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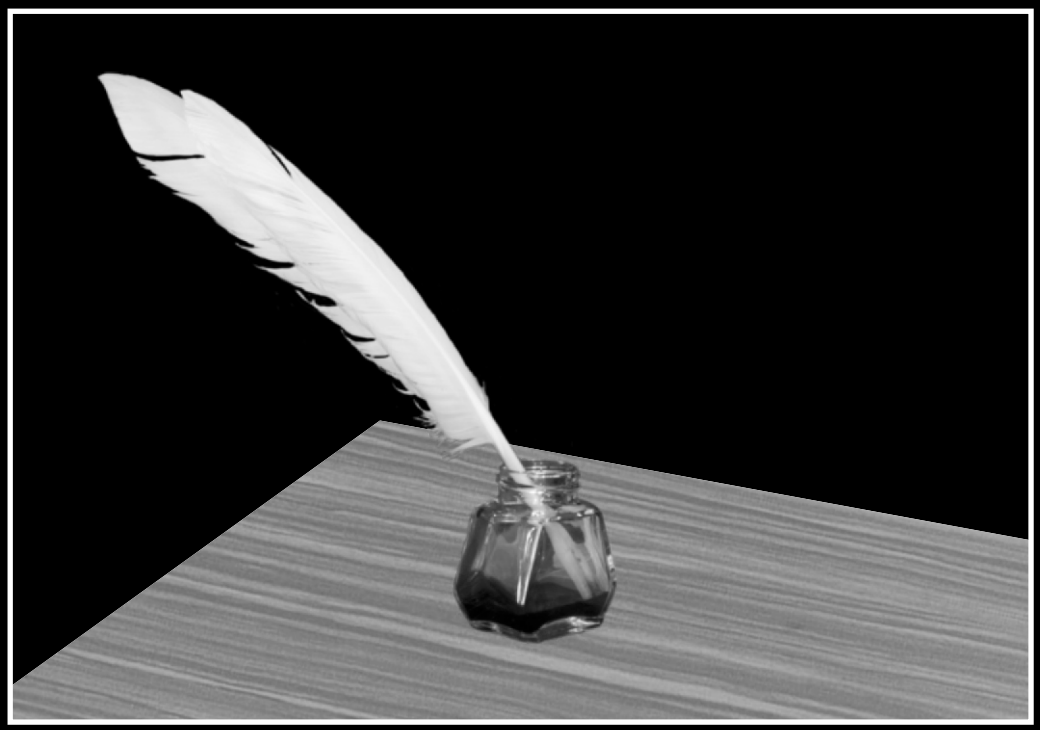

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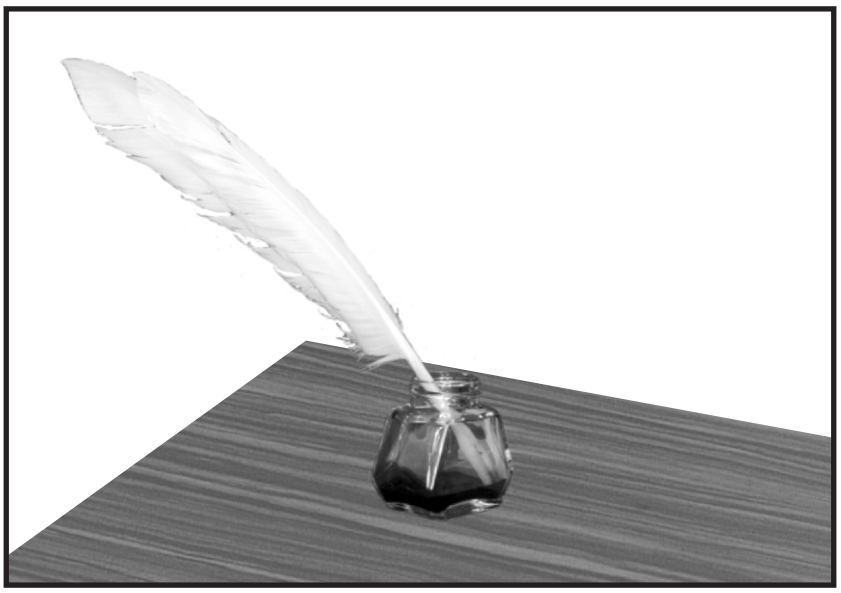

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A SOCIO-LAWFUL ASSESSMENT ON ADOLESCENT NUPTIALS VIS-À-VIS PERSONAL LAWS IMPEDIMENT: A LEGAL APPROACH

Dr. Partha Sarothi Rakshit*

FOREWORD

Albeit an adolescent nuptial in the society exists till date due to some societal based customary, religious and orthodox practices amid various communities and tribal clans in India and global concern. Such taboos ought to harm bride mental, physical health and family wellbeing and adolescent nuptials occur even in the financially developed world such as the USA, UK. It has been noticed that most of the Asian nations have practiced adolescent nuptials in the name of old family custom or religious belief and faith. On the other side of the world, various tribal communities, urban societies have the liberty to select living partner and premarital cohabitation ought to common practice[1].

Long traditions in the old Hindu law child nuptials were widespread in many families due to customary obligation, orthodox folklore; and guardians ought to initiate such marriage to fulfil the customary duties and family rituals. It is also asserted that the necessities to save girl child form alien invaders in India (Statement of Age of Consent Committee, GOI 92, 1929) ought to be practiced by adolescent nuptials in the society.

Adolescent nuptials in India is not a new chapter; it has practiced from long time some of the incident documented in *Mahabharata* (13.44.13), *Manu Smriti* (9.94),*Vishnu Purana* (3.10), beside ancient concept during the age of 200 BC to 700 AD, a young woman and man has a freedom to choose their life partner without intervene of their guardian.[2] The Muslim personal law has a permissible authority that after puberty a marriage is possible as per holy sects; but it is not a compulsory task as per the MPL (Shariat) Act, 1937[3].

A nuptial under the old Hindu personal law called a sacrament, which means no dissolution is possible and it is an act of eternal attainment. During the Smriti era, ten years was the exact time

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1. Aleksandra Sandstrom and A. E. Theodorou, "Many countries allow child marriage" Pew Research Center (Washington, DC, 2016) *available* at: https://www.pewresearch.org/short-reads/2016/09/12/many-countries-allow-child-marriage (visited on Jan. 11, 2023).
2. Auboyer Jeannine, Daily Life in Ancient India: From 200 BC to 700 AD 159-168 (Phoenix Press, London, 1st edn., 2002).
3. The Muslim Personal Law (Shariat) Application Act, 1937(Act No. 26 of 1937), s. 2.

for girls to marry as per the old Hindu tradition. As indicated by Dayabhaga and Mitakshara Hindu law concept, the age of nuptials was accomplished on the end of 16 years and 15 years respectively.[4] Beside Christian personal law initially permitted the age of nuptials i.e., sixteen years age and the Muslim personal law has permitted nikah in the age of twelve to fifteen years as per the Hadith.

The UNICEF is not in favour of child nuptials because child nuptials intimidate the healthy societies,[5] wellbeing, and panoramas of girls around the transnational milieu;[6] it has stated that child nuptials refer to any prescribed nuptials or unceremonious amalgamation amid a minor under the age of eighteen and a mature or an added minor.[7] It has been noticed that ahead of the COVID-19 virulent disease, over hundred million teenagers were anticipated to wed to attainment their eighteenth birthday in the subsequent decade. Now, up to ten million teenagers are in danger of becoming adolescent spouses despite of the deadly disease.[8]

Moreover, the rights of adolescents are obligatory in the transnational and Indian socio-legal jurisprudence.[9] Children are the backbone of the family, society, and nation. Some of the child rights shields as per the Constitutional mandates as well as under the personal laws and other statutory norms. Adolescent nuptials ruin the adolescent basic freedom/ rights to education. If an adolescent lingers uneducated, oblivious, and substandard, it ought to constraint their opportunity for wellbeing for financial soundness and solvent as grown person.[10]

SIGNIFICANT, METHODOLOGY AND SOME ASSUMPTION

Today's world witnesses adolescent nuptial as like a disease of the nation, because immature cohabitations will carry forth mother's metal and physical health issues, hazards of childhood; it

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4. Alladi Kuppuswami (Rev.), Mayne's Treaties on Hindu Law & Usage 162-186 (Bharat Law House, Delhi, 1996).
5. UN Fund for Population Activities-UNICEF, Global Programme to End Child Marriage: Driving action to reach the girls at greatest risk (2016) *available* at: https://www.unicef.org/protection/unfpa-unicef-global-programme-end-child-marriage (visited on Jan. 12, 2023).
6. UN-International Children Emergency Fund, Child Marriage: Child marriage threatens the lives, well-being and futures of girls around the world (2022) *available* at: https://www.unicef.org/protection/child-marriage (visited on Jan. 14, 2023).
7. UNICEF-For Every Child, Child Marriage (2022) *available* at: https://www.unicef.org/protection/child-marriage/ (visited on Jan. 14, 2023).
8. United Nations Children's Fund, COVID-19: A threat to progress against child marriage, UNICEF, NY. 2021 *available* at: https://data.unicef.org/resources/covid-19-a-threat-to-progress-against-child-marriage/ (visited on Jan. 15, 2023).
9. Anant Narayan Mishra v. The Union of India & Others, (2019) Writ Petition (Civil) No. 13214/2019 (All), para. 58-63.
10. Justice Shivraj V. Patil, "Report on Prevention of Child Marriage in the State of Karnataka" 27-55 (Jun. 30, 2011) *available* at: https://www.dwcd.karnata.gov.in/storage/pdf-files/Core%20Committee%20Report%20-English. (visited on May. 10, 2024).

directly affects growth of human personality, and family wellbeing.[11] The whole family ought to be under pressure for such socio-economic-backdrop. The UNSDGs call for inclusive deeds to end this human rights contravention by 2030.[12] The rights of the children are ensured in the Constitution like other Indian legislation to shield the educational right, cultural rights, mental and physical developments, which ought to bring a good family member also a citizen too.[13] Maintenance is an essential right of children for their survival factors and sustainable development.[14]

The study ought to apply a comparative legal approach which is based on personal laws and decided cases, Committee recommendations are the primary sources and secondary sources are the review of literature, research-based articles, and dailies. The methodology of the study is a comparative legal approach to finding out main causes relating to adolescent nuptials and other socio-legal issues.

Assumption

The issue of adolescent nuptials exists in the transnational arena. India has enough legislation to shield the interest of the rights of adolescents and as well as to forbid child nuptials through statutory norms and socio-lawful awareness among the societies to stop child nuptials and save their Constitutional and human rights.

LAWFUL IMPEDIMENT ON ADOLESCENT NUPTIALS: A COMPARATIVE PERSONAL LAW

Under the Hindu personal law minor nuptial ought to be declared voidable and may be negated by verdict of nullity[15] and post nuptial registration is not obligatory, if State ought to make provisions relating to registration.[16] If it is enforced then an adolescent nuptial may be outlawed from the society at large.

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11. National Health Mission, "Handbook for Members of Village Health Sanitation and Nutrition Committee" (Ministry of Health and Family Welfare, 2005) *available* at: https://nhm.gov.in/images/pdf/communication/vhsnc/Resources/Handbook_for_Members_of_VHSNC-English. (visited on Jan. 14, 2023).
12. UN-Sustainable Development Group, What does the 2030 Agenda say about universal values? (UN-Water, 2016) *available* at: https://unsdg.un.org/2030-agenda/universal-values (visited on Jan. 15, 2024).
13. Dr. Savita Bhakhry, Children in India and their Rights 53-60 (NHRC, New Delhi, 1st edn., 2006) available at: https://nhrc.nic.in/sites/default/files/ChildrenRights.pdf (visited on Jan. 15, 2023).
14. UN General Assembly, Convention on the Rights of the Child 1990, UNGA No.44/25, art. 49 (November, 1989) *available* at: https://www.unicef.org/child-rights-convention/convention-text (visited on Jan.13, 2023).
15. The Hindu Marriage Act, 1955 (Act No. 25 of 1955), s. 12(1)(b).
16. The Hindu Marriage Act, 1955 (Act No. 25 of 1955), s. 8(1) to (5).

The Act of 1955 Hindu Marriage (hereinafter cited HMA, 1955) has impliedly permitted adolescent nuptials by the approval of the guardian u/s. 5(vi) and s.6. The Muslim personal law treating a nuptial is a civil union and Nikah Nama is mandatory but adolescent nuptials are not forbidden by law. After puberty a boy or girl will fit for nuptials. The Act of 1972 Indian Christian Marriage (hereinafter cited ICMA, 1872) advocated numerous benefits and lawful protections to the married party through mandatory registration process[17]and the Act of 1936 Parsi Marriage and Divorce (hereinafter cited PMDA, 1936) said that nuptial is a contract and registration is compulsory.[18]

An adolescent nuptial under the Indian legislation and the UNs, US, UK lawful framework the below mentioned analysis may highlight various lawful provisions to examine the rights of children/or whether adolescent nuptials were permitted?

Legislation/ Convention	Lawful Provisions	Whether adolescent nuptials were permitted under the legislation?
The Constitution of India	U/Articles 14, 15, 15(3), 21, 21A, 29, 45, 46, 47, 39 (a), (e), (f).	The jurisprudence of the Constitution neither favours such nuptials rather it has shielded child rights as like adult citizens.
UN-CRC, 1990[19] (Pertinent amidst Participant Countries)	U/Articles 1-52	A defining human rights treaty for the shield of rights of adolescents. India consented in 1992.
The HMA, 1955 The HAMA, 1956[20]	U/s. 5-8 of the HMA, 1955	The codified Hindu law has no scope of adolescent nuptials; minors have no right to act as guardian Legal protection to adolescent/ women. Applicable to child (valid/prohibited/ adoption)

17. The Indian Christian Marriage Act, 1872 (Act No. 15 of 1872), ss. 5(4), 7, 9.
18. The Parsi Marriage and Divorce Act, 1936 (Act No. 3 of 1936), s. 3(c), 6 to 9.
19. United Nations, Convention on the Rights of the Child 1990, UNGA No. 44/25, arts. 1-49 (November 20, 1989) *available* at: http://www.ohchr.org/sites/default/files/Documents/Professionalinterest/crc. (visited on Jan. 19, 2023).
20. The Hindu Adoption and Maintenance Act, 1956 (Act No. 78 of 1956), s. 3 (b) (i).

The Muslim Personal Law (*Shariat*) Act 1937[21]	Custody of children both boy and girl;	As per customary context not affected adolescent nuptials because Muslim law permitted that after touching boy/girl puberty will be performing marriage. But a minor has no right to become testamentary guardian appointed by his/her father.
The Christian Law (The IDA 1869, *relevant for all Indian*) ICM Act, 1872[22] (Part VI)	Custody of children both boy and girl. U/s. 41 of the IDA, 1869[23] s. 37-38, u/s. 60 (1)	If a couple is minor than affected as provision. Rather the Christian law will not permit nuptials below 18 years.
The PMDA, 1936[24]	U/s. 49, s.40	Not allowed adolescent nuptials u/ the Parsi law. Right to assert upholding.
The GW Act, 1890[25] (*relevant to all Indian*)	U/s. 7, 15, 20, 21	No scope of adolescent nuptials.
The SMA 1954[26] (*relevant to all Indians*)	U/s. 38 of the SMA, 1954	No scope of adolescent nuptials.
The PCM Act 2006[27]	U/s. 2(a)-(d); 3, 4, 6, 9-11, and 12	To some extent adolescent nuptials are voidable and void as per the statute.
The Cr PC, 1973[28]	U/s. 125 Cr. P.C	Applicable both legitimate and illegitimate adolescents.
The IPC, 1860[29]	U/s. 366, 375, 496,	Not directly concerned with adolescent nuptials but a girl has a right to shield herself
		under penal law.

21. The Muslim Personal Law (Shariat) Application Act, 1937 (Act No. 26 of 1937), ss. 2, 3.
22. The Indian Christian Marriage Act, 1872 (Act No.15 of 1872), s. 60(1).
23. The Indian Divorce Act, 1869 (Act No.4 of 1869), ss. 37, 38.
24. The Parsi Marriage and Divorce Act, 1936 (Act No. 3 of 1936), ss. 40, 49.
25. The Guardians and Wards Act, 1890 (Act No. 8 of 1890), ss. 7, 15, 20.
26. The Special Marriage Act, 1954 (Act No. 43 of 1954), s. 38.
27. The Prohibition of Child Marriage Act, 2006 (Act No. 6 of 2007), ss. 2(a) (d), 3, 4, 6, 9-12.
28. The Code of Criminal Procedure, 1973 (Act No. 2 of 1974), s. 125.
29. The Indian Penal Code, 1860 (Act No. 45 of 1860), ss. 366, 375, 494, 496, 498A.

The PWDV Act, 2005[30] (*applicable to all Indian*)	U/ss. 2(b)-(h), and 3.	Shield of women and adolescent legal rights.
The POCSO Act, 2012[31]	U/ss. 2, 7, 8, 9 (m), (n)	Shield from sexual offences.
The MCP (MA)A 2022 (c. 28) (UK)[32] The MCA 2005 (c.9) (UK)[33]	U/ss. 2 (22)-(26), 3 (27)-(29), & 4. 27 (1) (a) to (h), Family relationships etc.	It is a felonious act relating to adolescent nuptials in the UK. At present 18 years is compulsory for marriage. If threats exist, then it becomes a penal act.
Child Marriage Prevention Act, H.R. 4867 (115th Congress, 2017-2018) (US)	U/ss. 2 (2), (5), & 6 (1) (2).	Prohibition of adolescent nuptials.
CPCR Act, 2005[34]	U/ss. 2(b), 3, 13 (1) & (2), 17, 25	Overall shields of adolescent rights and wellbeing of the children in India.

Table: 1.1 Source: Indian and Transnational Legislation, Convention and Judicial decisions.

The Constitution has mandated some lawful shield to protect the interest of the rights of adolescents along with an infringement of human rights in India. The HMA, 1955 PMAD Act, 1936, and SMA, 1954, PCM Act, 2006, MCPMA, Act, 2022 (UK) and CMPA (US) struck down adolescent nuptials and it is a penal act, and the status of nuptials are not valid/ voidable in nature as observed. Regarding custody and maintenance are the paramount aspects to shield the interest of adolescents in each personal law.

30. The Protection of Women from Domestic Violence Act, 2005 (Act No. 43 of 2005), ss. 2(b)-(h), 3.
31. The Protection of Children from Sexual Offences Act, 2012 (Act No. 32 of 2012), ss. 2, 7-9 (m) (n).
32. The Marriage and Civil Partnership (Minimum Age) Act [2022] c. 28, ss. 2(22)-(26), 3 (27)-(29), 4.
33. The Mental Capacity Act [2005] c.9, ss. 27(1)(a)-(h).
34. The Commission for Protection of Child Rights Act, 2005 (Act No. 4 of 2006), ss. 2(b), 3, 13(1), 17, 25.

The Muslim law allows hizanat in all schools at least up to puberty for daughter, and primarily custody of children ought to be taken care of by the Muslim mother along with her husband. The Act of POSCO, IPC, PWDV, Cr. PC, will protect adolescent rights from various felonious acts in the family and community.

Aftermath of the HMA, 1955 have firmly barred child/minor nuptial (except consent of the guardian in nuptial as it stood instantaneously prior to the initiation of the CMR (Amendment) Act, 1978[35]) amid age of bride and bridegroom which is parallel to SMA, 1954 (hereinafter cited SMA, 1956) i.e., age of the bridegroom ought to 21 years and bride must complete 18 years. A child/minor is below <18 years as per the laws;[36] therefore, adolescent nuptials are not possible u/the HMA, 1955[37] and SMA, 1954.

The Act of 1872 ICM has not strictly barred solemnization of nuptials below the eighteenth year. The Act of 1892 Marriage Validation Proclaimed for Native Christian to get nuptial certificates and validate their wedding (apart from judiciary asserted invalid or prohibited) even though they have crossed the age of sixteen years.

The Holy of Quran and Hadith mentioned that a marriage is a good act, for all physically and mentally fit Muslims. The notion of nuptials will start to touch puberty which is applicable for both boy and girl, but it is not obligatory act and the age ought to vary among 12-15 years as per the geographical locations.[38] The Act of 1936 PMD has clearly indicated that u/s. 3 (1) (c) of the Act, that prescribed the minimum age of nuptials be eighteen years for girls and twenty-one years for boys.[39]

The Act 1929 of CMR was enacted to be a restrained and ready penal act for those who enter adolescent nuptials either boy or girl; the Act aims to restrain performance of child nuptials. But the Act does not affect the validity of an adolescent nuptial, despite the matrimony not being declared unacceptable or void or made voidable. In *Shikha Sharma v. the State and Anr.*[40], it was a case of runaway nuptials without fulfilling stipulated age. The Court said that girl might not be made to hang about in the remand beside the desires unless the being there was necessitated for

35. Act. No. 2 of 1978.
36. The Indian Majority Act, 1875 (Act No. 9 of 1875), s. 3(2).
37. The Hindu Marriage Act, 1955 (Act No. 25 of 1955), s.5 (iii).
38. Lawal Mohammed Bani and A. Pate Hamza, "The Role of Spouses under Islamic Family Law" 37 International Affairs and Global Strategy 104-111 (2015) *available* at: https://www.studocu.com/row/document/university-of-maiduguri/nigerian-legal-system-i/234670779/72834249 (visited on Feb. 21, 2023).
39. The Parsi Marriage and Divorce, 1936 (Amendment Act, 1988 of Minimum Age), s. 2.
40. Writ Petition (Crl.) 1369/2005.

lawful application as per statute. The girl was unwavering in resolve to live with the spouse. The girl was released from remand and permitted to cohabit with her husband. Therefore, enforcement of statute is averse to stop the child nuptials in the society at large.

Liberty to marry is enshrined in the SMA, 1954, HMA, 1955, CMDA, 1872, PMDA, 1936 at least after lawful majority *(i.e., eighteen for female and twenty-one for male).* In India some underage nuptials ought to be solemnised with the consent of the lawful guardians. The SMA, 1954 *(relevant for all without any spiritual status)* said that Child nuptials are void and have no scope of legality relating to such marriages.

The HMA, 1955, PMDA, 1936 and CMDA, 1872 and the PCMA, 2006 statutorily described <18 years marriage not possible in the eyes of law. Although, the High Court of Delhi observed that u/s. 5(iii) of the 1955 of HMA stated that age stipulated regarding marriage are either void or voidable as per u/ss. 11 and 12 of the HMA. The Act tells us that u/s. 18 deals with against such provision ought to be punished which may be either fine or imprisonment.[41] The High Court of Madras also observed and explains that the Act, 1955 of HMA and Act, 2006 of PCM, do not declare nuptials of a child either null or voidable and such nuptials could be treated as apparently valid.[42]

Childbearing and upholding are a basic and welfare aspect u/Articles, 14, 15 (3), 21, 21(A),[43] and DPSP in the Constitution; in conjunction with Personal laws, for the reason that without fulfilling basic things an individual cannot survive. Right to upholding of a child is a basic and legal right[44] which ought to be provided by the lawful/natural guardian; and if orphaned, the State is responsible for upbringing and shield under the lawful maintenance. The penal statute is also in favour of both legitimate and illegitimate minor/child for upholding and happiness.[45]

Recently the UK has passed a legislation called MCPMA, Act 2022 (c.28, UK) to prevent such civil contract < 18 years old is a penal act, and the US also placed a Bill (CMP Act, H.R. 4867, US) to prevent minor nuptials contract but it has accepted and shield of interest only few states.

PRACTICE, CAUSES OF ADOLESCENT NUPTIAL AND PREMATURE PREGNANCY: A STUDY

India has various aboriginal communities/clans, and they are performing their marriage as per

41. Ravi Kumar v. The State and Anr., (2005) 124 (DLT).
42. T. Sivakumar v. The Inspector of Police, (2011) HCP No. 907/11 (2011).
43. The Constitution of India (Eighty-sixth Amendment) Act, 2002, art. 21(A).
44. The Wakf Act, 1954 (Act No. 29 of 1954).
45. The Code of Criminal Procedure, 1973 (Act No.2 of 1974), s.125 (1) (b) (C).

the tribal customs; a girl/boy has the freedom to select a life partner without fulfilling stipulated age bar i.e., eighteen/twenty years. In 2017, the NCPCR has reported that the State of Tripura (twenty-one-point six percent), Assam (sixteen-point seven percent) and Arunachal Pradesh (twelve-point one percent) recorded adolescent nuptial and adolescent pregnancy rates higher than the national average,[46] till date has not been radically changes relating to adolescent nuptials and adolescent pregnancy rates.

Nation/Northeast States	% of child nuptials <18 (NFH-5)	% of conceived/ childbirth<18
India	23.3	6.8
Arunachal Pradesh	18.90	6.0
Assam	31.80	11.7
Chandigarh	9.7	0.8
Chhattisgarh	12.1	31.
Haryana	12.5	3.9
Jharkhand	32.2	9.8
Madhya Pradesh	23.1	5.1
Manipur	16.3	8.6
Meghalaya	16.9	7.2
Mizoram	8.0	4.1
Nagaland	5.6	3.8
NCT Delhi	9.9	3.3
Odisha	20.5	7.6
Puducherry	6.5	4.1
Punjab	8.7	3.1
Rajasthan	25.4	3.7
Sikkim	10.8	3.1
Tamil Nadu	12.8	6.3
Tripura	40.1	21.9
Uttar Pradesh	15.8	2.9
Uttarakhand	9.8	2.5
West Bengal	40.0	16.0

Table: 1.2 (Source: Information accumulated from the NFHS-5 (2019-2021)[47]; and table prepared by author).

46. Tanmoy Bhaduri, "Why Northeast witnesses highest rates of child marriages in India" The East Mojo, Mar. 11, 2019 *available* at: https://www.eastmojo.com/news/2019/03/11/why-northeast-witnesses-highest-rates-of-child-marriages-in-india/ (visited on Feb. 22, 2023).
47. Government of India, "National Family Health Survey-5" (Ministry of Health & Family Welfare, 2019-2021) available at: http://www.rchiips.org/nfhs/index.shtml (last visited on Feb. 18, 2023).

The above NFHS-5 (2019-2021) data illustrate the State of Tripura and Assam is a high prone of child nuptials issues in compared to India as a whole; regarding adolescent pregnancy is also high in the National standard, such as Assam, Meghalaya, Manipur, Tripura, Jharkhand, Odisha, and West Bengal.

Further, adolescent nuptials are high in respect to national figures such as Tripura, West Bengal, Assam, Jharkhand, Odisha, and Rajasthan etc. Amid forte percent to twenty percent, which are mass offensive acts and infringement human rights towards adolescent nuptials also threatened adolescent mothers and their newborn child. The below table ought to help us for a better viewpoint in respect to the world and India about adolescent nuptials which have been reported by the UNICEF Global database, 2022.

Region-Across World	Percentile of child nuptials amid girls Age <18
World as a whole	19%
West and Central Africa	37% (four out of ten girls were nuptials <18)
Eastern and Southern Africa	32%
South Asia	28%
Latin America & Caribbean	21%
Easter Europe & Central Asia	10%
East Asia and Pacific	7%
Least developed Countries	37%

(Table 1.3 Source: UNICEF global databases, 2022[48] and author design it for analytical study)

Adolescent nuptials are not only the headache of the India but some of the Asian, African, American and European nations have experienced and practice adolescent nuptials, which is against the human rights and other specified legal frameworks as stated in the UN Conventions (UN-GA Resolution 1763 A (XVII), 1962[49] and transnational regulations. That is a felonious act to arrange such nuptials.

48. UN-International Children's Emergency Fund, Child marriage among girls: the highest levels of child marriage are found in sub-Saharan Africa (May, 2022) *available* at: https://data.incef.org/topic/child-protection/child-marriage/#:~:text=Across%20th%20globe%2C%20levels%20of,Caribbean%20(21%20per%20cent) (visited on Feb.19, 2023).
49. UN Human Rights, UNs Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, UNGA No. 1763 A (XVII), arts. 1(1)-2 (November 7, 1962) *available* at: https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-consent-marriage-minimum-age-marriage-and (visited on Feb. 19, 2023).

The above UNICEF global data reported that African region, South Asian region, Latin Americans and other under developing/developed countries have frequently arranged and practiced adolescent nuptials; and adolescent nuptials now a compulsion or ought to say tradition due to various societal issues has been documented by the UN organisation. Based on the above figure (i.e., NFHS-5 and UNICEF data) some root/or causes ought to examine such evil practice which is given below:

Some causes of Adolescent Nuptials with Adolescent Pregnancy

The key causes of school dropout with adolescent-nuptials (R. Govindaraju & S. Venkatesan, 2010),[50] ought to connection with poverty (Dipa Mukerjee, 2011),[51] unemployment and Child labour, gender discriminations (M.H. Siddiqui, 2013),[52] patriarchal society, religious/customary orthodox practise; and girls may be treated as property or concept of virginity ought to influence child nuptials in the society.

Financial Paucity in the family and Adolescent Nuptials is Low-cost

India has overall ranked hundred-seven out of hundred twenty one nations as per the GHI, 2022 (hunger index), down-fall from hundred one places in 2021; meanwhile India also grades lower than Sri Lank (sixty four), Nepal (eighty one), and Bangladesh (eight four).[53] UNDP reported that four hundred fourteen million subsisted in poverty in India in fifteen years (from 2005 to 2021).[54] The figure has shown that till date our society has some fundamental problem.

The UNFPA (APS-1, 2022) exposed that teenage nuptials are intimately linked with financial-paucity and is possibly to augment young woman's susceptibilities. Even though the Act of 2006 PCM not controlled the practice of child nuptials stays insidious due to widen athwart the socio-educational-economic-conservation gamut, with counting structural disproportion in the society.[55]

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50. R. Govindaraju and S. Venkatesan, "A Study on School Drop-Outs in Rural Settings" 1(1) Journal of Psychology 47-53 (2010) *available* at: https://doi.org/10.1080/09764224.2010.11885445 (visited on Feb. 21, 2023).
51. Dipa Mukherjee, "Reducing Out-of-School Children in India"25(2) Journal of Educational Planning and Administration 171-183 (2011).
52. Mujibul Hasan Siddiqui, "The Problems of School Dropouts among Minorities with Special Reference to Muslims in India" 2(1) International Journal of Management and Social Sciences Research 50-55 (2013).
53. Jagriti Chandra, "India ranks 107th out of 121 countries on the Global Hunger Index" The Hindu, Dec. 09, 2022 *available* at: https://www.thehindu.com/news/national/india-ranks-107-out-of-121-countries-on-global-hunger-index/aricle66010797.ece (visited on Jan. 14, 2023).
54. PTI, "415 million existed in poverty in India in 15 years: UNDP" The Times of India, Oct. 18, 2022 available at: https://timesofindia.indiatimes.com/india/415-million-existed-in-poverty-in-india-in-15-years-undp/articleshow/94927710.cms (visited on Jan. 15, 2023).
55. UN Population Fund, Child Marriage in India: Key Insights from the NFHS-5 (2019-21) (May 1, 2022) *available* at:https://india.unfpa.org/sites/default/files/pub-pdf/analytical_series_1_-_child_marriage_in_india_-_insights_from_bfhs-5_final_0,pdf (visited on Feb. 22, 2023).

Justice Shivraj V. Patil and Committee Members (as directed by the Hon'ble Karnataka High Court to the State to constitute a committee on prevention of Child Marriage in WP No. 11154/2006, GM-RES-PIL) has observed and reported that an adolescent nuptial is a tradition in India due to financial paucity, also early nuptial ought to less financial burden to the family members. In the background of paucity, the tradition of giving bride value can persuade adolescent nuptials.[56]

Globally, more than a third of female aged 20-24 in 2012 were nuptials < 18 years old, while half of all child brides live in South Asia; and adolescent nuptials is greatest number amid financially feebler relations in various South Asian nations, for whom it ought to be a domestic planning to deal with fiscal ill-strength, predominantly when institute fees or conveyance expenses are high range factors.[57]

Lack of Basic Education and Awareness in Rural India

As per the study of NFHS-5 report, exposed that the anomalous for adolescent nuptials <18 years of age are a large amount for the females with inferior levels of edifying accomplishment (i.e. OR=15.5 v. OR=1.0); and odds ratios are higher for women residing in rural areas and lower amid those belonging to the Christian, Muslim and other religious communities compared to Hindus.[58]

Therefore, lack of learning is a vital role and one of the crucial issues to persuade such type of adolescent-nuptials ought to enter young age in various religious communities in India's rural areas.[59] NFHS-5 reported that young woman's with or without basic intensity edification has employed advanced stage of teenager nuptials i.e., around forty-eight percent as compared to only four percent among those who have accomplished advanced learning.[60]

Further, it has been noticed that early/forced nuptials and female sexual exploitation are interlinked to some extent in the rural society, due to poverty, illiteracy, and outdated tradition. Adolescent run-way nuptials will occur on rigid family custom and lack of proper counselling.

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56. Government of Karnataka Order No. 310/2010 dt. 21.12.2010.
57. UN Executive Summary Child marriage, Adolescent pregnancy and school dropout in South Asia, UNICEF-ROSA/2019/ 2-7 (2019) *available* at: https://www.unicef.org/rosa/media/3015/file (visited on Feb. 22, 2023).
58. UNICEF-For Every Child, Child marriage, adolescent pregnancy and school dropout in South Asia, UNICEF-ROSA/2019 (2019) *available* at: https://www.unicef.org/rosa/media/3015/file (visited on Feb. 22, 2023).
59. *Ibid.*
60. Government of India, "National Family Health Survey (NFHS-5) 2019-21"(Ministry of Health and Family Welfare, 2022) *available* at: https://rchiips.org/nfhs/NF-HS-5Reports/NFHS-5_India_Report. (visited on Feb. 25, 2023).

Gender Discrimination and Visionless beliefs about Chastity

India has the huge number of brides in the transnational arenas that is approximately 1/3 of the international prospective as stated the UNICEF,[61] such underage nuptials, an intensely caused societal standard, endow with obtrusive data of prevalent sex unfairness and favouritism amid the public at large. Majority of the communities irrespective of any caste, or religion in India have a patriarchal mindset and the family custom can encourage child marriage, apartheid such patriarchal domination ought to be a social tradition. Dropping the gender fraction also impact to adolescent nuptial, patriarchy mindset ought to assist gender disparity, and customary viewpoint.[62]

As reported by Justice S.V. Patil Committee that an adolescent nuptial is a way to confirm chastity and virginity of the girl, adolescent may not pay attention to the guardians one they mature etc., further persuade adolescent nuptials.

Customary Saddle, Ignorance of Laws, and Demand Dowry

It is the consequence of the interaction of fiscal and community strengths. UNICEF comes close to wrapping up teenage weddings in India by being acquainted with the intricate nature of the predicament, and the socio-artistic and structural aspects reinforce the tradition.

Further, it has been globally acclaimed that this type of nuptials reveals human rights issues and (under target 5.3) to eradicate all detrimental traditions, like minor nuptials, early and forced nuptials and woman genital damage. Unawareness of regulation regarding deterrence of adolescent nuptials and penal effects that result is one of the issues for persistent occurrence of adolescent nuptials in various state.[63] School dropout especially for girls due to financial condition of the family as well as outdated custom will encourage adolescent nuptials in the rural society.

Demand dowry is also another cause for encouraging adolescent nuptials in the society and it has been noticed that sometimes lower dowry amounts ought to encourage adolescent nuptials in financially weaker families in various religious communities in India.[64]

Rigid Tribal Traditions and Human Trafficking

Mostly northeast Indians tribal have belief in adolescent nuptials as per the tradition practice and

61. UNICEF/UN0276216/Boro.
62. Palak Poddar, "Prevalence of child marriages as a part of customs in India" The Times of India, Sep. 27, 2021 *available* at: https://www.timesofindia.indiatimes.com/readersblog/some-thought/prevalance-of-child - marriage-as-a-part-of-customs-in-india-37796/ (visited on May 10, 2024).
63. Id. at 3 para 2.
64. Shireen J. Jejeebhoy, "Ending Child Marriage in India, Drivers and Strategies" 20 (UNICEF, New Delhi, 2019) *available* at: https://www.unicef.org/india/media/2556/file/Drivers-strategies-for-ending-child-marriage.pdf (Visited on May 11, 2024).

various clans have their own governing practice (as per NFHS-5 report) to execute such type of nuptial tradition since time immemorial and it is one of the issues to encourage adolescent nuptial.

The UN reported that around the world, girls as <12 years being imposed or trapped into marrying men who abuse them for coitus and housework.[65] The SAARC has initiated to eradicate adolescent forced labour and human trafficking in relation to adolescent nuptials.[66]

Age of Nuptials variability under the Personal Law

Variable age of nuptials in the personal laws is one of the prime causes for encouraging adolescent nuptials in India. Personal laws manifest some customs/tradition ought to reinforce adolescent nuptials. It has been noticed in Hindu and Muslim law such as adolescent nuptials will be possible through the guardian consent and age of nuptials for Muslim after puberty.

THE JUDICIARY, CENTRAL, AND LAW COMMISSION ON ADOLESCENT NUPTIALS

The temple of judiciary always acts pro bono and the wellbeing for the society with castigates wrongdoers as per the actual interpretation of legislation; the Apex Court has observed and profound a historical out-set to furthermore upholding each minor girl child's right to their corporal gravity and penalises sexual intercourse during the juvenile nuptials.[67] Factum valet is that a child nuptial is sought to be by some means in the legal scanner by the central.

The Apex Court observed that child nuptials are not only legislative unintentional know-how towards the validity of such nuptials. But the PCMA, 2006 is a rational legislation and it has supersede the Personal law due it's generalise applicability, i.e., is a so called secular nature; and therefore by the Act if a male >21 years nuptial with <18 years old girl and try to accomplish physical relationship ought to be fine more than one lakhs and it is penal acts; also as per u/s. 375 of IPC, 1860 is amount to punish if consummate child nuptials/ or couples cohabiting.[68] The Apex Court had scrutinized that regulation cannot be parochial and immobile. It must advance and transform with the requirements of humanity.

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65. UN-Global perspective Human stories, Report reveals linkages between human trafficking and forced marriage, UNICEF/UN0159775/Nyno (Oct. 7, 2020) *available* at: https://www.news.un.org/en/story/2020/10/1074892 (visited on May 10, 2024).
66. South Asia Initiative to End Violence Against Children (SAIEVAC), South Asia Follow Up Regional Consultation on the UN Study on Violence against Children (Colombo, Sri Lanka, May 28-30, 2012) *available*at: https://violenceagainstchildren.un.org/sites/violenceagainstchildren.un.org/files/documents/political_declarations/south_asia/saievac_furc_report_2012. (visited on May 11, 2024).
67. Independent Thought v. Union of India, (2017) 10 SCC 800.
68. Bharata Matha And Anr. v. R. Vijaya Renganathan and Ors., AIR (2010) SC 2685.

The Central has recommended 21 years as identical nuptial age for all Indians; but the Law Commission (2018) had unbolted that 18 years ought to be the bare minimum nuptials age for both male and female in India. The Commission in its discussion document on transformation of Personal law in 2018[69] has said that the age of mainstream ought to be identified unvaryingly as the officially permitted age i.e., 18 years of nuptial both male and female (the LCI, Age of Approval for wedding, 2.20-2.23) as per the IMA, 1875.[70] The PCMA reckons a nuptial where one or more are <18 years as voidable at the view of the child.

The Apex Court observed that the guardianship dealings are insightful issue and while come to a decision its equilibrium has to be preserved amid the emotions and draw near of the litigants.[71] In another instance the Court try to be settled a case in relation to child guardianship is the ultimate welfare of that minor and waving some lawful stipulations if necessary.[72] Again the Court struck down that permitted liberties of the parties are not to be subjugated observation, rather the dispute is to be established on the basis of ultimate standard of what ought to be preeminent overhaul to the concern and security of the minor. [73]

The LCI in its 133rd Report stated that the stipulations of restrained in u/s. 6(a) of the HMGA, 1956 is awfully unreasonable and has befall extraneous and outmoded with the current situation; therefore, need to be improvement.[74]

In Muslim Personal law custodian ought to arrange child nuptial for the wellbeing of the adolescent if required, such nuptial is called jabar marriage, even child assent is not obligatory to fulfil jabar nuptial.[75] The custodian having liberty to be entailed the nuptial on the minor, prior to

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69. Government of India, "Law Commission of India Consultation paper on Reform of Family Law" (Law Commission, 2018) at: https://archive.pib.gov.in/documents/rlink/2018/aug/p201883101. (visited on Feb. 23, 2023).
70. Raghav Ohri, "Centre relied upon Supreme Court's 2017 ruling to propose 21 as uniform marriage age" The Economic Times, Dec. 23, 2021, *available* at: https://economictimes.com/news/india/centre-relied-upon-supreme-courts-2017-ruling-to-propose-21-as-uniform-marriage-age/articleshow/ (visited on Feb. 23, 2023).
71. R.V. Srinath Prasad v. Nandamuri Jaykrishna and Ors., AIR (2001) SC 1056.
72. Shyamrao Maroti Korwate v. Deepak Kisanrao Tekram, (2010) 10 SCC 31.
73. Mrs. Elizabeth Dinshow v. Arvand M. Dinshow and Anr., (1987) 1 SCR 175.
74. Law Commission of India, "133 Report on Removal of Discrimination against Women in Matters Relating to Guardianship and Custody of Minor Children and Elaboration of the Welfare Principle" (August, 1989) *available* at: https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022080845. (visited on Feb. 25, 2023).
75. Flavia Agnes, Family Law II Marriage, Divorce, and Matrimonial Litigation 88-95 (Oxford University Press, New Delhi, 1st edn., 2011).

he/she reaches puberty;[76] such would be enclosed by the prevailing outcome of the PCMA, 2006. The Apex Court assessed that if the adolescent father is alive, mother cannot be the warden of the adolescent to grant a bequest on his behalf.[77]

CONCLUSION AND SOME SUGGESTIONS

Adolescent nuptials very much existed in every corner of the society as reported by the NFHS-5 data, in the national and transnational level (as reported UNICEF Global databases 2022). An adolescent nuptial has not only infringed human rights, but it has expressly and implicitly been responsible to the orthodox family customs, dowry, illiteracy, and biased rituals which is accountable for such societal misdeeds and unlawful practice. The Law Commission has recommended the age of nuptial is >18 years for all on the other hand Central has approached 21 years as the suitable age of nuptial for all Indian citizens.

The research work recommends minimising an orthodox practice in the rural/ tribal community, dowry culture, unjust or illogical family tradition through the proper legislation/ or modification of the various personal laws and educating common people to curtail and reduce adolescent nuptials.

It is the prime time to uphold the right to free education up to eighteen years for all Indians with some vocational training that might be helping common people and especially to girl children to combat such evil wedding culture and reducing financial heaviness to their family. Unemployment, dowry tradition, and poverty are the major causes to influence adolescent nuptials in India; therefore, the government and private sector will work together to stop/reduce such evil tradition to facilitate work culture in the society at large. Proper education might be solving adolescent nuptial crises in society.

Mass awareness (both offline and online) is necessary about the evil-impact of an adolescent nuptials, mental and physical health of an adolescent mother, to help from bad custom. The State and NGOs work together for educating tribal clans[78] relating to evil and peril impact on adolescent nuptials.

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76. D.U. Mulla, B.L. Bansal, et.al., Mulla Mohammedan Law Digest with Basic Principles32-48 (Vinod Publications, Delhi, 1st edn., 2016).
77. Gulamhussain Kutubuddin Maner v. Abdulrashid Abdulrajak Maner, (2000) 8 SCC 507.
78. Sushanta Talukdar, "Uniform Civil Code: Tribal communities fear erosion of customary laws, cultural heritage" The Hindu, Jul. 27, 2023 *available* at: https://www.frontline.thehindu.com/the-nation/uniform-civil-code-tribal-communities-in-north-eastern-india-fear-erosion-of-customary-laws-cutural-heritage/article67105854.ece (visited on Nov. 22, 2023).

Even street-drama/ or short films will be more effective in educating common people about the ill-effects of adolescent nuptials in all sections of the society.

Requiring dowry is not only an invasive act, but it may spur society to promote adolescent nuptials. The Act of 1961 DP ought to amend with a few clauses that u/4 of the DPA such as penalization shall contain up to ten years imprisonment with one lakh fine if it has been proved in the competent jurisdiction. The Act of 1955 HM ought to amend u/8 that all nuptial u/Hindu law ought to be registered. Such an amendment will help implicitly to curtail the bad custom in the Hindu community.

It is the right time to execute the UCC as stated in the ILC, 2018 and impose a precise age of nuptials with provisions for protection and adaptation for all inhabitants at large. Rural communities have a greater number of adolescent nuptials compared to urban communities as reported by the NFHS-5/the UNO. To minimise/or stop such evil practices then public and private financial/ well being initiatives are necessary.

Currently there is abundant legislation that deals with exploitation/offering related issues but needs rigid lawful framework to prohibit an adolescent nuptials settlement. The Central ought to take curriculum to outlaw adolescent nuptials and other community hazards. Some justifiable growth is conceivable then we can generate a healthier environment and an evocative world for all without any unfair traditional perils and practices.

ANALYSING 'CONSUMER HARM' THROUGH BIG DATA IN THE ERA OF PRICING ALGORITHMS: A COMPETITION LAW PERSPECTIVE

Prof. Kritika Singh*

Dr. Gagandeep Kaur**

INTRODUCTION

A sharp rise in the purchasing power of the consumer has proved to be a blessing in disguise, as it has ensured a higher degree of consideration being accorded to the consumer, within the domains of the business as well as product-oriented decisions being taken by the commercial entities.[1] Thus, it is rather unsurprising that, *'consumerism'* as a notion has developed into one of the fundamental principles of legislating newer enactments in contemporary times, the instances of which are not restricted to mere commercial laws but may be witnessed in all legal arenas.[2]

In such a scenario, competition law is neither a stranger nor an exception to the principle of consumerism. The significant interplay of competition laws within the domain of consumer protection could be best explained through the words of William Kovacic, a former commission of the Federal Trade Commission (US), where he observed that *"consumer protection policy are important complements of the Competition Policy"*[3].

In India, while the notion of consumer protection did not play a central role within the erstwhile MRTP regime, however, the enactment of the Competition Act, of 2002 as well as the revamped enactment of the Consumer Protection Act, of 2019, has portrayed a significant degree of harmonisation, essentially indicating a symbiotic development of the two overlapping legal arenas in the future[4].

However, just like every other advancement of the human species, the current development, which is being termed the era of technological revolution, has been marred with its own specific

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1. Schumpeter, "Flexible Figures: A Growing Number of Companies are Using 'Dynamic' Pricing, The Economist, *available* at: https://www.economist.com/business/2016/01/28/flexible-figures (visited on Sept. 24, 2023).
2. John B. Kirkwood and Robert Lande, "The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency" 84 Notre Dame Law Review. 181-183 (2008).
3. William Kovacic, "Competition Policy, Consumer Protection and Economic Disadvantage" 25 J. L. &Pol'y 101-114 (2007).
4. A. Kashyap & K. Thajudheen, "Competition Law and Consumer Welfare in India", 6(1) J. ECON. & INT'L BUS. MGMT. 1-9 (2018).

set of challenges. This era has been defined by the increased growth of platform economies and the usage of data in algorithms in the various facets of daily business operations. This has redefined our notions of efficiency and streamlining the whole product delivery process, thus greatly benefitting the consumer[5]. However, the cynics assert, that, the redefined business model has put the consumers in a rather precarious position. In justification of their assertion, they argue the gap in the extant laws, in dealing with the changed dynamics leaves the consumers susceptible and vulnerable to unseen deception mechanisms, previously otherwise absent previously[6].

In light of the above context, the particular piece, through the forthcoming discussion, would attempt to clarify and highlight the author's stance on one such particular phenomenon i.e., Algorithmic Collusion. Although extremely nascent the phenomenon has started a assume a rather uncomfortable position within the regulatory framework. To be succinctly put, algorithmic collusion refers to *'any act of collusion or a situation where any collusive outcome has been achieved by resorting to the use of pricing algorithms*[7]. While this may sound like a work of fiction as has been noted by certain scholars[8], the threat posed by the same seems to be more apparent and real than previously assessed[9].

In general parlance, agreements covered within § 3(3)(a) of the Competition require intent to collude on behalf of the colluding parties. However, the use of pricing algorithms effectively allows parties to collude, without leaving any trace of intent or the pre-requisite mental element[10]. Thus, the lack of evidentiary links and the fractured legal position concerning its invalidity creates regulatory hurdles in establishing a causal link between the pricing algorithm and the resultant collusive outcomes[11].

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5. Niamh Dunne, "Algorithms in Contemporary EU Competition Enforcement: Evolution Before Revolution?"CPI Antitrust Chronicle 31-34 (July, 2020)
6. Michal S. Gal,"Limiting Algorithmic Coordination", 38(1) Berkeley TechnologyLaw Journal (2023) (Forthcoming).
7. Joseph Harrington, "Developing Competition Law for Collusion by Autonomous Artificial Agents", 14 Journal of Competition law and Economics 331-334(2018).
8. Nicholas Petit, "Antitrust and Artificial Intelligence: A Research Agenda", 8(6) Journal of European Competition Law and Practice 361-367 (2017); Salil K Mehra, "Robo-seller Prosecutions and Antitrust's Error - cost Framework", CPI Antitrust Chronicle 36-40 (2017).
9. Hans-Theo Normann & Martin Sternberg, "Do Machines Collude better than Humans?", 12(10) Journal Of European Competition Law and Practice 765-800 (2021)
10. Michal S. Gal, "Algorithms as Illegal Agreements", 34 Berkeley Technology Law Journal 67-76 (2019)
11. Peter D. Camesasca and Laurie Anne-Grelier, "Close Your Eyes'? Navigating the Torturous Waters of Conscious Parallelism and Signalling in European Union" 7(9) Journal of Competition Law and Practice (2016).

In light of the above context, the authors through this piece, would attempt to assert and clarify his position, concerning the plausible issues arising out of the interplay between the principle of *'consumerism'* and the phenomenon of *'algorithmic collusion'*. The authors would be asserting their position through three primary questions: *firstly*, whether algorithmic collusion be regarded as a genuine threat to the functional competition within the market and consequently to the consumers. *Secondly,* whether there exists an emergent need to revisit the approaches prescribed under §3(3), to explore its plausible application to an instance of algorithmic collusion. Lastly, whether there is a need for exploring a revamped understanding of 'consumer harm', given the change in dynamics due to technological innovations.

III. DECIPHERING THE PHENOMENON OF ALGORITHMIC COLLUSION

The contemporary global market structure can be regarded as a long-drawn result of the New International Economic Order[12] (*hereinafter* referred to as 'NIEO').[13] The objectives enshrined within NIEO not only advocated measures attempting to end the era of economic colonization but also harboured the vision of a utopic commercial world based on the principles of liberalization and economic co-dependency.[14] The current market dynamics have not only achieved the abovementioned utopia but have greatly broadened its previously envisioned scope. The underlying credit for the same is attributed to the imperious advancements in the field of technology.[15]

The interplay of technology with that of business has ushered in completely new market dynamics and approaches to operating a business. However, at the same time, it has also given rise to a newer set of legal issues, which the various legal regimes are having difficulties to regulate.[16]

The most prominent of these legal concerns when viewed from the regulatory lens of the antitrust legal regime, have been the dramatic rise of the Platform Economies (also

12. The underlying philosophy behind New International Economic Order (a.k.a. NIEO) is that of 'economic independence'. It accentuates the claim that, the political independence of any State is directly reflected in its economic strength. Thus, NIEO intended to overhaul the then existing global economic structure which was heavily discriminatory against the Least Developed Countries (or the erstwhile Colonies), and focusing on restructuring the capital flow and technological advance to ensure equitable distribution of the benefits amongst the Developed and Developing/Least Developed Countries.
13. Milanovic Branko, XXXI World Development 667-6683 (Elsevier, 4th edn., 2003).
14. F.M. Gebremariam, "New International Economic Order (NIEO): Origin, Elements and Criticisms", 4(3) International Journal of Multicultural and Multireligious Understanding 22-28 (2017)
15. Roger D. Blair and D. Daniel Sokol (eds.), I The Oxford Handbook of International Antitrust Economics 404-448 (Oxford Academic, 2015).
16. Maurice E Stucke & Ariel Ezrachi, "How Digital Assistants Can Harm Our Economy, Privacy, and Democracy", 32 Berkeley technology law journal 1239-1298 (2018).

synonymously referred to as 'Platform Enterprises') and the Big Techs over the last decade, which have given rise an entirely different market structure i.e., the 'Digital Market'.[17] The so-called platform enterprises operate in a diametrically opposite manner in comparison to the enterprises in a traditional brick-and-mortar market, that the prevalent antitrust regimes were intended to regulate.[18] One of the major concerns with these platform economies has been the legal difficulty in regulating their attempts at collusive conduct. Thus, arises the primary question, what exactly is the phenomenon of algorithmic collusion?

A. What are Algorithms?

Algorithmic Pricing is no more a figment of imagination.[19] They are transforming digital markets rapidly, be it ride-sharing apps, online air travel booking sites or the ever-growing online retail sector. In the era of technological advancements and unrelenting ever-increasing online markets, the challenge for algorithmic pricing is likely to continue to grow.[20] Online markets have broken the barriers of healthy competition and algorithmic pricing is transforming into a common prevalence,[21] the debate surrounding the possibility of collusive behaviour by enterprises being achieved through the use of such technology also intensifying. However, the assessment of the phenomenon could only be made, upon a better understanding being gained concerning Algorithms. In the age of big data, sellers are amassing considerable consumer information which algorithms can use for personalised pricing practices on a large scale. From a competition law perspective, personalisation of prices by big data companies may lead in future to a gradual disappearance of uniform market prices which were based on traditional economic parameters of demand and supply and have been at the centre of economics-based competition law for several years. This could call into question various traditional tools of competition and consumer harm analysis. The question of whether algorithmic customised pricing could be considered an anti-competitive act that should be contested under the current competition laws also arises. Consumer trust in digitalization and markets may call for the development of a theory of harm that is specifically suited to algorithmic personalised pricing, even though some

17. Maurice E. Stucke, "Should we be concerned about Data-opolies?", 2 Georgetown L. Tech. Rev. 275-325 (2018)
18. Michelle Cini & Patrick Czulno, "Digital Single Market and EU Competition Regime: An Explanation of Policy Change", 44(1) Journal of European Integration41-57 (2022).
19 Andreas Mundt, "Algorithms and Competition in a Digitalized World", CPI Antitrust Chronicle 2-8 (July, 2020).
20. Mandrescu Daniel, "Applying EU Competition Law to online platforms: The Road Ahead – Part 1",38(8)European Competition Law Review357-363 (2017)
21. Ariel Ezrachi and Maurice E. Stucke, Virtual Competition: The Promise and Perils of an Algorithm Driven Economy (Harvard University Press, 2016).

theories of harm, such as discrimination and excessive prices, are possible candidates when analysing the applicability of well-known abuses to algorithmic personalised pricing. Additionally, it is debatable whether more specialised legislation should take into account the specific harm that algorithmic customised pricing can cause. Although the focus of this contribution is on EU competition law, similar ideas can serve as a framework for discussion in other legal systems.

There appears to be no clear consensus on the definition of the term algorithm.[22] It may be interpreted rather broadly, which goes beyond a specific software, source code or programming language.[23] A possible definition of a term that reflects this broad meaning could be a sequence of simple and/or well-defined operations that should be carried out accurately to perform a specific task or class of tasks or to solve a particular problem or class of problems.[24]

However, for this study, we would be limiting the study of algorithms to only such instances, where these algorithms are being used as a price determination tool or pricing algorithms. In this aspect, the definition provided by Joseph Harrington is particularly beneficial. He has described pricing algorithms "*as codes that determine the prices of the products following the prevailing market circumstances*".[25]

B. Why is Algorithmic Collusion a Concern?

in its report on *'Algorithmic Pricing and Competition Policy in Digital Age'*, the OECD raised certain concerns regarding the challenges that may arise due to the use of algorithmic pricing, which may create enforcement issues for competition regulators worldwide.[26] The same shall be considered in the following paragraphs.

The first concern that has been raised in the OECD report regarding the use of algorithmic pricing was that of tacit coordination.[27] According to the report, algorithmic pricing broadens the grey area between illegal overt collusion and legal implicit collusion.[28] Thereby, making it easier

22. Ariel Ezrachi and Maurice E. Stucke, Virtual Competition: The Promise and Perils of an Algorithm Driven Economy (Harvard University Press, 2016).
23. Thomas H. Cormen Et. Al, Introduction to Algorithms (MIT Press, 2009).
24. Donald Knuth, I The Art of Computer Programming: Fundamental Algorithms (Addison-Wesley Professional, 3rd edn., 1997).
25. Joseph E. Harrington, "Developing Competition Law for Collusion by Autonomous Artificial Agents", 14 J. Comp. L. & Econ. 331-334 (2018).
26. OECD, "Algorithmic Pricing and Competition Policy in Digital Age" (2017) <www.oecd.org/competition/algorithms-collusion-competition-policy-in-the-digital-age.htm> (visited on August 18, 2023).
27. Timo Klein, "Autonomous Algorithmic Collusion: Q-Learning under Sequential Pricing", 52(3) The Rand J. of Econ. 538-558.
28. OECD, "Algorithmic Pricing and Competition Policy in Digital Age" (2017)

for companies to retain profits above the competitive average without having to enter into an overt arrangement.[29]

Similar sentiments could also be witnessed in the reports released by the various national Competition Regulators within the EU jurisdiction, there have been two primary concerns regarding the use of algorithmic pricing: a) it might result in high price transparency and rapid price adjustments, that would allow the competitors react quickly and aggressively concerning any price change in the market, which in turn would make the cartels more stable. b) algorithmic pricing might enable the firms to outcomes of traditional cartels through tacit collusion.[30]

Thus, to be succinctly put, tacit collusion is seemingly the primary concern arising out of the increased use of algorithms. Hence, the following section will attempt a brief analysis of the same. Furthermore, the section would also attempt to bifurcate the two primary forms of algorithmic collusion, based on the degree of autonomous decision-making involved.

C. Pricing Algorithms vis-à-vis Likelihood of Tacit Collusion

Tacit collusion or Tacit Coordination is a phenomenon that occurs in markets where few operators function in parallel because of market characteristics, without concerted practice in the legal sense.[31] Although, from a broader perspective, tacit coordination may be achieved by employing algorithms, yet, some scholars have attempted to differentiate them based on human interference in achieving tacit coordination.[32]

The existing literature suggests a divided opinion regarding the issue of the likelihood of tacit collusion.[33] On one hand, the legal scholars advocating the regulation of these algorithmic pricing software opine that the use of algorithms for determining prices increases the possibility of collusion.[34] Some have considered algorithmic collusion very likely. They have argued that

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29. OECD, "Algorithmic Pricing and Competition Policy in Digital Age" (2017)
30. Autorité de La Concurrence &Bundeskartellamt, Algorithms and Competition (2019); European Commission, Competition Policy for the Digital Era (2019); Competition & Markets Authority (UK), Pricing Algorithms (2018); OECD, Personalised Pricing in the Digital Era (2018).
31. Richard Whish and David Bailey, Competition Law 533-546 (Oup, 9th edn., 2018).
32. Lea Bernhardt & Ralf Dewenter, "Collusion by code or algorithmic collusion? When pricing algorithms take over", 16 European Competition Law Journal312-342(2020)
33. Emilio Calvano et. al., "Artificial Intelligence, Algorithmic Pricing and Collusion", 110(10) American Economic Review 3267-3278(2020); Ulrich Schwalbe, "Algorithms,Machine Learning, and Collusion", 14(4) Journal of Competition Law and Economics. 568-578 (2018);Ashwin Ittoo and Nicolas Petit, "Algorithmic Pricing Agents and Tacit Collusion: A Technological Perspective" in Artificial Intelligence and Law (Alexander de Steel, Hervé Jacquemin eds.) 241-252 (2019); Dylan I. Ballard and Amar S Naik, "Algorithms, Artificial Intelligence, and Joint Conduct"CPI Antitrust Chronicle 29-35 (2017)
34. Alistair Lindsay and Eithne McCarthy, "Do we need to prevent pricing algorithms cooking up markets?", 12 European Competition Law Review 533-542 (2017);

pricing algorithms stabilise collusive outcomes by facilitating easy identification of deviations from the agreement and enabling rapid price changes. As a result, the collusion could become more persistent.[35]

The contrary position of the above statement could be inferred from the observations of Petit, according to whom, the possibility of collusion using pricing algorithms has been referred to as nothing but science fiction. He further observed the entire understanding of algorithmic collusion is based upon certain strict underlying assumptions like product homogeneity and the use of either similar or compatible algorithms by both competitors.[36] Therefore, he has argued that the above-mentioned underlying assumption is inapplicable to most markets, hence, algorithmic collusions are relatively unlikely to occur.[37]

Similarly, Schwalbe argues that algorithmic collusion may arise out of even the simplest of coincidences, where two independent competitors unintentionally tend to use similar algorithms. For the same reason, he has maintained that evaluating the usage of algorithms from the lens of anti-competitive conduct might prove to be counterproductive.[38] He argues that such an evaluation might go against the fundamental ethos of the competition policy as it would inhibit innovation, rather than assisting the same.[39]

Similarly placed arguments have also been pointed out by the scholars for not considering tacit collusion as a serious likelihood which has hinged upon the reason for the dearth of empirical evidence regarding the occurrence of algorithmic collusion.[40]

However, the authors believe that the collusive outcomes due to the use of algorithms are often like tacit collusions, thus, there is a high possibility that they might be mistaken for conscious parallelism.

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35. Ariel Ezrachi and Maurice E. Stucke, Virtual Competition: The Promise and Perils of an Algorithm Driven Economy.
36. Nicholas Petit, "Antitrust and Artificial Intelligence: A Research Agenda", 8(6) Journal of European Competition Law and Practice 361-367 (2017)
37. Nicholas Petit, "Antitrust and Artificial Intelligence: A Research Agenda", 8(6) Journal of European Competition Law and Practice 361-367 (2017)
38. Ulrich Schwalbe, "Algorithms,Machine Learning, and Collusion", 14(4) Journal of Competition Law and Economics. 568-578 (2018).
39. Ulrich Schwalbe, "Algorithms,Machine Learning, and Collusion", 14(4) Journal of Competition Law and Economics. 568-578 (2018).
40. Ashwin Ittoo and Nicolas Petit, "Algorithmic Pricing Agents and Tacit Collusion: A Technological Perspective" in Artificial Intelligence and Law (Alexander de Steel, Hervé Jacquemin eds.) 241-252 (2019)

III. CONSUMER HARM VIS-À-VIS ALGORITHMIC COLLUSION: THE NEED FOR REVALUATING THE CURRENT APPROACH?

The notion of *'consumer harm'* is a test adopted by the competition regulators, across the globe to determine the degree of (anti) competitiveness of a particular conduct or measure adopted by the market players. In general parlance, the test of consumer harm is often adopted in the cases subjected within the domain of the *'rule of reason'* approach, with Indian jurisdiction not being an exception.

The Competition Act, of 2002 has adopted the rule of reason approach through the implementation of the phrase '*causes or likely to cause appreciable adverse effects on competition may be held anti-competitive.*[41] The phrase while on a superficial analysis, indicates a focus on the competitive harm, however, when read with the relevant provisions concerning the determination of '*appreciable adverse effect*'[42] reveals an undertone of an approach, of which the consumers continue to remain as the touchstone.

In a traditional set-up, where the operationality of the markets is not impacted by autonomous algorithms, a test for determining anti-competitiveness, solely based on the notion of consumer harm, comes with its own set of challenges. Such tests as several scholars have argued[43] 'have the potency of attracting unnecessary intervention. A pure consumer harm test allows for a regulatory intervention, wherever in the opinion of the regulator, there is a harmful conduct being carried out by an enterprise, thus, creating a possible scenario of jurisdictional over-reach.[44]

However, the position varies, rather significantly, when the notion of consumer harm is viewed in a situation otherwise dominated by the influx of algorithms. The consensus suggests that pricing algorithms do offer significantly better incentives, by making the secrecy adopted in the pricing strategy being adopted.[45] However, it does raise certain concerns, when viewed from the perspective of the consumers by allowing the sellers to charge supra-competitive prices, even in the absence of collusive behaviour.[46]

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41. Competition Act, 2002, ss 3(4) & 4.
42. Competition Act, 2002, s 19(3).
43. Moritz Lorenz, An Introduction to EU Competition Law 34 (Cambridge University Press, 1st edn., 2011).
44. Patrick Rey, "On the Use of Economic Analysis in Cartel Detection" in European Competition Law Annual 69-76 (Claus-Dieter-Ehlermann& Isabella Atanasiu (eds.), Hart Publishing, 2007)
45. Ariel Ezrachi and Maurice Stucke, "Sustainable and Unchallenged Algorithmic Tacit Collusion", 17 Northwestern Journal of Techonology& Intellectual Property217-227 (2020).
46. Zach Y. Brown & Alexander Mackay, "Competition in Pricing Algorithms", 15(2) American Economic Journal: Microeconomics 109-156 (2023).

A. Scenarios of Consumer Harm through Algorithmic Collusion

The authors through this piece argue that consumer harm unlike algorithmic collusion is not necessarily dependent on the coordinated conduct of the enterprises. The same could be initiated even by a single enterprise, through the implementation of an advanced algorithm. His assertion is a significant departure from the present understanding we have regarding the notion of consumer harm.[47] However, considering a market, such as e-commerce platforms, where the prices are generally determined through the employment of algorithms, the reduced thresholds of defining consumer harm are of paramount importance in the opinion of the authors.

Algorithmic pricing strategies could be used to facilitate supra-competitive prices within a market primarily in two ways. *Firstly*, such strategies allow the enterprises employing such algorithms, to indulge in real-time updation and re-pricing of the commodities. This remains a key advantage when viewed from the perspective of enterprises, that lack such abilities.[48] The ability of price updation or repricing on a real-time basis provides a significant competitive edge to the specific market players, allowing them to favourably price their products, without being concerned about a commensurate response from their competitors.[49]

The lack of ability to reprice their products on a real-time basis, eventually forces the competitors to price their products above the existing competitive price levels, in an attempt to mitigate potential losses arising due to the pricing war. However, at the same time, the algorithms allow the firms, to reprice their products yet again.The revised prices would although below the levels of the prices of their rivals, but would remain above the competitive levels. The strategy not only allows such an enterprise to undercut its rival's position but also enables it to capture supra-competitive margins without any adverse implications. The sole victim of this entire process remains the consumer, who now has to pay a higher price as compared to the earlier situation.[50]

Another mechanism, in which algorithms may be employed to initiate consumer harm, is through a pre-specified pricing strategy. Any enterprise possessing superior or advanced

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47. Ariel Ezrachi and Maurice E. Stucke, Virtual Competition: The Promise and Perils of an Algorithm Driven Economy (Harvard University Press, 2016).
48. Emilio Calvano et. al., "Artificial Intelligence, Algorithmic Pricing and Collusion", 110(10) American Economic Review 3267-3278 (2020)
49. Zach Y. Brown & Alexander Mackay, "Competition in Pricing Algorithms", 15(2) American Economic Journal: Microeconomics 109-156 (2023).
50. Zach Y. Brown & Alexander Mackay, "Competition in Pricing Algorithms", 15(2) American Economic Journal: Microeconomics 109-156 (2023).

technology (known as the Lead Market Player) adopts a particular pricing strategy, and then all the other market players with inferior technological know-how, automatically conform to such strategy as employed by their superior rival.

The conduct on the part of such inferior market players is understandable as they want to avoid undercutting their consumer base. In doing so, all the market players in their attempt to conform to the price followed by the Lead Market Player, end up pricing their products at supra-competitive prices, even though there is no semblance of collusion or pre-existing agreement to collude amongst the players.[51]

While, the prudent understanding while evaluating the interaction of algorithms with market dynamics, suggests increased competition. However, practical prospects could not be any further from the truth. The theoretical models suggest that an increased use of algorithms results in higher prices not only within an oligopoly structure but also in cases where the inherent market structure does not conform to either oligopoly or monopolistic models.[52] The assertion is further substantiated through empirical studies, which have concluded that algorithmic pricing strategies have not only increased the frequency of asymmetric prices but have also resulted in higher prices within the platform markets.[53]

The authors thus, in the context of the foregoing discussion assert that contrary to explicit or implicit cooperation, algorithmic pricing that does not involve collusion usually results in higher consumer prices and is more challenging to address. This behaviour is outside of the existing purview of antitrust, even when that term is used broadly, as we are by definition concentrating on competitive marketplaces where firms are not collaborating.

V. CONCLUSION

As stated in the previous discussion, algorithmic pricing is no longer a figment of imagination. On the contrary, as the technical advancements become more nuanced, the threat being posed by pricing algorithms will become increasingly severe. From a contemporary viewpoint, an assertion that consumers are already purchasing products, which have been tarnished by algorithmic prices, would not be unsurprising.

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51. Jonathan Baker & Joseph Farrell, "Oligopoly, Coordination, Economic Analysis and the Prophylactic Role of Horizontal Merger Enforcement", 168 Pennsylvania Law Review 1985-1998 (2020).
52. Emilio Calvano et. al., "Artificial Intelligence, Algorithmic Pricing and Collusion", 110(10) American Economic Review 3267-3278 (2020).
53. Zach Y. Brown & Alexander Mackay, "Competition in Pricing Algorithms", 15(2) American Economic Journal: Microeconomics 109-156 (2023).

While the authors in no manner, denounce the possible positive implications arising out of the employment of algorithms. However, given the propensity of the algorithms to be utilised as an effective tool to facilitate either tacit collusion or non-collusive supra-competitive pricing, the same should be considered rather carefully. Consequently, he would steadfastly assert that forming an understanding that the algorithmic pricing strategies currently are not advanced enough to pose a competitive threat would be counterproductive, to say the least.

It is important to be clearly understood that the phenomenon of algorithmic collusion is far-reaching, not only in its ambit but also in its consequences. The current piece has attempted to discuss and evaluate a very small facet of the entire legal behemoth, solely from the perspective and notion of *'consumerism'*.

Consequently, the authors would suggest that the Competition regulator should adopt a less intrusive functional approach, intended towards regulating the ability and the frequency of price alteration being adopted by the market entities. The approach remains an advantageous option in comparison to the more apparent structural approach, where our current understanding and knowledge concerning the pricing algorithms may prove to be inadequate.

AN ANALYTICAL STUDY ON CYBERSTALKING WITH SPECIAL EMPHASIS ON INVESTIGATIONS THROUGH THE LENS OF DIGITAL FORENSICS

Dr. Aparajita Baruah*

Pravek Medhi**

INTRODUCTION

It is a universal truth that there can be no society without crime or criminals. Crime and criminality have been omnipresent throughout the ages. Numerous criminologists have offered grandiose justifications for why some individuals are predisposed to engaging in criminal behaviour. Researchers have used biological, psychological, and sociological premises to explain the subtleties of criminality.

Currently, as science and technology have advanced in the globe and affected nearly every aspect of our lives, the convenience that these have created in people's lives have been monumental. Technology has changed the way we as humans live, it changes our understanding of the way things work and changes the way we interact with one another.[1]

However, the flipside of the story paints a different picture where the people have to live their lives in a state of paranoia. The major reason that can be attributed for this has been the evolution of the cyberspace into a hunting ground for criminals. The criminal opportunities produced in cyberspace have opened up this whole new category of crime for criminologists to study- cybercrimes.[2]

Certain crimes that were once only committed in the real world have now migrated to the cyberspace as well. One such cybercrime that has been worryingly developing is cyberstalking. Its rapid move up the crime charts has been an issue of major concern. The ramifications of the same being mainly psychological, it can have physical repercussions as well and has been affecting the populace significantly. According to National Crime Records Bureau (NCRB) data, 1176 cases of cybers talking alone were reported around India in the year 2021.[3] This just makes up the number of cases that were reported, however, owing to the nature of the crime, much of the instances go unreported.

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1. P. L. Ramesh, "Impact of Technology in Human Life" 6 Global Journal for Research Analysis 106 (2017).
2. Bradford W. Reyns, The Anti-Social Network 2 (LFB Scholarly Publishing LLC, 2012).
3. National Crime Records Bureau, "Crime in India 2021" 790 (2022).

Cyberstalking, just like any other cybercrime presents the Criminal Justice System (CJS) with multitude of challenges, especially in matters of investigation. This is mainly because of the ever-evolving nature of technology as well as the anonymity it secures for the users. Investigation of cyberstalking requires a different strategy from traditional stalking, and here is where the Forensic Sciences have stepped in with their newfound species, Digital Forensics.

As the Internet is growing, numerous legal issues have been arising.[4] The Information Technology Act of 2000 was enacted in response to the need to create a specific regulation on the issue of cybercrimes. Additionally, the Indian Penal Code (IPC), 1860 comes into play in circumstances where some cybercrimes have traits and components alike with traditional crimes, such as stalking and cyberstalking. A thorough examination of the complexities of this crime and its corollaries will paint a picture of the specifics of the investigations as a whole.

II. Offline Stalking versus Cyber Stalking

While cyberstalking is as recent a phenomenon as the internet itself, even offline stalking is a relatively new crime.[5] Fundamentally, cyberstalking does not differ from offline/proximal stalking, as the ingredients of both are very much alike, however, there are slight variations between the two.

One of the major elements that categorises an act as stalking is that it should create an apprehension of fear or distress in the victim's mind regarding his/her own physical or mental health. This mandates a measure of proximity between the offender and the victim. On the other hand, because the cyberstalkers are not physically present around the victims like that in offline stalking, there are times when the victims are not even aware of or alarmed by the threat lurking over them. Furthermore, it demonstrates that unlike victims of offline stalking, victims of cyberstalking are less likely to be familiar with their stalkers.[6] It's worth noting that just because cyberstalking does not include physical contact does not mean it's less dangerous.[7]

Cyberspace is a place without bounds. It's a limitless space with abundance of scope for cyberstalkers. Instant messaging, chat rooms, social media networks and even online gaming

4. Rajarshi Rai Choudhury, Somnath Basak & Digbijay Guha, "Cyber Crimes- Challenges & Solutions" 4 International Journal of Computer Science and Information Technologies 729 (2013).
5. Naomi Harlin Goodno, "Cyberstalking, a New Crime: Evaluating the Effectiveness of Current State and Federal Laws" Missouri Law Review 127 (2007).
6. *Supra* note 2 at 10.
7. Fighter Law, *available* at: https://www.fighterlaw.com/whats-the-difference-between-stalking-and-cyberstalking/ (visited on March 08, 2023).

platforms can be and are being used by the cyberstalkers. It is an established fact that offline stalking comparatively originated earlier than cyberstalking, yet due to the nature of cyberspace, there are more instances of cyberstalking.

Cyberstalking being committed online has a wider reach than offlines talking. For example, an offline stalker may harass the victim by repeatedly telephoning the victim.[8] But each call is a separate event that takes the stalker's effort and time. This behaviour can easily snowball online because, with only one action, the stalker can create a harassing e-mail message that the computer systematically and repeatedly sends to the victim thousands upon thousands of times.[9]

Anonymity is a trait that is inherent in all of the cybercrimes and as such the stalker being anonymous is much greater a possibility in cyberstalking than in offline stalking. A growing number of online criminals are purchasing software that allows them to stay anonymous while committing crimes on the dark web,[10] the untraceable, encrypted portion of the internet. It presents a rather difficult terrain for the investigators to identify and nab the culprits which is comparatively swifter in cases of offline stalking.

Also, offline stalking events consume a considerable amount of time as compared to cyberstalking, because one can use the cyberspace in a very fluent and swift manner and also the ease of use and access is very much inherent in it. The human effort in cyberstalking unlike any of the traditional criminal cases is very minimal which makes it more convenient to commit than offline stalking.

III. Analysis of Cyber Stalking

As has been defined earlier, in simple terms, cyberstalking is the commission of stalking using Information and Communications Technology (ICT). Though a case of cyberstalking begins in the cyber world, it can eventually have repercussions on the offender-victim relationship in the physical world.

The connotation provided for it under Section 354D IPC talks about “any person monitoring the use by a woman of the internet, email or any other form of electronic examples to communication.”[11] The phrase "any other form of electronic communication" in this case gives the clause a broad meaning. In fact, it closes all gaps that might arise in the future because it is

8. *Supra* note 5 at 129.
9. *Ibid.*
10. As defined by Kaspersky, the dark web is the hidden collective of internet sites only accessible by a specialized web browser. It is used for keeping internet activity anonymous and private, which can be helpful in both legal and illegal applications
11. Indian Penal Code, 1860 (Act 45 of 1860), s. 354D.

impossible to streamline just a few devices or platforms via which cyberstalking might occur given the rapid advancement of technology. The aforementioned provision is somewhat limiting because it completely dismisses the possibility that men could also become victims of cyberstalking. Mumbai-based entrepreneur Vijay Nair being cyber stalked by a woman is a landmark example of the same.[12]

Cyberstalking involves a series of behaviours and actions over a period of time that are intended to intimidate, alarm, frighten, or harass the victim and/or the victim's family, partner, and friends.[13] These behaviours and actions include (but are not limited to): flooding the user's inbox with emails; frequently posting on the user's online sites, pages, and social media accounts; repeatedly calling and/or texting the victim, leaving voicemails, and sending follower and friend requests; joining all online groups and communities the victim is a part of or following the victim's posts through acquaintances, colleagues, classmates, family members' or friends' social media accounts; and continuously viewing the victim's page.[14] In both online and offline settings, offenders have the ability to continuously watch, observe, and monitor victims with or without the victims' knowledge.

The nature of cyberstalking reveals that it is difficult to combat because the stalker could be in another state or sitting three cubicles away from the victim.[15] Online anonymity can make it difficult to verify a stalker's identity, collect the necessary evidence for an arrest and then trace the cyberstalker to a physical location.[16]

There can be many reasons for which a perpetrator may cyberstalk someone. Harassment is one of the primary reasons and has an aggravated form in the guise of revenge. Harassment can primarily be attributed to some kind of sadistic pleasure of an offender. Sometimes for acts of revenge because of failed love proposals or the termination of a relationship or a marriage, cyberstalking maybe carried out. Also, there are cases of one-sided love or fascination of one person towards the other which might lead to cyberstalking. It is worth mentioning that, people who are currently in a relationship or in a marital bond also undertake cyberstalking because of curiosity or trust-issues over their partners.

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12. The Times of India, available at: https://timesofindia.indiatimes.com/city/delhi/cyberstalking-law-ill-equipped-to-protect-women-non-existent-for-men/articleshow/59179132.cms (visited on June 5, 2023).
13. UNODC, available at: https://www.unodc.org (last visited on June 25, 2022 at 09:00 am).
14. *Ibid*.
15. Privacy Rights Clearing house, available at: https://privacyrights.org (visited on June 25, 2022).
16. *Ibid.*

Characteristic	Share of Respondents
Checked their phone to view text messages, phone calls, direct messages (DMs), emails, or photos	17%
Reviewing their search history on one of their devices	13%
Used knowledge of their passwords to access their device or online accounts	10%
Tracked their location via a location sharing app	9%
Created a fake profile to check on them on social media	8%
Used an app to monitor their text messages, phone calls, direct messages (DMs), emails, or photos	7%
Tracked their physical activity via their phone or health app	6%
Created a fake profile on a dating app to see if they have a dating profile	6%
None of these	63%

Table.1: Most common forms of cyberstalking an ex or current partner worldwide from November 15 to December 7, 2021.[17]

The above data is based on a survey conducted on a global scale between November 15 to December 7, 2021 and it reveals the most common ways that are employed by perpetrators to cyberstalk an ex or a current partner. The ways of cyberstalking mentioned herein are not exhaustive. The data reveals that cyberstalking is more common amongst people who have a connection, and the perpetrator has direct access to the victim's social devices or platforms.

17. Statista, *available* at: https://www.statista.com (visited on June 28, 2022).

IV. Mens Rea/Actus Reus in Cyberstalking

The architecture of social networking sites presents a very complicated picture in cybercrime jurisprudence. As has been discussed throughout the paper, cyber space is a limitless terrain without any bounds. It complicates matters for the CJS to operate especially in cases of cyberstalking.

For committing a crime, the intention and act both are taken to be the constituents of the crime, which is embedded in the maxim *"actus non facit reum nisi mens sit rea."*[18] It means that, generally, a person cannot be guilty of a crime unless two elements are present: the *actus reus* (guilty act) and the *mens rea* (guilty mind).[19] It applies in cases of cybercrime as well. As for example, in an instance of hacking, the act of the perpetrator in illegally intruding the domain of some other person and siphoning off valuables makes up for the *actus reus*. And the knowledge of the perpetrator that the access to the particular space is illegal draws up the *mens rea.*

However, to prove both these elements in case of cybers talking is somewhat complex. The whole idea behind social networking sites is the creation of social connections with people who are already known as well as with those that are unknown. The algorithm of such sites is tweaked in such a way that they make recommendations to connect based on varied parameters. For example, Instagram presents to the users a tab named 'Suggested for you' under which a user may find account suggestions of different people who might be mutual friends with someone who the user might already be connected with in the platform. This lures the user into the unknown space of a different user, which he might exploit in different ways.

Despite any platform's claims of privacy protections such as private profiles and turning off account suggestions, etc., it raises concerns about the authenticity of the sites in terms of cybers talking because it gives potential stalkers a place to continue their operations unhindered. Also, shutting down the safeguards means the user being devoid of fascinating stuff to relish on the platform.

In these situations, it can be difficult to demonstrate *mens rea* and *actus reus* because the stalker may routinely observe the everyday activities of a person who frequently posts updates in the platform without him/her having any whiff about being stalked. It does not create any

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18. State of Rajasthan v. Shera Ram alias Vishnu Dutta, Criminal Appeal No. 1502 of 2005.
19. Oxford Reference, *available* at: https://www.oxfordreference.com/display/10.1093/oi/authority.20110803095349253;jsessionid=5F9C5ECADA7FB93E47913A48A52428D2 (last visited on March 09, 2023 at 01:41 pm).

apprehension of fear or disturbance like that in offline stalking cases. For the reason, that the platform itself is providing an avenue, to question the legitimacy of the action on the part of the person would be wrong. And also, this does not imply that the platform is liable as it is providing safeguards.

Actus reus in such cases is the act of the stalker in invading the personal space of some other person and the *mens rea* should have been the knowledge on the part of the stalker that such an invasion is not appreciated. Thee lament of *actus reus* gets nullified by the fact that the idea behind social networking is to check out profiles and connect and also there is no bar to the number of times a person can actually do so. *Mens rea* on the other hand, in many instances is difficult to judge, again because of the sole nature of social networking. To say that the intent was malicious or wrongful would be vague as such. These factors as such complicate the jurisprudential aspects of cybercrime.

V. Catalysts and Impact of Cyberstalking

The inception of the smartphone was a boost to the entire domain of ICT. These have a strong resemblance with computers in terms of functionality, but the aspect of mobility bolsters its utility. These have exacerbated the serious effects of cyberstalking. Latest technologies like the Global Positioning System (GPS) being infused with the smartphones can allow cyberstalkers to gain information about the location of their targets.

The rise of social media has also had an impact on the rising number of cyberstalking cases. People can now create social relationships online through a variety of sites. On the other hand, regular updates about a person's everyday life and activities are like inadvertently asking cyberstalkers to track his/her every step.

A profile on a social network might include information such as the owner's email address, phone number, general (or even specific) address information, birthday, legal name and even names of family members.[20] If a victim has a public profile, a stalker could easily access any information posted to the social networking account.[21] Check-ins at restaurants or cafes on Facebook, exposing the exact location at one point in time, are a pretty typical occurrence these days.

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20. *Supra* note 15.
21. *Ibid.*

Cyberstalking can have significant psychosocial impacts on the victims.[22] They report several severe consequences of victimization: Increased suicidal ideation, fear, anger, depression, and Post Traumatic Stress Disorder (PTSD).[23] The personal, professional and social life of the victim can get highly affected.

Also, there are instances where a large number of cyberstalking cases go unreported because of the fear of further victimization. Most often the cyberstalkers target people who they are familiar with. Both the victim and the perpetrator may belong to a common social circle. Also, there are no bounds to the use of social media and as such there are endless possibilities for a perpetrator to randomly target anyone.

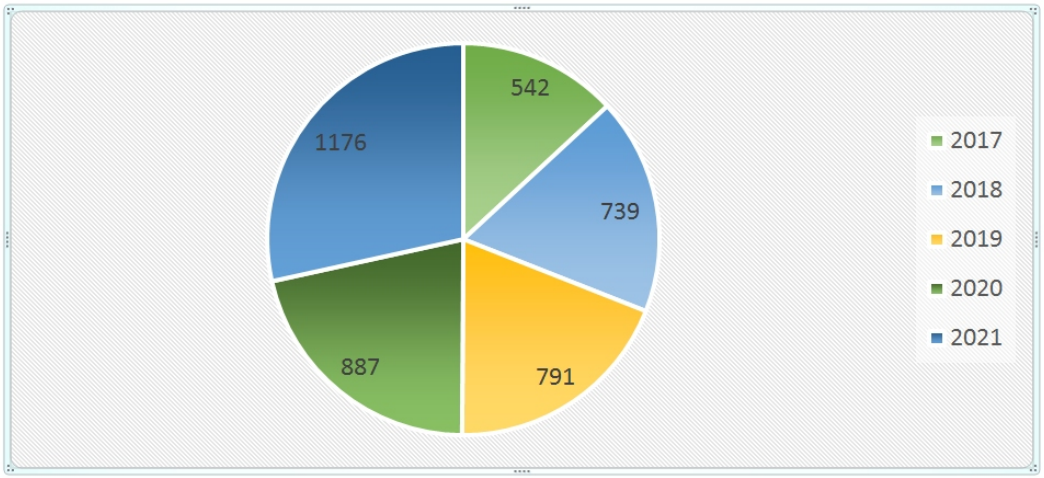

Fig.1: Statistics on Cyber Stalking/Cyber Bullying of Women (Sec.354D IPC r/w IT Act).[24]

The statistics above represent the growing graph of cyberstalking incidents in India over a five-year period between 2017-2021 as per the National Crime Records Bureau (NCRB) data. A reason for the rise in numbers can be attributed but not limited to the pandemic. The COVID-19 pandemic and the eventual lockdowns mandated the use of ICT technology for day-to-day work, there by increasing the online presence of people to a far greater extent. This in turn opened up avenues for the cybercriminals. The repercussions of the pandemic led to the increased online presence which is still very evident.

22. National Library of Medicine, *available* at: https://pubmed.ncbi.nlm.nih.gov (visited on June 25, 2022).
23. *Ibid.*
24. National Crime Records Bureau, available at: https://ncrb.gov.in (visited on June 15, 2022).

VI. Legal Framework

The Information Technology (IT) Act, 2000 was passed in order to fill the lacunae created by the development of technology and the eventual emergence of cybercrime in the nation. The primary and most important law pertaining to criminal activities in India is the Indian Penal Code (IPC), which was passed in 1860. Therefore, there may occasionally be a contradiction in how the requirements of the two pieces of legislation are applied in particular situations. The principle to be applied in such scenarios is that special laws would take precedence over ordinary laws in these situations, and later laws would take precedence over earlier legislation.[25] Therefore, the IT Act shall supersede the IPC in cases of conflict.

However, the IT Act does not specifically incorporate the aspect of cyberstalking per se. The Criminal Law (Amendment) Act, 2013 introduced to the IPC, Section 354D giving a situational picture as to what constitutes cyberstalking. But it does not use the term 'cyberstalking' specifically. Also, the provision has been criticised of not being gender neutral and being more centred towards women.

There are other provisions in the IPC like Section 292 which makes it punishable, the conveyance of any obscene material over the internet to deprave the receiver, Section 507 which deals with criminal intimidation through anonymous communication and Section 509 which can be attracted if the offender's actions violate the privacy of a women or infringes the modesty of a women.

The striking down of Section 66A by the Supreme Court from the IT Act in the case of *Shreya Singhal v. Union of India*[26] in 2015 pertaining to punishment for sending offensive messages through communication service, etc has left a void as regards cyberstalking in the IT Act. However, Section 67 explicitly makes it punishable to publish or transmit any obscene material in the electronic form. Sections 67A and 67B respectively deals with publication and transmission of sexually explicit material in electronic form and the publication and transmission of material depicting children in sexually explicit act in electronic form including facilitating abuse of children online. Therefore, only if a cyberstalker publishes obscene matter a case can be filed against him under the provisions of the IT Act.

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25. Sharat Babu Digumarti v. Government of NCT of Delhi, AIR 2017 SC150.
26. AIR 2015 SC. 1523.

VII. Investigations

Investigation of cyberstalking poses new challenges to the CJS because of a wide variety of reasons. The element of anonymity in these cases is very high. Even a perpetrator who is not that adept in cyberstalking can remain anonymous because that is how the online environment is. It can be committed from anywhere without coming into close physical proximity with the victim.

Whenever a cybercrime takes place, the police are the first-responders. However, for the collection and handling of the evidence and other scientific assessments of the crime, the assistance of forensic experts is called upon, more specifically the Digital Forensic experts.

The use of advanced technologies to commit cyberstalking raises significant investigative and evidentiary challenges.[27] The evidence that is collected from such cases can be very volatile and like any other electronic evidence needs special expertise to handle. Unlike general physical evidence in traditional crimes that can be photographed, video captured or sketched, the handling of digital evidence is somewhat complex. There might be occasions where the perpetrator might program the device used for cyberstalking to automatically erase all the data which would make it difficult to retrieve the same.

Section 80 of the Information Technology Act, 2000 provides that notwithstanding anything contained in the Code of Criminal Procedure, 1973, any police officer, not below the rank of a Deputy Superintendent of Police, or any other officer of the Central Government or a State Government authorised by the Central Government in this behalf may enter any public place and search and arrest without warrant any person found there in who is reasonably suspected or having committed or of committing or of being about to commit any offence under this Act.[28] Though the Information Technology Act, 2000 does not define cyberstalking per se, but it anyhow falls under the scope of the Act.

Crime detection falls into three distinguishable phases: the discovery that a crime has been committed, the identification of a suspect, and the collection of sufficient evidence to indict the suspect before a court.[29] The primary responsibility for this falls with police and as such the investigating officer will employ all means to quiz all those who might be suspected to have some kind of connection with the crime as well as the witnesses. The complainant or the victim shall be interviewed to find out intricate details about whether she has any knowledge as regards

27. Science Direct, *available* at: https://www.sciencedirect.com (visited on June 25, 2022).
28. Information Technology Act, 2000, (Act 21 of 2000).
29. Britannica, *available* at: https://www.britannica.com (visited on June 26, 2022).

who the offender might be, any reason for which she might have been targeted, when did she realize that she was being cyberstalked and what kind of ways and platforms were employed by the cyberstalker.

The timeline of events shall be sought to be reconstructed based on all the available details. The evidence and the materials found shall assist in the recreation of the events. Therefore, the investigating officer shall do everything to secure any possible digital or physical evidence available therein. As has been mentioned earlier, Digital Forensics is the process of uncovering and interpreting electronic data.[30] The goal of the process is to preserve any evidence in its most original form while performing a structured investigation by collecting, identifying and validating the digital information for the purpose of reconstructing past events.[31]

The first step of the forensic investigation entails identification of the probable sources of evidence. It can be a laptop, a smartphone, external hard disk drive or any other device which was used for the commission of the act or maybe it belonged to the victim. Second, preserving the identified data by protecting it from being contaminated or lost is carried out. It is basically securing whatever is contained within a device. In cyberstalking cases, for example, preserving a smartphone can be very crucial. The act of cyberstalking might have been done using a messenger application on the phone but it being a wireless device there is all possibility of wirelessly corrupting the evidence therein. In such cases Faraday bags are used for its preservation. It protects electronics from being damaged by radio frequency interference (RFI) or from an electromagnetic pulse (EMP) by not allowing radio frequency or electromagnetic pulse waves to pass through the material.[32]

After preservation, the requisite information or data is extracted from the device. It can be done by printing or copying the contents to some other device. Various data retrieval softwares are available. Some are open-source while some are paid services. The choice of software depends on the type of data to be retrieved, because there might be occasions where the data might be highly encrypted and there might be times where there is null encryption. The data so retrieved shall then be analysed with apt procedures and finally a report on the findings and all other relevant details shall be prepared which can be presented before the court.

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30. Techopedia, *available* at: https://www.techopedia.com (visited on June 26, 2022).
31. *Ibid.*
32. Privacy Pros, *available* at: https://privacypros.io (visited on June 26, 2022).

Digital footprints become very crucial in cyberstalking investigations. It is the information about a particular person that exists on the Internet as a result of his/her online activity.[33] As for example, the browser history of the offender might reveal a lot of details as regards his activities. These can be deleted by the offender which is impossible for a layman to retrieve, but the forensic experts can methodically do so. An active digital footprint is intentional and purposeful, that is, data left on the internet because it was intended.[34] Likewise, passive digital footprint is created by unintentional data- the data left behind without meaning to, or without having a choice to.[35]

The principle described by Dr Edmond Locard, more commonly known as the Locard's Exchange Principle, that when two objects come into contact with each other something is exchanged and taken away by both objects applies to any criminal act and is true for cybercrimes as well.[36] This is the basis of the transfer and recovery of all scientific evidence.[37] However, the contact between the offender and the victim in cyberstalking cases is in the binary form or so as to say, it is virtual.

From a judicial point of view, the opinion of a digital forensic expert becomes relevant under Section 45A of the Indian Evidence Act, 1872. It says that when in a proceeding, the court has to form an opinion on any matter relating to any information transmitted or stored in any computer resource or any other electronic or digital form, the opinion of the Examiner of Electronic Evidence is a relevant fact.[38]

VIII. Challenges in Cyberstalking Investigations

Some of the key challenges in conducting digital forensics investigations related to cyberstalking can be summarised as under:

1. **Anonymous Perpetrators:** Cyberstalkers frequently go to considerable efforts to hide their identity, employing strategies like proxy servers, VPNs, and anonymous email accounts. It might be quite difficult to discover who an

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33. EdTech Review, *available* at: https://www.edtechreview.in/dictionary/what-is-digital-footprint/ (visited on June 26, 2022),
34. Business Insider, *available* at: https://www.businessinsider.com/guides/tech/what-is-a-digital-footprint?IR=T#:~:text=Your%20digital%20footprint%20refers%20to,behind%2C%20like%20your%20IP%20address (visited on June 26, 2022).
35. *Ibid.*
36. Oxford Reference, *available* at: https://www.oxfordreference.com/ (last visited on June 26, 2022 at 08:45 pm).
37. *Ibid.*
38. Indian Evidence Act, 1872, (Act 10 of 2009).

anonymous cyberstalker is.

2. **Cross-Jurisdictional Issues:** Cyberstalking cases often involve perpetrators and victims in different jurisdictions or countries. Investigating and prosecuting across borders can be complex due to varying laws and challenges in obtaining evidence from foreign entities.
3. **Digital Evidence Preservation:** Digital evidence must be gathered and preserved, but it can be challenging to assure its integrity, especially if the offender has the technical know-how to hide their trails or erase evidence.
4. **Encryption and Anonymization:** Cyberstalking messages and actions are difficult to intercept and decode due to encrypted communications and anonymization techniques. Specialized knowledge and equipment may be needed to decode encrypted data.
5. **Data Volume and Complexity:** In today's digital age, the sheer amount of digital data generated might be daunting. It takes a lot of time and resources to analyse huge amounts of data to spot cyberstalking activity.
6. **Ephemeral Data:** On platforms with self-destructing or ephemeral messaging features, cyberstalking is frequently practised. It is difficult to locate and save evidence before it vanishes as a result.
7. **Social Media and Online Platforms:** Social media and online platforms are frequently used by cyberstalkers as harassment tools. Collaboration with service providers is necessary for investigations, and there may be legal repercussions.

IX. CONCLUSION

Cyberstalking is relatively a new form of crime. The hurdles for the law enforcement authorities to track and apprehend cybercriminals applies significantly in these cases. Also, anonymity is a major concern here. With the wide use of internet and rapid development of technology and platforms for social connections, cyberstalking cases are gradually shooting up the charts not only in India, but on a global scale.

Digital Forensics is very much instrumental to the CJS in cases of cyberstalking. The factor of

anonymity of the offenders can be tackled with the tools and techniques employed by the experts. Constant upgradation of the techniques of cybercriminals mandates proportionate upgradation to the tools and techniques of investigations.

The findings of the study can be summarised as under:

1. The adverse impact of the proliferation of technology is very much evident with the rising number of cases of cybercrimes. Social media platforms are major cause of concern in cases of cyberstalking. Though privacy controls are constantly updated, the nature of cyberspace presents amplitude of possibilities for the cyberstalkers.
2. The impact of cyberstalking can be immediate and long-lasting. The mental health and well-being of the victims is deeply impacted. PTSD symptoms can turn-up at any time during the lifetime of a victim.
3. Digital Forensics is an integral element to the domain of the CJS. However, maintenance of a proper set-up with the requisite resources and personnel can be a tolling and costly affair.
4. The nature of digital evidence entails expertise in its handling and it makes Digital Forensics all the more essential. There are major distinctions between digital evidence and physical evidence and as such an expert proficient in Digital Forensics is preferred for collection and analysis of digital evidence.
5. Neither the Information Technology Act, 2000 nor the Indian Penal Code, 1860 specifically defines and prescribes any punishment for cyberstalking. Though the IPC gives a situational depiction of an act of cyberstalking, it does not specifically incorporate the term 'Cyberstalking' as such. Cybercrimes and conventional crimes, though seems alike when the outcome of the crimes is calculated, are very much different altogether. As such, stalking and cyberstalking are also very much distinctive.
6. Section 354D of the IPC specifically considers cyberstalking against women but neglects the fact that men can be victims of the crime as well. Though statistics reveal women are the primary targets, still there are instances where men fall victim to cyberstalking cases.

The following ideas can be taken as suggestions based on the findings of the research work:

1. Shelving the pace at which technology is developing just to curb the growing rates of cybercrimes will be unreasonable and impractical. Therefore, increasing the digital literacy amongst the masses is more preferrable. Digital literacy in this case not only entails just the operation of a computer or a smartphone, but it signifies being literate in the security and privacy aspects of the cyberworld.
2. Digital Forensics is a developing subject-matter as well as cybercrimes are dynamic and ever-evolving. Therefore, the infrastructure at play, at times may not be comprehensive enough to deal with newfound and critical situations. Hence, periodic upgradation of the tools and techniques in consonance with international developments should be carried out. Well-equipped laboratories at the district level in each state must be mandatorily maintained. Also, research and development of indigenous methods and techniques should be encouraged.
3. Training programmes for the police or investigating authorities should be conducted on the handling of digital evidence thereby also increasing the manpower. It requires special training and with the current state of affairs whereby majority of the things have been digitalized, in most of the crime scenes there is a strong possibility that the first responders will encounter digital evidence. Collaborations with the Interpol and also initiatives for global or regional alliances should be taken up by the Government as regards this.
4. The Information Technology Act, 2000 should be amended to incorporate cyberstalking in a dedicated sense. The Indian Penal Code, 1860 does not incorporate the term 'cyberstalking' and as such changes should be made in the former law as it is a specialized legislation on information technology and also it supersedes the IPC in matters of conflict.

5. Any penal law should incorporate provisions looking at the bigger picture. As such Section 354D of the IPC excluding men as victims is somewhat debatable. Therefore, necessary alterations should be done to the same.
6. Sensitisation of the public on key cyber safety measures should be undertaken by the police or any other authority. This is highly essential as the modern-day affairs necessitates people to engage more over social media and most often people are themselves responsible for making themselves vulnerable to cyberstalkers.

In view of the above findings and suggestions, it is evident that there is no dearth of laws to address the issue of cybercrimes in India. However, cyberstalking as a specific crime has to be defined and penalized. Also, efforts should be made to prepare a stringent ecosystem whereby people are more proficient in the use of technology having due regard to cyber safety tips and measures. Digital Forensic infrastructure being of paramount importance, focus should be applied on its regular upgradation with state-of-the-art facilities, tools and techniques.

BLOCKCHAIN TECHNOLOGY AS THE FUTURE OF INTELLECTUAL PROPERTY RIGHTS: CAPABILITIES AND LEGAL CHALLENGES

"The blockchain cannot be described just as a revolution. It is a tsunami-like phenomenon, slowly advancing and gradually enveloping everything along its way by the force of its progression- DonTapscott"

Eisha Vashishtha*

INTRODUCTION

In the digital realm IPR infringements are rampant with issues such as piracy and unauthorized use of intellectual property causing significant losses for creators and rights holders. The nature of the virtual world makes it a formidable task to spot infringements and enforce the IP laws specially when the creator of IP cannot easily track the infringement of his IP in the vast virtual world. Blockchain technology presents a promising solution for curbing virtual IPR infringements as it has the potential to revolutionize the protection and management of intellectual property rights in the virtual world. It is classified as a "Frontier technology" which as WIPO[1] defines it, is a technology at a juncture of a radical scientific breakthrough with immense real-world implications[2] .The technology offers a wide range of characteristics like security, transparency and a hi-tech way to safeguard digital assets and it can play a significant role in curbing the prevalent IPR infringements. With the rise of every such technology, the role of law comes into immediate focus and it will be essential to address the legal and technical challenges associated with its implementation of blockchain technology to ensure its effective use in the realm of virtual intellectual property rights protection. A systematic approach is required towards the development of this technology and the understanding of its potential impact on the sectors in which it promises to deliver the most. To do this, it will be imperative to understand the way this technology works by the governance as ultimately it will rest on the authorities to open channels to secure the future of intellectual property rights. This will call for a

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1. World Intellectual Property organization
2. https://www.wipo.int/export/sites/www/about-ip/en/frontier_technologies/pdf/frontier-tech-6th-factsheet. (Visited on on 20/09/2023)

symphony between technology experts and law makers to find common grounds and give such answers to the problem with leverage the full potential of blockchain technology. This paper will attempt to understand the features of blockchain technology through the prism of intellectual property rights in the digital and virtual worlds. Throughout the paper, the focus shall remain on the use of these features in protection and management of intellectual property and the viability of blockchain technology, both in technical and legal manner, towards being a legal solution in curbing unabated infringements and fostering the future of intellectual property rights.

INTELLECTUAL PROPERTY RIGHTS IN THE VIRTUAL WORLD

In the virtual world, the intellectual property rights play a critical role in protecting the creative works, innovations, brand identities, businesses and the like operating in the digital space.In the physical world, the major sectors which contribute to IPR registrations include pharmaceutical, auto industry, engineering, agriculture and fashion. Although, it is difficult to quantify the exact proportion of IPR's created in the virtual world compared to the real world, it is safe to say that in the era of digital economy the distinction between the two is becoming increasingly blurred. The rapid growth of this very digital economy and increasing internet penetration have led to a significant rise in the creation of digital content, the content which can and is subject to IPR law to a great extent. Due to the nature of digital space the most commonly generated and enforced Intellectual Property Right is copyright and trademark. Digital works such as softwares, websites, e-books, digital art, video games, multimedia content etc. are some prime examples of virtual copyrights and trademarks which represent a massive industry with a large and independent economy. Some of this digital content has multiple layers of IPR's attracting several IPR laws all at once. Let's take the example of a website, the content created on it can be subject to copyright, the domain name of the website as well as what it represents i.e., a logo or symbol is protected by trademark. In the virtual world patents also may cover software innovations, algorithms and unique digital solutions.

One of the earliest examples of such patent in the virtual world is that of Amazon's "1-click"[3] registered in 1999. Another example is that of Google's patent titled 'Watermarking in a three-dimensional virtual environment'[4] which was granted in 2012. It covers an invention that

3. US Patent No. 5,960,411. The 1-Click patent covers a method for simplifying the online shopping process by allowing customers to make purchases with a single click, using pre-stored payment and shipping information.
4. US Patent No. 8,199,052 B2

provides a method for embedding watermarks into three-dimensional objects within virtual environments like those found in virtual reality or online games. And now we are faced with an absolutely different category of IPR's, the software patents to which the Indian law specifically are yet to allot a place. They emerged sometime in the second half of the 20th century with the hasty development of computer technology and software. The landmark case of *Gottschalk v. Benson*[5] in which the United States Supreme court opened a narrow channel for the patentability of software-related inventions. But it was only in 1982 and with the case of *Diamond v. Diehr*[6] that the patentability of software was more firmly established. In this case, the United States Supreme Court ruled that an invention involving a computer-controlled process for curing rubber was patentable because it involved a specific application of a mathematical algorithm rather than the algorithm itself. These cases set the stage for development and legal regulation of software patents throughout the world. Although assumably the legal regulation of software patents is yet to breach into many IPR regimes of the world including that of India and this may also take a while. But India seems to have a distinct approach to software patentability compared to the United States. Indian patent law i.e., Patents Act of 1970 explicitly excludes certain categories of inventions from patent eligibility including "a mathematical or business method or a computer program per se or algorithms". The software-related inventions can be granted patents if they meet specific criteria, specifically a software invention must have a technical application or contribute to a technical advancement to be considered patentable[7]. The landmark case in India that touches upon software patentability is the 2011 decision by the Intellectual Property Appellate Board or IPAB in the *Yahoo v. Controller General of Patents*[8]. Yahoo sought a patent for an invention related to a method and system for customizing web page content which was initially rejected by the Indian Patent Office. In the appeal, the IPAB upheld the rejection, stating that the invention was a computer program per se and so not patentable under s. 3(k) of the Patents Act, 1970. The IPAB's decision in this case provided clarification on the interpretation of "computer program per se" and set a

5. 409 U.S. 63 (1972)
6. 450 U.S. 175 (1981)
7. Patents Act, 1970S.3(k)provides an interpretation on patentability of software-related inventions.
8. OA/22/2009/PT/DEL, Intellectual Property Appellate Board (IPAB), Order dated 8th December, 2011

precedent for further legal regulation of software-related inventions in India and so far, the legal situation remains the same. Turning the attention to a different end of developing technology we see the arrival of the blockchain-based cryptocurrencies and non-fungible tokens building a whole new genre of trade in the virtual world. NFT's specifically allowed the creation of even more virtual IP with one called "Merge" selling for US$91.8million. This bought great attention everyone was minting them on blockchain and selling them. But questions relating to the intellectual property took a centre stage when a particular person created an NFT resembling a "Hermes" handbag which is an international fashion label protecting each of its designs with IP. The NFT was put up for sale in the *Metaverse* virtual shop of the NFT creator called *"MetaBirkin"*. The matter went to the court for Trademark infringement and in a landmark case[9] the court, for the first time in world's history, extended the spectrum of IPR's into a virtual world by acknowledging trademark infringement and providing relief to *Hermes.* But it's worth thinking that if an NFT created in the virtual world is reproduced in the real world, would the same set of laws apply? As the technologies progress, the legal framework will have to tackle such ambiguous grey areas which are product of such technologies and it is certain that they will affect IPR by either easing its protection or make difficult further ahead. In such a scenario it is very vital to keep continuous track of these developments and as technology advances and the digital and virtual worlds becomes more intertwined with our daily lives and the importance of safeguarding these rights becomes progressively significant. But one the other hand, we must also ponder, whether the blockchain technology, in this case, can for once be the solution to IP infringements? I would explore the answer to this question further in this paper.

CHALLENGES IN PROTECTING VIRTUAL IPR'S

Today, steering the digital landscape by IPR's is a complex and immensely compounded situation. IPR's could be treated as virtual property although the reverse may not always be true. An analysis of such challenges is vital to deduce the extent of IPR protection needed to be given in the digital and virtual world. *Firstly*, it can be challenging to determine the nature of virtual property. The question will be whether the virtual property should be treated as copyrightable content like software or if it should be considered a separate category of property altogether like

9. Hermès Int'l v. Rothschild, 22-CV-384 (JSR) (S.D.N.Y. May 18, 2022) August 30 , 2022).

software patents. *Secondly,* the infinite replicability of virtual IPR's without any loss of quality and every copy appearing to be authentic or original can complicate the enforcement of intellectual property rights in virtual worlds as it becomes difficult to control this unauthorized duplication and distribution of copyright protected content in the endless virtual world. *Thirdly*, a massive amount of IPR's is created by users themselves rather than the platforms on which such IPR's are created. This raises questions about the ownership and control of user-generated content. It can also be controlled by the platform owners via an end-user license agreement which may deprive the rightful owner of moral and economical rights attached to IPR's. *Fourthly,* the internet operates across borders thus making it difficult to enforce IPR's in different jurisdictions. This challenge is heightened by differences in intellectual property laws and regulations amongst different countries. *Fifthly,* the monumental difficulties in detecting infringement and the infringer confounds the enforcement of IPR holder's rights further and also making it difficult for him/her to detect infringement in order to report it to enforcement authorities and since the burden of proof lies with the right holder, it may amount to great legal expenses as well. Apart from the above-mentioned challenges, a unique question attributed to virtual IPR's is determining the economic value of IPR's as it is a daunting task and without which it is frivolous to seek and enforce IPR's. New technologies such as artificial intelligence, virtual reality and blockchain have the potential to significantly impact the protection and enforcement of virtual IPR's. It is and will be a colossal task for policy and law makers to keep up with the pace of these development and ensure protection of virtual IPR's.

BLOCKCHAIN TECHNOLOGY & ITS GENESIS

Blockchain technology is a decentralized distributed ledger system that enables secure and transparent recording of transactions. A distributed ledger system is a digital database or record-keeping system that stores transactional data across multiple computers in a decentralized manner. Each computer in the network maintains a copy of the entire ledger which ensures that the data remains safe and secure. It is also an open-source technology that allows anyone to examine the code and verify the integrity of the system. This feature ensures that trust is generated amongst the users. This is also the key feature of blockchain technology which makes it so desirable towards achieving cyber safety. But the technology didn't just take shape overnight. The history of blockchain technology can be traced back to the early 1990's when

cryptographers *Stuart Haber and W. Scott Stornetta* introduced the concept of time-stamping digital documents to ensure their authenticity and prevent tampering. In 1997, Adam Back[10] developed 'Hashcash', a proof-of-work algorithm that required users to solve a cryptographic puzzle in order to send email. This concept later became integral to blockchain's consensus mechanism. Then in the concept of 'Reusable Proof of Work' developed by *Hal Finney*[11] in 2004, aimed to address the double-spending problem[12] which was a major challenge in digital currencies usage.

The introduction of Bitcoin in 2009which bought the technology to the attention of the masses, came during a period of financial crisis[13] and growing distrust in centralized financial institutions. The Bitcoin was developed and introduced pseudo anonymously by *Satoshi Nakamoto.* By making blockchain technology available to all, he aimed to create a decentralized financial system that could operate independently of banks and governments. This could effectively reduce the potential for fraud, corruption and mismanagement. The success of bitcoin and the now availability of blockchain framework attracted many cryptocurrency creators and thus started the era of cryptocurrency craze. Then there was the Ethereum's launch in 2015 which popularized the concept of smart contracts, which are self-executing contracts with the terms of the agreement directly written into code. Fast forward to 2020's, we see that the tech world giants such as IBM and Microsoft are offering blockchain-as-a-service or BaaS solutions. Not only the private sector caught the blockchain train but the governments also hitched a ride to explore the potential of blockchain technology in various sectors. As of 2023, most of us are aware of non-fungible tokens or the NFT's and many are eager to learn their way into minting them as a new and profound way to become a part of the technology and also make some serious money out of its use.

At this junction an important question comes to mind, why did *Satoshi Nakamoto* choose not to patent blockchain technology? It was, by far, a rare event. It seemed to have stemmed from a

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10. Adam Back is the CEO of Blockstream and the inventor of Hashcash, a process used for mining Bitcoin..
11. Hal Finney was an American cryptographer. He received the first bitcoin transaction from bitcoin's creator Satoshi Nakamoto.
12. The double-spending problem refers to the potential risk in digital currencies, where a user spends the same digital token or coin more than once making it possible for users to create duplicates of their digital currency and thereby defrauding others.
13. The 2008 collapse of Lehman brothers in the United States of America.

deep distrust in the current banking and financial system handled by the government. But besides his reasoning for doing so, by not patenting the technology he ensured that it remained freely accessible to anyone interested in using or building upon it. *Satoshi Nakamoto's* decision to not patent the invention of Bitcoin and blockchain technology aligns with the core principles of decentralization, open-source collaboration and fostering innovation. Precisely here, a silhouette of opportunity took shape for intellectual property rights which I would be discussing in the later part of this paper. But needless to say, Satoshi's choice has significantly contributed to the rapid growth and development of the blockchain ecosystem.

PROGRESSION OF BLOCKCHAIN TECHNOLOGY BEYOND CRYPTOCURRENCIES

The need for the evolution of blockchain technology beyond cryptocurrencies arises from the realization of that fact that blockchain can be of immense utilization and value to a wide range of applications and industries specifically banking, finance and even governance. Specifically, in area of banking and finance the need of this technology cannot be over emphasized and so it becomes pertinent to examine the features of blockchain technology to determine how it can support these sectors. Many industries suffer from a lack of transparency which lead to issues like fraud and corruption. Blockchain technology can be a solution to this by providing a decentralized and transparent system for recording and verifying transactions or data and thereby increasing trust among participants and improving overall accountability. Since blockchain technology also supports for direct peer-to-peer transactions it eliminates the need for intermediaries in various processes furthering transparency in the process.

A major development through blockchain is the introduction of smart contracts on platforms like 'Ethereum' has enabled the automation of various processes leading to increased efficiency and reducing costs[14]. The Blockchain technology employs advanced cryptographic techniques to secure data which as an important feature can be particularly valuable in industries where sensitive data is regularly exchanged. This could include sectors like banking, corporate and healthcare. Blockchain can also be used to secure the vast amount of data generated by internet of things or IoT devices and enable decentralized communication amongst them. An excellent

14. J.P. Morgan Bank has developed a blockchain-based platform that uses Quorum, a permissioned version of Ethereum. IIN enables member banks to exchange information related to cross-border payments in real-time.

example of the use of blockchain existing is its use in the supply Chain Management is *'TradeLens'* which is a blockchain-based supply chain platform developed by *IBM* and *Maersk.* It provides a real-time tamper-proof record of transactions and documents such as bills of lading, customs forms, invoices etc. which are all shared among the various parties involved in the supply chain management system. In case of healthcare, blockchain technology can help streamline the sharing of patient records among hospitals and in turn ensure data privacy. Another critical development of blockchain beyond cryptocurrencies has led to innovations like decentralized finance or De-Fi and non-fungible tokens. Talking about NFT's, a platform[15] that tracks decentralized applications and NFT market places reports that the NFT market saw explosive growth in 2021, with sales reaching over $2.5 billion in the first half of the year. As of March, 2023, it stated that the NFT's saw a doubling in traded volume in with a 137.04% increase[16].The statistics makes it abundantly clear that blockchain technology as an innovation has the potential to disrupt traditional industries and create new opportunities for growth and development.

CAPABILITIES OF BLOCKCHAIN TECHNOLOGY FOR VIRTUAL INTELLECTUAL PROPERTY RIGHTS PROTECTION

Blockchain technology comes along with several unique features like immutability, decentralization, tokenization etc. which are the very reasons it can become an indispensable tool in the hands of law enforcement authorities in protecting the IPR's. I would like to discuss these features vis à vis the intellectual property rights to shed light on the fact that blockchain technology can be the breakthrough needed to ensure the innovation is fostered without fear in the digital landscapes. Blockchain can be used to establish a tamper-proof record of creation and ownership for virtual assets. By registering the asset on the blockchain, creators can obtain an immutable timestamp proving when the work was created which can help establish their rights in case of disputes. In case of copyright, the challenge of ownership in digital world, as discussed earlier, can be countered by storing copyright information on the blockchain. This way the creators can ensure that their rights are easily accessible, traceable and verifiable. Further, the

15. Dapp Radar
16. Sara Gherghelas, 'NFT Marketplace War Doubles Trading Volume in First Quarter' (30th Mar 2023) https://dappradar.com/blog/dappradar-dapp-industry-report-q1-2023-defi-nft-crypto *available* at 01/09/2023

immutability of blockchain can help prevent unauthorized use or distribution of copyrighted material and facilitate proper attribution. So, a block in the blockchain will, in essence, simply act like an ownership certificate which can be authenticated in case of a dispute. In case the creator decides to license his work, smart contracts[17]on the blockchain platform can be very convenient and fool-proof. These smart contract can automate licensing agreements, royalty distribution and apply desired restrictions on one simple click. This can be particularly useful to IP Rights manging societies like the Indian Performing Right Society which currently over see the licensing and royalty collection on behalf of performers who are registered members of the society and holding a valid copyright in music, theatre, movies and the like. But even a step further is possible with the use of blockchain technology for creators of music and performers which will completely eliminate any middleman in future. To understand this let's consider a situation, about two decades ago if a person had to buy music of a particular movie in India, he/she would approach a shop and buy the compact disc or CD of such music manufactured by the music recording company thereby the music would reach us quite directly from the music maker. Nowadays, the maximum music we listen to is available on streaming platforms like *spotify" youtube music, amazon or jiosaavn* to name a few and the music makers are selling the streaming rights to these platforms on payment-per-stream basis which is very low. So, in essence these platforms have become a middleman costing more to creators and on the other hand use the subscriber's data for marketing on subscription to such platforms along with charging them too for the same music. These platforms, based on this simple transaction between music makers and listeners have become a colossal industry and is expected to show an annual growth rate of 7.08% for 2023-2027, resulting in a projected market volume of US$33.97 billion by 2027[18] and yet it hasn't helped musicians a lot and they are now almost forced to sell music rights to these platforms. To cope up the music industry channels aggressive marketing and data selling which is projected towards subscribers to gain more views and personal data. Blockchain technology can be a potential solution here. If a music artist could issue a NFT or

17. A smart contract is a computer program that automatically enforces the terms and conditions agreed upon by the parties involved
18. https://www.statista.com/outlook/dmo/digital-media/digital-music/music-streaming/worldwide last seen on 12/09/2023

non-fungible token, based on blockchain, of his work directly to the listeners then it would cost both parties lesser along with giving a reliable ownership of such music to the creator. In addition to this, IPRS may also be done away with in the future and the music makers need not share their royalty with such organizations by simple licensing their NFT directly to desirable parties.

Perhaps, the most important contribution of blockchain can be towards preventing IPR infringements and online piracy. Blockchain can help authenticate virtual goods and prevent counterfeiting by providing a transparent and tamper-proof record of their origin. By tracking the ownership and transfer of virtual assets on the blockchain it becomes more difficult for counterfeit goods to enter the market or to claim ownership of a copyrighted work. Also, blockchain can help track and identify instances of piracy making it easier to enforce intellectual property rights. Talking about the enforcement of IPR's, this very characteristic of being decentralized and borderless blockchain technology can help facilitate cross-jurisdictional enforcement of intellectual property rights. By providing a universally accessible record of virtual IPRs, blockchain can make it easier for rights holders to assert their claims and enforce their rights even in different jurisdictions.From the governance point of view, a blockchain based platform can be controlled and maintained by the country's IP offices which generally administer and facilitate the current IP laws. A blockchain based IP platform within state's control will also encourage foreign entities desiring to enter Indian markets with more confidence. Indian government has long begun the initiative to establish such blockchain based platforms by the "Centre of Excellence in Blockchain Technology" under the aegis of The Ministry of Electronics and Information Technology[19] in collaborative efforts with many private players working on private, public, consortium and hybrid blockchain platforms. The products of offer already promise a huge advantage to general public in securing tamper-proof public services document. The same is easily foreseeable for the future of IP registrations and management.

At this point it may seem that blockchain technology is a revolutionary system which can be adopted to save millions or even halt the IP infringements. Yet, blockchain seems to be marred

19. https://blockchain.gov.in/platforms.htmllast seen on 15/09/2023

with some very critical issues which challenges the potential that it reflects. Although if adopted and implemented, blockchain promises to resolve several issues associated with creation and enforcement of IPR's but the road to that path is seemingly sluggish at the moment. The next part of this papers looks into such critical issues with may result in slow adaptation of the technology in a wider range of things.

LIMITATIONS AND LEGAL CHALLENGES

Despite the potential benefits of blockchain technology, many organizations and industries are slow to adopt it. The technology is still in an evolutionary phase and could present a lack of understanding about itself and the potential risks which may come along its adoption. One of the most significant issues with blockchain technology is its limited ability to scale efficiently. Since blockchains fundamental framework consists of blocks of information stored in a chain life form, as the number of transactions increases, the size of this chain grows, leading to longer transaction times and increased storage requirements. This can make it difficult for blockchains to compete with existing centralized systems. This framework is also relatively complex compared to traditional systems which can make it challenging for users to understand and organizations to adopt. To understand this better we can consider an example, say a person is granted a patent certificate by a state controlled blockchain based IP Platform and eventually many blocks come after it. After 20 years and in absence of any patent of addition, the IP office may need to change the information in the corresponding block or add new block, but to retrieve the old block a significant time will be consumed after the elapse of 20 years. Since blockchain technology is not environmentally friendly currently and the transactions occur through a process of "mining"[20] , it may seem that the whole idea is more of a work than the benefits it promises. With the environmental degradation already a pressing matter of attention and action throughout the world, it remains to be seen if this technology would be able to overcome this challenge in future. Further, most blockchains operate independently and cannot easily communicate or share data with other blockchains. This lack of interoperability can limit the access to information relating to IPR's which may be stored across other blockchains thereby

20. The process of solving a complex arithmetical problem to make a transaction on a blockchain.

rendering it difficult for authorities over different jurisdictions to authenticate ownership of IP. Since jurisdiction is a country-specific legal matter, different countries have varying legal frameworks for intellectual property rights and it would be daunting to determine which laws apply when dealing with cross-border enforcement of IPR's based on a blockchain platform [21]. These platforms may not be recognized by some countries altogether and so traditional registration systems and institutions are still required for granting legal rights and protection. So, a uniform world-wide adaptation of the technology may be needed which is as difficult as it sounds.

Blockchains may also pose an issue of determination of liability. The use of smart contracts for managing intellectual property rights may give rise to questions of legal liability in case of disputes or technical issues. In case, a blockchain is derecognised, the parties effected under a smart contract will be left in lurch without legal remedies. Although there aren't many legal precedents present to establish a particular stance of courts towards disputes arising out of the use of blockchain based platforms, it can be noted that in the case of *B2C2 Ltd. v. Quoine Pte Ltd.*[22], the court showed trust in the technology. The case involved a dispute between a cryptocurrency trading platform, *'Quoine'* and a market maker *B2C2* over a trade that was executed at an abnormal exchange rate due to a glitch in *Quoine's* software. The Singapore International Commercial Court ruled in favour of *B2C2* ruling that *Quoine* had wrongfully reversed the trade and the blockchain-based record of the transaction should be considered final and immutable. This case certainly brings relief to users and operators of blockchain based platforms as the features of the technology are recognized legally by an international court. But a single precedent dose not present the regulatory guidelines which are needed to be made to ensure that law is in place before disputes arise.

As mentioned earlier, blockchain technology is still relatively new and evolving and regulatory frameworks have not yet fully adapted to address its unique characteristics and so formulating laws relating its use is still and matter of research as it is yet to be seem what kinds of further new

21. This is an existing situation between several IPR registries like Binded, Verisart, Bernstien and IPCHAIN Database to quote a few.
22. (2019) SGHC(I) 03

and unique challenges can we come across by the use of this technology. This uncertainty can create complications for organizations looking to implement blockchain solutions and can slow the pace of innovation.

POSSIBLE SOLUTIONS

The use of blockchain technology for the management and protection of virtual intellectual property rights assets may not be viable at this stage but only due to certain technicalities and regulatory perception. But a balance can be achieved between the benefits of using blockchain technology for managing virtual IPR assets and addressing the legal implications and challenges. In fact, several governments and public institutions around the world have shown interest in exploring the potential of blockchain for IP protection and management. In 2018, the European Union Intellectual Property Office launched the *"Blockathon"* event to explore potential blockchain-based solutions to combat counterfeiting. In 2019, the U.S. Patent and Trademark Office held an initiative[23] to discuss the potential benefits and challenges of using blockchain for IP protection and management indicating an interest in exploring the technology.

Along with such government initiatives, various stakeholders need to work together to create a harmonized legal framework that recognizes blockchain-based IP registries and smart contracts to create legal certainty and facilitate cross-border IP transactions. For this purpose, it may be necessary for the countries to come to a common understanding regarding the use of technology and the parameters which need to be employed and worked within. This will ensure a smooth adaption of a uniform blockchain platform as well create a standardized method of use by the users. At the international level as well a more extensive participation is required onthe WTO's[24] stage to reach a consensus on the use of blockchain technology-based IP platforms. Further, building awareness and understanding of the legal implications of using blockchain technology for virtual IPR assets among creators and IP holders is also very critical as this can help to minimize the risk of infringement and related legal issues.

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23. U.S. Patent and Trademark Office, "Inventing AI: Tracing the diffusion of artificial intelligence with U.S Patent",October 2020
24. World Trade Organization

WIPO could also be a frontrunner of this change by taking up the onus of maintaining a single and all-accessible blockchain database just as does for administering several IPR treaties. Another way WIPO could lead is by developing alternative dispute resolution mechanisms like arbitration or mediation designed specifically to address disputes as it already sits in this role of providing alternative dispute resolution between countries. Though many strategies can be developed in the course of bringing blockchain and IPR protection together, the forthcoming time will determine how the use and development of blockchain may actually affect the exercise of the rights of IP holders.

CONCLUSION

Blockchain technology can definitely be an answer to several existing problems which occur daily in day-to-day human transactions across the world. The growth of blockchain has been a blockbuster in certain spheres and in others, not so much. Yet, the technology without doubt promises to be a desirable resolution in dealings with matters of digital finance and cyber security to say the least. We are quickly arriving at a decisive stage and must urgently consider the challenges discussed if the technology is to be the future in protection of the IPR's and to explore innovative solutions to overcome existing legal issues. Needless to say, it is important to note that the legal landscape and the adoption of blockchain technology for IP protection is in its nascent stage. As the technology becomes more widespread and integrated into various industries, it is possible that legal cases involving these registries may arise in the future. We may observe in the coming time that as the use of blockchain for IP protection becomes more mainstream, it is likely that legal disputes and cases will emerge involving questions of jurisdiction, legal recognition, enforcement and liability. In such a scenario, it is essential for legal professionals, policymakers, IPR holders as well as the industry stakeholders to work in tandem and closely monitor the development and integration of blockchain technology in the IP space. This will enable them to better understand the legal implications and challenges associated with using blockchain for IP protection and adapt the existing legal frameworks accordingly. Such a fundamental and solid legal framework contributes towards a country's growth and that of an individual alike.

CONTEMPORARY MENACE OF MARINE POLLUTION IN INDIA: A GROSS VIOLATION OF SUSTAINABLE DEVELOPMENT DICTUM

Dr. Sanyogita*

Namrta Sharma**

"We have not inherited this Earth from our forefathers; we have borrowed it from our children."

-Lester Brown

INTRODUCTION

Pollution and over-exploitation know no limitations and today are not only confined to terrestrial ecosystems; but has also been extended to marine ecosystems. The huge water bodies called seas, are also falling prey to pollution and over-exploitation, in the name of development. *Homosapiens are* polluting the seas, without having regard to its aftermath. Oceans make life possible on this Earth.[1] Oceans cover two-third surface of the Earth and due to this reason, oceans are also deemed as bloodstream of the planet Earth. The United Nations in its Report *"Green Economy in Blue World"* termed vast resources of the oceans as 'cornucopia' for human civilization. Here,'cornucopia' referred to a Greek mythical cone shaped ornament which have everything in abundance, whatever is desired from it, by its owner.[2] The bulk of resources in oceans and their importance to economy, can be well understood by usage of term 'cornucopia' by the United Nations. Presently, for their respective development, nations are utilizing oceans for extracting minerals, extracting oil, extracting gas, using marine flora and fauna for pharmaceutical purposes, getting fish & sea food etc.[3]

The marine ecosystem or oceans are enriched of natural resources and due to this reason, these vast water bodies are getting more & more involved in the whole process of development.[4]

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1. C. Meiaraj and S.P Jeyapriya, "Marine Water Quality Studies at Tuticorin Harbour Coastal Area" 48(06) IJGMC 943-945 (2016).
2. Mohammad Rubaiyat Rahman, "Blue Economy and Marine Cooperation in the Bay of Bengal: Role of Bangladesh" 194 SD 356 (2016).
3. H.N Misra (ed.), Managing Natural Resources Focus on Land and Water 102-104 (Ashok K. Ghosh, PHI Learning Private Limited, New Delhi, 2014).
4. *Ibid.*

Development involves a progressive transformation of a nation and its economy. Therefore, marine ecosystem help building economy of any nation. The satisfaction of human needs and aspirations is the major objective of development.[5] But development can never be done without affecting environment. For instance, any country relies upon industries for its advancement. Industries in turn exploit our natural resources. Thus, development necessarily as well as ostensibly, introduce changes in physical ecosystems while exploiting natural resources. The extraction of oil & minerals from the chest of oceans, for satisfying the needs of growing population; uncontrolled construction near coastal areas; diversion of watercourses for enhancing agricultural productivity; commercialization of forests for getting much by-products; genetic manipulation of different species for better breeds etc. all are the instances of development, accompanied by changes in environment.[6] In fact, no development is possible without affecting natural environment and so is the case of oceans.

If seen from the lens of an environmentalist or scientist, the existence of pollution free oceans are utmost important for sustenance of human race. However, in the course of development in India, marine environment is not just being utilised for its natural resources but is also being polluted. Initiatives are being taken by Government of India to abate marine pollution, after looking into the gravity of hazard. Every year, thousands of tonnes of garbage, glass, metals, sanitary clothes etc. reach the oceans. Working Groups were begun to be set up by the Ministry of Environment and Forests (now Ministry of Environment, Forest and Climate Change) far earlier in 1982, acknowledging the problem of marine pollution in India. The prepared guidelines by these Working Groups for development of beaches, promulgated in July 1983, inter alia, stated:

> *"The traditional use of sea water as a dump site from our land-derived wastes hasincreased the polluted loads of sea and reduced its development potentials, including the economic support, it provides to the people living nearby. Degradation and misutilization of beaches are affecting the aesthetic and environmental loss. These could be avoided through prudent coastal development and management based on assessment of ecological values and potential damages from coastal developments."*[7]

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5. World Commission on Environment and Development, Our Common Future 43 (Oxford University Press, Delhi, Reprint, 1987).
6. *Id*. at p. 44-45.
7. Indian Council For Enviro-Legal Action Vs. Union Of India & Others (1996)5 SCC 281

A study named as "Health Status of the Coastal Marine Environment of India" done under the auspices of the Regional Center, National Institute of Oceanography reveals alarming situation of Territorial Waters of India. It depicts that estuaries, creeks and bays have been polluted to varying degrees in India. Apart from this, marine plastic pollution is also on rise. The study discloses that sewer, domestic waste, industries, plastic, fertilisers, pesticides are some major pollutants causing marine pollution in India.[8] The Ministry of Ports, Shipping and Waterways has unequivocally observed that increasing reliance on the coastal and international shipping for the purposes of trade & commerce (i.e. development), has caused popping up of various issues in India, that need to be addressed. India's coastal areas have a rich biodiversity both on land and under the sea, and include estuaries, lagoons, mangroves, backwaters, salt marshes, rocky coasts, sandy beaches and coral reefs. This diverse marine ecosystem, however, is exposed to increasing pressures.[9]

Several studies have reported an increase in deaths of marine animals due to plastic ingestion and abandoned fishing nets. Recently, during International Coastal Cleanup Day (ICC) Campaign, 2022, the Indian Coast Guard collected 56,974 kilograms of marine litter & 25,561 kilograms of plastic litter from the selected coasts.[10] However, during ICC-2021 Campaign,38,008 kilograms of marine litter was collected, from selected coasts.[11] Thus, the increasing trend may be noticed, in bulk of marine litter, as per the official data released. Some other preventive measures for containing of marine pollution include *Swachh Sagar, Surakshit Sagar Abhiyan,* aiming to clean 75 beaches across India; establishment of National Centre for Coastal Research (NCCR) as an attached office to Ministry of Earth Sciences for monitoring scientific trends of marine pollution and its associated impacts etc.[12] Humans are neglecting the universal truth that deleterious effects to the oceans can affect the human survival itself and also can never be reversed. Moreover, natural resources are scarce and shall be optimally used having regard to the needs of future generations.

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8. Pollution of Sea and India, available at: https://incois.gov.in/iogoos/abstracts/abstract121.html (Visited on May 9, 2024).
9. Government of India, Report: Maritime India Vision 2030 (Ministry of Ports, Shipping and Waterways, 2021).
10. Ministry of Earth Sciences, Report: Cleaning 75 beaches in 75 days: Clean Coast, Safe Coast (National Centre for Coastal Research, 2022).
11. Marine Pollution in India, *available* at:https://indiancoastguard.gov.in/content/1666_3_CoastalCleanup.aspx (Visited on September 9, 2023).
12. *Supra* Note 10.

Marine Ecosystem: A Boon for Environment& Economy: Oceans play a vital role in ecological balancing and sustaining life around the Earth.[13] Without oceans, this planet would be uninhabitable. The oceans or seas- the marine environment comprise an essential component of global life support system. The World's oceans cover a little less than 71 percent of the planet's surface and play a dominant role in the Earth's biological, geological and chemical processes. Global energy, climate & weather, the hydrological & carbon cycles, atmospheric and physical processes are all critically influenced by the marine ecosystem.[14]

All major weather phenomena viz. the monsoons which are so critical for the agricultural economy, disasters like cyclones, tidal waves, cloud formations, water distribution over the Earth's surface and global temperature variations are attributable to these vast water bodies called the oceans.[15] The oceans generate 50 percent of the oxygen we need, absorbs 25 percent of all carbon dioxide emissions and captures 90 percent of the excess heat generated by these emissions. It is not just 'the lungs of the planet' but also largest 'carbon sink' – a vital buffer against the impacts of climate change.[16] Apart from this, oceans are home to a large number of species and act as guardian of biological diversity, of the planet. Especially, India is a megadiverse nation because of its unique geographic location and is highly rich in marine as well as terrestrial biodiversity.[17] Oceans provide shelter and food for this marine biodiversity which in turn is used by man for various purposes like food, medicinal, recreational, aesthetic etc.[18]

Besides sustaining life &environment, the marine ecosystem also aids in building economy of any country. Oceans cannot be considered lesser than a boon for any nation especially, India. The coastal line of India stretches for approximately 7,516.6 kilometers[19] and has an extensive

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13. Dr. Arup Poddar, "Marine Pollution and its Regulation" 3(2) IJLSR 145 (2014).
14. H.N Misra (ed.), Managing Natural Resources Focus on Land and Water 101 (Ashok K. Ghosh, PHI Learning Private Limited, Delhi, 2014).
15. *Id.* at p. 102.
16. Seas act as carbon sinks, *available* at:https://www.un.org/en/climatechange/science/climate-issues/ocean#:~:text=The%20ocean%20generates%2050%20percent,heat%20generated%20by%20these%20emissions (Visited on September 11, 2023).
17. Chandrakasan Sivaperuman, Ayyam Velmurugan, et.al. (eds.), Biodiversity and Climate Change Adaptation in tropical Islands Preface(Academic Press, Elsevier, Oxford, 2018).
18. Krishnamoorthy Venkataraman, Chandrakasan Sivaperuman (eds.), Marine Faunal Diversity in India: Taxonomy, Ecology and Conservation 461 (Academic Press, Elsevier, Oxford, 2015).
19. Coastal boundary of India, *available* at: https://en.wikipedia.org/wiki/Geography_of_India#:~:text=It%20is%20the%20seventh%2Dlar gest,7%2C516.6%20km%20(4%2C671%20mi) (Last Visited April 15, 2023).

continental shelf.[20] The importance of oceans for Indian economy can be calculated easily by numerous activities being carried out on Territorial Waters and other Maritime Zones of India. During the financial year 2019-20, India exported 12,89,651 metric tons of sea food, worth US$ 6.68 billion which included frozen shrimp, fish, cuttle fish, squids, dried items, live items and others.[21] As per the latest data available, during the financial year of 2019-20, India produced 24.38 million metric tonnes of crude oil and23.82 billion cubic meters of natural gas, offshore and onshore.[22] About 95 percent of India's international trade by volume and 77 percent by value moves by sea transport.[23] Apart from this the aesthetic nature of oceans are fetching revenue to government by way of tourism also. Submarine cables which serve as lifeline to a country's communication grid, empowers business and also the economic operations of the nation, are also laid on the sea beds. Marine ecosystem acts as host for submarine cables which are vital digital communication infrastructures.[24] Therefore, a rough idea can be drawn of the economic importance of oceans to India or any other nation.

Meaning of Marine Pollution and Its Origin: Earlier oceans were used often for procuring food and transportation; but with the advancement of science & technology and development done by mankind, various other uses of oceans are recognized. But the development never happens in vacuum. Development also have equal and opposite reactions.[25] In economics, development is expressed in terms of Gross Domestic Product (GDP). But economists are not concerned with the environmental aspect of development and its repercussions on the human lives, in the long run. However, some economists like Richard Lecomber through his books, Economic Growth Versus Environment (1975) and *Economics of Natural resources (1979),* stressed that no formula relating to development or growth is valid, unless it takes into account the damage to environment and biodiversity.[26]

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20. Dr. S.C Tripathi and Mrs. Vibha Arora, Environmental Law 676 (Central Law Publications, Allahabad, 7th edn., 2019).
21. Government of India, Annual Report: The Marine Products Export Development Authority (Ministry of Commerce & Industry, 2019-20).
22. Government of India, Annual Report: Emerging India's Progress (Ministry of Petroleum & Natural Gas, 2019-20).
23. Trade in India through oceans, available at:https://commerce.gov.in/international-trade/india-and-world-trade-organization-wto/indias-gats-schedule-forcommitments-and-offers/negotiating-group-on-maritime-transport-services-communication-from-indiaresponse-to-questionnaire-on-maritime-transport-services/ (Visited on September 9, 2023)
24. TRAI and submarine cables in India, *available* at: https://www.trai.gov.in/sites/defaultfiles/PR_No.54of2023.pdf (Visited on August 29, 2023).
25. *Supra* Note 6.
26. Infra Note 35.

Man is exploiting the wealth of oceans and affecting the marine ecosystem for numerous developmental purposes & economic gains viz. for getting food, obtaining oil, acquiring of gas, mineral procurement, getting flora & fauna for medicinal purposes etc.[27] The repercussions of developmental activities on marine environment is extreme degradation of marine resources, marine pollution and loss of marine biodiversity. Thus, development and economic progress without paying any heed to environmental aspects, had become a problem in 20th century and among other kinds of pollutions also originated marine pollution. As the novel utilities of oceans got discovered, the magnitude of pollution and level of exploitation also aggravated.[28] This started to affect the wholesomeness of the marine water. This gave rise to a new kind of pollution which came to be known as "marine pollution". Thus, the contamination/pollution of marine environment was termed as marine pollution. It can be better understood by analyzing some definitions:

According to Oxford Advanced Learner's Dictionary,'Marine'[29] means connected with the sea and the creatures and the plants that live there. However, the word 'Pollution'[30] refers to the process of making land, air, water etc. dirty. Therefore, in ordinary words, the marine pollution can be interpreted as process of making sea water dirty and thus, affecting the flora and fauna present therein. But this definition is narrower, as it doesn't take into account the associated effect of marine water contamination on humans.

Group of Experts on the Scientific Aspects of Marine Pollution (GESAMP) ,[31] as part of the basic framework of the United Nations Convention on the Law of the Sea (UNCLOS) defines marine pollution as the "introduction by man, directly or indirectly, of substances or energy into the marine environment (including estuaries) resulting in such deleterious effects as harm to living resources, hazards to human health, hindrance to marine activities including fishing, impairment of quality for use of sea water, and reduction of amenities."

As per the Intergovernmental Oceanographic Commission marine pollution is, "the introduction by man, directly or indirectly, of substances or energy into the marine environment (including estuaries), resulting in such deleterious effects as: harm to living resources; hazards to human health; hindrance to marine activities including fishing; impairing the quality for use

27. *Supra* Note 3.
28. Mahesh Mathur, Legal Control of Environmental Pollution, Jurisprudence and Laws Applicable to Environmental Violation & Prevention, 76 (Deep & Deep Publications, New Delhi, 2017).
29. A.S Hornby, Oxford Advanced Learner's Dictionary 938 (Oxford University Press, UK, 7th Edn., 2005).
30. *Id.* at p. 1167.
31. Clark, Robert Bernard, et.al.,Marine Pollution 2(Oxford University Press, Oxford, 5th Edn., 2002).

of seawater and reduction of amenities"[32].

Therefore, on analyzing all of the above definitions, it can be concluded that contamination of sea water (as differentiated from fresh water ecosystems, due to saline content of sea water) is referred as marine pollution. So, any activity which changes the properties of sea water; makes it unfit for natural purposes, for which it was earlier suitable; affects the life or biodiversity present in it; and even affects the other organisms outside marine environment in any way, can be tagged as activity polluting the marine environment. Such pollution can be done by various ways, to name some, by adding substances whether liquid or solid into the oceans; by exploiting sea bed without adhering to proper scientific precautions; doing nuclear tests at sea beds, affecting the biodiversity present therein; dredging, which affect the coastal ecosystems etc. The list is very long. But all these activities have one single common attribute i.e these all are being done in name of development or progress.

Concept of "Sustainable Development" and Marine Environment: Albeit, development and so the pollution, are not new phenomena. These are as old as the human race; but the magnitude of the pollution and dimensions of pollution has expanded, with the expansion of scope of developmental activities.[33] The exhaustion of planetary resources, mainly the food and energy resources in post-World War era, gave rise to the debates on environment-development relationship. *'The Growth Boundaries'* Report by Club Rome and debates led by Sir Julian Huxley drew the attention of International community towards environmental degradation, by excessive use of natural resources and its further chain implications. This gave rise to a modified and better concept of development called the 'sustainable development'.[34]

The term "sustainable development" was coined for the first time by the International Union for the Conservation of Nature (IUCN), in the year 1980 in its "World Conservation Strategy". At that time, it was insignificant, as it had nothing to do with the development and environmental protection.[35] In 1984, the United Nations established an independent group for identifying environmental strategies which may be complied by the international community, for

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32. Sebastian A. Gerlach, Marine Pollution: Diagonis and Therapy 4 (Springer-Verlag Berlin Haidelberg, New York, 1st edn.,1976). See also Jerome Williams, Introduction to Marine Pollution Control 13 (A Willey Interscience Publication, New York, 1979).
33. K. Chaturvedi, Legal Control of Marine Pollution 10 (Deep & Deep Publications, New Delhi, 1981).
34. Ioan Ianos, Daniel Peptenatu, "Respect for Environment and Sustainable Development"4(1) CJEES 82-83 (2009).
35. Dr. H.N Tiwari, Environmental Law 57 (Allahabad Law Agency, Faridabad, Reprint, 2015).

safeguarding the environment. In 1987, the World Commission on Environment and Development (WCED) published a report entitled *"Our Common Future"*and is considered to evolve the concept of sustainable development. The said report, used the term 'sustainable development' and for the first time, defined it. The Commission was chaired at that time by the Prime Minister of Norway, G.H. Brundtland. Therefore, this report is also called Brundtland Report.[36]

After this, the odyssey of evolution of concept of sustainable development is continuing. The work of World Commission was undertaken as basis for the UN Conference on Environment and Development (UNCED), named the 'Earth Summit'. It was held in the year 1992 in Rio de Janeiro, Brazil. The key outcome of the Summit was 'Agenda 21' document, dealing many aspects of sustainable development.[37] Then onwards, international community is recognizing many facets of sustainable development as per the needs of progressing times.

The principle of sustainable development as differentiated from only development, asks for adoption of frameworks which must be the integration of developmental, social and environmental friendly strategies. Sustainable development stresses upon boosting of economic progress along with safeguarding the environment, for future generations; it also requires guarantying equal opportunities to all, especially the poor. Thus, the concept of sustainable development unifies perspectives amenable to environment, society and economy in long run.[38]

According to the Report of World Commission on Environment and Development named *Our Common Future,* "Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs." The concept of sustainable development thus contains following two key aspects:[39]

(i) The concept of needs, particularly the needs of world's poor. The concept of sustainable development combines the social, environmental and economical approaches of development, all on the equitable basis. Hence, to term development sustainable, it shall also meet the needs of poor strata by strengthening the production base and shall also keep in mind other factors. This is the social plus economical aspect of the principle of sustainable development.

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36. Sustainable development and Article 21 of the Constitution of India, *available* at: https://www.legalserviceindia.com/articles/jud.htm (Visited on April 20th, 2023).
38. Thomas M. Parris and Robert W. Kates, "Characterizing and Measuring Sustainable Development" 28 ARER 559 (2003).
39. *Supra* Note 5.

(ii) The idea of limitation, in light of environment's ability to meet needs of future. Sustainable development requires putting a bar on developmental activities, so far as, they threaten the ability of environment to meet needs of future generations. This facet of the sustainable development represents the environmental concern on basis of intergenerational equity.

Thus, it can be said that unsustainable kind of development occurs when current progress is being done at the expense of future generations and without any regard being paid to economical and social concerns. All phenomena which jeopardize the use of existent natural resources by future generations like, irresponsible planning, environmental degradation through exploitation or over-exploitation of natural resources, generation of excess wastes & pollutants are some examples/reasons leading to unsustainable development.[40]

The dictum of sustainable development is applicable to the whole ecosystem and its constituents including the oceans, as all of them are Nature. Sustainable Development in respect of oceans therefore, means sustainable economic development through utilizing and exploring the resources of the blue waters without affecting its wholesomeness and genuine uses.[41] If the marine environment is being polluted in course of any developmental activity or otherwise, that act is in contravention of the principle of sustainable development. This is so because this disables the marine environment to meet the needs of future generations. Also, if the natural resources within oceans are being over-exploited by present generation, in the name of development, then also the development can't be termed as'sustainable'. This is so because, this kind of development overlooks the inter-generational equity facet of sustainable development.

Legal Sanctity of Sustainable Development Dictum in India: The term "sustainable development" has acquired legal status, as it has origin in treaties at international level.[42] International agreements, understanding or treaties to which our country is a part, serves as good source of law and they can be considered by the Courts. While adjudicating a matter. The Constitution of India is the *suprema lexi.e* supreme law of land and it can also be said tha[43]t it is mother of all the other laws. Any law or rule which is in contravention to the Constitution of

40. Ashok Kumar Verma, "Sustainable Development and Environmental Ethics" 10(1) IJES 2 (2019).
41. Mohammad Rubaiyat Rahman, "Blue Economy and Marine Cooperation in the Bay of Bengal: Role of Bangladesh" 194 SD 357 (2016).
42. *Supra* Note 36.
43. Dr. H.O. Aggarwal, International Law & Human Rights 58 (Central Law Publications, Allahabad, 22ndedn., 2019).

India can be declared *ultra vires* to the Constitution and hence, unconstitutional by the Constitutional Courts while judicially reviewing those laws.[44] Initially, the Constitution of India did not contain any express provision for the protection of environment. It was in the year 1976 that the Constitution 42nd Amendment Act, 1976 introduced, Articles 48A[45] and 51A[46] (g) in the Constitution. Both these Articles added express environmental friendly provisions in the Constitution of India. However, the right to environment and right to sustainable development was always implied in the Constitution of India, under the wide umbrella of Article 21. The Hon'ble Supreme Court of India by giving purposive interpretation, gave the right of healthy environment and sustainable development, a place under Article 21 and recognised these rights as fundamental rights. The Hon'ble Supreme Court in catena of cases has unequivocally held that right to sustainable development is implicit in right to life, guaranteed under Article 21 of the Constitution. This means that right to sustainable development is fundamental right as per the interpretation afforded to the Article 21 of the Constitution. This further leads to the conclusion that if in any case, the dictum of sustainable development is compromised, same remedies as are available for the infringement of fundamental rights, are available upon the compromising of this dictum.

Valuing the principle of sustainable development, the Apex Court in *M.C Mehta v. Union of India*[47] has ruled that balance has to be maintained between environmental protection and developmental activities, which can be achieved by strictly following the principle of sustainable development, without which the life of coming generations will be in peril. A three-Judge Bench of the Apex Court in *I.R Coelho v. State of Tamil Nadu* further said that the concept of sustainable development is to be treated as an integral part of life under Article 21 of the Constitution of India.[48] According to the Honourable Supreme Court, the doctrine of sustainable development, has to be held not just an empty slogan, it is required to be implemented, taking a pragmatic view and not on *ipse dixit* of the Court.[49]

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44. The Constitution of India, Article 13(2).
45. Article 48A provides that "The state shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country."
46. Article 51 A(g),"It shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures."
47. AIR 1987 SC 1965.
48. AIR 2007 SC 861.
49. Intellectual Forums v. State of A.P. (2006) 3 SCC 549.

In *State of Himachal Pradesh v. Ganesh Wood Products*,[50] the Supreme Court held that the present generation has no right to imperil the safety and well-being of the next generations to come thereafter. Recognizing the intergenerational equity aspect of principle of sustainable development, the Supreme Court in *Rural Litigation Entitlement Kendra, Dehradun v. State of U.P,*[51] held that natural resources are the permanent assets of mankind and shall not be intended to be exhausted in one generation only. Therefore, the Apex Court while dealing with environmental matters, always keep in mind the worthy constituents of the principle of sustainable development whether it be the intergenerational equity or the Polluter Pays Principle or any other. Now, it is established that even the marine ecosystem is facing the problem of over-exploitation and pollution. There had been the instances and incidents which triggered the reaction of general public in form of the Writ Petitions before the Constitutional Courts. While deciding such matters pertaining to the growing menace of marine pollution, the Courts strictly relied upon the principle of sustainable development.

While facing questions pertaining to sustainable development of marine ecosystem, the Supreme Court pronounced a historic judgment in case of *S. Jagannath v. Union of India*[52]. The case dealt with the ecological and social implications of commercial shrimp farming in Coastal Regulation Zones (CRZ) of India. In this case, the petitioner sought the enforcement CRZ Notification, issued by the Government of India. The petitioner also asked for the stoppage of intensive and semi-intensive shrimp aquaculture in the fragile coastal areas; prohibition to use wet lands for shrimp farming; the constitution of National Coastal Management Authority to safeguard the marine life and coastal areas. The question before the Court was whether intensive shrimp farming through shrimp aquaculture is violative of right to environment and sustainable development? The Court held that the new trend including the more intensified form of shrimp farming, without controlling feeds, seeds and other inputs of water management practices, has posed a serious threat to marine environment and ecology. The Court treating the principle of sustainable development as guiding star, directed strict adherence of this principal, during the process of shrimp aquaculture. This way the concept of sustainable development is safeguarding the marine ecosystem also.

Further, the Apex Court recognising the menace of marine pollution observed that *"Apart from*

50. AIR 1966 SC 149.
51. AIR 1987 SC 359.
52. (1997) 5 SCC 281.

direct dumping of waste materials into the seas, discharge through marine outfalls, untreated or semi-treated wastes generated out of various land-based sources/activities, find way to the seas. With increasing extent of marine pollution and the consequential decline in marine resources, concern was expressed by the United Nations' Conference on Human Environment, held in Stockholm, 1972. The Conference resolved that littoral Nations must take early action, at national level for assessment and control of marine pollution. The Conference also proposed for systematic monitoring by the States, in order to ascertain their efficacy of preventive measures, undertaken to abate marine pollution. In India, besides land drainage, huge number of marine coastal outfalls discharge industrial and municipal effluents into the seas. Unchecked and uncontrolled disposal of land-based wastes into the seas through rivers and effluent outfalls is a major cause of pollution of coastal waters. In the background of the Stockholm Conference and keeping in mind 1982 Convention on the Law of Sea, a model comprehensive Action Plan has been evolved under the United Nations Environment Programme (UNEP). In light of all these facts, the Union Government of India and the Government of all the coastal States/UTs are under legal obligation to control marine pollution and protect the coastal environments."[53]

In *Indian Council for Enviro-Legal Action and Ors. v. Union of India,*[54] the main grievance of the petitioner was that the CRZ Notification dated 19.02.1991 promulgated by Ministry of Environment and Forests was not being enforced. The petitioner also questioned the CRZ Notification of 18.08.1994 which reduced the width of 'No Development Zone' from 100 meters to 50 meters, without keeping its deleterious effects on marine environment, in mind by the Respondent. Due to these acts of executive, severe loss of ecology in coastal areas had resulted. The Hon'ble Court struck down the CRZ Notification of 18.08.1994, being violative of right to environment and right to sustainable development guaranteed under Article 21of the Constitution. Apart from this, the Court also mandated the creation of the National Coastal Management Authority and the State Coastal Management Authorities. Consequently, the National Coastal Management Authority (NCMA) was established.[55]

In *Vellore Citizens Welfare Forum v. Union of India,*[56] the Supreme Court of India recognising the 'Polluter Pays Principle' as one constituent of sustainable development dictum, said that

53. *Ibid.*
54. (1996) 3 SCC 212.
55. Vide S.O 851 (E) dated April 16, 2012.
56. AIR 1996 SC 2718.

remediation of damage to the environment, is an aspect of sustainable development. The defaulter must be made liable, to pay compensation to individual sufferers, as well as, compensation for loss caused to the environment. Later on, Supreme Court applied the 'Polluter Pay Principle' to marine environment also. In Research Foundation for Science Technology *v.* Union of India,[57] the Apex Court made it clear that the 'Polluter Pays Principle' is also applicable to ship breaking cases which involve contamination of environment due to exposure of hazardous substances.

Recently, in Sameer Mehta vs. Union of India O.A 24 of 2011, Principal Bench, NGT, a vessel named M.V. Rak Carrier was carrying around 60054 metric tons of coal, 290 tonnes of fuel oil and huge volume of diesel, sank within 20 nautical miles from the coast of South Mumbai due to water ingression in its ballast tanks, that happened due to technical faults. The coal was being transported to Adani Enterprises Ltd. And was being carried by the Delta Group International. The sinking of ship caused marine oil spill over the sea and led to marine pollution that wreaked environmental damage, by jeopardising the quality of sea water. Adani Enterprises took no action to control the marine pollution caused by the alleged oil spill. Later, the Indian Coastguard stepped in and took preventive measures to abate marine oil pollution. Consequently, a hefty amount of monetary costs was borne by the Indian Government in this task.

The petitioner in this case contended that the marine oil spills are form of marine pollution and have detrimental effects on marine flora and fauna, as well as on human lives. The Tribunal accepting the view of the petitioner held that the incident has caused marine pollution and the respondents have fault in this case. The Tribunal also said that the act of respondents has caused infringement of fundamental right guaranteed under Article 21 of the Constitution of India. The Tribunal further held that delinquent &unlawful acts of respondents have caused interference with fundamental right of living in healthy environment and right to sustainable development of public, at large. Therefore, the Hon'ble Tribunal imposed the exemplary penalties of 100 Crore Rupees and 5 Crore Rupees on Delta Group International and Adani Enterprises, respectively for causing marine pollution in the Territorial Water, Contiguous Zone and Exclusive Economic Zone of India.

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57. AIR 2012 SC 2627

CONCLUSION:

Development at the cost of environment, without paying any regard to its restoration is like a boomerang and if this continues to happen, the doomsday will not be far away for humans. Sustainable development is a balanced approach, innovated by the intellects worldwide, realizing the need to balance economic and developmental interests. The concept of sustainable development has acquired the highest status in Indian legal jurisprudence. This is because the Hon'ble Supreme Court has recognized it as a fundamental right under Article 21 of the Constitution. The menace of marine pollution is unequivocal infringement of sustainable development dictum, as it clearly affects the fulfilment of needs of the future generations. Due to excess anthropogenic activities being carried out in the chest of oceans, the marine environment is getting extremely polluted. This pollution of marine environment per se make it unfit to be inherited by future generations. If the pollution continues, the future generations wouldn't be able to either fulfil their needs or to utilize the resources within it. Therefore, the marine pollution is grave violation of sustainable development dictum and also the fundamental right guaranteed under Article 21 of the Constitution of India. The balance between development and conservation of marine environment has to be struck, before it's too late.

CORPORATE FRAUDS: THE NEED AND VIABILITY OF NON-PROSECUTION AGREEMENTS AND DEFERRED PROSECUTION AGREEMENTS IN INDIA

Dr. Preetha S.*
Ms. Manjula R.S**

INTRODUCTION

Corporate frauds are a threat to an economy and takes a staggering toll on economic growth of the corporate sector.[1] It is an arduous task for the regulator when it comes to criminal prosecution of corporate frauds, let alone to say nothing of the time consumed and gruelling process involved in prosecutions. For example, for the year 2021-22, the Securities and Exchange Board of India(SEBI) completed a whopping 169 instances of investigations on various subject matters such as market manipulation, price rigging, insider trading, violations in takeovers, violations in listing conditions, violations in disclosure etc.[2] This is in addition to the 82 cases which completed investigation under the category of fraudulent and unfair trade practices.[3] Enforcement actions were taken against 1,079 entities.[4] The study of enforcement is interesting, myriad with literature. Regulators worldwide resort to strict control for serious violations. At the base of the pyramid are less serious violations and the regulator persuades for compliance. Whereas, at the top of the pyramid, serious violations are placed and hence regulators undertake stringent measures.[5]

Market regulations are an important facet of financial regulation and the role of the regulator is central especially considering that the instances of fraud are complex and many a times

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1. Alexander, Cindy R., et.al.,"The Causes of Corporate Crime: An Economic Perspective" in Anthony S. Barkow and Rachel E. Barkow(eds.),Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct 11–37 (NYU Press, 2011), available at: https://www.jstor.org/stable/j.ctt9qfhcd.5(Visited on July 19, 2023).
2. The Securities and Exchange Board of India, "Annual Report 2021-22" 189-230(2022), *available* at: https://www.sebi.gov.in/reports-and-statistics/publications/oct-2022/annual-report-2021-22_63812.html(Visited on July 11, 2023).
3. *Ibid.*
4. *Ibid.*
5. Ian Ayres and John Braithwaite, Responsive Regulation Transcending The Deregulation Debate 35 (Oxford University Press, Inc., New York, 1992).

technical. While jurisdictions such as United States[6], UK,[7] Canada[8] use strategies such as non-prosecution agreements (NPAs) and deferred prosecution agreements (DPAs) as effective regulatory tools to respond to corporate crimes, Indian regulatory landscape has not incorporated such modern innovative mechanisms in the enforcement regime and sadly is still grappling with insoluble problems of weak enforcements and convictions. The traditional criminal law system in India provides little incentive for corporations to voluntarily approach authorities and disclose fraudulent conduct. Although, the criminal law system allows for compounding of offences under 320 CrPC, the Hon'ble Supreme Court of India in *Prakash Gupta v. Securities and Exchange Board of India*,[9] interpreted the non-obstante clause and held that that Section 24A of the Securities and Exchange Board of India Act, 1992 is the relevant provision for compounding corporate frauds. It is important therefore, to analyse the scope and effectiveness of compounding of offences vis-à-vis non-prosecution agreements (NPAs) and deferred prosecution agreements (DPAs). There is however, also a need to not upset the notions of deterrence and public expectations in criminal conviction which are the centrifugal elements in corporate criminal liability. It is well established that corporations are criminally responsible for the criminal acts of their employees committed within the scope of their employment. A delve into whether (NPAs) and (DPAs) have a tendency to erode the teeth of corporate criminal liability in the Indian setting is also worthy of scrutiny.

THE REGULATORY FRAMEWORK ON CORPORATE FRAUDS

Under the current legal framework, corporate fraud is dealt under various enactments such as the Indian Contract Act 1872, the Companies Act 2013, SEBI Act 1992, SEBI (Prohibition of Insider Trading) Regulations, 2015, SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Markets) Regulations, 2003 etc. To understand the nature of fraud, it is to be noted that fraud is a civil wrong doing wherein *mens rea* is not an indispensable requirement. The test applied is the preponderance of probabilities in civil violations.[10]

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6. Principles of Federal Prosecution, *available* at: https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution (Visited on July 20, 2023).
7. Deferred Prosecution Agreements, *available* at: https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/deferred-prosecution-agreements/(Visited on July 29, 2023).
8. Remediation Agreements, available at: https://www.ppsc-sppc.gc.ca/eng/tra/tr/38.html(Visited on July 30, 2023).
9. AIR 2021 SC 3601.
10. SEBI v. Kishore R. Ajmera, (2016) 6 SCC 368; SEBI v. Kanaiyalal Baldevbhai Patel, 2017 15 SCC 1.

A fraud committed by a corporation is also a crime. Under Section 447 of the Companies Act, 2013[11], fraud is a cognizable, non-bailable, non-compoundable offence. Section 447 which is punitive in nature was introduced for the first time in the Companies Act of 2013. Section 447 did not have any corresponding provision in the earlier Companies Act 1956.[12] When the provision came into force on 12.09.2013, it was not cognizable and was later made cognizable by the amendment to Section 212 (6) by the Companies (Amendment) Act, 2015 with effect from 25th May 2015.[13]

Section 438 of the Companies Act, 2013, states that in relation to offences under the Act, the Code of Criminal Procedure, 1973 applies and the Special Court has the powers to apply Criminal Procedure Code in matters of trial, enquiry etc.[14] In relation to affairs of a company, 'fraud' includes any act, omission, concealment of any fact, or abuse of position committed by any person or any other person with the connivance, in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholder or its creditors or any other person, whether or not there is any wrongful gain or loss.[15] This definition is not an exhaustive definition; rather it is an inclusive definition. It leaves necessary scope for the courts to cover other commission/omission within the ambit of the definition. The term 'any person' used in the definition gives it a wide coverage to include any person who has committed the fraud, instead of restricting it to certain officers, directors or employees of the company. Section 447 of the Companies Act, 2013, is not only applicable to the cases of fraud, but also to various other offences under the Act. Some of the instances inter alia are:- (i) criminal liability for mis-statements in prospectus[16] (ii) punishment for fraudulently inducing persons to invest money[17] (iii) personation for acquisition, subscribing of securities[18] (iv) defrauding by issuing duplicate certificate of shares[19] (v) transfer of shares by defrauding a person[20] (vi)concealment or misrepresentation in the reduction of share capital[21] (vii) penalty for furnishing false statement,

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11. Neeraj Singal v. Union Of India And Ors., 2019 CRI LJ 191.
12. *Ibid.*
13. *Ibid.*
14. The Companies Act, 2013 (Act 18 of 2013), s. 438.
15. *Id.*,s. 447.
16. *Id*.,s. 34.
17. *Id*.,s. 36.
18. *Id*.,s. 38.
19. *Id*.,s. 46.
20. *Id*.,s. 56(7).
21. *Id*.,s. 66(10).

mutilation, destruction of documents.[22] Section 447of the Companies Act, 2013,requires 'proof beyond reasonable doubt'. A novel interpretation to the concept of burden of proof generally in criminal matters was given the Supreme Court of India in *Latesh v. State of Maharashtra.*[23] The court held that, the term 'reasonable doubt' as "The reasonableness of a doubt must be a practical one and not on an abstract theoretical hypothesis. Reasonableness is a virtue that forms as a mean between excessive caution and excessive indifference to a doubt." Section 447 is actually an amalgam of various ingredients from the Indian Penal Code such as criminal breach of trust from section 405, cheating from section 415, forgery from section 463, falsification of accounts from section 477A.[24] The SEBI Act also covers instances of offences.[25] This can include instances of fraud and its species like manipulation, concealment etc. and for every such contravention under the SEBI Act or rules framed thereunder, prosecution can be initiated.

The Serious Fraud Investigation Office (SFIO) constituted under Section 211 of the Companies Act, 2013, can be assigned with investigation by the Central Government in matters of serious fraud. However, there requires more guidance to determine what would constitute an offence as a serious fraud under the Companies Act. The avenues to set SFIO to conduct investigation are described in the Act, but, the threshold to constitute a serious fraud as distinct from any other lesser fraud is not mentioned under the Act. There are no monetary thresholds prescribed under the Companies Act, 2013, for initiation of investigation by the SFIO, but simply prescribes that an investigation can be initiated in situations where public interest is warranted.[26]

However, Section 212 of the Companies Act, 2013, empowers the Central Government to assign a matter to the SFIO for investigation, and in which case other investigating agency of Central Government or any State Government are precluded to proceed with investigation in such matter in respect of any offence under the Act.[27] An important principle drawn from section 212(2) is that once the Central Government assigns investigation to SFIO, any other investigating agency is bound to transfer the documents and records in respect of offences under the Companies Act, 2013, Act, to SFIO.[28]

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22. *Id*.,s. 229.
23. (2018) 3 SCC 66.
24. Corporate Frauds – Emerging Legal Architecture & Judicial Trends, *available* at: https://conventuslaw.com/report/india-corporate-frauds-emerging-legal-architecture/(Visited on July 12, 2023).
25. The Securities And Exchange Board Of India Act, 1992 (Act 15 of 1992), s. 24.
26. The Companies Act, 2013 (Act 18 of 2013), s.212(c).
27. *Id*., s. 212(2).
28. Serious Fraud Investigation Office v. Rahul Modi, 2019 SCC 5 266.
29. 2019 CrLJ 191.

In *Neeraj Singal v. Union of India and Ors.*[29], the Delhi High Court had the occasion to look into the constitutional validity of provisions Sections 212(6)(ii) and 212(7) of the Companies Act, 2013. The Court held that in so far as the power vested in an Inspector of the SFIO to use the signed statement of an accused as evidence against him, prima facie appears to violate the fundamental right against self-incrimination enshrined in Article 20(3) of the Constitution of India. The Court also observed that it will be virtually impossible for the Special Judge to conclude for the purpose of Section 212 (6) that a person is not guilty of the offence when for a valid arrest, the records have to bear out the opinion of the Director of SFIO that the person arrested "has been guilty" of the offence under Section 447. The Court even though did not strike down the said provisions as unconstitutional, granted an order of release of the petitioner on bail conditions. The Court expressly held that the offence under Section 447 is not as heinous as other offences under other statutes and was critical of the high threshold given to bail conditions under Section 212(6). Against this, the SFIO went in appeal to the Supreme Court as the observations of the Delhi High had far reaching adverse consequences in respect of powers of SFIO. On appeal, the Supreme Court in *Serious Fraud Investigation Office v. Neeraj Singal and Anr.*[30], held that it was unwarranted of the High Court to go to the constitutionality of the said provisions, as such observations would deprive the competent/statutory authority to proceed in the matter in accordance with the Companies Act, 2013, in respect of investigations and filing of complaint/police report when serious financial frauds or economic misdemeanours have been committed. However, the court anticipated that similar questions are likely to arise in certain pending matters before it. Hence, there is a need to re-look into the provisions concerning powers of SFIO in investigation and arrest for frauds. It is in this context of complexity of the regulatory and enforcement mechanism in India, the need for non-prosecution and deferred prosecution agreements as alternative enforcement mechanisms against corporate fraud deserves a due consideration.

CORPORATE FRAUDSIN THE CONTEXT OF ENFORCEMENT

Corporate frauds have debilitating effects in the business and economic systems.[31] The difficulty in understanding the nature of this wrong-doing is attributed to the very nature of f*raud which is*

30. (2019)11 SCC 446.
31. P. K. Gupta and Sanjeev Gupta, "Corporate Frauds in India - Perceptions and Emerging Issues"22 J. Financ. Crime 79 (2015), available at: http://dx.doi.org/10.1108/JFC-07-2013-0045 (Visited on July 11, 2023)
32. Association of Certified Fraud Examiners, '2008 Report to the Nation on Occupational Fraud and Abuse' (2008), available at https://www.acfe.com/uploadedFiles/ACFE_Website/Content/documents/2008-rttn.pdf(Visited on July 15, 2023)

in itself inherently clandestine and deceptive. The world's largest anti-fraud organization, the Association of Certified Fraud Examiners (ACFE) states that, "Fraud by its very nature, does not lend itself to being scientifically observed or measured in an accurate manner. One of the primary characteristics of fraud is that it is clandestine, or hidden; almost all fraud involves the attempted concealment of the crime." [32]Another difficulty in the study of corporate frauds is with respect to shaping a sound economic regulatory policy, a topic widely discussed and debated under the 'economic theories of regulation'[33]. The extant literature on regulation shows that it is a narrow one. One description of regulation is that "regulation consists of policies that are intended to correct for market failures by the promulgation and enforcement of rules constraining the behaviour of some or all of the participants in a market." [34]An even more limited understanding of regulation is that it consists only of written laws.[35] This restricted meaning and scope of a regulation undermines the alternatives such as new regimes for liability and good corporate governance, important among them being the use of negotiated agreements styled under 'non-prosecution agreements' (NPAs) and 'deferred prosecution agreements' (DPAs) which are explored hereunder.

Corporate frauds are also undesirable and deterred through laws.[36] In serving public interest, regulators all around the world therefore devote a lot of attention to effective enforcement against fraud.[37] In India, the Hon'ble Supreme Court has in numerous instances upheld the broad powers of SEBI as a capital market regulator. The interpretation of Section 11 in SEBI Act, 1992, spelling out the powers of SEBI is noteworthy.[38] The issue of fraud in the corporate world is

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33. George J. Stigler "The Theory of Economic Regulation" 2 Bell j. econ. manage. sci. 3 (1971), *available* at: https://doi.org/10.2307/3003160(Visited on July 25, 2023); Richard A. Posner, "Theories of Economic Regulation" 5 Bell j. econ. manage. sci. 335 (1974), available at:https://doi.org/10.2307/3003113(Visited on July 28, 2023)
34. Richard A. Posner, "Theories of Economic Regulation" 5 Bell j. econ. manage. sci. 335 (1974) *available* at: https://doi.org/10.2307/3003113(Visited on July 28, 2023); Roger Noll, "The Political Foundations of Regulatory Policy" J Inst Theor Econ 377(1983), available at:http://www.jstor.org/stable/40750622 (Visited on July 22, 2023)
35. Roger Noll, "The Political Foundations of Regulatory Policy" J Inst Theor Econ377(1983), *available* at:http://www.jstor.org/stable/40750622 (Visited on July 22, 2023)
36. Miriam H. Baer, "Linkage and the Deterrence of Corporate Fraud" 94 Va. L. Rev. 1295 (2008), available at: http://www.jstor.org/stable/25470590 (Visited on August11, 2023)
37. Michael E. Levine and Jennifer L. Forrence, "Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis" 6 J Law Econ Organ 167 (1990), available at: http://www.jstor.org/stable/764987(Visited on July 25, 2023).
38. Sahara India Real Estate v. SEBI, (2013) 1 SCC 1; Ritesh Agarwal & Anr. v. SEBI, (2008) 8 SCC 205.

actually not just a shareholder-centric problem but is rather democratic because its consequences are distributed and shared by many.[39] The financial system was jolted by the Satyam Scam that surfaced in 2009-10, wherein the Company Law Board's judgment recognized the deleterious consequences of corporate fraud not only for shareholders but also for other stakeholders.[40] The Company Law Board held that "[F]inancial impropriety and jugglery of financial statements, with the view to mislead the stakeholders, employees and the public in general. It appears that a serious fraud has been perpetrated on the society as a whole."[41] The apex court held in *K.K. Baskaran v. State rep. by its Secretary, Tamil Nadu,*[42] "The State being the custodian of the welfare of the citizens as *parens patriae* cannot be a silent spectator without finding a solution for this malady. The financial swindlers, who are nothing but cheats and charlatans having no social responsibility, but only a lust for easy money by making false promise of attractive returns for the gullible investors, had to be dealt with strongly."

But, the real obstacle to a successful enforcement in corporate fraud is that fraud by its very nature is very difficult to be unearthed.[43] While there are numerous research and literature exploring the instances of fraud, its causes, its effects, methods to detection, regulation etc., a significant aspect that has been overlooked by the academia as well the statutory agencies in India are the use of tools of settlement through agreements for an improved enforcement. One of the reasons why this method has remained in hindsight in the Indian regulatory arena is perhaps because the enforcement agencies have focused more on the traditional methods in enforcement against corporate frauds. The traditional techniques in enforcement, undoubtedly being important in the regulatory scheme is found in the form of deterrence i.e., penalty,[44] incarceration,[45] debarring from access to capital markets,[46] seizure,[47] cease and desist[48] etc. While there is nothing wrong in sticking with the traditional methods by a regulator, albeit its inherent problems of technicality, prolonged prosecutions, nuances of evidence collection and

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39. Louis L. Straney, Securities fraud : detection, prevention and control2(John Wiley & Sons, Inc., New Jersey, 2011)
40. Union of India v. Satyam Computer Services Ltd.., (2009) 148 Comp.Cas. 252 (CLB).
41. *Ibid.*
42. 2011 (3) S.C.C. 793.
43. Samuel W. Buell, "What Is Securities Fraud?" 61 Duke Law Journal 511(2011), *available* at: http://www.jstor.org/stable/41353728(Visited on July 29, 2023)
44. The Securities And Exchange Board Of India Act, 1992 (Act 15 of 1992), s. 11B.
45. *Id*., s. 24.
46. *Id*., s. 11(4)(b).
47. *Id*., s. 11C(8).
48. *Id*., s. 11D.

submission etc., but, for having a wholesome regulatory structure, it is imperative to adopt modern methods in enforcements, i.e., non-prosecution agreements (NPAs) and deferred prosecution agreements (DPAs). These modern techniques have benefits such as swiftness in action, effective reliefs to victims, reformatory changes in corporate governance and structure etc. The traditional techniques are only put to use when frauds are detected or atleast when there is a suspicion. Whereas, non-prosecution agreements (NPAs) and deferred prosecution agreements (DPAs) can also be used when a corporation voluntarily comes forward and agrees to enter into these agreements with the regulator, the scope of which is more fully detailed hereunder. With a view to incentivise corporate fraud detection, self-reporting and effective enforcement in aberrations, these unique tools of settlements through negotiated agreements have been in prevalence in many jurisdictionssuch as United States, United Kingdom, Australia, Canada etc. The following part analyses the nature of these agreements, its accomplishments and pitfalls. In that light, the desirability of incorporating them to the Indian regulatory set up is analysed.

THE MECHANICS OF NON-PROSECUTION AGREEMENTS (NPAS) AND DEFERRED PROSECUTION AGREEMENTS (DPAS)

Non-prosecution agreements (NPAs) and deferred prosecution agreements (DPAs) offer the scope of negotiated settlement which bypass the traditional plea-bargaining process whereby the delinquent organisation without pleading guilty agrees to a combination of restitution, forfeiture, monetary sanctions, and other legal and structural governance reforms[49]. N/DPAs deviate from the traditional corporate liability, in that, while the traditional criminal liability imposes sanctions on corporations based on duties ex anteon all firms, N/DPAs impose policing duties ex post on select corporations which have committed violations.[51]

N/DPAsare mandated by governmental authorities in many jurisdictions such as US, UK, Canada etc. and require compliance by the aberrant corporation to avoid prosecution. This practice of neither admitting not disputing the charge but accepting the conviction and its consequences is known as *"nolo contendere",* an English common law concept which in Latin

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49. Cindy R. Alexander & Mark A. Cohen, "The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements"52 Am. Crim. L. Rev.537 (2015), *available* at:https://api.semanticscholar.org/CorpusID:13855084 (Visited on July 29, 2023)
50. For brevity, referred also as N/DPAs when both the agreements are mentioned together.
51. *Supra* note 49.

means "I do not wish to contend". It is a typical plea of no contest or no defence. The term *nolo contendere* also goes by the phrases "nolle contend" and "non vult".[52] The plea has the following effects - a quasi confession of guilt, an implied confession, a mild form of pleading guilty, and with a compromise arrangement entered into between the defendant and the State.[53] The plea originally was from England during reign of Henry IV. It is stated in 'A Treatise of the Pleas Of The Crown,' the leading English authority as:

> "An implied confession is where a defendant, in a case not capital, doth not directly own himself guilty, but in a manner admits it by yielding to the King's mercy, and desiring to submit to a small fine: in which case, if the court think fit to accept of such submission, and make an entry that defendant *posuit se ingratiam regis,* without putting him to a direct confession, or plea (which in such cases seems to be left to discretion), the defendant shall not be estopped to plead not guilty to an action for the same fact, as he shall if the entry is quod *cognovit indictainentum."* [54]

The plea of *"nolo contendere*" had fallen into oblivion for quite a long time in England since 1702, however, found its revival and usage in criminal prosecutions in America.[55] The mechanism of N/DPAs in United States, which was the first country to formally shape it, is explored hereunder.

(i) Pre-trial diversion agreements (PDA) of the United States

A large number of prosecutions of the U.S. federal criminal cases in antitrust, fraud, domestic bribery, tax evasion, environmental violations, foreign corruption cases have resorted to the use of *"nolo contendere"* plea, applied in its modern form as pre-trial diversion agreements (PDAs), which are available explicitly in the form of deferred prosecution agreements and non-prosecution agreements.[56] The first use of PDA arose in 1994 with Prudential Securities Inc.in whichthe first deferred prosecution agreement was used by the Department of Justice(DOJ)

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52. Norman S. Oberstein, "Nolo Contendere--Its Use and Effect" 52 CalLRev 408 (1964), *available* at: https://doi.org/10.2307/3478927 (Visited on August 12, 2023)
53. Nathan B. Lenvin and Ernest S. Meyers, "Nolo Contendere: Its Nature and Implications" 51YaleLJ 1255 (1942).
54. William Hawkins, A Treatise of the Pleas of the Crown (8th edn., 1824).
55. Thomas C. Hayden Jr., "The Plea of Nolo Contendere" 25 Md. L. Rev. 227 (1965), *available* at: https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1958&context=mlr (Visited on August 29, 2023)
56. Jennifer Arlen and Marcel Kahan, "Corporate Governance Regulation through Nonprosecution"84 U Chi L Rev 323(2017), available at: http://www.jstor.org/stable/44211836 (Visited on July 19, 2023).

when Prudential Securities committed securities fraud[57]. The delinquent financial firm had to pay out $330 million under a strict settlement agreement.[58] The use of N/DPAs was made possible with the introduction of Chapter Eight, Sentencing of Organizations, into the Federal Sentencing Guidelines Manual in 1991.The history of use of DPAs and NPAs would show that they were alternative forms of punishment for juvenile and drug offenders to avoid scarring them with a criminal record.[59]

The PDAs are purely innovative enforcement mechanisms and does not involve change in statutory content in United States.[60] PDAs offer the flexibility such that prosecutors can use them to impose directives on erring corporations to incorporate structural changes in their governance mechanisms or internal structures.[61] In exchange, the firm agrees to cooperate with the investigation. One advantage of this method is that corporations are deterred without causing them to collapse.[62] The story of destruction of the accounting firm of Arthur Andersen through its indictment in the Enron-era enforcementwas a learning lesson to the government, as it left numerous innocent employees jobless.[63] The proliferation of Deferred Prosecution Agreements happened after this event.[64] There is an academic debate on whether the aberrant corporation admits to facts or participates without admission or refusal of allegations. Some scholars view the PDAs as one where there is admission of wrongdoing,[65] while others view it as instances of

57. Court E. Golumbic and Albert D. Lichy, "The Too Big to Jail Effect and the Impact on the Justice Department's Corporate Charging Policy" 65 Hastings L J 1302(2014), *available* at: https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=1176&context=hastings_law_journal(Visited on 10 August 2023)
58. At Prudential, The Fraud Case That Won't Die, *available* at: https://www.washingtonpost.com/archive/business/1994/02/13/at-prudential-the-fraud-case-that-wont-die/135ee4ab-7806-4fd5-b517-fe779b8d844f/ (Visited on 10August 2023).
59. Benjamin S. Greenblum, "Note, What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements" 105 ColumLRev1863(2005).
60. 9-22.000 - Pretrial Diversion Program, *available* at: https://www.justice.gov/jm/jm-9-22000-pretrial-diversion-program(Visited on 16 August 2023).
61. *Ibid.*
62. David Debold and Kyle C. Barry, "Consistency in NPAs and DPAs" 20 FSR 331(2008), *available* at:https://api.semanticscholar.org/CorpusID:144848432(Visited on 16 August 2023).
63. Lawrence A. Cunningham, "Deferred Prosecutions and Corporate Governance: An Integrated Approach to Investigation and Reform"66 Fla. L. Rev.1 (2014), *available* at: https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1174&context=flr (Visited on 14 August 2023).
64. *Ibid.*
65. Jennifer Arlen and Marcel Kahan, "Corporate Governance Regulation through Nonprosecution" 84 U Chi L Rev 323(2017), *available* at:https://www.jstor.org/stable/44211836 (Visited on 22 August 2023); Peter R. Reilly, "Corporate Deferred Prosecution as Discretionary Injustice,"5 UTAH L. REV. 839 (2017) *available* at: https://dc.law.utah.edu/ulr/vol2017/iss5/1(Visited on 22 August 2023).

neither an admission nor a denial.[66]

The Justice Manual of the Department of Justice in United States spells out the principles for prosecution of business organisations.[67] The 'Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy' offers the guidelines to be followed by the Department of Justice to decide whether to decline to prosecute a criminal case.[68] An external corporate monitor, mutually agreed between the corporation and the State is appointed to reviewthe company's business and filing compliance reports to the government in respect of the agreements. In addition to this, memorandums are issued from the office of the Deputy Attorney General on "Principles of Federal Prosecution of Business Organizations" which are guidelines on the duties of the federal prosecutor and corporate leaders and general principles on charging a corporation.[69]

PDAs are also different from the traditional plea bargaining. In a plea bargain, there is a negotiated deal between the government and a defendant such that the government agrees to either/both reduce the charges or the severity of the punishment in return for which the defendant would plead guilty.[70] In PDAs, a public prosecutor takes a middle-ground approach whereby prosecutors take an intermediate option between declination to prosecute and plea bargaining.[71] The agreements exact sanctions without the collateral consequences of a conviction.[72] The collateral consequences of a conviction include instances of debarment from government contracts, inability to avoid insolvency, loss to employees and shareholders etc.

The key difference between Deferred Prosecution Agreements (DPAs) and Non-Prosecution

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66. David M. Uhlmann, "Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability" 72 Md. L. Rev.1295 (2013), *available* at: https://digitalcommons.law.umaryland.edu/mlr/vol72/iss4/15 (Visited on 24 August 2023); Stephanos Bibas, "Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas" 88 Cornell Law Rev. 1361 (2003), *available* at: https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2929&context=clr(Visited on 10 August 2023).
67. 9-28.000 - Principles of Federal Prosecution Of Business Organizations, *available* at: https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations(Visited on 12 August 2023).
68. Corporate Enforcement Policy, available at: https://www.justice.gov/criminal/criminal-fraud/corporate-enforcement-policy(Visited on 12 August 2023).
69. McNulty Memorandum, *available* at: https://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty_memo.pdf(Visited on 14 August 2023).
70. Peter R. Reilly, "Justice Deferred Is Justice Denied: We Must End Our Failed Experiment in Deferring Corporate Criminal Prosecutions," 2 BYU L. Rev. 307(2015), *available* at: https://digitalcommons.law.byu.edu/lawreview/vol2015/iss2/4(Visited on 23 August 2023).
71. *Ibid.*
72. *Supra* note 59 at 1869.

Agreements (NPAs) is that in the former, criminal charges are filed and that the prosecution is deferred and finally with dismissal of charges if the corporation complies with the terms of DPA.[73] Whereas, in an NPA, there is no filing of charges and investigation simply remains pending till the time the corporation complies the terms.[74] Moreover, only DPAs are potentially subject to judicial review.[75] On the other hand, NPAs, are not subjected to judicial scrutiny.[76]

There are also significant nuances of PDAs and many a times the terms of the settlement agreements are too lenient and rather the erring corporation ought to be criminally convicted.[77] Moreover, the terms imposed by the government are also not sugar coated but sometimes excessively punitive, leaving the functioning of the corporation disrupted.[78] Some critics also point that the prosecutors may not have the expertise in corporate governance.[79] There have also been situations of conflict of interest in selection of the officer to monitor the aberrant corporation with acceptance of bribes.[80] It is also important for prosecutors to carefully consider governance while proceeding ex ante and avoid prosecutorial failure in enforcing governance mechanisms which may not be desirable for corporations.[81] A major criticism levelled against the agreementsis with respect to the quantum of prosecutorial discretion which is unbridled. The broad scope of this unfettered prosecutorial discretion can give rise to unfair terms in the agreement leading to counterproductive results.[82] The major challenge to the viability of N/DPAs consists in the need to not dilute the traditional general principles of criminal law in the administration of justice, which requires prosecution and conviction of the wrongdoer. The non-prosecution agreement for Massey Energy's Upper Big Branch mine incident stirred up quite a

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73. Ved P. Nanda, "Corporate Criminal Liability in the United States: Is a New Approach Warranted?" 58 The AmJCompL 605(2010), *available* at: https://doi.org/10.5131/ajcl.2009.0034 (Visited on 16 August 2023).
74. *Ibid.*
75. Jennifer Arlen and Marcel Kahan, "Corporate Governance Regulation through Nonprosecution" 84 UChiLRev 323 (2017), *available* at:https://www.jstor.org/stable/44211836(Visited on 18 August 2023).
76. *Ibid.*
77. Crime Without Conviction: The Rise of Deferred and Non Prosecution Agreements, *available* at: https://www.corporatecrimereporter.com/news/200/crime-without-conviction-the-rise-of-deferred-and-non-prosecution-agreements-2/(Visited on August 20, 2023).
78. Jennifer O'Hare, "The Use of the Corporate Monitor in SEC Enforcement Actions" 1 Brook. J. Corp. Fin. & Com. L. 89 (2006), *available* at: https://brooklynworks.brooklaw.edu/bjcfcl/vol1/iss1/5(Visited on August 21, 2023).
79. *Supra* note 56.
80. In Justice Shift, Corporate Deals Replace Trials, available at: https://www.nytimes.com/2008/04/09/washington/09justice.html (Visited on September 10, 2023).
81. *Supra* note 63.
82. Alexander A. Zendeh, "Can Congress Authorize Judicial Review of Deferred Prosecution and Nonprosecution Agreements - And Does It Need to," 95Tex. L. Rev. 1451(2017), available at:https://texaslawreview.org/wp-content/uploads/2017/05/Zendeh.Final_.pdf(Visited on August 25, 2023).

public outcry when workers died due to blatant safety violations and hence, the agreement was felt unwarranted.[83]

(ii) Deferred prosecution agreements in other jurisdictions

The philosophies behind DPAs have been borrowed from United States, but has inspired many other countries and hence, a short description of DPAs in other jurisdictions is provided here.

DPAs were introduced in the year 2014 in United Kingdom as an aftermath of a consultation process led by the Ministry of Justice.[84] An amendment was made to the Crime and Courts Act, 2013 (UK) to enable the use of the agreements.[85] In 2015, the agreement was used in the matter of Standard Bank PLC, which paid huge fines and costs.[86] The DPA is fashioned similar to the one in USA and enables prosecutors to tailor punishment and remediation measures.[87] The court finally approves the same. Australia is trying to embrace a scheme of DPA in corporate criminal prosecutions and in the year 2017 brought out the Deferred prosecution agreement scheme - Draft code of practice.[88] In 2018, Canada adopted 'remediation agreements' under Part XXII.1 of the Criminal Code,which is Canada's version of deferred prosecution agreements.[89] Under this, there is suspension of prosecution of a corporation for the listed offences under the Code which includes offences on fraud and bribery. In 2022, the first remediation agreement was used in R v. SNC-Lavalin Inc., in which payment of payment of $18,135,135 was approved along with other monitoring and reparation measures.[90] The offences involved fraud and conspiracy against the government in the award of the contract to rehabilitate the Jacques Cartier Bridge.[91]

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83. David M. Uhlmann, "Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability" 72 Md. L. Rev. 1295 (2013), *available* at: https://digitalcommons.law.umaryland.edu/mlr/vol72/iss4/15 (Visited on 24 August 2023).
84. Senate Economics References Committee, "Foreign bribery"94 (2018), *available* at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Foreignbribery45th/~/media/Committees/economics_ctte/Foreignbribery45th/report.pdf(Visited on 28 August 2023).
85. The Crime and Courts Act 2013, s. 45.
86. *Supra* note 83.
84. Senate Economics References Committee, "Foreign bribery"94 (2018), *available* at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Foreignbribery45th/~/media/Committees/economics_ctte/Foreignbribery45th/report.pdf(Visited on 28 August 2023).
85. The Crime and Courts Act 2013, s. 45.
86. *Supra note 83.*
87. Qingxiu Bu, "The Viability of Deferred Prosecution Agreements (DPAs) in the UK: The Impact on Global Anti Bribery Compliance" 22 Eur Bus Org Law Rev 173 (2021), *available* at: https://doi.org/10.1007/s40804-021-00203-5(Visited on August 23, 2023).
88. Proposed model for a deferred prosecution agreement scheme in Australia, *available* at: https://www.ag.gov.au/integrity/consultations/proposed-model-deferred-prosecution-agreement-scheme-australia (Visited on July 31, 2023).
89. *Supra* note 8.
90. 2022 QCCS 1967, available at: https://canlii.ca/t/jpjqg(Visited on August 27, 2023).
91. *Ibid.*

CONCLUSION

Enforcement in corporate fraud is unquestionably one of the most crucial facets of fraud regulation. A good policy on regulation is dependent on various factors such as the scope of private regulation by corporations, public regulation by the government etc. and one needs a mixture of different approaches for a holistic enforcement environment. The N/DPAs which are relatively new techniques of enforcement are a departure from the traditional legal regimes of imposing liabilities based on duties and sanctions. They are also strikingly different and unconcerned of the doctrine of corporate criminal liability in which the principle of vicarious criminal liability is applied by culling out the *actus reusand mens rea* of an individual who acts on behalf of the corporation. The negotiated settlement agreements are born out of the necessity of the time when the government cannot waste time in corporate compliance in events of serious wrongs. These agreements are also different from compounding of offences. Under criminal law, compounding is the forbearance from the prosecution due to a compromise between the parties.[92] Such a scheme is available under section 24A of the SEBI Act for less serious offences not involving compulsory imprisonment whereby the Securities Appellate Tribunal or a court before which such proceedings are pending can grant compounding.[93] This is distinct from a prosecution deferred or a non-prosecution which agreements as already elaborated before, have peculiar advantages. Moreover, the inability to invoke compounding in all offences, but,which categorically prescribes imprisonment without exception calls for an urgent need of N/DPAs to be adopted to the enforcement regime.

Considering the fact that, scams are ubiquitous in corporate environment so long as greed of man remains insatiable, it is high time that India adopts the modern techniques of N/DPA's in the regulatory pitch for faster and effective enforcements. Similar leniency programs are already available in the Indian legal framework on Competition Law.[94] While adopting the agreements, care must be taken such that long-tested deterrence effect of criminal law should not be watered down for serious offences just as what happened in United States incident of Massey Energy's

92. Dr. Janardan Kumar Tiwari, "Compounding of Offences Under Criminal Procedure Code, 1973 – An Analysis" 2 LRD 77 (2017), *available* at:https://doi.org/10.53724/lrd/v2n1.08(Visited on August 29, 2023).
93. The Securities And Exchange Board Of India Act, 1992 (Act 15 of 1992), s. 24A.
94. The Competition Act, 2002 (Act 12 of 2003),s.46. See, Leniency Programme for detecting Cartel which incentivises cartel members to share information and cooperate with the Competition Commission in return for lenient treatments, *available* at: http://164.100.58.95/sites/default/files/advocacy_booklet_document/Leniency.pdf(Visited on August 22, 2023).

Upper Big Branch mine. It is also to be kept in mind while framing policies for N/DPAs and referring cases for N/DPAs involve no disrespect for the law. Because, corporations need to be prosecuted in highly egregious corporate fraud which are sustained for a long period of time.[95] Hence, adequate policy should be framed for listing those violations that may be subjected to N/DPAs. Well delineated policies and guidelines are also required as a prosecutor is vested with a lot of discretion which must not be manipulated. There have been instances of prosecutorial discretion leading to overly harsh and dystopian reaction to criminal wrongdoing by corporations.[96] The prosecutor even has an unlimited ability to conclude that the corporation has failed to comply with the agreement's terms and revoke the same and prosecute criminally which entails miscarriage of justice. Court supervision is therefore pivotal in the functioning of these agreements.

If these agreements are properly designed, it canameliorate policing agency costs i.e., it would become more tough or more expensive for senior managers in following ineffective governance policies. Also, if properly worked, these agreements have the capacity to function far superior to the existing regulations because it is usually only in limited situations of corporate disclosures that regulators can identify violations of compliance beforehand

95. Nick Werle, "Prosecuting Corporate Crime When Firms Are Too Big to Jail: Investigation, Deterrence, and Judicial Review"5 YaleLJ 1366-1438 (2019), *available* at: https://www.yalelawjournal.org/pdf/Werle_6rys3t3n.pdf(Visited on August 27, 2023).
96. Jacob Stock, "Judicial Review of Corporate Non-Prosecution and Deferred Prosecution Agreements: A Narrow Road to Checking Prosecutorial Discretion" 3 CORP. & Bus. L.J 215 (2022).

DECIPHERING THE INTERNATIONAL REGULATORY JURISPRUDENCE OF BIOBANKS AND THE NEED FOR INTERNATIONAL COOPERATION

Dr Liji Samuel*

INTRODUCTION

Biobanks have revolutionised the healthcare industry, especially in the post-Human Genome Project period.[1] The entire diagnosis and treatment process is transmuted into more personalised medical care. Identification of disease conditions became easier through biological samples and genetic tracing. The biobanks[2] are the resource centres offering a variety of biosamples, including blood, urine, bone marrow, saliva, spinal fluid, tissues, reproductive materials,etc., forresearchers in various fields. Biobanks have now grown from individual or small pathological labs having few numbers of freezers to business enterprises of transnational character.[3] The outbreak of COVID-19 was another breakthrough which resulted in the establishment of COVID-specific biobanks in various jurisdictions.[4] Additionally, the market expects increased participation of virtual biobanks that have just started functioning in some regions like Scotland.[5] In the changed circumstance of increased private sector participation, transfer of samples and data between institutions in different countries and digitalisation of various healthcare services, biobanks pose many ethical and legal issues in their administration and management. Generally,biosamples are gathered from the patients or the public while visiting clinics, diagnostic centres, and laboratories for treatments ormay be donated by people

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1. Flavio D'Abramo, "Biobank research, informed consent and society. Towards a new alliance?" 69 Journal of Epidemiology and Community Health 1125 (2015).
2. The usage of the word 'bank' for the collection of human tissue for the first time appeared in 1930 with the usage of 'blood banks', coined by Bernard Fantus, an American Physician. The word 'biobank' first appeared in PubMed in 1996.
   See, Judit Sándor, Petra Bárd, et. al., "The case of biobank with the law: between a legal and scientific fiction" 38 Journal of Medical Ethics, 347 (2012).
   See also, Manjulika vaz, Mario Vaz, et. al., "Ethical Challenges in Biobanking: Moving the Agenda Forward in India" 11 Indian Journal of Medical Ethics 79 (2014).
3. George Vaniotis, "The History and Function of Biobanks" available at: https://blog.labtag.com/the-history-and-function-of-biobanks/(last visited on June 25, 2023).
   Richard Tutto, "Biobanks and the Inclusion of Racial/Ethnic Minorities" 3 Race/Ethnicity: Multidisciplinary Global Contexts , 76 (2009).
4. Biobanks Market Size, Share, Growth Report, 2022 – 2030, *available* at: https://www.grandviewresearch.com/industry-analysis/biobanksindustry#:~:text=The%20global%20biobanks%20market%20size%20was%20valued%20at,and%20cancer%20genomic%20studies%2C%20are%20driving%20the%20space(last visited on June 25, 2023).
5. *Id.*

voluntarily. Along with the biosamples, they will share their personal information and provide access to their medical records for future studies. Against this backdrop, this research paper aims to identify the significant ethical and legal issues of biobanks and analyse there levant international regulatory norms.

The sporadic growth of biobanks coupled with improper regulations and lack of proper awareness among the stakeholders will have a disastrous effect. It may lead to gross violations of the human rights of patients and research participants. The commercialisation of biobanks and their transnational character may seriously hamper national unity and integration by misusing the genetic and health data of the population. Integrating biobanks, bioinformatics and the digital healthcare system can have unforeseeable consequences. The need to ensure quality standards and the rights of parties have not yet been appropriately addressed at the international level. The interest of minority groups and the necessity of informed consent are other essential aspects of bio-banking. To review the regulations at the international level, issues are identified and discussed separately. The study examines the standards and Guidelines issued by the Organisation for Economic Cooperation and Development (OECD) in 2007[6] and 2009[7] and the International Society for Biological and Environmental Repositories (ISBER).[8] The following are the significant issues in the governance of biobanks;

A. Compromising the Quality of Biospecimens

Biobanks primarily aim to ensure the availability of biospecimens across different entities engaged in various biomedical research studies. For any clinical research, the result has a strong correlation with the quality of the input. Thus, along with biospecimen availability, its quality assurance is quintessential. Though increased demand for biospecimens spurred the growth of biobanking systems in public, private and academic sectors, the development was slow as it lacked a proper framework for quality standards. To ensure the availability of high-quality biospecimens, it is necessary to develop standardised techniques for collecting, processing, storing and distributing biological materials.

The International Society for Biological and Environmental Repositories (ISBER) is the leading global forum for developing, managing, and operating biorepositories. It sets out specific guidelines for the infrastructural facilities for collecting, processing and storing biospecimens.[9]

6. OECD, Best Practice Guidelines for Biological Resource Centres, 2007.
7. OECD, Guidelines on Human Biobanks and Genetic Research Databases, 2009.
8. ISBER, Best Practices: Recommendations for Biorepositories, 4th ed., 2018.
9. *Supra* note8,Section B &C.

It provides for adopting Quality Assurance (Q.A.) and Quality Control (Q.C.) programmes for quality management. It mandates the adoption of quality management documents, including quality manuals describing the roles and responsibilities of the staff within the system.[10] It also provides for regular internal audits to evaluate all SOPs in operation, find deviations, and take corrective action. As per the ISBER Good Practice Recommendations, a National Ethics Body / Central Ethics Committee shall be endowed with the authority to approve the functioning of the institutional repositories, and the functioning of such institutional repositories shall be reviewed by the Institutional Ethics Board/Ethics Review Committee .[11]

To meet the demands of modern biotechnology, the OECD introduced the concept of the Biological Resource Centre (BRC) in 2007 to provide high-quality biological materials and information.[12] The chapter under OECD Guidelines 2007 and 2009 deals with human-derived biological materials and directs the BRCs to institute a quality control system to monitor the process of preparation and conservation of samples.[13] Based on the nature of the biological materials, adequate quality checks shall be put in place. Additionally, it recommends athree-level certification process. First - Party Assessment at the first level is a self-audit done by the BRC to find out the gaps in quality management at different levels and adopt capacity-building programmes and best practices. The Second - Party Assessment or Conformity Assessment is done by the customers of the BRCs. This is recommended to ensure transparency and coordinated efforts for capacity-building and full compliance with the best practice guidelines. Third - Party Independent Assessment or Certification is proposed to be done by independent certifying agencies like ISO[14] . In 2018, ISO published the certification standards for biobanks.[15]

As discussed earlier, though the biobanking system in different forms started to function a century ago, itstill lacks proper standards that are generally to be followed even in crucial areas like the quality of biospecimens made available by these biobanks. The existing standards, be it ISBER Recommendations or OECD Guidelines, have no clear delineation of the exact standards to be followed by these biobanks. It leaves the discretion to the institutions to adopt

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10. *Ibid.*
11. *Id.* at 77.
12. *Supra* note 6.
13. *Ibid.*
14. *Id.*at 27.
15. ISO 20387 (2018), Biotechnology — Biobanking — General requirements for biobanking, https://www.iso.org/standard/67888.html.(last visited on August 28, 2023).
16. David J. Kaufman, Juli Murphy-Bollinger, et. al., "Public Opinion about the Importance of Privacy in Biobank Research" 85 The American Journal of Human Genetics 643 (2009).

proper regulatory standards and quality control systems. More importantly, these guidelines and regulations lack enforceability. Thus, it is high time to adopt appropriate regulatory measures to ensure the high quality of biospecimens, and coordinated efforts at the international level are required for the transfer of quality biospecimens.

B. Infringement of Privacy and Confidentiality

The Biobanking system requires a large number of representative samples embedded with genotypic and phenotypic information. It is a storehouse of robust, sensitive, and personal health data. Biospecimens annotated with medical, environmental, and lifestyle information are essential to examine the gene manifestations, the impact of the environment and changes in lifestyle in complex diseases.[16] The process of de-identification or anonymisation by removing personal identifiers like name, date of birth, address, age, personal contact details including phone numbers and email address, personal identification numbers issued by various agencies, URLs, I.P. addresses, photographs, fingerprints etc. is part of the routine procedures of biobanks nowadays[17]. There are different degrees of de-identification techniques, such as coded or linked[18], encrypted,[19] anonymised or unlinked[20], and anonymous unidentified[21] . However, modern forensic methods help for the easy re-identification of anonymised data[22] . The 21st-century digital inventions facilitate the conglomeration of all related health information. Digitalising healthcare services and health data makes transboundary data transactions easier. Thus, re-identifying de-identified data is less painstaking in the era of digital health.

Medical privacy and confidentiality are foundational principles of medical practice and biomedical research. From the Hippocratic tradition from the 4th Century[23], the right to privacy has been a part of all types of clinical practice, including biomedical research[24]. In relation to biobanking, the ISBER guidance document mandates that biobanks shall respect and maintain

17. *Ibid.*
18. A code is attached to the sample/data and the correspondence between the code and the identity is physically separated. Only a few people are aware of the connection.
See,Supra note 2, Manjulika vaz, mario vaz, et.al.
19. The code is transformed into several characters by a third party. The third party will be required to trace the individual identity. (This method was in use in Iceland's deCODE biobank.). Ibid.
20. The link between the samples/data and the individual identity is irreversibly cut. Therefore, they lack identifiers. Ibid.
21. The sample/data were without any identifiers from the start. Ibid.
22. *Ibid.*
23. John C. Moskop, Catherine A. Marco, et. al., "From Hippocrates to HIPAA: Privacy and Confidentiality in Emergency Medicined"*available* at: https://pubmed.ncbi.nlm.nih.gov/15635312/ (last visited on 27 June, 2023).
24. WMA Declaration of Helsinki 1964, International Ethical Guidelines for Health-Related Research Involving Humans 2016 , Convention on Human Rights and Biomedicine 1997 , and Universal Declaration on the Human Genome and Human Rights 1997.

the privacy and confidentiality requirements set out in the national laws and regulations at all stages of collection, storage and use of human specimens[25]. Also, it points out that privacy and confidentiality issues shall be considered in the context that includes the risks and benefits to the family members, community, and identified population[26].

The OECD Guidelines 2007 stipulate that two types of data sets must be maintained: MDS (Minimum Data Set) and RDS (Recommended Data Set for additional information). The procedure for MDS and RDS shall be prepared before the data collection. It recommends updating the information of the donor's sample regularly[27]. To maintain privacy, it provides that the associated data/identifying data can be transmitted only to secured systems as per the regulations. The OECD Guidelines 2009 provides for coding, encryption and anonymisation of information of donors along with the adoption of measures to block unauthorised access to biological materials, data enclaves, honest broker systems, etc[28]. It directs human biobanks to ensure that the researchers are handling the data cautiously and not inadvertently providing access to identifying or potentially identifying data. Only authorised persons can use identifying personal data, and biobanks shall fix their responsibility in such situations. All human biobanks shall maintain a privacy policy and data storage duration. It completely prohibits data transfer to a third party for non-research purposes and participants contacting researchers who have accessed their specimens and data from any human biobanks[29] .

Though privacy and confidentiality are in common parlance and are part of legal documents and bioethical regulations, bio researchers agree that genetic identifiers can never be erased from the bio-specimens, and thus an individual can always be traced[30]. More importantly, for biobank-related research studies, it is vital to maintain and update medical information for biospecimens' prolonged use. Thus, some biobanks have the policy of maintaining the link with the contributor to update on various matters, including medical, lifestyle, etc[31]. Therefore, a robust regulatory structure is required to ensure the privacy and confidentiality of parties. It is also important to note that privacy jurisprudence has evolved beyond the right to be let alone, and it gives essential rights to the data owner in managing their personal information. Thus, a paradigm shift is

25. *Supra* note 8at 77.
26. *Ibid.*
27. *Supra* note 6.
28. *Ibid.,* Supra note 7 at 36.
29. *Id.* annotations 63&64 at 38.
30. *Supra* note 2, Manjulika vaz, Mario Vaz, et.al.
31. *Ibid.*

required in privacy regulations, enabling donors and patients to participate in administering and managing their personal details and biosamples.

C. The impracticability of Obtaining Informed Consent

The requirement to obtain the consent of the research participant is one of the golden rules embodied in all biomedical research laws and regulations and has been widely accepted at the international and national levels[32] . Informed consent implies the capacity to make autonomous and informed decisions to participate in existing or future research studies/projects[33] . Thus, to make an informed choice, the research participant shall be empowered by giving adequate information. So the Declaration of Helsinki directs that "each potential subject must be adequately informed of the aims, methods, sources of funding, any possible conflicts of interest, institutional affiliations of the researcher, the anticipated benefits and potential risks of the study and the discomfort it may entail, post-study provisions and any other relevant aspects of the study. The potential subject must be informed of the right to refuse to participate in the study or to withdraw consent to participate at any time without reprisal".[34] Though the condition of informed consent is well accepted for biomedical research, the principle lacks practical implementation in the bio-banking sector. Also, the approach of countries and the level of adoption and implementation vary.

The requirement of informed consent has some practical difficulties while collecting biological materials from research participants. At first, the genetic materials of an individual have a solid potential to reveal the medical history of family members of the participants or a particular community. The present informed consent system only considers the research participant's interest. It does not protect the interests of third parties, family members, or communities that would be affected by the research output[35]. Secondly, biobanks are resource centres for researchers and research institutions intended to provide only the essential samples. Thus, obtaining consent from the donors for each project is impossible. Thirdly, biobanks are future-oriented and obtaining informed consent during sample collection is impractical. Finally, there is no clarity on how far the participants can exercise the right to withdraw consent. Hence, the

32. *Supra* note 26.
33. Kristin Solum Steinsbekk and Berge Solberg, "When is Re-consent Necessary?" 4Public Health Ethics237 (2011).
34. TheDeclaration of Helsinki 1964, Art. 24.
35. Heather Widdows&Sean Cordell, "The Ethics of Biobanking: Key Issues and Controversies" 19Health Care Analysis 208-210 (2011).

biobanking institution looks for alternative consent models to ensure the easy transferof biosamples to researchers, such as one-time general or tired consent. The tired consent gives the participant a set of options, of which the most convenient and suitable may be chosen by the participant [36].

In order to ensure flexibility in the matter of informed consent, the ISBER Recommendations provide for four different types of consent regimes[37] .

a. Specific Consent: This allows the use of samples for the immediate, specific research project and forbids all future research projects not envisaged at the time of giving consent.

b. Broad Consent: General information is provided to the participant for future research use.

c. Partially Restricted Consent: This allows the use of samples in immediate, specific research, and it also allows use for future projects directly or indirectly related.

d. Multi-layered Consent: Participants will be allowed to choose from various options.

For withdrawal of consent, three types of withdrawals are given in the ISBER Recommendations, and the right to withdrawal will be available only if the specimen and the phenotypic and demographic data are not anonymous[38]. The following are the three types of withdrawals [39];

a. No further contact with the Donor: This allows continued retention and use of samples, information and health records.

b. No Further Access: Continued retention and use of samples and information but no further access to health records of the participant.

c. No further use of Specimen: Prohibit retention and use of samples, information and access to health records. The remaining specimens shall be destroyed.

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36. Options may include one or more of the following: Permitting use of the specimen in the current study only (if collected in the context of a specific study), Permitting use of the specimen in the current study only, but allowing contact to request consent for future studies, Permitting identified versus unidentified future use, Limiting future use to certain types of research (e.g., related to a specific disease or conducted by a particular category of researchers), Allowing commercial use of specimens.
See. Susanne B. Haga and Laura M. Beskow, "Ethical, Legal, and Social Implications of Biobanks for Genetics Research" 60 Advances in Genetics 507 (2008).
37. *Supra* note 8 at 78.
38. *Id*. at 78.
39. *Id*. at 79.

The condition of obtaining consent is an inevitable part of biomedical research and biobanking. However, the nature of the biobanking system is entirely different. Hence, the legal condition of informed consent has various issues in the context of biobanking. Above all, there is no harmonised approach at the national or international level. Hence, implementing informed consent in the biobanking sector is complex and largely depends on national laws and regulations. The lack of rules at the national level adds fuel to the conundrum. Hence, a more focused approach must be developed to protect the interest of biobanks and contributors.

D. Issues of Profit Sharing and Property Rights

The legal intricacies of claiming property rights over biological materials have raised unresolved debates worldwide. The issue of property rights on biological materials needs to be considered under the legal principles of property rights. Ethicists put forward different connotations. Multiple problemsrevolve around the property concept. First, can property rights be claimed on biological materials? Secondly,if so, who can claim the ownership? Thirdly, what are the rights of the biobanks and the contributors? Fourthly, can contributor claims benefit sharing? Fifthly, can donors retain control over biospecimens donated? Etc. Due to the uncertainties in applying the legal principles of property law to biological materials, the matter came before many courts in different jurisdictions[40] .

Though the emerging property jurisprudence assigns some property rights or quasi-property rights in favour of the donor, no finality isarrived at in deciding the ownership of biological materials. Regarding the source of ownership, there are two different views. Since donors are the contributors of biological materials, they are considered the source of property. This approach closely favours the donors and enables them to make a never-ending list of rights over the biological materials, which will, in turn, undermine the basic purpose of biobanks [41]. On the other hand, applying the theories of private property, the one who first acquired the biological materials can be considered the property owner. This gives the biobanks an upper hand over the donors in owning and managing the biological materials. However, this may lead to a complete negation of the fundamental rights of the owner. Thus, to balance donors' rights and facilitate the

40. Moore v. Regents of the University of California 51 Cal.3d 120 (1990), R v. Kelly and Lindsay[1998] 3 All E.R. 741, Washington University v. Catalona 437 F. Supp. 2d 985 (2006) , In re Estate of Kievernagel 83 Cal. Rptr. 3d 311 (2008).
41. Simon Douglas and Imogen Goold, "Property in Human Biomaterials: A New Methodology"75 The Cambridge Law Journal 482-484 (2016).

working of biobanks, it is necessary to find a possible way out through mutual discussions.

On a closer look at the ISBER Recommendations, nothing is provided to recognise any aspects of property rights. Instead, it directs the biobanks to adopt policies addressing ownership and benefit-sharing to the participants/groups/communities. Benefit-sharing may include monetary benefits (capacity building, education, research partnership etc.) and non-monetary benefits (commercial products, royalties, salaries etc.), and it may be decided based on Mutually Agreed Terms (MAT)[42]. The repositories that are supported by public funds are directed to make their resources available to the wider community of researchers[43]. In this line, the OECD Guidelines 2009 directs the operator of human biobanks to adopt policies to indicate the rights of participants over the samples, nature of rights, sharing of benefits and intellectual property rights[44]. Examining these guidelines and existing practice, it may be concluded that the intricacies of ownership and property rights still lack clarity, and it is subject primarily to judicial interpretations and statutory provisions in different jurisdictions. Thus, it is the need of the hour to delineate the scope and ambit of property rights over biospecimens and set out the rights of the contributor for the better coordination of biobanks at the international level.

E. Conundrum of Commercialisation and Cross–Border Transfer

In the context of biobanks, the term commercialisation has different connotations. It includes commercialising biobank resources, results derived, or products developed. It also includes biobanks receiving funds from private or for-profit entities[45]. Thus, commercialisation implies many operational differences in the working of biobanks, which entails complex questions of ethical and legal principles such as consent, confidentiality, proprietary rights, benefit-sharing, etc[46]. Along with the growth of large-scale commercial biobanks, there are reports of cross-border transfer of biological materials to biobanks in other countries without the consent of patients or contributors[47]. No harmonised approach or global consensus exists on commercialising biological materials or biobanks.

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42. *Supra* note 8 at 87 &88.
43. *Id. at 88.*
44. *Supra* note 7, Guideline 9.
45. Christine Critchley, Dianne Nicol, et. al.,"The Impact of Commercialisation and Genetic Data Sharing Arrangements on Public Trust and the Intention to Participate in Biobank Research"18 Public Health Genomics 162 (2015).
46. Mary R. Anderlik, "Commercial Biobanks and Genetic Research Ethical and Legal Issues"3 Am J Pharmacogenomics206 (2003).
47. Flavio D'Abram, "Biobank research, informed consent and society. Towards a new alliance"69 Journal of Epidemiology and Community Health 1125 (2015).

The commercialisation of biological materials is prohibited in various international documents. The Convention on Human Rights and Biomedicine 1997[48] and Universal Declaration on the Human Genome and Human Rights 1997[49] strictly prohibit making financial gain from the human body, bodily parts and human genome. In this context, it is essential to understand the different approaches countries follow in recognising the property value of biological materials. Thus four broad perspectives are in vogue in countries ; [50]

a. No-property approach and anti-commercialisation of biological materials,
b. Donors' or participants' right to decide on the commercial use of samples,
c. Fixed price determined by the Government authority for samples without any further control over the donor.
d. The market will determine the complete commercialisation of bodily materials and their price.

In tune with the strategies mentioned above for commercialisation, the Belgian Government has fixed prices for biological materials. Also, in Spain, commercial donation for reproductive research is allowed[51] . To safeguard the participants' interest, the OECD Guidelines 2009 provide for adopting a policy to communicate with the participants about the commercialisation of resources, research results, and products developed from their biological resources[52] . It also reimburses costs incurred by the participant to promote participation in human Biobanking[53] . However, similar approaches have not yet been adopted by many countries, including India.

The main concerns of trans-border/cross-border biobanks are the trans-border sample and data transfer along with other issues already discussed, such as compliance with the consent regime, privacy and confidentiality benefit-sharing, etc. The cross-border sample transfers are generally regulated by national legislation and other ethical regulations. Similar to the transfer of data within the state, the OECD Guidelines and ISBER Recommendations direct the biobanks transferring samples and data to ensure that the recipient has adequate standards in place for regulating privacy and confidentiality[54]. The digital data protection laws are also not strong

48. The Convention on Human Rights and Biomedicine 1997, Art. 21.
49. The Universal Declaration on the Human Genome and Human Rights 1997, Art. 4.
50. Christian Lenk, Katharina Beier, "Is the commercialisation of human tissue and body material forbidden in the countries of the European Union?"J Med Ethics343 (2012).
51. *Ibid.*
52. *Supra* note 7 Guideline 4.
53. *Ibid.*
54. *Supra* note 8 & Supra note 7.

enough at the international and national levels. Thus, there exists a considerable disparity in privacy and data protection laws. The OCED Guideline on Protection of Privacy and Transborder Flows of Personal Data[55] and E.U. General Data Protection Regulations[56] are some attempts made at the international level for data protection. Nevertheless, similar initiatives are absent in other countries, including India. The existing framework contains no regulatory mechanism to control commercial biobanks properly. Using biosamples for commercial purposes by commercial biobanks without proper regulatory standards will have far-reaching consequences as commercial biobanks have only emerged in recent years, and issues relating to commercial biobanks are yet to be deciphered. Above all, uniformity in regulatory standards is imperative to facilitate international collaboration and coordination.

E. Protecting the Rights of Minorities and Vulnerable Subjects

The current regime of protective measures for minorities, ethnic or racial, reflects the long legacy of racial discrimination. Two such instances were the Tuskegee Syphilis Study and the Havasupai Tribe Case. The Tuskegee Syphilis Study was started in 1932 and continued for 40 years, and it is considered a 'dark chapter' in the history of medical research due to the unethical methods adopted for the study on research participants.[57] Hence, the ISBER Recommendations provide best practices regarding ethnic and social minorities and vulnerable and pediatric subjects.

According to ISBER Recommendations,vulnerable subjects may include people under heavy sedation, patients with dementia, or patients with syndromes of impaired consciousness such as coma, brain death, locked-in syndrome, and persistent vegetative state.[58] It mandates the biobank to adopt ethical and legal regulations and obtain consent from a legally authorised representative for vulnerable subjects. For paediatric subjects, informed consent is not permitted below a particular age, and the age limit may vary according to national regulations. Thus, in such situations, ISBER envisages a two-way consent procedure in lieu of informed

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55. *Available at*: https://www.oecd.org/digital/ieconomy/oecdguidelinesontheprotectionofprivacyandtransborderflowsofpersonaldata.htm (last visited on September12, 2023).
56. General Data Protection Regulation (GDPR), available at:https://gdpr.eu/what-is-gdpr/ (last visited on September 10, 2023).
57. Elizabeth Landau, "Studies show 'dark chapter' of medical research"available at: http://edition.cnn.com/2010/HEALTH/10/01/guatemala.syphilis.tuskegee/index.html#:~:text=The%20Tuskegee%20study%2C%20which%20began%20in%20the%20early ,6%20months.%20Instead%20it%20lasted%20about%2040%20years (last visited onAugust 25, 2022).
58. *Supra* note 8.

consent.[59] For them, consent shall first be obtained from the parent by following the same procedure for informed consent, and paediatric assent must also be ensured. The paediatric assent process should be conducted by discussing the details of the research, procedures, and processes to be adopted with the child in appropriate language, including the opportunity to ask questions.

Similar to ISBER Recommendations, OECD Guidelines 2009 also directs the humanbiobanks explicitly to ensure that safeguards are provided under ethical and legal regulations in case vulnerable people are involved in any sample or data collection. It also directs the biobanks to adopt specific policies based on existing legal and ethical regulations withrespectto minors and vulnerable subjects impaired in decision-making.[60] A detailed analysis of ISBER and OECD Guidelines points out that no proper regulations exist to protect the rights of vulnerable populations and minors. The existing guidelines direct the biobanks to follow standards set out under their respective countries' ethical and legal regulations. This ensures the flexibility of adopting regulatory measures according to the local situations. However, the absence of general standards may lead to gross violations of fundamental human rights, especially for minorities and vulnerable people.

F. Ensuring Biosecurity

Since biobanks are repositories of biological materials of different nature, their release, deliberate or unintended, may lead to large-scale damage to public health. Hence it is necessary to ensure that these materials are not misused or used for immoral or unethical purposes, including bioterrorism. Thus, biosecurity assumes great importance in the context of biobanks. The term biosecurity denotes 'institutional and personal security measures and procedures designed to prevent the loss, theft, misuse, diversion or intentional release of pathogens, or parts of them, and toxin-producing organisms, as well as such toxins that are held, transferred and/or supplied by Biological Resource Centres'.[61] To ensure the security of samples stored, strict adherence to the ethical and legal regulations is required from all who are directly or indirectly involved in the management and administration of biobanks.

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59. *Ibid.*
60. *Supra* note 7.
61. *Supra* note 6.
62. *Id.* at 45 to 54.

To avoid security risks, the OECD Guidelines 2007 has given detailed directions to be followed by nation-states, including assessment of the risk of biological materials, re-assessment of inventory on an acquisition of new biological materials, and biosecurity risk management practices. The 2009 Guideline also strictly directs that human biobanks shall be established, managed, governed, and operated in such a way as to prevent inappropriate and unauthorised access to or use of human biological materials and personal data.[63] There are other international instruments to prevent bioterrorism and biological risks. The Biological Weapons Convention (BWC) specifically prohibits the development, production, stockpiling, acquisition, retention, or transfer of biological weapons.[64] Security Council resolution 1540 (2004) requires States to have adequate legislation in place and to cooperate to counter the threat of proliferation of biological weapons by non-state actors.[65] The U.N. Office on Drugs and Crime recently initiated an awareness programme titled *'The International Legal Framework against Biological Terrorism"* in September 2020, in which 219 participants from 41 countries and 17 international organisations participated. Though biosecurity has been amuch-debated issue for centuries, the legislative and regulatory attempts to eliminate biohazards are halfway through. Many countries, including India, have no particular regulations to tackle such issues. In the context of the commercialisation of biobanks and the involvement of non-state actors, the issue must be discussed from a border perspective, and stringent regulatory standards need to be adopted for the proper administration and management of biobanks and to prevent all sorts of risks involved and to fix the responsibility of parties involved.

g. Safe destruction of samples and closure of biobanks

Most biobanks follow the selection of unwanted samples, and destroying or transferring such samples is a routine procedure. Since samples are to be handled with extreme care and caution, their destruction assumes importance as it poses a risk at various levels. Hence, ISBER recommendations give clear guidelines on how the destruction and transfer of samples can be effected. It mandates periodical reviewing and elimination of selected samples or transfer of samples to a new custodian. There are various reasons for the elimination of samples, such as

63. *Supra* note 7.
64. The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and their Destruction,1975, *available* at: https://www.un.org/disarmament/biological-weapons (last visited on August 26, 2023).
65. U.N. Security Council Resolution 1540 (2004), *available* at: https://www.un.org/disarmament/wmd/sc1540/ (last visited on August 26, 2023).

consent issues, regulatory changes, the identity of the specimen being lost, quality compromised, collection of excess samples etc.[66] In case of a complete transfer of samples, the transferor and transferee shall endorse a material transfer agreement (MTA). Also, it is essential to document the risk level and biosafety requirements to be followed while handling the specimen, future uses of the specimen, potential risks associated etc.[67] All cases of elimination and transfer of biobanks shall have proper policies and operating procedures along with adequate documentation of all the procedures conducted, and inventory shall be prepared for future reference.[68]

Similarly, the OECD Guidelines 2009 also advocate for adopting a proper policy for all human biobanks for appropriate disposition or destruction of biological materials in all cases where a biobank has lost its significance or scientific value or is no longer required or incapable of continuing it due to legal or other issues.[69] Compared with ISBER Recommendations, the OECD guidelines warn the biobanks to inform their participants about the procedures that will be followed in case the shutdown happens under the insolvency proceedings where the liquidator may be permitted to sell the assets of the biobanks to commercial buyers.[70] It also provides that the human biobank policy shall consider the cultural and religious beliefs of the participants that are known, disclosed or intimated. They are also bound to ensure the elimination irretrievably by completely complying with laws applicable to the disposal of human materials and bio-hazardous waste.[71] Though the ISBER and OECD Guidelines mandate specific procedures for the transfer and destruction of biosamples, as in the case of other issues mentioned above, these guidelines lack enforcement, and countries' national laws and regulations play a vital role in these matters.

CONCLUSION

Biobanks are independent entities present in all regions in both public and private sectors. The corporate sector is investing heavily in biobanking systems, understanding the potential of developing business networks and ventures. Though it emerged as an institution vital for biomedical research during the beginning of the 19th Century, little attention was given to

66. *Supra* note 8.
67. *Ibid.*
68. *Ibid.*
69. *Supra* note 7.
70. *Ibid.*
71. *Ibid.*

regulating and standardising the functioning of the biobanks. There are no proper regulatory standards existing at national and international levels. The ISBER and OECD guidelines provide only guidance to adopt country-specific standards for issues concerning biobank functioning, including quality of biological materials, privacy and confidentiality, informed consent, etc. There are no accepted norms for protecting the property rights of interested parties and benefit-sharing schemes. Also, it is essential to note that the domain of transborder sharing of biological materials and enlisting of rights of minorities also needs to be addressed with great care. Thus, biobanking regulations require a multispectral, transdisciplinary and practical approach to determine the proper strategies to govern the administration, internal and external collaborations and transfers, digitalisation, etc. Also, countries must encourage deliberations at different levels to ensure the biosecurity and proper management and destruction of biological materials. Though biobanks have emerged as business entities, policymakers must follow a right based approach evaluating and addressing the rights of donors, patients and research participants.

DECIPHERING THE SHIFTING PARADIGMS ON SEAT VS VENUE DEBATE UNDER ARBITRATION LAW IN INDIA

Dr. Kulpreet Kaur Bhullar*

INTRODUCTION

The traditional method of resolving disputes, which is through litigation, is a drawn-out procedure that impedes the administration of justice and overburdens the judicial system. Alternative Dispute Resolution (ADR) techniques including arbitration, conciliation, mediation, etc. are very useful as courts today are overburdened. These ADR processes are less adversarial and a more effective alternative to traditional dispute resolution techniques.

Arbitration is a procedure in which a dispute is submitted, by agreement of the parties, to one or more arbitrators who make a binding decision on the dispute. In choosing arbitration, the parties opt for a private dispute resolution procedure instead of going to court.[1] The primary difference between litigation and arbitration is that, in the case of arbitration, the parties do not approach a court of law rather a neutral person to decide the dispute.[2]

Since, arbitration follows a similar process to that of the courts in resolving disputes, it guarantees objectivity and justice to the parties and is open to everyone. However, national courts play important supplementary role in arbitration process where it runs into difficulty. Generally, country which is specified seat of arbitration will assist the arbitral tribunal in removing the deadlock in arbitration process. Consequently, it is imperative to mention the seat of arbitration inarbitral clause, as courts at seat will have supplementary control on arbitration. However, sometimes parties do not mention the seat and sometime instead of seat word venue of arbitration is used which results in conundrum. Since, these two terms do not convey same meaning, problem arise. As a result, interpretation from the court is required for ascertaining the seat. Supreme court has given different factors to ascertain the seat of arbitration,so far,no definite clarity has been provided. Although, recent decisions provide explanation which can be utilised to ascertain the seat, but they will be analysed to see if they can help in resolving the long-standing seat venue debate.

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1. https://www.wipo.int/amc/en/arbitration/what-is-arb.html (last visited July 16, 2023)
2. https://burlingtonslegal.com/insight/what-is-arbitration-all-you-need-to-know-about-the-process/ (last visited July 16, 2023)

Main traits of arbitration:

a) Arbitration is consensual-

Arbitration can be conducted when both parties agree to it. The parties add an arbitration clause to the contract so that any future disagreements arising from it can be settled by arbitration. Through a submission agreement between the parties, a present dispute may be brought to arbitration.

b) Party appointed Judges in form of Arbitrators-

Parties to an arbitration agreement are free to choose number of arbitrators. They can choose a sole arbitrator or a panel of three arbitrators. National and International institutions providing for arbitration may also directly appoint arbitral tribunal members, when institution has been named in arbitration agreement.

c) Party autonomy is supreme-

Parties have the option to decide on crucial aspects of the arbitration, including the applicable legislation, language, seat, venue, number of arbitrators, to opt for hearings or decision based on documents alone. It enables them to make sure that neither party has an edge due to home court.

d) Arbitration is a confidential procedure

It safeguards any disclosures made throughout the process before the tribunal.

e) Binding decision-

Awards are enforced pursuant to the New York Convention 1958, which is ratified by the majority of the trading nations. The convention's major goal is to make foreign awards enforceable in countries where loosing party has its assets.

II. LEGAL FRAMEWORK FOR ARBITRATION IN INDIA

The Arbitration and Conciliation Act, 1996[3] is the act of parliament that governs the conduct of arbitrations within India. This law was created and revised to bring it in compliance with current arbitration law practiced in other nations. It was based on Model Law[4] on International

3. 22nd August, 1996, vide notification No. G.S.R 375(E), dated 22nd August, 1996, see Gazette of India, Extraordinary, Part II, sec. 3(i).
4. UNCITRAL Model Law on International Commercial Arbitration United Nation document A/40/17, annex 1 as adopted by United Nation Commission International Trade Law on 21st June 1985

Commercial Arbitration drafted by United Nation Commission on International Trade Law[5] a body of United Nations. It consolidates the legislation governing domestic arbitration, international arbitration and the recognition and enforcement of foreign arbitral rulings. It also defines the law related to conciliation and following are its primary goals:

a. Minimising the role of the judiciary
b. Providing speedy dispute resolution.
c. Peaceful, prompt, and economical resolution of disputes.
d. Assuring the effectiveness, justice, and fairness of the arbitration process.
e. Completely encompass local arbitration and conciliation in addition to international commercial arbitration and conciliation.
f. Permit an arbitrator to use conciliation, mediation, or another technique to promote dispute resolution during the arbitral proceedings.
g. Arbitral award that decides the dispute.

Part I of the 1996 Act deals with arbitration taking place in India between Indian parties and those arbitrations in which parties are from different countries but where seat of arbitration is India.

Part II of the Act deals with enforcement of foreign awards.

Part III of the Act deals with the Conciliation process in India.

Part IV contains supplementary provisions.

III. LAWS APPLICABLE TO ARBITRATION

In international commercial arbitration different laws are applicable, but law governing the lex arbitri is most important because it determines courts at the seat of arbitration will assist arbitration process. Unlike domestic arbitration, international arbitration typically uses several different legal codes or legal systems. In fact, without using excessive sophistication, it is conceivable to name at least four separate legal systems that, in actuality, can affect an international arbitration:[6]

a) The law governing the arbitration agreement;
b) The applicable law (is known by different names such as the governing law,

5. The United Nations Commission on International Trade Law (UNCITRAL) was established by the General Assembly in 1966 (Resolution 2205(XXI) of 17 December 1966).
6. Nigel Blackaby and Constantine Partasides QC, et. Al.,Redfern and Hunter on International Arbitration 197 (Oxford University Press, United Kingdom, sixth ed/ 2015)

proper law of the contract, or the substantive law of contract), or the applicable legal norms regulating the substantive issues in dispute;

c) the law governing arbitration or the *lex arbitri*;

d) the law governing recognition and enforcement of the award. It will include the laws of the country where loosing party has its assets[7]

a) Law governing the arbitration agreement

An agreement to arbitrate can be in form of a or a tailor-made *submission agreement* or may have an *arbitration clause,* which is incorporated in contract itself as dispute resolution clause. Law governing the arbitration agreement is usually the law of the seat of arbitration. Law dealing with arbitration agreement will address the issues regarding the legitimacy, survival and construal of the arbitration agreement. More frequently than not, parties to an arbitration agreement fail to specify the law that would govern the arbitration agreement.[8] If it is not specified in the arbitration clause than arbitral tribunal will normally look into the validity of the agreement according to proper law of contract chosen by the parties and also according to the legal framework of the country which is the seat of arbitration.

b) The proper law or the law dealing the liability of parties in dispute

An agreement to arbitrate cannot exist in a legal vacuum. The legal framework dealing with the contract is referred to as the "proper law" of the arbitration. This term refers to the specific legal framework that controls the validity and interpretation of the contract, the rights and responsibilities of the parties, the process of execution, and the repercussions for violating the terms of contract.

The options of substantive law which the parties may choose includes:

- state law of a particular country
- public international law together with specific and general international law
- concurrent laws
- transnational law together with other trade customs and practices that are prevalent in the commercial world.
- equity and good conscience[9]

7. *Ibid*
8. *Supra* note 6 at 158
9. *Id* at 190

c) **Law governing arbitration or the *lex arbitri* or seat**

An international arbitration often takes place in a nation that is 'neutral', necessary extrapolation of which is that, none of the parties who have entered into arbitration agreement have their principal place of business in that country. Consequently, the *lex arbitri*[10] —the national arbitration law of territory where the arbitration takes place—will typically differ from the law that governs the substantive questions in dispute.[11]

Certain examples of the areas that the *lex arbitri*, might be anticipated to cover can be identified, but it's imperative to verify the precise position under each relevant *lex arbitri,* especially in cases where these legal requirements are mandatory. With this caveat, the *lex arbitri* is possibly applicable to:

- the meaning and form of an arbitration agreement;
- *arbitrability* of the dispute, specifically, if it is arbitrable in accordance with the lex arbitri);
- the composition of the arbitral tribunal and any grounds for challenge of that tribunal;
- the power of the arbitral tribunal to rule on its own jurisdiction;
- procedural rules to be followed in arbitral process;
- interim measures of protection;
- statements of claim and defence and how hearings are to be conducted;
- seeking court assistance where arbitration runs into trouble.
- the powers of the arbitrators, including any powers to decide matter amicably;
- the contents of the arbitration award;
- and right to appeal against the award.[12]

Examples given above are crucial parts of international arbitration and they are encountered by the parties' practically while using arbitration to resolve conflicts.

d) Law Governing Recognition and Enforcement of The Award

Almost all awards are carried out willingly. The winning party must, however, take concrete steps to warrant execution of an award if the losing party refuses to do so. In reality, there are just two possible actions. The first is to use pressure, whether it be commercial or otherwise, to

10. The lex arbitri is the law chosen by the parties to govern arbitral procedure, or the procedural law governing the conduct of the arbitration.
11. *Supra* note 6 at 166
12. *Id* at 169

persuade the party which has lost the award, to persuade them to carry out the award and that it would be in its benefit to give effect to the award. The second option is appeal in the national courts where loosing party has its assets, and get the order from the court for the execution of the award.

IV. CONCEPT OF SEAT AND VENUE

The seat of arbitration is very critical in defining the legal framework for arbitral proceedings.[13] By selecting the seat, the parties are able to choose the legal environment in which they wish to operate.[14] Courts in the country selected as the seat will support the arbitration process, for instance, by resolving adeadlock in the selection of the arbitrator, obtaining temporary relief from the court, and contesting the arbitral decision.

a) Seat of Arbitration

The words ‘Seat' and 'Venue' in arbitration are used interchangeably but they imply different meaning. The term ‘Seat' of arbitration refer to *situs* of arbitration, or in other words it refers to the territory, physical location or a country whose arbitration laws will be used in conducting arbitration. Seat of arbitration suggests that arbitration is affixed to acountry and courts in that county will supplement the arbitral process. Consequently, the seat is lawful home of an arbitration process and offer it appurtenant legal framework.[15] Since, seat of arbitration has a definite legal consequence, parties executing arbitration agreement must stipulate the arbitrational seat in arbitral clause.[16]

Main rationale for designating seat of arbitration in any arbitral proceeding is to identify the courts that will facilitate the smooth operation of the arbitration and to resolve any impasses that may develop during the course of the arbitration. Consequently, parties are aware of which courts to approach for any judicial or administrative assistance. The logical conclusion of this is that it will aid the parties in seeking the court's input when arbitrations encounter difficulty. In international commercial arbitration, for instance, where India is designated as a seat, parties can approach the Supreme court for the selection of the arbitrator if they are unable to come to a consensus regarding the arbitrator.

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13. https://www.fenwickelliott.com/researchinsight/newsletters/internationalquarterly/choosing-arbitral-seat-parties (last visited on 15th July 2023)
14. *Ibid*
15. *Supra* note 13
16. *Ibid*

b) Venue of Arbitration

The 'Venue' of arbitration is essentially a place where arbitral tribunal shall meet and discuss the issue which has been brought for resolution. It is therefore, logical to conclude that venue of an arbitration is a place for discussion by the arbitral tribunal, which has little concern regarding the courts potential right to regulate the arbitration. Therefore, while choosing venue of arbitration, there are many options open to the parties including conference rooms, hotel rooms, lecture halls, etc.

V. JURISPRUDENCE OF COURT IN ASCERTAINING SEAT

To determine court's jurisdiction in disputes of civil nature, the procedure outlined in sections 16 to 20 of the Code of Civil Procedure, 1908, is taken into consideration. As a general rule, suit is filed in the court of lowest jurisdiction and section 20 of CPC states that, a court may exercise its jurisdiction over a particular subject matter if the defendant resides or does business within the court's geographical bounds or if the entire or a portion of the cause of action originates within the court's boundaries. This rule normally results in circumstances when different courts have simultaneous control over a subject matter of dispute.

However, different rules, apply in the case of arbitration, as parties can stipulate in their agreement the seat (country whose courts will exercise jurisdiction for matters that require interference by the courts) of arbitration. They can select the seat of arbitration in a country which has no connection either with the dispute or with the parties. In other words, parties to international disputes often choose neutral country to conduct arbitration i.e., neutral seat is chosen. UNCITRAL Model law, which is edifice on which the domestic arbitrations legislations of the most of the trading countries are structured, does not provide the definition of seat or venue, leading thereby to conundrum. The 1996 Act, dealing with arbitration in India, and domestic legislation of other countries do not define these terms either. However, the only indication to the seat in the Indian arbitration act can be found in sec 20[17] which uses the word place instead of seat of arbitration.

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17. Arbitration and Conciliation Act ,1996 (Act 26 of 1996) Sec 20 Place of arbitration. —
(1) The parties are free to agree on the place of arbitration.
(2) Failing any agreement referred to in sub-section (1), the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.
(3) Notwithstanding sub-section (1) or sub-section (2), the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property."

Sec 20 sub clause 1[18] of the 1996Act states that parties can mutually decide on the place of the arbitration and if they fail to reach on consensus, then sec 20 subclause 2 states that arbitral tribunal can make choice for them. In a similar spirit, pursuant to subclause 3 of section 20of the Act, the parties may select a convenient location for the arbitration proceedings. Clearly Section 20 of the act does not use the word seat or venue which leads to confusion.

Since, venue only refers to a location for deliberations and courts at venue cannot supplement arbitration, it becomes imperative to ascertain seat of arbitration. Failing any guidance from the legislations, and considering the fact that sometimes arbitration agreements are drafted by the people having no legal background, complications are but natural. It is seen parties in their agreements often use the word *venue* instead of *seat*. So, it becomes difficult to ascertain which is the seat from the arbitration agreement if parties have not clearly mentioned it and have instead used the word venue. Even though the distinction between the venue and the seat of arbitration is normally evident in international commercial arbitration, nevertheless imperfectly designed arbitration agreements may obscure this dissimilarity.

In light of lack of clarity in the legislation and in the international instruments relating to arbitration, the task of determining seat falls upon the courts. So, the key issue that requires consideration from the Apex court is to decide which court will exercise jurisdiction in arbitration if seat of arbitration is not expressly stated in the arbitration clause and instead venue is mentioned. Further, when matter is referred to court, there is a lot of disparity in the approach taken by Supreme court to interpret when the word venue is actually a reference to a seat in the arbitral clauses. Although, the Apex court has delved into this issue on several occasions, nevertheless ambiguity still prevails. Inconsistent ruling by the court has further added to the confusion and Apex court has not delineated definitive factors to refer to ascertain seat. In some of the cases the court has accepted the concurrent jurisdiction, in others, where the cause of action arose, or where the agreement was signed or place with which the arbitration has closest linking were used to determine seat of arbitration.

a) Ascertaining the Seat: Roger Shashoua Setting the Tone

To begin with, in order to grasp the stance of the Indian courts in differentiating between the notion of seat and venue in the framework of international arbitration, reference to the decision

18. *Ibid.*

of English court in the case of *Roger Shashoua v. Mukesh Sharma*[19] becomes imperative. In this case, Cooke, J. had to decide where arbitration would take place because the word seat was not expressly used in the arbitral clause instead arbitration agreement stipulated that London will be the venue of the arbitration.

Justice Cooke, interpreted the above arbitral clause by stating that,if venue is used in a clause instead of seat, then safe inference in such scenario is that *venue* is actually the *seat* of arbitration if there are no other factors to conclude otherwise. This came to be known as *Shashoua Principle.*

b) New dawn in Arbitration, Balco Judgement: Clarifying the mist

Apex court clarified the difference between these terms in landmark judgement given on 6th Sept. 2012 in the case of Bharat *Aluminium Company (BALCO) v. Kaiser Aluminium Technical Service Inc.*[20] The Supreme Court carefully gauged the concepts of "seat" and "venue" and stated that they are not same andthey vary greatly from each other. The constitution bench clarified the distinction between the two terms and stated that *venue* exclusively refers to a place for the deliberations of an arbitral tribunal. On the other hand, *seat* of the arbitral tribunal will fix arbitration to a particular territory and arbitration will be governed by the laws of that nation.

Court also provided clarification to section 20 of the 1996 Act and delineated that “place of arbitration” as used in the sub clause 2 of the section 20 relate to seat and sub clause 3 of section 20 indicate venue of arbitration. Meaning of the seat and venue was cleared by the court in this case but at the same time court created confusion by stating that two courts at different places can have concurrent jurisdiction in arbitration. As a result, courts at the place where the issue first occurred as well as the court at the seat will have jurisdiction. This inference of the court ran counter to the accepted notion, that country which is the seat of arbitration will usually have jurisdiction to regulate thearbitration. This verdict by Supreme Court did not settle the position regarding seat and venue but rather resulted in vagueness and caused numerous High Courts to take opposite view.

In the Enercon case[21], the Supreme Court was once again asked to decipher the seat of the arbitration from the arbitral clause where parties had only stated venue of arbitration.Arbitral clause provides for joint venture between the Enerc on India, an Indian Party and Enercon

19. 2009 EWHC 957 (Comm)).
20. (2012) 9 SCC 552)

Gmbh, a German party to produce and sell wind turbine generator in India. Enercon Gmbhwas patent holder for the technology used in the wind turbine generators. As Enercon Gmbhhad to give licence for the use of its intellectual property, they concluded an Intellectual Property License Agreement (IPLA) which had arbitration clause for resolving the conflict.

As per the arbitral clause incorporated in the arbitration agreement, the venue of the arbitration proceedings was London, and the provisions of the 1996 Act were to be used by the arbitrators while deciding the dispute.[22] Dispute arose between the parties and German party approached English courts for the appointment of arbitrator. However, the Enercon India challenged the legitimacy of the IPLA and the clause providing for arbitration. Main claim put forward by the Indian party was that London cannot be the seat of arbitration, as arbitral clause uses the word venue of arbitration and venue only means physical place for deliberations and cannot be equated to a seat. Seat of arbitration should be India rather than in London.

Court in order to ascertain the seat took into account the closet connection test i.e., the territory with which the dispute had the closest connection, would be regarded as the seat of the arbitration. Court considered several factors namely, law dealing with the rights and liabilities of the parties, law dealing with arbitration agreement, where licence agreement was made where it was to be performed. Court after analysing these factors, concluded, since arbitration was conducted in India under the 1996 Act, law dealing with the rights and liabilities of the parties is the Indian Contract Act, Patent law is that of India, licence agreement was made in India and agreement was to be performed in India. All these factors suggest that India is seat of arbitration.

So, court took into account the Shashou a principle, according to which place named in the agreement which used the word venue should be generally taken as reference to seat unless there are some clear factors to indicate that named place does not refer to the seat rather to a physical location where meeting or deliberations of the arbitral tribunal will take place. Factors connecting India to arbitration were contrary elements, which were in the a forementioned case suggested India as the seat of the arbitration rather than London, which was just the venue in the current case. Hence, named venue, of arbitration will actually be a reference to a seat of arbitration, if there is no evidence to demonstrate otherwise.[23]

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21. Enercon (India) Limited v. Enercon Gmbh and Anr. (2014) 2 SCR 855
22. https://www.penningtonslaw.com/news-publications/latest-news/2013/judgment-sets-a-worryingn precedent-for-international-arbitration (visited on 28th Aug 2023)

Court was of the opinion that the elucidation put forth by Enercon Gmbh that the venue London must be interpreted as seat is irrational. London cannot be seat of arbitration in this case as none of party to dispute was British. In this case proper law of the contract was Indian Contract Act and 1996 Arbitration act was made applicable and, in such scenario, choosing English law as the law applicable to arbitral proceeding would make the choice of the Indian Arbitration Act, 1996 totally insignificant and futile.[24]

However, court made a very appropriate remark that, "Once the seat of arbitration has been stated as India, then court in India will have exclusive and only jurisdiction to exercise the controlling powers over the arbitration" and no other courts will have simultaneous jurisdiction, In Enercon India (supra), the Supreme Court recognised exclusive jurisdiction at the seat of arbitration and embraced this approach.

c) Hardy Exploration – Shift from Shashoua Principle

The debate regardingseat and venue was once againconsidered by the apex court in the case of Hardy Exploration.[25] Parties concluded a production-sharing agreement which comprised an arbitration clause. The arbitration clause stated that the venue of arbitration will be Kuala Lumpur without mentioning the seat of arbitration. The dispute resolution clause in the agreement read "venue of conciliation or arbitration proceeding unless the parties otherwise agree, shall be Kuala Lumpur and that arbitration proceedings shall be conducted in accordance with the UNCITRAL[26] Model Law on International Commercial Arbitration of 1985.[27]"

The substantive issues in the dispute were to be decided in accordance with the Indian Contract Act, which served as the applicable governing law. Pursuant to arbitral clause the hearings were held in Kuala Lumpur, and the award was signed there.

Union of India challenged the award before the Delhi High Court. Contention put forward by the them was Kuala Lumper was venue and not the seat of arbitration. They also argued that New Delhi was the seat of arbitration. Hardy Exploration opposed the arguments and pleaded otherwise. The Supreme Court observed that firstly the parties did not expressly postulate the seat in the agreement and secondly the arbitral tribunal did not delve into this question.

Court reiterated that arbitral tribunal should have determined the question of the seat first before proceeding further. Kuala Lumper will not automatically become the seat of arbitration as words

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23. *Supra* note 21
24. *Ibid*
25. Union of India v. Hardy Exploration and Production (India)(2019) 13 SCC 472

used in the dispute resolution clause had specified Kuala Lumper as the venue of arbitration.The Supreme Court ruled that a venue could not become the seat on its own; rather, it could only do so if there are some other factors to indicate that venue is actually seat of arbitration. The arbitration hearing and signing of award were conducted in Kuala Lumpur. Apart from this, nothing else indicated that the parties wanted Kuala Lumpur to serve as the arbitration's seat. As a result, the Supreme Court decided that Indian courts had the authority to entertain a challenge to the award. The Supreme Court held that India and not Kuala Lumpur was the seat of arbitration.

It is to be inferred that due to its unclear definitions of the terms "place," "seat," and "venue," as well as its omission to specify the supporting evidence required to establish that the chosen venue should serve as the arbitration's seat, the Hardy Exploration ruling is of partial use.

This judgement ran counter to the Shashoua case. This ruling has drawn criticism since the arbitral clause in agreement made it plain that the arbitration would take place in Kuala Lumpur, pursuant to the UNCITRAL model law, and that an award was rendered there. Therefore, these elements suggest that parties desired Kaula lumper to be the actual seat rather than just the venue. In the end it can be stated that the Supreme Court was unable to provide any clarification on this issue through its ruling, other than the up-front conclusion, that the chosen venue could not be regarded as an arbitration seat in the absence of other additional indicators.

d) BGS-SGS-Soma-JV – Clarifying the Conundrum

The contract was executed between the BGS SGS Soma JV v NHPC Ltd. [28] for constructing a large hydropower project in Assam and Arunachal Pradesh. The contract provided for dispute resolution through arbitration, and dispute resolution clause stated, 'Arbitration Proceedings shall be held at New Delhi/Faridabad, India.

Arbitral tribunal conducted hearings in New Delhi. A unanimous decision in favour of the petitioner was made by the arbitral tribunal in Delhi. The respondent, who was upset by the decision, applied to the court in Faridabad for challenging the award under the grounds specified in the 1996 Act. Court had to decide whether New Delhi or Faridabad was the seat of Arbitration. The Supreme Court said explicitly that when the parties select the seat of the arbitration, only the courts at seat have the authority to oversee the arbitration hearing, and the jurisdiction of all

26. *Supra* note 5
27. *Supra* note 4
28. (2019) SCC Online SC 1585

other courts is nullified.

For gaging when venue can be regarded the seat of arbitration, the Supreme Court recognized the following clear-cut criteria:

- If a particular place is selected in the arbitration agreement as the venue where arbitral proceedings will be conducted, then by using the words "arbitration proceeding" with word venue, will indicate that party want entire arbitration to be conducted there rather than just some hearings. In this situation, choice of the venue is indeed a choice of the seat of the arbitration.
- As opposed to that, if the words used in arbitration agreement provides that tribunals will meet at a particular venue, witnesses in the dispute are to examined at that venue or the specialists if required will be called there, then it can be safely assumed that intention of the parties was only to have hearings at that place. The selected venue cannot be regarded as the seat of arbitration in this instance.
- If the arbitration agreement states that *arbitration procedures* "must be held" at a specific venue, that means that the arbitration would be anchored at that venue, and in such scenario, *venue* refers to the arbitration seat.
- Another sign that the chosen venue is the seat of arbitration, is the selection of a supranational body of rules such as the ICC Rules to regulate the arbitration at that venue.[29]

Contrary to the theory outlined in Hardy Exploration, the bright-line test recommended in Soma JV expressly states that when the phrase venue is included in an arbitration agreement, it means that the parties have chosen that venue to serve as the arbitration's *seat.*[30] Only when there is proof that the parties' aim was not to use it as a seat as there are factors that suggest otherwise, can this be refuted. Furthermore, court added that if arbitration agreement only provides for the meetings and hearing to be conducted at venue and word venue is not accompanied with the words arbitration proceedings than it is venue and not seat.

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29. *Ibid.*
30. https://www.scconline.com/blog/post/2021/05/06/seat-v-venue-in-contemporary-arbitral-jurisprudence/ (Visited on Augst 24, 2023)

e) **Mankastu Impex aberration from BGS SGS -Soma JV and Shashoua**

In the case of Mankastu Impex Pvt. Ltd. v. Airvisual Ltd.[31], Mankastu, an Indian company and Airvisual, Hong Kong company had affected a memorandum of understanding comprising an arbitration clause. The arbitration clause specified that "any dispute, controversy shall be referred to and finally resolved by arbitration administered in Hong Kong" and "the place of arbitration shall be Hong Kong". The proper law deciding the liability of parties was the law of India i.e., Indian Contract Act. Dispute arose and Mankastu reached the Supreme Court to appoint an arbitrator.

Although Supreme Court determined that Hong Kong was the seat of arbitration, it was made clear that venue would not automatically become the seat of arbitration. Before deciding that the defined venue was the intended seat, it would be necessary to consider a few other concurrent aspects such as provisions of the governing legislations and rules of arbitral institutions, as well as the conduct of the parties, must be taken into consideration when assessing the parties' intentions to consider venue as seat of Arbitration.

It can be concluded though the outcome in Mankastu Impex is proper in as much as Hong Kong was chosen as the seat of the arbitration, but the Apex Court's reluctance to uphold Soma JV has raised questions about its precedent-setting potential. Furthermore, although Supreme Court did not directly refer to Hardy Exploration, in Mankastu Impex but it seems to have taken a similar course of action in coming to its decision by insisting upon the requirement for supplementary evidence of the parties' intent rather than deducing from the simple usage of the phrase "place of arbitration proceeding" in the dispute resolution clause as reference to the seat of arbitration.

Because of this, it is uncertain if Hardy Exploration constitutes sound legal precedent or whether law laid down in Soma JV is still applicable to ascertain the seat as all these decisions are given by coordinates benches. The test delineated in the Soma JV is undoubtedly more lucid, clear, objective, and in accordance with the idea of party autonomy.

VI. CONCLUSION

As has been already said, "Seat" and "Venue" are distinct and self-regulating concepts. However, reality presents a very different picture. Poorly written arbitration clauses now and then use these phrases interchangeably and fail to postulate the real seat and venue of the

31. 2019 (17) SCALE 369

arbitration. As a result of such badly written contracts, the courts have developed number of norms to sort through the tangle and determine the seat of arbitration. This has broadened the misunderstanding since these principles have frequently been in conflict and coordinated benches of Supreme Court have given different interpretation to it. Consequently, there is still a great deal of ambiguity around the venue, seat, and place of the arbitration. One of the apparent causes, as is evident from the aforementioned cases for the same is improper structuring of arbitration agreements. With enormous sums of money and commercial transactions at hand, it is imperative that the arbitration agreements and provisions be impenetrable and devoid of any room for interpretational ambiguities. The arbitration agreements must clearly state the seat, place, venue, and the laws that will apply to the proceedings. Each term must also be carefully defined so that all parties are aware of its ramifications in the event that a disagreement develop between the parties to the agreement. But still cases will be referred to the court for interpretation as arbitration agreements are not drafted taking the technicalities of the seat and venue into account.

Resultantly, author is of the opinion that test laid down in BGS SGS Soma-JV is correct approach which was also laid down in *Roger Sahshoua* case that if word venue is mentioned in the agreement, it should be taken as reference to the seat till the time there is no other contrary indication by the parties. The Supreme Court should thus take it into account and confirm it at the earliest convenient time the test to applied in ascertaining the seat. In the meanwhile, in order to prevent pointless litigation on this matter, parties would be well advised to adopt clear wording relating to the "seat" of arbitration expressly.

PENDING

EXAMINING THE IMPACT OF INSIDER TRADING ON MARKET EFFICIENCY AND INVESTOR CONFIDENCE

Prof. (Dr.) Vikas Gupta*

INTRODUCTION

In India and other worldwide financial markets, insider trading is a persistent problem. Insider trading occurs when a person receives significant, confidential information about a company for trading purposes or to gain an unfair advantage over rivals. Insider trading raises ethical issues, but it also has a negative impact on investor confidence and market efficiency.

The historical background, legal framework, regulatory structure, and contemporary difficulties are the main topics of this paper. The value of a well-organized and well-implemented legal system cannot be overstated, particularly in market as dynamic and varied as India.

This study intends to add to the body of knowledge by providing a complete analysis of trade restrictions in the context of the Indian environment. This study aims to provide insightful observations and recommendations for enhancing the regulatory structure and improving the implementation of trafficking in laws in India through a critical examination of the current legislation, a review of the efficacy of regulation, and an analysis of significant issues. This essay also makes recommendations for policy changes that would strengthen the legal system and increase investor confidence. Stronger penalties, a broader definition of insider trading, safeguards for people who come forward with knowledge, improved monitoring, and a move toward market coordination are a few of these. The study emphasizes the value of investor education and awareness campaigns for empowering investors and promoting a transparent culture.

BACKGROUND AND SIGNIFICANCE OF INSIDER TRADING IN INDIA

Insider trading has become increasingly popular in India since the establishment of the securities market. Insider trading incidents have been documented for a long period of time, which emphasizes the need for strict legislation and compliance procedures. Insider trading undermines the principles of fairness and transparency and creates an unfavorable playing field for investors.

OBJECTIVE AND SCOPE OF THE RESEARCH PAPER:

The purpose of this study is to look at how insider trading impacts investor confidence and

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market effectiveness in the Indian context. The study aims to provide information on how insider trading impacts investor sentiment and the efficiency of the financial market. The goal of this study is to further understanding in this area by examining the relationship between insider trading, market efficiency, and investor trust.

The research paper scope includes an examination of insider trading, India's regulatory environment, and its regulatory structures. It will investigate the legal and regulatory frameworks governing insider trading, including important guidelines produced by SEBI and other regulatory organizations. The study will examine case studies of big insider trading scandals that happened in India to show the impact on market performance and investor trust. Additionally, in order to increase investor trust in the Indian stock market, the study report will offer recommendations for changes and additions to the regulatory framework.

The paper lays the foundation for a full analysis of insider trading's effects on market efficiency and investor trust by examining the background and significance of insider trading in India and stating the objectives and purview of this research. The insight that this study project will bring an increased awareness of the repercussions of insider trading in the Indian context will be very helpful to lawmakers, regulators, and market participants in limiting the impacts of insider trading.

INSIDER TRADING: DEFINITION, TYPES, AND REGULATORY FRAMEWORK IN INDIA

Definition and Forms of Insider Trading

Insider trading is the practice of those who have access to important, private information about a firm, who use that knowledge to compete unfairly with other investors in the securities market.[1] There are many different ways that insider trading might occur, for instance.

1. **Classical insider trading:** This kind of insider trading occurs when using substantial non-public knowledge, insiders, such as corporate officials, directors, or workers, engage in trading in the company's securities.[2]
2. **Tipper-tippy insider trading:** In this case, the individual who has access to sensitive information divulges it to others, who subsequently transact using the

1. Jennifer Moore, "What Is Really Unethical about Insider Trading?" 9 Journal of Business Ethics (1990).
2. Saikrishna Prakash, "Our Dysfunctional Insider Trading Regime" 99 Columbia Law Review (1999).

tip. In exchange for providing knowledge, the tipper may be seeking personal reward or hoping for a future favour.[3]

3. **Front-Running:** Front-running is the practice of trading stocks or any other financial asset by a broker who has firsthand information of a transaction that will soon have a significant impact on the asset's price. A broker may also front-run if they have inside information about their company's impending recommendation to customers to purchase or sell an asset, which will almost surely have an impact on the asset's price.

Insider Trading Regulations In India

Insider trading is governed in India under the Securities Exchange Board of India Act, 1992,[4] and the SEBI (Prohibition of Insider Trading) Regulations, 2015. These regulations are designed to prohibit insider trading, enhance market integrity, and protect investors' interests.

SEBI is essential in creating and upholding company regulations since it is the primary regulatory body. It has the power to investigate alleged insider trading and bring criminal charges against offenders. The SEBI Act also grants SEBI the power to oversee the development of the securities market, protect investor rights, and ensure that securities are handled in an equitable and fair manner.

The SEBI (Prohibition of Insider Trading) Regulations, 2015[5] contain a number of regulations designed to prohibit and detect insider trading in India. This law describes insider trading and discusses the responsibilities of insiders, associates, and others. The processes for creating an ordered digital record of residents and their commercial transactions are also outlined, along with disclosure standards. It has been made mandatory for the companies to set up the code of conduct for regulating, monitoring and reporting the trading by their employees and any other connected person. Additionally, if the insider is in possession of unpublished price sensitive information, then he is prohibited to trade in securities. These Regulations has put checks over the arbitrary practices of the insiders and connected person.

To ensure proper adherence, SEBI has set up a monitoring system to maintain tabs on business activities and identify suspect conduct. The SEBI undertakes surveys and inspections to look for

3. Dirks v. SEC, 463 U.S. 646 (1983).
4. Securities and Exchange Board of India Act, 1992 (Act 15 of 1992).
5. The SEBI (Prohibition of Insider Trading) Regulations, 2015.

potential cases of insider trading. If a violation occurs, SEBI may impose a multitude of penalties, such as a monetary punishment, the withholding of benefits, or even a criminal probe. The Securities Appellate Tribunal (SAT) serves as an independent appellate body that renders decisions on appeals from SEBI rulings. By employing SAT, persons who have been wronged by SEBI decisions can request compensation and ensure a fair and impartial adjudication.[6]

Market participants' attempts at self-regulation are supported by the regulatory framework. As self-regulatory organizations, stock exchanges have developed mechanisms to recognize and prevent insider trading. They have surveillance systems in place to monitor trade activity, detect unusual price increases, and investigate dubious transactions.[7]

The Securities Contracts (Regulation) Act of 1956 and the Companies Act of 2013 both prohibit insider trading. This Act gives SEBI the power to monitor and regulate domestic trading activities, as well as to ensure that all legal criteria are being met.

MARKET EFFICIENCY: CONCEPT AND MEASURES

In the field of finance, market efficiency is a key idea that affects how much general knowledge is represented in securities prices. This is a fundamental component of a strong capital market since it supports investor trust, accountability, and equity. The purpose of this section is to describe market efficiency, underline its importance, and discuss market efficiency monitoring methods for the Indian securities market.[8]

Definition And Importance of Market Efficiency

Market efficiency is the ability of financial markets to accurately and swiftly reflect all relevant information in securities pricing. Since prices in an efficient market are believed to incorporate all of that information, investors find it difficult to trade based on publicly available information. The idea of market efficiency is crucial for a variety of reasons. It first ensures that assets represent their genuine value, trade at fair prices, and restrict arbitrage opportunities. Market participants are compelled to choose investments wisely as a result, enhancing market integrity and reducing market distortions. Second, resource allocation in the economy is encouraged by market efficiency

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6. FJ Investigation, Enforcement and Surveillence, *available* at: https://www.sebi.gov.in/sebi_data/commondocs/ar99002f_h.html (last visited on September 28, 2023).
7. John W. Carson, "Self-Regulation in Securities Markets" Carson, John W., Self-Regulation in Securities Markets (January 1, 2011). World Bank Policy Research (2011).
8. Market Efficiency, *available* at: https://www.cfainstitute.org/en/membership/professional-development/refresher-readings/market-efficiency (last visited on September 28, 2023).

Markets that are efficient allow capital to flow to the most advantageous purposes, allowing enterprises to raise money efficiently and distribute it. This market-based resource distribution promotes economic expansion and development.[9]

Measures of Market Efficiency

There are various metrics to measure various elements of market performance in order to determine market efficiency. Cost efficiency and information efficiency are the two often utilized metrics.

1. Price efficiency: Price efficiency is the measure of how well security prices reflect all relevant information that is available on the market. Since prices react quickly to new information, there are minimal chances for overvaluation or undervaluation in a competitive market.[10] The absence of persistent pricing differences demonstrates high price efficiency. In the Indian context, the response of stock prices to new information may be used to assess cost efficiency. Efficient markets should show quick and fair price fluctuations immediately after the release of business statements, financial reports, or other market-moving events. Any deviations from this standard might be a sign of future market inefficiencies.
2. Information efficiency: Information efficiency is the rate and precision with which new information is incorporated into security pricing. A market that is information-efficient ensures that players have access to all relevant information and that prices adjust quickly to new information. The market's response to Indian news and events may be used to gauge how effective information is. When market participants swiftly modify prices in reaction to fresh knowledge, a higher level of information efficiency is evident. On the other side, insufficient or delayed price increases may indicate market inefficiencies or knowledge asymmetries. Market prices correctly reflect all existing available knowledge, according to EMH, making it difficult to consistently outperform the market using that knowledge. The three types of EMH—weak, semi-strong, and strong—variate in how much information they believe is included into pricing.

9. Ajay Shah,"Institutional Change in India's Capital Markets" 34 Economi and Political Weekly183–194(1999).
10. Merl, Robert, "Literature Review of Experimental Asset Markets with Insiders" 33 Journal of Behavioral and Experimental Finance(2022).

IMPACT OF INSIDER TRADING ON MARKET EFFICIENCY IN INDIA:

Unlawful Trading in Securities Based on Material private Information, which is insider trading affects market efficiency substantially. This section looks into how insider trading affects market efficiency in the context of the Indian securities market. Along with evidence of mispricing and market inefficiencies, it examines empirical data on the impact of insider trading on price discovery, liquidity, and trade volume.[11]

EMPIRICAL STUDIES ON THE RELATIONSHIP BETWEEN INSIDER TRADING AND MARKET EFFICIENCY

Numerous independent studies have looked into the relationship between insider trading and market efficiency in India. These research have shed light on how insider trading affects many aspects of market efficiency. One area of interest is how insider trading affects stock price performance. According to studies, insider trading can result in mispriced stocks because insiders exploit their insider information to their advantage. This incorrect pricing might distort market valuations and obstruct the efficient allocation of assets. The study also found a connection between insider trading and anomalous stock returns, which points to market inefficiencies.[12]

EVIDENCE OF MISPRICING, MARKET DISTORTIONS, AND ALLOCATION OF CAPITAL

Insider trading involves a number of possible consequences that might undermine the efficient allocation of money and promote market inefficiencies. First, insider trading on material non-public information can lead to mispricing of securities because it forces investors to make poor investment decisions and results in inappropriate distribution of funds. In addition, insider trading can slant the odds against investors, eroding their confidence in the stock market. The fairness and integrity of the market are impacted when insiders abuse their unique access to information, perhaps discouraging individual institutional investors from joining.[13]

IMPACT ON PRICE DISCOVERY, LIQUIDITY, AND TRADING VOLUMES

Market liquidity, trade volume, and price discovery may all be impacted by insider trading. Price

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11. Stephen M. Bainbridge, "The Law and Economics of Insider Trading 2.0" Encyclopedia of Law and Economics (2021).
12. Trang Hoang, "The Linkage Between Insider Trading Activities, Market Efficiency, and Stock Information Content" 4 Journal of Business & Economic Policy (2017).
13. Morris Mendelson, "The Linkage Between Insider Trading Activities, Market Efficiency, and Stock Information Content" 117 University of Pennyslavania Law Review (1969).

discovery describes the process through which market prices accurately reflect a share's intrinsic value. Due to insider trading, market prices do not fully represent all of the information that is accessible, which distorts price discovery.

The market's liquidity may also be impacted by insider trading. Significant insider trading can lead to a mismatch between supply and demand, which can raise volatility and lower liquidity. This can make it more difficult for investors to buy or sell assets at reasonable prices, which can reduce market efficiency. The volume of trades may also be impacted by insider trading.

Research has shown that insider trading activities can result in a very high number of activity, especially when big news or events are announced. Increased trading volume brought on by insider trading can weaken market efficiency and skew market activity by reducing the precision of price signals and amplifying short-term price movements.[14]

INVESTOR CONFIDENCE: IMPORTANCE AND DETERMINANTS

The operation of the financial markets, especially the Indian securities markets, is significantly influenced by investor confidence. The significance of financial confidence, its function in financial markets, and significant factors influencing investor confidence in the Indian context are all examined in this section. It's critical to comprehend these elements if you want to make an appropriate assessment of how insider traders affect investor confidence and market performance.

ROLE OF INVESTOR CONFIDENCE IN FINANCIAL MARKETS

For financial markets to run smoothly, investor confidence is essential. Market liquidity, trade volume, and general market stability are all directly impacted. Investors are more inclined to actively engage, invest their money, and support effective price discovery when they have faith in the market's equitable treatment, openness, and integrity. A varied range of players and a fair amount of competition are attracted by investor confidence, which also helps the market function efficiently. Investors are more likely to take greater risks, make wise investment choices, and deploy their cash effectively when they have faith in the market. This improves the market's overall liquidity, depth, and efficiency.

FACTORS INFLUENCING INVESTOR CONFIDENCE

Investor confidence in the Indian securities market is impacted by a number of variables. It's

14. Does Insider Trading Raise Market Volatility? *available* at: https://www.imf.org/external/pubs/ft/wp/2003/wp0351.pdf (last visited on September 28, 2023).

essential to comprehend these factors in order to assess how insider trading affects market efficiency and investor trust.

Fairness and Transparency: Fundamental elements that influence investor confidence include market fairness and transparency. Investors want confirmation that market players are given fair treatment and equitable access to data. Insider trading compromises this objectivity by enabling insiders to make money off of confidential knowledge and by weakening investor confidence. Maintain investor trust through enforcing tough regulations against insider trading, promoting openness, and ensuring equitable access to information.

Trust in Market Institutions: The confidence of investors is directly correlated with trust in financial institutions such as stock exchanges, regulatory bodies, and intermediaries in the market. These organizations are relied upon by investors to maintain market integrity, uphold regulations, and create an even playing field. Investor trust is substantially impacted by regulatory agencies' abilities and reputations to effectively investigate and penalize insider trading offenses,[15] such as

The Securities and Exchange Board of India (SEBI). A positive investment environment is created when investors have faith in the regulatory system and believe that market players will be made liable for their activities.

Legal and Enforcement Framework: Investor confidence is greatly influenced by the potency and efficiency of the legal and enforcement environment. Investor safety depends on clear, comprehensive regulations that forbid insider trading and have strong enforcement tools. The SEBI (Prohibition of Insider Trading) Rules, 2015 define insider trading in India and provide SEBI the authority to look into and punish violators. Investor trust in the market is increased by the strict execution of these regulations, which strongly convey that insider trading will not be permitted.[16]

Market Education and Awareness: The amount of knowledge and awareness about the market has an impact on investor confidence as well. Investors develop trust in the market when they are aware of their rights and obligations, comprehend the advantages and hazards of investments, and get reliable information. Initiatives to advance investor education and

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15. ESG Investing: Practices, Progress and Challenges, *available* at: https://www.oecd.org/finance/ESG-Investing-Practices-Progress-Challenges.pdf (visited on September 28, 2023).
16. Insider Trading Policy, *available* at: https://www.sec.gov/Archives/edgar/data/1164964/000101968715004168/globalfuture_8k-ex9904.htm (last visited on September 28, 2023).

awareness include actions to safeguard investors, the distribution of educational resources, and the organization of awareness campaigns. They also provide them the ability to shop around the market.[17]

IMPACT OF INSIDER TRADING ON INVESTOR CONFIDENCE IN INDIA:

The operation and growth of economic markets, including the Indian securities market, depend greatly on investor trust. In this section, the effect of insider trading on investor confidence in the context of India is examined. It focuses on how investors perceive equity and transparency in Indian markets, how insider trading occurrences affect investor confidence, and how these factors affect financing interest and regular market participation.

PERCEPTION OF FAIRNESS AND TRANSPARENCY IN INDIAN MARKETS

Fairness and openness play a key role in determining investor trust. Investors anticipate a level playing field and equal possibilities to get information and participate in the market. This notion of fairness and openness, however, may be challenged during periods of insider purchasing and selling.

Investors' confidence in the market is damaged when they believe that insiders have a disproportionate advantage and may use personal information for personal benefit. Investors have a sense of unfairness due to the impression of an unequal gambling environment, which has a negative impact on their confidence in the market's integrity.[18]

INVESTOR SENTIMENT AND TRUST IN THE FACE OF INSIDER TRADING INCIDENTS

Insider transactions will have a significant impact on investor confidence and sentiment in the Indian securities market. High-profile instances of insider trading and purchasing attract media attention and public scrutiny, harming purchasers' image.

Buyers' concerns about the integrity and efficacy of the regulatory structure grow when they encounter insider trading instances. They ask if the local laws are sufficient to detect, stop, and punish such infractions. This deterioration of credibility may lead to a drop in investor confidence and dampen excitement for business partnerships.[19]

17. Strategic Framework for Investor Education and Financial Literacy *available* at: https://www.iosco.org/library/pubdocs/pdf/IOSCOPD462.pdf (visited on September 28, 2023).
18. Insider Trading: The Illegality and Consequences Explained, *available* at: https://rainmaker.co.in/blog/view/ea032a3a-8187-4548-b3bc-2d7b9d822dec/insider-trading-the-illegality-and-consequences-explained (last visited on September 28, 2023).
19. Insider Trading Policy, *available* at: https://www.sec.gov/Archives/edgar/data/1164964/000101968715004168/globalfuture_8k-ex9904.htm (visited on September 28, 2023).

CONSEQUENCES FOR INVESTMENT ACTIVITY AND OVERALL MARKET PARTICIPATION

Besides mental state and trust, insider trading has a negative impact on investors' self-confidence. It could have observable effects on investment activity and market participation across the board in India.

Reduced Investment Activity: Insider trading incidents may make purchasers less likely to participate actively in the market. Buyers may be discouraged from investing their cash in shares or other assets if they fear losing out to insiders. This may cause financing activity to decrease, which would diminish liquidity and increase market inefficiencies related to capacity.

Impact on Market Participation: Market participation may decline if investor confidence becomes impaired because of insider trading instances. Additionally, investors could decide to sell their holdings or use a more cautious approach, which would limit trading volumes. This diminished market activity has the potential to delay price discovery, increase turbulence, and affect typical market behaviour.[20]

Implications for Capital Formation: Investor confidence is intimately related to the market's ability to raise funds. Insider trading situations that occur often or are seen to be significant may deter capacity issuers from accessing the capital market. Companies may encounter challenging circumstances while trying to attract investments and raise prices, which might thwart their objectives for growth and advancement.[21]

ADDRESSING THE IMPACT OF INSIDER TRADING ON INVESTOR CONFIDENCE

To assuage the effect of insider trading on investor confidence in India, a few measures ought to be given thought:

Strengthening Regulatory Framework: Investor trust may be restored by bolstering the regulatory system via the implementation of stronger rules, surveillance of activities, and positive punishments for breaches of insider trading. Strong enforcement measures taken against offenders send a clear message that insider trading will not be condoned.[22]

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20. FJ Investigation, Enforcement and Surveillience, *available* at: https://www.sebi.gov.in/sebi_data/commondocs/ar99002f_h.html (visited on September 28, 2023).
21. ESG Investing: Practices, Progress and Challenges, *available* at: https://www.oecd.org/finance/ESG-Investing-Practices-Progress-Challenges.pdf (visited on September 28, 2023).
22. Illegal Insider Trading: How Widespread Is The Problem And Is There Adequate Criminal Enforcement? *available* at: https://www.govinfo.gov/content/pkg/CHRG-109shr g31445/html/CHRG-109shr g31445.htm (last visited on September 28, 2023).

Investor Education and Awareness: Developing investor knowledge of insider trading, its effects, and preventative measures may increase investor empowerment and boost their trust. A better informed and cautious investor base may be created through familiarising and educating investors with their rights, obligations, and the resources available for exposing dubious enterprises

Transparency and Disclosure: Enhanced transparency and openness to practises may increase investor confidence. A more accessible and dependable market environment may be created by ensuring the timely and accurate sharing of data, such as firm notifications, financial records, and important accomplishments.

Market Surveillance and Monitoring: Insider trading might be discovered and prevented by improving market surveillance and monitoring. It is attainable to improve the capacity to recognise odd trading patterns and examine potential examples of insider trading by using cutting-edge technology, data analytics, and encouraging collaboration among regulatory agencies and market parties.

CASE STUDIES: PROMINENT INSIDER TRADING SCANDALS IN INDIA:

Continuous insider trading scandals have long been a source of concern for the Indian stock market, endangering both investor confidence and market performance. This article looks at actual instances of insider trading in India, including the Satyam Computers and Reliance Petroleum scams. It assesses the effects of these occurrences on investor confidence and market efficiency, recognises the lessons learned, and examines governmental responses to restrict insider trading.

SATYAM COMPUTERS SCANDAL

In the digital Ramalinga Raju, the chairman of Satyam Computers, revealed the creation of false bank accounts and other fraudulent activities in the infamous Satyam Computers controversy of 2009, which shocked India. Investor confidence quickly declined, with significant effects.[23]

Impact on Market Efficiency: The Satyam Computers scandal had a negative impact on the effectiveness of the market. Investors' access to information was affected by the company's falsified financials, which resulted in mispricing and an unreliable market value. Due to this, there were bottlenecks in the market and the effective use of money.

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23. Satyam Computer Services Limited v. Central Board of Direct Taxes, 2012 AIR SC 868.

Impact on Investor Confidence: Significant investor trust in the Indian securities market was severely damaged by the Satyam crisis. The impression of candidness and integrity was shattered by a well-known company's falsification of financial accounts. Investors suffered significant losses, which seriously undermined their faith in corporate management and regulatory oversight.

Lessons Learned and Regulatory Responses: Stronger regulatory monitoring and safeguarding of investors measures are required, as the Satyam Computers affair made clear. Regulating authorities took many actions after the incident to rectify the problems and regain investor trust:

a) **Strengthening Corporate Governance:**

Stricter corporate governance standards were implemented by the SEBI, which focused on the importance of having separate directors, board credibility, and financial reporting transparency. These actions sought to improve investor protection and reestablish trust in the processes of corporate governance.[24]

b) **Regulatory Reforms:**

The listing agreement was amended by SEBI, and as a result, listed businesses are now required to provide more information and be more transparent. The statutory framework for preventing insider trading and enhancing market integrity was further enhanced by the adoption of the SEBI (Prohibition of Insider Trading) Regulations in 2015.[25]

RELIANCE PETROLEUM SCANDAL

Allegations that Reliance Industries Ltd. (RIL) associates secretly traded Reliance Petroleum shares based on insider knowledge were a part of the 2007 Reliance Petroleum insider trading affair. This event made people think about the possibility of misusing sensitive information for one's own gain.[26]

Impact on Market Efficiency: The Reliance Petroleum scandal had a significant impact on market competence. The alleged insider trading actions resulted to differences in the price of

24. Consultative Paper on Review of Corporate Governance Norms in India, *available* at: https://www.sebi.gov.in/sebi_data/attachdocs/1357290354602.pdf (visited on September 28, 2023).
25. Guidance Note on Prevention of Insider Trading (The Institute of Company Secretaries of India, 2nd edn., 2022).
26. Reeba Zechariah, "SAT Upholds SEBI Order Against RIL in '07 Insider Trading Case", Times of India, Nov. 06, 2020, *available* at: https://timesofindia.indiatimes.com/business/india-business/sat-upholds-sebi-order-against-ril-in-07-insider-trading-case/articleshow/79070901.cms (visited on Sept. 29, 2023).

shares Page 15 of because investors who did not have access to the inside information traded at a disadvantage. This hindered the efficiency of price disclosure and hampered the efficient allocation of resources.

Impact on Investor Confidence: The failure of Reliance Petroleum severely damaged investor confidence. The idea of equality and a level playing field was undermined by the unauthorised use of private data. Those without access to inside knowledge felt hampered and questioned the fairness of the market. As a result, trust and confidence in the investing environment as a whole began to decline. [27]

Lessons Learned and Regulatory Responses: Regulation and judicial action were taken in reaction to the Reliance Petroleum affair to prevent insider trading and boost investor trust.:

a) **Enforcement Actions:**

The entities allegedly implicated in the insider trading were the targets of SEBI investigations and enforcement measures. To prevent future wrongdoing of a similar kind, penalties were assessed and restitution orders were issued. These measures strongly implied that trading by insiders would result in severe repercussions.[28]

b) **Improved Surveillance Mechanisms:**

Regulatory organisations like SEBI improved their monitoring techniques to find possible cases of insider trading and questionable trading activity. To improve market monitoring, new technical tools, data analytics, and better cooperation between market players and regulatory agencies were used.

REGULATORY FRAMEWORK AND ENFORCEMENT MECHANISMS IN INDIA:

The effectiveness of the legal system and monitoring mechanisms is crucial in combating insider trading, which has a direct impact on market competence and investor confidence. This section explores the legal foundation for insider trading in India, the purpose of regulatory organisations like the SEBI in detecting and preventing insider trading, and the methods used to detect violations and penalise offenders.

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27. Why Worry About Corruption? *available* at: https://www.imf.org/EXTERNAL/PUBS/FT/ISSUES6/INDEX.HTM (visited on September 28, 2023).
28. Ranjith Krishnan, "SEBI to Realign UPSI Definition with Material Events to Curb Insider Trading", Mint, May 30, 2023, *available* at: https://www.livemint.com/money/personal-finance/sebi-proposes-to-redefine-upsi-to-deter-insider-trading-aligning-it-with-material-events-disclosure-for-greater-transparency-11685468934515.html (visited on Sept. 29, 2023).

OVERVIEW OF THE REGULATORY FRAMEWORK

Insider trading is addressed by a comprehensive regulatory system in India. The main piece of regulation regulating such activities is the SEBI (Prohibition of Insider Trading) Regulations, 2015. These rules provide insiders and linked parties duties, define insider trading precisely, and allow SEBI to look into and penalise illegal activity.

The regulatory structure highlights the need of fair and unambiguous markets and ensures that all players will have a competitive advantage. Its goals are to protect investors' interests, provide market stability, and foster investor confidence.

ROLE OF REGULATORY BODIES

The primary regulatory authority in India, SEBI, is crucial in identifying and combating insider trading. It is in charge of creating policies, controlling market intermediaries, and enforcing rules on insider trading. The authority and duties of SEBI include:

a) Monitoring and Surveillance:

In order to identify potential instances of insider trading and suspicious trading tendencies, the Securities and Exchange Board of India (SEBI) continuously analyses transactions. The board uses advanced technical processes and data insights to identify abnormalities and unusual trading tasks in order to do this.

b) Investigation and Enforcement:

Any accusations of insider trading may be investigated by the Securities and Exchange Board of India (SEBI). It has the right to bring back witnesses, gather relevant information and proof, and take the necessary enforcement action against offenders. SEBI has the power to take legal action, impose penalties, and attempt to recover illegal earnings as a component of its punitive actions.

ENFORCEMENT MECHANISMS AND PENALTIES

The regulatory system in India provides strong penalties for infractions to guarantee adherence to insider trading legislation. The SEBI Act of 1992 gives SEBI the authority to punish violators with a variety of sanctions, including monetary fines and limitations on market participation. Penalties for insider trading offences are set forth in the SEBI (Prohibition of Insider Trading) Regulations, 2015, and may include:

Monetary Penalties:

Board of India (SEBI), with potentially large penalties being levied. The gain or loss saved as a result of such acts may be used as the basis for sanctions, with the severity of the penalties corresponding to the offense's gravity. The severity of the penalty is therefore determined by the kind and extent of the offence in question.[29]

Disgorgement of Unlawful Gains:

Any gains obtained illegally via insider trading may be demanded to be forfeited by the Securities and Exchange Board of India (SEBI). Disgorgement aims to return the market to its intended condition by depriving wrongdoers of their ill-gotten riches.

Restrictions and Market Bans:

For individuals engaged in insider trading, the Securities and Exchange Board of India (SEBI) may impose restrictions on their ability to participate in the market. This might take the shape of suspending or cancelling trading licences, restricting access to the stock market, or outlawing certain activity for a set period of time.

STRENGTHENING THE REGULATORY FRAMEWORK AND ENHANCING INVESTOR CONFIDENCE:

Strengthening the regulatory framework in charge of policing insider trading is crucial to ensuring market competence and boosting investor confidence. This section examines suggested changes and measures to combat insider trading in India, including stepping up monitoring and surveillance systems as well as investor education and awareness programmes.

RECOMMENDED REFORMS AND MEASURES

To effectively tackle insider trading in India, the following reforms and measures can be considered:

Stringent Penalties:

The penalties for insider trading offences must be strengthened. Raising the financial penalties and compensations for these offences is likely to deter people from participating in them since the costs might exceed any possible rewards. Further discouraging such a conduct and highlighting the seriousness of the violation would be to make criminal penalties applicable for severe instances of insider trading.

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29. Huge penalties being levied by SEBI following recent Supreme Court decision, *available* at: https://indiacorplaw.in/2016/01/huge-penalties-being-levied-by-sebi.html (visited on Sept. 29, 2023).

Expanded Scope of Insider Trading:

To combat possible avoidance and dodges, the definition of insider dealing should be expanded to include a broader variety of actions. This may include not just the trading of stocks but also many types of economic tools like choices and hedges. Additionally, including non-trading behaviours as types of insider trading, such as leaking information or providing insider knowledge, may help in recognising the whole spectrum of improper activity.

Whistleblower Protection:

Effective whistleblower protections may encourage individuals with knowledge of insider trading to come out without fear of reprisal. Whistleblowers may be encouraged to report any wrongdoings, enhancing the detection and prevention of insider trading occurrences, by being assured of their anonymity, being legally protected, and receiving rewards for reliable information.

ENHANCING SURVEILLANCE SYSTEMS AND MONITORING MECHANISMS

It is crucial to improve monitoring and surveillance systems in order to effectively identify and stop insider trading. The actions listed below can be done:

Advanced Technological Tools:

Surveillance skills may be improved by using technology such as data analysis, artificial intelligence, and machine learning algorithms. These techniques make it feasible for regulatory organisations like the SEBI to quickly discover potential cases of insider trading by identifying suspicious trade patterns, odd market activity, and anomalous price fluctuations.

Cross-Market Surveillance:

Cross-market monitoring may be made easier by cooperation between the different market authorities and exchanges. By pooling resources and exchanging information, it is possible to identify patterns and trading practises that may be indicators of insider trading in a variety of financial markets. This coordinated strategy may increase the effectiveness of surveillance apparatus and promote a wider range of insider trading activity supervision.

INVESTOR EDUCATION AND AWARENESS PROGRAMS

Enhancing investor trust and giving them the information and resources they need to defend themselves against insider trading require proactively encouraging investor education and awareness. The following programmes may be put into practise:

Educational Campaigns:

Investors may benefit from increased strength by launching educational programmes to increase awareness of insider trading, its effects, and preventative measures. These campaigns may be promoted through a range of strategies, including online platforms, seminars, tutorials, and collaborations with trade groups and businesses.

Disclosure Requirements:

In order to emphasise the need of transparency and disclosure, authorities may impose more stringent requirements on businesses to rapidly disclose pertinent information. This minimises the information asymmetry that can encourage insider trading by ensuring that investors have the ability to access reliable and up-to-date data.

CONCLUSION:

It is well recognised that insider trading has a negative impact on the Indian securities market, resulting in erroneous pricing, inconsistent market behaviour, and ineffective capital allocation. It may be argued to impair investor confidence, undermine market dependability, and hinder efficient market operation. Furthermore, it has the ability to change transaction volumes, liquidity, and value estimation, distorting price-setting procedures, reducing liquidity, and perhaps amplification volatility, making it difficult for investors to transact at fair prices.

An extensive regulatory framework, efficient enforcement, and investor education are required to address the problem of insider trading and further increase market knowledge in India. These programmes may increase investor confidence, maximise capital outlay, and create open, fair markets.

Measures should be implemented to combat insider trading, strengthen regulatory frameworks, have better transparency, and provide investor education in order to enhance investor confidence in the Indian stock market. By attracting a variety of investors and enhancing market knowledge, these efforts may create an inviting investment climate. Insider trading significantly affects investor confidence in the Indian securities market, affecting how equity, openness, trust, and general attitude are interpreted. Reduced investment activity, diminishing market participation, and other negative outcomes are the consequences. The key to solving these issues is improving the regulatory environment, investor education, transparency, and market oversight.

Reliance Petroleum and Satyam Computers scams, among other well-known insider trading incidents in India, highlight the need for improved corporate governance, improved regulatory monitoring, and strengthened investor protections. Strict standards, disciplinary measures, and heightened inspection techniques have been put in place to ensure fair business practises and restore market trust.

A multifaceted approach is required to support the regulatory environment and boost investor confidence in the Indian securities market. Suggested improvements include stiffer penalties, a broader definition of insider trading, and immunity for whistleblowers. Increased inspection methods and cross-market cooperation may strengthen efforts to identify and stop insider trading. Initiatives for investor education and recognition are equally important for approving people and fostering clarity and equality. India can strengthen its regulatory framework, gain market knowledge, and increase investor confidence in the securities exchange by implementing these measures.

EXAMINING THE REGULATION OF CRYPTOCURRENCIES IN INDIA AND FOREIGN JURISDICTIONS

Abhay Kumar*

Raushan**

INTRODUCTION AND EVOLUTION OF CRYPTOCURRENCY

Money is, first and foremost, a social contract that builds trust between two entities or individuals in terms of financial exchange. It has rightly been stated by German economist Georg Friedrich Knapp "Money is a creature of law rather than a commodity"[1]. In this view, individuals, although they don't know or trust each other, trust the bank issued currency in exchange for labour, goods or services provided as it is best among available alternatives.[2] The monetary system can be considered to be a trust building element necessary to authenticate economic transactions.[3] This trust building has taken place over the centuries when coins were first issued by the Governments to be used by its citizens to the emergence of banknotes.

The age-old saying "money makes the world go round" underlines the importance of money in society while providing deeper insight into its significance. Money, as we today see and know, has developed through a long series of evolutionary process. Several parameters have impacted upon the evolution of currency. Various dynasties throughout the World have changed the currency, sometimes as a representation of their power or at other times as per the need of time.

At the beginning of civilization, the concept of money was not developed. People would exchange required items, a method known as barter system. This system was first used in Mesopotamia around 6000 BC, and the Phoenicians later adopted it. The Phoenicians traded goods with distant cities across the sea. Barter system was a highly robust and adaptable payment method, because it being responsible for its longevity and ubiquity. However, the inefficiency and lack of fair exchange were two of its major drawbacks. It also failed to establish a sufficient unit under which the contracts concerning postponed or future payments could be negotiated. These drawbacks of barter system led mankind to find a new method of payment which led to the evolution of metallic money.

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1. G.F. Knapp, The State theory of Money (Macmillan & Company Ltd., London, 1st edn., 1924).
2. G. Camera, M. Casari, M. Bigoni, "Money and Trust Among Strangers",Proceedings of the National Academy of Sciences of the United States of America, Vol. 110 No. 37, 2013,14889-14893.
3. G. Camera, M. Casari, The Coordination Value of Monetary Exchange: Experimental Evidence Economic Journal: Micro economics American, 6(1), 290 (2014).

Around 1100 BCE in China use of actual tools and items as a medium of exchange was replaced by circular tools made up of bronze. However, the first ever minted coins were developed in 600 BCE in Lydia (present Turkey) by king Alyatles using Electrum (a mixture of gold and silver) to cast into coins with pictures stamped onto them that served as denomination. However, by 120 CE paper currency became the most frequently used medium of financial transactions in China.

In the last two decades, a new type of currency known as "virtual currency" or "digital currency" has come into being. Popularly known as "cryptocurrency" it is a global, decentralised system for exchanging money and storing value that is mostly supported by user consensus. They have become popular among various segments of society ranging from consumers to software developers and from entrepreneurs to capitalists. According to the European Commission virtual currency is defined as:

> "A digital representation of value that is neither issued by a central bank or a public authority, nor necessarily attached to a fiat currency, but is accepted by natural or legal persons as a means of payment and can be transferred, stored or traded electronically."[4]

According to Coin Market Cap – Forbes, virtual currencies come in more than 1,100 different varieties, with Bitcoin, Litecoin, Ethereum, Dash, and XYO being the most well-known ones. One bitcoin was worth US$310 in December 2014, while it was worth US$20,000 in December 2017.[5] CREBACO, a crypto research and intelligence firm, claims, nearly 7.90% of Indians have invested in cryptocurrency by last year with total value amounting to $10 billion.[6]

Cryptocurrency came into being with the launch of Bitcoin – first successful cryptocurrency – by an unidentified group using the alias Satoshi Nakamoto in 2009. It was different from previously developed digital currencies as there was no involvement of trusted third party. It was an open-source project developed by integrating ideas and contributions from programmers across the Globe.

Bitcoin is the most popular virtual currency which covers 40% of the total cryptocurrency market. It is a peer-to-peer payment mechanism that is cryptographically secure. Bitcoin's value

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4. David L.K. Chuen, Handbook of Digital Currency: Bitcoin, Innovation, Financial Instruments,andBigData310 *(Lndon: Elsevier, 2015).*
5. Global Bitcoin Price Index, Bitcoin Average, *available* at: https://bitcoinaverage.com/en/bitcoin-price/btc-to-usd. (Visited on January 18, 2023).
6. Indian investments in cryptocurrencies hit Rs 75,000 crore *available* at: https://www.timesnownews.com/cryptonow/article/indian-investments-in-cryptocurrencies-hit-rs-75000-crore/828351(Visited on January 18, 2023)

is predicated on the belief that it will continue to be valuable in the future, although it fluctuates a lot.

In order to describe how bitcoin functions, the current study focuses on comprehending the blockchain technology concept. It then explores the legal nature of cryptocurrencies and the regulations and laws enacted in various countries for the purpose of taxation. Finally, a critical analysis of its legal status in India is made to determine its future in Indian economy.

THE BLOCKCHAIN TECHNOLOGY

Online transactions are linked to a financial institution that acts as a third party that validates, preserves and safeguards the transactions. Such mediation by trusted third party is required to prevent fraud in online transactions and results in high transaction cost. Instead of third party authentication, blockchain uses cryptographic technology to perform online transactions (Fig. 1).

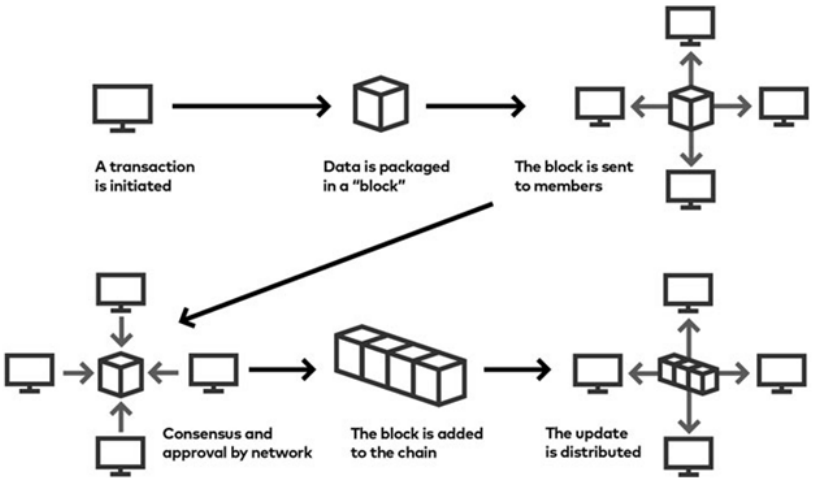

Fig 1: Schematic Representation of Blockchain Technology[7]

Blockchain is a database that contains shared public ledgers of every virtual transaction that has ever been made. The majority of participants verify and confirm each transaction in the record. Once entered, the record can never be deleted.

A unique digital signature is used for every transaction. Each transaction is digitally signed by the sender's "private key" and sent to the recipient's "public key." Utilising the "public key," the

7. N. Al Goni, S. Saad, and A. Ibrahim, A P2P Optimistic Fair-Exchange (OFE) Scheme for Personal Health Records Using Blockchain Technology. In: 3rd International Conference on Wireless, Intelligent and Distributed Environment for Communication(2020). 10.1007/978-3-030-44372-6_*1*.

recipient authenticates the digital signature, proving that the accompanying "private key" belongs to the sender. Every user on the bitcoin network receives a copy of every transaction, which is subsequently verified and added to the public ledger[8]. Before the transaction is completed, verifying node confirms that:

1. Spender owns the cryptocurrency.
2. Spender has enough number of cryptocurrencies in their account.

The transactions are organised into collections called blocks, which are then connected to form a blockchain (transactions within a block are regarded as having occurred simultaneously). Before the introduction of a block in blockchain, it is scanned for solution to a specific mathematical puzzle, called as "proof of work". The node generating a block needs to prove that it has put enough computing resources to solve a mathematical puzzle. For instance, a node can be required to find a "nonce" which when hashed with transactions and hash of previous block produces a hash with certain number of leading zeros. The average effort required is exponential in the number of zero bits required but verification process is very simple and can be done by executing a single hash. The ability of the node generating block to complete the mathematical puzzle must be demonstrated. It was designed such that it would take a node at least ten minutes to figure out the puzzle. The likelihood of two nodes solving a puzzle simultaneously is extremely slim, and the first node to do so would add the block to the network, which would be accepted by all nodes. As the process is scrutinized by the whole network and as it is cryptographically secured, it is next to impossible to create a fraudulent block in the blockchain and hence the currency remains secure.[9]

LEGAL DEFINITION OF CRYPTOCURRENCY

Next question that arises in this context is what is the legal nature of cryptocurrency? Is it actual money, a substitute for actual money, electronic money, a financial instrument, a good or an asset? Regarding the legal status of cryptocurrencies, different economists and specialists have differing opinions. Cryptocurrencies have elements of legitimate money in several aspects. It is a method of payment for both products and services. The legislation in the United States makes it clear that employees' pay may be paid in cryptocurrencies. The U.S. Financial Crimes Enforcement Network (FinCEN) contends that cryptocurrency-for-fiat transactions should be

8. M. Crosby, Nachiappan, P. Pattanayak, S. Verma, V. Kalyanaraman,"Blockchain Technology: Beyond Bitcoin". Sutardja Center for Entrepreneurship & Technology Technical Report (2015).
9. *Ibid.*

governed in the same manner as those using only fiat currency. Meanwhile, Japan is regulating cryptocurrency by integrating it in the banking system. Clearly, in these countries, cryptocurrency enjoys the status of money. On the contrary, Netherlands does not allow its citizens to pay tax in cryptocurrency. They hold the view that as it is not Government issued and as they cannot guarantee its value, cryptocurrencies cannot be considered as a legal method of payment. Moreover, Denmark, in 2014, announced that Bitcoinis not a real currency stating that as compared to gold and silver it has not real value and hence are much more like marbles.[10]

Experts that consider cryptocurrencies as electronic money argue that as there is no issuer involved, transactions can be compared as those made in cash where the parties involved do not need to open a bank account. The opponents of this view claim that as cryptocurrency lack an intermediary that verifies the authenticity of payment (which is true in the case of electronic money) calculations for payment is carried by the individual without any means of its verification and authentication.

Cryptocurrency is viewed as a taxable asset in many nations. It is believed that cryptocurrencies are non-consumable commodities that have a specific value at a given time. The Australian Tax Services equates exchange made in cryptocurrency to a barter arrangement.[11] The US government's Commodity Futures Trading Commission also acknowledges cryptocurrencies as commodities.[12] In a draughts circular released in 2017, the Israel Tax Service classified cryptocurrencies as digital units that can be utilised for investment or barter transactions.[13]

Cryptocurrencies can be viewed as money, property, and investment instruments, in accordance with IRS instructions on taxing cryptocurrency transactions in the United States.[14] Consequently, for the purpose of paying US federal tax, upon sale of bitcoin, the owner would

10. The Danish Central Bank went on to point out that bitcoins are not protected by any national laws or guarantees, such as a deposit guarantee. Danmarks Nationalbank, Bitcoin er ikke penge, *available* at http://www.nationalbanken.dk/da/presse/Documents/2014/03/PH_bitcoin.pdf#search=Bitcoin.(visited onJan. 28, 2023).
11. Australian Government, Australian Taxation Office, Tax Treatment of Cryptocurrencies, *available* at: https://www.ato.gov.au/General/Gen/Tax-treatment-of-crypto-currencies-in-Australia-specifically-bitcoin/(visited onJan. 28, 2023).
12. Commodity Futures Trading Commission, Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act, Making Findings and Imposing Remedial Sanctions, *available* at: https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfcoinfliprorder09172015.pdf.(visited onJan. 28, 2023)
13. Jenny David, Israel Seeks Tax on Bitcoin, Bloomberg BNA,available at:https://www.bna.com/israel-seeks-tax-n73014450141/(visited onJan. 28, 2023).
https://www.thebureauinvestigates.com/projects/drone-war (Visited on February 6, 2022).
14. Financial Crimes Enforcement Network, Application of FinCEN 's Regulations to Persons Administering, Exchanging, or Using Virtual Currencies: Guidance (FIN-2013-G001), *available* at: https://www.fincen.gov/sites/default/files/shared/FIN-2013-G001.pdf.(visited onFeb. 06, 2023)

receive profit from capital gains and not from exchange rate differences. Moreover, for the purpose of payment of salaries in cryptocurrencies, income tax could be levied.

LEGAL REGULATION OF CRYPTOCURRENCIES: INTERNATIONAL ASPECT

The emergence of cryptocurrency has presented numerous new challenges to the state with the task of constituting legal regulations to monitor the transfer and safeguarding the interests of stakeholders being the most prominent ones.[15] Cryptocurrencies have a multitude of legal and security concerns, some of which include :[16]

a) In absence of appropriate legal framework it has been difficult to control their value.

b) The volatile nature of these currencies might cause instability in market and economy.

c) E-wallets are managed by private institutions which are not regulated by any government agency in the absence of any international bidding law. Thus, they cannot be held liable if any crime or fraud is committed using these wallets.

d) Because of their apparent anonymity, it is simple to exploit them for tax evasion. Many countries, including India, have no system of taxing transactions made in cryptocurrencies.

e) Using the online way to store and transport them makes it simpler to transport them through border checkpoints and cash them out inside the nation, making it simpler to go around border security and lessening money laundering.

Different countries have different opinion regarding the validity of cryptocurrencies. The stance of major economies of the World on cryptocurrency is explained below:

Australia: Because cryptocurrency is not a financial product, its related activities are not regulated. The Australian Digital Currency & Commerce Association created the Australian Digital Currency Industry Code of Conduct, which lays out the requirements for operating bitcoin businesses in the nation.[17]

15. P. Vishwakarma, Z. Khan, T. Jain, "Cryptocurrency, Security Issues and Upcoming Challenges to Legal Framework in India" 5(1) International Research Journal of Engineering and Technology 212-215 (2018).
16. *Ibid.*
17. Ignacio Olivera Doll & Camila Russo, Argentina's Biggest Futures Market Plans to Join the Bitcoin Party, Bloomberg, *available* at: https://www.bloomberg.com/news/articles/2017-11-02/argentina-s-biggest-futures-market-plans-to-join-bitcoin-party.(visited onFeb. 06, 2023)..

United States of America: It can be a medium of exchange, a unit of settlement, or a valuable stock, in accordance with Internal Revenue Service Guidance No. 2014-21 of March 25, 2014, which is now in effect. It is a thing that can be categorised as property for taxes purposes. Taxes are another option for any cryptocurrency transaction.[18]

Canada: In Canada, cryptocurrencies are entirely legal tender. Only the United States has more deployed cryptocurrency ATMs. Cryptocurrency payments are taxed as barter transactions. Income tax, corporate income tax, or capital gains tax may be assessed in the event of its sale.[19]

China: There is no overarching strategy for legally regulating bitcoin transactions. The taxation of cryptocurrencies or their transactions is not governed by any regulation. However, a National Bank declaration from 2013 states that cryptocurrency is a commodity and may be subject to VAT taxation. Cryptocurrency profits and revenue are subject to corporate, individual, and capital gains taxes.[20]

Israel: The Central Bank of Israel has classified Bitcoin as a financial asset rather than a form of money. The Israel Securities Authority (ISA) has established reasonable requirements for initial coin offerings (ICOs) and specified the circumstances under which securities legislation would apply[21]

Japan: In order to control exchange activities, legislation was developed in 2016 that mandates that all exchanges register with the Financial Services Agency. When necessary, the agency would inspect these establishments and take the proper administrative action. This law states that since cryptocurrencies are considered assets, they must be taxed in accordance with the standard regulations. For example, any income received in cryptocurrencies by an individual must be reported as income, any profits made by a legal entity must be reported as corporate income, and any cryptocurrencies sold must be subject to consumption tax.[22]

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18. Financial Crimes Enforcement Network, Application of FinCEN's Regulations to Persons Administering, Exchanging, or Using Virtual Currencies: Guidance (FIN-2013-G001), *available* at: https://www.fincen.gov/sites/default/files/shared/FIN-2013-G001.pdf. (visited on Feb. 06, 2023)
19. Government of Canada, What You Should Know About Digital Currency, *available* at: https://www.canada.ca/en/revenue-agency/news/newsroom/fact-sheets/fact-sheets-2013/whatyou-should-know-about-digital-currency.html (visited on Feb. 06, 2023)
20. V italik Buterin, *China Releases First Regulatory Report on Bitcoin Businesses,* Bitcoin Magazine, *available* at: https://bitcoinmagazine.com/articles/china-releases-firstregulatory-report-on-bitcoin-businesses-1386283989/ (visited on Feb. 06, 2023).
21. Israel: The Hotspot for Blockchain Innovation, Deloitte, *available* at: https://www2.deloitte.com/content/dam/Deloitte/il/Documents/financialservices/israel_a_hotspot_for_blockchain_innovation_feb2016_1.1.pdf. (visited on Feb. 16, 2023)
22. Diet OKs Bill to Regulate Virtual Currency Exchanges, The Japan Times, *available* at: https://www.japantimes.co.jp/article-expired/#.WFGw4vmLTIV.(visited on Feb. 06, 2023).

Russian Federation: Following the Russian Central Bank's April 2017 recognition of cryptocurrencies as digital commodities, the Russian Duma began debating a Federal Law on digital assets in 2018. Mining has been characterised as an entrepreneurial endeavour. As per the guidelines for maintaining a register for digital transactions, cryptocurrency is a sort of digital financial asset that has been generated and registered in a digital registry. However, the measure makes no mention of taxing cryptocurrencies.

Denmark: In order to govern electronic payment systems for goods and services, the Payment Services Act was implemented in 2009. However, only currencies with an issuer are subject to this rule. Since cryptocurrencies do not have an issuer and are therefore not governed by the Act, they are totally ungoverned.[23]

France: There have been hints that the government may permit virtual currencies to function as payment service providers, notwithstanding the Bank of France's caution against their use[24] . France plans to introduce digital currencies that resemble bitcoin and would establish a legal framework for generating money using cryptocurrencies.

Italy: In Legislative Decree No. 90 of 2017, a statutory definition of "virtual currency" was put forward. For the purpose of preventing their use in money laundering and terrorist operations, cryptocurrencies are defined as a virtual asset. The Initial Coin Offering (ICO) was published by the Commissione Nazionale per le Società e la Borsa (CONSOB), which classified cryptocurrencies as financial products rather than financial instruments. In order to apply the appropriate tax regimes, the Italian Tax Authority (Agenzia delle Entrate) has been attempting to categorise it as a traditional asset.[25]

Spain: cryptocurrencies are taxable as e-payment systems under gambling law. To entice blockchain-based enterprises, the government is drafting legislation that is beneficial to the technology.[26]

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23. Anders Laursen & Jon Hasling Kyed, Virtual Currencies, Danmarks National bank, Monetary Review,1st Quarter 85-87 (2014).
24. Regulating Virtual Currencies, Virtual Currencies Working Group - June 2014 *available* at: https://www.economie.gouv.fr/files/regulatingvirtualcurrencies.pdf
25. Blockchain and Cryptocurrency Laws and Regulations 2022: Italy, *available* at: https://www.globallegalinsights.com/practice-areas/blockchain-laws-and-regulations/italy#:~:text=Cryptocurrency%20taxation%20is%20still%20unregulated,applying%20the%20relevant20tax%20regimes(visited on Feb. 16, 2023).
26. Giulio Prisco, Government of Spain Considers Blockchain-Friendly Regulations, Bitcoin Magazine, *available* at:https://bitcoinmagazine.com/articles/government-spainconsiders-blockchain-friendly-regulations/ (visited on Feb. 16, 2023).

United Kingdom: It is a pioneer in integrating cryptocurrencies and one of the best legal jurisdictions for doing business with cryptocurrencies. Because it is an economic entity, it is governed by corporate law, income tax, and capital gains laws.[27]

CRYPTOCURRENCY REGULATION: AN INDIAN PERSPECTIVE

The Central Government formed a high-level interministerial group in November 2017 to look into the risks posed by cryptocurrencies and suggest specific steps that needs to be taken.[28] The Reserve Bank of India's concerns about the security of private cryptocurrencies were reflected in the committee's proposal to outlaw them. On April 6, 2018, the RBI issued a circular (hereafter referred to as the 2018 circular) barring banks and financial institutions from transacting in cryptocurrency and other cryptocurrency-related services. Additionally, the circular forbids banks from accepting cryptocurrencies as collateral for loans or lending against them. A three-judge panel of the Apex Court, however, overturned this circular, reasoning that it would be excessive to bar cryptocurrencies from using the banking system and payment methods given that they are not illegal in the nation and pose no evident risk[29]. It was held that

"The position as on date is that virtual currencies are not banned, but the trading in VCs and the functioning of VC exchanges are sent to comatose by the impugned circular by disconnecting their lifeline, namely, the interface with the regular banking sector. What is worse that this has been done (i) despite RBI not finding anything wrong about the way in which these exchanges function and (ii) despite the fact that VCs are not banned."

In response to the aforementioned ruling, the RBI issued a follow-up circular on May 31, 2021, informing the financial entities it regulates that they could no longer rely on the 2018 circular because it had been declared invalid in accordance with the Hon'ble Supreme Court's ruling.

The Steering Committee, chaired by Subhash Chandra Gargon Fintech Related Issues submitted its report to the Finance Minister on September 2, 2019. The Committee was constituted with the objective of making Fintech related regulations more flexible and enhance entrepreneurship. The SC Garg Committee announced its intention to ban cryptocurrencies in

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27. Revenue and Customs Brief 9 (2014): Bitcoin and Other Cryptocurrencies, Policy Paper, GOV .UK, *available* at: https://www.gov.uk/government/publications/revenueand-customs-brief-9-2014-bitcoin-and-other-cryptocurrencies/revenue-and-customs-brief-9-2014-bitcoin-and-other-cryptocurrencies. (visited on Feb. 20, 2023).
28. Cryptocurrency in India: To ban or not to ban (The RMLNLU Law Review Blog, 2 March 2021), *available* at: https://rmlnlulawreview.com/2021/03/02/cryptocurrency-in-india-to-ban-or-not-to-ban (last visited on, Mar 04, 2023)
29. Internet and Mobile Association of India v. Reserve Bank of India, (2020) SCC Online SC 275

2019 and presented a research claiming that almost all cryptocurrencies are issued by foreign companies with significant investor interest.The report stated that:

"All these cryptocurrencies have been created by non-sovereigns and are in this sense entirely private enterprises and there is no underlying intrinsic value of these private cryptocurrencies due to which they lack all the attributes of a currency."

The committee mentioned the possibility of cryptocurrency being used improperly for money laundering in its report. Additionally, it has viewed them as unstable investments.

In spite of the Indian government's seeming reluctance, Bitcoin will inevitably develop into a commodity and a means of payment. The changing times require legalization of cryptocurrency and laws ought to be formulated for its regulation and taxation. Banning its use will not be effective in preventing its use to fund illegal activities or for money laundering. However, keeping in place proper legislations for its regulations will give the government appropriate channel for its monitoring and safeguarding the economy.

The Government of India is set to introduce "Cryptocurrency and Regulation of Official Digital Currency Bill 2021" in the Lok Sabha. Although the details of the said bill are not known, it is being presumed that it is aimed at regulating exchange. This bill would empower SEBI to collect all the information about investors[30]. .The Lok Sabha bulletin of November 23, 2021, states that, the Bill *"seeks to create a facilitative framework for creation of the official digital currency to be issued by the Reserve Bank of India. The Bill also seeks to prohibit all private cryptocurrencies in India; however, it allows for certain exceptions to promote the underlying technology of cryptocurrencies and its uses."*

The Bill primarily seeks to outlaw all private cryptocurrencies, including trade and mining. The sanctions stated appear to be far harsher than those for equivalent economic violations.

Hon'ble Finance Minister Nirmala Sitharaman announces the launch of an RBI-issued digital currency, Central Bank Digital Currency (CDBC), in fiscal year 2022-23 in her Budget 2022 speech. CDBC would be a sovereign currency in electronic form that would show up on the RBI's balance sheet as a liability. This would eliminate the settlement risk as well as all other security concerns connected with decentralised virtual currencies.[31]

30. "Bill on cryptocurrency, regulation of official digital currency under finalisation: FinMin" The Hindu, December14, 2021.
31. All you need to know the RBI Central Bank Digital Currency or digital rupee, *available* at: https://economictimes.indiatimes.com/wealth/save/all-you-need-to-know-the-rbi-central-bank-digital currency-or-digital-rupee/why-cbdc-scores-over-other-digital-payment mechanisms/slideshow/89408999. cms(last visited on, Mar 04, 2023).

The Taxation of Virtual Digital Assets proposal to tax cryptocurrency investors in India as of April 1, 2022, was also proposed in the Union budget for the years 2022–2023. As virtual digital assets, cryptocurrencies are subject to a 30% tax plus cess and surcharges. Except for acquisition costs, there would be no deduction for any expense or allowance for calculating this income. Infrastructure costs spent during cryptocurrency mining are not deductible.

CONCLUSION

Cryptocurrency is the next chapter in historical development of money. Due to its decentralized nature, it has become a popular medium of exchange. It is replacing both cash and e-money as a mode of payment. It will undoubtedly become an essential component of the market economy during the coming years. Crpytocurrency removes the barrier of currency exchange across the border and can become a global currency that might unite the World economy. The ease of use, independence from national economies, and diminished faith in paper currency have all led to the popularity of cryptocurrencies.

The governments have always found it difficult to keep up with the pace of technological advancements. Those in power have always had complete dominion over economic matters and currency has always been under the Government's control. However, the emergence of cryptocurrency, which is not regulated by any entity, the legal systems ought to change. There is need of a proper legal definition and formulation of certain laws for its regulation. It is evident from the amount invested in cryptocurrency, that the public are adopting this new method of exchange. The international legal system needs to evolve in order to protect the interests of the populace.

The international community has no single coordinating center to look into matters pertaining to cryptocurrency. In order to build a cryptocurrency community where the risk of fraud is minimal, the chances of its use in illegal activities is negligible and where there is a legitimate and safe cryptocurrency activity, a progressive jurisdiction is required. The public's attraction to cryptocurrencies is evident, and eventually, their legal status and role in conjunction with physical currency will have to be established. It is evident that, in addition to cash and e-money, it is required to ascertain the essence and character of cryptocurrencies, as well as their legal status and functions.

FAST FASHION AND ENVIRONMENT INJUSTICE: THE DARK SIDE OF THE FASHION INDUSTRY

Kritika Sheoran*

INTRODUCTION

"Fast fashion isn't free. Someone, somewhere is paying."[1]

-Lucy Siegle

Globalization has brought tremendous change in many industries and the fashion industry is not left untouched by its impact. The term 'fashion' represents not just a style but a complete industry divided into a number-of segments viz. apparel, foot-wear and accessories. Among these, garment sector is the most revolutionized segment in the world.[2] When a person goes to purchase clothes or any other fashion accessories from the market, he never thinks about the probable environmental concerns. Indeed, it would be too much of an expectation from any purchaser that he would concern himself with the probable relationship between his every individual purchase and its effect on the overall environment. This paper attempts to define and bring out the strong connection that exists between the so-called ever-changing fashion industry and environment in the light of concerns of sustainability. Manufacturing apparel generate carbon pollution and the carbon emissions coming from the fashion industry are increasing with the increasing shopping trend among the people. When it comes to discarding clothes, the people have become used to this practice because of the rise of fast fashion.

FAST FASHION

In present times, there has been a trend of making clothes for mass consumption and this process is termed as 'fast fashion'. It is a process in which items in the fashion industry are produced at a breakneck speed at low price to meet the demands of the market.[3] According to Merriam Webster dictionary, fast fashion is "an approach to the design, creation and marketing of clothing fashions that emphasizes making fashion trends quickly and cheaply available to consumers."[4]

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1. "What is fast fashion, anyway?", *available* athttps://www.thegoodtrade.com/features/what-is-fast-fashion (visited on September 23,2023).
2. Sophie Xue, "Ethical Fashion in the Age of Fast Fashion",Art Honors Papers(2018), *available* at https://digitalcommons.conncoll.edu/cgi/viewcontent.cgi?article=1023&context=arthp (visited on June 24, 2023).
3. Jennifer Back, "Sustainable and Ethical Practices for the Fast Fashion Industry"UEP Student Scholarship (2017), *available* athttps://core.ac.uk/download/pdf/73345814 (visited on June 24,2023).
4. "Fast Fashion", *available* athttps://www.merriam-webster.com/dictionary/fast%20fashion (visited on June 25,2023).

The intention behind the emergence of this concept is to provide affordable apparels to the consumers with increased disposability and creating a demand for further new articles.[5] The fast fashion industry is growing tremendously at the international level and the trend shows that it will continue to grow in future as well. For example- Hennes & Mauritz, popularly known as H & M was founded in 1947[6] , has 3675 stores globally in the year 2015[7] which rose to 4399 stores in the year 2023 along with online presence.[8]

On the face of it, the concept of fast fashion seems to have only positive side especially for the consumers as they can get cost effective fashion items of latest trends in a very short span of time. But when delved deeper into the process, it turns out to have a darker side as well which includes injustice both social as well as environmental.[9] The industry has scored below the threshold in terms of its impact on the environment and has catastrophic results on the sustainability.

EVOLUTION OF FAST FASHION

In the ancient societies, the term 'fashion' was linked with status of a person. A person belonging to the upper strata of the society used to dress-up with the clothes of latest trend. They wanted to stand out among the people of other classes, so they used to wear fine-quality branded clothes.[10] During this period, fashion was known for its artistic craftsmanship. In the early 19th century, the concept of fashion house was introduced by designer Charles Frederick Worth in Paris. These fashion houses used to design high-quality expensive designer clothes for rich members of the society. Early 1900s witnessed shift in appeal of trendy clothes from upper class to the middle class. This trend rapidly increased in the middle of the 20th century as a result of globalization. A huge demand was created for trendy and fashionable clothes in this period

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5. Vineeta Mishra and Ajit Mittal, "Ethical and Sustainability Concerns of Fast Fashion: A Review" 16International Journal of Economics Research99 (2019), *available* athttps://serialsjournals.com/abstract/82838_10-vineeta_mishra. (visited on June 28, 2023).
6. "H&M India announces the expansion of H&M Home" The Print,May 10,2023, available athttps://theprint.in/ani-press-releases/hm-india-announces-the-expansion-of-hm-home/1565373/(last visited on June 29,2023).
7. Eliza Brooke, "The Latest in H&M's Plan for Global Domination: Expanding Beauty, opening 3 Stores a day", *available* at https://fashionista.com/2015/09/hm-store-expansion#:~:text=In%20July%2C%20the%20retailer%20launched,in%20India%20and%20South%20Africa (last visited on July 10,2023).
8. "H & M Group: Markets and Expansion", *available* athttps://hmgroup.com/about-us/markets-and-expansion/(last visited on September 15,2023).
9. Emma Williams,"Appalling or Advantageous? Exploring the Impacts of Fast Fashion from Environmental, Social, and Economic Perspectives"13 Journal for Global Business and Community, (2022), available at https://doi.org/10.56020/001c.36873 (last visited on July 25,2023).
10. C. Scott Hemphill and Jeannie Suk, "The Law, Culture and Economics of Fashion" 61 Stan. L. Rev. 1147 (2009).

which could not be fulfilled by the existing ready-to-wear pattern. People demanded trendy clothes at lower prices giving birth to the concept of 'fast fashion'[11]. In the beginning of 1900s, the term 'Fast fashion' was used for the first time. The New York Times coined this term to explain the mission started by Zara to make apparels available in the stores within 15 days.[12]

ENVIRONMENTAL IMPACT OF FAST FASHION

Since the beginning of the 21st century, the fashion industry has shown exponential growth as evident from the fact that the clothing production almost doubled from 2000 to 2014. The per capita purchase of garments between 2000 to 2014 escalated by 60 percent.[13] The ever-increasing demand of new and trendy fashion has led to think upon the environmental impact of the fashion industry. In order to satisfy the consumer needs, retailers come up with new designs at regular intervals so-as to replace the old merchandise with new ones. But this cycle of changing old designs with the new ones at such a fast rate has an alarming impact on the natural resources of our planet.[14]

4.1 Greenhouse Gas Emissions

In the 21st century, globally 10 % of the greenhouse gas emissions has been attributable to the fast fashion industry.[15] The manufacturing units are mostly concentrated in Asia and the industry relies heavily on coal and natural gas in order to produce electricity for the functioning of machines. If the fashion industry keeps using the same approach, then the industry's greenhouse gas emissions are anticipated to increase by approximately 50% by the year 2030.[16] The industry accounts for more greenhouse gas emissions than the combined emission by all the maritime shipping and international flights.[17]

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11. Victoria Ledezma, "Globalization and Fashion: Too Fast, Too Furious"4Laurier Undergraduate Journal of the Arts71 (2017), *available* athttps://scholars.wlu.ca/cgi/viewcontent.cgi?article=1052&context=luja (visited on September 24, 2023).
12. "Fast Fashion and its Environmental Impact", *available* athttps://earth.org/fast-fashions-detrimental-effect-on-the-environment/ (visited on July 27,2023).
13. Nathalie Remy, Eveline Speelman, et.al., "Style that's sustainable: A new fast-fashion formula", *available* athttps://www.mckinsey.com/capabilities/sustainability/our-insights/style-thats-sustainable-a-new-fast-fashion-formula#/ (visited on July 27,2023).
14. Cassandra Elrod, "The Domino Effect: How Inadequate Intellectual Property Rights in the Fashion Industry Affect Global Sustainability" 24 Indiana Journal of Global Legal Studies575 (2017).
15. *Available* athttps://unfccc.int/news/un-helps-fashion-industry-shift-to-low-carbon(last visited on July 29, 2023).
16. *Available athttps:*//guardian.ng/property/environment/un-highlights-environmental-cost-of-staying-fashionable/ (visited on August 5,2023).
17. *Supra* note 9.

4.2 Water Consumption and Pollution

According to the survey conducted by the Ellen MacArthur Foundation, apparels and textile production consumes approximately 93 billion cubic meters of water per year resulting into scarcity of water.[18] This amount of water used by the industry is enough to meet the requirements of about five million people.[19] On an average, 2700 liters of water is consumed to manufacture a cotton t-shirt which equals a person's water consumption of 900 days.[20] In terms of world's water consumption, the fashion industry is the second largest consumer.[21] About 2000 gallons of water is used to produce a single pair of jeans, this much water is more than enough for a person if he drinks eight cups per day for approximately 10 years. The reason for this high-water consumption is the use of high-water intensive crop i.e. cotton. The high rate of water consumptionby the fashion industrywhich uses cotton as a main fiber in apparels and garmentsis evident from the fact that in Uzbekistan, the water consumption by cotton farming was so high that the Aral Sea dried up in about 50 years.[22]

Not only the water consumption, the industry is known for causing water pollution as well. Textile dyeing and treatment accounts to 17 to 20% of industrial water pollution, throughout the world, about 8000 synthetic chemicals are used in order to convert raw material into textiles which are ultimately released into rivers and other water sources. It is not only the manufacturing process in the industry that is making contribution in water pollution but people at home also have a significant contribution in this water footprint. Washing clothes at home results in 40% domestic water pollution coming from laundry. Detergents loaded with heavy chemicals ultimately reach fresh water sources and pollute them.[23]

4.3 Textile Waste

Fast fashion concept has resulted in an increase in the waste generated by textiles and other fashion accessories. Articles purchased from fast fashion stores are usually discarded after the

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18. "Report maps manufacturing pollution in sub-Saharan African and South Asia", *available* athttps://unctad.org/news/report-maps-manufacturing-pollution-in-sub-saharan-africa-and-south-asia (visited on August 17,2023).
19. *Supra* note 9.
20. Kelly Drennan, "How the Fashion Industry is Picking Up the Threads After Rana Plaza", *available* athttps://www.alternativesjournal.ca/community/how-the-fashion-industry-is-picking-up-the-threads-after-rana-plaza/ (visited on August 7,2023).
21. "These facts show how unsustainable the fashion industry is", *available* at: https://www.weforum.org/agenda/2020/01/fashion-industry-carbon-unsustainable-environment-pollution/ (visited on August 9,2023).
22. *Ibid.*
23. "How can we stop water from becoming a fashion victim?", *available* at: https://www.theguardian.com/sustainable-business/water-scarcity-fashion-industry(last visited on September 7,2023).

first use due to the low quality of products used in order to make cheap garments.[24] Environmental injustice of the industry continues not only during the manufacturing stage but till the articles are completely disposed of. The fast fashion model has encouraged the consumers to see clothing as a disposable article.[25] There are different environmental issues attached with disposal of clothes manufactured by using different fibers. If cotton or semi-synthetic fibers like rayon are dumped in a landfill, they produce greenhouse gases such as methane in the process of degradation. Irrespective of the fact that natural fibers which causes less harm as compared to synthetic fibers, it is not easy to convert clothes into compost. In the process of making clothes from natural fibers, a number of chemicals are used. These chemicals seep deep inside the earth from the landfills and pollutes the underground water. On the other hand, synthetic fibers such as nylon and polyester are a kind of plastic derived from petroleum thus, it takes hundreds of years to undergo bio-degradation. Additionally, synthetic fibers have all the negative characteristics that are attached with the natural fibers thus making them more hazardous for the environment.[26] In fact, an-average American dumps about 80 pounds of textiles per year. As per the statistics released by the Environmental Protection Agency, deflecting all the discarded textiles towards recycling program would be comparable to transfer 73 million cars along with their carbon dioxide emissions off the road.[27]

4.4 Microplastic Pollution

Synthetic fibers such as nylon and polyester are the most-commonly used fibers in the fashion industry. These days an estimated 60% of clothing is made from polyester and nylon.[28] These synthetic fibers are cheap and adaptable, thus provides stretch and breathability to clothes. During manufacturing, washing and while wearing, hundreds of thousands of tiny plastic fibers (commonly known as microplastics) are released in the air and water. Majority of plastic reaching the ocean is not in the form of bottles or straws but includes broken down tiny fibers amounting to microplastic pollution. These microplastics have entered the food chain and are

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24. *Supra* note 14.
25. Rachel Bick, Erika Halsey, et. al., "The global environmental injustice of fast fashion" Environmental Health(2018), *available* athttps://ehjournal.biomedcentral.com/articles/10.1 186/s12940-018-0433-7#citeas (visited on July 21, 2023).
26. "Fast Fashion Is Creating an Environmental Crisis", available athttps://www.newsweek.com/2016/09/09/old-clothes-fashion-waste-crisis-494824.html(last visited on September 10,2023).
27. *Ibid.*
28. "Environmental Sustainability in the Fashion Industry", *available* at https://www.genevaenvironmentnetwork.org/resources/updates/sustainable-fashion/ (visited on August 2, 2023).

being consumed not only by marine life but also by humans.[29] It is estimated that microplastics make up 85% of man-made debris in the oceans. Moreover, the rate of decomposition of synthetic fibers is very slow. For example- a single bottle of polyester can take up to 800 to 1000 years to decompose. As majority of polyester used globally is consumed by the textile and garment industry, these synthetic fibers are extremely dangerous for the environment.[30]

4.5 Biodiversity Loss

Biodiversity refers to the diversity of living beings on earth. Every species has different role to play in the ecosystem such as nutrient cycling, making the soil fertile, pollution control, absorption of carbon and many more. Directly or indirectly, human beings are dependent on different species to maintain their lives as this biodiversity maintains the ecosystem where humans live in. Thus, biodiversity is fundamental for human survival and any change or loss in the biodiversity will have an impact on health and subsistence of humans. As a result of fast fashion phenomenon, humans are putting a great pressure on the ecosystem and this over-usage of resources is at a very high speed in comparison to the regeneration capacity of the ecosystem.[31]

Fast fashion, which is notorious for its overproduction and overconsumption patterns, has indirectly resulted in the loss of biodiversity. In order to meet the ever-increasing demand of the industry, the natural resources are over exploited so-as to generate as many products as possible in the shortest time-span. These natural resources are required by different species on the planet for their survival. Moreover, the carbon footprint of the industry has brought climate change which adversely affect the flora and fauna of the planet.[32] Textile waste generated by the industry often ends up in landfills which results in land-use change and ultimately impacting the habitat of different species. Habitat loss is known to be the driving force for biodiversity loss. There is heavy reliance of fashion industry on biodiversity, especially in production and processing stages. The negative impact of the industry on biodiversity is due to the fact that there is habitat

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29. Brian Resnick, "More than ever, our clothes are made of plastic. Just washing them can pollute the oceans.", *available* athttps://www.vox.com/the-goods/2018/9/19/17800654/clothes-plastic-pollution-polyester-washing-machine (visited on August 16, 2023).
30. M.K. Brewer, "Slow Fashion in a Fast Fashion World: Promoting Sustainability and Responsibility", available athttps://www.mdpi.com/2075-471X/8/4/24 (visited on August 29, 2023).
31. Sienna Somers, "Nature in Freefall: How Fashion Contributes to Biodiversity Loss",*available* athttps://www.fashionrevolution.org/nature-in-freefall/#:~:text=What%20can%20the%20fashion%20industry, the%20drivers%20of%20biodiversity%20los (visited on August 2,2023).
32. *Supra* note 31.

change because of agriculture of various types of fibers used in the industry. For example- growth of fast fashion has resulted in deforestation with approximately 150 million trees disappearing every year to make viscose and rayon clothing.[33]

INTERNATIONAL LEGAL REGIME FOR SUSTAINABLE FASHION

The deleterious effect of fast fashion on the environment has come to the notice of people as well as the government. People are taking minor steps to bring a change in the industry in order to reduce its negative impact but till the time stringent laws are made applicable on the industry, it will not be possible to bring a change in the fashion phenomenon. A new concept called 'Sustainable fashion' has emerged in order to reduce negative impacts of fast fashion. When efficient environmental measures are taken while making clothes, the process is known as sustainable fashion. At international level, some sustainable fashion laws are implemented and some legislative measures are proposed so-as to tackle the problems created by fast fashion.

5.1 Anti Waste Circular Economy Law of France

To address the issue of environment especially with regard to the waste generated by the French people, France adopted a comprehensive law to tackle the situation. On 10th February 2020, French President signed the Anti Waste Circular Economy Law (AGEC). The main aim of this law was to change the French model from a linear economy to a circular economy.[34]

Some of the key requirements that the apparel industry is bound to disclose to the consumers under the new law are as follows:

(a) Recycled Material Content: Companies are bound to disclose in their products the percentage of recyclable material in terms of global proportion in weight. This applies to not only apparels but also to the packaging materials used in the fashion industry.

(b) Recyclability: Whether the product is recyclable or not, this information must be available on the product itself. There are certain requirements for recyclability such as-

- There should be no element or substance used in making the apparel

33. "Canopy Style 5year anniversary report", *available* at https://canopyplanet.org/wp content/uploads/2019/02/CanopyStyle-5th-Anniversary-Report. (visited on September 10, 2023).
34. "France: New Anti-waste Law adopted", available athttps://www.loc.gov/item/global-legal-monitor/2020-03-20/france-new-anti-waste-law-adopted/ (visited on September 10, 2023).

which can disrupt the recycling process or if recycled, the apparel will have a limited use only.

- The substance from which the apparel is made should have the ability to undergo recycling process at an industrial scale.
- There should be a guarantee attached with the apparel that if it gets recycled, the quality of recycled material will be sufficient to get re-used.

If a product fulfills the aforesaid requirement then manufacturer can mention "entirely recyclable product" on it.

(c) Microplastics: If a product contains 50% synthetic fibers or more, then it is mandatory to include information that during washing, the product releases microplastics in the environment.[35]

(d) Harmful substances: There are certain chemicals that are harmful for human health as well as the environment. A list of harmful substances is made available as per EU Reach regulation. The list includes name of the substance, its date of inclusion in the list and reasons for inclusion. Some of the chemicals mentioned in the list include Melamine, Barium diboron tetraoxide, Phenol, etc.[36] If the harmful substances mentioned in the list are present in the product at a concentration above 0.1%, then disclosure must be made that "the product contains a harmful substance". Along with this disclosure, names of all the harmful substances used while making the product must also be mentioned.

All the aforesaid information must be disclosed in a free and accessible format to the consumers at the time of purchase. Use of words "environmentally friendly" or "biodegradable" or "eco-friendly" or other related terms has been prohibited on all the new consumer products and packaging.[37]

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35. Lisa Lerouge, "AGEC: Decree under the French Anti-Waste for a Circular Economy Law", *available* athttps://trustrace.com/knowledge-hub/decree-french-anti-waste-circular-economy-law#:~:text=What%20does%20this%20decree%20mean,characteristics%20of%20waste%2Dgenerating%20products (visited on September 10, 2023).
36. "Candidate List of substances of very high concern for Authorisation", *available* at https://echa.europa.eu/candidate-list-table(last visited on September 12, 2023).
37. *Supra* note 31.

5.2 The United Nations Alliance for Sustainable Fashion

The United Nations Environment Assembly launched the UN Alliance for Sustainable Fashion in Nairobi, Kenya on 14th March 2019. The Alliance seeks to put a stop on the disastrous practices of the fashion industry and aims at harnessing the industry in improving the ecosystem of the world.[38] It is the vision of different UN agencies and organizations to work in a coordinated manner to achieve the Sustainable Development Goals in the fashion industry.[39] The main objectives of the Alliance are:

- To improve participation of all the agencies of the United Nations by organizing joint activities, outreach programs and formulating new guidelines to tackle the negative effects of the fashion industry.
- To improve coordination between the already existing initiatives taken by the stakeholders.
- To promote knowledge sharing among the stakeholders and implement the gathered knowledge more effectively. This can be achieved by promoting transparency and sharing data among different agencies.
- To advocate the concept of sustainable fashion more effectively with a unified United Nations voice and to make advancement towards achieving the Sustainable Development Goals.[40]

The organizations working under the aegis of Alliance includes:

- United Nations Development Programme (UNDP)
- International Labor Organization (ILO)
- United Nations Environment Programme (UNEP)
- International Trade Centre/ Ethical Fashion Initiative (ITC/EFI)
- United Nations Global Impact
- United Nations Economic Commission for Europe (UNECE)
- The World Bank Group (Connect4 Climate)[41]

38 "UN Alliance for Sustainable Fashion addresses damage of Fast-Fashion",*available* athttps://www.unep.org/news-and-stories/press-release/un-alliance-sustainable-fashion-addresses-damage-fast-fashion(last visited on September 18, 2023).

39. "UN Alliance for Sustainable Fashion", available athttps://unfashionalliance.org/ (visited on September 18, 2023).

40. Leonie Meier,"Synthesis Report on United Nations System- wide Initiatives related to Fashion", *available* at https://unfashionalliance.org/wp-content/uploads/2021/10/UN-Fashion-Alliance-Mapping-Report_Final.pdf (visited on September 10, 2023).

41. *Supra* note 40.

Some of the initiatives taken up by the aforesaid organizations working under the Alliance are:

(a) Fashion 4 Climate: A global awareness campaign started by the World Bank for organizing world tours under the name "X-RAY FASHION" giving firsthand look to the consumers about the life-cycle of the garments, starting with the oppressive work environment in the garment factories and garments ending up in landfills; thus, encouraging them to make informed decisions while purchasing garments keeping in mind the deleterious impact of growing fast fashion.[42]

(b) Responsible Sustainable Ethical Trade: A global sustainability framework initiated by the International Trade Centre for setting up an innovative system in order to carry environmentally accountable fashion supply chains.

(c) Small Grants Programme: a project started by UNDP in Peru to provide small grants for supporting the production of natural fibers with prime focus on the management of soil, pastures and water enabling sustainable lifestyle and improving livelihood.

(d) Traceability for Sustainable Garment and Footwear: An international framework and traceability tool formulated by UNECE aiming to achieve transparency and traceability in the garment and footwear industry supply chains.

(e) The Sustainable Lifestyles and Education (SLE) programme's work on fashion: A project started by UNEP to educate consumers through media tool kit "FASHION SLOW DOWN" asking consumers to purchase better quality products and avoid fast fashion which is based on the concept of mass production at the price of human rights and environment.[43]

5.3 The Fashion Industry Charter for Climate Action

In 2018, various stakeholders from the fashion industry came together under the aegis of the United Nations Framework Convention on Climate Change (UNFCCC) to discover methods to move the fashion industry towards a comprehensive adherence to climate action. They adopted the Fashion Industry Charter for Climate Action (hereinafter The FashionCharter) to achieve the

42. "Be Fashionably Sustainable", *available* athttps://www.connect4climate.org/initiatives/fashion4climate(last visited on September 19, 2023).
43. *Supra* note 31.

goals set out by the UNFCCC at 24th Conference of Parties (COP24) in Poland in December 2018 and was further renewed in November 2021 at COP 26 in the United Kingdom.[44] Being the third largest manufacturing sector, the fashion industry has adopted the vision of achieving net-zero green-house gas emission by the year 2050 as the prime goal under the FashionCharter.[45]

The signatories to the Fashion Charter commit to the following key principles on climate action in order to reduce the environmental impact of the industry and undertaking sustainability related initiatives:

(a) Supporting the goals set out by the Paris Agreement in restricting the rise in global temperature to below 2degree Celsius.

(b) Using the science-based targets initiative to set up a decarbonization pathway for the industry.

(c) To track and publish reports regarding greenhouse gas emissions (GHG) from the industry and to maintain transparency and consistency with the standards laid down under the Fashion Charter.

(d) To work in collaboration with the experts, other stakeholders and environmental advocates in developing tools and strategies required for achieving the targets of GHG emission reduction.

(e) To use materials with low climate impact without having any negative impact on other sustainability aspects.

(f) To use renewable energy resources and undertaking energy efficient measures in the industry.

(g) To prefer circular business models and appreciate the positive impact they have in reducing the harmful impact caused by the fashion industry on the environment.

(h) Along with other stakeholders, work in developing policies and laws to enable climate action in the industry.

(i) To find scalable solutions for reducing carbon emissions in the fashion sector by working in partnership with the policy makers and finance community.[46]

44. "Fashion Industry Charter for Climate Action", *available* athttps://unfccc.int/climate-action/sectoral-engagement-for-climate-action/fashion-charter#The-Charter (visited on September 20, 2023).
45. "Fashion Industry Charter for Climate Action: Information Pack 2022", *available* athttps://unfccc.int/sites/default/files/resource/FICCA%20Booklet%202022. (visited on September 20, 2023).
46. "Fashion Industry Charter for Climate Action", *available* at https://unfccc.int/sites/default/files/resource/Industry%20Charter%20%20Fashion%20and%20Climate%20Action%20-%2022102018. (visited on September 22, 2023).

5.4 The New York Fashion Sustainability and Social Accountability Act

The Fashion Sustainability and Social Accountability Act (hereinafter the Fashion Act) is the New York State Assembly Bill which was introduced in the regular session of the New York assembly on October 20, 2021.[47] The bill was introduced to redress the issues generated by the fashion industry and fixing responsibility on the corporations and other stakeholders through an effective accountability mechanism. The Fashion Act makes an attempt to strike a balance between the economic power of all the stakeholders of the fashion industry and their legal responsibility. The striking provision on the Fashion Act is the *Mandatory Due Diligence framework.*[48] Due diligence refers to the process of identifying, preventing, mitigating and accounting for the measures taken by the fashion companies to address the actual as well as the anticipated negative impacts in their operations and supply chains.[49] The Fashion Act imposes a mandatory obligation on the companies to prevent harmful operations carried out by them and further preventing them in evading the responsibility towards the planet. The key elements of the Mandatory Due Diligence Framework under the Act includes:

- All the areas of the fashion supply chain- from deforestation to forced labor; requiring companies to focus on the areas having greatest impact in terms of environmental and human degradation;
- Companies to decrease the climate emissions not only in their own company but also in their supply chains so-as to be at par with the goals set out by the Paris Agreement and
- Chemical management in the industry by obligating the fashion companies to implement Zero Discharge of Hazardous Chemicals Guidelines.

CONCLUSION AND SUGGESTIONS

There has been ground-breaking increase in the fast fashion phenomena in the last few years. On one hand, it has given tremendous boost to the economy; on the other hand, there has been environmental concerns which are so grave that they cannot be ignored. The fast fashion industry known for making quick availability of products in the market has led to severe

47. "The New York state Senate: Assembly Bill A8352", *available* at https://www.nysenate.gov/legislation/bills/2021/A8352 (visited on September 22, 2023).
48. "The Fashion Act", *available* athttps://www.thefashionact.org/backgrounder/#tfa1(visited on September 22, 2023).
49. Section 2 (G) of the Assembly Bill A8352, *available* at https://www.nysenate.gov/legislation/bills/2021/A8352 (visited on September 23, 2023).

environmental implications in the form of greenhouse gas emissions, water pollution, biodiversity loss, soil pollution, textile waste and microplastic pollution. The list is endless and if the issues are not addressed early, it can lead to permanent damage to the environment which cannot be undone. No doubt, consumers are aware now and have shown change in their purchasing habits as far as sustainability is concerned but these voluntary steps are not enough to solve the problem in hand. International organizations such as United Nations and some countries have formulated certain guidelines for making the fashion industry sustainable but stringent laws and their implementation in proper manner is the need of the hour. Till the time statutory laws are not formulated, making guidelines and creating awareness will be of little use. In order to convert the idea of sustainable fashion into reality, the following suggestions are put forward:

- Time has arrived to move from fast fashion to sustainable slow fashion. Slowing down the production by focusing on quality rather than quantity will be a step forward in this direction.
- Companies working under the sustainable model to combat the menace of fast fashion should be encouraged and given incentives by the governments.
- Inclusion of sustainable fabrics (which are bio-degradable and needs less water for cultivation) in manufacturing products in the fashion industry.
- Fixing accountability on the companies for making false green claims by using "eco-friendly" or "environment friendly" labels on their products. Heavy fines should be imposed on such acts.
- Companies as well as consumers should be encouraged to follow closed loop cycle by recycling and reusing the products.
- The 'soft law' in the form of guidelines adopted by different countries and organizations may be helpful in creating awareness but they are only voluntary and non-binding measures. There is a dire need of statutory provisions to solve the problems created by fast fashion.[50]
- Lack of effective intellectual property rights protection in the fashion industry has also contributed in the emergence of fast fashion as one can easily make as

50. "The Fashion Act", *available* athttps://www.thefashionact.org/backgrounder/#tfa1 (visited on September 23, 2023).

many copies of the original product as one desires without any risk of being punished under intellectual property law. This practice has also resulted in the rise of fast fashion and along with this, rise in negative impacts of fast fashion as well.

FROM VISION TO REALITY: THE EVOLUTION OF INDIA'S PUBLIC SERVICE DELIVERY SYSTEM

"Administration is meant to achieve something, and not to exist in some kind of an ivory tower, following certain rules of procedure and Narcissus like looking on itself with satisfaction. The test, after all, is human beings and their welfare."
-Pandit Jawaharlal Nehru

Prof (Dr). K. C. Sunny*

Devi Sanal**

INTRODUCTION

Good governance, intertwined with timely public service delivery, is fundamental to the functioning of a democracy. Central to this notion is the concept of a welfare state, where government plays an active role in safeguarding citizen well-being. Traditional views of the state's functions have evolved into a dynamic perspective, encompassing roles as a protector, provider of social services, industrial manager, economic controller, and arbitrator[1]. The establishment of Constitutional governance lays the foundation for good governance, rooted in democratic principles. In India, connecting this dynamic State role to public service delivery underlines the importance of effective governance. Emphasizing transparency, accountability, and citizen participation, good governance ensures efficient and equitable distribution of social services. Furthermore, as the state takes on diverse roles like industrial management and economic control, a governance framework promoting efficiency, fairness, and responsiveness becomes imperative[2] . Commitment to good governance principles is vital for optimizing the State's impact, fostering an effective and inclusive public service delivery system.

With regard to public service laws, India encompasses a wide range of legal provisions aimed at ensuring the efficient, equitable, and accountable by providing public services to the populace. One of the key legislations in this regard is the Right to Public Services Act[3], which has been enacted by several Indian states. This act establishes a statutory framework for citizens to

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1. M.P Jain, Indian Constitutional Law 846 (Lexis Nexis, 7th edn, 2016).
2. Granville Austin, Working a Democratic Constitution: The Indian Experience 8(Sweet & Maxwell,4th edn, 2000).
3. The State Acts are the Bihar-Right to Public Services Act, 2011; Chhattisgarh- Lok Seva Guarantee Adhiniyam, 2011; Himachal Pradesh- Public Service Guarantee Act, 201 1; Jammu and Kashmir- Public Services Guarantee Act, 201 1 etc are worth enough to mention.

receive time-bound delivery of services and to hold government officials accountable for any delays or denials. It empowers citizens to demand services in a hassle-free manner, promoting for openness and responsibility in governmental operations.

The adoption of digital technologies, such as Aadhaar[4], has been instrumental in simplifying service delivery processes, reducing corruption, and enhancing transparency. Initiatives like Direct Benefit Transfer[5] have aimed to cut out middlemen, ensuring welfare benefits reach their intended recipients more efficiently. However, challenges persist, including regional disparities, bureaucratic hurdles, and inconsistent implementation at the grassroots level. Despite notable advancements, ongoing efforts are required to address these challenges and further strengthen the link between good governance and effective public service delivery in India.

"EXPLORING THE EVOLUTION: MODELS OF PUBLIC ADMINISTRATION AND THE HISTORICAL JOURNEY OF PUBLIC SERVICE DELIVERY"

The evolution of public administration through four main models - old public administration, new public administration, new public management, and new public service-is deeply intertwined with the historical development of how public services are delivered. The 'old public administration model', influenced by Max Weber's concept of a modern bureaucracy, emphasized hierarchy, meritocracy, and efficiency[6]. It operated through centralized control, clear rules, a division between policy making and implementation, and a defined organizational structure. However, it overlooked social justice concerns in public service delivery. The emergence of the 'new public administration' in the 1970s prompted a critical reevaluation, emphasizing the need to address social justice alongside efficiency. This shift reflected a

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4. In Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1), The Supreme Court's decision in this case has significant implications for public service delivery. The ruling recognized the right to privacy as a fundamental right under the Indian Constitution. In the context of public service delivery, it implies that any government initiative, such as Aadhaar, must adhere to the principles of privacy and data protection. The judgment emphasized the need for a robust legal framework to govern the collection and use of personal information, particularly in schemes related to public services. This decision serves as a crucial guideline, ensuring that while leveraging technology for efficient service delivery, the government must respect and protect the privacy rights of its citizens.
5. The government introduced the scheme with the objective of improving the delivery system and redesigning the existing procedures in welfare schemes.
6. D. Bandyopadhyay, 'Administration, Decentralization and Good Governance', 31, Economic and Political Weekly, 3109,32-38, (1996)

recognition that bureaucratic interests sometimes conflicted with public interests[7] . Therefore, ensuring social justice became a pivotal aspect of public service under the new administration model.

After fifteen years, a new paradigm known as 'new public management' emerged, drawing inspiration from private sector leadership styles. It stressed the importance of innovative leadership rather than rigid adherence to laws in public entities. This approach involved overseeing inputs and outputs, managing performance, monitoring and evaluating, and implementing audits as standard practices in public organizations. However, concerns arose as self-interest and technical-economic rationality gained prominence, leading to skepticism about the effectiveness of this management paradigm. Additionally, there was a noticeable decline in the quality of services provided to citizens due to the new found emphasis. Around the turn of the century, the concept of 'new public service' emerged, shifting the focus towards strategic reasoning and citizen interests. This perspective views public service as a collaborative process involving politicians, bureaucrats, citizens, and the business sector. Citizens are seen as active participants in policymaking and public service, acting both as customers and agents for themselves. Through forming partnerships with various organizations, the government takes on the role of a 'serving organization.'

The evolution from Government 1.0 to Government 4.0 reflects similar shifts seen in public service delivery. Government 1.0 operates on a one-way, government-centric model aimed at maximizing efficiency. Government 2.0 introduces a two-way approach, prioritizing citizen engagement and democratic values. Government 3.0 becomes person-centered, focusing on tailored services to enhance individual satisfaction, with increased use of mobile technology for government interaction. Government 4.0 incorporates advanced technologies such as big data, analytics, AI, smart cities, and robotics into its operations[8] .

Despite numerous policies, legal frameworks, institutional reforms, and procedural measures aimed at improving essential service delivery, inefficiency remains a significant issue. While the government has prioritized administrative reform to enhance service flow to the public, challenges persist. Efforts such as decentralization, simplification of processes, establishment

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7. Deepali Singh, 'Good Governance & Implementation In Era Of Globalisation', 70, The Indian Journal of Political Science, 1109,41-44, (2009).
8. Gandhi Shailesh, 'A Difficult Law to Implement: The Right to Public Services Act, 2015', 43 Economic and Political Weekly 23-25 (2015).

of staff service centers with skilled personnel, and streamlining service delivery have been undertaken, but there is a need for more effective implementation. Fundamental pillars ensuring public service quality have not been adequately strengthened. Public officials and civil servants face criticism for their slow and cumbersome processes, leading to frustration among citizens seeking hassle-free access to public services. Common challenges contributing to ineffective public service include traditional thinking, negative perceptions within administration, limited resources, lack of transparency, accountability, and responsibility, underutilization of information technology, low citizen awareness, absence of pressure groups, and complex procedures.

CONSTITUTIONAL GOVERNANCE & PUBLIC SERVICE DELIVERY: A SYMBIOTIC RELATIONSHIP

In 1950, India established its Constitutional system of governance with the adoption of its Constitution. This Constitution envisions the nation as a welfare state, outlining the fundamental principles and policies in Part IV. To realize the welfare state's objectives, policymakers have pursued planned social transformation through a series of 5-year plans, as well as various initiatives and programs at both the central and state levels. In the wake of India's liberation from British colonial rule in 1947, the nation's architects envisioned a government inextricably intertwined with the everyday lives of its citizens. Central to this construct was the traditional emphasis of public policy on the provision of essential services either free of charge or at significantly subsidized rates, with the overarching aim of combating entrenched poverty. Regrettably, a prevailing consensus now laments the state's inability to deliver these crucial public services effectively, particularly to the marginalized segments of the populace[9]. This deficiency manifests acutely in India's underwhelming performance across a spectrum of human development indicators.

Owing to high poverty rates and the absence of robust social security programs, a significant portion of government subsidies has been allocated to the subsidized distribution of staple food grains through a public distribution system[10]. However, the PDS suffers from substantial

9. Kala Seetharam Sridhar, 'Reforming Delivery of Urban Services in Developing Countries: Evidence from a Case Study in India' 42 Economic and Political Weekly 3404–3413(2007)
10. Herein after called as PDS.

leakages[11], with grains often diverted to the open market. Consequently, per capita consumption among the poorest households in the country remains among the lowest globally, and since 1980, nutritional intake has been on the decline for all income groups[12]. Similar concerns regarding inadequate targeting and misuse also afflict India's second-largest social protection program, which guarantees the right to employment under the National Rural Employment Guarantee Act. In the fiscal year 2015-16, the government's spending on public education amounted to approximately 3% of the GDP[13]. While India has witnessed substantial growth in student enrollment in educational institutions since gaining independence, achieving satisfactory levels of educational attainment among students has remained elusive. A nationwide survey[14] conducted in rural primary schools exposed the alarming fact that nearly half of grade 5 students were unable to read texts designed for second-graders. Factors such as high teacher absenteeism, elevated pupil-to-teacher ratios, and inadequate school infrastructure all contribute to subpar learning outcomes.

Just as with education, the primary duty of furnishing healthcare services, access to clean drinking water, and sanitation falls upon the state governments and urban local bodies in India. Unfortunately, this often translates into low-quality or even non-existent public health services. The lack of adequate sanitation facilities is a significant public health concern, as more than half of India's population still practices open defecation. This is a result of various factors, including a shortage of public toilets, limited access to piped water, and cultural norms that tolerate open defecation.

Moreover, the inadequate levels of human capital and limited access to essential infrastructure like clean water, electricity, and all-weather roads underscore governance failures in India when it comes to delivering public services. The primary culprit behind this governance inefficiency is frequently identified as corruption[15]. It is widely acknowledged that corruption negatively impacts the effectiveness and fairness of public service delivery in developing countries. While much attention has been focused on political corruption, there is a growing body of evidence

11. Satyanarayana Sangita, 'Decentralization for good governance and service delivery in India: Theory and practice' 68 The Indian Journal of Political Science447–464(2004).
12. Deaton, Angus and Jean Dreze, 'Food and Nutrition in India: Facts and Interpretations' 44Economic and Political Weekly 42-55 (2009).
13. Jaffrelot Christophe, "India in 2015: A Year of Modi's Prime Ministership" 56 Asian Survey174-186(2016).
14. Issac M.biti, "The Need of Accountability in Education in Developing Countries"30 The Journal of Economic Perspectives 109-132(2016)
15. Over the past decade, based on Transparency International's Corruption Perception Index, India's public sector has consistently been perceived as more corrupt than that of other developing countries with similar rates of economic growth, including Brazil, China, and South Africa.

pointing to poor management practices among unelected public authorities in developing nations, including bureaucrats and providers of healthcare, education, and other essential services.

Additionally, civil servants often prioritize their personal interests over those of society, working to serve their own narrow agendas. These officials receive a fixed salary and are not rewarded for their performance, which diminishes their motivation to exert significant effort. Consequently, the lack of incentives may lead to a misalignment of preferences between elected officials, service providers, and the disadvantaged and vulnerable populations they are meant to serve. Moreover, public employees have limited autonomy, and their assignments, transfers, and promotions are frequently contingent on their ability to appease political authorities. The prevalence of bribery in exchange for essential services is another issue, exacerbated by bureaucratic red tape, the limited knowledge of citizens, and procedural norms.

Moreover, the majority of state laws do not include provisions for the publication of citizens' charters or ensuring free access to information. This, combined with low literacy rates, has led to a lack of awareness among the populace. While there is an emphasis on expeditious service delivery, there are no established mechanisms to enforce standards of quality. Both human and financial resources are insufficient. In various states, there is a failure to adequately recognize and incentivize government officials through means such as promotions, rewards, and performance assessments. Additionally, numerous states continue to grapple with issues of absenteeism among public employees and a prevailing bureaucratic indifference.

Furthermore, the utilization of technology for public service delivery necessitates a highly skilled workforce. However, the implementation is hindered by a shortage of public officials trained in technology. The adoption of e-governance models for public service delivery generates a substantial volume of sensitive data. Concerns arise from the absence of data protection laws and the existence of stringent ones. India's cyber security measures are relatively weak, leaving it susceptible to cyber attacks and data breaches.[16] Without a comprehensive recovery plan, inadequate data backup methods, and vulnerability to natural disasters like fires and floods, there is a risk of permanent data loss and system failure. Therefore, gaining a deeper understanding of the disparities between design and reality and their underlying causes is essential for addressing deficiencies and developing more efficient designs to cater to user needs.

16. Joshua Goldstein, "Sensing Service Delivery: Pervasive Computing and Governance in Developing Countries"46 Political Science and Politics307–311(2013).

INDIA'S QUEST FROM TIMELY PUBLIC SERVICES: A HISTORICAL ODYEESY

The clamor for a citizen-centric approach to service delivery in India was profoundly shaped by the United Kingdom's Citizens' Charter movement. Within the realm of public service, a palpable discontentment prevailed among the populace. Factors such as corruption, bureaucratic hurdles, administrative deficiencies, and various other causes collectively exerted substantial impediments towards the realization of efficient, effective, and time bound public service delivery.

The first phase of this approach began with the enhancement of the constitutional standing of local self-governing bodies, as demonstrated by the adoption of the 73rd and 74th Constitutional Amendment Act in the year 1992. These amendments emphasized the principles of political devolution, decentralization, and public participation in the management of local affairs. Recognizing the imperative need for a revamped public service delivery system in India, especially in light of the under performance of numerous flagship programs in reaching their intended beneficiaries, the Indian government has adopted a mechanism akin to charters. This transition commenced following the tradition set during the Chief Secretaries' Conference in 1996. Following progress in this regard was made under the leadership of the former Prime Minister of India, Shri I.K. Gujral, who organized the Chief Ministers' Conference in May 1997, focusing on the 'Action Plan for Efficient and Responsive Governance.' This comprehensive strategy encompassed three pivotal domains: fostering administrative accountability and citizen-centricity, ensuring transparency and the right to access information within the administrative realm, and, lastly, motivating civil servants to excel in their roles while upholding stringent quality standards in public service provision.

Furthermore, the plan advocated for the rigorous enforcement of Citizens' Charters, the expeditious redressal of public grievances, the decentralization and devolution of authority, and a thorough examination of prevailing laws, regulations, and procedural frameworks. The Citizens' Charter Scheme was subsequently implemented across diverse central and state government ministries and departments, resulting in the establishment of approximately 120 Charters in central government departments and roughly 729 Charters in state government departments.[17] However, these Charters were discovered to suffer from obsolescence, a lack of commitment and precision, along with suboptimal design and composition.[18] Regrettably, their

17. 2002
18. Bhagwan, Vishnu, "Corruption & Good Governance" 68 The Indian Journal of Political Science 727–738(2007)

execution often lacked the enthusiasm with which they were conceived. Consequently, the concept of Citizens' Charters became an ambiguous notion with unclear objectives and proved ineffective[19] as an administrative instrument, leading to heightened discontent among citizens regarding public service delivery.

India's administrative system, grappling with issues like bureaucratic inefficiency and red tape, compelled the government to explore alternative avenues for delivering public services. The shortcomings of the Citizens' Charter initiative in India acted as a catalyst, prompting state governments to enact legislation guaranteeing public service delivery with stringent timelines. The legacy of British colonial rule bestowed upon India a bureaucratic structure primarily focused on maintaining law and order, rather than fostering development and serving the populace. Sensitizing officials and enhancing their responsiveness to citizen needs emerged as a critical imperative.

Numerous government-conducted studies, as well as assessments by independent organizations, underscored the pressing requirement for formal legislation that could ensure effective and time bound delivery of service to citizens. In pursuit of a more citizen-centric and responsive administration, new legislation was forged to guarantee public services to citizens. Pioneering this effort, Madhya Pradesh enacted the Madhya Pradesh Right to Guaranteed Public Services Act in 2010, establishing clear mandates for delivering specific services to citizens within stipulated time frames. Subsequently, several other states followed suit, enacting similar legislations, often incorporating additional provisions as deemed necessary.

BRIDGING THE GAP: PUBLIC SERVICE LEGISLATIONS AS A TOOL FOR CITIZEN EMPOWERMENT

The trajectory of public service law in India commenced with the historical 'Doctrine of Pleasure,' where the appointment and dismissal of government employees rested solely at the discretion of the head of state. Employees were afforded an opportunity to present their case before termination, prompting governments to establish service guidelines. While there existed ample provisions safeguarding the tenure and service conditions of government employees, a void remained concerning the efficient execution of their duties in accordance with the Constitution's mandates.[20] Despite governmental oversight, other authorities operated outside

19. Priyanka Pandey, "Service Delivery and Corruption in Public Services: How Does History Matter?" 2 American Economic Journal: Applied Economics 190–204(2010).
20. The Constitution of India, arts. 309, 310,311.

the purview of service regulations, leaving no recourse for dissatisfied citizens seeking services. Since the right to services lacked constitutional or legal recognition,[21] citizens were unable to file writ petitions before the judiciary, thus resorting to administrative tribunals with limited remedial authority as their sole recourse.[22] Governments have long prioritized the provision of efficient, effective, and timely public services. However, due to bureaucratic indifference and delays, ordinary citizens, who possess the fundamental entitlement to access information and public services seamlessly and promptly, find themselves entangled in a plethora of issues, often resorting to bribery to secure the services they require.

The Right to Service Act represents a significant administrative reform endeavor, rooted in the concept of the Citizen Charter, aimed at remedying this unfortunate situation. While Citizen Charters set standards for the quality of public services, the Act takes a further step by legally obligating the timely provision of public services as a citizen's right, with penalties for non-compliance by officials. Consequently, the Right to Service Act serves as a tangible testament to the state's commitment to uphold service delivery standards encompassing quality and punctuality. This legislation ensures that the public indeed receives services within specified timeframes, with a primary objective of curbing corruption within the government workforce and enhancing both accountability and transparency.

The Madhya Pradesh[23] made history in August 2010 by becoming the first Indian state to enact the "Madhya Pradesh Lok Sevaon Ke Pradan Ki Guarantee Adhiniyam," also known as the Public Service Guarantee Act. Bihar[24] followed suit shortly after, marking the second state to do so. Subsequently, a wave of states including Delhi, Rajasthan, Punjab, Uttar Pradesh, Himachal Pradesh, Chhattisgarh, Kerala, Uttarakhand, Haryana, Karnataka, Chhattisgarh, Jammu and Kashmir, Odisha, Assam, Gujarat, West Bengal, and Goa passed their versions of Right to Service Acts.

Building upon the momentum generated by these state-level initiatives, the central government introduced the "Rights of Citizen for Time-bound Delivery of Goods & Services and Redressal of Their Grievances Bill 2011" in Parliament. This federal legislation, mirroring the state-level efforts, extends to every individual citizen the entitlement to receive goods and services within

21. Sukhdeo Singh v. Bhagatram, AIR 1975 SC 421.
22. O.P. Dwivedi, 'Ethics and Values of Public Responsibility and Accountability" 63 International Review of Administrative Sciences, 61-73 (1985).
23. The Madhya Pradesh Act received the UNPSA (United Nations Public Service Award) for 2012, beating out 483 nominations from 73 countries in the area of "improving the delivery of Public Services."
24. July 25, 2012

specified time frames, alongside a mechanism for addressing their grievances. It's indeed a positive development that both central and various state governments in India have embarked on the path of enacting legislation pertaining to the right to services, ultimately prioritizing citizen empowerment and service efficiency.

- **The Right of Citizens for Time-Bound Delivery of Goods & Services & Redressal of Grievance Bill, 2011**

In 2011, amidst the public uproar surrounding the Lokpal Bill, the "Right of Citizens for Time-Bound Delivery of Goods and Services and Redressal of their Grievance Bill" emerged in the Lok Sabha. This legislation was a crucial response to the pressing need for a system ensuring timely delivery of goods and services to citizens and an avenue for addressing their grievances efficiently. Its core focus rested on guaranteeing the prompt provision of essential services like passports, ration cards, pensions, caste, birth and death certificates, among others, without subjecting citizens to the ordeal of endless waiting and bureaucracy. Undoubtedly, this bill constituted a significant stride in fostering public trust. Its principal objective was to deliver justice to citizens swiftly, efficiently, with the utmost transparency and accountability, while also aligning seamlessly with the principles enshrined in the Right to Information Act of 2005. Beyond that, this law sought to bridge the chasm between corruption and its profound impacts on the day-to-day interactions of citizens with governmental institutions.

The term 'service'[25] here encompasses a wide array of offerings, including goods, functions, responsibilities, or duties, to be provided or carried out by a public entity. It's worth highlighting that this regulation mandates that every public authority must release a Citizens Charter[26] within six months of the Act coming into effect. This Charter sets out the time frames for service delivery, and any official who fails to adhere to the Citizen's Charter faces penalties[27] deducted from their salary. Additionally, it establishes a mechanism for addressing grievances arising from breaches of the citizen charter

25. Right of Citizens for Time-Bound Delivery of Goods & Services & Redressal of Grievance Bill, 2011,s.2(o).
26. Right of Citizens for Time-Bound Delivery of Goods & Services & Redressal of Grievance Bill, 2011, s.2(e) defines the term "Citizen Charter" as a document that must include information about the products and services provided, as well as the responsibilities of public servants to address complaints within a specified timeframe. Every public authority must maintain a Citizen Charter that outlines all the rules, responsibilities, operations, and commitments for delivering goods and services within a designated timeframe. Failure to adhere to this Charter can serve as the basis for complaints filed with the authorities under this Bill. Importantly, citizens still have the right to seek grievance resolution under the bill even if there is no Citizen Charter in place.
27. If do not comply, they will be required to pay a specified penalty of Rs 250 for each day of non-compliance, with a maximum limit of Rs 50,000.

Every public authority[28] is mandated to establish a resource, which may include services like call centers, customer service centers, help desks, and support centers, to assist the public. Furthermore, the legislation necessitates the appointment of grievance redressal officers (GROs) in all administrative units, spanning central, state, district, and sub-district levels, municipalities, and panchayats, within six months of the law's enactment. These officers are responsible for receiving, investigating, and resolving complaints from citizens concerning goods or services provided as per the prescribed procedures, with a strict requirement for resolution within 30 days of receiving the complaint. Should the aggrieved individual wish to do so, they have the option to file an appeal with the designated authority within 30 days of receiving the initial decision or within 30 days of the date on which the appeal is received by that designated authority.

In the complaint and appeal process, the initial recourse available to a citizen dissatisfied with a public authority's violation of the Citizen Charter is to approach the Grievance Redressal Officer within that very public authority. After the Designated Authority has issued its decision, the citizen has the option to escalate the matter outside the public authority. At this point, the second appeal can be filed against the Designated Authority's decision, and this appeal falls under the jurisdiction of either the Central Government or the State Government. The appeals are directed to the Central Public Grievance Redressal Commission and the State Public Grievance Redressal Commissions as appropriate. If a grievance arises from the ruling of the second appeal, it may further lead to a third appeal, which is presented before the Lokayukta and Lokpal[29] at the central and state levels, respectively.

The 2011 "Right of Citizens for Time-Bound Delivery of Goods and Services and Redressals of their Grievances Bill" carried a vision of spearheading a global effort towards a welfare-oriented society. Unfortunately, this transformative bill saw its demise with the dissolution of the 15th Lok Sabha. Despite its potential to revolutionize public service delivery, the bill faced

28. Right of Citizens for Time-Bound Delivery of Goods & Services & Redressal of Grievance Bill, 2011, s.2(n) defines various public authorities, regardless of their specific roles within the administration. This bill includes a comprehensive list of institutions and authorities, irrespective of whether they are directly involved in providing goods or services to citizens. Various public authorities operate within different government departments, such as research, development, and policymaking, which may overlap with the roles outlined in this bill. Nonetheless, these authorities also fall under the jurisdiction of this Bill. The primary function of public authorities encompasses a range of tasks, including addressing grievances and evaluating legal protections.
29. Right of Citizens for Time-Bound Delivery of Goods & Services & Redressal of Grievance Bill, 2011, s 47, establishes that the Lokpal and Lokayuktas serve as the final option for appeals following decisions made by the CPGRC and SPGRC. The specific timeframe for filing this third appeal is determined by the relevant government or authority.

challenges, notably its failure to incorporate incentives, issues concerning the relationship between state and central authorities, and certain implementation aspects. While the bill establishes an independent commission, it leaves room for addressing concerns related to infrastructure and machinery. Additionally, it lacks clarity in terms of the commission's jurisdiction and a precise definition of what constitutes a public authority and service. Without addressing these issues in the future, there's a risk of a backlog of cases accumulating.

"From Digital Awakening to Governance Revolution: The Evolution of E-Governance in India"

In 1970, the Indian government recognized the growing importance of electronics and established the Department of Electronics. A significant step towards e-Governance occurred in 1977 with the creation of the National Informatics Centre, which focused on managing and communicating information. In the early 1980s, computers were only used by a limited number of organizations. However, the introduction of personal computers provided government departments with access to computer capabilities for processing, storing, and retrieving data.[30] By the late 1980s, more government employees had access to computers, although they were primarily used for word processing. As software improved, computers started being utilized for various purposes, including information processing and database management. Advancements in communication technology expanded the functionality and reach of computers, leading many government agencies to employ Information and Communication Technology for tasks such as tracking documents, monitoring development programs, managing employee payrolls, and generating reports.[31]

A significant step towards e-Governance was taken in 1987 with the establishment of NICNET, a national satellite-based computer network. This was followed by the introduction of the District Informatics System of the National Informatics Centre,[32] which aimed to computerize all district offices across the country. To support this initiative, each state government received the necessary software and hardware. In 1990, NICNET was extended to all district offices through the state capitals. In the subsequent years, numerous e-Government projects were carried out at both the national and state levels, alongside efforts to computerize systems,

30. Samuel Paul, Suresh Balakrishnan, K. Gopakumar, Sita Sekhar and M. Vivekananda, "State of India's Public Services: Benchmarks for the States"39 Economic and Political Weekly, 920-925 (2004).
31. Shantayanan Devarajan and Shekhar Shah "Making Services Work for India" 39 Economic and Political Weekly, 907-911 (2004).
32. Herein after called as DISNIC

establish teleconnections, and expand internet access. A Task Force proposed the initiation of an "Operation Knowledge" program[33] to promote computer literacy and the use of computers and information technology in education. Additionally, in 2000, the Information Technology Act was enacted to acknowledge digital signatures, electronic filing, computer crime prevention, and related technologies.

In 2006, the Department of Information Technology collaborated with the Department of Administrative Reforms and Public Grievances to develop a national e-Government Plan.[34] This plan aimed to enhance the efficiency and effectiveness of governance through digital means.In November 2010, a national policy emphasizing the importance of open e-governance was introduced. It outlined guidelines for implementing an efficient and systematic e-Governance framework. The primary objective was to establish the Digital India program, which was launched by the Department of Electronics and Information Technology. The overarching goal of the TWELFTH FIVE YEAR PLAN[35] is to prepare India for a future driven by information technology and to integrate technology across various departments. The mission of Digital India is to foster a knowledge-based society and economy nationwide.

Some of the initiatives of e-governance in India are - In 2005, the e-Courts project was conceived to align with the 'National Policy and Action Plan for Implementation of Information and Communication Technology.' Its vision is to revolutionize the Indian Judiciary by introducing ICT solutions in Courts across the nation. This project, supervised and funded by the Department of Justice under the Ministry of Law and Justice, Government of India, aims to improve judicial efficiency, making the justice system more affordable, cost-effective, accessible, transparent, predictable, and reliable. Aadhar, initiated in 2009, is a biometric identification system that assigns a unique 12-digit identity number to residents of India. It has become a fundamental component of e-governance by enabling efficient and secure verification for various government services, subsidies, and financial transactions. The Digital India, launched in 2015. It aims to transform India into a digitally empowered society and knowledge economy. The program focuses on providing broadband connectivity to all villages, delivering

33. 1988
34. The The NeGP has the goal of enhancing the provision of government services to both citizens and businesses. Its vision is to ensure that all government services are easily accessible to the general public in their local areas through shared service delivery points, all while ensuring efficiency, transparency, and dependability of these services at reasonable expenses, to meet the fundamental requirements of ordinary individuals.
35. 2012-2017

government services digitally, and promoting digital literacy. Next is UMANG,[36] it is a mobile application launched in 2017 that provides access to a wide range of government services and information. Citizens can use the app to access services from various government departments, making it a one-stop platform for e-governance services. The National Health Stack,[37] announced in 2020, is an ambitious initiative to create a unified digital healthcare ecosystem in India. It aims to facilitate the seamless exchange of health data, telemedicine, and the delivery of healthcare services through digital means.

E-governance initiatives in India have made remarkable strides in reshaping the country's administrative landscape. In conclusion, these initiatives have ushered in a new era of efficiency, transparency, and accessibility in government services. They have not only streamlined bureaucratic processes but have also empowered citizens by granting them easy access to vital services from the comfort of their homes. However, it is important to acknowledge that challenges persist, such as bridging the digital divide and addressing data security concerns. As India continues to expand its e-governance efforts, it must focus on ensuring that the benefits of these initiatives reach every corner of the country, especially in rural and remote areas. Apart from that the efficacy of e-Governance endeavors can be gauged through several factors such as internet accessibility, concerns about cybercrimes, digital proficiency, mobile device utilization, public perceptions, and attitudes.[38] Additionally, robust data protection measures and cyber security protocols should be in place to safeguard citizens' sensitive information. In conclusion, while e-governance initiatives have come a long way in India, their success will ultimately hinge on addressing these challenges and fostering innovation to create a more efficient and responsive government for all citizens.

CONCLUSION

In conclusion, the effectiveness of India's public service delivery system remains a complex and evolving challenge. While there have been notable improvements in various sectors, persistent issues such as unequal access, bureaucratic inefficiencies, and corruption continue to hinder its overall efficiency. The digitalization of services, increased transparency efforts, and citizen engagement initiatives have shown promise, but a concerted and sustained effort is required to

36. Unified Mobile Application for New-age Governance
37. S. A. Palekar, "E-governance Initiatives in India : An Analytical Study of Karnataka State." 71 The Indian Journal of Political Science 85–96 (2010).
38. Ritu Hooda, "Time Bound Public Service Delivery System" 25 International Journal of Scientific Progress and Research, 112-119 (2016)

ensure that public services effectively meet the diverse needs of India's vast population. Strengthening infrastructure, enhancing accountability, and promoting equitable access should be central to any strategy aimed at improving the nation's public service delivery system.

While there are existing laws at both the Central and State levels, there are some gaps in these legislations. The Right of Citizens for Time-Bound Delivery of Goods and Services and Redressal of their Grievances Bill, 2011, aspires to establish a global model for a welfare-oriented society. However, the bill doesn't address issues like the absence of incentives, the relationship between States and the Centre, and challenges in its implementation. Additionally, it's important to define "public authority" and "service" clearly in the future to prevent a backlog of cases. Moving forward, India must continue its journey towards a citizen-centric e-governance paradigm, addressing disparities in digital literacy, bolstering cybersecurity measures, and fostering a culture of accountable governance. With the right blend of visionary leadership, sustained investment, and an unwavering commitment to inclusivity, India's public service delivery system has the potential to become a shining example of efficiency and responsiveness on the global stage.

RECOMMENDATIONS

- Due to low literacy rates and a large population, many citizens are unaware of systems governing their welfare, and even when informed, they often lack full comprehension. Therefore, a grassroots approach should be adopted, starting in remote areas, through measures like community-based awareness campaigns, budget allocation for education programs, and the maintenance of information help desks in government departments.
- To ensure the quality and effectiveness of service delivery, it's crucial to establish appropriate benchmarks or standards and incorporate them into policy initiatives
- Conducting regular intensive workshops and training programs for officials is essential to enhance their skills, promote proper conduct among public servants, and foster a citizen-friendly approach.
- Additionally, to effectively oversee service delivery processes, it's crucial to provide public employees with training in information and technology tools, equipping them with practical skills

- In terms of officials' responsibilities, it's important to consistently assess and supervise their performance, offering incentives or rewards to recognize top performers. This approach can help mitigate issues like absenteeism.
- To ensure the long-term success of India's e-governance system, it is imperative to prioritize data security and privacy. Employing suitable technology and robust legal mechanisms for data protection can help prevent both cyber-attacks and unauthorized data usage. Additionally, the comprehensive strategy should encompass data backup protocols and effective management strategies for electronic waste.

ISSUE OF ARBITRABILITY OF LEASE DISPUTE VIS A VIS RIGHT CREATED BY PETROLEUM CONTRACT IN INDIA

Konark Pratap Gupta*

Dr. Sarvesh Kumar Shahi**

INTRODUCTION:

India's petroleum industry is distinguished by its strategic significance for both economic growth and energy security. Petroleum contracts, which assign rights for petroleum resource exploration, production, and development, are essential to this industry. However, disagreements between the parties to these contracts frequently occur, just like in any complicated economic partnership. Determining whether lease disputes resulting from petroleum contracts are arbitrable is one of the major issues the Indian legal system faces.

The subject of arbitrability of disputes in India is regulated by case law rather than statute. This is due to the fact that the only reference to arbitrability is found in "Section 2(3) of the Arbitration and Conciliation Act, 1996", which only states that some conflicts may not be referred to arbitration,[1] but does not specify which instances are not arbitrable.[2]

Furthermore, "Sections 34(2)(b) and 48(2) of the Arbitration and Conciliation Act, 1996" enable courts to overturn an award if the conflict could not be resolved via arbitration or if the result is inconsistent with Indian public policy, reserving the issue of arbitrability to the courts. It's worth noting that arbitrability and public policy are two distinct grounds in the aforementioned passages.

Nevertheless, arbitrability has been irrevocably linked to public policy since certain kinds of issues, such as serious offences and succession, would not be in the interest of the public to be resolved through arbitration because they affect issues such as national security, sovereignty, law and order, and social objectives.

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1. "The Arbitration and Conciliation Act (No. 26 of 1996), s 2(3)"
2. A. Ayyasamy v. A Paramasivam, (2016) 10 SCC 386; Aftab Singh v. Emaar, (2017) SCC Online NCDRC 1614

The issue of arbitrability might very well emerge at different phases, including.

(i) "before a court of law where the court has an obligation to refuse to hear the matter and refer it to arbitration under Sections 8(1) or 45 of the Arbitration Act, unless there exist sufficient reasons for not doing so";

(ii) "during an arbitration proceeding as a question of jurisdiction under" *"the principle of kompetenz-kompetenz";*

(iii) "At the time of considering an application for setting aside an award"; "or (iv) at the stage of enforcement of an award".

The most common grounds for not fulfilling a party's commitment to have their issue addressed through arbitration are: "*(i) public interest; (ii) public policy, and (iii) the need for judicial protection"*[3].

Nevertheless, eliminating jurisdiction on the basis of "non-arbitrability" is not something that should be taken for granted, and should only be undertaken in the most egregious situations.

So, at moment, the jurisprudence on arbitrability is overtaken by the judgement of the Hon'ble Supreme Court in "Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd." [also called as Booz Allen case], in which the Judge, while upholding public policy in the face of arbitration clauses, expounded the "in rem and in personam test", i.e. rights against specific individuals (in personam) do seem to be arbitrable but "rights against the world at large (in rem) are not".

THE TEST OF BOOZ ALLEN

The Supreme Court was asked to evaluate the topic of arbitrability in the case of "Booz Allen", which involved the execution of a bank mortgage by sale. While the majority of the facts of this case had a primarily inter parties' effect, i.e., "the entire cause of action was based on agreements being executed between the parties and the bank", the Court proceeded to address the situation of arbitrability using the broad tests of "(a) whether the subject matter is capable of adjudication by a private forum; and (b) whether the relief sought can only be granted by a special court or tribunal"[4].

The Court recognized as arbitration is a private venue selected by the parties, and that any disagreement, civil or anything else, is susceptible to arbitration unless "expressly or impliedly banned". The Court reasoned that if a legislation imposes a right and offers a mechanism for its enforcement, then a party can only use that act's sole remedy.

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3. Gary B. Born, International Arbitration: Law and Practice 82 (2nd edn., 2015).
4. Booz Allen v. SBI Home Finance Ltd., CIVIL APPEAL NO.5440 OF 2002

The Supreme court then went on to cite examples of *"in arbitrable" things, including as - "Criminal offences; Matrimonial disputes; Guardianship; Insolvency and winding up; Tenancy governed by a special statute,".*

And it has been also clearly held that the inarbitrability of these conflicts stems from the fact that they are "proceedings in rem". As a result, the Court utilised a "rights-based approach" and established a "public policy test" based on the distinction between rights in personam, or rights against specific individuals, and "rights in rem, or rights against the whole world". Actions or conflicts involving in rem rights would be not subject to arbitration. However, the Court expressly said that this was not an inflexible rule, and that "subordinate rights arising from proceedings in rem would be arbitrable", such as rights under a "patent licencing agreement, but not the validity of the patent"[5].

Finally, the Court held that a mortgage suit for sale was not arbitrable as an action in rem. The Court considered the nature of the dispute and determined that, because any person with an interest or right of redemption in the litigation could be interested, the proceedings could not be sent to a private adjudicatory process of arbitration because the Court must protect third-party interests as well as adjudicate on their rights and liabilities. As a result, the Court effectively reasoned that enabling a civil court to lose jurisdiction would result in the elimination of third-party rights, which could not be permitted on public policy grounds.[6]

2.2. The Inadequacies of Booz Allen

Given that the Court originally established the rule for determining arbitrability in India in Booz Allen, any consideration of arbitrability should begin with the "in rem and in personam tests". Not unexpectedly, the standard is utterly insufficient to address the considerations that should make a matter in-arbitrable because the Court did not explicitly identify the parameters of what would constitute public policy. For the reasons listed, the test of prohibiting arbitration by referring to public policy, either explicitly or implicitly, and the premise that the development of specialized forums includes public policy issues, is profoundly incorrect.

2.3. "Inadequacy of the in rem and in personam Distinction"

It should be noted that the situations mentioned above all involve actions in rem. A right in rem is a right that may be exercised against the entire world, as opposed to a "right in personam", which

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5. Mustill and Boyd, Law and Practice of Commercial Arbitration in England 73 (2nd edn., 1989).Supra note 15 at 7.
6. *Id*.

protects an interest only against specific persons. Actions in personam determine the legitimate interests of the parties in the "subject matter of the case", whereas actions in rem determine the title to the property and the rights of the parties not only among themselves, but also against "all people claiming an interest in the property at any time".

Judgment "in personam" refers to a judgement against such a person as opposed to a judgement against a thing, right, or status, whereas decision "in rem" refers to a judgement that establishes "the status or condition of property that works directly on the property itself". (According to Black's Law Dictionary). All issues involving rights in personam are generally and historically deemed susceptible to arbitration, but all disputes involving rights in rem are required to be handled by courts and public tribunals, and are unsuitable for private arbitration. It is not, though, a hard and fast rule. Disputes over subordinate rights "in personam" originating from rem rights have traditionally been regarded as arbitrable.

In order to establish public policy, the Court will look at well-known "examples of non-arbitrable" conflicts and concluded that they are inarbitrable because they include acts in rem. Even just an action "in personam" would become non-arbitrable if it was reserved for adjudication by a public forum as a matter of public policy.[7] A deeper inspection of some of the examples reveals the Court's flaws in thinking.

2.4. Relief Claimed

Whenever the Court decided to look into the issue of "arbitrability in Booz Allen", it limited its inquiry to determining whether the remedy sought by the party is one that may only be awarded by a special forum or tribunal. As a result, the Court indirectly agreed that the standard for evaluating arbitrability is the remedy or relief sought. Based on its consideration of proceedings in rem, the Court recognized that if the remedy sought would have an impact in rem, it could not be given in private fora and would thus be inarbitrable.[8] This really is problematic for three major reasons: initially, as long even as conflict is "inter partes" and can be restricted to an *"inter omnes effect"*[9], the mere idea of an effect in rem cannot be a reasonable basis to supersede the parties' free expression, because it is exceedingly rare for a conflict to not involve a rule of public policy, i.e., a law governing the subject.

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7. Kingfisher Airlines Limited v. Prithvi Malhotra Instructor, 2013 (7) Bom C.R. 738
8. David St. John Sutton and Judith Gill, Russell on Arbitration 28 (22nd ed., 2003).); Donde et al, "Arbitrability of Intellectual Property Disputes: Setting the Scene", Young Icca Blog July 28, 2016, *available* at <http://www.youngicca-blog.com/arbitrability-of-intellectual-property-disputes-setting-the-scene/>

Second, if the disagreement is industrial or commercial and the parties have intentionally opted to bring a contract dispute to an arbitral tribunal, one party is effectively seeking precise and particular redress against some other specific, defined party, rather than against the entire globe. As a result, notwithstanding its impact in rem, the issue remains in *personam*. In practice, the Court hinted at this prospect when it decided that subordinate rights in *personam* emanating from rem rights are arbitrable. Even if the National Company Law Tribunal was established to adjudicate such rights, accusations of "oppression and mismanagement" coming out of pure violation of contract should be arbitrable.[10] Furthermore, the arbitrator can issue an "injunction and damages" for violation of law of copyright, even if it would have an impact *in rem*.[11]

Thirdly, a party would purposefully seek relief that the arbitral tribunal could not provide in order to prevent arbitration.[12] This is known as "dressing-up" the claim with vexatious, mala fide, and malicious petitions in place to evade arbitration. As a result, the standard of remedy sought is insufficient to decide whether a dispute is arbitrable.

ARBITRABILITY OF TENANCY DISPUTES:

"Vidya Drolia"[13] re-calibrates the laws on subject-matter arbitrability and encapsulates the 4-fold standard as a complement to the "rights test" established in Booz Allen, the ratio of which was ruled to be "per incuriam" with respect to the arbitrability of TPA-governed tenancy disputes.

The test for arbitrability is an investigation into the "non-arbitrability" of the cause of action and subject matter of the dispute, which is fascinating. As a result, arbitrability comes with a negative condition that, if met, renders the subject matter non-arbitrable. These are the following:

(1) "when cause of action and subject matter of the dispute relates to actions *in rem*, that do not pertain to subordinate rights in *personam* that arise from rights *in rem*".

(2) "when cause of action and subject matter of the dispute affects third party rights; have *erga omnes* effect; require centralized adjudication, and mutual adjudication would not be appropriate and enforceable";

9. Dário Moura Vicente, "Arbitrability of Intellectual Property Disputes: A Comparative Survey", 31(1) ARB. INTL. 163 (2015)
10. Fulham Football Club (1987) Ltd. v. Richards, [2011] EWCA (Civ.) 855 (Eng.).
11. "Eros International, Though it will in some way involve determining the validity of the copyright itself, which is a right in rem."
12. Rakesh Malhotra v. Rajinder Kumar Malhotra, (2017) SCC Online SC 733.
13. Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1

(3) "when cause of action and subject matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable"; and

(4) "when the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s)".

Such standards dovetail and overlap, but when used comprehensively and practically, they can help and assist in identifying and verifying with a high degree of confidence when a dispute or subject matter is non-arbitrable under Indian law. The subject matter of the dispute becomes non-arbitrable only when the answer is yes.

Using the framework proposed above to ascertain non-arbitrability, it is clear that "insolvency or intracompany disputes" must be resolved by a centralized forum, such as a court or a special forum, which is more efficient and has complete jurisdiction to effectively and completely resolve the matter. They are also *in rem* acts.

To fully appreciate the significance of this decision, we must consider it in the context of other decisions on tenancy *arbitrability*. The Supreme Court's position in three important cases, namely "Natraj Studios,[14] Booz Allen,[15] and Himangni Enterprises,[16]" that established the law regulating arbitrability of tenancy issues prior to Vidya Drolia, may be understood by looking at the Supreme Court's decisions over the years.

The Supreme Court concluded in the "case of Natraj Studios" in 1981 that conflicts between landlords and renters protected by special legislation governing rent control can be heard only by the special court designated by "the statute and are thus not arbitrable". In the case of Booz Allen, the Supreme Court restated the same position on tenancy concerns governed by special statutes in which the tenant has "statutory immunity from eviction" and only certain courts have jurisdiction over such disputes. The case of Himangni Enterprises in 2017 only, gave decision which reinforced the non-arbitrability of lease and eviction conflicts, holding that even in circumstances regulated by the TPA rather than a specific legislation, the "civil court, not an arbitrator", would have subject matter jurisdiction over landlord-tenant disputes.

The justification in all of these judgments has remained the public policy point of view that "tenancy statutes are special statutes that are inherently public welfare legislations" that serve

14. Natraj Studios (P) Ltd v. Navrang Studios & Anr, AIR 1981 SC 537
15. Booz Allen and Hamilton Inc v. SBI Home Finance Limited, MANU/SC/0533/
16. Himangni Enterprises v. Kamaljeet Singh Ahluwalia, CIVIL APPEAL No. 16850 of 2017

the dual purpose of protecting tenants from unfair evictions and unfair rent/exploitation, striking a balance against the tenant's inherently weaker bargaining power. As a result, Indian courts have repeatedly found that the conflicts covered by these statutes are not arbitrable. Vidya Drolia[17] represents a change in this perspective. The court clarified the law on this point by overturning its judgement in Himangni Enterprises, ruling that "landlord-tenant disputes covered and governed by special statutes would not be arbitrable" unless "a specific court or forum has been given exclusive jurisdiction to apply and decide special rights and obligations". The Supreme Court declared in *"Vidya Drolia and Ors. v. Durga Trading Corporation"*[18] that tenancy issues regulated by the Transfer of Property Act, are very much arbitrable. It said that landlord-tenant conflicts are "not proceedings in rem", but rather *"relate to subordinate rights in personam arising from rights in rem"*. Normally, such conduct would not affect third-party rights, entail erga omnes consequences, or necessitate centralised adjudication. An award that resolves landlord-tenant conflicts can be implemented and enforced in the same way that a civil court decision can. Landlord-tenant issues have nothing to do with the state's fundamental and sovereign powers. The Transfer of Property Act's provisions do not clearly or impliedly prohibit arbitration.

3.1. Status of Petroleum Contracts in The Context of Lease Agreement

A Production Sharing Contract (hereanafter referred as PSC) is a legal arrangement that the Government and the Contractor enter into for the purpose of Exploration and Production (E&P) of hydrocarbon resources, specifically crude oil and natural gas. The Petroleum and Natural Gas Rules, 1959, require that the licensee or lessee and the government enter into an agreement outlining the terms and conditions of the license or lease. These terms and conditions are listed as PSC articles. The history of oil exploration in India is noted in "Annexure-B", up until the emergence of PSCs under the New Exploration and Licensing Policy (NELP). PSCs are now the country's dominant mechanism of hydrocarbon administration. Because they are based on Article 297 of the Indian Constitution, these contracts are essentially regulatory contracts. Article 297 states that petroleum in its natural state in India's territorial waters and continental shelf belongs to the Union of India. The Oil Fields (Regulation and Development) Act of 1948, as amended by the Petroleum and Natural Gas Rules of 1959, regulates petroleum operations.

17. *Supra* note 15.
18. *Supra* note 15.

Oil and natural gas are indeed the end products of rare natural resources that are only available in small quantities. There are numerous forms of petroleum contracts, one of which is the "Production Sharing Contract," often known as PSC. Production Sharing Contracts were extensively embraced as part of the government's New Development and Licensing Policy (NELP) in 1997, which aimed to increase the country's oil and gas exploration. A "Production Sharing Contract (PSC)" is a legally binding agreement between the "government and the contractor" for the exploration and production of hydrocarbon resources such as "crude oil and natural gas".

Article 17 of the PSC deals with Taxes, "Royalties, Rentals, Duties", etc., whereby it is in the most explicit manner mentioned that the Companies, their employees, persons providing any materials, supplies, services or facilities or supplying any ship, aircraft, machinery, equipment or plant (whether by way of sale or hire) to the Companies for Petroleum Operations or for any other purpose and the employees of such persons shall be subject to all fiscal legislation in India except where, pursuant to any authority granted under any applicable law, they are exempted wholly or partly from the application of the provisions of a particular law or as otherwise provided in the PSC"[19] [20]. Subject to the provisions mentioned in the "PSC, deductions at the rate of One hundred (100%) per annum shall be allowed for all expenditures, both capital and revenue expenditures, incurred in respect of Exploration Operations and drilling operations. The expenditure incurred in respect of Development Operations, other than drilling operations, and Production Operations will be allowable as per the provisions of the Income-tax Act, 1961"[21].

Articles 11 and 12 of the PSC deal with "Offshore and Onshore Petroleum Exploration Licenses and Mining Leases", respectively. According to the PSC, the Contractor must submit an application for a licence in respect of the Contract Area as soon as feasible, but no later than

19. "Things of value within territorial waters or continental shelf and resources of the exclusive economic zone to vest in the Union: (1) All lands, minerals and other things of value underlying the ocean within the territorial waters, or the continental shelf, or the exclusive economic zone, of India shall vest in the Union and be held for the purposes of the Union. (2) All other resources of the exclusive economic zone of India shall also vest in the Union and be held for the purposes of the Union. (3) The limits of the territorial waters, the continental shelf, the exclusive economic zone, and other maritime zones, of India shall be such as may be specified, from time to time, by or under any law made by Parliament".
20. Government of India, "Model Production Sharing Contract for the Ninth Offer of Blocks (NELP - IX)" Article 17.1 (Ministry of Petroleum and Natural Gas, 2003)
21. Government of India, "Model Production Sharing Contract for the Ninth Offer of Blocks (NELP - IX)" Article 17.2.1 (Ministry of Petroleum and Natural Gas, 2003)

fifteen (15) Business Days after the Contract is executed.[22] The PSC envisions the state granting a Lease for an "initial period of twenty (20) years" from the date of grant subject to the condition of cancellation or termination of this Contract in line with its provisions upon receipt of an application and permission for Lease post discovery.[23] An extension by mutual contract between the Two for five (5) years or such period as the Parties may agree after taking into consideration the "balance recoverable reserve and balance economic life of the Field/Development Area" from the expiry of the initial period, provided that throughout the event of commercial production of Non Associated Natural Gas, "the extension may be for ten (10) years or such period as the Parties may mutually agree after taking into account the balance recoverable reserve and balance economic life of the Field/Development Area from the date of expiry of the initial term"[24].

The "Petroleum and Natural Gas Rules of 1959" establish a contract between the authority of government and the licensee or lessee that *spells out the contract terms of the licence or lease.* These terms and conditions are spelled forth in the PSC's articles.

PSCs are now the most common way to manage hydrocarbons in the country.

Now we have "Revenue Sharing Contracts under the Hydrocarbon Exploration and Licensing Policy or HELP," which was adopted by the cabinet in March 2016 with the goal of boosting openness and reducing administrative discretion in issuing hydrocarbon licenses. Both contracts generate the same type of legal right.

Now if we apply the ratio of the series of judgments as discussed above regarding the issue of arbitrability of Lease or Rent disputes to the present situation of Lease agreement under PSC then it is clear from the articles of PSC specially article 11, 17 etc. which laid down the foundations for liabilities under the PSC that the nature of Lease agreement created under the PSC are such that it creates a right in rem. Now before Vidya[25] Test such disputes were not arbitrable, bur Vidya Test also created an exception where it clearly stated that – "there are certain Right in Rem which belong to sub ordinate right in personam". According to the Vidya test, any lease or rental issues must be of such kind that the problems "are not actions in rem but

22. Government of India, "Model Production Sharing Contract for the Ninth Offer of Blocks (NELP - IX)" Article 11.1 (Ministry of Petroleum and Natural Gas, 2003)
23. Government of India, "Model Production Sharing Contract for the Ninth Offer of Blocks (NELP - IX)" Article 11.5(Ministry of Petroleum and Natural Gas, 2003)
24. Government of India, "Model Production Sharing Contract for the Ninth Offer of Blocks (NELP - IX)" Article 11.5(b) (Ministry of Petroleum and Natural Gas, 2003)
25. Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1

belong to subordinate rights in personam that emerge from rights in rem." Normally, such conduct would not affect third-party rights, entail erga omnes consequences, or necessitate centralised adjudication. An award that resolves landlord-tenant conflicts can be implemented and enforced in the same way that a civil court decision can. Landlord-tenant issues have nothing to do with the state's fundamental and sovereign powers. The Transfer of Property Act's provisions do not clearly or impliedly prohibit arbitration.

Now it seems the concern is "what is the nature of the relationship between the parties under the PSC", because this relationship will decide whether the Vidya Drolia and Ors. v. Durga Trading Corporation[26] test will apply to such conflicts under the PSC or not.

There are many instances in Production Sharing Contracts which clearly demonstrates that the PSC is nothing but prescribes the terms and conditions of a *"Lease Agreement"*. The various tests prescribed and discussed above regarding the Public Policy if applied to PSC's it will give clear expression that such disputes will create a right in rem and arbitrability of such disputes become questionable on numerous grounds if not justified through exceptions.

CONCLUSION:

In India, the arbitrability of lease disputes resulting from petroleum contracts is a complicated and developing topic. The Act's provisions should be liberally read to encourage arbitration as the preferred way for resolving commercial disputes, notwithstanding the possibility of some rights in rem being involved, according to previous judicial rulings. Because of this, leasing disputes in petroleum contracts are typically regarded as arbitrable, subject to particular conditions.

However, those who are involved in the petroleum sector and those who practice law must be on guard and adapt to changing legal doctrines and legislative requirements. Arbitrability needs to be clarified if commercial certainty is to be promoted and foreign investment is to be attracted to India's petroleum industry. The arbitration of lease disputes is anticipated to play a bigger and bigger role in creating a favorable business environment for petroleum exploration and production in India as the energy landscape continues to change.

Arbitrability in lease disputes is a complex topic. It necessitates a complex strategy that takes into account the specific contractual rights, the existence of arbitration clauses, the types of disputes (contractual, regulatory, or connected to public policy), as well as the changing legal

26. Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1

and regulatory landscape.

In the end, the question of whether leasing disputes resulting from petroleum contracts in India can be arbitrated is more than just a legal one; it lies at the crucial nexus of law, economics, the public good, and environmental stewardship. For the petroleum sector to flourish sustainably and for the good of the country, it is crucial to strike the correct balance between these various factors. The judicial system, industry stakeholders, arbitrators, and legislators must work together to achieve this balance. India can only make sure that the arbitrability of leasing disputes is in line with its larger national goals, encourages responsible resource use, and boosts the nation's economic development and energy security by taking a holistic approach.

ISSUE OF OWNERSHIP IN ARTIFICIAL INTELLIGENCE GENERATED WORK UNDER THE COPYRIGHT ACT

Dr. Pramita Gurung*

INTRODUCTION

Homo sapiens are recognised as the planet's intellectuals. But given how swiftly technology is evolving, it cannot be disputed that machine learning is gradually taking the place of human abilities.

Later the 1970s witnessed a notable surge in the utilization of computer programs, The computer applications office supplies such as Microsoft office word, MS Excel, MS worksheet etc. are used by people to produce works and the copyright ownership of such computer-generated works has not posed substantial concerns, as during that time the computer programs were viewed as a tool and a human involvement was necessary for the creation of the piece of work which merely supports the creative activity. Currently, there has been a comprehensive transformation in all aspects. The advent of artificial intelligence (AI) has transformed computer programs from mere tools into autonomous creators capable of making independent decisions. Consequently, a pertinent issue arises about the ownership of copyright for works generated by both human beings and AI systems, particularly as the similarities between these works continue to grow.

It was Arthur McCarthy who coined the term "artificial intelligence" in the year 1956. Artificial intelligence (AI) is the ability of a digital computer or computer-controlled robot to do tasks routinely performed by intelligent beings. It is an intangible technology that performs tasks by using several forms of intelligence, including verbal intelligence, problem-solving, learning, reasoning, and perception.

Undoubtedly, the progress of technology and its utilization have facilitated a more convenient, time-efficient, and trouble-free daily existence. The advent of artificial intelligence has streamlined certain processes, enabling them to be executed with a single touch or click. Artificial intelligence (AI) operates in a manner similar to GPT-3, which is a language processing model. Additionally, AI is utilized in various applications, such as image recognition programs like Google Lens and product recommendation systems like Amazon's. Furthermore, AI is employed in beauty product analysis by platforms such as Myntra and Nykaa and in the

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implementation of 3D try-on features by Lenskart, among others. Undoubtedly, within a limited timeframe, technology has brought about a change in our lifestyle, work patterns, and creative productivity. The transformative potential of AI is seen in its ability to significantly impact individuals' daily lives, either positively or negatively.

The debate over copyright protection of AI-generated work has resurfaced with the release of Chat GPT which creates replies depending on the algorithms and data inputs. The proliferation of artificial intelligence (AI)-fabricated textual works, images, and music, together with the processes by which they were produced, has sparked a wide range of complex legal issues. These cast doubt on how we see ownership, justice, and the fundamental tenets of creativity.

However, the works created by humans and the AI is increasingly becoming indistinguishable whichraises the question as to who owns the copyright to these works. The copyright rules do not protect any work that is entirely generated by AI, even if it originated from a text prompt created by a person. Even if fair use rules allowed the use of copyrighted content without the owner's consent in some circumstances, the ongoing legal battles might upset the status quo and cast doubt on the future of AI model training.

With the above view point the main objective of the study is to examine the issue of authorship, originality, infringement and fair use with regard to the Artificial generated works and propose to suggest the legal ramifications of AI-generated creative works in India.

ARTIFICIAL INTELLIGENT GENERATED WORK: ISSUES & CHALLENGES

As per the provisions of Indian copyright law, the person responsible for creating a work is recognized as the author. The majority of copyright laws, such as the Indian Copyright Act of 1957, do not clearly specify the legal status of the author. In these laws, the term "author" only refers to a person or legal entity who creates a work. In accordance with the provisions of the Copyright Act, for a work to be eligible for legal protection, it must possess the qualities of originality, human authorship, and autonomy. Hence, the question that arises concerns is the acknowledgment of artificial intelligence (AI) as a creator and the legal safeguarding of works made by AI within the framework of copyright legislation. The guidelines for the evaluation of patent applications utilising AI and machine learning were published by the Indian Patent Office in 2020. According to the rules, the owner or operator of the AI system would be regarded as the inventor if it were used to develop an innovation. These principles may offer some insight into

how Indian copyright law may develop in the future, even if they do not explicitly address copyright ownership. So, the question is: can AI-generated content be protected by copyright? This has drawn controversy due to the differing ideas and points of view.

The issue of copyright ownership in AI-generated works is still unclear under Indian copyright law as the definition of author excludes AI systems from owing authorship.

Apart for the authorship issue the basic problem with generative AI systems is how they work. These models gain knowledge by spotting and imitating patterns in the data. In order for the AI system to create output like written words or visuals, it must first learn from human work. For instance, if an AI-generated image resembled the work of Japanese artist Yokoyama Taikan, the AI would use the artist's genuine artwork as training data. Similar to this, the AI system would need to be taught using J. K. Rowling's words in order to produce written content in her manner.

However, these AI systems, which include picture and music generators as well as chatbots like ChatGPT, are not recognised as the authors of the work. Instead, their outputs are the conclusion of human-generated work, a large portion of which is protected by copyright in one way or another and was obtained via the internet. This does not imply that AI-generated works must be accessible to a general audience. Another illustration is the possibility that a business using AI to create material may still be the owner of exclusive rights to that content, such as trade secrets or patents.

There may be a number of problems if AI is thought of as the author of the AI-generated content or work. Typically, the inventor or owner of the AI system would claim copyright ownership. Nonetheless, this concept raises a number of legal and ethical questions, as AI may use objectionable or indecent language, advocate for violence based on racial, ethnic, or religious factors, or produce unintended outcomes. The absence of legal recognition of the AI as a legal entity presents a significant barrier to determining its civil and criminal culpability in this context. In the event that the material is eliminated or, in extreme circumstances, AI software is prohibited, it is possible that the adverse effects have already reached an irreversible stage, rendering any potential corrective measures ineffective. It is noteworthy that many nations' copyright laws grant authors moral rights despite the fact that the TRIPs Agreement does not mandate this. Typically, the author is granted two moral rights:

i) the right of paternity; and

ii) the right to integrity.

The former ensures the author's right to be identified as the work's creator, while the latter allows the author to seek damages for any mutilation or distortion that harms his or her honor or reputation.

In the realm of material existence, legal frameworks are designed with the purpose of safeguarding the entitlement to fair and just compensation. However, life extends beyond the realm of material possessions. It also has a temporal nature. A large number of people believe that the soul exists. The moral rights of the artist are part of what makes their works what they are. With their moral rights, the author has the right to protect, support, and promote the things they've made. Moral rights are based on the feelings and emotional situations of the person who made them. These rights are not meant for AI.[1]

When an AI creates something that is "substantially similar" to an existing work that may be protected by copyright, there is concern about who will be held liable for the infringement. Furthermore, if AI is regarded an author, it will be unable to convey ownership of the work because it lacks personhood. Also, it's unclear what should happen if authorship of AI-generated works is equated with that of Human-created works, as AI doesn't perish the way humans do. One could argue, however, that the term should begin on the day of publication and continue for another fifty or sixty years. It's worth noting, though, that the AI never gets tired, lives forever, and can produce an infinite number of masterpieces. In addition, when using the same model and inputs, AI-generated works will consistently provide the same outcomes. This makes it hard to characterize as "unique and creative."

However, AI will have trouble enforcing the author's copyright rights and negotiating royalties with third parties. It will be challenging to make AI the creator of the work because doing so will likely be more problematic than solving the problem.

Apart from the authorship issues, WIPO has also highlighted a new problem, namely the copyright problem in "deep fakes" [2]. When tech companies give anyone the ability to create false images, synthetic audio and video, and text that sounds convincingly human, even experts are

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1. Amar Nath Sehgal v. Union of India 2005 (30) PTC 253 (Del).
2. A Deepfake allows users to manipulate existing videos or images by replacing them with someone else's voice and farcical features. The Deepfake technology uses deep learning, AI, and a Generative Adversarial Network or GAN to create videos or images that are actually fake.

baffled. "Deep fakes" app such as Face Swap Live, Cartoon makers, Avatarify, FaceApp, Fakeme, Reface etc is creation where a person is depicted in a deep imitation without their consent and their actions and opinions are inaccurate.

In addition to copyright infringements, it is important to consider other potential legal concerns, including but not limited to invasion of privacy and defamation. The potentially influential audio-visual representations of renowned actors, musicians, politicians, and other prominent individuals within the public sphere possess the capacity to garner significant popularity and generate substantial economic value. These precisely fabricated works may even persist beyond the demise of their creators and continue to yield significant financial returns for the authors. In this particular scenario, a pertinent question that emerges regarding the justifiability of affording copyright protection to a work that is fundamentally erroneous, especially when it is produced without the authorization of the concerned party. Under copyright law, if the relevant party has granted permission, they possess certain rights in relation to such compositions. Is it possible to develop a system of fair compensation for both the creator of significant forgeries and the individuals depicted in the artwork? With the growing prevalence of artificial intelligence (AI), it is imperative to address these concerns, as they will inevitably pose more complexities in the coming years. Efforts are also being undertaken to address the aforementioned challenges at the World Intellectual Property Organization (WIPO).

In response to the questions that have been posed, it is appropriate to bring up the concept of fair use and dealing. However, fair use/dealing may not apply if the economic value of the copyrighted work used for machine learning has been lowered to its owner due to AI-created work. Hence, depending on the national laws of the various nations, it may qualify as fair use or dealing if it does not reduce the economic value of the original work.

THE LEGAL IMPLICATIONS OF AI-GENERATED WORK: A COMPARATIVE ANALYSIS OF INTERNATIONAL AND NATIONAL LAW

According to Indian copyright work must be of sufficient inputs and authorship of human being. In several ruling, Indian court have reaffirmed this stance and made it clear that AI systems cannot be regarded as authors of copyrighted works.

The Hon'ble Delhi High Court in Camlin Pvt. Ltd. v. National Pencil Industries[3], stated that "copyright is conferred only upon authors or those who are natural person from whom the work

3. AIR 1986 Delhi 444.

has originated and expounded the meaning of the term "author" by affirming that "mechanically reproduced printed carton" was not a subject matter of copyright for the reason that it was not possible to determine who the author of such carton was. In the circumstances the plaintiff cannot claim any copyright in any carton that has been mechanically reproduced by a printing process as the work cannot be said to have originated from the author. A machine cannot be an author of an artistic work, nor can it have a copyright therein"[4].

The Hon'ble Delhi High Court further In *Tech Plus Media Private Ltd v. Jyoti Janda*,[5] held that "the plaintiff is a juristic person and is incapable of being the author of any work in which copyright may exist". The Court further stated that the plaintiff, however, could become the owner of the copyright in the work under a contract with its author.[6]

Even the U.S. Copyright Office has declared that works created by machines or other non-human entities are not subject to copyright protection[7]. Therefore, a generative AI model's output cannot be said to be copyrighted.

The UK Copyright, Designs and Patents Act, 1988 (CDPA) deals with computer-generated work. "Computer-generated" work is defined to mean that "the work is generated by a computer in circumstances such that there is no human author of the work".[8] This clause was added "to create an exception to the requirement of human authorship in order to provide due recognition and protection for the work that goes into creating a program capable of independently generating works."[9]

The author is "taken to be the person by whom the arrangements necessary for the creation of the work are undertaken" in the event of "literary, dramatic, musical, or artistic work which is computer-generated.[10]" According to Andres Guadamuz, authorship in this situation belongs to the coder and not the user. He uses Microsoft, which created the word processing tool "Word" to allow users to generate original works, to illustrate his point. A work created by a user using that program cannot be protected by Microsoft's copyright. The user of the application, who will be

4. *Supra* note at para.54-55.
5. 2014 (60) PTC 121 (Del).
6. *Supra* note at para 20.
7. U.S, Copyright Office, The Compendium of U.S Copyright office Practices 101 (3d ed.2021) Chapter 300: 21 & 22 (revised on Sept.29, 2017).
8. The Copyright, Design and Patents Act, 1988, s.178.
9. Nina Fitzgerald and Eoin Martyn, "AI: Understanding the IP: An In-depth Analysis of Copyright and the Challenges Presented by Artificial Intelligence". Vol 39-3 Communication Law Bulletin 12 (June 2020-Bonus Edition).available at 25.pdf (austlii.edu.au)
10. UK Copyright, Design and Patents Act, 1988, s. 9(3).

acknowledged as the creator because they used that program to generate the work, will own the copyright to that work.

In Express Newspapers plc v. Liverpool Daily Post & Echo,[11] the court considered computer as a tool in the same manner as a pen is regarded as a tool.

In the United States also, the author of a work which is created with the help of AI may have copyright if he/she establishes that the AI program was used as a tool/medium in the creation of the work.[12]

In Naruto v. Slater,[13] popularly known as "Monkey Selfie" case, the court in the United States held that the monkey could not be taken as the author of the selfies it clicked. Copyright in a work can only be conferred on a human author and not on animals and machines in the U.S.[14]

However, in the case of "artificial intelligence algorithms" that possess the potential to generate content autonomously, the situation will be distinct. There appears to be a discernible disparity between the input provided by humans and the output generated by computers employing artificial intelligence (AI) when the computer assumes the role of an autonomous agent and generates works through algorithmic, sequential, or non-deterministic processes. In this scenario, the user's participation in the production of the work may be limited to the act of initiating the machine to generate the intended outcome. In this particular case, it is deemed suitable to designate the individual responsible for coordinating the production of the task as a programmer. Furthermore, one could argue that the programming of artificial intelligence (AI) is designed in a way that enables it to autonomously generate and recognize equations to produce outcomes. Consequently, the responsibility for creativity may ultimately lie with the programmer who developed the AI, given that they possess adequate programming skills.

The concept of "fair use," which is rooted in American law, allows for the unauthorized use of copyrighted material under certain conditions. A fair use determination for an AI-generated work requires looking at factors like intent, context, scale, and result. An important factor in determining fair use is whether or if the use transforms the original work in some way, giving it new meaning or expression.

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11. (1985)FSR 306.
12. Kalin Hristov, "Artificial Intelligence and the Copyright Dilemma", 57 (3) IDEA: The IP Law Review435 (2017).
13. 888 F.3d 418 (9th Cir. 2018).
14. *Supra* note at 449.

Due to the lack of human involvement, the author of an AI machine only has copyright in the "machine's source code" and not in the AI-generated work, and Australia takes a case-by-case approach when deciding who is the true author of an AI-generated work.

The distinction between AI operations that require human oversight and those that can run without it is an important one to consider. As a result, it's not a good idea to credit both the AI and the human author with writing the piece. This does not qualify as "works of joint authorship" under the aforementioned criterion. By way of illustration, the term "work of joint authorship" is defined under the Indian Copyright Act, 1957 as "a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors." Making the AI developer and user co-authors of an AI-created application is also not recommended.

There was no international discussion of "non-human authorship" in the Berne Convention of 1886. This is a valid point of view because the requirements of the Berne Convention are included in the Trade Related Aspects of Intellectual Property Rights Agreement (henceforth "TRIPS Agreement," or "TRIPs"). You could reach a similar conclusion in regards to the WIPO Internet Treaties (the WIPO Performances and Phonograms Treaty and the WIPO Copyright Treaty). However, it might be argued that the international legal regime on copyright did not forbid the notion of a non-human authorship under state laws. The minimum acceptable standards are typically laid down in international treaties. Even while the nations must adhere by the treaties, they can provide more protection if they so want.

A "selection or arrangement of data" is an intellectual work that may be subject to copyright or sui generis protection depending on the country in which it is created. Data protected by copyright law may or may not be included in such collections. Given the growing importance of AI, a data protection legal framework is necessary for determining who is owed credit for what creative works or ideas. Having such a law in place is important for a number of social and economic reasons, including the promotion of new ideas and the maintenance of free and open markets. Overprotecting personal information could have a chilling effect on machine innovation, which is poised to replace human ingenuity in the near future, therefore regulations must strike a fair balance. Unfortunately, there is not yet a data protection statute in place in India. However, in India, "computer programs, tables, compilations, including computer databases," are all considered "literary works" and so protected by the Copyright Act.

SUGGESTION

It is evident from the above that AI-generated works are neither specifically covered by the current Copyright Act of 1957 in India, nor is AI acknowledged as an author. To meet the particular difficulties presented by AI technology, copyright law changes may be taken into consideration. Several actions can be made to address the legal ramifications of AI-generated creative works in India the few are discussed below

1. Recent changes to intellectual property laws: The rules governing intellectual property should be updated to reflect AI technology breakthroughs. This entails being aware of and responding to the particular issues that AI-generated material, copyright ownership, and fair use in the digital age present.
2. Set Data Usage and Governance Policies into Practice: AI initiatives should abide by clearly stated data usage and governance policies. To ensure the responsible and ethical usage of copyrighted material during AI training, these regulations should incorporate oversight and compliance methods.
3. Different Standards for AI-Generated Works: Even if AI is not given legal status, its work may nevertheless be recognized using a different standard than traditional copyrights. Without significantly compromising the current laws and ideals, this might fill the gaps
4. Mandatory appointment of compliance officers: AI companies should be required to employ compliance officers in charge of copyright defence, auditing, and evaluation. These officers would make sure AI-generated content complies with copyright regulations and look out for any potential violations.

CONCLUSION

The use of AI will become increasingly prevalent in many facets of daily life. Its uses must be governed by the law. AI will continue to play a crucial role when it comes to intellectual property rights, particularly copyright. It is evident form the above discussed that the Indian legal framework is not suitable for discussing the formation and rights of AI. Unless artificial intelligence (AI) is regarded as a legal creature to this effect, the inclusion of rights for AI is immaterial and not in dispute. The Copyright Act of 1957 primarily characterizes the author as a natural person. Therefore, the alternative strategy is to change the Copyright Act to recognize AI as an author or to add AI-related works to a different category. The acknowledgment of AI as a

separate legal body or the modification of Indian law, however, do not appear to be viable options anytime soon.

The issues pertaining to authorship and ownership of AI-generated works within the framework of copyright law have prompted the global community to contemplate potential courses of action and devise a viable resolution that accommodates all states. There isn't a rule that can solve this problem perfectly, and each rule has its own shortcomings. Offering non-human authorship to AI-generated works will have enormous consequences. It is also not a smart idea to make AI-generated works available to the general public because doing so will deter AI programmers and the businesses that control such AI from making additional investments in the field. To solve these problems, the WIPO is making a lot of effort. Possible solutions to this problem include adopting a sui generis system or making advantage of provisions in national copyright laws that were drafted with AI and AI-generated works in mind. In any event, less protection should be given to works created by AI, and human ingenuity should be valued above that of machines. Therefore, the best course of action is to take a balanced approach.

NAVIGATING THE ATTENTION MARKET: A COMPETITION LAW PERSPECTIVE

Dr. Mohammad Atif Khan*

INTRODUCTION

Everyone wants attention, whether it is your family, friends, students, or your colleagues. It is not limited to our surroundings but the largest brands in the world have one thing in common, i.e. their attention-seeking attitude.[1] Whether it is a social media, billboard on highways, online advertising, television commercial, radio spots, or hyperventilating news anchors during prime-time debates, they all are targeting for 'attention'.

Google, Facebook, WhatsApp, Twitter, TikTok, Netflix, and a myriad of other online platforms have become integral components of our daily lives. We willingly allocate a substantial portion of our attention to these platforms as we engage with an ever-expanding array of digital products and services. According to one estimate, in the United States, an average adult spends 7.1 trillion US Dollars' worth of their time on advertisement-based media in a single year.[2] A similar trend can also be seen in other parts of the world including India, being the fastest-growing ad market in the world, with an estimated growth of 14% in 2019.[3]

'Attention', being a finite resource, is considered one of the most important among all types of assets.[4] The global economy has witnessed a transformative shift in recent years, where the tradeable of human attention has taken center stage. This phenomenon is often described as the 'attention market'.

Covid-19 has also exposed us, voluntarily or forcefully, to the digital world where firms are ready to exploit our scarce attention. Numerous competition law concerns have arisen in the context of attention within the market economy, where the dynamics of supply and demand are at play. Competition authorities must maintain a vigilant stance in detecting anti-competitive activities and implementing appropriate regulatory measures. However, it is worth noting that

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1. Tony Pec, "Attention Is an Asset." Forbes, May 13, 2020, https://www.forbes.com/sites/forbesagencycouncil/2020/05/13/attention-is-an-asset/?sh=172db7913646. (visited on June 15, 2023).
2. David S. Evans, "The Economics of Attention Markets," February 12, 2019, *available* at: https:papers.ssrn.com/sol3/papers.cfm?abstract_id=3044858 (visited on July 18, 2023).
3. "Economic Times" (February 12, 2019), *available* at: https://economictimes.indiatimes.com/industry/services/advertisin (last visited on February 18, 2023).
4. Emilia Kirk, Forbes Business Development Council, Mar 23, 2022, *available* at: https://www.forbes.com/sites/forbesbusinessdevelopmentcouncil/2022/03/23/the-attention-economy-standing-out-among-the-noise/?sh=68615c187fda.

the attention market has, to a significant extent, remained outside the purview of competition authorities.[5] Therefore, the paper embarks upon a comprehensive exploration of the prevailing conditions within the 'attention market' from the perspective of competition law.

NATURE OF ATTENTION AND ITS ROLE IN DECISION MAKING

What is attention?

Attention, as defined in the APA Dictionary of Psychology for humans, can be understood as a mental state where our cognitive resources are directed towards specific aspects of our surroundings, while other elements are deliberately excluded from our focus.[6]

Human attention is the unique ability, one uses, to process specific information while excluding irrelevant details. Since, in the present age of information where humans are surrounded with tons of information every single second. Therefore, it is nearly impossible to have undivided attention to any single point. Psychologists have recognized attention as a process of *"selectively concentrating on a discrete aspect of information while ignoring other perceivable information"*[7].

Humans have their limitations in all aspects of life and the capacity to focus on something is not an exception. There is a presumption of finite human attention which requires the effective allocation of it to maximize pleasure in a particular field.[8] In technical terms, attention can also be considered as an asset called cognitive processing resource which is limited and therefore, should be allocated wisely.[9]

Human Attention as an Asset

Gone are those days when time was considered the most valuable thing. In today's complex and demanding workplace, the most valuable asset is no longer people's time but their attention. Attention is defined as what we each choose to focus on and what we decide to ignore.[10] The 21st century is considered as the information age where our attention is the new attraction. The new focal point of interest is not in microchips, windmills, or solar panels, but rather in humanity's

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5. Rebecca Tushnet, "Attention Must Be Paid: Commercial Speech, User-Generated Ads, and the Challenge of Regulation", 58 Buffalo Law Review 721 (2010).
6. *available* at: https://dictionary.apa.org/attention (visited on July 18, 2023).
7. See, Chapter 3 Attention, The Nature and Roles of Attention, University of Victoria, British Columbia, available at: https://web.uvic.ca/~dbub/Cognition_Action/Cog_Psych_Readings_files/Attention.pdf (visited on April 25, 2023).
8. *Supra* note 6.
9. J.R. Anderson & J. Crawford, "Cognitive psychology and its implications", San Francisco: freeman, 519 (1980).
10. *available* at: https://www.impactinternational.com/blog/2018/03/attention-our-most-valuable-asset (last visited on Aug. 18, 2023).

attention itself. This attention is not merely a cognitive resource but has now become a valuable capital asset.[11]

Studies by Lanier[12] (2013) and Wu[13] (2016) emphasize that human attention has become a commodity in high demand, transforming the way businesses operate. The relevant question here may be asked is why Companies like Facebook and Twitter are so much interested in human attention. Generally, the answer is hidden in those platforms' attention-seeking power, which in turn attracts advertisers who pay to show content that keeps users engaged.

Scarcity of Human Attention

Indeed, we find ourselves immersed in the information age, a time when human attention has become an increasingly precious and limited resource. The prescient words of Herbert Simon (1916–2001), a renowned economist and Nobel laureate in 1978, carry significant weight in today's digital era. Back in 1971, he made a keen prediction, stating that "in the information age of the future, human attention would emerge as the paramount asset and the most invaluable resource"[14]. If any resource is limited, it has to be utilized most efficiently.

Human attention is scarce basically for two reasons. First, sometimes we deal with a too heavy cognitive load and secondly, it is also a known fact that our cognitive capacity is depleted over time with its continuous use. The basic economics of supply and demand demonstrates the value of being scares. If something is limited, it is evaluated as precious and today human attention is the most precious asset. As the total supply of attention remains fixed, the value of each unit of attention grows.[15] In the contemporary landscape, where human attention is captured with different tactics, too much information may lead to bad decisions.

EFFECT OF COGNITIVE OVERLOAD ON OUR DECISION-MAKING

As machinery gets overheated with its over-utilization, human cognitive capacity also gets depleted which leads to poorer analysis, reasoning, performance, and finally more impatient choices.[16] It has been demonstrated, that like other human capacities, humans have limited capacity to process the huge available information while making important economic decisions.

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11. Vincent F. Hendricks, "The-nuts-and-bolts-of-attention-economy" *available* at: https://www.oecd-forum.org/posts/the-nuts-and-bolts-of-attention-economy (visited on Aug. 5, 2023).
12. See, Simon and Schuster (eds.), Who Owns the Future? (New York, 2013).
13. Tim Wu, "The Attention Merchants: The Epic Scramble to Get Inside Our Heads" in (New York: Knopf, 2016).
14. *Id.*
15. J.M. Newman, "Antitrust in Attention Markets: Objections and Responses", 59 Santa Clara Law Review 743 (2020).
16. Sheryl Ball et. al., "The effect of cognitive load on economic decision-making: a replication attempt", 210 Journal of Economic Behavior and Organization 226-242 (2023), *available* at https://doi.org/10.1016/j.jebo.2023.03.018 (last visited on Aug. 22, 2023).

These constraints may bind an individual and the decision would be affected adversely.[17]

Since human attention is limited, it has to be utilized carefully to avoid any sort of cognitive overload. Cognitive overload has its natural consequence leading to wrong purchasing/dealing decisions. Psychologists refer to our mind as an engine that can either overheat or run out of fuel, under such cognitive load.[18]

While working on 'Limits on Our Capacity for Processing Information', a Psychologist Miller has gone deeper and mentioned that the typical human can manage, analyze, and retain approximately five to nine pieces of information concurrently, commonly referred to as the "seven plus or minus two" rule.[19] It has mathematically identified that humans can only manage to remember about seven (plus–minus ± 2), *"items in their short-term memory at once, after which performance can be greatly depleted"*.[20] There is also a depletion of cognitive capacity due to overuse known as the 'cost of thinking'.[21]

It is also important to understand the effect of cognitive overload on our decision-making. This overload is responsible for our degraded decision-making and represents a shift from analytical cognition to predominantly associative thinking. Consequently, it diminishes the exertion of effort required to meticulously gather information for making optimal assessments. we make faster decisions in place of slower ones.[22] Therefore, it increases the risk of misleading decisions not based on relevant data and requisite research. Also, the psychological experiment shows that complex decisions require examining and measuring a gamut of information, which causes depletion of cognitive capacity more quickly as compared to the era of a *"low-information environment"*.[23]

DOES HUMAN ATTENTION TRADABLE?

Until recently, our attention was not considered as a commodity that can be bought and sold. Each day, substantial quantities of human attention are traded worldwide under various market

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17. *Id.*
18. Paul Chandler & John Sweller, "Cognitive Load Theory and the Format of Instruction", 8 Cognition & Instruction 293 (1991).
19. George A. Miller, "The Magical Number Seven, Plus or Minus Two: Some Limits on Our Capacity for Processing Information", 63 Psychological Review81 (1956).
20. C. Deck and S. Jahedi, "The Effect of Cognitive Load on Economic Decision Making: A Survey and New Experiments", 78 European Economic Review 119 (2015).
21. Jonathan Levav et al., "Order in Product Customization Decisions: Evidence from Field Experiments", 118 Journal of Political Economy 276 (2011).
22. Diana J. Burgess et al., "The Effect of Cognitive Load and Patient Race on Physicians' Decisions to Prescribe Opioids for Chronic Low Back Pain: A Randomized Trial", 15 Pain Medicine 966 (2014).
23. Roy F. Baumeister et al., "Ego Depletion: Is the Active Self a Limited Resource?", 74 Journal of Personality and Social Psychology 1252 (1998).

settings.[24] In the contemporary digital landscape, characterized by the proliferation of online platforms such as Google, Facebook, WhatsApp, Twitter, TikTok, Netflix, and others, a noteworthy paradigm shift has transpired wherein attention has undergone a transformation into a commodifiable entity. This metamorphosis underscores the emergent reality wherein the attentiveness of individuals, once considered an intangible attribute, has acquired tangible value within the realm of commercial exchange. These platforms prompt us to give up a huge amount of 'attention' each day while accessing the ever-growing variety of digital products and services. Based on one estimate, adults in the United States allocated an estimated $7.1 trillion worth of their time to advertising-supported media within a single year.[25] The same trend can also be seen in India, being the fastest-growing ad market in the world, with growth estimated growth of 14% in 2019.[26] Since attention has come out as the most valuable asset, companies have started targeting our attention through various channels (online and offline). This trend has made human attention tradable.

Attention Rivalry and Advertisements

Competing aggressively to capture our attention has led to attention rivalry. At the core of this rivalry, advertising plays a very important role. The advertisement experts explain that there are two types of advertisements i.e. unsolicited and solicited.

Where the advertisements are transmitted without the invitation of the person, it is known as an unsolicited advertisement. Telemarketing calls, junk faxes, and spam emails are a few common types of unsolicited advertisements. In these transactions, companies indulge in attention extraction but not attention exchange. Therefore, it is not reasonable to automatically assume economic benefits from this type of business activity, which keeps it outside the purview of antitrust intervention.

On the other hand, the solicited advertisements are under the purview of the competition agencies because in these transactions there is an express or implied consent involved of the targeted audience and actual attention exchange takes place, unlike unsolicited advertisements.

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24. Janna Anderson & Lee Rainie, "The Future of Well-Being in a Tech-Saturated World", Pew Research Center (Apr. 17, 2018).
25. *Supra* note 2.
25. *Supra* note 3.
26. *Id.*

Attention Market and Competition

In today's world, attention is an asset that can be transferred or traded to various companies in exchange for (so-called) free services.[27] But the reality remains uncontested that nothing is free in the present commercialized world. For example, if we use Google as a free search engine for collecting information, so google also acquires our huge attention which is further traded to its advertisers. Scholars in this field mention that nothing comes for free. We exchange our 'attention' in exchange for information. According to Evans, *"In the attention market, consumers supply time in return for content that entertains or informs them. Attention platforms assemble bundles of content to acquire that time and sell advertisers access to those consumers"*[28] .

The attention market is a place where various types of content are being traded in exchange for time spent on the platform. In this setup, the size of the platform and the number of users are very crucial and decided by the time spent on the platform.[29] Among other factors, the most important one is the time spent on ad-supported content. Evans, while discussing the economics of attention markets, has presented the surprising estimation that the average time spent on ad-supported platforms is about 8 hours daily, which is frightening. Many times, these ad-based platforms manipulate the market information, resulting in anti-competitive agreements, or abuse of dominance by market leaders. Therefore, we should understand the worth of these platforms and the possible violations of anti-trust/competition regulations while conveying trade-related messages in the present economy.

TWO-SIDED PLATFORMS: A PUZZLE

The Place of Trading Human Attention

A market is a place where things are bought and sold in its traditional sense.[30] The French economist, A. Cournot (1801-1877)[31] , had given the earlier definition of the market as: *"...not any particular marketplace in which things are bought and sold, but the whole of any region in which buyers and sellers are in such free intercourse...."*. This definition was based on Alfred

27. Actually, nothing comes for free. Companies offer their products and services in exchange of our attention.
28. *Supra* note 2.
29. *Id.*
30. Joan Violet Robinson, "Market", Encyclopaedia Britannica, (Apr. 15, 2023), *available* at: https://www.britannica.com/topic/market (visited on July 20, 2023).
31. Antoine Augustin Cournot was a French philosopher and mathematician who also contributed to the development of economics.

Marshall's Principles of Economics (first published in 1890) and remained a guiding force for long for English economists. This gap is filled by contemporary scholars who have developed a newer concept of the market in the digital world.

Taking the analogy of the traditional market, economists generally, have labelled the attention market as a two-sided market. The expression two-sided market is comparatively a novel concept, and it was first time used in 2003 by Rochet and Tirole.[32] The concept of a two-sided market explains a situation in which a particular firm caters to the needs of two interdependent groups of customers simultaneously. Both physical and digital marketplaces are examples of a common place, where buyers and sellers trade human attention frequently. A few examples are worth mentioning such as stock exchanges, malls, media outlets, and online platforms, where buyers and sellers regularly engage in the exchange of attention.[33]

A two-sided market comprises of a buy-side market and a sell-side market. Evans has explained the buy-side market where platforms like Google, Facebook, Instagram, etc. acquire consumers' time, and the sell-side market where these platforms sell those chunks of time to marketers.[34] Newman uses a different term as the attention intermediary in the place of attention market.[35] It is a puzzle that will be discussed in the subsequent part of the paper. Attention markets can also be described as zero-price markets where we do not pay in monetary form, rather, we pay our attention.[36] The phrase, 'pay your attention', had started the misconception of describing attention as a price/consideration paid for a particular product or service. In zero-price markets, consumers, instead of making monetary payments, pay for something more important and precious, that is their attention.

Mechanism of Attention Platforms

There are various types of markets, including, one of the most famous in present time-platforms. Platforms are the modern-day marketplace, where two distinct groups of the market, buyer and seller interact. This is the novel marketplace, *"where one group's benefit from joining*

32. Rochet, Jean-Charles, et.al. (eds.),"Platform Competition in Two-Sided Markets" Journal of the European Economic Association 1, no. 4 (2003), pp. 990-1029, available athttp://www.jstor.org/stable/40005175 (visited on July 20, 2023).
33. *available* at: https://www.concurrences.com/en/dictionary/two-sided-market(last visited on June 13, 2023).
34. *Supra* note 2.
35. J.M. Newman, "Antitrust in Attention Markets: Definition, Power, Harm", University of Miami Legal Studies, Research Paper (3745839), 17 (Dec. 9, 2020), *available* at: https://ssrn.com/sol3/papers.cfm?abstract_id=3745839 (visited on Aug. 29, 2023).
36. J.M. Newman, "Antitrust in Zero-Price Markets: Applications", 94 Washington University Law Review49 (2016).
37. M. Armstrong, "Competition in two-sided markets", 37 (3) The RAND journal of economics 668 (2006).

a platform depends on the size of the other group that joins the platform"[37].

Antitrust scholarship, on two-sided platforms, has helped to identify many of these issues and has made progress toward adapting antitrust principles and methodologies to deal with two-sidedness.[38] Evans (2003a) has described two-sided platforms as *"a market setup where two distinct customer groups interact for their mutual benefit"*. However, this intermediation is not efficiently possible without the effective intermediation services between these (atleast) two groups.[39]

The most fundamental element of these platforms is the existence of two distinct groups of customers and their reliance on each other. These two distinct groups, who need each other in some way, are connected with a common link, named the platform, which is used to intermediate transactions between them.[40] The same platform mechanism has been adopted in many markets like credit cards [41], television channels[42], and shopping malls .[43]

Two-Sided Market

With the advent of technology, many new concepts emerged regarding the market and its operation. The two-sided market is such a new concept atleast for developing countries like India. Although these concepts are very relevant in the present time, it is equally true, that there is *"no universally adopted definition of two-sided platforms"*.[44]

In modern economics, the notion of a "two-sided market" pertains to situations where the demand for a product or service is influenced by multiple distinct user groups or customer segments.[45] This is the point when one can see the value of the 'network effect'. It exemplifies a scenario where the worth of a product, service, or platform is contingent on the quantity of

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38. David S. Evans, "The Antitrust Economics of Multi-Sided Platform Markets", 20 Yale Journal on Regulation 325 (2003).
39. *Id.*
40. OECD, "Competition in digital advertising markets", 25 (2020), *available* at: http://www.oecd.org/daf/competition/competition-in-digital-advertising-markets-2020.pdf (last visited on Mar. 13, 2023).
41. "Considering a set of charges, consumers tend to prefer credit cards accepted at numerous retailers, while retailers lean toward accepting cards held by a larger consumer base".
42. "In the realm of television, viewers typically favour channels with fewer commercials, whereas advertisers are willing to invest more to feature their commercials on channels with a larger viewership".
43. "When it comes to malls, consumers tend to favour those offering a diverse array of retailers, while retailers are more inclined to invest in malls frequented by a higher volume of passing consumers".
44. E. Hovenkamp, "Antitrust Policy for Two-Sided Markets", 2018. available at SSRN 3121481(last visited on June 6, 2023).
45. J.G. Sidak and R.D. Willig, "Two-sided market definition and competitive effects for credit cards after United States v. American Express", Criterion Journal on Innovation, 1301 (2016).
46. Tim Stobierski, "What Are Network Effects?", Harvard Business School, Nov. 12 (2020), *available*

buyers, sellers, or users engaging with it.[46] In essence, the more extensive the participation of buyers, sellers, or users, the stronger the network effect, leading to heightened value derived from the offering.[47] In this transaction, one group of participants cares about the involvement of another group which is popularly known as so-called 'indirect network effects' or 'cross-group externalities'[48].

ATTENTION MARKET UNDER COMPETITION LAW

Attention As a Form of Currency

The most famous British economist Adam Smith has given enormous guidance related to the market. According to his observation, *"The division of labor or the allocation of resources depends upon the extent of the market"*.[49] Nobody can deny the importance of the allocation of resources in the market economy. Although attention is a very important factor in the modern marketplace, it remains hideously unexamined and poorly understood in society.[50]

Webster emphasized the value of attention and mentioned and declared that apart from money and time there is also a novel form of currency that is 'attention'[51]. Generally, we use the phrase 'please pay your attention' which indicates that attention is something that can be paid in exchange. The term "attention" in the phrase "to pay attention" implies its tradeable nature, akin to currency. It signifies the exchangeable value associated with focusing one's awareness. Before attempting to capture someone's attention, a crucial prerequisite is a profound understanding of the human mind. A guiding principle is that the brain doesn't seek pleasure per se; rather, the anticipation of pleasure serves as a more influential catalyst, elevating dopamine levels and thus facilitating attention capture.[52]

Marxian Theory of Value

A craft must not be valued based on the cost incurred in making that, but Karl Marx valued it concerning the time spent making it. Marx's 'labor theory of value' posits that the worth of a

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at:https://online.hbs.edu/blog/post/what-are-network-effects (visited on Aug. 25, 2023).

47. *Id.*
48. *Supra* note 30.
49. R. Chandra, "Adam Smith, Allyn Young, and the division of labor", 38(3) Journal of Economic Issues 787 (2004).
50. Tom Chatfield, "What Is the Real Cost of Your Online Attention?", AEON (Oct. 7, 2013), *available* at:http://aeon.co/magazine/world-views/does-each-click-of-attention-cost-a-bit-of-ourselves/ (visited on Feb. 13, 2023).
51. James G. Webster, "User Information Regimes: How Social Media Shape Patterns of Consumption", 104 Northwestern University Law Review 594 (2010).
52. *available* at: https://www.financialexpress.com/brandwagon/bloggers-park-navigating-the-attention economy/2584322/ (last visited on Sept. 15, 2023).
53. L. Tran Jasper, "The Right to Attention", 3 Indiana Law Journal 1034 (2016).

"thing" is contingent on the human time and effort invested in its production.[53] The important question here is how someone ascertains the value of attention. Today business is rated based on attention attracted. And therefore, here the actual competition starts. The relevant literature shows (Tushnet) [54], that how our attention is grabbed through one channel and sold to another.

Given that human attention is finite and relatively unresponsive to change, it is now regarded as an exceedingly valuable asset.[55] In contemporary society, the marketing and advertising industry hinges on capturing, retaining, and redistributing viewers' attention, shaping its overall effectiveness.[56] The attention market is a substantial part of the economy. According to one estimate, in 2019, the average American adult spent an estimated 514 billion hours primarily interacting with content featuring ads, surpassing the 325 billion hours dedicated to work.[57] We have witnessed the same trend in India in the same year.[58]

Concept of Price Concerning Attention

If some resources are scarce like time, one has to be mindful about the spending of those resources. Scholars have been debating the shrinking attention spans in the current information age.[59] Recent research in the attention market reveals that we can flexibly allocate attention, treating it as interchangeable with both time and money, indicating a nuanced understanding of its value.[60]

Manson's (2014) anticipation foresaw a future where our attention would become a tradable commodity.[61] It means they were talking about the monetization of attention. Many other scholars even placed human attention above time and money. While highlighting the importance of human attention, Batista mentioned that a leader's most valuable asset is not their time but their concentrated attention.[62] He further says that time simply passes while focused attention makes things happen.[63] Why attention has been given too much importance? This is the most

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54. *Supra* note 5.
55. *Supra* note 50.
56. *Id.*
57. *Supra* note 2.
58. *Supra* note 3.
59. Richard A. Lanham, "The Economics of Attention", *available* at: https://press.uchicago.edu/ucp/books/book/chicago/E/bo3680280.html (visited on July 28, 2023).
60. N.J. Ashby and T. Rakow, "When time is (not) money: Preliminary guidance on the interchangeability of time and money in laboratory-based risk research", 21(8) Journal of Risk Research 1036 (2018).
61. Mark Manson, "In the Future, Our Attention Will Be Sold", (Dec. 4, 2014), *available* at: http://markmanson.net/attention [https://perma.cc/6THB-CRSE (visited on Aug. 3, 2023).
62. Ed Batista, "To Stay Focused, Manage Your Emotions", Harvard Business Review (Feb. 2, 2015), *available* at: https://hbr.org/2015/02/to-stay-focused-manage-your-emotions (visited on Sep. 12, 2023).
63. *Id.*

important question to be discussed while making a study of attention vis a vis time and currency. From the perspective of business, grabbing attention from one place/platform and selling it at another is one of the relevant phenomena from a competition law/antitrust perspective. There are various strategies (including anti-competitive agreements, and others… i.e. misleading advertisements) adopted by companies to grab our attention and advertisement is one of them.[64] This is also one of the reasons why *"[g]rabbing and keeping the customer's attention"* is considered the foundation of the entire marketing industry.[65]

Grabbing Attention from One Place and Selling at Other Disturbs the Market Forces Supply and Demand

Today, we are surrounded by technology as a part of our daily routine. From having lunch to flying from one place to another, we depend on technology. It all happens swiftly with the intervention of various platforms like Google, Facebook, WhatsApp, Twitter, TikTok, and Netflix, in many cases for free or for nominal charges or through a subscription model.[66] On those many platforms, we are not paying a price (in a monetary sense) but our attention which is sold to advertisers. As per Evans, adults in the United States invested a staggering $7.1 trillion worth of their time in a single year on media supported by advertising.[67] The same trend can be seen in India which has remained the fastest-growing ad market in the world with an estimated growth of 14% in 2019.[68]

Even a book becomes a bestseller based on attention dragged towards it. Statistically, the exposure to advertisements has surged from approximately 500 ads a day in the 1970s to potentially as high as 5,000 a day in 2006, with the trend continuing upward.[69] According to Simpson's estimate suggests that the average American encounters anywhere from 4,000 to 10,000 advertisements daily.[70] According to another estimate, the number may reach upto 6,000 to 10,000 ads each day.[71] There is a market that exists today, especially, targeting our attention which may have the capacity to shift the market equilibrium. As an author, I am also trying to grab readers' maximum attention by presenting updated available data.

64. Carol Mcclelland, Green Careers for Dummies,184 (2010).
65. *Supra* note 50.
66. Actually, in the exchange of our attention.
67. *Supra* note 2.
68. *Supra* note 3.
69. Caitlin Johnson, "Cutting Through Advertising Clutter", CBS News (Sept. 17, 2006), *available* at: http://www.cbsnews.com/stories/2006/09/17/sunday/main2015684.shtml (visited on March 23, 2023).
70. Jon Simpson, Forbes Councils Member Digital marketing experts, Aug 25, 2017, available at : https://www.forbes.com/sites/forbesagencycouncil/2017/08/25/finding-brand-success-in-the-digital-world/?sh=4a53aafc626e (visited on July 15, 2023).
71. *available* at: https://lunio.ai/blog/strategy/how-many-ads-do-we-see-a-day/ (visited on Sept. 24, 2023).

Price As a Central Attraction

Most of the concepts of competition law revolve around the concept of price. For example, anti-competitive agreements under section 1 of the Sherman Act, 1890, Article 101 of TFEU, or section 3 of the Indian Competition Act, 2002. A similar approach has been adopted in the cases of abuse of dominant position and anti-competition combinations/mergers under various jurisdictions.[72] If we try to trace the price factor in the attention market, so it would be very clear that it is absent in many of the attention market setups. Also, there is a question that how to define the attention market.

The basic concept of economics is based on supply and demand. Economists employ the principles of supply and demand to elucidate the price-setting dynamics within competitive markets. In the study by Joseph & Carl, they used the fundamental principle of price, which corresponds the supply and demand.[73] Pricing of our attention is one tricky phenomenon where the supply and demand of attention are to be taken into consideration.

Identification Of Relevant Market: SSNIP Test

Under the competition law across jurisdictions, the SSNIP test applies to identifying the relevant market, to rule out the nature of any act alleged as anti-competitive. It is the most popular test which has been identified by competition law scholars, based on price. SSNIP test is named a *"Small but Significant Non-Transitory Increase in Price"*. This test is also known as 5-10% test. This is also known as the hypothetical monopolist test where a hypothetical monopolist firm can be assumed to control 100% of the market share without any substitutes even when it increases the price of its product by 5-10%. The SSNIP test, reliant on price changes, faces limitations. It's unsuitable in cases without pricing or zero-price transactions, where individuals trade their attention for access to desired goods or services through intermediaries.[74]

EFFECTIVE COMPETITION LAW MEASURES

For the General Market of Products and Services

Effective competition law measures in the attention market are crucial for maintaining fair and open competition, protecting consumer choice, and preventing anticompetitive practices. Since attention market operation is like a traditional market, where commodities are bought and sold,

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72. See, Section 2 of the Sherman Act, 1890, Section 7 of the Clayton Act, 1915, Article 102 of Treaty on the Functioning of the European Union (TFEU) and the European Union Merger Regulation (EUMR), Section 4 & 5 of the Indian Competition Act, 2002.
73. Joseph E. Stiglitz & Carl E., Walsh, Principles of Microeconomics, 69–71 (4th ed. 2006.
74. *Supra* note 71.

henceforth, open for most of the anticompetitive activities and their negative impact on the economy. Attention exchange markets resemble currency markets and are vulnerable to monopolization and abuse of market power, necessitating the application of competition law provisions.[75] Since the competition law covers all trade or commerce, the attention market, which is a newly emerged area, should also be scrutinized and (if required) regulated by the provisions of competition law.

The Sherman Act, of 1890 and Clayton Act of 1914 are fundamental competition laws governing antitrust in the United States. Section 1 of the Sherman Act declares the anticompetitive agreements of 'every form' and conspiracy which is in restraint of trade, illegal.[76] This provision also covers the conspiracy in the attention market where players plan to grab more attention through deceptive practices. Similarly, the European Union also prohibits such agreements under Article101 of the Treaty on the Functioning of the European Union ('TFEU').[77] Section 2[78] of the Sherman Act prohibits monopolization or attempts to monopolize any part of interstate commerce which prevents the possibility of abuse of dominant position also mentioned under the TFEU. Article 102 of the TFEU prohibits abusive conduct by companies that have a dominant position in a particular market.[79]

India's competition regime is governed by the Competition Act, 2002 along with various regulations and guidelines issued by the Competition Commission of India (CCI). The Act aims to promote fair competition, prevent anti-competitive practices, and protect consumers.[80] India has also followed a similar path of protecting competition but not competitors. Indian Competition Act also prohibits agreements, including cartels, that have an appreciable adverse

75. *Supra* note 50.
76. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."
77. "Any agreements between undertakings, decisions by associations of undertakings, and concerted practices which may affect trade between Member States, and which have as their object or effect the prevention, restriction, or distortion of competition within the internal market shall be prohibited."
78. "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a [felony]."
79. "Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States."
80. Preamble the Competition Act, 2002, "An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto."

effect on competition (section 3).[81] The act also prohibits enterprises from abusing their dominant position (section 4).[82] The Act also mandates the notification and approval of mergers and acquisitions that exceed specified thresholds in terms of assets and turnover (sections 5 and 6).[83] This notification triggers a review process to assess potential adverse effects on competition.

For Attention Market

In the attention market, content-sharing agreements, data-sharing agreements, or collusion among digital platforms that harm competition can be subject to scrutiny under section 3 of the Competition Act, 2002. For example, if platforms collude to limit the availability of certain content to the detriment of consumers or competitors, it may be considered an anti-competitive agreement. Data-sharing agreements among digital platforms, especially if they result in the unfair accumulation of user data or the exclusion of competitors from accessing critical data, can be examined under Section 3. Such agreements might stifle competition and harm consumers' ability to access a diverse range of services and choices. There are other ways too, for example, Collusion or coordination among digital platforms that harm competition at great extent. Price-fixing, bid rigging, or market allocation, is a clear violation of Section 3. Such practices can lead to increased prices, reduced innovation, and limited consumer choice.

In the context of the attention market, dominant players, such as social media platforms or tech giants, could potentially abuse their dominance by engaging in practices that harm competition. This could include preferential treatment of their content, stifling competition from smaller players, or exploiting user data in ways that negatively impact consumers which is a violation of section 4 of the Competition Act 2002. Regulating the abuse of dominance in the attention market, where digital platforms and tech giants often hold significant market power, is crucial to ensure fair competition and protect consumers. For this Conduct a thorough market analysis to define the relevant market in the attention market sector. This includes identifying the product or

81. "Section 3 (1) of the Competition Act, 2002: No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.
(2) Any agreement entered into in contravention of the provisions contained in subsection (1) shall be void."
82. "Section 4 (1) of the Competition Act, 2002: No enterprise or group shall abuse its dominant position."
83. "Section 5 of the Competition Act, 2002: The acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall be a combination of such enterprises and persons or enterprises, if… more than six billion US dollars, including at least rupees Fifteen Hundred Crores in India… and Section 6 of the Competition Act, 2002: (1) No person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void.".

service market and geographic market.

Set stringent merger notification thresholds that account for the unique dynamics of the attention market. Conduct thorough reviews of proposed mergers, considering their potential impact on competition, innovation, and consumer choice. If anticompetitive concerns arise, require merging parties to implement remedies, such as divestitures of certain assets or businesses, to mitigate the adverse effects on competition. It can be advised to enforce these remedies effectively to maintain a competitive landscape. Conduct periodic market assessments to identify emerging anticompetitive trends and evolving dominance in the attention market. Regularly update merger guidelines to address new challenges and ensure that regulatory frameworks remain effective in preserving competition.

Relevant Case Studies

The proliferation of digital platforms has fundamentally altered the dynamics of the attention market. Competition authorities worldwide have increasingly recognized the need to apply competition law measures to regulate this evolving landscape. In this section paper would try to unfold real-world examples citing relevant cases. Since this domain is emerging, the paper discusses three most interesting cases like Facebook's Acquisition of Instagram, Google's Dominance in Online Search case and Apple's App Store Policies case.

Facebook's Acquisition of Instagram[84]

Facebook's acquisition of Instagram raised competition concerns regarding its potential to eliminate or diminish competition in the social media and attention markets. The Federal Trade Commission's investigation into the acquisition highlighted the need to assess the competitive effects of mergers and acquisitions in the attention market. This case underscores the importance of competition law measures, such as merger control and antitrust scrutiny, in preserving competition and innovation in the attention market.

Google's Dominance in Online Search case[85]

Google's dominance in the online search market has raised concerns among competition authorities regarding its impact on the attention market. The European Commission's investigation into Google's search practices highlighted anticompetitive behaviour, such as

84. See,Federal Trade Commission (2012). In the Matter of Facebook, Inc. (File No. 1110061). *available* at https://www.ftc.gov/enforcement/cases-proceedings/121-0120/facebook-inc
85. See, European Commission (2017), Google Search (Case No. COMP/AT.40411). *available* athttps://ec.europa.eu/competition/antitrust/cases/dec_docs/40411/40411_1779_3.pdf

favouring its own services over competitors in search results. This case demonstrates the application of competition law measures, including antitrust investigations and enforcement actions, to address concerns related to market dominance and unfair competition practices in the attention market.

Apple's App Store Policies Issue

Apple's App Store policies, including its revenue-sharing arrangements and app store exclusivity requirements, have been subject to scrutiny by competition authorities. The ongoing investigations by regulatory authorities in various jurisdictions highlight concerns regarding Apple's control over app distribution and its impact on competition in the attention market. This case underscores the application of competition law measures, such as investigations into unilateral conduct and potentially anticompetitive agreements, to address concerns related to platform dominance and ecosystem lock-in.[86]

CONCLUSION

In the contemporary digital milieu, the attention market assumes a pivotal yet insufficiently explored role. While scholarly discourse has predominantly revolved around the data-driven economy, the commensurate significance of attention remains overshadowed. Nevertheless, the pre-eminence of personal information to commercial enterprises poses a formidable threat to fair competition and equitable avenues for success. In order to uphold a level playing field, regulatory authorities must diligently scrutinize any instances of anti-competitive conduct (majorly highlighted in the paper) within the attention market. This domain has emerged as a pivotal battleground in the era of digitization, wielding profound implications for both competitive dynamics and consumer welfare. Drawing upon insights derived from psychological and behavioural economics, regulatory bodies are urged to realign their focus towards the attention market to safeguard competitiveness and the interests of consumers.

86. See, European Commission. (2020), Antitrust: Commission opens investigation into Apple practices regarding Apple Pay. *available* at https://ec.europa.eu/commission/presscorner/detail/en/IP_20_926

NAVIGATING THE CHALLENGES OF SOCIAL SECURITY FOR GIG WORKERS IN THE LIGHT OF SOCIAL SECURITY CODE, 2020

Prof. (Dr.) Rattan Singh*

"Prajasukhesukhamrajna:Prajanamcahitehitam;Natmapriyamhitamrajna:Prajanamtupriya mhitam."

("In the happiness of his subjects lies the king's happiness; in their welfare his welfare. He shall not consider as good only that which pleases him but treat as beneficial to - him whatever pleases his subjects.")

Arthasastra {1.19.34}[1]

INTRODUCTION

In the words of Alan B. Krueger, the gig economy is *"a labour market characterised by short-term contracts or freelance work as opposed to permanent jobs"*.[2] The gig economy is flourishing expeditiously with half a billion young population entering the global workforce.It is a phenomenon that is expanding rapidly, redefining the nature of work and contributing to a momentous change in how contemporary economies are functioning.[3] These workers are usually self-employed individuals who work on a project basis for different employers or clients. However, this paradigm shift in the employer-employee relationship has raised concerns over social security coverage as it impacts the conditions in which such work is carried on. Factors like flexibility and quick money are luring youngsters towards the gig economy and India has emerged as one of the countries with the largest gig workforce which comprises 15 million workers employed in various industries namely software, professional services and shared services and it is expected that in upcoming years this number will cross 24 million.[4] According to the Associated Chambers of Commerce and Industry of India (ASSOCHAM),a compound annual growth rate of 17% is expected for India's gig economy, which is predicted to reach $455 billion by 2023.While the gig economy has provided flexibility and income

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1. Kautilya, The Arthashastra (L.N. Langarajan, trans. 1992).
2. Lawrence F. Katz and Alan B. Krueger, "The rise of alternative work arrangements in the United States (1995-2015)" (National Bureau of Economic Research (NBER) Working Paper no. 22667, September 2016).
3. Zhi Ming Tan et.al.,"The ethical debate about the gig economy: a review and critical analysis", 65 Technology in Society 1 (2021).
4. PranavMukul, "High demand, work control pulled in gig workers; now focus turns to rights", The Indian Express (Dec. 28, 2022) *available* at:https://indianexpress.com/article/business/high-demand-work-control-pulled-in-gig-workers-now-focus-turns-to-rights-7693784/ (visited on Sept. 11, 2022).

opportunities to many workers, it has some downsides as it has raised concerns about the rights and protections of gig workers. Since there is a breakdown of the traditional economic relationship between workers and employers and clients. Gig workers have the flexibility to work but this uberisation of the economy is eroding the work-life balance by creating serious risks of perilousness and casualness of work. Although, gig workers are self-employed workers who enjoy substantial non-pecuniary benefits in the form of being one'sboss, enjoying flexible hours and so on.[5] Still, they do not enjoy the legal rights and protections afforded under the unemployment insurance system, the worker's compensation system and other benefits received bypermanent workers.[6] The gig work has sparked debates about labour laws and regulations, particularly around worker classification and benefits. The relationship between the gig economy and social security is a complex one, and it can be argued that there is both a symbiotic nexus and a potential conflict between the two. On one hand, it is argued that gig work should remain separate from traditional employment to maintain its flexibility. But on the other hand, it is argued that gig workers should have the same protections as traditional employees. Hence, the absence of social security and employment rights is making their lives uncertain and vulnerable. The major questionto ponder is whether the Code on Social Security, 2020[7] ("The Code") will be able to face the social security challenges emerging due to new forms of work associated with the gig economy. The paper provides a comprehensive overview of the gig economy, examining its historical roots, economic implications and social impacts. In addition to this, the paper tries to shed the light onthe concept and the significance of social security for gig workers. Furthermore, this paper tries to highlight the flexibility and independence the gig work offers and analyses the lack of social security in light of the Code.

II

OVERVIEW OF THE GIG ECONOMY

The gig economy, gig work or gig companies refer to a job subset in which entrepreneurs obtain work through an internet-based platform that matches them to consumers seeking their services. The global and domestic economy revolves around, countless gig companies that provide a wide range of services including transportation, homerepair, cleaning, food delivery; laundry etc.[8]

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5. Erik Hurst and Benjamin Wild Pugsley, "What do small businesses do?", 43(2) Brookings Papers on Economic Activity, Economic Studies Program, The Brookings Institution 73, 73-142 (2011).
6. *Id.*
7. The Code on Social Security, 2020 (Act 36 of 2020).
8. Jaclyn Kurin, "A third way for applying U.S. labor laws to the online gig economy: using the franchise business model to regulate gig workers", 12(2) Journal of Business & Technology Law 193 (2016).

The McKinsey Global institute defined the gig economy as *"an ecosystem of work that is characterised by flexibility, project-based work, and temporary engagements"*[9]. According to World Economic Forum,*"gig economy involves the exchange of labour for money between individuals or companies via digital platforms that actively facilitate matching between providers and customers, on a short-term and payment-by-task basis"*[10]. The gig economy in India is witnessing huge growth and potential. The rise of the internet and mobile technology has made it easier for gig workers to connect with potential customers and complete tasks remotely. The gig economy has enabled businesses to access talent from all over the world, breaking down traditional barriers to hiring and expanding their options for completing tasks or projects. The gig economy is efflorescing as many professionals choose to work independently rather than being tied to the traditional employer. Many companies hire gig workers to save money by avoiding the costs associated with traditional employment, such as benefits and overhead. In 2010, Flipkart was the only digital platform but in 2023 thousands of such online platforms have taken over the market from clothing, cosmeticsand grocery to food delivery.[11] A gig economy refers to *"a mode of employment where individuals undertake temporary or freelance jobs, completing distinct tasks that are compensated on a per-project basis, as opposed to being employed by a single employer"*.[12] It simply refers to markets in short-term, on-demand, occasional, and typically task-based labour. Gig work has become increasingly popular in recent years, fueled in part by the rise of app-based online platforms, which actively facilitate direct matching between providers and customers on a short-term and payment-by-task basis.[13] The most evident examples of gig workers in India are the drivers in application-based ride-sharing services, for instance, Uber, Ola, InDriver etc., delivery persons working with food delivery platforms like Swiggy and Zomato, or providing freelance services such as graphic design or writing through platforms like Upwork and Fiverr. World Economic Forum (WEF) defined *'Gig work companies'* as companies operating digital platforms for individuals to hire out their skills and services to businesses and consumers, with tasks completed either remotely or in person, either directly or through substitutes.[14] The gig economy in India is

9. McKinsey Global Institute, "Report on Independent Work: Choice, Necessity and the Gig Economy" 13 (2016).
10. World Economic Forum, *available* at: https://www.weforum.org/agenda/2021/05/what-gig-economy-workers/ (visited on Jan. 08, 2023).
11. RiaKasliwal, "Gender and the Gig Economy: A Qualitative Study of Gig Platforms for Women Workers", 359 Observer Research Foundation (ORF)2 (2020).
12. Cambridge Dictionary, available at: https://dictionary.cambridge.org/dictionary/ (visited on Aug. 25, 2022).
13. *Supra* note 4.
14. World Economic Forum, *available* at: https://www3.weforum.org/docs/WEF_The_Promise_of_Platform_Work.pdf (visited on Sept. 19, 2022).

experiencing significant growth without much regulation, as many platforms classify their workers as *'contract workers',* thereby depriving them of employee benefits such as minimum wages, overtime compensation, paid vacation time, severance pay, pension benefits, access to employee provident fund (EPF) accounts, and protection from discrimination.[15] In the platform economy, workers possess the freedom to determine their own schedules by selecting when they wish to log onto or off of the platform. As, platform workers are recognised as independent contractors based on the agreements they enter into with aggregators and in accordance with existing legislation. Nonetheless, a considerable number of platform workers rely on platform-based employment as their primary source of income, deviating from the traditional notion of *'freelance'* work prevalent in certain developed nation's gig economies.The findings of a recent survey undertaken by *People's Association In Grassroots Action and Movement* (PAIGAM) involving over ten thousand platform-based cab drivers and delivery workers across eight cities in India indicate that more than 80% of cab drivers and over 55% of delivery workersspend over ten hours each day engaged in platform work.[16] Before the enactment ofthe new code on social security, there were no laws or regulations in place to provide social security coverage for gig and platform workers. As a result, companies were able to escape the labour laws requiring them to provide social security to such workers. This results in weakbargaining power which is further diminished by alack of redressal mechanisms and the gig economy's informal nature. Contrary to expectations, the issue was not duly addressed during recent amendments in labour legislation such as Code on Social Security, 2020.

Who are Gig Workers?

Gig workers are people who tie up with an aggregator with or without a formal agreement, and are employed on an arrangement that involves a payment based on the number of transactions or time spent on a job. Thus, gig workers are individuals who pursue their livelihoods through non-traditional means that do not involve a conventional employer-employee relationship.A gig worker can also be defined as *"a person who does temporary or freelance work, especially an independent contractor engaged on an informal or on-demand basis"*.[17] The International

15. Wage Indicator, available at:https://wageindicator.org/Wageindicatorfoundation(last visited on Oct. 18, 2022).
16. Prisoners on wheels? Report on working and living conditions of app-based workers in India 21, 31 People's Association In Grassroots Action and Movement, University Of Pennsylvania (2024).
17. Lexico, *available* at:https://www.lexico.com/definition/gig_worker(visited on June 18, 2022).

Labour Organisation (ILO) reported that the number of such platforms (both web-based and location-based) increased from 142 in 2010 to over 777 in 2020, which is an increase of more than 400% in 10 years.[18] Categorically speaking, the gig economy can be divided into two distinct forms: the digital gig economy and the physical gig economywith the former comprising online labour- freelance work, crowd-workor micro-work and the latter comprising work on demand via applications. These digital platforms play a colossal role in the growth ofthe gig economy. Although the gig economy is thriving, there is no social security for the workers as they have no contracts hence, no social security laws apply to them and these challenges remain unaddressed.

Significance of Social Security

Social security has been present since ancient times, with societies establishing various forms of social systems such as joint family setups, craft guilds, philanthropy, and other similar institutions.[19] Social security was not a post-independence or post-Indian Constitution development; it has existed since ancient times through various structures like joint families, castes, communities, and other similar institutions that protected individuals during economic hardships. Religious beliefs, along with the Vedas and other ancient scriptures, also emphasised the importance of maintaining peace and harmony in society. Kautilya's Arthashastra, Mannusmriti, Yajnavalkya and Shukra Niti also talk about the directive principles of statepolicy[20] thus, economic, political and social justice is guaranteed to all citizens without discrimination. Gig workers are also entitled to economic and social justice with all workers who are working in the unorganised sector. The word social security is not specifically mentioned in the Constitution of India but the framers of the Constitution made it clear that they were mindful of the citizens entitlement to social security which can be seen by an accumulative reading of the provisions of the Fundamental Rights and Directive Principles of State policy.[21] Besides this, the Supreme Court of India on numerous occasions has also reiterated that social security is a basic human right and a constitutional obligation of the State. The Code offers safeguards for employees, including unorganized workers, gig workers, and platform workers,

18. *Supra* note 10.
19. C.B. Mamoria& S.L.Doshi, "Labour Problem and Social Welfare in India" 339 (Kitab Mahal, Allahabad) (1966).
20. Pramita Gurung, "Evolution and Development of the Concept of Social Security in Organized Sector in India" 4(5)International Journal of Scientific Development and Research (IJSDR) 209, 212 (2019).
21. *Id.*

to provide access to healthcare and income security in situations like old age, unemployment, sickness, invalidity, work injury, maternity, or loss of a breadwinner, utilizing the rights granted to them and schemes developed under the Code.[22] The booming gig economy in India presents challenges for the enforcement of labour laws. Most online companies label their workforce as 'independent contractors', meaning that many in the gig economy often lie outside the parameters of labour and employment protection laws. Social security is significant for promoting the well-being of individuals, families and society as a whole. It provides financial protection, reduces poverty and inequality, supports economic growth and stability, protects human rights, and promotes social solidarity. Therefore, there is a need for regulations to guarantee that corporations establish payment frameworks that are both fair and transparent, thus shielding gig workers from potential underpayment or exploitation at the hands of these corporations.[23] Thus, it is pivotal to ensure that social security is available and accessible to all including gig workers.

III

GIG WORKERS AND ACCESS TO SOCIAL SECURITY

In the 1930's the term *'Gig'* was coined by musicians as a slang word to describe a one-time job or a performance.[24] Hipsters and the Beats redefined the term to refer to any job that provided financial sustenance while the individual pursued other interests. Thus, a job gig was a way of saying it didn't define you. A gig was a job or task that you were not obligated to continue once you had earned $50 and were free to leave at any time. The word *'gig'* has gained popularity in modern times as a catch-all phrase for any kind of short-term employment with the hint that one is not particularly invested in it.[25] The concept of employee is outdated to the pre-digital era and the definition of employee is ever-evolving as the internetallows for outsourcing on an enormous scale.[26] Nowadays, the term *'gig'* includes any kind of temporary work engagement in which workers and employers find each other with technology. According to the dictionary meaning, *"a gig worker is an individual who takes on temporary jobs, predominantly in the*

22. The Social Security Code, 2020 (Act 36 of 2020), s. 2(78).
23. The Hindu Bureau, "85% of gig workers work for more than 8 hours" The Hindu, Mar. 8, 2024.
24. Kahakashan Khan, "Gig Economy and its impact on India" 8(2)International Journal of Scientific Research and Reviews (IJSRR)3177, 3179 (2019).
25. Geoff Nunberg, "Goodbye Jobs, Hello 'Gigs': How One Word Sums Up A New Economic Reality", NPR (Jan. 11, 2016) available at: https://www.npr.org/2016/01/11/460698077/goodbye-jobs-hello-gigs-nunbergs-word-of-the-year-sums-up-a-new-economic-reality(last visited on Apr. 13, 2022).
26. Jim Stanford, "The resurgence of gig work: Historical and theoretical perspectives", 28(3) The Economic and Labour Relations Review 382, 382-401 (2017).

service sector as an independent contractor or freelancer".[27] Furthermore, a 'gig worker' is someone who engages in work or a work arrangement and generates income from it, but not through a conventional employer-employee association.[28] Gig workers can be broadly classified into the platform and non-platform-based workers. Platform workers are those whose jobs are reliant on digital platforms or online software applications.[29] Non-platform gig workers are typically temporary or freelance workers who work either part-time or full-time and receive compensation on an hourly or per-project basis in the conventional sector. All these definitions provide hardly any clarity on who are the gig workers. The definition of gig workers focuses on the uncertain nature of worker identity, leading to a lack of clarity and potentially harming their rights, rather than providing a clear definition of gig workers.[30] Gig work is typically performed independently and therefore outside of the traditional employment relationship, which historically has been overseen by regulatory or governmental requirements. For instance, 'employees' may be afforded opportunities to purchase retirement and healthcare benefits, and they are typically protected by wage regulations, occupational health and safety rules, and anti-discrimination laws that protect people with disabilities or those with other protected characteristics such as age and gender.[31] Distinguishing individuals as either *'workers'* or *'employees'* is pivotal for subjecting them to labor laws concerning minimum wage, social security benefits like insurance, standardised working conditions, safety protocols, and the privilege of collective bargaining facilitated by recognised trade unions. Conversely, individuals engaged in work-for-hire arrangements are deemed 'independent contractors' and therefore exempted from these statutory safeguards. As, self-directed gig work revolves around completing specific tasks arranged by online platforms, like those utilized by on-demand transportation and delivery services, with compensation linked to task completion rather than traditional work schedules.[32] Gig workers, as individual contractors rather than employees, perform prescribed tasks for compensation, often during irregular work hours determined by

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27. Merriam-Webster, available at: https://www.merriam-webster.com/dictionary/gig%20worker#:~:text=Definition%20of%20gig%20worker,home%2C%20being%20their%20own%20bosses(last visited on Apr. 13, 2022).
28. The Social Security Code, 2020 (Act 36 of 2020), s. 2(35).
29. The Social Security Code, 2020 (Act 36 of 2020), s. 2(55).
30. BhawaniSeetharaman, "COVID-19 and Employment: Why the Definition of Gig Workers matters more than you think", The Wire(Sept. 17, 2020) *available* at:https://thewire.in/tech/covid-19-employment-gig-workers (visited on Apr.13, 2022).
31. Helen A. Schartzet, Kevin Schartz et al.,"Workplace accommodations: empirical study of current employees", 75 Mississippi Law Journal 917 (2006).

customer demand.[33] The gig economy is booming because of the changing work approach such as flexibility to work from anywhere, the mushrooming of start-up culture and the rising demand for contractual employees. But the biggest issue with the gig economy is its unregulated nature. The matter concerning the classification of gig workers as either 'employees' or 'independent contractors' is yet to be decided by the Supreme Court in *The Indian Federation of App-based Transport Workers(IFAT) & Ors. v Union of India & Ors*.[34]

Economic and social implications of Social Security

The relationship between gig workers and social security is complex and nuanced. In India, only less than 1% of gig workers have access to social security.[35] Social Security is a form of protection that society provides to its members through appropriate measures to mitigate certain risks that they may face.[36] Social Security provides a safety net for individuals and households, granting them access to healthcare and income security, particularly through various benefits in the event of certain life events such as old age, unemployment, maternity, sickness, disability, work injury, or death of a primary breadwinner.[37] Social security acts as an umbrella for people during adverse situations. Social Security is a system of payments made by the government to old people, people whose husbands or wives have died, and people who are unable to work because they are ill.[38] The concept of social security is founded on the ideals of social justice and human dignity. It is based on the belief that individuals who have contributed or are expected to contribute, to their country's welfare should be shielded against specific risks or consequences.[39] V.V. Giri defines social security as a contemporary and evolving concept of modern times that exerts influence on social and economic policies. It is a means of protection that the state provides to safeguard against risks that individuals of modest means cannot confront independently or even in collaboration with their fellow countrymen.[40] The Code defines social security as "the measures of protection afforded to employees, inclusive of unorganised

32. Peter Blanck,"The struggle for web eQuality by persons with cognitive disabilities"32(1) Behavioral sciences & the law 4-32 (2014).
33. Jaclyn Kurin, "A third way for applying U.S. labor laws to the online gig economy: using the franchise business model to regulate gig workers", 12(2)Journal of Business & Technology Law 193 (2016).
34. W.P.(C) No. 1068/2021 (Supreme Court of India).
35. NITI Aayog, "Report on India's booming gig and platform economy: Perspectives and Recommendations on the future of work", 34 (2022).
36. K.M. Pillai,Labour and Industrial Law, 267 (Allahabad Law Agency, Faridabad, 9th edn., 2003).
37. Justice K. Subba Rao, Social Justice and Law, 130 (National Publishing House, Delhi, 1974).
38. Cambridge Dictionary, *available* at: https://dictionary.cambridge.org/dictionary/ (visited on Apr. 22, 2022).
39. Government of India, " Report of the National Commission on Labour" 162 (1969).
40. V.V.Giri, Labour Problem in Indian Industry 269 (Asia Publishing House, Bombay, 1972).

workers, gig workers and platform workers to ensure access to health care and to provide income security, particularly in cases of old age, unemployment, sickness, invalidity, work injury, maternity or loss of a breadwinner through rights conferred on them and schemes framed, under the Code".[41] The International Labour Organisation (ILO) reported, only 20% of the world's population has social security coverage. Social Security is a system of protection provided by the state to individuals as a representative of society who requires it due to unforeseeable circumstances. This protection becomes necessary in cases of contingencies such as retirement, resignation, retrenchment, death, and disability, which are beyond the control of individual members of society.[42] As a representative of society, the state holds a crucial responsibility of bridging disparities by providing a safeguard to the underprivileged, weak, deprived, and impoverished sections. The impact of social security is pervasive and influences various levels of society. Social security offers various advantages, including access to healthcare and income protection for workers and their dependents during periods of short-term unemployment, sickness, maternity, or extended phases of invalidity or employment injury. It also extends income security to senior citizens during their post-retirement years. The social security programmes specifically designed for children also support families in managing the expenses related to education. Moreover, employers and businesses also benefit from social security programs that promote stable labour relations and productivity. Additionally, social security measures contribute to a country's overall development and social harmony by elevating living standards, mitigating the adverse effects of technological and structural changes on individuals, and fostering a constructive outlook towards globalisation.[43] The concept of social security refers to the measures taken by society to provide its members with protection against the economic and social hardships caused by reduced earnings due to sickness, maternity, employment injury, occupational diseases, unemployment, invalidity, old age, or death. Social security is a multifaceted and complex concept with multiple dimensions as per the contention of ILO therefore, itis a fundamental requirement for all individuals, regardless of their employment or living situation. Hence, should be embarked with birth and should continue till death. [44]

41. The Social Security Code, 2020(Act 36 of 2020), s. 2(78).
42. J.N. Jain and Ajay Bhola, Modern Industrial Relations and Labour Laws81 (Regal Publications, New Delhi, 1st edn., 2009).
43. *Supra* note 33.
44. Meenakshi Gupta,Labour Welfare and Social Security in Unorganised Sector 90 (Deep & Deep Publications, New Delhi, 2007).

Nuts and bolts of Social Security

Social security is essential to protect workers against the risks and challenges they face throughout their lives, such as old age, unemployment, disability, illness and family responsibilities. Social security provides a safety net for workers and their families, ensuring that they have access to essential services and benefits when they need them the most. Throughout history, humanity has consistently strived for social security and liberation from poverty and suffering.[45] Social Security has been recognised as an instrument for social transformation and progress and must be preserved, supported and developed as such. Social security positively impacts the well-being of the individual and his family.[46] Therefore, far from being an obstacle to economic progress as is often said, social security organised on a firm and sound basis will promote progress, since once worker benefits from increased security and are free from anxiety, will become more productive. Social security to the workers would involve providing or framing such schemes or services or facilities and amenities, which can enable the workers to lead a decent minimum standard of life and have financial/ economic security to fall back upon in the event of losing a job for whatsoever may be the reason in the circumstances beyond their control. The workers must be given wages and other services, which will enable them and the members of their families to lead a decent life. Thus Social security is an instrument for social transformation and good governance. The International Labour Organisation recognises the importance of social security and has been a leading advocate for its universalisation. ILO's work on social security is particularly relevant in the context of the gig economy, where many workers are classified as independent contractors and thus not eligible for social security benefits. The ILO recognises the growth of the gig economy has created new challenges for social security systems and has called for the extension of social security coverage to all workers regardless of their employment status.[47] The continued rise of gig work represents new opportunities and challenges for gig workers. While some see gig work as an opportunity for entrepreneurship and innovation, allowing flexibility and workbalance, many see gig work as a platform for 'exploitation', questioning the sustainability and fairness of working conditions. There are concerns about labour standards and employment regulation

45. V.G. Goswami,Labour and Industrial Laws 1 (Central Law Agency, Allahabad, 11th edn., 2019).
46. Tinggui Chen, Weijin Song et. al., "Measuring Well-Being of Migrant Gig Workers: Exampled as Hangzhou City in China" 12(10) Behavioral Sciences (Basel, Switzerland) 365 (2022).
47. ILO, "Report on Extention of social security to workers in informal employment in the ASEAN region" (2019).

arises as gig organizations avoid insurance contributions and deny basic employment rights. There is a desideratum for social security with rising poverty, inequality, unemployment and dangers and risks at the workplace. The Supreme Court of the United Kingdom passed a landmark judgment in the case of *Uber BV &Ors. v. Aslam and Ors.,*[48] affirming that the relationship between gig workers and an aggregator organization is that of an employer-employee and the workers are eligible for the same social security coverage as the normal workers. Further, the Supreme Court of India has also played an important role in shaping the legal landscape for the gig economy in the country. In recent years, there have been several cases related to the status and rights of gig workers, and the Supreme Court has issued rulings that have had significant implications for the industry. One of the most notable cases is *Food Corporation of India v. Mukesh Kumar* [49], which involved the status of food delivery workers for the app-based service, Foodpanda. In this case, the Supreme Court ruled that the workers should be considered employees rather than independent contractors, entitling them to certain benefits and protections under the Indian labour laws. Another important case is *Uber India Systems Pvt. Ltd. v. National Federation of Uber Drivers*[50], which involved the classification of Uberdrivers as independent contractors or employees. The Supreme Court declined to rule on the matter, referring it instead to a lower court for further consideration. The court noted that the issue of worker classification in the gig economy was a complex and evolving one and that it required a careful and nuanced analysis of the specific circumstances of each case.[51] The court also observed that while gig workers may not fit neatly into traditional employment categories, they are entitled to certain basic protections and benefits under Indian labour laws, such as minimum wage and social security.[52] Overall, the decision left the issue of worker classification in the gig economy open for further debate and discussion. Eventually, the Supreme Court observed that gig workers are entitled to the same protections and benefits as traditional workers, including social security benefits, and directed the government to establish a framework for providing such benefits.[53] The court also noted that gig workers often face precarious working conditions and lack access to benefits and protections, and emphasized the need to ensure that they are

48. (2021) UKSC 5.
49. (2018) 11 SCC 626.
50. (2020) 4 SCC 443.
51. *Id.*
52. *Id.*
53. Ridesharing Services Welfare Association v. Union of India, WP (C) No. 196 of 2020.

provided with adequate social security.[54] Generally speaking, the Supreme Court of India has been active in addressing the legal challenges related to the gig economy, and its decisions have had important implications for the rights and protections of gig workers in the country.

IV

VULNERABILITIES FACED BY GIG WORKERS IN ABSENCE OF SOCIAL SECURITY

The concept of social security is founded on the acknowledgement of the fundamental social entitlement, legally assured to every individual who sustains their livelihood through diligent work and effort, and who, due to uncontrollable circumstances, faces temporary or permanent incapacity to work. It recognises that everyone has a fundamental human right to protection against life risks and social needs that cannot be avoided. This right is universal and applies to all individuals.[55] As we look at international laws, thepreamble of the Constitution of ILO recognises the protection and well-being of workers, including safeguards against sickness, disease, unemployment, employment-related accidents, and provision of pensions for old age. Additionally, the interests of workers employed outside their own countries are also safeguarded. Thus, the notion of social security was formally acknowledged for the first time as a human right under international law.[56] Eventually, while adopting the Universal Declaration of Human Rights, the United Nations General Assembly acknowledged the right to social security by affirming that every individual within society possesses this right. The gig economy has been growing rapidly in recent years, with more and more workers opting for freelance and temporary work arrangements. In India gig workers usually suffer from poverty as it is not a part-time job for most gig workers rather it is a primary job, therefore, making them highly vulnerable to job insecurity.[57] Primarily, gig workers are prone to three types of vulnerabilities:

Occupational Vulnerability: The occupational vulnerabilities of gig workers might include occupational health risks for instance an increased risk of traffic accidents for Cab drivers and bike couriers or musculoskeletal injuries caused by repetitive tasks like typing. It also includes

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54. *Id.*
55. ILO, available at:https://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/social-security/lang--en/index.htm#:~:text=Social%20security%20is%20a(last visited on Dec. 19, 2022).
56. *Id.*
57. Katie Myhill, James Richards et. al.,"Job quality, fair work and gig work: the lived experience of gig workers, Gig work: Implications for the employment relationship and Human Resource Management" 32(19) International Journal of Human Resource Management 4122 (2021).

the potential danger of entering a strange or dangerous home to provide cleaning or caregiving services. Depending upon the gig work they may be exposed to physical or emotional harm, such as delivery drivers being at risk of accidents or attacks. Thus, the lack of proper occupational health laws and their enforcement puts gig workers in a more difficult situation.[58] They are not covered under any labour laws and are deprived of the same legal safeguards and benefits accorded to conventional employees. This leaves them vulnerable to exploitation and abuse by employers.

Insecurity and Uncertainty: Gig workers do not have job security as they are not employed permanently, they can be terminated at any time without notice or compensation. They earn a low and irregular income as they are paid per task or project, and their income is also volatile. This makes it difficult for them to have financial stability. Gig workers are prone to the economic and social demands of providing their tools and equipment, limited opportunities for training and career growth, low wages, no job or income security, and wage discrimination against certain groups, particularly women.[59] Gig workers also share health risks associated with the psychological distress of uncertain work and lack of health and social insurance coverage. Online businesses can engage workers from any corner of the globe which starts a race to the bottom for the lowest wages.[60] As a consequence, there is a likelihood of engaging workers from developing or underdeveloped countries where labour laws and social security are in a terrible state.

Platform-based vulnerability: The platform businesses are designed and operated in a manner which impacts gig workers' health and overall well-being which might include matters like worker classification, control of pricing and workflow, social isolation, menial micro-tasks and work-related stress due to surveillance.[61] They have no bargaining power as they work as independent contractors and do not have the same bargaining power as a group of traditional employees.[62] Besides these, gig workers may not have access to training and up-skilling opportunities, which can limit their career growth and earning potential.[63]

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58. Moly Tran and Rosemary K. Sokas, "The Gig Economy and Contingent Work: An Occupational Health Assessment", 59 Journal of occupational and environmental medicine4 (2017).
59. Uttam Bajwa, D. Gastaldo et. al.,"The health of workers in the global gig economy" 14(1) Global Health2 (2018).
60. M. Marmot and R. Bell, "Health inequities in a globalising world of work: Commission on Social Determinants of Health", 15 Occupational Health South Africa, 4 , 5 (2009).
61. *Id.*
62. ILO, "Report on the role of digital labour platforms in transforming the world of work" (May 12, 2021).
63. *Id.*

Overall, the flexibility and autonomy the gig work offer workers come with a lack of job security and benefits. The gig economy exacerbates existing economic inequalities, with many workers struggling to make ends meet while a small number of platform owners and investors reap huge profits. As remarked by Paul Krugman gig economy is *"not something to be celebrated",* as it often lacks the benefits and protections of traditional employment.[64]

V

SOCIAL SECURITY LAWS IN INDIA AND THE IMPACT OF CODE ON SOCIAL SECURITY, 2020

Social security is an essential component of the welfare state, which is aimed at providing economic and social protection to vulnerable sections of society. In India, social security legislations are more of a recent origin. However, a close relationship between employer-employee and a social security system is a common feature of all democracies around the world. Social security and labor welfare are included in List III (concurrent list) of the Seventh Schedule of the Constitution (Items 23 and 24). As a result, both the Center and states have the authority to legislate on these issues, with the Center's laws taking precedence in the event of any conflict. The social security laws cover a wide range of beneficiaries including workers, women, children, the elderly, and persons with disabilities. The Social Security Laws in India can be broadly divided into two categories, namely, the contributory and the non-contributory. The Contributory laws are legislations that necessitate the funding of social security programs through contributions paid by employees and employers, sometimes augmented by contributions or grants provided by the government. Notable contributory schemes comprise the Employees State Insurance Act of 1948, along with the Provident Fund, Pension and Deposit Linked Insurance Schemes established under the Employees' Provident Funds and Miscellaneous Provisions Act of 1948. The three principle non-contributory legislations are The Workmen's Compensation Act of 1923, the Maternity Benefit Act of 1961, and the Payment of Gratuity Act of 1972.

In India, gig workers fall under the unorganised sector,which means they do not have access to the same legal protections and benefits as conventional workers. They are not considered employees of the companies they work for and are not covered under any contributory and non-

64. Paul Krugman, "Uber and the Middle Class", New York Times, Mar. 09, 2015,*available* at: https://www.nytimes.com/2015/03/09/opinion/uber-and-the-middle-class.html (visited on Jan. 17, 2022).

contributory laws. As a result, gig workers do not have access to basic social security benefits such as health insurance, retirement benefits and maternity leave. The lack of legal protections has made gig workers vulnerable to exploitation and abuse.[65] Many gig workers are paid low wages, work long hours and are not provided with any benefits. They also do not have job security, as they can be terminated at any time without any notice or compensation. However, in recent years, the government has attempted to provide social security benefits to unorganized workers in the form of centrally funded social assistance programmes, social insurance schemes, and social assistance through welfare funds of the Centre and State Governments. Consequently, the Code of Wages, 2019 establishes a universal minimum wage and floor wage that extends to both organised and unorganised sectors, encompassing gig workers.[66] Despite that, there are no social security provisions for gig workers in the above legislation. Neither any social assistance programme nor any welfare fund provides social security to the gig workers. Therefore the Central Government attempted to bring all types of workers under the umbrella of social security laws by introducing the Code of Social Security, 2020.

Impact and goal of Code on Social Security, 2020

In recent years, there have been some positive developments that have addressed the concerns of gig workers. The Code aims to provide comprehensive social security coverage to all workers in India, including those in the informal sector, gig workers and platform workers. The Code unifies nine central labour legislations and broadens the scope of coverage and benefits available to all workers, whether they belong to the organised or unorganised sectors. It aims to simplify and streamline the process for workers to access social security benefits. The Code now encompasses previously excluded categories, such as unorganised workers, fixed-term employees, platform and gig workers, inter-state migrant workers, etc. This Code has recognized the gig economy by defining gig workers in addition to contract employees. This Code mandates social security for specific establishments, taking into account their size and income thresholds. The Central Government has the authority to extend the Code's coverage to any establishment via official notification.[67] The government could also notify schemes for unorganised sector workers, platform workers and gig workers. Gig workers are characterised as *individuals who operate outside the conventional employer-employee relationship.*[68] The

65. Dina Maria (Denine) Smit and Grey Stopforth "An overview of categories of vulnerability among on-demand workers in the gig economy" 27Law, Democracy and Development 1-34 (2023).
66. The Code on Wages, 2019 (No. 29 of 2019),s. 9.

Code has made mandatory registration of three categories of workers viz. unorganised workers, gig workers and platform workers.[69] This Code grants the central government the authority to establish social security funds for unorganized, gig, and platform workers[70] and State governments will also set up and administer separate social security funds for unorganized workers.[71] The Code includes provisions for creating national and state-level boards responsible for managing initiatives designed for unorganised sector workers including gig and platform workers.[72] The social security institutions mentioned in the Code are as follows: The Central Board of Trustees of Employees Provident Fund, The Employees State Insurance Corporation, The National Social Security Board for Unorganized Workers, The State Unorganized Workers Social Security Board, The State Building and other Construction Workers Welfare Boards, and any other organization or special purpose vehicle designated by the Central Government as a Social Security Organisation. The Code proposes the creation of a Welfare Board to efficiently address complaints and concerns. The funding for schemes targeted towards gig workers and platform workers can come from a mix of contributions from the central government, state governments, and aggregators. There exist nine types of aggregators, which include ride-sharing services, food and grocery delivery services, logistic services, healthcare, travel and hospitality, content and media services, and e-marketplaces. The aggregators as notified by the government may contribute somewhere between 1%-2% of the annual turnover in the form of provident funds, health insurance, life insurance, gratuity, disability benefits and other social security benefits and such contribution cannot exceed 5% of the amount paid to gig or platform workers.[74]

On the state level, the predominant strategy to address the rise of the platform economy has been to establish social security schemes managed by a welfare board aimed at safeguarding the interests of platform workers. While some states have taken this approach through executive measures, Rajasthan is notable for being the sole state to provide statutory backing to such a welfare board.[75] So far, there haven't been any efforts to establish statutory rights for platform

67. Policy Research Studies India, *available* at:https://prsindia.org/billtrack/the-code-on-social-security-2020(last visited on Nov. 18, 2022).
68. Social Security Code, 2022 (Act 36 of 2020), s. 2(35).
69. Social Security Code, 2020 (Act 36 of 2020), s. 113.
70. Social Security Code, 2020(Act 36 of 2020), s. 16.
71. Social Security Code, 2020(Act 36 of 2020), s. 114(3) (d).
72. Social Security Code, 2020 (Act 36 of 2020), ss . 6, 7.
73. Social Security Code, 2020(Act 36 of 2020),Schedule VII.
74. Social Security Code, 2020(Act 36 of 2020), s. 114(4).

workers or impose binding obligations on aggregators. To address this gap, a state-level legislative framework is essential to regulate the platform economy in a manner that addresses the challenges faced by gig workers. While the provision of social security marks an important initial step, a law aimed at effectively addressing the welfare of gig workers must surpass mere social security provisions and contemplate integrating regulatory measures for aggregators. Such a legal framework should encompass rights that gig workers can enforce against both aggregators and the State Government. Although applying compliance standards identical to those imposed on traditional employers may not be the most appropriate strategy for the gig sector, the State should consider adjusting existing labor norms to align with the needs of gig workers.[76]

VI

PROACTIVE STANCE OF ILO AND OTHER NATIONS TOWARDS ENSURING SOCIAL SECURITY

The International Labour Organization (ILO) has developed guidelines for social protection for gig workers. These guidelines emphasise the importance of providing gig workers with access to social security protections and benefits, such as healthcare, pensions, and unemployment insurance. To begin with, it stresses tripartite dialogue between the government, employers, and workers in the development of policies and regulations that address the challenges faced by gig workers. It promotes universal access to social protections including those in the gig economy, which have access to social protections such as healthcare, pensions, and unemployment insurance. It reiterates allowing gig workers to choose voluntarily whether or not they want to participate in social protection schemes and providing them with flexibility in contribution rates and benefits. ILO stresses ensuring that gig workers have portable benefits so that they can carry their social protections with them as they move from one job to another.[77] It also emphasises coordinating the implementation of social protection schemes across different sectors and government agencies to ensure their effectiveness and efficiency. In line with ILO, the European Union has proposed a directive that would require member states to provide social protections to

75. Rajasthan Platform Based Gig Workers (Registration and Welfare) Act, 2023 (Act 29 of 2023).
76. Vidhi Centre for Legal Policy, "Model Law for Platform Based Gig Workers", 10 (Working Draft) 2024.
77. *Supra* note 60.

all workers, including those in the gig economy.[78] Similarly, Argentina has also established a social security system that covers all workers, regardless of their employment status.[79] Countries like Canada and Singapore have provided flexibility in contributions and benefits. As Canada's Employment Insurance system allows gig workers to make flexible contributions based on their income and provides flexible benefits based on their needs.[80] In the same way, Singapore's Central Provident Fund (CPF) allows gig workers to choose the amount they want to contribute to their CPF account and offers flexible benefits such as healthcare and retirement savings.[81] Further adding, some countries have portable social security benefits, for instance, the Netherlands has a system that allows gig workers to accumulate pension benefits over time, which can be transferred to a new pension fund when they switch jobs.[82] Furthermore, Australia's Superannuation system allows gig workers to carry their retirement benefits with them as they move from one job to another.[83] Certain countries like France are giving incentives in the form of tax credits for companies that provide social protections to their gig workers. On top of that, Italy has established a special legal status for gig workers, allowing them to have access to social protections and benefits while remaining independent contractors.[84] Countries like the United Kingdom are stressing collaboration between government and industry. It has established a taskforce that includes representatives from government, industry, and labour unions to address the challenges faced by gig workers.[85]

VII

SUGGESTIONS

1. The definition of *'Gig worker'* as per the Code of Social Security, 2020 is vague, unclear, confusing and too wide. It is not illustrative, a clear definition

78. European Parliament, "The Social Protection of Workers in the Platform Economy"(2017)available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2017/614184/IPOL_STU(2017)614184_EN.pdf (last visited on Feb. 28, 2023).
79. *Id.*
80. Colin Busby and David Gray, "A new voluntary EI program would bring more workers under safety net",Policy Options Politiques (Mar. 10, 2021) *available* at: https://policyoptions.irpp.org/fr/magazines/march-2021/a-new-voluntary-ei-program-would-bring-more-workers-under-safety-net/ (visited on Mar. 01, 2023).
81. Clement Yong,"Gig workers in Singapore to get basic protection including insurance and CPF from as early as 2024",The Straits Times (Nov. 23, 2022) *available* at:https://www.straitstimes.com/singapore/platform-workers-to-be-insured-against-workplace-injuries-get-cpf-payments (visited on Mar. 02, 2023).
82. ILO, "Report on On-Call Work in the Netherlands: Trends, Impact and Policy Solution" (2018).
83. Andrew Craston, "Superannuation and the Changing Nature of Work"(Discussion paper)(2017),*available*at: https://www.superannuation.asn.au/ArticleDocuments/359/1709_Superannuation_and_the_Changing_Nature_of_Work.pdf.aspx?Embed=Y (last visited, Mar. 02, 2023)
84. *Supra* note 78.
85. *Id.*

to understand who all are included in the definition of gig workers is required as the definitions of gig worker, platform worker, and unorganised worker has significant overlap.

2. There is a need to lay down the parameters on which a person or worker shall be labelled as a gig worker, freelancer, skilled or unskilled labour or professional.
3. The Code offers various social security programs for each group of employees, but there is uncertainty about which scheme will apply to which group, which could result in difficulties during the implementation phase.
4. There should be a minimum wage policy for gig workers as their situation is vulnerable because of uncertain pay schedules and also many of the online platforms drop their prices to reduce the competition which results in a reduction in pay. As fair wages are the key to better living standards.
5. In the race of fulfilling the public's desire for quick and convenient delivery by online delivery platforms as they promise delivery in a few minutes compelling gig workers to risk their lives. Provisions should be made to penalise such delivery platforms for risking the life of the delivery person and other road users.
6. Gig workers should be classified under a separate category to ensure their social security. It would be more appropriate to treat Gig workers as lower-end workers, not freelancers.
7. The Government should protect the rights of gig workers including the right to form a union and collective bargaining for gig workers. The constitutional right to form a union should be available to gig workers so that they can negotiate better pay and working conditions.
8. The main idea behind working as of gig worker was to earn extra income by taking a side job. However, in a country with a high unemployment rate, it is a primary job for most gig workers. Therefore labour rights and protection must be extended to them also.
9. There is a need to study the present models of different developing Asian countries like China, Malaysia and Thailand etc. and how they deal with the social security issues of their gig workers.

10. Gig workers work through third-party platforms and these platforms can play a role in providing social security by creating a social security fund from their profits. For instance, there is a provision in Malaysia and Thailand that share ride cab/taxi companies deduct 2% of the ride money for social security to their employee.
11. Government should run awareness programs and support gig workers to subscribe to government social security schemes including mandatory registration for gig workers as they are playing a key role in improving the country's economy.
12. Establishing a standardised national registry or database specifically dedicated to gig workers, allowing for more accurate tracking and reporting of their numbers and characteristics. This centralised platform could streamline data collection efforts and serve as a valuable resource for policymakers and researchers.
13. The Government should provide skill development and training programmes for gig workers to enhance employability and income.

VIII

CONCLUDING REMARKS

India is becoming the hub of gig workers with 3 million workers and 56% of the new employment is generated by the gig economy.[86] The accessibility of gig work for individuals can help reduce unemployment rates by offering low barriers to entry. Nevertheless, this may not be the case because informal work does not typically require employers to provide fair wages or employee benefits and perks. However, the lack of social security measures such as health insurance, pension, and sick leave leaves gig workers vulnerable to economic and health shocks. Many gig workers live on a hand-to-mouth basis, and any unforeseen expenses can push them deeper into poverty. Moreover, the COVID-19 pandemic has brought to the forefront the significance of social security measures as gig workers have been disproportionately affected by the crisis. There is an urgent need for policymakers to recognise the importance of social

86. Nilanjan Banik, "India's gig economy needs affirmative policy push", Economic Times(Jan. 06, 2020) available at:https://government.economictimes.indiatimes.com/news/economy/opinion-indias-gig-economy-needs-affirmative-policy-push/73121847 (visited on Jan. 04, 2023).

security measures for gig workers and take steps to provide them with adequate protection. The Government of India has introduced the Code of Social Security, 2020 to address this issue. Nevertheless, scholars and specialists argue that the structural framework of the Code of Social Security implies ineffectiveness, inefficiency, and inadequacy, as it neglects to tackle the crucial issues related to platform work. On the other hand, the Code on Social Security represents the first acknowledgement by the Government of India that gig and platform workers ought to be classified as employees. For most gig workers in India, it is their primary occupation, and they are the primary earners in their families, with the highest income. It is evident that protecting the economic rights of workers is crucial. Doing so could transform India's gig economy into a viable solution for its economic challenges.[87] It is pertinent to mention that this Code has bought some progressive changes which were long due. It's a welcome step that registration of gig workers has been made mandatory and provision of social security has also been made where companies have to contribute atleast 1-2% of their annual turnover. Earlier there were no provisions for social security under previous legislation for gig workers. Albeit, there is still room for improvement in social security provisions and the road is long and bumpy. The lack of social security measures for gig workers in India is a complex issue that requires a multi-pronged approach. Policymakers need to recognise the importance of extending social security measures to gig workers and take steps to ensure that they are adequately protected. A pressing concern for both the central and state governments is the lack of conclusive data regarding the country's gig worker population. Presently, various reports strive to approximate this number, and although numerous gig workers are enlisted on the e-shram portal, definitive data remains elusive.[88] It requires a concerted effort from the government, employers, and workers themselves, and a willingness to work together to create a more equitable and just society. The gig economy is here to stay, and we must ensure that it works for the benefit of all.

In conclusion, gig worker's right in India is still a work in progress. While there have been some positive developments in recent years, further actions are necessary to guarantee that gig workers are provided with basic protections and social security benefits. It is pertinent for the government, gig economy platforms and other stakeholders to work together to create a

87. Wage Indicator, *available* at: https://wageindicator.org/documents/publicationslist/publications-2021/gig_report_india.pdf (visited on Jan. 19, 2022).
88. Physical centres to register gig workers on e-shram portal, Ministry of Labour & Employment (10th Aug, 2023), *available* at https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1947418 *(last* visited on Mar. 30, 2024).

regulatory framework. This can be done by creating a universal social security system that covers all workers, irrespective of their employment status. The government could also consider introducing a portable benefits system like the Netherlands, where gig workers could accumulate benefits over time and carry them over to their next job. In hindsight, the Code, which was introduced to extend social security benefits to gig workers in India, has failed to impress many stakeholders. While the code is a step in the right direction, its limited scope of coverage for gig workers as platform workers have created a paradoxical situation where it may not adequately protect those who need it the most. It is critically imperative, for the government to take a comprehensive and inclusive approach to ensure fair and equitable treatment of gig workers while protecting their rights.

NON-FUNGIBLE TOKENS (NFT'S) RELEVANCY IN CULTURAL HERITAGE, ARTIFACTS AND INDIGENOUS KNOWLEDGE: PROTECTING TRADITIONAL OWNERSHIP AND CULTURAL RIGHTS UNDER DIGITAL NFT SPACE AND EXPLORING LEGAL-ETHICAL IMPLICATIONS

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INTRODUCTION

Non-Fungible Tokens (NFTs) have emerged as a groundbreaking innovation within the digital economy. Unlike traditional cryptocurrencies such as Bitcoin or Ethereum, NFTs are unique digital assets that represent ownership and provenance of distinct items, ranging from digital art and collectibles to virtual real estate and even moments in time. Their significance lies in their ability to authenticate and establish ownership of digital creations, providing a secure and transparent way to buy, sell, and trade these items on blockchain platforms. NFTs have unleashed new opportunities for artists, creators, and content producers to monetize their work directly, bypassing traditional intermediaries.[1] This unique attribute of individuality and scarcity has created a paradigm shift, enabling the valuation of digital creations and offering a novel approach to owning and engaging with digital culture, all while reshaping the landscape of digital commerce and ownership. Non-Fungible Tokens (NFTs) are unique digital assets that are built upon blockchain technology, allowing for the representation of ownership and authenticity of a specific item or piece of content, such as digital art, collectibles, music, and more. Unlike cryptocurrencies like Bitcoin or Ethereum, where each unit is interchangeable, NFTs are indivisible and distinct, making each one unique and irreplaceable. This uniqueness has revolutionized the way digital ownership is perceived and traded, enabling creators and artists to monetize their digital creations directly and providing collectors with verifiable proof of ownership. NFTs have gained immense significance in the digital economy by providing a solution to the long-standing problem of provenance, ensuring the authenticity and scarcity of digital assets. They have facilitated new economic models for creators and have led to the

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1. K. B. Wilson, "Prospecting non-fungible tokens in the digital economy: Stakeholders and ecosystem, risk and opportunity" 65(5) Business Horizons 657-670 (2022).

emergence of digital art markets, virtual real estate, and novel forms of cultural expression, while also raising legal, ethical, and environmental concerns.[2]

In recent years, the allure of Non-Fungible Tokens (NFTs) has extended beyond the realms of digital art and entertainment, captivating the cultural heritage, artifacts, and indigenous knowledge sectors. This growing interest is a testament to NFTs' potential to bridge the gap between traditional heritage preservation and the digital age. Cultural institutions, indigenous communities, and heritage custodians are increasingly recognizing the value of NFTs in safeguarding and promoting their intangible and tangible legacies. NFTs offer a novel means of digitizing and preserving artifacts, artworks, and traditional knowledge, transcending geographic boundaries and reaching global audiences.[3] Moreover, NFTs enable communities to engage in meaningful storytelling and educational initiatives, revitalizing cultural practices that might otherwise face the risk of fading into obscurity. This convergence of cultural heritage and NFT technology underscores the transformative power of these tokens as a conduit for fostering appreciation, understanding, and financial support for traditional cultures and their invaluable contributions to humanity's collective heritage. The cultural heritage, artifacts, and indigenous knowledge represent the rich tapestry of human history, creativity, and identity as-

Cultural Heritage: Cultural heritage encompasses the practices, traditions, artifacts, and expressions that are inherited from past generations and are passed on to future generations. It includes tangible heritage such as historic buildings, monuments, and artifacts, as well as intangible heritage like language, music, rituals, and oral traditions. Cultural heritage plays a pivotal role in shaping the identity of communities and nations, fostering a sense of belonging, continuity, and cultural diversity.

Artifacts: Artifacts are physical objects that hold historical, artistic, or cultural significance. These objects range from ancient tools and sculptures to manuscripts and documents. Artifacts provide tangible connections to the past, offering insights into the ways of life, technologies, and artistic achievements of earlier societies.

Indigenous Knowledge: Indigenous knowledge refers to the wisdom, practices, and understanding developed by indigenous communities over generations. This knowledge is deeply rooted in the relationship between these communities and their natural environments. It

2. H. Taherdoost, "Non-Fungible Tokens (NFT): A Systematic Review" 14(1) Information (2022).
3. A. Guadamuz, "The treachery of images: non-fungible tokens and copyright" 16(12) Journal Of Intellectual Property Law and Practice 1367-1385 (2021).

encompasses traditional ecological knowledge, medicinal practices, storytelling, and spiritual beliefs. Indigenous knowledge systems contribute not only to community resilience but also to broader discussions about sustainable living, biodiversity, and holistic perspectives on the world. [4]

Preserving and respecting these aspects is crucial, as they contribute to cultural diversity, foster cross-cultural dialogue, and provide insights that can enrich contemporary societies. The digital age and technologies like NFTs offer new ways to engage with, protect, and share these cultural treasures, but also pose challenges related to authenticity, ownership, and cultural representation. Indeed, as technology and innovation continue to advance, the delicate balance between embracing these advancements and safeguarding the integrity of cultural heritage and indigenous knowledge becomes increasingly vital. This balance is a paramount concern for several reasons:

Cultural Sensitivity: Innovation should be approached with cultural sensitivity, acknowledging that certain technologies or practices might clash with deeply held cultural beliefs or practices. Ensuring that technological interventions are in harmony with cultural values is essential to prevent unintentional disrespect or harm.

Authentic Representation: Technological interventions, such as digitizing artifacts or traditional knowledge, must prioritize accurate and respectful representation. Distorting or misrepresenting cultural elements can perpetuate stereotypes or dilute the true essence of these treasures.

Intellectual Property Rights: Indigenous knowledge is often collectively held and may not align with conventional intellectual property frameworks. Innovations must respect and protect communal ownership, avoiding situations where traditional knowledge is exploited without consent or benefit-sharing.

Equitable Participation: As innovation impacts cultural heritage and indigenous knowledge, it's imperative that communities are active participants in decisions regarding digitization, dissemination, and use. Empowering these communities to have a say in how their heritage is treated fosters inclusivity and respect.

Benefit-Sharing: When cultural heritage or indigenous knowledge is leveraged for commercial

4. L. J. Trautman, "Virtual art and non-fungible tokens" 50 Hofstra L. Rev., 361 (2021).

purposes using technologies like NFTs, mechanisms for fair compensation and benefit-sharing should be established. This ensures that communities receive their due share of the economic gains.

Long-Term Preservation: While technology can aid preservation, it also brings the risk of rapid obsolescence. Striking a balance involves employing innovative methods for preservation while ensuring the long-term accessibility of these digital assets.

Community Engagement: Innovations should be designed collaboratively with input from the communities involved. Involving indigenous peoples, cultural custodians, and heritage experts ensures that the solutions address real needs and concerns.

Education and Empowerment: Technology can serve as a tool for education and empowerment, helping communities to document, share, and revitalize their cultural heritage and knowledge on their own terms.

Legal and Ethical Frameworks: Evolving legal and ethical frameworks are necessary to govern the intersection of innovation and cultural heritage. This includes addressing issues such as repatriation of artifacts, data ownership, and informed consent.

Striking this balance requires open dialogue, interdisciplinary collaboration, and a commitment to upholding the rights and values of communities intertwined with these cultural treasures. As NFTs and other innovations continue to shape the landscape, a holistic approach that merges technological innovation with cultural stewardship will be essential to ensure a harmonious coexistence between tradition and progress.[5]

In the digital era, the domains of cultural heritage, artifacts, and indigenous knowledge confront a complex array of challenges that stem from the rapid advancements in technology and the digitization of information. One of the most pressing concerns is the issue of appropriation, where cultural elements are borrowed or imitated without proper understanding or respect for their origins. In a digital landscape characterized by easy accessibility and the rapid spread of information, the risk of misappropriation becomes amplified. Indigenous symbols, traditional designs, and sacred practices are often co-opted for commercial gain or diluted in meaning when disseminated without context. This appropriation not only distorts the cultural significance of these elements but also perpetuates cultural stereotypes, undermining the identity and dignity of

5. C. H., Wu, & C. Y. Liu, "Educational applications of non-fungible token (NFT)" 15(1) Sustainability 7 (2022).

the communities they belong to. Concurrent with appropriation is the commodification of cultural heritage and indigenous knowledge. The digital era's global connectivity has led to an increased demand for cultural artifacts and expressions, often leading to their commercialization for profit. This commodification can lead to a distortion of values, where objects or practices that hold profound cultural or spiritual significance are reduced to mere commodities for consumption. This erosion of intrinsic value can exacerbate the disconnect between a cultural item's original context and its digital representation, further contributing to the loss of cultural authenticity and depth.[6]

Another significant challenge in the digital era is the loss of control over cultural heritage and indigenous knowledge. Digital technologies enable the dissemination of information at an unprecedented speed and scale, but this very aspect also poses a risk. Once digital artifacts, images, or knowledge are shared online, they can quickly become divorced from their originating context. The loss of control over how cultural elements are represented, shared, or used in the digital space can lead to misinterpretations, inaccuracies, and ultimately, the dilution of their cultural significance. Indigenous communities, in particular, face the challenge of preserving their traditional knowledge while also navigating a digital environment where information can be easily manipulated or exploited.[7]

Moreover, the rapid digitization of cultural heritage and artifacts raises concerns about their vulnerability to loss or degradation. Digital materials are subject to the risks of technological obsolescence, data corruption, and digital decay. In the case of indigenous knowledge, the transition from oral traditions to digital formats may inadvertently expose sacred or sensitive information to unintended audiences. This potential loss of control over the narrative and the dissemination of knowledge pose a threat to the custodians of these traditions and their ability to preserve them authentically.

Addressing these challenges in the digital era requires a multifaceted approach that combines technological solutions with ethical considerations and legal frameworks. Collaboration between technology experts, cultural custodians, legal scholars, and policymakers is essential to create a digital landscape that respects the rights, values, and authenticity of cultural heritage,

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6. P. Fernandez, "Non-fungible tokens and libraries" 38(4) Library Hi Tech News 7-9 (2021).
7. D. He, "The Development of Digital Collection Platform under Responsible Innovation Framework: A Study on China's Non-Fungible Token (NFT) Industry" 8(4) Journal of Open Innovation: Technology, Market, and Complexity 203 (2022).

artifacts, and indigenous knowledge. The ultimate goal is to harness the power of technology to preserve, promote, and protect these domains while preventing their exploitation, dilution, or misrepresentation in the digital realm.

NFTS: TECHNICAL AND LEGAL OVERVIEW

Non-Fungible Tokens (NFTs) have emerged as a groundbreaking innovation within the realm of blockchain technology, transforming the way digital ownership and provenance are established. At their core, NFTs are cryptographic tokens built on blockchain networks, most commonly the Ethereum blockchain. Unlike traditional cryptocurrencies such as Bitcoin or Ethereum, which are fungible and interchangeable on a one-to-one basis, NFTs are indivisible and unique, representing distinct digital assets with their own distinct properties and values.

The foundation of NFTs lies in blockchain technology, which is a decentralized and distributed digital ledger. This ledger records transactions in a secure and transparent manner, enhancing trust and minimizing the need for intermediaries. Blockchain consist of a chain of blocks, each containing a list of transactions. What sets NFTs apart is their utilization of smart contracts, which are self-executing contracts with the terms of the agreement directly coded into them. These smart contracts enable the creation, ownership, and transfer of NFTs in a decentralized and automated fashion, reducing the reliance on centralized entities for authentication and verification.[8]

As the key characteristics distinguish NFTs from other digital assets as- Firstly, each NFT is unique, carrying specific attributes that differentiate it from any other token. This uniqueness is fundamental for representing one-of-a-kind digital items, such as digital art, collectibles, virtual real estate, or even ownership deeds to physical assets. Secondly, NFTs carry metadata that provides contextual information about the asset they represent. This metadata can include details about the creator, creation date, ownership history, and other relevant information that contributes to the asset's provenance and authenticity. The immutability of the blockchain ensures that this information remains tamper-proof and verifiable over time. NFTs facilitate true ownership and provenance tracking. Through the transparency and permanence of blockchain, the history of ownership is traceable, eliminating doubts about authenticity and enabling creators to retain a portion of the value generated through subsequent sales. This concept of

8. B. Hammi, "Non-fungible tokens: a review" 6(1) IEEE Internet of Things Magazine 46-50 (2023).

royalties is encoded into the smart contract, ensuring that creators are compensated every time their NFT changes hands in the secondary market.[9]

The impact of NFTs on various industries is profound. In the context of cultural heritage, artifacts, and indigenous knowledge, NFTs offer a novel means of preserving, displaying, and monetizing intangible and tangible cultural assets. The combination of blockchain's transparency and NFTs' unique characteristics addresses the challenges of authenticity, provenance, and ownership rights that have plagued the digitization of these domains. However, while NFTs present exciting opportunities, their adoption also raises legal, ethical, and environmental considerations that must be thoughtfully addressed to ensure a sustainable and equitable digital future.

Within the Non-Fungible Token (NFT) ecosystem, the concepts of ownership and provenance take on new dimensions that leverage the unique characteristics of blockchain technology. Ownership, in this context, goes beyond traditional possession to encompass a verifiable and decentralized form of control over digital assets. Provenance, on the other hand, refers to the historical record of an asset's ownership and transactions, ensuring its authenticity and origin can be traced back with certainty.[10]

NFTs introduce a paradigm shift in ownership by representing digital assets as unique tokens on a blockchain. When someone owns an NFT, they hold a cryptographic key that provides them with a special kind of ownership: the ownership of a specific, indivisible digital item. This ownership is secured and verified by the blockchain network, making it tamper-proof and resistant to unauthorized alteration. Unlike traditional digital files that can be copied infinitely, NFT ownership is recorded on the blockchain, ensuring that the owner possesses the original, authentic version of the digital asset.

Provenance, within the NFT ecosystem, is a mechanism that guarantees the traceability and authenticity of an NFT's history. Every NFT has metadata attached to it, containing information such as the creator's details, creation date, and any relevant attributes. This metadata is stored on the blockchain, creating an immutable record of the NFT's journey from its creation to its current owner. This transparent provenance ensures that potential buyers or viewers can verify the

9. C. Flick, "A critical professional ethical analysis of Non-Fungible Tokens (NFTs)" Journal of Responsible Technology 12 (2022).
10. P. Gonserkewitz, "Non-Fungible Tokens: Use Cases of NFTs and Future Research Agenda" 12(3) Risk Governance & Control: Financial Markets & Institutions 56 (2022).

legitimacy and history of the NFT before acquiring it. Provenance is a powerful tool for preventing the circulation of counterfeit or misrepresented digital assets, a concern that has long plagued the art and collectibles market. These concepts of ownership and provenance within the NFT ecosystem have far-reaching implications, especially in industries like art, cultural heritage, and indigenous knowledge. By providing a secure and transparent method of asserting ownership and tracking the history of digital assets, NFTs empower creators, collectors, and communities to interact with digital content in ways that were previously unattainable. However, challenges such as legal recognition of NFT ownership and the environmental impact of blockchain networks underscore the need for careful consideration of the broader implications of this technology.[11]

The legal categorization of Non-Fungible Tokens (NFTs) within the cultural and indigenous contexts poses significant challenges due to the unique nature of these digital assets and their intersection with traditional heritage and indigenous knowledge. NFTs straddle various legal categories, and existing regulatory frameworks often struggle to comprehensively address their complexities.

In the cultural context, NFTs can represent digital versions of artifacts, artworks, or other cultural expressions. The legal categorization of these assets involves aspects of intellectual property law, contract law, and property law. For instance, the sale and transfer of NFTs could raise questions about copyright ownership, licensing agreements, and potential royalty claims for creators. However, these legal concepts were initially developed for physical assets and may not seamlessly apply to the digital and decentralized nature of NFTs. This results in regulatory gaps and uncertainty around issues such as resale rights, fair use, and the balance between creator rights and public access to digital cultural heritage.[12]

In the indigenous context, NFTs can intersect with traditional knowledge, cultural practices, and spirituality. Indigenous communities often have distinct systems of ownership, stewardship, and knowledge transmission that may not align with conventional legal frameworks. The unauthorized tokenization of indigenous cultural elements as NFTs raises ethical and legal concerns about misappropriation, infringement of cultural rights, and violation of collective ownership. Protecting indigenous knowledge within the NFT space requires innovative legal

11. K. A. Houser, & J. T. Holden, "Navigating the non-fungible token" Utah L. Rev., 891 (2022).
12. F. Chiacchio, D'Urso, D., Oliveri, L. M., Spitaleri, A., Spampinato, C., & Giordano, D, "A non-fungible token solution for the track and trace of pharmaceutical supply chain" 12(8) Applied Sciences 4019 (2022).

solutions that respect indigenous self-determination and acknowledge the importance of informed consent, benefit-sharing, and community involvement.

Also, regulatory gaps emerge due to the cross-border nature of NFT transactions. The global nature of the internet and blockchain networks means that NFTs can be created, sold, and purchased from virtually anywhere. This challenges traditional jurisdictional boundaries and complicates enforcement efforts when disputes arise. The lack of international harmonization on NFT regulations exacerbates these challenges. Addressing these regulatory gaps necessitates a multi-faceted approach. It involves adapting existing legal frameworks to account for the unique attributes of NFTs, while also developing new regulations that specifically address the cultural and indigenous implications of NFT tokenization. Collaboration among legal experts, cultural heritage organizations, indigenous representatives, and technology developers is crucial to ensure that legal categorizations and regulations align with ethical considerations, respect cultural diversity, and protect the rights of creators, communities, and traditional knowledge holders.

TRADITIONAL OWNERSHIP AND CULTURAL RIGHTS: NFT'S SCALING

The establishment and maintenance of traditional ownership and cultural rights within the domains of cultural heritage, artifacts, and indigenous knowledge are deeply rooted in historical practices, communal consensus, and a profound connection to heritage. Cultural heritage encompasses a spectrum of tangible and intangible elements that hold significance for communities. Traditional ownership is often established through generations of custodianship, where specific families, clans, or groups are recognized as guardians of certain artifacts or practices. This recognition is grounded in cultural norms, oral traditions, and shared narratives that affirm the custodians' responsibility for preserving and transmitting these elements to future generations. Artifacts, as physical embodiments of cultural heritage, may bear specific significance tied to rituals, historical events, or identity markers. Their ownership is frequently vested in the collective, rather than in individuals, reflecting the communal nature of cultural identity. Artifacts' provenance is intricately linked to stories passed down through generations, often enshrining narratives that reinforce the interconnectedness between the past, present, and future. This shared ownership ethos within cultural heritage emphasizes the value of artifacts beyond their material worth, underscoring their role as carriers of history and cultural

continuity.[13]

In indigenous contexts, cultural rights are inseparable from the land, language, and traditional knowledge that define a community's identity. Indigenous knowledge systems, developed over millennia, encompass ecological wisdom, medicinal practices, and spiritual beliefs. Ownership is vested in the collective, and knowledge is transmitted through oral tradition. Indigenous cultural rights are intricately tied to self-governance, autonomy, and the preservation of unique worldviews that reflect indigenous people's deep relationships with their environments. These rights often intersect with legal concepts such as intellectual property, requiring nuanced approaches that respect customary practices while addressing the challenges of protection in the digital age.

The establishment and maintenance of traditional ownership and cultural rights face challenges in a rapidly changing world. Globalization, digital technology, and evolving legal systems can disrupt these traditional frameworks. The emergence of NFTs introduces both opportunities and risks. On one hand, NFTs offer a novel avenue to record and assert ownership of digital representations of artifacts or indigenous knowledge. On the other hand, their commercial nature and potential for misappropriation raise concerns about commodification and exploitation.

Balancing these concerns requires innovative solutions that combine technological tools with cultural sensitivity. Collaborative approaches that involve indigenous communities, cultural institutions, legal experts, and technology developers are crucial. These approaches must recognize the intrinsic connection between ownership and cultural significance, and they must safeguard traditional knowledge holders' rights while adapting to the digital era. Ultimately, the preservation of traditional ownership and cultural rights demands a delicate negotiation between preserving heritage's intrinsic value and harnessing technology's potential to facilitate its protection and dissemination.[14]

The utilization of Non-Fungible Tokens (NFTs) to represent and protect traditional ownership and cultural rights presents a range of promising benefits that resonate deeply within the domains of cultural heritage, artifacts, and indigenous knowledge-

13. A. Barbon, & Ranaldo, A. "Non-fungible tokens" The Fintech Disruption: How Financial Innovation Is Transforming the Banking Industry Cham: Springer International Publishing 163 (2023).
14. M. Middleton, "White Paper-The IEEE Global Initiative on Ethics of Extended Reality (XR) Report-Business, Finance, and Economics" The IEEE Global Initiative on Ethics of Extended Reality (XR) Report--Business, Finance, and Economics 1-30 (2022).

Immutable Ownership Records: NFTs, built upon blockchain technology, offer an immutable and transparent record of ownership. This is particularly significant for traditional ownership, where establishing and proving historical custodianship can be challenging. NFTs provide a digital equivalent to ancestral narratives, allowing communities to assert ownership with confidence and thwart disputes over provenance.

Digitizing Intangible Heritage: NFTs enable the digital representation of intangible cultural heritage, such as oral traditions, songs, and rituals. By tokenizing these intangible elements, indigenous communities can ensure their preservation and dissemination while maintaining control over who accesses and uses them.

Secure Provenance Tracking: NFTs embed metadata detailing an asset's history, creator, and other relevant information. This provenance tracking ensures that the journey of an asset, be it an artifact or indigenous knowledge, is transparent and verifiable. This can deter the unauthorized use of cultural elements and promote respect for traditional ownership.

Royalties and Benefit-Sharing: NFTs can be programmed to automatically distribute royalties to creators or custodians whenever an asset is resold. This mechanism allows indigenous communities and artists to receive ongoing financial recognition for their cultural contributions, helping sustain their cultural practices and livelihoods.

Cultural Revitalization: NFTs empower communities to tell their own stories and reclaim narratives through digital platforms. This can foster cultural revitalization, especially among younger generations, who can engage with their heritage in contemporary ways.

Global Outreach and Education: NFTs provide a digital platform for sharing cultural heritage and indigenous knowledge globally. This outreach facilitates cross-cultural understanding, supports educational initiatives, and creates awareness about the value of diverse cultural expressions.

Leveraging Digital Economies: NFTs tap into the burgeoning digital economy, enabling indigenous creators and cultural stakeholders to participate in digital marketplaces and earn income. This economic empowerment can contribute to the sustainability of cultural traditions and encourage innovation.

Decentralization and Autonomy: NFTs decentralize ownership and control, aligning with indigenous values of self-governance and autonomy. Communities can manage and administer their digital heritage without relying on external intermediaries.

Legal Documentation: NFTs can serve as legal documentation of ownership, particularly in cases where traditional ownership lacks formal legal recognition. They offer a digital equivalent of legal deeds, affirming a community's custodianship.

While the benefits of NFTs for traditional ownership and cultural rights are evident, it's crucial to acknowledge potential challenges. NFT adoption must occur in tandem with culturally sensitive and ethical practices, ensuring that communities have agency in decisions involving their heritage. Engaging indigenous representatives, legal experts, cultural institutions, and technology developers is essential to harness NFTs' potential while safeguarding the integrity and dignity of cultural heritage and knowledge.

PROTECTING CULTURAL HERITAGE AND INDIGENOUS KNOWLEDGE THROUGH NFTS

The integration of Non-Fungible Tokens (NFTs) into the preservation of cultural heritage and indigenous knowledge holds immense potential for safeguarding these invaluable assets in the digital age. NFTs offer a dynamic platform to address some of the persistent challenges faced by cultural custodians and indigenous communities, providing innovative solutions that balance technological progress with cultural integrity. By digitizing cultural heritage, artifacts, and indigenous knowledge as NFTs, custodians can establish a secure and immutable record of ownership and provenance. This addresses concerns of misappropriation and unauthorized use, as NFTs serve as digital certificates of authenticity, verifiable on the blockchain. Such authentication bolsters the confidence of communities, artists, and collectors, reducing the risk of counterfeit replicas that dilute the value and significance of these assets.[15]

NFTs contribute to the revival and celebration of cultural practices that might be endangered or overlooked. For indigenous communities, NFTs offer an avenue to share their traditional knowledge, stories, and art on a global stage while maintaining control over how they are represented. Indigenous artists can monetize their work and establish direct relationships with audiences, bypassing intermediaries that historically may have exploited their creations. One of the transformative aspects of NFTs is the potential for fair compensation through royalties. Traditional creators and indigenous knowledge holders can receive a percentage of the proceeds each time their NFT changes hands in the secondary market. This mechanism supports

15. D. Wei, & Rafael, A. "Digital art and the belt and road initiative: challenges and opportunities" 17 Braz. J. Int'l L. 257 (2020).

sustainable economic models for artists and custodians, aligning with the principle of benefit-sharing. For indigenous communities, the ability to generate income from their cultural heritage fosters a sense of agency and self-determination, vital components in preserving their ways of life. NFTs amplify the reach and impact of cultural heritage and indigenous knowledge. The digital nature of NFTs transcends geographical boundaries, allowing communities to engage with global audiences and share their narratives, struggles, and achievements. This digital outreach becomes an educational tool, promoting cross-cultural understanding and dispelling misconceptions that might surround these traditions.[16]

The adoption of NFTs for cultural heritage and indigenous knowledge is not without challenges. Concerns over cultural commodification, ethical representation, and the digital divide must be addressed. Cultural custodians and communities must actively shape the process, ensuring that NFT projects align with their values, respect protocols of informed consent, and prioritize cultural sensitivity.

Ultimately, NFTs serve as a bridge between tradition and innovation, offering a medium where past, present, and future converge. As technological advancements reshape the landscape of cultural preservation, NFTs have the potential to empower cultural custodians, indigenous communities, and creators alike, forging a path that not only protects cultural heritage but also strengthens its relevance in an interconnected world. Through thoughtful and collaborative initiatives, NFTs can become a transformative force for preserving the essence of cultures and traditions that are the cornerstones of our shared human experience.

LEGAL-ETHICAL IMPLICATIONS VIA NFT'S

The rise of Non-Fungible Tokens (NFTs) has introduced a host of legal challenges, particularly in areas such as copyright, intellectual property, cultural rights, and the protection of indigenous knowledge. These challenges stem from the unique attributes of NFTs and their potential to disrupt traditional legal frameworks-

Copyright and Ownership: NFTs often involve digital artworks, which are subject to copyright protection. However, tokenizing an artwork as an NFT raises questions about the scope of ownership. While owning an NFT may grant the holder certain rights, the underlying copyright might still belong to the original creator. This disconnect between NFT ownership and

16. Wajiha Rehman, "NFTs: Applications and challenges" In 2021 22nd International Arab Conference on Information Technology (ACIT) 1-7 (2021).

copyright ownership can lead to legal disputes and uncertainties, especially when the NFT is resold or used in ways that the creator did not anticipate.

Licensing and Permissions: The creation of NFTs from existing copyrighted works demands an understanding of licensing agreements. Artists may not necessarily hold the rights to create and sell NFTs of works they've created for clients or employers. Unauthorized tokenization could infringe upon the rights of copyright holders and breach contractual agreements, leading to legal actions.

Derivative Works and Transformation: NFTs can also involve derivative works that modify or transform existing copyrighted material. Determining the extent of transformation and whether it constitutes fair use or copyright infringement is a complex challenge. The transformative nature of NFTs can blur the lines between original creation and derivative work.

Cultural and Indigenous Rights: NFTs that involve cultural heritage and indigenous knowledge raise concerns about cultural appropriation and misrepresentation. Indigenous communities often hold collective ownership over their cultural elements, which may not align with copyright norms. Unauthorized tokenization of indigenous symbols or knowledge can infringe upon cultural rights and indigenous intellectual property, demanding new legal mechanisms that respect customary practices.

Digital Repatriation: The international movement to repatriate cultural artifacts raises questions about whether digital representations of these artifacts can be considered legitimate repatriation. NFTs can complicate efforts to address historical imbalances in cultural heritage ownership, as the digital assets might still be controlled and monetized by entities outside the originating community.

Jurisdiction and Enforcement: The decentralized nature of blockchain and NFT transactions presents jurisdictional challenges. Legal enforcement becomes complex when transactions occur across international borders, and legal remedies may be limited due to the pseudonymous nature of blockchain addresses.

Smart Contract Liability: Smart contracts, which automate NFT transactions, introduce potential legal liabilities. Flaws in the code or misinterpretations of the contract terms could result in unintended consequences, such as the transfer of NFT ownership without proper authorization.

Addressing these legal challenges necessitates the evolution of existing legal frameworks and the creation of novel solutions. Collaborative efforts involving legal experts, artists, creators, cultural institutions, indigenous representatives, and technology developers are essential. A balance must be struck between protecting creators' and communities' rights and enabling the innovative potential of NFTs. Legal reforms should recognize the unique attributes of NFTs, the intersection of technology and culture, and the importance of fostering a legal environment that upholds ethical and cultural considerations.[17]

Tokenizing cultural assets, including artworks, artifacts, and indigenous knowledge, raises significant ethical concerns, foremost among them being the potential for cultural commodification. This refers to the process by which cultural elements are transformed into commodities that are bought, sold, and traded for profit, often without adequate consideration for their cultural significance, origins, or the rights of the communities from which they originate.

The central ethical concerns is the risk of reducing rich and multifaceted cultural expressions into mere commodities for financial gain. Cultural heritage, whether tangible or intangible, holds intrinsic value to communities, often embodying deep spiritual, historical, and communal connections. Tokenizing these assets can trivialize their importance and commodify elements that should be respected and revered. Moreover, tokenization may inadvertently reinforce existing power imbalances, perpetuating historical injustices. Indigenous communities, often marginalized and historically subjected to exploitation, are particularly vulnerable to cultural commodification. Their traditional knowledge, symbols, and practices risk being tokenized without their consent or input, reinforcing a history of cultural appropriation and dispossession.[18]

The ease of tokenization and global accessibility of NFT markets can also lead to a lack of cultural context and understanding. Items that hold immense significance within a community might be bought, sold, and owned by individuals outside of that culture who lack a nuanced understanding of their meaning. This divorces the cultural asset from its original context and may result in misinterpretation, misrepresentation, or misappropriation.

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17. Mochammad Tanzil Multazam, "Exploring the Legal and Policy Implications of Non-Fungible Tokens." 2 Jurnal Politik dan Pemerintahan Daerah 293 (2022).
18. Adarsh Vijayakumaran, "Democratizing NFTs: F-NFTs, DAOs and Securities Law" Richmond Journal of Law and Technology 56 (2021).

The financial motivations of collectors and investors might overshadow the preservation and respect for cultural heritage. When NFTs are seen primarily as investment opportunities, the focus shifts away from the cultural value they hold. This could drive demand for cultural assets as investment vehicles rather than as vehicles for cultural appreciation and understanding. Mitigating these ethical concerns requires a multifaceted approach. Collaboration between creators, cultural custodians, indigenous representatives, legal experts, and technology developers is crucial. Informed consent, cultural sensitivity, and community involvement must be at the forefront of any tokenization effort. Implementing benefit-sharing mechanisms, such as directing proceeds to community projects or educational initiatives, can help balance the economic benefits of tokenization with the ethical responsibilities toward cultural preservation.[19]

Ultimately, ethical tokenization should prioritize the empowerment, autonomy, and dignity of the communities and individuals connected to the cultural assets. It should reflect a genuine commitment to preserving cultural heritage and knowledge while avoiding their reduction to mere commodities in the digital marketplace.6. Cross-Cultural Perspectives and ChallengesThe framework for Ethical NFTs as creating and trading ethical NFTs that respect traditional ownership and cultural rights requires a comprehensive framework that balances technological innovation with cultural sensitivity, inclusivity, and ethical considerations. This framework should be collaborative, transparent, and adaptable to the diverse needs of different communities as proposed outline-

Community Engagement and Informed Consent:

Begin with engaging the relevant cultural communities, artists, and custodians. Ensure their active involvement in decisions related to tokenization, ownership, and use of cultural assets. Obtain informed consent and establish a clear understanding of the goals and implications of NFT tokenization.

Cultural Sensitivity and Protocols:

Develop guidelines that respect cultural protocols, taboos, and values. Create a set of principles for tokenization that consider the cultural significance of the asset, including its spiritual, historical, and communal dimensions. These guidelines should emphasize the importance of preserving cultural integrity.

19. Iris HY Chiu, and Jason G. Allen. "Exploring the Assetisation and Financialisation of Non-Fungible Tokens (NFTs): Opportunities and Regulatory Implications" Banking and Finance Law Review Summer 33 (2022).

Benefit-Sharing Mechanisms:

Design a mechanism for sharing the benefits generated by NFT sales. Allocate a portion of the proceeds to the community, artists, or initiatives that align with the cultural values and goals. This mechanism helps ensure that financial gains are reinvested in cultural preservation, education, and community well-being.

Provenance and Authenticity:

Prioritize transparent and detailed provenance records within the metadata of NFTs. This information should include details about the creator, historical context, and community approval. Authenticity verification mechanisms can deter the tokenization of inauthentic or culturally insensitive assets.

Smart Contracts and Cultural Agreements:

Incorporate smart contracts that reflect cultural agreements. These contracts can outline the terms of use, resale royalties, and any restrictions on the NFT. Such contracts may also specify the intended use of proceeds and ensure that the NFT retains its cultural value throughout its lifecycle.

Educational and Cultural Context:

Provide educational materials accompanying NFTs, explaining the cultural context and significance of the asset. This enhances understanding and respect among collectors and viewers. Include narratives, stories, or traditional knowledge to enrich the NFT experience.

Community Verification:

Explore mechanisms for community verification to ensure that NFTs are created and traded with the community's approval. This verification process can involve community representatives or elders, creating an additional layer of assurance regarding cultural authenticity.

Access and Control:

Grant the community control over the accessibility of NFTs, allowing them to decide who can view or purchase the assets. This respects their desire to maintain the exclusivity of certain cultural elements and safeguards against inappropriate use.

Continuous Feedback Loop:

Establish an ongoing feedback loop with the community to address evolving concerns and aspirations. This ensures that the framework remains adaptable and responsive to changes within the cultural landscape.

Regulatory and Legal Alignment:

Collaborate with legal experts to ensure that the ethical NFT framework aligns with existing intellectual property, cultural heritage, and indigenous rights laws. Advocate for necessary legal reforms to address the unique challenges posed by NFTs.

So the implementation of this framework involves a nuanced and community-centric approach. It's important to recognize that each cultural community's needs and priorities are unique. By prioritizing cultural respect, informed consent, and equitable benefit-sharing, ethical NFTs can serve as a bridge between technological innovation and the preservation of cultural heritage and knowledge.

CONCLUSION AND FUTURE SCOPE

The emergence of Non-Fungible Tokens (NFTs) has sparked a paradigm shift in how we approach and interact with cultural heritage, artifacts, and indigenous knowledge in the digital realm. These unique digital assets hold the promise of preserving, promoting, and protecting the rich tapestry of human creativity and tradition. However, this transformation comes with a complex landscape of legal, ethical, and cultural considerations that demand thoughtful navigation.

NFTs present an unprecedented opportunity to establish secure ownership, transparent provenance, and innovative monetization models for cultural artifacts and indigenous knowledge. They enable us to bridge the gap between historical significance and technological innovation, allowing cultural custodians and communities to assert their ownership rights and share their stories with a global audience.

Yet, the integration of NFTs into the cultural domain requires a delicate balance between innovation and preservation. Ethical challenges, such as the potential for cultural commodification and the misappropriation of indigenous knowledge, underscore the need for robust frameworks that respect traditional ownership and cultural rights. Informed consent, benefit-sharing mechanisms, and community involvement stand as pillars of these frameworks, ensuring that the benefits of NFT tokenization are equitably distributed and that the cultural significance of these assets remains intact. As NFTs continue to evolve, collaboration becomes paramount. Cultural institutions, indigenous communities, legal experts, artists, and technology developers must join forces to shape an ethical, inclusive, and culturally sensitive approach to NFTs in the context of cultural heritage and indigenous knowledge. By doing so, it can harness

the potential of NFTs to both preserve the past and embrace the future, fostering a digital landscape that reflects the intricate beauty and diversity of human culture for generations to come.

The incorporating of these principles such as informed consent, benefit-sharing, and community involvement is pivotal to creating ethical NFTs that respect traditional ownership and cultural rights. These principles acknowledge the agency and autonomy of communities and individuals connected to cultural assets, while ensuring that the benefits of NFT tokenization are distributed fairly and in alignment with cultural values. The informed consent lies at the heart of ethical NFT tokenization. It requires transparent communication with cultural communities, artists, and custodians about the intentions, implications, and potential risks associated with tokenizing cultural assets. This process involves open dialogue, where stakeholders are informed about the technology, market dynamics, and potential challenges. Informed consent respects the right of individuals and communities to make informed decisions about how their cultural heritage is represented, shared, and monetized in the digital space. Similarly, Benefit-sharing mechanisms are essential for ensuring that the economic gains derived from NFT sales are directed back to the communities and individuals that contribute to the cultural asset. This can take the form of direct financial compensation, royalties, or investments in community projects, educational initiatives, or cultural preservation efforts. Benefit-sharing recognizes that NFTs should not merely enrich collectors and investors, but also contribute to the well-being and sustainability of the communities whose cultural assets are being tokenized. Also, Community involvement is vital throughout the entire NFT tokenization process. It extends beyond informed consent to encompass collaborative decision-making, validation of authenticity, and even co-creation of NFTs. Involving the community ensures that the asset's cultural significance is accurately represented, contextualized, and respected. It can also result in narratives, stories, or insights that enhance the NFT experience, fostering cross-cultural understanding and appreciation.

The future scope of Non-Fungible Tokens (NFTs) in the context of cultural heritage, artifacts, and indigenous knowledge is both promising and multifaceted, offering a realm of possibilities that extend beyond the current horizon. As technology and society continue to evolve, NFTs are poised to play a transformative role in how it perceive, protect, and engage with our collective cultural heritage. The future of NFTs in cultural heritage, artifacts, and indigenous knowledge lies in a delicate dance between technological innovation, cultural preservation, and ethical

considerations. By leveraging the power of NFTs to honor, protect, and share our diverse cultural narratives, it has the opportunity to forge a digital legacy that celebrates our shared human heritage while embracing the tapestry of our differences.

NURTURING WOMEN ENTREPRENEURS THROUGH INTELLECTUAL PROPERTY RIGHTS: A STUDY ON INDIA'S CREATIVE AND INNOVATIVE MILIEU

Shivanshi Thakur*

"Creative India; Innovative India"

INTRODUCTION

Ingenuity and innovation are indispensable elements for sustainable growth and advancement of any nation. The ability to think creatively and implement novel ideas sets an individual apart from the rest of the world. Despite its potential, India struggles to secure a top position in the global rankings due to its lower rank in intellectual property in comparison to countries like the USA, Japan, France, Germany, and China. Intellectual Property (IP) is also a crucial parameter in determining a nation's standing in the 'Global Innovation Index.' In 2021, the US Chamber of Commerce's Global Innovation Policy Centre report ranked India at the fortieth position among 53 global economies in the Intellectual Property Index.[1] The Indian economy has made significant strides in recent years, as evidenced by its improved rankings in various global indices. For instance, India's position in the Global Innovation Index has ascended from 81 in 2015 to 52 in 2019, indicating the country's enhanced ability to innovate and generate new ideas. Additionally, India's ranking in the World Bank Logistics Performance Index has improved from 54 in 2014 to 44 in 2018, indicating an increased efficiency in the country's logistics and supply chain management. These developments clearly demonstrate an enhanced level of confidence among the global business and trade community in the Indian economy.[2] It is noteworthy that the involvement of Indian females in the domains of innovation and startups is a matter of great concern. Assessing the level of gender inclusivity and equality in India requires consideration of their significant contributions to the economy and Intellectual Property Rights (IPR).The Press Information Bureau report, states that 45% of start-ups are represented by women entrepreneurs.[3] Furthermore, as per government data, 18% of micro, small and medium enterprises (MSMEs) registered in India are owned by women entrepreneurs. The latest data

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1. Rupinder Tewari & Ms. Mamta Bhardwaj,Intellectual Property-A Primer for Academia(Publication Bureau, Panjab University Chandigarh, 2021).
2. Trade Policy Review Body, India, Report: WTO Trade Policy Review,(25 November, 2020)
3. Government of India, Year-end Review – 2021 for Department for Promotion Of Industry & Internal Trade (Ministry of Commerce and Industry,2021).

released by the Minister of State for MSMEs, Bhanu Pratap Singh Verma, reveals that out of the total 99,58,903 MSMEs registered on the Udyam portal as of August 3, 2022, 17,96,408 were women-owned MSMEs. According to the MSME Ministry's annual report for 2021-22, based on the National Sample Survey (NSS) 73rd round conducted in FY16, out of 6.33 crore MSMEs, 6.08 crore were proprietary concerns with men owning 79.63% of enterprises, while women owned 20.37% of them. The report also indicates that the dominance of men-owned enterprises was more evident in urban areas (81.58%) than in rural areas (77.76%).[4] This demonstrates that women are now slowly moving towards innovation and business while working in diverse sectors like science, technology, manufacture, retail, service etc. Throughout history, humans have recognized the power of knowledge, both for virtuous and evil purposes. By the virtue of above data, it can be said that thankfully, India has become increasingly aware of the importance of creating and capturing intellectual wealth, especially after globalization, and has made significant progress in terms of establishing new ventures and patent protection activity. In this perspective, the only cause of concern is a smaller number of female forces working in the field of IPR and Industrial establishments, causing a huge gender-divide in the economy. Intellectual Property (IP), which refers to the property created with the ingenuity of the mind, has become a fast-growing field, and it plays a crucial role in the economic development of a nation. Acquiring IP, which includes copyrights, patents, trademarks, industrial designs, geographical indications, traditional knowledge, layout designs, biodiversity, etc., not only boosts the image of an organization or individual but also helps to address societal issues while potentially bringing in significant revenues. Moreover, companies and entrepreneurs who are ignorant of IP laws may face legal action for using manufacturing practices based on previously protected products and technologies. Therefore, it is essential to spread awareness of IP among prospecting women entrepreneurs, teachers, scientists, researchers, and students in universities and colleges. This will help to avoid unnecessary litigation while capturing and protecting innovation.[5] The significance of Intellectual Property (IP) rights is evident from the fact that they are enshrined in Article 27 of the Universal Declaration of Human Rights of 1948. This article declares that every individual has the right to protection of the moral and material interests that arise from their authorship of any scientific, literary or artistic production.[6] The present study delves into the

4. Financial Express,Govt data: Only 18% of 1 crore registered MSMEs owned by women entrepreneurs by Parvathy Pillai, *available* at: https://www.financialexpress.com/industry/sme/msme-eodb-govt-data-only-18-of-1-crore-registered-msmes-owned-by-women-entrepreneurs/2629578/ (visited on Aug. 10, 2023).
5. *Supra* note 5.

arena of IPR protection available to women entrepreneurs in India and states why efforts are still needed in this area for a sustainable approach of economic growth.

PURPOSE AND METHODOLOGY OF THE STUDY

The researcher has utilized a blend of doctrinal and non-doctrinal study methodologies, yielding a comprehensive understanding necessary for the successful completion of the study. The research tries to explore and investigate the potential benefits offostering an inclusive environment for women in the IP regime and entrepreneurial landscape. The study also attempts a rigorous analysis of the important government initiatives taken for uplifting the under-represented women entrepreneurs & the recent reforms in IP sector. The research proposes practical recommendations for policymakers and relevant stakeholders to improve the IP ecosystem in India, with a specific focus on women's participation, representation, and ownership. It further contributes to the existing literature on gender inclusivity and IP rights in emerging economies and highlight the significance of IP protection in promoting sustainable economic growth and development.

ENTREPRENEURSHIP, IPR SYSTEMS AND WOMEN ACROSS THE GLOBE

The word "entrepreneur" finds its origins in the French term "enterprendre," which encapsulates the notion of undertaking a venture. It signifies an individual who dares to innovate and manifests their own ideas into tangible manifestations. Poornima Charantimath suggests that the term "entrepreneur" stems from the Sanskrit word "Antaraprerana,"[7] representing the essence of creative drive and the decisive actions undertaken by an entrepreneur to establish their enterprise. In order to safeguard these profound ideas conceived within the depths of the human mind, the concept of 'intellectual property' emerged as an ingenious invention. It encompasses a diverse set of legal principles that govern the use of various ideas and insignia. Intellectual property rights are established with the fundamental aim of safeguarding the products of human intellect, much like physical properties are protected.

Strong protection of intellectual property (IP) rights not only benefits content creators but also protects the rights of women. For instance, countries with strong copyright protection typically have higher salaries for female artists and actresses. IP rights offer content creators exclusive control over their creations, thus restoring the financial incentive to create and innovate. This is of particular significance for women because countries with stronger IP rights tend to have

6. Art. 27, The Universal Declaration of Human Rights (1948).
7. P. Charantimath, Entrepreneurship Development Small Business Enterprises (Pearson, India, 2nd edt. 2014).

better measures of gender equality. Women in the economy have the potential to drive change and lead entrepreneurship, and IP rights enable women to secure financing, signal their innovation, and negotiate access to others'. According to the author of the Patent Index, Prof. Walter G. Park, American University, the protection of creativity, including contributions from traditional and indigenous knowledge developed by women, is essential. The weak IP regimes in developing countries exacerbate gender discrepancies in living conditions. These countries tend to have higher levels of female unemployment, infant mortality rates, and lower female education rates. Rampant rights abuses disincentivize major companies from entering the market, limiting investments that can raise GDP per capita and improve the standard of living for all. Protecting IP rights is essential to changing this, as the country that protects IP rights the most has the best entrepreneurial environment for women. Historically, women inventors have played a significant role in creating some of today's most common items. For instance, Mary Anderson patented the windshield wiper, and Hedy Lamarr's frequency hopping technology laid the foundation for Bluetooth and WiFi technology. Different indexes show that countries that do a better job of protecting property rights tend to have better measures of gender equality, including access to land, credit, and equal inheritance rights. Empowering women by giving them property rights is a solution to poverty, as stated by Prof. Sary Levy-Carciente of Universidad Central de Venezuela.Protecting IP rights is a win-win situation for all societies. It creates economic incentives for innovation and investment, resulting in economic growth and prosperity. Additionally, it elevates the position of women in society to one of more equality with men, resulting in even more long-term economic growth.[8]

In United States, such encouragement can be traced back to 1979 when the US small business administration established the office for women's ownership. The establishment of this office demonstrated governmental commitment to supporting female enterprise and it is therefore, not surprising that the US has the highest participation rate of female entrepreneurship amongst all developed economy of 30%. As a result, the US is often regarded as an example when it comes to female entrepreneurship and the benchmark against which to measure female entrepreneurship in other countries. And example of this comes from UK where the department of trade and industry States its aim as *"to increase significantly the numbers of women starting and growing business in UK to proportionately match or exceed the level achieved in the USA".* Although

8. Forbes, How IP Rights Empower Women by Lorenzo Montanar,*available* at

the United Kingdom has witnessed the introduction and embedding of a number of initiatives to support female enterprises in the last 10 years, such initiatives do not appear to have a longevity of their US counterparts and as a result, have not delivered to the same degree. Policy initiative aimed at increasing women's entrepreneurship must just not focus on promoting entrepreneurship as available career option or creating an enterprise culture, rather they must take into account the social-economic context of the countries in which they are implemented, otherwise their impact will be limited. Obviously, international comparisons do provide us some critical insights with regard to the best practice; however, caution must be exercised as the basis for the data may not be compatible or theoretically/ statistically Robust.[9]

NATIONAL IPR POLICY AND WOMEN ENTREPRENEURS

In pursuit of sustainable economic development, the United Nations' Sustainable Development Agenda 2015 has identified gender equality (goal no. 5) and decent work & economic growth (goal no. 8) as vital components. India has implemented several policies and plans to promote gender inclusivity and women's emancipation to achieve these goals. The inclusion of provisions pertaining to women entrepreneurs in the national IPR policy is a noteworthy step in this direction. The National Intellectual Property Rights Policy was introduced by the Department for Promotion of Industry and Internal Trade (DPIIT) under the Ministry of Commerce and Industry in 2016. Its aim was to raise public awareness about the economic, social, and cultural benefits of Intellectual Property Rights (IPRs) across all sections of society while providing clear guidelines on IPR issues. This study examines some of the key provisions of the National IPR Policy that relate to women entrepreneurs:

a) Creating awareness and building capacity among women entrepreneurs, innovators, and creators on IP laws and processes.

b) Encouraging and promoting women's participation in IP-related activities, such as research and development, technology transfer, and commercialization of IP.

c) Providing support and incentives to women-owned businesses, start-ups, and innovators in the form of funding, mentoring, and incubation facilities.

d) Strengthening the legal and regulatory framework for the protection of women's IP rights, including trademarks, patents, and copyrights.

9. Maura McAdam, Women's Entrepreneurship 29(Routledge UK, 2023).

e) Encouraging and facilitating the registration of IP by women entrepreneurs and innovators.

f) Recognizing and protecting the traditional knowledge and intellectual property rights of women, especially in indigenous and rural communities.

g) Providing support for women-led ventures in emerging fields such as biotechnology, nanotechnology, and green technology.

These provisions are aimed at creating a more gender-inclusive and supportive environment for women in the field of intellectual property, and promoting their participation and contribution to innovation and economic growth.[10] In May 2016, a comprehensive National Intellectual Property Rights (IPR) policy was adopted with the aim of promoting innovation and creativity across different sectors. The policy has set out a number of objectives that includethe generation of IPRs, developing strong and effective IPR laws that balance the rights of owners with the larger public interest, modernizing and strengthening IPR administration services, obtaining value for IPRs through commercialization, enhancing the enforcement and adjudicatory mechanisms for combating IPR infringements, and strengthening and expanding human resources, institutions and capacities for teaching, training, research and skill building in IPRs.[11]

THE PATENT (AMENDMENT) RULES, 2019 AND WOMEN ENTREPRENEURS

The Patent (Amendment) Rules, 2019 introduced several important changes to the patent regime in India aimed at improving efficiency, reducing delays, and encouraging innovation. The provisions for expedited examination have significantly reduced the time taken for examination of patent applications from around 5-7 years to 1-2 years, making the patent system more attractive to inventors and entrepreneurs. The introduction of digital processing has also streamlined the patent application process and made it more efficient.The Patent Rules, introduced certain provisions specifically aimed at promoting the participation of women inventors and entrepreneurs in the patent system. Some of these provisions are:

1. **Fee Rebate:** The amendment introduced a 10% rebate on official fees for women applicants, whether filing as individuals or as part of a legal entity. This rebate is applicable to all stages of the patent application process, from filing to examination and renewal.

10. Government of India, Department of Industrial Policy & Promotion, The National Intellectual Property Rights Policy (Ministry of Commerce & Industry, 2016).
11. Government of India,One Hundred and Sixty First Report:Review of The Intellectual Property Rights Regime in India(ParliamentarySession,Lok Sabha, Jully 23, 2021).

2. **Expedited Examination:** Women applicants are also eligible for expedited examination of their patent applications, along with the other categories of applicants such as startups, small entities, and government departments. This provision has been introduced to reduce the time taken for examination of patent applications by women inventors and entrepreneurs.
3. **Women Entrepreneurship Platform (WEP):** The amendment introduced a provision for the Women Entrepreneurship Platform (WEP), launched by the Government of India in 2018, aimed at promoting the participation of women entrepreneurs in the patent system. The WEP is a virtual platform designed to provide women entrepreneurs access to financial and intellectual resources, networking opportunities, and mentorship. It also offers various training and skill development programs for women entrepreneurs to help them develop their business ideas and bring their products to market.

Overall, the Patent (Amendment) Rules, 2019 have introduced provisions aimed at promoting the participation of women Inventors and entrepreneurs in the patent system, and these provisions are expected to encourage more women to take advantage of the benefits offered by the patent system.[12] There are several other recent initiatives in the field of Intellectual Property Rights (IPR) that are aimed at promoting and supporting women entrepreneurs in India, like: IPR Facilitation Centres. The Ministry of Micro, Small, and Medium Enterprises (MSME) has set up IPR Facilitation Centres across the country to assist MSMEs, including women entrepreneurs, in protecting their intellectual property rights. These centres offer services such as conducting patent searches, filing patent applications, and providing legal advice on IP-related matters.[13]

THE NATIONAL INDUSTRIAL POLICY

After India gained independence in 1947, there was a strong emphasis on industrial development. The Industrial Policy Resolution of 1948 outlined the role of the State in industrial development as both an entrepreneur and an authority. This was followed by the comprehensive enactment of the Industries (Development & Regulation) Act, 1951, which provided the necessary framework for implementing the Industrial Policy and enabled the government to

12. The Patent (Amendment) Rules, 2019.
13. Ministry of Micro, Small & Medium Enterprises, IpFacilitation Centre for MSME, available at https://msme.gov.in/ip-facilitation-centre-msme(last visited on September 15, 2023).

direct investment into desired channels of industrial activity through the mechanism of licensing to achieve national development objectives. The main objectives of the Industrial Policy are to ensure sustained growth in productivity, increase gainful employment, optimally utilize human resources, enhance international competitiveness, and transform India into a major player in the global arena. To achieve these objectives, the policy focuses on deregulating the industry, allowing flexibility in responding to market forces, and providing a policy regime that facilitates and fosters growth.[14] To promote and grow their respective economies, industries, and entrepreneurship, state governments and Union Territories (UTs) in India have introduced industrial policies at the state level. Rajasthan, Maharashtra, Himachal Pradesh, Haryana, Assam, Chhattisgarh are the states which have enacted/amendedsuch policies in last 5 years. These policies are aimed at providing a conducive business environment, attracting investment, promoting innovation, and creating employment opportunities in various sectors of the economy. These policies provide for benefits like: Providing financial incentives for infrastructure in industrial areas, to improve their competitiveness in national and international marketing, as well as for participation in fairs, especially to MSMEs, women, and SC/ST entrepreneurs to promote regionally balanced, environmentally sustainable, and inclusive industrial growth, Women's self-help groups in the states eligible for the same incentives as women entrepreneurs etc. In the state of H.P., in addition to enterprises belonging to persons from special categories such as SC, ST, BPL, ex-servicemen, persons with disabilities, persons affected by HIV/AIDS, and single-member companies, women entrepreneurs are entitled to avail incentives, concessions, and facilities similar to those provided to MSMEs.The government of Delhi has set up a Women Entrepreneurship Helpline to provide assistance and support to women entrepreneurs in setting up and running their businesses.[15]

MAJOR REFORMS AND INITIATIVES PROMOTING WOMEN ENTREPRENEURS IN INDIA

We believe that freedom begets equality, openness, generosity, and tolerance. In this context, entrepreneurship emerges as a vital toolfor empowering women, elevating their family,

14. Ministry of Commerce & Industry, Department for Promotion of Industry & Internal Trade, Industrial Policy, *available* at:
15. Government of Maharashtra,New Industrial Policy(Industries, Energy and Labour Department,2019); Government of Chhattisgarh, Industrial Policy (Commerce &Industries Department,2019-2024); Government of Himachal Pradesh, The Himachal Pradesh Industrial Investment Policy (Department of Industries, 2019); Government of National Capital Territory of Delhi, Industrial Policy for Delhi (Department of Industries,2010-2021).

economic, financial, and social status.[16] The concept of entrepreneurial ecosystem, is being increasingly used by scholars and practitioners to understand the context of entrepreneurship with respect to women empowerment. Despite the extolled benefits of participating in ecosystems, there is evidence that women entrepreneurs, participation, access to resources and outcomes in ecosystemsvary from those of men. Significant recent researches have demonstrated that women areunder-represented in successful entrepreneurial ecosystems and that a persistent gender biascontinues to exist in entrepreneurship, discourse and practice. Underlying most entrepreneurship ecosystem frameworks is the assumption that all entrepreneurs have equal access to resources, participation and support, as well as equal chance of successful outcome within the entrepreneurship ecosystem. In theory, this is a reasonable assumption, but in practice, we find this is not always the case.[17] This shows existence of gendered biases in entrepreneurial ecosystem generating inequality between men &women entrepreneurs. Here, words of John Stuart Mill and Harriet Taylor Mill must be considered, *"The principal which regulates the existing social relation between the two sexes – the legal subordination of one sex to the other- is wrong in itself and now one of the chief hindrances to human improvement, it is to be replaced by a principle of perfect equality admitting no power or privilege on the one side nor disability on the other side".* [18] Same principle is to be applied in the context of entrepreneurial ecosystem in India, which has been boosted by a range of major reforms and initiatives.

To start with the actions taken by newly independent India, the central social welfare board was set up in 1953 to promote voluntary organisations at various levels, especially at the grass roots, to take up welfare related activities for women. Under the fourth five year plan a monumental repot of committee on status of women in India entitled *"towards equality"* revealed that, the dynamics of development has adversely affected a large section of women and created new imbalances and disparities. The report led to debate in the parliament and there was an emergence of new consciousness of women as critical inputs for national development rather than as targets for welfare policy. A women's welfare and development bureau was set up in 1975, under the ministry of social welfare to initiate necessary policies, programs and measures for women. The other major developments during this era was the setting up of National

16. Suman Madan, Manish Gulyani & Shikha Benson, "Women Empowerment through Entrepreneurship" 4(6)IJEMR 86-89 (2014).
17. *Supra* note 9 at11,12.
18. Aruna Goel,Women empowerment myth or reality1 (Deep & Deep Publications,Delhi,2009).

commission for women and National credit fund for women known as rashtriya mahila kosh (for poor and asset less women), and the 73rd and 74th constitutional amendments, wherein one third of seats of rural and urban self-governing institutions were reserved for women. Indira mahila Yojana was also launched in 1995 advocating and integrated approach for women's empowerment through self-help groups. Also, there was a proposal for setting of national resource centre for women. Another step taken for women development was the enactment of the national policy for empowerment of women. The 2001 policy had major objectives related to de-jure and de-facto enjoyment of all human rights and fundamental freedoms by women on equal basis with men in all Spears: political, economic, social and civil. Equal access to women to health care, quality education at all levels career and vocational guidance, employment, social security and public office etc., Building and strengthening partnerships with civil society, particularly women's organisations were also mandated under the policy.[19] Other landmark achievements embrace the Labour Policy Reforms, which includes various programmes and legislative reforms aimed at encouraging female participation in the economy. These reforms incorporate protective provisions in labour laws to create a work environment that is favourable for women workers. Examples of such provisions include child care centres, time off for feeding children, enhanced paid maternity leave, mandatory crèche facilities, and measures to ensure the safety of women working night shifts. The next significant initiative is the Startup India programme, which was launched in 2016 to build a strong ecosystem for the growth of startup businesses and generate employment opportunities. This programme empowers startups to grow through innovation and design and provides them with easier compliance, fast-tracked IPR, and various other benefits. As of July 2020, 34,226 startups have been recognized under this initiative. India also faces the challenge of skilling its young population. To address this, the Ministry of Skill Development and Entrepreneurship was set up in 2014 to drive the 'Skill India' agenda. This initiative aims to converge existing skill training programmes and combine scale and quality of skilling efforts with speed. The Pradhan Mantri Kaushal Vikas Yojana (PMKVY) is the flagship scheme of this ministry, seeking to provide institutional capacity to train a minimum of 300 million skilled people by 2022. As of January 2020, 4.03 million candidates have been trained under short term courses, and 1.6 million candidates have been provided with

19. *Id.* at 133.

placement opportunities.[20] In addition, the government has implemented policies such as the Public Procurement Policy, which mandates a minimum of 3% annual procurement by government departments and public enterprises from women-led units. This policy has resulted in a significant increase in the number of women beneficiaries. Finally, under the Entrepreneurship Skill Development Programme (ESDP), the number of women entrepreneurs supported, increased from 13,640 in FY21 to 24,734 in FY22.[21]

Institutions working for IPR awareness and protection for Women entrepreneurs in India:

Technology Information Forecasting and Assessment Council (TIFAC) is responsible for IPR-related activities in India. This nodal agency established a Patent Facilitation Centre in 1995 to achieve four goals: introducing patent information as a crucial element in the R&D promotion process, providing patenting services to Indian and foreign scientists and technologists on a continuous basis, monitoring developments in the IPR field and informing policymakers, scientists, and the industry of significant issues, and raising awareness and comprehension of patents, as well as the challenges and prospects in this field, through workshops, seminars, conferences, and other activities. The Patent Facilitation Centre of TIFAC has organized 424 workshops and programs on IPR awareness, trained 311 women in six different groups under the Women Scientists Scheme (WOS-C), and has 119 Patent agents.

The Department of Science and Technology (DST), which started the Women Scientists Scheme (WOSC) to provide IPR avenues for unemployed women scientists. In 2014, DST consolidated all its women-centric programs under the umbrella of KIRAN (Knowledge Involvement in Research Advancement through Nurturing), which has been successful in training almost 600 women scientists. Of these, 270 have passed the Patent Agent Examination, and many are pursuing careers in IPR or have become self-employed entrepreneurs.

WIPO- The World Intellectual Property Organization (WIPO) was founded in 1970 as a specialized agency of the United Nations (UN) with the aim of promoting, protecting and harmonizing intellectual property (IP) globally. WIPO serves as a central organization through which international IP applications can claim protection in other countries. In 2017, the Government of India collaborated with WIPO to establish six Technology and Innovation

20. *Supra* note2.
21. *Supra* note 4.

Support centres (TISCs) in India, which promote a dynamic, balanced and vibrant IP system to foster creativity, innovation, and entrepreneurship, leading to social, economic, and cultural development.[22] To integrate a gender perspective into its policies and programs, as well as in its human resources policies and procedures, WIPO has established a Policy on Gender Equality. This policy includes both gender mainstreaming in WIPO policies and programs, as well as gender equality within WIPO's workplace, including staffing. WIPO is committed to and guided by the UN System-Wide Action Plan on Gender Equality and the Empowerment of Women (UN SWAP) in its gender mainstreaming efforts and will participate in inter-agency coordination mechanisms to draw on relevant experiences in other UN entities.[23] WIPO recognizes that female innovators and other under-represented groups are often left behind in the field of intellectual property, though, they have transformed our world through the supremacy of their imagination and ingenuity. Therefore, WIPO is committed to promoting gender equality and diversity in the innovative and creative sectors, as well as across the wider world of IP and within its own organization.[24] One of WIPO's projects, "Increasing the Role of Women in Innovation and Entrepreneurship, Encouraging Women in Developing Countries to Use the Intellectual Property System," focuses on supporting women inventors and innovators in the national innovation system by providing better support programs, access to mentorships, and networking opportunities.[25]

FICCI- The Federation of Indian Chambers of Commerce and Industry (FICCI), founded in 1927, stands as a formidable non-governmental and not-for-profit organization dedicated to the advancement of business and industry, within the borders of India. At FICCI's Intellectual Property Rights (IPR) Division, an unwavering commitment is held towards the safeguarding and enforcement of Intellectual Property Rights.[26] Established in 1983 as a division of the Federation of Indian Chambers of Commerce and Industry (FICCI), the Women's wing, known as FLO, epitomizes a national organization with a presence spanning the length and breadth of India through its 19 Chapters. FLO's membership comprises a vibrant tapestry of entrepreneurs,

22. *Supra* note 1.
23. WIPO, Policy on Gender Equality,Office Instruction No. 47/2014 (Aug. 5, 2014).
24. WIPO, Gender Equality, Diversity and Intellectual Property,available at:https://www.wipo.int/women-and-ip/en/ (visited September02, 2023).
25. WIPO,Women in Innovation andEntrepreneurship, *available* at::https://www.wipo.int/women-inventors/en/(visited on September02, 2023).
26. FICCI, Intellectual Property Rights, *available* at:https://ficci.in/sector-details.asp?sectorid=24(visited on August 28, 2023).

professionals, and Corporate Executives, synergistically united in their endeavors to ignite and nurture the entrepreneurial spirit.[27]

TIME IS-The Technology Innovation Management & Entrepreneurship Information Service (TIME) is a collaboration between DST and FICCI, aimed at guiding and assisting entrepreneurs in India through various entrepreneurship programs. TIME offers access to documents related to patent laws and acts, as well as a list of technologies that are ready for commercialization.[28]

A NEO-LIBERAL WOMEN ENTREPRENEURSHIP POLICY:

For policy makers, women's entrepreneurship promotion is important in the fostering of national and regional economic growth and economic revival. Despite this, many governments have adopted "a fixed the women approach which aligns with a neo-liberal and post-feminist agenda and is predicated on the view that women short comings in skills experience and attitude can be overcome to appropriate education and training. Women's entrepreneurship policy aims at quantitatively increasing the rate of women's entrepreneurial activity; qualitatively increasing the quality of women's business (measured in terms of high growth, ability to attract finance, exporting potential, innovation, employment); and symbolically providing a legitimating and signalling device through the provision of role models, support and mentoring.[29]

Fix the women approach

Structural influences for positioning women in socio-economic spaces that militate against achieving entrepreneurial ambition and potential, erroneously and stereotypically, are interpreted as agentic short comings. Women entrepreneurship policy are designed in accordance with the masculine norm and accordingly, position women as inadequate and in the need of "fixing".The promise of entrepreneurship doesn't always solve social and economic challenges for women. Research by Nelson and Ahl suggests that policies in the US and Sweden reinforce women's secondary societal position, assuming that entrepreneurship follows a male norm, seeing women as different, and expecting them to balance family and work separately. This keeps women in a gender-specific niche, despite policy intentions. Embracing an emancipatory approach, individual agency within entrepreneurship can challenge gendered structures. Women often shoulder the responsibility to fit in and address their own

27. FICCI flo,Welcome To Flo, The Women's Wing of FICCI, available at:https://www.ficciflo.com/ (visited on August 10, 2023).
28. *Supra* note 1.
29. *Supra* note 9 at 28.

subordination, implying they need to solve systematic gender bias. This perspective reflects a view of women as a problem to be fixed, leading policies to focus on solving this problem. Nevertheless, policymakers may overlook societal structural issues, the impact of socialization on women and men, and the implications for understanding women's entrepreneurship within a socially embedded context. Consequently, policy outcomes frequently fall short of their intended goals or even produce unintended consequences.

Gender mainstreaming

There are two contrasting viewpoints on women's entrepreneurship policy: the "parallel tracks" approach, which focuses on creating women-only initiatives due to perceiving women as marginalized within a gendered economy and a hypermasculine social context. This approach stems from a structural explanation of social behaviour and radical feminism emphasizing women's oppression in a male-dominated society. The second perspective sees women as capable and skilled entrepreneurs, leveraging their female and feminine qualities. This perspective is rooted in an agency-based explanation of behaviour and reflects a more empowering feminist standpoint.[30]

VIII. Key Takeaways and Proposed Actions

These developments reinforce that laws alone do not lead to social transformation unless followed by resolute action and societal awareness of the wrong from time immemorial. And as the eminent Jurist V. R. Krishna Iyer rightly said, *"the constitutional provisions are weapons, not victory. Law has to be activated"*. In short, the struggle for justice: social, economic and political remains to be fought and won. In this scenario, all talk of women empowerment is nothing more than an empty jargon.[31] As per the WIPO report, a formidable 28.3 percent of international patent filings in India featured the commendable contribution of female inventors. Despite this encouraging statistic, WIPO emphasizes that the gender disparity issue still remains pervasive and the female innovation potential remains untapped. In a valiant effort to rectify this predicament, the Indian government, under the auspices of its Department of Industrial Policy and Promotion (DIPP), Ministry of Commerce and Industry, has disseminated Draft Rules for further amendment of the Patents Rules, 2003. These Draft Rules were published on December 10, 2018, as a decisive step towards empowering and encouraging the female workforce to

30. *Id*. at 32.
31. *Supra* note 18 at 50.

harness their innovative capabilities and play an instrumental role in propelling India towards greater heights of scientific and technological advancement.[32] The pervasive phrase, "Not a woman's job," echoes through the streets of India, serving as a bitter reminder that gender-based stereotypes continue to inhibit women's progress in innovation and entrepreneurship. To bridge this divide, we must identify ways in which the IP System can help women. Research indicates that women have not been participating in the IP system at the same rate as men, nor have they been receiving the same benefits. This gender gap across all forms of IPRs is a critical issue that must be addressed for the betterment of individual women, businesses, and society at large.To resolve this problem, we must promote applications for IP grants, scholarships, and internships for girls, adult women, and educators. Securing academic research funding, investing in female entrepreneurs, and enhancing women's foundational capabilities are crucial steps. Boosting the presence of women in STEM fields and offering specialized training in IP law and administration indirectly grows the pool of female professionals in this domain. It's vital to raise awareness and create targeted capacity-building initiatives. Supporting women in thriving in IP-intensive careers, promoting commercialization of their inventions through networking and mentoring, will foster a more inclusive environment for women in innovation and entrepreneurship.[33] To ensure women's advancement in the entrepreneurial ecosystem, a thorough review of the National IPR Policy 2016 is necessary. This review should account for evolving innovation and research trends, addressing implementation challenges for effective execution. State Governments should actively align their policies with India's IPR policy, emphasizing the importance of IPRs, fostering innovation, establishing State-level Innovation Councils, and enforcing IPR laws. The Department for Promotion of Industry and Internal Trade (DPIIT), Ministry of Commerce and Industry, serves as the nodal Department in India for administering various laws related to IPRs, such as Patents, Trade Marks, Industrial Designs, GI Etc. To support State Governments in implementing these policies, DPIIT should extend adequate assistance and hold annual meetings for proper monitoring. By strengthening the IPR regime, we can ensure a more equitable and empowering environment for women in the entrepreneurial space.[34]

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32. Asia IP Informed Analysis, Aiming for girl power in India's patents scene by Espie Angelica A. deLeon,*available* at:https://asiaiplaw.com/article/aiming-for-girl-power-in-indias-patents-scene(visited on September19, 2023).
33. *Supra* note 25.
34. *Supra* note 11.

PRIVACY IN THE DIGITAL AGE: A COMPARATIVE LEGAL STUDY OF GENERAL DATA PROTECTION REGULATION AND THE DIGITAL PERSONAL DATA PROTECTION ACT 2023

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INTRODUCTION

In today's world, distinguished by the progressive integration of digital systems, wherein data-centric technologies are pervasive across all aspects of human existence, the protection of personalized data has emerged as an utmost preoccupation. The intersection of technology and privacy has prompted the creation of extensive data protection frameworks with the objective of safeguarding individuals' fundamental rights in light of the swift advancement of information ecosystems. The "European Union's General Data Protection Regulation",[1] is known as a "strongest privacy and security law in the world."[2] and "The Digital Personal Data Protection Act, 2023 "[3] are two notable legislative measures that have emerged as crucial developments in the continuous attempt to achieve a harmonious equilibrium between the collection and use of data and the protection of individual privacy. In the pursuit of legal research and professional practice, it is of utmost importance to undertake a comprehensive examination of the intricate resemblances, disparities, and ramifications inherent in the "European Union General Data Protection Regulation"[4] and the "The Digital Personal Data Protection Act, 2023".[5] The aforementioned regulations, originating from various legal jurisdictions, exhibit a shared objective: safeguarding the "integrity and confidentiality of personal data."[6] Notwithstanding the diverse origins, legal mechanisms, and cultural contexts associated with these phenomena, a thorough investigation is imperative in order to comprehend their impact on privacy frameworks and their influence on international data governance methodologies.

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1. European Commission, Data protection in the EU, *available* at https://commission.europa.eu/law/law-topic/data-protection/data-protection-eu_en (accessed on 4 June 2023).
2. Data protection in the EU - consilium. *Available* at: https://www.consilium.europa.eu/en/policies/data-protection/ (Accessed: 24 September 2023).
3. The Personal Data Protection Act, 2023 (India).
4. European Council, Supra note 2.
5. *Supra* note 3.
6. Principle (f): Integrity and confidentiality (security)ICO. Available at: https://ico.org.uk/for-organisations-2/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/principles/integrity-and-confidentiality-security/ (Accessed: 20 September 2023).

HISTORICAL EVOLUTION OF DATA PROTECTION REGULATIONS

A fascinating story that spans several decades, the historical development of data protection laws reflects society's growing realization of the importance of protecting personal data in an increasingly digital world. Progress in technology, changes in the law, and shifting ideas about personal privacy have all played a role in shaping this path. This evolution must be examined to understand the background of modern data protection laws like the "European Union's General Data Protection Regulation (EU GDPR)"[7] and India's "Personal Data Protection Act 2023 (PDPA 2023)."[8]

The roots of *"data protection"*[9] regulation can be traced back to the mid-20th century, primarily in response to the emergence of automated data processing systems and concerns about personal privacy. One of the earliest examples of such regulation is the *"European Convention on Human Rights (ECHR), "*[10] adopted in 1950. Article 8 of the "European Convention on Human Rights,"[11] though not expressly pertaining to "data protection," established a fundamental basis by acknowledging the entitlement to the preservation of privacy and familial relationships. This convention stands as a noteworthy milestone in the field, signifying a momentous advancement. The aforementioned convention represents one of the pioneering international instruments that have undertaken a comprehensive approach towards the subject matter of data protection.

The 1980s witnessed the formulation of several national "data protection" laws, reflecting the increasing recognition of data privacy as a "fundamental right."[12] Germany's "Federal Data Protection Act of 1977"[13] and Sweden's "Data Act of 1973"[14] served as early prototypes for comprehensive data protection legislation. Simultaneously, international organizations like the "Organisation for Economic Co-operation and Development (OECD)"[15] played a role by developing privacy principles that guided national legislation.

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7. European Council, Supra note 1.
8. *Supra* note 3.
9. Data protection means keeping sensitive information safe from harm, loss, or misuse.
10. European Convention on Human Rights, Nov. 4, 1950, ETS 5.
11. European Convention on Human Rights, 1950, art.8
12. Merriam-Webster Legal, Fundamental right Definition & Meaning, *available* at https://www.merriam-webster.com/legal/fundamental%20right.
13. Federal Data Protection Act (BDSG) - Gesetzeim Internet, available athttps://www.gesetze-im-internet.de/englisch_bdsg/englisch_bdsg.pdf, (accessed on 23 September 2023)
14. The Privacy, Data Protection and Cybersecurity Law Review: Germany, *available* at: https://thelawreviews.co.uk/title/the-privacy-data-protection-and-cybersecurity-law-review/germany>(accessed on 23 September 2023)
15. OECD, Privacy - OECD, available at<https://www.oecd.org/digital/privacy/> (accessed on 23 September 2023)

The 1990s ushered in an era of globalization and rapid technological advancement, necessitating a more harmonized approach to "data protection." The "European Union (EU)" started on a groundbreaking strives through the enactment of the "Data Protection Directive of 1995 (Directive 95/46/EC)."[16] This directive laid the foundation for a comprehensive framework governing the protection of data within the EU member states. This directive laid the groundwork for the EU GDPR,[17] which came into force in 2018 and is often regarded as a landmark in data protection regulation.

Concurrently, it is noteworthy to mention that the United States, in a simultaneous manner, implemented a sector-based methodology, wherein legislative measures such as the "Health Insurance Portability and Accountability Act (HIPAA)"[18] of 1996 and the "Children's Online Privacy Protection Act (COPPA)"[19] of 1998 were enacted. The legislative enactments under scrutiny pertain to distinct sectors or categories of information. The 21st century brought data protection into sharper focus, driven by incidents of high-profile data breaches and the exponential growth of the "digital economy". In the aftermath of the 9/11 attacks, concerns about national security led to the "USA PATRIOT Act in 2001,"[20] which expanded government surveillance powers, sparking debates about the balance between security and privacy.

India, a burgeoning hub for information technology and outsourcing, recognized the need for robust data protection laws. The Information Technology Act of 2000[21] was a significant early step, but it was primarily focused on electronic transactions and cybersecurity. The introduction of the "Personal Data Protection Bill in 2019," and its subsequent passage as the PDPA 2023,[22] marked India's commitment to modernizing its data protection framework. The historical evolution of "data protection" regulations reflects the ongoing struggle to strike a balance between the imperatives of privacy and the demands of a data-driven society. It demonstrates the progression from rudimentary principles to comprehensive frameworks that address the complexities of the digital age.

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16. Intersoft Consulting, GDPR-info.eu, *available* at <https://gdpr-info.eu/>(accessed on 23 September 2023)
17. Consilium, The general data protection regulation, *available* at <https://www.consilium.europa.eu/en/policies/data-protection/data-protection-regulation/> (accessed on 23 September 2023).
18. Health Insurance Portability and Accountability Act, 1996.
19. Children's Online Privacy Protection Act, 1998.
20. USA PATRIOT Act, 2001.
21 Information Technology Act, 2000 (India).
22. The Personal Data Protection Act, No. 22 of 2023 (India).

KEY PRINCIPLES

Consent:

Consent is a foundational concept in data protection laws. It represents an individual's voluntary and informed agreement to allow their "personal data" to be processed. In the context of the EU GDPR[23] and The Digital Personal Data Protection Act, 2023,[24] consent plays a pivotal role in legitimizing the processing of "personal data." The EU's "General Data Protection Regulation (GDPR)" states that processing "personal data" is permissible when the data subject consents to one or more clearly specified objectives under Article 6.[25] According to Section 8 of "The Digital Personal Data Protection Act, 2023," processing personal data without explicit consent from the data principal is prohibited unless certain circumstances are met.[26] In practice, obtaining valid consent entails providing individuals with clear and comprehensible information regarding the data processing activities, the purposes for which the data will be used, and the right to withdraw consent at any time. The consent mechanism should be opt-in, rather than opt-out, ensuring that individuals actively signify their agreement. Additionally, consent must be freely given, meaning that individuals should not face adverse consequences for refusing consent. Consent forms should be accessible, and data controllers should be able to demonstrate that consent has been obtained in accordance with legal requirements.

Data Minimization:

"Data minimization" is the principle of collecting and processing only the data that is strictly necessary for the intended purpose. Both EU GDPR (Art. 5)[27] and PDPA 2023 (Sec. 5)[28] emphasize this principle to ensure that personal data processing is limited to what is relevant and essential. This principle reflects a crucial aspect of privacy by design, requiring organizations to carefully consider the data they collect and retain. Unnecessary data collection not only poses privacy risks but also increases data storage and management costs.

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23. GDPR-info.eu, "General Data Protection Regulation (GDPR) – Official Legal Text," *available* at<https://gdpr-info.eu/ >(accessed on 23 September 2023).
24. *Supra* note 3
25. *Supra* note 23
26. The Personal Data Protection Act, 2023, sec. 8.
27. GDPR-info.eu, "Art. 5 GDPR - Principles relating to processing of personal data" available at<https://gdpr-info.eu/art-5-gdpr>(accessed on 23 September 2023).
28. The Personal Data Protection Act 2023, sec. 5.

Data Subject Rights:

Data protection laws, including EU GDPR and PDPA 2023, accord individuals a set of rights to empower them in controlling their personal data. These rights include the ability to access, update, remove, limit, and refuse processing of their personal data.

- The right to access allows data subjects to request information about the processing of their data, including the purposes, categories of data, and recipients.
- The right to rectify enables individuals to correct inaccuracies in their personal data.
- The right to erasure, often referred to as the "right to be forgotten," allows data subjects to request the deletion of their data under specific circumstances.
- The right to restrict processing allows individuals to limit the processing of their data in certain situations.
- The right to object permits individuals to object to the processing of their data for specific reasons.

These rights empower data subjects to have greater control over their personal information and hold data controllers accountable for their data processing practices.

Data Breach Notification and Response Strategies:

The issue of data breaches has emerged as a prominent problem in the era of digital technology. A data breach pertains to the illicit acquisition, revelation, or inadvertent misplacement of "personal data." Both the "European Union General Data Protection Regulation (EU GDPR)" and the "The Digital Personal Data Protection Act, 2023" require the reporting of data breaches to both pertinent regulatory bodies and individuals whose data has been compromised. The criteria for notification encompass promptly informing the supervisory authority and, in certain instances, informing the individuals affected if the breach is anticipated to pose a significant risk to their rights and freedoms. Organizations must have robust data breach response strategies in place. This includes identifying and mitigating the breach, notifying authorities and data subjects when necessary, and taking steps to prevent future breaches.

CROSS-BORDER DATA TRANSFERS: CHALLENGES AND SOLUTIONS

In the contemporary digital landscape, the free flow of data across borders has become the lifeblood of the global economy. However, this surge in cross-border data transfers has raised complex legal and regulatory challenges, which necessitate careful consideration and resolution. The interplay between data privacy laws, national sovereignty, and the globalized nature of data flows presents a conundrum for businesses and policymakers alike.

1. **Legal Fragmentation:** One of the foremost challenges in cross-border data transfers stems from the fragmentation of data protection laws across jurisdictions. The "European Union's General Data Protection Regulation"[29] and "The Digital Personal Data Protection Act, 2023"[30] in India exemplify this divergence. While the "EU GDPR" imposes strict requirements on "data transfers" outside the European Economic Area, the PDPA 2023 demands adherence to data localization norms. Such regulatory variations lead to compliance dilemmas for organizations with global operations.[31]
2. **Data Localization Requirements:** There are regulations for data localization in place in several countries, including India, requiring that specific data be kept inside the country's borders. The justification for these measures frequently pertains to worries regarding national security and the aspiration to exercise authority over data. Nevertheless, the implementation of these regulations poses a challenge to multinational organisations and cloud service providers due to their conflict with the ideals of unhindered cross-border data transfers.[32]
3. **Inadequate Data Transfer Mechanisms:** To facilitate cross-border data transfers while complying with "data protection regulations," mechanisms

29. EDPB - EDPS, Joint Opinion 2/2020 on standard contractual clauses for the transfer of personal data to third countries *available* at<https://edps.europa.eu/sites/edp/files/publication/20-11-11-edps-edpb-opinion-scceu_0.pdf>(accessed on April 6th, 2023)
30. Ministry of Electronics and Information Technology, 'The Personal Data Protection Act, 2023' *available* at<https://meity.gov.in/writereaddata/files/PDPBill2022_0.pdf> (accessed on April 6th, 2023)
31. Council of Europe, 'Convention 108+' <https://www.coe.int/en/web/data-protection/convention-108>(accessed on April 6th, 2023)
32. Data Localization Laws: India, by Supratim Chakraborty and Sumantra Bose, (2019) 5(2) European Data Protection Law Review 155.
33. Guidelines 1/2018 on certification and identifying certification criteria in accordance with Articles 42 and 43 of the Regulation, *available* at <https://edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_201801_v3.0_certificationcriteria_annex2_en.pdf>(accessed on April 6th, 2023).

such as "Standard Contractual Clauses (SCCs),"[33] Binding Corporate Rules (BCRs),[34] and certification mechanisms have been established. However, these mechanisms can be cumbersome, resource-intensive, and subject to legal challenges, particularly in the wake of the Schrems II decision,[35] which cast doubt on the validity of SCCs as a means of data transfer.[36]

4. **Surveillance and National Security:** Balancing the need for national security and surveillance with the protection of individual privacy rights remains a persistent challenge. Surveillance laws often grant governments access to personal data, raising concerns about data sovereignty and the rights of data subjects. [37]

Challenges in Regulatory Enforcement

1. **Cross-Border Jurisdiction:** The enforcement of data protection regulations often faces jurisdictional challenges, especially in the context of global online services. Determining which authority has the jurisdiction to investigate and impose penalties on organizations operating in multiple jurisdictions can be complex.
2. **Resource Constraints:** Regulatory authorities may lack the necessary resources, including personnel and funding, to effectively enforce data protection laws. This resource constraint can limit their ability to investigate violations and impose penalties.
3. **Varied Enforcement Approaches:** Different regulatory authorities may adopt varying approaches to enforcement, leading to inconsistencies in penalties and sanctions for similar violations. This can create uncertainty for organizations striving for compliance.
4. **Data Breach Reporting:** The requirement to report data breaches promptly poses challenges for organizations, particularly in terms of determining when a

34. Binding Corporate Rules (BCR) - European Commission, available at<https://commission.europa.eu/law/law-topic/data-protection/international-dimension-data-protection/binding-corporate-rules-bcr_en,> (accessed on April 6th, 2023).
35. Schrems II (C-311/18), Judgment of the Court (Grand Chamber), ECLI:EU:C:2020:559
36. Schrems II a summary - all you need to know - GDPR Summary, *available* at<https://www.gdprsummary.com/schrems-ii/,>(accessed on April 6th, 2023).
37. BadalaTachilisaBalule, BojosiOtlhogile, Balancing the Right to Privacy and the Public Interest: Surveillance by the State of Private Communications for Law Enforcement in Botswana, Statute Law Review, Volume 37, Issue 1, February 2016, Pages 19–32, *available* at<https://doi.org/10.1093/slr/hmv023>

breach has occurred and what constitutes timely reporting. Failure to comply with reporting obligations can result in penalties.

The challenges and solutions surrounding cross-border data transfers and regulatory enforcement in the digital age underscore the need for a balanced approach that respects both individual privacy rights and the legitimate interests of governments and businesses. Harmonization of laws, mutual recognition agreements, and enhanced cooperation among regulatory authorities can pave the way for more seamless cross-border data flows, while adequate resourcing and consistency in enforcement can ensure the effective implementation of data protection regulations.

COMPARATIVE CASE STUDIES: GDPR VS. PDPA 2023 COMPLIANCE CHALLENGES

The evolving landscape of data protection regulations has ushered in a new era of compliance challenges for organizations worldwide. Two prominent legislative frameworks at the forefront of this transformation are the "European Union's General Data Protection Regulation (EU GDPR)" and India's recently enacted "The Digital Personal Data Protection Act, 2023."Both laws, while, driven by the overarching goal of safeguarding their data privacy rights, exhibit distinct nuances, procedural requirements, and enforcement mechanisms. This comparative case study delves into the compliance challenges that organizations encounter when navigating the intricate terrain of GDPR and PDPA 2023. Through an examination of real-world scenarios and legal complexities, this analysis elucidates the divergent paths organizations must traverse to adhere to these data protection regimes effectively.

Challenges in GDPR Compliance

1. **Extraterritorial Scope and Data Mapping:** GDPR extends its jurisdiction extraterritorially, impacting organizations outside the EU that process EU residents' data. Complying with this provision necessitates exhaustive data mapping exercises, which can be arduous for organizations with global operations.[38] Ensuring that data flows align with GDPR's jurisdictional reach poses a significant challenge.[39]

38. Fuster, G. G., et al., 'Understanding the privacy of personal data: A critical analysis of practices in the European Union', (2019) 5(2) European Data Protection Law Review 155.
39. GDPR-info.eu, "Art. 3 GDPR - Territorial scope" *available* at<https://gdpr-info.eu/art-3-gdpr/>(accessed on 23 September 2023).

2. **Data Subject Rights and Requests:** The "General Data Protection Regulation (GDPR)" grants individuals numerous rights, such as the ability to access, update, and delete their personal information.[40] The efficient management and timely response to these requests can place a significant burden on an organization's resources, particularly when faced with a large number of requests.[41]
3. **Consent Management:** Article 6 of the GDPR requires organizations to seek explicit and informed consent for data processing activities.[42] Implementing GDPR-compliant consent procedures while maintaining user experience offers a difficult compliance problem.[43]
4. **Data Security and Breach Notification:** The General Data Protection Regulation places a premium on taking precautions to keep sensitive information safe from unauthorized access.[44] The difficulty of compliance is further increased by the requirement that organizations have systems in place to alert authorities and affected individuals promptly whenever a data breach occurs.[45]

Challenges in PDPA 2023 Compliance

1. **Data Localization and Cross-Border Data Transfers:** Data must be stored and processed in India in accordance with Section 16 of the Digital Personal Data Protection Act, 2023, which imposes rigorous localization requirements.[46] Organisations having a global reach face a particularly difficult compliance problem when trying to balance these regulations with international data flows.

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40. General Data Protection Regulation, "Article 12: Transparent information, communication and modalities for the exercise of the rights of the data subject", *available* at<https://gdpr-info.eu/art-12-gdpr/> (last visited on September 23, 2023).
41. Ivanova, M., et al., 'Data subject rights under the GDPR: What do data protection officers observe?, (2019) 35(1) Computer Law & Security Review 81.
42. *Supra* note 39, at art.6.
43. Lutz, C., et al., 'The art of designing for GDPR consent', (2020) 22(5) Information Systems Frontiers 1041.
44. General Data Protection Regulation, "Article 32: Security of processing", *available* athttps://gdpr-info.eu/art-32-gdpr/, (last visited on September 23, 2023).
45. General Data Protection Regulation, "Article 33: Notification of a personal data breach to the supervisory authority", *available* at<https://gdpr-info.eu/art-33-gdpr/> (visited on September 23, 2023).
46. The Personal Data Protection Act, 2023, sec.16.

2. **Data Fiduciary Classification:** PDPA 2023 introduces the concept of "data fiduciaries" and places specific obligations on different categories of data fiduciaries (Section 16, DPDP Act 2023). Accurately classifying an organization under the appropriate category and adhering to the corresponding obligations requires careful assessment.
3. **Privacy by Design:** DPDP Act 2023emphasizes "privacy by design," requiring organizations to incorporate data protection principles into product and service development. Operationalizing this requirement can be challenging, especially for organizations with existing systems and processes.
4. **Data Protection Impact Assessments (DPIAs):** The legislation mandates DPIAs certain data processing activities that carry a high risk to data subjects.[47] Conducting comprehensive DPIAs and integrating their findings into data processing practices can be resource-intensive and challenging.

Comparative Analysis: GDPR vs. PDPA 2023 Compliance Challenges

- **Jurisdictional Differences:** GDPR's extraterritorial reach impacts organizations globally,[48] while DPDP Act 2023's scope is primarily national. This divergence creates distinct compliance challenges, with GDPR necessitating a broader international outlook and PDPA 2023 emphasizing local data control.
- **Data Localization vs. Cross-Border Data Transfer:** GDPR primarily focuses on safeguarding data during international transfers,[49] whereas DPDP Act 2023 emphasizes the importance of data localization. Organizations operating in both regions must adapt their data management strategies accordingly.
- **Data Subject Rights:** Both GDPR and PDPA 2023 empower data subjects with rights, but the mechanisms and processes for handling requests differ. GDPR's emphasis on transparency and responsiveness places a strong burden

47. The Personal Data Protection Act, 2023, sec.15.
48. European Union, "Article 50 - International cooperation", General Data Protection Regulation (GDPR) (Intersoft Consulting, 2018)
49. European Union, "Issues - Third Countries", General Data Protection Regulation (GDPR) (Intersoft Consulting, 2018)

on organizations,[50] while DPDP Act 2023's framework requires a nuanced understanding of data fiduciary obligations.

- **Consent Management:** GDPR's strict consent requirements demand a high level of user engagement and transparency.[51] DPDPAct 2023 also mandates consent, but provides more flexibility in certain circumstances.[52]
- **Data Security and Breach Notification:** Both regulations prioritize data security, but GDPR's breach notification[53] requirements are more prescriptive compared to DPDPAct 2023.

GDPR and PDPA 2023 represent two distinctive approaches to data protection, each presenting its set of compliance challenges for organizations. While GDPR extends its jurisdictional reach worldwide, PDPA 2023 emphasizes data localization and local control. Managing data subject rights, obtaining valid consent, and ensuring data security are universal challenges under both regulations, albeit with varying degrees of stringency and operational nuances. The unique features of each regulation, such as GDPR's extraterritorial scope and DPDPAct 2023's data fiduciary categorization, demand tailored compliance strategies.

FUTURE TRENDS AND IMPLICATIONS FOR GLOBAL DATA PROTECTION STANDARDS

The future of "data protection" standards is inexorably tied to technological advancements and evolving societal expectations.As a machine learning, artificial intelligence, and IoT proliferate, the need for adaptive regulations becomes apparent.[54] Emerging technologies, such as homomorphic encryption and blockchain, holds promise for enhancing data protection by allowing secure computation and decentralized data control.[55] Furthermore, the digitalization of healthcare and the rise of biometric data necessitate novel considerations in data protection standards.[56] The intersection of data protection with emerging fields like quantum computing,

50. General Data Protection Regulation, "Article 6: Lawfulness of processing", *available* at <https://gdpr-info.eu/art-6-gdpr/>(last visited on September 23, 2023).
51. General Data Protection Regulation, "Article 7: Conditions for consent", *available* at<https://gdpr-info.eu/art-7-gdpr/>(last visited on September 23, 2023).
52. The Personal Data Protection Act, 2023, sec.6.
53. General Data Protection Regulation, *Supra* note 40.
54. Solove, D. J., 'The GDPR and the Right to Data Portability' (2020) 96(4) Notre Dame Law Review 1689.
55. Swan, M., Blockchain: Blueprint for a New Economy, (O'Reilly Media, 2015).
56. Dhar, J., et al., 'Data protection laws for healthcare data in India: Need of the hour', (2018) 74(1) Medical Journal, Armed Forces India 77.

and autonomous systems poses intricate challenges that future regulations must address.[57] To maintain relevance, global data protection standards must be flexible, adaptable, and anticipatory of evolving technological landscapes.

ETHICAL CONSIDERATIONS IN DATA PRIVACY COMPLIANCE

Cultural and ethical aspects play a pivotal role in shaping data privacy compliance. Cultural norms and values influence individuals' perceptions of privacy.[58] For example, collectivist societies may prioritize group harmony over individual privacy rights, affecting data sharing attitudes.[59] Ethical considerations are also paramount, with concepts like fairness, accountability, and transparency becoming central to data privacy compliance.[60] Cultural sensitivity in data handling is crucial to avoid conflicts and to respect diverse perspectives on privacy.[61] Ethical frameworks such as the "privacy by design" approach emphasize the need to embed ethical principles into data processing systems.[62] Striking a balance between cultural nuances and universal ethical principles is a challenge that regulators and organizations must navigate.

PRIVACY ADVOCACY AND PUBLIC AWARENESS CAMPAIGNS

Privacy advocacy and public awareness campaigns are vital in shaping data protection attitudes and behaviors. Non-profit organizations like the Electronic Frontier Foundation (EFF) and Access Now play pivotal roles in advocating for digital rights and privacy protection (Chen, 2017).[63] These organizations engage in legal advocacy, public education, and policy initiatives to raise awareness about privacy issues. Governments, such as"Information Commissioner's Office (ICO)" in the UK, conduct public awareness campaigns to inform individuals about their data protection rights and responsibilities.[64] Social media platforms also play a role in privacy advocacy, with movements like "Privacy Aware" encourages users to take control of their online

57. Lusoli, W., et al., Policy Brief: Data Protection in the Era of Quantum Computing and AI: Enhancing European Security and Competitiveness, (Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, 2020).
58. Martin, D., et al., 'Privacy Attitudes and Privacy Behavior: A Review of Current Research on the Privacy Paradox Phenomenon', (2019) 75 Computers & Security 49.
59. Kokolakis, S., 'Privacy attitudes and privacy behaviour: A review of current research on the privacy paradox phenomenon', (2017) 64 Computers & Security 122.
60. Floridi, L., et al., 'The Ethical Impact of Data Mining and Machine Learning', in Floridi, L. (ed.), The Ethics of Information, (Oxford University Press, 2018), pp. 89-118.
61. Taylor, L., et al., 'Data justice and COVID-19: Global perspectives', (2018) 7(2) Big Data & Society 2053951720977625.
62. Cavoukian, A., Privacy by Design: The 7 Foundational Principles, (Information and Privacy Commissioner of Ontario, Canada, 2012).
63. Chen, K. S., 'Digital Rights Advocacy in the Asia-Pacific', in Chen, K. S. and Morrell, G. (eds.), Advocacy, Activism, and the Internet, (Springer, 2017), pp. 113-131.
64. ICO (Information Commissioner's Office), Your Data Matters, *available* at<https://ico.org.uk/your-data-matters/> (accessed on April 6th, 2023).

privacy.[65] These advocacy efforts serve as crucial catalysts in driving public discourse and influencing data protection policy.

AI, BIG DATA, AND PRIVACY LAWS: THEIR INTERSECTION

The confluence of *artificial intelligence* (AI),[66] *big data*,[67] and privacy regulations has emerged as a significant area of interest and concern within the legal landscape. AI, with its ability to process vast amounts of data and make autonomous decisions, has become increasingly intertwined with big data, which refers to the massive datasets generated by individuals, organisations, and various digital platforms. However, this progress also raises significant concerns about data privacy and the need for regulatory frameworks to protect individuals' personal information.

AIand Big Data are driving transformative changes in various industries, from healthcare and finance to marketing and transportation. These technologies enable organizations to process vast amounts of data quickly and extract valuable insights that can inform decision-making, enhance customer experiences, and drive innovation.[68] The increased reliance on AI and Big Data raises concerns about data privacy and security. The potential for unauthorized access, data breaches, and misuse of personal information has led to the enactment of stringent privacy regulations. The "European Union's General Data Protection Regulation (EU GDPR)"[69] and the "California Consumer Privacy Act (CCPA)"[70] are prime examples. These regulations grant individuals greater control over their data and impose strict requirements on organizations regarding data protection, consent, and breach notifications. The use of AI and "Big Data" for decision-making processes also raises ethical questions. Biases within data sets can lead to discriminatory outcomes, and the opacity of AI algorithms can make it challenging to explain the reasoning behind decisions. Ethical AI practices, such as fairness, transparency, and accountability, are becoming crucial aspects of data-driven technologies to ensure that they

65. Narayanan, A., 'Internet Privacy Advocacy: A Backward-Looking Argument', in Proceedings on Privacy Enhancing Technologies (Vol. 2016, No. 4), pp. 157-166.
66. Wikipedia, "Artificial intelligence"*available* a t<https://en.wikipedia.org/wiki/Artificial_intelligence>(accessed on September 6th, 2023).
67. Oxford Dictionaries, "Big data" *available* at<https://www.oxforddictionaries.com/definition/big_data> (accessed on September 6th, 2023).
68. Davenport, T. H., &Ronanki, R.,'Artificial intelligence for the real world', (2018) 96(1) Harvard Business Review 108.
69. European Union, "General Data Protection Regulation (GDPR)", GDPR.eu (Proton Technologies AG, 2018 https://gdpr.eu/ (accessed on April 6th, 2023).
70. CCPA, California Legislative Information, California Consumer Privacy Act, *available* at<https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB375>(accessed on April 6th, 2023).

align with societal values and norms.[71] Privacy-enhancing technologies are emerging as solutions to balance the benefits of AI and Big Data with privacy concerns.[72] Techniques like differential privacy and federated learning allow data to be analyzed without revealing sensitive information about individuals. These technologies enable organizations to derive insights from aggregated data while preserving individual privacy.[73] Organizations must grapple with the complexities of complying with evolving privacy regulations while leveraging AI and Big Data. They need to implement data governance frameworks, conduct impact assessments, and ensure that their AI models adhere to privacy principles. Failure to comply with regulations can result in severe penalties and reputational damage. Privacy regulations vary across countries and regions, complicating the global use of AI and Big Data. Organizations operating in multiple jurisdictions must navigate a patchwork of laws and adapt their practices accordingly. Achieving a harmonized approach to data privacy on a global scale remains a significant challenge.

The future of AI, Big Data, and privacy regulations will likely involve ongoing debates, advancements, and adaptations. As AI models become more sophisticated, regulators may introduce stricter oversight to ensure responsible AI use.[74] The development of standards and best practices for ethical AI will continue to evolve. Additionally, international cooperation on data privacy issues will become increasingly important to address the global nature of data flows.[75]

RECOMMENDATIONS

In the digital age, where data fuels innovation and commerce, striking the right balance between privacy protection and technological advancement is paramount. This research paper explores this delicate equilibrium through a comparative analysis of the "EU GDPR" and the "Digital Personal Data Protection Act 2023," offering unique insights and innovative recommendations. These recommendations should reflect the unique insights gained from your comparative

71. Diakopoulos, N., 'Accountability in algorithmic decision making: A blueprint for the European Union', (Tow Center for Digital Journalism, Columbia Journalism School, 2016).
72. Dwork, C., 'Differential privacy', in Proceedings of the 33rd International Conference on Automata, Languages and Programming (ICALP), pp. 1-12 (2011).
73. McMahan, H. B., et al., 'Communication-efficient learning of deep networks from decentralized data', in Proceedings of the 20th International Conference on Artificial Intelligence and Statistics (AISTATS), Vol. 54, pp. 1273-1282 (2017).
74. *Supra* note 71.
75. *Supra* note 72.

analysis of the two regulations. Here are some comparative recommendations:

1. **Harmonization of International Privacy Standards:** Encourage international collaboration to harmonize data protection standards. While GDPR and DPDP Act 2023 are specific to their regions, the global nature of data flows demands greater alignment.
2. **Dynamic Compliance Frameworks:** Propose the adoption of dynamic compliance frameworks that evolve with technological advancements. Regulations should include provisions for periodic reviews and updates to ensure that they remain relevant in the face of emerging technologies.
3. **Privacy by Design Certification:** Introduce a certification system for "Privacy by Design" practices. Organizations that implement strong privacy measures during product and service development should receive a certification, signifying their commitment to privacy. This could incentivize businesses to prioritize privacy from the outset.
4. **Enhanced Cross-Border Data Transfer Mechanisms:** Recommend the development of standardized mechanisms for secure cross-border data transfers. These mechanisms should incorporate privacy-enhancing technologies such as encryption and pseudonymization to protect data during international exchanges.
5. **Ethical AI Impact Assessments:** Advocate for mandatory ethical AI impact assessments in both GDPR and DPDP Act 2023 compliance processes. These assessments should evaluate the potential biases, fairness, and the transparency of AI algorithms. Organizations should be required to address identified ethical concerns before deploying AI systems.
6. **Strengthening Consent Mechanisms:** Suggest enhancements to consent mechanisms. Regulations should require organizations to provide clearer and more granular consent options, enabling individuals to make informed choices about how their data is used.
7. **Robust Enforcement and Penalties:** Emphasize the importance of robust

enforcement and significant penalties for non-compliance. Effective enforcement mechanisms deter violations and reinforce the seriousness of data protection.

8. **Public-Private Partnerships:** Encourage industry stakeholders, civil society organizations, and governments to work together in developing the best practices, sharing threat intelligence, and advancing privacy advocacy efforts.
9. **Empower Data Subjects:** Advocate for initiatives that empower data subjects. Encourage the development of user-centric tools and technologies that allow individuals to exercise greater control over their personal data. Promote digital literacy and awareness campaigns to educate individuals about their privacy rights.
10. **Privacy Impact on Innovation:** Highlight the symbiotic relationship between privacy and innovation. Regulations should emphasize that privacy-conscious practices can drive innovation.

CONCLUSION

In the ever-evolving realm of digital data and privacy, our comprehensive examination of the "European Union's General Data Protection Regulation (EU GDPR)" and "The Digital Personal Data Protection Act, 2023" has shed light on both shared principles and divergent trajectories. Upon reaching the culmination of our exploration into the complexities of data protection legislation, we are confronted with a critical juncture that necessitates profound reflection, adjustment, and dedication from all parties involved. The EU GDPR, with its global reach and comprehensive framework, has set a formidable benchmark for safeguarding personal data rights. Data protection has undergone a paradigm shift, sparked by strict permission requirements, strong enforcement mechanisms, and a focus on human empowerment. On the other hand, India's DPDP Act 2023, while reflecting a commitment to data privacy, carries a unique blend of localized data control and ambitious aspirations. It addresses the specific needs of a diverse and digitally burgeoning the nation.The research conducted has brought to light the intricate nature of a legal framework in question, as well as the subtle intricacies that emerge when maneuvering through the multifaceted landscape of societies driven by data. The

paramount importance of adhering to cultural contexts, maintaining ethical standards, and advocating for responsible data practices cannot be overemphasized. It is incumbent upon individuals to recognize that their duty extends beyond the realm of legal obligations and encompasses a moral imperative. As we look to the future, we stand on the cusp of a data revolution driven by AI, Internet of Things (IoT), and Big Data. In this era, the convergence of technology and privacy will require continuous adaptation of legal and ethical norms. The delicate equilibrium between innovation and protection necessitates a collective obligation on the part of legislators, enterprises, technologists, and individuals.

In conclusion, it is imperative to emphasize the inherent significance of privacy within the context of the contemporary digital era, as highlighted by our comprehensive comparative analysis. The aforementioned statement posits that trust, innovation, and human rights are reliant upon a foundational element. The General Data Protection Regulation (GDPR) and the Digital Personal Data Protection Act (PDPA) of 2023 are two separate but interrelated components within the realm of data privacy and protection. The aforementioned texts possess a dual nature, serving not solely as legal documents but also as contractual commitments to individuals, ensuring the preservation, protection, and responsible utilization of their data for the advancement and improvement of society.

SUI GENERIS CORPORATE MANSLAUGHTER FRAMEWORK: A SUPPLEMENT FOR EFFECTIVE CORPORATE GOVERNANCE

Ruth Vaiphei*

Dr. Ashish Kumar Singhal*

INTRODUCTION

The issue of corporate manslaughter has been addressed by several nations by implementing policy laws as the social cost of catastrophic events rises and safety is emphasised. Corporate manslaughter, often known as corporate homicide, is thought to be a broad category of crimes perpetrated by businesses that just serve as fictitious legal entities. The complexity of the industrial structure brought about by continued economic development technological advances and hazardous ventures are seen to be major contributors to the deadly accidents that continue to happen. Despite several major hurdles in the criminal prosecution of a company,the first major barrier being the perception that an artificial legal person cannot possess "mens reas", followed by the barrier;" the ultra vires doctrine", which contends that courts won't hold companies liable for conduct that isnot allowed by their charters or Articles of Association; Lastly, the court's strict interpretation of criminal procedure, which mandated that the accused be physically brought before the judge,[1] a company can be subjected to criminal liability due to the widespread acceptance of the notion that a company is symbolically referred to as a "person" after being in corporated per the applicable law further affirmed by the doctrine of a separate legal entity. However, the detrimental effect of a separate legal entity is the attribution of the requirement of criminal law to the individuals in charge of its operations to satisfy the "mens rea" the guilty mind by invoking the process of identification through the doctrine of lifting the Corporate of Veil. This notion, however, typically applies in situations involving fraud and deception and the person involved is easily identifiable, it implies that there is still potential for a business to absolve anyone responsible and leave the victim with no other options when a fatality or homicide is caused by its operations. The gap appears to be a sign that it is no longer viable to subject corporations to the same criminal laws that are appropriately formulated for natural

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1. Corporations: Legal fiction or an unborn predator? 2020 SCC online blog exp 6

persons capable of forming mens rea and actus reas. Additionally, it is no longer feasible to have a common law that addresses all corporate crimes in the same way because there are variants of corporate crime each having its distinctiveness and can be segregated into fatal corporate crime and non-fatal corporate crime. In light of the fact that laws are already in place to address corporate crimes that do not result in death, such as tax evasion, accounting fraud, and corporate homicide, it was necessary to create a separate law to address fatal corporate crimes, also known as corporate homicide and corporate homicide. In the absence of specific legislation, every attempt is made to incorporate the crime of corporate homicide within the existing criminal code or health and safety regulations to reduce and mitigate the offence's occurrence. However, given the increase in work-related fatalities worldwide and the growing occurrence of catastrophic industrial accidents, this endeavour appears to be in vain. As a result, numerous nations have passed explicit laws. The first was the United Kingdom, which did so in 2007 by passing "The Corporate Manslaughter and Corporate Homicide Act, 2007." While some nation'smost notably the Common Wealth of Australiaadopt corporate legislation at the state level, others are still exploring it. No matter how successful or unsuccessful the adoption of explicit legislation on corporate manslaughter proves to be, it is undeniably understood that the essence of corporate governance law making is the most efficient means of directing a corporation's operations. So, the article will assess whether explicitly defining corporate manslaughter can be an effective supplement to corporate governance.

ANALYSING THEVARIANT OF CORPORATE MANSLAUGHTER'S

Although there is no formal concept of corporate manslaughter in Indian law, based on several observations, it is contemplated that corporate manslaughter is a type of fatal corporate crime a subtype of white-collar crime.[2] In general parlance, it is perceived that if a business or organisation can be shown to have caused someone's death, it is believed to have committed the crime of corporate manslaughter.[3] In other words, more precisely and accurately defined as unintentional deaths that typically result from negligence and happen to employees while they are performing their duties or while members of the general public use the products and services that a corporation offers the presence of death is a prerequisite for charging businesses with manslaughter.Thus, the crimes of corporate manslaughter or homicide may occur in either of the

2. John Braithwaite, “White collar crime” 11 Annual review of sociology 19 (1985).
3. Editorial, Corporate Manslaughter, *available* at:<https://www.nibusinessinfo.co.uk/content/what-corporatemanslaughter#:~:text=corporate%20manslaughter%20is%20a%20criminal,of%20care%20to%20the%20deceased.https://www.nibusinessinfo.co.uk/content/what-corporate-> (visited on Sept. 15, 2023)

several following ways:

1. Egregious negligence in the company's venture's execution: Every company has a purpose that is expressly stated in its articles of association and is never meant to endanger anyone's life. However, sometimes the nature of a company venture is carried out with extreme or gross negligence, which occasionally results in the loss of potential lives, in the course of striving to achieve the objective of the company or in furtherance to accomplish the objective of the businesses lured by the greed of yielding profit. In such a case, a firm may be charged with corporate manslaughter and murder. Gross negligence is when someone acts with such extreme carelessness that it appears they are wilfully infringing on the right to the safety of others. It reveals a callous disregard for the lives or security of others. A state of mind that cannot be effectively defined by any simple distinction between advertence and inadvertence has always been covered by the idea of gross negligence because it is so broad. The mental attitude is known as indifference. When applied correctly, indifference can be a strong indicator of mens rea even in situations where criminal behaviour is required.[4] One such recent event was the MV Sewol tragedy in 2014, which resulted in the deaths of over 280 people.[5] Initial investigations reveal that the boat had routinely been overloaded and was up to three times its safe cargo capacity, which was a conspicuous example of egregious negligence in how the business's routine activity was conducted. Charges of corporate manslaughter were made against the Chonhaejin Marine Co. Ltd., its captain, and three other crew members.[6] This is a clear case of corporate manslaughter, even though the person personally responsible for the company's severe negligence can be identified and charged.

2. Corporate Hazardous Undertaking Affecting Environment and Individual Lives: Sustainability in the business world is defined as ensuring that society, the economy, and the environment are stable for both present and future clientele. In addition, it includes duties that go beyond attending to consumer demands. This suggests that it is essential to safeguard the wealth and well-being of future generations while also taking into account the needs of the broader public and society. Even though the corporation has a legal obligation to protect the

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4. J. Horder, "Gross negligence and criminal culpability",47 University of TorontoLawJournal496 (1997).
5. Editorial, "Sewol sinking: South Korea's ferry disaster" SAFETY4SEA, April 16, 2019, *available* at<https://safety4sea.com/cm-sewol-sinking-south-koreas-ferry-disaster/>(last visited on Sept. 15, 2023)
6. Editorial, "South Korean ferry captain and three crew charged with manslaughter" The Guardian, May 15, 2014, *available* at<https://www.theguardian.com/world/2014/may/15/south-korea-ferry-captain-charged-manslaughter>(last visited on Sept. 15, 2023)

environment, and the corporation makes every effort to uphold this duty, occasionally, unintentionally, the corporation's activities harm the environment and lead to a person's death, particularly when the corporation is dealing with hazardous materials, and this constitutes corporate manslaughter. One notable incident is the mass fatal gas explosion in Bhopal, which cost thousands of lives and is said to have had a long-lasting effect on the environment. Toxicology research has shown that the gas had a negative effect on the immune system and that there was a chance that it could be mutagenic and carcinogenic.[7] The Assam gas and oil leak in May 2020, also notorious as the Baghjan gas leak, is another incident of corporate manslaughter that not only causes human fatalities but also has detrimental effects on the ecosystem. A natural gas leak that started to burn caused widespread local evacuations, which were followed by environmental mutilationin the area's Dibru-Saikhowa National Park. The area, recognized for its abundant natural capital like tea, natural gas, oil and coal, burned for about six months, turning the nighttime skies orange and spewing an ash cloud into the air.[8] On May 7, 2020, a similar gas leak episodebefell at Vishakhapatnam (Vizag), Andhra Pradesh. Similar effects on the lives of the locals were caused by a styrene gas leak from a chemical plant run by a South Korean corporation, LG Polymers India Private Ltd. The instantaneous concern was that this might be another instance of the 1984 Bhopal Gas Tragedy. People in the vicinity were immediately expatriated to limit the damage. This gas leak resulted in 13 fatalities and significantly impacted a large number of people, albeit it was not as much oflethalas the one at the Union Carbide factory in Bhopal and still is a case of corporate.[9]

3. Corporate Manslaughter via Product: A product is a thing or service that is being traded. This implies that merchandise can take the shape of anything tangible, digital, or technological. Every item has a price and a cost attached to it. The price that can be paid is influenced by thequality, the market, the advertising, and the target market.[10] It does constitute corporate manslaughter when the clients' purchases of these products turn out to be the actual cause of their demise. Because they were in the best position to do so, it is therefore the

7. C. M. Abraham, s. Abraham, "The Bhopal case and the development of environmental law in India"40 International& comparative law quarterly 335 (1991).
8. Swapnali Gogoi, Annekha Chetia, "Baghjan fire: a case study of the 2020 Assam gas and oil leak' at Baghjan oil field, Tinsukia, Assam" 7 International Journal of mechanical engineering 510 (2020).
9. Wasim Beg, Swarnendu Chatterjee&Kritika Khanna, "Bhopal to vizag - a jurisprudential analysis of the tortious liability for companies"SCC online blog, 2020, *available* at:https://www.scconline.com/blog/post/2020/06/15/bhopal-to-vizag-a-jurisprudential-analysis-of-the-tortious-liability-for-companies/(last visited on Sept. 16, 2023)
10. Editorial, "What is 'product" TheEconomic Times, Sept. 13, 2023, *available* at<https://economictimes.indiatimes.com/defaultinterstitial.cms>(last visited on Sept. 16, 2023)

manufacturing company's responsibility to check their products before marketing them.[11] Corporate manslaughter via product can be attributed to the theory of "Automaker Liability" which is one of the variants of the deep pocket theory of jurisprudence that has emerged when the notion of crashworthiness is overextended past its reasonable bounds. Conferring to the description of the crashworthy principle in tort law, a car manufacturer is legally responsible if they produce automobiles that are unduly perilous to operate in the incident of a collision.[12] For instance, if the manufacturer of a specific car omitted security measures features or the plaintiff is injured due to a manufacturing defect. If this happens, the car will be considered crashworthy and any deaths will constitute corporate manslaughter.

4. Fatal accidents at workplace or company premises: This is the most common and widest amplitude form of corporate manslaughter which usually occurs due to either unhealthy or hazardous work environments under which the corporation's employees are forced to work; or owing to accidents that result in the deaths of workers (during the course of their employment) because the machinery used to carry out the necessary work is outdated or unstandardized; or the workers are forced to work overtime, with the workers' lives being lost as a result. R v Cox, Bowles & Bowles (1999)[13] was one such successfully prosecuted instance of corporate manslaughter at the workplace. A haulage company driver dozed off behind the wheel, causing a collision that claimed the lives of two persons. The motorist had exceeded the weekly limit of 60 hours of driving, which was against the law. Due to their egregious negligence in ignoring the employee's excessive working hours, two firm directors were found responsible for the corporate manslaughter of the employee. The international standard for prosecuting corporations for the crime of manslaughter, owing to the demise of workmen has been outlined in the following words, in the case of R v. Northern Strip Mining Construction Co. Ltd.(1965) *"It is for the prosecution to show that the defendant company, in person of the managing director or other individuals forming the determining mind and will of the company, was guilty to such a degree of negligence that amounted to a reckless disregard for the life and limb of the workmen"*[14].

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11. Escola v. Coca-cola bottling co. (1944) 24 cal. 2d 453.
12. R v. Brisbane Auto Recycling PtvLtd&Ors (2020) QDC 113.
13. Shantha M. W. Rajaratnam, "Legal issues in accidents caused by sleepiness" 30 Journal of human ergology., 110 (2001).
14. Slapper, Gary, "Corporate manslaughter: an examination of the determinants of prosecutorial policy" 2 Social and legal studies 424 (1993).

The essence of death at the workplace is not just limited to the death of the employees who are on the company payroll, however, it may extend to workers who are on a contractual basis dead during work at the company premises the company can be equally held liable for the offence of corporate manslaughter. One such example isa deadly accident that occurred on April 14, 2017, at the Deco-Pak location in Hipperholme, West Yorkshire,where a 48-year-old Andrew Tibbott, who had just been employed by the company for less than six weeks, was crushed while attempting to clean a sensor on the apparatus. The corporation was charged with corporate manslaughter following an investigation in which the company Deco-Pak was found guilty of corporate manslaughter in January 2022.[15]

From the explanation above, it is clear that corporate manslaughter can take place in a variety of ways. However, work-related deaths are the most common type of corporate manslaughter, and the rise in these fatalities is a serious cause for concern. Statistics from several nations show an increase in workplace deaths in a variety of industries, including manufacturing, transportation, construction, and healthcareand The International Labour Organisation (ILO) estimates that 2.3 million men and women worldwide die from work-related illnesses or accidents each year, which equates to more than 6000 fatalities per day.[16] To maintain worker safety and well-being, this trend necessitates immediate action. The rise in deaths at work is attributed to several variables. These include insufficient safety precautions, inadequate training, improper supervision, escalating workloads, insufficient rules, and placing a premium on productivity over employee well-being. Furthermore, it may be necessary to handle any new risks that emerge as a result of new technology and changing work practices.

UNDERSTANDING THE ESSENCE OF CORPORATE GOVERNANCE

The phrase "corporate governance" is at present widely branded in India and worldwide. Lately, we have seen a great increase in its prominence, particularly following the second half of 1996. One major contributor to this boom is the liberalisation of the economy, as well as the requirement for a new corporate ethos, and greater compliance.[17] The term “Governance” is

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15. Sophie Wood, “Review of recent corporate manslaughter cases: deco-pak, Bosley mill, aster healthcare”, KingsleyNapley, (2022), available at: https://www.kingsleynapley.co.uk/insights/blogs/criminal-law-blog/review-of-recent-corporate-manslaughter-cases-deco-pak-bosley-mill-aster-healthcare (last visited on Sept. 20, 2023)
16. ILO, “World statistic”, ILO Org., available at:https://www.ilo.org/moscow/areas-of-work/occupational-safety-and-health/wcms_249278/lang--en/index.htm(last visited on Sept.2, 2023).
17. SmitaJain, Corporate governance-national and international scenario,33rd National Convention of Company Secretaries,*available* at: <https://www.icsi.edu/media/webmodules/programmes/33nc/33souvearticle-smitajain.pdf > (visited on Sept.25, 2023)

derived from the Latin verb 'Gubernare' meaning 'to steer'.[18] If used literally, it means "control," and it alludes to a corporate organization's governance or control. The norms of conduct and behaviour expected of directors and key managerial personnel in handling and managing the affairs of the corporation are the subject of corporate governance.[19] Thus, corporate governance is all about introducing fundamental guiding principles and opinions for the operation of a business unit in the best interest. It establishes and demonstrates a novel and distinctive viewpoint of the company that may make it feasible to uphold a set of fundamental principles, improve managerial oversight, encompass human rights, and improve communication between the private sector and the broader community since it is acknowledged that relationships between stakeholders and firms are established on expectations and understandings and that stakeholders have a right to rely on these expectations.[20] This concept indicates the requirement of effective regulation to implement good governance. However, in contrast, it is clear from the etymology of corporate governance that even in the absence of regulation, good governance results from morally sound business practices. During the predominant period of monarchy way before the emergence of the concept of a well-defined organisation of business or corporation as what we have in contemporary, system society is said to have a market or exchange economy, and ethical business conduct still contributes to effective governance. When all or the majority of the goods used in society are distributed in this way, it is claimed that society has a market or exchange economy, even among the same company, it is all possible because the king was driven by ethics and had instilled moral leadership in the community.[21] A philosophy of right and wrong behaviour that identifies when our activities are moral and when they are immoral is known as ethics. The application of general ethical principles to corporate behaviour is known as business ethics. [22] Applying ethical concepts to analyse and resolve difficult moral quandaries is a skill and a discipline in itself. Business ethics demonstrate that a company can be ethical and profitable at the same time. When personal morals diverge from those of professional ethics,

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18. Editorial, "Corporate governance as a concept", Nagrika, *available* at: https://www.nagrika.org/nagrikalarticles/governanceconcept (last visited on Sept.2, 2023).
19. Goel Sandeep, Corporate Governance Principle and Practices, 2.2 (McGraw Hill India, New Delhi, 1st edn., 2020).
20. PoonamPuri, "Thefuture of stakeholder interests in corporate governance"48 CanadianBusiness Law Journal432 (2009).
21. ICSI, "Corporate governance through ancient Indian scriptures",TheInstitute of Company Secretary of India, July 16, 2020, *available* at:https://www.icsi.edu/media/webmodules/gyanganga_3_16062020.pdf (visited on Sept. 27, 2023)
22. A.CFernando, business ethics and corporategovernance, 3 (Pearson Education India, Noida, 2d edn., 2020).

ethical issues in business occur. Impartiality, Openness, Confidentiality/Trust, and Due Diligence/Duty of Care are the guiding principles of professional ethics. Adherence to one's obligations in the workplace prevents perceived or potential conflicts of interest. Integrity, objectivity, responsiveness to the public interest, accountability, honesty, and transparency are all aspects of management ethics. So long as the concept of ethics is strictly upheld, good governance is very much feasible even in the absence of legislation, which may not be practicable in today's corporate world given the size and structure of the corporations.

An organisational structure that dealt with the nuances of strong ruling and governance rose as a result of civilization. A business can be set up in several ways, including as a single proprietorship, a partnership, a joint venture, or a Hindu undivided family enterprise. However, they are constrained by the inherent risks of operating a large-scale firm, which includes limited resources and unlimited liability. As a company enterprise overcomes these constraints, the corporate form of business organisation is ideal. The biggest benefit of the corporate form of organisation or joint stock company is that it makes it possible for individuals who would not typically be connected to one another to co-own a company and in as much as it paves the way for the involvement of an outsider in the management of the company unlike other business organisations, consequently, this triggers an effective corporate governance process. Governance is described as "the act, process, or power of governing government" in the American Heritage Dictionary and "the act or mode of the ruling, of exercising control or authority over the activities of subjects; a system of regulations" in the Oxford English Dictionary.[23] In the business world, effective and good governance is the only issue that matters.

Principles of good governance: According to the United Nations Economic and Social Commission for Asia and the Pacific, a "governance mechanism" must exhibit eight key traits to be deemed "good governance." These eight criteria are shown in the accompanying graphic:1. The idea that by implementing these elements in a company, corruption would be reduced, as minority opinions would be taken into account, and the voices of the most vulnerable people of society would be heard throughout decision-making. Furthermore, it adapts to the demands of society now and in the future.[24]

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23. Paul P.Streeten, Saeed Ahmad Qureshi, S. M. Naseem, “Governance” 38 The PakistanDevelopment Review355 (1999).
24. United Nations Economic and Social Commission for Asia and the Pacific, whatis Good Governance?*available* at: https://www.unescap.org/sites/default/files/good-governance.pdf (visited on Sept. 1, 2023).

Graphic.1,

Source "United Nations Economic and Social Commission for Asia and the Pacific," (ESCAP)[25]

The above-stated traits of good governance advocate that Men and women participating equally in governance is a crucial component of good governance which is embedded in the "Participation" element. "Rule of law" calls for impartially applied, fair legal systems. Also, ample protection of human rights, predominantly those of minorities, is essential. "Transparency"implies that decisions are made and then actions are taken and then performed in a way that is in accordance with rules and regulations. Additionally, it indicates that there is ample access to information and is free for thosewho may be impacted by such decisions and their enforcement. In addition, where disclosure has supported accountability, it has deterred a good deal of undesirable corporate conduct.[26] Institutions and procedures must strive to meet the needs of all stakeholders within a reasonable timeframe to be considered "responsive" The "corporation" is widely regarded as the key force propelling the economic growth of the private sector.[27] On the other hand, the "Consensus-oriented" principle asserts that a particular society contains several actors and a variety of viewpoints. For society to fully understand what is and how it is in the best interest of the entire community, good governance necessitates the conciliation of conflicting interests in society. It is also vital to have a thorough understanding of what is needed for such development in the long run to achieve the goals of sustainable human

25. *Id.*
26. Elliott J. Weiss, "Disclosure and Corporate Accountability" 34 The Business Lawyer 589 (1979).
27. Lalita S. Som "Corporate Governance Codes in India" 41 Economic and Political Weekly4154 (2006).

development. The only way to do this is to comprehend the historical, cultural, and social contexts of a particular culture or group. According to the "Equity and efficiency" principle, organisations and procedures must create results that meet societal goals while maximising the usage of the available resources at their disposal to be regarded as engaging in good governance. Efficiency in the context of good governance also refers to the mindful utilisation of resources and the conservancy of the environment. Last but not least, "Accountability," a key element of effective governance, calls for institutional and public stakeholders to hold governmental entities, the corporate sector, and civil society organisations accountable. Various individuals may be held accountable depending on whether decisions or actions are taken by an organisation or entity internally or externally. In general, it is important to consider the individuals whose lives may be affected by a company's or organization's decisions or actions. Transparency and the proper implementation of the law are required to ensure responsibility.[28]

Corporate governance is the process by which a board of directors directs and controls a company to produce and develop value for stakeholders by carefully crafting the corporate strategy that will shape the organisation of the future. The effectiveness with which the Board of Directors and management perform their responsibilities to win over and satisfy stakeholders is governed by corporate governance. The constitution, optimal size, makeup, and qualifications of the Board of Directors, as well as the frequency of board member and candidate director changes, are all structural and administrative components covered by systems. In its most basic form, corporate governance outlines how a company is run and managed. Catherwool defines "Corporate governance" as the way a business manages its activities while being answerable to and responsible to the shareholders. A company's obligation to its stakeholders, which include its customers, suppliers, employees, and the local community, is referred to as corporate governance in a larger sense.[29]

LEGISLATION AN INDISPENSABLE AVENUE FOR THE ADVANCEMENT OF CORPORATE GOVERNANCE:

A larger definition of corporate governance would be a collection of operating procedures used by businesses where ownership and management are segregated.According to popular belief,

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28. Jason B. Freeman, Wilful Blindness and Corporate Liability, Freeman Law, available at: bhttps://freemanlaw.com/willful-blindness-and-corporate-liability/(last visited on Sept. 2, 2023).
29. Editorial, Code of Corporate Governance,The Intactone,*available* at:https://theintactone.com/2019/03/11/cgve-u2-topic-1-code-of-corporate-governance/(visited on Sept. 2, 2023).

"corporate governance systems are thought of as economic and legal entities that can be changed through the political process.[30] Legislation can therefore be an avenue to achieve effective company governance. Upon extensive research it is observed thata string of well-known firm failures in different parts of the world have marked the history of the evolution of corporate governance: The failure of corporate giants Enron and WorldCom in the United Statesin early 2000 prompted Congress to promulgatethe Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley), levitation standards for corporate responsibility. The corporate governance movement then gained momentum and sparked several institutional reforms in the United States.[31] In terms of corporate governance advancement, the United Kingdom (UK) has been in the forefront. Due to widely reported business scandals in the late '90s, such as Polly Peck (1990), Maxwell (1991), and BCCI (1991)., corporate governance issues began to surface in the UK, giving this age-old problem a fresh perspective. The corporate issues that arose included, among other things numerous financial reporting irregularities, creative accounting, unexpected business failures, the auditors' limited role, and an inconsistent relationship between directors' compensation and company performance. To address concerns about corporate scandals, the first corporate governance group, the Cadbury group, was established in 1991. This effort resulted in the publication of the Cadbury Report in 1992, and it developed a code of corporate governance better known as the 'Code of Best Practice'.[32] It is noteworthy that the U.K. was the first country in the world to take up a nationwide initiative towards corporate governance and several countries emulated the innovative approach.[33] Prior and post-Satyam are the two main phases into which corporate governance development in India can be divided. The primary objective of the corporation governance reform during its initial phase, which can be roughly dated to the 1990s, was to increase the strength and independence of Audit Committees and Boards while also enhancing their ability to oversee management. These reform attempts, which were carried out in numerous ways, were greatly assisted by the Securities and Exchange Board of India (SEBI) and the Ministry of Corporate Affairs (MCA).[34] Followed by the second phase in which several unsettling truths regarding the shortcomings of the corporate governance norms in India

30. Stijn Claessens, "Corporate Governance and Development" 21 the World Bank Research Observer 95 (2006).
31. HaticeUzun, Samuel H. Szewczyk, Raj Varma, "Board composition and corporate fraud" 10 Financial Analysts Journal60 (2004).
32. Elewechi Okike, Corporate governance in Commonwealth Countries 339 (International Centre for Research in Accountability and Governance, Washington, UK, 2019).
33. IICA, Corporate Governance, 4.52 (Taxman Publication, New Delhi, 2015).
34. Bhumesh Verma, Himani Singh, "Evolution of corporate governance in India" 69 pl (cl) (2019)

were exposed by the Satyam scam in 2009, which shocked the Indian business community. The new Companies Act 2013, which among other measures fixed the liabilities of the auditor and independent directors, was the government's response to the scam, rewriting the legal structure. In an effort to enhance corporate governance, the market regulator Sebi modified Listing Guidelines Clause 49 in 2014 and adopted the Securities and Exchange Board of India (Issue and Listing of Municipal Debt Securities) Regulations, 2015.[35]

The only corporate crimes associated with all of the cited failures are those that were not fatal. The formation of a complex patchwork of laws, regulations, and organizations served as a response to each crisis proving the vitalness of legislation in overhauling flaws in corporate governance in the business world. On the other hand, there are lethal corporate crimes. The "Bhopal gas tragedy," which is considered the most notorious corporate homicide in history, and the deadliest catastrophes ever also served as impetuses for the passage of several pieces of legislation, including the Environmental Protection Act of 1986, the Public Liability Insurance Act of 1991, and the Protection of Human Rights Act of 1993. The Public Liability Insurance Act of 1991 was enacted to make the owner of an industrial undertaking strictly liable for any injury or damage caused because of pollution.[36] However, despite all this effort by the government of India to facilitate effective redressal to the victim ofcorporate manslaughter, it appears that in the absence of explicit legislation,there is still scope for corporations to evade their accountability, especially in a case where a person responsible for the accident is not identifiable who can be held exclusivelyaccountable and left the victim with no remedy. Thus, there is a need for specific legislation for the creation of sanctions or provisions that can be imposed on corporations in events of industrial disasters. All this elucidation indicates that it is only through legislation effective corporate governance can be achieved.

EXPLICIT CORPORATE MANSLAUGHTER LEGISLATION VIS-A-VIS CORPORATE GOVERNANCE: RESEARCHER'S PERSPECTIVE

The field of corporate governance is quite diverse. Fundamentally, it promotes moral and ethical behaviour, and the cornerstones of effective corporate governance are integrity, accountability,

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35. Rica Bhattacharyya, SachinDave, “Lesson from Satyam: corporate governance evolves, not execution” TheEconomic Time, Jan. 07, 2016, *available* at<https://economictimes.indiatimes.com/news/company/corporate-trends/lesson-from-satyam-corporate-governance-evolves-not-execution/articleshow/50476372.cms?from=mdr>(last visited on Sept. 2, 2023)
36. MohammedNaseem, Environmental law in India 88-89 (WoltersKluwer, Gurgaon, 2011).

and transparency. Good corporate governance includes a number of components, inter alia:A skilledBoard of Directors, efficient risk management, a code of conduct, and clear laws and regulations, etc.[37] However, it must be remembered that merely passing laws would not guarantee effective government. Even in the absence of legislation, ethical business practises advance good governance, but given the numerous high-profile corporate scandals and cases of corporate homicide, there is an urgent need for explicit regulation to address the prevalence of fatal accidents. The viability of such regulation is examined in the paragraph that follows.

Accountability and Transparency: which is one of the primaries in corporate governance requires the establishment of rules and regulations that mandate transparency and accountability. In this regard, explicit legislation on corporate manslaughter is of utmost importance for holding corporations accountable, deterring negligence, providing clarity and guidance to the legal system, and delivering justice to victims and their families. By establishing clear laws, society can ensure that corporations prioritize safety, prevent tragic incidents, and face appropriate consequences when their actions result in loss of life. Explicit legislation on corporate manslaughter is essential for ensuring that corporations are held accountable for their actions.

Unambiguous legislation: Explicit legislation provides clarity and guidance for law enforcement agencies and the judicial system. By defining the specific elements required for a conviction, legislation makes it easier for prosecutors to build a compelling case and for judges to deliver appropriate judgments. It is possible to ensure that investigations and legal proceedings go quickly, minimising ambiguity and ensuring just conclusions, by having precise legislation on corporate manslaughter. Additionally, absent specific laws, corporate manslaughter charges may be handled as civil affairs with just monetary penalties.This undermines public trust and fails to provide justice for the victims and their families. Explicit legislation allows for criminal convictions, enabling the legal system to hold corporations accountable in a manner that reflects the severity of the offence. For instance, one benefit of adopting explicit legislation by the UK is that it enshrines provisions of "Remedial orders [38] and publicised conviction orders,[39] "which essentially require the convicted company to publicise that they have been found guilty of corporate manslaughter and have taken a corrective action

37. Governance, Risk Management, Compliances and Ethics, ICSI, *available* at:https://www.icsi.edu/media/webmodules/governance_risk_management_compliances_and_ethics.pdf,(last visited on Sept. 25, 2023).
38. Corporate Manslaughter and Corporate Homicide Act, 2007, s. 9.
39. Corporate Manslaughter and Corporate Homicide Act, 2007, s.10.

step,this helps in preventing unethical practices that could harm a company's reputation and value as well as protect the interest of the various stakeholders of the company. This demonstrates thatthrough explicit legislation the penalty for corporate manslaughter can be enhanced and not only confined to merely imposing fines. This ensures that justice is served and provides closure for those affected by the tragedy.

Risk Management: Legislation also aids in risk management within the corporate sphere. These measures protect businesses from legal and reputational risks associated with unethical or illegal activities. Compliance and EnforcementPerhaps the most compelling reason for legislation in corporate governance is its enforcement mechanisms. Thus, laws empower regulatory bodies to oversee corporate behaviour, investigate misconduct, and impose penalties for non-compliance. This enforcement ensures that companies adhere to established governance standards, reducing the likelihood of corporate scandals and fatal industrial disasters. Thus, legislation is the cornerstone of effective corporate governance, nevertheless,it is the boards of directors who must develop more efficient corporate governance mechanisms to ensure strategic control over the company's ethical direction even in the lack of clear rules.[40] Nevertheless, in a rapidly evolving corporate landscape, ongoing efforts to refine and enforce corporate governance laws are essential to ensuring the integrity and trustworthiness of businesses worldwide.

CONCLUSION:

Upon extensive research, it can be concluded that explicit legislation on corporate manslaughter serves as a crucial supplement to corporate governance practices by holding corporations accountable for their actions resulting in the loss of life. It also reinforces the importance of good governance practices within corporations. By explicitly addressing the criminal liability for causing death due to negligence or reckless behaviour, legislation sends a clear message to corporations that ethical conduct and responsibility towards human life are integral to effective governance. This encourages companies to establish robust governance frameworks, ensuring that safety measures and risk management protocols are prioritized. Explicit legislation acts as a

40. David Weitzner, Theo Peridis, "Corporate governance as part of the strategic process: rethinking the role of the board" 102 Journal of business ethics 34 (2011).

catalyst for enhancing corporate responsibility. It compels companies to evaluate their operations, identify potential risks, and implement measures to mitigate them. By imposing criminal liability, the legislation creates a strong incentive for corporations to invest in safety protocols, employee training, and risk assessment procedures. This, in turn, fosters a culture of responsibility and accountability, which is vital for effective corporate governance.Explicit legislation on corporate manslaughter contributes to a safer working environment. By establishing legal consequences for corporations that fail to meet their duty of care, the legislation encourages companies to proactively address safety concerns. This may involve conducting regular audits, implementing safety protocols, and providing appropriate training to employees. As a result, workplaces become safer, reducing the risk of accidents and fatalities, and promoting employee well-being.It further aligns corporate and societal interests by recognizing the importance of human life and the impact of corporate actions on society. By holding corporations accountable for their actions resulting in loss of life, the legislation ensures that companies prioritize societal welfare alongside their financial goals. This alignment reinforces the notion that corporations have a broader responsibility to the communities they operate in, strengthening the bond between corporations and society. Thus, undisputedly, explicit legislation on corporate manslaughter acts as a supplement to corporate governance practices by reinforcing good governance, enhancing corporate responsibility, promoting a safer working environment, and aligning corporate and societal interests. By imposing criminal liability, the legislation creates a strong incentive for corporations to prioritize safety and ethical conduct, leading to enhanced governance frameworks and improved accountability. Governments and regulatory bodies must recognize the significance of explicit legislation in complementing corporate governance efforts, thereby ensuring corporations operate in a manner that respects and safeguards human life. Thus, it is imperative this critical issue of corporate homicide and take proactive steps to implement and enforce such laws.

THE DISSENT OF THE CHIEF JUSTICE IN HIS OWN COURT

Dr. Mridula Devi*

Sinta Umpo**

INSTITUTIONAL AND FUNCTIONAL INDEPENDENCE OF JUDICIARY

Judiciary is a formidable, yet very vulnerable institution and therefor it requires protection in order to secure its independence. The independence of the judiciary can be secured by *Institutional independence and Functional independence*. While the former secures the freedom in the workings of the judiciary as a collective organ of the State, the later envisages the independence instilled on those who man the judicial institution. When both limbs of independence are secured, the judiciary resembles the vibrancy in the democracy.

Constitution of India endeavours to secure through various mechanisms both the limbs of independence. Institutional independence is secured by:

- Power to punish for contempt.[1]
- The law declared by the Supreme Court is binding on all courts.[2]
- All authorities civil and judicial are obliged to act in aid of the Supreme Court.[3]
- It can pass any decree or order so as to secure complete justice.[4]
- Is entitled to regulate its own practice and procedure.[5]
- Can appoint its own officers.[6]
- Administrative expenses on such officers are charged on Consolidated Fund of India.[7]
- No discussion on the conduct of judge in discharge of his duty, except when in impeachment proceedings.[8]
- Separation of the judiciary.[9]

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1. The Constitution of India, art. 129.
2. *Id*., art. 141.
3. *Id*., art. 144.
4. *Id*., art. 142.
5. *Id*., art. 145.
6. *Id*., art. 146(1).
7. *Id*., art. 146(3).
8. The Judges (Protection) Act, 1985 (Act 59 of 1985), sec. 3.
9. *Supra* note 1, art. 50.

Functional independence is secured through:

- Appointment and continuance of judge is not subject to election process.
- There is certainty of tenure.
- Protection from ease process of removal.
- Protection of salaries, allowances and other privileges which cannot be varied to their disadvantage by the executive and legislative action.
- Salaries and allowances are chargeable on Consolidated Fund.
- Freedom to offer dissenting opinion.[10]

The present paper approaches to address on one aspect of functional independence i.e., the dissenting opinions, with specific reference to the role of Chief Justice as a dissenter. The Constitution of India permits judges who do not concur with the majority to deliver a dissenting opinion vide Art. 145(5). The dissenting opinions are welcome feature of free society, for it shows the fallibility of law and the judges. It opens the marketplace of judicial discourse between the judges and public at large, thus, it contributes integrity, transparency and sanctity to the judicial process. It is an essential criterion of judicial independence. Whereas, in most of civil law countries of Europe, decision of the court is collegial, and thus, dissent if any, is not disclosed.[11] The author of the opinion is also anonymous. It is presumed that the certainty and stability of law is achieved when the judgement is unanimous.[12]

Chief Justice Hughes rightly points out dissent as an appeal to the 'intelligence of a future day'. It is often prophetic, for what may have been a minority opinion may become the majority in future. Thus, the dissent helps in maintaining the dynamic character of the Constitution by making it evolving to the requirements of the changing times.

It reflects the strong character of the judges and thus sustains the public Confidence on the character and independence of the judges.[13] It allows the judges not to be mute but to express themselves. Thus, the dissent throttles the passivity of the majority by enthusing them to justify their own position, as against that of the minority. It causes the majority to refine and clarify its

10. *Supra* note 1, art. 145(5).
11. Yogesh Pratap Singh, Judicial dissent and Indian Supreme Court 143 (Thomson Reuters, New Delhi,1stedn., 2018).
12. Rohinton F. Nariman, Discordant Notes: The voice of dissent in the court of last resort 25 (Penguin Random House India, New Delhi, 1stedn., 2021).
13. *Id.* at 29.

opinion as to the hardest question posed by the dissenter.[14] The dissent therefore exposes the majority opinion to be closely scrutinised. Dissent thus is perks to the majority opinion, for it enhances the quality of argument reasoned by the judges. In the absence of the dissent the judgement would have been often brief and without much objectivity to the arguments placed by the parties.

Dissent ought not to be, therefore, a suspect merely because it goes against the majoritarian view. Conformist approach of the judges only reduces the dissent and thus decreases the chances of finding the inherent flaw in majoritarian. In order to showcase the majority, the dissents being clothed and silently acquiesced into submission before the majority views, would be seriously flawed. It would sound dead the expounding of law. In order to have a united court, we would be having a submissive court. A court where the judges would not author any opinion of his own, but merely write 'I agree'.[15]

The dissenting opinions, sometimes become the majority opinion, yet receive little attention, for the professionals of law are far more concerned with *what the law* is, and not *what law ought to be;* therefore, reading dissent is deemed to be a futile exercise. The majority opinion sheds light on what law is, and that is what suffices, for many, at the bar, bench and academia, unlike the dissent, which has no precedential value.

Review of Literature

The dissenting opinions were generally not encouraged in the past and therefore the dissent, if any, were generally expressed in *apologetic tones,* but over time it turned into a *respectful dissent*, nonetheless, the dissent is still thought to create challenges to the collegiality on the bench (Loinsigh, 2014).[16]And therefore, the judicial members of House of Lords, best thought of dissent as an *idiosyncrasy* and one that inspires little more than anecdotal interest, which sometimes present the *breakdown in the system* (Adler, 2000).[17]It was also necessary that to assert its own authority and legitimacy, the courts wanted its opinion to be seen as one and not divided. And therefore, some countries like Germany and Lithuania did not allow the

14. Katalin Kelemen, Judicial dissent in European Constitutional Courts: a comparative and legal perspective 159(Routledge,New York, 1stedn., 2019).
15. Sudhanshu Ranjan, Justice vs Judiciary 260 (Oxford University Press, New Delhi, 1stedn., 2019).
16. Nora Ni Loinsigh , "Judicial dissent in Ireland: Theory, practice and the constraints of single opinion rule"51 Irish Jurist(2014).
17. John Adler, "Dissents in courts of last resort: Tragic choices" 20Oxford Journal of Legal Studies(2000).

publication of dissent for almost two decades (Kelmen, 2013).[18]

Dissent is generally a declining trend. Rarity of dissent may be contributed to the belief that public good is best served by having unanimity amongst the judges in the decision arrived by the court and due to fear that dissent may occasion confusion, for sometimes, judges don't reason on respect of dissent in *Partly Concurring* opinions, as to *why and where* he concurs and where he doesn't (Simpson, Jr, 1923).[19] Further, the chances are that once the deliberation or the draft judgements are shared with the brother judges, the possibility of disputing it, possibly gets reduced out of collegiality. And therefore, a trial judge, who is accustomed to taking his own decisions in lower courts, may experience in constant consultation, discussion and compromising with other judges, a new and strange experience (Freda Steel, 2017).[20]

Further a compromise may also be made in salient cases. In such cases thelikelihood of dissenting opinion is lowered, and it generally is provided with longer reasoned judgements in order to be more authoritative. Similarly, the dissent is also minimised in cases of complex nature (Muro et.al., 2020).[21]

In the context of Indian Supreme Court, the dissent has declined towards the third decade for which may be contributed to external (Government) or internal (CJI) pressures,constitution of two-judge Bench or due to rising workloads(Singh et.al. 2016).[22]It is also seen that when the Chief Justice is on the bench, the chances of dissenting judgements are lowered (Singh, 2016).[23]To similar effect was the role of the Chief Justice of Indonesian Constitutional Court, who was not to forthcoming to the role of differences amongst the judges (Butt, 2018).[24] The dissent further may be reduced by the Chief Justice by manipulation of the roster,by handpicking judges of one's choice (Ranjan, 2019).[25]

There is also growing concern about the concurring judgements that it also leads to uncertainty and therefore it must be provided only with a sincere conviction that the majority is unable to see

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18. Katalin Kelmen, "Dissenting Opinions in Constitutional Courts"14 German Law Review (2013).
19. Alex Jr. Simpson, "Dissenting Opinions"71 University of Pennsylvania Law Review (1923).
20. Freda Steel, "Focus Feature: Dissent"67 University of Toronto Law Journal (2017).
21. Sergio Muro, Sofia AmarlalGarcia, et. al., "Exploring dissent in Supreme Court of Argentina"63 International Review of Law and Economics(2020).
22. Yogesh Pratap Singh, Afroz Alam, et. al.,"Dissenting opinions of Judges in the Supreme Court"51 Economic and Political Weekly (2016).
23. *Supra* note11.
24. Simon Butt, "The function of Judicial dissent in Indonesia's Constitutional Court"4 Constitutional Review(2018).
25. *Supra* note 15.

what it ought to (Gogoi, 2021).[26]One cautioning area is the increasing involvement of the law clerks in the preparation of judgements which has led to the proliferation of separate opinions (Kelemen, 2019).[27]

Dissent is a powerful tool,so much so that it leads to better final draft, as it allows the judgement to be redrafted, clarified and circulated, so as to remove the mistakes that may creep in (Ginsburg, 2018).[28]The court should not endeavour to give single judgement for it would lead to, what Gerry Whyte calls, search for *lowest common denominator* that leads to a compromise which produces a weak precedent, which will make it exceedingly difficult to find the ratio decidendi of the case, due to very general statements of law made by the court in its decision.[29] Such judgements also will be offering extremely short reasons for its decisions.

Research Questions

The research question for the purposes of the present research are as follows:

- Does a judge of Supreme Court of India dissent after his elevation as Chief Justice?
- Is there a major difference in proportion of dissenting opinions by a justice before and after his elevation as Chief Justice of Supreme Court of India?
- How often does a Chief Justice of Supreme Court of India give solo dissent?

Research Hypothesis

- The frequency of dissent of a judge after elevation as Chief Justice of Supreme Court of India reduces.

Research Methodology

The paper herein adopts empirical approach in order to statistically analyse the dissenting opinions given by the Chief Justices of the Indian Supreme Court. It also takes into account dissenting opinions that were given by him before he became the Chief Justice. For the stated approach, the use of Manupatra database has been extensively used.

Limitations

The discussions in the present paper will be confined till the year 2022 only. The endeavour of the present paper is not to analyse each and every decisions, but only an attempt to bring out the

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26. RanjanGogoi, Justice for the judge: An autobiography (Rupa Publications, New Delhi,2nd edn., 2021).
27. *Supra* note 14.
28. Ruth BaderGinsburg, My own Words, (Simon and Schuster Paperbacks, New York, 1stedn., 2018).
29. *Supra* note 16 at 138.

quantifiable data of the dissenting judgements given by the Chief Justices of the Supreme Court. Another limitation being that the cases where dissent which has been given prior to becoming the Chief Justice, is not named, unless otherwise required. This is particularly due to the reason that endeavour to give all the names of such cases would have otherwise made the paper extremely lengthy and leave little scope of matters of significance presently dealt with. Nonetheless, the statistical data of such dissent made by each judge before becoming Chief Justice will be provided.

I. No dissent in SC either before or after becoming Chief Justice

Figure 1

Cheif Justice No.	CHIF JUSTICE	YEAR IN SC(AS A PUISNE JUDGE TO CHIFJUSTICESHIP)[30]
21	Ranganath Mishra	1983-1991
22	Kamal Narain Singh	1986-1991
23	Madhukar Hiralal Kania	1987-1992
41	Rajendra Mal Lodha	2008-2014
45	Dipak Mishra	2011-2018
47	Sharad Arvind Bobde	2013-2021
48	Nuthalapati Venkata Ramana	2014-2022

It is quite revealing to find that there are Chief Justices who have never dissented in the Supreme Court either before or after their elevation, even though the shortest stint itself is 5 years. Figure 1shows that there are Seven judges who fall within this category.

Their tenure as puisne judge of Supreme Court has been fairly long, though the duration as Chief Justice varied from days to years. The shortest time to be spentby amongst them in Supreme Court was K.N. Singh, who he remained for 5 years and 70 days of which he has had his name recorded for the shortest tenure as Chief Justice of India with 17 days. R.M. Lodha remained for 5 years and 284 days of which as a Chief Justice for 153 days; M.H. Kania remained in Supreme

30. Supreme Court of India, *available* at:https://main.sci.gov.in/former-chief-justices (visitedon Sept13, 2023).

Court for 5 years and 317 days of which he remained as Chief Justice for 340 days.

The other four have been in reign for more than a year as a Chief Justice. Ranganath Mishra had a total tenure of 8 years and 254 days of which 1 year and 59 days as Chief Justice; Dipak Mishra for 6 years and 357 days of which 1 year and 35 days as Chief Justice; S.A. Bobde for 8 years and 11 days of which 1 year and 156 daysas Chief Justice and N.V. Ramana for 8 years and 190 days of which 1 year and 124 days as Chief Justice.

DISSENTING BEFORE BUT NOT AFTER ELEVATION AS CHIEF JUSTICE

Figure 2

SL NO	NAME OF JUSTICE	NUMBERS OF DISSENT	YEARS AS CHIEF JUSTICE
1	Mehr Chand Mahajan	12	352 days
2	Bijan Kumar Mukherjea	6	1 year 39 days
3	Sudhi Ranjan Das	6	3 years 241 days
4	PralhadBalacharyaGajendragadkar	1	2 years 42 days
5	Koka Subba Rao	53	285 days
6	Kailash Nath Wancho	13	318 days
7	Mohammed Hidayatullah	39	2 years 294 days
8	Jayantilal Chhotalal Shah	37	35 days
9	Ajit Nath Ray	7	3 years 276 days
10	Yeshwant Vishnu Chandrachud	3	7 years 139 days
12	Raghunandan Swarup Pathak	5	2 years 209 days
13	EngalaguppeSeetharamiahVenkataramiah	2	181 days
14	ManepalliNarayanaraoVenkatachalia	1	1 year 254 days
15	Aziz Mushabber Ahmadi	6	2 years 150 days
16	Jagdish Sharan Verma	4	298 days
17	Madan Mohan Punchhi	5	264 days
18	Adarsh Sein Anand	1	3 years 21 days
19	Bhupender Nath Kirpal	1	185 days
20	Gopal Ballav Patnaik	3	40 day
21	Vishweshwar Nath Khare	1	1 year 134 days
22	S. Rajendra Babu	2	29 days
23	Ramesh Chandra Lahoti	2	1 year 73 days
25	Konakuppakatil Gopinathan Balakrishnan	2	3 years 117 days
26	Soresh Homi Kapadia	2	2 years 139 days
27	Palanisamy Sathasivam	1	281 days
28	HandyalaLakshiminarayanaswamy Dattu	1	1 years 65 days
29	Ranjan Gogoi	1	1 year 45 days
30	Udey Umesh Lalit	2	73 days

The research finds that there are total of 30 Chief Justices who have dissented as a Puisne Judge but have not dissented after becoming the Chief Justice.The list of the same is provided as Figure 2. The study finds that majority of them, more than fifty percent, had more than one year at their disposal as Chief Justice and yet remained without a single dissent. The most notable amongst them is Y.V. Chandrachud, who remained as Chief Justice for a period of seven long years, and yet retired without a single dissent.

Of the notable dissenterin this category is K. Subba Rao, who has given 53 dissenting judgements.Out of this many dissenting judgements, 44 were solo dissents, which is more than any other judge. Vast majority of the judgement was in the Constitution Bench. He gave 17 dissents while BP Sinha was presiding over the Bench as Chief Justice. However, once he himself became the Chief Justice, he did not write any dissenting judgements. This could possibly be attributed to his short stint of 285 days as Chief Justice when he resigned for contesting the post of President of India.

Another notable entry in this list is J.C. Shah who has authored 728 judgements of which 102 judgements was made in a single year (1969).[31] He has given 37 dissents. He has spent a short stint of 35 days as Chief Justice.

But then 17 judges out of 30 in this category had a stint of more than one year as Chief Justice and yet remained without a dissent. The most notable one amongst them is M. Hidayatullah who has dissented in 39 occasions but has not dissented after elevation as Chief Justice, where he remained for 2 years and 294 days. He has given 19 solo dissents as a judge of Supreme Court. Nine of this solo dissent has been in the Constitution Bench. Of all the dissents, eight have been while K. Subba Rao (Chief Justice), was presiding over the Bench. He retired a day after his judgement nullifying government action in *privy pursecase.*[32] He was then elected as Vice President of India unopposed and unanimously in 1979. The distant second with more than a year as Chief Justice is A.N. Ray with 7 dissents as puisne judge and none as Chief Justice during a tenure of 3 years and 276 days.

Now that more than 50% of judges in this category is without dissent gives rise to hypothesis, as to whether the Chief Justice have formidable influence on brother judges so as to align their opinions with his own line of thinking. But then, how does the Chief Justice influence his brother

31. Supreme Court Observer, *available* at:https://www.scobserver.in/judges/j-c-shah/ (visited on Sept. 15th2023).
32. Madhav Rao Scindia v. UOI, 1971 3 SCR 9.

judges? One of the possible answers is that the bench could have been constituted so as to have a bench of like-minded judges.[33] What is of particular interest pointing towards present hypothesis is the media briefing of the four senior-most judges of the Supreme Court asserting arbitrary assigning of cases by the Chief Justice.[34]

DISSENTED ONLY AFTER BECOMING CHIEF JUSTICE OF SC

Figure 3

NAME OF THE CHIEF JUSTICE	NUMBERS OF DISSENT	NAME OF THE CASE	COMPOSITION
Hiralal Jekisondas Kania	1	In re The Delhi Laws Act 1912, the Ajmer -Merwara (Extension of Laws) Act, 1947[35]	7
Altamas Kabir	1	Subash Popatlal Dave v. UOI[36]	3
Tirath Singh Thakur	1	K.K. Singh v. State of Bihar[37]	7
Jagdish Singh Khehar	1	Shayara Bano v. UOI[38]	5

Hiralal Jekisondas Kania, has come within this group by default. He was the first Indian Chief Justice of the Federal Court on 14th of August 1947, was also sworn in as Chief Justice of the newly constituted Supreme Court on 26th of January 1950.[39] The new court constituted of 6 judges, where except S.R. Das, all other judges had been judges of the Federal Court.[40] In his only dissent as Chief Justice, he was accompanied by M.C. Mahajan whom he had appointed to

33. *Supra* note 22 at 15.
34. Maxim Bonnemann, PhiliphDann,"The Indian Supreme Court in crisis"51 Law and politics in Africa, Asia and Latin America 271 (2018).
35. MANU/SC/0010/1951.
36. (2014) 1 SCC 280.
37. (2017) 3 SCC 1.
38. MANU/SC/1031/2017.
39. George H. Gadbois, Jr., Judges of the Supreme Court of India 1950-198920(Oxford India Paperbacks, New Delhi,10thedn., 2018).
40. Motilal C. Setalvad, My life law and other things152 (Law and Justice Publishing Co., New Delhi, 2023).

the Supreme Court.

Figure 3 shows that except for the dissent of Altamas Kabir, all the other dissents given under this category have been made in the Constitution Bench.

DISSENTED BOTH BEFORE AND AFTER BECOMING CHIEF JUSTICE

Figure 4

Name of Justice	Numbers of Dissent before becoming Chief Justice	Dissent after being elevated as Chief Justice
Patanjali Sastri	6	• State of West Bengal v. Anwar Ali Sarkar[41] • Lachmandas Kewalram Ahuja v. State of Bombay[42] • The State of Bihar v. Sir Kameshwar Singh[43]
Bhuvaneshwar Prasad Sinha	5	• Atiabari Tea Company v. State of Assam[44] • Kishan Chand Arora v. Commissioner of Police, Calcutta[45] • Sardar Syedna Taher Saifuddin Saheb v. State of Bombay[46] • State of Gujarat v. Vora Fiddali Badruddin Mithibarwala[47]
Amal Kumar Sarkar	52	• The Barium Chemicals Ltd. V. The Company Law Board[48]

41. MANU/SC/0033/1952.
42. MANU/SC/0034/1952.
43. MANU/SC/0019/1952.
44. MANU/SC/0030/1960.
45. MANU/SC/0043/1960.
46. MANU/SC/0072/1962.
47. (1964) 6 SCR 461.
48. MANU/SC/0037/1966.
49. MANU/SC/0324/1972.

Sarv Mittra Sikri	1	• M/s Devidas Vithaldas and Co. V. CIT, Bombay City[49] • The Neptune Assurance Co. Ltd. V. UOI[50]
Mirza Hameedullah Beg	6	• In re Shri Shyam Lal[51] • M/s Prag Ice and Oil Mills v. UOI[52]
Prafullachandra Natvarlal Bhagwati	10	• UOI v. Godfrey Philips India Ltd.[53] • Mohd. Mumtaz v. Nandini Satpathy II[54] • Mohd. Mumtaz v. Nandini Satpathy I[55] • Sheonandan Paswan v. State of Bihar[56]
Sabyasachi Mukharji	5	• Delhi Transport Corporation v. DTC Mazdoor Congress[57]
Lalit Mohan Sharma	5	• R.C. Poudyal v. UOI[58]
Sam Piroj Bharucha	4	• ITC Ltd. V. Agricultural Produce Market Committee[59]
Dhananjaya Yeshwant Chandrachud	6	• Beghar Foundation through its Secretary and Ors. vs. Justice K.S.Puttaswamy and Ors.[60]

Patanjali Sastri being older than Kania, could not have become Chief Justice, but for the early death of predecessor due to heart attack. Favourably, he went on to become the Chief Justice after the sitting judges threatening to resign en-masse if seniority rule was not adhered to.[61] Figure 4 shows that Justice Patanjali dissented in 6 cases before and 3 cases after becoming the

50. MANU/SC/0409/1972.
51. (1978) 2 SCC 479.
52. MANU/SC/0493/1978.
53. MANU/SC/0036/1986.
54. (1987) 1 SCC 279.
55. (1987) 1 SCC 269.
56. MANU/SC/0206/1986.
57. MANU/SC/0031/1991.
58. MANU/SC/0292/1993.
59. MANU/SC/0047/2002.
60. MANU/SC/0030/2021.
61. M.C. Chagla, Roses in December an autobiography 171 (Bhavan's Book University, Mumbai, 17thEdn.,2018).

Chief Justice respectively. The three cases he dissented after becoming Chief Justice was all in Constitution Bench.

Similarly, all the cases dissented by Bhuvaneshwar Prasad Sinha after presiding over the highest office were made in the Constitution Bench.

One of the most notable dissenters in this category was Amal Kumar Sarkar, who has contributed 53 dissents. He was also the largest separate opinion writer amongst his contemporaries or before followed by K. Subba Rao.[62] He spent 9 years 87 days in the Supreme Court out of which 105 days was as a Chief Justice. His only dissent after being elevated to Chief Justiceship was in a Constitution Bench.

Sarv Mittra Sikri before coming to Supreme Court was Advocate General of Punjab, thus becoming the first to come directly from the bar to bench in 1964[63]. Justice Sikri presided over the Supreme Court for 2 years and 93 days. He has two solo dissents to his credit after elevation. His only dissent before he became the Chief Justice was in *Coffee Board, Bangalore v. Joint Commercial Tax Officer.*[64] After becoming Chief Justice he dissented in *M/S Devidas Vithaldas& Co. v. CIT, Bombay City*[65] in a composition of 4-judge benchand in the Constitution Benchin *Neptune* case.

Mirza Hameedullah Beg has dissented after his elevation in a full Bench decision in *shyamlal* case and in a 7-Judge Constitution Benchin *Prag Ice*. Whereas, PrafullachandraNatvarlal Bhagwati, who remained in the Supreme Court for the longest time of 13 years and 156 days, has dissented as Chief Justice, except for in *Godfrey Philips,* all other decisions were in Constitution Bench of Five Judges.

Sabyasachi Mukharjihas given one dissent after elevated as a Chief Justice. Notably, he has given five solo dissents in Supreme Court, of which, one was as Chief Justice of India. All the dissents as puisne judge were in a full bench composition, while his only dissent as Chief Justice was in a Constitution Bench. Similarly, Sam Piroj Bharucha and Lalit Mohan Sharma's only dissent as Chief Justice was also in a Constitution Bench.

In this category, except for three judgements in *Devidas, Shyam Lal* and *Godfrey,* all the other judgements after elevation as Chief Justice were made in Constitution Bench.

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62. *Supra* note 39 at 76.
63. *Supra* note 39 at 109.
64. (1969) 3 SCC 349.
65. MANU/SC/0324/1972.

CONCLUSION

The current paper finds that the Chief Justice of Supreme Court may dissent after his elevation in that position, but the frequency of such dissent is fewer in proportion to the one as puisne judge. In case of some Chief Justices who often dissented as puisne judge, did not remain as Chief Justice for long and thus proportionally effecting his chances of dissent. Thus, reducing dissent could possibly be attributed to different reasons, such as time factor, increased administrative workload, stare-decisis principle, collegiality and after-retirement prospects, amongst others.

Further, most of the dissents *after* elevation as Chief Justice were made in Constitution Bench decisions. Research finds only four dissenting judgements which have been made in other cases after elevation as Chief Justice. This points towards the direction of presence of more collegiality in cases of Bench with lower numbers of judges and distributed collegiality in the Constitution Bench. The prospect of solo dissenting also is found to reduce with the elevation of the justice as Chief Justice.

Although dissenting judgements should remain as basic criterion for securing the independence of a judge, yet the dissent normally may reduce with time as the laws get settled. Thus, the dissent frequency may be attributed to the early years when the laws were uncertain and the jurisprudence around them were evolving. The principle of stare-decisis which requires judicial discipline will also act as major factor in reduction of dissenting opinions.

THE IMPACT OF THE COGNITIVE BIAS ON THE CREDIBILITY OF EXPERT TESTIMONY IN CRIMINAL TRIALS: AN ASSESSMENT

Dr. Abhishek Sharma Padmanabhan*[1]

Dr. K V K Santhy**

INTRODUCTION

Despite their small size, human brains are remarkably powerful and efficient computational devices. This is because individuals are not just recipients of data, but rather active participants who use factors like context and expectation when deciding what data to analyse and how. The mind is not like a camera, but rather it chooses which "parts of an image" to concentrate on. Humans use intricate mental processes to take in data, process it, create opinions, and ultimately make choices. These mental processes are fundamental to intelligence and expert knowledge. People's brains adapt and grow in valuable ways as they gain expertise; nevertheless, these same processes might make specialists more susceptible to prejudice[2]. Filtering information, forming ideas and expectations, zeroing down on specifics, and relying on one's prior experiences are all cognitive underpinnings of expertise. Experts are able to excel because of cognitive processes like filtering, yet this advantage may come with drawbacks including selective perception, overconfidence, and prejudice. Experts in any field, such as doctors, criminologists, fighter pilots, or police officers, make cognitive trade-offs like this on a regular basis. Studies in cognitive science have shown that many different variables influence people's opinions [3]. Tunnel vision may result, for instance, when one places too much stock on a certain outcome and fails to account for other possibilities. Perception and judgement are also susceptible to being skewed by factors such as environment, motivation, and emotions. Experts may get so fixated and emotionally invested in an initial thought or hypothesis that they fail to objectively evaluate alternate explanations or correctly spot errors[4]. For instance, if people are led to feel that two people are genetically linked, or if they are led to believe that a face composite and a suspect are similar, they will assign a greater degree of resemblance to the composite and the suspect. That is

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2. Dror, I. E, Cognitive Bias in Forensic Science. Yearbook of Science and Technology43 (McGraw-Hill, United States, 2012).
3. Edmond and Martire, "Just Cognition: Scientific Research on Bias and Some Implications for Legal Procedure and Decision-Making" 82 Modern Law Review25 (2019).
4. Peer and Gamliel, "Heuristics and Biases in Judicial Decisions" 49 Court Review 114 (2013).

to say, the cognitive and brain systems at work during perception and judgement might be skewed by something as simple as anticipation. It is crucial to keep in mind that cognitive biases operate unconsciously, leading prejudiced experts to mistakenly believe they are impartial and to exhibit an excessive degree of confidence in their findings.

ROLE AND RELEVANCY OF FORENSIC EXPERT WITNESS IN CRIMINAL TRIALS

The contributions of Forensic experts in the field of criminal law are extensive and crucial. Their opinions have weight because they come out as objective and well-grounded in their presentation. But the legal system must make sure that Judges can get their hands on the best scientific and expert testimony available and that it is correctly interpreted and utilized by the jurors who decide the case. There is reason to be wary since experts may be exaggerating the evidence. There are two main possible outcomes in this situation. To begin, even the most accomplished individuals are not immune to overestimating their abilities. This is the outcome of a person's metacognitive skills, or the capacity to "know what you know and know what you do not know."[5] In this aspect, humans do poorly. As a second point, experts are frequently hired by one side and operate inside that side's team and aims, even though it is generally accepted that experts should be free from bias and not persuaded by the rigors of litigation. Experts are often put in circumstances where their ability to make objective assessments may be subtly influenced by factors such as their non-neutral surroundings and/or body language[6]. Problems arise when relying on expert testimony since it is seldom wholly impartial and scientific. For instance, there is often a lack of comprehensive procedures and objective evaluation tools in the field. This means that the majority of so-called "Expert" testimony is really just the speaker's own interpretation and judgement. Forensic Experts typically need to compare two patterns, one from the crime scene and one from the suspect, in order to reach a conclusion. Common forms of forensic evidence include tire and shoe imprints, fingerprints, photos from security cameras, handwriting samples, and shell casings from firearms. The Forensic Experts must decide whether it is plausible to assume that the two patterns are from the same source (a crime scene or the suspect) since the two patterns are never identical. Due to the lack of agreed-upon standards,

5. Gravett, "The Myth of Rationality: Cognitive Biases and Heuristics in Judicial Decision-Making" 134 The South African Law Journal 53 (2017).
6. Irwin and Real, "Unconscious Influences on Judicial Decision-Making: The Illusion of Objectivity" 42 McGeorge Law Review 2 (2016).

we must depend on individual opinions when deciding what constitutes an "adequate" degree of similarity. Despite its high credibility, fingerprint evidence has been found to have inherent biases. For instance, studies have shown that the same examiner may get different findings when provided with the same evidence in a variety of circumstances. Examiners' perceptions of the similarity between the prints and the conclusions they draw may be influenced by factors outside of fingerprint science (such as whether or not the suspect confessed to the crime, the detective's opinion, etc.)[7]. DNA mixture analysis is only one branch of forensics where similar conclusions have been found. It may be beneficial to provide evidence while also warning the fact-finder of the subjectivity's propensity to cognitive bias so long as the chance of mistake remains. When forensic DNA Experts are stumped, it is usually a sign that other forensics fields are, too. Forensic science must deal with cognitive bias, often known as contextual bias or observer effects. These problems are not exclusive to the employment of specialists in medical contexts, such as shaken infant syndrome cases. In the expert and scientific fields, where interpretation is necessary or when the human examiner is an essential element of the instrument of analysis, the impact of context on perception and judgment may be particularly troublesome[8].

IMPACT OF COGNITIVE BIAS OF FORENSIC EXPERT WITNESS ON THE APPRECIATION OF EVIDENCE

In a Criminal Trial, after the admission of Incriminating Evidence, the accused is supposed to have the advantage of constitutional protections of Right against Self Incrimination to avoid an unfair and erroneous conviction. If an expert witness is unavailable, the defendant's advocate must explain the limitations of the evidence to the fact finder (and any prospective appellate body. This is due to the way trials are resourced and operationalized. Cross-examination is the most well-known method for finding flaws in harmful expert testimony. However, in practice, Prosecution often lack the resources, expertise, and time to undertake detailed cross-examinations of forensic specialists. Many defense lawyers, instead of delving extensively into technical and methodological difficulties, instead focus on the chain of custody and the credibility of expert witnesses. Given the technical expertise of lawyers (and forensic Experts) and beliefs about the capabilities of the Judges, cross-examination may not be very helpful in

7. Reese, "Techniques for Mitigating Cognitive Biases in Fingerprint Identification" 59 UCLA Law Review 1252 (2012).
8. Rassin, Eerland and Kuijpers, "Let's Find the Evidence: An Analogue Study of Confirmation Bias in Criminal Investigations" 26Journal of Investigative Psychology and Offender Profiling 26 (2010).

substantively addressing problems and risks for the trier of fact. When dealing with irrelevant information, the effectiveness of cross-examination is drastically reduced due to the predominance of unconscious and unrecorded (therefore unknown) barriers to cognition and interpretation. Even though many state-run forensic science laboratories do not require good practises, a forensic expert may invoke experience and personal qualities to dismiss defence inquiries about unrelated contextual information and influences as speculative, absurd, and professionally offensive. It is very improbable that the court would give less weight to evidence produced in circumstances where contextual bias and cross-contamination were not a concern when the defense is allowed to employ their own rebuttal expert and their testimony is accepted.[9] The usefulness of 'lessons' in approach derived from testing remains untested when contrasted to the advantages of protecting experts from domain-irrelevant information. In a criminal trial, rebuttal evidence is not permitted despite its usefulness in a civil trial. Experts in the area who have been requested to evaluate (and often criticize) a forensic experts work for the state make up the vast majority of reviewers. Experts are compensated here, in contrast to when they are hired by the government. Due to concerns about methodological issues like the need for validation studies and the protection against notorious risks from contextual bias and other sources of contamination, experts in defense counterargument are often misrepresented and possibly misunderstood as theoretical or even desperate. Although this is often disregarded or minimized, their worries often reflect more conventional values. When considering all of the evidence against the defendant, the fact finder can only disagree with the findings of an unbiased and skilled forensic experts on methodological grounds. Judicial directives, instructions, and cautions to the Judge tend to be of little use when analysing harmful expert evidence (along with the knowledge of judges) since they rely on what the prosecution and defense counsel present to the court. Even after hearing counter-evidence and hearing cross-examination, the Judge may still be predisposed to find in favour of the prosecution. Most importantly, the trial judge is never made aware of the possibility that the experts was exposed to or influenced by data that was beyond the experts' area of competence. In contrast to other fields (such as biological research), trial judges seldom explain the significance of the incapacity to test, include limits, or fight

9. Findley and Scott, "The Multiple Dimensions of Tunnel Vision in Criminal Cases" 26 Wisconsin Law Review 292 (2006).

against risks to interpretation. Since these threats are seldom proven, courts with summary or appellate jurisdiction rarely give them the serious consideration they need[10]. Due to these mistakes, the burden of evidence of unreliability and explanation for potentially detrimental epistemic consequences falls unfairly on the defense. They concurrently lower the bar for evidence, which raises the possibility of an erroneous conviction.[11] How damning expert evidence (including "shaky" evidence) is handled at trial depends on a number of factors, including the prosecutor's position (as a "minister of justice"), cross-examination, rebuttal witnesses, court directions and cautions, and the burden of proof. However, as this research analysis shows, these measures have fallen short. The court has not been made aware of problems that are already well-known in the scientific community. There has been no research dealt with the concerns of cognitive bias and contextual considerations in expert testimony and evidence.

INSTANCES OF COGNITIVE BIAS AFFECTING THE CREDIBILITY OF EXPERT WITNESS

If the expert's conclusion is supported by the expert's expertise and the expert is better able to draw inferences from the evidence than the court, then the court may consider the expert's view. Due to the court's inability to make an informed judgement in areas where it lacks experience, it is sometimes necessary to consult an expert for help. The cognitive processes and any biases shown by humans are the subject of investigation in a wide variety of forensic fields. Cognitive patterns have been linked to human mistake, which might compromise the objectivity of forensic experts. The observation and decision-making processes may be profoundly affected by the complex interaction of many elements. These include the surroundings, the anticipated time constraints, and encouraging words[12].

The interpretation of incomplete or partial DNA profiles, as well as the determination of the number and identity of contributors to a mixed sample, may be difficult tasks in DNA analysis. Therefore, the Experts' confidence in the defendant's contribution might be greatly bolstered by the supposition that the defendant's DNA may have formed the observed profile.

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10. Saks, M.J., Risinger, D. M., Rosenthal, R. & Thompson, W. C., "Context Effects in Forensic Science: A Review and Application of the Science of Science to Crime Laboratory Practice in the United States" 43 Science & Justice, 77 (2003).
11. Kassin, S. M., Dror, I. E. & Kukucka, J,."The Forensic Confirmation Bias: Problems, Perspectives, and Proposed Solutions" 2Journal of Applied Research in Memory and Cognition42 (2013).
12. Dror, I.E. & Charlton, D,"Why Experts make Errors" 56 Journal of Forensic Identification 26 (2006).

In the instance of Fingerprinting, law enforcement agencies use a four-step fingerprint analysis procedure called Analysis, Comparison, Evaluation, and Verification (ACE-V) to determine a criminal's identification. Incomplete or poor quality prints due to smudging, distortion, or other factors can create ambiguity during the comparison stage, where the examiner compares the friction ridge patterns from the unknown latent fingerprints with the known fingerprint. There are potentially two sets of prints, which might lead to cognitive bias among specialists. This bias is more likely to occur when fingerprints are ambiguous because fingerprint examiners are influenced by information they know but which is irrelevant to making an accurate identification [13].

There may be more problems with expert testimony than just the possible psychological contamination of a single piece of evidence. Many typical types of evidence are given in court, although their independence is often overstated. Each influences (and could taint) the other. As a result, expert testimony on one kind of evidence cannot be regarded independently of expert testimony on other types of evidence. There is a risk that the defendant may make a false confession if the forensic examiner has access to the other forensic evidence in the case or the thoughts of the investigating detective, or if the detective has access to the forensic examiner's findings. The Judge might be misled without such information. Even if the examiner knew that the suspect had been positively identified by DNA evidence, the examiner would submit his or her conclusion that the fingerprints gathered at the crime scene matched those of the suspect as if it were based only on the fingerprints evidence. This is deceptive because it fails to reveal the true motivations behind the outcomes. DNA evidence is also counted twice: once, implicitly, as part of the fingerprint evidence, and once again when the DNA expert testifies (though this may be the result of any number of effects, such as being influenced by a suspect's confession). The potential for contamination from such cross-evidence interactions warrants careful consideration. Experts should look at the relevant material in isolation without the possibly biasing impacts of other irrelevant evidence or views, whereas the fact finder is responsible for analysing the value of each kind of evidence and integrating other lines of information. When cognitive contamination spreads across seemingly separate types of data, a "bias snowball effect" might result. This occurs when the introduction of even a single biased piece of evidence introduces bias into the whole body of knowledge.

13. Thompson, W. C, "What Role should Investigative Facts play in the Evaluation of Scientific Evidence?"43 Australian Journal of Forensic Sciences 123 (2011).

IMPACT OF COGNITIVE BIAS

Unfortunately, there are few workable remedies to the problem of prejudice in the forensic sciences and criminal investigation processes. While there has been some improvement, there is still a wide gap in the ways in which various sectors, regions, and countries implement solutions. There has been a rise in awareness of the role that cognitive biases play in forensic science and criminal investigations, but this has not resulted in widespread changes in procedure. Perhaps this is because of moral issues that arise from the misuse of cognitive biases. Rather than being the result of malice, cognitive biases are an unavoidable outcome of human thought and emotion. Self-Regulation alone is not enough to overcome cognitive biases, and nobody knows to what extent they are susceptible to cognitive errors. Even if an expert's increased knowledge should lead to improved decision making, it will not be adequate to eliminate cognitive bias entirely[14]. In the present article, the authors will discuss several novel approaches to addressing the issue of cognitive bias in the legal sciences. Misconceptions and faulty thinking give rise to cognitive biases. These deductions are the ultimate result of exploiting subconsciously established cognitive shortcuts on the path to reason. Among the many potential problems in forensic science, motivated reasoning and contextual bias have received the greatest attention. Furthermore, cognitive bias may either help or hurt the accuracy of forensic decisions depending on the specifics of the situation.

The accuracy of fingerprint matching was enhanced by knowing the DNA match, while the accuracy of fingerprint matching was lowered by knowing the DNA match[15]. These results demonstrate that simplistic depictions of forensic science findings based on assumptions about context and bias are inaccurate. It is difficult to analyse cognitive biases because of methodological deductions in research leading to a lack of external validation. The dissimilarity is clarified by the concept of "expertise alignment." In order to determine whether and how logical fallacies and cognitive biases impact forensic decision making, experts in the discipline of decision science are able to undertake carefully supervised studies. Disciplines may be manipulated into making a conclusive and optimistic choice. Researchers in both domains may provide proof of the practical implications of forensic knowledge if they collaborated on this project. Although it is one of the four essential steps of fingerprint testing, there is little evidence

14. *Supra* note 3 at 2
15. Cole, S.A. and Lynch, M, "Genetic Suspects: Global Governance of Forensic DNA Profiling and Data basing"105(Cambridge University Press, United Kingdom, 2010).

that the verification step is employed in other forensic science domains such as bite marks, hair, tool marks, footwear imprints, and the like. This mismatch might be due to the fact that fingerprint analysis facilities follow specified standard operating procedures. Therefore, biometric examination has advanced more methodologically than other forensic fields. The fact that the distribution of error rates varies according to the visual content of the provided comparison is illustrative of the complexity of fingerprint analysis. The court's capacity to grasp and accept the parallels may suffer as a consequence. Forensic examiners' claims that the ability to enhance performance and assess skills is crucial in any forensic arena are backed up by the study's results. Contextual and confirmatory biases compromise the Experts's objectivity and the validity of the findings[16]. As a result, it is not uncommon for the prosecution, the defense, and the judge or Court to all draw similarly negative conclusions based on the information and testimony presented. The credibility of forensic scientists' testimony may improve if they were able to conceal task-irrelevant information utilizing context management techniques to avoid bias.

THE NEED FOR REGULATION OF BIAS FOR BETTER APPRECIATION OF THE TESTIMONY OF FORENSIC EXPERTS

Evidence used in forensics (and elsewhere) is always at risk of contamination and blunders, which is wholly unnecessary. It is sometimes difficult and unknown to determine whether a particular analysis and its conclusions are polluted. The vast majority of lawyers, judges, and jurors, as well as a sizeable proportion of forensic scientists, are oblivious to the dangers inherent in conducting investigations and practicing law. Our findings suggest that these risks should not be dismissed as insignificant or assumed to be easily mitigated by legal justifications and judicial warnings. The concept of "adversarial bias" has become more important in adversarial judicial systems. When a witness with specialized knowledge testifies in favour of a party's stance and interests, even if it was unintentional or subconscious on their part, this is sometimes seen as malicious. Adversarial bias in criminal procedures has mostly been discussed after the submission of expert evidence (often rebuttal evidence) by the defense or after an exposé' of a wrongful conviction. There has not been a comprehensive examination of the impact of Bias on the Forensic Experts Testimony and in this regard it is suggested that it must be

16. Dror, I. E, "Practical Solutions to Cognitive and Human Factor Challenges in Forensic Science" 4Forensic Science Policy & Management105 (2014).

subjected to stricter oversight. Research shows that only a tiny fraction of forensic science analyses and interpretations are susceptible to major challenges due to domain-irrelevant information and context. Procedures are necessary as a reaction to high-risk analyses. When it comes to identifying and counteracting issues relating to cognitive bias, defense lawyers and trial safeguards have a spotty record. Even while it is seldom brought up, it is possible that our inherent biases may set off a chain reaction that would lead to widespread contamination. When such issues are discussed (the term "raised" conveys more thought than is required), they are usually given just a cursory look. Threats to evidence are not examined in depth, and there are few citations to relevant scientific publications. So, the Judge, may assign the evidence whatever weight they see fit. Due of their rarity as trial topics, there is no evidence to suggest that they have any impact on the trial's process or conclusion. As neither the Prosecution nor its Forensic Experts are likely to accept the risks of contextual bias and cross-contamination, and as neither the defense nor the trial judge are likely to raise them significantly, it is unclear how Judges are expected to reasonably examine evidence generated from procedures that were oblivious to these risks [17].

SUGGESTIONS TO PREVENT COGNITIVE BIAS AMONG FORENSIC EXPERTS

In certain circumstances, the courts ought to be open to the possibility of excluding the testimony of expert witnesses. Even if the relevant evidence is disregarded, it is still possible to obtain credible testimony from an expert. If the pertinent data or analyses are reinterpreted by an independent Forensic Expert in settings that isolate the reanalysis from extraneous background information, then the majority of our concerns may be put to rest. An example of this would be a second fingerprint examiner comparing two fingerprints without being aware of the primary suspect's profile, or a scientist analysing alleles in a mixed sample without being aware of the primary suspect's profile. The aforementioned applications are just two of the many possible uses for fingerprinting technology. Even if the tools in question and the Experts in question are reliable, having an interpretation that is tainted by bias is significantly worse than having no interpretation at all. The second collection of research results can be evaluated apart from the first group of findings. Insights will be supplied that are consistent with the actual probative

17. Murrie, D. C., Boccaccini, M.T., Guarnera, L. A., & Rufino, K. A,"Are Forensic Experts Biased by the Side that Retained Them?" 24 Psychological Science1889 (2013).

value of the evidence, and this will be the case even in the event that the results are weaker or more qualified than anticipated[18]. It should not be allowed to stand simply because the potentially negative conclusion of the Experts could be used against them in court if they have improper access to the case or questionable information.

We are all susceptible to a wide variety of cognitive and environmental biases, some of which are more prominent than others. Even among people who have a deep understanding of forensics, many people struggle with a common problem: they are unable to "think their way out of the context" and see the highly subtle ways in which the context might contaminate or affect them. This is owing to the fact that contamination and influence can manifest in a variety of ways depending on the context in which they are found. As a consequence of this, we are in a position to expect that our forensic experts will take the appropriate precautions to safeguard themselves. If the defense was required to face serious threats at their own expense, it would seem that the aims of a fair trial, an accurate judgment, and the elimination of reasonable doubt would be compromised. These goals have the potential to be undermined. As a result of financial constraints, the accused rarely have the opportunity to make methodological arguments during trials. These arguments are intended to emphasize the seriousness of key dangers that may be minimized by the prosecution, the prosecution's expert witnesses, the Judge. In rare instances, accused do have the ability to do so. This is due to the fact that the accused might have to expend a significant amount of time and money defending themselves against such allegations. Since the institutions that produce the evidence do not manage them in a systematic manner, it will be necessary to conduct a new survey on these concerns for each and every trial that takes place in the future. It is not unreasonable to probe the honesty, accuracy, and recall of forensic Expert who are responsible for keeping records. Perhaps if psychological research demonstrates that the effects are unnoticeable or perhaps imperceptible, a court will nonetheless require a comprehensive explanation of any exposure and the method that was used. It is preferable to isolate the Forensic Expert throughout the entirety of the study procedure rather than exposing them again to the same unconscious effect months or years later during a disputed operation (or presenting true evidence of a capability to resist) [19].

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18. Kassin, S., Dror, I.E. & Kukucka, J, "The Forensic Confirmation Bias: Problems, Perspectives, and Proposed Solutions" 2 Journal of Applied Research in Memory and Cognition14 (2013).
19. Dror, I. E, "On Proper Research and Understanding of the Interplay between Bias and Decision Outcomes" 19 Forensic Science International, 17 (2002).

It is more efficient and effective to require blinding of forensic Expert and their institutions before an investigation is conducted (also known as "upstream" or "before the fact") than it is to address or repair real risks of error at trial when we do not know what information was conveyed, the effects of context and other influences, or whether or not an error has been made (also known as "downstream" or "after the fact") requiring blinding of forensic Experts and their institutions before an investigation is conducted is also known as " The accused is no longer at the mercy of individual defense attorneys, juries, or the availability of funds for a rebuttal expert, and the state-employed forensic Experts is no longer required to conceal the real risks of error and the unwillingness of continuing to use procedures that have been in place, in many cases, for decades. Since the potential dangers connected with contextual bias and cross-contamination are so never addressed (or explained), the evidence that is produced by forensic science is almost never believed. The benefits of having Forensic Experts who will never admit to making a mistake due to factors like contextual bias will accrue to the state if the risks connected with acquiring, managing, polluting, and calculating data are not minimized. The Prosecution will reap the advantages of having Experts in this position. The Prosecution can also benefit from the Forensic Experts who are resistant to contextual bias and who, as a result, never admit making a mistake. When there is a possibility of malfunctions occurring even in well-built systems, the Prosecution should not have such an unfair advantage. It is the responsibility of the government to present credible expert testimony and to confirm that it is accurate. This is essential in the operation of a just judicial system since judges are required to make decisions in an unbiased manner based on the evidence that is presented to them.

In addition to expanding on the issues with the law, we offer some suggestions for enhancing and bolstering the contributions made by Forensic Expert Witness to the Criminal judicial system. In the initial and most important place, it is essential that the evidence presented by Forensic Expert in legal processes be accorded the necessary weight to which it is entitled. Expert testimony has the potential to enhance and improve the administration of criminal justice if its benefits, limitations, and appropriate scope are understood and accepted. To this aim, we advocate for the implementation of mandatory training for all participants in the criminal justice system regarding the benefits and drawbacks of admitting evidence from expert witnesses. Education has the capacity to demystify expertise by highlighting its benefits and limitations, such as its susceptibility to bias and reliance on contextual variables.

Second, the adoption of both best practices and standard operating procedures can help to reinforce the credibility of the expert evidence that has been presented. It is standard practice to withhold non-essential information from the Forensic Expert throughout this operation. It is in the best interest of Forensic Expert to block out any unnecessary information that can distort their judgment. It is recommended that responsibilities be delegated to a case manager or investigator as well as a worker who is sheltered from all context information other than the most necessary pieces of data. The task that needs to be done should be carried out in such a way that the particulars of the setting are irrelevant to the outcome. This becomes especially significant when the expert is undertaking investigative activities or when the results of testing might impact the path that the investigation takes.

In the "Linear Sequential Unmasking" (LSU) method, investigators analyse the evidence at a crime scene in isolation from a "target" suspect[20]. This helps to reduce the possibility of investigator bias. The term "independently of the suspect's pattern" is pertinent since making a perfect match requires analysing the crime scene without consideration to the suspect's pattern (that is, without knowing that there is a suspect or a "target suspect"). After examining the evidence "context free," it can then be compared to other pieces of evidence and evaluated in connection to a suspect. For example, fingerprint evidence should be viewed and evaluated at the scene of the crime by a trained examiner before the suspect's fingerprints are presented to the examiner for comparison. This is done before the suspect's fingerprints are submitted to the examiner.

It is essential that the use of circular reasoning should be avoided at all costs by experts in favour of working logically from the facts. Documentation that explains the work done by the experts ought to be included in the additional standards and best practices as well. The professionals who are carrying out the assignment as well as anyone else who might have an effect on the findings should be kept at a safe distance from the investigators. Face-to-face meetings should only be held when absolutely required; nevertheless, whenever you do hold one, you should always take notes. The findings of the experts had to be scrutinized in secret by a second group of specialists. Finally, experts should consider a number of different hypotheses rather than just one (often the investigator's own, as they are the ones who have a vested interest in having it

20. Krane, D. et al.,"Sequential Unmasking: a Means of Minimizing Observer Effects in Forensic DNA Interpretation"53 Journal of Forensic Science 1006 (2008).

validated). This might be accomplished by the forensics expert providing them with the suspect's sample as well as a panel of potential DNA match samples gathered from the crime scene .[21]

Training on cognitive bias and best practices can assist forensic specialists and other expert witnesses from other professions in being more objective and unbiased in the courtroom. This is done in order to improve productivity and to assist professionals in achieving their ethical and legal requirements, which may include providing assessments that are unbiased and objective.

The overall quality management framework of the laboratory must to incorporate preventative techniques against cognitive bias. The Forensic Science Laboratories that perform fingerprint analysis are required to demonstrate, in order to receive accreditation from quality management systems, that they are aware of the possibility of cognitive bias and that they have protections built into the technological approaches that they use to prevent the influence of prejudice and peer pressure. Though itis a good beginning, but on its own, it will not be enough to complete the mission by itself.

The Advocates should use cross-examination to ascertain whether or not the expert has received sufficient training on cognitive bias and has followed best practices to increase the possibility that the judge will give the evidence the weight it deserves. This will be accomplished by determining whether or not the expert has followed best practices and has received sufficient training on cognitive bias. In this manner, the Advocate is assured that the judge will give the evidence presented by the expert the serious consideration it merits. If there is even a remote possibility that a reasonable Judge could be swayed to make the incorrect judgment based on the evidence because of the influence of irrelevant contextual information, then the court is obligated to order that certain pieces of evidence be thrown out of the case. The purpose of these actions is to ensure that the court obtains the most credible and objective evidence possible by encouraging experts to voluntarily adhere to best practices (rather than risk having their testimony rejected)[22]. The goal of taking these actions is to ensure that the court is presented with the most reliable and impartial evidence possible.

The members of the criminal justice administration system, including judges, are neglecting crucial scientific information. When it comes to the forensic scientific evidence produced by the

21. William N. Eskridge, Jr. & John Ferejohn, "Structuring Law-making to Reduce Cognitive Bias: A Critical View" 87 Cornell Law Review. 616 (2001).
22. William C. Thompson, "Beyond Bad Apples: Analyzing the Role of Forensic Science in Wrongful Convictions", 37 South Western Law Review 971 (2009).

Prosecution, Judges appear to have an excessive amount of confidence in both the dependability of their own systems and the dependability of the evidence presented by Forensic Experts. The validity of the legal system and other institutions might be called into question when scientific data and ideas are rejected out of hand. There is a long tradition of overconfident Judges reflecting the reticence of some forensic scientists to publicly recognize weaknesses in their methodologies.

CONCLUSION

The "human mind is not a camera," and through time, people have evolved a wide array of brain systems that allow them to interpret information in a way that is both effective and efficient. These identical systems, are what give us our intellect and our skill, but they also include flaws like being influenced by irrelevant information and having cognitive biases. It is necessary to take into consideration actions that will prevent cognitive contamination and guarantee that the evidence provided by experts is as unbiased and objective as is reasonably practicable. Even though the majority of this job ought to be done in the laboratory, a portion of it will always be assigned to the courts. It is possible for cognitive science to be of use to the judicial system and criminal justice system by assisting individuals in better understanding the problems at hand and providing suggestions about concrete methods to improve the quality of expert evidence, and therefore, its contribution.

The purpose of this article was to conduct an analysis of recent developments in forensic science and to identify the challenges that this field encounters within the judicial system. This analysis was to be done from the perspective of paying particular attention to the critical role that forensic scientists play in both the legal and societal domains. The problems that develop during forensic investigation may be traced back to any point of the procedure, from the very beginning of the investigation until the moment when the findings are presented in court. To find solutions to these problems would take a substantial investment of time and energy. We have had a cursory look at a few strategies that have the potential to assist in the elimination of cognitivebias; they are blind testing, blind verification, independent review, and LSU.This article takes a look at the potential for prejudice and the effect that it may have on various aspects of forensic science, including the investigation of fingerprints and other trace evidence, the matching of bullets, and the analysis of DNA. In these domains, interpretation seems to be rather hazy and nonspecific with regard to the potential for bias, which represents a more substantial source of worry than in other objective and quantitative fields that make use of methodologies that are free from bias to provide unambiguous conclusions.

THE NATIONAL INVESTIGATION AGENCY AND FEDERALISM: WHERE DOES THE BUCK STOP?

Prof. Dr. Shruti Bedi*

"The fight against terrorism can and must co-exist with federalism. It would be meaningless to debate an imaginary 'federalism versus terrorism' issue."

- Arun Jaitely[1]

INTRODUCTION

Undoubtedly, terrorism poses a serious challenge to India's constitutional authority and national security. The constitutional and legal-institutional architecture under the federal system has been wrought with trials and tribulations from the perspective of national security. The legal scheduling to counter terrorism comprises of extraordinary laws established by Parliament, bestowing overriding powers on the Centre to investigate the crime of terrorism. The dilemma surrounds the ambiguity over the responsibility for 'security' which is a state subject and countering terrorism which has to be tackled at the national level. Resultantly, there is a rising tension on account of the debate between federalisation and centralisation that imperils our strategic response.

Jaitely, the former Union Minister of Defence believed that the fight against terrorism could co-exist with federalism. The ground reality however has been contrary to the statement,as the sphere constitutionally allocated to the States has allegedly been usurped by the Centre, albeit with legitimate reason and requirement. This paper examines the constitution of the National Investigation Agency (NIA) by the Indian government under the counter-terrorism architecture and its impact on the federal structure. It analyses whether there is any substance to the federalism versus terrorism debate. It concludes with a solution to the predicament of usurpation of powers by the Centre through a constitutional amendment by way of adding a new entry to the Union List under the Seventh Schedule of the Indian Constitution.

THE INDIAN CONSTITUTION AND ITS 'FEDERAL CLOUT'

The Constituent Assembly had to contend with defining the degree of 'federal spirit' in the Constitution. Dr. Rajendra Prasad, President of the Constituent Assembly neatly avoided a clear

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1. National, "Fight against terror must co-exist with federalism: Jaitely"The Hindu, Feb. 25, 2013, *available* at: https://www.thehindu.com/news/national/fight-against-terror-must-coexist-with-federalism-jaitley/article4452190.ece (visited on May2, 2024).

answer on the issue of centre-state relations while stating, "Whether you call it a federal Constitution or a unitary Constitution or by any other name… it makes no difference so long as it serves our purpose.[2]" The Union Powers Committee of the Constituent Assembly chaired by Jawaharlal Nehru plainly viewed a weak central authority, injurious to the interests of the country.[3] Since a unitary constitution would have been a retrograde step, it concluded that "the soundest framework for our Constitution is a Federation, with a strong Centre".[4] That the framers insisted on a strong Centre is evident from Jawaharlal Nehru's statement, "Now that partition is a settled fact, we are unanimously of the view that it would be injurious to the interests of the country to provide for a weak central authority which would be incapable of ensuring peace, of coordinating vital matters of common concern and of speaking effectively for the whole country in the international sphere."[5]

The partition of India had led to a fear of fissiparous tendencies and it was believed that making the provinces more powerful would lead to further disintegration.[6]The aftermath of India's troubled partition and the Congress Party's ideology of favouring a strong Centre for the country's modernization, gave rise to a 'union', and not a 'federal' state.[7] Dr. Ambedkar however, had insisted that this 'union' had an inbuilt flexibility wherein the position could be either 'federal' or 'unitary' as desired by the circumstances.[8] Although Dr. Ambedkar minimised the centralisation of the Constitution, theorists believed that the it wasn't "straightforwardly federal."[9] The Constituent Assembly had chosen to adopt a comparatively centralised albeit a flexible version of federalism in its constitutional framework. The founding fathers of the Indian Constitution had sculpted a constitution with a "unitary tone and strong centralising features".[10] The one drawback being that the Constitution did not provide any meaningful protections to the states against incursions of the Centre into the domain of the States.[11]

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2. Constituent Assembly Debates (CAD) Vol. II No. 12, 987.
3. Second Report of the Union Powers Committee (July 5, 1947) in B. Shiva Rao (ed.), The Framing of India's Constitution: Select Documents, Vol. 2, 778 (Universal Law Publishing, 2012).
4. *Ibid.*
5. Letter from Jawaharlal Nehru, Chairman of the Union Powers Committee to President, Constituent Assembly of India, Vol. 5 CAD 58-59 (July 5, 1947).
6. Speech by Balkrishna Sharma, Vol. 4 CAD (July 5, 1947), *available* at: https://eparlib.nic.in/bitstream/123456789/762957/1/cad_14-07-1947.pdf (visited on May 2, 2024).
7. I. Talbot & G. Singh, The Partition of India (Cambridge University Press, 2009).
8. K.H.C. Raju, "Dr. B. R. Ambedkar and the making of the constitution: A case study of Indian federalism"52(2) The Indian Journal of Political Science 153–164 (1991); L. Sáez, Federalism without a centre: The impact of political and economic reform on India's federal system (Sage Publications, 2002).
9. Madhav Khosla, India's Founding Moment: The Constitution of a most Surprising Democracy 72-73 (Harvard University Press, 2020).
10. Granville Austin, Working a Democratic Constitution 560 (Oxford University Press, 1999).
11. Louise Tillin, Indian Federalism 41 (Oxford University Press, 2019).

The legacy and thinking of the framers were reflected in the provisions of the Constitution. The federal scheme of the Constitution of India, 1950 ensures division of powers between the Centre and States through the three lists: Union List, State List and Concurrent List.[12] This constitutional design provides for independence of States to enact laws and policies in their own spheres. However, the Constitution favours the Centre in times of crises and empowers it to legislate on state subjects in certain situations.[13] This centralising propensity is further enhanced in situations of national security challenges like terrorism.

DEFENDING INDIA: THE COUNTER-TERRORISM LANDSCAPE

Federalism is a concept which is subject to changing conditions in the social, economic, and political spheres. The tendency with centralisation has been further exacerbated by the control of the central government over issues of public order and security for reasons of 'global terrorism'. The recurrent problem of terrorism and the consequent threat to security of the nation, has eventually led to the enactment of a string of extraordinary laws, Terrorist and Disruptive Activities Prevention Act (TADA) 1985, 1987, the Prevention of Terrorism Act (POTA) 2002, and the Unlawful Activities Prevention Act (UAPA) 1967, 2004, 2008, 2019[14] at the national level. TADA and POTA were the foundation of a centralised security structure in India, which was further legitimised by the enactment of POTA in the then prevailing anti-terrorism sentiment, post the 9/11 attacks. In addition to the central laws, at the state level, the Maharashtra Control of Organised Crime Act (MCOCA), 1999 and the Karnataka Control of Organised Crime Act (KCOCA), 2000 have been enacted.

Under the dictate of national security, the central government has enacted special anti-terror laws such as TADA and POTA. Both these enactments had sunset clauses and were allowed to lapse.[15] They were also constitutionally scrutinised by the Supreme Court on the ground of legislative competence of the centre in matters of policing and public order. The Supreme Court while attempting jurisprudential innovation designated terrorism as a special offence. It permitted the central government to enact laws on this subject matter, by locating terrorism

12. The Seventh Schedule to the Indian Constitution contains three lists which divide the subject matters of legislation between the centre and states.
13. Parliament can legislate on subject matters in the State List in exceptional situations under Articles 249, 250, 252, 253 & 356 of the Constitution of India, 1950.
14. While TADA and POTA were temporary laws, UAPA was a permanent one through which the state of exception was normalised. There is no sunset clause present in UAPA.
15. V. Venkatesan andV. Ramakrishnan, "Limits of law"Frontline, January 16, 2009, *available* at:https://frontline.thehindu.com/the-nation/article30183339.ece (visited on May 3, 2024).

within the *residuary powers* framework.[16]

In the case of *Kartar Singh v. State of Punjab*[17] the Supreme Court while analysing the constitutional validity of TADA, held that state governments while legislating on matters of Entry I 'public order' under the State List, had to confine themselves to matters of "lesser gravity having an impact within the boundaries of the State."[18] It went on to observe that "activities of a more serious nature which threaten the security and integrity of the country as a whole would not be within the legislative field assigned to the States under Entry 1 of the State List but would fall within the ambit of Entry 1 of the Union List relating to *defence* of India and in any event under the residuary power conferred on Parliament under Article 248 read with Entry 97 of the Union List."[19] The court further concluded that since TADA was enacted under Entry I 'criminal law' of List III, it did not suffer from lack of legislative competence.[20] The issue of legislative competence of the centre in enacting anti-terror laws was again debated in *People's Union for Civil Liberties (PUCL) v. Union of India* [21]where the court analysed the constitutional validity of POTA. It reiterated that the Centre was competent to enact a law for anti-terror activities.[2] [2]Therefore under the umbrella terms, 'residuary powers', 'defence of India' and 'criminal law', the apex court bestowed legislative competence on the Centre even though it ventured into the domain of 'public order', a subject matter in the State List.

Continuing with the national security architecture, the Parliament amended the UAPA, 1967in 2004 which converted it into a counter-terror law. This amendment incorporated the stringent elements of the repealed POTA.[23] The 26/11 Mumbai attacksin 2008 provided the validation for the enactment of the National Investigation Agency Act (NIA), 2008, furthering the supersession by the Centre over the domain of the States. The justification came from the significant difference between ordinary crimes and crimes committed against the state. The crimes against the state were more political in nature and were heinous and formidable, thereby

16. M. Mate, "Elite institutionalism and judicial assertiveness in the Supreme Court of India"Temple International and Comparative Law Journal 399–400 (2014) [Emphasis mine].
17. (1994) 3 SCC 569: 1994 SCC (Cri) 899.
18. *Id.,* at para 66.
19. *Ibid.,* [Emphasis mine].
20. *Id.,* at paras 446, 447.
21. (2004) 9 SCC 580.
22. *Id.,* at para 20.
23. Ujjawal KumarSingh, "Mapping anti-terror legal regimes in India"in V. V. Ramraj (ed.), Global Anti-Terrorism Law and Policy420-446 (Cambridge University Press, 2012); T. Svennson, "Fixing the elusive: India and the foreignness of terror"in A. Siniver (ed.), International Terrorism Post-9/11: Comparative Dynamics and Responses168-170 (Routledge, 2010).

requiring a stronger intervention from a centralised authority.[24] The establishment of a national investigation agency for dealing with offences of terrorism and other security crimes strengthened the centralising tendency adopted by the framers of the constitution, resulting in a national security state.[25] This was duly executed with support from the Indian judiciary, which has upheld the constitutionality of such legislations.[26]

NIA: SOWING THE SEEDS OF STRIFE

The NIA was created by an Act of the Parliament in 2008 to *investigate and prosecute* offences affecting the sovereignty, security and integrity of India, security of State, friendly relations with foreign States and offences under Acts enacted to implement international treaties, agreements, conventions and resolutions of the United Nations, its agencies and other international organisations.[27] It functions as the central counter terrorism law enforcement agency.[28]The NIA investigates terror related cases throughout India on the authority of the central government and prosecutes the alleged criminal in special NIA courts without the states requesting for its intervention.[29] This enactment coincided with the strengthening of the counter terrorism law, UAPA in 2008 after the Mumbai attacks.NIA is empowered to take over the investigation of the Scheduled Offences from the jurisdiction of the state government.[30] The constitution of the NIA has led to resentment in the States as it allegedly interferes in their domain. This statute has consequently fortified the acquisition of policing powers of the States by the Centre.

The dilemmasurrounding the creation of a central counter-terror investigative architecture arises from the indistinctiveness surrounding the responsibility for security. As per the division of legislative powers, 'public order' and 'police' are mentioned as Entry 1 and 2 respectively in the State List. Meaning thereby that these are state subjects and states accordingly have

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24. C.H. Cameron &D. Eliot, "The Indian penal code as originally framed in 1837"The Second Report on the Indian Penal Code,Appx, note C 117 (Indian Law Commissioners, Madras, 1888).
25. Ujjawal Kumar Singh, "Federalism, democracy and the national security state in India"Territory, Politics, Governance 4(2021), DOI: 10.1080/21622671.2021.1899975.
26. *Id.*, 8-9; Wilfried Swenden & Rekha Saxena,"Policing the federation: the Supreme Court and judicial federalism in India"Territory, Politics, Governance 10-11, (2021), DOI: 10.1080/21622671.2021.1887756.
27. National Investigation Agency (NIA) Act, 2008, section 3.The proposal for setting up of a National Investigating Agency was approved by the Union Cabinet on December 15, 2008. It waspassed by Lok Sabha on 17 December, 2008, Bill No. 75-C of 2008, available at: https://www.satp.org/document/paper-acts-and-oridinances/the-national-investigation-agency-bill-2008(last visited on May 3, 2024).
28. Government of India, "National Investigation Agency: Vision and Mission", *available* at: https://www.nia.gov.in/vision-mission.htm(last visited on May3, 2024).
29. *Supra* note 27, NIA,section 6.
30. *Id.,* section 3.

exclusive power to legislate with respect to policing and exercise administrative power over the police. The central government can intervene to maintain public order only on the request of the state.[31] The Indian model of federalism is unique and different from the American model. It is concerned with the distribution of power between the centre and states rather than limiting government power. The state governments in India enjoy greater powers in comparison with similar government units of other democracies. The local police are usually the first-responder to a terror attack. Consequently, it is the appropriate authority to handle security issues as policing is carried out based on local norms.

The NIA was set up by the Indian government and is the sole agency empowered to "supersede the state's police forces" for the investigation and prosecution of terrorism cases.[32] The unwarranted delay in responding to the Mumbai attack in 2008 and the lack of a concerted intelligence gathering and sharing system at the national level,[33] had eventually paved the path for a centralised authority. Consequently, in addition to establishing the NIA, the government also expressed its desire to create a single overarching authority for counter-terrorism, the National Counter Terrorism Centre (NCTC) in 2012.[34] The NCTC was to 'collect, integrate, analyse and disseminate data, intelligence and assessments on terrorists and terrorist threats across India' and 'coordinate national and State agencies for counterterrorism intelligence-gathering' as well as 'plan and coordinate counterterrorism operations'.[35] However, it was never set up as the proposal became a victim of the "politics of federalism" and "departmental turf battles".[36]

TAKING OVER THE INVESTIGATION

With the enactment of the NIA Act, the Agency can supersede the authority of the local police toinvestigate offences related to terror. For this purpose, it can seek assistance from any intelligence and investigating agency.The state governments are expected to cooperate in the

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31. Constitution of India, 1950, Seventh Schedule, Union List (List I) Entry 2A.
32. K. Davar, "Intelligence reforms to meet future challenges"in G. Kanwal and N. Kohli (eds.), Defence Reforms: A National Imperative114 (Pentagon Press, 2016).
33. National, "NSG gets fourth and final regional hub in Mumbai"The Hindu, Feb. 24, 2012, *available* at:https://www.thehindu.com/news/national/nsg-gets-fourth-and-final-regional-hub-in-mumbai/article2925072.ece (visited on May 4, 2024).
34. *Supra* note 25 at 12.
35. The proposal for the NCTC came through an Executive Order by the UPA government in 2012. See SAHRDC, "The National Counter Terrorism Centre: The case of the Indian Stasi" 47(11) Economic and Political Weekly 12 (2012).
36. Vinay Kaura, "India's federalism puzzle, counter-terrorism challenge and NCTC debate"15(2) Journal of Policing, Intelligence and Counter Terrorism161 (2020).

investigation of offences falling under the jurisdiction of the NIA.[37] Section 6(6) of the NIA Act prohibits state governments from proceeding with any investigation once the NIA is entrusted with the same.

The NIA is empowered to "investigate and prosecute offences" under two situations. Firstly, in a situation when the state government sends a report to the central government of the occurrence of a scheduled offence.[38] The central government upon receipt of such report or information received from the state government or from any other source, examines whether the investigation of the offence ought to be carried out by the NIA.[39] Secondly, if the central government is of the opinion that a scheduled offence has been committed and it needs to be investigated by the NIA, it *maysuo motudirect* the NIA to investigate it.[40]

CURTAILING THE EXECUTIVE POWER OF THE STATES

Under section 6(6) of the NIA Act, 2008, when the central government hands over the investigation of the matter to NIA, "the State Government and any police officer of the State Government investigating the offence shall not proceed with the investigation and shall forthwith transmit the relevant documents and records to the Agency." The Agency, if it thinks it necessary, may ask the state government to associate itself with the investigation or may even transfer the matter to it, with prior approval of the central government.[41] Consequently, the states do not have any leverage in matters of scheduled offences even though maintenance of public order and policing are state subjects. Commenting on the interference of the centre into the domain of the states, P. Chidambaram, the former Home Minister observed, "that the NIA law would be challenged in court because it ascribes certain investigating powers to the NIA, which may be seen to conflict with responsibility that is exclusively with the states."[42]

CHALLENGING THE FEDERAL SPIRIT

Under Article 355 of the Indian Constitution, the centre has been given the responsibility to protect the states against external aggression and internal disturbance, as well as to ensure that every state is governed in accordance with the principles of the constitution. Since 1947, India

37. *Supra* note 27, NIA, section 9.
38. *Id.*, section 6(2).
39. *Id.,* section 6(3) & (4).
40. *Id.,* section 6(5).
41. *Id.,* section 7(b).
42. WikiLeaks, "Indian Home Minister pledges counterterrorism cooperation to FBI Director Mueller"Document no. 195165, March 4, 2009, *available* at:https://wikileaks.org/plusd/cables/09NEWDELHI405_a.html (visited on May 5, 2024).

has faced multiple "internal security threats" and "public order in about 40% of the districts is seriously affected by insurgencies, terrorist activities or political extremism."[43] The problem arises because of'police' is a state subject and constitutionally the central government has limited powers to intervene.

The Constitution provides for intervention of the central government in situations posing a threat to security.However, this can only be done when emergency is invoked. Terrorism is a sophisticated crime and a major national security threat. The internal security mechanism in states is incapable of dealing with such a threat.It is in fact unreasonable to expect the local police to tackle it with their limited operational capacity, resources, training, and intelligence organisation.Nevertheless, the intrusion into the jurisdiction of the states is a violation of the federal spirit of the Constitution.

ALLEGATIONS AGAINST NIA

Even the Central Bureau of Investigation (CBI),[44] which is governed by the Delhi Special Police Establishment Act, 1946 requires the consent of the concerned state before taking over the investigation.[45] On some occasions the states have been seen to withdraw their consent to the CBI conducting investigation for reasons of unjustified interference by the centre.[46] Contrarily, the NIA does not require any permission from the states to investigate a scheduled offence. The NIA has also been the subject of political battles between the centre and the states. An inquiry into the investigation of the Malegaon and Samjhauta Express attacks raise a pertinent question as to why the stance of the NIA changed with the change in the government.[47]

NIA: FEDERALISM AND NATIONAL SECURITY

The NIA faces different functional challenges[48] on account of regular jurisdictional clashes with the state police as to whether the centre can authorise the entrustment of investigation to the NIA

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43. N.N. Vohra, "National Governance and internal Security" 2(1) Journal of Defence Studies (2008), *available* at: https://idsa.in/jds/2_1_2008_NationalGovernanceandInternalSecurity_NNVohra (visited on May 1, 2024).
44. The Central Bureau of Investigation is an authority established by the central government under Entry 8, Union List (List I), Seventh Schedule.
45. The Delhi Special Police Establishment Act, 1946, section 6.
46. "Explained: Why CBI needs consent, how far the denial will restrict it in Andhra, Bengal"Indian Express, Nov. 19, 2018, available at: https://indianexpress.com/article/india/cbi-investigation-consent-andhra-pradesh-west-bengal-5452619/ (visited on May 3, 2024).
47. S. Shekhar,"10 years since 26/11: Lessons for Indian politicians in handling terrorism"Mint, Nov. 25, 2018, *available* at: https://www.livemint.com/Opinion/rFSUOvXB8m2qYyHj69gOtN/ Opinion–10-years-since-2611-Lessons-for-Indian-politicia.html (visited on May4, 2024).
48. P.S. Amrit,"Tackling terror with smart, seamless grid"The Tribune,Oct. 15, 2019, *available* at:https://www.tribuneindia.com/news/archive/comment/tackling-terror-with-smart-seamless-grid-847286 (visited on May 4, 2024).

without the state government's consent. The resistance to the agency is further fuelled by using NIA to steamroll states' opposition.[49] Allegations of misuse of powers of the NIA have been further enhanced after the amendment to the Act in 2019. This amendment empowers the agency to investigate terror attacks on Indians and Indian properties abroad, in addition to investigation of offences related to human trafficking, counterfeit currency, manufacture or sale of prohibited arms and cyber-terrorism.[50] The position has been heightened by the judiciary upholding the enactment of the previous anti-terror legislations.[51]

The recent legislative action (2019 amendment) of the Parliament has been challenged by the Chhattisgarh government in January 2020, questioning the interference of the centre into the domain of the states.[52] Chhattisgarh argues that the NIA Act is beyond "legislative competence of the Parliament" and is against the "federal spirit" of the Constitution.[53] In the petition filed under Article 131 of the Constitution before the apex court, it states that "A holistic appreciation of the fact that "Police" was placed under List- II as the subject matter of State, with power to investigate, and equally significant fact that no such entry of "Police" or even any incidental or ancillary entry was provided in List 1 i.e., Centre List suggests that the framing of a legislation such as NIA Act by the Parliament, which creates an "investigation" agency having overriding powers over the "Police" of a State, was never the intention of the makers of the Constitution."[54]

The constitutional validity of the NIA has already been upheld bythe Bombay High Court in 2013 in the case of *Pragyasingh Chandrapalsingh Thakur v State of Maharashtra, UOI, NIA*. [55] The allegations made in this case against the NIA were similar to the Chhattisgarh government's contentions. Based on the judgment of the Bombay High Court, an analysis is made as to the

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49. *Supra* note 36 at164.
50. PIB,"National investigation agency (amendment) bill, 2019 unanimously passed by Rajya Sabha"Government of India, Ministry of Home Affairs, July 17, 2019, *available* at: https://pib.gov.in/Pressreleaseshare.aspx?PRID=1579249(last visited on May 3, 2024); V. Venkatesan,"Amendment to the National Investigation Agency Act, 2008: An act of violation"Frontline,Aug. 16, 2019, available at: https://frontline.thehindu.com/the-nation/article28758410.ece (visited on May 4, 2024).
51. Ram Manohar Lohia v. State of Bihar AIR 1966 SC 740;Supra note 17;Supra note 21.
52. PTI,"SC agrees to hear plea challenging NIA Act, seeks response from Centre"Business Standard, Jan. 20, 2020, available at: https://www.business-standard.com/article/pti-stories/sc-agrees-to-hear-plea-challenging-national-investigation-agency-amendment-act-2019-120012001226_1.html (last visited on May 6, 2024); Also see"Chhattisgarh files suit against centre in Supreme Court challenging NIA Act"The Wire,Jan. 15, 2020, *available* at: https://thewire.in/law/chhattisgarh-files-suit-against-centre-in-supreme-court-challenging-nia-act (visited on May 7, 2024).
53. Original suit, Bar and Bench, available at: https://images.assettype.com/barandbench/2020-01/a986997f-b4b1-4d2d-b32a-4686b367cd3b/Final_Draft_NIA_Original_Suit.pdf (last visited on May 7, 2024).
54. *Ibid.*
55. 2013 SCC OnLine Bom 1354.

constitutional validity of the constitution of NIA from the perspective of both federalism and national security.

An International Crime

The sovereign function of national security is vested with the Union. Even though considerable autonomy has been accorded to the states under the constitutional scheme, however, the centre bears the final responsibility of the sovereign function of maintenance of security. India has had to deal with terror attacks and bomb blasts having "complex inter-State and international linkages."[56] The objective of NIA is to effectively confront cross-border international crimes like terrorism and to protect the life, liberty, and property of citizens. The investigation conducted by NIA deals with collection of sensitive information, disclosure of which can lead to dangerous consequences not only for national security but also for diplomatic relations between countries.

Is NIA a Police Force?

Justice Dharmadhikari speaking for the court in Pragyasingh equatedthe power of the Parliament to constitute an investigating agency at the national level with the power to set up the Central Bureau of Intelligence and Investigation (CBI), holding that NIA like the CBI was not a 'police force' under Entry 2 of List II (State List).[57] It was alleged that NIA sets up a police force since section 3(1) of NIA Act contains a reference to Police Act, 1861. However, section 3(1), NIAA is a non-obstante clause which simply states, "notwithstanding anything in the Police Act, 1961, the Central Government may constitute a special agency…" The provision was inserted to remove conflict and confusion about the powers of NIA to investigate and prosecute the scheduled offences. This was necessitated to empower the NIA to enter State limits and limits of any local Police Station for the investigation of such offences. The NIA Act does not set up a police force and therefore in no way usurps the domain of the states.

Defence of India

Entry 2, List II (State List) is entitled 'police' which includes railway and village police, but is subject to Entry 2A of List I.[58] Importantly, Entry 1 and 2 of List III, 'criminal law and criminal procedure' is not an exclusive state subject but both Parliament and States can make laws since it

56. *Id*.at para 75.
57. *Id*.at paras 80, 86.
58. Constitution of India, 1950, Seventh Schedule, State List (List II) Entry 2.

is in the Concurrent List. Consequently, for matters pertaining to defence of India, Parliament's competence cannot be excluded.[59] The entries in the three lists do not enumerate the powers of legislations but the fields. They do not restrict the legislative power in any manner nor do they prescribe a specific procedure of legislation. Further, every entry must necessarily be given a wider interpretation.[60]

Pith and Substance

The doctrine of pith and substance is applied in cases of overlapping between two entries. The NIA Act does not create any separate offence and it simply provides for a machinery for the investigation and prosecution of certain offences (referable to List I entries). The Bombay High Court accordingly applied the doctrine of pith and substance and held that the NIA Act legitimately falls under Entry 2 of List III i.e., 'Criminal Procedure'.[61] Any incidental transgression on the power of the competent legislature, namely, State Legislature in this case cannot be said to be violative of the constitutional mandate flowing from Article 246, Constitution of India.[62]

Is Handing over Investigation to NIA Violative of Federal Structure?

Under section 6, NIA Act, the central government must determine whether the offence mentioned in the report of the state government is a scheduled offence or not. Besides being a scheduled offence, the centre must apply its mind to the "gravity of the offence and other relevant factors." Once the central government is satisfied about the nature of the offence is grave enough to warrant the attention of a national agency, it will record its satisfaction that it is a fit case to be investigated by the NIA.[63] The central government also must satisfy itself that it is a fit case to be investigated by the Agency. The satisfaction of the centre is open to judicial review.[64]

Even the power conferred on the centre to *suo motu* hand over the investigation of the matter to the NIA is to be exercised only once it is satisfied that the matter needs to be investigated by the NIA. It is only when there is compliance of the requisite satisfaction of the central government, that the NIA is directed to investigate the offence. For the *suo motu* exercise of power, the central

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59. *Supra* note55 at para 88.
60. UOI v. Harbhajan Singh Dhillon AIR 1972 SC 1061.
61. *Supra* note 55at para 92.
62. Shruti Bedi, Indian Counter Terrorism Law 293 (Lexis Nexis, 2016).
63. *Supra* note 55at para 106.
64. *Id*., at para 107.

government should have some "definite material" based on which it determines the gravity of the offence and the consequent handing over of the investigation to the agency.[65] The procedure ensures inbuilt checks and balances on the centre's intervention for such cases. Speaking of the limitations on the Centre's powers, the Bombay High Court held that "If the power flowing from such provision is exercised for extraneous reasons or by taking into account irrelevant factors or is vitiated by *malafides,* then, in all such matters, depending upon the facts and circumstances in each case, it could be said that the power is misused or abused. Such abuse or misuse can be corrected at the instance of an aggrieved party by the superior courts under their constitutional and inherent powers."[66]

Consequently, the court held that the constitution of NIA is not unconstitutional and the central government must be given a free hand to "achieve larger public interest…" [67] The court however issued a word of caution, stating that the NIA could not in "the guise of its absolute powers indulge in such acts which would violate the constitutional guarantees…"[68]

The Punchhi Commission report dealing with 'internal security, criminal justice and centre-state cooperation' stated that national security had not been assigned to wither the Centre or the States. However, it was a matter of 'common interest' which required the cooperation of both.[69] The Commission was of the view that the central government's "obligation under Article 355 supersedes the argument that 'this duty' rests with the State Governments since 'police' and 'public order' are subjects falling in the domain of the States."[70] Therefore when national security is at risk or any criminal act is a threat to defence of India, the matter cannot be left to be "dealt with by the concerned State police force as an ordinary crime or law and order problem."[71] The commission went on to endorse that "creating effective legal and institutional instruments to deal with external aggression, terrorist acts and serious internal disturbances is a solemn duty of the Union Government obligated by the Constitution itself and not a matter of choice."[72] Consequently, if there is a slight transgression into the sphere of the states by the Centre, it is justified in the larger interest of public and national security.

65. *Id.*, at para 108
66. *Id.,* at para 107.
67. *Id.,* at para 131.
68. *Ibid.*
69. Report of the Commission on Centre State Relations, "Internal Security, Criminal Justice and Centre State Relations" Vol. V,Government of India 4 (March 2010), *available* at: http://interstatecouncil.nic.in/wp-content/uploads/2015/06/volume5.pdf (visited on May 5, 2024).
70. *Id.,* at 37.
71. *Id.,* at 44.
72. *Ibid.*

UNRAVELLING THE KNOT

The initiatives of the central government are not simply limited to enactment of legislations but addresses terrorism in numerous ways.[73] Conversely, states do not possess as many options or a vantage point except that they are the first responders to a terror attack at the local level. As compared to the centre they do not enjoy the authority to investigate the offences at the international level, manoeuvre national policy or gather intelligence from international sources. The central government with its wherewithal and access to the international arena is better placed to prevent as well as tackle the consequences of terrorism.This however, does not mean that the central government operates without problems but the lack of a coherent strategy results in a disorganised government, which ultimately has an adverse impact on the unprotected citizens. This uncoordinated response and lack of control is precisely what the terrorists seek to exploit. [74]It is therefore imperative for the governments to work in tandem with each other.

The legislative counter terrorism architecture is complex with overlapping between various laws. Recently, the Parliament replaced the Indian Penal Code, 1860 (IPC) with the Bhartiya Nyaya Sanhita (BNS), 2023 wherein section 113 of the BNS seeks to adda new offence of "terrorist act", not present in the original IPC.[75] This duplication would allow misuse of police discretion, by choosing to book a person either under UAPA or BNS. Moreover, resolving of cases on terrorism leads to the involvement of multiple investigating agencies.[76] To untangle the knotted issue, it is therefore proposed that a constitutional amendment be passed. The NIA was created by resorting to the entry relating to defence of India in the Union List, which is not endorsed by the states.[77] It is suggested that this dissension can be resolved by amending the

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73. Philip B. Heymann, Terrorism and America: A Commonsense Strategy for a Democratic Society (MIT Press, 1998).
74. Laura K. Donohue and Juliette N. Kayyem,"Federalism and the Battle over Counterterrorist Law: State Sovereignty, Criminal Law Enforcement, and National Security" 25(1)Studies in Conflict and Terrorism 13 (2002).
75. Sanjoy Ghose & Prakhar Bajpai, "Terrorist Acts in the UAPA and BNS: Duplication or Duplicity?" The Wire Feb. 8, 2024, *available* at: https://thewire.in/law/duplication-or-duplicity (visited on May 6, 2024).
76. The 2007 Hyderabad Mecca Masjid bomb blast case, for example, involved the transfer of investigation multiple times, from police to CBI, and then to NIA. NIA, Hyderabad v Devendra Gupta 2013 SCC OnLine AP 136 (Andhra Pradesh High Court).
77. Ashutosh Varshney, "How has Indian Federalism Done?" 1(1) Studies in Indian Politics 60 (2013); See A. Sengupta et al., "Cooperative Federalism: From Rhetoric to Reality"Vidhi Centre for Legal Policy(2015), *available* at: https://vidhilegalpolicy.in/wp-content/uploads/2019/05/CooperativeFederalism_VidhiBriefingBook.pdf (visited on May 8, 2024).

Seventh Schedule to the Indian Constitution and adding a new entry specifically dedicated to the offence of 'terrorism' in the Union List.[78]

This proposal for a constitutional amendment had been suggested by different committees set up under the authority of the government.[79] The Padmanabhaiah Committee had recommended in 2000, that certain offences, including terrorism, should be declared as federal crimes so as to enable a central agency to investigate them.[80] In 2003, the Malimath Committee also suggested that a federal law dealing with crimes of inter-state, international or transnational ramification be included in the Union List of the Seventh Schedule.[81] Even the judiciary has categorised terrorism as an offence covered under the residuary powers of the Parliament.[82]

CONCLUSION

The legislative framework including the setting up of a central investigating agency for countering terrorism is insufficient to handle the persistent threat. Mahadevan, believes that India's failures in the field of countering terrorism do not stem from fiascos of intelligence gathering, but the inability to act on intelligence. This is attributed to four constraints: "the lack of political consistency, political consensus, operational capacity and operational coordination."[83] Regardless of the division of powers between the centre and states under the federal system, national security is a vital matter that cannot be left to individual states which lack the mechanism and capability to tackle the crime.

The existing environment of mistrust between the Centre and States is reflective of a wide trust deficit. But the turf battles and interagency rivalries cannot negate the need for a comprehensive national counter-terrorism approach. Undoubtedly, federalism is an essential component of any democracy, however, the security mandate with its inclination towards centralisation of power, cannot be overlooked. The federalism versus terrorism debate is irrelevant when the lives of citizens are at stake.

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78. Sohini Chatterjee et al, "Cleaning Constitutional Cobwebs: Reforming the Seventh Schedule"Vidhi Centre for Legal Policy 54-55, *available* at: https://vidhilegalpolicy.in/wp-content/uploads/2019/10/Cleaning-constitutional-cobwebs_Reforming-the-Seventh-schedule1.pdf (visited on May 7, 2024).
79. Anurag Deep & Fawaz Shaheen, "National Investigation Agency Act 2008: Constitutionality, Desirability and Feasibility" 23 Aligarh Law Journal 174 (2015-16).
80. Report of the Committee on Police Reforms,Chapter 17 (2000), *available* at: https://www.humanrightsinitiative.org/programs/aj/police/india/initiatives/analysis_padmanabhaiah.pdf (visited on May 4, 2024).
81. Report of the Committee on Reforms of Criminal Justice System 294 (2003), *available* at: https://www.mha.gov.in/sites/default/files/criminal_justice_system.pdf (visited on May 5, 2024).
82. *Supra* note17.
83. P. Mahadevan, The politics of counterterrorism in India: Strategic intelligence and national security in South Asia(IB Tauris, 2012).

TITLE: UNVEILING THE BLUR: EXAMINING ONLINE GAMBLING WITHIN CONTEMPORARY REGULATORY FRAMEWORKS- DISTINGUISHING BETWEEN GAMING AND GAMBLING

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Ms. Hina Iliyas**

INTRODUCTION

Gambling involves betting cash or other assets on the final result of a sports event/contest, or other event for monetary advantage. Event outcome is partly or fully random.[1] Lotteries and gaming machines involve random outcomes, while card games and event betting need judgment.[2] With the growth of information and technology, gambling has grown into one of the most prominent online hobbies worldwide. The extent of online gambling has evolved in recent years, generating legal and health problems for gamblers, internet wagering and gaming are the two main types of internet gambling. Online gambling involves placing money on the outcome of a real event like horse racing, while online gaming comprises placing money on software-generated games with random results. Gambling has grown in popularity and market share in many countries. It is very popular with Indian gamblers. But, lack of regulation and laws to address internet gambling issues in India has rendered it problematic.

THE DEVELOPMENT OF INTERNET GAMBLING

Technology has brought the internet into every business, including online gaming. Gambling on internet has hugely evolved in the recent times due to technological innovations, widespread communication, and given the fact that these games are very easy to play and accessible anywhere.

Internet gaming is distinct from traditional gambling. Both consumers and operators want it. Online gambling was once limited, but now many Indians gamble online. Gambling has expanded so significantly that it now hires "professional gamblers" to engage in gambling

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1. T. MacKay, Internet Gambling in Canada Waits in Legal Purgatory, National Policy Working Group: Policy Discussion Document (2014)
2. A. Budd, Gambling Review Report (The Budd Report), United Kingdom Government Department for Culture, Media and Sport (2021)

online By 2024,[3] India's online gaming sector is expected to evolve from $360 mn to $1 bn.[4]
The rapid growth of this industry is due to several factors.
This market drives gamblers because:

- **Accessibility:** playable anywhere, anytime. With these gambling sites' ease of access, gamblers are increasing daily, expanding the internet gambling sector.Some gamblers prefer to play in solitude for the reason of the societal stigma.Internet gambling promotes equality because everyone is treated equally, unlike in conventional casinos.
- **Casino ambience:** some gamblers dislike casinos due to loud music, crowds, and smoke. Thus, online gaming suits them.
- **Event Frequency:** internet gamblers can play many games on multiple screens. Online gaming is preferred by companies over traditional casinos because: Online gambling enterprises have lower operational and overhead expenses than traditional casinos, resulting in significant profit. Online casinos use computer algorithms to manage games instead of recruiting and training dealers, croupiers, gaming staff members, and supervisors.[5] Online gambling requires less investment than a real casino, which is costly. They don't have to pay for insurance or maintenance.

The online gaming sector offers several potential for customers and service providers to grow. Additionally, it has caused several concerns like problem gambling and criminal behavior. Involvement in gambling to the extent that it causes substantial adverse effects on oneself and others is problem gambling.[6] Online gambling creates serious problems like despair, suicidal thoughts, criminality, guilt, and high spending.[7] Online gambling also encourages illegal behavior and increases organized crime like laundering of cash and fraud. Many online websites that claim to offer gambling products and services are not authentic, and there are no governing

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3. S. Pillai, "Now, online gaming is a career for some", (May 7, 2023) *available* at: https://timesofindia.indiatimes.com/india/now-online-gaming-is-a-career forsome/articleshow/64056984.cms(visited on September 1, 2023)
4. Study by KPMG and Google, Online Gaming in India: Researching a new Pinnacle, (May 2023), *available* at https://www.stoodnt.com/blog/career-in-online-gaming/ (visited on September 1, 2023)
5. E.A. Morse, Extraterritorial Internet Gambling: Legal Challenges and Policy Options, ICLR (2020)
6. S. Ranade, S. Bailey, and A. Harvey, A literature review and survey of statistical sources on remote gambling, ILR (2016)
7. *Ibid*

bodies to assess their legality, making it easier for them to mislead consumers and raising safety and concerns related to privacy.

REQUIREMENT FOR GAMBLING LAWS

Gambling through internet has grown into a worry because to its rapid expansion and the lack of adequate regulations to manage its issues. Thus, reviewing online gaming and betting rules is crucial.It is clear that these operations will continue and that the state cannot stop them. Even if the government bans online gambling, it won't help because the internet is too big to oversee everything. At least the government can regulate them as opposed to banning them. India is a state of welfare and must safeguard its citizens against malpractices. There are various issues with unregulated online gambling, such as:[8]

Unethical Practices

This firm may be engaging in unethical practices that endanger consumers. Some unscrupulous gaming websites can manipulate online results, increasing client loss. These websites also use software to modify results and lower gamblers' chances of winning.

Because these kinds of transactions are unregulated, gamblers always worry not getting their wins, and there is no legal structure to sue unscrupulous websites for payment.These websites additionally gather online gamblers' information and establish a database including their gambling habits, duration, and games. The databases in question are sold to companies that create more enticing websites to encourage gambling.

Regulating online websites would make sure there's a minimum acceptable level of ethical practices by monitoring and complying with fair and ethical norms. Because internet gamblers cannot physically assess the game's fairness, they must have the same level of faith as traditional gamblers.

Evolution of Illegal economy

A ban on certain activities creates a black market, making regulation harder. It also creates coalitions that benefit from unregulated unlawful practices. These unlawful gaming activities have a major impact on the financial system since the profits are unaccountable and unnoticed, therefore they are not taxed and black money spreads. Such illicit actions would harm our economy, hence regulation is needed.

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8. Regulating Sports Betting in India: FICCI, *available* at :http://blog.ficci.com/sports-bettingindia (visited on September 1, 2023)

Money laundering

Online gambling is a big contributor to illegal money transfers, a three-step phase comprising positioning, layering, and integrating. The individual physically removes unlawful funds from the market, hides its audit trace, and then returns it to the economy as genuine.

BENEFITS OF REGULATION OF ONLINE GAMBLING

As the internet gambling business grows, it's important to monitor and regulate such activities because unregulated gambling has many negative effects. Regulation of online gambling has many benefits:

- Government regulation of gaming activities can assure fairness and prohibit unethical practices. Increased consumer protection will give them confidence that they won't be duped, consumers can also sue for fraud.
- A thorough age check can prevent kids from gambling online. Every gaming website would have security measures to prevent underage gambling by requiring age verification documents when logging in.
- Regulation would guarantee that all industries providing internet gambling services are monitored, allowing the government to trace and tax earnings for public welfare.
- Online gamblers' rights can be protected by legal protection, preventing loan sharks from exploiting them.
- Online gambling regulation promotes responsible gaming, allowing consumers to set wager limits and maximum losses, protecting those with addictions.
- By regulating internet gambling, the government can monitor transactions and reduce illegal money transfers.

CURRENT STATE LEGISLATION ENACTED

There is no central law regulating gambling via the internet in India. Only Sikkim and Nagaland have legalized online gaming in India. The Sikkim Online Gaming (Regulation) Act, 2008 is the first online gaming law. The Act and Sikkim-Online- Gaming (Regulation) Rules, 2009 allow specific online games with a state license.[9] The Act allows licensed gambling parlors in the state

9. J. Heydary, Advertising for Online Gambling – Is It Legal? (2015) Accessed from www.heydary.com/publications/online-gambling-laws.html (visited on September 1, 2023)

to provide these internet games and sports betting. To issue licenses through pan-India applications, Nagaland enacted Prohibition of Gambling &Promotion and Regulation of Online Gaming Act, 2016. Section 2(1) of this Act stipulates that providing a medium for online 'games of skill' or wagering on them is not considered gambling if such facilities are facilitated by the players from exempt territories.

Section 2(2) of this Act defines "territory" as "any territory in India in which 'games of skill' are permitted and are recognized as exempt from 'gambling'."However, Telangana has taken the opposite approach by amending the Gaming Act, 1974 and passing the Gaming (Amendment) Act, 2017, which prohibits all betting, online or offline, with serious consequences for the state's public.

RECENT AMENDMENTS - 2023

India's Min. of Elec. and I.T. ("MeitY") enacted the final I.T. Amendment Rules, 2023 on April 6, 2023.[10] The Amendment Rules could be considered as a milestone for gambling through internet in India. As a result of this Amendment Rules, the government has been able to protect the interest of gamblers and gamers in India from online abuse and obscenity.

Acknowledging Online Games

In the past few years India has witnessed huge interest and growth in online gambling games. Without legal recognition of online gambling games, these have witnessed state interference and public distrust. Many offshore and onshore frauds and games have targeted Indian people while the business was unregulated.

The Amendment Rules introduced new ideas:

- Permissible online games: These include real-money and non-real-money games.
- Online real money games which are permissible: Only SRB-verified games are allowed.

Indian consumers can now discern between real money and fake games. This legitimizes online games, including real money games, and might boost user numbers and investor interest in the Indian online gaming business.

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10. A. Nair, 'Online Gambling: Gambling with Regulation, Indian Journal of Law and Technology 3 (3) 2023

Categorization of Online Game Providers

These amended rules categorize online gaming providers as "intermediaries" under the I.T. Act, 2000, creating the "Online Gaming Intermediary" classification.The government enacted the IT Rules, 2021, and replaced the I.T. Rules 2011 with stronger digital media and social media regulation.

Compliance required for RM Intermediaries

The Amendment Rules establish compliance obligations for intermediaries, notably Online Gaming Intermediaries that offer legal real money games (each a "RM Intermediary").

The following are RM Intermediaries' main requirements:

- Provide a physical contact address in India for receiving communications;
- Inform gamers of statutes, confidentiality policy, and agreement terms.
- Upon receiving a deposit in lieu of online games/gambling, identify and verify the identity of the player in accordance with RBI's procedures.

No financing

These Rules further restrict these Intermediaries through funding or permitting 3rdparties to finance players towards authorized online real money games to promote responsible gaming.

Self-Regulatory Body

Self-regulation of internet gaming Intermediaries and SRBs are important parts of the Amendment Rules.

Primary function is to confirm real-money online games

Each SRB will verify online games that require real cash to determine their legality. Each SRB must have an updated list of games verified by it on its website and mobile app, including the date, period, reason for confirmation, and the cause for suspension or revocation.

SRB Form, Board Composition, Capacity

An SRB can only be a company established under Section 8 of the Companies Act, 2013 with gaming industry membership. The Amendment Rules also require all SRBs to have well-structured boards. Each SRB board will also have a MeitY nominee.

Key Reflections of recent Amendments

Games industry welcomes self-regulation under a well-defined Amendment Rules framework.

Where are we on the skill vs. chance debate?

The Draught Amendments and Amendment Rules show that Government has avoided the query

over gambling/betting, including what is a skill game (usually not considered gambling) and what is a game of chance (which is prohibited in some Indian states). The Amendment Rules require SRBs to verify real money games that "do not include gambling of any outcome." The Central Government cannot regulate gambling and betting. The Indian Constitution, state governments can regulate betting and gambling. Thus, stakeholders and SRBs will continue to use Indian case laws and asymmetric state laws to define the determining factors of gaming, or wagering in specific locations.

Investment of foreign countries in online gaming

Investment from foreign investors must be cautious when investing in Indian online gaming enterprises since Indian foreign exchange control regulations restrict betting and gambling.During a February 2023 draught amendment discussion in the Indian parliament, MeitY emphasized that a game publisher wasn't going to be considered a "intermediary." However, this explanation appeared to leave an enormous void in the legal structure for online gaming by ignoring game producers.

PROHIBITION V. REGULATION OF ONLINE GAMBLING/GAMING

People have argued for and against banning and controlling internet gambling, arguments against internet gambling regulation claim that it is immoral and against society morals, as witnessed in Mahabharata, where Yudhishtir lost his kingdom, brother and wife. Society doesn't favour gambling, and controlling it will encourage more gambling, which goes against our beliefs. Internet gambling regulation or legalisation is also said to be against public policy and contribute to problem gambling, addiction, and criminal activity.

Regulators say that internet gambling cannot be entirely banned due to technological advancement and the internet's vastness, which allows gamblers to access betting platforms online. Therefore, banning such behaviours would not work. Instead, the governing body should regulate these operations in order to tax them and use the proceeds for public welfare. Regulation will also monitor online websites for money laundering and fraudulent activity. Regulation will also prohibit kids from gambling online.

There is no central law regulating gambling via the internet in India. Only Sikkim and Nagaland have legalized online gaming in India. The Sikkim Online Gaming (Regulation) Act, 2008 is the first online gaming law. The Act and Sikkim-Online- Gaming (Regulation) Rules, 2009 allow specific online games with a state license. [9] The Act allows licensed gambling parlors in the

state to provide these internet games and sports betting. Online gambling regulation ensures licensing, fair practices, and customer security and privacy. Consumers would also have a legal method to seek legal protection if their rights are violated if they are perpetrators of fraud, unlike prohibition. To issue licenses through pan-India applications, Nagaland enacted Prohibition of Gambling & Promotion and Regulation of Online Gaming Act, 2016. Section 2(1) of this Act stipulates that providing a medium for online 'games of skill' or wagering on them is not considered gambling if such facilities are facilitated by the players from exempt territories.

In *Dr. K.R. Lakshmanan v. State of Tamil Nadu,*[11] The Indian Supreme Court exempted skill-based games from the Act. This justifies legalising virtual rummy, blackjack, and other games based on skill. Although India is governed by federal legislation, every state has unique gaming laws. Maharashtra and Tamil Nadu have banned all gambling, however Goa, Sikkim, and Daman & Diu have partially legalised it. The Apex Court in *State of Andhra Pradesh v. Satyanarayana*[12] found that a state may not outlaw skill-based games with chance. This has been used to justify state legalisation of digital poker and other games based on skill.

The Kerala High Court ruled in *Kizhakke Naduvath Suresh v. State of Kerala*[13] that the state administration can control rummy games played on the internet to prevent illicit use. The Delhi High Court ruled in *M/s Gaussian Networks Pvt. Ltd. v. Monica Lakhanpal &Ors*[14] that the RBI doesn't regulate games based on skill like poker because they're not gambling.

The Kerala High Court ruled in September 2021 that a blanket ban on online gaming was illegal since it did not reasonably restrict the basic liberties guaranteed under Indian Constitution Article 19(1)(g). The HC stated that the Supreme Court had declared rummy "a game of mere talent" and that "playing for prizes or not will never serve as considered an indicator to find out if a game is a game of ability".

In *Akshay Anant Matkar v. State of Maharashtra*,[15] the Bombay High Court rejected a First Information Report (FIR) against Wingame Enterprises' owner for gambling violations of the Maharashtra Prevention of Gambling Act, 1887 in May 2023. Division bench Justices Sunil Shukre & MM Sathaye rejected Akshay Matkar's FIR, ruling that the game is skill-based rather than chance and not 'gambling'.

11. AIR 1153, 1996 SCC (2) 226
12. (1967) INSC 266 (22 November 1967)
13. Criminal Appeal No. 752 of 2021
14. 2019 SCC OnLine Del 8819
15. Criminal Writ Petition No. 1175 OF 2023

CHALLENGES TO ONLINE GAMBLING IN INDIA

Federal laws

The Public gaming Act of 1867 is the primary federal law governing gaming in India. It declares running gambling establishments a felony and punishes those found guilty. However, it is unclear whether online gambling is permitted because it isn't addressed in the Act directly. This law does not mention the internet because it was passed before the internet existed. Online betting and gambling are therefore neither legal nor prohibited based only on this. Skill-based games are exempt from the Act's coverage, according to the Indian Supreme Court's ruling in *Dr. K.R.Lakshmanan v. State of TamilNadu.*[16] To justify legalising the use of digital rummy, poker, and various other skill-based games, this has been offered as rationale.

Laws followed by State

Despite being governed by federal legislation, each state in India has a distinct set of gaming laws. All types of gambling are completely outlawed in some states, including Maharashtra & Tamil Nadu, while they are only partially legalised in others, including Goa, Sikkim, the and Daman & Diu. In Andhra Pradesh vs. Satyanarayana, the Supreme Court held that states cannot forbid games of skill, even if they have a chance element. This may have been used as evidence in favour of state legalisation of skill-based games like online poker.

Poor Clarity

Online gambling is not explicitly governed by any laws or regulations, hence its legality is unknown. Numerous legal challenges have resulted from this, including disputes over the proper venue and the practicality of specific legislation.The Meghalaya Amusement and Betting Tax Act, 1982, and S. 13 Sikkim Regulation of Gambling (Amendment) Act, 2005.

Payment and Banking Restrictions

The RBI has placed tight rules in place to prevent financial institutions and banks for handling transactions related to internet gambling. As a result, players now have difficulties while attempting to deposit money into and withdraw money from online gambling sites.

HOW DO WE TACKLE THESE CHALLENGES?

Regulation of Online Gambling: By passing comprehensive law that handles all facets of the sector, including licencing, taxes, and user protection, the Indian government may think about

16. Dr. K.R. Lakshmanan v. State Of Tamil Nadu And Anr AIR 1153, 1996 SCC (2) 226

regulating online gambling. In *KizhakkeNaduvathSuresh v. State of Kerala*,[17] the Kerala High Court found that the state government might regulate rummy games played online in order to prevent their usage for illicit purposes.

Governmental Legalization

Jurisdictions may also think about legalizing online gambling, much as certain jurisdictions have done with brick-and-mortar casinos. The state will benefit from the cash this brings in, and players will benefit from a regulated system.

Banking and Payment Rules: To make it simpler for users to deposit and withdraw money from gaming websites, the RBI may review the rules governing online gambling transactions. The Delhi High Court held in *M/s GaussianNetworks(P)Ltd. v. MonicaLakhanpal & Ors.*[18] that skill-based games like poker are not considered gambling, hence the RBI laws do not apply to them.

Public awareness and education

The public can be informed by the Indian government about the advantages and disadvantages of internet gambling. This will help increase player awareness and lessen the chance that they will fall prey to scam websites or addiction.

COMPARATIVE ANALYSIS OF ONLINE GAMBLING LAWS IN INDIA AND OTHER COUNTRIES

Legalising the practise of gambling on the internet varies significantly among countries and territories, with some adopting a more liberal position and others establishing severe rules prohibiting it entirely. In this analysis, the laws governing internet gambling in India will be compared with the ones in the United States and the United Kingdom.

India

Gambling is prohibited in India under the Public-Gambling Act 1867.[19] The Act does not directly cover online gambling, and it is up to the courts to decide how to interpret it. In *Dr. K.R.Lakshmanan v. StateofTamil Nadu,* the Indian Supreme Court declared that contests of skill are not gambling and are therefore free from the Public Gambling Act. This decision has led to the emergence of online skill-based game portals including Dream[20] which are hugely popular in India.

17. Kizhakke Naduvath Suresh v. State of Kerala, Criminal Appeal No. 752 of 2021
18. M/s Gaussian Networks Pvt. Ltd. v. Monica Lakhanpal & Ors 2019 SCC OnLine Del 8819
19. Public Gambling Act of 1867 s.3
20. Dr. K.R. Lakshmanan v. State Of Tamil Nadu And Anr AIR 1153, 1996 SCC (2) 226

United States

State laws in the US determine whether online gambling is legal or not, with some states overtly permitting it and others explicitly forbidding it. The exchange of wagers or bets using wire communication services is prohibited by the Federal Wire Act 1961, however this rule has only been applied to sports betting.[21] In a 2011 legal opinion, the Ministry of Justice claimed that the Wire Act solely prohibits betting on sporting events and does not extend to any other kind of online gambling. However, the Unlawful Online Gambling Enforcement Act 2006 states that banking institutions are not allowed to receive payments for online gambling operations that are prohibited by state or federal law.

United Kingdom

In the UK, online gambling is regulated and authorised by the Gambling Commission. The Gambling Act (2005), that also requires operators to apply for and acquire permits from the Gambling Commission, governs online gambling in the UK. The Act also lays out rules for consumer protection, including as barriers against problem gambling, checks on the integrity of games, and bans on gambling among minors. Finally, Public-Gambling Regulation specifically exempts skill-based games in India, where internet gambling rules are stronger. Inconsistent state regulations exist in the US, with some jurisdictions allowing betting via the internet whereas other states forbid it. The UK's gaming Commission, which has a more lenient policy towards it, allows and regulates online gaming.

Controls are in existence in each of the three jurisdictions, though, to protect customers and curtail problem gambling. In *State of TamilNadu v. Dr.K.R. Lakshmanan,* the Supreme Court of India declared that skill-based games are not considered "gambling" for the purposes of the Public Gambling Act of 1867 and are therefore exempt from its regulations.[22] The court noted that skill games demand considerable amounts of expertise, judgement, and tactics, and that the players' skill, as opposed to chance or luck, largely determines the final result of such games. The court further emphasised that Public Gaming Act 1867 was passed at a time where gambling games were less well-known than they are now.

In *SantKumar v. State of Madhya Pradesh,* [23] the court had ordered both the federal government as well as state of M.P. to look into the constitutionality of such internet gambling plans

21. The Federal Wire Act of 1961 s.2
22. State of Tamil Nadu v. Dr. K.R. Lakshmanan, AIR 1996 SC 1153
23. Sant Kumar v. State of Madhya Pradesh MCRC No. 24271 of 2022

advocated by star players and determine if they are legitimate, right and in compliance with the statutes prevailing in the country or if there is a need to check such schemes to stop the country's youth to getting drawn to illegal activities that could ruin their careers.

11. Future of online gambling in India

The potential enforcement of these laws is questionable because they are ambiguous and subject to judicial interpretation in India. It is still not apparent exactly what distinguishes a game of skill from a game of chance, notwithstanding the Indian Supreme Court's ruling that skill-based games are not betting and are therefore free from the provisions of the Public Gambling Act.

Online gambling might generate a lot of revenue and create job opportunities, thus these have been suggestions from the Indian government to establish rules for it. However, there are worries about the possible negative social and economic impacts of gambling. In a report released in 2018, the Parliamentary Law Commission of India urged the government to make legal and regulate gambling and sports betting. Betting and wagering on sports should be legalized and strictly controlled in India, the Law Commission suggested in this study, adding that the current ban on these kinds of transactions has not succeeded in reducing unlawful betting and black money. The Commission claimed that regulation would increase revenue for the government, ensure transparency, and help stop fraud and money laundering. Additionally, the paper made recommendations for the regulatory framework, such as licensing standards, responsible gaming policies, and measures to safeguard consumers. It should be understood, though, that this is merely a guideline and that the Indian government is still working to transform these suggestions into laws. Online gambling has just been legalized and operators have received licences in some Indian states, notably Sikkim.[24] These regulations, however, have a limited scope and only apply to specific forms of internet gambling, such as online lotteries.

The Indian government could soon take action to control internet betting, or it might elect to leave the interpretation of the law up to the courts. To minimise any potential negative impacts, any legislation controlling internet gambling in India ought to put a heavy emphasis on safeguarding customers and promoting responsible gaming.

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24. Report No. 276, Legal Framework: Gambling and Sports Betting Including Cricket in India

Taxation

The GST (Goods and Services Tax) regime in India has caused issues for the business of online gaming. The Council on GST recently suggested a 28% increase in GST over the current rate for the online gaming industry.[25] The GST tax rate's rise between 18%-28% is anticipated to have an effect on the business activities of online gambling companies. Additionally, the cost of each game for participants will triple or quadruple, which may limit the amount of games any user may play.

The two primary GST models in the gaming industry are the Cross Gambling Revenue approach and the Turnover Tax model. The Cross Gaming Revenue model, sometimes referred to as the GGR model, permits the gaming operators to shoulder taxes on the commission or entry fee less the sum earmarked for the prize pool. In contrast, the Turnover Tax model charges the whole prize pool. The UK recently changed between a sales tax structure to a broad-based government revenue model in an effort to increase revenue. While skill-based games are free from this restriction in Germany, where VAT Model I is applied at a rate of 5%, France is also considering adopting a reform of a similar nature.

To encourage the industry's expansion in an environmentally friendly and ethical manner, the government has suggested supportive and regulating measures. In the future, India is expected to dominate the video game industry. The development of the online gambling industry has been facilitated by the identification of the Min. of Elect. and I.T. as the responsible ministry. India's future strategy for based on skills gaming on the internet is currently unknown.

The projected rise in the Goods and Services Tax (GST) tax rate from 18%-28% may have an effect on the activities of online gambling businesses in India, and the industry is already struggling with regulatory challenges relating to tax structures. Although it is unclear how India is going to approach skill-based gaming on the internet, it is predicted that the country will surpass all other countries in the world's gaming market.[26]

Budget

According to government's Budget 2023–24, the Indian internet gambling market finally has certainty about taxation. The F.M., Nirmala Sitharaman, suggested removing the required threshold of INR 10,000 for gambling wins subject to TDS while the business sought taxes

25. Report No. 276, Legal Framework: Gambling and Sports Betting Including Cricket in India
26. Gambling in India: Past, Present and Future Jatin Bhatia vol 7

clarification. But for the duration of a tax year, all cumulative gains from things like lotteries, crossword challenges, and games will still be subject to INR 10,000 TDS level.[27] The Finance Minister made a commitment to increase openness in the levying taxes of online gambling, and the addition of two sections in the Finance Act—115BBJ for the computation of taxes for those obtaining revenue from the profits from online gaming and 194BA for TDS on the profits compared to online video games for online intermediaries—help him keep that promise.

The calculation of TDS for online gambling has been made simpler for both enterprises and users thanks to two new subsections, 194BA (for TDS of profits from internet gambling for internet facilitators) and 115BBJ. The government's separation of games of ability and games of luck into distinct chapters in the Finance Bill, in the opinion of the parties involved in the internet-based gambling business, is a critical distinction. They view the inclusion of the additional parts as an important step in establishing a distinction between skill-based and chance-based games.

CONCLUSION

The demands of humans and technology change daily. Previously immoral activities like gambling are now acceptable. Gambling was always considered a social scourge, but now it's popular, especially online. The legislation must reflect changing social ideals. Gambling is evil and should be banned, but the internet is international and will continue to offer online gambling options. The online gambling sector is growing rapidly, and the government should control it. The parliament can also pass laws on internet gambling because it takes place in cyberspace and involves mass communications, which fall under entry 31 of the union list, “Posts and telegraphs; telephones, wireless, broadcasting and other like forms of communication”. I recommend buying complete laws to restrict online activities, which is needed now. This benefits customers and the government. The Act would protect gamblers from fraudulent market players and minimise problem gambling, juvenile addiction, criminal behaviour, and money laundering. However, the government might monitor such transactions and tax profits, which would generate income. Regulation will ensure transparency, which will reduce the unlawful market and black market in the economy. I further suggest that India establish a Gambling Commission to provide licences to market players and ensure that they link their

27. Report on GST on online skill-based gaming, August 2022 by ASSOCHAM and EY.

Aadhar/Pan cards to ensure a fair and free market. Online gambling without a licence should be illegal and penalised. The law commission's 276th report recommendations should also be considered while creating a legislative framework. Thus, internet gambling can only be solved by regulation and legislation.

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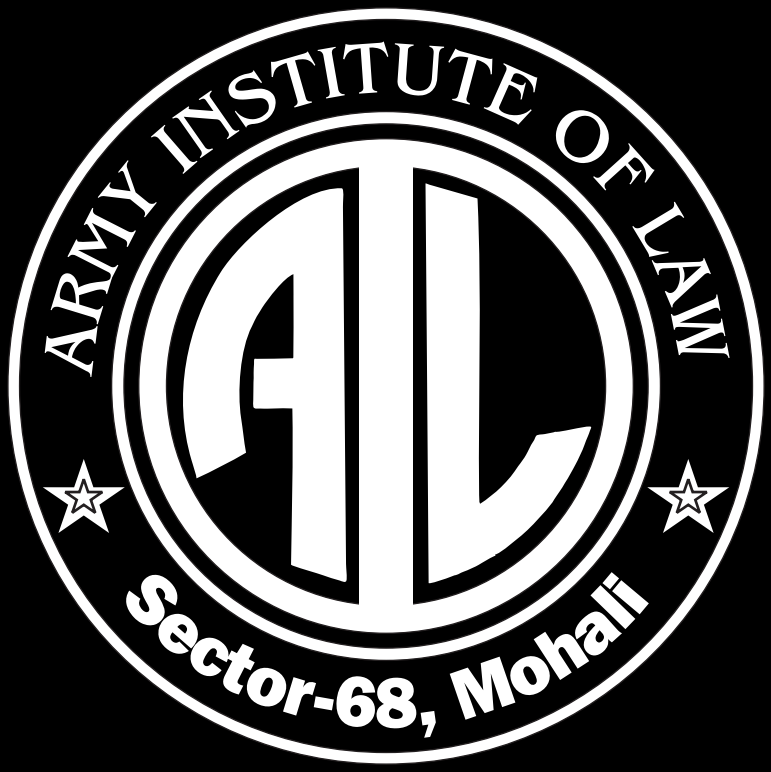

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