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FOREWORD

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Law is inherently an inter-disciplinary subject as the very object of laws is to regulate the society and the conduct of its members. Law can never be studied as a standalone discipline. Though disciplines such as history and political science have been its close companions for long, economics has proved to be best despite being the recent-most.

Economics sets law free from its shackles of ethical, societal, orthodox considerations and opens new avenues wherein law can be used as an economic tool to set the wheels of the economy in the right direction. Economics gives it a scientific, empirical and statistical perspective. Economic analyses not only enable one the understand the problem better, but also provide for efficient and socially desirable solutions to the same. Law is then used to apply those findings.

This importance of economics in law has enabled 'law and economics' to earn the status of a discipline in itself. Despite its importance, the discipline has not developed properly in India. There is a serious lack of literature on the discipline, especially indigenous. This can be attributed to the fact that the discipline has failed to reach sufficient number of academicians and students. This Journal is an attempt to spread the discipline among a wider base so as to stimulate young minds in this field and catalyse the process of development of the same in India.

It becomes all the more important to develop an indigenous school of thought in this discipline as the social and economic realities are different across countries. The terms of the bargain change as we move from one jurisdiction to another thereby rendering the findings of economic analysis of laws of a given jurisdiction useless in the others. Hence, development of literature on law and economics in India by Indian authors written specifically in context of the realities of India is essential.

The Literature of Law and Economics is enlarging throughout the globe, the main reason being that economics provides a general scientific methodology of recognizing and resolving complex

phenomena in the day to day transactions. Further, it has proven itself to be a dynamic field encompassing both theoretical and empirical frameworks. And a lot of work is needed to be done and is being done. The present issue consists of seven articles which cover different facets of law ranging from Intellectual Property Law to ADR, Constitutional Law to Corporate Law with a special insight on the developing 'Indian School of Thought' for law and economics which is in sync with the aim of the Journal.

This issue begins with Prof. Dr. Ram Singh's article titled "**The Law and Economics of Force Majeure Litigation: The case of Covid-19"**, wherein the law and economics of litigation has been discussed. The article has been written in the backdrop of the disruption of economic activities and frustration of contracts owing to COVID-19 and the litigation emerging out of the same. The article studies the predicted outcomes of litigation and trial and the effect of the predicted outcomes on the likelihood and terms of out of court settlement between parties. Dr. Ram Singh has argued in the article that the litigation outcomes have become uncertain owing to Covid-19 as the parties are unsure whether the Court will consider the pandemic as amounting to a force majeure event or not. This in turn changes the bargaining power of parties in the pre-trial negotiations. Based on the detailed law and economics analysis, Dr. Ram Singh has concluded that the pandemic reduces the chances of negotiation and increases the probability of litigation owing to the worsening of financial condition of the defendant, informational asymmetry and the uncertainty of the result of litigation.

Srishti Suresh's **"The Crossroad of Patent and Competition Law in the Context of Patent Assertion Entities: A Comparative Analysis".** Patent Assertion Entities (PAEs) has a dubious condition in India as it is detrimental for innovation and restricts free competition. Though the discussion of PAEs is still in a nascent stage, the author has dissected the problems of PAEs by analysing a plethora of existing costs and the anti-competitive regime through a comparative analysis of various jurisdictions. The author has strongly advocated for the revamp of the system by strengthening the antiquated patent laws wherein the country should majorly adopt '*hierarchy of inventiveness*', deconstructing the concept of novelty into its constitutive elements, and adopting an informed system for scrutinising patent applications.

In **"India's jumbled public policy jurisprudence: Stretch, Demarcate and 'Saw (Pipes)'",** Malcolm Katraj has reviewed the uncertainty in the expression *'opposed to public policy'* which is witnessed in the evolving Indian jurisprudence of arbitration. This might be a hurdle in the economic growth of the country, where the world is focused towards incentivizing cooperation through providing contractual rights and easy dispute settlement mechanisms. The author has attempted to reduce the apprehensions and the uncertainty through a 'focal point' approach where the legislature directs the parties to a better equilibrium by acknowledging the roles of multiple players in the economic game.

We then come to the fourth article of the issue by Aniruddha Pratap **"Availability Heuristics and Insights for Corruption",** wherein the author has given a unique insight on '*Behavioral Economics and Corruption'*. The author has primarily argued against the traditional and restricted approach of Law and Economics which needs to be widened through Behavioral Economics that takes into account the 'Bounded Rationality' of individuals. Further, the author has used empirical data to show the fallacy present in the substantive laws and the enforcement mechanism that may deform the results of 'law and economic' models due to the effects of 'availability heuristics'.

Avni Sharma in **"Examining the Potential Tax Implications of Transaction in Digital Intellectual Property",** has discussed the challenges present in the taxation system in the era of globalisation with a special focus on Digital Intellectual Property. Through a cross-jurisdictional analysis, the author has reflected the chaos between U.S.A and Europe which provides a specimen of the requirement of a better tax regulation regime in the digitised era. Further, the novel challenges posed by OTT platforms can be resolved through a multilayer tax system, expounded in the article. The author has strongly advocated for the separation of the digital economy from the basic tax system wherein a uniform tax arrangement is followed by all the jurisdictions.

In the sixth article of this issue, **Excessive Drug Pricing in Indian Pharmaceutical Market: Exploitative Practice or Aggressive Competition Conduct?,** Prerna Raturi has explained the economics of competition law specifically in the context of excessive pricing of pharmaceutical drugs and its relation with patent protection. The author has discussed how the position of competition law in USA and EU in respect of excessive pricing are at loggerheads wherein one is

a staunch proponent of competition law enforcement against excessive pricing of drugs while the other is against it. Further, the arguments against regulation of excessive pricing viz disincentivization of investment in R&D, self-correction of market, inter-brand competition have been discussed and rebutted using the counterviews on the same. The author has opined that the CCI has proved to be a toothless tiger in this regard and has vehemently argued that excessive drug pricing is a vice in that it defeats the purpose of the research and development of new drugs if they are kept out of the reach of those who need them owing to the high prices. Therefore, excessive pricing of drugs must be considered to be well within the ambit of competition law and excessive pricing must be controlled as an anti-competitive practice.

The next article is the **Economic Analysis of Euthanasia,** wherein Ishita Shukla and Ayush Yadav have presented a rather unique and interesting analysis of the practice of Euthanasia from a law and economics viewpoint. They have presented a cost-benefit analysis of the same and argued in favour of the practice. The authors have simply argued that if the social benefit of euthanasia exceeds the social cost, the same must be adopted. To determine the same, the authors have given a mathematical equation wherein if the possible contribution of the person to the economy if he revives is greater than the cost of medical care multiplied by the probability of death, then euthanasia should not be allowed in such cases. Another argument based on allocative efficiency has been extended by the authors which says that where the resources being allocated for the terminally ill can be better utilised, euthanasia should be resorted to. Euthanasia has been further proposed on utilitarian arguments. The authors have even pointed out the economic drawbacks of legalizing euthanasia as in the real world of imperfect information, people tend to behave irrationally. The decision of the family members of the terminally ill is generally based on emotion and seldom on economic criteria.

Vibhu Tripathi in **Credibility of Insolvency and Bankruptcy Code, 2016: Special Reference to Corporate Debtor** has carried out an economic analysis of IBC. The law has been instrumental for India, more so in light of the problem of NPA that the country is facing. The author has argued that there the provisions of IBC have been drafted without taking into consideration the inefficient outcomes. Too much powers in the hands of the Resolution Professional and treating all corporate debtors equally irrespective of the size of the concern has jeopardised the interest of the economy

as a whole. The argument has been developed further by highlighting issues pertaining the resolution professional such as lack of proper knowledge, lack of experience, requirement of special skills to run a particular business which might be faced by the corporate debtor. The author has further argued that the corporate debtor being a person, enjoys the rights guaranteed by the Constitution under Article 21 which include the right the privacy. The same is infringed by section 29 of the Code. It has been further argued that the Code has been drafted as a creditor favouring law without any regard to the debtors' situation. The author has further suggested certain amendments to the code so as to set the wheels of the said law in the direction of efficient resolution of disputes.

Shivangi Gangwar in **Another Prisoner Dilemma: Voting Rights of the Incarcerated** has done an economic analysis of the policy of disenfranchisement. There has been a lot of deliberation on the 'Right to Vote' of prisoners in Hon'ble Supreme court and foreign judgments. The author argues that not allowing voting rights to the prisoners imposes tremendous social costs wherein the legitimacy of the constitutional democracy comes into question. The author has used the micro economic tools to explain incentives, uncertainty and risk aversion present in the system. The Public choice analysis was used by the author to argue that if the prisoners had equal voting rights with non-prisoners, they would be in a better position to counter the dangers posed by the prison-industrial complex.

Finally, Advik Rijul Jha in **Subsidies to the Indian Sugar Sector: In Coherence with India's WTO Obligations?** has analysed the legality of the domestic support measures and export subsidies provided by the Indian government to producers of sugarcane and sugar vis a vis the laws of the World Trade Organization. The author has strongly advocated for the revisit and export subsidies provided by the Indian government in the light of WTO compatibility. Further along with discussing the issues in the present context, the author has attempted to give solutions which the Indian Government can undertake.

The discipline of law and economics focusses on efficiency in resolving the issues being faced by the society. An economic analysis of laws brings out the drawbacks of the law in question and enables policy makers to make the requisite changes to the law. The discipline has provided a new

canvass for those interested in studying law from an economic view point and finding efficient and innovative solutions to problems. This Journal is one such platform which enables academic writers to share their ideas and research outcomes and add to the literature on this discipline.

THE LAW AND ECONOMICS OF FORCE MAJEURE LITIGATION: *THE CASE OF COVID-19*

Ram Singh[1]

1. Introduction

In the aftermath of the Covid-19, the world is witnessing a flurry of disputes over contractual performances and compensation claims for injuries with India being no exception. The pandemic has forced companies and firms to suspend their promised supply of goods or services, triggering legal demands of compensation from the counterparties in the contract. Many employers have held back on the promised wages, debtors have suspended servicing their debts, and insurance companies have refused to compensate claimants for the business income losses. In many of the disputes triggered by Covid-19, one or the other contracting party has invoked the pandemic as 'force-majeure', or an event that has frustrated the contact. In many other disputes, the suppliers have argued that the disease has made contractual performance an economic impossibility. That is, the pandemic has increased the cost of contractual performance to a level that they cannot afford.

Covid-19 has triggered many claims for compensation for injuries as well. In the aftermath of Covid outbreak, many employees were able to work from home. However, for a large section of employees it was not possible to work remotely, especially those working in the essential services. These people faced an enhanced risk at the workplace. Indeed, many of these workers have been engaged in very high risk works with direct exposure to Covid-19. The degree of risk varies across activities. Therefore, it is very likely that the disease will take a higher toll on these people in terms of physical and mental health, leading to disputes over compensation. There are also reports of compensation claims arising from the injuries caused by safety products, like sanitizers, masks etc.

Indeed, the count of disputes triggered or caused by Covid-19 is large and is increasing by the day. In this paper, we examine these disputes from a law and economics perspective. We present a litigation model to analyze the effect of the pandemic on the probability of litigation

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and the subsequent trial outcomes. We examine how the predicted litigation outcomes have bearing on the likelihood and the terms of the 'out of court' settlements between the parties.

In several cases, disputant parties try to settle their dispute out of the court. The out of court settlement happens in the shadow of the litigation outcome.[2] In other words, during pretrial negotiations, the bargaining position of parties depend on what they can expect from the trial. A rational plaintiff will demand high compensation if he expects high compensation through trial and vice-versa. Covid related disputes are different on several counts. The pandemic has come as a macroeconomic shock for many workers, employers, traders, service sector firms and the industrial and service sector companies. The disease has adversely affected the financial position of many business entities and firms. Unsurprisingly, many find themselves unable to meet their contractual obligations; such as debtors are unable to service their debts, buyers are unable to make payment for goods delivered, etc. Numerous individuals and business entities have been left 'judgement proof' by the disease. In other words, these entities are not in a position to fulfill their obligations and hence their disputes cannot be resolved in pre-trial negotiations. However, the economic impact of the pandemic differs across sectors but more importantly across firms within a sector. This means that while buyers and the debtors know about their financial position, the other side (suppliers and creditors) does not.

Moreover, the Covid-19 has increased uncertainty about the litigation outcomes. As mentioned above, many parties have cited the pandemic as an force majeure event in an attempt to wriggle out of their contractual obligations. In numerous other cases, one or the other party has cited 'frustration of contract' as a ground for not making promised payments and/or for not fulfilling their other contractual obligations. During the lockdowns, many suppliers had refused supplies citing the high costs of production and transportation. Media reports also abound on these issues.

However, there is a lot of uncertainty around how the courts are going to adjudicate the disputes triggered by the pandemic. Therefore, how the courts adjudicate Covid related disputes will affect not only the distribution of losses among the litigants but more importantly it will affect the intensity of litigation as well as the success rate for the pre-trial negotiations.

[2] R.H. Mnookin & L. Kornhauser, *Bargaining in the shadow of the law: The case of divorce*, YALE L J 88, 950-997 (1979).

The legal uncertainty and asymmetric information about the case strength have direct consequences for the pre-trial negotiations. As such, many times the pre-trial negotiations fail because the disputants have very different beliefs about the court awards, or they have asymmetric information about the case strength, or both. As examined in the next section, the pandemic has exacerbated the problems of legal uncertainty and informational asymmetry, undermining the prospects of out of court settlements.

In Section 2, we discuss the Indian legal position on the force majeure, frustration of contract and cost of performance, and compensation for injuries. We also discuss how Covid-19 has increased legal uncertainty and informational asymmetry between the disputant parties. In Section 3, we present a model that serves as a basis for analysis in the next section. In Section 4, we examine the effect of uncertainty and informational asymmetry on the litigation outcomes and pretrial negotiations. Lastly, in Section 5, we offer our concluding remarks and suggestions for efficient adjudication of the disputes triggered by this pandemic.

2. The Law, Litigation and Uncertainty

The literature on litigation attributes the existence of, in equilibrium, litigation to different beliefs about litigation outcome or asymmetric information between the parties involved.[3]

In this paper, our focus is on examining the implication of Covid-19 pandemic on contractual disputes and litigation over them. A contract is a formal agreement between the contracting parties. However, for the purpose of this study, the contract can be 'implicit', or it could arise out of another formal agreement between the respective parties.

Consider an example of a derived contract: The case of Workplace Injuries. The Employees Compensation Act, 1923 in India provides compensation for workplace injuries based on the principle of no-fault liability. The victim of a workplace injury does not have to prove fault or negligence on the part of the employer. Rather, it is enough to show that an injury arose out of and in course of the employment. Similar is the case for occupational diseases. However, in case of Covid, the courts will have to ensure that the injury happened due to the Covid exposure

[3] *See* Kathryn Spier, *The dynamics of Pretrial Negotiation*, 59(1) THE REVIEW OF ECONOMIC STUDIES, 93-108 (1992); SHAVELL, STEVEN, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW (Belknap Press World 2004)

at the workplace and dealing with the issue of causation is not easy by any means, since most people are exposed to various different sources of exposure.[4] This mean that the worker plaintiff seeking compensation as well as the defendant employer cannot be certain about their victory in the trial.

Even if the causation can be established, enquiry into compensation for injury is equally difficult. It is difficult to quantify the cost of injury/disease in monetary terms, especially when the injury can take time to fully manifest all its symptoms and their consequences.

For a compensation suit to succeed, the court has to examine if there exists a causation between workplace conditions and the mental and physical health of the plaintiff/victim. However, in many cases, affected people face multiple exposure to the disease but the symptoms appear after a considerable time gap since the exposure. Therefore, it is difficult for the court and also for the parties to prove or rebut the claim that an injury arose in the course of employment. There is uncertainty about whether a compensation claim will be admitted by the court or not. Even if a claim is admitted, the court has to quantify the compensation based on its assessment of the severity of the injury which can be very subjective assessment of the court. In other words, the plaintiffs and defendants face uncertainty about the court awards.

A similar logic applies to suits for compensation for injuries caused by 'safety' products used in the aftermath of Covid-19; such as sanitizers, masks, air purifiers, etc. An example of an implicit contract is the relationship between manufactures of such risky products and their consumers. Even though there is no formal agreement between the two sides, the proof of a transaction between a manufacturer (seller) of a product can create entitlement for the consumer to sue the producer/seller in the event of consumer suffering from injury while using the product. In the context of Covid-19, disputes over the injuries caused by defective safety products can be a significant source of litigation. However, it is not clear whether and how courts will adjudicate such disputes. It seems plausible to assume that in the event of litigation, the producers will have an informational edge over the consumers, when it comes to establishing the manufacturing defects. The consumers will have better knowledge of the harm suffered by them.

[4] Ram Singh, *Causation-consistent' Liability, Economic Efficiency and the Law of Torts*, 27 INTL REV LAW & ECON, 179-203 (2007).

Most contractual disputes are likely between parties with explicit agreements. Media reports abound on how many promisors have suspended promised supply by arguing that the pandemic is a 'force majeure' (FM) event. During the lockdowns, the power producers had refused to accept supply of electricity arguing that the Covid was a FM event as per their power purchase agreements with the power producers. Similarly, the real-estate developers and contractors had cited the pandemic as an FM event to justify the delays on their part. Many employers have refused the promised wage payments, borrowers have defaulted on the debt contracts with lenders on similar grounds. Even insurance companies have refused claims for compensation for business income losses caused by Covid-19. In other words, one of the contracting parties has argued that the Covid-19 is an event that is beyond the control of the parties involved, and that the event has made it impossible for the party to perform its contractual duty.

As a matter of fact, most supply contracts contain a FM clause. The clause provides a list of events like strike, war, riot, etc., along with events called 'acts of god,' for example flood, cyclone, earthquake, hurricane, epidemic, among others. Several 'acts of government,' are also included in the FM clause; such as prohibitory lockdowns, travel bans, etc. The idea behind the clause is to allow the parties to either terminate the agreement or put it on hold (depending on the context), if an FM event listed in the clause happens. However, the problem is that most of the contracts provide an incomplete list of events that the parties would have liked to include under FM Clause. Even worse, the clause can contain ambiguous phrases like, 'events including but not limited to the ones listed herein'. This Incompleteness and vagueness of the FM clause offers an opportunity for exploitation by the self-interested parties to absolve themselves from contractual obligations.

The term force majeure is not defined in the Indian Contract Act, 1872 (ICA). In several landmark judgements, The Supreme Court (SC) has ruled that if a contract has FM clause, it will be governed under section *32* of the Act. In several important judgements, the higher judiciary has clarified several important issues related to the FM clause.[5] However, this does

[5] *See e.g.,* Edmund Bendit and Anr. vs Edgar Raphael Prudhomme, AIR 1925 Mad 626; Satyabrata Ghose v Mugneeram Bangur & Others, AIR 1954 SC 44; Energy Watchdog v Central Electricity Regulatory Commission, (2017) 14 SCC 80; *NAFED v Alimenta* (2020).

not detract from the fact that there are various kinds of uncertainty that still haunt the use of FM clause.

The Covid related disputes are especially vulnerable to different interpretations as the new virus does not find explicit mention in most of the contracts under dispute in the aftermath of the pandemic. Therefore, in each case, the court will have to check whether the promisor could not have fulfilled the promise under the circumstance. Moreover, it will have to ensure that the claimed impossibility of performance by the promisor is attributable to pandemic. For cases where the plaintiff is entitled to compensation, the court has to enquire if appropriate steps were taken to mitigate consequences of the pandemic. Judicial findings on all these matters can be a matter of guess for the disputants. Therefore, there is a lot of uncertainty about how the courts will deal with the disputes citing Covid as a force majeure event.

In other disputes, one of the parties has argued 'frustration of contract' to justify its failure to meet contract terms. For example, restaurant operators, retailers, occupants of multiplexes, and the commercial property premise owners have sought rental-waivers from the property owners, arguing that the Covid has caused frustration of the purpose with which they had signed the contract (i.e. lease agreements). Similar is the case with contracts in the hospitality sector and management services. Consider the clients of caterers, event-managers, venue-owners, wedding planners, and vendors for decor & entertainment companies. Their clients, who had provided security deposits/booking amounts, have now filed claims for refund citing frustration of contract by the government ordered lockdowns.

Frustration of a contract is said to have occurred if an unforeseen event happens after the contract has been signed. The event responsible for frustration should make performance impossible physically or commercially or illegal, and should be outside the control of the contracting parties.

Though the Indian contract law does not define the term 'frustration of contract', the SC has held that the doctrine of frustration of contract can be dealt with under *Section 56* of the ICA. This section of the ICA makes an agreement void if as a consequence of an ex-post event the promise is rendered impossible or an illegal act, after the contract is made.[6]

[6] *See* Boothalinga Agencies v V. T. C. Poriaswami, AIR 1969 SC 110; Satyabrata Ghose v Mugneeram Bangur & Others, AIR 1954 SC 44.

As far as Covid related disputes are concerned, to allow a party to use the claim of frustration of contract, the courts have to verify if the very purpose or basis of the contract has been upset by the pandemic. That is the court has to engage in a counterfactual enquiry. The litigation outcome will depend on which side can establish preponderance of its arguments. Again, the Judicial outcomes are highly unpredictable in such cases. Using a legal phrase, the jury is still out on how the courts will decide on Covid related disputes.

As mentioned in the introduction, in many instances the suppliers and producers have reneged on their promise citing high cost of production or transportation in the aftermath of the pandemic. Indeed, during lockdowns many contracting parties found the contractual performance economically ruinous and hence had breached the contractual promises. In other words, they had refused promised deliveries/supplies arguing that the cost of supply was beyond what they could afford.

In normal times, Indian courts do not allow a promisor to renege on their supply promises based on such ground. In several judgments the SC has held that an increase in production costs or cost of delivery is not an admissible ground for absolving a party of its contractual obligation. For instance, in *Alopi Parshad v Union of India* (1960)[7] , the Supreme Court (SC) held that the promisor (a supplier of ghee) cannot wriggle out of his contract merely because his cost had increased post signing of the contract, due to the war (World War II). The apex court held that commercial difficulty did not amount to impossibility to perform and was not an admissible ground for absolving a party of its contractual duties. This is true internationally as well – courts across jurisdictions do not permit non-performance on grounds of high costs. E.g, see Tsakiroglou & Co Ltd v Noblee Thorl GmbH [1962].[8] However, the situation created by Covid is unusual, and it is not clear if the courts will still take a similar view on the cost of compliance issue, leading to a feeling of uncertainty about judicial findings.

[7] Alopi Parshad v. Union of India, AIR 1960 SC 588; *See* Naihati Jute Mills Ltd. Vs. Khyaliram Jagannath, AIR 1968 SC 522.

[8] Tsakiroglou & Co Ltd v Noblee Thorl GmbH, [1962] AC 93; The appellants/seller had agreed to ship groundnuts by sea to Hamburg. The seller argued that he could not ensure supply as after signing of the contract, the Suez Canal was closed to navigation due to military operations by Great Britain and France against Egypt. The contract had a force majeure clause. However, the court held that closing of Suez Canal did not make the delivery impossible. Appellant goods could have shipped around the Cape of Good Hope, even though this route was almost twice as long and the freightage would have cost much more.

As to the compensation claims for the costs suffered by the promisee or profit lost by him on account of non-performance by the promisor, generally the compensation for the costs or losses arising on account of the breach of contract are restricted foreseeable costs/losses. First of all, it is difficult to establish what part of the loss was foreseeable. Even if foreseeability is established, a court may still deny compensation. In this regard Transfield *Shipping Inc. v. Mercator Shipping Inc.,* House of Lords [2008] UKHL 48, is an interesting judgment.[9] In the terminology of the law and economics, the foreseeability can be termed as the "expected damage". At the time when the hirer took the decision to return the ship too late the expected damage (on top of the lost rent for 11 days) was zero.

Summing up, the pandemic has not only caused a spate of disputes, it has created a lot of uncertainty about how the courts will adjudicate these disputes. In many cases, the pandemic has led to disputes where parties have asymmetric information or beliefs about their case strength and court awards.

In the next section, we model the litigation and settlement processes in the aftermath of Covid-19. Using the model, we show that the judicial uncertainty and informational asymmetry between the parties have implications for the trial outcomes as well as for the chances of out of court settlements.

3. The Model

Consider a dispute between a potential plaintiff, P, and a potential defendant, D. The plaintiff claims to have suffered a loss as a consequence of an act of the latter. The plaintiff can be a worker who has suffered physical or mental injuries at the workplace, or a buyer who has been denied contractually agreed delivery by the seller. In such contexts, the defendant can be thought of as the employer and the seller, respectively. In general terms, the plaintiff can be any person or entity that has suffered losses or incurred costs attributable to an act of the

[9] Transfield Shipping Inc. v. Mercator Shipping Inc, [2008] UKHL 48; In this case, the hirer of a ship returned it to the ship-owner after a gap of 11 days after expiry of the contract, leading to a suit for damage compensation. The ship-owner claimed damages for the lost rent of 11 days. In addition, he argued that during this delay period the charter prices had dropped so he was forced to make a new contract for renting the ship at a reduced price. Hence, he also claimed compensation for the lost profits for this period. The British court argued that the second part of the damage was foreseeable and neither unlikely nor remote and still denied compensation.

defendant.[10] The former may have a legal claim to demand compensation from the latter. Both parties are rational and risk neutral individuals. Simply put, they care only about their own expected gains or losses. Let,

π denote the probability that the plaintiff will win the trial.

A denote the award of damages (compensation) by the court.

Informally put, π represents the likelihood of the plaintiff winning a claim of compensation against the defendant; with probability $1 - \pi$, the defendant expects to win the case. If the plaintiff wins the trial, the court will ask the defendant to pay an amount A to the plaintiff. Therefore, for the plaintiff the expected value of the gains from trial is equal to $\pi \times A$. Let

$$E = \pi \times A$$

Trial is costly for both sides – parties have to spend time, money and other necessary resources during the trial. Let,

T_p and T_d denote the trial cost for the plaintiff and the defendant, respectively.

Therefore, the net trial gains for the plaintiff will be:

$$\pi A - T_p = E - T_p$$

On the other hand, the expected cost of the total trial for the defendant will be the expected damages that he will have to pay to the plaintiff plus the trial cost. That is, the total trial cost for D is given by

$$\pi A + T_d = E + T_d$$

Now, consider a litigation context where parties have symmetric beliefs about the litigation outcome. An example of this is a situation where both sides have an objective and therefore undertake a similar assessment of their case strength and the quantum of court award. Specifically, assume that both parties believe that the probability of the plaintiff winning the case is π and the value of court award is A. Under such a scenario, both sides are better off settling their dispute out of court, rather than going for a litigation. To see this, let

[10] The act can be an inaction on the part of the promisor. E.g., failure of the employer to provide adequate safety measures at the workplace.

S denote the settlement offer by the defendant to the plaintiff.

Note that if there is litigation, for P the net expected gains from the trial are: $E - T_p$. So, the plaintiff will be willing to accept a settlement offer if $S \geq E - T_p$. By a similar logic, the defendant will be willing to make a settlement offer that is less than or equal to their own total cost of litigation, i.e., the defendant will be willing to offer $S \leq E + T_d$.[11] However, $E - T_p < E + T_d$. That is, the net trial gains for the plaintiff are less than the total trial cost for the defendant, due to litigation costs. Therefore, when parties have symmetric belief about the litigation outcome, a mutually beneficial offer always exists for the parties. Actually, any settlement offer S is mutually beneficial for the parties as long as S lies in the following range:

$$E - T_p \leq S \leq E + T_d \qquad (1)$$

The range of mutually acceptable settlement offers is $[E - T_p; E + T_d]$

Next, suppose that both parties believe that the probability of win for the plaintiff is $\underline{\pi}$ and the court award is going to be $\underline{A}$. Even if $\underline{\pi} \neq \pi$ and/or $\underline{A} \neq A$, it can be checked that the parties are better off settling their dispute out of court, rather than going for a litigation. In other words, as long as parties have symmetric beliefs about the probability of winning, the trial and the court awards, they will prefer to settle their dispute out of court rather than going for costly litigation. Using terminology of law and economics, the Coase Theorem will hold as long as parties have symmetric information or beliefs about the trial outcome.[12]

Therefore, we have the following result:

Result 1: *If parties have similar expectation about the court outcome, they are more likely to settle rather than litigate*

4. Settlement in the Shadow of Uncertainty

As discussed in the previous section, Covid-19 has aggravated the problem of uncertainty for disputants and litigants. The parties at dispute face increased uncertainty not only with respect

[11] Note the defendant is indifferent between going for litigation and paying a settlement amount equal to E+Td. Without any loss of generality, we assume that the defendant will choose to pay S=E+Td, rather than going for litigation.

[12] The basic claim behind this 'informal' theorem is the following: If there are no transaction costs, the price mechanism will lead to efficient outcome regardless of the legal entitlements of the parties involved.

to their own case strength but also with respect to the court awards. In many cases, the pandemic has resulted in informational asymmetry between the parties involved in the disputes. The informational asymmetry can be unilateral or it can be bilateral.

Asymmetric Beliefs: Unilateral case

In many disputes one of the parties has better information about the strength of the case and/or the quantum of the loss under dispute. For instance, P may know the level of harm suffered by him but D may not have a good sense of the harm and hence the quantum of his obligation towards the plaintiff. In such contexts, the informational asymmetric is unilateral. That is, under unilateral asymmetry one of the parties has a better assessment of the strength of the case or the court award or both.

For example, consider the case of workplace injuries. It is plausible to argue that compared to the defendant, the victim of an injury (the plaintiff) has better information about the strength of his case. While the plaintiff would know whether he has had exposure to the disease at places other than at the workplace, but the defendant may be completely unaware of their whereabouts after working hours. Moreover, the plaintiff victim has better information about his health condition and also the associated costs. This means that when the parties litigate or bargain over the compensation for injury, there is an informational asymmetry between them; the victim has better information about the strength of his case as well as the quantum of loss to his health. In many other contexts, a promisee who has relied on performance by the promisor is likely to have a better idea of the losses that can be caused to him due to the non-performance by the promisor.

This kind of information asymmetry means that the plaintiffs have a better idea about the probability of their winning the suit before a court of law. The other side, the defendant, has only a partial knowledge of the case strength. Such contexts can be modeled as follows.

Assume there are two types of plaintiffs - Low and High types. Low types can be thought of as plaintiffs with a weak case strength, and hence has a low probability of win. High types can be thought of as plaintiffs with a strong case strength. Let

π_l denote the probability of win for low types of plaintiffs.

π_h denote the probability of win for high types of plaintiffs.

$0 < \pi_l < \pi_h < 1.$

This implies that the defendant has better chance of winning against a low type of plaintiff, compared to the high type.

Following the literature, assume that if the trial takes place, during cross examination the case strength, i.e., the type of the plaintiff will become clear to both sides as well as the court. To keep things simple, assume that both sides know the value of court award A . Moreover, the litigation cost of plaintiff is T_p, for both types of plaintiffs. These assumptions are made only to keep the exposition simple. All our arguments will hold even if we allow the possibility that the parties might have different beliefs about the value court award A or their litigation costs might be different.

If the trial takes place, a high type of P will end up with $\pi_h A - T_p = E_h - T_p$ as net gains. On the other hand, the low type will end up only with $\pi_l A - T_p = E_l - T_p$ as their net gains. Before the trial, however, the plaintiff's type is a private information for P. That is, D does not observe the plaintiff's type directly, i.e., it does not know whether he is up against a low or high type of plaintiff he is faced with. Therefore, D does not know whether $\pi = \pi_l$ or $\pi = \pi_h$. However, D knows the proportion of high types in the population of potential victims/plaintiffs. Let,

λ be the proportion of High type Plaintiffs

$1 - \lambda$ be the proportion of Low type Plaintiffs

This means that if there is no settlement and a trial takes place, the total expected costs for D is

$$\lambda[E_h + T_d] + (1 - \lambda)[E_l + T_d] = \lambda E_h + (1 - \lambda)E_l + T_d$$

Following the standard practice, assume that the uninformed party, D, makes a 'take it or leave it' (TIOLI) settlement offer to the plaintiff. In view of the above, it is clear that if the defendant's offer is greater than $E_h - T_p$ then all types of plaintiff will accept the offer and there will be no litigation. However, it is easy to see that a choice of settlement offer that is greater than $E_h - T_p$ can never be in the interest of the defendant. On other hand, if defendant's offer is less than $E_l - T_p$ then all types of plaintiff will reject the offer and there will be litigation for sure. Again, the defendant's interests are not served by a choice of settlement offer that is

less than $E_l - T_p$. The next question is whether a settlement offers of $E_h - T_p$ or $E_l - T_p$ are in the interest of the defendant. Let,

$$S_l = E_l - T_p \; and \; S_h = E_h - T_p$$

If D makes a TIOLI offer equal to $S_l = E_l - T_p$, then only the low type will accept the offer. If D makes a TIOLI offer equal to $S_h = E_h - T_p$, then both types will accept the offer. [13] However, when the settlement offer S is equal to or greater than S_l but less than S_h, the high type will reject the settlement and will go for litigation. Recall, that from the perspective of D, the probability that he is litigating with a low type of plaintiff is $1 - \lambda$. So, if the defendant makes a TIOLI offer of $S_l \leq S < S_h$, while the low type will accept his offer, the high type will not. Therefore, the expected cost of the defendant will be

$$\lambda[E_h + T_d] + (1 - \lambda)S$$

It can easily be seen that a choice of S such that $S_l < S < S_h$ is not a cost minimizing choice for D. A settlement offer S such that $S_l < S < S_h$, will be accepted only by the low type. However, the low type will accept the offer even if $S = S_l$. Therefore, it is not in the best interest of the defendant to make an offer more than $S_l = E_l - T_p$. If the defendant chooses $S = S_l$, his expected costs can be expressed as

$$\lambda[E_h + T_d] + (1 - \lambda)\big[E_l - T_p\big] = \lambda E_h + (1 - \lambda)E_l + \lambda T_d - (1 - \lambda)T_p$$

In view of the above, the defendant will choose $S = S_l$ over $S = S_h$, if and only if $\lambda E_h + (1 - \lambda)E_l + \lambda T_d - (1 - \lambda)T_p < E_h - T_p$ iff $\lambda\big[T_p + T_d\big] < (1 - \lambda)\,[E_h - E_l]$, i.e., if and only if

$$E_h - E_l \; > \frac{\lambda}{1 - \lambda}\big[T_d + T_p\big] \qquad (2)$$

Replacing E_l and $E_h$respectively with $\pi_l A$ and $\pi_h A$, gives us

$$(\pi_h - \pi_l)A \; > \frac{\lambda}{1 - \lambda}\big[T_d + T_p\big] \qquad (3)$$

[13] Even though the low type plaintiff is indifferent between accepting a settlement offer equal to El-Tp or going for litigation, without affecting the results we can assume that he will choose for the former. A similar assumption is made about the high type and the offer Eh-Tp.

Therefore, when stakes are high or the difference between the case strengths of low and high types is large, the defendant is more likely to make a low settlement offer. Similarly, as the fraction of the high types, λ becomes low, the defendant is more likely to make a low settlement offer, and vice-versa. However, a low offer means that the trial will take place between the defendant and the high type of plaintiffs. Therefore, we get the following result.

Result 2**:** *The probability of litigation increases with: the amount under dispute, the difference between beliefs case strength and the proportion of low types of plaintiffs.*

We can draw some inferences immediately. As informational asymmetry between the parties reduces, their beliefs about the court outcomes will converge. This in turn will reduce the conditions needed for litigation. In other words, if judiciary can reduce the uncertainty and asymmetry between the parties, it will encourage out of court settlements.

Asymmetric Beliefs: *Bilateral case*

As discussed above, many parties have terminated or suspended the performance of their contractual obligations citing Covid-19 as a force-majeure. However, there is uncertainty about whether the courts are going to treat this pandemic as a case of force-majeure or not. In other words, there is uncertainty about whether a claim will be admitted by the court or not. Even if a court is going to admit a case, its assessment of the harms suffered by the plaintiff and hence the compensation award is a matter of uncertainty. In the context of sales contracts, the seller knows better whether the pandemic and the subsequent lockdown really made it impossible for him to supply, however, the buyer has advantage with respect to the losses caused by this non-performance. Simply put, the informational asymmetry can be bilateral.[14]

Similar is the case with respect to tenability of the economic impossibility and frustration of the contract as grounds for contractual non-performance. In many cases, the parties at dispute may have distinct informational advantages. In such a scenario, the litigants can have very different beliefs about the tenability of their claims as well as the court awards. To formalize, these let

π_p denote the subjective probability of the plaintiff that he will win the trial.

π_d denote the subjective probability of the defendant that he will lose the trial.

[14] *See* Andrew F Dauchety & Jennifer F Reinganum, *Settlement Negotiations with Two-Sided Asymmetric Information: Model Duality, Information Distribution, and Efficiency*, 14 INTERNATIONAL REVIEW OF LAW AND ECONOMICS, 283-298 (1994).

In other words, the plaintiff believes that his chances of winning are given by π_p. On the other hand, defendant believes that the plaintiffs chance of winning is given by π_d; i.e., the defend expects to win and pay nothing with probability $1 - \pi_d$. Let

A_p denote the plaintiff's belief about the damages (compensation) from trial;
A_d denote the defendant's belief about the court award of damages (compensation).

That is, the plaintiff believes that in case of his winning the case, the value of compensation is A_p. However, the defendant thinks that in case he ends up losing the case, the amount he will end up paying to the plaintiff is A_d. This means that for P the net expected gain from trial is $E_p = \pi_p \times A_p$. For D, the expected payment to the plaintiff is $E_d = \pi_d \times A_d$.

An over confident or supper optimistic plaintiff will over-estimate either his chances of winning the case or the compensation award, or both. Formally, he will overestimate π or A or both, leading to an overestimation of the expected award E. On the other hand, an unreasonably optimistic defendant will under-estimate either the plaintiff's chance of winning the case or the damages compensation he will have to pay to P, or both. Formally, he will underestimate π or A or both, leading to an underestimation of the expected award E. To keep things simple, we assume that the parties do not suffer from optimum bias with respect to the trial costs, i.e., T_p and T_d.

Summing up, for P, the net expected gains from trial is$E_p - T_p$. The total cost of trial for D is given by $E_d + T_d$. An excessive optimism on part of P means that $E_p - T_p$ is an overestimate of the net gains from the trial. Due to excessive optimism on the part of D, the amount $E_d + T_d$ is an under-estimate by the defendant.

Arguing as in the case of symmetric uncertainty, it can be seen that a settlement offer S by the defendant is mutually beneficial as long as S lies within the following range:

$$E_p - T_p \leq S \leq E_d + T_d$$

However, under asymmetric beliefs about the trial outcome, it is possible that this condition is not met. When both the parties are over confident about the strength of their claims, they will fail to find a meeting ground. For example, suppose the trial costs are $T_p = T_d = 10$. Now, if

$E_p = 100$ and $E_d = 50$, the minimum amount acceptable to the plaintiff is 90 but the defendant would refuse to pay more than 60. Formally, there will not be any meeting ground for the parties, if $E_d + T_d < E_p - T_p$. That is, if $T_d + T_p < E_p - E_d$. This can be written as

$$\pi_p A_p - \pi_d A_d > T_d + T_p \qquad (4)$$

In view of the above, it is clear that the informational asymmetry between the parties has implications for their expectations from the trial and hence for the settlement offers. Our analysis leads to the following conclusion.

***Result 3*:** The litigation will happen only if $E_p > E_d$. In that case, the probability of litigation increases with the difference between beliefs about the expected court awards by the plaintiff and defendant, as well as the amount under dispute.

The pandemic has caused widespread financial distress. It has left many defendants as judgment proof. This essentially means that the effectively A_d has come become very low. As a result the condition (3) is more likely to be satisfied. Therefore, Covid has increased probability of litigation. Also note that as the gap between E_p and $E_d$comes down the litigation becomes less likely. Therefore, as the informational asymmetry comes down it will encourage out of court settlements.

5. Conclusions and Recommendations

As argued above, Covid-19 and the attendant lockdowns have either increased the cost of contractual performance for many promisors and/or have reduced contractual gains for many promisees (people who were to receive of goods and services as a part of contractual transactions), leading to termination or suspension of deals by one or the other side of contracts. Consequently, there is a surge in contractual disputes over performance or the compensation for the losses caused by non-performance. Moreover, the pandemic has triggered many claims for compensation for injuries at the workplace or the ones caused by safety products.

Our analysis shows that the pandemic has reduced the chances of out or court settlement and, hence, has increased probability of litigation for the following reasons. One, it has weakened the financial condition of the defendants, i.e., the suppliers of goods and services who have failed to fulfil their promise, the debtors who have failed to service their debts, etc. Second, it

has increased asymmetry of information among the disputants. Third, it has increased uncertainty about the litigation outcomes.

First consider the effect of economic costs of the pandemic. In terms of our terminology of our model, since the pandemic has weakened the financial condition of the defendants, it means that the probability of low types of defendant has increased. From our Result 2, this means that Covid has increased probability of litigation and reduced chances of pre-trial settlements.

Due to the financial distress caused by the pandemic, many defendants will not be able to pay for the court awarded damages. In other words, the effective payment made by them will be far less than the expectations of the plaintiffs. In such a situation, from our Result 3 it follows that the probability of out of court settlement for pandemic related disputes is going to be very low; by implication, the probability of litigation is very high.[15]

Courts cannot do much about the financial positions of the defendants. However, they can encourage pre-trial settlements and thereby reduce probability of costly litigation by reducing the informational asymmetry between the litigants. The most effective way of doing so is for the courts to make the litigation outcome clear and predictable. When litigation is consistent and predictable, it reduces the scope of unfounded optimism among the litigants. In terms of our terminology, it reduces the divergence between the expectation of the parties from litigation. As is shown in Section 4 greater the convergence between expectation of the parties from litigation, higher is the probability of out of court settlement. See the discussion related to our Result 3.

In other words, clear and consistent judgments are a public good in that they discourage socially wasteful litigation and encourage pre-trial negotiations. In the process, they reduce the social costs of litigation and induce parties to take efficient decisions. In contrast, delayed or ambiguous rulings encourage litigation thereby aggravating the economic cost of the pandemic and the lockdowns.[16]

[15] The plaintiff can still sue to extract maximum settlement. See L.A. Bebchuk, *Suing solely to extract a settlement offer*, JOURNAL OF LEGAL STUDIES 17, 437–450 (1998).

[16] On efficiency implications of legal errors *see* Ram Singh, *Efficiency of 'simple' liability rules when courts make erroneous estimation of the damage*, 16 EUROPEAN JOURNAL OF LAW AND ECONOMICS, 39-58 (2003); Ram Singh, *Economics of Judicial Decision Making, Indian Tort Law: Motor Accident Cases (special article)*, 39(25) ECONOMIC AND POLITICAL WEEKLY, 2613-2616 (2004).

Economic analysis in this paper, offers the following suggestions for judicial decision making. First, the courts should adopt clear and consistent rules for allowing claims using the pandemic as a force majeure or a ground for frustration of the contract. For instance, the Covid-19 and the ensuing lockdowns should be treated as a force majeure only if it had become impossible for the promiser to perform contractual duty.[17] While interpreting ambiguous and catch all terms in the FM clause, courts can apply the principle of '*ejusdem generis'* . The principle says that 'where general words follow an enumeration of particular things, those general words are construed of the nature or class as those specifically mentioned'.

As to the disputes over the claims of compensation, it is difficult for a court to correctly assess the quantum of harm suffered by the promisee. Therefore, courts stick to the contractually specified damages to the extent possible. In other words, the courts should interpret the contract narrowly by applying the *'Four Corners Rule'* (Posner 2004). In the context of business income losses, the rule implies that the compensation should be granted only if the contract explicitly provides for compensation in events like epidemic and lockdown. Moreover, the compensation should not be full expectation compensation.[18] Instead, the courts should restrict the scope of compensation to the foreseeable damages in the context of pandemic.[19] In terms of legal terminology, the compensation should be restricted to the consequential damages that can be proven to have occurred because of the failure of one party to meet a contractual obligation or breach of contract terms.

If the contract under dispute has gaps, courts can use clearly defined default and penalty default rules.[20] A default rule is a rule applied by courts to interpret a contract. A penalty default rule is a rule which will be applied by courts, if the promisee does not inform the promisor about the extraordinary harm that can result from breach by the promisor. Therefore, a penalty default rule penalizes the promisee by disallowing recovery of unforeseeable harms.

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[17] *See* Richard Posner & Andrew Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6(1) THE JOURNAL OF LEGAL STUDIES, 90-117 (1977).

[18] For merits and demerits of full compensation *see* Ram Singh, *'Full' Compensation Criteria: An Enquiry into Relative Merits*, 18 EUROPEAN JOURNAL OF LAW AND ECONOMICS, 223-237 (2004).

[19] *See* McDowell Banks, *Foreseeability in Contract and Tort: The Problems of Responsibility and Remoteness*, 36 CASE W. LAW. REV., 286 (1985)

[20] *See* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 87 YALE L J, (1989).

A narrow interpretation of contracts along with clearly defined default rules can go a long way in reducing the costly litigation. Moreover, this combination promotes efficiency by reducing the possibility of error by courts in assigning risk.

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INDIA'S JUMBLED PUBLIC POLICY JURISPRUDENCE: STRETCH, DEMARCATE AND 'SAW (PIPES)'

Malcolm Katrak[1]

1. INTRODUCTION

The incorporation of arbitration clauses in commercial contracts has become a norm. By incorporating an arbitration clause, contracting parties promise to refer their future disputes not to a court of law but to an arbitral tribunal that may consist of one or more arbitrators.[2] The rationale behind waiving one's right of going to court is the efficacy of the arbitral process, as it aspires to be a quicker and cheaper alternative.[3]

Arbitration in India truly began with the enactment of the Arbitration Act, 1940 (hereinafter referred to as '*Act of 1940*').[4] The Act of 1940 formalized the distinction between public and private adjudication of disputes. This stratification aimed to promote certainty and predictability in dispute resolution. Even though the Act of 1940 referred many kinds of disputes to arbitration, there were several issues that hampered its efficacy. These issues ranged from the lack of a provision prohibiting an arbitrator from resigning at any time during the course of arbitration to the lack of a proper procedure for substitution in the eventuality of the death of an arbitrator. Further, the Act of 1940 failed to recognize that the arbitration ought to fail in case of non-existence and invalidity of an agreement.[5]

Although the Act of 1940 codified Indian arbitration jurisprudence for the first time, the underlying issues plaguing the Act resulted in the practice of arbitration in India being jeopardised. It is not surprising that the legislature sought to replace the Act of 1940 with the Arbitration and Conciliation Act, 1996 (hereinafter referred to as '*the Act*'), in order to deal

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[2] DR. P. MARKANDA, NARESH MARKANDA & RAJESH MARKANDA, LAW RELATING TO ARBITRATION AND CONCILIATION (2016).
[3] *See*, Steven Shavell, *The Level of Litigation: Private versus Social Optimality of Suit and of Settlement*, 19 INTL. REV. L. & ECON. 99 (1999).
[4] The Arbitration Act, 1940, No. 10, Acts of Parliament, 1940 (India).
[5] Tracy Work, *India Satisfies its Jones for Arbitration: New Arbitration Law in India*, 10 Transnat'l L. 217 (1997).

with these deficiencies.[6] Based on the United Nations Commission on International Trade Law's Model Law on International Commercial Arbitration (UNCITRAL Model Law), the Act aimed to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of arbitral awards.[7] The legislature's intention was to provide for speedy resolution of disputes whilst limiting judicial intervention. In order to give maximum autonomy to the arbitrators, an explicit non-obstante clause was incorporated in the Act to limit judicial intervention.[8]

Since the turn of the century, there has been a steep increase in the number of arbitrations throughout the country. One could point to the new Act providing the impetus required for fostering a good dispute resolution atmosphere. On the other hand, several new questions and issues have cropped up since the enactment of the Act.[9] Many of these issues have had a drastic impact on shaping the Indian jurisprudence on domestic and international arbitration. This is not surprising if one considers that India is one of the first countries to have adopted the UNCITRAL Model Law. One such issue which has plagued the arbitration and judicial setting is the issue of public policy.[10]

The doctrine of public policy is a channel through which public law enters private law and bars it from actualizing its normal legal consequences.[11] Even though public policy is an old doctrine in common law, it is not clear which aspects of public law could enter the arena of private law and make it unenforceable. Despite the historical importance of the doctrine of public policy in contractual settings, there is still an unresolved tension at the heart of the intersection between private conflict resolution mechanisms and public policy.[12] Under the Act, the term 'public policy of India' has been used in three different sections which have been elaborated under three different chapters in the Act. It is first used under Section 34, i.e. 'Application of setting aside arbitral award' under Part I (Chapter VII), namely, 'Recourse

[6] The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India).
[7] *See*, United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration, 1985 with Amendments as Adopted in 2008* (Vienna: United Nations, 2008).
[8] The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 § 5 (India).
[9] *See generally*, Sumeet Kachwaha, *The Arbitration Law of India: A Critical Analysis*, 1 ASIAN INT'L ARB. J. 105 (2005).
[10] Arpan Gupta, *A New Dawn for India- Reducing Court Intervention in Enforcement of Foreign Awards*, 2 INDIAN J. ARB. L. 10 (2014).
[11] Farshad Ghodoosi, *The Concept of Public Policy in Law: Revisiting the Role of Public Policy Doctrine in the Enforcement of Private Legal Arrangements*, 94 NEB. L. REV. 685 (2015).
[12] Farshad Ghodoosi, *Arbitrating public policy: Why the buck should not stop at national courts*, 20(1) LEWIS & CLARK. L. REV. 237 (2016).

against arbitral award'.[13] The next mention of this term has been made in section 48, titled 'Conditions for enforcement of foreign awards' under Part II (Chapter I), titled 'Enforcement of certain foreign awards: New York Convention Awards' (hereinafter referred to as '*New York Convention*').[14] Lastly, the term has been used in Section 57, namely 'Conditions for Enforcement of Foreign Awards' under Part II (Chapter II), titled 'Enforcement of certain foreign awards: Geneva Convention Awards'.[15] The paper focuses on setting aside an arbitral award on the grounds that it is in conflict with the public policy of India. However, the analysis has equally important consequences on the enforcement of foreign awards through the New York and Geneva Conventions in India. It would be quite manifest, at this point, that there needs to be a balance on the minimal judicial interference principle and the scope of public policy. What needs to be investigated is the optimality of the scope of public policy. Just to anticipate the questions: How has the jurisprudence in relation to the doctrine of public policy developed since the inception of the Act? How has it impacted the development of arbitration in India? An attempt has been made to answer the aforesaid and other related questions in this research. Nevertheless, it is essential to point out that the present paper is not a research into the viability of the doctrine of public policy and therefore, the viability aspect is studied only to the extent necessary to understand the concept of the doctrine itself.

In order to embark upon a holistic understanding of the issues at hand, it is essential, firstly, to understand the changing contours of the doctrine of public policy in the context of Indian arbitration jurisprudence. To this end, Chapter 2 provides a historical overview of the judicial and legislative approach towards the doctrine of public policy as applied in the domain of arbitration. It not only explores the varying scope of the term 'public policy' but also the approaches adopted towards its use as a ground for setting aside arbitral awards. The impact of these changing judicial and legislative approaches on the adjudication of arbitration petitions by the High Courts is dealt with in Chapter 3. This chapter attempts to showcase the practical fallout of the fluctuating interpretations dealt with in the previous chapter. Chapter 4 attempts to explore the different connotations of public policy and the kinds of contracts that would

[13] The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 § 34(2)(b)(ii) (India).
[14] The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 § 48(2)(b) (India).
[15] The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 § 57(1)(e) (India).

represent a contravention of each connotation. As such, this Chapter seeks to explore the impact of the public policy doctrine on the performance and enforcement of contracts. Chapter 5 deals with the judicial cost arising from the issue of interpreting a vague terminology as well as the approaches adopted towards the minimization of the said costs. Further, it delves into the legislative and judicial preferences in relation to the interpretation of a vague term. Lastly, Chapter 6 investigates the reasons underlying the formulation of a particular law. An attempt has been made to resolve much of the confusion and retaliation surrounding the doctrine of public policy through the focal point approach elucidated in this chapter. The findings of the aforesaid chapters have been surmised in the concluding chapter, i.e. Chapter 7.

The correction of the fault-line with regard to the doctrine of public policy in Indian arbitration jurisprudence will hopefully contribute to the creation of a more conducive environment for alternative dispute resolution in India. The author emphasizes that the aim of this paper is to straighten out some of the wrinkles in the arbitration setting in India by providing a more nuanced analysis of the doctrine of public policy.

2. THE EVOLUTION OF THE PUBLIC POLICY DOCTRINE IN INDIAN ARBITRATION JURISPRUDENCE

When considering the topic of judicial intervention in the arbitral process in India, the starting point would be the Supreme Court of India's judgment in *Renusagar Power Co. Ltd.* v. *General Electric Co.* (hereinafter referred to as '*Renusagar*') where the Court whilst construing the term 'public policy' in the context of a foreign award held that an award would be against the public policy of India if it is contrary to the (1) fundamental policy of India; (2) the interest of India and (3) justice or morality.[16] Although the ratio in *Renusagar* was laid down in the year 1994, it laid the foundation of the public policy aspect of the Act of 1996. Implicitly, the decision confirmed the position that, only in exceptional circumstances should national courts interfere with the decisions of an arbitral tribunal. Furthermore, the Supreme Court held that the public policy exception cannot be used to adjudge the award on the merits of the case. This ratio was in conformity with the international practice in many developed nations at that point of time.

However, the scenario changed drastically when the Supreme Court through *ONGC Ltd.* v. *Saw pipes Ltd.* (hereinafter referred to as '*Saw Pipes*') added another ground to the doctrine of public policy, namely that of patent illegality in order to set aside an award under Section 34 of the Act.[17] Though the Supreme Court clarified that if the illegality is of a trivial nature it cannot be held that the award is against public policy, it still opened a Pandora's Box by mentioning that the award can be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. The arbitral tribunal in *Saw Pipes* was of the opinion that the claimant i.e. ONGC Ltd. had to prove its loss to gain liquidated damages. However, the Supreme Court rejected this argument and stated that, as a matter of law, the claimant did not have to prove its losses to avail liquidated damages. The Court went on to state that an award which violated a law cannot be said to be in the interest of public policy because it was likely to adversely impact the administration of justice.[18] The problem with this approach was the wider meaning imported to the term 'public policy' under Section 34. Consequently, the *Saw Pipes* judgment was criticized by several jurists; the bone of contention was that parties now had the option to

[16] Renusagar Power Co. Ltd. v. General Electric Co., (1994) Supp 1 SCC 644
[17] ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705
[18] *Id.*

review the award on the merits, which was never the legislative intent underlying the Act.[19] It is worth mentioning that seven years had passed since the inception of the Act when the Supreme Court laid down the ratio in *Saw Pipes*. Interestingly, the *Saw Pipes* decision was not to be applied for the enforcement of foreign awards under Section 48 of the Act, since the Act explicitly carves out a distinction between Parts I and II, which pertain to domestic and international arbitrations respectively.[20] Unfortunately, the scenario changed when the Supreme Court, through its decisions in *Bhatia International* v. *Bulk Trading S.A. and Anr.* (hereinafter referred to as '*Bhatia International*')[21] and *Venture Global Engineering* v. *Satyam Computer Services Ltd.* (hereinafter referred to as '*Venture Global Engineering*')[22] applied the *Saw Pipes* dictum to foreign awards.

A key role was subsequently played by the Government of India, which took corrective measures against this *mis*interpretation accorded by the judiciary by expanding the scope of public policy. Thus, in 2010, the Government of India released a consultation paper recommending changes to the Act, which would nullify the effects of the *Bhatia International, Venture Global Engineering* and *Saw Pipes* cases.[23] The major proposals were that Part I of the Act should be applicable only to arbitrations seated in India and that the ground of setting aside of awards on the basis of public policy should not include patent illegality within its ambit.[24] By this time, the *Saw Pipes* ratio had already trickled down to the High Courts, which had started to apply the patent illegality rule rather stringently. For instance, in the case of *Western Maharashtra Development Corporation Ltd.* v. *Bajaj Auto Ltd.* the Bombay High Court declared an award null and void as substantive provisions of the Companies Act, 1956 were not applied properly.[25] Even after the Government's consultation paper, the Supreme Court held firm and applied the 'patent illegality' standard under 'public policy of India' while examining the enforcement of foreign awards under Section 48(2)(b) of the Act. Through its

[19] *See*, Manav Kapur, *Judicial Interference and Arbitral Autonomy: An Overview of Indian Arbitration Law*, 2 Contemp. Asia Arb. J. 325 (2009); Promod Nair, *Surveying a Decade of the 'New Law' of Arbitration in India*, 23 Arb. Int'l 699 (2007). *But see*, Sidharth Sharma, *Public Policy under the Indian Arbitration Act: In Defence of the Indian Supreme Court's Judgment in ONGC v. Saw Pipe*, 26 J. Int'l Arb. 133 (2009).
[20] The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 § 2(2) (India).
[21] Bhatia International v. Bulk Trading S.A. and Another, (2004) 2 SCC 105.

[22] Venture Global Engineering v. Satyam Computer Services Ltd., (2008) 4 SCC 190
[23] Ministry of Law and Justice, Government of India, Proposed Amendments to the Arbitration & Conciliation Act, 1996: A Consultation Paper, (Apr., 2010).
[24] *Id.*
[25] Western Maharashtra Development Corporation Ltd. v. Bajaj Auto Ltd., 2010 (154) Com Cases 593 Bom.

decision in *Phulchand Exports Ltd.* v. *OOO Patriot* (hereinafter referred to as '*Phulchand Exports Ltd.*'), the Supreme Court concluded that the enforcement of foreign awards must now meet the tests as applicable to domestic awards.[26]

The Supreme Court's decision in *Phulchand Exports Ltd.* resulted in erasing the distinction of enforceability between foreign and domestic awards. Eventually, in the year 2014, the Supreme Court through its decision in *Shri Lal Mahal* v. *Progetto Grano Spa* decided that the expansive construction accorded to the term 'public policy' in the *Saw Pipes* decision cannot apply to the use of the term 'public policy of India' as far as foreign awards are concerned.[27] In the same year, the Law Commission of India opined that the legitimacy of judicial intervention in the case of a purely domestic award is far more than in cases where a court is examining the correctness of a foreign award.[28] Thus, it proposed that an amendment ought to be made to the Act, whereby the ground of public policy would be narrowed, *inter alia*, by amending Section 34 of the Act by removing the words 'interests of India' and enumerating that the said section only dealt with domestic awards which may be set aside by the Court, if the Court finds that such award is vitiated by 'patent illegality appearing on the face of the award'.[29] Clearly, the ground of 'patent illegality' put forward by the *Saw Pipes* judgement remained. However, the caveat was that in order to provide a balance and to avoid excessive intervention, a proviso was proposed that such an award shall not be set aside merely on the grounds of erroneous application of the law or re-appreciation of evidence.[30]

A month after the Law Commission's Report, Supreme Court, in *ONGC Ltd.* v. *Western Geco International* (hereinafter referred to as '*Western Geco International*'), added three other grounds under the aspect of fundamental policy of India viz. judicial approach, principles of natural justice and rationality of the decision i.e. a decision by the tribunal cannot be so perverse or irrational that no reasonable person would have arrived at the same.[31] If construed broadly,

[26] Phulchand Exports Ltd. v. OOO Patriot, (2011) 10 SCC 300.
[27] Shri Lal Mahal v. Progetto Grano Spa., (2014) 2 SCC 433.
[28] Report No. 246 of the Law Commission of India, Amendments to the Arbitration and Conciliation Act, 1996 (Aug, 2014).
[29] *Id.*
[30] *Id*. at 55.
[31] ONGC Ltd. v. Western Geco International Ltd., (2014) 9 SCC 263.

then the decision that the tribunal has reached could be irrational even if it ignores vital evidence, which allows judicial interference with the merits of the award. As a result of the incongruity of the *Western Geco International* decision and the goal of minimal judicial intervention, the Supreme Court in *Associate Builders* v. *DDA*, clarified that the test for identifying whether there is any contravention with the fundamental policy of Indian Law shall not entail a review of the merits of the dispute.[32] Additionally, the Legislature, through the Arbitration and Conciliation (Amendment) Act, 2015, clarified that section 34 (2) (b) (ii), which relates to setting aside of domestic awards, can be used by the Court only when it finds that the arbitral award is in conflict with the public policy of India.[33] To clarify what entails public policy of India, the law-makers inserted an explanation stating that an award is in conflict with public policy, only if, (i) the making of the award was induced or affected by fraud or corruption; or (ii) it is in contravention with the fundamental policy of Indian Law; or (iii) it is in conflict with the most basic notions of morality or justice. They went further to reiterate that under Section 34 (2A), a domestic award may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award, provided that an award shall not be set aside merely on the ground of an erroneous application of law or re-appreciation of evidence.[34]

In 2019, the Supreme Court of India, in the case of *Ssyangyong Engineering Construction Co. Ltd.* v. *National Highways Authority of India* (hereinafter referred to as '*Ssyangyong*'), analysed the amendment in its entirety and held that the term 'fundamental policy of Indian Law' would now correspond to the understanding of the expression in *Renusagar*. Furthermore, the approaches laid down in *Western Geco International*, except for natural justice would not apply. The ground for interference on the basis of the award being in conflict with justice and morality was to be understood as a conflict with the basic notions of morality or justice. This would mean that only such arbitral awards that shock the conscience of the Court could be set aside on this ground.[35] Recently, in the case of *Vijay Karia & Ors. v. Prysmian Cavi E Sistemi SRL & Ors.*, the court relied upon the *Ssyangyong* decision to state that, "*the foreign award must be read as a whole, fairly, and without nit-picking. If the said*

[32] Associate Builders v. DDA, (2015) 3 SCC 49.
[33] The Arbitration and Conciliation (Amendment) Act (No. 3 of 2016) (2015) § 34(2)(b)(ii) (India).
[34] The Arbitration and Conciliation (Amendment) Act (No. 3 of 2016) (2015) § 34(2A) (India).
[35] Ssangyong Engineering and Construction Co. Ltd. v. National Highways Authority of India, 2019 SCC OnLine SC 677.

award has addressed the basic issued raised by the parties and has, in substance, decided the claims and counter-claims of the parties then the enforcement must follow."[36] That said, the court's aim for making the *Ssyangyong* decision a panacea for all cases took a serious blow due to its decision in the case of *National Agricultural Cooperative Marketing Federation of India* v. *Alimenta S.A.*, where the court held that the award was *ex facie* illegal, and in contravention of the fundamental law of the country, as it violated a particular statute.[37]

Even today, public policy remains a potent tool in the hands of the judiciary. Over the years, there has been an increase in judicial intervention insofar as setting aside of awards passed by the arbitral tribunal on the grounds of public policy is concerned. A pertinent question that emerges is the extent to which the *Renusagar* and *Saw Pipes* decisions have impacted the number of setting aside applications. The forthcoming chapter aims to answer this question. It proceeds to look at the judgements passed by the Bombay High Court and then analyses the number of successful and unsuccessful applications for setting aside of arbitral awards.

3. DATA ANALYSIS AND FINDINGS

3.1 Data Set and Research Methodology

This research uses Bombay High Court judgements on the setting aside of arbitral awards. At the outset, it worth mentioning that in order to set aside an arbitral award under section 34 of the Act, a petitioner needs to file an Arbitration Petition.[38] These petitions can be filed either by the claimant or the respondent, depending on which party is aggrieved with the arbitral award. There may be exceptional cases where the petitions have been filed by both the parties i.e. the claimant and the respondent, which are normally clubbed together by the court as one petition. The data on these Arbitration Petitions has been collected through Supreme Court Cases Online (SCC). SCC Online is an online information database which makes reported case

[36] Vijay Karia & Ors. v. *Prysmian Cavi E Sistemi SRL & Ors*, (2020) 11 SCC 1.
[37] *National Agricultural Cooperative Marketing Federation of India v. Alimenta S.A.*, (2020) SCC OnLine SC 381.
[38] *See generally*, Bombay High Court (Original Side) Rules, 1980, https://bombayhighcourt.nic.in/libweb/rules/OSrules/bhcosrules.html (last visited on 12th Aug. 2019).

law accessible in the electronic medium. The information database is a proven source for quick retrieval of case-law precedents of the Supreme Court of India and the High Courts of the country. To get the requisite judgements, the search included 'Arbitration and Conciliation Act, 1996 AND Section 34' and was further narrowed down to include 'Arbitration Petitions AND Public Policy'. Through this, a total of 306 reported cases in the Bombay High Court were found. Out of these 306 cases, several cases were appeals, company petitions and writ petitions, which are outside the purview of the current research and therefore do not form part of the final dataset. Thus, the final dataset contains a sample of 156 cases from the Bombay High Court, since 1998 to 2019, wherein the parties have used the argument of public policy in some form to set aside an arbitral award.

To showcase a basic descriptive statistic, three time periods have been used as a case. The first time period is from 1998 to 2003 (hereinafter referred to as the '*first period*'). This focuses on the number of applications that have been successful/ unsuccessful after the formulation of the Act until the judgment of the Supreme Court in *Saw Pipes*, which widened the scope of the application of the public policy doctrine in setting aside of arbitral awards. The second time period is from 2004 to 2015 (hereinafter referred to as the '*second period*'). Hereunder, the impact on the number of applications (successful/ unsuccessful) after the Supreme Court widened the scope of public policy through *Saw Pipes* can be seen. The final time period is from the year 2016 to 2019 (hereinafter referred to as the '*third period*'). This will capture the applications after the 2015 Amendment to the Act, which proceeded to narrow the scope of public policy and thereby, judicial intervention. To analyse the applications, a dummy variable is used to indicate the number of successful (0)/ unsuccessful (1) applications between the time periods (1998 to 2019).

3.2 Findings

Table I provides information on the first period where a total of 36 applications were disposed of wherein 13 were successful applications, i.e. 36.11 %, and 23 were unsuccessful applications, i.e. 63.89 %.

Application (Successful/ Unsuccessful)	**Freq.**	**Percent**	**Cum.**
0	13	36.11	36.11
1	23	63.89	100.00
Total	36	100.00	

Table I: Disposed of applications (Successful/ Unsuccessful) in the first period

Table II analyses the second time period wherein the total number of disposed of cases increased to 92. Out of 92 cases, there were 51 successful applications, i.e. 55.43 %, and 41 unsuccessful applications, i.e. 44.57 %.

Application (Successful/ Unsuccessful)	**Freq.**	**Percent**	**Cum.**
0	51	55.43	55.43
1	41	44.57	100.00
Total	92	100.00	

Table II: Disposed of applications (Successful/ Unsuccessful) in the second period

Table III analyses the third period, wherein the total number of disposed cases is 28. Out of these, there were 11 successful applications, i.e. 39.29 %, and 17 unsuccessful applications, i.e. 60.71 %.

Application (Successful/ Unsuccessful)	**Freq.**	**Percent**	**Cum.**
0	11	39.29	39.29
1	17	60.71	100.00
Total	28	100.00	

Table III: Disposed of applications (Successful/ Unsuccessful) in the third period

Table IV provides an overview of all three time periods based on the 156 disposed of applications which have been analysed. Out of 156 arbitration applications, 75 were successful whereas 81 were unsuccessful.

Applications Successful/ Unsuccessful	1	2	3	Total
0	13	51	11	75
1	23	41	17	81
Total	36	92	28	156

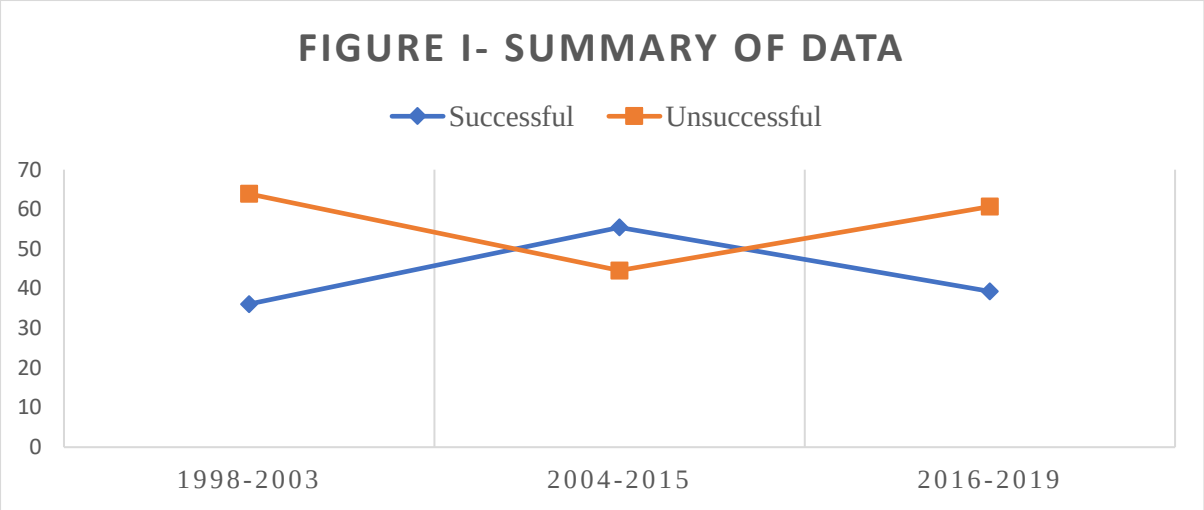
Table IV: Summary of disposed of applications (Successful/ Unsuccessful) since 1998 to 2019

It is clear that the three different time periods have massive fluctuations in the number of successful and unsuccessful applications. The findings pertaining to the first period show that the number of unsuccessful applications is considerably high as compared to successful ones. One could postulate that the Act was the reason behind a limited number of successful applications, keeping in mind the minimal judicial interference aspect enumerated under Section 5 of the Act.

On 17th April 2003, the Supreme Court laid down its decision in *Saw Pipes*, which widened the scope of public policy. This acted to catalyze the number of successful applications between 2004 and 2015. This is noticed through Table II wherein there is an increase in the successful applications as compared to the first period.

After the legislature came up with the 2015 Amendment to the Act of 1996, it may be seen that there is a substantial reduction in the number of successful applications wherein awards were

sought to be set aside on the ground of public policy. It is argued that this is the result of the legislature clarifying that the test of whether there is any contravention with the fundamental policy of Indian Law shall not entail a review on the merits of the dispute. The figure produced hereinafter summarizes the data in the foregoing table.



The differing principles, put forth in relation to the ground of public policy by the Supreme Court in a series of cases, have had severe implications on the number of applications as seen above. However, the analysis remains incomplete without exploring the various facets of public policy and the classification of contracts in relation to each notion. To this end, the next chapter carves out a distinction between public interest, public welfare and public security; all of which are essential facets of the doctrine.

4. PUBLIC POLICY AND THE VALIDITY OF CONTRACTS

4.1 Notions of Public Policy

All adjudicatory bodies including the public law courts are subject to criticism for erroneous decisions; arbitral tribunals are no exception to the same. These errors can stem from several

factors apart from public policy, which have been enumerated under Section 34 of the Act.[39] The provisions in Part I of the Act, which have been taken from the New York Convention, are rather exhaustive and violating them would imply violating the 'due process of law'.[40] The ambit of due process would include factors such as providing a procedural schedule, equal allocation of time for hearing and briefing, opportunity to confront evidence, disclosure of issues, selection of witnesses, party's right to appoint an arbitrator and the basic right of the parties to present a full case.[41] Historically, following due process merely implied compliance with the law of the land. In the modern arbitral context, due process refers to the legal procedure that is owed to a party by the arbitral tribunal.[42] By and large, countries which have ratified the New York Convention have had uniform jurisprudence on the 'due processes in arbitration'. However, the paranoia arises when the term public policy needs to be construed. There has been a lack of uniformity and, at times, divergence of opinions as to what entails public policy.[43] Besides the connotation of public policy expressed above, i.e. to bar the enforcement of judgments and awards, the term 'public policy' may also include rules that make the parties' contractual arrangements void. This makes it necessary to break public policy into different strands as the formation of various mandatory rules depends on these strands.[44] According to Ghodoosi, "…*to better understand the concept of public policy, it needs to be divided into three distinct strands - public interest, public morality and public security - each with a separate pedigree and logic requiring a separate method for its analysis. The public interest category*

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[39] *E.g.*, The Arbitration and Conciliation (Amendment) Act (No. 3 of 2016) (2015) § 34(2)(a)(i) (India).('An arbitral award may be set aside by the Court only if-the party making the application furnishing proof that-a party was under some incapacity')

[40] *See*, U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Jun. 10, 1958, 330 U.N.T.S. 38 (1959); *See also*, Albert Jan van den Berg, *The New York Convention of 1958: An Overview*, ARB.-ICCA https://www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf (last visited on 5th May 2020).

[41] Klaus Berger & J. Ole. Jensen, *Due Process Paranoia and the Procedural Judgment rule: A safe harbour for procedural management decisions by International Arbitrators*, 32 ARB. INT'L 415 (2016).

[42] Remy Gerbay, *Due Process Paranoia*, KLUWER ARBITRATION (Jun. 6, 2016) http://arbitrationblog.kluwerarbitration.com/2016/06/06/due-process-paranoia/ (last visited on 5th June 2020).

[43] Bernard Hanotiau & Olivier Caprasse, *Arbitrability, Due Proces, and Public Policy under Article V of the New York Convention: Belgian and French Perspectives*, 25 J. INTL. ARB. 721 (2008). *See also*, Marike Paulsson, *The U.S. Courts and their Convention Public Policy Gloss Revisited: Hardy Exploration & Production (India) Inc. v. Government of India, Ministry of Petroleum & Natural Gas: Glossing with International Comity*, KLUWER ARBITRATION (Dec. 26, 2018) http://arbitrationblog.kluwerarbitration.com/2018/12/26/the-us-courts-and-their-new-york-convention-public-policy-gloss-revisited-hardy-exploration-production-india-inc-v-government-of-india-ministry-of-petroleum-natural-gas-glossing-wi/ (last visited on 5th May 2020); Fali Nariman, *Judicial Dialogue on the New York Convention*, ICCA'S INTRODUCTION TO THE NEW YORK CONVENTION- CONVENTION AND SOVEREIGNTY (Nov. 23, 2013) https://www.arbitration-icca.org/media/2/13916005409590/nyc_roadshow_speech_23rd_nov_nariman.pdf. (last visited on 5th May 2020). Fali Nariman suggests that "independent sovereign States act too often like billiard balls, and do not co-operate."

[44] Alan Schwartz & Robert Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L. J. 541 (2003).

refers to instances wherein the public policy exception can be determined by employing a cost-benefit analysis, weighing the interests of private parties against societal interest. The second strand, public morality, attempts to safeguard communal values by allowing the judiciary not to lend its enforcement apparatus to private legal arrangements that are injurious to common morality. Lastly, public security is structured around the exceptionalist logic of modern statehood, which aims to protect the State's survival interests…"[45]

Based on these strands, we can analyse the need for a doctrine of public policy from the law and economics perspective. Law and economics scholars would argue that the sole purpose of entering into a contract is to effect an increase in wealth, social welfare and efficiency.[46] *Per contra*, any negative externalities that are caused through the contracts may be considered not contributing to social welfare. Therefore, one way to adjudge this is to consider the contract as inefficient when the net third party harm exceeds net third party benefits.[47] If the contracts cause third party harm, then the contracting parties can be directed to pay costs so as to maintain a status quo. An alternative approach to cost payment or the deterrence approach is the non-enforcement of such contracts. Thus, the contracts would be declared void by virtue of the public policy doctrine whenever there is a negative externality. This would inevitably force the contracting parties to evaluate third party effects before the agreement. This, in turn, would increase the information-acquiring cost and transaction cost of the parties, thereby resulting in over-deterrence. The Harvard Law Review, in its note on '*A Law and Economics look at contracts against public policy*', postulated that the consideration and the consequent performance is what causes negative externalities and not just entering into the contract.[48] On a purely legal basis, the act of entering into such an agreement may make the agreement *void ab initio*.[49] However, to analyse it from a law and economics perspective, the Harvard Law Review devised taxonomy of specific acts which may be against public policy. *Their opinion*

[45] Ghodoosi, *supra* note 10.
[46] *See generally*, Steven Shavell, *Economic Analysis of Contract Law*, HARVARD LAW SCHOOL JOHN M. OLIN CENTER FOR LAW, ECONOMICS AND BUSINESS DISCUSSION PAPER SERIES (2003). http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.661.5864&rep=rep1&type=pdf (last visited on 5th May 2020); *C.f*, Eric Posner, *Economic Analysis of Contract Law after Three Decades: Success or Failure?*, JOHN M. OLIN PROGRAM IN LAW AND ECONOMICS WORKING PAPER NO. 146 (2002).
[47] GREGORY KLASS, GEORGE LETSAS & PRINCE SAPRAI, PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW (2014).
[48] *A Law and Economics look at Contracts against Public Policy*, 119 HARV. L. REV. 1445 (2006).
[49] *See*, The Indian Contract Act, 1872, No. 9, Acts of Parliament, 1872, § 24.

was to create four categories which were (i) contracts to commit an act definitively against public policy, (ii) contracts to refrain from acts that further public policy, (iii) contracts to commit legal acts that themselves facilitate acts which are against public policy, and (iv) contract to commit acts of indeterminate legality.[50] Each category has been analyzed from an Indian perspective, taking Indian contract jurisprudence into account.

i. Contracts to Commit Acts Definitively Against Public Policy

The Indian Contract Act, 1872 does not define the terms 'public policy' or 'opposed to public policy'. Section 23 of the Indian Contract Act lays down certain conditions as to the lawfulness of the consideration and object of contracts.[51] Under this section, unless a court terms the consideration to be unethical and against public policy, the agreement shall be enforceable by law. This section gives the court authority to repudiate the clauses that are against public policy and to declare them as *void ab initio*. Certain acts which attract penal provisions have been declared to be against public policy; these would come under the first category. Thus, a contract to commit such an act would be against public policy *per se*; however, it is possible that ambiguity may arise in exceptional cases. For instance, a case where A promises to superintend, on behalf of B, a legal manufacturer of indigo and an illegal traffic in other articles, and B promises to pay A, a salary of 10,000 Rupees per year.[52] The agreement is void as the object of A's promise and the consideration for B's promise are, in part, unlawful.[53] The consideration in part being unlawful is on the basis that the legislature had anticipated that the act would create negative externalities. Let us presume that the illegal traffic of other articles is severed from the contract. In such a case, there is a welfare maximizing opportunity, which is lost. Taking the sample illustration further, A and B agree that A shall pay B 1,000 rupees, for which B shall afterwards deliver to A either rice or smuggled opium. This would then be a valid contract to deliver rice and a void agreement as to opium. *Thus, in cases where the negative externalities are not enough to justify complete deterrence, a blanket rule of non-enforcement is excessive.*[54] An argument for over-deterrence is that the court could address the aspect of over-deterrence by taking a cost-benefit analysis; however, this increases the cost of litigation.

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[50] *Supra* note 47
[51] *See*, The Indian Contract Act, 1872, No. 9, Acts of Parliament, 1872, § 23.
[52] *See*, The Indian Contract Act, 1872, No. 9, Acts of Parliament, 1872, § 24.
[53] *Id.*
[54] *Supra* note 47

Additionally, in cases where one party alleges voidability of the contract, the Court will necessarily have to delve into the intention of the legislature in every case even when the provision itself is unambiguous. Thus, if there is over-deterrence in any way whatsoever, the judiciary must take the literal interpretation into account unless exceptional circumstances arise.[55]

ii. Contracts to Refrain from Acts that Further Public Policy

The second category includes contracts to refrain from acts that further public policy. Under this, there is a possibility of the creation of a positive externality by the performance of the contract itself.[56] However, since the act contemplated by the performance itself is against the doctrine of public policy, the creation of a positive externality is barred.[57] Take, for instance, a post-employment restraint agreement between the employer and the employee. Let us assume that under this, the employee enters into an agreement with the employer whereby the employee cannot move to a more profitable position in another company, which sells the same product or service, where the employee's services could be put to use. *Post-employment restraints are said to monopolize the employment market because they limit the ability of the employees to sell their services to the highest bidder*.[58] Thus, at face value, one could term a long term employment contract to be anti-competitive. One could argue that there is a possibility that such agreements are against general contracting principles. Further, there is not only a loss to the employee's ability to earn a living but also the cost to society of losing the services of a productive individual. These would be substantial grounds for barring the contract as it goes against public policy. In *Affle Holdings Pte Ltd.* v. *Saurabh Singh*, the Delhi High Court was of the opinion that a negative covenant in the employment contract, which prohibits carrying on business beyond the tenure of the contract, is void and unenforceable.[59] The underlying reason behind invalidating post-employment restraints is that if such restraints are permitted, the employee would be unfairly restrained from using the skills and knowledge gained by him

[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] Maureen Callahan, *Post Employment Restraint Agreements: A Reassessment*, 52 U.CHI L. REV. 703 (1985).
[59] Affle Holdings Pte Ltd. v. Saurabh Singh and Ors., 2015 SCC OnLine Del 6765

or her to advance further in the industry. All of these arguments seem plausible to bar such contracts on the basis of violating public policy. On the other hand, Callahan, in her paper '*Post-Employment Restraint Agreements: A Reassessment'* was of the opinion that, "*post-employment contracts are not anti-competitive per se, and in many cases, foster competition by affording employers needed protection for confidential businesses or information in training.*"[60] Thus, the courts ought not to delve into the reasonableness of such contracts. If the employee breaches the post-employment restraint agreement, then there is a positive spillover, which is beneficial for the third parties employing the worker with the acquired skills. Courts should necessarily look at the contract and see whether the contract itself made the beneficial breach possible. If the contract was a factor that made beneficial breach possible, then it ought to be enforced. The approach used by the Supreme Court of India in *Percept D'Mark (India) Pvt. Ltd.* v. *Zaheer Khan & Another* seems to be the appropriate approach towards addressing concerns arising out of restricting covenants: "*Somewhere there must be a line between those contracts which are in restraint of trade and whose reasonableness can, therefore, be considered by the courts, and those contracts which merely regulate the normal commercial relations between the parties and are therefore, free from the doctrine…*".[61] This would enable the judges to view the reasonableness of the contract and provide just enough incentive for the breachee to enter into the contract in the first place. Moreover, this would maximize social welfare by maximizing opportunities for beneficial breach.

iii. Contracts to Commit Legal Acts That Themselves Facilitate Acts Against Public Policy

Certain activities do not require one or both the parties to engage in prohibited activities, but do facilitate such activities.[62] These activities would be under the third category, which includes contracts to commit legal acts that themselves facilitate acts against public policy. In this type of agreement, negative externality is more probabilistic in nature. Take, for instance, a case wherein A sells B an axe which was to be utilised for cutting trees. A knew that B did not have a proper license to cut trees in the forest. B, on the other hand, uses that axe to kill a person. The act of selling the axe did not result in any prohibited activity but facilitated the act

[60] Callahan, *Supra* note 57
[61] Percept D'Mark (India) Pvt. Ltd. v. Zaheer Khan & Anr., (2006) 4 SCC 227
[62] *Supra* note 47

of murder. In such a case, one could argue that the intention of the contracting party needs to be judged to see if the contract could be enforced. Thus, on that basis, the contract ought not to be enforced had A known about the intention of B, whereas the contract should be enforced if A did not know about the intention of B. However, analysing the intention of the parties during contract is a costly affair and, therefore such contracts ought not to be enforced. This would inevitably lead to over-deterrence and lack of incentives for people to enter into contracts in which there is a minor illegality. This results in the loss of social welfare as the promisor would not want to indulge in such an activity due to non-enforcement on the ground of public policy. One option for the judiciary would be to analyse the cost and benefit; however, the trade-off here is that it raises the cost on the judiciary as the judges would have to analyse what would be construed as minor or major illegality. Thus, in my opinion, these types of contracts should be barred for being against public policy.

iv. Contracts to Commit Acts of Indeterminate Legality

The fourth category deals with contracts with uncertain public policy effects. These contracts require a judicial determination as to whether the act is against public policy. At times, this may chill some legal activities and prevent welfare maximization.[63] In such cases, the risk-taking ability of the parties is a determinative factor with regard to the actualisation of the contract. The chilling effect can be reduced by reducing the penalties associated with the act. This would increase the value of expected return. However, it can under-deter parties in relation to entering into contracts that will definitely violate the statute. The same is faced while analysing the public policy doctrine vis-à-vis the setting aside of arbitral awards.

The effect of public policy on contracts varies from case to case. This complicates the understanding of voidability of contracts on the grounds of public policy. This complexity is compounded in cases where the State acts as a paternalist to protect parties to the contracts. Thus, it is necessary not only to analyse the contracts on the basis of externalities it creates but also from a welfare perspective.

[63] *Id.*

5. A WELFARE PERSPECTIVE ON THE PUBLIC POLICY DOCTRINE

The main aim of any institution is to protect the parties to the contract. The author has analysed the contracts being barred as against public policy on the basis of the externalities they create. However, public policy can be used to protect the parties from the contract itself. In such cases, the institution may act in a paternalist manner to bar contracts against public policy. Parties to a contract should be on an equal footing; however, the stark reality is that parties are never on an equal footing. Unfair terms in a contract can be one of the arguments raised by the parties to point out unequal bargaining. The Supreme Court of India, in the case of *Indian Financial Assn. of Seven Day Adventists* v. *M.A. Uneerikutty*, was of the opinion that if any particular clause or clauses in a contract are unlawful and one-sided, then the contract would be void and against public policy.[64] Although unconscionability is not a ground under Section 23 of the Indian Contract Act, the Law Commission of India, in its 103rd Report on Unfair (Procedural and Substantive) Terms in Contract, has mentioned that unconscionable bargain could be brought under the ambit of public policy.[65] Interestingly, Epstein is of the opinion that it does not serve any function beyond the prohibition against fraud, duress and incompetence.[66] Thus, the doctrine is acceptable only in instances where there is some incapacity of a contracting party, which results in informational asymmetry for one of the parties. On the other hand, Ghodoosi states that the public policy argument can be used to set aside an arbitral award when serious asymmetry of information has caused harm to party.[67] Petitions for setting aside arbitral awards are normally heard by the High Courts of India. Thus, the arguments of serious informational asymmetry ought to be raised in the arbitral proceedings and not before the High Courts during the setting aside proceedings. Understandably, the courts do have the responsibility to protect the weaker party, if the party had been subject to any incapacity. However, if the party has been unable to prove economic duress of any sorts, then asymmetry of information, if any, ought not to be the reason for setting aside an award. Since, the arbitral tribunal has the power to check the voidability of the agreement and impliedly unreasonable clauses; the author's argument is not in consonance with Ghodoosi's argument of the onus being on the judiciary to set aside such awards on the grounds of public policy.[68] Epstein is right in concluding that unless there is some incapacity that is caused, unjust terms due to

[64] Indian Financial Assn. of Seventh Day Adventists v. M.A. Unneerikutty, (2006) 6 SCC 351
[65] L. COMM'N OF INDIA, 103RD REPORT ON UNFAIR TERMS IN CONTRACT (1984).
[66] Richard Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293 (1975).
[67] FARSHAD GHOODOSI, INTERNATIONAL DISPUTE RESOLUTION AND THE PUBLIC POLICY EXCEPTION (2018).
[68] *Id.*

unequal bargaining power cannot be termed to be against public policy.[69] Courts in India have tried to adopt a balanced approach. For instance, the Supreme Court, in the case of *Phulchand Exports Ltd.* v *O.O.O Patriot*, held that "*when the commercial businessmen are involved in commercial contracts that are not of unequal bargaining power and have entered into a contract, then the agreed terms between them cannot be said to be unreasonable, unjust or unconscionable.*"[70]

From a welfare perspective, the State may act as a paternalist and draft laws to protect the weaker parties in the contract from certain incapacity. This is reasonable. However, the judicial institution should not interfere and have a balanced approach. Interference should happen only when there is a serious threat that the asymmetry has caused grave incapacity. Understandably, there is complexity in cases where the doctrine of public policy is applied. Thus, it is necessary to determine the costs of such vague statutory terms on the judiciary.

6. VAGUENESS OF 'PUBLIC POLICY' AND JUDICIAL COST MINIMIZATION

6.1 Optimal Interpretation of Public Policy to reduce judicial costs

The debate regarding the interpretation of public policy has been going on for years not just in the alternative dispute resolution setting but also in the contractual setting. In *Richardson* v. *Mellish*, Justice Burrough had termed public policy, "*as an unruly horse; once you get astride of it, you never know where it will carry you*."[71] Interestingly, this has been quoted on numerous occasions even by law and economics scholars whilst analysing the public policy usage in contracts and conflict resolutions.[72] Until the late 1970's, law and economics scholars were under the assumption that the statute had an unambiguous meaning once it had been drafted. However, Posner's article on statutory interpretation provided a different approach to interpretation of statutes and the constitution.[73] His analysis of judicial independence from

[69] Epstein, *supra* note 65
[70] Phulchand Exports v. O.O.O. Patriot, (2011) 10 SCC 300

[71] Richardson v. Mellish, (1824) 2 Bing 229
[72] *See*, David Friedman, *Brining Order to Contracts against Public Policy*, 39 FLA. ST. U. L. REV. 563 (2012)
[73] Richard Posner, *Statutory Interpretation- in the Classroom and in the Courtroom*, 50 U.CHI L. REV. 800 (1983).

political control laid down the premise of courts acting as agents of the original draftsmen, rather than the current legislators.[74] Therefore, the role of the judiciary in interpreting vague laws is to determine the underlying public interest foundation which had been laid down by the enacting legislature.[75] Thus, in our case, that would be the meaning or ambit of the public policy doctrine. Public policy, as used in other contexts mentioned in the previous chapters, has been employed in a different sense under contractual and arbitral settings. One could argue that the usage of public policy is narrower in the arbitral setting than the contractual setting in the Indian scenario. It is impossible to define "public policy" considering its multi-dimensional character. Winfield is of the opinion that "*public policy is a principle of judicial legislation or interpretation founded on the current needs of the community.*"[76] This would not be counted as a full-proof definition; nonetheless, the essence of the public policy depending on the dynamic changes of the society has been captured. This makes it even more difficult for the judiciary, as an agent of the enacting body, to interpret this vague term. The judicial interpretation of vague terms from an economic perspective has been on the rise since the 1980s. An initial attempt to fill the gap and to provide an economic framework of alternative rules for judicial interpretation was made by Rizzo and Arnold in, '*An economic framework for Statutory Interpretation*'.[77] In their paper, they developed the economic theory of judicial interpretation which is one of *relative* interpretations wherein the framework suggests that the interpretation should be broader in some areas and narrower in others.[78] Their main aim was to minimize deviations of judicial decisions from those that would have been made by a costless legislature. The model is simple; there is a hypothetical 'costless legislature' and the statutory vagueness is assumed to be exogenous to the cost minimization problem. Their model to determine the total cost of judicial errors is:

$$\mathbf{C = \alpha O(I,V_o) + \beta U(I,V_o)}$$

Here, V is the concept of statutory vagueness, I is the judicial interpretive stance, the over-inclusion and under-inclusion errors are O and U, respectively, and their relative costs are α

[74] William Landes & Richard Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J. L. & ECON. 875 (1975)
[75] Posner, *Supra* note 72
[76] Percy Winfield, *Public Policy in the English Common Law*, 42 Harv. L. Rev. 76 (1928).
[77] Mario Rizzo & Frank Arnold, *An Economic Framework for Statutory Interpretation*, 50 J. L. & CONTEMP. PROBS. 165 (1988)
[78] *Id.* at 166

and β, respectively. According to them, *the total cost of judicial errors is at a minimum when the first order condition of the above objective function is set equal to zero*[79]:

$$\alpha O_1 + \beta U_1 = 0$$

This implies that:

$$\alpha O_1 = -\beta U_1$$

The above model showcases that the appropriate reach of the statute or the vague term results when, given a fixed degree of vagueness, the judiciary selects an interpretive stance so that the costs of marginal over-inclusions balance the costs of marginal under-inclusions.[80]

Taking the same model, in the public policy context, the author opines that if the vagueness of public policy, or terms therein, increase, two consequences follow. First, there will be an increase in the number of petitions for setting aside, which, according to the costless legislature, ought not to have been included. Therefore, a widened scope of public policy may over-include cases. Conversely, a narrower interpretive stance would have several under-inclusions. Rizzo and Arnold's function has to be considered subject to the utility function of the business community; in the public policy context, which will be U_x. This would consist of the contracts which will be negatively affected due to the increase in scope of public policy (Co). This would give more grounds for the awards and contracts to be declared void. Taking the utility function of the business community in the analysis of public policy is essential as the social costs of errors become higher when the judicial interpretation goes awry. This would be under the assumption that Act will enhance social welfare and is not a private interest statute. Hereunder, (A) stands for the decrease in the number of arbitrations due to lesser number of contracts and more judicial intervention.

$$U_x (I, V_0, Co, A) = \bar{U}$$

[79] *Id.* at 171
[80] *Id.* at 171

By taking the utility function, courts would minimize the social costs (inclusive of the judicial minimization of cost) as they perceive them, from deviating from the legislative intent of a statute.

7. PREFERENCES OF THE JUDICIARY IN INTERPRETING VAGUE TERMS

Statutory interpretation has been excessively concerned with the different canons of interpretation such as the golden rule and the literal rule.[81] Thus, little attention has been paid to the preferences of the judiciary and the legislature.[82] Legal theorists believe that the courts are concerned with following the basic rules of interpretation and applying the law to interpret terms as they are in a contract or statute.[83] However, this may not be entirely true. Take for instance, the arguments laid by positive political theorists that the courts are primarily concerned with reading their own preferences into statutes, to the extent that they can do so whilst avoiding unnecessary statutory overrides.[84] Judges do have policy preferences that influence their reading of a particular term. Whilst construing their preference, a judge will prefer to use instruments such as precedents and interpretation tools. However, traditional sources of legal interpretation often support more than one interpretation of a statute or term, giving the judges law-making discretion. *Thus, when the option arises, judges typically consider how a "reasonable" lawmaker might have intended the statute to be interpreted, including his own preferences and the preferences of the current legislature. This would be termed as the legislative signal.*[85] When the judges include their own preferences, there may be divergence with the legislature's preferences. In the case of public policy, the Supreme Court in *Muralidhar Agarwal* v. *State of U.P.*[86], was of the opinion that, "*Public Policy is a dynamic concept which varies from generation to generation. Going further, the difficulty of discovering what public policy is at given moment certainly does not absolve the judges from the duty of doing so. In conducting an enquiry, judges are not hide-bound by precedent. The*

[81] JUSTICE G. P. SINGH, PRINCIPLES OF STATUTORY INTERPRETATION (2012).
[82] Jonathan Macey & Geoffrey Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647 (1992).
[83] Lawrence Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010); *But see*, Patrick Kelley, *Theories of Legislation and Statutory Interpretation: Natural Law and the Intention of the Legislature*, 1 WASH. U. JUR. REV. 47 (2009)
[84] Klass, s*upra* note 46
[85] William Eskridge, JR, *Post-enactment Legislative Signals*, 57 J. L. & CONTEMP. PROB. 75 (1994).
[86] Murlidhar Agarwal and Anr. v. State of U.P. and Anr., 1974 AIR 1924

judges must look beyond the narrow field of past precedents, though still leaves open the question, in which direction they must cast their gaze. The judges must base their decision on the opinions of the men of the world, as distinguished from opinions based on legal learning." Interestingly, Supreme Court placed reliance on this case to widen the scope of public policy in *Saw Pipes*. It is true that when the legislature enacts a particular statute, it cannot assume the judiciary's preferences, which may or may not diverge from its own preferences.[87] However, in this case, there was a clear path provided by the judiciary under the *Renusagar* case. The judiciary, by going against the principles laid down in *Renusagar* gave rise to unnecessary sunk cost and a massive opportunity cost. Unfortunately, when the court reviews the law and widens the ambit, it raises further social cost. To curb the misgiving, the legislature updates its assessment of the preferences, which results in the additional cost of reiterating its own policy preferences in the statute through amendments.

This discussion should make clear the importance of optimal judicial interpretive stance in reducing costs and maintaining legislative preferences. The implication of not taking the enacting legislature's preferences into account for analysing a vague term is an unnecessary dispute between the two arms, with each trying to put its own mark. Continuing on the same thought, the final chapter will try to identify the need for a focal point by the judiciary especially when the law, as in the case of public policy, is unclear. The author analyzes why the law is needed in the first place and what are the consequences when the law is unclear.

8. THE FOCAL POINT APPROACH AS A PANACEA TO THE PUBLIC POLICY CONUNDRUM

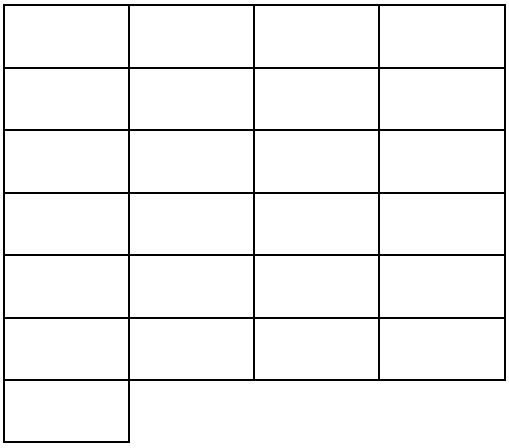
In the Indian context, the Supreme Court's judgment is binding on all courts within the territory of India.[88] Thus, the Indian hierarchical structure would have the Supreme Court at the top of the pyramid followed by the High Courts in different States of the country. The ratio laid down by the Supreme Court is binding as a precedent on all the lower courts. As pointed out in the first chapter, the Supreme Court's judgments in the *Renusagar* and *Saw Pipes* cases have binding precedential value on the lower courts. The basic reasoning behind the *Saw Pipes*

[87] *See*, Klass *supra* note 46
[88] INDIA CONST., art. 141

decision overrode the legislature's preferences. By adding the ground of patent illegality, the Supreme Court widened the scope of public policy considerably. This ratio trickled down to the High Courts of the country, which do not require any unanimity as far as appreciation of precedents are concerned. Let us assume that the Bombay High Court, staying within the limits of the *Saw Pipes* decision, interpreted public policy widely and further, construed the term patent illegality liberally. The consequence would be that more petitions of setting aside would be successful in the Bombay High Court. On the other hand, let us assume that the Madras High Court, staying within the limits of *Saw Pipes* decision, interpreted public policy narrowly, giving due consideration to the term 'patent illegality'. Consider that all the remaining High Courts in India interpret public policy and patent illegality anywhere between the scope defined by the High Courts of Bombay and Madras. Given this, multiple equilibria will be formed in relation to the scope of public policy, especially under a vague concept like patent illegality as put forward by the Supreme Court of India in the *Saw Pipes* decision. Clearly, the parties entering into contracts will be confused regarding the enforcement of arbitral awards, if there are any disputes that arise. Further, the parties would face the issue of analysing the contracts in the first place due to the lack of information regarding the doctrine of public policy and what constitutes patent illegality. In cases where there are multiple equilibria as in the hypothetical scenario mentioned above, where the High Courts throughout the country have more than one interpretation, the parties entering into contracts may be able to gauge which are the equilibrium outcomes. However, there is no sure-fire way for all of the said parties to converge on the same equilibrium. To further enunciate this concept, it is worth mentioning Basu's Island game. In this game, two people are left on an island with one opting to drive on the left and the other one opting to drive on the right. This may create two equal equilibria, vis-à-vis driving on the right equilibrium and driving on the left equilibrium. The result would be disastrous. The 'Island Game' analogy can be clearly applied to the case of High Court interpretations.[89] Interestingly, this is where Basu is of the opinion that the focal point can play a role.[90] According to him, "*the focal point is a concept that arises from psychological capacity, which enables people to guess what another person is likely to do when faced with the problem of choosing one from among several equilibria.*"[91] To better understand the focal point approach, the author continues with the High Courts' example. Since there are 25 High Courts throughout

[89] Kaushik Basu, *The Republic of Beliefs*, World Bank Group- Policy Research Working Paper No. 7259 (2015).
[90] KAUSHIK BASU, THE REPUBLIC OF BELIEFS: A NEW APPROACH TO LAW AND ECONOMICS (2018).
[91] *Id* at 38

the country, the author assumes that there are 25 focal points created. This is seen through the Squares Game below:



Game 1: Squares Game

Clearly, this game has 25 Equilibria. The author assumes that there are two contracting parties from Madras and Bombay respectively, who are unsure as to whether the contract they have entered into would be against the doctrine of public policy. The party from Bombay would not want to enter into a contract as the Bombay High Court has given a wide interpretation and thus, the contract could be void as against public policy. On the contrary, in an indeterminate legality regarding patent illegality, the contracting party from Madras would be willing to enter into this contract as the Madras High Court has given a narrower interpretation. On the assumption that there is no way to get any further information through a lawyer, which increases cost of transaction, the chances are that the parties will not want to enter into such a contract. This is where the parties get nothing. Assume that there are two contracts wherein one contract is signed by two parties from Madras and the other contract is signed by two parties from Bombay. Further, assume that both the contracts are of indeterminate legality under public policy and that neither violates any statute linked to public policy or public interest. However, assume that both violate minor regulations which have no bearing on public interest. If disputes arise in both contracts and the consequent arbitral awards are challenged on the grounds of violation of public policy, and if the challenge to the validity of both contracts reaches the Supreme Court, both the contracts would give the parties an expected income of

Rs. 40, which is equal to 1,000 multiplied by one-twenty-fifth, if the Supreme Court would choose the contract which they have entered into as valid. However, this probability is rather miniscule. This is understandably a game where the utility of the focal point comes into play. One way to create a focal equilibrium is to place a visible marker on any one of the squares. This would indicate to the parties that this is the focal point.[92]

Basu gives an instance of meeting at the airport. He says that if we suppose that "*two people decided to meet at an airport at a certain time but have forgotten to mention a specific place. This will allow each player to then choose a place to go and wait. If they both choose the same place, they meet and are happy. If they choose different places, they are unhappy. The game is the same as the squares game which has multiple equilibria*."[93] Basu then proposes a solution to this conundrum: "*the airport authorities can solve this by deliberately creating a focal point. They do this by simply choosing any visible place in the airport and putting up a sign, saying "Meeting Point*".[94] Since multiple equilibria are formed there is an inherent confusion in the minds of the parties. Whilst the law cannot change the options available to individuals, it can effect a change in individual beliefs about what others will do.[95] These can prompt individuals to behave differently and that is what can take society to a new equilibrium. In other words, the law is simply an instrument that gives salience to certain equilibria and certain kinds of behaviour. Thus, a new law, if it has to be effective, has to create a new focal point. In the case of public policy, the legislature narrows the scope of public policy with well-defined scope of what constitutes public policy. This, in turn, becomes the law of the land. Thus, the legislature directs the parties to a better equilibrium. It could happen that there may be a better outcome in the society and an equilibrium, which could not be realized by the law. Therefore, the law can be amended to realize this particular outcome as was done by the legislature with the amendment of the Act in 2015. This process goes on and on until the society reaches the optimal outcome. On the other hand, a cardinal mistake the Supreme Court made through the *Saw Pipes* decision by adding the ground of public policy was to not realize the limitation of the law and to try and overreach and direct the society to some outcome that is not the best equilibrium, and hence, not sustainable. The decision of the Supreme Court in *Saw Pipes* inevitably took

[92] *Id* at 45
[93] *Id* at 44
[94] *Id* at 44
[95] *Id*; *See also*, Robert Lee, *Kaushik Basu: The Republic of Beliefs: A New Approach to Law and Economics*, 46 J. L. Soc'y 340 (2019)

the society to a downward equilibrium, and hence, the law was not sustainable. In such cases we end up with laws that are doomed to fail. Hadfield's argument plays an important role here. He says "*It's not that there are no formal legal rules and systems in poor and developing countries. Indeed, there are often so many rules and systems that no one could possibly comply with all*"[96]

One could point to that fact that even the narrower scope of the doctrine of public policy is ambiguous and, thus, may lead parties astray. In this case, we use a focal curb. The law, as in our case, the doctrine of public policy ambit, directs the society to understand not a focal point but what may be called a "focal curb". *A focal curb is a set of strategies open to each player, such that the ordered collection of these sets- one for each player- is closed under rational behaviour.*[97] Take for instance, the squares game dealt with earlier. In the game above, there were 25 equilibria considering there were 25 High Courts in the country, each with a degree of their understanding of patent illegality and public policy pursuant to the *Saw Pipes* decision. Now, if we take the 2015 Amendment, where the legislature reduced the scope of public policy considerably, the legislature may not have given the parties a focal point but has created a focal curb.

X	X	X	X
X			

Game 2: Focal Curb Squares Game

[96] GILLIAN HADFIELD, RULES FOR A FLAT WORLD: WHY HUMANS INVENTED LAW AND HOW TO REINVENT IT FOR A COMPLEX GLOBAL ECONOMY (2017).
[97] Basu, *supra* note 89

In the 2015 amendment, the legislature narrowed the scope of public policy considerably. Let us suppose that this new amendment by the legislature says that parties are now to consider only major illegality under public policy which violates public interest and public welfare. Under this, one could argue that despite the ambiguity of the terms 'major illegality' 'public interest and welfare', the term public policy has been narrowed down considerably as compared to *Saw Pipes* decision, which includes the abovementioned ambiguous terms and additional vague terms such as patent illegality, without a proper connotation. In this regard, the Amendment states that, while construing public policy, only the bottom five squares need to be taken into consideration. This law, thus, directs society not to a point but to a set of actions. The law, in this case, can be thought of not as creating a focal point but a focal curb. Now, the parties expected income through the contracts would be Rs. 200, which is equal to 1,000 multiplied by one-fifth, i.e. the probability that the Supreme Court would choose the contract which they have entered into as valid. Because of the inherent ambiguity in the doctrine of public policy, it is important to go beyond focal points to focal curbs. This creates the space essential to accommodate the inherent ambiguity of the term 'public policy'. However, the term cannot be ambiguous to such an extent that the parties do not have any idea where to converge as was the case in the *Saw Pipes* decision.

The idea behind the focal point approach to law is that it helps create richer models. It takes multiple players into account and recognizes their role played in the economy game. As holistic as this approach may be, it does have its own limitations. Nevertheless, using this approach to settle the issue of ambiguous laws may help India achieve set-valued target of being the future arbitration hub. For now, given the amendments carried out to the Act, a clear *jurisprudence constante* is being achieved.

9. CONCLUSION

In this thesis, several issues have been outlined regarding the Supreme Court's approach towards public policy doctrine in arbitral setting. Whenever a dispute is settled through arbitration, the procedural costs are much lower as compared to a suit that is filed. The relationship between a private forum such as arbitral tribunal and the judiciary has been volatile since the inception of the Act with continuous intervention. Understandably, the legislature has had to put forward its own preferences, forcefully at times. Despite the effort to be

comprehensive, the author has reconciled to the fact that the vagueness of the public policy doctrine will have open-ended questions in the future. Countries now have the incentive to show that they are business friendly by providing contractual rights and easy dispute settlement mechanism. India has been making its mark by consistently rising in ranks on the ease of doing business statistics.[98] There will always be cases where certainty and consistency will have to outweigh the desire to achieve justice in indeterminate legality cases. Courts must check the unruly horse, i.e. public policy, try to tame it and ensure that it pulls in the right direction. If left unchecked the coach may never arrive at its destination.

[98] *See*, The World Bank's Ease of Doing Business Score, 2019, https://www.doingbusiness.org/en/data/exploreeconomies/india (last visited on 12th Aug. 2020); Press Information Bureau , Government of India, *India improves rank by 23 positions in Ease of Doing Business- India at 77 Rank in World Bank's Doing Business Report* (Oct. 31. 2018) http://pib.gov.in/newsite/PrintRelease.aspx?relid=184513 (last visited on 12th Aug. 2020).

ECONOMIC ANALYSIS OF EUTHANASIA

Ishita Shukla and Ayush Yadav

1. INTRODUCTION

Amidst the various indispensable rights, the Indian Judiciary has varied substantially with regards to Article 21, but it is not black and white on the Right to Die. This onset a debate that whether or not, Article 21 recognizes the 'Right to Die with dignity as a core to Right to Life and Personal Liberty. Many scholars across the globe fathom death as an inevitable part of life and hence advocate encircling the Right to Die within the ambit of Article 21.[1] Another section regards death as an autonomous phenomenon under no one's control. The assumption of rational autonomy, which has considerable value in many legal contexts, deserves to be treated with special caution when applied to medical practice.[2] Around the1900s Euthanasia evolved as one of the most controversial subjects in Europe, both in the medical and the legal aspect. The black law dictionary defines euthanasia as "the act or practice of painlessly putting to death persons suffering from incurable and distressing disease as an act of mercy."[3] The debate on Euthanasia has been dominated mostly by the ethicist and philosophers due to its emotive nature. However, the inclusion of Economics within the debate can help to access the situations more widely and form more rational decisions.

Economics focuses on more effective and equitable distribution of resources[4]. The paper does not rebut the ethical argument but focuses on the need to include economics to support the same. Ethics are mostly concerned with the individual, failing to recognize the societal impact. Economics includes both Individual and Societal Perspective.[5] Ethical considerations and Economics are corollary and should not be studied in isolation. The economic assessment of euthanasia can only be made once it is ethically accepted. Economic concepts can act as tools to solve ethical dilemma as economic analysis plays an important role in policy making as well, which takes value standards into consideration. In fact, economic analysis is often backed by

[1] INDIAN CONST. art. 21.
[2] P.R. Ward, *Health Care Rationing: Can we Afford to Ignore Euthanasia*, 10 HEALTH SERVICE MANAGEMENT RESEARCH 1, 1-2 (1997).
[3] *Euthanasia*, Black's Law Dictionary. (10th ed. 2014).
[4] Stephen Heasell & David Paton, *Economics and Euthanasia*, 14 HEALTH SERVICE MANAGEMENT RESEARCH 50, 62-63 (2001).
[5] Charlie Sprauge, *The Economic Argument for Euthanasia*, THE FORUM (May 27, 2020, 10:05 AM), https://cmcforum.com/2009/opinion/06082009-the-economic-argument-for-euthanasia.

moral values in order to support it. Refocusing on the sense of community would be a correct approach. Consequentially, the approach to associate economics with ethics will help to solve such dilemmas. We cannot derive any benefit from killing a patient against his wish. No Euthanasia can be morally right unless done with the person's consent. Involuntary Euthanasia or Unethical Euthanasia will have the same effect as that of Homicide and Assisted Suicide.

2. CLASSIFICATION

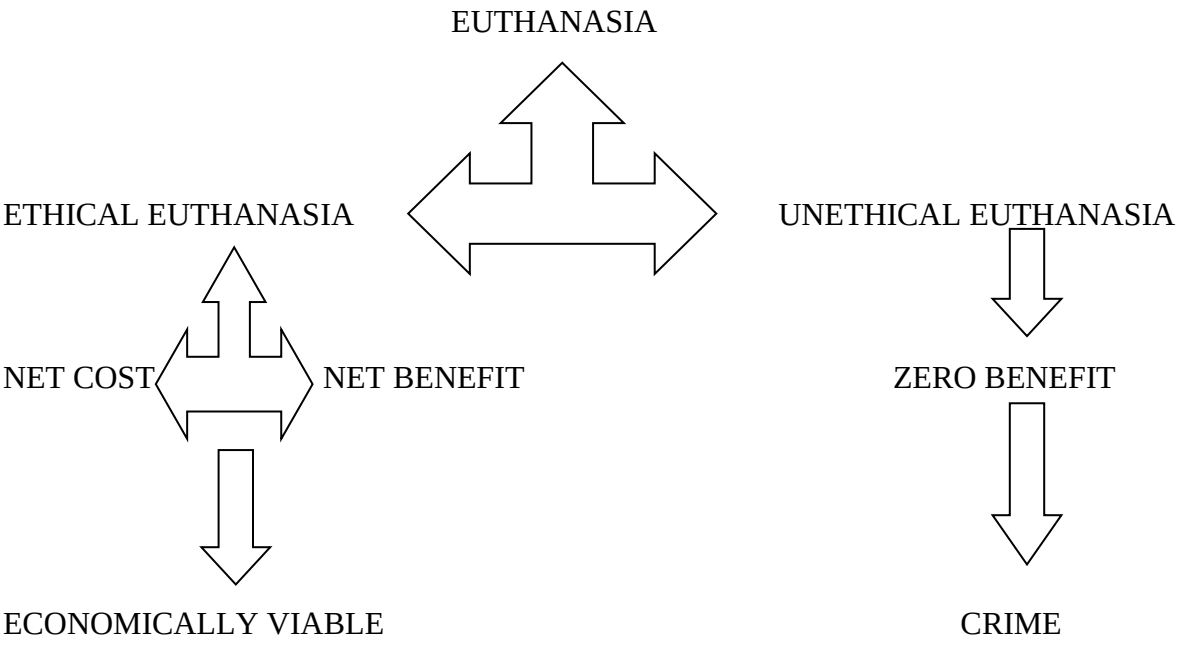


Illustration 1.1

3. LEADING JUDICIAL PRONOUNCEMENTS: RIGHT TO DIE

In the case of *Aruna Ramchandra Shanbaugv.Union of India&Ors*,[6] euthanasia has been broadly classified into two forms. Active euthanasia which is more direct and intense involves the act of killing a person by administering life terminating drugs to alleviate the pain and suffering. It appears to be morally wrong as it closely resembles murder and abetment to suicide. It is usually

[6] Aruna Ramchandra Shanbaug v. Union of India, (2011)4 SCC 454.

done by the doctors who are eventually accused of murder. By contrast, Passive euthanasia is an act of withdrawing life-saving measures to let the person die himself during a vegetative state. It is often considered as a negative right.

With the series of discussions and judgments, the Indian judiciary finally through its judgment in the case of *Common Cause v. Union of India*[7]gave legal sanction to Passive Euthanasia. Passive Euthanasia in the simplest form means, in case of a terminal illness, the patient has the right to terminate his life by removing life-saving measures. It permits living will by the patients on withdrawing medical support if they are suffering from incurable diseases and wish to terminate life. The Apex court, following the western paradigm, upheld the decision given in *Smt. Gian Kaur v. The State of Punjab*.[8]It incorporated 'die with dignity', as a part of Right to Life under Article 21 of the Indian Constitution. However, it does not render section 309 of IPC void as it differs from suicide in a number of ways.[9] Suicide happens for multiple reasons which are not justified under the Indian Constitution or any other law. It must not be confused with involuntary euthanasia as the court rightly observed the stance of passive euthanasia, which requires active consent from the patient at the time he is in his senses. A recent ray of hope in the Indian Legal system came with the advent of The Mental Healthcare Act, 2017. Section 115[10] of the same clearly excludes the application of Section 309 of the Indian Penal Code, 1860, to any person who attempts suicide on the assumption that he or she was under severe stress and hence cannot be tried.[11]Sub section 2 of the same section imposes a duty on the government to take care of that person, rehabilitate and provide proper treatment to avoid the chances of another attempt to commit suicide. For a country like India, allowing Euthanasia in its passive form was a great challenge as judicial precedents had always voted against its legality. One of the most challenging tasks was to get social acceptance as the orthodox Indian society has an upright perspective of death. The religious beliefs drive through the minds of the citizens and influence decisions including the end of life. Amongst many, Hindu mythology is the chief quibbler of euthanasia as its principles find death a result of Karma and depend on the wills and desires of the divine power.

[7] Common Cause v. Union of India, 2014 SC 1556.
[8] Smt. Gian Kaur v. The State of Punjab, (1996) 2 SCC 648.
[9] Indian Penal Code, 1860, § 309, No. 45, Acts of Parliament, 1860 (India).
[10] The Mental Health Act, 2017, § 115, No. 10, Acts of Parliament, 2017 (India).
[11] The Mental Health Act, 2017, § 115(2), No. 10, Acts of Parliament, 2017 (India).

The Santhara practice is yet another instance, which was criminalized by the Rajasthan High Court. It was a much-debated topic as it is deeply rooted in the religious belief of Jain Community.[12] The practice is considered as a welcoming death by attaining a sense of religious liberation and self-realization. It questions the religious freedom of Jain Community who claims that the practice of Santhara is different from the meaning of Suicide given Under Section 309 of the IPC. Unlike Suicide, Santhara is a conscious process of spiritual purification where one does not desire death but seeks to reduce the influx of karmas. Eventually, the Supreme Court granted the stay on Rajasthan High Court's order. However, owing to the material differences, Santhara should not be considered as a form of passive euthanasia. Only the ends are same but means and purpose are different. The purpose of Santhara is to attain spiritual purification and to get rid of worldly desires.

Passive Euthanasia is done under the medical supervision and not by the patient himself whereas, Santhara allows the individual himself to take away his life. Moreover, it not only refuses or denies the treatment but also stimulates the advent of death by denying sustenance.

4. COMPATIBILITY OF ETHICS AND ECONOMICS IN EUTHANASIA

In cases of ethical dilemmas, any practice, policy or law can progress through its economic analysis. There is no clear distinction between what is good or bad, it depends on the situation and outcome. A law or policy can be acceptable in a certain situation where the society can reap its economic advantages. In simple words, economics is an accomplice to support or withhold the enactment of any law which may or may not have ethical barriers.

As a matter of fact, it is not practically possible to have a complete assessment of Euthanasia if the social standpoint is not taken into consideration[13]. By only taking individual standpoint and leaving behind the whole societal view, equity is abandoned. The subject economics is basically to understand how scarce resources are distributed and extracting maximum benefits from the production and distribution of these resources in the society. So, adding an economic perspective in the assessment regarding euthanasia will only be beneficial for the society at large.

[12] Nikhil Soni v Union of India, AIR 2006 Raj 7417.
[13] P.R. WARD, *supra* note 2.

In reality, it is a misconception that Economics counters the current domination of ethics in the debate of Euthanasia. Hence, it is the need of the hour to understand the importance of including economics within the debate of euthanasia to rectify the misconstrued notion. It is contended that both ethics and economics must work in tandem to ensure the best interest of an individual.[14]Mooney and Mcguire suggest that when the patient is subjected to such intervention which is neither beneficial nor dignified, it must be called bad ethics as well as bad economics. The ethical argument supports claims such as personal autonomy, reduced suffering and, dignified death. Economics, on the other hand, focuses on the allocation of resources.[15]

Economics in fact aids in deciding the ethical dilemmas. For instance, if we take into consideration the concept of equitable distribution of resources in the context of euthanasia, the question of it being ethical or not can be looked into by considering the saved resources and time by euthanasia and its being used for the patients who can actually gain benefit from it.

5. FEASIBILITY OF EUTHANASIA

Euthanasia could be economically feasible if it satisfies the following equation:

$$px > n(1-p)\ h$$

where,

p = Probability of death in spite of providing medical care,

x = Cost of medical care,

h = Amount he will contribute to economy per year after getting cured,

n = prolonged years (number of years he will survive after getting medical care)

In case of Medical Insurance

$$px-I > n(1-p)\ h$$

[14] CHARLIE SPRAUGE, *supra* note 5.
[15] G. MOONEY & MCGUIRE, MEDICAL ETHICS AND ECONOMICS IN HEALTH CARE 23 (Oxford University Press 1986).

Where, I is the Insurance claim.

The above equation provides a possible way to assess the current argument of including economics within the domain of euthanasia. Euthanasia can be feasible under such circumstances where LHS > RHS. The equation is purely quantitative in nature hence does not recognize emotional and moral value related to the death of a person. As discussed above the choice to commit euthanasia mostly depends upon the chances of survival. Hence, the probability of death is the most significant factor which determines the choice of a patient. The equation considers only the contribution of the patient in the economy as a producer and not as a consumer. If we include the contribution as a consumer then even by being bed-ridden, he is being the consumer of the hospital services which will hamper the actual calculation as it will be contradictory to the cost of medical care.

6. ECONOMIC UTILITY PERSPECTIVE

There are several factors which determine the choice of a patient to opt for euthanasia, and these are:

(i) His chances of survival or how deadly is the disease.

(ii) The percentage of the medical cost that might be saved.

Often the certainty of these factors is questioned on ethical grounds but the proponents of Euthanasia largely concentrate on the second issue which in most cases is overlooked or has a little significance.

As far as the economic aspect is concerned, many scholars advocate the act of euthanasia to assuage the burden on the vulnerable groups like women, people with no medical insurance and elder people who find themselves as the dead weight to the society. Euthanasia can potentially save time in addition to medical costs and resources. The family in order to save the last breath of the concerned person spends much of their time looking after the patient. Prolonging life may sometimes turn out to be futile for some elderly terminally ill patients with the least chances of survival and also for their families to see their loved ones in a miserable state. A survey conducted in the Netherlands suggests that the major percentage of the cost of medical care

comes at the later stage of life.[16]If seen from a radical perspective, when a bedridden, terminally ill patient, with no chances of survival, occupies a bed in the hospital then it in some ways loss of certain resources that are used to keep him alive. When a patient reaches a stage where all the treatments prove to be futile, any treatment given afterward in order to drag the life span goes in vain. The doctors and hospital staff spend their time which will cost the other patients. The recent situation of COVID 19 which has affected even though a large number of people which is actually a very few percentages of the total population and yet medical resources are scarce. In a country like India, considering the current situation in mind one must realize how pathetic the medical facilities are when there are not enough hospital beds, PPE kits for the doctors even extreme shortage of hand sanitizers and face masks in the market. Instead of focusing on the methods to keep a terminally ill patient alive, one should rather emphasize on whether there is an actual need to keep him alive because that way, he is not living but merely in a state of being alive.

This concept can help in reaching the ethical point of view also that the resources should be given to the needy first. It is only ethical to not to keep giving away the limited resources and time to a person who has no chance of survival but to the people whose lives can be fairly saved.

Cost of care in an ICU

The main objective of ICU is to treat patients suffering from trauma or who are in utter need of surgery, not those with terminal illnesses. But in present days ICUs are fully occupied with people suffering from untreatable diseases[17].There is a bleak chance that these people get benefitted by providing a high concentration of medical techniques.[18]The patient in ICU requires three times the equipment and five times the staff than the normal patients[19]. All the resources utilized by an ICU patient, suffering from terminal illness go in vain. The expenditure and cost of care on patients with no scope of survival is much more than those who can actually survive. The proponents and the health experts usually favor the cost-saving mechanism at the end of life

[16] P. Singer & F. Lowy, *Rationing, patient preferences and cost of care at the end of life,* 152 ARCHIVES OF INTERNAL MEDICINE 477, 478-479 (1992).
[17] R. Bone, *Intensive care, survival and expense of treating critically ill cancer patients,* 269 JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION 779, 783 (1983).
[18] L.H Cohn, *The paradox of high-tee health care: has our technology outstripped our ability to be ethical, cost-effective and timely in its delivery,* 93 CHEST JOURNAL 863, 864-867 (1988).
[19] IVAN ILLICH, MEDICAL NEMESIS: THE EXPROPRIATION OF HEALTH 48 (Marion & Boyars Publication 1976).

which not only cuts futile spending but also saves resources for others.[20] An experiment conducted in the USA suggests that people who opt out life-sustaining treatments during the last week of life can save up to 50% of medical and other expenditures like routine therapies, dialysis in case of kidney failure[21]. It is desirable to consider all the costs related to a patient and not just the cost of medicines and surgeries.

Cost savings of futile care withdrawal

The blend of ethics and economics is beneficial, not only to the patient but to the family and society as well[22]. Cardiopulmonary resuscitation (CPR), an emergency procedure given to intact brain functioning often proves to be futile for those suffering from cancer and other incurable diseases. CPR often works against the interest of patients as it neither increases the life of patients nor improves the quality of care. Moreover, prolonging the vegetative state of the patient with such methods stands against the concept of personal autonomy.

Caplan offers a radical view to cut down the cost during the last week of life. The view is quite extreme as it offers to cut down on food and life saving measures which is purely unethical. Caplan's theory is often criticized as it neglects the moral duty towards the patient at the end of life.[23]

Cost of hospice care

Hospice care serves as a complementary method that can be used as an alternative to medicines and drugs. Hospice care involves a well-structured system for people suffering from life-threatening diseases[24]. The WHO defines it as an "an approach that improves the quality of life of patients and their families facing the problems associated with a life-threatening illness, through the prevention and relief of suffering utilizing early identification and impeccable

[20] J. C D'Oronzio, *Good Ethics, Good Health Economics*, N.Y. TIMES (Jun. 8, 1993), https ://www.nytimes.com /1993 /06/08/opinion/good-ethics-good-health-economics.html.
[21] P. SINGER, *supra* note 15.
[22] L. Emanuel et al., *Advanced directives for medical care - a case for their greater use*, 324 NEW ENGLAND JOURNAL OF MEDICINE 889, 889-895 (1991).
[23] H Caplan, *We can't afford to prolong so many hopeless lives*, 59 MEDICAL ECONOMICS 60, 62-66(1982).
[24] R. Kane et al., *Randomised control trial of hospice care*, 323(8382) THE LANCET, 890—894 (1984).

assessment and treatment of pain and other problems, physical, psychosocial, and spiritual."[25] It acts as a two-edged sword that ensures personal autonomy and reduces medical costs. These factors determine the significance of economics in the debate of euthanasia.

Socio-economic approach

Unlike developed nations, India does not have any uniform health care system. Data indicate that only 3-5 percent of people in India have a blanket of insurance to cover medical costs and expenditures. This small proportion consists only of the healthiest and the wealthiest. The inefficient health care system aggravates inequalities and socio-economic problems in India. In 2003, the government attempted to implement an effective medical and health care system by rolling out a universal health insurance scheme. However, it was ineffective as it failed to cover the poor class of people.[26]

To defend euthanasia there can be arguments from many perspectives. Majorly, sympathy towards the patient's painful condition, his or her right to die with dignity, the progression of the society, and economic requirements are the few arguments in support of euthanasia.

If a utilitarian point of view is considered if an action provides the maximum benefit of everybody it is morally acceptable. It can be said that in at least some cases euthanasia serves the best interest of everyone and hence euthanasia can be morally justified from a utilitarian point of view.[27] It is important to ascertain that who may be benefitted from the voluntary act of euthanasia. In the case of a voluntary act of euthanasia, the patient is getting a death which is easier than suffering and it is a death with dignity. Not just for the patient, it will be easier for the family and relatives also because they will not have to watch their loved ones suffer hopelessly anymore. More importantly, the doctors and hospital staff would be able to divert their attention towards the other patients. In addition to that, other patients would receive medical benefits like resources that were earlier used up for non-productive purposes and more attention from the hospital staff. These arguments somewhat succeed in convincing that euthanasia is not wrong per se.

[25] World Health Organization, *WHO Definition of Palliative Care*, WHO (May 12, 2020, 12:45 AM) http://www.who.int/cancer/palliative/definition/en.
[26] Arunangshu Ghoshal et al., *Economics of Palliative and End-of-Life Care in India: A Concept Paper*, 23 INDIAN JOURNAL OF PALLIATIVE CARE 456, 456-461 (2017).
[27] JAMES RACHELS, THE END OF LIFE, EUTHANASIA AND MORALITY 122-123 (Oxford University Press 1986).

It is not a question of ethics and economics. Without a wider use of economics in health care, we will go on spending large sums of money to save a life in one way, when similar lives but in greater number could be saved in another way. The price of inefficiency, inexplicitness and, irrationality in health care is paid by death and sickness. Is that ethical?

7. THE OTHER SIDE OF THE COIN: ECONOMIC DRAWBACKS

It is more likely that the vulnerable people considering the economic advantage of euthanasia might treat this as an option rather than last resort. The greatest victims are children and the women who depend on the Karta of the family, mostly males. Euthanasia jeopardizes the life of these vulnerable groups as the willful death of the male counterpart will have nothing for them to live off. In the long term scenario, it is unpropitious as it might hamper national income. The act of euthanasia shall be condemned where there is even a bleak chance of survival because he might contribute to the economy not as a contributor but as a consumer. In the health sector, patients resemble consumers.

Behavioral Economics puts another limitation on the choice of those people, opting for Euthanasia. Under certain circumstances, the emotions and psychology of the concerned person or relatives of the concerned person might outweigh the cost- benefit analysis. For instance, the patient or his relative may get carried away by their emotions due to the lack of knowledge of the future cost and expenses that would occur. Now the main consideration of the patient or his family might either be elimination of his suffering or saving his life, both depending on the psychology of the concerned people, differing from case- to- case basis. In both these cases, the decision will be independent of economic point of view, thus, going against the economic analysis.

The concept of euthanasia or assisted suicide is totally against the traditional Hippocratic oath taken by medical practitioners. According to these medical ethics the doctors' sole duty is to treat the patient and help them to cure by using all the expertise and skills that he or she possesses. Doctors are not supposed to use treatments that are not necessary for the betterment of the patients. The consent of the patients is very important here as the doctors are not supposed to use their expertise to treat in a frivolous manner. But this Hippocratic Oath could not turn out to be

of any significance in preventing doctors from using their skills for their agendas, be it for making some extra profit or satisfying their egos. Doctors, needless to mention that not all of them mostly use their exclusive knowledge to manipulate the patients and their naïve families into believing that certain overtreatment or extra tests are necessary which in reality are not. This has strained the trust relationship between the doctor and a patient and also has lowered the agency cost. This greed is somewhat an important factor in the conflict over assisted suicide but one opinion says that the legalization of assisted suicide will not resolve this issue.[28]

Another opinion regarding this could be in favor of legalizing euthanasia. The reason for this opinion is based on the ground that the doctors, as mentioned above, for their personal motives on several occasions over-treat the patients that cause the families of those patients a lot of extra money that goes in vain. Any family in such a case will not mind spending as much as required for the treatment if there is even a single ray of hope but when a terminally ill patient has no chance of recovery, the useless over treatment for making more money hamper the interests of the families. If it is decided and certain that there is nil chance of recovery of a patient, he or his family could use the option of euthanasia for saving the money from the overtreatment. The stumbling block here will be the authority or the credibility of both the aforementioned pieces of information, the certainty of irrecoverability and the questionability of the treatment, leaving the question open-ended.

The argument of a slippery slope is very common when euthanasia is debated. The primary base of this argument is that in case euthanasia is legalized it will cause a reduction in the value of human lives.[29] Not only that but the people who might not be able to afford the treatment, would compulsorily go for euthanasia which will jeopardize the voluntariness.[30] Abortion is an example that can be used against this argument as even abortions were legalized and it has been a successful practice with the help of professionals and dignified and effective services. [31] Even in India, abortion is legal with limitations to curb the misuse. There can be possible misuses of all the rights and liberties but that is no ground to deny any right or liberty. It is possible to monitor the necessity and number of euthanasia in clinics or hospitals. A control mechanism will be

[28] Nelson Lund, *Two Precipices, One Chasm: The Economics of Physician-Assisted Suicide and Euthanasia*, 24 HASTINGS CONST. L. Q. 903,1004-1005 (1997).
[29] J. CONWAY, EUTHANASIA. RIGHT OR WRONG (Aug., 1981) (Unpublished M.A dissertation, Nuffield Institute for Health).
[30] G.H. Fairburn, *Kuhse, singer and slippery slopes,* 14 JOURNAL OF MEDICAL ETHICS 120, 132-134 (1988).
[31] J. CONWAY, *supra* note 28.

required to regulate it. Without legalization, it cannot be completely ruled out that there can be immoral and substandard treatments.[32] If safeguards are properly implemented the argument of the slippery slope will not stand.[33]

Economic perspective calls to cut down the avoidable life-sustaining treatments that are not going to help in anyway but this is countered by ethical arguments despite euthanasia being for the patients' interest. But in reality, this conflict is not as complex as it seems, there is no contrasting conflict. The debate is due to different individual and societal points of view but this can be resolved by proper measures and regulations. It can be instituted in medical professionals from the very beginning that inclusion of societal as well as economic point of view is important. Economics and ethics can be made to work simultaneously in this debate as both are playing a major role in deciding for voluntary euthanasia.

8. CONCLUSION

The research was started keeping in mind a neutral approach. In the process of reaching the conclusion it was clear that economics does play a very crucial role in the debate of euthanasia to which, unfortunately, not much heed is paid. Economics adds to the reasons and justifications in support of voluntary euthanasia. Ethics and economics both need to be balanced to derive a more definitive answer to this long-lasting debate. On one hand where economics proved to be much in favor of euthanasia, a few drawbacks were also discovered on the other hand. What is noteworthy is that the positive aspects overshadow the negative aspects of legalizing euthanasia when we add economic factors. The only difference is that the negative aspects can be checked by proper rules and regulations. Every law comes with the lawbreakers and loopholes but that is no reason to not to bring the law altogether. The authors suggest that such implementation of economics can potentially restrict the sufferings of individual in addition to the conservation of time and resources. Even if a very small percentage of people opt for voluntary euthanasia, in order to limit pain and sufferings, it is incumbent upon the state to respect their autonomy. Therefore, the author believes that the blend of economics within the debate of Euthanasia would be advantageous for not only the people but for the state as well.

[32] J. CONWAY, *supra* note 30.
[33] JAMES RACHELS, *supra* note 26.

AVAILABILITY HEURISTICS AND INSIGHTS FOR CORRUPTION

Aniruddha Pratap

The most influencing insight which economic analysis of law provides is that human actors respond to incentives. This insight has two implications; first, law can be employed as an apparatus to bring in socially desirable behaviour as well as to discourage socially undesirable behaviour. In other words, law can be used as tool by policy makers to subsidize socially desirable behaviour and tax undesirable behaviour[1]. Secondly, law can be used from the perspective of efficiency and distributive concerns i.e. it can be used as a device to encourage or discourage the production of social resources as well as a tool for efficient allocation of such social resources. To exhibit in a coherent manner the repercussions of the incentives on people in a legal system the analysts borrowed from economics the 'rational choice theory' which focuses on assumptions relating to how human actors respond to incentives. These assumptions were then applied to the domain of law to understand how law as a tool can be used in incentivising and de-incentivising certain behaviour. Thus, these incentive effects of legal rules were studied and analyzed in designing an efficient legal policy to attain desired social behaviour. The underlying conception of the rational choice theory as pointed out by Richard Posner is that "man is a rational maximizer of his ends"[2] the adherents of 'utility maximization version' of rational choice theory take the above conception a bit further as according to them:

"Stripped of its mathematical adornments, the basic requirement of expected utility theory is that decision makers conduct an explicit or implicit cost-benefit analysis of competing options and select the optimal method of achieving their goals (that is, the method that maximizes expected benefits and minimizes expected costs, or maximizes net expected benefits), subject to external constraints."[3]

Thus, primary assumption of this theory is that an actor makes a decision by carrying out a cost-benefit analysis and making a choice which results in maximization of net expected

[1] Lehtinen et. al., *Unrealistic Assumptions in Rational Choice Theory*, 37(2) PHILOSOPHY OF THE SOCIAL SCIENCES, 1054 (2007). (hereinafter "LEHTINEN")
[2] R. A. Posner, *Are We One Self or Multiple Selves?: Implications for Law and Public Policy*, 3(1) LEGAL THEORY, 24 (1997).
[3] LEHTINEN, *supra* note 1, at 1063.

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benefits to him. Broadly we can enumerate the assumptions of expected utility version as: an actor is always maximising his utility by making choices which maximise his expected benefits; in doing so carries out cost-benefit analysis; he always has optimal information with him to take such decisions; he is always self-interested etc. The primary objection of the behavioural law economists to these traditional notions of expected utility theory is that even though human actors may intend to act rationally (i.e. maximise their expected utility) in actuality they are not utility maximizers due to limited cognitive capabilities[4]. The expected utility version assumes that human beings are infinitely rational and can processes unlimited information; these assumptions are far from reality. In the current discussion we will see that in reality the behaviour of the human actors is not as rational as it is hypothesised as. In real world due to limited cognitive capabilities and inadequacy of information human actors often rely on mental shortcuts to make decisions and these mental shortcuts are not based on any rational criteria rather available information, emotions, and other concerns. The seminal argument of the behavioural law economists[5] is that due to the reliance of human actors on these mental shortcuts rather than on actual statistical evidence the actual human behaviour is different from the hypothesized human behaviour. In the following discussion we will see how the actual human behaviour deviates from the hypothesized behaviour.

BOUNDED RATIONALITY

The idea was made known by Herbert Simon in his famous work[6] way back in 1955. As noted earlier the application of the idea to the field of economics is relatively new when compared with other social sciences. The idea simply points out the actuality that human cognitive capabilities are limited. As Jolls, Sunstein and Thaler have stressed: "We have limited computational skills and seriously flawed memories. People can respond sensibly to those failings; thus it might be said that people sometimes respond rationally to their own cognitive limitations, minimizing the sum of decision costs and error costs. To deal with limited memories we make lists. To deal with limited brain power and time we use mental shortcuts and rules of thumb. But even with these remedies, and in some cases because of

[4] LEHTINEN, *supra* note 1, at 115-138.
[5] R. B. Korobkin et. al., *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88(4) CAL L REV, 1051-1144 (2000).
[6] H. A. Simon, *A Behavioral Model of Rational Choice*, 69(1) THE QUARTERLY JOURNAL OF ECONOMICS, (1955).

these remedies, human behaviour differs in systematic ways from that predicted by the standard economic model of unbounded rationality. Even when the use of mental shortcuts is rational, it can produce predictable mistakes. The departures from the standard model can be divided into two categories: judgment and decision-making. Actual judgments show systematic departures from models of unbiased forecasts, and actual decisions often violate the axioms of expected utility theory."[7] Thus, due to limited or bounded cognitive abilities human actors rely on certain rules of thumb or mental shortcuts, and while the use of such rule of thumb may be rational in the context of economising on thinking time the forecasts which will emerge from such reliance will be different from the standard rational choice model. One way of saying it could be that it is presumed that under ideal situations i.e. assuming every human being to be rational we can expect utility-maximization from every such human being, but due to cost and processing limitations in obtaining information as well as the limited cognitive abilities utility-maximization is a physical impossibility. It is the unconscious use of heuristics in the processes of judgment and decision-making that leads to bounded rationality in decision-making. Daniel Kahneman and Amos Tversky[8] ratiocinate that the use of rules of thumb or heuristics leads us to misguided and fallacious conclusions. One of such heuristics is "availability heuristic". By use of "availability heuristic" individuals try to calculate the probability of an event by recalling other instances of that type in near memory, for example, the probability of a car accident will depend upon whether they have recently seen a car accident or not. Thus, rather than relying on the actual statistical evidence of a given phenomenon the actors rely on the evidence or occurrence of that phenomenon in their near memory. This is a clear deviation from the expected rational behaviour as a rational actor is supposed to rely on the actual statistical probability of an event before making a judgment about the probability of occurrence or non-occurrence of that event. Moreover these rational human beings are also required to update from time to time this statistical probability (base rate) to predict that particular event more accurately. Thus, what "availability heuristic" suggests is that an individual will rarely, due to his limited cognitive abilities, act as a rational human being as in calculating the probability of the occurrence or non-occurrence of an event he will rely on the information about that particular event in his near memory rather than on the actual statistical probability.

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[7] C. Jolls et. al., *A Behavioral Approach to Law and Economics*, 50(5) STAN L REV, 1477 (1998).

[8] A. Tversky et. al., *Judgment Under Uncertainty: Heuristics and Biases* in D. KAHNEMAN ET. AL. (eds.), JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Cambridge University Press 1982).

CORRUPTION

We will now explore what behavioural approach has to offer in context of corruption. Moving to the possible contribution of the issue at hand to the area of research i.e. corruption, I would like to refer that there has been sufficient literature which has concerned itself with appraising the possible deterrents of corruption such as strict laws or penalties.[9]Though this policy prescription (that strict laws or penalties deter corruption) has been disputed time and again but some recent research has suggested that stiffer laws and penalties result in less corruption, e.g. as Garoupa and Klerman[10] state: "A central conclusion of the literature is that corruption is usually socially undesirable, because it dilutes deterrence. As a consequence, it is usually optimal to expend resources to detect and penalize corruption." What these scholars have argued, which they acknowledge as the central conclusion of their literature, is that corruption is not socially desirable due to the fact that it dilutes the deterrent effect of the legal machinery as in a corrupt regime it is easier to bypass or undermine the laws. Thus, they suggest that it is usually more favourable to spend resources to detect and penalize corruption. Also Friehe in his paper concludes: "In our model, potential offenders tend to reduce the violation probability in response to an increase in the magnitude of the penalty."[11] Thus, he states that his model demonstrates when there is an increase in the magnitude of the penalty there are fewer violations by the potential offenders. This literature belongs to the traditional law and economics domain and suggests that in presence of stricter laws against corruption a rational agent would tend to be less corrupt. We will now explore how these prescriptions in the light of the behavioural specifications.

Consider a situation where corruption laws are strict but the procedural laws are inefficient and often result in acquittal of the corrupt agents when prosecuted. In such a situation where acquittal rate in corruption cases is high and conviction rate very low, it can very well be the

[9] T. Besley et. al., *Taxes and Bribery: The Role of Wage Incentives*, 103(416) ECONOMIC JOURNAL, (1993); D. Mookherjee et. al., *Corruptible Law Enforcers: How Should They Be Compensated?*, 105(428) ECONOMIC JOURNAL, (1995); D. Acemoglu et. al., *Property Rights, Corruption and the Allocation of Talent: A General Equilibrium Approach*, 108(450) ECONOMIC JOURNAL, (1998).
[10] N. Garoupa et. al., *Corruption and the Optimal Use of Non-Monetary Sanctions*, 24(2) INTL REV LAW & ECON, 220 (2004).
[11] T. Friehe, *Correlated Payoffs in the Inspection Game: Some Theory and an Application to Corruption*, 137(1) PUBLIC CHOICE, 142 (2008).

case that a rational agent (who turns out to be not that rational due to his limited cognitive capabilities) relies on a rule of thumb like say "availability heuristic" and finds out that in his near memory no one or a very less number of people were convicted on the charge of corruption. He may imply from this that his probability of being caught and getting convicted is very low which might give him the incentive to be corrupt. Thus, if the strict laws regime is not being complemented by a strict procedural regime (where those who are rightly being caught are getting convicted also) then the aforesaid predictions about the effects of strict laws regime will not be correct as due to the reliance of the wrong-doers on "availability heuristic" to judge the probability of being caught and getting convicted. What is being argued here is that the prescription of the economic analysis of law in regard to the corruption (i.e. strict penal laws will have the optimal deterrent effect) does not hold good when we assume that it is being supported by an inefficient procedural law regime which results in acquittal of the corrupt agents when prosecuted. In other words we can have a strict penal law regime against corruption which may help in detecting the corrupt agents but if we do not have a strict procedural law regime which ensures that those wrong doers are convicted also then we may have results which will vary from the prescriptions of the law and economics models considering the effect of "availability heuristic".

A question now can be raised that what kind of impact "availability heuristic" can have on the traditional law and economics policy prescriptions for deterring the corruption? We know that traditional rational choice model prophesizes that potential wrong-doers commit crime only if the benefits from the crime exceed the expected costs of committing crime.[12] Therefore if the policy makers intend to deter the crime they can raise these expected costs which can occur from committing the crime above the expected benefits from crime. About the costs expected costs of crime Cooter and Ulen have stated: "expected costs of crime are determined by multiplying the (monetized) severity of punishment by likelihood that the criminal will be arrested and convicted."[13] Thus, if the policy makers know that such wrong-doers are biased by "availability heuristics" then they can achieve a more efficient model of deterrence by attaining a mechanism to manipulate the bias of wrongdoers in such a way that they overestimate the likelihood of their being caught and convicted. Let us discuss the situation

[12] S. Shavell, *Criminal Law and the Optimal Use of Non-monetary Sanctions as a Deterrent*, 85(6) COLUM L REV, (1985).
[13] R. COOTER ET. AL., LAW AND ECONOMICS 447 (Addison, Wesley Longman 2000).

referred earlier where in a regime the conviction rate in corruption cases is very low while the acquittal rate is very high. In such a situation the wrong-doer will be biased by availability heuristics when he'll notice that his chances of getting convicted are very less and his expected costs of committing the crime i.e. say taking the bribe would be very less as compared to the benefits associated with committing the crime and therefore the wrong-does will be incentivised to commit the crime. Thus, such regimes are not only inefficient as they fail to achieve the optimal rate of conviction due to procedural law and other context specific constraints, but they incentivise the wrong doers to be corrupt. In such a situation we can think of two things, first, to correct the procedural and other context specific flaws or errors so as to reach an optimal level of conviction rate (such a possibility has been discussed at length earlier). Secondly, the policy makers can think of certain mechanisms by which they can manipulate the "availability heuristic" in their favour and dis-incentivise the wrong-doers form being corrupt. One of such mechanism can be relevant to the situation where due to myriad constraints in policy reform the first step mentioned above cannot be taken and in this situation the wrong-doers have incentive to be corrupt, then in such a case the policy makers can resort to a strategy where they can go for "highly publicizing" those few cases in which the wrong-doers were actually convicted. The policy makers can cleverly design a proper campaign to spotlight and propagandize the few corruption cases, which resulted in conviction of the offender, in a way such that the potential offenders over-estimate the probability of their being caught and getting convicted. The propaganda can be configured in a manner such that it conveys a picture of a tougher stance of the government organs towards corruption which is in sharp contrast to its earlier attitude. Such mechanisms can help the policy makers to divert the earlier "availability heuristic" bias in their favour to dis-incentivise the corrupt behaviour. One possible example of such a design could be putting posters, which contain newspaper cuttings of headlines along with photographs showing corrupt officials who were convicted for corruption, in public offices, bus stops, railway stations, banks, places of public resort etc. The idea should be to make these so visible that they don't escape the attention of the citizens, with the probable effect of manipulating the "availability heuristics" of the human actors to achieve desirable behaviour.

INDIAN SITUATION

We talked about regimes where conviction rates in corruption cases are low. There is a belief (shared formerly by the author as well) that conviction rate in corruption cases in India is extremely low. But when the data (provided by National Crime Records Bureau[14]) on the aforesaid rate was assayed something really interesting surfaced.

Table 1

State	**Years**	**Persons in whose case trial completed**	**Persons convicted**	**Conviction rate**
Andhra Pradesh	2001-2012	2170	1140	53.5%
Assam	2002-2012	34	26	76.47%
Bihar	2001-2012	102	74	72.54%
Chhattisgarh	2002-2012	394	170	43.14%
Gujarat	2002-2012	2847	891	31.2%
Haryana	2001-2012	2895	658	22.7%
Himachal Pradesh	2001-2012	1153	185	16.04%
Jammu and Kashmir	2001-2012	798	79	9.89%
Jharkhand	2002-2012	14	12	85.7%
Karnataka	2001-2012	2499	505	20.2%
Kerala	2001-2012	1142	569	49.82%
Madhya Pradesh	2001-2012	2008	868	43.2%
Maharashtra	2001-2012	6439	1594	24.75%
Odisha	2001-2012	1823	595	32.63%
Punjab	2001-2012	3540	1242	35.08%

[14] NCRB, www.ncrb.in (last visited May 4, 2020).

Rajasthan	2001-2012	3620	944	26.07%
Sikkim	2001-2012	65	39	60%
Tamil Nadu	2001-2012	1172	428	36.51%
Uttar Pradesh	2001-2012	182	27	14.8%
Uttarakhand	2001-2012	19	7	36.84%
West Bengal	2001-2012	29	1	3.57%
Delhi	2001-2012	1006	519	51.59%
Puducherry	2001-2012	34	10	29.41%
Chandigarh	2001-2012	71	28	39.43%
Total		34056	10591	31.09%

Usually the figures used to manifest the conviction rate in corruption cases in India are those related to cases handled by CBI which are very low when compared with the data for States, for instance if we calculate the conviction rate based on the figures presented in Lok Sabha[15] for years 2012, 2013 and 2014 the conviction rate would be around 1.7%. General understanding is that conviction rate in corruption cases is extremely low which may not be entirely true when compared with the conviction rate of other crimes in India. In fact it is more than or close to 50% in seven states (Table 1) which is not a low figure in Indian context. Also, if National Average is calculated from above figures it comes around 31.09% (Table 1) which is not ridiculously low as in case of CBI. In other words if I am told that out of every 3 persons nearly one person is getting convicted in corruption case then it may not sound as such a low figure. One can counter argue that the number of persons getting convicted is low when compared with the number of persons getting arrested. But these figures should not be confused with the disposal rate of corruption cases which is low not just for corruption cases but for other crimes as well. If we go by the media reporting of the conviction rate in corruption cases we come across top stories like these: 'CBI conviction rate stands at a lowly 4%, reveals study'[16]; '0%: Mumbai's Anti-Corruption Bureau's conviction

[15] LOK SABHA QUESTION RESULT, http://164.100.47.192/Loksabha/Questions/QResult15.aspx?qref=14133&lsno=16 (last visited May 4, 2020).
[16] S. K. Baruah, *CBI conviction rate stands at a lowly 4%, reveals study*, HINDUSTAN TIMES (Nov. 3, 2012), http://www.hindustantimes.com/delhi-news/cbi-conviction-rate-stands-at-a-lowly-4-reveals-study/story-wfZ2GgFUuGIeH4M9SAwIjM.html

rate in 2016'[17]; 'Convictions in corruption cases probed by CBI has declined since 2014: Government'[18]. But recently there was a top story which said: 'In 70% of the cases, CBI secures conviction of the tainted officials'[19]. Most of the media reporting of conviction rate in corruption cases is concerned with cases taken up by the CBI. This overlooks the plethora of cases handled by the Anti-Corruption Bureaus of the repective states. This hints at the possibility of a gap in conviction rate in the consciousness of the society and the actual statistical evidence. This becomes important with regard to the discussion on behavioural dimension of corruption which argues the possible repurcussions of a gap between perception and actual statistical evidence in relation to conviction in corruption cases.

The traditional law and economics approach focuses on the role of either ther size of the sanction or the probability of detection when it talks about deterrence of crime in society. The Behavioural law and economics scholarship has rather argued that more than the size of the sanction or the probability of detection what really matters for deterrence is the 'belief' regarding the size of the sanction or the probability of the sanction. Our beliefs regarding the aforesaid are not shaped by resorting to a reading of the penal statute or actual statistical data with respect to the same. Empirical studies done by Robinson and Darley have shown that human actors have very little or inadequate information vis-à-vis the probability of detection or size of the sanction and what really shapes the beliefs with respect to the aforesaid are the news stories which they read or anecdotes in their near memory.[20] What we are faced with in the current situation is the fact that even though the conviction rate in corruption cases in India is not that low it is projected to be so in the media reports due to aforementioned reasons. This creates a situation where such low projection may have some effect on shaping the beliefs of individuals with respect to such conviction rate and consequently upon decision-making by corrupt actors. One policy prescrption suggested by Behavioural Law scholarship is that "to be effective, enforcement activity ought to be salient and vivid such

[17] J. P. Naidu, *0%: Mumbai's Anti-Corruption Bureau's conviction rate in 2016*, HINDUSTAN TIMES (May 23, 2016) http://www.hindustantimes.com/mumbai/0-mumbai-anti-corruption-bureau-s-conviction-rate-in-2016/story-fAVLotaMRQwCvD81cK3I6J.html.

[18] *Conviction rate in corruption cases probed by CBI has declined since 2014: Government*, DAILY NEWS AND ANALYSIS (Mar. 9, 2016) http://www.dnaindia.com/india/report-convictions-in-corruption-cases-probed-by-cbi-has-declined-since-2014-government-2187326.

[19] H. Dhawan, *In 70% of the cases, CBI secures conviction of the tainted officials*, TIMES OF INDIA, (Sep. 18, 2016) http://timesofindia.indiatimes.com/india/In-70-of-cases-CBI-secures-conviction-of-tainted-officials/articleshow/54385604.cms.

[20] P. H. Robinson & J Darley, *Does Criminal Law Deter? A Behavioral Science Investigation*, 24(2) OJLS, 173-205 (2004).

that it will be registered in the minds of potential criminals".[21] Thus, one of the tasks which can be undertaken by the policy makers can be to bridge this gap between the media projected conviction rate and the actual rate so that it leaves little room for the interplay of availability heuristics in a manner such that corrupt actors do not underestimate the costs associated with the corrupt activity. Also, whenever the enforcement activity achieves success with respect to conviction of corrupt agents then the same needs to be made more salient and vivid so that it is registered in the minds of the potential corrupt actors. This can be achieved by highlighting the cases of conviction in corruption matters by giving them more prominence and space in news reports so that availability heuristics influences not only potential offenders but also the public opinion.

CONCLUSION

The insights provided by the behavioural law and economics scholarship and the data on conviction rate in corruption cases in India provides a unique opportunity for the policy makers to direct their endeavours in making use of the aforesaid in their research and experimental spheres. We have seen that due to limited or bounded cognitive abilities human actors rely on certain rules of thumb or mental shortcuts, and while the use of such rule of thumb may be rational in the context of economising on thinking time the forecasts which will emerge from such reliance will be different from the standard rational choice model. The studies in behavioural law and economics literature have shown how the hypothesized behaviour modeled by rationality assumption is different from actual behaviour of the human actors. We have seen how this insight is significant for the decision making by corrupt actors and also that it pushes back the narrative of 'strict laws for more deterrence' in regimes where procedural laws are inefficient.

[21] A. Harel, *Behavioral Analysis of Criminal Law: A Survey* in E. ZAMIR & D. TEICHMAN (*eds.*) OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW (Oxford University Press 2014).

EXCESSIVE DRUG PRICING IN INDIAN PHARMACEUTICAL MARKET: EXPLOITATIVE PRACTICE OR AGGRESSIVE COMPETITION CONDUCT?

Prerna Raturi

INTRODUCTION

Exploitative excessive pricing is one subject matter relating to Competition law that still remains a slippery slope. Application of excessive prices by a dominant firm is undeniably one of the most conspicuous form of abuse and thus, on the face of it, calls for regulation. However, different jurisdictions and their competition-regulating institutions are divided on this. A disagreement can be seen in their antitrust systems through their approaches and policies towards the same. Where on one hand certain jurisdictions believe that competition enforcement is not a suitable treatment for excessive pricing, others reckon excessive pricing to be well within the realm of competition law.[1] One of the most discussed and well-known examples is of American and European competition law regimes. EU competition law and judicial precedents state that excessive pricing by a dominant firm is unlawful. However, American antitrust law does not forbid the same as a form of abuse. Article 102 (a) of TFEU prohibits such conduct by a dominant company which *"directly or indirectly imposes unfair purchase or selling prices or other unfair trading conditions"*. This provision not only encompasses the imposition of extremely low prices, also called predatory pricing, but also proscribes the infliction of extremely high prices by the dominant firms. Whereas, Section 2 of the Sherman Act considers only acquiring and maintaining a monopoly by engaging in an abusive conduct a felony. That is why charging of monopoly prices in the US is not only legally permitted but also considered as an essential element of the free market system.[2]

Competition law in India is widely based on the regulatory template of the EU Competition law and borrows various provisions from it. Consequently, section 4 of the Indian Competition Act, 2002, prohibits abuse of dominant position by an enterprise or group. It defines the term "dominance" and lays down the conditions under which the unilateral behavior of a dominant

[1] F. Abbott, *Excessive Pharmaceutical Prices and Competition Law: Doctrinal Development to Protect Public Health*, 6(3) IRVINE L. REV. 281, 290 (2016).
[2] Verizon Communications Inc. Law Offices of Curtis v. Trinko, 540 US 398 (2004).

entity is abusive in the relevant market. An abuse of dominant position transpires when an entity impairs the competition and drives out the competitors, by virtue of its position in the relevant market. Section 4(2)(a)(ii) prohibits such conduct by a dominant company which *"directly or indirectly imposes unfair or discriminatory price in purchase or sale (including predatory price) of goods or services"*. Alike Article 102 of TFEU, abuse of dominance under Section 4 includes both predatory and excessive pricing. Competition Commission of India (CCI) plays a chief role in establishing the legal framework regulating the competition in Indian markets and thus, is also responsible for preventing the excessive pricing that impedes the entry to a particular market or distorts the competition in it. Despite this, CCI has dealt with only few cases involving excessive pricing as one of the allegations.[3] All the more so, there has not really been a specific case dealing individually with excessive pricing and that is why one cannot even find a judicial precedent guiding the firms while formulating their pricing policies.

The reason for contradicting approaches, when dealing with excessive pricing, is the conflicting beliefs of the policy makers and economists regarding the merit of competition law to be a suitable instrument for regulating the vice of excessive pricing. Interventionists are of the view that one of the objectives of the competition law is to ensure consumer welfare by limiting the exploitative behavior. Evidently enough, such an objective cannot be achieved by disallowing the addressal of excessive pricing cases under the legal standards of competition law. The earliest and a landmark case on the matter is of ***United Brands***.[4] This case made clear that excessive pricing must be determined in relation to the economic value of a product which must be determined by doing a cost-price analysis, i.e. whether the price of the product is excessively higher than the costs incurred in its production. If the price imposed turns out to be excessive then it must be found out if it is either unfair in itself or when compared with the price of similar or substitutable products. The European Court of Justice, through this case, paved a way for competition authorities to intervene in the matters of alleged excessive pricing but itself did not accept the Commission's claim that United Brands imposed excessive pricing for Chiquita Bananas in Germany, Denmark and Benelux in comparison to the prices of the bananas in Ireland. The Court judged the claim to

[3] Shri Shamsher Kataria v. Honda Siel, 2014 Comp LR 1 (CCI).
[4] United Brands Company and United Brands Continental BV v. EC Commission, (27/76) [1978] ECR 207.

be flawed on the ground of being based on a comparison of the price in other countries with that of Ireland, without even conducting an assessment of United Brands' margin of profits and cost structure in Ireland.

The Court observed that a firm is well within its rights to employ variable price for its product across countries in order to recover the costs and expenditure incurred by it, depending upon the competitive conditions in different geographical market. However, the case unfortunately left the question of how exactly to establish an excessive pricing abuse, unanswered. It was not until the case of ***Latvian Copyright Society,***[5] that this query was resolved. A pertinent query, inter alia, was raised regarding the validity of comparing the alleged high price with the prices in neighbouring as well as other Member states of EU for determining an abuse of dominant position. It was observed that there cannot be a straitjacket method to be made applicable in all the excessive pricing cases. Where in some cases cost-price analysis is the way to go, though only after assessing the cost structure of the firm in totality, others may require a comparative analysis with other countries, which also requires consideration of various factors such as fluctuation in demands, consumption habits, transportation charges, variance in the quality of the product and other economically driven factors.

Contrarily, another set of enforcers deems that there can never be an established method to find out if a price is actually excessive, for the reason that a price which is excessive in a particular region may not be so in another country, depending on the price-sensitivity of the customers of a geographical market. As a result, a dominant firm must not be punished for an offence which is found upon the touchstone of undefined and uncertain parameters. US antitrust law propounds that a firm that has attained and maintained monopoly through legal measures and practices should not be restrained from employing a price that it finds appropriate for Sherman Act is not a price-regulating statute.[6] Furthermore, these enforcers also advocate that rectifying alleged unfair pricing is against the underlying objective of enforcing an antitrust system in the first place i.e. enabling a robust yet competitive environment that can aid in optimization of allocative and productive efficiencies of the enterprises operating in the market. Unless these firms are allowed to adopt a

[5] Latvijas Autoru Apvienība v. Konkurences Padome, (177/16), ECLI:EU:C:2017:286.
[6] National Reporting Co. v. Alderson Reporting Co., 763 F.2d 1020, 1023-24 (8th Cir. 1985); U.S. v. Aluminum Co. of America, 148 F.2d 416, 430 (2d Cir. 1945).

business strategy or pricing scheme, they consider apposite, they cannot offer enhanced goods and provision of services to the consumers. Therefore, in order to encourage innovation and better research and development, incentivization is mandatory.

It is due to the presence of such conflicting theories and narratives that enforcement of competition law in cases involving excessive pricing are minimal, even in the jurisdictions where the statutes overtly proscribe the practice.

Excessive Drug Pricing Permeating Through the Pharma Sector

It was not until recently that the pharmaceutical markets across the globe saw a sequence of excessive pricing of various drugs. It is not to mention how crucial medicines are, from common and normal illnesses to life-threatening ailments. That is why even International law recognizes ***"access to essential medicines"*** as a part of right to the highest attainable standard of health i.e. the right to health.[7] Moreover, in 2015, members of the United Nations adopted 17 Sustainable Development Goals (SDGs), out of which one pertains to ensuring healthy lives and promoting well-being for all at all ages.[8] In order to achieve this goal by 2030, it is necessary that affordable medicines are made accessible to people but one would be hard pressed to advocate that this goal can be fulfilled amidst a recent spate of excessive drug pricing instances. However, drug manufacturers do not appreciate any sort of interference with their business schemes to price their medicines, as they deem fit, citing the costs they had to bear in the production of the medicines. An investment in the research and development (R&D) of the novel and innovative medicines is a financial burden on their pockets especially when they enter the market only after umpteen failed attempts to be effective. Maybe this is the reason that despite a substantial increase in such cases, it never garnered the attention it deserved. However, finally after years of taciturnity the longstanding discourse on excessive pricing of drugs has resumed.

[7] World Health Organization, *Declaration of Alma-Ata. In: International Conference on Primary Health Care* (Sept. 12, 1978), www.who.int/publications/almaata_declaration_en.pdf.
[8] U.N. Secretary-General, *High-Level Event on the Millennium Development Goals 25 September 2008: Committing to Action: Achieving the Millennium Development Goats: Background Note by the Secretary-General* (July 25, 2008), http://www.un.org/milleniumgoals/2008highlevel/pdf/commiting.pdf.

The most effective and dynamic enforcement jurisprudence regarding excessive drug pricing can be seen in the UK. One of the earliest cases is the ***Napp case*** where the Office of Fair Trading (OFT) alleged that Napp is pricing its off-patent painkiller morphine excessively high, especially for its sale to the public at large.[9] The OFT found the abuse of excessive pricing after conducting a two-stage test. It conducted a comparison of both, the price of morphine and the profit on its sales with the price charged and profit earned on the sales of morphine by Napp and other competitors in different markets.[10] It was learnt that the prices charged by Napp, for the sales of morphine to the public, were not only 10 times higher than the prices it imposed for the export of morphine and its sales to the hospital,[11] but also approximately 33% to 67% higher than what were being charged by its competitors.[12] Accordingly, a fine of £3.2 million (later reduced to £2.2 million by the Competition Appellate Tribunal (CAT),[13] was imposed on Napp.[14] Another vital decision on the matter came from the Italian Competition Authority (AGCM) in the famous ***Aspen Case*** in 2016.[15] Aspen had bought the trademark and marketing rights of four off-patent drugs, known as Cosmos, used for the treatment of leukemia specifically in children and old people. Cosmos drugs were reimbursed by the Italian health service and their prices were subject to negotiations with the Italian Regulator, AIFA. In 2013 Aspen mentioned its desire to AIFA to categorize the drugs as non-reimbursable so that their prices could be increased or else Aspen would withdraw the drugs from the market. Knowing the life-saving characteristic of the drugs and the absence of substitutable drugs, AIFA had to agree. When AGCM looked into the rationality of the price hike, it adopted the test established in the United Brands' case. It was assessed that Aspen was already having enough profits from the sales of Cosmos drugs but after an increase of around 1500% in the prices,[16] the profits earned ranged from 100–150% to 350–400%.[17] The prices were also determined to be unfair as neither did any non-cost factors invited an increment

[9] Napp Pharmaceuticals Holdings Ltd. v. The Director General of Fair Trading, CAT [2002] EWCA Civ 796, par. 142.
[10] *Id.,* at 203.
[11] *Id.,* at 207.
[12] *Id.,* at 215.
[13] *Id.,* at 538.
[14] *Id.,* at 264.
[15] Italian Competition Authority (AutoritA Garante del Mercato e della Concorrenza), Case A480—Price Increase of Aspen's Drugs (Incremento Prezzo Farmaci Aspen) [2016].
[16] *Id.,* at 3.
[17] *Id.,* at 184.

in the prices nor was there a qualitative improvement to the drugs. As a result, a fine of €5.2 million was imposed on Aspen for abusing its dominant position.[18] This case created a domino effect, inducing other European nations and finally, the European Commission to initiate a formal investigation against Aspen's unjustified excessive pricing of various pharmaceutical products in the entire European economic area, making it European Commission's first ever investigation into excessive pricing practices in the pharmaceutical industry.[19]

Furthermore, in 2013, the Competition and Markets Authority (CMA) of the UK (erstwhile OFT), initiated three different investigations into the excessive drug pricing cases, involving some of the biggest pharma giants.[20] Out of these three investigations, one that has already been decided upon is well known as ***Pfizer/ Flynn Pharma Case***.[21] The case dealt with phenytoin sodium capsules; a drug used for the treatment of epilepsy, originally manufactured by Pfizer in 1908 and sold under the brand name of Epatunin. The controversy regarding it arose when in 2012 Pfizer entered into an agreement to transfer the drug's marketing authorization in UK i.e. the right to sell the drug, to Flynn. As a result, Pfizer continued to manufactures the drug but Flynn became its leading distributor in UK. However, the fundamental objective behind the agreement was to first debrand the drug from Epatunin to a generic drug and then rebrand it again, once Flynn becomes the distributor. Consequently, the drug was not regulated under the National Health Service's (NHS) Pharmaceutical Price Regulation Scheme anymore, giving an opportunity to increase the price of the capsules. This sudden and substantial increase in the price caused NHS to annually expend from £2 million to approximately £50 million in 2013, £42 million in 2014 and £37 million in 2015 on the drug.[22] The CMA employed the test devised in United Brands by evaluating the costs incurred in synthesizing the drug and determining the reasonable rate of return or profit margin. Driven by the AGCM's approach in the famous ***Aspen Case***, the CMA decided a return of 6% on

[18] *Id.,* at 189.
[19] Elisabetta M. Lanza and Paola R. Sfasciotti, *Excessive Price Abuses: The Italian Aspen Case*, 9 J. EUR. COMP. L. & PRAC 382, 390 (2017).
[20] Competition and Markets Authority, *Drug Company Accused of Abusing its Position to Overcharge the NHS*, GOV.UK (Nov. 21, 2017), www.gov.uk/government/news/drug-company-accused-of-abusing-its-position-to-overcharge-the-nhs.
[21] UK Consumer and Market Authority (CMA), Case CE/9742-13, Pfizer/Flynn Pharma [2016], at 1.3-1.5. (hereinafter "UK CONSUMER CASE")
[22] *Id.,* at 5.398.

the sales of the drug to be reasonable. It was found out that Pfizer was charging a price which was 29% to 700% higher than the costs incurred and the price imposed by Flynn exceeded the costs by 31% to 133% which were way above than the agreed reasonable profit margin.[23]

After observing that the prices by Flynn and Pfizer were marred with the abuse of excessive pricing, the CMA went to decide if the prices were also unfair. It is usually argued that high prices of the medicines can be attributed to the recovery of the expenditure incurred in the development of the drug and its frequent failure to be effective before it can enter the market. But in the present case, since the drug was off patent at the time of investigation, drug manufacturers have had enough time to recover their R&D costs.[24] Therefore, in such a situation, when the patent exclusivity of the drug has expired, without any further innovation and additional development in the drug, Pfizer and Flynn are not justified in imposing extensively high and unfair prices. Subsequently, the CMA levied a fine of £84.2 on Pfizer and a fine of £5.2 on Flynn. However, on an appeal, the CAT annulled this decision stating that the CMA has adopted wrong methods to reach its finding.[25] The CAT opined that there cannot be a single method or approach to conclude that a price is excessive and thus, downright disregarded the decision of considering the price of Epatunin excessive as the CMA did not even determine a benchmark price to compare it with.[26] Furthermore, the CAT believed that the unfairness of the price was also found without sufficient comparison, especially with the prices both imposed in other countries and of other similar and comparable products.[27] Even though, the CAT explicitly stated the uncertainty and difficulty in placing an excessive drug pricing case under the competition law realm, it also made clear that it is untrue that no abuse can be found in this case, but only with correct approach, satisfying comparisons and substantial evidences. But a question that is worth asking is that how can unjustified and unfair pricing of the medicines not be condemned? What is the use of innovating and developing effective pharmaceutical drugs when they cannot even be accessed by the people in need, often to survive? While incentivizing the drug manufacturers and insulating them from antitrust scrutiny, who will ensure that the consumers interests are also protected? If despite being

[23] *Id.,* at 4.224.
[24] *Id.,* at 1.16, 3.23 and 5.268.
[25] Flynn Pharma Ltd and Flynn Pharma (Holdings) Ltd v. Competition and Markets Authority, [2018] CAT 11.
[26] *Id.,* at 310.
[27] *Id.,* at 379.

delimited with the difficulty of establishing when pricing is truly excessive, European competition regulators are willing to recalibrate their standards and resolve the issue of excessive drug pricing, why cannot other jurisdictions be impelled to do the same?

In context of Indian pharmaceutical space, there is an absence of enforcement actions by the CCI against excessive pricing of drugs. There is not even a single case in which CCI has found the contravention of Section 4(2)(a)(ii) in respect of the pharmaceutical sector, despite several allegations alluding the same. One of the most known cases is of the ***Roche case***.[28] Drug makers Biocon and Mylan Pharmaceuticals complained to the CCI that the conduct of Hoffmann-La Roche AG and its group entities Genentech and Roche Products (India) Pvt Ltd. has violated various provisions of the Competition Act, 2002 amongst which one involved flouting of Section 4(2)(a)(ii). It was alleged that Roche's breast cancer treating drugs, based on Trastuzumab, were excessively priced when compared to the price of their biosimilars.[29] Even though the Commission found the conduct of Roche and its subsidiaries to be abusive, it was not convinced that they were indulged in unfair pricing since *"Roche Group being the innovator, it might have invested huge sums on research and development of Trastuzumab. Thus, initial high prices can be attributable to being the reward for innovation."*[30] It is pertinent to note that Roche registered its patent for the its drug Trastuzumab, sold under the brand name Herceptin on 5th April, 2007 but later, in 2013, abandoned it because of which the patent lapsed.[31] Later, Roche withdrew Herceptin from the Indian market and introduced a lower cost version of Trastuzumab (biosimilars), known as Biceltis and Herclon.[32] This clearly came as an anticipatory and calculative strike by Roche to avoid Indian Government's spree of issuing compulsory licensing for various blockbuster cancer-treating drugs for their extravagant prices were making them inaccessible to Indian population.[33] Furthermore, it was due to the absence of any biosimilars of Trastuzumab in Indian pharma-market that such an

[28] Biocon Limited and Mylan Pharmaceutical Private Ltd. v. F. Hoffmann-La Roche AG & Others, Case No. 68 of 2016, available at http://www.cci.gov.in/sites/default/files/68%20of%202016_0.pdf.
[29] *Id.*, at 37.
[30] *Id.*, at 80.
[31] *Id.*, at 7.
[32] *Id.*, at 8.
[33] *Roche abandons Herceptin patent in India*, GABI Online (Oct. 30, 2013), http://www.gabionline.net/Biosimilars/News/Roche-abandons-Herceptin-patent-in-India.

issuance was delayed in respect of Herceptin.[34] Thus, it was a lucrative opportunity for the Roche group to make their biosimilars enter the market. The main reason that biosimilars enter a market is to commence the inter-brand competition in otherwise monopolist market.[35] Thus, when Roche had abandoned its patent and introduced its biosimilars, there exists no reason to earn an award for innovation by charging excessive prices because neither did the biosimilars had any further innovation or additional development in them nor were they protected by virtue of a patent exclusivity. However, the Commission failed to notice this development. It instantly rejected the allegation of excessive pricing without even delving into the issue or making suitable comparisons, merely on the worn-out and trite claim of R&D and innovation costs.

Thus, the nebulous position of excessive pricing in Indian competition law brings to the light a significant query that whether it is time to develop enforcement jurisprudence on excessive drug pricing as an abuse under Competition law and regulate high prices for procurement of affordable medicines.

Viability of Proscribing Excessive Drug Pricing Through Competition Enforcement

There exist several contentions that argue that excessive drug pricing must not be rendered as an antitrust violation as it is not only overreaching for Competition regulators to intervene in such cases but also difficult to attain desired results i.e. lower drug prices. In this section, the author has tried to debunk all such frequently raised arguments.

1. Diminishing R&D Investment and Chilling Innovation: One of the fundamental reasons that non-interventionist induce Competition regulators to abstain from intervening and employing competition law to prevent the excessive pricing of drugs is that they believe and argue that it would not only limit a firm's freedom to decide the prices for their drugs but would also shrink the innovation and investment for the development of enhances and better drugs. Indeed, the costs of the drugs are set in a manner that maximum profits can be earned from their sales to recuperate the expenditure incurred by the drug makers. Thus, excessive pricing of the drugs must be

[34] *India issues more compulsory licenses*, GABI Online (Jan. 24, 2013), http://www.gabionline.net/Policies-Legislation/India-issues-more-compulsory-licences.
[35] J. Reid and M. Balasegaram, *Research & development in the dark: what does it take to make one medicine? And what could it take?*, 22 CLINICAL MICROBIOLOGY & INFECTION 655, 657 (2016).

attributed to the risk involved in spurring innovation and considered as an incentive to the drug makers.[36] However, such a belief does not hold water, especially in the case of an off-patent drug. When a drug becomes off-patent, the patent exclusivity attached with it expires. In such a case, the original drug manufacturer cannot use the defence of "chilling innovation and earning the reward for R&D investment" for he has had sufficient time and opportunity, while the patent had not lapsed, to recover the costs incurred in the drug's production. The drug is off-patent, so there exists no distress of disincentivizing. Further, one cannot even derive any pro-competitive benefits from such an increment in the price. The only justification that can be forwarded is that since the firm is a dominant entity in the market, it had the privilege to set a price it thought suitable and profiting and thus, it did. Apart from that, any defense of "incentives for innovation" is not an issue in those cases where it is raised by a manufacturer who is not the innovator of the drug.

It is pertinent to note that Section 3 of the Competition Act, 2002 prohibits the concerted agreements that cause or are likely to cause an appreciable adverse effect on competition. Despite being a provision of general application i.e. applicable to all sectors and all economic activities, an exception has been extended to Section 3. Section 3(5)(i) of the Act allows an IP holder to impose reasonable conditions, that are necessary for protecting any IP rights conferred on him. The said IP rights also includes the rights conferred to a patent holder under Patents Act, 1970. But this exception is with respect to the provision of anti-competitive agreements. Such an exemption was not extended to the cases of abuse of dominance until recently. On 12th February, 2020 the Ministry of Corporate Affairs introduced the ***Competition (Amendment) Bill, 2020***.[37] One of the provisions of the bill and the one which is relevant in the present case is that the same defence is now extended even in the cases of abuse of dominance. This suggests that while establishing a case of abuse of dominance, the rights of a patent holder (the dominant firm) will be duly recognized. Only those unilaterally adopted practices will be penalized by the Commission

[36] Akman, P. and L. Garrod, *When are Excessive Prices Unfair?*, 7(2) J. COMP L & ECON 403, 420 (2011).

[37] Competition Commission of India, *Competition (Amendment) Bill, 2020*, available at http://feedapp.mca.gov.in/pdf/Draft-Competition-Amendment-Bill-2020.pdf. (hereinafter "2020 COMPETITION BILL")

that impose unreasonable conditions in exercise of IP-protected rights and impair the otherwise undistorted competition.

2. Ephemeral Nature of Excessive Pricing and Self-Correction of Market:

One argument for not intruding in a firm's pricing behavior and strategies is that usually any excessive pricing is temporary in nature because in the presence of vigorous competition, a market self-corrects itself.[38] The more competitive the market, the lesser the chances of distorting the competition by employing the excessive pricing because the customers will shift to the other competitors.[39] If customers shift, the firm will itself alter or change its practice or scheme of excessive pricing as it will lose customers.[40] That is why it is temporal in nature in a competitive market. Reflecting this, it would mean that the presence of substitutes is necessary for customers to shift to other drugs or brands. Consequently, it is a factor which would help to determine whether the case is of excessive pricing. However, this whole argument is based on the assumption that substitutable products, in this case drugs, are always present in the market, which is not the case always. If the substitutes are unavailable or absent in the market, the firm imposing excessive pricing would not lose customers. The higher the degree of market power, the less likely it is that the market will self-correct within a relevant timeframe.[41] Furthermore, the delineation of relevant market narrows down in the absence of substitutes, establishing the excessive price imposing firm as a dominant entity in the market. Broader relevant market definition means lesser likelihood of dominance in the market. It is pertinent to not that excessive pricing is considered as an antitrust violation only when employed by dominant firms, firms otherwise are allowed to mark their products as they wish. This means that the market power of the firm is such that its pricing scheme is capable of not only affecting the competition in the relevant market but the interests of the

[38] D. Evans and J. Padilla, *Excessive Prices: Using Economics to Define Administrable Legal Rules*, 1(1) J COMP. L & ECON 97, 102 (2005).
[39] Hou Liyang, *Excessive Prices within EU Competition Law*, 7(1) EUR. COMP. J. 47, 69 (2011).
[40] A. Sarpatwari, J. Avorn and A.S. Kesselheim, *State Initiatives to Control Medication Costs — Can Transparency Legislation Help?*, 4 N. ENG. J. MED. 2301, 2304 (2016).
[41] Organization for Economic Cooperation and Development, *Directorate for Financial and Enterprise Affairs Competition Committee's Comment on Excessive Prices*, DAF/COMP(2011)18 (Feb. 7, 2011), https://www.oecd.org/competition/abuse/49604207.pdf.

consumers as well. Therefore, had the substitutes been available, the firm would not have been a dominant entity leaving no reason or opportunity to regulate the pricing.

Another assumption on which this argument is based is that in the presence of substitutes the consumers tend to shift to or choose other drugs or brands. This argument completely negates the fact that consumers (who are also patients) do not make a voluntary decision while buying a medicine for their ailment. Their choices are induced by the instructions provided to them by their medics and physicians.[42] These prescriptions by the doctors are not based on the prices of the medicines but their availability and more importantly, the suitability and thus, consumers cannot switch to another medication or even to another brand of the same medication. For instance, in Pfizer/ Flynn Pharma Case the fundamental reason that patients did not switch to other epilepsy medications, despite exorbitantly high prices of phenytoin sodium capsules, is that a change in medication could have triggered severe effects of epilepsy and thus, discontinuation of the capsules would have been inappropriate for the benefits of patients.[43] Therefore, in such a situation when the life of a person is at stake, will one look for a cheaper medicine or resort to the one that is prescribed and readily available, irrespective of its unashamedly high prices. Thus, it would be wrong to assume that mere presence of substitutes, if any, would make the consumers shift to them in a setting of excessive pricing of the prescribed drug.

3. Excessive Pricing Initiates Inter-Brand Competition

Another caveat for allowing the addressal of excessive drug pricing as an antitrust violation is the belief that excessive pricing of the medicines in the market attract new entries and thus, initiates inter-brand competition.[44] It is a general presumption that high prices of the products in the market usually bolsters other competitors (generics and biosimilars) to enter the market. The reason for the same is that the price of a product is directly proportional to the profits earned form the sales

[42] Charles L. Denison and Max E. Greenberg, *Excessive Drug Pricing as an Antitrust Violation*, 82 ANTITRUST L. J. 701, 713 (2019).
[43] UK CONSUMER CASE, *supra* note 21, at 3.28-3.42, 7.70; Unfair Pricing in Respect of the Supply of Phenytoin Sodium Capsules in the UK, Decision of the CMA CE/9742-13, § 1.5 (Dec. 7, 2016) (Pfizer), www.gov.uk/cma-cases/investigation-into-the-supply-of-pharmaceutical-products#non-confidential-infringement-decision.
[44] Motta M. and De Streel A., *Excessive Pricing in Competition Law: Never say Never? - The Pros and Cons of High Prices*, SWEDISH COMPETITION AUTHORITY (2007), http://www.crid.be/pdf/public/7425.pdf.

of the goods, thus, high prices brings excessive profits.[45] This whole mechanism draws new entrants in the market. Therefore, in a situation when there exist no barriers to the entry and new entrants are also entering the market, an intervention from the side of Competition regulators is unnecessary and unwarranted. In lieu of regulating the prices in the market, stringent price regulation might just deter the new entrants and prolong the dominance of already dominant enterprise.[46]

The fundamental issue with this view is that it constructs on the assumption that various generics and biosimilars will enter the market on noticing high prices of the drugs. Another assumption is that their entry will cause the prices to fall and eventually make the drugs affordable. More importantly, the assumption on which all the remaining assumptions rely is that the new entrants will have no barriers to their entry in the market. In order to detest this view and the assumptions on which it is built, it is necessary to reconsider the cases already discussed above. In all the cases, *Napp*, *Pfizer* and *Aspen*, contrary to what is usually assumed, high prices of the drugs did not allure entries in the market. There was a sudden and substantial spike in the prices of the respective drugs, without any justification except for the unscrupulous desire of the firms to make their business more lucrative. Despite this, no new entry occurred in the market. There can be several reasons for the same, such as, smaller market, high capital-intensive character of the pharmaceutical industry, consumers' unwillingness to shift to other medicines or brand (which by the way, is not their personal choice but due to the prescriptions and advice of the doctors and hospitals), entry-deterrence pricing strategy, etc. These cases exhibit a crucial example of why intervention is essential and discredit the entire contention of high prices alluring new entries.

4. Institutional Difficulty in Determining a Case of Excessive Price: Enforcers' decision for non-condemnation of excessive drug pricing is also founded on the difficulty faced while determining what exactly falls squarely under the abuse of excessive pricing. Evaluating a reasonable price for a particular drug and on the basis of the same establishing a case of excessive pricing, is not only difficult but also goes beyond the competence of Competition regulators.[47] Stating that the

[45] Jenny F., *Abuse of Dominance by Firms Charging Excessive or Unfair Prices: An Assessment*, EXCESSIVE PRICING AND COMPETITION LAW (2018), http://www.msm.nl.
[46] Fletcher A. and A. Jardine, *Towards an appropriate policy for excessive pricing*, EUROPEAN COMPETITION LAW ANNUAL (2006), http://www.competitioneconomics.org/dyn/files/basic_items/295- file/AmeliaFletcher_plenary.pdf.
[47] United States v. Addyston Pipe & Steel Co., 85 F. 271, 283-284 (6th Cir. 1898).

reasonable price of a drug would mean its actual economic value cannot be a reason enough for antitrust agencies to intervene for this argument, in itself, is intricate. The difficulty posed by the question of reasonable price of a drug would be the same even in the case of economic value of a product.[48] Further, even if a consensus is reached on what constitutes a reasonable price, how would one determine if the actual price imposed is excessive?[49] One cannot really devise a method or standard to ascertain if the margin between the reasonable price (if determined) and the imposed price is higher than what must be achieved because if the consumers are willing to pay, how can a third non-related party decide for them?[50] However, this is not a correct approach to address this issue. Consumer's willingness is not an appropriate benchmark to determine if a price is reasonable. As already stated, a consumer would anyway not be reluctant to purchase a high-priced medicine when his or his family's life is in the peril.[51] Thus, even if they are forced to pay an extensive price for a medicine, they would, even if it is not worth the money. Going by this approach, any price imposed would never be an excessive price for the consumers will still buy the essential drugs and a dominant entity would never want to fix a price lesser than what consumers are willing to pay.

Coming to the challenges faced while evaluating a reasonable price and consequently establishing a case of excessive pricing, it must be realized that a straitjacket method cannot be devised. Complex problem of excessive drug pricing cannot be solved with a simple assessment criterion. It is necessary to comprehend that several usable and comparable measures and methodologies must be employed to find out the difference between excessive pricing and lawful pricing. With respect to this, a reference of guiding opinion of Advocate General Wahl (EU Court of Justice) must be made. While deciding the *Latvian Copyright Society's* case, Advocate General Wahl was

[48] Calcagno C. and M. Walker, *Excessive Pricing: Towards Clarity and Coherence*, 6(4) J. COMP. L. & ECON. 891, 905 (2010).
[49] Berndt E., R. Conti and S. Murphy, *The generic drug user fee amendments: an economic perspective*, 5(1) J. L. BIO. SCI. 103, 137 (2018).
[50] 2020 COMPETITION BILL, *supra* note 37, at 105.
[51] David Gilo, *A Coherent Approach to the Antitrust Prohibition of Excessive Pricing by Dominant Firms*, 4 J. COMP. L. ENF'T 113, 120 (2018).

requested to provide his opinion on under what conditions a price could be labeled as excessive.[52] It was opined that in such cases a case-specific analysis must be done. A comparative analysis can surely aid in reaching to a finding. This would include *"comparison of the prices charged by the dominant company for the same product in other geographic markets, a comparison with prices that rivals charge in other markets and a comparison of prices charged by the dominant company over time if there are no good explanations for price increases."*[53] He recommended combining several methods among those which are accepted by standard economic thinking and which appear suitable and available in the specific situation". When applied with rigour and objectivity, any convergence of results from the different tests may be taken as an indicator of a reasonable benchmark price. Therefore, while acknowledging the hardships accompanied with an excessive drug pricing case, one still cannot refute that it cannot be successfully addressed and resolved.

Moreover, this not the first time that a challenge like this is posed before the Commission. For example, predatory pricing is considered as an exclusionary abuse under the Competition Act, 2002. There exist economic theories, in regards of predatory pricing as well, that proposes that regulation of predatory pricing through Competition law is not very effective. It is advocated that predatory pricing is employed in two stages. Firstly, when the price is imposed, eliminating the competitors out of the market and later, when the competitors are not in the market anymore, the dominant firm increments the price again to recover the losses it suffered in the first stage. Such an increase in the price brings back the market in its original competitive environment as competitors re-enter the market. Thus, predatory behavior of a dominant firm must also be rendered temporary. However, despite this existing belief, the CCI has not sheared from evaluating predation in the cases presented before it. A classic case of predation is the ***NSE Case***,[54] where the CCI reprimanded the NSE for indulging in predatory pricing by offering waiver in transaction fee, in respect of all currency future trades executed on its platform, and imposed a penalty of Rs. 55

[52] *The EU Court of Justice AG Wahl Offers Guidance on the Criteria to Identify Excessive Prices in Abuse of Dominance Case (AKKA/LAA*), CONCURRENCES (Apr. 6, 2017), https://www.concurrences.com/en/bulletin/news-issues/april-2017/the-eu-court-of-justice-advocate-general-wahl-offers-guidance-on-the-criteria-en.

[53] EU Court of Justice AG Wahl, AKKA / LAA, Case C-177/16 (Apr. 6, 2017), http://curia.europa.eu/juris/document/document.jsf?text=&docid=189662&doclang=EN.

[54] MCX Stock Exchange Ltd. v. National Stock Exchange of India, Case 13 of 2009, available at http://www.cci.gov.in/sites/default/files/MCXMainOrder240611_0.pdf.

crores. When an indictment of predatory pricing can be remedied by the Commission then why can the same be done in a case of excessive drug pricing?

Conclusion

Indeed, remedying a wrong like excessive drug pricing is not simple considering the underlying institutional problems and peculiar characteristics of the pharmaceutical sector but it is not obligatory that a competition regulating authority works alone towards this. Sectoral regulation of the industries is an effective way to assist the antitrust agencies. Nobody is asking the competition authorities to be the price regulator. This function can be exercised by the specific sectoral regulators. In India, the ceiling price of the essential drugs are regulated and determined through the Drug Price Control Orders (DPCOs) of Ministry of Chemicals and Fertilizers.[55] Apart from that the National Pharmaceutical Pricing Authority (NPPA) monitors the prices of the scheduled drugs and ensures their enforcement.[56] Price of the drugs which are not scheduled in the DPCO are also regulated by NPPA and must not be more than 10% per cent of the maximum retail price of the drug during the preceding twelve months.[57] In such a case where there exist a sectoral regulator, the job of the Commission gets easier, given that a sectoral regulator is at a better footing in regards of the understanding of the peculiar characteristic of their sector and possesses significant market knowledge. Due to its deeper insight of the sector and technical expertise, it is capable of assessing the appropriate price for its sectoral market and regulate the price ceiling. In respect of the decided price range, it becomes easier to figure out the cases laden with the vice of unfair pricing. Intervention at this stage would be appropriate for the CCI to create an enabling environment for the competition in the market. Other than this, the pharmaceutical companies must be obligated to be more transparent about their cost-structure. The CCI, as per its advocacy mandate in October 2018, issued a policy note titled ***"Making Markets Work for Affordable Healthcare"*** that addresses the lack of transparency and regulation of the pharmaceutical sector

[55] The Essential Commodities Act, 1955, §3, No. 10, Acts of Parliament, 1955 (India).
[56] Government of India; Ministry of Chemicals & Fertilizers, Department of Pharmaceuticals, Resolution No 159 No 33/7197-P11 (Aug. 19, 1997), http://www.nppaindia.nic.in/wp-content/uploads/2019/07/PMRU-Guidelines.pdf.
[57] Ministry of Chemicals & Fertilizers, Department of Pharmaceuticals, Drug (Prices Control) Order 2013 (May 15, 2013), https://pharmaceuticals.gov.in/sites/default/files/dpco2013gaz.pdf.

and urges the pharmaceutical enterprises to be more transparent about their R&D costs.[58] Appropriate information and knowledge regarding the cost structure would make the whole procedure of assessing an excessive pricing case more feasible.

Competition law condemns the abusive practices by a dominant firm and purports to check its conduct to preserve competition in the market. But when similar situation of distorted competition is created through unfair pricing of drugs, why cannot the CCI intervene? The Commission has not even tried to evaluate such a case on its merits, let alone remedying one. This failure of the Commission can be attributed to its narrow view of the scope of the Competition Act, 2002 and thus, is making the Indian competition law regime a safe harbor for the pricing practices of the dominant firms in pharmaceutical space. The issue of excessive drug pricing is not similar to the excessive pricing of any other goods or provision of services. Unlike the market conditions of other sectors, in the pharmaceutical space the competition in the market and the purchase of the product (drugs) is not driven by the consumer's preferences. It is not the patient who take an informed decision of buying a cheaper medicine over an expensive one, based on his price sensitivity, but the prescription of the doctors and hospitals that influences the patient's (consumer's) choices. Unlike other sectors, buyers do not have a bargaining power. Neither do they have a control on the choices they make no do they have an opportunity of resorting to better options. Therefore, it is necessary that one not only approaches this issue from a competition enabling perspective but also with an intention to ensure consumer welfare. Competition law might not only be about consumer welfare but it does tend to achieve it as one of its objectives. Thus, any divergence from the same either through excessive intervention or through excessive clemency is bewildering, considering how critical pharmaceutical sector is to the consumers. India is a country with socialist goals. That is why even the preamble of the Competition Act, 2002 mandates that the provisions of the Act must protect the interests of the consumers. Such an objective emboldens an approach that treats excessive drug pricing as an exploitative practice and necessitates the prescription of remedies for the same.

[58] Competition Commission of India, Policy Note on Making Markets Work for Affordable Healthcare (Nov. 1, 2018), https://www.cci.gov.in/node/4184.

THE CROSSROAD OF PATENT AND COMPETITION LAW IN THE CONTEXT OF PATENT ASSERTION ENTITIES: A COMPARITIVE ANALYSIS

Srishti Suresh

1. INTRODUCTION

Determined to supersede one another in the race for technological advancement, patent rights seem to offer a benign opportunity for an inventor, to make exclusive his invention, while offering him the discretion in fixing license fees. This form of exclusivity is purported to behave as an incentive, in allowing an inventor to recoup the cost and energy expended in making the invention, while formally according him the status of being the sole owner of that technology. However, the bailiwick of patent holders is not restricted to first hand innovators and researchers. Intermediate entities and bodies known as Patent Assertion Entities ("**PAE**s"), have increasingly come to possess patent rights over significant patent technologies and inventions. The leverage offered by patent rights is often abused by PAEs, by adopting various tactful strategies. This abuse of dominance has cascading effects, including but not limited to stymieing innovation and growth; it has detrimental effects on free market competition and antitrust regulation, ultimately affecting the end consumer.

Globally, the recognition PAEs as a concept, is currently in its nascent stages. Its presence and operation have been witnessed in more mature Intellectual Property markets of the United States, the European Union and a few Asian countries. This is primarily attributed to the fact, that Research and Development ("**R&D**") in innovative technologies in Information Technology, Software and Artificial Intelligence ("**AI**") have been better exploited in these jurisdictions.; the incentive to further innovation is relatively greater.

While drawing attention to the Indian patent regime, one cannot slight the potential of the Indian markets in terms of innovation. According to the recently released World

Intellectual Property Organization ("**WIPO**") Report[1], India is emerging as the new target jurisdiction for patent filing in key fields of technology, securing for itself the eighth rank for first filing.[2] At present, India follows the 'first to file' system, where the patent rights are granted to those inventors who have first filed an application. A provisional application can be filed with the Indian Patents Office if the invention is still in the experimental stage, as it helps in establishing a priority date amongst competing inventors. India is also one of the top countries for scientific publications in technological categories such as natural language processing.[3]. As a result, PAEs have begun to mushroom in key Indian sectors such as automotive patens[4], Internet of Things ("**IoT**")[5], and several operating companies have involved themselves in privateering with PAEs. Therefore, the need to address the lacunae in Indian patent and competition laws in order to tackle the same, is exigent.

2. THE CONCEPT OF PATENT ASSERTION ENTITIES

PAEs, often called "patent trolls", are defined as firms with a business model focused primarily on purchasing and asserting patents, typically against operating companies with products currently on the market.[6] PAEs typically seek to issue threats and letters of patent infringement to operating companies, offering the alleged infringer an opportunity to either avoid a trial by paying a negotiated settlement for a license, or to 'battle it out' through litigation. The letters are often sent to small businesses and non-profits, that

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[1] WIPO, *China Becomes Top Tier Filer of International Patents in 2019 Amid Robust Growth for WIPO's IP Services*, https://www.wipo.int/pressroom/en/articles/2020/article_0005.html (last visited Apr. 7, 2020); Indivjal Dhasmana, *India leads Asian peers in growth in filing of patents*, BUSINESS STANDARD (Apr. 25, 2017) https://www.business-standard.com/article/economy-policy/india-leads-asian-peers-in-growth-in-filing-patents-report-117042500080_1.html.

[2] WIPO Report on Technology Trends 2019: Artificial Intelligence, https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1055.pdf.

[3] Anonymous, *India emerging new target for patent filing in Artificial Intelligence: WIPO*, BUSINESS STANDARD (last visited Feb. 1, 2019), https://www.business-standard.com/article/pti-stories/india-emerging-new-target-for-patent-filing-in-ai-wipo-119020100581_1.html

[4] Rahul Kapoor, *India an emerging hotbed for automotive patents: TVS Motor leads the charge*, INDIAN EXPRESS (Dec. 29, 2020), https://www.financialexpress.com/auto/industry/india-an-emerging-hotbed-for-automotive-patents-tvs-motor-leads-the-charge-tata-motors-mahindra-hero-bajaj-hona-nissan-daimler-patents-in-india-electric-vehilces-bosch/2159657/.

[5] OUTLOOK INDIA, *Over 5,000 IoT patents filed in India over last 5 years: NASSCOM*, (Jun. 5, 2020), https://www.outlookindia.com/newsscroll/over-5000-iot-patent-filed-in-india-over-last-5-years-nasscom/1856965.

[6] Colleen Chien and Edward Reines, *Why Technology Customers are being Sued En Masse for Patent Infringement and What can be Done*, (Santa Clara Law Digital Commons, Working Paper No. 20, 2013).

lack the resources to defend themselves against claims of patent infringement.[7] In addition, the letters often contain false/misleading statements aimed at scaring the recipient into purchasing a license, without offering a viable opportunity to investigate into the merits of the allegations.

The main objective of a PAE is "rent extraction", which it seeks to obtain via three tactful strategies. It is to be borne in mind, that the strategy adopted is dictated by the type of patent rights held by PAEs. Before proceeding to the operation and functioning mechanisms of PAEs, a prior understanding of the strategies could prove useful in understanding the magnanimity of the threats they pose. *At first*, we have "bottom feeder trolls" that hold rights over a few patents. Akin to nuisance suits, they seek to realize a license settlement which would potentially cost less when compared to the amount expended in litigating a lawsuit. These trolls hope to deter small startup companies from proceeding to a trial, in return for a cheaper settlement.[8] *Second*, the "lottery ticket trolls" play against probabilities and odds. These PAEs take on big corporations with high stakes, in the hopes of a big payout. *Third*, the "mass aggregators" are the most powerful PAEs, who hold patent rights over entire patent portfolios. With the control over many Standard Essential Patents ("**SEPs**"), they are aggressive in their assertion of infringement, and they possess the capability of enduring an expensive law suit.[9] Mass aggregators pose the biggest threat to antitrust law, owing to their likelihood of aggregation and privateering with operating entities and non-PAEs, thereby escaping the scrutiny of competition authorities.

2.1 Behaviour and Impact of PAEs

Weakness inherent in a patent system, offers an avenue for PAEs to make demands using weak and dubious patents. By issuing letters of demand, this form of rent seeking operates as a burdensome tax on innovation.[10] Every penny spent on defending a patent

[7] Paul Milgrom and John Roberts, *Limit Pricing and Entry Under Incomplete Information: An Equilibrium Analysis*, 50 ECONOMETRICA 443, (Mar, 1982).

[8] Mark A. Lemley and A. Douglas Melamed, *Missing The Forest For The Trolls*, 113 COLUM. L. REV. 2117, 2132, 2190 (2013).

[9] Sanjai Bhagat and Robert Romano, *Event Studies and the Law: Part I: Technique and Corporate Litigation*, 4 AMERICAN LAW AND ECONOMICS REVIEW 141, 141, 153 (2001).

[10] Mark A. Lemley and Douglas Lichtman, *Rethinking Patent Law's Presumption of Validity*, 60 STAN. L. REV. 45, 71 (2007).

infringement suit or negotiating a settlement, is proportionately a penny less spent on R&D and innovation. However, patent trolls are not problems in themselves; they are the symptoms of a deeper and more complex problem in the patent system. The following characteristics often exhibited by PAEs, expound on the impact they have on operating companies.

A. The Cost Factor

The unique positioning of PAEs, offers them a leverage in imposing serious impacts on the financial health of a corporation. This impact can be understood in the two commonly perceived notions.

i. Lack of Deterrence- Cross Licensing and MAD

Operating companies involved in R&D and product manufacture, when accused of patent infringement, generally resort to cross licensing of patents. By virtue of such licensing, the plaintiff company gets the right over the infringer's patents and *vice versa* (subject to mutual terms and conditions). The matter does not proceed to a court of law. In addition, cross licensing puts an implicit value on the patents owned by each party, by virtue of such patent exchange. The infringing company can thereby realize the value of its patents. Further, operating companies deter each other from expensive litigation through defensive stockpiling of patent portfolios.[11] The resulting 'Mutually Assured Destruction' ("**MAD**"), prevents aggressive assertion of patent rights as there is a risk symmetry between the two parties.

On the contrary, PAEs do not deal with production, and therefore do not implement the patents they own, in their operation. It is merely a means through which they earn their revenue. In asserting a fixed price of settlement, the defendant company is left to choose between realizing the value of its valid patent on arbitrary terms, or, to endure a long and expensive legal battle in a courtroom. Therefore, the trade off in cases of PAEs is

[11] Mark A. Lemley and Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEX. L. REV. 1991, 2006 (2007).

disproportional when compared to dealing with operating companies, and significantly more expensive. Further, the expending can cut through an entity's core business resources.

i. The Illusion of Money

Troll suits involve cash payments, directed out of the corporate budget of the defendant company. Moreover, companies do not consider their patents to be monetizable assets. Patents are viewed as assets leading to long term revenue generation, and as an ingredient for future innovation and production. It is not the general norm for operating companies, to use their licenses and patents as a threat to sue or deter other entities.[12] Therefore, paying exorbitant and arbitrary license settlement out of quarterly budgets to PAEs, creates the illusion of being much more expensive in terms of corporate liquidity.

B. Royalty Stacking

In fields such as AI and Information Technology, thousands of patent innovations are integrated in making multicomponent devices work. Therefore, a single product might be potentially incorporating several patented technologies. In a dynamic and technologically advanced environment, companies develop technologies at a faster pace, in order to meet the demands and needs of the market.

Generally, royalty is charged for the use of each license; and in cases of SEPs, Fair, Reasonable And Non-Discriminatory terms (hereinafter referred to as "**FRAND terms**") might restrict the royalty charges to a reasonable and fair amount. This is because, SEPs are elemental in technological advancement in a given field, and if left unfettered, SEP holders may invariably charge significantly higher amounts. However, when a product uses several patented technologies, the aggregate royalty charges paid in making a product, might exceed prohibitory limits. Simultaneous inventions and inadvertent infringements are ubiquitous in the field of Information Technology and telecommunication[13]. There is no mala fide intention to infringe on the rights of other patent holders. As a strategic move, PAEs who

[12] LEMLEY, *supra* note 4, at 4.

[13] Christopher A. Cotropia and Mark A. Lemley, *Copying in Patent Law*, 87 N. C. L. REV. 1421, 1427 (2009).

hold SEPs, begin to bundle them with non-SEPs, in order to charge royalty for each license while escaping the obligations imposed by FRAND terms. Therefore, royalty stacking by PAEs owning diverse patents, as opposed to licensing them as a single patent portfolio with fixed price, can have detrimental effects on operating companies. Owing to the fear of infringement, many small startup companies might be deterred from investing in research and innovation, as the cost incurred in paying the charge of royalty stacking in a dynamic market, far outweighs the benefits of investment in patentable technologies.

C. Patent Aggregation

A problem associated with mass aggregating tolls, is that of patent aggregation. By aggregating and accumulating a large number of patents and portfolios, a single PAE has the capacity to overwhelm the alleged infringers by giving them almost no choice, but to pay for the bundle of patents. Even in cases where the infringers believe that the patents held by such aggregating trolls are invalid or dubious, the cost of challenging them in a litigation proceeding, prohibitively bars them from ascertaining the validity and worth of such patents. Moreover, market power in terms of patent rights, can enable aggregators to combine substitute and complementary patents to their portfolio. A patent aggregator that deserves mention in this regard, is Intellectual Ventures. Commonly seen as the boogieman for aspiring technology companies[14], Intellectual Ventures is globally known for its patent aggregation and disruptive litigation, and the company has raised over USD 6 billion by acquiring close to 70,000 patents and other intellectual property assets.[15] As a result, competing companies and technology users cannot bargain for low royalties; the price fixed by the aggregator would be the final determinant (especially in cases of non-SEPs).[16] Disproportionate pricing could act as a market barrier in enticing entrants into market participation. In addition, aggregating trolls have the discretion in choosing to strike a deal with operating companies, for the purpose of transferring the ownership rights of portfolios

[14] Morgan Baskin & Jack Denton, *The Ultimate Patent Troll*, PACIFIC STANDARD, (Sept. 16, 2018), (https://psmag.com/magazine/a-patent-boogieman-with-the-potential-to-obliterate-aspiring-startups); Tom Ewing & Robin Feldman, 'Patent Mass Aggregators: The Giants Among Us', IP WATCH DOG, (Feb. 06, 2012), (https://www.ipwatchdog.com/2012/02/06/patent-mass-aggregators-the-giants-among-us/id=22137/).

[15] Dan Levine, *Intellectual Ventures settles lawsuit against Xilinx*, REUTERS, (May. 3, 2014), (https://www.reuters.com/article/iv-xilinx-lawsuit-idUSL2N0NO1WM20140502).

to competing firms, thereby disrupting healthy competition determined by demand and supply.

D. Hybrid PAEs- Collusion and the Pathway to an Anti-Competitive Practice

i. Patent Privateering

With a slight deviation from the traditional approach adopted by mass aggregator trolls, a hybridized version of PAEs has been paving the way for anti-competitive collusions. The resultant hybrid is the 'privateering' model. In this model, operating companies transfer their patent rights to PAEs, enabling the latter to assert patent claims which the operating companies was unable to assert, *OR,* to evade commitments relating to SEPs entered into by the operating companies themselves. Privateering allows companies to use third parties (PAEs) to sue competing firms, by issuing threats of a potential lawsuit. As a result, many upstream and small-scale downstream companies are enfeebled. Often, proxies are employed to obviate regulatory obligations imposed by IP and competition authorities. Operating companies use PAEs as proxies for anti-competitive ends.

The role of an intermediate proxy played by PAEs, could potentially unencumber operating companies from anti-royalty stacking commitments. Certain patents classified as SEPs, are patents which require inventions to comply with a technical standard. In cases where a product requires multiple patents, operating companies might have to acquire licenses *a la carte*, as opposed to acquiring them in a bundle. But such an *a la carte* system would not possess the economies of scale that companies desire. The resulting royalty stacking can potentially threaten pro-competitive bundles, thereby retarding innovation.[17] It is for this reason that Standard Setting Organizations ("**SSO**") formulate non-stacking pledges and provide incentives to companies, to create technical standards for SEPs. SSOs often require SEP holders to make a prior announcement that their patent licensing would be in consonance with the FRAND terms. FRAND compliance is aimed at preventing SEP aggregation and hold-up, as a refusal to license essential patents or charging an exorbitant/ discriminatory royalty for such patents, can hamper innovation, deter investors from making

[17] David S. Evans and Michael Salinger, *Why Do Firms Bundle and Tie? Evidence from Competitive Markets and Implications for Tying Law*, 22 YALE J. ON REG. 37, 45, 74 (2005).

a foray into the IP sector, and ultimately increase the price for the end consumer. By the virtue of transferring SEPs to patent trolls, operating companies are no longer the patent holders subject to FRAND commitments. Moreover, there is no universally binding guideline requiring future licensees to adhere to FRAND commitments. Flexibility is accorded to domestic jurisdictions, to determine the stringency of licensee obligations. Therefore, PAE as a proxy can refuse to license SEPs to competing firms or charge discriminatory royalties, without the operating companies being subject to liability.

ii. Raising Rival Costs ("RRC") Foreclosure

The RRC Foreclosure paradigm focusses on an exclusionary conduct that either totally or partially, forecloses competitors from gaining access to critical inputs or customer base. This leads to rival competitors either raising their prices or reducing the level of output, while simultaneously allowing the excluding firm to set a supracompetitive output price. RRC in theory, allows firms with monopoly powers to take actions that harm its competitors even if it harms the firm with monopoly power itself.[18] In the context of privateering and roping in PAE proxies, an avenue for the credible creation of an RRC strategy is created in conjunction with the specific benefits of PAE, coupled with the help of bargaining asymmetries available in patent portfolio control. This can lead to a significant increase in the prices of rival products (for critical input acquisition), whilst the excluding operating firm continues to set a supracompetitive price, resulting in an increased price to the end consumer. RRC behavior and strategy is not anti-competitive per se, or illegal; it might merely amount to a function of firm rivalry. However, the anti-competitive element gets attached when the strategy is based on the theory of overt exclusion.

RRC appears to be a feasible approach to privateering hybrid PAEs and operating firms for the following reasons. It is also to be noted, that RRC often escapes antitrust scrutiny for its seemingly innocuous operations. *First*, RRC does not require rivals to exit the market or even face a long-term reduction in their level of production. If the marginal cost of producing a product is raised, competitors will be incentivized to increase their prices

[18] Douglas A. Melamed, *Exclusive Dealing Agreements and Exclusionary Conduct- Are There Unifying Principles*, 73 ANTITRUST L. J., 435 (2006).

and reduce their level of output, if viable. *Second,* RRC foreclosure is not necessarily more costly to the excluding firms, when compared to excluded rival firms. The benefits obtained, largely offset the cost incurred in acquiring proxy PAEs for privateering.

In light of privateering and RRC foreclosure, one of the most notable cases in this forefront, is the case of *Rockstar Consortium*. The said consortium consisting of Google, Apple Inc, Microsoft and Research in Motion, made a group bid for the patent portfolio of Nortel Networks. While the United States Department of Justice granted an approval for the deals to succeed, it did not foresee the chances of the consortium itself turning into a PAE. While its order required acquiring firms to comply with FRAND terms, Rockstar unencumbered itself from such obligations by becoming a PAE, by pursuing an RRC strategy. This strategy allowed for Microsoft to publicly commit to keeping its FRAND commitments while simultaneously pursuing an RRC strategy through Rockstar.[19] This highlights the problematic nature of a seemingly innocuous a patent acquisition deal, when it adopts the RRC strategy.

3. THE ANTI-COMPETITIVE CONCERN

Granting patent rights not only secures a short-term exclusivity to the inventor, but this act of rewarding genuine innovation, is beneficial for healthy competition. More and more people are motivated to dwell into R&D, in an attempt to invent newer and more modern patentable technologies. However, patent law and antitrust laws are often viewed in contradiction. The latter is understood to restrict market monopolization, while the former is presumed to offer opportunities of monopoly. *But can the two seemingly contradictory body of laws be harmonized, in the context of the competition concerns raised by PAEs?* This particular section seeks to delineate the reasons for the perceived deviation observed between patent and antitrust laws, while drawing inferences from prominent cases decided in relevant IP jurisdictions.

[19] In re Nortel Networks, Inc., 469 B.R. 478 (Bankr. D. Del. 2012).

1. The United States

The Federal Trade Commission ("FTC"), has employed SSO terms and FRAND commitments in deciding patent monopolizing cases, as opposed to resorting to the provisions of the Sherman Antitrust Act, 1890 (hereinafter referred to as the "**Sherman Act**")[20]. A deference to established IPR Guidelines laid down by companies' consortium, *vis a vis*, technical standards, is given a more purposive interpretation.

In the case of *FTC v. Qualcomm Inc*[21], the "no license, no chip" policy of Qualcomm was adjudged to be an anticompetitive tactic used to disrupt the patent market and harm competitors.[22] Qualcomm, being the world's largest dominant supplier of baseband processors and a part of the SSO for telecommunications, had imposed onerous terms and anticompetitive licensing and supply terms on cell phone manufacturers, in order to weaken its competitors. In addition, by holding patents considered to be SEPs in the field of cellular connectivity and technology, it held a dominant position in the market.

According to FTC, *first*, Qualcomm conditioned the sale of its modern chips to customers on them mandatorily accepting to license its SEPs; and these SEPs were licensed for "elevated royalties". *Second*, it refused to license SEPs to competitors in the chip supplying market. Section 5 of the Federal Trade Commission Act ("**FTCA**") prohibits "*unfair methods of competition in or affecting commerce*".[23] In addition, the FTC under the said section, may "*bar incipient violations of the Sherman Act, and conduct, which although not a violation of the letter of antitrust laws, is contrary to its spirit"*.[24] Moreover, for SEPs, FRAND Commitments[25] include an express obligation to license to all comers, including competing modern chip suppliers. Technical standards for patent licensing and royalty extraction are specified, to ensure that products from different manufacturers and

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[20] 15 U.S.C §§1-38.

[21] Kristen Osenga, *Formerly Manufacturing Entities: Piercing the "Patent Troll" Rhetoric*, 47 CONNECTICUT L. REV. 435, 465 (2014).

[22] Federal Trade Commission v. Qualcomm Inc., 411 F. Supp. 3d 658, 215-232 (N.D. Cal. 2019).

[23] 15 U.S.C. §45.

[24] Federal Trade Commission Act of 1914 §5, 15 U.S.C §45.

[25] *Microsoft v. Motorola* (W.D. Wash 2012);*Apple v. Motorola* (D. Wis. 2012].

competitors are compatible with each other. In addition to interoperability, a uniform standard such as FRAND, cuts down product costs and increases competition in the market.

The Telecommunication Industry Association ("**TIA**")[26] and Alliance for Telecommunications Industry Solutions ("**ATIS**") IPR Policies under the FRAND commitments in this specific case include non-discriminatory provisions, which effectively prohibit Qualcomm from distinguishing between different types of applicants. Under the TIA Policy, a SEP holder promises to license its SEPs to "all applicants on terms and conditions that are reasonable and non-discriminatory". The District Court of California upheld FTC's claims against Qualcomm's discriminatory licensing terms, on the basis of the pro-competitive principles underlying the IPR Policies and Guidelines. In seeking to ensure that the public benefits, while also respecting the legitimate rights of IP owners, the TIA Guidelines specify that the FRAND Commitments *"prevent the inclusion of patented technology from resulting in a patent holder securing a monopoly in any market, as a result of the standardization process".*[27]

2. China

In the last decade, China has claimed for itself a position in the top ten destinations for patent filing and R&D, in science and technology. With Baidu leading the way in AI patent application (with 5,712 patents), other entities such as the Chinese Academy of Sciences possessing the largest portfolio in Deep Learning techniques (235 patent families), it has emerged as an attractive jurisdiction for patent filing.[28] Deep learning is expanding as a mode of learning, as its neural networks and advanced algorithms help in performing calculations, arriving at accurate predictions, and in progressively learning the outcome of

[26] Guidelines to the Telecommunications Industry Association Intellectual Property Rights Policy (1st ed., 2014), https://www.tiaonline.org/wp-content/uploads/2018/05/Guidelines_to_the_Intellectual_Rights_Policy_of_the_Telecommunications_Industry_Association.pdf.

[27] James Delacenserie, *FTC v. Qualcomm: Standard Essential Patent Holders Must License to Competitors*, HARVARD LAW DIGEST (Nov. 19, 2018), https://jolt.law.harvard.edu/digest/ftc-v-qualcomm-standard-essential-patent-holders-must-license-to-competitors.

[28] *Baidu Leads the Way in Innovation with 5,712 Artificial Intelligence Patent Applications*, GLOBE NEWS WIRE, (Dec. 6, 2019), https://www.globenewswire.com/news-release/2019/12/06/1957432/0/en/Baidu-Leads-the-Way-in-Innovation-with-5-712-Artificial-Intelligence-Patent-Applications.html.

a given set of raw data.[29] The three most important architectures of Deep Learning are, Convolution Neural Network ("**CNN**"), Recurrent Neural Network ("**RNN**") and Recursive Neural Network. Global corporations have been alert in recognizing the growth spurt in IP innovation in China, and have begun to tap into the Chinese market. However, with respect to PAEs, very few homegrown companies have posed threats as patent trolls. Significant cases adjudicated by courts, often stem between an international company behaving as a patent troll with a domestic company, thereby violating SEP and FRAND requirements.

The case of *Huawei v. InterDigital Corporation*[30], saw China at the cross roads of patent rights, antirust regulations and competition law. Huawei had filed its claim in the Shenzhen court, alleging that InterDigital had, a) abused its dominant position in the market, contrary to the Anti-Monopoly Law of China[31], and b) as a holder of several SEPs, had failed to comply with FRAND terms in licensing patents to the plaintiff company. InterDigital being a dominant SEP holder in the communication standard, had tied several of its essential SEPs with non-SEPs during licensing negotiations. It also resorted to charging exorbitant royalties from Huawei, by seeking injunction orders in several District Courts in the United States while negotiations were still in the processing stage. Huawei was forced to accept unreasonable licensing terms. The royalty charged was twice as high as those charged for other companies such as Apple and Samsung, operating in the same business. This was seen to be a clear discriminatory and unjustifiable breach of the FRAND terms. In addition to the aforementioned observations, the Guangdong High Court made several significant comments that are akin to US jurisprudence on the same: it was observed that InterDigital owned essential patents relating to the global 3G wireless communication field, and it thereby enjoyed a unique and irreplaceable dominant position in the specified market. The Court held that the following factors had to be considered in a holistic manner, when determining the reasonability of the royalty rates charged to a licensee: a) the quantity, quality and value of the SEPs held by the patent holder, b) the relevant licensing situation in a specified industry, and c) the share of the patent holder's SEPs in the market.

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[29] Volodymyr Mnih & Others, 'Playing Atari with Deep Reinforcement Learning', (2013), https://www.cs.toronto.edu/~vmnih/docs/dqn.pdf.

[30] Huawei Technologies Co. Ltd. v. InterDigital Corporation, [Guangdong Civil Judgement (2013)].

[31] Anti-Monopoly Law of the People's Republic of China, 2007.

a. Defining 'Market' in Relation to SEPs

The two major characteristics of SEPs are: *uniqueness* and *non-substitutability*. In a standard setting process, once a patent is adopted as a SEP, market participants forego the opportunity to invent technologies around the SEP, or create a substitute of it. Companies have to obtain licenses for SEPs and use them in their products as their **only and irreplaceable choice.** In a strong sense, companies are "locked in". Therefore, when a single entity owns a SEP standard, it translates to a hundred percent market share in that specific market for SEPs. Taking cognizance of the same, Chinese courts have reduced the threshold required in establishing "dominance" of SEP holders, in filing an antitrust suit.

b. The "Locked In" Effect and Dominance Abuse

The US Court of Appeals in *Broadcom v. Qualcomm*[32], held that a SEP may confer on its owner "market power", regardless of how the market is defined. This is because, implementing the essential standard is a *sine qua non* for market entry and sustenance.[33] Affirming this, the Shenzhen court linked the concept of market power to "locking in" of firms. A number of companies invest vast resources in developing products that adhere to a particular standard. It would be prohibitively expensive for them to abandon investments and shift to other standards. They are "locked in" in the sense of product innovation and standard compliance.[34] This accords the owner of SEPs a unique bargaining position, enabling it to charge supracompetitve royalties from rivals and participants.[35]

In addition, a trend that is emerging, is the collusion and mergers carried out between patent implementing entities, for the purposes of establishing PAE joint ventures, in order to eliminate/restrain competition; and this colluding has attracted the attention of various competition regulators. The famous Nokia acquisition by Microsoft, along with its meaty

[32] Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297 (3rd Cir. 2007).
[33] Broadcom Corp. v. Qualcomm Inc., 501 F. 3d 297 (3rd Cir. 2007).
[34] Daniel G. Swanson & William J. Baumol, *Reasonable and Nondiscriminatory (RAND) Royalties, Standards Selection, and Control of Market Power*, 73 ANTITRUST L.J. 1, 5, 10-11 (2005).
[35] Samsung, Nokia and ZTE 2013 USITC Proceeding (337-TA-868), <https://www.sec.gov/Archives/edgar/data/1405495/000140549514000017/idcc-20143312014.htm#sC9240CF5F5A753D656B388B46719C341>.

patent portfolios in the mobile phone market, fuelled scepticism in the minds of Chinese authorities of Nokia turning into a potential aggressive PAE.[36]

Nokia, by exiting the downstream market was presumed to be no longer threatened by cross-licensing and counter-patent assertions by similar operating companies. As a result, potential licensees requiring SEPs held by Nokia, would be unable to counterbalance Nokia's superior bargaining position. This in turn, would incentivize Nokia into charging exorbitant royalties. More importantly, 80% of Chinese mobile manufacturers produced Android models that implemented SEPs owned by Nokia. Therefore, there was a strong case for this acquisition to act as a major barrier for competition. The Ministry of Commerce ("**MOFCOM**") has been careful in formally dealing with PAEs. The *effect* of an entity's conduct is deemed to determine the market effect, and the Anti-Monopoly Law of the People's Republic of China has played a crucial role in this case. The MOFCOM conditioned the approval by subjecting Nokia to the following conditions; all SEPs held by Nokia has to be compulsorily licensed under FRAND terms in China, and all future licensees of Nokia are also subject to SEP standards and FRAND commitments.

MOFCOM's approach is novel, as it imposes FRAND terms on entities purported to turn into PAEs. Though no econometric analysis was conducted to gather factual data on patent rights abuse, MOFCOM highlighted the impacts of SEPs in merger cases, and a strong case for a robust merger review.

3. Japan

A unique intersection of competition and patent law is found in Japan. The Unfair Competition Prevention Act, 1993[37] ("**UCPA**") belongs to the genus of Intellectual Property laws, as opposed to competition law. More importantly, the Anti-Monopoly Act[38] ("**AMA**") plays an overarching and predominant role in regulating patent rights and holding.

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[36] Anonymous, *Microsoft's acquisition of Nokia patent game: Huawei ZTE application review*, People's Network, (Dec. 26, 2013), http://ip.people.com.cn/n/2013/1226/c136655-23949632.html.

[37] The Unfair Competition Prevention Act (Act No. 47 of 1993).

[38] The Antimonopoly and Fair Trade Maintenance Act, 1947.

The Japan Fair Trade Commission ("**JFTC**") IP Guideline 2009[39] explains the implications of Article 21 of the AMA: "*An act by a right holder to a technology to block other parties may seem, on its face, to be an exercise of right. The provisions of the Antimonopoly act become applicable in cases where, though an act "may seem" to be an exercise of rights, it cannot be "recognized" as the exercise of the rights. An act is not "recognized" as a right when it deviates from or runs counter to the intent and objectives of the IP system, which is to motivate entrepreneurs to actualize their creative efforts and make use of technology, in view of its intent and degree of impact on competition".*[40]

The significance of the "recognizable" component is that it offers discretion in terms of statutory interpretation to not only patent authorities, but also the JFTC, which is a competition/antitrust regulator. The underlying principle in each decision should be to further indigenous technological development by effective patent licensing, and ensuring a free market where domestic participants can enter at ease. In addition, an important factor that is often overlooked in relation to patent assertion by PAEs is, "*competition relationships*". In the United States, a competitive relationship between an excluding and excluded firm is necessary, in order to take an action under domestic antitrust laws. It is believed that PAEs do not assert and compete with potential licensees, out of self-interest.[41] In contrast, the AMA in Japan does not require competitive relationships between PAEs and other plaintiff entities.[42] This position is supported by the fact, that plausible anticompetitive effects to a relevant market remain unchanged, whether or not there exists a competitive relationship. Moreover, sufficient incentives to exclude a non-competitor would exist, when the conduct of assertion ensures abundant payment by a competitor of the excluded firm to the PAE, owing to the supracompetitve profits available to the paying party.

4. THE CURRENT POSITION IN INDIA

[39] JAPAN FAIR TRADE COMMISSION GUIDELINES ON EXCLUSIONARY PRIVATE MONOPOLIZATION UNDER THE ANTIMONOPOLY ACT, 2009.

[40] JAPAN FAIR TRADE COMMISSION, GUIDELINES CONCERNING DISTRIBUTION SYSTEMS AND BUSINESS PRACTICES UNDER THE ANTIMONOPOLY ACT (Note 6), (2009).

[41] Official Airline Guides, Inc. v. Federal Trade Commission, 630 F. 2d 920 (2d Cir. 1980).

[42] Healthcare Food Association. 1996. Japan Fair Trade Commission, Heisei 8 (Kan) 14, (May. 8, 1996).

While the debate over SEPs and PAEs in India is in its nascent stages, having drawn inspiration from international jurisdictions, several questions on the jurisdictional interplay between the Competition Act, 2002 and the Patents Act, 1970 have been raised. The primary question raised in each of the decided cases, has centered around whether anti-competitive conduct relating to SEPs can be investigated under the Competition Act, 2002 ("**Competition Act**") and whether the Competition Commission of India ("**CCI**") has jurisdiction to scrutinize the alleged behavior of a SEP holder, including the observance of FRAND terms.

The CCI has initiated investigations in three cases till date, out of which *Micromax Informatics Limited v Telefonaktiebolaget LM Ericsson*[43], is the most significant.

In this case, Ericsson held eight SEPs which had no alternative technologies available in the market. The plaintiff alleged an abuse of dominant position by Ericsson, as it charged exorbitant royalty rates. The royalties were charged not on the basis of the patent technology implemented by the firms, but rather on the value of the mobile handset (that used the technology) in the downstream market. In addition, Ericsson was accused of royalty stacking, as it had bundled the licensing of non-SEPs with the eight SEPs that it owned. CCI in this case observed that, owing to the non-availability of alternate technology in the market for mobile communication devices in India, Ericsson with its eight SEPs, held a dominant position in the market. The "dominance" aspect was established. In recognizing the importance of FRAND terms for maintaining the integrity of standard setting activities, the CCI found no rational nexus between the patented technology and the discriminatory pricing charged by Ericsson, calculated on the basis of the handset used. The CCI observed that the patent holder is required to apply FRAND terms fairly and uniformly to similarly placed players, and in the present context, Ericsson not only violated FRAND terms, but also violated Section 4 of the Competition Act, in imposing unfair and discriminatory terms on the plaintiff, owing to its superior bargaining position in the relevant market.[44]

[43] Case No. 50/2013, Competition Commission of India.

[44] Micromax Informatics Ltd v. Telefonaktiebolaget LM Ericsson (PUBL), Competition Commission of India, Case No. 50 (2013).

When the order was appealed, the Delhi High Court in its analysis, highlighted the importance of harmonizing patent laws and competition laws in dealing with patent assertions by SEP holders. The order stated, that though the Patents Act, 1970 was a special statute with overriding powers in case of inconsistencies, the two legislations were to be harmonized. The remedies offered by the two bodies of law were not mutually exclusive, and in correlation, they contemplate the exercise of jurisdiction by different regulators in different aspects. In upholding the ratio of Huawei v InterDigital[45], it held that royalty stacking and FRAND violations indirectly led to patent hold up and increased costs to competitors, thereby resulting in a foreclosure of competition.[46]

5. ANALYSIS

In the following section, the void that subsists in the characterization of PAEs, as well as the misconception of competition regulators with respect to the analogousness of concepts akin to antitrust cases, is discussed. This is borne out of the emerging trend of bringing scores of patent infringement suits under the radar of competition regulators, on the basis of hypothetical probabilities of them transforming into PAEs.

A. A Search for PAE Definition and the Complexity of Characterization

The United States FTC ("**USFTC**") has defined a PAE to be an entity that uses "the business model focusing on purchasing and asserting patents against manufacturers already using the technology, rather than developing and transferring technology."[47] The key differentiator which remains in telling anti-competitive behavior from valid patent assertion endeavors, is patent origination:[48]

[45] *supra* note 29.

[46] Telefonaktiebolaget LM Ericsson v. Competition Commission of India, [W. P. (C) 464/2014 & CM No. 911/2014, 915/2014).

[47] United States Federal Trade Commission Report (2011), No. 2, at 50.

[48] Jiaqing Lu, *The Economics and Controversies of Nonpracticing Entities (NPEs): How NPEs and Defensive Patent Aggregators will Change the License Market (Part I*), LES NOUVELLES 55, 62 (2012).

Were the technologies merely acquired or created through in-house innovation and R&D capacities? Drawing a clear line between the business model of an innovator and an exploiter is dicey, as an entity's form is not always determinative.[49] An entity can act as a troll, while in fact, it might not simply be a troll. An important question that domestic jurisdictions should answer, is whether the alleged harms of anti-competitive behavior should automatically be attributed to PAEs owing to their status of being aggressive patent asserting entities, *OR*, should greater scrutiny of the actual conduct have to be analyzed to pursue further anti-trust regulations?

As mentioned earlier, MOFCOM had imposed conditional terms on Nokia in the likelihood of it being influenced by extraneous motivations and switching over into an exploitative PAE. However, the conclusion in light of MAD elimination and Nokia's PAE transformation is impulsive and short-sighted. In stating that the merger would take away the prospect of cross-licensing and retaliation through counter suits by other rival operating companies, MOFCOM and the JFTC are observed to have taken a narrow approach in many cases, by focusing solely on the "product" market. In IT and wireless communication markets, retaliation and counter suits might originate from "innovation" or "technology" markets, owing to the interdependency of patents in the process of product creation. In addition, propelled by a desire to maintain a competitive edge by specializing in technological innovation, Nokia might be discouraged from increasing its royalties from existing patents in order to maintain its competitive edge.[50] The pricing could attract potential licensees to license SEPs from Nokia, an established leader in wireless technology, as against licensing them from its rivals. Therefore, an allegation by regulators, on a theoretical possibility of Nokia maximizing royalty and becoming a PAE is insufficient.

B. The Accosting Problems of Blanket Meaning Importation

[49] Erica S. Mintzer and Suzanne Munck, *The Joint U.S Department of Justice and Federal Trade Commission Workshop on Patent Assertion Entity Activities- "Follow the Money,"* 79 ANTITRUST LAW JOURNAL 423, 426 (2014).

[50] Peter C. Grindley and David J. Teece, *Managing Intellectual Capital: Licensing and Cross-Licensing in Semiconductors and Electronics*, 39 CALIFORNIA MANAGEMENT REVIEW 8, 20 (1997).

Often, enforcement hurdles prevent small investors and startups from filing for patents. The economies of pursuing an infringement suit, is weighed against small entities. Large corporations implementing such patents might be lackadaisical in responding to notices and demand letters, and the cost of a lawsuit may be prohibitive for small companies facing an uncertain payoff. It is in this situation that PAEs can become a part of the patent process, in ensuring a level playing field by generating economies of scale in litigation, and reducing the risk borne by smaller patent holding companies. In addition, the secondary patent market created by PAEs, help failed startups monetize their patent and allow it to be used in the market place. This leads to incentivizing greater R&D and innovation in patent technologies. Therefore, the significant benefits provided by PAEs cannot be slighted, when drawing a contrast to the unfair and anti-competitive behavior they impose.

However, the deviation between patent and antitrust law runs deeper than authorities recognize. Similar concepts and terminologies are employed, but in entirely different meanings and contexts; and it is this misunderstanding and misperception that blurs the line and leads to lacunae, with PAEs using it as an avenue in furthering their revenue maximization. Both the United States and Japanese supreme courts have previously ruled that antitrust law (can) operate only when patent holders reach beyond the boundaries inherent in the patent grant.[51] This includes the "intent" and "implied objectives" of patent law. Unfortunately, no court has been able to affirmatively rule on the exact determination of the boundaries inherent in a patent grant. Both uncertainty and confusion in this case have spawned great consternation on the powers that lie within and outside the bounds of patent grants. The following section deals with two of the most prominent debates surrounding the patent and antitrust law intersection, and the potential impacts it could have, if misconceived.

i. The Concept of "Exclusivity"

The notion of exclusivity in antitrust law, takes its meaning of permitting one party to the exclusion of others. It stems from the notion of occupying a competitive sphere and policing the same, to the exclusion of any form of incursion by potential rivals. This would

[51] Carbice Corp. v. Am. Patents Deb. Corp., 283 U.S. 27, 34 n.4 (1931).

imply, that a firm has the power to exclude its rivals. But both competition and patent regulatory authorities believe that this notion translates *in toto* to patent law.[52]

Antitrust laws analyze patents, as rights to keep *everyone* out of the defined sphere of patent grants. Patent laws grants the right to exclude others, but the notion of exclusivity in patent law is different from that of antitrust law. A patent is a negative right as opposed to a positive right. Contrary to the slovenly language used by authorities in describing the nature of the right, a patent does not grant the right to create, use and sell the invention. No affirmative rights are accorded. Rather, a patent grants the right to exclude others, but it does not accord an exclusive sphere to the patent holder- and this includes the sphere defined in the patent itself. Even within the sphere covered by a patent, there might be others situated in the same sphere. For instance, if A holds an original patent that covers a certain number of uses of the product, and B covers any other particular use of the product, both A and B can exclude each other, and any person/entity wanting to use the product, needs to negotiate and settle terms with both A and B. The "right to exclude" still subjects patent holders to negotiate with those that have overlapping rights to exclude. This constraint reveals the limited nature of a patent grant. A patent grant is a far less powerful concept, than exercising complete control over a sphere of technology or innovation, as often contemplated by antitrust authorities. This misperception is not merely a concern of semantics. It can have long ranging consequences of inhibiting innovation, as every attempt to secure protection by big entities owing patent portfolios can always be brought under the radar of antitrust regulators for anti-competitive behavior. *Therefore, the relevant question is not whether a patent possesses value, but whether substitutes for the same are available*.

ii. Monopoly and Monopolization

In antitrust terms, a firm is said to have "monopoly" when it has sufficient power to affect and command market prices, while being able to restrict competitors' output. It measures market power by looking into the shares held by a monopolistic firm in a defined market. Earlier, courts in the United States and the European Union explicitly spoke of "patent monopoly", and held that the existence of a valid patent was sufficient to establish

[52] Abbot Labs. v. Brennan, 952 F.2d 1346 (1991), at 1354-55.

market power in antitrust cases. However, a patent is no guarantee of power in a defined market for the following reasons.

First, substitutes and close alternatives in a market offer sufficient cross-market elasticity, disallowing a single firm to exercise power over an entire sphere of activity. It is often argued that the high value of a patent held by an entity confers automatic power in the market. But value does not simultaneously confer unfettered power.[53] *Second*, patents merely grant opportunities. For monopoly to be established, tangible evidence of the product attracting the market is to be ascertained. But in cases of patents, there is no guarantee that an invention will be successful in capturing market interest.[54] Even with respect to novel inventions, the affirmative guarantee that the market will categorically recognize the true worth and value of an invention, appear wanting. The true genius of an invention and its applications take a significant amount of time to be realized, and might even occur once the term of the patent expires. *Third*, an incompetent "monopolist" that fails to exude novel innovations and products, might in fact create opportunities for other entities to enter the market and compete. Stimulated by market behavior, similarly situated firms are incentivized in creating alternate products that can potentially work in the market. This leads to the erosion of monopoly, and effectively leads to increased competition.

With regard to monopolization, antitrust laws do not condemn entities for gaining or maintaining monopoly, if the same is a result of skill and hard work. Only certain types of behavior have been condemned and forbidden, in the road to market domination.[55] It is this behavior that is termed as "monopolization". In all the tests that have been employed, in each of the aforementioned jurisdictions, the focus is on identifying behavior that seeks to keep rivals from entering the competitive market. But there exists no clear conception of the threshold of footprint that a patent should reach, or how much market damage it is to cause in the context of a patent grant, before it is conceived as monopolization. This conceptual void, prevents a coherent deliberation on the limits of acceptable behavior of patent holders, irrespective of whether the rules flow from patent laws or antitrust laws.

[53] William Montgomery, *The Presumption of Economic Power for Patented and Copyrighted Products in Tying Arrangements*, 85 COLUM. L. REV., 1140, 1156 (1985).

[54] Robin Feldman, *The Insufficiency of Antitrust Analysis for Patent Misuse*, 55 HASTINGS L. REV. 400, 437 (2003).

[55] United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

6. CONCLUSION

While patent and antitrust laws strive to foster innovation, the situation assumes great complexity when PAEs holding dubious patents assert rights and privateer as proxies. In light of the misperception and blind imputation of terms on patent and antitrust laws, and the lacunae apparent in patent regime, *what trajectory should be undertaken in order to bolster genuine patent innovation and healthy market competition in a given jurisdiction?*

The Agreement on Trade Related Aspects of Intellectual Property Rights, 1995 (also known as the "TRIPS Agreement") to which India is a signatory, offers flexibility to domestic jurisdictions, enabling them to curate policies and regulations that are conducive to their national priorities. Therefore, the solution to PAEs begins with patent grants and starts at the level of domestic jurisdictions.

First, the scrutinization of patent application is critical in the process of granting rights. Most PAEs are reported to have asserted dubious patents with inferior quality. Therefore, in the context of a given jurisdiction, one needs to choose either a registration or an examination system. The former allows for self-assessment by applicants, and to the extent that they are in compliance with the provisions of domestic patent laws, rights are granted. In contrast, an examination system involves stringent standards and higher level of scrutiny. The aspects of "novelty", "inventiveness" and "use" are examined in greater detail, before granting rights. While an examination system appears superior and advanced in terms of its approach, it cannot be adopted in every patent jurisdiction. Capital and human resource constraints might require a country to implement a registration system. Therefore, developing countries such as India, need to take an educated and informed decision with respect to the system they would like to adopt, in the larger interests of national objectives.

Second, most jurisdictions including the European Union, India, Japan and China, attempt to delineate "absolute" novelty from "relative" novelties. The former refers to inventions that have not been publicly known anywhere in the world, prior to the filing of

the patent application.[56] Relative novelty would refer to those inventions that have been known and used only in that relevant jurisdiction, as opposed to global usage and knowledge. This approach is short-sighted and unhelpful when dealing with patents in AI and healthcare, as second use of patents and follow-on innovations are generally carried out. The very definition of "absolute" is unclear, as it differs among jurisdictions. Therefore, to better address the question of patent authenticity in terms of novelty, it would be useful to deconstruct the concept of novelty into its constitutive elements. The relevance and advantage of an element, in the usage of a particular patent can be analysed, to determine a truly genuine invention. *Lastly*, countries should adopt the *"hierarchy of inventiveness*"; primary and original inventions should be given primacy over sequential and subsequent innovations. While one cannot discount the importance of sequential innovations in various fields, setting the "non-obvious" standard can prove to be tricky for many jurisdictions. A low standard might bolster innovation and R&D, while a high standard might threaten the availability of more explorative technologies. Striking a balance would be the ideal approach. However, when competition and antitrust concerns arise with respect to a follow-on invention, the ingenuity of the original patent and its capability of constituting a potential SEP should be factored in, and protected.

As a patent filing hotspot, it is time for India to strengthen its antiquated patent laws, and the abovementioned pointers drawn as references from the more developed IP markets might prove beneficial in strengthening the entire Indian patent regime. The time is ripe for competition regulators to take note of the nuanced operations and approached undertaken by hybrid PAEs and privateers, as the traditional conception of monopoly and dominance abuse cannot be translated to patent laws. A coordinated approach by both the bodies of law, could usher in a robust system of patent regulation and free market competition in the dynamic Indian market.

[56] LEGISLATIVE COUNCIL PANEL ON COMMERCE AND INDUSTRY, REVIEW OF THE PATENT SYSTEM IN HONG KONG, (Feb. 19, 2013), at 193.

EXAMINING THE POTENTIAL TAX IMPLICATIONS OF TRANSACTIONS IN DIGITAL INTELLECTUAL PROPERTY

Avni Sharma[1]

1. INTRODUCTION

The contemporary digital aeon envelops numerous potential tax implications which may have an effective reverberation on the economy. The biggest ventures like Google and Facebook are fetching their greatest revenues by online advertisements and tapping the personal interests of the potential buyers. Similarly, companies have also begun investing in advertisement through influencer marketing, wherein, they tap their potential customers' social media preferences and accordingly reach out to the content creators who then advertise their products through processes like product reviews and various creative content. Needless to say, there is a high scope of tax revenues from these advertisements because of the amount that is involved in the process of advertising of products and services.

The largest amount of money earned is from the advertisements that are showcased for the attraction of customers over the digital intellectual property present online. These advertisements are showcased at all geographical locations with internet connectivity. The calculation of taxes with the laws that are applicable to the advertisers will have drastic variations than that of the tax regime in the creator's jurisdiction. It can be observed that with the number of channels that are engaged in advertising a product, it will be very difficult to gauge the amount of taxes applicable. Hence, the requirement of a uniform digital tax regime is imperative.

The advent of COVID-19 Pandemic has also paved the way for the digitalisation of several other action which initially were only deemed to be possible physically. Online activity has removed the criteria of physical presence, but most of the Tax laws rely upon the system of

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place of revenue origin and physical presence of the provider and the customer. However, this paper seeks to achieve a breakage in the link between income generation and physical presence.

Online advertisements are present in any and every form on the digital space today. Majorly, advertisements can be bifurcated into three segments. First, through online advertisements on regular browsing on the internet; Second, influencer marketing on social media platforms through brand integrations with bloggers and content creators on platforms like YouTube and Instagram form a major portion of advertisements online; Third, advertisement through Over the Top Platforms (OTT). In this article, the author intends to analyse the tax regime separately for revenue sources and suggest a uniform tax regime along with analysing the impediments.

2. DIGITAL TAX ON ONLINE ADVERTISEMENTS

Social Media Platforms generate most of their income in the form of revenue generated form the advertisements which are displayed while browsing the internet. There is no doubt about the fact that the advertising arena is where the most lucrative ventures are located. Considering the enormity of organisations like Facebook and Google, the potential tax revenue that can be originated is enough to serve various needs of a country.[2]

Maryland has introduced tax on online advertisements in order to levy charges on the revenue generated. The tax is estimated to raise 250 million dollars per year as it would levy a 10% excise tax on revenue earned on the income through online advertisements.[3]

2.1 The Existing Debate on Digital Advertisement Tax

2.1.1 Unfair to single out Online Advertisements

Advertisements must not be categorically taxed. It would be considered unfair on the part of digital advertisements as there is no firm ground for taxing the digital promotion. Moreover, it

[2] Assaf Y. Prussak, *The Income of the Twenty-First Century: Online Advertising as a Case study for the Implications of Technology for Source-Based Taxation*, 16 TUL. J. TECH. & INTELL. PROP. 39 (2013).
[3] Erin Cox, *Taxing digital ads could bring Maryland $250 million — and a hefty legal challenge*, WASHINGTON POST, Jan. 30, 2020.

is also said to make procedures 'complicated' as it would be intertangled with the outcome of the Wayfair Case.[4] The Supreme Court of United States of America, in the Wayfair Case stated that sales tax would be applicable on all online purchases. In such a scenario, when online advertisements also get a tax slab attached to it, the complication regarding the quantum of the tax will remain under conjecture.

2.1.2 An Incentive to Change Market Giants' Dangerous Models

The tax regime will erode the chances of exploitation by the giants such as Facebook and Amazon. The regime is also an alternative to antitrust or regulatory actions against such entities. Antitrust regulations on various levels intend to ban the current business model so that unfair practices may be given punitive action. Whereas, the tax regime will encourage the companies to opt for healthier, traditional methods instead of harvesting profits from user information to sell advertisements to targeted audience. This tax directly targets sales revenue from targeted advertisements which serves the purpose of generating revenue from these giants along with providing a fair chance for small enterprises to dwell.[5]

International organisations must take initiatives to tax these giants so that the greater public interest is served. The responsibility also lies with the domestic authorities to implement laws that divert revenues from the pockets of these giants to the tax authorities. The idea and concept of a digital advertisement tax must also form an essential part of the uniform tax model.[6]

3. TAX IMPLICATIONS OF ADVERTISING THROUGH INFLUENCER MARKETING AND BRAND INTEGRATIONS

A major portion of intellectual property is also present on the social media platforms, such as YouTube, Facebook and Instagram.[7] Intellectual property on these platforms is uploaded in order to provide content for the audience who also happen to be potential customers for brands

[4] South Dakota v Wayfair, Inc., Et Al. 200 U. S. 321, 337 (2017).
[5] Paul Romer, *A Tax That Could Fix Big Tech*, THE NEW YORK TIMES (May 06, 2019), https://www.nytimes.com/2019/05/06/opinion/tax-facebook-google.html.
[6] *OECD BEPS Action Plan*, OECD, (June 10, 2020, 08:30 A.M.), https://www.oecd.org/ctp/BEPSActionPlan.pdf.
[7] Dharika Merchant, *The Evolution of Influencer Marketing*, THE ECONOMIC TIMES, (May 29, 2020, 10:04 A.M.), https://brandequity.economictimes.indiatimes.com/news/marketing/the-evolution-of-influencer-marketing/72422721.

who integrate with social media creators for the purpose of advertising.[8] In this process, advertisers pay influencers in kind. For instance, a resort company may provide a vacation to social media creators for the endorsement of their resort. In this process, not only the companies will have the advantage of cutting the tax on this advertisement but the influencer will also not have this income accounted. Essentially, there is a high scope of this income being evaded from the tax system.[9] Considering the current situation under the pandemic, the global audience for social media has increased immensely and this must be taken into urgent consideration as it may lead to major losses to the economy.

The online content industry has two main sources of income, brand integrations and display of online advertisements. Different jurisdictions have had varied approaches to this area. The tax authorities consider most of these activities to be recreational instead of taking them as profit yielding activities. However, it is important to note that with the progression in time, there are quite a few individuals who have taken this up as income and profit generating mechanism and create a livelihood out of social media content. In the following part, the author analyses and compares the laws of different jurisdictions and the scope of improvement in their tax regime.

3.1 Cross Jurisdictional Analysis of the Tax Regime with regards to Influencer Marketing

The basic understanding needs to rest on the nature of the organisation working behind the content. In case of it being qualified as a non-profit organisation, their main source of income would be through sponsorships. At this juncture, one needs to understand the qualifications of a sponsorship. Sponsorships mainly equates to the profit generated by the party offering it.[10] Nevertheless, the sponsors who advertise their products or services in exchange of a favour, will be considered as taxable advertising. Therefore, the deduction of sponsor recognition and

[8] Edward Kim, *The Future of Integrated Marketing: When Influencer Marketing and Branded Content Collide*, CMS WIRE (May 28, 2020 5:45 P.M.), https://www.cmswire.com/digital-marketing/the-future-of-integrated-marketing-when-influencer-marketing-and-branded-content-collide/.

[9] Christian Phucs, *The Online Advertising Tax A Digital Policy Innovation*, (June 09, 2020 7:05 P.M.), https://library.oapen.org/bitstream/id/9b1e656e-a839-4b03-b215-55d76906bb17/UWP-024-fuchs.pdf.

[10] Ted Nobiolo, *How Social Media Influencers Are Taxed In the U.S.*, TAX WARRIORS (June 06, 2020 4:43 P.M.), https://www.taxwarriors.com/blog/how-social-media-influencers-are-taxed-in-the-u.s.

sponsor promotion is inevitable. The point of discussion now turns to the individuals or organisations who create content for generation of profit.[11]

In the U.S., influencers are categorised as independent contractors, as opposed to recognising them as employees of the brands they market.[12] The distinction is also made between a hobby and a business. However, this discussion is only restricted to profit-oriented channel. In circumstances where the influencer provides services to companies who are outside the state, they have to pay additional non-resident state tax returns.[13]

In Europe, big ventures had become a target for complaints as they were not paying enough amount of tax because of the lack of regulation. Considering all the demands of the public, there was a regime which brought a 3% percent levy in France and Italy.[14] In Turkey, there has been a proposed digital tax for a heavy percentage of 7.5. During elections in the UK, both the leading parties proposed a digital tax of at least 2% in their election campaign. Another proposal mentioned a levy on all search engines that 'derive value from U.K. users.'

The competition between United States of America and Europe has also led to all the more chaos as they refuse to tax profits and are adamant on taxing revenues. The above-stated fact is a specimen of the requirement of a better tax regulation regime in these areas.[15]

[11] Amanda Perelli, *How do influencers pay taxes? 4 steps to conquer tax season as a self-employed social-media creator,* BUSINESS INSIDER (June 10, 2020 3:55 P.M.), https://www.businessinsider.in/advertising/news/how-do-influencers-pay-taxes-4-steps-to-conquer-tax-season-as-a-self-employed-social-media-creator/articleshow/74290945.cms.
[12] Ted Nobiolo, *How Social Media Influencers Are Taxed in the U.S.*, TAX WARRIORS (June 06, 2020 4:43 P.M.), https://www.taxwarriors.com/blog/how-social-media-influencers-are-taxed-in-the-u.s.
[13] William Horobin and Aoife White, *How 'Digital Tax' Plans in Europe Hit U.S. Tech,* THE WASHINGTON POST (28th May, 2020 3:02 P.M.), https://www.washingtonpost.com/business/how-digital-tax-plans-in-europe-hit-us-tech/2019/12/02/f357b0aa-1558-11ea-80d6-d0ca7007273f_story.html.
[14] Ians, *After France, Italy approves digital tax on large tech companies*., THE HINDU (May 30, 2020, 2:08 P.M.) https://www.thehindu.com/news/international/after-france-italy-approves-digital-tax-on-large-tech-companies/article30400513.ece.
[15] Alex Hern, *UK to impose digital sales tax despite risk of souring US trade talks,* THE GUARDIAN (June 06, 2020, 9:07 P.M.), https://www.theguardian.com/media/2020/mar/11/uk-to-impose-digital-sales-tax-despite-risk-of-souring-us-trade-talks.

3.2 Indian Tax Regime – Digital Intellectual Property on the Internet

In India, this industry gets counted under the services category under the GST regime. There has been an exponential increase in the population who is deriving profits out of activities such as Blogging and making YouTube videos. The bloggers and content creators are taxed only when they make a certain amount of money. For the purposes of taxation, the agreement with the provider (host website) plays an essential role. These businesses generate revenues from Ad sense through Google and Brand Integrations. Indian YouTube content creation is generally linked with Google Asia Pacific. The creator provides the liberty to Google Asia Pacific to put Ads on their Intellectual Property.[16] Therefore, the place of supply here becomes Singapore, which will be ultimately be considered as an Inter-state Supply.

For Inter-State Supply of electronic operations, the Goods and Services Tax Act provides for registration. Their liability arises only after a revenue generation of Rs. 20,00,000.[17] The general rate of tax applied here is 18%, however, since this is also considered an export, it will be covered under Zero-rated Supply.[18] However, the requirement is to tax the giants which do not operate in India per se and still generate large amounts of revenue from the populace.

4. POTENTIAL TAX ON OTT PLATFORMS

The system of Over the Top (OTT) platforms have the most complex structure as it involves a web of links which combine to provide the experience of cloud viewing. The complication remains relevant in the tax scenario because the content cannot be clearly said to be 'delivered' as it may also get covered under the category of being 'accessed' which may have different tax implications.[19] Given the complexity, many countries have laws which are open to

[16] Ahmed Ali, *Google India revenue dips as ad a/c lists under Singapore*, THE TIMES OF INDIA (May 27, 2020 4:05 P.M.) https://timesofindia.indiatimes.com/business/india-business/google-india-revenue-dips-as-ad-a/c-lists-under-singapore/articleshow/71713987.cms.

[17] The Central Goods and Services Tax Act, 2017, § 24(i), No. 12, Acts of Parliament, 2017 (India).

[18] CBIC, *Zero Rated Supply*, (June 04, 2020 7:09 P.M.) https://www.cbic.gov.in/resources//htdocscbec/gst/Zero%20ratings%20of%20suplies.pdf;jsessionid=30FED836EF1B8676DFEA2BCCAEEB0418.

[19] Deloitte, *Flashpoint Over-the-top complexity Examining the potential tax implications of streaming video distribution*, DELLOITE (May 15, 2020), https://www2.deloitte.com/content/dam/Deloitte/us/Documents/technology-media-telecommunications/us-tmt-examining-streaming-tax-implications-of%20over-the-top-video.pdf.

interpretation along with being vague and inexplicable. Traditional partnerships led to traditional tax consequences, however, modern technologies demand for innovative tax strategies, where not only the market is free from unsolicited convolution around tax procedures but the competition in the market is also contained. The regular procedure followed by majority of the jurisdictions states that the taxes will be allowed according to the local laws of the customer. However, this procedure does not afford a solution which is adequate enough to tackle the current multiplayer situation at hand. A proposed solution, which is discussed elaborately in an upcoming section suggests coming up with a uniform tax approach system. This system will provide ease for taxation in a digital economy. Moreover, a uniform tax system will also help countries, who are a part of the WTO E-Commerce Moratorium, to impose taxes on import of electronic transmission of data.

OTT platforms have emerged as a new challenge for jurisdictions around the world. The author suggests to provide a multilayer tax system where, foremost, the digital economy will have to be considered separate from the original taxation setup. Subsequently, there must be nominal amounts of tax at each stage, depending upon the service provided and revenue collected. The tax collected at each stage must be uniform in majority of the jurisdictions, which will assist in easing out the procedure of collecting taxes.

5. THE IMPEDIMENT TO DIGITAL TAXES- WTO'S MORATORIUM

In late 1990s, debate had been ongoing among the WTO (World Trade Organisation) member on treating Electronic Transmissions (ET) as goods or services. This debate directly relates to the current situation as the OECD BEPS (Organisation for Economic Co-operation and Development Base Erosion and Profit Shifting) Action Plan is likely to be released in a matter of a few months. A unified regimen which is going to affect the taxes on electronic transmission. In 1998, WTO declared the adoption of a two-year moratorium on global electronic commerce and decisively banned the taxation on electronic transmissions in order to promote a free flow of transmission of network across the globe.[20] This moratorium was

[20] WTO, *WTO Moratorium* (June 07, 2020), https://iccwbo.org/publication/wto-moratorium-on-customs-duties-on-electronic-transmissions-a-primer-for-business/.

promoted and renewed every two-years only because the powerful economies were in favour of it being renewed.

It is important to note that the moratorium affects the trade by 2.7% per annum since 2000.[21] The developing countries can be estimated to generate 40 times more revenue than the developed countries.[22] A system of fairness will exist only when the countries make sufficient revenue out of ET.

5.2 Feasibility of applying tariffs and discontinuing the WTO Moratorium on ET

The moratorium directly affects the functioning of the GATT tariffs and well negotiated GATS commitments. The future in ET is unimaginable and the system will get increasingly complicated, if structures of custom duty is not built at this juncture. With the expanding revolution in technology, non-application of any duties will result in heavy losses and will not prove fair on the part of the creators. Developing countries like India and South Africa must strongly oppose such a declaration as it is leading to humongous losses every year.[23] The discontinuation of the moratorium will not only boost the daily surplus but also substantially increase the chances of efficiently surviving the effects of the global pandemic crisis.[24]

6. EXAMINING THE REQUIREMENT FOR AN INCLUSIVE FRAMEWORK

A regime where multi-national Enterprises, irrespective of their physical presence pay a minimum level of tax, requires a robust structure which may be relied upon by the majority of jurisdictions. The key to make a digital friendly tax system is to have a separate digital economy apart from the regular economy. A plaguing concern has been regarding the jurisdiction

[21] WTO, *WTO Note (2016- JOB/GC/114) on Fiscal Implications of the Customs Moratorium on Electronic Transmissions* (June 06, 2020), https://iccwbo.org/publication/wto-moratorium-on-customs-duties-on-electronic-transmissions-a-primer-for-business/.

[22]Rashmi Banga, *Growing Trade in Electronic Transmissions: Implications for the South*, UNCTAD RESEARCH PAPER NO. 29, 2019, (May 30, 2020 2:08 P.M.) https://www.wto.org/english/tratop_e/ecom_e/wkmoratorium29419_e/rashmi_banga.pdf.

[23] UNCTAD, *Trends in Structurally Weak, Vulnerable And Small Economies: Small island developing States*, (June 08, 2020 4:09 P.M.), https://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=2356.

[24] Sri Hari Managalam, *Digital Taxation – India's Struggle to tax the import of Electronic Transmissions*, GNLU JOURNAL ON LAW & ECONOMICS (June 17, 2020 5:07 P.M.), http://gjle.in/2020/06/04/digital-taxation-indias-struggle-to-tax-the-import-of-electronic-transmissions/.

challenges that arose from cross-border digital trade which heavily involved the usage of Intellectual Property and the 'Nexus, Data and Characterisation' requirement for the basic architecture.

The model convention by OECD state sunder Article 7 that the profits of an enterprise of a contracting state shall be taxable only when there is a permanent establishment in that state.[25] However, this provision is not in coherence with the multinational digital economical requirements. There is a critical requirement to take the matter into consideration on an urgent basis since there can be major losses to the economy when the economies turn fully digitalised, especially due to the presence of the COVID-19 pandemic. The pandemic is forcing the economies to turn digital and it is going to bring along with it, a plethora of tax complexities.

6.1 Inspection of the Challenges on Online Sales from Non-Resident Suppliers

International display of online advertisements leads to sales in the domestic market, which ultimately leads to the payment of taxes by the domestic players. However, the channel which is advertising the products does not require to pay any taxes to domestic government, even if it is generating income from that transaction. Therefore, taxes on the input and output stage are easily evaded due to the non-existence of stringent digital advertisement taxes.[26]

Evidences have shown that digital intellectual property creates an unfair competitive advantage to the international businesses because of the easy-to-evade tax benefits. In order to reduce this disparity, markets ought to apply the basic neutrality principles, wherein taxes are collected at a multi-level stage in domestic markets. Therefore, at each level of business, the tax will be paid at the input stage and collected at the output stage.

In international trade, it is suggested that the taxes be collected on the destination principle approach under which the exports are free from taxes whereas the imports are taxed as per the

[25] Articles of The Model Convention with Respect To Taxes on Income And On Capital, art. 7.
[26] OECD, *Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy. OECD/G20 Base Erosion and Profit Shifting Project*, (June 06, 2020 4:09 P.M.), https://www.oecd.org/tax/beps/programme-of-work-to-develop-a-consensus-solution-to-the-tax-challenges-arising-from-the-digitalisation-of-the-economy.pdf.

domestic laws. For instance, if a person clicks on a Google Advertisement and buys an online course from an international platform and pays in converted currency. In that case, the customer in Country A will have to pay taxes to the company providing the course. As a customer of the Google Advertisement, the company will have to pay taxes according the laws of the geographical location of the host, which is Google in the present instance. However, Google Advertisement does not have to pay taxes because the amount generated is minimal for it to be taxed. Nevertheless, if a total is calculated, the revenue crosses millions depending upon the population of a place. A uniform system of tax collection will not only assist the cross-border transactions, but also aid in taxing market giants which do not appear among the tax payers of the country. The laws of all the countries must be made in format which results in uniformity in the compliance system. These may also be applicable to countries which are 'non-adherent' to the G20.

The inclusive framework intends to break down the tax amounts into three categories in order to recognise the challenges and provide solutions. Category A includes the share in residual profit from intellectual property gained from online search engine operations, social media platforms, digital content streaming, cloud services, cloud computing services, online gaming along with online intermediation platforms.[27] This analysis will be restricted to the analysis of amount under Category A.

6.2 Amount under Category A

The amount under this category are classic examples of the branching problems due to the digitalisation of the economy. This category specifically also contains but does not address the problem at hand adequately. To elaborate, the complexity with regards to the revenue generated by advertising by way of attracting eye-balls has not been taken into consideration according to the Programme of Work as per the work published in January 2020.[28] The consideration needs to take place at the earliest considering the gravity of the concern at hand. The intellectual

[27] OECD, *Statement by OECD For Inclusive Framework,* (June 05, 2020 8:08 P.M.), https://www.oecd.org/tax/beps/statement-by-the-oecd-g20-inclusive-framework-on-beps-january-2020.pdf.
[28] OECD, *Statement by OECD For Inclusive Framework,* (June 05, 2020 8:08 P.M.), https://www.oecd.org/tax/beps/statement-by-the-oecd-g20-inclusive-framework-on-beps-january-2020.pdf.

property which is within the scope of this paper is counted mainly under this amount itself because of the nature of the income generated. In the next part of the analysis, the author intends on characterisation of the amounts which are included under this category along with the tax implications.

6.2.1 Tax Base

Under Amount A, unlike the traditional approach of 'Separate Entity', the tax system must follow an approach of consolidated group financial account method, wherein a group of MNEs create group financial accounts. These groups are essentially a Business Line or a group of companies which have a common parent organisation. Difference in accounting standard mostly remains about the time, however, that does not become a hurdle in the process as these accounts are created over a longer duration of time. In circumstance where there are differences in terms of a significant amount and duration, shall be taken care through adjustments recognised by the jurisdictions.

For out-of-scope MNEs carrying a material amount, there must be a creation of segmented accounts just to include the in-scope MNEs. This is to ensure that there is fair collection of taxes from the entities which fall under the scope and there is no injustice provided to the entities out of scope.[29] The calculation of Amount A encompasses portions of residual profit that is to be allocated to the eligible market jurisdictions only. For instance, the advertisers from Google will have to pay taxes to a country A, even if there is no physical presence there, nevertheless they have customers who are buying products using Google Ad Sense. However, this is only a matter for further consideration as the significant rationale will rest on the policies which will be created by the different jurisdictions.

6.2.2 Elimination of double taxation

The tax system proposed above can bring along with it, several opportunities of double taxation. Hence, it is necessary that there is a robust system to eliminate double taxation in this

[29] *OECD proposal on taxing MNEs to benefit countries like India: Experts*, (June 09, 2:00 P.M.), https://economictimes.indiatimes.com/news/economy/policy/oecd-proposal-on-taxing-mnes-to-benefit-countries-like-india-experts/articleshow/71564245.cms?from=mdr.

system. The solution to this problem will only be addressed through Tax treaties and Domestic laws in compliance with the approach mentioned above. Tax treaties will ensure that there is consensus between the parties to double taxation requirements.[30] Domestic laws will ensure that the parties know their negotiating terms while the decision under the treaties are being taken into consideration.

7. CONCLUSION

In conclusion, the author suggests that the OECD 'Unified Approach' should be accepted by majority of the jurisdictions for the prevalence of uniformity of the tax systems across the globe. The Unified Approach will address the problems related to business presence and activities without physical presence as well as determine the places to pay taxes and the basis to charge tax. A consensus-based solution which is applicable to the entire globe including maximum parts of the world which are involved in the digital space will not only provide a fair solution to the tax payers, but also maximise profits and corresponding taxing rights for the administration. Additionally, the countries which are still to be completely digitalised must also be encouraged to take up the unified tax regime because of the inevitable nature of digitalisation. The traditional concepts of economics must have to be contemplated upon and the countries must join hands in order to create an environment for international digital tax laws to co-exist with national tax laws.

The author suggests that the digital economy needs to be separated from the basic tax system as it is a dynamic platform and the innovation in tax strategies will be facilitated by this regime. A uniform tax arrangement must be followed by jurisdictions across the world. On one hand, it is difficult to bring such a consensus in a short period, whereas on the other hand, it is absolutely necessary that these solutions are put forth as soon as possible considering the rapid pace of digitalisation.

[30] *Why you should be aware of double tax avoidance treaties?*, (June 17, 2020), https://economictimes.indiatimes.com/why-you-should-be-aware-of-double-tax-avoidance treaties/tetrapak_show/70143405.cms.

The digital advertisement tax is an effective and efficient solution to the diversion of wealth. Market giants must be made responsible for the amount of revenue they generate from the population. The tax regulators are struggling with designing the appropriate way to tax the innovative advertising business models based on digital space. The international authorities must also pave way and suggest a uniform way to tax digital advertisements. The Inclusive Framework by OECD must allow space for such a digital advertisement tax. With the revolutionising technological industry, the world must be prepared with a healthy set of regulations which facilitate the ever-expanding requirements of change. As this ever-transforming industry advances virtually, the law must be prepared for the challenges it brings along with the technological promotion.

ANOTHER PRISONERS' DILEMMA: VOTING RIGHTS OF THE INCARCERATED

Shivangi Gangwar[1]

1. INTRODUCTION

Prisoner rights usually take one's attention towards the field of criminal law, constitutional law and human rights. Add voting rights to the mixture, and the result invariably falls in the exclusive domain of human rights, and thus by natural implication, constitutional law. Law and economics is an emerging field of analysis in India, and the purpose of this Short Note is to use this specific lens to analyse the question of voting rights of prisoners. While the author has undertaken a limited analysis of constitutional court decisions from other countries, the scope of this Short Note is limited to the Indian policy of disenfranchisement of detainees.

2. JUDICIAL TREATMENT OF THE PRISONERS' RIGHT TO VOTE

The Supreme Court decision in *Anukul Chandra Pradhan v. Union of India*[2], one of the only judgments in India, and very few in the world, which considered this issue. Under scrutiny in this writ petition was s. 62(5)[3] of the Representation of the Peoples Act which, barred those persons from voting who were either in lawful judicial or police custody. The bench, headed by Verma, J. (then Chief Justice of India) ruled that "*the classification of persons in and out of prison separately is reasonable. Restriction on voting of a person in prison result automatically*

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[2] Anukul Chandra Pradhan v. Union of India, AIR 1997 SC 2814.
[3] 62. Right to vote—(1) No person who is not, and except as expressly provided by this Act, every person who is, for the time being entered in the electoral roll of any constituency shall be entitled to vote in that constituency.
(2) No person shall vote at an election in any constituency if he is subject to any of the disqualifications referred to in section 16 of the Representation of the People Act, 1950 (43 of 1950).
(3) No person shall vote at a general election in more than one constituency of the same class, and if a person votes in more than one such constituency, his votes in all such constituencies shall be void.
(4) No person shall at any election vote in the same constituency more than once, notwithstanding that his name may have been registered in the electoral roll for the constituency more than once, and if he does so vote, all his votes in that constituency shall be void.
(5) No person shall vote at any election if he is confined in a prison, whether under a sentence of imprisonment or transportation or otherwise, or is in the lawful custody of the police: Provided that nothing in this sub-section shall apply to a person subjected to preventive detention under any law for the time being in force.
(6) Nothing contained in sub-sections (3) and (4) shall apply to a person who has been authorised to vote as proxy for an elector under this Act in so far as he votes as a proxy for such elector.

from his confinement as a logical consequence of imprisonment…In view of the restriction on movement of a prisoner, he cannot claim that he should be provided the facility to go and vote. Moreover, if the object is to keep persons with criminal background away from the election scene, a provision imposing a restriction on a prisoner to vote cannot be called unreasonable".[4] Permitting every person in prison to vote will require unnecessary allocation of scarce state resources. Moreover, since the right to vote is only a statutory right, it is open to the legislature to limit it. These limitations do not have the pass the test of reasonableness that similar restrictions on the exercise of fundamental rights would have to.

This decision is one of the few decisions that undertook an economic analysis of the impugned policy, albeit in a minimal manner. While the primary reason for upholding the constitutionality was that it did not violate article 14 of the Constitution of India, a secondary argument used by the Court was that of a scarcity of resources. The Court did not develop this analysis any further.

This decision was taken in the year 1997, and in the intervening twenty-odd years, much has changed. Several jurisdictions have lifted, either partially or wholly, this ban on prisoners voting. In 2002 the Supreme Court of Canada ruled in *Sauvé v. Canada (Chief Electoral Officer)*[5] that legislation that denied prisoners serving a sentence of two or more years the right to vote violated the Canadian Charter of Rights and Freedoms. This Court did look into the economic reasons for allowing enfranchisement of prisoners. McLachlin C.J. noted that disenfranchisement does not deter crime; it in fact "imposes negative costs on prisoners and on the penal system".[6]

In *Hirst v. United Kingdom*[7] the European Court of Human Rights held that United Kingdom's disenfranchising of all convicted prisoners was violative of article 3 of Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms. The Court discussed the *Sauvé* decision at length but did not add to the economic analysis of the disenfranchisement policy.

[4] *Supra* note 1, ¶8.
[5] Sauvé v. Canada (Chief Electoral Officer), [2002] 3 SCR 519.
[6] *Ibid* at ¶59.
[7] Hirst v. United Kingdom, [2005] ECHR 681.

The High Court of Australia considered this question in *Roach v. Electoral Commissioner*[8]. The amended Commonwealth Act prohibited anyone serving a sentence of imprisonment from voting, while prior to the 2006 amendment, this disqualification was limited to persons serving a sentence of three years or longer. The Court held that a blanket ban on voting by all convicted persons was unconstitutional, but it was permissible to draw the line at shorter prison terms. While extensive reference was made to the *Sauvé* and *Hirst* decisions, the High Court did not undertake any economic analysis of the policy.

Neighbouring New Zealand also dealt with the question of disenfranchisement of all prisoners in the case of *Taylor v. Attorney-General of New Zealand.* [9] The impugned provision was held in breach of guaranteed fundamental rights. While this Court also referred to the *Sauvé* and *Hirst* decisions, it focussed its analysis on the declaration of inconsistency and remedies arising from breach of fundamental rights, rather than taking an economic approach to the question.

It is thus apparent that constitutional courts over the world have rarely delved into an in-depth economic analysis of the question of disenfranchisement of prisoners. They have not moved beyond the usual infringement of equality investigation of the issue.

3. IS DISENFRANCHISEMENT OF PRISONERS EFFICIENT?

Economists use rational choice to navigate this world of limited resources, and unlimited human wants. The fundamental principles that underlie a law and economic analysis are opportunity cost, the law of demand and supply, equilibrium and the propensity of resources to move towards their most valuable use.[10] This Short Note will use the usual tools available in an economist's toolbox to answer this question. The analysis will centre itself around three axes: cost-benefit analysis, risk aversion and externalities.

[8] Roach v. Electoral Commissioner, [2007] HCA 43.
[9] Taylor v. Attorney-General of New Zealand, [2015] NZHC 1706.
[10] RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 5 (8th ed. 2010).

3.1 How much does Crime Cost?

Question 1: When does a rational human being commit a crime?
Answer: When the expected benefits from committing the crime outweigh its expected costs.[11]

Question 2: How do we prevent rational human beings from committing crimes?
Answer: By making it more costly for the rational human being to do so, so that s/he is worse off.[12]

Though we can be rest assured that no potential criminal sits down with paper and pencil to do a cost-benefit analysis before doing a socially undesirable act, these calculations are presumed to inform all our actions. The objective behind punishment is to deter criminal activity by increasing the costs and decreasing the benefits of said activity. Punishment in India usually takes the form of either monetary fines or prison sentences or both. This Short Note will only be examining prison sentences. Nonetheless, not all persons found guilty of an offence are disenfranchised. The loss of voting rights operates only on those who are in lawful custody for any reason[13], whether as convicts serving a sentence, or undertrials unable to furnish bail or even people who are in police custody during investigation, before the commencement of trial.[14] Persons being detained preventively, or those convicted and sentenced but released on bail, do not lose the right to vote.

Imprisonment imposes various private and social costs, alongside reducing the prisoner's human capital.[15] The question to consider here is whether disenfranchising prisoners and detainees is an efficient way of increasing the private costs of committing crimes?

Voting is not a compulsory requirement in India. The right to vote is not a fundamental right, and the Supreme Court thus far has been loath to read it into Part III of the Indian Constitution. In 1982, the Supreme Court ruled that the right to vote is merely a statutory right.[16] This was

[11] *Ibid*, at 278.
[12] *Id.* at 280.
[13] *Supra* note 1, ¶6.
[14] *Supra* note 1, ¶3.
[15] *Supra* note 9, at 284.
[16] Jyoti Basu v. Debi Ghoshal, AIR 1982 SC 983, ¶9.

later reaffirmed in the landmark decision of *Union of India v. People's Union of Civil Liberties*.[17] Since the right to vote is neither a right nor a duty, will the loss of such a right make any person worse off?

The author submits that the loss of the right to vote does not impose a cost on the potential criminal. In traditional literature, voting by itself is often seen as an inefficient exercise from a rational individual's perspective. Anthony Downs' seminal work[18] shone a light on this paradox of voting. The costs of voting outweigh the benefits since one's vote is meaningless unless it is the tiebreaker vote, the probability of which happening is low.

Add to this that fact that India is a country where voting culture has not gained much ground. The recent General Elections saw a voter turnout of 67.4%[19], which was celebrated for being the highest ever turnout in independent India.[20] Is this figure indicative of voter apathy? The answer changes depending on whom one asks. This author believes that a combination of the two factors (the paradox of voting and absence of voting culture) leads to the reasonable conclusion that the right to vote is not one valued by the rational potential criminal. For this reason, one cannot consider its deprivation as a form of punishment meted out for committing a crime. Thus, its loss does not operate as a private cost.

Of the two kinds of punishment used in India, prison sentences reduce the criminal's non-monetary wealth by placing restrictions on movement, association, bodily integrity, right to vote, and the like. It is not possible to create private costs of such kind without destroying wealth, which necessarily converts them into social costs too.[21] As argued earlier, the loss of the right to vote does not impose private costs on potential criminals. However, not allowing

[17] Union of India v. People's Union of Civil Liberties, (2013) 10 SCC 1.
[18] ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957).
[19] *Highlights*, ELECTION COMMISSION OF INDIA (Oct. 11, 2019), https://eci.gov.in/files/file/10991-2-highlights.
[20] See generally Gilles Verniers, *Verdict 2019 in Charts and Maps: More Voters Turned out than ever before, More Parties Contested*, SCROLL.IN (May 28, 2019, 12:30 PM), https://scroll.in/article/924965/verdict-2019-in-charts-and-maps-more-voters-turned-out-than-ever-before-more-parties-contested; *2019 Poll Records the Highest-ever Turnout of 67.47%*, THE HINDU (May 26, 2019, 12:52 AM), https://www.thehindu.com/elections/lok-sabha-2019/2019-poll-records-the-highest-ever-turnout-of-6747/article27250281.ece.
[21] Peter N. Salib, *Why Prison?: An Economic Critique*, 22 BERKELEY J. CRIM. L. 111, 122 (2017). (hereinafter "SALIB")

prisoners to vote imposes a tremendous social cost. The legitimacy of a constitutional democracy is tied with the idea of allowing the maximum number of people to exercise their choice. The more the number of individuals allowed to freely exercise their choice, the more representative that choice is seen to be. Not allowing prisoners to vote results in a loss to society because a sizeable chunk of the population is disallowed from exercising their choice to elect representatives that will later form the body that governs them.

Let us consider the right to vote as a good that one can purchase in the marketplace. Since it is a public good, whose use is non-excludable and non-rivalrous, it does not matter who has been given the right to vote by the state and who has not, because those who value it will be able to purchase it. Let us imagine an individual who is made worse off by losing their right to vote upon imprisonment. Such an individual will either post bail or bribe the police or judge to ensure that they are not incarcerated and thus do not lose their right to vote. In effect, the bail amount or the bribe becomes the price at which this individual buys the right to vote. In a society where the right to vote is supposedly free, the reality of specific individuals buying this right for a price imposes its own social costs.

Thus, not only is the loss of the vote an inefficient method of deterrence but also it results in a substantial social cost. Since society should buy less of any form of punishment that is less effective[22], enfranchising prisoners would be the rational thing to do.

3.2 Risk Aversion and Uncertainty

As already established, any rational potential criminal will try to lower the costs of committing a crime, while also maximising the benefit that accrues from said crime. S/he will also attempt to avoid losses more than making gains. The question that arises here is whether the loss of voting rights while incarcerated will deter a potential criminal?

The author submits that it will not, for the simple reason that the right to vote is not a highly valued right, unlike the right to freedom of movement or association, both of which are also curtailed as a consequence of imprisonment. We must not fall in the trap of mirror imaging in

[22] *Supra* note 9, at 297.

the course of this analysis. As free individuals, we value our right to vote and participate in a vibrant democracy. It is an essential aspect of experiencing freedom in all its senses, and the loss of the right to vote acts as a real deprivation for us. However, we cannot assume that others attach the same importance to the right to vote as we do. When the right to life and liberty is at stake, the right to vote understandably takes a back seat. A prisoner will value the loss of freedom of movement and association more than the loss of freedom to vote.

It is well established that it is the probability of conviction, and not the punishment once convicted, that deters potential criminals more.[23] While deciding whether or not to commit a crime, the fact that one will not be able to vote if one is caught and sentenced, will not influence the decision of the potential criminal one way or another. As such, it will not deter a potential criminal for committing the crime. It will also not provide the potential criminal with disincentives to conceal the crime once committed.

3.3 Perverse Incentives

Disenfranchisement of persons being criminally sanctioned does not operate uniformly. It only affects those who are in police or judicial custody. An accused out on bail, a convict on parole, and a preventive detenue are treated on par with each other but differently from a suspect in police custody, a prisoner serving a sentence, or an undertrial in judicial custody. This can give rise to incentives to pack the jails with people whom one does not want voting.

Any Indian citizen above the age of eighteen years is allowed to register themselves as voters unless they are of unsound mind or have been convicted of corrupt practices or electoral offences.[24] This implies that once a person (let us call them V) has successfully registered as a voter, only these two factors will prevent V from exercising their right to vote. In that case, what are the options in front of someone (let us call them N) who does not want V to vote?

[23] Gary S. Becker, *Crime and Punishment: An Economic Approach*, J. POLITICAL ECON. 169, 178 (1968).
[24] The Representation of the People Act, 1950, § 16, No. 43, Acts of Parliament, 1950 (India).

N can directly negotiate with V, pay V a sum of money in return for V not voting, and buy from them their choice to vote. Let us assume V does not agree to sell their vote. N can then convince/manipulate a court of law into declaring V of unsound mind, or an offender under the concerned corruption and electoral laws, and thus have V disqualified from voting. Admittedly, the first option is less costly than the second. Another option is that N get V detained in either police or judicial custody and thus successfully disenfranchise them. This is a costlier option than negotiating with V, but a less costly option than having V declared unsound or a corrupt/electoral malpractice offender.

This is not a fantastical thought experiment picked out of a dystopian novel. During the Emergency imposed by the Indira Gandhi government in 1975, thousands of ordinary citizens were arrested and detained under the Maintenance of Internal Security Act, 1971. Many of these were members of the opposition parties.[25] Since it has happened before, what is to say it cannot happen again? The current status of disenfranchisement of prisoners also incentivises political parties to pack the prisons with their opponents, so that the number of their supporters is higher than the number their challengers, ensuring an electoral decision in their favour.

4. A PUBLIC CHOICE ANALYSIS

Much has been written about the inhumane treatment meted out to the incarcerated population. There have been several Public Interest Litigations petitions as well as Supreme Court decisions[26] which have tried to improve the situation of those languishing in Indian prisons today. Notable amongst these are exertions by the Supreme Court to reduce the number of

[25] KRISTIN VICTORIA MAGISTRELLI PLYS, BREWING RESISTANCE: INDIAN COFFEE HOUSE AND THE EMERGENCY IN POSTCOLONIAL INDIA 145-8 (2020).

[26] *See*, for example, *Prem Shankar Shukla v. Delhi Administration*, AIR 1980 SC 1535, which outlawed handcuffing of prisoners; *Sunil Batra v. Delhi Administration*, 1978 CriLJ 1741, which held solitary confinement to be unconstitutional; *D. K. Basu v. State of West Bengal*, AIR 1997 SC 610, which ruled against custodial torture; *People's Union for Democratic Right v. Union of India*, AIR 1982 SC 1473, which held that prisoners are entitled to a minimum wage; and *Hussainara Khatoon v. Home Secretary, Bihar*, (1995) 5 SCC 326, which held that speedy trial was a fundamental right.

undertrial prisoners in judicial custody.[27] As is expected, such efforts are in vain. Even in the current COVID-19 pandemic, the prison population is amongst the biggest losers.[28]

The number of prisoners in India at the end of 2018[29] stood at 4,66,084. In a population of about 1366 million[30], that yields a percentage of 0.0341%. A well-used axis of analysis in public choice literature is that of lobbying or rent seeking by interest groups. Smaller groups are in a better position to lobby for favourable treatment and conditions than larger, diffuse groups.[31] The author posits that the reason behind the atrocious conditions of the prison population is that it does not vote. Thus it does not get to lobby for improved living conditions, and more efficient sentencing and punishment policies. An end of the disenfranchisement of prisoners would enable them to organise more effectively and bring about desired changes in the criminal justice system. If this group gets the right to vote, they will be able to effectively lobby the legislators and policymakers to enact policies in their favour.

Consider the US prison system. Like in India, prisoners in the US have also been disenfranchised, either partially or absolutely, by legislative action, depending on which state they are in.[32] However, unlike in India, where the state maintains prisons, for-profit private prisons are a reality in the US. Unlike the prisoners (who cannot vote), this interest group (which can vote) has very effectively lobbied US politicians and legislators to enact policies that benefit them, at the expense of the prison population.[33] If prisoners had equal voting rights

[27] See generally *'Release undertrials who served half term': SC*, HINDUSTAN TIMES (Sep. 6, 2014, 01:28 AM) https://www.hindustantimes.com/india/release-undertrials-who-served-half-term-sc/story-89tAJGywuM6MkDf3XyDOnO.html; *COVID-19: Set Up Panel to Consider Release of Prisoners on Parole, says SC to States, UTs*, THE WIRE (Mar. 24, 2020), https://thewire.in/law/covid-19-set-up-panel-to-consider-release-of-prisoners-on-parole-says-sc-to-states-uts.

[28] Sonam Saigal, *Jails turn into Hotbeds of Disease*, THE HINDU (May 25, 2020, 01:42 AM), https://www.thehindu.com/news/cities/mumbai/jails-turn-into-hotbeds-of-disease/article31666835.ece.

[29] The National Crimes Records Bureau publishes a yearly report on prison statistics. The latest report to be released was for the year 2018. *Prison Statistics India*, NATIONAL CRIME RECORDS BUREAU (Mar. 3, 2020), https://ncrb.gov.in/prison-statistics-india.

[30] *Population of India*, STATISTICS TIMES (May 17, 2020), http://statisticstimes.com/demographics/population-of-india.php.

[31] MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965).

[32] Daniel A. Gross, *Why Shouldn't Prisoners be Voters?*, THE NEW YORKER (Feb. 27, 2020), https://www.newyorker.com/news/the-future-of-democracy/why-shouldnt-prisoners-be-voters.

[33] Michael Cohen, *How for-profit prisons have become the biggest lobby no one is talking about*, THE WASHINGTON POST (Apr. 28, 2015, 03:30 PM),

with non-prisoners, they would be in a better position to counter the dangers posed by the prison-industrial complex.

It is easy to dismiss this argument as a scare tactic since Indian prisons are currently state-run. However, arguments have been made in favour of privatisation of Indian prisons, by high-ranking public officials such as the CEO of Niti Aayog[34], by lawyers[35], by students of the premier Indian law schools[36], among others. Given the trend of privatisation of the Indian public sector[37], whether fiscally necessary or not[38], Indian prisons remaining public is not a foregone conclusion.

5. CONCLUSION

This Short Note aimed to indulge in an economic analysis of the policy to disenfranchise prisoners and others who are in police custody. We see that this policy does not succeed in optimally deterring potential criminals. It imposes societal costs and not enough private costs and thus cannot be considered an efficient form of punishment.

An economic argument raised against allowing prisoners to vote is in the increased costs of setting up polling booths in prisons and deployment of police forces.[39] This is a disingenuous argument. We live in a country where polling officials have trekked close to 500 km to ensure that one single voter in a remote part of Arunachal Pradesh can cast her single vote.[40] If it is

https://www.washingtonpost.com/posteverything/wp/2015/04/28/how-for-profit-prisons-have-become-the-biggest-lobby-no-one-is-talking-about.

[34] *Hand over schools, colleges, jails to private sector: Amitabh Kant*, THE HINDU (Jul. 27, 2017, 03:26 AM) https://timesofindia.indiatimes.com/india/hand-over-schools-colleges-jails-to-private-sector-amitabh-kant/articleshow/59782227.cms.

[35] Sanjeeb Panigrahi, *Revitalising Indian prisons*, DECCAN HERALD (Oct. 23, 2017, 09:50 PM) https://www.deccanherald.com/content/639051/revitalising-indian-prisons.html.

[36] Yagnesh Sharma, *Privatization of Prisons and the Constitution in India*, THE CRIMINAL LAW BLOG (Feb. 14, 2020), https://criminallawstudiesnluj.wordpress.com/2020/02/14/privatization-of-prisons-and-the-constitution-in-india.

[37] Asit Ranjan Mishra, *₹20 trillion stimulus: Govt to privatise public sector entities*, LIVEMINT (May 17, 2020, 12:49 PM), https://www.livemint.com/news/india/rs-20-trillion-stimulus-govt-to-privatise-public-sector-entities-11589699168923.html.

[38] V. Ranganathan & Bhamy Shenoy, *Weighing in on the public sector privatisation debate*, THE HINDU (Jan. 1, 2020, 12:02 AM), https://www.thehindu.com/opinion/lead/weighing-in-on-the-public-sector-privatisation-debate/article30446194.ece.

[39] *Supra* note 1, ¶8.

[40] Preeti Soni, *A single vote for election in India comes at the cost of a 300-mile journey by six officers to the remotest jungle terrain*, BUSINESS INSIDER (Jun. 19, 2019, 03:13 PM), https://www.businessinsider.in/a-single-

possible to hold Aadhaar camps[41] and even Vipassana meditation courses[42] within prisons, surely it is possible to set up polling booths. Such polling stations will not cater only to prisoners, but also the wardens, workers, security officials and other administrative workers in the prison system, who will be travelling to another polling station in order to vote.

Prison diminishes the economic value of its inmates.[43] States have recognised this and sought to reduce social losses by allowing prisoners to work. Tihar Jail in New Delhi runs a restaurant staffed by its inmates[44], while also enabling prisoners to make and sell baked goods, clothes, furniture and other products in the marketplace.[45] It is only rational that this social loss be reduced further and prisoners enfranchised.

vote-for-election-in-india-comes-at-the-cost-of-a-300-mile-journey-by-six-officers-to-the-remotest-jungle-terrain/articleshow/69855925.cms.

[41] Shankar Bennur, *Prisons Dept. to issue Aadhaar cards to inmates across State*, THE HINDU (Nov. 7, 2014, 01:37 PM), https://www.thehindu.com/news/national/karnataka/prisons-dept-to-issue-aadhaar-cards-to-inmates-across-state/article6571496.ece.

[42] *Vipassana in Prisons*, VIPASSANA RESEARCH INSTITUTE, https://www.vridhamma.org/Vipassana-and-Prisons (last visited Jun. 6, 2020).

[43] SALIB, *supra* note 21, at 115.

[44] Aditi Malhotra, *Delhi's Infamous Tihar Jail Opens Restaurant for Public*, WALL ST. J. (Jul. 18, 2014, 02:37 PM), https://blogs.wsj.com/indiarealtime/2014/07/18/delhis-infamous-tihar-jail-opens-a-restaurant-for-the-public.

[45] TJ'S A TIHAR JAIL INITIATIVE, http://tihartj.nic.in/index.asp (last visited Jun. 6, 2020).

SUBSIDIES TO THE INDIAN SUGAR SECTOR: IN COHERENCE WITH INDIA'S WTO OBLIGATIONS?

Advik Rijul Jha[1]

1. INTRODUCTION TO RECENT DEVELOPMENTS

Recently, Brazil[2], Australia[3] and Guatemala[4] have each filed individual requests for Consultation with India at the WTO challenging the domestic support measures and export subsidies provided by India to producers of sugarcane and sugar. The countries claim that these measures are inconsistent with India's obligations under the WTO Agreement on Agriculture, the Agreement on Subsidies and Countervailing Measures and the General Agreement on Tariffs and Trade, 1994. Thailand, Costa Rica and European Union have also filed requests to join the Consultations[5] filed by Brazil, Australia and Guatemala against India. The reason that these countries have approached the WTO against policy incentives given by the Indian government to the sugar industry is that these countries are some of the largest sugar producers of the world[6] and they fear that India's sugar exports would lead to a reduction of global prices and thus leading to losses for them.

The significance of filing of the Request for Consultations is that it's the first step to initiate a WTO dispute. If the Consultations between the countries fail, Brazil, Australia and

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[2] *Australia and Brazil drag India to WTO over sugar subsidies*, Business Insider (Feb 28, 2019), *available at* https://www.businessinsider.in/australia-and-brazil-drag-india-to-wto-over-sugar subsidies/articleshow/68195623.cms.

[3] D. Ravi Kanth, *India, Australia locked in sugar trade dispute in WTO*, The Mint (Mar 8, 2019), *available at* https://www.livemint.com/industry/manufacturing/india-australia-locked-in-sugar-trade-dispute-at-wto-1552060700772.html.

[4] *Guatemala drags India to WTO's dispute mechanism over sugar subsidies*, The Mint (Mar 25, 2019) *available at* https://www.livemint.com/news/india/guatemala-drags-india-to-wto-s-dispute-mechanism-over-sugar-subsidies-1553538158287.html.

[5] *EU, Russia, Costa Rica seeks to join consultations in WTO dispute over India's sugar subsidies*, Economic Times (Apr 3, 2019), *available at* https://economictimes.indiatimes.com/news/economy/foreign-trade/eu-russia-costa-rica-seeks-to-join-consultations-in-wto-dispute-over-indias-sugar-subsidies/articleshow/68710009.cms.

[6] Suresh Gawali, *Distortions in World Sugar Trade, 38 EPW* 4513-4515 (2003), *available at* https://www.jstor.org/stable/4414181.

Guatemala can seek for a WTO Panel to be appointed to make a ruling on the WTO compatibility of the challenged measures.[7] In case of the ruling being determined against India, such a ruling being binding, India shall have to discontinue or strictly lower the benefits provided to the sugar and sugarcane industry. This can be a dampener for India which is currently sitting on a surplus production[8] and would be looking for avenues to export sugar to make a profit. Further, the international sugar trade is a colossal industry that has been operating for centuries.[9] The price of sugar impacts international markets from Europe to Asia and down into Latin America since it is an essential agricultural product with uses in many sectors and industries.[10] Thus, these countries have approached the WTO.

In this backdrop, this paper attempts to analyze the validity of the allegations levied against India with regard to violations of its WTO obligations relating to providing domestic support and export incentives to the sugar industry. The paper will commence by giving a brief synopsis of the growth of the world sugar trade over a period of time and the sensitivity of this commodity for trade. In Part II, a few significant disputes relating to sugar which have been brought to the WTO for adjudication would be discussed. In Part III, an overview of the Indian sugar industry would be given. In Part IV, the paper will look in depth at the allegations which have been brought by countries such as Brazil, Australia and Guatemala against India with regard to India's WTO obligations in the sugar industry. Part V of the paper will delve into the possible defenses which India can adopt to refute these allegations. Part VI of the paper will suggest some policy changes which need to be implemented by India to get its measures within the WTO obligations for the future.

[7] Annexure 1 provides an indicative timeline for a WTO Dispute.
[8] Jayashree Bhosale, *ISMA cuts India's 2018-19 sugar production estimate to 307 lakh tonnes*, The Economic Times (Jan 21, 2019), *available at* https://economictimes.indiatimes.com/news/economy/agriculture/isma-cuts-indias-2018-19-sugar-production-estimate-to-307-lakh-tonnes/articleshow/67622494.cms.
[9] J.H. Galloway, *The Sugarcane Industry: An Historical Geography from its origins to 1914*, CUP (1989).
[10] Vladimir P. Timoshenko and Boris C. Swerling, *The World's Sugar: Progress and Policy*, SUP (1957).

2. BRIEF HISTORY OF THE WORLD SUGAR TRADE

Sugar originated in India.[11] Sugar spread from its original habitat, to the Tigris River Valley and flourished under the rule of the Persians and Muslims.[12] Sugar continued to spread into Egypt, northern Africa, Syria, Palestine, the Mediterranean islands, and Spain.[13] The returning Crusaders in 1100 A.D. were the ones who brought sugar to Britain.[14] During the exploration age of the New World, sugar journeyed southward across the Atlantic to the Spanish West Indies, Mexico, and Brazil and beyond.[15]

Refinement process and its use in the international trade were major factors which influenced the transformation of sugar into a commodity.[16] The early fourteenth century was the first instance in history when sugar began arriving in sufficient quantities to be widely available. Christopher Columbus' second transoceanic voyage in 1493 was a significant factor in enabling sugar to flourish all across the Caribbean.[17] Further, after 1700, when Europeans had founded colonies in tropical America to produce sugar, did it appear on the world market in large enough quantities and at low enough prices for it to become a commonplace article of everyday use.

West African slaves were required to perform the refinement and trade of sugar owing to it being a labor-intensive process.[18] Slaves were brought over from West Africa and forced to work on the cultivation of sugar. Plantations were built all over the colonies and the slaves would work the plantations under extreme conditions to keep up with the growing need for sugar. As sugar became more of a hot commodity around the world, more slave labour was needed to keep up with the demands. The gruesome labour involved in the

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[11] Roy A. Balinger, *A History of Sugar Marketing through 1974*, *available at* https://www.ers.usda.gov/webdocs/publications/40532/50517_aer382a.pdf?v=0.
[12] Nadia B. Ahmad, *The International Sugar Trade and Sustainable Development: Curtailing the Sugar Rush*, 39 N.C.J. Int'l L. & Com. Reg. 675 (2014).
[13] See *supra note 11*.
[14] A.C. Hannah and Donald Spence, *The International Sugar Trade* (1996).
[15] See, *supra note11*.
[16] *Id.*
[17] H. Hobhouse, *Seeds of Change: Five Plants that Tranformed Mankind*, Harper & Row (1986), New York, *available at* https://hort.purdue.edu/newcrop/Hort_306/reading/Reading%2034-1.pdf.
[18] *Id.*

cultivation of sugar cane led to the death of many African slaves.[19] However the Europeans needed cheap or free labour to continue on with the vast profit they were making, so more and more slaves were brought in to work. To the Europeans, it was cheaper to bring over more African slaves than it was to better the conditions and lessen the labour of their already existing slaves.[20]

3. WHY SUGAR IS SO SENSITIVE FOR TRADE NEGOTIATION

Sugar is one of the most important commodities produced and consumed around the world. Sugar is produced in over 123 countries worldwide but over 70% of world sugar production is consumed domestically, thus leaving only the residue to be traded in the world.[21] Trade restrictions have had an adverse impact resulting in volatility in the world market due to the amount of freely traded sugar being miniscule.[22]

Further, the world sugar market has undergone significant structural changes over the past decade still it remains heavily distorted due to protectionism policy by various governments. Changes in domestic support policies and border measures, such as the imposition of export restrictions, have a major impact on trade volumes and international prices. Other uncertainties like saturated demand from developed countries also affecting the market. The sensitivity of sugar in world trade is also influenced by changes in oil and energy prices and their implications on the share of sugarcane for ethanol production to a large extent.[23]

4. HISTORY OF SUGAR SENSITIVITY IN INTERNATIONAL TRADE REGULATION

[19] *Id.*
[20] *Sugar and Slavery in an age of Global Transformation*, *available at* https://www.sunypress.edu/pdf/63296.pdf.
[21] *The Indian Sugar Industry: Sector Roadmap 2017* by KPMG, *available at* http://www.in.kpmg.com/pdf/indian_sugar_industry.pdf.
[22] Deokate Tai Balasaheb, *India's Sugar Trade: A fresh look*, Indira Gandhi Institute of Development Research (2013) *available at* http://www.igidr.ac.in/pdf/publication/WP-2013-024.pdf.
[23] *Id.*

Sugar Disputes in the GATT era –

US Sugar Waiver:

The case arose in regard to restrictions imposed on the import of agricultural products including sugar by the US. The complainant was the erstwhile EEC which is now covered under the European Union. According to a US federal legislation, the President could order restrictions to be put on imports of agricultural products which materially affected agricultural programs or substantially reduced the amount of the product which could be processed in the US. In pursuance of this legislation, the USA in 1987 put restrictions on the imports of sugar which were also supported by a waiver which they had signed in 1955 under the GATT. Owing to the impact that such a policy would have on the sugar market and specifically to the EEC, the GATT was approached to declare the measures applied by the United States on imports of sugar and sugar-containing products as inconsistent with the General Agreement and that accordingly they impaired benefits accruing to the Community. The panel found that the quota on imports of raw and refined sugar imposed by the United States was inconsistent with the General Agreement but owing to the existence of the waiver of 1955, US was not in breach of its obligations.[24]

Earlier Sugar Disputes in the WTO -

The EC Sugar Dispute:

In September 2004, a WTO Panel requested by Brazil, Australia, and Thailand concerning EU export subsidies for sugar found against the EU, a result upheld by the WTO Appellate Body in April 2005.[25]

[24]UNITED STATES - RESTRICTIONS ON THE IMPORTATION OF SUGAR AND SUGAR-CONTAINING PRODUCTS APPLIED UNDER THE 1955 WAIVER AND UNDER THE HEADNOTE TO THE SCHEDULE OF TARIFF CONCESSIONS, *available at* http://www.worldtradelaw.net/reports/gattpanels/ussugarwaiver.pdf.download.

[25] Stephen J. Powell & Andrew Schmitz, *The Cotton and Sugar Subsidies Decisions: WTO's Dispute Settlement System Rebalances the Agreement on Agriculture*, 10 Drake J. Agric. L. 287 (2005), *available at* http://scholarship.law.ufl.edu/facultypub/27.

The measures which were the bone of contention between the parties were C sugar and ACP/India re-exports. The EC sugar regime had established production quotas i.e. made two categories of sugar, known as 'A sugar' and 'B sugar'. These quotas were put in place to signify the maximum amounts of sugar which could be sold within the EC in a year. 'C sugar' was the nomenclature ascribed to any surplus sugar which was produced which had to be mandatorily exported. A host of domestic support measures were in place including direct export subsidies for domestic prices of 'A sugar' and 'B sugar'. However, no such support was extended to exporters of 'C sugar'. The argument put forth by the complainants was that such a policy led to an indirect benefit to 'C sugar' through a cross-subsidization of A and B sugar. Moving to the second issue i.e. ACP/India re-exports, under the Sugar Protocol of the Cotonou Agreement, preferential access was granted by the EU to 1.3 million tonnes of sugar from African, Caribbean, and Pacific (ACP) countries. EU producers obtained export subsidies to re-export amounts of sugar equivalent to the imports of ACP-origin sugar. An arrangement akin to this was also in place with India. It was contended by the complainants that ACP/India re-exports should have been included in its calculation of total subsidized exports.[26]

EU subsidies on sugar exports were held by the Panel and AB reports to be beyond the level formally notified to the WTO and were thus in violation of the WTO Agreement on Agriculture. In the Panel's opinion, EU's WTO export-subsidy limits should take into its calculations both C sugar exports and ACP/ India re-exports. The Panel further observed that C-sugar exports benefited from a cross-subsidization from A and B quota sugar, effectively receiving an export subsidy. In conclusion it was held that '*A, B, or C sugar are part of the same line of production which essentially means that the EC sugar regime provides an advantage to its sugar producers i.e. allows them to produce and export C sugar at below total cost of production.*'[27]

[26] Bernard Hoekman and Robert Howse, *EC–Sugar*, World Trade Rev 149-178 (2008).
[27] Paola Conconi, *EC - Export Subsidies on Sugar Prepared for the ALI Project on the Case Law of the WTO*, 7 World Trade Rev. 179 (2008).

China –

A request for consultation had been filed by Brazil against China with the WTO on 16th of October 2018. Brazil had questioned the legitimacy of measures taken by China with regard to safeguard measure imposed on imported sugar, China's administration of its tariff-rate quota for sugar and China's import licensing system for out-of-quota sugar.[28] According to Brazil, these measures are inconsistent with China's obligations under the WTO framework.

China's safeguard measure on sugar takes the form of an additional *ad valorem* duty of 45% for the first year, followed by 40% in the second year and 35% in the third year of its implementation. The safeguard duty applies to imports outside the existing TRQ for sugar. On its accession to the WTO, a TRQ of 1,945,000 tons of sugar, covering raw and refined sugar was established by China. The in-quota rate for this sugar was 15%. The out-of-quota rate has been significantly increased by imposition of this sugar safeguard from its earlier benchmark of 50%. Further, exemptions from these safeguard measures had been extended to a number of developing countries which have now been revoked effective from August 2018.

The administration of its tariff rate quota for sugar was the second measure by China which had been challenged at the WTO. A TRQ to permit the importation of specified volumes of sugar at lower in-quota duty rates is provided by China's Schedule of Concessions and Commitments on Goods. This administration of the TRQ by China for sugar is alleged to be inconsistent with its WTO obligations.

China's Automatic Import Licensing System for Sugar is the third measure under challenge. With respect to imports of sugar not covered by the TRQ, the Ministry of Commerce

[28] Tom Miles, *Brazil launches trade dispute against China over sugar: WTO*, Reuters (Oct 22, 2018), *available at* https://www.reuters.com/article/us-china-brazil/brazil-launches-trade-dispute-against-china-over-sugar-wto-idUSKCN1MW178.

requires that importers and refiners obtain an import license, which China labels as an "automatic" import license. However, Ministry of Commerce provides verbal instructions to importers and refiners, informing each of them of the maximum amount of sugar that they will be permitted to import outside of the TRQ, before such requests for import licenses are made. Importers and refiners make their import requests based on such instructions, and they refrain from requesting authorization to import sugar above the pre-determined amounts. Approval is granted only up to the maximum level approved by Ministry of Commerce. China makes this restriction effective through import licenses, which are granted only if the request presented by the importer does not exceed the amount set by Ministry of Commerce. Importation of out-of-quota sugar is being restricted by China through this policy.[29] These measures of China have been challenged in the WTO and this dispute is currently in the consultation phase.

Thailand -

A request for consultation had been filed by Brazil against Thailand with the WTO in 2016. Thailand imposes a quota system that limits the quantity of sugar sold in the domestic market and imposes price controls on ex-factory, wholesale, and retail sales of cane and sugar in the country. Thailand's quota system guarantees a high price for the sugar produced for domestic consumption (Quota A). Sugar produced in excess of this quota cannot be sold internally and must be exported (Quotas B and C). Thailand's quota and price control system cross-subsidizes exports of Quota B and Quota C sugar which is inconsistent with WTO rules. Moreover, Thailand supplements the fixed prices for cane sales to sugar mills with additional payments to cane growers. Because Thailand has not specified any export subsidy commitments in Section II of Part IV of its Schedule, Brazil was of the view that Thailand's quota and price control system and its supplementary payments to cane growers constitute export subsidies for sugar in violation of Thailand's obligations under the

[29] BRAZIL INITIATES WTO DISPUTE COMPLAINT AGAINST CHINESE MEASURES ON SUGAR IMPORTS, *available at* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds568_e.htm.

Agreement on Agriculture.[30] Subsidies were also being provided by Thailand to convert agricultural land from rice to cane production and to develop additional capacity to manufacture cane into sugar which constituted prohibited and actionable subsidies under the Agreement on Subsidies and Countervailing Measures. It was further alleged that Thailand had exceeded its *de minimis* level through policy measures such as domestic support for cane and sugar in the form of price support, supplementary payments to cane growers, and incentives to convert land used for rice production to cane production and to develop additional capacity to manufacture cane into sugar. The allegation put forth by Brazil was that since Thailand's domestic support for the sugar sector alone exceeds its total AMS[31] commitment level specified in its Schedule, Thailand violates its obligations under the Agreement on Agriculture.[32] These measures of Thailand have been challenged in the WTO and this dispute is currently in the consultation phase.

Regional Sugar Disputes-

Canada and USA:

Canada requested consultations with the USA regarding import restraints imposed by them on sugar imported from Canada. Canada was concerned that United States implementation of the WTO Agreement on Agriculture prejudiced Canadian sugar exports to the United States, thus resulting in a violation of both the NAFTA and the WTO agreements. Consultations were initially unsuccessful, and the matter was referred to the Free Trade Commission. In a related matter, Canadian sugar producers filed an antidumping action against refined sugar from the United States, which resulted in the imposition of antidumping duties. Specifically, the binational panel convened under NAFTA Chapter 19 affirmed the antidumping determination upon remand. The allegation that the filing of the antidumping action would prevent the continuation of bilateral consultations was denied by

[30] *Id.*
[31] *Id.*
[32] THAILAND – SUBSIDIES CONCERNING SUGAR, *available at* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds507_e.htm.

Canadian government officials before Parliament. However, finally Canada negotiated a quota agreement with the United States.[33]

Chile and Colombia:

Colombia requested consultations with Chile in April 2001 concerning the definitive safeguard measures imposed by Chile in respect of a number of agricultural products, including sugar. Another measure which was challenged pertained to Chile's decision of 14 March 2001 not to recognize Colombia's substantial interest to be consulted with respect to the modification of concessions regarding, *inter alia*, refined sugar.[34] Chile had notified its intention to modify these concessions pursuant to Article XXVIII of GATT 1994 in November of 2001. According to Colombia, the above measures were inconsistent with Chile's obligations under WTO. The Chilean measures, taken together or individually, appear to nullify and impair benefits accruing to Colombia as per their submissions. This dispute has been in the consultation stage.

USA and Mexico:

American sugar refiners had complained that Mexico was exporting low-cost refined sugar to the United States and limiting exports of raw sugar to be refined in the United States. An agreement was signed which was intended to prevent Mexico from dumping cheap sugar into the U.S. market thus leading to culmination of this dispute.[35]

Uganda and Kenya:

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[33] David A. Gantz, *Dispute Settlement Under the NAFTA and the WTO: Choice of Forum Opportunities and Risks for the NAFTA Parties*, 14 Am. Univ. Int. Law Rev., *available at* https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1328&context=auilr.

[34] CHILE: SAFEGUARD MEASURES AND MODIFICATION OF SCHEDULES REGARDING SUGAR, *available at* https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(@Symbol=%20wt/ds230/*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#.

[35] Adriana Barrera, *Exclusive: U.S.-Mexico sugar deal struck ahead of NAFTA talks; industry divided*, Reuters (June 5, 2017), *available at* https://www.reuters.com/article/us-usa-trade-mexico-idUSKBN18W1YK.

Dispute had arisen regarding the sugar market between Uganda and Kenya.[36] Since 2015, Uganda and Kenya nearly severed ties because Kenya did not believe that its neighbour had the capacity to export sugar. Kenya had not required to import sugar from Uganda till last year owing to having sufficient domestic production and import from other producers. However, this year the situation has been different and thus Kenya has imported sugar from Uganda and in the process accepting its neighbour to be a dominant player in the sugar sector in the region.

NAFTA:

North American Free Trade Agreement (NAFTA) between USA and Mexico has provided Mexico with tariff-free sugar exports into the US market since January 1, 2008. About 1.3 mn. tons of sugar per year is exported by Mexico to USA.[37]

DR-CAFTA:

The Dominican Republic-Central American Free Trade Agreement (DR-CAFTA) also includes attractive sugar provisions that provide Dominican Republic to export 0.15 mn. tons p.a. to Central America.[38]

Indonesia:

Indonesia allows raw sugar imports from Thailand and Australia at a concessional duty of 5% under ASEAN/bi-lateral agreement. For others, import duty of about 35 USD/ton is leviable. About 3.5 mn. tons of sugar have been exported by Thailand and 0.5 mn. tons by Australia in 2017-18 to Indonesia. Indonesia imports 1200 and above ICUMSA level of raw sugar, which is not an international standard, and benefits selected countries/preferred nations.[39]

[36] UGANDA WINS SUGAR DISPUTE AGAINST KENYA, TAARIFA (Mar 29, 2019), *available at* https://taarifa.rw/2019/03/29/uganda-wins-sugar-dispute-against-kenya/.
[37] INDIAN SUGAR MILLS ASSOCIATION HANDBOOK 2018-19.
[38] *Id.*
[39] *Id.*

Japan:

Japan allows duty free imports to Thailand and Australia only. Japan also has certain quality specifications called J-spec (over 6000 ICUMSA) which is generally produced by Thailand only. Australia exported 0.9 mn. tons of sugar and Thailand exported 0.4 mn. tons to Japan in 2017-18. Other countries are not able to import anything.[40]

KAFTA:

There is an agreement between Korea and Australia namely, Korea-Australia Free Trade Agreement (KAFTA) under which there is no import tariff for raw sugar (particular specification). Australia exports about 1.5 mn. tons p.a. to Korea. Thailand also enjoys similar benefits, as per which they exported 0.5 mn. tons to Korea in 2017-18 SS.[41]

China:

China imports (duty free) around 0.4 mn. tons from Cuba under an bi-lateral agreement, for which a TRQ (quota) is reserved for them.[42]

Malaysia:

Malaysia imports sugar under an import licensing arrangement managed by the Malaysian Ministry of International Trade and Industry (MITI). Imports are partly under long term sugar contracts (LTCs) and partly spot sales. LTCs are negotiated by MITI and for a number of years, Malaysia has maintained LTCs with Australia, Thailand and Fiji. Australia and Thailand together exported about 0.6 mn. tons in 2017-18.[43]

5. INDIA, SUGAR AND WTO COMPLIANCE

[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.*

Sugar Production and Trade – An Indian context-

India has been a major producer of sugar over the last few years but has still failed to capture a reasonable chunk of the world sugar market for itself. India's sugar exports are not more than 3 to 4% of the total quantum of world sugar exports (Around 2 mn. tons have been exported by India in 2018-19 and 6 -7 mn. tons in the current year).[44] The higher support provided to the sugar industry by EU and other countries has enabled them to export sugar at a comparatively lower rate in spite of them having considerably higher costs of production than India.[45]

In India, both sugar and sugarcane are in the list of essential commodities, under the purview of the Essential Commodities Act, 1956. Consequently, both production and trade have been influenced by both government controls and policy.[46] India being the largest consumer enters the international market only in years of surplus production and has not been a regular exporter. However, in recent years the introduction of new varieties has improved productivity of sugarcane and recovery of sucrose therefrom boosting sugar production.[47] Additionally, the rapid increase in the minimum support price of sugarcane (called Fair and Remunerative Price i.e. FRP) has encouraged farmers to shift to sugarcane cultivation. It is estimated that sugarcane gives the farmer almost 60-70% better returns than the alternate crops.[48] The rapid increase in sugar production resulted in India surpassing Brazil as the world's largest sugar producer in the 2017-18 sugar season at over 32 million metric tonnes. The situation was somewhat similar in 2018-19, 2019-20 and in the current 2020 -2021 sugar season.[49]

[44] *India will continue to export about 60-70 lakh tons of sugar during 2020-21 season: ISMA,* ChiniMandi.com (June 25, 2020), *available at* https://www.chinimandi.com/india-will-continue-to-export-about-60-70-lakh-tonnes-of-sugar-during-2020-21-season-isma/.
[45] See *supra note 6.*
[46] See *supra note22.*
[47] THE INDIAN SUGAR INDUSTRY: SECTOR ROADMAP 2017 by KPMG, *available at* http://www.in.kpmg.com/pdf/indian_sugar_industry.pdf.
[48] See *supra note 37.*
[49] See *supra note 44*.

By law, the sugar mills are expected to crush all the sugarcane in the area. Sugarcane, unlike other crops cannot be stored and has to be crushed immediately.[50] Farmers are also expected to be paid within 14 days. However, given the fact that crushing takes place over 4-6 months and sugar consumption is spread over the whole year, creates liquidity issues for the sugar mills. Given the small size of most land holdings[51], this has serious implications by way of agrarian unrest on the part of small and marginal farmers who have waited for a year to get paid against the crop. The situation is exacerbated in years of surplus and to reduce cane-price arrears India has to resort to exports. Given the high rate of sugarcane, and the political compulsion to increase prices year on year, our prices are uncompetitive and thus government has to step in with financial assistance in one form or the other to encourage exports.

Since 2010-11, India has been a surplus producer i.e. producing higher than domestic consumption in most years.[52] The odd year of lower production has not caused worry because of carryover stocks. However, the sudden leap in production in 2017-18 to over 32 million tonnes has resulted in closing stocks of 10.5 million tonnes and given this year's expected production of 32.22 million tonnes, the closing balance is likely to touch 15 million tonnes.[53] Consequently, this has resulted in mounting cane price arrears due to huge amounts locked in unsold sugar stocks. Over the past years the government has stepped in with policy interventions to promote exports as well as prevent domestic prices from falling in a bid to help mills clears their cane dues.[54] Thus, we have seen the creation of buffer stock, assistance on cane price payments, soft loans, transport assistance for exports and the minimum export obligation on sugar mills which must be met for receiving the above assistance.

[50] See *supra note 47.*
[51] *Id.*
[52] See *supra note 37.*
[53] *Id.*
[54] See *supra note 47.*

These measures have, allegedly led to distortions in the world market and also threaten to displace conventional exporters leading to their approaching the WTO.

General farm goods debate-

The crux of this issue lies in the general farm goods debate which has a corollary relationship with the Doha Rounds especially with regard to the agricultural sector. The Doha agreement's purpose was to boost the economic growth of developing countries. Its objective was to reduce subsidies for developed countries' agricultural industries. Food is one commodity which developed countries have the capacity to export and such aid would be reciprocated by the developing nations by opening their market to services from the developed countries. Such a policy change would also modernize these markets for the developing countries.[55]

The main issue of conflict relating to agriculture at the Doha Rounds was export subsidies and domestic support measures on agriculture[56] by USA, European Union and other advanced countries. The developing countries insisted on substantial reduction and elimination of these measures and ensuring greater market access to them in return for non-agriculture market access in their countries. The advanced countries, in particular the USA, were not willing to accede to the demand. This led to open confrontation between the USA and European Union on the one side and India, China and Brazil on the other. The little progress made in other areas were over-shadowed by this conflict and consequently, the Ministerial Meeting did not end on a positive note.[57]

Export subsidies and domestic support measures are still a roadblock for the Doha Round negotiations. As agriculture is tightly related to food security, it is a vital concern for

[55] DOHA ROUND OF TRADE TALKS, THE BALANCE, *available at* https://www.thebalance.com/what-is-the-doha-round-of-trade-talks-3306365.
[56] Alan Mathews, *Doha Negotiations on Agriculture and Future of the WTO Multilateral Trade System, available at* https://ageconsearch.umn.edu/record/160370/files/01Matthews%20-%20EAAE%20135.pdf.
[57] Fasih Uddin, *The Fate of Doha Development Agenda*, Policy Perspectives, Vol. 9, No. 2 (2012), pp. 87-96, *available at* https://www.jstor.org/stable/42922706.

developing countries.[58] It is the main reason for India providing subsidies to the agricultural sector, one of which has been challenged i.e. the sugar sector.

Another related factor for food security was discussed at the Bali Rounds which provided for exemption of measures such as expenditure on public stockholding for food security purposes from the calculation of AMS under the ambit of Green Box measures.[59] The *Bali Ministerial Decision on Public Stockholding*[60]was a step forward to achieve this objective as it allowed putting in place an '*interim mechanism' designed to regulate governmental support for 'traditional staple food crops in pursuance of public stockholding programmes for food security purposes'*.[61]

Owing to small land-holdings in India, farmers often are not able to earn a decent livelihood leading to problems like suicide and social unrest. In this backdrop, the government has to step in by providing subsidies and food stockholding to the agriculture sector which then may get them at loggerheads with fellow Member states at the WTO for breaching their WTO obligations such as the present issue which is the crux of this paper i.e. the dispute with regard to the Indian sugar sector.

6. SUBSTANCE OF CHALLENGES TO INDIA'S SUGAR AND SUGARCANE SUBSIDIES

The subsidies which have been given by the Indian government to its sugar sector during the sugar season of 2017-2018 and 2018-2019 and even earlier seasons, have been challenged by countries such as Guatemala, Australia and Brazil for being in violation of

[58] Barbara Pastori, *The Failure of the Doha Rounds (2012)*, *available at* https://tesi.luiss.it/8107/2/pastori-sintesi-2012.pdf.
[59] Anwarul Hoda, *Public Stockholdings Issue in the WTO*, ICRIER Policy Series (November 2017), *available at* http://icrier.org/pdf/Policy_Series_17.pdf.
[60] WTO, MINISTERIAL DECISION OF 07 DECEMBER, 2013 ON PUBLIC STOCKHOLDING FOR FOOD SECURITY PURPOSES, WT/MIN(13)/38 (2013), *available at* https://www.wto.org/english/tratop_e/agric_e/factsheet_agng_e.htm.
[61] Mary E. Footer, *Trade-related International Food Security and the Developing World 6(2) TRADE L. & DEV. 288 (2014)*, *available at* http://www.tradelawdevelopment.com/index.php/tld/article/viewFile/6%282%29%20TL%26D%20288%20%282014%29/215.

India's WTO commitments specifically under the Agreement on Agriculture[62], Agreement on Subsidies and Countervailing Measures[63] and the General Agreement on Trade and Tariffs, 1994[64]. The products which have been challenged separately at the WTO for subsidies provided by India are Sugarcane and Sugar which come under the ambit of "Basic Agricultural Product' and 'Agricultural Product' respectively.

The measures taken by India which have been challenged pertain to Domestic Price Support under the Agreement on Agriculture and Export Incentives dealt with under Agreement on Agriculture as well as Agreement on Subsidies and Countervailing Measures. The allegations levied on India under these will be discussed in detail in the subsequent part of the paper.

Domestic Price Support-

Brazil, Australia, and Guatemala claim that the domestic price support for sugarcane in the form of a mandatory minimum "Fair and Remunerative Price" that Indian sugar mills are required to pay sugarcane producers, *inter alia*, is inconsistent with India's obligations under the Agreement on Agriculture because they provide domestic support for sugarcane in excess of India's *de minimis* entitlement of 10 percent of the value of production. Another measure of the Indian government which has been challenged at the WTO by these countries pertains to financial assistance to sugarcane producers which include production subsidies provided to sugar mills to offset sugarcane price arrears, soft loans provided to sugar mills to offset sugarcane price arrears, and subsidies to maintain buffer stocks.[65]

[62] AGREEMENT ON AGRICULTURE, *available at* https://www.wto.org/english/docs_e/legal_e/14-ag_01_e.htm.
[63] AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES, *available at* https://www.wto.org/english/docs_e/legal_e/24-scm.pdf.
[64] GENERAL AGREEMENT ON TRADE AND TARIFFS, 1994, *available at* https://www.wto.org/english/docs_e/legal_e/gatt47.pdf.
[65] DS 581: INDIA – MEASURES CONCERNING SUGAR AND SUGARCANE, *available at* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds581_e.htm ; DS 579: India – Measures Concerning Sugar and Sugarcane, *available at* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds579_e.htm ; DS 580: India – Measures Concerning Sugar and Sugarcane, *available at* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds580_e.htm.

The basis of these allegations flow from the Agreement on Agriculture. Domestic policies, such as market price support measures, direct production subsidies or input subsidies are covered under the term 'domestic price support'. Under the Agreement on Agriculture, such non-exempt domestic support measures have trade-distorting effects or effects on production and are referred to as "Amber Box" measures.[66] Part IV of the Country's Schedule under the GATT lists down all domestic support measures in favour of agricultural producers that do not fit into any of the exempt categories which are subject to reduction commitments. The 1986-88 average levels reference price is the basis for ascertaining this cap. In case of WTO countries with no reduction commitments in its Schedule such as India, the level of domestic support not covered by the exempt category, i.e., the aggregate monetary value of Amber Box measures is subject to *de minimis* limitation requirements.

Under the *de minimis* provisions of the Agreement on Agriculture there is a requirement to limit such domestic support to 10 per cent of the total value of production of the agricultural product. Non-product specific support which is more than 10 per cent of the value of total agricultural production is also subject to limitation/reduction.

The subsidies provided to the domestic producers by India are as per the allegations levied, in excess of the 10 per cent *de minimis* provision of the agreement, thus a violation of India's commitments.

Export Incentives-

Brazil, Australia, and Guatemala claim that the Minimum Indicative Export Quotas ("MIEQ") that operate in conjunction with the other regulations are export subsidies. Along with the MIEQ, schemes for creation and maintenance of 'Buffer Stock', the Duty-free Import Authorization (DFIA) for raw sugar; and Export incentives and freight assistance

[66] Suman Modwel, *The WTO and Agriculture: Why Is India So Furious*, 5 J. World Investment & Trade 289 (2004).

under the Sugar Development Fund (SDF) Rules and other regulations are also claimed as export subsidies. Accordingly, these regulations are claimed as being inconsistent with India's export subsidy obligations under Agreement on Agriculture, the Agreement on Subsidies and Countervailing Measures and the GATT Article XVI.[67]

The basis of these allegations flow from the Agreement on Agriculture. Under the Agreement on Agriculture, '*export subsidies*' are "*subsidies contingent on export performance, including the export subsidies listed in detail in Article 9 of the Agreement*".[68] As specified in more detail in Article 9.1 of the Agreement, the list covers most of the export subsidy practices which are prevalent in the agricultural sector, viz direct export subsidies contingent on export performance, producer financed subsidies such as government programs which require a levy on all production which is then used to subsidize the export of a certain portion of that production, cost reduction measures such as subsidies to reduce the cost of marketing goods for export such as upgrading and handling costs and the costs of international freight. Further, under Article 3 of the Agreement on Subsidies and Countervailing Measures, subsidies based upon export performance have been prohibited.

However, the allegation levied is that since India did not schedule export subsidy reduction commitments in its Schedule of Concessions, India, therefore, may not provide export subsidies to sugarcane or sugar based on export performance.

7. THE INDIAN POSITION

The plausible legal argument which can be put forth is on the basis of the WTO Ministerial Decision on Export Competition at Nairobi of 19 December 2015.[69] This Ministerial Decision extended the window of Article 9.1 (d) and (e) till 2023 which was earlier to be

[67] See *supra note 64.*
[68] See *supra note 61.*
[69] TENTH WTO MINISTERIAL CONFERENCE, NAIROBI, 2015, *available at* https://www.wto.org/english/thewto_e/minist_e/mc10_e/briefing_notes_e/brief_agriculture_e.htm.

in effect till 2001 as per Article 9.4 of the Agreement on Agriculture. This in effect allows countries such as India to continue giving out subsidies which are in consonance with Article 9.1 (d) and (e) till 2023.

The need for India to continue with the subsidies has been pointed out earlier with regard to cane price arrears which has an essential economic angle as well. Owing to farmers having to be paid within 14 days for their sugarcane[70], and the sugar sales being a year-around process, sugar mills invariably face liquidity issues to pay the farmers for their produce i.e. resulting in cane arrears. For example, the cane arrears of 2020-2021 marketing year alone stand at Rs. 16,883 crore.[71] In order to mitigate this along with the need to ensure that surplus production doesn't result in fall in prices due to excess supply over demand (economics of demand and supply) which could reduce price of sugar in the domestic market. In case of such a fall in prices, it would become difficult for mills to even pay the minimum support price of sugarcane (called Fair and Remunerative Price i.e. FRP) to farmers, let alone make their ends meet which would disincentivize the mills themselves.

In order to avoid these economic challenges and put the surplus stock to better use, it becomes imperative for the government to support exports through measures mentioned earlier. The cane arrears can be paid off by the mills through the revenue earned through exports within a shorter time frame than having to wait for a whole year for domestic sales to take place. It also helps to maintain the FRP obtained on sale as surplus production is utilized and is not able to distort the domestic market. As apart from the economic angle, farmer unrests can also become a political issue at the national and international level as seen with respect to the recent farm laws.[72]

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[70] See *supra note 47*.
[71] *Sugarcane arrears at Rs. 16,883 crore on Jan 31 of 2020 – 2021 marketing year*, Business Standard (Feb 9, 2021), *available at* https://www.business-standard.com/article/economy-policy/sugarcane-arrears-at-rs-16-883-cr-as-on-jan-31-of-2020-21-marketing-year-121020901492_1.html.
[72] Kabir Agarwal, *India's Farmer Protests: A Basic Guide to the Issues at Stake*, The Wire (Dec 11, 2020), *available at* https://thewire.in/agriculture/indias-farmers-protests-guide-issues-at-stake-reforms-laws-msp.

However, in case this defense on the basis of the WTO Ministerial Decision on Export Competition is indeed taken up by India, it playing out before the panel and repercussions of its effect thereafter would be noteworthy on the WTO jurisprudence. This is submitted as the conflict which would arise would be whether the Agreement on Agriculture would supersede the Ministerial Decision of 2015 which was arrived at through consent of all Member States or vice-versa.

8. WAY FORWARD: HOW INDIA CAN GET ITS POLICIES WITHIN ITS WTO OBLIGATIONS FOR THE FUTURE

In all likelihood the measures of India with regard to the sugar sector will be held to be in violation of its WTO obligations once a panel to adjudicate this dispute is formed which is considered inevitable. Further, India does not stand on a very firm footing with respect to the possible defenses it can take. Thus, it is important to look at the way forward for India and future policies measures which are taken as WTO panel rulings have no retrospective effect.

In this regard keeping in mind the need to be WTO compliant, it is suggested that Article 6.2[73] and Article 6.5[74] of the Agreement on Agriculture need to be utilized till the maximum extent along with using Green Box[75] subsidies.

Redesign schemes under Agreement on Agriculture-

Article 6.2 of the Agreement on Agriculture provides that *'government measures of assistance, whether direct or indirect, to encourage agricultural and rural development*

[73] See *supra note 61*.
[74] *Id.*
[75] Shona Hawkes and Jagjit Kaur Plahe, *Worlds apart: The WTO's Agreement on Agriculture and the right to food in developing countries*, 34(1) Int. Political Sci. Rev. 21-38 (2013), pp. 21-38, *available at* https://www.jstor.org/stable/23352702 ; Martha Getachew Bekele, *Offer of a Truce: The Peace Clause Agreement on Food Stockholding in Bali (2014)*, *available at* http://www.cuts-geneva.org/pdf/BP-2014-7-Peace%20Clause.pdf.

and various subsidies generally included in such measures, such as investment subsidies, agricultural input subsidies and domestic support to producers to encourage diversification (e.g. from narcotic crops), shall be exempt from domestic support reduction commitments that would otherwise be applicable to such measures.'[76] Domestic support meeting these criteria shall not be required to be included in the calculation of a country's current AMS.[77] Policies furthering these objectives brought about by the government will pass the test of WTO compatibility and are suggested to be introduced.

Moving on, Article 6.5 of the Agreement on Agriculture can also be used by India to make its policies WTO compliant. Direct payments under production-limiting programs shall not be subject to reduction if such payments are based on fixed area and yields. These policies would not be considered to be a part of the 10 per cent *de minimis* requirement.

Green Box Subsidies-

Green Box subsidies are another avenue which can be explored by India to provide support to the Indian sugar sector while remaining WTO compliant. These pertain to measures that "*do not have distorting effects in agricultural markets*", such as research funds, direct payments decoupled from production levels and market prices etc.[78] Under the broad ambit of Green Box subsidies, decoupled income support is a policy which can be looked at along with income safety net.

Decoupled income support[79] was included in Green Box subsidies with neither any limit on the level of such payments nor any obligation to reduce them, based on the assumption that they would have no, or minimal, trade-distorting effects.[80] Thus, this is a policy measure

[76] See *supra note 61*.
[77] See *supra note 65*.
[78] *Id*.
[79] Annex 2 of the Agreement on Agriculture, *available at* https://www.wto.org/english/docs_e/legal_e/14-ag_02_e.htm#annII.
[80] See *supra note 65*.

which would be WTO compliant following the process mentioned here as it would not be related to export performance which is prohibited under the Agreement on Subsidies and Countervailing Measures. Eligibility for such payments shall be determined by clearly-defined criteria such as income, status as a producer or landowner, factor use or production level in a defined and fixed base period. The amount of such payments in any given year shall not be related to, or based on, the type or volume of production (including livestock units) undertaken by the producer in any year after the base period. The amount of such payments in any given year shall not be related to, or based on, the prices, domestic or international, applying to any production undertaken in any year after the base period. Such payments would no longer be contingent upon production. A similar scheme has been launched by the Indian government recently known as the Pradhan Mantri Kisan Samman Nidhi (PM – KISAN)[81] which is pertaining to the agricultural sector in general. Such a policy measure would enable subsidies to be given to the sugar industry while remaining WTO complaint.

Income safety net[82] is another policy which can be looked at. Its functioning could be as described hereunder. Eligibility determined by income loss, which exceeds 30% of average gross income or the equivalent in net income terms in the preceding 3-year period or a 3-year average based on the preceding 5-year period. The amount of such payments shall compensate for less than 70 % of the producer's income loss in the year the producer becomes eligible to receive this assistance. The amount of any such payments shall relate solely to income. The amount of such payments shall not relate to the type or volume of production (including livestock units) undertaken by the producer; or to the prices, domestic or international, applying to such production, or factors of production.

[81] Rituraj Tiwari, *PM Narendra Modi to launch scheme to give Rs 6,000 to farmers on February 24*, The Economic Times (Apr 18, 2019), *available at* https://economictimes.indiatimes.com/news/politics-and-nation/pm-narendra-modi-to-launch-scheme-to-give-rs-6000-to-farmers-on-feb-24/articleshow/67979715.cms.
[82] See *supra note 78.*

Last but not the least, ethanol production policy brought out by the government is a good way for India to meet its WTO compliance with respect to sugar industry subsidies as well to meet its climate change and Atmanirbhar Bharat objectives. Tweaking the old age, I'd like to say that the ethanol policy will help India *kill multiple birds with one stone*. First of all, the diversion of the surplus sugar into ethanol production would reduce the export by India i.e. nullifying the argument of other countries that India is distorting the market with its lower prices at the WTO level. Secondly, in line with the ethanol blending program[83] under the National Policy on Bio-fuels being followed, India is moving towards complying with its Nationally Determined Contributions (NDC's) with respect to climate change at the international level under the Paris Climate Change agreement.[84] Third but not last, by using ethanol as a fuel, India not only has the opportunity to reduce its oil/fuel import bill but also move towards self-reliance in fuel production, even though partially for now, as the National Policy on Bio-fuels targeting 10% all-India average ethanol blending in petrol by 2022 (from 4.2% in 2017-18) and 20% by 2030.[85] For instance, Oil marketing companies (OMC) are set to procure 283 crore litres of ethanol from mills for blending up to 10% with petrol in 2020-21 (December-November). This is against 167 crore, 179 crore and 150.5 crore litres in the preceding three supply years and a mere 38 crore litres in 2013-14.[86] This would also boost the Atmanirbhar Bharat project (Self-reliant India)[87] along with helping to pay off the cane arrears of farmers.[88]

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[83] ETHANOL BLENDING PROGRAM POLICY DOCUMENT, *available at* http://petroleum.nic.in/sites/default/files/biofuels.pdf.

[84] *India on course to exceed Paris agreement targets, says report*, The Economic Times (Nov 24, 2020), *available at* https://economictimes.indiatimes.com/news/politics-and-nation/india-on-course-to-exceed-paris-agreement-targets-says-report/articleshow/79394789.cms?from=mdr.

[85] Harish Damodaran, *As ethanol turns cheaper than petrol, sugar industry sees opportunity*, Indian Express (Mar 8, 2021), *available at* https://indianexpress.com/article/business/economy/price-and-policy-push-ethanol-cheaper-than-petrol-sweet-spot-for-sugar-industry-7218665/.

[86] *Id.*

[87] *Cabinet approves Mechanism for procurement of ethanol by Public Sector Oil Marketing Companies under Ethanol Blended Petrol Programme - Revision of ethanol price for supply to Public Sector OMCs for Ethanol Supply Year 2020-21*, PIB (Oct 29, 2020), *available at* https://pib.gov.in/PressReleasePage.aspx?PRID=1668399.

[88] See *supra note 84.*

9. CONCLUSION

This present dispute does not augur well for India. India would have to slowly and steadily tweak its policies in the sugar sector and make them WTO compliant or face the anomaly of dishing out exorbitant sums as penalty.

The current policies may be able to safeguard India till 2023 based on the Ministerial Decision of 2015 mentioned earlier but that is just a short-term gain. However, removing these subsidies immediately is also not feasible as it will adversely impact the Indian farmers and thus domestic production. As is well-known, India has a majority of small farmers who are from the low-income group. Cane price arrears have an immense economic and political impact which has to be kept in mind as mentioned earlier. Immediate withdrawal of subsidies can impact them economically leading them to commit suicides.[89]

Thus, a revisiting of the current policies governing domestic support and export assistance to the Indian sugar industry needs to be undertaken. WTO compatibility has to be worked into these policies as India is a large stakeholder at the WTO. India can only raise challenges to measures of other countries if it is compliant with the WTO obligations in the first place. Further, in order to prevent domestic uncertainty, chaos and repercussions which such challenges to measures taken by the Indian government at the WTO pose, it is better to be compliant with international obligations. As the adage goes, prevention is always better than cure. Further, as mentioned above, the ethanol blending program can be an excellent option to meet WTO compliance as well as other international and national objectives such as climate change, payments to cane farmers and Atma Nirbhar Bharat.

[89] Chethan Kumar, *25% of Karnataka's farmer suicides in four sugar districts*, The Times of India (Nov 27, 2018), *available at* https://timesofindia.indiatimes.com/city/bengaluru/25-of-karnatakas-farmer-suicides-in-four-sugar-districts/articleshow/66819674.cms ; Dr. Vandana Shiva, Kunwar Jalees, *Farmers Suicides in India*, Research Foundation for Science, Technology and Ecology, *available at* https://www.navdanya.org/attachments/Organic_Farming10.pdf.

10. ANNEXURE 1 – INDICATIVE TIMELINE FOR A WTO DISPUTE

Stage	Time-period (up to)	Scope
Request for Consultation	15-30 days	WTO Members file Request for Consultations with the WTO, the Country against whom a complaint is sought has to respond to the Request.
Consultation	60 days	The countries in dispute have the opportunity to settle their differences without proceeding further. Options such as mediations, negotiations are available.
Panel set up	45 days	In case the Consultations fail, the complaining countries can ask for a panel to be appointed. The panel adjudicates the dispute and makes its rulings and recommendations in its Report.
Final Panel Report issued to parties	6 months	The final Report of the Panel deciding the dispute is submitted to the parties.
Final panel report circulated to WTO members	3 weeks	The final report of the Panel deciding the dispute is submitted to the WTO for consideration.
Dispute Settlement Body adopts report (if no appeal)	60 days	The Final Report is adopted by all the WTO members as binding.
Appeal Filed	30 days	Either side can appeal a panel's ruling by means of an Appeal based on points of law such as legal interpretation of the WTO Agreements.
Appeal Report	60-90 days	Each Appeal is heard by three members of the permanent seven-member Appellate Body set up by the Dispute Settlement Body

		The appeal can uphold, modify or reverse the panel's legal findings and conclusions.
Dispute Settlement Body adopts Appeal Report	30 days	The Appeal Report is adopted by all the WTO members as binding.