaustion of the copyright owner's exclusive right to distribute is extended to digital copies with no physical embodiment, reproduction of copies is inevitable, thus hampering the reproduction rights of the copyright owner.

Unveiling the roadmap towards a digital first sale doctrine

If India ever considers expanding copyright exhaustion to digital content, Section 14(b)(i) will be a good template to start. Copyright exhaustion has already been recognized in computer programs by the statute. Here the question arises that, if computer programs and digital contents have the same features, for instance, for transferring a computer program or a digital content reproduction is inevitable, accidental deletion, corruption, or degradation can happen in case of both computer programs and digital contents and digital music files and movies need to be converted into different resolutions or modifications should be done to be used on the end user's device. If computer programs and digital content has similar functions, the differential treatment given to digital content in the statute cannot be justified.

In 2021, the Supreme Court of India in *Engineering Analysis Centre for Excellence Pvt. Ltd. v. CIT*[27], recognized the application of the first sale doctrine in computer software. The Court observed that the amount paid by

27 Engineering Analysis Centre for Excellence Pvt. Ltd. v. CIT LL 2021 SC 124(India).

the Indian companies to use software from the foreign companies cannot be considered as 'royalties' which is taxable in India. Even though the case predominantly deals with issues related to tax, it also deals with copyright issues related to the EULA of software and the first sale doctrine. Court recognizing the copyright exhaustion held that "the EULAs in the fact of the case was not 'licenses' under Section 30 of the Copyright Act, 1957 as they did not transfer any rights provided under Sections 14(a) or 14(b) of the Act".[28] Supreme Court has dealt with two important issues concerning copyright exhaustion. Firstly, Court made it clear that there exists copyright exhaustion in computer software. Court did that by stating the 1999 Amendment. This solves the debate regarding the effect Section 14(b)(ii) had on this doctrine provided under Section 14(a)(ii). This recognition of the doctrine of copyright exhaustion in computer programs will allow the creation of secondary markets and alternative distribution models. It would enable access and preservation which will increase competition and better consumer experience in the market. Secondly, the court held that the sale of transmission of the software to distributors will not be considered as the first sale and the owner's exclusive rights are not exhausted. The court observed that "The language of section 14(b)(ii) of the Copyright Act makes it clear that it is the exclusive right of the owner to sell or to give on commercial rental or offer for sale or commercial rental "any copy of the computer program". Thus, a distributor who purchases computer software in material form and resells it to an end-user cannot be said to be within the scope of the aforesaid provision. The sale or commercial rental envisaged in section 14(b)(ii) of the Copyright Act is of "any copy of a computer program", making it clear that the section would only apply to the making of copies of the computer program and then selling them, i.e., reproduction of the same for sale or commercial rental."

The law needs to be amended according to the changing dimensions of technology. The first step that should be taken is to give a proper definition

28 *Id.*

of digital assets in the statute. With a proper definition, courts will be able to handle digital assets, in the same manner, they handle tangible goods. The second step that should be taken is to determine the ambit of reproduction rights when applying the exhaustion principle to digital content. A purposive approach must be taken by the courts while determining the distribution and reproduction rights concerning digital content. The observation made by the court in ReDigi is a narrow approach that limits the scope of copyright exhaustion. If the 'delete and forward' rule is applied, then there will be only one copy which would have been sufficient ground for the court to hold that there is no infringement of the reproduction rights of the copyright owner. When extending this doctrine to the digital sphere, an exception to consider reproduction in the ambit of distribution must be made to the copyright owner's rights.

The 'forward and delete' rule should be given legal legitimacy in order to bring the exhaustion concept into the digital age. There have previously been numerous attempts to expand copyright exhaustion to digital content. Congress's 108th session saw the introduction of U.S. House Bill 1066 in 2003-2004 in the form of the proposed Benefit Authors without Limiting Advancement or Net Consumer Expectations (BALANCE) Act of 2003as one such initiative. It permitted the delete-and-forward rule for digital works, allowing the owner of a specific copy of a work to sell or otherwise dispose of it by transmitting it to a single recipient as long as the owner deletes their copy and the work is sold in its original format. However, the bill was not passed by Congress. It could have permitted the application of a digital first sale doctrine if it had been passed.

The main reason behind the courts' reluctance to extend this doctrine to digital content was piracy concerns. Prevailing anti-piracy solutions are sufficient to protect digital content from piracy. A lot of measures are available to protect digital content from piracy such as Digital Rights Management (DRM). DRM limits the distribution and use of digital content by encrypting the files. Tethering is one of the popular types of DRM which

links the copyrighted work to the user account of the device. DRM and other anti-piracy measures have significantly reduced piracy which is a major concern for not implementing the digital first sale doctrine. The statute must be amended to incorporate the first sale doctrine into digital assets which will allow the transfer of digital assets and will bridge the rift between the rights of a consumer who owns tangible goods and a consumer who owns digital goods .The lack of a clear legal framework regarding the resale and transfer of digital goods has led to legal uncertainties and disputes. Courts have struggled to apply traditional copyright principles to the digital landscape, resulting in inconsistent rulings and confusion. A digital first sale doctrine would provide a clear legal foundation, reducing ambiguity and allowing for consistent application of consumer rights across digital platforms. It would help establish a predictable and transparent environment that benefits both consumers and copyright owners.

A digital first-sale doctrine would also contribute to a more balanced and equitable copyright ecosystem by addressing the power imbalance between copyright owners and consumers. In the absence of such a doctrine, copyright owners maintain excessive control over digital content long after its initial sale, impeding competition and innovation. A digital first-sale doctrine would introduce competition into the digital marketplace, allowing secondary markets to flourish. This increased competition would provide consumers with more choices and potentially lower prices, while also fostering innovation by encouraging new business models and services that support the secondary market for digital goods.

Conclusion

Changing a cornerstone of copyright law, such as the First Sale Doctrine, is unlikely to be simple. As long as copyright holders continue to press the limits of material access restrictions, there will undoubtedly be tension between them and their customers. A cherished century-old doctrine that has permitted people to freely resell works in commerce, maintain the

viability of our library system and allow consumers to otherwise dispose of copies of works as they see fit must not be sacrificed in order to ensure proper protections for copyrighted works created and distributed through exciting new platforms.

In an increasingly digital world, it is crucial to adapt copyright laws to reflect the realities of the digital marketplace and protect consumer rights. Implementing a digital first-sale doctrine would ensure fair use, promote consumer freedom, and foster a balanced copyright ecosystem. By granting consumers the ability to resell or transfer legally acquired digital content, a digital first sale doctrine acknowledges the evolving nature of media consumption and empowers individuals in their digital transactions. As technology continues to advance, it is imperative that legal frameworks evolve alongside it to safeguard consumer rights and promote a vibrant and accessible digital marketplace.

The Contours of Emergency Arbitration in Indian Landscape

Abhishek Ranjan*

Introdution

This paper aims to explore the use and impact of emergency arbitration in the Indian landscape. As former Chief Justice of India, Dipak Misra noted, *"Arbitration is a noble and time-tested mechanism to resolve disputes."* Emergency arbitration, a relatively new form of dispute resolution, has gained popularity in India due to its fast and efficient nature. This paper will provide an overview of the concept of emergency arbitration, its legal framework in India, its advantages and limitations, and its prospects.

As the Hon'ble Supreme Court of India noted in the landmark case *of Raffles Design International India Pvt. Ltd. v. Educomp Professional Education Ltd*[1], "Emergency arbitration is a mechanism by which a party can seek urgent interim relief before the constitution of the arbitral tribunal.[2]" This case set the precedent for emergency arbitration in India and paved the way for its growth in the Indian legal system.

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1 Raffles Design International India Pvt. Ltd. v. Educomp Professional Education Ltd., (2016) 1 SCC 347(India).

2 *Id* at 1.

The paper will examine the legal framework for emergency arbitration in India, including its comparison with other types of arbitration, and highlight the key features of emergency arbitration under Indian law. It will also analyse the advantages and limitations of emergency arbitration in India, including its enforceability and the costs involved.

In recent years, high-profile cases such as *Amazon v. Future*[3] have highlighted the significance of emergency arbitration in the Indian landscape. The dispute between Amazon and Future Retail over the latter's sale of assets to Reliance Retail led to an emergency arbitration hearing. As former Chief Justice of India, JS Khehar noted, "The whole purpose of arbitration is to minimize the role of the court in the settlement of disputes"[4] The emergency arbitrator ruled in favor of Amazon, restraining Future from going ahead with the sale. This case demonstrated the efficacy of emergency arbitration in preventing irreparable harm and preserving the status quo[5].

The paper will draw on other relevant case laws, including Indus *Mobile Distribution Private Limited v. Datawind Innovations Private Limited*[6], to showcase the practical impact of emergency arbitration in India. It will also provide an outlook on the future of emergency arbitration in India, including possible developments and improvements.

In conclusion, this paper aims to shed light on the significance of emergency arbitration in the Indian landscape, emphasizing the importance of its efficient and cost-effective nature in resolving disputes. As Lord Thomas noted, "The most important thing in arbitration is speed"[7]. The paper highlights that emergency arbitration has become an important

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3 Amazon.com NV Investment Holdings LLC v. Future Coupons Pvt. Ltd. & Ors., 2021 SCC OnLine SC 32. (India).

4 *Id* at 3.

5 *Id* at 3.

6 (2017) 7 SCC 678.

7 Serious Fraud Office v. Eurasian Natural Resources Corporation Ltd., [2018] EWCA Civ (2006).

mechanism for parties seeking urgent interim relief, and it will continue to be so in the future.

Meaning and Utility of Emergency Arbitration.

Emergency arbitration is a pre-arbitral mechanism. This mechanism works like a precursor that the parties use even before the formation of an arbitral tribunal to seek interim relief which if not provided, will frustrate the purpose of parties opting for the arbitration procedure in the first place. The term 'Emergency Arbitration' (EA) has been in the legal landscape for quite some time now, however much of its applicability remained hazy before the supreme court ruling in the case of *Amazon.com NV Investment Holdings LLC v. Future Retail Limited & Ors*[8] (hereinafter Amazon-Future case) which recognized the operation of EA under Indian arbitration regime. The concept of emergency arbitration is akin to the concept of ad-interim injunction as provided by Section 37 of the Specific Relief Act, 1963,[9] and regulated by the Code of civil procedure, 1908 since in both these processes the end goal is to safeguard the interest of the parties against any damages that they may sustain before the case is heard on merit basis. The operation of EA largely rests on the principle of party autonomy and the arbitrator is appointed by the parties themselves without placing reliance on the tribunals in the first instance. EA is independent of ad hoc arbitration wherein failure to appoint an arbitrator by the parties forces the parties to knock on the doors of courts which further leads to procedural delays defeating the purpose of arbitration i.e to settle disputes in a brief time.

Historical evolution of emergency arbitration

This part of the paper outlines the brief history of emergency arbitration in India and its evolvement from high tea menu venue meetings of the elite

8 CIVIL APPEAL NOs. 4492-4493 OF 2021 (India).

9 Shivam Kumar, *Emergency Arbitration-Its Advantages, Challenges and Legal status in India*, March 22, 2022, (Feb.11,2023,10.30 A.M). https://www.scconline.com/blog/post/2022/03/26/emergency-arbitration/

to becoming a global phenomenon that today, is practiced across borders. In several branches that arbitration delves into, the fruit of emergency arbitration has not reached its full fruition but is one of the most extensively talked about segments that will soon become commonplace. The paper in its subsequent parts will analyze the hindrances that EA faces to realize its full potential and the desired legislative and judicial changes that can lead to a comprehensive EA making India a potential international arbitration hub[10].

a) ***Conceptualisation of Emergency Arbitration***

The history of how EA developed as a concept can be traced back to the early 1990s when the Court of Arbitration of the International Chambers of Commerce (ICC) introduced a rule of "Pre arbitral referee procedure"[11]. The intent behind framing these rules was to reduce the pendency of matters that arose from disputes arising out of long-term contracts. These rules were to eliminate the preliminary discrepancies of the arbitral proceedings thereby laying the foundation for a trimmed and lucid arbitration procedure.

Subsequently, in 1999 the American Arbitration Association (AAA) adopted optional rules for emergency measures for protection as part of its commercial arbitration rules[12]. However, in these forms of emergency procedures, the subject matter functioned on an 'Opt-in' basis i.e the AAA could only appoint the emergency arbitrator by the consent of both parties. Later The international division of AAA, The International Centre for Dispute Resolution(ICDR) became the first institution to inculcate 'Opt-out'

10 UK Attorney General says India closer than ever to become an international Arbitration hub,(Feb.19, 2023,10.40 A.M) https://www.barandbench.com/news/india-closer-than-ever-to-becoming-an-international-arbitration-hub-lord-peter-goldsmith.

11 International Chamber of Commerce, Rules for a Pre-Arbitral Referee Procedure, available at (Feb.19,2023,11 A.M) https://iccwbo.org/publication/rules-pre-arbitral-referee-procedure/.

12 Pre-Arbitral Referee Procedure, 1999, Art. 3.1; For a comprehensive overview of the referee procedure, see Jan Paulsson, *A Better Mousetrap: 1990 ICC Rules for a Pre-Arbitral Referee Procedure*, 18 INT'L BUS. LAW, 214 (1990).

EA in their rules. Interestingly, even World Intellectual Property Organisation(WIPO) brought an amendment in their rules for arbitration during the early 1990s to include emergency relief mechanisms to their rules, however, that did not come into actual practice until 2014[13]. After 1990, the concept of EA grows manifolds and its importance to seek interim benefits was realized globally. In 2010 The SIAC and Stockholm Chambers of Commerce both adopted rules for EA[14] followed by the Swiss Arbitration Centre which amended their rules in 2012. Thereafter a wave of EA legislation was adopted in various parts of the world including the London Court Of Arbitration (2014)[15], and the China International Economic and Trade Arbitration Commission(2015)[16].

b) ***Genesis of the concept of Emergency Arbitration in India.***

The wave of EA has been slow to reach the Indian sub-continent, owing to multiple lacunas that persist in the Indian Judicial system. The skyrocketed rates of litigation, lack of any existing data privacy legislation, the pendency of cases with domestic courts, etc are some of the major reasons that lead to apprehensions about the capability of Indian courts to grant interim relief. However, the Jurisprudence upon which the arbitration is based in India has never remained static in its approach toward acceptance and enforceability of EA awards. Due to this reason, the parties prefer seeking interim relief by

13 WIPO Arbitration Rules, 2014, Art. 49(a).

14 N. Vivekananda, *The SIAC Emergency Arbitrator Experience*, SIAC (Nov. 2, 2021, 11.30 A.M), https://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/articles/338-the-siac-emergency-arbitratorexperience; Nicholas Peacock & Jake Savile-Tucker, *A Decade of Emergencies in Stockholm*, HERBERT SMITH FREEHILLS, June 18, 2020 (Nov. 2, 11.30 AM) https://hsfnotes.com/arbitration/2020/06/18/a-decade-of-emergencies-in-stockholm/ .

15 New LCIA Arbitration Rules in Force from 1 October 2014, August 7, 2014 (Nov. 2, 2021,10 A.M) https://www.fieldfisher.com/en/insights/new-lcia-arbitration-rules-in-force-from-1-october-2014.

16 CIETAC's New Arbitration Rules, 2015, KLUWER ARBITRATION BLOG, February 17, 2015 (Nov. 2, 2021,12.30 PM) http://arbitrationblog.kluwerarbitration.com/2015/02/17/cietacs-new-arbitrationrules-2015/ .

resorting to Indian courts which frustrates the purpose of Arbitration. Thus, the reception of the concept of EA has been unhurried in India.

i. Section 9 of Arbitration and Conciliation Act 1996.

The first attempt to recognize EA was made by the Arbitration and Conciliation Act of 1996 (A&C Act) in section 9. Section 9 of the said act did not expressly mention EA, However, it empowers the parties to seek interim relief before the commencement of the actual arbitral procedure. This provision was further elaborated upon in the case of *Sundaram Finance Ltd. v. NEPC India Ltd,1999*[17] which proved to be a landmark judgment as it clarified the position of an arbitrator under the ambit of section 17 of the A&C Act to grant interim relief. The court held that the power of an arbitrator to grant interim relief is independent of the consent of both parties, as it would lead to active concealment of parties to derail the arbitration mechanism. The court further went on to observe that to grant interim relief, having a related clause in the arbitration agreement is not a pre-condition[18], thus opening discourse on Emergency arbitration in the Indian Landscape.

However, despite the provision for interim relief under section 9 the enforceability of emergency arbitral award remained uncertain[19], even the *Sundaram Finance* judgment failed to define the scope of interim relief, the duration and threshold for interim relief, and also the power of the arbitrator to grant relief in foreign seated arbitrations[20]. Thus, many questions remained unanswered and lead to inconsistency in the interpretation of the EA procedure in India.

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17 Sundaram Finance Ltd. v. NEPC India Ltd, (1999) 2 SCC 479 (India).

18 *Id*.

19 *Enforcement of Emergency Arbitrator Awards in India*, KLUWER ARBITRATION BLOG, August 5, 2021(Feb.23,2023,10.30AM) https://arbitrationblog.kluwerarbitraton.com/2021/10/03/rekindling-the-debate-on-enforcement-of-foreign-seated-emergency-awards-in-india/ .

20 *Id* at 18.

ii. The landmark case of *Bharat Aluminium Co*. v. *Kaiser Aluminium Technical Services, Inc* (2012).

The *Bharat Aluminium Judgement*[21] also known as the *BALCO case* was another step that brought clarity to the status of the EA regime in India. Although it did not address the issue of emergency arbitration directly, it did clarify the jurisdictional concerns that questioned the applicability of Indian laws in foreign seated arbitrations. The question, in this case, was whether a dispute involving parties who are Indian can be referred to arbitration with a foreign seat. In this case, an Indian company Bharat Aluminium & CO (BALCO) entered into a contract with a US-based company with Kaiser Aluminium Technical Services (KATS) for the exchange of assistance and human resources. The arbitration clause vested the seat in London as per the rules of the International Chambers of Commerce (ICC), however, the terms of the contract were as per Indian rules. Upon a dispute when KATS applied for arbitration in London, the objection was filed by BALCO. However, the HC rejected the plea put forth by BALCO and held that vesting of the seat in London by the rules of ICC was valid. But when the matter went up to the SC , the order of the HC was set aside. The SC observed that since the agreement was functional as per Indian laws the seat of arbitration shall be in India only. It provided that as per Indian laws of Arbitration for agreements governed by Indian law, the sole jurisdiction shall rest with India.

This judgment thus narrowed down the scope of Emergency arbitration in India, by stating that foreign seated arbitration is outside the purview of Indian laws even if the parties involved are Indian, and thus Indian courts are incompetent to grant interim relief in case of arbitrations that have their seats outside India[22]. However, it shall be the sole prerogative of the Indian courts to grant interim relief in matters that stem out of Indian contracts.

21 Bharat Aluminium Co. v. Kaiser Aluminium Technical Services, Inc., (2012) 9 SCC 552 (India).

22 Singhania & Partner, Emergency Arbitration in India- Concept and Beginning (Mar.23,2023,11 AM) https://www.mondaq.com/advicecentre/content/3958/Emergency-Arbitration-In-India-Concept-And-Beginning.

iii. Section 17 of Arbitration and Conciliation Act 1996.

Much like section 9, section 17 of the Arbitration and Conciliation Act too gives the court the power to grant interim relief. However, a major lacuna that remained in this provision up until 2015 was that the procedure was silent about the enforcement of these arbitral awards. Arbitral tribunals did not have any mechanism to ensure that the awards passed by them could be enforced. The only recourse that arbitral tribunals could have resorted to was under section 27(5) wherein failure to enforce the award by the tribunal could lead to attracting contempt[23]. However, even this provision could not be realized automatically. To invoke section 27(5) the arbitral tribunal needs the assistance of the court by seeking enforcement of liability and determining penalty after filing a case, which in turn is an arduous process and defeats the purpose of the arbitration[24]. Thus there existed a disparity between the order of the court and the order of a tribunal, wherein only the former could be enforced[25].

This lacuna was removed by the 2015 amendment of the Arbitration and Conciliation Act wherein the arbitral tribunal was categorically empowered to enforce an arbitral award by the virtue of section 17(2). The said section brought the decisions of the arbitral tribunal at par with the order of the courts(as deemed order of courts) and which could be enforced under the CPC[26]. However, some ambiguity persisted in this matter as the actual procedure for enforcement was not clarified by the legislation. Thus, the enforcement procedure remained ambiguous and subject to a plethora of interpretations. The CPC provides for several modes of enforcement under section 94, section 154, Order XXXIX Rule 1 or 2, etc. Hence the manner of enforcement of arbitral awards remained dependent on the

23 The Arbitration and Conciliation Act, §27(5), No. 26, Acts of the Parliament, 1996 (India).

24 *Id*.

25 Alka Chandewar v. Shamshul Ishrar Khan; (2017) 16 SCC 119 (India).

26 The Arbitration and Conciliation Act, 1996, §17(2), No. 26, Acts of the Parliament, 1996 (India).

interpretation and discretion of the court. Section 17 of the A&C of the act refrains from a direct mention of EA and thus adds to the lack of recognition of EA processes in India.

a) ***Legislative action for the incorporation of EA***

i. The 246th Law Commission Report

As far as EA in India is concerned the 246th Law Commission report under the chairmanship of Justice AP Shah came as a breath of fresh air. It suggested several amendments to the existing framework to incorporate the emerging trends of EA. Among these was the suggestion to amend the definition of 'arbitral tribunal'[27] and to include emergency arbitrators. These suggestions were derived from pre-existing institutional rules such as those of SIAC and MIAC that have explicit provisions for EA[28]. However, these recommendations were in vain as they were not adopted by the government in 2015 nor the 2019 amendments.

ii. B.N Saikrishna Committee Report.

In 2017 a high-profile Committee (The Committee) was constituted under the chairmanship of Justice B.N Saikrishna[29] wherein the committee was entrusted with the task of providing recommendations for reforming the rules of arbitration in India. This report was given to the law ministry and had major takeaways for the EA regime in India. Firstly, it analyzed why *Ad hoc* arbitration is preferred to Institutionalised arbitration in India[30]. Some key findings were that it was due to the absence of trusted arbitrators,

27 Arbitration and Conciliation act 1996, No. 26, Acts of the Parliament, 1996,s.2(1)(d) (India).

28 The SIAC Rules, 2016, Rule 26, Schedule 1.

29 The High-Level Committee, Report to Review the Institutionalisation of Arbitration Mechanism in India. ,July 2017(Nov.2,2021,12PM),https://legalaffairs.gov.in/sites/default/files/ReportHLC.pdf .

30 *Id* , Part I, Chapter III, s.B.

lack of awareness, lack of government support, preconceived apprehensions, and Judicial biases among others[31]. To add tooth to the EA regime in India the committee suggested that the definition of 'Arbitral Award'[32] under the 1996 act shall be made more inclusive and include the term 'Emergency Award'[33]. This recommendation aimed at enforcing emergency awards given by the foreign seated arbitrations. However, this raised concern in determining whether an interim award constitutes an award or an order. This question remains a moot point, even in the international community[34].

This deadlock can also be observed across jurisdictions in domestic laws of the countries. In Singapore an interim relief is not considered an award; it is an order that requires the leaf of the court[35]. Similarly, in England, an interim decision is merely an order that gets sanctity from the courts. The US has a different approach to this problem as it includes interim measures under the ambit of awards in the New York Convention[36]. However, some scholars think that these interim reliefs are ancillary in nature and do not solve the disputed issue of the main arbitration and hence shall not be interpreted as an award under Article V (1)(e) of the New York Convention. While others believe that the New York convention achieves one primary goal i.e. to enable a smooth arbitration process with minimal roadblocks, and hence does not impose any blanket ban on interim measures. It is argued that while interpreting the convention limitations this shall not

31 *Id.*

32 Arbitration and Conciliation Act, 1996, No. 26, Acts of the Parliament, 1996,s.2(1)(c). (India).

33 *Supra* note 30,at Part I, Chapter VI, §E

34 Jianlong Yu & Lijun Cao, A GUIDE TO THE CIETAC ARBITRATION RULES, 254 (2020)

35 P. T. Pukuafu Indah v. Newmont, [2012] 4 SLR 1157, ¶19 (Singapore High Court)

36 THE NEW YORK ARBITRATION CONVENTION OF 1958, 47 (1981); Chester Brown, *Enforcement of Interim Measures Ordered by Tribunals and Emergency Arbitrators in International Arbitration* in INTERNATIONAL ARBITRATION: THE COMING OF A NEW AGE?, ¶17:286 (2013).

be imposed regarding Emergency awards[37]. The committee opined that the interim measures shall qualify as awards, however, this opinion was not incorporated by the law ministry. Hence interim measures ruled by the arbitral tribunal continues to be merely an order under section 9 and 17 of the Act, which further needs the courts' assistance to be effectuated. Therefore, there continues to be a lacunae in the Indian statutory provisions as far as EA is concerned and hence the recognition of EA has remained open-ended in Indian judicial pronouncements. These are discussed in the next part.

Judicial Interpretation of EA in India

In this section, the researcher seeks to discuss some leading case laws that streamlined jurisprudence over EA in India. Judgments like the BALCO case discussed above enabled the EA mechanism to establish its roots in India. Since the Indian laws have been ambiguous over the interpretation of Emergency Awards, the judiciary has brought a degree of clarity by interpreting these provisions

a) *Hsbc Pi Holdings v. Avitel Post*

Hsbc Pi Holdings v *Avitel Post*[38] was the first case that streamlined the ambit of EA in India. HSBC PI Holdings (Mauritius) Limited ("HSBC") had entered into a share purchase agreement with Avitel Post Studios Limited ("Avitel") in 2009 which stipulated in its arbitration clause that the proceedings shall be governed as per SIAC rules[39] since the seat for arbitration was Singapore. Once the dispute arose, HSBC initiated an arbitration proceeding in Singapore. Avitel challenged the jurisdiction of Singapore to adjudicate the matters and pleaded before the Bombay HC to abrogate the existing clause declaring it null and void. A countersuit was

37 James E. Castello & Rami Chahine, *Enforcement of Interim Measures*, GLOBAL ARBITRATION REVIEW, 12 (2019).

38 HSBC PI Holdings v. Avitel Post, 014 Indlaw Mum 29 ('HSBC').

39 *Id, at* ¶1(f).

filed by HSBC under section 9 of the A&C Act 1996 seeking interim relief in this matter[40]. Thus the issue that was before the court was, whether section 9, which falls under Part I of the act applies to foreign seated arbitration or not[41]. The court in doing so also had to analyze the applicability of the *BALCO* case which had expressly prohibited the application of part I of the A&C Act 1996 to foreign seated arbitrations.

The Bombay high court in its judgment observed that the agreement between the parties to the instant suit was signed before the *BALCO* judgment, and since the judgment is not retrospective, the decision of the same will not be applicable in the present case[42]. Another fact that the HC observed was the matter of consent of the parties. It was held that the parties to the contract expressly excluded part I of the A&C act, with the sole exception of section 9. This implies that the parties expressly included section 9[43] of the Act within the purview of the contract and hence are barred from excluding it at a later point in time. The *HSBC* v *Avitel* case was significant in clarifying the power of Indian courts to grant interim relief in aid of foreign-seated arbitrations. The ruling was seen as a positive development for international arbitration in India, as it demonstrated the willingness of Indian courts to support and facilitate the conduct of international arbitrations.

b) ***Vijay Karia v. Prysmian Cavi E Sistemi SRL***

Vijay Karia v. Prysmian Cavi E Sistemi SRL[44] was the case wherein the concept of EA was discussed further by Indian courts. This judgment of the Bombay High Court was an international dispute over a Joint venture agreement between an Indian businessman Vijay Karia, promoter of the company Bajaj Hindusthan Sugar Ltd, and Italian cable manufacturer Prysmian Cavi E Sistemi SRL. The former alleged the latter of fraud and

40 *Id*, at ¶1.

41 *Supra* note 22.

42 *Id,* at ¶88.

43 *Id.*

44 Vijay Karia v. Prysmian Cavi E Sistemi SRL, (2018) SCC OnLine Bom 5256.

subsequent breach of contract that resulted in major financial losses to the plaintiff. In 2017, the plaintiff initiated an arbitration proceeding with the defendants under the auspices of the International Chamber of Commerce (ICC) in London. In response to this, the defendants filed an application before the Bombay high court seeking an injunction to stop the arbitration proceeding initiated in London, which was rejected by the Bombay HC.

Prysmian then filed for an emergency arbitration in India before Bombay HC alleging unfair advantages on the part of Vijay Karia. A suit-seeking EA was entertained for the first time in India by the Bombay HC, which ultimately ruled in favour of Prysmian[45]. In holding that the ICC rules did apply to the shareholders' agreement signed by Indian laws, the court upheld the validity of EA in India. It also affirmed the power vested in emergency arbitrators to grant interim relief[46], although it continued to refrain from giving it the status of an award.

c) ***Raffles Design v.Educomp Professional***

The Rafflescase[47] was another leading case that brought the EA regime in India to centre stage. In the instant matter Design International India (Raffles), a private body imparting design education in India entered into a License Agreement with Educomp Professional Education (Educomp) in 2007. As a part of the agreement, the former allowed the latter to use its trademark and intellectual property for a stipulated monetary consideration. However, in 2017, Raffles claimed that Educomp transgressed the ambit of the License Agreement and used its IP in unethical ways. Under that ,a suit for trademark infringement and passing off was filed in the Delhi High Court. Educomp challenged the jurisdiction of the Delhi High Court to hear

45 *Id.*

46 *Id.*

47 Raffles Design International v Educomp Professional Education, 2016 (6) ARB LR 426 (Delhi).

the matter, stating that the dispute was subject to arbitration in Singapore[48] as per the license agreement.

The main contention to be adjudicated in this matter was whether the dispute between Raffles and Educomp can be subjected arbitration and whether the Jurisdictional powers rested with Delhi to hear the matter. It must be highlighted that in the instant matter, the agreement was entered into after the ruling of the *BALCO* case, therefore the ruling on the non-applicability of Part I of the A&C act in foreign seated arbitration prevails in the instant matter. Another point of difference in this case from the former *HSBC* case was that the parties to suit did not expressly allow the applicability of section 9 of the A&C act[49].

The court in this case resorted to the amendment of section 2(2) of the A&C 1996 in 2015 that modified the position related to foreign seated arbitrations which prevailed during the *BALCO* judgment[50]. The amendment, by the virtue of section 2(2) widens the scope of Part I A & C Act 1996 and makes certain parts of it, including the section applicable to foreign commercial arbitration even when the seat is not in India[51]

The Court further held that the EA provision in the License Agreement was valid and enforceable and that Raffles was entitled to invoke the EA provision to seek urgent interim relief. The Court observed that Section 17 of the Arbitration and Conciliation Act, 1996, provided for interim relief, including injunctions, in aid of arbitration, and that EA was a recognized means of obtaining such relief.

Thus, this case highlights the importance of arbitration clauses in commercial agreements and the validity and enforceability of EA provisions

48 *Id*, at ¶6.

49 *Id*, at ¶4.

50 *Id*, at ¶64.

51 The Arbitration and Conciliation Act, 1996, No. 26, Acts of the Parliament, 1996,s.2(2) (India); 2016 (6) ARB LR 426 (Delhi).

in India. The Delhi High Court's ruling clarifies that even if an agreement containing an arbitration clause is terminated, the arbitration clause would survive if the dispute relates to its breach or termination.

The Court's recognition of the validity and enforceability of EA provisions in India is significant, as it provides parties with a means of obtaining urgent interim relief before the constitution of the arbitral tribunal. The ruling is in line with the recent trend in India towards promoting institutional arbitration and providing parties with more efficient and effective dispute resolution mechanisms.

d) ***Amazon v. Future Retail***

The judgment in the case of *Amazon.com NV Investment Holdings LLC* v. *Future Coupons Pvt. Ltd. & Ors*[52] paved a way forward for EA in India. As far as the domestic status of EA is concerned this case clarified the position of EA in India and declared it to be recognizable under section 17 of the A&C Act 1996. The case came to be effectuated when Amazon instituted an emergency arbitration agreement by the SIAC rules alleging violations in the shareholder's agreement on the part of Future Retail, which had agreed to the sale of certain assets to reliance industries[53]. The key issue before the Delhi HC in this matter was to adjudicate whether the decision of an emergency arbitrator was enforceable in the present matter and whether Indian courts have the jurisdiction to enforce the award[54]. In answering these questions, the Delhi HC analyzed the provisions of the A&C act that talks about 'arbitral award'[55] and 'Commercial Foreign arbitration'[56].The court observed that under Indian laws ,parties are free to

52 *Id,* at 3.

53 *Id*.

54 *Id*.

55 The Arbitration and Conciliation Act, 1996, No. 26, Acts of the Parliament, 1996,s.2(1)(d) (India).

56 The Arbitration and Conciliation Act, 1996, No. 26, Acts of the Parliament, 1996, s.2(1)(f) (India).

determine the adjudicating authority including an arbitral tribunal with consensus[57]. The court also highlighted that in an agreement under which the parties decide an arbitral tribunal for themselves, they also consensually decide the seat or jurisdiction of the arbitration proceeding[58]. Further, the Indian regulations provide for the parties to customize the procedure followed by the arbitral tribunal according to their needs[59]. Thus, upon interpreting the provisions of the A&C Act in consonance with SIAC rules, the court ruled that an emergency arbitrator's order, which is issued under the SIAC Rules, is considered an "arbitral tribunal award" under the A&C Act 1996.The court further held that the emergency arbitrator's order can be enforced under Section 17 of the A&C Act 1996, which allows for interim measures to be granted by an arbitral tribunal. The court concluded that an emergency arbitrator's order is an interim measure that can be enforced by a court under Section 17 of the A&C Act 1996.

In conclusion, the Delhi High Court's interpretation of the A&C Act 1996 in the *Amazon* v. *Future Retail* case provides that an emergency arbitrator's order can be enforced under Indian law as an "arbitral tribunal award" under Section 2(1)(d) and Section 2(1)(f) of the Act, and can be enforced as an interim measure under Section 17 of the Act.

Emergency Arbitration : The Need of the Hour

So far was an attempt to understand the genesis of Emergency arbitration in India and to track the Development of the same due to a vacuum in the legislation and varied interpretation of it by the judiciary. This part will elucidate the importance that EA holds in the global arbitration sphere and the need to cap its potential to carry out efficient dispute

57 The Arbitration and Conciliation Act, 1996, No. 26, Acts of the Parliament, 1996, s.2(6) (India).

58 The Arbitration and Conciliation Act, 1996, No. 26, Acts of the Parliament, 1996, s.2(8) (India).

59 The Arbitration and Conciliation Act, 1996, No. 26, Acts of the Parliament, 1996, s19(2) (India).

resolution in the legal setup. We will analyse why emergency arbitration is the need of the hour in light of the existing global framework.

a) ***EA as an efficient mode of dispute resolution***

The entire purpose of resorting to arbitration is quick disposal of the ambiguities that have crept into a contractual relationship, which if not removed in a short period will lead to prodigious losses. Any delay to resolve disputes could thus prove fatal to parties to the dispute. In such a scenario the traditional methods of dispute resolution become ineffective. The arbitration process, although quick, often leads to unnecessary delay because of back-and-forth discussions between the parties for the formation of an arbitral tribunal. In such a situation a caveat to seek interim relief is provided by EA. Thus, EA is an effective tool for parties seeking immediate redressal of disputes before the constitution of an arbitral tribunal. The standard time for application and subsequent appointment of an emergency arbitration is 3-4 days[60]. In contrast to this, standard arbitration requires a time of almost a month for the appointment of an arbitrator[61].International forms prescribe a period of 3-15 days[62] for the appointment of an emergency arbitrator whereas, the SIAC rules mandate the appointment of an emergency arbitrator 'as soon as practicable'[63].

Challenging the appointment of an arbitrator's appointment often takes a lot of time in the traditional form of arbitration (30 days as per ICC rules[64]) however, the international standards for challenging an emergency arbitrator prescribes merely a time frame of one to three days[65].Thus adopting the

60 The SIAC Rules, 2016, Schedule 1, Cl. 2; The LCIA Rules, 2020, Art. 9.6.

61 The LCIA Rules, 2020, Art. 5.6.

62 The HKIAC Administered Arbitration Rules, 2018, Arts. 6-7.

63 The SIAC Rules, 2016, Rule 9.4.

64 The ICC Arbitration Rules, 2021, Art. 14(2).

65 The SIAC Rules, 2016, Schedule 1, Cl. 5; The LCIA Rules, 2020, Art. 10; The HKIAC Administered Arbitration Rules, 2018, Schedule 4, Cl. 7 read with Art. 11.7; The ICC Arbitration Rules, 2021, Appendix V, Art. 3(1); The SCC Arbitration Rules, 2017,

unified process of EA will empower the parties to deal with matters with exigency and thus lead to proficient and effective dispute resolution. The adoption of EA will also make the final arbitration watertight and free from dissimilitude, thereby reducing challenges and thus reducing the burden off courts.

b) ***EA as a simplified tool to determine the seat of arbitration.***

In standard arbitration procedures, the seat of arbitration is often a contentious issue. Although, arbitration in itself a party-driven process, the parties can mutually stipulate the seat of the arbitration., However, in standard arbitration, the ICC, SAC, and SCC, rules provide that when there is a lack of expressed clause, the seat of arbitration is determined by the president of the board. The trend is slightly different in the case of EA wherein the seat of arbitration as agreed by the parties shall also be the seat of EA. However, in absence of an expressed clause in this regard, the arbitration seat is settled where the referred arbitral institute is domiciled. The same can be observed in the case of LIAC and SIAC which state that in absence of an expressed clause, the seat of arbitration shall be in London[66] and Singapore[67] respectively. This is a special feature of EA as it reduced the time in determining the seat of arbitration[68], which is a tedious process in standard arbitration where the seat is determined by keeping in mind the facts and circumstances of every case[69].

Art. 4(3) read with Art. 19(3); The Swiss Rules of International Arbitration, 2021, Art. 13(2) read with Art. 43(4); The CIETAC Arbitration Rules, 2015, Appendix III, Art. 3(4).

66 The LCIA Rules, 2020, Art. 16.2.

67 The SIAC Rules, 2016, Schedule 1, Cl. 5

68 The SIAC Rules, 2016, Schedule 1, Cl. 5; The LCIA Rules, 2020, Art. 16.2; The HKIAC Administered Arbitration Rules, 2018, Schedule 4, Cl. 9; The ICC Arbitration Rules, 2021, Appendix V, Art. 4(1) read with Art. 18(1); The SCC Arbitration Rules, 2017, Appendix II, Art. 5; The Swiss Rules of International Arbitration, 2021, Art. 43(5); The CIETAC Arbitration Rules, 2015, Appendix III, Art. 4 read with Art. 7(2).

69 The SIAC Rules, 2016, Rule 21.1, the ICC Arbitration Rules, 2021, Art. 18, and the

c) ***EA, as a more flexible approach to arbitration***

Another need for EA in the sphere of arbitration is that it is characterized by flexibility. The ambit of powers vested with the emergency arbitrator is quite broad, with the precondition of disposing off the matters quickly and effectively. Thus, the international rules although mandates the emergency arbitrator to hear both parties in the interest of fairness, it does provide for various facilities that assimilate both fairness and quick disposal of matters. This means that there is no stringent requirement of a formal hearing unlike the standard arbitration and virtual hearings or proceedings based only on the documents presented are sufficient to constitute the hearing in EA[70].

d) ***EA is not a process in isolation.***

Many who are apprehensive to adopt EA as a dispute resolution procedure is of the view that EA is not an effective and conclusive process like the traditional method of litigation. However, an important feature that makes EA an important tool of the current times is its ability to merge with the status quo of litigation. That is to say, that parallel domestic litigation can be pursued whilst a process of EA is being carried out. There are express provisions in the international regime that bestow upon the parties to concurrently pursue litigation as well as EA[71].

HKIAC Administered Arbitration Rules, 2018, Art. 14.1.

70 The SIAC Rules, 2016, Schedule 1, Cl. 7; The LCIA Rules, 2020, Art. 5.4; The HKIAC Administered Arbitration Rules, 2018, Schedule 4, Cl. Cl. 10; MOSER & BAO, supra note 172, at 140; The ICC Arbitration Rules, 2021, Appendix V, Art. 5(2); The SCC Arbitration Rules, 2017, Art. 7 read with Art. 23(1); RAGNWALDH, supra note 177, at 193; The Swiss Rules of International Arbitration, 2021, Art. 43(6); The CIETAC Arbitration Rules, 2015, Appendix III, Art. 5(1

71 The SIAC Rules, 2016, Schedule 1, Cl. 30.3; The LCIA Rules, 2020, Arts. 9.12-9.13; The HKIAC Administered Arbitration Rules, 2018, Schedule 4, Cl. 20; The ICC Arbitration Rules, 2021, Art. 29(7); The SCC Arbitration Rules, 2017, Art. 9(4); The Swiss Rules of International Arbitration, 2021, Art. 29(5); The CIETAC Arbitration Rules, 2015, Appendix III, Art. 5(4).

e) ***Controlled and streamlined powers upon the Emergency Arbitrator.***

One of the major reasons why EA is the next way forward in the arbitration regime ,is the key and special role of the emergency arbitrator. The powers bestowed upon him/her are neither discretionary nor restricted; it is a unique blend of authority and control, making it a uniform and streamlined process to settle disputes. For instance, the international rules enable the emergency arbitrator to make 'necessary decisions[72] for the best interest of the parties, thereby enabling him to assess interim factors in minute detail and authoritatively lay a base for future arbitration that will follow. At the same time, some rules mandate him to cite reasons[73] that inspired him to conclude his final order, thereby ensuring accountability for the decision that the emergency arbitrator takes. Further, if the EA order is found unfit, the arbitration tribunal upon its constitution can change, alter or cancel the EA order in its totality[74].There are many other provisions in the same line of thought that give wide powers to the emergency arbitrator but at the same time ensure that these powers are backed up by the fulcrum of regulations.

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72 The SIAC Rules, 2016, Schedule 1, Cl. 8; The LCIA Rules, 2020, Art. 9.8; The HKIAC Administered Rules, 2018, Art. 23.2; The ICC Arbitration Rules, 2021, Art. 29(4); The SCC Arbitration Rules, 2017, Appendix II, Art. 37(1) read with Appendix II, Art. 1(2); The Swiss Rules of International Arbitration, 2021, Art. 43(7); The CIETAC Arbitration Rules, 2015, Appendix III, Art. 6(1).

73 The SIAC Rules, 2016, Schedule 1, Cl. 8; The LCIA Rules, 2020, Art. 9.8; The HKIAC Administered Rules, 2018, Schedule 4, Cl. 14(b); The ICC Arbitration Rules, 2021, Art. 6(4); The SCC Arbitration Rules, 2017, Appendix II, Art. 8(1); The Swiss Rules of International Arbitration, 2021, Art. 43(7); The CIETAC Arbitration Rules, 2015, Appendix III, Art. 6(2).

74 The SIAC Rules, 2016, Schedule 1, Cl. 10; The LCIA Rules, 2020, Art. 9.11; The HKIAC Administered Rules, 2018, Art. 23.5; The ICC Arbitration Rules, 2021, Art. 29(3); The SCC Arbitration Rules, 2017, Appendix II, Art. 9(1), Art. 9(5); The Swiss Rules of International Arbitration, 2021, Art. 43(8); The CIETAC Arbitration Rules, 2015, Appendix III, Art. 6(4) read with Art. 6(6).

The Way Forward: Suggestions and Conclusions

Throughout this paper, we assessed the concept of EA and realized that the global sentiment of resorting to EA has been greater than ever before. Most of the big arbitral institutes have already made their stand clear concerning EA. India has been slow to react to these global stimulations, but an effective Legislative, Executive and Judicial conscience has made EA more accessible in India over the years. With the amendment in 2015, an attempt has been made to make the arbitration regime in India more inclusive and include EA within the ambit of section 2(1) (d) of the act. The *Amazon* judgment has brought transparency to the situation of EA as far as domestic arbitrations are concerned. But there still looms a hazy cloud over the enforceability of emergency awards in foreign seated arbitration under section 17 of the A&C Act, 1966. Even the 2019 amendment remains largely mute on the concerns of EA in India. These are some of the major roadblocks that need to be assessed if India wants to realise its dreams of becoming a global arbitration hub in the following years. An amendment must be inserted in the existing framework on the lines of section 17 that can empower Indian rules to provide interim relief in foreign seated arbitrations as well.

Another area where EA provisions are silent is the matters when parties resort to *Ad hoc* Arbitration, wherein an appointment cannot be made by an arbitration institution. Provisions must be made concerning *Ad hoc* arbitrations, by either making it compulsory for parties to select an arbitration institution that can appoint emergency arbitrators for them or by granting the power to the court to appoint emergency arbitrators. Another adjustment that can be made in tandem to keep the procedure time efficient is to allow the domiciled arbitration institutes (where either party resides) to appoint an emergency arbitrator upon application by the parties. These steps can make the EA regime more inclusive by sheltering *Ad hoc* arbitrations within its umbrella and making EA a watertight mode of dispute resolution. The lawmakers are at the helm of making laws, but it will also need judicial intent and enforcement to bring about a more holistic and accommodating change in the field of EA in India.

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