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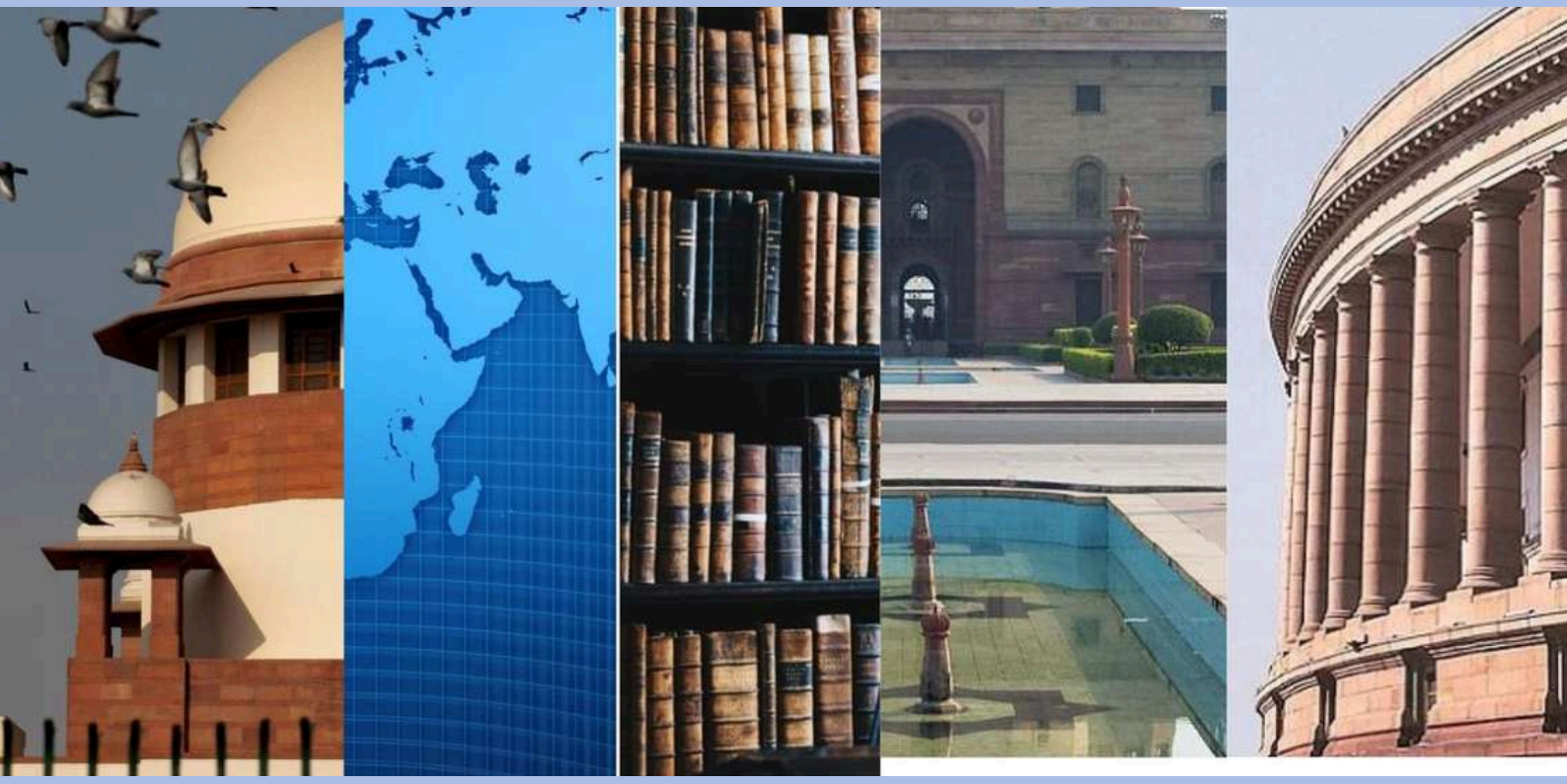

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# ARTICLES

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# ARBITRATION IN THE REALM OF SPORTS LAW: AN INDIAN PERSPECTIVE

**DR. PRITI RANA***

## ABSTRACT

*As in all matters, disputes remain a silent yet potent possibility in sports. Given the high stakes in terms of athletes' careers and technicalities, including the pressures of time involved, over the years, enormous investment has gone into structuring efficient dispute resolution mechanisms to resolve sports disputes. These mechanisms are highly customised and continuously fine-tuned to render a timely award that remains relevant given the short duration over which a sporting event takes place. This article aims to delve deeper into issues surrounding utilisation on one specific method of alternate dispute resolution, namely arbitration in resolving sports disputes. Over the years, arbitration has emerged as the method of choice for resolving sports-related disputes, with the Court of Arbitration for Sports (CAS) being a widely acclaimed success story. However, for arbitration to operationalise, the presence of certain core requirements, such as the existence of a valid arbitration agreement and jurisdictional competence of the arbitral tribunal, must first materialise. The attempt here is to explore some of these core issues in the context of arbitration laws in India, namely the Arbitration and Conciliation Act, 1996 (1996 Act), as amended in 2015. The first part of the paper will briefly discuss the intersection of arbitration and the resolution of sports disputes. The second part would explore issues of consent that constitute an imperative requirement of any arbitration. The third part will explore the legality of the multi-tier arbitration clause routinely provided for in sporting regulations such as the constitution of the Indian Olympic Association (IOA) in light of recent decisions of the Supreme Court of India. The fourth part would evaluate the establishment of arbitral tribunals under applicable rules for its conformity to the standards of independence and impartiality as expanded upon by the Indian judiciary.*

* Assistant Professor, Faculty of Law, University of Delhi.

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## I. INTRODUCTION

The need for alternate methods of dispute resolution arose out of the disillusionment from state-based methods of dispute resolution, namely the courts. Lengthy, costly and highly technical and complex procedures ensured that the outcome was often of little consequence if at all any to the litigants.[1] Faced with a judicial system that was fast losing its ability to deliver on promises of speedy and effective justice, efforts were intensified to find meaningful alternates that would assist and, in some instances, replace the courts as the primary mechanisms for resolving disputes.

India has a well-documented history of extensive utilisation of non-state- based methods of dispute resolution. Be it Panchayats, Puga, Sreni and Kula[2] early texts are replete with references to board of persons entrusted with the duty of amicably resolving disputes in a society, community, village or among traders and artisans.[3] Early colonial efforts such as regulations of 1772, 1781, 1813 and 1822 aimed at consolidating and systematising previous ad hoc methods and bringing them within a state sanctioned and recognised system of resolving disputes through arbitration. Legal developments, both pre and post-independence, ensured that law relating to ADR (Alternate Dispute Resolution) methods was continuously updated, keeping pace with the overgrowing and complex demands of an increasingly aware polity.

In 1996, the Indian arbitration law was updated to bring it in line with prevailing international standards. In sharp contrast to earlier regulations, the 1996 Act was expanded to allow for arbitration of a wide range of disputes. Arbitration is a private and consensual method of resolving disputes, with the following key elements: (a) agreement to arbitrate (consent and intention); (b) a legal dispute; (c) submission of dispute to a neutral independent party for its determination; and (d) binding end result.

However, not all types of disputes are arbitrable. Even though the 1996 Act does not explicitly list types of disputes that cannot be arbitrated, both legislative and judicial limitations on the

[1] M/s Guru Nanak Foundations v. M/s Rattan Singh & Sons, AIR 1981 SC 2075.
[2] These are Sanskrit/Hindi terms considered forerunners to a formal arbitral tribunal.
[3] Law Commission of India, Arbitration Act, 1940 (Law Com No. 76, 1978), paras 1.11-1.12. V.A. Mohta and Anoop V. Mohta, Arbitration, Conciliation and Mediation 2 (2nd ed. 2008).

nature of disputes that are considered inarbitrable have been readily established.[4] In other words, every civil or commercial disputer, either contractual or otherwise, which could be decided by a court was in principle capable of being adjudicated and resolved by arbitration unless excluded either expressly or by necessary implication. In a similar vein, certain set of disputes have been held to be of such nature that renders it unsuitable to be arbitrated. In *Booz Allen v SBI Home Finance*,[5] the Supreme Court of India had crystallised the principle of inarbitrability, noting that the disputes of certain nature could not be referred to arbitration. Consequently, the 1996 Act applies to all arbitration that take place in India, and portions of it apply to arbitral awards from arbitration that happen outside India and which are sought to be enforced within the territory of India.

Sports disputes do not fall within the exclusion list drawn up by the 1996 Act and the Booz Allen formula and, therefore, are amenable to arbitration within the Indian jurisdiction. Even globally, arbitration is the most preferred method of resolving sports dispute, with CAS being the most prominent example of the alliance.[6] Adjudication of sports disputes through arbitration in India would be regulated by the Memorandum and Rules and Regulations of Indian Olympic Association,[7] rules arbitration commission (RAC), rules of the sporting federation and the 1996 Act.[8] Although sports disputes render themselves to arbitration, given their nature is not in contention, the structuring of dispute resolution mechanisms within various sporting regulations generates certain crucial issues requiring a deeper look.

## II. CONSENT: ARBITRATION AGREEMENT

Arbitration is a method of private dispute resolution and is contingent on the consent of all parties involved therein. Consent, therefore, is the edifice on which the entire arbitration is premised, that is, a pre-requisite of arbitration.[9] In other words, unless a party gives its consent to arbitration, it cannot be compelled to arbitrate its dispute. Consent of the parties is contained

[4] Section 2(4), Arbitration and Conciliation Act, 1996.
[5] (2011) 5 SCC 532.
[6] Hilary A. Findlay, Symposium: Alternate Dispute Resolution in Sports: Rules of a Sport Specific Arbitration Process as an Instrument of Policy Making, 16 MARQ. SPORTS L. REV. 73, 73-77 (2005).
[7] IOA Rules, Rule XXII r/w Rule XXIV.
[8] Section 2(2): This part shall apply where the place of arbitration is in India.
[9] Andrea M. Steingruber, Consent in International Arbitration (2012), paras 5.43-5.44.

within the arbitration agreement by entering into which the parties voluntarily relinquish their right to have disputes adjudicated through a court-based system.

Consent for arbitrating sports disputes in India can be found in the Memorandum and Rules and Regulations of the Indian Olympic Association (IOA rules) which requires all NDFs, state Olympic associations, union territory Olympic associations, services sports control board and national federation of Indian sport kho-kho affiliated to IOA to include within their constitution a provision to have there unresolved disputes including sports- related ones arbitrated. This would also include all disputes arising within these federations and associations. The arbitration would be conducted by an arbitration commission (AC) established by IOA, with its members appointed by the latter.[10]

The rules are equally categorical in their requirement that the members of the federation and association voluntarily surrender the right to seek redress in a court of law. Such stipulation is necessary to prevent a party from readily avoiding arbitration by instituting an action before the state courts. Under the 1996 Act, any judicial authority faced with a valid arbitration agreement is mandatorily required to refer that matter to arbitration. Equally clear is that such mandatory reference, which does act as a restraint against legal proceedings, is not illegal. Under the Indian contract law, any agreement attempting to restrain a party from enforcing its rights by way of legal proceedings before an ordinary tribunal is considered void.[11] However, this rule is subject to three exceptions, one of which permits parties to legitimately impose a restriction by way of an arbitration agreement.[12]

At this juncture, it is important to query whether the IOA rules indeed form a valid arbitration agreement. The requirements of a valid arbitration agreement are drawn from both the 1996 Act and the Indian Contract Act, 1872. Thus, in addition to the requirement of free consent as noted previously, other requirements, namely of writing, competency to contract and a clear and unequivocal intention to arbitrate, become crucial. Viewed in that light, these rules clearly require a sporting federation or association, affiliated, or recognised or desirous of being so by IOA, to provide consent to arbitrating its disputes.

[10] IOA Rules, Rule XXII (i) and (ii) r/w Rule XXVIII (e).
[11] Indian Contract Act 1872, Section 28.
[12] Indian Contract Act 1872, Exception 1 to Section 28.

From arbitration standpoint, an important question would be whether these provisions fulfil the requirement of clear and unambiguous consent. The rule clearly notes that any federation affiliated with IOA has to submit to mandatory arbitration. It backs it up with a requirement of a waiver of right to seek remedy in court. All affiliated federations are bound to abide by the rules of IOA, including ones pertaining to dispute resolution. The rules require acceptance in their entirety. A federation cannot pick and choose the rules that it would obey. Thus, the single composite acceptance of all rules would effectively meet the unequivocal consent standard. These rules are similar to the ones found in trade associations which require its members to arbitrate their disputes. In such instances, consent and intent to arbitrate are presumed on the basis of knowledge and awareness on the part of members; in other words, since the members utilise and work in accordance with the rules, their familiarity with the provisions of the rules, including the presence of arbitration agreement within it is presumed. Being aware of the existence and yet agreeing to operate and abide by the rules indicates consent on the part of the members to the requirement of arbitration. Consequently, an affiliation or a request thereto translates into an acceptance of the offer to arbitrate. It implies effective consent on behalf of the sporting federation and association to abide by the requirement and refer all their disputes to arbitration.[13]

There are, however, scholars who argue that consent for arbitration obtained through barring an athlete from participating in an event unless they consent would at least, under the Indian Contract Act, 1872, vitiate the arbitration agreement so entered.

## III. TIERED ARBITRATION CLAUSES

A crucial difference in arbitration when compared to the state-based court system is the nature of remedy available against a judgement of the tribunal. For matters wherein a decision is rendered by a court, varying remedies, such as review, revision and appeal, are available. In sharp contradistinction, the only substantial remedy available against an arbitral award would be setting aside of the arbitral award on very limited and specific grounds. Numerous decisions of

[13] RAC Section 8 provides that all the members of IOA are bound by the Constitution of IOA which mandates the sports-related disputes to be adjudicated by CAS.

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the apex court have clarified the distinction between an appeal and setting aside of an arbitral award.[14]

As a consequence, an arbitral award cannot be appealed against; it can only be reviewed on specific standards prescribed in the 1996 Act. An interesting issue is presented by the rules for dispute resolution adopted by IOA. The rules designate AC as the highest internal authority for the resolution of sports-related disputes in India.[15] A decision by the AC can be appealed before CAS within 21 days of receiving the decision by the AC.[16] This presents an interesting scenario— once an award is rendered by an arbitral award, unless challenged within the given timeline, it conclusively determines the dispute between the parties and is considered to be final and binding on the parties and persons claiming under them.[17] Further, such an award can be enforced in the same manner as if it were a decree of the court.[18] This is crucial; in other words, once the possibility of limited review passes, the winning party obtains a right based on the finality and bindingness of the award. The state agrees to back such an award through an expedited enforcement mechanism.

In this context, it could well be argued that once the AC has rendered an award, such an award covered under the 1996 Act would be final and binding. It could be challenged before the reviewing court on limited grounds, and if such challenge is not made or made but fails, the award could be enforced against the losing party. Here, the possibility of appeal before CAS from decisions rendered by AC becomes relevant. Given this, is such tiered set-up permissible under Indian arbitration law? This question is relevant, considering that the winning party may enforce the award, while the losing party may proceed to CAS. If the latter wins, then the award renders in Switzerland could be brought into India for enforcement as a foreign award. It would indeed be a paradoxical situation wherein the same dispute would have rendered both a domestic and a foreign award.

[14] P. R. Shah, Shares & Stock Brokers (P) Ltd v. BHH Securities (P) Ltd, (2012) 1 SCC 594.
[15] IOA Rules, Rule XXIV (b).
[16] IOA Rules, Rule XXIV (c).
[17] Arbitration and Conciliation Act, 1996, Section 35.
[18] Arbitration and Conciliation Act, 1996, Section 36.

## IV. ARBITRAL TRIBUNAL: APPOINTMENT OF ARBITRATORS

A crucial principle of decision-making, which is now readily accepted in jurisdictions across the globe, is that no person can be a judge in his/her own cause since such a set-up would cast serious aspersions on the very ability of the arbitral tribunal to render impartial justice. The 1996 Act, as amended in 2015, imposes strict restrictions on who can act as an arbitrator in a given matter. A threshold requirement concerns the absence of pecuniary, personal and professional connection between the arbitrators and the parties so as to ensure transparent and unblemished decision-making. The presence of justifiable doubts regarding arbitrators' independence and impartiality gives rise to adequate cause for challenging an arbitrator. The 1996 Act further identifies certain connections, the presence of which automatically disqualifies a person from being an arbitrator, leaving no room for party autonomy unless such autonomy is exercised after the dispute has arisen.

The AC which is designated as the highest internal authority for the resolution of sports-related disputes in India also acts as the appellate authority against any decision taken by IOA. What is of interest is that all members of the AC are appointed by IOA.[19] Such a set-up raises concerns about the probity of the members of the arbitral tribunal so constituted, especially in instances where IOA is a direct party to dispute pending before them.

In comparison, the IOA rules concerning the AC seem rather primeval. The AC is established by IOA and deemed to be the highest internal authority for the resolution of sports-related disputes in India. Arbitrators to AC are nominated solely by IOA. Furthermore, the IOA rules make it mandatory for federations and associations to have all their disputes resolved through the aegis of the AC and under no circumstances resort to litigation in court of law. Disregard of the stricture would likely attract sanction and disciplinary action.[20] In addition to the AC, IOA also establishes what is refereed to as the Affiliation and Dispute Commission. No information relating to this commission is available, except a reference in the RAC whereby the chairman of

[19] IOA Rules, Rule XXIV (b).
[20] IOA Rules, Rule XXVIII (e).

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the Affiliation and Dispute Commission, IOA, may constitute a panel from the list of arbitrators notified by IOA.[21]

Section 1 of the RAC creates the Indian Court of Arbitration for Sports (I-CAS) tasked with facilitating settlement of sports related disputes through arbitration and mediation. I-CAS is seated at New Delhi, and consists of two divisions: the Ordinary Arbitration Division (OAD) and the Appeals Arbitration Division (AAD). Consequently, the current system puts in place a three-tier mechanism: internal remedy for federation, first instance before I-CAS (OAD), appeal before I-CAS (AAD) and final appeal before ICAS, Switzerland. At this juncture it is important to note that IOA rules or RAC are silent about the association between AC and CAS. Indeed, very little information is available on the IOA website. In fact, the IOA press release dated 21 July 2011 noting the composition of I-CAS, carries the heading 'Arbitration Commission'. Therefore, one assumes that AC and CAS are one and the same body with the over responsibility for resolution of disputes (commercial or disciplinary) falling within the purview of IOA rules.

Given that the seat of arbitration conducted by CAS is New Delhi, the 1996 Act would be the curial law. Concordantly, grounds for challenges to an arbitrator could arise from both the rules of AC and the 1996 Act. In the event of a conflict, the mandatory provisions of the 1996 Act would prevail.[22] Although the RAC clearly provides for challenge against the arbitrator, provided legitimate doubts exist with regard to their independence, all challenges to an arbitrator remain in the exclusive power of CAS, which may decide at its discretion.[23] It further suggests that parties have the liberty to decide the method of appointment of arbitrator. In the absence of any agreement, parties have to make a specific request for nominating an arbitrator and that such a request should be made to the chairman of Affiliation and Dispute Commission. Of more interest is the stipulation that none of the parties will have any objection to the nomination so made. In

[21] Section 5, Available at http://www.olympic.ind.in/images/IOACommittess-23-01-2012.pdf.
[22] A seat means the legal jurisdiction to which arbitration is attached. An arbitration is conducted according to the arbitration law at the seat of arbitration, even if hearing or other meetings are held elsewhere. SIMON GREENBERG ET AL., INTERNATIONAL COMMERCIAL ARBITRATION: AN ASIA PACIFIC PERSPECTIVE 55 (2011).
[23] RAC, Section 7 r/w Section 12.

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other words, the parties have no say as to who the arbitrator would be. The only choice they have is from the panel of CAS.[24]

At this juncture, it is important to understand that the 1996 Act lays heavy emphasis on neutrality for both arbitrators and the procedures from the initiation of arbitration all the way to its conclusion, that is, rendering of an award. The 1996 Act, thus, lays down precise rules prohibiting arbitrators from having direct or indirect, previous or existing relationship with or interest in parties or the subject matter of the dispute which may present justifiable doubts as to his/her independence and impartiality.[25] The relationship could be of the nature of financial, business, professional or other kind. Party autonomy, however, is held to be paramount, considering the parties can waive any objection and even in the presence of a relationship proceed to appoint such a person as arbitrator.

The relationship between IOA and AC seems clear. IOA appoints the commission, selects its arbitrators and funds their payments. Even though individuals of high eminence are nominated to the panel, that alone would be inadequate to secure neutrality of an institution. In a similar instance, the SFT though affirming neutrality of CAS had called for greater distancing IOC and CAS. Such a delinking is yet to occur in the functioning of IOA. On the other hand, the links between IOA and AC seem explicit and secure both financially and administratively. For instance, another IOA functionary (namely the chairman of Affiliation and Dispute Commission) nominates a panel of arbitrators from I-CAS; as a result, only IOA (even when it is a party) has any say in who would be the arbitrators in the matter, with other parties reduced to the status of mere bystanders. Further, given that the federations and athletes have no choice but to arbitrate their disputes before a panel nominated by ICAS, the independence and impartiality of I-CAS do become suspect.

[24] Even though a similar arrangement exists with CAS (Procedural Rules: Code of Sports- Related Arbitration in force as from 1 January 2017, Rule 33 requires that every arbitrator shall appear on the list drawn by the ICAS in accordance with the statutes), the list comprises of 370 arbitrators, and, while appointing, the ICAS shall consider continental representation and different judicial culture.
[25] Arbitration and Conciliation Act, 1996, Section 12.

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## V. CONCLUSION

Under the arbitration law of India, all disputes, unless expressly or impliedly prohibited, lend themselves to arbitration. Limitation tends to be centred on the nature of the disputes and the type of remedy sought.

Globally, arbitration is the preferred means of sports-related dispute resolution. In India, disputes pertaining to sports, whether contractual or otherwise, are deemed arbitrable with sports arbitration fulfilling the basic requirements of arbitration, namely, intention to refer the matter to a neutral third party, noting of the intention in a written document, and agreement to be bound by the final award so rendered. Governing bodies such as the IOA establish procedures and mechanisms to allow for the arbitration of sports-related disputes. These arbitrators are governed by a combination of provisions found in the 1996 Act and rules of IOA and various federations and associations.

However, there remain certain areas of concern, be it the manner in which consent is obtained, the multi-layered agreement to arbitrate or the manner in which arbitrators are appointed to arbitral tribunals organised to adjudicate sports disputes. On all three parameters, the current legal framework provided by an intersection of the applicable rules, particularly the IOA constitution and RAC, has been found to be wanting. Although such limitation in itself does not vitiate the entire set-up, combined, they do put a substantial dent in its overall efficiency.

That said, these issues are neither new nor novel. They have been witnessed and have been adequately addressed on the international level by extensive reforms to IOC, ICAS and CAS. Indian sports bodies led by IOA need to invest more effort and imagination in refining the existing mechanism to provide a genuine alternative in resolving sports disputes.

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# FOSTER'S FLAW: HOBBES' STATE OF NATURE AND THE FATE OF THE SPELUNCEAN EXPLORERS

**SIDDHARTH SRIKANTH***

## ABSTRACT

*Ever since its publication, Lon L. Fuller's seminal work "The Case of the Speluncean Explorers" continually inspires academicians and law students alike. Its analysis of law, society and human nature, continues to be significant in the 21st century. The most famous contribution of Fuller's article has been the judicial opinion of Justice Foster. Justice Foster believed that the explorers ought to be acquitted of murder, because when they killed Roger Whetmore, they no longer inhabited civil society, and had descended into a state of nature. While the other judges in the case, and numerous academicians have analysed his decision from consequentialist perspectives, none do so from first principles. This article looks to do precisely that. The author in this article, looks into the characteristics of "state of nature" the explorers had allegedly found themselves in. Then, the author contrasts the same with the "state of civil society" that had consequently been left behind by them. The article puts forward the proposition that analytically, an external state of nature is of little consequence, when it comes to determining individual criminal culpability. The article asserts that man throughout his life, continually rises above the state of nature, and chooses to remain in civil society. Therefore, although it may be easier to remain civil in civil society, the same ought not to Hence, while determining criminal culpability, it makes little difference, whether society's institutions are present to assist man in remaining civil.*

## I. Introduction

One of the lynchpins surrounding political theory regarding the foundation of State and civilization, is that of State of Nature. This primarily philosophical concept, has been used to explain the existence of the State and the coercive element of the law, by multiple philosophers

* Advocate, High Court of Karnataka.

ranging from Thomas Hobbes to Immanuel Kant and Jean-Jacques Rousseau. State of nature within political theory posits a world prior to social or political organisation, wherein there lived independent individuals.[1] This conception provides the context within which the aforesaid individuals would choose voluntarily to help establish and maintain governmental institutions and political authority.[2] Therefore, following this thread to one of its fruitful ends, there lies among multiple other obligations, a duty to obey and comply with the laws of the civil state.[3] However, it is not beyond the realm of possibility that a particular collection of individuals may be thrust back into the abyss of state of nature. Natural disasters such as tsunamis and hurricanes, plane crashes, riots and other moments of catastrophe can force individuals to instinctively break the presuppositions and norms of civilization, to embrace state of nature and simply act to ensure their own survival.[4] The application of law in such instances becomes extremely tricky both theoretically and practically. A seminal text providing exactly such a dilemma was enunciated by Lon L. Fuller.[5] "The Case of the Speluncean Explorers" encapsulated the various legal approaches that could be taken to solve the issue of application of law to an act done in an alleged state of nature.

This study to such end, aims to critique the opinion of Justice Foster given in the Case of the Speluncean Explorers. In doing so, the study hopes to better contextualise the debate on the role and significance of "State of Nature" in determining criminal liability, or lack thereof. Towards this end, Part II first highlights in brief the thought experiment of Fuller, by describing the facts and eventual judicial decisions in the Case of the Speluncean Explorers. After which Part III then further elaborates on the political conception of the State of Nature, with special reference being given to Hobbes' opinions on the State of Nature. Part IV then juxtaposes Hobbes' psychology of man within the State of Nature, on criminality. In doing so, the Part aims to establish that a person, when undertaking a criminal act, inhabits Hobbes' State of Nature. Finally, in Part V, the author analyses Justice Foster's conception of state of nature in Speluncean Explorers, thereby showcasing the fundamental principled flaw in his argumentation. This study concludes with

[1] Norman P. Ho, "State of Nature Theory in Traditional Chinese Political and Legal Thought", 8 *NW. INTERDISC. L. REV.* 131 (2015); Robert Grafstein, "The Significance of Modern State of Nature Theory", 19 *POLITY* 529, 529 (Summer 1987).
[2] *Ibid.*
[3] Cornelius F. Murphy, "Jurisprudence and the Social Contract", 33 *AM. J. JURIS.* 207, 218-219 (1988).
[4] John Alan Cohan, "Two Men and a Plank: The Argument from a State of Nature", 29 *WHITTIER L. REV.* 333, 337-338 (2007).
[5] Lon L. Fuller, "The Case of the Speluncean Explorers", 62 *HARV. L. REV.* 616 (1949).

some thoughts on the contemporary relevance of both, Fuller's thought experiment, as well as of this study.

## II. The Case of the Speluncean Explorers

### A. The Facts of the Case

The facts of Fuller's fictional parable were inspired and highly influenced by the real-world case of *R v. Dudley and Stephens*[6], wherein three members of a shipwreck decided to kill the weakest fourth member and eat his remains to satisfy their hunger, and more importantly, to survive.[7] The Court in the *Dudley* case held two of the rescued members of the shipwreck, to be guilty of murder, following which they received a royal pardon that reduced the punishment awarded to them from the death penalty, to a 6 month imprisonment without hard labour.[8] Fuller on the other hand, used instead of seamen, spelunkers or cave explorers, who were stranded and trapped in the cave they were exploring due to cave in at the entrance of the cave. This unfortunate incident took place in the fictional Commonwealth of Newgarth, in the year 4299. There were multiple attempts to rescue the trapped men, all of which were hindered by subsequent landslides, which resulted in the death of 10 workers. After twenty days had passed since the entrapment, the men within the cave could finally communicate with the rescuers through a portable wireless machine. It is then that they were informed that it would take at least ten days for the rescue attempt to break through the blocked entrance of the cave. Furthermore, the explorers, through conversation with physicians outside the cave, discerned that there was a slim chance of surviving the ten-day time period.

After 8 hours of silence, one of the trapped men namely Roger Whetmore, on behalf of the others asked the medical experts whether the likelihood of survival would increase if they ate the flesh of one of those trapped. This was reluctantly answered in the affirmative. There were also further requests to converse with a judge or even a priest in order to ascertain whether the trapped men could cast lots in order to determine would be the one to be consumed. None of these apprehensions were met with any answers. After 32 days, the men inside the cave were rescued. Upon which, it was learnt that on the twenty-third day, Whetmore had been killed and

[6] [1884] EWHC 2 (QB).
[7] Frederick Schauer, "Fuller's Fairness: The Case of the Speluncean Explorers", 35 *U. QUEENSLAND L.J.* 11, 11-12 (2016)
[8] *Ibid.*

eaten by the other explorers. Through witness testimony, it was ascertained that it has been Whetmore who had suggested the eating of a fellow member's flesh, and it was also he who suggested the method to decide the victim. There was a great deal of discussion regarding the procedure of choosing the fateful person, after which the method settled at was the use of dice. Promptly however, Whetmore backed out of the throw of dice. The rest continued to throw the dice and also threw on behalf of Whetmore, to which he had no objections. It would seem that Whetmore had lost the throw of the dice, and therefore was immediately killed and eaten. After a brief stint in hospital upon rescue, the explorers were charged with murder and found guilty by the trial court. Fuller's article chronicles the defendants appeal of the trial judge's decision, for consideration before the Supreme Court of Newgarth.

### B. The Judicial Approaches

The statute against which the conduct the defendants was contrasted was that which outlawed murder stating, "Whoever shall willfully take the life of another shall be punished by death."[9]. When confronted with the convoluted question of the guilt of the defendants, each Justice of the Supreme Court of Newgarth follows an individual logic to come to a conclusion. On this front, Chief Justice Truepenny opines in favour of the trial judge, stating that upholding the law and adjudging the defendants to be guilty was the only action that judges were allowed to do. Regardless of any sympathies one may have felt for the tragic circumstance, the judges were bound to uphold the conviction, especially since the statute offered no exceptions. With respect to punishment, once again the Chief Justice states that as per law, he is bound to prescribe the death penalty. However, respite is finally offered to the defendants, when he advises the various justices of the court to recommend, to the Chief Executive, exercise of the powers of clemency, and pardon the unfortunate convicts.

Justice Foster, whose position largely resembles that of Fuller himself,[10] wholly disagrees with the Chief Justice. He advocates for the acquittal of the defendants, bolstering this stance on two fronts. The first argument states that all statutes and positive law is established by assuming the possibility of coexistence of men in society. When this coexistence becomes impossible, then in such instances the force of law similarly vanishes. He believes, that this case is one such example

[9] *Supra* note 5, at 619.
[10] Francis J Mootz, III, "Natural Law and the Cultivation of Legal Rhetoric" in Willem J Witteveen and Wibren van der Burg (eds.), *Rediscovering Fuller: Essays on Implicit Law and Institutional Design* 425, 449 (1999).

where the possibility of coexistence had disappeared and the situation resembled largely a state of nature, where the law would have no force. His second argument puts forward the notion of purposive interpretation of laws, emphasising that the spirit of the law must be given primacy, and one should not get bogged down over the letter of the law. He postulates that, exceptions to liability such as self-defence would not be consistent with the letter of the law, and is established solely based on a purposive reading. Similarly, a purposive reading of the law makes it clear that the law is not applicable to the current case.

Justice Tatting gives the third judicial opinion (as reported by Fuller) on the question of the accused's liability. Justice Tatting at the outset, admits that he feels extremely conflicted in delivering his judgment, as he is "torn between sympathy for these men and a feeling of abhorrence and disgust at the monstrous act they committed"[11]. After this admission of emotion, the Justice spends considerable amount of time and energy, refuting the arguments put forward by Justice Foster. On the Foster's state of nature argument, Tatting enquires as to when exactly did the accused pass over to that state of nature, by leaving the civilised realm. Moreover, he argues that they are judges of the Commonwealth, and that they are not a court of nature, for Justice Foster to enforce the laws of nature upon the accused. Even on the merits of Justice Foster's claim, Tatting is unconvinced. He argues that the law of contract (the agreement amongst the explorers) cannot override the law of murder, and that any code which entertains such a thought is surely to be a "topsy-turvy and odious"[12] one. On the second limb of Justice Foster's acquittal, he argues, like a devout originalist, that a judge may indeed have numerous choices to choose from, when it comes to the purpose of a particular law.[13] How then is judge supposed to apply the law according to its alleged purpose, is such purpose itself remains foggy and disputed? On the argument of self-defence, Justice Tatting argues that this particular case could not have fallen within self-defence, because not only did the killers act wilfully, but did so after hours of deliberation and discussions. Given all these misgivings with Justice Foster's arguments, Justice Tatting is still repelled by the idea of convicting the accused. When those whose lives have been saved at the cost of ten brave workmen who rescued them, it would be absurd for this Court to send those saved lives to the hangman's noose. Further, he expresses

[11] *Supra* note 5, at 626.
[12] *Supra* note 5, at 627.
[13] *Ibid.*

discontent at the actions of the Prosecutor in asking for an indictment for murder. Therefore, being unable to come to a definitive conclusion for either side, Justice Tatting thought fit to withdraw himself from the decision of the case.

Next, Justice Keen provides a second vote to convict the accused. He argues that it is not for the court to determine questions of morality- whether what the accused did was right or wrong. The simple fact was that the actions of the accused fell within the scope of the aforesaid statute, and hence, they should be held guilty. Further, he argues that the exception of self-defence does not apply since Whetmore posed no direct threat to the lives of the other explorers. Hence, the justices instead of subjecting the law of the land to their personal moral preferences, should interpret the law as per the plain meaning of the statute. Therefore, he voted to uphold the conviction of the accused.

Finally, Justice Handy delivers his verdict, supporting the conclusion of Justice Foster. He argues that the current issue is one that requires practical wisdom, considering the ground reality faced by the explorers. He chides the other Justices for entangling themselves in theoretical debates about positive law and the law of nature. He reminds the other Justices that the legitimacy of the Court comes from the fact that the Court is bound by popular will. Since, most of the public was in favour of pardoning the accused, they must be pardoned, or in the least, given a nominal sentence. Hence, he would vote to acquit the Defendants.

In the end, since the Supreme Court of Newgarth was evenly divided, the conviction ordered by the Court of General Instances was thereby affirmed, and an appropriate time set for the carrying out of the death sentence. Fuller's article concludes with a postscript that is in some ways a disclaimer, stating that this article is not meant to resemble any contemporary legal development or dispute, and is solely mean to delineate the distinct theories of law and government that continue to haunt political thinkers and the human race till date.

## III. THE HOBBESIAN STATE OF NATURE

In order to fully appreciate the singular psychological problem with Justice Foster's analysis, one would do well to dwell on the conceptual underpinnings of the state of nature; especially that put forward by Thomas Hobbes. Hobbes seems to be the most apposite amongst the Social Contract 'Trinity', as Justice Foster has similar conceptions of a state of nature. Famously, Hobbes

believed the state of nature to be nasty, brutish and short. Justice Foster, thinking along similar lines, fancies the state of nature to be a situation wherein co-existence of men is impossible.[14] Therefore, in order to better understand the apparent flaw in Justice Foster's judicial argument, it is important to first enumerate the fundamentals of Hobbes' state of nature.

The Hobbesian state of nature flows from what Hobbes calls the "Natural Condition of Mankind"[15]. This condition put succinctly (at least it is endeavoured to be so put), is that the abilities and faculties of man are so *inter se* equal, that every man has equal hopes to attain a certain beneficial point in life.[16] Hence, in the absence of any greater power to keep such men in check, a state of war arises wherein every man pits himself against every other man. Therefore, "the life of man, solitary, poore, nasty, brutish and short"[17].

The logical conclusion of a lack of higher power is the absence of any morality, any justice, or any other civil value systems that the civilised world holds so dear. Hence, "every man has a right to what he can get, and for just so long as he can keep it"[18]. Force and Fraud reign supreme in the state of nature. The way out of this world for Hobbes is the relinquishment of total power. There are three reasons Hobbes gives, as to why men in the state of nature want to get out of such a state. First, they experience a fear of death. Second, they desire things that foster living. And third, they hope to get such things through industry.

Now it would be wrong to suggest that Hobbes ignores the inherently sociable tendencies of mankind, in order to propagate his theory of the Social Contract. He instead argues, that the man, in his natural state, would in all probability, be warlike and brutish, if it were not reason and instincts bestowed to him by nature, that make him sociable and peace-preferring.[19] Hobbes therefore, fundamentally believes the natural state of existence to be bad, and for any good in this world, to be fundamentally artificial. Hobbes' psychology is effectively that God has made man to natural incline to fraud, force and malice.[20] Man universally disregards his fellow men, is

[14] *Supra* note 5, at 620.
[15] Thomas Hobbes, *Leviathan*, 183-188 (Penguin Classics, London, 1985)(1651).
[16] Charles Edward Merriam, "Hobbes' Doctrine of the State of Nature" in *Proceedings of the American Political Science Association* 151 (Wickersham Press, Lancashire, 1907).
[17] *Supra* note 15, at 186.
[18] *Supra* note 16.
[19] *Id.* at 154-155.
[20] Thomas Hobbes, *De Cive* xxi (Sterling Lamprecht ed. 1949) (1651); Michael P Greeson, "Hobbes, Locke And The State Of Nature Theories: A Reassessment" 5(2) *EPISTEME* 1, 6-7.

simply violent and ruthless in his longing to preserve himself and to fulfil his desires. Man is not made for society naturally, but is made so by education.[21] For Hobbes therefore, civil society is the guardian of the lives of men.[22] From a legal perspective (as opposed to a sociological or political one), criminal law most closely resembles this endeavour of civil society, that is, to protect the lives of man from himself, or his brethren. It is criminal law that has extricated away from man, his liberty to harm others, and in some ways, has appropriated that power for itself. It is the State that, through criminal law, bestows unto itself, the power to imprison or even send a criminal to the gallows.

It is important to note that Hobbes' exposition of the state of nature and the natural condition of mankind, is not meant to be historical in nature. The Natural Man is not some ancient form of mankind, but is a permanent spectre that haunts all of mankind across time.[23] When man ceases to pay heed to reason, and cedes himself to his passions and emotions, the ugly head of the natural man rears itself again. In other words, he enters the realm of nature again.

## IV. HOBBES' CRIMINAL IN STATE OF NATURE

Over the ages, thinkers and academicians have studied Hobbes' man and his relationship with the State, through various lens. The political and psychological perspectives in this regard, are considerably significant for the purpose of this study. Politically, the state of nature is a device to understand the social organisation of mankind, and to study justifications for the State. Psychologically, it is a device to understand the inclinations of man, and his actions ensconced within surrounding society. State of Nature therefore, when viewed at from a psychological perspective, can also be understood as a state of mind - one which is in inhabited by a person who commits a crime and thereby, fundamentally breaks the Social Contract.

Politically, when man enters civil society, he does so voluntarily. While he naturally exists out of civil society, he wills himself into the social structure of society, through the social contract.[24] This doctrine of consent of allows Hobbes to justify the bestowing of such absolute powers on

[21] *Supra* note 16, at 154.
[22] Patrick Coby, "The Law of Nature in Locke's Second Treatise: Is Locke a Hobbesian?", 49 *REV. POL.* 3, 16 (1987).
[23] *Supra* note 20.
[24] See *Supra* note 16, at 156.

the Leviathan, or in other words, the government. The State therefore, restricts man, by taking away certain powers of man, and by restricting man, fashions civil society.

Psychologically therefore, when a man wills himself into civil society, he does so through his actions's *animus*—the *animus* not only relating to crime, but the *animus* behind every single one of his actions. The moment he takes the law into his own hands, (for instance, commits a crime like murder) he cedes that will to remain within civil society and wills himself into the state of nature. The flipside of that coin is that when he considers the social consequences of his actions; when man stops himself from acting as he pleases (vis-à-vis committing actions societally labelled as crimes), that refrain, is the psychological manifestation of those political restrictions placed on man; that is, of civil society.

Hence, when one considers the implications of the Hobbesian state of nature, they realise that Justice Foster's analysis is deeply flawed on a psychological level, and that the other Justices' simultaneously fail to address this particular flaw in their criticism of his logic. Hobbe's man in the natural state has no other forces acting on him other than his own ego, and his selfish desires. In other words, he does not respect others, and views them simply as an obstacle to his goal. Logically therefore, when a man commits a crime, he no longer inhabits civil society. He, by virtue of his actions, once again becomes a denizen of the nature from which he arose. It is no longer disputed that when a person commits murder, he ceases to view his victim as a human being worthy of respect and dignity.[25] He views his victim as an obstacle to his objective—be it money, fame, love or domination. The victim ceases to be a full human being in his head, inherently incapable of being respected or being treated with dignity. In other words, a criminal while committing the crime, returns to the realm of nature.

Politically, civil society is created through external institutions—institutions that exist across generations and to some extent, are independent to the passage of time.[26] As a result, these institutions are deemed permanent, at least for the lifetime of an individual. These institutions make it easier for a person, both outwardly, as well as inwardly (psychologically) to remain within civil society. This is precisely the basis for Justice Foster's position in the Speluncean

[25] Steven Gambardella, "The Psychological Trick that allows People to Kill", *Medium*, July 10, 2021 https://medium.com/the-sophist/the-psychological-trick-that-allows-people-to-kill-ab778a655ffa (last visited on Feb. 29, 2024).
[26] See Charles Covell, *Hobbes, Realism and the Tradition of International Law* 18 (Palgrave Macmillan, 2004).

Explorer case. According to him, once those institutions disappear, civil society ceases to exist. Psychologically however, those institutions never truly existed. The to-be criminal places value in such institutions, and hence, they exist, fleetingly. The institutions are psychologically engineered as a deterrent, to ensure that the people do not abandon civil society. It is only after eking all of these conceptual notions out, that one can finally begin to understand the profound flaw in Justice Foster's logic.

## V. FORTER'S FALLACY: WHERE THERE IS SOCIETY, THERE IS NATURE

Such an extensive foundation is required to be laid, in order to fundamentally understand the problem of Justice Foster's argument, especially when viewed from a Hobbesian perspective. To re-capture what Justice Foster postulates, he argues, that people who are placed within a state of nature, are free from criminal liability, as they are taken out of the framework that allows them to be civilised. In other words, in a state of nature, one cannot judge a man's actions using civilised logic.

One realises that this conception of the state of nature, and its role in civil society, is fundamentally flawed when one understands the relation of every man with the state of nature. Every person in civil society, is born as a denizen of the State of Nature. With the passage of time, man is moulded and educated into becoming civilised. However, his education is by his (and its) very nature, external and artificial. This means, that humanity constantly rises above its nature, to be civilised. On an individual level, every moment of a person's existence, is a constant fork in the path of their lives. They are constantly faced with the choice of embracing state of nature, or being civilised. A lawful life is therefore, a constant process of them consciously (and at times, subconsciously) opting for the civilised path of behaviour over that which might have been prevalent in Hobbes' State of Nature.

This choice is of course heavily influenced (or at least, is purported by the State to be) by the existence of laws (including criminal laws) that restrict and define the scope of acceptable behaviour in civilised society. Therefore, criminal laws and laws in general, are the primary

mechanism through which civil society comes into existence,[27] and which separates those who inhabit the State of Nature and those who don't.

The fundamental flaw in Justice Foster's argument is that he believes the framework of laws and civil society around a person to be determinative in them being civilised. While civil society is significant, it is not determinative. What decides whether a person acts in a civilised manner or not, is firstly determined by the willingness of the person to be subject themselves to such a framework. Every time any of the "passions"[28] act upon a person, he consciously chooses to act in a civilised manner. Therefore, humanity goes through life, being in State of Nature, and constantly choosing to rise above it and to prostrate themselves before the notion of a civilised society.

Now, merely because man is picked up from his cosy home, and placed into a dark cave, does not mean that his position vis-à-vis State of Nature (or even Civil Society) principally changed. I concede, it would be intentionally stubborn to suggest that his position has not changed in any manner whatsoever. It is no doubt true, that the structures of civil society make it easier of humanity to choose the civilised option. But man's position has not fundamentally changed when one looks at his culpability for his actions.

One cannot abandon the cardinal principle of individual responsibility merely because it was harder for the accused to remain civilised. If every person, constantly wills themselves into civil society throughout their lives, it should make very little difference, whether or not, civil institutions exist around them to assist them in this endeavour. In the state of nature, it merely becomes tougher for them to continue to be civilised. His culpability for crime therefore, ought not to change.

At this point, it is important to note that the case is not being made that culpability of those stuck in these sorts of unfortunate situations, is the same as that of other criminals and murderers. Justice Foster in this respect, does not make the case that the explorers deserve *lesser* punishment (or have *lesser* culpability attributable to them); he makes the case that the explorers deserve *no* punishment (as they have *no* culpability for their actions). That is precisely the point sought to be

[27] Roger A. Shiner, "Hart and Hobbes", 22 *WM. & MARY L. REV*. 201, 204-205 (1980),
[28] *Supra* note 15, at 187.

countered by the above exposition of man and nature. By no means is it contended that those who are stuck in such unfortunate circumstances deserve equal punishments as those who commit crime within the comfortable blanket provided to them by civilised institutions. It would be perfectly reasonable for the judge to reduce their sentences given the harsh circumstances within which their actions were ensconced. But on the principled point of the existence of the explorer's culpability, Justice Foster falters in his final analysis.

While there are many grounds of attack against the opinion put forward by Justice Foster, the Justices who undertake such attack fail to attack the fundamental principle underlying Justice Foster's position. They take consequentialist oppositions to his position, but don't principally engage with his ideas. This study, has undertaken to do precisely that. This study has attempted to show that merely because a man is placed in a literal State of Nature, does not mean that he is any less duty-bound to uphold the Rule of Law and the Rule of Civil Society. Morally, in fact, the case could be made that it is incumbent upon him to uphold civility, since "Virtue is only virtue, in extremis"[29]. Notwithstanding the truth of a science-fiction proverb, law does not require man to be virtuous. It merely requires him not to be evil. In this regard, this article has endeavoured to show that at every moment, humanity is constantly in the act of rising above their nature, and acting in a manner that is acceptable in civil society. Therefore, the expectation from the law, should not change, when the subject of such a law is placed beyond its reach.

## VI. CONCLUSION

From a consequentialist perspective, this study is quite vulnerable to the charge of being completely devoid of contributive value. There exists no real-world benefit from this study, nor is there any lacuna in any law that is being highlighted here. The best that I can do to help is that I would recommend that the reader turn their attention to Fuller's postscript of his article. The postscript drives home the timelessness of Fuller's article, and the fact that such debates will continue to take place across out societies for the foreseeable future. This article therefore, hopes to add a drop to the venerable ocean of scholarship on this subject. While there is no question of comparing this work with that of Fuller's article, the value of this study ought to be determined along similar lines. Fuller's article provides significant insight into how one particular

[29] Doctor Who: Extremis, *BBC television broadcast*, May 20, 2017.

circumstance can be viewed from different perspectives, especially with each perspective having its own conception of the interplay of society, law and humanity. This study, merely aims to bolster the significance of Fuller's article by expounding a critique of Justice Foster's marvellous, albeit flawed exposition of natural law.

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# EVALUATING INFRINGEMENT OF "INVISIBLE TRADEMARKS": INDIAN PERSPECTIVE

**TEESTA HANS***

## ABSTRACT

*Trade marks (TMs) are applied to products (goods and services) for source identification. This application of TMs can be in the form of name, label, packaging, or any other manner. Though there is an understandable distinction between conventional and non-conventional TMs, both these categories usually fall under the realm of visible trade marks. However, the rapid increase of Internet and digitalization has created another category, known as invisible trade marks, which is being used with the intent of infringing registered TMs. Such cases of infringement have increased manifold with technological advancements and have led to difficulties in enforcement. This paper discusses the differences between visible and invisible TMs and elucidates the negative effects of the usage of invisible TMs from the perspective of consumers as well as registrants. Furthermore, this paper elucidates the issue that it is simpler to demonstrate confusion between deceptively similar or identical TMs and subsequent infringement when in the case of visible TMs. Conversely, it is noted that invisible TMs necessitate a distinct criterion for substantiation in cases of infringement. This paper reviews relevant legislative and jurisprudential framework in India and concludes with recommendations on how to deal with the increasing infringement of invisible trade marks.*

## I. INTRODUCTION

A trade mark (TM) refers to a 'mark' which distinguishes the source of products (including goods and/or services)[1] among various existing players in the market for that particular product.[2]

* Ph.D. Research Scholar, and Coordinator, DPIIT - IPR Chair, Maharashtra National Law University, Mumbai.
[1] Giovanni Ramello, "What's in a Sign? Trademark Law and Economic Theory", Journal of Economic Surveys, Vol. 20 Issue 4, Pp 548, available at: https://doi.org/10.1111/j.1467-6419.2006.00255.x (last visited on 28 February 2024).

It does not denote quality or quantity[3], but the origin or source of a product.[4] The definition of the term 'trade mark'[5] provided in the Trade Marks Act is inclusive. It covers the concept of conventional or traditional as well as non-conventional trade marks. The application of TMs is being done in a manner that is visible to the consumers and is therefore, being termed as "visible trade marks". On the other hand, "invisible trade marks" refer to the non-conventional application of visible TMs.[6]

The usage of the term 'invisible trade mark' illustrates that TM is being used for a particular product, however, this application is not in a customary manner and is not noticeable by the consumer in a straightforward manner or even by the naked eye. The best example of an invisible trade mark is Meta tagging.[7] There are other examples also of invisible applications of trade marks where companies hide the registered TMs belonging to third parties in plain text by mentioning them in the same colour as that of the background or in an extremely small font size, which is not legible by Internet users, but in both the instances can be easily comprehended by search engines.[8] In this manner, third parties can ride on the goodwill of registered TMs, which results in infringement of such marks causing economic loss to the registrants.

This leads to diverse questions like: How does infringement take place when trade mark is being applied in a manner which is invisible to the naked eye? Does trade mark infringement in such a manner cause negative consequences for registrants? Does that negative effect extend to consumers?

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[2] WIPO, "Trademarks, What is a trademark?" Available at: https://www.wipo.int/trademarks/en/ (last visited on 28 February 2024).

[3] Raja Selvam, "Trademark & Quality Control - The Indian Perspective", 11 March 2013, available at: https://selvams.com/blog/quality-control-in-trademark-the-indian-perspective/#:~:text=It%20is%20an%20identity%20mark,it%20is%20only%20for%20identity. (last visited on 28 February 2024).

[4]USPTO, "What is a trademark?" 31 March, 2021, available at: https://www.uspto.gov/trademarks/basics/what-trademark (last visited on 28 February 2024).

[5] The Trade Marks Act, 1999, § 2 (1)(i)(viii)(zb), (ACT NO. 47 OF 1999) available at: https://legislative.gov.in/sites/default/files/A1999-47_0.pdf (last visited on 28 February 2024).

[6] Alexander McIsaac, "Trade Mark Room, Invisible and Subliminal Uses of Trade Marks", available at: https://trademarkroom.com/blog/item/invisible-and-subliminal-uses-of-trade-marks/ (last visited on 28 February 2024).

[7] Meeka Jun, "Meta Tags: The Case of the Invisible Infringer" NYLJ, 24 October, 1997, available at: https://cyber.harvard.edu/property00/Metatags/Meta3.html (last visited on 28 February 2024).

[8] Mauro Paiano & Shakespeare Martineau, "Invisible' trade marks. Is it possible to protect or infringe something you can't see or touch? Yes it is" 9 May 2022, available at: https://www.shma.co.uk/our-thoughts/invisible-trade-marks-is-it-possible-to-protect-or-infringe-something-you-cant-see-or-touch-yes-it-is/ (last visited on 28 February 2024).

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This paper evaluates the concept of infringement of registered trade marks when applied in an invisible manner or 'invisible trade marks'. For this assessment, it is important to understand the difference between visible and invisible trade marks, which is covered in part I of the paper. Part II of this paper reviews the negative effects of infringement faced by registrants as well as consumers and evaluates whether registrants receive the full gamut of protection in the digital world. Part III reviews the doctrine of 'initial interest confusion' and Part IV deals with judicial trends in India regarding the conundrum of infringement of invisible trade marks. The paper concludes by offering suggestions to clarify this subject matter in Section V.

The basis of this research is the analysis of current regulatory enactments in India, judicial decisions, and available literature on this subject matter including the findings and opinions. The methodology followed in the current study is doctrinal research, with a detailed analysis of existing legislative and jurisprudential framework.[9]

## II. TRADE MARKS: VISIBLE AND INVISIBLE

A trade mark is the first point of contact in a visible manner for a consumer to connect with the manufacturer or service provider and identify the source.[10] It is also a distinguishing factor for the registered owner to stand out among the competitors. The legal definition of the term 'trade mark' does include diverse types of known marks, commonly categorised into traditional or conventional as well as non-conventional (including, but not limited to, sound, smell, shape, 3-Dimensional, color, or motion trade marks).[11]

There is a divergent opinion that sound marks and smell (olfactory) marks, being invisible to the naked eye are invisible trade marks.[12] However, these marks should only be classified as non-

[9] P. Ishwara Bhat, "Doctrinal Legal Research as a Means of Synthesizing Facts, Thoughts, and Legal Principles, Idea and Methods of Legal Research" (Delhi, 2020; online edn, Oxford Academic, 23 January 2020), https://doi.org/10.1093/oso/9780199493098.003.0005 (last visited on 28 February 2024).
[10] Gardner Linn Intellectual Property Counsel, "A trademark must identify the source of a product or service", available at: https://www.gardner-linn.com/frequently-asked-questions/a-trademark-must-identify-the-source-of-a-product-or-service/ (last visited on 28 February 2024).
[11] Smriti Ganotraand Abdullah Qazi, "Non-Conventional Trademarks", Ct. Uncourt 5 (2018): 27, available at: https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/counco5&id=408&men_tab=srchresults (last visited on 28 February 2024).
[12] Piotr Dudek, TGC Corporate Lawyers, "Unconventional Trademarks – Invisible Marks", 13 October 2021, available at: https://www.tgc.eu/en/publications/unconventional-trademarks-invisible-marks (last visited on 28 February 2024).

conventional trade marks and cannot be clubbed under the category of invisible trade marks, since this categorization is being done on based on the application of trade marks.

To understand the difference between visible and invisible trade marks, a theoretical illustration is provided using a well-known trade mark 'COCA-COLA':

The 'COCA-COLA' used as a brand for different beverages, is a well-known trade mark across the globe.[13] Any consumer can effortlessly recognize: 'COCA-COLA' and 'COKE' indicated on the bottle in a particular font,[14] design (size and shape) of the bottle and color (red) combinations thereof. There are numerous trade mark registrations for the same in the name of the company throughout the world.[15] Whenever a customer buys a bottle of Coca-Cola, he can be assured that the taste of the drink will remain constant, which is the *bona fide* influence of trade mark on its customers[16]. Furthermore, trade mark helps in terms of impression and reach, thereby benefitting both the company as well as consumers.

Consider that the Coca-Cola Company receives a complaint that the taste of NEW Coca-Cola beverages is different from the available ones in the market. On conducting a market investigation, the company unearths that a third-party manufacturer is selling its cola concoction. It uses bottles that are confusingly similar to that of the Coca-Cola Company and under the trade mark "NEW COCA COLA". Since the TMs used by this third-party manufacturer are deceptively similar to the registrant (Coca-Cola Limited), it can confuse the minds of consumers that this new product also belongs to the registrant even though, it tasted different. This third-party manufacturer is the 'infringer', using a confusingly similar trade mark for similar

[13] Managing IP Correspondent, "Coca-Cola wins as well-known trade mark", 2 November 2011, available at: https://www.managingip.com/article/2a5c91qu2onmedca69kw0/coca-cola-wins-as-well-known-trade-mark (last visited on 28 February 2024).
[14]Justia Trademarks, "COCA-COLA - Trademark Details, Status: 800 - Registered And Renewed", available at: https://trademarks.justia.com/700/22/coca-70022406.html (last visited on 28 February 2024).
[15]Aparajita Kaul, "Trademarks And Trade Secrets: Know The Difference With Coca-Cola", 29 August 2018, available at: https://www.mondaq.com/india/trademark/731000/trademarks-and-trade-secrets-know-the-difference-with-coca-cola#:~:text=Coca%2DCola's%20trademark%20consists%20of,apart%20from%20all%20its%20competitors(last visited on 28 February 2024).
[16] CS Prachi Prajapati, "Benefits of Trademark Registration", available at: https://www.legalwiz.in/blog/advantages-of-registering-trademarks (last visited on 28 February 2024).

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products[17]. This infringement is uncomplicated to establish since it is clearly defined under the Trade Marks Act[18].

Contemplate another hypothetical complaint received by the Coca-Cola Company wherein on conducting an Internet search for the nearest distributor for Coca-Cola Company, the customer lands on the webpage of 'NEW COCA COLA' Company, owing to meta tags used which are the registered trade marks of Coca-Cola Company. Due to reliance on search engines and the similarity of websites, the customer gets the impression that this website is related to the Coca-Cola Company. The customer is tempted by their offers and purchases the products belonging to the 'NEW COCA COLA' Company while he is under the impression that he is purchasing products of the Coca-Cola Company. Thus, it becomes difficult for the customer to ascertain infringement in the cases of invisible usage of trade marks[19].

The evaluation of the invisibility of trade marks can be accomplished with the analysis of the working of Meta tags. Meta tags refer to the indiscernible codes, which are part of the Hyper Text Markup Language (HTML) and are used to create extracts of text describing the web page or website.[20] Such Meta tags do not usually appear on the text of a particular web page, but are used in the source code which is read by a search engine,[21] like GOOGLE, BING, or YAHOO.

Meta tags are categorised into different types based on the information they are providing to a search engine.[22] They are usually used as description tags to apprise the visitors or users of a web page regarding a brief and relevant summary of that page.[23] These tags are keywords that help

[17] Harsha Asnani, "What Is Infringement Of Trademark", May 26, 2016, available at: https://blog.ipleaders.in/what-is-infringement-of-trademark/(last visited on 28 February 2024).
[18] The Trade Marks Act, 1999, § 29 (ACT NO. 47 OF 1999) https://indiankanoon.org/doc/84096/ (last visited on 28 February 2024).
[19] Sanjukta Kaushik, "Legal Issues in 'Embedded Trademarks', Issue: Whether "Invisible Use" of Trademarks as Keywords Amounts to Infringement/Passing Off Under Trademark Law?", November 15, 2021, available at: https://www.algindia.com/wp-content/uploads/2021/11/LIS-GIP-41_Sanjukta-Kaushik-1.pdf (last visited on 28 February 2024).
[20] Searchmetrics, "Meta Tag", available at: https://www.searchmetrics.com/glossary/meta-tag/ (last visited on 28 February 2024).
[21] WorldStream by Localiq, "Meta Tags – How Google Meta Tags Impact SEO", available at: https://www.wordstream.com/Meta-tags (last visited on 28 February 2024).
[22] Tereza Litsa, Search Engine Watch, "A quick and easy guide to meta tags in SEO", 2 April 2018, available at:https://www.searchenginewatch.com/2018/04/04/a-quick-and-easy-guide-to-meta-tags-in-seo/ (last visited on 28 February 2024).
[23] Luke Harsel, Semrush Blog, "What is a Meta Description? (Plus, Tips on Writing a Good One)", 2 February 2021, available at: https://www.semrush.com/blog/on-page-seo-basics-meta-descriptions/?kw=&cmp=IN_SRCH_DSA_Blog_Core_BU_EN&label=dsa_pagefeed&Network=g&Device=c&utm

the search engines to index that page and propose the users to access it.[24] There is no restriction on the number of words that can be used as keywords, however, the limit of words that can be used by each search engine as summary of that page may vary.[25] These Meta tags aid the website owners to provide information about their web pages and divert traffic to the same when any Internet user searches for identical or similar information by employing those keywords through a search engine. The Meta tag text which can be added to the <head> section of an HTML page may appear like a code, which can be deciphered only by the search engines, and not the ordinary visitors of a website.[26] When an internet user types that particular keyword(s) on the search engine (say GOOGLE!), it will provide a list of web pages or websites corresponding to that keyword(s) and catalogue the hits as per their relevance to the keyword(s).[27] It has been observed that by using alterations and different arrangements of keywords, the results of search engines can be manipulated.[28]

Examine a situation that a registered trade mark is used as a Meta tag by a third party to lure traffic to its web page or website, which is unauthorised by the registrant. Since the Meta tag or keyword is not used as text of the webpage, the trade mark therefore remains invisible to the users. Although this unauthorised use of a registered trade mark may not be clear to internet users, it is comprehensible by the tools of a search engine and helps this web page or website to appear as a 'relevant hit' when the internet user searches that particular term or keyword as the tools employed by the search engine read the HTML code of a web page.

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_content=515771590504&kwid=dsa-1053501809467&cmpid=11773572684&agpid=115407102398&BU=Core&extid=23664257991&adpos=&gclid=Cj0KCQjwmdGYBhDRARIsABmSEeMZav_LsLeI8Up_lMDy0gVhJAkPuskCBqwTn4cjvEjYu9N0hJqMdIsaAqzrEALw_wcB (last visited on 28 February 2024).

[24] Aleh Barysevich, Search Engine Journal, "10 Most Important Meta Tags You Need to Know for SEO", 28 July 2020, available at: https://www.searchenginejournal.com/important-tags-seo/156440/#close (last visited on 28 February 2024).

[25] Google Search Central, "Control your snippets in search results", available at: https://developers.google.com/search/docs/advanced/appearance/snippet#Meta-descriptions (last visited on 28 February 2024).

[26] Google Search Central, "meta tags and attributes that Google supports", available at: https://developers.google.com/search/docs/crawling-indexing/special-tags (last visited on 28 February 2024).

[27] Google Ads Help, "About keywords in Search Network campaigns", available at: https://support.google.com/google-ads/answer/1704371?hl=en#:~:text=Keywords%20are%20words%20or%20phrases,you%20want%2C%20when%20you%20want (last visited on 28 February 2024).

[28] GNU Astronomy Utilities, 0.14 manual, "5.1.1.2 Keyword manipulation", January 2021, available at:https://www.gnu.org/software/gnuastro/manual/html_node/Keyword-manipulation.html (last visited on 28 February 2024).

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Meta tags originated to aid in describing the web page in HTML format; however, it has been observed that often Meta tags are not an accurate suggestion of the content of that page, but contain popular search terms as keywords, which have the sole purpose of enticing the Internet users to a particular web page or website.[29]

The reason behind the escalation of invisible trade marks and this form of infringement is the boom of the Internet and digitalisation. At present, the world can't operate without Google since approximately nine out of every 10 online searches throughout the world are conducted through it, except in China.[30]

With the increased use of social media and the Internet, many online marketing and advertising tools are deployed by companies, which leads to additional costs and resources for the online usage of a trade mark.[31]

## III. EVALUATION OF INFRINGEMENT

When another party uses an identical or confusingly similar trade mark in an unauthorised or illegal manner for any product, which may be related to the registrant and causes confusion or deception regarding the source of those products, it is termed as '*infringement'* and is defined under Section 29 of the Act.[32] This section highlights the different ways of infringement of registered trade marks. In accordance with the subject section, a registered trade mark is infringed, when any person other than the registrant, uses a trade mark in a manner that is identical or deceptively similar to that of the registrant in relation to identical, related, associated, or unrelated products. It also states that infringement occurs when an identical or deceptively similar trade mark is used in the course of trade or even if used as a trade name or business name or part thereof. Infringement also occurs in those cases when an identical or deceptively similar trade mark is used on goods or packaging of those goods when goods are sold in India or outside

[29] Danny Sullivan, Search Engine Land, "Meta Keywords Tag 101: How To "Legally" Hide Words On Your Pages For Search Engines", 5 September 2007, available at: https://searchengineland.com/meta-keywords-tag-101-how-to-legally-hide-words-on-your-pages-for-search-engines-12099 (last visited on 28 February 2024).
[30] Jackson Ryan, CNET Your Guide to a better future, "A Planet Without Google Search", 27 February 2023, available at: https://www.cnet.com/science/features/a-planet-without-google-search/ (last visited on 28 February 2024).
[31] Dr. Jochen M. Schaefer, WIPO Magazine, "IP Infringement Online: the dark side of digital", April 2011, available at: https://www.wipo.int/wipo_magazine/en/2011/02/article_0007.html (last visited on 28 February 2024).
[32] The Trade Marks Act, 1999, § 29 (ACT NO. 47 OF 1999) available at: https://legislative.gov.in/sites/default/files/A1999-47_0.pdf (last visited on 28 February 2024).

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the territory of India. Such wrongful usage[33] is not allowed even on business documents or advertising materials. Furthermore, a registered trade mark is considered to be infringed by advertising if the same is unfair, not following the market practices, detrimental, and/or against the reputation of that registered trade mark. The subject section also clarifies that infringement of a registered trade mark can occur even if the same is included in spoken language or visual representation by a third party in an unauthorised manner. All these instances referring to infringement of visible trade marks are mentioned in the Act and can be detected. However, can the same section be applicable in cases of invisible trade marks, where the registered trade mark may be infringed through a non-conventional application?

It is significant to assess this control and ownership for trade marks and more so, in the cases of infringement when it is not in conventional form, but in the manner which cannot be assessed by consumers and registrants alike. It supplements the challenge of whether infringement of a registered trade mark is injurious only to the registrant or does it impact the consumers also.[34]

Consider that the internet search of a registered trade mark lands the consumer on the web page of a competitor, which is offering a similar range of products at a much lower price and at inferior quality. The reason behind this mix-up can be the usage of a registered trade mark of a competitor as a Meta tag or keyword. In addition to creating confusion in the minds of consumers regarding the prices, this internet search can be damaging for both the registrant as well as the consumer since he is oblivious of the quality of products of competitors and thus, contributing to the theory of 'initial interest confusion'. Though initial interest confusion develops before the purchase effectuates, it is considered applicable in cases even when the confusion arises at the time of purchase and may be caused by unauthorised use of a registered trade mark, or by deflecting goodwill or name of a registered mark.[35]

[33] Mark McKenna, "Trademark use and the problem of source", U. Ill. L. Rev. (2009): 773, available at: https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/unilllr2009&id=779&men_tab=srchresults (last visited on 28 February 2024).
[34] Simon Webster, IP Watch Dog, "Challenges for Trademarks in a Digital World: A Review of INTA 2017", 6 June 2017, https://www.ipwatchdog.com/2017/06/06/challenges-trademarks-digital-world-inta-2017/id=84072/ (last visited on 28 February 2024).
[35] Himanshu Sharma, "India: Hijacking Of Identity: Initial Interest Confusion", available at: https://www.mondaq.com/india/trademark/407394/hijacking-of-identity-initial-interest-confusion#:~:text=This%20doctrine%2C%20identified%20as%20a,at%20the%20time%20of%20purchase (last visited on 28 February 2024).

It is pertinent to note that the confusion mentioned here is not a result of deceptive similarity in the trade marks, but the misrepresentation that may occur during the online search of products. The uncertainty is enhanced in the case of invisible trade marks as the usage of a registered trade mark may deceptively divert to a competitor's website due to manipulation by invisible trade marks.

## IV. DOCTRINE OF INITIAL INTEREST CONFUSION

The doctrine of "initial interest confusion" was propounded in the matter of *Brookfield Communications v. West Coast Entertainment Corporation*[36] wherein, trade mark "MovieBuff" was registered in the name of Brookfield Communications for software product related to the entertainment industry, which was registered as a domain name – www.moviebuff.com by West Coast Entertainment. It was observed by the Court that internet users on loading the domain name – www.moviebuff.com may easily discover that this website does not relate to Brookfield, however, it may result in initial confusion and cause harm to the registrant. The Court further opined that unauthorised use of a registered trade mark of any other registrant will always mean taking undue advantage of the goodwill of that registrant and also, will cause confusion in the minds of the consuming public.

Though this decision was about domain names, which is visible to the internet users, the Court applied an interesting analogy of billboards in relation to the usage of Meta tags. In this matter, the billboards, which attract customers to a shop or marketplace, were compared to the Meta tags, and was stated that a Meta tag acts as a signpost or billboard outside the front of a store and that the same should not bear the registered trade mark of any other registrant.

It can be contented that Meta tags are not even close to the example of billboards because once the internet user has discovered he has landed on the wrong web page, he may easily navigate back by pressing the 'Back' button, which is not possible in the real-life scenario and becomes an issue while crossing the billboard.[37]

[36] Brookfield Communications v. West Coast Entertainment Corporation,174 F.3d 1036, 1062 (9th Cir. 1999).
[37] Philip J. Greene, "Keyword Advertising, and Other Invisible Uses of Third-Party Trade Marks in Online Advertising - A New Zealand / Australian Perspective", VUWLR, 39(4), 1–106(2009). https://doi.org/10.26686/vuwlr.v39i4.6297 (last visited on 28 February 2024).

At the same time, other cases concerning the issue of Meta tags were also filed indicating a rise of trade mark related issues over the Internet.[38] In the matter of *Insituform Technologies Inc. v. National Envirotech Group, L.L.C.*,[39] the complainant (Insituform) contended that the defendant unauthorisedly used his registered trade marks "Insituform" and "Insitupipe" as Meta tags to ride on his goodwill. Despite the charges on grounds of false designation of origin, federal trade mark infringement, and unfair competition, the parties settled through an agreement.

This case was followed by the matter of *Oppedahl & Larson v. Advanced Concepts*,[40] wherein the law firm of Oppedahl & Larson sued website owners and service providers on grounds of trade mark infringement, trade mark dilution, and unfair competition on the contention that name of the law firm was used as Meta tags by these websites, which were not even its competitors or in the same line of business. A permanent injunction was granted against using the registered trade marks of the complainant "Oppedahl & Larson" along with the words "Oppedahl" and "Larson" separately as Meta tags on any of the web pages owned by the defendants.

In *Playboy Enterprises Inc. v. Calvin Designer Label*,[41] the plaintiff contended that defendants (Calvin Designer Label, Calvin Fuller and Calvin Merit) were unauthorisedly using the trade marks "PLAYBOY" and "PLAYMATE" registered in the name of Playboy Enterprises as part of domain names ("www.playboyxxx.com" and "www.playmatelive.com"), name of their online service ("Playmate Live Magazine") and in advertising slogan ("Get it all here @ Playboy"). The complainant also alleged that these registered trade marks were being used as Meta tags, which are not visible to the internet users being part of the HTML code but can be easily detected by the search engines. The plaintiff claimed that the customers, including potential customers, were getting confused regarding the origin of the products. Therefore, the defendants were barred from using the registered trade marks of the plaintiffs in any form – domain name, trade name, slogan, Meta tags, or for any other promotional material.

[38] Maureen A. O'Rourke, "Defining the Limits of Free-Riding in Cyberspace: Trademark Liability for Metatagging", 33 GONZ. L. REV. 277 (1997).
[39] Insituform Technologies Inc. v. National Envirotech Group, Civ. Action No. 97-2064.
[40] Oppedahl & Larson v. Advanced Concepts, Civ. Action No. 97-Z-1592, at 3 (D.Colo. filed July 23, 1997) (Order, Judgment and Permanent Injunction with regard to defendants MSI Marketing, Inc., Professional Website Development, and Internet Business Services, entered Dec. 19, 1997).
[41] Playboy Enterprises Inc. v. Calvin Designer Label, Civ. No. C-97-3204 (N.D. Cal., Sept. 8, 1997).

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The exponential growth in technology has resulted in the evaluation of traditional principles of trade marks with a different yardstick and to find creative solutions to novel issues caused by technology.

## V. JUDICIAL POSITION IN INDIA

The US jurisprudence was followed by the Mumbai High Court in the matter of *People Interactive (I) Private Limited v. Gaurav Jerry*,[42] wherein the Court opined that the 'invisible' use of a registered trade mark by an infringer dilutes that registered trade mark and that the infringement can be considered online piracy. In this matter, the plaintiff was registrant of well-known trade mark and domain name – "Shaadi.com" who complained against a confusingly similar domain name – "ShaadiHiShaadi.com" of the defendant along with unauthorised usage of the registered trade mark "shaadi.com" and domain name "www.shaadi.com" of plaintiff as Meta tags on the website of defendant. In this matter, a detailed analysis of Meta tags, meaning, and working was set forth before the Court. It was stated that Meta tags are now a routine market practice of diverting traffic to a website, however, illegitimate use of Meta tags can be extremely injurious for the registrants of trade marks as well as Internet users or consumers. Since Meta tags of one website may dishonestly use registered trade marks, domain name, or other unique identifying features of another registrant, a search engine tool, which reads only the HTML code, will provide both the web sites as results to the Internet users and cause confusion, deception, infringement and/or passing off as it may ride on the goodwill of the precious IPR of the registered and legitimate owner. The Court opined that hijacking or luring Internet traffic using such dishonest and mala fide practices of Meta tagging results in online piracy and cannot be allowed to continue.

With the clarity of mala fide intention of an infringer, it is significant to understand whether search engines also have a role to play in infringement of invisible trade marks. It has been reported that search engine companies offer bidding[43] for 'words' and/or 'phrases' of registered

[42] People Interactive (I) Private Limited v. Gaurav Jerry, NMS (L) NO. 1504 of 2014 in SUIT (L) NO. 622 OF 2014.
[43] Weslee Clyde, "Understanding Keyword Bidding in Google Ads", 10 April 2020, available at: https://www.newbreedrevenue.com/blog/understanding-keyword-bidding (last visited on 28 February 2024).

trade marks to their competitors, which is commonly known as 'Keyword Advertising'.[44] The concept of infringement becomes applicable only when the registered trade marks come into play and not generic terms.[45]

If an Internet user searches for the term 'apples', then he should ideally get the search results related to the fruit apple. However, since the term 'APPLE' is also a well-known trade mark, it is understandable that the search results lead to the products of the company Apple Inc., but if the search further lures the customers to websites of rivals or competitors of the products of Apple Inc., it is a case of keyword advertising trade mark infringement. This practice is detrimental to the consumers, who spend their time and resources on irrelevant web sites and also, to the legitimate registrants, who face the decline of their trade mark value.

Furthermore, the sale of keywords by the search engine is against the concept of trade marks protection, which accords full protection and rights to the registrant to use, copy, distribute, and monetize his registered trade marks. The profit-making by a search engine on selling keywords, which are registered trade marks of another person to a third party or competitor, therefore, is directly against this principle.[46] Likewise, the key purpose of registering a trade mark is to ensure that consumers are aware of the source of products and there is no confusion related to origin, however, keyword advertising only fuels confusion and deception regarding the source.[47]

A key question that follows the aforementioned is that do all kinds of keyword advertising translate to invisible trade mark infringement. In case, the keywords are only generic and are terms of common use, even if the same is part of the registered trade mark, the search engine

[44] Upcounsel, "Keyword Advertising Trademark Infringement: Everything You Need to Know", https://www.upcounsel.com/keyword-advertising-trademark-infringement (last visited on 28 February 2024).
[45] Bhumesh Verma & Abhisar Vidyarthi, "Keyword Advertisement and IPR Considerations" (2019) PL (CL) May 78, SCC Online Op. Ed, available at: https://www.scconline.com/blog/post/2019/06/04/keyword-advertisement-and-ipr-considerations/ (last visited on 28 February 2024).
[46] Times Now News, "ADIF asks Google to stop allowing the use of registered trademarks as keywords by competitors", 10 May 2022, available at: https://www.timesnownews.com/technology-science/adif-asks-google-to-stop-allowing-the-use-of-registered-trademarks-as-keywords-by-competitors-article-91472753 (last visited on 28 February 2024).
[47] Erkki Holmila, Reggster, "Can you use another company's trademark as a keyword in online advertising?" 31 December 2021, available at: https://reggster.com/insights/trademarks-as-keywords-in-advertising/ (last visited on 28 February 2024).

cannot be held liable if the search results include the websites of competitors in the market.[48] For instance, on conducting a search for the term 'smart phone', the Internet user may be confused with the diverse options since the majority of the key market players may be using these generic words – smart phone as keywords for advertising. However, if there is a legitimate owner of the domain name – www.smartphone.com, he may not be able to provide evidence for infringement for such a common search array. Therefore, the proof of existence of confusion is significant to determine whether the issue of infringement has arisen. While determining the cases of invisible trade mark infringements, the decision of 'likelihood of confusion' follows the rule of 'one size does not fit all' and has attracted divergent opinions in the absence of a uniform law, but is dependent on facts of that particular matter.

The dispute related to trade mark infringement through keyword advertising was deliberated initially in the matter of *Consim Info Private Limited v. Google India Private Limited and Others*.[49] In this case, the plaintiff rendered services of matrimony through online mode, through its websites in more than 15 regional languages, which catered to millions of Indians and also, owned numerous registered trade marks related to matrimonial services, including, "Bharatmatrimony", "Hindimatrimony", etc. The plaintiff alleged that the defendants, who were also in the business of online matrimonial services, advertised their services through the search engine Google using ad words and Meta tags based on the words identical or deceptively similar to the registered trade marks of the plaintiff. The Court examined the diverse case laws of different countries and concluded that the inclusion of registered trade marks, which comprised of common English words and have no alternate terms, if appearing in the keyword suggestion tool of the search engine (Google), does not amount to infringement or contributory infringement, however, if the registered trade mark is arbitrary or fanciful and has no relationship to the products offered, inclusion in keyword suggestion tool may amount to vicarious or contributory infringement. The Court held that the registered trade marks were descriptive of the services offered and thus, no infringement occurred.

[48] Urs Gasser, "Regulating Search Engines: Taking Stock and Looking Ahead", 9 YJLT (2006) 124, available at: https://www.researchgate.net/publication/36381831_Regulating_Search_Engines_Taking_Stock_and_Looking_Ahead (last visited on 28 February 2024).
[49] Consim Info Private Limited v. Google India Private Limited and Others, 2013 (54) PTC 578 (Mad).

In the matter of *People Interactive (I) Private Limited v. Ammanamanchi Lalitha Rani & Others*,[50] the plaintiff alleged that the defendant had *mala fidely* copied its well-known registered trade mark "Shaadi.com" and registered a domain name "GetShaadi.com" for providing identical services of online matrimony and for hijacking the high Internet traffic from the domain name of the registrant. The Bombay High Court stated that the impugned trade mark was deceptively identical and confusingly similar to the registered trade mark of the plaintiff and restrained the Defendant from using the said trade mark.

In the matter of *DRS Logistics Private Limited & Others v. Google India Private Limited & Others*,[51] Plaintiff requested for a permanent injunction against the defendant and other third parties from using its registered trade mark "Agarwal Movers and Packers" as a keyword or meta tag or as a search result on Google ad words program or in text for the purposes of advertising. The complaint was targeted against the mechanism followed by Google for keyword advertising. The Court opined that the usage of the registered trade mark of the plaintiff as a keyword by the third parties, diverted traffic from the web page of the plaintiff to the web pages of competitors or advertisers, thus, causing confusion to a consumer who searches for the registered trade mark of the plaintiff as query and landed on the webpage which did not belong to the plaintiff. Based on the evidence presented by the plaintiff of deficient services provided by a third party under the guise of a registrant, it was held that the public at large should not feel cheated in cases of online infringement. It was also held that the keyword even invisible, can direct traffic to the website of the competitor or advertiser and raise the issues of confusion in the minds of consumers. The court stated that the effect of trade mark infringement or passing off was implied as per the Indian trade mark laws.[52]

It is apt to conclude that the protection of registered trade marks in the online arena is fundamental to all businesses and consumers alike.[53] On one hand, the registrants are looking for

[50] People Interactive (I) Private Limited v. Ammanamanchi Lalitha Rani & Others, (Notice of Motion2312/2014 in Suit 962/2014).
[51] DRS Logistics Private Limited & Others v. Google India Private Limited & Others, CS (Comm) 1/2017.
[52] Kan & Krishme Attorneys at Law, "Use of a trademark as a keyword on Google Ad Program - Infringement or not?" https://kankrishme.com/use-of-a-trademark-as-a-keyword-on-google-ad-program-infringement-or-not/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration (last visited on 28 February 2024).
[53] Liisa M. Thomas & Robert H. Newman, WIPO Magazine, "Five Steps to Protect Your Trademarks in the Web 2.0 World", September 2010, available at: https://www.wipo.int/wipo_magazine/en/2010/05/article_0006.html (last visited on 28 February 2024).

ways to monitor their trade marks, and on the other, the infringers or third parties, who want to piggyback on the reputation or goodwill of the registered trade marks are also increasing at a menacing rate. The problem was still easier to tackle while it was limited to domain names or cyber-squatting; however, with the usage of Meta tags, keyword advertising, and other non-conventional manners of application of a trade mark to attain higher page ranking on search engines, gain more traffic on the websites or web pages, and/or increase in the number of online consumers,[54] the infringement of invisible trade marks has increased at an alarming speed.

In the matter of *MakeMyTrip India Private Limited v. Booking.Com B. V. & Others*,[55] the High Court of Delhi observed that the invisible trade mark, which acts as a keyword misleads the consumers and tantamount to passing off. The plaintiff alleged that the defendant (Booking.com B. V.) unauthorisedly used its registered trade mark "MakeMyTrip" and variants under the "*Google Ads Program*" to promote its business and website. On conducting an Internet search through the search engine – Google for the trade mark "MakeMyTrip", the first search result which appeared was that of the defendant. The plaintiff exchanged communication with the defendant and they eventually agreed to stop using the plaintiff's trade mark through the Google Ads Program. However, relying on the *Guess Judgment*,[56] related to the European Union Geo-Blocking Regulation, wherein the Commission opined that there cannot be any agreement restricting the use of a registered trade mark under the Google Ads Program as a keyword, the defendant refused to comply with the demands raised by the Plaintiff. The Court held that the use of the registered trade mark "MakeMyTrip" as a keyword through Google Ads Program by a competitor is infringement as a Meta tag. The Court also opined that in the absence of the Google Ad Program, the infringer has only the option of using the registered trade marks of the registrant as Meta tags. However, this decision was made applicable within the territory of India alone.[57] It was also clarified by the Court that the use of a registered trade mark as a keyword for advertisement amounts to use, even if it is invisible, causes deception when done to divert traffic from the website of the plaintiff to that of the Defendant.

[54] Zest IP, "The tussle with Trademarks in digital world", https://zestip.com/the-tussle-with-trademarks-in-digital-world/ (last visited on 28 February 2024).
[55] MakeMyTrip India Private Limited v. Booking.Com B. V. & Others, CS (COMM) 268/2022, vide order dated April 27, 2022.
[56] Guess (Case COMP/AT.40428), Commission decision of December 17, 2018.
[57] Vrinda Sehgal, "Use of Google Keywords is "Invisible Use": May amount to trademark infringement", https://www.candcip.com/single-post/use-of-google-keywords-is-invisible-use-may-amount-to-trademark-infringement (last visited on 28 February 2024).

In the matter of *Tictok Skill Games Private Limited v. Head Digital Works Private Limited,*[58] the Delhi High Court deals comprehensively with infringement of invisible trade mark in the form of Meta tags. In this case, the plaintiff (Tictok Skill Games) a digital gaming and technology company, extensively uses its registered trade mark "WinZo". The plaintiff alleged that the defendant has used his registered trade mark as a Meta tag on its website with its trade mark "A23" or "Ace2three" through the search engine – Google. Both the parties belong to the same industry. The plaintiff submitted evidence that on searching registered trade marks of the plaintiff "WinZo" or "WinZo Games" on a search engine, the Internet user will be led to the website of the defendant as the 1st relevant search and that the headline of this website states: "WinZo Game – Get Rs.50 instant Free Cash-a23.com.", which shows the *mala fide* intention of the defendant to use the goodwill of plaintiff. The Court granted a preliminary injunction in favor of the plaintiff since it appeared that the defendant though owns the brand "A23", uses the terms "WinZo" and "WinZo Games" preceding its own brand in the advertisements and meta tags, which may give a false impression of its affiliation to the plaintiff.

Thus, it can be observed that there is an increasing rise in the matters relating to trade mark issues over the Internet in both visible and invisible manner. It is clear that in India, the recent judicial trend appears to be in favour of the legitimate registrant in case of an invisible trade mark infringement. However, it is significant to understand that the jurisprudence related to Meta-tagging in India commenced with the lack of liability to search engine[59] or a third party for infringement of 'invisible' trade marks.

## VI. CONCLUSION

It can be summed up that though invisible trade marks infringement, like keyword advertising, intext usage of registered trade marks and meta tagging are effective methods of online advertising and diverting traffic to one's websites or specific web pages,[60] the issues regarding

[58] Tictok Skill Games Private Limited v. Head Digital Works Private Limited, CS(COMM) 301/2022 & I.As. 7251-53/2022.
[59] Devika Sharma, "The Odyssey of Google Search bias under the Indian Competition Law", 18 November 2019, available at:https://www.scconline.com/blog/post/2019/11/18/the-odyssey-of-google-search-bias-under-the-indian-competition-law/ (last visited on 28 February 2024).
[60] Erika Montgomery, "Keywords And Digital Marketing: What Do You Need To Know?" 22 September 2021, available at: https://www.threegirlsmedia.com/2021/09/22/keywords-and-digital-marketing-what-do-you-need-to-know/ (last visited on 28 February 2024).

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unauthorised use of registered trade marks of another party as keywords or meta tags and related trade mark infringement are on the rise in India.

It has been noted that infringement can be established when one party illegitimately utilizes another's registered trademark. However, determining infringement becomes challenging when adequate preventive measures are implemented to mitigate confusion between the registered trademark and keywords, meta tags, or generic terms. Nonetheless, the potential for infringement of a registered trademark persists.

Due to the absence of any particular regulations governing invisible trade marks infringement, the registrants live in constant fear of such online violations, which may even go undetected with the ever-rising number of web pages or websites or other newer social media-related platforms mushrooming over the Internet. The intricacies of discovering, following, and filing litigation against infringers in digital world is a complicated and insurmountable task.

The authorities must take charge of the current state of affairs and help the registrants to ensure full protection and control of their rights to steer the growth of the economy with the aid of IPRs. Given the lack of consistent judicial precedent that can be applied not only within Indian jurisdiction but also globally, as infringement can occur anywhere, legislation concerning these matters may be regarded as supplementary guidance to the existing applicable statutes.

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# AN ANALYSIS OF THE COMPATIBILITY BETWEEN CLASSICAL ISLAMIC LAW AND MODERN BANKRUPTCY: A FRAMEWORK FOR THE CONTEMPORARY BANKING SYSTEM

YASIR D. PATHAN*

## ABSTRACT

*This article explores the concept of Shari'a in various aspects of Muslim life, including finance and bankruptcy. It emphasises the need for modern Islamic finance to align with traditional bankruptcy laws and highlights the treatment of debtors and creditors under Islamic law. Additionally, it suggests adopting the well-developed classical Islamic bankruptcy system to address economic crises in Muslim countries. The article concludes by stressing the importance of reconciling traditional Islamic bankruptcy law with modern industry needs to develop effective bankruptcy laws for addressing loss scenarios.*

## I. INTRODUCTION

*Shari'a* is the way that Muslims try to understand and follow God's will in their lives. It covers everything they do, from business to family. *Shari'a* comes from the *Quran* and the Sunna, which are the holy sources of Islam. The *Quran* is the word of God that was revealed to the Prophet Mohammad by the angel Gabriel. The Sunna is the example of the Prophet Mohammad, based on his words and actions. These are recorded in the Hadith. Sometimes, the *Quran* and the Sunna did not have clear answers or could have different meanings. Then, Muslims used the *Quran* and the Sunna and other tools to figure out the law[1]. There was no one authority that could decide what God wanted. So, different scholars had different views and interpretations.

* IBL-LL.M. Student, NALSAR University of Law, Hyderabad.

[1] D.J. Stewart, 'Islamic Legal Orthodoxy: Twelver Shiite Responses To The Sunni Legal System', Page no 184 to 204 (Accessed: 06 February 2024). There are two primary denominations in Islam: Sunni and Shi'i. The substantial majority of Muslims (87-90%) in the world belong to the Sunni denomination, of which there are four schools of jurisprudence, as discussed below. Given the dominance in the most traditional Muslim communities of one of them, the Hanbali School, this article will primarily rely on its usages. While the Islamic Law of Bankruptcy according to Shi'a jurisprudence is very similar to Sunni jurisprudence, and the four Sunni Schools are also similar, there are differences.

These became different Schools of Law or *madhaheb*. *Hallaq* said that this "legal pluralism" made *Shari'a* "flexible and adaptable to different societies and regions." Many scholars started their own Schools of Law with students and followers." But by the 11th or 12th century, only four of these schools survived in Sunni law'8-*Hanafi, Maliki, Shafi'i, and Hanbali*[2]*'.*

*Shari'a* applies the same principles of honesty, good faith, fairness, social responsibility, and justice to business and finance as it does to personal relationships. The *Quran* and the Prophet Mohammad cared a lot about the poor and wanted to prevent the rich, especially moneylenders, from taking advantage of them. The Prophet also made some rules to control the market and stop wealth from being hoarded by a few and basic needs from being too expensive because of shortage. This article tries to find out how classical *Islamic* law dealt with debt and credit in the Golden Age of Islam, and what that means for "*Islamic*"

The article explains how Islamic law deals with bankruptcy and how it can be applied to modern finance. It starts by looking at how Islam views debt and credit in the past, and why modern Islamic finance should follow the old bankruptcy laws. Then it talks about how Islamic law treats debtors and creditors, and how it shows mercy to debtors and respect to contracts. It also shows how using the classical Islamic bankruptcy system can help Muslim countries deal with economic problems. It also discusses how to balance the traditional Islamic values with the modern finance needs, and why bankruptcy laws are important for handling losses. It also talks about the Islamic moral rules for debt and finance, such as avoiding interest and being socially responsible in Islamic finance. The article ends by saying that it is important to find ways to make the old Islamic bankruptcy law work with modern Islamic finance needs, especially for handling losses.

## II. THE CONCEPTUAL FRAMEWORK OF THE ISLAMIC LAW OF BANKRUPTCY

In *Islamic* law, the Arabic term "*iflas*" signifies bankruptcy, which implies balance sheet insolvency, arising when an entity's assets fall short of its liabilities, and income statement insolvency, which occurs when an entity lacks enough monetisable assets to pay off its debts as they arise. The Arabic word "*muflis*" is used to represent a bankrupt entity irrespective of the

[2] Wael B. Hallaq, 'Montréa Sharī'a', page no 67 to 89, Cambridge University Press, Published on 9 June 2004: https://www.cambridge.org/core/books/sharia/0071DAB556EC8200DEA1A61D8D4B5A8D (Accessed: 06 February 2024).

gender of the entity or whether it's an individual or an organisation[3]. It should be noted that a bankrupt entity can only shake off the title of "*muflis*" by paying off all its debts completely or through death. The *Islamic* law of bankruptcy finds its principal foundation in the *Quran*, the fundamental source of *Shari'a*, specifically *verse 2:280*, which has its translation as "If a person is in difficulties, let there be respite until a time of ease. And if you give freely, it would be better for you, if only you knew"[4]. The Divine instruction to be benevolent and compassionate to a debtor is not legally binding but is strongly encouraged in the *Quran*. However, a Muslim is required to pay off all debts, making it not only a legal duty but also a sin not to repay one's debts if they have the means to do so. It is a Divine instruction to fulfill contracts, and delaying repayment without a valid excuse amounts to a violation of Muslim ethical beliefs. *Islamic* law reveres debt as a sacred obligation, and it is a Muslim's spiritual duty to discharge all debts they owe. The *Islamic* law of bankruptcy illustrates a binding relationship between *Islamic* finance and social responsibility. The *Quran* prohibits usury *(riba)* and immediately follows it with verses that advocate for charity. The relationship between lending and repaying is paramount and mandatory. Money is regarded as a tool for exchange as well as a storage-of-value mechanism. Unlike Western law, intangible assets and rights, time, and risk costs of capital are not fundamental components of *Shari'a*, placing greater emphasis on social responsibility elements. Finally, *Islamic* bankruptcy law mandates fair treatment to debtors who face hardships and does not allow discharge of debts.

The time value of money refers to the basic opportunity cost of utilizing money in one period in comparison to another. Its common gauge is the inflation rate. The risk value of money is more intricate and has two constituents, the possibility of not getting repaid and the risk of not getting repaid for reasons that have nothing to do with the objective for which it was provided. According to classical *Islamic* law, it was acceptable to take the first risk for rewarding revenue or to incur losses in return for one's investment of worth. However, it was not acceptable to take the latter risk of not getting repaid for any other reason. The *Islamic* tradition perceives money

[3] Arabic Hans, 'Dictionary Of Modern : هانس فيهر ' published on 1976. https://archive.org/details/dictionary-of-modern-written-arabic-hans.

[4] Translations of the Quran, 'English Translations Of The Quran' Bibliography. https://quran-archive.org/translations-of-the-quran%20(Accessed:%2006%20February%202024).

purely as a commodity or universal means of exchange, which has far-reaching consequences for *Islamic* debtor-creditor law[5].

Many Muslims believe that the *Quran* forbids any kind of interest. The word "*riba*" means an extra or a profit. So, if you borrow $1,000 today, you have to pay back $1,000 later, no matter what happens in between. You can't take a loan and pay it back with interest. There are many debates among *Islamic* scholars and financiers about what *riba* really means. But most orthodox Muslims today agree that all types of normal "interest" are the same as the forbidden *riba*. Some people argue that interest is like inflation or that *riba* only applies to some goods or very high interest. However, this article defines interest as the increase in the value of money itself, not the things you can buy with it. According to this view, money has no time value in the Western sense. Under *Shari'a,* money is useless if you don't use it. So, it is wrong to lend or borrow $1,000 today and pay back $1,100 in a year. But *Shari'a* recognises the time value of real things. This is like Western inflation and appreciation. For example, a building owner can sell their building for $1,000 cash now or $1,100 in a year because the building is worth more and the seller is helping the buyer by giving them more time. This rule shows how *Shari'a* did not stop people from making money or doing business without *riba*[6].

The notion of the "time value of money" refers to the deficiency of an increase in the value of money as a storage-of-value mechanism. Nonetheless, commodities such as precious metals, jewellery, ingots, and currency are permitted to appreciate in value. Although this lack of value allocation impacts capital formation by hindering low-risk investments, it promotes a balanced debt repayment and charitable bankruptcy system, fulfilling the critical principles of *Shari'a*. Unlike interest on money, entity-shielding mechanisms, including the corporate veil, limited

[5] Abu Hamid al-Ghazali, Taylor & Francis. 'Economic Thought Of An Arab Scholastic' at: https://www.taylorfrancis.com/chapters/edit/10.4324/9780203633700-7/economic-thought-arab-scholastic-ghazanfar-azim-islahi (Accessed: 06 February 2024). "When someone is trading in dirhams and dinars themselves, he is making them as his goal, which is contrary to their functions. Money is not created to earn money, and doing so is a transgression. The two kinds of money are means to acquire other things; they are not meant for themselves. If a person is permitted to sell (or exchange), money with money (for gain), then such transactions will become his goal, and thus money will be imprisoned and hoarded. Imprisonment of the ruler or postman is a transgression, for then they are prevented from performing their functions; same with money.",http://httpj/www.jdsupra.com/post/documentViewer.aspx?fid=4ec3e621-e2cl-4abO-a2a2-798112b92.

[6] McRorie, C. (2018) 'Riba, Usury, And The Evolution Of Moral Finance: A Comparison Of Two Arguments', Journal of Religion and Society. , at: https://www.academia.edu/35914510/Riba_Usury_and_the_Evolution_of_Moral_Finance_A_Comparison_of_Two_Argument Among pre-Islamic legal systems of the region, Jewish law prohibited the charging of interest by a Jewish lender to a Jewish borrower; while Roman law regulated interest, setting rates above which it became usury.

liability companies, and partnerships, were never adopted by *Shari'a*. As a result, the corporate structure has no basis in *Islamic* law, and other modern vehicles like limited liability partnerships or companies do not exist. All personal and economic activities are either conducted through direct ownership or one of the "nominate" forms of partnerships authorised by the jurists. Classical *Islamic* law did not develop the concept of non-possessory liens and security interests, keeping its focus on tangible assets. Only personal property liens were recognised, with even real property rights being limited. However, there existed an explicit Hadith-based right to reclaim a vendor's goods delivered to a debtor on credit but not paid for. The limitations on property rights and absence of entity-shielding reflect unique *Islamic* law's approach to commerce and capital formation, distinguishing it from Western law. In some aspects, classical *Islamic* law was advanced beyond its Western counterpart, such as acknowledging real property leases *(Ijara*) and allowing joint ownership through partnerships. Found only in English common law after the 15th century, joint tenancies of real estate without the four unities did not emerge[7].

## III. DEBTOR UNDER ISLAMIC LAWS

Muslim jurists say that a person is *muflis* if they owe more than they own or if they spend more than they earn. *Islamic* law does not care if someone is broke or just short of cash, because money or intangible assets do not have any value over time in *Shari'a*. Only real things can be sold to pay off debts. So, it does not matter if someone has a problem with their assets or their cash flow. A person is *muflis* when they fail to pay their debts, and the creditor or creditors try to get their money back[8].

Women have the same rights as men under *Islamic* law. They can make contracts, own property, make money, and inherit. So, they can also go bankrupt. The same rules apply to businesses too. There is no difference between a business bankruptcy and a personal bankruptcy. *Islamic* law did not have companies or corporations that could limit their liability. Most businesses in *Islamic* history were different kinds of partnerships and joint ventures, not just simple buying and selling.

[7] Udovitch, Abraham, '*Credit As A Means Of Investment In Medieval Islamic trade'*.,https://www.semanticscholar.org/paper/Credit-as-a-Means-of-Investment-in-Medieval-Islamic Udovitch/07cd350f966e7edd8f6c934e3420ccdf9be813b6 (Accessed: 06 February 2024).

[8] Author Raditya Sukmana and paper, A. 'Critical Assessment Of Islamic Endowment Funds (Waqf) Literature: Lesson For Government And Future Directions, Heliyon'. , at: https://www.sciencedirect.com/science/article/pii/S2405844020319176 (Accessed: 06 February 2024).

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## IV. CREDITORS UNDER ISLAMIC LAWS

*Islamic* law considers all assets belonging to the debtor, which include third-party claims due to the debtor, as the debtor's estate. Under *Islamic* law, all creditors are treated equally, subject to class priorities. Anyone with a matured right or claim from the debtor counts as a creditor. Settlement offers creditors and debtors the option to resolve their claims. Public policy heavily encourages settlements under *Islamic* law, with two types of settlements established. The first type involves a compromise, mainly when the debtor disputes the claim, with the settlement reached to avoid litigation. Nonetheless, some schools of *Islamic* law do not accept such settlements based on compromise or exchange of unproven claims. The second type of settlement involves an acknowledgement of the debtor owing the creditor's claim. Settlements by creditors accepting less money have been argued by a few schools of law as unjust and an unlawful takeover of debtors' rightful claims, primarily due to the debtor's acknowledgement of their debt. However, other jurists argue that, as long as the creditor voluntarily relinquishes their right, the settlement is still valid, even though it counts more as a gift than a settlement. *Islamic* law's central principle of fulfilling one's contractual obligations is underscored by this.

### A. The Receiver

Following the recoveries of the debtor's assets, referred to as low by reclamation creditors, the first priority to be paid from the liquidation is the fees, expenses, and compensation of the receiver who managed the bankruptcy proceeding unless they agreed to perform their services pro bono. These fees and expenses customarily include transportation costs, public notices, and reasonable expenses incurred by the receiver in operating the business, if necessary. Additionally, any necessary or reasonable expenses incurred by the receiver in enforcing or complying with contracts made by the debtor or by the receiver to manage the business, subject to the approval of both the creditor(s) and the court, are also covered[9].

[9] Rashid Qurshid, Iflas and Chapter 11: 'Classical Islamic Law And Modern Bankruptcy', at: https://silo.tips/download/iflas-and-chapter-11-classical-islamic-law-and-modern-bankruptcy (Accessed: 06 February 2024).

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### B. Reclamation Creditors

In *Islamic* law, the second creditor priority is reserved for a creditor who discovers that their property is in the debtor's possession, granting such a creditor the option to demand its return to use for debt satisfaction or share it with other creditors. This practice is based on a Prophetic Sunna, in which the Prophet advocated the right of an individual to reclaim their property in the debtor's possession. Muslim jurists established a detailed criteria sequence of protocols for a creditor or seller to recover their property from the debtor. When debtor-farmed land or constructed buildings are in question, the creditor has three options. Under the first option, the creditor and the bankrupt individual can agree to dispense with the improvement and give the land back to the seller, leaving the debtor solely accountable for any damage arising from the removal of the improvement. Under option two, if the debtor and creditor choose to retain the improvement, the creditor takes possession of the improvement in addition to the returned land, and the creditor harvests crops, paying their value minus any rational expenditure generated while cultivating, harvesting, and selling. Thirdly, if both parties cannot agree on preferred options, they will negotiate a formula for forced options resembling a buy-sell agreement. The creditor gives the debtor the choice to either keep the improvement until harvest and then sell the crops or allow the creditor to harvest and sell the crops, giving the proceeds net of rational cultivation and sale costs to the debtor. However, if the original asset is indistinguishable from the debtor's addition, such as when sold goods transform into something else, different regulations apply. If the Seller's specific goods are identical because they form part of larger homogeneous quantities, such as crops, certain schools of *Islamic* law do not recognise the creditor's right to reclaim such property. Nonetheless, some permit traders to assume possession of a certain weight or volume of oil or grain sold regardless of whether it is what was initially sold. Traders may also recover completed items that undergo changes that do not transform their properties, like cloth dying, but must adjust for any cost or value changes charged by the debtor. If the goods or items subject to the sale or transaction undergo transformative improvements, the seller becomes a creditor. In such a case, they must share in concurrence with the rest of their class.

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### C. Lessors

*Shari'a* recognises the *ijara*, a kind of lease for real or personal property, as the main intangible asset. People who lease out property have some similar rights over it. For example, if a bankrupt person rents an animal or property from someone, the person who leased it out can end the contract and take back the property if the lease hasn't started yet. But if the lease is over, the person who leased it out can only ask for the unpaid rent. And if the lease is still going on, the person who leased it out can't end it. In this case, the bankrupt person has the actual property rights. The right to use and enjoy the property is still an asset of the bankrupt person, while the person who leased it out is a creditor for the unpaid rent. This same rule applies when the person who leased out the property is bankrupt. The Receiver has to follow the contract with the person who rented the property. This means that the person who rented the property's contract is not changed by the person who leased it out's bankruptcy because the right to use and enjoy the property comes first, like a pledge that gives possession. Of course, the lease income will go to the Receiver and the Court.

### D. Secured Creditor

*Shari'a* only recognised the ownership right of someone who leased out property as a valid intangible asset or right[10]. This also lets the owner of real property make a written contract that keeps their ownership right until the debt is paid off. This deal, called a *Murababa*, was a sale with a delay or a profit. For example, A wants to buy a house but needs money. B has the money. A and B agree that B buys the house and sells it back to A in parts, with some extra profit. A can use and live in the house until A pays B everything, and then B gives A the ownership. A *murababa* (and an *ijara*) was one of the only ways to create a security interest under *Shari'a* , besides a real pledge of possession (*rahn*). A creditor who had a pledge of possession to secure a debt could get their money back from the pledged item. But if the item was not enough to pay the debt, the creditor had to split the remaining amount with other creditors[11].

[10] Al Bawaba. , 'Bank Of London And The Middle East Acts As Lead Arranger For Murabaha Financing Deal In Turkey' at: https://www.albawaba.net/news/bank-london-and-middle-east-acts-lead-arranger-murabaha-financing-deal-turkey (Accessed: 06 February 2024).

[11] World Bank Group (2017) Islamic Finance, World Bank., at: https://www.worldbank.org/en/topic/financialsector/brief/islamic-finance (Accessed: 06 February 2024).

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### E. Personal Exemptions

*Shari'a* protects the debtor's basic living costs and family's needs from the Receiver and all creditors, except for those who have a secured interest in the debtor's assets. They have the first right to get paid.' This covers clothes, housing, food for the spouse, children, and parents. Some legal schools also said that the debtor should have enough money to keep running his business or trade. The debtor's work tools are also protected from the creditors. Moreover, if the debtor has a house, the house is also spared from being sold, as long as it respects the rights under an *ijara* or *murababa*. The Hanbali school says that a debtor who can work should work to pay his debts, but other legal schools say that a debtor who has an income cannot be forced to work to pay his debts. However, if he does work, his income will mainly go to his family, food, housing, and clothes.172 The rest, if any, will go to the creditors.

### F. Other Priorities

*Shari'a* gave some unsecured creditors more rights than others. For example, if a farm owner went bankrupt, the farm workers got paid first from the sale of the crops. Also, if a bankrupt person gave an item to a craftsman to fix or make, the craftsman got paid first for his work, and he could keep the item until he got paid. The creditors could pay him and take the item to add to the bankrupt person's estate. Or, the craftsman-creditor could sell the finished item and get the money first. The same was true for a transporter of goods, who had similar rights over the goods he was carrying, but only if he had not given the goods to the bankrupt person or someone else.

## V. CREDITOR ENFORCEMENT MECHANISMS

To enforce their valid rights, the creditors of a debtor, *muflis* or not, have three primary tools: 1) request the imprisonment of the *muflis* until he pays his debt, 2) follow the debtor around in his business and in his daily routine to find any assets that can be liquidated, and 3) prohibit his travel.

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### A. Imprisonment

Throughout history, the practice of imprisoning or enslaving debtors has been an essential element of debtor-creditor law. For example, The Code of *Hammurabi*, established in 1795-1750 BCE, enabled both practices and permitted the debtor's entire family to be held under custody. Despite this, the Code of *Hammurabi* authorised a maximum imprisonment term of four years, representing one of the code's limitations. Similarly, both Georgia and Australia's British colonies functioned as penal colonies, sanctioning debtors' enslavement or imprisonment. Ancient *Islamic* law also provided a similar consequence for non-payment of debts. Nevertheless, classical *Islamic* law differed from Babylonian and Jewish laws in that it did not include a fixed term for imprisonment due to the non-existence of the option for discharging debts[12]. However, it emphasised the distinction between debtors who faced force majeure and those reasonably responsible for their defaults. In *Islamic* law, imprisonment is only an option for wealthy debtors who refuse to pay what they owe despite having the resources and means to do so. The *Quranic* directive "If a person is in difficulties, let there be respite until a time of ease" is aligned with the philosophy of *Islamic* law. A person who claims to be bankrupt may be temporarily imprisoned in *Islamic* law to verify their claims. If a debtor cannot pay off debts despite judging the financial standing, the debtor will be released. A judge's judgment ultimately determines the extent of the sentence. However, some exceptions within the madhabeb dispute the practice of detaining debtors without tangible proof of willful default, suggesting that judges should use such measures only as a last resort[13].

### B. Monitoring and Putting Pressure on the *Muflis* and Travel Restrictions

*Islamic* law adopts a more compassionate approach to debtors with the aim of assisting them. This is embodied in Verse 2:280, which promotes the *Sharia's* gentle handling of debtors rather than harsh measures. In stark contrast to the Roman Law of the Twelve Tables, which provides more severe punishment, *Islamic* law allows creditors to follow around defaulting debtors discreetly to discover new property-owned by debtors. Creditors can publicly proclaim that they

[12] 'How Exodus Revises the Laws of Hammurabi' https://www.thetorah.com/article/how-exodus-revises-the-laws-of-hammurabi accessed 6 February 2024.
[13] Gratzer, supra note 93 ("The main objective of the execution, i.e. distraint, was no longer the debtor as a person and his body, but his property (G.R. No. 239418) https://lawphil.net/judjuris/juri2020/oct2020/gr_239418_2020.html accessed 6 February 2024.

are indebted to a certain individual who is unreliable. If a bankrupt person is restricted from travelling outside of the town or city, it is because the creditor requesting such has raised concern that the debtor may hide or dissipate assets. Consequently, the surrounding circumstances should be considered to determine whether travel permission will be granted by the court. If the debtor does not possess assets to offer as surety, the court will determine if other mechanisms are required to guarantee the debtor's return. A debtor can apply to the court for permission to travel based on reasonable grounds, such as health, pilgrimage, family obligations, and so on. In conclusion, the court will lift the travel restriction unless they establish the debtor's inability to repay the debt in question, following other debt-related injunctions[14].

## VI. CONCLUSION

Classical *Islamic* law had a well-developed bankruptcy system. Many Muslim countries may want to use it to improve their current bankruptcy laws after the economic crisis. Even though the world has changed a lot since the old times, *Islamic* law can still adapt and reform. Classical *Islamic* law treated bankrupts like civil and common law did before Chapter 11 in the U.S. Bankruptcy Code. Before Chapter 11, bankruptcy laws only divided the debtor's assets among the creditors. Chapter 11 changed that by making the main goal to save the business. Non-*Islamic* law was used to discharge to free debtors from their debts, but *Shari'a* stopped the debts from growing and encouraged settlements and forgiveness. To make a *Shari'a* version of Chapter 11, Muslim countries must agree, like the United Nations did, that saving the business is more important than paying the debts quickly. As we showed, Chapter 11's discharge is not allowed in *Shari'a* because Muslims must pay their debts. But creditors can agree to reduce the debt as a charity. This is based on the *Quran*'s command to give the debtor more time and to forgive. This idea needs more work. The question is whether creditors can be forced to reduce their debts or if they have to agree. This could copy some parts of a consensual Plan of Reorganization under 11 U.S.C. § 112 9(a), but not the "cramdown" Plans under § I129(b).

Undoubtedly, the orderly development of *Islamic* finance will necessitate finding ways to reconcile the traditional *Islamic* law of bankruptcy with the needs of the modern *Islamic* finance industry. The excessive reliance on ever-expanding opportunities has vanished alongside the

[14] Prof. John P. Adams M and CL and L (The twelve tables https://www.csun.edu/~hcfll004/12tables.html accessed 6 February 2024.

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global credit markets. It is, therefore, unavoidable that loss scenarios must be addressed. That, in turn, implies effective bankruptcy laws. We hope this article will contribute to the effort.

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# THE GLOBAL SHIFT IN INVESTOR-STATE DISPUTE RESOLUTION MECHANISM

HARSHIT TYAGI*

## ABSTRACT

*In this era of commercialization and globalization, nations are witnessing a significant expansion in their economic policies and markets, leading to a surge in investments. However, this influx of investment opportunities has brought about numerous conflicts stemming from various international investment agreements. As with any human endeavour, disputes are bound to arise and to address these disputes; an investment protection system has been established within these agreements, aimed at resolving disputes among the investor states and the host States where their operations are conducted.[1] A system has been devised to address the needs of citizens abroad and ensure equitable treatment, due process, the absence of arbitrariness, and the availability of effective remedies. By granting these obligations, nations aim to project an investor-friendly image.[2] India's attractiveness to investors has been inconsistent over time. Since its inception, investor-state arbitration has shown significant progress and has been in active operation. However, like any other mechanism, the investor-state dispute resolution mechanism also required improvements to be more effective. The introduction of the revised comprehensive International Centre for Settlement of Investment Disputes Rules, 2022 ("ICSID") marks a significant milestone as an upgrade from the 2006 rules, which were in need of reform in the way of investment arbitration[3]. In light of these recent ICSID rules, this paper highlights the enhancements made in the Investor-State arbitration process, providing a more comprehensive and forward-looking approach to resolving disputes and addressing the complexities surrounding it.*

* B.A.LL.B. Student at Symbiosis Law School, Nagpur

[1] Investor State Dispute Settlement and Impact on Investment Rulemaking, UNCTAD, Page 40 (2007), https://unctad.org/system/files/official-document/iteiia20073_en.pdf.

[2] Chapter 6 - Minimum Standards of Treatment, Kluwer Arbitration, 233-298, https://icsid.worldbank.org/sites/default/files/parties_publications/C3765/Claimants%27%20Amended%20Memorial/Legal%20Authorities/CL-0013.PDF.

[3] Recent Developments in Investor State Dispute Settlement (ISDS), UNCTAD, (May 29, 2013), at 12-13, https://unctad.org/system/files/official-document/webdiaepcb2013d3_en.pdf.

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## I. HISTORICAL ANTECEDENTS ALONG WITH CHANGING TRENDS IN THE FDI REGIME

The ever-changing trade policies of nations and the increasing globalization worldwide have spurred investments beyond national borders, leading to a rise in overall foreign direct investments (FDI) and cross-border investments over the years.[4] With a growing influx of investments from around the globe, the likelihood of disputes has also increased. As time passed, international disputes began involving individuals within territorial borders and those in extraterritorial regions. Most cases involving ICSID rules or investor-state disputes went through the roof between 2013 and 2021, beginning all the way down from 1987.[5] Consequently, resolving investment cases through litigation and exercising jurisdiction in international courts became common. However, as a more preferable option for commercial disputes, international arbitration emerged due to its acceptability as a mode of dispute resolution, offering faster and less time-consuming results.[6]

In contrast to a National Court, International Commercial Arbitration involves resolving legal disputes with unbiased judges called "arbitrators." This process, known as alternative dispute resolution (ADR), is different from traditional justice methods and aims to maintain competitiveness in the business sector. While such disputes often involve societal interest issues, typically absent in the international commercial arbitration sphere, the regulatory web for resolving such investment disputes has borrowed key concepts from the international commercial arbitration regime. Resolving investor-state disputes may require reconciling theories of public international legal principles and contract law principles.[7] The Investor-State Dispute Settlement (ISDS) emerged in its modern state during the 1960s as an exception to the normative rules relating to state-to-state regulation in public international law. It has since been included in various bilateral and multinational agreements. Traditionally, intellectual property

[4] Foreign Direct Investment for Development Maximising Benefits, Minimising Costs, OCED, at 9-10, https://www.oecd.org/investment/investmentfordevelopment/1959815.pdf.
[5] Primer on International Investment Treaties and Investor-State Dispute Settlement, Columbia Center on Sustainable Investment https://ccsi.columbia.edu/content/primer-international-investment-treaties-and-investor-state-dispute-settlement.
[6] Investor–State Disputes: Prevention and Alternatives to Arbitration, UNCTAD Series on International Investment Policies for Development 12-18 (2010), https://unctad.org/system/files/official-document/diaeia200911_en.pdf.
[7] Yannaca-Small, K, Improving the System of Investor-State Dispute Settlement, OECD Working Papers on International Investment, 2006/01, OECD Publishing. http://dx.doi.org/10.1787/631230863687.

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disputes were not part of ISDS proceedings, but this began to change with the introduction of the North American Free Trade Agreement (NAFTA).[8]

### A. Changing Trends in the FDI Regime and Their Effect on Investment Agreement Disputes

For the term investment, at first, the treaty is given priority while interpreting the term investment, and later on, as enumerated in Article 25 of the ICSID convention, [9]is made. In **Salini v. Morocco**[10] the tribunal observed that the necessary elements for the existence of an investment are: a) Endowment in terms of assets or money, b) A specified term of contract of performance, c) An element of threat, and d) A contribution to the financial growth of the host State. According to the Salini decision, investments wrapped under Article 25 of the Convention shall be considered in light of an objective standard, which is later termed the Salini test, to determine the term investment in distinct matters.[11] When an investor is based in a country ("home nation"), procuring assets in another country ("host country"), and intends to establish control over those assets, it is called a foreign direct investment (FDI). [12]Recent trends show that emerging market economies have surpassed the USA as a significant source of FDI for the rest of the world, reflecting their growing knowledge and involvement in the global market.[13] Foreign direct investment significantly impacts the host nation as they consider a loss of political sovereignty represented by increased reliance on multinational corporations. The host country retains its sovereign rights to regulate FDI and determine how it contributes to development.[14] In addition to its numerous advantages, a few of them encompass broader and more extensive benefits like facilitating growth in the host nations through the establishment of investment avenues, enabling the sharing of technological expertise, contributing to corporate tax revenue

[8] Jason Muth, The Emerging Role of Investor State Dispute Settlement Arbitration in Resolving Patent Disputes Under the Trans-Pacific Partnership, 3 8,9 12-18 (2015).https://www.wisbar.org/aboutus/forlawstudents/Documents/3%20-%20Rev%20-Emerging%20Role%20of%20Investor-State%20Dispute%20%20-%20Jason%20Muth.pdf.
[9] ICSID § 25 (International Centre for Settlement of Investment Disputes 1966).
[10] Salini Costruttori S.p.A. and Italstrade S.p.A v. Kingdom of Morocco, ICSID Case No. ARB/00/4 (ICSID 2020).
[11] Ashita Alag Aayush Marwah, Can an Arbitration Award be Considered an Investment for the Purpose of Investment Treaty Arbitration?, RGNUL Student Research Review, Pg 89-91.
[12] Trade and Foreign Direct Investment, WTO 12-18 (1996). https://www.wto.org/english/news_e/pres96_e/pr057_e.htm.
[13] Stephen E Blythe, The Advantages of Investor-State Arbitration as a Dispute Resolution Mechanism in Bilateral Investment Treaties, 472 SMU Scholar, International Lawyer 273-290. (2013). https://scholar.smu.edu/cgi/viewcontent.cgi?article=1583&context=til.
[14] Foreign Direct Investment for Development MAXIMISING BENEFITS, MINIMISING COSTS, OCED 6-7 https://www.oecd.org/investment/investmentfordevelopment/1959815.pdf.

within the host country, and ultimately contributing to the overall inflow of GDP into the nation.[15]

However, establishing an open international financial system to promote economic success for home and host nations clashes with the host country's limitations on FDI. Consequently, international law has evolved, creating international arbitration tribunals that limit the host country's jurisdiction over FDI.[16]

## II. CONSOLIDATION OF CLAIMS TO AVOID TREATY SHOPPING

Over the last decade, ICSID has experienced gradual growth in its case backlog. This exponential increase in the figures of arbitration cases brought to the doorstep of ICSID has led to procedural inefficiencies and inconsistent rulings on similar factual and legal issues. [17]

As the caseload continues to rise, there is a higher probability of claims involving the same legal or factual problems. This situation can give rise to two significant challenges. Firstly, conflicting decisions may occur if different arbitral courts decide on similar claims. As inconsistent judgments have gained more international attention recently, Susan Franck has described it as the "dirty little secret that is becoming less secret by the day" of investment treaty arbitration[18]. The second issue is that allowing similar claims to proceed separately may lead to procedural delays.[19]

Due to the high number of bilateral treaties and even more International Investment Agreements, several treaties are likely to be invoked in the arbitration proceedings to refer to the disputes. Even if the same treaty covers the shareholders and the funding business, their ability to submit distinct claims may result in multiple courts considering the same claim.[20]

In many areas of law, consolidation has been used as a solution to mitigate these challenges.

[15] Prakash Loungani & Assaf Razin, How Beneficial Is Foreign Direct Investment for Developing Countries?, 382 IMF (2001). https://www.imf.org/external/pubs/ft/fandd/2001/06/loungani.htm.
[16] Supra Note 4, Pg 6.
[17] Meg Kinnear Secretary-General, Annual Report, 2022 ISCID, OCED, at 5. 2022 - https://icsid.worldbank.org/sites/default/files/publications/ICSID_AR.EN.pdf.
[18] Alice Marie King, The Consolidation of Claims in ICSID Arbitration, International Arbitration (Laws 521), Victoria University of Wellington, 14, (2008). -https://core.ac.uk/download/pdf/153552976.pdf.
[19] Supra Note 14.
[20] Gaukrodger, D. (2014), "Investment Treaties and Shareholder Claims: Analysis of Treaty Practice", OECD Working Papers on International Investment, 2014/03, Pg 7, OECD Publishing. http://dx.doi.org/10.1787/5jxvk6shpvs4-en.

Consolidation of claims helps address the problem of concurrent procedures, contributes to a consistent interpretation of the law, and reduces the expenses of arbitral proceedings. Consolidation improves coherence and consistency in final arbitral awards, which is particularly crucial in investment arbitration, where previous awards and their decisions do not bind judges and are not appealable[21]. It involves revamping the rights and responsibilities in investment state dispute resolution.[22]

Until recently, the ICSID lacked a method for claim consolidation. With the introduction of the ICSID Arbitration Rules in 2022, the concept of consolidating claims in an investor-state dispute has been introduced. Parties relating to two or more pending ICSID arbitration proceedings may combine or manage such arbitrations.[23] Additionally, consolidation of such proceedings merges all elements of two or more proceedings, resulting in a special award.[24] There is a requirement that applications for consolidation and arbitration have to be filed in compliance or registered in compliance with the ICSID Convention and must involve the contracting state as well if it pertain to the same contracting state then it has to be combined under the ICSID Arb Rules.[25]

## III. The Implications of Coherent Bilateral Treaties to Avoid Conundrum Between Parties

Bilateral investment treaties are contracts between two countries to foster, promote, and securitize investments in both territories. These treaties are considered a crucial tool for safeguarding foreign investments internationally. They address four key aspects: entry, treatment, expropriation of foreign investments, and conflict resolution[26].

The rise in investor-state conflicts and their resolution has impacted the development of bilateral investment treaties. Recently, the challenges in interpreting treaty clauses have increased

[21] Alice Marie King, Consistency, Efficiency and Transparency in Investment Treaty Arbitration, IBA Arbitration Subcommittee on Investment Treaty Arbitration, UNCITRAL, at Pg No.20, (2018).- https://uncitral.un.org/sites/uncitral.un.org/files/investment_treaty_report_2018_full.pdf.
[22] UNCTAD, Investor State Dispute Settlement, (2014).https://unctad.org/system/files/official-document/diaeia2013d2_en.pdf.
[23] Arbitration Rule 46 of the ICSID Arbitration Rules, 2022.
[24] Arbitration Rule 46 (2) of the ICSID Arbitration Rules, 2022.
[25] Consolidation and Coordination- ICSID Convention Arbitration (2022 Rules) (ISID 2022).https://icsid.worldbank.org/procedures/arbitration/convention/consolidation-coordination/2022.
[26] Houde, M. and K. Yannaca-Small (2004), "Relationships between International Investment Agreements", OECD Working Papers on International Investment, 2004/01, Pg 19 OECD Publishing. http://dx.doi.org/10.1787/171461325566.

significantly, necessitating clarification to mitigate the risk of future disputes[27]. The coming of free trade agreements and ancillary laws addressing other forms of economic alignments have also had an impact on this matter.

Due to the investment agreements, the scope of trade treaties has expanded. Bilateral investment treaties have been developed to address concerns about services, intellectual property rights, and industrial strategy. As the broader implications related to human rights, environment, and health security have started to emerge, bilateral trade accords have evolved to align with the changing global political and economic conditions. [28]

Investment treaties have to undergo various changes to achieve higher levels of coherence, including incorporating specific non-investment legislations, defining the extent of investment related provisions, and revamping the conflict resolution process. Till these changes are implemented, coherence between bilateral investment treaties and other areas of international law will remain frail. Such infirmness undermines the very motive of international law, which seeks to establish control of law and security for all.[29]

## IV. CURRENT SHORTCOMINGS IN INVESTOR-STATE ARBITRATION

### A. Inconsistency in awards

According to Article 34(2) of the UNCITRAL Arbitration Rules [30], "All awards shall be furnished in writing and shall be enforceable against the Parties. All awards must be carried out immediately by the parties. Despite the fact that there are many arbitration rules, none of them define what an "arbitral award" is. The UNCITRAL Model Law Working Group defined it as follows: "Award indicates a final award that resolves all concerns brought before the tribunal, as well as an additional decision of the arbitral tribunal that concretely resolves any substantive dispute, a concern regarding the arbitral tribunal's competency, or any other procedural question,

[27] Supra note 17.
[28] Bertram Boie, The Protection of Intellectual Property Rights Through Bilateral Investment Treaties: Is There a TRIPS-plus Dimension?, NCCR Trade Regulation at 50 (2010). https://www.wti.org/media/filer_public/c5/47/c5475d4a-f97c-4a8b-a12a-4ae491c6abb3/the_protection_of_iprs_through_bits.pdf.
[29] Rawan Mustafa Al-Louzi, A Coherence Perspective of Bilateral Investment Treaties, The University of Manchester for the degree of Doctor of Philosophy (Ph.D.) in the Faculty of Humanities Pg 26 (2012). https://pure.manchester.ac.uk/ws/portalfiles/portal/54532399/FULL_TEXT.PDF.
[30] UNICITRAL Arbitration Rules (as revised in 2010) § 34 (UNCITRAL 2010).

but only if the tribunal names its decision as an award.[31] Consistency fosters predictability, and when a legal framework yields unequivocal solutions, the judicial system is deemed consistent, thus elevating its credibility and legitimacy. The significance of consistency and prejudiced viewpoints in arbitral decision-making cannot be overstated. Irregular interpretations have sown uncertainty regarding the interpretation of key Convention obligations and their future application. Such inconsistencies have sparked apprehensions regarding the integrity and equitableness of arbitration, a method employed to settle disputes encompassing both public and private issues[32]. Enunciating the process of arbitral decision taking can serve as an essential response to these denunciations, showcasing the efficacy of arbitration as a viable avenue for resolving matters within domestic courts.

Many facets of human society, including the resolution of conflicts, depend on rational choices. It is important to address concerns regarding the inconsistency in rulings issued by tribunals in different cases where comparable situations and violations led to divergent judgments due to varying assessment methodologies employed by the courts, thus introducing a biased perspective.

To illustrate, two distinct arbitral tribunals dealing with ad hoc arbitration in Stockholm handled the cases of **CME v. Czech Republic** [33]involving intellectual property rights (IPR) and **Lauder v. the Czech Republic**[34], both governed by the UNCITRAL Arbitration Rules 1976. Despite similar facts, these cases yielded contrasting outcomes, raising questions about the Czech Republic's liability under the corresponding Bilateral Investment Treaties.

Implicit biases, to some extent, contributed to the disparities in outcomes. It is conceivable that an arbitrator might empathize with one party's overarching argument while rejecting the rationale behind minor issues, leading to the dismissal of the claim in its entirety. In these scenarios, it may be advantageous for the party to present its averments broadly, allowing the decision-maker body to rule on a limited interpretation.[35]

[31] Supra note 11, Pg 101.
[32] Supra note 18, Pg. 152.
[33] CME v. Czech Republic, (2006) 9 ICSID Rep 264 (Stockholm International Arbitration) 2006.
[34] Ronald S. Lauder v. Czech Republic, IIC 205 (2001) (London International Arbitration) 2001.
[35] Stavros Brekoulakis et al., Arbitral Decision-Making: An Issue of Consistency and a Response to Bias, Kluwer Arbitration Blog, 26 (2018). https://arbitrationblog.kluwerarbitration.com/2018/06/12/arbitral-decision-making-issue-consistency-response-bias/.

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The existence of multiple arbitration courts dealing with similar circumstances increases the potential for conflicting arbitration awards. However, the shared objective should be there to establish uniformity in the interpretation of pertinent principles of investment law, necessitating the creation and implementation of measures to prevent inconsistency. In the case of **Saipem v. The People's Republic of Bangladesh**[36], the arbitral tribunal emphasized the duty of arbitral courts to satisfy "the legitimate expectations of the society of nations and investors towards the presence of the rule of law." In contrast, a dissenting viewpoint in the **Burlington Resources v. Ecuador** [37]case argued that arbitrators should decide every case on its merits, regardless of jurisprudential trends.[38] Nonetheless, the duty of an arbitrator is to assess a matter on its merits, aiming for justice rather than striving for a prescribed sequence of awards.

Arbitrators possess substantial discretion in interpreting and incorporating the suitable law to the facts of a given matter. They often incorporate transnational legal principles due to factors like limited oversight, global operations, and diverse legal backgrounds.[39]

A consistent albeit predictable body of case law can benefit states and businesses. It can reduce conflicts brought against states by specifying permissible and prohibited actions under investment treaties. Consistent decisions can also eliminate numerous points of contention, leading to more efficient and cost-effective arbitration proceedings. Adhering to the Rule of Law principles of responsible and consistent decision-making and the increased persuasive authority of decisions would undoubtedly enhance the arbitration system and benefit all stakeholders involved.[40]

### B. Limiting the Use of Investor-State Arbitration to the Involved Party

The question of whether excessive investment access should be curbed has two main aspects. Firstly, the ability to use a neutral international system for resolving investor-state disputes

[36] Saipem S.p.A v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/7 (ICSID International Center for Settlement of Investment Disputes, 2005).
[37] Burlington Resources v. Republic of Ecuador, (ICSID Case No. ARB/08/5) (ICSID International Center for Settlement of Investment Disputes 2017).
[38] Supra note 17.
[39] Gabrielle Kaufmann-Kohler, Arbitral Precedent: Dream, Necessity or Excuse?, Kluwer Arbitration Blog, Pg 364 (2006). https://lk-k.com/wp-content/uploads/Arbitral-Precedent-Dream-Necessity-or-Excuse.pdf.
[40] Julia Hildebrandt, *Persuasive Authority, Predictability and Consistency in Arbitral Decision Making*, Kluwer Arbitration Blog 4 (2017). https://deicl.univie.ac.at/fileadmin/user_upload/i_deicl/VR/VR_Personal/Reinisch/Internetpublikationen/hildebrandt.pdf.

through ISDS depends on states' ongoing willingness to engage in this process, which is more of a political matter than a legal one. Secondly, access to ISDS is influenced by how tribunals interpret the language in investment treaties. So far, efforts to restrict investor access have been gradual and limited to specific cases[41]. This approach aims to narrow the circumstances in which investors can utilize ISDS, which can be achieved by:

1) limiting the types of issues that can be raised in ISDS claims;
2) narrowing the scope of investors eligible for treaty benefits; and
3) requiring investors to exhaust local legal remedies before resorting to international arbitration.

A more extreme strategy would be to abandon ISDS completely and return to state-to-state arbitration procedures, as some recent treaties have done. Certain countries have implemented policies that exclude certain types of claims from being considered in arbitration. For instance, Belgium has excluded certain matters from arbitration, particularly those involving the dissolution of long-term exclusive distributorship contracts, where Belgian law is not applicable.[42] This could lead to ISDS being used as a last resort only if investors have exhausted domestic options or can prove that domestic courts are ineffective or biased. However, it's important to note that the requirement to exhaust local remedies is a fundamental condition for access to international judicial forums; this requirement is outlined in the ICSID Convention, which establishes the jurisdiction and prerequisites for international arbitration.[43] Nevertheless, directly limiting parties' access to ISDS through various means undermines the original purpose of ISDS. Such limitations could diminish the effectiveness of ISDS, which was established to depoliticize investment disputes and offer investors a fair review by an independent, unbiased, and qualified tribunal.

### C. Concerns Over Exorbitant Fees and Choosing the Arbitrator

Disputes in the current settlement system are resolved through an ISDS tribunal set up specifically for that dispute. However, the parties involved (the claimant-investor and the

[41] R. Polanco Lazo, *Is There a Life for Latin American Countries After Denouncing the ICSID Convention?*, Transnational Dispute Management 4 (2014). https://www.transnational-dispute-management.com/article.asp?key=2037.
[42] 'Policy department C citizens' rights and constitutional affairs, *Legal Instruments and Practice of Arbitration in the EU* 6-7 (2014). https://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU(2015)509988(ANN01)_EN.pdf.
[43] Articles 25 and 26 of the ICSID Convention.

respondent-state) have a significant say in the tribunal's composition. The rules governing the investor-state arbitration process allow the disputing parties to agree on the method of selecting arbitrators and the number of arbitrators. This approach lets parties pick arbitrators they believe are best suited to handle their conflicts, which is seen as making arbitration flexible and appealing[44]. Article 57 of the ICSID Rules permits the party disputing the appointment of an arbitrator to challenge the same on the grounds of manifest lack of qualities.[45]

There are different ways to appoint arbitrators. One option is a hybrid selection procedure where each party in the ISDS dispute picks a judge, and a neutral authority selects the chairperson. Another option is to assign an authority to nominate all members of the tribunal (two co-arbitrators and the chairman). Other possibilities include the appointing authority collaborating with the disputing parties to choose ISDS panel members, with the final decision resting with the appointing authority.[46]

Although all tribunal members must be unbiased and independent, concerns have arisen about potential bias or unintentional favouritism towards the appointing party. This has raised worries about ISDS arbitrators.[47] Specific concerns have emerged due to each party's perceived inclination to choose individuals sympathetic to their side. The arbitrators' desire to be reappointed for future cases and their frequent role-switching (acting as judges in some cases and lawyers in others) amplify these concerns.

### D. Cost- and Time-Intensity of Arbitrations

Arbitration fees have become a more widespread issue in investor-state arbitration, mainly because there are no specific provisions in the relevant arbitration rules. This means that arbitrators have significant discretion in determining and dividing costs among the involved parties. While most arbitration rules outline how institutional, administrative, and panel fees are

[44] Gabrielle Kaufmann-Kohler & Michele Potestà, The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards, CIDS Supplemental report 11-12 (2014). https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/cids_supplemental_report.pdf.
[45] Article 57 of ICSID rules.
[46] Secretariat, Possible reform of investor-State dispute settlement (ISDS) Selection and appointment of ISDS tribunal members (UNGA 2020). https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/selection_and_appointment_eu_and_ms_comments.pdf.
[47] Elsa Sardinha, Party-Appointed Arbitrators No More the EU-Led Investment Tribunal System as an (Imperfect?) Response to Certain Legitimacy Concerns in Investor-State Arbitration, The Law and Practice of International Courts and Tribunals 17 (2018) 117–134 117-134 (2018). https://cil.nus.edu.sg/wp-content/uploads/2017/07/SARDINHA-Elsa_Party-Appointed-Arbitrators-No-More_July2018.pdf.

established, the allocation of costs between parties is left to the discretion of arbitrators and the parties themselves[48].

**Chapter VI of the ICSID Convention** and the **Administrative and Financial Regulations** oversee the expenses of an ICSID case. In investor-state disputes, there are two types of costs: party costs, which include legal counsel fees, witness and expert expenses, travel costs, transcripts, and related expenses; and arbitration or tribunal costs, which encompass tribunal fees, administrative costs for managing arbitral procedures, and other expenditures. In ICSID arbitration, a panel determines the costs and expenses of its members within the limits set by the Administrative Council in consultation with the Secretary-General.[49]

Investors are worried about the high expenses, particularly those with limited financial capabilities.[50] The average costs per side in an investor-state dispute for respondent state entities are around US$4.7 million; according to cost trends, average expenses for investors are more than US$6.4 million.[51] It places a significant burden on the resources of any nation, especially those with limited means. Even if a government prevails, courts have not typically ordered the claimant investor to cover the respondent's costs.

Aside from cost considerations, recent cases have taken a year and a half longer to conclude than cases decided before 2017. While there is a slight increase in the median duration, ICSID procedures generally last around four years and eight months, slightly longer than UNCITRAL proceedings. However, the median duration suggests that the length variation is insignificant.[52] Given the financial strain on some nations and the time investment required to obtain an arbitral award, the current challenges in streamlining the investor-state dispute mechanism are the high costs and time involved.

## V. PARADIGM SHIFT TO CONTRACTOR-BASED INVESTOR-STATE DISPUTES VIA

[48] Matthew Hodgson, Yarik Kryvoi & Daniel Hrcka, ISDS Costs, Damages, Duration, British Institute of International and Comparative Law (BIICL), Allen & Ovary 6–7. https://www.biicl.org/documents/136_isds-costs-damages-duration_june_2021.pdf.
[49] Supra Note 1.
[50] Reform of Investor State Dispute Settlement: In Search of a Roadmap (United Nations Conference on Trade and Development), 2013, https://unctad.org/system/files/official-document/webdiaepcb2013d4_en.pdf.
[51] Deborah Ruff et al., Financing a Claim or Defence, Global Arbitration Review 1–2 (2022). https://globalarbitrationreview.com/guide/the-guide-investment-treaty-protection-and-enforcement/first-edition/article/financing-claim-or-defence.
[52] Matthew Hodgson ET AL., 2021 Empirical Studies: Costs, Damages and Duration in Investor State Arbitration, Allenovery.com (2021).

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## ISDS

International investment treaties encompass various provisions for resolving disputes between investors and states, which range from limited jurisdiction over specific compensation matters to extensive options for arbitrating any case, whether rooted in contracts or treaties. These dispute resolution clauses in international investment treaties (IIAs) have become a crucial aspect of the security guaranteed by such treaties, particularly since the inception of treaty arbitration.

Initially, bilateral investment treaties (BITs) primarily emphasised the substantive standards of treatment, encompassing principles like fair and equitable treatment, comprehensive security and protection, non-discrimination (national and most favoured nation treatment), and safeguards against uncompensated expropriation. However, the prominence of investment arbitration in the past two decades has underscored the importance of an effective mechanism.[53]

Yet, the efficacy of the direct or hybrid arbitration system, known as investor-state dispute settlement (ISDS), which facilitates resolution between foreign investors and host countries, has been subject to increased scrutiny. [54]Critics have raised concerns that ISDS may unduly favour investors and curtail domestic regulatory authority. Consequently, some nations have initiated the process of exiting the system by expressing disapproval of the ICSID Convention.

Determining the types of conflicts to be resolved through ISDS should ultimately align with the objectives of the Contracting Parties. BITs and IIAs are evolving to adopt a more "reciprocal" status due to the changing landscape of global investment flows, both in terms of structure and substance. The likelihood that participants in IIAs could find themselves on either side of investment arbitration—either as a host state defendant or an investor's home state no longer directly involved—has increased.[55]

Following their withdrawal from the ICSID Convention, certain states have referred to committing to a contract-based agreement that stipulates the terms governing investor-state arbitration proceedings.

[53] OECD (2004), "Fair and Equitable Treatment Standard in International Investment Law", OECD Working Papers on International Investment, 2004/03, OECD Publishing.
[54] Yannaca-Small, K. (2006), "Improving the System of Investor-State Dispute Settlement", OECD Working Papers on International Investment, 2006/01, OECD Publishing.
[55] August R. Einisch, The Scope of Investor State Dispute Settlement in International Investment Agreements, 21, Asia Pacific Law Review (2013).

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# VI. CHANGES IN INVESTOR-STATE ARBITRATION THROUGH ICSID RULES 2022 TO MAKE DISPUTE RESOLUTION MORE EFFICIENT

## Amendments brought in the arena of ICSID Arbitration Rules

The ICSID arbitration amended rules was a much-needed move, and the 2022 amendments reflected some of the pivotal changes in the direction of streamlining the overall process of dispute resolution in international investment arbitration. Some of the changes or amendments include:

### A. Third-Party Funding Agreements and Disclosure Requirements

The eagerly anticipated revisions to the ICSID Rules were implemented in 2022, heralding a new era of changes in the international arbitration landscape. A key objective underlying these updated ICSID Rules is to enhance transparency across various aspects of ICSID procedures, a trend that aligns with the prevailing direction observed in arbitration rules worldwide.

Of noteworthy significance is the concept of third-party funding, a form of non-recourse financing wherein an external entity—typically a specialized business with no direct involvement in the dispute—undertakes the financial burden of an arbitration party. The new rule requires disclosure compliance in the form of a written notice to be submitted to the secretary-general of a non-party from which the party is acquiring funds.[56] While initially appearing as a resource primarily tailored for financially disadvantaged parties who might otherwise struggle to afford arbitration costs, third-party funding has also emerged as a viable tool for financially robust entities aiming to optimize cash-flow management through accessible financing[57].

Furthermore, the introduction of third-party funding is comprehensively addressed in the newly revised ICSID Arbitration Rules under Rule 14(1).[58] The latest Rule 14(4) of the 2022 ICSID Rules stipulates, “The Tribunal may order disclosure of additional information regarding the funding agreement and the non-party providing funding.” This provision facilitates enhanced transparency within third-party funding arrangements.

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[56] Rule 14 (1), (2) of the ICSID Arbitration Rules Amendment 2022, Pg 103, ICSID Convention rules, regulations and rules 2022.

[57] Third Party funding in India, Cyril Amarchand Mangaldas 2–3 (2019). https://www.cyrilshroff.com/wp-content/uploads/2019/06/Third-Party-Funding-in-India.pdf.

[58] *Overview of an Arbitration - ICSID Convention Arbitration (2022 Rules)*, ICSID https://icsid.worldbank.org/procedures/arbitration/convention/overview/2022.

Under these fresh regulations, parties involved in ICSID Arbitration are now obligated to submit a written notice revealing the identity and contact details of any external entity from which they have received funds to support or defend their proceedings, whether directly, indirectly, through a donation, grant, or in exchange for outcome-contingent compensation (referred to as "third-party funding"). Should the funding source be a legal entity, the notice must extend to disclosing the individuals and entities that possess and oversee said legal entity.[59]

This newly imposed obligation extends to requiring the party benefiting from third-party funding to divulge the identity of its co-contracting party under the financing arrangement, along with the ultimate beneficial owners of the said contracting entity.[60]

Furthermore, as part of the revised rule framework, an ICSID tribunal is empowered to seek additional details regarding the substance of any funding arrangement once the funding notification has been submitted, a provision that contributes to streamlining the arbitration process and rendering it more efficient.

### B. Publication of final awards and the pronouncements on annulments

The new amendments enlarged the precedential basis by paving the way for the publication of final awards and the pronouncements on the annulments of the awards. Rule 62 of the revised ICSID arbitration rules talk about the provision for the publication of awards and the rulings on the annulments as well within the period of 60 days with the deemed consent of the parties if no objection is received to such publication.[61] Such a provision in the revised rules strengthens the precedential database by making the rulings on the awards set in stone for posterity. The ICSID rules of 2006 mark a juxtaposition from 2022 rules as previously there was only the provision of publication of the legal reasoning of an award by the centre.[62]

[59] Alberto Favro, *New ICSID Arbitration Rules: A Further Step in The Regulation of Third-Party Funding*, Kluwer Arbitration Blog (June 3, 2022), https://arbitrationblog.kluwerarbitration.com/2022/06/03/new-icsid-arbitration-rules-a-further-step-in-the-regulation-of-third-party-funding/.
[60] Olivia de Patoul & David Walker, *The New ICSID Rules Came Into Force on 1 July 2022. What Do These Mean for Funders?*, The Law and Practice of International Courts and Tribunals 17 (2018). https://drs.deminor.com/en/blog/the-new-icsid-rules-came-into-force-on-1-july-2022-what-do-these-mean-for-funders.
[61] Rule 62 of the ICSID Arbitration Rules Amendment 2022, Pg 128, ICSID Convention rules, regulations and rules 2022.
[62] Arbitration rule 48(4) of ICSID Arbitration rules 2006.

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### C. Impleadment of the non-party in the proceedings

The revised rules in Rule 67 talk about the impleadment of the non-disputing parties, stating that any person who is not a disputing party may file a written submission during the proceedings, allowing them the opportunity to be heard as an interested party. At the discretion of the tribunal, such a party may be allowed to file a written submission on the grounds that the party has a significant interest or affiliation in the matter. The tribunal also has the power to allow such a party to file a submission within 30 days or to deny it.[63] In addition to this, the tribunal has also been conferred the powers by the revised rules to allow the parties to observe the hearings[64] of the tribunal unless any party to the subject matter of the dispute objects to it by virtue of Rule 66[65] of the amended rules.

### D. Introduction of provisional Kum interim measures

The revised rules introduced the provisions of interim measures in the arbitration space to safeguard the interests of the parties by giving them the opportunity to approach the tribunal in case where there's an apprehension of imminent harm or prejudice likely to be caused during the arbitral process.[66] The tribunal is even empowered to recommend or take such measures on its own when it deems it necessary to safeguard the interests of parties.[67] In addition to that there's a provision in the revised rules which have given the liberty to the parties raising a dispute to bifurcate their claims in the initial stage.[68]

### E. Guidelines on Cost Allocation and More Flexibility to Order Security for Costs

Cost awards carry significant importance within ISDS, regardless of whether the award requires the defendant state to pay compensation. The amended rules cast an obligation on the parties to the proceedings to conduct in good faith and expedient manner to foster the timely passing of the

[63] Rule 67 (5) of the ICSID Arbitration Rules Amendment 2022, Pg 103, ICSID Convention rules, regulations and rules 2022.
[64] Rule 65 of the ICSID Arbitration Rules Amendment 2022, Pg 128, ICSID Convention rules, regulations and rules 2022.
[65] Rule 47 of the ICSID Arbitration Rules Amendment 2022, Pg 103, ICSID Convention rules, regulations and rules 2022.
[66] Rule 65 of the ICSID Arbitration Rules Amendment 2022, Pg 128, ICSID Convention rules, regulations and rules 2022.
[67] Rule 65 (4) of the ICSID Arbitration Rules Amendment 2022, Pg 128, ICSID Convention rules, regulations and rules 2022.
[68] Rule 47 of the ICSID Arbitration Rules Amendment 2022, Pg 103, ICSID Convention rules, regulations and rules 2022.

award.[69] Before 2022, the ICSID Rules lacked a predefined standard for cost allocation, granting the tribunal the discretion to decide how expenses should be divided. Additionally, some regulations indicated that the tribunal could consider party conduct when determining cost distribution[70]. However, the 2022 amendments to the ICSID Arbitration Rules and other associated regulations have addressed these complexities.

Introducing the new ICSID rules, particularly Rules 50 and 52, has resolved the cost-related challenges. Rule 50 in the 2022 Rules presents a clear and comprehensive outline of what constitutes "costs." This encompasses various elements such as legal expenses of the parties, expenses of the tribunal and tribunal-appointed experts, and administrative and direct costs of ICSID. Rule 52(4) mandates that the tribunal's cost should be explicitly detailed in the award, along with explanations. Rule 52(3) also empowers tribunals to issue interim decisions regarding expenses, either based on party requests or their own initiative.

In a different context, the 2022 Rules establish limitations on the tribunal's jurisdiction. When the tribunal determines that a claim lacks legal substance according to Rule 41(3), the prevailing party is entitled to its "reasonable costs" unless the tribunal finds "special circumstances" warrant a different distribution of costs as per Rule 52(2). Rule 52(1) of the 2022 Rules confines the discretion of ICSID judges in awarding costs.[71] Furthermore, Rule 53 introduces a dedicated provision on security for costs, which grants the authority to tribunals to grant security in relation to claims and counterclaims. This provision, absent in the 2006 rules, broadens the scope of costs under the new regulations.

### F. Mediation & Introduction of New Expedited Arbitration Procedures-

The Arbitration Rules establish a more efficient process that parties can choose to use. Chapter XII of the revised ICSID Arbitration Rules introduces the idea of Expedited Arbitration, allowing parties to speed up the process by mutual agreement. This means that the first session

[69] Rule 3 of the ICSID Arbitration Rules Amendment 2022, Pg 20, ICSID Convention rules, regulations and rules 2022.

[70] Cost submissions - ICSID convention arbitration (2022 rules), ICSID, https://icsid.worldbank.org/procedures/arbitration/convention/cost-submissions/2022 (last visited Aug 14, 2023).

[71] Raid Abu-Manneh et al, *David Walker*, Updated ICSID Arbitration Rules: a Closer Look at the New Cost Rules and Security for Costs Provision (2022). https://www.mayerbrown.com/en/perspectives-events/publications/2023/03/updated-icsid-arbitration-rules-a-closer-look-at-the-new-cost-rules-and-security-for-costs-provision#:~:text=Among%20other%20improvements%2C%20the%202022,provision%20on%20security%20for%20costs.

will occur within 30 days of the formation of the panel. Parties can also opt out of the expedited process using Rules 75-86 in the new ICSID Rules. The expedited process has specific requirements, like the claimant's submission within 60 days of the initial panel session, as per Rule 81. If the accelerated process is not used, the 2022 Arbitration Rules state that an award should be given as soon as possible but within 240 days after the last filing, under Rule 58.[72] Moreover, the consent of the parties is quintessential to commence the expedited arbitration proceedings as per the revised rules. [73]

Expedited arbitration is not automatic; it needs both parties' consent, and they can withdraw together. If one party requests it, a tribunal can decide to stop the expedited process [Rule 86(2)]. While most IIAs also allow arbitration for dispute resolution (like ICSID, ICSID Additional Facility, or other institutional or ad hoc arbitration), there have been recent proposals for an international investment court (or a multilateral investment court system).[74] However, these ideas have not been included in the 2022 rules.

Rule 22 of ICSID Arbitration sets a faster timeline for parties to challenge, with a specific 21-day limit for disqualification petitions, replacing the previous quick requirement. ICSID introduced expedited arbitration to stay competitive in global arbitration services by offering a quicker option.

Besides expedited arbitration, ICSID introduced new Mediation Rules in 2022 for resolving investment treaty disputes, adding alternative methods to ISDS. The main steps in investor-State mediation are: (i) requesting mediation; (ii) appointing a mediator; (iii) initial statements; (iv) first mediation session and protocol; and (v) concluding mediation.[75]

According to Rule 2(1) of the Mediation Rules, two conditions must be met to pursue mediation: the dispute involves a state or regional economic integration organization, and the parties must

[72] ICSID Rules 2022 Promote Efficiency in Investor-State Arbitration and Mediation, Clifford Chance pg 1-4 (2022)..https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2022/06/icsid- rules-june-2022.pdf.
[73] Rule 78 of the ICSID Arbitration Rules Amendment 2022, Pg 139, ICSID Convention rules, regulations and rules 2022.
[74] Loukas Mistelis Partner, Reform or Recalibrate ISDS? : Clyde & Co, Clyde & Co LLP (Aug. 17, 2022), https://www.clydeco.com/en/insights/2022/08/reform-or-recalibrate-isds.
[75] ICSID's New Mediation Rules approved by member states, Arbitration, https://www.arbitrationhub.com/insight/icsids-new-mediation-rules-approved-member-states#:~:text=C.,v)%20termination%20of%20the%20mediation.

agree in writing to mediate under the Rules.[76] The use of mediation in investment disputes largely depends on whether the underlying investment treaty allows it, but parties can still agree to ad hoc mediation. Combining mediation with arbitration can be beneficial, even though it may add complexity and cost, as both processes complement each other, benefiting parties who agree to use ISDS for dispute resolution.

## VII. THE PREDICTABLE FUTURE

### A. AI's Role in the Future Investment Arbitration -

The fundamental concept behind artificial intelligence (AI) is that a computer program can replicate all aspects of learning and intelligence by closely observing them. Throughout history, AI has played a role in facilitating legal processes, safeguarding human rights, and upholding societal values. For instance, AI has simplified and expedited legal tasks such as conflict resolution.

The dispute resolution landscape is undergoing a notable transformation in the present era, marked by the emergence and increasing integration of AI technologies. The potential for AI to revolutionize arbitration is a plausible projection for the future. At present, AI is instrumental in processing extensive volumes of data pertinent to arbitration cases, extracting relevant information, and streamlining the analysis of complex legal matters. [77] This efficiency significantly saves time and resources during case evaluation. Additionally, AI can streamline the arbitrator selection process, considering arbitrators' expertise in various domains of disputes.[78]

AI tools operating at different levels have proven valuable in the arbitration domain. For instance, Arbitrator Intelligence utilizes award data to generate AI Reports, and Arbitrator Intelligence Surveys accurately assess arbitrators' tendencies based on past decisions in diverse stages of arbitration. This, along with tracking arbitrators' relevant expertise, serves as a reliable

[76] Mediation rules and regulations (ICSID 2022). https://icsid.worldbank.org/sites/default/files/documents/ICSID_Mediation.pdf.
[77] Giovanni Sisinna, Generative AI for Lawyers: Revolutionizing the Legal Landscape LinkedIn, https://www.linkedin.com/pulse/generative-ai-lawyers-revolutionizing-legal-landscape-sisinna.
[78] Development, I. B. (n.d.). How can you leverage technology and AI to streamline arbitration and dispute resolution processes?. Technology and AI for Arbitration and Dispute Resolution. https://www.linkedin.com/advice/1/how-can-you-leverage-technology-ai#:~:text=AI%20and%20technology%20can%20streamline,to%20identify%20patterns%20and%20trends.

resource for selecting arbitrators. Unlike human arbitrators, AI is less susceptible to cognitive biases and emotional influences, minimizing errors in decision-making.[79] The possibility of making mistakes in evaluating, reviewing, interpreting, and making decisions is decreased because the AI works solely on the information rather than based on human feelings.[80]

However, before incorporating AI into dispute resolution processes, a comprehensive assessment should be conducted to ensure a sufficient level of familiarity and knowledge across the board. Interaction challenges between humans and AI should also be addressed to facilitate seamless utilization. AI is described as a "fourth party" facilitator in the structure of online dispute resolution, implying a more complex role than a mere tool.[81] It is crucial to strike a balance when utilizing AI tools in decision-making, as undue interference can pose challenges to the arbitration process. While AI can aid in researching and summarizing legal matters, processing submissions, and cross-verifying judgments, it should be carefully controlled to ensure due process and avoid violations of public policy and procedural requirements.[82]

### B. Blockchain Technology in the Investor-State Arbitration-

Blockchain technology has transitioned from a speculative concept to a tangible presence, impacting modern culture and the legal domain. The utilization of smart contracts and blockchains can revolutionize how we manage documents and resolve disputes. Consequently, it is essential to integrate, apply, and correlate these concepts with arbitration to establish a more streamlined, cost-effective, and automated framework.

The adoption of blockchain in arbitration is rooted in the belief that this technology can enhance the efficiency, security, and scalability of data handling for arbitral proceedings, primarily through the utilization of smart contracts. The UNCITRAL Convention on Electronic Communications in International Contracts (2007 Convention), specifically in Articles 6 and 18, validates the legitimacy of on-chain arbitration by permitting electronic data records and

[79] Aditya Singh Chauhan, *Future of AI in Arbitration: The Fine Line Between Fiction and Reality*, Kluwer Arbitration Blog (26/2020). https://arbitrationblog.kluwerarbitration.com/2020/09/26/future-of-ai-in-arbitration-the-fine-line-between-fiction-and-reality/.
[80] Srishti Pandey Akanksha Sinha, Artificial Intelligence in the Field of Arbitration: A Rational Approach or a Disruptive Myth, Mondaq Ltd (2022). https://www.mondaq.com/india/arbitration--dispute-resolution/1186812/artificial-intelligence-in-the-field-of-arbitration-a-rational-approach-or-a-disruptive-myth.
[81] Hibah Alessa (2022) The role of Artificial Intelligence in Online Dispute Resolution: A brief and critical overview, Information & Communications Technology Law, 31:3, 319-342, DOI: 10.1080/13600834.2022.2088060.
[82] Supra note 61.

transfers in arbitration, lending legal validation to on-chain arbitration processes.[83]

By employing blockchain technology, various stages of arbitration, such as arbitrator appointments and party pleadings, including claims and evidence recording and award preparation, can be facilitated.[84] While blockchain ensures robust security, data privacy becomes a significant consideration, particularly when an external third party acts as an oracle in conflict resolution, potentially deviating from General Data Protection Regulation (GDPR) guidelines, including the "right to be forgotten" requirement.[85]

Although blockchain technology has lost some of its novelty over the years, its practical implementation has been gradual due in part to uncertainties about network operations. While many aspects of blockchain processes can be automated, participants are cautious about the risks linked to incomplete contractual agreements.[86] While there is room for on-chain applications in the market, only a limited number of effective disagreement protocols exist.[87]

The future trajectory of blockchain-based arbitration hinges on the comprehension and readiness of arbitration organizations and experts to harness blockchain's potential. Their willingness to provide arbitration and alternative dispute resolution (ADR) services online and beyond will shape the future landscape of blockchain arbitration.[88]

### C. Mediation as an Alternative

International commercial arbitration stands as an efficient selection for resolving cross-border business disputes. Nonetheless, this framework faces scrutiny, prompting discussions about necessary modifications to address concerns like sluggishness, escalating costs, and the

[83] United Nations Convention on the Use of Electronic Communications in International Contracts § 6,18 (UNCITRAL 2007).https://uncitral.un.org/en/texts/ecommerce/conventions/electronic_communications.
[84] Joe Tirado, & Gabriela Cosio. (n.d.). Lex cryptographia: Guidelines for ensuring due process in transnational blockchain-based arbitration [1]. Lex Cryptographia: Guidelines for ensuring due process in transnational blockchain-based arbitration | International Bar Association. https://www.ibanet.org/lex-cryptographia-due-process-blockchain-based-arbitration.
[85] Mulia, S. (2023, May 27). Blockchain Arbitration: The Future of Dispute Resolution. Fox Mandal. https://www.foxmandal.in/blockchain-arbitration-the-future-of-dispute-resolution/.
[86] Hibah Alessa, Bridging the Governance Gap: Dispute Resolution for Blockchain-Based Transactions, World Economic Forum (2020). https://www3.weforum.org/docs/WEF_WP_Dispute_Resolution_for_Blockchain_2020.pdf.
[87] Michael Buchwald, Smart Contract Dispute Resolution: The Inescapable Flaws of Blockchain Based Arbitration, World Economic Forum 1415-1418 (2020). https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9702&context=penn_law_review.
[88] Roland Amoussou, Blockchain Arbitration: The Cutting Edge of Arbitration and Dispute Resolution, World Economic Forum (2022). https://www.linkedin.com/pulse/blockchain-arbitration-cutting-edge-dispute-roland-amoussou/.

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increasingly litigious nature of the proceedings. To enhance effectiveness in the global realm of commercial dispute resolution, it becomes crucial to introduce alternative mechanisms, such as mediation and conciliation, or hybrid approaches like Mediation-Arbitration for dispute resolution.

As a dispute resolution method, mediation exhibits variations that can vary significantly based on fields of activity, practices, cultures, and individual practitioners' roles. Despite these disparities, mediation offers a dispute resolution avenue that: (1) involves a neutral mediator aiding parties in gaining clearer insights into their case's strengths and weaknesses; (2) facilitates moving away from adversarial stances and entrenched positions; (3) empowers parties to collaboratively arrive at mutually acceptable solutions through consensus-based decision-making; (4) nurtures ongoing relationships; and (5) generates solutions that may not have been attainable without mediation. Like arbitration, mediation ensures confidentiality during dispute settlement.[89]

Furthermore, the emergence of the hybrid approach, known as Med-arb, combines the strengths of both Mediation and Arbitration. This fusion presents a potent duo for achieving effective amicable settlements. If an arb-med-arb strategy can seamlessly integrate the advantageous aspects of Mediation into international business arbitration without compromising the integrity of the arbitration framework, its adoption should be considered. By allowing parties to address their differences early in the arbitration process, embracing med-arb has the potential to address concerns that international commercial arbitration has become sluggish, costly, and closely resembling lawsuits.[90]

## VIII. CONCLUSION

The investor-state dispute resolution system has made significant progress, particularly introducing the new 2022 rules. These rules aim to enhance efficiency and participant-friendliness, enabling a more effective exercise of rights and ensuring transparent management of investment disputes. The recent reforms have also contributed to solidifying the international

[89] Daniel Fielding, If Two Heads Are Better Than One — Can Mediation Strengthen the Effectiveness of International Commercial Arbitration?, 3 Contemporary Issues in Mediation pg 1-5 (2018). https://www.worldscientific.com/doi/epdf/10.1142/9789813270824_0001.
[90] Id.

investment dispute landscape by formalizing provisions previously absent from legal statutes.

Considering the trajectory of ISDS, it is apparent that the future strives for a more efficient approach in terms of cost and time. This trend points towards Mediation as the future of Alternative Dispute Resolution (ADR) worldwide. Mediation's adaptable nature and overall effectiveness have positioned it as a pivotal method in dispute resolution. The updated rules indicate a shift towards more effective techniques, including Mediation and Conciliation, which are expected to take precedence over arbitration due to their versatility. This evolution is driven by their ability to offer flexible solutions compared to the comparatively time-consuming and costly alternative of arbitration.

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# SOVEREIGNTY OF STATES AND THE CONSTITUTIONS

**R. MANICKA VINAYAGAM***

## ABSTRACT

*In a way of detecting the Sovereign within the Constitution really mean the Constitutional Sovereignty which is nothing but dealt as Constitutional Supremacy. Constitutionalism is on the other hand a deliberative concept which mandates to adhere the provisions provided by the Constitution. While drafting of the Constitution, its enactment and question of true law attached to it are an endless topic for the jurisprudence, sovereign power which the state possesses is to be derived from which or where is also pivotal for the Jurisprudence to deal with. Constitution is unknown to the old jurisprudence; however, modern jurisprudence adopts the Constitution though its questionability of true law which is revolving around. Independence of the States is the obligatory requirement for a State to show its personality under the International Law. Independence of the States in this context to mean absolute independence without any limitation. Limitation of the power of independence will be an imagination and also apart from reality to exercise it practically. Constitutional Law provides itself the power of supremacy to it, then the separation of sovereign powers is indispensable by which Salmond's theory of sovereignty holds good rather than Austin's theory of Sovereignty. This paper will focus on the sovereign power which the State possesses under the purview of Constitution and investigate it.*

## I. INTRODUCTION

In regard to the question of the source of law, sovereign holds the place there. The term 'sovereignty'[1] which is attached to the supreme authority of the State is considered as essential for a state in the International Society. Every state is sovereign in its own sphere. The term 'sovereign' is said to be derived from the French word 'soyrain' which itself originates from the Latin word 'suprifus' which means authority without rivals. The right of sovereignty is one of

* Assistant Professor of Law, Government Law College, Coimbatore, Tamil Nadu, India.
[1] Coined by Jean Bodin (1530 – 1596) in his famous work 'Republic' in the year 1577.

the principal attributes of statehood. The power which the Sovereign exercises is one of without limitation and is one of beyond the power of others to interfere.[2] Sovereignty was the outcome of the concept of state absolutism which was developed by renowned scholar Machiavelli during the Medieval period when there was a renaissance and reformation in Europe. The sovereignty, commonly in the present day, and in relation to modern democracies, sovereign power rests with the people (popular sovereignty) and is exercised through representative bodies such as Congress and Parliament.[3] In this parlance, U.S.A.,'s is the congress and India's is Parliament. Is Indian Parliament sovereign in India? Question taken us to the Constitution of India to analyse for answering this. Parliament in India and Congress in U.S.A are having its source from the Constitution. Therefore, there arises a need to locate the sovereign in the present world based on the theory of sovereignty developed by the jurists Jean Bodin, Hobbes and John Austin.

## II. SOVEREIGNTY

Bodin defines the conception thus: "Sovereignty is supreme over citizens and subjects, unrestrained by the laws."[4] In his book Republic, Bodin "takes up the consideration of citizenship, that the character and the importance of his theory of sovereignty begin to appear."[5] While opined about a citizen, Bodin says, "a free man who is subject to the sovereign power of another."[6] The only requirement for citizenship is submission to such a sovereign power, and the only requirement for a state is acceptance of a common sovereign.[7] The primary and distinctive role of sovereignty is in the creation of laws. The sovereign is by definition exempt from the legally binding force of these laws. Not from every law, though.

"If we should define sovereignty as a power legibus omnibus solutam, no prince could be found to have sovereign rights; for all bound be divine law, by the law of nature and by that common law of nations, which has its source in these."[8] Austin in his treatise, "The Province of Jurisprudence Determined" dealt with the theory of sovereignty since it is the source of positive law, a typical law of him. Therefore, every political and independent society can be divided into

[2] Source available at: https://www.law.cornell.edu/wex/sovereignty (last visited on November 11, 2023).
[3] *Id.*
[4] Wm. A. Dunning, 'Jean Bodin on Sovereignty', 11(1) Political Science Quarterly 82–104 (1896)., available at: https://doi.org/10.2307/2139603 (last visited on November 11, 2023).
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*

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two parts: the part of its members who are supreme or sovereign, and the part of its members who are only subjects and if the sovereign part is made up of only one person, then either the sovereign or the supreme government is rightly a monarchy. The top government could be referred to as an aristocracy if that sovereign component had several members.[9]

### A. Sovereign Power - Nature

Like the subject, the sovereign is subject to natural and divine laws, but his duty in this regard is to God, who will carry them out.[10] Regarding civil law, or the law of the country, the ultimate source of all its precepts is the sovereign's free choice. Sovereign is a political fact, consisting only in the possession and exercise of supreme power; Hobbes observed as thus: "Law, properly, is the word of him that by right hath command over others." The ultimate human right to command is vested in the sovereign by the contract through which the state is instituted. "Civil laws, then, consist in expressions or other manifestations of the will of the sovereign, who himself is not bound thereby."[11] While Hobbes acknowledges in a number of places that the sovereign is subject to the laws of nature, his careful examination of the origins and nature of these laws disallows any notion that the sovereign's obligations are identical to those of the subject.

### B. Sovereignty and the States

"The State is an aggregation of families and their common possessions, ruled by a sovereign power and by reason." …a supreme power which could be described as one essential to the idea of the State;[12] The terms 'state' and 'sovereignty' are often used interchangeably in political concepts, but they are referred as have distinction between these two as politically for the international law.[13] On saying about the authority on whom really it exist, Bodin expressed his felt as the need of a system that should embody somewhere clear and unquestionable source of authority.[14] Supreme authority with respect to Germany, including all the powers possessed by

[9] John Austin, The Province of Jurisprudence Determined 217 (Law & Justice Publishing Co., India, 2023).
[10] Wm. A. Dunning, 'Jean Bodin on Sovereignty', 11(1) Political Science Quarterly 82–104 (1896)., available at: https://doi.org/10.2307/2139603 (last visited on November 11, 2023).
[11] *Id.*
[12] *Id.*
[13] Source available at: https://compass.onlinelibrary.wiley.com/doi/abs/10.1111/gec3.12065 (last visited on November 19, 2023).
[14] Wm. A. Dunning, 'Jean Bodin on Sovereignty', 11(1) Political Science Quarterly 82–104 (1896)., available at: https://doi.org/10.2307/2139603 (last visited on November 11, 2023).

the German Government, the high command, and any state, municipal, or local government or authority, is what the governments of the United States of America, the Union of Soviet Socialist Republic, the United Kingdom, and the Provisional Government of the French Republic declared in 1945 in Berlin. This indicates that the four powers now have jurisdiction over Germany's territory and its inhabitants.[15]

### C. Sovereignty and Few States

England system, here indispensable to mention, is of parliamentary form of government, however, described as the country with unwritten constitution or really uncodified or statutory laws to have constitutional provisions. Jurists from earlier days mentioning that 'Queen in Parliament' is sovereign in England. Parliamentary sovereignty is the principle of U.K. Constitution, by which, Parliament has been given the power of supreme legal authority in England which can make law or end any law.[16] In England, Parliament is considered as sovereign, it is to be bear in mind that no power which is less than the Queen in Parliament is sovereign there and it is the only power that is, sovereign, which can issue supreme and uncontrolled legal commands. However, Parliament as a whole, and it alone, by possessing the sovereign power, can make and alter laws without reference to any other authority in England.[17]

The United States of America is an independent nation, that is, a separate political country governed by the people of America. The people of America adopted the Constitution and created the government by electing their representatives. Americans were referred to as "one people" and granted the right "to assume among the other powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them" in the 1776 Declaration of Independence. The Declaration of 1776 states that the United States of America is and has the right to the status of "free and independent."

Japan's system is that of the nature, Emperor shall be the symbol of the State and of the unity of the People, deriving his position from the will of the people with whom resides sovereign

[15] Available at https://www.jstor.org/stable/2193527 (last visited on November 12, 2023).
[16] Source available at: https://www.parliament.uk/about/how/role/sovereignty/ (last visited on November 11, 2023).
[17] Pollock F., 'Sovereignty in English Law', 8(5) Harvard Law Review 243–251 (1894)., available at: https://doi.org/10.2307/1321473 (last visited on November 11, 2023).

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power.[18] The National Parliament of Japan is Diet. Like that of system of India and England the Parliamentary system, the Diet is having an upper house (the House of Councillors) and a lower house (the House of Representatives) and the lower house is powerful and the Prime Minister is the head of the Government.[19]

In Italy, sovereignty belongs to the people described as popular sovereignty, who (the people of Italy) exercise it in the forms and within limits laid down by the Constitution.[20]

### D. State and Popular Sovereignty

Congress in USA and Parliament in India portrayed as popular sovereignty[21] since the Constitution is the source of sovereign power. Popular sovereignty is characterised as sovereignty exist with the people. Stephen A. Douglas (1813 – 1861) had adopted the cause of popular sovereignty in relation to the issue of slavery in America.[22] To remove the onus from Congress in the United States, Douglas had developed the theory of popular sovereignty (originally, this sovereignty is called as squatter sovereignty).[23] John Bolton, "The Coming War on Sovereignty," commentary, March 2009 Ambassador Bolton says about sovereignty by referring to the Constitution of the United States as it "locates the basis of its legitimacy in 'we the people' who constitute the sovereign authority of the nation."[24] Popular sovereignty in United States History, which is considered as a controversial political doctrine, by which, the people of federal territories should decide for themselves whether their territories would enter the Union as free or slave states.[25]

The head of state of a republic is typically referred to as the president. A prime minister is the head of state of a nation having a parliamentary form of government, which can be either

[18] The Constitution of Japan, art. 1 available at: https://japan.kantei.go.jp/constitution_and_government_of_japan/constitution_e.html (last visited on November 11, 2023).
[19] Source available at: http://afe.easia.columbia.edu/special/japan_1900_elections.html (last visited on November 19, 2023).
[20] The Constitution of Italy, art. 1 available at: https://www.refworld.org/docid/3ae6b59cc.html (last visited on November 11, 2023).
[21] The Constitution of India, Preamble.
[22] Source available at: https://www.britannica.com/biography/Stephen-A-Douglas (last visited on November 12, 2023).
[23] *Id*.
[24] Available at: https://www.heritage.org/american-founders/report/why-does-sovereignty-matter-america (last visited on November 12, 2023).
[25] Source available at: https://www.britannica.com/topic/popular-sovereignty (last visited on November 12, 2023).

republican (like India and Taiwan) or constitutional monarchical (like Australia). The president serves as both the head of state and the head of government in some political systems, such as those in Indonesia and the United States.[26]

### E. Popular Sovereignty States and Sovereign Power

The power which the Sovereign exercises is one of without limitation and is one of beyond the power of others to interfere. Judiciary, by exercising judicial review interfere with the legislation legislated by the legislative and declare, on some consideration, unconstitutional. Popular sovereignty gained importance in our idea of the constitution, and the status of unwritten law supported the judicial review system's quick rise to prominence.[27] "In Bodin's view, populous, a populous is a view too nearly identical with a disorderly mob. So, his opportunity to elaborate the great distinction between a Constitution-making sovereign and an ordinary law-making superior was lost. With his exact definition of the latter, however, he advanced the theory of sovereignty to a point beyond which a great many writers have not passed even at the present day."[28] "Popular sovereignty stands in antithesis to the theocratic doctrines under which the source of sovereign power is supernatural…"[29] Blackstone says: "However they (existing form of government) began, or by what right soever they subsist, there is and must be in all of them a supreme, irresistible, absolute, uncontrolled authority in which the jura summa imperii or the rights of sovereignty reside."[30]

## III. SOVEREIGNTY AND THE CONSTITUTION

Theoretically, at first, the concept propounded for sovereignty is supreme, indivisible and free from rivals. Then comes the concept of democracy, which pictures the sovereign lies with the people, familiarly known as popular sovereignty. Then comes the Constitution, it is the

[26] Source available at: https://peo.gov.au/understand-our-parliament/your-questions-on-notice/questions/what-is-the-difference-between-a-prime-minister-and-a-president-why-does-australia-have-a-prime-minister (last visited on November 19, 2023).

[27] Goldstein L. F., 'Popular Sovereignty, the Origins of Judicial Review, and the Revival of Unwritten Law', 48(1) The Journal of Politics 51–71 (1986)., available at: https://doi.org/10.2307/2130924 (last visited on November 11, 2023).

[28] Wm. A. Dunning, 'Jean Bodin on Sovereignty', 11(1) Political Science Quarterly 82–104 (1896)., available at: https://doi.org/10.2307/2139603 (last visited on November 11, 2023).

[29] Source available at: https://oxcon.ouplaw.com/display/10.1093/law-mpeccol/law-mpeccol-e423 (last visited on November 12, 2023).

[30] Pollock F., 'Sovereignty in English Law', 8(5) Harvard Law Review 243–251 (1894)., available at: https://doi.org/10.2307/1321473 (last visited on November 11, 2023).

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sovereign, conferred sovereignty by the people into the Constitution. Even sovereignty was unknown to the pre-world of Jean Bodin, as the term of political means could exist without the designated terminology 'sovereignty' as of now. To make the subjects obey for the welfare of the fraternity, enforcing obedience of the subjects is needed by way of which the power is making and enforcing the obedience of the subjects factually possesses sovereignty. Being that sovereignty is factual, the present-day context revolves around the design of the concept of legal sovereignty and could not be left without proper analysis of it.

"The immediate author of a law of the kind, or any of the sovereign successors to that immediate author, may abrogate the law at pleasure. And though the law is not abrogated, the sovereign, for the time being, is not constrained to observe it by a legal or political sanction. For if the sovereign for the time being were legally bound to observe it, that present sovereign would be in a state of subjection to a higher or superior sovereign. As it regards the successors to the sovereign or supreme powers, a law of the kind amounts, at the most, to a rule of positive morality." [31] "…constitutional law is positive morality merely, or is enforced merely by moral sanctions: though, as I shall show hereafter, it may amount to positive law, or may be enforced by legal sanctions against the members of the body considered severally."[32]

The state has laws that the sovereign is powerless to change. Although his references to these higher laws are not entirely clear, they do appear to point to the author's somewhat hazy understanding of what constitutes a constitution.[33] It is pertinent to take note here that every state had its own history before its Constitution. There is an answerless question that revolves around "Is the State or the Constitution prior?" No State is without a Constitution. However, one thing is to be kept in mind regarding the Constitution: The Constitution and its laws are unknown to the old jurisprudence. On another point of view, sources of law such as custom, legislation, precedent and opinion of the jurists are not in a position to adopt the constitution to any of it as its source. However, the Constitution occupies a strong place in modern jurisprudence and strives severely to find a place in the law in the eye of positive jurisprudence. Analytical Positivism is founded on the theory that law emanates from the sovereign, while the Constitution

[31] John Austin, The Province of Jurisprudence Determined 255 (Law & Justice Publishing Co., India, 2023).
[32] John Austin, The Province of Jurisprudence Determined 259 (Law & Justice Publishing Co., India, 2023).
[33] Wm. A. Dunning, 'Jean Bodin on Sovereignty', 11(1) Political Science Quarterly 82–104 (1896)., available at: https://doi.org/10.2307/2139603 (last visited on November 11, 2023).

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and its adoption seem far away from this theory. John Salmond came up with a unique notion for the constitution that might be the customary law, while Hans Kelson, in his Pure Theory of Law, gave a grund norm and that being the norm when traceable to be the first and no prior norm should reach the vision to qualify. However, it is always said that the Constitution is the ground norm, commonly by the experts, for India. On this point of consideration, the Constitution is the source of giving sovereignty to the state; it remains a study point in regard to Constitutional Sovereignty since the form of the Constitution is a document. As already discussed, popular sovereignty is the ideology of, for example, the Indian Constitution, where the representatives are elected by the people.

On further analysis of Constitutional Sovereignty, referring to the Constitution and the concept of popular sovereignty, locating the sovereignty is far away. The following cases and the remarks made in them are pertinent to quote while discussing the rulings of the Indian Supreme Court concerning the authority that possesses sovereignty. In the case of State of West Bengal v. Union of India (1962), the Supreme Court of India observed that "…Legal sovereignty of the India nation is vested in the people of India who as stated by the preamble have solemnly resolved to constitute India into a Sovereign Democratic Republic for the objects specified therein." In the case of GNCTD v. Union of India (2018), the Supreme Court, through its Constitution bench, held that a democratic form of government recognises that sovereignty resides within the people and is exercised directly or through their elected representatives. The Supreme Court's Constitution bench noted in Kalpana Mehta v. Union of India (2018) that the constitution's framework governs all three of the State's wings and that they are all constrained by the concept of constitutional sovereignty.

## IV. SOVEREIGNTY IN INDIA

In India, in the pre-constitution period, sovereignty resided in the King and Parliament. After the commencement of the Constitution, there are four powers that are said to hold sovereign power: The Indian people, the Constitution, and the legislature all have sovereign authority within their respective domains.[34]

[34] Dwivedi S. N., 'Location of Sovereignty In India', 9(1) Journal of the Indian Law Institute 71–84 (1967)., available at: http://www.jstor.org/stable/43949964 (last visited on November 11, 2023).

The concept of popular sovereignty in India by the Constitution through its Preamble, "We the People… adopt, enact and give ourselves this Constitution", is worth quoting here. In the system of constitutional sovereignty, it is difficult to ascertain or identify the sovereign power. Deriving sovereignty from the Constitution would have constitutional limitations for the exercise of sovereignty, which is opposed to the theory of sovereignty.

Form for a Minister of the Union's office oath, The oath or affirmation that a candidate for the election to the legislature must make, The oath or affirmation that a member of Parliament is required to make[35] and form of oath or affirmation to be made by the judges of the Supreme Court consist of "that I will uphold the sovereignty and integrity of India.[36] Originally, there were no such words "that I will uphold the sovereignty and integrity of India" in the Constitution as the form of oath for the Judges of the Supreme Court.

Since Sovereignty is the principal attribute of statehood, State, jurisprudentially, on analysis, the primary and secondary functions of the state are war and administration of justice and taxation, respectively. Even the term 'state' is open to attract various meanings, with relevance to the jurisprudence, aptly chosen to mean 'government'. It is additionally important to mention here, in the Constitution of India, the meaning of the State[37] as provided in it, and the same is connected to Part -IV[38] of it. Under the Directive Principles of States Policy, the State has been provided some principles to follow. Among them to quote here are that the State shall take steps to separate the judiciary from the executive in the public services of the State[39] and the State Shall endeavour to promote international peace and security, maintain just and honourable relations between nations, foster respect for international law and treaty obligations in the dealings of organised peoples with one another and encourage settlement of international

[35] The Constitution of India, Third Schedule.
[36] Inserted by Amendment in the year, 1963.
[37] Article 12. Definition.—In this Part, unless the context otherwise requires, ―the State‖ includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.
[38] Article 36. Definition.—In this Part, unless the context otherwise requires, ―the State‖ has the same meaning as in Part III.
Article 37. Application of the principles contained in this Part.—The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.
[39] The Constitution of India, 1950 Article 50. Separation of judiciary from executive.—The State shall take steps to separate the judiciary from the executive in the public services of the State.

disputes by arbitration.[40] If sovereignty exists in this, the State, i.e. the government, possesses sovereignty, not other organs of the State. When the basic structure doctrine was evolved by the Supreme Court, some political parties wanted to restore the supremacy of Parliament.[41]

Further, if the state has sovereignty, then the head of the state is a human being. If India is looked into, the President is the head of the state and sovereign and the same is again related to the power of the President that he has to act on the advice of the Council of Ministers and by that again, Parliament enters into the sovereign picture, and by that being head of the Parliament, Prime Minister definitely be sovereign as to the founded-theory of sovereignty. However, Constitutional limitation portrays itself as the sovereign because the President, as the head of the State, derives the power from it. In practical reality, the question of who is sovereign is theoretically not possible, and popular sovereignty shows the people as sovereignty; there arises a need to discuss the existence of legal sovereignty with the elected representatives by the people, even then reaching the sovereign is far away. Without sovereignty, no state will be. However, constitutional morality makes the research on sovereignty inevitable for ascertaining a state's independence.

In the case of demonetisation in the year 2016, the action of the Central Government has been challenged on the basis of Constitutionality with reference to the related statutory provisions of the Reserve Bank of India Act, 1934. As per Section 26(2) of the Act, the recommendation of the Central Board of the Reserve Bank was not there for said demonetisation. In spite of upholding that demonetisation by the Supreme Court, the role of the judiciary is there.

Illustratively, to quote only one of the questions in consideration, the Central Government under sub-section (2) of Section 26 of the RBI Act can be restricted to mean that it can be exercised only for "one" or "some" series of bank notes and not "all" series in view of the word "any" appearing before the word "series" in the subsection, specifically so, when on earlier two occasions, the demonetisation exercise was done by the plenary legislations?" framed in the case.

[40] The Constitution of India, 1950 Article 51. Promotion of international peace and security.—The State shall endeavour to— (a) promote international peace and security; (b) maintain just and honourable relations between nations; (c) foster respect for international law and treaty obligations in the dealings of organised peoples with one another; and (d) encourage settlement of international disputes by arbitration.

[41] Glanville Austin, Working a Democratic Constitution – A History of Indian Experience 235 (oxford Indian Paper Backs, India, 2023).

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Though other questions are also relevant here, they need not be mentioned because the subject matter of this paper is quite different.

It is also important to note that, during the oral hearing of the petitions contesting the repeal of Article 370, the Chief Justice of India stated that Jammu and Kashmir had "absolutely and completely" given up its sovereignty and that this surrender was unconditional.[42] The fact that India has sovereignty is unaffected by the division of legislative authority.

## V. CONCLUDING REMARKS

Therefore, it arrives from the readings above that the sovereignty is closely and without an alternative for the relation connected with the State, and the state is, because of the non-availability of the alternative, appropriately connected to the government and the functions of the government is strictly connected to the making of legislation, apart from any doubt, the sovereign must be connected to the law-making body but to none other else. Searching for sovereignty, founded on a theoretical basis, raises the question of sovereignty belonging to those who, in the modern state, derive powers from the so-called positive morality, the Constitution, and the same is capable of being mentioned as constitutional sovereignty. If any distinction exists between the state and the government, ultimately, it is connected to the international political order. Presupposing the ideology that the state functions through government clearly emphasises and puts an end to the question of who is sovereign in the state.

[42] Source available at: https://www.thehindu.com/news/national/jks-surrender-of-sovereignty-to-india-was-absolutely-complete-says-supreme-court/article67180690.ece (last visited on November 11, 2023).

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# TRANS-BOUNDARY FOOD SECURITY: INTERNATIONAL LAW AND COOPERATION

AAKASH MALIK* AND GAURAV KUMAR**

## ABSTRACT

*Trans-boundary food security presents a complex challenge in a world where the global food supply chain is increasingly interconnected, and food crises in one region can have cascading effects on others. This research paper examines the intricate interplay between international law and cooperation mechanisms in addressing the issue of Trans-boundary food security. The paper commences by analyzing the multifaceted dimensions of Trans-boundary food security, encompassing factors such as trade, climate change, migration, and geopolitical tensions. It underscores the significance of this issue in the context of a rapidly changing global landscape. Through an in-depth examination of international legal instruments, agreements, and conventions, the research delineates the legal framework governing Trans-boundary food security. It explores the obligations and responsibilities of states, international organizations, and non-state actors in ensuring food security across borders. The paper evaluates the effectiveness of existing international cooperation mechanisms, including bilateral agreements, regional initiatives, and global partnerships, in addressing Trans-boundary food security challenges. It highlights successful models of cooperation and identifies areas in need of enhancement. The study also discusses the intricate balance between national sovereignty and collective responsibility, as well as the potential conflicts that may arise in the pursuit of Trans-boundary food security objectives. It addresses the ethical and humanitarian imperatives that underpin international efforts to prevent hunger and malnutrition.*

## I. INTRODUCTION

Food security, an essential entitlement of every individual and a crucial pillar of long-term progress, is a matter of utmost significance in the 21st century. With the ongoing increase in the

* Ph.D. Scholar, Panjab University, Chandigarh.
** Ph.D. Scholar, Delhi University, Delhi.

worldwide population and the escalating impact of climate change and environmental degradation, the global challenge of providing safe, nutritious, and adequate food for everyone has become more prominent. In this context, the notion of "Trans-boundary Food Security" has gained prominence, reflecting the interconnectedness of food systems and the need for international cooperation to address the complex, cross-border nature of food security issues. Trans-boundary food security refers to the intricate web of factors that affect food availability, access, utilization, and stability across borders, encompassing trade, water resources, climate change, conflict, and various other interrelated elements. In this research paper, we delve into the multifaceted dimension of Trans-boundary food security and its intersection with international law and cooperation. Our objective is to explore the legal frameworks and mechanisms in place to address the research discusses the problems related to food security across borders and examines the importance of international cooperation in maintaining global food security.

Food systems on a global scale are inherently interrelated. The consequences of events occurring in a particular region of the world, such as a prosperous crop yield, a trade disagreement, or a humanitarian emergency, can extend beyond national boundaries and impact food costs, accessibility, and, significantly, the welfare of numerous individuals. It is in this context that international law and cooperation become essential tools for addressing these cross-border challenges. The international community, through various treaties, conventions, and organizations, has sought to create a framework that promotes cooperation, transparency, and sustainable practices to secure food for all.

In this research paper, we will begin by examining the roots of Trans-boundary food security issues, including the various global trends and challenges that contribute to its complexity. Subsequently, we will analyze the significance of international law by reviewing pivotal legal instruments, principles, and methods that have been implemented to tackle the issue of food security on a global scale. Additionally, we will assess the effectiveness of these legal frameworks in practice, highlighting both successes and areas where further improvements are needed. The study will also examine the importance of international collaboration in attaining food security, as no country can address these challenges independently. Ultimately, our aim is to shed light on the critical relationship between Trans-boundary food security and international law and cooperation, and to provide insights into the ongoing efforts to ensure that the right to

food is upheld for every person, regardless of where they reside. In a world faced with the challenges of climate change, conflict, and resource scarcity, understanding the legal and cooperative mechanisms available to address Trans-boundary food security is imperative to finding sustainable solutions for our shared global future.

## II. CONCEPT OF TRANS-BOUNDARY FOOD SECURITY

### A. Definition and Key Elements

Trans-boundary food security encompasses the interdependence of food availability, accessibility, use, and stability across national borders and regions.[1] It acknowledges that food security is not exclusively a domestic matter but is influenced by an intricate network of factors that go beyond the boundaries of a nation. Trans-boundary food security consists of three key elements: food availability, food accessibility, food utilization, and food stability[2]. Food availability refers to the ability to produce or import food to meet a population's nutritional needs. Accessibility involves individuals obtaining and affording food without discrimination or barriers. Utilization involves proper consumption of food, including safe preparation and storage, and education about nutrition and dietary practices. Food stability ensures consistent access to food, preventing food insecurity.

The right to food entails the ability to nourish oneself with dignity, rather than relying on others to provide sustenance.[3] Individuals are required to fulfill their own demands by utilizing their own exertions and assets, which might be generated or acquired through purchase. States must create a conducive atmosphere that allows individuals to fully utilize their abilities to generate or obtain sufficient food for themselves and their families. Nevertheless, in cases where individuals are unable to sustain themselves as a result of armed conflict, natural calamities, or imprisonment, it becomes the responsibility of the government to directly supply them with food.

The deprivation of the right to food is not attributable to a scarcity of food, but rather to a deficiency in the ability to obtain food that is readily accessible.[4] Factors such as poverty, social

[1] M. S. Islam & E. Kieu, "Tackling Regional Climate Change Impacts and Food Security Issues: A Critical Analysis Across ASEAN", PIF, and SAARC, 12(3) Sustainability 883 (2020).
[2] L. Ndirangu, J. Omiti & N. Waiyaki, "Critical Issues on Food Security in the Nile Basin Countries: An Interventionist Trans-boundary Approach" (Kenya Institute for Public Policy Research and Analysis, 2010).
[3] D. M. Kaplan, "Food Philosophy: An Introduction" (Columbia University Press, 2019).
[4] G. Riches, "Food Bank Nations: Poverty, Corporate Charity and the Right to Food" (Routledge, 2018).

exclusion, and discrimination frequently hinder individuals' ability to obtain food, even in economically advanced countries with plentiful food resources. States must prioritize the development of sustainable food production systems in order to guarantee future food availability for upcoming generations. This entails taking into account several issues such population increase, the effects of climate change, and the availability of natural resources.

### B. Global Challenges and Implications

Global food security across borders is impacted by multiple causes, such as climate change, environmental degradation, geopolitical conflicts, trade policies, sociocultural issues, migration, international collaboration, and inequality. Climate change causes disturbances in weather patterns, which in turn have an impact on food production and systems, resulting in shortages of food and fluctuations in prices.[5] Environmental degradation, including the processes of soil erosion and deforestation, poses a significant threat to the long-term viability of food production, impacting both domestic and global food security.[6] Geopolitical conflicts disrupt food supply chains and trade, leading to regional food shortages and humanitarian crises[7]. Trade policies, including tariffs, subsidies, and non-tariff barriers, distort global food markets and create inequities in food access[8]. Sociocultural factors influence food consumption and production choices, affecting food security within and between nations[9].

Migration due to food insecurity, conflicts, or environmental challenges can lead to refugee crises and strain resources in host countries[10]. International cooperation and adherence to legal frameworks also affect global food security efforts. Inequality perpetuates global inequalities, impacting human development and stability. Addressing Trans-boundary food security requires a holistic and collaborative approach to address the complex web of factors influencing food security at local, national, and international levels.

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[5] S. S. Myers et al., "Climate Change and Global Food Systems: Potential Impacts on Food Security and Undernutrition", 38 Annual Review of Public Health 259-277 (2017).
[6] T. Gomiero, "Soil Degradation, Land Scarcity and Food Security: Reviewing a Complex Challenge, 8(3) Sustainability" 281 (2016).
[7] S. Jagtap et al., "The Russia-Ukraine Conflict: Its Implications for the Global Food Supply Chains", 11(14) Foods 2098 (2022).
[8] S. van Berkum, "How Trade Can Drive Inclusive and Sustainable Food System Outcomes in Food Deficit Low-Income Countries", 13(6) Food Security 1541-1554 (2021).
[9] P. J. Gregory, J. S. Ingram & M. Brklacich, "Climate Change and Food Security, 360(1463) Philosophical Transactions of the Royal Society B: Biological Sciences" 2139-2148 (2005).
[10] C. Raleigh, "The Search for Safety: The Effects of Conflict, Poverty and Ecological Influences on Migration in the Developing World, 21 Global Environmental Change" S82-S93 (2011).

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### C. Treaties, Conventions, and Agreements

International law is essential in addressing food security as it creates treaties, conventions, and accords that build the legal foundation for controlling global food systems. Important elements encompass the Food and Agriculture Organization (FAO), the World Trade Organization (WTO), the Rome Declaration, the Voluntary Guidelines on the Right to Food, the International Plant Protection Convention (IPPC), the Convention on Biological Diversity (CBD), and trade agreements. The FAO is tasked with the development and enforcement of international agreements pertaining to food and agriculture, such as the International Plant Protection Convention and the Codex Alimentarius.[11]

The World Trade Organization (WTO) establishes a structure for trade-related agreements that have an effect on food security, by dealing with matters such as agricultural subsidies, market entry, and competition in exports.[12] The Rome Declaration and the Voluntary Guidelines on the Right to Food urge nations to implement measures that enhance food security, including enhancing access to resources and guaranteeing sufficient nourishment for all individuals.[13] The IPPC aims to prevent pests and diseases in plants and products, while the CBD promotes biodiversity conservation for resilient and sustainable food systems[14]. Trade agreements, such as free trade agreements and economic partnership agreements, often contain provisions related to food trade, affecting food security in participating nations[15].

### D. Human Rights Frameworks

Human rights frameworks are essential in ensuring food security, as they recognize the right to food as a fundamental human right. Important components comprise the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Guiding Principles on Business and Human Rights (Ruggi Principles), the Sustainable Development Goals (SDGs), and domestic constitutions and laws. The UDHR, ratified by the United Nations General Assembly in 1948, underscores the entitlement to a

[11] M. A. Mekouar, "Food and Agriculture Organization of the United Nations (FAO), 31(1) Yearbook of International Environmental Law" 326-340 (2020).
[12] A. A. Farsund, C. Daugbjerg & O. Langhelle, "Food Security and Trade: Reconciling Discourses in the Food and Agriculture Organization and the World Trade Organization", 7 Food Security 383-391 (2015).
[13] I. Rae, J. Thomas & M. Vidar, "The Right to Food as a Fundamental Human Right: FAO's Experience, in Food Insecurity, Vulnerability and Human Rights Failure" 266-285 (London: Palgrave Macmillan UK, 2007).
[14] C. Shine, "Invasive Species in an International Context: IPPC, CBD, European Strategy on Invasive Alien Species and Other Legal Instruments", 37(1) EPPO Bulletin 103-113 (2007).
[15] D. Rodrik, "What Do Trade Agreements Really Do?", 32(2) Journal of Economic Perspectives 73-90 (2018).

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satisfactory level of living, encompassing sustenance.[16] The International Covenant on Economic, Social and Cultural Rights (ICESCR) requires states to guarantee persons' access to sufficient and suitable food.[17]

The Ruggie Principles prioritize the obligation of both states and corporations to uphold and safeguard human rights, with a particular influence on the food industry.[18] The Sustainable Development Goals, specifically Goal 2 (Zero Hunger), highlight the worldwide dedication to eradicating hunger, attaining food security, and establishing sustainable food systems.[19] Both national constitutions and statutes have provisions for the right to food, granting individuals the authority to assert their rights and demand government responsibility. International law, established through formal agreements, agreements, and frameworks for human rights, influences the legal environment for ensuring food security, by advocating for fair and equal access to food and protecting the fundamental human right to food.

## III. TRANS-BOUNDARY FOOD SECURITY: A MULTIFACETED CHALLENGE

### A. Environmental Factors and Climate Change

Climate change poses a huge threat to global food security by disrupting agricultural systems and presenting substantial obstacles.[20] Climate change has led to increased weather variability, causing more frequent and severe events like droughts, floods, storms, and heatwaves, which can devastate crop yields and reduce food production and availability. Rising global temperatures and shifting weather patterns have altered growing seasons, causing crops to no longer thrive in their historical regions and reducing agricultural output[21]. Additionally, changing temperature and humidity patterns can increase pest and disease pressures on crops, further impacting food availability[22].

[16] A. Ayala & B. M. Meier, "A Human Rights Approach to the Health Implications of Food and Nutrition Insecurity", 38(1) Public Health Reviews 1-22 (2017).
[17] Ibid.
[18] J. G. Ruggie, C. R. E. E. S. & R. Davis, "Ten Years After: From UN Guiding Principles to Multi-Fiduciary Obligations", 6(2) Business and Human Rights Journal 179-197 (2021).
[19] P. Atukunda et al., "Unlocking the Potential for Achievement of the UN Sustainable Development Goal 2–'Zero Hunger'–in Africa: Targets, Strategies, Synergies and Challenges", 65 Food & Nutrition Research (2021).
[20] Supra note 5
[21] R. Anderson, P. E. Bayer & D. Edwards, "Climate Change and the Need for Agricultural Adaptation", 56 Current Opinion in Plant Biology 197-202 (2020).
[22] S. Skendžić et al., "The Impact of Climate Change on Agricultural Insect Pests", 12(5) Insects 440 (2021).

Climate change can lead to the loss of biodiversity, as habitats of plant and animal species shift, potentially reducing the diversity of pollinators and natural pest control mechanisms in agriculture. This loss of biodiversity can disrupt the ecological balance that sustains food production, leading to reduced yields and increased susceptibility to diseases and pests.

Climate-related challenges impact food security differently across different regions. Low-income countries, particularly in Africa and South Asia, are particularly vulnerable due to their dependence on rain-fed agriculture, limited access to advanced farming technologies, and inadequate infrastructure for climate resilience[23]. These regions often lack the financial and technological resources needed to adapt to changing conditions. Small Island Developing States (SIDS) are exposed to rising sea levels and extreme weather events, disrupting supply chains and making imported food more expensive and less accessible[24].

Arctic and high-latitude regions are disproportionately affected by climate change, leading to glacier melting and permafrost, affecting freshwater availability and ecosystem dynamics. Conflict-affected areas are particularly vulnerable due to their lack of infrastructure and governance, leading to displacement, reduced agricultural productivity, and food scarcity.[25] It is essential to address these vulnerabilities in order to improve international efforts to boost food security across borders. International collaboration and legislative structures are crucial in assisting these areas to adjust to and reduce the effects of climate change on food production and accessibility. Through comprehending these obstacles and enacting efficient tactics, the global community can strive for a more stable and enduring worldwide food system.

### B. Political and Economic Factors

Trade policies are essential for governing global food markets, as they impact the production, distribution, and affordability of food. Trade barriers, such as tariffs and import restrictions, have the potential to raise food prices and hinder the ability of food-exporting countries to access global markets.[26] Subsidies provided to domestic agriculture can distort global food markets, leading to overproduction and lower prices, negatively impacting agricultural sectors in other

[23] B. Praveen & P. Sharma, "A Review of Literature on Climate Change and Its Impacts on Agriculture Productivity", 19(4) Journal of Public Affairs e1960 (2019).
[24] M. J. Bush, "Climate Change Adaptation in Small Island Developing States" (John Wiley & Sons, 2018).
[25] A. Adelaja & J. George, "Effects of Conflict on Agriculture: Evidence from the Boko Haram Insurgency", 117 World Development 184-195 (2019).
[26] Ibid.

nations[27]. Trade agreements, designed to promote fair and open trade, can have varying effects on food security. Some prioritize market access and liberalization, while others focus on domestic industry protection.

The equilibrium achieved in trade agreements can have a significant influence on the accessibility and cost-effectiveness of food goods, especially in locations that are more susceptible to adverse effects. Therefore, trade policies and trade agreements are essential for addressing Trans-boundary food security.

Geopolitical conflicts have a substantial impact on Trans-boundary food security by causing disruptions in the production and delivery of food. This, in turn, results in food shortages and worsens the vulnerability of affected regions.[28] These conflicts can disrupt supply chains, causing food shortages and higher prices, especially in conflict-affected areas. Forced displacement of populations, particularly refugees, further exacerbates food insecurity. Agricultural destruction, including targeted or destroyed infrastructure and farmlands, reduces the available food supply and hampers long-term food security by undermining the ability to rebuild agricultural systems. Conflict zones also restrict humanitarian access, making it difficult for humanitarian organizations to deliver food assistance and support.

International cooperation and legal mechanisms are crucial in addressing challenges associated with global food markets and geopolitical conflicts. Trade policies can be deliberated upon to foster equitable commerce and diminish market imbalances, while global accords, such as those addressing humanitarian access and civilian protection during conflicts, can significantly alleviate the repercussions of geopolitical crises on food security. Gaining a comprehensive understanding of these interactions and the significance of international law is essential for formulating successful approaches to guaranteeing food security across borders in an interconnected global context.

[27] C. Bellmann, "Subsidies and Sustainable Agriculture: Mapping the Policy Landscape" (Chatham House: London, UK, 2019).
[28] H. Ayeb & R. Bush, "Food Insecurity and Revolution in the Middle East and North Africa: Agrarian Questions in Egypt and Tunisia" (Anthem Press, 2019).

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### C. Sociocultural Factors

Cultural practices significantly influence food consumption patterns, impacting Trans-boundary food security[29]. These practices include dietary preferences, which dictate the types of food consumed within a region, and traditional methods of food preservation and storage. These preferences can affect food availability, especially in regions where food preservation is crucial for meeting nutritional needs during lean seasons. Indigenous and local knowledge about agriculture, plant varieties, and traditional farming practices can be valuable for food security, contributing to more resilient and sustainable food systems[30]. By preserving and leveraging this knowledge, Trans-boundary food security can be enhanced and sustainable.

Food insecurity, a result of sociocultural, economic, and environmental factors, can lead to population displacement and migration[31]. Rural-urban migration is a common trend, driven by economic opportunities and reliable food access in urban areas. This can strain resources and infrastructure, impacting urban food security. Cross-border migration, often triggered by severe food shortages, can lead to refugee flows and migration crises, straining host countries' resources and capacity[32]. Forced displacement occurs in conflict-affected regions or areas with persistent food insecurity, putting pressure on humanitarian organizations and host communities[33]. Cultural disruption is another consequence, as migration and displacement can disrupt traditional cultural practices and dietary habits, making it challenging for individuals to adapt to new food environments and preferences[34].

Understanding the sociocultural factors at play in food security is essential for effective policy and humanitarian responses. It is crucial to respect and integrate local practices and knowledge into strategies for improving food security. Additionally, addressing migration and displacement

[29] Y. Wang et al., "Complex Regional Telecoupling Between People and Nature Revealed via Quantification of Trans-Boundary Ecosystem Service Flows", 4(1) People and Nature 274-292 (2022).
[30] T. Mabhaudhi et al., "Mainstreaming Underutilized Indigenous and Traditional Crops into Food Systems: A South African Perspective", 11(1) Sustainability 172 (2018).
[31] M. A. Carney & K. C. Krause, "Immigration/Migration and Healthy Publics: The Threat of Food Insecurity", 6(1) Palgrave Communications 1-12 (2020).
[32] A. C. Hartman & B. S. Morse, "Violence, Empathy and Altruism: Evidence from the Ivorian Refugee Crisis in Liberia", 50(2) British Journal of Political Science 731-755 (2020).
[33] J. George & A. Adelaja, "Armed Conflicts, Forced Displacement and Food Security in Host Communities", 158 World Development 105991 (2022).
[34] R. L. Woodgate & D. S. Busolo, "African Refugee Youth's Experiences of Navigating Different Cultures in Canada: A "Push and Pull" Experience", 18(4) International Journal of Environmental Research and Public Health 2063 (2021).

resulting from food insecurity requires international cooperation, legal protections, and humanitarian support to ensure that the displaced populations have access to adequate nutrition and livelihood opportunities while preserving their cultural identities. Recognizing the sociocultural aspects of food security is crucial for creating comprehensive and enduring solutions to cross-border food security issues.

## IV. INTERNATIONAL LEGAL FRAMEWORKS ADDRESSING TRANS-BOUNDARY FOOD SECURITY

### A. Food and Agriculture Organization (FAO)

The Food and Agriculture Organization (FAO), a United Nations agency, is a key player in addressing global food security issues[35]. The organization was founded in 1945 with the main objective of spearheading global initiatives to combat hunger, malnutrition, and food insecurity. The FAO compiles, examines, and distributes statistics on food production, consumption, and availability, facilitating well-informed decision-making. In addition, it offers technical support, training, and programs aimed at enhancing the capabilities of member nations, enabling them to enhance their agricultural practices and policies. The organization also has a pivotal role in formulating international policies and frameworks pertaining to food security, agriculture, and sustainable development, promoting collaboration among member states.

FAO responds to food and agricultural emergencies by providing immediate assistance to affected populations, mitigating the short-term impacts of crises on food security. The organization advocates for sustainable agriculture and natural resource management practices, focusing on agroecology, conservation agriculture, and climate-smart farming. The FAO conducts research and promotes innovation in agriculture and food systems, focusing on productivity improvement, reducing post-harvest losses, and addressing emerging challenges like climate change and food waste.

The Food and Agriculture Organization (FAO) is actively involved in various international conventions, agreements, and initiatives aimed at addressing global food security issues. These instruments provide a legal and policy framework for collective action and cooperation. The International Plant Protection Convention (IPPC) aims to prevent pests and diseases that can

[35] Supra note 11.

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have devastating effects on crops and food security[36]. The Code of Conduct for Responsible Fisheries promotes responsible and sustainable fishing practices, addressing food security in regions heavily dependent on seafood. The Committee on World Food Security (CFS) is a prestigious policy forum that convenes governments, civil society, and the commercial sector to formulate policies, guidelines, and recommendations.[37]

The FAO, in collaboration with the United Nations Environment Programme (UNEP), is spearheading the Global Initiative on Food Loss and Waste Reduction, with the objective of diminishing food loss and waste at every stage of the supply chain. The Food and Agriculture Organization (FAO) has formulated recommendations pertaining to the right to food, acknowledging it as an essential and inherent entitlement of every individual. The FAO is actively involved in global projects including climate change, biodiversity conservation, and the Sustainable Development Goals (SDGs). These activities align with the FAO's mission and its efforts to tackle global food security challenges.

### B. World Trade Organization (WTO)

The World Trade Organization (WTO) is a key player in shaping international trade policies, which can significantly impact food security[38]. Trade agreements can influence the availability, affordability, and accessibility of food globally. Trade liberalization, which reduces barriers to the movement of goods, can expand food access but may also expose domestic markets to foreign competition, affecting local farmers and food producers. WTO agreements can determine the permissible levels of tariffs and subsidies, which can raise food import costs and distort global markets[39].

The implementation of sanitary and phytosanitary measures, exemplified by the World Trade Organization's Agreement on the Application of Sanitary and Phytosanitary Measures, serves the purpose of safeguarding human, animal, and plant health. However, it is important to note that these measures can also be employed as non-tariff barriers to limit the importation of food

[36] IPPC Secretariat et al., "Scientific Review of the Impact of Climate Change on Plant Pests" (FAO on Behalf of the IPPC Secretariat, 2021).
[37] S. Guttal, "Re-Imagining the UN Committee on World Food Security", 64(3-4) Development 227-235 (2021).
[38] M. E. Margulis, "Negotiating from the Margins: How the UN Shapes the Rules of the WTO", 25(3) Review of International Political Economy 364-391 (2018).
[39] J. C. Bureau & J. Swinnen, "EU Policies and Global Food Security", 16 Global Food Security 106-115 (2018).

products.[40] Intellectual property rights, which can impact the agricultural sector through seed patents, can also be affected by trade agreements. Special and differential treatment provisions are provided to least-developed countries (LDCs), allowing them to take more time to implement trade-related reforms and comply with WTO rules[41]. Balancing trade liberalization and food security is crucial, as unfettered globalization can lead to vulnerabilities in food systems, such as over-reliance on imports and potential disruptions during global crises.

The World Trade Organization (WTO) has established dispute resolution mechanisms to address trade-related issues, including those related to food trade. These mechanisms allow member countries to resolve trade disputes and uphold international trade agreements. Key aspects of these mechanisms include the Dispute Settlement Body (DSB), which is the central body for settling disputes, and panel proceedings, which establish panels to examine and make recommendations on issues related to agricultural subsidies, tariff levels, and trade-distorting measures. The Appellate Body serves as the final appellate authority for trade disputes, allowing parties to appeal panel reports for a transparent and fair resolution process. The WTO's dispute resolution mechanisms also include measures to ensure the enforcement of panel recommendations, as non-compliance can result in trade sanctions, which can affect food trade[42]. Before resorting to formal dispute settlement procedures, member countries can engage in consultations to seek mutually agreeable solutions to trade issues. The effectiveness of these mechanisms in resolving food security challenges relies on the commitment of member countries to participate in genuine negotiations and preserve principles of fairness and equity.

### C. Human Rights Frameworks

The right to food is a basic human right that is acknowledged in global human rights frameworks, such as the Universal Declaration of Human Rights and the International Covenant on Economic, Social, and Cultural Rights (ICESCR). This statement asserts that every individual is entitled to have food that is safe, nutritious, and culturally appropriate in order to lead an active and healthy lifestyle. The concept of the right to food is commonly interpreted as a

[40] J. W. Kang & D. M. Ramizo, "Impact of Sanitary and Phytosanitary Measures and Technical Barriers on International Trade", 51(4) Journal of World Trade (2017).
[41] A. Ukpe & S. Khorana, "Special and Differential Treatment in the WTO: Framing Differential Treatment to Achieve (Real) Development", 20(2) Journal of International Trade Law and Policy 83-100 (2021).
[42] K. Holzer, "Addressing Tensions and Avoiding Disputes: Specific Trade Concerns in the TBT Committee", 14(3) Global Trade and Customs Journal (2019).

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gradual process, where governments actively work towards achieving full fulfillment over a period of time. The Food and Agriculture Organization (FAO) and other United Nations (UN) organizations have established fundamental principles that govern the understanding of the right to food. These principles encompass the concepts of availability, accessibility, adequacy, non-discrimination, and participation. The right to food highlights the susceptibility of particular demographics, including children, women, indigenous populations, and anyone residing in impoverished or conflict-ridden regions. States have a duty to safeguard certain people from experiencing food insecurity. Businesses and international organizations, as non-state actors, have a duty to ensure the right to food. Meanwhile, individuals and communities have the right to demand that their right to food be fulfilled.

States have various obligations to ensure food security in line with human rights frameworks. These encompass the principles of upholding the entitlement to food, safeguarding individuals and communities from transgressions committed by external parties, and fulfilling the responsibility to guarantee that food is readily accessible, available, and sufficient for everybody residing under their jurisdiction.[43] States must avoid policies and practices that undermine food production, distribution, or accessibility. They must also develop and enforce regulatory frameworks to protect individuals and communities from violations by corporations and other non-state actors. States must also ensure non-discrimination in their actions, addressing disparities in access to food based on gender, age, ethnicity, disability, and economic status. Additionally, states must engage individuals and communities in decision-making processes related to food security and establish accountability mechanisms to monitor progress in realizing the right to food.

The inclusion of the right to food as a fundamental human right offers a robust foundation for effectively addressing matters of food security from both a legal and ethical perspective. By acknowledging the responsibilities of nations and the entitlements of individuals, it establishes a basis for promoting policies and actions that guarantee the absence of hunger and the preservation of food security as a fundamental human entitlement. Comprehending and advocating for the right to food is crucial for global endeavors to eliminate hunger and malnutrition.

[43] J. Clapp et al., "The Case for a Six-Dimensional Food Security Framework", 106 Food Policy 102164 (2022).

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## V. CASE STUDIES IN TRANS-BOUNDARY FOOD SECURITY

### A. Case 1: Drought and Food Insecurity in East Africa

Drought and food insecurity in East Africa have been recurring challenges due to the region's vulnerability to climatic variations, population pressure, and limited access to resources[44]. The response to these issues involves both regional cooperation among East African nations and international efforts. The East African Community (EAC) and the Intergovernmental Authority on Development (IGAD) play crucial roles in fostering regional collaboration.[45] They have established mechanisms for information-sharing, early warning systems, and coordinated responses to food security crises. Common agricultural policies have been developed to harmonize practices and promote regional food trade. The Nile Basin Initiative aims to address water resource management challenges in East Africa, promoting food security by ensuring consistent water access for agriculture[46]. These collaborations are crucial for enhancing agricultural productivity and addressing regional challenges.

International organizations like the United Nations and World Food Programme are crucial in providing humanitarian aid to East Africa to mitigate the immediate impacts of drought and food insecurity. These aids include distributing food, providing nutrition assistance, and addressing urgent needs. International funding supports climate resilience and adaptation programs in East Africa, focusing on long-term strategies to build community and agricultural resilience to climate-related challenges. Capacity building in East African nations is also a key aspect of international cooperation, with training, technology transfer, and knowledge sharing enhancing local expertise and resilience. Early warning systems are also developed and maintained by international agencies to enable proactive responses.

The case of drought and food insecurity in East Africa underscores the importance of regional cooperation and international response to address Trans-boundary food security challenges. Coordination among East African countries and international actors can be improved by addressing differences in priorities, resources, and governance structures. Long-term solutions to

[44] Ibid.
[45] A. Zewdie, "Intergovernmental Authority on Development and East African Community: Viability of Merger", 5(2) International Journal of African Development 7 (2019).
[46] M. Al-Saidi et al., "Water-Energy-Food Security Nexus in the Eastern Nile Basin: Assessing the Potential of Transboundary Regional Cooperation", in Water-Energy-Food Nexus: Principles and Practices 103-116 (2017).

drought and food security require investments in sustainable agriculture, infrastructure development, and climate resilience. Enhanced data sharing and transparency among countries and international actors can improve decision-making and response efforts. East Africa can mitigate the impact of drought on food security by strengthening coordination, prioritizing long-term solutions, and enhancing data sharing.

### B. Case 2: Trade Disputes and Food Access in Developing Countries

Trade policies play a significant role in determining food affordability and availability in developing countries. These policies can either enhance or hinder a nation's ability to access an adequate food supply. High tariffs and import restrictions can increase the cost of imported food products, making them less affordable for consumers, especially in developing countries. Agricultural subsidies in developed countries can distort global food markets, undercutting local farmers and disrupting domestic food production[47]. Export bans and taxes may be imposed to stabilize domestic food prices, but they can reduce food availability in international markets, leading to global price spikes that disproportionately affect importing nations[48]. Bilateral and multilateral trade agreements can promote trade liberalization and market access, benefiting food security by diversifying food sources but also exposing domestic markets to global price fluctuations[49]. Non-tariff barriers, such as sanitary and phytosanitary measures (SPS), can also impact food trade, making it difficult for developing countries to export their food products despite meeting international safety standards[50].

Trade disputes affecting food access in developing countries can be resolved through various legal remedies and international mechanisms. The World Trade Organization (WTO) offers a framework for resolving disputes, including those related to food access. However, the process can be lengthy and success is not guaranteed. The WTO also provides special and differential treatment (S&D) provisions to grant developing countries more flexibility in implementing trade agreements. Bilateral negotiations with trade partners can also be used to address trade policies affecting food access, but the relative bargaining power of each country can sometimes be

[47] V. H. Smith & J. W. Glauber, "Trade, Policy, and Food Security", 51(1) Agricultural Economics 159-171 (2020).
[48] Supra note 39
[49] Z. Sun & D. Zhang, "Impact of Trade Openness on Food Security: Evidence from Panel Data for Central Asian Countries", 10(12) Foods 3012 (2021).
[50] B. Joubert, "Sanitary and Phytosanitary Measures as Barriers to Trade: A South African Perspective" (Doctoral dissertation, North-West University (South Africa), 2022).

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unequal. Developing countries may face challenges in navigating complex trade agreements and dispute resolution mechanisms. Balancing trade and food security is crucial, as international trade is essential for economic development but should not compromise the ability of nations to ensure adequate food access for their populations.

Trade disputes and their impact on food access in developing countries present a multifaceted challenge. Trade policies can affect food affordability and availability, sometimes exacerbating food insecurity. Legal remedies through mechanisms like the WTO offer avenues for addressing trade disputes, but these are not without their challenges. Developing nations must tactfully handle the point where trade and food security collide in order to guarantee that their citizens have access to reasonably priced and nourishing food.

### C. Case 3: Migration and Food Security in Conflict Zones

Conflict zones are a major humanitarian crisis, causing forced displacement and food security issues[51]. These displacements often result from violence, persecution, or food system collapse, disrupting access to food and nutrition. Vulnerable populations, including refugees and internally displaced persons, face significant challenges in accessing safe food, clean water, and basic necessities. Displacement can lead to chronic food insecurity and malnutrition, with limited healthcare access exacerbating health and nutritional issues. Livelihood disruptions can also occur, making it difficult for displaced individuals to produce or purchase food. The loss of assets and land can have long-term implications for food security. International legal obligations are needed to address these humanitarian aspects.

The 1951 Refugee Convention and its 1967 Protocol delineate the legal responsibilities of nations to offer protection and aid to individuals escaping persecution, with provisions for food and essential provisions.[52] International humanitarian law, such as the Geneva Conventions, requires that civilians and individuals who are no longer involved in fighting are treated with kindness and compassion during times of conflict.[53] This includes providing them with

[51] G. S. Yigzaw & E. B. Abitew, "Causes and Impacts of Internal Displacement in Ethiopia", 9(2) African Journal of Social Work 32-41 (2019).
[52] J. C. Hathaway, "A Reconsideration of the Underlying Premise of Refugee Law", in International Refugee Law 65-119 (Routledge, 2017).
[53] F. M. Burkle et al., "Health Care Providers in War and Armed Conflict: Operational and Educational Challenges in International Humanitarian Law and the Geneva Conventions", Part II. Educational and Training Initiatives, 13(3) Disaster Medicine and Public Health Preparedness 383-396 (2019).

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necessities like food, medical assistance, and protection. The right to adequate food is acknowledged as a fundamental human right in international human rights law, including the Universal Declaration of Human Rights and the International Covenant on Economic, Social, and Cultural Rights. It is the responsibility of states to uphold and ensure this right for all individuals under their authority. The Guiding Principles on Internal Displacement establish a structure for safeguarding and supporting individuals who have been internally displaced, with a particular focus on food and nutrition as crucial components of humanitarian aid.

Addressing food security in conflict-induced migration scenarios presents numerous practical and logistical challenges. Insecurity in conflict zones can hinder humanitarian organizations from accessing and delivering food aid, leading to disruptions in aid distribution. Funding constraints, donor fatigue, and competing crises can limit resources available for food aid. Infrastructure and logistics in conflict-affected areas may lack the necessary networks for efficient distribution, causing delays and difficulties in reaching affected populations. Coordination among multiple humanitarian organizations and government authorities is crucial for effective food assistance. Local market disruptions can occur due to the provision of free or subsidized food aid, affecting local food producers and traders. A balance between emergency food aid and support for local food systems is essential. Long-term solutions, such as livelihood support and self-reliance promotion, are also necessary to address food security challenges in conflict zones.

### D. Case 4: Situations like Earthquakes and wars

Earthquakes and wars can have severe consequences, including disruptions to food security[54]. This case study examines the challenges and effectiveness of regional cooperation and international responses in addressing transboundary food security issues. Regional organizations like ASEAN and the EU play essential roles in coordinating and harmonizing responses. Disaster preparedness mechanisms aim to enhance early warning systems and facilitate coordinated action among affected countries. Refugee and displacement management is crucial in conflict contexts, as it can have profound implications for food security.

Regional organizations play a crucial role in facilitating the coordination of efforts to address the movement of refugees, thereby ensuring them access to vital services. An illustration of this is

[54] B. Daher et al., "Toward Resilient Water-Energy-Food Systems Under Shocks: Understanding the Impact of Migration, Pandemics, and Natural Disasters", 13(16) Sustainability 9402 (2021).

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the ongoing trade conflict between the United States and China.[55] In 2018, the United States implemented tariffs on several Chinese goods, which encompassed agricultural products as well. In response, China implemented taxes on agricultural goods from the United States. The trade war has adversely affected farmers and consumers in both nations.

However, in 2020, the US and China signed a phase one trade agreement that included a commitment by China to purchase more US agricultural products. The trade agreement has helped to improve relations between the two countries and to reduce the negative impact of the trade war on agriculture. Another example is The Russia-Ukraine conflict has significantly impacted global food supply chains, with Russia and Ukraine being major exporters of wheat, corn, sunflower oil, and other agricultural products. The conflict has directly affected Ukrainian agricultural production, leading to a 35% decline in wheat production in 2023[56].

The conflict has also indirectly affected agricultural production in other parts of the world, as the high cost of fertilizer and fuel has made it more expensive to grow crops. Transportation of agricultural products has been disrupted by the Black Sea closure, making it difficult and expensive to export Ukrainian agricultural products. The conflict has led to higher freight costs for all agricultural products due to increased risks of shipping in the Black Sea and other parts of the world. Trade disruptions have occurred due to sanctions imposed on Russia and Belarus, making it difficult to import agricultural products from these countries. Some countries have restricted exports of agricultural products to protect their own food security.

Challenges persist in achieving effective regional cooperation, including differing levels of preparedness and resources among member states. Political conflicts and territorial disputes can also impede collaborative efforts. International organizations, such as the United Nations and numerous non-governmental organizations (NGOs), offer humanitarian aid and relief operations following disasters and wars. These organizations mobilize resources, provide food aid, and coordinate disaster relief operations. Humanitarian agencies like OCHA and Médecins Sans Frontières are often the first responders in conflict zones and disaster-stricken areas[57]. Donor

[55] M. Amiti, S. J. Redding & D. E. Weinstein, "The Impact of the 2018 Tariffs on Prices and Welfare", 33(4) Journal of Economic Perspectives 187-210 (2019).
[56] T. Ben Hassen & H. El Bilali, "Impacts of the Russia-Ukraine War on Global Food Security: Towards More Sustainable and Resilient Food Systems?", 11(15) Foods 2301 (2022).
[57] B. K. Paul, "Disaster Relief Aid: Changes and Challenges" (Springer, 2018).

countries contribute financial resources and relief supplies to support affected regions. International organizations play a critical role in ensuring effective coordination of response efforts, preventing duplication of resources, and maximizing aid delivery efficiency.

## VI. INTERNATIONAL COOPERATION AND CHALLENGES

### A. The Role of International Organizations and Agencies

International organizations are essential in dealing with food security, yet there are still difficulties that need to be overcome. These include bureaucracy and red tape, funding gaps, geopolitical factors, capacity and expertise in developing countries, and inequality and equity. Complex bureaucracies can slow down decision-making and hinder timely response to crises. Developing nations may have insufficient capability and knowledge to actively participate in global coordination and collaboration endeavors. Geopolitical tensions and power dynamics can also affect international collaboration, potentially hindering efforts in conflict-affected regions. Capacity-building support is needed for developing countries to fully benefit from international coordination efforts.

International organizations and agencies are central to coordinating and collaborating on efforts to address global food security challenges. Their role in data sharing, policy development, capacity building, and humanitarian assistance is essential for creating a cohesive global response. Despite the challenges, these organizations continue to play a pivotal role in advancing food security as a fundamental human right and supporting nations in their quest for a more secure and sustainable food system.

### B. Sovereignty and Its Implications for International Cooperation

The concept of the right to food is separate from the concepts of food security and food sovereignty, although there is some overlap between both. Food security is a legal principle that guarantees universal access to an adequate, safe, and nourishing food supply that fulfills individuals' dietary requirements and preferences, enabling them to lead an active and healthy lifestyle. While the right to food is essential for complete enjoyment, it does not place obligations on stakeholders or grant privileges. Food sovereignty is a developing idea in which individuals have the power to establish their own food and food production systems, so ensuring their independence and safeguarding local food production. It advocates for a different approach

to agriculture, trade policy, and practices that prioritize people's rights to food and the production of safe, healthy, and environmentally sustainable food.

Although there is no universal agreement on the concept of food sovereignty at the international level, it is acknowledged and protected by certain national legislations. States have a legal responsibility to address hunger and malnutrition and ensure food security for everyone, as mandated by the right to food. Additionally, it deals with the responsibilities of nations that extend beyond their own territories, particularly those relating to trade, such as the International Covenant on Economic, Social, and Cultural Rights. This covenant mandates that governments must guarantee that their trade or other policies are aligned with this objective.

State interests and conflicting priorities can hinder international cooperation on issues like food security. National interests, such as protecting domestic agricultural sectors and ensuring food self-sufficiency, can lead to conflicting priorities in international cooperation efforts.[58] Trade protectionism, which includes the use of tariffs and subsidies, has the potential to impede international food trade and undermine global food security initiatives.

Policy autonomy is often sought by sovereign nations, making them hesitant to accept external influences. Economic and political factors can also shape national interests, with leaders prioritizing job creation, rural development, or food price stability over global food security concerns. Conflicting priorities can impede international cooperation efforts, making it difficult to reach consensus on strategies and agreements promoting global food security. Overall, understanding and addressing these factors is crucial for effective international cooperation on food security.

Balancing sovereignty with the global food security agenda is crucial for effective cooperation among nations. This requires mutually beneficial agreements, which respect each nation's sovereignty while advancing shared goals. Food security strategies should be tailored to each country’s unique circumstances and needs, recognizing the diversity of national contexts. Supporting capacity-building efforts of developing nations can enhance their ability to address food security while maintaining control over their policies.

[58] J. Clapp, “Food Self-Sufficiency: Making Sense of It, and When It Makes Sense”, 66 Food Policy 88-96 (2017).

Organizations like the United Nations and the World Trade Organization, which involve multiple countries, can help promote collaboration while also respecting the authority of individual states. Encouraging transparency in national policies and international agreements builds trust among nations, and accountability mechanisms should be in place to ensure commitments are honored. Dialogue and diplomacy are essential in resolving conflicts of interest and fostering cooperation, helping nations find common ground while addressing sovereignty concerns. The United Nations' Sustainable Development Goals (SDGs) provide a comprehensive framework for aligning food security efforts with the global agenda, including Goal 2: Zero Hunger.

Sovereignty is a foundational principle of international relations, but it must be balanced with the imperative of addressing global challenges such as food security. International cooperation can be achieved by recognizing national interests, respecting the diversity of national contexts, and building partnerships that respect sovereignty while advancing the global food security agenda. Attaining this equilibrium is crucial for a global society in which every individual has the opportunity to obtain food that is safe, nourishing, and culturally appropriate.

## VII. POLICY RECOMMENDATIONS

### A. Strengthening International Legal Frameworks

To effectively tackle global food security concerns, the international community may enhance collaboration and ensure the rights of governments and individuals by strengthening legal frameworks. Here are policy recommendations for achieving this:

1) Strengthen the Right to Food: Strengthen the acknowledgment and implementation of the right to food as a fundamental human right in global legal frameworks. Ensure that states are held accountable for upholding this right for all their citizens, irrespective of their displacement status or socio-economic conditions.
2) Reinforce Trade Rules: Develop and implement international trade rules that balance the interests of sovereign nations with the need to promote global food security. These rules should encourage fair trade practices, reduce trade barriers, and prevent the distortion of global food markets through excessive subsidies.
3) Legal Mechanisms for Dispute Resolution: Strengthen the legal mechanisms for resolving international trade disputes related to food security, ensuring timely and

equitable resolutions. Improve the effectiveness of international organizations like the World Trade Organization (WTO) in addressing trade disputes in a manner that respects national sovereignty and promotes food security.

4) Harmonize Regulatory Frameworks: Facilitate the harmonization of national regulatory frameworks for food safety, agricultural practices, and quality standards. This can reduce non-tariff barriers and promote international food trade while upholding consumer protection.
5) Protect Intellectual Property Rights: Ensure that intellectual property rights, especially related to agricultural innovations and technologies, balance the interests of innovators and the global need for sustainable and accessible food production. Encourage international agreements that protect traditional knowledge and allow for technology transfer.
6) Environmental and Social Standards: Develop and enforce international environmental and social standards for agricultural and food production. This includes regulating land use, resource management, and labor practices to ensure sustainable and ethical food systems.

**B. Promoting Sustainable Agriculture and Climate Resilience:**

Addressing global food security necessitates the incorporation of sustainable agriculture and climate resilience as crucial components. Policymakers can take the following actions to promote these goals:

1) Invest in Research and Innovation: Assign resources to support research and development in agriculture, with a specific emphasis on sustainable practices, expanding the range of crops, and developing types that are robust to climate change. Promote the adoption of cutting-edge technology such as precision agriculture and genetic engineering to augment food production.
2) Climate-Resilient Infrastructure: Allocate funds towards the development of infrastructure that facilitates climate-resilient agriculture, including the establishment of irrigation systems, the cultivation of drought-resistant crop types, and the implementation of early warning systems for extreme weather events.

3) Capacity Building: Provide training and support to farmers, especially in developing countries, to adopt sustainable agricultural practices, conserve natural resources, and adapt to changing climatic conditions.
4) Strengthen Agricultural Extension Services: Enhance agricultural extension services to disseminate knowledge, best practices, and technologies among farmers. These services have the potential to enhance production and enhance food security.
5) Encourage Agroecology: Advocate for agroecological approaches that utilize the potential of natural ecosystems to promote soil fertility, minimize reliance on artificial inputs, and optimize food production while safeguarding the environment.
6) Climate Financing: Mobilize climate financing and international development aid to support climate-resilient agricultural projects in vulnerable regions. These funds can be directed toward building resilience in agriculture and addressing food security in the face of climate change.
7) Public-Private Partnerships: Encourage public-private partnerships to invest in sustainable agricultural initiatives. Collaboration between governments, businesses, and civil society can drive innovation and support the adoption of sustainable practices in food production.
8) Promote Sustainable Consumption: Advocate for sustainable consumption patterns at the individual and societal levels. Education campaigns and policies can encourage responsible food choices and reduce food waste, contributing to global food security.

By strengthening international legal frameworks and promoting sustainable agriculture and climate resilience, the international community can work towards a more food-secure world. These policy ideas highlight the significance of global collaboration, upholding national autonomy, and discovering enduring answers to the intricate issues of worldwide food security.

## VIII. CONCLUSION

The concept of Trans-boundary food security serves as a reminder that the difficulties associated with guaranteeing the availability, accessibility, use, and stability of food extend beyond the boundaries of individual nations. The topic at hand is influenced by an intricate combination of environmental, political, economic, and societal elements.

As demonstrated in this research study, it is crucial to acknowledge that food security is not only a national issue but also a worldwide necessity that requires international cooperation and legal structures.

The urgent need to cooperatively address the global challenges and implications of trans-boundary food security is emphasized. Climate change, environmental degradation, geopolitical conflicts, trade policies, and sociocultural issues all influence the capacity of states to ensure food security for their inhabitants. Food insecurity has wide-ranging ramifications, such as hunger, poverty, and social unrest, which impact not just individual countries but also regional and global stability. The difficulties can be effectively addressed by relying on the fundamental foundation provided by international law, which encompasses treaties, conventions, and agreements.

The Food and Agriculture Organization (FAO), the World Trade Organization (WTO), and international human rights frameworks provide guidelines for the global community to promote fair access to safe, nutritious, and culturally acceptable food. The significance of international collaboration is apparent in the collective endeavors of nations to address challenges such as climate change, sustainable agriculture, and trade policy reform. International food security necessitates collaborative efforts among governments to establish enduring strategies and adjust to the evolving conditions that impact worldwide food systems.

In the future, there are distinct policy recommendations and opportunities for additional research that might provide guidance for future endeavors to improve global food security. Enhancing global legal structures, advocating for sustainable farming practices, and tackling developing challenges in food security are crucial measures in this undertaking. Addressing the issue of food security across borders is a complicated and diverse problem that necessitates comprehensive and cooperative strategies, which take into account the authority of individual nations while adhering to international legal standards. In our ongoing efforts to achieve universal access to adequate, safe, and nourishing food, it is crucial to realize the interdependence of food security and understand that our combined endeavors can result in a more equitable and secure future for everyone.

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# ENVIRONMENTAL CONSTITUTIONALISM IN INDIA

**GIRIJA SHANKAR BAGH***

## ABSTRACT

*The Constitution serves as the embodiment of laws and duties, ensuring the holistic growth of a country. Environmental constitutionalism, defined as the fusion of international law, human rights, and the constitution, underscores the fundamental duty of protecting the environment in any democratic nation. This protection is upheld through various legislations, with the judiciary, through landmark decisions, interpreting environmental provisions purposefully to pave the way for environmental constitutionalism in India. Nonetheless, given the extensive scope of overarching legislation, it is necessary to establish a grundnorm within the fundamental law of the land, namely the 'Constitution of India'. The ongoing evolution of environmental jurisprudence represents a significant stride toward environmental protection. The author's analysis delves into the constitutional provisions that have been integrated to safeguard the right to life in its true essence. Furthermore, the author explores the transition from an anthropocentric approach to an eco-centric approach in India, signifying a paradigm shift in environmental philosophy. Finally, the author puts forth recommendations and measures aimed at ensuring contemporary environmental protection.*

## I. INTRODUCTION

Earth has been the only habitable planet in the solar system. The environment which has been established with the passage of time has made it convenient for the existence of life forms. After the evolution of human beings on earth, there has been constant change in nature due to human intervention. It has been widely explained historically regarding the influence of human beings on the planet. Humans have developed basic tenets in the form of law to sustain the habitat.

These laws have been improvised time and again as per contemporary development. From the feudal system, society has shifted towards a democratic mechanism where laws are being made

* Ph.D. Scholar, Gujarat National Law University, Gandhinagar, Gujarat.

as per the requirements and demands of the public at large through their elected candidates. There are fundamental laws which are being followed in every country. It has been present in written or unwritten form, which is called the Constitution. According to C.F. Strong, "A constitution may be said to be the collection of principles according to which the powers of the government, the rights of the governed and the relation between the two are adjusted.

Environment, being the source of survival of the human race, has been recklessly used in contemporary times for human necessities. Various environmental-inclined legislations have been enacted in different countries to ensure the protection and sustenance of natural resources. Environment as a concept has been imbibed in India for ages. Different religions practised in India have referred to the environment as a form of God or a creation of God. In modern India, the grundnorm which has been drafted and enacted in India is called the Constitution of India after the independence.

The environment was not given explicit importance during the Constitution's drafting. However, decades of independence and international obligation have led to changes in the provisions of the Constitution. The constitution is the guidelines by which countries are governed. Adherence to the principle of the Constitution is called constitutionalism. Environmental constitutionalism encompasses rights as well as the duties of the State and Individual. India has included environmental aspects through the 42nd Constitutional Amendment in 1976 through Directive Principles of State Policy and Insertion of Fundamental Duties in Part IV and Part IVA, respectively.

Concept of rights and duties are correlated to each other as Rights comes with an obligation to show respect towards rights of other person. It has been distinguished by numerous jurists. Rights are the interests which are protected by the state, whereas duties are the obligations created by the state[1]. The rights-based approach has been primarily utilized in the country to ensure environmental protection through legislation policies and judicial endeavours. The article primarily focuses on three aspects through its chapters. The concept of Environmental Constitutionalism has been enunciated in the Second chapter through various provisions of the Constitution and its interpretation. The third chapter deals with the judicial practices that ensure

[1] Abdin, Md. Joynal. (2008). Rights & Duties of Citizens (01/01/2008), available at available at: https://dx.doi.org/10.2139/ssrn.1116902 (last visited 14 November 2023).

environmental constitutionalism through decisions and recommendations. The fourth Chapter is regarding the critical analysis of the Environmental Constitutionalism in India. Lastly, the author deals with the Conclusion and Suggestions to improve the contemporary conundrum in environmental policies through various measures.

## II. CONCEPT OF ENVIRONMENTAL CONSTITUTIONALISM

Environmental Constitutionalism has not been defined in any legislation in India. It is the correlation between the duties and rights of individuals and the state as per the constitutional entrenchment. Stockholm Declaration (Conference on the Human Environment) has been the stepping stone for numerous countries to develop environmental values and protection through legislation in their respective countries. The Conference was held in 1972, where 26 principles were adopted by the participating countries, which are also known as Magna Carta on Human Environment.

### A. Directive Principle of State Policy

As already mentioned earlier, constitutionalism is the adherence to the values imbibed in the Constitution. The Constitution of India has no mention of the environment in any of the 395 Articles. In the year 1976, with the enactment of the 42nd Amendment, environmental constitutionalism was imbibed through the insertion of Articles 48-A and 51A(g) in the directive principle of state policy (Part IV) and fundamental duties (Part V).

Directive Principles of State Policy (Part IV) are the obligations of the state which are to be used as guiding principles for policy formulation in the country. As per Article 37 of the Indian Constitution, DPSP are not enforceable. As per Dr. B.R. Ambedkar "Though Directive principle has no legal force but any particular party who is in power cannot act whimsically. They might have to answer in the court but will be answerable to the electorate at the election time".[2] Article 48-A declares, "The State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country[3]" During the debate in the parliament for the drafting Article 48-A there was debate about inserting "conserve and develop the water, soil and other natural resources" and "mineral and wealth" in the article but it was denied as broad terms

[2] VII, *Constitutional Assembly Debate*, 41.
[3] Constitution of India, art.48-a.

of directive principle need not contain details[4]. The Supreme Court's approach to the interpretation of Article 48-A has been reflected in its various landmark decisions. The Hon'ble apex court has stated that "Wherever a problem of ecology is brought before the Court, the Court is bound to bear in mind Article 48-A of the Constitution and Article 51- A (g). When the Court is called upon to give effect to the Directive Principle and the fundamental duty, the Court is not to shrug its shoulders and say that priorities are a matter of policy, and so it is a matter for the policy-making authority. The least that the Court may do is to examine whether appropriate considerations are borne in mind and irrelevancies excluded. In appropriate cases, the Court may go further, but how much further must depend on the circumstances of the case. The Court may always give necessary directions. However, the Court will not attempt to balance relevant considerations nicely. When the question involves the nice balancing of relevant considerations, the Court may feel 'justified' in resigning itself to acceptance of the decision of the concerned authority[5].

Other than 48-A, environmental constitutionalism has also been reflected in Article 39(e), which is regarding policy formulation for securing the health and strength of the workers, men, women and children[6]. Moreover, Article 47 provides for direction to the state to make policies for the enhancement of nutrition and standard of living of its people and improvement of public health.[7] Article 39(e), Article 47, and Article 48-A have a collective goal to secure health and improve the environment of human beings.

Besides, Article 49 of the Directive Principle of State Policy has been inserted to protect the monuments of national importance from environmental pollution. Article 51(c) directs the State to comply with international law and treaty obligations. India has been a signatory of various environmental treaties, and this provision acts as an aid to enforce such environmental provisions.

[4] Lok Sabha Debates, Eighteenth Session, Fifth series, Vol. LXV, No. 5, Oct. 29, 1976, Col. 94-116; Parliamentary Debate: Rajya Sabha, Officia1 Report, Vol. XCVlll, No.5, Nov. 9, 1976, Col.158-71.
[5] *Sachidanand Paney v. State of West Bengal*, (1987) 2 SCC 295.
[6] Constitution of India, 1950, art. 39.
[7] Constitution of India, 1950, art. 47.

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### B. Fundamental Duties

Sir B. N. Rau, who was the constitutional adviser of the Constituent Assembly, had included a section regarding duties of Citizenship, which was dropped[8]. 42nd Constitutional Amendment in 1976 has inserted Article IV-A into the Constitution of India. Article 51-A includes fundamental duties for citizens of India, which reflects the attribute of Environmental Constitutionalism. Article 51-A (g) states that "It shall be the duty of every citizen of India – to protect and improve the natural environment including forests, lakes, rivers and wild animals and to have compassion for living creatures[9]".

In 1969, Apex Court had acknowledged the existence of constitutional duties and identified Part IV of the Constitution as its source. It has stated that "It is a fallacy to think that under our Constitution there are only rights and no duties. The provisions of Part IV enable the legislatures and the Government to impose various duties on the citizens. The provisions therein are deliberately made elastic because the duties to be imposed on the citizen depend on the extent to which the directive principles are implemented"[10].When the 1976 Bill was introduced in the Lok Sabha, Mrs . Indira Gandhi discussed the importance and reasoning for the inclusion of fundamental duties. She has asserted that duties are included not to smother rights but to establish democratic balance. It will also result in the rectification of one-sided stress on the rights[11].

Fundamental duties are being inserted in the Part IVA of the Constitution. As per Article 5 of the Constitution of India, natural persons are considered citizens.[12] This depicts that individuals are considered duty-bearers in this country. Part IV discusses the duties of the state to be followed during policy formulation. However, the apex court has imposed the duty under the ambit of Part IVA on to the state. It has stated that the state is, all the citizens placed together, and hence,

[8] Kalyani Ramnath, '"We the People": Seamless Webs and Social Revolution in India's Constituent Assembly Debates' (2012) 32(1) South Asia Research 57, 58.
[9] Constitution of India, 1950, art. 51-A.
[10] *Chandra Bhavan Boarding and Lodging Bangalore v The State of Mysore and Another*, (1969) 3 SCC 84 [13].
[11] Lok Sabha Debates, Eighteenth Session, Fifth Series, Vol. LXV, No. 3, 27 October 1976 (Indira Gandhi) column 143.
[12] Constitution of India, 1950, art. 5.

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though Article 51-A does not expressly cast any fundamental duty on the State, the fact remains that the duty of every citizen of India is the collective duty of the State[13].

Besides, the apex court has included the judiciary as well as the executive under the ambit of fundamental duties. The executive is considered an extension of the state, due to which it has been considered to be an entity as a duty-bearer. It has been stated that the duty of the executive, which is to implement the statutory provision, has a direct nexus with the fundamental duties[14]. It has also been reiterated through the Bombay High Court decision, where it has been stated that the state has a collective duty to protect the lakes, which binds the public bodies which are constituted by citizens[15].

Fundamental duties are extended to all the three organs of the State, i.e. legislature, executive and judiciary. As already mentioned, the state is nothing but a collective unit of citizens. The duty of the judiciary has also been enunciated through judicial precedents. Andra Pradesh High Court has opined that the fundamental duty is extended to the judiciary. It has stated that protection of the state is not only the duty of the citizen, but it is also the obligation of the State and all other organs, including Courts[16]"

As mentioned above, Environmental constitutionalism has been reflected though the 42nd Amendment and it has been consolidated through the judicial precedents by elaboration on the interpretation of the environmental entrenchment in the directive principle of state policy and fundamental duties of the citizens. Through the coordination of the state organs, India has been able to imbibe constitutionalism in the ambit of environmental protection and conservation.

## III. JUDICIAL PRACTICES TO ENSURE ENVIRONMENTAL CONSTITUTIONALISM

The judiciary has always been at the forefront of protecting the essence and principle of the Constitution of India. After the independence of the country, Courts have been quintessential in protecting the interest of the public at large in every aspect of life. Whenever there has been the curtailment of the principle of Constitutionalism, the apex court has struck down the necessary laws to ensure the prevalence of the grundnorm in our country. Apex court has defined the basic

[13] *Jitendra Singh v Ministry of Environment and Others,* Civil Appeal No 5109 of 2019 (Supreme Court of India, 25 November 2019) [18].
[14] *People for Animals v Union of India and Others,*2002 (65) Delhi Reported Judgments 168 [13].
[15] *Edwin Bretto and Another v State of Maharashtra and Others*, 2016 SCC OnLine Bombay 3975 [15].
[16] *T. Damodhar Rao v. S. 0. Municipal Corp., Hyderabad*, AIR 1987 A.P. 171,181.

structure of the constitution in order to enunciate the paramount features of the constitution to ensure the protection of constitutionalism. The Basic Structure of the Constitution has been elaborated in the decision of Keshavananda Bharti v. Union of India[17].

### A. Sustainable Development

The concept of sustainable development emphasizes the balance between the utilization of environmental resources and preservation for future generations. The concept was well explained and enunciated in the report of the World Commission on Environment and Development in 1987, which is popularly known as the Brundtland Report. The importance of sustainable development has been enunciated in various landmark judgments.

In Dr. Meenakshi Bhararth v. State of Karnataka, Sustainable development is not considered to be a fragile principle, but it is regarded as an important concept to be developed in the country. It has been further explained that adherence to sustainable development is a sine-qua-non for the maintenance of the symbiotic relationship between environment and development. The right to sustainable development cannot be singled out and is to be treated as an integral part of life under Article 21 of the Constitution of India[18]. The Hon'ble apex court has also stated that no development is possible without adverse effects on the environment, and public utility projects cannot be abandoned. There is a necessity to balance the necessity of maintaining the environment and the interests of the people[19].

### B. Intergenerational Equity

The concept of Intergenerational Equity deals with the responsibility of the current generation to utilize the natural resources without adversely affecting rights of the future generation. It has been reiterated in State of Himachal Pradesh v. Ganesh Wood Products[20].Apex court has denied permission to a project as it will have adverse effect on the environment. The court has stated that present generation has no right to deplete resources ignoring the interest of the future generation.

[17] *Keshavananda Bharti v. Union of India*, AIR 1973 SC 1461.
[18] *Dr. Meenakshi Bharath v. State of Karnataka*, 2012 (4) Kar LJ 248.
[19] *K. M. Chinnappa v. Union of India*, AIR 2002 SC 724.
[20] *State of Himachal Pradesh v. Ganesh Wood Products*, 1995 SCC (6) 363.

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### C. Polluter Pays Principle

Introduction of harmful material to the environment has been an consequence of most of the human activities in the contemporary times. However, polluters are not being spared if there is an excessive damage done through their act. Apex court has directed assessment of the damage to the ecology and imposed on the polluters the responsibility of paying compensation[21].

### D. Precautionary Principle

Human intervention through its development has made some irreversible changes in the environment. Hence, Apex court has also applied precautionary policy through its judgement in order to ensure that such irreversible changes can be prevented. This principle has been enunciated in the case of Andhra Pradesh Pollution Control Board v. M.V.Nayudu where it has been stated that the it is better to err on the side of caution and prevent environmental harm that to run the risk of irreversible harm[22].Apex court has also stated that sustainable development has been accepted as an part of Customary International Law and regarded Polluter pays along with Precautionary principle as an essential feature of Sustainable Development.

### E. Public Trust Doctrine

Public Trust Doctrine is the principle which imposes duty on the state to protect public property for its preservation and optimum usage by the public at large. As per Professor Joseph L. Sax Public trust doctrine imposes three fold restrictions on the government. Firstly, the property not to be only used for public purpose but accessibility to public should be ensured. Secondly, the property shall be not be sold for financial benefit. Thirdly, the property should be maintained to ensure its use.

In MC Mehta v Kamal Nath apex court has stated that deviation to the natural flow of river to increase facilities of a motel through government sanction is violation of the trust conferred by the public to protect the natural resources[23]. This Doctrine also protects the public's right to enjoy the aesthetic beauty.

[21] *MC Mehta v. Union of India*, AIR 1986 SC 1086.
[22] *Andhra Pradesh Pollution Control Board v. M.V. Nayudu*, AIR 1999 SC 812.
[23] *MC Mehta v Kamal Nath*, (1997)1 SCC 388.

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### F. Eco-centric Approach

Eco-centric approach proponents philosophy of nature in the equal footing with the humans. Uttrakhand High Court in Mohammad Salim v. State of Uttrakhand[24] have stated that Ganga and Yamuna are living entity. It has also referred Chief Secretary and Advocate General of State of Uttrakhand as loco parentis to protect the rivers. In Narayan Dutt v. Union of India[25] the entire animal kingdom including avain and aquatic animals are declared as legal entities having distinct persona with corresponding rights, duties and liabilities of a living person. Guidelines were also given by the court regarding the treatment and protection of the animals used during the transportation between Uttrakhand and Nepal.

### G. Substantial and Procedural Innovation by the Judiciary

#### *Expert Opinion and Committees*

Indian Evidence Act, 1872 has provisions which allow expert opinion in certain criteria[26]. Expert Opinion means the application of expertise of another person who has knowledge about that area which needs to be examined. Special Committees can be formed under the inherent power of High Court and Supreme Court. In LK Koolwal v State of Rajasthan[27] High Court of Rajasthan has relied upon the expert report regarding the unsanitary condition in the city of the Jaipur.

#### *Spot Visit*

To analyze the situation of the spot, judges have also visited the spot to understand the environmental concern. The spot visit provides first- hand experience to the judge. In Ratlam Municipality v. Vardhichand and Ors[28] Justice VR Krishnan has visited the spot to inspect the environmental condition before the judgment.

#### *Continuous Mandamus*

Doctrine of separation of power asserts on division of work among the organs of the state. But Judiciary in some cases have instructed partly to ensure the execution of decision instructed by the judiciary. This concept is being used to ensure implementation of decision properly. In MC

[24] *Mohammad Salim v. State of Uttrakhand*, Writ Petition (PIL) No.126 of 2014.
[25] *Narayan Dutt v. Union of India*, Writ Petition Civil Nos. 43/2014, (High Court Uttarakhand, 04/07/2018).
[26] Indian Evidence Act, 1872, s. 45.
[27] *LK Koolwal v. State of Rajasthan*, AIR 1988 Raj 2.
[28] *Ratlam Municipality v. Vardhichand and Ors*, AIR 1980 SC 1629.

Mehta v. Union of India ( Vehicular Pollution Case) Apex court has directed step wise to examine the implementation of the order.

***Fact Finding***

In order to ensure the protection of environment Supreme Court had also assigned different bodies to examine and provide necessary information as per requirement without biasness. The fact which has been submitted to the court are also rechecked and accountability is ensured through this process. In Bandwasi Seva Ashram v. State of Uttar Pradesh[29] apex court has directed for examination by new committee to ensure the result regarding the eviction of inhabitants from the forests.

***Amicus Curiae***

Amicus Curiae mean the friend of the court. The court appoints advocates to help the court to take decision in a pending case. In Own motions v. State of Himachal Pradesh[30] amicus curiae fact opinion was referred to determine the scheme to protect the eco-system of the region which helped in creation of balance between the economic interest and the environmental protection.

**H. of Right to Life**

Article 21 of the Constitution has been taken as a tool to ensure the constitutionalism in various aspects by the judiciary. Environmental Constitutionalism has been ensured through Article 21 though various landmark judgements. In Rural Litigation Environment Kendra v. State of Uttar Pradesh[31], apex court has discussed about the adverse effect on life of the people with respect to environmental degradation and established its nexus with Article 21 of the Indian Constitution. In Subash Kumar v State of Bihar[32] Apex court has discussed about the nexus between environment and life. Court has considered environment and life are indispensable to each other. Article 21 ensures right to life which also includes right to enjoy pollution free water and air for enjoyment of life.

[29] *Banwasi Seva Ashram v. State of Uttar Pradesh*, AIR 1987 SC 374.
[30] *Own Motions v. State of Himachal Pradesh*, Original Application no. 488(THC) of 2014 (M.A No. 1085 of 2015) and Original Application No. 170 of 2015.
[31] *Rural Litigation and Environment Kendra, Dehradun v. State of Uttar Pradesh*, AIR 1988 SC 2187.
[32] *Subhash Kumar v. State of Bihar*, AIR 1991 SC 420.

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### I. Concept of Public Interest Litigation

The basic tenet to file any litigation has been locus standi. The concept of locus standi has been relaxed by the court in certain circumstances. This has been a pathway to public interest litigation where unrepresented people and issues which affects the public at large. Environmental concerns are being highlighted to the judiciary through this form of litigation. It is considered as a constitutional promise to ensure social, economic and environment transformation through litigation.

In Indian Council for Enviro-legal Action v. Union of India[33] public interest litigation has been filed against the hazardous chemical substances released by certain industrial houses. Apex has relied on the expert reports and decided accordingly on the basis of the expert opinion in this case.

## IV. CRITICAL ANALYSIS OF ENVIRONMENTAL CONSTITUTIONALISM IN INDIA

Environmental Constitutionalism has been ensured through legislations as well as the judiciary. Fundamental rights have been used as an primary instrument by the judiciary to ensure the environmental protection in the country. Directive Principle of State Policy and Fundamental Duties have been inserted in constitution through Constitutional Amendment which has been used for interpretation by the courts.

Fundamental Duties has been used as an interpretative tool it has been enunciated through various apex court and high court decisions. As already mentioned above In Sachidananda Pandey and another v. State of West Bengal and others[34] it has been stated that, court cannot shrug the shoulder by considering any matter as policy matter. The court is bound to examine whether appropriate consideration to take necessary actions. In other words, judiciary has to consider environmental duties of the state and citizens in a ecological issue. Fundamental duties can be used for interpreting ambiguous statutes.

In Indian Handicrafts Emporium and Others v Union of India and Others[35] where constitutional validity of provision prohibition of importing ivory was challenged. Apex court has stated that statutory provision made should be made keeping in view the fundamental environmental duty

[33] *Indian Council for Enviro-legal Action v. Union of India*, AIR 1996 SC 1446.
[34] *Supra 6.*
[35] *Indian Handicrafts Emporium and Others v Union of India and Others* ,(2003) 7 SCC 589 [52].

and principles of Part IV and Part IVA of the constitution must be given full effect. As per the constitutional provisions and judicial practices fundamental duties are not enforceable in nature. It has been stated by High Court of Himachal Pradesh in their decisions that non compliance of fundamental duties is nothing short of betrayal. High Court of Andhra Pradesh have reflected that fundamental duties awareness should be ensured regarding forest and ecology by the citizens[36].

The constitutional design which has been propagated in the current scenario has been enforcement of right whereas DPSP and fundamental duties are used as interpretative tools for enforcement of fundamental rights. There are primarily two issues which are being faced while dealing environmental concerns through the current approach. Environmental concerns are multi-layered in nature. Environmental issues have implication on wide varieties of social issues which needs to address through proper policies which can be ensured through legislative policies. Moreover, Deep Disagreement in environmental issues are concerned in two folds i.e fact based and value based. Fact based disagreement is due to the regular scientific development which makes the requirement of policies of paramount importance. Value based disagreement is due to the two approaches which are anthropocentric and eco-centric. Anthropocentric approach considers nature as a commodity for human. Eco-centric approach puts nature in the equal footing with human. Deep Disagreement requires better understanding and application of principles to formulate policies which can be enhanced by more emphasis on state policies.

Environmental decision making requires accountability, expertise and flexibility. Accountability is required through sense of responsiveness to response to social needs and values. Expertise is required through access and analysis of complex information. Flexibility is required through ability to change goals and policies as per social needs and values and new information. This depicts environmental concerns can be solved through state policies. State policies can be only be ensured when the contemporary constitutionalism tilt from right based perspectives towards fundamental duties and directive principle of state policies. Current environmental conundrum requires more responsibility towards political branches.

[36] *Gatlameedi Pothanna and Others v Divisional Forest Officer, Nirmal, Adilabad*, District 1998 (3) Andhra Law Times 660.

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## V. CONCLUSION AND SUGGESTIONS

Environmental Constitutionalism has been defined as adherence to constitutional mandate through the different organs of the state and the citizens towards environmental development and protection. After 42nd Amendment in the Constitution though addition in Directive Principle of State Policy and Fundamental Duties, there has been change in approach towards the environmental issues in India. It has been reflected through various legislations passed by the parliament to ensure environmental protection in the country keeping the constitutional entrenchment.

Judiciary have taken relevant steps to prevent environmental degradation and promote environmental constitutionalism. Apex court and High Court had endeavoured to make necessary interpretation of the constitutional rights to ensure that environmental protection is upheld through its decisions. Right to life in the Article 21 of the Constitution of India has been used as an important aspect to ensure environmental rights of the country. Apex court has also extended its approach through Pubilc Interest Litigation, intergenerational equity and by striking off balance between development and environmental protection. Moreover, the rights of nature has also been recognised as a living entity though various judicial decision in the country.

However the right based approach which has been ensured through the judiciary as propounded by the environmental constitutionalism needs to be altered. An environmental conundrum is unique and involves multiple layers in it and there is an element of deep disagreement which involves fact based as well as value based disagreement. The solution to environmental conundrum can only be resolved through accountability, expertise and flexibility. All these attributes can be ensured through more responsibilities towards the political branches. Environmental duties and directive principle of state policies needs to be more emphasised through constitutional amendments and judicial pronouncement. The cotemporary practice of right based approach in the constitutionalism needs to shift towards directive principles as well as the fundamental duties.

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# CONSTITUTIONAL MORALITY: VARIANCES AND CONVERGENCES IN JURISDICTIONS

**AYUSHI RAGHUWANSHI***

## ABSTRACT

*Constitutional morality is an evolving and complex concept across different jurisdictions; it is a fluid and multifaceted notion that encompasses observance of the values and principles of the Constitution and the norms that reinforce the application and interpretation of the provisions of the Constitution. This study focuses on the evolution of the concept in different jurisdictions. Constitutional morality as a principle has been extensively referred in India but express reference to this term cannot be found in other jurisdictions. However, implications can be drawn from similar concepts. This study explores how different jurisdictions, including the United Kingdom and the United States, deal with the concept of Constitutional morality within their cultural and legal contexts. The role of Constitutional courts in the interpretation and shaping of Constitutional morality cannot be overlooked. The study seeks to examine their role and the interplay of contemporary societal values and historical contexts in the interpretation of the Constitution. There are conflicts between the minority and majority perspectives due to divergent views on constitutional morality. The landmark judgments have a considerable impact on the evolution of the principle of constitutional morality, which is highlighted in this study. Through a comparative study of the principle in different jurisdictions, the study seeks to contribute to a better understanding of how various legal systems navigate the intricate terrain of the interpretation of the Constitution.*

## I. INTRODUCTION

In the field of constitutional law, the idea of constitutional morality is crucial for forming and interpreting a country's legal system[1]. It speaks of the ideals and concepts that direct how a

* Assistant Professor, Manipal University, Jaipur.

constitution is interpreted and put into practise, especially in relation to individual liberties, the division of powers, and the general organisation and operation of the state. Although the idea of "constitutional morality" is universal, different nations may have diverse interpretations and applications of it[2]. It is critical to compare and contrast how the concept of constitutional morality is interpreted in the United Kingdom, India, and the United States of America in order to comprehend it.

## II. UNITED KINGDOM (UK)

Regarding constitutional morality, the UK's lack of a written constitution is frequently viewed as paradoxical. A system of values, norms, and principles that direct a constitutional system's operation is referred to as constitutional morality. The UK demonstrates aspects of constitutional morality even in the lack of a defined constitution by upholding particular values and customs. The notion of parliamentary sovereignty is one facet of constitutional morality in the United Kingdom. According to constitutional scholar A.V. Dicey, parliament is the highest authority in the land and its laws are obligatory in the absence of any higher law. This concept is known as parliamentary sovereignty[3].

Since it creates the foundation for democratic decision-making and guarantees that the people's will is upheld by their elected representatives in Parliament, this concept displays a sense of constitutional morality. The rule of law is another facet of constitutional morality in the United Kingdom. According to the rule of law, every person and every institution is governed by and answerable to the law. This idea makes sure the government stays within the law and guards against power abuse.

In the UK, the concept of constitutional morality emerged from a blend of historical, philosophical, and native elements[4].

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[1] E. Mak, "Reference to foreign law in the supreme courts of britain and the Netherlands: Explaining the Development of Judicial Practices", Utrecht Law Review, vol. 8, no. 2, p. 20, 2012.
[2] R. Gargarella, "Interpretation and democratic dialogue", Revista Da Faculdade De Direito UFPR, vol. 60, no. 2, p. 41, 2015.
[3] K. Takayasu, "The changing UK prime ministership from an institutional perspective", Asian Journal of Comparative Politics, vol. 8, no. 1, p. 95-111, 2022.
[4] M. O. Arun, "Beyond the Conventional -A Sociological Criticism of Sen's Capability Approach", Journal of Economy Culture and Society, no. 58, p. 229-245, 2018.

The long-standing constitutionalist tradition among indigenous cultures has had a considerable impact on the UK's conception of constitutional morality. Many Indigenous nations have a long history of constitutionalism that reflects their social, political, economic, and spiritual histories, as highlighted by Stephen Cornell, and John Borrows[5]. Based on sources that predate Canadian legal concepts, these rules draw from a variety of sources, such as national and local conventions, naturalistic observations, positivistic declarations, and holy teachings.

The idea of constitutional morality in the UK was greatly influenced by this indigenous constitutionalism, which emphasised the value of upholding and protecting the traditions and customs of many groups within the confines of the constitution[6].

Moreover, the historical evolution of constitutional orders and legal systems have had an impact on the notion of constitutional morality in the United Kingdom. Native American legal systems were altered, and European law was imposed as a result of European powers' colonisation of nations, including those on the African continent[7]. As a result of these legal system modifications and integrations, indigenous and European legal principles coexisted in parallel. This, in turn, shaped the idea of Constitutional morality, emphasising the necessity of integrating and reconciling these disparate legal systems within a constitutional framework. The British concept of Constitutional morality drew from historical and intellectual sources in addition to indigenous influences.

Ideology and moral principles shaped the UK's preexisting constitutional order, which in turn shaped the political and legal frameworks[8]. The process outlined by North and Weingast illustrates how morality and ideology were significant factors in the formation of the UK constitutional system, which in turn shaped the concept of constitutional morality[9]. Overall, a number of factors led to the development of the concept of constitutional morality in the UK,

[5] F. Amaral and J. Simão, "People's voices on the sustainable forest reform in the democratic republic of Congo", Modern Africa: Politics, History and Society, vol. 9, no. 1, p. 59-89, 2021.
[6] A. Ambers, "The river's legal personhood: a branch growing on Canada's multi-juridical living tree", The Arbutus Review, vol. 13, no. 1, 2022.
[7] S. Ramcilovic-Suominen, "Forest law compliance in the high-forest zone of Ghana: an analysis of forest farmers' livelihoods, their forest values, and the factors affecting law compliance behaviour", Dissertationes Forestales, vol. 2012, no. 149, 2012.
[8] J. Sachs, W. Woo, & X. Yang, "Economic reforms and constitutional transition", SSRN Electronic Journal, 2001.
[9] Z. Orbik, "Human rights in the light of the concepts of natural law", Scientific Papers of Silesian University of Technology. Organization and Management Series, vol. 9, no. 6, p. 275-284, 2019.

including the long-standing constitutionalism of indigenous peoples, the colonisation of societies and the imposition of European law, as well as the philosophical and historical influences that shaped the current constitutional order[10].

### A. Judgments

Although the word "constitutional morality" is not often used specifically in UK legal proceedings, there are several situations where the ideals and concepts connected with constitutional morality have been established and put to use[11]. The case of R v. Ministry of Justice, UKSC 38, is a noteworthy instance whereby the topic of human dignity and its correlation with constitutional values were scrutinised. The treatment of inmates serving life sentences without the chance of release was taken into consideration by the UK Supreme Court in this case. The court acknowledged that the idea of human dignity is a cornerstone of the constitution of the United Kingdom and ought to guide the interpretation and implementation of laws concerning the treatment and rights of prisoners.

In addition, the right to a dignified and autonomous death was examined in the Pretty v. United Kingdom, EHRR 1 case[12].

The right to private life encompasses the right to personal autonomy and self-determination, which includes the freedom to make decisions regarding one's own life and death. This ruling was made by the European Court of Human Rights, to which the UK is committed. This suggests that the UK legal system acknowledged and upheld the concept of human dignity, which is a fundamental tenet of constitutional morality.

The concepts and ideals connected with constitutional morality have been acknowledged and implemented in a variety of circumstances, even though there may not be specific cases in the UK where the concept has been established. In interpreting and applying constitutional principles, the courts have recognised the significance of individual autonomy and human dignity in certain circumstances. In conclusion, even while there might not be particular UK

[10] S. Suryajiyoso, "Power and authority in the state administration system: comparing the Netherlands and Indonesia", Journal of Law and Legal Reform, vol. 2, no. 3, p. 411-420, 2021.
[11] S. Al-Najjar and H. Saeed, "Ronald Dworkin and human dignity as highest constitutional value: philosophical theorization of rights and human dignity in a comparative perspective", Issue Eight, vol. 5, no. 1, p. 82-89, 2021.
[12] M. Erdoğan, "The rise of hermeneutics in human rights interpretation in the case-law of the ECtHR and the domestic courts", Annales De La Faculté De Droit D'Istanbul, vol. 0, no. 70, p. 91-118, 2021.

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cases that clearly describe[13] the concept of constitutional morality, there are situations in which the guiding ideals and principles of constitutional morality have been acknowledged and put into practise.

### B. Jurists Perspective

Different jurists have looked at constitutional morality in the UK from different angles. The idea that constitutional morality in the UK should be viewed as a living tree[14] that symbolises the community's true moral ideals and principles is one viewpoint held by jurists.

According to this viewpoint, the constitution ought to change and adapt to the moral, political, and social dynamics of society as they change[15]. This point of view contends that justice, equality, and the defence of individual rights should be prioritised when interpreting the constitution rather than its strict and limited interpretation.

This viewpoint acknowledges that constitutional morality is a dynamic concept that is subject to change based on judicial rulings and other political actions that are impacted by constitutional morality.

An alternative legal viewpoint regarding the concept of constitutional morality in the United Kingdom is that moral principles pertaining to societal organisation and governance need to inform interpretations and understandings of the principle, rather than personal moral convictions or objective morality[16]. According to this viewpoint, moral concepts should be applied when interpreting constitutional articles pertaining to individual rights since they suggest moral standards for the creation of a just society.

From this angle, the UK constitution, like the German Basic Law, views human dignity as the paramount ideal that all state authorities ought to uphold and safeguard[17]. Human dignity is emphasised and ranked first in the constitutional hierarchy according to this legal viewpoint. According to this viewpoint, constitutional morality ought to direct how the constitution is

[13] A. Tomza, "Is there any morality here? Richard Posner's economic approach to judge behavior", Studia Iuridica Lublinensia, vol. 31, no. 3, p. 255-269, 2022.
[14] Constitutional Law as Moral Philosophy - JSTOR. (n.d).available at: https://www.jstor.org/stable/1122347.
[15] Sceptical Perspectives on the Changing Constitution of the United, available at https://www.bloomsbury.com/uk/sceptical-perspectives-on-the-changing-constitution-of-the-united-kingdom-9781509963713/.
[16] V. Mamnitskyi, I. Cherevatenko, & N. Horban, "Judicial protection of a human dignity right", Cuestiones Políticas, vol. 39, no. 69, p. 225-236, 2021.
[17] Supra note 11.

interpreted and applied in order to protect and advance peoples' rights and freedoms. The divergent viewpoints about the principle of constitutional morality in the United Kingdom are indicative of the continuous discourse among legal scholars over the appropriate construal and implementation of constitutional provisions[18].

## III. UNITED STATES OF AMERICA (USA)

The idea that the US Constitution should act as a moral code for government gave rise to the concept of constitutional morality. This viewpoint dates back to the United States' inception and the Constitution's writing. Prominent theories, including those of Jeffrey Goldsworthy and Ronald Dworkin, emphasise the relationship between broad moral principles and constitutional clause interpretation[19]. Dworkin's thesis[20] holds that the Bill of Rights' sections are universal moral principles that need to be interpreted in particular settings rather than embodied interpretations of particular moral principles.

On the other hand, Goldsworthy's view[21] asserts that the Constitution reflects the enactment intentions of the drafters, suggesting that the interpretation and execution of constitutional principles should take a moral component.

According to these two perspectives, moral principles ingrained in the Constitution should be considered while interpreting it[22]. Moreover, these theories recognise that the framers' intentions and the original meaning of constitutional phrases can aid in guiding interpretation[23].

### A. Bill of Rights and Constitutional Morality

There is a nuanced and intricate relationship in the United States between constitutional morality and the Bill of Rights. On the one hand, by defending individual rights and liberties, the Bill of Rights acts as a pillar of constitutional morality. However, a moral interpretation of the

[18] Judicious Review: The Constitutional practice of the UK Supreme Court, available at: https://www.cambridge.org/core/journals/cambridge-law-journal/article/abs/judicious-review-the-constitutional-practice-of-the-uk-supreme-court/8EFB30F92A0F837547FE07555941C1EA.
[19] B. Leiter, "The roles of judges in democracies: a realistic view", Rei - Revista Estudos Institucionais, vol. 6, no. 2, p. 346-375, 2020.
[20] A. Coan and A. Desai, "Difficulty of amendment and interpretative choice", Rei - Revista Estudos Institucionais, vol. 1, no. 1, p. 201-267, 2016.
[21] Supra note 17.
[22] R. Gargarella, "Interpretation and democratic dialogue", Revista Da Faculdade De Direito UFPR, vol. 60, no. 2, p. 41, 2015.
[23] C. Figueroa, "U.S. Supreme Court in the Civil Rights Era: Deliberative Democracy and its Educative Institutional Role, 1950s–1970s", Annales. Etyka W Życiu Gospodarczym, vol. 21, no. 4, p. 59-88, 2018.

constitutional requirements is necessary for the understanding and implementation of these rights. This idea is reinforced by the claim that individual rights are written in modern constitutions in a way that is frequently vague and general, requiring a moral interpretation of these provisions to ascertain their significance for structuring a just society[24].

This viewpoint is consistent with the German Basic Law, which creates a value-based system that gives individual dignity first priority and prioritises human dignity. In addition, a constitution's incorporation of specific rights and moral precepts serves to shield them from the power of the majority[25]. Therefore, it would be against the goals of constitutionally protected rights and values to read constitutional articles in a majoritarian manner. The relationship between the United States Constitution's morality and the Bill of Rights is clarified by two major views. Dworkin's thesis and Goldsworthy's theory are two well-known theories that explore the connection between the US Constitution's morals and the Bill of Rights.

According to Dworkin's argument, the meaning of the Bill of Rights' sections is left up to interpreters, who decide what these fundamental moral principles imply at any particular time rather than giving them specific interpretations. Alternatively, Goldsworthy's theory holds that the enactment of the Constitution represents the intentions of its drafters rather than the application of those principles. These ideas advance our knowledge of how constitutional morality interprets the moral precepts that underpin the Bill of Rights to safeguard individual liberties in a pluralistic society.

In conclusion, there is a complicated link between American constitutional morality and the Bill of Rights.

### B. Judgments

The idea of constitutional morality has been the subject of numerous cases in the US. In Griswold v. Connecticut, for example, the Supreme Court acknowledged the right to privacy as a fundamental component of the Bill of Rights' penumbras and emanations[26].

[24] Supra note 11.
[25] G. Pino, "Positivism, legal validity, and the separation of law and morals", SSRN Electronic Journal, 2012.
[26] E. Celeste and F. Fabbrini, "Competing jurisdictions: data privacy across the borders", Palgrave Studies in Digital Business & Enabling Technologies, p. 43-58, 2020.

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This 1965 case concerned a Connecticut statute that made using birth control illegal. The law infringed upon the right to marital privacy, according to the Supreme Court. In his dissenting opinion, Justice Potter Stewart contended that the Constitution made no express reference of a right to privacy. Roe v. Wade is another significant case that deals with the idea of constitutional morality. The Supreme Court upheld a woman's constitutional freedom to choose whether or not to have an abortion in this 1973 decision.

The Court found that a woman's right to terminate her pregnancy was protected by the constitutional right to privacy, basing its ruling on the definition of privacy as established in Griswold v. Connecticut[27]. The evolution of American constitutional morality is illustrated by these cases[28]. They represent the acceptance of ideas and rights that are taken from the Constitution's larger ideals but are not stated in it specifically. Another significant decision that establishes the fundamental morality of the US Constitution is Obergefell v. Hodges, which was decided in 2015.

### C. Jurists Perspective

Scholars and jurists disagree on the issue of constitutional morality in the US. Ronald Dworkin and Jeffrey Goldsworthy are the authors of two well-known theories of constitutional morality. According to Dworkin's theory, the US Constitution represents universal moral principles as opposed to particular interpretations of those principles[29].

This suggests that the interpreter is always required to ascertain the meaning of these concepts. However, Goldsworthy contends that, in terms of enactment as opposed to application, the Constitution represents the objectives of its drafters. These arguments imply that American society does, in fact, uphold constitutional morality. It is crucial to remember that there are other points of view about this as well.

Larry Alexander, for instance, disputes the idea of constitutional morality[30] and contends that constitutions are documents produced by particular people that usually cover topics other than

[27] H. Zhang, H. Zhang, Z. Zhang, & Y. Wang, "Patient privacy and autonomy: a comparative analysis of cases of ethical dilemmas in china and the united states", BMC Medical Ethics, vol. 22, no. 1, 2021.
[28] C. Figueroa, "U.S. Supreme Court in the Civil Rights Era: Deliberative Democracy and its Educative Institutional Role, 1950s–1970s", Annales. Etyka W Życiu Gospodarczym, vol. 21, no. 4, p. 59-88, 2018.
[29] Supra note 17.
[30] R. Gargarella, "Interpretation and democratic dialogue", Revista Da Faculdade De Direito UFPR, vol. 60, no. 2, p. 41, 2015.

moral rights. As a result, jurists continue to debate and argue about whether or not constitutional morality is upheld in the US.

## IV. INDIA

The term Constitutional morality has not been referred to in the text of the Constitution or defined. However, common interpretation of the term means adherence to the values of the Constitution. The scope of Constitutional morality extends beyond merely adhering to constitutional requirements and includes a commitment to an inclusive and democratic political process that serves both individual and group interests. It includes upholding constitutional principles including the rule of law, social justice, personal autonomy, judicial independence, and sovereignty.

In India, the term "Constitutional Morality" was first used by Dr Ambedkar in the Constituent Assembly debate on 4th November 1948 Part II[31]. When he was referring to the borrowing of provisions from the Government of India Act, 1935 he remarked:

> *"As to the accusation that the Draft Constitution has produced a good part of the provisions of the Government of India Act, 1935, I make no apologies. There is nothing to be ashamed of in borrowing. It involves no plagiarism. Nobody holds any patent rights in the fundamental ideas of a Constitution. What I am sorry about is that the provisions taken from the Government of India Act, 1935, relate mostly to the details of administration. I agree that administrative details should have no place in the Constitution. I wish very much that the Drafting Committee could see its way to avoid their inclusion in the Constitution. But this is to be said on the necessity which justifies their inclusion in the Constitution."*

Dr Ambedkar then referred to Grote's description of Constitutional Morality from his book History of Greece and the importance of having Constitutional Morality for any democratic Constitution's working. He pointed out to two aspects which are closely interrelated but not recognized in general. The first one, "the form of administration has a close connection with the form of the Constitution" and the second one, "*it is perfectly possible to pervert the Constitution,*

[31] VII, ***Constituent assembly debates*** on 4th November 1948. available at: https://loksabha.nic.in/writereaddata/cadebatefiles/C04111948.html (last visited on 30.06.2023).

*without changing its form by merely changing the form of the administration and to make it inconsistent and opposed to the spirit of the Constitution*[32]."

The details of the administration were therefore pertinent to be mentioned in the Constitution itself. He also remarked, "*It follows that it is only where people are saturated with Constitutional morality such as the one described by Grote the historian that one can take the risk of omitting from the Constitution details of administration and leaving it for the Legislature to prescribe them*[33]*."*

On the question whether Constitutional Morality could be presumed to be diffused amongst the masses Dr Ambedkar remarked further that the people of India were yet to learn it and India was undemocratic in essence with a top-dressing of democracy. Therefore, the legislature could not be trusted to deal with the form of administration. That is perhaps why the Constituent assembly adopted nearly all the provisions of the details of governance from the Government of India Act 1935.

### A. Judgments

Constitutional morality is now a fairly common term used by the Courts, being more often used in India since the past few years. But what is Constitutional Morality? is it the morality as referred to by the Court in Manoj Narula v. Union of India[34] or by Justice Indu Malhotra in Sabrimala case[35] or by Justice D Y Chandrachud in the same case or by Justice Chandrachud in NCT of Delhi v. Union of India[36]? The term 'Constitutional morality' has been used while delivering judgments by different High Courts without there being a uniform definition of the doctrine. Constitutional morality has been given different meanings through different interpretations by the judges such that the real meaning of the term as implied by Dr Ambedkar has been lost.

In the case of Manoj Narula v. Union of India[37], the Supreme Court addressed a matter of significant public concern regarding the admissibility of an individual with a criminal record and

[32] Ibid.
[33] Ibid.
[34] (2014) 9 SCC 1.
[35] 2019 (11) SCC 1.
[36] C. A. No. 2357 of 2017.
[37] (2014) 9 SCC 1.

allegations of moral turpitude to hold a ministerial position in both the federal and state governments.

While addressing the problem of political corruption, it was noted that the Indian Constitution is a living document with great dynamism potential. The Constitution was written with a progressive society in mind. The way such a constitution operates depends on the general climate and circumstances. Throughout the discussion, Dr. Ambedkar maintained that constitutional morality is the cornerstone upon which the Constitution can survive and flourish.

In the Navtej Singh Johar v. Union of India, Ministry of Law and other [38] of 2018, the Supreme Court partially overturned Section 377 of the IPC, 1860, declaring it unconstitutional insofar as it prohibited "consensual sexual conduct between adults of the same sex". This decision was made after the concept of constitutional morality and social morality were discussed.

The ruling in the Suresh Kumar Koushal v. Naz Foundation & Ors.[39], in which the SC reversed the Delhi High Court's ruling in the Naz Foundation v. Govt. of (NCT) Delhi and Ors[40], was mentioned. In the Navtej Singh's matter, the main argument was that, in the Suresh Kousal's matter, the bench had been influenced by social morality that relied on popular opinion, whereas, in reality, the matter needed to be discussed against "constitutional morality".

Both the majority and minority views in the Indian Young lawyers Association & Ors v. State of Kerala [41], which involved the Indian Young Lawyers Association, applied the concept of constitutional morality.

## V. CONCLUSION

Social justice and advancing the welfare of the people are central to Indian constitutional morality. The Indian Constitution lists obtaining "justice, social, economic, and political" as one of its primary goals in the preamble. The cornerstone of Indian constitutional morality is the belief that the Constitution should act as a transformative tool to empower the weaker and marginalised segments of society. The interpretation and development of morality inside the constitution has been greatly aided by the Indian judiciary. It has taken a proactive stance in

[38] Writ petition (cr.) no. 76 of 2016.
[39] Civil Appeal No. 10972 of 2013.
[40] WP (c) no. 7455/2001 of 2009.
[41] 2019 (11) SCC 1.

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promoting and defending the rights of marginalised communities, like as Dalits, women, and members of minority religions. In the UK, constitutional morality is based on the concepts of parliamentary sovereignty and the rule of law.

The UK does not have a codified constitution, in contrast to the USA and India; instead, common law and legal conventions form the basis of its fundamental values. In the UK, upholding the principles of justice, equality, and fairness as well as Parliament's supremacy is central to the idea of constitutional morality. On the other hand, the foundations of constitutional morality are enshrined in the written constitution of the United States of America. The interpretation of constitutional morality is influenced by a strong commitment to individual rights and liberties in the United States. The United States Constitution, specifically the Bill of Rights, provides a structure for safeguarding personal freedoms and limiting the power of the state.

The defence of individual rights and the maintenance of a system of checks and balances are at the centre of American constitutional morality. There are parallels and divergences in the ways that the USA, UK, and India perceive the concept of constitutional morality.

The significance of constitutional principles in upholding justice and safeguarding individual rights is acknowledged in each of the three nations. But the precise strategy and focus can change. India prioritises social justice and the well-being of marginalised communities, whereas the UK lays more stress on parliamentary sovereignty and devotion to equality and fairness.

In contrast, the USA strongly prioritises limiting governmental power and defending individual rights. The judiciary is essential to interpreting and maintaining constitutional morality in each of the three nations. In terms of defining and extending the bounds of constitutional morality, courts in the USA, the UK, and India have frequently been in the vanguard. If laws or government activities go against the fundamental moral precepts of the constitution, they have the power to declare them to be unconstitutional.

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# JURISPRUDENTIAL AND CONSTITUTIONAL PARAMETERS SURROUNDING THE EROSION OF THE "RIGHT TO PROPERTY"

**INDRONIL CHOUDHARY[*] AND RUGVEDA SATBHAI[**]**

## ABSTRACT

*The development of the "Right to Property" in India is a fascinating exploration of constitutional and legal changes. Originally established as an essential entitlement in the Indian Constitution, property rights were designed to protect individual autonomy and economic independence. Nonetheless, the implementation of the 44th Amendment constituted a significant turning point, as it demoted property rights from being basic to being of constitutional importance. This modification highlighted the jurisdiction of the state to restrict certain privileges in the quest for the well-being of society. This transition ignited complex discussions, frequently juxtaposing private property rights with greater social interests. In this context, this research paper delves into the constitutional and jurisprudential facets of contemporary property rights challenges in India, particularly in the aftermath of the 44th Amendment. Focusing on the erosion of property rights as "Fundamental Rights", it explores the ensuing judicial endeavours aimed at their restoration. This study briefly scrutinizes the complexities and possibilities surrounding this significant legal transformation, highlighting the delicate balance between individual property rights and broader societal interests. Based on the aforementioned analysis, it may be inferred that property rights are crucial to India's legal and political framework. The longevity of the Indian democratic system is evident via its historical background, the obstacles it has faced, and its ability to adjust and evolve. The property rights issue in India demonstrates its dedication to principles of justice, fairness, and the fundamental objectives of the constitution.*

[*] Student, LLM 2023-24, United Nations Interregional Crime and Justice Institute, Turin.
[**] Student, LL.M. in Insolvency and Bankruptcy Laws (2023-25), NALSAR | Indian Institute of Corporate Affairs.

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## I. INTRODUCTION

Recently, the Goa State assembly passed the Goa Bhumiputra Adhikarini Bill. It has been revealed through an RTI that the revenue minister Jennifer Monserrat has warned the government that the 'Forceful Land Transfer' clause will contravene Article 300A[1] of the Constitution of India while providing the "Right to Property" prescribes that 'Persons not to be deprived of property saved by authority of law.' With a bare perusal of this Article, a question might strike to anyone that if 'Forceful Land Transfers' are enabled by the authority of law such as the Bumiputra Bill, it cannot be said that it is violative of Article 300A, but on what exact grounds the revenue ministers warning seems to be reasonable? The greater mind-boggling dilemma the reader might face is how a constitutional democracy like ours may allow the deprivation of the Property Rights of any person with a single sweep of majoritarian legislation. What happened to the individual rights guaranteed to us by the Constitution? And is it possible for the judiciary to strike down such an Act which vests the government to forcefully alienate a man from his property?

The term "*property"* has a broad definition under various legal frameworks. According to *Section 2(c)* of the *Benami Transactions (Prohibition) Act, 1988*, encompasses "*any sort of property, whether movable or immovable, tangible or intangible and includes any right or interest in such property.*" Similarly, under *Section 2(11)* of the *Sale of Products Act of 1930, "property"* refers to the *general property in goods, not just a special property*.

In constitutional interpretations, the *Supreme Court* has emphasized that the term *"property"* should be broadly interpreted to include all well-known categories of interests bearing the characteristics of a property right, whether corporeal or incorporeal.[2] This encompasses *money, contracts, various property interests, including allottee's interest, licenses, mortgages,* and *property lessees*. Even an identifiable interest in the property, such as the *Mahantship* of a Hindu Temple or *stockholders'* interests in a company.

[1] TNN / "Goa CM Ignored Objections by Minister, Govt Officials on Bhumi Bill" (*The Times of India* August 31, 2021) <https://timesofindia.indiatimes.com/city/goa/sawant-ignored-objections-by-min-govt-officials-on-bhumi-bill/articleshow/85751043.cms> accessed September 6, 2021.
[2] *The Commissioner, Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar* 1954 AIR 282.

The evolution of the *"Right to Property"* in India is a captivating journey through *constitutional* and *jurisprudential* transformations. Initially enshrined as a *fundamental right* in the *Indian Constitution*, *property rights* were intended to safeguard individual *liberty* and *economic* freedom. However, the enactment of the *44th Amendment* marked a pivotal moment, downgrading *property rights* from *fundamental* to *constitutional* status. This alteration emphasized the state's authority to limit these rights in the pursuit of *societal welfare*.

This shift sparked intricate debates, often pitting individual property rights against broader social interests. Consequently, India's legal landscape witnessed a series of *landmark judicial decisions* like ***Sanjeev Coke Manufacturing Company v. Bharat Coking Coal Ltd. (1983)*** as the courts grappled with the complexities of restoring the sanctity of *property rights* while striving to strike a delicate balance between safeguarding *individual liberties* and addressing *broader societal welfare* concerns.

## II. JURISPRUDENTIAL FOOTPRINT RELATED TO THE '"RIGHT TO PROPERTY"' IN INDIA

The tale begins from the inception of the Constitution. The framers were well aware of the fact that when an unrestrained power is vested with anyone, it will be abused, hence they inserted a "Fundamental Rights" chapter in the Constitution which guarantees a person with some inalienable rights. The chapter ensures that the rights provided therein, including the "Right to Property",[3] are sacrosanct and will not cater to the whims and fancies of the state. Whatever ideological tilt the contemporary polity has, it cannot encroach upon the rights of individuals. But every right is subjected to reasonable restrictions. As the famous US Supreme Court dicta says, "*My right to move the fist is limited by the proximity of your chin*." The "Right to Property" is particularly a double-edged sword[4] that allows the control of things to enlarge the horizons of freedom and security, but at the same time, the same control enables a person to encroach upon the freedom of others.[5] In both *Rawlsian liberalism* and *Nozickian libertarianism*, the "Right to Property" holds a central position within the framework of modern democracies. It symbolizes a

[3] Namita Wahi, "The Fundamental "Right to Property" in the Indian Constitution" [2015] SSRN Electronic Journal.
[4] Alexander, Gregory S., "*Property as a Fundamental Constitutional Right*? The German Example" (2003). Cornell Law Faculty Publications. Paper 1115.
[5] Karl Marx & F. Engels, *The Communist Manifesto,* (1979) 96.

society's commitment to achieving *egalitarian* ideals, a principle echoed by the framers of the Indian Constitution. The *Constitution's "Fundamental Rights"* chapter, including the *"Right to Property"*, was enshrined as sacrosanct, safeguarding individuals against state capriciousness. However, this protection is not absolute, as rights are subject to reasonable restrictions.

The framers aimed to strike a balance between *individual rights* and *collective welfare*, exemplified by *Article 31*, allowing property to be taken under specific conditions: *public purpose, legal authority, and adequate compensation*. Yet, the erosion of these rights began early with the *1st Amendment's* extra schedule, shielding certain laws from *"Fundamental Rights" scrutiny*. The dichotomy between the *Supreme Court's classical liberal view* on compensation and the government's *socialist* stance led to constitutional disputes, culminating in the ***Kesavananda Bharati case***.

In 1978, the *Janata Government's 44th Amendment* transformed *property rights* from *fundamental* to *constitutional*, introducing *Article 300A*. However, criticism arises because *property rights* are intertwined with other *"Fundamental Rights"*, and their isolation is a fallacy. The *Supreme Court's* role as the *'custodian of "Fundamental Rights"'* has been pivotal, with modern jurisprudence emphasizing the right to fair compensation and public purpose. This evolution reflects the dynamic interplay between *constitutional principles* and *jurisprudential interpretations.*

The drafters were not mere *status quoist*, but they were committed to suppressing this power aspect[6] by abolishing practices like *Zamindari* and achieving social and economic equality through redistribution and welfare policies. Therefore, to seek the balance between welfare and individual rights, Article 31 was inserted, which provided that a property can be taken away from an individual on three conditions: the taking has to be done for a public purpose, there must be the authority of law to back such taking, and the law must provide for adequate compensation. Unfortunately, the deterioration of this guarantee started in the very first year of the inception of the constitution. Pt. Nehru saw "Fundamental Rights" as an impediment to agrarian land reform measures and apologetically appended an extra schedule that essentially shielded any law/enactment added therein from the scrutiny of "Fundamental Rights". One cannot miss the

[6] Article 14 and Chapter IV of Constitution of India.

irony in the tale of two constitutions. The 1st Amendment of the US Constitution introduced the Bill of Rights, whereas the 1st Amendment of the Indian Constitution curtailed "Fundamental Rights".

The further degradation of the "Right to Property" lies in the dichotomy between the views of the Apex Court and the governing Congress. The SC followed the Classical Liberal approach towards Article 31 that if the state wants to acquire any property under the *Land Acquisition Acts,* the compensation cannot be lower than the market price.[7] This reverence for the market price was contrary to the Socialist views of the government, which believed that for the public welfare, compensating the landlords with nominal compensation is enough, and if in mass projects every land has to be compensated at the market price, the costs of the projects will become unbearable. This contradiction raised a series of constitutional judgments and led to the tussle between the judiciary and the legislature, which finally concluded in *Kesavananda Bharti's*[8] Judgment. In this mammoth case, by razor-thin majority court held that the "Right to Property" is not a basic structure of the Constitution and hence it may be altered. To quote Victor Hugo "*No force on earth can stop an idea whose time has come*" and from most of the Indian economic policies, it is evident that when such an idea is bad, let alone any force on earth, not even Brahma can stop it. The idea that the "Right to Property" hampers the government's egalitarian policies of redistribution has penetrated deeper into the psyche of the Polity and society. Eventually, with '*Tughlakian*' wit and conviction, in 1978, the right was abrogated by the Janta Government,[9] and the new castrated Avtar of "Right to Property" Article 300A came to exist. This Article does not provide for 'Public Purpose' as well as 'Compensation' conditions.

When George Washington proclaimed, "*Freedom and Property Rights are inseparable. You can't have one without the other.*" it wasn't a rhetoric in vain, but a profound observation. The "Right to Property" is so intertwined with other "Fundamental Rights", that the taking of one has an immediate effect on the other. Property does not always mean *Zamindari*; it might also mean a small dispensary one might be running from the savings of his life, or it might be a 4-acre plot of land upon which a poor farmer family of 5 is dependent to survive. Taking away such land with nominal compensation will be a direct violation of the right to life, which contains a bundle

[7] *Union Of India v. The Metal Corporation Of India Anr.,* AIR 1967 SC 637.
[8] *Kesavananda Bharati v. State of Kerala,* (1973) 4 SCC 225.
[9] The Constitution (Forty Fourth Amendment) Act, 1978.

of rights, including the right to livelihood.[10] A media house cannot claim to have Freedom of Speech if confiscation of their office building is threatened by the government. There may be no right to practice and propagate religion if a majoritarian regime decides to carry out a public project exactly where the place of worship lies. Every right to a certain extent supplements the other. This interlinked indivisible nature of "Fundamental Rights" is also pointed out *in Maneka Gandhi's*[11] case and reaffirmed in *IR Cohello's*[12] case. The whole idea of abrogation of property rights in isolation is nothing but a farce.

The peculiar thing about freedoms and rights is that, unlike genes, we do not inherit them; in our bloodstreams, we have to cherish them and fight for them. Otherwise, they will just vanish. Fortunately, for us, the Supreme Court has taken a positive step to reinstate the "Right to Property". From the 80's onwards, the SC opted for a liberal path while performing the judicial review power. Three routes have been taken by the court to reinstate the earlier guarantee of the "Right to Property", which consists of the right to fair compensation and the surety that the taking can be only done for a public purpose. The first path was by invoking the doctrine of arbitrariness. The second was by interpreting the 'right to life' in a way which includes the right to livelihood and, hence, the "Right to Property" to a certain extent. The last trend is modern jurisprudence, which accommodates the right to compensation as an implied provision within Art 300A.

### A. Historical Genesis of Property Rights

The relationship between property rights and the Indian Constitution is entrenched in a distinctive historical and legal backdrop. The power to influence the Constitution's formation initially rested with property holders, predominantly men, who elected provincial legislators. These legislators then played a crucial role in electing members of the Constituent Assembly. The Constitution, adopted by this Assembly in the name of "We the People of India," fundamentally enshrined the right for all citizens to "acquire, hold and dispose of property."[13] This significant legal provision marked a transformative moment in Indian history, as it represented a stark departure from the colonial era, transitioning Indians from subjects under

[10] *Olga Tellis v. Bombay Municipal Corporation,* 1986 AIR 180.
[11] *Maneka Gandhi v. Union of India,* 1978 SCR (2) 621.
[12] *I.R. Coelho (Dead) by Lrs. v. State of Tamil Nadu and Ors.,* (1999) 7 SCC 580.
[13] The Constitution of India, 1950, Article 19(1) (f).

British rule to citizens endowed with constitutionally guaranteed rights overnight. This transformation was notably different from the situation during the adoption of the US Constitution, underscoring India's unique constitutional journey.

The evolution of the constitutional and legal framework surrounding property rights in India further illuminates this journey. The demand for constitutionally guaranteed rights, including the "Right to Property", dates back to the late 19th century. The Constitution of India Bill of 1895, also known as the Home Rule Bill, and the Commonwealth of India Bill of 1925 were pivotal in shaping these early demands, seeking to establish rights such as freedom of expression, inviolability of one's house, "Right to Property", and equality before the law.[14] These demands, which mirrored the rights recognized under British common and statutory law in England, were a response to the Indian National Congress's increasing calls for basic civil and political rights, which formed the foundation of India's freedom struggle. This push for "Fundamental Rights" continued into the 20th century, culminating in the framing of the Constitution that sought to balance these historical demands with the practical realities and aspirations of a newly independent nation.[15]

### *Constitutional Framers' Vision*

The discourse surrounding the "Right to Property" within the Indian Constituent Assembly was marked by a depth and intensity reflective of the issue's significance. These deliberations, spanning over two and a half years, echoed the diverse voices and conflicting interests of a nation on the cusp of monumental change. The debates began early, even as India's independence terms were being negotiated, and the contentious nature of property rights often eclipsed other subjects, including the debate over official languages. This prolonged and acute controversy over property rights within the Constituent Assembly was not just a matter of legal discourse but also a reflection of India's complex socio-political and legal history, significantly impacting the Commonwealth as well. The outcome of these debates was a nuanced understanding of property rights, embedded within the broader framework of India's constitutional ethos and its commitment to both individual liberty and social welfare. The drafters were not mere *status*

[14] B. Shiva Rao (1968). The Framing of India's Constitution. Indian Institute of Public Administration.
[15] Constitution of India. (1925). The Commonwealth of India Bill (National Convention, India, 1925) Archives. [online] Available at: https://www.constitutionofindia.net/historical-constitution/the-commonwealth-of-india-bill-national-convention-india-1925/.

*quoist,* but they were committed to suppressing this power aspect[16] by abolishing practices like *Zamindari* and achieving social and economic equality through redistribution and welfare policies. Therefore, to seek the balance between welfare and individual rights, *Article 31* was inserted as a safeguard against arbitrary state actions, setting the stage for its constitutional journey.

The shaping of the "Right to Property" in the Indian Constitution was significantly influenced by a multitude of social and political movements throughout the 20th century. These movements, each representing unique societal interests, played a pivotal role in framing the debates and final articulation of property rights. The Congress, particularly under Mahatma Gandhi, spearheaded a national awakening that underscored the importance of property rights in the context of freedom and equality.[17] Additionally, other influential groups like the Hindu Mahasabha and the Communist Party of India (CPI) contributed diverse perspectives. The Hindu Mahasabha's efforts, despite their limited electoral success, impacted the discourse on property rights, especially concerning disadvantaged groups within the Hindu community. Similarly, the CPI's emphasis on land reforms and workers' rights infused the debates with a focus on equitable distribution and social justice. This confluence of diverse ideologies and aspirations was instrumental in shaping the constitutional narrative on the "Right to Property", reflecting the complex tapestry of India's struggle for independence and its pursuit of a balanced and just social order.[18]

***The 1st Amendment and the Erosion Begins***

The deterioration of this guarantee started in the very first year of the inception of the constitution. *Pandit Nehru's* perception of *"Fundamental Rights"* as obstacles to *agrarian land reforms* led to the *1st Amendment.*

*In 1951, the Constitution (First Amendment) Act* introduced the *Ninth Schedule, Articles 31A, and 31B* to shield certain laws, especially those affecting zamindars, from judicial scrutiny. A

[16] Article 14 and Chapter IV of Constitution of India.
[17] Merillat, H.C. (1970). Land and the Constitution in India. New York: Columbia University Press.
[18] Namita Wahi (2021). The Evolution of the "Right to Property" in India before the Drafting of the Constitution . https://deliverypdf.ssrn.com/delivery.php?.

paradox emerged, contrasting the *U.S. First Amendment's* introduction of the *Bill of Rights* with *India's First Amendment* curtailing *"Fundamental Rights"*.

### B. Clash of Ideologies

***The Apex Court vs. the Government***

The *Supreme Court,* in its pursuit of safeguarding individual rights, notably adopted a *Classical Liberal* approach regarding Article 31. It firmly held that if the state intended to acquire any property under the Land Acquisition Acts, the compensation should not fall below the market price.[19] This unwavering stance stood in stark contrast to the government's *socialist leanings,* advocating *nominal compensation* in the name of public welfare, especially for large-scale projects. This ideological clash ignited a series of constitutional judgments, setting the stage for an enduring tussle between the judiciary and the legislature, ultimately culminating in the historic ***Kesavananda Bharati Judgment***[20] which declared *property rights non-essential to the Constitution's basic structure*. The prevailing sentiment that *property rights* posed a hindrance to the government's pursuit of redistributive and egalitarian policies had deeply permeated both the polity and society.

### C. Interconnectedness of "Fundamental Rights"

***Rights Beyond Isolation***

*Property rights* encompass more than mere *land ownership or zamindari* as they extend to *livelihoods, places of worship,* and *other vital aspects of life.* The violation of *property rights* directly impinges upon the *right to life*, including *the right to livelihood*[21]. It's important to recognize that property rights aren't confined to large landholdings; they can involve small businesses or plots of land crucial for the subsistence of impoverished families. This interconnection of "Fundamental Rights" is underscored by significant legal precedents such as ***Maneka Gandhi v. Union of India***[22] and ***I.R. Coelho v. State of Tamil Nadu***[23]. These cases emphasize the indivisible nature of *"Fundamental Rights"*, highlighting the necessity for a

[19] *Union Of India v. The Metal Corporation Of India Anr.,* AIR 1967 SC 637.
[20] *Kesavananda Bharati v. State of Kerala,* (1973) 4 SCC 225.
[21] *Olga Tellis v. Bombay Municipal Corporation,* 1986 AIR 180.
[22] 1978 SCR (2) 621.
[23] (1999) 7 SCC 580.

comprehensive approach when contemplating changes, particularly concerning the "Right to Property", within the framework of the current project.

## III. JUDICIAL STEWARDSHIP AND EVOLUTION

### A. The Role of the Supreme Court

The *Supreme Court, as the guardian of "Fundamental Rights",* has taken proactive measures to restore the *"Right to Property"*. Starting in the *1980s,* the Court embarked on a more *liberal path* during its exercise of *judicial review* powers. It pursued three distinct routes to reinstate the earlier guarantee of property rights, emphasizing the right to fair compensation and ensuring property could only be acquired for public purposes.

### B. The First Route

In the ***Ajay Hasia v Khalid Mujib***[24] case, by declaring *"Equality is antithetical to arbitrariness."* The Court propounded the *'New Equality Doctrine'*, which states that any arbitrary action is in violation of the *Right to Equality*. The case was reaffirmed in the *Maneka Gandhi case*, which added that such action is violative of *Article 14, 19 as well as Article 21. (The Golden Triangle.)* Interestingly, in ***Tamil Nadu v. Ananthi Ammal***,[25] the court included the grant of *'inadequate compensation'* within the meaning of arbitrary action. In ***K. T. Plantation***,[26] the court at a detailed length discussed the issues regarding *'the new "Right to Property"'* under *Article 300A* as well as the scope of the challenges to any action which affects this right under other *"Fundamental Rights"*. However, the challenge to the *inadequate compensation* being arbitrary was held to be valid. In this case, full compensation against the taking of the property was allowed, but this *classical liberal* view, which was followed by the SC, is the exception to the rule.[27]

### C. The Second Route

*Article 21* of the constitution grants the right to life and liberty, and by virtue *of the liberal interpretation* of this article, a *'bundle of rights'* is being accommodated under this title, which also includes the *'right to livelihood'*. It can be observed that the courts have used this

[24] (1981) 1 SCC 722.
[25] 1995 AIR 2114
[26] *K.T. Plantation Pvt. Ltd. v. State of Karnataka,* (2011)13 SCR 636.
[27] Tom Allen, "The Revival of the "Right to Property" in India" (2015) 10 Asian Journal of Comparative Law 23.

interpretation to accommodate the *'right to compensation'* to a certain extent. The rationale behind this interpretation is that when the taking devoid a person of his livelihood, it directly attracts the vice of *Article 21*. In various cases, full compensation was granted.[28] The problem with this approach is that the grant of compensation has a really constrained scope.

### D. The Third Route

This route states the the "Right to Property" is still a constitutional right enshrined under Article 300A and this vests an implied right of compensation against any taking. The bold statement that 'Private Property is a Human Right'[29] has been made by the SC in a recent judgment.

If all these three routes are opted, the challenge the provisions of the law passed by Goan assembly can be struck down by the SC only to the extent where it finds any arbitrariness. On the case-to-case basis, transfer of the land of a poor who's dependent upon it can be barred. In some cases, compensation cannot be claimed. Regrettably, none of these routes can reinstate the position of the "Right to Property" as a Fundamental Right and hence provide for the complete repeal of such provision. This might be done only through repeal of the 44th Amendment, either by the legislature or by the Judiciary. The politics of property rights is history now, and thus, expecting the legislature to overturn the amendment is a fruitless endeavour. The Judiciary also seems to miss the opportunity. In Sanjiv Kumar Agarwal Case,30 the constitutionality of this Amendment was challenged and yet the court refused the petition. If a river changes its natural course, it takes Bhagiratha efforts to correct its course. And if that does not happen, civilization is at peril. One can only hope.

## IV. Challenges and the Road Ahead: The 44th Amendment and Its Implications

The *44th Amendment* in 1978 was a turning point, reclassifying property rights as constitutional under *Article 300A*. However, criticism emerged due to the interdependence of *property rights* with other *"Fundamental Rights"*. *Property rights* were not isolated, and their violation had cascading effects on other liberties. It plainly stated: *"Persons are not to be deprived of property*

[28] *State of Maharashtra v. Basantibai*, A.I.R. 1986 S.C. 1466.; *Ram Prasad* v. *Chairman, Bombay Port Trust*, A.I.R. 1989 S.C. 1306.
[29] *Vidya Devi v. The State of Himachal Pradesh and Ors,* Civil Appeal nos. 6061 OF 2020.
[30] *Sanjiv Kumar Agarwal v. Union of India,* Writ Petition (Civil) No. 464 of 2007.

*save by authority of law."* This article does not contain the conditions of *'Public Purpose'* and *'Compensation'* conditions which existed earlier. Moreover, the Article demoted the Property Right from being a Fundamental Right to a Constitutional Right.

Over time, the landscape of *property rights* in the political arena has undergone significant evolution. This transformation makes it *increasingly unlikely* that the legislature would take the initiative to repeal the 44th Amendment, which downgraded *property rights from fundamental to constitutional rights.* The historical context of property rights, and their intersection with *diverse ideologies* and *policies,* has created a complex backdrop that renders legislative action a challenging prospect. In this intricate landscape, the judiciary assumes a crucial role as a *guardian of constitutional principles.* It possesses the authority to interpret and uphold the *Constitution's values,* including the protection of *property rights*. However, there have been instances where the judiciary seemed to miss opportunities to address this issue comprehensively. An example of this is *the* ***Sanjiv Kumar Agarwal case***[31], where a challenge to the constitutionality of the 44th Amendment was presented, but the court declined to entertain the petition.

Restoring property rights to their former status may require extraordinary efforts on different stages akin to *Labours of Hercules*. It is a situation where one can only hope that the judiciary or political avenues will take proactive steps to restore the right to its original status.

## V. CONCLUSION: SAFEGUARDING CONSTITUTIONAL PRINCIPLES

It is now clear that discussions surrounding *property rights* and *their protection* are far from new, having deep historical roots, and that they are intertwined with individual liberties, economic stability, and social justice. It is evident that *property rights* continue to be a critical component of India's legal and political landscape. Their evolution, challenges, and potential for adaptation underline the resilience of the *Indian democratic framework*. The dialogue on property rights in India serves as a testament to the enduring commitment to *justice, equity, and constitutional principles* that underpin the nation's progress.

[31] Writ Petition (Civil) No. 464 of 2007.

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