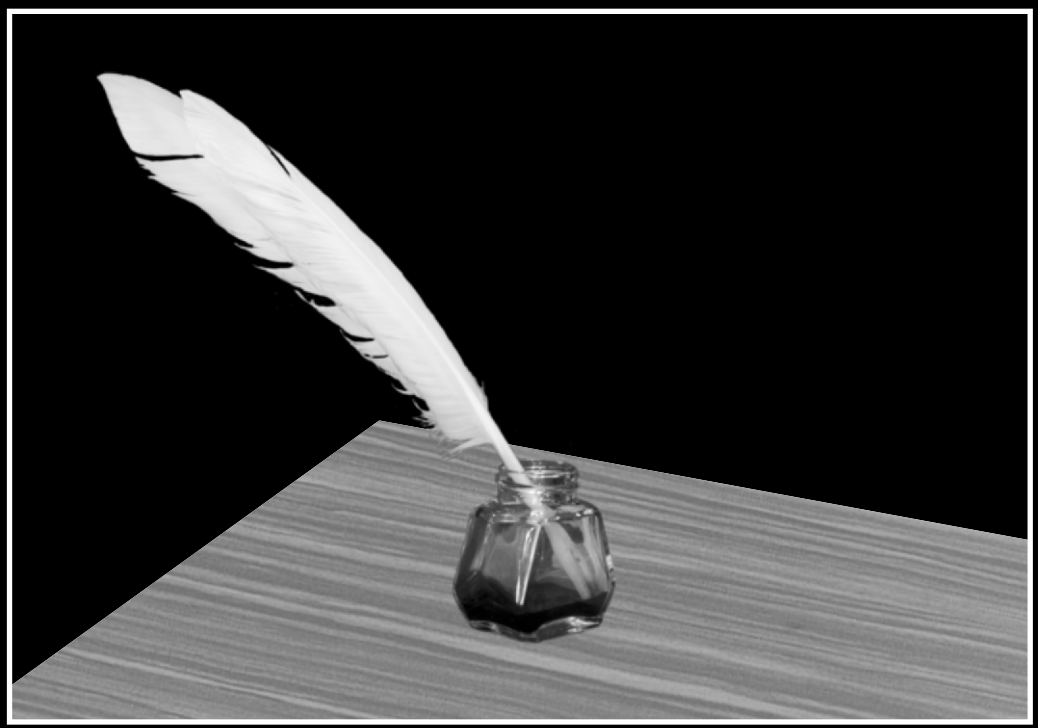
ISSN 0975-8208

Army Institute of Law

Journal

Volume XVIII 2025



Peer Reviewed Journal

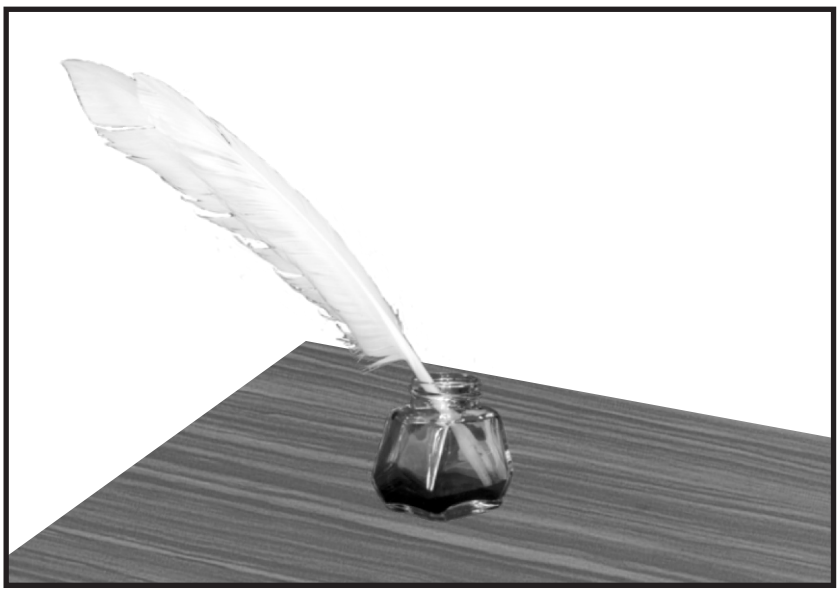
Vol. XVIII, 2025

Refereed Journal Since 2006

ARMY INSTITUTE OF LAW JOURNAL

Vol. XVIII, 2025 (ISSN: 0975-8208)
Registration No. PUNENG/2007/25057

Date of Publication: 01/10 / 2025



Army Institute of Law Journal

Army Institute of Law

Sector 68, Mohali

Contents

UNMASKING DECEPTION: RECENT CONTROVERSIES ON MISLEADING ADVERTISEMENTS IN INDIA

***Prof. Alisha Thomas**

****Ms Aishwarya Gawde**

INTRODUCTION

In India, misleading advertisements and unfair trade practices are primarily governed by the **Consumer Protection Act, 2019.** According to Section 2(28) of the Act, a misleading advertisement is defined as one that falsely describes a product or service, provides misleading impressions about its nature or benefits, or is likely to mislead consumers about the price of goods or services.[1] This definition encapsulates a broad range of deceptive marketing practices, ensuring that consumers are protected from false claims that could lead to uninformed purchasing decisions.Unfair trade practices, as outlined in Section 2(47) of the Consumer Protection Act, encompass a wider array of unethical behaviours in the marketplace. These include misrepresentation of goods or services, false endorsements, and misleading testimonials.[2] Such practices not only harm consumers but also disrupt fair competition among businesses. The Act empowers the **Central Consumer Protection Authority (CCPA)** to take action against misleading advertisements and unfair trade practices, enabling swift remedies for affected consumers.

In addition to the Consumer Protection Act, misleading advertisements are also subject to regulations set by the **Advertising Standards Council of India (ASCI),** which provides a self-regulatory framework for ethical advertising practices. ASCI's code emphasizes honesty and substantiation in advertising, promoting accountability among advertisers. While these laws and guidelines are designed to protect consumers, enforcement remains a challenge.[3]

Rapid advancements in digital marketing, combined with a lack of consumer awareness, complicate the detection and prosecution of misleading advertisements. Consequently, a more robust regulatory framework and increased consumer education are essential to effectively combat misleading advertising and ensure fair trade practices in India. Through these efforts, consumer rights can be better safeguarded, fostering a marketplace built on trust and

---

* Assistant Professor of Law, Narsee Monjee Institute ofManagement Studies(NMIMS), Karnataka
** Student BBA, LLB 3rd year NMIMS.

1. Section 2(28), Consumer Protection Act, 2019.
2. Section 2(47), Consumer Protection Act, 2019.
3. V. Aishwariya, ILLUSORY ADVERTISEMENTS AND THEIR IMPACT ON CONSUMERS, JETIR June 2022, Volume 9, Issue 6, ISSN-2349-5162, https://www.jetir.org/papers/JETIR2206879.pdf.

transparency.[4]

RECENT CONTROVERSIES IN MISLEADING ADVERTISEMENTS

- **BOURNVITA CONTROVERSY**

The **Bournvita controversy** with respect to **misleading advertisements** touches on significant legal concerns about false advertising, consumer protection laws, and corporate accountability. The controversy arose when an influencer accused Bournvita of making misleading claims about the health benefits of its product while ignoring its high sugar content.[5]

Key Legal Details:

1. Misleading Advertisement:

- **The Consumer Protection Act, 2019:** This act defines a **misleading advertisement** as one that falsely describes a product, gives a false guarantee, or deliberately hides important information to deceive consumers. In Bournvita's case, the accusation is that its advertisements emphasized health benefits like immunity, brain development, and strength while downplaying or concealing the high sugar content, which could negate those benefits.[6]
- **Food Safety and Standards (Advertising and Claims) Regulations, 2018:** These regulations prevent food manufacturers from making health claims that are not scientifically substantiated or are misleading. A product like Bournvita, marketed as promoting children's health while being high in sugar, could be seen as violating these regulations if the health claims are misleading.[7]

2. Claims of High Sugar Content:

The central issue in the Bournvita controversy is the allegation that the product contains excessive sugar, contradicting its **"health drink"** branding. Misleading health claims about sugar-laden products can fall under:

---

4. NIKITA MODI & Dr. RAMARAO P, MISLEADING ADVERTISEMENTS , VOLUME 6 I ISSUE 1 I JAN. – MARCH 2019, e ISSN 2348 –1269, https://ijrar.com/upload_issue/ijrar_issue_20543209.pdf
5. India's child rights body asks Bournvita to remove misleading ads amid claims of high sugar content, https://economictimes.indiatimes.com/industry/cons-products/food/bournvita-sugar-content-row-ncpcr-asks-health-drink-brand-to-remove-misleading-ads/articleshow/99785399.cms?from=mdr
6. Dr. Sheetal Kapoor and Sukriti Kapoor, Misleading Advertisement and its Impact on Children, INDIAN INSTITUTE OF MANAGEMENT KOZHIKODE 04th International Conference on Marketing, Technology & Society 2020 , ISBN : 978-93-5419-748-2
7. 'Misleading' ads: FSSAI may slap notices on food business operators,\ https://fssai.gov.in/upload/media/fssaiBS28042023.pdf

- **Section 24 of the Food Safety and Standards Act, 2006:** This provision prohibits misleading advertisements about the nature, substance, or quality of the food product. Bournvita's advertisement, promoting itself as a health drink while containing significant amounts of sugar, could potentially be seen as misrepresenting the product's true nature.
- **The Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954:** Although primarily related to medicinal claims, this Act prohibits advertisements that promote certain health-related benefits without evidence. If Bournvita claimed to enhance children's immunity or strength without adequate scientific proof, it could be challenged under these guidelines.

3. Legal Notices and Corporate Response:

After the influencer's video pointing out the sugar content went viral, **Mondelez India,** the parent company of Bournvita, issued a legal notice to the influencer. This **legal notice** may have been based on defamation or intellectual property laws, but it sparked a debate about the ethical use of such measures to silence critics.

4. Consumer Protection and Legal Remedies:

Consumers misled by such advertisements can seek remedies under **The Consumer Protection Act, 2019.** The law allows consumers or consumer associations to file complaints about misleading advertisements with:

- **The Central Consumer Protection Authority (CCPA),** which can impose penalties on manufacturers or advertisers for misleading advertisements.
- **Filing a complaint in consumer courts,** where consumers may demand compensation for being misled by false advertising.

  Additionally, the **Advertising Standards Council of India (ASCI),** a self-regulatory organization, plays a role in monitoring misleading advertisements. ASCI's code prohibits deceptive claims, and the council could act against Bournvita's advertisements if found to violate these standards.

5. Food Safety and Standards Authority of India (FSSAI) Compliance:

Mondelez India defended Bournvita by claiming that the product complies with **FSSAI standards.** However, compliance with nutritional standards does not necessarily exempt the company from accusations of misleading advertisements. Even if the product is legally allowed to have certain sugar content, the way it is advertised could still fall under **false representation**

if it omits relevant facts or creates a deceptive impression of the product's health benefits.[8]

Conclusion:

The **Bournvita controversy** raises important legal questions about how companies promote products, especially those targeting children. Misleading advertisements can have serious implications under Indian law, especially when they relate to consumer health. The controversy also highlights the tension between freedom of speech and defamation, as the company's legal notice to the influencer sparked a broader conversation about the ethics of silencing criticism through legal means.[9]

❒ FAIR AND LOVELY CONTROVERSY

The **Fair & Lovely controversy** primarily centers around the product's misleading advertising related to skin fairness, societal beauty standards, and regulatory violations. Fair & Lovely, a skin-lightening cream owned by **Hindustan Unilever,** has been at the forefront of controversy for promoting the idea that lighter skin is more desirable, leading to legal and ethical challenges regarding **misleading advertisements.**[10]

Key Legal Details:

1. Misleading Advertisements:

The core issue in the **Fair & Lovely controversy is the product's** advertising, which has historically associated fairness with success, confidence, and beauty. The brand has faced backlash for promoting these stereotypes, and its claims of improving skin fairness were viewed as misleading. Legal concerns arise under:

- **The Consumer Protection Act, 2019:** Under this law, a **misleading advertisement** is defined as an advertisement that deceives consumers by making false claims or by hiding important facts. Fair & Lovely ads implied that using the cream would significantly lighten skin tone, often associating lighter skin with better social, professional, and personal outcomes. This portrayal could be seen as deceptive, as there was no scientific backing for the

8. Pallavi Devi and Alankar Kaushik , FEEDING NUTRITIONAL CONSCIOUSNESS THROUGH SOCIAL MEDIA: A COMMENTARY ON FOODPHARMER IN SPREADING CONSUMER AWARENESS IN INDIA, Journal of Content, Community & Communication, Vol. 18 Year 9, December, 2023 [ISSN: 2395-7514], https://www.amity.edu/gwalior/jccc/pdf/04-paper-4-doi-4-dec-23.pdf
9. Mr. Soham Shripad Kulkarni and Mrs. Shraddha Amit Pathak, NMASKING DECEPTIVE NOURISHMENT : THE HIDDEN RISKS OF FALSE HEALTH CLAIMS AND MISLEADING ADVERTISEMENTS IN CHILDREN'S DRINKS, Pharmaceutical Resonance 2024 Vol. VI - Issue II, Published by DYPIPSR, Pimpri, Pune, https://pharmacy.dypvp.edu.in/pharmaceutical-resonance/downloads/vol-6-issue-II/PR09.pdf
10. Shevde, Natasha. (2008). All's Fair in Love and Cream: A Cultural Case Study of Fair & Lovely in India. Advertising & Society Review. 9. 10.1353/asr.0.0003.

claim that the product could permanently or significantly lighten skin tone.

- **The Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954:** This Act prohibits advertisements for products that claim to have magical properties to change skin color or enhance physical appearance without proper evidence. Fair & Lovely's ads often promoted the idea that regular use of the cream could achieve such results, which could violate the provisions of this law, particularly when those claims were not substantiated by scientific studies.
- **The Food Safety and Standards (Advertising and Claims) Regulations, 2018:** While primarily applicable to food products, these regulations emphasize that claims made in advertisements should be based on scientific evidence. Fair & Lovely's claims about fairness lacked scientific backing, making the advertisements vulnerable to being classified as misleading.

2. Discrimination and Societal Impact:

One of the key legal and ethical concerns surrounding Fair & Lovely was the way it perpetuated racial and societal stereotypes by suggesting that fairer skin is superior. This issue goes beyond misleading advertisements and taps into broader consumer rights and ethical marketing. [11] These advertisements raised legal questions related to:

- **Unfair Trade Practices:** Under the Consumer Protection Act, any practice that harms the interests of consumers or misrepresents the effects of a product is considered an unfair trade practice. By promoting fairness as a standard of beauty, Fair & Lovely's advertisements arguably manipulated consumer perceptions and exploited insecurities, thereby constituting an unfair trade practice[12].
- **The Indecent Representation of Women (Prohibition) Act, 1986:** This law prohibits the representation of women in advertisements in a manner that is derogatory or likely to deprive them of their dignity. Fair & Lovely's advertisements, which often showed women gaining confidence or career

11. Chauhan, Gajendra Singh; Tiwari, Aakreti, Unfair Promotion of Whitening Creams: Is Beauty No More Skin Deep? , Media Watch 10 (2) 365-373, 2019 ISSN 0976-0911 e-ISSN 2249-8818 DOI: 10.15655/mw/2019/v10i2/49635
12. Monika Gulati, Misleading Advertisements in India, International Journal of Research in Business Studies ISSN: 2455-2992, Vol. 8(1), June 2023

success after lightening their skin, have been criticized for reinforcing regressive gender stereotypes and may be seen as violating this Act.

3. Regulatory Action and Self-Regulation:

In 2014, the **Advertising Standards Council of India (ASCI)**, a self-regulatory body, issued guidelines that prohibited fairness product advertisements from portraying people with darker skin tones in a negative light. Fair & Lovely had to modify its advertisements to comply with these guidelines.

- **ASCI Guidelines:** ASCI's code prohibits advertisements from portraying people in a way that shows a preference for fair skin, implying that darker skin is inferior. The guidelines require that fairness products focus on improving skin quality rather than changing skin tone. Fair & Lovely had to adapt its marketing approach, removing explicit references to skin whitening and repositioning the product as enhancing "glow" or "radiance.[13]"
- **Cosmetic Regulatory Oversight: The Drugs and Cosmetics Act, 1940** governs the sale and advertising of cosmetics in India. If a cosmetic product claims to deliver a specific result (like skin lightening), the product must be tested and proven to achieve those results. Fair & Lovely's claims of delivering fairness could have been challenged under this law if the results were not scientifically validated.

4. Rebranding and Public Backlash:

In response to the growing criticism and changing societal views on colorism, Hindustan Unilever decided in **2020** to rebrand **Fair & Lovely as Glow & Lovely,** removing explicit references to "fairness" and promoting a broader message of skin health and radiance. This rebranding was an attempt to address public outrage and legal concerns about misleading advertising and societal harm.[14]

---

13. Dr. Smitha Poulose, MISLEADING ADVERTISEMENTS AND ITS IMPACT ON CONSUMER BUYING BEHAVIOUR WITH REFERENCE TO SKIN CARE PRODUCTS, JOURNAL OF CRITICAL REVIEWS, VOL 7, ISSUE 04, 2020, ISSN- 2394-5125, https://www.jcreview.com/admin/Uploads/Files/61b3a872c8c211.82380010.pdf
14. Prakriti Sarkar and Dr.ChilkaGhosh, ETHICAL NORMS IN FAIRNESS CREAM ADVERTISEMENT, Commentary-1, Global Media Journal – Indian Edition, Sponsored by the University of Calcutta www.caluniv.ac.in ISSN 2249 – 5835, Winter-Summer Issue/December 2016 – June 2017, https://caluniv.ac.in/global-mdia-journal/Comm-Nov-2017/C1.pdf

- **Legal Repercussions for Rebranding:** The rebranding was largely seen as a response to societal pressures rather than direct legal action, but it demonstrated the company's recognition of the problematic nature of its previous advertising. Although the product's formula remained largely the same, the rebranding aligned with ASCI's regulations and helped avoid future legal scrutiny.

5. Consumer Protection Remedies:

- **Compensation:** If consumers could prove that they were misled by the product's claims of fairness and suffered a financial loss or psychological harm, they could claim compensation in a consumer court.
- **Corrective Advertising:** Companies can be ordered to run corrective advertisements, clarifying the true nature and effectiveness of their products. Although Hindustan Unilever voluntarily rebranded the product, it may have been subject to further corrective action had it not acted preemptively.

6. Global Trends and Legal Pressure:

The **Fair & Lovely controversy** also reflected a broader global trend in regulating cosmetic advertising. In countries like the U.S. and the U.K., cosmetic companies face stringent laws against making unsubstantiated claims. These legal frameworks likely influenced the regulatory and market pressures that ultimately led to Hindustan Unilever's rebranding and modification of advertising strategies in India.[15]

Conclusion:

The **Fair & Lovely controversy** is a prime example of how **misleading advertisements,** when combined with societal stereotypes, can lead to both **legal challenges** and **public backlash**. Legally, the product's advertisements were scrutinized for potentially violating laws against false claims, unfair trade practices, and indecent representation. Over time, legal pressure from regulators like the ASCI, as well as shifts in public perception and global trends, forced Hindustan Unilever to rebrand and adjust its marketing approach to avoid further legal consequences. [16]

---

15. Heena Harlalka, Aayushi Goenka, Prof. M. Guruprasad, From Fair to Glow- Reimagining Beauty, Published in IJIRMPS (E-ISSN: 2349-7300), Volume 10, Issue 4, July-August 2022 https://www.ijirmps.org/papers/2022/4/1576.pdf
16. Sharma, Rishi & Chander, Subhash. (2011). What's Wrong with Misleading Advertising? — An Empirical Investigation. Asia Pacific Business Review. 7. 191-205. 10.1177/097324701100700116.

□ NESTLE MAGGI NOODLES CONTROVERSY

The **Nestlé Maggi noodles controversy** in India is one of the most prominent cases of misleading advertisements and regulatory non-compliance in the food industry. It revolves around claims of safety, nutritional benefits, and mislabeling of ingredients like **lead** and **monosodium glutamate (MSG).**[17] Here's a detailed explanation of the controversy from a legal perspective:

1. Background of the Controversy

In **2015,** Nestlé India faced significant scrutiny after food safety regulators in Uttar Pradesh conducted tests on Maggi noodles. The tests revealed that the noodles contained **excessive levels of lead and undeclared MSG,** which contradicted the company's advertisements and labeling. Nestlé had been marketing Maggi as a safe and nutritious snack, claiming it contained no harmful additives.

2. Key Issues in the Controversy

(a) Lead Content Beyond Permissible Limits

- Tests conducted by the **Food Safety and Drug Administration (FSDA)** in Uttar Pradesh found that the lead content in some samples of Maggi noodles was **17.2 parts per million (ppm),** far exceeding the permissible limit of 2.5 ppm set by Indian law under the **Food Safety and Standards Act, 2006 (FSSA).**
- Lead is a toxic metal that can cause severe health problems, especially in children, including developmental delays, learning difficulties, and even neurological damage when consumed in excessive amounts over time.

(b) Monosodium Glutamate (MSG)

- Nestlé's labeling claimed that **Maggi noodles were free of added MSG.** However, laboratory tests detected the presence of MSG in the product.
- Under the **Food Safety and Standards (Packaging and Labelling) Regulations, 2011,** it is mandatory to disclose the presence of MSG in the ingredient list if it is added during the manufacturing process. Though Nestlé argued that MSG was naturally occurring due to the ingredients used (e.g.,

17. Jaggi, Shamily & Bahl, Sanjay. (2015). Tradeoff Of Advertising And Publicity: A Case Study On Maggi In PAN India. 10.9790/487X-178497103.

hydrolyzed vegetable protein), regulators insisted that the company misled consumers by labeling the product as "No added MSG."

(c) Misleading Advertisements

- Nestlé India's advertising for Maggi noodles had long promoted the product as **safe and healthy,** particularly targeting children and families. The company emphasized that the noodles were free from harmful additives and fit for regular consumption.
- The excessive levels of lead and the misrepresentation about MSG led to charges of **misleading advertising,** which violated Indian consumer protection and food safety laws.[18]

3. Legal Framework and Violations

(a) Food Safety and Standards Act, 2006 (FSSA)

The **Food Safety and Standards Act, 2006** is the primary law governing food safety in India. Under this act:

- Food products must meet safety standards regarding the levels of harmful substances like lead.
- Mislabeling or failure to declare ingredients (such as MSG) can be considered a violation under the **Food Safety and Standards (Packaging and Labelling) Regulations, 2011,** which require transparency in food labeling.
- Nestlé's alleged failure to meet these standards resulted in the recall of the product and charges against the company.

(b) Consumer Protection Act, 1986 (now 2019)

- **The Consumer Protection Act, 1986** (later replaced by the **Consumer Protection Act, 2019)** provides for penalties against companies engaging in misleading or deceptive advertisements. The excessive lead content and false claims about MSG led to accusations of Nestlé misleading consumers about the safety of Maggi noodles.

---

18. Syed Kazim and Ajai Thomas Abraham, The return of Maggi: A case study, International Journal of Applied Research 2017; 3(8): 544-549 , ISSN- 2394-5869, https://www.allresearchjournal.com/archives/2017/vol3issue8/PartH/3-6-273-317.pdf

- Under the act, misleading advertisements are defined as those that falsely describe a product, give false guarantees, or deliberately conceal important information that might influence consumer decisions.[19]

(c) Legal Action and Product Recall

- In **June 2015,** the **Food Safety and Standards Authority of India (FSSAI)** ordered a nationwide recall of Maggi noodles after determining that the product was unsafe for consumption due to excessive lead and misrepresentation about MSG content.
- The FSSAI directed Nestlé to withdraw all Maggi products from the market and cease production until the company could prove compliance with safety standards.

4. Legal Proceedings and Court Cases

(a) Nestlé vs. FSSAI (Bombay High Court)

- In response to the FSSAI's order, Nestlé challenged the ban in the **Bombay High Court,** arguing that its product was safe and that the testing procedures were flawed.
- In **August 2015,** the Bombay High Court overturned the FSSAI's ban, stating that the regulatory body's actions were **"arbitrary"** and not in full compliance with due process. However, the court also ordered Nestlé to **test Maggi noodles at accredited labs** and prove the product's compliance with safety standards before it could be reintroduced to the market.

(b) National Consumer Disputes Redressal Commission (NCDRC)

- Separately, the Indian government, through the **Department of Consumer Affairs,** filed a class-action lawsuit against Nestlé India before the **National Consumer Disputes Redressal Commission (NCDRC),** seeking damages of ₹640 crores (around $99 million at that time) for allegedly endangering public health through misleading advertisements and unsafe products.
- The NCDRC case was based on violations of the **Consumer Protection Act** and accused Nestlé of deceiving consumers by selling unsafe products under the guise of being healthy.

19. Dr.P. Balasubramanian, Anjali V. Gopal and S. Reefana, A Case Study on Misleading Celebrity Endorsements and its Impact on Consumer Behavior, Bonfring International Journal of Industrial Engineering and Management Science, Vol. 6, No. 3, July 2016 , ISSN 2277-5056 , DOI: 10.9756/BIJIEMS.7464

5. Post-Ban Testing and Re-launch

- After several months of additional testing, Nestlé India was able to clear Maggi noodles of any significant safety concerns. The **National Accreditation Board for Testing and Calibration Laboratories (NABL)** certified the product as **safe for consumption,** leading to the re-launch of Maggi in **November 2015.**
- Nestlé revised its packaging and advertisements, emphasizing compliance with safety standards and making efforts to rebuild consumer trust.

6. Advertising Standards Council of India (ASCI) Intervention

- The **Advertising Standards Council of India (ASCI)** played a role in ensuring that Nestlé's future advertisements complied with Indian advertising regulations. The ASCI requires that claims made in advertisements be **factual, substantiated, and not misleading.**
- Nestlé's ads prior to the controversy focused on Maggi being a quick, nutritious snack. Following the controversy, ASCI closely monitored food-related advertisements to prevent misleading health and safety claims.[20]

7. Consumer Trust and Brand Reputation

- The Maggi controversy caused a massive public relations crisis for Nestlé. Despite its subsequent re-launch and efforts to clarify the safety of its product, the brand's reputation suffered significant damage.
- Nestlé embarked on an extensive advertising campaign to regain consumer trust, focusing on transparency, safety, and the nutritional benefits of Maggi[21]

8. Outcome and Impact

- Nestlé India was forced to **recall 38,000 tonnes of Maggi noodles,** leading to a reported ₹**500 crore** (approximately $70 million) financial loss due to the recall and destruction of the product.
- The controversy also led to greater scrutiny of food safety standards in India, particularly for processed and packaged foods. The **FSSAI** became more vigilant in monitoring food products and ensuring compliance with food safety regulations.

20. Mahendrakumar S. Yadav and Dr. Bommuluri Bhavana Rao, Legal Protection of Consumers against Misleading Advertisements with special reference to Food Products, Afr.J.Bio.Sc. 6(14) (2024) ISSN: 2663-2187 , https://doi.org/10.48047/AFJBS.6.14.2024.3115-3122

- The incident highlighted the importance of **accurate labeling** and transparency in advertising, and it contributed to public awareness about the risks of misleading advertisements, particularly in food products.

9. Key Legal Takeaways

- **Labeling Transparency:** This case highlighted the legal necessity for food companies to be transparent about the contents of their products, particularly when it comes to potential allergens or additives like MSG.
- **Safety Standards:** The controversy underscored the role of regulatory bodies like **FSSAI** in enforcing food safety standards. Companies that fail to meet these standards or mislead consumers about product safety can face significant legal consequences, including product recalls and lawsuits.
- **Consumer Protection:** The Consumer Protection Act played a crucial role in holding Nestlé accountable for its advertising claims. Misleading consumers about the safety of a product can result in both financial penalties and damage to brand reputation.

Conclusion

The **Nestlé Maggi noodles controversy** serves as a landmark case in India's legal history concerning **misleading advertisements** and **food safety violations.** The incident not only resulted in a large-scale product recall and regulatory backlash but also raised important legal questions regarding food safety, accurate labeling, and the responsibility of companies to ensure that their products and advertisements are truthful and compliant with national laws. The controversy had a lasting impact on consumer protection and food safety standards in India.[22]

□ PATANJALI CONTROVERSY

The **Patanjali controversy** surrounding misleading advertisements is most notably associated with the launch of its product **Coronil** during the COVID-19 pandemic. This incident raised serious legal questions regarding false claims, regulatory compliance, and misleading advertising practices.[23] Below is an analysis of the controversy from a legal perspective:

---

21. Sahoo SK, Mishra US, Sahoo S. Maggi saga in India: An ethical issue or uncontrolled viral marketing!.J.
22. Advances in Bus. Management 2016;2(3):140-145, DOI: 10.14260/jadbm/2016/33
Prof. Manvi Sharma Sood , A STUDY NESTLE IN INDIA WITH & WITHOUT MAGGI, UDGAMVIGYATI,Volume2,2015,(November) , Online ISSN 2455-2488 , Page No. 279-283 , https://udgamvigyati.org/admin/images/A%20Study%20Nestle%20In%20India%20With%20&%20Without%20Maggi-%20Ms%20Manvi%20Sharma%20Sood.pdf

1. The Coronil Controversy

In June 2020, **Patanjali Ayurved,** a well-known Indian Ayurvedic company founded by Baba Ramdev and Acharya Balkrishna, launched a product called **Coronil,** claiming that it could cure COVID-19. This sparked widespread controversy and led to legal scrutiny over the validity of the claims and the lack of proper regulatory approval[24].

Key Misleading Claims:

- Patanjali initially marketed **Coronil** as a **cure** for COVID-19, asserting that it had successfully treated patients in clinical trials.
- The company claimed that the product was developed based on Ayurveda, using natural ingredients such as **Giloy, Ashwagandha, and Tulsi**, and could strengthen immunity against the virus.
- These claims were made without the necessary regulatory approvals, scientific validation, or public transparency regarding the clinical trials.

Legal Issues and Violations:

The Coronil controversy involved several legal violations related to **misleading advertising,** regulatory non-compliance, and consumer rights violations:

(a) Violation of the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954:

- **False and Misleading Claims: The Drugs and Magic Remedies Act** prohibits the advertisement of any product that claims to cure certain diseases, including those not scientifically proven to be curable by the advertised treatment. COVID-19 falls into this category. By advertising Coronil as a cure for COVID-19, Patanjali violated Section 3 of the Act, which bans misleading and magical claims about products without scientific basis.

(b) Violation of The Drugs and Cosmetics Act, 1940:

- **Non-Compliance with Regulatory Approval:** Patanjali did not receive necessary regulatory approval from the **Central Drugs Standard Control**

---

23. Sinha, Rohit. (2015). Misleading Advertisements In India: A Critical Study On Violation Of Consumer's Right By Patanjali Ayurved Limited., ISSN- 0976-1136, https://www.researchgate.net/publication/346643496_Misleading_Advertisements_In_India_A_Critical_Study_On_Violation_Of_Consumer's_Right_By_Patanjali_Ayurved_Limited
24. Venugopal, V., 2016. Baba Ramdev's Patanjali Ayurved Ltd becomes India's biggest FMCG advertiser this week; outnumbers Cadbury, Parle. *Available at:* http://economictimes.indiatimes.com/industry/services/advertising/baba-ramdevs-patanjali-ayurved-ltd-becomes-indias-biggest-fmcg-advertiser-this-week-outnumbers-cadbury- parle/articleshow/50872844.cms

Organization (CDSCO) or the **Ministry of AYUSH** to market Coronil as a cure for COVID-19. Under the **Drugs and Cosmetics Act,** any product claiming medicinal benefits must be approved by the appropriate regulatory bodies, and the product must undergo clinical trials and rigorous scientific testing.

- Patanjali bypassed these steps by launching Coronil without approval. Following the backlash, the **Ministry of AYUSH** intervened, demanding that the company stop marketing the product as a cure and only promote it as an immunity booster.[25]

(c) Violation of The Consumer Protection Act, 2019:

- **Misleading Advertisements:** Under Section 2(28) of the **Consumer Protection Act,** 2019, a misleading advertisement is defined as any advertisement that deceives consumers or provides false information. The initial marketing of Coronil as a cure for COVID-19 was deceptive because it misled consumers into believing that the product had been proven to treat or cure the virus.[26]
- Patanjali's claims could have caused consumers to rely on an ineffective product, potentially endangering their health by preventing them from seeking proper medical treatment, which is a direct violation of consumer rights.

(d) Advertising Standards Council of India (ASCI) Guidelines:

- **The Advertising Standards Council of India (ASCI)** has strict guidelines that prohibit the promotion of products without scientific evidence to support the claims made in advertisements. Patanjali's promotional material for Coronil violated ASCI's code by making unsubstantiated claims of curing COVID-19, which could mislead consumers.

2. Government and Legal Action

(a) Ministry of AYUSH Intervention:

- Shortly after the launch of Coronil, the **Ministry of AYUSH** issued a notice to Patanjali, instructing them to stop advertising the product as a cure for COVID-

25. Sinha, Rohit. (2015). Misleading Advertisements In India: A Critical Study On Violation Of Consumer's Right By Patanjali Ayurved Limited., International Multidisciplinary Journal Deliberative Research, Vol 36 Issue 36, ISSN- 0976-1136

19 until they provided evidence of clinical trials and secured the necessary approvals. The ministry made it clear that no regulatory approval had been granted to Patanjali to sell the product as a treatment for COVID-19.

- Patanjali was required to submit details of the clinical trials it claimed to have conducted, and the Ministry of AYUSH later clarified that the product could only be marketed as an immunity booster, not as a cure.

(b) FIRs and Legal Complaints:

- Several **First Information Reports (FIRs)** were filed across India against Patanjali, alleging violations of the Drugs and Magic Remedies Act, **Drugs and Cosmetics Act, and Consumer Protection Act.**
- For example, in Rajasthan, an FIR was lodged against Baba Ramdev and other executives of Patanjali for making false claims about Coronil. Legal action was also initiated in Bihar, Tamil Nadu, and Maharashtra.[27]

(c) High Court Rulings:

In some cases, the courts intervened, taking a stricter stance on Patanjali's advertisements. For instance, a **Madras High Court ruling** in September 2020 restrained Patanjali from using the term "Coronil" for marketing purposes, citing trademark infringement issues, although this was a separate matter from the misleading advertisements claim.

3. Rebranding and Corrective Advertising

Following public and government pressure, Patanjali had to rebrand the product's purpose and amend its advertising:

- Patanjali rebranded **Coronil** as an **immunity booster,** rather than a cure for COVID-19. The company began advertising the product as a supportive health supplement, which is allowed under Ayurvedic regulations, provided there are no explicit medical claims about curing diseases.[28]
- The revised advertisements and packaging complied with **Ministry of AYUSH**

---

26. Singh, Harvinder & Aggarwal, Rashmi & Rishi, Bikramjit. (2022). Patanjali Ayurved Limited: role reversal in competitive advertising. Emerald Emerging Markets Case Studies. 12. 1-28. 10.1108/EEMCS-01-2021-0027.
27. Mukherjee, J. (2024). Patanjali Ayurveda's Coronil: Marketing Controversy on COVID-19 Cure. Vision, 28(1), 120-129. https://doi.org/10.1177/09722629211004003
28. Misleading ads case: Patanjali Ayurved issues public apology in a daily newspaper, https://economictimes.indiatimes.com/news/india/misleading-ads-case-patanjali-issues-public-apology-in-a-dailynewspaper/articleshow/109510732.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

regulations and ASCI guidelines, no longer making unverified claims about COVID-19 treatment.

4. **Consumer and Public Backlash**
   - **Public Health Concerns:** Misleading advertisements like those of Coronil caused significant concern during the pandemic, as they potentially encouraged people to rely on ineffective treatments. This could have diverted consumers from seeking appropriate medical care, which posed a public health risk.
   - **Consumer Trust:** The controversy damaged Patanjali's credibility with some segments of the public and regulatory authorities. By misleading consumers about the efficacy of its product, the company eroded trust, especially in a high-stakes health crisis like COVID-19.
5. **Ethical and Legal Criticism**
   - **Exploitation of Public Fear:** From an ethical perspective, Patanjali's misleading advertisements were criticized for taking advantage of the public's fear and desperation during the pandemic. By marketing a product as a cure for COVID-19 without scientific evidence, the company exploited consumer anxiety, a violation of both legal standards and ethical marketing principles.[29]
   - **Lack of Scientific Rigor:** Critics also pointed out the dangers of promoting products based on anecdotal evidence and traditional remedies without proper scientific validation. While Ayurveda is recognized as a legitimate system of medicine, marketing claims must still adhere to modern regulatory frameworks, which prioritize scientific evidence.

Conclusion

The **Patanjali Coronil controversy** is a landmark case in the legal landscape of **misleading advertisements** in India. By claiming to have developed a cure for COVID-19 without regulatory approval or scientific validation, Patanjali violated several laws, including the **Drugs and Magic Remedies Act, Drugs and Cosmetics Act, and Consumer Protection Act.** Government intervention, legal complaints, and public backlash forced the company to alter its

29. Supreme Court's Contempt Notice To Patanjali: An Analysis , https://www.livelaw.in/law-firms/law-firm-articles-/supreme-court-contempt-notice-patanjali-fast-moving-consumer-goods-indian-medical-association-objectionable-advertisements-naik-nail-co-254671

marketing strategy and rebrand the product as an immunity booster, rather than a cure. This controversy underscores the importance of regulatory compliance and ethical marketing, particularly during public health crises where consumer protection is paramount.[30]

CRITICAL ANALYSIS ON REGULATING MISLEADING ADVERTISEMENTS

The regulation of misleading advertisements in India is a critical area of consumer protection law, as deceptive marketing practices undermine consumer trust and distort market dynamics. Despite the existence of regulatory frameworks, the efficacy of these measures in addressing misleading advertisements remains a contentious issue.

Regulatory Framework

- **Consumer Protection Act, 2019 The Consumer Protection Act, 2019** serves as the primary legal framework for regulating misleading advertisements in India. It empowers consumers to seek redress for deceptive marketing practices and establishes the Central Consumer Protection Authority (CCPA), tasked with enforcing compliance. The Act defines misleading advertisements and allows for stringent penalties against violators, providing a robust mechanism for consumer protection.
- **Advertising Standards Council of India (ASCI)** ASCI is a self-regulatory organization that establishes guidelines for ethical advertising practices. Its code of conduct emphasizes truthfulness and substantiation in advertisements. While ASCI plays a vital role in promoting responsible advertising, its lack of legal authority limits its effectiveness. Compliance is voluntary, and advertisers may choose to ignore ASCI's recommendations without facing legal repercussions.
- **Sector-Specific Regulations** Certain sectors, such as food and beverages, pharmaceuticals, and cosmetics, are governed by specific regulations that address misleading advertisements. For instance, the Food Safety and Standards Act, 2006 mandates accurate labelling and advertising of food products. However, the enforcement of these regulations often suffers from

30. No More Misleading Ads: Centre Mandates Self-Declaration Certificate For Advertising Agencies, https://www.livelaw.in/lawschool/articles/misleading-advertisement-patanjali-case-self-declaration-certificate-celebrities-influencers-consumer-protection-advertising-agencies-261264

inadequate monitoring and limited resources.

Effectiveness of Current Regulations

- **Strengths** The establishment of the CCPA represents a significant advancement in consumer protection, as it provides a centralized authority to address misleading advertisements. The Act's provision for swift actions against violators empowers consumers and deters companies from engaging in deceptive practices. Additionally, ASCI's guidelines promote ethical advertising and create awareness about responsible marketing.
- **Weaknesses** Despite these strengths, several weaknesses persist in the regulatory framework. The lack of stringent enforcement mechanisms means that many companies continue to engage in misleading advertising without fear of repercussions. The reliance on self-regulation through ASCI has resulted in inconsistencies in compliance, as not all advertisers adhere to the guidelines. Furthermore, the regulatory process can be slow, leaving consumers vulnerable to misleading claims for extended periods[31].

Challenges in Regulation

- **Resource Constraints** Regulatory bodies like the CCPA often face resource limitations that hinder effective monitoring and enforcement. Insufficient manpower and funding can result in delays in addressing complaints and investigating misleading advertisements. This situation is exacerbated by the rapid pace of advertising on digital platforms, which can outstrip the capacity of regulators to respond.
- **Digital Advertising and E-Commerce** The rise of digital marketing has created new challenges for regulating misleading advertisements. Online platforms can facilitate the rapid dissemination of false information, often making it difficult to identify responsible parties. Consumers may encounter deceptive practices such as fake reviews, misleading endorsements, and hidden terms, making it difficult to discern the truth behind marketing claims. The anonymity of digital advertising complicates enforcement, as consumers may struggle to trace misleading claims back to specific advertisers.

---

31. Chakraborty, Anirban Assistant Professor of Law (2016) "Curbing False or Misleading Advertisements in India: Challenges and Solutions," International Journal on Consumer Law and Practice: Vol. 4, Article 4. *Available at:* https://repository.nls.ac.in/ijclp/vol4/iss1/4

- **Challenges in Proving Misleading Claims** Consumers often face significant hurdles in proving that they have been misled by advertisements. The burden of proof typically falls on the consumer, requiring them to demonstrate that the advertisement in question is indeed deceptive. This situation can be particularly challenging given the intricate nature of many advertisements, where claims may be exaggerated or presented in a way that obscures the truth.
- **Consumer Awareness and Education** The effectiveness of regulatory measures is closely tied to consumer awareness. Many consumers are unaware of their rights under the Consumer Protection Act or the existence of bodies like ASCI. This lack of knowledge can lead to underreporting of misleading advertisements and a general sense of powerlessness among consumers.[32]
- **Cultural and Socioeconomic Factors** Cultural attitudes towards authority and varying levels of education can influence consumer responses to misleading advertisements. Consumers from lower socioeconomic backgrounds may lack access to information and resources, making them more vulnerable to deceptive marketing practices.

Recent Developments

- In recent years, there has been a push for stricter regulations regarding misleading advertisements, particularly in response to high-profile controversies involving companies like Nestlé and Patanjali. The introduction of the **Consumer Protection (E-Commerce) Rules, 2020** aimed to address deceptive practices in the online marketplace, requiring e-commerce platforms to ensure the accuracy of product information. However, these rules still require rigorous enforcement and consumer awareness campaigns to be effective.

RECOMMENDATIONS

- **Strengthening Enforcement Mechanisms** Enhancing the enforcement capabilities of regulatory bodies is essential to address misleading advertisements effectively. This can include increasing funding, hiring more

32. Sharma, Rishi & Chander, Subhash. (2011). What's Wrong with Misleading Advertising? — An Empirical Investigation. Asia Pacific Business Review. 7. 191-205. 10.1177/097324701100700116.

personnel, and utilizing technology for better monitoring of advertising practices.

- **Integrating Online and Offline Regulations** Developing comprehensive regulations that specifically address digital advertising is crucial. This could involve creating guidelines for social media influencers, online marketplaces, and e-commerce platforms to ensure transparency and accountability.
- **Increasing Consumer Awareness** Initiatives aimed at educating consumers about their rights and the mechanisms available for reporting misleading advertisements can empower individuals to take action. Awareness campaigns should target diverse demographics to ensure widespread understanding.
- **Promoting Collaboration** Collaboration between regulatory bodies, industry stakeholders, and consumer advocacy groups can foster a more robust regulatory environment. Sharing best practices and information can lead to improved compliance and a collective approach to combating misleading advertisements.

CONCLUSION

Regulating misleading advertisements in India presents significant challenges, yet it remains a crucial endeavour for protecting consumer rights and promoting fair market practices. While existing frameworks provide a foundation for addressing deceptive advertising, enhancing enforcement mechanisms, raising consumer awareness, and adapting to the digital landscape are essential steps for improving the effectiveness of regulations. By taking these measures, India can foster a more transparent advertising environment that prioritizes consumer welfare and maintains trust in the marketplace.

FREEDOM OF E-SOCIALIZING UNDER SIEGE: A LEGAL INQUIRY INTO THE IMPACT OF DEEPFAKES

***Ms. Ana Sisodia**

****Ms. Sonal Jain**

INTRODUCTION

The Constitution of India has bestowed upon Indian citizens plethora of essential rights. The Preamble of the Indian Constitution guarantees Justice in all arenas inclusive of Social, Political and Economic along with Liberty pertaining to thoughts, Belief, Expression etc. Therefore, to accomplish this objective the world's largest Democracy has incorporated in the *Lex Loci* a bunch of indispensable Fundamental Rights. Without a speck of uncertainty these crucial rights are regarded as one of the most significant fragment of the Indian Constitution and as part of its fundamental framework. These rights are vital to the lives of all Indian citizens since they protect their honour and dignity. Such Fundamental Rights are inclusive of Right to Equality,[1] Right to Freedom,[2] Right to Life and Personal Liberty, etc.[3] It is in spirit the most obligatory rights as they have been guaranteed against the State for a true establishment of Democracy. Thus, one aspect of Liberty is freedom of Speech and Expression which is later reckoned under Article 19(1) (a) of the Indian Constitution as a Fundamental Right. This Freedom in 21st century is not only limited to Print or Electronic Media but has extended its scope to include vehement consumption of social media through Instagram, WhatsApp, Facebook, X, etc. thereby resulting in vast dissemination of content to general public in all forms.

However, the issue does not lie with the use of social media at all, rather it has it root in the misuse of available technology. One such talk of the town these days is the technical advancement of Artificial Intelligence (AI) in almost every field of human development, from laborious to intellectual, you name it and AI has its comprehensive and contemporaneous solution. As it is said that excess of everything is bad, so thus the use of excessive technology in

---

* Assistant Professor Sardar Patel Subharti Institute of Law, Swami Vivekanand Subharti University.
** University Assistant Professor, Sardar Patel Subharti Institute of Law, Swami Vivekanand Subharti University.

1. The Constitution of India, art. 14.
2. The Constitution of India, art. 19.
3. The Constitution of India, art. 21.

the hands of notorious beings may create more destruction socially, legally, ethically, morally and politically. Thereby, the world these days faces a challenge to combat their dignity and privacy against DeepFakes. Moreover, an in-depth legal analysis into the laws also raises concerns about how well-suited the laws already in place are to handle the complex issues raised by deepfake technology. The paper underlines how crucial these regulatory concerns are to protecting society, maintaining democracy, and defending the rule of law as deepfakes blur the lines between fact and fiction more and more.

DEEP FAKE AND ASSOCIATED CHALLENGES

On November 07, 2023, film actress Rashmika Mandanna made a statement casting doubt on the authenticity of a vulgar video that had surfaced on several social media platforms the day before. Unfortunately, the actor's face was overlaid on a British Indian influencer's body in an inappropriate and indecent manner. Since Artificial Intelligence techniques were utilised to edit the photos and videos, this becomes a prominent example of a 'DeepFake' video.[4] Consequently, the outcome produced through photos or videos are a type of misinformation, and it will rely on the situation and how it is interpreted whether or not these images are offensive. Since celebrities are public figures, therefore they are easily targeted, and their offensive videos become a highly marketable product. However, it does not means that it will spare the commoners, not far are those days when it will used for revenge tactics and even causing large mass distress in the society, thereby hampering the Public Order.

Nonetheless, it may be in widespread news since past few months but on socialising sites such as Reddit, users have long back started superimposing celebrities' faces onto other people, especially in pornographic material, thus the term "deepfake" first surfaced in 2017. The[5] definition of "deepfake" in the article is wide and includes a variety of manipulations that are consistent with common knowledge. When used in this context, the term "deepfake" refers to the process of creating a video that uses sophisticated technical techniques to make someone

4. Deepfakes And Breach of Personal Data – A Bigger Picture, *available* at: https://www.livelaw.in/law-firms/law-firm-articles-/deepfakes-personal-data-artificial-intelligence-machine-learning-ministry-of-electronics-and-information-technology-information-technology-act-242916 (last visited on august 28,2024).
5. The Emergence of Deepfake Technology: A Review, *available* at: https://timreview.ca/article/1282 (last visited on august 26,2024).

appear to speak or act in a way that they did not.[6] Thus to conclude, a machine learning model called Deepfake is used to edit, modify, or overlay pre-existing photos, videos, or audio files to produce new material that seems authentic but is actually fake.[7]

Now the persistent problem lies in the fact that it is difficult to identify these kinds of manipulations because of its peripheral uses, which include realistic-looking films made using low-tech tools, excellent footage with people who aren't there, bogus text or audio snippets, and altered satellite signals. This broad viewpoint, which prioritises results above particular technical techniques, is considered essential for legal and policy issues.

Deepfakes have recently been under fire from all around the world for using technology to produce revenge porn, financial frauds, sex records involving celebrities, and phoney films of politicians. There have been multiple attempts around the world to create fictitious videos featuring politicians or public servants expressing their opinions. These videos were intended to be harmful and had the potential to spread false information like wildfire among the populace. Deepfake technology is used to produce fake political material that poses a threat to society. Facebook and other social media companies are under continual pressure to take down deepfake content from their networks. For that matter take a phoney film that purportedly showed Obama disparaging Donald Trump in 2018. Ås a part of Political and social satire, occasionally, a deepfake video with a politician's body and face is created, but the speech is fictitious and extremely light-hearted but has all prospective probabilities of appearing as a true document and thereby causing disturbed social orders.

Apart from other concern there is an instilled fear that the media profession may suffer harm by this emerging technology because it is unable to thoroughly vet both true and false information before distributing it to the public. Deepfakes are more hazardous than regular fake news since they are harder to identify and people are more likely to believe what they say.

---

6. The deepfake dilemma: Detection and decree, available at: https://www.barandbench.com/columns/deepfake-dilemma-detection-and-desirability (last visited on September 3,2024)
7. Deepfake, *available* at: https://en.wikipedia.org/wiki/Deepfake#:~:text=Deepfakes%20(a%20portmanteau%20of%20'deep,a%20type%20of%20synthetic%20media. (last visited on September 5,2024)
8. TED 2018: Fake Obama video creator defends invention, *available* at: https://www.bbc.com/news/technology-43639704 (last visited on September 7,2024)

The technology may create films of news stories that look authentic and damage the credibility of the news organisation. A potent tool in today's fake information war is foreign meddling in elections, using technology to disseminate false political propaganda, and sabotaging election campaigns by putting new words in the mouths of influential public figures with the intention of inciting riots, violence, unrest, doubt, and distress among the electorate. These days, news media agencies compete to be the first to report stories to their audience and obtain video footage captured by witnesses of incidents. As a result, in their haste to win the race, they frequently neglect to confirm whether the footage is authentic or not.

Specifically in a Country like India, with vast geographical and ideological differences, a fake political video can do more harm than imagine and may be a tough menace to India's Security and Public Order leading to weakening of threads of Nationalism and brotherhood. It is evident that social media sites like Facebook are trying to make an effort to discern between deepfakes intended for satire and deepfakes disseminating false information[9].

Additionally, gone are the days when armies were sent into combat zones and battles resulted in the loss of lives and property. Today, as artificial intelligence advances, people are using technology and cyberspace to wage battles and targeting more harm than ever at minimum expense and labour. Therefore, such advances of technology if went unchecked would cause a great deal to National security and public order in long run.

Thus, it embarks the questions as to concerns regarding the need for more robust legal frameworks to address issues like privacy, data protection, and cybercrime which have been highlighted by the growing usage of deepfake technology. Although India has laws that can be used to counteract the said issue, however having regards to the current trends globally it would be safe to quote that additional specialised legislation is required to address the particular problems that deepfakes present in modern era. On all parameters of Legal, Moral, Ethical, Political and National frontiers this issue can cause irreparable loss to the entire existence of humanity and dignity.

---

9. *Id.* at 5.

To summarise misinformation and deepfakes clubbed together are utilised to influence social interactions and public opinion on social media sites with the propagation of deepfakes in relation to election meddling, privacy issues, and defamation etc., which if not taken care of will ruin the social, legal and just thread of any democracy. It becomes also peculiar to balance the regulation of hazardous Deepfakes without Infringing on Free Speech. Because if Right to Privacy and Personal Liberty is Fundamental right, so thus the free flow of Information and Right to Know. The strategies which may work best to protect people's ability to interact online without worrying about being copied or misrepresented are the need of hour. The legal ramifications of deepfakes on consent, and online identity theft, with a particular emphasis on the impact on these rights that may be violated by deepfakes in relation to one's ability to manage one's online persona and image is an indispensable issue to be addressed.

Effect of Deepfakes includes examining those ways in which marginalised populations—such as women, LGBTQ+ people, and minorities—are disproportionately impacted. This also gives rise to sustain apprehensions as to how exposure to deepfakes affects social media users' mental health. The suggestions may include providing restorative justice-focused legal remedies for anyone who have experienced emotional and mental pain as a result of deepfake material.

Thus, while addressing the risks associated with deepfakes, each of these concepts explores various facets of deepfakes in regard to legal problems, with an emphasis on maintaining the integrity of e-socializing.

A GLOBAL PERSPECTIVE

The global community has played a significant role if not effective to minimise the issue. Concerns over the misuse of AI on a global scale prompted the signature of the Bletchley Declaration by 28 countries in early November, 2023. [10] International approaches to AI regulation differ; the United States, for example, has chosen more stringent control. A new

10. 'World-First' Agreement on AI Reached, *available* at: https://datamatters.sidley.com/2023/12/07/world-first-agreement-on-ai reached/#:~:text=The%20%E2%80%9CBletchley%20Declaration%E2%80%9D%20%E2%80%93%20descr bed,the%20UK)%20and%20the%20EU (last visited on September 6,2024)

executive order signed by President Joe Biden emphasises the need for comprehensive testing before public release by requiring corporations to disclose AI safety test findings with the US government.[11]

At the aforesaid meeting in London, focus of respective countries was on developing a safe path ahead for the quickly advancing technology. India, the United States, Australia, China, and the United Kingdom have all committed to working to limit the threat that artificial intelligence presents.[12]

Additionally, the Chinese Cyberspace Administration has been working to impose new regulations to restrict the use of deep synthesis technologies and stifle false information. Under the guideline, users and suppliers of deep synthesis services must make sure that any information that has been doctored using the technology is clearly identified as such and can be tracked back to its original source.[13]

Similarly, the European Union updated its Code of Practice to stop the spread of misleading material using deepfakes. Tech firms like Twitter, Meta, and Google are required by the updated Code to take action against fraudulent accounts and deepfakes on their services.[14]

The United States sponsored the bipartisan Deepfake Task Force Act in order to assist the Department of Homeland Security (DHS) in combating deepfake technologies.[15]

Alongside, WIPO too recognises that deepfakes are more sophisticated than traditional copyright infringements and can involve breaches of human rights, privacy, and personal data protection. This raises the important question of whether deepfake images should ever be given

---

11. Fact Sheet: President Biden Issues Executive Order on Safe, Secure, and Trustworthy Artificial Intelligence, *available* at: https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/30/fact-sheet-president-biden-issues-executive-order-on-safe-secure-and-trustworthy-artificial-intelligence/ (last visited on September 8, 2024)
12. Countries at UK AI summit pledge to tackle potentially 'catastrophic' risks, *available* at: https://www.thehindu.com/sci-tech/technology/countries-at-uk-ai-summit-pledge-to-tackle-potentially-catastrophic-risks/article67487738.ece (last visited on September 10,2024)
13. Regulating deepfakes and generative AI in India | Explained, available at: https://www.thehindu.com/news/national/regulating-deepfakes-generative-ai-in-india-explained/article67591640.ece#:~:text=In%20January%2C%20the%20Cyberspace%20Administration,traced%20back%20to%20its%20source(last visited on September 13,2024)
14. Big Tech must deal with disinformation or face fines, says EU, *available* at: https://www.bbc.com/news/technology-61817647 (last visited on September 13,2024)
15. Portman, Peters Introduce Bipartisan Legislation to Create Task Force at DHS to Combat Deepfakes, *available* at:https://www.hsgac.senate.gov/media/reps/portman-peters-introduce-bipartisan-legislation-to-create-task-force-at-dhs-to-combat-deepfakes/ (last visited on September 15, 2024)

copyright protection. In answer to these inquiries, WIPO suggests that deepfake copyright should be owned by the developer instead of the original source. This suggestion takes into account the absence of involvement or consent throughout the development process, highlighting how crucial it is to recognise the creative work of the person who created the deepfake.[16]

Because victims do not have a copyright interest, WIPO claims that copyright is not the best defence against deepfakes on its own. It is recommended that victims make advantage of their right to have their personal data protected. Referencing Article 5(1) of the EU General Data Protection Regulation (GDPR), which requires accurate and current personal data, WIPO suggests that irrelevant, incorrect, or false deepfake information be promptly removed or corrected.[17] Furthermore, victims may take use of the "right to be forgotten" under Article 17 of GDPR, which permits the prompt removal of personal data, even in cases when deepfake material is true.[18] Deepfake material has a variety of issues, and this dual approach combining personal data protection rights is positioned as a more effective technique to counter those challenges.

India has also proposed a legislative authority, a risk matrix, and other possible regulatory frameworks. To counter deepfakes, IT behemoths like Meta, OpenAI, and Alphabet are implementing techniques like watermarking. India, a key participant in the global development of AI, needs to help shape the regulatory environment while striking a balance between innovation and security concerns.[19]

An organisation located in the US called Home Security Heroes released the 2023 State of Deepfakes study, which showed that the number of deepfake videos on the internet has

---

16. The deepfake dilemma: Detection and decree, *available* at: https://www.barandbench.com/columns/deepfake-dilemma-detection-and-desirability (last visited on September 15,2024)
17. Principles relating to processing of personal data, art. 5 GDPR, *available* at: https://gdpr-info.eu/art-5-gdpr/(last visited on September 17,2024)
18. AI-Generated Realities: The Legal Implications of Deepfakes, *available* at: https://theamikusqriae.com/ai-generated-realities-the-legal-implications-of deepfakes/#:~:text=Swift%20removal%20or%20correction%20of,prompt%20deletion%20of%20personal%20data (last visited on September 17, 2024)
19. Is watermarking the way to go to combat the deepfake crisis? ,*available* at: https://ccgnludelhi.wordpress.com/2024/07/15/is-watermarking-the-way-to-go-to-combat-the-deepfake-crisis/

increased by 550% to a startling 95,820. India is listed in the research as the sixth most vulnerable nation to this new danger.[20]

This is because there is a lack of laws, more affordable technology are available, and candidates are willing to go to any lengths to win over votes and damage the reputations of their rivals. In a nation where a vast majority of people lack formal education and are therefore unable to distinguish between fact and fiction, there is a great danger of misinformation due to the hyperconnectedness of the country (800 million Indians have internet access). Propaganda and false information disseminated by mostly pro-power media entities have long tainted the Indian media landscape.[21]

According to a poll conducted by cybersecurity company McAfee and published on Thursday, over 75% of Indians who are online have seen deepfake material at least once in the past year. Additionally, at least 38% of those questioned had fallen victim to a deepfake fraud.[22]

INDIA'S ANTI-DEEPFAKE LAWS

When someone is the victim of a deepfake crime—that is, when their photos are taken, published, or transmitted in the media, invading their privacy—they are subject to Section 66E[23] of the IT Act of 2000. The maximum penalty for this offence is ₹2 lakh in fines or three years in jail. Section 66D[24] of the IT Act is another pertinent section. A clause of the law stipulates that anyone who utilise computer resources or communication devices maliciously to deceive or impersonate someone may face up to three years in prison and/or a fine of up to ₹1 lakh. The IT Act's provisions in question may be used to bring criminal charges against those responsible for deepfake cybercrimes in India.

---

20. https://www.dw.com/en/can-india-tackle-deepfakes/a-67791106 (last visited on September 18,2024)
21. India's general election is being impacted by deepfakes, *available* at: https://www.lemonde.fr/en/pixels/article/2024/05/21/india-s-general-election-is-being-impacted-by-deepfakes_6672168_13.html (last visited on September 19,2024)
22. 75% Indians have viewed some deepfake content in last 12 months, says McAfee survey, The Economic Times, Apr 25, 2024, *available* at: https://economictimes.indiatimes.com/tech/technology/75-indians-have-viewed-some-deepfake-content-in-last-12-months-says-mcafee-survey/articleshow/109599811.cms?from=mdr (last visited on September 22,2024)
23. The Information Technology Act,2000(Act 21 of 2000), s. 66E.
24. The Information Technology Act,2000(Act 21 of 2000), s. 66D.

Copyright protection for creative works, such as music, films, and other media, is granted under Indian law. If someone uses copyrighted materials to create deepfakes without authorization, copyright owners may file a lawsuit against that person.

Section 51[25] of the Indian Copyright Act of 1957 stipulates penalties for a number of offences, including copyright infringement. It prohibits utilising property that is the exclusive property of another person without that person's consent. Provisions of Indian law forbid fraud, including financial and identity theft.[26]

Apart from the aforementioned legislative measures, media outlets were advised by the Ministry of Information and Broadcasting to exercise caution while airing anything that may be modified or tampered with, on January 9, 2023. In order to make sure that viewers are aware that any information has been altered, the Ministry also recommended media outlets to explicitly mark any manipulated content as "manipulated" or "modified."[27]

Although there are presently no laws in India specifically addressing deepfakes, there are several legal measures and government efforts that may be utilised to combat the problem. The Indian government will probably take further action to address the problem and shield people from danger as deepfakes become more common and complex.

In compliance with the IT Rules 2021, the Indian government mandated on November 8th that "social media intermediaries" take down modified films or deepfakes from their sites within 24 hours of receiving a complaint. Within a week, deepfake films purporting to be of stars Rashmika Mandanna and Katrina Kaif appeared online. This prompted the instructions.[28]

Deepfake is a type of artificial intelligence (AI) technology that uses machine learning techniques, particularly generative adversarial networks (GANs), to produce synthetic media, such as images, videos, and audios. Deepfake technology aims to produce extremely lifelike

25. The Copyright Act, 1957 (14 of 1957), s.51.
26. Deepfakes call for stronger laws, *available* at: https://www.thehindubusinessline.com/business-laws/deepfakes-call-for-stronger-laws/article67077019.ece (last visited on September 22,2024)
27. *Ibid.*
28. Why has the government issued a directive on deepfake? :explained, *available* at: https://www.thehindu.com/sci-tech/technology/why-has-the-government-issued-a-directive-on-deepfake-explained/article67516589.ece (last visited on September 22,2024)

synthetic media that mimics actual people, although with some content manipulation.[29] There are several ways that crimes might be committed with deepfake technology.

Deepfake virtual forgeries and identity theft are serious crimes that might significantly affect people's lives as well as society at large. Deepfakes may be used to spread false information and harm someone's credibility and reputation by taking on another person's identity, creating fictionalised personal stories, or influencing public opinion. These offences may be punished under the Information Technology Act of 2000's by virtue of penalty for identity theft [30] and computer-related offences.[31] In this context, the Penal Code, 1860's Sections 420 and 468 may also be used.

When deepfakes are used to spread misleading information, challenge the legitimacy of the government, or incite resentment and disillusionment against it, they pose a serious threat to society and might have far-reaching consequences. The propagation of false or misleading information has the power to change people's minds, undermine their trust, and have an impact on political outcomes. Cyberterrorism offences may be prosecuted under Information Technology Act, 2000, Section 66-F, and the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules, 2022. Additionally, Section 124-A of the Penal Code, 1860 and Section 121, which deal with waging war against the Government of India, may be used in this context.

Furthermore, harmful issues like hate speech and deepfake online defamation have the potential to harm both individuals and society as a whole. When deepfakes are used to spread hate speech or false information, they may cause significant harm to people's reputations, wellbeing, and online communities. The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules, 2022 of the Information Technology Act, 2000 stipulate the legal penalties for certain violations. In addition, Sections 153-A and 153-B (Speech influencing public tranquilly) and Section 499 (defamation) of the Penal Code, 1860, may be applied in this case.

29. Emerging Technologies and Law: Legal Status of Tackling Crimes Relating to Deepfakes in India, *available* at: https://www.scconline.com/blog/post/2023/03/17/emerging-technologies-and-law-legal-status-of-tackling-crimes-relating-to-deepfakes-in-india/ (last visited on September 22,2024)
30. The Information Technology Act,2000(Act 21 of 2000), s. 66C.
31. The Information Technology Act,2000(Act 21 of 2000), s. 66.
32. The Digital Personal Data Protection Act, 2023 (NO. 22 OF 2023).

Furthermore, Deepfakes can have serious repercussions and compromise the integrity of the democratic process when used in elections. Deepfakes have the potential to sway public opinion, impact election results, and disseminate inaccurate or misleading information about political candidates .A lot of governments and organisations are acting to address the rising worry over the influence of deepfakes on elections.

CONCLUSION AND SUGGESTIONS

The emergence of deepfakes poses significant obstacles to the legal structures that protect the liberty of online socialising. Digital platforms have made social interaction and communication more accessible, but the proliferation of altered media content—particularly deepfakes—threatens to compromise both the security of users engaging in the digital public sphere and the integrity of online participation. This study sheds light on the intricate conflict between the legal requirements to lessen the negative effects of developing technology like deepfakes and the promise of unrestricted digital communication.

Fundamentally, deepfakes violate a number of rights, including those to privacy, reputation, and, in extreme cases, bodily safety. In particular, when such information is used maliciously—for example, to extort, libel, or mislead—it presents significant ethical and legal questions. This is especially true when manipulating photos, audio, and video to construct false narratives. Deepfake legislation is still in its infancy, and many nations are still struggling to reconcile the need for regulatory oversight with the right to free expression.

Although laws pertaining to intellectual property, defamation, and privacy are frequently expanded to meet problems originating from deepfakes, they are unable to adequately address the particular harms brought about by this type of material.

The existing legal framework in India does not adequately handle cyber offences resulting from the usage of deepfakesThe lack of specific restrictions on artificial intelligence, machine learning, and deepfakes under the IT Act, 2000 makes it difficult to effectively regulate their usage.

To effectively manage offences committed by them, it could be necessary to alter the IT Act, 2000 to include provisions that specifically address the use of deepfakes and the consequences

for their misuse. This would entail tougher legal safeguards for people whose likenesses or photos are utilised without their permission, as well as harsher punishments for those who produce or disseminate deepfakes for nefarious ends.

Furthermore, it is essential to keep in mind that the production and use of deepfakes is a worldwide issue, and that effective international coordination and collaboration will most likely be required to limit their use and put an end to privacy violations. While this is going on, it's critical that people and organisations understand the possible dangers of deepfakes and exercise caution when confirming the legitimacy of material they come across online. The governments in the interim may incorporate the following in the risk management process: (a) Directing publishers and intermediaries to prevent the public from getting misleading material is the first censorship tactic. (b) The second tactic, known as the punitive technique, is to make businesses or individuals accountable for disseminating or producing misleading information. (c) The intermediary regulatory method, which is the third option, mandates that internet intermediaries expeditiously expunge misleading content from their platforms. If they don't, they risk liability under Sections 69-A and 79 of the Information Technology Act of 2000 and now under Digital Personal Data Protection Act, 2023[32].

This study comes to the conclusion that deepfakes constitute a socio-legal issue that endangers people's rights and public confidence in digital settings, rather than only being a technological aberration. Overuse of deepfakes might inhibit free expression since users may feel less comfortable interacting openly on digital platforms due to the potential for manipulation. Furthermore, the lack of clarity around the manufacturing and distribution of deepfakes may encourage dishonest people to take advantage of legal loopholes in order to commit heinous crimes for which they are not held accountable.

❒ Suggestions

1. Strengthening Legal Frameworks: To combat the production, dissemination, and usage of deepfakes, legislative authorities worldwide need to be proactive in passing targeted legislation. Although certain parts of the harm produced by deepfakes may be covered by current legislation, a comprehensive legal framework that expressly addresses the creation and

malicious use of synthetic media is necessary. These rules ought to prioritise striking a balance between safeguarding people from online abuse and manipulation and allowing free expression.

2. **Strengthening International collaboration:** To counteract the cross-border effects of deepfakes, international collaboration is crucial due to the global nature of the internet. Governments and law enforcement agencies have to work together to develop global guidelines and norms that guarantee uniform and efficient legal reactions. Initiatives to promote such cooperation and harmonise regulatory methods might be led by institutions like the European Union and the United Nations.

3. **Technological Solutions and Digital Literacy:** In addition to taking legal action, technological advancements need to be made in order to lessen the threat posed by deepfakes. Prioritising should be given to investments in detecting systems that can instantly detect altered information. Programs for digital literacy should also be created to inform the public about the risks posed by deepfakes and to provide them the means of spotting and avoiding distorted information. Increasing awareness is essential to enabling people to use the internet properly. Citizens, especially the younger ones, may take part in peer-led campaigns to inform themselves and others on the dangers, existence, and identification of deepfakes. Attending seminars and taking online classes on spotting deepfakes might equip people to be more watchful while consuming digital information.

4. **Platform Accountability and Self-Regulation:** It is necessary to impose stricter content moderation guidelines on social media sites and other digital intermediaries, with a particular focus on deepfakes. Regulatory incentives that encourage openness in algorithmic decision-making, giving users a greater understanding of how modified information is identified and deleted, might improve platform accountability. Legal regulations combined with voluntary self-regulation can give platforms a flexible and efficient way to handle deepfake-related material while maintaining user freedoms.

5. **Victim Support and Remedies:** Strong legal frameworks should be crafted to offer victims of deepfake abuse recourse. This includes the capacity to seek civil damages, accelerated removal processes, and support services for anyone whose safety or reputation have

been jeopardised by deepfake content. To guarantee that justice is carried out in a timely and efficient manner, specialised legal procedures for reporting and reacting to deepfakes will be essential.

6. **Social media campaigns to raise awareness:** Start ads that show off actual instances of deepfakes, emphasising their risks and instructing people on how to recognise faked media. You may utilise social media sites like YouTube, and Instagram to share viral instructional content.

7. **Participation in Policy Discussions:** The younger generations may be invited in discussions pertaining to new or current deepfake laws. They may share their viewpoints in this fashion, especially because younger generations are typically more tech-savvy and can provide insights into how social interactions are impacted by technology.

8. **Encouragement of Fact-Checking Projects:** People may assist fact-checking groups that seek to authenticate digital information and spot deepfakes, and they can even volunteer there. Spreading accurate information may be slowed down by endorsing and disseminating verified content.

9. **Encourage sharing That Is Responsible:** Promote content verification prior to posting on social media to promote responsible behaviour. Trends may be formed by younger generations in particular to guarantee that only real and verified material is shared.

10. **Utilising Open-Source Detection Software:** Teach the public and youth how to use open-source AI tools and software that can identify deepfakes. Before sharing or accepting content, they may use these tools to confirm the legitimacy of photos and videos that they come across online.

11. **Community-Based Deepfake Reporting:** Establish networks where users may alert platforms or fact-checkers about alleged deepfakes. Promoting group alertness can hasten the detection and removal of dangerous information.

12. **Promoting Moral Conduct on the Internet:** By making a commitment to ethical content creation, younger generations may set a positive example. This emphasises respect for others' privacy and reputation and prohibits the production, editing, or dissemination of

deepfakes for amusement or disinformation reasons.

13. **Accountability among peers:** Encourage the development of a culture in which sharing or producing deepfakes is held accountable by everybody. People have the power to establish social standards that make it unacceptable and socially irresponsible to share deepfakes.

14. **Curriculums and Programs for Schools Incorporate Deepfake awareness into Education:** Promote the inclusion of ethical technology usage and digital media literacy in school curricula. A better informed generation may be produced by teaching young children about deepfakes, their effects, and how to evaluate internet information critically. This may include advising students to create groups or student-run projects that are devoted to media vetting, digital ethics, and cybersecurity. These organisations can hold seminars, organise educational campaigns, and collaborate on initiatives to create more effective instruments and techniques to thwart deepfakes.

15. **Work together with Tech Pioneers, Hackathons and Innovation Challenges:** Young people interested in technology can host or take part in hackathons that are designed to create innovative techniques for identifying or stopping the spread of deepfakes. This may also entail partnering with IT firms or academic establishments engaged in cybersecurity and artificial intelligence.

16. **Encourage technological efforts to combat deepfakes:** Encourage and support technical innovation to counteract deepfakes, by testing new detection techniques and tools or by participating in crowdfunding initiatives.

17. **Encourage Mental Fortitude against Deception by promoting critical thinking:** People should be urged to examine the source and purpose of potentially manipulative information and to think critically about the media they consume. Particularly younger generations may develop scepticism towards dramatic or contentious media without sufficient evidence.

18. **Provide Secure Online Communities:** Assist in the development and promotion of online communities devoted to real and verifiable interactions, which will reduce exposure to

potentially dangerous deepfakes by establishing confidence in these areas. When scaled up, these community-based and grassroots initiatives can significantly contribute to reducing the threat of deepfake content by fostering a more aware, accountable, and watchful online community.

To summarise, the resolution of the issues raised by deepfakes necessitates a comprehensive strategy that incorporates technical advancement, legislative modification, and public awareness campaigns. This will guarantee that the liberty to engage in e-socialization is safeguarded without compromising personal liberties and communal confidence.

HUB & SPOKE AGREEMENTS VIS-À-VIS THE COMPETITION (AMENDMENT) ACT, 2023: AN ANALYSIS

*** Dr Anuj Kumar Sinha**

INTRODUCTION

The Competition Act, 2002 established the Competition Commission of India to eliminate anti-competitive conducts. In 2018, the Ministry of Corporate Affairs established the Competition Law Review Committee to assess the impact of novel business practices which submitted its "thorough and exhaustive assessment" of the Act in 2019. The Ministry reviewed the findings of the Committee and presented the Competition Amendment Bill (2022) to implement several recommendations of the Committee in the Parliament of India. After Parliament passed the Bill and the President assented to it, this amended law inter-alia covers 'hub & spoke agreements'. A 'hub and spoke' agreement involve both collusion among firms operating in the same market and the participation of at least one member operating in a distinct segment of the supply chain. This paper acknowledges the fact that due to the increasing growth of e-commerce sectors in India, 'hub & spoke' agreements have become a reality, and the new law is an attempt to address the issue of anti-competitive practices entered into by e-commerce sector service and goods provider. This article condenses and analyses the new "hub & spoke agreements" regulation vis-à-vis The Competition (Amendment) Act, 2023.

HUB & SPOKE AGREEMENTS: CONCEPT

Hub and Spoke (H&S) agreements are a type of anti-competitive arrangement that involves a collection of vertical and horizontal agreements. In these agreements, there is a central party known as the 'hub' and multiple other parties known as the 'spokes', with each agreement having a separate 'spoke'. The spoke represents rival entities functioning at the same hierarchical level, whereas the hub operates at a distinct level within the manufacturing chain. The second arrangement that violates competition laws involves the spokes, who share information or cooperate in some other way through a central hub, eliminating the need for direct connection. The spokes are the participants at the same stage of the production cycle; the hub is the common

* Asst. Professor, Amity Law School, Amity University, Jharkhand.

supplier or retailer; and the rim is the agreement that keeps everything together[1]. A H&S model represents an intricate kind of indirect cartelization among entities that participate in the exchange of sensitive information via a third party, situated at various levels of production. Consequently, a horizontal agreement, characterized by tacit collusion, is present among the spokes because of independent, predominantly legal, agreements established between each spoke and a singular hub.[2] The hub enables the setup of competition among the spokes without direct interactions between them, thereby complicating the task of demonstrating that the spoke participated in coordinated activities. H&S arrangements can serve to enable a range of horizontal agreements among the spokes, including practices such as price-fixing and geographical market allocation.[4]

COMPONENTS OF A HUB & SPOKE (H & S) AGREEMENTS

The phrase 'hub and spoke' originates from the analogy of a wheel, wherein the entities at the same tier of the production cycle represent the spokes, while the common supplier or retailer serves as the hub, and the agreement constitutes the rim, thereby creating a cohesive operational framework.[5]H&S agreements have been identified as a fraudulent business practice within the industry, comprising of the following components.:

Hub: A hub refers to a mechanism that facilitates indirect coordination among rival entities. The competitors are arranged in a vertical stack, with the hub positioned at the top. Hubs facilitate the advancement of cartels through the exchange of confidential information. A cartel operates through a central hub that enables price fixing among competing entities at the same level. This hub

1. Anumeha Agarwal and Akanksha Singh, "Hub and Spoke: An Analysis of the Existing International Scenario and the Draft Competition Amendment Bill 2020" Summer 2020: Vol. 1: Issue 1 Indraprastha Law Review 1 (2020)
2. Ansruta Debnath, "SOLVING THE ENIGMA OF HUB-AND-SPOKE CARTELS- APPLICABILITY AND ENFORCEMENT" The Competition and Commercial Law Review, 2024 *available at:* https://www.tcclr.com/post/solving-the-enigma-of-hub-and-spoke-cartels-applicability-and-enforcement (last visited September 26, 2024).
3. Barak Orbach, "Hub-and-Spoke Conspiracies", 15 Antitrust Source, no. 3, 2016, at 1 2016 available at: https://shorturl.at/1474g (last visited August 25, 2024)
4. Manika Brar and Anik Bhaduri, "Hub-and-spoke cartels: The next 'big thing'?," Shardul Amarchand Mangaldas & Co available at: https://www.amsshardul.com/insight/hub-and-spoke-cartels-the-next-big-thing/ (last visited September 27, 2024).
5. *Supra* Note 1

acts as a pivotal point for the exchange of sensitive market data and the coordination of strategic initiatives, thereby ensuring uniform pricing decisions across the entire industry. A hub could be anything from an algorithm or software programme to an actual participant in the same sort of trade. [7]

Spokes: The spoke represent distinct entities that participate in competition within a shared marketplace. The complex arrangement of various interrelated elements presents substantial challenges for horizontal companies in successfully managing coordination among all market participants. As a result, the members of the cartel maintain a strict policy of confidentiality and abstain from direct interpersonal interactions. Within the framework of H&S Agreements, the spoke engage in the exchange of information or collaborate through the hub. The absence of direct communication among the spoke further complicates the establishment of information transfer and exchange between them. Spoke fundamentally relate to the horizontal participants or competitors in the same market.

Rim: In an H & S cartel, all spoke agree with the hub to work together. This agreement underpins the rim. A cartel of spokes cannot be formed without finding the hub. The rim can prevent spoke from exiting the cartel. Rims support the cartel's scheme. Individual spoke may be deterred from violating or quitting from the cartel arrangement by means of the rim. The rim serves as the foundational support for the convergence of the cartel's members. The spoke will not consent to a H & S agreement unless all the spokes are tied down

6. "The Missing Element of Intention in a Hub and Spoke Agreement," *available* at: https://crclp.nliu.ac.in/the-missing-element-of-intention-in-a-hub-and-spoke-agreement/ (last visited September 27, 2024).
7. Yash Arjariya & Kunal Thawani, "Hub And Spoke Cartels In The Indian Competition Regime: Sketching The Way Forward" CBFL, 2023 *available* at: https://www.cbflnludelhi.in/post/hub-and-spoke-cartels-in-the-indian-competition-regime-sketching-the-way-forward (last visited September 27, 2024).

by the rim.[8] The rim constitutes a connection established between a hub and a spoke, or alternatively, among the spokes themselves. This agreement exhibits traits of both vertical and horizontal arrangements, the existence of which depends upon the rim which acts as the point of junction where these two agreements viz. horizontal and vertical meets.

CHARACTERISTICS OF HUB & SPOKE AGREEMENTS- HYBRID NATURE OF THE AGREEMENTS

The H&S agreements are characterized by a hybrid nature, combining both horizontal and vertical agreements. The parties involved in H&S agreements aim to gain economic benefits by limiting competition and manipulating market dynamics through the hybrid nature of these arrangements. A H&S arrangement represents an intricate model in which the involved entities converge around a shared objective, integrating the diverse incentives present across various tiers of the supply chain. A H&S arrangement thus involves a unified practice that encompasses both vertical and horizontal behaviors, usually executed via an informal cooperation mechanism, specifically through an indirect exchange of sensitive information. As a result, it becomes more challenging for regulatory authorities to identify a H&S agreement. H&S agreements are characterized by three primary features, which are derived from the cases of Toys v. United States.[9] This case is regarded as significant precedent that competition regulators use to analyze competition in such arrangements. To form a H&S agreement/cartel, it is necessary to have clear proof of anti-competitive conduct, specifically an express agreement to collude[10]. To prove the hub's responsibility, the plaintiffs need to provide evidence of a horizontal agreement among the spokes, involvement of the vertical participant (the 'hub'), and active participation in the agreement. In addition, it is crucial to acknowledge that reaching an agreement usually necessitates reiterated exchanges between the hub and each spoke. H&S agreements possess three main characteristics[11] which are as follows:

---

8. Ayush Verma, "Evolution of Hub and spoke cartels in India – inspiration from the USA" iPleaders, 2020 *available* at: https://blog.ipleaders.in/evolution-hub-spoke-cartels-india-inspiration-usa/ (last visited September 27, 2024).
9. Toys "R" Us and Interstate Circuit, Inc. v. United States (2000) 221 F.3d 928, 7th Cir.
10. *Supra* note 3 at 4
11. *Supra* note 1 at 2

- **Presence of Horizontal Agreement:** There exists among the spokes, horizontal agreement resembling that of a cartel. To establish its existence, it is necessary to provide evidence of the cartel members' coordinated conduct and their communication with one another. The H&S agreement obviates the necessity for direct connection among the spokes, hence rendering the tracking of such an exchange of information more arduous.
- **Presence of Vertical Agreements:** The second characteristic of this arrangement involves vertical agreements between the 'hub' and individual 'spoke's'. These agreements involve the exchange of information, which is typically legal and may even promote competition. However, in the context of H&S arrangements, the purpose of such communication is for the hub to share this information with other spokes, facilitating coordinated anti-competitive actions.
- **Economic Incentives:** The final characteristic pertains to the economic advantages that the parties aim to attain through the H&S agreement. In situations when the manufacturer holds a monopoly, it is assumed that the presence of perfect competition at the retail level will hinder the monopolist from using their monopolistic power. When a hub fosters collaboration among its spokes, the spoke have the potential to increase the prices at which they sell their goods. Because of this, the manufacturing hub and its associated spoke may experience an increase in profits.

CONDITIONS TO ESTABLISH HUB & SPOKE AGREEMENTS

To understand the conditions [12] that must exist to constitute a H&S agreements/cartel, the following illustration comes to rescue, which is analyzed as under: "Undertaking X and Y are retailer spoke and Undertaking Z is the Supplier hub"'. The Conditions can be analyzed as under:

12. OECD, Roundtable on Hub-and-Spoke Arrangements – Background Note by the Secretariat, 2019 DAF/COMP(2019)14 at p. 6, *available* at: https://one.oecd.org/document/DAF/COMP(2019)14/en/pdf (last visited on August 21, 2024)

- **Undertaking X passed important information to Y**

  X meets the first objective if they disclose Y their sensitive business information. X's 'competitively sensitive business knowledge' [13] reduces market uncertainty if X's competitors know it. For this purpose, companies' price rises may be commercially sensitive.[14]

- **Y passes X's important information to competitor Z**

  The second objective requirement is satisfied when firm X shares information with 'hub' Y, and subsequently, 'hub' Y shares that information with company Z. Subsequently, Z integrates this info into its subsequent price determinations.

- **Knowledge on the part of X that his competitors will have access to the data sent to Y**

  X's horizontal competitor Z will receive X's competitively sensitive information due to Y's commitments. There is a divergence of opinions on the sufficiency of X's anticipation that Y can transmit the knowledge to Z, as opposed to X's purpose to convey the information to Z through Y. Bidirectional communication implies the presence of a H&S system. X and Z partake in concurrent discourse with Y, thereby enhancing the probability of X and Z revealing one another's strategies. This enables the exhibition of careful consideration or purpose. The unique mode of communication complicates the determination of whether the exchange of information was deliberate. Considering the allowance for disclosing commercially sensitive information during the negotiation and agreement formation process, it is essential to evaluate the timing and execution of information sharing as a further subjective element.[15] Alongside this subjective aspect, it is essential to evaluate the economic justification for data sharing, as this may preclude its classification as an H&S agreement/cartel.

13. *Supra* note 4
14. Court of Appeal's Argos Limited and Littlewoods Limited v. Office of Fair Trading, [2006] EWCA Civ 1318 at Para 126
15. Okeoghene Odudu, "Indirect Information Exchange: The Constituent Elements of Hub and Spoke Collusion" European Competition Journal 206 (2011).

- **Z having the knowledge that information is obtained from X and subsequently using it to determine its own behavior**

  Z also needs to know why and how[16] Y got the information from X, in addition to the aforementioned requirements. Otherwise, it may be argued that Z wasn't trying to stifle other businesses. Furthermore, Z must comprehend the rationale behind the information transfer, and Z must rely on the veracity of the information to establish its future market behaviour and price[17].

POSITION PRIOR TO THE COMPETITION (AMENDMENT) ACT, 2023

The snapdeal case[18] could be regarded as a seminal instance wherein allegations of the formation of H&S cartels were directed towards the opposition party (OP). The informant asserted that the OP sustained elevated pricing for its products through arrangements with its suppliers and distributors. Nevertheless, the CCI chose to direct the Director General to exclusively examine the issues surrounding violations of "resale price management" as outlined in Section 3(4)(e) of the Act,[19] effectively sidelining the inquiry into the potential existence of a H&S arrangement in this matter. Identical observation was made in the Hyundai case. [20] The informant detailed a sequence of H&S patterns manifested as bilateral vertical agreements between suppliers and dealers, alongside horizontal agreements among dealers facilitated by a shared supplier, culminating in pricing collusion. In a manner reminiscent of the previous case, the CCI similarly focused on resale price management to determine Hyundai's culpability, neglecting to investigate the assertions regarding a H&S arrangement.

---

16. *Supra* note 14 at para. 141
17. Ann Hayes, "Tesco Stores Ltd v Office of Fair Trading [2012] CAT 6" Twenty Essex, 2012 *available* at: https://www.twentyessex.com/tesco-stores-ltd-v-office-of-fair-trading-2012-cat-6/ (last visited September 27, 2024).
18. Jasper Infotech (Snapdeal) v. Kaff Appliances, CCI case no. 61/2014 order dated 29.02.2014
19. The Competition Act, 2002 (Act 12 of 2003) Explanation to s. 3 (4) (e) explains "resale price maintenance" as – "resale price maintenance" includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged."
20. Fx Enterprise Solutions (India) (P) Ltd. v. Hyundai Motor (India) Ltd, 2017 SCC OnLine CCI 26

However, the evolution of Indian jurisprudence regarding H&S cartels can be traced back to the Cab Aggregator Case. [21] In this case, the Informant contended that the algorithmic pricing employed by cab aggregators, such as Ola and Uber, constitutes a charge of price-fixing. It was argued that algorithmic pricing constrained the drivers' autonomy to adjust prices at their discretion, prohibited them from offering discounts, and compelled them to accept the fare determined by the pricing algorithm, leaving no room for personal decision-making in the process. Furthermore, it imposed limitations on the riders, preventing them from engaging in price negotiations with the drivers. Ola/Uber engaged in vertical agreements with its drivers to establish minimum pricing, specifically resale price maintenance, while also leveraging the personalized information they possessed about riders to their detriment. It was further argued that the drivers operated under the independent third-party service providers of the cab aggregator. They were not employees; therefore, they did not form a singular economic entity. It was thus argued that the partnership among drivers facilitated by the Cab aggregators led to what can be described as 'concerted action,' with Ola/Uber functioning as a hub that allowed the spokes (drivers) to synchronize and conspire regarding pricing strategies.[22] While deciding the matter, the Competition Commission of India described H&S arrangements as- *"'hub' and 'spoke' arrangement refer to an exchange of sensitive information between competitors through a third party that facilitates the cartelistic behaviour of such competitors."* [23] Based on the understanding of H&S agreements as concluded above the CCI determined that this case did not constitute a H&S agreement, as there was a lack of any agreement among the drivers or between Ola/Uber and the drivers. The establishment of any exchange of information, coordinated action, or shared intention among the drivers was not proved. Furthermore, no detrimental impact of competition could be demonstrated. Moreover, numerous other mobile applications offer analogous services. Drivers do not qualify as employees, and the pricing structure is established through an algorithm that assesses various factors, including time and traffic conditions, to determine costs. This model, therefore, cannot be characterized as akin to a H&S

21. Samir Agrawal v CCI, (2021) 3 SCC 136
22. *Supra* note 1 at 12
23. *Supra* note 21 at para 5

agreement. The observation of CCI was affirmed by National Company Law Appellate Tribunal. Consequently, as established by CCI, the criteria for identifying H&S cartel behavior in India is two-pronged: an agreement among participants (where a third-party aids in the collusion between two or more horizontal entities) and the intention (a convergence of opinions among the parties involved i.e. consensus ad idem). The previous standards of consensus among parties supersede intention in the assessment of hub and spoke agreement/cartel conduct by the CCI. The former criteria of agreement between parties take precedence over intention when determining H&S behaviour by CCI.[24]

THE COMPETITION (AMENDMENT) ACT, 2023: PROSCRIBING H&S AGREEMENTS

The Indian competition framework did not address H&S agreements until the enactment of the Competition (Amendment) Act, 2023. Notwithstanding this limitation, it offered valuable insight into CCI's interpretation of H&S agreements within the framework of competition law. The absence of explicit legal provisions rendered controlling of such concerns challenging, a situation that has since been remedied post the 2023 amendment.

- **Amendment in Section 3 (3)**

  In Section 3 (3) of The Competition Act, 2002 after the already existing proviso the following has been added as a proviso after the proviso : *"Provided further that an enterprise or association of enterprises or a person or association of persons though not engaged in identical or similar trade shall also be presumed to be part of the agreement under this sub-section if it participates or intends to participate in the furtherance of such agreement.*[25]*"*

  The examination of this provision demonstrates that H&S agreements/cartels, previously unaddressed by the Act, have now been included into the Act without explicit reference to them as 'hub & spoke Cartels.' This provision recognizes hybrid anti-competitive agreements, including H&S cartels.

---

24. In Re: Domestic Airlines Case, Case No. 01/2011 CCI Order dated 11.01.2012
25. The Competition (Amendment) Act, 2023 (Act 9 of 2023) s. 4

Furthermore, it recognizes the participation of intermediaries or facilitators who are not engaged in identical economic activities. If these parties participate in or intend to participate in the promotion of anti-competitive agreements, it is presumed that they are engaged in such agreements. [26] H&S agreements do not exclusively fit into either vertical or horizontal categories, as they encompass both a vertical agreement between the 'hub' and the 'spoke' and a horizontal agreement among the spokes. Consequently, agreements lacking any explicit horizontal collusion were not deemed anti-competitive. They evaded all forms of culpability. The 2023 amendment impose liability on participants involved in a H&S agreement/cartel. The definition of anti-competitive agreements has been expanded to encompass anyone who 'intend to participate in or participate in furtherance of' such agreements, even if they are not involved in the trading of similar goods, so incorporating H&S agreements within its scope. Regardless of their lack of involvement in the trade of analogous commodities, i.e., their absence as horizontal competitors, entities will be deemed liable or considered to be participants in the agreement. The amendment was significant as such agreements can result in anti-competitive behaviors, impede economic progress, and disrupt the market's capacity to operate freely for trade.[27]

- **Burden of Proof**

  The amendment clarifies that H&S is a horizontal agreement, therefore the per se standard will apply and the Director General (DG) will not need to prove appreciable adverse effect on competition in the relevant market. Detecting and proving vertical agreements between H&S is much simpler compared to

26. Sanjay Vashishtha and Abhay Pratap "Navigating the Hub-and-Spoke Cartel in India: An Analytical Overview of the New Provision" SCC Times, 2023 *available* at: https://www.scconline.com/blog/post/2023/10/05/navigating-hub-and-spoke-cartel-in-india-an-analytical-overview-of-new-provision/ (last visited August 30, 2024).
27. Akshata Singhvi "The Missing Element of Intention in a Hub and Spoke Agreement," *available* at: https://crclp.nliu.ac.in/the-missing-element-of-intention-in-a-hub-and-spoke-agreement/ (last visited September 27, 2024).

horizontal agreements. CCI now considers H&S a horizontal agreement, hence the argument rests on proving its existence. In addition to explicitly acknowledging H&S agreements, the 2023 Amendment permits the CCI to examine the involvement of a non-competing organization as a cartel participant if it 'participates or intends to participate in furtherance of' a cartel. A hub may be held accountable for cartelization, irrespective of its direct involvement in enabling a cartel, provided that the CCI can demonstrate an agreement among competing entities to engage in any prohibited conduct under Section 3(3) of the Act; and the hub had the 'intention' to participate. [28] The 2023 Amendment significantly weakens the evidentiary standard necessary to assign culpability to the hub as a cartel member in an anti-competitive H&S agreement. Nonetheless, it does not eliminate the necessity for a 'rim', meaning an active agreement among competitors, nor does it clarify the extent of engagement required among spoke to be considered a 'rim' in an H&S arrangement. This indicates that for a hub to be accountable for an anti-competitive H&S agreement, its 'intent' to participate is adequate, irrespective of whether it has undertaken any actions to actively engage, provided that a pre-existing arrangement among the spoke is in place to manipulate prices, restrict supplies, or allocate markets or customers. The 2023 Amendment seems to impose on a vertically related businesses a financial liability equivalent to that of cartel members for knowledge of or involvement in a cartel, despite its lack of engagement in the same degree of businesses as those participants.[29]

- **Effect on Penalty**

  Furthermore, the liability of the 'hub' will be the same as that of the 'spoke' because of the agreement's classification as horizontal, i.e. a penalty not exceeding 10% of the average turnover for the last three preceding financial

28. "Hub and Spokes Cartels – Codification and Challenges," azb *available* at: https://www.azbpartners.com/bank/hub-and-spokes-cartels-codification-and-challenges/ (last visited September 28, 2024).
29. *Ibid.*

years, unless the agreement is a cartel, in which case the penalty can be the above-mentioned amount or three times the profit for each year the agreement is maintained, whichever is greater[30] Since the 'hub' is considered as horizontal agreement, all H&S participants are liable.

HUB& SPOKE AGREEMENTS AND E-COMMERCE

The Internet has emerged as a contentious junction in the digital era, facilitating various entities (spokes) to form cartels while evading the constraints of competition laws. [31] The process of digitalization has profoundly transformed the competitive landscape of the economy, resulting in the creation of new markets and the reorganization of established ones. This presents a multifaceted challenge for regulatory authorities tasked with overseeing competitive dynamics. Digital markets display unique features, including multi-sided structures, pronounced network effects, substantial economies of scale and scope, dependence on extensive user data, and elevated switching costs.[32] The emergence of digitization has led to considerable benefits for consumers across various domains, including lower prices, improved accessibility and convenience, greater diversity, and the launch of novel products. At the same time, additional concerns have been recognized regarding competition across diverse digital marketplaces, encompassing market structure, business conduct, and merger dynamics within the sector. Each of these concerns signifies a decline in competitive dynamics, as demonstrated by escalating mark-ups, diminishing entry rates, and increased concentration, all of which are indicative of the underlying issue.[33]

In the wake of the COVID-19 pandemic, as individuals found themselves restricted indoors due to government-mandated lockdowns, there was a significant surge in the dependence on

30. The Competition Act, 2002 (Act 12 of 2003) s.27
31. Aditya Goyal and Shreya Chandhok, "Hub and Spoke Cartels: A Perspective on Future Investigations" IndiaCorpLaw, 2020 *available* at: https://indiacorplaw.in/2020/07/hub-and-spoke-cartels-a-perspective-on-future-investigations.html (last visited September 05, 2024).
32. "OECD Handbook on Competition Policy in the Digital Age P.14-16 OECD (2022), *"available* at: https://www.oecd.org/en/publications/oecd-handbook-on-competition-policy-in-the-digital-age_c8c1841b-en.html (last visited September 28, 2024).
33. OECD, "Big Data: Bringing Competition Policy to the Digital Era: Background note by the Secretariat" 2016 *available* at: https://one.oecd.org/document/DAF/COMP(2016)14/en/pdf (last visited September 28, 2024)

e-commerce platforms for the acquisition of goods and services. The pricing algorithms employed by online shopping platforms enable horizontal collusion, leading to various competitive issues that echo the dynamics of H&S cartels. Online retailers often employ pricing algorithms to dynamically modify product prices. Pricing algorithms can meticulously observe the pricing strategies employed by competing businesses within the market. The existence of Across Platform Parity Agreements (APPAs) and Most Favoured Customer (MFC) provisions raises significant concerns regarding price fixing within the e-commerce market, highlighting critical issues related to competition. In the domain of e-commerce, enterprises that collaborate utilize identical algorithms to ascertain product pricing in accordance with market demand and consumer interest. Furthermore, it is probable that two competing enterprises could effectively leverage identical IT services to collect data on customer preferences. In such instances, the phenomenon of competing enterprises participating in clandestine collaboration is not merely a theoretical concept. Tacit collusion manifests when neither party possesses a deliberate intention to engage in cooperation with the other. In contrast to a traditional H&S cartel, this collaboration is facilitated by a shared intermediary or service provider, rather than by an upstream or downstream entity. Online platforms often assert a lack of awareness concerning the conduct of sellers operating within their domain and refute any participation in enabling coordinated activities. Nonetheless, regulatory bodies contend that the platform, in its pivotal function as a central 'hub', actively facilitated the anti-competitive arrangement.[34]

By January 2024, internet had reached a penetration rate exceeding 52.4%[35] of the population, resulting in approximately 751.5 [36] million internet users in India. Undoubtedly, Internet and smartphones have established themselves as essential components of everyday existence, consequently leading to the proliferation of e-commerce which has enabled all to procure virtually any item with a mere tap on our smart phones, encompassing gadgets, apparel, and even groceries. Companies in the realm of e-commerce are perpetually engaged in competition.

---

34. *Supra* note 4
35. "India: internet penetration rate 2024," Statista available at: https://www.statista.com/statistics/792074/india-internet-penetration-rate/ (last visited September 29, 2024).
36. "India: digital population by type 2024," Statista available at: https://www.statista.com/statistics/309866/india-digital-population-by-type/ (last visited September 29, 2024).

In the pursuit of competitive advantage, leading E-commerce firms have increasingly embraced Artificial Intelligence (AI) to analyze market dynamics, develop desirable products, and optimize logistics management. Flipkart, Myntra, Amazon, and similar platforms possess proprietary AI models and algorithms designed to efficiently manage and market products from various retailers on their websites. Nonetheless, this business model cannot be classified as akin to a H&S agreement, as these algorithms merely serve as platforms to enable communication. They cannot be classified as anti-competitive. The issue that may emerge from the recent amendments stems from the ambiguity regarding the underlying intentions, potentially resulting in the unwarranted engagement of these platforms.

The recent amendment suggests that these e-commerce platforms establish a connection between the website and various retailers, potentially leading to anti-competitive practices that could be deemed prohibited under the Act. However, they cannot be classified as anti-competitive since they do not negatively impact the existence of competition among retailers. Consequently, in these instances, it is crucial to ascertain the intention of the parties involved to determine the existence of an agreement. Such agreements ought not to be categorized as H&S arrangements without a definitive intention evident between the parties involved. Another facet of digitalisation that warrants attention is the role of AI and third-party software algorithms, which function as a central 'hub' and, in effect, contribute to an anti-competitive landscape. Consequently, in these situations, it is essential to determine intent to assign liability precisely to those individuals or entities that are actively promoting anti-competitive conduct within the marketplace.[37]

In a digital marketplace, where the entity functions as the fulcrum of business operations owing to its economic framework, its basic role is the dissemination of information for instance, intermediaries like online e-commerce platforms that operate with a complex business model. The amended interpretation of Section 3(3) of the Act may present challenges in specific

37. *Supra* note 6

circumstances. It merely states “participates” or “intends to participate” to suggest the entity's involvement in these hybrid anti-competitive agreements or cartels. The ambiguity inherent in this language may lead to a considerable rise in the volume of insignificant complaints lodged with the CCI against the entities. The allegations presented would suggest their participation in enabling a cartel yet lack significant evidence of any anti-competitive conduct.

CONCLUSION AND SUGGESTIONS

The explicit incorporation of H&S agreements as a prohibited business conduct in Section 3(3) clarifies the legal uncertainties associated with such agreements. Nevertheless, in its present form, the provision could potentially lead to an overwhelming influx of enforcement cases. The standards of evidence that the CCI must adhere to in evaluating H&S cartels ought to be articulated with precision, accompanied by appropriate guidance for clarity. A crucial issue involves establishing the evidentiary threshold beyond which the CCI may infer that the agreement could result in an appreciable adverse effect on competition. H&S agreements generally encompass a series of analogous independent vertical agreements among multiple enterprises. Vertical agreements, whether considered individually or collectively, do not constitute anti-competitive behavior unless there is evidence demonstrating that they result in collusion.

This amendment has enlarged CCI's jurisdiction to include H&S agreements and widened horizontal arrangements to include parties not in similar or identical businesses but who support such agreements. H&S agreements are difficult to find due to the level of proof, evidence assessment, hybrid nature, and legal relevance. This amendment has been instrumental in establishing a mechanism through which the e-commerce can be regulated, and their anti-competitive activities can be checked upon by the regulatory authorities. However, there are many pertinent issues that needs to be addressed as outlined in the previous part. Before this amendment, H&S agreements that violated the Act were only culpable for non-cartel infractions, but now they would be penalized for cartelization. Examining H&S cartel dynamics and anti-competitive effects helps attain these goals. So, while assessing business models, comprehensive evaluation of the arrangement is essential. Material and document inspection,

not an adverse presumption or legal fiction, should establish whether the regulation applies to individuals who are not engaged in the same or a similar trade. This amendment may cause inconvenience to an enterprise/association of enterprises/persons/association of persons who don't benefit from anti-competitive agreements. In addition, the term 'participates or intends to participate in the furtherance of such agreement' is not well-defined, which could lead to abuse of this clause. Associations within various industries may, for for example organize conferences where participants can engage in discussions regarding the challenges confronting their enterprises. Should specific participants within the industry, independently and without the awareness of the industry association, engage in anti-competitive agreements during these events, the industry association could find itself implicated for having orchestrated the event, thereby acting as a facilitator or 'hub'. This holds particular significance when engaging with third parties who merely serve as intermediaries or facilitators for the exchange of information, lacking any direct involvement in the cartel's structure. Whether or not a trade association's role in facilitating the exchange of commercially sensitive information by competitors through meetings constitutes 'participates or intends to participate in the furtherance of such agreement' in a cartel is not made clear by the Amendment.

It is suggested that incorporating 'actual intent' serves to elucidate a party's involvement in the promotion of a cartel, thereby preventing the erroneous attribution of cartel advancement to a party lacking such intention. This provision ought to be applicable solely when the actions of the businesses have been undertaken with the explicit intention of furthering the cartel. This would safeguard enterprises that did not engage in the collusion but simply created circumstances in which it could inadvertently take place. Consequently, this specific area warrants further examination, and the inclusion of 'express actual intention' should be integrated to ensure that this provision achieves its intended outcomes. Also, the provision to end the arrangements in the nature of 'H&S' Agreements has been included but use of the express words have been avoided which has caused ambiguity and has caused confusion. The advent of digitalization has introduced a variety of competitive challenges, prompting the need for action from regulatory bodies. Nonetheless, legislation that is ambiguous can hinder genuine collaboration and

cooperation among intermediaries, even in situations where such synergy would enhance efficiency or foster creativity. This particular type of legislation may be perceived as excessively stringent. This may lead to significant legal inconsistencies and extended legal conflicts. As a result, valuable resources could be diverted from more productive endeavors, such as fostering innovation. To address this issue, it is imperative that a definition of H&S be incorporated into the Act via an amendment, which should be articulated as follows:

"Indirect transmission of information between two entities engaged in horizontal competition at the supplier or retailer level, referred to as 'spokes', facilitated by another entity operating at a distinct level within the production or distribution chain, known as the 'hub'".

ENHANCING CORPORATE GOVERNANCE THROUGH BOARDROOM DIVERSITY: THE STRATEGIC IMPERATIVE OF GENDER INCLUSION

***Dr. Arti Aneja**

INTRODUCTION

"A boardroom without diverse voices is like a ship without a compass: adrift in a sea of missed opportunities."

Corporate governance, the framework by which an organization's values, guiding principles, and management practices are shaped, is crucial in establishing a corporate culture that aligns with the strategic objectives of a company. A vital aspect of effective corporate governance is the makeup of a company's board of directors, where diversity has become a crucial factor. Across the globe, there is a growing consensus among companies, governments, investors, and other stakeholders that diverse boards are more effective in overseeing management, driving innovation, and ensuring long-term sustainability.

In the realm of corporate governance, boardroom diversity—particularly gender diversity—has gained significant attention. Advocates for strong corporate governance and gender equality stress that empowering women to take on leadership roles is not only a matter of social justice but also a driver of economic growth. Companies that successfully integrate women into their leadership structures are perceived by shareholders, institutional investors, and corporate governance rating agencies as being better equipped to navigate the complexities of the global market.

A notable endorsement of this perspective comes from the International Corporate Governance[1] Network (ICGN), a coalition of institutional investors with assets exceeding US$70 trillion. The ICGN strongly advocates for gender diversity on boards, arguing that a well-balanced board,

* Assistant Professor, Faculty of Law, University of Delhi

1. International Corporate Governance Network (ICGN), "Gender Diversity on Boards: A View from Investors," ICGN Viewpoint, 2018, https://www.icgn.org/gender-diversity-boards.

composed of individuals with diverse experiences, expertise, and perspectives, is vital for sound governance and effective risk management.

Board diversity, defined broadly as the inclusion of women and other underrepresented groups on corporate boards, is increasingly recognized as a critical factor in strategic decision-making, governance, and risk oversight. Gender diversity, in particular, is not just about numbers; it is about recognizing and valuing the unique skills, insights, and potentials that both men and women bring to the table. Corporate boards that harness this diversity are better positioned to make informed decisions, foster innovation, and respond to the evolving demands of global stakeholders.

In the context of the rapidly changing global economy, the push for gender diversity on boards is not merely a trend but a necessity. Research[2] consistently shows that diverse boards lead to better financial performance, enhanced corporate reputation, and more resilient companies. As we move forward, it is imperative that corporate governance frameworks continue to evolve to embrace and promote diversity, ensuring that boards are composed of the most competent individuals with a wide array of experiences and viewpoints.

THE EVOLVING LANDSCAPE OF GENDER DIVERSITY ON CORPORATE BOARDS: INTERNATIONAL PATTERNS AND INDIA'S ADVANCEMENT.

Internationally,[3] the momentum for enhancing gender diversity within corporate boardrooms continues to gain traction. India has made significant strides through the Companies Act of 2013, reflecting a global movement in legislative and regulatory frameworks. This important legislation requires all publicly listed companies, as well as certain other specified classes of companies, to appoint at least one female director. This requirement emphasizes the growing acknowledgment of gender diversity as a crucial element of efficient corporate governance. Around the world, countries are adopting diverse approaches to bolster gender representation on boards. Some have implemented legislative quotas to ensure a minimum level of female participation, while others rely on moral persuasion, voluntary guidelines, or corporate governance codes. For instance, several nations have amended their corporate governance

2. Lynne E. Ford, Women and Politics: The Pursuit of Equality, 4th ed. (Cengage Learning, 2018).
3. Deloitte, "Women in the Boardroom: A Global Perspective," Deloitte Insights, 7th edition, 2022, https://www2.deloitte.com/global/en/pages/risk/articles/women-in-the-boardroom-global-perspective.html

codes to include provisions that require companies to disclose their gender diversity policies or set specific targets for board composition. These measures go beyond merely fulfilling quotas; they represent a broader acknowledgment of the substantial benefits that diverse leadership brings to companies and society at large. The global push[4] for greater female representation on boards is not solely about meeting numerical targets or advancing women's rights. It is driven by a growing understanding of the significant opportunities that are missed when the potential of women remains underutilized. Organizations that aspire to top-tier leadership recognize that achieving excellence necessitates a diverse array of perspectives, skills, experiences, and talents. Gender diversity, in this context, is seen as essential not only for ethical and social reasons but also for fostering innovation, enhancing decision-making, and driving long-term business success.

Recent studies and global reports consistently indicate that companies with gender-diverse boards tend to have better financial performance, higher levels of corporate governance, and greater resilience in the face of challenges. As such, the conversation around gender diversity is evolving from a focus on compliance to a strategic imperative that is integral to upcoming of corporate governance. In this day and age, gender diversity on corporate boards is not only a target but also a crucial factor in maintaining sustainable business practices and a foundation of modern corporate governance frameworks. The global momentum for enhancing gender diversity in corporate boardrooms continues to strengthen, with new data from 2023–2024 highlighting key developments in various countries. In Europe, for example,[5] several nations such as France, Italy, and Austria have taken significant strides, with more than 40% of board seats held by women in many companies. By sector, industries like communication services (43.7% female representation) have made the most progress, while sectors such as materials still lag behind with only 19.3% of women on boards.

In the U.S. and other developed markets, gender diversity initiatives have progressed, but

4. McKinsey & Company, "Diversity Wins: How Inclusion Matters," McKinsey Global Institute, May 2020, https://www.mckinsey.com/featured-insights/diversity-and-inclusion/diversity-wins-how-inclusion-matters.
5. European Institute for Gender Equality, "Gender Balance in Business Leadership," European Union, 2024, https://eige.europa.eu/publications/gender-balance-business-leadership-2023.

challenges remain. While companies with at least 30% of board seats occupied by women have seen increased shareholder engagement, many still fall short of the growing push for a 40% threshold. Countries like the U.K. and Canada are following a voluntary compliance model, where organizations are encouraged to set diversity targets and disclose their progress, as seen through corporate governance codes.

India's Companies Act of 2013 requires all listed companies to have at least one female director. This legislative framework positions India as a leader in Asia, recognizing gender diversity as an essential element of corporate governance. However, despite this mandate, the proportion of women on Indian corporate boards remains lower than in many developed markets, highlighting a need for continued focus on not just compliance, but also building a strong pipeline of female leaders.

In 2023–2024, these trends show that gender diversity is increasingly viewed not just as a compliance issue, but as a strategic advantage. Research consistently shows that companies with diverse boards tend to perform better financially and demonstrate higher resilience and governance standards. The global regulatory push continues to evolve, with a mix of legislative quotas, voluntary targets, and corporate transparency driving this shift toward more inclusive leadership. Internationally, several countries have adopted diverse frameworks and laws to enhance gender diversity in corporate boardrooms. These regulations range from mandatory quotas to voluntary guidelines aimed at boosting female representation.

1. European Union

The European Union (EU) has been leading the way in promoting gender diversity on boards. In November 2022, the EU passed the Women on Boards Directive, which mandates that listed companies must ensure that at least 40% of non-executive director positions are held by women by mid-2026. Companies that fail to meet these quotas must prioritize equally qualified female candidates during the hiring process and report on their gender diversity statistics publicly.

---

6. Catalyst, "Women on Corporate Boards: Quick Take," Catalyst, 2024, https://www.catalyst.org/research/women-on-corporate-boards/.
7. European Commission, "Boardroom Gender Balance Directive: Achievements and Future Goals," 2023, https://ec.europa.eu/commission/presscorner/detail/en/IP_23_2033.

France and Norway have been notable leaders, with France mandating 40% of board seats for women since 2011.

2. Norway

In 2003, Norway[8] became the first country to implement a mandatory gender quota, requiring **40% female representation** on corporate boards for public limited companies. This bold move has since set the standard for many other European nations.

3. Germany

Germany implemented its Gender Quota Law in 2015, mandating[9] that at least **30% of supervisory board positions** in the largest publicly traded companies be filled by women. In 2021, Germany extended this requirement to executive boards, requiring companies with more than three members to have at least one female executive.

4. United Kingdom

The **U.K.** takes a different approach[10], opting for voluntary targets rather than mandatory quotas. The Hampton-Alexander Review, initiated in 2016, aimed to achieve 33% female representation on boards of FTSE 350 companies by 2020.The U.K. governance code requires annual disclosure of gender diversity policies, promoting greater accountability.

5. United States

The U.S.[11] does not have federal quotas for gender diversity on boards. However, **California** was the first state to mandate female representation on corporate boards. Senate Bill 826, passed in 2018, requires publicly traded companies headquartered in California to have at least one female director. In addition to California, states like **Washington** and **New York** have introduced similar gender diversity laws or disclosure requirements, while other states are

---

8. International Finance Corporation (IFC), "Gender Diversity and Corporate Boards: Recent Developments," World Bank Group, March 2024, https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/gender+at+ifc/resources/gender-diversity-and-corporate-boards-2023.
9. Catalyst, "Women on Corporate Boards: Quick Take," Catalyst, 2024, https://www.catalyst.org/research/women-on-corporate-boards/.
10. UK Government, "Corporate Governance and Gender Diversity Targets," Financial Reporting Council, February 2024, https://www.frc.org.uk/corporate-governance/board-diversity-targets.
11. U.S. Securities and Exchange Commission (SEC), "Enhancing Board Diversity Disclosures," SEC Release No. 34-92703, July 2023, https://www.sec.gov/rules/proposed/2023/34-92703.pdf.

moving towards adopting comparable frameworks.

6. Australia

Australia follows a "comply or explain" approach, where companies listed on the Australian Securities Exchange (ASX)[12] are encouraged to adopt a 30% gender diversity target for board composition. The ASX Corporate Governance Council's principles mandate that companies disclose their gender diversity practices and either meet the target or explain why they have not.

7. India

Under the Companies Act of 2013, India mandates that publicly listed and certain other classes of companies appoint at least one female director. Despite this requirement, female board representation in India still hovers around 17-18%, far below the levels seen in European countries. However, India's legislative framework is seen as a critical step toward advancing gender diversity in a traditionally male-dominated business environment.

8. Canada

Canada's[13] approach is also centered around transparency. **The Canada Business Corporations Act** (CBCA) was amended in 2019 to require companies to disclose the number and percentage of women on their boards and in executive positions. While there are no federal quotas, some provinces like **Quebec** have adopted laws that require gender parity on the boards of public sector organizations.

OTHER GLOBAL INITIATIVES

Global organizations like the World Economic Forum (WEF) and International Finance Corporation (IFC) advocate for gender diversity through voluntary codes and best practice guidelines, in addition to national laws. Many multinational corporations are also setting their internal targets for gender diversity, particularly as research consistently shows that diverse boards perform better in terms of financial returns and governance.

These international frameworks and laws highlight that while approaches to gender diversity

12. International Finance Corporation (IFC), "Gender Diversity and Corporate Boards: Recent Developments," World Bank Group, March 2024, https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/gender+at+ifc/resources/gender-diversity-and-corporate-boards-2023.
13. Spencer Stuart, "Canada Board Index 2023," Spencer Stuart Research, November 2023, https://www.spencerstuart.com/research-and-insight/canada-board-index-2023.

vary, there is a growing global consensus that more female representation on corporate boards is essential for better corporate governance and long-term business success

CHALLENGES TO GENDER DIVERSITY IN BOARDROOMS

The persistent gender disparity on corporate boards is influenced by a complex interplay of structural, cultural, and social factors that continue to impede the progress of women into top leadership roles. One of the most significant barriers is the entrenched preference for hiring board members who reflect the existing demographic—primarily male. This phenomenon, often described as "homosocial reproduction," perpetuates a cycle where women are systematically excluded from board opportunities, leading to a lack of board experience, which in turn diminishes their chances of being considered for future positions. This self-reinforcing loop is one of the major obstacles to achieving gender diversity in boardrooms globally.

Corporate culture in many countries further exacerbates this challenge, particularly in environments where work-life balance policies are inadequate or non-existent. In such cultures, women, especially mothers, face significant challenges in balancing their professional and personal responsibilities. The lack of supportive family policies, such as parental leave and flexible working hours, forces many women to take time off or reduce their work commitments, which is often perceived as a lack of dedication to their careers. This perception can unjustly disqualify them from consideration for executive roles, reinforcing the gender disparity at the board level.

Childcare remains a significant issue globally, with costs, availability, and quality varying widely. In many areas, the lack of affordable and accessible childcare options burdens women, who are still predominantly seen as the primary caregivers. This expectation creates a "double burden" for women, who must juggle demanding work schedules with family responsibilities, a challenge that is particularly pronounced in Asia. According[14] to recent studies, nearly 50% of Asian business leaders acknowledge that the dual demands of work and family are a major obstacle to women's career advancement. The expectation that senior managers be available at

14. International Labour Organization (ILO), “Childcare and Working Families: New Evidence and Policy Approaches for Better Outcomes,” ILO Report, 2023, https://www.ilo.org/global/publications/reports/WCMS_2023.pdf.

all times further compounds this issue, making it difficult for women to ascend to or remain in top leadership positions.

In addition to structural barriers, individual and social factors contribute to the gender gap in boardrooms. Women often face internal challenges such as reluctance to self-promote, lower ambition compared to men, and a scarcity of female role models in leadership positions. Networking, which is crucial for career advancement, also presents challenges, as many women find themselves excluded from informal networks that are dominated by men. In countries like Korea, Japan, and India, societal expectations continue to place a disproportionate burden on women to fulfill family obligations, leading to higher rates of voluntary employment departures among women in these regions.

Social norms and perceptions surrounding gender roles significantly contribute to perpetuating the gender gap. Traditional views that assign men to the role of providers and women to the role of primary caregivers remain deeply ingrained in many societies. While these views are slowly evolving, with more women taking on provider roles, the shift presents additional challenges for women seeking to balance professional aspirations with familial responsibilities. The persistent societal expectation that women should be the primary caregivers hinders their full participation in the workforce and pursuit of leadership opportunities.The issue of childcare remains a critical global challenge, with many women unable to afford or access quality childcare services. This limitation significantly restricts women's ability to remain in the workforce, pursue career advancement, and obtain board positions. In countries with underdeveloped childcare infrastructure, this impact is more pronounced, resulting in lower female labor force participation and fewer women in leadership roles.In addition to these challenges, recent data highlights the ongoing disparities in boardroom diversity. Despite efforts to increase female representation on boards, progress remains slow. A 2023 Deloitte[15] report revealed that women hold only 19.7% of board seats globally, showing slow progress towards gender parity. This underscores the need for more comprehensive strategies to address barriers to gender diversity

15. Deloitte, “Women in the Boardroom: A Global Perspective,” 7th edition, 2023, https://www2.deloitte.com/global/en/pages/risk/articles/women-in-the-boardroom-global-perspective.html.

in boardrooms. To overcome these challenges, a multifaceted approach is required, one that includes not only legislative and policy changes but also cultural shifts within organizations and society at large. Companies need to actively promote gender diversity by implementing mentorship and sponsorship programs, creating more flexible work environments, and addressing unconscious biases in recruitment and promotion processes. Additionally, gender diversity should be seen as a strategic imperative that can drive innovation, improve decision-making, and enhance corporate performance, not just a compliance issue.

In conclusion, while significant strides have been made in recent years to promote gender diversity on corporate boards, many challenges remain. Addressing these challenges requires concerted efforts from governments, corporations, and society to create an environment where women can thrive in leadership roles. Only through such comprehensive efforts can the full potential of gender diversity be realized, leading to more effective governance and better business outcomes.

THE EVOLUTION OF DIVERSITY IN INDIAN CORPORATE BOARDROOMS

India has been making strides in promoting gender diversity on corporate boards, with a series of legislative and regulatory measures aimed at ensuring better female representation. The Companies Act of 2013,[16] Section 149(1), mandates that specific types of companies, including all listed companies and certain public companies meeting defined criteria, must appoint at least one female director. Companies with a paid-up share capital of Rs. 100 crore or more or a turnover of Rs. 300 crore or more, as per Rule 3 [17] of the Companies (Appointment and Qualification of Directors) Rules, 2014, can have women as independent, non-executive, or executive directors, offering various pathways to board participation.

The Securities and Exchange Board of India (SEBI) [18] has implemented rigorous mandates to promote boardroom diversity, particularly through its Listing Obligations and Disclosure Requirements (LODR) regulations. Effective April 1, 2019, SEBI mandated that the top 500

16. The Companies Act, 2013, Section 149(1), India Code (2023), https://www.indiacode.nic.in/handle/123456789/2089?view_type=browse&sam_handle=123456789/1362.
17. Ministry of Corporate Affairs, Companies (Appointment and Qualification of Directors) Rules, 2014, Rule 3, https://www.mca.gov.in/Ministry/pdf/CompaniesRules_2014.pdf.
18. Securities and Exchange Board of India (SEBI), SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, https://www.sebi.gov.in/legal/regulations/jan-2020/sebi-listing-obligations-and-disclosure-requirements-regulations-2015-last-amended-on-january-8-2020-_37269.html.

listed entities, as determined by market capitalization, appoint at least one independent woman director. This requirement was subsequently expanded to the top 1000 listed companies as of April 1, 2020. [19] These regulations, alongside Clause 49 of the previous listing agreement, underscore the importance of achieving a balanced board composition. Specifically, they stipulate that each board must include a minimum of one woman director and ensure that at least 50% of its members are non-executive directors. This initiative reflects a broader commitment to enhancing gender diversity within corporate governance structures.

However, the journey towards gender equality in Indian boardrooms is far from complete. As of December 2014,[20] women occupied only 8.9% of board positions across Indian companies. Specifically, out of approximately 10,185 directors in 1,468 companies listed on the National Stock Exchange (NSE), only 908 were women. This significant underrepresentation reflects deeper structural and cultural challenges that still need to be addressed. While some companies, such as Apollo Hospitals, Zomato, Cummins India, and Nestle India, have taken meaningful steps to increase female representation on their boards, the overall progress has been slow. Non-compliance with these regulations can result in penalties, as demonstrated in the 2016 case of *Soumag Electronics Limited vs. the Deputy Registrar of Companies,*[21] where the company was fined ₹50,000 for failing to appoint a woman director by the required deadline.

Notwithstanding these challenges, there has been a pronounced shift towards enhanced gender diversity within corporate India. Recent projections[22] suggest that the proportion of women in white-collar jobs could rise from 35% in 2022 to 38% in 2024. Companies like Titan have been proactive in improving their gender diversity ratios, with broader initiatives focusing on diversity, skill development, and better working conditions likely to contribute to increased female participation across various sectors. A more in-depth look at recent data further

---

19. SEBI, SEBI (Listing Obligations and Disclosure Requirements) (Amendment) Regulations, 2018, Notification No. SEBI/LAD-NRO/GN/2018/10, https://www.sebi.gov.in/legal/regulations/apr-2018/sebi-listing-obligations-and-disclosure-requirements-amendment-regulations-2018_38828.html.
20. EY, "Diversity in India's Corporate Boardrooms," EY Global Report, October 2023, https://www.ey.com/en_in/diversity-inclusion/boardroom-diversity-india-report-2023.
21. Soumag Electronics Ltd. v. Deputy Registrar of Companies, (2016) SCL 50 (India).
22. Deloitte, "Women in the Boardroom: A Global Perspective," 7th Edition, 2023, https://www2.deloitte.com/global/en/pages/risk/articles/women-in-the-boardroom-global-perspective.html.

underscores this positive trend. An October 2023 report by EY indicates that women's representation on Indian corporate boards has continued to grow, albeit gradually. From just 6% in 2013, the proportion of women on boards increased to 13% in 2017 and reached 20% by 2024. This steady progress highlights a growing recognition of the value that diverse perspectives bring to the boardroom. The report also reveals that women now hold 22% of non-executive positions and 9% of executive positions in India's top companies. These figures, while still below parity, represent a significant improvement over the past decade.

Recent studies underscore the significant advantages of enhancing gender diversity on corporate boards. ICICI[23] Bank, a prominent private sector bank in India, exemplifies this trend by actively promoting women to pivotal leadership positions within its board of directors. This strategic emphasis on inclusivity has cultivated a more dynamic and innovative boardroom environment, yielding positive outcomes in governance and strategic decision-making processes. ICICI Bank's dedication to gender diversity is evident not only in its leadership composition but also in its overarching corporate culture, which prioritizes diversity and inclusion across all organizational levels.Similarly, Infosys,[24] a leading global technology and consulting firm, has made gender diversity a strategic priority within its boardroom. By appointing women to key roles, Infosys demonstrates its commitment to inclusive leadership. This focus on diversity has not only bolstered the company's reputation as an avant-garde employer but also contributed to its sustained success in a competitive global market. Infosys's initiatives highlight the broader benefits of gender diversity, including enhanced decision-making capabilities, increased innovation, and strengthened organizational resilience. Likewise, Wipro,[25] another major player in the IT sector, has been recognized for its efforts to promote gender diversity within its leadership. Wipro has consistently worked to increase female representation on its board, with women holding critical positions that influence the company's strategic direction. This commitment to diversity has been instrumental in Wipro's

23. ICICI Bank, Annual Report 2023-24, https://www.icicibank.com/aboutus/annual-report.page.
24. Infosys, Annual Report 2023-24, https://www.infosys.com/investors/reports-filings/annual-report.html.
25. Wipro, Annual Report 2023-24, https://www.wipro.com/investors/annual-reports/.

ability to navigate the complexities of the global market, reinforcing the idea that diverse leadership teams are better equipped to address the challenges and opportunities of today's business environment. Despite these successes, there remains a significant gap between policy and practice. While regulations like those mandated by SEBI have laid the groundwork for increased female representation, achieving true gender parity in Indian boardrooms requires a more comprehensive approach. This includes addressing cultural and societal norms that have historically limited women's participation in leadership roles. For instance, the persistence of patriarchal attitudes and the lack of supportive infrastructure, such as affordable childcare and flexible working conditions, continue to pose significant barriers for women aspiring to board positions.

Moreover, the challenge of unconscious bias in the selection process for board positions cannot be overlooked. Even when women are qualified, they may be overlooked in favor of male candidates due to entrenched biases that favor men as the default choice for leadership roles. Addressing these biases requires a concerted effort from both the private sector and government, including the implementation of more rigorous diversity training programs and the promotion of mentorship opportunities that can help women navigate the path to boardroom leadership.

Looking ahead, the path to greater gender diversity in Indian boardrooms is likely to be shaped by a combination of regulatory enforcement, corporate commitment, and societal change.. While considerable work remains, the progress achieved thus far provides a solid foundation for future developments. By continuing to prioritize diversity and inclusion, Indian companies can unlock the full potential of their leadership teams, driving better governance, fostering innovation, and ultimately enhancing their competitiveness in the global market. While India has made notable progress in promoting gender diversity on corporate boards, the journey is far from complete. Ongoing efforts are essential to bridge the gap between policy and practice, ensuring that more women have the opportunity to contribute their invaluable perspectives and skills at the highest levels of corporate leadership.As Indian companies continue to evolve and adapt to the demands of a rapidly changing world, embracing gender diversity will be key to their success in the years to come.

THE FACTORS HINDERING GENDER DIVERSITY ON INDIAN BOARDS

Despite global and local efforts to promote gender diversity, corporate boardrooms continue to be largely male-dominated, and several factors contribute to this persistent disparity. Understanding and addressing these factors is critical for fostering a more inclusive and diverse corporate environment.

1. **Lack of Proactive Measures and Awareness:** Many businesses still do not recognize the importance of gender diversity as a critical component of corporate governance. The advantages of diverse boards—such as enhanced decision-making, improved risk management, and increased innovation—are often overlooked or undervalued. This lack of awareness leads to minimal corporate action and few board meetings that prioritize gender diversity. As a result, gender diversity is often sidelined as an optional or secondary concern rather than a strategic priority.
2. **Unconscious Bias and Reluctance to Change:** Boards may be hesitant to appoint directors who challenge their existing beliefs or bring different perspectives, particularly when it comes to traditional gender roles. Unconscious biases—ingrained beliefs and attitudes that subtly influence decision-making—often lead to the exclusion of women from board positions. These biases can manifest in various ways, such as preferring candidates who share similar backgrounds, experiences, or worldviews, thereby perpetuating the status quo and limiting diversity.
3. **Reliance on Personal Networks:** The recruitment of board members is often driven by informal processes and personal networks, which can exclude qualified female candidates. A survey of SGX-listed[26] companies revealed that 89% of these businesses rely heavily on personal connections for board appointments, with only 42% utilizing formal search and nomination

26. SGX, "Board Diversity and Inclusion: Survey on SGX-Listed Companies," Singapore Exchange Report, August 2021, https://www.sgx.com/regulation/corporate-governance/board-diversity.

processes. This reliance on personal networks not only narrows the pool of potential candidates but also reinforces existing gender imbalances, as men in senior positions are more likely to recommend other men.

4. **Preference for Traditional Qualifications:** Board selection criteria often emphasize traditional qualifications, such as prior board experience or expertise in industries historically dominated by men, like finance, engineering, or technology. This focus on conventional qualifications disproportionately disadvantages women, who may possess valuable skills and perspectives but lack the specific experience traditionally valued by boards. As a result, the pipeline of female candidates remains limited, further entrenching gender disparities.

5. **Challenges in the Female Talent Pipeline:** The pool of female candidates for board positions is constrained by various factors, including societal expectations and the disproportionate burden of household responsibilities. Many women are compelled to choose flexible work arrangements or limit their professional ambitions to balance work and family life. Additionally, some women may be less likely to seek board positions due to self-doubt or reluctance to advocate for themselves, which contrasts with the more aggressive approaches often taken by their male counterparts. This cautiousness, combined with the absence of strong female role models in leadership positions, perpetuates the cycle of underrepresentation.

6. **Societal and Cultural Barriers:** Persistent societal norms and cultural attitudes continue to hinder gender diversity in the workplace. In many cultures, women are still primarily seen as caregivers, with men viewed as the primary breadwinners. This deeply ingrained gender division often discourages women from pursuing leadership roles and results in fewer women being considered for executive positions. Furthermore, the lack of supportive family policies, such as affordable childcare and flexible working hours,

exacerbates the challenges women face in balancing professional and personal responsibilities.

7. **Global Challenges and COVID-19 Impact:** The COVID-19 pandemic has exacerbated existing gender inequalities, particularly in the corporate sector. The economic downturn that followed the pandemic disproportionately affected women, who were more likely to lose their jobs or take on increased caregiving responsibilities during lockdowns. The latest Global Gender Gap Report (2023) [27] indicates that, at the current rate of progress, it will take approximately 131 years to close the global gender gap, a slight improvement from previous estimates but still a formidable challenge. The pandemic has also introduced new challenges, making it even more difficult to create inclusive and thriving corporate environments.

SOLUTIONS AND PROGRESS TOWARDS GENDER DIVERSITY

While the challenges to achieving gender diversity are significant, several initiatives and solutions have been proposed and implemented globally to address these issues:

1. **Legislative Measures and Quotas:** Several countries have implemented gender quotas for boardrooms. Norway[28] led the way in 2008, requiring at least 40% female representation on public company boards. Other countries like France, Germany, and Spain have followed suit. In India, the Companies Act of 2013[29] mandates at least one female director for certain companies, and SEBI requires at least one independent woman director for the top 1,000 listed companies.
2. **Transparency and Reporting Requirements:** To encourage gender diversity, some countries require companies to disclose their board composition and

27. The World Economic Forum, "Global Gender Gap Report 2023," World Economic Forum Report, April 2023, https://www.weforum.org/reports/global-gender-gap-report-2023/.
28. Norway Public Companies Act, Section 6-11a (Amendments 2008), Norway Code (2008), https://www.regjeringen.no/en/topics/business-and-industry/compulsory-gender-balance-on-company-boards/id494414/.
29. The Companies Act, 2013, Section 149(1), India Code (2023), https://www.indiacode.nic.in/handle/123456789/2089?view_type=browse&sam_handle=123456789/1362.

diversity policies. For example, the UK's Financial Reporting Council [30] recommends setting measurable objectives and reporting on progress. Australia has similar requirements.[31]

3. **Corporate Governance Reforms:** Beyond legislative measures, there has been a growing emphasis on broader corporate governance reforms aimed at promoting diversity. These include encouraging companies to adopt formal search and nomination processes that prioritize diversity, as well as providing training to board members on unconscious bias and inclusive leadership. Additionally, some companies are implementing mentorship and sponsorship programs to support the development of female leaders and expand the pipeline of potential board candidates.
4. **Economic and Social Incentives:** Gender diversity is not only a moral imperative but also a business advantage. Research shows that companies with diverse boards tend to perform better financially, with higher returns on equity and improved risk management. As a result, investors are increasingly valuing gender diversity, and companies that prioritize it are likely to benefit from stronger relationships with stakeholders and enhanced corporate reputation. Studies have found that gender-diverse boards are more likely to consider a wider range of perspectives, leading to better decision-making and innovation.
5. **Promoting Work-Life Balance and Family-Friendly Policies:** To support women in the workforce, companies are increasingly adopting policies that promote work-life balance, such as flexible working arrangements, parental leave, and childcare support. These policies help retain female talent and foster a more inclusive and supportive corporate culture. Companies like IBM and Unilever have been recognized for their efforts to create family-friendly

30. Financial Reporting Council, "UK Corporate Governance Code 2018," Financial Reporting Council Report, July 2018, https://www.frc.org.uk/directors/corporate-governance-and-stewardship/uk-corporate-governance-code.
31. Australian Government, "Corporate Governance Principles and Recommendations, 4th Edition," Australian Securities Exchange Corporate Governance Council Report, February 2019, https://www.asx.com.au/regulation/corporate-governance-council/corporate-governance-overview.

workplaces, which attract and retain top female talent.

CASE STUDIES AND RECENT DEVELOPMENTS IN INDIA

India has seen some progress in improving gender diversity on corporate boards, although challenges remain. Companies like Apollo Hospitals, Zomato, and Titan have made significant strides in increasing female representation at the board level. For example, Zomato became one of the first Indian unicorns to appoint a woman as its CEO, while Apollo Hospitals has consistently maintained a strong gender balance on its board. Recent data from 2024 indicates that the percentage of women on Indian corporate boards has risen to 20%, a marked improvement from previous years. This increase can be attributed to both regulatory pressure and a growing recognition of the value of diversity in leadership. However, there is still a long way to go, particularly in ensuring that women hold executive and decision-making roles rather than merely serving as token representatives .One notable case study is Infosys, [32] which has taken proactive steps to improve gender diversity by implementing targeted initiatives, such as mentorship programs and leadership development for women. As a result, Infosys has seen an increase in the number of women in senior leadership positions, contributing to a more diverse and dynamic boardroom environment.

CONCLUSION:

The journey towards achieving gender diversity in Indian corporate boardrooms has been a complex and challenging one, marked by significant regulatory interventions, evolving societal attitudes, and ongoing efforts by businesses to embrace more inclusive practices. Despite the progress made over the past few decades, gender diversity remains an area where much work is still needed to ensure that women are fully represented and empowered to contribute to corporate leadership at the highest levels. India's Companies Act of 2013 has been instrumental in promoting gender diversity on corporate boards. The mandatory requirement for certain companies to appoint at least one female director is a significant step forward, reflecting the government's recognition of the importance of women's representation in corporate governance. Additionally, SEBI's regulations have further reinforced this mandate by

32. Infosys, Annual Report 2023-24, https://www.infosys.com/investors/reports-filings/annual-report.html.

expanding the requirement to include independent women directors for the top 1000 listed entities. While these legal provisions have undoubtedly increased the visibility of women in boardrooms, the numbers still fall short of achieving true gender parity. Despite these regulatory efforts, the representation of women on Indian corporate boards remains limited. As of 2022, women held only 18% of board positions, with even fewer occupying executive roles. This gap highlights the persistent challenges that women face in ascending to leadership positions. Cultural norms, unconscious biases, and structural barriers continue to impede women's progress, creating an environment where the full potential of female leaders is not realized.

One of the key factors contributing to poor gender diversity is the reluctance of many businesses to proactively address the issue. There is often a lack of awareness or appreciation for the benefits that gender diversity can bring to an organization. Companies that fail to recognize the value of diverse perspectives may hold fewer board meetings dedicated to this issue, resulting in limited corporate action. Additionally, the reliance on personal networks for board appointments further exacerbates the problem, as it perpetuates a cycle where women are often overlooked in favor of male candidates who are more familiar to existing board members. The challenge is not just about getting women into boardrooms but ensuring they thrive and contribute meaningfully once there. Women frequently encounter hurdles such as balancing professional and personal responsibilities, particularly in a culture that often expects them to prioritize family over career. The lack of supportive family policies and affordable childcare options makes it difficult for many women to pursue demanding leadership roles. This situation is further compounded by societal expectations that still largely assign caregiving responsibilities to women, limiting their opportunities for career advancement. Moreover, there is a significant gap in the pipeline of female talent, which is partly due to the limited opportunities for women to gain the experience and skills needed to qualify for board positions. Women often face higher scrutiny and are expected to possess more qualifications than their male counterparts, creating additional barriers to entry. The absence of female role models and mentors in leadership positions further discourages women from aspiring to board roles, perpetuating a cycle of underrepresentation.

Despite these challenges, there is a growing recognition among Indian companies of the need to improve gender diversity. Forward-thinking organizations are beginning to implement policies and practices that support the advancement of women, such as targeted recruitment initiatives, leadership development programs, and flexible work arrangements. Companies like Apollo Hospitals, Zomato, Cummins India, and Nestle India have made notable strides in increasing the number of women on their boards, setting an example for others to follow. The benefits of gender diversity extend beyond moral and ethical considerations. Research has consistently shown that companies with diverse boards tend to perform better financially, exhibit stronger governance, and are better equipped to navigate complex business environments. Gender-diverse boards bring a wider range of perspectives and experiences to the table, enhancing decision-making processes and fostering innovation. From an agency perspective, greater gender diversity can also strengthen board independence, reduce agency costs, and ultimately lead to improved business outcomes. The global context further underscores the importance of gender diversity. Internationally, many countries have adopted various approaches to address gender imbalance on corporate boards, ranging from legislative quotas to voluntary targets and corporate governance codes. These efforts have yielded varying degrees of success, but they all point to a common understanding: gender diversity is not just a matter of social justice but a strategic business imperative. As India continues to integrate with the global economy, it is essential for Indian companies to align with these international best practices to remain competitive and relevant.

The COVID-19 pandemic has added a new dimension to the discussion on gender diversity. The economic crisis triggered by the pandemic has disproportionately affected women, exacerbating existing inequalities and threatening to reverse the progress made in recent years. However, this crisis also presents an opportunity for companies to rethink their approach to diversity and inclusion. By implementing policies that support gender equality, such as remote work options, flexible hours, and targeted support for working mothers, companies can build a more resilient and inclusive workforce. Looking ahead, the path to achieving gender diversity in Indian corporate boardrooms requires sustained commitment and action from all stakeholders.

Companies must go beyond compliance with regulatory requirements and actively seek to create an inclusive culture that values and leverages the contributions of women. This involves not only recruiting more women to boards but also ensuring they have the support and resources needed to succeed in these roles. In conclusion, gender diversity in Indian corporate boardrooms is not just a goal to be achieved but an ongoing process that requires continuous effort and adaptation. While significant progress has been made, particularly through legislative measures, there is still a long way to go to achieve true gender parity. The benefits of a diverse boardroom are clear, and the onus is on businesses, regulators, and society as a whole to work together to overcome the barriers that continue to hold women back. By embracing gender diversity, Indian companies can unlock new opportunities for growth, innovation, and improved governance, positioning themselves for success in an increasingly competitive global market.

DATA PRIVACY & SECURITY VIS-A-VIS THE DIGITAL PERSONAL DATA PROTECTION ACT, 2023: LOCATING THE MANDATE OF PUTTASWAMY JUDGEMENT AND THE WAY AHEAD

***Dr. Ashok P. Wadje**

INTRODUCTION

The Hon'ble Supreme Court in Justice (Retd.) K.S. Puttaswamy vs. Union of India[1] in the year 2017 pronounced an important judgment declaring 'Right to Privacy 'as Fundamental Right, guaranteed under Article 21 of the Indian Constitution, which is crucial and significant step in the light of two reasons: a) 'Privacy 'for the first time, ever since the inception of the Indian Constitution, has been declared as the fundamental right by nine Judge bench judicial decision by the Supreme Court in Puttaswamy case and b) it has paved way to develop the jurisprudence of informational privacy in wake of proliferation of the digital technologies. The judgment was delivered in relation to the introduction of the Aadhar System[2] of the government, the UIDA[3] which enables the government to collect, maintain, retain and retrieve the personal and sensitive data of the individuals in electronic form. Before discussing the legal validity of the Aadhar judgement, the apex court sought to discuss first, the nature of 'right to informational privacy' vis-a-vis Fundamental rights guaranteed under the Indian constitution, in a petition moved by Justice (Retd.) K.S. Puttaswami, [4]followed by consideration of litigation pertaining to the constitutional challenge to the Aadhaar scheme of the central government, wherein the apex court upheld the constitutional validity of the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016[5].

However, mere introduction of the privacy as a fundamental right will not provide solution to the

---

* Associate Professor of Law Associate Dean, Maharashtra National Law University, Aurangabad.

1. AIR 2017 SC 4161
2. UIDA, https://uidai.gov.in/ (last visited on September 20, 2024)
3. The Unique Identification Authority of India
4. Writ Petition (Civil) No. 494 of 2012
5. Pronounced on 26th September, 2018

problems surrounding two important concerns of the legal fraternity:

a) Data Privacy and

b) Data Security

It will not be a cakewalk given the fact that the information of the citizens is sine qua non for the discharge of essential duties and welfare schemes by the State and providing of commercial and non-commercial services by the non-State entities in the era of E-Commerce and E-Governance. Finding of a balance and suitable approach in the era captured by the digital technologies and its usage in the form of e-Gvoernance and e-Commerce and at the same time maintaining the security of data has been the major concern for the legal fraternity. Moreover, the Supreme Court failed to define the counters of right to privacy and areas serving limitation on the State and non-State entity has also been not laid down. So, amidst the chaotic state of affair, there is lack of clarity as to balancing of the State interest and individual interest in the privacy jurisprudence, which the this paper will delve into. Furthermore, for time and again the Indian government had been trying to bring a robust Data Protection Law in India on the touchstones of the European General Data Protection Regulations which is considered be one of the strongest and exhaustive code on the data protection in the European Union.[6] The job of enactment of data protection law in India got expedited, ever since the judicial pronouncement of the apex court in Puttaswami case. Several drafts came in public for its consultation, including the consultations with the civil society members who were critical about the brining in place, a robust data protection law in India.[7] Finally, after a detailed deliberations in the public life, inviting suggestions and consultations on the proposed Law, the Indian Parliament enacted the Digital Personal Data Protection Act, 2023 which seeks to protect the personal data of the individuals, by acknowledging the need to protect the data of the individuals. It would be pertinent to know how far the Act of 2023, the rules of which are yet to be released, will protect the privacy of the individual in the digital world. Furthermore, it would be interesting to see,

---

6. Ben Wolford, GDPR.EU, What is GDPR, the EU's new data protection law? *available at:* https://gdpr.eu/what-is-gdpr/ (last visited on September 20, 2024)
7. Apoorva Mandhani, Civil Society Releases Draft Model Law On Privacy And Data Protection, LiveLaw.in, *available at:* https://www.livelaw.in/civil-society-releases-draft-model-law-on-privacy-and-data-protection-launches-community-project-saveourprivacy/ (last visited on September 20, 2024)

considering the controversial nature of the

It would be difficult to look into the post-Puttaswamy ramifications without appreciating or understanding the background of how we have come to concern of information privacy as fundamental right and how new digital technologies are posing or will pose threat to the data security and privacy.

A QUEST FOR THE PRIVACY

The Indian Society and its citizens, ever since the inception of the Constitution of India, 1950 were struggling for their natural due - the natural, fundamental and human 'right to privacy ' which could be ensured in 2017 by the Supreme Court of India in Puttaswamy Case. The credit for this goes to the complex nature of and the constant use of the digital technologies by the State and non-State entities. In the absence of the guarantee of the privacy and in the garb of the advantages that the Information Technology offers, the privacy, autonomy, choices and exclusivity of the individuals is getting compromised with. If this right to be read and implemented as a fundamental right, ultimately it is the society in general and individuals in particular will be the beneficiary of the said interpretation. The societal interest is getting damaged under the garb of state sovereignty, security and integrity, resulting in electronic surveillance on the citizens and under the garb of offering of best and affordable services in the age of Internet to the citizens by the private entities, as opposed to the idea of 'privacy'.

The *right to privacy,* as has been discussed above, taken seriously at the International forum, including the Universal Declaration of Human Rights, 1948[8] which defines it as follows:

> *No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.*

The International Covenant on Civil and Political Rights, 1966[9] also codifies similar provision

8. Article 12

to that effect and concerns the members states to recognise and implement the same in the legal system. Some of the prominent legal systems like United States, although right to privacy has not been explicitly provided in the US Constitution, however, in *Griswold vs. Connecticut*[10] the US Supreme Court held that the right to privacy could be inferred from the guarantees provided in the US Bill of Rights and accordingly they can be read in First, Third, Fourth, Fifth, Ninth and Fourteenth Amendments to the US Constitution. [11] Furthermore, the USA has followed a sectoral approach in terms of legislations giving effect to the right to privacy in the domain of the subject matter of that particular enactment. [12] In the United Kingdom, the Human Rights Act, 1998 includes right to privacy on the similar lines of the Universal Declaration of Human Rights, 1948 and the International Covenant on Civil and Political Rights, 1966.

It is notable that the right to privacy in any of these jurisdictions or jurisprudences has not been evolved in the light of developments in Information and Communications Technologies. They have been evolved either as a part of the criminal justice system or family laws or personal laws. The journey of right to privacy in India has not been a cakewalk and has seen several ups and downs in judicial pronouncements making it difficult for the right to find its place in the Indian legal system. The Constitution of India guarantees human rights as fundamental rights in Part-III from Article 12-35. In none of the Articles in the Part-III, there has been a specific mention of the right to privacy.

The Supreme Court pronouncements in India, in *M P Sharma vs. Satish Chandra*[13] and *Kharak Singh vs. State of Uttar Pradesh*[14] has negated the notion of right to privacy from finding its place in the scheme of Fundamental Rights in Part-III of the Indian Constitution. However, there are some judgements of smaller bench, such as, *Gobind vs. State of Madhya Pradesh*,[15] *R. Raj Gopal vs. State of Tamil Nadu,*[16] and *Poeple's Union for Civil Liberties vs. Union of India*[17] who have

9. Article 17
10. (1965) 381 U.S. 479
11. Genre for Communications Governance, NLU, Delhi, available at: https://privacylibrary.ccgnlud.org/case/griswold-vs-connecticut
12. The California Consumer Privacy Act, 2018
13. (1954) SCR 1077
14. (1964) 1 SCR 332
15. (1975) 2 SCC 148

brought the right to privacy within the ambit of the Part-III. Furthermore, In *T. Sareetha vs. T. Venkata,*[18] the right to bodily privacy was recognised in the context of matrimonial law. However, later the Supreme Court of India in *Saroj Rani vs. Sudarshan Kumar Chadda,* [19] overruled the judgement of the A.P. High Court of T. Sareetha vs. T. Venkata.

It was in 2017, the judgement of the Supreme Court in Justice *K.S. Puttaswamy vs. Union of India,*[20] the included and read 'right to privacy' in Article 21 of the Constitution of India. However, the judgement is being criticised for losing an opportunity, by the apex court, to lay down the parameters of both the right and the standards which protect it. Further, it was understood that, while not defining the contours of privacy is justifiable in the sense that the notions of privacy are changing at lightening speed, but not laying down the standards was indeed a mistake that needs to be corrected as soon as possible[21].Having said that the judgement paved a way for the new ear of legal system wherein legal principles will be analysed in the light of privacy as a part of fundamental right. The judgement of the Supreme Court in Puttaswamy, which has been delivered in the light of 'informational privacy', will be a catalyst, and game changer in the wake of new technologies and new concepts, role of big data, concerns regarding data use, dark web, profiling, advertisements, new market players in the Internet such as Uber, Alibaba, Facebook, Airbnb, Online tracking, cookies, collection of meta data[22].

The judgment of the Supreme Court in Puttaswamy case, we come across pressing need to have a robust legislation on the lines of European Union Data protection Regulations, as has been expressed by the Hon'ble Judges of the Supreme Court in the present case. They talked about the dire need for informational privacy over the medium of internet and social media[23]. Vital issues surrounding the informational privacy need to be addressed by the legislature, and it is not possible at the judicial level to lay down a detailed guidelines. Given the proliferation of the data

16. (1994) 6 SCC 632
17. (1997) 1 SCC 301
18. (1983) 2 APLJ 37
19. (1984) AIR 1562
20. AIR 2017 SC 4161
21. R. Venkata Rao and T.V. Subba Rao, A Public Discourse on Privacy - An Analysis of Justice K.S. Puttaswamy v. Union of India (2018) NLS, Bengaluru
22. *Id*. at 53
23. AIR 2017 SC 4161

usage by the State and non-State actors, it becomes to have a detailed enactment on the similar lines of the European General Data Protection Regulation, focusing on the jurisprudence of 'Data processing' by the entities giving services or dealing with the citizens through or with the involvement of personal information. The data processing activities of the entities, using 'personal' & 'sensitive' information or data of the individuals need to be regulated and the concerns such as 'Notice', (informed) 'Consent', 'Data Minimisation', various rights on the part of the individuals and fixing of liabilities on the part of these entities in cyberspace, now becomes a need of the hour.

In fact, the Committee of Experts on a Data Protection Framework for India[24] headed by Justice (Retd.) B S Srikrishna worked extensively and did come up with several drafts in the process of having a robust data protection law of India.

PROLIFERATION OF DIGITAL TECHNOLOGIES AND LEGAL CONCERNS - DATA PRIVACY AND DATA SECURITY

The Digital Age in general and information and communication technologies in particular have brought a lot of significant changes in the human lives, making it easy, convenient and affordable living affairs. It has transform the human life in manifolds. The two revolutionary changes that have been brought into the legal system are: a) E-Commerce and b) E-Governance. Further, the technology is transforming and is rapidly changing in the changing socio-economic scenario, giving rise to new forms of technologies such as Artificial Intelligence, Machine Learning, Deep Learning, Internet of Things, Augmented Realities or Virtual Realities or Extended Realities such as the Metaverse[25] platform, multiplied the human interfaces with the technologies more. The data sharing becomes a sine qua non for these technologies, leading to data dependency of the individuals, which is potential dangerous in a data driven platforms. [26] New threats to privacy as a result of Big Data which is about collection of large-scale data from social networking sites has been the concern of many scholars in their studies[27] A need to repose

24. Economic Law Practice, ELP Discussion Paper *available at:* https://elplaw.in/wp-content/uploads/2023/09/ELP-Discussion-Paper-Justice-BN-Srikrishna-Committee-Data-Protection-2.pdf (last visited on September 22, 2024)
25. https://about.meta.com/metaverse/
26. Bibri, S.E., Allam, Z. & Krogstie, J. The Metaverse as a virtual form of data-driven smart urbanism: platformization and its underlying processes, institutional dimensions, and disruptive impacts. Comput.Urban Sci. 2, 24 (2022). *available at:* https://doi.org/10.1007/s43762-022-00051-0 (last visited on September 22, 2024)

the trust in the Internet which is a harbinger of social, and economic change in the world is also felt and it is the government, which has this duty of ensuring the same for the people.[28] It was stressed and appreciated that the scope and magnitude of digital technology is such that privacy cannot respond quickly enough to keep privacy protection relevant and robust.[29] The usage of modern and advanced technologies were considered for the review vis-a-vis its impact on privacy, and it was thought that modern technology affords us many luxuries, and tech companies rely on our addiction to their services to safeguard their interest in hoovering up as much detail as possible about our day to day lives and connects the same to privacy and to the dignify of the individuals being at stake[30].

The E-Commerce regime has brought the entire world together creating revolution in the lives of the Consumers and has accelerated the business in the virtual world. The E-Governance regime has transform the governance by ensuring transparency and accountability and by reducing the scope and chance for the corruption in the governance system. Further, in a democratic set up like India, it is essential for a citizen to get participated and be a part of the Governance, which the technology has ensured. The digital platforms have brought people near to the governance and citizens can easily raise their voices against the government through the instrumentality of freedom of speech and expression, which got strengthen on social media. The citizens are at the centre of both the revolutions that took place because of the digital technologies in the country, and it could not have been possible unless citizens share their personal information and data to the State and non-State entities. In jurisprudence, i.e. science of law, there is a famous doctrine

27. Xu, Heng, and Haiyan Jia. "Privacy in a Networked World: New Challenges and Opportunities for Privacy Research." Journal of the Washington Academy of Sciences, vol. 101, no. 3, 2015, pp. 73–84. JSTOR, *available at* https://www.jstor.org/stable/jwashacadscie.101.3.73. (last visited on September 22, 2024)
28. Centre for International Governance Innovation, Toward a Social Compact for Digital Privacy and Security, *available at:* https://www.cigionline.org/publications/toward-social-compact-digital-privacy-and-security (last visited on September 22, 2024)
29. DeVries, Will Thomas. "Protecting Privacy in the Digital Age." Berkeley Technology Law Journal, vol. 18, no. 1, 2003, pp. 283–311. JSTOR, available at: http://www.jstor.org/stable/24120519. (last visited on September 22, 2024)
30. Theresa E. Miedema, 'Privacy in the Digital Age, University of North Carolina Press, Vol. 70, No. 2, PRIVACY (JUNE 2020)

namely, 'Social Contract Theory '[31]which states that there is a contract between the State and the Subject (citizens). The State derives authority from the subject to govern and regulate them and in return the citizens will have to contribute to the revenue and will have to surrender certain rights for the sake of the governance.[32] Similarly, if the technology is to be taken help of for the sake of commerce and governance, it is necessary for the State and non-state entities to collect the data or information of the citizens. That is where problem arises, to what extent government and the private players will collect the data and for what purpose the data will be used. If it were not for the digital technologies, the Supreme Court in Puttaswamy Case would not have heard the 'Privacy Case 'in 2017. The collection of data and personal information with the State and non-State actors, comes with the risk, risk of misuse or risk of electronic surveillance or risk of data being into the hands of third party, which has the potentiality of disturbing the comfort, the private zone and exclusivity of the individuals. Moreover in India, the civil society was struggling and was concerned about the 'Privacy 'of the individuals however, neither the apex court nor the Law makers could bother about the privacy of the individuals for decades, until the passing of Puttaswamy Judgement by the Supreme Court in 2017 and the Digital Personal Data Protection Act, 2023.

Despite these landmark events in the legal history of India, there is no sufficient clarity as to what constitutes 'Privacy 'and 'Where to draw a line 'between State authority and the citizen's privacy which is a part of the 'Liberty 'jurisprudence of the Constitution of India, which this paper is trying to focus on the lacunas and the vacuum created by the legal system in the country.

PRIVACY AND DATA PROTECTION: EU GENERAL DATA PROTECTION REGULATION AS A CATALYST

The General Data Protection Regulation[33] of the European Union, in its both format, 1995 and the revised document in 2018, is strong legal base to protect the privacy and to maintain the security of the data in the information driven world. [34] This law protect persons, which are

31. Ritchie, David G. "Contributions to the History of the Social Contract Theory." Political Science Quarterly, vol. 6, no. 4, 1891, pp. 656–76. JSTOR, *available at:* https://doi.org/10.2307/2139203. (last visited on September 22, 2024)
32. *Id.*
33. Hereinafter read as "GDPR"

referred to as "data subject", with regard to the processing of their personal data by the "data controllers" and provides several safeguards against the data breaches. The GDPR outlines following important principles with respect to the processing of data of the data subjects[35]:

1. Lawfulness, fairness and transparency
2. Purpose limitation
3. Data Minimisation
4. Accuracy
5. Storage limitation
6. Integrity and confidentiality
7. Accountability

Further, It also mandates the processing of data must be done for the legitimate purpose, requiring consent of the data subject to be taken in a legitimate and due manner as presented by the Regulations, it provides rights to the data subjects against data controllers in relation to the collection, retention, processing, transmitting or usages of data, and puts responsibilities on the data controller to maintain confidentiality, integrity and availability of the data.[36] In addition to the regular and general responsibilities, it also puts additional responsibilities such as carrying out of a data protection impact assessment for the proposed data processing operations and appoint data protection officers when the processing is on a large scale. [37] These actions are further supported by sanctions to be imposed, in the form of heavy fines on the part of the data controllers, in the event of data breach or compromise of the data or illegal data availability or failure to perform its obligations under the GDPR.

The European Union has been pioneering in terms of addressing legal problems and their commitment to safeguard human rights of the individuals always reflective of from time to time. The right to privacy is a part and parcel of the European Convention on Human Rights, 1950[38] and European Charter of Fundamental Rights, 2012[39] it puts obligation on the member states to

34. Supra Note 6.
35. *Id.*
36. Voss, W. Gregory. "European Union Data Privacy Law Reform: General Data Protection Regulation, Privacy Shield, and the Right to Delisting." The Business Lawyer, vol. 72, no. 1, 2016, pp. 221–34. JSTOR, *available at:* https://www.jstor.org/stable/26419118. (last visited on September 22, 2024)
37. *Id.*
38. Article 8

protect the data of the individuals and respect the privacy, although they are in principle different rights but holds similar concerns. [40] It is evident from this that the idea of data protection, originates and is a part of the privacy jurisprudence, both being instrumental in preserving and promoting fundamental values and rights and its dependance on other important fundamental rights such as freedoms of speech and expression[41]. Further, the European Union has taken some other drastic steps in order to ensure that the cyberspace remains a safe space for the individuals to interact and digitise the human actions in the best of interest of business and democracy, also enacted the European Union Budapest Convention on Cyber Crime, 2001 [42] is one of the few, perhaps in the realm of cyberspace only international document dealing with cyber crime. It ensures and makes cyberspace a safe and secure place by mandating members states to codify and enforce Cybercrime norms in their respective countries. The best part being, the European Union Budapest Convention on Cyber Crime, 2001 is open for even non-European countries to sign, ratify and enforce the same in a truly global world of cyberspace.

On a similar lines, even several international human rights documents also declared right to privacy as basic human right, such as Universal Declaration Human Rights, 1948 [43] and the International Covenant on Civil and Political Rights, 1966[44].

A QUEST FOR THE ROBUST DATA PROTECTION LAW IN INDIA

Indian Legal System is now in the phase of introducing and revamping its Technology Laws in order to bring them at par with the jurisprudence of Puttaswamy Judgement of the Supreme Court in 2017, the the Digital Personal Data Protection Act, 2023 and the Telecommunications Act, 2023. In this series of new digital technology laws following proposed Bills are introduced:

1. The Broadcasters Bill, 2024
2. The Digital India Bill (seeks to replace Information Technology Act, 2000)
3. The Cybersecurity Bill which will be introduced

Due to its chilling effect on the freedom of speech and expression guaranteed under Article 19

39. Article 7
40. European Data Protection Supervisor, European Union, *available at:* https://www.edps.europa.eu/data-protection/data-protection_en (last visited on September 22, 2024)
41. *Id.*
42. https://rm.coe.int/1680081561 (last visited on September 22, 2024)
43. Article 12
44. Article 17

(1) (a) and Article 19 (1) (g) the Broadcasters Bill, 2024 has already been reverted for further refining work by the drafters of Law and civil society refuted the proposed Bill owing chilling effect doctrine as was made applicable by the Supreme Court of India in Shreya Singhal vs. Union of India.[45]

There have been no significant developments in regard to the 'Privacy judgement' of the Supreme Court in 2017 until the 'Data Protection Act of 2023'. An analysis of the existing framework of the the Digital Personal Data Protection Act, 2023[46] as it exists today, provides us with the existing framework of the law dealing with 'Privacy vis-a vis Data Protection.' It would be interesting to note here that we also have an exclusive law dealing with the cyberspace in India, which was enacted way before the passing of the Digital Personal Data Protection Act, 2023, namely, the Information Technology Act, 2000. The Information Technology Act, 2000 was passed in order to enforce the ideals, model of cyber law, released by the UNCITRAL Model Law on E-Commerce, 1996.[47] The Act of 2000 did contain certain provision dealing with the 'Data Privacy and Data Security' in the form of following provisions:

- Section 43: Penalty and Compensation for damage to computer, computer system etc.
- Section 43A: Compensation for failure to protect data by the body corporates and for negligence in maintaining cyber security practices in the firm.
- Section 66: Computer Related Offences

These provisions coupled with the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 were taking care of the concern of 'data protection and data security.'

The newly enacted the Digital Personal Data Protection Act, 2023[48] provides for the processing

45. AIR 2015 SC 1523
46. Popularly referred to as 'DPDPA'
47. https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_commerce (last visited on September 25, 2024)

of digital personal data in a manner that recognises both the right of individuals to protect their personal data and the need to process such personal data for lawful purposes and thereby tried reflecting a balanced approach. The Act of 2023, it is believed, enacted to enforce the mandate of the Supreme Court ruling in Puttaswamy case.[49] The Act of 2023, no doubt, is in line with the European Union General Data Protection Regulations as far as principles are concerned, however, there has been a change in the use of nomenclatures for the stakeholders and for the principles so used. For example for 'Data subject', 'Data Principal' expression is used, for 'Data Controller', 'Data Fiduciary' is used. Further, the DPDPA has also given enforcement to Data Privacy / Data protection norms such as 'Notice' norms,[50] 'Consent'[51] norms,[52] 'Usage for Lawful Purposes'[53] 'Obligations of the data fiduciary', [54] 'Penalty in case of data breach', [55] and thereby establishing the trust in the people as to usage of information and communication technologies for a healthy democratic set up like India. The DPDPA has also included 'State' to certain extent, which was not included in the Information Technology Act, 2000.[56]

However, to the purpose of the author of this paper, the Act of 2023 needs review on many counts including the following concerns and questions surrounding the DPDPA, 2023:

1) The DPDPA has failed to lay down technical and substantial aspects of the 'Consent Manager'. Further, affiliation of the 'Consent Manager 'is with whom and his relationship with that of the Data Principal and Data Fiduciary is not clarified. Whether they Are private entities or public entities or appointed or designated or licensed by government or appointed or referred to or contracted by Data Fiduciary or will it be a separate enterprise, like Certifying Authorities under ITA, 2000 for Digital Signatures, not clarified;

---

48. Act No. 22 of 2023
49. The Economics Times, *available at:* https://economictimes.indiatimes.com/tech/technology/govt-expects-to-implement-new-data-protection-law-within-10-months/articleshow/102582200.cms?from=mdr (last visited on September 25, 2024)
50. Section 5
51. Section 6
52. Informed Consent before processing of data.
53. Section 4
54. Section 8
55. Section 33 read with Schedule-I
56. Section 43A

2) What is the relationship between the 'Data Fiduciary 'and that of 'Data Processor ,'not clarified;

3) The form or the medium through which Consent is to be given has not been laid down.

4) The expression 'privacy' is used nowhere in the complete Statute, however, some similar or related terms have been used such as 'confidentiality' 'integrity' and 'availability' of the personal information;

5) The position of the 'State' as the 'Data fiduciary' needs to be clarified in more details;

6) No express mention of 'Penalty for Data Breach': Unauthorised processing or Data Breach, although defined in Section 2 (u) is not reflecting in the body of the Statute anywhere, except by necessary implications, under Section 8 (1). Instead of prescribing penalty for 'violation of the provisions of Act / Rules ' there should have been a direct provision to the effect of 'Penalty for unauthorised process of personal data '(Data breach)

7) Unauthorised Processing ought to have been defined, in stead of leaving it to the interpretation of the Act amidst the scattered provisions;

8) Being a Parent legislation, it ought to have defined 'Significant Data Fiduciary ' under section 10 of the Act, like Intermediary Guidelines and Digital Media Ethics Code Rules 2021;

9) Right to be Forgotten vis-a-vis criminal administration or otherwise, ought to have been defined or given enforcement to in addition to or not limited to the 'Right to Erase 'the data u/Sec. 8 (7) (a) & (b);

10) Appointment of 'Special Data Auditors 'and 'Data Audit 'must be made compulsory, like safety audit, financial audit etc. even for the small firms or MSSEs/MSMEs and must not be limited only to Significant Data Fiduciary;

11) Why 'Duties of the Data Principal 'and why impose separate penalty, even though it could be means of ensuring cyber hygiene, there are laws taking care of the conducts defined in Section 15 r.w. Schedule (penalty) of the Act;

12) Impracticality involved in the 'Consent 'Jurisprudence under section 6 of the Act, given the complexities of the business and of the (emerging) technologies. It needs to be addressed with a) issuance of FAQs / Public Consultation / codification of as many as examples from the experts in the filed of law, commerce technology and governance;

13) No definition of "publicly available data" has not been defined (except by way of an example) and it is likely that the Social Media entities may be expected from those aspect, which may otherwise fall within the ambit of the Act;

14) Significant 'and 'non-significant 'data breach: a heavy amount of discretion seems to have been given to DP Board under Sec. 33 (1);

15) No compensation to the Data Principal / Victim of Data breach (like Section 43A of the Information Technology Act, 2000) and all sums realised from imposing penalty shall be credited to the Consolidated Fund of India and hence, expression 'Data Principal' becomes a misnomer;

16) The 'Employers 'action vis-a vis data processing and its exemption in the form of 'legitimate use 'should have been qualified by the principle of 'Data Minimisation ,'as otherwise they will not have to obtain express consent in order to process the personal data of employees.

These issues or concerns or queries need to be addressed by the legislations either in the form of Rules to be made under the DPDPA, 2023 by the Central Government or by way of an amendment or by way of judicial pronouncements.

CONCLUSION

In the past two decades, we have witnessed a lot of developments both, in information technology as well as the legal developments in regard to it. The proliferation of the digital technologies and its intrusion in almost all the sectors and affairs of life, necessitated us increase our dependence on the proxy representation of the humans i.e. through the digital personal data of the individuals. Even for the businesses in the age of competition, dependency on the data based services, was bound to increase and same goes with the State who has to ensure and which could be ensured well with the help of digital technologies, transparency, accountability and expeditious disposal of the administrative affairs. While doing so, 'stake' or an 'interest' of the citizens in the form of 'personal information', while processing the data by the State and non-state entities, needed to be secured. The Puttaswamy judgement of the Supreme Court should not be a surprise to us, given the proliferation of the digital technologies and the same goest with the passing of the Digital Personal Data Protection Act, 2023, both aiming at “Data Privacy” and “Data Security”. However, real struggle lies in seeing the efficacy of the Act of 2023, the DPDPA and it implementation in the digitally driven society.

RIGHT AGAINST SELF INCRIMINATION: A CRITICAL EVALUATION OF RIGHT TO PRIVACY VIS-À-VIS REQUIREMENT OF FORENSIC SCIENCE IN CRIMINAL INVESTIGATION

***Ms Avneet Kaur Dhillon**

INTRODUCTION

"Article 20(3) of the "constitution" of India" guarantees the right to "self-incrimination" by prohibiting the coercion of an accused individual to testify against oneself. As a result, the accused have access to something akin to immunity. The principle that one is not obligated to incriminate oneself—"Nemo tenetur podre accussare seipsum"—forms the basis of this right. This right is applicable in criminal cases exclusively; it does not apply in civil proceedings whatsoever, in contrast to the American "constitution", which makes this distinction clear. Nevertheless, this right to "self-incrimination" cannot be invoked in situations when the accused is required to have any document or object seized from their possession. Consequently, the accused's thumb impression or signature can still be taken, despite this right. Science and law have a long history of working together. Looking back in time, we find that Imhotep, the chief physician of the monarch of Egypt in the 27th century B.C., established particular regulations and standards for medical treatment. Looking at India, the 7th-century Charaka Samhita discussed the duties and social status of a doctor[1]. Many new scientific inventions are appearing at the present time, and science as a whole is thriving. Forensic science is a valuable tool for investigators working on criminal cases. It is an important part of the decision-making process in some instances and is the intersection of law and science. The application of justice is facilitated and expedited by forensic science. But many in India believe that forensic testing in criminal investigations goes against "Article 20(3)" of the country's "constitution".

---

* Assistant Professor Rayat Bahra University (Mohali Campus).

1. Karun Sanjaya, "The "constitution"al Legitimacy of Narco-Analysis: An Analysis of Article 20 (3)", 421 IJJS 2021, at 46.

CONCEPT OF SELF INCRIMINATION

When an accused person indirectly or directly implicates himself in a crime, this is known as "self-incrimination". Until proven guilty, the accused enjoys the presumption of innocence. If a prosecution wants to prove their case, they have the burden of evidence. In reality, the burden of proof lies with the prosecution to establish the accused's guilt. The accused must not be coerced into making a statement or answering questions that could be used as evidence against him in the future. The freedom to abstain from speaking is also protected by the Indian "constitution", specifically "Article 20(3)". The accused is likewise protected from being a witness against oneself by this right. The accused is protected from having his statements coerced or coerced in any way by the use of threats or force. The "Supreme Court" ruled in the case of *V.S. Kuttan Pillai v. Ramakrishnan and Another*[2] that a warrant is necessary to search an accused person's possessions or retrieve any document. If the accused gives a statement knowingly and voluntarily without feeling coerced, the court can use it against him, even if he has waived his right to "self-incrimination".

The right to "self-incrimination" is a fundamental component of a fair trial in every criminal proceeding in any civilised society. A person facing criminal charges cannot be coerced into giving testimony or other evidence that could lead to their guilt, according to this "constitution"al principle. The purpose of the right against "self-incrimination" is to ensure that the legal process does not lead to the improper use of the accused's words in order to secure his conviction.

The third paragraph of Article 20 states that no one may force an accused person to testify against himself in a criminal trial. The defendants claim that the "constitution"al right to a fair trial and the right to a narco test are violated when the defendants are subjected to such procedures. Is it being used in a way that goes against the "constitution"? That is the question. It should be emphasised that in order to claim the protections afforded by "Article 20(3)", one must be an accused person who is coerced into testifying against him. The right is broadly

2. 1980 AIR 185

defined, but Indian courts have narrowed its view to apply primarily to testimonial evidence. Nevertheless, the protection afforded by article 2(3) is limited to proof that necessitates the defendant's willing participation.[3] A fundamental aspect of criminal law is the right to remain silent, which goes by several names: the right against “self-incrimination”, the privilege against testimony coercion, and the right to remain silent. This right to be free from testimonial coercion rests on the legal principle known as "nemo tenetur seipsum accusare," which literally translates to "no one needs to accuse himself." The principle of "nemo debet prodere se ipsum," which protects against “self-incrimination”, is the bedrock of this principle. The prosecution has the burden of proof in a criminal case, since the accused are presumed innocent unless proven guilty, according to this principle. It is not possible to force the accused to testify against his will.[4] There are three primary parts to the right against “self-incrimination”: first, that the prosecution has the burden of proof regarding the guilt of the accused; second, that an accused person is deemed innocent unless proven guilty; and third, that they have the right to stay silent. The rule is not without its exceptions, though; for instance, a suspect in a criminal case may be compelled to assist investigators by furnishing evidence in the form of photographs, audio recordings, blood samples, hair, or other biological materials for DNA testing, and so on. Both directly incriminating evidence and so-called hint facts could give rise to the privilege against testimony coercion. Criminal procedure used by law enforcement during investigations and court hearings is squarely subject to the prohibitions outlined in “Article 20(3)”. This protection is in place to ensure that investigating authorities do not subject suspects to cruel or degrading treatment in order to coerce them into confessing. The burden of proof is on the prosecution to establish that the witness was a person facing criminal charges, that they were coerced into making the statement, and that the statement was incriminating. This is in order to invoke the right to remain silent guaranteed by “Article 20(3)” of the “constitution”. *State of Bombay v. Kathi Kalu Oghad*[6] was a seminal decision in which the “Supreme Court” widened the scope of what ~~constitutes "compelled testimony~~" under “Article 20(3)” to encompass both admissible

3. M. Sivamanda Reddy, “Narco Analysis and Truth Serum”, http://www.cidap.gov.in/documents/narco analysis./.
4. A.S..Dalal & Arunava Mukherjee, ““constitution”al and Evidentiary Validity of New Scientific Tests”, 49JILI 529-540, 529 (2007).
5. Mark A. Godsey, “Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled “self-incrimination”, 93 Cal. L. Rev. 465, 479 (2005)
6. (1962) 3 SCR 10

evidence and state evidence. Compulsion might mean either mental or physical coercion, according to the Oghad case's interpretation of the compelled witness. Those who disagree with the method argue that narco-analysis is only a fancy name for mental coercion. The term "mental compulsion" describes the situation in which an individual feels pressured to make a statement because they are conditioned to do so by outside forces. “Article 20(3)” does not apply to basic revelations and disclosures made by the accused during the investigation period if they were not gained by coercion. In the case of Dinesh Dalmia v. State of Maharashtra, the court determined that in a narco-analysis, the accused is free to answer any questions he wants, without any outside pressure to reveal anything.

FORENSIC SCIENCE AND CRIMINAL INVESTIGATION

It takes a long time to get justice in India because the lawsuits are so lengthy. As technology develops, new tools like forensic science allow the criminal justice system to function more efficiently. In order to speed up a criminal investigation, forensic science incorporates techniques from various scientific domains, such as biology, chemistry, and medicine. Forensic laboratories collect all the evidence that is readily available at the scene of the crime and send it there for analysis. These forensic science tests can produce reports that can be used as evidence in a legal proceeding. The Court noted in *Rojo George v. Deputy Superintendent of Police* [7] (2006) that standard investigative techniques are inadequate in this age of technologically advanced crime, and that narco-analysis and similar testing should be legal.

- **Legal Provisions Relating To Application Of Forensic Science in Criminal Investigation**

An individual can only exercise their right to “self-incrimination” as outlined in “Article 20(3)” of the Indian “constitution” if they are the subject of a First Information Report (FIR). To be effective, the right under “Article 20(3)” requires specific elements to be met. Crucially, the accused must be compelled to answer any question or make any comment that implicates himself—in other words, be made to testify as a witness against himself. An accused person may exercise his right under “Article 20(3)” if a statement he or she was coerced into making becomes evidence against them. It is possible for a court to reject as evidence any statement that

7. 2006 (2) KLT 197

was taken from an accused person under coercion or threats. The highest court in India ruled in the 1953 case of *Kalawati v. State of H.P.*[8] that "Article 20(3)" does not apply when an accused person gives a confession freely and without coercion. It has been established in both *Vidya Verma v. Shri Narain*[9] and other criminal cases that protection under "Article 20(3)" cannot be extended in civil proceedings. It is legal for a registered medical practitioner to examine an arrested individual upon request from a police officer who is not lower in rank than sub-inspector, according to Section 53 of the "Criminal Procedure Code", 1973. This can happen if there are reasonable grounds to believe that the medical examination of the arrested person may be used as evidence in a court of law. The accused must answer any questions posed by the investigating officer in a genuine and honest manner, as stated in Section 161(2) of the CrPC. On the other hand, the accused is absolved from answering any question that could be used as evidence against him and lead to his punishment under this provision. Because of the right to stay silent guaranteed by "Article 20(3)" of the Indian "constitution" and Section 161(2) of the CrPC, an accused person is not compelled to answer questions that could lead to his incrimination. The "Supreme Court" in India ruled in the 1961 case *State of Bombay v. Kathi Kalu Oghad and others*[10] that an accused person's free and voluntary confession during police interrogation does not constitute coercion and is therefore not subject to "Article 20(3)" of the Indian "constitution".

ADMISSIBILITY OF SCIENTIFIC EVIDENCE

The admissibility of scientific evidence has been the subject of heated controversy in India, particularly in the wake of the *Selvi v. State of Karnataka* [11] decision, in which the esteemed "Supreme Court" ruled that the accused must give their informed agreement before any kind of narco-analysis, brain mapping, or polygraph test can be performed. From the perspective of the accused, fundamental rights afforded to them under numerous statutes are at issue in the admissibility of scientific evidence, but we fail to take into account the anguish, suffering, and trauma endured by victims and their families. "Because whatever the legislature's objective was,

8. 1953 AIR 131
9. 1956 AIR 108
10. (1962) 3 SCR 10
11. AIR 2010 SC 1974

it has been represented through words, the fundamental principle of interpretation is that words in an enactment should be given their ordinary and natural meaning. It is the responsibility of the court to give effect to a statute if its language is clear. The legal maxim quod res magis valeat quam pereat is also relevant here." This maxim states that in cases where competing interpretations of a statute are plausible, the court must adopt the one that facilitates the efficient operation of the system, rather than the one that is likely to cause needless obstacles to the intended purpose of the statute. As much as feasible, every term in the act should have a specific meaning; after all, lawmakers aren't supposed to employ flowery language. The framers of a statute do not include words that are unnecessary or unimportant. The "Supreme Courts"' decision in *Shreenath v. Rajesh* [12] makes it clear that when faced with a potential conflicting interpretation of a procedural statute, the court will favour the interpretation that limits the procedure because procedural law is always helpful and subservient to justice, without avoiding it, should be implemented. The "Supreme Court"'s decision in the case of *Alamgir v. State of Bihar*[13] upheld the interpretation of the word "detains" in light of its proximity to the words "takes," "entices," and "conceals," thus in this context the word "detains" means "without the consent of husband" rather than its usual meaning of "detention against will." This interpretation was reached in light of the fact that section 498 of the "Indian Penal Code", 1860 was at issue. That is why it is important to interpret different parts of Indian statutes in light of the current state of affairs in India, the development of criminal technology, and the evolution of crime generally. Because Indian laws are centuries old and particularly specify the most recent acts, charged persons should not benefit from them. The researcher respectfully argues that, notwithstanding the 'n' number of revisions to statutory legislation, the courts continue to embolden criminals and cause displeasure among the population. Researchers believe that in order to combat the rising crime rate, courts should authorise the usage of cutting-edge technologies by relevant authorities.

- **Admissibility of Scientific Evidence under the "constitution"**

12. AIR 1998 SC 1827
13. 1959 AIR 436

The Indian “constitution” seeks to enhance the current administrative system; it is the result of considerable study and deliberation by notable persons. While draughting the “constitution”, the framers took into account cultural and socioeconomic diversity, historical precedence, and geographical demands. No one may be forced to testify against themself as a witness in any prosecution, even those involving accusations of criminal offences, according to “Article 20(3)” of the “constitution”. An inspiration for this rule came from the Fifth Amendment to the US “constitution”, which forbids the government from requiring an individual to submit evidence that could implicate them. The “Supreme Court” has expanded the scope of this protection, defining a "witness" to include both oral and documentary evidence that could be utilised to prosecute the accused. Anyone who is not an accused at the time of the statement or who becomes accused later cannot claim this protection against testimonial compulsion. When recovering anything from someone's possession, whether it be objects or evidence, “Article 20(3)” does not apply. Article 20 should not apply to narco-analysis claims since they do not meet all three requirements simultaneously. Bombay High Court's decision in *Ramachandra Reddy and Ors. v. State of Maharashtra,*[14] which supported the use of P300, brain fingerprinting, lie detector tests, truth serum, or narco analysis, suggests that Indian courts are attempting to restrict the scope of “Article 20(3)” by relying on the "Minimal Bodily Harm Doctrine." The petitioner in *Rojo George v. State of Kerala* [15] was amenable to polygraph and brain mapping exams, but he refused to do narco-analysis, which he viewed as an unscientific technique. According to J. Padmanabhan Nair's reasoning in Kathi Kallu's case, the petition should not be granted. The “Supreme Court” held in the case of *Usufalli v. State of Maharashtra*[16] that, since no coercion was involved, the audio recording of the accused's utterances did not constitute a breach of “Article 20(3)”. The key provision of the “constitution”, Article 21, guarantees that no individual may be taken from life or liberty without following the proper legal process. In adopting and implementing basic rights, the “constitution”'s framers followed the American model. Article 21 guarantees two rights: the right to exist and the right to be free. Every person

14. CR. W.P(C) NO. 1979 OF 2003.
15. 1979 KLT 337
16. AIR 1968 SC 147.
17. AIR 1950 SC 27

has an inherent right to life and liberty, and the “Supreme Court” has noted that this is a necessary condition for any civilised nation. Upon the implementation of the Indian “constitution”, the concept of "personal liberty" was outlined in the landmark case of *A.K. Gopalan v. State of Madras* [17] as the polar opposite of physical constraint or compulsion. Following this, in 1963, the “Supreme Court” characterised personal liberty as the inherent right of every person to live unencumbered by arbitrary government action or decree. The “Supreme Court”'s decision in *Maneka Gandhi v. Union of India*[18] broadened the definition of "personal liberty" to encompass a range of rights that are essential to individual autonomy. Defending against the arbitrary deprivation of "life" encompasses more than just preventing harm or death; it also ensures that people can enjoy all the things that give their lives purpose and meaning. The right to privacy is one of the most fundamental rights that emerged from cases decided by courts. While the Right to Privacy is acknowledged by the Indian judiciary, it is not explicitly guaranteed as a basic right in the Indian “constitution”. Though it can be legitimately limited to avoid crime, disorder, health or moral protection, or the rights and freedoms of others, the right to privacy is an integral part of the right to life as envisioned by Article 21.

- **Admissibility of Scientific Evidence under the Criminal Justice System**

“Code of Criminal Procedure” and “Indian Penal Code”, 1860 are the primary legal documents upon which the I”ndian criminal justice system” is based, with the exception of the “constitution” and the “Evidence Act”. Both the Penal Code and the “Criminal Procedure Code” provide that those charged receive a fair trial. When it comes to running the criminal justice system, investigations are key. The “Criminal Procedure Code” ranks it high among its most crucial provisions.[19] The “Criminal Procedure Code” defines "investigation" under section 2(h). It states: "investigation includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) authorised by a Magistrate on this behalf. This means that it encompasses all the proceedings for the collection of evidence carried out by a police officer or any person (other than a magistrate) authorised by a

18. (1978) 1 SCC 248
19. Manu Saxena, “Striking a Balance: Efficient Investigation and Individual Rights”, *available* at: http://www.legalservicesindia.com/article/1864/Investigation-and-Law.html.

magistrate. The fundamental goal of an investigation is to gather evidence, and it must be carried out by a police officer, someone with the authority to do so, a magistrate", or someone in charge, according to the decision of the *State of U.P. v. Sant Prakash*[20] The code definition provided here is by no means comprehensive. Investigations include detaining and arresting suspects, questioning witnesses, and planning raids. A criminal trail cannot be complete without an investigation. No one can evade justice in a fair investigation.

CONTROVERSIES RELATED TO APPLICATION OF FORENSIC SCIENCE

Scientific progress has made it feasible to use forensic science in criminal case investigations. They are vital pieces of evidence in cases involving criminal charges. Having said that, such evidence is often hesitantly accepted by courts. The courts have noted that forensic test results could not be very trustworthy. One example is the possibility that a DNA test will be useless due to contamination. Delays in transmitting evidence for forensic testing can cause the evidence to deteriorate and cast doubt on the reliability of the results. This makes it extremely problematic for the courts to rely on this evidence in such cases. Many people have strong opinions on whether or not forensic science testing should be used in criminal investigations. Forensic science has been an integral part of India's judicial system, but judges are free to disregard forensic evidence if they so choose.

- **Legitimacy of DNA Test**

Genomic evidence has been found in approximately 3% of assault cases and 5% of murder cases. Despite DNA testing' potential as significant evidence, courts are hesitant to accept evidence derived from them. The DNA test goes against the fundamental right to privacy that is part of the right to life and personal liberty guaranteed by Article 21 of the Indian "constitution". Some have argued that the right to remain silent under "Article 20(3)" of the Indian "constitution" is violated when an accused is forced to submit to a DNA test, since it amounts to the accused testifying against himself. Although the privilege guaranteed by Article 21 of the Indian "constitution" is not without limitations, the Court has ruled in some instances that these limitations apply. A person's right to privacy is not violated when they are ordered to provide a

20. 1976 CRI.L.J. 274 (ALL)

DNA sample for testing, according to the decision of *Kanchan Bedi v. Gurpreet Singh Bedi.* [21] The division bench ordered a DNA test in the 1999 assault case *Geeta Saha v. NCT of Delhi.* [22]

Legitimacy of the narco-analysis tests

Since the answers provided during narco-analysis tests are not supplied voluntarily, its usage has been the subject of heated controversy. There is no opportunity for the person to choose whether or not to answer the question. The behaviour of a suspect or accused person can be better understood through the application of narco-analysis. Under the influence of drugs, the subject of a narco analysis test enters a hypnotic state, when he is more prone to give information. The "Supreme Court" ruled in the 2008 case of State of *Andhra Pradesh v. Smt. Inapuri Padmi* [23] that narco-analysis can only be carried out on an accused person, and not on a suspect, in order to avoid violating "Article 20(3)". The Court thus upheld the narco-analysis of several suspects in this case. The "Supreme Court" of India ruled in the case of Ramachandra Ram Reddy v. State of Maharashtra (2004) that "Article 20(3)" of the Indian "constitution" does not prohibit the use of narco-analysis tests. "Article 20(3)" of the Indian "constitution" was interpreted by the court in this instance to encompass both the accused and the suspected. Everyone now has this right, and no one can be subjected to a narco-analysis test against their will.[24] The court ruled that this kind of evidence cannot be used in a legal proceeding. After all reasonable efforts to get evidence have been made, the Court in *Santokben Sarman Bhai Jadeja v. The State of Gujarat* [25] upheld the use of narco-analysis testing as a last resort in the investigation. According to the court, administering narco-analysis tests to suspects does not violate "Article 20(3)" of the Indian "constitution". However, using the suspects' self-incriminating statements as evidence against them does.

CONCLUSION

---

21. AIR 2003 Delhi 446
22. 1999 (1) JCC 101 (DB).
23. 2008 Cri LJ 3992
24. Ananthi Bharadwaj, Suresh et.al. Narco Analysis and Protecting the Rights of the Accuse, 4 NALSAR STUDENT Law Review 121(2008).
25. 2008 CriLJ 68

The Indian "constitution" guarantees citizens the right to "self-incrimination" and privacy, which is violated by forensic examinations like narco-analysis, polygraph, and DNA testing. Public servants have an obligation to inform the accused of their legal protections. However, traditional non-forensic methods are still preferred by courts. For terrorism investigations, forensic testing should only be used as a last resort. India could benefit from a more robust forensic science community, as there is a shortage of qualified examiners. Forensic science courses should be offered in higher education institutions to address the shortage and advance forensic science in India. This would help address the issue of forensic science in the country. There is no set content for basic rights, and this is said to be the case using scientific procedures such as narco-analysis, brain mapping, and polygraph. The benefits of new scientific technology in the detection of crime, criminality, and lies have long been recognised, and the criminal justice system may soon reap the rewards. Although it has not been established by Indian courts whether or not it is acceptable, scientific tests like these do provide evidence concerning the guilt of the accused and can support other witness statements. Narcoanalysis, polygraph, and brain mapping should all be legalised by the courts. Since the only thing that brain fingerprinting and lie detector tests reveal is the existence of criminal knowledge in the brain, they do not constitute statements. The narco-analysis exam does include statements, but they are not involuntarily delivered. One of the safeguards provided by "Article 20(3)" is the prohibition of coercive evidence; in other words, no one may be forced to testify against oneself. Therefore, "Article 20(3)" does not apply if the witness is not coerced into giving testimony. Assisting with the investigation is the narco analysis test. It lays the groundwork for additional research because, depending on what happens during that examination, it might lead to the gathering of other data. When investigating major crimes like terrorism or murder plot, the aforementioned methods become very important because the investigating institutions often lack crucial leads.Judicial interpretation should be the primary means by which the courts seek to increase the scope and application of basic rights. While not proclaimed to be unchanging, fundamental rights must be maintained in line with evolving circumstances. The 114th Amendment must be kept dynamic, active, and youthful. [26] If the judge is responsible for ensuring that no one is

wrongfully punished, then he must also prevent the guilty from getting away with it. Each of these responsibilities falls on the government.[27] Clearly, the rights of the accused should take a back seat to the needs of society's security, protection, and justice. These methods are completely legal, and social security is far more vital than the accused's rights. Courts will make decisions based on their findings; their role is limited to assisting with investigations. It is respectfully argued that the accused's rights should not be inflated in order to obstruct a thorough, effective, and scientific investigation into the crime.

26. "PEOPLE'S UNION FOR CIVIL LIBERTIES V. UNION OF INDIA, AIR 2003 SC 2363"
27. "STATE OF PUNJAB V. KARNAIL SINGH (2013) 11 SCC 27."

EXPLORING THE NEED FOR RECOGNITION AND PROTECTION OF INDIGENOUS KNOWLEDGE AND CULTURAL HERITAGE THROUGH INTELLECTUAL PROPERTY REGIME

*** Dr. Debmita Mondal**

INTRODUCTION

Indigenous people are inhabiting this world from time immemorial and their connection with their environment and land and community has a spiritual linkage with their culture, traditions, and values. Indigenous communities have been displaced from their traditional lands, deprived of their natural habitats, and forced to assimilate into societies radically different from their own due to invasion by foreigners for centuries. In fact, such Indigenous communities have been marginalized in their own land and relegated to reservation status due to growth of new societies build upon by invaders on Indigenous lands.

Colonization of lands is one such widely accepted tools of marginalization of Indigenous communities on their lands. For example: the "Treaty of Waitangi" concluded between native Maori and British crown in 1840 provided for cession of territorial sovereignty from indigenous inhabitants to British Crown.[1] While there was no such agreement between Australian indigenous people and the land was declared terra nullius for European settlement.[2] This terra nullius doctrine was in fact in operation in Australia for 200 years until it was renounced in Mabo decision.[3] Justice Brennan in the Mabo case pointed out that:

> *"Where a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connection with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence."*[4]

---

* Assistant Professor of Law, Hidayatullah National University, Chhattisgarh.

1. The Treaty of Waitangi, 1840 (New Zealand).
2. Kerrin Schillhorn, The Status and Rights of Indigenous Peoples in Australia, 59 Heidelberg J. Int'l L. 443, 494 (1999).
3. Mabo and others v. Queensland (No. 2) HCA 23 (1992).
4. *Id.*

The Indigenous communities' culture and practices have been misunderstood and often labelled as uncouth, unscientific by the west for long period of time disposing such communities of not only their land and immediate natural habitats but also their socio-economic, cultural, and religious practices. In fact, they were treated often to be uncivilized groups of individuals having no societal organization because foreign invaders failed to comprehend the socio-legal or economic institutional functioning of these communities.

WHO ARE INDIGENOUS PEOPLE?

While the concept of indigenousness is discussed in American, Australasia and Nordic countries from reference to European settlement in such lands, indigenous groups in Asia and Africa identify themselves in relationship to majority Asian or African population, respectively[5]. With passage of long periods of time, while indigenous people issues have gained more and more international recognition, it has become increasingly difficult to identify who are indigenous people in a land. In international law there is no agreed definition setting parameters of what constitutes Indigenous community or who can be identified as Indigenous people of a land. While at national level, some countries like Canada requires registration under the Indian Act 1876,[6] in others state recognition is usually given based on former treaty or agreement between native communities and the government.

The challenges in defining the term "Indigenous" had been well recognized by Erica-Irene Daes, the Chairperson of the *"Working Group on Indigenous Populations;" "the concept of indigenous is not capable of a precise, inclusive definition that can be applied in same manner to all regions of the world"*[7]. This is because Indigenous peoples, whether the Masai of Africa, the Aboriginal people of Australia, the Maori of New Zealand, or the Ainu in Japan, show more differences when compared to each other than similarities in its traditional practices and cultural activities and so no single definition can capture such diversity in whole. It is the fear that a rigid watertight definition would leave specific Indigenous communities outside the *rationae*

5. PETER-TOBIAS STOLL AND ANJA VON HAHN, Indigenous Peoples, Indigenous Knowledge, and Indigenous Resources in International Law, in INDIGENOUS HERITAGE AND INTELLECTUAL PROPERTY GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE 9 (Silke Von Lewinski 2d ed., Wolters Kluwer 2008)."

personae (by reason of his or her person) that has led to the argument emphasizing "right of self-determination."[8]

One of the early attempts made to arrive at a definition was by Martinez Cobo (United States Special Rapporteur):

> *Indigenous communities, people and nations are those, which, having a historic continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of the societies and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their cultural partners, social institutions and legal systems*.[9]

A similar attempt has been made by *"International Labor Organization"* (ILO) in their *"Convention concerning Indigenous and Tribal Peoples in Independent Countries"* where tribal people are those in independent countries whose social, cultural, and economic conditions are distinguishable from other sections of the society and these tribal peoples are regulated whether wholly or partially by their own customs and traditions or special laws and regulations unique to their community. [10] The Convention states on other hand that the "Indigenous" communities' descent from the population which inhabited the geographical area or country previous to colonization or conquest or establishment of the present state, but the community

---

6. See, William B. Henderson, "The Indian Act, THE CANADIAN ENCYCLOPEDIA, https://www.thecanadianencyclopedia.ca/en/article/indian-act: The Indian Act is the principal statute through which the federal government administers Indian status, local First Nations governments and the management of reserve land and communal monies. It was first introduced in 1876 as a consolidation of previous colonial ordinances that aimed to eradicate First Nations culture in favour of assimilation into Euro-Canadian society and has been amended several times, most significantly in 1951 and 1985."
7. Erica-Irene A. Deas Chairperson/Rapporteur, Note on Criteria Which Might Be Applied When Considering the Concept of Indigenous Peoples, "UN. SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES. WORKING GROUP ON INDIGENOUS POPULATIONS, U.N. Doc. E/CN.4/Sub.2/ AC.4/1995/3" (Jun. 21, 1995), https://digitallibrary.un.org/record/183213.
8. *Id.*
9. Jose Martinez Cobo, Special Rapporteur of the Sub-Commission, "Study of the Problem of Discrimination against Indigenous Populations, U.N. SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4" paras 379-380 (Mar. 1987), https://digitallibrary.un.org/record/133666.
10. ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169) art. 1, para. 1."

has managed to retain their own social, cultural, political, and economic institutions irrespective of such change.[11]

It is interesting to note that while the definition given by Special Rapporteur of United States as discussed above is narrower in its ambit because it identifies the link between the terroir and indigenous community only in relation to colonization or invasion, the definition given by ILO is wider as it states into account even those communities who have inhabited the land in continuum from time immemorial till the establishment of the present state boundaries. In even dictionaries like Cambridge Dictionary, the term "Indigenous" is wide enough to cover people *"naturally existing in a place or country rather than arriving from another place."*[12]

An official definition for the term *"Indigenous"* has not been adopted by United Nations but has adopted a board understanding of the same based on the common features of any Indigenous community as listed:

a. *"self-identification"* as Indigenous people at individual level and accepted by the community as their member.
b. *"historical continuity"* in the land inhabited and priority in time in occupation of specific land
c. close connection with their ancestral lands and natural resources
d. Indigenous local social, political, and other institutions
e. presence of a distinct Indigenous language
f. self-identification or identification by state authorities as collectively distinct community,
g. experience of dispossession, marginalization, discrimination, or subjugation, whether or not the conditions persist.[13]

United Nations believe in the idea that the more fruitful approach is not defining Indigenous people but "to identify."

Another approach adopted by international environmental legal instruments like *"Convention*

11. *Id.*
12. Indigenous, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/dictionary/english/indigenous.
13. Who are indigenous peoples?, UNITED NATIONS PERMANENT FORUM ON INDIGENOUS ISSUES, (Jan. 11, 2022, 1.00AM), https://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf"

on Biological Diversity" use the word *"Indigenous and local communities"* [14] together, thus avoiding any clear definition of Indigenous communities. But the focus under Convention is more on sovereignty of natural resources and biodiversity and *"prior informed consent (herein after referred as PIC)"* and *"benefit sharing"* for such access to natural resources which is not a predominant theme for the purpose of this chapter.

The World Bank in its *"Operational Directive 4.20"* use the word "indigenous peoples" along with other terms like *"tribal groups", "scheduled tribes (herein after referred as ST)", "indigenous ethnic minorities"* to take a functional approach to all social groups which has distinct cultural and social identify from the other sections of society and has/ had a disadvantaged position in the land they inhabit. [15] While this definition might cater to World Bank's functionality of aiding communities, this is not a definition which truly helps to understand who indigenous peoples are.

This brings us to the conclusion that a global meaning of the term "indigenous people" has not been arrived at till date and has the definition has prevailed a generic term for *"tribes, first peoples/nations, aboriginals, ethnic groups, Adivasi, Janajati," etc*....[16]Even occupational and geographic terms like *"hunter-gatherers, nomads, peasants, hill people, etc... also exist interchangeable with indigenous people"*.[17] It can be said that may be a wide, feature-oriented or functional definition is much more suited to the needs of indigenous community so that wide diversity of such communities across the world can derive the benefits of the rights guaranteed or the reservations provided for indigenous community.

The second concern rising out of lack of such definition is whether the term to be used for reference to a native community is "Indigenous people" or "Indigenous peoples." The definitions referred above mention Indigenous communities as "Indigenous peoples." This is to

14. See, Introduction to Convention of Biodiversity, https://www.cbd.int/traditional/intro.shtml: "Traditional knowledge refers to the knowledge, innovations and practices of Indigenous and local communities around the world."
15. Operations Evaluation Department Country Evaluation and Regional Relations (OEDCR), "Report No. 25332 Implementation of Operational Directive 4.20 on Indigenous Peoples: An Independent Desk Review, WORLD BANK 11 (JAN. 10, 2003), https://documents1.worldbank.org/curated/en/570331468761746572/pdf/Implementation-of-Operational-Directive-4-20-on-Indigenous-Peoples-an-independent-desk-review.pdf."
16. UNPFII, supra note 13.
17. UNPFII, supra note 13.

ensure that the community as a whole has a *"right of self-determination."* While the right of self-determination as available under the international human rights instruments[18] talks about self-determination as a right available to each people who can freely determine their political status and pursue its economic, social, and cultural development.

There is always an apprehension that if a community as a collective group has a *"right of self-determination,"* there are chances that such community can demand for substantial internal autonomy or at the gravest situation session from the present State. This makes government reluctant to recognize *"right of self-determination"* of Indigenous peoples.

The above discussed both issues namely, first, the difference in understanding of Indigenous people whether to be considered from perspective of pre and post colonization of a land as well as *second,* whether Indigenous communities should have a "right of self-determination" both are important from India's take on Indigenous people. The author will delve into this issue in the next chapter concerning international legal instruments on rights of Indigenous peoples.

ESSENTIAL CHARACTERISTICS OF INDIGENOUS CULTURE AND INDIGENOUS PROPERTY

It has already been discussed in the previous section how Indigenous peoples represent a broad and diverse range of cultural groups who might be as different as, for example: the American Indians and the Ainu in Japan. Each such Indigenous peoples form distinct communities different in their beliefs, cultural heritage and traditional rituals and practices which make them unique. These Indigenous communities might have either maintained their traditional ways or adopted modern societal ways along with their ancestral practices, but essentially such communities retain their common elements fundamental to their indigenous cultural heritage.

Before proceeding any further, a widespread problem needs to be acknowledged at this stage. There is no one definition of what constitutes "culture", but in 1871 a British anthropologist Sir Edward Burnett Tylor described it as: *"that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of*

18. "International Covenant on Civil and Political Rights, ICCPR art. 1 (1966); Charter of United Nations art. 1(2) (1945) and International Covenant on Economic, Social and Cultural Rights ICESCR art. 1(3) (1966)."

society" [19] which is the earliest definition of "culture". That means the culture of an individual differs from others who are not member of that community and culture is a kind of response of a particular community to its immediate surrounding[20].

Thus, Indigenous communities are predominantly different not only from modern societies but also other indigenous communities. The difference primarily lies between these two societies because Indigenous societies are generally away from the sweeps of industrialization, modernization, and technological advancement. To understand Indigenous knowledge, it is pertinent to see how Indigenous communities or traditional society's function, the idea of property or rights associated with property in such societies.

The social organization of Indigenous society is based on a strong pattern of kinship groups with lineage as their basic constituent. Unlike Western rights concept which is premised on rights attached to individual human beings, lineage forms the foundation of an Indigenous social group popularly referred to as the clan. Indigenous cultures are holistic in the sense that their culture whether in form of beliefs, norms, spirituality, and values are not sharply separated from human social life and the Indigenous peoples submit themselves to the community. Thus, the principal place in such a community is given to group or collective rights rather than the individualistic rights prevalent in modern societies.

Indigenous communities nurture a close relationship with their environment and the knowledge in such communities is a result of generations of skill and observation and practice handed down from ancestors. Thus, such knowledge and heritage are continuously evolving and not stagnant. The nature of Indigenous knowledge and heritage being living includes broad arena of subject matter from folklore like stories, music, stories, symbols, languages to scientific, technical, agricultural, and other such knowledge of flora and fauna to moveable cultural properties like totems, musical instruments, daily object and immovable properties like burial grounds, tombs, etc.[21]

As an Indigenous person is inseparable from his community, the community forms integral part

19. Wanjiku Karanja, The Legitimacy of Indigenous Intellectual Property Rights' Claims, 1 STRATHMORE L. REV. 165,167 (2016)."
20. *Id.*
21. Terri "Janke, Respecting Indigenous Cultural and Intellectual Property Rights, 22 U.N.S.W.L.J. 631, 633 (1999)."

of his identity. This does not, however, imply that there is no structure or individual rights within the community. Specific rights or rituals, though a part of the common heritage of the community, may be restricted to only the elders or specific people.

> *"certain works of folklore . . . cannot be shown, nor can the themes in them be disclosed, except to those few who have been admitted to knowledge of ritual secrets and mysteries by undergoing initiation or other special ceremonies.*[22]"

Thus, even an Indigenous people allowed to perform a ritual or practice or having access to an Indigenous knowledge does not have the right to convey the same to an outsider without the permission of the community.

The laws and norms in Indigenous communities are premised on responsibility for cultural knowledge to be sustained and protected and transferred on to future generations and thus individual indigenous people or a group of such peoples together act as a caretaker or custodian of the indigenous knowledge and heritage[23]. As rightly said by Halewood,

"the indigenous view differs radically from the Western conceptualization... For local communities, rights are a means of maintaining and developing group identity rather than pursuing private economic benefit…"[24]

For Indigenous peoples, culture and common heritage is usually tightly interconnected with territory, kinship, community, ceremony, personality, and cosmic order. For example: apart from its entertainment value, music serves as a means of recording history by preserving information about important past events. Similarly, lands mean more than mere basis of subsistence for the community. Indigenous communities have profound spiritual, religious as well as cultural connection with their land and the control and preservation of the land is an essential pillar to Indigenous culture and ancestry.

As a result of which, the concept of property alienated from nature or culture is not prevalent in traditional communities. This explains the call for rights in natural resources as a part of the cultural heritage of the community. The holistic culture of Indigenous communities makes

---

22. Kamal "Puri, Cultural Ownership and Intellectual Property Rights Post. Mabo: Putting Ideas into Action, 9 INTELL. PROP. J. 293, 298 (1995)."
23. Terri "Janke, Respecting Indigenous Cultural and Intellectual Property Rights, 22 U.N.S.W.L.J. 631, 633 (1999).
24. Michael Halewood, Indigenous Knowledge in International Law: A Preface to Sui Generis Intellectual Property Protection, 44 MCGILL L. J., 155-171 (1999).

Indigenous people see property either as a gift from God or owned communally by the Indigenous community. Therefore, property in indigenous sense is inalienable and intricately linked with the spirit of the community itself. Ownership of property or rights associated is not individualistic, but community based. The introduction of "private property rights" in lands and expropriation of such native lands pose serious threat to indigenous collective identity and their understanding of property.

UNDERSTANDING INDIGENOUS INTELLECTUAL PROPERTY

The indigenous knowledge is irrevocably interlinked with nature and sacredness of communal cultural practices and refers to the vast body of information and skills that are unique to an indigenous community.[25] For example: Indigenous knowledge may be regarding use of Aloe Vera leaf gel for treating skin diseases, but indigenous people will not see this knowledge to be their private property and therefore will not try to monopolize it. On the other hand, such knowledge will be treated as gift of God or a miracle and will be conserved and passed on through generations.

Indigenous knowledge and recourses are central to maintenance of the identity of the community and often cannot be distinguished from each other. A similarity can be found with modern industrial intangible property rights which are embodied in tangible properties. However, while it is of essential nature that communities have control over both the knowledge and resources, in the modern world, the ownership over tangible and intangible property entangled together might belong to separate persons. For example: While a person can own a laptop, he does not own proprietary rights over the software on which the laptop runs.

It is important here to mention indigenous intellectual property is a broad umbrella term and overs in its ambit all the cultural knowledge and heritage. The nature of indigenous intellectual property is multi-faced. It can include storytelling, songs, art, treatment procedure, culinary process, design making, dance forms, paintings, poetry, carvings, sculptures, pottery, terra cotta, mosaic, woodwork, metal ware, jewelry, handicrafts, costumes, and indigenous textiles, [26] properties of elements existing in nature, etc. all forming a part of a communities' cultural life.

25. INDIGENOUS KNOWLEDGE SYSTEMS AND DEVELOPMENT 4 (David W. Brokensha, D. M. Warren, and Oswald Werner eds., Lanham: University Press of America 1980)."

But the common characteristics to indigenous intellectual property can be identified and summarized as:

i. Intergenerationally passed through imitation or orally

ii. Attribution to a single individual or set of individuals is difficult but such indigenous work is held by the community at large.

iii. Continuously evolving and considered living in nature.

Indigenous intellectual properties are categorized into three broad groups: i. *"Traditional knowledge"* ii. *"Traditional cultural expression"* iii. *"Genetic resources."* While the evolution and the conflicting opinions on these groups will be highlighted in the following chapters, the diagram below shows these groups.

Figure 1 Categories of Indigenous Intellectual Property

"Traditional knowledge" / T y, artistic, scientific works and inventions, innovations and creativity,[27] *"traditional cultural expressions",* / TCEs or *"expressions of folklore"* / EoF refer to artistic and cultural expressions like dance, designs, music, performances, handicrafts, art, carvings, architectural designs, etc. while *"genetic resources"* refer to the genetic material of plants, animals etc.[28] Many other terms like *"indigenous culture and intellectual property", "intangible cultural*

26. Matthew Rimmer, Introduction: Mapping Indigenous Intellectual Property, in INDIGENOUS INTELLECTUAL PROPERTY: A HANDBOOK OF CONTEMPORARY RESEARCH 20 (Mathew Rimmer ed., Edward Elgar Publishing) 2015.
27. WIPO, "Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge 25 (1998-1999), http://www.wipo.int/tk/en/tk/ffm/report/final/index.html (hereinafter WIPO Fact-Finding Missions)."
28. Wanjiku Karanja, The Legitimacy of Indigenous Intellectual Property Rights' Claims, 1 STRATHMORE L. REV. 169, 170, 171 (2016)."

heritage" similar to traditional cultural expressions are also used referring to more less same subject matter in different international, regional, national or non-governmental forums for deliberations.[29] Commercialization of such indigenous intellectual as well as cultural property without the consent or legal control by indigenous people leads to its erosion and cultural harm.[30] For example: When a patent was filed for the process of making *"Caribbean steelpan musical instrument"* which first ones were carved out of discarded oil drums, the same was objected by Caribbeans as the steelpans formed part of their cultural heritage.[31]

However, in this article is limited to only such Indigenous cultural heritage like cultural expressions which can be categorized as artistic, dramatic, musical, literary, sound recordings, etc. and thus a subject matter for copyright regime.

PROBLEM WITH NATURE OF INTANGIBLE CULTURAL HERITAGE

Many ethnologists have had problem with the term folklore and had applauded the adoption of the term *"intangible cultural heritage"* in place of folklore as the reference of *"folklore"* was equated with uncouth and primitive. There have been voices however that the term *"intangible cultural heritage"* is equally problematic as *"Heritage begins where culture ends.,"* meaning authorities offer the heritage status often with implication of immutability and fixity.[32]

This further is supported by how domestic legislations often give power to local authorities to identify and designate buildings, monuments, and areas as cultural heritage and such people in power or the "top-down" relationship often have an inherent role to show in awarding the status of cultural heritage.[33] A preferable term for some is "intangible culture" excluding the term heritage as cultures focus on relationship between past and present and is evolving in context to immutability as associated with heritage.

It is also important there to note that the very term *"heritage"* from legal perspective can cause distinct problems as cultural heritages are often safeguarded, cared and acknowledged under

29. WIPO, "Preliminary Systematic Analysis of National Experiences with The Legal Protection of Expressions of Folklore, INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE Fourth Session," WIPO/GRTKF/IC/4/3 (Dec. 2002).
30. Janke, supra note 21, at 632.
31. See Baram Marcus, "A Nation's Steel Soul, N. Y. TIMES, July 7, 2002, http://www.nytimes.com/2002/07/07/weekinreview/07BARA.html."
32. Ljiljana Gavrilovic, Mirela Hrovatin, Jelincic Daniela & Tvrtko Zebec, Culture or Heritage? The Problem of Intangibility, 42 ETHNOLOGICAL FORUM 99-103 (2012).
33. *Id.*

legal instruments like *"UNESCO Convention for the Safeguarding of Intangible Cultural Heritage from 2003";* in contrast to right over cultural object or process as such right can be exclusive in nature and have an angle of tradability in addition to acknowledgement of ownership of such right. The second interpretation is a property-based approach as under intellectual property laws where the focus is on exclusivity and tradability rather than acknowledgement and safeguarding.

To elaborate how the objective of the legislation may or may not at times serve the purpose of a community, a reference can be made here to Halubaj bellringers. Halubaj bell-ringers were included in the *"UNESCO's Representative List of the Intangible Cultural Heritage of Humanity"* and it led to major confusion as there were other bell-ringers from Kastav area of Croatia who argued that all bell-ringer groups should be protected as Croatian intangible cultural heritage and presumed on exclusivity of status of Halubaj bell-ringers.[34] However, such inclusion in form of inscription on UNESCO's Representative List was not a matter of exclusivity or protection but just a certain acknowledgement or recognition. This got further aggravated when "Kastavea" tourist agency printed T-shirts with print *"I am also the bellringer from UNESCO list"* leading to major conflict between Matuji bellringers and Halubej Bell-ringers, both eventually questioning how someone from Paris have right to protect their cultural heritage.[35]

Thus, protection, safeguarding, acknowledgement, exclusivity are terms which might not have the same connotation for different communities across the globe and a legal instrument facilitating such objectives may also create discontent and be frowned upon by the community. Regardless, this study is an attempt to find out whether intangible cultural rights can be accommodated, upheld, and protected through intellectual property laws.

INTELLECTUAL PROPERTY AND NATURE OF RIGHTS ASSOCIATED

The definition of property in intellectual property law regime is different. Property in physical

34. *Id.*
35. *Id.*

world can be owned.[36] Rights over a property are demarcation for third parties and function as fences to stop third parties from trespassing. Physical property like land, house, car, pen, book etc., whether moveable or immovable in nature, are tangible and can be transferred by the owner to others.

Intellectual property is interestingly different even from the traditional concept of property. Intellectual property is not only intangible in nature but the demarcation around the intellectual work and the tangible property in which it is embodied is often indistinguishable. According to the economists, an important nature of intellectual property regarding its consumption is its "non-rivalrous" nature. Consumption by one person does not diminish for another. Lawrence Lessig (2009) describes it best as:

> "If I write a song, you can sing it without making it impossible for me to sing it. If I write a book, you can read a copy of it (please do) without disabling me from reading another copy of it.[37]

The best example is the exchange of ideas. Idea is a creation of mind but exchanging two ideas between two individuals don't deprive the initial holder of idea. In fact, at the end of exchange both persons have two ideas. [38] However if a person exchanges his apple with another person having apple (both being traditional moveable properties) each does not end up having two apples.

Thus, the current intellectual property laws do not protect idea per se as a property and it is only the expression, manifestation or application of the idea that is protected as intellectual property of an individual. [39] Ideas can be shared with no reduction in the quantity the "owner" can consume. This difference is central and fails Lockean *"Theory of Labour"* as a justification for protection of intellectual property. John Lock's Labour theory says anyone who puts labor is entitled to extraction his fruits of labor from state of nature and owns such fruits of his labor.[40] For example: If A picks up berries from a bush, A is entitled to ownership over the berries as he

36. "Jeremy Stern, Spiritual Property, 'Intellectual' Property, and a Solution to the Mystery of IP Rights in Jewish Law, 10 U. ST. THOMAS L.J.603, 604 (2013)."
37. Lawrence Lessig, Code: Version 2.0 – Intellectual Property, 2 INJlIP Law 1 (2009) http://www.commonlii.org/in/journals/INJlIPLaw/2009/1.html.
38. "ROBERT P. MERGES Et Al., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE Chapter 1 (Aspen Law and Business 1997)."
39. Peter W. Jones, Indigenous Peoples and Intellectual Property Rights, 4 WAIKATO L. REV. 117 (1996).

put effort to extract such berries from nature. But the ownership over fruits of labour is subject to non-waste principle and that *"enough as good left for others"* condition should be left in common.[41] Since ideas are in abundance and its extraction (or expression) by one does not exclude the idea from common and intellectual property laws protect not the idea but the expression of the idea.

The difference between real property and intellectual property can be better understood from what Jefferson said:

> *"If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it."*[42]

The reason why intellectual property laws protect the rights of authors is that by recognizing works of intellect as protectable; authors are given an incentive to produce. Whereas regarding ordinary property, the law must both produce an inducement to produce and guard the right of possession; with intellectual property, the law need only generate the *"incentive to produce."* This is the difference between these two quite distinct kinds of property, and this difference affects the nature of intellectual property law.

Another key factor is that though laws protect intellectual property to ensure that there is sufficient incentive to produce it, however the rights guaranteed over such property is less than *"perfect control"* as the rights conferred are limited by the statute conferring such right. Therefore, one can say that the ideal protections of intellectual property law are something less than the ideal protections for ordinary or real property which is absolute.

It is important to mention that there are several kinds of intellectual property like patent for inventions; trademark to protect marks used in course of trade; copyright for original works; trade-secret for confidential valuable information; geographical indication as indicator of

---

40. Alexander D. Northover, "Enough and as Good" "in the Intellectual Commons: A Lockean Theory of Copyright and the Merger Doctrine, EMORY LAW JOURNAL, http://law.emory.edu/elj/content/volume-65/issue-5/comments/enough-good-commons-lockean-theory-copyright-merger-doctrine.html."
41. Gordon Hull, Clearing the Rubbish: Locke, the Waste Proviso, and the Moral Justification of Intellectual Property, 23:1 PUBLIC AFFAIRS QUARTERLY 67, 67-93 (2009).
42. "Letter from Thomas Jefferson, to Isaac Mcpherson quoted in Graham v. John Deere Company, 383 US 1, 8-9 n.2 (1966)."

origin, plant variety and related rights for protection of intellectual property relating to plant biodiversity, industrial designs protection and so on. The *"WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge,"* 2024 is one such recent example of World Intellectual Property Organization (WIPO)'s attempt at defensive protection of traditional knowledge belonging to indigenous peoples or local communities by disclosure of origin when an invention is based on same[43].

However, intellectual property rights are designated often as western legal tools, suited for the needs of the corporate or the industries only. The following is an example of such opinions which disfavor connection between intellectual property rights and Indigenous peoples and highlights the pertinent threat involved in governing Indigenous culture within intellectual property regime:

> "Intellectual property rights (IPRs) are a product of the logic and the interests of the states and corporations, which have historically been responsible for the cultural, economic, political, and physical violence visited upon Indigenous peoples. The question of IPRs has its origins outside Indigenous culture and it arises as but one element of the renewed assault against Indigenous peoples represented by the promulgation of new economic regimes…"[44]

But this article seeks to attempt at accommodating Indigenous culture and knowledge within intellectual property regime.

NEED FOR PROTECTING INDIGENOUS INTELLECTUAL PROPERTY THROUGH IP REGIME

The protection for Indigenous knowledge and cultural heritage can be of two types: positive

---

43. WIPO Member States Adopt Historic New Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge, https://www.wipo.int/pressroom/en/articles/2024/article_0007.html.
44. Denise "Brunsdon, Recognizing Indigenous Legal Values in Modern Copyright Law, 6:3 online: UWO J LEG STUD 2, 11-12 (2016) https://ir.lib.uwo.ca/uwojls/vol6/iss3/2."

strategies whereby there is active exercise of rights over TK and TCEs or defensive strategies whereby others are prevented from asserting IPRs over such TK and TCEs. [45] For example, if Indigenous peoples want to gain revenue through their creative endeavors, commercializing their cultural expressions and they aim at preventing non-Indigenous other people from selling imitations or similar styled products market as competitors, the positive strategy will facilitate their causes in such situation. On other hand, if Indigenous peoples aim to have total control and prevent any form of use or dissemination of their cultural heritage as that destroy their original significance, such group's interest can be protected more through defensive strategies.

It is thus important for recognizing the appropriate measures so that indigenous intellectual properties utilization happens on the principles of respect, *"prior informed consent,"* proper attribution and "benefit sharing" with such indigenous community. For example: if we consider protection of such music as a basic human right of Indigenous people to protect their cultural heritage, then privatization of such music by a multinational music company through copyright regime is a violation of the Indigenous people's rights. Such act by Music Company also deprives Indigenous communities from right of recognition as the originator of such music as well as beneficial rights in terms of economic enrichment. In such cases policymakers should consider whether copyright law in its present form is suitable to protect and prevent unauthorized usage of such intangible property of Indigenous communities based on these principles.

A classic example of such misappropriation is the case of Ami tribe from the South region of Taiwan.[46] Ami people are descent of Malay-Polynesian descent, and their ancestry can be traced back to 3000 years in Taiwan. Enigma's (recorded by German musical composer named Michael Cretu) international hit song "Return to Innocence" in his album "Cross of Changes" managed to stay over 32 consecutive weeks in the international chart for Billboard Magazine and was also adopted by the "International Olympic Committee" to serve as background theme for television

45. NIRMAL "SENGUPTA, TRADITIONAL KNOWLEDGE IN MODERN INDIA PRESERVATION, PROMOTION, ETHICAL ACCESS AND BENEFIT SHARING MECHANISMS 45 (Springer 2019)."
46. Angela "Riley, Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities, 18 AELJ 175 (2000)."

broadcast for Olympics summer games of 1996. [48] The *"Return to Innocence"* [47] was an exploitation of the sacred tribal chants of the Ami tribe where an Ami tribal couple is singing *"Jubilant Drinking Song"* in Ami language which became the hook that gave the unique appeal to Enigma's song. Ami language is one of those few languages in the world which has not been transcribed into written form and therefore is transmitted through generations by oral tradition of chanting or songs or personal narratives of Ami people.

Kuo Ying-nan, an Ami tribal leader, whose role in his community was to keep the tribal chants alive was invited by the *"Ministries of Culture of Taiwan"* as well as France to perform Ami folksongs.[49] It is during this world tour and performances that the aboriginal folksong performances of Kuo Ying-nan and his wife Kuo Hsiu-chuwere recorded without their consent and later published as compact disc. Enigma brought the rights from the Ministry of Culture in France and the Ami people were never consulted neither for recording of their performance nor acknowledged or paid for their contribution towards "Return to Innocence" which became hit song popularly called "world beat" in the record industry of United States of America.

While Enigma's song became a cutting edge hit in the record industry across the world, the piracy which happened of the folksong of Ami people is an example of how capitalist motive people/entities often oppress and encash on the tradition and culture of lesser-known communities. It is a popular trend in the music and record industry to steal rhythm and songs from unknown artists and turned those works into big hits, without recognition and with minimal or no recompense to the originators[50].

CONCLUSION

The Indigenous Peoples' knowledge and cultural heritage sacred can be irreversibly put in the global public domain very easily. It is important to legislate intellectual property laws that

---

47. Enigma, Return to Innocence (Official Video), YOUTUBE (Mar. 10, 2009), https://www.youtube.com/watch?v=Rk_sAHh9s08.
48. Angela "Riley, Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities, 18 AELJ 175 (2000)."
49. Caroline Joan S. Picart, Cross-Cultural Negotiations and International Intellectual Property Law: Attempts To Work Across Cultural Clashes Between Indigenous Peoples And Majoritarian Cultures, Vol 23 ILJ 37, 43 (Jan. 2014).
50. San Jose Law Firm Assists Elderly Taiwanese Couple Whose Work Gained Fame But Not Compensation, ENTERTAINMENT WIRE (Dec. 28, 1998), http://www.angelfire.com/az/MizSpiffysLair/article.html."

empower Indigenous peoples have the power to determine the fate of their creations, reap the benefits of their community' work or control the dissemination of their works within modern commercialized world. The challenge has only increased manifold with globalization since access, communication and distribution copies of embodying indigenous knowledge and heritage has become possible at the touch of finger.[51] It can be rightly said: *"For the marketers, Aboriginal culture is merely a commodity, there to be strip-mined for commercial profits."* [52] Intellectual property laws internationally and domestically needs upgradation to address concerns of indigenous peoples.

51. See "A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (2000)."
52. Alan Jabbour, Folklore Protection and A rational Patrimony: Developments and Dilemmas In the Legal Protection of the Lar; 17 COPYRIGHT BULL. 10, 11 (1983).

MANAGING CORPORATE CRIME: FINDING THE RIGHT CORPORATE LIABILITY REGIME

*** Ms Deborisha Dutta**

**** Dr. Sujata Roy**

INTRODUCTION

A corporation is a separate legal personality independent from its members therefore, logically the liability should be imposed only on the corporation. That should be a plausible understanding to tackle situations of corporate crime[1]. It is believed that intent, knowledge, and subjective irresponsibility are the standards of faults that criminal law looks into. So, whenever we are wrapped in the cloud of thoughts that criminal liability is not easily attributable when it comes to a corporate entity one must keep in mind that laying down civil liability to a corporation is also to a great extent difficult[2].

The self-conceived notion that is being harboured acts as a barrier to investigating the fact that corporations are capable of committing crimes for which accountability lies on them as well as legal sanctions for such commissions attributable. This acts as a hindrance to accepting the concept of corporate criminal liability in totality. The effort to overcome the issue of imputing criminal liability to fictional bodies has been a persistent tussle between the judiciary and the legislature.[3]

• Understanding 'Corporate Crime' And 'Corporation'

Mala in se and *Mala prohibita* are the two categories under which the concept of crime can fall. The former means an act that is innately wrong and the latter means an act labelled by the legislature as a crime.[4] A closer inspection into the types of crime would reveal that the most commonly known crime in the society would be conventional crimes apart from this there are occupational crimes which are termed white-collar crimes and the third type would be an

* Assistant professor (Sr. Scale), The NorthCap University, Gurugram.
** Associate Professor, The West Bengal National University of Juridical Sciences (WBNUJS).

1. Yuvraj Dilip Patil, "Corporate Sentencing in India" 1(1) Symbiosis Journal (2012).
2. Celia Wells, "Criminal Responsibility of Legal Persons in Common Law Jurisdictions" (2000) Paper prepared for OECD Anti-Corruption Unit Working Group on Bribery in International Business Transactions.
3. Shouvik Guha and Abhyudaya Agarwal, "Criminal Liability of Corporations: Does the Old Order Need to Change?" 1 NUJS Law Review (2008).
4. Vijay Kumar Singh, Corporate Power to Corporate Crime: Understanding Corporate Criminal Liability in India 144 (Satyam Law International, New Delhi, 1st edn., 2013).

organizational crime. If corporate crime is to be put under any of the potholes, then it would be under both the second and third kind. Here comes the dilemma because often the two terms white-collar crime and corporate crime are used interchangeably but there lies a difference between the two which is essential for the initial understanding.[5]

White collar crimes and corporate criminalities are both socially detrimental and blameworthy acts but the distinguishing factor is that in the former it is committed by somebody who is in an advantageous position for attaining individual gains against the corporations that employ them. On the other side of the coin is a corporate crime that is committed by the corporations against their workers, the public at large, the environment, government, other businesses, or countries that can cause monetary, corporeal, or environmental harm. According[6] to Braithwaite "corporate crime not only includes acts in violation of criminal law, but civil and administrative violation as well and secondly, both corporation and their representative are recognized as illegal actors."[7] The aforesaid definition has been somewhat reiterated with other add-on factors by many authors.

The corporation being the subject matter of corporate crime it becomes imperative to have a clear concept of it. A corporation is a wider term than a company which comprises a body corporate as well as an unincorporated body in which a one-man company can also be included and the sole motive of it is to derive profit without the individuals having any responsibility.[8] The motive to derive profit has been criticised because many believe that it ought not to be something that should drive a particular company rather other aspects should also be given equal importance and have the potential to help a company to achieve its desired goal.

A separate legal personality is something that can knock off the whole concept of corporate

5. Sanskriti Singh and Lipsa Dash, "Criminal Liability of Corporations" 21(2) IOSR Journal Of Humanities and Social Science (2016).
6. Sanskriti Singh and Lipsa Dash, "Criminal Liability of Corporations" 21(2) IOSR Journal Of Humanities and Social Science (2016).
7. Sally S Simpson, Corporate crime, Law and Social Control 6-7 (Cambridge University Press, Cambridge, 2002).
8. Vijay Kumar Singh, Corporate Power to Corporate Crime: Understanding Corporate Criminal Liability in India (Satyam Law International, New Delhi, 1st edn., 2013).

criminal liability. The term-limited liability means the members are liable only to the extent of their shares in that company. It can be said here that the concept of a separate legal entity along with the limited liability concept in a way creates the concept of the corporate veil that has been protecting matters of corporate wrongdoings. The corporate veil has been often lifted by the court in various matters especially in evidence of illegal wrongdoings though the standards and rules regarding the same have not been incorporated into law. Along[9] with the above impediment, another barrier to the growth of corporate criminal liability is the principle of *Ultra Vires* which states any act which is not laid down in the resolution of the corporation is an ultra vires act, and therefore it cannot be binding. It is a given understanding that no criminal activity can form a part of a company's memorandum of association and article of association and hence this doctrine can be easily availed to hide behind it by the so-called business culprits.[10] It should be noted that the usage of this doctrine of *ultra vires* has eventually reduced in England and America[11] and it is expected that this wind of change would prevail over the rest of the world.

THE COMPLEXITY OF CORPORATION'S LIABILITY

Civil liability has always been easier to attribute to the company as compared to criminal liability as it has been developing itself from an intricate web of statutes and common law. The simplification of this concept has been tried by various jurists, academics, legislators, etc. but ultimately it boils down to the understanding of the term 'liability' which is believed to break down the complexity of the perception of corporate criminal liability and which will eventually help in laying down a structured pathway. The intricacy of deciding liability would arise in many situations, such as, as was seen in the case of the *Herald of Free Enterprise* [12] where several individuals caused the harm which was the result of their combined action and as a result of which laying down liability righteously became a matter of debate.[13]

---

9. Brian Lewis and Steven Woodward, "Corporate Criminal Liability" 51 American Criminal Law Review 923 (2014).
10. V S Khanna, "Corporate Criminal Liability: What Purpose Does It Serve?" 109(7) Harvard Law Review 1477-1534 (1996).
11. Kent Greenfield, "Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality (With Notes on How Corporate Law Could Reinforce International Law Norms)" 87(7) Virginia Law Review (2001).
12. Herald of Free Enterprise, [1987] 120 Deb 678 (HC).

A brief note on the types of liability that the corporate entities can be subjected to should be highlighted at the outset.[14]

- **Vicarious Liability**

The two basic models are vicarious liability and direct liability, and both are the offspring of torts. The principle of *respondeat superior* governs the former model which says that the master shall be liable for the acts of his servant. If we look into the parameters of the criminal law the *respondeat superior* rule cannot be given a place in it because a master cannot be held responsible for the crime committed by its agent. Therefore, on what criteria a corporate entity should be made responsible as an employer in matters of corporate crime is something that is still debatable. The two deciding factors for imputing criminal liability on corporations are 'course and scope of employment' and 'agency principle'. Agency law is dependent on the concept of authority otherwise it will be of no use. Similarly, the identification of the agent is very important and that is where the challenge with respect to large corporate houses lies where the identification of the culprit becomes difficult because of the complex structure of the company which ultimately results in a lack of evidence and hence it is seen that the corporation cannot be held liable under the vicarious liability rule.[15] The question that always arises in such a situation is to what extent the applicability of vicarious liability can be inflicted by the court? The failure of vicarious liability can be seen when it is tested on any complex or larger company and it also overlooks the concept of *mens rea* as it simply holds the company liable by proving the wrongdoing of an employee.

- **The Principle of Attribution**

Lord Hoffman laid down the three rules of attribution which are primary, general, and special in nature. Rules of attribution are a culmination of vicarious liability. The primary rule talks about the company being liable because of its constitution where usually the authority of the director is well defined. The general rule is derived from the concept of agency theory as given under the

---

13. Conceição Soares, "Can Corporations Be Criminally Responsible?" 3(6) International Journal of Humanities and Social Science (2013).
14. Vijay Kumar Singh, Corporate Power to Corporate Crime: Understanding Corporate Criminal Liability in India 106 (Satyam Law International, New Delhi, 1st edn., 2013).
15. Brian Lewis and Steven Woodward, "Corporate Criminal Liability" 51 American Criminal Law Review 923 (2014).

concept of vicarious liability and the latter rule comes into action only in the absence of the other two rules.[16]

- **Direct Liability Imbibing the Rule of Strict Liability and Absolute Liability**

Here the company is held liable once it is proved that the person who has committed the crime is somewhat associated with the said company. The strict liability and the absolute liability have been approached to oppose against criminal immunity of the corporate entities. These two principles do not bother whether the perpetrator had any intention or ill-will to commit the crime what is important is the wrongdoing which automatically will make the company liable. In strict liability, certain exceptions can be taken as a defence by the company to evade the liability but that is not the case with absolute liability.[17]

Apart from the aforesaid kind there is two other liability that comes under the concept of direct liability and they are 'permitting' and 'secondary' liability. Permitting liability is imposed when it is shown that the company knew of certain prior activities which can give rise to the commission of a crime even though they were unaware of the misdeed when it occurred. Acts like aiding, abetting, counselling, etc. can lay down secondary liability on the company. In both these cases what is important is the actual knowledge of facts and not the commission of the crime.[18]

- **The Identification Doctrine: Rise of The Alter Ego Doctrine**

Viscount Caldecote L.C.J. while judging a particular case said "…although the directors and general managers of the company are its agents, they are something more. A company is incapable of acting or speaking, or even thinking except in so far as its officers have acted, spoken or thought." [19] The simple belief which directs the identification doctrine is that the directors and people having important positions in a company are the ones who take and sanction important decisions and therefore, identifying them for punishment becomes very easy. The initial wave of trend believed that a company had no mind of its own and hence cannot be held liable but this doctrine laid down the theory saying that the 'directing will' of the important position holder in the company can be laid down on the company which will help the law to

16. Meridian Global funds management Asia ltd v Securities Commission [1995] 3 All ER 918.
17. Ritika Banerjee, "Corporate Criminal Liability: A New Paradigm" 4 Madras Law Journal- Criminal (2011).
18. John Henshell (Quarries) Ltd v Harvey [1965] 2 QB 233.
19. DPP v Kent and Sussex Contractors Ltd [1944] 1 KB 146.

justify the guilt of the latter along with the higher officials. This is otherwise known as 'Directing mind and will test' or the 'Alter Ego doctrine'. Two things that are essential in this regard are that the director's mind and will be imputed on the company but there might be circumstances where if proved that the status of non-directors is as important as that of a director then they might also be included. Similarly, the mind which will be laid on the company can be found in different people holding important portfolios of the company for different activities. This is something that must be probed into for correctly applying this doctrine[20].

The failure of this principle lies in matters of delegation whereby the director instead of taking up or sanctioning a particular act allocates it to some other person and in such a circumstance it will be unfair to impute the mind of the delegate to the director per se. The 'individual liability against collective liability' can be a challenge in applying this doctrine.[21] When the act is done cooperatively by many then can it be supposed that it was the will of the director alone that needs to be attributed, therefore, the problem lies in the fact of detection as to which officer's/ employee's/ director's act can be ascribed to the company in a scenario where many officials are acting conjointly?

- **New Models of Corporate Liability**

The USA has contributed to the development of many liability models in the field of corporate crime and the most important one in this field is the aggregation model. It has culminated from the theories of sociology and management and it tries to solve the issue of 'collective knowledge'. Instead of the directing head having the sole knowledge if it can be proved that other employees collectively knew of certain wrongdoing then the company would also be said to know of it. This model had a short outreach as it only tried to solve the situation where many people are involved and not just one individual. It fails to distinguish between 'collective knowledge' and 'collective intent' which should have been an important distinctive factor. The question here is whether the company will still be found guilty if none of the employees

20. El Ajou v Dollar Land Holdings plc [1993] 2 All ER 717 (HC).
21. Jennifer A. Quaid, "The Assessment of Corporate Criminal Liability on The Basis of Corporate Identity: An

irrespective of knowing had any intent to commit the crime[22]?

This theory has been developed as an alternative to the identification doctrine that has been mentioned above. The identification doctrine to combat its shortcoming tried solving the collective action issue by accumulating the mental element and the actions of all the employees and trying to pin it down on one individual if the situation permits. Simply collecting the actions of individuals will not give a correct approach as one employee may not have any idea about the other's intent therefore pinning such collective liability on the decision maker of the company would not be a fair outcome[23].

The separate self-identity model opposes the idea of derivative corporate liability as is followed by the other models instead it centers on the primary liability of the company. This model believes that the corporation has a separate identity altogether and the members cannot be recognized by the organization sensibly as they are ancillary in nature. The subject of focus in this regard should be the corporate system under which the said company is performing. [24]

Parallel to this model the model of 'corporate culture' plays a pivotal role. Corporate culture includes within its ambit philosophy, character, policy, morals, etc. which ultimately reveal the fact as to how the entity works; whether it encourages its employees to deal in unethical practices or not. To understand how liability can be attributed to the company the working pedagogy of that company has to be investigated and that is how along with the 'separate self-identity model' the 'corporate culture model' will be fruitful[25].

Another recently developed theory in the UK is the Reactive Corporate Fault theory and this lays down that the corporation that has done a particular misdeed should internally investigate and find the real culprit behind it in order to levy the responsibility for the same. Such an initiative must be taken up by the said corporate entity on the orders given to them by the court when their

---

Analysis" 43 McGill Law Journal 67 (1998).

22. Vijay Kumar Singh, Corporate Power to Corporate Crime: Understanding Corporate Criminal Liability in India 129-131 (Satyam Law International, New Delhi, 1st edn., 2013).
23. *Ibid.*
24. Eli Lederman, "Models for Imposing Corporate Criminal Liability: From Adaptation And Imitation Toward Aggregation And The Search For Self-Identity" 4 Buffalo Criminal Law Review 641-708 (2000).
25. Pamela H Bucy, "Corporate Ethos: A Standard for Imposing Corporate Criminal Liability" 75(1) Minnesota Law Review 1125 (1991).

offence has been proved. If the company is successful, then it should come up with its own rules and regulation to apply suitable measures. Criminal liability will only be attached if the company fails to undertake the said order laid down by the court.[26]

This theory like any other theory was not beyond any disadvantages because the first question that arises is whether an ultimate discretion is given to the accused corporations to build their measures to avoid criminal liability and if the answer is negative then a second issue arises that is what standards and rules should be followed with respect to those measures? Another interrogation would be on the failure of not taking those suitable measures and whether this failure will result in the commission of an offence and if it is answered in positive then will the previous offence be clubbed with the latter one to enhance their corporate criminal liability? Lastly can a simple measure of warning given to its employees be enough and that will ensure curbing of similar actions in the future?[27]

After the observations made with respect to the new models of corporate liability, it can be concluded that though certain benefits are attached to these new models of liability still they are yet to develop as they are still in their nascent stage, therefore, the models need to be scrutinised by the legislators. Nevertheless, there exists an apparent accord on the point that if a crime has been committed using the corporate vehicle, criminal liability must attach to at least one of them but where the vehicle is only acknowledged as the carrier of the crime then to what extent the accountability can be allocated to the said corporate vehicle alone?[28] The answer to this remains open-ended.

CORPORATE CRIMINAL LIABILITY AS COMPARED TO INDIVIDUAL LIABILITY

After understanding the various models of liability, the main question that needs to be solved is whether the individual perpetrators in the accused company should be punished along with the said company or should they be dealt with individually or rather be given a guilt-free pass. Another question arises with respect to the size of the companies as it is much easier to apply any

26. William S Laufer, "Corporate Culpability and the Limits of Law" 6(3) Business Ethics Quarterly Cambridge University Press 311-324 (1996).
27. CMV Clarkson, "Kicking Corporate Bodies and Damning Their Souls" 59(4) The Modern Law Review 557-572 (1996).
28. Nicholas Lord and others, "Other People's Dirty Money: Professional Intermediaries, Market Dynamics and the Finances of White-collar, Corporate and Organized Crimes" 59(9) The British Journal of Criminology (2019).

of the aforesaid liability models when it is a small company on the other hand the scope becomes limited when the company is large with many complex subsidiaries. Laying down the liability simply on the director of the company in such a situation can absolve the web of complexity in matters of a larger company but would that be legally fair is something that needs to be probed upon.

THE CONSTRAINT OF CORPORATE CRIMINAL LIABILITY

Corporate criminal liability from not being recognized to a stage where it has become a prime focus of discussion and concern because of the limitation with respect to the liability factor that it portrays. Though now majority believes that a company should suffer for the crime that it has committed but enforcing that thought becomes a matter of hindrance. One limitation in enforcing the liability can be said to be the very nature of the company, that is, they cannot commit crimes like perjury, rape, bigamy, etc. Secondly, offences where the death sentence or imprisonment is prescribed by law that is when the appropriate order or liability can be overridden by the company.

INDIAN SCENARIO

The most basic criminal legislation of our country is the Indian Penal Code of 1860 which is now replaced by The Bharatiya Nyaya Sanhita, 2023. If we try to find our answer in it with respect to the present issue then at the very outset, we find the definition of 'person' to be quite broad in its approach as it includes a 'company or association or body of persons, whether incorporated or not'.[29] Yet at the same time, the viewpoint of the judiciary in dealing with corporate liability till a few years back has not been very progressive as the accountability was laid down only in a certain limited case. The mens rea factor and the punishment of imprisonment acted as an impediment in holding the accused company liable for the offence of corporate crime. Therefore, in such cases the qualifying clause, which says "unless there is anything repugnant in the subject or context",[30] has been taken as a defence to justify the exoneration of such corporate bodies when the aforesaid two conditions are met.

---

29. The Bharatiya Nyaya Sanhita 2023 (Act No. 45 of 2023), s. 2(26) and previously it was Indian Penal Code 1860 (Act No. 45 of 1860), s. 11
30. The Bharatiya Nyaya Sanhita 2023 (Act No. 45 of 2023).

Curbing corporate crime though has been accepted to be of prime importance after industrialization and globalization and that can be achieved by bringing certain changes in the approach we take. Firstly, there must be a voluntary modification of the corporate mindset and corporate edifice, secondly the political environment of our country rather than lobbying with the powerful corporate houses they must intervene and demand the restructuring of the company whenever they feel the necessity. Thirdly, exemplary legal punishment should deter the activities of corporate crime along with the importance of consumer action which can be achieved by their awareness in the corporate world.[31]

The negation for the concept of *mens rea* in laying down the liability of a corporation has been somewhat answered in a number of cases where the judiciary has mostly come to the settlement that allocation of the mental element to corporate entities can be done. The concerning element was the punishment of imprisonment which is still a conundrum. The initial trend believed that corporations will not be subjected to those provisions where there is a compulsory requirement of imprisonment which is ironic because it meant that corporations will be liable for less serious crimes but not for grave offences. The above viewpoint was laid down in *Assistant Commisioner Vs. Velliappa Textiles ltd*.[32] It was further held that in matters of provision laying down both fine and imprisonment, only fine alone cannot be levied as a fair alternative. Discretionary power is not laid down on the court for imposing a fine alone.[33]

In the Standard Chartered Bank v. Directorate of Enforcement, the decision provided relief to a certain extent by stating that when the punishment requires both mandatory imprisonment and a fine instead of following the previous approach of exonerating the company totally, they can be charged for the fine at least.[34]

IS DISTRIBUTION OF LIABILITY THE CORRECT APPROACH?

To analyse the situation of pinning the liability in matters of corporate crime one must study the various models of liability as well as their drawbacks. The vicarious liability and the

---

31. Marshall B Clinard and Peter C Yeager, Corporate Crime (Macmillan Publishing Company, Inc, London, 2011).
32. Assistant Commisioner Vs Velliappa Textiles ltd [2003] 11 SCC 405 (SC).
33. *Ibid.*
34. Iridium India Telecom Ltd v Motorola Incorporated [2011] 20 AIR (SC).

identification approach will work when there is enough evidence against the higher officials especially the director who is said to be the head of the company but what about those situations where the offence is committed by more than one employee and there has been an eventual delegation of duties by the heads of the company? The general observation is that apportionment of liability is more feasible in economic offences. Therefore, the situation can be broken down into three categories which are to make the person in charge of the business responsible until and unless he proves that he did not know of the wrongdoing that was taking place. The next stage would be to look at whether the crime can be attributed to the connivance of any other official of the company for the matter of impugning them with the responsibility. Finally, the said entity, of course, is held liable, irrespective of whether any person is made responsible for the said act or not. Accountability for wrongdoings will be based on different considerations in the absence of express wording to that effect under penal statutes[35].

CAN MENS REA PLAY AN IMPORTANT ROLE FOR IMPUTING LIABILITY?

The term *mens rea* has always been associated with conventional crime and therefore, the liability is individualistic in its nature making it easier to levy punishment. The important element to prove *mens rea* is a culpable state of mind of the accused which is practically not possible if it is a company. Hence, in a way, no liability should be laid down from this perspective of *mens rea* but if the theory of strict liability is applied which is also known as the objective test, then the result of levying the liability would be successful in a great extent. Every person who has contributed to the harm will be liable even though they did not foresee the result mostly because they did not take any steps to refrain from those actions which led up to that foreseen harm.

Let us lay down a hypothetical situation where a company has been accused of an environmental pollution crime. Here, 'A' was responsible for allowing the use of an outdated machine which was one of the reasons for the harm, and 'B' was responsible for the usage of the deadly chemical

35. Shouvik Guha and Abhyudaya Agarwal, "Criminal Liability of Corporations: Does the Old Order Need to Change?" 1 NUJS Law Review (2008).

components of which he could have found an alternative also 'C' who was responsible with the role of supervision and failed to check that the emission of the said chemical components from various machinery were taking place in a river which is easily accessible to the town people for their daily usage. In this situation, if we apply the subjective test, it will give rise to individual responsibility but not against the said corporate entity, which is not a "flesh-and-blood individual". Hence, the issue here that needs to be addressed is whether we will be bound to apply the strict liability/objective test for the aforesaid situation? Whether imprisoning 'A' by applying the latter test can be the imprisonment of the company itself? The next dilemma is that why not jail 'Z' who was one of the top officials and because of his given position he should have been more vigilant? Surely mens rea fades to be acquired in the case of corporate behaviour.[36] Irrespective of the above problem it is recommended that corporate conviction can be approached "by humanising companies in the sense of breaking them down, metaphorically, into their underlying human components to see if there was an individual within the company who had committed the actus reus of a crime with the appropriate *mens rea.*"[37]

In the United Kingdom law took the help of the identification doctrine in matters of laying down responsibility in matters of crime showing evidence of mens rea. According to this doctrine, the decision-making officers are always blameworthy and therefore the company will stand accountable for the act and mental element of that person. In this way, the liability is bestowed upon the company through the said directing mind of the company. Now let us take the above-stated situation where 'Z' is the highest official in that corporate entity but irresponsibility was proved against 'A', 'B', and 'C' hence, in such a situation the said doctrine would fail to attach liability on the corporate entity and prosecution will only be imputed on those mere employees. Consequently, there is a clear distinction between the directing mind and the hands within the corporate structure.

A combination of corporate compliance programmes along with the doctrine of corporate mens

36. Conceição Soares, "Can Corporations Be Criminally Responsible?" 3(6) International Journal of Humanities and Social Science 48 (2013).
37. CMV Clarkson, "Kicking Corporate Bodies and Damning Their Souls" 59(4) The Modern Law Review 557-572 (1996).

rea should be a viable approach to mitigating corporate crime with the law. The compliance programme will aid the employees of the company to know about the do's and don'ts relating to the corporate actions, including its structure, philosophy, objectives, and positions. [38] The doctrine of corporate mens rea interprets in a manner suitable for corporations where it states that the mental element can be discovered with the corporate ethos. This derivation has been made from capacity theory and culpability theory of responsibility.

The capacity theory has been culminated out of the work of H.L.A. Hart which is simply related to the acceptance of accountability of an individual whenever he commits wrongdoing because of his flesh and blood existence and mental capacity. If this concept is imbibed within a corporation, then proving the mental element will be through the company's objectives, policies, practices, etc. It is assumed that these practices laid down by the company did not come up overnight and a lot of deliberation was done not by one individual but by many to avoid giving rise to any flaw in the future that will lead the company to trouble. This theory mainly tries to highlight how negligence can give rise to corporate criminal liability.[39]

The character theory was propounded by Michael D. Bayles who states that agents causing harm be it negligent or premeditated portray their flawed character. Drawing from the above-mentioned example if the company allowed the dumping of deadly chemical substances in the river causing death or harm then it will show that it is morally unfit for the society as a result of which responsibility will be fastened on it simply based on the flawed moral character that they displayed. If the said act were negligent or intentional would not make a difference under this given theory.[40]

Acknowledging the liability ultimately comes down to the boiling point of condemning corporations for the crimes that they commit by laying down the appropriate sanctions. There has always been a great debate with respect to the type of sanction that will be correct in dealing

---

38. John Boatright, "Corporate Bodies and Guilty Minds: The Failure of Corporate Criminal Liability by William S. Laufer" 18(3) Business Ethics Quarterly 417-426 (2008).
39. Conceição Soares, "Can Corporations Be Criminally Responsible?" 3(6) International Journal of Humanities and Social Science 49 (2013).
40. Conceição Soares, "Can Corporations Be Criminally Responsible?" 3(6) International Journal of Humanities and Social Science 50 (2013).

with such corporate criminals. It is advised that there should be an amalgamation of both fines and imprisonment whereby the latter sanction can be limited to the directors of the accused company. Accordingly, this will be the correct answer about the efficacy of censuring corporations.[41]

CONCLUSION

Hopefully, gone are those days when a company can escape liability by committing a crime on the pretext of it having a separate legal entity. Though there are jurists who still don't believe in the concept of corporate crime but such extreme opinions would not improve the situation especially when the victims of such kind of an offence are not restricted to one or two but are in fact can be traced in bulk. In order to control corporate crime, the revamping of the liability model into a structured one is very essential which can remove any sort of confusion and is an absolute necessity. A structured model would mean unanimity under which it should be clear who should be liable, to what extent the liability should be applied and if there is any exception with respect to laying that liability then what are those? We must keep in mind that corporate bodies are complex structures so there might always be hindrances when it comes to making them liable and that is the reason why we have so many liabilities theory models which have developed one after the other and still no outcome has been reached. Keeping this in mind the structured liability theory that is being apprehended might have slight changes with respect to the country or place that it is being applied to.

The first step to controlling or managing corporate crime should come from the internal working of the corporate entity itself. Here the reactive fault theory can be of help through which we can interpret that the role of corporate governance should play an imperative part in the working of any company. If internally all the actions are kept under check through rigorous policies and rules incorporated by the companies then disasters like the Satyam Scam, Enron debacle, etc. would not happen in the near future.

One more thing that needs a mention is that with industrialisation and globalization corporations have reached many high peaks which also mostly require transnational support and

41. Celia Wells, Corporations and Criminal Responsibility (Oxford University Press, London 2 edn., 2001).

collaboration between countries. There is definitely a requirement of law within the concept of corporate criminal liability that will tackle such transnational crimes. Specific transnational crime has always been a matter of concern as was seen in the Bhopal Gas leak Disaster as the pinning of liability delayed the whole justice as there was a great dilemma regarding who should be accountable whether the holding company which was in the USA or the subsidiary plant which was situated in India.

Corporate ethos plays a big role as it will tell us how the characters of the individuals in the company are and what principles they carry in their businesses. Even if the corporations are against a particular act, it might not be impeded by them as those acts are committed by the so-called 'flesh and blood' individuals who have a mind of their own in such a situation the vicarious liability would not be the correct approach. Individuals should be responsible for their actions and similarly be accountable for the same except in situations where the company has proven to be absolutely irresponsible in steering its employees in the correct direction then the latter should under no circumstances escape its liability. All the liability model theories have their flaws attached but irrespective of that fact, coming up with the most evolved and structural theory should be the need of the hour.

SCHOLASTICIDE AS DESTRUCTION OF EDUCATIONAL INFRASTRUCTURE DURING ARMED CONFLICT: AN OVERVIEW OF THE WAR IN GAZA

***Professor Emeke N. Chegwe**

****Professor Joseph E. Edet**

INTRODUCTION

Palestine's buildings and educational system have suffered significant damage since October 7, 2023,[1] when Israel began its retaliatory assault and invasion on the Gaza Strip. With 350 faculty members and about 4,000 students enrolled in programs in engineering, law, accounting, humanities, and medical sciences, Al-Israa University, the only standing university in Gaza, was established ten years ago.The only thing that remains of it after Israel attacked and destroyed it in March 2024[2] is its website's mission statement, which reads, "To contribute of the Palestinian society by encouraging scientific research through innovative and continuing education offerings."[3] Online news sites claim that Al-Israa's demolition was a part of a planned and well-executed series of actions intended to topple Gaza's educational system. The Islamic University and the University College of Applied Sciences both had bombs detonated on October 11 and October 19, respectively. Israeli forces shelled Al Azhar, Gaza's second-largest university, on November 4, and on November 15 they demolished Al Quds University. Al-Aqsa University and Palestine Technical College suffered significant damage on December 10th, following an explosion at the Islamic University's medical school[4].

---

* Professor of International Law and Jurisprudence, University of Delta, Nigeria.

1. The Israel-Palestine conflict is one of the longest ongoing conflicts in modern history. The multi-faceted nature of the conflict has been amply documented and discussed by many scholars, academics, and experts, and unknown to most people, whose only source of information is mass media, there is close to consensus on the violation of several aspects of international law by the parties in the conflict: The current armed conflict started on 7 October 2023. The Palestinian militant group Hamas launched an unprecedented assault on Israel with hundreds of gunmen infiltrating communities near the Gaza Strip. About 1,200 people were killed, and more than 250 were taken to Gaza as hostages, according to Israeli tallies. In response to the October 7 attacks, Israel declared war on Hamas and launched aerial bombardment and ground operations in Gaza. As of March 12, 2024, more than 31,000 Palestinians in Gaza have been killed. The situation in Gaza, with an estimated 1.7 million Gazans displaced out of a population of approximately 2.1 million people) constitutes a humanitarian crisis. See Fleitman M. S. & Rabia H. A. Resolving the Israeli-Palestinian Conflict: Perspectives on the Peace Process (Cambria Press, New York, 2024).
2. Chandni D.“The War in Gaza is Wiping out Palestine's Education and knowledge Systems,”In the Conversation News Magazine, Feb.8, 2024.
3. Gordon N. “Academics have a Duty to Help Stop 'Educide' in Gaza” Newspaper, Mar. 8, 2024.
4. O'Malley B. &Sawahel W. “Israel bombs Gaza University, alleging use by military” University World, Apr.27, 2024.

According to the Palestinian Ministry of Education, in the four months since the fighting began, all or sections of Gaza's 12 colleges have been bombed and damaged, and over 4,327 students, 231 teachers, and 94 professors have lost their lives. There have also been about 378 destroyed or severely damaged schools. Libraries, museums, and other historically important educational facilities have all suffered damage, destruction, and looting[5].

In the current International Court of Justice (ICJ) case concerning Israel and genocide, South Africa contended that systematic killings of Palestinian scholars were occurring. South Africa's attorney, Blinne Ní Ghrálaigh, declares:

> In Gaza, almost 90,000 Palestinian students are unable to attend universities. There have been many bookstores and libraries destroyed, nearly all universities, and more than 60% of schools ruined. The hopes for Gaza's children and youth to receive an education in the future have been completely destroyed by the hundreds of academics and teachers who have been slain, including deans of universities and prominent Palestinian thinkers.[6]

Raphael Lamkin, a pioneering Polish Jewish legal scholar who originally defined the word and helped establish it in international law, saw genocide as an attempt to "undermine the fundamental basis of the social order".Due to its motivations—the intention to completely eradicate a particular group and the potential consequences for humanity—genocide is considered a different kind of crime from other crimes.The United Nations hasn't done much research to define the precise scope of genocide outside of officially acknowledged mass killings, although this is starting to change as a result of the jurisprudence established by the Ad Hog international criminal courts.

WHAT IS SCHOLASTICIDE?

In an effort to investigate the close relationship between intentional destruction of educational

5. *Ibid.*
6. Chandni D.“The war in Gaza is wiping out Palestine's education and knowledge systems,” Conversation News Magazine, Feb.8, 2024.
7. Sherene S. “In the Shadow of War” Vol. 51, Issue 2, TJPS 26, (Apr 2022)

infrastructure and genocide, some scholars have coined the term "scholasticide" to describe the genocide of education. [7] Karma Nabulsi, [8]a Palestinian expert on war laws and an Oxford professor, coined the term "scholasticide" to describe the pattern of Israeli colonial attacks on Palestinian academics, students, and educational institutions that dates back to the 1948 Nakba[9] and continues to grow in the wake of the 1967 war on Palestine and the 1982 invasion of Lebanon.She coined the phrase in reference to the 2009 Israeli attack on Gaza, Palestine.The term "scholasticide"[10] is a combination of the Latin word "schola," which means "school," and the Latin suffix "cide," which means "killing" (in an effort to discredit a Palestinian educational legacy). Nabulsi used the phrase to describe Israel's deliberate dismantling of Palestinian educational institutions.Nabulsi observed that this tradition emphasizes the immense relevance and power of education in an occupied community in which freedom of thought proposes possibilities and wide vistas, in stark contrast to the apartheid wall, the shackling checkpoints, and the suffocating prisons.Knowing the importance of education for the Palestinian struggle and culture, Nabulsi made the argument that the Israeli colonial planners could not stand it and had to annihilate it. Taking the aforementioned into consideration, this research looks at the current international legal framework for the protection of education, which is made up of regulations created by specialized United Nations bodies as well as international criminal law and humanitarian law.

INTERNATIONAL LEGAL FRAMEWORK

The various international legal regimes and how they connect with regards to abuses of education during times of instability and armed war have not received nearly enough attention. Understanding how international law safeguards education and the advantages it provides, as well as how to strengthen this protection, requires a thorough analysis of the protections provided by international humanitarian law (IHL), international human rights law (IHRL), and international criminal law (ICL).

8. Karma N. is a Tutor and Fellow in Politics at St Edmund Hall at the University of Oxford, and a Library Fellow. Her research is on 18th and 19th-century political thought, the laws of war, and the contemporary history and politics of Palestinian refugees and representation.
9. The Nakba, which means “catastrophe” in Arabic, refers to the mass displacement of Palestinians during the 1948 Arab-Israeli war during which an estimated 7,60,000 Palestinians fled or were expelled -- comprising around 80% of the Palestinian Arab inhabitants of what became Israel.
10. Chandni D. defines scholasticide as the systematic destruction of Palestinian education: see Chandni D. “The war in Gaza is wiping out Palestine's Education and knowledge systems” Conversation Magazine, Feb. 8, 2024. *Available* online<https://theconversation.com/the-war-in-gaza-is-wiping-out-palestines-education-and-knowledge-systems-222055> (Retrieved Apr.11, 2024)
11. See Lawrence Weschler, International Humanitarian Law: An Overview, in Crimes of War: What the Public Should Know 18, 20 (Roy Gutman et al. eds., 1999).

3.1 International Humanitarian Law (IHL)

International humanitarian law is the law governing the relationship between combatant forces and non- combatants in time of armed or military conflict. [11] Parties to an armed conflict are subject to rules governed by International humanitarian law sometimes known as "the international law of armed conflict" or "the law of war" which ensures that military victory should not be obtained at any cost. IHL seeks to make conflict more humanitarian. All sides to a conflict including States and non-State armed organizations are subject to IHL which is largely codified in the following international treaties:

- The Four Geneva Conventions, often known as the 1949 Geneva Conventions for the Protection of War Victims,;
- The three protocols additional to the Geneva Conventions (Additional Protocols): Additional Protocol I of 1977 applicable in international armed conflict; AdditionalProtocol II of 1977 applicable in non-international armed conflict; and Additional Protocol 3 relating to the adoption of a new distinctive emblem.

The use of schools and universities for military operations is forbidden by the law of armed conflict, unless they become legitimate military target. [12] It would be a war crime, in fact, to deliberately launch assaults against them when they are not used to achieve military goals by parties to an armed conflict. According to definitions, military goals are things that, by their very nature, position, function, or use, effectively support military operations and whose complete or partial destruction, capture, or neutralization, under the conditions prevailing at the moment, provides a clear military advantage.[13] For instance, in the ongoing battle, if it can be established in accordance with Israel assertions that Hamas has made a concerted efforts to defend itself against Israeli strikes by disguising weaponry in schools and hospitals and using locals as human shields,[14]

---

12. See Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (“Additional Protocol I”), art. 52(1). This rule is also part of customary law for international and non-international armed conflicts. See Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law: Rules,vol. 1, International Committee of the Red Cross (”ICRC Customary IHL Study”), rule 9 and 10.
13. See Additional Protocol I, art. 52(2). This rule is also part of customary law for international and non-international armed conflicts. See ICRC Customary IHL Study, rule 8. See also ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, s41.
14. Gordon N. and Perugini N. Human Shields 25 (University of California Press, Berkeley California, August 2020)

Hamas fighters will be held accountable under Article 58(c) of the Geneva Convention Protocol Additional I.

A fundamental assurance of general protection against the impacts of warfare is provided by Article 48 of Additional Protocol I: "The Parties to the conflict shall at all times distinguish between the civilian population and combatants as well as between civilian objects and military objectives and, accordingly, shall direct their operations only against military objectives," the statement reads.[15] This is the concept of distinction i.e., that each party to a war must always make a distinction between military aims and civilian targets, as well as between civilians and those directly involved in hostilities.This implies that civilians are shielded from injury during military operations by humanitarian regulations guiding army behavior. Since they are classified as citizens and civilian commodities, the idea of distinction protects educators, students, and educational institutions.[16]The parties to a dispute are required by the law of armed conflict to take protective measures against potential attacks. When it comes to civilian objects like schools and universities, the parties involved in an armed conflict must, to the greatest extent possible, (a) refrain from placing military objectives in or close to densely populated areas where these types of institutions are likely to be found; (b) work to keep the civilian population, individual civilians, and civilian objects under their control away from the vicinity of military objectives; and (c) take all other necessary precautions to shield those civilian institutions from the risks associated with military operations. [17] The ramifications of these regulations on colleges and universities are significant. Furthermore, IHL prohibits destroying or capturing an enemy's property unless there is an urgent military necessity.

□ Child Education during Armed Conflict

War has terrible and severe impacts, especially on children who miss out on the peace, security, equality, health, and mental health that education provides.[18] Despite the fact that international

15. Article 48, 'Additional Protocol I of 1977'
16. Nathalie Durhin, “Protecting Civilians in Urban Areas: A Military Perspective on the Application of International Humanitarian Law”, International Review of the Red Cross, 98. (2016)
17. See Additional Protocol I, art. 58(a), (b), and (c). These rules are also part of customary law for international and non-international armed conflicts. See ICRC Customary IHL Study, rules 22-24. See also: ICTY, Kupreskic case, Judgment, Trial Chamber, 14 January 2000, Pp524-525.
18. Mayai A. “War and Schooling in South Sudan,” Volume 8, Issue1, JOEE 14-49, (2020)
19. Doswald-Beck L. “International Humanitarian Law: A Means of Protecting Human Rights in Time of Armed Conflict” Vol 1, Afr. J. Int'l & Comp. L., 1, 595,(1998)

agreements like the 1949 Fourth Geneva Convention[19] protect children's right to an education in times of armed conflict, these regulations are frequently disregarded.[20] Mandargelia, contends that conflicts have a significant impact on the quality of education, making it an important governmental concern and a driving force behind the social and economic growth of civilization.According to Akresh and de Walque, [21] the genocide in Rwanda caused a notable 18.3% decline in school completion, with impacted children completing half a year less in education. In summary, there were more than 5,000 documented attacks against education and the military's use of colleges and universities between 2020 and 2021.Clover,[22] claims that wars can destroy schools or force them to close, but Ichino and Winter-Ehmer[23] concur that one of the long-term effects of a conflict is the human capital lost by school-age children who don't obtain as much education. Muthanna et al.,[24] went on to emphasize the numerous negative effects of conflict on education, including the normalization of undesirable behaviors, the devaluation of teachers' dignity, the use of child soldiers, identity issues in children, the deterioration of children's physical and mental health, and prejudice against displaced people. According to Safonov and Fliarkovska,[25] psychological factors have a major role in determining the quality of education in post-war and wartime settings.

Children's education was supported by both the Additional Protocols of 1977 and the Fourth Geneva Convention of 1949. Article 24 of the Fourth Geneva Convention (1949) states that organizations engaged in armed conflict have an obligation to ensure that adolescents under fifteen who are abandoned or who have lost family members as a result of the conflict are not overlooked.

As part of its general protection of civilian populations, international humanitarian law incorporates the following guidelines for the preservation of the right to education during armed

---

20. Mandragelia, V. Impact of War on the Education in Ukraine. World-Social Research & Behavioral Sciences (2022).
21. Akresh R. & De Walque, D., “Armed conflict and schooling: Evidence from the 1994 Rwandan Genocide” Policy Research Working Paper Series 4606(2008). The World Bank. DOI: https://doi.org/10.1596/1813-9450-4606
22. Clover J. “Angola's Children, Bearing the Greatest Cost of War” Vol. 11, Issue 3, Afr. Sec. Rev. 5, (2002). DOI: https://doi.org/10.1080/10246029.2002.9627974
23. Ichino A. and Winter-Ehmer R. (2004). “The long-run educational cost of World-War II” 57-86 Vol. 22, Issue1, JOLE (2004) DOI: https://doi.org/10.1086/380403
24. Muthanna, A. et al, “The Interaction of War Impacts on Education: Experiences of School Teachers and Leaders” Volume 12, .Educ. Sci., 719 (2022).DOI: https://doi.org/10.3390/educsci12100719
25. Safonov Y. and Fliarkovska O. (2023). “Ukrainian Education in the War and Post-War Periods: Psychological Factors and Economic Consequences. Problems of Education” 6-22 Volume 1, Issue 98, (2023). DOI: https://doi.org/10.52256/2710-3986.1-98.2023.01

conflict:

- Education of children who are abandoned or alone "The parties to the conflict must take the necessary steps to guarantee that children under the age of fifteen who are left orphaned or separated from their families due to the war do not have to rely solely on their own resources and that their education, maintenance, and right to practice their religion are all supported in every situation. People with similar cultural traditions will, to the greatest extent feasible, be entrusted with their instruction.[26]
- Occupation-Related Education Rights
  International humanitarian law guarantees the safeguarding of education in occupied territory. The Hague Regulations set forth the occupying nations' obligations. Although the protection of civilians in national education is not specifically mentioned in the Hague Regulations, protecting the civilian population essentially implies acknowledging the right of civilians to carry on with their daily lives and participate in necessary and customary national education activities. This is a logical outgrowth of the occupying power's duty to maintain the established order of the seized region, including ensuring the regular operation of educational establishments. The International Committee of the Red Cross (ICRC) developed a convention in 1939 to provide for the safety, upbringing, and education of children during armed conflict in occupied countries.
- The Occupying Power will assist the appropriate running of all establishments dedicated to the care and education of children, working in tandem with both national and local authorities. The Occupying Power shall take all appropriate measures to enable the registration of a child's paternity and identify. It is not permitted to alter their individual status or include them in groups or associations that report to it. If the institutions in the area are deemed insufficient, the Occupying Power will arrange for the upkeep and education of children who have been left orphaned by the war and are unable to receive

26. Art. 24, Fourth Geneva Convention relative to Protection of Civilian persons in Time of War of 12 August, 1949.

proper care from close friends or relatives. This will be done, if at all possible, by individuals who share their nationality, language, and religion. The responsibility for identifying children whose identity is uncertain lies with a dedicated division of the Bureau established under Article 136. If at all possible, details about their parents or other close relatives should always be documented. Preferential measures in favor of children under fifteen, expectant mothers, and mothers of children under seven years old may have been adopted prior to the occupation; the Occupying Power shall not impede the application of these measures. These measures may include those related to food, medical care, and protection against the effects of war.[27]

- Education of children and youth detained "Internees will be provided with the necessary resources to pursue new interests or to finish their education. Children and teenagers will have access to education; they will be permitted to attend classes both inside and outside of the internment facility.[28]"
- Child education in non-international armed conflicts "Children shall be provided with the care and aid they require, and in particular: (a) they shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care."[29]

4. INTERNATIONAL HUMAN RIGHTS LAW

Regardless of a person's ethnicity, sex, language, religion, political viewpoint, national or social origin, property, birthplace, or other position, IHRL defends their rights. Generally speaking, IHRL is applicable in all circumstances and at all times, as well as during armed conflict. IHRL has the broadest application of the three regimes, making it the most universal. States are subject to international human rights law (IHRL) either by signing and ratifying a human rights treaty or by customary international human rights law which is applicable to all States irrespective of whether they have signed a treaty. The two most relevant treaty of IHRL

27. Art. 50, *Ibid.*
28. Art. 94, *ibid*
29. 8 Art. 4(3)(a), Protocol additional to the Geneva Convention of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts(Proto 7 Art. 94, ibid. col II), 8 June 1977.

are International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) and its Optional Protocol; and the International Covenant on Civil and Political Rights 1966 (ICCPR) and its Optional Protocols.[30]

The Convention on the Rights of the Child provides specific responsibilities to states that must be met for the right to education to be effectively fulfilled, thereby reinforcing the fact that children are the primary beneficiaries of this right. If pupils can't go to school or university in a safe way, then they have no right to an education. Subject to permissible deviations, international human rights legislation is applicable at all times. [31] Consequently, it safeguards scholars, educators, and all other members of the educational staff in times of peace, military conflict, and internal unrest and tension. Regarding the matter of the military use of colleges and universities, several provisions of international human rights law are pertinent.

The rights to life, [32] personal liberty, and security are guaranteed to academics, instructors, students, and all other members of the education staff by international human rights legislation.[33] Additionally, states must do everything within their power to guarantee the survival and upbringing of minors under the age of eighteen.Under international human rights law, pupils under the age of 18 [34] are entitled to particular safeguards as children. The Convention on the Rights of the Child states that the best interests of the child must always come first in all decisions pertaining to children, whether they are made by public or private social welfare organizations, courts of law, administrative agencies, or legislative bodies. [35] Everybody is

---

30. The International Covenant on Economic, Social and Cultural Rights (hereinafter "ICESCR"), together with the International Covenant on Civil and Political Rights (hereinafter "ICCPR"), were adopted by the United Nations General Assembly on 16 December 1966 by consensus, with no abstentions (General Assembly resolution 2200 A (XXI) of 16 December 1966). The ICESCR entered into force in general on 3 January 1976 and the ICCPR on 24 March 1976.
31. See Advisory Opinion, Legality of the Threat or Use of Nuclear Weapons, ICJ, 8 July 1996, para. 25; Advisory Opinion, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ, 9 July 2004, para. 106; Doswald-Beck L. and Sylvain V. "International Humanitarian Law and Human Rights Law," 293 IRRC 94 (1993).
32. International Covenant on Civil and Political Rights ("ICCPR"), art. 6. See also African Charter on Human and Peoples' Rights ("ACHPR"), art. 4; European Convention on the Protection of Human Rights and Fundamental Freedoms ("ECHR"), art. 2; American Convention on Human Rights ("IACHR"), art. 4; Arab Charter on Human Rights ("Arab Charter"), art. 5; and Human Rights Committee, General Comment 6: the Right to Life (1982).
33. ICCPR, arts. 9 & 10. See also ACHPR, art. 6; ECHR, art. 5(1); IACHR, art. 7; and Arab Charter, art. 14(1).
34. Convention on the Rights of the Child ("CRC"), art. 6.
35. CRC. art. 3(1).
36. International Covenant on Economic, Social, and Cultural Rights ("ICESCR"), art. 13; and CRC, art. 28. See also ACHPR, art. 17; African Charter on the Rights and Welfare of the Child, art. 11; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, arts. 13 & 16; Additional Protocol I to the European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2; Arab Charter, art. 41.

entitled to an education.[36]

To fully realize this right, states must ensure that basic education is free and mandatory for everyone, that secondary education is widely available and accessible for all, and that higher education is equally accessible to all based on capacity. [37] The instructional staff's material circumstances must be continuously enhanced.[38] States must also take action to lower the rate of child dropouts and promote children's regular attendance at school.[39] States are required to take such action in the interest of children, using all of their resources and, when necessary, working within the parameters of international cooperation.[40] There is no clause allowing for derogation or suspension in the Convention on the Rights of the Child, one of the primary international agreements protecting children's right to an education.[41]

INTERNATIONAL CRIMINAL LAW

The branch of public international law known as international criminal law (ICL) was created to forbid certain types of behavior that are frequently considered to be grave crimes and to hold those who commit them criminally responsible for their actions, without the need for local laws to step in.A permanent International Criminal Court was established in 2001 as a result of the resuscitation of international criminal law in the 1990s to confront war crimes in the former Yugoslavia[42] and the Rwandan genocide, [43] after it had been dormant for decades. [44] Customary international law, national and international agreements like the Special Criminal Courts of Lebanon and Sierra Leone, Security Council resolutions like those establishing the International Criminal Tribunal for Rwanda, and the Rome Statute of 1998, which established the International Criminal Court, are the main sources of international criminal law. Genocide, crimes against humanity, crimes in war, and crimes of aggression are considered the main crimes under international law.

International criminal law by persecution and incitement to genocide, which are both prohibited

37. ICESCR, art. 13(2)(a)-(d); and CRC, art. 28(a)-(d)
38. ICESCR, art. 13(e).
39. CRC, art. 28(e)
40. CRC, art. 4.
41. 5 CRC. Similarly, the ICESCR provides no derogation provision; however, article 4 permits states to limit rights when proscribed by law to the extent compatible with the nature of the right and for the purpose of promoting general public welfare.
42. "History | International Criminal Tribunal for the former Yugoslavia". www.icty.org. (Retrieved on 30 July, 2024).
43. "The ICTR in Brief | United Nations International Criminal Tribunal for Rwanda". unictr.irmct.org. (Retrieved on 30 July, 2024).
44. "International Criminal Court | Definition, History, Purpose, & Facts". Encyclopedia Britannica. (Retrieved on 30 July, 2024).

by the Rome Statute, you can directly defend education. Educational property is likewise protected under international criminal law.According to Article 8(2)(b)(ix) of the Rome Statute, a war crime is the deliberate targeting of structures that are used for charitable, educational, artistic, scientific, or religious purposes; additionally, it includes historic monuments, hospitals, and gathering places for the ill and injured, as long as they are not military targets.There are currently no case laws or ICL clauses addressing the preservation of education itself. The Rome Statute's list of war crimes includes only the targeting and/or destruction of "educational property," which is where education is addressed. However, it is important to take into account the likelihood that some laws pertaining to crimes against humanity and the reading of genocide could be used to safeguard education.

- **Crime against Humanity**

The International Criminal Tribunal for the Former Yugoslavia (ICTY) ruled that the exclusion of individuals belonging to an ethnic or religious group from educational institutions could be considered persecution. These rulings suggest that the systematic and widespread denial of education to a group of people with a particular political, racial, national, ethnic, cultural, religious, or gender identity may amount to a crime against humanity. This might be applied to ensure education during times of armed conflict and instability[45].

- **Genocide**

Genocide is the most heinous crime against humanity. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide includes "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as (a) Killing members of the group;(b) Causing serious bodily or mental harm to members of the group;(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;(d)Imposing measures intended to prevent birth within the group;(e) Forcibly transferring children of the group to another group". The Convention made conspiracy, incitement, attempt, and cooperation in genocide illegal under international

45. Kristin H. and Nicole U. et all Protecting Education in Insecurity and Armed Conflict: An International Law Handbook 108, (British Institute of International and Comparative Law, London-United Kingdom, 2012); Prosecutor v Tadic, Trial Chamber Judgment, para.710, 1999, sited by Khalil A. and Pardis M. T. in “The Role of International Law in Protection against Attacks on Children's Education Rights in Armed Conflict” Vol. 13, No. 3, J O P L 106 (2020)

law in addition to the actual commission of genocide.

It is the intentionality of genocide that sets it apart from other crimes against humanity.[46] Intentionality denotes the existence of an exacerbated criminal intention (dolus specialis) to conduct this offense in order to destroy the targeted group as such, in addition to the criminal purpose that goes along with the underlying offense (such as killing).[47] The absence of several groups of people (social and political organizations, in particular) from the list of individuals whose persecution would constitute the crime of genocide was one of the Convention's shortcomings.

The Genocide Convention was eventually invoked prior to international criminal proceedings with the creation of the two ad-hog tribunals for Rwanda (ICTR) and the Former Yugoslavia (ICTY). The fundamental components of the crime of genocide have been clarified in large part because to the two tribunals' developing bodies of precedent.When it came to "the intent to destroy," for instance, the International Criminal Tribunal found in Prosecutor v. Krstic[48] that the targeting of Bosnian men who were old enough to serve in the military at Srebrenica constituted such intent because the group would be permanently impacted by this "selective destruction of the group."From that point on, the term "genocide" was widely employed to describe the mass killing of members of particular communities or groups. It has also been declared to be genocide to systematically destroy and demolish an educational system in a country or region, either totally or partially, or to specifically target and assassinate a certain ethnic group.[49]

By placing these initiatives within a historical, political, and colonial framework, Naser-Najjab[50] argues that Israel's attempts to impose restrictions on Palestinian education are part of a deliberate attempt to undermine the legitimacy of resistance to occupation. Israel has imposed Israeli curriculum on Arab schools, regulated Palestinian education, and enacted discriminatory laws that have hindered Palestinian children's academic progress and performance since its foundation.[51]

---

46. Andreopoulus G. J. (Ed.) Genocide: Conceptual and Historical Dimensions. (University of Pennsylvania Press, Philadelphia, 1994)
47. Causes A. International Criminal Law (Oxford, New York, 2003)
48. Prosecutor v. Radislav Krstic (Appeal Judgement) · Document Source: International Criminal Tribunal for the former Yugoslavia (ICTY) 19 April 2004.
49. Rula A. "Educide: The Genocide of Education A Case Study on the Impact of Invasion, and Conflict on Education" Volume 13, Number 2, B &M Rev.(2022.) Number 2.
50. Naser-Najjab N. "Palestinian education and the 'logic of elimination." 311–330 Volume 10, Issue 3, Settler Colonial Studies(2020).*Available* online< https://doi.org/10.1080/2201473X.2020.1760433>(Retrieved 0n 29 July, 2024).
51. Al Haq, Israel's War Against Education in the Occupied West Bank (Ramallah: Al Haq, 1988); Ismael Abu-Saad, 'Palestinian Education in Israel: The Legacy of the Military Government', Holy Land Studies: A Multidisciplinary Journal 56, no. 1 (2006): 21–56; Adalah Report, Education Rights – Palestinian Citizens of Israel (Shafa'amr: Adalah, 2003)

According to Naser-Najjab, Israel's unlawful goal of preventing and restricting Palestinians' ability to advance intellectually is reflected in the actual devastation of Gaza's educational infrastructure. Israeli supremacy in scientific and intellectual pursuits may be threatened by talent emerging from the Palestinian educational system, which is the driving force behind the targeted killings of academics and professionals in fields such as medicine.Furthermore, he argues that the continued lack of a Palestinian-specific educational system should be seen as a purposeful political endeavor to suppress the Palestinian national narrative and eradicate the native, rather than as the result of a limitation on human or material capacity.[52]

The West Bank and Gaza Strip had separate educational systems before Israel invaded them in 1967; in the former, teaching materials and textbooks were imported from Jordan, while in the latter, Egyptian educational materials were employed. After 1967, the Israeli military took control of the Palestinian educational system; as a result, it was left underdeveloped and devoid of resources. Israel was not entirely indifferent, either; textbooks and remarks endorsing Palestinian national independence were prohibited, and educators were kept under constant security watch.

It's critical to consider the damage and destruction of the Palestinian educational and cultural model in relation to Israel's active intervention in the Palestinian educational system. The colonizer, according to Albert Memmi, "extinguishes memories," "rewrites laws," and fabricates history in order to undermine ethnic identity and cultural resurgence.The colonial subject becomes permanently dislocated from others and from oneself through involvement in the colonial educational system, as Memmi points out, leading to the dualistic idea of self. According to Assaf, Palestinian culture is robust and vital to the defense of the country's identity as well as the resistance to occupation. In the face of continuous hardships and tragedy brought on by occupation, Palestinians have found that cultural expression is a powerful tool for announcing their presence, opposing oppression, and preserving their shared heritage.Israeli occupiers have intentionally worked to eradicate Palestinian cultural identity through seemingly innocent but misleading textbooks and curricula, which is the primary reason for Palestinian students' waning dedication and behavioral problems.[53]

---

52. Patrick Wolfe, “Settler-Colonialism and the Elimination of the Native” 338–9, Volume 8, Number 4, JOGR (2006).
53. Said Assaf, “Educational Disruption and Recovery in Palestine” in Sobhi Tawil (eds.) Final Report and Case Studies of the Workshop on Educational Destruction and Reconstruction in Disrupted Societies 53 (UNESCO,Geneva, 1997).

CONCLUSION

Examining the relationship between genocide and the devastation of educational infrastructure through the lens of the ongoing Gaza conflict, the study emphasizes the importance of international criminal law (ICL) and international humanitarian law (IHL) in averting attacks on students, faculty, and educational facilities during armed conflict. However, no formal definition exists that offers a compelling, legally sound, and logically supported explanation for why a crime against education should be considered comparable to genocide.

This meant that the exact definition of scholasticide needed to be stated clearly.Scholasticide is the term used to describe the systematic destruction of education by the detention, arrest, or death of staff members, students, or teachers as well as the devastation of educational facilities. More than 5,479 pupils, 261 teachers, and 95 university professors have died in Gaza after six months of military attack; the number of injured students and teachers is still rising every day.At least 625,000 pupils lack access to school, and at least 60% of educational facilities—including 13 public libraries—have been damaged or destroyed. In addition, 227 mosques, three churches, and another 195 heritage sites—including Gaza's Central Archives, which houses 150 years of history—have been damaged or completely destroyed. The Israeli forces destroyed Israa University, the final university in Gaza, on January 17, 2024.Another generation of Palestinians is robbed of their future by the merciless, ongoing attacks on Gaza's educational infrastructure. These attacks have a catastrophic long-term effect on people's fundamental rights to learn and express themselves.

History has demonstrated that the removal of education can only be viewed as an act of genocide imposed upon a people, since it is the foundation of the modern world and offers a strong foundation for a developed and civilized society.It has been proposed that the ICL contain clauses that hold violators of the principle of distinction criminally accountable. Examples of such instances would be when someone intentionally destroys or seizes enemy property, including educational facilities, during an international armed conflict. There are also comparable exclusions on certain objects, like schools. These strengthen the case for the International Criminal Court to investigate and prosecute the criminals.

AN ANALYSIS OF PUBLIC EXAMINATIONS (PREVENTION OF UNFAIR MEANS) ACT, 2024: LEGAL IMPLICATIONS IN THE VANSHIKA YADAV CASE

***Dr. Harpreet Kaur**

INTRODUCTION

"Examinations reflect integrity; fairness is non-negotiable."

Education plays a pivotal role in the growth of individuals and also the country. Examinations are a touchstone of the entire education system which decides the future of the individuals. [1] Whilst exams are considered as an important part of the education system, it becomes imperative that the trust in the conduct of the examination and the results are a transparent process. Unfortunately, over the few decades there have been a large number of cases where the conduct of the exams has been jeopardized by the malpractice.

Examination malpractice is any illegal act committed by a student single handedly or in collaboration with others like fellow students, parents, teachers, supervisors, invigilators, and anybody or group of people before, during or after examination in order to obtain undeserved marks or grades[2]. Issues that have jeopardised the public examination range from fraud, cheating and even leaking of the question papers. With this as the backdrop there was a need to pass a law which would help deal with the growing malpractices in the realm of public examinations. There was a dire need to enact a law which could check the malpractices that happen especially with the examinations. India did not have any enacted legislation that was specifically dealing with the case of paper leak, tampering with the results or overall, the entire conduct of the examinations. In the present year, 2024 the country saw malpractices in the conduct of the NEET exam. With this as the backdrop there was a need to pass a law which would help deal with the growing malpractices in the realm of public examinations. The Indian Legislation enacted the Public Examinations (Prevention of Unfair Means) Act, 2024 with an aim to keep check on the

---

* Assistant Professor, Army Institute of Law, Mohali.

1. Justin W. Cook, "Sustainability, Human Well-Being, and the Future of Education", *available* at file:///C:/Users/DELL/Downloads/Sustainability_Human_Well-Being_and_the_Future_of_.pdf ((last visited on September 16, 2024)
2. Dr. Suraksha Bansal, MALPRACTICES IN EXAMINATIONS, International Journal of Education and Science Research Review Volume-2, Issue-2 April- 2015 E-ISSN 2348-6457, *available* at https://ijesrr.org/publication/19/IJESRR%20V-2-2-15.pdf (last visited on September 16, 2024)

malpractices.[3] The Act tends to expand the meaning of the term malpractises and unfair means and also provides punishments for any such act that tends to question the credibility of the exams. India being a nation with the maximum youth population; it is imperative that a law which impacts the major chunk of the student population is strong enough to deal with any issues pertaining exams.

HISTORICAL CONTEXT OF EXAMINATION MALPRACTICES IN INDIA

Examination malpractices in India is not new, characterized by numerous high-profile incidents that have exposed the vulnerabilities and loopholes in the system. These malpractices range from leakage of question papers to impersonation and bribery, affecting the integrity of examinations at various levels. These are:

1. CBSE PAPER LEAK (2018)

CBSE paper leak in the year 2018 was one of the biggest examination scandals that was reported in recent years. The Mathematics paper of Class 10 and the Economics paper[4] of Class 12 were leaked at the social networking sites before the actual dates of examinations and it caused troubles for more than two million of students.[5] This fuelled the already aggrieved students, parents, and educators into calling for strict & appropriate measures to be taken in order to ensure the prevention of such occurrences in the future. Police introduced the CBI in the case to investigate the leakage, and based on the leakage that unfolded through the pages, another network that circulated the papers through the Use of the WhatsApp group was unveiled. It was an eye-opener in the aspect of security in the examination process, as well as the laxity in penalties meted on those involved in fraudulent activities concerning examinations.

2. VYAPAM SCAM (2013)

---

3. The Hindu, "Act that punishes organized cheating in government exams comes into effect", *available* at https://www.thehindu.com/news/national/act-that-punishes-organised-cheating-in-government-exams-comes-into-effect/article68318128.ece (last visited on September 16, 2024).
4. The Hindu, "Three teachers held for Class 12 Economics paper leak, CBSE official suspended", *available* at https://timesofindia.indiatimes.com/home/education/3-teachers-held-for-eco-paper-leak-cbse-official-suspended/articleshow/63572114.cms (last visited on September 16, 2024)
5. The Indian Express, "CBSE Class X, XII papers leaked: Over 20 lakh students have to retake exam, dates to be announced soon", available at https://indianexpress.com/article/education/cbse-class-ten-maths-class-twelve-economics-papers-leak-re-test-probe-ordered-5115057/ (last visited on September 16, 2024)

The case of Madhya Pradesh Vyapam exam fraud was one of the largest and complex scandals in the examinations in India. It was a major aftermath relating to cheating in the entrance examinations for the medical and various other professional courses conducted by the Madhya Pradesh Professional Examination Board (MPPEB). Some of the practices adopted included impersonation, offering of gifts to some people and altering records. More than 2000 people including politicians, civil servants, and touts have been accused in the scam.[6] That is why the Supreme Court of India launched a CBI investigation, as a result of which many arrests and trials were carried out. The Vyapam scam painted the examination system a massively corrupt entity in need of major overhauls to purge the vices.

3. VANSHIKA YADAV CASE (2024)

It is a judgment delivered by the 3 judge Bench of the Supreme Court consisting of Chief Justice of India D.Y. Chandrachud, Justice J.B. Pardiwala, and Justice Manoj Misra. The judgment was delivered on 23 July 2024.

ANALYSIS OF VANSHIKA YADAV V. UNION OF INDIA

In the wake of rising concerns over academic dishonesty, the *Public Examinations (Prevention of Unfair Means) Act, 2024* was enacted to preserve the sanctity of the examination system. *The Vanshika Yadav v. Union of India*[7] case emerged as a critical test of this legislation, raising important questions about its application and effectiveness.

- **FACTS OF THE CASE**[8]

In the present case the National Eligibility-cum-Entrance Test (NEET) (UG) 2024 was conducted by the National Testing Agency (NTA) on May 5, 2024, with results declared on June 4, 2024. The exam was held at 4,750 centers across 571 cities, including 14 overseas locations. A total of 23,33,297 candidates appeared for the exam, competing for approximately 1.08 lakh medical undergraduate seats, of which 56,000 are in government institutions and 52,000 in

---

6. Geetam Acharya, " Public Examinations (Preventions of Unfair Means) Act, 2024", *available* at https://www.impriindia.com/insights/public-examinations-unfair-means-act/ (last visited on September 16, 2024).
7. Vanshika Yadav v. Union of India, W.P. (C) No. 335/2024.
8. Available at https://digiscr.sci.gov.in/pdf_viewer?dir=YWRtaW4vanVkZ2VtZW50X2ZpbGUvanVkZ2VtZW50X3BkZi8yMDI0L3ZvbHVtZSA4L1BhcnQgSS8yMDI0XzhfNDUtOThfMTcyMzUzODc4NC5wZGY=

private ones. To qualify, candidates must score at or above the 50th percentile, which equates to 164 marks out of a total of 720. The exam includes 180 questions, with four marks for each correct answer and one mark deducted for each incorrect one. While candidates who meet the cut-off are eligible for consideration, admission to MBBS programs is not guaranteed. Seats are distributed among both unreserved and reserved categories, including Scheduled Castes, Scheduled Tribes, Other Backward Classes, and Economically Weaker Sections. Directions were issued to relevant agencies to provide specific disclosures on issues highlighted in prior orders. The turmoil took place when on 5-05-2024, a First Information Report was lodged alleging a leak in the NEET (UG) 2024 question papers implicating offences under Sections 407, 408 and 409 read with Section 120-B of the Penal Code, 1860 (IPC). On June 23, 2024, the Economic Offences Unit of the Bihar Police reportedly issued a press release regarding the alleged paper leak. However, the same day, a contradictory communication was issued by the Additional Director General of Police, Economic Offences Unit, denying the release of any official press statement on the matter.

- **ISSUES INVOLVED**

  The issues involved in the present case be summed up as follows -

  1. Whether the NEET 2024 is valid or the paper should be annulled in the light of the leak of the paper and other malpractices?
  2. Whether the compensatory marks that were given to 1563 students were justified?
  3. Whether the integrity of the examination process has been affected in light of the malpractices?

- **JUDGMENT**

The Apex Court while delivering the judgement focused on the point that the present case is of utmost importance considering the number of candidates that have appeared in the NEET.

- The court did agree to the fact NEET is held every year with lakhs of candidates and this

9. Anisha Sinha, Case comment : Vanshika Yadav v. Union of India, others And Other Connected Matters, Legal Wires, available at https://legal-wires.com/case-study/case-comment-vanshika-yadav-v-union-of-india-others-and-other-connected-matters/ (last visited September 14, 2024)

year there has been leak of the paper at certain centres. There were certain loopholes in centres such as Hazari Bagh and Patna but the percentage of the successful results is not that high to prove the systematic leak. But a re-test is not possible which resulted in frustration amongst students, teachers, parents, coaching institutes as well.

- The result of the examination cannot be invalidated as there is not sufficient evidence.
- There was also an issue pertaining to a particular question which was also argued before the court questioning the provisional answer key of the NTA. In order to get an expert opinion, the Court directed that the Director of IIT Delhi form a committee consisting of three members from the Physics Department[10].
- The Court had to strike a balance between the conduct of the re examination as well as the integrity of the exam, which will impact the lives of millions of students.

The Apex Court's judgment in this case not only covered the malpractices in the NEET exam but also covered a broader issue of malpractices that came up.

IMPACT OF EXAMINATION MALPRACTICES IN INDIA

Public examinations in India are not just seen as exams but rather as the 'make or break' of an individual's career and overall life. But over the past few years the credibility of these exams has been put to test because of a variety of reasons. During the last five years, a minimum of 48 question paper leaks has occurred across at least 16 states. [11] In the past years the exams have been cancelled or even deferred with or without notice owing to the malpractices that are in a rise with respect to the conduct of the public examinations. The impact of such blur on the students takes a toll on the, not only physically but even mentally leaving them with to taking extreme steps like leaving the country or even suicides. While the public examinations tend to cater to the most important employments in the society, it is imperative that these exams should be conducted in the most transparent and accountable manner. The impacts of such malpractices

10. Pulugam Devaki, Neet UG 2024 Case: Vanshika Yadav vs. Union Of India (UOI) and Ors. *Available* at https://www.lawyersclubindia.com/articles/neet-ug-2024-case-vanshika-yadav-vs-union-of-india-uoi-and-ors--16872.asp (last visited September 16, 2924)
11. Public Examination Bill 2024 UPSC Notes: Background, Need, Provisions & More, available at https://testbook.com/ias-preparation/public-examination-bill (last visited September 10, 2024)

are:

- **DEMOTIVATES THE STUDENTS -** When a national agency like NTA is questioned it leaves a bad imprint in the mind of the good candidates to prepare well and take the exams.
- **REDUCES OPPORTUNITY -** When the malpractices in the examinations increase the innocent students tend to lose the opportunities that are available especially the deserving candidates.
- **HAMPERS THE CONDUCT OF EXAMINATION -** The main aim of conducting examinations is to ensure that the result of the candidates shows the level of preparation and helps judge them for the concerned exam. Any unfair means that alter the result of the exam has the capacity to hamper the entire examination.[12]
- **NOT ACCOUNTABLE -** Whenever there is any malpractice or unfair means in any exam it directly hits the credibility and the accountability of the authority that conducts the examination. In a situation where the education institutions can't be trusted on the entire education system in the country seems to have a downfall which is not good for any nation.
- IMPACTS ON JOBS- When a non-deserving candidate secures a job or a seat by appearing in an examination where he succeeds only by unfair means the chances that the efficiency of the person will be at stake and ultimately leading to a situation of inefficient employees.

The above stated reasons impact the entire examination system and results in the academic loss. The methodology of cheating in examinations is different in offline and online exams[13]. The new law was thus enacted to ensure that cheating in no way can happen.

12. The Times of India, "National Testing Agency in trouble over exam issues", *available* at https://timesofindia.indiatimes.com/blogs/gen-zedits/national-testing-agency-in-trouble-over-exam-issues/ (last visited September 10, 2024).
13. Dr Onkar Singh, Decrypting integrity breaches in Indian examinations *available* at https://timesofindia.indiatimes.com/blogs/onkar-singh/decrypting-integrity-breaches-in-indian-examinations/ (last visited September 16, 2024)

REASONS FOR ENACTING THE LEGISLATION

The Public Examinations (Prevention of Unfair Means) Act, 2024, the first of its kind, is an attempt to fill the legislative vacuum to check and deter examination-related malpractices.[14]The Public Examinations (Prevention of Unfair Means) Act, 2024 was enacted to address several critical issues and challenges surrounding the conduct of public examinations in India. Here are the primary reasons and needs for enacting this legislation:

1. INCREASING INCIDENTS OF EXAMINATION MALPRACTICE

Malpractices in the past years have been on a rise. There have been numerous instances of question papers being leaked before the examination date, leading to unfair advantages and compromising the integrity of the examination process. At least 48 instances of paper leaks in 16 states over the last five years, in which the process of hiring for government jobs was disrupted.[15] Candidates have been found using unauthorised means, such as electronic devices or external help, to cheat during exams. This undermines the fairness and meritocracy of the examination process.

2. ORGANISED CHEATING SYNDICATES

There has been a rise in organized groups and syndicates involved in facilitating cheating in public examinations. These groups use sophisticated methods, including technology, to manipulate exam processes for financial gain. In some cases, there has been collusion among examiners, invigilators, and service providers to manipulate examination outcomes, necessitating a legal framework to penalize such conspiracies.[16]

3. TECHNOLOGICAL ADVANCES AND CHALLENGES

The proliferation of smartphones, communication devices, and the internet has made it easier for candidates to engage in unfair practices during exams. [17] The Act addresses the misuse of

---

14. Sayed Kirdar Husain, Shielding Tomorrow: Can the 2024 Public Examinations Act Secure Our Youth's Future? NLIU LAW REVIEW, July 15, 2024 *available* at https://nliulawreview.nliu.ac.in/blog/shielding-tomorrow-can-the-2024-public-examinations-act-secure-our-youths-future/ (last visited on August 26, 2024)
15. Public Examinations (Prevention of Unfair Means) Bill, 2024, *available* at https://www.drishtiias.com/daily-updates/daily-news-analysis/public-examinations-prevention-of-unfair-means-bill-2024 (last visited on August 26,2024)
16. Kevin Curran, "Cheating in Exams with Technology", *available* at https://kevincurran.org/papers/Cheating.pdf (last visited September 10, 2024).

technology in examinations and sets penalties for such actions. With the increasing use of online platforms for conducting examinations, there are significant risks related to cybersecurity, including hacking and unauthorized access to examination materials.

4. MAINTAINING PUBLIC TRUST AND CREDIBILITY

Repeated instances of exam malpractices and the resultant controversies have eroded public confidence in the examination systems. This Act aims to restore faith in the system by ensuring stringent measures against unfair means. Public examinations are a primary means of determining merit and capability for employment, education, and other opportunities. Ensuring a fair examination process is crucial to upholding meritocracy in the country

5. LACK OF COMPREHENSIVE LEGAL FRAMEWORK

Prior to this Act, there was no comprehensive legal framework specifically addressing unfair means in public examinations. Existing laws were inadequate to deal with the sophisticated nature of examination malpractices. The Act introduces specific penalties for various offences related to examination malpractices, which serve as a deterrent to potential offenders.

6. PROTECTION OF EXAMINATION INFRASTRUCTURE

The Act provides for the protection of examination centres and the integrity of examination processes, ensuring that only authorised individuals have access to sensitive examination materials and venues. It criminalises unauthorised entry into examination centres and any actions intended to disrupt the examination process.

7. ALIGNING WITH MODERN CRIMINAL JUSTICE REFORMS

The Act aligns with the provisions of the Bharatiya Nyaya Sanhita, 2023, reflecting modern criminal justice reforms and ensuring consistency in penal provisions. The enactment of the *Public Examinations (Prevention of Unfair Means) Act, 2024* is a crucial step towards enhancing the credibility, fairness, and integrity of public examinations in India. By addressing the multifaceted challenges posed by modern examination malpractices, the Act aims to ensure a level playing field for all candidates and uphold the principles of meritocracy and justice in

17. Ally Nyamawe, " The Use of Mobile Phones in University Exams Cheating: Proposed Solution", *available* at file:///C:/Users/DELL/Downloads/The_Use_of_Mobile_Phones_in_University_Exams_Cheat.pdf (last visited September 10, 2024)

public examinations.

PUBLIC EXAMINATIONS (PREVENTION OF UNFAIR MEANS) ACT, 2024

The Public Examinations Act received the assent of the President, Droupadi Murmu on the 12th of February, 2024 and law came into effect on 21st June, 2024. The Act has been enacted for purpose of the prevention of the unfair means in the public examinations and for providing any other incidental matter with regards to public examination.[18] The statute has been divided into 6 chapters, 19 Sections and a schedule appended to the act. The 6 chapters of the Act deal with the key definitions, offences, punishments, investigation and the rule making powers of the central government. The Act aims at combating cheating in public examinations. Public Examination is defined as any examination conducted by a "public examination authority" listed in the Schedule of the Bill, or any such other authority as may be notified by the Central Government.[19] The schedule lists five public examination authorities, the Union Public Service Commission (UPSC), the Staff Selection Commission (SSC), the Railway Recruitment Boards (RRBs), the Institute of Banking Personnel Selection (IBPS), the National Testing Agency (NTA).

- **UNFAIR MEANS AND OFFENCES**

Section 3[20] of the Public Examination Act (2024) outlines what constitutes "unfair means" during the conduct of public examinations. These acts or omission are done by a person or a group, typically for monetary or wrongful gain, include a wide range of activities, such as:

- **LEAKAGE OF QUESTION PAPERS OR ANSWER KEYS:** Unauthorized disclosure of the exam content.
    - COLLUSION: Collaborating with others to leak exam papers or answer keys.
    - UNAUTHORIZED ACCESS: Taking possession of a question paper or Optical Mark Recognition (OMR) response sheet without permission.
    - PROVIDING UNAUTHORIZED SOLUTIONS: Any unauthorized person providing answers during the exam.

---

18. Sayed Kirdar Husain, "Shielding Tomorrow: Can the 2024 Public Examinations Act Secure Our Youth's Future?", *available* at https://nliulawreview.nliu.ac.in/blog/shielding-tomorrow-can-the-2024-public-examinations-act-secure-our-youths-future/ (last visited September 10, 2024).
19. Section 2(1)(k), The Public Examinations (Prevention of Unfair Means) Act, 2024
20. Section 3, The Public Examinations (Prevention of Unfair Means) Act, 2024

- ASSISTING CANDIDATES ILLEGALLY: Helping a candidate in any manner not allowed during the exam.
- TAMPERING WITH ANSWER SHEETS: Altering or interfering with answer sheets, including OMR response sheets.
- UNAUTHORIZED ALTERATION OF ASSESSMENT: Changing assessments without authorization, except in bona fide cases.
- VIOLATION OF EXAM NORMS: Deliberately ignoring standards set by the Central Government for conducting the examination.
- TAMPERING WITH SHORTLISTING DOCUMENTS: Manipulating documents used for determining candidate ranks or merit.
- SECURITY BREACHES: Willfully violating security measures to facilitate cheating or other unfair practices.
- TAMPERING WITH TECHNOLOGY: Interfering with the computer network, resources, or systems used in the examination.
- MANIPULATING EXAM LOGISTICS: Manipulating seating arrangements, exam dates, or shifts to aid unfair practices.
- THREATS AND OBSTRUCTION: Threatening or restraining individuals involved with the exam authority or obstructing the examination process.
- CREATING FAKE WEBSITES: Setting up fake websites to deceive candidates or for monetary gain.
- CONDUCTING FAKE EXAMS: Organizing fake exams or issuing fake admit cards or offer letters to cheat or gain financially.

The Act prohibits individuals, group or institutions to collude or conspire with respect to facilitating unfair practices during public examinations.[21] It further lays down creating rules with regard to the disruption of the exam-

- No unauthorized person, not involved in conducting the examination or not a candidate, can enter the premises of the exam centre with the intent to disrupt the examination.
- Authorized personnel involved in conducting the examination must not:
- Open or access the question paper before the scheduled time for personal gain.
- Leak, possess, or solve the question paper in any unauthorized way for financial or wrongful gain.
- Share confidential information about the exam for wrongful purposes.
- Any entrusted person who reveals examination-related information without proper authorization will be held accountable[22].

The Act has not given a precise meaning to 'service provider' but this term refers to an agency, an organization, a body, association, business entity, company, partnership or any other organisation, including its affiliates and subcontractors who are hired by the public examination authority to conduct public examinations. [23] If an examination authority or service provider commits an organized crime, then the jail term of minimum imprisonment will be of five years whereas the imprisonment may extend up to ten years, and the fine will remain ₹ 1 crore as per Section 30 J.

- **PUNISHMENTS**

Section 9 of the Act defines the nature of the offense as cognizable, non-bailable, and non-compoundable.

- This means police can start their investigation without seeking permission from the magistrate
- Arrest can be made without any warrant and bail would be granted on the discretion of the magistrate not as a right
- Non-compoundable means the case cannot be withdrawn from any party even if parties are ready to compromise.

21. Section 4, The Public Examinations (Prevention of Unfair Means) Act, 2024.
22. Section 5, The Public Examinations (Prevention of Unfair Means) Act, 2024.
23. Section 7, The Public Examinations (Prevention of Unfair Means) Act, 2024.

Punishment for "any person or persons resorting to unfair means and offenses" can be three to five years in prison, and a fine of up to Rs 10 lakh. If the convict fails to pay the fine, "an additional punishment of imprisonment shall be imposed, as per the provisions of the Bharatiya Nyay Sanhita, 2023.

Punishment for the Service Providers:

- A service provider, engaged by the public examination authority for the conduct of examinations, shall also be liable to be punished with the imposition of a fine up to Rs 1 crore and proportionate cost of examination shall also be recovered from it, if the service provider is involved in illegal practices.

The Public Examinations (Prevention of Unfair Means) Act, 2024 is a step towards the prohibition of the unfair means used in the public examinations. The law has tries to explain the term unfair means with a very wide connotation and has also dealt with the offences with penal consequences. The Act's introduction offers a glimmer of hope for a fairer examination system in India, but it must be part of a broader strategy that includes technological advancements, increased surveillance, and robust administrative procedures.

CRITICISM OF THE LEGISLATION

Despite its intent to uphold fairness in public examinations, the *Public Examinations (Prevention of Unfair Means) Act, 2024* has faced significant criticism.

1. **IMPLEMENTATION ACROSS DIVERSE REGIONS:** A major challenge is to achieve compliance with the Act across various geographical and administrative areas of the country. The scale, availability, and capacity of resources, infrastructures, and officials as well as coordination among them may impact the measures required by the Act.
2. **TECHNOLOGICAL INFRASTRUCTURE:** Paying for the required technological needs including the creation of an examination system that can only be compromised with significant difficulty can be relatively expensive. As for the role of security, it must be said that smaller examining bodies and institutions can experience difficulties in implementing such enhanced registration and verification methods as biometrics and central controls.
3. **RESISTANCE TO CHANGE:** This might be due to the fact that the stakeholders involved

in the examination activities may not accept the changes brought by the Act from the traditional examination practices. This can hamper the effectiveness of the above measures and translate to the Act's performance levels on the low end[24].

CONCLUSION AND SUGGESTIONS

The Vanshika Yadav case and the subsequent enactment of the Public Examinations (Prevention of Unfair Means) Act, 2024, highlight the increasing need for transparency, integrity, and accountability in India's examination system. Public examinations like NEET hold immense importance for students' futures, and any malpractice undermines the trust and credibility of the entire system. The case emphasized the magnitude of the problem, with millions of students being affected by even small breaches in examination protocols.

The Supreme Court, while balancing the need for fairness with practicality, refused to annul the exam despite the paper leak allegations, citing insufficient evidence for widespread malpractice. This decision underlines the challenges faced in addressing such issues within a limited legal framework. The new legislation attempts to fill this gap by providing a structured and comprehensive framework to combat unfair practices. To further strengthen the credibility and effectiveness of the examination system and prevent unfair means, several measures could be considered:

1. **CAPACITY BUILDING:** Academic education oriented in the training and capacity builds of examination officials and service providers are useful in a smooth implementation of the Act. Such programs may target at being an improvement on the technical and administrative matters of the implementation of the Act so that officials have adequate knowledge regarding the new measures.
2. **CONTINUOUS MONITORING:** Audits can be conducted at various intervals as well as constant supervision of examination processes might be useful in regard to realization of the possible problems. Such check-ins can help the organs of state power to track the degree of the act's implementation and adherence to constantly update and

24. Priyanshu Bharadwaj, "An In-Depth Analysis Of Public Examinations (Prevention Of Unfair Means) Act, 2024", *available* at https://www.livelaw.in/lawschool/articles/in-depth-analysis-public-examinations-prevention-unfair-means-act-263436 (last visited on September 17, 2024).

reinforce them.

3. **STRENGTHENING CYBERSECURITY:** There are technological advances that enable sophisticated cheating methods, there is a need for robust cybersecurity measures, including encrypted communication systems for question papers and advanced monitoring techniques during online and offline examinations.
4. **USE OF ARTIFICIAL INTELLIGENCE AND TECHNOLOGY:** AI-based proctoring systems can be employed during online exams to monitor candidates and detect any suspicious activity. These systems could help identify potential unfair practices in real-time, preventing incidents of malpractice.
5. **PUBLIC AWARENESS CAMPAIGNS:** Educating students and the public about the legal consequences of examination malpractices, along with ethical responsibility, could serve as a deterrent. This will also reinforce the importance of merit-based achievements.
6. **STRINGENT PENALTIES AND TIMELY INVESTIGATION:** While the new law provides strong penalties for offences, timely and thorough investigations are crucial. Law enforcement agencies should be equipped to investigate examination-related crimes efficiently and without delay.
7. **WHISTLEBLOWER MECHANISM:** Encouraging whistleblowers to come forward with information about examination malpractices can be a strong deterrent. Providing legal protection and incentives for whistleblowers may increase reporting of unfair means.
8. **REGULAR UPDATES AND AMENDMENTS:** As malpractices evolve with time and technology, it is essential that laws like the Public Examinations Act remain dynamic, being regularly updated to address emerging forms of cheating and fraud.

By implementing these suggestions, India can work towards restoring faith in its public examination system, ensuring that merit and hard work remain the true determinants of success. Strengthening transparency, refining legal provisions, and fostering a more balanced approach to enforcement will help create an environment where students are evaluated fairly. Ultimately, a robust and just examination system is crucial for cultivating future leaders and maintaining the

integrity of the nation's educational framework.

DISCIPLINARY MANAGEMENT THROUGH ACTIVE INVOLVEMENT BY THE JUDICIAL ARM OF THE ARMY IN PRE-TRIAL STAGES

***Dr. Hemangini Chandra Sharma**

****Lt Col Dibakar Chandra**

INTRODUCTION

Collection and recording of evidence in the trial of a soldier has always been a secondary aspect in the military, whereas the primary aspect has always been punitive action, which we still observe through the provisions of Army Rule 36[1] and sub-rule (2) of Army Rule 160[2]. However, with the rise of modern theories of criminology and criminal justice system, the military also had to imbibe these basic principles in its criminal justice system, wherever permissible and whenever possible. The celebrated judgements of *Lt Col Prithi Pal Singh Bedi vs Union of India*,[3] which led to the establishment of Armed Forces Tribunal through the enactment of the Armed Forces Tribunal Act, 2007 to act as an appellate court to Courts Martial and *SN Mukherjee vs Union of India*,[4] which led to amendment of Army Rule 62 for recording brief reasons in support of findings, i.e. principles of natural justice in General, Summary-General and District Courts Martial. Since these principles had evolved in the European countries, its entry into the Indian subcontinent, both in civil and military were through the British settlers of East India Company. Once the Company had established its dominance over the sub-continent, they evolved a new judicial system different from the prevalent practices of various princely states of India viz the natives. Post the Revolt of 1857 and British Crown's take-over of the Company's territorial gains in the Indian Sub-Continent; there was swift implementation of new and revamped Penal and Procedural Laws, noteworthy being the Indian Penal Code, 1860[5], and

---

* Assistant Professor, NALSAR, Hyderabad,

** Assistant Judge Advocate General, PhD scholar, School of Law, KIIT (Deemed University) Bhubaneshwar

1. Suspension of rules on the ground of military exigencies or the necessities of discipline, SRO No 484 dated 27 November 1954, published in Gazette of India, Part II, Sec 4, p291.
2. Record of the Evidence and Defence – (2) if it appears to the convening authority that military exigencies or other circumstances prevent recording of evidence, he may direct that the trial will be carried on without such brief of evidence, SRO No 484 dated 27 November 1954, published in Gazette of India, Part II, Sec 4, p291.
3. AIR 1982 SC 1413
4. AIR 1990 SC 1984,
5. Act No XLV of 1860, passed by the Legislative Council of India, British Parliament on 06 October 1860 and came into force on 01.01.1862 with the ascent of the Governor General in Council of British India.

Code of Criminal Procedure, 1861, Indian Police Act, 1861 and the Indian Evidence Act, 1872.[8] In the new order of criminal justice system under the British, a more decentralized pattern was established, wherein Courts were setup, having autonomy in dispensing justice, followed by limited scope for appeal before the superior courts. Establishment of the three Presidency High Courts,[9] respectively for Calcutta,[10] Bombay and Madras[11] saw the introduction of the five writs of Habeas Corpus, Certiorari, Mandamus, Quo-Warranto and Prohibition for the first time in India, but with only civil remedies. The only noteworthy change in the pattern of dispensation of criminal justice system in the civil was that the Courts were not answerable to the Administrators of each of the three Presidencies, except for the Head of the State viz the Monarch through the Governor General in Council of British India, whereas in the earlier times, the Lords, Administrators and Governors, themselves used to dispense criminal justice. This bifurcation was the direct result of the 'Doctrine of Separation of Powers'[12].

CRIMINAL JUSTICE SYSTEM IN THE MILITARY

'The Doctrine of Separation of Powers' is not entirely incorporated in the military justice system because of certain peculiarities. The Doctrine of Separation of Powers is not possible in the military because of its pyramidal organizational structure, working solely on the principles of command, control and discipline. Having separate bodies of command and control, one for the Executive i.e. Commanders at various levels, and a separate Judiciary, would have led to administrative consequences such as, dilution of discipline as well as command and control. Therefore, the military was allowed to try soldiers for offences, purely of military nature, which were commonly known as military offences, along with certain civil offences including offences against civilians, except serious offences like murder, culpable homicide not amounting to murder and rape of civilians[13]. However, certain exceptions were created, wherein troops stationed on active service, or at any place outside India, or at a frontier post specified by

6. Act No XXV of 1861, passed by the Legislative Council of India, British Parliament and came into force on 05.09.1861 with the ascent of the Governor General in Council of British India.
7. Act No V of 1861, passed by the Legislative Council of India, British Parliament on 22 March 1861 and came into force with the ascent of the Governor General in Council of British India.
8. Act No I of 1872, passed by the Legislative Council of India, British Parliament on 15 March 1872 and came into force with the ascent of the Governor General in Council of British India (Gazette of India, 1872, pp136 and 230).
9. The Indian High Courts Act, 1861 (24 & 25 Vict. c. 104) passed by the British Parliament on 06 August 1861 empowering the Crown to issue Letters Patent for establishment of High Courts of Judicature at Calcutta, Bombay and Madras (Case No: Civil Appeal No 3005 of 2005 Vidyawati Gupta & Others vs Bhakti Hari Nayak & Others, Supreme Court of India. Date of Judgement: 03.02.2006).
10. Letters Patent dated 14 May 1862 issued by Her Majesty, Queen Victoria of Great Britain.
11. Letters Patent dated 26 June 1862 issued by Her Majesty, Queen Victoria of Great Britain.
12. Charles Louis de Secondat, Baron Montesquieu, "De l'Esprit des Loix (Spirit of Laws)", Book XI, Chapter 6.
13. Section 70 of Army Act, 1950 (SRO No 120 dated 22 July 1950, published in Gazette of India, Part II, Sec 4, p86).

the Central Government by notification.[14] Whereas, offences like murder, culpable homicide not amounting to murder and rape against persons subject to the Act [15] can be tried despite of the above exceptions.

In the Army, there are four types of criminal trials, General, Summary-General, District and Summary Courts Martial. Selection of these forums was based on the gravity of the charge, rank of the accused and place of offence ('Peace' or 'Active'). Though these forums with difference in procedures were always interchangeable, the only thing that remained constant for all the Courts Martial were the pre-trial procedures and the evidence collected therein, commencing from investigation through a Court of Inquiry,[16] taking cognizance of an offence through Hearing of Charge[17] by the Commanding Officer and collection of prima-facie evidence through the recording of Summary of Evidence[18] by the Commanding Officer or any other Officer detailed by him. The Commanding Officer exercises the power of decision to recommend the forum of trial.[19] Whereas, in cases of Summary Courts Martial,[20] he is the sole authority to adjudicate and preside over the trial, except for four offences under Army Act Sections 34 (Offences in relation to the enemy and punishable with death), 37 (Mutiny), 69 (Civil Offences) and when committed against the Commanding Officer. Lastly, the Superior Military Authority is empowered to convene General or District Courts Martial having the requisite warrant.[21] Whereas, in case of Summary General Court Martial, it can be convened by Superior Military Authority empowered under Section 112 of the Act.[22]

PRE-TRIAL STAGES OF CRIMINAL PROCEEDINGS

Certain principles of a criminal investigation and trial as applicable in the civil, had been varied

---

14. *Supra ibid.*
15. Section 69 of Army Act, 1950 (SRO No 120 dated 22 July 1950, published in Gazette of India, Part II, Sec 4, p86).
16. Rules 177-185 of Army Rules, 1954 (SRO No 484 dated 27 November 1954, published in Gazette of India, Part II, Sec 4, p291).
    SK Bhatnagar, Secretary to Government of India, 05 December 1986, Regulations for the Army, 1987 Volume - I (Revised Edition), "Courts Martial", Chapter X, Paragraph 518-529, p177-184.
17. Rule 22 of Army Rules, 1954 (SRO No 484 dated 27 November 1954, published in Gazette of India, Part II, Sec 4, p291).
18. Rule 23 of Army Rules, 1954 (SRO No 484 dated 27 November 1954, published in Gazette of India, Part II, Sec 4, p291).
19. Rule 24 of Army Rules, 1954 (SRO No 484 dated 27 November 1954, published in Gazette of India, Part II, Sec 4, p291).
20. Section 120 of Army Act, 1950 (SRO No 120 dated 22 July 1950, published in Gazette of India, Part II, Sec 4, p86).
21. Sections 109-111 of Army Act, 1950 (SRO No 120 dated 22 July 1950, published in Gazette of India, Part II, Sec 4, p86).
22. Army Act, 1950 (SRO No 120 dated 22 July 1950, published in Gazette of India, Part II, Sec 4, p86).

while incorporating them in the Indian Army Act, 1911[23] and the Indian Army Act Rules,[24] the basic principles of fairness, justice and equity had been duly incorporated in the said Act and Rules, as well as in their later versions, Army Act 1950 [25] and Army Rules of 1954, [26] in a measured manner. A comparison of provisions of military law with the provisions of civil law during pre-trial stages of criminal proceedings are highlighted below:-

(a) Within the military, at the investigation stage, a Court of Inquiry records statements of witnesses and a person whose character and military reputation has been affected, is given due opportunity to defend himself, which is absent in a police investigation and recording of statements under Section 161 of the Code of Criminal Procedure, 1973 @ Section 180 of the Bharatiya Nagarik Suraksha Sanhita, 2023.[27] The Army Act and Rules are an amalgamation of Service Law and Criminal Procedure. Court of Inquiry also leads to administrative actions of dismissal, removal, compulsory retirement, reduction, release, discharge,[28] award of Censure/Reproof[29] and is also a tool for initial investigation for initiating disciplinary action i.e. criminal proceedings.

(b) In the military, the Commanding Officer, having no legal background, takes cognizance of the offence through Hearing of Charge, whereas under Section 190 of Code of Criminal Procedure, 1973 @ Section 210 of the Bharatiya Nagarik Suraksha Sanhita, 2023 [30] and Section 204 of Code of Criminal Procedure, 1973 @ Section 227 of the Bharatiya Nagarik Suraksha Sanhita, 2023[31], a Magistrate who is a legal expert and a qualified judicial officer takes

23. Act No VIII of 1911, passed by the British Parliament in March 1911 and came into force on 01.01.1912.
24. Manual of Indian Military Law, 1911, Government of India, Army Department, "Indian Army Act Rules, 1911", pp159-319.
25. SRO No 120 dated 22 July 1950, published in Gazette of India, Part II, Sec 4, p86.
26. SRO No 484 dated 27 November 1954, published in Gazette of India, Part II, Sec 4, p291.
27. Act No 46 of 2023, S.O. No 54 dated 25 December 2023, published in Gazette of India, Extraordinary, Part II, Sec. 1.
28. Sections 19 & 20 of Army Act, 1950 (SRO No 120 dated 22 July 1950, published in Gazette of India, Part II, Sec 4, p86). Rules 13, 14 and 13 of Army Rules, 1954 (SRO No 484 dated 27 November 1954, published in Gazette of India, Part II, Sec 4, p291).
29. Government of India, Ministry of Defence, Department of Military Affairs, Letter No 560/US(P)/D(N-II)2022 dated 30 October 2023.
30. Act No 46 of 2023, S.O. No 54 dated 25 December 2023, published in Gazette of India, Extraordinary, Part II, Sec. 1.
31. Section 204, Code of Criminal Procedure, 1973 (Act N0 2 of 1974, passed by the Parliament of India and came into force on 01.04.1974 with the ascent of the President of India) @ Section 227 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (Act No 46 of 2023, S.O. No 54 dated 25 December 2023, published in Gazette of India, Extraordinary, Part II, Sec. 1).

cognizance of an offence against the accused and issues process. Under the military law, there is no requirement of issuing process, since at the time of taking cognizance of the offence, the accused is invariably present before the Commanding Officer.

(c) Post taking cognizance of the offence, the Commanding Officer orders recording of Summary of Evidence, which is physical collection of evidence, both oral and documentary in the form of statements and exhibits in the presence of the accused. The Commanding Officer or the Officer detailed by him to record the evidence does not have any expert knowledge of the procedural laws and law of evidence. In civil cases, the Magistrate, who is an expert in the procedural laws and law of evidence by virtue of being a judicial officer, post taking cognizance of the offence, issues orders for either inquiry (collection of prima-facie evidence) or trial of the accused. [32] In a complaint case, if the Magistrate is of the opinion that the evidence is inadequate, he may either direct further investigation by the Police, or may himself inquire by recording evidence on oath.[33]

(d) Post recording of the Summary of Evidence, the Commanding Officer may decide to try the accused by a Summary Court Martial. Another option with the Commanding Officer is to remand the case to Superior Military Authority for convening of a General, Summary General or District Courts Martial. At the time of remanding the case to the Convening Authority, the Commanding Officer also forwards the Charge Sheet for endorsement by the Convening Authority, along with the complete evidence on record.[34] Before endorsing his remark at the foot of the Charge Sheet, as to the forum of trial, the Convening

32. Sections 190 (2), 191 and 192 of Code of Criminal Procedure, 1973 (Act No 2 of 1974, passed by the Parliament of India and came into force on 01.04.1974 with the ascent of the President of India) @ Sections 210 (2), 211 and 212 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (Act No 46 of 2023, S.O. No 54 dated 25 December 2023, published in Gazette of India, Extraordinary, Part II, Sec. 1).
33. Sections 202 of Code of Criminal Procedure, 1973 (Act No 2 of 1974, passed by the Parliament of India and came into force on 01.04.1974 with the ascent of the President of India) @ Section 225 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (Act No 46 of 2023, S.O. No 54 dated 25 December 2023, published in Gazette of India, Extraordinary, Part II, Sec. 1).
34. Serial Nos 7 and 10 (h), Memoranda for the Guidance of Officers concerned with Courts Martial, Page 309, Manual of Military Law, Vol II (Revised Edition), 2011.

Authority is entitled to seek legal advice from the Judge Advocate General's Branch of the Command or Corps in all cases of indecency, fraud, theft, except ordinary theft and civil offences; and in all other cases of doubt or difficulty.[35] In civil cases, the Magistrate, himself being a judicial officer issues process for appearance of the accused. At this stage, the Magistrate may dispense with the attendance of the accused and allow the accused to be represented by his counsel, i.e. to appear on his behalf[36].

ROLE AND REQUIREMENT OF JUDGE ADVOCATE GENERAL'S DEPARTMENT IN THE ARMY

The role and requirement of Judge Advocate General[37] and his department started to multiply in the post-Independence period. In the year 2003, a necessity was felt to increase the role of the Judge Advocate General, wherein an additional provision was added to the aforesaid role.[38] It is interesting to note that the Judge Advocate General in the pre-Independence era had a limited role in advising the Commanders in pre-trial procedures. In the year 1911 when the first Indian Army Act was enacted, the Judge Advocate General or the Deputy Judge Advocate General had the limited statutory role of detailing a Judge Advocate for the trial,[39] issuing commissions for collection of evidence, [40] conduct of Courts Martial proceedings when composed of native officers[41] and reviewing Summary Court Martial proceedings [42] post completion. The same

---

35. Serial 10 (a), Memoranda for the Guidance of Officers concerned with Courts Martial, Page 309, Manual of Military Law, Vol II (Revised Edition), 2011. SK Bhatnagar, Secretary to Government of India, 05 December 1986, Regulations for the Army, 1987 Volume - I (Revised Edition), "Courts Martial", Chapter X, Paragraph 459, p164.
36. Section 205, Code of Criminal Procedure, 1973 (Act N0 2 of 1974, passed by the Parliament of India and came into force on 01.04.1974 with the ascent of the Prsident of India) @ Section 228 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (Act No 46 of 2023, S.O. No 54 dated 25 December 2023, published in Gazette of India, Extraordinary, Part II, Sec. 1).
37. SK Bhatnagar, Secretary to Government of India, 05 December 1986, Regulations for the Army, 1987 Volume - I (Revised Edition), "Duties of Commanders, Staff, Advisers, Directors and Regimental Officers", Chapter II, Paragraph 33, p12.
38. Army Headquarters, Judge Advocate General's Department, New Delhi letter No B/80137/JAG dated 05 August 2003.
39. Section 78 of the Indian Army Act, 1911 (Act No VIII of 1911), passed by the British Parliament in March 1911 and came into force on 01.01.1912, Manual of Indian Military Law, 1911, Government of India, Army Department, "Courts Martial", Chapter VIII, p139.
40. Section 85 of the Indian Army Act, 1911 (Act No VIII of 1911), passed by the British Parliament in March 1911 and came into force on 01.01.1912, Manual of Indian Military Law, 1911, Government of India, Army Department, "Courts Martial", Chapter VIII, p141.
41. Rule 64 (B) of the Indian Army Act Rules, promulgated in the year 1911, Manual of Indian Military Law, 1937, Government of India, Army Department, "Investigation of Charges and Trial by Courts Martial", Chapter IV, p211.
42. Rule 119 of the Indian Army Act Rules, promulgated in the year 1911, Manual of Indian Military Law, 1937, Government of India, Army Department, "Investigation of Charges and Trial by Courts Martial", Chapter IV, p282.

followed in subsequent amendments to the Act in the year 1937[43], as discernible from Manual of Indian Military Law, 1937. In the pre-Independence period, the Judge Advocate General's Department was not even required to review General, Summary General and District Court Martial proceedings before confirmation, since these Courts Martial were attended by a Judge Advocate who represented the Judge Advocate General's Department[44]. It is seen from these pre-Independence legislations that interference of Judge Advocate General in the criminal proceedings conducted by a Military Court was very limited and there was no necessity felt in the pre-Independence era to enlarge the statutory role of Judge Advocate General's Department in either pre-trial or post-trial proceedings.

The scenario changed post-Independence with the enactment of the Army Act, 1950 and the Army Rules, 1954 wherein, the statutory role of the Judge Advocate General's Department increased to the effect that General, Summary General and District Court Martial proceedings before confirmation were required to be reviewed by the Deputy or Assistant Judge Advocate General of the Command under Army Rule 69. [45] There was no statutory role prescribed for review of pre-trial proceedings in respect of analysis of evidence and framing of Charge Sheet under the Army Rules, 1954, except for the non-statutory provision of Paragraph 459 of the Regulations for the Army, 1987 (Revised Edition), which was incorporated to assist the Convening Authority in analyzing the pre-trial evidence on record and framing of the Charge Sheet, limited to *"the cases of indecency, fraud, theft, except ordinary theft, civil offences, except simple assaults or any other case of doubt or difficulty"* [46]. At this stage, the Judge Advocate General' Department for the first time is mandated to legally scrutinize the pre-trial documents. Though the said provision did not have the statutory enforcement, but had a customary mandate, since the said Regulation being non-statutory was supplementary to the relevant statutory provisions wherever they exist, but did not supplant them[47].

---

43. Major General MHS Grover, Secretary to the Government of India, "Manual of Indian Military Law, 1937, Government of India, Army Department".
44. Section 78 of the Indian Army Act, 1911 (Act No VIII of 1911), passed by the British Parliament in March 1911 and came into force on 01.01.1912, Manual of Indian Military Law, 1911, Government of India, Army Department, "Courts Martial", Chapter VIII, p139. Rule 56 of the Indian Army Act Rules, promulgated in the year 1911, Manual of Indian Military Law, 1937, Government of India, Army Department, "Investigation of Charges and Trial by Courts Martial", Chapter IV, p261.
45 Army Rules, 1954 (SRO No 484 dated 27 November 1954, published in Gazette of India, Part II, Sec 4, p291).
46. SK Bhatnagar, Secretary to Government of India, 05 December 1986, Regulations for the Army, 1987 Volume - I (Revised Edition), "Courts Martial", Chapter X, Paragraph 459, p164. Serial 10 (a), Memoranda for the Guidance of Officers concerned with Courts Martial, Page 309, Manual of Military Law, Vol II (Revised Edition), 2011.
47. SK Bhatnagar, Secretary to Government of India, 05 December 1986, Regulations for the Army, 1987 Volume - I (Revised Edition), "Preface", Paragraph 3, piii.

INVOLVEMENT OF JUDGE ADVOCATE GENERAL'S DEPARTMENT IN COLLECTION AND ANALYSIS OF EVIDENCE AT PRE-TRIAL STAGES

Unlike in the civil, where there is a clear distinction between the Executive, i.e. the prosecuting agency and the Judiciary, i.e. the adjudicating agency, there is no such distinction in the military. The Executive i.e the Commanders at all levels, exercises the power of both, prosecution and adjudication. However, the powers are limited to the extent that a Commanding Officer who frames the Charge Sheet, investigates the charge and takes cognizance of the said charge, followed by recording of evidence, is barred from convening a General, Summary General and District Court Martial, except for a Summary Court Martial, which is peculiar to the Indian Army Act, 1911[48] and its successors. The notable intellectual difference at the pre-trial stages in the military as compared to the civil, is the legal knowledge, a Magistrate has, which is absent with the Commanding Officer, who is professionally trained to handle weapons, plan operations and fight wars, and not to solve legal issues. In the military, the Commanding Officer is purely dependent upon the confines of the Manual of Military Law 2011 (Volumes I, II and III) and the Regulations for the Army (Revised Edition), 1987 (Volumes I and II), while conducting pre-trial procedures. On the other hand, in the civil, there is a Magistrate who is a trained legal professional and a judicial officer. A Commanding Officer's understanding and knowledge of law and judiciary is never at par with that of a Magistrate, and this handicap may lead to procedural fallacies in legal matters like framing of a charge, taking cognizance of the same as per the initial evidence on record and collection of evidence for prima facie decision to make an accused undergo the rigours of a criminal trial.

The procedural aspect of pre-trial stages in criminal proceedings determines the legal validity or the jurisdiction of a Court Martial, which may be challenged under Army Rule 51[49] for General and District Courts Martial, Army Rule 114[50] for Summary Courts Martial and Army Rules 157 and 164[51] for Summary General Courts Martial. Since pre-trial procedures greatly determine the fate of a Court Martial, it becomes imperative that the same is conducted in the most deliberate

48. Manual of Indian Military Law, 1911, Government of India, Army Department, "The Indian Army Act", Chapter II, Para 15, p12.
49. Army Rule 51. Special plea to the jurisdiction, SRO No 484 dated 27 November 1954, published in Gazette of India, Part II, Sec 4, p291.
50. Army Rule 114. Special pleas, SRO No 484 dated 27 November 1954, published in Gazette of India, Part II, Sec 4, p291.
51. Army Rule 164. Application of rules, SRO No 484 dated 27 November 1954, published in Gazette of India, Part II, Sec 4, p291.

manner and the same can only be expected out of a Commanding Officer who is legally empowered. It is not practically possible for the Commanding Officer to reach the same standard of legal acumen as that of a civil Magistrate. Therefore, it is imperative that he is armed with the basic legal knowledge required for effective and legally correct pre-trial procedures. At this stage, the Commanding Officer must be encouraged to seek active legal support from the Officers of the Judge Advocate General's Department posted at the nearest or immediate higher formations. This aspect gains more momentum when there is a quantum increase in the legal awareness amongst both men and officers as compared to the period from pre-independence era to the end of the millennium. However, there is an apprehension that this arrangement might get challenged before a higher judicial forum on the ground that at the pre-trial stage, the accused will be prejudiced in his defence when he is not having access to legal aid, whereas the officer investigating the case, giving direction to initiate criminal proceedings by way of disciplinary action, framing charges, taking cognizance of the said charges and collecting evidence, is having access to legal advice. In other words, the military authorities while seeking legal advice will have an outside advantage as compared to the accused.

In popular culture, the aforesaid argument has somewhat been over emphasised, when we examine the provisions of the Code of Criminal Procedure 1973 @ the Bharatiya Nagarik Suraksha Sanhita, 2023, where a Counsel is for the first time actively involved in pleading before a Magistrate in a criminal proceeding under Section 205 of the said Code[52] @ Section 228 of the Sanhita,[53] which mandates, *"whenever a Magistrate issues process, he may, if he sees reason so to do, dispense with the personal attendance of the accused and permit him to appear by his pleader".* However, in sub-section 2 of the said section, "the Magistrate may exercise his discretion and ensure the personal attendance of the accused when he is inquiring into or trying the case". Therefore, at the time of taking cognizance of the offence by a civil Magistrate, the presence of the accused is not mandatory till at the time of issue of process, whereas, under the Army Rules, presence of the accused before the Commanding Officer at the time of cognizance of the offence is sine qua non. At the Hearing of Charge, [54] the rule does not explicitly allow

52. Act No 2 of 1974, passed by the Parliament of India and came into force on 01.04.1974 with the ascent of the President of India.
53. Act No 46 of 2023, S.O. No 54 dated 25 December 2023, published in Gazette of India, Extraordinary, Part II, Sec. 1.
54. Rule 22 of Army Rules, 1954 (SRO No 484 dated 27 November 1954, published in Gazette of India, Part II, Sec 4, p291).

appearance of a counsel on behalf of the accused. In case the accused is under arrest, the access to the counsel is also restricted, since Army Rule 27[55] is also silent on the accused having access to a counsel. Even at the time of recording of evidence under Army Rule 23, i.e. inquiry in civil parlance, the accused is still not allowed to have the physical assistance of a legal counsel during recording of the statements. It is only post remand of the accused for trial, framing of the charge-sheet and warning for trial, the accused can appoint a legal counsel to represent him at the Courts Martial.[56] However, the ibid argument is completely flawed, when we minutely examine Army Rule 33.[57] Army Rules 33 (1) and (5) falls under the Chapter V, "Investigation of Charges and Trial by Court-Martial", SECTION 1 – Investigation of Charges and remand for Trial, sub-head: *Preparation for defence by accused person.* Under the ibid chapter and section, the accused is subjected to various stages of pre-trial proceedings, like the Hearing of Charge, recording of Summary of Evidence, Framing of Charge and Remand for Trial. Sub-rule (1) of the rule uses the term "legal adviser", which is in contrast to the term "counsel" used in Army Rule 96. Therefore, in Courts Martial, counsels are allowed to appear on behalf of the accused, whereas, in pre-trial stages, the accused also has the right to engage a legal counsel, but only in an advisory role through correspondence only. Sub-rule (5), also provides the procedure for the accused, when under arrest, for corresponding with his legal adviser. Therefore, at every stage of the pre-trial proceedings, the accused is legally entitled to prepare his defence with the services of a legal adviser. However, the accessibility to a legal adviser remains with certain restrictions. Therefore, no prejudice will be caused to the accused when Commanding Officers seek legal advice at any of the pre-trial stages.

There is always a cautious approach by Judge Advocate General's Branch Officers in entertaining legal queries by the Commanding Officers who are conducting any of the pre-trial procedures. Such caution comes to the forefront, especially when the Judge Advocate General Officers are not physically part of pre-trial procedures and are left to advise the Commanding Officers without perusing the legal documents, which are recorded not based on legal understanding, but on general understanding of the provisions of the Manual of Military Law,

---

55. Delay reports. In cases where a person subject to the Act is in military custody…. (SRO No 484 dated 27 November 1954, published in Gazette of India, Part II, Sec 4, p291).
56. Army Rule 96. Counsel allowed in certain general and district courts-martial (SRO No 484 dated 27 November 1954, published in Gazette of India, Part II, Sec 4, p291).
57. Rights of accused to prepare defence. (SRO No 484 dated 27 November 1954, published in Gazette of India, Part II, Sec 4, p291).

2011 (Revised Edition).[58] Except for policy instruction in relation to Courts of Inquiry,[59] there is neither any statutory nor any departmental nor any policy instruction as to periodic legal advice to be rendered by Judge Advocate General's Branch Officers to the Commanding Officers at each and every stage of pre-trial procedures i.e. framing of Tentative Charge Sheet, Hearing of Charge under Army Rule 22[60] read with Army Order 03/2018/DV[61] and recording of Summary of Evidence under Army Rule 23 [62] read with Paragraphs 5 to 8 of Special Army Order 1/S/2002/DV-Courts Martial.[63] Whereas, a Court of Inquiry is convened to investigate into the conduct of a person subject to the Army Act, or investigate into matters that may implicate such a person, especially when administrative action either for termination of service or award of Censure including Reproof is initiated. It is mandatory to obtain advice of the Judge Advocate General's Department at the appropriate level with respect to preparation of the Convening Order and finalization of the Court of Inquiry proceedings. Judge Advocate General's Department advice should be referred to at any stage during the conduct of the Court of Inquiry where progress of the investigation is hampered by issues that need legal resolution. [64] Such elaborate instruction is absent in Army Order 03/2018/DV and Special Army Order 1/S/2002/DV[65]-Courts Martial,[66] wherein no role of the Judge Advocate General's Department has been envisaged for aiding the Commanding Officers while Framing of Tentative Charge, Hearing of Charge and recording of the Summary of Evidence.

EFFECTIVE ROLE AND REQUIREMENT OF JUDGE ADVOCATE GENERAL'S DEPARTMENT IN COLLECTION AND ANALYSIS OF EVIDENCE AT PRE-TRIAL STAGES

As explained aforesaid, conduct of pre-trial procedures especially, collection and analysis of evidence determines the fate of the criminal proceedings as well as the accused. The role of the Officer recording Summary of Evidence in collection of evidence, and its analysis by the Convening Authority is crucial in determining such fate. The Summary of Evidence is an

58. *Supra ibid.*
59. Adjutant General's Department (Discipline and Vigilance), Integrated Headquarter of Ministry of Defence (Army) Policy letter No 44660/AG/DV-1(P) dated 29 August 2013.
60. *Supra ibid.*
61. Col GK Sharma and Col MS Jaswal, "Study and Practice of Military Law", 8th Edition, 2019, Chapter XI, pp431-434 [Lieutenant General Ashwani Kumar, Adjutant General, File No A/28119/AG/DV-1(P)].
62. *Supra ibid.*
63. Col GK Sharma and Col MS Jaswal, "Study and Practice of Military Law", 8th Edition, 2019, Chapter XVI, pp600-632, [Lieutenant General SS Grewal, Adjutant General, File No 35418/AG/DV-1(P)].
64. Adjutant General's Department (Discipline and Vigilance), Integrated Headquarter of Ministry of Defence (Army) Policy letter No 44660/AG/DV-1(P) dated 29 August 2013, Para 10, p3.
65. *Supra ibid.*
66. *Supra ibid.*

important document, which gives both the Commanding Officer and the Convening Authority an insight into the nature of the case and whether it ought to be proceeded with or merits dismissal of the charge. The importance of Summary of Evidence can also be seen from the purposes it serves, as mentioned below :-

(a) It assists the Commanding Officer to decide whether the accused should be remanded for trial by a Court Martial, or the charge against him should be disposed of summarily or whether the charge should be dismissed.[67]

(b) It enables the Judge Advocate General's Branch to advice on an application for trial.[68]

(c) It assists the Convening Authority to consider whether it should order trial by a Court Martial, and by what type of Court Martial.[69]

(d) It informs the accused of the nature of evidence against him and enables him to prepare his defense and cross-examination of witnesses based on their statements at the Summary of Evidence.[70]

(e) It also assists the Court in deciding whether a plea of guilty should be accepted or not, and the proper punishment to be awarded.[71]

(f) When the accused pleads 'Guilty' and the Summary of Evidence is read out to him and attached to the Courts Martial proceedings as an Exhibit[72] to arrive at an appropriate sentence.

(g) Statements recorded in the Summary of Evidence can be used as previous statements in any of the eventualities under Section 33 of the Indian Evidence Act, 1872.[73]

---

67. Rule 24 of Army Rules, 1954 (SRO No 484 dated 27 November 1954, published in Gazette of India, Part II, Sec 4, p291).
68. Serial 10 (a), Memoranda for the Guidance of Officers concerned with Courts Martial, Page 309, Manual of Military Law, Vol II (Revised Edition), 2011. SK Bhatnagar, Secretary to Government of India, 05 December 1986, Regulations for the Army, 1987 Volume - I (Revised Edition), "Courts Martial", Chapter X, Paragraph 459, p164.
69. Rule 37 of Army Rules, 1954 (SRO No 484 dated 27 November 1954, published in Gazette of India, Part II, Sec 4, p291).
70. Rules 23 (3), 33 (7) and 34 (1) of Army Rules, 1954 (SRO No 484 dated 27 November 1954, published in Gazette of India, Part II, Sec 4, p291).
71. Rule 54 (5) of Army Rules, 1954 (SRO No 484 dated 27 November 1954, published in Gazette of India, Part II, Sec 4, p291).
72. Rule 54 (4) of Army Rules, 1954 (SRO No 484 dated 27 November 1954, published in Gazette of India, Part II, Sec 4, p291).
73. Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated.

Under Paragraph 459 of the Regulations for the Army, 1987 (Revised Edition)[74], post recording of the Summary of Evidence, all the pre-trial documents are forwarded to the Judge Advocate General's Department at Command or Corps level for scrutiny and issue of pre-trial advice. At this stage, if certain errors or mistakes are identified in any one of the pre-trial documents, the complete pre-trial documents are returned with the advice for recording of the procedures de novo. Especially, when illegality has been committed while carrying out the Hearing of Charge proceedings under Army Rule 22 and the evidence recorded in the Summary of Evidence, which does not give a clear picture as to the commission of the offence and there is no method of adducing the prima facie case against the accused. In such situations it is always a *fait accompli for* advising *de novo* pre-trial proceedings or recording of an Additional Summary of Evidence. In case the limitation period of three years[75] from the date of commission of offence or date of direction in the Court of Inquiry has already crossed or expired, as a *fait accompli,* the charge is per se dropped against the accused. The latter proposition causes travesty of justice and the accused goes unpunished, even when there is strong evidence to prove the charge. The military is witnessing a trend where pre-trial procedures are taking longer periods of time to conclude, especially due to lack of legal knowledge of the Commanding Officers, compounded by lengthy Court of Inquiry proceedings. In order to arrest such misendeavours, it is now becoming an inescapable requirement for active participation of the Judge Advocate General's Department Officers in advising the Commanding Officers in conducting pre-trial proceedings and collection of evidence.

CONCLUSION

In the general course of events, the Military follows a certain process for dispensation of justice and to maintain discipline. The general rule is that, once an incident is reported, a 'Court of Inquiry' is convened, after which 'Hearing of Charge' is conducted by the Commanding Officer, which is followed by recording of 'Summary of Evidence' which is ordered by the Commanding Officer if he feels that it is required to proceed with the trial. After this, there is a pre-trial advice in the form of Report on Application for Trial (RAT) in terms of Paragraph 459 of the Regulations for the Army, 1987 (Revised Edition),[76] on the basis of which Courts Martial takes place. All the aforementioned stages are considered to be 'Pre-Trial'. The exception to the

74. Refence to the The Judge Advocate General's Department before trial.
75. Section 122 of Army Act, 1950 (SRO No 120 dated 22 July 1950, published in Gazette of India, Part II, Sec 4, p86).
76. *Supra* ibid.

aforementioned general rule is that, when the facts and circumstances of a case sufficiently indicate the probability of an offence by a certain person or persons subject to the Army Act, the Commanding Officer may proceed without taking recourse to holding of a Court of Inquiry. Till the pre-trial documents reaches the Judge Advocate General's Branch, a lot of pre-trial procedures had already taken place. At this stage of advice, any illegality or deviation in the procedure becomes fatal and without any other option, the complete procedure has to be carried out de-novo. It is imperative to avoid such pitfall by completing the pre-trial procedures and convene the Court Martial within the limitation period of three years,[77] otherwise the complete proceedings will fall flat on its face, thereby benefiting the offenders. It is for these reasons that pre-trial proceedings are conducted legally, and evidence needs to be collected, recorded and analyzed properly to give correct and legally sustainable advice to the Formation Commanders to decide the correct forum of trial, i.e. Courts Martial under Army Rule 37.[78] In doing so, the Judge Advocate General's Department and its Officers give their advice, interpreting the correct procedures and applying the various rules of evidence, and how it is to be recorded. In order to avoid the legal pitfalls at a later stage of the trial, it is imperative that advice of the Judge Advocate General's Branch is sought by each and every Commander at all levels of pre-trial proceedings.

77. *Supra ibid.*
78. *Supra ibid.*

DECIPHERING INDIAN EXPERIENCE OF MEDICAL TOURISM: NEED FOR LEGAL REGULATION

***Ms Kriti Misra**

****Mr. Surya Prakash Maurya**

INTRODUCTION

The phrase "law" seems to be a human construct, for over time and context it has been a subject of myriad interpretations. Beginning from divine law to natural law, customs and dictates of sovereign, the body of law has witnessed a change in the content. Within the body of law and the legal system built on this law, the discourse on rights has assumed primacy. Given the post-modernistic society, where the narrative on rights is anchored to the cultural and political ecosystem of a society.[1]

Before proceeding with any discussion on development of rights, one needs to answer "What rights mean to us?". It is true that what rights constitute is still undergoing development trajectory. No doubt that the intellectual discussions on Rights has assumed a dynamic texture, only to be understood in its context. Harold Laski has meticulously articulated, *"Rights are those conditions of social life without which no man can seek in general, to be himself at his best."*[2]The definition to certain extent places the element of quality of life within the text of Rights. Perusing Ihering's definition of law as a *"Form of guarantee of the conditions of life of society, assured by state's power of constrain"* further pushes the idea that law is a means to an end of a social purpose rather than individual.

Within this ever-expanding universe of rights, Human rights particularly, have been the most often discussed and defended voraciously. For Human Rights have been deemed to be inherent in humans[3] and stems from their personality. The correlative duties with respect to human rights

---

* Research Scholar Faculty of Law, Banaras Hindu University.

** Research Scholar, Faculty of Law, Hemwati Nandan Bahuguna Garhwal University.

1. Zhihe Wang, "Toward a Postmodern Notion of Human Rights" 34(2) Educational Philosophy and Theory 2 (2002).
2. Ting Xu, Harold Laski, Travelling Concepts, and the Evolution of the Human Rights Idea in Republic China, *available* at: https://british-association-comparative-law.org/2023/06/09/harold-laski-travelling-concepts-and-the-evolution-of-the-human-rights-idea-in-republic-china-1919-49-by-ting-xu/> (last visited on July 23, 2024).
3. Johannes Morsink, Inherent Human Rights: Philosophical Roots of the Universal Declaration 17 (University of Pennsylvania Press, Philadelphia, 2009).

imposes provisions for 'protection, facilitation of the right, and provision' on the State and individuals against the right holders[5].

Influenced by the French revolution, Karel Vasak, proposed a scheme of human rights generations. The *"First generation rights"* ensured civil and political rights; the *"Second generation rights"* embodied socio-economic rights; and the *"Third generation rights"* contained rights to be enjoyed by a group together (solidarity rights). Human rights[6] are undoubtedly the kingpin of the social order in motion.

Normative Content of Right to Health within the Human Rights framework:

Upon a closer look on Human rights, one can conclude it to be a bundle of rights which by nature is limitless and ever-expanding. At this juncture, it is pertinent to understand whether and how Right to Health has been contained within this larger scheme of Human Rights.

The Preamble of World Health Organisation (1946) opens with the definition of health as, *"A state of complete physical, mental and social well-being and not merely the absence of disease or infirmity"*.[7]

Undoubtedly, human rights are one of the significant aspects shaping our collective political reality; these are the moral rights of the highest order.[8] Right to Health as a huma right is an inclusive right and covers the following within its ambit determinants such as, "adequate supply of food, nutrition; access to drinkable water; provision for adequate sanitation; ensuring healthy environment; and dissemination of health centric education".[9] The right to health as a human right forms a facet of multifarious international human rights, thereby imposing legal obligations on the State parties. The right comprises of freedoms and entitlements. Before we proceed ahead with the issue at hand, it is crucial to breaking down the elements to understand the contours of the right in terms of the debate on freedom and entitlement.

4. See Leszek Kolakowski, Modernity on Endless (1990) in Michael J. Perry, "Is the Idea of Human Rights Ineliminably Religious?" 27(5) 5 (1993).
5. World Health Organisation and Office of the United Nations High Commissioner for Human Rights, "The Right to Health: Factsheet No 31" 7 (2008).
6. Spasimir Domaradzki, David Pupovac, et.al., "Karel Vasak's Generations of Rights and the Contemporary Human Rights Discourse" 20 Human Rights Review 424 (2019).
7. Preamble to the Constitution of World Health Organisation, *available* at: https://www.who.int/about/governance/constitution (last visited on July 29, 2024).
8. The Idea of Rights: Entitlements and Boundaries, *available* at: https://egyankosh.ac.in/bitstream/123456789/66934/1/Unit-10.pdf (last visited on August 23, 2024).
9. Committee on Economic, Social and Cultural Rights, The Right to the Highest Attainable Standard of Health, UN Doc UN Doc E/C.12/2000/4 (Aug. 11, 2000)..

The Right to Health is then proclaimed as a fundamental right of every individual to *"enjoy the highest attainable standard of health without any form of distinction*[10]". The definition is unclear as to what shall constitute the content of this right. For the time being we take Right to Health as a right which is not restricted to be taken as a right to be *healthy*.[11] This Right encompasses both "Freedom and Entitlements".[12]

- **Health as Freedom:** Freedom denotes absence of any restrictions, constraints in action or plainly the state of being free. Right to Health as a freedom invokes the inherent power of an individual to determine one's health by exercising their choices on the kind of treatment, including the right to be free from non-consensual medical treatment and experimentation. [13] Right to Health as a freedom finds mention in various international documents like UDHR [14] (1948), International Covenant on Economic, Social and Cultural Rights (1966),[15] International Convention on the Elimination of All Forms of Racial Discrimination[16] (1965), International Health Regulations (2005) etc.
- **Health as Entitlement:** Entitlements in general are the welfare measures provided by the government and is subject to economic ecosystem of the nation. Right as an entitlement guarantees individuals the access to necessary resources and services to secure highest possible standard of health. It also covers[17] the freedom to make informed choices and, opportunities and means to exercise those choices.

The Right to Health should be interpreted as the right to access a range of facilities, goods, services, and conditions essential for achieving the highest possible standard of health. States parties have immediate obligations to undertake "deliberate, concrete and targeted"[18] steps for

10. *Supra* 9.
11. *Supra* 11 at 3.
12. Supra 7 at 3.
13. *Ibid.*
14. Article 25.
15. Article 12.
16. Article 5.
17. Committee on Economic, Social and Cultural Rights, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN Doc E/C.12/2000/4 (Aug. 11, 2000).

full realisation of Right to Health.

Further, the provisions of health-related services must keep in mind the pillars on which the Right to Health has been built upon:

- **Availability** of health-care facilities and services in sufficient quantity like safe and potable drinking water, adequate sanitation, hospitals and related infrastructure, skilled medical personnel, and life-saving drugs.[19]
- **Accessibility** of health facilities to all sans discrimination. The head covers physical accessibility of medicines, hospitals and services to all; affordability of these services on the basis of equity; right to obtain, and share information. relating to medical distress etc.[20]
- **Acceptability** of the practices and medical facilities in accordance with medical ethics and culturally acceptable norms.[21]
- **Quality** of the services offered by medical staff must be in accordance with set standards prevalent in medicine.[22]

INDIAN PERSPECTIVE ON RIGHT TO HEALTH

India is one of signatories to International Health Regulations (2005), as a result it is obliged to contribute towards national and international health security. [23] The Constitution of India is considered as an organic document enlisting an array of rights to its citizens and non-citizens. Nonetheless, Right to Health finds no categorical place in the Indian constitutional norms. To certain extent debates in constituent assembly might lend us assistance in setting the context in which right to health was incorporated in our norms.

The union government ultimately plays a proactive role in shaping health policies by virtue of entries in concurrent list like "legal, medical and other professions" [24] though the power to regulate public health in hands of State government.[25]

---

18. *Supra* 19 at 9.
19. *Supra* 19 at 4.
20. *Ibid.*
21. *Ibid* at 5.
22. *Ibid.*
23. World Health Organisation, "International Public Health Hazards: Indian Legislative Provisions" 9 (2015).
24. List III, Entry 26:

Centre steps in the as the major source of finance, consequently establishing dominance over health policies and programmes. One may regard this interplay of governments as "Health Federalism." Most of the crucial programmes[26] have been shaped at the union level, while states are tasked with the implementation.

The non-inclusion of health within chapter on Fundamental Rights in Indian Constitution leaves the situation in limbo. However, the gap has been plugged by the judicial intervention by the Supreme Court of India. The courts' interpretation of Article 21 of the Indian Constitution paved the way for the right to health to sweep in within the scope of right to life and personal liberty. The courts' stand on Right to Health has withstood the test of time.

Health does find mention within the framework for governance as envisaged under Chapter on Directive Principle for State Policies (Chapter IV). Article 39 envisages certain principles to be followed by the State whilst promulgating policies, including the duty of State to take steps to maintain "*the health and strength of workers, men and women, and the tender age of children".* Article 47 imposes duty on the State to *"raise the level of nutrition and the standard of living and to improve public health".*

The Indian Supreme Court took upon itself the task of concretising the Right to Health through judgments delivered in *Bandhua Mukti Morcha v. Union of India,*[27] where the Supreme Court determined that dignity and health are covered within the ambit of life and liberty under Article 21. In similar vein, the court in *Paschim Banga Khet Mazoor Samity v. State of West Bengal,*[28] expanded the reach of Article 21, placing an obligation on the government to ensure that every individual receives adequate medical assistance and to work towards the overall welfare of the public.

MEDICAL TOURISM

Medical Tourism or Health Tourism can be simply defined as "Travelling to another country for the purpose of receiving medical care."[29]The first documented record of medical tourism dates

25. List II, Entry 6: Public health and sanitation; hospitals and dispensaries.
26. Programmes like malaria, polio, AIDS are key examples to this.
27. AIR 1984 SC 812.
28. (1996) 4 SCC 37.

to the ancient Greeks in honour of Aesculapius, the God of medicine.[30] Historical archives signal towards presence of wellness centres built by Sumerians around 4000 BC;[31] alternative methods like Yoga, Ayurveda, Siddha etc. in India as early as 5000 years ago.[32]

MEDICAL TOURISM VS WELLNESS TOURISM

More than often 'Medical Tourism' and 'Wellness Tourism' are used interchangeably, though they differ in terms of services covered within the bubble of Health tourism.

Medical Tourism insinuates the diagnosis and treatment of a medical distress involving medical interventions.[33] Wellness Tourism has less to do with specialized medicine personnels and infrastructures; addressing health concerns through alternative procedures and indulgence like Spas etc. Thus, Medical Tourism is taken as reactive form of Health Tourism, whereas Wellness Tourism is more of proactive version of Health Tourism.

MEDICAL TOURISM: THE INDIAN EXPERIENCE

Indian government defines medical tourism as "Activities related to travelling and hosting a foreign tourist who stays at least one night at the destination region for the purpose of maintaining, improving or restoring health through medical intervention."[34]

India boasts of being ranked 10th in Medical Tourism Index (MTI) for the year 2020-2021.[35] The data is evident of the influx of tourists that have arrived in India for medical treatments leading to India becoming a preferred choice for many across the globe.[36] What makes India a formidable choice for other nationals is the presence of state of art facilities at comparatively lesser cost,[37]

---

29. Matthew Crist, Grace Appiah, et.al. (2023) Medical Tourism in CDC Yellow Book (Oxford University Press, 2024). Retrieved from https://wwwnc.cdc.gov/travel/yellowbook/2024/health-care-abroad/medical-tourism
30. Androula Pavli and Helena C. Maltezou, "Asclepieia in Ancient Greece: Pilgrimage and Healing Destinations, the Forerunner of Medical Tourism" 32(1) Le Infezioni in Medicina 1 (2024).
31. Egypt and Medical Tourism: What is and What Could Be, *available* at: https://www.magazine.medicaltourism.com/article/egypt-and-medical-tourism-what-is-and-what-could-be (last visited on August 13, 2024).
32. Arul Uthira, R. Dhanalakshmi, "History and Prevailing Status of Medical Tourism in India: A Sociological Perspective" Conference Paper (2016) p.no. 3.
33. Health, Medical and Wellness Tourism, *available* at: https://egyankosh.ac.in/bitstream/123456789/69998/3/Unit-10.pdf, p.no. 2.
34. Government of India, "National Strategy and Roadmap for Medical and Wellness Tourism" 12 (Ministry of Tourism, 2022).
35. "India Ranked Tenth in Medical Tourism Index for 2020-2021", The Statesman, Mar. 21, 2023, *available* at: https://www.thestatesman.com/india/india-ranked-tenth-in-medical-tourism-index-for-2020-2021-1503164803.html (last visited on Sept. 30, 2024).

hospitals with advanced equipment and medical experts,[38] rich knowledge of age-old practices and societal values.[39] An inflow of $13 billion is expected from this medical tourism market by 2026.[40] To reap the economic fruits of such a large scale inward influx of patients the Indian Government for the first time in 2022 brought in a national strategy to regulate the sector. The aim was to give the much-needed impetus to develop Indian ecosystem for medical and wellness tourism. The roadmap brought into forefront the role of *"digitalisation, enhancement of accessibility, and enlarging governance and institutional framework"* in promotion of Medical Tourism.[41]

Various stakeholders have come forward to collaborate on building India's brand value in Medical Value Travel (MVT) including ministries, [42] hospitals, MVT facilitators, insurance companies, and National Accreditation Board for Hospitals & Healthcare Providers[43] (NABH). The Government aims to augment the business through its newly introduced "medical visa" to patients flying inward to India for medical treatment. The visa is valid for a year from its date of issuance and can also be extended for over another year. The extended visa duration allows patients to make up to three visits within a year, and they can be accompanied by a relative or friend during their medical trip to India.[44]

Medical tourism comprises a complex web within which key stakeholders participate in tandem to make it a success. The following paragraph charts the usual procedure for availing services

36. The number of tourists coming to India surged from 1.83 Lakh in 2020 to 6.35 Lakh in 2023. *available* at: https://www.investindia.gov.in/sector/healthcare/medical-value-travel (last visited on July 11, 2024).
37. Renuka Sagar and P. Vasavi Latha, "Medical Tourism – an Emerging Industry in India" 2(3) Journal of Medical and Scientific Research 1 (2014).
38. Swamis to surgeries, *available* at: https://www.magazine.medicaltourism.com/article/swamis-to-surgeries-2 (last visited on July 12, 2024).
39. National Accreditation Board for Hospitals & Healthcare Providers, "Medical Value Travel Facilitator General Information Brochure" 6 (2020).
40. Supra 38.
41. E-Medical Visa facility for nationals of 156 countries to promote medical tourism in the country, *available* at: https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1844700 (last visited on August 13, 2024).
42. Union Ministry of Health & Family Welfare along with Ministry of Home Affairs, Tourism, AYUSH, External Affairs, Civil Aviation, State Governments.
43. NABH as an integral part of Quality Council of India has been set up to establish and run accreditation programme for healthcare organizations.
44. Government of India, "Details of Visas Granted by India" 1 (Ministry of Home Affairs, 2018).

under MVT:

The interested patients are required to apply for Indian Medical Visa Invitation Letter[45] which is to be issued by an Indian hospital inviting the patient (foreign national) to come to India for medical treatment. Along with the letter the patients are required to apply for e-visa with a validity of 60 days with triple entry on e-Medical Visa. Extension may be granted up to 6 months depending upon the facts of the case by the respective Foreign Registration Office (FRO) within whose jurisdiction the treatment is sought.[46] It is during this process that MVT facilitators step in by facilitating the appointment with the medical facility and specialists; providing visa assistance, accommodation and logistics etc.

LEGAL ISSUES PLAGUING INDIAN MEDICAL TOURISM MARKET

The economic advantages of medical tourism create an optimistic view of the market, sidelining the legal and ethical issues it wrestles with.

Law needs to take care of medico-legal issues arising in due course of treatment starting from solicitation of prospective patients to post-treatment care in terms of quality. Lack of adequate law is likely to be anathema to international diplomatic relations and negatively affect the Indian market. The need of having a Standard Operating Protocol for treatment of patients inflowing to India for treatment was first highlighted in early 2000s. The Confederation of Indian Industry advocated for an official government policy taking into consideration medical tourism, which was later adopted as part of its national health policy in 2002 as "deemed exports".[47] Litigation in such sensitive matters can have impact on the "medical diplomacy" is one may say.

The impending legal issues can be broken down into following heads for a better understanding:

1. **Accreditation of hospitals:** Accreditation implies "A form of external quality assessment that is carried out by a third-party assessment entity".[48] Accreditation serves as a hallmark for quality as it presents a framework for quality governance of a facility offering medical service like hospital. With the

45. Medical Tourism in India, *available* at: https://www.cgidubai.gov.in/page/medical-tourism-in-india/ (last visited on August 11, 2024).
46. E-Visa Application Process, *available* at: https://indianvisaonline.gov.in/evisa/tvoa.html (last visited on August 16, 2024).
47. National Health Policy 2002 (India), *available* at: https://nhm.gov.in/images/pdf/guidelines/nrhm-guidelines/national_health_policy_2002.pdf

> health sector developing at par excellence India establishing numerous state of art hospitals, but they are also experiencing an increase in demand for quality as well as medical tourism. India launched its own accreditation system back in 2006, conforming to standards accredited by Accreditation Council of the International Society for Quality in HealthCare (ISQua) of which NABH is a member. NABH is also a constituent board of Quality Council of India (QCI), created to develop and manage accreditation programs for healthcare institutions. Its purpose is to strengthen healthcare systems while fostering ongoing quality improvement and ensuring patient safety.[49]

NABH ensures quality through the accreditation mechanism of hospitals and various healthcare establishments, ultimately enhancing their credibility and helps promote medical tourism in the country. As per the government guidelines, NABH accreditation is a must for establishing a healthcare facility, however the process for getting NABH accreditation is voluntary, opening the pandora's box when it comes to quality of treatment and care to patients.

Apart from NABH, the Indian medical sector has gained a notable reputation for having one of the highest numbers of hospitals with the Joint Commission International (JCI) accreditation. JCI is responsible for accreditation of hospitals that comply with its rigorous standards for patient safety and quality care.

Since quality is challenging to assess post-establishment, it is often evaluated in advance through accreditation.[50]When carried out effectively, accreditation can offer substantial benefits beyond its apparent marketing value by offering benefits like steering consumer decisions, minimising legal risks, attracting business from third-party payers seeking quality assurance, and open doors to international markets.[51]

Previous researches have highlighted that destination countries have mostly concentrated on policies aimed at growing the medical tourism market and enhancing its competitiveness to milk

48. Stephen T. Green & Hannah King, Independent Health Care Accreditation: Medical Tourism and Other International Aspects, in Jill R. Hodges, Ann Marie Kimball, et.al. (eds.), Risks and Challenges in Medical Tourism Understanding the Global Market for Health Services 230-231 (Bloomsbury, 1st edn., 2012).
49. *Supra* 41 at 2.
50. Anthony Woodhead, "Scoping Medical Tourism and International Hospital Accreditation Growth" 26(8) Int J Health Care Quality Assurance 688 (2013).
51. *Supra* 50 at 238–39.

profits, often neglecting the potential effects on local healthcare systems and regulatory plugholes. In developing nation like ours, where private hospitals have been leading the medical tourism industry, government policies need to focus on policies strengthening improvement of local health care facilities and services; standardizing of treatment protocols to enhance health care quality, strict enforcement of certification systems and installing a web of electronic medical records for improved information sharing securing at the same time issues of privacy to the patient.

Government plays a significant role in the industry, by facilitating its growth and regulating the sector. Key areas such as "specialised training and regulation of medic professionals, accreditation of healthcare providers, regulation of intermediaries, and establishing legal frameworks for addressing medical malpractice claims" require proactive steps by the government. [52]

` 2. **Registration of MVT facilitators:** Registration is the procedure through which individuals or organizations facilitating the international patients in accessing healthcare services in a country other than their home country, specifically for medical value tourism, are enrolled by the competent regulatory body. They are essential in arranging medical tretments, travel, accommodations, and other logistical details making the process seamless for patients.

Registration ensures that facilitators meet quality standards, and offer true information on matters that could influence the patients' decision making. This process lends transparency and builds trust within the industry. Unfortunately, there is a dearth of regulations governing MVT sector, leaving it unorganised and without adequate oversight on quality of services provided by MVT facilitators. [53] Medical tourism comes with its own set of associated risks including communication gap between the patients and the doctors or physicians, exposure to medical malpractice, amongst others.[54]

52. Ronald Labonté, Valorie A. Crooks, et.al., "Government Roles in Regulating Medical Tourism: Evidence from Guatemala" 17 International Journal for Equity in Health Volume 5 (2018).
53. *Supra* 36 at 19.

The choice of term 'facilitator' over 'broker' stirs the image of a helper,[55] obligating a duty of good faith towards the prospective patients. Patients traveling across countries for medical procedures seek out these MVTFs to gain information on quality, safety, and legal concerns.[56] There is a need for greater support from the Government towards regulation and organisation of the MVTF. Lack of nodal agency to spearhead and regulate Medical Value Travel is another concern that needs urgent attention. MVTF need to be well organised and brought into a singular head of service providers to bring in line with the consumer rights. NABH has initiated certain empanelment programmes for MVTF,[57] to assure the services offered by the facilitator are in accordance with set standards.[58] A key advantage for facilitators is the ability to highlight this empanelment as evidence of their commitment to quality and patient safety.[59] The drawback lies in the non-mandatory nature of empanelment process. There is no legal liability in case MVTF operates sans getting accredited.

Another loophole stems from the content of the criteria, which simply outlines the necessary requirements, leaving it up to the organization to develop the systems, processes, and methods for measuring performance indicators that demonstrate compliance with the empanelment standards. Thus, the programmes impact has been limited. The ripple effect shows in form of arbitrary charges by MVTFs, joined with lack of consistency across hospitals. The lack of standardized pricing allows some MVT facilitators to take advantage and mislead patients.[60] One can draw lessons from national regulatory model adopted by Israel, with a mixed public-private system. Israel through legislation has installed several regulatory requirements to address the issue of preference to international patients over its citizens due to income generated by charging the former higher, such as:

---

54. Valorie a Crooks, Paul Kingsbury, et.al., "What is Known About the Patient's Experience of Medical Tourism? a Scoping Review" 10 BMC Health Services Research 6-7 (2010).
55. *Supra* 54 at 2.
56. Indian Institute of Tourism and Travel Management, "A Study of Problems and Challenges Faced by Medical Tourists Visiting India" 16 (2011).
57. The MVTF empanelment program was launched in 2016 as collaboration of the Ministry of Tourism and FICCI.
58. *Supra* 41 at 4.
59. *Ibid.*
60. Nayantara Narayanan, "Nigerian Man's Twitter Complaint Sparks Discussion on Lack of Support for Medical Tourists in India", Scroll, Apr. 30, 2019, available at: https://scroll.in/pulse/921630/nigerian-mans-twitter-plaint-throws-light-on-on-lack-of-support-for-medical-tourists-in-india (last visited on Sept. 30, 2024).

i. Revenue generated from medical tourism is allocated towards enhancing the public health system.

ii. Establishing data monitoring systems by hospitals allowing government to track the economic activities of facilities serving international patients and monitor the quality of care provided to those patients.

iii. Capping the number of international patients that each medical facility can accommodate, subject to waiting time and capacity.

3. Liability of websites providing information to patients: Online resources play a crucial role in the marketing and advertisement of medical tourism service, influencing the decision-making process of potential medical tourists, with websites of medical tourism facilitation companies serving as a key source of information for these individuals. When these websites neglect to highlight the risks linked to medical tourism, it can hinder the ability of potential medical tourists to make informed decisions.

There has been little emphasis on the accuracy of content provided by these MVTF's websites and whether they abide by ethical guidelines and standards. The content on these websites remains unregulated.[61] Research has indicated that web portals provide minimal information, particularly regarding legal matters and patients' rights[62].

In the case of *Tata Press Limited vs Mahanagar Telephone Nigam,*[63] the Supreme Court ruled that commercial speech falls under the scope of the freedom of speech and expression guaranteed by Article 19(1)(a). This decision extended protection to commercial advertisements under Article 19(1)(a), while also making them subject to the limitations outlined in Article 19(2). Unethical advertisements by medical entities would be subject to reasonable restrictions on commercial speech under Article 19(2) and cannot be protected from legal action.

---

61. Suchitra Wagle, "Web-Based Medical Facilitators in Medical Tourism: The Third Party in Decision-Making" 10(1) Indian Journal of Medical Ethics 4-5 (2013).
62. Alicia Mason and Kevin B Wright, "Framing Medical Tourism: An Examination of Appeal, Risk, Convalescence, Accreditation, and Interactivity in Medical Tourism Web Sites" 16(2) 8 (2011).
63. (1995) 5 SCC 139.

The **Professional Conduct & Ethics Regulations of 2002**, forbids doctors from engaging in self-promotional advertising.[64] However, these regulations do not address hospitals, allowing private institutions, particularly large corporate hospitals, to advertise without restriction.[65]

As per the National Medical Council's **Professional Conduct Guidelines 2023**, registered medical practitioners and organizations are allowed to make announcements through different media conduits. However, the content is restricted to details such as the institution's name, types of patients treated, staff qualifications, available facilities, and the fees. Any breach of these guidelines may lead to penalties, including a warning or a 30-day suspension of the involved doctors' licenses.[66]

The issue of ethical advertisements by corporate hospitals, in line with the Professional Conduct of Registered Medical Practitioners regulations is yet to be determined by the Supreme Court as the issue is sub judice.[67] However, ethical advertisement by both doctors and hospitals providing healthcare services has been endorsed by NMC.[68]

Another recourse in case of misinformation by such website can be found in the Consumer Protection Act, 2019 under Section 2(42) that defines "service as service of any description which is made available to potential users". The definition includes the facilities connected to providing of information. Thus, legal liability can be imposed on websites in the business of facilitating medical tourism for any misinformation.

The quality of information provided on the portals can be maintained through self-regulation by the MTFs but this shall be an idealistic presumption fall from reality. Since the relationship falls beyond the traditional domain of doctor-patient relationship, a setup where doctors follow a code of conduct, services offered by intermediaries like MTFs, require ethical guidelines and

64. Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 p.no. 6.
65. Sumi Sukanya Dutta, "Can Corporate Hospitals Advertise? NMC Panel to Examine Issue After SC Notice", The Print, Dec. 01, 2023, *available* at: https://theprint.in/health/can-corporate-hospitals-advertise-nmc-panel-to-examine-issue-after-sc-notice/1867574/ (last visited on Sept. 30, 2024).
66. National Medical Commission, Registered Medical Practitioner (Professional Conduct) Regulations 2022, p.no. 27.
67. *Supra* 67.
68. Sumi Sukanya Dutta, "Advertisement Norms for Doctors, Corporate Hospitals Can't Be Different, Says NMC Panel", The Print, Apr. 01, 2024, *available* at: https://theprint.in/health/advertisement-norms-for-doctors-corporate-hospitals-cant-be-different-says-nmc-panel/2019838/ (last visited on Sept. 30, 2024).

regulation.[69]

4. **Legal determination of complaints and laws thereof:** Healthcare facilities treating medical tourists may not have sufficient complaints policies to handle grievances from dissatisfied patients fairly and effectively. To ensure a consistent and positive experience for medical value tourism (MVT) patients, it is crucial that issues arising from negligence, incompetence, or crimes like fraud and theft are promptly addressed. Presently, there is limited awareness about the legal options available to MVT patients or their families in cases of substandard service.

Negative experiences generate considerable bad publicity for both the country and its healthcare providers. The CII lawyers are working on a standard contract to ensure that any litigation related to treatment is handled in Indian courts. At present, both medical tourists and Indian patients cannot bring their cases directly to Indian courts; their only option is the State and National Consumer Disputes Redressal Commissions, which are burdened with a significant backlog.[70]

CONCLUSION

Now that we have identified the main factors influencing the MVT market to be "the demand and supply of medical services; the development of infrastructure; and the implementation of policies affecting the market."

The right to health imposes obligation to *"respect, protect and fulfil"*[71] upon States parties. The obligation to fulfil ensures facilitation, provision and promotion of the determinants. [72] The obligation to protect imposes duty on States to implement measures that render third parties from violating guaranteed rights. On the other hand, the obligation to fulfil demands that states adopt appropriate measures to ensure the full realization of the right to health.

The success of medical tourism development relies heavily on strong collaboration among all

69. *Supra* 63 at 4.
70. World Health Organization, "Medical Visas Mark Growth of Indian Medical Tourism" 164 (2007).
71. *Supra* 7 at 29.
72. *Supra* 11 at 9.

stakeholders.[73] To enhance medical tourism in India, raising awareness through government and industry efforts is crucial. In this regard, the Government of India has launched the 'Heal in India' and 'Heal by India' initiatives to promote medical value tourism.

Health tourism destinations have become an essential part of the global healthcare sector. In India, a group of accredited hospitals offers care that meets or exceeds international standards. However, the legislative approach to the Right to Health in India falls short of emphasizing and promoting health from a human rights view.

Lawmakers aiming to promote or regulate the medical tourism sector often lack empirical data and theoretical frameworks to assess the industry's impact. This is particularly evident when considering the effects of medical tourism on a country's healthcare system and the connections it may create between source and destination countries. As a result, policymaking in this area has been insufficient. The absence of empirical data on the effects of medical tourism on a country's healthcare system results in unresolved regulatory challenges.

In India, the significance of accountability in maintaining quality healthcare is largely undervalued.[74] The Consumer Protection Act of 2019 [75] is the primary legislation protecting patients' rights (consumers under the Act, also tele-medicine has been brought within the ambit of service[76]), but it is largely ineffective due to the slow-moving judicial system. Moreover, there is no standardized pricing policy, nor are there basic requirements for price transparency.[77] Apart from these, inconsistent fee structure and lack of transparency in billing to foreign patients and absurdly high margins to trade to refer patients are some of the challenges.[78] Additionally, there is no standardized pricing policy or basic requirements for price transparency. Others include inconsistent fee structures, lack of transparency in billing for foreign patients, and excessively

73. Ahmed Kamassi, Noor Hazilah Abd Manaf, et.al., "The Identity and Role of Stakeholders in the Medical Tourism Industry: State of the Art" 75(3) Tourism Review 1 (2020).
74. Manish Priyadarshi and Sanjiv Kumar, "Accountability in Healthcare in India" 45 Indian Journal of Community Medicine: Official Publication of Indian Association of Preventive & Social Medicine 4 (2020).
75. In Indian Medical Association vs V.P. Shantha 1996 AIR 550, the medical profession was swept within the ambit of the Consumer Protection Act, 1986. The Consumer Protection Act, 1986, was later repealed and replaced by the Consumer Protection Act, 2019
76. Bhavika Vajawat, Damodharan Dinakaran, et.al., "The Consumer Protection Act, 2019: A Critical Analysis from a Medical Practitioner's Perspective" 9(1) Indian Journal of Medical Ethics 4 (2024).
77. Iris R. Joosse, David Tordrup, et.al., "Evidence on the Effectiveness of Policies Promoting Price Transparency - a Systematic Review" 134 Health Policy 6 (2023).
78. Indian Institute of Public Administration, "Medical Tourism in India: Challenges and Way Forward Post the Pandemic" 59 (2021).

high referral commissions for patient referrals.

Other pressing issues include taxation inconsistencies, bureaucratic hurdles, a lack of long-term investor-friendly policies, and insufficient insurance coverage.[79] Additionally, the intersection of national policies and regulations with international law demand that governments ensure the privatization of health markets and the actions of third parties do not compromise citizens' right to healthcare and related services[80].

Thus, Indian lawmakers need to wake from slumber and take proactive initiatives at all fronts to retain the top most position and to emerge as leader in medical tourism.

79. *Ibid.*

80. Antenor Hallo De Wolf and Brigit Toebes, "Assessing Private Sector Involvement in Health Care and Universal Health Coverage in Light of the Right to Health" 18(2) Health and Human Rights Journal 7-12 (2016).

SAILING TOWARDS INNOVATION: THE CONVERGENCE OF TECHNOLOGY AND GLOBAL MARITIME GOVERNANCE

***Dr. Paramita Choudhury**

****Dr. Sayan Das**

INTRODUCTION

Utilizing technological advances and international regulations in maritime governance has emerged as more crucial as we endeavour to tackle the obstacles confronting our oceans. The advent of technology has completely transformed our capacity to observe, comprehend, and oversee marine ecosystems, offering invaluable instruments for gathering data, conducting research, and making informed decisions. International law, ocean governance, and the United Nations Convention on the Law of the Sea (UNCLOS) are vital in regulating technology use and establishing protocols for the sustainable governance of maritime ecosystems. This study examines the convergence of technologies and global legislation in maritime regulations, emphasizing the profound influence of technology on our comprehension of the seas and the legal structures that govern our strategy for the preservation of marine life. This study explores the advantages of technology in facilitating evidence-based decision-making and promoting global cooperation. It also acknowledges the challenges posed by legal and regulatory intricacies. The study highlights the importance of continuous communication and the creation of international legal structures to adjust to new technologies and address ethical concerns in discussions. By utilising the potential of technological advances along with global law, we can strive for efficient aquatic regulations that guarantee the preservation and viable utilization of the marine environment for future endeavours generations to inherit.

OVERVIEW

With ships transporting more than 90% of the world's products, the maritime industry is vital to international trade and commerce. An increase in the demand for dependable and reasonably priced shipping services has been driven by the dramatic increase in online shopping since the

* Assistant Professor School of Law, Woxsen University.
** Assistant Professor, ICFAI Law School, IFHE.

start of the COVID-19 epidemic. More and more, the marine industry is trying to lessen the damage it does to the environment. To accomplish this, digital technology cannot be avoided. Also, to meet the increasing demands of clients and to make the maritime industry more sustainable and efficient, there is a want to implement new developments.[1] The transition to digital has grown in importance in the last several years, forcing businesses across all industries to change. Technological advancements in the marine sector have had far-reaching consequences for the whole supply chain. There has been widespread use of electronic interaction and teamwork tools, vessel and freight monitoring platforms, and other similar technologies. Other creative approaches, however, step out and provide promising new possibilities in several domains. The goal is to enable shipment to be more effective, more secure, quicker, and less harmful to the environment.[2]

There are several examples throughout history of how changes in technology have influenced or even required in the evolution of laws and legal systems considering the myriads of rights related to property, accountability, and other issues of law that arose with the advent of railways. In a similar vein, the introduction of personal computers prompted the need for established legal principles regarding the admissibility of computer outputs as evidence, the capacity of digital files to be considered for legal documents, taxability of software used in computers, and such.[3] In the same vein, UNCLOS helped bridge the barrier to maritime technology among industrialized and emerging nations, and[4] it was crucial to the modernization of maritime legislation. Technological developments in resource exploitation, such as catching fish, have also contributed to the expansion of maritime territorial claim(s) by nations.

The development of international legislation is very sluggish, and legislation generally, if not always, falls beyond technology. This delay could be caused by several things. One possible explanation is that it stems from the *"move fast and break things"* attitude of technology professionals, whose role causes societal as well as normative upheaval at breakneck velocity, in contrast to the more prudent perspective of attorneys.[5]

1. What are the Main Technological Innovations in the Maritime Industry for 2023? 24 March 2023, Sinay Maritime Data Solution, *available* at: https://sinay.ai/en/what-are-the-main-technological-innovation-in-the-maritime-industry-for-2023/ (last visited on July, 21, 2024).
2. Edvard Tijan, Marija Jović, et. al., Digital Transformation in the Maritime Transport Sector, *available* at: https://www.sciencedirect.com/science/article/pii/S0040162521003115 (last visited on August, 09, 2024).
3. Lyria Bennett Moses, Recurring Dilemmas: The Law's Race to keep up with Technological Change, *available* at: https://ssrn.com/abstract=979861 or http://dx.doi.org/10.2139/ssrn.979861 (last visited on August, 08, 2024).
4. Dr Scott Parsons, Transfer of Marine Technology, International Oceanographic Commission (of UNESCO), *available* at: https://unesdoc.unesco.org/ark:/48223/pf0000122697 (last visited on July, 24, 2024).
5. Lindsay Freeman, Law in Conflict: The Technological Transformation of War and Its Consequences for the International Criminal Court, *available* at: https://nyujilp.org/wp-content/uploads/2019/07/NYI303.pdf (last visited on August, 09, 2024).

The legal system does adapt to new technologies, albeit at a snail's pace. The capacity to harness aquatic assets like fish has been steadily increasing thanks to technological improvements during the eleventh century. As a result, regulatory measures to tackle excessive use, coastline states' rights, etc. have been required (or justified, subject to one's point of view). President Truman of the United States of America laid out US policy for the seas and their assets in the Truman Proclamations, which were released in 1945.[6]

More and more, technological developments and international law are shaping maritime policy. Technology facilitates global cooperation and gives useful resources for making decisions based on evidence. On the other hand, it raises questions of regulation and law that call for continued discussion and the creation of global frameworks. To achieve a more effective marine policy that safeguards the oceans for generations to come, we must use technology to its full potential and set up strong legal structures.[7] A key instrument for tackling the dynamic threats posed by our seas, marine policy that incorporates technological advancements and international law offers limitless potential. Technology and international legal frameworks have the potential to revolutionize marine policy, but there are challenges along the way.[8] In marine policy, the incorporation of technology and international law presents a number of difficulties as in problems with data management, lack of uniform laws, weak leadership, and inadequate international cooperation to mention.[9] In light of technological advancements and worldwide environmental concerns, the paper stresses the significance of tackling these issues to guarantee efficient and long-term management of maritime resources.

PROBLEM STATEMENT

The swift progress of marine technology offering improved safety and efficiency, presents a notable obstacle due to the disparity between these advancements and current international

---

6. Mary Ann Palma-Robles, Martin Tsamenyi, et. al., Promoting Sustainable Fisheries: The International Legal and Policy Framework to Combat Illegal, Unreported and Unregulated Fishing, *available* at: https://www.researchgate.net/publication/288730358_Promoting_sustainable_fisheries_The_international_legal_and_policy_framework_to_combat_illegal_unreported_and_unregulated_fishing (last visited on July, 25, 2024).
7. Xidi Chen, Qi Xu, et. al., Illegal, Unreported, and Unregulated Fishing Governance in Disputed Maritime Areas: Reflections on the International Legal Obligations of States, *available* at: https://www.mdpi.com/2410-3888/8/1/36 (last visited on August, 01, 2024).
8. Cameron Moore, Freedom of Navigation and The Law of the Sea: Warships, States and The Use of Force, available at DOI:10.4324/9780429425745 (last visited on August, 03, 2024).
9. Helen M. Rozwadowski, Wild Blue: The Post-World War Two Ocean Frontier and its Legacy for Law of the Sea, *available* at: https://www.liverpooluniversitypress.co.uk/doi/10.3197/096734021X16245313029949 (last visited on August, 02, 2024).

regulatory frameworks. This discrepancy is evident in insufficient regulations for automated ships and newly developed technologies, unclear accountability systems, issues over database accountability, weaknesses in privacy and security, asymmetrical availability of advances in technology for countries that are developing, and significant sustainability and societal consequences. To successfully manage and administer the changing maritime environment, it is imperative to promptly update global maritime law.

OBJECTIVE OF THE STUDY

The primary objective of this study is to dissect the intricate relationship between the current system of international law regulating maritime policy and the ever-changing landscape of maritime technology. The study's overarching goal is to learn how new technologies are testing long-established rules of law and how international law might change to accommodate them so that the ocean's resources can be used in a way that is safe, sustainable, and fair.

a) **Locating and Examining Significant Technological Developments:** To find and examine methodically the most important technical developments influencing the marine industry, such as autonomous boats, AI, blockchain, and remote sensing. To weigh the pros and cons of these technologies in fields including marine security, environmental monitoring, resource extraction, and navigation.

b) **Assessing the Sufficiency of Current International Law:** Taking into consideration recent developments in technology, assess the current state of international law, with a focus on UNCLOS. To find out if the current legal framework can handle the unique problems brought about by technological advancements, like cybersecurity, data ownership, and responsibility for autonomous vessels.

c) **Finding Inconsistencies and Missing Pieces of Law:** The goal is to identify certain areas where technological progress causes problems with international law. The goal is to find out how these disagreements and voids might cause problems with maritime activity regulation and governance, which could lead to injustices.

d) **Advising on Matters of Law and Public Policy:** The goal is to come up with specific policy and legal suggestions on how international law might be

adjusted to suit new technologies. To propose new or revised legislative instruments that can deal with new problems and make sure maritime resources are used fairly and sustainably.

e) **Aiming to Promote Global Collaboration:** The goal is to find ways that countries may work together to solve the policy and legal issues that have emerged as a result of technological progress. To stress the significance of a unified strategy for preventing regulatory arbitrage and guaranteeing uniform regulation.

This study hopes to add knowledge of the intertwined nature of technology and international law as it pertains to the marine domain. Its goal is to help those involved in maritime policymaking, law, and the sector as a whole better understand and adapt to the changing technology world.

RESEARCH METHODOLOGY

The study's process is tailored to each individual study. The research is strictly theoretical. Data is gathered from sources that are both primary and secondary. Data and information are gathered from various national and global legal and non-legal sources, including books, magazines, newspapers, and websites. Attempts are made to shed light on the many facets of technology on maritime landscape and environmental sustainability.

SIGNIFICANCE OF THE STUDY

This study is extremely important because it focuses on the crucial disparity between the fast progress of marine technology and the slower growth of global regulatory structures. The study aims to analyse this gap to determine the precise legal obstacles presented by developing technological advances, including self-navigating ships and AI, and suggest remedies to safeguard their secure, environmentally friendly, and fair utilization. The main aim of this research is to provide valuable information to lawmakers, legal advisors, and players in the marine sector. This will help in the creation of robust and efficient legislative and regulatory structures that can successfully regulate the changing maritime environment. This will enhance the long-term viability and conscientious management of the seas and their assets for the advantage of current and future civilizations.

THE RELEVANCE OF TECHNOLOGICAL INNOVATION IN THE CONTEXT OF INTERNATIONAL LEGAL SYSTEMS

Modern technology has equipped scientists, politicians, and environmentalists with potent instruments to observe and investigate marine environments, resulting in more knowledgeable

decision-making and policies grounded in data. The advent of technology such as aerial photography, satellite navigation, and seabed surveillance equipment has brought about a significant transformation in the way we accumulate and analyse data. These advancements have empowered us to effectively tackle urgent concerns including illegal fishing, ecological loss, contamination, and environmental degradation.[10] The use of technology has also made it easier for countries to work together on maritime policy. Because of this, countries are now able to communicate, collaborate, and share information instantaneously, regardless of their physical location.

However, there are new regulatory and legal hurdles to overcome as marine policy becomes more dependent on technology. To successfully address new difficulties in diverse fields, international legal frameworks must continuously improve and adapt to the ever-changing technology landscape. Because technological progress has a direct bearing on how we comprehend and manage the oceans, marine policy is an area that needs special focus. It is of the utmost importance to keep international rules controlling maritime activities up-to-date when new technology like autonomous marine vehicles, big data analytics, and artificial intelligence (AI) emerge. Data ownership, privacy, IP rights, and responsibility for harms brought about by tech-driven actions in the ocean necessitate thoughtful deliberation and concerted global action.

When it comes to marine policy, the application of technology is heavily influenced by international law. **The UN Convention on the Law of the Sea (UNCLOS)** and other preexisting legal frameworks lay the groundwork for maritime cooperation and control. To keep up with the ever-changing technology landscape and new problems that arise, these frameworks must be continuously updated and expanded[11].

The era of the seas, specifically the 1970s, is regarded as a failure due to the lack of progress in achieving aims such as enhanced collaboration amongst global maritime institutions about sustainability for the environment. Contrary to its intended purpose of enhancing international

---

10. Richard Castillo Rodríguez, Jorge Jiménez, et. al., An Analysis of Policy Options Available to the International Maritime Organization to Protect the Costa Rica Thermal Dome: Building the Case for a Particularly Sensitive Sea Area, *available* at: https://www.sciencedirect.com/science/article/abs/pii/S0308597X22004225?via%3Dihub (last visited on August, 07, 2024).
11. Muhammad Bilawal Khaskheli, Shumin Wang, et. al., Technology Advancement and International Law in Marine Policy, Challenges, Solutions and Future Prospective, *available* at: https://www.frontiersin.org/journals/marine-science/articles/10.3389/fmars.2023.1258924/full (last visited on August, 02, 2024).

collaboration among governments, the 11th edition of the 3rd UN Convention of the Law of the Sea (UNCLOS III) exacerbated the worldwide split of the marine environment. The opposing national interests that underlie all global partnerships between nations could not be negotiated altogether. Despite not achieving its objectives, UNCLOS III was successful in streamlining and facilitating the regular collaborative governance of oceanic usage and preservation.[12] UNCLOS, which was approved in 1982 and became effective in 1994, establishes a regulatory structure at both global and national levels for nations with coastlines to address matters related to their authority, entitlements, and obligations concerning the governance of the aquatic ecosystem and its riches. In addition, UNCLOS encompasses a wide range of international treaties that address particular issues, such as the administration of aquaculture related to fishing, ensuring the security of nautical congestion, combating pollution, the safeguarding and preservation of ecosystems, ways to react to anticipated warming temperatures, and agreements among nations focused on ensuring the preservation and growth of geographical waters.[13]

In 1992, at the **UN Conference on Environment and Development (UNCED)** in Rio de Janeiro,[14] a novel conceptual structure was incorporated into the 1982 UNCLOS. Agenda 21, also known as the *Programme of Action for Sustainable Development,* deals with concerns about cooperation among legislatures, IGOs, and NGOs. The gathering lays toward an array of guiding principles that advocate for novel ways of managing and governing the utilization, safeguarding, and preservation of environmental resources. Probably the finest consequential outcome of the Rio Conference was the newly placed focus on tenacious choice-making, as stated by Vander Zwaag. [15] Agenda 21 of UNCED states several significant concepts of environmentally friendly development, including equity between generations, pollution avoidance, insertion, security measures, intergenerational relationships, fairness, and polluter contributions.[16]

12. Kjell Grip, International Marine Environmental Governance: A Review, *available* at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5385665/#CR17 (last visited on August, 09, 2024).
13. Veronica Frank, The European Community and Marine Environmental Protection in the International Law of the Sea, 2007, *available* at: https://www.researchgate.net/publication/46697022_The_European_Community_and_Marine_Environmental_Protection_in_the_International_Law_of_the_Sea (last visited on August, 12, 2024).
14. United Nations Conference on Environment and Development, *available* at: https://sustainabledevelopment.un.org/milestones/unced (last visited on August, 09, 2024).
15. Douglas M. Johnston and David L VanderZwaag, The Ocean and International Environmental Law: Swimming, The Ocean and International Environmental Law: Swimming, Sinking, and Treading Water at the Millennium, *available* at: https://www.sciencedirect.com/science/article/abs/pii/S0964569199000708 (last visited on August, 11, 2024).
16. Ashutosh Jaiswal, International Conventions: The Earth Summit, Rio Declaration, and Agenda 21, Environmental Geography, *available* at: https://ebooks.inflibnet.ac.in/geop08/chapter/international-conventions-the-earth-summit-rio-declaration-and-agenda-21/ (last visited on August, 10, 2024).

Many matters remained unanswered during the **UNCED summit** in 1992. Some of these issues included clarifying and codifying the tenets of environmentally friendly development and the necessity of reinforcing pledges made by Rio Convention-established procedures. Global and national policies and legislative developments for oceanic and maritime administration should be guided by several "soft law" fundamentals expressed in each UNCLOS (III) and UNCED. Despite acknowledging the issue of coherence and collaboration, UNCED [17] was unable to accomplish its stated goal of enhancing the effectiveness of worldwide coordination in marine operations, such as collaboration amongst the fishing industry and environmental protection[18]. Despite several transpositions into national mechanisms or global regulations, the 2012 evaluation of the Rio Principles reveals that they have not consistently flowed into substantial impact in reality. Nothing can be done to guarantee that the laws adhere to the goal and intention of the standards unless there are systems in place to monitor total adherence. The analysis found that although the importance of precautionary measures is generally acknowledged, there has been a lag in the legislative administration of community-driven governance or local control over aquatic assets. One probable explanation is that the majority of nations' governments have the authority to administer the sea and attempts to cede this authority generally encounter opposition.[19]

The seventeenth chapter of **Agenda 21** (UNCED 1992) focused on the conservation of the marine environment. The document restated the fundamental tenets of environmental sustainability and presented seven specific sectors of focus for immediate execution:

The objectives include the following: managing and establishing coastline and nautical regions in a way that combines different aspects and ensures long-term viability; protecting the aquatic ecosystem; using the natural assets of the High Seas in a resilient manner; using and conserving the existing assets pursuant to national sovereignty in an environmentally friendly manner; dealing with ambiguities related to managing the aquatic realm and changes in the climate;

---

17. Taoheed Olalekan Folami, Towards an Integrated Ocean Governance Regime and Implementation of the Sustainable Development Goal 14 in Nigeria, *available* at: https://commons.wmu.se/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1591&context=all_dissertations (last visited on July, 12, 2024).
18. Grip Kjell, Better Integration of Environmental and Fisheries Science for Management Advice, *available* at: https://www.sciencedirect.com/science/article/abs/pii/S0272771402002871 (last visited on August, 14, 2024).
19. R. Kearney, C.D. Buxton, et. al., Australia's No-Take Marine Protected Areas: Appropriate Conservation or Inappropriate Management of Fishing? *available* at: https://www.sciencedirect.com/science/article/abs/pii/S0308597X12000413 (last visited on August, 05, 2024).

enhancing worldwide partnership and integration, which involves at the geographical level; and promoting environmentally friendly development in Small Islands Developing States (SIDS)[20]. The **Conventions on Climate Change and Biological Diversity** were ratified at Rio, alongside Agenda 21. The Convention is an all-encompassing and obligatory treaty that addresses the utilization and preservation of biodiversity. Nevertheless, the 1992 treaty did not include precise provisions regarding maritime and coastline ecology. The **Jakarta Mandate** represents the worldwide agreement on the significance of maritime and coastline biodiversity. This directive was included in the Ministerial Declaration during the subsequent session of the Conference of the Parties (COP) of the **Convention on Biological Diversity** (CBD/COP 2) in Jakarta in 1995. The project agenda was approved during the CBD/COP 4 conference in 1998[21].

THE APPLICATION OF TECHNICAL INNOVATION WITHIN THE MARITIME SECTOR

The COVID-19 epidemic has caused a substantial increase in e-commerce, resulting in a greater need for effective and affordable marine shipping operations. In addition, the marine industry is placing greater emphasis on minimizing its ecological footprint. To accomplish this, digitized techniques are needed. In 2023, notable advancements in the marine sector have been observed, aimed at improving long-term viability and effectiveness and meeting the increasing demands of consumers.[22]

Despite technological progress, the marine industry has faced intricate regulatory challenges focused on ensuring safety, security, and environmental preservation. International treaties, such as the regulations set by the International Maritime Organisation, provide the basic standards for the design of vessels, training of crews, control of pollution, and ensuring marine security. The purpose of these regulations is to mitigate risks associated with marine operations, including accidents, oil spills, and maritime terrorism, while also promoting sustainable practices and environmental stewardship. The interaction between innovation and regulation in the marine sector presents both opportunities and challenges for industry participants,

---

20. 1992 Agenda 21 Preamble and Chapter, adopted in Rio de Janeiro, Brazil on 3-14 June 1992, *available* at: https://cil.nus.edu.sg/wp-content/uploads/2019/02/1992-Agenda-21-Preamble-and-Chapter-17.pdf (last visited on August, 01, 2024).
21. Convention on Biological Diversity, The Jakarta Mandate-From Global Consensus to Global Work Conservation and Sustainable Use of Marine and Coastal Biological Diversity, *available* at: https://www.cbd.int/doc/publications/jm-brochure-en.pdf (last visited on August, 03, 2024).
22. Peter J. Stavroulakis, Markella Koutsouradi, et. al., Decarbonisation and Sustainable Shipping in a Post COVID-19 World, available at: https://www.sciencedirect.com/science/article/pii/S2468227623002144 (last visited on August, 03, 2024).

lawmakers, and regulators. Innovation-driven solutions can enhance operating efficiency, reduce environmental impact, and enhance safety. For instance, using alternative fuels has the potential to decrease carbon dioxide emissions and lessen the industry's impact on climate change. Integrating blockchain technology into marine logistics can enhance supply chain efficiency, enhance transparency, and address illegal activities such as smuggling and piracy. However, the rapid advancements in technology often surpass the formation of regulatory frameworks, leading to the creation of regulatory gaps, difficulties in compliance, and safety concerns. The advent of advanced technology, such as autonomous battleships and unmanned aerial aircraft (UAVs), raises significant problems regarding liability, insurance, cybersecurity, and regulatory oversight. Moreover, the marine industry's decentralized structure, characterized by a multitude of participants, flag states, and port authorities, poses obstacles to achieving uniformity and enforcing global norms. To address these difficulties, it is necessary to have efficient cooperation and dialogue between industry participants, governments, and international organizations to encourage innovation while upholding regulatory adherence and safety standards. Suppose policymakers adopt a proactive and adaptable regulatory strategy. In that case, they can utilize innovation to achieve sustainable prosperity, enhance marine security, and address emerging issues such as climate change, cybersecurity hazards, and digitalization.[23]

CONTEMPORARY INNOVATIONS IN TECHNOLOGY THAT HAVE HAD THE GREATEST INFLUENCE ON THE MARITIME SECTOR

The technological developments in the marine sector propounded the aftermath of the altogether distributive network. The use of internet-based services for shipping and freight monitoring, together with the integration of electronic interaction and collaborative devices has grown widespread in the business.

☐ State-of-the-art Surveillance System

The sophisticated surveillance methods employed in the marine sector are specifically engineered to continuously track the current condition of the surroundings instantaneously, including the cleanliness of the environment, climate conditions, and vessel movements. These networks employ a blend of detectors, aerial imaging, and additional techniques to gather and scrutinize information about the seafloor and its environment.

---

23. Eunice O. Olaniyi, Maria Claude Solarte-Vasquez, et. al., Smart Regulations in Maritime Governance: Efficacy, Gaps, and Stakeholder Perspectives, *available* at: https://www.sciencedirect.com/science/article/pii/S0025326X24003187 (last visited on August, 15, 2024).

The information gathered by these devices is subsequently utilized to generate intricate cartographic representations and simulations of the seafloor, as well as to notify vessel managers and regulators of possible ecological risks or urgent situations. This data can aid in the prevention of contamination and preservation of maritime ecological systems hence mitigating the expenses related to ecological remediation in the case of a catastrophe.[24]

- **Artificial and Augmented Intelligence**

Intelligent technology has grown into an essential instrument for succeeding in the age of internet-based assistance. Sinay.ai utilises AI-based components to assist experts in the marine sector with calculating the Estimated Time of Arrival (ETA) for vessels across the globe. Additionally, these applications enable monitoring the quality of the environment and water, as well as assessing below-sea-level acoustic levels.

Intelligent automation is crucial for advancing intelligent harbours when integrated with 5G connectivity, Big Data, the Internet of Things (IoT), and blockchain technologies. The seaports of Los Angeles, Rotterdam, Quebec, Le Havre, Hamburg, Shanghai, and Singapore, amongst those around them, exemplify the implementation of technological advances in achieving a digital overhaul, resulting in enhanced effectiveness, openness and sustainable development.[25]

- **Sustainable Shipment**

With the rising need for environmentalism in the marine sector, there is a growing emphasis on using alternative fuels including liquefied natural gas, renewable fuels, hydrogen, and ammonia. These fuels aim to decrease the sector's dependence on fossil fuels and minimise the amount of carbon dioxide produced by ships.

Furthermore, there is ongoing exploration of technology advancements aimed at enhancing energy effectiveness in equipment, such as engine systems, and on-board boats, including illuminating and additional equipment. Furthermore, starting from January 2023, the maritime transportation sector has experienced a substantial legislative transformation with the implementation of the Energy Efficiency Existing Ship Index (EEXI) quantification. This metric will be obligatory for every ship and will be included in the annual evaluation of their

---

24. Yassir Zardoua, Bilal Sebbar, Moussab Chbeine, et. al., Role and Integration of Image Processing Systems in Maritime Target Tracking, *available* at: https://arxiv.org/html/2206.12809v3 (last visited on August, 06, 2024).
25. Dorota Owczarek, AI in Maritime Industry: How Artificial Intelligence Solutions Benefit the Shipping Sector, *available* at: https://nexocode.com/blog/posts/ai-in-maritime-artificial-intelligence-solutions-in-the-shipping-sector/ (last visited on August, 10, 2024).
26. Ayushi Srivastava, Towards Zero-Emission Shipping for India- The Case for Ammonia versus Hydrogen as the Fuel of Choice, *available* at: https://maritimeindia.org/towards-zero-emission-shipping-for-india-the-case-for-ammonia-versus-hydrogen-as-the-fuel-of-choice/ (last visited on August, 21, 2024).

carbon footprint indicator (CII). Both endeavours strive to advance the adoption of more environmentally friendly methods that utilize energy more efficiently. New developments in naval architecture, the utilization of environmentally friendly resources, and the innovation of hull coats can collectively diminish fuel usage and greenhouse gas emissions, so fostering a more environmentally friendly vision for the shipping sector along with a more sustainable planet for humanity.[26]

- **Powering the Maritime Renewables**

Green energy sources are becoming progressively vital in the transition in the direction of environmentally friendly methods. Despite being at various phases of development, the renewable energy breakthroughs listed below have successfully resulted in energy avenues that do not produce carbon emissions, hence reducing carbon dioxide pollutants and reducing dependence on fossil fuel-powered generators.

Wind turbines are vertical sails that are mounted on ships to capture wind from various directions and convert it into electricity. China, the United States, India, and the United Kingdom are home to the world's largest wind farms. Solar panels harness solar radiation and thermal energy to produce electrical power for the systems on board the vessels. The M/V Auriga Leader, a massive commercial ship now parked at the Port of Long Beach in California, has achieved a significant milestone by becoming the first ocean liner to utilize solar power for propulsion. This is made possible through the installation of solar panels that provide electricity for the ship's main electrical grid. Hydrogen-fuelled batteries are utilized in the energy generation of huge ships through the chemical interaction between hydrogen and oxygen in the air.[27]

- **BlueTech Innovations in Driving Ocean Sustainability**

With growing worries over the well-being of our oceans, BlueTech, a rapidly developing discipline that combines technological advances and maritime research, is being recognized as a promising solution. BlueTech refers to a diverse range of innovative solutions aimed at enhancing marine resilience by tackling various difficulties such as polluting substances and

---

27. E.L.V. Eriksson and E. MacA. Gray, Optimization and Integration of Hybrid Renewable Energy Hydrogen Fuel Cell Energy Systems - A Critical Review, *available* at: https://www.sciencedirect.com/topics/engineering/hydrogen-fuel-cell-system (last visited on August, 17, 2024).

excessive fishing. Here we will examine how advanced BlueTech techniques are transforming our efforts to conserve the vital resources of our world.

- **Technological Advancements in Aquatic Sciences:** The implementation of cutting-edge detectors, continuous surveillance mechanisms, and content processing is revolutionizing aquatic methods. Such innovations improve the accuracy and long-term viability of aquatic life-cultivating enterprises. For example, XpertSea is a Canadian BlueTech firm that uses intelligent aquaculture technology to oversee and control shrimp and fish farms. Their technology uses artificial intelligence and machine intelligence to evaluate variables like waste material, rate of growth, and wellness. This allows producers to improve consumption practices and reduce ecological effects.

- **Technology for Cleaning the Seafloor**

Unmanned ships and UAVs with detectors and accumulation mechanisms are used to identify and remove marine waste, specifically petrochemical materials. For example, The Ocean Cleanup, established by Boyan Slat, employs inert floating devices to ensnare polymer garbage in maritime cycles. These networks utilize inherent maritime dynamics to prioritize and gather garbage made of plastic, thus averting more damage to aquatic organisms.

- **Intelligent Buoyant Devices**

State-of-the-art boats, integrated with sophisticated detectors and sophisticated networking technologies, continuously track maritime environments instantaneously. This enables the collection of essential information that is used for research study and environmental governance purposes. For example, Blue Water Gear utilizes advanced buoys to gather data on water heat, and tidal elevation among other essential characteristics. The utilization of contemporaneous information improves our comprehension of marine procedures, hence assisting in environmental studies and facilitating the implementation of environmentally friendly management methods.

- **Unmanned Aerial Vehicles for Marine Research**

Scientists utilize self-navigating undersea automobiles (AUVs) that are installed with sophisticated detection devices and lenses to investigate the deepest parts of the seafloor. These engines are capable of surveying habitats and collecting statistics on aquatic species. For

---

28. Ocean Technology's Moment: A More Sustainable Future with Ocean A.I. and BlueTech Innovation, *available* at:https://masschallenge.org/articles/ocean-technologys-moment-a-more-sustainable-future-with-ocean-a-i-and-bluetech-innovation/ (last visited on August, 07, 2024).

example, Sea Deep is an oceanic monitoring system that uses artificial intelligence to improve images, analyse data, and create precise 3D visuals with realistic colours. Investigators can utilize this technology to carry out inspections of underneath environments, record aquatic ecosystems, and gather information for sustainability programs.

- **Methods for Eco-Friendly Fishery**

The implementation of advancements in gearing technological advances, aquatic life monitoring, and continuous surveillance systems is effectively mitigating the issues of accidental capture, illicit catching of fish, and excessive fishing. For example, Pelagic Intelligence Solutions specializes in the creation of digital surveillance solutions designed specifically for small-scale fishing. Their innovation encompasses intelligent beacons and boat monitoring technologies that offer up-to-the-minute information on fishing operations, aiding in the enforcement of responsible fishing techniques.

- **Restoring and Treating Waters**

Advancements in biological technologies and novel ways of filtration enable the treatment of water bodies to achieve higher levels of cleanliness, making them potentially suitable for reuse. These technological advances have the potential to promote sustainable ecosystems that minimize trash. For example, Algbio utilizes microalgae to cleanse water waste and filth, as well as trap CO2, to generate biofuels, bioplastics, and biomaterials. Additionally, this process generates credits for carbon emissions.

BlueTech is revolutionizing marine conservation by utilizing technologies to tackle intricate ecological problems. The integration of technological advances and maritime research is facilitating a greater environmentally friendly cohabitation amid the globe's seas, including sophisticated aqua farming techniques and new marine remediation projects. As these advancements progress, BlueTech is positioned to have a crucial impact in protecting the well-being and sustainability of our oceanic environments[28].

LAWS GOVERNING MARITIME TECHNOLOGY ON A GLOBAL SCALE

- **United Nations Convention on the Law of the Sea**

Global legislation regulates the use of shipping technology and requires the transmission of advanced technology to developing countries, according to Part XIV of the 1982 UNCLOS. Article 266 of UNCLOS permits, among other things, the promotion of scientific study and

29. United Nations Convention on the Law of the Sea, *available* at: https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf (last visited on August, 10, 2024).

protection of marine resources through the dissemination and interchange of nautical knowledge and technology. International cooperation, particularly in the field of scientific research, is one of the aims outlined in Article 268 of UNCLOS, which also covers the improvement of employment opportunities, the development of new technologies, and the dissemination of existing data.[29]

Equitable considerations have played a pivotal role in shaping the regulatory progress that has ensued from technology advancements. In his influential 1967 address to the General Assembly of the United Nations, the ambassador, Arvid Pardo mentioned a competition in oceanography science and proposed that the global seafloor should be considered the collective legacy of mankind, ensuring that its assets are distributed equitably.[30]

However, the incorporation of the transmission of technology in the UNCLOS was a subject of dispute throughout that period. The reluctance of industrialized governments to share their nautical technological advances with different nations was a significant factor in the fourteen-year delay in the implementation of UNCLOS. The 1994 Implementing Agreement (about the enforcement of Part XI of the UNCLOS of 10 December 1982 was responsible for bringing the regulation into effect. This accord diluted some responsibilities concerning the dissemination of maritime technological advances within the framework of profound seabed element extraction. It replaced required commitments with measures that promote increased coordination.[31]

The accord also established the basis for an expansive understanding of technology transmission, not merely as a one-sided provision of technologies, but as a reciprocal interchange of ideas, expertise, and technologies. The establishment of the Criteria and Guidelines on the Transfer of Marine Technology by the Intergovernmental Oceanographic Commission of UNESCO emphasized the importance of worldwide scientific collaboration in facilitating the transmission of maritime technological advances. This initiative builds upon the principles outlined in the UNCLOS and the 1994 Implementing Protocol.[32]

---

30. Hang Zhou and Jieyi Xie, Revisiting Heritage in The Ocean: Common Heritage Of [Hu] Mankind, Maritime Heritage and Beyond? *available* at: https://www.tandfonline.com/doi/epdf/10.1080/13527258.2024.2315242?needAccess=true (last visited on August, 13, 2024).
31. *Ibid.*
32. Igor Olegovich Anisimov & Elena Evgenyevna Gulyaeva, Promoting The Development and Transfer of Marine Technologies as A Mechanism for Implementing the Sustainable Development Goals: International Legal Aspect, *available* at: https://www.redalyc.org/journal/6338/633875002007/html/ (last visited on August, 18, 2024).

Aside from UNCLOS, several additional international instruments of law and agencies contribute to marine policy. These encompass regional agreements such as the OSPAR Convention and the CCAMLR, which emphasize the safeguarding of the maritime ecosystem in the North-East Atlantic & the preservation of Antarctic coastal biological resources, correspondingly. Additionally, there are global agreements like the CBD and the UNFCCC, which address the preservation of biological diversity and the management of climate change, respectively.

- **International Maritime Organization**

The IMO, a specialized agency of the United Nations, plays a pivotal role in setting international standards for the safety, security, and environmental performance of shipping. The IMO has developed a myriad of conventions and codes pertinent to maritime technology, including the International Convention for the Safety of Life at Sea (SOLAS) and the International Convention for the Prevention of Pollution from Ships. Recognizing the transformative potential of emerging technologies, the IMO is actively working to develop new regulations specifically for autonomous vessels and other cutting-edge innovations[33].

- **International Labour Organization (ILO)**

The ILO, the UN agency championing social justice and promoting decent work, has a vested interest in maritime technology due to its potential impact on seafarers' employment and working conditions. The Maritime Labour Convention, 2006 (MLC, 2006), a landmark instrument adopted by the ILO, enshrines seafarers' rights to fair treatment and decent work. As autonomous vessels and other technologies redefine roles and responsibilities at sea, the ILO is actively engaged in crafting guidelines to ensure the protection of seafarers' rights and livelihoods in this evolving landscape. The maritime industry experiences both advantages and difficulties when it comes to incorporating technology.

FINDINGS

Through the utilization of cutting-edge digital technology, organizations within the maritime sector can enhance the value chain and fulfil the demands of technologically adept business users. This includes achieving more cost-effective and expedited shipping, improved adaptability, immediate access to operational information, and enhanced customer satisfaction.

33. International Convention for the Safety of Life at Sea (SOLAS), *available* at: https://www.dgrm.pt/en/web/guest/solas (last visited on August, 12, 2024).

- Enhance effectiveness, resulting in more efficient operations; Maximize routes to minimize delays, decrease fuel usage, and diminish greenhouse gas emissions;
- Reduce expenses associated with operations;
- Reduce potential hazards by utilizing predictive data;
- Facilitate the connection between organizations and customers to optimize communication, hence enhancing customer happiness.
- Implement an automated process for gathering and analysing data within a centralized system, which will enhance decision-making and optimize resource utilization.
- Streamline administrative processes by replacing manual paperwork with automated systems, saving time and decreasing human errors.

However, harnessing the complete capabilities of these new tools may prove to be difficult for many organizations, especially small and medium-sized enterprises (SMEs), since digital transformation necessitates specialized and expensive resources.

Moreover, rules must remain up-to-date with these advancements, guaranteeing that the existing policies do not hinder progress but uphold safety and security benchmarks. The IMO, as the primary governing body for the shipping sector, is dedicated to creating a regulatory framework that successfully tackles the unique difficulties posed by the advancement of maritime technologies. Close coordination is necessary among all stakeholders in the business, including international and national politicians, corporate and public professionals, and technology developers. Ensuring the security and protection of all digital systems against cyber risk is crucial in light of the growing use of connectivity. Indeed, cyberattacks have the potential to cause significant financial and operational damage. This is especially accurate concerning technologies like autonomous vessels.

In addition, the sector continues to face a shortage of technical knowledge in integrating these new technologies, as well as comprehending and evaluating the safety and security consequences. It is imperative for governments, port authorities, shipping corporations, and other transportation leaders to actively encourage the global dissemination of knowledge in marine science technology.

ANTICIPATED LEGAL ADVANCEMENTS

The legal framework governing maritime technology constantly changes and adapts in response to technological progress. Potential future advancements encompass:

- **Alignment of global and domestic regulations:** It is essential to make a coordinated and determined attempt to align international and national legislation to provide a consistent and predictable legal structure for marine technology. This will encourage innovation while reducing the likelihood of conflicts and contradictions.
- ***Regulatory Structure for Self-Navigating Watercraft:*** The International Maritime Organization is leading the effort to create a comprehensive set of regulations for Maritime Autonomous Surface Ships (MASS). This framework will focus on crucial elements such as MASS's design, building, operation, and certification, paving the way for their secure and accountable integration into the maritime ecosystem.
- ***Liability and insurance mechanisms:*** The rise of autonomous vessels and other new technology requires the creation of inventive legal and insurance systems to deal with the distinct liability concerns they present. These procedures should distribute responsibility justly and guarantee sufficient compensation for potential harm.

  Cybersecurity regulations are necessary in the maritime industry to address increasing cyber threats. These regulations should focus on protecting against cyberattacks and assuring the reliability and security of important naval infrastructure.

CONCLUSION

The swift progress of nautical technology is a captivating account of ingenuity and change. As the ongoing technology revolution progresses, the legal system must adjust and develop to effectively tackle complex issues and take advantage of the vast potential it offers. By implementing a comprehensive and proactive legal structure, we can facilitate the secure, accountable, and enduring incorporation of marine technology, guaranteeing that it acts as an incubator for advancement and success in the maritime sector.

ABROGATION OF ARTICLE 370: A STEP TOWARDS HOLISTIC DEMOCRACY

***Dr. Pawandeep Kaur**

****Ravreet Sandhu**

INTRODUCTION

The Indian government introduced the Jammu and Kashmir Reorganisation Act in August 2019, which separated Jammu and Kashmir into two Union Territories, Ladakh and Jammu and Kashmir, under the direct authority of the Union government. The bill also repealed the unique status accorded to the region by Article 370. The government claimed that by taking this action, terrorism and separatism in the area would cease. The first part of this article begins by outlining the history and development of Article 370, emphasizing the unique provisions that granted the state of Jammu and Kashmir a level of autonomy that distinguished it from other Indian states. In the second part, it delves into the complex legal and constitutional implications of the abrogation process. The third part of this article evaluates whether or not separatism and militancy increased after Article 370 was repealed. The article also looks at the implications for the people residing in Jammu and Kashmir, the Deploying Public Safety Act, 1978 and lockdown in the Valley, the political background, the Global Response to the Abrogation, as well as the socio-economic challenges and changes in the region's population after the abrogation of article 370.

OUTLOOK

As soon as India gained sovereignty against British control in 1947, several princes, including Mysore, the Deccan, and Madras, became part of the Indian nation. Most felt obliged to accede to India, whereas others were provided an option. Considering the area's Muslim majority, Kashmir was hesitant about joining either side, India or Pakistan. In October 1949, the Maharaja of Kashmir and Congress leader Sheikh Abdulla temporarily introduced Article 370 to the Indian Constitution. Since then, Article 370 remained an integral component of the law

* Assistant Professor of Law Khalsa College Amritsar, Punjab.
** Assistant Professor of Law, Amritsar Law College, Punjab.

prevailing in Jammu and Kashmir up until it was repealed in 2019. Article 370 of the Indian constitution was a specific clause that permitted Jammu and Kashmir to establish an independent constitution and restricted the Indian Union's authority over the territory of Jammu and Kashmir. Essentially, it provided the Jammu and Kashmir State Assembly with extensive autonomy. Save for military, diplomatic ties, communication, and finance, Jammu and Kashmir politicians wielded immense dominance over the state in the absence of the Indian federal government's looming authority. Politicians took advantage of Article 370's rights to create different laws and impose constraints on the citizens of Jammu and Kashmir. On August 5, 2019, with the repeal of Article 370 of the Constitution and the complete absorption of Jammu and Kashmir within India, each of these laws became ineffective. The repeal, however, proved not unlawful because Article 370 had been included as a "temporary measure" since its beginning. However, erroneous regulatory and political judgments have stymied its withdrawal throughout the years. The abrogation has alienated prominent political organizations in J&K, including the Public Democratic Parry, which campaigned on their calls for self-rule. J&K's political, ideological and societal route continues to sway on perilously delineated avenues that remain unexplored, yet there seem to be promising improvements towards growth, development and the establishment of a holistic democracy in the region, especially with the alteration of the state into a Union Territory, despite the different political narratives being created to sway public opinion.[1]

HISTORICAL AND POLITICAL BACKGROUND[2]

India has a long history involving questions of national unity, and incorporation of the states into a common national administrative system. One of the most significant examples of such challenges is the existence and operation of the state of Jammu and Kashmir (now Union Territories Jammu & Kashmir and Ladakh), which is closely interlinked with (former) Article 370 of the Indian Constitution, and akin to numerous political compromises that India has made since its independence, Article 370 contains a deep and intricate history from its inclusion in the

1. Aman Hingorani, Unravelling the Kashmir Knot 481(Sage Publication India Pvt Ltd, New Delhi, 2017).
2. Dr. Pawan Sharma(ed.), Article 370 A Monograph 35 (Oakbridge Publishing Pvt. Ltd, Gurugram, 2022).

Constitution to its abrogation. To understand why Article 370 was abrogated, it is essential to examine why it was first brought about.

SEEDS OF ARTICLE 370

Kashmir and its Accession to India After the declaration of India's sovereignty in 1947, Jammu and Kashmir's King Maharaja Hari Singh proclaimed separation from both resulting nations, India and Pakistan. Consequently, upon learning of this announcement, Pakistan initiated an unauthorized campaign to free the province of Hindu control in regions dominated by Muslims. When Maharaja Hari Singh couldn't manage to secure his reign, he turned to the Indian State for aid. The Indian government was prepared to help on the ground that Kashmir became a part of India. As a consequence, both parties ratified the Instrument of Accession in October 1947. This accession contract could not be modified outside of the state's agreement, and it additionally explicitly guaranteed the ability to correct any implementation of any eventual Indian Constitution in its jurisdiction. While Kashmir's accession to India was a welcome move, this became a matter of concern for nationalists, who were uncertain about the autonomy that this clause inevitably guaranteed to Jammu & Kashmir, and what it meant for the democratic integrity of the nation.

The reason for the inclusion of Article 370 was simple: India needed a bridge to connect Jammu and Kashmir to the rest of the country. While Jammu and Kashmir were in India, the autonomy that it had been granted at the time of the signing of the Instrument of Accession removed any influence that India could have had on its administration, as it did on other states. There are only two articles within the Indian Constitution that pertain to Jammu and Kashmir. Article 1 of the Constitution of India includes the state of Jammu and Kashmir on the official list of states. Article 370 which permits the Constitution to be enacted and implemented in the state, constitutes a passage. It was recently highlighted that India utilized Article 370 more than 45 times to broaden the provisions of the Indian Constitution to the state of Jammu and Kashmir. Through just one Presidential proclamation, India had the power to destroy the impact of the state's unique status under Article 370[3].

3. Dalrymple, The Anarchy: The Relentless Rise of the East India Company 79 (Bloomsbury Publishing House, 2019).

Therefore, Article 370 was a major clause in the Indian Constitution which provided the erstwhile state of Jammu and Kashmir unique protection. Hari Singh, at the time Maharaja of Kashmir, created a temporary administration in the territory in March 1948, with Sheikh Abdullah names its leader. Sheikh Abdullah and three other associates entered the Indian Constituent Assembly in July in 1949 and later secured Jammu and Kashmir's unique status. This culminated in the enactment of Article 370, which was adopted the following year. It granted Jammu and Kashmir a certain degree of independence, including permitting the territory to establish a constitution of its own, a flag, and restricted influence on the Indian government. While this was a worry for nationalists pushing for total democracy, this was a necessary move to ensure Kashmir's accession to India, which was of supreme priority at the time.

CHANGING DIMENSIONS OF INDIAN FEDERALISM: SOME PARADOXES AND CONUNDRUMS

Article 370 of the Constitution of India incorporated special arrangements for the governance of the State of Jammu and Kashmir. The President issued Constitutional Orders 272 and 273[4] during the subsistence of a Proclamation under Article 356(1)(b) in the State of Jammu and Kashmir. These orders have the effect of applying the entire Constitution of India to the State of Jammu and Kashmir and abrogating Article 370. Contemporaneously, Parliament enacted the Jammu and Kashmir Reorganisation Act 2019 which bifurcated the State into two Union territories. The decision was followed by an initiative to divide Jammu and Kashmir into two distinctly independent Union Territories: Jammu and Kashmir and Ladakh. Jammu and Kashmir's Union Territory would be given a legislative body, whereas Ladakh would not. The State government in Jammu and Kashmir was formed by an alliance of the Peoples' Democratic Party with the Bharatiya Janata Party in 2015.

The Chief Minister of the State, Ms Mehbooba Mufti, belonging to the Peoples' Democratic Party, resigned on 19 June 2018 after the Bharatiya Janata Party withdrew support. The next day,

4. "That the President of India has referred the Jammu and Kashmir Reorganisation Bill, 2019 to this House under the proviso to article 3 of the Constitution of India for its views as this House is vested with the powers of the State Legislature of Jammu and Kashmir, as per proclamation of the President of India dated 19 December 2018. This House resolves to express the view to accept the Jammu and Kashmir Reorganisation Bill 2019"

the Governor issued a Proclamation under Section 92 of the Constitution of Jammu and Kashmir, which entrusts power to the Governor to assume all the powers and functions of the Government of the State in the event of a failure of the constitutional machinery in the State. A Proclamation under Section 92 requires the concurrence of the President of India under clause (5). Under clause (3) of Section 92, the Proclamation ceases to exist after six months. The promulgation of the Governor's rule in the State was made with the concurrence of the President. On 21 November 2018, the Governor dissolved the Legislative Assembly of the State under Section 53(2) of the Constitution of Jammu and Kashmir. On 28 November 2018, the Governor submitted a report to the President recommending the invocation of Article 356 of the Constitution for six months since the issuance of the Proclamation under Section 92(3) was to end. On 19 December 2018, the President issued a Proclamation under Article 356 promulgating the President's rule in the State upon considering the report from the Governor of Jammu and Kashmir and other information. On 6 August 2019, under the recommendation of the Lok Sabha, the President of India issued Constitutional Order 273 under Article 370(3) of the Constitution as amended by Constitutional Order 272 by which Article 370 ceased to apply with effect from 6 August 2019. On 9 August 2019, the Union Ministry of Home Affairs issued a notification, S.O. 2889 (E), in exercise of the powers conferred by Section 2(a) of the Reorganisation Act bringing the provisions of the Act into force with effect from 31 October 2019 following Presidential assent. Under this notification, the State of Jammu and Kashmir stood bifurcated on 31 October 2019 into the Union Territory of Ladakh and the Union Territory of Jammu and Kashmir. President's rule was revoked.[5]

HOW THE GOVERNMENT BYPASSED THE AMENDMENT PROCESS

Article 370 of the Indian Constitution granted special autonomy to the State of Jammu and Kashmir. The process to amend or abrogate this article was complex, involving both legal and

5. Dr. Pawan Sharma(ed.), Article 370 A Monograph 91(Oakbridge Publishing Pvt. Ltd, Gurugram, 2022).
6. Article 368(1): This grants the Parliament the authority to amend the Constitution by way of addition, variation, or repeal of any provision. The procedure for such amendments is detailed in Article 368 and other relevant articles. Article 368(2): This states that the power to amend the Constitution under Article 368 does not extend to altering the federal structure or the powers of the States, as these changes would require a different procedure. The process of amendment involves various stages, including proposals by either house of Parliament, approval by a majority, and, in some cases, ratification by a majority of state legislatures. This ensures a balance between central and state powers and provides a flexible yet controlled method for constitutional changes.

political strategies. Article 370 provided Jammu and Kashmir with a special autonomous status, allowing the state to have its constitution and significant independence in legislative matters, while the Indian Parliament's powers were limited. This special status was meant to be a temporary provision but remained in place for decades. On August 5, 2019, the Indian government, led by the Bharatiya Janata Party (BJP) under Prime Minister Narendra Modi, used a combination of Presidential Orders and Parliamentary legislation to abrogate Article 370. The President of India issued the "Constitution (Application to Jammu and Kashmir) Order, 2019" under Article 370(1).[7] This order effectively abrogated the special status of Jammu and Kashmir by applying the Indian Constitution fully to the State of Jammu and Kashmir. On the same day, Parliament passed the "Jammu and Kashmir Reorganisation Act, 2019." This legislation bifurcated the state into two Union Territories—Jammu and Kashmir, and Ladakh—removing its special status and bringing it under direct central administration. The "Constitution (Application to Jammu and Kashmir) Order, 2019" used Article 367 to interpret Article 370. This Order included an amendment to the interpretation of Article 367,[8] effectively modifying how Article 370 should be understood and applied. This order was designed to override the special provisions for Jammu and Kashmir by applying the Indian Constitution fully to the State of Jammu and Kashmir. The Order clarified that for Article 370, the term "Constituent Assembly" would be understood to mean the "Legislative Assembly" of Jammu and Kashmir. This was crucial because Article 370(3) required the concurrence of the state's Constituent Assembly for any amendments to the Article, but since the Constituent Assembly of Jammu and Kashmir had ceased to exist, this interpretation allowed for the changes to be made with the legislative assembly's approval. By this interpretation, the government was able to bypass the need for a formal amendment to Article 370 by using Article 367 to redefine the terms related to the Article's application and modification.

7. Article 370(1) provided a framework for the special status of Jammu and Kashmir, defining how the Indian Constitution applied to the state and limiting the central government's legislative powers. The changes to Article 370 in August 2019 were significant in reshaping Jammu and Kashmir's relationship with the Indian Union.
8. Article 367 of the Indian Constitution deals with the interpretation of the Constitution, specifically concerning the definitions and meanings of certain terms and provisions. It provides guidelines for how certain provisions should be interpreted, particularly in the context of various Articles and their application. The clause mentioning the "Constituent Assembly" and "State" is particularly relevant to Jammu and Kashmir. In the context of Jammu and Kashmir, Article 367 has been used to interpret how Article 370 should be applied. For instance, the term "Constituent Assembly" was relevant in discussions about the abrogation of Article 370, which granted special autonomy to Jammu and Kashmir

CHALLENGING THE CONSTITUTIONAL VALIDITY OF THE ABROGATION OF ARTICLE 370

The abrogation of Article 370, which granted special autonomy to Jammu and Kashmir, has been a topic of intense legal and constitutional scrutiny since the Indian government's decision on August 5, 2019. The central issue revolves around whether this move was constitutionally valid or if it undermined the foundational principles of the Indian Constitution. Article 370 had been a temporary provision granting the erstwhile state of Jammu and Kashmir significant autonomy while ensuring it remained an integral part of India. The abrogation involved the revocation of this special status and the bifurcation of the state into two Union Territories: Jammu & Kashmir and Ladakh. This move was challenged on several grounds, raising fundamental constitutional questions. The Indian government argued that Article 370 was a "temporary provision" and that its abrogation was permissible under the Constitution's provisions for amendments and modifications. They contended that the President had the authority to modify or abrogate the Article with the concurrence of the State Government. Since the original provisions under Article 370(3) required the concurrence of the State Government for any changes, the government argued that this requirement had been fulfilled by the President's Order, following the dissolution of the state legislature and the imposition of direct rule. The BJP had a strong majority in both houses of Parliament, which facilitated the swift passage of the legislation required to reorganize the state and implement the abrogation of Article 370. This political strength allowed the government to push through the changes without requiring a formal constitutional amendment, which would have needed a more complex and potentially contentious process.

FUNDAMENTAL ISSUES RAISED IN THE PETITION[9]

Petitions[10] challenging the abrogation of Article 370 primarily question the legality and procedure of its repeal. The key issues raised include:

---

9. Re: Abrogation of Article 370, Writ Petition (Civil) No. 73 of 2019.
10. Multiple petitions were filed by various parties, including politicians, activists, and organizations. Major petitions include Ghulam Nabi Azad vs. Union of India, Smt. Saima Haseeb vs. Union of India Dr. K. S. Bhatia vs. Union of India.

- **Procedural Legitimacy:** Petitioners argue that the procedure followed for abrogating Article 370 did not adhere to the constitutional requirements. According to Article 370(3), the President of India can abrogate the provision only upon the recommendation of the Constituent Assembly of Jammu and Kashmir. Since the Constituent Assembly had dissolved in 1957, petitioners claim that the President's action was unconstitutional as it did not have the required legislative backing.
- **Federal Structure:** The abrogation is challenged because it disrupts the federal structure of the Indian Constitution. Critics argue that the move undermines the autonomy granted to states and the principle of federalism by unilaterally changing the status of a state without its legislative consent.
- **Legal and Constitutional Precedents:** The petitioners invoke previous legal precedents to argue that the abrogation was not merely an administrative decision but a substantive change requiring a rigorous legal process and broader consensus.

STATE'S STAND IN THE PETITION

In response to the petitions, the Indian government has defended the abrogation on several grounds:

- **Constitutional Authority:** The government contends that the President's action was within constitutional bounds, arguing that Article 370 is a temporary provision and can be abrogated based on the President's recommendation. They assert that since the special status was meant to be temporary, its abrogation is legally permissible.
- **Legislative and Executive Powers:** The government argues that the power to abrogate Article 370 rests with the central government under the Constitution's broader framework. They emphasize that the Parliament of India holds the authority to alter the boundaries of states and Union Territories as part of its legislative powers.

- **National Interest and Integration:** The government justifies the abrogation as a necessary step for national integration and development. They argue that Jammu and Kashmir's special status was a hindrance to full integration and economic progress and that the move aligns with national interests and constitutional goals.

ANURADHA BHASIN[11] CASE AND ITS IMPACT

The Anuradha Bhasin v. Union of India case, decided by the Supreme Court of India, played a crucial role in addressing the ramifications of the abrogation. Anuradha Bhasin, a journalist, challenged the restrictions on communication and media in Jammu and Kashmir following the abrogation, highlighting the severe impact on fundamental rights.

The Supreme Court's verdict in this case underscored the importance of upholding constitutional rights even during periods of administrative change. The Court emphasized that while the abrogation of Article 370 itself was a legislative matter, the implementation of such changes must comply with constitutional guarantees, including the protection of fundamental rights. The verdict reinforced that while the state's special status could be altered, the fundamental rights of its residents must be safeguarded.

POLITICAL VACUUM ENSUING THE ABROGATION

The abrogation of Article 370 created a significant political vacuum in Jammu and Kashmir. This vacuum had several consequences:[12]

- **Governance and Administration:** The transition from a state with special autonomy to Union Territories led to administrative challenges and governance issues. The reorganization disrupted local governance structures and necessitated the establishment of new administrative frameworks.
- **Political Representation:** The abrogation led to the dissolution of the state legislature and the suspension of local political processes. This lack of political representation created a vacuum that impacted the democratic participation of

11. Anuradha Bhasin v. Union of India, AIR 2020 SUPREME COURT 1308, (2020).
12. Mohit Bhattacharya, "The Mind of the Founding Fathers" in Federalism in India: Origins and Development 157 Nirmal Mukhrajhi & Balveer Arora (eds.), (Vikas Publishing House Pvt. Ltd, Delhi, 1992).

residents and led to political uncertainty.

- **Socio-Economic Impact:** The political vacuum affected socio-economic development, as the region faced challenges in implementing policies and ensuring effective governance. Economic activities and development projects experienced delays due to the transitional phase.

Implementation of the Public Safety Act 1978 in the Valley

The deployment of the Public Safety Act (PSA) in Jammu and Kashmir, particularly after the abrogation of Article 370 in August 2019, has been a focal point of significant controversy and legal debate. The Public Safety Act, a preventive detention law enacted in 1978, empowers the authorities to detain individuals without trial for up to two years if their actions are deemed to threaten public safety. Its use in Jammu and Kashmir has been scrutinized extensively due to the broad and sometimes ambiguous criteria for detention, leading to concerns about its impact on fundamental rights.

LOCKDOWN IN THE VALLEY IMPINGING ON FUNDAMENTAL RIGHTS

Following the abrogation of Article 370, the Indian government imposed a severe lockdown in Jammu and Kashmir. This lockdown involved a communication blackout, restrictions on movement, and the suspension of internet services. The rationale provided by the authorities was to maintain law and order and prevent unrest. However, the lockdown has been criticized for its profound impact on fundamental rights, particularly the right to freedom of expression, movement, and access to information.[13]

The communication blockade severely curtailed the ability of residents to access news, contact legal representatives, and engage in ordinary social and economic activities. This suspension of services infringed on the right to information and effectively silenced dissenting voices. The lockdown also led to widespread disruptions in daily life, affecting not just political activists but the general populace, including students, businesses, and health services.

13. "UN Concern on Kashmir Lockdown, Other Curbs", The Asian Age, September 10, 2019, pages 1 and 4.

DETENTION OF POLITICAL LEADERS UNDER THE PUBLIC SAFETY ACT

The Public Safety Act has been used extensively to detain political leaders and activists in Jammu and Kashmir. High-profile political figures, including former Chief Ministers and leaders of various political parties, were detained under this act as part of the government's strategy to control the situation in the region. Notable figures such as Omar Abdullah, Mehbooba Mufti, and others faced prolonged detention under the Public Safety Act, raising significant concerns about the legality and justifiability of these measures.

Detaining political leaders under the Public Safety Act has been controversial for several reasons:[14]

- **Legal Basis:** Critics argue that the use of the Public Safety Act against political leaders, who are often vocal about their political views, can be seen as a means of stifling political dissent rather than addressing genuine threats to public safety. The act's broad provisions allow for the detention of individuals without formal charges or trials, raising questions about due process and the rule of law.
- **Human Rights Concerns:** The detention of political leaders under the Public Safety Act has been perceived as a violation of their fundamental rights, including the right to a fair trial and the right to personal liberty. Such detentions without proper judicial oversight or specific allegations of wrongdoing can be seen as a breach of human rights standards.

  Impact on Political Climate: The detention of prominent political figures also affects the political climate in Jammu and Kashmir. It creates an atmosphere of fear and uncertainty, discourages political engagement, and undermines democratic processes.

DETENTIONS UNDER PUBLIC SAFETY ACT VIS-À-VIS HABEAS CORPUS PETITIONS

The widespread use of the Public Safety Act led to numerous habeas corpus petitions filed in the courts challenging the legality of these detentions. Habeas corpus is a legal remedy that allows

14. Sharad Mohan, Kashmir the Bermunda Triangle of India 16-62 (Manas Publications, New Delhi 2019).

individuals to challenge unlawful detention and seek release from imprisonment. These petitions argue that the detentions under the PSA violate constitutional rights and the principles of natural justice. Petitioners argue that the detentions under the Public Safety Act often do not follow proper legal procedures.[15] The act allows for detentions without formal charges or trials, which can lead to arbitrary or unjust imprisonment. Petitioners challenge whether the authorities provided sufficient grounds for detention and whether the detainees were given a fair opportunity to contest their detention.[16] The Supreme Court of India and various High Courts have reviewed the legality of detentions under the Public Safety Act. Courts have examined whether the detentions are consistent with constitutional guarantees and international human rights standards. Some rulings have emphasized the need for adherence to procedural safeguards and the protection of fundamental rights.

GEO-POLITICAL BACKGROUND

Understanding the geo-political background involving India, Pakistan, and China requires examining the complex and evolving relationships between these countries, as well as key diplomatic events and agreements that have shaped their interactions.

- **India-Pakistan Relations-** India and Pakistan have a fraught relationship marked by periods of intense conflict and attempts at reconciliation. The territorial conflict over Kashmir has been a central issue since both countries gained independence in 1947. This dispute has led to several wars and ongoing skirmishes, affecting bilateral relations profoundly. India accuses Pakistan of supporting terrorist activities in Kashmir and other parts of India, a charge Pakistan denies. This issue has been a major obstacle to improving relations. Despite tensions, there have been efforts to improve relations through dialogue and peace talks. Notable examples include the Agra Summit in 2001 and the Lahore Summit in 1999, although many such initiatives have faltered.

15. Asian Age Report, September 10, 2019.
16. Moolchand Sharma, "Transforming of Cooperative Federalism- a Journey from the Constituent Assembly to Epidemic of Coronavirus" Vol.XLIII-XLVI, The Constitution of India Celeberating and Calibrating 70 Years: Compendium of Articles 57(2019-2020).

- **India-China Relations**

India and China share a complex relationship that includes both cooperation and competition. Key aspects include:

- **Border Disputes:** The unresolved boundary disputes, including the conflict over Arunachal Pradesh and the Aksai Chin region, have led to periodic tensions. The 1962 Sino-Indian War and recent skirmishes in Ladakh are notable examples.
- **Economic Engagement:** Despite political tensions, India and China have robust economic interactions. China is a major trading partner for India, and both countries have cooperated on various economic initiatives.
- **Strategic Rivalry:** China's growing influence in South Asia, including its support for Pakistan and its Belt and Road Initiative (BRI), is viewed with concern by India. Similarly, India's strategic partnerships with countries such as the United States and Japan are closely watched by China.

- **India-Pakistan-China Relations**

The triangular relationship between these three countries is particularly significant:

- **Strategic Alliances:** Pakistan's close ties with China, including military and economic support, have strategic implications for India. China's investments in Pakistan and the development of infrastructure such as the China-Pakistan Economic Corridor (CPEC) have been viewed with apprehension by India.
- **Regional Influence:** India views China's growing influence in South Asia, including its involvement in Pakistan, as a direct challenge to its regional dominance. Conversely, China sees India's alignment with the United States and its strategic partnerships as a counterbalance to its influence.

MAMALLAPURAM SUMMIT

The Mamallapuram Summit,[17] held in October 2019, was a significant diplomatic event between India and China. Key points include: Indian Prime Minister Narendra Modi and Chinese

17. Dr. Pawan Sharma(ed.), Article 370 A Monograph 115 (Oakbridge Publishing Pvt. Ltd, Gurugram, 2022). "In the US, India's Perception Battle", The Editorial, Hindustan Times, October 24, 2019 at p. 20.

President Xi Jinping met in Mamallapuram, Tamil Nadu, for an informal summit. This meeting was part of a series of such informal summits aimed at improving bilateral relations and addressing key issues. The summit focused on enhancing bilateral cooperation, managing disputes, and addressing global challenges. Discussions included trade, regional security, and strategic interests. While the summit was characterized by a friendly and cooperative atmosphere, it did not result in significant breakthroughs on contentious issues such as the border disputes. However, it set the stage for continued dialogue and engagement.

GLOBAL RESPONSE TO THE ABROGATION

The abrogation of Article 370 by India in August 2019, which removed the special status of Jammu and Kashmir, has had wide-ranging repercussions on the international stage. The global response has been a mix of concern, critique, and diplomatic maneuvering. The following points provide a comprehensive overview of the varied international reactions and their implications for India. The international community's response to the abrogation of Article 370 has been multifaceted. While there has been significant criticism, particularly concerning human rights and democratic values, India needs to navigate this landscape without excessive alarm. The global response includes:

- **Human Rights Concerns:** Many countries and international organizations have expressed concerns over the humanitarian situation in Kashmir, emphasizing the need for respect for human rights and democratic principles. This includes calls for restoring normalcy, lifting restrictions, and engaging in dialogue with stakeholders.
- **Diplomatic Relations:** While criticism has been voiced, it has not led to substantial diplomatic isolation or sanctions against India. Most countries have approached the situation with a degree of caution, balancing their diplomatic relations with India against their concern for human rights.
- **Pakistan's Reaction on Kashmir-** Pakistan's reaction to the abrogation has been one of strong condemnation. Pakistan has strongly condemned India's

actions, describing them as a violation of international law and United Nations resolutions on Kashmir. It has sought to internationalize the issue, presenting it as a humanitarian crisis and a breach of the United Nations Security Council's resolutions. Pakistan has actively engaged with international organizations and forums, including the United Nations, to highlight its position and garner support. It has called for global intervention and international monitoring of the situation in Kashmir. The abrogation has heightened cross-border tensions, with increased exchanges of fire along the Line of Control (LoC) and heightened diplomatic strains between the two countries.

- **US View on Kashmir**

The United States has been cautious in its response, reflecting its strategic relationship with India while addressing humanitarian concerns. The US government has reiterated its support for India's sovereignty and territorial integrity but has also expressed concern over the humanitarian situation in Kashmir. It has urged India to restore normalcy and respect human rights. While the US has addressed these issues, it has maintained a strategic partnership with India, focusing on broader geopolitical and economic interests.[18]

INDIA'S RESPONSE

India has consistently maintained that the abrogation of Article 370 is an internal matter and a sovereign decision aimed at integrating Jammu and Kashmir more fully into the Indian Union. It argues that this move is legally and constitutionally valid and aligns with its policy of ensuring uniform application of laws across the country. India has engaged diplomatically to counter international criticism, emphasizing its commitment to democratic values and development in the region.[19] It has invited international delegations to visit Jammu and Kashmir to witness the situation on the ground firsthand. India has highlighted the need for maintaining security and stability in the region, framing its actions as necessary for countering terrorism and ensuring peace.[20]

---

18. Suhasini Haider, "U.S. Congress Needs to Know What is Going on in Kashmir: Ex-Envoy Roemer" in The Hindu, October 22, 2019.
19. Barkha Dutt, "How the BJP went against its India-First Narrative" in the Hindustan Times, November 5, 2019 at page 12.
20. United Nation Office of the High Commissioner for Human Rights, OHCHR Intervention before the European Court of Human Rights in the case of Hirsi et al. v. Italy, 5 May 2011, Application No. 27765/09.

POLITICAL RAMIFICATIONS OF THE ABROGATION OF THE RULING PARTY

For the ruling Bharatiya Janata Party (BJP) in India, the abrogation of Article 370 has had several political ramifications. The move has been largely popular among the BJP's base and nationalist supporters, who view it as a significant achievement in fulfilling promises related to national integration and sovereignty. On the other hand, opposition parties have criticized the abrogation, arguing that it was executed without sufficient legislative or public consultation and that it exacerbates regional tensions. This has led to a polarized domestic political climate. The abrogation has been used by the BJP to consolidate its position in national and state elections, presenting it as a key policy achievement.

CROSS-BORDER TERRORISM IN THE VALLEY

The abrogation has had implications for cross-border terrorism.

Increased Militancy: The security situation in Jammu and Kashmir has been volatile, with increased militant activities and cross-border infiltration. The abrogation has been cited as a factor in the heightened insurgency and violence in the region.

- **Counter-Terrorism Measures:** India has intensified its counter-terrorism operations, both within the Valley and along the Line of Control. The security measures have included increased military presence and operations against militant groups.

INDIA & GLOBAL TRADE RELATIONS

India's global trade relations have been influenced by its domestic and foreign policies:

Trade Partnerships: India has continued to pursue economic partnerships and trade agreements with various countries despite the geopolitical tensions. Its trade relationships are seen as vital for economic growth and development.

Impact of Geopolitical Tensions: The geopolitical tensions and international criticisms related to Kashmir have not significantly disrupted India's major trade partnerships, but they have added a layer of complexity to diplomatic and economic relations with some countries.

INDIA'S EFFORTS TOWARDS RESTORING GLOBAL CONFIDENCE IN ITS DEMOCRATIC & CONSTITUTIONAL VALUES

India has made concerted efforts to reaffirm its commitment to democratic and constitutional values:

- **Engagement with International Bodies:** India has engaged with international bodies to demonstrate its adherence to democratic principles and human rights. This includes participating in dialogues, addressing concerns raised by international organizations, and emphasizing its commitment to upholding the rule of law.
- **Reforms and Transparency:** India has also highlighted its efforts to address humanitarian concerns through reforms and increased transparency in governance. This includes initiatives aimed at improving conditions in Jammu and Kashmir and ensuring that democratic processes are followed.

VISIT OF MEMBER OF THE EUROPEAN PARLIAMENT

The visit of Members of the European Parliament (MEPs) to Jammu and Kashmir was a significant diplomatic event. The visit aimed to provide a first-hand account of the situation in the region and assess the impact of the abrogation of Article 370. It was intended to offer a balanced perspective and counter some of the international criticism. The visit was met with mixed reactions. While it allowed for a controlled presentation of the situation by Indian authorities, critics argued that it did not fully address the concerns about human rights and democratic freedoms. The visit was also criticized by some international observers who felt that it was not fully representative of the broader issues at play. The success of the visit is debated, with some viewing it as a diplomatic victory for India in managing international perceptions, while others argue it did not resolve underlying issues or fully address the concerns of human rights advocates.

INTERNATIONALIZATION OF THE KASHMIR ISSUE

The internationalization of the Kashmir issue, particularly following the abrogation of Article 370 in India, has garnered significant global attention. The United Nations Human Rights

Council (UNHRC) has played a key role in shaping the international discourse on the abrogation of Article 370. The United Nations Human Rights Council (UNHRC) has expressed concerns regarding the abrogation of Article 370, particularly regarding the impact on the human rights and freedoms of the residents of Jammu and Kashmir. The United Nations Human Rights Council (UNHRC) has called for the restoration of communication lines and greater access to international observers to assess the human rights situation in the region. The Council's stance reflects broader international apprehensions about the implications of the abrogation on regional stability and the rights of individuals. Various United Nations bodies and member states have emphasized the need for dialogue between India and Pakistan and adherence to international human rights standards. The United Nations Human Rights Council (UNHRC) has urged India to address allegations of human rights violations and provide greater transparency regarding the situation in Kashmir. However, India maintains that the abrogation is an internal matter and that it is committed to ensuring peace and stability in the region.

CONCLUSION

Jammu and Kashmir's position has been frequently contested, both locally and abroad. A trio of countries claims the territory in question: India, Pakistan, and China, leading to a perpetual sequence of disruptions and territorial disputes. In India, the valley of Kashmir is split apart by an administrative struggle between state and federal administrations. Each of these variables has played a role in the valley's ever-growing disagreements and instability. India has established its dominance through the abrogation of Article 370 with a Presidential Order while the state was under the President's Rule, effectively integrating the state of Jammu and Kashmir into its national territory in its full sense. Ultimately, the choice to repeal Article 370 centered on the Indian government's assessment that the law impeded Jammu and Kashmir's unification with the rest of the nation of India and inhibited the region's growth. The repeal's supporters said that the measure would contribute to advancement in society, equal privileges and possibilities, and better administration in the region as a whole. They also claimed that it would make it easier to implement national legislation and programs that had been otherwise not able to be entirely effective in Jammu and Kashmir. Those who disagree with the judgment expressed worry regarding the move's influence on Jammu and Kashmir's exclusive status and character, in addition to its possible consequences for the region's sovereignty and population makeup. While it seemed impossible to be completely rid of the exclusivity surrounding Jammu and Kashmir, the government at the Centre made use of the emergency provisions given under Article 356 of the Constitution about the President's Rule in a state to apply Article 370 for its abrogation,

REGULATING THE UNSEEN: A COMPREHENSIVE ANALYSIS OF ANTI-MONEY LAUNDERING LAWS IN INDIA FOR CRYPTOCURRENCY TRANSACTIONS

***Ms Pooja Bhargawa**

****Mr Abhishek Tripathi**

INTRODUCTION

Cryptocurrencies, led by the pioneering Bitcoin, have disrupted traditional financial systems by offering decentralized and borderless transactions. The blockchain technology underpinning these digital assets ensures transparency and security. Bitcoin and other cryptocurrencies have transformed the financial sector in the last ten years by introducing a secure payment that is unrelated to any authority and enabling secret anonymous transactions[1].

Cryptocurrencies can be defined as a type of transaction from one person to another without any facilitator in between like banks or any other financial institution. The proliferation of the black market can be attributed to the anonymity provided by cryptocurrencies, which enable users to conduct unlawful financial transactions that are challenging, if not impossible, to trace[2].

It is said that- "for every level there's a new devil" and Due to the fact that technology has brought civilization to a all different level, it appears that financial crimes that take place through digital media is the new devil and is the new problem to be dealt with.

It is not accurate to say that cybercrime is only a digital representation of traditional criminal activity; rather, it possesses new qualities that bring up new difficulties. A number of cybercrimes, on the other hand, are able to operate purely within the virtual environment; yet, there are also cybercrimes that embed themselves between the cracks of previously existing crimes. Some criminal activities that take place on land make use of technical advancements in order to improve their capabilities. An instance of this is the practice of money laundering, which uses virtual currencies to increase its chances of success while simultaneously reducing

---

* Research Scholar Faculty of Law, University of Delhi.

** PhD scholar, Faculty of Law, University of Delhi

1. 'Technology Behind Crypto Can Also Improve Payments, providing a Public Good' (IMF, 23 February 2023) <https://www.imf.org/en/Blogs/Articles/2023/02/23/technology-behind-crypto-can-also-improve-payments-providing-a-public-good> accessed 22 February 2024.
2. Chad Albrecht, Steven Hawkins and Victor Manuel Morales Rocha, "The use of cryptocurrencies in the money laundering process," 22 Journal of Money Laundering Control 210–6 (2019).

the probability of detection.[3]

As the adoption of cryptocurrencies grows globally, so do the challenges related to illicit financial activities, particularly money laundering but India is taking a positive move towards it by including cryptocurrency under its "Prevention of Money laundering Act" by notification dated , March , 2023 . However this paper will delve into discussing into how is money laundering regulated by FATF along with the move taken by India and probable challenges that could be faced.

MONEY LAUNDERING IN THE CRYPTO WORLD

Money laundering is one of the age old financial crime that exists around the world and is a cause for concern for communities at large. As the businesses are continuously evolving itself and the modus operandi gets updated , this criminal phenomena is constantly changing with time.

When it comes to the illegal enterprise, finding a cash-out strategy that is satisfactory is not an easy task. If crime proceeds cannot be laundered, the illicit company would be unproductive unless it is solely for personal expenses[4].

Bitcoin possesses various characteristics that appeal to scammers.

First, Bitcoin is considered "pseudo-anonymous" since very less private details of the person can be extracted from the system. Example- When users public keys are published on the blockchain, transactions to and from any Bitcoin address can be tracked back to the address of origin. Additionally, the quantity and timing of the transaction could provide significant details regarding distinctive habits or patterns of behaviour specific to the individuals or groups[5].

---

3. Sagwadi Mabunda, "Cryptocurrency: The New Face of Cyber Money Laundering" 2018 International Conference on Advances in Big Data, Computing and Data Communication Systems (icABCD) 1–6 (presented at the 2018 International Conference on Advances in Big Data, Computing and Data Communication Systems (icABCD), IEEE, Durban, South Africa, 2018).
4. Wegberg Rolf van, Jan-Jaap Oerlemans and Deventer Oskar van, "Bitcoin money laundering: mixed results? An explorative study on money laundering of cybercrime proceeds using bitcoin," 25 Journal of Financial Crime 419–35 (2018).
5. Emily Grace Fletcher, "COUNTERING MONEY LAUNDERING AND TERRORIST FINANCING: A CASE FOR BITCOIN REGULATION."

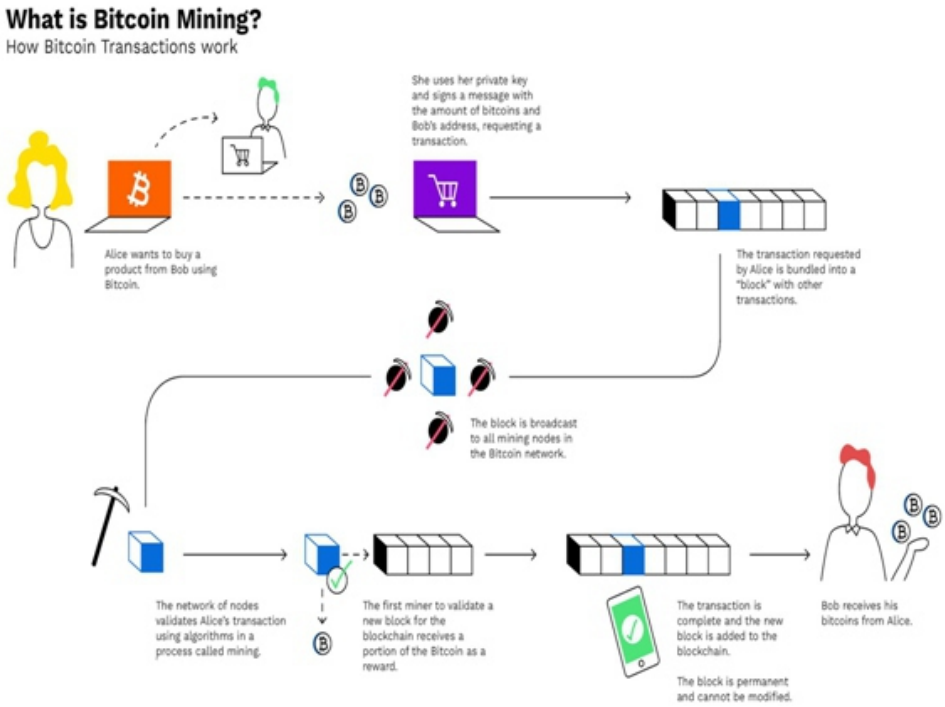


Figure 2: Illustration of the Bitcoin Mining and Verification Process

SOURCE: Bitpanda, "What is 'Bitcoin mining' and how does mining work?" available at: https://www.bitpanda.com/academy/en/lessons/what-is-bitcoin-mining-and-how-does-mining-work (last visited February 21, 2024).

A digital wallet can be associated with the distinct "Internet Protocol address" of the device being used by the user. However, individuals are rarely obligated to reveal their actual names, which might be a significant motivation for prospective criminals.

Secondly, the peer-to-peer (P2P) nature of transfers can facilitate the funding of terrorist organizations, as Bitcoin transactions do not have to go through "the regulatory controls that third-party institutions… are legally bound to perform"[6].

Thirdly, and related, Bitcoin's appeal lies in its ability to facilitate transactions with worldwide

6. *Id* at 5.

accessibility and speed . This is because transactions are not regulated and also because of the fundamental characteristics of the technology being used.

Transactions can be carried out rapidly and across several countries, which can benefit terrorist organizations seeking to swiftly transfer illegal funds to and from various locations worldwide. It shortens the timeframes for law enforcement organizations to identify and prevent questionable payments.

Fourth, Cryptocurrency has low cost of use and is relatively easy which is why it becomes attractive to use. Also, Utilizing Bitcoin often demands no technical expertise and just necessitates devices capable of Internet connectivity. Sending cryptocurrencies can be as simple and straightforward as writing an email.

The irreversibility of payments could be appealing to terrorist groups. No extra authentication is required to complete a payment, allowing transfers to be performed faster. Furthermore, once the money is transferred, it can't be retracted, a crucial factor for terrorist organizations heavily reliant on consistent financial support.[7]

UNCOVERING THE METHODS USED BY CRIMINALS

Recognizing the methodologies employed by criminals is essential for effectively countering money laundering in crypto world. By understanding these approaches, law enforcement authorities and regulatory organizations may formulate tactics and tools to combat laundering operations and safeguard the integrity of the cryptocurrency sector.

- **Cryptocurrency Tumblers and Mixing Services**

Cryptocurrency tumblers and money laundering services, are important in many of the ways and techniques that are being used by the launderers in effectively implementing their plan.

These type of techniques are useful for the criminals to hide the actual origin of the funds by way of dividing them in very small fragments of amount and then all of them are added together after being passed through a series of transactions. At last, this process ends in a set of funds whose origin is hard to be traced and impossible for those enforcing law to get and prosecute those who

7. Emily Grace Fletcher, “countering Money Laundering And Terrorist Financing: A Case For Bitcoin Regulation.”

are involved in such criminal activities[8].

Peer-to-Peer Networks and OTC Brokers

Offenders can further conceal their cryptocurrency gains using peer-to-peer networks and over-the-counter brokers.[9] Such platforms let users to engage in cryptocurrency trading without adequate identification, creating an atmosphere suitable to illegal activity including a degree of anonymity. Criminals use these platforms in such a way that not a trace of laundering is left for them to get prosecuted by enforcement agencies.

Use of Decentralized Finance (DeFi) Platforms

A wide variety of unique services and innovative financial products are being offered by these Decentralized Finance (DeFi) platforms which is why they have become a fascinating new front in the cryptocurrency market. On the other hand, criminals looking to hide funds have found the DeFi sector appealing because of the absence of legislation and control. [10] The decentralized nature and anonymity of such networks allow criminals to launder money via intricate webs of payments that are impossible for authorities to track.

Thus, the increasing sophistication of money laundering techniques in the cryptocurrency space presents significant challenges for law enforcement and regulatory bodies. Criminals exploit various platforms and services, such as tumblers, peer-to-peer networks, and decentralized finance (DeFi) platforms, to obscure the origins of illicit funds and evade detection.[11] As these technologies evolve, so must the strategies used to combat them. A concerted effort, involving enhanced regulation, improved tracking methods, and international cooperation, is essential to preserve the integrity of the cryptocurrency ecosystem and ensure that it is not misused for illicit purposes.

- **Money Laundering Watchdog**

---

8. "Understanding Crypto Money Laundering Methods: The Cryptocurrency Crime," 2024 *available* at: https://financialcrimeacademy.org/cryptocurrency-money-laundering-methods/ (last visited September 23, 2024).
9. "Money Laundering via Cryptocurrencies: All You Need to Know,"*available* at: https://www.tookitaki.com/blog/moneylaundering-via-cryptocurrencies (last visited September 23, 2024).
10. "Combatting Illicit Activity .pdf,."
11.. David Grau, "What Law Enforcement Needs to Know About Crypto Money Laundering" Cognyte, 2023 *available* at: https://www.cognyte.com/blog/anti-money-laundering-cryptocurrency/ (last visited September 23, 2024).

The "Financial Action Task Force" ("FATF") is a multinational organization that keeps a check on money laundering and funding for terrorism on a worldwide basis. The FATF establishes worldwide guidelines to deter the improper use of virtual assets, which are subsequently incorporated into national legislation in various ways[12].

In 2019, the "FATF" made changes to "Recommendation 15", requiring "Virtual Asset Service Providers" ("VASPs") to be monitored similarly to financial services providers[13].

"The Recommendation includes registration or licensing for VASPs at least in the jurisdiction where they are established, and compliance with AML regulations, such as Customer Due Diligence, KYC, transaction monitoring, sanctions screening, and other requirements.[14]"

Thus, there are no universal regulatory bodies overseeing "VASPs" in terms of certification or license. The "FATF" considers a company to be a "VASP" if it offers these types of services[15] :

- Transactions involving virtual assets and fiat currencies
- Transaction involving multiple types of virtual assets
- Transferring of digital assets
- The management and/or safeguarding of virtual assets or instruments that enable control of virtual assets
- Engagement in and delivery of financial assistance associated with the offering and/or selling of a virtual asset by an issuer.

Additionally, jurisdictions may have varying notions of "VASP" due to the fact that FATF definitions and suggestions are not mandatory. Consequently, individual jurisdictions establish their own regulations and definitions pertaining to "VASP".

"Financial institutions" and "Virtual Asset Service Providers" ("VASPs") involved in crypto transactions are now obligated to adhere to the Travel Rule, as per the revised FATF Guidelines. This requires the collection and exchange of the personal information of both senders an and

---

12. "AML Cryptocurrency Regulations Around the World | The Sumsuber," Sumsub *available* at: https://sumsub.com/blog/aml-cryptocurrency-regulations-around-the-world/ (last visited February 20, 2024).
13. "Updated Guidance for a Risk-Based Approach to Virtual Assets and Virtual Asset Service Providers," *available* at: https://www.fatf-gafi.org/en/publications/fatfrecommendations/documents/guidance-rba-virtual-assets-2021.html (last visited February 18, 2024).
14. *Ibid.*
15. "AML Cryptocurrency Regulations Around the World | The Sumsuber," Sumsub *available* at: https://sumsub.com/blog/aml-cryptocurrency-regulations-around-the-world/ (last visited February 20, 2024).

beneficiaries. The FATF has put forth a suggested benchmark of 1000 USD/€ for the transmission of virtual assets.

Conversely, when the value of the transaction falls below the threshold, "VASPs" may be exempted from more rigorous requirements, such as the transmission of less details. Nevertheless, it is worth noting that individual nations have the option to set their own thresholds or completely eschew them. As it is stated in "Recommendation 16", which is commonly known as the Travel Rule[16].

Therefore, the FATF's recommendations play a critical role in shaping the global framework for combating money laundering and terrorist financing within the realm of virtual assets. By extending regulatory oversight to "Virtual Asset Service Providers" (VASPs), the "FATF" has reinforced the importance of compliance with "Anti-Money Laundering" (AML) measures, including KYC, transaction monitoring, and adherence to the Travel Rule. However, the lack of universal regulatory bodies and the flexibility given to individual jurisdictions in defining VASPs and setting thresholds pose challenges to the uniformity and effectiveness of these guidelines. As the virtual asset ecosystem continues to evolve, so too must the regulatory measures that seek to safeguard its integrity on a global scale.

CRYPTOCURRENCY AND MONEY LAUNDERING LAWS IN INDIA

The "Prevention of Money Laundering Act, 2002" ("PMLA") in India has undergone substantial revisions to incorporate provisions pertaining to the oversight of digital assets and cryptocurrencies. By means of a "notification dated March 07, 2023" (the "Notification"), the Central Government has, in accordance with its authority under section 2(1)(sa)(vi) of the "PMLA", incorporated activities pertaining to "virtual digital assets" (VDA), such as cryptocurrencies and NFTs, into the regulatory framework of the "PMLA"[17].

Financial activities related to VDAs, such as exchanging fiat currency for VDAs, exchanging

16. "Financial Action Task Force (FATF) Travel Rule - Sanction Scanner,"*available* at: https://sanctionscanner.com/blog/financial-action-task-force-fatf-travel-rule-140 (last visited February 20, 2024).
17. India Briefing, "Cryptocurrencies in India to be Subject to AML Compliance" India Briefing News, 2023 *available* at: https://www.india-briefing.com/news/cryptocurrencies-in-india-to-be-subject-to-anti-money-laundering-aml-compliance-27354.html/ (last visited February 20, 2024).

different types of VDAs, storing or managing VDAs, providing tools for VDA control, and participating in these services, are all regulated by the PMLA because of the Notification.

With the inclusion of cryptocurrency transactions under the "Prevention of Money Laundering Act" ("PMLA"), the Indian government can now control and monitor them. This means that any cryptocurrency exchange suspicious to be part of the "proceeds of crime" can be investigated under the PMLA.

Individuals who are connected in any way to the "proceeds of crime," whether by means of deception, being in possession, or use of said proceeds, are deemed culpable of laundering the funds under the PMLA. Intentionally broad but simple, the PMLA defines "money laundering" as "any process or activity involving the concealment of illicitly obtained funds under the guise of untainted property."[18]

According to Section 3 of the PMLA, "an individual is guilty of money laundering if he or she knowingly assists, directly or indirectly attempts to indulge, is a party to, or is currently involved in any process or activity associated with the proceeds of a crime, including its concealment, possession, acquisition, or use, and asserts that the funds are untainted property".

Thus, the recent inclusion of "virtual digital assets" ("VDAs"), such as cryptocurrencies and NFTs, under the purview of the "Prevention of Money Laundering Act" ("PMLA") marks a significant step by the Indian government in regulating the digital financial ecosystem. By bringing VDAs within the legal framework of the "PMLA", the government has enhanced its ability to monitor, control, and investigate suspicious transactions associated with the proceeds of crime. This move emphasizes the importance of transparency and accountability in digital asset exchanges, further aligning cryptocurrency transactions with traditional financial systems. The broad definition of money laundering under the "PMLA" ensures that individuals involved in any activity linked to illicit funds can be held accountable, helping to curb financial crimes in the growing VDA space.

POTENTIAL IMPACT OF THE ANTI-MONEY LAUNDERING LAW

18. "Digital Assets & the Indian Anti-Money Laundering Regime | Oxford Law Blogs," 2023 *available* at: https://blogs.law.ox.ac.uk/oblb/blog-post/2023/07/digital-assets-indian-anti-money-laundering-regime (last visited February 18, 2024).

The cryptocurrency industry has expressed positive reception towards the shift in the wider sphere. However, there are additionally reasons for worry that the notification fails to provide sufficient time for entities to comply with the updated standards. Furthermore, the absence of a single governing body raises concerns within the industry that crypto businesses may be compelled to interact directly with enforcement agencies such as the ED[19]..

There have been different crypto experts who have expressed their views on the regulation as Mr. Samudra Sarangi , Partner of Law offices of Panag and Babu said that "Indian law makers have had a chequered history of accepting the growing reality of crypto currencies. The move of bringing activities involved with cryptos within the scope of the anti-money laundering law (PMLA) shows the law maker's willingness to regulate, as opposed to initial attempts to ban. The crypto exchanges will feel the full weight of compliance and record keeping requirements under the PMLA, if they don't have internal compliance policies already.[20]"

Thus, this notification made by government is an important move to regulate the crypto space as it is one of the fastest growing industry that we have witnessed in past few years. However the regulation brings in certain implications for the people involved in it like-

- **For crypto exchanges and intermediaries**

Cryptocurrency exchanges and intermediaries serve as means that enable the purchase, sale, swap, and storage of Virtual Digital Assets. Now as per the amended regulation, they have to comply with the KYC norms and also the "anti-money laundering measures" which means that they have to follow the procedure of verifying the identity of their customers by collecting and using their government identity cards like PAN , Adhaar etc. Therefore, they need to report all transactions that are high in value or seem to be suspicious and these lengthy compliances might bring an up surge in the cost of operations and administrative burden. They might want assistance in accessing banking services because a lot of banks are hesitant to engage with firms

19. "Finance Ministry brings crypto assets under Prevention of Money Laundering Act: What are the implications?," The Indian Express, 2023 *available* at: https://indianexpress.com/article/explained/explained-economics/crypto-assets-pmla-explained-8486629/ (last visited February 19, 2024).
20. BL Bengaluru Bureau, "Crypto transactions to come under anti-money laundering laws" BusinessLine, 2023 *available* at: https://www.thehindubusinessline.com/money-and-banking/cryptocurrency/crypto-transactions-to-come-under-anti-money-laundering-laws/article66596205.ece (last visited February 19, 2024).

associated to cryptocurrency due to statutory ambiguity.[21]

Customers, however, may place greater confidence and credibility in regulated platforms as opposed to unregulated ones; this may turn out advantageous for them.

- **For crypto investors and users**

VDAs are purchased, sold, traded, or held by crypto users and investors for a variety of reasons, including investment, making a payment, or conjecture. In order to establish accounts or conduct transactions, they are now required to furnish crypto exchanges and intermediaries with their private details and supporting documentation. Additionally, the profits they make from VDA trades may be subject to taxation in accordance with their income tax bracket rates.[22]

As frequently cited benefits of utilizing cryptocurrencies, their privacy and anonymity may be compromised by these disclosure obligations. They would encounter heightened attention from law enforcement agencies, who could monitor their transactions for illicit activity including money laundering, tax evasion, or terrorism financing.[23]

Nonetheless, they could also gain from enhanced safeguards against the forgeries and schemes that are prevalent in the unregulated cryptocurrency industry. Additionally, their confidence in investing in cryptocurrencies may increase now that they have legal rights against intermediaries or crypto exchanges in the event of conflicts or complaints.

- **For regulators**

Regulators here mean the government agencies that look after regulation of financial market , policies related to finance , regulation of the securities market and are "RBI"("Reserve Bank of India") ,"SEBI"("Securities and Exchange Board of India"),"ED" ("Enforcement Directorate")etc.

They will be able to obtain records regarding VDA activities facilitated by middlemen and cryptocurrency exchanges, which will be beneficial for them. They will be entrusted with

---

21. "(18) How PMLA Will Impact Crypto and Virtual Digital Assets in India | LinkedIn,"*available* at: https://www.linkedin.com/pulse/how-pmla-impact-crypto-virtual-digital-assets-india-suvrat-mehta/ (last visited February 20, 2024).
22. "How Can the Prevention of Money Laundering Act Affect Crypto Investors? | Guides Crypto Investing | CryptoRank.io," CryptoRank *available* at: https://cryptorank.io/news/feed/f745d-pmla-jurisdiction-crypto-investors (last visited February 20, 2024).
23. *Ibid.*

increased oversight and control over the digital currency market, which is largely beyond their jurisdiction.

However, the government's decision to bring cryptocurrency exchanges and intermediaries under the framework of the Prevention of Money Laundering Act (PMLA) is a significant regulatory step for the rapidly growing crypto industry in India. While this move signals a shift towards regulation rather than prohibition, it also presents several challenges for businesses operating in the space. Compliance with Know Your Customer (KYC) norms and anti-money laundering measures will increase operational costs and administrative burdens for crypto platforms, but could also enhance their credibility with customers.

For crypto users and investors, while their privacy and anonymity may be compromised due to increased scrutiny from enforcement agencies, they stand to benefit from greater legal protection and security against fraudulent activities. Regulators, including the Reserve Bank of India (RBI) and the Enforcement Directorate (ED), will now have better tools to oversee and control digital asset activities, potentially curbing illicit uses of cryptocurrency. Overall, this regulation introduces a more structured and secure environment for the crypto industry, though it may come with growing pains for the entities and individuals involved.

THE ROAD AHEAD

CapDeck one of the business consulting firms , its CEO Mr. Mohnish Wadhwa said , that "With these changes , VDA entities are now considered reporting organizations, requiring exchanges, custodians, or administrators of VDAs handling customer funds to comply with PMLA requirements similar to banks and report any suspicious transactions."[24]

He also added to this that direct recourse of the particular regulation could be taken by agencies involved in enforcement due to lack of regulators in the market . "Unlike banks , where there are regulators who have specified rules to comply with , for being compliant with PMLA requirements , the VDA exchanges have been relying on best practices to make sure these are

24. BL Bengaluru Bureau, "Crypto transactions to come under anti-money laundering laws" BusinessLine, 2023 *available* at: https://www.thehindubusinessline.com/money-and-banking/cryptocurrency/crypto-transactions-to-come-under-anti-money-laundering-laws/article66595176.ece (last visited February 20, 2024).

taken care of."[25]

The recent addition of cryptocurrency to the PMLA caused issues among bitcoin enthusiasts about privacy and data security. Some believe that the strict KYC regulations and data retention rules will violate user confidentiality and make them vulnerable to data breaches.[26]

Moreover, as a result, the compliance expenses for cryptocurrency enterprises can rise, necessitating investments in new technology and procedures to adhere to the regulations. They could impose stricter regulations on cryptocurrency companies operating on a worldwide basis. Each country has unique AML requirements, and complying with all of them can be difficult. As already discussed above in a way this will escalate expenses for businesses . This is due to the necessity of investing in systems and processes to adhere to the requirements. "It could also make it more difficult for some users to access cryptocurrency exchanges if they do not meet the KYC requirements " as said by Agarwal from Kcoinx.[27]

The PMLA would mandate bitcoin exchanges as well as other intermediaries to keep records of payments and notify the Financial Investigations Unit of any questionable transfers. This will result in increased inspection of cryptocurrency trades and exchanges, which will occur gradually over time. Overall, the incorporation of digital currencies by the PMLA is an essential move in overseeing the Indian cryptocurrency sector.[28]

However, this action also poses challenges such as the requirement for an independent watchdog and the potential effects on investor safety and confidentiality. Governments and regulatory bodies need to collaborate stronger as the industry evolves to ensure its proper functioning. Investors and exchanges must be informed about the evolving laws and regulations to avoid penalties, fines, and legal consequences.

Therefore ,organizations in the crypto business must develop strong procedures and use suitable

---

25. *Ibid.*
26. "Explainer: Why crypto has come under India's anti-money laundering law - Times of India,"*available* at: https://timesofindia.indiatimes.com/business/cryptocurrency/bitcoin/explainer-why-crypto-has-come-under-indias-anti-money-laundering-law/articleshow/98515196.cms (last visited February 21, 2024).
27. Imarticus, "Bringing Crypto Transaction Under the AML Lens in India" Finance, Tech & Analytics Career Resources | Imarticus Blog, 2023 *available* at: https://imarticus.org/blog/bringing-crypto-transaction-under-the-aml-lens-in-india/ (last visited February 18, 2024).
28. Bhumika Indulia, "PMLA – Crypto Currency: When Prevention is Better than Cure" SCC Times, 2023 *available* at: https://www.scconline.com/blog/post/2023/03/15/pmla-crypto-currency-when-prevention-is-better-than-cure/ (last visited February 21, 2024).

tools to stay in line with laws and regulations successfully.

CONCLUSION

Despite the fact that both the public and private sectors are avidly investigating the complete potential of digital currencies, legislative and policy deficiencies and discrepancies continue to persist. As a consequence of the disparity between the rate of technological advancement and the rate of regulatory and policy development, the majority of these gaps and inconsistencies exist. Policymakers must carefully evaluate to structure the regulatory landscape to get ready for a future filled with digital currencies, as well as how to establish both national and cross-jurisdictional coordinating mechanisms. An endeavour that is synchronized among diverse agencies both domestically and internationally, as well as among institutions, could facilitate the solution of discrepancies and the bridging in gaps, especially where they happen to be most crucial: in the areas of protecting customers, financial crime prevention, privacy safeguarding, and resolving disputes.

A regulatory approach predicated on risk may offer greater adaptability to deal with future innovations. Although absolute future-proofing is unattainable in the dynamic realm of digital currency, implementing regulations prematurely may impede constructive innovation and restrict the good that society can derive. Additionally, they might facilitate regulatory safe havens and arbitrage for less-compliant participants, thereby diminishing the potential benefits of these developments in finance

Additionally, the Indian government will face challenges in its efforts to implement these regulations. Decentralized cryptocurrencies can be utilized globally without requiring authorization from a central entity. As a result, the collaboration between the Indian government and other nations in order to prevent the laundering of illicit funds via cryptocurrencies is critical. Anti-Money Laundering (AML) adherence is, in summary, vital to the cryptocurrency sector, as AML legislation is influenced by international standards. In order to ensure the compliance of AML in India, one must be aware of the reporting requirements and investigative authorities tasked with examining money laundering incidents.

Penalties may result from failure to comply with anti-money laundering (AML) obligations,

compelling the sector to implement strong safeguards and promptly adapt to regulatory advancements. It is critical to prioritize AML compliance in order to cultivate a secure and transparent atmosphere within the cryptocurrency industry.

EMPIRICISM AS A FOUNDATION OF LEGAL POSITIVISM: AN APPRAISAL

***Ramandeep Singh**

INTRODUCTION

The oldest known legal code of the world is The Code of Ur-Nammu. It was codified in 2100-2050 BCE by the Sumerian King Ur-Nammu.[1] Thereafter, the most famous archaic written criminal law namely-The code of Hammurabi was promulgated by the divine king Hammurabi by getting it engraved on stone and clay tablets in the kingdom of Babylon.[2] Roman Emperors had the '12 tables', which exhibited the rights and obligations of a Roman citizen, written on the bronze tablets providing for Roman Law.[3] But these are few examples of earliest codified laws showing the existence of well-defined legal systems even before the dawn of the common era. There definitely existed legal systems regulated by uncodified legal rules like customs, tribal dictates and pronouncements before the codification of law. Hence, it can be said that existence of laws and legal systems is not a recent phenomenon and, perhaps, its inception precedes the inception of a state for custom is not a creation of state.

It is very likely that the laws and legal systems must have come into existence when the civilisations began and *homo sapiens,* instead of wandering from one place to another looking for food, water and shelter, settled permanently.[4] At this point of time the agricultural revolution may have already kicked in and the legal concepts like possession and ownership must have emerged, thus laying down the foundation of civil law. However, there is a huge probability that customs regulating marriage, family and crimes must have existed even in a nomadic tribal society. But this co-existence of laws with societies raises many mysterious questions like, how does law come into being? What rules can be called law? Does law really need a state for it to be

---

* Assistant Professor (Law), Bahra College of Law, Patiala.

1. Code of Ur-Nammu | Laws, Discovery, *available* at: https://study.com/academy/lesson/code-of-ur-nammu-definition-lesson-quiz.html (last visited Jul 19, 2024).
2. Code of Hammurabi: Laws & Facts, *available* at: https://www.history.com/topics/ancient-middle-east/hammurabi (last visited Jul 19, 2024).
3. The Twelve Tables, Roman Law, *available* at: https://roman-empire.net/republic/the-twelve-tables/ (last visited Jul 19, 2024).
4. Yuval Noah Harari, Sapiens: A Brief History of Humankind 66-68 (Random House, 2011).

there? What essential conditions must any stipulation or rule fulfil in order to become a law? What are the basic essentials of a legal system to exist in any country or nation? These questions are fundamental to the law and legal systems.

Legal theory is a field within jurisprudence wherein the jurists endeavour to unravel these mysterious questions by providing concrete theories. Just like to understand the physical world we have theories namely-theory of gravitation, quantum mechanics and relativity. Similarly, for a proper and sound understanding of legal systems and laws, legal theories are required. There have been many attempts by a number of jurists to devise theories which may explain the legal concepts and systems around the world[5].

These theories have led to formulation of schools of thought in legal philosophy on the basis of the fundamental commonalities and stark distinction they had among each other. These schools are Analytical School also known as Legal Positivism, Natural School of Law, Realists' School or also known as Legal Realism, Historical School and Sociological School of Jurisprudence. Although the jurists belonging to these schools have never expressly affirmed their affiliation to such schools, it is just that the theories contained in each of such schools are so logically interlinked that they have to be studied together in tandem and compared with the theories contained in other schools for a proper understanding of law[6].

Most of the times the methodology lying underneath the origin of these legal theories is the one propounded by Hegal- Thesis, Antithesis and Synthesis. While studying these theories one can often find a jurist philosophizing his own theory by criticising and attacking the theory of a former legal jurist. For instance, HLA Hart laid down his theory in his seminal book “the Concept of Law” by systematically attacking John Austin's work in Province of Jurisprudence Determined.[7]Notably, it took 129 years for anybody to dethrone the work of Austin. This trend is further carried on by star pupil of HLA Hart, Ronald Dworkin who in his book, 'Law's Empire' criticised legal positivism as elaborated by Hart[8].

---

5. N.V. Paranjape, Studies in Jurisprudence and Legal Theory 22 (Central Law Agency, Allahabad, 7th edn., 2001).
6. *Ibid.*
7. H.L.A. Hart, The Concept of Law (Oxford University Press, 3rd edn., 2014).
8. Ronald Dworkin, Law's Empire (Belknap Press, 1988).

LEGAL POSITIVISM

Legal Positivism as the name suggests, focuses upon study of law as it is posited. Here the word 'posit' means 'to put forth' or 'to formulate'. Therefore, a positivist shall study the law as it is framed. He shall not go into ethical or moral considerations of law. Here, a positivist will focus upon what law is as against the ethical approach which is what law ought to be. The former is a descriptive study of law whereas the latter is a normative study of lȧw.

For a positivist the moral content of law is immaterial. What is material for a positivist is an analysis of law and in true essence the descriptive analysis of law. Therefore, sometimes this school of law is called The Analytical School of Law. A positivist is more concerned with whether certain social facts have been fulfilled which transform a mere rule into a law. Essentially all the positivists agree that law is a social phenomenon. It is obliging certain social facts that result into law. For instance, for Austin a general command by a sovereign to his subjects for which a threat of sanction is there, is law. A positivist will not inquiry into the morality or justness of such a law passed by the sovereign. For positivists, a law does not cease to be a law even if it is immoral or unethical. The fact that a king has promulgated it or a bill was duly passed in the parliament by a majority of votes after which it received the President's consideration, is enough for there to be any law notwithstanding the moral content of such a law.[10]

For instance, during Nazi's rule in Germany there were many laws passed by the totalitarian Nazi Government which systematically identified and persecuted the Jews and gypsies. Under these laws the Jews and gypsies were under legal obligations to produce the identification of their race and their basic civil liberties were abrogated by the State itself. Jews were legally bound to carry ID cards which showed their Jewish bloodline and their passports were stamped with letter “J” to segregate them systematically. The Law for the restoration of the professional civil service passed on 7th April 1933 excluded Jews and other non-Aryan races from the civil services of the state. The Nuremberg Laws deprived Jews from the citizenship of The Reich and

---

9. *Supra* note , at 23
10. What Is Legal Positivism, *available* at https://www.youtube.com/watch?v=ATtqAjOkqwk (last visited Jul 22, 2024).

forbade them from entering into sexual or marital relationship from persons having German blood.[11] Ultimately, a lot of hardship and suffering was inflicted upon Jews through Nazi laws. Similarly, the Apartheid laws in South Africa aimed at prohibiting black native population from entering into certain specific areas like beaches, schools, buses and rail coaches which were exclusively reserved for the minority white population.[12]

There is not an iota of doubt that these laws brought havoc upon the subjects to which these laws applied. Also, there are no qualms in holding out that these laws were unfair, irrational, unjust and immoral in nature. The inhumane content of these laws is apparent from the explicit provisions contained in these laws. A question of jurisprudential significance annexed to Nazi and Apartheid legal systems is -were these systems actually legal systems? Were the so-called Apartheid and Nazi laws, were laws in fact?

For a positivist, these laws were actually laws irrespective of their immoral, irrational and inhumane content. Under legal positivism immorality in law cannot deprive the law of its legality and enforceability as it is not a legal criterion for the legality of law. However, a natural law theorist is strictly against such a rigid descriptive approach and for him these *laws are void ab initio since* these man-made laws violated the natural law. For a natural law theorist only, those rules are laws which are rational and moral. For him Nazi and Apartheid laws were never laws at first place when those were promulgated. [13] But this does not imply that the positivists encourage immoral and unfair legislations. That shall be a wrong understanding of legal positivism. Instead, what they simply say is legality and morality are two distinct and separate things.

INFLUENCE OF BEHAVIOURISM IN LEGAL PHILOSOPHY

There is a peculiar reason associated with legal positivism why the positivists term law as only a social phenomenon and denounce ethical or moral study of law. During the early 1900s a scientific method of studying any discipline became quite famous. This method was against the

---

11. Anti-Jewish Legislation, *available* at: https://encyclopedia.ushmm.org/content/en/article/anti-jewish-legislation-in-prewar-germany (last visited Jul 18, 2024).
12. Laws from South Africa's Apartheid Era, at: https://blackandeducation.org/stories/2017/2/5/selected-laws-from-apartheid (last visited Jul 22, 2024).
13. Stephen Mathis, Philosophy and the Law: How Judges Reason 12-13 (Modern Scholar, 2008).

conventional and dogmatic study of any discipline as the conventional mode of studying was purely doctrinal, hardly observable in real world and most of the time elusive. The conventional study relied upon what the reason says to the man, an a priori method. A priori is the knowledge which is acquired without any sensory experience at all. *A priori* knowledge is universal and holds true due to necessity. Hence, Kant calls *a priori* as pure reason[14].

The modern scientific method instead relied upon observation in the real world, which included collection of data and later its analysis. Hence, a posteriori method. A posteriori knowledge is acquired via sensory experience and is not the domain of pure reason. In 1900s, the psychologists started using a posteriori method i.e. empirical method of studying human psychology as against the doctrinal method. A school of thought called behaviourism emerged. This school propounded that for any study of human mind and conclusion to be made on its working, the basis of such study and conclusion must be the evidence which can be observed and recorded in real world. For human psychology such evidence is human behaviour. Thus, the behaviourists put forth that human psychology must be studied on the basis of human behaviour either by observation or experimentation. It is only the human behaviour upon which sole reliance has to be made for any study in psychology and not any vague idea which is non-observable and stated to be available to human reason[15].

The idea of behaviourism had its ramifications beyond the field of psychology and influenced legal philosophy. There is no surprise in such influence as after all law regulates nothing but human behaviour itself. Hence, the legal philosophers started conceptualising law and legal systems on the basis of observable and perceptual facts, and denounced vague and obscure ideas of natural law as a basis for such a conceptualisation. This is the reason that the legal positivists term law as a social phenomenon. This social phenomenon happens in the real world which is observable and can be recorded.

The fact that a bill entered Upper house first and majority of parliamentarians passed it by a vote of hand and thereafter it was passed in Lower house in a similar manner and finally assent was

14. *Supra* note .
15. *Ibid.*

given to it by the President, is a social phenomenon which can be observed and recorded in real world. The fact that the King had promulgated a law by getting it engraved upon large monolithic stones which were thereafter placed at conspicuous places in the kingdom is a social fact which can be observed and recorded in real world. On the contrary, the fact that something is moral and rational as against another thing is not revealed to a human being by experience but by human reasoning. It is not something which can be observed and gathered in real world.[16]

THE CONFLICT BETWEEN REASON AND EXPERIENCE

The legal philosophy as like philosophy generally relies much on epistemology. Epistemology is a branch within philosophy which endeavours to explore the nature, origins, limits and validity of human knowledge. The philosophers in this branch of philosophy ponder upon some pivotal issues like how does a person get to know anything? Is all the knowledge gained from outside world via sensory experience or is there some unique blessing bestowed upon human beings that provides some innate knowledge with which every human being is born? What opinions and beliefs made on the basis of human knowledge can be conclusively established to be truths? What are the limitations upon human knowledge or is there something in the world which is, due to its intrinsic nature, unknowable? When knowledge of any object is acquired, is it acquired in totality of the object or in a corpuscular form of the tiny constituting parts of the object? Is a thing defined to be that particular thing by virtue of its structure or appearance or is it by virtue of its purpose that its serves? How can any knowledge claim be established as a truth?[17] The above-mentioned issues are some of the pivotal issues which epistemology deals with. These questions are naturally linked with legal philosophy too. It is on epistemological basis that any legal philosophy can be made. At epistemological level, historically, there have been two schools of philosophy- empiricism and rationalism.[18]

Some of the notable philosophers of empiricism are- John Locke, George Berkely and David Hume. These philosophers gave experience as against reason the final authority to make any claim of knowledge. They were opposed to the idea of innate knowledge. Notably, John Lock

16. *Ibid.*
17. Professor Daniel N. Robinson, The Great Ideas of Philosophy, 145-147(The Teaching Company, 2ndedn., 2004).
18. *Ibid.*

famously propounded the theory of 'tabula rasa' literally meaning blank slate. He put forth that human mind is a clean slate at the time of birth devoid of any rules, principles or ideas. All the knowledge about world is later on gained through the sensory experience. Hence, knowledge is stimulated in the human mind via an interaction between the environment and the sensory organs of the body. He expressly rejects that a man is born with some innate ideas available to courtesy to his rationality.[19]

On the contrary the philosophers of Rationalism like Rene Descartes, Spinoza, Leibniz and ancient Greek philosophers like Socrates and Plato, believed that sensory experience is subject to suspicion and deception. No valid knowledge claim can be made on the basis of experience alone. They emphasised upon the intellect, the reasoning faculty of human mind which separates a human being from an animal. The School of Rationalism advocated the existence of innate ideas and concepts which a man is born with because of reason. Under this school of philosophy, the mode of inquiry is initially doubt upon sensory perceived data and discovering the truth via reason. This reasoning faculty which makes him accessible all these innates ideas is bestowed upon him by the god, nature or any other entity responsible for his creation.[20]

The best example of innate ideas as put forth by the rationalists is mathematics. One plus One shall always be two even if no human being had existed and taken any sensory experience. Pythagoras theorem, the fact that hypotenuse in a right-angled triangle shall always be bigger than the base and perpendicular of every right-angled triangle in this world is a fact, the knowledge of which can be acquired even without actually measuring the sides of every triangle on this earth. It is believed that Pythagoras never discovered Pythagoras theorem by actually measuring the sides of triangles. Moreover, how many triangles must be measured to conclude Pythagoras theorem and lay a claim that the same is true for every right-angled triangle drawn in this universe. Similarly, some logical syllogisms, that if A is bigger than B and B is bigger than C then the conclusion that A is bigger than C[21] without actually manually comparing the lengths of A and C are knowledge claims accessible to mankind without any need of sensory experience.

---

19. *Ibid.*
20. *Ibid.*
21. *Supra* note at 35.

In legal philosophy too, the school of rationalism gave birth to the theory of natural law. To further elucidate upon principles of natural law being revealed to human being in virtue of his rational capacity and not from observation, an instance of principle of equality can be taken. No information or conceptualisation of equality among human beings can be made via observation in the world. One shall find people of different structures, height, skin colour, eye colour, hair colour and even mental aptitude. One shall find how unequal people are due to biological circumstances like gender variations and genetic disabilities are found. Similarly, the economic, social and cultural differences among people bring forth to our mind via observation that people are not equal in the world. Therefore, amidst all this experiential information coming to human mind only of differentiation and variation, how could the concept of equality that all human beings are equal irrespective of their colour, cast, sex, creed and gender kindle human mind? There is only one answer and that is the core concept of equality is not an experiential learning but revealed to human being by his reason.[22]

It is truly an amazing yet an under rated fact that despite so much of diversity among human beings that our species came to the realisation and understanding of equality among all human beings. The fact that every man is born free and he has certain natural rights which are available to him by virtue of being born in this world, is not an empirical observation. The socialist idea that earth and it natural resources including land belong to all and not to a particular human being also took birth from rationalist epistemology.[23]

INDUCTIVE METHODOLOGY IN LEGAL POSITIVISM

This rationalistic epistemology led to a methodology of deduction. The deductive method presupposes the existence of a general and universal rule, the validity and existence of which is not denied. Later, this rule is broken into as many parts as possible for a proper understanding so that each part could be analysed and studied separately. Thereafter, from this study, specific conclusions are made which are quite local and narrow in scope. Hence, in a deductive method of study espoused by a rationalist it is the discovery of a specific conclusion from a more general

22. *Ibid.*
23. Raymond Wacks, Philosophy of Law: A Very Short Introduction (Oxford University Press,1st edn., 2006).

conclusion. The general conclusion is an overarching umbrella observation from which specific discoveries are extrapolated. A simple example of this is a famous syllogism, if all men are mortal and Socrates is a man, then it is definite that Socrates too is mortal. From a much general statement concerning mortality of all men, we came to a specific conclusion concerning mortality of Socrates.[24]

Similar deduction method could also be applied in legal philosophy. Once it is settled and agreed that there are universal, immutable and everlasting principles of natural law accessible to man via reason and bestowed upon him by the God or other creating being, specific rules could be made out of the general principles of natural law. Natural law is not created by human beings nor its principles like Equality and Right to life are creation of human made law. The right to life is bestowed upon man by God himself and no legislation can grant it. Therefore, when human beings legislate to make specific rules to regulate human conduct in various field of life like trade, commerce, family, crime, contract et cetra, these specific rules are to be deduced from more general principles of natural law. Thus, the jurists who believe in rationalism as a mode of acquiring knowledge espoused deductive method of legislating. Since natural law philosophy has its epistemological root in rationalism, it relies heavily upon the tool of deduction as a mode of inquiry or discovery.[25]

Here examples can be taken of some provisions under Indian Laws. For instance, the fact that a charge is to be framed in a criminal trial and notice of the accusation must be properly formulated in the charge by mentioning important particulars like date of offence, place, time and manner of crime, section being invoked and even the name of the offence, if the law gives it a special name,[26] and framing of charge in this way is mandatory can be traced to a sacred principle of natural law- *"audi altrem partem'* which means no body can be condemned without being heard. Here, hearing the accused would be of no meaning if he is not informed of the accusation against him. So, the hearing would be rational only if he is apprised of the accusation against him. This purpose is served by charge. Thus, the parent principle behind charge is rooted in natural law philosophy.

24. *Supra* note at 127.
25. *Supra* note .
26. The Bharatiya Nagarik Suraksha Sanhita, 2023 (Act 46 of 2023), ss. 234,235 & 236.

But on the contrary the empiricists believe in inductive method as the correct scientific method for any mode of inquiry. The inductive method starts with gathering information and data via experience to come to any particular specific conclusion and it is only later on that this conclusion that could be generalised. Hence, the mode of inquiry proceeds from a specific to a general overarching conclusion. [27] However, to generalise any specific conclusion, the population size of sample and other safeguards is required to fulfilled to negate any erroneous interpretation. A simple example could be taken of a dog. One can have a sample size of 1000 or more dogs and if it is found that all those dogs wag tails, a generalisation could be made that all dogs wag tails. Here, the initial collection of data aided in reaching a specific conclusion that the surveyed dogs wag tails. It is later on generalised that all other dogs (un-surveyed ones too) wag tails. It is also remarkable that a conclusion reached via inductive reasoning cannot be absolutely true however it is most likely to be true. The only way to nullify such a conclusion is to just give one contrary instance upon which this conclusion is not applicable. In the abovementioned example, it could be done by discovering a dog who does not wag his tail.[28]

The positivists as are staunch believers in empiricism and employ inductive method as a mode of inquiry. HLA Hart uses a specific instance of gun-man theory to explain Austin's concept of Law. He dramatically asks the reader to imagine a situation wherein a gunman enters a bank and demands money from the staff of the bank else otherwise he will shoot at them. This situation can be expanded to a sovereign's reign at large in order to understand Austin's definition of law. The sovereign is just like the gun-man who issues commands like the gun man issued to the staff of the bank. The sovereign is free both internally and externally. Internally in his empire he is the supreme and not bound by any other person's will. Externally, he is not under the influence of some other kingdom. Similarly, the gunman is supreme as he has the gun in his hand and is not bound by the word of the people inside the bank. He is externally supreme too as nobody outside the bank is aware of any robbery happening inside the bank. Gun-man is sovereign in his own miniature system. Just like the gun-man backs the command of handing over of money to him

27. *Supra* note at 137.
28. Induction Definition, available at: https://sociologydictionary.org/induction/ (last accessed on July 27, 2024)

with a death threat so does the sovereign with the threat of penal sanctions enforces his own command. As citizens of nation habitually and generally obey the sovereign under a threat of sanction so do the people in the bank obey the gun-man to evade death. Hence, an overarching and a general conclusion is induced that law is a command of sovereign backed by a threat of sanctions and to this sovereign people have a habit of obedience from a much smaller model.[29]

The positivists just like any empiricist believe in formulating a simple model of legal system and from this simplicity they induce more complex and overarching models applicable to the legal systems of real world. HLA Hart in his own theory of primary and secondary rules initially starts off with a basic model of a primitive society and thereafter scales it to a large legal system like those of nations.[30] Similarly, Sir Henry Maine too, though he is no a supporter of positivism, starts off with family system to explain the origin of state.[31] Hence, in inductive methodology which the positivists apply law is developed from specific instances to general instances whereas natural law theorists apply deductive reasoning to develop law.

A modern instance of induction as tool of development of law under positivism in Indian context is worthy of discussion here. The doctrine of *'stare decisis'* provides that law declared by the Supreme Court of India shall be applicable throughout India and all the Courts in India are bound to apply the law so declared by Supreme court in its judgments.[32] On similar lines, the same is true for a high court with in a state. The High courts and the Supreme court are different from other courts in India as these are constitutional courts whereas the other courts are constituted under statutes. While declaring the law via stare decisis the constitutional courts do not merely provide literal meaning but in that interpretative act develop the law too. So, the act of interpretation is not just transliteration or paraphrasing but a purposive development of meaning of the provisions of law in specific contexts and in that meaning lies the soul of implementation of the law.[33] This is an inductive process as the law is developed by a constitutional court in a particular matter before it, in a particular petition and in context of

29. *Supra* note at 10.
30. *Supra* note at 35.
31. *Id.* at 58-59.
32. The Constitution of India, art. 141.
33. Justice Asok K Ganguly, Landmark Judgments That Changed India (Rupa Publications India, 2015)

specific facts of a particular case. But the law so declared i.e. the ratio in it, shall be applicable throughout India and all the courts are bound to apply such an interpretation in the like cases coming before it. So, the Supreme Court generalises a conclusion arrived from a specific case to all the similar or like cases. Hence, law developed via stare decisis is an outcome of inductive process.

Conversely, as the non-constitutional courts are bound by the decisions of the constitutional courts, they deduce their decisions from the decisions of the constitutional courts. For the non-constitutional courts, the method of working is of deduction.

AN ANALYTICAL AND EMPIRICAL METHOD

For positivists it is an empirical, analytical and descriptive study of law which is important. The natural law theorists espouse a normative study of law. The distinction is 'as it is' against 'as it ought to be'. The ideas of equality, fraternity, freedom and other natural law concepts don't become legal concepts by virtue of being called natural conditions for humanity. Nor do the positivists ignore their importance. To simply put, these natural concepts of law might be tools for aiding in formulation of law but by themselves these do not become law until incorporated in legislation. For positivists a law shall continue to be a valid law even if it does not conform to principles of equality or fairness subject to one condition which is fulfilment of those social facts, as against moral facts, which render a rule a law[34].

This is where the whole dichotomy starts the positivists don't base their theories of law on the vague ideas of natural law. Austin rather said that the natural law conflated religion and ethics with law. What is ethically and religiously proper by itself does not become legal. The Legality of anything must come on the basis of social facts capable of being perceived and recorded and not on the innate things of mind which stay in the mind only. But this also does not mean that positivists encourage immoral and irrational rules to be laws. They don't ignore the importance of rationality, an innate nature of human mind which separate a human being from animals. All positivists say is what law should be and what law is are two different and distinct concepts. The

34. *Supra* note at 12.

former is of importance to a parliamentarian or to people at large, hence it falls within the field of science legislation as put forth by Bentham. But the latter is for judges and advocates in a court. Judges and lawyers are meant to apply law and not legislate. Therefore, for them the pivotal question is not what law should be rather what law is. Hence, they need an analytical and descriptive approach to law and not a normative one.[35]

SOCIAL AND SEPARATION THESIS

All the positivists notably agree upon two matters which establish a common thread among them. First, what law is and how just, immoral, rational or fair it is are two different and distinct questions. This is often called 'separation thesis' as is found famously in the works of John Austin.[36] John Austin says 'what law is' and 'what it ought to be' are two distinct questions and not intertwined. The significance of this separation is that it leads to following conclusions.[37] If some rule is just, rational, moral, fair and ethical, it does not automatically become law. The converse is true too if there is a rule of law, it does not become void by virtue of the fact that it is unfair, irrational or immoral. Thus, morality can neither supply legality nor can it seize it.[38]

The second matter upon which the positivists commonly agree is famously dubbed as 'the social thesis' as discussed earlier that law is a social phenomenon. All the positivists agree or rather propound that law is always posited i.e. created or formulated. It is not something that God has given to human beings or something that nature has bestowed upon us. [39] Nor it is anything a *priori* readily available to rational capacity of human beings. To put in other words, Positivists reject the existence of Natural Law. The jurists which subscribe to the ideology of Natural Law School believe that there is a law which is not made by man but revealed to man by the god either in form of reason or in scriptures. This law is immutable, universal and everlasting. According to Natural Law theorists all the human made laws or Positive laws (the name positive presumably as human laws were posited) must not violate the natural law as otherwise they shall cease to be laws. The Natural law theorist Saint Thomas Aquinas famously defined law is a rational human

35. *Ibid.*
36. *Supra* note .
37. *Supra* note at 29.
38. *Supra* note .
39. *Supra* note .

conduct.[40] Here the word rational needs emphasis. It is something related to innate nature of human mind. The human mind itself knows what is appropriate and what is mischievous. This rational capacity is bestowed upon him by God or nature. However, on the contrary, the positivists believe law to be a social phenomenon, hence the propound a social thesis of law as against the normative one.

MORALITY IS NOT A LEGAL CRITERION

The social thesis is the first step in understanding legal positivism which provides that it is the social facts of empirical nature that lay down the legal criterion. The separability thesis is the next natural step which provides that the criteria for legality i.e. the essential conditions for a rule to be a law don't lie in the moral substantive content of the rule. Now, this too has two interpretations- The Restrictive and the Inclusive construal. The Restrictive construal of the separability thesis says that it can never be a criterion for legality that a norm possesses moral value. Restrictive construal of the thesis completely eliminates morality as a criterion for some rule to be called law. The other construal of the thesis the more inclusive one bears the name Inclusive construal of the thesis. The inclusive one provides that it is not necessary that for a rule to be a law it must be moral too. *'It is not necessary'* implies in some cases it could be. But what could be these cases which allow morality to be a part of legal criterion and still continue to obey the overarching fundamentals of positivism.[41]

Recall that, the true essence of positivism is that the criterion for legality is not moral requirements. The criterion of legality rather is that essentially law is a matter of social fact and it is upon basis of these social facts and conventions that any rule transforms into law. This is what the social thesis provides for. We already took an example of a parliamentarian system in which law comes into being when a bill is passed by both the houses and assented to by the President. This procedure is mentioned in the most fundamental legal enactment of a legal system i.e. the constitution. But suppose the constitution is amended by the Parliamentarians and a provision is

40. Mark C. Murphy, "Natural Law Theory" The Blackwell Guide to the Philosophy of Law and Legal Theory 15-17 (Blackwell Publishing Ltd, 2005); Brian Bix, "Natural Law Theory," 2nd ed. A Companion to Philosophy of Lawand Legal Theory 211-227(Wiley Blackwell Publications, 2010).
41. Jules L. Coleman and Brian Leiter, "Legal Positivism," 2nd ed. A Companion to Philosophy of Law and Legal Theory 228 (Wiley Blackwell Publications, 2010).

added by them that not bill shall become law even if assented to by the President unless it passes the touchstone of social morality of the nation[42].

This shall result in complete convergence of law and morality yet the separability thesis shall still stand as not being violated. Hence, the inclusive construal of separability thesis allow morality to be a part of law but that really is only if the social facts upon which legality is based allow it to be so. Therefore, it can be said that what separability thesis provides for is not how morality and law are not intertwined, linked or aligned but rather that the criterion for legality of law is not directly a moral criterion[43].

Thus, one conclusion can be drawn here. The positivists don't say that law and morality are completely separate. In fact, some of the legal provisions may be based on upon certain moral values. It is also the fact that law must meet certain moral demands of the society. Hence, the positivists don't say that laws and morality don't overlap. In fact, they do provide a case and also provide conditions for this case when law and morality may get intertwined. What the positivists really want to convey through separability thesis, particularly in its inclusive construal, is that notwithstanding this intertwining and overlapping between morality and law, the criterion for legality of law stills stays meeting certain social conditions or facts which are empirical in nature. Morality could enter into legal domain only if it is agreed so via social conventions and facts which are observable in nature. So, one cannot say the legal criterion of law itself is morality though it could be intertwined with law.

CONCLUSION

The true epistemological root of positivism lies in empiricism which espouses that the pursuit of sensory knowledge is worthy and not of vague innate concepts. This is the reason that the positivists rely upon social facts in laying down the jurisprudential theory concerning law. The school of behaviourism in psychology, which too has a root in empiricism, influenced legal philosophy and as a result positivists started theorising upon law on the basis of observable

42. *Ibid.*
43. *Ibid.*

human behaviour. Austin observed the general obedience by subjects to sovereign's commands as a human behaviour capable of explaining a legal system. Similarly, for Hart it was the shared attitude and behaviour of majority of people that gave the legal content to law and when accepted from an internal point, it provided the people enough reasons to adhere it hence providing law the feature of normativity. Although positivists, differ among themselves about the kind of social facts which lead to formation of law, yet the core feature of positivism and the common theme which run among the works of all positivists is the social and separation thesis.

THE CURIOUS CASE OF SECTION 2(m) OF THE COPYRIGHT ACT: EXHAUSTION AND PARALLEL IMPORTS IN INDIA

***Dr. Ramneek Kaur**

INTRODUCTION

"When you have wit of your own, it's a pleasure to credit other people for theirs."[1]

Criss Jami

Around the years 2010-14, there had been raging debate relating to the legality of parallel imports in India of works under copyright law. The debate was more specifically about the import of cheaper books into India from foreign markets. Prior to the amendment of the Copyright Act, 1957 in the year 2012, the Standing Committee of the Parliament in the Copyright Amendment Bill, 2010 had included an amendment to Section 2(m) to allow parallel imports in India so that latest editions of books could be available at cheaper prices, particularly in order to protect the interests of students. However, the said amendment was not included in the final version of the Bill. The proposed amendment to Section 2(m) was simply worded but was powerful in its impact,[3] it would have brought application of the principle of international exhaustion to Copyright law. In this paper, discussion is done with respect to nexus between copyright and principle of exhaustion, treatment of parallel imports under copyright law and the effect that Section 2(m) if amended as proposed would have brought with it.

DOCTRINE OF EXHAUSTION VIS-À-VIS COPYRIGHT

The principle of exhaustion in respect of copyright means that on sale of a copy of the copyrighted work, copyright owner's exclusive right to sell or distribute a copy of the work becomes exhausted by the said sale. So the copies which now have already been put into circulation cannot be controlled by the owner of the copyright and exhaustion acts as a limitation on the distribution right of the copyright holder. By[4] virtue of application of doctrine of

---

* Assistant Professor , Amity Law School Mohali

1. Criss Jami, Killosophy, 112 (CreateSpace Independent Publishing Platform, South Carolina, 2015).
2. Anupriya Dhonchak, "Debate on Parallel Import of Books: Still Relevant in the Post-Amazon Age?" *available* at https://spicyip.com/2020/05/debate-on-parallel-import-of-books-still-relevant-in-the-post-amazon-age.html, (visited on May 30, 2024)
3. Prashant Reddy, "Guest Post: Exhaustion and Copyright Law – A look at the Copyright Amendment Bill, 2010", *available* at https://spicyip.com/2010/05/guest-post-exhaustion-and-copyright-law.html, (visited on May 30, 2024).
4. *Ibid.*

exhaustion, certain limits are imposed on the exclusive rights of the owner of a copyrighted work whereby the resale or re-distribution of a work already sold by or with the consent of the owner, cannot be controlled by him. As a result thereof, if a person purchases a copyrighted work, say a book, he is free to do whatever he desires to with his copy, he could even resell it without dreading about being sued for copyright infringement[6]. The rationale behind this theory of 'exhaustion' is that a copyright owner has been adequately rewarded after the first sale of his copyrighted work and he should therefore, not be allowed to make profits repeatedly by controlling the resale and distribution of that very product[7]. Depending on the law of the territory in issue, exhaustion could be (i) *Domestic/national:* the owner would exhausts his right on sale of the copies of the copyrighted work for the first time domestically; (ii) *Regional:* the owner's rights would be exhausted on sale of the copies for the first time within his own country or any country within a region; and (iii) *International:* where irrespective of the place where the copies of the copyrighted work are put up for sale for the first time, the rights would be exhausted[8]. The concept of parallel imports kicks when we talk about the doctrine of international exhaustion.

PARALLEL IMPORTS UNDER THE INDIAN COPYRIGHT LAW

Parallel imports essentially involve the act of bringing a copyrighted work from one country, into another country, without the permission of the owner of the copyrighted work[9]. The concept of parallel imports has to be understood in light of the principle of territoriality, wherein rights to distribute any work are split up generally and thereafter assigned based on territory[10]. So, though a publisher in India might have the right of publishing and selling a book in India, he could do so to the exclusion of any foreign publisher. The question that we seek to answer in this respect is "If a book is legally published in a foreign country, would its import into India constitute infringement of copyright if it is done without the permission of the copyright owner? And if a book is published in India with a notice saying "For sale only in the state of Karnataka", would

5. Glass Equipment Development Inc v. Besten Inc, 174 F.3d 1337.
6. J C Paul, "US patent exhaustion: Yesterday, today, and maybe tomorrow", 3(7) Journal of Intellectual Property Law & Practice, 461 (2008).
7. *Ibid.*
8. *Supra* note 2.
9. Amlan Mohanty, "Amendment to S.2(m) – Copyright Standing Committee Report" *available* at https://spicyip.com/2011/01/amendment-to-s2m-copyright-standing.html (Visited May 15, 2024).
10. *Ibid.*

such a notice be legally enforceable and result in the prevention of the sale or resale of that book in Kerala?"[11]

The concept of parallel imports has not been expressly provided for under the Copyright Act in India. While Section 14 empowers a copyright owner with various rights, it nowhere grants a 'right to import' to the copyright owner. However, with regard to literary, dramatic and musical works, it grants an exclusive right to the owner of the copyright to issue copies of the work to the public; such copies that are not already in circulation. According to the explanation to section 14, a copy once sold is deemed to be a copy already in circulation.[12] It can also be said that right conferred upon the copyright owner with respect to issuing copies of the work to the public, that are not already in circulation under Section 14 endorses the principle of exhaustion and it is apparent that exhaustion covered under the provision is national exhaustion. The real debate is as to whether it covers international exhaustion also or not.[13]

On one hand it could be argued that the term 'copies already in circulation' is meant to be copies in circulation anywhere in the world and on the other hand, it could be argued that the extent of the Copyright Act as per Section 1(2) is India, the term 'already in circulation' would mean in circulation within the territory of India. Another argument that supports the interpretation of section 14(a)(ii) to be only restricted to national exhaustion is the fact that by virtue of the amendment, Section 2(m) was proposed to be amended to expressly provide for the doctrine of international exhaustion. Had the provision under section 14(a)(iii) meant to include international exhaustion, the question of amending section 2(m) to expressly provide for international exhaustion would not have arisen. In this regard, Court in the case of *John Wiley & Sons v. Prabhat Kumar Jain* [14] rejected the application of the principle of international exhaustion in India, observing that in the absence of an express provision stating so, the Act could only be taken to support national exhaustion. [15] In the case of Warner Bros. v. V.G.

---

11. Pranesh Prakash, "Exhaustion: Imports, Exports, And The Doctrine Of First Sale In Indian Copyright Law" 5(4) NUJS Law Review 635 (2012).
12. *Ibid.*
13. *Supra* note 9.
14. CS (OS) No1960/2008, decided on May 17, 2010.

Santosh,[16] the Court explicitly observed that, in respect of copyright law, the principle of international exhaustion may apply to literary, musical, dramatic or artistic works; however it would not be applicable to cinematographic films and sound recordings.

WHETHER PARALLEL IMPORTS AMOUNT TO INFRINGEMENT OF COPYRIGHT

The issue of parallel importation in copyright works came up before the courts in India for the first time in year 1984 in *Penguin Books Ltd. v. India Book Distributors,*[17] wherein the issue was regarding import by a third party who had not taken any express authorization from the copyright owner. The Court observed that since the act constituted a violation the copyright owner's right to publish, it would be an infringement. The Court observed that the copyright owner's exclusive right of printing, publishing and selling his work in India would be extended to an exclusive right of importing copies of such work into India for the purpose of sale or offer or expose for sale such work. As per the Court, knowingly making an import into India without the copyright owner's consent for the purpose of selling or hiring infringing copies of a work would amount to infringement even if such copies of the work were made by or with the copyright owner's consent in the place where they were made.[18] The Court directed the Registrar of Copyrights that copies made out of India of a work which if made in India would have infringed a copyright, shall not be imported.

The decision in this case was however overturned by virtue of an amendment to Section 14 in the year 1994. The amendment to Section 14 substituted right to 'publish' in place of right to 'issue copies of the work to the public not being copies already in circulation'. Since as per Section 40, all provisions of the Act apply to foreign works in the same manner as if they were first published within India, and since thereby all the foreign works are given protection under the Act as if they had been published in India by Indian authors, it is thus likely to imply that such foreign works should also be subject to all the same limitations as well. One of such limitation (as per section 14), would be the doctrine of first sale. The amendment to section 14 by including words 'to issue copies of the work to the public not being copies already in circulation' ensures the importance of

15. *Ibid.*
16. *Supra* note 3.
17. AIR 1985 Del 29.
18. *Ibid.*

the doctrine of first sale in India, as well as permits international exhaustion, thus allowing for parallel import.

Certain copyright experts opine that like other nations, India has also accepted the principle of international exhaustion.[19] However, though experts seem to be interpreting the amendment to Section 14 to be permitting parallel imports, the Courts seem to have a different view. In the case of *Eurokids International Pvt. Ltd. v. India Book Distributors* [20] issue of parallel imports of literary works came up before the Court. However, without examining the issue of the first sale doctrine, amendment to section 14, implications of section 14 in terms of exhaustion of rights and/or Section 2(m), the Court went on to observe that any copy is sold in India by any third party in contravention of an exclusive licence contract would automatically be assumed to be infringing. From a reading of the judgment, it seems that reliance has been placed on the decision in Penguin's case without having accounted for the subsequent change in section 14 by the amendment of 1994.

In year 2009, the issue of parallel imports came before the Court in the case of *Warner Bros. v. Santosh V.G,*[21] DVDs (and not books) were parallel imported. The Court in its decision had a discussion over the meaning of the first sale doctrine in reference to literary works (thereby becoming the first judgment to explicitly mention about the doctrine), it ruled that the doctrine was inapplicable to cinematograph films. The Court reasoned that the copies of the work in question (cinematographic film) that were being let out for rent/hire by the Defendant were not made in India. But imported to India from US were they were made. Since Berne Convention country, like the US, entitles the owner of a copyright work to assert copyright in India and rights thereunder in the same manner as an Indian work. The Court observed that the proviso to Section 51(b)(iv) carved only one exception i.e. permitting importation of one copy of any work for importers domestic and private use. As a result, importation of genuinely made cinematographic films is not given relaxation but the importation of one copy for the private and domestic use has been permitted. This means that the proviso permits importation of an infringing work, not for

19. Arathi Ashok, "Economic Rights of Authors under Copyright Law", 15 Journal of Intellectual Property Rights 46 (2010).
20. 2005 (6) BomCR 198.
21. *Supra* note 3.

commercial use but for private and domestic use of the importer. The Court acknowledged that though the copies in question were infringing copies and their importation, under Section 51, was in contravention of the Act. The Court opined that the question in issue was whether the act of the Defendants amounted to infringement of the copyright of the Plaintiffs and that had to be addressed independent of the question whether parallel imports of copyrighted goods is permissible under Indian copyright law.

CONTROVERSY AROUND SECTION 2(M)

The Copyright Act was amended in the year 2012. The Standing Committee of the Parliament in the Copyright Amendment Bill, 2010 had included an amendment to Section 2(m) to allow parallel imports in India. However, the said amendment was not included in the final version of the Bill. The proposed amendment to Section 2(m) would have brought application of the principle of international exhaustion to Copyright law.

- **Proposed Amendment:** The Copyright (Amendment) Act 2012 proposed to incorporate the principle of international exhaustion which was sought to be formally brought into India by a simple and elegant amendment to the definition of an "infringing copy" (under section 2(m)).[22] The Standing Committee of the Parliament in the Copyright Amendment Bill, 2010 (first version)[23] that was tabled on April 19, 2010, had suggested an amendment to Section 2(m) to allow parallel imports in India thereby endorsing the doctrine of international exhaustion and proposing to legalise parallel imports. This meant that the imports into India of the copyrighted works by a third party who purchased copies of such works abroad legitimately, would be exempt from liability of infringement.[24] The said proposal was to amend Section 2(m) by way of adding a proviso to Section 2 (m) exempting 'parallel imports' from the definition of infringing copy "provided that a copy of a work published in any country outside India with the permission of the author of the work and imported from that country into India shall not be deemed to be an infringing copy".

22. Shamnad Basheer, "Indian Copyright Amendments: Making Bollywood Fairer?", *available* at https://spicyip.com/2010/04/indian-copyright-amendments-making.html (Visited on April 20, 2024).
23. Bill Summary: The Copyright (Amendment) Bill, 2010, *available* at http://www.prsindia.org/uploads/media/Copyright%20Act/Bill_Summary_Copyright%20Bill,%202010.pdf (Visited on April 20, 2024).
24. *Supra* note 9.

Evidently, the new proposed provision (if implemented) would have allowed the third parties to import and sell copies of copyrighted works purchased legitimately from any part of the world, without worrying about the risk of copyright infringement. [25] In other words, the effect of the amendment would have been elimination of principle of national exhaustion thereby allowing free import of copyright works (say books) published in another country, provided the author of the work had given his consent, irrespective of an Indian publisher had given permission for such importation.[26] So if X purchased a copy of Harry Potter from a bookstore in London, X could have been able to bring that book to India and sell it within any local market here.[27] Just like permitted in countries like Australia, New Zealand and Japan.[28]

- **Recommendation of the Standing Committee:** The idea behind the amendment was to allow parallel imports in India so that latest editions of books could be available at cheaper prices, particularly in order to protect the interests of students. The Parliamentary Standing Committee while reviewing the bill had noted that the latest editions of books were only available at very high prices as a result of the current practice which is based on territorial licenses and the low priced books were available only in old editions.[29] Strongly endorsing the proposed amendment the Standing Committee noted that it was only the old editions of the books that were available at low prices under the present regime. It would be in the best interests of students if they could have access to latest editions of the books. A note of caution was specifically put to Government that the purpose for which the amendment was proposed was to protect the interest of the students and it should be ensured that the same is not lost sight of.[30]
- **Opposition to the amendment:** The proposed amendment was largely opposed by the Indian publishers and broadcasters. [31] In this regard the South India Music Companies Association (SIMCA) objected stating that the amendment would act as a significant

25. *Ibid.*
26. *Supra* note 11.
27. *Supra* note 9.
28. *Ibid.*
29. *Supra* note 11.
30. 227th Report on the Copyright (Amendment) Bill, 2010, Department-Related Parliamentary Standing Committee on Human Resource Development ('Standing Committee Report'), *available* at http://www.prsindia.org/uploads/media/Copyright%20Act/SCR%20Copyright%20Bill%202010.pdf (Visited June 6, 2024).

disincentive for Indian sound recording labels for obtaining licenses from foreign producers.[32] Vigorous protests were spurred from the publishing industry that claimed the provision would act as the death knell of the publishing industry in India which was at nascent stage and hence be detrimental to the national interest of India. [33] Alleging that the amendment had failed in understanding the fundamental system of operation of the publishing industry, the Association of Publishers in India apprehended that Indian publishers would not be permitted to sell Indian editions in protected markets abroad. Even Federation of Indian Publishers contended that since rights of the publishers were being eroded by the proposed amendment, this could result in litigation between authors and publishers.[34]

- **Final bill:** As a huge victory for the publishing industry which had strongly opposed the proposed amendment that would have allowed parallel imports of books into India and as a result would have significantly dropped the prices of books especially in the education sector,[35] was dropped by from the final version of the Bill.
- **Opposition to the final bill:** When the final bill (without the amendment for parallel imports) came out, it was questioned by certain ministers in the Parliament itself who demanded reasons for dropping the parallel imports clause from the amendments.[36] It was alleged that the clause has been very 'cleverly' dropped to protect the interests of publishers.[37] It was complete volte face and was surprising particularly because the said amendment was initially proposed by the same government and had been supported strongly by the Standing Committee of the Parliament in its report reviewing the bill. [38] Upon strong opposition in Parliament, the HRD Minister assured that the issue of parallel imports was referred to a committee and a final decision on the issue of 'parallel imports' would be taken only after the Committee submitted the

---

31. *Supra* note 11.
32. *Ibid.*
33. *Supra* note 22.
34. *Supra* note 9.
35. Prashant Reddy, "A first look at the 'Amendments' to the 'Copyright Amendment Bill, 2010", *available* at https://spicyip.com/2011/08/first-look-at-amendments-to-copyright.html (Visited on May 05, 2024).
36. Prashant Reddy, "Victory for Akhtar – Rajya Sabha unanimously passes historic amendments to Copyright Act, 1957", available at https://spicyip.com/2012/05/victory-for-akhtar-rajya-sabha.html, (Visited on May 07, 2024).
37. Prashant Reddy, "Lok Sabha passes the Copyright (Amendment) Bill, 2012 with overwhelming support from the Opposition", *available* at https://spicyip.com/2012/05/lok-sabha-passes-copyright-amendment.html, (Visited on May 07, 2024).

report.[39]

- **Reference of the issue to a committee:** The issue was referred to a committee under the chairmanship of the economist, Prof. Rajesh Chadha at National Council for Applied Economic Research (NCAER)[40] to determine whether or not parallel imports should be legalized in India. After series of consultations and meetings with a number of stakeholders, the much awaited report on the "Impact of Parallel Imports on Copyrighted Works[41]" was released in March 2014. The report entailed a detailed study of price comparison of books, interest of students in buying books, the issue of editions, issue of remaindered copies, dumping and other pertinent issues relating to the issue of parallel imports in India. Considering the opposing views of the producers as well as the consumers, the report urged all the stakeholders to amicably form an optimal solution to the problem of parallel imports. And in case of failure to come to an optimal solution, the report made a suggestion in favour of adding the proviso to section 2(m) with requisite safety valves. The report noted that *"permitting parallel imports of books would not have an immediate damaging effect on the publishing industry or on the economy as a whole and the impact of the effect of amending section 2(m) would be tested over time*[42]*"*.

DELIBERATING WHETHER PARALLEL IMPORTS BE PERMITTED UNDER COPYRIGHT LAW

Striking a balance between private and public interest is always attempted by the intellectual property regimes. To strike a balance between the two, legitimate fetters on the scope of the monopoly under a copyrighted work would have to be put so that the latest creations are accessible to the consumers at affordable prices.[43] Though on one hand it could be argued that a practice like parallel imports would harm the interests of owners intellectual property since incentives to create new works would be reduced.[44] An owner of an intellectual property ought to have maximum control over how his goods would be dealt in a market. On the other hand,

38. Shamnad Basheer, "Samsung at the Supreme Court: Nationalising Exhaustion?", *available* at https://spicyip.com/2013/01/samsung-at-supreme-court-nationalising.html, , (Visited on May 06, 2024).
39. *Supra* note 35.
40. *Supra* note 37.
41. Aparajita Lath, "NCAER Report on Parallel Imports OUT!", *available* at https://spicyip.com/2014/03/ncaer-report-on-parallel-imports-out.html (Visited on May 07, 2024).
42. *Supra* note 11.
43 R P Merges, et. al., Intellectual Property in the New Technological Age, 391 (Aspen Publishers, New York, 2007).

however, it could be argued that such control over the markets should not extend to goods which have already been sold once and in respect of which a monopoly price has been extracted. [45] Hence parallel imports should be allowed. The practice could lead to increased consumer welfare by enhancing competition, fostering access to goods at lower rates. [46] So the question really is: whether the practice of parallel imports that results in reduced incentives to owners of intellectual property outweighs the fact that it would result in free market competition and increased access to goods at lower prices?[47] The answer to this question would depend largely upon the nature of the intellectual property and the country involved. In respect of copyright, particularly in a digital economy, with the advent of online book sellers and the massively increasing rate of digitisation in books, the national borders of a country becomes more porous and less amenable to artificial territory based distributorship agreements and price discrimination. The considerations of whether parallel imports should be permitted or not, depend on certain factors. Some of these factors have been discussed hereunder:

- **Accessibility and Availability of Educational Titles in India:** It is often argued (by the publishing industry) that in India there is no availability or accessibility issue (the country is served well by latest editions of books at affordable rates) and so even if the practice of parallel import supports free market competition and increased access to goods at lower prices, the same is not required in India thereby there being no need for an amendment to Section 2(m). The question is if parallel imports were to be legalised or say section 2(m) was amended as proposed, whether it would have caused a palpable negative impact on the Indian industry and its incentives to create? The onus is on the publishers to prove so.[48] Though it is asserted that the latest books are available in India at affordable prices and hence no need for a separate parallel imports provision, no empirical evidence has be proffered in support of this claim. The representations made by the publishers against amendment to section 2(m) of the Act was

---

44. Epstein R A, "Parallel imports as a perversion of free trade", *available* at http://heartland.org/sites/all/modules/custom/heartland_migr ation/files/pdfs/13292.pdf (Visited on July 27, 2024).
45 WPZ Waldeck, et al. (eds.), Patents and Technological Progress in a Globalized World, 105 (Springer, New York/Heidelberg, 2009).
46. A Krattiger, et al.(eds.), Intellectual Property Management in Health and Agricultural Innovation: A Handbook of Best Practices, 1430 (MIHR, USA, 2007).
47. *Supra* note 9.
48. *Ibid.*

captured by the Standing Committee while reviewing the Copyright Amendment Bill and it was alleged that so far as higher education was concerned, foreign books were being made available in India at low prices in spite of their being priced at much higher rate in the country of their origin.[49] Thomas Abraham, MD of Hachette India, in an opinion editorial titled 'The death of books'[50] criticising the proposed amendment to section 2(m) asserted that all the major books whether of academic importance or fictional/non-fictional blockbusters like Harry Potter were available in India on the same day of their release and in fact at a cheaper rate. His opinion was reiterated in a blog[51] where he criticised the proposed amendment of Section 2(m) as a "mindless introduction" of Section 2(m).

In order to test these assertions made by the publishers, an empirical study[52] was conducted by Shamnad Basheer, Debanshu Khettry, Shambo Nandy and Sree Mitra wherein the authors considered certain educational books, mostly of law and social sciences. The authors procured data for the said testing by corresponding with various libraries, including the libraries of the National Law School of India University, Bangalore, the National University of Juridical Sciences, Kolkata and the Centre for Studies in Social Sciences (CSSS) at Kolkata. The said study sought to answer the two claims made by the publishers i.e. (a) there is no 'availability' issue in India since the latest editions of all foreign titles were available in India on the same day of their release in the Western markets; and (b) there is no 'accessibility' issue in India, as these books were in fact available in India at much cheaper rates compared to their US and EU counterparts.[53] With respect to the availability issue it was found out that out of the foreign titles acquired by the said libraries for the period 2009-2011, only a few had equivalent Indian editions that were low priced and the vast majority of these were in fact older editions i.e. an edition or two behind their Western counterparts. The authors observed that only in rare instances the Indian edition corresponded with the latest international edition and in such cases the Indian

49. *Supra* note 36.
50. "The death of books", The Hindustan Times, January 20, 2011, *available* at http://www.hindustantimes.com/The-death-of-books/ Article1-652735.aspx (Visited on July 17, 2024).
51. "Thomas Abraham's rebuttal to 'Why the parallel importation of books should be allowed' (2m, copyright law)", *available* at http://withinthepurview.blogspot.in/2011/01/thomas-abrahams-rebuttal-to-why.html (Visited on July 17, 2024).
52. *Supra* note 11.
53. *Ibid.*

edition was introduced much later than the corresponding version in Western markets.

The findings of this study noted that foreign publishers did subject the Indian market to old and/or outdated editions on routine basis and despite their low prices, the librarians of these libraries (on being interviewed), categorically expressed their reluctance in purchasing these outdated editions. [54] The libraries informed that the latest titles were acquired by them by importing the same through their local distributors (and upon the transportation charges being added, these editions ended up costing much more in India than in the West). The distributors thereupon placed orders directly with foreign publishers or their agents abroad or procured the same from websites like Amazon and Abebooks. Since these websites are hosted in foreign countries, a foreign currency account and a credit card are needed to effectuate the purchase. No libraries in India generally have such an account that could enable them to import directly and hence resorting to the leading distributors (mostly based in metro cities) possessing such foreign currency accounts is the only option. Hence the foreign books are necessarily routed through the distributors. The distributors on being interviewed alleged that a deliberate strategy of dumping outdated editions in India was pursued by the publishers.

Now, what is pertinent to note is that in this study, the two law schools that were interviewed are located in prominent cities that have access to leading distributors, who are further equipped procure the latest edition of books either directly from publishers abroad or through online purchases. But majority of the other law schools in India which do not have access to such distributors or online import facilities, are likely to face a stark 'availability and accessibility' issue.[55] On the issue of 'availability and accessibility', the authors observed that countless students across the country are disadvantaged due to the restrictions on parallel imports. And when such textbooks are prescribed as essential readings, not many students possess resources sufficient to enable an import of latest editions at exorbitant prices. Observing that interests of students would be served well by fostering the emergence of a number of smaller distributors willing to enter into unexplored markets, particularly in non- urban areas, the authors advocated for an amendment to Section 2(m). They further opined that the amendment proposing to

54. *Id* at 340.
55. *Id* at 341.

legitimise parallel imports in all likelihood would compel foreign publishers to make available in India the latest editions at affordable prices thereby serving the interests of the Indian consumers in a more meaningful way.

- **Legality of Imports (through distributor or online):** Besides the issue of 'availability' and 'accessibility', there is the issue of the legality of the purchases of foreign book titles in India made by Indian educational institutions via distributors or online stores. Now if parallel imports are considered illegal under the current Indian copyright regime, it would effectively mean that any copy purchased from a source other than the copyright owner or the authorised licensee would be in violation of current law. To illustrate, if a book on Amazon or Flipkart is made available by a third party other than the owner of the copyright or his authorised licensee/agent, any distributor who purchases such copy and sells it further (say to the libraries or other consumers in India) would be acting in violation of the current Indian copyright regime.[56] So far as the end consumers of such copies of books are concerned, if the same is an individual, then he might not be liable as the proviso to Section 51(a)(iv) of the Act exempts the import of a copy for personal use from infringement. So if an individual purchases a copy from a distributor or from an online store, he would be exempt from infringement. The position as regards the libraries is however, unclear. It could be argued that 'imports' by libraries would fall outside the scope of the exemption since the import is not strictly speaking for the 'private and domestic use' of the libraries.[57] However, even if it is assumed that libraries could avail this exemption, the fact that they knowingly import books from distributors or online channels which are not authorized (strictly so speaking) by the copyright owner in India, might make them liable for a charge of aiding and abetting the said infringement under Section 63 of the Act.[58] The ones in favour of the amendment advocate that an amendment to Section 2(m) would solve this this legal uncertainty and enable libraries to import copies of the books without fear of copyright infringement.

1 **Remaindered Copies:** While arguing against the amendment, it was argued by the publishing industry that if parallel imports into India were allowed, it would result in

---

56. *Supra* note 9.
57. Pranesh Prakash, "Why parallel importation of books should be allowed", *available* at http://cis-india.org/a2k/blog/parallel-importation-of-books (Visited on June 28, 2024).
58. Section 63, the Copyright Act, 1957

remaindered copies flooding into the Indian market, thereby destroying the business of the distributors and agents authorised to sell in India. This argument of the remaindered copies was dispelled by Prof. Shamnad Basheer and Rahul Mathan in newspaper editorials. [59] Prof. Shamnad Basheer opined that a phenomenon "the fear of *'remaindering'"* is triggered by excess stocks of titles of books which compel publishers in markets of Western countries to sell copies at dirt-cheap prices. It is a worry to the Indian publishers that if parallel imports are permitted in India, these remaindered copies will eventually flood the domestic market and kill their business. However, in his view, even in countries that allow parallel imports, there was not much evidence of such flooding. An empirical proof, therefore, that could authenticate the magnitude of this alleged remaindering threat ought to be seen. [60] Now, if it were to be assumed that remaindering is a danger that is enough potent to hurt booksellers in India, there could be a solution – a contractual safeguard i.e. if the 'remaindered' copies are actually controlled by the Western publishers before they are released into any 'parallel' market, there could be a contract between the copyright owners and western publishers whereby the copyright owners could bind the Western publisher to ensure that surplus copies of books that are of interest to India are returned by bookstores and shipped to the Indian publisher. [61] This would help eliminate the prospects third party 'remaindering' profiteers who intend to plunder the Indian market. And additionally this would yield extra profits for publishers and authors. Another alternate solution could be that an exception to Section 2(m) be carved out to prevent copies labelled as 'remaindered' from entering the Indian markets. These solutions might prove to be better in working than dispensing with the amended permitting parallel imports altogether.[62]

- **Threat of Exports:** As a result of opposition against legality of parallel imports, another question arises as to whether it would be legal to export low priced Indian books to foreign markets.[63] It has been argued that if the proposed amendment was allowed, it would have

59. Rahul Mathan, "Nobody's about to kill books", The Indian Express, 7 February 2011(Visited on May 16, 2024) and Shamnad Basheer, "Remainders of the day: A case for parallel imports", livemint.com, 23 February 2012 *available* at http://www.livemint.com/ 2011/02/25195802/Remainders-of-the-day-a-case.html (Visited on May 16, 2024).
60. Shamnad Basheer, "Remainders of the day: A case for parallel imports", livemint.com, 23 February 2012 *available* at http://www.livemint.com/ 2011/02/25195802/Remainders-of-the-day-a-case.html (Visited on May 16, 2024).
61. *Supra* note 9.
62. *Ibid.*

resulted in increase in the 'parallel exportation'. i.e. if legalised, parallel imports would result in increase of parallel exports to countries like USA and UK.[64] As a result, the foreign publishers would cancel their licenses for low-priced Indian editions. The concerns of the Federation of Indian Publishers and the Association of Publishers in India, [65] who resisted the amendment, were noted by the Parliamentary Standing Committee in their report[66] that the as a result of this amendment, the low priced editions of the books that are actually meant for India could be exported back to the country of their origin where these books were priced at much higher rates. The publishers would have no incentives to sell books in India at a lower price because foreign publishers would not want to grant the reprint rights to Indian publishers because they might fear that Indian editions which are low priced would eventually flood and dilute their own market.[67] In this regard and in first of its kind, the Delhi High Court in the cases concerning *John Wiley*[68] temporarily restrained re-sellers in India from exporting to the foreign markets in the U.S.A low-priced Indian editions. The decisions in these gave publishers an unknown right, which is not enjoyed by them in any other country. In no other country does a similar position exist- in countries like USA and UK where though parallel imports are illegal, resellers are free to make exports to any other country.[69] And since USA and UK do not allow parallel imports, any 'flood' of books from India to these nations would be illegal under their own laws. There have been cases where Courts in USA have restrained the import of such books. Copyright being a territorial law, it is for the law of the importing country to decide the legality of such action. Even otherwise, the rights of a reseller could be only associated with the Doctrine of 'First Sale' and not with 'parallel imports'. As enshrined under Section 14, doctrine of 'first sale' provides that the owner of the copyright, after the first sale, loses all rights in a physical copy of a book. And so, in

---

63. Prashant Reddy, "An update on the Wiley cases & 'parallel exports'", *available* at https://spicyip.com/2011/03/update-on-wiley-cases-parallel-exports.html (Visited on June 02, 2024).
64. Divya Dubey, "Publishers have right to protect their territory", *available* at http://www.twocircles.net/2011mar11/publishers_have_right_protect_their_territory.html (Visited on June 02, 2024).
65. *Supra* note 11.
66. *Supra* note 22.
67. *Supra* note 11.
68. John Wiley & Sons & Ors v Prabhat Chander Kumar Jain & Ors, CS (OS) No 1960/2008, decided on May 17, 2010 and John Wiley & Sons v International Book Stores & Ors, CS(OS) No 2488/2008, decided on May 20, 2010.
69. *Supra* note 59.

contrast to say a video CD, where the owner can control certain rights such as the right of broadcast and the right to rent, in case of a book, the publisher loses all rights in its physical copy pursuant to a sale.[70]

So prima facie itself, the entire argument of 'exports', based on the assumption that export of low-priced editions is legally permissible, [71] is misguided. [72] It is pertinent to note that the amendment of Section 2(m) dealt with only with parallel imports and had nothing to do with the legality of exports outside India. Even otherwise, explanation to Section 14, makes circulation of copies of any book, which has been sold once by the owner of the copyright, permissible and ordinarily, the circulation would include an 'export' as well. In fact, under section 31, only those books which are issued under compulsory licenses are expressly prevented from being exported, thereby suggesting that for all other books, no separate right to prevent exports exists. An explicit right to prevent export was endorsed by the Delhi High Court in two cases involving the publisher *John Wiley & Sons.* [73] However, this concern of exports is completely an issue different from that of parallel imports, dragging this exports concern into parallel imports issue would result into a fusion of two essentially distinct sets of issue with distinct statutory framework. It is opined that if such exports are a prospective fear, separate statutory right to prevent such exports must be advocated for.[74]

- **Imports for the Differently Abled:** By virtue of section 31B introduced by the Copyright (Amendment) Act, 2012 an exemption has been carved out in favour of differently abled. With an aim to foster access to these people, conversions of copyrighted works into accessible formats have been exempted from copyright infringement. However, now that a number of books are not available in India and if import of copies for conversion or import of already converted copies (by disability organizations abroad) is not permitted, this especially carved out exemption does not have much potency. The decision not to amend section 2(m) thereby not permitting import of books from abroad is going to affect persons with disabilities,

70. *Ibid.*
71. *Supra* note 11.
72. *Supra* note 9.
73. *Supra* note 59.
74. *Supra* note 9.

who already are deprived of proper books.

- **Illegal imports:** Opposing the proposed amendment to section 2(m), it was alleged by the Indian Motion Picture Producers' Association that the amendment would result in illegal imports of works without the consent of the copyright owners. The Business Software Alliance in this regard contended that as a result of the amendment, imbalance of trade and development of illegal channels of distribution would be created. However, it has to be understood that if parallel importation is allowed then the copies of works that are being referred to by these association, would not be considered as infringing. Certainly the custom authorities would still have to make demarcations between counterfeit products and parallel imports that are legally purchased thereby developing a system to deal with such a situation. The Indian Broadcasting Foundation apprehended that this would result in foreign works being accessed by consumers before their formal release in India. However, the question is if a foreign work is legally purchased, then why its accessibility to consumers in India before the 'scheduled release date' be an issue because that does not qualify as piracy.[75]

CONCLUSION AND SUGGESTIONS

Lack of express recognition of principle of exhaustion under the Copyright law is leading to complex situations. It is suggested that requisite steps be taken for identifying the practice of parallel imports as part of the copyright law as well as the entire intellectual property framework in India. Amendment to Section 2(m) of the Copyright Act, 1957 as proposed earlier by the Parliament which in effect would legalise parallel imports is suggested. The amendment would prove beneficial in the following ways:

(i) This amendment which would clarify that the copyright law recognises principle of international exhaustion is likely to serve the interests of students because it would result in fostering emergence of a large number of smaller distributors who would be willing to scout for and enter into the unexplored

75. *Supra* note 11.

markets, especially in non-urban areas.

(ii) The amendment would also resultantly force foreign publishers to make the latest editions of their books available in India at affordable prices thereby serving the interests of Indian consumers in a more meaningful manner.

(iii) The amendment will ensure legality of book imports various distributors in India like Flipkart thereby providing more teeth to the recently introduced exemption for disability.

(iv) Amendment to Section 2(m) would not have the effect of destroying the publishing industry in India as claimed and alleged. There are examples of nations like New Zealand and Japan which have had provisions relating to parallel import in their regimes for several years and such provisions do not have any devastating impact on local publishers.

(v) Permitting parallel imports would contribute to the availability and accessibility of books in India, which also was the concern of the Parliamentary Standing Committee which reviewed the Copyright Amendment Bill and opined that "nobody can deny the fact that the interests of students will be best protected if they have access to latest editions of the books[76]."

It is recommended that the Government should reconsider its stance and effectuate the amendment to Section 2(m) of the Copyright Act, 1957 as early as it can.

76. Bill Summary: The Copyright (Amendment) Bill, 2010, *available* at http://www.prsindia.org/uploads/media/Copyright%20Act/Bill_Summary_Copyright%20Bill,%202010.pdf (Visited on May 31, 2024).

E-SPORTS AND PLAYER DATA PROTECTION: A GORDIAN'S KNOT

***Prof. Dr. Rattan Singh**

****Sanighdha**

INTRODUCTION

"Privacy is not for sale; it is a valuable asset that needs to be protected."[1]

– Stephane Nappo

It is an understandable and a widely acknowledged fact that sports in India and around the world[2] are a rage among the young and the old; among the males , the females or the third gender; the privileged and the deprived; the sane and the insane; the people who understand the sports and the people who do not; the ones who want to watch the game for fun and the ones who have their stakes put in and finally the ones who are playing-either to win or to learn, to lose or to earn. Sports and the related industry are so vast that the whole paraphernalia can make a talented sportsperson, whether a male or a female, the master of billions of dollars. If one had to count the number of successful players who had the rags to riches story, one would not have an end to that list. The advertising industry, the e-sports industry, the travel, and tour industry or the upscale-brand marketing industries; all these are related to the sports industry so intrinsically and so beautifully that to separate them all, would take infinite years and yet one would find a common connection between all of them and that is- the value of talent of each player that helps these technological and industrial conglomerates earn more than they could ever wish for. However,

---

* Professor of Law, University Institute of Legal Studies, Panjab University, Chandigarh.

** Junior Research Fellow(JRF), Department of Laws, Panjab University, Chandigarh.

1. Data Privacy- Protecting This Asset Is A Priority, Available At: Https://Www.Isaca.Org/Resources/Isaca-Journal/Past-Issues/2014/Data-Privacy-Protecting-This-Asset-Is-A-Priority (Last Visited March 22, 2024).
2. Prof. (Dr.) Aman Amrit Cheema & Dr. Ashish Virk, Sports, And Law- Contemporary Challenges (2023); Mukul Mudgal & Vidhushpat Singhania, Law And Sports In India- Issues And Challenges (2015); Jack Anderson, Sports Law- A Concise Introduction (2023); Tony Buti, Sports Law (2022); Ulrich Haas And Deborah Haeley, Doping In Sports And Law (2016); Jon Otto Spengler, Introduction To Sports Law (2009); Stephen F. Ross, Advanced Introduction To Global Sports Law (2021); Rodney K. Smith, Sports Law (1986); James R.A. Nafziger, Transnational Law On Sports (1988); Glenn Wong, Essentials Of Sports Law (1988); Urvasi Naidoo, Sports Law (1988); Michael Beloff, Sports Law (1999); Timothy Davis, Understanding Sports Law (2022); Katrien Lefever, New Media And Sports (2012); Ronojoy Sen, Nation At Play- A History Of Indian Sport (2015); Kausik Bandhopadhya, Sport Culture And Nation: Perspectives From Indian Football And South Asian Cricket (2015); Boria Majumdar, A History Of Indian Sport Through 100 Artefacts (2017); Jack Anderson, Leading Cases In Sports Law (2015).

there is one part of this whole expanse and that is the e-sports industry which is driving the growth in today's technology-driven area. Artificial intelligence and Internet of Things are the talk of the town now-a-days and these are taking forward the mettle from the old industrial ways. Today, details about a player are readily available everywhere and one does not have to look too deep to take out an analysis of the same. However, one might ask what is the security of a player's data in e-sports? Why are there so less or maybe more, but highly inadequate laws dealing with the issue? Why is not much attention paid to these areas? Why is so less academic or research work carried out in this sphere? Is the sports law developed enough to deal with it? Are we open enough to include sports law into the actual realm of law? Or is it still regarded as a very childish thought?

HISTORICAL BACKGROUND: SPORTS AND E-SPORTS IN INDIA

Before delving into the issue, it is pertinent to examine the history and origin of sports in India. Sanskrit is one of the oldest languages[3] developed in India, and most of the ancient literature and texts are in this language. Ancient Vedic literature[4] dates back to at least 5,000 years BC. It is in these texts that the term Krida is found and profusely used to connote the meaning of Sport. Krida is defined as follows: *The physical activities in which people participate and which delight them. The broader sense of the term includes all recreational activities in which one gets pleasure in participation.*[5] Sisu krida is referred to as child sport. Adult play is based on politico-social needs and play activities of cultural significance; Raas Krida is a dancing form of sport, Jala-Krida is water sport, Kanduka Krida is ball sport; S'ailadhirohan krida means rock climbing sport; As'wa Kanduka Krida means Horse Polo sport. Whatever is the basis of sport, the eternal principle of enjoyment remains the same. The concept formed about sport clearly indicated an

3. Central Sanskrit University, Available At: Https://Sanskrit.Nic.In/About_Sanskrit.Php (Visited March 22, 2024); Mundaka Upanishad; Ram Sharan Sharma, India's Ancient Past , (2004) Upinder Singh, A History Of Ancient And Early Medieval India- From The Stone Age To The 12the Century (2008); Arthur Llewellyn Basham, The Wonder That Was India (1954); R.C. Majumdar, Ancient India (1972); John Keay, India- A History, (2000); Romila Thapar, Early India: From Origins To The 1300s (2002); Tony Joseph, Early Indians: The Story Of Our Ancestors And Where We Came From (2021); Krishna Dwaipayana Vyasa, The Bhagavad Gita ; The Upanishads; The Ramayana; Re-Sanskrit, Https://Resanskrit.Com/Blogs/Blog-Post/Vasudhaiva-Kutumbakam (Visited March 23, 2024
4. The Rig Veda, *Available At:* Https://Www.Shrivedabharathi.In/Resources/Documents/Rig%20veda%20(%20pdfdrive%20).Pdf (Last Visited March 22, 2024); Glimpses Of History, Available At: Https://Glimpsesofhistory.Com/Ancient-Vedic-Literature/ (Last Visited March 22, 2024).
5. Ancient Concept Of Sports In Modern Perspective, Available At: Https://Www.Icsspe.Org/Content/Ancient-Concept-Sport-Modern-Perspective (Last Visited March 22, 2024)

inclination towards deriving recreation, fun, enjoyment, and pleasure through sporting activity. The term 'physical exercise' was separated from the term sport. Exercise in Sanskrit is called *'Vyayam*.' It is aimed at building strength and fitness. A separate chapter is written on the term 'Vyayam' in ancient medical texts. An element of enjoyment has little significance in this term.[6]

In ancient texts, a Shloka marking the importance of Vyayam has been included and the same is reproduced below:

"Vyayamaat labhte swasthyaam deerghayunsham balam sukham

Aarogyam paramam bhagyam swasthyaam sarvaarthsaadhnam." [7]

Apart from material pleasure, krida is also viewed in terms of spiritualism.[8]The joy or Anand that one derives from voluntary participation in sport. According to the ancient theory of joy or happiness, there is no distinction of kind between physical good and spiritual good, the two are commensurable in terms of each other. Physical good is itself an aspect of 'bliss.' The physical bliss, which is the first step for achieving spiritual bliss, is obtainable through the medium of sport - the bliss that is non-polluted, and perfectly pure should be the output of sport. For achieving such a pure bliss sport which is free from competitions, commercialism and brutality should also be of a different type. Sport in which one gets completely engrossed, sport which is of individual type, non-competitive and that makes individuals forget everything around themselves. In this theory of joy, though the emphasis is on *'Krida'* or sport, equally important is the body or *S'arira* that has to be swift, firm, and strong. Such a type of body is obviously possible only through sport and physical education. The principles of voluntarism and social acceptability are properly safeguarded as they are inherent in this philosophy. Sport was viewed

---

6. *Id* At 7.
7. World Health Organisation, Available At: Https://Www.Who.Int/Initiatives/Sports-And-Health (Last Visited March 22, 2024); The Healthcare Insights, Available At: Https://Thehealthcareinsights.Com/The-Importance-Of-Sports-To-Health-And-Fitness/ (Last Visited March 22, 2024); Better Health Channel, *Available At*: Https://Www.Betterhealth.Vic.Gov.Au/Health/Healthyliving/Sports-And-Physical-Activity (Last Visited March 22, 2024); University Of Missouri Healthcare, *Available At:* Https://Www.Muhealth.Org/Conditions-Treatments/Pediatrics/Adolescent-Medicine/Benefits-Of-Sports (Last Visited March 22, 2024); World Health Organisation, Available At: Https://Www.Who.Int/Activities/Ensuring-Sports-For-All (Last Visited March 22, 2024); Central Sanskrit University, Available At: Https://Sanskrit.Nic.In/About_Sanskrit.Php (Last Visited March 22, 2024); Ancient Concept Of Sports In Modern Perspective, *Available At*: Https://Www.Icsspe.Org/Content/Ancient-Concept-Sport-Modern-Perspective (Last Visited March 22, 2024)
8. *Ibid*; Central Sanskrit University, Available At: Https://Sanskrit.Nic.In/About_Sanskrit.Php (Last Visited March 22, 2024); Ancient Concept Of Sports In Modern Perspective, *Available At:* Https://Www.Icsspe.Org/Content/Ancient-Concept-Sport-Modern-Perspective (Last Visited March 22, 2024)

by ancient Indians from a very different perspective. Not frustration, but pleasure, not hatred, but love, no competition, but cooperation, not materialism, but spiritualism, not commercialism, but amateurism, etc. are the inner characteristics of 'sport.'[9] Health and sports have always been interconnected. The importance of health is highlighted in various texts of ancient spiritual texts of India. Lord Dhanvantri, an incarnation of Sri Hari Vishnu, is said to be the one who blesses one and all with good health and a spiritual mind that one can invest in positive activities. According to the definition given by the Cambridge Dictionary, E-Sports is defined as "the activity of playing computer games against other people on the internet, often for money, and often watched by other people using the internet, sometimes at special organized events."[10] Jack According to the Harvard International review, "Esports, as they are most commonly called, are in an international gray area. Their enormous popularity—some events routinely draw more than a million concurrent viewers— make esport athletes' attractive options for lucrative corporate sponsorships, but the fluidity of esports over international boundaries and lack of defined rules makes them incredibly complex."[11] Further it states that, "esports are video games that are played in a highly organized competitive environment. These games can range from popular, team-oriented multiplayer online battle arenas (MOBAs), to single player first person shooters, to survival battle royales, to virtual reconstructions of physical sports. The rise in this genre of video games comes as the young adult demographic has started to create and control a host of new cultural trends. Specifically essential in this transformation is an evolution of young adults' fundamental relationship with sports. Viewership of traditional sports is declining, while that of esports is skyrocketing. The boom is so significant that almost every major popular video game on the market currently has some type of pseudo-professional circuit (yes, even Farming Simulator 2019)."[12]

It is interesting to note that the history of e-sports is not very dated but it is also not a very new

9. Ancient Concept Of Sports In Modern Perspective, Available At: Https://Www.Icsspe.Org/Content/Ancient-Concept-Sport-Modern-Perspective (Last Visited March 22, 2024).
10. T.L. Taylor, Raising The Stakes: E-Sports And Professionalization Of Computer Gaming (2012) Cambridge Dictionary, *Available At:* Https://Dictionary.Cambridge.Org/Dictionary/English/E-Sports (Last Visited March 22, 2024).
11. Harvard International Review, Available At: Https://Hir.Harvard.Edu/Esports-Part-1-What-Are-Esports/ (Last Visited March 22, 2024); William Collins, The Book On E-Sports (2020).
12. *Id.* At 10; T.L. Taylor, Raising The Stakes: E-Sports And Professionalization Of Computer Gaming (2012); Tobias Scholz, E-Sports Is Business: Management In The World Of Competitive Gaming (2019); E Sports: The Ultimate Guide (2019); Ryan Rogers, Understanding E-Sports: Introduction To Global Phenomenon (2019).

thing. The origins of competitive gaming dates to 1952, when information technologist Alexander Shafto Douglas developed a computer version of the game "XOX" for his doctoral thesis at Cambridge University. This game allowed for one-on-one competition between a human player and the computer, with players taking turns starting the game. The first multiplayer game was produced in 1958 by William Higinbotham, the head of Instrumentation at the Open Day event. Called "Tennis for Two," this game gain permission two players to compete against each other using an early form of a joystick to control the ball and adjust its trajectory. Many consider this game to be the precursor to modern eSports[13]Esports as we know it today is relatively new, however, competitive gaming has been around since the days of Pong. Esports traces its origins back to 1972, when home consoles first became common. In 1980, the first nationwide Space Invaders competition was held with 10,000 participants. A year later, gamers competed in the surprisingly cutthroat, inaugural Donkey Kong tournament. In the early 1990's, Street Fighter and Mortal Kombat competitions and tournaments grew in popularity followed by Goldeneye and other first-person shooters later that decade, which paved the way for the StarCraft, Warcraft, Overwatch, Call of Duty, and Halo series. Fast forward to 1998, the legendary StarCraft 2 tournament on PC boasted more than 50 million online viewers, 17 million of those participating via Twitch. As the 2000's rolled around, Esports gained serious momentum. Tournament hosts such as the World Cyber Games and the Electronic Sports World Cup debuted, followed by the launch of Major League Gaming (MLG) in 2002. Today, MLG is considered one of the world's most prominent hosts in Esports[14].

The first televised Esports event happened in 2006, Halo 2 on the USA Network. Broadcasting Esports did not prove fruitful until the inception of Twitch in 2011, when players could actively engage with their audiences. In 2014, Amazon bought Twitch and League of Legends became one of the most popular Esports games ever which remains true today). In 2011, League of Legends had its first World Championship and in 2013, the event sold out the Staples Center in

13. Understanding E-Sports: Introduction To Global Phenomenon (2019).; Ispo, E-Sports: How It All Began, *Available At:* Https://Www.Ispo.Com/En/Sports-Business/Esports-History-How-It-All-Began (Last Visited March 22, 2024).
14. Ryan Rogers, Understanding E-Sports: Introduction To Global Phenomenon (2019); Southern Illinois University Edwardsville, *Available At:* Https://Www.Siue.Edu/Esports/About/History.Shtml#:~:Text=Esports%20is%20a%20fascinating%20phenomenon,Teams%20(Multiplayer)%20or%20individually. (Last Visited March 22, 2024).

Los Angeles within minutes of tickets going on sale.[15] South Korea is widely recognised as the cradle of competitive gaming because of its high-speed broadband connection and government initiatives to promote gaming culture in the early noughties. PC Bangs, or gaming cafes, became a mainstay with tech-savvy, young Koreans who paid an hourly fee to play the most popular video games against each other in the same room. Today, esports are a global affair, with players hailing from every continent and competitions taking place around the world. The term has come to envelop all gaming at a competitive and professional level with an engaged following, similar to traditional sports. [16] According to the Maryville University Research, there are different types of e-sports that are present in today's world like fighting games, racing games, sports games, digital card games, real time strategy, first person shooter, third person shooter and multiplayer open battle arena.[17] While many of the larger events are watched in person, a large fan base watches esports through streaming services. Twitch, the world's leading video platform and community for gamers, boasts more than 45 million gamers a month who broadcast, watch, and chat. To shed some light on the astounding number of viewers, the 2017 *League of Legends* World Championship drew more than 80 million viewers, making it one of the most popular esports competitions ever.[18]

The e-sports industry is a growing industry and thus is said to grown at the pace of collecting and earning billions of dollars every day in the future. The aspect and prospects of e-gaming and the diversification of the field are meant to increase opportunities for the young and the crazed along with the management personnels who earn handsomely through the medium.

SPORTS LAW IN INDIA AND DATA PROTECTION: HISTORICAL PERSPECTIVE

---

15. Southern Illinois University Edwardsville, *Available At:* Https://Www.Siue.Edu/Esports/About/History.Shtml#:~:Text=Esports%20is%20a%20fascinating%20phenomenon,Teams%20(Multiplayer)%20or%20individually. (Last Visited March 22, 2024).
16. Understanding E-Sports: Introduction To Global Phenomenon (2019).; Ispo, E-Sports: How It All Began, Available At: Https://Www.Ispo.Com/En/Sports-Business/Esports-History-How-It-All-Began (Last Visited March 22, 2024); Euronews.Culture, *Available At:* Https://Www.Euronews.Com/Culture/2023/06/22/Everything-Youve-Ever-Wanted-To-Know-About-Esports-But-Were-Too-Afraid-To-Ask (Last Visited March 22, 2024).
17. Maryville University, *Available At:* Https://Online.Maryville.Edu/Blog/Different-Types-Of-Esports/ (Last Visited March 22, 2024).
18. Diversified, *Available At:* Https://Onediversified.Com/The-Wide-World-Of-Esports/ (Last Visited March 22, 2024).

AND PRESENT TREND ANALYSIS

In India, law relating to sports is not very developed and hence there is no comprehensive law that deals with sports. Sports are considered a mere entertainment industry and hence the progression in the modelling of laws relating to sports has been very slow. This slow progression has at times, led to the exploitation of players and their personal data. Sports fall under Entry 33 of the Second List, that is the State List of the Seventh Schedule. The Sports Authority of India and the related Ministry that is the Ministry of Sports and Youth Affairs is the nodal Ministry dealing with the same. Nuanced approach has not been followed while developing sports laws and India has thus far lagged behind other countries in this regard. Since the traditional sports have no independent overlooking or over-sight mechanism to look into the sports affairs, traditional sports as well as, now e-sports have been fixed in a mix of confusion and dilemmas, while taking important decisions.

Speaking of the Indian scenario, sports regulatory bodies, such as Board of Control for Cricket in India (BCCI) and Indian Olympic Association are some regulatory bodies which are autonomous to a great extent. The Government of India set up the Ministry of Youth Affairs & Sports in order to design infrastructure and achieve excellence in numerous competitive events and promote capacity building for broad-basing sports at the national as well as international level. Initially, various National Sports Federations (NSF) are held responsible for the promotion of sports. These self-ruling bodies, i.e., NSFs are issued with notifications and guidelines time to time by the Ministry of Sports and Youth Affairs for the purpose of their regulation. Several sports activities are coordinated by the apex body, i.e., the Sports Authority of India. There are various schemes formulated and implemented by the Government of India relating to Awards, events of sports, etc. The National Sports Policy of India of 2001 has the main aim to achieve brilliance in sports at national as well as international levels. Sports law in India is regulated and governed by: Sports Authority of India, National Sports Policy, Sports Law and Welfare Association of India, Sports Broadcasting Signals (Mandatory Sharing with Prasar Bharati) Act, 2007.[19]

A Resolution on the National Sports Policy was laid in both Houses of Parliament in August,

19. Exploring And Analyzing Sports Law In India, *Available At:* Https://Www.Ijlmh.Com/Wp-Content/Uploads/Exploring-And-Analysing-Sports-Laws-In-India.Pdf (Last Visited March 22, 2024).

1984. The National Sports Policy, 1984 was formulated with the objective of raising the standard of Sports in the country. The National Sports Policy, 1984 provided inter-alia that the progress made in its implementation would be reviewed every five years to determine the further course of action, as may be necessary, following such review. Over the years, it has transpired that even as the National Sports Policy, 1984 encompasses various facets in respect of encouraging sports in the country, the implementation of the same is not complete. In order to reformulate the National Sports Policy 1984, National Sports Policy 2001, was drafted

The objective of the guidelines of National Sports Policy 2001 is threefold[20]:

- Firstly, to define the areas of responsibility of the various agencies involved in the promotion and development of sports,
- Secondly, to identify National Sports Federations eligible for coverage under these guidelines, to set priorities, and to detail the procedures to be followed by the Federations, to avail of Government sponsorship and assistance.
- Thirdly, to state the conditions for eligibility which the Government will insist upon while releasing grants to Sports Federations[21].

In accordance with the provisions of the National Sports Policy, 2001, the Central Government pursues the objectives of "Broad-basing" of Sports and "Achieving Excellence in Sports at the National and International levels" in a combined effort with the State Government, the Olympic Association, and the National Sports Federation. The Government of India and the Sports Authority of India, in association with the Indian Olympic Association and the National Sports Federations, are expected to focus specific attention on the objective of achieving excellence at the National and International levels. The National Sports Policy aims to pursue inclusion of "Sports" in the Concurrent List of the Constitution of India and introduction of appropriate legislation for guiding all matters involving national and inter-state jurisdiction[22].

A specific enactment is required for the entire nation, though there are certain enactments such

---

20. National Sports Policy, 2001, *Available At:* Https://Yas.Nic.In/Sites/Default/Files/National%20sports%20policy%202001.Pdf (Last Visited March 22, 2024), Press Information Bureau, Government Of India.
21. *Ibid.*
22. Indian Law Journal, *Available At:* Https://Www.Indialawjournal.Org/Archives/Volume3/Issue_2/Article_By_Gaurang.Html (Last Visited March 22, 2024).

as the National Sports Development Code, 2011[23] which governs the National Sports Federation of India, but as sports is held to be a part of the State List of Seventh Schedule[24] of the Indian Constitution,[25] the above-mentioned Code's validity was upheld in the case of *Indian Olympic Association v. Union of India* by the Delhi High Court. At present there are two draft Central Bills i.e. the Prevention of Sporting Fraud Bill, 2013 and the National Sports Development Bill, 2013, which are to be promulgated, and if did then it would give further belief and acceptance in the existence of Sports Laws in India.[26] Data Protection Laws in India are a new crop of laws and are in constant development. The recent Data Protection Act 2023 have ushered in a new age of development in these laws. The Government of India under the Digital Personal Data Protection Act 2023 has notified important principles to be followed in applying the same for preserving the fundamental right to privacy and balancing the nuances of data collection. However, these data protection laws are non-working in the filed of sports and e-sports because the requirements are completely different.

At this juncture, it will be pertinent to look into the trends and growth graph of the data protection laws in India. Data protection laws can be closely linked to the fundamental right to privacy in India because without the recognition of that fundamental penumbral right in the landmark case of Retd. (Justice) K.S. Puttaswamy v Union of India (2017). Intrinsically linked to each other, it is unimaginable to think of data protection as a concept without the recognition and protection of right to privacy. The laws to protect data in India are actually the laws that intend to prevent and protect the privacy of the individuals. The first step in this direction was taken by the Information Technology Act of the year 2000, which bought in a number of amendments in many other laws. Also, through an amendment to the IT Act in 2008, the Indian Computer Emergency Response Team (CERT-In) was designated as the national agency for performing certain functions in the area of cyber security. CERT-In is responsible for collecting, analyzing, and disseminating information on cyber security incidents, as well as forecasting and

23. National Sports Development Code, 2011.
24. Seventh Schedule, Constitution Of India, 1950.
25. Constitution Of India, 1950.
26. Exploring And Analyzing Sports Law In India, *Available At:* Https://Www.Ijlmh.Com/Wp-Content/Uploads/Exploring-And-Analysing-Sports-Laws-In-India.Pdf (Last Visited March 22, 2024).

alerting on potential incidents of this nature. CERT-In is authorized to take emergency measures to handle cyber security incidents and coordinate response activities. The agency also issues guidelines, advisories, vulnerability notes, and white papers on information security practices, procedures, prevention, response, and reporting of cyber incidents. Overall, CERT-In's role is to ensure the security of information systems and to minimise the impact of any cyber security incidents that may occur. [27]Thereafter came in the Intermediary Guidelines of Data Protection and the step to store critical sensitive data in the country itself, instead of exporting it to outside sources. Thus, data protection laws have a long history behind them and have finally, for the time being have culminated into the 2023 Data Protection Act.

An intermediary under Section 2(1)(w) of the Information Technology Act 2000 ("IT Act"), [28] would include gaming platforms as they store, transmit, and receive the data of the users. Furthermore, Section 72A of the IT Act[29] provides punishment for disclosure of information in a breach of lawful contract. This provision can help fix the liability of third-person parties in esports tournaments and activities, however the issue of whether interest of minors and sale of personal information has been addressed in such a contract remains to be determined. Gaming platforms are duty bound to process the players' data safely. This duty of protecting personal data of players has been duly recognised in international jurisdictions. Particularly, in the celebrated case of *United States of America v. Epic Games,* an e-sport company was penalized by the Federal Trade Commission ("FTC") for violating data protection laws. A hefty fine of $520 million was levied upon Epic Games Inc. to settle an FTC case for deliberate breach of children's privacy while playing their popular game, Fortnite. The FTC held that Epic Games used deceptive interfaces and privacy-invasive default settings that tricked young gamers into shelling out an amount to the tune of $245 million! Additionally, Epic Games was also fined for collecting personal data of minor Fortnite players who were below 13 years of age without their parental consent.[30]

In July 2022, the Central Government banned Battle Ground Mobile India ("BGMI"). BGMI

27. Ir Global, *Available At:* Https://Irglobal.Com/Article/Evolution-Of-Data-Protection-Law-In-India/ (Last Visited March 22, 2024); Retd. Justice K.S. Puttaswamy V Union Of India (2017); Data Protection Act 2023; Information Technology Act 2000.
28. Information Technology Act, 2000.
29. Information Technology Act (2000)., Art. 72.
30. Revsports, *Available At:* Https://Revsportz.In/Data-Privacy-In-E-Sportz-And-Online-Gaming/ (Last Visited March 22, 2024).

was found to be indulging in data malpractices by gaining personal information without consent. The information was later being transferred to servers located outside India in an unauthorized manner. The compilation of personal data of BGMI users and its mining posed a threat to the security of India. While BGMI was banned, the Central Government refrained from levying a financial penalty upon the makers of BGMI.[31] A look at the data privacy regulations curated for E-Sports and Online Gaming of some of the countries brings forth the following:

- China has very rigid regulations and guidelines when it comes to online gaming. In March 2022, China released draft rules titled *"Regulations on the Online Protection of Minors"* with the main aim being the protection of minors and youth from internet addiction which also includes playing online games. The draft rules include several stringent and arbitrary guidelines. Some of the key rules are limiting the number of hours a child can play video games in a single day and calling upon tech companies (including game-developers) to terminate the services to minor users who are found liable for giving fake credentials etc. Whereas it appears that these rules have been promulgated by the Chinese government for the primary purpose of protection of minors' data and might possibly lead to better mental orientation for minors, one cannot help but wonder that these rules have depicted online gaming in a bad light.[32]
- The European Union has enacted a very comprehensive legislative framework for dealing with privacy and data protection concerns. This framework, termed as General Data Protection Regulation 2016, relies heavily on consent of the consumer or the consumer's guardians (in case of the consumer being aged below 16 years) for providing their personal data to the gaming companies, while also barring use of this information for commercial purposes.[33]
- In the United States of America, there are various legislations that govern

31. *Ibid.*
32. Regulation On Online Protection Of Minors, Id At 38.
33. *Id.* At 38.

privacy on the internet. For online gaming companies, the Entertainment Software Rating Board's "Privacy Certified" program ensures that game companies are complying with privacy laws and regulations by assessing the privacy risks associated with them. To protect the privacy of children, the USA has enacted a separate legislation called, *"The Children's Online Privacy Protection Act, 2013".* As per this Act, online services collecting, sharing, and processing personal information about children below 13 years of age are required to obtain parental consent and follow data handling requirements.[34]

- So far as India is concerned, the Ministry of Electronics and Information Technology ("MeitY") notified the draft rules for online gaming for public consultation, titled the *"Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules, 2023" ("draft IT (Amendment) Rules 2023").* The draft rules have defined an 'online gaming intermediary' as a platform which hosts one or more online games. The rules have introduced due diligence requirements which require a gaming intermediary to follow Know-Your-Customer (KYC) procedures to be followed for the registration of the accounts of the user. Additionally, the rules mandate the establishment of self-regulatory bodies to register such platforms. The proposed registration framework would require the intermediaries to have a mechanism for safeguarding children, and users against financial frauds. It requires a mechanism to safeguard its users from gaming addiction. Parallelly, the Government of India has also prepared the draft Digital Personal Data Protection Bill, 2022 since the previous Data Protection Bill, 2019 was withdrawn. The Digital Personal Data Protection Bill of 2022 seeks to addresses some of the important concerns for online gamers such as cross border data transfer, liability in case of personal data breach, and processing of

34. Revsports, *Available At:* Https://Revsportz.In/Data-Privacy-In-E-Sportz-And-Online-Gaming/ (Last Visited March 22, 2024).

children's data.[35]

CONCLUSION

India has had a long history of sports and sports-related activities. It is clearly evident from the fact that the spiritual texts of the nation and the various phases of historical development have always upheld the importance of sports and physical activities. Even though, India has always put the welfare of the players first, the development of e-sports does put the management in fix, with the only option of making laws work for the whole space of e-sports. It is pertinent to note that controlling e-sports is not at all easy and the present laws are inadequate. However, it must also be noted that laws have been made, it is just that all now hinges upon the implementation of the same. The steps taken by the government are laudable however, clear connection must be established between the issue that has to be resolved and the issue that have arisen alongwith the steps that must be taken, while dealing with the present sphere of e-sports. Conclusively, Indian scenario of e-sports, though in need of urgent attention has succeeded in respecting the players and the digital privacy has been protected by far. The step-by-step development in the filed will ensure more benefit than just one stroke of action. This will, lastly ensure a more just, equitable and level-playing field for all players by guarding their constitutional and other legal rights as well.

35. *Ibid.*

MARITAL RAPE IN INDIA: A LEGAL VACUUM AND THE QUEST FOR REFORM

***Mr Rishabh Bhandari**

****Ms Vaishnavi Kumari**

INTRODUCTION

About 10% of married women in India report having experienced sexual violence from their husbands,[1] suggesting that the tradition of marriage accounts for a large percentage of sexual assault in the country. Particularly vulnerable to this abuse are adolescent spouses, who report the greatest incidence of marital sexual assault of any age group. Surprisingly, less than 1% of sexual misconduct victims in India choose to report their experience to the authorities. A [2] contributing factor to this tendency can be the lack of recognition of marital rape as a crime in India.

India is counted among the 36 nations yet to outlaw marital rape.[3] Section 375, Indian Penal code (henceforth 'IPC'), which has excluded sexual acts by a man with his own wife aged more than 15 years, from being considered as rape, has sparked prolonged debate and opposition for a long time. And to add to that, in the recently enacted Bharatiya Nyaya Sanhita (henceforth 'BNS'), marital rape is still not criminalised, as according to Exception 2 to Section 63, “sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape.” Thus, the act of marital rape, defined as a husband sexually assaulting his wife without her consent,[4] is not deemed a criminal offense under BNS.

Supporters of the exemption of marital rape argue that it safeguards the institution of marriage, suggesting that the implementation of marital rape laws could lead to false accusations and

---

* Assistant Professor of Law, Ramaiah College of Law, Bengaluru.
** 4th year student, Ramaiah College of Law, Bengaluru.

1. International Institute for Population Sciences (IIPS) and Macro International. National Family Health Survey (NFHS-3) India. http://www.rchiips.org/nfh s/nfh s3_national_report.shtml (accessed Feb 17, 2014).
2. www.thelancet.com, correspondence (Vol 383 March 8, 2014), Sexual violence and rape in India (thelancet.com).
3. D Banerjee & T.S.S. Rao, 'The Need to Rewrite the Story on the Dark Shadow of Marital Rape' (2022) 4(1) Journal of Psychosexual Health 11, *available* at https://doi.org/10.1177/26318318221083709 (last visited on Sep. 27, 2024).
4. V.P. Singh, 'Legal Strategies for Making Marital Rape a Crime', Indian Journal of Gender Studies 29, no. 1 (2022): 10, *available* at https://journals.sagepub.com/doi/abs/10.1177/09715215211056791?journalCode=ijgb (last visited on Sep. 27, 2024).

potential disruption of families. However, critics challenge this perspective, asserting that this legal and cultural exception perpetuates the concerning prevalence of violence against women.[5] They also argue that the failure to criminalize marital rape violates women's fundamental rights to equality, liberty, and dignity as guaranteed by the Indian Constitution. The idea of "mandatory sexual interaction" within marriage contradicts 'Right to Equality' and 'Right to Life and Personal Liberty', as enumerated in 'Article 14 and Article 21 of the Constitution', perpetuating male dominance and patriarchal norms. This paper discusses both the perspectives at length and underscores the need for comprehensive legal reforms and societal interventions to address this pervasive issue to uphold the rights and dignity of women.

INDIA'S HISTORY OF MARITAL RAPE

A. 1983 Amendment

Since its inception in 1860, up to the 1983 amendment, the IPC remained unaltered in its definition of rape under Sections 375 and 376. The 1983 amendment was instigated by protests stemming from the Indian Supreme Court's ruling in the contentious Mathura gang-rape case, Tukaram v. State of Maharashtra.[6] Mathura, a 16-year-old tribal girl, while at the police station, was raped by drunken male police officers. The Sessions Court, relying on Mathura's previous sexual experience, ruled the incident as a consensual sex and acquitted the accused. The Bombay High Court overturned this and distinguished between passive submission and free consent, stating that Mathura's submission was due to fear and not genuine consent. However, the Supreme Court later acquitted the accused, stating that the absence of injuries and lack of resistance indicated consent, and required a higher threshold for fear for it to be considered as non-consensual. This judgment became controversial for its interpretation of consent and led to widespread legal reforms. Women's rights organizations denounced this abuse of victims of sexual assault and the continuation of the culture of sexual abuse in Indian courts. The [7]

---

5. Vinayaka Raina & Ramesh Kumar, 'Societal Issues Relating to Marital Rape in India: An Overview' (2022), *available* at https://www.researchgate.net/publication/357677828_SOCIETAL_ISSUES_RELATING_TO_MARITAL_RAPE_IN_INDIA_AN_OVERVIEW/citation/download (last visited on Sep. 27, 2024).
6. Tuka Ram And Anr v State of Maharashtra, AIR 1979 SC 185, (1979) 1 SCR 810.
7. Flavia Agnes, 'Law and Gender Inequality: The Politics of Women's Rights in India', Oxford University Press (2001), *available* at https://global.oup.com/academic/product/law-and-gender-inequality-9780195645891 (last accessed Sept. 21, 2024).

subsequent protests culminated in the 'Criminal Law (Amendment) Act, 1983' which introduced several significant provisions.,[8] aimed at curbing the abuse of power with respect to custodial rape and sexual exploitation by authority figures.[9] Amendments to Section 376(2) of the IPC added sub-sections (b) and (c), and penalised rape committed by public servants, jail superintendents, hospital staff, and managers,[10] emphasizing the severity of exploiting power for sexual gain, and transferred the 'burden of proof' from the victim to the accused. The Act also made it illegal for a husband, post-separation, to coerce his estranged wife into sexual intercourse.[11] However, it did not cover rape by family members or people in positions of authority or marital rape beyond separation.[12]

B. 2013 Amendment

A devastating gang rape in Delhi occurred on December 16, 2012. A twenty-three-year-old female physiotherapy intern was brutally attacked and raped by six men on a bus, resulting in severe injuries, including the loss of most of her intestines.[13] Despite medical interventions, she tragically succumbed to her injuries less than two weeks later.[14] This horrific crime sparked a nationwide outrage, prompting the former CJI, Late. Justice J.S. Verma, to establish a committee aimed at amending and strengthening laws related to rape and sexual assault.[15] One of the recommendations of the committee was to abolish the marital rape exception, as it was based on outdated notions of women being construed as property.[16] Subsequently, major changes were enacted through the 'Criminal Law (Amendment) Act, 2013'.[17] Notably, the meaning of "rape" under Section 375 was expanded to cover other types of penetration on any area of a woman's or

8. Kasera P, A Comprehensive Study of Rape Laws in India (2020) [Online] SSRN. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3619807.
9. Criminal Law Amendment Act, 1983, *available* at https://www.indiankanoon.org/doc/239508 (last accessed Sept. 21, 2024)
10. *Ibid.*
11. *Ibid.*
12. *ibid*
13. Mukesh & Anr. v. State for NCT of Delhi & Ors., AIR 2017 SC 2161 (India), *available* at https://www.jstor.org/stable/26720556 (last accessed Sept. 21, 2024).
14. *Ibid.*
15. Patel Krina, 'The Shortcoming in Marital Rape Laws in India: Advocating for Criminalizing and Social Change' (2019) 42(5) Fordham International Law Journal 1519 [Online]. *Available* at: https://ir.lawnet.fordham.edu/ilj/vol42/iss5/7 [Accessed 22 April 2024].
16. Justice J.S. Verma Committee Report, Amendments to Criminal Law (2013), *available* at https://www.prsindia.org/report-summaries/justice-verma-committee-report-summary (last accessed Sept. 21, 2024).
17. Pathak H, Reconsidering Gender Neutral in Indian Rape Law: Moving Beyond the Binary (2016) Asian Journal of Comparative Law. *Available* at: https://doi.org/10.1017/asjcl.2016.8.

girl's body, as opposed to it its prior restriction of vaginal penetration by a man's penis. [18] Importantly, the amendment clarified that a woman's lack of physical opposition does not imply agreement, and introduced a provision for cases where she cannot express consent. [19] Further, Section 376 was also expanded to address aggravated punishment for rape committed by military personnel, parents, guardians, and other people in positions of authority, and those incapable of giving consent, including the physically or mentally disabled.[20] This included rape committed repeatedly on the same victim and rape causing severe injury, maiming, or life endangerment.[21] Additional crimes like voyeurism, acid attacks, and stalking were also addressed separately.[22]

However, a few flaws remained, which included raising the age of consent for women to engage in sexual intercourse from 16 to 18,[23] thereby affecting teenage relationships, and retaining the application of the offense of "outraging the modesty of a woman" even in cases where the harm would be severe, thereby resulting in mild punishments unfitting for serious crimes.[24] Further, the law maintaining immunity for rape committed by security forces, thereby preventing them from being punished for rape or sexual assault, was left untouched. [25] Moreover, despite the 'Criminal Law (Amendment) Act, 2013' bringing about some important and necessary modifications, it did not make marital rape a crime, except for situations in which a man engaged in sexual relations with his separated wife or a girl who was younger than fifteen.[26]

C. 'Independent Thought v. Union Of India

In October 2017, Independent Thought, a non-governmental organization, filed a PIL to protect

18. Dhillon K, India's Criminalization of Marital Rape: A Step Toward Sustainable Development? (2021) [Online] SSRN. *Available* at: https://papers.ssrn.com/sol3/abstract_id=4242784.
19. Criminal Law Amendment Act, 2013, Section 375, IPC, *available* at https://www.indiankanoon.org/doc/245965 (last accessed Sept. 21, 2024)
20. *Ibid.*
21. *Ibid*
22. Ministry of Home Affairs, Government of India, Criminal Law Amendment Act, 2013, *available* at https://mha.gov.in/sites/default/files/CSCCriminalLaw_140713_1.pdf (last accessed Sept. 21, 2024).
23. *Ibid.*
24. *ibid*
25. Bhattacharyya R, Will Women's Safety in Public Settings Be Guaranteed by the Criminal Law (Amendment) Act of 2013? (2013) 1(1) Space and Culture, India 13. Available at: https://ssrn.com/abstract=2399827.
26. Criminal Law Amendment Act, 2013, Section 375, Exception 2, *available* at https://www.indiankanoon.org/doc/245965 (last accessed Sept. 21, 2024).

young brides from marital rape.[27] In the past, Exception 2, Section 375, IPC, legally protected men who committed non-consensual sexual intercourse with their wives who were under 15 years old. This provision was problematic because it effectively sanctioned sexual relations with child brides, ignoring their rights and agency. In the Independent Thought case, Supreme Court Justices, Justice Madan B. Lokur and Justice Deepak Gupta argued that this exception for child brides aged between fifteen to eighteen was both superfluous and unjust, creating an arbitrary distinction between married and unmarried female minors. The Supreme Court justified changing the exception from "under fifteen years of age" to "under eighteen years of age" with well-supported reasoning. It pointed out that such a disparity violated the Indian Constitution's Article 15(3), Article 21, and the equal protection mentioned under Article 14. The Court further noted that coercing sexual relations with a child bride violated her constitutional rights and the 'Protection of Human Rights Act, 1993' with respect to rights to liberty, dignity, physical integrity, and privacy. It emphasized that spouses who commit sexual offenses are often treated less severely under the law and are not charged with rape. The Court also highlighted India's international obligations under the 'Convention on the Elimination of All Forms of Discrimination Against Women' (henceforth 'CEDAW'), as well as the protections provided to women by the 'Protection of Women from Domestic Violence Act', 2005 (henceforth 'PWDVA').[28]

MARITAL RAPE AND INDIAN SOCIETY: PSYCHOLOGICAL IMPACT

Marriage is entered into for various reasons, including legal, social, and emotional factors. In India, traditionally, where marriage has been seen as a sacred bond, wives are often regarded as submissive and primarily responsible for household duties, with husbands being regarded as a divine authority, thereby making sexual relations within marriage obligatory for the women. Rape carries a heavy societal stigma, with victims often seen as "damaged," especially if they were virgins.[29] They can face isolation, rejection, divorce, or even threats to their lives, a process

27. Independent Thought v. Union of India, (2017) 10 SCC 800.
28. Singh VP, 'Judicial Approaches to the Criminalisation of Marital Rape' (2022) 29(1) Indian Journal of Gender Studies 10. Available at: https://doi.org/10.1177/09715215211056791.

known as secondary victimization. [30] Rape survivors, whether assaulted in childhood or adulthood, are at higher risk of attempting or committing suicide, regardless of factors like sex, age, or education..[31] The trauma of rape can lead to suicidal behaviour during adolescence, with studies suggesting that 6% of raped schoolgirls having attempted suicide. Rape and sexual assault can lead to a long-term psychological, emotional, and physical adverse effects such as Depression, Post Traumatic Stress Disorder, Anxiety, Eating Disorders, Low Self-Esteem, Dissociation, Drug Use, Criminal Behaviour, and Suicide.[32] Further, victims of sexual offenses committed by relatives face an even higher risk of long-term psychological harm, especially when it comes to incest, which is one of the most severe types of childhood trauma.[33] Incestuous rape, particularly by a parent, can inflict profound and lasting psychological damage.

Victims can rely on PWDVA for civil remedies, but it does not address the criminality of marital rape. As of 2013, over 27,515,391 women in the age range of 40-49 reported serious sexual assault.[34] Further, research on rape and sexual assault in India, conducted in 2014, found that women are 40% prone to be raped in their marriages than they are by strangers. [35] However, despite evidence suggesting increasing occurrence of such crimes, the 'Law Commission of India' did not support criminalizing marital rape in its 172nd Report, though the UN later urged India to do so in 2015.[36]

STATUS OF CRIMINALISATION OF MARITAL RAPE ACROSS THE GLOBE

29. D. Stockman, L. Haney, K. Uzieblo, H. Littleton, I. Keygnaert, G. Lemmens, & L. Verhofstadt, 'An Ecological Approach to Understanding the Impact of Sexual Violence: A Systematic Meta-Review', Frontiers in Psychology 14 (2023), *available* at https://www.frontiersin.org/journals/psychology/articles/10.3389/fpsyg.2023.1032408 (last visited on Sep. 27, 2024).
30. M. Boskovic & G. Misev, 'Secondary Victimization of Sexually Assaulted Women', Victimology, ed. R.T. Gopalan (Springer, Cham, 2022), available at https://doi.org/10.1007/978-3-031-12930-8_15 (last visited on Sep. 27, 2024).
31. S.S. Brokke, T.B. Bertelsen, N.I. Landrø, & V.Ø. Haaland, 'The Effect of Sexual Abuse and Dissociation on Suicide Attempt', BMC Psychiatry 22, no. 1 (2022): 29, doi: 10.1186/s12888-021-03662-9, *available* at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8751353/ (last visited on Sep. 27, 2024).
32. G.U. Kim & M.Y. Kim, 'The Effectiveness of Psychological Interventions for Women Traumatized by Sexual Abuse: A Systematic Review and Meta-Analysis', Issues in Mental Health Nursing 41, no. 5 (2020): 385–394, doi:10.1080/01612840.2019.1677830, *available* at, https://www.tandfonline.com/doi/full/10.1080/01612840.2019.1677830# (last visited on Sep. 27, 2024).
33. Hanson RK, 'A Review of How Sexual Assault Affects Women and Children Psychologically' (1990) 3(2) Annals of Sex Research 187-232. *Available* at: https://doi.org/10.1177/107906329000300204.
34. Kuriakose M, 'A Cross-Cultural Study of Young Adults' Attitudes Regarding Marital Rape in the UK and India' (2019) 7 International Journal of Indian Psychology 2349-3429. *Available* at: https://doi.org/10.25215/0701.036.
35. Raj A and McDougal L, 'Sexual Violence and Rape in India' (2014) The Lancet [Online]. *Available* at: https://doi.org/10.1016/S0140-6736(14)60435-9.
36. Law Commission of India, '172nd Report on Review of Rape Laws', 2000, *available* at https://lawcommissionofindia.nic.in.

Advocating for the elimination of the marital rape exemption within criminal law underscores a commitment to female emancipation and equality between men and women, which are two significant principles deeply embedded in international law of human rights. [37] Article 2 of CEDAW, which was ratified by the 'United Nations General Assembly' in 1979, states that States must denounce discrimination against women and enact laws promoting gender equality.[38] Further, Article 16(1)(h) specifically prohibits discrimination in marriage and family, including marital rape. [39] Moreover, the United Nations 'Declaration on the Elimination of Violence Against Women' (henceforth 'DEVAW') has declared violence against women a human rights violation and called for legal reforms to criminalize and prosecute such violence. [40] The 'Beijing Declaration, 1995', has emphasized the need for comprehensive measures to combat gender-based violence, including marital rape. [41] Similarly, the 'International Covenant on Economic, Social and Cultural Rights' highlights the right to health and freedom from violence, urging states to address abuses like marital rape.[42]

Since the late eighteenth century, women's movements in Europe and America have consistently opposed the marital rape exemption, recognizing its importance in dismantling legal constructs like coverture.[43] The legal concept of 'coverture', originating in medieval Europe, dictated that a woman's legal rights were absorbed by her husband upon marriage, thereby subordinating women and denying them individual legal autonomy. However, even in countries such as U.S.A, where marital rape exemptions have been abolished, the legal system often treats intimate partner rape differently than stranger rape,[44] imposing stricter criteria and lighter sentences for

37. Recent Publications in International Human Rights Law, (2021) 39(4) Netherlands Quarterly of Human Rights 335-340. *Available* at: https://doi.org/10.1177/09240519211052931.
38. UN General Assembly, 'Convention on the Elimination of All Forms of Discrimination Against Women', 1979, *available* at https://www.un.org/womenwatch/daw/cedaw/ (last accessed Sept. 23, 2024).
39. *Ibid.*
40. UN Declaration on the Elimination of Violence Against Women', 1993, *available* at https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-elimination-violence-against-women (last accessed Sept. 23, 2024).
41. 'Beijing Declaration and Platform for Action, Fourth World Conference on Women', 1995, *available* at https://www.un.org/womenwatch/daw/beijing/platform/ (last accessed Sept. 23, 2024).
42. *Ibid.*
43. Ireland E, 'Re-examining the Presumption: Coverture and Legal Impossibilities in Early Modern English Criminal Law' (2022) 43(2) The Journal of Legal History 187-209. *Available* at: https://doi.org/10.1080/01440365.2022.2092945.

the former. This leads to underreporting, low arrests, and rare convictions, which especially impact marginalized communities.[45]

Second Wave Feminists in the 1960s pushed to reclassify sexual offenses as crimes against physical integrity and liberty. [46] Although women's rights movements have varied across different contexts, with the U.S. anti-domestic violence movement focusing more on punitive measures than broader issues like structural inequality in excluded communities. [47] Structural inequality refers to a system where public policies, institutional practices, and cultural representations reinforce unequal treatment based on categories such as race, class, gender, etc. The focus on punitive measures like incarceration has often overlooked broader structural issues such as poverty, racial discrimination, and lack of social services, disproportionately affecting marginalized groups like low-income communities and people of colour. This leads to a failure to address the root causes of violence in excluded communities. In a similar vein, in Sweden, proper changes regarding domestic violence and sexual assault with harsher punishments were not enacted for decades after it abolished the marital rape exemption in the 1960s.[48]

Marital rape is criminalized in all European, South American, and Oceanic countries, except Haiti, but remains legal in much of Africa and Asia. [49] Further, notable instances of recent decisions from the Supreme Courts of Nepal and the Philippines highlight the need for international law to criminalise marital rape. [50] The Nepalese Supreme Court argued that extending legal immunity for marital rape is a “discriminatory practice” that violates CEDAW

---

44. Sarah, 'Marital Rape in U.S. Law: An Analysis', Journal of Criminal Law, 2019, *available* at https://www.journalofcriminallaw.com/marital-rape-us (last accessed Sept. 23, 2024).
45. Kelly, J.B., & Johnson, M.P., 'Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions', Family Court Review, vol. 46, no. 3, 2008, pp. 476-499, *available* at https://doi.org/10.1111/j.1744-1617.2008.00215.x (last accessed Sept. 23, 2024).
46. C.A. MacKinnon, 'Toward a Feminist Theory of the State' (Harvard University Press, 1989), 171, *available* at https://www.jstor.org/stable/1122928?origin=crossref (last visited on Sep. 27, 2024).
47. Arnold G, 'U.S. Females Movements for the Prevention of Crime against Women: Domestic Violence and Rape', Holly J. McCammon et al. (eds.), The Oxford Handbook of U.S. Female Social Movements Campaigning (Oxford Handbooks, 2017; online edn, Oxford Academic, 10 May 2017) (Accessed 26 April 2024). https://doi.org/10.1093/oxfordhb/9780190204204.013.15
48. Amnesty International, 'Sweden's Criminalizing and Rape Prosecution System: Response to the UN Specialized Adviser on the Origins and Effects of Violence Against Women' (n.d.), *available* at https://www.amnesty.org/en/wp-content/uploads/2021/05/EUR4224262020ENGLISH.pdf (last visited on Sep. 27, 2024).
49. UNICEF, 'Ending Violence Against Women and Girls: Progress and Challenges', 2015, *available* at https://www.unicef.org.
50. Randall M and Venkatesh V, 'Why International Human Rights Law Requires Sexual Assault in Intimate Relationships to Be Criminalized: An Answer to the Remarks from the Symposium' (2015) AJIL Unbound 109342-347. *Available* at: https://doi.org/10.1017/S2398772300001719.

as well as the constitution of the Kingdom of Nepal.[51] Similarly, the Philippine Supreme Court has emphasized that the country's international legal obligations on marital rape are broken by the impunity. Following a careful examination of the state's responsibilities under international accords such as the CEDAW and the DEVAW, the court concluded that "marriage is not a license to rape".[52]

The California Penal Code formally recognised marital rape in 1979 with Section 262. [53] However, in this section, marital and non-spousal rape are distinguished. As per Section 262, if a spouse declined to consent to sexual activity, they had to thwart the other spouse's aggressive advances until they were either prevented from resisting on account of any controlled substance or were unable to resist because they were unconscious, or asleep, or uninformed that a sexual act was happening, or they had fallen for the perpetrator's deceit.

In 1991, the House of Lords made marital rape illegal in England and Wales, marking a historic shift by rejecting the notion of a husband's inalienable right to sex in a marriage.[54] This ruling recognized marital rape as a serious crime and emphasized women's rights. Although there are several exceptions to the general prohibition of rape in marriage. For instance, if both the perpetrator and victim were living together at the time of the crime, the victim of rape in a marriage cannot be penalized. [55] And changing public perceptions and ensuring that law enforcement, predominantly male officers, understand and enforce the new law has been a challenging process.

Nonetheless, the idea that a married person has a right to sexual interactions has become less prevalent as notions of human rights have grown. In December 1993, when the 'United Nations High Commissioner for Human Rights' published the DEVAW, marital rape was acknowledged as a violation of human rights. [56] In 2005, Turkey's Penal Code criminalized "non-consensual

---

51. Supreme Court of Nepal, Judgment on Marital Rape, 2017, available at https://supremecourtnepal.gov.in/case-marital-rape (last accessed Sept. 23, 2024).
52. UN, 'Proclamation on the Eradication of Abuse Against Women' (1993) [Online] OHCHR. *Available* at: https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-elimination-violence-against-women.
53. California Penal Code, § 262 (1872).
54. House of Lords, Judgment on Marital Rape (1991), *available* at https://vlex.co.uk/vid/r-v-r-rape-802810933 (last visited on Sep. 27, 2024).
55. *Ibid.*

sexual intercourse within marriage", [57] effectively eliminating the marital rape exemption. Similarly, as of 2011-2012, 52 countries, including Poland, the US, UK, Australia, and Canada, had made marital rape a criminal offense[58].

At the same time, not every nation that is a member of the United Nations (henceforth 'UN') has agreed that marital rape is illegal. For instance, in 1997, United Nations Children's Fund stated that only 17 governments had made marital rape a crime. [59] Although in 2003, United Nations Development Fund for Women claimed that over 50 states recognized it as a violation of human rights.[60] And, by 2006, the UN Secretary-General observed that "Marital rape may be prosecuted in at least 104 States. Of these, 32 have made marital rape a specific criminal offense, while the remaining 74 do not exempt marital rape from general rape provisions. Four States criminalize marital rape only when the spouses are judicially separated[61].

PERSPECTIVES ON THE MARITAL RAPE EXEMPTION IN INDIA

A. Arguments For Non-Criminalisation Of Marital Rape: There are several voices in opposition of criminalisation of marital rape. Proponents of non-criminalisation of marital rape in India claim that since the wife gives her express agreement to be married, her spouse should not be held accountable for raping her. The Supreme court has also reasoned in Independent Thought v. Union of India', that since nobody can see what happens behind closed doors, the wife's consent would be hard to prove. Eliminating the exemption would thus constitute an excessive invasion of personal space.

Marriage in India is seen as both a civil transaction and a sacrament, so much so that, it is

---

56. OHCHR, 'Rape as a Grave and Systematic Human Rights Violation and Gender-Based Violence Against Women' [n.d.] [Online]. *Available* at: https://www.ohchr.org/en/calls-for-input/rape-grave-and-systematic-human-rights-violation-and-gender- based-violence-against.
57. Khachatryan N, Crime and Punishment in Turkey (2015). *Available* at: https://doi.org/10.1002/9781118519639.wbecpx240.
58. Law Commission of India, 172nd Report, 2000, *available* at https://lawcommissionofindia.nic.in/reports/rep172.pdf (last accessed Sept. 23, 2024).
59. UNICEF Report on Marital Rape, 1997, *available* at https://www.unicef.org/criminalizing-marital-rape-report (last accessed Sept. 23, 2024).
60. UNICEF, 'The State of the World's Children 1997' [n.d.] [Online]. *Available* at: https://www.unicef.org/reports/state-worlds-children-1997.
61. Security Council Report, A/61/122/Add.1: UN Documents [n.d.] [Online]. *Available* at: https://www.securitycouncilreport.org/un-documents/document/WPS-A61122Add1.php.

considered inappropriate to bring up the idea of marital rape in Indian society because such a belief would not align with the "mindset of the society to treat the marriage as a sacrament[62]". Former Minister of Women and Child Development, Maneka Gandhi has stated her opposition for criminalising marital rape: "It is considered that the concept of marital rape, as understood internationally, cannot be suitably applied in the Indian context due to various factors like level of education/illiteracy, poverty, myriad social customs and values, religious beliefs, the mindset of the society to treat the marriage as a sacrament, etc[63]."

There have been concerns raised about the suitability of criminalizing marital rape in India. Former Home Secretary, RK Singh has said that "marital rape is difficult to define." His reasoning has been that since India views marriage as a sacred institution, it would be disrespectful to criminalize marital discord and the abuse that stems from it.

One of the many important ramifications that are feared for criminalising marital rape is that women would use the exemption as a weapon against their husbands. Considering the Supreme Court's statement against the misuse of section 498A[64], it is argued that the prohibition of marital rape would become a "simple tool for harassing the husbands". According to a 2014 study by the Delhi Commission of Women, 53.2% of the reported rape cases between April 2013 and July 2014 were fraud cases, in which women falsely accused men of rape and sexual assault[65].

B. Arguments For Criminalisation Of Marital Rape : The second exception under Section 375, IPC, now mentioned under Section 63, BNS, not only violates a married women's fundamental rights under the Indian Constitution, but also contradicts international obligations.[66] It breaches Articles 1 and 2 of CEDAW, which prohibit any discrimination or harm based on a woman's sex. [67] Additionally, the exemption contradicts the definition of gender-based violence mentioned in DEVAW, which includes "physical, mental, or sexual harm,

62. Leow H, 'The Marriage Sacramentality from a Protestant Point of View' (2021) 35 Asia Journal of Theology 215. *Available* at: https://doi.org/10.54424/ajt.v35i2.12.
63. Rao TSS, Shah N and Andrade C, Indian Marital Rape (2022) 4(4) Psychosexual Health Journal 221. Available at: https://doi.org/10.1177/26318318221131745.
64. Lalita Kumari v. Government of U.P. & Ors, (2014) 2 SCC 1, *available* at https://indiankanoon.org/doc/10239019/ (last visited on Sep. 27, 2024).
65. India Today, 'According to DCW, 53.2% of Rape Cases Reported Between April 2013 and July 2014 Were Fraudulent' [n.d.] [Online]. *Available* at: https://www.indiatoday.in/india/north/story/False-allegations-of-rape-in-delhi-the-delhi-commission-of-women-233222-2014-12-29.
66. Indian Penal Code, 1860, § 375 (India).

coercion, or deprivation of liberty in both public and private life". The 42nd Law Commission was the first to examine the issue of marital rape. However, its report did not give a clarity on whether the marital rape exception should be kept or removed.[68]

The Justice Verma Committee established in 2012, in response to the Nirbhaya rape case, strongly suggested eliminating the exemption and making marital rape a criminal offense.[69] The committee further emphasized that rape and sexual assault are not just crimes, but also displays of power. The parliamentarians excused their reluctance to agree and implement the suggestion by stating that the "whole family system will be under greater stress and the committee may perhaps be doing more injustice."[70]

Consider the plight of an 18-year-old girl who, after minimal acquaintance with a stranger, is forced into marriage and subjected to verbal and sexual abuse.[71] Her pleas for help are dismissed by family and law enforcement, leaving her without legal recourse. This grim scenario reflects the reality of many Indian women who enter arranged marriages and lack protection against marital rape despite the existing laws such as PWDVA and 'The Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act' (henceforth 'SH Act'), [72] which are progressive towards women's rights. Regardless of the fact that marital rape is not specifically classified as a crime in India, the National Crime Records Bureau (henceforth 'NCRB') does keep track of certain types of domestic violence such as cruelty by a spouse or their relatives under Section 498-A of the IPC.[73] These cases may encompass instances of marital rape, and the NCRB data indicates a rise in such cases.

According to the 2018 National Family Health Survey, over 80 percent of women who have

---

67. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. Doc. A/RES/34/180 (1979), *available* at https://www.un.org/womenwatch/daw/cedaw/text/econvention.htm (last accessed Sept. 23, 2024).
68. Law Commission of India, Report No. 42 on the Indian Penal Code (June 1971). *Available* at: http://lawcommissionofindia.nic.in/1-50/report42.pdf.
69. Justice Verma Committee Report, 2013, *available* at https://www.prsindia.org/uploads/media/Justice%20Verma%20Committee%20Report/Justice%20Verma%20Committee%20Report.pdf (last accessed Sept. 23, 2024).
70. Chakravorty S, The Verma Committee Report, 2013 [2019]. *Available* at: https://doi.org/10.4324/9780429294013-3.
71. Gaurav Jain v. Union of India, (1997) 8 SCC 114 (India), available at https://www.indiankanoon.org/doc/183734
72. http://ncw.nic.in/sites/default/files/SexualHarassmentofWomenatWorkPlaceAct2013_0.pdf
73. National Crime Records Bureau, Crime in India Report 2020, Ministry of Home Affairs, Government of India, *available* at https://ncrb.gov.in/en/crime-in-india-table (last accessed Sept. 21, 2024).

reported having been sexually assaulted have named the offender as their present spouse or partner.[74] 32% of Indian males acknowledged in a 2010 poll that they had forced their spouses or wives to engage in sexual activity.[75]

According to Haribhai Chaudary, a Minister of State in the Ministry of Home Affairs, India's high rates of illiteracy, intense religious convictions, and the "sanctity" of marriage make it impossible to outlaw marital rape.[76] Nonetheless, this is not to mean that everyone in India has such outdated and traditional beliefs about marital rape. During a Gujarat High Court ruling, Justice J.B. Pardiwala expressed his disgust with the antiquated legislation that did not consider marital rape to be rape.[77] The case included a man who had sexually assaulted and raped his wife. He said that making non-consensual sexual relations illegal is the first step in educating society about the unacceptable treatment of women. He also supported the prosecution of marital rape and stated that marital rape should not be viewed as a privilege for a spouse, but rather as a terrible crime.

The same is evident in the Delhi High Court's judgment of RIT Foundation v. Union of India,[78] which came because of the efforts of The RIT Foundation and the All India Democratic Women's Association challenging the legality of Section 375 of the Indian Penal Code, arguing that that the marital rape exception violates fundamental rights such as dignity, gender equality, and bodily autonomy, protected under Articles 14, 15, 19(1)(a), and 21 of the Indian Constitution. They sought to strike down this exception, arguing it treats married women as property and undermines their sexual autonomy. In a split verdict was delivered by the Delhi High Court, Justice Rajiv Shakdher favoured striking down the marital rape exception as

74. Pathak VK, Lahariya C and Tripathi S, 'Observing Patterns of Indicators of Health Between NFHS-4 and NFHS-5: Report's Primary Findings from NFHS-5 India' (2023) 12(9) Journal of Family Medicine and Primary Care 1759. Epub 30 September 2023. *Available* at: https://doi.org/10.4103/jfmpc.jfmpc_377_23.
75. Rege S, Deosthali PB and Arora S, 'Evidence from Service Records on Indian Women's Experiences with Marital Sexual Assault and Rape in Marriage' (2022) 29(2) Matters of Sexual and Reproductive Health. *Available* at: https://doi.org/10.1080/26410397.2022.2048455.
76. I. Atrey, 'Marital Rape: Exposing the Unseen Crime in Close Relationships', International Journal of Rights of Humans Law 2, no. 4 (2023), available at https://humanrightlawreview.in/wp-content/uploads/2023/07/Marital-Rape-Unveiling-the-Hidden-Crime-within-Intimate-Relationships.pdf (last visited on Sep. 27, 2024).
77. Nimeshbhai Bharatbhai Desai v State of Gujarat, (2018) Indian Kanoon. *Available* at: https://indiankanoon.org/doc/185050052 [Accessed 2 April 2018].
78. RIT Foundation v Union of India, 2022 SCC OnLine Del 1404 [2022] Indian Kanoon. *Available* at: https://indiankanoon.org/doc/102185307 [Accessed 14 January 2022].

unconstitutional, noting it discriminated against married women. On the other hand, Justice C. Hari Shankar upheld the exception, stating that marriage inherently involves legitimate expectations of sex and that the institution of marriage should be protected. As of now, the matter is awaiting a final resolution by the Supreme Court.

At the same time, the Kerala High Court has recognized marital rape as a ground for divorce, equating it to "mental and physical cruelty."[79]

CONCLUSION

In the wake of horrific incidents such as the December 2012 group rape of a student in New Delhi,[80] and the January 2014 group sexual assault of a young woman in West Bengal, [81] the problem of rape in India shot to prominence. Despite India reporting a relatively lower prevalence of sexual violence at 8.5%,[82] when compared to global rates which is 38%, the sheer magnitude of its population translates to an estimated 27.5 million women who are affected by such violence[83]. Further, despite making up just 9% of the total female population, [84] teenage females account for a startling 24% of the nation's recorded rape incidents.[85] An estimated 2.5 million teenage females in India, between the ages of 15 and 19, are victims of sexual assault.[86] While most of these statistics represent the scenario of rape in our country which has been recognised as a crime, one can only imagine how worse things must be for marital rape, which is not even recognised as a crime. The current legal framework is rooted in patriarchal values and denies married women fundamental rights by exempting marital rape, thereby perpetuating gender-based violence. The inability of the 'Criminal Law (Amendment) Act, 2013', post Nirbhaya rape case outcry, and the newly enacted BNS Act to handle rape cases within marriage, underscores the urgent need for a change.[87] The outdated notion of implied consent undermines women's autonomy. While our research strongly supports criminalizing marital rape and

79. Independent Thought v. Union of India, (2017) 10 SCC 800 (India), *available* at https://indiankanoon.org/doc/187906002/ (last accessed Sept. 23, 2024).
80. Mukesh & Anr. v. State for NCT of Delhi & Ors., AIR 2017 SC 2161 (India), *available* at https://www.jstor.org/stable/26720556 (last accessed Sept. 21, 2024).
81. West Bengal Gang Rape Case, AIR 2014 SC 120, *available* at https://www.indiankanoon.org/doc/182892 (last accessed Sept. 21, 2024).
82. www.thelancet.com, correspondence (Vol 383 March 8, 2014),Sexual violence and rape in India (thelancet.com)
83. *Ibid.*
84. *Ibid.*
85. National Crime Records Bureau (Ministry of Home Affairs). Crime in India 2012 statistics. http://ncrb.nic.in/ (accessed Feb 17, 2014).
86. www.thelancet.com, correspondence (Vol 383 March 8, 2014),Sexual violence and rape in India (thelancet.com)

removing barriers to justice, this requires not only legislative reforms but also investment in resources, institutional support, and capacity building. Healthcare providers and law enforcement must support survivors and ensure justice, regardless of legal recognition. Comprehensive reforms in India are essential to prioritise women's rights. Criminalizing marital rape is crucial to ending gender-based violence and ensuring equality and justice for all. Promoting respect for women and advocating their rights as equal contributors in a consensual sex is essential.

87. A.S. Nair, 'Marital Rape: An Examination of Legal and Social Perspectives in India', IJFMR 5, no. 5 (2023), *available* at https://www.ijfmr.com/papers/2023/5/7622.pdf (last visited on Sep. 27, 2024)..

THE AMOUNT OF LIABILITY AND SUITABILITY OF COMPENSATION UNDER INDIA'S NUCLEAR LIABILITY REGIME: A REVIEW

***Dr. Shivani Gupta**

INTRODUCTION

It was understood early that in the expansion of nuclear energy for non-violent purposes, there would be risks associated with atomic energy that could not be compared to conventional risks due to their unique features and possible scale. The Brookhaven Report of 1957,[1] the first risk assessment report on using nuclear power for civilian use, calculated, that in case of a nuclear mishap at a civil facility, non-lethal injuries may range from zero to a maximum of 43000 and lethal injuries/exposures may range from zero to 3400 and also estimated the amount of property damage to range within US $500,000 to US $7 billion. Despite the fact that there are a plethora of laws, rules and guidelines, governing the safe planning and operations of the radioactive material driven power plants, both at international and national level, yet accidents can still occur.[2] Given the chances (though very remote) of another accident,[3] there is always a dependence on a liability law that can be adhered to in times of emergency. Achieving sufficient nuclear liability coverage necessitates a system that is effective, economical, and has enough money to cover damages.[4]

A transnational system of liability and reimbursement ought to be founded on the 'polluter pays principle', as contained under 'Principle 16 of the Rio Declaration'. Such a regime must be capable of preventing and remedying not only ecological damage, but also the victims.[5][6] A civil law's obligation to make amends for an unauthorised injury to another person's person or property can be understood as civil liability.[7] Given this, the Organisation for Economic Co-

---

* Assistant Professor in Law University Institute of Legal Studies, Panjab University, Chandigarh

1. Brookhaven National Laboratory Annual Report: 1957, *available* at: https://digital.library.unt.edu/ark:/67531/metadc67224/m1/1/ (accessed on 27-09-2024 at 10:55 pm IST)
2. Ayyub B., Risk Analysis in Engineering and Economics (Chapman & Hall/CRC, Boca Raton, FL, 2003).
3. Presidential Commission on Catastrophic Nuclear Accidents, "Report to the Congress from the Presidential Commission on Catastrophic Nuclear Accidents" (Washington DC, United States, 1990); *Available* at: https://inis.iaea.org/search/search.aspx?orig_q=RN:23049945 (Accessed 24-09-2024).
4. B. M. Ayyub and L. Parker, "Financing nuclear liability" 334(6062) Science 1494-1494 (2011).
5. Rio Declaration on Environment and Development, June 3 - 14, 1992, Principle 16, UN Doc. A/CONF.151/26 (vol. I) (June 16, 31 ILM 874 (1992); *Available* at https://www.cbd.int/doc/ref/rio-declaration.shtml (Accessed 20-09-2024).
6. *Id*. at Principle 13.

operation and Development (OECD) was tasked with promoting, elucidating, and coordinating a unified legal framework on nuclear energy, particularly with 'third-party liability' and coverage against atomic hazards, while leaving some autonomy with the nations to implement any other suitable measures.[8] Thus began the adoption of various intercontinental documents on 'third party liability'.

INTERNATIONAL LAW ON NUCLEAR LIABILITY AND COMPENSATION

The potential liabilities in the relevant legal jurisdictions regulate civil liability for nuclear damage. Both national and transnational law give birth to potential civil compulsions for nuclear damage.

- **Paris Convention on Third Party Liability in the Field of Nuclear Energy, 1960 (hereinafter referred as Paris Convention)**

The operator of the nuclear installation is liable for nuclear accidents, causing personal or property losses, that have caused damage inside the borders of the Contracting Party where the responsible operator's nuclear site is located;[9] i.e. it is only the power plant's operator against whom resides the right to compensation; however, if local or national legislation so permits, the right may also be exercised against an insurance or financial guarantor providing the security.[10] Establishing responsibility only makes sense if the incident's victims are entitled to a sufficient sum of money. The maximum amount of compensation that must be paid in relation to a nuclear damage cannot be more than that which is specified under Article 7 as operator's liability. The ceiling on operator's liability is fixed not below 5 000 000 'Special Drawing Rights'[11] (hereinafter referred to as SDRs), but which may extend to a maximum of 15 000 000 SDRs, provided a further greater amount has not been set by the contracting party, after calculating the value of 'insurance or financial security' taken by the operator.

Vienna Convention on Civil Liability for Nuclear Damage, 1963 (hereinafter referred as

---

7. Civil Liability Definition; *Available* at: http://www.duhaime.org/LegalDictionary/C/CivilLiability.aspx (Accessed 30-09-2024).
8. Convention on Third Party Liability in the Field of Nuclear Energy of 29th July 1960, as amended by the Additional Protocol of 28th January 1964 and by the Protocol of 16th November 1982; *Available* at: https://www.oecd-nea.org/law/nlparis_conv.html (Accessed 14-09-2024).
9. Paris Convention on Third Party Liability in the Field of Nuclear Energy, 1960; art. 3.
10. *Id.* at art. 6(a) and 10.
11. Special Drawing Rights shall be taken as defined by International Monetary Fund and as used by it for its own operations and transactions.

Vienna Convention)

Though adopted in 1963, it became enforceable on 12 November 1977. The primary goal of this convention was to establish the most fundamental guidelines that might assist in offering individuals financial security against harm that could arise from peaceful applications of nuclear power. Herein, only if it can be demonstrated that the 'nuclear damage' resulted from a 'nuclear incident',[12] would the operator be made responsible. It says that the operator's liability, as asset by the installation state, for a single nuclear incident, cannot be below than US $5 million.[13] This Convention also introduces the concept of a single claim for compensation. [14] It also encompasses in its ambit the 'operator's right of recourse' and the 'concept of subrogation'.[15] Both these Conventions were applicable only on the State parties and not to the damages endured in the terrain of a State which was Party to the sister Convention. However, the tragic events at Chernobyl in June 1986 compelled the world nations to question whether the current liability and compensation system was truly capable of upholding the rights of victims, particularly when it came to the losses and damages that a nation's citizens suffered from a nuclear accident in a neighbouring country. This resulted in the adoption of the Joint Protocol of 1988, by the IAEA and OECD, which came into force on April 27, 1992.

Joint Protocol relating to the application of the Vienna Convention and the Paris Convention, 1988 (hereinafter referred as Joint Protocol, 1988)

The contracting parties believed that since no state was a party to both the Paris and Vienna Conventions at that time, it could be problematic for states being parties to one Convention to observe the requirements of the other Convention. Whereby, only the states who had already ratified, acceded to, or signed any one of these Convention were made eligible to sign this Protocol.[16] As the name suggests, this Protocol determines the joint enforceability of both these Conventions.[17] Should a nuclear accident transpire within a nuclear site, the applicable Convention to determine culpability is the one to which the state is a party and, on whose territory, the nuclear facility is installed.[18]

12. Vienna Convention on Civil Liability for Nuclear Damage, 1963, art. 2(1).
13 *Id*. at art. 4(6).
14. *Id*. at art. 16.
15. *Id*. at art. 10.
16. Joint Protocol Relating to the application of The Vienna Convention and the Paris Convention, 1988, art. V.
17. Id. at art. IV (1) and IV (2).

The contractual parties intended to create a general liability statute since they had now understood the importance of compensation for nuclear damage. The goal of the enactment was to raise and improve the extent of compensation, in order to foster greater regional and international cooperation in the effort to improve nuclear safety. Thus, came into being the Convention on Supplementary Compensation, a legislation, which can be attributed to the joint efforts of all the Contracting parties, also fostering the philosophies of international cooperation and camaraderie.

Convention on Supplementary Compensation for Nuclear Damage, 1997 (hereinafter referred as CSC) and the Annex to this Convention

This Convention covers situations where nuclear installations within a Contracting Party's borders sustain 'nuclear damage' while performing peaceful operations; such that the installation's operator is accountable under any applicable national law or either of the aforementioned Conventions. 'Nuclear damage' herein shall include: injury of life or property; individual injury; property impairment; ensuing fiscal loss; costs associated with restoring the flora and fauna; income loss due to ecological impairment; and the costs associated with taking preventive action. Though this Convention, always propagated the use of set guidelines for determining the amount of compensation for any 'nuclear incident', yet its main purpose was also to augment the existing system of compensation under the prevailing national laws. Though the opening amount was fixed at 150 million SDRs, but presently, it obligates every 'Installation State' to maintain a tiniest of 300 million SDRs or more in the Depositary.

The annex to CSC obligates the Contracting Parties to frame a national legislation consistent with it. If there is a very little risk associated with any nuclear installation or that it involves the use of very small amounts of radioactive material, it may permit such installation to be omitted from the application of CSC. It establishes the requirement of having national laws in the Contracting Party to be consistent with this Convention, in terms of operator's liability, extent of liability, financial security and the amount of liability where more than one person is involved.[18]

18. *Id*. at art. III (2).

It requisites the national law to contain clauses that: (a) guarantee 'strict liability' in the event that substantial nuclear damage occurs off the nuclear installation's site; (b) provide for redressing anyone but the operator who is accountable for radiological damage; and (c) guarantee the accessibility of at least one thousand million SDRs for civil nuclear power plants (NPPs) and at least three hundred million SDRs for any other civil nuclear installation in order to make indemnification payments. The operator is unconditionally liable for the harm that occurred in the installation,[20] but not for the one resulting from an armed conflict, hostility, civil war, insurrection or natural catastrophe of an exceptional character, [21] however, may be wholly or partially exempted of liability, where the damage was the result of gross negligence or intentional act of any person. In totality, a liability of not less than 300 million SDR's is fixed upon the operator,[23] and for that it must maintain 'an insurance or financial security' covering the figures of its liability.[24]

All these are the major international documents that regulate the facets of liability and compensation arising out of radiological catastrophes. These documents become the guiding lights for any nation to formulate its domestic laws.

3. INDIAN LAW ON NUCLEAR LIABILITY AND COMPENSATION

Having seen and experienced the past 'Bhopal Gas Leak Tragedy' and also having heard and been aware of the catastrophe that resulted from the nuclear incidents at Three Miles Island and Chernobyl,[25] the Indian Government was since long looking forward for legislating and adopting some policy to be able to answer the issues concerning liability and compensation, had there ever been a situation. The requirement of such a law dealing with various ambits of civil liability, became a necessary mandate in the year 2008, i.e. after the signing of the Indo-US Civil Nuclear Agreement. This requisite, gave birth to the inception of the law in the year 2010, in the form of the Civil Liability for Nuclear Damage Act, 2010 (hereinafter referred as the CLND

19. The Annex to the Convention on Supplementary Compensation for Nuclear Damage, 1997, art. 2(1).
20. *Id.* at art. 3(3).
21. *Id.* at art. 3(5).
22. *Id.* at art. 3(6).
23. *Id.* at art. 4.
24. *Id.* at art. 5(1).
25. Chernobyl Accident June 1986, available at: http://www.world-nuclear.org/information-library/safety-and-security/safety-of-plants/chernobyl-accident.aspx (Visited on Aug 16, 2024)

Act).

- **The Civil Liability for Nuclear Damage Act, 2010: Critical Analysis**

Often categorised as one of the most comprehensive legislations, the CLND Act is appropriately drafted to resolve the questions pertaining to reimbursements had there be a nuclear disaster. A noteworthy fact is that though this piece of legislation majorly originates from the provisions contained in the two international documents, i.e. the Paris and the Vienna Convention, yet till date India is a signatory of none of those. This act was thus enacted to specify the laws to be applied for deciding civil liability in case of 'nuclear damage', so as to make possible the payment of immediate reimbursement to the wounded of any nuclear incident. 'Nuclear damage' under s. 2(g) of this enactment includes, any loss to life or property, any personal injury or economic loss, or any reinstatement cost for repairing any impairment to environment; thus, being in complete consonance with the definition under the CSC. The principle of no-faulty liability is the grundnorn that decides the amount of compensation to be paid, thus making it a rule absolutely complacent with the rule of 'strict liability'.

Applicability: This is the principal regulation applicable throughout the stretches of the Indian territory, in case of a nuclear damage. [26] This Act also governs India's maritime areas, which includes vessels registered in India. However, the scope of its application is not unlimited. This act is only applicable, where the cause of damage is some 'nuclear installation', as defined under section 2(j) of the act. According to this provision, a nuclear installation shall mean (a) a nuclear reactor being used as a source of power generation, (b) any facility producing or processing nuclear material or re-processing nuclear fuel, and (c) any facility for the storage of nuclear material. Further, this act shall only come into operation if the nuclear damage is by any such nuclear installation, provided, it is either 'owned or controlled by the Central Government', or that atleast by a 'Government Company'.

The applicability of this act is however not absolute on every such installation. The act under section 45, gives absolute powers to the Central government to exempt an installation, if the amount of nuclear material to be used in a particular installation is insignificant in its opinion.

26. Civil Liability for Nuclear Damage Act, 2010, s. 1(2).

What is notable here is that, nuclear accident, whatever may be its intensity, would never be too small to be ignored. So why is it that the Central Government has been given this discretionary power to exclude smaller nuclear installations from its purview.

Operator's Liability: The liability for a nuclear damage to a nuclear installation lies on its 'operator'. Section 2(m) of the Act states that an 'operator' shall mean the Central Government of India, or any authority, corporation or Government Company that has been given the charge, licence and authority to operate that nuclear installation, the provisions of the Atomic Energy Act, 1962. Section 3 of this act, authorises the Central Government or any Government Company to control nuclear materials and to develop nuclear energy from its exploitation.

In India, the sole body corporate that undertakes the responsibility to perform all these activities, including the establishment and the operation of nuclear power plants is the Nuclear Power Corporation of India Limited, popularly known as NPCIL. NPCIL is a public sector corporate entity, exclusively owned by the Government of India (hereinafter referred as the GOI), and functions solely under the directorial controls of the Department of Atomic Energy. Whereby, the ultimate outcome is that, in the eventuality of a nuclear accident, the resolution of all disputes and matters concerning compensation payouts to the sufferers of the accident and for the reinforcement of the loss to environment shall indirectly be cast upon the GOI. Thus, a closed analysis of this whole story suggests that at the end, the whole compensation amount, whether appropriate or inappropriate, it is to be paid either directly or indirectly, by the GOI. And it is the bitter truth of our system, that any payments made by GOI means payments actually made by the taxpayer.[27] Even if the control and operations of the nuclear power plants is subsumed by private companies, in the long run, then will this per-decided amount be enough to reimburse the damage caused from the nuclear incident.

Joint and Several Liability: Section 4(2) of the Act however states that, if in case the nuclear installation is operated by more than one operator, such that it is not possible to ascertain with certainty the quantum of damage attributable of each one of those individually, then both/all of

---

27. M. P. Ram Mohan, “Nuclear Liability law of India: an appraisal of extent of liability, right of recourse and transboundary applicability” 17(1) Journal of Risk Research 115-131 (2014).

such operators shall be jointly and severally accountable, such that the total liability of such operators shall not exceed the total amount of liability fixed under the Act.

Limited Liability of the Operator: The Act, under the provisions of section 5(1), however, does not cast any liability on the operator for any resultant nuclear damage caused, where the cause of the nuclear incident was a severe natural disaster, a civil war, an armed conflict, an insurrection, a hostility or some act of terrorism. If, however, the nuclear damage suffered by a person is the result of his own *actus reus* or negligence, the operator stands not liable.[28] It can thus be made out that where the accident is the result of an 'Act of God', there the sole liability to compensate shall be borne by the government; i.e. in the event of a happening similar to that in Fukushima Daichi in Japan, where the nuclear catastrophe was the result of an earthquake and then a Tsunami hitting the power plant, the sole responsibility to compensate shall lie with the Central government, if it is established that there was no other reason or fault involved. It is even argued that if the operator is made liable to beer the full compensation costs, the potential costs and the operational expenses associated with a nuclear power plant are expected to rise substantially.[29]

Compensation under any other law: Payment of compensation by the operator under this Act, does not absolve him from any other compensation, if his liability so arises, under any other law enforceable at that time.[30] One common complaint is that there are no sufficient compensation structures from the operator in any of the legislative frameworks dealing with nuclear liability, and that taxpayers would bear the majority of the cost of such compensations. The public's reluctance to embrace nuclear energy is further hampered by this critique, particularly in developing nations.

Insurance or Financial Security: The Act also casts an obligation on the operator to secure an insurance policy or financial security before the onset of any processes in the nuclear installation.[31] The purpose behind the compulsory possession of such insurance and financial security is to make the 'non-government owned installation be able to cover its liability in the event of an accident'.[32] In India, this insurance is provided by the nuclear insurance pool.

---

28. *Supra* note 26, s. 5(3).
29. Duncan E. J. Currie, "The problems and gaps in the nuclear liability conventions and an analysis of how an actual claim would be brought under the current existing treaty regime in the event of a nuclear accident." 35(1) Denver Journal of International Law & Policy 85-127 (2006).
30. *Supra* note 26, s. 5(3).

Supplier's Liability: Ordinarily, the manufacturer or the supplier of equipment, machinery or other allied components is called as a supplier. But if a supplier is to be made liable under this law, he must be one who has worked on functional specifications and not only on engineering drawings. 'Engineering drawings' means that the supplier had not contributed anything of its own in terms of functional specifications, but has only worked on the drawings, designs, quality controls, operations, etc. as provided to him by the operator. Where the supplier had only worked on engineering designs, he is completely absolved from any liable, for the reason that he had only provided his services for manufacturing the requisite supplies.

The incorporation of provisions that cast liability upon the supplier separately from the liability cast upon the operator, is a very rational and deep-rooted step. The Bhopal Gas Leak Tragedy in the year 1984 was partially because of some defective parts in the operating unit. Similarly, Three Miles Island nuclear accident was also due to lapses on the part of the suppliers. Thus, the suppliers are cast with an additional liability that too towards a higher side.

Earlier, the right of recourse was only available to the operator against the supplier i) where the incident was the result of an act or omission, so intended by the supplier (similar to the provision under Section 17(c) of the CLND Act); and ii) a contractual right of recourse (similar to the provision under Section 17(a) of the CLND Act). That is to say, 'the operator's right of recourse', and is only enforceable, where the compensation has already been paid by the operator, such that there is a specific written contract to that effect. However, to avail this right is also necessary to establish that the ensuing nuclear incident was the result of an act attributable to the supplier. According to Rule 24 of the CLND regulations, a supplier's liability is limited to the amount of liability borne by the operator or the contract value, whichever is lower. Further, this provision also restricts the right of recourse to the time of the first licence granted, which is five years, or a longer period of product responsibility that is negotiated between the operator and supplier.su This provision in the rules has been vehemently criticised by eminent jurists like Soli Sorabjee, as being ultra vires the parent act and even the CSC. [33] It is however, alleged that the policy

31. *Supra* note 26, s. 8(1).
32. *Supra* note 26, s. 8(3).

making the supplier liable, India is limiting its scope to importing nuclear fuel solely for its current power plants, hindering the essential future expansion of its nuclear power sector.[34] However, the insertion of Section 17rule 24(b) to the Act, introduced a new concept of supplier liability, allowing the operator to recover, whatever compensation amount it may have paid, from a supplier, in the event when the goods supplied contain faults or when the services are lacking. The words 'act of the supplier' in the provision also includes within its ambit the supply of sub-standard material or equipment possessing latent or patent defects, and even the performance of sub-standard services. It has however been alleged and criticised by some, that casting liability upon the supplier in such a manner was inconsistent with the provisions laid in the CSC, to which India is a signatory, wherein, such liability is only cast upon the operator.[35] The anti-nuclear groups have regarded this move as necessary to bring responsible expansion of nuclear industry, stating that the earlier regime was only targeting the operators, while this shall also make the suppliers responsible.[36] It shows that there are some existing factual situations that evident some serious design and component problems leading to past nuclear accidents.[37]There are however, some jurists who consider this step detrimental, considering that it would reduce the willingness of suppliers to contract with Indian market, and will lead to long delays in the completion of ongoing projects. [38] It is however opined that this step of bringing the supplier within the ambit of liability was a watershed decision, making them responsible and accountability for the supply of quality equipment; though the same has been turned to square one with the adoption of the 'nuclear insurance pool', where half of the amount to the pool has to be contributed by the government of India.

Extent of Liability: The maximum amount of liability that can be fixed in case of a nuclear accident is fixed at an amount equivalent to three million 'Special Drawing Rights'.[39] [40] Of this total amount, however, section 6(2) specifies the maximum liability that is cast upon the

33. Sandeep Dikshit, "Nuclear Liability Rules Ultra Vires" The Hindu, Dec. 13, 2011.
34. Rakesh Sood, "Agenda for nuclear diplomacy" The Hindu, Nov.18, 2016.
35. R. B. Grover, "The Civil Liability for Nuclear damage Act of India: An engineering perspective regarding Supplier's liability" 101(A) Progress in Nuclear Energy page 168-175 (2017).
36. M. V. Ramana and Suvrat Raju, "Nuclear Safety before Vendor Interests" The Hindu, Oct. 30, 2012.

operator. Difference is created in the extent of liability, depending upon the type of nuclear installation. The amounts are subject to timely reviews, however, presently, the amount of liability upon the operator of a nuclear reactor with an inbuilt capacity of more than ten megawatt (MW) is cast at a maximum of 1500 crore. Beyond rupees 2610 crores, India can access international funds under CSC. [41] The liability for other installations like spent fuel processing plants, research reactors, etc, is cast between 300 to 100 crores. A notification from the Central Government could increase this amount of obligation. Let's put it this way: the Government of India continues to keep its doors open on the 'un'-limited liability clause.

The 'amount of liability' under the act has been at the peak of controversy, since the very introduction of the CLND Bill in the Lok Sabha, wherein it was very vehemently opposed by the then BJP government.[42] Mr. Yashwant Sinha, the then sitting BJP leader in opposition argued the Bill as being violative of Article 14 and Article 21 of the Constitution. He argued that under the USA's Price-Anderson Act[43], $12.5 billion is the liability fixed in case of a civil disaster in USA, which is equivalent to Rupees 50,000 crores (according to the then prevailing values of dollar), while the one fixed under the CLND Bill was just rupees 2,142 crores. When calculated, the liability fixed under the CLND Bill was nearly 23 times lower than the liability fixed under the Price Act. This huge difference simply forces one to conclude that the American government values the life of its people 23 times more than what is being valued by our government of its people.

Another astonishing feature in the bill was highlighted by other political parties of the left wing.[44] They contended that this liability of Rupees 2,142 crores was not imposed solely on the operator of the nuclear installation. They argued that under the bill, of the total amount, Rupees

37. *Ibid.*
38. M. R. Srinivasan, "A Liability for Our Nuclear Plans" The Hindu, Oct.15, 2012.
39. Special Drawing Rights means Special Drawing Rights as determined by the International Monetary Fund.
40. *Supra* note 26, s. 6(1).
41. Tyson R. Smith and M. P. Ram Mohan, Handbook on Nuclear Regulatory Framework in India 60 (Eastern Book Co., Lucknow, 2018).
42. PTI, "We will never accept Nuclear Liability Bill: BJP" The Hindu, Mar. 15, 2010; TNN, "Nuclear Liability Bill: Foreign operator to pay just Rs 500 cr for nuclear accident?" The Economic Times, Mar. 15, 2010.
43. *Available* at: https://inis.iaea.org/collection/NCLCollectionStore/_Public/31/051/31051426.pdf (Accessed 10-09-2024)

1,642 crores were to be borne by the government, while only the remaining amount of Rupees 500 crores was to be borne by the operator; i.e. the operator was to pay less than one-fourth of the total liability amount. In the existing act, this provision of government's liability, is not contained in the same terms, but as under. It was again around this time that the Standing Committee on Science & Technology, Environment & Forests was asked to submit its report after carefully scrutinizing the whole bill. The committee recommended some augmentation in the amount of compensation that was stated at Rupees 500 crore, stating that 'fixing an inadequate amount may result in the marginalization of the safety parameters by the operator'.[45]

Central Government's Liability: This liability arises, when the actual amount of liability exceeds the liability fixed upon the operator. The extent of government's liability is only to the amount that exceeds the operator's liability.[46] However, if the Central Government deems fit to do so in larger public interest, it may assume complete liability for any nuclear installation, irrespective of the fact, whether or not it is operated by it. If this provision is to be judged from the angle of 'the option of right of recourse' with the operator, the amount paid by the government shall fall out of the purview of this right, as the right is only available to the operator for the amount of compensation paid by it. Thus, where the compensation is paid by the Central Government as an excess liability or of its own accord, there is no such option to claim the refund of the amount paid from the operator.

Nuclear Liability Fund: For meeting its liabilities, the central government has the option of establishing a fund called as the Nuclear Liability Fund. Section 7(1) provides that the amount of such fund may be charged from the operator. This provision seems completely ambiguous in the Indian context, where the operator is NPCIL, a wholly owned government Company. Thus, the resultant would be the government funding its company itself. And if its government funded, it means, public funded.[47]

Nuclear Insurance Pool: On June 12, 2015, the government of India established the Indian

---

44. PTI, "Nuclear Liability Bill faces fresh hurdles from BJP, Left" The Economic Times, Aug. 22, 2010.
45. *Available* at: prsindia.org/uploads/media/Nuclear/Civil%20Liability%20for%20Nuclear%20Damage%20Bill%202010%20-%20SCR.pdf (Accessed 13-09-2024).
46. *Supra* note 26, s. 7(1).

Nuclear Insurance Pool (INIP), which has a ₹1500 crore (15 billion) capacity. It was established by M/s. General Insurance Corporation of India (GIC-Re) and a number of other Indian insurance companies to provide insurance to cover both operator and supplier liability as specified under the CLND Act.[48] According to the Indian Department of Atomic Energy, these insurers would make up for half of this 15 billion rupees ($182.9 million) in total, with the government covering the remaining amount for the first few years "until the insurance companies are able to maintain it on their own". The revelation about the funds was made in December 2022, at the 'nuclear insurance session of the India Nuclear Business Platform' where it was disclosed that the INIP had till that date collected approximately seven to eight billion rupees of the total amount. This figure clearly indicated a critical shortfall in funds that may be required to reimburse the sufferers and to clean up the environment.[49]

CONCLUSION

After having studied the existing relevant law, the following suggestions are proposed:

- **Standard for determining the Compensation Amount:** When determining the appropriate pay, a number of factors must be taken into consideration. Comparatively speaking, it is simpler to estimate the loss of property because the market value may be used as the benchmark. It is also necessary to take into account the loss of business, which can be assessed based on how long the firm is impacted or is thought to be impacted. In addition to physical suffering and mental trauma, psychological loss can also arise from forced evictions carried out as part of crisis management procedures used during such disasters. Because the value of a person's life cannot be measured, calculating the value of life is very challenging.
- ***Limitation of time:*** It may not be known how long the radiation will continue to radiate, the effects may not become apparent until later generations, and even then, it might be challenging to identify the reasons. Therefore, ten years would obviously be too short for claims

47. A. Vinod Kumar, "India's nuclear energy renaissance: stuck in the middle?" Journal of Risk Research 1-18 (2013).
48. "Nuclear Insurance Pool", Department of Atomic Energy (July 10, 2019). *Available* at: https://pib.gov.in/newsite/PrintRelease.aspx?relid=191503 (Accessed 27-09-2024)
49. Urvashi Sarkar, "Does India have enough insurance coverage for a nuclear disaster?" Aljazeera, Apr. 21, 2023; *Available* at: https://www.aljazeera.com/economy/2023/4/21/does-india-have-enough-insurance-coverage-for-a-nuclear-disaster (Accessed 20-09-2024)

for intergenerational injury, and even thirty years might be too short for plaintiffs. [50] It is thus crucial that claims should be allowed to be initiated upon the discovery of damage, as well as at the time of its occurrence, and that a reasonable timeframe must be established for filing a claim following the identification.

- ***Risk assessment and coverage:*** The coverage of non-actuarial risks associated with nuclear catastrophes necessitates substantial financial investment and can be regarded as a highly speculative endeavour. Thus, insurance can only substantially resolve the problem. The same can however, be better resolved with the concept of pooling.[51]
- **Interim Relief:** Taking into account the time taken to decide the amount of compensation to be awarded in the inappropriate Bhopal Gas Tragedy case (more than five years), interim relief is proposed. One of the major deficiencies envisioned by the expert Committee on Subordinate Legislation (2011-2012)[52] was the lack of any provision for interim relief to the victims. The DAE however alleges that the insertion of any additional provision on interim relief would only delay the process of claims related to damages, which is already fixed at not more than 3 months. It is suggested that in the eventuality of the claimants approaching the higher judiciary for the review of their claims, atleast the amount of compensation that has already been decided by the claims commission should be disbursed with immediate effect and that be treated as an interim relief.
- ***State Responsibility:*** In light of the fact that the victims are the citizens of a specific State, the researcher wishes to warn the relevant State Governments, who should be held accountable for providing some immediate relief to the victims of the predicted catastrophe. This is not meant to relieve the Central Government, the operator NPCIL, or the supplier of their responsibilities. In order to ensure that the victims receive the necessary rehabilitation in a remote location that is totally free from radiation side effects and other hazards, it is suggested

50. Duncan E. J. Currie, "The problems and gaps in the nuclear liability conventions and an analysis of how an actual claim would be brought under the current existing treaty regime in the event of a nuclear accident." 35(1) Denver Journal of International Law & Policy 85-127 (2006).
51. Marcus Radetzki, "Limitation of third-party nuclear liability: Causes, implications and future possibilities" 63 Nuclear Law Bulletin 7-24 (1999).
52. *Available* at: indiaenvironmentportal.org.in/files/SC-report-on-Rules-for-CLND.pdf (Accessed on 17-09-2024).

that the responsible State Government should take primary responsibility for making these arrangements. As part of the emergency preparedness system, the location must be decided upon in advance because these tragedies happen without a doorbell being rung. In addition, the victim's rehabilitation must unavoidably and mandatorily be furnished with sufficient medical facilities, as well as mandatory schooling for the kids and respectable employment opportunities for the working class.

Ultimately, the nuclear industry worldwide contends that limiting responsibility to operators encourages them to implement the newest technologies and closely follow the safety regulations in order to uphold the greatest levels of safety. But CLND, because of the manner in which it has handled supplier's liability, has marked a turning point in the development of international nuclear liability law. The impact has been such that even the Canadian government is currently considering the introduction of legislation to raise the liability thresholds for nuclear accidents from the current level of approximately $73 million to $1 billion[53]. This is a big step in this area.

53. Nuclear Engineering International, "Canadian Government Introduces Nuclear Liability Legislation," February 4, 2014; *Available* at: http://www.neimagazine.com/news/newscanadian-government-introduces-nuclear-liability-legislation-4171533 (Accessed on 22-09-2024).

REVAMPING ANTITRUST FOR DIGITAL ECOSYSTEM: TOWARDS A NEW REGULATORY PARADIGM

***Ms Shruti Kandoi**

****Mr Akash Seguri**

INTRODUCTION:

In 1969, The Monopolies and Restrictive Trade Practices Act (hereinafter "MRTP Act") came into force.[1] The act aimed to shun the monopoly and restrictive trade practices. The need for a comprehensive framework for antitrust laws in India arose after the introduction of economic reforms in the year 1991. The shift of focus towards de-regulating various industries and encouraging competition among the market players in India led than government to establish a committee to come up with solutions to overcome the existing lacunes in the MRTP Act. In 1999, the Raghavan Committee was constituted to reform the MRTP Act, the committee submitted several recommendations to foster domestic practices in alliance with global practices. Key recommendations were to repeal the MRTP Act and enact the Competition Act, of 2002, a separate independent regulatory body to be established as the **"Competition Committee of India"** (hereinafter "CCI"). CCI was vested with the power to adjudicate the matters regarding any violations of the provisions stated under the Competition Act, 2002 (hereinafter "CA, 2002) to probe into the unfair practices followed in the market. Some of the vital clauses were recommended to prohibit the abuse of dominant provisions and anti-competitive agreements and also to control mergers. The Competition Act, 2002 inherently does not prohibit the dominance of any enterprise in the market, rather it prohibits and imposes severe penalties on the enterprise for abuse of its dominant position. To adapt itself to the evolving markets, committees were constituted and reports were submitted time and again,

---

* Assistant Professor ICFAI Law School, Hyderabad.
** 4 th year, BBA LL. B, ICFAI Law school Hyderabad.

1. Mohd Aqib Aslam, "Monopolistic And Restrictive Trade Practices Act,1969: An Overview", *available* at: https://www.legalserviceindia.com/legal/article-7043-monopolistic-and-restrictive-trade-practices-act-1969-an-overview.html (last visited on July 06th, 2024)
2. Raghavan Committee Report, *available* at: https://mbahub.in/business-law/raghavan-committee-report/ (last visited on July 06th, 2024)
3. Government of India, "Raghavan Committee Report of the high-level Committee on Competition Law & Policy" (Ministry of Corporate Affairs,1999)
4. Tilottama Raychaudhuri, "Abuse of Dominance in Digital Platforms: An Analysis of Indian Competition Jurisprudence" 1 Competition Commission of India Journal on Competition Law and Policy 1-27 (2020).

encompassing the dynamics of the digital markets.

UNDERSTANDING THE DIGITAL MARKETS

Over the span of years, the dynamics of the market environment has changed drastically. It started with barter system, then it advanced to buying and selling of products and services in brick-and-mortar model, which is referred as "Traditional Markets". Inadvertently, with the innovation of technology, the market is now shifted to the buying and selling of any products and services on e-commerce platforms (may it be Apps, or Websites), which is referred to as "Digital Markets".

Notwithstanding multiple benefits in terms of efficiency and economic boost of digital markets, it is still vulnerable to substantial issues that may affect the market's fairness, transparency, and distortions.[5] These issues are: -

1. **Firstly,** the large digital platforms act as gatekeepers or gateways between business users and consumers. For example, an OTT platform is a gateway between commercial advertisement companies and their end users. Few of these platforms hold control over the whole platform, providing them access to consumer data, consumer preferences, market demand, ratings, consumer preferences, etc. This may result in no competition in the market as new entrants will find it difficult to compete with the existing platforms, leading to "high market concentration" & "weak contestability of platform markets[6]".
2. **Secondly,** the increasing dependence on digital platforms as gatekeepers could result in gross imbalance and may prompt unfair practices. Because of this imbalance, gatekeepers may hold the bargaining power and may impose unfair business conditions on the consumers and the business users of such digital platforms.
3. **Thirdly,** these giant platforms may take the aid of different algorithms to influence the market as well as the consumers through search engines. For

5. European Commission, "Commission Staff Working Document Impact Assessment Report" 47 (2020).
6. European Parliamentary Research Service, "Digital Market Act" 4-5 (2022)

example, if a consumer is trying to get a product/service from the brand "A" but the product of brand "B" appears first on the screen it is due to the use of an algorithm to influence the market (like a cartel between the marketplace model company and business user company).

VITAL FEATURES OF CORE PLATFORM SERVICES AND NOTIONS OF GATEKEEPERS IN THE DIGITAL MARKET

It is crucial to examine the vital features of the core digital platforms to have a better understanding of the vulnerabilities. These features reshaping the competition in the market are multi-sided markets, strong network effects, reliance on large quantities of data, substantial economies of scale and scope, low or zero prices, switching costs, disruptive innovations and vertically integrated and conglomerate business models[7].

Presently, "GAFAM" enterprises (Google, Amazon, Facebook, Apple, and Microsoft) are considered potential gatekeepers in the market. Thus, even the CCI focuses on them for regulating ex-ante provisions.[8] According to the US investigation report, GAFAM platforms are dominant online platforms.[9] These tech giants may act as gatekeepers or gateways between the end users and the business users by holding unique features such as conducting business with the help of collection, processing, and editing large amounts of data, possessing the ability to create and shape new markets, benefiting from the economics of scale and scope operating in multi-sided markets, playing the substantial role in digital value creation benefiting from the strong network effects..[10]

The EU Commission has identified services that have the features of core platform services; cloud computing services, video-sharing platform services, streaming platforms, online intermediation services, online search engines, operating services, [11] advertising services, and number-independent electronic communication services. However, although streaming

7. *Ibid*
8. Annika Linck, "Digital Services/Markets Act: Commission proposes rules on gatekeepers for a more competitive market environment", *available* at: https://www.digitalsme.eu/dsa-dsm-commission-proposes-rules-for-gatekeepers/ (last visited on July 12th, 2024).
9. US Government Publishing Office, "Investigation of Competition in Digital Markets" 110 (2022).
10. Supra note 5 at 4-5.
11. Beritan Zorkun Arik, "A Paradigm Shift in the Regulation of Digital Platforms? Ex-Ante Market Rules for Contestable and Fair Digital Markets", LUND University, SCHOOL OF ECONOMICS AND MANAGEMENT 10-11 (2021).

platforms are mentioned in the Impact Assessment Report for DMA, they were not considered to be core service provider platforms as they hold fewer network effects and subscription costs, and consumers can easily shift from one platform to another.[12]

Online marketplaces and app stores have benefited from the strong network effects, data-driven advantages, and high switching costs. [13] Google used its dominant position and imposed restrictions on mobile manufacturers to pre-install all the Google applications priorly and it cannot be uninstalled. Online search engines provide the end users with to access all the free websites and on the other end, they generate profit from commercial advertisements. Google has a market share of over 90% worldwide. [14] Currently, Google has expanded its market area to Google Maps, Google Cloud, Chrome, YouTube, Google One, Google Lens, Google Drive, Google Documents, etc. Google search engines are managed by an algorithm wherein only the advertisements or preferred platforms will pop up at the top and organic search listings are eventually pushed down. Due to this, business users are left with no option other than opting for Google advertisement services.

Social network services play a substantial role as gateways as they allow end users to build a network with people around the globe and generate profits from the business users who want to advertise. These platforms will help the business users who opted for advertisements by especially advertising to those end users who showed at least minimal interest in the same product/service, it is because these platforms will track and analyze the whole data generated in the platform.[15] These unique features are helping platforms to enjoy the highly concentrated market. For instance, Facebook, Instagram, Facebook Messenger, and WhatsApp of the Meta group have the majority of active users as of April 2024.[16] In U.K. Facebook holds the position of the largest supplier in the domain of display advertising. [17] Additionally, in operating systems,

---

12. *Supra* note 9 at 38.
13. *Id*
14. Search Engine Market Share Worldwide, Statcounter GlobalStats, *available* at: https://gs.statcounter.com/search-engine-market-share. (last visited July 16th, 2024)
15. Supra note 5 at 41.
16. Global social networks ranked by number of users 2022, Statista, *available* at: https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/. (July 26, 2022)
17. Competition and Market Authority, "Online Platforms and Digital Advertising" 115 (2020).

platforms like Windows, Android, and iOS are holding dominant positions across the globe. These platforms enjoy the benefit of economic scale and high switching costs.[18] In the regime of social network markets, it is very difficult for the new entrants because of the existing barriers such as social network effects, high switching costs and a large amount of existing data with the existing players. [19] Besides Facebook also locks/restricts end users while using the other platforms. For instance; the end-user needs to hold his/her Facebook credentials for years, to continue playing PUBG/BGMI.

Cloud services provide infrastructure support such as networking, computing, storage, middleware, IoT, and other software tools to other companies to conduct their business efficiently along with benefiting from the high switching cost and economics of scale. Cloud service providers are helping start-ups with the technical capabilities without the help of cloud services it would not be easily possible for the start-ups. Presently, Amazon Cloud services hold 31% of the market share whereas Microsoft edges closer to Amazon. [20] Large cloud service providers have vertical integration and provide software and hardware services which makes consumers highly dependent on them.[21]

Amazon stands as one of the largest online retail platforms. The concern regarding Amazon is that it is playing a dual role as an intermediary marketplace model and also as the seller of a few products. Preferential listing is another concern as Amazon may prefer to list its products on top in comparison to other products from different brands. Amazon may also influence the market because as an intermediary marketplace model, they have a large amount of data such as market demand, consumer preferences, high-selling products, the product in need, etc. Amazon may use such data not only to make preferred products but also to display them first on the screen. Another giant Apple is a predominantly hardware enterprise, where the bulk of its revenue

---

18. *Supra* note 9 at 110.
19. *Supra* note 9 at 272-314
20. Felix Richter, "Amazon Maintains Cloud Lead as Microsoft Edges Closer", Statista, *available* at: https://www.statista.com/chart/18819/worldwide-market-share-of-leading-cloud-infrastructure-service-providers/. (July 26th, 2024).
21. Christopher Tozzi, "Why Vertical Integration Is a Cloud Computing Trend to Watch", *available* at: https://www.itprotoday.com/cloud-integration/from-software-to-hardware-vertical-integration-is-a-cloud-trend-to-watch. (July 26th, 2024).

comes from the sale of its devices and accessories, however, it enjoys a durable market position in smartphones. It controls the entire software distribution to iOS devices. There is an apprehension that Apple is exploiting this dominance over app developers by misappropriating competitively sensitive information and charging super-competitive prices for the App Store[22].

JOURNEY OF REGULATING COMPETITION IN THE DIGITAL MARKET IN INDIA

In 2018, the Ministry of Corporate Affairs (hereinafter "MCA") constituted a **"Competition Law Review Committee"** (hereinafter "CLRC") to review and recommend the changes that ought to be made to the existing legal framework. The question before the committee was whether the existing legal framework would be sufficient to regulate the digital markets. Additionally, it suggested that CCI must periodically review the latest trends and developments in the market along with the policy implications on the digital ecosystems. It also recommended an amendment to section 19 (4) to include "network effects" or "control over data" as one of the factors for determining the dominant position in the digital market..[23] To give effect to the recommendations in the CLRC report, the Competition (Amendment) Act, of 2023 was enacted. The rapid evolution of these "Big Tech" companies over the past two decades has resulted in the need for regulation. To address the concern MCA in 2022 laid before the Lok Sabha its 53rd report on "Anti-Competitive Practices by Big Tech Companies" (hereinafter "Standing Committee Report").[24]The standing committee report examined the rapid growth of digitalization and the ability of digital enterprises to indulge in anti-competitive practices (hereinafter "ACPs"). It was the first to acknowledge the need for an ex-ante measure for the digital market in the competition regime.[25] And coined **"Systemically Important Digital**

22. *Supra* note 9 at 272-314.
23. Government of India, (Report of Competition Law Review Committee) (Ministry of Corporate Affairs), Pg: 156-157
24. Law Commission of India, "Fifty-Third Report of the Standing Committee on Finance (17th Lok Sabha) on the Subject 'Anticompetitive Practices by Big Tech Companies'." (Committee on Finance, 2022)
25. *Id*. at 31

Intermediaries" (hereinafter referred to as SSDE) to identify the large digital platforms.[26] Additionally, it deliberated on ten anti-competitive practices.[27]

The further explanation for ACPs are as follows: -

1. **Anti-Seering -** Exclusionary behaviour makes it difficult for business users and consumer users to switch to third-party service providers.
2. **Platform neutrality / Self Preferencing-** A digital enterprise preferring or favouring its products on its platforms over products of other business users, thus this creates a conflict of interest.
3. **Adjacency / Bundling and Tying-** Forcing users to buy related services by combining or bundling core or essential services as a complementary offering.
4. **Data usage (use of non-public data)-** With the help of personal data, these digital platforms are consumer profiling to offer targeted online products and services leading to privacy concerns.
5. **Pricing / Deep discounting-** Intentionally setting the prices below the cost price or applying predatory pricing strategies to exclude the competitors.
6. **Exclusive tie-ups-** Entering into exclusive agreements with business users or sellers ultimately prevents these business users and sellers from dealing with

other enterprises.

7. **Search and ranking preferences-** These gatekeepers or intermediaries are prioritising sponsored or own products which leads to low visibility of other products.
8. **Restricting third-party applications-** Users are restricted from accessing or utilising third-party applications.
9. **Advertising Policies-**There seems to be an increasing tendency in the market concentration, consolidation, and integration in the ad-tech supply chain on many levels. It gives the incumbent platform an unwarranted edge over the market

To further examine the need for ex-ante measures in digital markets and to review the existing legal framework of CA, 2002, The MCA and Ministry of Finance constituted a **"Committee on Digital Competition Law"** (hereinafter "CDCL") in 2023. The committee consulted with the relevant regulatory bodies, examined the international emerging practices and concluded in its report that there is a requirement for separate legislation and a chapter on the ex-ante measures must not be inserted into the existing Act.[28] It also proposed a draft bill on the digital market as **"Digital Competition Bill, 2024"** (hereinafter "the bill").

ANALYSIS OF DIGITAL COMPETITION BILL, 2024

By the introduction of the bill, the legislation aims to lay harmonised provisions to regulate the digital platform's behaviour acting as an SSDE. Enterprises will be designated as SSDEs if they satisfy the twofold threshold limits i.e., financial threshold limits and user threshold limits[29]. To give wider scope to this provision, CCI has been vested with the discretionary power to designate any enterprise as an SSDE, even if such enterprise is not satisfying the threshold limits. This approach entails a shift from the ex-post regulations to ex-ante regulations, provisions of the proposed bill grant the CCI to intervene pre-emptively before digital platforms engage in any anti-competitive practices. The Bill has adopted multiple provisions from the

26. *Id*. at 31.
27. *Id*. at 4.
28. Government of India, "Report of the Committee on Digital Competition Law" (Ministry of Corporate Affairs, 2024).

European Digital Markets Act, of 2023 with slight amends. The bill suffers from defects which may result in amendments and clarifications from the authority.

The term "end user" definition in the bill is ambiguous as it lacks clarity on the term using the core digital services. For instance; an individual may download the "online intermediation service" platform services apps but the individual neither uses it nor enters any of its details. The question will be whether this individual on mere downloading the application will still be considered as an "end user".

Another concern can be that an individual using the services of 'online intermediation services" through its known people credentials. In such condition, whether the individual who is using the services through the credentials of others will be considered as the "end user" or the individual whose credentials have been used will be considered as the "end user" or both. It is pertinent to note that out of the nine ACPs mentioned by CDCL, only six found their way into the bill. The ACPs buried in the bill are pricing/deep-discounting, exclusive tie-ups, and advertising policies.

COMPARATIVE ANALYSIS BETWEEN THE DIGITAL MARKET ACT AND DIGITAL COMPETITION BILL

The European legislation Digital Markets Act (hereinafter "DMA") is a groundbreaking law that aims to prevent giant online platforms from abusing their market power.[30] DMA was enacted on November 01st, 2022 and came into effect on May 02nd, 2023.[31] The purpose of the DMA is to identify and selectively regulate the behaviour of giant digital platforms in an ex-ante manner.[32] DMA acts as a complementary legislation amending the existing EU framework on competition rules. The DMA is the first regulatory tool that regulates giant digital platforms that act as gatekeepers. [33] The tables mentioned below attempt to highlight the similarities and differences between the bill and DMA.

---

29. The Digital Competition Bill, 2024, S. 3
30. Daniel Liberto, "Digital Markets Act (DMA): How the EU Law Will Work", *available* at: https://www.investopedia.com/digital-markets-act-7097402. (last visited on August 09th, 2024)
31. *Id*
32. *Supra* note 6 at 1.
33. About the Digital Markets Act, Digital Markets Act (DMA), *available* at: https://digital-markets-act.ec.europa.eu/about-dma_en. (last visited on August 12th, 2024).

The Similarities

S. No.	Digital Markets Act	Digital Competition Bill
1. **Definitions of "end users" and "business users"**	The definitions of "business user[1]" and "end user[2]" both are mentioned.	Both the definitions of "business user[3]" and "end user[4]" have been mentioned.
2. **Designation and Threshold limits**	In DMA for designating as a "gatekeeper" the digital platforms shall satisfy both the qualitative and quantitative thresholds.	For any digital platform to be designated as an SSDE it shall satisfy both the qualitative and quantitative thresholds.
3. **Ex- ante obligations**	It prescribes various obligations on gatekeepers under Articles 5, 6, and 7 of the Act. Though DMA specifically doesn't provide the subheadings the following articles cover:- **Data usage:** Articles 5(2) & 6(2) **Anti-steering:** Article 5(3) **Tying and bundling:** Article 5(8) **Self- preferencing:** Article 6(5) **Restricting third-party applications**: Article 6(6) **Fair and transparent dealing:** Article 6(11) & (12).	It prescribes various obligations on SSDE. However, obligations stated in the Bill are limited. **Data usage:** Section 12 **Anti – Steering:** Section 14 **Tying and bundling:** Section 15 **Self – Preferencing:** Section 11 **Restricting third-party applications:** Section 13 **Fair and transparent dealing:** Section 10
4. **Anti-Circumventing**	Article 13 explicitly states that core platform services shall not	Section 5 of the proposed bill deals with the anti-circumventing

34. The Digital Markets Act, 2022, art. 2 (21).
35. *Id*, art. 2 (20).
36. *Supra* note 29, s. 2(3).
37. *Id*. s. 2(4).

	gatekeepers.	
5. Fines/ Penalties	Article 30 empowers the commission to impose ten per cent of its total worldwide turnover in the preceding financial year in case the "gatekeepers" fail to comply with the obligations.	Section 28 (1) of the proposed bill states that the commission can impose ten per cent of its global turnover in the preceding financial year in case the SSDE fails to comply with the obligations.
6. Interim Measures	Commission under Article 24 is empowered to order interim measures against gatekeepers in case of any infringements.	Commission under section 25 is vested with the power to order interim measures if there is any contravention of the provisions, rules or regulations.

The Differences:

S. No.	Digital Markets Act	Digital Competition Bill
1. Terminology	The term "gatekeeper" has been used to refer to core digital platforms for the Applicability of Act.[38]	The term "systemically significant digital enterprise" has been used to refer to core digital platforms for the Applicability of the Act.[39]
2. Core Digital Service	A total of ten (10) core digital services are mentioned including all the services which are mentioned in the Digital Competition Bill, the only additional service which is mentioned in the DMA is Virtual Assistance.[40]	A total of nine (9) core digital services are mentioned; online search engines; online social networking services, operating systems, web browsers, cloud services, advertising services, online intermediation services, video-sharing platform services,

38. *Supra* note 34, art. 2(1).
38. *Supra* note 29, s. 2(17)
40. *Supra* note 34, art. 2 (2).

		and interpersonal communication services.[41]
3. **Designation and Thresholds**	**The Act mentions;** **Business users:** 10,000 (last financial year).[42] **End users:** 45 million (last financial year).[43] And **Annual T/O:** EUR 75 billion (in each of the last three final years).[44] (or) **Market Capitalization or fair market value:** EUR 75 billion (last financial year).[45]	**The bill mentions;** **Business users:** 10,000 (last three financial years).[46] **End users:** One crore (last three financial years).[47] And **Annual T/O:** INR 4000 crore (in each of the last three final years)[48] (or) **Global T/0:** INR USD 30 billion (in each of the last three final years).[49] (or) **Gross merchandise value:** USD 75 billion (in each of the last three final years).[50] (or) **Global market capitalization or fair market value:** USD 75 billion (in each of the last three final years).[51]
4. **Commission's Power**	The European Commission is vested with the power to	Even the CCI is vested with the power to designate any digital

41. *Supra* note 29, sch. 1.
42. *Supra* note 34, art. 3(2)(b).
43. *Id*
44. Id, art. 3(2)(a).
45. *Supra* at 50.
46. *Supra* note 29, s. 2 (b)(i)
47. *Id*, s. 2 (b)(ii).
48. *Id*, s.(2)(a)(i).
49. *Id*, s. 2(a)(ii).
50. *Id*, s. 2(b)(iii).
51. *Id*, s. 2(b)(iii).

	designate any digital service platform as a gatekeeper even if such platform does not satisfy the requirements stated under Article 2 of the Act.[52] The provision also states seven (7) elements that the commission shall take into consideration while designating as a gatekeeper.	service platform as an SSDE. The provision states sixteen (16) elements that can be taken into consideration while designating a "systemically significant digital enterprise". However, we can conclude that seven (7) elements stated in DMA are divided into fourteen 14 elements in the Digital Competition Bill, 2024. The only add-on elements are a monopoly position in the market and commission discretionary power to consider any other factor.[53]
5. Onus on the platforms	The onus is on digital platforms to notify the commission within two months once they meet the threshold limits.[54]	Even here, the onus is on the digital platforms to notify the commission within three months once they meet the threshold limits.[55]

THE NEED FOR EX-ANTE INTERVENTION IN THIS DIGITAL ECOSYSTEM

The need for ex-ante regulations in the digital sphere is to ensure fairness, contestability, transparency and innovation and to safeguard the end user's interests that extend beyond economic consideration.[56]

- **Fairness**

The good functioning of the market directly depends on the level of fairness maintained among the market participants.[57] It is important to note that fairness is considered a substantial pillar of

52. *Supra* note 34, art. 3(80).
53. *Supra* note 29, s. 3
54. *Supra* note 34, art. 3 (3).
55. *Supra* note 29, s. 4.
56. Marco Cappai & Giuseppe Colangelo, "Taming Digital Gatekeepers: The 'More Regulatory Approach' to Antitrust Law", 41, Computer Law & Security Review, 55, (2021).
57. Crawford, G. et al. (2021), "Fairness and Contestability in the Digital Markets Act", Digital Regulation Project, Policy Discussion Paper No. 3.

the market economy, and it can be only achieved with regulations.[58] The ultimate objective of the bill is to identify and regulate the SSDE keeping in view the principles of fairness, contestability and transparency. However, fairness finds its presence in the bill in the preamble and section 10. Unfortunately, fairness is ambiguous under the bill. It is essential to have some understanding of the interpretation of the term fairness otherwise it may be challenged on every step by the stakeholders. It may be difficult for the authority exercising the power to define and execute the limits and extends of the term fairness. The ambiguity will raise doubt as to how to implement and achieve fairness, is it light with a level playing field for companies or to increase market efficiency and achieve consumer welfare.[59]

Jacques Cremer et al., in their draft article, defined the term fairness as *"Fairness is the organisation of economic activity to the benefit of users in such ways that they reap the just rewards for their contributions to economic and social welfare and that business users are not restricted in their ability to compete*[60]

The interpretation of fairness can also extend to consumer protection where dominant digital platforms excessively increase the prices. Thus, it becomes essential to have an exhaustive list or explanation of the term fairness within the legal framework to avoid usage and interpretation of it as it where its basis. This fortifies the objective and effective implementation of ex-ante regulations.

- **Contestability and Market Power**

Contestability plays a pivotal role and is one of the fundamental principles of market theory. Freedom plays a crucial role in fostering innovation in the market. The freedom in competition will be reduced when any firm reaches to monopolistic position in the market. [61] The largest platforms in the market can use techniques, such as envelopment and vertical integration to create powerful ecosystems. [62] The structure of these platforms helps them to hold economic

58. Motta, M. (2004), Competition Policy Theory and Practice, Cambridge University Press.
59. *Supra* note 34
60. *Supra* note 57 at 108.
61. OECD, Data portability, interoperability and digital platform competition, 42, 2021.
62. Fletcher, A., "Digital competition policy: Are ecosystems different? -- Background note for the OECD Hearing on Competition Economics of Digital Ecosystems", (2020) *available* at: https://www.oecd.org/daf/competition/competition-economics-of-digital-ecosystems.htm. (2020).

characteristics such as the economics of scale and scope of network effects, and potentially anti-competitive conduct, which facilitates these platforms to gain entrenching market power[63].. Contestability can be achieved by allowing user access without any restrictions. So, users will have multi-homing but it is generally considered as a competitive constraint in digital markets[64]. The digital platforms can leverage data portability or interoperability to stand as a central element in the market and ultimately build barriers for others to enter[65]. Open choice principles or contestability aims to resolve the issue of exclusionary behaviour seen from these tech giant platforms[66]. Currently, data plays a key source of value, because it harnesses the organizations to be more effective, and innovative and re-use can boost the economic and social benefits. As a result, user-friendly access without any restrictions and sharing of data is a critical concern in the digital age, for the markets to be contestable[67].

The term contestability is also not defined under the bill and find its mention in the preamble of the bill. Although the term has not been used categorically, Section 12 (Data Usage) Section 14 (Anti-Steering) and Section (Tying and Bundling) aim to achieve market contestability.

DMA, under Article 5 covers the contestability obligations of the gatekeepers. It is observed that obligations stated in Article 5 are of a more detailed nature in comparison to the bill. For instance, DMA encourages business users to approach directly to the end users and have the freedom to enter into contracts directly with the end users without mandatorily using the platform.

- **Innovation and Transparency:**

Contestability is highly dependent on innovation; as the latest innovations assist contestability The legislators aim to foster innovation on one hand and on the other hand transparency. It can be achieved if enterprises ensure that information regarding terms and conditions or any other information is publicly available either to competing businesses or consumers. These digital platforms depend on algorithms to make real-time decisions which ultimately makes it difficult for the end users and the business users to comprehend the basic decisions. Additionally,

63. OECD, Ex ante Regulation in Digital Markets, 17, 2021.
64. Schnitzer, M. et al. (2021), “International coherence in digital platform regulation: an economic perspective on the US and EU proposals”, Digital Regulation Project, Policy Discussion Paper No. 5.
65. The "Augmenting Compatibility and Competition by Enabling Service Switching Act of 2021", 11 June 2021
66. Marsden, P. and R. Podszun (2020), Restoring Balance to Digital Competition - Sensible Rules, Effective Enforcement, Konrad-Adenauer-Stiftung, http://www.kas.de.
67. *Supra* note 61 at 14-18.

business users and end users can only make rational decisions provided sufficient information is available from the digital platforms e.g., its value, price, and performance[68].

The bill u/s. 10 states that the SSDE must be maintained fairly and transparently. However, the bill fails the explain how transparency can be achieved. In contrast, DMA enumerates transparency obligations on the gatekeepers to disclose the information regarding the price that the advertiser has paid and the amount of remuneration paid to the publisher for publishing. [69] This further promotes the end-user or advertiser to understand the breakdown of the price structure and assists the advertiser in making significant decisions[70].

It is believed that the bill fails to address effectively the application and interpretation of fairness, contestability and transparency which are considered as an essential pillar. However, that doesn't change the actual requirement of the ex-ante measures.

It is important to address whether imposing obligations for restricting the operations of a business on anti-competitive practices hamper innovation. It is also important to know whether end users and business users are ready to bear the damage caused by the anti-competitive practices at the cost of fostering innovation. It is pertinent to note that inserting a chapter on ex-ante measures in the existing CA will result in discrepancies. For instance, the mere size of an enterprise is not a concern, but for ex-ante measures size of the enterprise becomes a paramount consideration to bring the digital enterprises within the ambit of obligations. In addition, the ex-post measures require a lot of time for investigation to consider an enterprise as a dominant enterprise in the market considering the dynamic nature of technology and its usage by these digital platforms. These large dominant firms may misuse the advantage of the dynamic nature of technology and cause irreparable damage while the investigation is still ongoing[71].

Lastly, the bill provides limited remedies and the CA is ineffective in addressing the repeated offence for the same or similar misconducts by the digital enterprises.

---

68. Centre on Regulation in Europe, Making the Digital Markets Act more resilient and effective, 26, 2021.
69. *Supra* note 34, art. 5(g).
70. Takigawa, T., "Super platforms, big data, and competition law: the Japanese approach in contrast with the USA and EU", 9, Journal of Antitrust Enforcement, 289-312, 2021.
71. Congressional Research Service, 'Antitrust Reform and Big-tech firms' (2023).

CONCLUSIONS

Systemically significant digital enterprises are providing core platform services that are acting as a centre of today's economy and social life. Amid the recent developments in the digital sphere, these core platform services are used by thousands of millions across the globe. It's like people are dependent on such core platform services. It is indeed these systemically significant digital enterprises actively contributing to the country's economy and better social life. However, it is undeniable that with the growth of such rapid development challenges like fairness, contestability and transparency are at stake. These giant digital platforms are enjoying entrenching and durable positions in the market by operating their businesses with anti-competitive practices. If these anti-competitive practices are not regulated soon, then in such a scenario the quality of the products or services will be gradually decreased, the prices of the products and services will be increased and the end users will be left with no options for other than opting such products and services, at last, there won't be any innovations in the market which will be benefiting to the society and its economy.

It is undeniable that existing provisions of the CA can address these anti-competitive practices and CCI has dealt with and imposed penalties on such digital platforms for indulging in anti-competitive practices. However, mere sufficiency to address these anti-competitive practices is not what is required at present. Efficiently addressing anti-competitive practices is what is required at present considering the dynamic nature of digital markets. It is undeniable that the digital markets have unique and dynamic features that require separate and effective competition laws in terms of imposing ex-ante measures and conducting quick investigations considering the fact of rapid developments in the digital market. It is not possible to adopt ex-ante measures to the existing law because it may lead to discrepancies or ambiguity even if a solution is found to insert these ex-ante measures into the existing act. This adoption will still be considered delayed because digital platforms will be a step ahead in the time being.

No doubt the proposed bill is very much welcomed at this point in India. Contrary to the existing ex-post measures mentioned under the CA, it proposes ex-ante measures to address the anti-

competitive practices conducted by the SSDEs. Ex-ante measures are adequate tools to ensure fairness, contestability and transparency in the digital markets as it does not wait till the damages have been caused because these digital platforms are conducting anti-competitive practices. However, on the other hand, there is a huge requirement for the ex-ante measures to regulate digital platforms. But it is unfortunate to state that the proposed bill is not the best tool to address the anti-competitive practices and to achieve fairness, contestability and transparency in the digital markets. It is suggested that the obligations under the bill be enumerated in detail and be made flexible to encompass the advancing era of the digital market and will result in effective regulation.

OPPORTUNITIES AND LEGAL BARRIERS IN STARTUP ECOSYSTEMS: A U.S., CHINA, AND INDIA PERSPECTIVE

***Dr. Smita Srivastava**

INTRODUCTION

The growth of every country depends on its citizens and the economy. If more people are working, growth will take place at a higher rate. In today's world, where big companies and industries are growing very fast, the role of startups cannot be ignored. Startups nowadays are playing an important role in different sectors. Startups ecosystem are not only doing innovations but also employing the people and thereby contributing in growth of the country's economy. Growth of startup depends on economy system and legal regime of particular country. Startups act as a counter to the marketplace where business and industry are lacking and where there is a need to fill that gap. Network[1] of individuals, institutions, environment which interact themselves shapes the ecosystem of startup in different cities and location to meet the requirement of startup. This article throws a light on the ecosystem of startups and its challenge in USA, China and India.

MEANING OF STARTUPS

Literal meaning of startup is the act or instance of setting in operation or motion. This term is basically used for newly established business or a company in first stage of operation. It is founded by one or more entrepreneurs who want to develop a product or service of which there is demand in market. Initially, founders basically finance their startups and may attempt to attract outside investment. The innovation may be in any sector like agriculture, animal husbandry, biotechnology, business finance, clean technology, consumer products, consumer services, food processing, manufacturing, renewable energy, virtual games, pharmaceuticals, e-learning, web development, waste management, drone. There are four stages of Startups:

a. Ideation: Where the entrepreneur has interesting idea & he is working on it.

b. Validation: Where startup has been established & it is time to enter into market.

---

* Assistant Professor Faculty of Law University of Allahabad

1. Harshit gupta et.al, Contrast between Startup Ecosystem of India and USA, 10 IJSR. 1125,1125(2020) *available* at https://www.ijsr.net/archive/v10i7/SR21714171643.pdf (September 24,2024)

c. Early Traction: Where the Startup has established a mark with first wave of customers.

d. Scaling: Where the Startup has successfully got the product market fit. It has crossed the valley of death. It may raise or expand the capital.

There are many benefits of Startups. It basically generates employment. Through new or improved technology, it improves the quality of life of citizen. Ultimately, it is important for the growth of nation. However, there is high chance of failure if innovation is not scalable.

PROBLEMS FACED BY STARTUPS[2]

Basically entrepreneurs face various problems:

- **Complex registration process:** Complex registration procedure and lack of clarity about that may delay the establishment and operation of Startup.
- **Limited Guidance-**Many Startups do not have any guidance about how to register the business. How to start business? How to nurture it? How to attract investment?
- **Regulatory Formalities-** Regulatory procedure requiring compliance of numerous labour and environmental laws are very complex and time consuming. Many times, new enterprises are not aware about these formalities and can be subjected to stringent action by regulatory bodies. For making the ecosystem startup friendly, simplifications of regulatory regime is required.
- **Financial Constraints:** Access to finance is an important issue faced by Startups. Success of Startups depend upon their idea of innovation. Due to high risk involved in innovation, enterprises are not able to attract investment at their initial stage. Lack of financial support ultimately adversely affect their ability to start their business.
- **Lack of Knowledge about IPR Protection:** Startups having limited resources and man power can survive in this highly competitive world only through

2. Action Plan, *available* at https://www.startupindia.gov.in/content/dam/invest-india/Templates/public/Action__Plan.pdf (last visited on September 05, 2024)

continuous growth and need based innovations. IPR has emerged as business tool for enterprises to protect their innovations. Lack of knowledge about IPR protection may jeopardize their interest.

- **Requisition of Prior experience or prior turnover-** Tender of Government body or Public Sector Undertaking, often requires prior experience or prior turnover as the eligibility criteria which the Startups lack. Such a condition restrict Startups from participating in such tenders.
- **Chance of Failure-** Due to high risk involved in innovation by startups, mostly enterprises fail to succeed. If the business fails, it difficult to reallocate money and other resources to more productive business.

In order to tackle these issues, different countries have adopted different measures.

POSITION IN UNITED STATES OF AMERICA (USA)

Startup ecosystem located in different country or different region has their own story because different availability of resources and entrepreneurial atmosphere gives different output. One such example can be seen in the USA. The USA is the first largest country in the world with its strong GDP and growth rate. The term "Startup" originated from this country in 1970. Slowly and gradually, it was popularized in 1990 and busted in 2000 when there is the hype about the internet and technology.[3] Start-up as a terminology was initially used in the United States to describe an early stage company with great growth potential. These Startups are called technology startups as they are playing an important factor in the growth of the economy of the USA.

For the advancement of more Startups and investment, President Barack Obama 2011 introduced "Startup America" a white house initiative.[4] The main aim of this initiative was to

---

3. Dr.Vaibhav Bhalerao, A Comparative Study of the Indian and the American Start-up Ecosystem, RJIERJ.202 (202- 203) 2020,
. *Available* at https://www.researchgate.net/publication/348232008_A_Comparative_Study_of_the_Indian_and_the_American_St art-up_Ecosystem. (last visited on September 5, 2024)
4. Startup America, The white House president Barack Obama, *available* at https://obamawhitehouse.archives.gov/economy/business/startup-america#:~:text=Startup%20America%20is%20a%20White,growth%20entrepreneurship%20throughout%20the%20 nation. (last visited on August 30, 2024)

inspire, celebrate, and accelerate high growth in the nation with major objectives to fuel startup growth, to connect Entrepreneur with education and mentors, to make the ecosystem in which Entrepreneur will work with little barriers, to ensure market opportunities in industries like healthcare, clean energy, and education. For that purpose various measures have been taken up under the initiatives such as-

a. Expansion of access to capital for high growth of start-ups in the Nation;
b. Expansion of entrepreneurship education and mentorship programs for empowering the citizens not just for getting a job, but for creating jobs;
c. Commercialization of the about $148 billion in annual federal funded research & development for developing innovative start-ups and new industries;
d. Identifying & removing unwanted barriers for high growth of start-ups; and
e. Expansion of collaborative activities between large companies and startups.[5]

Apart from this, not only has the government done something for startups, but private organizations have also come forward to support startups. "Startup America Partnership" is a platform introduced by their private organizations to support young companies and startups to the growth of the startups. This initiative not only provides support to the startups but also acts as a trainer, mentor, and adviser in their field.[6] Following challenges are faced by startups in USA-

- **Patent Complexity and Costs:** The U.S. has a strong IP protection regime, but securing patents, trademarks, and copyrights can be expensive and time-consuming, particularly for tech startups. Infringement lawsuits are also common and can be financially draining.
- **Classification of Employment and Complex Labor Laws:** The distinction between employees and independent contractors can lead to disputes and penalties e.g., recent debates over gig economy workers in California. Startups must comply with federal, state, and local labor regulations, including

5. Fact Sheet: White House launches Startup America Initiative, *available* at https://obamawhitehouse.archives.gov/startup-america-fact-sheet (last visited on 20th September, 2024)
6. Startup America Partnership, available at https://www.startupamericapartnership.org/ (last visited on September 21, 2024)

minimum wage laws, overtime pay, and anti-discrimination requirements, which vary widely.

- **Data Privacy and Security:** Data protection regulations vary by state (e.g., California's CCPA) and federal sectors (e.g., HIPAA for healthcare). Ensuring compliance with these laws can be complex and expensive. Startups may face liabilities from data breaches, especially if they don't have sufficient protections in place.
- **Securities Law and Fundraising:** The U.S. has strict securities laws, which regulate how startups can raise money through crowdfunding or private placements. Non-compliance can lead to penalties or the invalidation of funding rounds. Fundraising from non-accredited investors (individuals with high net worth or income) is restricted, limiting the pool of potential investors.
- **Antitrust Issues:** The U.S. has strict antitrust laws. Startups may face legal challenges if they grow rapidly and are perceived to be engaging in monopolistic practices, especially in the tech sector (e.g., concerns over Big Tech).

POSITION IN CHINA

China is the 2nd largest country in the world with its strong growth rate and GDP after America. Since the introduction of the Opening up policy in 1978 under Deng Xiaoping regime China's economy is growing rapidly.[7] Under this, it opens the door for the private sector and foreign investment. Earlier in China, there was a transition from the planned economy to a market economy where entrepreneur only explored the manufacturing sector but with more focus on privatization and entrepreneurship in 1990, entrepreneur started exploring the service industry also.[8]

---

7. Linjuan Rita MEN et.al, The state of Startups and entrepreneurship in China,Researchgate.1,1- 4(2019), *available* at https://www.researchgate.net/publication/338032316_The_state_of_startups_and_entrepreneurship_in_China (last visited on September 15, 2024)
8. *Ibid.*

In 2015, adopting the qualitative growth model, Chinese government introduced a policy of "Mass entrepreneurship and innovation" for building a startup ecosystem in order to resolve the issue of youth unemployment and create new growth opportunities. After the introduction of the policy, several new companies grow rapidly with the new infrastructure. Initially, focus was on establishing startup friendly ecosystem for example making the business environment, providing a platform, and strengthening the startup investment market. After 2017, Chinese startup strategy is focused on improving its startup ecosystem to make it more innovative. It includes the commercialization of science and technology, stronger co-operation between start-ups and big enterprises, revitalizing the external support for startups and making of a global startup base. Global Innovation Index of China improved from 35th in 2013 to 14th in 2019. Beijing (3rd) & Shanghai (8th) are in top ten cities in the global start-up ecosystem. According to the 2019 Global Startup Ecosystem Report by Startup Genome, many cities of China are in top thirty global start-up ecosystems.[9]

Following challenges are faced by startups in China-

- **Complex Registration Process:** Starting a business in China can involve navigating complex bureaucratic processes, requiring multiple permits and approvals, particularly for foreign startups. Some industries, such as finance, e-commerce, and telecommunications, are heavily regulated, and startups need to comply with restrictive laws like cybersecurity requirements.
- **Weak IP Enforcement:** Although China has improved its IP laws, enforcement remains weak, making startups vulnerable to IP theft and counterfeit goods. Startups often struggle with protecting their patents, trademarks, and copyrights.
- **Data Privacy and Cybersecurity:** China's Cybersecurity Law requires that all data collected within the country be stored on servers located in China, posing operational challenges for foreign startups. startups must comply with strict

9. Sangbaek Hyun et.al , China′s Startup Ecosystem Policy and Implications, 10 WEB,1 (1-4)2020,(Dec. 2019), *available* at https://think-asia.org/bitstream/handle/11540/12235/WEB20-17.pdf?sequence=1. (last visited on September 18, 2024)

data protection laws that require rigorous consent mechanisms and place limitations on data sharing, especially for cross-border data transfers.

- **Foreign Investment Restrictions:** In several sectors, including telecommunications, education, and media, there are limits on foreign ownership, making it difficult for foreign startups to enter or operate without local partners. Foreign investments are subject to strict government review, which can delay or block funding rounds.
- **State Control and Censorship:** Startups in media, social networking, and content platforms must navigate strict censorship laws and self-censor to avoid government sanctions.
- **State-Owned Enterprises:** Startups face competition from large SOEs, which often receive government subsidies and preferential treatment in procurement and regulatory enforcement.

POSITION IN INDIA

India is the 3rd largest startup ecosystem in the world. More than 100 unicorns and more than 91000 startups are working within the territory of country. It became possible due to the Startup friendly ecosystem made by the Government of India through its various schemes and programs. India is the third largest country in terms of its growth rate and it's GDP after USA and China.

Before 1991, most of the business and trade were dependent on governmental institutions. They were operating as per the need of government. Social relation and bureaucracy were more relevant than the main function of the business. Main purpose was to curtail the use of western goods. However, after economic reform in 1991, orientation of business in the nation changed substantially. Still traditional businesses had to compete with the bigger multinational companies having better technology. In India, many people had unique ideas and wanted to run their businesses but due to financial constraints, they were not able to fulfill their idea.

On 16 January 2016, the government under the leadership of Prime Minister Narendra Modi launched Startup India Initiative which consist of several schemes. Purpose of this initiative was to support entrepreneurs and to build a startup friendly ecosystem. Ultimate object was to transform India into a nation of job creators rather than job seekers. For implementation of this scheme dedicated Startup India Team has been made. This team works under supervision of Department for Industrial Policy and Promotion. Government of India also introduced the Aatmanirbhar Bharat Abhiyan and the 'Make in India' program, for the purpose of converting country into a global manufacturing and design export hub.

A. Startup India Initiative

"Startup India" is initiative of the Indian government for the purpose of supporting the startups and entrepreneurs. The main aim of the program is to create a strong ecosystem for nurturing and protecting innovation and startups in India. Ultimately it will generate huge employment opportunities leading to the sustainable economic growth of the Nation. This initiative was introduced when government realized that people have more potential to work hard and some people have a unique idea in their mind but they are not able to build it because of lack of investment, lack of money, etc. Startup India is a revolutionary scheme of government to support the people in building their unique idea to implement and grow. [10] Under this scheme there are tremendous opportunities for an entrepreneur to implement their idea with the financial support of the government in various sectors like Textiles, food, IT, Environment, etc. In order to get the benefit of this initiative-

- The startup should be a registered partnership firm, private limited company, or Limited liability partnership.
- Turnover shouldn't exceed 100 crores in any of the previous financial years.
- The startup must apply within ten years from the date of formation.

Key features of Startup India Initiative are as follows-

a. Specific web portal and mobile app for compliance of nine environmental and

10. Prof. Dr. Roshan S. Pate, STARTUP INDIA – OPPORTUNITIES AND CHALLENGES, 2 An International Peer- Reviewed Open Access Journal of Interdisciplinary Studies.220, 220-224, *available* at https://www.gapinterdisciplinarities.org/res/articles/(220-224).pdf. (last visited on September 16, 2024)

labour laws through self-certification

b. Startup India Hub- Interaction of Startups with Government, Regulatory authorities and different stakeholders on one platform.

c. Income Tax exemptions for 3 years

d. Speedy process of Patent application for Startups

e. Panel of facilitators to assist in filing applications at the cost of government.

f. 80% rebate in filing of patent

g. Exit Process- Startups with simple debt structure may be wound up within 90 days[11]

Serial No.	Startup Network	Number
1.	DPIIT recognized Startups	91018
2.	Mentors	827
3.	Investors	83
4.	Incubators	939
5.	Government Bodies	70

B. Startup India Seed Fund scheme

Under Startup India, the government launched the Startup India seed fund scheme on April 21, 2021. The Government of India allotted a total budget of ₹945 Crores for the purpose of financing to 3600 businesses and 300 incubators.[12]

C. Pradhan Mantri Mudra Yojana[13]

Government of India launched Pradhan Mantri Mudra Yojana, in which Micro Units Development and Refinance Agency Bank or MUDRA Banks provide loan at low rate to micro-finance institutions and non-banking financial institutions, which in turn provide low-interest loan to start-ups and MSMEs. Therefore, this programme generates fund of funds to strengthen Indian entrepreneurs. Three categories for providing loan are as follows:

---

11. *Supra* Note 2
12. Startup India seed fund scheme, *available* at https://seedfund.startupindia.gov.in/ (last visited on September 10, 2024)
13. Pradhanmantri Mudra Yojna, *available* at https://www.mudra.org.in/ (last visited on September 29, 2024)

a. Shishu category – Loan up to fifty thousand Rs for small enterprises in their initial stages.

b. Kishor category – Loan up to five lakhs Rs for Mid-aged enterprises for expanding their business.

c. Tarun category – Loans up to ten lakhs Rs for experienced enterprises.

D. Scheme for Facilitating Start-Ups Intellectual Property Protection (SIPP) [14] and National Intellectual Property Right (IPR) Policy

In 2016, Government has also introduced the SiPP scheme and National IPR Policy to facilitate and support startups for their IPR filing. The main objective of these policies is to make fast track procedure of IPR, atmosphere of innovation, awareness etc.

E. Atal Innovation Mission (AIM)[15]

To promote innovation and entrepreneurship in nation Atal Innovation Mission (AIM) was launched by the NITI Aayog in 2016. Purpose of this initiative was to develop an environment of innovation and entrepreneurship in schools, universities and research institutions etc. This initiatives has two main functions: First, Entrepreneurship promotion through Self-Employment and Talent Utilization, in which innovators would be supported and mentored to become successful entrepreneurs. *Second,* to give a platform for nurturing the innovative ideas. Following challenges are faced by startups in India-

- **Regulatory Complexity:** Starting a business in India requires navigating through multiple permits, approvals, and registrations across various levels of government, from local to national, creating significant delays and costs for startups. Startups in finance (e.g., fintech), healthcare, and other sectors face stringent regulatory requirements that can slow down growth and raise compliance costs.
- **Slow IP Registration Process:** Although India has improved its IP laws, the process of securing patents and trademarks is often slow and can take years,

14. Scheme for Facilitating Start-ups Intellectual Property Protection, *available* at https://dpiit.gov.in/sipp (last visited on September 18, 2024)
15. National IPR Policy, CIPAM, *available* at https://cipam.gov.in/index.php/about/national-ipr-policy/ (last visited on September 20, 2024)
16. About AIM, Government of India, *available* at https://aim.gov.in/ . (last visited on September 13, 2024),

which is problematic for fast-moving startups. While laws are in place, enforcement is weak, and startups often struggle with counterfeit products, copyright violations, and trademark infringement.

- **Complex Tax Regime:** India's tax system, including Goods and Services Tax (GST), can be complicated for startups. Compliance with multiple layers of taxation (central, state, and local) creates financial and administrative burdens. Startups face scrutiny from tax authorities, particularly regarding "angel tax" on funding from angel investors, which taxes the difference between capital raised and fair market valuation as income.
- **Data Privacy and Cybersecurity:** Like China, India has introduced data localization requirements under its proposed Personal Data Protection Bill, requiring that data collected in India be stored within the country. This complicates operations for foreign startups and tech companies. Compliance with India's evolving cybersecurity regulations, including mandatory breach reporting and data protection mechanisms, adds an additional layer of complexity.
- **Regulatory Barriers to Foreign Investment:** While India has liberalized foreign investment rules in recent years, restrictions still apply in certain sectors, such as retail, e-commerce, and defense. This creates obstacles for foreign investors looking to fund Indian startups.
- **Bankruptcy and Insolvency Issues:** India's startup ecosystem is hindered by a slow and cumbersome bankruptcy process, making it difficult for startups to wind up operations or restructure in the event of failure.

17. Startup India, *available* at https://www.startupindia.gov.in/ (last visited September 10, 2024).
18. Tracxn, *available* at https://tracxn.com/explore/Startups-in-United-States (last visited September 20, 2024).
19. Traxcn, *available* at https://tracxn.com/explore/Startups-in-China(last visited September 23 1, 2024).
20. Startup India, https://www.startupindia.gov.in/content/sih/en/search.html?roles=Incubator&page=0# (last visited September 15,2024).

COMPARATIVE STUDY OF ECOSYSTEM OF U.S., CHINA AND INDIA

India is the 3rd largest nation in the ranking of startup ecosystems after the USA and China. America, which has always maintained its position, is on ranking 1st whereas China is on 2nd rank. Despite the USA being the startup capital, India has twice the number of startup. Every country has its economic structure and different policies and their entrepreneurs vary too. There are different categories where the startup ecosystem of India, the USA, and China are categorized:-

1. Population Rank: India is currently in 2nd position in terms of population ranking whereas China and USA are on 1st and 3rd position respectively.

2. Number of Startups: Recently India saw an advancement and innovation in startups after the 2016 startup India program. Currently, India has 91,021 [17] startups whereas the USA has 226,657[18] and China have 25,668[19] startups.

3. Number of Investors: Most of the funding to startups comes from Angel investors and venture capitalists. Venture capital investment in India is $20.9 Billion whereas in the USA, it is $ 37 Billion and in China, it is $ 73.5 Billion made to startups.

4. Number of Unicorn: Unicorn is a startup whose valuation is more than $ 1 Billion. In 2022, India had 108 Unicorns whereas the USA has 704 and china had 243 a number of unicorn.

5. Number of Incubators: Currently, India has 940[20] incubators as compared to the USA where there are 2301 and in China has 11,000 incubators.

Serial No.	Particulars	U.S.	China	India
1.	Population Rank	3rd	1st	2nd
2.	Startup Ecosystem Rank	1st	2nd	3rd
3.	Number Of Startups	226,657	25,668	91,021
4.	Number Of Unicorn	704	243	108
5.	Number Of Incubators	500	11,000	939
6.	Venture Capital Investment	$37 billion	$73.5 Billion	$20.9 billion
7.	Number Of Venture Capitalist	10,632	1829	1726

CONCLUSION

Start-up ecosystems are very important in the growth of any nation as it supports the economy and generates income and employment to youngsters. The comparative analysis of startup ecosystems in the U.S., China, and India reveals distinct approaches shaped by each country's regulatory environment, economic strategies, and societal needs. While all three countries offer immense opportunities for startups, the legal barriers present unique challenges. In the U.S., the mature regulatory framework fosters innovation through relatively stable intellectual property rights, flexible corporate laws, and access to venture capital. However, regulatory complexity, particularly concerning data privacy and antitrust issues, presents hurdles for scaling businesses. China's startup ecosystem is driven by government-led innovation policies and significant market opportunities. However, state regulations, particularly in the fields of data security, foreign investments, and intellectual property, create uncertainties for both domestic and foreign startups. India's startup landscape is rapidly growing, driven by government initiatives and a tech-savvy young population. However, compliance with evolving regulatory norms, especially around taxation, foreign investments, and labor laws, remains a significant challenge for new ventures. Despite these legal barriers, all three countries present dynamic opportunities for startups. A unified effort between startups and governments to streamline legal processes can foster innovation and promote sustainable growth in these ecosystems.

GOVERNANCE AND SUSTAINABLE DEVELOPMENT OF THE BLUE ECONOMY IN THE INDIAN OCEAN RIM: INDIA'S O-SMART INITIATIVES AND COLLABORATIVE EFFORTS

*** Dr. Souvik Dhar**

****Dr. Rakesh Kumar Singh**

INTRODUCTION

The paper looks into India's efforts at securing its interests and endeavours in the Blue Economy and discusses how these influence its international relations. The Blue Economy, being a source of potential growth, is assessed in the conclusion for its possible effects on the improvement of ecology and environment, societal well-being, and individual economic potentials.[1] Continuation and scaling up of the "Ocean Services, Modeling, Application, Resources and Technology", in short, O-SMART scheme, by the Ministry of Earth Sciences, in ways, demonstrates India's resolve to further advance ocean research, early warnings, and Blue Economy.[2] The paper supports this study, which views the Blue Economy as a way forward in the attainment of sustainable development goals, especially in the Indian Ocean littoral states[3]. In addition, that calls for strong governance structures, regional cooperation, and sustainable management practices, that may ensure the health and productivity of ocean resources are sustained over long periods. India's proactive initiatives through the O-SMART scheme epitomize the strategic approach that will realize full potential of the Blue Economy, while addressing environmental sustainability.[4]

SUSTAINABLE DEVELOPMENT GOAL 14: LIFE BELOW WATER

The major objectives of Sustainable Development Goal (SDG) – 14 feature a reduction of marine pollution, especially from land-based activities.[5] These have been accomplished by the aggregation of plastic waste in huge oceanic waste patches, with the most famous one being the

---

* Assistant Professor Department of Law, Brainware University, W.B., India.
** Associate Professor, Xavier Law School, St. Xavier's University, W.B., India.

1. L.Wenhai, et. al., "Successful blue economy examples with an emphasis on international perspectives." 6 Frontiers in Marine Science 261 (2019).
2. N. Agarwala, "Powering India's Blue Economy through ocean energy." 14(4) Australian Journal of Maritime & Ocean Affairs 270-296 (2022).
3. A. Roy, "Blue economy in the Indian Ocean: Governance perspectives for sustainable development in the region." ORF Occasional Paper 181 (2019).
4. *Ibid.*
5. J. Acharya, "Marine Pollution and SDG 14 Implementation Degree of Challenges and Combat Strategies." 7(2) IIRE Journal of Maritime Research and Development (2023).

Great Pacific Garbage Patch.[6] This will not only seriously disrupt entire ecosystems and endanger human health but will also be directly poisoning marine life such as fish, seabirds, and marine animals. It advocates the radical reduction in marine pollution by 2025 through reduction, recycling, safe disposal, and more scientific researches on waste management. So, an international cooperation in development of new products and techniques is called for cleaning up and preventing pollution.[7]

Conservation and sustainable use of marine and coastal ecosystems are included within SDG – 14.[8] It also aims to ensure sustainable fisheries, putting an end to over fishing, other illegal activities around fishing, unreported and unregulated, and methods of harmful fishing.[9] Overfishing has reduced the stocks of many fish species, posing a threat not only to the overall health of the marine ecosystems but also to livelihoods in communities that depend on fishing[10] SDG – 14 calls for management strategies which must be adequately underpin by science to rebuild the fish stocks to levels termed sustainable, while fishing operations allow an opportunity for the ecosystem to regenerate.[11]

BLUE ECONOMY VIS-À-VIS SUSTAINABLE DEVELOPMENT

The Blue Economy requires integrated use and protection of coastal and marine resources-resources that should be used in such a way that ensures all economic activities, inclusive of production and services, are conducted in a sustainable manner. It is termed the 'blue economy' because it balances human activity within the health of marine environments to make it long-lasting and resilient through the integration of economic growth with environmental stewardship. It therefore refers to the sustainable use and management of both coastal and marine resources in various sectors.[12]

The "Blue Economy" shall contribute to the sustainable use of the ocean's resources for

---

6. S. Hajbane, et. al., "Coastal garbage patches: Fronts accumulate plastic films at Ashmore Reef marine park (Pulau Pasir), Australia." 8 Frontiers in Marine Science 8, 613399 (2021).
7. I. Issifu and U. R. Sumaila. "A review of the production, recycling and management of marine plastic pollution." 8(11) Journal of Marine Science and Engineering 945 (2020).
8. K.H. Lee, et. al., "The Blue Economy and the United Nations' sustainable development goals: Challenges and opportunities." 137 Environment international 105528 (2020).
9. T. Long, et. al., "Approaches to combatting illegal, unreported and unregulated fishing." 1(7) Nature Food 389-391 (2020).
10. *Ibid.*
11. *Ibid.*
12. *Supra* note 1.

economic growth in such a manner that the health of the ocean ecosystem would not be impaired.[13] A number of national and international projects have been developed over the last ten years, which aim at the sustainable use of marine resources, having the blue economy as a significant pillar for inclusive and sustainable development. The growth within the various industries that comprise the blue economy has been driven by technological advancement, investment, and international collaboration. While various approaches by the Indian Ocean littoral states prevail, attention stays glued on how to achieve substantial economic growth amidst the balanced utilization and renewability of resources.

The coming of SDGs has increased the concern about the sustainability of natural resources in most especially growth-centric paradigms of development. Marine-related activities are now seen as important elements for development in this era after the recession.[14] Ocean resources are inexorably linked with the attainment of the SDGs through the use and management of such resources, which are of great importance in ensuring food security and in offering support for the economies based on marine resources. [15] This might turn into more competition among the Indian Ocean littorals and other regions, where the struggle for resources might escalate to conflict over natural resources and SLOCs.[16]

NAVIGATING THE BLUE ECONOMY IN THE INDIAN OCEAN RIM

A particular focus area for Blue Economy development is the Indian Ocean Rim, hosting 21 countries along its shores. [17] It has been referred to as the sustainable utilization of the ocean resources in contributing to economic growth, livelihood, and employment in such a manner as to assure food security, while maintaining healthy marine and coastal ecosystems.[18] Located in the rich biodiversity of the Indian Ocean and at a strategic location of immense economic potential, the Blue Economy core driver is, therefore, a factor of sustainable development. [19] Slowly but surely, countries along the Indian Ocean Rim, such as India, Indonesia, Australia,

---

13. *Ibid.*
14. *Supra* note 8.
15. *Ibid.*
16. *Supra* note 3.
17. *Ibid.*
18. *Ibid.*

and South Africa, have begun to realize that their marine resources need to be responsibly harnessed if their people are to realize inclusive economic growth, reduced poverty, and environmental sustainability.[20]

One of the most critical aspects of the Blue Economy in the Indian Ocean Rim is sustainable management of fisheries.[21] It encapsulates some of the most productive fishing areas around the world, which provide livelihoods to millions of people and hold a considerable role in food security.[22] However, overfishing, illicit, unreported, and unregulated fishing, and habitat degradation pose serious threats to such fisheries. This is being addressed through regional collaboration in the implementation of science-based management practices, regional cooperation, and regulation to deter IUU fishing amongst countries in the Indian Ocean Rim.[23] It means that promotion of responsible fishing practices will contribute to the long-term viability of the region's fish stocks, contribute to livelihoods of coastal communities, and maintain healthy marine ecosystems.[24]

The other big concern for Indian Ocean Rim is sustainable marine tourism.[25] Marine ecosystems, such as coral reefs, mangroves, and beaches, attract millions of tourists each year, increasing revenues for the local economies at high rates.[26] If left unmanaged, however, it leads to environmental degradation in the form of damage to coral reefs, pollution, and displacement of the local communities. Countries bordering the Indian Ocean are hence trying to establish methods that ensure ecotourism and other forms of sustainable tourism in an effort toward a balanced approach between economic benefits and environmental conservation.[27] These include the development of marine-protected areas, regulation of activities within the tourism sector, and involvement of the local communities within the planning and management of tourism development to ensure that it is both sustainable and inclusive.[28]

---

19. *Ibid.*
20. R. Mukhopadhyay, et al., Blue economy of the Indian Ocean: resource economics, strategic vision, and ethical governance (CRC Press, 2020).
21. *Ibid.*
22. *Ibid.*
23. *Ibid.*
24. *Ibid.*
25. T. Doyle, "Blue economy and the Indian Ocean rim." 14(1) Journal of the Indian Ocean Region 1-6 (2018).
26. *Ibid.*
27. *Ibid.*

Another promising sector contributing to the sustainable development of the Indian Ocean Rim in the Blue Economy is marine renewable energy. [29] Indeed, the region does have immense potential for renewable energy tapping from the ocean, including offshore wind, tidal, and wave energy.[30] Harnessed properly, these resources would go a long way in reducing dependency on fossil fuels and mitigating the effects of climate change, opening up new avenues for the economy.[31] This is also from the shores of countries like India, Australia, and South Africa; the potential may be considered important investment in research and development as a basis for advancement of these technologies.[32] Emphasis would be given to the sustainable development of the marine renewable energies taken from the Indian Ocean Rim, as it will undermine its value as a response to global concerns toward the low-carbon economy, besides developing energy security and economic diversification.[33]

BLUE ECONOMY: INDIA'S INITIATIVES

The seriousness of India in ocean research and development started in 1981 with the establishment of the Department of Ocean Development (DOD). Establishment of DOD was with the aim of co-ordinating all activities related to the exploration of the ocean, research on oceans, and the exploitation of marine resources in a manner that would ensure their long term sustainability. It was over time that the department initiated the founding of various studies in oceanography and developing the necessary infrastructure for ocean research in India.

The Ministry of Ocean Development, hence, in view of the interconnected ocean sciences with the atmospheric and earth sciences, was merged in 2006 as the Ministry of Earth Sciences. The integration aimed at creating synergy among various scientific disciplines related to ocean sciences and effectively addressing the emerging challenges related to climate change, natural hazards, and resource management. Since then, the MoES has been in the forefront of ocean research and development in India, bringing about huge strides both in terms of scientific

---

28. *Ibid.*
29. *Supra* note 20.
30. *Ibid.*
31. *Ibid.*
32. *Ibid.*
33. *Ibid.*

advancement and building up of critical infrastructure.

The Ministry of Earth Sciences (MoES), Government of India, has chalked out a comprehensive set of initiatives and programs that reflect the country's growing emphasis on exploring, conserving, and sustainably utilizing marine and ocean resources. [34] The basis for these initiatives is scientific research combined with technological innovation and is designed to address the strategic challenges of ocean management in multifarious directions-from resource exploration and environmental monitoring to energy generation and biodiversity conservation. Each of these programmes has an important role to play in advancing the oceanic capabilities of India and increasing its contribution to marine science globally.

It is with this endeavour that the **Centre for Marine Living Resources and Ecology,** with its programme on Marine Living Resources (MLR), is in the frontline. [35] The program aims at building an ecosystem-based model for managing the living resources within the Exclusive Economic Zone (EEZ) of India. The objectives of the programme are to understand the physical and biological processes that govern the Arabian Sea ecosystem, besides addressing the impact of environmental changes on these processes. The MLR programme focuses on deep-sea fisheries, tuna resources, harmful algal blooms, and studies on marine mammals, with Fishery **Oceanographic Research Vessel (FORV) Sagar Sampada.**[36] Complementary activities such as benthic ecosystem studies, plankton diversity, and development of marine-derived antifouling compounds are also pursued. It is a program that is crucial in the sustainable management and use of India's marine biodiversity and economic resources that there are.

Another key organization is the **National Centre for Coastal Research** at Chennai, entrusted with certain responsibilities regarding Indian coastal waters. It pursues a nationally coordinated research program to monitor the quality of seawater and physical, chemical, biological, and microbial parameters along the Indian coast. This is of great import for the long-term data collection needed in real-time water quality forecasting through dissemination to the general

---

34. N. Vedachalam, M. Ravindran, and M. A. Atmanand, "Technology developments for the strategic Indian blue economy." 37(7) Marine Georesources & Geotechnology 828-844 (2019).
35. K.V. Aneesh Kumar, et. al. "Length–weight relationships of 11 deep▪sea fishes from the western Bay of Bengal and Andaman waters, India.", 34(4) Journal of applied ichthyology 1048-1051 (2018).
36. M. Sileesh, B. Madhusoodana Kurup, and A. Korath. "Length▪weight relationship of deep▪sea demersal finfishes from the Southeastern Arabian Sea.", 36(6) Journal of Applied Ichthyology 855-857 (2020).

public via mobile apps, in support of coastal planning, disaster preparedness, and ecosystem health. NCCR's contribution-in the realm of coastal erosion, the status of coral reefs, and microplastic pollution- forte-tells saving the vulnerable coasts of India from natural and anthropogenic threats.

The **Ocean Observation Systems** developed by MoES contribute valuable data relating to weather forecasting, climate change studies, and disaster management. [37] The network of moored buoys in the Indian Ocean that has been operational for over two decades has helped in the accurate prediction of cyclones and issuing tsunami warnings. IndArc Mooring in the Polar Region testifies to India's commitment to understand the impact of climate change on polar and sub-polar regions.[38] Coupled with the high-frequency radar networks and tsunami buoys, these observational systems represent the cornerstone services in terms of preparedness and response against ocean hazards in India, besides the protection of coastal communities and marine resources.

Ocean state advisories issued by the **Indian National Centre for Ocean Information Services (INCOIS),** Hyderabad, are a step toward ocean forecasting.[39] INCOIS now provides the total ocean state information on wind waves, surface currents of the sea, and trajectories of oil slick with a lead period of up to seven days. The forecasts are of immense benefit to users in the country, from fishermen to the Indian Navy, since the forecasts support national security as well as economic activities in the Indian Ocean. The **Deep Ocean Mission** (DOM) under MoES represents an ambitious undertaking by India regarding deep-sea exploration and utilization of its resources.[40] It aims at developing technologies related to deep ocean mining, human-operated submersibles, and underwater robotics in order to harness polymetallic nodules from depths up to 6000 meters.[41] Also included in the mission is the impact of climate change on coastal and marine ecosystems through the development of advisory services for coastal zones. Further,

---

37. V. Jain, et. al., "Two decades of current observations in the equatorial Indian Ocean." 130(2) Journal of Earth System Science 75 (2021).
38. T. Ayyadurai, et. al., "Ambient Noise Measurement System for the Arctic Region." 89 (Special issue) Journal of Coastal Research 67-70 (2020).
39. T.M. Balakrishnan Nair, et al., "Advances in Ocean State Forecasting and Marine Fishery Advisory Services for the Indian Ocean Region." Social and Economic Impact of Earth Sciences 201-227. (Springer Nature Singapore, 2022)
40. W. Sebastian, et. al., "Marine living resources-a blue future." 126(2) Current Science 200-207 (2024).

innovative efforts under DOM in exploring deep-sea biodiversity, mapping hydrothermal vents, and harnessing ocean thermal energy for sustainable development are undertaken. **The Advanced Marine Station for Ocean Biology** is a forward-looking initiative for building capacity in marine sciences and international collaborations.[42] It is proposed that this Centre be established with active linkages to the already energized systems of coastal and island research centers within and outside the country, so as to evolve a network of excellence in the area of marine sciences.

O-SMART INITIATIVE

Scheme of O-SMART by the Indian government is a strategic move underlining the commitment of the country toward oceanographic research and technology.[43] This is reflective of the prime place of the marine sector in India's economic and environmental policy initiatives, apart from being in tune with global imperatives aimed at advancing sustainable utilization of the ocean resources. The scheme, with an outlay of Rs 2177 crore for the period 2021-26, represents that.[44] These clearances reflect the importance given by the government to tapping the resources of the ocean in a non-detrimental manner by way of scientific research and technological innovation. India tries to strike deep into global marine research and the blue economy. O-SMART has become an important and integral framework to achieve such goals due to its comprehensive multidisciplinary approach. The Ministry of Earth Sciences has pursued this O-SMART initiative that encompasses all aspects of ocean services, modelling, application, resources, and technology to further enhance India's ocean research and development.[45]

The highlight of this O-SMART scheme is to update the information on marine living resources, monitor seawater pollutants, development of Advanced Ocean Observation Systems, generation of user-oriented ocean information, generation of High-Resolution Ocean Forecast

41. *Supra* note 2.
42. M. Ravichandran, et. al., "Diving to Newer Depths India's Deep Ocean Mission Set to Create New Landmarks." 59(5) Science Reporter (2022).
43. *Supra* note 2.
44. *Ibid.*
45. *Ibid.*

Models, undertaking validation of satellite data for coastal research, acquisition of Coastal Research Vessels, and development of Marine Biotechnology.[46] The related key achievements include recognition accorded to India by the International Seabed Authority as a Pioneer Investor for deep-sea mining; the making of desalination technology; the continuing leadership within the Indian Ocean component of the Global Ocean Observing System (GOOS); and the setting up of a state-of-the-art early warning system for oceanic disasters.[47]

The focus of the major highlight under the O-SMART scheme is on the fact that India has been recognized as a Pioneer Investor with ISA for research on deep-sea mining.[48] It thus places India as forerunners in the exploration and possible exploitation of the deep ocean resources such as PMN and hydrothermal sulphides in the Indian Ocean.[49] These are very large resources, hosting many valuable minerals of strategic interest to the country's electronics, renewable energy, and manufacturing activities. The country also houses successful demonstration deep-sea mining technologies; for example, the desalination process through low-temperature thermal desalination technology in the Lakshadweep Islands has been successfully commissioned. [50] These developments contribute to economic growth besides enhancing a country's capacity in managing and using marine resources in a more sustainable way.

The scheme also promotes improvement efforts in oceanic disaster preparedness and response across the country. [51] It has an advanced early warning system related to tsunamis and storm surges at the INCOIS, Hyderabad. The system is identified by UNESCO and is linked in order to provide an early warning for any member country within the Indian Ocean to reduce the natural calamity within the coastline of such countries. Apart from that, the regional survey work carried out under the scheme within the EEZ and continental shelf of India has generated a lot of valuable data on national benefits concerning resource identification, ocean-related advisory services, and better navigation.[52] All these activities are the most critical ones for protecting the

46. *Ibid.*
47. *Ibid.*
48. *Ibid.*
49. *Ibid.*
50. S. Guduru, P. Bajaj, and O. Nelson Gonsalves, "India's low temperature thermal desalination technology: Water diplomacy with Small Island Developing States in the Indo-Pacific Region." 16(2) Maritime Affairs: Journal of the National Maritime Foundation of India 30-45 (2020).
51. *Supra* note 2.

coastal population, infrastructure, and economies from natural disasters besides ensuring that living marine resources are used in sustainable manners.

The extension of the O-SMART scheme, therefore, for 2021-2026 will be more comprehensive and improvements in the research and technological advancements in oceanographic research. Increased activities under the scheme will further be powered by state-of-the-art technologies applicable in the marine domain, enhancing forecast and warning services extended to coastal stakeholders, while improving the understanding of marine biodiversity vis-à-vis conservation strategies. The multidisciplinary approach will foster work in building national capacity for Indian leadership in global marine science and technology. Contributions from oceanic advisory services and technological developments that are part of the scheme are further likely to enhance the national GDP, helping to earn much good from community, industrial, and general environment-related benefits, particularly in the coastal states of India. As according to the United Nations, the decade starting this year has been declared the "Decade of Ocean Science for Sustainable Development". [53]Continuation of the O-SMART scheme would facilitate the accomplishment of globally targeted objectives during this decade and thereby help reinforce India's commitment towards sustainable development and the 'Blue Economy'.

O-SMART SCHEME: IMPACT AND FUTURE

The O-SMART scheme is one of the major initiatives by the Indian government in order to enhance the country's capabilities in oceanographic research, marine resource management, and technological innovation. Continuation of the O-SMART scheme reflects the strategic focus of India on the sustainable harnessing of its vast oceanic resources. The plan will also form part of the wider goals the country has in the blue economy and the growing international commitment toward the increased sustainable utilization of marine resources and scientific studies in the ocean. Through understanding and development of ocean-related technologies and services, India aspires to attain a position of global leader in marine research making significant

52. *Ibid.*
53. L.K. Nash, et. al., "Developing achievable alternate futures for key challenges during the UN decade of ocean science for sustainable development." 32 Reviews in Fish Biology and Fisheries 1-18 (2021).

contributions towards national development goals.

The development of technology under the O-SMART scheme has been one of the key drivers to make India adequately prepared to exploit her marine resources. For instance, in manned and unmanned underwater vehicles, there is much-enhanced capability to go deeper into the ocean for resource exploration and other purposes. Deep ocean expedition and extraction require these vehicles, which have strategic metals like polymetallic nodules and gas hydrates. In that aspect, access and extraction of these resources in an environment-friendly sustainable manner become key to India's economic development in electronics, renewable energy, and other manufacturing sectors dependent on such minerals.

The O-SMART scheme is also valuable from the scientific research and technological innovation perspective. The various research programs and collaborative efforts undertaken by the Scheme have given India the leadership position in global oceanographic research. Suffice it to say that the recognition accorded to India as Pioneer Investor by the International Seabed Authority (ISA) itself for deep-sea mining research, apart from expertise generated within the country concerning technology, speaks volumes about its rising status. [54] Accordingly, the scheme has enabled considerable technological enhancement, including acquisition and development of desalination technologies, considered very important for the supply of fresh water to communities in islands that have no access to resources. Such innovation contributes to not only India's quest for self-reliance in important technologies but also finds a place to position it as a global leader in marine science and technology. The O-SMART scheme aligns highly with the United Nations' SDG 14 aimed at conservation and sustainable use of oceans, seas, and marine resources in view of global environmental goals. The scheme, therefore, directly contributes to the attainment of SDG 14 through its operating focus on marine biodiversity conservation, coastal research, and sustainable management of marine living resources. In this regard, O-SMART facilitates India in taking extra strides towards the conservation of marine ecosystems to ensure uses of ocean resources are sustainable.

---

54. *Supra* note 2.

The O-SMART scheme of India is a strategic investment in the oceanographic research and technological capabilities of India. Its broad expanse ranges from the multiple sub-schemes to an active involvement of key national research institutes that position India as the leading country towards the sustainable usage and management of ocean resources. The mileage it has gained on deep ocean mining, desalination technology, disaster preparedness, and marine biodiversity conservation are serious milestones for putting in more investment in ocean sciences. Coming to its next phase, the scheme will be very vital for advancing India's blue economy, improving national security and disaster resilience while contributing to global efforts at protection and sustainable management of the world's oceans. The O-SMART scheme provides India with an opportunity to secure the marine resources for future generations and has also emerged as an example for other nations with regard to the responsible and sustainable development of the ocean economy. Further continuation of the O-SMART scheme is in line with the United Nations Decade of Ocean Science for Sustainable Development and supports the national policy on Blue Economy. It goes well with SDG-14, whose aim is to ensure that oceans, seas, and marine resources are conserved and used sustainably. Because of the all-inclusive range of activities, the scheme enhances India's oceanographic research capabilities, supports environmental protection, and nurtures growth in the national GDP through incentives given to coastal communities and various marine sectors. More fruitful for India will be the continuity of the O-SMART scheme from 2021 to 2026.

The multidisciplinary approach of the scheme, with various aspects of oceanographic research, technology development, and resource management integrated into it, would be continued in future for national capacity building. The scheme O-SMART would, therefore, contribute significantly to the Government of India's objective of sustainable development of ocean resources while providing better forecast and warning services for the different stakeholders in the coastal community, advanced knowledge on marine biodiversity for effective conservation strategies, and state-of-the-art technologies in the marine domain. Besides, the output of such a scheme as contributions to national GDP is bound to increase with ocean advisory services among other technological developments that would benefit communities and industries, apart

from the environment.

CONCLUSION

India's initiative makes sustainable development of the Blue Economy in the Indian Ocean Rim one with a great potential impact on ensuring economic growth, improving livelihoods, and maintaining marine and coastal ecosystems peculiar to the region. Emphasizing sustainable management of fisheries, responsible marine tourism, the development of marine renewable energy-as well as good governance and regional cooperation-allows the countries in the Indian Ocean Rim to use their ocean resources in a manner that can benefit both people and the planet. As the world increasingly looks to the oceans as potential solutions for global challenges, the Indian Ocean Rim is well-positioned to lead the way, showing how the Blue Economy can drive sustainable development by demonstrating how marine resources in this region might be used judiciously and equitably for future generations. The ocean research and development programs of India, undertaken by the MoES, have given a fillip to the blue economy of the nation for the sustainable management of the marine resources of the country. In this aspect, the O-SMART Scheme has brought together observation, modelling, resource survey, exploration, and technology development with regard to adverse climate conditions, events of natural hazards, and management of resources. While the country continues to build its capability for ocean research and development, sustainable management of its EEZ and protection of marine ecosystems would be of topmost priority. The MoES would continue to play a very important role in advancing ocean science and technology, contributing to the economic growth of India, and ensuring the well-being of its coastal communities. In this backdrop, the O-SMART scheme would be an integrated, future-looking program that places India among the world leader in oceanographic research and technology.

Given its motive for sustainable resource management, technological innovation, disaster preparedness, and global environmental goals, it is one of the key elements of India's national strategy for economic development and environmental conservation. Especially in the wake of entering the Decade of Ocean Science for Sustainable Development, continued implementation

of the O-SMART scheme would be critical in accomplishing not only national but also global objectives concerning the sustainable use of ocean resources. The O-SMART initiative undertaken by India symbolizes its commitments toward a holistic and visionary approach to governance and sustainable development along the Indian Ocean Rim. Advanced research, technological innovation coupled with international collaboration is aimed at addressing the complex challenges of managing marine resources in a non-destructive manner. More importantly, in tune with the commitment to global environmental goals, especially SDG 14, it underlines the commitment of the country toward marine ecosystem conservation and sustainable use of ocean resources. With the continuous development of the O-SMART scheme, it would also define the future of the blue economy in the Indian Ocean Rim, a process in which India will be at the frontline to develop a sustainable world in the marine domain. Through science and technology, harnessing the ocean wealth will make India committed to a prosperous and sustainable future of all its citizens for the benefit of the global community in protecting and conserving the oceans.

OWNERSHIP OF AI-GENERATED CONTENT: NAVIGATING INTELLECTUAL PROPERTY CHALLENGES IN THE AI ERA

***Dr. Suhasini**

INTRODUCTION

Copyright refers to a bundle of exclusive rights conferred by law on authors/creators of original works for commercially exploiting the work. It is a property right which subsists in certain specified types of original work conferred by the copyright statute to the authors. In this context, copyright is referred to as 'right of diversity'. It governs the commercial exploitation of works born out of culture in the course of day-to-day human activity.

Copyright is a distinct form of intellectual property entitlement. In the context of British legal terminology, copyright refers to the domain of intellectual property law that governs the production and utilisation of various cultural artefacts, including but not limited to literature, music, movies and software.[2]

The primary purpose of copyright is not solely to provide compensation for the efforts of authors, but rather to foster the advancement of literary, cultural, scientific and practical knowledge. In order to achieve this objective, copyright law provides authors/owner with the legal entitlement to their unique creative expression, while also fostering an environment that promotes unrestricted expansion and development of ideas and information derived from a particular work. The primary objectives of copyright law can be categorised into two basic aspects. The copyright law is established by nations in order to safeguard the rights of authors, composers, artists, designers, and other creative individuals, as well as film producers and sound recording producers. These individuals invest their resources and take on financial risks by presenting their work to the public, and copyright law ensures their entitlement to protection for their original expressions. This is achieved by granting the author, or in certain instances, their employer or a third party as first owner,[3] specific exclusive rights to reap the advantages of the ~~produced intellectual property for~~ a finite duration. These exclusive rights encompass several

* Assistant Professor School of Law, Bennett University.

1. S. Sivakumar and Lisa P. Lukose, Broadcasting Reproduction Right In India: Copyright and Neighbouring Rights Issues 18 (Indian Law Institute Publication, New Delhi, 2013).
2. Lionel Bently and Brad Sherman, Intellectual Property Law 28 (Oxford University press(Indian edn.,), New Delhi, 3rd edn., 2009).
3. s.17 Indian Copyright Act, 1957.

privileges, such as the right to reproduce the work in any tangible format, distribute copies of the work to the general public, and publicly perform the work, among others[4]. The copyright owner is awarded exclusive rights in their work, allowing them to utilise it without interference from others for a specific duration of time. In India, this duration is set at 60 years following the author's death.[5] During this period, individuals who are not the copyright owner are prohibited from benefiting financially at the expense of the copyright owner's investment in the creation of the work. In addition to the aforementioned economic rights, copyright law also grants moral rights to the author[6]. These moral rights encompass the right to be recognised as the creator of the work and the right to protect the integrity of the work. Given that the author is the originator or producer of a piece of work[7], which serves as an embodiment of their individuality, they own the entitlement to safeguard against any harm or distortion inflicted against their intellectual creation.

Additionally, the copyright law promotes the unrestricted development of concepts and knowledge derived from a given work. Moreover, it permits individuals to exercise certain rights to utilise copyrighted material without incurring any liability. The enumeration of acts which are exempted from the exclusive coverage of copyright under section 14 are specifically stipulated in the Copyright Act of 1957[8]. The inclusion of provisions pertaining to fair/permitted use in the Act serves the purpose of achieving a harmonious equilibrium between the rights of copyright holders and the broader societal interests.

With the introduction of Artificial intelligence (AI) especially in the field of generating content which was earlier purely the domain of human and their intellect, the entire dynamics have changed. Where human used to apply their mind while generating the content, just on a command AI is ready with the content through the use of certain algorithm. The advent of certain tools like ChatGPT, Google Gemini the content creation hardly takes few minutes in generating new and original content . This unconventional ability offers unprecedented possibility for creation but also raises complex legal issues, especially in the domain of copyright. With the

4. s.14 Indian Copyright Act, 1957.
5. s.22 Indian Copyright Act, 1957.
6. s.57 Indian Copyright Act, 1957.
7. s.2(d) Indian Copyright Act, 1957.
8. s.52, Indian Copyright Act, 1957.

increasing uses of AI-generated work, concerns around originality, ownership, and the implementation of traditional copyright laws become eminent. The intense nature of this changing dynamics requires a revisit into the established legal structures in order to effectively tackle the distinct challenges that arise from the convergence of artificial intelligence and intellectual property.

TRADITIONAL FOUNDATIONS OF COPYRIGHT: FROM THE LENSE OF INDIAN COPYRIGHT LAW

In the field of intellectual property rights, copyright law is extremely important since it protects the creative expressions and interest of writers, artists, and inventors. Deeply ingrained in the ideas of incentive and protection, the historical foundation of copyright law has evolved dramatically over years. Reflecting both UK influence and India's modern needs, copyright law in the Indian setting emulates the careful balancing between the creators rights and public interest at general level.

Starting copyright law, the printing press transformed the sharing of knowledge, ideas, and literature, so revolutionising their access. Realising the need to defend literary works in the Indian surroundings, the British colonial authorities created the Indian Copyright Act, 1914, very accurately duplicating the ideals of the British Copyright Act of 1911. Establishing the fundamental ideas guiding current copyright law, this legislative system signalled the start of official copyright protection in India.

Basically, Indian copyright law is meant to guard original works of writers against duplication and illegal use. The Indian Copyright Act, 1957 as revised over years catches this protective attitude. It grants certain rights for writers of literary, dramatic, musical, and creative works as well as for cinematograph films and sound recordings. These special rights guarantee that artists may control and benefit from their creative output by allowing one to reproduce, distribute, perform, and exhibit the works publically.

Originality is a basic idea guiding copyright law. Under Indian law, a work eligible for copyright protection has to be original and expressed physically. This need of originality stresses the

author's intellectual effort and skill-based development of a work, instead of demanding novelty or uniqueness. In the well-known case *Eastern Book Company v. D.B. Modak*[9] the Supreme Court of India underlined in particular that uniqueness entails the exercise of skill and judgement, therefore separating it from plain labour or waste of time. Another important factor reflecting the historical background of copyright law in India is the length of copyright protection in India. Copyright usually lasts the lifetime of the author plus sixty years for artistic, literary, theatrical, musical, and creative works. For works including photographs, sound recordings, and cinematograph films, the term denotes sixty years from the date of printing. This extended period guarantees that artists' financial rights are safeguarded for a significant length of time, therefore enabling their heirs to gain from their artistic activities. The idea of moral rights is fundamental to Indian copyright law and conforms to the conventional wisdom on safeguarding authors' personal and reputation interests. Section 57 of the Indian Copyright Act, 1957, reflects moral rights incorporated in which the author has the right to claim ownership of the work and to forbid any distortion, mutilation, or other modification of the work that would be detrimental to her honour or reputation. These rights emphasise the whole approach of Indian copyright law in preserving the dignity and integrity of authors since they are perpetual, inalienable, and independent of the author's financial rights. Conventional underpinnings of copyright law also include the idea of exceptions and restrictions, so balancing the exclusive rights of writers with the requirement of public access to information and cultural resources. Fair dealing for the uses of private research, criticism, review, reporting on current events is one of the numerous exceptions Indian copyright law recognises. These exceptions guarantee that copyright protection does not limit information flow, research, or artistic expression, therefore promoting a rich intellectual and cultural environment.[10]

9. Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1

The digital revolution presents major difficulties for the acknowledged basis of copyright law in current years. The evolution of digital technology and the internet has changed the production, distribution, and consumption of artistic products, thereby demanding changes in the legal system. India has responded to these issues by adding to the Copyright Act regulations protecting digital works and controlling digital rights management systems. These guidelines seek to guarantee the availability and distribution of digital works while nevertheless allowing protection of artists' rights in the digital age.

TRANSFORMING COPYRIGHT: THE LEGAL LANDSCAPE OF AI- GENERATED WORKS IN INDIA

Artificial intelligence (AI) has transformed several fields, including intellectual property (IP), hitherto unheard-of changes in which regard AI raises major concerns to current copyright systems that are basically human-centric as it evolves. Examining well-known cases like RAGHAV and the issues with deepfake movies, this paper explores the intricacy of AI-generated content and its effects on Indian copyright law. The aim is to grasp the present legal framework, the challenges given by artificial intelligence, and prospective reforms to match the evolving character of artistic productions in the AI age.

Artificial intelligence systems may produce a great spectrum of artistic works these days including music, painting, literature, and video. These rights challenge the fundamental principles of copyright law, which usually credit human creators with authorship and ownership. The increasing complexity of artificial intelligence technology demands a review of these concepts to fit the particular challenges provided by works generated by AI.

---

10. Author's special rights.

1[(1) Independently of the authors copyright and even after the assignment either wholly or partially of the said copyright, the author of a work shall have the right–

(a) to claim authorship of the work; and

(b) to restrain or claim damages in respect of any distortion, mutilation, modification or other act in relation to the said work 2*** if such distortion, mutilation, modification or other act would be prejudicial to his honour or reputation:

Provided that the author shall not have any right to restrain or claim damages in respect of any adaptation of a computer programme to which clause (aa) of sub-section (1) of section 52 applies.

Explanation.-- Failure to display a work or to display it to the satisfaction of the author shall not be deemed to be an infringement of the rights conferred by this section.]

(2) The right conferred upon an author of a work by sub-section (1), 3***, may be exercised by the legal representatives of the author.

Content Created Using Artificial Intelligence and the Indian Copyright Act

"Author" is defined in the Indian Copyright Act, 1957 in a way that effectively speaks to human creators.[11] Section 2(d) identifies the author of any literary, dramatic, musical, or artistic creation created with computers as the person who generates it. This concept, meantime, does not adequately address scenarios in which artificial intelligence runs either alone or with minimal human interaction.

The RAGHAV case makes clear how challenging it is to attribute authorship to works produced by artificial intelligence. Originally named as a co-author by the Indian copyright office, RAGHAV is a music generating artificial intelligence. Later on, nevertheless, this decision was undone to highlight the ambiguity and challenges of the current judicial system. The case highlights the need of improved regulations and legal approval of artificial intelligence involvement in the creative process.[12]

LEGAL CHALLENGES AND THE PRECEDENTS

Among the primary challenges is determining authorship and ownership of works produced by artificial intelligence. While artificial intelligence systems can currently create works with low to no human input, conventional copyright law grants human creators these rights. One wonders who should be credited as the author—the artificial intelligence, its developer, or the user who helped it to be developed.

Apart from the RAGHAV[13] scenario, numerous countries have also handled related issues. For example, the DABUS decision looking at whether artificial intelligence might be credited as an inventor in patent applications considered Europe as well as the United States. Usually rejecting such acknowledgement, these courts have declared that present rules only respect human inventors and authors. Similar legal battles most likely will affect artificial intelligence and

---

11. "author" means,—(i)in relation to a literary or dramatic work, the author of the work;(ii)in relation to a musical work, the composer;(iii)in relation to an artistic work other than a photograph, the artist;(iv)in relation to a photograph, the person taking the photograph;(v)in relation to a cinematograph film or sound recording, the producer; and(vi)in relation to any literary, dramatic, musical or artistic work which is computer-generated, the person who causes the work to be created;(dd)"broadcast" means communication to the public and includes a re-broadcast;
12. https://www.mondaq.com/india/copyright/1432036/human-authorship-essential-for-copyright-claim-us-copyright-review-boards-denial-of-registration-to-ankit-sahni#:~:text=Sahni%20further%20explained%20that%20he,his%20contribution%20to%20the%20Work. Accessed on 28th September, 2024.
13. *Ibid* 12

copyright law in India. Deepfake movies or videos or picture which is hyper-realistic, and artificial intelligence-generated videos that tamper with real footage—cause plenty of fresh legal problems. Malicious use of these videos violates consent and privacy, so creating possible copyright infringement. Lack of particular clauses addressing deepfakes, Indian law demands fast legislative changes to manage this growing issue.

The Indian Copyright Act could have to be changed to address issues raised by artificial intelligence produced works. These developments can contain particular clauses allowing the acceptance of works created by artificial intelligence and outlining the roles among many actors in the process of development. Within the framework of artificial intelligence, the concept of moral rights—which protect authors' personal link to their works—gets convoluted. AI lacks human agency, hence it is challenging to attribute traditional moral rights to objects created by it. Legislators have to consider how to change these rights to meet the current scene of modern technology.

Building procedures for royalties and licencing for AI-generated content is critically crucial. This addresses determining which among the artificial intelligence developers, consumers, or other interested parties is entitled to profit from such projects.

The UK Copyright Act states that the author of computer-generated works is the one who arranges the necessary production conditions.[14] This approach presents India with a possible model and a way to honour the human involvement in AI-generated works without thus endangering the purpose of artificial intelligence. Important legal conflicts involving artificial intelligence and copyright have surfaced in the United States; one such case, the Monkey Selfie, saw the U.S. Copyright Office clarify that protection of copyright depends on human authorship.[15]

The DABUS case underlines still further the opposition to give intellectual property rights to non-human creatures. Comprising the proposed Artificial Intelligence Act, meant to ensure ethical and legal use of artificial intelligence, the EU is actively establishing comprehensive AI

14. UK Copyright, Designs and Patents Act 1988, s. 9(3) (UK). "In the case of a literary, dramatic, musical or artistic work which is computer-generated, the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken."
15. Naruto v. Slater, 888 F.3d 418 (9th Cir. 2018)

legislation. These guidelines could provide India with smart advice on how to design her legal system for content produced by artificial intelligence.[16]

The *RAGHAV* case is one significant case study illustrating the challenges in assigning authorship to works generated by artificial intelligence. Originally named a co-author, RAGHAV's name was later taken down, underlining the need of improved legal definitions and systems. This case underlines the necessity of clearing the ambiguity in the present copyright law to allow work produced by artificial intelligence.

The Deepfakes are becoming increasingly frequent, hence their prospective use demands for specific legislative guidelines. Proposed rules propose for penalising non-consensual creation and distribution of deepfakes as well as for changes in legal systems to manage the privacy and ethical concerns brought by deepfakes.

The increasing use of artificial intelligence to generate realistic images—such as superimposing the faces of renowned actors onto an individual's own—raises concerns over ownership, intellectual property rights, and privacy infringements. Distinctive and appealing individuals are prime candidates for profit; inappropriate utilisation of their image may lead to financial detriment. A primary issue is the ownership of AI-generated content, including authentic images. Legislation must be established to address the ethical and legal dilemmas posed by artificial intelligence, as these issues may not align with current intellectual property norms, necessitating stringent regulation to safeguard artistic rights and privacy in the age of AI-generated content.

Comparing India's strategy with those of other nations helps one to have significant understanding. India can, for example, find a model in the UK's respect of the person in charge of producing computer-generated works. Similarly, the evolving legal environment of the EU for artificial intelligence provides understanding of creating comprehensive regulations.

SUGGESTIONS AND FUTURE DIRECTIONS

As artificial intelligence (AI) grows more blended into creative activities, India has to build a

16. Thaler v. Comptroller-General of Patents, 2021 EWCA Civ 1374) (UK).

comprehensive legal framework to handle authorship and ownership of the work generated by AI. The Copyright Act of 1957 especially exclude the works created by non-human entities. Lack of clear guidelines leaves open entitlements about whether they belong to the AI developer, the user, or neither party, so defining ownership of rights of AI-generated work is unknown. Traditionally, copyright law safeguards works of human artists. Still, artificial intelligence created works challenge authorship and cross this line. Should the person creating the artificial intelligence system be identified as a developer or an artist? Has the entity—personal or commercial—owning the artificial intelligence done?

Dealing with the challenge requires include, inside Indian copyright law, works produced or assisted by artificial intelligence under a more general term of "author". India could take note Section 9(3) of the UK Copyright, Designs and Patents Act, 1988, which specifies the author as the one in charge of compiling the necessary components for the publishing of a computer-generated work.

1. Ethics Concerning Human Rights: Indian copyright law provides moral rights to authors under Section 57 of the Copyright Act, therefore preserving their right to assert authorship and challenge unfair usage of their work. The work generated by artificial intelligence, poses difficult ethical questions about the moral rights of the authors. . Do artificial intelligence—especially ones developed outside of human control—have moral rights?
2. Legislators have to make sure that moral rights evolve to include acts when artificial intelligence either greatly or just effects output. Reaching balance is honouring the dignity of human creators while giving artificial intelligence top attention.
3. Mostly driven by financial concerns, copyright is especially related to producer or author income and licencing expenses. Should the owner of artificial intelligence be paid for works produced either semi-autonomously or independently or lack commercial value? Indian rules define how profits or royalties generated by artificial intelligence should be shared. This might mean

licencing rights for artificial intelligence developers establishing constraints for everyone involved in the creative process under control.

4. Legal right to privacy and consent: When used unauthorised, deepfakes and AI-generated pictures featuring a celebrity's likeness or voice create major privacy concerns. Unless artificial intelligence makers and users ensure privacy and have authorisation since they must protect people from the criminal use of their identities by technology, Indian laws must limit the generation of such information.

India should adopt regulations compliant with international standards, especially the General Data Protection Regulation (GDPR) of the European Union, so preserving digital identity and personal information in AI-generated material.

The Copyright Act has to be amended to reflect AI aspect and emerging challenges. India should make amendments to the 1957 Copyright Act to especially look into the work created by the Artificial intelligence. These amendments should handle problems with authorship, ownership, and rights distribution for works mostly generated by artificial intelligence. Clearly one subset of "AI-generated works" are those produced with minimal human influence. Development Ethics for Artificial Intelligence. Apart from legislative changes, ethical policies for the usage of artificial intelligence in the creative sector should be developed. This would correct the exploitation of intellectual property by human artists in addition to problems with prejudice and privacy.

Referring to foreign cases like the DABUS case, which acknowledged artificial intelligence as an inventor on patents, India should engage in worldwide intellectual property rights and artificial intelligence debates alongside continuous legislative developments of the European Union Artificial Intelligence Act. Working with foreign friends might help India create rules compliant with its legal system. The establishment of legislation or an official body will help to enhance the control over the distribution of knowledge produced by artificial intelligence. This implies, much as copyright registration for works produced by humans, the establishment of a register for AI-generated works. This would help to handle problems with ownership and

consumption.

Artificial intelligence is clearly necessary for content creation; but, control must protect the rights of human creators. Encouragement of human-AI partnerships protects human authorship and stimulates creativity. India should encourage the creation of AI-generated content while also ensuring appropriate credit and pay for human effort.

public awareness-raising and instruction. Crucially, activities meant to increase public awareness of the moral and legal consequences of using artificial intelligence in artistic domains will be ones targeted towards Educating people about AI-generated content, possible legal infringements, and human creators' rights helps to create a more informed society ready to handle these new legal complexity.

CONCLUSION

India's laws on artificial intelligence (AI) are still under development, hence the fast spread of AI systems generates both good and negative property law issues. India's legal system has to be changed to address the special problems that content created poses since artificial intelligence systems are now generating creative work that humans used to do. Within the scope of artificial intelligence, this means not only changing the current laws but also creating new legal theories to address rising concerns on authorship, ownership, and moral rights.

Determining who owns the copyright to something created by artificial intelligence is not very easy. The Indian Copyright Act of 1957 does not cover the work generated by Artificial intelligence because it focus only on Human author. Red redefining authorship to include both AI-generated works in which people have little to no influence and AI-assisted works in which people are participating in the creative process is something Indian policymakers should thus give thought. Apart from authorship, moral rights are very important since they protect the integrity and image of the author. Whether the person who created or applied the AI system could uphold such protections as none one person could claim ownership of works created wholly by AI is unknown.

In relation to artificial intelligence, one should take note the basic ideas of copyright law, especially with relation to economic rights. The ability of artificial intelligence to produce

important products on its own could change the nature of incentives such as to decrease their favouring of human producers. Laws have to be developed immediately to protect human creative value against harmful effects of artificial intelligence in terms of economics. Moreover, the fact that artificial intelligence systems need a lot of data—some of which is shielded by intellectual property laws—makes me think about how best to exploit currently accessible data. Legislators have to make the changes making it quite clear how copyrighted materials can and cannot be used to drive artificial intelligence, therefore ensuring a balance between new ideas and protection of cultural rights.

Notwithstanding these difficulties, artificial intelligence offers India a unique chance to develop laws that meet local needs while nevertheless following international standards. India might learn from countries like the US and UK that have already started to address issues including artificial intelligence and property. Looking at world best practices and working with foreign specialists, India can draft laws protecting human creators and artificial intelligence writers. This will help to create an environment whereby people are ready to be innovative and cooperative.

Apart from legislative changes, India has to develop moral rules for the use of artificial intelligence in creative domains. Among these ideas should be privacy, permission-seeking, and the risks related to using deepfakes. Ensuring suitable use of AI-generated content helps to lower these problems and promotes creativity unaffected by them. India may also encourage creative ideas by distributing its people and technologies in line with well defined rules for projects involving both humans and artificial intelligence.

These changes will result from cooperation among Indian legislators, lawyers, business leaders in the tech and creative industries. Stakeholders and the general public will have to be quite active to guarantee that new rules are fair, rational, and flexible enough to fit evolving new technology. India has to maintain attending international conferences and intellectual property and artificial intelligence debates to ensure that its legal system is modern and competitive.

India will have to address the problem since artificial intelligence constantly shapes spheres of innovation. They could reach this by developing policies that support creativity and defend the rights of every producer, synthetic or natural. India might yet have a robust and equitable legal system by integrating global standards with its specific needs, developing new legal theories, and pushing people and artificial intelligence to collaborate even while AI is still developing.

SUBSCRIPTION FORM

I wish to subscribe/renew my subscription to "Army Institute of Law Journal" annually. A bank draft bearing machine No..... dated.....of Rs./US$/UK£ .....drawn in the name of "Army Institute of Law, payable at Mohali/ Chandigarh is enclosed.

Name: _____

Address : _____

City : _____Pin : _____

Country : _____

Phone : _____Fax : _____

E-mail _____Mobile : _____

Signature with date

Please send the amount by DD ***"Army Institute of Law, payable at Mohali/ Chandigarh*** *for timely receipt of the Journal.*

CONTACT

Address all editorial correspondence to:

Editor-in-Chief

Army Institute of Law Jounal

Sector 68, Mohali, Punjab - 160062

Tel.: 0172-5095336-338

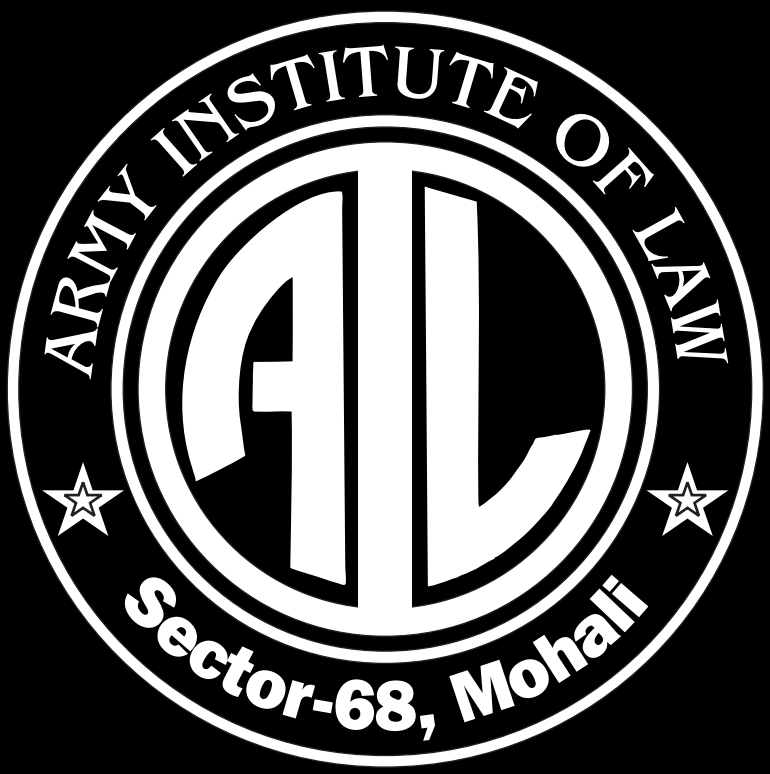
E-mail : info@ail.ac.in

Website : www.ail.ac.in

Subscription Rates

(Postage Extra)

India (Rs.)		Overseas	
Individual	250	UK	£20
Institution	200	US	$20
Alumni	100		



Sector 68, Mohali, India.
Ph.: 0172-5095336, Fax : 0172-5039280
E-mail: info@ail.ac.in, Website : www.ail.ac.in