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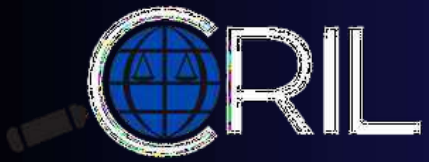

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--
Prof. (Dr.) Raka Arya
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WHAT'S IN THIS ISSUE?

EDITORIAL NOTE ON CONTEMPORARY ISSUES - TAKING AWAY OF HOSTAGES: A VIOLATION OF INTERNATIONAL LAW

Tejas Sateesha Hinder[1] and Vaishnavi Salimath[2]

I. BACKGROUND

Taking away hostages can be observed as an internationally wrongful act in times of armed conflict, most notably in the instances of Russia-Ukraine and Indo-Pakistan. It hence becomes imperative to revisit the laws in place at the international level to bar such taking away of hostages. Modelled on this aim, this article revisits considerations over the issue under International Humanitarian Law and International Human Rights Law.

II. CONTRAVENTIONS UNDER INTERNATIONAL HUMANITARIAN LAW

Common Article 3 of the Geneva Conventions prohibits the taking of hostages. It is also prohibited by the Fourth Geneva Convention and is considered a grave breach thereof. These provisions were to some extent a departure from international law as it stood at that time, articulated in the List (Hostages Trial) case in 1948 [United States, Military Tribunal at Nuremberg, List (Hostages Trial) case], in which the US Military Tribunal at Nuremberg did not rule out the possibility of an occupying power taking hostages as a measure of last resort and under certain strict conditions.

However, in addition to the provisions in the Geneva Conventions, practice since then shows that the prohibition of hostage-taking is now firmly entrenched in customary international law and is considered a war crime. Taking away hostages would hence contravene common Article 3 of the Geneva Convention and the Fourth Geneva Convention, which explicitly prohibit the taking away of hostages. The prohibition of hostage-taking is recognised as a fundamental guarantee for civilians and persons hors de combat in Additional Protocols I and II.

During armed conflicts, the army personnel qualify as persons hors de combat, and hence possess the right from being taken away as hostages. Therefore, a country by taking away the army personnel of another state as hostages amidst armed conflicts, violates the rights guaranteed to them under Additional Protocols I and II.

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III. VIOLATION OF INTERNATIONAL HUMAN RIGHTS LAW

International human rights law does not specifically prohibit "hostage taking", but the practice is prohibited by virtue of non-derogable human rights law because it amounts to an arbitrary deprivation of liberty.
The United Nations Commission on Human Rights in Resolutions 1998 and 2001/38 has stated that hostage-taking, wherever and by whoever committed, is an illegal act aimed at the destruction of human rights and is never justifiable.

IV. STATE OF EMERGENCY-WHETHER A PROSPECTIVE CONSIDERATION?

In its General Comment on Article 4 of the International Covenant on Civil and Political Rights (concerning states of emergency), the UN Human Rights Committee, *vide* General Comment No. 29 stated that States parties may "in no circumstances" invoke a state of emergency "as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages".

Although the prohibition of hostage-taking is specified in the Fourth Geneva Convention and is typically associated with the holding of civilians as hostages, there is no indication that the offence is limited to taking civilians hostage. Common Article 3 of the Geneva Conventions, the Statute of the International Criminal Court and the International Convention against the Taking of Hostages do not limit the offence to the taking of civilians, but apply it to the taking of any person. Indeed, in the Elements of Crimes for the International Criminal Court, as under Article 8(2)(a)(viii) of the ICC Statute, which enlists Definition of the taking of hostages as a war crime as a war crime, the definition applies to the taking of any person protected by the Geneva Conventions.

Therefore, a state cannot plead emergency, the reason being the interpretation of Article 4 of the ICCPR by the UNHRC and the Fourth Geneva Convention.

V. OBLIGATION TO RETURN HOSTAGES

Article 3 of the International Convention against the taking away of hostages states that, "The State Party in the territory of which the hostage is held by the offender shall take all measures it considers appropriate to ease the situation of the hostage, in particular, to secure his release and, after his release, to facilitate, when relevant, his departure." Therefore, countries taking away hostages are under an obligation to return the hostages of Indiana by virtue of the aforesaid statutory provision.

VI. PROSPECTIVE WRONGS VIS-À-VIS CLAIMS BY OR AGAINST INDIVIDUALS BEFORE THE ICC

Under Articles 8(2)(a)(viii) and (c)(iii) the ICC Statute, the "taking of hostages" constitutes a war crime in both international and non-international armed conflicts. Instances of hostage-taking, whether in international or non-international armed conflicts, have been condemned by States. Conflicts, once established to be armed conflicts, would pave way for consideration of taking of hostages as a war crime, under the aforementioned article.

A MULTIDISCIPLINARY APPROACH TO AGGRESSIVE TAX AVOIDANCE

Aisvaria Subramanian[1]

ABSTRACT

The Base Erosion and Profit Shifting has started to become a major concern for the OECD due to the negative impact it has on third-world countries, citizens, other businesses, and the economy of countries. It has become an obstacle difficult to overcome, especially in developing nations, as the tax revenues contribute to providing services to the residents of the respective country. Through this paper, the author purports to establish a correlation between law of taxation and human rights law, through the case studies of mega enterprises such as Google, Amazon, Starbucks, Zambia Sugar, etc. and prove that them paying less or no taxes might be within the purview of laws of taxation, but is illegal from human rights law perspective, as they are making their sales from the consumer market of various countries, but are not willing to contribute equally for the services of the countries, thereby forcing them to tax the residents instead to tax their populations for public projects such as infrastructure, healthcare, and education.

I. INTRODUCTION

The Physiocrats, in the 18th century, observed the "*impôt unique*" which was indeed a "natural revenue" to the sovereign, as a way to reclaim a fee from the landholders for the protection that the sovereign provided for their land titles.[2] In the earlier days, people bore the weight of heavy taxation in the form of land taxation. In the Middle Ages, period taxation arose as a practice to earn revenue from the taxation of land. Since Adam Smith, the capitalist creed has held that in pursuing its own interest of profit, business serves the interests of society.[3] Adam Smith's original theory on taxation was based on the principle of "*ability to pay*".[4] The entire framework of taxation emerged as an efficient structure to provide additional revenue to the government. have come to be known for being exceptionally influential international actors. These corporations, as perceived by many scholars, fall within two main perceptions: (i) these highly efficient economic machines end up doing more harm than good by exploiting the labour and natural resources of developing states; (ii) that multinational corporations are the key to modernization in the developing

[1] The author is a 5th year law student from O.P. Jindal Global University, India.
[2] Dwyer Terence, *Taxation: The Lost History*, The American Journal of Economics and Sociology 73, no. 4 664–988 (2014), <http://www.jstor.org/stable/43817496>.
[3] Conway W Henderson, *Multinational Corporations and Human Rights in Developing States*, World Affairs 142 no. 1, 17–30, (1979), <http://www.jstor.org/stable/20671799>.
[4] Ibid at 2.

nations.[5] The fast pace in which globalization of multinationals is taking place, and the growth of digital economy, have increased the possibilities for multinationals to engage in tax planning activities. In a scenario where tax revenue is lower to begin with due to the economic recession, a new tax planning opportunity for multinationals will be greeted with skepticism, not only by governments but by honest taxpayers, politicians concerned, the NGO's, the media, and other stakeholders. The ongoing debate of international tax law is largely focused on the tax-paying morale of the multinationals. The main question that needs to be answered, is how the actions of these multinationals affect various countries' economies, especially the third world countries. Are the corporations contributing their fair share of taxes to the countries in which they are doing business? The tax-paying morale of multinationals is beginning to cause serious detriment to not just the nations, but the citizens as well.

The author through this paper purports to establish a multidisciplinary policy in the arena of International Tax, which will help in inaugurating a strong foundation, leaving no room for loopholes, and every party involved pays their fair share of taxes. Parts II and III introduce the concepts of digital taxation and the debate of tax avoidance and evasion. Part IV delves deep into the Aggressive Tax Avoidance and the strategies used by various multinationals. In Part V, the author includes multiple disciplines that could be incorporated while formulating the perfect solution for tax avoidance in the era of digital tax. Part VI talks about the important developments by the OECD, and its impact. This paper shall aim to establish the above-mentioned objectives, through a deep analysis of the major case studies of multinationals, their corporate tax planning, and how it intensely affects the developing nations. While identifying the problem, this paper shall also provide alternative methods and solutions through the analysis of BEPS action plan and case studies, in which the government of various nations may be able to prevent this from happening.

II. SISYPHIAN TASK? DIGITAL ECONOMY AND IT'S TAXATION

The *Organization for Economic Cooperation and Development* ("**OECD**") rightly pointed out that "*digital economy is increasingly becoming the economy itself*".[6] Digital economy has existed for as long as computers and software has been introduced.[7] It is characterized by an unparallel reliance on intangible assets, and the massive use of data. The result of the growth of digital economy is a misalignment between where value is created and where profits are taxed.[8] The fact that Digital economy will continue to challenge tax laws has become banal yet continues to be weighty because of its significance to the global economy.[9]

[5] Ibid at 2.
[6] Nicole Lim, *A "Digital Economy"*, 2020 Sing. COMP. L. REV. 128 (2020).
[7] Annette Nellen, *Taxation and Today's Digital Economy,* 17 J. TAX PRAC. & PROC. 17 (2015).
[8] Ibid at 6.
[9] Bruno Fajersztajn & Ramon Tomazela Santos, *The challenges of taxing the digital economy*, INTERNATIONAL TAX REVIEW, (March 30, 2020) <https://www.internationaltaxreview.com/article/b1ky5z950v9tl6/the-challenges-of-taxing-the-digital-economy>.

The rules for taxation were written for an economy where physical goods and location were key elements in determining the tax liability. The conventional tax rules of Permanent Establishment (PE) and profit allocation have become archaic in nature and fail to apply effectively in the digitalized economy. Multinational corporations such as Google, YouTube, Amazon, and Facebook operate in countries with no physical presence and connect multiple groups of customers via online platforms.[10] The Permanent Establishment rule is starting to have secondary effects as it was considered to be a prerequisite in a lot of countries such as China, India, EU, which causes problems in characterizing income from digital economy.[11] Proving a business connection or PE in a digitalized economy becomes a burden in cases of non-resident entities.[12] A disadvantage of introducing rules such as 'Significant Economic Presence' (SEP) was the prospect of double taxation for the tech companies, as it would be taxed for the same revenue twice, in the country where they hold a permanent establishment, and in the countries with SEP rules.[13]

The large technology corporations end up facing a lower tax burden compared to their competitors in the traditional economy, leading to a scenario that increases the economic power of these giants, and distorts fair competition.[14] The disparity between the amount of revenue earned by the Mega-giants from the consumer market and the amount of tax contribution to the government, is immense. For example, despite the revenue of Google crossing 10000 crores in India in the 2019 fiscal year, the company merely contributed 2% of its income i.e., Rs 200 crores to the government as taxes.[15] While a developed nation might be able to accommodate this disparity to some extent, it is a case of Hobson's choice for a developing nation, because if they do not receive enough revenue from the MNC's, they have to recover the deficit from consumers as there is a lack of money to provide government services. The duty of remedying the negative effects of abusive tax avoidance lies with the MNC's and the tax professionals.[16]

In light of this disparity, this paper aims to focus on the difficulties risen from digital taxation, and the way forward.

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[10] Young Ran Kim, *Digital Services Tax: A Cross-Border Variation of the Consumption Tax Debate*, 72 ALA. L. REV. 131 (2020).
[11] Ajay Sharma & Nikhil Gupta, *Digital Tax: The changing contours of tax structure in India*, SCC ONLINE (October 22, 2019) <https://www.scconline.com/blog/post/2019/10/22/digital-tax-the-changing-contours-of-tax-structure-in-india/#_ftn3>.
[12] Ibid.
[13] Ibid.
[14] Bruno Fajersztajn & Ramon Tomazela Santos, *The challenges of taxing the digital economy*, INTERNATIONAL TAX REVIEW, (March 30, 2020) <https://www.internationaltaxreview.com/article/b1ky5z950v9tl6/the-challenges-of-taxing-the-digital-economy>.
[15] Ajay Sharma & Nikhil Gupta, *Digital Tax: The changing contours of tax structure in India*, SCC ONLINE (October 22, 2019) <https://www.scconline.com/blog/post/2019/10/22/digital-tax-the-changing-contours-of-tax-structure-in-india/#_ftn3>.
[16] Brock, Gillian and Russell, Hamish, *Abusive Tax Avoidance and Institutional Corruption: The Responsibilities of Tax Professionals*, EDMOND J. SAFRA WORKING PAPER (February 17, 2015) <http://dx.doi.org/10.2139/ssrn.2566281>.

III. TAX AVOIDANCE AND EVASION

"*Business goes global, taxes stay local*" principle coaxed the multinationals such as Apple, Facebook, Amazon, and Google to exploit international corporate taxation through clever tax planning.[17] According to the doctrine of "*taxation at source*", the international income flows are subject to taxation in the country of residence of the person earning the income.[18] The most important nexus for this traditional method is the concept of permanent establishment.[19] As per Oxford dictionary, tax avoidance is defined as "*arrangement of a person's business and ⁄or private affairs in order to minimize tax liability*."[20] Less than a century ago, many judiciary rulings had reinforced the principles that tax avoidance was not a moral issue.[21] However, with digital economy coming into the picture, cross-border transactions have increased. From the perspective of the source state principle, there appears to be two major challenges, firstly, the increase in the number of direct transactions in which foreign platforms like Airbnb **derive income from doing business in a country but do not use a physical presence in the country for this purpose**; and which **connecting factor should be chosen** for taxation as the **source state**.[22] This paper seeks to establish the negation of the source rules, as with the increase in the digital economy, these rules have become anachronistic.

3.1. Types of Tax Avoidance

1. Transfer Pricing: In a few scenarios, big corporations sell something at a low price to its subsidiary situated in a low-tax jurisdiction or a tax haven, and from there-on ultimately sells it to the customer at full price in a third country.[23] Therefore, the income in the producing/headquartered country to be taxed is extremely less and appears as high profits in the tax haven.[24]
2. Debt and Interest: Another strategic method used by corporations is simply allocating debt to a low-tax jurisdiction and claim for the interest in the high-tax jurisdictions.[25]
3. Intellectual Property: Tax law has allowed notional allocation of companies' intellectual property anywhere it wants. Therefore, companies like Apple, through payments of licensing of intellectual property, avoid paying taxes, as the fee qualifies as royalties, licensing fee, management fees and so on.[26]

[17] Thomas Fetzer & Bianka Dinger, *The Digital Platform Economy and Its Challenges to Taxation*, 12 Tsinghua CHINA L. REV. 29 (2019).
[18] Ibid at 10.
[19] Ibid at 10.
[20] De Colle, S., & Bennett, A. M. State-induced, Strategic, or Toxic? An Ethical Analysis of Tax Avoidance Practices. Business & Professional Ethics Journal, 33(1), 53–82 (2014) <http://www.jstor.org/stable/44074823>.
[21] Ibid at 13.
[22] Ibid at 10.
[23] David Richardson, *Chasing the Artful Dodger: Multinational Tax Avoidance*, AQ: Australian Quarterly 90, no. 4 3–10 (2019) <https://www.jstor.org/stable/26773343>.
[24] Ibid.
[25] Ibid.
[26] Ibid.

4. Tax Havens: One of the most popular loopholes in the international tax law, which has led to loss of billions of tax revenue to the governments worldwide are tax havens. They appeal to the MNE's due to their low- or no-income tax jurisdiction, thereby inviting companies to set up a base there, and hence paying no tax or very little tax.[27]

A few notable aspects of the above-mentioned strategies include the derivation of its power from the absence of physical presence, strong dependence on intangible assets, complex nature of transactions carried out in the digital economy, and the difficulty of qualifying assets, activities, and types of income.[28] International tax laws have not gotten acclimatized to the digital economy, wherein the MNC's had leaped forward, and dodged paying taxes, costing nations billions of tax revenue.

3.2. The Pandora Papers Exposé

The budding investigation in the Pandora Papers, following the lineage of Panama Papers, also aims at shedding light on the instances of 'potential laundering' such as money laundering, round-tripping, parking of black money etc. The Pandora Papers is the biggest leak till now, when measured in terabytes.[29] The Pandora Paper's reveal the inner workings of a 'shadow economy' that benefits the wealthy and well-connected at the expense of everyone else.[30]

According to the study, in 2016, Multi- National Corporations ("**MNC**") have shifted around $1 trillion in profits from countries where there economic activities take place, to a lower corporate income tax jurisdiction, which deprived the governments worldwide close to $200 billion in tax revenues.[31]

The focal point of this investigation set one's sight on the liberty of creative book-keeping which the companies explore under the ambit of 'entitlement to corporate veil'. The creative book-keeping helps exploit legal loopholes and dodge the taxes. This aggressive avoidance is slowly starting to look like evasion. The ongoing investigation reveals how the businesses and individuals '*evade'* detection by using the law at home and the lax jurisdiction of tax havens.

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[27] Ibid.

[28] Bruno Fajersztajn & Ramon Tomazela Santos, *The challenges of taxing the digital economy,* INTERNATIONAL TAX REVIEW, (March 30, 2020) <https://www.internationaltaxreview.com/article/b1ky5z950v9tl6/the-challenges-of-taxing-the-digital-economy>.

[29] Pandora Papers, International Consortium of Investigative Journalists, <https://www.icij.org/investigations/pandora-papers/global-investigation-tax-havens-offshore/>

[30] Ibid.

[31] Scilla Alecci, *Multinationals shifted $1 trillion offshore, stripping countries of billions in tax revenues*, PANDORA PAPERS, INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS, <https://www.icij.org/investigations/paradise-papers/multinationals-shifted-1-trillion-offshore-stripping-countries-of-billions-in-tax-revenues-study-says/>.

The tax avoidance to this rate is proving to be severely affecting the innocent citizens of the nations. Governments of developing nations tax their population in order to finance public infrastructure, healthcare, education and perform other wide range of services in the public interest.[32] The ICIJ analysis of the secret documents had led them to identify 336 high-level politicians and public officials, including country leaders, cabinet ministers, ambassadors, and others.[33]

3.3. How are Developing Nations Impacted by this?

Through the case studies discussed later in the paper, it shall be observed how these multinational corporations impact the developing nations such as Zambia in the Illovo Sugar case. The reason MNC's were getting away with their aggressive tax planning, was because developing nations use such situation as an incentive to lure in as many investors as possible. According to the OECD, the lack of tax revenue in developing nations leads to critical under funding of public investment, that could help promote economic growth.

Governmental and supra-governmental organizations are being called upon by the media and public, as they want to guarantee protection for all the compliant taxpayers.[34] One of the main important questions that arise from this public debate, is the principle of fairness. The question of fairness arises when free persons, who have no authority to one another.[35] With the evolution of digital taxation in this world, the MNC's have taken over the entire digital economy. The advent of the digital economy is resulting in the disappearance of the Permanent Establishment. Hence, it has become pertinent to change this whole principle completely, in order to allow the new age economy. The source principle and permanent establishment has become archaic in nature, due to the new age economy, therefore, it is high time to change these laws completely, in order to provide better legislation to enable at least the under-developed and developing nations to not be drastically affected by the low revenue that multinational companies contribute.

IV. AGGRESSIVE TAX PLANNING STRUCTURES IN INTERNATIONAL TAX LAW

It is well established, that a company's obligation to its shareholders is to minimize tax, but on the contrary, a government's obligation to its people is to close the tax gap.[36] Recent studies have shown linkage of tax

[32] Brock, Gillian and Russell, Hamish, *Abusive Tax Avoidance and Institutional Corruption: The Responsibilities of Tax Professionals*, EDMOND J. SAFRA WORKING PAPER (February 17,2015) http://dx.doi.org/10.2139/ssrn.2566281
[33] Pandora Papers, International Consortium of Investigative Journalists, https://www.icij.org/investigations/pandora-papers/global-investigation-tax-havens-offshore/
[34] Sigrid Hemels, *Fairness and Taxation in a Globalized World* (February 26, 2015).http://dx.doi.org/10.2139/ssrn.2570750
[35] Ibid at 15.
[36] Sophie Ashley, *The blurring lines in tax planning*, INTERNATIONAL TAX REVIEW, (December 1, 2010) https://www.internationaltaxreview.com/article/b1fbrpyd1y05j4/the-blurring-lines-in-tax-planning

avoidance to factors such as firm characteristics, corporate governance, ownership structure, cultural norms, and labour unions among others.[37] With the Panama Papers and the recent development in the Pandora Papers, the public media and lawmakers have been calling for a greater transparency from the companies, in order to reduce the tax avoidance.[38] In 2014, it was estimated that the developing nations lose $1 trillion in capital flow.[39] Before the BEPS Action Plan became an important priority of the OECD, the international tax rules were not as stringent, and it was not public knowledge as to what these multinational corporations were upto.

4.1. Aggressive Tax Avoidance

Dave Hartnett, permanent secretary of tax at HMRC in UK rightly said, "*It can all be legal. That doesn't make it right.*"[40] The increase in the tax planning by giant multinational corporations, led to the coining of the term "aggressive tax avoidance". The MNC's kept exploiting loopholes in tax laws, to reduce the tax liability to almost nothing.[41] The European Tax Commission defines aggressive tax planning as "*taking advantage of the technicalities of a tax system or of mismatches between two or more tax system for the purpose of reducing tax liability*."[42] Every form of tax avoidance raises a different ethical question.[43] Primarily there are three main forms of tax avoidance:

a) *State-induced tax avoidance*: These are tax benefits introduced by the government, which enables the citizens, corporations and MNE's to reduce their tax liabilities by adhering to certain schemes.[44]
b) *Strategic avoidance*: This form relates to decisions taken by the corporations, in which tax-reduction becomes a by-product of the commercially sound business decision.[45]
c) *Toxic avoidance*: This form refers to the decisions taken by the corporations intentionally to exclusively reduce tax. Most of the corporations that are known for aggressive tax avoidance, fall under the category of toxic avoidance, as although avoidance through loopholes was legal, but its legality in this is uncertain as it contradicts the intention of the legislator. [46]

[37] Tao Chen & Chen Lin, *Does Information Asymmetry Affect Corporate Tax Aggressiveness?*, 52 Journal of Financial and Quantitative Analysis 2053–2081 (2017)
[38] Ibid at 15.
[39] Will Fitzgibbon, *Can the OECD's tax evasion plan trickle down to the developing world?* , 24 December 2014, ICIJ, https://www.icij.org/inside-icij/2014/02/can-oecds-tax-evasion-plan-trickle-down-developing-world/
[40] Sophie Ashley, *The blurring lines in tax planning*, INTERNATIONAL TAX REVIEW, (December 1, 2010) https://www.internationaltaxreview.com/article/b1fbrpyd1y05j4/the-blurring-lines-in-tax-planning
[41] de Colle, S., & Bennett, A. M. State-induced, Strategic, or Toxic? An Ethical Analysis of Tax Avoidance Practices. Business & Professional Ethics Journal, 33(1), 53–82 (2014). http://www.jstor.org/stable/44074823
[42] Ibid.
[43] Ibid.
[44] Ibid.
[45] Ibid.
[46] Ibid.

While state-induced and strategic forms of avoidance can be justified to some extent,[47] toxic avoidance has been proven to be an unjustified form of avoidance and must be prevented as much as possible.

4.2. Multinationals and their Tax-Avoiding Strategies

Prior to the proposal of BEPS Action Plan, there was a wave of multinational companies strategically avoiding taxes and shifting the profits to tax havens, thereby affecting the revenue of the nations. The worst hit are the developing countries. This is because, a developing nation invites the big multinational corps to carry out their business in their country, so as to grow. On the failure of the MNC's payment of fair share of taxes, nations lose a lot of revenue. The country does not benefit, even though they provide labour, land, and a huge consumer market. The genuine taxpayers on the other hand end up paying a lot more tax as the government is falling short in their tax revenue, which should have been contributed by the Multinationals in the first place. The cases mentioned below, shed light on the aggressive tax avoidance strategies that were adopted by some of the high-profile companies, and the consequences of those strategies in the respective nations:

1. **Illovo Sugar**

   "**Taxes pay teachers. Taxes pay nurses. Taxes maintain roads, deliver medicine, provide clean water. This is as true in the developing world as it is in the developed world. Tax is the most important, sustainable and predictable source of public finance for almost all the countries.**"[48]

   Illovo Sugar Africa Limited was a wholly owned subsidiary of British foods stood accused of massive tax avoidance. In the report that was released, it was proven that between 2007-2012, they had not paid tax to the government of Zambia. Zambia generated around 123 million dollars in the 5 years but contributed less than 0.5% of the total business income.

   Zambia is considered to be one of the poorest nations in the world. Through the report, it could be shown that among three different tax payers, Caroline (*who ran a market stall which sells basic toiletries, drinks and foodstuff, including bags of 'white spoon' Zambian sugar*), Isaac Banda (*a cane cutter in Zambia sugar*) and the sugar giant Zambia Sugar Plc, the company paid tax which was *90 times less* than what Caroline paid, and *20 times less* than what Isaac paid, even though the company's reported revenue was over *200 Million Dollars*, using the labour of people like Caroline and Isaac. The cold-heartedness of the Multinational Corporations had led to the heartbreaking poverty in the nation.

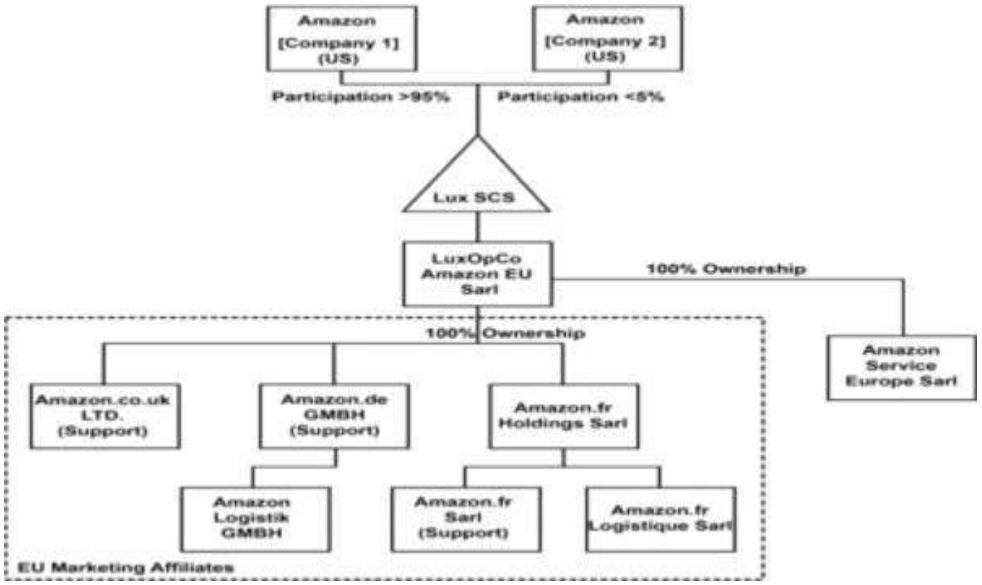
[47] Ibid.
[48] Mike Lewis, *Sweet Nothings- The Human Cost of a British Sugar Giant Avoiding Taxes in Southern Africa*, February 2013, https://actionaid.ie/wp-content/uploads/2016/10/Sweet-Nothings.pdf

The report estimated that Zambian government had lost roughly 27 million dollars as a result of the aggressive tax strategy.[49] "*From 2008-2010, an agricultural laborer employed by the company has paid more income tax in absolute terms than the company whose 200-million-dollar revenues have benefitted from her labour.*"[50] Although the corporation used the labour of the nation, and the consumer market of the nation, it refused to contribute to the public services such as health care, infrastructure, and other important public services.

Till date, of all the developing nations in the world, African countries are the most prone to "profit-shifting".[51]

2. The Amazon Case

Given below is the chart showing how Amazon avoided paying taxes.



The above chart is the corporate tax structure of Amazon. In the report by the European Commission, the following observations were made:

i. The Luxembourg partnership (Lux SCS) is regarded as a fiscally transparent entity, thereby not being subject to any tax.
ii. The US partners do not have any physical establishment in Luxembourg.

[49] Ibid at 15.
[50] Ibid at 15.
[51] Scilla Alecci, *Multinationals shifted $1 trillion offshore, stripping countries of billions in tax revenues*, PANDORA PAPERS, INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS, https://www.icij.org/investigations/paradise-papers/multinationals-shifted-1-trillion-offshore-stripping-countries-of-billions-in-tax-revenues-study-says/

iii. The royalty paid by the Luxembourg company to the Luxembourg partnership is deductible for tax purposes at the level of the Luxembourg company, and not taxable at the level of the partnership.

iv. The amount of the tax-deductible royalty is determined by a transfer pricing analysis. The royalty payment is itself not subject to a withholding tax in Luxembourg.

v. The Luxembourg Company provides intra group loans to other group members of Amazon. The interest payment is typically deductible at the level of the company paying the interest, and taxable at the level of the recipients.

The OECD noted that breaking a case into a base case structure usually comprises of 4 main elements, firstly, minimization of taxation at source country; secondly, a low or no withholding tax at source; thirdly, low or no taxation at the level of the recipient; and lastly, no current taxation of the low tax profits at the level of the ultimate parent. With the introduction of the state aid rule by EU, Amazon was asked to pay $294 million plus interest for 'undue tax advantages.'[52] By obtaining a so-called sweetheart deal which allowed it to inflate the level of royalty payments to a related party, both owned by Amazon, Amazon gained a selective economic advantage over other companies.

3. Starbucks Case Study

In 2012, Starbucks in UK had faced a public relations uproar over its failure to pay taxes to the British government, inspite of its tremendous profit turnover.[53] Starbucks at that point was quite public in its commitment to being socially responsible, and a good citizen of the communities in which it had operated.[54] Hence its critics found it easier to point out their hypocrisy in showing their social responsibility but not contributing their fair share of taxes.

During one of the UK Parliament discussions, it was found out that Starbucks described its UK operations as profitable to its investors in the board meeting, but to UK tax authorities as losses.[55] Starbucks resorted to different techniques to transfer UK operating profits to different taxable jurisdictions:

(1) *Royalty Payments*: For every 1 million Euro UK Starbucks made, they would pay 60,000 Euro as royalty to another Starbucks entity and deduct this amount in computing its UK taxable

[52] Anjana Haines, *Amazon slapped with €250 million bill for illegal state aid,* INTERNATIONAL TAX REVIEW, (October 4, 2017) https://www.internationaltaxreview.com/article/b1f7n9kbdty5sv/amazon-slapped-with-250-million-bill-for-illegal-state-aid

[53] Katherine Campbell & Duane Helleloid, *Starbucks: Social Responsiblity and Tax Avoidance,* MANAGEMENT FACULTY PUBLICATIONS, (2016) https://commons.und.edu/man-fac/1

[54] Ibid at 22.

[55] Ibid at 22.

income.[56] If they did not make the royalty payments, their taxable income would have been 60000 euro more.

(2) *Transfer Pricing*: The coffee sold at Starbucks stores in the UK was purchased from a Starbucks trading company based in Switzerland and was roasted by a Starbucks company based in the Netherlands.[57] By paying a higher price for coffee to another Starbucks entity, Starbucks UK increased costs and reduced taxable income reported in the UK, thus shifting profit to its Dutch and/or Swiss entities.[58] Although corporate income tax rates were similar in the UK and the Netherlands (24 and 25 percent, respectively), in Switzerland, profits from international commodity trades were taxed at 5 percent (Bergin, 2012).[59]

(3) *Inter-Company Debt*: The interest Starbucks UK paid to other Starbucks companies was deductible and reduced the amount of income subject to tax in the UK.[60] Albeit Starbucks UK's interest payments represented interest revenue for another Starbucks entity thus being subject to income tax, that entity would be strategically located in a tax haven where the tax rate was substantially lower than the rate in the UK.[61]

4. Google:

Google, like any other multinational, has always made use of the international tax minimization strategies. Although, its argument, throughout any discussions, especially the UK parliament discussion in 2012, has been that Google has always paid its taxes. Google has always been known for its famous "Double Irish" structure, wherein it avoided an estimated $2 billion in worldwide taxes in the year 2011, by shifting $9.8 billion revenue to a Bermuda Shell Company.[62] In the system of Double Irish, royalty payments are used as tools to substantial sums of money to other subsidiaries.[63] The tech giant moved all the money out of Google Ireland Holdings Unlimited Company via interim dividends and other payments.[64] Although the above company was incorporated in Ireland, it was tax domiciled in Bermuda during the transfer, thereby allowing the company to escape tax both in the Republic and in the US (ultimate parent), Alphabet is

[56] Ibid at 22.
[57] Ibid at 22.
[58] Ibid at 22.
[59] Ibid at 22.
[60] Ibid at 22.
[61] Ibid at 22.
[62] De Colle, S., & Bennett, A. M. State-induced, Strategic, or Toxic? An Ethical Analysis of Tax Avoidance Practices. Business & Professional Ethics Journal, 33(1), 53–82 (2014). http://www.jstor.org/stable/44074823
[63] Christian Fuchs, *The Online Advertising Tax as the Foundation of a Public Service Internet*, 19-28, https://www.jstor.org/stable/j.ctv5vddk0.6
[64] Charlie Taylor, *Google used 'double-Irish' to shift $75.4bn in profits out of Ireland*, THE IRISH TIMES, April 17, 2017, https://www.irishtimes.com/business/technology/google-used-double-irish-to-shift-75-4bn-in-profits-out-of-ireland-1.4540519

headquartered.[65] The holding company reported a $13 billion pretax profit for 2019, which was effectively tax-free, the accounts show.[66]

The above pie chart represents the ratio of total revenue of Google against the amount of taxes paid by them in the year of 2020.[67] Google only contributed 4.3% of their total revenue towards taxes, while their revenue stood at around $182 thousand million.[68] Even if we calculate their taxes from the total profits they made, i.e., $48 thousand million, the percent of taxes will still only be around 16%.

These are just few of the examples. Even companies like Burger King, Apple, Microsoft and many other have been accused of the same. In 2011, Microsoft sold its intellectual property rights to Microsoft Ireland for €2.8 billion and Microsoft Ireland subsequently received €9 billion for the use of these rights.[69] This way, Microsoft successfully transferred $6.2 billion in profits and avoid the high US corporation tax. Microsoft, was also accused of engaging in the 'Double Irish Scheme' to further reduce its Irish corporation tax liability, just like Apple and Google.

All the above-mentioned cases impacted the developing nations drastically. Therefore, to overcome this, the OECD proposed a well-coordinated international approach to tackle the aggressive tax avoidance, which undermines the taxpayer's voluntary compliance.[70]

[65] Ibid.
[66] Ibid.
[67] Alphabet Inc. Google, Reuters data, https://www.reuters.com/companies/GOOGL.O/financials
[68] Ibid.
[69] De Colle, S., & Bennett, A. M. State-induced, Strategic, or Toxic? An Ethical Analysis of Tax Avoidance Practices. Business & Professional Ethics Journal, 33(1), 53–82 (2014). http://www.jstor.org/stable/44074823
[70] Ibid.

4.3. Ethical Issues with Aggressive Tax Avoidance

Due to the multinationals indulging in aggressive tax practices, the OECD felt the need to come up with an action plan, one that could help prevent the ethical issues involved with tax avoidance.

4.3.1. The ethical issues involved with tax avoidance included

(1) Increasing social inequality.[71]

(2) It undermines the integrity of the tax system and as a result, weakens compliance.[72]

(3) It unfairly advantages the multinationals over domestically based firms, thus affecting competition.[73]

(4) Harmful tax competitions between states[74]

(5) Eroding tax revenue[75]

(6) Causes an immense impact on the global poverty[76]

(7) The tax avoidance strategies designed by the MNE's lack the transparency towards the tax authorities and towards the stakeholders affected by these practices, in home and host countries.[77]

(8) Deception[78]

(9) Violating the social contract of the MNC's with the host communities.[79]

4.3.2. BEPS Action Plan

OECD launched the Action Plan in 2013, primarily to encourage the G20 countries to address Base Erosion and Profit Shifting.[80] It was well established by then that the lack of tax revenues leads to critical under-funding of public investment, that otherwise could have contributed to economic growth. The first part of the OECD report dealt with challenges faced by the developing nations. These challenges in particular included, lack of necessary legislative measures needed to address base erosion and profit shifting. Developing nations measure is often hindered by lack of information. In comparison to the developed nations, the developing nation also face the difficulty in building the capacity to needed to implement the complex tax rules. The lack of an effective legislation leaves the door open simpler but potentially aggressive tax avoidance as compared to the tax avoidance encountered in the developed nations. Developing countries such as India, rely heavily on source-based taxation such as withholding taxes, permanent establishments, and such rules can be quite easily avoided by treaty shopping.

[71] Ibid.
[72] Ibid.
[73] Ibid.
[74] Ibid.
[75] Ibid.
[76] Ibid.
[77] Ibid.
[78] Ibid.
[79] Ibid.
[80] Ibid.

V. MULTIDISCIPLINARY APPROACH

Many issues in international taxation are intertwined thereby making it difficult to pin it down to the root cause. A multidisciplinary practice is a practice of different professions within the same structure and with common interests.[81] Engaging multiple disciplines to produce one harmonized solution will help the world to reach a more viable solution. A lot of scholars believe that the multidisciplinary approach must be inclusive of a tax policy compliant with the environment.[82] To some extent, it is pertinent to establish a tax structure, one which engages with multiple disciplines such as environment, human rights, economy (especially of under-developed and developing nations), etc. A few disciplines that could be included in the multidisciplinary approach are:

5.1. Human Rights

A salient feature of the growing international tax policy must be to ensure that no business corporation makes incessant profit by strategic tax avoidance at the cost of humans, thus violating the human rights of citizens of various countries, especially the developing nations. The OECD recognized that the corporate income tax plays an indispensable role in the government revenues, comprising around 15% of the total tax take in the developing nations.[83] The phenomenal profits that the MNC's have made by cleverly avoiding tax, has been troubling the governments and genuine tax paying citizens of many countries, but particularly the developing nations.[84] With the fast-paced progression of digital economy, there needs to be a multidisciplinary approach established in the international tax system, which will enable the major MNE's to make sure they contribute their fair share of taxes.

For instance, the case of Illovo Sugar had not taken into consideration the consequences of their tax avoidance to the nation. It utilized the consumer market and the required labour in the country to further its business and make profits but made negligible contribution towards the welfare of the same citizens, that helped their business grow. A tax structure that is compliant with human rights will provide protection to all those workers and employees who deserve to get a reward for their unconditional contribution to their business. Good tax behavior by these MNC's is critical to their corporate social responsibility as well. All the countries have the duty to protect their tax base, as well as their citizen's basic human rights.[85]

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[81] Mullerat, Ramón, *The Multidisciplinary Practice of Law in Europe*, Journal of Legal Education 50, no. 4, 481–93 (2000) http://www.jstor.org/stable/42898288.

[82] Roberta F. Mann & Tracey M. Roberts, *Tax Law and the Environment- A Multidisciplinary and Worldwide Perspective*, November 16, 2018, https://law.uoregon.edu/news/tax-law-and-the-environment-a-multidisciplinary-and-worldwide-perspective

[83] Shane Darcy, *The Elephant in the Room: Corporate Tax Avoidance & Business and Human Rights*, 2 Business and Human Rights Journal 1–30 (2017).

[84] David Scheffer, *The Ethical Imperative of Curbing Corporate Tax Avoidance*, 27 Ethics & International Affairs 361–369 (2013).

[85] *Corporate taxation key to protecting human rights in the global economy*, CENTRE FOR ECONOMIC AND SOCIAL RIGHTS, March 2017, https://www.cesr.org/corporate-taxation-key-protecting-human-rights-global-economy

5.2. Sustainability of the Environment

As well all know, the fundamental purpose of taxation is to provide enough revenue to the government to fulfill their public obligations.[86] Human activities have been harming the environment for a long time, and it is vital for the government to intervene in order to provide a better life to the citizens. At the end, there is no point of taxes and profit-maximization if there is no suitable environment for people to reside in.[87] EU had introduced plastic packaging taxes in the beginning 2021 as a sustainability measure, which also prompted countries such as Italy and Spain to introduce taxes in this area.[88] With the global tax landscape poised to undergo a significant reform, from digital tax to technology and sustainability, tax teams will need to be quick-moving to meet the changes that are coming.[89]

5.3. Economical Impact

While MNE's strategically plan to avoid paying taxes, the economic growth of the countries come to a standstill. Tax Havens severely affect nations by costing governments worldwide $500- $600 Billions of tax revenue. The impact of the loss of revenue results in higher tax rates, thus negatively impacting households and domestic firms and companies.[90]

A significant draft for the International Tax Policy will be one that considers all the disciplines such as human rights, environment and climate change, and economy. With the digitalization, multinationals such as Google, Youtube, Amazon, and others have gone completely digital. We live in a world, where a company such as Google is at the fingertips of every individual acquainted with technology. The whole revenue of these corporations is solely based on the amount of usage by consumers, thereby violating moral code of ethics by unfairly avoiding taxes in these nations and keeping the wealth to themselves. As the government taxes citizens to recover the deficit, the wealthy citizens might not be as adversely affected as the normal and honest taxpaying citizens, which comprise of the majority of the population in the developing nations. Placing the corporate tax avoidance on the business and human rights agenda can help stimulate further discussion debate and analysis of the human rights implications of this global issue, maintain the attention

[86] Roberta F. Mann & Tracey M. Roberts, *Tax Law and the Environment- A Multidisciplinary and Worldwide Perspective*, November 16, 2018, https://law.uoregon.edu/news/tax-law-and-the-environment-a-multidisciplinary-and-worldwide-perspective
[87] Ibid
[88] Anugraha Sundaravelu, *Women in Tax: The global tax landscape gears up for transformation*, INTERNATIONAL TAX REVIEW, June 24, 2021, https://www.internationaltaxreview.com/article/b1sdz3ywpy8kmb/women-in-tax-the-global-tax-landscape-gears-up-for-transformation
[89] Ibid.
[90] JLP Carvalho, *The Effects of Tax Evasion on Economic Growth: A Stochastic Growth Model Approach*, 2019, https://www.locus.ufv.br/bitstream/123456789/26737/1/texto%20completo.pdf

of states, corporates, civil society, and human rights bodies, and perhaps even foster human rights-oriented developments aimed at addressing this harmful practice.[91]

The indirect impact of corporate tax avoidance on human rights might be one of the major factors resulting in the OECD undertakings not adopting a human rights-based approach. The nature of the corporate tax avoidance presents a serious challenge for the existing human rights machinery.[92] Further research and analysis is required in building an approach which involves business and human rights to coexist, including the role of human rights in international organizations addressing issues of taxation such as the OECD, and the application of the requirements under the three pillars of the UN Guiding Principles.[93] The obligations of states in the context of corporate tax avoidance must incorporate extraterritorial human rights given the nature of globalization and the presence of tax havens in the overseas territories of certain states. According to Article 28 of the Universal Declaration of Human rights, states possess a duty of international cooperation and the right to an international and social order.[94] Given the obligations of the states, the rules must reflect human rights, environmental rights, and economical impact as well, in order to arrive at the most viable solution.

VI. DEVELOPMENTS BY OECD TO CURB THE TAX AVOIDANCE IMPACTING THE DEVELOPING NATIONS

One of the major concerns for OECD was the advent of the digital economy. With many of the giant companies such as Google operating an internet-based business, they tend to have no physical presence in the countries. Thus, giving rise to a major loophole in the international tax system, wherein the companies don't end up paying taxes due to the lack of physical presence in the countries they do business in.[95]

It is becoming crucial for the OECD to build a solid framework, which will tackle the challenges of the digital taxation by bringing about a change in the archaic "*permanent establishment*" principle, and also help provide nations, especially the developing nations, the fair share of taxes, that will help the developing nations. Since the developing nations helped in the negotiation of the new rules, over time, will benefit their DRM needs in the recovery phase post the pandemic.[96]

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[91] Shane Darcy, *The Elephant in the Room: Corporate Tax Avoidance & Business and Human Rights*, 2 Business and Human Rights Journal 1–30 (2017).
[92] Ibid.
[93] Ibid.
[94] Ibid.
[95] *Curbing tax avoidance by multinational companies*, THE ECONOMIC TIMES, June 5, 2021, https://economictimes.indiatimes.com/news/international/business/curbing-tax-avoidance-by-multinational-companies/how-can-govts-keep-mncs-from-avoiding-taxes/slideshow/83259354.cms
[96] OECD (2021), Developing Countries and the OECD/G20 Inclusive Framework on BEPS: OECD Report for the G20 Finance Ministers and Central Bank Governors, October 2021, Italy, OECD, Paris, https://www.oecd.org/tax/beps/developingcountries-and-the-oecd-g20-inclusive-framework-on-beps.htm.

6.1. Two-pillar agreement for the developing nations

The Inclusive Framework by OECD, which was introduced in 2016, intended to monitor the implementation and contribute to the development of measures to combat the Base Erosion and Profit Shifting. On July 1, 2021, as part of the multilateral efforts to reform the International Tax Policies, the **Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalization of the Economy** was announced and was agreed to by 134 countries.[97] Under the Two-Pillar agreement:

a) Pillar One seeks to ensure a fair distribution of taxing rights by re-allocating the rights from home countries of the MNE's to the countries where they indulge in business activities and make profits regardless of the physical presence of the corporation.[98]
b) Pillar two involves establishing a floor on the corporate income tax, by the introduction of the global minimum tax through which countries can protect their tax bases.[99]

6.2. Introduction of the Global Minimum Tax

With the new introduction by OECD of a Global Minimum Corporate Tax[100], countries are going to have to change their current tax laws to comply with the minimum tax. Through this action plan, companies that go untaxed or lightly taxed offshore, that company will be forced to pay tax at home to bring its rate upto minimum.[101] The headquarter nation will raise the tax rate for offshore income, till the minimum tax amount is met.[102]
The OECD now estimates that the global minimum corporate taxation of 15% would fetch an additional of $150 billion per year, in each country. As per the agreement, countries where MNCs operate would get the right to tax at least 20% of the profits exceeding a 10% margin. India, Germany, China, Russia and many other have signed this agreement, which is expected to be implemented from the year 2023.[103]

While the idea of a minimum global rate seems like the perfect solution, there are a couple of issues with regards to this, for instance:

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[97] OECD (2021), Tax and Fiscal Policies after the COVID-19 Crisis: OECD Report for the G20 Finance Ministers and Central Bank Governors, October 2021, Italy, OECD, Paris, www.oecd.org/tax/tax-policy/tax-and-fiscal-policies-after-the-covid-19-crisis.htm.
[98] Ibid.
[99] Ibid.
[100] Ibid.
[101] *Curbing tax avoidance by multinational companies,* THE ECONOMIC TIMES, June 5, 2021, https://economictimes.indiatimes.com/news/international/business/curbing-tax-avoidance-by-multinational-companies/how-can-govts-keep-mncs-from-avoiding-taxes/slideshow/83259354.cms
[102] Ibid.
[103] Ramanujam & Sangeetha, *The global tax revolution,* THE HINDU, October 21, 2021, https://www.thehindu.com/opinion/op-ed/the-global-tax-revolution/article37099097.ece

a) Government inefficiency: A major issue that has always been there, is even if the MNC's pay their fair share of taxes, there is absolutely no way of knowing whether the money is being used for the welfare of the citizens or is being lost due to corruptive practices.[104]
b) Political and Technical Issues: Some countries such as Nigeria, Kenya and others have not joined the agreement as a result of the fear of Pillar two undermining their domestic tax set-ups.[105]
c) Ultimate benefit lies where the parent company is based: Under application of Pillar Two, smaller nations are fearing that they would be burdened with the limits to fiscal receipts. They also fear that the rules are most likely to favour the nation where the parent company is based.[106]

In the long run, the rights of the genuine taxpayers are affected the most, as they are having to bear the deficiency of the tax revenue for the government. Taxpayers are concerned that governments will target MNE's for extra revenue, and that there is very little clarity provided by the tax authorities on the same.[107] There is no guarantee that the tax revenue will, in fact, be used by the government for the welfare of the citizens. The wealthy will always get wealthier. To bring about a phenomenal change, a completely transparent system must be established. This system could be available for the public at large to see and understand whether the money is being utilized and where is it being used in.

6.3. Establishment of a transparent system

In 2009, the G20 had come up with an efficient system of tax transparency, called the *Global Forum on Transparency and Exchange of Information for Tax Purposes.* This enables the transparency and the exchange of information for tax purposes, thereby putting an end to the bank secrecy. By providing a multilateral response to tackle offshore tax evasion, the forum has managed to establish a system, one which provides for a closer co-operation between the tax authorities worldwide to obtain important information necessary to ensure tax compliance.

6.4. A suggestive model to enable better growth of the developing nations

While the corporate global minimum tax rate is one of the best developments in the international tax policy, there might be certain problems that will arise in the future. For instance, the author had mentioned government inefficiency above. Even though the MNE's will pay the required tax i.e., 15%, there might be

[104] de Colle, S., & Bennett, A. M. State-induced, Strategic, or Toxic? An Ethical Analysis of Tax Avoidance Practices. Business & Professional Ethics Journal, 33(1), 53–82 (2014). http://www.jstor.org/stable/44074823
[105] Danish Mehboob, *Last stretch to taxing Digital Economy,* INTERNATIONAL TAX REVIEW, November 1, 2021, https://www.internationaltaxreview.com/article/b1v8c3lt7y8qhy/last-stretch-to-taxing-the-digital-economy
[106] Ibid.
[107] Anugraha Sundaravelu, *Women in Tax: The global tax landscape gears up for transformation*, INTERNATIONAL TAX REVIEW, June 24, 2021, https://www.internationaltaxreview.com/article/b1sdz3ywpy8kmb/women-in-tax-the-global-tax-landscape-gears-up-for-transformation

the issue of whether that money will actually be used for public welfare, or will it become the target of corruptive practices. In this scenario, a better solution would be to monitor carefully in which projects the tax revenue is being contributed to. The government could annually come up with a few schemes, wherein the tax revenue of the multinationals could directly be contributed. This would reduce the chances of the tax revenue disappearing into the hands of the corrupt politicians.

Secondly, apropos of the transparency, a cardinal note is that the rights of the taxpayers are the one that gets affected the most, as they are forced to bear the brunt of the deficit. A more efficient transparent system would be if the taxpayers also have access to the information of the tax revenues paid by all the multinationals corporations conducting business in developing nations and using the consumer market of developing countries to make the huge amount of profits.

VII. CONCLUSION

For decades, tax avoidance was considered to be legally permitted, thus resulting in one of the worst financial crises that led to governments of nations worldwide losing billions of tax revenue. Unfortunately, the developing nations are the worst hit when the MNE's rake profits out of the country.[108] Corporate taxation has been causing economic injustice, poverty, underdevelopment, and under-investment in a lot of countries.[109] As per certain reports, highest intensity of losses occur in the sub-Saharan Africa, Latin America and the Caribbean, and South Asia.[110] For instance, the estimated annual corporate tax losses in a developing nation such as India is $41 billion.[111] There seems to be no economic justification to the tax avoidance strategies. These injustice acts can be directly linked to the dereliction of contributing their fair share of taxes to the nations which are helping them make the profits in the first place.[112]

Prior to the introduction of the BEPS action, global information exchange was unthinkable. But post the financial crises, and the OECD taking control of the entire international tax policies, the pace of change has been remarkable.[113] Now the Global Information Exchange is within reach, and narrowing down the options of the Tax Avoiders and Evaders.[114] In the last 5 years, since the advent of the 15 BEPS Action Plans, Global Tax Authorities and taxpayers have reacted to the changes brought about by the OECD

[108] Sara Dillon, *Tax Avoidance, Revenue Starvation and the Age of the Multinational Corporation*, The International Lawyer , 2017, Vol. 50, No. 2, pp. 275-328 (2017), American Bar Association https://www.jstor.org/stable/10.2307/26415648
[109] Ibid.
[110] Alex Cobham & Petr Janský, *Global distribution of revenue loss from tax avoidance*, WIDER WORKING PAPER 2017/55, March 2017, https://www.wider.unu.edu/sites/default/files/wp2017-55.pdf
[111] Adrija Shukla, *Countries worst affected by tax avoidance*, BUSINESS STANDARD, (APRIL 27, 2017), https://www.business-standard.com/article/international/countries-worst-affected-by-tax-avoidance-117042700085_1.html
[112] Ibid.
[113] Satoshi Kambayashi, *The data revolution*, THE ECONOMIST, May 10, 2014, https://www.economist.com/finance-and-economics/2014/05/10/the-data-revolution
[114] Ibid.

BEPS Project in various ways.[115] For instance, the multidisciplinary team established by the Canadian Revenue Agency, to address the complex and the emerging tax issues.[116] As stated above, a Multidisciplinary Team of specialists will come to the aid of the genuine taxpayers.

The 2 Pillar Agreement introduced by OECD has marked the evolution of profit allocation. The finalised approach by the OECD is going to massively impact the MNC's with sales of $58 Billion, whose profitability is above 10%.[117] Another important development that OECD is bringing about includes the reallocation of profit rate.[118] The G24 Working Group on Tax Policy and international tax cooperation called for a higher re-allocation of profits rate for the developing countries, being a minimum of 30%. in July.[119]

The OECD hopes that by establishing the reallocation rate of 25% could work since most of the developing countries want 30% of the profits, while the developed nations are willing to settle at 20%.[120] Till date, over 130 jurisdictions have agreed to implement the two-pillar solution.[121] While the OECD'S plan moving a step forward introduces innovative ways of doing business, but for most companies the old and archaic source rules of permanent establishment will still be applicable, and the Digital Service Taxes will be scrapped out.[122] Most forms of contemporary tax avoidance are based on manipulative misallocations or misattributions of corporate profits to whatever jurisdiction offers the corporation the best possible tax "deal."[123]

Through their actions, corporations prove that they no longer consider themselves bound to pay fair share of taxes to the states in which their profits are actually derived.[124] Clearly, it is only through international cooperation and global initiatives that the harmful effects of tax avoidance can be tackled effectively. As the OECD advocates in its Action Plan on Base Erosion and Profit Shifting (BEPS) "a holistic approach is necessary to properly address the issue of BEPS."[125] OECD still gives credence to the fact that there is a

[115] Ibid.
[116] Paul Riley & Shaun Austin, *Transfer Pricing in 2019*, INTERNATIONAL TAX REVIEW, February 14, 2019, https://www.internationaltaxreview.com/article/b1f7mxkzycmcfq/transfer-pricing-in-2019
[117] Leanna Reaves, *Solving Profit Allocation is Crucial to Reaching a Global tax Consensus*, INTERNATIONAL TAX REVIEW, October 21, 2021, https://www.internationaltaxreview.com/article/b1v3jm85cmj11z/solving-profit-allocation-is-crucial-to-reaching-a-global-tax-consensus
[118] Ibid.
[119] Ibid.
[120] Ibid.
[121] Ibid.
[122] Ibid.
[123] Sara Dillon, *Tax Avoidance, Revenue Starvation and the Age of the Multinational Corporation*, The International Lawyer , 2017, Vol. 50, No. 2, pp. 275-328, (2017), American Bar Association https://www.jstor.org/stable/10.2307/26415648
[124] Ibid.
[125] De Colle, S., & Bennett, A. M. State-induced, Strategic, or Toxic? An Ethical Analysis of Tax Avoidance Practices. Business & Professional Ethics Journal, 33(1), 53–82 (2014). http://www.jstor.org/stable/44074823

lot more to tackle in multinational tax avoidance.[126] The most important unfinished agenda is 'the challenges of the digitalisation of the economy'.[127]

There also remain the large differences in tax rates on companies (and other entities such as trusts) among economies, which range from zero percent to the thirties.[128] In addition, there are practical matters such as the ability of some countries to s administer a tax system in a sophisticated world economy.[129]

The author believes that the honest taxpayers of developing nations are working hard to make a living, and it is rather unfair if they have to spend a larger portion of their money on taxes, due to the lack of fair share of tax revenue from the multinationals to the government. The OECD at this point is focused on creating a perfect and solid international tax system, one that benefits everyone, i.e., the MNC's, the governments of the nations, the genuine taxpaying citizens of the country, and most of all helps to improve the economy in general.

[126] RICHARDSON, DAVID, *Chasing the Artful Dodger: Multinational Tax Avoidance*, AQ: Australian Quarterly 90, no. 4, 3–10 (2019), https://www.jstor.org/stable/26773343.
[127] Ibid.
[128] Ibid.
[129] Ibid.

REGIONAL ORGANISATIONS AND UNITED NATIONS: PROBLEMS HAUNTING THE RELATIONSHIP

Sanjana Grover[1] & Harshit[2]

ABSTRACT

Many decades have passed since the formation of regional organisations when they emerged as a body responsible for representing a group of nations divided on the basis of region with the objective of maintaining peace and security. This function was hitherto essentially kept with the United Nations Security Council. However, since then, their role has changed significantly. In the contemporary world, regional organisations have now taken up the status of international organisations. They have started to play an increased role in influencing regional peacekeeping and dispute settlement by undertaking enforcement actions with or without the prior consent of the United Nations Security Council. This increased role poses a challenge for the United Nations Charter to reconcile the actions of regional organisations with that of the Security Council.

In light of this increased role, it is important to understand the source of the power of such organisations and their role vis-à-vis the Security Council. It is against this background that the article first traces the incorporation of regional organisations back to Chapter VIII of the United Nations Charter. Having analysed the governing mechanism, the article highlights the inherent gaps in the United Nations Charter to explain the resultant inconsistencies in the actual use of power by these organisations. Further, the paper explores how to reconcile one of such inconsistencies i.e., the tension between unlawful use of enforcement action and the restriction on the use of force under Article 2(4) of the Charter. Finally, it covers some of the practical issues that limit UN-Regional peacekeeping deployments, as well as potential reforms.

I. INTRODUCTION

After the conclusion of the Cold War, the world has seen greater participation of regional organisations in the task of maintaining international peace and security, a task which was primarily given to the Security Council under the Charter of United Nations (*hereafter* UN Charter).[3] However, such a role of the regional organisations had been recognized under the UN Charter from its very inception under Chapter VIII which lays down the governing principles with respect to regional organisations.[4] The inclusion of this chapter on regional organisations was a result of the opposition raised by Latin American states, at the San Francisco

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[3] Charter of the United Nations 1945, Article 24(1).
[4] *Ibid*, Chapter VIII (Art 52 to 54).

Conference, to the primacy of the Security Council in peacekeeping.[5] The opposition stemmed from the fear that a permanent member can veto any peacekeeping proposal in the security council which would render these states defenseless in case of any attack.[6] In order to accommodate the concerns of Latin states, Articles 52 to 54 (Chapter VIII) were added to the Charter. The chapter empowers regional organisations with the primary role in pacific dispute settlement but subjects them to the control of the Security Council in cases where enforcement action is needed.[7] However, contrary to expectations of the UN Charter, regional organisations have often taken the main role in enforcement actions without the prior consent of the Security Council.[8]

In this context, the article analyses the role of regional organisations as stipulated in Chapter VIII of the Charter. *Firstly,* the article provides an overview of the governing framework and points out the substantive and structural weaknesses which make the chapter inadequate to deal with the contemporary role that is being played by regional organisations. *Secondly*, the article discusses the conflict between the unauthorized use of enforcement action and the prohibition on the use of force under Article 2(4) of the Charter and ways to reconcile it. *Lastly*, it addresses some of the practical problems that impede the UN-Regional peacekeeping missions and solutions for the same.

II. REGIONAL ORGANISATIONS : UN CHARTER AND ITS WEAK FRAMEWORK

2.1. Lack of Definition of Regional Organisation

The Charter nowhere defines the term "regional association or regional agencies".[9] This is because attempts were made to define these terms at the San Francisco Conference but the state deliberately chose not to endorse any specific definition and leave that to be ascertained in practice.[10] However, if we look at the text of Article 52(1), the Charter stipulates one requirement that is "such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nation."[11] Various commentators have elucidated that the term "Purposes and Principles" pertains to chapter 1 of the Charter.[12] The purposes that are mentioned in Article 1 of the Charter include the maintenance of peace and security;[13] socio-economic, cultural, and humanitarian cooperation;[14] friendly good relations amongst States based on

[5] Suyash Paliwal, 'The Primacy of Regional Organisation in International Peacekeeping: The African Example" (2010) 51 Virginia Journal of Int. Law 185, 188.
[6] *Ibid.*
[7] Charter of the United Nations 1945, Articles 52 and 53.
[8] Suyash Paliwal (n 2), 190.
[9] Charter of the United Nations 1945, Article 52.
[10] Gary Wilson, 'Regional Arrangements as Agents of the UN Security Council: Some African and European Organisations Contrasted' (2008) 29 Liverpool L Rev 183, 185.
[11] Charter of the United Nations 1945, Article 52(1).
[12] Suyash Paliwal (n 2), 192.
[13] Charter of the United Nations 1945, Article 1(1).
[14] *Ibid*, Article 1(3).

respect for equal rights and self-determination;[15] "respect for fundamental freedoms and human rights all without distinction as to race, sex, language, or religion."[16] Further, Article 2 includes the principles of good faith,[17] sovereign equality,[18] settlement of disputes,[19] a bar on the use of force.[20]

The non-adoption of a specific definition of regional organisation has usually been praised because it provides flexibility to Security Council to determine which organisation could perform the task laid down under Article 53.[21] However, the lack of definition gives rise to the issue of the self-proclamation of a body as a regional organisation or alternatively, a regional organisation can claim not to be one, a major consequence of which would be that it would no longer be governed by Chapter VIII.

2.2. No Clarity as to What Constitutes Enforcement Actions by the Regional Organisation

Article 53(1) of the Charter confers the authority of the Security Council to delegate its power of enforcement action, given under Chapter VII, on regional arrangements.[22] Enforcement action has been defined as "*any action which would itself be a violation of international law if taken without either some special justification or without the contemporaneous consent or acquiescence of the target state*."[23] In the early drafts, the phrase "coercive action" was used along with "enforcement action" and there was no disagreement on the usage between the two. Hence, it can be understood that the word "enforcement action" includes within its meaning the use of force. However, the reading of the word "enforcement action" is of significant importance as it determines what forceful measures can be carried by the regional organisations.

The first issue concerning the interpretation of the phrase "enforcement action" arose during the Cold War. The question was whether the Organisation of American States (OAS) interception of the ships of the Soviet Union amounts to enforcement action under Article 53(1).[24] While the act involved clear use of force and there existed a formal proclamation by OAS, the Security Council chose to take no action.[25] Subsequently, when a resolution was passed by the Soviet Union holding OAS liable under Article 53, the Security Council suggested a political resolution instead of taking a stand on it. Similarly, in 1960, when

[15] *Ibid*, Article 1(2).
[16] *Ibid*, Article 1(3).
[17] *Ibid*, Article 2(2).
[18] *Ibid*, Article 2(1).
[19] *Ibid*, Article 2(3).
[20] *Ibid*, Article 2(4).
[21] Gary Wilson (n 8), 185,186.
[22] Charter of the United Nations 1945, Article 53(1).
[23] Ademola Abass, *Regional Organisations and the Development of Collective Security Beyond Chapter VIII of the UN Charter* (Hart Publication 2004) 43.
[24] *Ibid*, 44.
[25] *Ibid.*

OAS imposed economic sanctions on the Dominican Republic, the Soviet Union moved that it amounts to enforcement action.[26] At that time also, the Security Council did not give any definite answer.[27]

This situation gave rise to another hotly debated issue i.e., whether economic sanctions by regional organisations count as an enforcement action? This issue first came into light when ECOWAS (Economic Community of West African States) thought of imposing severe economic restrictions on the rebel forces in Libya and approached Security Council for authorization.[28] While it is often argued that economic sanctions constitute non-military measures and hence they should not be counted as enforcement actions[29], there exists no reason to not treat them as enforcement actions when they are being used to coerce the target states. The argument that is generally made against treating economic sanctions as enforcement actions is that Article 2(4) expressly excludes economic sanctions and hence it cannot be treated as an enforcement action under Article 53.[30]

However, Chapter VIII's inclusion of economic sanctions as an enforcement measure should not be determined by the position of economic force under Article 2(4) as economic sanctions have quite different legal statuses under Article 2(4) and Chapter VIII respectively. Economic penalties are interpreted under Article 53(1) as a punitive measure in reaction to what the regulatory state regards as a prior unlawful act by the Target State rather than as a tool of aggression to invade a state as they are under Article 2(4). The distinction between the two is that of *aggression* and *enforcement* action.[31] Additionally, not treating economic sanctions as enforcement actions also gives rise to an implication that in situations where peace is threatened, the Security Council can only take military actions since only those measures count as an exception to Article 2(7).[32]

Given that economic sanctions have emerged as a potent tool for nations to impose their will on others and persuade recalcitrant governments to adhere to their international responsibilities because many states are reluctant to employ force, it is of utmost importance that Security Council should take a firm stand on this and recognize economic sanctions as enforcement actions.

[26] Michael Akehurst, 'Enforcement Actions by Regional Organisations with Special Reference to the Organisation of American States (1967) 42 British Yearbook of International Law 175, 204.
[27] *Ibid.*
[28] S/PV.3822 3822nd mtg, 8 October 1997.
[29] Suyash Paliwal (n 2), 193.
[30] Derek W Bowett, 'Economic Coercion and Reprisal by States', (1972) 13 (1) Virginia Journal of International Law 1.
[31] Ademola Abass (n 21), 49.
[32] *Ibid*, 50.

2.3. Lack Of Modalities On The Requirement Of Authorization Under Article 53(1)

The provision laid down under Article 53(1) further provides that for a regional organisation to take enforcement action, they need to first take authorization from the Security Council.[33] The intention behind this requirement was to ensure overall control of the Security Council on the conduct of regional organisations.[34] In reality, the UN Charter's necessity for authorization under Chapter VIII has proven to be a typical case of irony. The necessity has encouraged regional organisations to avoid Security Council supervision and to disengage from the Chapter VIII framework, rather than guaranteeing that they are subjected to its authority.[35]

The reason behind such development is that the Charter does not specify the modalities such as the time at which such authorization must be sought by the regional organisation. It has generally been argued that such authorization must be sought before any action is taken because of the relationship between Article 53(1) and the power of the Security Council to make a determination as to the state of peace under Article 39.[36] However, that argument is unfounded because Chapter VIII nowhere provides that in order to trigger an enforcement action, Security Council should first make a determination as to whether any threat exists or not.[37] Even if we assume that such determination is required, there is nothing that stops the regional organisation from exercising the same power.

The conduct of regional organisations, particularly after the end of the Cold War, makes it quite evident that the issue of whether regional organisations must get permission from the Security Council before taking enforcement action has become redundant. Many regional organisations now hold the opinion that action does not necessarily need to be pre-authorized under Article 53(1).[38] Therefore they now first act and then attempt to justify the action by claiming that the Security Council has already approved it. *Ex post facto* authorization is the term used to describe this retroactive approval.[39]

The retroactive authorization has affected the framework and lessened rather than increased the Security Council's influence over regional enforcement measures, despite the fact that it has been highly obvious in the evolution of the relationship between the UN and regional organisations. Today, the clause in Article 54 requiring regional organisations to inform the Security Council of their operations is largely upheld in

[33] Charter of the United Nations 1945, Article 53(1).
[34] Suyash Paliwal (n 2), 195.
[35] Ademola Abass (n 21), 52.
[36] Gary Wilson (n 8), 188; The author of the article discusses the argument in detail and provides a citation for the articles that have made this particular argument.
[37] Charter of United Nations 1945, Chapter VIII.
[38] Suyash Paliwal (n 2), 195; The article shows how AU has followed this practice of retroactive authorization often and how it has become a part of customary rule between AU and UN; Hikaru Yamashita, 'Peacekeeping cooperation between the United Nations and regional organisations (2012) 38(1) Review of International Studies 65; Similarly, this paper discusses the practice of retroactive authorization followed in cases of NATO and EU.
[39] Ademola Abass (n 21), 54.

violation. In actuality, very few organisations care to alert the Security Council of their operations, and when they do, it is almost always too late, leaving the UN unaware of their actions the majority of the time.[40]

Further, as the chapter does not explicitly bar the regional organisations from making an assessment as to the presence of any threat to peace or aggression, regional organisations have conferred this power upon themselves.[41] This has limited the control of the Security Council over regional organisations even further. For example, ECOWAS was able to operate with its authority, command, and influence for the majority of the Liberian war because it need not have to wait for the Security Council to use its judgement under Article 39 in relation to its intervention in Sierra Leone and Liberia.[42] At each point of the fight, it was able to deploy its forces, impose financial sanctions on rebel groups, and provide its soldiers with the orders they needed while still maintaining field control.

Hence, it can be evident from this analysis that the emergence of *ex post facto* authorization, the non-conformity with Article 54, and the persistent use of economic sanctions, have all greatly affected the framework given under Chapter VIII. Chapter VIII provides the rules of engagement, but does not set up the guidelines for their implementation, thereby leaving the gap to be filled based on each specific situation.

III. RECONCILING THE CONFLICT BETWEEN THE ROLE OF REGIONAL ORGANISATION AND ARTICLE 2(4)

Article 2(4) contains the most fundamental principle of the UN Charter i.e., "*no threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nation*."[43] The rule has been given the customary status and is widely known to have been raised to the level of *jus cogens* rule.[44] Nevertheless, several generations of authors disagree on the precise parameters of Article 2(4). The last clause of Article 2(4), which prohibits the threat or use of force "*in any other way inconsistent with the Purpose of the United Nations*"[45] is what caused this division. The question is whether there are any further exceptions to Article 2(4) other than those that the UN Charter specifically recognizes. This part looks at whether consensual interventions by a regional organisation that lacks the authorization of the Security Council are in violation of the peremptory norm of Article 2(4). In order to ascertain this, it is important to first look at what norm constitutes a peremptory norm under Article 2(4) as Article 20 of Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA)[46] provides that states may

[40] *Ibid.*
[41] *Ibid*, 58.
[42] Decision A/DEC/8/97, 'Twentieth Session of the Authority of Heads of State and Government on Sanctions Against the Illegal regime in Sierra Leone.' < http://ecowas.akomantoso.com/_lang/fr/doc/_iri/akn/ecowas/statement/decision/1997-08-29/A_DEC.8_8_97/eng@/!main> accessed 07 September 2022.
[43] Charter of the United Nations 1945, Article 2(4).
[44] Ademola Abass (n 21), 184.
[45] Charter of the United Nations 1945, Article 2(4).
[46] Articles on Responsibility of States for Internationally Wrongful Acts 2001, Article 20.

by consent preclude the wrongfulness of conducts otherwise inconsistent with international obligations but Article 26[47] bars such protection in case of peremptory norms.

3.1. Ascertaining The Peremptory Character Of Article 2(4)

In 2001, the International Law Commission in its Articles on Responsibilities of States for Internationally Wrongful Acts (*hereafter* ARSIWA) confirmed the peremptory character of the ban on the use of force.[48] Hence, there is no doubt that Article 2(4) comprises certain norms that enjoy the peremptory character out of which no state can contract. However, it is important to go into the content of the article to analyse what norms of the said article have become peremptory and consequently what kind of force can be said to violate these peremptory norms.

Two requirements must be met as per Article 53 of the Vienna Convention on the Law of Treaties before a rule of general international law is deemed to have become *jus cogens*. The two requirements are that the rule in question must be (1) applicable to all members of the international community of nations as a whole and (2) acknowledged by the international community as being non-negotiable.[49] A further test might be the test of the 'seriousness' of the breach as formulated in the Commentary to the ARSIWA.[50]

Although authors have written extensively on the subject of *Jus Cogens,* it is International Law Commission's (*hereafter* ILC) work that has more fully developed the concept. So, if we look at the status of Article 2(4) as a peremptory norm, ILC recognised only the prohibition of aggression as a peremptory norm under Article 2(4). It did not categorise other *types* of forces as a peremptory norm in Article 2(4). This can also found in *Nicaragua*[51] where the International Court of Justice very interestingly distinguished "most grave forms of the use of force from other less grave forms". It is this ban on most grave forms of use of force that enjoys the status of the peremptory norm and not otherwise.

Further, in his report on the state of necessity, Roberto Ago, the former ILC Rapporteur on State Responsibility, similarly differentiated between aggression and other types of forces.[52] While he specifically recognised prohibition on aggression as a peremptory norm of international law, he was reluctant to include other categories, including forcible self-determination.[53] From this analysis, it can be concluded that only the prohibition on the use of force as *aggression* under Article 2(4) amounts to the peremptory norm. This

[47] *Ibid*, Article 26.
[48] Ademola Abass (n 21), 191.
[49] Vienna Convention on Law of Treaties 1969, Article 53.
[50] Ademola Abass (n 21), 193.
[51] *Nicaragua v. United States* (1986) I.C.J. 14, para 101.
[52] Roberto Ago, 'Addendum to the Eighth Report on State Responsibility' (1980) Yearbook of International Law Commission II, 1, 44.
[53] *Ibid.*

position is also in consonance with the growing support for recognizing humanitarian intervention as an exception to Article 2(4).[54]

IV. Can the Applicability of Article 2(4) Concerning Regional Actions That Do Not Violate Peremptory Norms Be Ruled Out by Consent?

Having established that only prohibition on the use of force as aggression counts as a peremptory norm under Article 2(4), it is important to now analyse whether states by agreement can rule out the operation of article 2(4) concerning regional actions not amounting to aggression. According to Article 20 of the ARSIWA, a State's agreement to another State's conduct of a specific act prohibits that conduct's wrongfulness in reference to the former state to the degree that the act is still within the parameters of such consent.[55] However, Article 26 states that consent does not function to negate a duty resulting from a peremptory norm.[56] Thus, it can be followed from the analysis above that the state's consent to the use of force (not entailing aggression) by regional organisations in particular instances does not go against Article 2(4).

It is therefore evident that the governing charter for regional organisations has gaps that remain to be filled or else there is a resultant ambiguity in terms of the nature and the extent of their power, that looms large. Considering the growing and immense influence these organisations have over contemporary world politics, it is of significance that their smooth functioning is ensured. In the long term, these organisations are the representatives and the primary players in regional as well as global peacekeeping. Hence, it is important that not only the inconsistencies in the United Nations Charter be looked at but also some of the major practical problems that impede the functioning of regional organisations. Thus, the following section analyses the issues regional organisations currently face and puts forward potential reforms.

V. UN-Regional Peacekeeping: Practical Problems and Way Forward

In order to ensure that regional organisations are able to fulfil their pursuit of maintaining peace and security and carry out operations effectively, it is imperative to acknowledge the contemporary challenges they face and work upon possible solutions for the same. First, the problem of resource mobilization needs to be dealt with adequately.[57] Growing regional organisations need to cut down on their dependency on international partners for funding or for providing resources.[58] This is so because their assistance is contingent on their national interests. Turning to UN Security Council then seems like a possible solution.

[54] Suyash Paliwal (n 2), 195.
[55] Articles on Responsibility of States for Internationally Wrongful Acts 2001, Article 20.
[56] *Ibid*, Article 26.
[57] Charles Riziki Majinge, 'Regional Arrangements and the Maintenance of International Peace and Security: The Role of the African Union Peace and Security Council' (2010) 48 Can YB Int'l L 97, 140.
[58] Charles Riziki Majinge (n 55).

However, even though, in an ideal situation, the UN Security Council will provide military and financial assistance to maintain international peace and security, history has shown that the UN Security Council's willingness to act is determined by the larger interests of its permanent members.[59] It is best understood then that regional organisations should take it upon themselves to carry the burden of mobilizing the required resources. For instance, in the African Union's Peace and Security Council, a special Peace Fund has been established that uses annual contributions from the organisation's general fund.[60] Further, for contributions from both within and beyond the region, the organisation should come up with more initiatives such as the mandatory imposition of international taxes or increased funding from larger member states.

Second, for any regional organisation to be effective at peacekeeping, it ought to have a clear mandate.[61] This entails having not only set, comprehensive goals and guidelines but also such mandates that are within the capabilities of the organisation. The importance of the workability of the mandates can be understood in the Economic Community of West African States Monitoring Group's intervention in Liberia in the late 1990s.[62] Despite having clear mandates to impose a cease-fire, help establish a government, and bring about order in the civil war-torn country of Liberia, the organisation failed to carry out the mission successfully. The failure was attributed to incomprehensible objectives that lacked clarity, the absence of proper planning, and conflicting views of the different members.[63]

At the same time, the effectiveness of peacekeeping operations is also drawn from international legitimacy. This concept is best understood to mean that any initiative of the regional organisation should be in consonance with the accepted international laws and norms, diplomatic conventions, and the provisions of the UN Charter.[64] Any organisation wishing to commence peacekeeping operations without the approval of the UN can only do so if it is in line with the widely recognized international treaties and arrangements. Furthermore, legitimacy seen through the lens of credibility of the organisation, both within and outside the region, also adds to the success of peacekeeping missions carried out by it. Regional organisations thus need to ensure that member states uphold the ideals that the organisation commits to, for instance, human rights, and rule of law to prevent serious questions regarding its legitimacy. In this light, there is a further recognized need to bring about the stricter implementation of directives by member states. It tends to set an undesirable precedent when member states ignore the mandates from the regional organisation with no repercussions for the same. It is imperative that regional organisations monitor the implementation of the given directives or set out sanctions for the defaulting members. The resultant cohesiveness in the

[59] *Ibid*,141.
[60] *Ibid.*
[61] Gurol Baba & Stephen Slotter, 'Successful Peacekeeping by Regional Organisations: Necessarily Hybrid' (2014) 10 Rev Int'l L & Pol 1, 5.
[62] *Ibid*
[63] *Ibid*, 6-7.
[64] *Ibid*, 8.

organisation would lead to greater consensus, and in theory, more commitment from the member states. This would lead to a much more effective and quick response to emerging issues in the region.

Finally, light has to be thrown on the crucial role that the UN Security Council plays in maintaining international peace and security as per the UN Charter. The privilege to be the only body that directs global security threats comes with even greater responsibility. By not fully committing to its efforts and not sending in requisite resources, the Council creates a damaging effect on other member states. It prevents other members to be encouraged to participate in peacekeeping efforts and disproportionately burdens the smaller member states willing to assist.[65] It is crucial that the UN Security Council assumes greater responsibility and send in resources if not troops. However, aid from the UN should not eclipse attention from other vital aspects by remaining limited to economic assistance. There is an urgent need for "in-kind" assistance in terms of better-trained UN peacekeepers, trained mediators, and improved cooperation between envoys of the two.

VI. CONCLUSION

The article analyses the role of the regional organisation as stipulated in Chapter VIII of the Charter and further deals with some of the practical problems that UN-Regional Peacekeeping faces. The article highlighted the substantive and structural weaknesses which make the chapter inadequate to deal with the contemporary role that is being played by regional organisations. The article pointed out how the development of *ex post facto* authorization, the non-conformity with Article 54, and the persistent use of economic sanctions, have all greatly affected the framework given under Chapter VIII. The article further discussed the conflict between the unauthorized use of enforcement action and the prohibition on the use of force under Article 2(4) of the Charter and argues that it can be reconciled if clearly distinguish what counts as a peremptory norm under Article 2(4) and what does not. In the end, it addressed some of the practical problems that impede the UN-Regional peacekeeping missions and solutions for the same.

[65] Charles Riziki Majinge (n 55), 143-144.

UNDERSTANDING THE PUBLIC POLICY EXCEPTION IN PRIVATE INTERNATIONAL LAW - THROUGH INDIA'S LENS

Isha Khurana[1]

ABSTRACT

Public policy is an expression that is used consistently by various members of the legal fraternity. This term depicts a nation's fundamental values. Of the three fundamental pillars of private international law, public policy has a direct impact on the pillar of applicable law. This impact occurs in two ways. Firstly, if a foreign court were to deliver a judgement that was contradictory to the forum's public policy, the same would go unrecognized. Secondly, if parties have made a choice of law in a contract that is to be enforced in a forum, but the same is contrary to the forum's policy, it will not be acceptable and thereby, invalidate the choice of law made. Thus, it directly impedes upon the party's autonomy.

Public policy has formed a rightful exception to the usual acceptance of a party's choice of law. The paper aligns with this line of thought and seeks to establish the integral nature of a nation's policy. However, the paper argues that the real issue seems to be with the difficulties of interpreting the public policy of any country, rather than the exception it so forms. Indian public policy and overriding mandatory norms are unfortunately poorly defined and due to this, there is hesitance to submit any matter for settlement before Indian courts.

Accordingly, the paper analyses the circumstances in which the law of another country would be perceived as a plausible contravention of India's overriding mandatory norms and public policy. In furtherance, the paper aims to make a distinction between India and the European Union (EU). Like in most aspects of private international law, the EU seems to be a step ahead of most nations in the interpretation of public policy as well. The paper thus, concludes with a call to the Indian legal fraternity, to strengthen the role of the public policy exception, with a more concrete understanding of what it constitutes, to facilitate the growth of private international law in India.

I. INTRODUCTION

The public policy of nations has an extremely important role to play in transnational matters, due to the sheer power it holds in the adjudication of disputes. The concept of public policy, however, has not been described in any exhaustive list and has grown to be largely interpreted through judicial decisions or certain pieces of codified law of different nations. Due to this lack of clarity, public policy has often been criticized. Nevertheless, this does not change the very fact that public policy highlights what nations consider to be

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of utmost importance to their interests.[2] Here is where the role it plays in international law comes into the picture. Public policy largely impacts the choice of law made by parties in international agreements. If parties to a contract want to apply a foreign law that goes against a forum's tenets of public policy, this practice shall not be allowed. Going by the very basic principles of conflict of laws, no country will apply a foreign law that is contradictory to its public policy,[3] which leads to public policy acting as an exception to the choice of law. Since this position has been long established, its consequences for involved parties must be discussed, to ensure a smooth operation of agreements in international matters. It is thus, imperative to delve into what matters and ideologies form the public policy of different nations, how it is understood in international matters, and the importance it holds in today's globalized world so that one can create a sense of predictability and a harmonious understanding of its applicability.

This paper thus seeks to study the interpretation of public policy, and how it is exercised as an exception by countries for the disapplication of foreign law. For the same, the paper first dives into the nature of public policy itself, with the following section analysing its impact on the choice of law that is present in various contracts. To facilitate a better understanding of the subject, India is taken as a forum and the precedents established by its judiciary as well as codified legislations, are discussed, as an attempt to decipher various heads of public policy. Further, the European Union is taken as another benchmark and is used to understand public policy's interpretation in foreign nations. The last section of the paper aims to deal with the widened criticism that is projected towards the use of the public policy exception and attempts to depict the importance of this exception for better functioning of international law and the concept of comity that surrounds this topic. In this section, the intersection of overriding mandatory norms and public policy is also discussed to show how the two function with respect to one another. The paper concludes with general suggestions being offered, that hopefully contribute to the development of public policy.

II. ANALYSING PUBLIC POLICY: ITS NATURE, EVOLUTION, AND SCOPE AS AN EXCEPTION

A broad interpretation of public policy depicts it to be an area that is a fundamental principle of a State, or rather, a forum as is known in international law. These policies are developed and interpreted by governments and their representatives and are largely understood as law.[4] Now, considering these policies are of national interest, they will inherently be posed as restrictions to the scope of private acts between parties, such as contracts as well. For instance, if two parties enter into a contract and choose India as their

[2] Alexander J. Belohlavek, 'Public Policy and Public Interest in International Law and EU Law' (2012) Czech Yearbook of International Law pp. 117-147 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2050205> accessed 6 September 2022.
[3] Taprogge Gesellschaft Mbh v Iaec India Ltd. AIR 1988 Bom 157.
[4] Dean G. Kilpatrick, 'Definitions of Public Policy and the Law' (*Medical University of South Carolina)* <https://mainweb-v.musc.edu/vawprevention/policy/definition.shtml> accessed 5 September 2022.

forum or its laws as their applicable law, and the contract contains a clause that restricts the parties' right to trade, this would violate India's public policy due to Section 27 of the Indian Contract Act being an element of the same.[5] This in turn will negate their choice of law. Thus, the public policy of a forum plays a huge role in making the choice of law by the contracting parties. While the impact on the choice of law will be discussed in greater detail soon, as of now, the scope and nature of public policy must be understood. Now, there exist two kinds of public policy, one that functions at a domestic level and one at an international level.[6] The latter is also termed as *ordre public externe* or *ordre public universel*. Under *ordre public universel*, principles of a nation's public policy are given preference when it comes to the choice of law, if the application of a foreign law that is chosen, conflicts with the public policy and is detrimental to justice that is recognized in the international community.[7] Hence, this practice of allowing the public policy of a nation to prevail even in matters of transnational parties eventually led to public policy being an exception in applying the chosen law of the parties. The same tradition of rejecting a foreign law has also been named a public policy reservation.[8]

Since no government or State is certain as to what the boundaries of this doctrine are, the aspects of one's private life which could be affected by this public sphere, remain unsettled.[9] Further, as previously stated, the standards for considering an act to be violative of a nation's public policy while dealing with international matters are quite high. Usually, practices that are frowned upon universally, such as terrorism, fraud, corruption, slavery, and acts of this nature, are deemed to fall under violations of public policy.[10] States hence cannot deem an act as violative of public policy according to their whims and fancies, or selfishly to protect themselves.[11] They can only embark into the private lives of individuals if their acts aim to subvert the mandatory norms and rules of a nation-state, which occurs only in the rarest cases.[12]

Another feature of public policy that must be highlighted, is its changing nature. Indian Courts have also, through preceding case laws, stated that since public policy is a subject that derives itself from public interest and for the public's good, it is bound to change over time due to the ever-changing notions of what is best

[5] Section 27, The Indian Contract Act, 1872, No. 9, Acts of Parliament, 1872 (India) [Indian Contract Act].
[6] Adeline Chong, 'The Public Policy and Mandatory Rules of Third Countries in International Contracts' (2006) 2 (1) Journal of Private International Law < https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=1880&context=sol_research> accessed 5 September 2022.
[7] David Clifford Burger, 'Transnational Public Policy as a Factor in Choice of Law Analysis' (1984) 5 (2) NYLS Journal of International and Comparative Law <https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=1192&context=journal_of_international_and_comparative_law> accessed 7 September 2022.
[8] Dieter Martiny, 'Public Policy' *Max Planck Encyclopedia of European Private Law* <https://max-eup2012.mpipriv.de/index.php/Public_Policy> accessed 6 September 2022.
[9] Farshad Ghodoosi, 'The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements' (2016) 94 (3) Nebraska Law Review < https://core.ac.uk/download/pdf/188101311.pdf> accessed 2 September 2022.
[10] Peter Nygh, Autonomy in International Contracts (Clarendon Press 1999).
[11] Burger, (n 6).
[12] Nygh (n 9).

for society at large.[13] Further, while certain categories or heads of public policy are already in existence, courts can in certain cases, exercise the power to establish new heads. Critics may once again argue that this gives unbridled and arbitrary power to the decision-makers, however, it has been established through precedent that these new heads are established only in extraordinary circumstances and that the stability of the society must be kept in mind.[14] In the case of *Gujarat Bottling Co. Ltd v. Coca Cola*,[15] the evolving nature of public policy in matters of trade was also highlighted since the same is bound to change with emerging economic thoughts. Through this, one can see the role that public policy would play in international contracts, thereby obviously affecting transnational litigation and arbitration as well. Thus, public policy can find reasons to refuse enforcement of contracts that are objectionable according to changing socio-economic situations.[16]

So far, two characteristics of public policy which stand out are that while there is no clarity on its scope or composition, they are imperative for a nation's security and are construed strictly.[17] Once a matter has been ascertained to be that which affects public policy, States and Courts are open to using this as an exception that allows them to avoid adjudicating matters that are contravening their public policy and allows them to further refrain from recognizing any foreign law that violates their policy. This thus gives rise to the public policy exception that has been mentioned above, which potentially affects one's choice of law, an area that will now be discussed in detail.

III. IMPACT ON THE CHOICE OF LAW

The preceding section while discussing how public policy plays the role of an exception, makes quite clear that it would render a party's choice of law, invalid. A forum usually exercises the public policy exception in the later phase of a trial procedure, after it has identified the governing law, to understand whether the foreign law has been chosen by the parties, can be enforced in their State.[18] While this is undoubtedly done to preserve a forum's morals and fundamental values, one must also understand how it would cause grievance to the parties. The exception allows forums to use an "escape route" of sorts that allows them to avoid the application of relevant foreign law,[19] which would normally aid the parties in achieving justice.

[13] Central Inland Water Transport Corporation. Ltd. v Brojo Nath Ganguly 1986 AIR 1571.
[14] Gherulal Parakh v Mahadeodas Maiya 1959 AIR 781.
[15] Gujarat Bottling Co. Ltd v Coca Cola 1995 AIR 2372.
[16] George A. Strong, 'The Enforceability of Illegal Contracts' (1961) 12 (4) Hastings Law Journal < https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1658&context=hastings_law_journal> accessed 2 October 2022.
[17] Marketa Trimble, 'The Public Policy Exception to Recognition and Enforcement of Judgments in Cases of Copyright Infringement' (2009) Scholarly Works < https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1577&context=facpub> accessed 27 August 2022.
[18] Adeline Chong, 'The Public Policy and Mandatory Rules of Third Countries in International Contracts' (2006) 2 (1) Journal of Private International Law <https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=1880&context=sol_research> accessed 5 September 2022..
[19] Chong (n 18).

Further, many critics of this exception have often stated that relying on this practice gives extreme powers to the decision-makers and they might often adopt a narrow-minded approach to applying foreign law.[20] To add on, the very fact that the realms or boundaries of public policy and its constituents are vaguely defined may further worsen the situations of concerned parties.

The above position, while a valid argument, does not however disregard the importance that public policy plays in the international context. At the end of the day, the exception is largely applied to protect the sovereignty and public interest of a State, both of which cannot be challenged as unnecessary or arbitrary acts. Researchers also argue that adopting a stringent approach to applying this exception does not give extreme powers to any particular State or its people, and is exercised quite fairly.[21] This paper will deal with the imperative nature and necessity of public policy shortly. The next section, however, aims to display how the understanding of public policy has evolved over the years, either by Governments or the developments in case laws, while taking India as an example.

IV. DELVING INTO INDIA'S PUBLIC POLICY

The understanding of what constitutes public policy that has been discussed so far finds itself as a part of the understanding of Indian courts. As rightly established in the case of *National Thermal Power Corporation v. Singer Company*,[22] the concept of party autonomy in international contracts, which would undoubtedly comprise their choice of law, is respected in the Indian legal system, so far as it is not inconsistent with an overriding public policy of the forum. In *Central Inland Water Transport Corporation Ltd v Brojo Nath Ganguly*,[23] the court stated that an act would be opposed to public policy if they harm public welfare in a substantially incontestable manner, thereby making the standard for invoking this exception, quite high. One can say that in matters of domestic public policy, India considers matters that are truly fundamental to its nature, and to justice and morality to constitute the same,[24] thereby implying a similar interpretation of public policy for transnational matters. At this juncture, it would seem appropriate to explore how India has gone about defining public policy for international contracts.

4.1. India's Public Policy in Arbitration

[20] Burger (n 6).
[21] Margaret Moses, 'Public Policy: National, International, and Transnational' (Kluwer Arbitration Blog, 2018) < http://arbitrationblog.kluwerarbitration.com/2018/11/12/public-policy-national-international-and-transnational/> accessed 3 September 2022.
[22] National Thermal Power Corporation v Singer Company 1993 AIR 998.
[23] Nygh (n 9).
[24] Oil & Natural Gas Corporation Ltd. v Saw Pipes Ltd. (2003) 5 SCC 705.

The next few paragraphs would be dealing with how the Indian judiciary has dealt with the intersection of public policy and enforcement of arbitral awards. Under the Arbitration and Conciliation Act, it is clearly stated that any enforcement of a foreign award is denied if it is violative of the public policy, which was caused by fraud or corruption during the attainment of the award.[25] Now, while the aforementioned act deals with matters of arbitration and arbitral awards thereby making it separate from litigation, the fundamental understanding of public policy can be observed and taken into consideration.

Expressly stating that fraud, corruption, and similar practices violate India's public policy, brings the nation on par with the internationally recognized understanding of what public policy is, as the same examples have been reiterated in preceding sections of the paper. Here, it must be stated that while enforcing foreign awards, it is largely international public policy that must be considered instead of allowing domestic policy to override the application of foreign law.[26] A similar stance has been applied in countries like the United Kingdom and France as well, where public policy for cross-border matters is based on reflections of international norms.[27] In the New York Convention, 1858, it is stipulated that to enforce foreign awards, it is the laws of that nation that are being asked for such enforcement that must be followed.[28] Thus, discretionary powers are inherently given to a forum that is a contracting party to this convention.

One of the landmark cases for this matter in India was the previously mentioned case of *National Thermal Power Corporation v. Singer Company*[29] wherein it was highlighted that arbitration proceedings will also be held according to the chosen law unless the same contradicts the chosen forum's public policy. Thus, courts have often switched between the approaches they take towards a construing public policy for foreign awards, with a broader interpretation at times to use the public policy exception, and then a narrower one to allow enforcement.[30] In recent cases, the Supreme Court has been adopting a pro-enforcement approach, suggesting a narrower interpretation of the public policy to allow the application of foreign awards in India and focusing on minimal interference in such matters.[31]

Now, in the case of *Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd*,[32] the Supreme Court engaged in a discourse about this matter and hence concluded that matters which are the fundamental policies of India, that have a connection to the interests of the nation, affect justice or morality of the country, and are

[25] Section 48 (2) (b), The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India).
[26] Bhavana Sunder & Kshama A. Loya, 'Demystifying Public Policy to Enable Enforcement of Foreign Awards-Indian Perspective' (2021) 1 (1) Indian Review of International Arbitration < http://iriarb.com/Demystifying%20Public%20Policy%20to%20Enable%20Enforcement%20of%20Foreign%20Awards-%20Indian%20Perspective%20-%20Kshama%20A.%20Loya%20&%20Bhavana%20Sunder.pdf> accessed 10 September 2022.
[27] ibid 25.
[28] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).
[29] Margaret Moses (n 21).
[30] Sunder & Loya (n 25).
[31] Government of India v Vedanta Ltd 2020 SCC Online SC 749.
[32] Nygh (n 9).

patently illegal, would amount to public policy. While these heads of public policy might seem vague to a reader, and rightly so, exploring and dissecting judicial decisions thus helps one gain more clarity on this subject. For instance, "fundamental policies" of India could be construed to mean the fundamental rights that have been granted, as it was also noted by the Apex Court in *Smt Ujjam Bai v. State of U.P*,[33] that these rights are based on high public policy. Additionally, even violations of the nation's economic interest would result in violating public policy, as noted in *Renusagar Power Company v. General Electric Company*.[34]

The *Saw Pipes* Decision[35] further narrowed down the definition of public policy and stated that patently illegal acts would contravene India's public policy. Through this, it can be understood that contracts or arbitral awards in violation of any substantive law of India, and essentially agreements that are tainted with illegality, would not be enforced or accepted in India, due to the public policy exception.

4.2. India's Public Policy in Litigation

Judicial decisions in the field of international contractual agreements will now be discussed, to gain a more litigation-based perspective of the public policy exception. However, it must also be highlighted that although the preceding cases discussed arbitral awards, the principles which have been laid down through them, still apply to other legal areas such as litigation. It has been previously stated that one cannot usually predict when the public policy exception starts entering the private lives of citizens, thereby affecting the agreements they enter into. Now, the Indian Contract Act[36] does entail some provisions from sections 23-28 that have been recognized as situations that potentially amount to violations of public policy.[37] In the landmark *Taproggue* case, it was clearly stated that section 27 of the Indian Contract Act was in fact enacted while keeping the country's public policy in mind. It is deciphered through this that public policy thus frowns upon any agreement that restrains trade, business, and profession. This has been recognized in the international arena as well as by scholars since a restraint in one's trade practices violates a state's public policy unless it is reasonable and natural.[38] Further, we can observe that restraining marriage also amounts to a violation of public policy.[39]

One can say that a legislator's intentions can be derived from the language used in various laws, such as sections 23-28 of the Contracts Act itself, to understand what adds to the formation of a nation's public

[33] Smt Ujjam Bai v State of U.P 1962 AIR 1621.
[34] Renusagar Power Company v General Electric Company 1994 AIR 860.
[35] Nygh (n 9).
[36] Indian Contract Act, 1872.
[37] PASL Wind Solutions (P) Ltd. v GE Power Conversion (India) (P) Ltd 2021 SCC Online SC 331.
[38] Amasa M. Eaton, 'On Contracts in Restraint of Trade' (1890) 4 (3) Harvard Law Review <https://www.jstor.org/stable/1321349> accessed 8 September 2022.
[39] Section 26, Indian Contract Act, 1872; Saloni Khanderia, 'Practice does not make perfect: Rethinking the doctrine of "the proper law of the contract" – A case for the Indian courts' (2020) 16 (3) Journal of Private International Law < https://www.tandfonline.com/doi/full/10.1080/17441048.2020.1823068> accessed 2 September 2022.

policy and how it can be construed. Further, precedent cases state that when there is confusion about whether a matter falls under public policy, the principles of our fundamental rights and DPSPs can be relied upon, as stated in the *Ujjam Bai*[40] case as well, thereby allowing substantive interpretation for this subject. The Supreme Court, in *Central Inland Water Transport Corporation Ltd v Brojo Nath Ganguly,*[41] explored yet another type of agreement that would invite an invocation of the public policy exception. The case discussed at length, how contracts with weaker parties i.e., between parties who are unequal in bargaining power would be opposed to public policy. As reiterated in the case of *L.I.C of India & Another v. Consumer Education & Research*,[42] today's world involves extremely large corporations that deal with various business activities, these corporations would thus hold an unequal power, or rather, an upper hand while dealing with any third party and through this, could easily exploit them through uneven terms of contracts. The duty thus falls upon the State and its courts to ensure that contracts which are being enforced, are not arbitrary or harmful to the public interest at large.[43]

It must be noted here that public policy is not limited to the instances cited above, there are several other instances, which will now be discussed, that can invoke this public policy exception. The Bombay High Court, in *Re: K.L. Gauba v. Unknown*,[44] discussed that, while the public policy may seem vague, its understanding regarding the administration of justice stands clear. It was then stated that all agreements that interfere with the administration of justice would be opposed to public policy under Section 23 of the Indian Contract Act.[45] For a more international law-based understanding another ground for exercising the public policy exception has been for agreements that oust the jurisdiction of courts. While this may not be directly related to the choice of law, the choice of jurisdiction by parties is still an important factor that must be considered while deciding validity under public policy. The choice of forum thus forms an integral part of many international contracts and if courts find this choice, or the way the choice was made, to be against their public policy, it would result in unfavourable results for the parties involved. This was discussed in the case of *A.B.C Laminart*,[46] where the court relied on *Hakam Singh v. Gammon*,[47] as well as the maxim of ex dolo malo non oritur action, and stated that an agreement that ousts the jurisdiction of a court is opposed to public policy and is hence, void. It was further stated that unless the ouster is through a valid clause in an arbitration agreement, or a valid clause deciding upon which court would have jurisdiction, the ouster would be opposed to public policy since it takes away an individual's right to submit his claims to a court. Additionally, if two courts were of competent jurisdiction, then an agreement to confer jurisdiction

[40] Smt. Ujjam Bai v State Of Uttar Pradesh, 1962 AIR 1621.
[41] Central Inland Water Transport Corporation Ltd v Brojo Nath Ganguly, 1986 AIR 1571.
[42] L.I.C of India & Another v Consumer Education & Research 1995 AIR 1811.
[43] Central Inland Water Transport Corporation Ltd v Brojo Nath Ganguly 1986 AIR 1571; L.I.C of India & Another v Consumer Education & Research 1995 AIR 1811.
[44] Re: K.L. Gauba v Unknown AIR 1954 Bom 478.
[45] Section 23, Indian Contract Act, 1872; Re: K.L. Gauba v Unknown AIR 1954 Bom 478.
[46] A.B.C Laminart Pvt Ltd. & Another v A.P. Agencies, Salem 1989 AIR 1239.
[47] Hakam Singh v Gammon (India) Ltd 1971 AIR 740.

on only one of them would be valid under section 28 of the Indian Contract Act, as also upheld in the case of Hakam Singh and further discussed in *Kumarina Investment Ltd. v. Digital Media Convergence*.[48]
As has been stated multiple times throughout the course of this paper, the exception of public policy is still invoked strictly and construed narrowly. To understand and illustrate this, one can look at the case of *Gherulal Parakh v. Mahadeodas Maiya*,[49] which goes on to state a subject that would ***not*** constitute public policy. In this case, it was put forth that the tenets of Hindu law could not be taken into consideration to understand what constitutes public policy and what does not, and further, one could not use the principles of Hindu law to invalidate certain contracts on grounds of public policy violation.

Hence, India as a forum has seen great developments in this matter and should ideally continue to move towards such developments and an understanding of public policy that aligns with the principles of private international law. The following section of this paper will deal with the European Union's interpretation of the same and the various regulations that govern this subject in litigation matters.

V. PUBLIC POLICY IN THE EU AND OTHER NATIONS

To gain a more comparative and global understanding of the constituents of public policy, the EU, which is often seen as a benchmark in the field of private international law, will be briefly discussed through legislation and case laws, which will further help in drawing parallels to the Indian position on this subject. The European Union over the years has come up with several legislations surrounding matters in private international law. These have also been mirrored by other countries that use the EU legislation to formulate their methods of determining applicable law in cases of litigation. As we have seen above, private international law and contracts between parties are bound to be affected by a forum's public policy. Hence, even the EU, through regulations such as the Rome I Regulation[50] on the law applicable to contractual obligations (hereinafter referred to as the Rome I Regulation) and Brussels 1 bis recast Regulation[51] on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter referred to as Brussels 1 bis Regulation) has incorporated the public policy exception into its practice to safeguard its public policy.

The understanding of what falls within the public policy for the EU member states is largely similar to what has been discussed so far. In *Krombach v. Bamberski*,[52] the European Court of Human Rights stated that to

[48] Kumarina Investment Ltd. v Digital Media Convergence 2010 TDSAT 73 (27).
[49] Gherulal Parakh v Mahadeodas Maiya, 1959 AIR 781.
[50] Council Regulation (EC) 593/2008 on the law applicable to contractual obligations [2008].
[51] Council Regulation (EU) 1215/2012 on jurisdiction and enforcement of judgements in civil and commercial matters (recast) [2012].
[52] Krombach v Bamberski [2000] ECJ C-7/98.

avail of the public policy exception, there would have to be an infringement of the fundamental principles of the forum or a manifest breach of the rule of law.

The Brussels 1 bis Regulation read along with the Rome 1 Regulation essentially accounts for the same understanding of public policy, of invoking the exception in specific circumstances according to international public policy. This sort of development in understanding, as well as regulations, has in a way led to EU public policy, which essentially is a combination of the public policy of several EU member states.[53] Despite such development, the EU lies in a similar position as India, since there is no demarcation in particular about what is considered their public policy. Courts such as the CJEU have only gone to the extent of stating that the exception ought to be understood and applied in a strict and narrow manner[54] and that it would represent the protection of the State's legal interests.

To understand the instances that give rise to the utilization of the exception, we can take a look at case laws. Firstly, looking within the EU itself, the ECJ applied the exception in *Hoffman v Krieg*,[55] a case seeking enforcement of German a maintenance order which was ancillary to a divorce decree, in the Belgian court. Here, since the matter dealt with personal matters and maintenance, the court held it was against the scope of Brussels 1 bis Regulation due to Article 1. To protect the interests of the States involved and uphold the regulation, the Court thus applied the exception which is done in very limited scenarios.[56] In a more recent case, German Courts refused to enforce a Polish judgement, stating that the same violated Article 5 of the German Constitution.[57] Here, we can observe a parallel to the construal of public policy of the German Court and Indian Courts. Both nations portray a significant similarity in this aspect, as would most other nations, by stating that their constitutional provisions undoubtedly must be considered as their public policy.

Moving to additional interactions with other nations, we look at how Courts of a forum might look into the laws and public policy of other nations that have a connection with the contract or dispute in question. For instance, in *Foster v Driscoll*,[58] the agreement comprised smuggling alcohol into the United States during the period of prohibition and the matter lay before English Courts. Here, the English court refused to enforce such a contract since it was violative of the United States' interest and they were closely related to the contract. This practice of respecting another nation's public policy and interests will be discussed in greater detail in the following section, under the interpretation of comity.

[53] Chong (n 18).
[54] Hoffmann v Krieg [1988] ECJ R-145/86.
[55] ibid 59.
[56] Karen E. Minehan, 'The Public Policy Exception to the Enforcement of Foreign Judgments: Necessary or Nemesis' (1996) 18 (5) Loyola of Los Angeles International and Comparative Law Review < https://digitalcommons.lmu.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1399&context=ilr> accessed 7 September 2022.
[57] Bundesgerichtshof, (BGH) (IX ZB 10/18).
[58] Foster v Driscoll [1929] 1 KB 470.

In present times, we can understand this through another illustration. Taking two individuals who are planning to smuggle marijuana into India, which constitutes an illegal act for India,[59] have chosen Dutch law to be applicable before a court in the Netherlands. While the act mentioned might not be against their legal norms and public policy, it could be deemed against Indian public policy since it is illegal. In such scenarios, the courts might choose to refuse such enforcement to preserve their relations and maintain a balance of the policies of both nations. These scenarios also provide a positive view of the public policy exception and depict how it aids in preserving friendly relations with Foreign States, which will be discussed in the following section.

VI. NEED FOR PUBLIC POLICY

As mentioned before, a substantial amount of criticism has been raised towards the public policy exception. The idea and practice of letting a forum's domestic policy affect international matters and foreign law as such, doesn't sit well with many scholars and can to an extent deprive a person seeking justice of their rights. Despite this, it is put forth that there is an extremely strong and imperative reason for keeping this exception in place. The fact of the matter is that the policies depict the fundamental values of the nation and compromising these values would be detrimental to the State's interests.[60] The trends that are set through invoking public policy, are done to preserve the public interest at large and for protecting societal values,[61] which are duties that a nation must perform.

Courts in cases such as *PASL Wind Solutions (P) Ltd. v GE Power Conversion* often described the public policy to be an unruly horse that is clouded with uncertainty[62] but one must note that the same is another branch of law that has been developed through precedents and is applied or invoked where there is a clear need for the same and is only done to prevent great harm to a nation's values.[63]

Here, I would attempt to draw a parallel to the subject matters falling within Article 24 of the Brussels 1 bis recast. From the language used by legislators and policymakers, it becomes amply clear that the subjects enlisted are to be perceived as holding significant importance for the EU member states and their sovereignty. Thus, they were granted immunity to adjudicate these matters. The point being made here is that, when it comes to matters and values that are substantially important to a nation, which public policy as a concept represents, they must be given the right to preserve them and make decisions per the same.

[59] Section 23, Indian Contract Act, 1872.
[60] Belohlavek (n 1).
[61] Belohlavek (n 1).
[62] PASL Wind Solutions (P) Ltd. v GE Power Conversion (India) (P) Ltd 2021 SCC Online SC 331; Halsbury's Law of England (3rd edn, vol. 8).
[63] PASL (n 62).

The same has been put forth for overriding mandatory norms. To a large extent, public policy and overriding mandatory norms have been viewed as falling under the same umbrella or category of matters through which the eminent interest of a forum is protected.[64] It has thus been stated that mandatory norms or rules are an expression of public policy itself.[65] However, there does exist a certain level of distinction between the two, since public policy is largely concerned with justice and ensuring conduct that is aligned with the public interest, whereas overriding mandatory norms are compulsorily applicable norms that are usually prescribed by law.[66] Further, overriding mandatory norms have also been defined in Article 9 of the Rome 1 Regulation as provisions that are necessary for safeguarding a nation's economic, political, and social interests.[67] This definition has thus grown to be globally accepted. Within the EU, the Rome Convention, of 1980, also aimed to distinguish between the two, with Article 7 largely addressing overriding mandatory norms and Article 16 establishing the position of public policy.[68] That being said, both these subjects revolve around the same matters, that are considered to be of high importance for a nation. On a more international note, the EU seems to be one of the entities or groups of nations that are seen as taking a step forward to differentiate between the two concepts, through the regulations listed above. Thus, other nations such as India must also move in this direction, so that there is holistic development on this subject.

Now, a large difference in perceptions between the two then comes because public policy is often viewed in a negative light while the norms are viewed in a positive light.[69] The former here is seen as a means to avoid enforcement of foreign law and focuses on the dis-application of relevant laws whereas the latter is a positive obligation enforced onto people to follow the rules of a nation.[70] Thus, it can be stated that while understandings of the two may slightly differ, it is largely the application of the two that gives rise to differing interpretations. Public policy, negates one's choice of law, portraying itself as a shield to protect the forum's interest, and hence, gives way for its own rules or mandatory norms to apply, allowing a nation's overriding rules to be a sword.[71] It is perhaps due to this negative connotation of public policy being an "escape route" or an exception that it is criticized.

To counter this, we must understand the positive effects that public policy can have in an international context. One of the major benefits in this context stems from a forum applying another nation's public policy, or international public policy at large. As portrayed by case laws above, English courts have by far engaged in applying policies and laws of other nations connected to a contract even when English courts

[64] Chong (n 18).
[65] Nygh (n 9).
[66] Willian Tetley, 'Vita Food Products Revisited (Which Parts of the Decision Are Good Law Today?) (1992) 37 McGill L.J. 292.
[67] Council Regulation (EC) 593/2008 on the law applicable to contractual obligations [2008], art 9.
[68] Consolidated version of the Convention on the law applicable to contractual obligations C 27/02, art 7 & art 16.
[69] Nygh (n 9).
[70] Chong (n 18).
[71] Hossein Fazilatfar, 'Public policy and mandatory rules of law: definition, distinction, and function' in Overriding Mandatory Rules in International Commercial Arbitration (2019, Elgar Online); Peter Nygh, Autonomy in International Contracts (Clarendon Press 1999).

were the chosen forum. Hence, comity comes into the picture since forums and courts at large use public policy to foster greater cooperation and maintain good relations with foreign states.[72] Further, it would be right and quite obvious to assume that all nations would be pleased if their laws were abided by especially when they bear a close connection to the disputes in question. The practice of applying another closely related nation's public policy has been long-standing and can be illustrated through the case of *Regazzani v. K. C. Sethia*.[73] Here, the sale of jute to South Africa had been made illegal by Indian law, and while the chosen forum was England, the House of Lords refused to enforce such an agreement since it was contrary to India's public policy, thereby portraying a spirit of international comity.

Thus, when forums apply the public policy exception to protect the interests of a foreign State, it performs a two-fold function. Firstly, it preserves international relations and it also creates a sense of reciprocity since the other nation would become more likely to be as considerate and respectful towards the forum's policies and goodwill. In furtherance, one might suggest that instead of looking at public policy as something that restricts justice or access to the same, one must look at its application as something that protects them.[74] The protection here would occur since, if forum "A" refuses to enforce a certain contract that is illegal in nation "B" that is the place of performance, it would protect the parties from performing an illegal act that would come with dire repercussions to both parties involved. Further, the exception behaves as a guardian of a nation's fundamental principles of law, thereby providing reassurance to all States about the protection of their interests.[75]

Lastly, decreasing the resistance towards exercising public policy and focusing more on its development and conceptualization could further lead to uniformity in decisions.[76] Here, one suggestion scholars have made, and rightly so, would be to create demarcations for what constitutes international public policy and increase attempts to envision the kind of matters and practices that nations together would agree as composing public policy at an international level. While this can be deciphered through precedents and legislative intent as such, more work in this area leads to a more harmonized understanding between nations, thereby facilitating better and more informed international trade and activities.

VII. CONCLUSION

This paper has attempted to give its readers a deeper insight into the concept of public policy as a whole, and more specifically in an international context. Through the various topics discussed in the paper, one

[72] Chong (n 18).
[73] Regazzani v K. C. Sethia (1956) 3 W.L.R 79.
[74] Chong (n 18).
[75] Tomaž Keresteš, 'Public Policy in Brussels Regulation 1: Yesterday, Today, and Tomorrow' (2016) 8 (2) LeXonomica Journal of Law and Economics < https://journals.um.si/index.php/lexonomica/article/view/33> accessed 10 September 2022.
[76] Chong (n 18).

can observe how a nation's domestic public policy, or rather, a combination of various nations' public policy leads to a harmonious understanding of transnational public policy. The matters discussed in the last section of the paper especially highlight the need for the public policy exception due to the role it plays in fostering better international relations and maintaining domestic public order.

Needless to say, one cannot disregard the issues that may arise and the concerns many critics have about the misuse of this exception. To tackle this, precedents must be relied upon to understand the perspectives that courts usually take in applying the exception. Further, a look into internationally recognized principles and rules such as the ones applied in the case of *Kuwait Airways Corp v Iraqi Airways Co*,[77] where the United Nations Security Council resolutions and international law at large were relied upon, could give a deeper insight into how forums interpret this subject in practicality. While the public policy exception is deeply rooted and necessary for the sovereignty of all nations and their interests, through this paper, it is put forth, that the criticism regarding this matter, is not, and should not be, towards the presence of the exception, but rather the trouble faced during its interpretation. Within India and the EU itself, one has to read through a plethora of case laws or orbiters of courts, to gain a sufficient understanding of this matter. Apart from this, we have to rely on academic writings as well, to interpret the subject holistically.

Therefore, the struggles faced by any researcher or reader must be highlighted, not to negate any support for public policy, but merely to combat its vague and hidden nature. Thus, more discussions on this topic and the development of more substantial regulations and understanding of this matter, across nations, some of which the paper has attempted to understand, could aid in creating an environment of predictability and security in transnational matters and perhaps forego the view of the public policy exception being an unruly horse.

[77] Kuwait Airways Corporation v Iraqi Airways Corporation [2002] UKHL 19.