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# EDITORIAL

"I apologize for the length of this letter. If I had had more time, it would have been shorter."

**Mark Twain**

Lawyers, judges, legal academicians, and most of those in the broad legal fraternity have the propensity to expand one sentence into three - something many may consider a gift. Over my tenure through the various strata of the Journal, I have come to understand that it is quite the contrary. The ability to put forth one's entire argument concisely is a talent which is only honed through practice. It takes a significant amount of cogitation to be precise and clear while simultaneously avoiding the use of unnecessary jargon. Legal academicians are quite proficient/adept at this skill. The clarity provided by the succinctness and simplicity of a manuscript aids in highlighting the substantive deficiencies, often resulting in the author utilising verbiage to hide these shortcomings. The sign of a good editor is the ability to navigate through the labyrinthine submissions, composed of verbose sentences and paragraphs, accurately judging the writer's ability to provide a thorough elaboration of their innovative idea.

This edition of the NUALS Law Journal marked the return of the Board of Editors to an in-person and completely offline functioning after successfully having navigated nearly four issues completely online. This transition of the Board merely reflected the transition faced by each individual editor. As we struggled to adapt and readjust to the offline mode of work, not withholding the years we lost, the NUALS Law Journal Board of Editors has had to take it

all in stride and learn together, as a team, with an almost completely new set of editors, each learning as we go along.

Having to train our new editors, we took on a different garb, rehauling our training methodology. We moved to a more efficient, hands-on procedure, ensuring the editor's astute adaptation to the process of editing. The Board also witnessed a structural rehaul, having introduced two new positions - that of an administrative editor and a technical editor. This change wrought an increase in the Board's efficiency having streamlined the entire editorial process.

The Journal now witnesses an improved response time for submissions to both the Journal and our blog while providing more personalised and specific feedback to authors through all levels of the editorial process. This further ensures that the authors benefit from the mere experience of submitting their articles to our Journal.

In light of what I have said about succinct articulation, I am delighted to present to all the readers, the first issue of the Seventeenth Volume of the NUALS Law Journal. This issue of the Journal would not have been on paper had it not been for the tireless efforts of every single member of my Board, who were successful in reviewing and editing the numerous submissions we received, within the short time frame. I am delighted in, and proud of, our editors' keen eye for details and which in turn helps them give their feedback to all our authors. My sincere thanks to our Faculty Advisors and the University for always supporting us and all the endeavours we attempt to undertake. Their words of wisdom in times of adversity and setbacks have always been appreciated. To our erudite readers, looking to expand their knowledge, without whom we would not be able to continue publishing, we

thank you for your belief in us to present you with the best of academic literature.

On behalf of the Board of Editors,

Poorvi Yerrapureddy,

**Editor-in-Chief**

March, 2023

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# PLACE OF AFFECTED PEOPLE'S RIGHTS IN ISDS REFORM OPTIONS

G. Mahith Vidyasagar*

**Abstract**

*It is a general phenomenon that in any legal proceeding, a party whose rights or interest was affected should always be given the right to stand in the process, so far as the interest is affected. However, the Investor-State arbitration cases do not grant such right to participate in proceedings to the persons whose rights are involved in the subject matter of the dispute. As a result, the issue of third-party participation in the Investor-State dispute settlement (ISDS) cases gained wider attention. Along with the other concerns, the issues pertaining to third-party participation attacked the legitimacy and transparency of ISDS. In order to resolve those issues, the United Nations Commission on International Trade Law (UNCITRAL) entrusted its Working Group III with a mandate to work on the possible reforms of ISDS. Nonetheless, the WG III did not identify third-party participation in ISDS as a concern to develop reform options. There is a contention that third-party participation needs a stand-alone discussion. In that light, this article analysed the options available for third-party participation in investment treaty disputes and their limitations, the need for providing third-party participation, as well as the approach of the WG III towards the issue of third-party participation.*

## I. Introduction

It is familiar that the character of investment-treaty arbitration, which is popularly called *Investor-State Dispute Settlement (ISDS)* in the present day

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international investment law regime, is hybrid.[1] Because it contains both the principles of international commercial arbitration,[2] and (the investment treaties between the host States and investors, are governed by) the principles of public international law. This *sui generis* nature is one of the peculiar features that the system of ISDS possesses. Also, there are certain other prominent aspects which tend to be controversial in nature. The effect of the arbitration of investment disputes under ISDS on the general public is one among them.

There is a transition of disputes between the investors and host-States from ancient expropriation issues to cases stemming out of the regulatory interferences with various aspects of the investment.[3] This means, in today's international investment realm, in most cases, the Investor-State arbitration claims or ISDS claims have been used by foreign investors to challenge the policy measures adopted by States in their sovereign capacity in the interest of the public (*e.g.*, policies to promote social equity, foster environmental protection or protect public health).[4] It is apt to say, "[a] dispute resolution process that has been fair for the rest of the world came to be seen as a tool to

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[1] *See* Z Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 BYIL 151 (2003).

[2] Tomoko Ishikawa, *Third Party Participation in Investment Treaty Arbitration*, 59 INT'L & COMP. L. Q. 373 (2010).

[3] *Id.*, at 376.

[4] UNCTAD, *Investor-State Dispute Settlement: A Sequel*, *25* UNCTAD/DIAE/IA/2013/2, (2014). *See also* Daniel J. Gervais, *Investor-State Dispute Settlement: Human Rights and Regulatory Lessons from Lilly v. Canada*, 8 UC IRVINE L. REV. 459 (2018); James Harrison, *Environmental Counterclaims in Investor-State Arbitration*, 17 J. WORLD INVESTMENT & TRADE 479 (2016); Susan L. Karamanian, *The Place of Human Rights in Investor-State Arbitration*, 17 LEWIS & CLARK L. REV. 423 (2013); Susan L. Karamanian, *The Role of International Human Rights Law in Re-Shaping Investor-State Arbitration*, 45 INT'L J. LEGAL INFO. 34 (2017).

put business before public interest."[5] This created a turmoil where States being parties to investment agreements, are not able to "legislate at will without concern that an arbitral tribunal will determine that the legislation constitutes interference with an investment."[6]

Unlike international commercial arbitration, which usually includes disputes concerning two private contracting parties, Investor-State arbitration involves challenges to governmental measures.[7] As a result, the disputed matter in ISDS cases is concerned not only with the parties to the dispute (*i.e.,* investor and host-State) but also to the public.[8] This raises a question of considering public input in such cases. This question is worth considering because public participation in such cases is severely limited.[9] It is a general phenomenon that in any legal proceeding, a party whose rights or interest was affected should always be given the right to stand in the process, so far the interest affected.[10] However, with the embodiment of the "confidential and secretive nature of international commercial arbitration"[11] in ISDS, no such third-party participation will be given to the public whose rights are being affected or at stake.

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[5] Guillermo Aguilar Alvarez & William W Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT'L L. 365, 371 (2003).

[6] Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit*, 41 VAND. J. TRANSNAT'L L. 775, 778 (2008).

[7] Eugenia Levine, *Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation*, 29 BERKELEY J. INT'L L. 200, 205 (2011).

[8] Tomoko Ishikawa, *supra* note 2, at 376.

[9] Barnali Choudhury, *supra* note 6, at 785-786.

[10] Gus Van Harten et. al., *Phase 2 of the UNCITRAL ISDS Review: Why 'Other Matters' Really Matter*, ALL PAPERS 328 (2019), available at: https://digitalcommons.osgoode.yorku.ca/all_papers/328 (last visited Aug. 30, 2022)

[11] Barnali Choudhury, *supra* note 6, at 786.

The argument that "dispute settlement procedures in investment arbitrations lack public openness and scrutiny, and delegitimize outcomes arrived at in secrecy by private decision-makers"[12] attacked the system of *ISDS* and began to highlight the lack of transparency in the process. Commentators and the groups of civil society have raised their voices for the larger public participation in *ISDS* proceedings, for the inclusion of wider policy considerations into the dispute settlement mechanism and to add a measure of transparency.[13] This deficiency in transparency coupled with legitimacy crisis,[14] has triggered backlash[15] from certain States, different actors of civic society[16] and scholars,[17] against the dispute settlement process of *ISDS*.

As a result, the United Nations Commission on International Trade Law (UNCITRAL), in its 50th Session, entrusted its Working Group III (WG III)

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[12] Eugenia Levine, *supra* note 7, at 206.

[13] *Id*., at 200.

[14] *See* Susan D Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521 (2005).

[15] The backlash is well documented. *See* THE BACKLASH AGAINST INVESTMENT ARBITRATION (M. Waibel et. al. eds., Kluwer Law International, 2010); O. Thomas Johnson & Catherine H. Gibson, *The Objections of Developed and Developing States to Investor-State Dispute Settlement and What they are Doing about Them*, *in* 7 CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2013, 254 (Arthur W. Rovine ed., Brill Nijhoff, 2014); UNCTAD, *Reform of Investor-State Dispute Settlement: In Search of a Roadmap* (UNCTAD IIA Issues Note 2, Jun. 26, 2013); G. Kaufmann-Kohler & Michele Potestà, *Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism?* 6 (CIDS-Geneva Centre for International Dispute Settlement, Jun. 2016); RODRIGO POLANCO, THE RETURN OF THE HOME STATE TO INVESTOR-STATE DISPUTES: BRINGING BACK DIPLOMATIC PROTECTION? ( 2019).

[16] *See, e.g.,* P. Eberhardt & C. Olivet, *Profiting from Injustice: How Law Firms, Arbitrators, and Financiers Are Fuelling an Investment Arbitration Boom*, (Corporate Europe Observatory & Transnat'l Inst., Nov. 2012).

[17] Malcolm Langford et al., *Backlash and State Strategies in International Investment Law*, *in* THE CHANGING PRACTICES OF INTERNATIONAL LAW, 70 (T. Aalberts & T. Gammeltoft-Hansen eds., Cambridge Uni. Press, 2018).

with a broad mandate to work on the possible reforms of ISDS.[18] The mandate assigned to WG III is divided into three phases: *(i) to identify the concerns pertaining to ISDS; (ii) to look into the aspect whether reforms are necessary for the concerns identified; (iii) if reforms are necessary, to develop the possible reform options for those identified concerns.* In pursuance of this mandate, the *WG III* finished the initial two phases and is currently working on the third phase *i.e.*, developing possible reform options for the concerns of *ISDS*.

As *WG III* is developing the reform options, there is a need to look into the efficacy of those options addressing the concerns pertaining to *third-party* participation. It has to be kept in mind that in the initial phase *i.e.*, identifying the concerns, the *WG III* did not recognise *third-party* participation as a separate concern raised against *ISDS.* In the later stage, even though the *third-party* participation was recognised as a concern, it was not considered for a stand-alone discussion and *WG III* opined that it would not consider any other concerns at that stage of deliberations. However, it was agreed by the *WG III* that it would take into account all the other concerns identified in the later stage of developing the reform options.

If the *WG III* fails to do as agreed, there might be a possibility of recurrence of raising concerns against the Investor-State arbitration system, which may lead to its further breakdown. As rightly stated by the Bahrain Government in its submission to the *WG III*,

> "[r]eform[s] should not only maintain the advantages of ISDS, it must substantially improve

[18] U.N., Rep. of United Nations Commissions on International Trade Law, 50th Sess., July 3-21, 2017, U.N. Doc. A/72/17, at 46, ¶ 264 (2017) [hereinafter U.N. Doc. A/72/17].

> upon them. Most importantly, any reform that is implemented by UNCITRAL should not risk further fragmentation of ISDS."[19]

Against this background, this article will analyse the *third-party* participation, especially the participation of the public whose rights are affected or at stake in the cases of *ISDS* and also how this issue be treated by the *WG III* through its reform options.

For that purpose, Part II of the article deals with the option of *amicus curiae*, which is currently facilitating the non-disputing parties or *third-party* to participate in investment disputes by way of written submissions and the procedural limitations attached to it. Part III advocates the need for better *third-party* participation in the interest of environmental concerns and for protecting human rights in the *ISDS* cases. Part IV analyses the approach of the *WG III* towards *third-party* participation. Part V highlights the arguments for and against the *third-party* participation and puts forth the potential ways to overcome the hurdles for increased *third-party* participation.

## II. **Amicus Curiae Submissions as an Option for Third-Party Participation**

In the investment arbitration regime driven by *ISDS*, the *amicus curiae* concept has become an important part.[20] This part explains the concept of amicus curiae in the context of investment dispute settlement and how it works as well as the limitations attached to it. The institution of *amicus curiae* is

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[19] UNCITRAL, Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the Government of Bahrain, Note by the Secretariat, 38th Sess., Oct. 14-18, 2019, at 2, ¶ 3, U.N. Doc. A/CN.9/WG. III/WP. 180 (Aug. 29, 2019).

[20] Fernando Dias Simoes, *Amicus Curiae in the Trans-Pacific Partnership*, 54 AM. BUS. L. J 161 (2017).

considered as a resort by the civil society for addressing the concerns of public interest and human rights involved in the investment arbitration.[21] There is no proper authoritative definition of *amicus curiae,*[22] the word literally means '*friend of the court*'.[23] In *amicus* submissions, the role of this friend is to provide the court or tribunal its special representative, arguments, or expertise on the disputes.[24] The submissions by this friend turned out to be a promising source of public input into the process of arbitration. However, traditionally there's no place for *amicus curiae* submissions in Investor-State arbitration based on treaty.[25]

Initially, the investment arbitration tribunals were reluctant to permit *third-party* participation because of the dissimilarities between the arbitration proceedings and those before the domestic or international courts.[26] Even though there is a wider acceptance of *amicus* submissions by various international courts and tribunals, the incorporation of accepting such submissions into investment disputes is relatively novel.[27] *Methanex*[28] is the first prominent case of Investor-State arbitration that recognised the importance of *third-party* participation as *amicus curiae* in the proceedings of

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[21] Katia Fach Gomez, *Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest*, 35 FORDHAM INT'L L. J 510, 513 (2012).

[22] Nicolette Butler, *Non-Disputing Party Participation in ICSID Disputes: Faux Amici?*, 66 NETHERLANDS INT'L L. REV. 143, 145 (2019).

[23] Lance Bartholomeusz, *The Amicus Curiae Before International Courts and Tribunals*, 5 NON-STATE ACTORS & INT'L L. 209, 211 (2005).

[24] *Id.*

[25] Barnali Choudhury, *supra* note 6, at 814.

[26] Eugenia Levine, *supra* note 7, at 208.

[27] Nicolette Butler, *supra* note 22, at 146.

[28] *Methanex Corporation v. USA,* Decision of the tribunal from third parties intervene as 'amicus curiae' (Jan.15, 2001).

investment arbitration. This case was brought under *North-American Free Trade Agreement (NAFTA)* and decided under the *UNCITRAL* Rules. The right of the California Government to ban the use of harmful substances on the basis of potential health risks was challenged by a Canadian investor. Along with International Institute for Sustainable Development, several non-Governmental organisations (NGOs) submitted petitions to the arbitral tribunal seeking for *amicus curiae* submissions and also to access the parties' copies as well as access to the oral hearings as an observer.[29]

The tribunal after considering the relevant provisions of *NAFTA* and *UNCITRAL* Arbitration Rules – Article 15(1) – concluded that it had the power to accept the *amicus curiae* submissions in writing from a *third-party* or non-disputing party. But it had no power to accept the request of the NGOs' regarding the access to the documents and access to oral hearings.[30] The disclosure of the materials is at the liberty of the disputing parties and it is a matter between them but not of the tribunal.[31] Because the *amici* participating in the arbitration are to be treated as any other members of the public by the tribunal and have no rights under Chapter 11 of *NAFTA* to receive any materials generated within the arbitration.[32]

The tribunal also held that it had no authority to allow the *amici* for the oral proceedings. Article 25(4) specifically provides that hearings are to be conducted *in camera* unless both the disputing parties consent otherwise and there is no such consent in this case.[33] This provision clearly excludes

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[29] *Id.*
[30] *Id.*, ¶ 47.
[31] *Id.*, ¶ 46.
[32] *Id*.
[33] *Id.*, ¶ 41.

members of the general public *i.e.,* "*non-party third persons.*"[34] Article 15(1) provides for the procedural flexibility that has to be applied in the arbitration proceedings on a case-by-case basis. However, being a procedural provision it neither "grant the [arbitral] tribunal any power to add further disputing parties to the arbitration, nor to accord to persons who are non-parties the substantive status, rights or privileges of a Disputing Party."[35]

While the *Methanex* case was still ongoing, the *NAFTA* Free Trade Commission (FTC) in 2003, issued a statement regarding *third-party* participation in the Chapter 11 *NAFTA* proceedings. It was expressly provided in the statement that non-disputing parties may petition to file submissions.[36] Based on the FTC statement on *third-party* participation, the *Methanex* arbitral tribunal in 2004, accepted the *amicus curiae* submissions of International Institute of Sustainable Development and other NGOs.[37] However, it did not recognise the *amicus curiae* as a party to the dispute and was allowed to participate in the oral hearings.

The arbitration tribunal in *United Parcel Service (UPS)*[38] case followed the footsteps of the *Methanex* and decided the issue of *third-party amicus curiae* submission on similar lines. In this case, against the claim brought by *UPS*, which challenges different policy measures of Canada regarding its postal service market, the Canadian Union of Postal Workers (CUPE) and Council of Canadians, requested the arbitral tribunal for standing as parties to certain

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[34] *Id*.
[35] *Id.*, ¶ 27.
[36] Tomoko Ishikawa, *supra* note 2, at 380.
[37] *Id*.
[38] *United Parcel Service v. Canada*, ICSID Case No. UNCT/02/1, Decision on Petitions for Intervention and Participation as Amici Curiae (Oct. 17, 2001).

proceedings; in case the status as a party is denied, the right to intervene in the proceedings as *amicus curiae*; and access to all types of materials of the arbitration proceedings.[39]

With respect to the request of adding the petitioners as party to the dispute, the tribunal clearly stated that it had no authority to add parties to the arbitration either generally or in the present case. It held that none of the provisions of *NAFTA* Chapter 11, conferred such powers on the tribunal and rejected the request of the petitioners.[40] The tribunal also emphasised that the procedural powers granted under Article 15(1) were limited and were restricted by other provisions of *NAFTA* and other principles of equity and fairness. Those powers can be used to facilitate the tribunal's process of deciding a dispute submitted to it on the basis of parties' consent but not to change the subject of the arbitration into a new dispute by adding a new party.[41]

As far as the *amicus curiae* submissions are concerned, the tribunal solely relied on the dictum of *Methanex* arbitral tribunal and the reasoning drawn from it, and held that it is within the scope of Article 15(1) to receive submissions from the *third-party* for the purpose of assisting the tribunal. It does not mean that the *third-party* is on par with the party to the dispute.[42] Article 25(4), which provides for '*in camera*' proceedings did not prevent the tribunal from accepting the *amicus curiae* written submissions from the *third-party* but it restricts them from attending the hearings in the absence of

[39] *Id*., ¶ 1.
[40] *Id*., ¶ 34-43.
[41] *Id*., ¶ 60.
[42] *Id*., ¶ 61.

agreement between the disputing parties.[43] Receiving the *amicus curiae* submissions is the matter of tribunal's power but not of the *third-party* right.[44]

Unlike the tribunals constituted under the *UNCITRAL* Rules, the tribunals established "under the auspices ICSID [International Centre for Settlement of Investment Disputes] were initially hesitant to allow *third-party* participation in investment disputes."[45] The question of admissibility of *amicus curiae* submissions came up for the first time before *ICSID* arbitral tribunal in the case of *Aguas del Tunari SA v. The Republic of Bolivia*.[46] As the arbitration proceedings in this case were ongoing, petitions were filed before the tribunal asking permission for participation in the arbitration and also for amicus curiae submissions because of the public interest involved in this case. This initiative was indeed appreciated by the tribunal.[47] However, it refused the citizens and environmental groups standing at the arbitration due to parties' unwillingness to consent to their participation.[48] The tribunal stressed that the *"interplay of the ICSID Convention and the BIT [Bilateral Investment Treaty], and the consensual nature of arbitration,"*[49] placed the ultimate decision of whether allowing *amicus* submissions or not in the hands of the disputing parties to the arbitration.[50] This decision was subjected to considerable criticism.[51] As there was growing pressure from the general public and continuous criticism against

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[43] *Id*., ¶ 68.
[44] *Id*., ¶ 61.
[45] Nicolette Butler, *supra* note 22, at 146.
[46] ICSID Case No. ARB/03/02 (2005).
[47] Gomez, *supra* note 21, at 510.
[48] Barnali Choudhury, *supra* note 6, at 814-815.
[49] *Id*., at 814.
[50] Nicolette Butler, *supra* note 22, at 146.
[51] *See generally* Loukas Mistelis, *Confidentiality and Third-Party Participation: UPS v. Canada and Methanex Corp. v. USA* 21 ARB. INT'L L. 211 (2005).

the decisions, investment arbitral tribunals began allowing *third-party* participation.[52]

The criticism against the above decision resulted in taking a different approach by the *ICSID* arbitral tribunals in the subsequent cases. *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine*[53] was the first case in which the *ICSID* tribunal acknowledged its power of accepting *amicus curiae* briefs from the *third-party*. In this case, five NGOs submitted to the tribunal to allow them to the hearings of the case, an opportunity to present the *amicus curiae* submissions and to access the documents of the arbitration. The tribunal denied the request of the petitioners to have access to and attend hearings of the case.[54] Whereas, when it comes to the *amicus curiae,* the tribunal observed that neither the *ICSID Convention* nor the Arbitration rules specifically empowered or restricted the non-disputing *third-party* briefs.[55] However, by relying on Article 44 of the Convention, which confers residual power on the tribunal to decide the procedural questions that are not answered by the *ICSID Convention* or the Arbitrations rules, the tribunal concluded that it had the power to admit the *third-party amicus curiae* submissions.[56]

The tribunal emphasised that "*amicus curiae*.... is not a party to the proceeding.... and the [t]ribunal believes that *amicus curiae* in an *ICSID*

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[52] Eugenia Levine, *supra* note 7, at 209.
[53] ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae* Submissions (May 19, 2005).
[54] *Id.*, ¶ 4-7.
[55] *Id.*, ¶ 9.
[56] *Id*., ¶ 16.

proceeding would also be that of a non-party."[57] It is also highlighted that the request to act as an *amicus curiae* is an offer which is at the discretion of the tribunal.[58] The arbitral tribunal went a step ahead and also put forth the criteria to accept the *amicus curiae* submissions.[59] The tribunal also expressed its willingness to establish a procedure for submitting the *amicus curiae* submissions by the *third-party* by safeguarding the due process and equal treatment as well as the efficiency of the proceedings.[60] The goal of such procedure is "to enable an approved *amicus curiae* to present its views and at the same time to protect the substantive rights and procedural rights of the parties."[61] This procedure was formulated by the tribunal in its order where the five NGOs filed for the permission of the tribunal to submit a single joint *amicus curiae* submission.[62] The tribunal in this order again reaffirmed the credibility of the five NGOs to submit the *amicus curiae* submissions and also the appropriateness of receiving such submissions in accordance with the procedure.[63] In that procedure, the tribunal laid down the timeline for submitting the *amicus curiae* briefs, the format in which it has to be submitted as well as the number of pages.[64]

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[57] *Id*., ¶ 13.
[58] *Id*.
[59] *Id*., ¶ 17.
[60] *Id*., ¶ 29.
[61] *Id*.
[62] Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine, ICSID Case No. ARB/03/19, Order in Response to a Petition by Five Non-Governmental Organizations for Permission to make an Amicus Curiae Submissions (Feb. 12, 2005).
[63] *Id*., ¶ 22.
[64] *Id*., ¶ 26.

The tribunal's decision in this case is not only famous for the *third-party amicus curiae* submissions but also for the revision of the *ICSID Rules*. After the first order of the tribunal on *amicus curiae* submissions, the *ICSID* revised its Arbitration Rules and adopted a new Rule 37(2), which is effective from 10 April 2006. This new amended rule specifically empowers the tribunal to allow a non-disputing *third-party* to file a written submission after considering both the disputing parties. It also listed the issues to be considered by the tribunal while determining the acceptance of such filings.[65] This rule has been successfully invoked in the subsequent *ICSID* arbitral tribunal's decisions. The best example in this regard – *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*.[66]

Like in the earlier cases, in this present case also application was made to the tribunal by certain NGOs seeking for *amicus curiae* submissions, and participation in the oral hearings as well as access to the materials of the arbitration.[67] The tribunal, in its order, observed that the amended *ICSID* Arbitration Rules did not simply grant for a 'general *amicus curiae* status', but specific and carefully delimited types of participation by *third-parties*: a) the filing of written submission (Rule 37(2)) and b) the attendance at hearings (Rule 32(2)).[68] Based on the previous decisions of *Methanex,*[69] and *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v.*

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[65] See *Id*., ¶ 14.
[66] ICSID Case No. ARB/05/22 (2005).
[67] Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Petition for Amicus Curiae Status (Nov. 17, 2006).
[68] Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Procedural Order No 5, ¶ 46 (Feb. 2, 2007).
[69] *Methanex Corporation v. USA* (1999).

*Argentine*,[70] the tribunal grants the petitioners an opportunity to file written submission in accordance with Rule 37(2).[71] With respect to the *third-party* participation as an *amici* in oral hearings, the tribunal considered Rule 37(2), which provides that unless either of the disputing parties objects, the tribunal after consultation with the Secretary-General, may allow the other non-disputing persons to attend or observe the hearings.[72] However, the disputing parties to the present case objected to the petitioners' presence or participation in the hearings and accordingly, the tribunal denied the request.[73] Similar to the other *amicus curiae* decisions discussed earlier, the arbitral tribunal in this case also rejected the request for access to the materials of the arbitration, but it gave more detailed reasons for the same.[74]

This discussion helps in understanding that the seminal decision of *Methanex*[75] is path breaking with regard to the *third-party amicus curiae* submissions in Investor-State disputes. The amended *ICSID* Arbitration Rules especially, Rule 37(2), is a notable step towards the formalization of *amicus curiae* submission and the incorporation of public input into *ISDS* disputes.[76] These cases clearly show that the investment arbitral tribunals have the power to accept the *third-party amicus curiae* submissions in the written form but it is a matter of tribunals' discretion and not a right of the non-disputing parties. It is also evident that the investment arbitral tribunals either governed by the

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[70] ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae* Submissions of (May 19, 2005).

[71] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No 5, ¶ 46 (Feb. 2, 2007).

[72] *Id*., ¶ 29.

[73] *Id*., ¶ 71.

[74] See Tomoko Ishikawa, *supra* note 2, at 387.

[75] *Methanex Corporation v. USA* (1999).

[76] Barnali Choudhury, *supra* note 6, at 816.

*UNCITRAL* Rules or *ICSID* Arbitration Rules do not allow the *third-party* as *amici curiae* to access the oral hearings of the arbitration, and the rules in this regard are well established. Finally, the tribunals do not provide access to materials of arbitration to *third-party* and the reasons for the same varies from case to case.

The paradigmatic change in accepting the *amicus curiae* submissions in Investor-State arbitration is a laudable one. It is even considered as a "promising source of public input into the arbitration process,"[77] and this incorporation of public input into investment arbitration is "a democratic measure related to the publication of documents and the provision of open public hearings."[78] Commentators even stated that the *amicus curiae* submissions undoubtedly "have the potential to enhance both procedural and legal transparency"[79] in the investment arbitration system. However, transparency in *ISDS* proceedings by the *amicus curiae* submissions is not the subject matter of this discussion, but the question is, are the *third-parties* (especially, whose rights are being affected or at stake) granted effective voice through *amicus curiae* submissions? The answer to this question will be a 'no' because the public interest in investment disputes is not justified by the *amicus curiae* submissions as they usually take the form of written submissions addressed to the arbitral tribunal,[80] but the involvement of *third-party* participation by definition is not limited to written submissions.[81]

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[77] *Id*., at 814.
[78] *Id*.
[79] Nicolette Butler, *supra* note 22, at 147.
[80] Lance Bartholomeusz, *supra* note 23, at 211.
[81] Eugenia Levine, *supra* note 7, at 207.

Investment treaty disputes always somewhat trigger the necessity of *third-party* participation in the arbitration proceedings because of the public interest in them. The presence of public interest in *ISDS* cases is withheld by the arbitral tribunals. For instance, in *Mehtanex* the tribunal stressed that:

> "[t]here is an undoubtedly public interest in this arbitration… not merely because one of the disputing Parties is a State: there are of course disputes involving States which ace of no greater general public importance than a dispute between private persons. The public interest in this arbitration arises from its subject matter… amicus submissions might support the process in general and this arbitration in particular…"*[82]*

Investment-treaty disputes almost always contain public interest by challenging the public acts and often the public regulatory acts of the host-State.[83] Some significant examples in this regard are the *ISDS* cases involving *2001-2002 economic crisis of Argentina*,[84] *an affirmative action program aiming to remedy injustices of apartheid system in South-Africa*,[85] *banning of*

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[82] *Methanex Corporation v. USA,* Decision of the tribunal from third parties intervene as 'amicus curiae', ¶ 49 (Jan.15, 2001).

[83] Charles H. Brower II, *Politics, Reason, and the Trajectory of Investor-State Dispute Settlement*, 49 Loy. U. Chi. L J 271, 272 (2017).

[84] *See* CMS Gas Transmission Co v. Arg. Republic, ICSID Case No. ARB/01/8, Award (May 12, 2005); LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc v. Arg. Republic, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006); Continental Casualty Company v. Arg. Republic, ICSID Case No. ARB/03/9, Award (Sep. 5, 2008); National Grid Plc v. The Arg. Republic, UNCITRAL, Award (Nov. 3 2008); Total SA v. The Arg. Republic, ICSID Case No. ARB/04/1, Decision on Liability (Dec. 27, 2010); Impregilo SpA v. Arg. Republic, ICSID Case No. ARB/07/17; El Paso Energy International Company v. The Arg. Republic, ICSID Case No. ARB/03/15, Award (Oct. 31, 2011).

[85] Piero Foresti, Laura de Carli and others v. Republic of S. Afr., ICSID Case No. ARB(AF)/07/1, Award (Aug. 4, 2010).

*harmful chemicals in Canada*,[86] *the human rights and environmental policies of Ecuador*,[87] and *the water permits of Germany*.[88] The decisions of the arbitral tribunals in all these cases not only affect the disputing parties *i.e.,* host-State and the investor, but also a vast majority of the general public – *third-party* – who are not given an adequate right to represent themselves and whose voice is unheard. This happens because of the limited nature of *amicus curiae* involvement in investment arbitral tribunals.

### A. Limitations of Amicus Curiae

Technically speaking, the *third-party amici* participants in Investor-State arbitration are not "interveners," since they do not vindicate their own rights.[89] Nonetheless, they provide useful factual and legal information in addition to the one provided by the disputing parties and indirectly help in improving the opportunities of access to justice.[90] This *third-party* participation by way of *amicus curiae* is restricted in nature.

*First,* the *amicus* participation in Investor-State arbitration disputes is not a right of the *third-party,* it is the discretion of the tribunal.[91] It means the arbitral tribunal has every power to accept the *amicus curiae* submissions however,

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[86] *See* Chemtura Corporation (formerly Crompton Corporation) v. Government of Canada, UNCITRAL (NAFTA), Award (Aug. 2, 2010).

[87] Chevron Corp. and Texaco Petroleum Co. v. The Republic of Ecuador (II), PCA Case No. 2009-23 (Sep.23, 2009).

[88] Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany, ICSID Case No. ARB/09/6, Award (Mar. 11, 2011); Vattenfall AB and others v. Federal Republic of Germany, ICSID Case No. ARB/12/12 (May 31. 2012).

[89] Patrick Wieland, *Why the Amicus Curia Institution is Ill-Suited to Address Indigenous Peoples' Rights before Investor-State Arbitration Tribunals: Glamis Gold and the Right of Intervention*, 3 TRADE L. & DEV. 334, 340 (2011).

[90] *Id*.

[91] United Parcel Service v. Canada, ICSID Case No. UNCT/02/1, Decision on Petitions for Intervention and Participation as Amici Curiae, ¶ 61 (Oct. 17, 2001).

whether to accept such submissions or not is purely dependent on the interest of the arbitral tribunal this is because the *third-party*, which is affected or is likely to be affected by the arbitration and arbitral award does not have any right to submit their claims or have any right to be heard. Although the *amicus curiae* submissions are accepted by the arbitral tribunals, it does not necessarily mean that those submissions are taken into consideration by them.[92]

Granting the *amicus curiae* submissions as a right to the affected *third-party* helps to "provide information and raise public policy issues necessary to properly decide the dispute."[93] The "investor-State arbitration process allows investors to bypass domestic courts and challenge democratically enacted legislation through a private process."[94] As a result, it also imposes heavy burden on the public finances because the States have to defend their legitimate public policies[95] and the monetary awards imposed by the arbitral tribunal will likely be paid out of the public tax.[96] When such an impact is created by the investment disputes on the general public there is a need to grant the *amicus curiae* submissions as a right to the non-disputing *third-party*.

*Second,* the *amicus curiae* participants are always not given the chance to access the key documents of the arbitration proceedings because of the

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[92] Tomoko Ishikawa, *supra* note 2, at 404.

[93] Lucas Bastin, *The Amicus Curiae in Investor-State Arbitration*, 1 CAMBRIDGE J. INT'L & COMP. L. 208, 224 (2012).

[94] *Id*.

[95] G. Kaufmann-Kohler & Michele Potestà, *Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism?* 13, para 22 (CIDS-Geneva Centre for International Dispute Settlement, Jun. 2016).

[96] Barnali Choudhury, *supra* note 6, at 809.

reluctance of the disputing parties and arbitral tribunals.[97] It has been opined that "[p]otential *amici* need sufficient information on the subject matter of disputes in order to: find an arbitration to which it may contribute by its expertise and perspective; decide whether or not to file a request for participation as *amicus*; and make meaningful arguments."[98] Without having knowledge of the content of the important documents in the arbitration proceedings, the *amici* would only be of limited assistance to the arbitral tribunal, on the disputed subject matter.[99] The case of *Pacific Rim v. El Salvador*[100] is a prototypical example. In this case, the tribunal sought for *amicus curiae* submission by way of a press release and accepted an application for submitting the brief. However the tribunal in its award refused to take the *amicus curiae* submissions into consideration as they could not produce evidence to support their claims. It is because the petitioners did not have access to the documents.

*Finally*, as stated earlier, the *third-party amicus curiae* participation is always limited to submit written briefs to the tribunals. They were never given the chance to present the oral hearings because of the limited procedural powers granted for the tribunals under the arbitration rules. The "*amici* could also be granted the right to attend and participate in oral hearings; ....and cross-examine witnesses."[101] When a broad range of regulatory measures are considered under Investor-State arbitration disputes, a proper understanding

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[97] *Id*., at 817.
[98] Tomoko Ishikawa, *supra* note 2, at 401.
[99] Barnali Choudhury, *supra* note 6, at 817.
[100] Pac Rim Cayman LLC v. The Republic of El Salvador, ICSID Case No. ARB/09/12, Award (Oct. 14, 2016).
[101] Patrick Wieland, *supra* note 89, at 344.

of the public impact of the implementation of such measures, and its potential modification is fundamental for accomplishing the appropriate task of reviewing those measures by the arbitral tribunal.[102] Facilitating such understanding of regulatory measures "may not be always in the parties' interests, and perhaps especially not that of the investor,"[103] making it necessary for the *amicus curiae* to be given adequate participation not only confining to written submissions but also to attend the oral hearings and cross-examination of the witnesses.

In addition to these limitations, the Investor-State arbitration tribunals also impose some other restrictions on the *amicus curiae* submissions, such as "fixing a number of pages for written briefs; not allowing the submission of exhibits or other evidence unless requested expressly by the tribunal."[104] It still "remains as a procedural prerogative subject to the parties' and the tribunal's discretion."[105] Owing to all these limitations and restrictions of *amicus curiae,* certain critics stated, "*amicus curiae* submissions becomes an empty promise."[106] Some others commented that the amicus participation in investment disputes "is certainly not a panacea to cure all the existing defects and limits of access to justice in the context of investment arbitration"[107] and does not "enable affected *third-parties* to meaningfully intervene in order to protect their rights."[108]

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[102] Lucas Bastin, *supra* note 93.
[103] *Id.*
[104] Patrick Wieland, s*upra* note 89, at 344.
[105] *Id.*, at 345.
[106] *See* Tomoko Ishikawa, *supra* note 2, at 404.
[107] Patrick Wieland, *supra* note 89, at 345.
[108] Jesse Coleman et. al., *Third-Party Rights in Investor-State Dispute Settlement: Options for Reforms*, 6 (IIED & IISD, Jun. 2019).

This insufficient nature of the *amicus curiae* in *ISDS* process made the concerns of *third-party* participation as a stand-alone discussion. For instance, the story of *Chevron-Texaco*,[109] popularly known as *Amazonian Chernobyl* is worth considering. The issue of *third-party* participation raises a question, *"Are human rights undermined, when an investor's dispute against a State arising out of the State's alleged breach of an IIA is settled by means of arbitration?"*[110] For this question, some people answer with a loud *"Yes!"* and demanded for termination of Investor-State arbitration because it is mainly a system governed by private persons, who are incapable of addressing the issues of public concern, such as human rights.[111]

At the other end, there are people who consider this question as irrelevant. According to them, human rights have little, if any, role in the process of dispute resolution, which is focused to protect foreign investors. Between the both extreme ends, there exists a critical middle path, which wants to accommodate both investment and objectives of human rights.[112]

On this issue, *John Ruggie*[113] passed through a slight tightrope in the *Guiding Principles on Business and Human Rights.* The *Guiding Principles* did not expressly ask for the removal of Investor-State arbitration, but they requested

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[109] Chevron Corp. and Texaco Petroleum Co. v. The Republic of Ecuador, PCA Case No. 2009-23 (Sep. 23 2009).

[110] Susan L. Karamanian, *The Place of Human Rights in Investor-State Arbitration*, 17 LEWIS & CLARK L. REV. 423 (2013).

[111] *Id.*, at 423-24; *See* CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award, ¶ 114 (May 12, 2005) – Argentina argued that "as the economic and social crisis that affected the country compromised basic human rights, no investment treaty could prevail as it would be in violation of such constitutionally recognized rights."

[112] *Id.*, at 424.

[113] Former United Nations Special Representative of the Secretary-General for Business and Human Rights.

the States to *"ensure that they retain adequate policy and regulatory ability to protect human rights under the terms of such IIAs."*[114] In this aspect, *Professor George Foster* proposes - *"investment treaties enable local stakeholders whose human rights are aggrieved by foreign investment to arbitrate claims that investors had failed to respect their human rights."*[115] In order to uphold and protect the human rights in *ISDS* cases, adequate representation must be given to the *third-party*, whose rights are being affected by the claims.

## III. **Third-Party Participation: Need of the Hour for Protecting Human Rights**

The aim of the sovereign States is to promote, protect and uphold the rights of its people. It is the constitutional mandate of every State and also an obligation of a democratically elected government. However, the Investor-State disputes have positioned the States in a situation, where they cannot perform their constitutional duties and fulfill their obligations. It has already been stated that the investment disputes or *ISDS* cases always challenge the policy measures (especially, the policies of human rights and environmental issues) taken by the sovereign States. Therefore, the States being parties to the disputes, always argue in support of their regulatory actions. On the other hand, investors argue for the protection of their investment. Whereas, both the parties do not give proper consideration or representation to the rights of the general public, which have already been affected by the investment or tend to be impacted by

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[114] John Ruggie, Special Representative of the U.N. Secy-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, at 12, ¶ 9, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011).

[115] George K. Foster, *Investors, States and Stakeholders: Power Asymmetries and the Stabilizing Potential of Investment Treaties*, 17 LEWIS & CLARK L. REV. 361 (2013).

the arbitral award. This can be supported by the prominent investment arbitration claims such as *Chevron Corp. and Texaco Petroleum Co. v. The Republic of Ecuador*,[116] *Piero Foresti v. South Africa*,[117] *Vattenfall v. Germany*,[118] and *Pezold v. Republic of Zimbabwe*.[119] These instances show why there should be a proper third-party participation in investment-treaty arbitration cases. The unpopular environmental pollution tale of *Chevron Texaco*, which is otherwise known as *'Amazon Chernobyl',* will guide this discussion further.

The *Texaco Petroleum Corporation (Texaco)*, before its acquisition by the *Chevron Corporation (Chevron)* in 2001, entered Ecuador in 1964 for oil drilling in the northern Ecuadorian Amazon, which is a high biodiversity and a home for dozens of indigenous communities. Starting from 1972, after receiving the concession contract, *Texaco* conducted excavations in over one million acres of pristine Amazon Rainforest.[120] By the time *Texaco* relinquished and handed over its sole operational responsibility to *Petroecuador* in early 1990, it had drilled 339 oil wells[121] and to bury the sludge and other waste materials produced during the process of oil extraction,

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[116] [2009] PCA Case No. 2009-23.

[117] Piero Foresti, Laura de Carli and others v. Rep. of South Africa, ICSID Case No. ARB(AF)/07/1, Award (Aug. 4, 2010).

[118] Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Rep. of Germany, ICSID Case No. ARB/09/6, Award (Mar. 11, 2011).

[119] Bernhard von Pezold and Ors. v. Rep. of Zimbabwe, ICSID Case No. ARB/10/25 (2010).

[120] Damira Khatam, *Chevron and Ecuador Proceedings: A Primer on Transnational Litigation Strategies*, 53 STAN. J. INT'L L. 249, 252 (2017).

[121] Judith Kimerling, *Transnational Operations, Bi-National Injustice: Chevrontexaco and Indigenous Huaorani and Kichwa in the Amazon Rainforest in Ecuador*, 31 AM. INDIAN L. REV. 445, 457 (2007).

it is estimated that over 800 waste pits were excavated.[122] The river bodies in proximity to the oil wells were filled with millions of gallons of toxic material. It is an undeniable fact that the toxic removal system used by the *Texaco* "ravaged the Ecuadorian Amazon and brought considerable damage to human life, flora, fauna, aquatic species, etc."[123]

The residents of the affected river basin faced devastating consequences, which were the results of the oil contamination in the river bodies. The development of oil and the associated deforestation of an estimated 2.5 million acres of land resulted in forced dislocation and extinction of the indigenous people, depletion of natural resources, and irreparable damage to the environment.[124] The indigenous people and the residents of the affected areas of the oil contamination have suffered from various health issues, such as skin rashes, memory loss, headaches, miscarriages, birth defects, and cancer.[125]

After causing years of damage to the environment and the rights of the indigenous people, the concession contract of *Texaco* came to an end in 1992. The legal battle against the atrocities of *Texaco* had started in November 1993, by way of a class action lawsuit[126] filed by the U.S. based attorney in federal court in New York on behalf of the indigenous people and the settled residents

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[122] Nathalie Cely, *Balancing Profit and Environmental Sustainability in Ecuador: Lessons Learned from the Chevron Case*, 24 DUKE ENVTL. L. & POL'Y F 353, 361 (2014).
[123] *Id.*
[124] Judith Kimerling, *supra* note 6, at 459-461. *See also* Judith Kimberling, *Indigenous Peoples and the Oil Frontier in Amazonia: The Case of Ecuador, Chevrontexaco, and Aguinda v. Texaco*, 38 NYU J. INT'L L & POL. 413, 459-462 (2006) - The author reported that the *Huaorani, Kichwa, Cofán, Siona, and Secoya* lost their lands. *Huaorini* were forced to relocate by the *Texaco* and others fled deeper into the forests. Indigenous groups such as *Tetetes, Tagaeri* disappeared as distinct groups by the time *Texaco* finished its oil operations.
[125] Damira Khatam, *supra* note 5, at 253.
[126] *Aguinda v. Texaco Inc*., 93 Civ. 7527 (S.D.N.Y. 3 November 1993).

of the Amazon basin, who are affected by the oil exploration activities.[127] The *Aguinda v. Texaco* class action lawsuit consists of 74 plaintiffs, and the putative class was estimated to contain not less than 30,000 people. However, the lawsuit did not identify all the affected indigenous people.[128]

The plaintiffs in the suit alleged that "they and the class had suffered injuries to their persons and property and 'are at a significantly increased risk of developing cancer as a result of their exposure'"[129] The litigation continued for nine years, and in 2001, the federal court dismissed the case on the ground *'forum non conveniens',* and told the plaintiffs of *Aguinda* to litigate the case in the courts of Ecuador.[130] On the decision of the federal court, the plaintiffs appealed to the Second Circuit Court of Appeals.[131] The appellate court also dismissed the case and upheld the decision of the district court that *Aguinda* "has everything to do with Ecuador and nothing to do with the United States."[132] It has been agreed by the *Texaco* that it will submit to the jurisdiction of the Ecuadorian courts, as a part of the dismissal.

In May 2003, the 46 plaintiffs of *Aguinda*, along with two additional plaintiffs filed a case against the *Chevron Texaco* (*Chevron* and *Texaco* were merged in 2001), in Scumbios Provincial Court of Justice.[133] This lawsuit is popularly termed as the *Lago Agrio* case – taking its name from the region, where oil

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[127] Judith Kimerling, *Indigenous People and the Oil Frontier in Amazonia: The Case of Ecuador, Chevrontexaco, and Aguinda v. Texaco*, 38 NYU J. INT'L L & POL. 413, 474 (2006).
[128] *Id.*, at 476-478.
[129] *Id.*
[130] *Aguinda v. Texaco Inc*., 142 F. Supp. 2d 534, 534 (S.D.N.Y 2001).
[131] *Aguinda v. Texaco Inc.*, 303 F. 3d 470 (2d Cir. 2002).
[132] *Id.*
[133] *Maria Aguinda v. Chevron Corp., Sentencia definitive, Corte Provincial de Justicia Sucumbios*, (February 14, 2011) file 2003-0002, 181-87.

operations had happened. Since then, the lawsuit has moved through the Ecuadorian judiciary. In 2011, the Scumbios Provisional Court ruled against the *Chevron Texaco* and ordered them to pay $9500 million as compensation for the damage caused to both environment and human life. *Chevron Texaco* filed an appeal on this decision. However, in 2013, the National Court of Justice decided the case and held the *Chevron Texaco* is liable for the socio-environmental damage caused in the *Lago Agrio* region.[134] The National Court of Justice upheld the decision of the Provisional court and ordered the *Chevron Texaco* to pay $9500 million towards "environmental redemption (treatment of waste, restoration of soil quality, and aquatic and terrestrial fauna and flora), provision of water services, implementation of mitigation measures for irreversible damage to human health and culture, community reconstruction and ethnical reaffirmation, compensation for public health problems and funding for the organization representing the claimants." [135]

If one thinks that the two decade long legal battle of the indigenous people and others, against the *Chevron Texaco* has come to an end, then it is completely wrong. Because in 2009, at the time when the litigation was undergoing in the Ecuadorian courts, *Chevron Texaco* filed a request for arbitration in the *Permanent Court of Arbitration* alleging that Ecuador had violated the *Ecuador-United States (1993) BIT*.[136] In this case, *Fundación Pachamama* and the *International Institute for Sustainable Development (IISD)* filed a

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[134] *Maria Aguinda Salazar y otros v. Chevron Corp., Corte Nacional de Justicia* (December 11, 2013).

[135] Lorenzo Pellegrini et. al., *International Investment Agreements, Human Rights, and Environmental Justice: The Texaco/Chevron Case From the Ecuadorian Amazon*, 23 J INT'L ECONOMIC L. 455, 461 (2020).

[136] Chevron Corp. and Texaco Petroleum Co. v. The Rep. of Ecuador (II), PCA Case No. 2009-23 (Sep. 23, 2009).

petition before the tribunal for participation as a non-disputing party.[137] The petitioners asked for participation in the arbitration proceedings with the consent of the parties to the disputes. Nevertheless, the tribunal relied on Art. 25(4) of *UNCITRAL Rules* and declined the petitioners permission to submit their claims or as an alternative to attend the oral hearings.[138] In addition to this, the tribunal under Art. 15(1) of the *UNCITRAL Rules* did not permit the participation of the petitioners as *amicus curiae*.[139] The arbitration in this case is separated into different tracks and the partial award of the second track, issued in 2018, ordered Ecuador to "[t]ake immediate steps, of its own choosing, to remove the status of enforceability from the *Lago Agrio* Judgement"[140] The assessment of the amount of compensation, which has to be paid by Ecuador as damages to the *Chevron Texaco* because of the *Lago Agrio*, will be part of the third track of the judgement.[141] Commentators critiqued that the "*arbitration might represent the last nail in the coffin for the quest of the Ecuadorian plaintiffs to obtain redress through the courts and hold Texaco/Chevron accountable*."[142]

The next one that comes in the line of discussion is *Piero Foresti v. South Africa*.[143] In this case, a group of Italian investors brought an action against

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[137] Chevron Corp. and Texaco Petroleum Co. v. The Rep. of Ecuador (II), PCA Case No. 2009-23, Petition for Participation as Non-Disputing Parties, (Octo. 22, 2010).

[138] Chevron Corp. and Texaco Petroleum Co. v. The Rep. of Ecuador (II), PCA Case No. 2009-23, Procedural Order 8, ¶ 17 (Apr. 18, 2011).

[139] *Id.*, ¶ 20.

[140] Chevron Corp. and Texaco Petroleum Co. v. The Rep. of Ecuador (II), PCA Case No. 2009-23, Second Partial Award on Track II, 515, ¶ 10.13 (Aug. 30, 2018).

[141] *Id.*, ¶ 10, 14.

[142] Lorenzo Pellegrini, *supra* note 135, at 464.

[143] Piero Foresti, Laura de Carli and others v. Rep. of South Africa, ICSID Case No. ARB(AF)/07/1, Award, (4 Aug. 2010).

the new mining legislation enacted by the South-African government for the up-liftment of the people who suffered due to apartheid practices. Before ending abruptly, the case against South Africa dragged for about four years. However, this case was decided in favour of South Africa and the tribunal ordered the Claimants to pay € 400,000 in respect of fees and costs.[144] Despite the fact that South Africa was still left with €5 million in unreimbursed legal fees, at that time, its government celebrated it as a *"successful conclusion"* in a press release. Although the case was decided in favour of the State, a more significant victory has been claimed by the investors of the mining sector. The pressure of the case permitted the investors to strike an unexpected deal with the South African government, permitting the companies to transfer just 5% of their ownership instead of 26%, which has been decided by the new mining charter.

Although the case was discontinued before the final arbitral award, it is extremely remarkable, as a number of new approaches have been introduced by the arbitral tribunal with respect to the *third-party* participation.[145] The tribunal made certain key notes in its procedural order[146] regarding the non-disputing *third-party* participation. It is the first *ICSID* case, where the arbitral tribunal allowed the non-disputing *third-party* to access those papers which were submitted to the tribunal by the parties, for enabling the non-disputing *third-party* to focus on their submissions.[147] Although it is a remarkable step in permitting the *third-party* to access the documents in investment disputes,

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[144] *Id*., at 32.
[145] Nicolette Butler, *supra* note 22, at 167.
[146] Piero Foresti, Laura de Carli and others v. Rep. of South Africa, ICSID Case No. ARB(AF)/07/1, Procedural Order, (Sep. 25, 2009).
[147] *Id*., ¶ 2.

the arbitral tribunal in this case also did not allow the *third-party* to participate in the oral hearings and give status as a party to the dispute to present their claims.

*Vattenfall v. Germany*,[148] is another significant case to continue this journey. It is yet another eloquent illustration of how transnational corporations work internationally and how the investment disputes cause a *regulatory chill* on sovereign States and violate environmental norms and human rights. The documents regarding the case are not available in public domain. However, the brief facts of the case are as follows. This case is related to the water permits granted to the *Vattenfall's Moorburg* power plant. Even long before the institution of this case, the power plant was controversial. The local residents and environmental activists opposed its construction because of the increasing concern over climate change and the effect of the project on the aquatic life and the dependents of the Elbe River. A water permit was granted to *Vattenfall* for its *Moorburg* project in 2008. However, as a response to the pressure from the local residents, strict environmental conditions have been imposed by the local authorities in order to limit the water usage utility and its effect on fish.

*Vattenfall* sued the authorities of Hamburg in the local courts and in its capacity as a foreign investor, it also brought a claim at *ICSID* under the *Energy Charter Treaty (ECT)*. *Vattenfall* said that these environmental measures taken by the Hamburg authorities were so strict and they contributed to the violation of their rights granted under *ECT*. This case ended in a settlement after *Vattenfall* succeeded in the domestic courts and a new water

[148] Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Rep. of Germany, ICSID Case No. ARB/09/6, Award (Mar. 11, 2011).

permit was received for its *Moorburg* project, which explicitly lowered the standards of environment that had been imposed originally. In this case also the environmental effects caused by the proposed power project and its impact on the local residents and the fishing communities, were not considered before the investment.

The vexed question of the sensitivity of Investor-State arbitration pertaining to the human rights interests of *third-parties* was once again raised[149] in the combined case of *Pezold v. Zimbabwe*,[150] and *Border Timbers Ltd. v. Zimbabwe*.[151] These arbitrations concerning "the escalation of Zimbabwe's Land Reform Programme, by which the property rights of white-owned estates were acquired, or otherwise rendered valueless, without compensation, in a reversal of past colonial land policies."[152] The claimants alleged that Zimbabwe expropriated their lands and filed for arbitration under the *Germany-Zimbabwe (1995) BIT* and *Switzerland-Zimbabwe (1996) BIT*. The arbitral tribunal in this case issued award in favour of the claimants and held that the government of Zimbabwe expropriated the lands of *von Pezold* family (Claimants) and also breached the *Fair and Equitable Treatment (FET)* and the *Full Protection and Security (FPS)* standards under the relevant *BITs*.[153] The tribunal also ordered the respondent (Zimbabwe) to pay moral damages

[149] Thomas Leary, *Non-Disputing Parties and Human Rights in Investor-State Arbitration*, 18 J. WORLD INV. & TRADE 1062 (2017).
[150] Bernhard von Pezold and Ors. v. Rep. of Zimbabwe, ICSID Case No. ARB/10/25 (2010).
[151] Border Timbers Ltd., Timber Products International (Pvt.) Ltd., and Hangani Development Co. (Pvt.) Ltd. v. Rep. of Zimbabwe, ICSID Case No. ARB/10/25 (2010).
[152] Thomas Leary, *supra* note 149, at 1063.
[153] Bernhard von Pezold and Ors. v. Rep. of Zimbabwe, ICSID Case No. ARB/10/25, Award, 303, ¶ 1016-1017 (July 28, 2015).

to the claimants for the pain and suffering caused to them, and also the costs of the arbitration proceedings.[154]

Keeping aside the political and historical importance of the award, the procedural order[155] dismissing the application of a third-party is the point of consideration. In this case, the *European Centre for Constitutional and Human Rights (ECCHR)* and four indigenous communities of Zimbabwe petitioned for leave to *third-party amicus curiae submissions* in the combined arbitral proceedings.[156] The petitioners sought permission to make *amicus curiae* submissions, access the key arbitration documents and permission to attend the oral proceedings.[157] The interesting point highlighted by the plaintiffs in their application was that the parties to the dispute incurred shared responsibility and asserted that the indigenous communities have rights under the international law in relation to the land, which is the subject matter of the case. They also submitted that the *International Human Rights Law* on indigenous peoples applies to this present arbitration proceedings.[158] The petitioners also argued:

> "…that, in light of the 'interdependence of international investment law and international human rights law', any decision in these conjoined arbitrations which neglects the content of the international human rights norms will be

[154] *Id*., at 304-305, ¶ 1020-1024.

[155] Bernhard von Pezold and Ors. v. Rep. of Zimbabwe ICSID Case No. ARB/10/25 (2010) and Border Timbers Ltd., Timber Products International (Pvt.) Ltd., and Hangani Development Co. (Pvt.) Ltd. v. Rep. of Zimbabwe, ICSID Case No. ARB/10/25. Procedural Order No. 2 (Jun. 26, 2012).

[156] *Id*., ¶ 1.

[157] *Id*., at 4-5, ¶ 14.

[158] *Id*., at 7, ¶ 27.

> 'legally incomplete'... they urge the Arbitral Tribunals to give due consideration to the duties of States and the responsibilities of companies with respect to the rights of indigenous communities."[159]

The tribunal did not agree with the application made by the petitioners and dismissed it. The tribunal solely relying on Rule 37(2) of *ICSID* Arbitration Rules, held that there is lack of independence and neutrality of the petitioners, it further opined that the proposed *non-disputing third-party* submission do not address a matter within the scope of the dispute and finally, the tribunal found that the petitioners do not have significant interest in the proceeding. As a result, the tribunal neither allowed the *ECCHR* and four indigenous communities to make *amicus* submissions nor allowed them to access the key documents of the arbitration and to participate in the oral hearings.[160]

The above cited examples show the clear neglect of rights of the people affected by the investment or by the *ISDS* awards. It doesn't necessarily indicate that arbitral tribunals always support the investors by undermining the regulations of the sovereign States made in the interest of environment and human rights. The recent *ICSID* awards are some of the best examples. In this regard, *Philip Morris v. Uruguay*[161] is worth considering. This award is a welcome decision for Latin America and the international community. It confirmed the States' right to regulate, especially on the issues of public health and also confirmed the high standard application when it comes to denial of justice. In this case, the tribunal allowed the non-disputing *amicus curiae*

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[159] *Id.*, at 8, ¶ 26.

[160] *Id.*, at 15-21, ¶ 48-63.

[161] Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Rep. of Uruguay, ICSID Case No. ARB/10/7, Award (July 8, 2016).

submissions by *World Health Organization (WHO)* and *WHO's Framework Convention on Tobacco Control,* and also held that the submissions were related to the matter within the scope of the dispute.[162] The enforcement of local laws that are aimed at the protection of environment or local communities by the arbitral tribunal could also be seen in the awards of *Pacific Rim v. El Salvador,*[163] *David Aven v. Costa Rica,*[164] *and Álvarez y Marín v. Panamá*.[165]

Although these cases show the arbitral tribunals' support in upholding the environmental issues and human rights aspects over investment, its effect cannot be uniform because of a lack of proper mechanism enabling the participation of non-disputing *third-party* in investment disputes. The *amicus curiae* option available for the *third-parties* to submit their claims is an incomplete remedy to the disease because the submissions have their own limitations and do not have any considerable value while deciding the dispute. Another reason emphasizing proper *third-party* participation in *ISDS* cases is that disputes like *Chevron Texaco* "shows how *ISDS* mechanisms generate a number of conundrums that go well beyond the specifics of the case."[166] The fact that has be noted from the foregoing cases is, in Investor-State arbitration disputes, "investor rights intersect human rights, but the arbitration mechanism did not reflect the importance of the latter and the fact that the

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[162] *Id*., Procedural order, at 6, ¶ 25 (Feb., 17, 2015).

[163] Pac Rim Cayman LLC v. The Rep. of El Salvador, ICSID Case No. ARB/09/12, Award (Oct. 14, 2016).

[164] David Aven, Samuel D. Aven, Giacomo A. Buscemi and Ors. v. The Republic of Costa Rica, Case No. UNCT/15/3, Award (Sep. 18, 2018).

[165] Álvarez y Marín Corporación S.A. and ors. v. Republic of Panama, ICSID Case No. ARB/15/14, Award (Sep. 12, 2018).

[166] Lorenzo Pellegrini, *supra* note 135, at 465.

protection given to investors would detract from human rights of individuals and communities affected by way the investors operated."[167]

The separation of investment protection from the human rights stated in the above quote means that the investment protection is "not accorded to the investors for the sake of human flourishing."[168] It does not mean in any way that the claims of *third-party* in the interest of human rights be treated as independent claims. This is because the general trend of case law favours the fact that the claims of human rights being independent do not have an opportunity to stand before the *ISDS* tribunals.[169] The case of *Biloune*[170] is the classical example in this regard. In this case, the tribunal does not show any interest in considering an independent claim for an alleged human rights violation.[171] On the other hand, with a similar outcome, the tribunal in *Toto* case,[172] gave importance to *denial of justice* claim and discussed various international human rights instruments regarding the same. At the end of the day, because of lack of proper evidence, the tribunal denied jurisdiction over the claim.[173]

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[167] *Id.*

[168] ANNE PETERS, BEYOND HUMAN RIGHTS: THE LEGAL STATUS OF THE INDIVIDUAL IN INTERNATIONAL LAW, 320 (Larissa van den Herik & Jean D' Aspremont eds., Jonathan Huston Trans, 2016).

[169] Yannick Radi, *Realizing Human Rights in Investment Treaty Arbitration: A Perspective from Within the International Investment Law Toolbox*, 37 NC J. INT'L L & COM. REG. 1107, 1123 (2012).

[170] Biloune v. Ghana Inv. Ctr., 95 I.L.R. 187, Ad Hoc Award on Jurisdiction and Liability (Oct. 27, 1989).

[171] *Id.*

[172] Toto Construzioni Genrali S.P. v. Republic of Lebnon, ICSID Case No. ARB/07/12, Decision on Jurisdiction, ¶¶ 157-160 (Sep. 11, 2009).

[173] *Id.*, at 168.

One primary reason for this kind of reluctance is pursuant to the consent of the parties, the investment arbitral tribunals only have the competence to hear claims that come within the ambit of their jurisdiction.[174] Which means the dispute resolution clauses in investment treaties and the relevant rules of arbitration, both play a crucial role in determining which claims the tribunal may hear.[175] Additionally, for determining the role of human rights in investment related disputes, the tribunals' interpretation of its own jurisdiction has been crucial.[176] Owing to the fact that the human rights claims indeed may not be competent, they cannot per se be excluded from the jurisdiction of the arbitral tribunal. "If and to the extent that the human rights violation affects the investment, it will become a dispute 'in respect of' the investment and must hence be arbitrable."[177] However, if the investment affects human rights, then the tribunals cannot exercise their jurisdiction to entertain the human rights claims and has to give a chance to the *third-party* to participate in the dispute because of the procedural restraints. This is an unfair aspect in the entire investment arbitration system driven by *ISDS*.

Not only does there exist complexities in establishing the jurisdiction on the human rights claims in investment disputes, but in certain cases the approach of the arbitral tribunal in providing the limited option of submitting *amicus*

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[174] Nicholas J. Diamond & Kabir A.N. Duggal, *Adding New Ingredients to an Old Recipe: Do ISDS Reforms and New Investment Treaties Support Human Rights?*, 53 CASE W. RES. L. INT'L L. 117, 121 (2021). *See* also ERIC DE BRABANDERE, INVESTMENT TREATY ARBITRATION AS PUBLIC INTERNATIONAL LAW: PROCEDURAL ASPECTS AND IMPLICATIONS (Cambridge Univ. Press, 2014); Clara Reiner & Christoph Schreuer, *Human Rights and International Investment Arbitration in* HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION (Pierre-Marie Dupuy et. al. eds., Oxford Univ. Press, 2009).

[175] *Id.*, at 122.

[176] *Id.*

[177] Clara Reiner & Christoph Schreuer, *supra* note 174, at 84.

*curiae* briefs to the non-disputing party or *third-party* is not satisfactory and sometimes it is even questionable. For instance, the arbitral tribunals in the combined arbitration of *Pezold v. Zimbabwe*,[178] and *Border Timbers Ltd. v. Zimbabwe*,[179] doubted the independence and impartiality of the petitioners (which is one of the criteria for allowing *amicus curiae* submissions under Rule 37(2) of the *ICSID* Arbitration Rules), in their procedural order deciding the non-disputing *third-party* application. In this case, despite following it, the tribunal doubted the neutrality of the petitioners on the basis that the chiefs of the indigenous communities are appointed by the President of Zimbabwe and found there exists a relationship between the chiefs and the President. [180] Moreover, the tribunals also considered the contention raised by the claimants regarding the funding of indigenous communities. Based on this, the tribunals consider that "the circumstances of petitioners application give rise to legitimate doubts as to the independence or neutrality of the [p]etitioners,"[181] and dismissed their application.

Similarly, in certain other cases, the arbitral tribunals do not even specify the reasons for rejecting the non-disputing *third-party* application. *Caratube v. Kazakhstan*[182] is one of the examples in this regard. In this case, the tribunal did not grant leave to *third-party* for submitting the *amicus curiae* briefs. Its

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[178] Bernhard von Pezold and Ors. v. Rep. of Zimbabwe, ICSID Case No. ARB/10/25 (2010).

[179] Border Timbers Ltd., Timber Products International (Pvt.) Ltd., and Hangani Development Co. (Pvt.) Ltd. v. Rep. of Zimbabwe, ICSID Case No. ARB/10/25 (2010).

[180] Bernhard von Pezold and Ors. v. Rep. of Zimbabwe, ICSID Case No. ARB/10/25 (2010) and Border Timbers Ltd., Timber Products International (Pvt.) Ltd., and Hangani Development Co. (Pvt.) Ltd. v. Rep. of Zimbabwe, ICSID Case No. ARB/10/25, Procedural Order No. 2, 17, ¶ 52-53 (Jun. 26, 2012).

[181] *Id*., at 18, ¶ 56.

[182] Caratube International Oil Company LLP v. The Rep. of Kazakhstan, ICSID Case No. ARB/08/12, Final Award (Jun. 5, 2012).

final award neither provided any details with respect to the recognition of the petitioners as *third-party* nor a reason as to why it did not allow the *amicus curiae* submissions.[183]

In contrast, the tribunals in *Apotex* cases,[184] by way of procedural orders rejected the non-disputing *third-party* application for submitting amicus curiae briefs. The applications in both disputes have been decided in a highly transparent manner and the reasons stated by the tribunals in the procedural orders for rejecting the applications appear to be just and fair. At the same time, in some other cases like *Philip Morris v. Uruguay*,[185] the tribunal in its final award gave adequate consideration to the *third-party amicus curiae* submissions and decided the case in upholding the health measures taken by the State.

The above discussion explains that the discretion of the investment arbitral tribunals do not require them to give specific reasons for their decision as to allow or reject the *third-party* petitions in *ISDS* cases. This is because of the lack of proper rules compelling the arbitral tribunals to provide robust reasons for rejecting the *third-party amicus* applications that are made in the interest of human rights. The process of handling the application provides a lot of discretion to the arbitrators, which in turn results in inconsistency as there is no precedent in the investment disputes. This evidence provides an assertion that the procedural rules need to be reformed for enabling better *third-party*

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[183] *Id.*

[184] Apotex Inc. v. The Government of United States, ICSID Case No. UNCT/10/2 (2010); Apotex Holdings Inc. and Apotex Inc. v. United States of America, ICSID Case No. ABR(AF)/12/1 (2012).

[185] Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Rep. of Uruguay, ICSID Case No. ARB/10/7, Award (July 8, 2016).

participation extending beyond written submissions in the interest of the human rights claims and to restrict the discretion of the arbitral tribunals in both deciding the non-disputing *third-party* applications and thereby enabling consistency across the regime.

This need for procedural reforms, which grants better *third-party* participation in *ISDS* cases, has been disregarded by the *WG III* in its reform process. As a matter of fact, it neither gave adequate importance to the issue of *third-party* participation nor considered the findings of the studies, as well as the reforms recommended in that regard. [186] In particular, it did not even consider the issue of *third-party* participation as a stand-alone concern, which needs peculiar reforms.

## IV. **Third-Party Participation and ISDS Reform Options**

As stated in the beginning, the *UNCITRAL* in its fiftieth session entrusted its *WG III* with a broad mandate to work on the possible reforms of *ISDS*, which is divided into three phases. With respect to the first phase of the mandate *i.e., identification of concerns,* the Note by the Secretariat (U.N. Doc. A/CN.9/WG III/WP. 149)[187] of the *WG III* classified the concerns of *ISDS* into three main headings: *consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals; arbitrators/decision makers; and costs and duration*[188] and these are detailed in the subsequent documents.[189] In its thirty

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[186] *See* Nicolette Butler, *supra* note 22, at 172-175; Jesse Coleman, *supra* note 108, at 7-12.

[187] UNCITRAL, Possible Reform of Investor-State Dispute Settlement (ISDS), Note by the Secretariat, 36th Sess., Oct. 29-Nov. 2, 2018, U.N. Doc. A/CN.9/WG III/WP. 149 (Sep. 5, 2018) [hereinafter U.N. Doc. A/CN.9/WG III/WP. 149].

[188] *Id*., at 3, ¶ 8.

[189] *See* UNCITRAL, Possible Reform of Investor-State Dispute Settlement (ISDS): Consistency and Related Matters, Note by the Secretariat, 36th Sess., Oct. 29-Nov. 2, 2018, U.N. Doc. A/CN.9/WG. III/WP. 150 (Aug. 28, 2018); UNCITRAL, Possible Reform of Investor-State Dispute Settlement (ISDS): Ensuring Independence and Impartiality on the Part

sixth session, the *WG III* declared that *"it was desirable that reforms be developed by UNCITRAL to address all the concerns"*[190] that were identified in the U.N. Doc. A/CN.9/WG III/WP. 149 and were elaborated in the subsequent documents. By this, the *WG III* finished the initial two phases of the mandate.

Nonetheless, certain commentators criticised this move by stating that the identification of the concerns regarding *ISDS* under phase two is incomplete because of the exclusion of "the consideration of *cross-cutting* and more systematic concerns."[191] It has been opined that those *cross-cutting* issues lie at the centre of the controversy of *ISDS.* One such concern - *third-party* participation in the *ISDS* proceedings. The three categories of concerns identified by the *WG III* did not recognise the issues relating to the *third-party* participation whose rights are being affected or at stake. However, the Note U.N. Doc. A/CN.9/WG III/WP. 149 recalled the emphasis made by *WG III* in its thirty-fifth session regarding the opportunity given to the States to raise additional concerns at its future sessions. The *WG III* may wish to consider whether other concerns pertaining to the *ISDS* regime would need further consideration.[192] In its thirty-sixth session, the *WG III* asked the States, who

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of Arbitrators and Decision Makers in ISDS, Note by the Secretariat, 36th Sess., Oct. 29-Nov. 2, 2018, U.N. Doc. A/CN.9/WG. III/WP. 151 (Aug. 30, 2018); UNCITRAL, Possible Reform of Investor-State Dispute Settlement (ISDS): Arbitrators and Decision Makers: Appointment Mechanisms and Related Issues, Note by the Secretariat, 36th Sess., Oct. 29-Nov. 2, 2018, U.N. Doc. A/CN.9/WG. III/WP. 152 (Aug. 30, 2018); UNCITRAL, Possible Reform of Investor-State Dispute Settlement (ISDS)-Cost and Duration, Note by the Secretariat, 36th Sess., Oct. 29-Nov. 2, 2018, U.N. Doc. A/CN.9/WG. III/WP. 153 (Aug. 31, 2018).

[190] UNCITRAL, Rep. of Working Group III (Investor-State Dispute Settlement Reform) on the work of its 36th Sess., Oct. 29-Nov. 2, 2018, at 6-19, ¶ 27-133, U.N. Doc. A/CN.9/964 (Nov. 6, 2018).

[191] Gus Van Harten et. al., *supra* note 10.

[192] U.N. Doc. A/CN.9/WG III/WP. 149, *supra* note 187, at 5, ¶ 17.

wished to raise the additional concerns, to submit them in writing before the next session.[193]

Subsequently, submissions were made to the *WG III* regarding other concerns including the participation of *third-party*, whose rights are being affected or at stake. At its thirty-seventh session, the *WG III* considered the following *cross-cutting* issues as other concerns: *(i) Means other than arbitration to resolve investment disputes as well as dispute prevention methods; (ii) Exhaustion of local remedies; (iii) Third-party participation; (iv) Counterclaims; (v) Regulatory Chill; (vi) Calculation of Damages*.[194]

The *WG III* considered the issue of *third-party* participation in *ISDS* as an issue warranting consideration for discussing the possible reform options. The participation of *third-party* includes participation of the general public and local communities affected by the investment or the dispute at hand,[195] though the rationale for and scope of such participation may vary.[196] The least opportunity available for the interested parties (*i.e., amicus curiae* option and the limitations of it, which has already been discussed in the previous part of this) to take part in the *ISDS* proceedings has been highlighted in the discussion. During this discussion, stress has been laid on certain prominent issues – (i) the *third-party* participation in *ISDS* proceedings would better enable the interested parties to be presented and considered by the investment

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[193] UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its thirty-sixth session' (29 October-2 November 2018) U.N. Doc. A/CN.9/964, 19, para 137.

[194] UNCITRAL, Rep. of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its 37th Sess., Apr. 1-5, 2019, at 6-8, ¶ 29-38, U.N. Doc. A/CN.9/970 (Apr. 9, 2019) [hereinafter U.N. Doc. A/CN.9/970].

[195] *Id*., at 7, ¶ 31.

[196] Jesse Coleman et. al., *supra* note 108.

tribunal regarding the subject matter of the dispute; (ii) such participation would back the consideration of certain issues including, issues relating to environment, protection of human rights, as well as obligation of the investors.[197] It has also been raised before the *WG III* that "as a matter of legitimacy of the *ISDS* system, it would be important that affected communities and individuals as well as public interest organizations be able to participate in *ISDS* proceedings beyond making submissions as *third-parties*."[198]

At the time of discussions, it was noted that the *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("Rules on Transparency")* as well as *Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration ("Mauritius Convention on Transparency")* addressed *amicus curiae* submissions by a *third-party* and by a non-disputing party to the treaty.[199] However, the question that was raised was whether the provisions of the transparency rules were insufficient to provide adequate consideration for the submissions of *third-party* and protection of their rights.[200] The reason for this question was because the *Rules on Transparency* and the subsequent *Mauritius Convention on Transparency* did not achieve desired results for protecting the rights of the affected parties.

These *Rules on Transparency* were adopted by the *UNCITRAL* on July 11, 2013.[201] These rules are the product of three years of negotiations and came

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[197] U.N. Doc. A/CN.9/970, *supra* note 194, at 7, ¶ 31.
[198] *Id.*
[199] *Id.*, at 7, ¶ 32.
[200] *Id.*
[201] U.N., Rep. of the United Nations Commission on International Trade Law, 46th Sess., July 8-26, 2013, at 14, ¶ 81-86 U.N. Doc. A/68/17 [hereinafter U.N. Doc. A/68/17].

into effect on 1st April 2014.[202] They introduced a significant degree of publicity of the arbitral proceedings, by providing, *inter alia*, for the public disclosure of awards and other key documents (Articles 2 and 3), open hearings (Article 6) and submissions by *third-party* and non-disputing parties to the treaty (Articles 4 and 5).

Speaking about the *amicus curiae* submissions, the *Rules on Transparency* distinguishes the submissions made by the *third-parties* and non-disputing parties to the treaty. Article 4 of the rules deals with the *amicus curiae* submissions made by *third-party*. However, the provision uses different terminology for those submissions. During the discussions, a question was raised about whether the *amicus curiae* term should be used for *third-party* submissions. It was noted that the *amicus curiae* participation in Investor-State arbitration proceedings was said to be a more recent evolution and it was recommended to avoid the use of the term *amicus curiae* and to use other words such as *"third-party submission", "third-party participation"*, or terms with similar kind of meaning.[203] A subsequent question was also raised on whether the term *third-party* was appropriate to use. Considering the various interpretations that could be given to it in different contexts and in different jurisdictions, the term "*third-persons*" was considered for use in the provision.[204] As a result the provision was titled as *"Submission by a third-person."*

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[202] Keith Loken, *Introductory Note to UNCITRAL on Transparency in Treaty-Based Investor-State Arbitration* 52 INT'L LEGAL MATERIALS 1300 (2013).
[203] UNCITRAL, Rep. of Working Group II (Arbitration and Conciliation) on the Work of its 55th Sess., Oct. 3-7, 2011, at 15-16, ¶ 71, U.N. Doc. A/CN.9/736, (Oct. 17, 2011) [hereinafter U.N. Doc. A/CN.9/736].
[204] *Id.*, at 16, ¶ 72.

When it comes to the contents of Article 4, a plain reading of paragraph one gives us a clear understanding that the acceptance of *third-person(s)* submissions lies at the discretion of the arbitral tribunal and the disputing parties.[205] Paragraph 2 sets a page limit for the application and such page limit will be determined by the tribunal itself. This paragraph also provided the information to be disclosed by the *third-person(s)* – including the nature, membership, and its objectives and activities; its connection with any disputing party; the financial or other assistance received by it for making the submissions from any government, person or organization; its interest in the arbitration; and the specific issues of fact or law that the *third-person(s)* intends to address in the submissions. Paragraph 3 of the Article laid down the factors to be taken into consideration for allowing such submissions: (a) whether the *third person* has a significant interest in the arbitral proceedings; and (b) the extent to which the submission would assist the arbitral tribunal in the determination of a factual or legal issue by bringing a perspective different from that of the disputing parties.

This Article also provides for *third-person(s)* submissions as a discretion given to the arbitral tribunal and disputing parties, but not as a right. It has also to be noted that this Article also confines the participation of the *third-person(s)* to make written submissions only. It does not provide any opportunity for them to participate in the arbitration proceedings. Through this, an inference can be drawn that the *amicus curiae* submissions by the

[205] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, Art. 4(1): "After consultation with the disputing parties, the arbitral tribunal may allow a person that is not a disputing party, and not a non-disputing Party to the treaty ("*third person(s)*"), to file a written submission with the arbitral tribunal regarding a matter within the scope of the dispute."

*third-party* in Investor-State disputes and the submissions by the *third-person(s)* to the investment arbitral tribunal under the *Rules on Transparency* are of same nature – limited – and also have the same value of consideration in the investment arbitration proceedings.

Although the *third-person(s)* participation is limited, the *Rules on Transparency* made laudable provisions regarding the disclosure of key documents of the arbitration proceedings and awards, to the general public. Article 2 and 3 of the Rules deal with the same. These provisions grant access to the necessary documents and key information of the arbitration proceedings to the *third-party/third-person(s)*, so that they can have a better knowledge of the dispute and can make submissions which are more relevant and appropriate for the arbitral tribunal to decide the case. However, Article 7 of the rules exempted certain information, which is *confidential or protected information* from publication of documents under Article 3.

The *Rules on Transparency* also contain another Article dealing with the submissions made by the parties other than the disputing parties. Article 5 provides for the submissions from another non-disputing party other than the *third-person(s)* stated in Article 3. The non-disputing party enumerated in the above stated Article is a State which is not a party to the dispute but a party to the investment treaty out of which the dispute arises. Article 5 allows submissions from a non-disputing State party. The Article has been given the heading *"Submission by a non-disputing party to the treaty."* However, the *Rules on Transparency* did not provide any meaning or definition for the *third-person(s)* stated in Article 3 and *non-disputing party to the treaty* stated in Article 5. If the general meaning of the term *non-disputing party* is considered, it also includes the *third-party/third-person(s)*. Whereas, the preliminary discussions on the draft of these rules explains that the submissions from the

*non-disputing party to the treaty* means the submissions from a State which is a party to the investment treaty but not a party to the dispute in hand.[206]

The wording of paragraph 1 of Article 5 clearly shows that the submissions by the *non-disputing party to the treaty* has to be compulsorily allowed by the arbitral tribunal. However, at the same time, it is also left to the discretion of the tribunal. One part of the paragraph says that the "tribunal shall.... allow.... submissions on issues of treaty interpretation from a non-disputing Party to the treaty." Next part of the Article says that "arbitral tribunal.... after consultation with the disputing parties, may invite, submissions on issues of treaty interpretation from a non-disputing Party to the treaty."[207] This means when it is necessary there exists a duty on the tribunal to accept the submissions from the *non-disputing party to the treaty*. In certain other cases, only after consultation with the disputing parties the tribunal may allow such submissions. However, when it comes to the submissions on other matters, which are within the ambit of the dispute, it is purely at the discretion of the tribunal whether to accept the submissions, that too after consultation with the disputing parties.[208] However, the submissions by the non-disputing State Party to a treaty is outside the scope of our present discussion.

These *Rules on Transparency* were applied for the first time in the case of *Iberdrola, S.A. and Iberdrola Energia. S.A.U. v. Bolivia*.[209] According to the first procedural order issued by the arbitral tribunal, the parties to the disputes agreed to the application of the rules to their proceedings although the case

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[206] U.N. Doc. A/CN.9/736, *supra* note 203, at 17, ¶ 78.
[207] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, Art. 5(1).
[208] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, Art. 5(2).
[209] PCA Case No. 2015-05.

was initiated under the 1976 *UNCITRAL* Arbitration Rules. Nonetheless, a concern was raised when the *Rules on Transparency* were adopted that their significance in practice could be limited.[210] In fact, these rules apply automatically to investment arbitrations arising out of the investment treaties concluded on or after 1st April, 2014 under the *UNCITRAL* Arbitration Rules.[211] In contrast, these rules only apply to the investment disputes under the *UNCITRAL* Arbitration Rules pursuant to investment treaties concluded before 1st April, 2014, provided that the parties to such treaty[212] or that the parties to the dispute[213] have accepted their application.

With this distinction, a fear was raised that the extension of the *Rules on Transparency* would largely be limited to the subsequent treaties concluded on or after 1st April, 2014.[214] It was noted that the claims raised under the investment treaties concluded before 1st April, 2014 would continue to be exempted from the application of the *Rules on Transparency*.[215] Against this background, the *UNCITRAL* decided to draft a convention designed specifically to provide the application of the *Rules on Transparency* to the roughly 3000 treaties, which were concluded before the rules came into effect.[216] The aim of this Convention was to "give those States that wished to make the *Rules on Transparency* applicable to their existing investment

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[210] Kohler & Michele, *supra* note 95, at 27, ¶ 57.
[211] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, Art. 1(1).
[212] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, Art. 1(2)(b).
[213] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, Art. 1(2)(a).
[214] Kohler & Potestà, *supra* note 95, at 28, ¶ 58.
[215] *Id.*
[216] *Id.*, at 28, ¶ 59.

treaties an efficient mechanism to do so."[217] As a result, the *Mauritius Convention on Transparency* was adopted by the United Nations General Assembly on 10th December, 2014.[218]

The *Mauritius Convention* helps to achieve the extension of the *Rules on Transparency* to the treaties that are concluded before their adoption. Article 2 of the *Mauritius Convention* explains the circumstances under which the *Rules on Transparency* are made applicable to the previously initiated Investor-State arbitration whether or not pursuant to the *UNCITRAL* Arbitration Rules. Although this Convention is a significant step in increasing the transparency in the Investor-State disputes, it did not achieve any better results for the increasing *third-party* participation in the investment disputes. This is because the *Mauritius Convention* also provides the same limited role that is granted at the discretion of the arbitral tribunal under the *Rules on Transparency* was applied to Investor-State arbitration pursuant to the treaties concluded before the adoption of the rules.

As the *Rules on Transparency* and *Mauritius Convention* both confine the affected *third-party* for making written submissions only and does not grant any further participation in the Investor-State arbitration disputes, the effectiveness of both the rules and Convention was doubted in the thirty-seventh session of the *WG III*. During discussions, specific comments were made by States and observers, which are appropriate to this issue, "focussing, for instance, on concerns that *ISDS* proceedings can impact the rights of *third-parties*, and indicating that the role and intent of *amicus curiae* submissions

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[217] U.N. Doc. A/68/17, *supra* note 201, at 21-22, ¶ 127.

[218] U.N., United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, G.A. Res., A/69/116 (10 December 2014).

are insufficient, and not intended, to address these issues."[219] It was also noted that *third-party* (affected communities and individuals as well as interested NGOs) participation must go beyond making *amicus curiae* submissions, which is relevant for the legitimacy of the *ISDS* regime.[220]

These discussions highlight the impact that *ISDS* may have on the rights and interests of *third-party*. However, with respect to the other concerns that were raised in the thirty-seventh session including *third-party* participation, the *WG III* had concluded that there was no additional concern that could be identified pertaining to *ISDS* at that stage of the deliberations.[221] It was noted that it would be necessary to consider all of the above-mentioned issues as the *Working Group* advanced instruments to address the concerns that had already been identified, so that they would be treated as legitimate by all relevant stakeholders.[222] With respect to the issues raised against *third-party* participation, it was felt by the *WG III* that some of those aspects could be addressed, as it dealt with concerns about inconsistency and incorrectness of awards, and as it developed means to give the treaty parties more control over the *ISDS* procedure.[223]

## V. **Conclusion**

The issue of *third-party* participation is a long standing debate in the Investor-State arbitration regime. The existing literature on the topic clearly contextualizes the fact that *third-party* participation by way of *amicus curiae*, increases transparency and legitimacy in the investment dispute settlement

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[219] Jesse Coleman et. al., *supra* note 107.
[220] U.N. Doc. A/CN.9/970, *supra* note 122, at 7, ¶ 31
[221] *Id*., at 8, ¶ 39.
[222] *Id*., at 8, ¶ 40.
[223] *Id*., at 7, ¶ 33.

system.[224] The commentators even advocated for greater *third-party* participation in investment disputes beyond submitting *amicus curiae* briefs. In contrast, on the other side of the ledger, there are concerns on the extending role of the *third-party* participation in the investment arbitration. First, allowing the *third-party* intervention in the proceedings could potentially increase the time and costs of arbitration,[225] as well as the practical burdens on an arbitral tribunal because it has to decide not only the subject matter of the dispute but also the additional claims brought before it.[226]

There is also a possibility that opening up the arbitration process for greater *third-party* participation can convert the procedurally informal and parties' convenient arbitration procedure into a "court-like" system.[227] As a result the arbitration procedure could *re-politicise* the dispute[228] by allowing to inculcate the political or ideological views against the wishes of the parties.[229] In the words of *Blackby Nigel & Caroline Richard*:

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[224] *See* A. Newcombe & A. Lemaire, *Should Amici Curiae Participate in International Arbitration*, 14 AM. REV. INT'L ARB. 121 (2003); J. Anthony VanDuzer, *Enhancing the Procedural Legitimacy of Investor-State Arbitration through Transparency and Amicus Curiae Participation*, 52 MCGILL L. J. 681 (2007); Daniel Barstow Magraw Jr. & Niranjali Manel Amerasinghe, *Transparency and Public Participation in Investor-State Arbitration*, 15 ILSA J. INT'L & COMP. L. 337 (2009); Jame D. Fry & Odysseas G. Repousis, *Towards a New World for Investor-State Arbitration through Transparency*, 48 N.Y.U. J. INT'L L. & POL. 795 (2016); Lucas Bastin, *supra* note 93, at 223-25; Tomoko Ishikawa, *supra* note 2, at 402-3, Barnali Choudhury, *supra* note 6; Eugenia Levine, *supra* note 7, at 217-19; Gomez, *supra* note 21, at 543-47.

[225] Lucas Bastin, *supra* note 93, at 225; Eugenia Levine, *supra* note 7, at 219; Kyla Tienhaara, *Third-Party Participation in Investment-Environment Disputes: Recent Developments*, 16 REV. EUR. COMP. & INT'L ENVTL. L. 230, 239 (2007);

[226] Eugenia Levine, *supra* note 7, at 219-20.

[227] *Id.*

[228] *Id*., at 220.

[229] Lucas Bastin, *supra* note 93, at 226.

> "[t]he intervention of third-parties seeking to advance their own political agendas may defeat the purpose of the [S]tate parties to investment treaties…and allowing partisan civil society groups to participate in investment treaty arbitration from a policy perspective may result in the re-politicization of investment disputes and the disruption of proceedings."[230]

Therefore, the resolution "of disputes in [such] conditions of complete publicity does not lend itself to such principled outcomes" and for obtaining 'nuisance value' compensation, there is a chance of exaggerating the claims by the parties.[231] Subsequently, allowing *third-party* would undermine the consensual nature of arbitration,[232] there will be "a fundamental departure from this established arbitral principle."[233] In the words of *Professor Viñuales,* "public legitimacy is a double-edged sword in that, if badly used, *amicus* intervention could undermine the very arbitration regime… may also erode the traditional basis of arbitral proceedings, namely consent of the parties."[234] Furthermore, *third-party* participation would also disrupt the confidentiality, privacy and autonomy of the parties by affecting the strategies of the parties.[235]

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[230] Blackby Nigal & Caroline Richard, *Amicus Curiae: A Panacea for Legitimacy in Investment Arbitration, in* THE BACKLASH AGAINST INVESTMENT ARBITRATION 273 (Michael Waibel et. al., (eds.), Kluwer Law International, 2010).

[231] Noah Rubins, *Opening the Investment Arbitration Process: At What Cost, for What Benefit?*, 3 TRANSNAT'L DISP. MGMT. (2006); Eugenia Levine, *supra* note 7, at 220.

[232] Gomez, *supra* note 21, at 549; Lance Bartholomeusz, *supra* note 23, at 282.

[233] Newcombe & Lemaire, *supra* note 224, at 32.

[234] Jorge E. Viñuales, *Amicus Intervention in Investor-State Arbitration,* 61 DISP. RESOL. J. 72, 75 (2007).

[235] *See* A. Boralessa, *The Limitations of Party Autonomy in ICSID Arbitration*, 15 AM. REV. INT'L ARB. 253 (2004); Eugenia Levine, *supra* note 7, at 220; Gomez, *supra* note 21, at 550, 553; Lucas Bastin, *supra* note 93, at 225.

It will also "upset the balance between the positions of the respondent and claimant by favouring one side."[236]

The preceding discussion laid emphasis on the rival issues that need to be considered for allowing the *third-party* beyond making written submissions in investment treaty arbitration. With respect to these concerns on *third-party* participation, divergent opinions have been expressed. On one side of the balance, it has been opined that "these concerns are either misplaced or avoidable, and therefore do not constitute valid objections."[237] On the contrary, it has been opined that "[t]he problems linked to *amicus curiae* [*third-party*] participation are real."[238] Each opinion has their own supporting arguments.[239] Keeping aside these divergent opinions, it is indisputable that increased *third-party* participation is associated with certain problems. Here, *Newton's* third law of motion has to be remembered, *"For every action, there is an equal and opposite reaction,"* which is not only confined to physics, but also applicable beyond the subject.

The analogy here is that incorporating a new mechanism or process will always be associated with certain opposite complications. However, those can be treated with a proper and systematic approach. Which means, the concerns

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[236] Tienhaara, *supra* note 225, at 240. *See* Gomez, *supra* note 21, at 551.

[237] Tomoko Ishikawa, *supra* note 2, at 391.

[238] Lucas Bastin, *supra* note 93, at 227.

[239] *See* Tomoko Ishikawa, *supra* note 2, at 391-401, where the author emphasised on how the concerns regarding *third-party amicus curiae* submissions are not legitimate oppositions in investor-State disputes. The author gave appreciable attention to the issues such as, effect on the arbitration strategies of the parties as well as the *re-politicization* of dispute. On a similar vein, *see* Tienhaara, *supra* note 225, at 240-41, where the author put forth the counter-arguments against each of the concerns and how they can be minimised or treated in practice. In contrast, Lucas Bastin, *supra* note 93, at 227-30, where the author opposed the above views and laid stress on the practical possibilities of how increased *third-party* participation will raise the cost of arbitration and burden on the arbitral tribunal.

pertaining to the *third-party* participation can be treated by developing a *'formalized criteria'*[240] that contain procedural changes. Without making the necessary procedural changes, neither will the *third-party* be allowed to participate beyond making written submissions, nor would it be possible to establish the jurisdiction of the arbitral tribunal on the claims put forth by them. This needs the creation of a *'harmonized approach'* to *third-party* participation among different arbitral rules.[241] Although it is undoubtedly difficult, this can be achieved by making significant changes to the central regimes regarding *third-party* participation and permitting "for guaranteed or mandatory, rather than purely discretionary, right of participation" based on a uniform criteria as well as structured discretion on the forms of participation.[242] This may lead to harmonization by way of *'cross-fertilization'*.[243]

These suggestions are difficult to incorporate but they are not *''impracticable and unhelpful''*[244] There is a possibility of achieving the enormous task of allowing the *third-party* participation and the treatment of their submissions with the help of *WG III*'s possible reform measures that are taking place at the multilateral level. The first reason in this regard is that the reform measures are completely focussed on the procedural aspects of the *ISDS* system.[245] Allowing *third-party* participation in investment disputes is also a procedural issue, which can be addressed by making necessary amendments to the arbitral

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[240] Eugenia Levine, *supra* note 7, at 221-23.
[241] *Id.*, at 222.
[242] *Id.*
[243] *Id.*
[244] Lucas Bastin, *supra* note 93, at 229.
[245] UNCITRAL, Rep. of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its 37th Sess., Apr. 1-5, 2019, at 6, ¶ 26, U.N. Doc. A/CN.9/970 (Apr. 9, 2019).

rules.[246] Second, the *WG III* also identified some concerns, which are akin to ones that restricted the *third-party* participation, as the ones that needed reforms. For instance, with respect to the concern of cost and duration of arbitration, *WG III* considered certain measures to streamline the *ISDS* procedures to expedite certain of its aspects, preparing principles or guidelines on allocation of cost and security for cost and also other tools to lower the costs of proceedings like, fixing acceptable budget and creating transparent fees structure.[247]

For lowering the costs of *ISDS* one of the suggestions received by *WG III* from the Government of Morocco is "to include the loser-pays rule, according to which the losing party must bear all the costs."[248] If the *WG III* is willing to adopt this rule or a rule of similar kind, in order to incorporate into Investor-State arbitration system, then there will be an obligation on it to make necessary arrangements for *third-party* participation also. Because Investor-State arbitration disputes "often involve issues that 'touch upon the matters of public policy' and therefore the arbitral awards have a significant impact on the welfare of the citizens of the host-State."[249] When a State loses while defending a legitimate public policy, along with the monetary compensation, the cost arbitration will also have to be paid out of the *'public purse'*. When

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[246] *See* Nicolette Butler, *supra* note 22, at 173-76, at end of the study the author recommended the possible amendments to *ICSID* rules for maximizing the participation of non-disputing parties in investor-State arbitration. *See also* Jesse Coleman et. al., *supra* note 108, at 7-11, the paper highlighted the procedural rules prevalent in various national legal systems allowing *third-party* participation.

[247] UNCITRAL, Possible Reform of Investor-State Dispute Settlement (ISDS): Note by the Secretariat, 38th Sess., Oct. 14-18, 2019, at 12-14 ¶ 51-60, U.N. Doc. A/CN.9/WG III/WP.166 (July 30, 2019) [hereinafter U.N. Doc. A/CN.9/WG III/WP.166].

[248] *Id.*, at 14, ¶ 57.

[249] Tomoko Ishikawa, *supra* note 2, at 394.

such a burden is going to be placed on the people, they must be given adequate representation.

When it comes to the next concern of eroding party's autonomy with increased *third-party* participation, as a general reform option, the *WG III* is working on enhancing the control of parties' over the treaties.[250] However, the reform measures undertaken by the *WG III* do not directly address the concerns halting *third-party* participation. They are to address the entire *legitimacy peril* of the Investor-State arbitration regime. However, the approach adopted in those reform measures can also be adopted to minimise the concerns against *third-party* participation.

There is also another possible way that the *WG III* reform options can support the *third-party* participation. It was felt by the *WG III* that some of the aspects of *third-party* participation could be addressed as it dealt with the concerns about inconsistency and incorrectness of arbitral awards. The primary reform options considered with respect to these concerns are: *(i) setting up a stand-alone review or appellate mechanism; (ii) setting-up a standing first instance and appeal investment court [Multilateral Investment Court - MIC]*. These reform options will address the issues of inconsistency in arbitral decisions and also to correct the erroneous arbitral decisions consisting manifestation errors of law.[251] These bodies will act as the international adjudicating bodies for investment disputes.

Thus, the best practice of allowing *third-party* participation before various international adjudicating mechanisms such as, *ICJ, International Tribunal*

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[250] U.N. Doc. A/CN.9/WG III/WP.166, *supra* note 247, at 8, ¶ 29-32.
[251] *Id.*, at 6-7, ¶ 17-23.

*for the Law of the Sea, European Court of Human Rights, International Criminal Courts and Tribunals, and WTO Dispute Settlement Body*,[252] can be adopted for the proposed stand-alone review mechanism as well as *MIC*, after making necessary amendments that are suitable and convenient to the Investor-State arbitration system. Along with the practice before the international adjudicating bodies, the approaches of various domestic legal systems in allowing *third-party* participation can also be considered.[253] While considering these practices and making reform options so as to systemize and enable full *third-party* participation in investment disputes, two issues have to be kept in mind. First, the "approach of expanding *third-party* participation rights should be adopted with caution; it appears to represent an appropriate balance between preserving the traditional features of arbitration and enhancing the systemic legitimacy of State-investor dispute resolution."[254] Second, the reform should not risk further fragmentation of ISDS.[255]

[252] For detailed discussion on the *third-party* before various international adjudicating bodies, *see* Lance Bartholomeusz, *supra* note 23, at 212-54.

[253] For further discussion on the approaches of *third-party* participation in various legal systems, their operation and their applicability in the context of *ISDS*, *see* Jesse Coleman et. al., *supra* note 108, at 7-11.

[254] Eugenia Levine, *supra* note 7, at 223.

[255] Submission from the Government of Bahrain, *supra* note 19.

# IS MARRIAGE A CONTRACT FOR SEXUAL SLAVERY? : A STUDY ON MARITAL RAPE

Siddeeqa Iram* and Sambit Kumar Patri**

**Abstract**

*Marital rape is a crime against a woman's bodily autonomy and integrity. The concept of 'consent' in sexual intercourse is vitiated merely due to a marital relationship existing between the parties resulting in a violation of the basic human rights of a woman. Marital rape was seldom recognized as an offence, as marriage, its associate regimes of property and sexual control acted as linchpin of patriarchal relations and arising power hierarchy. Till date, it has not been viable for the nations to implement the objectives of the International Instruments due to societal structures and thus, 36 nations, including India, are yet to criminalise marital rape.The non-criminalisation of marital rape in India is due to the orthodox interpretation of marriage as 'sanctified sex'. The embedded sexism in society gives rise to stereotyped gender roles in a marriage that often lead to gender-based violence affecting the enjoyment of human rights. Though it is agreed that criminalising marital rape would not be sufficient to protect women, it is the foremost step in achieving the objective. Therefore, the article seeks to analyse the historical and legal background of marital rape exemption and the impact of international human rights law in protecting women's rights. It further seeks to study the current situation in India and explore the way forward.*

## I. Introduction

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Marital rape, an act of sexual intercourse committed by a husband on his wife without her consent, is hardly recognised as a serious crime or a crime in itself. Women have been a target of gender-based violence for ages. Their human rights have always been under-recognised and subjugated. One such right women have been refused since time immemorial is the right to sexual autonomy. Marriage, despite being holy matrimony, was and continues to be reduced to nothing but 'sexual slavery'.[1]

The feminist movements of the 19th century questioned the concept of marriage, its purpose and the sexual politics involved that led to the redefining of the nature of marriage outside its sexual precept[2] and opened up a plethora of issues for the jurists and the legislators. The strong objection towards the exception that discredited all supporting theories led to the acknowledgement of the rights of women. With the development of law and society, though marital rape was recognised as an act of violence, the exemption was preserved by majority nations in some substantial manifestation.[3]

In the modern era, the law has evolved considerably to recognise women's rights and provide them protection in all spheres including the domestic realm but, the marital rape exemption still finds a place in the penal codes. The major historical argument supporting the non-criminalisation of marital rape by States is the invasion of familial privacy. It gained support because of the

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[1] VICTORIA C. WOODHULL, THE SCARE-CROWS OF SEXUAL SLAVERY 22 (1874); Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF L REV 1373 (2000) hereinafter "Hasday"

[2] Rebecca M. Ryan, *The Sex Right: A Legal History of the Marital Rape Exemption*, 20 (4) LAW & SOCIAL INQUIRY 941 (1995). hereinafter "Rebecca", https://www.jstor.org/stable/pdf/828736.pdf

[3] HASDAY, *supra note 1*, at 1375.

prevailing societal acceptance and reinforcement of discipline of men over their women that had created a shroud of privacy within the home.[4] Despite rape being recognized as a crime of violence, unlike the ancient times wherein it was a crime of sexual passion,[5] the issue of privacy continues to exist.

The normative view of marriage today in both law and society is a partnership of equals. But, unless marital rape is criminalised, the power hierarchy in a marital relationship will continue to exist[6] as the exception to marital rape is an obvious sign of acquiescence to power.[7] Therefore, the criminalisation of marital rape is mandatory for every nation to achieve equality in its actual sense and to safeguard their women's rights.

Even International Human Rights law over time has recognised violence against women ('VAW') including in the private sphere, yet marital rape remains drastically underrecognised.[8] The basic human rights violations are clear in marital rape as it involves coercion, assault and sometimes physical violence as well. Hence, instruments like the Social and Cultural Rights ('ICESCR'), International Covenant on Civil and Political Rights ('ICCPR'), Universal Declaration of Human Rights ('UDHR'), International Covenant on Economic and Convention on Elimination of Discrimination Against Women

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[4] Morgan Lee Woolley, *Marital Rape: A Unique Blend of Domestic Violence and Non-Marital Rape Issues,* 18 HASTINGS WOMEN'S L.J. 269, 272 (2007).

[5] Melanie Randall & Vasanthi Venkatesh, The Right to No: The Crime of Marital Rape, Women's Human Rights, and International Law, 41 BROOK. J. INT'l L. 153, 184 (2015).

[6] Lalenya Weintraub Siegel, *The Marital Rape Exemption: Evolution to Extinction,* 43 CLEV ST L REV 351, 353 (1995) hereinafter "Seigel"

[7] Katherine O' Donovan, *Consent to Marital Rape: Common Law Oxymoron,* 2 CARDOZO WOMEN'S LJ 91 (1995).

[8] Melanie Randall and Vasanthi Venkatesh, *The Right to No: The crime of Marital Rape, Women's Human Rights and International Law*, 41 BROOK J INT'L L 153, 154 (2015).

('CEDAW') identify human rights and obligate the States to protect women and comply with the standards of due diligence under the international law.

With this background, this article argues that criminalisation of marital rape is an essential step for recognising the rights of women in marital relationships. Further in specific, this article will not explore a gender-neutral approach to the issue of marital rape. To establish its case, Part II begins with the common law origins and justifications related to marital rape. It also discusses the causes and consequences of the same. Part III recognises the human rights violations marital rape presents and analyses the role of the International Human Rights Law in protecting women and the obligations under it. Part IV discusses the marital rape laws in the neighbouring countries of India, to establish the prevalent pattern and focuses on the Indian scenario of Marital Rape. Part V argues for the elimination of the marital rape exception in India while suggesting model reforms and further courses of action. Finally, Part VI concludes the paper by suggesting India to criminalise marital rape explicitly and take efficient measures for its implementation.

## II. **Historical Background and Causes of Marital Rape**

The traditional property theories originated based on biblical and Roman law that denied equal rights to women and regarded them as the legal property of their husbands.[9] According to the Cannon law, marriage is a sacred contract entered into with the primary purpose of procreation and for raising kids.[10]

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[9] Katherine Schelong, *Domestic violence and the State: Responses to and Rationales for spousal battering, Marital Rape and Stalking,* 78 MARQ. L. REV. 79, 85 (1994).

[10] EDWARD COLLINS VACEK S.J., *EVOLUTION OF CATHOLIC MARRIAGE MORALITY IN THE TWENTIETH CENTURY FROM BABY MAKING CONTRACT TO A LOVE-MAKING COVENANT* IN BIOETHICS IN MEDICINE AND SOCIETY, (Thomas F. Hefton, Sujoy Ray eds., 2020)

The couple once entered into marriage, that was a non-negotiable contract, had to give up their rights over their body and had to give the marital 'debt' of sexual intercourse, also known as conjugal debt.[11] Thereby, people did not believe in marital rape, as the rape of a married woman by her husband himself was not a transgression at all because a man was allowed to treat his chattel as he deemed appropriate.[12]

The position of marital rape in the legal arena was settled by a British Jurist, Sir Lord Matthew Hales in his infamous treatise, Plea of Crowns. He proclaimed in it, that "the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto the husband, which she cannot retract"[13] Though no other authority was cited by Lord Hale, it was clear that marital immunity was derived from the concept of 'conjugal debt'.[14] Hale's extrajudicial statement contended that marriage was a contract that included 'implied and irrevocable consent' of a wife to have sexual intercourse with her husband.

His statement gave rise to two theories; the 'implied consent' theory and the 'contract' theory. The main proposition in the implied consent theory was that all the sexual acts within marriage are to be assumed to be consensual as sexual intercourse is a fundamental part of marriage and the wife's consent is present through the marital contract. Hence, the idea of rape does not arise in the case

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[11] *Id.*

[12] Michelle Anderson, *Marital immunity, Intimate Relationships, and Improper References: A New Law on Sexual offences by Intimates*, 54 HASTINGS L. J. 1465, 1512 (2003).

[13] MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN, I 634 (Sollom Emlyn ed., 1736).

[14] P. K. Chaturvedi, *A Legal History of Marital Rape: The Erosion of Anachronism*, 1 INDIAN JL & JUST 122, 123 (2010). hereinafter "Chaturvedi"

of forced sex as the husband is justly exercising his marital right.[15] On the other hand, the contract theory was based on the idea of marriage as a matrimonial contract wherein a woman gives up her rights on her body as a result of the contract with her husband that cannot be retracted.[16]

The theories were criticised by the legal scholars while observing that the 'implied consent theory' was contradictory to the notion of consent in the criminal law jurisprudence. Further, it was criticised on the premise that a person is not allowed by law to consent to serious bodily harm or injury inflicted by another.[17] Even, the 'contract theory' was criticised as it failed to comply with the general standards of the contract law. It was because the matrimonial contract's terms were unwritten, not known to the contracting parties themselves, and no penalties were specified,[18] contravening all the general principles of contract law. Therefore, these major arguments discredited the crux of Hale's statement.

Apart from Hale's doctrine, there were many other doctrines and commentaries of legal scholars supporting the marital exemption. The widely cited commentary is of William Black Stone who quoted,

> "By marriage, the husband and wife are one person under the very being or legal existence of the woman, is suspended marriage, or at least is incorporated or consolidated into that of the husband: under whose wing, protection, and cover, she performs everything ... and her

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[15] Maria Pracher, *The Marital Rape Exemption: A Violation of a Woman's Right of Privacy*, 11 GOLDEN GATE U L REV 717, 728 (1981).
[16] SEIGAL, *supra* note 6.
[17] *Id.*
[18] *Id.*

> condition during her marriage is called coverture."[19]

The doctrine was known as the doctrine of unity or the doctrine of coverture. According to Blackstone, a woman's existence is merged with her husband's and they become an entity. He opined that as a wife's existence is merged, all her independent rights are forfeited and the husband assumes rights over her[20], legally claiming the wife's sexual identity. He agreed with Hale's contract theory with the exception that parties could not define the terms of the contract.[21]

The matrimonial contract, essentially a codification of natural law, considered the institution of marriage superior to the individuals.[22] The 18th and 19th century legal scholars including Blackstone contemplated marriage as a way of regulating the man's natural sexual instinct. By bringing it within the moral framework of marriage, regulation of male sex drive and procreation became essential objectives of marriage[23] which in turn necessitated the exclusive sexual right over a wife. A century later, James Schouler, expressed that the framework of the institution of marriage bestowed a man with a superior status than that of a woman along with the sexual authority.[24] He further wrote in his treatise, "Living in the same house, but willfully declining matrimonial intimacy and companionship, is per se a breach of duty, tending to subvert the

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[19] SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS, I 279 (George Sharswood ed. 1893).
[20] *Id.*
[21] *Id* at *274.*
[22] REBECCA, *supra* note 2.
[23] *Id* at 14.
[24] JAMES SCHOULER, A TREATISE ON THE LAW OF DOMESTIC RELATIONS: EMBRACING HUSBAND AND WIFE, PARENT AND CHILD, GUARDIAN AND WARD, INFANCY, MASTER AND SERVANT (1889).

true ends of marriage."[25] Even after a century, a woman's status in marriage was not recognised and hence, led to states creating privileged positions for the husbands in penal codes. The marital unity had the husbands escape sexual crimes by terming it as their 'conjugal right'.

### A. Modern Justifications Defending the Exemption

Hale's doctrine cemented without any legal basis or authority acted as a precedent for more than 200 years.[26] Though its authority was questioned across many courts in various jurisdictions including the United States , Canada and United Kingdom it was still used as a precedent to protect marital immunity.[27] The doctrine failed on numerous grounds. to justify marital exemption in rape laws; jurists and courts began to re-frame their arguments to protect the immunity.

The post-war scholars of the 20th century began justifying marital rape exemption on moral distinction between intramarital and extramarital sex.[28] The justifications defending marital rape included 1) risk of fabrication of cases[29] 2) use as a weapon of vengeance 3) lessening the likelihood of reconciliation[30] 4) difficulty in proving marital rape.[31] The arguments that continue to play a role till date are based on marital privacy and presupposed alignment of interests of husband and wife.[32] It was asserted that a wife's

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[25] *Id.*

[26] Sandra L. Ryder and Sheryl A. Kuzmenka, *Legal Rape: The Marital Rape Exception*, 24 J MARSHALL L REV 393, 396 (1991). hereinafter "Ryder and Kuzmenka".

[27] CHATURVEDI, *supra* note 14 at 126.

[28] HASDAY, s*upra* note 1 at 114; REBECCA, s*upra* note 2 at 17.

[29] RYDER AND KUZMENKA, *supra* note 26 at 4.

[30] Jeannie A. Morris, *The Marital Rape Exemption*, 27 LOY L REV 597, 605 (1981).

[31] SEIGAL, *supra* note 6.

[32] HASDAY, *supra* note 1 at 114.

interests are also served equally in a marital relationship, hence the husband could not be prosecuted for raping her, rendering the harm caused due to forced intercourse invalid.[33]

As feminism, constitutionalism, and international human rights became established as global movements, many legislatures and judiciaries across the globe like the UK, Canada, Australia and other countries declared marital rape exemption as an anomaly. By the end of the 1980s, the Australian jurisdictions had amended their laws to remove the marital rape exception.[34] In 1985, New Zealand[35] unequivocally abolished spousal immunity following Canada in 1983.[36] As for the US, treatment of marital rape as an offence differs from state to state,[37] but, New York was the first one to declare it unconstitutional.[38] Even, the English judiciary with *R v. R* [39], *R v. C*[40] and *R v. J*[41], its three crucial cases in 1991, ended the usage of Hale's doctrine. The House of Lords upheld that there was no justification for the exemption to marital rape and pushed Hale's doctrine to ring of antiquity considering it as anachronous.

### B. Causes and Consequences of Marital Rape

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[33] *Id.*

[34] Australian Law Reform Commission (ALRCR), *Family Violence: A National Legal Response*, (Law Reform Commission Report No. 114, 2010) https://www.alrc.gov.au/wp-content/uploads/2019/08/ALRC114_WholeReport.pdf

[35] New Zealand Rape Law Reform Act, 1985 (New Zealand)*;* The Crimes Amendment Act, 1985 (New Zealand).

[36] Criminal Code, RSC 1985, c C-46, § 271,(Canada) .

[37] VASANTHI VENKATESH AND MELANIC RANDLL, NORMATIVE AND INTERNATIONAL HUMAN RIGHTS LAW IMPERAIVED FOR CRIMINALISING INTIMATE PARTNER SEXUAL VIOLENCE: THE MARITAL RAPE IMPUNITY IN COMPARATIVE AND HISTORICAL PERSPECTIVE (Melanie Randall, Jeniffer Koshan and Patrica Nyaundi eds. 2017).

[38] *People v Liberta* 62 NY2d 651 (1984).

[39] *R v. R* [1991] 4 A E.R. 481.

[40] *R v. C* [1991] 1 All. E.R. 755.

[41] *R v. J* [1991] 1 All. E.R. 759.

The World Health Organisation (WHO) established that VAW constituted a grave health problem.[42] Numerous studies and research concluded that a variety of factors contributed towards the VAW inclusive of sexual violence and forced sex. Individual factors, institutional factors including socio-economic factors and community norms play a major role in determining the cause of violence against a woman in a particular society.[43]

Individual factors like witnessing abuse in a household in childhood, drinking disorders, low level of education[44] and predatory male sexuality[45] are contributory reasons as to why men force their wives. Community norms of accepted spousal violence including sexual violence, poverty, illiteracy and child marriages are the known reasons for marital rape. Further, discriminatory laws in a nation, patriarchal structure of society and notions of rigid masculinity and the unequal power relationship between husband and wife[46] arising from the same, contribute towards marital rape, granting men a superior status.

### i. Impact of spousal rape

[42] *Violence Against Women*, WORLD HEALTH ORGANISATION (9 Mar. 2021) https://www.who.int/news-room/fact-sheets/detail/violence-against-women (last visited Sept. 10, 2022)

[43] M. GABRIELLA, SEXUAL VIOLENCE IN INTIMACY: IMPLICATIONS FOR RESEARCH AND POLICY IN GLOBAL HEALTH, (M. Gabriela Torres, Kersti Yllo eds, 2021). hereinafter "Gabriela".

[44] Jennifer L. Solotaroff and Rohini Prabha Pande, *Violence against women and girls: Lessons from South Asia* South Asia Development Forum 95 (2014) https://openknowledge.worldbank.org/handle/10986/20153.

[45] DIANA E. H. RUSSELL, RAPE IN MARRIAGE (1990). hereinafter "Russel".

[46] *Id*; M. GABRIELA, *supra* note 43.

Marital rape includes instances of manipulative sexual coercion, physical forced sex, battering rape, force only rape and obsessive rape.[47] A national study conducted by Basile found that non-physical sexual coercion includes social or normative coercion that refers to the the duty of women to submit sexually to their husbands, and interpersonal coercion meaning hereby, the use of non-violent threats to make women realise their economic dependence on their partners.[48] It revealed that marital obligation resulted in 34% of women being coerced to have unwanted sexual intercourse with their spouse.[49]

Marital rape, like other forms of VAW has a drastic effect on the victim's mental, emotional, and physical health. Studies show that the severity of a rape is minimised by the individuals in cases of victim's familiarity with the perpetrator.[50] Research had shown that most of the women who were raped were battered as well and experienced violence in different ways.[51] The physical effects of marital rape as endorsed by scholars and individuals as being less serious than stranger rape have proved to be a myth.[52] It is because evidence suggests that forced sex results in bruises, chronic pain in genital

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[47] Elaine K. Martin, Casey T. Taft, and Patricia A. Resick, *A Review of Marital Rape* 12 (3) AGGRESSION AND VIOLENT BEHAVIOUR 329 (2007). hereinafter "Martin"

[48] Kathleen C. Basile, *Prevalence of Wife Rape and other intimate partner sexual coercion in a Nationally Representative Sample of Women* 17 (5) VIOLENCE AND VICTIMS 511 (2002); JANELLE N. ROBINSON, MARITAL RAPE PERCEPTION AND IMPACT OF FORCE (2017). hereinafter "Robinson".

[49] *Id.*

[50] S. Ben David and Ofra Schneider, *Rape perceptions, gender role attitudes, and victim-perpetrator acquaintance* 53(5-6) SEX ROLES 385 (2005); D.M. Vandiver, J.R. Dupalo, *Factors that affect college students' perceptions of rape. What is the role of gender and other situational factors?* 57(5) INTERNATIONAL JOURNAL OF OFFENDER THERAPY AND COMPARATIVE CRIMINOLOGY 592 (2013).

[51] D. FINKELHOR & K. YLLO, RAPE IN MARRIAGE, THE DARK SIDE OF FAMILIES: CURRENT FAMILY VIOLENCE RESEARCH, 119 (David Finkelhor, R J Gelles, G T Hotaling, M A Straus eds.1983). hereinafter "Finkelhor & Yllo".

[52] MARTIN, *supra* note 47.

areas and broken bones.[53] Gynaecological consequences[54] of marital rape include urinary tract infections, vaginal stretching, miscarriages,[55] pelvic pain, bladder infections,[56] stillbirths, infertility, unwanted pregnancies and the potential of being exposed to sexually transmitted diseases including HIV/AIDS.[57] A study conducted in 2000[58] found that forced sexual intercourse results in a higher chance of a woman contracting HIV due to non-use of contraceptives and barriers owing to the threats and refusal of their partner.

Moreover, the victims of marital rape suffer from psychological distress, like anxiety, intense fear, depression, shock, suicidal ideation, disordered sleeping, sexual distress, and post-traumatic stress disorder.[59] Significant evidence suggests that victims of marital rape suffer trauma longer than other victims[60] and are likely to be diagnosed with depression in comparison to victims of stranger rape or only physical violence.[61] It leads to victims suffering from negativity, poor self-image, low self-esteem and greater negative feelings towards men, relationships, and sex in general.[62] In addition

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[53] Boucher, Lemelin and McNicoll, *Marital Rape and relational trauma* 18 (2) SEXOLOGIES (2009).hereinafter "Boucher, Lemelin and McNicoll".

[54] MARTIN, *supra* note 47.

[55] J.C Campbell and P. Alfrod, *The Dark Consequences of Marital Rape* 89 (7) THE AMERICAN JOURNAL OF NURSING 946 (1989). hereinafter "Campbell and Alfrod ".

[56] *Id.*

[57] BOUCHER, LEMELIN AND MCNICOLL, *supra* note 53.

[58] Suzanne Maman and others, *The Intersections of HIV and Violence: Directions for Future Research and Interventions,* 50 SOCIAL SCIENCE & MEDICINE (2000).

[59] MARTIN, *supra* note 47; ROBINSON, *supra* note 48 at 10.

[60] RUSSELL *supra* note 45 at 193.

[61] Stacey Plichta and Marilyn Falik, *Prevalence of violence and its implications for women's health* 11 WOMEN'S HEALTH ISSUES (2001).

[62] FINKELHOR AND YLLO *supra* note 51; CAMPBELL AND ALFORD *supra* note 55.

to the psychological problems, marital rape victims are known to suffer more physical violence than stranger rape.[63] Therefore, spousal rape has been proved to be way more detrimental to a woman's health than a stranger rape as a consequence of the traumatic experience caused due to a sense of betrayal, disillusionment,[64] along with the fear of living with the perpetrator forever.[65]

The above-discussed studies provide us with an insight into disproving the myths related to marital rape's seriousness. But, the level of force in sexual assault involved within marriages and its impact on rape perception is still a grey area. Despite much research towards the rape literature, marital rape till today is an understudied phenomenon.[66]

## III. **International Human Rights Law and Its Impact on Women's Rights**

Women's rights and freedom were at the heart of a series of international conferences after the establishment of the United Nations (UN). The UN Charter recognised the principle that human rights and fundamental freedoms should be enjoyed by everyone 'without distinction as to race, sex, language or religion'. Since then, international human rights instruments have repeatedly affirmed the same.[67]

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[63] RUSSELL, *supra* note 45.

[64] R. Weingourt, *Wife rape: Barriers to identification and treatment* 39(2) AMERICAN JOURNAL OF PSYCHOTHERAPY, 187 (1985); RUSSELL *supra* note 45; FINKELHOR AND YLLO, *supra* note 51.

[65] RUSSELL *supra* note 45.

[66] *Id* at 12.

[67] Universal Declaration of Human Rights, G.A. Res 217 A(III) art. 1, 2 (adopted on Dec.10 1948); International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 art. 2(2), 3 (adopted on Dec. 16, 1966); International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 art. 2(1), 3(adopted on Dec. 16 1966).

Starting in 1975, world conferences for women were held to encourage political commitments concerning the rights of women.[68] As early as 1993, the Vienna Declaration on Violence Against Women (DEVAW) recognised VAW including marital rape under International Human Rights law. The 4th World Conference on women, in 1995 adopted the Beijing Declaration and Platform for Action[69], which was considered as an achievement for explicitly articulating women's rights as human rights and listing VAW as one of the twelve critical areas of concern.[70] It reiterated that VAW included "physical, sexual and psychological violence occurring in the family…. including marital rape and violence related to exploitation".[71] Gender-based violence was recognised as a grave human rights violation by impairing the enjoyment of other rights of women including the right to life, freedom from torture, right to equality, liberty and security, equality within family, health and so on. Marital rape in itself constitutes a breach of all these fundamental rights.[72]

Further, the reproductive rights recognised by Beijing Declaration and International Conference on Population and Development (ICPD) are breached in crimes of sexual violence including marital rape. They are described as couples' and individuals' essential rights to freely choose the number, spacing, and timing of their children, as well as to have the knowledge and resources to do so. It also encompasses the right to the best possible sexual and reproductive health, as well as the right of women to make their own

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[68] UNITED NATIONS, WOMEN'S RIGHTS ARE HUMAN RIGHTS E.14.XIV.5 (2014)

[69] World Conference on Women, *Beijing Declaration and Platform of Action*, U.N. Doc. A/CONF.177/20 (Sept. 15, 1995)

[70] Women's Rights at 75.

[71] *Report of the Fourth World Conference on Women*, U.N. Doc. AICONF.177/20/Rev.1 paras 112, 113, 117, 118 (1996).

[72] RANDALL AND VENKATESH, *supra* note 8 at 162.

decisions about reproduction and sexuality without fear of discrimination, coercion, or violence.[73] Hence, the states under international law are obliged to commit towards the prevention, investigation, punishment and provision of remedies for violence against women and take appropriate actions.[74]

### A. Marital Rape as a violation of human rights

Marital Rape impinges on myriad elementary human rights of women including the right to life, liberty and security,[75] equal protection under the law, non-discrimination and *jus cogens* norms like the prohibition against torture.[76] It also violates the right to self-determination, sexual and reproductive choice, humane treatment and physical and mental integrity recognised under international instruments, domestic laws, domestic courts and regional instruments.[77] The UN through its core international treaties like ICCPR and ICESCR recognises violation of the above-mentioned rights as nullifying women's human rights[78] and has imposed obligations on states to

[73] United Nations Economic and Social Council [ECOSOC], Sub-commission on Prevention of Discrimination and Protection of Minorities, Working Group on Minorities, Working paper: Universal and Regional Mechanisms for Minority Protection, U.N. Doc. E/CN.4/Sub.2/AC.5/1999/WP.6 (May. 05, 1995).

[74] Convention on Elimination of All Forms of Discrimination Against Women, 1249 UNTS 13 (Adopted on December 18 1979)

[75] Universal Declaration on Human Rights, G.A. Res 217 A(III) arts. 3, 9 (Adopted on December 10 1948).

[76] RANDALL AND VENKATESH, *supra* note 8 at 177.

[77] American Convention on Human Rights, 1144 U.N.T.S. 123, arts. 1, 2, 5, 11 & 25 (Adopted on Jul. 18 1978); African Charter on Human and Peoples' Rights, 21 ILM 58 (African Charter) art. 2, 3 &5 (Adopted on Jun. 27 1981).

[78]International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (Adopted on Dec. 16, 1966); International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 (Adopted on Dec. 16, 1966).

protect the same regardless of the violation occurring within public or private life.[79]

A comprehensive international binding authority, Convention Against Torture (CAT) identifies 'torture' as an 'intentionally inflicted' act that imposes both 'severe pain and sufferings' and marital rape satisfies the same.[80] The prohibition against torture is a peremptory norm accepted under international law[81] and hence, CAT mandates the penalisation of acts of torture by states.[82] The standard of due diligence under international law further prohibits states from prosecuting any violation of the convention as a mere 'ill-treatment' by imposing less serious sanctions or civil remedies.[83]

However, marital rape is not categorically specified in the international instruments. The treaty bodies like the CEDAW Committee have interpreted these rights to include the prohibition of marital rape. States accept the jurisdiction of the treaty bodies by ratifying these conventions, monitoring state compliance and providing the substantive content for the rights and the nature of obligations through general comments and recommendations. In furtherance of the same, many global studies had been conducted to identify

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[79] UNGA, *Declaration on the Elimination of Violence against Women*, Res 48/104 (20 December, 1993) art. 4(c); UN CEDAW, General Recommendation No 19 UN Doc HRI/GEN/1/Rev.8 (1992).

[80] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984 1465 UNTS 85 (CAT) art. 1.

[81] ILIAS BANTEKAS AND LUTZ OETTE, INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE 504 (2016).

[82] International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (Adopted on Dec. 16, 1966); International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 (Adopted on Dec. 16, 1966); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85 (Adopted on Dec. 10, 1984).

[83] Committee Against Torture, *CAT General Comment No. 2 on interpretation of article 2 by State parties*, CAT/C/GC/2 para 10 (2008).

the prevalence of VAW. A UN study revealed that intimate partner violence, which encompasses sexual, physical, and psychological coercion, is the most frequent kind of violence suffered by women throughout the world.[84] The 2013 study by WHO had reported that 1 out of every 3 women faces physical and/or sexual violence by an intimate partner or sexual violence by a non-partner.[85] In addition to it, a recent study by Lancet reported that every 4th woman in the world faces intimate partner violence within her lifetime.[86] This suggests that marital rape is much prevalent and requires immediate recognition by the non-criminalising states of the world.

### B. The International view on criminalisation of Marital Rape

Rape laws were introduced in society to protect the rights of men over their 'property' rather than to protect women's fundamental rights. The definition of rape as a crime against morality and honour in statutes of certain nations such as Hungary indicate the same.[87] The acceptance of marital rape in societies to an extent that if the perpetrators marry their victim, the marital rape exemption applies retroactively, nullifying the assault[88] reprehensibly

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[84] UN, ENDING VIOLENCE AGAINST WOMEN: FROM WORDS TO ACTION (2006).

[85] *Global and regional estimates of violence against women: prevalence and health effects of intimate partner violence and non-partner sexual violence* (WHO) file:///C:/Users/siddi/Downloads/9789241564625_eng.pdf (last visited Mar. 2, 2022)

[86] Lynmarie Sardinha et al., *Global, regional and national prevalence estimates of physical, sexual or both intimate partner violence against women in 2018,* 399 LANCET JOURNAL (2022).

[87] *Hungary: Cries unheard: The failure to protect women from rape and sexual violence in the home,* Amnesty International, EUR 27/002/2007 (2007), https://www.refworld.org/pdfid/465bfa162.pdf (last visited Mar. 14, 2022)

[88] UN Commissioner of Human Rights, *Report of Special Rapporteur on Violence Against Women, Its Causes and Consequences*, U.N. Doc E/CN.4/2002/83 (31 January, 2002).

degrades the rights of women proving that states still believe in traditional theories.

Marital rape continues to be seen as something superficial, despite its recognition under international law as well as many national statutes.[89] VAW is endemic in every country and culture affecting millions of women across the world. The first multi-country study on VAW found that women were more likely to be victims than perpetrators of intimate partner violence.[90] It was reported that intimate partner violence accounted for the majority of women's experiences of violence.[91] Half of the countries involved in the study reported lifetime prevalence of intimate partner physical and/ or sexual violence and co-existence of psychological violence.[92]

In addition to it, the WHO had conducted the largest ever study on prevalence of VAW and reported that every 1 in 3 women around 736 million are subjected to physical or sexual violence by an intimate partner wherein it begins at an early age of 15-24 years for every 1 in 4 women who have been in a relationship.[93]

Hence, the vague notion of physical violence being attached to marital rape indicates the failure in identification and recognition of the concept of 'consent', violating the rights of married women. The International Criminal

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[89] Contravention of Sexual Offences Act, 2003; People v. Liberta, N.Y.S.2d 207 (1984); Merton v. State, 500 So.2d 1301 (1986).

[90] UN, THE WORLD'S WOMEN 2015: TRENDS AND STATISTICS (E.15.XVII.8) 155.

[91] WHO, *WHO Multi-Country Study on Women's Health and Domestic Violence Against Women: summary report of initial results on prevalence, health outcomes and women's responses* (2005).

[92] WORLD'S WOMEN, *supra* note 89 at 155.

[93] World Health Organisation [WHO], *Violence Against Women Prevalence Estimates*, (2021), https://apps.who.int/iris/bitstream/handle/10665/341338/9789240026681-eng.pdf.

Court's Rules of Procedure and Evidence identifies sexual violence as a lack of consent and consent obtained from coercive methods.[94] In a similar context, the Convention on Elimination of Violence Against Women (CEDAW) Committee rightly observed, that the narrow interpretation of rape and rape within marriage being restricted to using physical force and not lack of consent was problematic and recommended the States to define rape as sexual intercourse lacking consent.[95] It further asserted that sexual crimes be treated as violations of women's rights and not as crimes defending morality.[96]

Hence, intimate partner violence has been recognised by the international community due to its prevalence across the world affirming that women's rights are not yet acknowledged.

### C. State Obligations: Standard of Due Diligence

Historically, the protection of human rights, in general, was perceived as an obligation of States to refrain from doing anything that could violate women's rights, hence excluding the omissions and violations within the private sphere. The application of International Human Rights Law suffered from the liberal and minimalist interpretation of State, creating a public/private dichotomy in the issues of violence against women as well.[97] However, since the 1980s and 1990s, this interpretation has been criticised as perpetuating violence

[94]International Criminal Court, *Rules of Procedure and Evidence*, Doc. No. ICC-ASP/1/3 (2019) https://www.icc-cpi.int/Publications/Rules-of-Procedure-and-Evidence.pdf.
[95] CEDAW, Report of the Committee on Elimination of All forms of Discrimination Against Women Committee U.N. Doc. No. A/57/38 (September 15, 2002).
[96] CEDAW, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Hungary* U.N. Doc. CEDAW/C/HUN/CO/6 (August 10, 2007).
[97]UN Special Rapporteur, *Report of the Special Rapporteur on violence against women, its causes and consequences,* UN Doc. E/CN.4/2006/61 (2006).

stemming from male bias.[98] Therefore, to address the concerns of violence against women, in 1979, the general assembly adopted a specific convention, i.e. the Convention on Elimination of Violence Against Women ('CEDAW').

CEDAW recognises gender-based violence against women both in public and private life as an obstacle to women's enjoyment of human rights and fundamental freedoms.[99] The CEDAW Committee explicitly affirms the obligation of the State to prevent violation of rights within the private sphere as well.[100] The development of State responsibility in issues related to VAW can be drawn from the standard of due diligence under international law. It holds the State accountable for illegal actions committed by State actors, non-State actors including private persons in the public and private domain. The concept of due diligence was extended to VAW through Article 4 (c) of DEVAW,[101] which specifies the exercising of a standard of due diligence by the States as a yardstick to determine the extent of the fulfilment of obligations in combating violence against women. Article 2(e) of CEDAW was interpreted as an obligation of due diligence under international human rights law.[102]

The State's active intervention in transforming the social and material structures revolving around VAW to make the State less patriarchal is a part

[98]UN, *supra* note 68 at 26.
[99] GENERAL RECOMMENDATION NO. 19, *supra* note 78.
[100] *Id.*
[101] UNGA, *Declaration on the Elimination of Violence against Women,* Res 48/104, (20 Dec 1993).
[102]UN Committee for the Elimination of All Forms of Discrimination against Women, *General Recommendation No 35* CEDAW/C/GC/35, (2017); GENERAL RECOMMENDATION NO. 19, *supra* note 78.

of its due diligence obligation.[103] The UN Special Rapporteur on VAW had elaborated that the State's obligation to prevent violence against women included recognition by way of ratification of treaties, enactment of special legislation and initiation of positive action from the State through policies, campaigns, awareness programmes and creation of special mechanisms to tackle the same.[104] Further, it was opined that a law fails to meet the standard of due diligence if it is gender-neutral or exempts domestic violence under certain conditions.[105]

Moreover, while recognising the prohibition of torture as a principle of customary international law and as a peremptory norm, a series of historic decisions of the European Human Rights Commission, Inter-American Court on Human Rights and CEDAW Committee had confirmed the position of the standard of due diligence as an accepted norm within international human rights law.[106] The due-diligence standard requires that States impose 'severe' and effective sanctions against spousal violence to prevent future conduct 'because of the ongoing nature of the relationship between victim and perpetrator'.[107] Thus, due diligence has been emphasised as more than the

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[103] UNHCR, *supra* note 96.

[104] *Id.*

[105] UN Special Rapporteur, *Report of the Special Rapporteur on violence against women, its causes and consequences- Addendum Mission to Netherlands* A/HRC/4/34/Add.4 (2007).

[106] Velásquez Rodríguez v Honduras, IACHR Series C No 4, [1988] IACHR 1, (1989) 28 ILM 291 ; Bevacqua and M.C. v Bulgaria App. No. 71127/01 (ECtHR 2008); Opuz v Turkey App no. 33401/02 (ECtHR 2009); AT v Hungary Communication No. 2/2003 (CtEDAW 2005); Maria da Penha v. Brazil (2001) EHRR (Commission Decision); Lenahan (Gonzales) v United States (IACHR) OEA/Ser.LV/II. 142; Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, and replacing Framework Decision 2001/220/JHA, [ 2012] OJ L315, 57; GENERAL RECOMMENDATION NO.35, *supra* note 101.

[107] UN Special Rapporteur, *Report of the Special Rapporteur on Violence against Women, its Causes and Consequences — Promotion and Protection of All Human Rights, Civil, Political,*

mere enactment of formal legal provisions and that the State must act in good faith to 'effectively prevent' VAW,[108] the State's inaction and blunt response towards VAW is a violation of international law.

## IV. **The Indian Scenario of Marital Rape**

Unlike the European and American regions, Asia does not have a regional human rights mechanism[109] due to under-development, population pressure and historical exploitation by colonisers.[110] Further, the patriarchy embedded within the society is responsible for the circumstances that perpetuate social norms conducive to continuing violence against women.[111] Hence, VAW has been considerably high in the south-Asian region.

A regional analysis of VAW in South Asia covering India and its neighbours reports the prevalence of domestic and specifically spousal violence as the predominant type of VAW.[112] Though, unlike India, some of them have recognised marital rape as a criminal offence, the sentencing policy reflects disparity. For instance, Bhutan identifies marital rape as a crime

*Economic, Social and Cultural Rights, Including the Right to Development* UN Doc A/ HRC/23/49 (2013).

[108]UN Special Rapporteur, *Report on Violence Against Women, its causes and Consequences*, UN Doc. E/CN.4/2000/68 para 51-53 (2000).

[109] Surya Deuja, *Establishing Robust Human Rights Mechanism in South-Asia* 6 (1) SOUTH ASIA HRM (2010), available at https://forumasia.org/documents/South%20Asia%20HRM%20%20Surya's%20Article%20in%20AHRD.pdf. (last visited Feb 2. 2022)

[110] Gyan Basnet, *Human Rights system for SAARC: Problems and Perspectives* 76 FOCUS (2014), available at https://www.hurights.or.jp/archives/focus/section3/2014/06/human-rights-system-for-saarc-problems-and-perspectives.html. (last visited Feb. 2, 2022)

[111] SOLOTAROFF AND PANDE, *supra* note 44.

[112] *Id.*

unconditionally but considers it as a petty misdemeanour with far fewer penalties than rape.[113]

Even in Bangladesh, stranger rape is punishable with an imprisonment of a minimum of 10 years extendable up to life imprisonment, whereas marital rape that is recognised partially is punishable with 2 years of imprisonment.[114] Meanwhile, in Sri Lanka, marital rape is a crime only if the woman is aged below 16 years or is officially separated from her spouse.[115] Contrary to it, Pakistan is the only country in the south-Asian region to have recognised marital rape at par with stranger rape in 2006.[116]

### A. Marital Rape Exemption in India

India is a party to major conventions like the UN Charter, ICCPR and CEDAW that promote and recognise women's rights. Owing to the British colonisation of India and their role in drafting the Indian Penal Code ('IPC'), the marital rape exemption has a place in the code. Section 375 of IPC, which defines rape, contains an exemption that "sexual intercourse by a man with his wife, the wife not being under fifteen years of age".[117] It was not until 1983 that it was amended for the 1st time owing to the huge public uproar due to the incident leading to the ruling of the apex court in *Tukaram v. State of*

[113]Sexual Rights Database, *Marital Rape*,(18 January 2022), available at https://sexualrightsdatabase.org/countries/479/Bhutan. (last visited Feb. 2, 2022)
[114] The Penal Code 1860, (BD) § 375.
[115] G.I.D. Isankhya Udani, *Contesting the Consent: An Analysis of The Law Relating To Marital Rape Exception In Sri Lanka* 14(4) INTERNATIONAL JOURNAL OF BUSINESS, ECONOMICS AND LAW (2017) https://www.ijbel.com/wp-content/uploads/2018/01/LAW-45-1.pdf. (last visited Feb.2, 2022)
[116] The Pakistan Penal Code 1860, (PAK) § 375.
[117] Indian Penal code 1860, (IND) § 375.

*Maharashtra.*[118] This amendment played a significant role in developing the concept of consent to a certain extent by considering the consent of a woman of unsound mind or an intoxicated woman to be invalid. In furtherance, rape by persons in authority was also recognised and added in Section 376B to 376D.[119]

In 2012, the infamous Nirbhaya Gang-rape case that shook the nation led to the constitution of the Justice J.S. Verma Committee to recommend stringent reforms in the criminal law for sexual crimes. The committee was the first to have suggested the repealing of the Marital rape exemption.[120] The recommendations were, however, not implemented as the Parliamentary Standing Committee on Home Affairs had rejected them on the grounds of endangering the institution of the family.[121] Later, in 2015 and 2018, a private member bill was introduced in Lok Sabha to amend the Marital Rape exemption.[122] It had acknowledged that criminalisation was an essential step to protect the sexual freedom of married women.[123] But, it could not make it as law of the land.

### i. Justifications Against Criminalisation of Marital Rape

[118] Tukaram v. State of Maharashtra, 1979 SCR (1) 810.
[119] *Id.*
[120] Ministry of Home Affairs, Justice J.S. Verma, Justice Leila Seth and Gopal Subramanium, *Report of the committee on Amendments to Criminal Law* (2013) https://prsindia.org/policy/report-summaries/justice-verma-committee-report-summary.
[121] Parliamentary Standing Committee on Home Affairs, *Report on The Criminal Law (Amendment) Bill, 2012* (Report No 167, 15th Lok Sabha, 2015), http://164.100.47.5/newcommittee/reports/EnglishCommittees/Committee%20on%20Home%20Affairs/167.pdf.
[122] Parliamentary Debates, Rajya Sabha, 4 December 2015, 113 (Shri Avinash Pande).
[123] The Women's Sexual, Reproductive and Menstrual Rights Bill, No. 255, 2018.

Indian society continues to believe in the traditional theories on marriage and the duties of women. Despite the progression of the country in many aspects since independence, the non-recognition of marital rape is an example of the existing lacunas. Though due to the development of law the traditional notions have been discredited, the modern justifications for marital rape exemption continue to play a key role in the non-recognition of spousal rape in India.

Broadly, the modern arguments defending the marital rape exemption under Section 375 of the IPC are the availability of other recourses for victimised women and intrusion in familial privacy leading to the disestablishment of the institution of the family. However, the Indian Government had acknowledged the infringement of women's rights in the private sphere by enacting the Protection of Woman from Domestic Violence Act, 2005 ('DV Act') which identifies 'sexual abuse' as a part of domestic violence[124] yet, it continues to base its reluctance of recognising marital rape as a crime on marital privacy.

The DV Act further under Section 3(d) defines sexual abuse as "any sexual action that harms, humiliates, degrades, or otherwise breaches the dignity of a woman, which can be the reason of a legal proceeding against their partner."[125] This definition satisfies the components of marital rape, but, as the proceedings are civil in nature, providing for compensation and restrainment orders, it fails to identify and address the concerns of women completely.

[124] Protection of Women from Domestic Violence Act, 2005, No. 43, § 3, Acts of Parliament, 2005.
[125] *Id.*

The justification of availability of other remedies for victims of marital rape under Section 498 A of IPC[126] and Section 13 of the Hindu Marriage Act, 1955, providing cruelty as a ground for divorce[127] is flawed in itself as these recourses fail to acknowledge the violation of human rights of women involved and consider marital rape as less serious than stranger rape. The suggested remedies do not discourage the behaviour of the perpetrators but rather, provide a choice to the woman to remove herself from such 'dangerous position'.[128] Therefore, the criminalisation of marital rape is the foremost step towards identifying marital rape as a crime of VAW and safeguarding their rights.

The most prominent of modern defences to marital rape exemption is the intrusion of a couple's privacy.[129] It is believed that a matrimonial relationship depends on intimacy protected from outside scrutiny and would fail and break if the law intervenes in the sanctity of the relationship.[130] However, considering the psychological and physical harm a woman undergoes within a marriage due to non-consensual sex, the non-intervention by the State within the private sphere would cause greater harm than remedy.

The legislature's hesitance to not recognise marital rape based on grounds of privacy is biased as there have been instances of legislature venturing into the private sphere previously, for instance, the DV Act and Section 489 A of IPC.

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[126] Indian Penal Code 1860, § 498(A).
[127] The Hindu Marriage Act, 1955, No. 25, § 13, Acts of Parliament, 1955.
[128] Krina Patel, *The Gap in Marital Rape Law in India* 42 (5) FORDHAM INTERNATIONAL LAW JOURNAL (2019). https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2760&context=ilj.
[129] *Id.* at 1529.
[130] CHATURVEDI, *supra* note 14.

It is widely misunderstood that the 'privacy' envisioned in the Constitution does not protect spaces but rather the individuals within those spaces.[131] The argument of privacy as an element for non-interference in the marital sphere is erroneous because, in a case where the act of a party violates the sexual autonomy and dignity of another person, the right to privacy cannot protect such individuals.[132]

### ii. Judicial Response

The Indian judiciary has been ambiguous while dealing with the issue of marital rape. The Hon'ble Supreme court in *Independent Thought v. Union of India*[133] acknowledged that marriage was an association of two equals and a single person cannot be given the right to control another's sexuality on the grounds of marriage. It stated that the argument of preserving the sanctity of marriage by exempting prosecution of husbands led to the acceptance of the traditional notions of a woman having no bodily autonomy.[134] It further stated that recognising marital rape would not harm the institution of marriage. [135] Although the case dealt with the immunity provided in section 375 for the rape of girls of age 15-17 years, the court went on to recognise that marital rape is not a 'conceptual impossibility'.[136] Yet, the Supreme Court prevented itself

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[131] Naz Foundation v Government (NCT of Delhi), (2009) SCC OnLine Del 1762.

[132] Agnidipto Tarafder and Adrija Ghosh, *The Unconstitutionality of Marital Rape Exemption in India*, OXFORD HUMAN RIGHTS HUB (2020). https://ohrh.law.ox.ac.uk/wpcontent/uploads/2021/04/U-of-OxHRH-J-The-Unconstitutionality-of-the-Marital-Rape-Exemption-in-India-1.pdf. .

[133] Independent Thought v. Union of India, (2017) 10 SCC 800.

[134] Joseph Shine v. Union of India, 2018 SCC OnLine SC 1676.

[135] *Id.*

[136] TARAFDER AND GHOSH, *supra* note 129 at 211.

from commenting on marital rape and specified for the judgement to not be treated as an "expression of opinion on the said issue, even collaterally".[137]

Further, the Gujarat High Court had held that "non-consensual acts of rape in marriage impair the institution of marriage because they undermine the foundation of mutual trust and confidence in a couple's union".[138] The Karnataka High Court went on to hold that the institution of marriage could not be used to confer license on a husband for "unleashing a brutal beast" on the wife but, the Supreme Court had stayed the prosecution of husband.[139] Therefore, though the Indian judiciary through its decisions has expressed that women's fundamental rights included sexual autonomy and bodily integrity, yet has failed to take necessary action.

In addition to it, the attitude of the Indian judiciary towards victims of rape had been controversial as marriage has been looked at as a possible solution. A man convicted of raping a woman for over three years was granted bail by the Bombay High Court in 2011 so that he may marry the woman.[140] Similar stance of courts has been observed in several cases where the Supreme Court

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[137] *supra* note 133.

[138] Nimeshbhai Bharatbhai Desai v. State of Gujarat, 2018 SCC OnLine Guj 732.

[139] Hrishikesh Sahoo v. State of Karnataka, 2022 Livelaw (Kar) 89; *Supreme Court Stays Karnataka High Court judgement allowing prosecution of man for rape of wife*, BAR AND BENCH (Jul. 20, 2022), https://www.barandbench.com/news/marital-rape-supreme-court-stays-karnataka-high-court-judgment-allowing-prosecution-of-man-for-rape-of-wife

[140] *Man accused of rape gets bail to marry victim*, HINDUSTAN TIMES (Jan. 3, 2011), https://www.hindustantimes.com/mumbai/man-accused-of-rape-gets-bail-to-marry-victim/story-41ugEYcStxcowaTroeDMkN.html

had granted the accused protection from arrest if he promised to marry the rape victim.[141]

Further, the Indian courts have also blamed the victims of rape for the crimes perpetrated against them. A single judge bench of Allahabad High Court had observed while delivering a judgement on a case of sexual violence and dowry abuse that the victim had exaggerated the incident before the court[142] and in another such case the Karnataka High Court had commented on the rape victim as 'unbecoming' as she fell asleep after the incident.[143] Similarly a recent judgement of a court in Kerala had observed that a sexual harassment complaint would not stand if the victim was wearing short and provocative clothes.[144]

These observations by the judiciary not only undermine the victim's confidence in courts but also hint at a patriarchal understanding of the situation at hand. In addition to violation of the victim's basic rights, the practise of promoting marriage as a solution to rape is deeply problematic and contributes to normalising marital rape. It not only devalues marriage which is meant to

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[141] *Will You Marry Her? Supreme Court Asks Man Accused Of Raping woman when she was Minor*, LIVELAW (Mar. 1, 2021), https://thewire.in/law/supreme-court-rape-accused-marry-pocso-government-employee)

[142] *Defining 'ideal rape victim', judging 'dissolute ladies' - why courts get called out for sexism*, THE PRINT (Jun. 22, 2022), https://theprint.in/judiciary/defining-ideal-rape-victim-judging-dissolute-ladies-why-courts-get-called-out-for-sexism/1003877/.

[143] *Karnataka HC's 'Unwarranted Remarks; in rape case should be expunged: Students, Lawyers*, THE WIRE (June. 30, 2020), https://thewire.in/rights/karnataka-hcs-unwarranted-remarks-in-rape-case-should-be-expunged-students-lawyers.

[144] *Sexual Harassment Complaint Will Not Stand If Woman Was Wearing Provocative Dress: Kerala Court* INDIA TIMES (Aug. 17, 2022), https://www.indiatimes.com/news/india/sexual-harassment-complaint-will-not-stand-if-woman-was-wearing-provocative-dress-577447.html.

be a sacred institution but also traps the victim in an abusive relationship with her abuser for the rest of her life.

### B. Marital Rape as a violation of Fundamental Rights

Rape has been held to be a crime against basic human rights, violative of the most cherished fundamental right, namely, the right to life.[145] Similarly, marital rape is also a crime of grave human rights violation in an intimate relationship. It violates Art. 14, 15, 19(1) and 21 as guaranteed by the Constitution of India.[146]

#### i. Article 21

Marital rape is a clear transgression of the right to life and reproductive rights of women as the choice of a woman to consent to sexual intercourse is seized from her in the name of marital duty. Right to life is not only mere security of existence but also to a dignified existence.[147] It is recognised as more than mere animal-like existence.[148] The scope of the right to liberty was expanded to include dignity.[149] While recognising the reproductive rights of women, in *Suchitra Shrivastava v. Chandigarh Administration*,[150] the Supreme Court held that the right to make reproductive choices was a part of personal liberty under Article 21 ('art').

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[145] M.P. JAIN, INDIAN CONSTITUTIONAL LAW 1218 (Justice Jasti Chelameswar, Justice Seshadri Naidu eds., 8th edn, LexisNexis, 2018).
[146] INDIA CONST., arts. 14, 15, 19(1), 21.
[147] Francis Coralie Mullin v. The Administrator, Union Territory of Delhi, 1981 AIR 746.
[148] Bandhua Mukti Morcha v. Union of India, 1984 AIR 802.
[149] Navtej Singh Johar v. Union of India, AIR 2018 SC 4321.
[150] Suchitra Shrivastava v. Chandigarh Administration, AIR 2010 SC 235.

The right to privacy is a fundamental right under Art. 21.[151] The Supreme Court in *Puttuswamy's case* had held that "patriarchal notions are used as a shield to violate core constitutional rights of women based on gender and autonomy".[152] It upheld bodily integrity including reproductive choices, the choice to participate in sexual activities and the use of contraceptives as a part of personal liberty.[153] But, marital rape violates it as it infringes the personal sphere around an individual that facilitates the exercise of intimate and personal choices of women.[154] The Supreme Court had held that sexual violence infringes the right to privacy of a woman[155] and had also discussed the traumatic effect of rape on adult victims.[156] Therefore, the marital rape exemption in Indian law is violative of the Indian Constitution.

### ii. Article 14

The doctrine of equality is a necessary corollary of rule of law that pervades the Indian constitution.[157] It embodies the principle of non-discrimination. To determine the violation of Art. 14, two tests have been propounded by the judiciary, namely, the reasonable classification test and the test of the standard of arbitrariness.[158]

Marital rape satisfies both the tests to render it as violative of Art. 14. The reasonable classification test requires that a classifying law must be based on

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[151] Justice K.S. Puttaswamy (retd.), & Another v Union of India & Others, AIR 2017 SC 4161.
[152] *Id.* at 140.
[153] *Id.* at 134.
[154] *Id.* at 298.
[155] Independent Thought v. Union of India, (2017) 10 SCC 800
[156] *Id.* at 43.
[157] Ashutosh Gupta v State of Rajasthan, (2002) 4 SCC 34.
[158] TARAFDER AND GHOSH, *supra* note 129 at 218.

intelligible differentia having a rational nexus with the objective it seeks to achieve.[159] Here, the marital rape exemption under section 375 categorises a woman into two different groups; the married and the unmarried, without any reasonable grounds. The Court had held exception 2 of Section 375 as violative of Art. 14 as victims are not legally capable of giving consent[160], affirming the fact that consent is an integral component of sexual intercourse.

The emergence of rape laws was based on the unlawful taking away of property of a husband but now, it is on the grounds of 'consent' by a woman that rape is punishable. Hence, the differentiation of women based on marital status unrelated to the goal of criminalising and preventing rape nullifies the objective of rape law.[161] Further, it arbitrarily creates an artificial shield on marriage, protecting the institution over the rights of the individuals involved.[162] Hence, the marital rape exception is in defiance of Art. 14 as it fails to satisfy the requirements under the same.

### iii. Article 15

Art. 15 bars discrimination on grounds of "sex, religion, race, caste, place of birth or any of them." It is an extension of Art. 14 and expresses the application of the principle of equality embodied in it.[163] The marital rape exemption violates Art. 15 as it discriminates against women unreasonably based on their

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[159] State of West Bengal v Anwar Ali Sarkar AIR 1952 SC 75

[160] Independent Thought v. Union of India, (2017) 10 SCC 800

[161] TARAFDER AND GHOSH, *supra* note 129 at 219.

[162] *Marital Rape violates Fundamental Rights, Delhi High Court Told,* TIMES OF INDIA (FEB. 3, 2022), https://timesofindia.indiatimes.com/city/delhi/marital-rape-exception-violates-fundamental-rights-hc-told/articleshow/89307955.cms); *Marital Rape Exception takes away women's right to say No,* THE HINDU (Feb. 3, 2022), https://www.thehindu.com/news/national/other-states/marital-rape-exception-takes-away-womans-right-to-say-no/article38367343.ece.

[163] M.P. JAIN, *supra* note 136 at 969.

marital status. The innocuous assumptions on gender roles in a family emerging from patriarchal notions promote gender stereotypes, which in turn leads to the acceptance of traditional gender roles that did not acknowledge the rights of women in a marital relationship. Hence, the marital rape exemption violates Art. 15 of the constitution.

#### iv. Article 19

The marital rape exemption also violates freedom of expression under Art. 19(1)(a) of the Indian constitution. The right to express the initiation or refusal of sexual encounters comes under freedom of expression. The liberty to say 'yes' or 'no' to sexual encounters is the integral idea of freedom of expression.[164] In continuance, freedom of expression summarises aspects of individuality and self-identity into the realm of self-determination.[165] It also covers the concepts of sexual identity and sexual orientation along with expressing sexual desire.[166] However, these liberties are infringed upon by the marital rape exemption, violating Art. 19(1)(a).

### C. Recent Developments and the legal issues of criminalisation of Marital Rape

The Delhi High Court in *RTI Foundation v. UOI*[167] gave a split verdict regarding the constitutionality of the MRE under S.375 of IPC. The petitioners contended that the exception violated Articles 14, 15, 19 (1)(a) and 21 of the Indian constitution. They argued that the distinction between married and

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[164] TARAFDER AND GHOSH, *supra* note 129 at 225.
[165] National Legal Services Authority v. Union of India (2014) 5 SCC 438
[166] Navtej Singh Johar v Union of India, AIR 2018 SC 4321.
[167] RTI Foundation v. UOI, 2022 Livelaw (Del) 433.

unmarried women made by the provision was unreasonable as it failed to satisfy the criteria of nexus of the intelligible differentia created with the object it sought as here, the objective is the protection of the institution of marriage. Further, they argued that protection of conjugal rights cannot be expanded to include the right to demand sex. In response to the same, the respondents agreed that non-consensual sexual intercourse is violative of women's rights but refused to term it as 'rape' due to the marital relationship existing between the couple.

Justice Rajiv Shakder while emphasising on partnership, mutuality and the ability to respect physical and mental autonomy as core principles of the edifice of the familial structure, agreed that the MRE was violative of women's rights and should be struck down. He observed that though in a marital relationship expectation of sexual communion exists, it cannot be demanded as a right. Therefore, he went on to observe that a woman's right to sexual autonomy and bodily integrity flows from the right to life giving her the liberty to refuse engaging in sexual activity even with her husband, calling for a change in the law.

On the other hand, Justice Hari Shankar dissented, explaining that sexual aspect of marriage was one of the facets acting as 'bedrock' for institution of marriage and expectation of the same was a conjugal right. Though he agreed that it cannot be demanded as a right, he refused to term the non-consensual intercourse as 'rape' and equate it with 'rape by stranger'. Justice Hari reasoned that the sacred unique relationship existing between the couple due to marriage satisfies the test of intelligible differentia and justifies the nexus with the objective as preserving the institution of marriage was a public and societal interest. In addition to it, he opined that Art. 21 was not violated as

privacy of relationship has been given more importance than that of individuals by the legislature leading to no 'breach' of the same. Also, because the MRE did not affect a woman's right to refuse participation in sexual activity, he observed it to not be violative of Art. 21. Hence, he held that the MRE was constitutional and was not violative of any of the alleged fundamental rights.

Thereby, the contrary view of the judges of the Delhi High Court has drawn a premise for the Supreme Court to interfere and protect women's rights. It is to be noted that the general public was not satisfied by the verdict as at the end of the day, marital rape was not yet recognised as a crime leaving the women of India a target of inherent sexism of the patriarchal society.[168]

### i. Legalities surrounding the criminalisation of Marital Rape

Men's rights campaigners and many lawyers have voiced concern regarding the misuse of the law if marital rape was criminalised. Examples of false dowry and cruelty cases have been cited against the criminalisation of marital rape terming it as 'legal terrorism'.[169] Deepika Narayan, a men's rights activist had asserted that many husbands charged under S.498A of IPC had committed suicide due to the judicial harassment based on false allegations. Hence, it was

[168] *How women reacted to Delhi High Court's split verdict on marital rape*, INDIA TODAY (May. 12, 2022), https://www.indiatoday.in/india/story/women-react-delhi-high-court-split-verdict-marital-rape-1948770-2022-05-12.

[169] *Marital Rape debate: Case right now, arguments for criminalisation and 5 arguments that need to be considered before legislating*, OPINDIA (Jan. 20, 2022), https://www.opindia.com/2022/01/marital-rape-debate-explained-arguments-for-and-against/

argued that the law would be misused against innocent men than actually utilised for women's rights.[170]

In furtherance of the same, the difficulty in collection of evidence has been put forth as a legal issue against criminalisation of marital rape as sexual activity is considered as a normal aspect of a marital life. The private nature of the crime makes a wife's testimony the only reliable evidence it requires to be corroborated by further evidence of patterns of behaviour of the husband leading to history of assault. [171]

While the procedural aspects are the supposed preliminary legal issues, the preservation of institution of marriage has been the major argument posed by the supporters of the MRE contending that criminalisation of marital rape would lead to dissolution of the institution of marriage. While speaking in favour of the MRE, Justice Hari Shankar had explained 'preservation of the marital institution' as a constitutional imperative having a socio-legal importance due to which non-consensual intercourse was not be termed as 'rape'.[172]

Hence, the legal aspects of the criminalisation of marital rape create lacunas in the existing law, requiring the legislature and judiciary's cooperation to protect the rights of women efficiently.

## V. **Way Ahead for India: Suggestions**

[170] *Id.*
[171] Raveena Rao Kallakuru and Pradyumna Soni, *Criminalisation of Marital Rape in India: Understanding Its Constitutional, Cultural and Legal Impact* 11 NUJS L REV 121 (2018).
[172] RTI Foundation v. Union of India, 2022 Livelaw (Del) 433.

Marital rape is partially recognised in India, resulting in failure to recognise the rights of married women. The prevalence of marital rape in India is widely unreported due to various reasons, including the patriarchal structure of society and the under-recognition of the same as a crime. The statistics on spousal violence do not include marital rape explicitly but it can be inferred from the data that sexual violence against women in India has been increasing.[173] According to the National Family Health Survey, the percentage of married women who have ever faced spousal violence has increased and is as high as 44% in some States.[174] An All-India study found that 10% of 69,704 married women reported that their husbands physically forced them to have sexual intercourse.[175] This in turn causes reproductive health issues such as abortion, miscarriage and prolapse of uterus along with mental health issues such as suicidal ideation and anxiety.[176] Hence, there is a need for the Indian government to recognise the violation of women's rights and uphold their personal autonomy through a criminalisation of marital rape and other institutional measures.

The Justice Verma Report recommended the criminalisation of marital rape by removing the exemption clause under Section 375 of IPC. It further

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[173] *Sharp rise in sexual assault cases in 5 years: police data*, THE INDIAN EXPRESS (Jan. 25, 2022), https://indianexpress.com/article/cities/mumbai/sharp-rise-in-sexual-assault-cases-in-5-years-police-data-7739988/.

[174] National Family Health Survey, 5 PRS LEGISLATIVE RESEARCH https://prsindia.org/policy/vital-stats/national-family-health-survey-5.

[175] Shireen Jejeebhoy, KG Santhya and Rajib Acharya, *Health and Social Consequences of Violence: A synthesis of Evidence from India*, INDIA UNFPA (2010) https://india.unfpa.org/sites/default/files/pub-pdf/ViolenceReport-25-11-10.pdf (last visited Mar. 14 2022); Meghna Bhatt and Sarah E. Ullman, *Examining Marital Violence in India* 15(1) TRAUMA, VIOLENCE AND ABUSE 57, 58 (2014).

[176] Padma Bhate Deosthali et.al., *Women's experiences of marital rape and sexual violence within marriage in India: evidence from service records*, 29 (2) Sex Reprod Health Matters (2022).

suggested that no presumption of consent be made and the sentencing be the same as rape.[177] The 42nd Law Commission Report, on the other hand, recommended that marital rape be classified as a separate crime, not be named "marital rape", and be given a distinct penalty.[178] In the following section, the model India can opt for the criminalisation will be suggested while studying the existing model of criminalisation of marital rape in other States.

### A. Models of Criminalising Marital Rape

#### i. Removal of Exemption Clause

The J. Verma committee had rightly pointed out the insufficiency of the mere removal of the exception clause. It had opined that for better criminalisation, the statute must be clear in its objectives. The mere removal of the exception clause can lead to ambiguity regarding the aim of the same,leading to different interpretations.[179] For instance, in Ghana, although the government removed the Marital rape exception in 2007, a lack of precedent on the subject led to confusion and varying interpretations on the subject, leading to ineffective criminalisation.[180] Therefore, it is essential to lay down unambiguously that marriage is not a defence to non-consensual sexual intercourse.

Although it would be ideal to treat marital rape and rape within the same provision, it may be necessary to differentiate the crime of marital rape from rape owing to the different evidentiary requirements and modes and methods of proof. For example, California has a separate section for marital rape[181] and

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[177] JUSTICE J.S. VERMA ET AL., *supra* note 119.
[178] Law Commission, *Indian Penal Code* (No. 42, 1971).
[179] RAVEENA RAO KALLAKURU AND PRADYUMNA SONI, *supra* note 170.
[180] Elizabeth A. Archampong, *Marital Rape – A Women's Equality Issue in Ghana,* EQUALITY EFFECT (2010), http://theequalityeffect.org/pdfs/maritalrapeequalityghana.pdf.
[181] Penal Code 1872 (Cal.) § 262.

another for rape due to the distinct nature of the crime.[182] Further, certain countries like the U.K have separate statutes dealing with sexual offences under which marital rape has its own mode and method of proof.[183]

### ii. Evidentiary Requirements

Unlike other cases of rape where consent can be proved by various methods, marital rape is a unique situation because proving the existence of consent becomes a strenuous task. Thereby, there is a need to modify the existing law on evidence for effective prosecution of marital rape. Currently, according to section 114 A[184] of the Indian Evidence Act, the testimony of the victim against the accused will lead to a presumption of no consent in case of stranger rape but the same cannot be operated in cases of marital rape as it is a crime that occurs within the four walls of a bedroom. Therefore, the availability of witnesses would also not always be possible.

Most countries that have criminalised marital rape have different requirements to establish consent. For example, in South Caroline, USA, the use of a weapon or aggravated force has to be shown to prove marital rape.[185] Moreover, thirty-three States of the USA require a certain degree of force to be present for it to qualify as marital rape. In addition to it, in the U.K, the accused has the onus to prove that he had a reason to believe consent was given by the victim post which the onus to rebut it shifts on the prosecution.[186]

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[182] *Id* at § 261.
[183] Sexual Offences Act, 2003 c. 42.
[184] Indian Evidence Act 1872, § 114 cl. A
[185] S.C. Code Ann. §16-3-615 (2012).
[186] *CPS Policy for Prosecuting Cases of Rape*, THE CROWN PROSECUTION SERVICE, 2012 https://www.cps.gov.uk/publication/cps-policy-prosecuting-cases-rape.

Similarly, the criminalisation of marital rape in India requires to be assisted with certain evidentiary rules specific to it like the inclusion of evidence of patterns of cruelty and domestic violence to act as corroborative evidence.[187] In addition, medical evidence and the evidence of experts would be extremely important to prove 'consent' by highlighting physical and mental trauma suffered by the victim.

### iii. Sentencing Policy

It is argued that the ideal way to punish marital rape would be to bring it to par with stranger rape with the same punishments. For instance, most States in the USA have same punishment for marital rape as that of stranger rape.[188] However, in Canada and UK, just like the majority of the countries that have recognised marital rape, the punishment of spousal rape is less serious in nature than the punishment for non-spousal rape in the implementation of the statutory punishment.[189] This is because of the fact that there is a stigma attached to marital rape making it difficult for women to approach the authorities and also because, in family related convictions, pleas of guilt are more common explaining the difference in sentence gravity.[190]

Therefore, reforms are a part of a progressive country and hence, India should take appropriate steps in ensuring the protection of women and prevention of

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[187] RAVEENA RAO, *supra* note 170 at 147.

[188] *Spousal Rape Laws: 20 Years Later*, NATIONAL CENTER ON DOMESTIC AND SEXUAL VIOLENCE (2004) http://www.ncdsv.org/images/NCVC_SpousalRapeLaws20YearsLater_2004.pdf (last visited Feb. 19, 2022)

[189] Marie Gannon and Karen Mihorean, *Sentencing outcomes: A comparison of family violence and non-family violence cases*, Department of Justice Canada (2005), https://www.justice.gc.ca/eng/rp-pr/jr/jr12/p5e.html (last visited Mar. 15, 2022)

[190] *Id.*

such gross human rights violations against them. Therefore, the Indian legislature and judiciary must criminalise marital rape explicitly and put efforts to bring a change in the patriarchal structure of the society.

### B. Ancillary Measures

The criminalisation of marital rape is the initial step towards breaking the stereotyped gender roles in marriage. But it is an inadequate remedy to prevent violence against them. It is because women continue to face hurdles while seeking redressal in the legal system due to patriarchal nature of our society and the traditional belief that regards wives as no more than the property of their husbands, thereby refusing to acknowledge marital rape as a crime. Hence, along with the criminalisation of marital rape, the Indian government must take appropriate measures to enable women accessible and reformative justice mechanisms.

- A holistic approach for the prevention of intimate VAW and their protection must be considered including necessary legislative measures, institutional measures and capacity-building activities with a purpose to reform the society and promote the rights of women, such as, sensitizing the public and officials about the concept of marital rape, conducting awareness campaigns in order to set aside the stigma attached to marital rape to enable victims to approach the appropriate authorities etc.
- India has to act responsibly while condemning acts of marital rape and take necessary steps like introducing relevant policies and programmes, and allocating adequate human and financial resources to promote equality between the genders.
- To address the structural causes of VAW, India must take steps to promote and support women empowerment through specific

educational programmes including sexual awareness programmes, skill building, legal literacy and access to productive resources.

- A positive and supportive environment needs to be created for women in the legal system to prevent any kind of hurdles and obstacles in accessing justice. Further, it has to be ensured that reporting rates are not impacted by discriminatory beliefs and stereotypes, hence requiring training of the police personnel accordingly.
- Public sensitisation programmes of officials, as well as the general public, must be held. It has to include training of the members of the judicial system to enable gender-sensitive court procedures and to assist the victims of marital rape in accessing necessary protection mechanisms.
- India must establish and implement appropriate multi-sectoral referral mechanisms to ensure effective access of women survivors to comprehensive services including women shelter homes etc, ensuring full participation of and cooperation with non-governmental organisations.
- The State agencies must ensure that sufficient reparations are provided to victims of sexual violence including monetary compensations and provision of legal and health facilities. Further, it should ensure the effective implementation of the law if passed and must maintain records of the same to analyse the effectiveness.

## VI. **Conclusion**

The status of women has drastically improved since the 17$^{th}$ century owing to the efforts of social activists, States, as well as the international community. But, there still exists lacunas in the systems leading to increased violence

against women. Despite decades of advocacy, community organising and law reforms, violence against women remains a major social problem.

The UN and its agencies have addressed the concerns of women and regarded their protection and prevention of crimes against them as the obligation of the States. Despite the same, marital rape has failed to find a place in the penal codes. Also, because sexual assaults perpetrated by male inmates including marital rape are deemed to be too private in nature, it remained beyond the hold of law. The application of international law through unevenly progressing across the States, there has been a developing trend of extending criminal law's reach towards crimes within marital relationships.

The status of women in India is far from satisfactory. However, recently, the Delhi High Court had opened the discussion for criminalisation of marital rape and the judgement is awaited. Criminalisation of marital rape forms only a part of the solution of addressing the complex issue of marital rape. Alongside, various measures towards shifting public attitude, public awareness programmes and education requires to be undertaken to abolish remnants of spousal immunity. Further, any kind of legal and social support for gender inequality must be eliminated through a systematic approach towards the issue to combat damaging stereotypes for an equal society. Therefore, adhering to the obligation under international law and guaranteed rights under the constitution, India must take efficient initiatives to criminalise marital rape explicitly and ensure its appropriate implementation.

# Interplay of Anthropogenic Climate Change on Human Rights and Marine Environment: Paradox of Peripherality

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**Abstract**

*The rights based approach discourse to climate change commenced after the Inuit petition and found recognition in the international framework through a detailed study by the OHCHR (Office of the United Nations High Commissioner for Human Rights)on the interrelation of human rights and climate change, but the struggle to recognise, protect, and fulfil the human rights violated by climate change to terrestrial environment has been difficult, pushing the marine environment to the periphery of the climate-human rights discourse. Although contemporary and complementary maritime law defines State jurisdiction in the maritime context, they are either unstructured or even absent to address the basic human rights violated by climate change in relation to the marine environment. The article has been an attempt to understand and examine the intentional interaction between international environmental law and the human rights regime that has seemingly brought an impetus to develop an array of rights in the context of climate change. Part 1 introduces the forgotten essentiality of the ocean, sea, and marine environment in the international framework and global politics of climate change. Part 2 proceeds to inquire into the interrelationship between human rights and climate change. This part precisely delves into the evolution of the principles of human rights in the expanding climate change framework. Part 3 explores the various universal human rights affected by climate change variability in the marine environment by applying the modified version of Vasak's 'generational' theory of human rights. Part 4 scrutinises the present status of contemporary and complementary governing laws of the sea and*

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*marine environment and the various challenges confronted in the marine realm.*

## I. **Introduction**

The global ocean is an integral part of the earth system and supports marine ecosystems essential not only to marine life but also humans. It occupies 71% of the Earth's surface and is a source of food, livelihood, transportation, tourism, source for generation of renewable energy, traditional knowledge, component for national security, trade etc.[1]

Oceans are considered an effective carbon sink having estimated capacity to absorb one quarter of the global carbon emissions,[2] but there has been peripherality of ocean and marine ecosystems towards formulation of climate action and strategies at the global climate negotiations for framework conventions. The oceanic islands geographically located in the Pacific, Caribbean, Atlantic, and Indian ocean, are very highly susceptible to climate related interventions than the other geographically secure (but not absolutely) located countries or jurisdictions. Textually, inclusion of oceans along with the already emphasised forests in Article 5 (1) & (2) of the Paris Agreement, would bring deserving attention towards the significant role of oceans and marine environment in climate mitigation and adaptation actions. Oceans find its place only in the preamble of the Paris Agreement.[3] Much importance has

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[1]Intergovernmental Panel on Climate Change, *Summary for Policymakers. In: IPCC Special Report on the Ocean and Cryosphere in a Changing Climate* pp. 3-35 (2019), https://www.ipcc.ch/site/assets/uploads/sites/3/2022/03/01_SROCC_SPM_FINAL.pdf.

[2] Intergovernmental Panel on Climate Change, *Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* pp. 1535 (2013), https://www.ipcc.ch/site/assets/uploads/2018/02/WG1AR5_all_final.pdf.

[3] Paris Agreement to the United Nations Framework Convention on Climate Change, T.I.A.S. No. 16-1104 (Adopted on 12th Dec, 2015) [hereinafter "Paris Agreement"].

been given to reducing emissions from deforestation and forest degradation through the REDD+ (Reducing Emissions from Deforestation and forest Degradation, plus the sustainable management of forests, and the conservation and enhancement of forest carbon stocks) framework adopted in Warsaw in 2013.[4] This COP (Conference of the Parties) was convened at the right time as the IPCC (Intergovernmental Panel on Climate Change) released its Special Report on the Ocean and Cryosphere in Changing Climate (SROCC), bringing in scientific evidences on marine ecosystems, biodiversity, and its nexus with human well-being at the face of climate variability.[5] Along with the support of civil society, the discussions were carried forward by various oceanic policy recommendations,[6] alliances and associations to collaborate on the efforts towards healthier ocean,[7] consolidating and providing possible ways in which challenges of climate change on the ocean and marine ecosystem can be addressed.

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[4] UNFCCC Secretariat, *Key Decisions relevant for reducing emissions from deforestation and forest degradation in developing countries (REDD+)*, February, 2016, available at https://unfccc.int/files/land_use_and_climate_change/redd/application/pdf/compilation_redd_decision_booklet_v1.2.pdf.

[5] Special Report on Ocean, *supra* note 1.

[6] Ocean and Climate Platform, *Policy Recommendations: A healthy ocean, a protected climate*, December 2019, available at https://ocean-climate.org/en/policy-recommendations-a-healthy-ocean-a-protected-climate/ (Last visited on February 12, 2023); Because the Ocean Initiative, *Ocean for Climate: Ocean related Measures in Climate Strategies (Nationally Determined Contributions, National Adaptation Plans, Adaptation Communications and National Policy Frameworks)* (2019), https://www.becausetheocean.org/wp-content/uploads/2019/10/Ocean_for_Climate_Because_the_Ocean.pdf
IDDRI, *Opportunities for increasing Ocean Action in Climate Strategies***,** 2 November, 2019, available at https://www.iddri.org/sites/default/files/PDF/Publications/Catalogue%20Iddri/Propositions/201911-PB0219-ocean%20NDCs_0.pdf (Last visited on February 12, 2023).

[7] To name few: *Because the Ocean* initiative, the Ocean Acidification Alliance (OAA), the Pacific Community, the Plymouth Marine Laboratory, IDDRI, the Global Ocean Forum, Conservation International, the Tara Ocean Foundation and the French Global Environment Facility (FFEM), Ocean and Climate Platform

UNFCCC COP 25 (2019) in Madrid, organised by Spain and Chile (also referred as 'Blue COP'), is marked as the first COP to include oceans and its role towards climate change action, offering a global platform as well as witnessing political leadership from ocean States such as Monaco, Costa Rica, and Fiji.[8] Eventually, the expectations of COP 26 in Glasgow (2020) gathered towards strengthening the dialogue on 'ocean-climate' into action through institutional support in their existing mandates.[9] The final report that came out of COP 26 as the Glasgow Climate Pact, included the ocean in its preamble along with other carbon sinks and recognised its importance in protecting, conserving vulnerable biodiversity, and reducing other socio-economic challenges created by the adverse effects of climate change.[10]

The annual Ocean Climate Dialogue mandated by the COP 25, is committed towards understanding the existing structures and exploring the ocean related UNFCCC progress for strengthening, adaptating and mitigating ocean-climate action.[11] Year 2022 has been famously termed as 'super year for the ocean' centering the role of the ocean in climate negotiation and action. The recently convened COP27 in Egypt, places the ocean as the focal point in its blue zone

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[8] UNESCO, *Climate Negotiations in Madrid COP25 made a splash*, 2nd July, 2020, available at https://oceanliteracy.unesco.org/climate-negotiations-in-madrid-cop25-made-a-splash/ (Last visited on February 12, 2023); UNFCCC, *Climate Conference to Spur Action on the Ocean*, 2nd December, 2019, available at https://unfccc.int/news/climate-conference-to-spur-action-on-the-ocean (Last visited on February 12, 2023).

[9] United Nations Framework Convention on Climate Change [UNFCCC], *Glasgow Climate Pact*, U.N. Doc.
CP26/AUV/2F/Cover_decision (13th Nov., 2021).

[10] United Nations Framework Convention on Climate Change [UNFCCC], *Report of the COP on its 26th session in Glasgow,* U.N. Doc. FCCC/CP/2021/12 (8th Mar., 2022).

[11] United Nations Framework Convention on Climate Change, *Ocean and Climate change dialogue 2022, Informal summary report by the Chair of the Subsidiary Body for Scientific and Technological Advice* (2022), https://unfccc.int/sites/default/files/resource/OceanAndClimateChangeDialogue2022_summary%20report.pdf.

events creating the first ever Ocean Pavilion[12] involving stakeholders, research institutions, innovation partnerships, and audience discussions around recognition and reinforcement of ocean science, energy, aquatic biodiversity, and coastal communities, human rights, health, indigenous knowledge, gender, youth, capacity building, biodiversity finance, mitigating ocean disasters, and blue climate solutions. The COP encouraged blue carbon projects such as 'Mangrove Breakthrough'[13] to protect and restore mangroves which are critical ecosystems for coastal conservation, sequestration system and a source of livelihood. The global climate negotiation also issued the 'High Quality Blue Carbon Principles and Guidance'[14] as an essential standard to balance economising the blue market and ocean-climate action towards ecological sustainability by instilling ethical practices in blue spaces.[15]

Practising environmental ethics in the marine realm is vital to both human and non-human existence and co-existence. Discarding the lens which portray humans as the superior entity 'capable enough' to utilise and exploit the natural resources for their own benefit and self-actualisation (anthropocentricism), would open our minds to the holistic eco-philosophy of eco-centrism in the ecological spectrum.[16] Eco-centrism, deep dives into the

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[12] Ocean Pavilion, *COP27 Ocean Pavilion Schedule,* available at https://oceanpavilion-cop.org/schedule/ (Last visited on February 12, 2023).

[13] Climate Champions UNFCCC, *The Mangrove Breakthrough: a call to action for a critical ecosystem,* 9th November, 2022, available at https://climatechampions.unfccc.int/the-mangrove-breakthrough/ (Last visited on February 12, 2023).

[14] Conservation International et al., *The High-Quality Blue Carbon Principles & Guidance* (2022), https://www3.weforum.org/docs/WEF_HC_Blue_Carbon_2022.pdf.

[15] McKenna, Catherine, Arunabha Ghosh, et al., *Integrity Matters: Net Zero Commitments by Businesses, Financial Institutions, Cities and Regions* (2022), https://www.un.org/sites/un2.un.org/files/high-level_expert_group_n7b.pdf.

[16]ROBYN ECKERSLEY, EXPLORING THE ENVIRONMENTAL SPECTRUM: FROM ANTHROPOCENTRISM TO ECOCENTRISM IN ENVIRONMENTALISM AND POLITICAL THEORY: TOWARDS AND ECO-CENTRIC APPROACH (2003).

interaction of human and non-human elements within the common heritage, shifting prominence from individualism to collectivism. Marine eco-centrism, therefore appreciates the inherent value of the ocean as pivotal to the earth rather than as human-centric understanding of its essentiality.[17]

## II. Inter-relationship between Climate Change and Human Rights

In 1972, the UN Conference on Human Environment or the Stockholm Conference marked a watershed moment in the history of international environmental agreements to recognise the interrelation between the environment and the humans or 'human environment.' Even though the Intergovernmental Panel on Climate Change (IPCC) had not been established then, the conference report clearly underscores the man-made exploits of the environment and the impacts of the exploits on both human and natural ecosystems, posing a serious threat to basic rights (adequate food, shelter, clothing, education, health and sanitation). Reiterating the known through this report, and recognising the legality (and illegality) of ignorance and indifference towards dependency of humans on the environment, the conference laid the groundwork for future environmental agreements.

The recognition of the correlation between climate change and human rights was not an easy journey. The *Inuit* petition[18] (2005) is considered as the first

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[17] DUPONT S & FAUVILLE G, *Ocean Literacy as a key toward sustainable development and ocean governance* in HANDBOOK ON THE ECONOMICS AND MANAGEMENT OF SUSTAINABLE OCEANS (2017).

[18] Petition from Sheila Watt-Cloutier, Chair, Inuit Circumpolar Conference, to the Inter American Commission on Human Rights (December 7, 2005), available at https://earthjustice.org/sites/default/files/library/legal_docs/petition-to-the-inter-american-commission-on-human-rights-on-behalf-of-the-inuit-circumpolar-conference.pdf.

of its kind litigation on the effects of Arctic warming on indigenous rights (health, subsistence, safety, culture, property etc.) of the *Inuit* community in Canada. The petition was filed against United States, the highest GHG (Greenhouse Gases) contributor for their acts and omission, indicating the extraterritoriality of the effects of climate change. Though dismissed due to the inability to determine the connection between the information provided in the petition to the violation of rights provided in the American Declaration of Rights and Duties of Man, the petition garnered international attention towards understanding and further exploring the interrelation between human rights and climate change.

Climate science plays a vital role in climate negotiations, policy making, governance etc., etching a link between multi-dimensional aspects of climate change. IPCC Assessment Report AR4 (2007) has provided scientific findings on the impact of climate change on marine environments which are essential to understanding the impact on human rights.[19] Warming of climate systems reduces the absorbing capacity of terrestrial as well as ocean ecosystems leaving excessive Co2 in the atmosphere, melting of glaciers, rise in sea level, higher water temperatures, increased intensity of weather patterns such as cyclones, hurricanes, heavy rainfall in tropical or coastal regions and low precipitation, drought, desertification in arid and semi-arid regions. Consequently, the rise in global temperature and the oceans' ability to absorb

[19] Bindoff, N.L et l., *Observations: Oceanic Climate Change and Sea Level Chapter 5 in IPCC Assessment Report 4* (2007), https://www.ipcc.ch/site/assets/uploads/2018/02/ar4-wg1-chapter5-1.pdf.

Co2 leads to ocean acidification, salinity, coral reef bleaching, and deoxygenation.[20]

With the expansion of the discourse on drawing a nexus between environment-human, the associated impacts of environmental degradation on rudimentary social issues surrounding humans in the society necessitated attention. The earliest efforts involving promotion of the human rights approach to climate change involved Maldives and other small island States resulting in a comprehensive study by the OHCHR.[21] This milestone was achieved with the combined efforts of the concerned States,[22] civil society, human rights organisations, youth movements, and indigenous communities over several decades. The physical effects of climate change on our environment affects access to basic needs such as food, water, drinking water, housing, security etc. Non-fulfilment or interference in enjoying these basic needs due to climatic stresses draws an ultimate correlation between climate change and its impact on human rights, giving effect to State obligation towards its citizens and the duality of duty bearers and right holders. The centrality of the human rights approach in climate change discourse is to 'put a human face on climate change which reminds us that climate change is about suffering.'[23] As the State responsibility under the generality of international law regarding human rights

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[20] Intergovernmental Panel on Climate Change, *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* 151 pp. (2014), https://www.ipcc.ch/site/assets/uploads/2018/05/SYR_AR5_FINAL_full_wcover.pdf. [hereinafter "AR5 Synthesis Report"].

[21] OHCHR, *Report on the relationship between Climate Change and Human Rights*, U.N. Doc. A/HRC/10/61 (15th January, 2009).

[22] *Male' Declaration on Human Dimension of Global Climate Change*, (Adopted on 14th Nov., 2007), https://www.ciel.org/Publications/Male_Declaration_Nov07.pdf.

[23] Derek Bell, *Climate Change and Human Rights*, 4 WIREs Clim Change 159 (2013).

depends on the ratification of the treaties, but through its specificity in domestic laws within their national jurisdictions, States are respectively obligated to respect and promote the universality of human rights.[24]

The UN Human Rights Council (HRC) has recognised through its resolutions 7/23 (2008) and 10/4 (2009) that the adverse environmental changes caused by climate change interferes with the fulfillment of human rights such as right to life, adequate food, housing, health, drinkable water etc.[25] It also recognises that the effects of climate change are disproportionate to those more vulnerable in factors such as geography, poverty, gender, age, indigenous communities, disability, or minority status. In HRC Resolutions 29/15,[26] 28/11,[27] it has been recognised that climate change obstructs the enjoyment of right to life, adequate food, achievement of the highest attainable standard of physical and mental health, safe drinking water, sanitation, development and, safe, clean, healthy, sustainable environment, putting at risk certain vulnerable segments of the population.[28] In furtherance to this, another resolution outlines the role of biodiversity (defined under Biodiversity Convention as 'variability amongst living organisms from all sources including, inter alia, terrestrial, marine, and other aquatic ecosystems and the ecological complexes…") and fulfilment of human rights through conservation and sustainable use of

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[24] Paris Agreement, *supra* note 3; International Covenant on Civil and Political Rights, 999 UNTS 171 (Adopted on 16th Dec, 1966) [hereinafter "ICCPR"]; International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 (Adopted on 16th Dec, 1966) [hereinafter "ICESCR"].

[25] UNHRC, *Resolution 7/23*, A/HRC/RES/7/23 (28th Mar., 2008); UNHRC, *Resolution 10/4, A/HRC/RES/10/4* (25th Mar., 2009).

[26] UNHRC, *Resolution 29/15*, A/HRC/RES/29/15 (22nd Jul., 2015).

[27] UNHRC, *Resolution 28/11*, A/HRC/RES/28/11 (6th Apr., 2015).

[28] *Id.*

biodiversity.[29] The Paris Agreement, in its preamble expressly mentions human rights obligations, emphasising the obligations of the State parties towards climate action.

The UN General Assembly, recently in 2022 through its most awaited resolution, declared access to a clean, healthy, and sustainable environment as a universal human right. This was after the Human Right Council resolution[30] recognised the need for 'protection of the environment which contributed to human well-being and enjoyment of human rights to life, to the enjoyment of the highest attainable standard of physical and mental health, to an adequate standard of living, to adequate food, to housing, to safe drinking water and sanitation and to participate in culture life, for present and future generation.'[31] Consequently, the UN Special Rapporteur on human rights and climate change was appointed in March 2022, after much deliberations from States, civil society and even UN agencies, for the need to understand and explore the interplay, addressing its adverse impacts with reasonable solutions. There is no doubt that global recognition of greening human rights will lead to 'stronger environmental laws and policies, reduced environmental injustices, improved implementation and enforcement, greater public participation and

[29] John H. Knox (Special Rapporteur on the issue of human rights obligations relating to the enjoyment of
a safe, clean, healthy and sustainable environment), *Report of the Special Rapporteur on the issue of human*
*rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, U.N. Doc. A/HRC/34/49 (19th Jan., 2017).

[30] UNHRC, *48th Resolution on The Human Right to Clean Healthy and Sustainable Environment*, A/HRC/RES/48/13 (8th Oct., 2021).

[31] *Id.*

environmental decision making, in turn resulting in better environment performance of the State parties.'[32]

## III. **Human Rights affected by Climate Variability in the Marine Environment**

Unsustainable interference with the marine environment leads to inability to enjoy basic, inalienable needs, thereby bringing into context, the human rights of an individual/community and State obligation towards rights protection. Human Rights are centered around the 'dignity and worth of human persons, in the equal rights of men and women and of nations, large and small.'[33] The rise in sea level, inundation of coastal islands, ocean acidification and depletion of oceanic resources, climate change through its effects on marine environment severely infringes human rights. [34] It also raises both in-country and transboundary issues of marine preservation, governance, and security.

The generations theory or Vasak's categorisation of human rights[35] has been widely applied in scholarships and human rights discourses[36] on the gamut of

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[32]John H. Knox (Special Rapporteur on the issue of human rights obligations relating to the enjoyment of
a safe, clean, healthy and sustainable environment), *Report of the Special Rapporteur on the issue of human*
*rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, U.N. Doc. A/73/188 (19th July, 2018).

[33]UN CHARTER.

[34] Changing Marine Ecosystem Services and Human Well-Being in Chapter 5 Changing Ocean, Marine Ecosystem and Dependent Communities, IPCC Special Report on the Ocean and Cryrosphere in the Changing Climate (2019) Accessible at https://www.ipcc.ch/srocc/

[35] Vasak K, *Human Rights: A thirty-year struggle: the sustained efforts to give force of law to the UDHR*, 11 UNESCO Courier 29 (1977).

[36] Spasimir Domaradzki et al., *Karel Vasak's Generations of Rights and the Contemporary Human Rights Discourse*, 20 Human Rights Review 423 (2019): Quantitative and qualitative exploratory research employed by the authors conclude that the scholarly discourse of Vasak's approach to human rights is predominated by the first generation rights (and many expanding the classical Vasak list), succeeded by rights which don't fit any of the categorizations,

value-based approaches to human rights expressed by the UDHR, ICCPR and ICESCR. However, this theory has also been criticised for its 'generational' connotation, which is susceptible to misinterpretation for primarily prioritizing the struggles to achieve recognition of human rights of the global north over the global south.[37] This part will explore the effects of climate variability on the marine environment obstructing the enjoyment of universal rights, as a result expounding the dependency of humans on richness of marine environment. For that matter, the sections in this part don't employ the Vasak's theory strictly as per chronological order of generations, thereby placing all the three 'generations' of rights at the same pedestal. Though the text of the UNFCCC emphasises on the 'adverse effects of climate change' on the socio-economic systems[38], I argue, in this segment, that along with socio economic rights, even political and collective rights are as integral and interconnected, obligating the State to respect, protect, and fulfil the same.

### A. The Progressive Rights or Social, Economic and Cultural rights: Right to Adequate Standard of Living and Right to Highest Attainable Standard of Health

Everyone has an inherent right to life, liberty, and security, not subjected to arbitrary deprivation.[39] The right to life is considered the most important of all human rights as it is a prerequisite to all other rights. The Human Rights

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comprising of transitional justice, migration, identity, security, reparations and, reconciliation, economic sanctions etc.

[37] PATRICK MACKLEM, *Human Rights: Three Generations or One?* in THE SOVEREIGNTY OF HUMAN RIGHTS (2015).

[38] UNGA, United Nations Framework Convention on Climate Change, A/RES/48/189 (20th Jan., 1994), art. 1(1). [hereinafter "UNFCCC"].

[39] Universal Declaration of Human Rights, 217 A (III) (Adopted on 10th Dec., 1948), art.3; ICCPR, *supra* note 24, art.6.

Committee (HRC) describes right to life as 'the supreme right from which no derogation is permitted even in times of public emergency which threatens the life of the nation.'[40] This clearly implies the pre-eminence of human rights to life over the life of a nation. Arbitrary deprivation cannot always be construed as an act but may occur as an omission, when the State has acted recklessly or unjustly or in case of failure to act with due diligence to protect life.[41] Climate change and unsustainable development interferes with the full enjoyment of the right to life not only for the present but also future generations.[42]

Projected increase in the intensity of storms and flooding in the coastal and low-lying areas are high risks to human lives.[43] Changes in the physical, chemical, and biological components of oceanic ecosystems also diminish the effectiveness of ecosystem activities such as climate regulation, flood protection, water purification. The right to health[44] complements the right to life and are intertwined,[45] however the conditions to decent health may not always be fulfilled by the State which thereupon impacts the right to life. As ocean temperature increases, it surges the growth of micro-bacteria, raising the chances of infectious diseases to both marine and human ecosystems. Warming tropical and coastal oceans cause excessive harmful algae bloom,

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[40] UNHRC, *General Comment No.6: Art 6 (Right to life)* [1], (30th Apr., 1982).

[41] STUART CASEY MASLEN, THE RIGHT TO LIFE UNDER INTERNATIONAL LAW: AN INTERPRETATIVE MANUAL (2021).

[42]UNHRC, *General Comment No.36: Art 6 (Right to life)* [62], CCPR/C/GC/36 (31st Mar., 1998); UNGA, *Declaration of the UN Conference on Human Environment,* A/RES/2994 (15th Dec., 1972); United Nations Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26, vol. I (14th June, 1992); UNFCCC, *supra* note 37.

[43]AR5 Synthesis Report, *supra* note 20.

[44]ICESCR, *supra* note 24, art.12.

[45] UNFCCC, *supra* note 37, art.1(1).

escalating the threat of water borne diseases such as cholera.[46] Ocean acidification causes toxicity in marine species resulting in seafood poisoning to humans.[47] Food safety and nutrient contents are compromised due to continuous warming and declining pH, causing high rates of mass mortality of marine plants and animals, especially fragile shellfishes. Moreover, saltwater intrusion and shortage of freshwater leads to poor accessibility of clean, safe drinking or usable water. Plankton and coral reefs are an integral part of the marine food chain ecosystem for thousands of marine species. Coral reefs are also natural barriers to strong sea waves, preventing coastal erosion and providing safety to the coastal communities. As oceanic temperatures get warmer causing ocean acidification, the change in the neutrality level of the ocean pushes various species towards extinction. 75% of the world's coral reefs have already triggered bleaching due to climatic heat stress between 2014-2017.[48]

The right to life is also linked with the right to livelihood, housing (habitability), and security. Adverse impacts of climate change on the coastal, low-lying areas leads to rapid erosion of the sea banks, hiking the risk of inundation, destroying the fertile farms, housing, livestock etc. threatening the peaceful lives and displacing the affected communities to lesser vulnerable but unfamiliar areas. The coastal communities who are largely dependent on the coastal ecosystem for their survival are most vulnerable. Other resultant

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[46]Lobitz, B. et al., *Climate and infectious disease: use of remote sensing for detection of Vibrio cholerae by indirect measurement*, 97(4) Proceedings of the National Academy of Sciences of the United States of America 1438 (2000).

[47] Hales, S., P. Weinstein, & A. Woodward, *Ciguatera (fish poisoning), El Niño, and Pacific sea surface temperatures*, 5(1) Ecosystem Health 20 (1999).

[48]Eakin, C.M., Liu, G., et al., *Unprecedented three years of global coral bleaching 2014–17* in *State of the Climate in 2017*, 99(8) Bulletin of the American Meteorological Society S74 (2018).

stresses include increase in the price of food commodities, political instability and rise in conflicts due to increased social, political, and economic inequality amongst the affected population.[49] The rise in demand and shortage of supply of resources leads to widening of the gap of inequalities between those who can afford to adapt to the scarcity of resources from the poorer, impaired, and vulnerable sectors within the affected population. Prolonged ineffective governance and mis-management of these situations heightens the chances of inability to fulfil vital interests of the population, leading to vicious cycles of poverty.

In developing countries, small-scale marine fisheries generate jobs for 47 million people including post fisheries engagements.[50] Climate variability in this sector tremendously hits the economies of developing countries due to the interconnected system of marine labour markets, industries, and the demanding consumers of the tourism sector. The enormous competition of catching transboundary oceanic stocks within exclusive economic zones by island States and rise in sea level, changes the distribution of the stocks, thereby greatly affecting their economies.[51] Change in reproduction and migration patterns of marine organisms caused by ocean warming and rise in sea level impacts the aquaculture and marine capture fisheries production

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[49] United Nations Environment Programme, *Climate Change and Human Rights* (2015), https://wedocs.unep.org/bitstream/handle/20.500.11822/9530/-Climate_Change_and_Human_Rightshuman-rights-climate-change.pdf.pdf.

[50] D.J. MILLS ET AL., *Underreported and undervalued: small-scale fisheries in the developing world* in SMALL-SCALE FISHERIES MANAGEMENT: FRAMEWORKS AND APPROACHES FOR THE DEVELOPING WORLD pp. 1-15 (2011).

[51] Johann D. Bell et al., *Effects of climate change on oceanic fisheries in the tropical Pacific: implications for economic development and food security*, 119(1) Climatic Change 199 (2013).

which threatens marine dependent livelihoods. It is significant for the States highly dependent on aqua-culture, coastal tourism, and marine environment, to diversify their livelihood opportunities in order to minimise risks of vicious cycle of poverty as an adaptation strategy. These practical adaptation efforts should identify and benefit the most vulnerable set of people such as the local coastal communities who are highly reliant on the marine environment. It is pertinent to strengthen sustainable fisheries practices as well as identify risks of climate variability and develop alternative methods to support aquaculture. It would need collaborative efforts by the regional as well as local regulatory authorities towards generating alternative sustainable economies adapting to effects of climate change. Poor coastal States and small Island States communities are at higher risks, mirroring the social and economic inequalities created by climatic stresses. Lax law and enforcement mechanisms to regulate such causation makes a breeding ground for blue crime, irregular migration, illegal fishing, and pollution.[52] Every year Brahmaputra river plains causes climate related flooding affecting Bangladeshis from inundated regions to illegally enter neighbouring coastal regions of India and it has been predicted that about 1.3 million people will be displaced by rise in sea level by 2050[53]. The influx of cross border migrations and Bangladesh government's inactivity towards climate adaptive strategies additionally cause stress to the internally displaced Assamese and Bengalis to access social and economic resources. In order to protect and rehabilitate the

[52] Germond B. & Mazaris A., *Climate Change and Maritime Security,* Marine Policy 99: 262-266 (2019); Scott Edwards et. al, *UNCLOS in Action: Evidence on Maritime Security Challenges*(2021), https://www.safeseas.net/wp-content/uploads/2021/12/download.pdf (Last visited on ).

[53] Pietro De Lellis et. al, *Modeling Human Migration Under Environmental Change: A Case Study of the Effect of Sea Level Rise in Bangladesh,* 9(4), EARTH'S FUTURE, (2021).

internally displaced climate related migrants, Climate Migrants (Protection and Rehabilitation) Bill 2022 has been introduced by the Assam MP in the parliament.

### B. Political or Access Rights: Dissemination/Accessibility of Information, Public Participation and Access to Justice related to Environmental Matters

Political rights, alike social and cultural rights, are individual rights, albeit political rights encompass the rights concerning governance, decision making, accessibility to information towards environmental protection and sustainability. In this context, the general political rights such as freedom of expression, freedom of peaceful assembly and freedom of association etc may entail recognition (by conscious public, if not State) of rights towards structural strengthening of State governance with an eco-centric approach.

ICCPR recognises the right to take part 'in the conduct of the public affairs, directly or through freely chosen representatives.'[54] The conduct of public affairs has been elaborated by the Human Rights Committee as 'a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers as well as implementation of policy at international, national and regional/local levels.'[55] This gives the citizens an opportunity to protect their recognised rights through a fair, democratic process with an objective to create an environment which is participative, transparent, and accountable. In the context of environmental protection, everyone has the right to participate in environmental decision-

[54] ICCPR, Art.25(a); UDHR, Art.21,
[55] UNFCCC, Art. 6 (a) (ii) & 6(a)(iii).

making, which in itself legitimises the governance process and builds public trust. These 'access rights' which are procedural in nature, are based on Principle 1 of Stockholm Declaration and Principle 10 of Rio Declaration. UNFCCC is commited towards promotion of public access to information and public participation in addressing climate change by its parties at national, regional and sub-regional levels. Similarly, right to access information[56] has been recognised as crucial for the enjoyment of a safe, clean, healthy and sustainable environment.[57] Convention on Access to Information, Public Participation in Decision making and access to Justice in Environmental Matters (Aarhus Convention),[58] a multilateral environmental agreement ratified by the European and Central Asian community has been known to spearhead 'environmental democracy'. The Convention can be seen as an outcome of the realisation of the right based approach towards an environmentally sound system of procedures, that effectively bridges together civil society and public authorities/institutions with environmentally-conscious choice of governance. Access to justice in environmental matters concerns the administrative or judicial remedies sought to secure the other two access rights, thereby achieving accessibility and participatory justice in environmental and climate knowledge, as well as response and decision making. The access rights further obliges the developing States towards designing transparent, inclusive and consultative environment legislations,

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[56] ICCPR, Art.19.

[57] Human Rights Council, *Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox,* U.N. Doc. A/HRC/25/53 (Feb 03, 2015).

[58]Also Escazu Agreement based in Latin America and Caribbean (2018)
UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Art.4-8, 2161 UNTS 447 (Adopted on June 25, 1998) [hereinafter "Aarhus Convention"].

action plans and strategies with the support and involvement of civil society.[59] Recently in *Waorani of Pastaza v. Ecuadorian State* (2019), the *Waorani* People of Pastaza won against the Ecuadorian government in a landmark decision protecting their indigenous land in Amazon rainforest against the oil companies holding that adequate informed consultative process with the communities is utmost necessary setting a global precedent.[60]

These access rights have permeated within the regulatory framework of the national jurisdictions prone to climate variability, particularly those States which have high climatic impacts[61]. Philippines, an archipelagic country in Southeast Asia with 7,461 islands has specialised procedural rules of access to remedies for environmental cases[62]. Writ of *Kalikasan* (nature) aims to protect the right to life, health or property threatened by environmental damage of grave nature, has also been extended to protect, preserve and rehabilitate marine environment in Scarborough Shoal, Ayungin Shoal and Panganiban Reef located within the EEZ limits of Philippines, after the coral reef ecosystem were found to have been significantly damaged by the Chinese flagged vessels.[63] Similarly, with regard to the access to information rights,

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[59] Bali Guidelines for the Development of National Legislation on Access to Information Public Participation and Access to Justice in Environmental Matters, UNEP (Adopted on Feb. 26, 2010), https://www.unep.org/resources/publication/bali-guideline-implementation-guide.

[60] MARGHERITA SCAZZA & OSWANDO NENQUIMO, FROM SPEARS TO MAPS: THE CASE OF WAORANI RESISTANCE IN ECUADOR FOR DEFENCE OF THEIR RIGHT TO PRIOR CONSULTATION (International Institute for Environment and Development, International Institute for Environment and Development (IIED), 2021).

[61] UNEP and UNESCAP, An Assessment of Access to Information, Public Participation and Access to Justice in Environmental Decision making in Asia-Pacific (2021), https://www.unescap.org/kp/2021/assessment-access-information-public-participation-and-access-justice-environmental.

[62] Rules of Procedure for Environmental Cases, A.M. No. 09-6-8-SC (April 29, 2010) (Phil.).

[63] Abogado et al. v. Dept. of Environmental and Natural Resources, et al., G.R. No. 246209 (2019).

Pacific Environmental Portal is a repository for data required to acquire information, monitoring, planning, review or forecasting, has been a notable initiative by the Secretariat of Pacific Regional Environmental Programme (SPREP) and the Pacific Community (SPC). Environment Impact Assessment (EIA) Guidelines in the Pacific region provides a detailed framework of EIA in national jurisdictions involving local stakeholders and facilitates transparency.[64] For instance, tourism sector in pacific island contributes significantly to the GDP,[65] strategic planning of EIA alongside involvement of stakeholders (locals and tourism industries) would create a supportive sustainable tourism development with social and climate resilience.[66]

### C. Collective or Solidarity Rights

Unlike the political and socio-cultural economic rights, collective rights are identified as rights of group rather than an individual. Also referred to as third generational rights, these group rights are as relevant as the rights of the individuals, in a world plagued by climate change. They comprise of right to

[64] Convention for the Protection of Natural Resources and Environment of South Pacific Region , Art.16, Vol. 1982 1-33912 (Adopted on Aug.31, 1995) ("hereinafter "Noumea Convention"); Strengthening Environmental Impact Assessment: Guidelines for Pacific Island Countries and Territories, SPREP (2016)

[65] World Travel and Tourism Council, *12% of GDP for Pacific Island Economies in 2016 as per World Travel and Tourism Council report,* Feb.2021, available at https://wttc.org/Portals/0/Documents/Reports/2021/Travel%20and%20Tourism%20as%20a%20Catalyst%20for%20Social%20Impact.pdf?ver=2021-02-25-183248-583 (Last visited on Sep. 19, 2022)

[66] Environment Impact Assessment: Guidelines for Coastal Tourism Development in Pacific Island Countries and Territories, SPREP (2018).

healthy environment, right to development,[67] right of the indigenous people, self-determination, etc.

Right to a healthy environment (RtHE) has been recognised by about 155 States.[68] The recognition of RtHE related to the promotion of 'life of dignity and wellbeing' can be traced to the 1970 Stockholm Declaration. Recent UNGA resolution preceded by the HRC declaration on recognising right to safe, clean and healthy environment as a universal human right as well as appointment of Special Rapporteur on Human Rights and Climate Change[69]. This can be seen as a grand formalised step towards climate justice, after decades of discussions and deliberations. While the resolutions are not binding, they are legally relevant for the judiciary as well as legislature in the national jurisdiction of the States in the international order. It lays a firm foundation for the universality of RtHE in the international law by urging the State parties to take active steps towards fulfilment of the right, in support of climate action. Non-fulfilment or inaction by the State would be in violation of the human rights of the citizen collectively having locus standi in the court of law.

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[67] Human Rights Council, Art.48, *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development*, OHCHR 48/10 U.N. Doc. A/HRC/48/L.18 (Oct.4, 2012)

[68] D. Boyd (UN Special Rapporteur on Human Rights and the Environment), *Report on Human Rights Obligation Relating to the Enjoyment of a safe, clean, healthy and sustainable environment*, U.N. Doc. A/75/161 (2020).

[69] Human Rights Council, *HRC Resolution on the Mandate of the Special Rapporteur on the Promotion and Protection of Human Rights in the context of climate change*, U.N. Doc. A/HRC/RES/48/14 (Oct.13, 2021).

Right to Development (RtD) has been recognised by the UN as a human right[70] and reaffirmed by various international instruments.[71] RtD, both in theory and practice, aims at constant improvement of well-being which are civil, political, economic, social and cultural in nature, integrating the principles of equality, justice, non-discrimination, participation and cooperation at national and international level. RtD is intertwined with the realisation of other human rights and fundamental freedoms.[72] Right to development is imperative in the climate change context since through State action towards RtD both human development and economic development can be achieved. As mentioned in Article 8 of the Declaration,[73] States as the duty bearers should 'undertake, at the national level, all necessary measures for the realisation of the RtD and shall ensure, inter alia, equality of opportunities for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income.' Moreover, the premise of RtD applied in the context of climate change concerns not only community rights but also individual rights, which is highly imperative to the disproportionately affected diverse population of marginalised and vulnerable States impacted by the implications of climate change and its direct as well as indirect connection with human rights. It will only be fair to the climate challenged vulnerable States to exercise their RtD in the course of sustainable actions in view of historical

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[70] UNGA, *Declaration on the Right to Development*, G.A. res. 41/128, annex, 41 U.N. GAOR Supp. (No. 53) at 186, U.N. Doc. A/41/53 (Dec.4, 1986).

[71] U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc.A/CONF.151/26/Rev.1 (Vol. l), annex I (Aug.12, 1992); World Conference on Human Rights, *Vienna Declaration and Programme of Action*, U.N. Doc.A/CONF.157/23 (June 25, 1993); UNGA, *United Nations Declaration on the Rights of Indigenous Peoples*, U.N. Doc. A/RES/61/295 (Oct.2, 2007).

[72] Supra 70, Art.1(1).

[73] Supra 27.

responsibility of the developed States, and focussing as much as on adaptation (assisting global south) as mitigation in the light of principle of Common but Differentiated Responsibility and Respective Capabilties.[74] The adaptation process will help in transitioning to a climate resilient economy where in the times to come, the global south is at par with the global north in its capacity towards climate action. In furtherance to this, it is admitted that there are substantial differentiations on the development parameters amongst the global south states.

The collective rights of indigenous people (RoIP) to their ancestral lands, resources, livelihood, culture, traditional knowledge and security continued to be threatened by climate change. Inaction by the States to recognise RoIP could lead to conflicts, displacements causing grave injustices and discrimination to the indigenous people as nature is their raison d'être. The UN General Assembly adopted the UN Declaration on the RoIP in 2007, recognising the urgent need to respect and promote the RoIP as affirmed in treaties, agreement and other constructive arrangements with States. [75] In July 2022, a petition by indigenous minority group of Torres Strait Island to HRC ruled against Australia for inadequately protecting the RoIP of life, culture, livelihood (violation of Art 27, 17 and 6 of ICCPR) as the low-lying island faces rise in sea level due to climate change.[76] This landmark decision has

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[74] V. Mukherjee & F Mustafa, *Climate Change and Right to Development*, Management and Economics Research Journal, 5(3) (2019), available at https://doi.org/10.18639/MERJ.2019.735041.

[75] UNGA, *United Nations Declaration on the Rights of Indigenous Peoples*, U.N. Doc. A/RES/61/295 (Oct.2, 2007).

[76] *Daniel Billy and Others vs. Australia (Torres Strait Islanders Petition)* CCPR/C/135/D/3624/2019 (2022).

given clarity to the inter-linkage between climate change, human rights and indigenous rights in relation to the obligation of States.

Minority rights of women, children, senior citizens, differently abled and other marginalized groups based on sexual orientation, socio-economic backgrounds face discrimination and inequality to access basic rights and climate change acts as a threat multiplier. There is an established link between lack of access to ecosystem services with dimensions of poverty- income poverty, diseases, malnutrition, lack of education and social stability,[77] and it is the duty of the State to enhance right based capacity building towards equitable access to enjoyment of human rights for everyone since political, socio-economic and collective rights are inter-connected. Prioritising one over the other would only lead human rights-climate action to collapse like a pack of cards.

## IV. **Governing Laws of Seas and Marine Environment: Status and Challenges**

The States in the international order are bound to respect certain obligations immediately or progressively[78] with the premise of non-interference in their domestic affairs. Nonetheless, through conventions and treaties, signatories and ratifying State parties are expected to assume their responsibilities of duty bearer to their citizens and *erga omnes*, to meet the international cooperative standards. International human rights regime imposes State responsibility of recognition, protection and promotion of universally inalienable inherent

[77] *World In Transition- Fighting Poverty Through Environmental Policy*, GERMAN ADVISORY COUNCIL ON GLOBAL CHANGE (2004).

[78] International Covenant on Civil and Political Rights, U.N.T.S. 999 (1966); International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3 (1967).

rights of human beings. These obligations of the States may be in the nature of 'positive obligation' ensuring the protection of the rights from infringement and positive action towards its fulfilment, whereas 'negative obligation' to not interfere with the enjoyment of basic human rights. 'The duty to respect' has been interpreted as affirmative action by the State to do more than just avoiding human right violation.[79] ICESCR has also referred in its text a duty to fulfil rights by the State parties.[80] The effectiveness of protection of human rights depends upon the established institutions of implementation in the State jurisdiction.

The 1982 UN Convention on the Law of the Sea (UNCLOS), an international treaty on marine and maritime activities, has been much criticised for not accommodating human rights-based obligations related to marine environment, since the convention was 'designed for the States and not the individuals.'[81] Article 192 and 194(1) provides for general obligation on State parties to protect and preserve marine environment and to take measures to control pollution from any source respectively. Furthermore, though UNCLOS largely provides 'international rules and national legislation to prevent, reduce and control pollution of the marine environment' as well as Part XII 'protection and preservation of the marine environment', however it doesn't specify clearly the minimum global standards, presenting these provisions as very broad to the State parties. Article 56 provides the rights,

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[79] MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY ((N. P. Engel 2005).

[80] Committee on Economic,Social and Cultural Rights,*General Comment No.14.The right to the highest attainable standard of health,* U.N. Doc. E/C.12/2000/4 (Adopted on Aug.11.2000).

[81] Papanicolopulu, *The Law of the Sea Convention: No place for Persons?*, 27, INTERNATIONAL JOURNAL MARINE AND COASTAL LAW, 867 (2012).

jurisdiction and duties of coastal States related to Exclusive Economic Zones (EEZ) and have full discretion to assess, plan and adopt climate change mitigation and adaptation plans towards use of natural resources in EEZ. Lately, Marine Protected Areas (MPAs) and Particularly Sensitive Sea Areas (PSSAs) have been experimented as area-based tools for marine conservation in climate change context.[82] India has more than 120 MPAs in its Islands, wherein Lakshadweep Islands has added 3 new MPAs in the year 2020 and one of the sites, Dr. KK Mohammad Koya Sea Cucumber Conservation Reserve, as the world's first sea cucumber conservation reserve.[83] MPAs as conservation tool not only help protect the exotic marine biodiversity by minimal human interference, reduces illegal trading of marine resources but also promote and respect sustainable socio-cultural livelihoods of the indigenous communities. This action is also in the lines with Aichi Targets Strategic Plan for Biodiversity 2011-2020 towards improvement of biodiversity and safeguarding marine ecosystems. Similar protected status has been recommended for Angaria Bank in Maharashtra (coral reef biodiversity hub for several species of aquatic life) by the State government of Maharashtra and awaits central approval towards extension of conservation and protection of marine resources in EEZ through Maritime Zones Act 1976.[84] According to Article 56 and 57 of UNCLOS, coastal States have rights over EEZ which

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[82] L. Kriwoken et. al, *Marine Protected Areas and Transboundary Governance* in R Warner and S Marden (eds), Transboundary Environmental Governance: Inland, Coastal and Marine Perspective, Ashgate Farnham, 85 (2012).

[83]K. Shivakumar et. al, *Coastal and Marine Protected Areas in India: Challenges and Way Forward*, Wildlife Institute of India Dehradun (2013).

[84] Sanjana Bhalerao, *State nod to declare 2011 sq km Angria Bank as protected area, Centre's approval awaits*, INDIAN EXPRESS, (Aug 2020), available at: https://indianexpress.com/article/india/maharashtra-state-nod-to-declare-2011-sq-km-angria-bank-as-protected-area-centres-approval-awaited-6545086/.

is 200 nautical miles from the baseline and thereby allows greater length of sovereignty to protect marine biodiversity .

The 1992 Convention on Biological Diversity ('CBD')[85] aims towards conservation of biological diversity and their sustainable use. CBD in its COP 10 decision X/29 on marine and coastal biodiversity has noted, amongst others, the adverse impact of climate change on marine and coastal biodiversity and urged the States to 'integrate climate change related aspects of marine and coastal biodiversity into relevant national strategies, action plans and programmes, national biodiversity strategies and action places (NBSAPs), national adaptation programmes of action (NAPAs), national integrated marine and coastal management programmes, the design and management of marine and coastal protected areas, including the selection of areas in need of protection to ensure maximum adaptive capacity of biodiversity'.[86] The recent COP 15 or 2022 Kunming Biodiversity Conference has adopted the Global Biodiversity Framework with 23 targets to achieve by 2030, one of it '30x30' which is conservation of 30% of world's land and 30% of ocean by the targeted year. The bio-diversity conference also laid emphasis on ocean acidification in relation to climate change under target 8 and practice of sustainable fisheries, aqua-culture and deep mining practices in target 10.[87]

The 1972 London Convention for the Prevention of Marine Pollution by Dumping Wastes and other matters as well as the 1973 International

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[85] The United Nations Convention on Biological Diversity, 1760 UNTS 79 (Adopted on June 5, 1992).The Convention was opened for signature at the Earth Summit in Rio de Janeiro on 5 June 1992 and entered into force on 29 Dec 1993. India is a party to CBD.

[86] Conference of the Parties to the Convention on Biological Diversity, CBD UNEP/CBD/COP/DEC/X/29 (Oct.29, 2010).

[87] Kunming-Montreal Global Biodiversity Framework, Convention on Biological Diversity CBD/COP/15/L/25 (Dec.18,2022)

Convention for the Prevention of Pollution from Ships (MARPOL) prohibits marine pollution or ocean dumping causing damage to marine environment. There has been an estimate of 300% increase in emission from ships by 2050.[88] Coupling the irreparable damages by ocean dumping (plastic wastes, oil spills) with ocean warming, marine environment and the coastal communities are confronted with high vulnerabilities and therefore these treaties play a very vital role towards ocean protection and governance. The Rena oil spill in New Zealand committed a major maritime environmental disaster causing both coastal and seabed contamination, threatening the aquatic life as well as the indigenous communities of Motiti Island and Tauranga.[89] The criminal liability in such cases brings into question the utmost perils of environmental damages that monetary damages can never compensate. On the other hand, in order to protect Baltic Sea area which is a hotspot for exotic marine species, 1992 Convention on the Protection of the Marine Environment of the Baltic Sea Area was signed and in furtherance, coordinated by HELCOM (Helsinki Commission) recognised the detailed target goals towards maritime emissions with ecosystem based approach to the management of human activities for sustainable use of marine goods and services.'[90] Protection of Arctic Marine Environment (PAME) by the Arctic Council working group recommended area-based protection of Arctic high seas vulnerable to shipping risks to

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[88] UNGA (Report of the Secretary General), *Ocean and the Law of the Sea*, UN Doc A/64/66/Add. 1 [349] (Nov.25, 2009).

[89]Waitangi Tribunal Report, *The Final Report on the MV Rena and Motiti Island Claims* (2015),
https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_85134478/Final%20Report%20on%20the%20MV%20Rena%20W.pdf.

[90] HELCOM Copenhagen Ministerial Declaration, *Taking further Action to implement the Baltic Sea Action Plan- Reaching good environmental status for a healthy Baltic Sea*, Baltic Marine Environmental Protection Commission (2013).

marine environment.[91] Recognising the harmful effects of climate change on the Antarctic marine environment, a resolution passed by the Committee on Convention for the Conservation of Antarctic Marine Living Resources (CAMLR 2009) affirmed the rational use of marine resources and improvement of management strategies to conserve the southern ocean environment.[92]

It is important to note that UNFCCC regime has laid less emphasis on ocean and marine environment than atmospheric or terrestrial sphere in its text[93] and hence increasing anthropocentric effects of climate change on the ocean that are not well recognised in a comprehensive structure, would be a downfall towards aiming to keep the global temperature well below the 2 degrees Celsius. Both Paris Agreement and Kyoto Protocol mention least of ocean/marine ecosystem and targets are set for emissions based on atmospheric level than ocean acidification,[94] since blue carbon assets are seen as adaptation agendas rather than mitigation measures. IPCC describes mitigation as the human intervention to reduce the sources or enhance the sinks of greenhouse gases and, mitigation together with adaptation to climate

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[91] Det Norske Veritas, *Specially Designed Marine Areas in the Arctic High Seas*, Report No. DNV Reg No. 2013-1442/17JTMM1d-26, Rev 2 (2014), https://pame.is/images/03_Projects/AMSA/Specially_Designated%20Marine_Areas_in_the_Arctic/AMSA_Specially_Designated_Marine_Areas_in_the_Arctic_final_report_by_DNV_signed.pdf.

[92] Resolution 30, Committee on Convention of conservation of Antarctic Marine Living Resources (2009), https://cm.ccamlr.org/sites/default/files/r30-xxviii_5.pdf.

[93] UNFCCC, Art. 4¶1(d).

[94] Tim Stephens, *Warming Waters And Souring Seas: Climate Change And Ocean Acidification* in Donald Rothwell (eds), THE OXFORD HANDBOOK OF THE LAW OF THE SEA, (Oxford Academic, 2015).

change, have been expressed in Article 2 of UNFCCC.[95] The ocean as a natural carbon sink has been repeatedly undervalued and has been evidently absent in COPs in Bali, Copenhagen, Cancun and Durban, wherein effective management of forest and forest systems towards reducing GHG have been well-negotiated, marginalising ocean in climate policy formulation[96]. It is confirmed that ocean absorb 30% of anthropogenic CO2[97] which increases the global oceanic temperature, yet it saw delayed attention in the climate forum until the IPCC special report on the ocean in 2019 and COP 25 (2019).

Envisaging a healthy and sustainable marine ecosystem beyond national jurisdiction, commitment of 2012 UN Conference on Sustainable Development towards developing an internationally binding instrument on marine biodiversity in areas beyond national jurisdiction (BBNJ) or Treaty of the High Seas as part of UNCLOS is eagerly awaited, which reflects the pressing priority for substantial clarity and deliberation on shared ocean resources, global commons governance, informed decision-making with a precautionary, integrated and ecosystem based approach.[98] Other forthcoming challenges as per predictions such as the increase of global temperature

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[95] Intergovernmental Panel on Climate Change, *Summary for Policymakers in Climate Change: Mitigation of Climate Change, Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (2014).

[96] G. Galland et al, *The Ocean and Climate Change Policy*, 12 Climate Policy 764, 765 (2012).

[97] Sabine, C.L., Feely et al., *The Oceanic sink for anthropogenic CO2*, Science 305, 367-371 (2004).

[98] UNGA, *Resolution on International legally binding instrument under United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction*, U.N. Doc. A/RES/72/249 (Jan.19, 2018).

causing rise in sea level[99] would cause changes in coastlines and maritime boundaries leading to undefined international law issues of statehood without territory, mass exodus of climate related displacements from inundated islands and possibly extra-territoriality of human rights and State jurisdiction. UNCLOS is not equipped to handle the present-day challenges of climate change and human rights on the ocean and marine environment, especially the small island developing States (SIDs). Tuvalu, Kiribati and other small pacific island States are threatened by the rise in sea level for their territorial survival, human rights and statehood. Cross-border climate related migrations have rapidly increased from island States to neighbouring inland States such as New Zealand and Australia, but due to lack of legal status of climate refugees, their cases are rejected viewing climate change adaptations as duty of the State[100] or granted immigrant status on humanitarian grounds other than climate change issues.[101] This calls for legal recognition of the status of climate refugee in the international order, which is the most urgent issue for SIDs from the increased climate change change effects.[102]

Nevertheless, with an accommodating perspective, principle of human rights law (and its effects caused by climate change) are highly relevant in the context of reinforcement of redundant laws and could be incorporated into the

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[99]IPCC, *Special report on the Ocean and Cryosphere in a Changing Climate, Sea Level Rise and Implication for Low Lying Islands, Coasts and Communities*, ch. 4 (2019), https://www.ipcc.ch/site/assets/uploads/sites/3/2022/03/SROCC_FullReport_FINAL.pdf.

[100] Ioane Teitiota v. The Chief Executive of the Ministry of Business, Innovation and Employment [2015]NZSC 107.

[101] AD (Tuvalu), [2014] NZIPT 501370-37. 501370-371 wherein the NZ Immigration and Protection Tribunal granted residential visas to Tuvalu citizens on exceptional humanitarian grounds based on evidences other than climate change effects on Tuvalu.

[102] JANE MCADAM, CLIMATE CHANGE, FORCED MIGRATION AND INTERNATIONAL LAW, (OUP 2012).

UNCLOS under Article 31 of Para 3(c) of the Vienna Convention on the Law of Treaties for the purpose of interpretation of a treaty as it allows 'application to any relevant rules of international law application in relation between the parties' in addition to the text and the preamble.[103]

In consideration of the governing international laws on the cmarine realm and their interaction with the existing challenge of climate change, recognition of the universality of human rights and the obligation (and proactivity) of the States to protect them, is in exigency. The international law has to be broadened to include the new challenges over the global commons, concomitantly bringing legal clarity and specificity for States practice within their jurisdiction. The international community has started to realise the full potential of the ocean and marine environment and its crucial role in climate action. It is pertinent to assess and design emissions threshold that integrates ocean warming and its adverse effects from climate variability in climate policy and decision making. The approach to marine related policies and laws should be precautionary and eco-centric rather than anthropocentric. Through State regulation and elaborate arrangements (inclusive and informed participation) of liability and responsibility over marine resources, sustainable development of the human ecosystem will be possible. Mitigation is as significant as adaptation processes and both should run simultaneously. Proactivity in adaptation will be successful if climate science is taken seriously for the collective collaboration of citizens, civil society and State to formulate climate policies after assessing, monitoring the patterns of climate variability.

## V. **Conclusion**

[103] Vienna Convention on the Law of Treaties, Art. 31 (1)(c),1155 UNTS 331 (Adopted on May 23, 1969).

Climate change has been the most intimidating challenge of the 21st century which can only be tackled with international cooperation and solidarity. The challenge to confront the effects of climate change becomes more problematic owing to its multidisciplinary, cross-sectoral, extra-territorial nature. As the climate change regime is still evolving, an interaction between international environment law and human rights regime presents a plausible direction towards formulations of ecologically and sustainably sound climate policies. Vasak's generational theory has selective application to its content than its context (of generations) in the human rights approach against climate change variability to the marine environment. The context remains the same: political, socio-economic and collective rights are all equally relevant for the enjoyment of universal human rights protected by the States. Since climate justice concerns not just intergenerational but also intragenerational equity, human rights approach to climate change challenges necessitates sustainable development and a precautionary approach. Blue environment until now has been marginalised by the divided attention towards terrestrial and atmospheric environments. To set it right, the paradox of this marginalisation or peripherality of the ocean in the global climate negotiation needs to be more than just recognised in the overall climate change action.

# COUNTERTERRORISM LEGISLATIONS AND INDIA: PATENT INCONSISTENCIES AND THE QUEST FOR UNIFORM JUDICIAL INTERPRETATIONS

Dr. Sandeep Menon Nandakumar*

**Abstract**

*The provisions of counter terrorism legislations are known to be harsh and severe, especially in the context of securing the rights of the accused. One of the main arguments at the international level in the context of terrorism is to include acts of terrorism under the jurisdiction of the Rome Statute of the International Criminal Court, mainly to ensure that a fair process of adjudication or trial would happen before Tribunals or Courts established on the basis of global consensus. There have also been multiple attempts at the national level to challenge the counter terrorism legislations as a whole or certain specific amendment acts that have introduced stricter provisions, so as to ensure that human rights of the alleged accused are not violated. This paper, however, is not an attempt to challenge the constitutional validity of the counter terrorism measures in India on the above-mentioned grounds, but to trace whether the Courts in India are consistent in their approach in interpreting and understanding the provisions of such counter terrorism measures. This paper, in its first part, gives an introduction to the various counter terrorism measures adopted by the country and the legislation that exists at present. The next part of the paper addresses the inconsistencies by the judiciary in its approach in interpreting the provisions of the UAPA, the existing counter terrorism legislation in the country, with specific focus on the provisions relating to bail and sanction for prosecution. The last part of the paper highlights the dangers that might result due to such inconsistencies and argues that such inconsistencies ought to be noted by the Courts and resolved*

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*at the earliest to ensure a better criminal justice administration system so far as counterterrorism legislations are concerned.*

## I. **Introduction**

India, as a nation, does not believe in the utopian ideal that terrorism can be prevented all at once and that the legislations at the national level alone would act as a major deterrent against all future terrorist acts. Probably, it is this realisation that has prompted us to ensure that there are adequate 'counter' terrorism measures at the domestic level and not necessarily 'anti' terrorism laws. The concept of terrorism itself is very difficult to comprehend for a number of reasons. Firstly, the position on whether only non-State actors can be branded as terrorists is unclear. This issue seems important when State sponsored terrorist activities are on the rise. Secondly, the question of whether terrorist acts have to always be transnational, for them to be considered as an act of international terrorism remains unanswered. Thirdly, the definition of terrorism itself is not easy to decipher. This is especially true when one compares the definitions of terrorism that exist at the international and national level. In this context, it should be understood that there exists no universal international convention on terrorism. The draft international convention, namely the Comprehensive Convention on International Terrorism has been under discussion since 1996, and it remains a draft because of the lack of international consensus on the definition of terrorism itself. Fourthly, though there have been attempts at the regional level such as the Council of Europe Convention on the Prevention of Terrorism, the same has not echoed in every regional jurisdiction. This could also lead to certain ambiguities regarding the concept of terrorism as every regional attempt may not provide for similar provisions, which may, in future, lead to issues concerning extradition. For example, Article 5 of the Council of Europe Convention on the Prevention of Terrorism requires State parties to take measures to establish 'public

provocation to commit a terrorist offence' as a criminal offence under their domestic laws. It cannot be stated with certainty that other regional jurisdictions may also incorporate similar provisions requiring State parties to consider making similar acts as criminal offences in their domestic laws. Fifthly, compared to other domestic legislations, counterterrorism legislations have secured a reputation that is not so favourable to them. Most of the provisions in almost all of the counterterrorism legislations have been branded as 'draconian' and 'anti-human rights.' This has led to a situation where adequate focus shifted towards condemning the already existing provisions in such counterterrorism legislations, rather than refining the definition of terrorist acts in such legislations. The creation of new definitions of terrorism as and when new counterterrorism legislations are enacted, replacing the former ones, have made it difficult to ascertain the true implications of the concept of terrorism.

However, India did enact more than a couple of counterterrorism legislations such as the Terrorist and Disruptive Activities (Prevention) Act, 1987 ("TADA"), the Prevention of Terrorism Act, 2002 and the Unlawful Activities Prevention Act, 1967 ("UAPA"). Currently, it is the UAPA that has been used to crackdown the activities of terrorists, terrorist gangs and terrorist organisations.[1] Though there have been various issues addressed by the Indian judiciary related to different provisions of UAPA, the judicial pronouncements

[1] *See* The Unlawful Activities (Prevention) Act, 1967, §2(1)(1), §2(1)(m), No. 37, Acts of Parliament, 1967 where terrorist gangs and terrorist organisations have been defined in different sections under UAPA. According to the UAPA, §2(1)(l), "terrorist gang" means any association, other than terrorist organisation, whether systematic or otherwise, which is concerned with, or involved in, terrorist act and according to UAPA, §2(1)(m), "terrorist organisation" means an organisation listed in the Schedule or an organisation operating under the same name as an organisation so listed.

on provisions related to bail and sanction for prosecution stands out. It stands out not only because of the significance attached to those judicial pronouncements, but also due to certain inconsistencies evident in the judicial interpretations of the same. This paper is an attempt to trace such inconsistencies, specifically with regard to provisions regarding bail and sanction for prosecution, an analysis of which is highly important in the current scenario, as conflicting judicial pronouncements and interpretations on the same might lead to unprecedented results, that may further deteriorate the progress of a democratic country like ours. This paper specifically looks into the bail jurisprudence evolved by the Indian Supreme Court in counterterrorism legislations in the case of *National Investigation Agency* v. *Zahoor Ahmad Shah Watali*[2] and matches the same with that of the judgement in *Union of India* v. *K.A. Najeeb*[3] so as to analyse whether the answers to the issues related to bail under UAPA have attained a finality or whether there are still areas that need to be addressed by the judiciary before calling it finally settled. This would be done by specifically referring to the observations and decision of the Delhi High Court regarding the grant or rejection of bail in *Asif Iqbal Tanha* v. *State of NCT of Delhi*.[4] This paper, in its next part, focuses on the provision regarding sanction for prosecution under UAPA and attempts to address the connected issues with the help of decisions such as *Roopesh* v.

[2] National Investigation Agency v. Zahoor Ahmad Shah Watali, (2019) 5 SCC 1 [hereinafter 'Watali'].

[3] Union Of India v. K.A. Najeeb, (2021) 3 SCC 713 [hereinafter 'Najeeb'].

[4] Asif Iqbal Tanha v. State (NCT of Delhi), 2021 SCC OnLine Del 3253 [hereinafter 'Asif Iqbal Tanha'].

*State of Kerala*[5] and *Mahesh Kariman Tirki and Ors.* v. *State of Maharashtra*.[6] These, however, do not indicate that these are the only inconsistencies that one may find with regard to UAPA or counterterrorism measures in India. The attempt is only to highlight the major ones that are needed to be addressed more urgently than the rest so as to ensure a better legal framework to safeguard the country from the massive human rights violations caused by terrorist acts.

## II. Counterterrorism Legislations in India

The attempt towards a counterterrorism measure at the national level started with the enactment of the Terrorist and Disruptive Activities (Prevention) Act in 1987. It is true that the legislation by the name 'Unlawful Activities Prevention Act' has existed since 1967, but the main objective of the same was not to counterterrorism *per se*. It should be noted that the main reason behind the enactment of UAPA in 1967 was to fulfil the objectives of the 16th Constitutional Amendment Act of 1963. The enactment of the Unlawful Activities Prevention Act in the year 1967 was mainly to give effect to the recommendation by the Committee on National Integration and Regionalisation. The Committee on National Integration and Regionalisation had recommended to include 'sovereignty and integrity of India' as a restriction to freedoms enumerated under Article 19 of the Constitution of India and the same got accepted through the 16th Constitutional Amendment Act of 1963. It was to give effect to the newly added restriction to Article 19 that the Unlawful Activities Prevention Act got enacted in the year 1967. This

[5] Roopesh v. State of Kerala, Crl.Rev.Pet.No 732/2019 (Kerala High Court) [hereinafter 'Roopesh'].

[6] State of Maharashtra v. Mahesh Kariman Tirki, (2022) SCC OnLine SC 1430 [hereinafter 'Mahesh Kariman Tirki'].

is the main reason why UAPA did not deal initially with terrorism, but only with unlawful activities.

The Terrorist and Disruptive Activities (Prevention) Act, 1987 had become infamous to the extent that even the constitutional validity of several provisions and the Act altogether was challenged in *Kartar Singh* v. *State of Punjab*.[7] Though the Supreme Court upheld the constitutional validity of the Act in the case, certain guidelines were also issued by the Court to ensure that the human rights of those affected by the legislation are preserved. After TADA lapsed on its own (owing to the sunset clause),[8] the Prevention of Terrorism Act ("POTA") was enacted in the year 2002, which was also branded as 'draconian' by several critics. Certain provisions of TADA did not find mention in POTA. For example, where appeal under TADA was only allowed before the Supreme Court, POTA provided for appeal to the High Court.[9] Similarly, confession made by the accused was only made admissible against him and not against the co-accused, abettor or conspirator under provisions of POTA, unlike TADA.[10] These changes were presumably for ensuring that the legislation is more progressive than TADA in many aspects. However, the presence of provisions in POTA such as the admissibility of intercepted communications, the extended period of custody, non-applicability of several provisions of Code of Criminal Procedure, 1973 including provisions related to anticipatory bail, rigorous procedure for

[7] Kartar Singh v. State Of Punjab, (1994) SCC (3) 569.

[8] Terrorist and Disruptive Activities (Prevention) Act, 1987, §1(4), No. 28, Act of Parliament, 1987, provided for a 'sunset clause' as per which the Act only had a life of eight years.

[9] Prevention of Terrorism Act, 2002, §10, No. 15, Acts of Parliament, 2002 where the appeal provision states as follows, "Any person aggrieved by an order of forfeiture under section 8 may, within one month from the date of the receipt of such order, appeal to the High Court."

[10] Prevention of Terrorism Act, 2002, §32, No. 15, Acts of Parliament, 2002.

securing bail, etc made the legislation face similar sets of criticisms as TADA before its repeal in 2004. This became the reason for the major amendments in 2004 to UAPA, 1967 by which a new chapter on 'Punishment for Terrorist Activities'[11] was introduced paving the way for it to be the counterterrorism legislation since 2004. The Act was also later amended in 2008, 2013 and 2019.

## III. Inconsistencies in the Judicial approach

### A. Bail or Jail

The foundational principles of criminal jurisprudence ensure that bail is the rule and jail is an exception. However, specific criminal legislations, depending upon the severity of the crime that they intend to deal with, have made several exceptions to the above-mentioned rule of criminal justice administration. Bail provisions under statutes such as Narcotic Drugs and Psychotropic Substances Act, 1987 ("NDPS"), TADA, Maharashtra Control of Organised Crime Act, 1999 ("MCOCA"), POTA, UAPA are all examples of this. However, when one analyses the provisions regarding bail in the above-mentioned legislations, it is quite surprising to note that the provisions in the UAPA deviate from all the other legislations. The provisions of NDPS, TADA, MCOCA and POTA follow a uniform pattern where the Public Prosecutor is given an opportunity to oppose the bail application, and unless the Court is satisfied that there are reasonable grounds for believing that the accused is not guilty of an offence under the concerned provisions of the legislation and that the accused is not likely to commit any offence while on

[11] The Unlawful Activities (Prevention) Act, 1967, Chapter IV, No. 37, Acts of Parliament, 1967.

bail, the accused may be refused bail.[12] The provision in POTA, however, does not insist on the latter part of the requirement, i.e., whether the accused is not likely to commit any offence while on bail. On a perusal of the provision regarding bail under UAPA, a stark distinction is noted, wherein the provision States that the accused person shall not be released on bail or on his own bond if the Court, on a perusal of the case diary or the report made under Section 173 of the Code, is of the opinion that there are reasonable grounds for believing that the accusation against such person is *prima facie* true.[13] Thus, when all the other legislations made it significant for the Courts to consider grounds for believing that the accused is not guilty of the offence, the provision under UAPA ensures that the Court has grounds, after perusing the case diary and the 173 report, to believe that the accusation against the accused are true.

The Supreme Court's initial stance with regard to the provision regarding bail under UAPA in *National Investigation Agency* v. *Zahoor Ahmad Shah Watali*[14] was and is still considered as the law related to bail in matters connected to UAPA. However, on a detailed examination of judicial precedents on the question of bail under UAPA, one may notice that the said rule underwent a slight alteration in *Union of India* v. *K.A. Najeeb*[15] and a complete deviation from the said rule in *Watali*, in *Asif Iqbal Tanha* v. *State*

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[12] Narcotic Drugs and Psychotropic Substances Act, 1985, §37, No. 61, Acts of Parliament, 1985; Terrorist and Disruptive Activities (Prevention) Act, 1987,§20(8), No. 28, Acts of Parliament, 1987; Maharashtra Control of Organised Crime Act, 1999, §21(4), No. 30, Acts of Maharashtra State Legislature, 1999; Prevention of Terrorism Act, 2002, §49(7), No. 15, Acts of Parliament, 2002.

[13] The Unlawful Activities (Prevention) Act, 1967, §43D(5), No. 37, Acts of Parliament, 1967.

[14] Watali, *supra* note 2.

[15] Najeeb, *supra* note 3.

*of NCT of Delhi*.[16] This highlights the first set of inconsistencies in judicial pronouncements so far as provisions regarding counterterrorism laws are concerned. In *National Investigation Agency* v. *Zahoor Ahmad Shah Watali*,[17] the Hon'ble Supreme Court was of the opinion that an elaborate examination of the evidence is not required at the stage of consideration of bail, and the Court is only under a duty to arrive at a conclusion based on broad probabilities regarding the involvement of the accused in the commission of the offence. According to the Court, examining the merits and demerits of evidence is not required under Section 43D(5) of UAPA. In this context, the Supreme Court observed thus:

> "The totality of the material gathered by the Investigating Agency and presented along with the report and including the case diary, is required to be reckoned and not by analysing individual pieces of evidence or circumstance."

The judgement in *National Investigation Agency* v. *Zahoor Ahmad Shah Watali* specifically highlighted the interpretation of the Apex Court with regard to the bail provision under the UAPA, wherein the Court ruled against the decision of the High Court in granting bail to the accused on the ground that the recorded statements under Section 164 of the CrPC were presented to the Designated Court in a sealed envelope, thus denying the defence an opportunity to peruse the copies of the same. According to the Court, Section 48 of UAPA, 1967 clearly provides that the provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than the said Act and hence the act of the High Court in

[16] Asif Iqbal Tanha, *supra* note 4.
[17] Watali, *supra* note 2.

disregarding the statements presented under a sealed envelope is in complete disregard of its duty to record its opinion as to whether the accusation against the accused is *prima facie* true or not. Thus one can see that the approach of the Court in *National Investigation Agency* v. *Zahoor Ahmad Shah Watali* was duty bound to refuse bail.

When the Supreme Court did not allow any beneficial interpretation of Section 43D(5) of UAPA in *National Investigation Agency* v. *Zahoor Ahmad Shah Watali* so far as the accused is concerned, the decision in *Union of India* v. *K.A. Najeeb*[18] deviated from the same and set a precedent that favoured the granting of bail to the accused under the very same provision. However, the judicial pronouncement in *Union of India* v. *K.A. Najeeb* was based on the protection of the constitutional rights of the accused and not on the legislative prohibition created by Section 43D(5) of UAPA. The Supreme Court in *Union of India* v. *K.A. Najeeb* vehemently opined that the statutory restrictions under Section 43D(5) of UAPA does not oust the Constitutional Courts to grant bail in case of violation of fundamental rights of the Constitution of India. Thus, the decision in *Union of India* v. *K.A. Najeeb*, though on the basis of constitutional reasoning, deviated from the strict interpretation in *National Investigation Agency* v. *Zahoor Ahmad Shah Watali*. This created a scenario where the decision in *Watali* still remained a precedent whereas the decision in *Najeeb* constituted an exception on constitutional grounds.

The inconsistencies in the approach towards bail under the UAPA became more evident when the Delhi High Court in *Asif Iqbal Tanha* v. *State of NCT of Delhi*[19] granted bail to the accused irrespective of the directions regarding

[18] Najeeb, *supra* note 3.
[19] Asif Iqbal Tanha, *supra* note 4.

the same in the *Watali* judgement. But the interesting point here is that the Delhi High Court in *Asif Iqbal Tanha* v. *State of NCT of Delhi* uses the very same reasoning given in *Watali* judgement to grant bail to the accused, which had recommended against bail to be granted to those accused under UAPA. The Court did this by understanding the *Watali* judgement to mean that only a perusal of the case diary and the 173 report submitted before the Court could be done and a detailed examination of those is not required for the purposes of determining bail. Thus, according to the Court, on a perusal of the evidence adduced before the Court, the Court itself could not find any accusations validly made for the purpose of constituting offences under UAPA and hence bail was granted to the accused. It is also worth noticing that the Court in *Asif Iqbal Tanha* v. *State of NCT of Delhi* relies on the Supreme Court's decision in *Najeeb's case* thereby analysing the constitutional dimensions of the rights of the accused before deciding to grant bail.

The point to be noted here is that when the Supreme Court decided *Watali*, it was supposed to have tied the hands of the defence from securing bail to the accused under UAPA. When the decision in *Watali* created a judicial interpretation that almost signalled an impossibility in securing bail in UAPA matters, the same court in *Najeeb's case* took a different stand by granting bail to an accused under UAPA on constitutional grounds. This paved the way for two scenarios: firstly, *Watali* still stood as a binding precedent but deviations are possible on constitutional grounds and secondly, future decisions could be decided either strictly on the basis of the judgement in *Watali* or on the basis of a beneficial interpretation as given in *Najeeb's* judgement. This inconsistency remains even today and it has become extremely difficult to formulate or decipher a uniform rule with respect to bail that is currently applicable in India with regard to counterterrorism legislations. It remains to

be seen as to whether there would be a reconsideration of the *Watali* judgement in matters pending before the Apex Court or whether the Court would reiterate *Watali* as the benchmark for matters connected to bail under UAPA.

### B. Sanction for prosecution under UAPA

In *Roopesh v. State of Kerala*,[20] the Kerala High Court held that the delay in sanction obtained by the prosecution for prosecuting under the Unlawful Activities (Prevention) Act, 1967 could be regarded as invalid in view of the blatant violation of the provisions of the Unlawful Activities (Prevention) (Recommendation And Sanction of Prosecution) Rules, 2008. Though the prosecution tried to convince the Court by stating that mere failure of the State to follow the deadlines stipulated in the 2008 Rules shall not affect the prosecution of an UAPA offender, especially when the allegations against the offender were grave, the High Court held that a valid sanction is *sine qua non* for enabling the prosecuting agency to approach the Court to enable the Court to take cognizance of the offence under UAPA. According to the Court,

> "If there is no valid sanction, the Designated Court will get no jurisdiction to try a case against any person mentioned in the report as the Court is forbidden from taking cognizance of the offence without such sanction. If the Designated Court has taken cognizance of the offence without a valid sanction, such action is without jurisdiction and any proceedings adopted thereunder will also be without jurisdiction."

[20] Roopesh, *supra* note 6.

The Court held that both the statutory provision under Section 45 of UAPA[21] and the 2008 Rules use the word 'shall' which makes it obligatory on the part of the authorities to follow the requirement of a 'sanction', that too, within the stipulated period, or else the prosecution would stand vitiated. In this regard, the Court held thus:

> "When the penalty provided is extremely stringent and the procedure for trial prescribed is compendious, the sanctioning process mentioned under Section 45 of the Act and under the Recommendation Rules, 2008 must have to be adopted very seriously and exhaustively than the sanction contemplated in other penal statutes."

The main issue due to these problems is that an actual offender may have to be discharged for want of compliance with the provisions of the Act or Rules, which is detrimental in the long run as there are chances of more terrorist acts happening in the country.

In the context of sanction under Section 45 of UAPA, the Bombay High Court in *Mahesh Kariman Tirki and Ors.* v. *State of Maharashtra*,[22] held that the sanction to be given under section 45 of UAPA, after considering the report of the authority should first mean that the report presented for obtaining sanction should not be a mere 'communication'. The report should show

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[21] The Unlawful Activities (Prevention) Act, 1967, §45, No. 37, Acts of Parliament, 1967 where the provision on cognizance of offences reads, "(1) No court shall take cognizance of any offence (i) under Chapter III without the previous sanction of the Central Government or any officer authorised by the Central Government in this behalf; (ii) under Chapter IV and VI without the previous sanction of the Central Government or, as the case may be, the State Government, and where such offence is committed against the Government of a foreign country without the previous sanction of the Central Government."

[22] *See* Mahesh Kariman Tirki, *supra* note 7 where the acquittal order by the Bombay High Court stands suspended after the intervention by the Hon'ble Supreme Court of India.

evidence of an independent review of the evidence gathered in the course of the investigation and the recommendation thereof. With regard to the factual instances, the Court held that the material which was considered by the authority for framing the report was blurred, as it contains the conclusion without reasoning. The authority which forwarded the report also did not have the report of the Central Forensic Science Laboratory on the digital data retrieved from the electronic gadgets which formed an important piece of evidence. According to the Court,

> "The use of expression 'only after considering the report' of such authority is a mandate that the sanctioning authority must give due consideration to the report, and to enable the sanctioning authority to be aided and assisted, the report of the authority which makes an independent review must, at the very minimum incorporate summary of the evaluation or review of the evidence gathered in the course of investigation."

However, the Court in *Mahesh Kariman Tirki and Ors.* v. *State of Maharashtra*,[23] took a different viewpoint than that of the decision in *Roopesh* v. *State of Kerala*.[24] The Court, in *Mahesh Kariman Tirki and Ors.* v. *State of Maharashtra*,[25] held that the time limit prescribed for making the recommendation or according sanction under UAPA could not be said to be mandatory. According to the Court,

> "Albeit directory, the time frame must be substantially complied with. The effect of gross

[23] *Id.*
[24] Roopesh, *supra* note 5.
[25] Mahesh Kariman Tirki, *supra* note 6.

> delay in submitting recommendatory report and according sanction may have to be examined on case to case basis, and the principles underlying Sections 460 and 465 of the Code of 1973 may come into play."

With regard to the term 'shall' that appear in Section 45 of UAPA and Rules 3 and 4 of the Unlawful Activities (Prevention) (Recommendation And Sanction of Prosecution) Rules, 2008, the Court held thus:

> "The prima facie inference that use of the word "shall" raises a presumption that the provision is mandatory may stand rebutted by other considerations and one extremely relevant consideration is the consequences which may flow from such construction."

Nevertheless, the Bombay High Court held that the fact that the requisite sanction under Section 45 of UAPA was only submitted after the framing of the charges by the trial judge, is a sufficient ground for vitiating trial. According to the Court,

> "If cognizance is taken without complying with the requirement of valid sanction, entire trial shall stand vitiated, and the conviction or acquittal recorded would not be by Court of competent jurisdiction."

The Court further held that, "the requirement of sanction, envisaged in stringent penal statutes, and the fetter on the power of the Court to take cognizance, cannot be equated with the bar envisaged under Section 193 of the Code of 1973, and we are fortified in the said view by the schematic distinction succinctly articulated by the Hon'ble Supreme Court between the provisions of the erstwhile Code of 1898 and the Code of 1973."

This is another inconsistency that needs to be urgently addressed by the Apex Court, as there exist two conflicting opinions by different High Courts in the country on the issue of sanction for prosecution, that too, on matters connected to UAPA, which in itself is facing the wrath of criticisms due to the presence of stringent provisions. It could be hoped that the same would be settled in the appeal against the decision of the Bombay High Court in *Mahesh Kariman Tirki and Ors.* v. *State of Maharashtra*.[26]

## IV. Counterterrorism Legislations – A Tale of Inconsistencies

### A. Requirement of 'Notice'

It is not the first time that a counterterrorism measure at the national level has suffered from certain inconsistencies. Earlier counterterrorism legislations such as TADA and POTA too, had suffered from certain inconsistencies which had to be resolved by the judiciary. For instance, the Court in *Hitendra Vishnu Thakur* v. *State of Maharashtra*[27] held that when the report is submitted by the Public Prosecutor for a grant of extension of custody of the accused, its 'notice' should be sent to the accused before an extension of custody is granted so that the accused gets an opportunity to oppose such an extension on available legal grounds. The Court explicitly stated that though the requirement of a formal notice is not mentioned in the statute, the same should be read into the provision.[28] This requirement of 'notice' was further modified in a later judgement, *Sanjay Dutt* v. *State,*[29] wherein the Court held that a 'notice' does not mean a written notice to the accused, but only means

[26] *Id.*

[27] Hitendra Vishnu Thakur v. State Of Maharashtra, (1994) 4 SCC 602.

[28] The same was held to be a requirement of principles of natural justice which would ensure a fair trial so far as the accused is concerned.

[29] Sanjay Dutt v. State through CBI, (1994) 5 SCC 410.

production of the accused when the question regarding the extension of the accused beyond the statutory period is being considered by the Court. This could have led to future inconsistencies, but fortunately didn't as the statute itself became non-existent in a couple of years.

### B. House arrest

One of the major inconsistencies that the country would face soon with regard to judicial interpretations of the provisions related to counterterrorism legislations, specifically UAPA, is regarding the use of the Court's discretionary powers in permitting house arrest to those accused of offences under the UAPA. It is true that the decision to allow house arrest is generally taken primarily on medical grounds, but there have been no consistencies in allowing the same. For instance, though the Supreme Court permitted house arrest in the case of *Gautam Navlakha* with certain restrictions,[30] a similar prayer on similar grounds was refused by the Delhi High Court in *Aboobacker E.* v. *National Investigation Agency*[31] stating that the High Court does not possess such powers possessed by the Supreme Court to grant house arrest in matters falling under the UAPA. This instance, by the Supreme Court, of granting house arrest to a person accused of an offence under UAPA will definitely lead to more subsequent petitions being filed before the constitutional courts across the country, possibly leading to different and, sometimes, conflicting outcomes. Control orders or TPIM notices[32] or house

[30] Gautam Navlakha v. National Investigation Agency & Anr, Petition for Special Leave to Appeal (Crl.) No. 9216/2022 (Supreme Court).

[31] Mastiguda Aboobacker v. National Investigation Agency, Crl.MC.No.5149 (Delhi High Court).

[32] *See* Terrorism Prevention and Investigation Measures Act, 2011 (Eng.), which provides for measures that are taken in the United Kingdom to prevent terrorism and investigate into possible terrorist activities.

arrests were not precedents in matters connected to counterterrorism legislations in India, and one might have to wait and see whether all of these would, in future, form a part of the interpretations of provisions of such legislations.

## V. **Conclusion**

The conscious interval between the end of TADA and the enactment of POTA itself shows the amount of time the Central Government took before giving effect to a new counterterrorism measure in the country. This window period was mainly intentional, as it was a cooling-off period so far as existing criticisms to TADA were concerned, and it was also to ensure the fact that the new legislation, namely, POTA did not meet with similar criticisms from its very inception. Similarly, the findings of the Review Committee constituted under Section 60 of POTA, the powers of which were increased by the POTA Repeal Act of 2004 also showed the drawbacks of POTA. The Review Committee found that around 11,384 persons were wrongfully charged under POTA who should have been charged under other legislations.[33] Both TADA and POTA were not free from criticisms and though their constitutional validity as such were not disputed by the Courts, severe criticisms against the provisions of both legislations did result in people doubting their credibility and efficacy in effectively countering terrorist acts. In this context, it should also be noted that the constitutional validity of UAPA itself has been challenged, the adjudication of which is still pending before the Hon'ble Supreme Court. The writ petition in *Foundation of Media Professionals and*

[33] Liberation, *Impact of Anti-Terrorism Laws on the enjoyment of Human Rights in India*, https://www.ohchr.org/sites/default/files/lib-docs/HRBodies/UPR/Documents/Session1/IN/LIB_IND_UPR_S1_2008_Liberation_uprsubmission.pdf.

*Anr.* v. *UOI and ors.*[34] contends that the provisions of UAPA are against fundamental rights guaranteed under Articles 14, 19 and 21 of the Constitution of India. According to the petitioners, the whole Act is mainly against dissent and it punishes those who legitimately criticise the government, which is fundamentally against the working of a democratic country.

In terms of legislations and agencies to counterterrorism, it could be said that India does not fall short of adequate counterterrorism measures when compared to other jurisdictions. However, criticisms to the ways in which the legislative and policy measures have been implemented stands in the way of combating and countering terrorism at the national level. For example, there have been several instances where proper sanction for prosecution is not obtained for prosecuting an offender under UAPA. Either sanction, as such, may not be obtained or there may be delay in obtaining the sanction prescribed under the necessary Rules. Rules (3)[35] and (4)[36] of the Unlawful Activities (Prevention) (Recommendation And Sanction of Prosecution) Rules, 2008 clearly state that the Authority constituted under Section 45(2) of the UAPA shall, within seven working days of the receipt of evidence gathered by the Investigating Officer under the Code submit its report of recommendation to

[34] Foundation of Media Professionals v. Union of India, W.P.(C) No. 230/2022 (Supreme Court).

[35] Unlawful Activities (Prevention) (Recommendation And Sanction of Prosecution) Rules, 2008, where Rule 3 states as follows: "Time limit for making a recommendation by the Authority: The Authority shall, under sub-section (2) of section 45 of the Act, make its report containing the recommendations to the Central Government or, as the case may be, the State Government within seven working days of the receipt of the evidence gathered by the investigating officer under the Code."

[36] *See id.*, where Rule 4 states, "Time limit for sanction of prosecution: The Central Government [or, as the case may be, the State Government] shall, under sub-section (2) of section 45 of the Act, take a decision regarding sanction for prosecution within seven working days after receipt of the recommendations of the Authority."

the State Government, and that the State Government shall, under sub-section (2) of Section 45 of the Act, take a decision regarding sanction for prosecution within seven working days after receipt of recommendations of the Authority. However, due to the laxity on the part of the investigating officials, the sanction orders get issued only after the expiry of the period stipulated under the 2008 Rules. The continuing inconsistencies in judicial interpretations of provisions of counterterrorism legislations results in grave injustice not only to the victims in concerned cases, but also to the reputation of the Supreme Court. It may be hoped that the Apex Court of the country will find a suitable way to restore justice in matters connected to counterterrorism.