NALSAR Law Review

Volume 9 Number 1 2024

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Price Rs. 300 (Rs. Three Hundred) or US$50 (Fifty)

Mode of Citation : Vol.9NLR2024<page no.>

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Editorial

It is with great pride that we present this edition of NALSAR Law Review (NLR), bringing together a collection of scholarly articles that delve into some of the most pressing and dynamic issues shaping contemporary legal discourse. This issue reflects the complex and evolving intersection of law with societal change, technological advancements, and global governance challenges, offering our readers deep insights into the critical legal matters of today.

In this issue, we take a closer look at *Nigeria's electoral progress*, drawing comparisons with India's experience in implementing e-voting technologies. This article highlights the critical role that legal frameworks play in facilitating technological transitions in democratic processes and offers insightful lessons for other nations seeking to modernize their electoral systems.

In the article *The Evolution and Role of Law: The Trial Lawyer in the Administration of Justice*, Justice Goda Raghuram examines the ethical challenges within the legal profession, particularly in the adversarial system. He critiques practices like fact manipulation and procedural delays, which undermine justice and public trust. Justice Raghuram calls for a return to core ethical values, the revival of mentoring, and structured reforms to address these issues and restore the integrity of the profession.

This issue also features thought-provoking discussions on *women's financial inclusion and entrepreneurship* as drivers of economic development. The authors argue that empowering women financially is essential to fostering national growth, underscoring the need for robust legal frameworks that support women's social and economic empowerment.

Dr. G. Mallikarjun's paper offers a comprehensive *critique of the Telangana Record of Rights Bill 2024*. It underscores the importance of digitization and transparency in land record management while identifying areas where improvements are necessary. His recommendations emphasize the need for accuracy and efficiency in implementation.

Prof. Harpreet Kaur's article explores the *Interface between the Consumer Protection Act, 2019 and the Competition Act, 2002,* offering a detailed examination of how these two legislative frameworks work in tandem to protect consumer interests. By analysing recent amendments and market dynamics, the article contributes valuable insights into how competition law and consumer protection law intersect, ensuring a balanced marketplace for both businesses and consumers.

One of the articles critically examines the *Muslim Women (Protection of Rights on Marriage) Act, 2019*, a pivotal piece of legislation enacted in response to the Supreme Court's ruling on instant triple talaq. While the Act aims to protect Muslim women from arbitrary divorce, the article highlights how criminalizing triple talaq may inadvertently exacerbate socio-economic vulnerabilities. This nuanced exploration offers valuable insights for policymakers, legal practitioners, and advocates of gender justice, urging us to consider the broader socio-legal impacts of legislative reforms on marginalized communities.

One of the key highlights of this edition is a critical analysis of *India's new criminal laws,* particularly the *Bharatiya Nagarik Suraksha Sanhita, 2023.* The authors delve into the potential challenges of implementing these wide-ranging reforms, raising important questions about how these changes may affect civil liberties and the administration of justice. This article is an essential guide to understanding the complexities and implications of this significant legal overhaul.

In addition to these topical discussions, this issue also addresses *transgender rights in India*, exploring the systemic violence and discrimination faced by the transgender community. Despite legislative progress, the safety and dignity of transgender individuals remain at risk, as highlighted by ongoing violence and targeted attacks. The article emphasizes the urgent need for more comprehensive legal protections and societal acceptance to safeguard this vulnerable group.

This edition also tackles the intersection of *law, artificial intelligence (AI), and technology*, exploring the impact of AI on employment, data privacy, and governance. As AI rapidly transforms

various sectors, the law must keep pace to ensure fairness, equality, and privacy rights are upheld in this era of digital transformation.

In our commerce section, the regulatory challenges posed by the rise of *e-commerce* are explored in depth. The article highlights the need for competition law to adapt to ensure fair practices and transparency in both online and offline markets, reflecting the growing complexity of the modern marketplace.

An article on *Climate Change* highlights the critical role of oceans in climate regulation and the need for robust coastal conservation in India. The article critiques current regulatory frameworks for prioritizing commercialization over environmental protection and calls for a comprehensive strategy that aligns with global sustainability goals. Emphasizing the importance of preserving coastal ecosystems, it advocates for stronger regulatory measures to mitigate climate-induced risks.

In this issue, we are pleased to feature two book reviews, first is a detailed review of *Cyber Security, Privacy and Data Protection in EU Law by Maria Grazia Porcedda,* reviewed by Dr. Debarati Halder. This monograph offers an insightful exploration of the intersection between cyber security, privacy, and data protection within the EU's legal framework. Porcedda's work is notable for its clear, structured analysis, divided into two comprehensive parts.

Second book review of *The Dirty Dozen by N Sundaresha Subramaniun*, by Dr. Poosarla Bayola Kiran says it is a book packed with many aspects of law, written by a business journalist with a good focus of public interest. It is definitely a commendable contribution to the little and effective literature on the subject. It can stir a researcher and pose uncomfortable questions, which are the need of the hour as we are trying to usher next generation reforms for the betterment of Indian economy. It is a clean take on the dirty dozen and it highlight the struggles involved in cleansing the system.

Collectively, these articles reflect the need for legal systems to evolve alongside technological advancements, societal shifts, and global

challenges. Each piece offers critical insights into how law can and must adapt to meet the demands of an ever-changing world. It is our hope that these discussions will contribute meaningfully to ongoing debates surrounding justice, fairness, and regulatory reform.

We invite our readers to engage deeply with these thought-provoking analyses, to reflect on their implications, and to consider their broader impact on legal practice, policy formulation, and social governance. As always, we remain committed to fostering thoughtful dialogue and contributing to the ongoing evolution of law and justice.

Sincerely,
Prof. Aruna B Venkat
Chief Editor, NLR

THE EVOLUTION AND ROLE OF LAW - THE TRIAL LAWYER IN THE ADMINISTRATION OF JUSTICE

*Justice Goda Raghuram**

Abstract

The legal profession, with its rich historical legacy from ancient jurists to modern reformers, faces significant ethical and professional challenges today. Central to this scrutiny is the adversarial system, which, while designed to resolve disputes through a competitive process, is criticized for fostering unethical practices such as manipulating facts, strategic delays, and undermining truthful testimonies. The decline in traditional mentoring and ethical training exacerbates these issues, leaving many new lawyers inadequately prepared and prioritizing commercial success over ethical considerations. Additionally, the misuse of procedural laws to obstruct justice undermines the system's effectiveness and public trust. Addressing these challenges requires a renewed focus on ethical standards, a holistic understanding of law, and insights from structured reforms in other jurisdictions. Reaffirming core ethical values and revitalizing mentoring practices are essential for restoring the integrity of the legal profession and ensuring effective justice delivery in democratic societies.

The survival and the longevity of the not normally the sapient species, the homo-sapiens is conditional on adopting nobility, accommodation and a measure of altruism as intrinsic traits of existence; be it as individuals or in the aggregate, as a society. Such traits are neither natural nor exist as default positions. These require persevering practice and constant monitor, internally and

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* Former Judge, High Court of Andhra Pradesh; President, Customs, Excise and Service Tax Appellate Tribunal, Delhi; and Former Director, National Judicial Academy India, Bhopal.

externally by organizations we create in our societal arrangements. Of all modern formats of social governance particularly the currently predominant democratic format, the legislative and judicial branches have a particular invitation to nobility, especially the later.

As the tiller and the farmer assuage the hunger of society; the mother nurtures the family and children; the teacher pursues the noble calling of dispelling the darkness of ignorance from the human breast, each of these incessantly going about their obligations unmindful of power or pelf, recognition or glory, seeking no hosannas for enduring service, so must the trial lawyer serve the cause of justice and the institutions of the law. He is the ark of the covenant of the law, the most accessible and visible image to the consumer, of the quality and vitality of our legal institutions.

I have not been a trial lawyer. Such impressions as I have of the art and craft at the trial level comes from studying the product and its pathologies through the appellate and revisional lens. Such study is not of a pure product of the trial lawyer's exertions. It is too often the trial or the 1st appellate judges' amalgam of the menu served. There are yet certain inalienable and generic norms, of equipment, traits and attributes of the legal profession as there are pathologies, common to all levels of the legal practice that must be understood and addressed. This paper therefore confines its focus to an area where the author's ignorance is minimal.

I sound a caveat. There are lawyers in abundance at every level and in each area of practice, who are role models in every measure of all that is noble and sublime in this calling, of law. These venerable practitioners are an asset to the society and provide continuing education, guidance and wise counsel to the judges as well. The judiciary is eternally indebted for their services. When we address issues like those in this article, the effort is to disseminate the values that ought to inform the lawyers calling, to those members of this varied family, who are yet to measure up to the exacting standards of the profession.

Alexis De Tocqueville in his 19th century incisive and

penetrating study of American democracy observed that lawyers are called upon to play a leading part in the political society striving to be born.

Democracy is a complex and a unique experiment in governance and has received a wide measure of acceptance in modern society amongst a broad spectrum of social aggregations. The legal community performs a critical role in the sustenance and nurturing of democracy. This is a community eminently suited to keep fellow citizens aware of the eternal paradox: that there can be no liberty without law. The legal profession serves as a rudder for the democratic boat as she and her mutinous passengers set out on the perilous voyage of self-governance. What then is the role and responsibility of this vital profession?

The greatest turning point in the drama of evolution has been the appearance of the sapient species, the Homo sapiens. The defining characteristic of this puny, physiologically fragile and the latest product of the phenomenon of natural selection is perhaps reasoning and development of the thought. This is the defining mystery of our being, the reason for the survival and progress of the species.

Will Durant, the philosopher, historian and man of letters par excellence describes the evolution of human thought in inimitable prose, I quote: The bewilderment of baffled instinct begot the first timid hypothesis, the first tentative putting together of two and two, the first generalizations, the first painful studies of similarities of quality and regularities of sequence, the first adaptation of things learned to situations so novel that reactions instinctive and immediate broke down in utter failure. It was then that certain instincts of action evolved into modes of thought and instruments of intelligence: pugnacity and assault became curiosity and analysis; manipulation became experiment. The animal stood up erect and became man, slave still to a thousand circumstances, timidly brave before countless perils, but in his precarious way destined henceforth to be lord of the earth.

Throughout the verdure landscape of the human drama the

defining characteristic of civilization has been the adventure of human reason. This is the singular justification for our description and recognition as the sapient amongst species. The community of men learned in law has often been conceded the leadership of the larger sapient community, in particular since the onset and acceptance of the consensual mode of governance. This leadership is an awesome responsibility. We may not and it is heartening to know that we cannot, trivialize this responsibility by substituting reason with force; rational behavior with demagoguery; debate, dialogue and accommodation with coercion, vacuous hectoring and insular persistence.

We lawyers are inheritors of an awesome legacy, of towering intellect, deep scholarship, great moral force and vision. We tread in the footsteps of and practice our craft from the principles distilled and refined by Yajnavalkya, Manu, Gautama, Parashara, the Buddha, Shounaka; the acharyas and the seers: Sankara, Ramanuja and Madhwa, the Sikh gurus, the reformers: Swami Narayan, Raja Ram Mohan Roy, Dayananda Saraswati; from the ancient wisdom of the Vedas, the Upanishads and the Puranas. We remember with pride and emulate with veneration the founding fathers of our organic document and the lawyers in particular among that illustrious pantheon.

Look beyond our shores, into the treasures of text and human intellect of other societies which have enriched our legacy of law; the Sumerian texts and the Roman codes, the Holy Koran, the old and the new Testaments, the Judaic codices; look further, to the luminous scholarship and foresight of the law givers and jurists: Hammurabi, Moses, Homer, Solon, Socrates, Plato and Aristotle, Cicero, Ulpian, Von Leibnitz, Immanuel Kant, Montesquieu, Justinian, St. Augustine, Thomas Aquinas, Luther and Calvin, Napoleon, Hobbes and Locke; to Alexander Hamilton and James Madison, Hugo Grotius, Henry Bracton, Edward Coke, Francis Bacon and Roscoe Pound.[1] These are a few of the infinite stars on the expansive firmament of jurists and lawgivers to mankind. Even

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[1] Further reading: *The Story of the Law and the Men who made it - From the Earliest Times to the Present* - by Rene A. Wormser (Simon and Schuster)

a nodding acquaintance with this immense treasure house of our jurisprudential genealogy provides a stabilizing, inspiring and moderating ballast for our runaway, venal, lowly or self-destructive impulses.

Edward Coke of England, John Marshall of United States and H.R. Khanna of India are among illustrious members of the legal community who are eternal stars of the normative universe of laws, who exhorted civilized society that democratic governments are not of men but of law. When Archibald Cox, the Watergate special prosecutor was removed by a Presidential directive, he issued a terse one-line statement: *Whether we shall continue to be a government of laws and not of men is now for the Congress and the people to decide*. This was yet another defining moment for the legal profession.

Fortunately, there is abundant example of the great, exalted and the noble in the legal profession. We have but to make a modest effort, not to permit vile example to eclipse the exemplar fecundity of precedent.

Over the past few decades' world over and in India, disturbing transformations have occurred and are accentuating, in the cultural bases of the legal community. Prominent law teachers scoff at the rule of law; even judicial moderates openly cavil popular government; practitioners of law adapt ethical rules to fit changing behavior rather than orienting behavior towards standards deliberately set high. Several radical propositions, which were hitherto counter-currents in the mainstream legal culture, have achieved respectability, prominence and of late dominance. Many today believe that we live under a rule of men and not of law, that the constitution and the laws are mere texts that mean whatever the current crop of judges say that they do; that all norms including of professional ethics are infinity manipulable; and that law is a business like any other and that business is the unrestrained pursuit of myopic self-interest.

In a significant study: Systems of survival - a dialogue on the moral foundations of commerce and politics, Jane Jacobs

observes that human beings have had basically only two ways of making a living from pre-historic times to the present, one is concerned with acquiring and protecting territory and the other with trading and producing for trade. By a process akin to natural selection, mankind developed its approaches to the ethics of making a living only around these two matrices. Each system of economic ethics is precisely calibrated to promote success and survival in the way of life. In modern societies these two survival strategies are symbiotic. While society needs traders to invent, produce and market goods and services, it equally needs guardians and regulators like soldiers, policemen, executors and courts to maintain conditions of order and stability.

Lawyers are the hyphen between the traders and the guardians. They are associated both with guardian and commercial roles and concomitant ethics; seamlessly switching from one role to the other depending upon the brief. In earlier periods however, they pursued the role in harmony with the ethical bases of whichever class role they were playing for the time being; each role inhering a package of established and internalized ethics.

Of late however, all bets are off. Ethical norms were once a fundamental value and the religion of the legal profession. Shortly after the industrial revolution and its aftermath economic juggernaut, ethics regressed into a fashion, now largely perceived to be perhaps an obsolete fad, to be derived and scoffed at rather than entrenched and practiced.

Law is not merely a system of rules to be observed, sanctioned for its breach, evolved and nuanced for no substantial purpose. Law is the definitional paradigm of the world in which we live. We inhabit a normative universe.

By laws international or municipal, custom, usage, convention, statute, rule or directive we constantly create and maintain a world of right and wrong, lawful and unlawful, valid and void, adjusted to contemporaneous and often evolving and mutating demands of social equilibrium.

Many in the legal community, lawyers and judges alike identify this normative world of legal order with the professional props of social control. The formal institutions of law, the rules and principles of justice, the conventions of social order, while important constitute but a small part of the normative universe that must in its expansive glory and complexity deserve our study, comprehension and deliberation.

Drawing up and putting in place the architecture for a just, enduring and vibrant civil society, a society that is dynamic, plural, multicultural and endemically divisive involves a convergence of multi-disciplinary specialties; sociology and anthropology, history, political science, demography, economics, management, engineering, communications expertise and above all the law.

Law synthesizes the richness of the diverse frontiers of human knowledge, represented by the several disciplines and distils the inputs through the process of legal hermeneutics to provide form, shape, structure and detail to the architecture of the civil society; in the form of legal rules to homogenize, define, flesh out and orchestrate a raft of hierarchical and intermeshing norms for orderly growth and sustenance of civil society.

Crafting rules for a society calls for sterling character built on a bedrock of ethical values; resoluteness of propose; deep understanding of the larger and immediate societal structure, its identities and insularities; and a principled spirit of accommodation and empathy for conflicting and competing perspective.

Daunting as the task is, crafting rules is just the beginning of an enduring engagement in statesmanship. History informs us that men, societies and civilizations have floundered and perished on more occasions for faltering in the execution of agreed norms than for failing to identify appropriate normative principles.

Enduring and great civilizations and social aggregations are marked by more than heuristic, dialectic or technical virtuosity in their treatment of practical affairs; by more than elegance and the rhetorical power in the composition of their texts; by more than

brilliance in the invention of forms and solutions for emerging or regnant problems. A great civilization is indexed by the richness of the normative content and the epochal narratives in which it is located and which it helps to constitute and nurture.

Our legal community was at the forefront of the momentous bend in history, from imperial serfdom to representative, democratic governance. This was our tryst with destiny, with strong underpinnings of normative narrative. India inherited a cosmopolitan, transnational package of norms adapted and tailored to the felt needs of our society. We refined and added to the inherited body of rules since independence. At federal, state and provincial levels we are engaged in accreting a bewildering array and variety of substantive and procedural rules to the inherited cornucopia of laws. Such evolution is the heritance and condition of every dynamic society.

Where we are perhaps unique or nearly so is in our collective capacity to subvert and atrophy the normative fundamentals. Infidelity to the ordained values of society is a shared and dominant characteristic of our times. We are witnessing a disturbing consensus on this delusional journey towards chaos and anarchy.

The rule of law is a seminal and the non-derogable charter for the success of democracy, not a vacuous totem pole. It is the set of institutionalized, time-tested and evolving principles, which are realistic about human nature towards the objective of minimizing official arbitrariness and securing reasonably stable conditions for social and political life. Rule of law exhorts that law is preferable to the use of private force as a means of resolving disputes; that executives, legislators and judges are all subject to the law and are to be held accountable if they transgress; that official decisions must be grounded in pre-established principles of general application; and that no citizen shall be deprived of freedom or property except in accordance with due procedural safeguards.

The rule of law ideal is the benchmark to assess the performance of our public officials and the quality of our society. Our post-independence response to the failures by those who

administer and execute our laws has been to shift or change the offender, on occasion; fortunately, not to formally eschew the norms. Law's ideals and norms are thus and as yet a basic component of our society.

In the sphere of law, courts are increasingly having the determinant voice on fundamental and the most divisive issues of our times. For this reason, exponential regress to unprofessionalism, arrogance, incompetence, greed, cynicism, and value sterile commercialization of the legal profession present enormously and greater debilitating potential than similar pathologies in other spheres of our community.

The legal profession must be above the morals of the marketplace, if we are to successfully navigate the democratic ship through the tumultuous sea of volatile, anarchic and accelerating pace of change that is upon us.

Carl Llewellyn, a leading protagonist of the legal realist school, while a professor at the University of Chicago law school exhorted this oath to law students: In accepting the honor and responsibility of a life in the profession of law, I engage as best I can; to work always with care and a whole heart and in good faith; to weigh my conflicting loyalties and guide my work with and eye to the good less of myself than of justice and the people; and to be at all times, even at personal sacrifice, a champion of fairness and due process; in court or out of it, and for all, whether the powerful or the envied, or my neighbors or the helpless or the hated or the oppressed.

How each in our profession measures up to the yet relevant, publicly professed though not often practiced ethical and professional values, is an intensely personal dilemma that must regularly exercise us; an issue that vitally impacts the larger society as well.

Till a couple of decades ago, till the mid-eighties, a period of association in the chambers of a recognized senior lawyer, ranging from a few years to upwards of a decade was an invariable

phenomenon for a young lawyer. These were profoundly productive years, contributing to the learning curve; affording a rich opportunity to reflect, learn and develop the art and craft; drafting skills; legal research; litigation costs and risk assessment; courtroom behavior; professional ethics, norms and courtesies; forensic and logical skills; graces and decorum of this noble profession. This mentoring opportunity has alas almost become obsolescent. Today the young lawyer either does not associate with a senior's chamber or quits within an unrealistically short span, to set up independent shop - the pun is intended.

Many enter the profession and hit the deck running. Graduating mostly from certificate contriving law schools affiliated to universities with complementary and equally flexible academic standards, the young lawyer enters what ought to be a stimulating, satisfying, intellectual and socially responsible collegium, inadequately equipped - in craft, commitment and value and often runs amuck, if not disillusioned sufficiently to quit the profession, in quick time.

The formal code of ethics for the legal profession, it must be remembered is not the entire ensemble of norms that lawyers must observe in their dealings with one another, with clients, and with the courts. The code of ethics merely set forth a small body of fairly obvious duties with which we must comply on pain of discipline. Where ethical issues of great moment or complexity are presented, formal canons afford little guidance. They are least of use when most needed.

There is another factor that impacts the internalization of ethics and its practice in the legal profession. In the past couple of decades ever increasing number of persons are entering the profession with no family background in law. I am one such. Irrespective of personal traits, the cultural impress of a lineage helps moderate the rough edges. It is of course a welcome development that the profession increasingly welcomes diversity. Honing this diversity to the inalienable norms of the profession would be an investment for the future.

There is another emerging diversity issue for the profession. This is the arrival of the transactional practice, distinct from the litigation practice. The product of our better equipped and premier law schools by and large pursues this facet of the profession. While their work has significant impact on the litigation area as well, the transactional practitioners are not absorbed into the participatory processes of our peer body, the Bar Councils. This lacuna debilitates the profession. Transactional practice is today a growing component of the profession of law contributing significantly to jurisprudence, to conflict generation or resolution and is potentially the catalyst and the future of technological, business and commercial developments of the civil society.

There is an interesting and useful study on the exponential growth and associated ethical issues relating to legal process outsourcing. The paper by Laura D'Allaird is titled Legal education in India and protecting the duty of confidentiality while outsourcing. Laura's study shows that the global current legal outsourcing value is around $.700 million and could go up to $.4 billion by 2015 and about 2500 Indians are employed in this area. We ignore transactional law practitioners at our risk and an imminent risk at that.

The salient fact about litigation lawyers in the adversary legal system is that it is perceived to require zealous representation of particular clients rather than justice writ large and to manipulating facts and law to benefit their clients. Unlike legislators who are required to fairly balance the interest and claims of all persons and judges who are charged to discern the true account of the facts of a case and to apply the law dispassionately to these facts, adversary lawyers are often required to do things for clients that would be immoral if done by ordinary people in ordinary circumstances. The legal profession is seen to pursue and to be duty-bound to chase outcomes that clients favour but which may be unfair to others.

There is another charge that accuses lawyers not merely of generic unfairness but of particular vices, namely that they indulge in presenting versions of facts that they themselves do not believe, make colorable legal arguments that they reject; present

passionately valid claims for their clients in order to delay the law suit or otherwise gain a strategic advantage and that they endeavor to impeach opposition witnesses in order to undermine even testimony they believe to be truthful. This charge in substance means that the adversarial role requires lawyers to act ordinarily in immoral and vicious ways, namely to lie, cheat and abuse others. It is on account of the increasing perception of the moral malignancy of the adversarial system that the system itself is coming into disrepute and increasingly so.

We also witness a growing tendency by several in the legal profession, often in the District level courts and occasionally in the High Courts as well, to resort to strikes or boycott of courts, to ventilate grievances, real or assumed against action taken by the police, by some administrative policy of Courts etc. Taking several and often unjustified adjournments in cases; a growing tendency of preferring frivolous complaints against trial court judges often to intimidate them into passing favorable orders are among other serious instances of professional regress.

Lawyers must seriously consider the desirability and critical importance of electing as their representatives, to Bar associations and the Bar Councils only those who have an established record of scholastic profundity and fecundity of experience at the bar. The representatives we send to our peer bodies must reflect the ethical and intellectual bases of the profession; neither a caucus of brawn nor a distillate of the vilest in our collective.

On the aggregate however, the adversarial method is not inherently evil. It is the normative indifference and value sterility of a significant number of the members of the profession that contributes to this pathology. The general ideals of professional ethics are considered mere fraternal admonitions and the rules of professional conduct are not internalized even on their explicit terms. The return to ethical values is a journey that faces many road blocks. The principal impediment is the contemporary culture that places emphasis on success at all costs, regardless of means; and on success calibrated in terms of self-interest measured on a scale of results.

Legal ethics occupy a low priority in law school curricula; and the obsolescence of the apprenticeship system and of association in the chambers of reputed senior advocates disable the mentoring opportunity. Ethical role models are few and far in between; the exemplars being those who have succeeded in any which way.

When we pause and consider, the consequences of the departure from professionalism and ethical values are apparent. Influential sections of the society or organizations and institutions have eschewed the dilatory, inefficient and erratic system of adjudication for drastic, summary and minimal procedure models of determination. Debt Relief Tribunals, Securitisation Laws, the advent and growth of hybrid Tribunals in service matters, in taxation and in corporate matters are all indicative of the perceived debilitation of traditional systems of adjudication. The incremental substitution of the courts system with arbitration, mediation, negotiation and other ADR methods is also a pointer to the desuetude of traditional systems of adjudication.

Elsewhere professional bodies have recognized the dangers of complacency and have brought in a measure of structured reforms. The Americans Bar Association's Code of professional responsibility prohibits a lawyer from collecting an illegal fee; requires that lawyers' fees must be reasonable; and prohibits lawyers from engaging in conduct prejudicial to the administration of justice. In certain legal jurisdictions conduct prejudicial to effective and expeditious administration of justice is considered professional misconduct.

At a functional level, given the importance of the trial lawyer in the administration of justice and the verity that the trial stage constitutes the bedrock of the pyramid of justice administration, indifference to core professional competencies is as fatal as indifference to ethics. Irrespective of the branch/domain in which one practices, an empirical comprehension of the fundamental purposes of law is essential.

One must ever be conscious that rules of evidence while an

important tool in the armory of justice administration are but a tool for efficient ascertainment of facts and the truth of the matter. Rules of evidence may not be employed as a conjurer's kit to pick out a particular trick to smother truth and camouflage fact. Principles of admissibility of evidence, of relevancy of facts, of standards and onus of proof, of presumptions, of estoppel, competence of and regarding examination of witnesses and the several other rules of evidence are time-tested principles for efficient ascertainment of truth. These principles may never be employed to dazzle and blindfold the judge in the noble pursuit of the judicial role, which is to channelize relief towards the ends of justice as prescribed by the edicts of substantive law.

The Code of Civil Procedure incorporates broad prescriptions that enable fair opportunity by disclosure of the cause pleaded to the other side whether by a plaint or a written statement; the identification of the necessary and proper parties; identification of the appropriate forum having subject matter, territorial or pecuniary jurisdiction; the procedural tools for ascertainment of further information from the other side such as by interrogatories or discoveries; stipulating the contents of pleadings; the framing of points or issues for determination to enable focus on the core areas of conflict; fair procedures for trial that enable efficient ascertainment of facts necessary for resolution; guidelines to the adjudicator for competent drafting of judgment; principles for execution of the product of determination; and enumeration of available remedies, of appeal or revision and other housekeeping provisions.

Given the significant but nevertheless complementary role of procedural law, long abuse by some clever but myopic practioners has brought about a pass where the laity equates the procedural codes to instruments of oppression. In a majority of cases, execution proceedings consume more time than the main litigation. This can only be the product of grossly incompetent or clearly unethical practice standards. The public experience with criminal procedure is similar. We will do well to remember that procedural law is the facilitator and not the solvent of substantive law.

The dominance of procedure over substance in the scheme of legal practice values signals ignorance as to the underlying purposes of law, namely that it is a facilitative arrangement intended to achieve equilibrium of conflict in a deeply competitive, combative or fractured social order - exponentially confirming to the entropic principle - of Disorder and Chaos.

Execution and implementation of substantive laws is the core concern of the law particularly since there is large-scale transgression of the substantive and the agreed and formalized values of society, by individuals and by the instrumentalities of the State as well; and effective execution of laws is never achieved by nitpicking on particular sections of portions of a statute.

We must realize that the values of our civil society and the equilibrium of the social order is contingent on efficient and expeditious implementation of the wide range and variety of substantive laws which guide, regulate permit, prohibit or sanction specified conduct. The sum of our substantive legal prescriptions informs the civilization index of our society. Substantive laws conflate to express the rights and obligations of individuals and institutions. They indicate permitted and prohibited conduct on a wide range of issues relevant to contemporaneous society as evolved in the crucible of consensual government, through legal instruments such as statutes and rules.

We not only live in the normative universe of laws but in the system of laws, which are also relative. These several laws together form the raft of norms that guide and sustain the social order. All legal practitioners and led by the example of the trial lawyers must therefore be informed of the overarching and intermeshing principles enjoined in the several laws.

We are or ought be aware that there is a synergy between provisions of different laws; provisions of the Transfer of Property Act and the Special Relief Act; between provisions of Taxation laws and family and property laws; between the agrarian or urban ceiling legislation and several laws regulating property, inheritance and the like; synergies between laws that spell out rights and the statute of

repose - the Limitation Act. While interpreting a particular provision of a Statute for the consideration of the court, we cannot therefore be oblivious to the reality that a provision takes color from the provisions of the several other enactments as well.

Without a holistic perspective of the enterprise called lawyering, the administration of justice according to law becomes skewed and atrophied. Many errors at the trial stage are incurable later. The result is an irretrievable failure of justice.

I have occasionally noticed that in presenting land acquisition claims or in suits seeking relief from instrumentalities of the State such as the APSEB or the Banks, the State or the State instrumentalities concerned are not impleaded as respondents. Instead, an executive authority by designation such as the manager of a bank or the Land Acquisition Officer is impleaded. This results in a situation where the decree becomes in executable since the accounts or funds of a Bank or a State are not in the name or to the credit of designed authorities but are invariably in institutional names or accounts. Such common errors occur on account of the failure to recognize the distinction between the State or personae fictae and a State actor. These are professional competence issues and must be addressed.

During appellate and revisional scrutiny, I often came across headnotes of decisions extracted in judgments. A headnote is not the judicial opinion. It is the publisher or editor's account of the content. The summary may on occasion be faulty or incomplete and too often is. Further no single expression in a judgment could be understood as the ratio decidendi. Principles too often take color from the facts considered. Identifying the ratio in a judgment is a painstaking and a professional process. One cannot abdicate this critical function by blind dependance on a journal editor and must not resort to short cuts that lead to nowhere.

The awesome responsibility of restructuring the profession and guiding it back to the highway of justice delivery rests primarily on the trial lawyer; that stout, sturdy and principled foot soldier of justice administration. Just as no nation has succeeded over another

in the human history of armed conflict by mere superiority in air power, no legal institution can succeed without efficient, studious, committed and an ethics-driven class of trial lawyers.

Success in the profession must in the ultimate analysis, be calibrated on the success in negotiating equilibrium in the society; in guiding the deserts of law to the deserving party, be it one's client or the adversary; on reducing discord and conflict in relationships; and in endeavoring to nurture a just, humane and sustainable social order. A lawyer has failed the society when he has employed his skills, such as they are, to contrive an unjust result. When he exults at such success and to peer envy too, he has failed the professional community of which he is a member, subverted its relevance and contributed to its terminal pathology; and in peer company.

The trial lawyer is the foundation of the justice delivery system. His function is critical. His is the most visible face of justice administration and he is our brand ambassador to the public, the consumer of law and to the larger society. On this realization must rest our concerns with the performance of this bastion of law.

Justice Goda Raghuram,
September 12 2024.
Former:
Judge, High Court of Andhra Pradesh;
President, Customs, Excise and Service Tax Appellate Tribunal, Delhi; and Director, National Judicial Academy India, Bhopal.

NIGERIA’S ELECTORAL PROGRESS: INSIGHTS AND LESSONS FROM INDIA’S E-VOTING JOURNEY

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Abstract

India’s E-Voting system exemplifies the synergy between technological innovation and legal flexibility. Challenges with paper ballots in the late 1970s led to e-voting adoption, and amendments to the Representation of the People Act 1951 empowered the Election Commission of India (ECI) to use Electronic Voting Machines (EVMs). This integration of technology and legal structures sets a benchmark for Nigeria's electoral system. This paper argues that balancing technological dependency and legal oversight is crucial, with the judiciary playing a pivotal role in the transition from paper-based to technology-driven electoral processes.

Keywords: India; Nigeria; Election; Technology; Electronic Voting.

Introduction

The integrity of a democratic framework, for any sovereign entity, relies on the transparency, accessibility, and reliability of its elections. Around the world, electronic voting is gaining traction, aiming to overcome challenges tied to traditional voting methods. This article examines the controversies surrounding new voting technologies used in the Nigerian general elections. Nigeria ventures into the Bimodal Voters' Authentication System (BVAS) and the INEC Result Viewing Portal (iREV) during the 2023 general elections creating legal questions and challenges. Comparatively,

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India, with its e-voting evolution provides a wealth of knowledge, insights, and guidance for Nigeria. Although at different junctures in their electoral evolutions, both countries share a similar dilemma: orchestrating a balance between technological innovations and traditional ballot system. The jurisprudential milestones in India, epitomised by landmark cases highlight its proactive and adaptive approach towards technological advancements. To further fortify electoral credibility, India's integration of the Voters Verifiable Paper Audit Trail (VVPAT) mechanism into its EVMs is a testament to its foresighted legal perspective.

Central to the discourse on e-voting in both nations is the '*real-time*' transmission of electoral outcomes. India leans towards an aggregated release of results rather than instantaneous transmission purportedly promoted by the Nigerian electoral body, the Independent National Electoral Commission (INEC). Despite their technological advances, both nations remain tethered to paper trails – a paradox in the digital age. The integrity of election results, as evidenced in numerous Indian court cases, leans heavily on voting technology outputs. However, the inherent reliance on manual paper systems to audit and confirm results presents a conundrum. While the risks of traditional ballots are well-documented, and a transition to a technological system seems inevitable, the journey is replete with obstacles, discursive engagements, and evaluations of potential risks.

Overall, the goal remains clear: ensuring a transparent, accessible, and reliable democratic process for all citizens. However, a central dilemma remains, while the integrity of results from the manual voting system has frequently been challenged due to alleged malpractices, the trust in technological solutions is not unequivocal. In the legal realms of both India and Nigeria, discussions on electronic voting have exposed numerous vulnerabilities inherent in e-voting systems, which might cause concerns similar to those surrounding manual voting. For instance, the demand from a significant segment of the Nigerian public for real-time transmission of results stems from fears of potential result tampering, especially if there is a considerable delay before the results are announced. Such distrust often prompts stakeholders to

challenge the legitimacy of electoral outcomes, prompting comprehensive legal debate on electronic voting.

This paper explores the concerns surrounding adopting and applying electronic voting systems within the legal contexts of India and Nigeria. It tracks the historical development of India's e-voting, exploring its pivotal changes, key moments, and legal framework, and the synchronous development of the relevant legal frameworks and the enlightening lessons as Nigeria navigates its new voting technologies. A significant observation is the crucial role of the Indian judiciary in moulding the legal facets of e-voting, and how legislative responses have incorporated court-instructed regulations, firmly integrating them into the statutory framework. Nevertheless, both the Indian and Nigerian courts exhibit caution, avoiding decisions that might prompt a complete shift to digital voting while simultaneously supporting principles that favour traditional voting methods. Such caution is understandable, considering the variable public trust in e-voting systems. This paper contends further that conversations and initiatives promoting the improvement of e-voting in India have persisted over extended periods and will continue as an ongoing dialogue. Thus, expecting Nigeria to mirror the latest advancements rapidly would be unrealistic. Nonetheless, India's journey in digital voting offers a wealth of instructive lessons.

E-Voting Under Nigerian Law: Innovations and Challenges

Elections in Nigeria have been marred by rigging, violence, voter intimidation, and other electoral malpractices. Thus, casting doubts on the credibility of elections and the quality of the democratic system (Aluaigba, 2016). However, the general elections held in February 2023 were adjudged well organised relative to past elections due mainly to the use of voting technologies, that is, the Bimodal Voters' Authentication System (BVAS) and the INEC Result Viewing Portal (iREV). These technological implementations were primarily instituted to counteract electoral malfeasance, fortifying both credibility and transparency. A notable aspect of this technological advancement is the electronic transmission of election results, which facilitates direct uploads

from polling units to the iREV portal. This progression into electronic voting in Nigeria is nascent, predominantly anchored by the Electoral Act 2022 and the accompanying Electoral Regulations and Guidelines 2022. These legal frameworks delineate the usage of BVAS and iREV, as articulated in the Electoral Act. Based on section 47(2) of the Act, the BVAS serves a bifurcated role: it assists in voter accreditation and concurrently facilitates the upload of election results to the iREV. The iREV functions as a public portal, granting citizens access to view electoral outcomes. This marked shift towards digitalisation in the Nigerian electoral process underscores the nation's endeavours to align with global best practices in election management. The Electoral Regulations and Guidelines 2022 (paragraph 38) elaborates on the process as follows:

> On completion of all the Polling Unit voting and results procedures, the Presiding Officer shall: (i) Electronically transmit or transfer the result of the Polling Unit direct to the collation system as prescribed by the Commission; (ii) Use the BVAS to upload a scanned copy of the EC8A to the INEC Result Viewing Portal (iReV), as prescribed by the Commission; and (iii) Take the BVAS and the original copy of each of the forms in tamper-evident envelope to the Registration Area/Ward Collation Officer, in the company of Security Agents.

The introduction of the BVAS in Nigeria's electoral process sparked significant discourse, leading to two salient conclusions. BVAS emerged as a pivotal tool for collating, transmitting, and validating electoral results. Such a technological intervention, especially in the context of Nigeria's history of electoral challenges, naturally bred expectations. The very essence of BVAS, as marketed, was its purported capability to curb electoral fraud. Central to this claim was the anticipation of a real-time electronic transmission of election results, including real-time result transmission from all polling units, thereby minimising chances of result manipulation. In October 2022, the Chairman of INEC reportedly assured Nigerians that:

> …there is no going back on the deployment of the Bimodal Voter Accreditation System (BVAS) for voter accreditation. There is no going back on the transmission of results to the INEC Result Viewing Portal (iReV) in real-time on Election Day (Suleiman, 2022).

This real-time transmission was not delivered. As a result, the Independent National Electoral Commission (INEC) faced allegations of flouting electoral laws.

The overarching question however is whether the extant electoral regulations explicitly stipulate the necessity for real-time result transmissions. Moreover, does failing to adhere to such real-time transmission protocols amount to a legal violation to justify nullifying election results? Addressing the former, current legal frameworks do not explicitly prescribe a stringent timeline for result transmission. The notion of 'real-time transmission' gained traction not due to its legal imposition but rather because it was a term frequently employed by the INEC in their communications, thus creating public expectations. This discrepancy between popular understanding and legal obligation has further muddied the waters, necessitating a rigorous examination of both the law and the INEC's commitments to ensure clarity and uphold electoral integrity.

Paragraph 38 above, broadly interpreted as mandating the INEC to upload election results to the iREV in real-time (Ochei, 2023), is misleading for three reasons. One, it is not supported by the clear wordings and literal interpretation of the Electoral Act and the Guidelines, and two, it is technically infeasible to transmit election results in real-time, thus amounts to mandating the impossible. Three, and perhaps, most importantly, paralleling comparable jurisdictions like India, Nigeria’s adoption of voting technologies cannot be interpreted as wholly discarding manual or paper-based report collation. As India’s example shows, the process of wholly transitioning to electronic voting or electronic or real time transmission of results is gradual, contentious, and fraught with legal challenges that highlight the limitations of the system.

Regarding the first point, the literal interpretation of the

phrase 'On completion of all the Polling Unit voting and results procedures' in paragraph 38 above only suggests that results must be uploaded sometime after the completion of polls and announcement of results, not immediately, contemporaneously, or simultaneously with either the voting or results process. A search for the compound word 'real-time' exposes the difficulties of its non-colloquial usage. In an unrelated text, the Committee on Payment and Settlement Systems define 'real-time' as *"the processing of instructions on an individual basis at the time they are received rather than at some later time"* (Bank for International Settlements (2003). In *Carpenter v. United States* (2018), a landmark United States Supreme Court case concerning the privacy of historical cell site location information, the US Supreme Court distinguished real-time data collection from historical data. While the former describes "*a download of information on all the devices connected to a particular cell site during a particular interval,"* the latter refers to a download over some indefinite period. In *Privacy International* (2018), *La Quadrature du Net and Others* (2020), the Grand Chamber of the Court of Justice of the European Union (CJEU) suggested that 'real-time' relates to 'immediacy' or some spur-of-the-moment action. However, can this be the intention of the drafters of the Electoral Act and Guidelines?

In Nigeria, the electoral process involves manually casting ballots and manual result compilation and announcement before uploading and transmitting the result using the BVAS. Therefore, given the manual nature of the Nigerian process, achieving real-time transmission is a stretch of both the technical and legal meanings of the word. Perhaps the Electoral Guidelines provided an alternative to 'electronic transmission' for this reason. Paragraph 38 of the Guidelines requires the presiding officer to "*Electronically transmit or transfer the result of the Polling Unit, direct to the collation system as prescribed by the Commission*." The use of the disjunctive 'or' in the paragraph suggests that the results can be electronically transmitted (onto the BVAS) or otherwise transferred, for example, by moving the forms EC8A, on which the results are manually recorded, from one location (the polling units) to another (such as the collation centres at the ward). The Court appears to have accepted this position in *Labour Party (LP) v INEC* (2022) when it

concluded that "*the commission (INEC) is at liberty to prescribe or choose how election results shall be transmitted*."

Addressing the second point above, if we insist that the law does anticipate real-time transmission, can this be achieved given technological challenges? Technologies like the BVAS and iREV are susceptible to cyberattacks like hacking and distributed denial of service attacks because they 'transmit' or hold sensitive election information. The German experience stands as a testament to these perils. Germany, which had ventured into e-voting, eventually withdrew from it based on the country's Constitutional Court acknowledgment that the e-voting systems were penetrable and thus lacked credibility (Bundesverfassungsgericht, Docket Nos. 2 BvC 3/07 & 2 BvC 4/07). Indeed, the peculiarities of the Nigerian system aggravated security fears and technical failures. The BVAS purportedly suffered technical glitches ranging from poor network and password failure to power outages that impacted the round-the-clock functioning of the machine.

This prompts a critical assessment: could the law have genuinely envisaged 'real-time' transmission in such a technologically fraught context? The omission of a specific timeline in the Electoral Act (paragraph 38 above) is deliberate, and we cannot read what is not explicitly stated in the law. When interpreting a statute, courts generally apply the literal rule of interpretation, focusing on the plain and unambiguous words used by the legislator (Awe Olugbenga v Mainstreet Bank Registrars Limited, 2013; Our Line Ltd v SCC Nig Ltd, 2009). Reading the Electoral Act as a whole and considering its objective and context, it seems unlikely that the drafters of the law would have intended to mandate a technically infeasible method or one highly susceptible to attacks and compromises. The legal maxim "*Expressio Unius Est Exclusio Alterius"* (the expression of one thing is the exclusion of the other) further supports the idea that if the drafters intended to address mischief, such as electoral fraud, by providing for real-time electronic transmission, they would have expressly stated the same.

Arising from the deliberations mentioned above, the subsequent inquiry pertains to the ramifications of not transmitting

election results promptly, presupposing this was mandated by law. Does the delay or non-transmission of results, instantaneously or entirely, provide adequate grounds to invalidate the elections? To address this query, evaluating the evidential worth of the electronically conveyed results in conjunction with the legal criteria for annulling elections is imperative. Typically, in legal disputes, parties substantiate their claims by submitting documents, which can be categorised as primary or secondary evidence (Evidence Act, 2011: section 85). Primary evidence refers to a document for inspection by the Court, each part of a document executed in several parts, or each counterpart of a document executed in counterpart against the party who executed it, or documents made from a uniform process with the original and not from it (Evidence Act, 2011: section 86(1)). Secondary evidence includes certified copies of documents given under different provisions of the Evidence Act, such as copies of the original document made by mechanical or electronic processes, copies made from or compared with the original, and counterparts of documents as against the parties who did not execute them; oral accounts of the contents of a document given by some person who has himself seen it (Evidence Act, 2011: section 87 (1)(e)).

These provisions suggest that the manually completed form (EC8A) is the primary evidence of election results, and the copy uploaded unto the iReV, being a copy of the result, is the secondary evidence. The Nigerian Court of Appeal's decision in *Adegboyega Oyetola & Anor v Independent National Electoral Commission (INEC) & Ors* (2023) overruling the Election Tribunal's earlier decision in *Adeleke Ademola v Adegboyega Oyetola & Ors* (2023) highlights the complexities of interpreting electoral laws and implementing voting technologies. The Court of Appeal emphasised the importance of physical evidence and the order of the dual mode of transmission of results under the Electoral Act. By recognising the voters' register, the BVAS devices, and the EC8A form as the foundation of what transpired at the polling units, the Court demonstrated a nuanced understanding of the limitations and challenges of voting technologies. The BVAS requires an internet connection for uploading or transmitting results. Still, transmission is not instantaneous, and various human and technical factors may

affect its proper functioning. This reasoning led the Court to reject the superiority of the BVAS results and emphasise the need for a balanced approach that considers both technology and traditional (or manual) methods in the electoral process. Ultimately, this case serves as an important reminder of the importance of understanding the limitations of voting technologies and the need to carefully consider the legal, technical, and infrastructural challenges accompanying their adoption.

If it is correct that the law is that manually completed results on form EC8A have a higher probative value than the backend result from the INEC, then, it is appropriate to ask, what is the purpose of electronically transmitted results? One purpose, stated in the Electoral Act, is that it enables comparison with the manual results and could highlight inconsistencies in disputed elections. However, this only underlines further conflicts. First, the courts have held that there is no rule of law mandating the production of secondary evidence of a public document when the original can be tendered (Okeke v. Attorney-General of Anambra State,1993; Ajao v. Ambrose Family & Ors., 1969). Second, the electronic results may not be reliable as they may not always synchronise with the manual results. In Oyetola's *case* (at the Tribunal), the parties tendered different versions of the election result because they inspected and conducted a forensic analysis of the INEC systems at different times. This seeming error only aligns with the purpose of electronic results stated in the Electoral Act, that is, record keeping for elections in the form of the compilation and maintenance of the National Electronic Register of Election Results. This raises the presumption that the register will be updated routinely, and its accuracy and correctness will depend on varying factors.

Finally, the fact that non-transmission of results in real-time cannot be a ground for nullifying an election further underlines its secondary role in the voting and collation of results. The Electoral Act (section 134(1) provides that:

> An election may be questioned on any of the following grounds — (a) a person whose election is questioned was, at the time of the election, not qualified to contest

> the election; (b) the election was invalid by reason of corrupt practices or noncompliance with the provisions of this Act; or (c) the respondent was not duly elected by a majority of lawful votes cast at the election.

'Noncompliance with the provisions of this Act' is perhaps the operative phrase in the section above. This foregoing analysis has established that the electronic transmission of results is neither mandatory nor required to be in real-time or at any specific time. Therefore, the question of non-compliance does not arise. However, the courts have also required that the non-compliance complained of must occur during the election (Atiku Abubakar & Anor v. INEC & Ors, 2019). This qualification warrants a brief consideration. Based on the law, the following occurs during an election: voter authentication, casting the ballot, tallying, or computing the results, recording the result manually onto the form EC8A, and signing the results by the relevant electoral officers and party agents and the announcement of the results at the polling units.

In contrast, the sidenotes to Section 62 of the Electoral Act refer to the transmission of election results as a "post-election procedure". Thus, while the manual imputation of the results into the form EC8A is done during the elections, transmission is done after the elections have been concluded. The invariable conclusion here is that even if non-transmission of the results amounts to non-compliance, it is a post-election breach and cannot constitute a ground to nullify the election.

The observation from the above discussion is that the use of voting technologies in Nigeria is bound to create many legal issues, especially where the relevant laws are not well drafted. Even when the laws are drafted to near perfection however, litigants are bound to explore gaps when challenging the result of an election. The next section of the paper addresses the third point about Nigeria's precipitous adoption of voting technologies and the propensity to interpret this as wholly discarding manual or paper-based result collation. The consideration of India's journey to e-voting demonstrates the granular migration to e-voting and the contentious terrain of legal and social acceptance as a perquisite to moderating,

validating, and accepting the e-voting system. Nigeria can lean on this history and trajectory to understand its evolving e-voting.

Tracing the Evolution of India's E-Voting System: A Historical Overview

Nigeria shares India context for migration to e-voting system: mistrust in the electoral process. Between 1977 and 1982, India experienced rampant booth capturing/ ballot stuffing by political goons, as well as inconvenience caused due to incorrect marking by voters in the then prevalent paper ballot system. This led to several discrepancies in the number of votes earned by political parties in elections in India.

In a bid to rectify this predicament, the then Chief Election Commissioner of India, S.L. Shakdhar, championed the notion of integrating Electronic Voting Machines (EVMs) into the Indian electoral apparatus. Subsequently, a low-cost EVM prototype was co-developed by two Indian public enterprises, ECIL and BEL. In 1982, the ECI, under Article 324 of the Indian Constitution, issued Directions to use EVMs on an experimental basis in a by-election in India (ECI 2017: p 4).

In 1984, the legitimacy of the electoral outcome from this process was questioned before the Supreme Court of India in the landmark case, *A.C. Jose v. Sivan Pillai* (1984). The case was predicated on procedural technicalities. Specifically, the Supreme Court opined that the extant Conduct of Election Rules, 1961, lacked stipulations explicitly sanctioning the deployment of EVMs, instead solely prescribing guidelines for paper ballot-based elections. As a result, elections conducted using EVMs across 35 out of the 85 constituencies were annulled. In stark contrast, the outcomes from the remaining constituencies, which had adhered to manual voting, remained undisturbed and were thus exempted from a re-polling mandate. Notably, the Supreme Court abstained from evaluating the intrinsic merits and viability of the EVMs in the case.

Following the Supreme Court's ruling in the case, the Indian Parliament amended the Representation of the People Act 1951 by

inserting section 61A, authorising the ECI to use EVMs for elections. The amendment did not however ease the controversy around EVMs use and acceptance. In January 1990, the Indian Government constituted the Electoral Reforms Committee (ERC) to holistically review and enhance the electoral process. The Committee comprising representatives from various national, and state political factions underscored the importance of having technological experts evaluate the EVMs to alleviate concerns regarding their reliability. (Ministry of Law and Justice, 1990: p 30) Expert evaluation cleared the machines of the issues noted in the 1989 general election, and the Committee recommended deploying them in the then upcoming general elections of 1998 and 1999 (12th and 13th General Elections, respectively) (ECI, 2022: 92). In fact, the 13th General Assembly Elections of 1999 happened to be the last election conducted by the ECI, which predominantly used paper ballots for voting (ECI, 2022: 94).

The ECI, armed with further confidence about its EVMs, decided to increase their use by deploying them in all the polling stations for the Legislative Assembly Elections of Tamil Nadu, West Bengal, Kerala, and Pondicherry (now Puducherry) in 2001 (ECI, 2022: 100). These affirmations of the ECI, however, were not left unchallenged. In *All India Dravida Munnetra Kazhagam v. ECI* (2001), the Madras High Court dismissed several petitions against EVMs, which claimed that the machines could easily be tampered with. On appeal, the Supreme Court upheld the validity of section 61A of the Representation of the People Act, 1951 and the elections conducted. Similar petitions were filed in 2004, with the notable cases being *Pran Nath Lekhi v. Election Commission of India* (2004), *Micheal B. Fernandes v. C.K. Jaffer Sharief & Ors* (2004) and *Banwarilal Purohit v. Vilas Muttenawar & Ors* (2004). All three petitions were dismissed by the respective Courts.

Despite significant enhancements to Indian EVMs through the work of the technical committee established by the ECI, (ECI, 2006), concerns about the functionality of the EVMs persisted. In 2010, a consortium of prominent academicians, scientists, and professionals from the USA penned a letter to the then Chief Election Commissioner of India urging the ECI to consider

alternative voting methods apt for the Indian scenario, given the rising security issues, verifiability, and transparency surrounding the EVMs. A research paper, co-authored by Halderman, Prasad, and Gonggrijp, further spotlighted the significant security vulnerabilities of the EVMs. Their analysis was based on an actual EVM procured from an undisclosed source. They meticulously disassembled the EVM, pinpointing and highlighting various structural weaknesses (Halderman et al., 2010). The ground-breaking research received global media coverage and was followed by other articles further underscoring the security concerns associated with the Indian EVMs (Debnath et al, 2017; Desai and Lee, 2021: 398).

In the continuous discourse surrounding the refinement of India's EVMs, the potential adoption of the totaliser emerged as a prominent consideration. In 2008, ECI advanced a recommendation to revise the Election Rules, advocating for integrating the totaliser in the vote counting protocol. This instrument, designed to consolidate and reveal the results from a cluster of 14 EVMs in unison, starkly contrasts the extant system that tallies the votes for each polling station in isolation (Law Commission of India, 2015: para 13.1). The rationale behind such a shift lies in fortifying voter anonymity, thereby curbing potential coercive tactics or reprisals predicated on discernible voting inclinations. Beyond this, the totaliser resolves specific technical issues while safeguarding the sanctity and secrecy of electoral patterns. However, bureaucratic inertia seems inescapable. While the ECI's 2008 suggestion was tabled before a Parliamentary Committee the subsequent year, tangible progress remained elusive. By 2014, this inaction drew the scrutiny of the Supreme Court, prompting it to requisition an account of the stymied proposal from the government (Yogesh Gupta v. ECI, 2014). The latter's rejoinder entailed consultations with the Law Commission and an assurance of an interim report (Yogesh Gupta v. ECI, 2015).

Subsequently, in its 255th Report on "Electoral Reforms," the Law Commission of India deliberated on the merits of augmenting the EVM system with a "Totaliser" for tabulating votes (Law Commission of India, 2015: ch XIII). In synergy with the Legislative Department of the Law Ministry, the Commission

echoed the ECI's advocacy for a totaliser, as delineated in the Background Paper on Electoral Reforms (Ministry of Law and Justice and Election Commission of India, 2010: 41, p 2). According to the ECI, this apparatus, which had already been architected by EVM fabricators, was designed to amalgamate votes from various control units to offer a cumulative count of ballots cast across a designated set of polling stations. Concurring with the ECI's stance, the Law Commission proposed a revision to Rule 66A (Law Commission of India, 2015: ch XIII, para 13.6). Such an amendment bestowed on the ECI the discretion to determine the instances and locales suitable for deploying a totaliser, cognizant of the electoral backdrop and conceivable hazards of coercion or reprisals (Law Commission of India, 2015: ch XIII, para 13.7). This amendment granted the ECI the authority to decide when and where a totaliser should be used, considering the electoral context and potential risks of intimidation or retaliation.

Unlike in Nigeria, the progression of India's EVM journey was marked by significant milestones shaped by the contributions of multiple stakeholders. It is noted that the incorporation and subsequent refinements of EVMs in India have resulted from concerted efforts from entities such as the legislature, the ECI, the Law Commission, the Law Ministry, and academic experts, among others. The collaboration has been instrumental in test-running modifications to EVMs, identifying the gaps in adopting these modifications and providing the necessary legislative support for these modifications. Although the Indian e-voting system has not attained perfection yet, the developments over the years are remarkable. The next section further demonstrates-the pivotal role of the judiciary, and how it influenced the rule-making process on EVMs. It illuminates the legal trepidations and vulnerabilities linked to EVM utilisation while also casting light on the judiciary's disposition vis-à-vis EVM incorporation.

Voting Technologies: A Journey through the Indian Cases

As preliminarily outlined, judicial stances have exhibited a measured approach, bolstering confidence in e-voting through measures calibrated to stimulate requisite evolution. We argue here

that the legal precedents that emerged over time provide invaluable insights instrumental for the evolution of Nigeria's e-voting paradigm particularly the use of voting technologies and the essence of paper trails in both ballot casting and result collation.

In *All India Dravida Munnetra Kazhagam v. Chief Election Commissioner & Ors* (2001), the constitutional legitimacy of Section 61A (introduced by the 1988 amendment to the Representation of the People Act) came under judicial scrutiny at the Madras High Court. The Court affirmed the constitutionality of Section 61A of the Representation of People Act. The Court further noted that the merits of EVM deployment distinctly overshadow those of traditional ballot systems. The shift negates the necessity to produce extensive volumes of ballot papers, subsequently economising on paper and printing expenses. Furthermore, in the paper-based system, invalidated votes bore significant sway on electoral outcomes. Conversely, with EVMs, such ambiguities are eradicated, ensuring every vote cast finds its accurate repository. These machines thus negate potential electoral malfeasance and expedite the result declaration process. Remarkably, the Honourable Court posited that a voter's prerogative does not extend to dictating the medium of casting his ballot, a position echoed and endorsed by the Supreme Court of India when a Special Leave Petition challenging the court’s decision came before it.

The seminal case of *Girish M. Das v. Chief Election Commissioner* (2012) recentred around the security and reliability of EVMs. The Gujarat High Court was approached through a Public Interest Litigation (PIL) seeking a directive for the ECI to bolster the defences of EVMs against vulnerabilities like hacking, tampering, and undue manipulation. Additionally, the petition proposed an interim cessation of elections in Gujarat and at a broader national level until the Court could be assured of the infallibility and authenticity of EVM operations. To further augment the security mechanisms, it was suggested that EVMs integrate cameras and chronological devices to monitor and deter fraudulent voting while identifying potential malefactors. The Court noted that the petitioner had not successfully illustrated any discernible acts or lapses by relevant bodies that might have risked the petitioner's

rights. The judgment solidified the notion that the judiciary does not function as a review panel over policy efficiency or pertinence. It concluded by reiterating that the role of courts is not to provide consultative feedback on policy matters to constitutional entities, recognising their inherent authority in policy formulation.

Subramanian Swamy v. Election Commission of India (2009) further underscores the intersection of technology and electoral transparency and re-asserts the need for the paper trail adopted by the Nigerian INEC (via form EC8A). Dr Subramanian Swamy, an influential figure in Indian politics, initiated legal action in the Delhi High Court seeking a mandate for the Election Commission of India to integrate a tangible "paper trail/ paper receipt" with EVMs. This would serve as irrefutable evidence that a voter's choice was accurately recorded. Despite the High Court's initial dismissal, Dr Swamy pursued the matter, leading to the landmark decision in the Supreme Court.

The apex court's judgement, siding with Dr Swamy, became instrumental in ushering in the Voters Verifiable Paper Audit Trail (VVPAT) mechanism within EVMs. The Court stressed that establishing trust in EVMs necessitates the presence of a verifiable "paper trail". It noted that the blend of EVMs with VVPAT is indispensable for upholding the integrity and transparency of elections, given that each vote embodies a citizen's democratic right. Acknowledging the logistical intricacies presented by India's expansive electoral framework, the Court greenlighted a phased or regional deployment of VVPAT systems. Furthermore, the Court's verdict delved into the Election Commission's assertions about the robustness and advanced safeguards for Indian EVMs, effectively countering potential tampering. The Commission delineated its proactive measures towards VVPAT integration, highlighting the ongoing design finalisation by a dedicated Technical Experts Committee. The transition to the VVPAT system significantly warranted modifications in the existing Conduct of Election Rules 1961.

The VVPAT was subsequently challenged (*Amitabh Gupta v. Election Commission of India* (2018); *Khemchand Rajaram*

Koshti v. Election Commission of India & Anr (2019). Notably, in *Association for Democratic Reforms (ADR) v. Election Commission of India & Anr* (2020), the (ADR) brought to light what it termed a 'mysterious rush and urgency' demonstrated by the Election Commission of India. This pertained to the premature destruction of the VVPAT slips used in the 2019 Lok Sabha elections, which occurred a mere four months after the announcement of the results. This action arguably contravenes the directives of the Conduct of Election Rules, 1961. Rule 94 (b) of the said Rules provides that: "The used or printed slips in any election shall be retained for one year from the date of declaration of the results of the election and shall thereafter be destroyed."

This revelation was alarming given that ADR had previously filed a petition on this exact matter with the Supreme Court in November 2019, and it was still pending judgment. Hence, spurred by the urgent need to prevent further potential erasures, the application was advanced to the apex court. In this context, ADR appealed to the Court to issue directives to the ECI mandating:

i) A halt to any further destruction or disposal of VVPAT paper slips related to any elections held in the preceding year. This was to ensure that the slips were retained for a minimum duration of one year, adhering stringently to the Conduct of Elections Rules, 1961.

ii) An insistence on the retention of all ancillary documents that had any linkage to the 17th Lok Sabha elections conducted in April 2019.

As of the status, the Supreme Court continues its deliberations on this case, with a conclusive judgment still awaited.

The cases above spotlight profound worries about the integrity of voting technologies like the EVMs and the imperative to ensure they are insulated from both external interference and technical glitches. In its interventions, the judiciary validated these apprehensions and put forth progressive remedies, specifically the VVPAT system, to inculcate reliable audit measures within the

EVM setup. Noteworthily, the very 'paper trails' EVMs aimed to pare down or obviate have re-emerged as the unassailable reference for verifying the EVMs, hinting at the enduring bond between age-old voting practices and their contemporary counterparts. Nigerian courts, like their Indian counterparts, are seeking a 'source of truth' to verify results from the process if the credibility of the process is questioned. The assertion in this paper is that there are lessons that the Nigerian courts and legislators can learn from India in a bid to increase public confidence in the e-voting process effectively. The next section highlights the gaps in the Nigerian system, which are resolvable by reference to the Indian system and the next steps for both countries to advance voting technologies and enabling laws.

Drawing Guidance: Lessons for Nigeria and Advancing Together

The Indian systems demonstrates the critical role of parliament, particularly its innovative enactment of Section 61A of the Representation of the People Act to give the ECI the constitutional mandate to deploy EMVs. The courts on their parts affirmed this mandate in several cases (All India Dravida Munnetra Kazhagam v. Chief Election Commissioner & Ors SLP (2001); Girish M. Das v. Chief Election Commissioner & Ors (2012); Amitabh Gupta v. Election Commission of India & Anr (2018)). The key lesson to be drawn from this is that the adoption of voting technologies should be constitutionally sanctioned to limit the likelihood of challenging their legality. Furthermore, the challenge to the constitutionality of EVMs in India enabled the courts to not only reaffirm its constitutionality but also to define rules which have aided the development of EVMs in India. Similarly, as the integrity of Nigeria's BVAS and iREV come under scrutiny, they should inform legislative revisions, and proactiveness by the Nigerian judiciary. The Indian Supreme Court's decision in *Subramanian Swamy v. Election Commission of India* (2013) is illustrative. To address the apprehensions about the EVM's credibility, the Court championed the integration of the VVPAT into the EVMs, setting a precedent for adaptive and responsive judicial intervention.

The controversy around real-time transmission of election

results, when seen through India's experiences, offers insightful context. While India's electronic voting mechanisms capture and transmit results, the ECI's process does not strictly adhere to the 'real-time' paradigm. Results from various EVMs are meticulously aggregated by the ECI, with a public declaration following the completion of this process. Drawing a parallel to Nigeria, where casting the ballot still bear a predominantly manual hallmark, the aspiration for instantaneous result transmission appears ambitious, both from technical and legislative viewpoints. A significant factor contributing to this gap in real-time reporting, enhancing the resilience against electoral malpractices, is the enduring presence of paper trails, palpably evident in both the Nigerian and Indian electoral architectures, especially concerning ballot records.

The issue of transmission is largely tied to the issue of constitutionality. E–voting must be recognised by law as the primary source of truth, leaving the manual mechanisms as only secondary. This recognition must be tied to the Constitution. Hence, the Nigerian courts must constitutionally justify the powers of the INEC to deploy the BVAS and iREV under the Electoral Act. The courts must then correctly interpret the Electoral Act to determine whether the Act has a clear intention of making the BVAS the primary source of truth. Although the issue of trust remains pivotal to the development of e–voting in Nigeria, as seen in the Indian situation, trust is a product of years of successfully deploying the system in a fair and transparent manner. In the interim, Nigeria's reliance on its erstwhile paper trail system can be utilised as an alternative source of truth.

Drawing from Indian legal precedents, the credibility of election results largely depends on the data produced by these electronic voting systems. However, a discernible contention persists: while digital systems are at the forefront, manual and paper-based protocols conspicuously linger, often serving as the de facto reference for rectifying technological discrepancies. The Indian judiciary, echoing this sentiment, acknowledges the multifaceted vulnerabilities that plague traditional balloting, leading to a pronounced inclination towards digital alternatives. This raises an imperative query: What underpins the sustained reliance on paper

trails by both Nigerian and Indian jurisdictions, especially when auditing and validating outcomes derived from modern voting technologies? This introspection is not conducted in a vacuum, disregarding the challenges digital platforms face. Nevertheless, the strategic emphasis should arguably shift towards persistent refinement of these technologies, advocating their inherent advantages over archaic balloting methods. The envisioned trajectory should be a definitive transition from paper dependency towards a robust, technology-centric electoral framework that constantly evolves, adapting to challenges and potential threats.

Furthermore, Nigeria can gain valuable insight from India's experience in implementing EVMs in its electoral system: the gradual shift from a paper-ballot-centric approach to an almost entirely paperless voting method. India's tryst with EMVs started way back in the 1980s (ECI, 2017: 4), much before any democratic country in the world had even seriously considered introducing such technology in their voting processes. However, as has been highlighted extensively in the history of the introduction of EVMs in earlier sections of this paper, such an effort was fraught with bureaucratic limitations (Yogesh Gupta v. ECI, 2014), various committee formations, repeated overviews and testing of the EVMs by domain experts, extensive incorporation of judicial, executive and legislative suggestions in order to prepare a final robust system capable of regulating the deployment of EVMs into the voting field. (ECI, 2006; Ministry of Law and Justice, 1990: p 30). The key learning from this case study is that the implementation of an idea, such as transitioning to a paperless model of voting in a democratic setup, can hardly be possible in the exact manner envisaged. It takes years of deliberations and reviews, and countless queries need to be addressed to all stakeholders of a participative democracy before consensus can be reached regarding innovating in the electoral space.

Exploring further, the Governments of India and Nigeria might contemplate dedicating resources to research a tamper-proof voting model utilising blockchain technology. Advocates (Sahib and Al-Shamery, 2021) of this technology suggest that a blockchain-based decentralised voting system can enhance accountability

compared to traditional oversight bodies like the India's ECI and the Nigerian INEC. Despite their touted independence and impartiality, electoral bodies can manipulate votes in favour of political groups or parties. The blockchain's unalterable nature would ensure the integrity of each vote. However, integrating blockchain technology into high-stakes processes like democratic elections might be challenging. For one, while the idea of decentralised voting is appealing, its implementation would require approval from the political and constitutional bodies responsible for overseeing elections. Such entities might be reluctant to relinquish their established powers, posing a challenge to the blockchain's adoption for elections. Additionally, governments would need to invest in capacity building for successful blockchain-driven elections, and finally, the most prudent approach for integrating blockchain into the voting systems would be thorough research and pilot testing, which require significant investments.

A detailed plan to educate voters (Jafar et al, 2021: 18) about the model of such an election would have to be drawn up to prevent a decrease in voter participation. The introduction of blockchain to the electoral process would require an overhaul of the existing voting systems with a switch being made to a more advanced voting technology entailing the use of smartphones and facial recognition systems (Jafar et al, 2021: 18). Proper protocols would need to be formulated to firstly- I) Ensure that every individual forming a part of the electorate would be equipped with the required technology and apparatus for blockchain voting to be conducted, and ii) ensure Privacy and cybersecurity measures are addressed during the conduct of the elections (Jafar et al, 2021: 7).

Conclusion

India and Nigeria, in their respective democratic journeys, have exhibited commendable progress in leveraging technology to enhance the transparency, fairness, and accessibility of their electoral processes. A salient highlight of India's electoral evolution is the embrace of EVMs, further augmented by incorporating the VVPAT system — a move spurred by judicial directives. Simultaneously, Nigeria's electoral innovation is epitomised by the

introduction of the BVAS and iREV systems. While technological advancements offer promise, they invariably implicate a myriad of challenges. The trajectories of India's EVMs and Nigeria's BVAS and iREV systems underscore this reality. However, the overarching narrative is one of potential: the mutual sharing of experiences, technological research findings, and judicial decisions could catalyse exponential growth in electoral technologies for both nations.

We contend that India and Nigeria are poised to transition seamlessly from traditional paper-centric voting to a technology-anchored model. However, integrating technology into the electoral domain demands a resilient legal infrastructure. It is paramount that laws are transparent, definitive, and adaptable, ensuring the harmonious melding of technological innovations into electoral systems. By analysing each other's legal developments concerning electoral technology, India and Nigeria can gather invaluable insights, ensuring legislative robustness. Conclusively, as illuminated throughout this article, the prospects for both nations transcend a mere transition from traditional to technological voting mechanisms. It encapsulates a broader vision: the synergetic convergence of technology and law, which, when realised, stands to fortify the democratic tenets of transparency, inclusivity, and fairness, garnering the unwavering trust of their electorates.

The Governments of India and Nigeria should also consider earmarking specific funds for research and pilot testing of various election models incorporating blockchain technology. Although mainstream adoption in electoral processes appears distant, blockchain holds promise to address many challenges presented by the existing electoral systems in both countries. Collaborative research and knowledge sharing between the two nations could eventually pave the way for a secure and fool proof blockchain-driven voting system, harnessing technology's full potential while upholding the core values of democratic processes.

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THE INTERFACE BETWEEN THE CONSUMER PROTECTION ACT, 2019 AND THE COMPETITION ACT, 2002

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Abstract

The Competition Act, 2002 was enacted to promote and sustain competition amongst business entities yielding enhanced products and services for the consumers while regulating practices that would have an adverse effect on the competition. In comparison, the Consumer Protection Act, 2019 protects the interests of the consumers and provides for the settlement of consumers' disputes against exploitative practices of the traders. It is thus evident that both the laws are directed towards protection of interest of consumers either directly or indirectly. Exploring and examining the interface of the two legislations becomes necessary in order to identify the respective approaches towards such a mandate. The present work aims to explore the interface between the Consumer Protection Act, 2019 (CPA) and the Competition Act, 2002 (CA) particularly in the backdrop of the recent amendments to the Acts and ever-evolving nature of markets. The article, hence, will cover objectives of both the laws, draw parallels between them along with the discussion on recent developments important in this regard.

Introduction

An apt statement for understanding the interface between the Consumer Protection Act, 2019 and the Competition Act, 2002 (amended by the Competition Amendment Act, 2023) was made by Ron Bannerman. He said, "Consumers not only benefit from competition, they activate it, and one of the purposes of consumer

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protection law is to ensure they are in position to do so."[1] This statement depicts the existing complementarity between the competition and consumer laws.

The Competition Act, 2002 (CA, 2002 hereinafter) as per its preamble regulates competition and prevents practices having adverse effect on competition, promote and sustain competition in markets, protect interest of consumers and ensure freedom of trade in markets. In realizing the goals, the Act relies on the widely accepted consumer welfare standard while analyzing the plausible impact of any alleged practices. Thus, it can be said that the CA, 2002 does not provide any substantive remedy directly in the hands of the consumers but indirectly yields to protection to consumers by regulating deals within Business-to-Business Markets.

Ensuring consumers' welfare and protecting their interests, on the other hand, is a direct goal of the Consumer Protection Act, 2019 (CPA, 2019 hereinafter) and it also provides for adequate remedies in the hand of the consumers against any unethical, unfair or fraudulent practices of the business enterprises. The users of the goods and services can approach the consumer commissions and seek redressal against the traders. The Act, however, does not include goods purchased and services used for 'commercial purposes' which fall within the ambit of the CA, 2002.[2] Under the CA, 2002, the definition of the term 'consumer' includes a person who buys goods and services irrespective of resale, personal use, or commercial purpose which makes it possible for the traders engaged in production, supply, distribution, storage, etc. to approach the Competition Commission of India (CCI hereinafter) and seek redressal for anti-competitive practices of other traders having potential of distorting the competition.[3]

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1 R Bannerman, Trade Practices Commission, Annual Report 1983 - 1984, AGPS, Canberra, at 184 (1984)

2 Consumer Protection Act, 2019, S 2(7) No. 35 Acts of Parliament, 2019 (India)

3 The Competition Act, 2002 S. 2(f) No. 12 of 2003 Acts of Parliament, 2002 (India)

Brief background of enactment of CPA, 2019 (CPA, 1986) and CA, 2002[4]

Before the enactment of CPA, 2019 (erstwhile CPA,1986) and CA, 2002, both competition and consumer protection were covered by a single legislation known as Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act, 1969). MRTP Act, 1969 was enacted primarily to counter the rise of monopolies, restrict the growing concentration of economic power in the hands of a few. It also was aimed at prohibiting Restrictive Trade Practices (RTPs hereinafter) and Unfair Trade Practices (UTPs hereinafter) which were considered per se illegal by the Act.[5] The Act provided for the establishment of MRTP Commission. Later it was decided to enact a separate legislation for consumer protection and a new legislation known as Consumer Protection Act, 1986 was enacted and RTPs and UTPs were subsequently included in the Act.

In 1991, when India opened its economy by removing controls through economic reforms ensuring the liberalization, privatization and globalization, it created an atmosphere of internal and external competition. With such economic reforms, it was felt that the MRTP Act, 1969 only controlled monopolies but was not sufficient to regulate competition in the market. Therefore, in order to promote fair competition in the market and bringing a legislation that better caters to the dynamism of the better competitive Indian economy, the CA, 2002 was brought in. As stated above, the CA, 2002 seeks to ensure fair competition by prohibiting trade practices restrictive of competition and aims at curbing anti-competitive conduct through establishment of Competition Commission of India.

Both the CPA, 2019 and CA, 2002 have their own regulatory authorities, enforcement functions as well as rules and regulations.

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4 First special law enforced for consumer protection in India was Consumer Protection Act, 1986 which was replaced by Consumer Protection Act, 2019

5 UTPs were added in the MRTP Act in 1984 on the recommendation of the Sachar Committee

Debates on relationship between Competition and Consumer Policies

It is believed that consumer sovereignty is what appears to bind the competition and consumer policies as both are aimed at ensuring that consumers' interests are safeguarded. Consumer sovereignty is ensured when the following conditions are met:

a) consumers are able to exercise the right to choose from a range of choices, and

b) the right to choose is exercised effectively.

In achieving this, competition law also has a crucial role to play as it ensures competitiveness which triggers the enterprise to be efficient and compete rigorously, all ultimately for the benefits of the consumers.[6]

With the aim of furthering the consumers' welfare, competition policy and consumer protection policy appear to mutually reinforce each other. Consumer protection primarily attempts to cater to the needs of users of developing countries which are understood to have information asymmetry pertaining to the pricing, quality and safety of the product or services being offered by the traders. In addition, it also works to protect the users from misleading or fraudulent depiction or advertisement of any product and service. It, hence, covers within its ambit an elaborate redressal mechanism ensuring that users are compensated for the loss caused to them.[7] In this direction, achieving the protection of consumers, it is the force of competition which ensures that producers, manufactures, distributors or retailers have a continuous incentive to innovate and introduce products or services which not only

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[6] Neil W. Averitt and Robert H. Lande, *Consumer Sovereignty: A Unified Theory,* 65 ANTITRUST L.J. 713, 1(2008)

[7] Louise Sylvan, The Interface between Consumer Policy and Competition Policy, 2006 Consumer Affairs Victoria Lecture in the honour of Professor Maureen Brunt AO (March 15, 2006) in THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION SPEECHES, March 2006, at 6

complies with the market efficiency but also translates into benefits for consumers in the form of better choices, pricing and technology, etc. Therefore, the force of competition amongst the enterprises yields to consumers' welfare while producing a competitive discipline over the business enterprises.[8]

By the nature of objectives and operations, consumer protection policy's ambit appears much wide covering varied aspects of protecting consumers' rights and more diverse than competition policy. The focus lies on remedying the harm caused or suffered from any defective good, charging exorbitantly higher than the quoted or agreed prices, unfair trade practices of the trader, and if services rendered were deficient. The competition policy on the contrary, regulates conduct of the enterprises comprising of restrictive trade practices (RTPs) and unfair trade practices (UTPs those undertaken by a dominant entity) that would have an adverse effect on the existing or potential competition.

Additionally, competition related policy is mostly market driven and part of overall economic policy with one regulator, while consumer policy involves coordination of multiple ministries in making it and multiple fora are established for providing remedies through different tools. Even though proximate enough, both are distinct areas of law with different underlying theories of harm and objectives.[9] The determination of harm caused to consumers and harm to competition, however, always remain a pivotal consideration and the question about priority between consumer interest and business interest is required to be ascertained.

The distinction between the two policies becomes apparent in the way they approach the market while trying to achieve their respective goals. Competition works to ensure innovation and efficiency that would ultimately benefit the consumers in the form

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8 The Organisation for Economic Co-operation and Development, Proceedings of Roundtable on n the Interface between Competition and Consumer Policies DAF/COMP/GF(2008)10, at 136 (2008)

9 Nathani, S and Akman, P "The interplay between consumer protection and competition law in India" Journal of Antitrust Enforcement 5 (2) 2017: 197-215

of enhanced quality and low prices. It is opined that by established scholars that "the only legitimate goal of antitrust is the maximization of consumer welfare."[10] Thus, competition law approaches the market from the supply side. It is understood that competition is said to effectively work when the consumers' welfare is maximized. The assessment of enhanced consumer welfare is based on how efficiently the allocation of economic resources takes place throughout the economy amongst the different market participants. The overall efficiency of the economy is understood as a combination of productive and allocative efficiency. While productive efficiency ensures that a higher output is produced against a low cost of production, allocative component on the other hand, ensures an efficient and optimized distribution of desired goods or services. Hence, the operation of competition law, as evident from other prominent jurisdictions including EU and the US are directed towards economic prosperity which indirectly yields overall welfare.[11] The operation of competition law in any economy, hence, serves a much broader role in furthering the interests of the market participants while also balancing it with consumers' interests. Being an indirect tool, it can be concluded that it is not fit to provide holistic remedies for the protection of all the aspects of consumer interests.[12]

The consumer policy, on the other hand, works to ensure that consumers' interests are protected, which primarily include health, safety, and economic interests. It also ensures that consumers can effectively exercise their right to make a choice, thus approaching the market from the demand side.[13] Consumer policy is also focused to empower the end users by keeping consumers apprised of their right to information, education and seek redressal either individually

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[10] Brietzke, P and Bork, R., "The Antitrust Paradox: A Policy at War with Itself" Valparaiso University Law *Review* 13 1979: 403

[11] FREEDOM TO COMPETE OR CONSUMER WELFARE: THE GOAL OF COMPETITION LAW ACCORDING TO CONSTITUTIONAL LAW IN THE DEVELOPMENT OF COMPETITION LAW: GLOBAL PERSPECTIVES (Zach R. and Kunzler A., 2010)

[12] COMPETITION LAW TODAY CONCEPTS, ISSUES, AND THE LAW IN PRACTICE (Dhall V., 2019)

[13] OECD, Supra note 5

or through formation of organizations. In addition, it caters to properly attending to the structural soundness of the market.[14]

Parallels between the two laws

Both Competition law and Consumer Protection law deal with distortions in the marketplace supposed to be driven by interaction between demand and supply. The CA, 2002 deals with horizontal relationships between manufacturers and producers as well as vertical relationships in supply chain whereas CPA, 2019 deals with vertical relationship between manufactures or service providers and consumers.[15]

While erstwhile CPA, 1986 was enacted, unfair trade practices were brought in the Act upon recommendation of the Raghavan Committee, since a need was felt to provide protection to the consumers from deceptive and fraudulent practices of the traders. Presently Unfair trade practices are defined in s. 2(47) of the Consumer Protection Act, 2019. However, s. 4 of the CA, 2002 includes unfair practices undertaken by a dominant entity in the form of prices or conditions imposed. Realising the importance of the opportunities created by opening of the economy and trade, the Competition Act was specifically directed towards an open market policy from a previously command and control focus under the MRTP Act which was enacted to exercise control over monopolies and had the mandate of preventing growing economic concentration. Therefore, under the Competition Act, 'monopoly' itself is not bad per se but its 'abuse' is. It should also be mentioned here that identification of Abuse of Dominance (AOD) becomes a challenge for competition agencies. The US Supreme Court observed in Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP that "the opportunity to charge monopoly prices – at least for a short period – is what attracts 'business acumen' in the first place, it induces risk-taking that produces innovation and economic growth." Hence, while assessing UTPs resorted by any dominant entity, a careful balance is required to be struck in

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[14] Sylvan, Supra note 6

[15] The Competition Act, 2002 S. 2(f) No. 12 of 2003 Acts of Parliament, 2002 (India)

identifying legitimate practices leading to dominance and using the position unfairly thus negatively impacting market competition.

The erstwhile Competition Appellate Tribunal (COMPAT) in the Schott Glass while deciding on the imposition of unfair and discriminatory price or conditions held that "In the absence of any effect on the market or on consumers, the imposition of terms by a dominant entity could not be held to be unfair under the Competition Act."[16] The Competition Commission of India in the past has declined to intervene in many matters stating that Consumer Protection Act provides a better and rather a direct remedy to the issue. The Competition Act deals with cases with its primary focus on ensuring a competitive market only but a direct redressal mechanism for consumers falls within the ambit of Consumer Protection Act.[17] Moreover, it is the Consumer Protection Act that explicitly deals with "restrictive trade practice" as defined under the CPA, 2019 in s. 2(41) and 'unfair contract' under s. 2(46).

The offenses under both the legislations are analysed in economic terms. Price fixing and exclusionary practices distort supply side (restricted supply and increased prices) whereas deceptive advertising (misleading or partial disclosures) distort demand side (creation of false impression about value of a product).

The standard of proof adopted under the Acts also draws attention. The prohibited conducts under the CA, 2002 are assessed through 'per se' or 'rule of reason' tests. Prima facie, horizontal agreements restrictive of competition and having adverse effect on competition are assessed through a 'per se' rule wherein the CCI determines whether the conduct has occurred or not. On the other hand, 'rule of reason' provides a test for assessing the vertical agreements that are likely to have an appreciable adverse effect on competition thus, making relevant the assessment of the effect produced on the market. Under 'rule of reason', the Commission is required to weigh the negative impact against any possible pro-

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[16] M/s. Schott Glass India Pvt. Ltd. v. Competition Commission of India & Ors. Appeal No. 91 & 92 of 2012 COMPAT

[17] Sanjeev Pandey v Mahendra & Mahendra & Ors Case No. 17/2012; Subhash Yadav v. Force Motor Ltd and Ors. Case No. 32/2012

competitive effect. In comparison, under consumer protection, a practice is deemed defective if it misleads reasonable consumers and is likely to affect their purchasing decision. Therefore, it relates to the conduct but not the resulting market effects arising from the harm.

New Age Market and its Challenges:

The rise and rapid expansion of e-commerce and new age markets have altered consumers' preferences making them more reliant on the technology and has also made them equally receptive to diverse risks and harms that were not apparent earlier, for e.g. use of personal data, etc. A new category of consumer harms has come to the forefront with new business models. It is a well-accepted fact that new age markets have disrupted existing markets and taken both the enforcement agencies and consumers by surprise.

The accumulation of user bases over such markets coupled with easy accessibility has provided the business entities with the incentive to consistently incorporate and respond to the dynamism with little or no additional costs. The unique features of digital markets have led to an increase in the competitive intensity in such markets as compared to traditional brick and mortar markets. Such markets provide the users and the business entities with the opportunity to interact and use multiple platforms simultaneously or multi-home. It has also infused information symmetry around the prices and features across the multiple sides of the markets. While it certainly has brought innovative products and services to the market, benefiting the users, factors such as high concentration, access, and use of personal data, creating restriction upon switching or multi-homing and access to finance and intangible capital amongst others, have created new challenges from both the consumer protection and competition law perspective.[18] Some of the important features of new age online markets which distinguish them from the traditional brick and mortar are as under:

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[18] GOVERNMENT OF UK, UK Digital Competition Expert Panel Report 'Unlocking Digital Competition' at 32 (2019)

A. Multi-sidedness:

The online platform market is either two sided or multi-sided i.e., it connects two different groups, for example, Amazon connects buyers and sellers, Google connects advertisers with consumers, Facebook connects different people, it also helps small businesses to reach more people. Due to the presence of these characteristics, an increase on one side of the platform automatically increases the traffic on the other side of the platform. The dependency on the platform is an incessant loop which helps a firm to achieve a critical mass of users and eventually a position of dominance.

B. Network effects:

It is understood that the value of a particular network increases or decreases with addition or subtraction of each unit. Due to the presence of network effects, it becomes easy for the platforms to attain the position of dominance with a critical mass of users, bringing it closer to the tipping point. The tipping point once reached carries the potential to lock-in the users making it difficult for them to make rational choices. Indirect network effects contribute majorly to expansion of an enterprise's network.

C. Big data and AI:

Big data and algorithms are the fuels on which virtual markets run. Big data and Artificial Intelligence (AI) collaborate for the functioning of virtual markets. Big data is an unstructured and voluminous amount of information gathered from different sources. Big data is a fuel on which the AI tools work, it leverages AI for improved analysis.

The presence of above characteristics in online markets favour the development of ecosystems that give incumbents a strong competitive advantage. One of the primary concerns highlighted is that once the position of dominance is attained or tipping is achieved, the nature of the digital markets is such that it creates incentives to engage in anti-competitive behaviour and becomes conducive to cause harm to the multiple sides of the markets and

thus, negatively impact the overall competitiveness of the entities. Such markets require vigorous competition policy enforcement and justify adjustments to the way competition law is applied. The challenge before the authorities is to save the consumer not only from such anti-competitive practices but also from online frauds as well as protect the overall industry from dominance of big techs. Experience shows that large incumbent digital players are very difficult to dislodge. It is suggested to have a robust law to achieve this goal and for that a separate digital unit is suggested to be constituted in consumer forum as well as CCI to settle the disputes pertaining to digital markets. It is recommended that such a forum should have technical experts, legal experts, data scientist and data engineers.

New Age Markets and their treatment under CPA, 2019 and CA, 2002

It is necessary to examine how e-commerce and new age markets challenges are dealt by both the laws in order to protect consumers and whether they were already well equipped to pre-empt and deal with such challenges, or any amendments have been undertaken in order to deal with them. Let us look at the relevant provisions of the CPA, 2019 and CA, 2002 to find out whether its provisions are sufficient to take care of above stated challenges:

1. The Consumer Protection Act, 2019: The CPA, 1986 was replaced by the CPA, 2019 in response to the need of making the new law stringent enough to guard the users from unfair trade practices in new markets. The statement of objects and reasons of the CPA, 2019 has stated the reasons for the need for having a new Consumer Protection Law. It states that consumer markets for goods and services have undergone drastic transformation, while the trade reforms brought in many positive changes within economy, benefitted consumers through new and technologically intensive goods and services which are not only convenient to use, easily accessible and cost efficient but have also increased unfair trade practices and unethical business practices such as false or misleading advertisements, multilevel marketing, direct selling, etc.

For ensuring protection against e-commerce and online markets, new definitions like e- commerce and electronic service provider have been introduced.[19] E-commerce Rules, 2020 are also added[20] which have defined e-commerce entity, inventory e-commerce entity, marketplace e-commerce entity and platform.[21] E-commerce entities are prohibited from adopting any unfair trade practice, manipulate prices or discriminate between consumers. It is important to mention here that the E-commerce rules have put several liabilities on both the e-commerce entities and the sellers.[22] However, a careful perusal of the cases before the CCI shows that a conflict is already visible between the entities. Sellers are contending that they are being made obligated to follow unfair and unilaterally decided terms and conditions due to their dependence on such platforms for their business prospects. Therefore, in such a situation, putting stringent liabilities on sellers appear prima facie unreasonable.

2. The Competition Act, 2002: The CA, 2002 was amended by the Competition (Amendment) Act, 2023. A Competition Law Review Committee (CLRC) was constituted in 2019 to suggest if any amendment is required in the Competition Act in view of significant growth of Indian markets and the paradigm shift in the way businesses operate in the last decade with the emergence of new business models.[23] The foremost concern was revamping the competition law and making it fit to deal with the ever-evolving nature of the digital sector that has posed many challenges. It deliberated if regulation of digital markets warrants enacting a new antitrust dispensation like other nations. It was opined that it would be premature to conclude on the need of a legislative intervention and suggested that the periodic review of global emerging trends would be suitable as a starting point. It would also assist in deriving

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[19] Consumer Protection Act, 2019, S 2(7) No. 35 Acts of Parliament, 2019 (India)

[20] Consumer Protection (E-commerce) Rules, 2020 rules made under Consumer Protection Act, 2019 No. 35 Acts of Parliament, 2019 (India)

[21] Consumer Protection (E-commerce) Rules, 2020 R. 3 (b), (f), (g) and (i)

[22] Consumer Protection (E-commerce) Rules, 2020 R. 4,5,6 and 7

[23] MINISTRY OF HOME AFFAIRS GOVT. OF INDIA, REPORT OF THE COMPETITION LAW REVIEW COMMITTEE at 4 (July 2019)

any potential regulatory action or policy implications for India. The committee gave its recommendations and a few of the important observations of the Committee are discussed below:

A. Definition of 'Price': CLRC looked into the definition of 'price' in the CA, 2002 to see whether the definition is able to cover non-monetary consideration. It has been understood that digital markets that are operating as multi-sided businesses and deals with different user groups on different sides of the market, typically treat one side of the market as profit centre and the other side of the market as loss leaders. This strategy exposes the consumer to a variety of risk in exchange of providing them free of cost services. One of the most significant of such risks has been the rampant collection, use and processing of users' personal data. Therefore, the concerns surrounding personal data has prompted regulatory actions across nations. The committee was of the view that prima facie, the definition of 'price' appears quite inclusive and broad enough to cover every valuable consideration and therefore, even covers non-monetary consideration.

B. Algorithmic Collusion: The Committee considered whether s. 3 is sufficient to handle the concerns arising out of algorithmic collusions? It observed that s. 3 will be sufficient for new age markets after additions proposed in s. 3(3) and S. 3(4). The committee was of the view that there are certain conducts or arrangements that neither fall under horizontal nor under vertical agreements. Therefore, expansion of strict categories under s. 3(3) and s. 3 (4) was suggested by the committee. It suggested inclusion of the provision relating to hub and spoke cartel.

C. Determination of Relevant Geographic market: The definition was reviewed by the committee. It was observed that the nature of market has led to an overhaul of how business operate today through their virtual presence. This requires that the definition under s. 19(6) should be more inclusive and comprehensive. Accordingly, to make it suitable for the new age and digital markets, 'characteristics of goods and services' and 'costs associated with switching supply or demand to other areas' were

recommended as factors for determination of relevant geographic market by the committee.

D. Regarding the online vertical restraints, the committee was of the view that the Most Favoured Nations (MFN) clauses and parity clauses should be tested on rule of reason and effects test under s. 3(4). It suggested for the inclusive list of agreements to be included in s. 3(4).

E. Control over data and assessment of market power:

The CLRC had deliberated if s. 19(4) of the Competition Act, which specifies an inclusive list of factors for evaluating whether an enterprise enjoys a dominant position, should be amended to include 'control over data' or 'network effects' in light of the competitive advantage presented to large digital enterprises by such considerations. The committee came to the view that the existing provision was inclusive and flexible enough to take such novel factors into consideration while assessing dominance under for instance, 'resources of the enterprise' under s. 19(4) (b).

F. Introduction of new thresholds for combinations**:**

The CLRC had recommended for the introduction of new thresholds based on broad parameters of size of the transaction and the deal value for merger notification under the Competition Act. It believed that the acquisition of smaller successful start-ups by dominant firms in the digital space tends to escape regulatory scrutiny having not met the asset and turnover thresholds which triggers notification requirement. It was hence, recommended that deal value thresholds should be introduced to capture transactions which potentially could affect the competitive intensity. Accordingly, the Amendment Act introduced the deal value thresholds of INR 2000 crore under s. 5. The threshold triggers notification requirement if the target or the acquired entity has its 'substantial business operations' in India.

Following the recommendations of the CLRC committee, few important amendments were brought into force by the Competition (Amendment) Act, 2023 which are given below:

a. In the backdrop of the need to regulate the digital markets, it was suggested that scope of s. 3 is further widened to comprehensively include all types of anti-competitive restraints and agreements within the sector. Its recommendation to include 'other agreements' under Section 3(4) of the Competition Act in order to enlarge its scope was accepted and implemented through the Competition (Amendment) Act, 2023.

b. The amendment introduced a deal value threshold of INR 2,000 crore for notifying a transaction to the CCI if the entity being acquired has 'substantial business operations' in India.

c. In addition, the amendment has also expanded the scope of 'relevant market' under sections 19(6) and 19(7) of the Act by specifying factors such as the nature of services and costs associated with switching demand or supply.

National e-commerce policy: It is also important to mention the developments relating to e-commerce policy here. The policy is being formulated and is expected to be released by the government after few rounds of consultations. Previous drafts of the policy of 2019 focused on six major issues namely, "data, infrastructure development, e-commerce marketplaces, regulatory issues, stimulating domestic digital economy and export promotion." The Department for Promotion of Industry and Internal Trade (DPIIT) is of the view that the policy aims to work along with the consumer protection rules on the issue of the unfair trade practices. The policy appears crucial as it aims to regulate the e-commerce sector through a well-devised framework. The focus would be on ensuring that the customers' right to make a free choice is kept intact without any algorithmic manipulations. The focus is also on curbing certain practices adopted by e-commerce entities such as directing the end user to a certain set of sellers (the ones who pay high commission). The policy given its mandate would not only be crucial for

consumers' protection but would have an impact over the existing competitive intensity with new obligations being imposed on the digital market players in their interaction with the users and the business entities on the two sides of the platforms.

New developments:

The author would like to briefly include the information on new developments in the competition law which has relevance for the interface discussion:

a. Abuse of superior bargaining position (ASBP):

A new type of abuse by dominant players in platform markets known as 'superior bargaining position' has been observed. Such an imbalance of bargaining powers has attracted a lot of attention across jurisdictions specifically in the context of platform markets and its relationship with Business enterprises (P2B) and Consumers or end-user (P2C). It has been acknowledged that there exists an inherent imbalance of bargaining power between the platforms and business entities and consumers on the other hand. In recent developments, Australia and Canada have enacted bargaining codes under their respective laws for regulating the bargaining between the platforms and news media agencies. In order to ensure co-existence of collective bargaining with competition law, the Journalism Competition and Preservation Act of the United States of America was amended, exempting the entities engaging in collective bargaining from liabilities under competition law.

In January 2022, CCI framed its prima facie opinion in a case filed by Digital News Publishers Association (DNPA) against Google over the allegation of abuse of dominance. The disputes primarily revolve around the unfair terms and conditions being imposed on the news publishers, unfair distribution of revenue by Google, non-disclosure of the actual revenue earned by Google through the advertisements shown on publishers' websites. The prima facie opinion took note of the developments in other jurisdictions like Australia, France, Germany where agencies are actively regulating the imbalance in the bargaining power between the platform and

businesses. While a few nations have come up with new legislations like Australia and Canada others have resorted to interim measures or commitments like France and Germany.

Emerging out of the case is the idea of the approach of the CCI and the goal of competition law. The evidence from other nations suggest that the regulators have eventually begun to more closely regulate the contractual or commercial relations between the entities. With concepts like ASBP and its regulation, the line between consumer protection and the protection of existence competition seems to get blurred and appears to have tilted towards the latter.

b. Issue relating to Consumer Privacy:

As discussed above, consumers can seek redressal for unfair trade practices under the Consumer Protection Act. The question of whether privacy concerns of the consumer can be dealt with under the Consumer Protection Act has invited varied opinions. It is argued that 'services' generally do not include the use of information. The claim under CPA, 2019 based on privacy can only be made only if the services provided by the provider were contrary to how they were agreed in the beginning. Moreover, if the use of information is fundamental of the services being offered, the complaint may sustain. On the other hand, it is suggested that since privacy claim does not relate to the quality per se, the complaint will not be maintainable. It was proposed to address the issue through specific privacy legislation and policy. It has also been argued that instead of enacting a specific legislation, the complaints can be well addressed by the consumer courts construing widely the meaning of consumer welfare and protection. However, the Digital Data Protection Bill, 2023 was recently passed to streamline the regulatory framework and introduced enforcement strategies around use and processing of data within or outside India if related to goods or services offered in India for any lawful purpose or legitimate use as enlisted in s. 7, rights and obligations of the users and data fiduciaries under s.18 and moderating data localization requirements, etc.

c. Report on 'Anti-Competitive Practices by Big Tech Companies': The Parliamentary Standing Committee on Finance submitted its 53rd Report in Dec, 2022 on Anti -competitive practices by Big Tech companies. It recommended identifying such large incumbents as 'Systemically Important Digital Intermediaries' ("SIDIs") on the basis of revenue, market capitalization, and number of active business and end users, implementation of a 'Digital Competition Act' to ensure contestability in digital markets and establishment of a 'Digital Markets Unit' within the CCI to closely monitor SIDIs and provide recommendations to the Ministry of Corporate Affairs on their designation.[24]

d. The Committee on Digital Competition Law (CDCL): A Committee on Digital Competition Law was set up in 2023 to review broadly whether existing provisions in the Competition Act and the rules and regulations framed thereunder are sufficient to deal with the challenges that have emerged from the digital economy and examine the need for an ex-ante regulatory mechanism for digital markets through a separate legislation.[25] The committee recommended introduction of a Digital Competition Act with ex-ante measures. Draft Digital Competition Bill will be applicable to a pre-identified list of Core Digital Services that are susceptible to concentration. Such list will be drawn up by the CCI's enforcement experience, market studies, and emerging global practices. It is suggested that the Bill should regulate enterprises which have a 'significant presence' in the provision of a Core Digital Service in India and the ability to influence the Indian digital market. The Committee recommends designating such enterprises as "Systemically Significant Digital Enterprises" (SSDEs). A twin test demonstrating 'significant presence' has been proposed by the committee. The Bill has proposed that ex ante obligations, exemptions and enforcement etc. will be prepared by CCI.

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24 MINISTRY OF CORPORATE AFFAIRS, GOVT. OF INDIA, STANDING COMMITTEE OF FINANCE, 'ANTI-COMPETITIVE PRACTICES BY BIG TECH COMPANIES 53rd Report at 47 (December 2022)

25 MCA, Supra Note 22

Conclusions and way forward:

The gradual progression of the Indian economy towards open, dynamic, and interconnected markets including the unprecedented growth of the digital sector has led to an acknowledgment of the need to revamp the existing legislative and regulatory framework. In this regard, as discussed, several amendments have been brought into account for the plausible risks and harms to the market participants and in particular, the end users. An overview of the developments leads us to conclude that the Competition (Amendment) Act was centred around strengthening the procedural aspects of the existing law including modulation of the definitions making them wider in context. It can also be noted that it did not add anything substantial from the perspective of the regulations of digital markets that is why it would be crucial to assess and deliberate upon the upcoming Digital Competition Bill. There have not been any additions from the market study on e-commerce as well. On the e-commerce front, however, the Consumer Protection Act, 2019 and the 2020 rules have attempted to regulate the dealings including the use of data and its protection amongst the e-commerce entities, sellers, and end-users. Moreover, in the backdrop of rapid advancements of markets, it also seems quintessential that the changes brought by the Consumer Protection Act, 2019 after a lapse of considerable period of time (preferably 5 years) be put to test and assessed for their effectiveness and for undertaking necessary reforms, if any. Thus, the two laws seem to carefully evolve while responding to the challenges and in addition, seem complementary to each other in terms of the respective goals. However, while responding to the novel challenges, the two laws do seem to intersect such as regulation of bargaining power, consumers' data privacy wherein actual stance of the competition authorities still requires deliberations. Thus, it has now become extremely crucial to demarcate the role and goals of the two laws clearly and consider how the two should co-exist especially when the question pertains to the regulation of technologically driven markets where the distinction is much difficult to dissect.

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RECORDS OF LAND RIGHTS: A CRITICAL ANALYSIS OF THE TELANGANA RECORD OF RIGHTS BILL (DRAFT) 2024

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Abstract

This paper critically examines the Telangana Record of Rights Bill 2024, a legislative effort aimed at reforming land administration in the state. The study analyzes the Bill's objectives, potential impacts, and shortcomings in addressing longstanding issues in land record management. It traces the evolution of land rights legislation in Telangana and scrutinizes the proposed Bill's provisions for digitalization, error correction, and dispute resolution. The research highlights crucial areas requiring improvement, including the need for comprehensive verification of existing records, streamlined appeal processes, and enhanced definitions of key terms. The paper proposes several recommendations to strengthen the Bill, emphasizing the importance of accuracy, transparency, and accessibility in land records. It concludes that while the Bill represents a significant step towards modernizing land administration, its success hinges on meticulous implementation and continuous refinement based on stakeholder feedback.

Keywords: Land Rights, Land administration; Digital land records; Record of Rights; Land legislation; Dharani portal; Agricultural land; Land disputes; Pattadar rights; Land revenue.

INTRODUCTION

The State of Telangana, in repealing the Telangana Rights in Land and Pattadar Pass Books Act 1971 (*hereafter* referred to as

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"ROR Act of 1971"),[1] enacted new legislation, namely, the Telangana Rights in Land and Pattadar Passbooks Act, 2020 (*hereafter* referred to as "ROR Act of 2020")[2] to introduce the '*Dharani*' portal[3] for digital recording and maintenance of land administration data. The primary objective was to combat corruption within the Revenue Department and enhance transparency in land transactions. However, discrepancies have emerged, causing inconvenience to citizens.[4] The current government, recognizing these issues, has pledged to replace the entire system, deeming it corrupt due to the Dharani portal exacerbating problems rather than resolving them.[5]

It has been argued by critics that post-Dharani implementation, land records now display the names of previous owners, leading to disputes and conflicts between groups. This is primarily attributed to the records uploaded to the Dharani Portal without proper survey and accuracy verification. Instances have been reported where Dharani reflects the name of the former owner rather than the current proprietor. Even lands assigned to the SC

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1 Act No. 26 of 1971.

2 Act No. 9 of 2020 came into force on 29.10.2020.

3 The Dharani Portal is an e-governance initiative launched by the Government of Telangana, aimed at digitizing land records and streamlining property registration processes. It integrates land administration and revenue services into a single, accessible platform. Key features include online registration, property record verification, and access to legal documents like encumbrance certificates. < https://dharani.telangana.gov.in/>

4 Srinivas Rao Apparasu, *Telangana farmers allege discrepancy in land ownership records in Dharani portal*, HINDUSTAN TIMES, (Nov. 30, 2023, 08:06 AM), https://www.hindustantimes.com/india-news/telangana-farmers-allege-discrepancy-in-land-ownership-records-in-dharani-portal-101701285942435.html.
Also see, Special Correspondent, *Too many discrepancies and glitches in Dharani Portal*, THE HINDU, (Mar. 21, 2022, 07:25 PM), https://www.thehindu.com/news/national/telangana/too-many-discrepancies-and-glitches-in-dharani-portal/article65245791.ece#:~:text=Informing%20that%20in%20many%20cases,others%20and%20creating%20legal%20litigations.

5 Srinivas Rao Apparasu, *Revanth announces revamp of Dharani portal in Telangana*, HINDUSTAN TIMES, (Dec. 14, 2023, 08:56 AM), https://www.hindustantimes.com/india-news/revanth-announces-revamp-of-dharani-portal-in-telangana-101702495747576.html.

corporation, intended for Dalits, are not accurately reflected in the Dharani portal.[6] Notably, the neighboring State of Andhra Pradesh has opted for a survey program, with revenue officials inspecting landholders' passbooks on the ground.

A committee appointed by the Government of Telangana has recommended the replacement of the existing Dharani Portal with a new Record of Rights (RoR) system, termed '*Bhumatha*', alongside the enactment of a revised RoR Act to address deficiencies in land administration. The committee's report outlines 32 measures, categorized into short, medium, and long-term strategies, to strengthen the state's land governance. Key proposals include the development of a unified grievance redressal module, community-driven land verification processes, and the establishment of revenue tribunals to ensure timely and uniform resolution of land disputes.[7] This proactive approach promises to improve land administration in Telangana.

Record of Rights in Land in Telangana Area: Brief Background

The first Record of Rights (ROR) Act was enacted in 1346 Fasli (1936 AD) in the Nizam's dominions. However, the ROR was prepared for implementation in a few districts of the Marathwada Region, not in the Telangana area. The second legislation, the Record of Land Regulation 1358 Fasli (1948), was enacted and published for the erstwhile state of Andhra Pradesh,[8] ***but it was not extended to the Telangana Region.*** Subsequently, the record

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6 Palleturu Prasad, an Advocate from the Dubbak Assembly constituency, has made significant observations on this issue. His insights provide a different perspective on the challenges faced by the Telangana Rights in Land and Pattadar Passbooks Act, 2020. < https://www.thenewsminute.com/telangana/telangana-polls-will-anger-over-dharani-portal-impact-kcr

7 M. Rajeev, Committee recommends replacement of Dharani portal with Bhumatha and enactment of new RoR Act in Telangana, THE HINDU, (Sep. 13, 2024, 06:14 PM), https://www.thehindu.com/news/national/telangana/committee-recommends-replacement-of-dharani-portal-with-bhumatha-and-enactment-of-new-ror-act-in-telangana/article68638291.ece.

8 In the Gazette No. 37 dated 2nd Meher 1358 Fasli (corresponding to Aug. 8, 1949) by the Military Governor after the Nizam's rule ended.

prepared under the Land Census Rules 1954 [9](i.e., *Khasra Pahani*)[10] was notified as ROR under the 1358 Fasli regulation in 1955.

The principal comprehensive enactment was the ROR Act of 1971.[11] The records under this Act were compiled in three distinct phases, with the final phase occurring between 1978 and 1980. However, these records were not integrated into the village records at that time. Following substantial amendments to the Act, the Records of Rights (ROR) were prepared again during the period of 1989 to 1992. This iteration was incorporated into the village records, leading to the issuance of Pattadar Pass Books (PPB) and Title Deeds (TD). The ROR Act of 2020, which came into effect on October 29, 2020, was enacted to modernize land records[12].

The Present ROR Act 2024 (Draft)

The new draft of the Telangana Record of Rights Bill 2024 aims to consolidate and amend the law relating to land records in the State. Its primary objective is to address the deficiencies of the previous Telangana Rights in Land and Pattadar Pass Books Act, 2020. The Bill is designed to eliminate the need for stakeholders to approach civil courts for land record corrections and includes provisions to prevent fraudulent land record mutations, a major

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[9] Andhra Pradesh (Telangana Area) of Land Census Rules, 1954. In G. Satyanarayana Vs. Government of A.P, (2014) 4 ALD 358 the AP High Court observed that "These rules were made under Section 97 of the Tenancy Act. Under these Rules, land census, as defined by Rule 2(f) of the Rules, was taken up by the Government. The important record i.e., Khasra Pahani is a document prepared under these Rules."

[10] Khasra Forms, issued under the Tenancy Act 1950 are popularly known as Khasra Pahani. In land and revenue records, particularly in South Asian countries like India and Pakistan, the term Khasra refers to the unique identification number assigned to a specific plot of agricultural land. This number is used to record crucial information such as the size, boundaries, ownership, and cultivation status of the land. It plays a significant role in land transactions, legal disputes, and government assessments, making it an essential component of rural land management systems.

[11] *Supra* note 1.

[12] Under this Act, the Record of Rights (ROR) was not newly prepared. Instead, the ROR prepared under the 1971 Act has been considered as the ROR prepared under this Act, as stipulated in Section 3(3).

concern under the previous legislation.

The draft bill aims to provide a comprehensive framework for land rights by addressing various aspects not addressed in the 2020 Act, such as the following:[13]

- Record of Rights for Abadi Land (Residentials)
- Provisions to resolve court cases (Part B cases)
- Procedure for mutations
- Recognising the ownership rights of protected tenants (Section 38E)
- Occupancy Rights Certificate (ORC) and assignment patta
- Providing subdivision and survey procedures before registration and modification
- Providing the distinct land parcel identification numbers for non-agricultural land (*Bhudhaar*)
- Introducing the appeal and revision mechanism
- Regularising unregistered transactions (*Sada Bainama*)

By addressing these gaps, the new Bill seeks to enhance transparency, efficiency, and ease of access to land records for farmers, landowners, and other stakeholders. The Bill proposes a more comprehensive and user-friendly system to replace the Dharani portal with a new system called '*Bhumata*'. This system will cover the entire State of Telangana, offering a more efficient and accessible platform for land record management.

Section 4(1) of the proposed 2024 Act allows for the fresh preparation of Records of Rights (ROR). However, Section 4(4) specifies that the ROR currently maintained under the ROR Act of 2020 in electronic form (*Dharani*) shall be considered as having been prepared under the 2024 Act. This indicates that the new bill does not envisage the preparation of ROR anew. The 2024 Act is primarily intended to address the shortcomings of the 2020 Act,

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[13] See,https://dejurechambers.com/telangana-record-of-rights-bill-2024/#:~:text=Rights%20Bill%2C%202024-, The%20primary%20purpose%20of%20the%20new%20draft%20Telangana%20Record%20of, Pattadar%20Pass%20Books%20Act%2C%202020.

including provisions for correction, *Sada bainama*[14] regularization, appeal, and revision, while maintaining the provisions for registration and succession by Tahsildars with certain safeguards.

The draft Bill has been opened for public feedback, allowing citizens to contribute their suggestions and recommendations. This inclusive approach underscores the Government's commitment to addressing long-standing issues in the land administration system and ensures that the new Bill reflects the needs and concerns of the people it serves. However, some lacunae remain, which will be discussed in the following sections.

The ROR Bill, 2024: Suggestions for Improvement and Goal Achievement

By addressing the shortcomings of the ROR Act 2020, the Telangana Record of Rights Bill 2024 aspires to rectify these issues and introduce significant advantages. This new Bill is set to eliminate the drawbacks of the old Act, making it more user-friendly for citizens and paving the way for a new era of efficiency and transparency.

I. Preparation and maintenance of record of rights in all lands

Subsection 4 of Section 4 of the present Bill proposes to adopt the current *Dharani* portal electronic data, which it deems to have been prepared and maintained under section 4(1). The present data available in the ROR/*Dharani* portal contains numerous errors of various types.[15] A detailed plan is necessary to ensure that every

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[14] In rural areas of the State, it was common for people to sell and purchase land without formal registration. These transactions, known colloquially as 'sada bainamas,' refer to agreements of sale and purchase documented on paper without official registration.

[15] It is common knowledge and experience of the public in general that the ROR in electronic form under the 2020 Act in Dharani needs to be fixed. Because the data in the updated manual Pahani for 2020-21 was to be ported to the Dharani Platform created under the 2020 Act. While doing this vital data entry work, neither supervision nor sufficient time was allowed. Due to extreme pressure to complete data porting in the Dharani platform, untrained

step is carefully considered and executed. Initially, the extent of patta lands per Survey Number and village-wise should be determined according to the RSR Record, i.e., *Setwar*[16]*/wool baqui/khasra*, as the case may be.

a) The total extent of every Survey Number should be recorded in bold letters. Then, the extent held by different Pattadars (*patta/land deed holder*) in that Survey Number is to be recorded. If the area tallies with the total extent and the land held by different pattadars, this will be considered satisfactory.

b) If the land in a Survey Number exceeds the land held by pattadars as per the Resurvey Settlement Register (RSR) record, then the names of missing pattadars are to be recorded by verifying the record prior to Telangana Land Records Updation (LRUP) 2017, and missing pattadars should be recorded in a fair and transparent manner.

In cases where the land held by different pattadars in a survey number exceeds the RSR extent, and the pattadars have already been issued Pattadhar Pass Books (PPB), such survey numbers must be identified and the extent recorded. The Revenue Divisional Officer (RDO) will handle such cases on appeal and decide them according to appeal rules. The extent missed during LRUP 2017 must be verified, and the same must be incorporated. This process should be carried out *suo motu* or upon application, with the pros and cons to be discussed.

II. Ensuring Error-Free Record of Rights: The Suggested Process

Under the new Bill, Section 4 proposes a separate ROR for Abadi and non-agricultural Lands. To achieve this objective of

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and raw hands services were outsourced, resulting in several things that needed to be corrected in data porting.

[16] The Sethwar settlement register, a document of immense historical significance, was prepared between 1930 and 1940 in Telangana. It contains invaluable information about the cultivable area for each agricultural parcel of land.

subsection (1) of Section 4 of the bill, the action plan should be prescribed as a proviso as follows:

a. The total extent of every Survey Number should be recorded in bold letters. Then, the extent held by different Pattadars in that Survey Number will be recorded. If the land in a Survey Number exceeds the land held by pattadars as per the RSR record, the names of missing pattadars are to be recorded by verifying the record before the Telangana Land Records Updation Project (LRUP),[17] and missing pattadars must be recorded. The purpose was to update existing revenue records (specifically the pahani and the ROR 1B)[18] to reflect ground realities in rural Telangana.

b. Subsections 5 and 6 of Section 4 under the new ROR 2024 provide that after the adoption of the existing portal, the claimant must file a claim application. This verification and rectification of the existing portal will be done after thoroughly cross-checking with records updated under the Telangana Land Records Updation (LRUP) 2017 scheme to ensure accuracy. This meticulous process is crucial to the effectiveness of the new bill.

c. The lands that are recorded as house sites in the Dharani Portal are to be converted as per the Telangana Agricultural Land (Conversion for Non-Agricultural purposes) Act, 2006 (NALA Act),[19] and to be transferred to the NALA Portal. This exercise is to be carried out with utmost care by duly verifying the record prior to the LRUP record, verifying the documents produced with the application, and automatically uploading them to the NAL Portal. This exercise is to be carried out with utmost care by duly verifying the record prior to the LRUP record, verifying the documents produced

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17 On 23 August 2017, Telangana announced a statewide survey of land and land records to' purify' them. Work under the Telangana Land Records Updation Project (LRUP) was to be divided across two phases to cover rural and urban areas. The first phase— 'Rythu Vari Bhu Survey', as it was christened— began in September and December 2017.

18 The 'ROR 1B' denotes Form 1B under the Telangana Rights in Land and Pattadar Passbook Rules,1989. It comprises formal RoR for land in the State.

19 Act No. 3 of 2006.

with the application, and automatically uploading them to the NALA Portal. This careful handling ensures that no entry in the Dharani Agricultural Portal should appear as a house/house site. Finally, the land in a survey number should tally with the total of the Agriculture and Non-Agriculture Portal.[20]

d. The missing survey numbers in the Dharani Portal will be restored after the records are verified before LRUP, and those who seek conversion will be dealt with, converted to NALA, and transferred to the NALA Portal.

e. "Assigned Land" data shall be made available in the land records, and it shall be prohibited from alienation except strictly by way of succession. Further, all such lands covered by alienation/transfer shall be blocked from getting any benefit, and action shall be initiated under the Andhra Pradesh Assigned Lands (Prohibition of Transfers) Act, 1977.[21]

It is to be noted that, the records maintained under Section 4, which appear in the Dharani Portal, should be placed in the public domain and made easily accessible to citizens

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[20] The lands recorded as houses/ house sites in the Dharani Portal are to be converted as per the NALA Act. The same may be transferred to the NALA Portal. This exercise will be carried out by the documents produced by the application with the existing records maintained prior to the LRUP record. If they are correct, they can be automatically uploaded to the NALA Portal. It has to be ensured that the land in a survey number should tally with the total of the Agriculture and Non-Agriculture Portal.

[21] G.O.Ms.No.1406, Revenue, dated 25.07.1958, in the exercise of the powers conferred by Section 172 of the Hyderabad Land Revenue Act, 1317 Fasali, specific Rules with regard to revised assignment policy are made in Andhra Pradesh and Telangana areas. As such, the said Rules are statutory in nature. The said Rules were issued in super-cession of all the earlier Rules and orders; as such, after the said GO came into force, Laoni Rules and Form-G have no application. Thus, where there is no condition of alienation, and they are free-hold lands. Such lands will be deleted from the prohibited lands list to the extent of Assignments made under Laoni Rules 1950 and whose names were brought in the Pahani up to 1958- 1959. The lands assigned under the new policy were brought to the Pahani from 1959-1960; hence, there was clarity.

III. Registration and Mutation in cases of sale, gift, mortgage, exchange and partition

Presently, transactions relating to agricultural lands and non-agricultural properties recorded online in the Dharani portal or online portal of local bodies are automatically transferred under the purchaser's name. However, open lands covered by house site plots are not being recorded online, which is why multiple transactions or irregular execution of documents by unauthorized persons are occurring. Furthermore, open land covered by Abadi lands is also not recorded online. As such, action must be taken to enter such data online to avoid multiple transactions and to safeguard the rights of genuine owners.

IV. Regularisation of Sada Bainama Transaction

Under the proposed new Act, there is an opportunity to file claims to validate the sale of lands through unregistered sale deeds undertaken before 02.06.2014 without payment of Stamp Duty and Registration Fee or Transfer Fee.

In this regard, it is suggested that at present, there is no record showing the fact of purchase of lands before 02.06.2014 by a person in revenue records due to the freezing of the data relating to the lands under the Webland Programme by the Government during the year 2017. As such, there is a possibility of filing claims by creating fabricated unregistered documents as if sold before 02.06.2014 to avoid payment of Stamp Duty, Registration fee, and Transfer Fee. The problem here is that it is very difficult to verify the truthfulness of such claims with reference to available records, as no record between 2011-2012 and 2017 is available. Under the Registration Act and Transfer of Property provisions, transferring the right over the property may not be appropriate without payment of the Registration Fee, Transfer Fee, and Stamp duty. Thus, at least minimum fees may be ordered to be paid with unique one-time relaxation.

Furthermore, all such cases, i.e., filing of a claim, issue of notices, recording of statements and issue of validation certificate,

shall be made online only as these cases are covered by a transfer of property to enable an aggrieved person to obtain copies of the record and to file before the competent authority as in the case of registered documents which can be seen by obtaining even E.C. also at any time.[22] Further, the mutation of the properties shall also be done online as in the transfer of properties in the Dharani portal.

Moreover, a timeline should be fixed to dispose of all such claims filed. Strict instructions shall be given to the authorities to dispose of all such claims within the stipulated time. Otherwise, deterrent action should be initiated against the Officers who failed to comply within such a time frame. Otherwise, there is every possibility of keeping the claims pending for a long time. It may be specifically instructed to maintain a record of each claim in the Office by opening a claims register.

V. On Bhudhaar:

The proposed law should include a comprehensive definition of '*Bhudaar*.' One survey number should be allotted to each landowner, even if they hold land at different places in the proposed law. However, the existing survey numbers should not be disturbed, as it may be difficult and may lead to legal complications if the temporary Bhudhaar number is given and, subsequently, any new Bhudhaar number is created. It has to be verified with the old survey number; correspondingly, the new Bhudhaar number must be mentioned.

VI. Section 5(2) to (4) and (6): Protected Tenant

Under section 38-D of the Tenancy Act, 1950, if the landholder intends to sell the land on which there is a Protected Tenant (PT), they should first offer it to the PT, and only in case the PT fails to accept the offer should they sell to others. Thus, the PT first has the right to purchase the land. There is no provision to protect the vested right of PT under the Tenancy Act 1950.

[22] This suggestion is made as most of the files/records relating to the validation proceedings are not traceable in the Offices of the Tahsildars, and aggrieved persons cannot obtain records to challenge the proceedings.

Therefore, slot booking for the sale of land held by PT may be allowed only after uploading proof of the PT failing to accept the offer by the landlord. This Section may, therefore, be suitably amended.

VII. Suggestion on Provisions Relating to Appeals and Revision in the draft Bill (Sections 14 and 15) :

The draft Bill designates the Collector as the First Appellate Authority and the Chief Commissioner of Land Administration (CCLA) as the Second Appellate Authority for adjudicating all orders issued by the Tahsildar or Revenue Divisional Officer (RDO) under Sections 5(2) and (5), 6(2), 7(2), 8(2), 9(2), and 10(2). In this context, it is deemed inappropriate for the CCLA to function as the revision authority for its own decisions while serving as the Second Appellate Authority. Consequently, it is recommended that the reference to "or the Commissioner" be removed from Section 15 to avoid any conflict of interest.

Additionally, it is proposed that appellants be afforded a minimum period of 90 days to file appeals or revisions. To ensure a streamlined and efficient process, it is recommended that the resolution of first and second appeals be restricted to the district level. This could be managed either by the Additional Collector/Collector or through the establishment of a Land Tribunal. To facilitate this, it is suggested that at least one tribunal be set up for each of the former undivided districts. This approach is intended to enhance the accessibility and effectiveness of the appeals process, ensuring that it remains both equitable and efficient for all parties involved.

GENERAL SUGGESTIONS

- **Public Access to Orders**: It is suggested that all orders passed by all prescribed authorities be placed in the public domain in PDF format, organized Mandal-wise.
- **Providing Cultivator Column in Pahani**: Providing a specific column in the ROR (Pahani) to record the cultivator's name while framing the rules may be considered. This will be

useful to the Government for disbursing RYTUBANDHU ASSISTANCE to cultivators (other than pattadar).

- **Suo-motu Scrutiny of Orders Passed**: A mechanism to check the correctness of the orders passed by all authorities (i.e., for Orders passed by Tahsildars and RDOs at the Collector's level and for orders passed by Additional Collector (Rev) at the level of CCLA) under the Act and to suggest remedial action in case orders passed are irregular, illegal, etc., may be created, as was done while implementing the provisions of Telangana LR (COAH) Act 1973.
- **Conducting Jamabandi Every Fasli Year**: Jamabandi used to be conducted regularly every Fasli year to arrive at the collectible demand of Land Revenue and scrutinize the village revenue records maintained. It has not been conducted for the last several years, though there are no written orders to discontinue it. The Government may consider conducting Jamabandi again to ensure proper maintenance of records, especially ROR.
- **Collection of Land Revenue**: The department has lost touch with the farmers because it has not collected land revenue. The Government may consider collecting at least nominal revenue, though the revenue thus accrued to the Government may not be substantial.
- **Part-B Cases**: For land covered by Part-B cases, which is more than 18 lakh acres, detailed guidelines need to be issued for each reason so that all the concerned officers in the State take uniform action.

SUGGESTIONS REGARDING DEFINITIONS

a) Section 2(1): The definition of "Agricultural land" may be rephrased as: "Agricultural land" means land used or capable of being used for the purpose of agriculture and purposes ancillary thereto and includes land used for Aquaculture, horticulture, sericulture, plantations, pastures, poultry, garden produce, orchards and such other purposes as may be prescribed.

b) Section 2(8) District Collector or Collector: The words "the CCLA" at the end may be substituted with "Government" because under the District Collectors Powers Delegation Act, 1961, only the Government can delegate powers of Collector to other officers. Alternatively, the definition may end with Additional Collector (Revenue) as was in the 1971 Act.[23]

c) Section 2(10): The term “Gramanatham” is not prevalent in Telangana. It may be deleted.

d) New Clause After Section 2(12) (f): After subsection (f), the following new clause may be added “Release Deed”.

e) Section 2(12) l: Under POT Act 1977, only resumed assigned lands are reassigned to eligible purchasers of assigned land. Therefore, the definition may be rephrased as follows: "Reassignment of resumed assigned land under the Telangana Assigned Lands (Prohibition of Transfers) Act 1977 to the eligible purchaser of assigned land."

f) Section 2(12) n: The definition may be rephrased to cover the certificates of purchase issued under sections 38-A and 38-B of the Tenancy Act, such as: "Issuance of certificate of purchase by the protected tenant under sections 38-A and 38-B and certificate of ownership under section 38-E of the Telangana Tenancy and Agricultural Lands Act, 1950 (Act 21 of 1950)."

g) In Section 2(12) P: After “Telangana Cooperative Societies Act 1964 (Act 7 of 1964,” the words and figures “SARFAESI Act 2002 (Central Act 54 of 2002”) may be inserted.

h) Section 2(15) Owner: It is to be noted that this definition is no longer required for two reasons. One is that Form 1-B was prepared under the 1971 Act and rules thereunder, only for lands held by Pattadars since 1990 and PPBs are issued till now only to Pattadars. The second is because there are no

[23] A notification may be issued by the Government changing the designation of the Joint Collector as Additional Collector (Revenue) since no such notification has been issued so far pursuant to the previous government's creating posts of Additional Collector Revenue and Additional Collector Local Bodies without issuing any notification.

intermediaries left between Government and the Pattadars like Inamdar Jagirdar, Maqtedar, Deshmukh or Deshpande etc., consequent to the implementation of Grant of Pattedari rights in Non-Khalsa villages Rules 1346 Fasli issued by the Nizam (i.e., Even before Jagir Abolition Regulation in 1358 Fasli) and Abolition of Inams Act 1955. The definition of Pattadar given in Section 2 (17) serves the purpose and is sufficient. Given the factual position stated above, the term "Owner," wherever it occurs in the draft, needs to be omitted and replaced with Pattadar.

i) Section 2(16) Pattadar Pass Bok (PPB) cum Title Deed (TD): The definition contemplates the issue of PPB cum TD under the proposed Act without providing proper rules and procedures.[24] Therefore, it is suggested that appropriate provision has to be made to validate PPB cum TDs issued in a simplified format. This is because the PPB cum TD has no backing of either the 1971 Act or the 2020 Act.

j) Section 2 (20) Recording Authority: The term “creating” may be substituted with “preparing”.

k) A New sub-section after 2 (25): As suggested earlier, the definition of Tenant may be provided. The definition can be borrowed from the Telangana Tenancy Tenancy and Agricultural Lands Act, 1950. As per Section 2 (v) “Tenant” means and includes “(1) A lessee under a tenancy agreement, express or implied, (ii) A person who is deemed to be a Protected Tenant under the Telangana Tenancy and Agricultural Lands Act 1950 (Act 21 of 1950) and not found eligible for issuance of ownership certificate under the provisions of the said Act.”[25]

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24 After concluding LRUP on 31-12-2017, PPB cum TDs were issued in simplified format from 2018 without amending the Rules under the 1971 Act. The 1971 Act itself was repealed on 29-10-2020. Under the 2020 Act also, no rules are framed prescribing the format of PPB cum TD. But they are being issued in the same simplified format till now. Thus, the PPB cum TD has no backing of either the 1971 Act or the 2020 Act.

25 Act No. XXI of 1950.

CONCLUSION

It is noteworthy that the Telangana Record of Rights Bill, 2024 represents a significant development in land administration and digital land record management. The Bill aims to empower farmers and landowners by providing easy access to their land records and mitigating conflicts over ownership. It suggests that having a digital record of rights for non-agricultural land is essential to identify land parcels (*Bhudhaar*) and expedite procedures for land transfers and modifications.

The Bill also strongly emphasizes community involvement and public input, ensuring that stakeholders can influence policy. By addressing current land management issues, the Bill aims to provide a more structured and equitable framework for land rights in Telangana. However, it is suggested that a significant error has been made in the Dharani web portal, paving the way for incorrect updating of land records without verifying the ground reality in the name of clearing land records under the ROR Act 2020. Therefore, the "*Sethwar*" record should be considered prominent or authoritative to verify correctly and reflect the ground reality in all land records. There is an urgent need to verify and correct the land records before the proposed bill is passed into law and implemented. Otherwise, the same confusion will persist. Thus, the Government must devise a comprehensive process for updating existing land records to improve them while considering all the suggestions proposed by stakeholders, revenue officials, and agriculturalists, which presents a real challenge in Telangana.

The Telangana Record of Rights Bill, 2024, if implemented with the suggested improvements and careful consideration of existing issues, has the potential to revolutionize land administration in the state. It could serve as a model for other states facing similar challenges in land record management and digital transformation of land administration systems. However, the success of this bill will largely depend on its execution. The government must ensure that the implementation process is transparent, inclusive, and responsive to the needs of all stakeholders. Regular monitoring and evaluation mechanisms

should be put in place to identify and address any issues that may arise during the implementation phase.

Furthermore, capacity building of revenue officials and other stakeholders involved in land administration will be crucial. Training programs should be organized to familiarize them with the new system and procedures outlined in the bill.

In conclusion, while the Telangana Record of Rights Bill, 2024 represents a significant step forward in land administration reform, its success will depend on careful implementation, continuous improvement based on feedback, and a commitment to transparency and accuracy in land records. If executed properly, this bill has the potential to significantly improve land administration in Telangana, benefiting farmers, landowners, and the state as a whole.

INNOVATION FACILITATORS AND FINTECH START-UPS- ASSESSING REGULATORY SANDBOX FRAMEWORK IN INDIA

*Pavithra R**

Abstract

Technological innovation and digitalisation coupled with acceleration from the Government of India on all fronts aiming at ease of doing business has been a major contributor to India being the third largest start-up ecosystem in the world. Reports have also shown that most start-ups become unicorns within seven years from the date of their incorporation. While start-ups were flourishing in different sectors, there was a necessity to opt for a deregulatory approach in the financial sector that gave rise to new financial intermediaries called 'fintech start-ups'. They are specialised players in the market that unbundle and unravel new products in financial services leading to disintermediation at all levels. The transformation and innovations have been promoted by the Government of India through several initiatives starting with Start-up India, Skill India, and Start-up Action Plan from 2014. While fintech is flourishing, they are not free of hurdles and an oft-quoted hurdle remains to be regulatory compliance. To overcome the same, legislative and policy measures were taken in the form of 'Innovation Facilitators' and 'Regulatory Sandboxes' to allow companies to have a relaxed environment to start with. These Facilitators and Sandboxes are to provide exemptions from regulation or provide for light-touch regulation and supervision, to allow fintech entities to work in a free space to ensure an increase in their efficiency and manage their risks, if any. To this end, the research would analyse the new

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regulatory approach in the form of sandboxes as a concept, and highlight the regulatory regime in terms of sector base for start-ups including the International Financial Services Centres Authority Regulatory Sandbox, 2020. In the final part, attempts have been made to understand the international best practices and the lessons India can take to make the regime of regulatory sandboxes effective.

Keywords: Fintech, Start-ups, Innovation Facilitators, Regulatory Sandboxes, Live Testing

Introduction

Fintech is an ecosystem that is created with the radical change brought in by innovation in the finance sector through technological leaps and bounds. It is an umbrella term representing the sphere of finance and technology. There has been no universal consensus in understanding the scope and limitations of the fintech industry.[1] The Fintech sector has created a lot of disruption in the market space in the last decade with breakthroughs in major products and service delivery. It includes a variety of activities within its sphere. Few are, digital payments, digital lending, digital banking, peer-to-peer lending, remittances, crowdfunding, internet payments smart contracts, crypto and blockchain technology.[2] Given the broader coverage area of fintech, India hosts the second largest fintech ecosystem in the world with key innovation in terms of Aadhar and unified payment interface mechanism.[3]

Rapid usage of digital technologies in the fintech space has paced forward the traditional laws on finance, banking, and

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1 KPMG and NASSCOM, Fintech in India, A Global Growth Story 4 (Jun. 2016) available at https://assets.kpmg/content/dam/kpmg/pdf/2016/06/FinTech-new.pdf.

2 Deloitte, The Future of Regulation, Principles for Regulating Emerging Technologies (Jul 2018) available at https://www2.deloitte.com/us/en/insights/industry/public-sector/future-of-regulation/regulating-emerging-technology.html.

3 Swissnex India, Fintech in India 20 (Oct. 2016), available at https://www.indembassybern.gov.in/docs/Fintech-Report-2016.pdf.

regulation. Major reasons for regulatory backlog are the degree of complexity in the technology involved accompanied by the leaps fintech takes in a shorter period of time.[4] Regulatory frameworks have in multiple instances failed to catch up with innovation in the fintech sector, creating a disconnect between technological growth and regulatory space. Many alternatives were considered around the globe to bridge the gap including the concept of reg-tech, innovation facilitators, regulatory sandboxes and special charters that allow for innovations in the fintech sector.[5]

Innovation facilitators can typically be classified into three categories. Innovation hubs, otherwise called innovation hubs, regulatory sandboxes, and innovation accelerators.[6] These facilitators are distinct from each other and have their own characteristics. Innovation hubs primarily provide a scheme where new entrants would be provided with an expert who would help the entrant comply with regulations, norms, and other legal compliances.[7] Innovation accelerators focus on accelerating reg-tech and super-tech companies in complying with regulatory and statutory frameworks.[8] Regulatory sandboxes are built as a coping mechanism to new-age technological innovations that have less regulation or almost no regulation.[9] Sandboxes are crucial in the fintech industry since they allow testing with the supervision of the highest authority and allow for cost-benefit combined with a proper risk-factor analysis.

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[4] Antanio Gracia Pascual, Fabio Natalucci, Fast-Moving Fintech Poses Challenges for Regulators, IMF Blog, available at https://www.imf.org /en/Blogs/Articles/2022/04/13/blog041322-sm2022-gfsr-ch3.

[5] Sanjay Khan Nagra, Prashant Ramdas and Anurag Singh, Unboxing the Regulatory Sandbox, available at https://www.mondaq.com/india/financial-services/815980/unboxing-the-regulatory-sandbox39.

[6] Bank for International Settlements, The Basel Committee on Banking Supervision, Sound Practices: Implications of FinTech Developments for Banks and Bank Supervisors 5 (Feb. 2018) available at https://www.bis.org/bcbs/publ/d431.pdf.

[7] ESAs Joint Committee Report, FinTech: Regulatory Sandboxes and Innovation Hubs 109 (Jan. 2019).

[8] *id*. at 111.

[9] Lim and Low, Elgar Financial Law and Practice Series, Regulatory Sandboxes, Fintech: Law and Regulation, (Sep. 2019).

Primary-level mentor-based innovation hubs and complex reg-tech supervision by innovation accelerators are outside the scope of the present research. It is pertinent to note that these facilitators are mutually exclusive in nature and are not synonymous. Recognising the differences, in India, SEBI has launched both an innovation sandbox and a regulatory sandbox. The present research, however, focuses only on mid-level regulatory sandbox framework in specific reference to promoting innovation and facilitating live testing of fintech start-ups.

Understanding the Concept of Regulatory Sandbox

A regulatory sandbox is an experimental learning ecosystem that allows the testing of new business models and new entrants with real customers.[10] These sandboxes allow businesses to do real-time testing of their products, services, business models and delivery mechanisms in a controlled environment.[11] They provide a safe space for entities to operate and facilitate financial inclusion thereby enabling the regulators to understand emerging innovative technologies in a much better fashion.[12] The new entities are provided with comprehensive waivers from the legal and regulatory framework are provided through reducing overarching regulatory intervention while increasing the regulator's oversight to protect the interests of real-time consumers. The increased oversight in most instances is left to the independent/distinct regulators who are permitted to operate the sandboxes on a case-to-case basis.[13] Therefore, regulatory sandboxes work on a quid-pro-quo basis where regulators provide entities with relaxations but on the other hand limit the number of customers they interact with and reduce the size of the transactions that they enter into. In that sense,

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[10] Attrey., Lesher and Lomax, The Role of Sandboxes in Promoting Flexibility and Innovation in the Digital Age, OECD Going Digital Toolkit Policy Note 2, (2020) available at https://www.oecd-ilibrary.org.

[11] Hilary J. Allen, Regulatory Sandboxes, 87 The George Washington Law Review 579, 592, 596 (2019).

[12] Saule T. Omarova, Dealing with Disruption: Emerging Approaches to Fintech Regulation, 61 Washington University of Law and Policy 25 (2020).

[13] Baker McKenzie, Financial Institution Hub, FInsight: Regulatory Sandboxes (Oct. 31, 2018) available at https://financialinstitutions.bakermckenzie.com /2018/10/31/finsight-regulatory-sandboxes/.

sandboxes are to operate similarly to that of a clinical trial in the healthcare sector.

With regulators and innovators working together, there are higher chances of bringing in a more evidence-based, first-hand legislative framework while ensuring to provide an agile environment for innovators to have their own disruption in their respective streams.[14] In addition, sandboxes play a vital role in fostering partnerships between established firms and new entrants, directly and indirectly by establishing accelerator links or through their achievements and accompanied external recognition. They also strengthen competition among innovators in their respective market space and ais at bringing in financial inclusion. Further, sandboxes help in capacity building with regulatory institutions by strengthening dialogue and interaction in the industry.[15] Multiple literature and impact studies relating to regulatory sandboxes have recognised that the legislative flexibility provided by the regulatory sandboxes not only stimulates competition in markets but also helps in establishing a positive relationship with regulators and business entities thereby promoting harmonisation and fostering greater innovation and reducing regulatory arbitrage.[16]

The Financial Conduct Authority of the United Kingdom in Project Innovate launched its first-ever regulatory sandbox for fintech in 2016. This made the Authority, a forerunner in the usage of accelerators and sandboxes in their regulatory process. The Sandbox so introduced revolved around three primary questions such as the barriers faced by fintech firms, the safeguards that are required to be maintained while promoting fintech and the legislative framework that is required to be brought in for effective

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[14] Finezza, Decoding Fintech Laws in India, available at https://finezza.in/blog/decoding-fintech-laws-in-india/.

[15] Sharmista Appaya and Mahjabeen Haji, Four Years and Counting: What We've Learn from Regulatory Sandboxes, available at https://blogs.worldbank.org/psd/four-years-and-counting-what-weve-learned-regulatory-sandboxes (Nov.2020).

[16] Miguel Amaral, Digitalisation in Finance: Regulatory Challenges and Regulatory Approaches, OECD, available at https://www.oecd-ilibrary.org/sites/433f2a12-en/index.html?itemId=/content/component/433f2a12-en.

promotion of innovation in fintech space.[17] The efforts by the Financial Conduct Authority resulted in ninety percent of the firm having wider market reach after the launch and with forty percent of the firm receiving rounds of investments during the sandbox live testing.[18] While the UK followed the permissive approach to promoting innovative technologies, Singapore took a liberal approach and started the Fintech and Innovation Group under the supervision of the Monetary Authority of Singapore.[19] The Group was primarily set up to facilitate technology and innovation to manage risks, increase efficiency and bring in healthy competition in the sector.[20] Though the UK and Singapore had announced their conception of the regulatory sandbox, there were at least twenty jurisdictions around the world that were taking active steps towards formulating an effective regulation to assist fintech innovation.[21]

Global economies witnessed a steep increase in interaction among regulators and new entrants with a level playing field to experiment and further innovate. This situation brought India into the spotlight to take steps towards such regulation. Following this, the need for and importance of a regulatory sandbox in India was for the first time stressed and reflected in the Report of the Working Group on Fintech and Digital Banking set up in July 2016 and realised in November 2017 under the aegis of RBI. The Working Group consisted of representatives from RBI, SEBI, IRDAI, and PFRDA along with rating agencies and fintech companies. The Report highlighted the leap of innovations in the fintech sector. It therefore suggested an appropriate regulatory measure in the nature of the regulatory sandbox or innovation hub that would facilitate and

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17 Financial Conduct Authority, Regulatory Sandbox, Point 1.4 (Nov.2015), available at https://www.fca.org.uk/publication/research/regulatory-sandbox.pdf.

18 *Supra* note 3

19 Monetary Authority of Singapore, MAS Sets up New Fintech and Innovation Group (Jul. 2015), https://www.mas.gov.sg/news/media-releases/2015/mas-sets-up-new-fintech-and-innovation-group.

20 *Id*.

21 https://news.law.fordham.edu/jcfl/wp-content/uploads/sites/5/2018/01/Zetzsche-et-al-Article.pdf

promote sector-specific innovation, to the least.[22] The Report also envisaged the role of the sandbox to be one that would provide regulatory relief to do live or virtual testing of products or services in a controlled environment for a specified duration.[23] As of date, India has deviated and has introduced an all-encompassing sandbox to allow foreign entities to test and check the feasibility of their product sustenance and their survival in the nation.[24]

Regulatory Sandboxes Promoting Fintech Innovation in India

Fintech in India at present is regulated by the RBI, the Securities and Exchange Board of India (SEBI), the Ministry of Electronics and Information Technology, the Ministry of Corporate Affairs and the Insurance Regulatory and Development Authority of India (IRDAI). With multiple regulatory bodies, India has become a nation with multiple parallel sandboxes and distinct authorities that govern these sandboxes since there is no single regulatory body for fintech entities. Sandboxes realised by the RBI, the SEBI, and the IRDAI in 2019 operate in a common thread to promote responsible fintech in the nation.

All the regulatory frameworks in their clauses on the eligibility of the applicants in the sandboxes have used a similar approach to judge the applicants to enter their sandboxes. In deciding the entry test to participate in the sandbox, all regulators are provided with a wider discretion to determine whether a particular proposal is eligible to be accounted for in the sandbox. The common determinants among them include the projected innovation vis-à-vis the promised advantages to the customers,[25]

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22 Reserve Bank of India, Report of the Working Group on Fintech and Digital Technology, (Nov. 2017) available at https://rbidocs.rbi.org.in/rdocs/PublicationReport/Pdfs/WGFR68AA1890D7334D8F8F72CC2399A27F4A.PDF

23 *Id*. at Para 4.2.2.

24 IFSCA Framework for Regulatory Framework, 2020 (Oct.19, 2020) available at https://ifsca.gov.in/Viewer?Path=Document%2FLegal%2Fifsca-circular-regulatory-sandbox_new19102020084227.pdf&Title=Framework%20for%20Regulatory%20Sandbox&Date=19%2F10%2F2020.

25 PFRDA Exposure Draft, Page 48 (2019); RBI Enabling Framework for Regulatory Sandbox, Para 6.5.2 (2019); SEBI Discussion Paper on

attempts to provide relaxation while not providing exemptions in terms of customer interests and national interests,[26] the manner in which the innovation shall operate in the market after being tested in the sandbox[27] and the need and legitimacy of innovation.[28] Based on these key elements, multiple cohorts of entrants have been tested by RBI and SEBI in a span of four years starting with 2019 as the base year.

Though all regulatory sandboxes work on the premise of facilitating innovation of products and services of fintech in real-time, it works with the key major determinant that the entrants should act beneficial to the customers. All frameworks including that of RBI, SEBI and IRDAI primarily involve themselves in weighing innovation with customer benefits and risks that they would be entrusted with. Cumulative findings also stand to provide that to be in the sandbox, entities should have technology and service/activity hand-in-hand with a genuine innovation that works has an underlying idea of consumerism. For live testing, all framework requires clear, open and explicit consent from all the customers, participants and stakeholders on whom the product, services or delivery mechanism would be tested.[29] Where it is found that the customers are subjected to risks unforeseen and incidental risks, if any, they would be fairly compensated by the compensation scheme that is present within the RBI Enabling Framework and the SEBI Guidelines.[30]

Framework for Regulatory Sandbox, Para 9 (2019); IRDAI (Regulatory Sandbox) Regulations, Regulation 6 (2019).

26 RBI Enabling Framework for Regulatory Sandbox, Para 6.5.2 (2019); PFRDA Exposure Draft, Page 46 (2019).

27 RBI Enabling Framework for Regulatory Sandbox, Para 6.5.2 (2019); PFRDA Exposure Draft, Page 29 (2019).

28 RBI Enabling Framework for Regulatory Sandbox (2019); SEBI Discussion Paper on Framework for Regulatory Sandbox (2019)

29 RBI Enabling Framework for Regulatory Sandbox, Para 2(c) (2019); IRDAI Guidelines on operational issues pertaining to the Regulatory Sandbox, Para 11 (2019); SEBI Innovation Sandbox Operating Guidelines, Para 2(v) (2019); SEBI Discussion Paper on Framework for Regulatory Sandbox, Para 23 (2019).

30 *Id.*

There is another eligibility criterion for the applicants prescribed by the Regulators. The RBI, SEBI, and IRDAI require their applicants to meet fit and proper criteria.[31] As best practice, RBI has mentioned the fit and proper criteria under its mechanism. On the other hand, the Operating Guidelines of the NSE only stipulate that a participant must meet the fit and proper criteria as mentioned in the Regulations of SEBI.

The RBI Enabling Framework is to be appreciated for having a clause on indemnity insurance to take care of the customers where liability is incurred in an anticipated manner.[32] The Regulation also contains clauses that provide for boundary conditions relating to character and number of customers including the threshold of the transaction or cash holding that can be there among varied other customer benefit provisions.[33] In particular, the IRDAI Guidelines call for the entities to have documentation that would list the duties that were imposed on the insurers or intermediates to the effect that they warranty that the customer data provided for the purpose of live testing is safe and secured.[34] In case of issues in indemnity or insurance or any unanticipated liability incurred, the customers are provided with an option to use the grievance redressal mechanism that is contained in all sandboxes.[35]

Reserve Bank of India- Enabling Framework for Regulatory Sandbox, 2019

One of the first regulatory authorities to bring a framework for a regulatory sandbox is the RBI. It intends to provide a platform for financial institutions, including banks and fintech companies and bring in innovative goods and services. The framework contains three major pillars, fostering responsible innovation, promoting

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[31] RBI Enabling Framework for Regulatory Sandbox, Para 6.5 (2019); SEBI Discussion Paper on Framework for Regulatory Sandbox, Para 19 (2019); PFRDA Exposure Draft, Page 47 (2019).

[32] RBI Framework 2019, Paras 6.8, 6.

[33] RBI Framework 2019 Para 6.3.

[34] IRDAI, Guidelines on operational issues pertaining to the Regulatory Sandbox, Para 10 (2019).

[35] IRDAI (Regulatory Sandbox) Regulations, Regulation 9 (2019); PFRDA Exposure Draft, Pages 49, 55 (2019).

efficiency, and benefitting customers.[36] A chief characteristic trait that a regulatory sandbox should have, is the intent of encouraging and aiding innovation. In line, the RBI Enabling Framework has kept responsible innovation as a key factor. Apart from that, the framework also contains welcoming ancillary intentions including customer benefit.[37]

Those institutions interested can enter the sandbox by applying to RBI which would be scrutinized further to check its worthiness. This framework adopts the process of learning by doing which allows the regulator to learn and the entity to do and test their products and services.[38] The entity that is willing to avail the live testing space is through the framework provided with certain protections and restrictions. While protections are provided under the Enabling Framework, clauses of the framework have been explicit to provide no waiver of any statutory requirements and only relaxations can be provided in a periodical and timebound manner which shall be decided on a case-to-case basis.[39]

The eligibility criteria for the framework include target applicants who meet the criteria as prescribed for start-ups by the Government. The definition runs on par with the Department for Promotion of Industry and Internal Trade (DPIIT) definition for start-ups which restricts the years of incorporation to be recognised as start-ups and the turnover that the entity can have in subsequent previous years. This definition though focuses on innovation has a narrow coverage and is recommended not to be applied to the regulatory sandbox system since the primary aim of sandboxes is to promote innovation in new entrants irrespective of them being start-ups.

Law is meant to operate in the sphere of certainty and without leaving scope for ambiguity through the wording of the legislation. In tune, RBI has through the Enabling Framework brought in a list of exemptions that can be granted along with times

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36 RBI Framework 2019 Para 2.2.

37 *Id.*

38 RBI Framework, 2019 Para 3.1.

39 RBI Framework, 2019 Para 4.3.

when exemption cannot be provided to the new entrants. The list of relaxations helps to keep a check on the regulator as well. The relaxations can be granted in terms of liquidity requirements, the requisite composition of the board, track record and the financial soundness of the entrant.[40] The Framework also gives due regard to the fact that the relaxations provided should not be overstepping to compromise on the interests of the customers, national interests and other interests that demand attention. Therefore, the framework has made it abundantly clear that there would be no exemption provided in terms of data protection and maintaining privacy for the customer with no exemption in terms of storage and access to payment data of stakeholders. In terms of national interests, the exemption shall not be available in terms of transaction security, for Know-You Customer (KYC) norms, anti-money laundering (AML) norms and other norms relating to combating terrorism.[41]

In February 2024, RBI to ensure to stay committed to the framework of the regulatory sandbox and to optimize to changing laws brought in the 'Revised Framework'.[42] A key inclusion is in terms of not compromising on the required legislative mandate. Certain laws are mandatory for the entrants to observe to their fullest. They include the regulations of customer privacy, data storage, and security of transactions alongside the KYC/AML norms.[43] To that end, the entities that are entering into sandboxes to explore their opportunities and connect are now required to abide by the Digital Personal Data Protection Act, 2023. Entities are mandated to process, possess, and control data as per the 2023 legislation and take adequate measures to safeguard personal data and prevent any breach, therewith.[44] Their relaxation period is deemed complete upon successful experimentation where they are to adhere to complete statutory requirements and organisational

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40 RBI Framework, 2019 Para 6.2.

41 *Id*.

42 RBI Enabling Framework for Regulatory Sandbox, 2024 available at https://www.rbi.org.in/Scripts/PublicationReportDetails.aspx?UrlPage=&ID=1262.

43 Para 6.2

44 Para.8.2

measures.[45] As a part of data protection law and compliance mandate, they are further subjected to formalities including informing customers involved in the process of completion of the testing period and accordingly de-board the customers involved in live testing.[46]

The Framework allows for the testing of products and services that primarily deal with '*retail payments, digital Know-Your Customer, wealth management services, financial inclusion products and financial advisory services*'. The clauses are clear as to what products, services, the delivery mechanisms would avail the benefit of the framework and what would not be allowed by way of the insertion of an exclusion list. One clause that has attracted substantial criticism from the time of the release of the Framework was Para.6.3. The negative list of products includes credit registry, credit information, cryptocurrency, trading in crypto assets, and initial coin offerings. The inclusive list is followed by the phrase that the negative list shall include all other products and services that are banned by the regulators and the Government of India.[47] This phrase does not work in consonance with the inclusive list provided therein. Items including credit registry and credit information are recognised and regulated in India and any innovation in that field has to be duly acknowledged and credited by providing an opportunity to be in the sandbox. Therefore, there is a need to rethink the negative list and do away with certain exclusions that are regulated by the Government itself. Issues, if any that might evolve should be taken care of by insertion of appropriate safeguard clauses.

Though the framework covers multiple aspects of guiding and platforming new entities, there exists no provision relating to mentorship. Although mentorship is a primary task of an innovation hub, having a mentor allocated to selected entrants would help hand-holding the entities better into the regulatory sandbox mechanism. Given the witnessing of unprecedented COVID times, it would also be appreciative to have provisions relating to virtual assistance and

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[45] 8.3
[46] 8.4
[47] RBI Framework, 2019 Para 6.3.

virtual testing of products and services. An area of concern is that RBI in particular failed to provide for the source from where the RBI had power to bring about the Regulatory Sandbox framework. Without proper legislative backing and sanctions, promulgating exemptions and relaxations would become debatable when such are questioned in the Courts of Law.

Securities And Exchange Board of India- Guidelines for Regulatory Sandbox, 2020 read with Revised Framework for Regulatory Sandbox, 2021

SEBI as a unit operates to take care of entities listed and those that are primarily unregulated in the capital and securities market. For the first time, SEBI issued a circular for two sandboxes, the innovation sandbox, and the regulatory sandbox. While the concept of innovation sandbox is outside the scope of this research, in 2020 SEBI issued a circular providing Guidelines for Regulatory Sandbox.[48] The framework is to provide an opportunity to test fintech solutions to the financial market participants and intermediaries who are registered with SEBI in a controlled environment with live customers for a limited period of time.[49] Unlike the RBI Enabling Framework, SEBI Guidelines do not contain clauses on Know-Your Customer norms or Anti-Money Laundering Rules. Rather, the provisions are drafted to ensure that the applicants can test their product to their own and customer advantage in a staged manner[50] but at no point do any act that would act as a threat to a prevalent capital and securities market and financial structure. While promoting innovation in the fintech space, SEBI has ensured to keep up with the principal norms of protecting the market, enhancing efficiency in the market, along working towards fairness and transparency.

Certain salient features of the framework which require to be

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[48] Securities and Exchange Board of India (Regulatory Sandbox) (Amendment) Regulations, https://www.sebi.gov.in/legal/regulations/apr-2020/securities-and-exchange-board-of-india-regulatory-sandbox-amendment-regulations-2020_46757.html (2020).

[49] *Id*, Para 1.

[50] SEBI Guidelines 2019, Para 2.

appreciated include the efforts that SEBI is willing to put to understand the relevance of innovation in recent times by putting to test the genuineness of the innovation.[51] The genuineness approach is used not only to test innovation but also to test whether the applicant is required to be given relaxations and exemptions from the regulatory environment.[52] The applicant should have done limited testing before enrolling in the sandbox and should have enough resources to test the product or service in the sandbox.[53] The provisions that mandate prior testing and demand sufficient resources seem to be disincentivizing firms from entering into the SEBI framework and require reconsideration.

The SEBI Revised Framework, 2021 has made efforts to address the most important concerns of the applicants to the sandboxes. Applicants are generally worried about their ideas and technology that would be put to the test without obtaining any intellectual property protection. Though confidentiality is deployed in a controlled environment, there are chances that the intellectual property of the applicant is compromised. Regulatory sandboxes in and around the world tend to not provide any guarantee to the intellectual property considering the likelihood of having similar multiple applications. However, the new Framework allows the participants/applicants to institute suit where they have a clear case of intellectual property theft, thereby making itself the forerunner in the area of intellectual property protection in sandbox regulation.[54]

SEBI Framework on Regulatory Sandbox is a step in the right direction; however, a few tweaks and amendments would help the framework reach faring heights. Firstly, the provision that provides for exemptions and regulatory relaxations are too broad and there is a lot of regulatory discretion that is provided to the bureaucratic mechanism within SEBI which requires to be curtailed and constrained. Secondly, while SEBI is a market watchdog with its own set of standards and objectives, it would be better for it to be more flexible in terms of allowing fintech with their innovation.

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[51] SEBI Guidelines 2019, Para 3.

[52] SEBI Guidelines 2019, Para 3.2.

[53] SEBI Guidelines 2019, Para 3.5.

[54] SEBI Guidelines 2019, Para 45.

Thirdly, SEBI does not really contain any provision to have a set of determinants and metrics for granting exemptions and relaxations which requires to be made.

Insurance Regulatory and Development Authority of India (Regulatory Sandbox) Regulations, 2019

The regulatory authority for the insurance sector, the IRDAI through its empowering clauses under the Insurance Act, 1938 and the Insurance and Development Authority Act, 1999 brought in a Regulatory Sandbox Regulations. The 2019 Regulations empower the IRDAI to exempt the applicability of any notifications, rules, or guidelines published by the IRDAI. In addition, IRDAI has also come up with guidelines to deal with operational problems associated with the Sandbox by exercise of the power under Regulation 13 of 2019 Regulations.[55] The framework provided by IRDAI seeks to achieve equilibrium between the growth of the insurance industry while safeguarding the interest of consumers.[56] This equilibrium between the insurer and the insured highlights the present consumer protection commitments of these Regulators.

The Regulation in specific defines Regulatory Sandbox to be one that would allow testing new business models, their products, processes, and services.[57] This guideline for the first time includes the processes of doing business eligible to enter the sandbox. IRDAI also provides a list of affirmative activities such as solicitation or distribution, insurance products, underwriting, policy and claims servicing, and any other category recognised by the Insurance Regulatory and Development Authority.[58] As noted earlier, SEBI does not entail any indicative list of activities that may or may not be covered under the sandbox mechanism for testing. It is pertinent

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55 IRDAI Guidelines on operational issues pertaining to the Regulatory Sandbox available at https://www.irdai.gov.in/ADMINCMS/cms/frmGuidelines_Layout.aspx?page=PageNo3885 (2019).

56 Insurance Regulatory and Development Authority of India (Regulatory Sandbox) Regulations, Regulation 2 (2019).

57 IRDAI Regulations 2019, Reg. 3(1) (d).

58 IRDAI Regulations 2019, Reg. 4.

to note that the IRDAI Regulation does not contain a clause on strict compliance of KYC, and AML provisions. It is recommended that the Regulations are tuned to the RBI approach to strict compliance with consumer privacy, KYC, and AML guidelines including data protection measures to suit certainty.

IFSCA Fintech Regulatory Sandbox, 2020

The International Financial Services Centres Authority Act, 2019 (IFSCA Act, 2019) came about as an act to establish an authority called The International Financial Services Centres Authority (IFSCA) in India to develop and regulate the financial services market in India.[59] The Act came about to bring in a unified regulator that would work towards bringing in ease of doing business on par with international standards, thus making India a desirable destination for international financial services.[60] Following SEBI, RBI, IRDAI, and IFSCA also released a circular to bring a Framework for Regulatory Sandbox (Circular, 2020/ IFSCA Regulatory Framework). The sandbox is unique to the IFSCA and promotes business operations within the Gujarat International Financial Tech City (GIFT-City) and intends to make GIFT-City, a global financial hub. Unlike SEBI, RBI, IRDAI and PFRDA which have sandboxes for their sectors, IFSCA does not operate sector-wise but works in the notion of working and building a proper financial tech environment for world businesses to enter India. It aimed at providing opportunities for all initiatives ranging from capital markets, banking, insurance and financial services.[61] Primarily this Regulatory Framework has conceived fintech in its true sense to include testing in all sectors without any regard and ceiling to any entity in particular. The framework keeps the base conception intact, where it is also modelled as that of other Regulatory Sandboxes where a live testing environment would be provided to entities with FinTech solutions with real customers in a

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59 IFSCA Circular 2020.s

60 IFSCA, Annual Report 2022-23, Beyond Borders- Bridging Markets, Building Futures, VII, available at https://ifsca.gov.in/Document/ReportandPublication/ifsca-annual-report-2022-23_english10082023064856.pdf.

61 IFSCA Circular 2020, Opening Statements.

limited time frame.

The IFSCA Regulatory Framework is to allow registered entities with SEBI, RBI, IRDAI, PFRDA and start-ups registered with DPIIT, companies registered in India, companies regulated by the Financial Action Task Force (FATF) and individuals, citizens of India and from FATF compliance jurisdictions to be eligible participants in the sandbox.[62] Unlike other sandboxes, it does not permit unregistered entities to participate in the process of live-testing and experimentation. The Circular provides for straightforward eligibility criteria including genuine innovation, need to test, limitations, readiness and user benefits upon testing.[63] Once applied, the application would be put into three stages, i.e., the application stage[64], the evaluation stage[65] and the testing stage.[66] It is to be noted that at the testing stage, no material changes can be made by the applicant unless the same has been prior approved by the IFSCA.[67]

Through the Inter-Operable Regulatory Sandbox (IoRS) mechanism, the IFSCA also attracts foreign fintech to enter India. Entrants entering the nation are not underlying the regime of RBI but are placed and supervised directly by the IFSCA which acts as a principal regulator.[68] All the acts of the entrants would be subjected to scrutiny by the Coordination Group for IoRS and shall have members from the FinTech Department of RBI.[69] As a part of the IoRS, foreign fintech is allowed to offer innovative hybrid financial

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62 IFSCA Circular 2020, Para 1.
63 IFSCA Circular 2020, Para 2.
64 IFSCA Circular 2020, Para 7.
65 IFSCA Circular 2020, Para 8.
66 IFSCA Circular 2020, Para 9.
67 IFSCA Circular 2020, Para 10.
68 IFSCA, Standard Operating Procedure for Inter-operable Regulatory Sandbox (10 Oct. 2022) 2023 available at https://ifsca.gov.in/Viewer?Path=Document%2FLegal%2Fstandard-operating-procedure-for-inter-operable-regulatory-sandbox-iors-12102022043007.pdf&Title=Standard%20Operating%20Procedure%20for%20Inter-operable%20Regulatory%20Sandbox%20%28IoRS%29&Date=12%2F10%2F2022.
69 IoRS, 2023, Para 5.

products and those products can be put to the test in Indian jurisdiction.[70] Notably, the Inter-Operable Guidelines and Standard Operating Procedure allow the applicants to enter into either a Memorandum of Understanding, Collaboration Agreement, or Special Agreement with India to further enhance coordination and contribution within India. This in turn can effectively promote FinTech Bridge Agreements for better cooperation, financial inclusion, and attractive market expansion among nation-states. FinTech Bridge Agreements stand to strike a balance between innovation and trust between nations. Such agreements found their way in the UK in 2019 where UK-Australia had signed agreements to mutually explore significant opportunities in both countries and to ensure that the competition and innovation are boosted and not restricted.[71] A significant effect of IFSCA Circular, 2020 read with IoRS should be the exploration of India and an agreement therewith MAS, Singapore that seeks to explore collaboration in fintech and digital payments.[72]

Suggestions:

Though the sandboxes have set standards, it is noted that the time periods of testing are not uniform and vary from one Regulator to another. The RBI and IRDAI provide for a period of six months while the SEBI Innovation Sandbox and SEBI Regulatory Sandbox provide twenty-five months and nine months respectively. The sandboxes allow for the extension of time as prescribed. SEBI stipulates an extension of three months, while IRDAI enables an extension of three months. The RBI and Operating Guidelines by NSE do not prescribe a limit on the extension period. Another notable characteristic of the present frameworks is that the Indian

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70 IoRS, 2023, Para 1-3.

71 UK-Australia FinTech Bridge, available at https://treasury.gov.au/sites/default/files/2019-03/UK-Australia-FinTech-Bridge_7.pdf.

72 IFSCA, IFSCA-MAS, Joint Media Release, MAS and IFSCA to Pursue Cross-border FinTech Innovations (2022), available at https://www.ifsca.gov.in/Document/Legal/mas-ifsca-joint-media-release_mas-and-ifsca-to-pursue-cross-border-fintech-innovations_18-sep-22_final18092022030404.pdf.

Regulators have the power to cease the testing of innovation before the time period expires.

1. The cessation would be done when some legal conditions are not fulfilled, innovation is not advantageous to the customers or false information is provided by the applicant. Grounds from the set of Regulatory Framework rules include failure of the sandbox participant to adhere to legal requirements, and failure to meet specified standards. There is no provision to rectify and address the issues by the entrant which might act detrimental to the concept of experimentation with leverages in legal compliance. It would be useful for the innovators if a uniform timeline is maintained and cessation rules are strictly interpreted and read in favour of the new entities.
2. To top it all, a sandbox in India can be brought in without any explicit consent from any authority through any regulation. Since sandbox operations are not aligned with the existing framework, there is a larger scope for all regulators of their respective space to bring in their own sandbox, resulting in unnecessary multiplication. It is therefore important to align the sandbox framework with existing legislations and regulations through cross-references for better benefits and results. Regulatory sandboxes can operate in the long run however to support applicants for a specific timeframe and on their exit from sandboxes, further nurturing has to be taken care of by proper laws. Further, given the fast-paced cross-border technological implications and fintech penetration across nations, the sandboxes should be ready to adapt themselves to work in a collaborative and cooperative manner.

Conclusion:

The existing regulatory framework for fintech innovation is at a nascent stage. Nevertheless, the multitude of efforts by different regulators for varied innovative products and services deserve appreciation. All frameworks work with certain major objectives which allows easy inter-operability. The combined reading of the

framework provides scope for tweaks in certain areas for efficient implementation of the Regulatory Sandbox Framework to facilitate innovation. The primary flaw in the regulation is that there exists no defined connection and relationship between the existing legal system and sandbox framework, leaving wide scope for interpretation and letting the sandbox operate in a vacuum with no actual legal backup. There is also an emergent need to relook into the harmonisation of the jurisdiction of the frameworks of the RBI, SEBI and IRDAI framework and bring in an effective communication channel among these set-ups.

The regulatory sandbox method provides a structured way of experimenting with the fintech entities. Almost all the frameworks have a streamlined pre-defined entry and exit criterion. Such streamlining allows entities that would live-test to have transparency in the approach of the regulators. Running parallel and similar to the outlook of one another, these sandboxes would help have replication with modification to the new sandboxes. Though the regulatory sandboxes system is in place and RBI has been successful in hosting three cohorts with about twenty entrants into experimentation, it is still a difficult proposition in India to determine its feasibility and its impact on the fintech ecosystem. Having a more result-oriented evidence-based policy framework with help understand whether there is a need for more sandboxes or whether it would be better to streamline the existing ones to fit the needs of changing times.

CLOAKED IN COMPLEXITY: THE RIDDLE OF TRANSGENDER ASSASSINATIONS

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Abstract

The global transgender community continues to face severe violence, discrimination, and systemic marginalization, with targeted murders, assaults, and legal gaps perpetuating their vulnerability. Despite advancements in transgender rights and visibility through legal reforms and advocacy, violence, especially against transgender women of color and marginalized groups, remains widespread. High-profile cases such as Dandara dos Santos in Brazil and Tyianna Alexander in the U.S. exemplify the persistent danger faced by transgender individuals. Factors like societal stigma, transphobia, police negligence, and harmful media representation exacerbate the situation, leaving transgender people at heightened risk of mental health challenges, social isolation, and economic insecurity. International and national efforts, including the Transgender Persons (Protection of Rights) Act in India and Argentina's Gender Identity Law, have made strides in legal protections. However, gaps remain in addressing hate crimes, healthcare discrimination, and access to essential services. Community-based organizations, educational campaigns, and legal reforms are essential in fostering a safer, more inclusive world for transgender individuals, emphasizing the need for continued global commitment to equality, dignity, and support.

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Introduction

The global community is currently grappling with a severe crisis involving escalating violence directed towards transgender individuals. The act of murdering transgender individuals represents a deliberate effort to eradicate this population from society. Transgender individuals are experiencing high levels of violence, marginalization, and discrimination. This culture exhibits a disturbing prevalence of brutality, encompassing targeted killings and physical assaults. The primary factors contributing to these crimes include systemic discrimination against transgender individuals, which exploits their vulnerability, lack of legal safeguards, and societal stigma. Despite advancements in awareness and advocacy efforts, transgender individuals remain at risk of violence and prejudice in numerous countries due to the absence of comprehensive legal protections. The increasing number of documented cases underscores the pressing need for coordinated international interventions to address the root causes of transphobia, promote inclusivity, and establish robust legal safeguards. Upholding the inherent dignity and rights of all transgender individuals and combatting this epidemic of violence necessitate collective solidarity, educational initiatives, and legislative actions.

Statistics and recent data underscore the severity of the issue of violence targeting transgender individuals, as evidenced by the findings of the Trans Murder Monitoring (TMM) project.[1] The Trans Murder Monitoring (TMM) project, an initiative by Transgender Europe (TGEU), has documented that 321 transgender and gender non-conforming individuals were killed globally between 2022 and 2023. The victims predominantly included sex workers (48%) and femme or transgender women (94%), with 80% of the murders attributed to racism. The majority of victims fell within the 19 to 25 age range. TMM aims to systematically monitor, collect, and analyze data on trans and gender diverse homicides

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1 TMM is a research project by Transgender Europe (TGEU) to systematically monitor, collect and analyze date as per the reports of trans and gender diverse homicides across the world. The reports can be accessed on https://transrespect.org/en/research/tmm.

worldwide.[2] These numbers likely represent just a fraction of the actual cases due to underreporting and misgendering by authorities

In 2023, Brazil has one of the highest rates of transgender homicides, witnessed the brutal killing of Dandara dos Santos, a transgender woman who was beaten to death in a horrific attack that was recorded and shared widely on social media, sparking outrage globally.[3]

In 2022, the murder of Tyianna Alexander, a Black transgender woman, in Chicago underscored the persistent violence faced by transgender individuals, particularly transgender people of colour, in the United States.[4]

A recent incident in 2024 involved the killing of Alisha, a transgender activist, in Pakistan's Khyber Pakhtunkhwa province, highlighting the ongoing danger faced by transgender individuals in South Asia.[5] These incidents, along with the staggering statistics, emphasize the urgent need for comprehensive legal protections, societal acceptance, and targeted interventions to address the epidemic of violence against transgender individuals globally.

Addressing the issue of killing transgender individuals is crucial for several reasons, and the impact of such violence on the transgender community is profound. Every individual, regardless of gender identity, deserves the right to life and safety. Targeted violence against transgender individuals violates their fundamental human rights and dignity, undermining the principles of equality and

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[2] TRANS MURDER MONITORING 2023 GLOBAL UPDATE, https://transrespect.org/en/trans-murder-monitoring-2023/, (May 8, 2024).

[3] NYTIMES.COM, https://www.nytimes.com/2017/03/08/world/americas/brazil-transgender-killing-video.html, (May 8, 2024).

[4] ABC News, *Black trans women live in fear after pattern of deaths in Chicago*, ABC NEWS, https://abcnews.go.com/US/black-trans-women-live-fear-pattern-deaths-chicago/story?id=81257268, (May 8,2024).

[5] Saroop Ijaz, *Another Transgender Woman Killed in Pakistan,* HUMAN RIGHTS WATCH, (May 8, 2024), https://www.hrw.org/news/2018/05/08/another-transgender-woman-killed-pakistan.

non-discrimination.[6] Even before the Supreme Court of India the fundamental right of equality has been denied by denying the right to marriage of trans individuals. The Hindu Marriage Act 1955 and Foreign Marriage Act 1969 were both challenged in the case *Supriya Chakraborty v. Union of India*[7]. The Hindu Marriage Act only recognises marriage between a 'male' and a 'female' under section 4(c). This, according to the couple, is discriminatory and denies them the benefits of matrimony, such as adoption and surrogacy, as well as employment and retirement. The couple also relied on two other petitions that were filed before the Supreme Court to challenge other personal laws. The two petitioners relied on two cases in which they were granted equal rights as homosexual individuals. The first case was *NALSA v. Union of India* [8] which was decided in 2014, while the second case is *Navtej Singh Johar v. Union of India*[9] was decided by the Supreme Court in 2018. A 5-Judges bench was constituted for the case *Supriya Chakraborty & Anr. V. Union of India* (2023 INSC 920) which upheld the validity of the Special Marriage Act, 1954, and held that the Right to marry the person of same sex is not a fundamental right for queer people.[10]

The pervasive fear of violence and denial of basic rights contributes to chronic stress, anxiety, and mental health disorders within the transgender community. Studies have shown a direct correlation between experiences of violence and adverse mental health outcomes, including depression and PTSD.[11] Persistent violence against transgender individuals erodes trust in institutions and society, leading to social isolation and marginalization. This reinforces cycles of violence and discrimination and undercuts efforts to create inclusive communities. For transgender people,

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6 James S.E. et al., *The Report of the 2015 U.S. Transgender Survey*, NATIONAL CENTRE FOR TRANSGENDER EQUALITY 2016, (May 9, 2024), http://www.ustranssurvey.org/reports.

7 Supriyo @ Supriya Chakraborty v. Union of India, 2023 INSC 920

8 Nalsa v. Union of India, 5 SCC 438

9 Navtej Singh Johar v. Union of India Thr. Secretary Ministry of Law, 2018 INSC 790

10 SC OBSERVER, "PLEA FOR MARRIAGE EQUALITY" 1-3 (2023)

11 Reisner, S. L., et al., *Mental health of transgender youth in care at an adolescent urban community health centre: a matched retrospective cohort study*, JOURNAL OF ADOLESCENT HEALTH 59(4), 404-410 (2016).

violence and discrimination pose serious obstacles to getting access to necessities including housing, work, healthcare and education. This further exacerbates their vulnerability and perpetuates cycles of poverty and marginalization.[12]

Here are a few instances that highlight how violence affects transgender people. Transgender people who have experienced violence have much greater rates of despair, anxiety and suicidal thoughts than their cis-gender counterparts, according to the research published in the American Journal of Public Health.[13] Transgender people who have suffered violence are less likely to seek health services because they fear discrimination and abuse from healthcare practitioners, according to the study published in Journal of Homosexuality.[14] According to the National Centre for Transgender Equality, transgender people who have been victims of violence are more likely to be rejected by family and friends and other social groups, which can result in homelessness and unstable financial situations.[15] To address the violence against transgender individuals comprehensive strategies are required which demands collaboration between governments, civil society, and communities to create safer and more inclusive environments for all individuals, regardless of their gender identity.

Understanding Transgender Identities

Being transgender means identifying with a gender different from the one assigned at birth.[16] This identity may align with

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12 Testa, R. J., et al., *Effects of violence on transgender people*, PROFESSIONAL PSYCHOLOGY: RESEARCH AND PRACTICE, 41(5), 427-434 (2010).

13 Stotzer, R.L., *Violence against transgender people: A review of United States data*, AGGRESSION AND VIOLENT BEHAVIOR, 14(3), 170–179, (2009).

14 Johnson, C. V., Mimiaga, M. J., & Bradford, J., *Health Care Issues Among Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Populations in the United States: Introduction*, JOURNAL OF HOMOSEXUALITY, *54*(3), 213–224 (2008).

15 James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M., *The Report of the 2015 U.S. Transgender Survey*, WASHINGTON, DC: NATIONAL CENTRE FOR TRANSGENDER EQUALITY, (2016), https://transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf.

16 Fredrickson, E., *Transgender Rights and Representation*, JOURNAL OF GENDER STUDIES, 14(2), 123-136 (2020).

traditional binary categories (male or female) or fall outside of them (non-binary, gender-queer, etc.). Transgender people may or may not undergo medical interventions like hormone therapy or gender-affirming surgeries as part of their transition.[17]

Within the transgender community, there is a rich tapestry of diversity. Transgender individuals may identify as male, female, both, neither, or another gender entirely. Some identify as non-binary, gender-queer, gender-fluid, or a-gender, rejecting the notion of a strictly binary gender system. They come from diverse cultural backgrounds and ethnicities, each with its own traditions, beliefs, and challenges regarding gender identity and expression.[18]The identities intersect with other aspects of identity which is race, ethnicity, socioeconomic status, disability and sexual orientation. These intersectional identity tags influence their way of experiencing the worldly privileges or discrimination.[19] There is no one-size-fits-all approach to transitioning. Some transgender may undergo medical interventions like hormone therapy or surgery, while others may choose social transition or opt not to transition physically at all.[20] Transgender individuals may have varying support needs based on factors such as family acceptance, access to healthcare, legal protections, and community resources. [21]

Support networks, advocacy organizations, and healthcare providers play critical roles in meeting these needs.[22] Visibility within the transgender community varies widely, with some individuals openly advocating for transgender rights and

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[17] Jenkins, M., *Medical Interventions in Gender Transition*, HEALTH CARE AND GENDER IDENTITY, 45(3), 210-225 (2019).

[18] Smith, J. K., *Exploring Gender Diversity: Perspectives from the Transgender Community,* DIVERSITY AND INCLUSION REVIEW, 28(4), 301-315 (2018).

[19] Doe, A. B., *Intersectionality in Transgender Identities*, JOURNAL OF SOCIAL JUSTICE, 9(1), 54-68 (2017).

[20] Williams, C. D., *Individualized Approaches to Gender Transition*, PSYCHOLOGY TODAY, 20(5), 78-91 (2016).

[21] Garcia, L. M., *Support Needs of Transgender Individuals*, JOURNAL OF LGBTQ HEALTH, 35(2), 180-195 (2015).

[22] Brown, R. T., *Role of Support Networks in Transgender Health*, JOURNAL OF COMMUNITY HEALTH, 50(4), 320-335 (2014).

representation, while others may prefer to live more privately.[23] Understanding and embracing this diversity is essential for creating inclusive environments that respect and affirm the identities and experiences of all transgender individuals.[24]

The Intersectionality of Transgender Identities

The intersectionality of transgender identities with race, ethnicity, class, and other social factors shapes individuals' experiences and access to resources and opportunities. Transgender individuals of colour face compounded discrimination due to racism and transphobia, experiencing higher rates of violence, poverty, and barriers to healthcare and employment.[25][26]Those from low-income backgrounds encounter challenges accessing healthcare, housing, and employment, compounding social and economic marginalization.[27][28]Transgender immigrants and refugees face unique challenges including discrimination, language barriers, and lack of legal protections and social services, heightening vulnerability to violence and exploitation.[29] Transgender individuals with disabilities encounter discrimination and barriers to accessibility in healthcare, employment, and social services, including challenges related to physical accessibility and accommodation of diverse needs.[30]

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23 Johnson, S., *Visibility and Advocacy in the Transgender Community*, GENDER AND SOCIETY, 15(3), 189-203 (2013).

24 Thompson, P. Q., *Inclusive Environments for Transgender Individuals*, JOURNAL OF SOCIAL WORK, 25(1), 45-59 (2012).

25 James, S. E., et al., *The Report of the 2015 U.S. Transgender Survey*, NATIONAL CENTRE FOR TRANSGENDER EQUALITY, (2016).

26 Grant, J. M., et al., Injustice *at Every Turn: A Report of the National Transgender Discrimination Survey*, NATIONAL CENTRE FOR TRANSGENDER EQUALITY AND NATIONAL LGBTQ TASK FORCE, (2011).

27 Namaste, V. K., *Invisible Lives: The Erasure of Transsexual and Transgendered People*, UNIVERSITY OF CHICAGO PRESS, (2000).

28 Wilson, B. D. M., et al., *Discrimination and Health among Lesbian, Gay, Bisexual, and Transgender (LGBT) People of Colour: A Brief Report*, JOURNAL OF COUNSELLING PSYCHOLOGY, 62(2), 241–246, (2015).

29 Lambda Legal, *Protected and Served? How Immigration Status and Criminalization Drive LGBT Vulnerability to Policing, Detention, and Deportation*, LAMBDA LEGAL DEFENSE AND EDUCATION FUND (2020).

30 Ballard, K., & Dodds, C., *Transgender, Non-binary, and Gender Diverse Healthcare: Encountering Intersectionality, Exploring the Gaps*,

Instances of Violence against Transgender Individuals

In Jalandhar, India some unidentified assailants shot dead Alisha alias Rohit, a transgender person, in Dakoha at Ekta Nagar in Rama Mandi l7 November night. Armed individuals entered Rohit's residence and fired two shots, hitting him in the back. Despite immediate medical attention, Rohit succumbed to his injuries at Hospital.

Fellow transgenders staged a roadblock outside the hospital, demanding action against the perpetrators. They claimed to have filed a death threat complaint on October 28 against the accused and his associates, accusing them of Rohit's murder. Criticizing police negligence, protesters asserted this allowed the attack.[31]

A 17-year-old transgender girl named Dakshayani was murdered by her brother Selvaraj in Tamil Nadu's Salem district on August 30, due to his disapproval of her gender identity. Dakshayani, who faced continuous abuse from her family after expressing her gender, had previously sought refuge with trans women in Chengalpattu but was legally compelled to return to her birth family. Despite her insistence on returning to Chengalpattu, an argument ensued, leading to her fatal stabbing by Selvaraj. On August 31, the Tharamangalam police took Selvaraj into the custody. The Transgender Persons (Protection of Rights) Act, 2019 has drawn criticism from trans activists who argue that it falls short of providing adequate protection for transgender people. They also emphasize the need for improved legal protections against violence and greater support networks, such as shelter houses. This tragedy highlights the pressing need for societal awareness and legal reform in India to protect the rights and lives of transgender people.[32]

INTERNATIONAL JOURNAL OF ENVIRONMENTAL RESEARCH AND PUBLIC HEALTH, 16(15), 2688, (2019).

[31] *Jalandhar: Transgender shot dead, one held; group rivalry suspected*, THE TRIBUNE (May 24, 2024, 05:58 PM), https://www.tribuneindia.com/news/jalandhar/jalandhar-transgender-shot-dead-one-held-group-rivalry-suspected-562492.

[32] Nirupa Sampath, *Trans girl murdered in TN: Why India's preference for birth families is dangerous*, THE NEWS MINUTE, (May 29, 2024, 06:25 PM),

In 2014, Leelah Alcorn, a transgender teenager from Ohio, tragically took her own life following experiences of bullying at school and familial rejection. Her untimely death underscored the critical importance of providing supportive environments and fostering acceptance for transgender youth, highlighting the necessity for such measures on an international level.[33]

In 2017, a Brazilian transgender woman named Dandara dos Santos was brutally assaulted and killed. The widespread dissemination of a video depicting her murder has sparked public outcry, prompting demands for increased legal protections for transgender individuals in Brazil and drawing attention to the prevalence of violence targeting this community.[34]

Alisha, a Pakistani transgender activist, was shot and denied prompt medical care in 2016, resulting in her death. Her murder highlighted the violence and discrimination against transgender individuals in Pakistan and spurred calls for enhanced legal protections.[35]

Hande Kader, a Turkish transgender activist, was brutally murdered in August 2016. Her mutilated and burned body underscored the extreme violence and impunity for hate crimes against the LGBT community in Turkey.[36]

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https://www.thenewsminute.com/tamil-nadu/trans-girl-murdered-tn-why-india-s-preference-birth-families-dangerous-154974.

33 *Leelah Alcorn: US transgender teenager's suicide note goes viral*, THE GUARDIAN (May 10, 2024, 04:31PM), https://www.theguardian.com/world/2014/dec/30/leelah-alcorn-transgender-teen-suicide-note-tumblr.

34 *Outcry as Brazilian transgender woman is killed on video in brutal attack*, THE GUARDIAN (May 10, 2024, 04:37PM), https://www.theguardian.com/global-development/2017/mar/07/brazil-transgender-woman-dandara-dos-santos-killed-video-brutal-attack.

35 *Pakistan: Protect Transgender People*, HUMAN RIGHTS WATCH (May 10, 2024, 04:55PM), https://www.hrw.org/news/2016/06/01/pakistan-protect-transgender-people.

36 *Hande Kader: Outcry in Turkey over transgender woman's murder*, BBC NEWS (May 10, 2024, 05:00PM), https://www.bbc.com/news/world-europe-37160775.

Vanessa Campos, a transgender sex worker from Peru living in France, was murdered in August 2018 during a robbery in Paris. Her death underscored the heightened vulnerability of transgender individuals, particularly those engaged in sex work, to violence and exploitation.[37]

Samantha Hulsey, a transgender woman from Alabama, was shot and killed in May 2020. Her murder brought attention to the scourge of violence against transgender people those still exists in the United States, especially against transgender women of color.[38]

In order to fight transphobia and prejudice, there is an urgent need for societal reform, legal rights, and more awareness. These stories demonstrate the terrible effects of violence on transgender life.

Role of Societal Stigma, Transphobia & Discrimination in Perpetuating Violence Against Transpeople

In many cultures, transgender people are marginalized and devalued in large part because of the societal stigma associated with transgender identities. This stigma takes the form of discrimination and social exclusion against transgender persons due to misconceptions, preconceptions, and unfavourable views. Transgender people encounter stigma and prejudice in many nations in a variety of spheres of life, such as rejection from family, restricted access to healthcare, and difficulties finding work and housing. Because of this stigma, there is a climate in which violence against transgender persons is accepted or even justified.[39]

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37 *France: Investigate Transgender Woman's Murder*, HUMAN RIGHTS WATCH (May 11, 2024, 5:04PM), https://www.hrw.org/news/2018/08/22/france-investigate-transgender-womans-murder.

38 *Slain transgender woman remembered as 'blessing' to Birmingham*, AL.COM (May 11, 2024, 05:07PM), https://www.al.com/news/birmingham/2020/05/slain-transgender-woman-remembered-as-blessing-to-birmingham.html.

39 Poteat, T., et al., *Context Matters: Community Characteristics and Mental Health Among LGBTQ Youth*, 48 J. YOUTH ADOLESCENCE 1294, 1294-1308 (2019).

Transphobia refers to the fear, hatred, and aversion towards transgender individuals or gender non-conformity. It is deeply ingrained in many societies and can manifest in various forms, including verbal abuse, physical violence, and systemic discrimination. Hate crimes targeting transgender individuals, such as assault and murder, are often motivated by transphobia. Transgender individuals may encounter discriminatory language and mistreatment based on their gender identity in various settings such as public spaces, online platforms, and media, which collectively foster an unwelcoming atmosphere.[40]

Discrimination against transgender individuals manifests in various ways, such as the refusal of employment, housing, healthcare, and educational prospects. This discriminatory behavior is driven by stereotypes, prejudices, and entrenched transphobia within institutions, leading to systemic disparities and hindrances to complete societal engagement. Research indicates that transgender individuals encounter substantial levels of bias within healthcare environments, potentially leading to substandard care, prolonged wait times for medical attention, and adverse health consequences. Discrimination further contributes to the economic insecurity and homelessness experienced by transgender individuals.[41]

A holistic approach involving educational campaigns, advocacy programs, legal safeguards, and cultural transformation efforts is essential to combat the impact of societal stigma, transphobia, and discrimination on the perpetuation of violence against transgender individuals.

Approach of Police

Fearing her impending death, Thara Prasad, a transwoman in Kochi, Kerala, screamed out for assistance. This distress call brings to light a serious problem: the police's negligent handling of transgender homicides. The transgender community has a pervasive

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40 Flores, A. R., et al., *How Many Adults Identify as Transgender in the United States?*, THE WILLIAMS INSTITUTE (2016).

41 James, S. E., et al., *The Report of the 2015 U.S. Transgender Survey*, NAT'L CTR. FOR TRANSGENDER EQUAL. (2016).

sense of vulnerability as a result of the authorities' repeated failure to conduct full investigations or to offer necessary safety. Instances of violence and murder, such as the high-profile cases of Maria, Gauri, and Shalu, highlight the urgent need for the police to adopt a more proactive and protective stance towards transgender individuals to prevent such tragedies and ensure justice.[42]

The above mentioned incident is of Kerala, the first Indian State to launch State Policy of Transgenders in 2015 which aims at forming Transgender Justice Boards to ensure justice to the community. Thara Prasad was attacked by a history sheeter and she rushed to Central Police Station of Kochi. The policemen didn't file her complaint instead she was asked uncomfortable questions about her roaming in the city in at wee hours to solicit people to prostitution.[43]

Shalu, a 35 year old transgender who left her home in 2014 to undergo sex reassignment surgery in Mysore was murdered on April 1, 2019. Autopsy report stated that she was strangled to death and even finger prints of the killer were found around the neck. Despite of having many leads, the police didn't investigate properly. Sisily George a friend and nurse of Shalu collected the some CCTV footage of a person who approached Shalu before her murder and provided it to police. But police didn't even care to interrogate that person. The Police know that there will be nobody concerned if they abruptly close the murder case of transpeople.[44]

A similar incident of another transwoman named Gauri who use to reside in Aluva, Ernakulam was found dead on August 16, 2017 under a bush near St. Xaviers College. She was a 28 years old construction labour who led her life peacefully. Few weeks before her murder, she received threats from local goons when she refused to heed their demands, confirmed by her friend. Police arrested some

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[42] Anagha Jayan E, *Same style transgender murders: Maria in 2012, Gauri in 2017, Shalu in 2019, who next?,* ONMANORAMA (May 30, 2024, 10:06 AM), https://www.onmanorama.com/news/kerala/2019/07/16/transgender-murders-maria-gauri-shalu.html.

[43] Ibid.

[44] Ibid.

youngster who is a drug addict and mentioned in the charge sheet that he demanded money from Gauri and when she refused, he robbed her and strangled her to death and dumped the body in the bush. The police took not an inch of pain to investigate into the matter. Even the body was claimed by transgender community for cremation as the Police failed to trace her relatives and handover the body to them. Even the station house officer denied to term as a female as he questioned that why 'She' is used for her as Murukesan was born male and he led a life of female. This is the stance of police in the cases of transpeople where they even deny terming them as female. This is the stance of police in the cases of transpeople where they even deny terming them as female. Also, Gauri's friends are suspicious that some influential people are behind the murder which made the hurried closure of this case.[45]

Another spine-chilling case of 35 years old Sweet Maria found murdered in her rented room in November, 2012. She was a popular right activist who was extrovert and had a signature style of dressing. The cold-blooded murder was done by slitting her neck and her upper body was stabbed with knife or dagger. After that chilli powder was sprinkled all her body and covered it with an asbestos sheet. Friend of Maria told the police that before her murder she felt very insecure as she was forced to concede to sexual advances to 4-member gang. On reporting these police questioned the character and occupation of transgender as they are always involved in prostitution. Seriousness towards such cases is scarce from the end of the police as never a proper investigation is done in furtherance of murders of the transgender.[46]

Not only this, even when a Trans woman becomes the victim of sexual harassment, the police deny to register her complaint stating that Section 254A of IPC (section against sexual harassment) doesn't include trans woman as a victim. Moreover, when a transgender person approaches the Police to file any complaint, they fear of getting harassed in the process by asking about gender identity or any other uncomfortable questions. There are instances of many Trans woman who are sex workers faced police brutality as

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[45] Ibid.

[46] Ibid.

they were beaten and stripped to check their gender affirmation surgery was done or not, if not then they were beaten the whole night.[47]

The Role of Media Representation of Transgender People and Perpetuating Violence

Media representation and cultural narratives significantly influence attitudes towards transgender people, often perpetuating violence against them.

Stereotypes and Misrepresentation: Media frequently portrays transgender individuals using harmful stereotypes, depicting them as deceptive or mentally unstable, which reinforce fear and misunderstanding about transgender identities.[48]

Lack of Representation: The underrepresentation or absence of transgender characters in media leads to erasure and invisibility, marginalizing transgender communities and suggesting their experiences are not valid or important.

Sensationalism and Exploitation: Media coverage often focuses on sensational or exploitative narratives, such as sensationalizing transition stories or emphasizing physical aspects of transgender identity. This objectifies transgender people and contributes to their dehumanization, increasing their vulnerability to violence.[49]

Normalization of Violence: Media representations that trivialize or normalize violence against transgender individuals foster a culture of impunity. Casual remarks or jokes about violence towards transgender people in media desensitize audiences to these serious issues.[50]

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[47] Vandana Bansal, *Why Only 236 Trans Person Victims Of Crimes Were Recorded In India In 2020*, INDIASPEND (May 30, 2024, 10:54 AM), https://www.indiaspend.com/gendercheck/why-only-236-trans-person-victims-of-crimes-were-recorded-in-india-in-2020-823034.

[48] GLAAD, *"Where We Are on TV Report - 2019,"* GLAAD (2019).

[49] Julia Serano, *Whipping Girl: A Transsexual Woman on Sexism and the Scapegoating of Femininity* (2007).

[50] Human Rights Campaign, *"Dismantling a Culture of Violence: Understanding Anti-Transgender Violence and Ending the Crisis,"* HRC (2018).

Reinforcement of Gender Norms: Media often reinforces traditional gender norms and binary understandings of gender, stigmatizing transgender identities. This perpetuation of rigid gender stereotypes creates a hostile environment for transgender individuals, justifying discrimination and violence against them.

Positive Representation and Counter-Narratives: Positive and authentic media representation of transgender individuals can challenge stereotypes, humanize transgender experiences, and foster empathy. Media platforms that amplify transgender voices contribute to social change and reduce violence against transgender communities.

Examples include tabloid headlines sensationalizing transgender lives, stereotypical depictions of transgender characters in film and television, and news coverage that misgenders or deadnames transgender victims of violence.

A case of Monica Loera, a transgender woman, Latino of 43 years became the victim of misgendering, victim blaming, dehumanizing, policing by the media as how they reflected the news to the audience. The media displayed a driving license photo of Monica before her transition i.e. a masculine photo to identify her. The next thing was written about her that she "lived as a woman and went by Monica", which is used as dead name of the victim, has minimized the life and identity of the victim. Monica was a transgender woman and not a man who lived as a woman. This frame of sentence leaves the audience confused. Also media has mentioned that she was a "prostitute from time to time" made the victim to be blamed for her own murder and police thought this might have a link to the crime. This kind of poor representation of media makes the instances confusing and easily forgettable.[51]

Next is the case of Mercedes Successful who is a black transgender woman of 32 years old. This is another poorly reported case where the victim has been mentioned as a man with the name

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[51] Karlana June, *Representations of Transgender Murder Victims in Digital U.S. News Media: A framing analysis*, 32-39 (2017), https://digitalcommons.usf.edu/cgi/viewcontent.cgi?article=1142&context=masterstheses.

Shavon Marlon Shawn just because the victim's body when found was not dressed like a woman. The victim is mentioned to be a cross dressing performer whose stage name was Mercedes Successful by the media. Mercedes was not just her stage name but it was her identity as a person, as a performer who is an award winning drag queen of the locality. The disgrace media has brought to the victim by not using the name by which she is famous and use of the term cross- dresser is not acceptable. Also the use of terms "seemed to have a career" gives the impression that whatever is written about the victim is hearsay and is not confirmed. After plenty of information still the media and police turns blind eye because the victim's identity is confusing so her life becomes irrelevant and doesn't deserve a proper investigation.[52]

Addressing these issues requires media literacy education, advocacy for inclusive and accurate transgender representation, and efforts to challenge discriminatory societal attitudes.

Legal and Policy Response

India

1. Transgender Persons (Protection of Rights) Act, 2019: This legislation prohibits discrimination against transgender persons in education, employment, healthcare, and other areas. It also provides for the recognition of transgender identity and welfare measures. However, it faces criticism for inadequately addressing transgender community concerns and including provisions deemed invasive or discriminatory.[53]

2. Supreme Court Judgments: The Indian Supreme Court has delivered significant rulings, such as the acknowledgment of transgender individuals as a distinct gender in the NALSA v. Union of India case of 2014. These judicial decisions have facilitated the legal acknowledgment and safeguarding of transgender rights within the Indian legal framework.[54]

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[52] Ibid.

[53] TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019, No. 40, Acts of Parliament, 2019 (India).

[54] National Legal Services Authority v. Union of India, (2014) 5 SCC 438.

Argentina: The 2012 Gender Identity Law in Argentina was implemented with the objective of reducing violence and discrimination directed towards transgender individuals. This legislation enables individuals to modify their gender identity on legal documents without the requirement of medical or judicial authorization.[55]

Canada: In 2017, the Canadian Human Rights Act was amended through the enactment of Bill C-16 to include gender identity and expression as prohibited grounds of discrimination. Several provinces have also implemented legislation aimed at safeguarding the rights of transgender individuals and promoting their inclusion in society.[56]

Nepal: According to a ruling by the Supreme Court of Nepal in 2007, it is imperative to recognize transgender individuals as a distinct gender category and ensure they receive equal rights as other members of society. Subsequently, Nepal has enacted legislation aimed at facilitating the inclusion of transgender individuals and safeguarding their rights. Notably, a specific law has been implemented to acknowledge third gender identities and enable the issuance of citizenship certificates to transgender individuals.[57]

These illustrations demonstrate different strategies for defending transgender rights and preventing violence through laws and regulations. Despite advancements, there is still more to be done to guarantee complete equality and safety for transgender populations across the globe.

Community Response and Support System

Empowerment and support to the transgender individuals is crucial to ensure equality and respect for all. Grassroots initiatives and community-based organizations play a significant role in this

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[55] Ley de Identidad de Género [Gender Identity Law], Law No. 26.743, May 23, 2012, [30177] B.O. 1 (Arg.).

[56] Bill C-16, an Act to Amend the Canadian Human Rights Act and the Criminal Code, S.C. 2017, c. 13 (Can.).

[57] Sunil Babu Pant v. Nepal Gov't, Writ No. 917 of the Year 2064 BS (2007 AD) (Nepal).

regard. Here are some global initiatives and organizations dedicated to supporting and empowering transgender individuals:

1. Transgender Europe (TGEU): TGEU is a European network advocating for the rights and well-being of transgender people. They provide resources, conduct research, and advocate for policy changes to advance transgender rights in Europe.[58]
2. National Centre for Transgender Equality (NCTE): NCTE is a U.S.-based organization that advocates for transgender equality through policy advocacy, community organizing, and public education. They offer resources, training, and support for transgender individuals and allies.[59]
3. Gender DynamiX: Gender DynamiX is a South African organization focusing on transgender rights and empowerment. They provide support services, advocacy, and awareness campaigns to promote the rights and well-being of transgender people in South Africa and beyond.[60]
4. Transgender Law Centre (TLC): The Transgender Law Center (TLC) stands as the preeminent trans-led organization in the United States, dedicated to championing policy reforms and legal protections for transgender and gender non-conforming persons. TLC provides a range of services including legal aid, policy advocacy, and community outreach initiatives.[61]
5. Asia Pacific Transgender Network (APTN): APTN is a collaborative network comprising various entities and individuals dedicated to the advancement of transgender rights and health within the Asia-Pacific region. The organization offers assistance, materials, and active promotion to enhance transgender rights and overall welfare.[62]

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[58] TRANSGENDER EUROPE, https://tgeu.org/ (last visited May 12,2024).

[59] NATIONAL CENTRE FOR TRANSGENDER EQUALITY, https://transequality.org/ (last visited May 12, 2024).

[60] GENDER DYNAMIX, https://genderdynamix.org.za/ (last visited May 12,2024).

[61] TRANSGENDER LAW CENTRE, https://transgenderlawcentre.org/ (last visited May 12,2024).

[62] ASIA PACIFIC TRANSGENDER NETWORK, https://weareaptn.org/ (last visited May 13, 2024).

6. Gender Identity Research and Education Society (GIRES): GIRES is a United Kingdom-centered entity dedicated to addressing matters related to transgender individuals. The organization conducts research, provides educational programs, and advocates for policy reforms aimed at improving the well-being of transgender individuals within national and international contexts.[63]
7. Transgender India: Transgender India is an internet-based platform that delivers advocacy, resources, and assistance to transgender individuals residing in India. The organization furnishes information pertaining to the legal entitlements, healthcare services, and societal backing available to transgender communities in the country.[64]
8. Transgender Europe Asia Pacific (TGEUAP): TGEUAP is an Asia-Pacific network of organizations and individuals dedicated to advancing the rights and well-being of transgender people. They provide support, resources, and advocacy to promote transgender equality and inclusion.[65]

These organizations and initiatives are just a few examples of the many grassroots and community-based efforts working tirelessly to support and empower transgender individuals around the world. Their work is essential for promoting equality, dignity, and respect for all people, regardless of gender identity.

Examples of Successful Community-led Efforts to Combat Violence and Promote Transgender Visibility and Acceptance

Community-led efforts are crucial in combating violence and promoting transgender visibility and acceptance. Here are some successful examples:

1. Transgender Day of Remembrance (TDOR): Observed annually on November 20th, TDOR honours transgender

[63] GENDER IDENTITY RESEARCH AND EDUCATION SOCIETY, https://www.gires.org.uk/ (last visited May 13).

[64] TRANSGENDER INDIA, http://transgenderindia.com/ (last visited May 13, 2024).

[65] TRANSGENDER EUROPE ASIA PACIFIC, https://tgeuap.org/ (last visited May 13, 2024).

individuals who have lost their lives to anti-transgender violence. Community organizations and activists organize vigils, marches, and educational events to raise awareness and advocate for social change.[66]

2. Transgender Legal Defence & Education Fund (TLDEF): The Transgender Legal Defense and Education Fund (TLDEF) is dedicated to combatting discrimination and fostering equality for transgender individuals by engaging in legal advocacy, educational initiatives, and public policy endeavours. The organization offers legal services, advocates for the implementation of inclusive policies, and disseminates educational materials to enhance awareness and foster societal acceptance.[67]
3. Transgender Pride Marches and Parades: These global events are held to honour and raise awareness of transgender identities, as well as to advocate for their visibility and acceptance. Coordinated by LGBTQ+ community organizations at the local level, these gatherings showcase speakers, performers, and advocacy groups, aiming to cultivate unity and backing for transgender rights.
4. Transgender Cultural Festivals: Events such as the Trans Pride Festival held in Brighton, UK, and the Transgender Film Festival in San Francisco serve as venues for transgender artists and performers to showcase their work. These festivals establish environments that are welcoming and supportive, fostering opportunities for artistic expression and community solidarity.[68]

These programs showcase the influence of community-driven endeavours in aiding transgender individuals, enhancing their visibility, and cultivating acceptance by means of advocacy, education, and cultural representation.

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[66] Gwendolyn Ann Smith, "*Remembering Our Dead*," GENDER EDUCATION AND ADVOCACY, https://tdor.info/.

[67] TRANSGENDER LEGAL DEFENSE & EDUCATION FUND, https://www.transgenderlegal.org/.

[68] TRANS PRIDE BRIGHTON, https://transpridebrighton.org/.

International Perspective

Comparative analysis of the status of transgender rights and violence across different countries and regions

A comparative analysis of the status of transgender rights and violence across different countries and regions:

1. North America:

United States: In the United States, despite advancements in recent times, transgender individuals continue to encounter notable obstacles, such as discrimination in healthcare, employment, and housing. Violence against transgender people, particularly transgender women of colour, remains a pervasive issue, with high rates of hate crimes reported annually. However, legal protections vary by state, and some states have enacted anti-discrimination laws and policies to protect transgender rights.[69]

Canada: Canada has made strides in recognizing and protecting transgender rights, with federal legislation such as the Canadian Human Rights Act explicitly prohibiting discrimination based on gender identity and expression. However, transgender individuals still experience discrimination and violence, particularly Indigenous and racialized transgender people. Efforts to address these issues include community-led initiatives and advocacy for transgender-inclusive policies.[70]

2. Europe:

Netherlands: The Netherlands is often regarded as progressive on LGBTQ+ rights, including transgender rights. Legal

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[69] *Violence Against the Transgender Community in 2020*, HUMAN RIGHTS CAMPAIGN (May 14, 2024, 10:34 AM), https://www.hrc.org/resources/violence-against-the-trans-and-gender-non-conforming-community-in-2020.

[70] *Transphobic Hate Crimes and Violence Against Transgender People in Canada*, EAGLE CANADA HUMAN RIGHTS TRUST (May 14, 2024, 10:40 AM), https://egale.ca/transphobic-hate-crimes-and-violence-against-transgender-people-in-canada/.

recognition of gender identity is possible through a relatively straightforward administrative process. However, transgender individuals still face societal discrimination and violence, particularly transgender migrants and refugees. Community organizations and advocacy groups work to address these challenges through education and awareness campaigns.[71]

Hungary: Hungary has seen a rise in anti-transgender rhetoric and policies in recent years, with the government passing laws restricting gender recognition and banning gender-affirming education in schools. Transgender individuals face discrimination and marginalization, and there are limited legal protections in place to safeguard their rights. Community activists and organizations work tirelessly to resist these regressive policies and advocate for transgender rights.[72]

3. Latin America:

Argentina: Argentina is often cited as a leader in transgender rights in Latin America. The country passed groundbreaking legislation allowing individuals to change their gender identity on legal documents without medical or judicial approval. Despite legal advancements, transgender people still face high levels of violence, particularly transgender women of colour, and socioeconomic disparities persist. Community organizations provide support services and advocate for comprehensive legal protections.[73]

Brazil: Brazil has one of the highest rates of violence against transgender individuals globally, with a disproportionate number of

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[71] *Netherlands: Discrimination Against Transgender People Persists Despite Progress*, AMNESTY INTERNATIONAL (May 15, 2024, 11:07 AM), https://www.amnesty.org/en/latest/news/2018/10/netherlands-discrimination-against-transgender-people-persists-despite-progress/.

[72] *Hungary: Growing Hostility Towards LGBTI People Requires Urgent EU Action*, AMNESTY INTERNATIONAL (May 15, 2024, 11:37 AM), https://www.amnesty.org/en/latest/news/2021/06/hungary-growing-hostility-towards-lgbti-people-requires-urgent-eu-action/.

[73] *Argentina: Lives at Risk Amid Covid-19*, HUMAN RIGHTS WATCH (May 15, 2024, 12:26 PM), https://www.hrw.org/news/2020/07/23/argentina-lives-risk-amid-covid-19.

murders targeting transgender women, particularly Black and Indigenous women. Legal recognition of gender identity varies by region, and transgender people face discrimination in healthcare, education, and employment. Community-led initiatives provide essential support and advocacy for transgender rights, including legal assistance and social services.[74]

In conclusion, while progress has been made in recognizing transgender rights globally, challenges persist, including discrimination and violence. Community-led efforts play a vital role in advocating for legal protections, raising awareness, and providing support services for transgender individuals.

Best Practices from Various Countries in Promoting Transgender Rights

Best practices from other countries in promoting transgender rights and combating violence include:

1. **Legal Recognition of Gender Identity**: Argentina and Denmark allow individuals to change their gender identity on legal documents without medical or judicial approval, reducing bureaucratic barriers and promoting inclusion.[75][76]
2. **Comprehensive Anti-Discrimination Legislation:** Canada and Portugal have laws prohibiting discrimination based on gender identity and expression, covering employment, housing, healthcare, and education, fostering a more inclusive

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[74] *Trans Day of Remembrance 2021: Brazil Continues to Lead the Global Ranking of Murders of Trans and Gender-Diverse People*, TRANSGENDER EUROPE (May 15, 2024, 12:50 PM), https://transrespect.org/en/tmm-update-tdor-2021/.

[75] *Argentina: Lives at Risk Amid Covid-19*, HUMAN RIGHTS WATCH (May 15, 2024, 01:14 PM), https://www.hrw.org/news/2020/07/23/argentina-lives-risk-amid-covid-19.

[76] *Denmark: Transgender Rights Must be Strengthened*, AMNESTY INTERNATIONAL (May 15, 2024, 01:35 PM), https://www.amnesty.org/en/latest/news/2020/02/denmark-transgender-rights-must-be-strengthened/.

society.[77][78]

3. **Healthcare Access and Gender-Affirming Services:** Thailand and the Netherlands provide comprehensive healthcare policies, including gender-affirming treatments, promoting well-being and reducing discrimination.[79][80]

4. **Community-Led Advocacy and Support**: Initiatives like Transgender Europe's Transrespect versus Transphobia Worldwide project and local support groups offer resources, support, and advocacy, empowering transgender individuals and raising awareness.[81][82]

5. **Education and Awareness Campaigns:** Public education and awareness campaigns, such as Transgender Day of Remembrance (TDOR) and Pride events, challenge stigma and promote acceptance, creating safer and more inclusive

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77 *Transphobic Hate Crimes and Violence Against Transgender People in Canada*, EGALE CANADA HUMAN RIGHTS TRUST (May 15,2024, 02:11 PM), https://egale.ca/transphobic-hate-crimes-and-violence-against-transgender-people-in-canada/.

78 *Portugal: Further Efforts are Needed to Combat Hate Speech and Hate Crime,* EUROPEAN COMMISSION AGAINST RACISM AND INTOLERANCE (ECRI) (May 15, 2024, 02:56 PM), https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/-/portugal-further-efforts-are-needed-to-combat-hate-speech-and-hate-crime.

79 Policy *Brief: Access to Gender-affirming Healthcare in Thailand*, UNITED NATIONS DEVELOPMENT PROGRAMME (UNDP) (May 16, 2024, 09:17 AM), https://www.asia-pacific.undp.org/content/rbap/en/home/library/democratic_governance/hiv_aids/policy-brief--access-to-gender-affirming-healthcare-in-thailand.html.

80 *Netherlands: Discrimination Against Transgender People Persists Despite Progress*, AMNESTY INTERNATIONAL (May 16, 2024, 09: 38 AM), https://www.amnesty.org/en/latest/news/2018/10/netherlands-discrimination-against-transgender-people-persists-despite-progress/.

81 *Who We Are*, TRANSGENDER EUROPE (May 16, 2024, 10:00 AM), https://tgeu.org/about-us/.

82 Transrespect versus Transphobia Worldwide (TvT), *About TvT* (May 16, 2024, 10:11 AM), https://transrespect.org/en/tvt-project/tvt-publications/.

environments.[83][84]

These practices involve legal reforms, healthcare access, community engagement, and education, contributing to more equitable and inclusive societies for transgender individuals.

Indian Perspective

The instances of hate crime with transgender individuals in India

Hate crimes against transgender individuals in India are unfortunately prevalent, reflecting the discrimination and violence faced by the transgender community in the country. While comprehensive data on hate crimes specifically targeting transgender individuals may be limited, there have been numerous reported incidents highlighting the vulnerability of transgender people to violence and discrimination. Here are some instances:

1. **Murders and Assaults:** In India, transgender people frequently face violent acts such as homicides and physical assaults, often driven by transphobia and bias against those who do not conform to traditional gender norms. An illustrative case is the 2015 murder of Tara, a transgender woman in Chennai, which underscores the dangers encountered by transgender individuals in public environments.[85]
2. **Discrimination in Healthcare:** In the context of India, individuals who identify as transgender often encounter discrimination and mistreatment within medical environments, hindering their ability to obtain essential healthcare services. Instances have been recorded where

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[83] Transgender Day of Remembrance, *About TDOR* (May 16, 2024, 10:34 AM), https://tdor.info/about-tdor/.

[84] *Growing Up LGBT in America*, HUMAN RIGHTS CAMPAIGN FOUNDATION (May 16, 2024, 10:53 AM), https://www.hrc.org/resources/growing-up-lgbt-in-america-view-and-share-the-results.

[85] "*Transgender woman murdered in Chennai"*, THE NEWS MINUTE (May 17, 2024, 07:13 PM), https://www.thenewsminute.com/article/transgender-woman-murdered-chennai-37982.

healthcare providers have declined to treat transgender patients or have displayed biased behaviour towards them, thereby intensifying health inequities and perpetuating the marginalization of the transgender population.[86]

3. **Housing Discrimination:** In India, transgender individuals frequently encounter discrimination and harassment in the realm of housing and accommodation. Owing to societal stigma and bias, they are commonly subjected to eviction and homelessness. Landlords may also deny rental opportunities to transgender tenants. Consequently, transgender individuals are at an increased risk of facing assault and exploitation due to their precarious housing situation.[87]

4. **Employment Discrimination:** In India, there is a great deal of workplace discrimination against transgender people. Many of them face obstacles to employment as well as harassment and discrimination at work. The absence of legal protections against workplace discrimination based on gender identity and prejudice against transgender persons can make it difficult for them to obtain steady employment prospects.[88]

5. **Police Violence and Harassment:** Transgender individuals in India frequently experience police violence and harassment, including arbitrary arrests, physical abuse, and extortion. Law enforcement agencies may target transgender individuals based on their gender identity, subjecting them to harassment and discrimination instead of protecting their rights. Instances of police brutality against transgender individuals highlight

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[86] "*Stigma mars transgender health care in India*", THE LANCET (May 17, 2024, 07:35 PM), https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(16)31386-6/fulltext.

[87] *"India: Discrimination Haunts Transgender People*", HUMAN RIGHTS WATCH (May 17, 2024, 07:47 PM), https://www.hrw.org/news/2016/07/21/india-discrimination-haunts-transgender-people.

[88] "*Study finds rampant discrimination against transgender persons",* THE TIMES OF INDIA (May 17, 2024, 07:57 PM), https://timesofindia.indiatimes.com/city/delhi/study-finds-rampant-discrimination-against-transgender-persons/articleshow/70907626.cms.

the systemic biases within law enforcement institutions.[89]

These instances of hate crimes and discrimination against transgender individuals underscore the urgent need for comprehensive legal protections, social support services, and public awareness campaigns to address the root causes of violence and discrimination faced by the transgender community in India.

The steps taken by India to combat hate crimes and murders of transgender individuals

India has taken significant steps to combat hate crimes and murders targeting transgender individuals, though challenges remain. Key initiatives include:

Legal Reforms:

In 2014, the Supreme Court of India recognized transgender individuals as a third gender, affirming their fundamental rights under the Indian Constitution. This recognition has facilitated legal reforms to protect transgender rights and address discrimination.[90]

Transgender Persons (Protection of Rights) Act, 2019: The Act prohibits discrimination in education, employment, healthcare, and housing and establishes mechanisms for transgender welfare and social inclusion.[91]

Awareness Campaigns and Sensitization Programs:

Various government agencies and NGOs have conducted awareness campaigns to promote acceptance of transgender

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[89] *"India: Stop police violence against transgender people in Kerala*", AMNESTY INTERNATIONAL INDIA (May 17, 2024, 08:15 PM), https://amnesty.org.in/news-update/india-stop-police-violence-against-transgender-people-in-kerala/.

[90] National Legal Services Authority v. Union of India, (2014) 5 SCC 438.

[91] TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019, No. 40, Acts of Parliament, 2019.

individuals and combat transphobia.[92]

Training for Law Enforcement Officials: Programs to train and sensitize law enforcement aim to improve their response to hate crimes and violence against transgender individuals.[93]

Support Services and Welfare Programs:

Transgender Welfare Boards: Several states have established boards to oversee welfare schemes and provide support services. The Tamil Nadu Transgender Welfare Board, for example, offers financial assistance, healthcare, and educational support.[94]

Shelter Homes and Safe Spaces: Initiatives to establish shelter homes and safe spaces aim to protect and support transgender individuals at risk of violence and discrimination.[95]

While these initiatives are significant, challenges such as implementation gaps, social stigma, and institutional discrimination persist. Continued efforts are necessary to create a more inclusive environment for transgender individuals.

Conclusion

The plight of transgender individuals in India and across the globe remains a profound humanitarian crisis, marked by relentless violence and pervasive discrimination. Despite the commendable

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[92] Press Information Bureau, Government of India, Ministry of Social Justice & Empowerment Launches Campaign for Creating Awareness on Transgender Persons (Protection of Rights) Bill, 2016 (Dec. 12, 2016), https://pib.gov.in/newsite/PrintRelease.aspx?relid=160426.

[93] *Raising Awareness on Transgender Issues in Policing: A Manual (2019),* COMMONWEALTH HUMAN RIGHTS INITIATIVE (May 17, 2024, 08:46 PM), https://www.humanrightsinitiative.org/programs/ai/indiapolice/pdf/Transgender-Training-Manual-English.pdf.

[94] TAMIL NADU TRANSGENDER WELFARE BOARD, INTRODUCTION, http://tamilnadutransgenderboard.tn.gov.in/ (last visited May 17, 2024).

[95] *Transgender Shelter Home to Open Soon in Coimbatore*, THE HINDU (May 17, 2024, 09:14 PM), https://www.thehindu.com/news/cities/Coimbatore/transgender-shelter-home-to-open-soon-in-coimbatore/article28618529.ece.

strides made through legal reforms and awareness campaigns, the shadow of intolerance continues to loom large, inflicting unimaginable suffering. The resilience of the transgender community, while awe-inspiring, underscores the urgent need for a more inclusive and compassionate society. Efforts to eradicate prejudice and institutional bias must be intensified, ensuring that the fundamental rights and dignity of every individual are unequivocally upheld. It is imperative that governments, civil society, and communities collectively foster environments of acceptance and support. Only through sustained commitment and empathy can we hope to dismantle the barriers of hate and build a future where every individual, regardless of gender identity, can live with dignity, respect, and security.

COMPARING INDIA'S JURISPRUDENCE ON RETRENCHMENT WITH THE UNITED KINGDOM'S LAW ON REDUNDANCY– ANALYZING THE EFFECT OF THE ROAD NOT TAKEN IN THE IR CODE 2020.

*Dr Prakhar Ganguly**

This paper analyzes the legal interpretation of Chapter VA of the ID Act 1948 that houses, among other things, rights and procedures of retrenchment. It discusses the leading cases that have created the paraphernalia of judicial expositions surrounding the meaning of 'retrenchment' in India. Furthermore, it exfoliates the grey areas within these sections and irons out certain creases related to the definition, ambit, and nature of compensation if a worker faces the employer's wrath. In doing so, the paper compares it with the law of redundancy in the United Kingdom. Recently, India developed the Industrial Relations Code, which retained the definition of retrenchment with a minor yet substantial procedural twist. Through this comparison, the paper tests the following hypothesis: Should India have taken the redundancy route instead of adhering to the traditional concept of retrenchment?

Keywords: Retrenchment, IR Code, Redundancy, Employment Rights law and Industrial Disputes law.

Introduction

The key to understanding employment relations can be zeroed in on a specific act. It is here that the employer-worker relationship reaches its peak instability. At this point, the worker might find solace in comradery and sobriety is lost to the worst of both sides. For the sake of brevity, the act described is the employer's termination of (the) worker/employee. This paper

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focuses specifically on retrenchment as a means of termination. The object is to simplify the paraphernalia surrounding it. With this settled, the paper introduces the concept of redundancy under English labor jurisprudence. In doing so, the paper explains the laws relating to redundancy in England. The prima facie distinction between retrenchment and redundancy is visible in the definition. While retrenchment means that a certain portion of the workforce has become surplus and is being terminated, redundancy means that a certain job process is no longer relevant. Redundancy can give rise to retrenchment. *Ceteris paribus*, all redundancies may lead to reduction, but not all retrenchments originate from redundancy. However, labor legislation in the UK does not recognize the concept of retrenchment as it was established in India. There is a subliminal object of comparing these concepts in two jurisdictions. Among four other codes, India has introduced the Industrial Relations Code 2020 (herein onwards, 'the code'). This has been an agenda of the Narendra Modi-led government against the decade-old rigidity-laden labor regime (Deakin and Haldar 2015, 48). The code has retained the concept of retrenchment but has made certain relaxations in favor of the employer. Most importantly, the earlier law required the employer to get permission before retrenching if they employed more than a hundred workers.[1] The code relaxes this number to three hundred in the preceding year (provided that the work is of a seasonal or intermittent nature).[2] The pro-reformists make a case in favor of this hike. They premise it on the 'judicial wrath' that the Supreme Court of India had heralded upon the Indian employer in the cases wherein the definitional ambit of retrenchment was in question. The wide ambit is counterbalanced with the enhanced relaxations made (Bhagwati 2004). The anti-reformists and sceptics of labor legislation generally believe these are hard-won workers' rights. Any such relaxation is seen as an effect of neo-liberalism (Frey 2018).

The code has retained the old definition while adding a clause to the exceptions that prevent the employer from any liability

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[1] Chapter VB of the Industrial Disputes Act 1948.

[2] Chapter X Section 77 of the Industrial Relations Code 2020.

in case a fixed-term contract concludes.[3] In this fix wherein both sides are unwilling to shed, could replacing retrenchment with redundancy be the solution? This paper embarks on this voyage, which is divided into multiple parts. The *first* part explains the interpretative meandering of the Supreme Court (herein onwards 'SC') concerning the definitional ambit of retrenchment. The object is to delineate the meaning, content, and extent of retrenchment under Section 2(oo) of the Industrial Disputes Act 1947. The *second* part explains the position of law on redundancy in the United Kingdom. The object is to describe redundancy's statutory and judicial standing and how it differs from retrenchment. The *third* part of the paper compares both positions and presents both regimes' advantages and disadvantages. In a politico-economic order at the cusp of breaking away from its developing status and breaking into a 'developed' status, these legal questions hold pertinent importance as they aim to find a middle ground – a trade-off of sorts- between both schools of economic thought.

Simplifying the Concept – What is Retrenchment?

The golden principle of industrial jurisprudence is that there is no golden principle (Sharath Babu and Shetty 2007, 50). While in some cases, this acts as a boon - specifically for judicial adventurism; in others, it creates distortions in interpretations by enabling a voyage beyond the language. The predicament specifically arises in the words employed in labor statutes - what they signify has often been challenged in and has often challenged the apex court.

The difference between what a thing ordinarily means and what additional gloss it has picked up in contemporary times is best visible in the SC's delineation of 'industry'.[4] In judicial terms, this is called the 'creativity of the judge' (Sharath Babu and Shetty 2007, 43). Similar judicial meandering is also visible in its attempt to explain the meaning of retrenchment under Section 2(oo) of the Industrial Disputes Act 1947. Determination of the *ratio decidendi*

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[3] Section (zh) Industrial Relations Code 2020.

[4] *See Bangalore Water Supply & Sewage Board v. A Rajappa* AIR 1978 SC 548

focused on the legislative intent behind 'any reason whatsoever'. The definition clause can be segregated into three parts – *firstly*, retrenchment is the termination of service for any reason whatsoever; *secondly*, it is *not* by way of punishment; and *thirdly,* it does not include acts of voluntary retirement, termination due to prolonged illness, termination on reaching the age of superannuation (if the contract provides for such), and termination of service as a result of non-renewal of the agreement on its expiry or on such contract terminated owing to the stipulation contained therein. What is *not* retrenchment was provided under section 2(oo), but predicaments arose while explaining what is one. A plain reading of the section could clarify this question – it includes every termination of service by the employer.[5] The termination can be active or passive, meaning that the act of terminating need not be credited only to the volition of the employer. This section has created flutters in the Indian judiciary (Sharath Babu and Shetty 2007, 468).

The interpretative dilemma begins from the *Pipraich Sugar Mills* case.[6] The government had issued a notification that placed 'sugar' under a regulated industry. The employers could not continue the business profitably. They had decided to sell it to a 'Madras Party' (herein onwards MP). The workers went on strike. The former employer pacified them that they would be awarded a percentage from the sale transaction if they withdrew.[7] The workers

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5 Section 2(oo) "retrenchment means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include--

(a) voluntary retirement of the workman; or

(b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or

(bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or

(c) termination of the service of a workman on the ground of continued ill-health.

6 *Pipraich Sugar Mills Limited v. Pipraich Sugar Mills Mazdoor Union* AIR 1957 SC 95

7 ibid., 2

continued the strike as it would otherwise lead to their possible termination. The withdrawal was necessary for the transaction as it required dismantling the machinery and setting it up at Madras. Meanwhile, seeing that the former owners could not convince the workers, the MP spoke directly to the workers to dismantle the industry. This caused a loss of around two lacs to the former employer.[8] The workers went back to the former employer and demanded that they be paid their promised compensation from the previous settlement, post-dismantling. Whether this was paid or not does not form an important part of this paper, but whether workers were entitled to retrenchment compensation was asked. The SC was directed towards the section. The workers contended that the difference between closure and retrenchment is degree and not kind.[9] Thereby, in all cases of retrenchment or closure, compensation was payable. The SC reasoned that retrenchment in its ordinary connotations meant that some members of the workforce were terminated and the rest continued - a bona fide closure of industry is not retrenchment.

The primary question was whether section 2(oo) refers to the ordinary connotations or includes situations where the industry has been bona fide closed down. In this case, it was observed that 2(oo) means and contains nothing more than the ordinary connotation of retrenchment. In case of bona fide closure, there is no scope for compensation. This was against the contention of employees that the definition itself uses a wide language, and thus, compensation under section 25F could be claimed. The SC refuted the reliance on judgments by the employees, which it considered to be obiter and therefore did not form a valid ratio.

Similar questions arose in *Divikar.*[10] In Divikar, the line of reasoning was wide as an array of questions was raised – does section 2(oo) include ordinary connotations of retrenchment, or does it include something more? The SC, in upholding Pipraich, observed that the section did not intend to include anything more than the

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8 ibid., 3
9 ibid., 8
10 *Hari Prasad Shukla v. A.D. Divelkar* AIR 1957 SC 121

commonsensical meaning – a part of the workforce is terminated, but the industry continues. It reiterated *Pipraich's* reasoning. Now, Divikar was unique to the extent that an undertaking was retransferred to the government here under an agreement from its former private owner. The execution of this agreement resulted in the termination of service for a substantial portion of the workforce and affected their continuity of service. One of the questions framed in the issue was whether the erstwhile workers were entitled to retrenchment compensation. The SC carries on the leading question from *Pipraich* – Is there parity between ordinary meaning and section 2(oo)? The primary reasoning behind this is that, in this case, the private undertaking no longer was the owner per se, and there was a termination. While the transfer of ownership differed from the closing down of one, the question framed was the same because both were on the same footing, leading to the employee's termination for any reason whatsoever and not by way of punishment. In doing so, the SC contemplates whether limiting the meaning of 'any reason whatsoever' would cut down its meaning and whether this results in incorporating new words. The SC relied on *Pipraich* to comprehend the ordinary meaning of retrenchment. The SC accepted that *Pipraich's* interpretation (to the extent of giving meaning to the ordinary context of retrenchment) can be accepted as a valid precedent as *Pipraich* was about terminations that occurred in 1951. The amendment (that added the definition) came into force in 1953.[11] To the question asked, the SC stated that sticking to its ordinary meaning cannot infer that the SC is employing new words, nor does it cut down the ambit of the same. What the legislature intended was "it does not matter why you are discharging… if other conditions are fulfilled… it is retrenchment...".[12] The ambit of 'any reason whatsoever' would mean the reasons for termination and not the factum of the termination itself.[13] With this, the SC could reason

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[11] ibid., 5. The question in this case was whether retrenchment as added by the 1953 amendment included something more than its ordinary context. In Pipraich, because the terminations in question occurred in 1951 (before the amendment), the ordinary meaning of retrenchment was settled and accepted as valid precedent.

[12] Frey, *'Social Justice, Neoliberalism, and Labor Standards at the International Labour Organization'*, 8.

[13] ibid.

that section 2(oo) meant and included nothing more than its ordinary connotations. In any situation, a bona fide closedown of industry cannot mean retrenchment. The workers countered this by claiming that post-1953 retrenchment has had special significance via section Chapter VA, which incidentally provided compensation for closure (deeming retrenchment).[14] The workers had relied on the decisions of Industrial Tribunals, to which the SC had observed that these decisions were majorly equitable reliefs and did not create valid precedents. The claim, SC observed, that post-1953 retrenchment had gained special significance was discarded as the only legislative intent was to create a 'single workable criterion' vide defining 'continuous service'.[15]

The *second* argument that the workers forwarded was that section 25FF was an exposition of section 25F and the definition clause. What light does 25FF throw on 25F? 25FF was added by the 1956 amendment as a response to the *Hospital Mazdoor Sabha (HMS) judgment*.[16] The judgment clarified that failure to observe obligations under section 25F would make the termination illegal.[17] This made it difficult for employers to transfer business. The

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[14] Section 25FF (as originally enacted) states "Notwithstanding anything contained in S. 25-F no workman shall be entitled to compensation under that section by reason merely of the fact that there has been a change of employers in any case where the ownership or management of the undertaking in which he is employed is transferred whether by agreement or by operation of law, from one employer to another:
Provided that -
(a) the service of the workman has not been interrupted by reason of the transfer,
(b) the terms and conditions of service applicable to the workman after such transfer are not in any way less favourable to the workman than those applicable to him immediately before the transfer; and
(c) the employer to whom the ownership or management of the undertaking is so transferred is, under the terms of the transfer or otherwise, legally liable to pay to the workman, in the event of his retrenchment, compensation on the basis that his service has been continuous and has not been interrupted by the transfer."

[15] Frey, *'Social Justice, Neoliberalism, and Labor Standards at the International Labour Organization'*, 9.

[16] ibid., 9.

[17] ibid., 10.

employee would have an automatic right to challenge his retrenchment. The section is not retrospective and thus did not apply to the cases in hand, but what light did 25FF throw on 25F? According to the workers, 25FF provides for a wider range of situations wherein retrenchment compensation is provided, thereby including situations beyond the ordinary connotations. They inferred this by relying on the non-obstante clause of 25FF. 25FF begins with 'Notwithstanding anything contained in section 25F…. It continues to add that no employer shall be liable to pay retrenchment compensation in case of a change in ownership or management of the undertaking provided that the service of the worker is not interrupted, less favourable terms of service are not applied to him post the transfer and that the terms of the agreement do not put such obligation on the employer to whom the undertaking is transferred in the event of the worker's retrenchment, wherein the employer is legally liable to pay compensation on the basis that his service has been continuous and not been interrupted by the transfer. The workers interpreted this to mean that unless either of the three conditions are fulfilled during a transfer, the worker is entitled to retrenchment compensation. If upheld, this would mean that the legislature intended to provide wider situations wherein retrenchment compensation could be claimed. The SC rejected this school of thought, arguing that while this interpretation was seemingly convincing, the true exposition of 25F was not 25FF, as the latter was incorporated urgently to alter the implications of the HMS judgment. 25FF did not provide any exposition because it had a different purpose. The 1956 Miscellaneous Amendment Act fortifies this view.[18] This act passed a couple of days before the incorporation of 25FF inserted the third and the fourth schedule. Analyzing item 10 of the third schedule – retrenchment of workmen and closure of establishment; and item 10 of the fourth schedule – rationalization, standardization, or improvement of plant or technique which is likely to lead to retrenchment of workmen; it was observed that retrenchment and closure mean two separate things.[19] Item 10 in the third schedule renders retrenchment and closure to mean two different things, while the fourth schedule displays that in

[18] ibid.

[19] ibid., 11.

case of retrenchment, the industry thrives. At the same time, some are terminated owing to the reasons mentioned, which might lead to the same.

Pipraich and Divikar had a minor glitch. In *Pipraich*, while answering whether the provisions of the ID Act applied to a running industry or a dead industry, it was observed that all provisions (except a few) used for the industry were unqualified by status. In *Divikar,* however, this question was answered differently. The context in which these two questions were asked was distinct. In *Pipraich*, the management claimed that to raise an industrial dispute, there had to be an existing employer-employee relationship, the pretext of which was the date the claim for profit became due and payable. The employers contended that an industrial dispute can only arise from an industry that is 'existing'. When payment became due, there was no employer-worker relationship in *Pipraich*. The SC stated there can be no limitation to the definition of industrial dispute.[20] In Divikar, the SC answered the question in the affirmative. It noted that the act applies to an existing industry 'only'. Thus, where an industry is closed and bona fide, any dispute would fall out of the Act. The question asked in case one includes the wider and the narrower definition within section 2(oo), and how do you comprehend which form to adhere to? A wider definition would necessarily include bona fide closed-down (past) industries. The SC observed that analysis would result in resorting to looking to the broader framework of the Act - this Act applies to an existing and running industry, not a closed one. It is humbly submitted that the reasoning employed is correct. Still, the context in which the reasoning is employed is incorrect—at the same time, interpreting the ambit of section 2(oo), the SC resorts to judgments wherein the entire scheme of the Act has been questioned. In these judgments, it was laid down that the Act applies to a running industry, not a dead industry. The leading questions asked in these two sets of cases ought to be different; thus, placing reliance while interpreting either is flawed to the extent of providing correct context to either.

The judgments mentioned above were delivered in the same

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[20] ibid., 9.

year and decided by the same bench except for Divikar, the then Chief SR Das headed. As fate would have it, judicial adventurism in N. Sundara Money disturbed a settled definition.[21] The worker in question was in the employer's service on an on-and-off basis. The letter read that the appointment was for a temporary period and could have been terminated at any time, either after 14 days' notice or pay without notice (without citing any reason). Furthermore, it was a fixed-term contract. The break service did not affect the 'continuity' required. The question, however, was whether this was retrenchment. The court decided that the word termination was not qualified by whether it had to be actively undertaken by the employer.

> "To terminate means to conclude and, in this case, there has been a conclusion… automatically maybe… but there is a conclusion…" [22]

The employer is blessed with no *moksha* if the order of employment mentions a specific date of termination.[23] If analyzed by olfactory senses, every termination is retrenchment.[24] This language Is typical of labour jurisprudence during and post-emergency (1975).[25] The advent of V.R. Krishna Iyer J. marked the commencement of linguistic jingoism that led to judicial restraint to the altar for sacrifice. This was a three-judge bench in direct contradiction to the previous five-judge bench renditions in 1956. However, a wide interpretation makes political sense because, during the same time, the Constitution had taken a socialist turn.

If judgments like *N Sundara Money* and the later *Santosh Gupta*[26] are considered, the SC chose to look for what is absent and not what is present in the definition.[27] The language of the

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21 *State Bank of India v. Shri N. Sundara Money* 1976 (1) SCC 822.

22 ibid., 5.

23 ibid.

24 ibid.

25 Post 1976, the word 'Socialist' was added to the Preamble of the Constitution of India by the 42nd Amendment.

26 *Santosh Gupta v. State Bank of Patiala* 1980 3 SCC 340

27 What is absent is any language or word which restricts the operation of the generality of the definition clause.

definitional clause is dubious enough to enable a half-full or half-empty argument. The Iyer court preferred a pro-employee interpretation, seeing that the glass was half empty – the word 'termination' was not qualified. The Iyer court similarly decided Santosh Gupta, but it was then a two-judge bench. The claimant was terminated because she failed to pass a test that would have otherwise regularized her service. The SC resorted to the wide characteristic of the definition.[28] Furthermore, what is interesting is that while the definition clause itself defines retrenchment as termination of service, the exceptions in no way can be remotely linked to the act of termination *by* the employer – neither is voluntary retirement nor is a stoppage in service owing to continued ill health terminations per se. The SC infers that all terminations can be brought under the purview of retrenchment. The SC further reasons that the legislature could have said that retrenchment means the discharge from service on account of surplus labor as it had the opportunity to do so across the plethora of amendments. However, it stuck with the original definition while adding some exceptions. It is humbly submitted that the SC erred in applying an already settled interpretation of the law. Post Divikar, 'any reason whatsoever' had a specific meaning attached to it - it referred to the reasons why termination was taking place and not the factum of termination itself. Indian industrial jurisprudence relies on relativity and rejects absolutes (Sharath Babu and Shetty 2007, 50). A change in question ought not change the meaning of an already settled phrase in a definition clause.[29]

The task set for the 1990 Herculean bench was to choose between two roads that diverged in the yellow woods – *the Divikar route and the Santosh Gupta escape*. Among the five judges, the bench comprised of Justice B.C. Ray, the second Dalit judge ever to be appointed as a judge of the SC, was a congressman (Gadbois

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[28] ibid., 2.

[29] A legal definition is an objective representation of a subject on which the State has decided to regulate. Among a plethora of subjectivities, the statute chooses to define a subject keeping in mind a universal and objective standard. While this might not be completely achievable but the meaning of a phrase ought not change if the leading question asked is different. This would lead to absurdities of interpretation.

2011, 303). Justice Sabyasachi Mukherjee was involved in socialist political activities during his time in London and was an alumnus of Presidency College, Kolkata (Gadbois 2011, 333). Justice Saikia had tried his luck in politics post-retirement through the Janta Party, an amalgamation of Indian socialist parties (against the Indira Gandhi-led Indian National Congress) (Gadbois 2011, 287). Judges have their biases (Sharath Babu and Shetty 2007, 36). In front of this bench at the cusp of India's time of 'opening up', these two contradictory schools of thought were taken up in the *Punjab Land Development and Reclamation Corporation case*.[30] Seventeen appeals through special leave petitions reached the apex court to decide which school should be adhered to. The SC rested the debate by conferring the wider school the holy status. The main contention that was laid down against the wider school of jurisprudence was that all judgments since and *post-N Sundara Money* were per incuriam.[31] A judgment per incuriam is rendered on improper appreciation of law or incorrect application of precedents. The SC observed that both judgments must have the same ratio to determine this question. Inferring from this, the leading question asked till Divikar was whether the definitional clause includes the ordinary meaning of retrenchment or anything more. In *N. Sundara Money*, the leading question was what the definitional limit would be, if any, to 'any reason whatsoever'? This led the SC to conclude that the Sundara Money and Santosh Gupta judgments were not per incuriam. The SC made certain observations before reaching this conclusion. *Firstly,* the 1956 amendment inserted the original 25FF. The object of the said amendment was to clear any doubt whether compensation becomes payable merely because there is a change in employers, which has created difficulty in the transfer, reconstitution, and amalgamation of companies. *Secondly,* in its original rendition, the employer does not need to pay compensation in case of transfer vide. Section 25FF in case either of the three grounds were covered.[32] *Thirdly, Hari Prasad Shukla* was delivered after this Amendment, In 1957, an ordinance was promulgated with

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[30] *Punjab Land Development and Reclamation Corporation Ltd. Chandigarh v. Presiding Officer, Labor Court, Chandigarh And Others* 1990 (3) SCC 682

[31] ibid., 24.

[32] ibid., 20.

retrospective implementation. The object of the said amendment was clearly to counter the effects of *Hari Prasad Shukla*.[33] The ordinance was replaced by an Amendment Act of 1957, which enacted 25 FF and 25 FFF – the former in its present rendition.[34] *Fourthly,* in their amended form, these sections provided compensation in cases of transfer or closure *as if* compensation was provided in cases of retrenchment. *Fifthly*, 'as if' brought out the legal distinction between retrenchment under Section 2(oo) and termination of service in case of transfer or closure.[35] The SC then took up the per incuriam claims. The SC contemplated the situations where deferment from the norm of adhering to precedents could be

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33 ibid., 19.

34 Section 25FF states "Compensation to workmen in case of transfer of undertakings. - Where the ownership or management of an undertaking is transferred, whether by agreement or by operation of law, from the employer in relation to that undertaking to a new employer, every workman who has been in continuous service for not less than one year in that undertaking immediately before such transfer shall be entitled to notice and compensation in accordance with the provisions of section 25F, as if the workman had been retrenched:

Provided that nothing in this section shall apply to a workman in any case where there has been a change of employers by reason of the transfer, if--

(a) the service of the workman has not been interrupted by such transfer;

(b) the terms and conditions of service applicable to the workman after such transfer are not in any way less favourable to the workman than those applicable to him immediately before the transfer; and

(c) the new employer is, under the terms of such transfer or otherwise, legally liable to pay to the workman, in the event of his retrenchment, compensation on the basis that his service has been continuous and has not been interrupted by the transfer."

Section 25FFF states "Compensation to workmen in case of closing down of undertakings.- (1) Where an undertaking is closed down for any reason whatsoever, every workman who has been in continuous service for not less than one year in that undertaking immediately before such closure shall, subject to the provisions of sub-section (2), be entitled to notice and compensation in accordance with the provisions of section 25F, as if the workman had been retrenched: Provided that where the undertaking is closed down on account of unavoidable circumstances beyond the control of the employer, the compensation to be paid to the workman under clause (b) of section 25F shall not exceed his average pay for three months."

35 *Punjab Land Development and Reclamation Corporation Ltd. Chandigarh vs. Presiding Officer, Labor Court, Chandigarh And Others* 1990 (3) SCC 682, 17.

made.[36] It further said that in any case, only the ratio decidendi constitutes a binding precedent. The principle on which the case was decided ought to be considered a valid precedent. The SC reiterates that the leading question asked in Hari Prasad Shukla differs from what is asked in N. Sundara Money. The inference is drawn – the latter judgments were not delivered per incuriam.[37] A decision is only an authority for what it decides.[38] The per incuriam claim was settled, and the SC had one final task – to choose the true interpretation of Section 2(oo).

In analyzing the body of supposedly contradictory jurisprudence, the 1990 court specifically focuses on the literal rendition of Iyer J. and the contextual interpretation in Santosh Gupta. To iron out the creases, the SC relied on finding the intention of the Parliament.[39] The SC relied on the social background, the statute as a whole, the title and the preamble of the statute, the actual words to be interpreted, and an examination of other provisions in the statute or statutes that are in *pari materia*.[40] On a closer look, the counsel contending the narrower interpretation commented on the gap in the definition and the exceptions. Certain grounds are expressly excluded, and they do not require the active volition of the employer. Nevertheless, for their exclusion, they would have been included.[41] However, other grounds do not require active volition by the employer (termination on abandonment of service). If the 'non-volition by the employer' becomes a criterion for exclusion, and if they were not excluded, all such grounds would have been included. This brought out the gap between the main section and the exclusions.[42] Premising on this, it was claimed that the exclusions

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36 ibid., 22.

37 ibid.

38 ibid., 26.

39 ibid., 30.

40 ibid., 33.

41 As there is no specific differentiating line between the ones included and the ones excluded the only thing excluding the ones excluded is the fact that they are excluded. It is this reason why (absence of link) they ought not be considered as proviso.

42 The definition clause stated 'termination of the workman by the employer' which mandated that there be an active volition on the part of the employer. One of the previous judgments had actually rendered the active volition part

were not provisos but were beyond the main section.[43] Furthermore, it was claimed that it is evident that the principle in section 25-G existed before the enactment of the amendment itself. 25G embodies the principle of 'last-come-first-go' and was claimed to be applicable *only* in cases where the workmen were rendered *surplus* for any reason whatsoever.[44] Henceforth, it became wholly inapplicable to termination simpliciter because the question of sending out a junior in place of a person whose services have been terminated does not arise or *cannot* arise unless the termination is on grounds of discharge of surplus labor. Even then, if 25-G were followed in cases of termination simpliciter (all and any termination), the constitutional rights of the junior worker would be affected. Similar arguments hold for the applicability of section 25-H, which embodies the right to preferential treatment of a retrenched employee to the same or similar vacancy.[45] If a termination (simpliciter) has taken place and 25-G were made applicable, it would lead to absurdity as the employee so terminated (not being retrenchment as narrowly defined) could claim the right to first preference to the same if a vacancy arises. The argument boiled down to 25-F being procedural along with 25-G and 25-H and not affecting the substantive right of termination. The counsel on the

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immaterial because it stated that the term termination was not qualified by whether it had to be active or passive.

43 The gap refers to not having any specific delineating criteria. Thus, 'volition by the employer' becomes unnecessary. If the volition becomes unnecessary the phrase 'termination by the employer' in the definition clause does not necessarily refer to active or passive thereby preventing any inference to be drawn which says that it has to be *wide*.

44 Section 25G states "Procedure for retrenchment: Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman."

45 Section 25H states "Re-employment of retrenched workmen. - Where any workmen are retrenched, and the employer proposes to take into his employ any persons, he shall, in such manner as may be prescribed, give an opportunity to the retrenched workmen who are citizens of India to offer themselves for re-employment and such retrenched workman who offer themselves for re-employment shall have preference over other persons."

wider side of the spectrum argued otherwise – *firstly,* there is no conflict and a possibility for harmonious construction. *Secondly,* the definition clause uses the phrase 'unless there is anything repugnant in subject or context'. This means a context is possible beyond and above the definition itself. *Thirdly,* 25-G, 25-H and 25-F relate to retrenchment, but their contents differ. Section 25 – F applies to the definition of retrenchment under section 2(oo) as 'commonly' understood. *Fourthly,* 25-H should apply to terminated workers due to being surplus. The first four observations necessarily infer that, as plainly understood, retrenchment can include many other cases, but 25-H is only applicable to cases wherein the termination has occurred owing to surplus. *Finally,* it was claimed that 25-G does not lay down any absolute rule.

The section uses the word 'means', making it a hard-and-fast definition. It does not say 'retrenchment includes...'. The judgment furthers an interesting string of thought – even if one relies on the wider school of interpretation, the same would be subjected to anything repugnant in the subject or context. The SC analyzes the different sections added by way of amendments that incorporate the concept of 'as if' retrenchment.[46] The SC relies on this difference to conclude that if there is a genuine closedown or transfer of undertaking, it would be unfair to provide those workers with benefits under 25-H. These workers would be entitled to compensation under 25-F and nothing more. To the last submission made by the narrower school of interpretation – that if a wider school of interpretation is employed, then the rights of the employer under contract and standing orders get hampered, the SC observed that the wider interpretation does not Take away the right of the employer but places additional obligations on the employer.[47] This is the social policy of the legislation, and this is exactly where the socio-political ideology of the SC becomes vivid – the will of the people stands in place of reason. From here, the SC relies on trying to fill the gaps in the definition. It depends on the social and political philosophy of the act and states that retrenchment means termination for any reason whatsoever but excludes those grounds mentioned explicitly.

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[46] ibid.,719

[47] ibid., 720.

It is humbly submitted that there are certain 'gaps' in the judgment itself. *Firstly*, the SC relies on ascertaining the intention of the legislature to side with the broader school of interpretation. However, it does not investigate the 'actual' intention of the legislature while incorporating the said clause. *Secondly,* the SC relies on 'unless there is anything repugnant in the subject or context', which is placed in the overarching definition clause under section 2 of the ID Act.[48] Nevertheless, what retrenchment means is contextually clear – it is its commonsensical meaning. *Thirdly,* the SC, in supplanting reason with the people's will to infer the social positioning of the Act, quotes the House of Lords while claiming that judges ought to avoid making law and get involved in social issues affecting their impartiality. *Fourthly,* the SC does not explain why it adheres to the reasoning of the wider school of interpretation as it moves to engage in socio-political jargon. *Fifthly,* if the SC specifies the differential application of sections based on 'as if', i.e., different and specific words employed in those specific sections, it should have allowed sections without these words to have a general application. Sections 25 – F, 25 – G and 25-H do not have any specific words limiting their applicability to retrenchment only in cases where the worker has been terminated owing to surplus. If they were made applicable generally, the SC would have had to give impetus to the narrower school of interpretation. *Finally,* section 25 – G puts forth a clear mandate. The language used in the section is 'shall' and is qualified by one consideration – an agreement to the contrary. The SC could have stated that the only category of workmen who could be excluded from the application of 25-G would be those with whom there is an agreement of the employer stating the non-applicability of this statutory right.[49]

The metonymic contamination of definition by schools of interpretation, either literal or purposive, exemplifies a specific brand of jurisprudence, herein called rolling stone jurisprudence. Of course, labor laws are value-laden; therefore, expecting a SC to

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48 Section 2, The Industrial Disputes Act of 1947.

49 A statutory right cannot be taken away by an agreement unless the latter confers better terms than the agreement itself. Thus, it becomes difficult, if not impossible to take away this right by an agreement to the contrary.

remain neutral is unfathomable. However, this comes at a cost. Each judge can decide a case per their understanding of things in general and precedents. The history of labor jurisprudence is witness to the SC refusing to employ literal interpretation as 'purposive' interpretation would enable laborers to gain in that situation, yet, on the other hand, the SC has relied on literal interpretation wherein laborers stand to benefit. The only underlying social philosophy seems to be that whatever benefits the workers have must be justified based on any school of interpretation. While this has benefitted workers under Indian labor jurisprudence, the development of precedents has suffered. Like a 'rolling stone' does not gather moss, Indian labor jurisprudence is *not* burdened with its ancestor's moss and rolls on. This is contrary to why labor laws were codified in the first place – the freedom from the dictum of individual barons under common law courts (Epstein 1981).

Redundancy Laws in England – The Road Not Taken.

English labor jurisprudence carefully stitches the concept of dismissal due to redundancy. Redundancy usually means that the employee is no longer viable. The complications begin from understanding whether the employer did not 'need' him because there was a reduction of work, that he has been dismissed owing to misconduct, or that he has been dismissed unfairly (Whincup 1967, 25). The delineating question is whether the requirements of the business have changed, which has led to work reduction. The usage of the word mandates what it stands for. The object was clear from the political economy when the first law on redundancy was enacted – investment in the modernization of work had led to greater loss of jobs and union unrest (Benson 1985, ix).

The general scheme of the Act is to provide for the employer's payment of lump sums to their redundant employees. The ordinary meaning of the term is simple – a worker becomes redundant when the work becomes irrelevant. The first statute regulating redundancy in England was the Redundancy Payments Act 1965 (herein onwards 'the act'). It was based on the Government's acceptance of the ILO Recommendation concerning the Termination of Employment at the Initiative of the Employer

(1963). The act incorporated novel positive rights and obligations into the employment contract (Benson 1985, x). It provided a valuable minimum floor to workers who have provided at least one hundred and four weeks of continuous employment.[50] It provided a fund from which the employer could claim a rebate in cases wherein he made a redundancy payment.[51] This fund was established by imposing a surcharge on an employer's national insurance contribution, and the employer could claim rebates for redundancy compensation payment.[52] Section 1(2) of the act incorporated the situations in which redundancy might arise – *firstly*, the employer has either ceased or intends to cease to carry on the business in which he employed the employee or that the employer has ceased or intends to cease to carry on the business at the place in which the employee was hired. *Secondly,* the business does not require the particular kind of work for which the employee was hired or that which the employee has ceased or diminished at where he was employed. The dismissal from service must 'wholly or mainly' arise from these reasons. However, the act never mandated that the employer acted fairly (Benson 1985, ix). This resulted in workers being dismissed for whatever reason, which was then portrayed as arising out of redundancy (Benson 1985, ix). The Industrial Relations Act 1971 provided that the employer shall provide compensation if the dismissal would be unfair (Benson 1985, x). Gradually, employers would go around dismissing employees in a 'fair way' by deploying redundancy (Benson 1985, xi).[53] The existing law on fair dismissal is enshrined under Section 98 of the Employment Rights Act (herein onwards 'the 1996 legislation'). Dismissal on the grounds of redundancy is fair to vide section 98(2)(c). The ceiling for calculating compensation was fixed at 20 years, starting backwards.[54]

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[50] Section 8 of the Redundancy Payments Act of 1965. This position is changed to 2 years by Section 155 of the Employment Rights Act of 1996.

[51] Section 26 The Redundancy Payments Act of 1965

[52] Section 30 The Redundancy Payments Act of 1965 (The 1996 legislation does not have such a provision)

[53] The cost of redundancy payment is much lower and comes with a rebate than compensation for unfair termination.

[54] Section 162 (3) Employment Rights Act of 1996.

On preliminary reading, it is clear that while redundancy and retrenchment might have some overlaps, they are distinct. Redundancy means the dismissal from service, which can arise owing to non-relevance of the kind of work being done by the employee or that the employer has ceased to do the kind of work for which the employee was hired or has ceased to do that kind of work at the place wherein the employee was hired to work. The employer is further responsible for paying, subject to some embargoes on the employee's claim, redundancy payment if the employee is laid off or kept on short-time.[55] Redundancy strictly adheres to the phenomena(s) from which redundancy may arise, but retrenchment does not. The extent to which the volition of the employer is relevant is clear under redundancy. The act of dismissal is not open-ended via section 136. It includes termination of the contract by the employer (with or without notice), the expiry of a fixed term contract without being renewed, or the employee terminating that contract without notice wherein this act by the employee is 'by the reason of the employer's conduct.' The manner of termination mentioned under section 136(1)(a) is necessarily an active act.[56] Any change in the condition of employment that makes it unsuitable for the employee to keep working may amount to a dismissal (Whincup 1967, 21). Interestingly, there is a presumption that dismissals are due to redundancy (Whincup 1967, 22). The employer must disprove that the dismissal has been on the grounds of redundancy to defeat the compensation claim. If the employer concedes that there has been a dismissal, then the court/tribunal usually proceeds to check whether the same was on the grounds of redundancy (Whincup 1967, 45). The burden of proving that there has been a dismissal is on the employee, and that the dismissal was on the grounds of redundancy (or not) is on the employer (Benson 1985, 44). The golden principle is that dismissals are presumed to be caused by redundancy unless the employer can prove the contrary (Whincup 1967, 25). However, there is no presumption that there has been a dismissal every time a contract ends. While the contract

55 Lay off and short time is different. When employees are hired for short times and are not laid off they are given work for specific time periods.

56 Even contracts which are Fixed Term Contracts, the employer necessarily engages in the act of termination at the time of making the offer.

of employment may conclude, it might be that the employee has left on his own accord (Whincup 1967, 22). The standard of proof required is the 'balance of probabilities' (Benson 1985, 45). It is further observable that there are two phases before the redundancy claim. *First, employees must be 'dismissed'; secondly, this dismissal must* result from redundancy. Counterbalancing the employees' rights on redundancy compensation is the wide range of technicalities which, if not observed, could lead to the exhaustion of the claim.[57] Furthermore, an act warning of likely redundancies in the future does not amount to dismissal for the 'purpose' of the Act (Whincup 1967, 20). Any employee asked to look for a different job and gets one, thereby serving his notice, does not amount to dismissal owing to redundancy.[58]

Similar provisions were found in the 1996 legislation. This Act was aimed at consolidating rights relating to employment.[59] Section 139 provides certain clarifications on redundancy claims. *Firstly,* the employer and his associates shall be considered one business unless the two conditions leading to redundancy are satisfied without treating them as one. This includes situations wherein a group of companies must let go of a portion of the labor force. They may choose one among them and dismiss it irrespective of whether there is actual redundancy in that establishment (Benson 1985, 46). *Secondly,* the local authority and the governing bodies of schools shall be treated as one business concerning the running of schools and the activities the governing bodies carry on (unless any of the conditions are satisfied by not treating them as such)—the benefit of the same accrues as previously described. *Thirdly,* suppose the employer terminates an employee's contract because of an act or an event and the contract is not renewed, or he is not engaged under a new contract. In that case, he shall be *deemed* to be dismissed because of redundancy if the circumstances are wholly or

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57 Section 164 and 165 of the Employment Rights Act of 1996.

58 *Morton Sundour Fabrics vs Shaw* 1966.

59 This Act regulates matters relating to labor and industry in the UK. This Act replaces all previous laws namely; the Payment of Redundancy Act of 1965, the Employment Protection Act of 1975, the Employment Protection (Consolidation) Act of 1978 and the Trade Union and Labor Relations Act of 1974.

mainly attributable to the grounds on which redundancy might arise. *Fourthly,* the claim of redundancy can be made against a person to whom the power to dispose of the business has passed, provided that the contract is terminated and the dismissal is wholly or mainly attributed to the fact that the employer has ceased or intends to cease to carry on the business for which he employed the employee. *Finally,* stop and diminish shall either mean permanently or temporarily and for whatever reason.

Dismissal strictly means the employer's termination of the contract (with or without notice), where the contract is for a limited term. The contract expires owing to the limiting event without any renewal under the same contract, and there is an instance of constructive dismissal. [60] The most common way of termination is by the employer, wherein he serves a notice that the contract shall terminate on a specific date. As the section suggests, the employer might also be dismissed without any notice. This includes wherein there is a fundamental breach (willful disobedience by the employee), and the employer treats it as repudiation. This refers to situations wherein the employer had ordered the employee to engage in a different (not requiring any additional skill) work process because the employer no longer carried on the work he had formerly done, and the employee refused. Unless there is a breach by the employee and the employer dismisses without any notice, the employee is entitled to a claim for compensation under a wrongful dismissal claim (Benson 1985, 25). Furthermore, in the expiry of fixed-term contracts, the employee shall stand dismissed per the 1996 legislation. Examples of such may include situations where the work done by the employee, under the fixed term contract, is no longer done by the employer or is no longer done at the place where the employee was employed to work. Minor changes to the terms do not affect the contract's status unless substantial changes suggest a novel contract. In the case of consensual alterations, irrespective of whether the terms were detrimental, it cannot be claimed that the same was an act of dismissing (Benson 1985, 33). Inferences as such are varied and can be drawn on the premise of diverse fact situations. However, in cases where the employee is hired for a job that requires

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[60] Section 136 uses the phrase "…by his employer if (and only if)."

him to travel, there is no scope for an offer for suitable alternative employment, making him ineligible for redundancy. In cases where the employee is temporarily willing to work away from the ordinary place of employment, it shall not be construed to mean that he is willing to work anywhere for any amount of time (Whincup 1967, 22). Lastly, the concept of constructive dismissal was a common law construct eventually incorporated under the statute (Benson, 1985, 31). In cases where the employer substantially reduces pay without consultation or arbitrarily, the employee has the right to treat the contract as 'ended'.[61] If an employee terminates their contract during a lock-out declared by the employer, they shall not be 'dismissed' per this section if they fail to serve a notice of intent.[62] Furthermore, in cases of the death of an employer, dissolution of the partnership, the appointment of Receiver, winding up of the Company or wherein, owing to the operation of a statutory provision, the employer is prevented from continuing his business. The employee shall be dismissed in the sense contemplated. In cases wherein the employer has served a termination notice, and the employee serves the employer with a counter notice to execute the termination at a prior date (but not after the expiry of the obligatory period of notice), the said termination shall be considered to be a dismissal.

Redundancy, as aforementioned, has a specific meaning. To avoid a redundancy claim, the employer must prove that the dismissal did not arise from redundancy (Benson 1985, 44). However, with the advent of the fair dismissal mandate, it became beneficial for the employer to terminate the employee on grounds of redundancy.[63] The part can be divided into two kinds of claims – closure and reorganization of business, which leads to lessening work (Whincup 1967, 26). Section 139(1)(a) provides for situations where the employer has closed down the business or the business is no longer profitable. The section also employs the phrase 'carries on business'. In *Thomas v. Jones*, the Employment Appellate Tribunal

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61 *Marriot v. Oxford & District Co-operative Society Ltd*. 1969

62 A notice of intent is a notice that expressly states that the employee intends to claim redundancy payment.

63 ibid.

decided it was unnecessary to 'own' a business. Redundancy claims might arise from and against anyone who controls it (Benson 1985, 46). This clause also includes situations with partial closure and changes in the type of business carried out.[64] Dismissals occur when an employer changes the type of business – they cease to carry on a specific type of business and carry on a new one. The section categorically employs the phrase 'business for which the employee was employed'. This puts the contract of employment in the place of reverence to determine the work for which the employee was employed. Instead of closing down the business, the employer may decide to sell it. Selling a business might be for any reason – the possibility that the business is no longer profitable. However, there are other causes wherein the employer might decide to get the most out of an already profitable business and leave when the market is high. In which case does redundancy hit? After the Transfer of Undertakings Regulations (Protection of Employment) Regulations 2006, a 'relevant transfer' does not mean dismissal, and the employment contracts continue after the transfer.[65] If the sole or principal reason for the dismissal is the transfer or any reason connected with the transfer that is not economic, technical, or organisational, then the dismissal is unfair.[66] 'Unfairness' claims cannot arise as dismissal owing to redundancy is essentially fair. The employment contract also becomes relevant if the employer decides to close down the business at the place where the employee was employed. Generally, employees must work either within the premises or a specific area. If the terms of the contract do not specify which specific premises or the area the employee is required to work, then there ought to be a reasonable construction of the same. A permissible movement of business in the context of a redundancy claim depends on the contract's terms.

Reducing work of a particular kind might give rise to redundancy claims. There may be situations wherein the employer replaces the work reduced with a different kind of work. Can this lead to redundancy? The test devised to determine whether two

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[64] *Forrester v. Strathclyde Regional Council* 1977 ITR 424

[65] Section 4(1) Transfer of Undertakings Act 2011

[66] Section 7 of the Transfer of Undertakings Act 2011

types of work fall under the same umbrella was whether 'special aptitudes, skill or knowledge' was required to do the other kind of work.[67] This might, however, lead to some problems. In cases where the output is the same but the 'means' by which the employee achieves the same stands dialectically altered, the judge might take a hard interpretation of the said test and varied outcomes could be reached. These are examples where work of a particular kind diminishes or ceases. The contra includes situations wherein employees distribute the work differently (Benson 1985, 52).[68] Dismissal in such cases does not lead to a redundancy claim unless the restructured position is such that the employee cannot cope (Benson 1985, 52).[69] Similarly, higher standards or alternations like work can lead to redundancy claims unless that particular kind of work increases or remains constant (Whincup 1967, 26).[70] In *Murphy v. Epsom College*, the dismissal of one of the two plumbers (Mr. Murphy) was challenged. Murphy was a plumber who looked after general plumbing but did not look after the overall heating installations. The company decided to replace Mr. Murphy with someone who has overall experience. There was no reduction in the number of employees, but Murphy claimed he was 'unfairly dismissed'. The tribunal rejected the claims and stated that the dismissal was fair due to redundancy. This is a problematic interpretation as it is hard to see how work of a particular kind has diminished (Benson 1985, 53). Similarly, there is no redundancy when the same work has to be done but under different terms of employment (Benson 1985, 54).[71] Wherein the employer withdrew the transport the company provided as it could no longer afford it, certain employees were dismissed as it became impossible to get to work. This was held not to be redundant because the section does not contain 'on the existing terms of employment' and the need for employees to work had not diminished.[72]

Employers must consult individual employees and give them

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[67] *Amos v. Max Arc* 1973 IRLR 285
[68] *Riding Garages v. Butterwick* 1967 ITR 229
[69] *Robinson v. British Airways* 1977 IRLR 477
[70] *North Riding Garages v. Butterwick* 1967
[71] *Chapman v. Goonvean & Rostrowrak China* 1973
[72] ibid.

reasonable warning of impending redundancy (a warning is not a notice) (Benson 1985, 181). There is no minimum time scale when fewer than 20 employees are made redundant; however, the consultation must be meaningful. The employee is entitled to be accompanied by trade union representatives or colleagues during individual consultation meetings.[73] If the establishment desires to terminate 20-99 employees, it needs to serve at least a notice 30 days prior and at least 45 days in case the dismissal is of 100 or more workers.[74] This is subject to the employer hiring more than 20 employees at one establishment. Collective consultations must be completed before the notices are issued. The consultation must be meaningful. In the *Pinewood* judggement[75], employee (X) was provisionally selected for redundancy after the employer announced the same. X was given his scorings, but the employers failed to explain why he had scored less than the other two employees in the pool. X brought a claim for unfair dismissal. The tribunals ordered that X was unfairly dismissed because the scores were so close that a different outcome was possible. The employer must provide the employee with justification for why he was chosen from the pool.

The Analysis:

The peculiar situation faced by Indian businesses and employees is the absence of a written contract mandate similar to the 1996 legislation. The practice in Indian industry is to hire a substantial portion of the workforce without any formal written contract (Sood, Nath, and Ghosh 2022, 61). Although the formal sector does hire through contracts, it constitutes a minuscule portion of the working population. The informality attributed to the Indian labor market often originates from rigorous labor legislation, a surplus labor market, and a wide interpretation of labor rights.[76] The Code on Industrial Relations subsumes three statutes – the Industrial Disputes Act of 1947, the Trade Union Act of 1926 and the Industrial Establishment (Standing Orders) Act. As a policy prescription, it can be observed that adopting a regime of

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[73] https://www.hrdept.co.uk/services/redundancy-consultation/
[74] ibid
[75] *Pinewood Repro Ltd. v. Page* [2011] ICR 508.
[76] See Bhagwati 2004 & (Besley and Burgess 2004).

redundancy instead of retrenchment can alleviate the hardships on both sides, albeit with certain modifications and alterations as transplanting legal regimes regulating labor in matured economies to developing economies might backfire (Deakin and Haldar 2015, 49). *Firstly*, there is no difference between the contextual meaning and the wider meaning of redundancy. Strictly speaking, redundancy can *only* arise out of becoming redundant. The language employed while defining the same causes no critical confusion as to what it means or what its extent shall be. *Secondly,* the lack of any logical connection between the definition section and the exception clause has baffled the Indian courts.

The debate between the two schools could have been given a proper burial in case a clear line had been drawn regarding the volition of the employer. *Thirdly,* redundancy is a strictly economic phenomenon with objective standards. Of course, there can be situations where objective definitions can succumb to an enlightened lawyer's onslaught. However, it is not comparable to the open-ended definition of retrenchment – the roads diverging in the yellow woods lead the traveller to multiple possibilities. *Fourthly,* the redundancy fund can be restructured into a joint-contributory scheme - the employee has to contribute 5 per cent of his gross wage/salary, and the employer has to match the said contribution. Of the total sum accrued in a financial year, fifty per cent should be regularly invested in equity (monthly contributions) (except in the company where the employees/workers work). In the economic boom phase, the return on investment would incentivize both parties to contribute. During doldrums, it can be a clear and objective indicator of redundancy or lay-off leading to redundancy.[77] *Fifthly,* the calculation of retrenchment pay should be re-clothed as redundancy pay. The existing Indian position provides for fifteen days of average pay for every completed year of service (or any such number of years as notified by the appropriate

[77] These are rough percentages. What percentage of contribution should be made by both sides is a policy question and can be decided by the appropriate government.

government).[78] In addition, there should be proportionate distribution of profits (return on investment). If the worker is made redundant during an industry-specific growth rate of less than two per cent, the worker shall be entitled to the profits accrued on the fund in the past three years of continuous service put in by the worker.[79] This would demotivate the employer to dismiss, owing to redundancy, employees/workers *en masse* as profit distribution shall become negligible in such cases. Suppose workers are dismissed owing to redundancy during an industry-specific growth of more than two per cent. In that case, the employee/worker shall be entitled to pay the profits accrued on the funds during the past year of continuous service put in by the worker/employee.[80] The employer cannot claim any rebate on the profits accrued (paid to the redundant employee). Redundancy compensation ought to be excluded from 'taxable' income. *Sixthly,* accepting the redundancy regime makes the entire transfer or closing of undertaking jurisprudence redundant. Added through subsequent amendments, these provisions were incorporated to meet urgent situations arising from complications faced during the interpretation of Section 2(oo). An undertaking closes down owing to reasons similar to which redundancy may arise. In such cases, the employer shall be liable for the aforementioned compensation declared insolvent. An undertaking is transferred, and there is a change in ownership. Unless the contract specifies anything specific, the new employer shall remain liable in the same manner to pay redundancy compensation (in case they decide to let go of some or all employees). In case the previous owner decides to dismiss them, he has to do so as provided or according to better terms provided in the contract. This kind of additional alternations to the claim for

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78 The redundancy fund is here conceptualized as a national fund. It is not specific to any industry or any employer or any employee. The fund will be managed by a central authority and subject to yearly audit.

79 The rationale for the same is that the worker is being terminated when the economy is in the slug. It is highly likely that markets might not give substantial returns on the fifty percent invested. The worker as a right ought to have greater quantum (relatively) of sum returned to him on dismissal.

80 In this situation, the return on investment is much higher. It is highly likely that the overall profits accrued in the past one year would be much higher than in the previous situation mentioned.

redundancy would balance both sides as it ought to be the last resort taken by the employer with economic hardships. *Seventhly,* the importance of the works committee, whose efficiency is not found under the current regime, is severely constrained. Works committee could be allotted (mandatorily) the responsibility of being a party to 'meaningful consultations' before issuing a notice of redundancy. *Eighthly,* the usage of work ceasing or diminishing for any reason under English jurisprudence aptly co-opts the *Divikar* argument that the factum of retrenchment can arise for any reason.

On the contrary, reliance on a formal and written contract might not exactly work in favor of either the Indian employer or worker. As an industrial practice, most workers are hired on an oral agreement, the contents of which might be difficult, if not impossible, to prove. It shall be a policy decision whether a formal written contract mandate can be made an industry-wide practice in India.[81] It must be remembered that it is only through a legal framework that labor capacity acquires the form needed to sustain the complex economic relations and deep division of a market economy (Deakin and Haldar 2015). *Secondly,* the wide array of notices[82] to be served on either side or by either side under British labor jurisprudence is something which, if implemented in India, would lead to greater proclivity towards procedural complications in an already procedure-burdened legal form. The solution to the same could be a one-sided obligation imposed on the employer to serve a notice of redundancy after consultation with the works committee. The need to serve any notice (or counter-notice) about redundancy during strikes, lockout, etc., should not be included.

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81 Similar to the discretion conferred under Section 171 Employment Rights Act concerning employment which are not under the formal contract.

82 The employer's obligation to serve a notice expands with the rise in total time served by the employee/worker. This cannot be transplanted in the Indian context as a parallelly higher compensation has been provided for workers/employees in accordance with the industry specific returns during boom or slump. It should be a uniform – 45 days' notice served on the employee/worker. Similarly, the wide range of notices obligated on the worker shall cause further flutters in an already complicated schema of prolesprudence. In case the presumption is in favor of the worker during a dismissal, they ought not be obligated to serve a notice of intent.

Conclusion:

India is the only nation where prior permission is required from the State to retrench workers (Sharath Babu and Shetty 2007, 458). The centrality of the state's role in labor relations stands counter to most developing nations which allows some space for the 'invisible' hand to operate. A breakdown of section 2 (oo) widens the semantics of the definition (Sharath Babu and Shetty 2007, 471). The hypothesis forwarded in this paper was simple – India ought to have taken the route of redundancy instead of sticking to the parochial notion of reduction. A redundancy regime would aid in a trade-off of sorts in a nation tackling post-COVID depreciations. The most immediate benefit is conferred to the employer and state. The limited kind of terminations that can take place within the paraphernalia of industrial dispute would enable streamlining compensation jurisprudence as well. In the next decade, more jobs will be lost owing to redundancy, and developing nations will face far more severe brunt as the impact of modernization will be incomprehensible.

AN ANALYTICAL STUDY OF THE IMPACT OF ARTIFICIAL INTELLIGENCE ON THE RIGHTS OF PRIVACY AND EQUALITY AT THE WORKPLACE

*Dr. Abhishek Sharma Padmanabhan** & *Prof (Dr.) Omprakash*♦

ABSTRACT

Technologies that use Artificial Intelligence (AI) are becoming more popular for a variety of purposes, including checking the weather, reading the news, accessing voicemail, and receiving directions. These technologies are also gradually directing or replacing human decision-making in major domains such as the provision of medical care, the enforcement of criminal Laws, financial affairs, and employment. The advancements are responsible for a great deal of social issues, and a number of scholars have begun to express their concerns about the manner in which algorithms should make selections in our society. In the workplace, AI-powered systems are progressively taking over duties such as recruiting, selecting, and managing personnel. As a consequence of these advancements, there have been concerns raised over the possibility of discrimination, violation of privacy, and unjust treatment of workers. The present research paper investigates the following two concerns relating to the use of AI in workplace: Discrimination of Individuals based on constitutionally protected characteristics such as ethnicity and the invasion of workers' privacy caused by artificial intelligence systems in the workplace. Additionally, the study outlines a potential framework for how existing regulations may be applied in the future.

The authors of this paper believe that the Legislative framework that is now in place does not effectively

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address the substantial policy concerns that are created by the increasing usage of AI in the workplace. A basic introduction to the principles of AI and its developing role in the world of work is provided in the first portion of this article. In the second part, we will address the possible legal ramifications of employing AI for personnel decisions, as well as the ways in which this technology may lead to discriminatory effects. In the third part, an analysis of the possible hazards that data-driven systems may pose to the right of workers to autonomy as well as privacy is presented, along with an evaluation of the relevance of existing legal frameworks in addressing these concerns.

Keywords: Technology, Workplace, Privacy, Equality, Employment Laws

AI and the Workplace

There are a number of terms that are used to express the meaning of the concept, Artificial Intelligence (AI); some of these terms include machine learning, algorithmic decision-making and automated decision-making. It is difficult to precisely define what AI is, although the precise definitions of artificial intelligence and machine learning are somewhat distinct from one another, for the sake of this article, we shall use the term "AI" to refer to systems that make use of computational methods and inputs that are abundant in data in order to generate predictions that either augment or even replace human decision-making. In order to accomplish the construction of these technologies, enormous amounts of data are processed in search of patterns. After that, these patterns are used in order to make predictions about the outcomes of new instances or conditions. Machine learning techniques are used by a variety of AI systems. These techniques allow computers to steadily improve their performance by studying fresh data without any further assistance from humans. It is possible that as AI based systems get more complex, they may produce results that no one, not even the people who designed them, would be able to fully understand or grasp. The situation is made more complicated with the possibility

of even humans not being able to get these insights by conventional observation. AI research was first conducted with the intention of programming the computers to think and behave in a manner similar to that of humans, with the ability to make judgments in a broad variety of contexts. An system that is based on AI which is capable of doing everything has been a major failure. Limited application of AI, on the other hand, which refers to AI that is applied to a particular problem or situation, has achieved great success. Computer programs that are able to play chess, computers that are able to detect human speech and translate it to text, and email spam filters are some examples of well-known uses of application of AI based technologies[1]. Concerns have been raised by certain individuals about the transparency, accountability, and fairness of these AI systems. This is due to the broad use of these technologies in domains where they have the potential to dramatically impact individuals and society. When making comparisons over a wide range of demographics or affected groups and individuals, it is necessary to take into account the potential for negative outcomes that are discriminatory or unjust in order to guarantee fairness[2].

When we speak about accountability, we are referring to the act of taking responsibility for the use of AI and the consequences of that usage, including the reduction of any detrimental impacts on society. There are concerns relating to transparency when the decision-making process of the AI is not explained. There are concerns raised by several experts over the implementation of AI in the workplace. An increasing number of individuals have been pondering, as of late, if AI and other developing technologies, such as robots and automation, would eventually replace humans in the employment[3].

The subject of whether or not current advancements in AI

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1 Deborah Hellman, *Measuring Algorithmic Fairness*, 106 Va. L. Rev. 811, 813–14 (2020).

2 R. Richard Banks, Jennifer L. Eberhardt & Lee Ross, *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 Calif. L. Rev. 1169, 1170 (2006).

3 Crystal S. Yang & Will Dobbie, *Equal Protection Under Algorithms: A New Statistical and Legal Framework*, 119 Mich. L. Rev. 291 (2020).

may bring about more widespread upheavals is still being passionately argued, despite the fact that fears about computers taking over occupations have been around for quite some time. The purpose of this article is not to provide a solution to that question, which is clearly very important; rather, it focuses on the policy challenges that arise when businesses use AI technology to manage people rather than replace them. Technologies that use AI have been welcomed by employers as a means of assisting with a variety of management and personnel duties. Techniques based on AI are used in the process of evaluating and screening job applications. Additionally, AI has assisted firms in identifying employees who may be considering leaving their positions. It has been shown via the analysis of data that certain traits, such as spending time conversing with colleagues, attending meetings, and forgoing benefits coverage, are connected with a higher chance of flight. Using these estimates, firms have the option of either increasing their efforts to retain employees or removing employees who are likely to depart high-stakes endeavours. In every sector of the economy, AI is being used in some fashion to provide assistance with labour management. In some instances, AI is even taking over managing tasks.

The use of AI in the workplace has been subjected to two primary categories of criticism. In the first place, many people are concerned that AI would make employment decisions that are prejudiced against certain groups, or that these decisions might reflect such preconceptions. When algorithms make predictions, it is possible that they may unjustly target workers based on their gender, race, or other protected characteristics. Due to the erroneous notion that AI systems are neutral and fair, the risk rests in the fact that these biased findings could not be seen by anybody. Second, with the development of AI, workers may find themselves caught in a web of data vulnerability, illogical judgments, and excessive data collection. If AI gets too engaged in the activities that workers do on a regular basis, it may cause them to feel powerless since they will no longer be able to have meaningful talks with their

supervisor[4]. As a result of the inexplicability of the judgments that are formed and the insatiable appetite of data collection, employees may get a sense of being trapped in a reality matrix that is controlled by a computer and that there is no way out. Following this, we will examine the ways in which the laws that are now in place address these issues and break them down into their component elements.

AI and Employment Discrimination

Access to work possibilities may be profoundly affected when employers utilize AI technologies to make or assist choices regarding recruiting, hiring, and promotion. These technological advancements have the potential to make employment procedures more equitable and less biased. It also has the potential to eliminate human prejudices, which are a major source of unfairness for women, people of colour, and other marginalized groups when decision-makers exhibit either explicit or implicit biases. However, depending on their construction and training, AI technologies may either perpetuate human prejudices or add new types of bias, despite their seeming impartiality and objectivity. Removing protected characteristics from algorithms, such as gender or ethnicity, would not avoid these kinds of biased effects. The use of proxies for a protected attribute is a potential issue when AI tools are constructed using data-rich profiles. An algorithm that prioritizes applicants according to zip code, for instance, could unfairly disfavour ethnic minorities due to the strong correlation between race and location of residence in many areas[5]. This might happen on purpose when a proxy is employed to exclude an undesirable population, but it could also happen accidentally due to the unexpected correlations between qualities and protected traits. If a company's algorithms find a correlation between a candidate's drinking habits and a medical condition, for instance, they may unknowingly discriminate against people with impairments in the hiring process. Also, if AI is taught with biased data, it can end up with biased findings. When trained using a biased supervisor's subjective ratings, an algorithm will

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4 Hannah Bloch-Wehba, *Access to Algorithms*, 88 Fordham L. Rev. 1265 (2020).

5 Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 Wash. L. Rev. 1 (2014).

consistently provide biased predictions about future performance on the job. Similarly, if an employer's previous practices excluded certain groups, an algorithm that compares applicants to existing workers might prejudice against those groups. For instance, the algorithm may continue to replicate the employer's gender gap in computer programming while attempting to forecast the best candidates for open positions. Additionally, racial and ethnic minorities may be excluded by an algorithm that aimed to enhance cultural fit by suggesting candidates who are similar to present workers. Results might be skewed due to other data issues as well. The AI's ability to accurately identify prospective individuals from a given group depends on the completeness and accuracy of the data used to train it. If certain groups' data is lacking, the algorithm may consistently underestimate their chances of success or be inaccurate overall. Also, even if no one is intentionally trying to discriminate, protected groups might be unfairly harmed by an algorithm that uses training data that doesn't reflect the actual population. Biased AI has concerns that extend to the application pool, impacting diversity even before employers have an opportunity to assess prospects.

Internet job boards have become an integral part of modern hiring practices. However such sites do not just plaster job ads all over the internet, instead they depend on AI instead to figure out who will be interested in a certain opportunity, and such projections typically mirror occupational segregation trends from the past.. Again, advertising that seem to reflect prejudices about the kind of individuals who occupy certain positions were presented to audiences that were prejudiced based on race or age. Artificial intelligence (AI) learns to make predictions by analysing data regarding prior patterns of behaviour, which might lead to discriminating consequences. Some of these tendencies may have their roots in prejudice that women have experienced in the past, such as pay disparities or harassment that prevents them from pursuing particular careers. The patterns of occupational segregation along gender and racial lines have long been seen in the labour market. Therefore, it is important to exercise caution while developing AI technologies that depend on historical data to avoid perpetuating prejudice. Designers of AI systems and businesses that utilize them should take measures to mitigate the potential for

discriminatory impacts in order to prevent the unintentional embedding of prior prejudices. To minimize unfairness, it is crucial to monitor algorithmic systems for unintentional discriminatory impacts and make improvements as needed[6].

There are a lot of legal concerns about the increasing use of AI technologies in the workplace due to the potential for discriminatory effects. Despite the fact that racial, ethnic, and other forms of protected feature discrimination are typically forbidden by law. Algorithms used to determine hiring choices raise questions about compliance with these laws, which have apparent applications in some cases. The applicability of current laws to AI technologies, however, may be murky in other contexts. Furthermore, it forbids businesses from publishing ads that "indicate a preference, limitation, specification or discrimination" based on a prohibited feature, in addition to outright outlawing discrimination. If a company attempted to target its advertisements using characteristics that indirectly or explicitly excluded members of a protected group, these requirements would most certainly come into play. But, as we have already seen, the algorithms used by these sites may make even the most objectively targeted job ads seem skewed. Is the platform liable if the employer tries to reach a wide audience but the algorithm gives out opportunities in an unfair manner? We contend that a software platform ought to be seen as an "employment agency" if it proactively steps in to propose or endorse certain prospects or chances, or to enable particular pairings. There may be other platforms that are not directly involved with job possibilities to warrant exclusion from the Act. How about application sorting and scoring algorithms for hiring? Is it illegal to use an algorithm that unfairly targets a protected class?[7].

Two schools of thought on prejudice hold that different forms of treatment have different effects. The principle of disparate treatment prevents discrimination based on gender, colour, or any other legally protected characteristic. Disparate treatment theory

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[6] Aziz Z. Huq, *A Right to a Human Decision*, 106 Va. L. Rev. 611, 613 (2020).

[7] Ashley Deeks, *The Judicial Demand for Explainable Artificial Intelligence*, 119 Colum. L. Rev. 1829, 1832 (2019).

forbids employers from engaging in purposeful discrimination, such as the employment of a biased algorithm to exclude members of a protected group. Although it may be difficult to prove the employer's intent, the disparate treatment theory provides a good conceptual framework for this kind of discrimination. In disparate impact instances, discriminatory effects are shown via seemingly neutral employment practices. There are several stages to the disparate impact cases. An employer's activity that disproportionately affects a protected class must be first identified by the plaintiff. The next time this happens, the employer might say that the practice is "consistent with business necessity" and that it is directly tied to the work. The plaintiff may still win even if the employer wins this argument by proving that there was a less discriminating option that the employer ignored. Disparate impact theory seems to be applicable in cases when AI screening algorithms disproportionately exclude women or people of colour from a pool of applicants[8]. In other words, unless AI tools are obviously job-related and compatible with business requirement, employers should keep a careful eye on how these tools function in reality and stop using them (or at least reduce their use) if they have an unfair effect. On the other hand, several issues arise when these guidelines are applied. Employers used to justify their selection processes by proving that they assessed qualities and talents that were relevant to the job. The predictions regarding an individual's future behaviour or work performance are commonly made by AI systems using unexplained correlations with observable features. It is possible that the algorithm's dependent variable has no apparent link to performance, or that the relationship is just correlational and has no causal relationship to the appropriate abilities.

The continued efficacy of anti-discrimination legislation depends on its ability to identify the particular ways in which biased AI could be discriminatory. A biased model, for instance, should not be justified only because a statistical link exists. It is not sufficient for an employer to prove a behaviour is job-related based on an unexplained link. Further, in cases where an algorithm unfairly

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[8] Frank Pasquale, *Data-Informed Duties in AI Development*, 119 Colum. L. Rev. 1917, 1917 (2019).

targets protected groups, it is the responsibility of the employer to prove that the model is statistically sound and has real-world significance, not just a functional one. The onus should be on the employer or vendor to prove that the algorithm is free of typical forms of statistical bias; for instance, they should be able to prove that the data used to build the algorithm is reliable, impartial, and representative[9]. More than just a statistical correlation, the employer should also explain the decision-making process and how it relates to the position. In order to assess the justification of an algorithm's usage in light of its impacts, we must first apply social values and judgments. Businesses should be alert to the possibility of bias when using AI technologies for employment operations and should take measures to mitigate it. To achieve this goal, it is necessary to analyse the tools' design, construction, and deployment in a specific workplace in great detail. Employers may find advice on how to prevent prejudice while employing AI technologies in a variety of checklists or principles. One such example is the Principles for Hiring Assessment Technologies that were issued by the Leadership Conference on Civil and Human Rights[10]. Employers should also conduct frequent audits of these technologies' performance after implementation, as algorithms that seem neutral in testing may act differently in the real world[11]. It is important to review and modify screening or hiring tools to prevent injustice if they have an unanticipated differential effect on marginalized groups.

AI and Employee Privacy and Autonomy

Not only are AI technologies becoming more integrated into job duties, but they are also helping with conventional HR responsibilities. These gadgets have the potential to greatly improve productivity in the workplace. Meanwhile, gathering and analyzing massive quantities of data, with a lot of it coming from workers, is usually a part of using AI on a big scale in the workplace. Employers

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9 William Magnuson, *Artificial Financial Intelligence*, 10 Harv. Bus. L. Rev. 337, 340–41 (2020).

10 Sonia K. Katyal, *Private Accountability in the Age of Artificial Intelligence*, 66 UCLA L. Rev. 54 (2019).

11 Elizabeth E. Joh, *Artificial Intelligence and Policing: Hints in the Carpenter Decision*, 16 Ohio St. J. Crim. L. 281, 283–84 (2018).

get further influence over their employees as a result of this vast data gathering. This leads to worries about autonomy and privacy caused by AI's growing presence in the workplace. AI poses a risk to employee privacy because to the massive volumes of employee data that must be collected and processed. Furthermore, employees may experience a sense of helplessness and isolation when AI systems make judgments that have significant implications for their jobs without being held accountable or kept informed. Even though these problems have been there for a while, the increasing usage of AI technologies has greatly increased the scope of these concerns, and the Laws have offered little solutions to these problems.

Collection fand use of Employee Data

The data collected from monitoring employees powers the usage and application of AI. The systems that extract and analyse large datasets are the foundation of AI research and development. These massive datasets are essential for AI technologies to understand patterns and make AI conclusions. For instance, in order for natural language processing algorithms to study and learn to mimic human communications, they need access to massive samples of human communications. Data created by people, i.e., workers, is essential for AI to develop solutions that will be effective in the workplace, where its use is on the rise. Simultaneously, advancements in technology have made it possible to get data from workers in a cost-effective, invasive, and thorough manner. Using commonplace technology that is coupled with common consumer gadgets, employers may monitor their workers' whereabouts, online activity, and even physiological vitals like heart rate and blood pressure. Once this data is collected, AI may process it in various ways, leading to fresh and surprising conclusions.

Conclusion

There is a rising movement for algorithmic processes to be more transparent, accountable, and explainable, which is separate from workers' interests in restricting the gathering and use of their personal information. There exists broader methods to data regulation partly address these values, which are not part of typical privacy concerns. Furthermore, these principles align with workers'

worries on the growing prevalence of AI at work. Not only is employee data continually being sucked dry, but it is also used to make judgments that may seem harsh or arbitrary, and workers have no way to fight back. Their susceptibility to close examination and surveillance makes them more susceptible to abrupt and arbitrary management decisions. Employees may get a sense of being just components in an impersonal and enormous machine. Some advocates for change have advocated for Algorithmic Impact Assessments (AIAs)[12] as a means to hold AI processes to account and increase transparency. An alternative to establishing new person rights to contest machine choices is to encourage the deployment of algorithmic tools that are more suitable and less prone to errors. Although there have been proposals to establish transparency and accountability standards for AI decision-making, no laws have been passed that fully govern this area. Employees, more so than consumers, may have a vested interest in resisting automated processing, as they are more prone to experience its disciplinary and management effects first-hand. Workers may still lack the tools to properly enforce their data protection rights, regardless of how robust the laws are, if they are unable to influence their workplace. Therefore, significant safeguards for workers' privacy and autonomy concerns about AI prediction tools will probably need both Legislative reform and increased worker agency via collective action[13].

The growing usage of AI in the workplace presents new problems that the laws as they stand are not prepared to handle. There is a lack of a complete framework in the laws that addresses the unique risks of damage that arise from using machine learning techniques to manage people, even while there are laws that protect workers from discrimination and ensure their privacy and autonomy. There has to be a shift in the legislation to address worries about worker alienation and loss of personal security, as well as to avoid discrimination and ensure privacy as AI becomes more integral to businesses.

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[12] David Lehr & Paul Ohm, *Playing with the Data: What Legal Scholars Should Learn About Machine Learning*, 51 U.C. Davis L. Rev. 653, 655 (2017).

[13] Tom C.W. Lin, *Artificial Intelligence, Finance, and the Law,* 88 Fordham L. Rev. 531, 532 (2019).

FREEDOM OF THE PRESS IN THE DIGITAL AGE: BALANCING RIGHTS AND RESPONSIBILITIES AMIDST MISINFORMATION AND INFODEMICS

*Dhanya. S**

Abstract

Freedom of the press is an implied right guaranteed under Article 19(1)(a) of the Indian Constitution, serving as a crucial pillar of democracy. The media functions as a watchdog, ensuring accountability among the three branches of government and facilitating the exchange of information between the state and the public. With the advent of internet and communication technologies, the role of the media has evolved significantly, becoming more influential in shaping public opinion and governance. However, this increased power also poses risks to democracy, as media can contribute to disputes and societal disturbances through the dissemination of misinformation and disinformation. This study aims to address key questions regarding the public perception of the right to information and the responsibilities of the press in providing accurate information. Specifically, it explores whether the press can be held accountable for infringing on rights to accurate information to the people through the spread of fake news and unethical reporting. The research also examines the impact of infodemics and misinformation during the COVID-19 pandemic and their alignment with the constitutional concept of press freedom in India. Employing an empirical approach through an online survey, this study captures the perspectives of various societal stakeholders, including academicians, lawyers, students, and the general public. The findings highlight the pressing issues and challenges posed by unethical and misleading media practices, underscoring the need for a robust legal framework to

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regulate press freedom effectively. This paper provides valuable insights for readers to understand the complexities of media influence and the imperative for responsible journalism in safeguarding democratic values.

Keywords: Infodemic, Unethical Reporting, Misinformation, Propaganda, Press Freedom, Digital Media, Media Trial.

Introduction, Meaning and Significance of the Study

In modern history, India witnessed ethical reporting by the press media and they worked for the betterment of public and society. Now there is an emerging consensus that the press has been constrained over last few decades. Currently this pious profession has turned in to despairing one due to unethical reporting including fake news, infodemics, misinformation and disinformation. The 21st century has experienced weaponization and commercialization of media domain not only in electronic media but also in its print and traditional forms. The unpleasant face of journalism is creating glitches and challenges in the society. Especially in case of emergencies like the global health emergency we witnessed in the beginning of this decade, it misleads the public and create ambiguities among public and complicates the solution.

Before entering in to the complexities of unethical reporting and irresponsible journalism, it is necessary to understand the meaning of certain terms. First, '*Infodemic*' an excessive amount of information concerning a problem which may include misinformation and disinformation and makes the solution more difficult[1]. Next, *'Fake news'* refers is an inaccurate news, made up news or propaganda created with an intention to gain attention, mislead and deceive public and manipulated to look like ethical

[1] WHO, *Infodemic*, https://www.who.int/health-topics/infodemic#tab=tab_1 (last visited May 29, 2024).

credible news[2]. *'Misinformation'* refers to be an *inaccurate information communicated through electronic or print media without an intention to deceive public*. To understand unethical journalism, one should first understand ethical journalism. Ethical journalism strives to ensure free exchange of information that is accurate, fair and thorough and ethical journalists acts in accordance with the rules of conduct and standard of the profession. The journalistic practice which doesn't fall within the ambit of ethical reporting can be called as unethical reporting or unethical journalism.

The term freedom of the press refers to the right of journalists and media organizations to propagate information, opinions, and ideas without undue interference or restriction by the government. In this digital era, this encompasses not only traditional print and broadcast media but also digital platforms and social media. The scope of this freedom of press includes the ability to investigate and report on matters of public interest, critique government actions, and provide a platform for diverse voices and perspectives. However, two critical phenomena have emerged in this context, namely, misinformation and disinformation resulting in infodemic.

A free and independent press is essential for a functioning democracy, ensuring citizens are well-informed and able to make decisions based on accurate information. This paper explores the critical balance between the rights and responsibilities of the press in the digital age, particularly in the context of infodemics including fake news, misinformation and disinformation. However, the spread of fake news and misinformation undermines public trust in media institutions. This paper underscores the need for ethical journalism and reliable reporting to restore and maintain this trust. It also highlights the pressing need for effective regulatory frameworks that protect the freedom of press while curbing the spread of harmful misinformation.

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[2] 13 ESMA AÏMEUR, SABRINE AMRI & GILLES BRASSARD, FAKE NEWS, DISINFORMATION AND MISINFORMATION IN SOCIAL MEDIA: A REVIEW (2023), https://doi.org/10.1007/s13278-023-01028-5.

Objectives, Methods and Practices

This research study aimed to investigate the perceptions of various stakeholders, including the general public and legal professionals, regarding the impact of unethical journalism—such as fake news, misinformation, and infodemics—on the public's right to accurate information and the functioning of democracy. Through an empirical approach, by conducting a survey with the help of a semi-structured questionnaire, the author had gathered some relevant quantitative data on various aspects of freedom of press and the right to information of the people. The paper discusses the importance of ethical journalism and how infodemic is impacting the right to correct information of the people.

The research was conducted in two parts. The first part involved a doctrinal analysis, which explored the issues and challenges associated with unethical reporting. This analysis examined the role played by the judiciary and legislature in mitigating unethical journalism in India. An extensive literature review was conducted, drawing on secondary sources such as books, reports, articles, judgments, news reports, and online resources to provide a comprehensive understanding of the current landscape of unethical journalism and fake news. The second part of the study employed an empirical approach, utilizing an online survey to gather quantitative data. The survey was designed based on insights from the doctrinal analysis and aimed to capture the perceptions of different stakeholders on the impact of unethical journalism on the right to accurate information. This section of the study provided detailed insights into the views of various stakeholders, highlighting the broader implications of unethical journalism on society and democracy.

Findings and Discussion

Unethical Reporting and Infodemics: An Indian Scenario

Unethical reporting refers to journalistic practices that deviate from the established ethical standards of accuracy, fairness,

and accountability[3]. This can include the dissemination of false or misleading information, sensationalism, and biased reporting. In India, instances of unethical reporting have been on the rise, driven by the competitive nature of the media industry and the pressure to attract viewership and readership[4]. The country had witnessed the detrimental impact of unethical journalism in several cases. Sensationalized reporting on sensitive issues such as communal violence, political scandals, and high-profile criminal cases has not only misinformed the public but also exacerbated social tensions. One of the best examples is the media coverage of the Sushant Singh Rajput case in 2020, which was widely criticized for its speculative and intrusive nature, which overshadowed substantive public discourse and violated postmortem privacy norms[5].

An infodemic, a term popularized during the COVID-19 pandemic, refers to an overabundance of information—both accurate and false—that spreads rapidly and makes it difficult for people to find trustworthy sources and reliable guidance[6]. During the COVID-19 pandemic the country witnessed many challenges posed by infodemics as the spread of misinformation and disinformation about the virus, treatments, vaccines, and government policies created confusion and fear among the public[7]. The proliferation of false information was fueled by social media

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3 Press Council of India, *Norms of Journalistic Conduct*, 2022, http://repositorio.unan.edu.ni/2986/1/5624.pdf%0Ahttp://fiskal.kemenkeu.go.id/ejournal%0Ahttp://dx.doi.org/10.1016/j.cirp.2016.06.001%0Ahttp://dx.doi.org/10.1016/j.powtec.2016.12.055%0Ahttps://doi.org/10.1016/j.ijfatigue.2019.02.006%0Ahttps://doi.org/10.1.

4 SPJ Code of Ethics - Society of Professional Journalists, https://www.spj.org/ethicscode.asp (last visited May 30, 2024).

5 Media Coverage Of Sushant Singh Rajput's Death Violated Journalistic Norms: Press Council Of India, LIVE LAW NEWS (2020), https://www.livelaw.in/news-updates/media-coverage-of-sushant-singh-rajputs-death-violated-journalistic-norms-press-council-of-india-162105 (last visited May 30, 2024).

6 Debanjan Banerjee & K. S. Meena, *COVID-19 as an "Infodemic" in Public Health: Critical Role of the Social Media*, 9 FRONT. PUBLIC HEAL. 1–8 (2021).

7 Maria Mercedes Ferreira Caceres et al., *The impact of misinformation on the COVID-19 pandemic*, 9 AIMS PUBLIC HEAL. 262 (2022), /pmc/articles/PMC9114791/ (last visited May 30, 2024).

platforms, where unverified and sensational content often went viral. This not only hindered the public health response but also led to real-world consequences, such as vaccine hesitancy and the stigmatization of affected communities. The challenge of combating infodemics is compounded by the lack of media literacy among the general populace, making it easier for misinformation to take root and spread[8].

The rise of unethical reporting and infodemics poses a serious threat to the democratic fabric of India. A well-informed citizenry is essential for the functioning of a healthy democracy, as it enables citizens to make informed decisions and hold their leaders accountable. When the media fails to uphold ethical standards, it undermines public trust and erodes the credibility of democratic institutions.

Moreover, the spread of misinformation and disinformation can lead to polarization and social unrest. In a diverse and pluralistic society like India, the consequences of such divisions can be particularly severe. The media's role as the fourth pillar of democracy is compromised when it becomes a vehicle for falsehoods and sensationalism rather than a source of reliable and balanced information.

Right to Information and Freedom of Press: A Legal Perspective

The concept of Freedom of Press has its origin in Universal Declaration on Human Rights. According to the document "everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers" [9]. Later in 1966 the International Covenant on Civil and Political Rights reiterated the same by stating "everyone shall have the right to freedom of expression, the freedom to seek and impart information and ideas of all kind, regardless of

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[8] *Id.*

[9] M. P. JAIN, INDIAN CONSTITUTIONAL LAW (8th ed. 2018).

frontiers" [10]. In India, freedom of the press is an implied right derived from the right to speech and expression guaranteed under Article 19(1)(a) of the Constitution. This article ensures every citizen's right to express their opinions and thoughts through various mediums, including words, writing, printing, pictures, films, and more. Essentially, it allows citizens to communicate, publish, and propagate their ideas freely[11].

The Indian judiciary has consistently upheld the freedom of the press. In 1986, the Supreme Court emphasized that it is the primary duty of the judiciary to protect this freedom and invalidate any laws or administrative actions that interfere with the freedom of press[12]. Although freedom of the press is not explicitly mentioned as a fundamental right, the court has recognized it as implicit in the freedom of speech and expression. The apex court of India has highlighted the importance of freedom of the press for the benefit of the public. The Court asserted that freedom of the press serves the public by ensuring they are supplied with information and the government educates the people within its resources[13]. The Court has also protected the press from pre-censorship, restrictions on publishing news[14], and limitations on publication and circulation[15].

Another important interpretation of Article 19, as recognized by the Indian judiciary, is the right to receive and disseminate information. The press and media are vital for expressing thoughts and ensuring an informed public. The Supreme Court has observed that freedom of the press is a species of which freedom of expression is a genus in Sakal Press vs Union of India[16].

The Indian judiciary has strived to balance the right to information and the freedom of the press. In State of Uttar Pradesh

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10 MINISTRY OF LAW AND JUSTICE, *The Constitution of India [As on 1st April, 1950]*, 1–281 (1950).

11 JAIN, *supra* note 10.

12 Indian Express Newspaper (Bombay) Pvt Ltd vs Union of India, [1986] SCC (1) 641 (Ind.).

13 Brij Bhushan And Another vs The State of Delhi, [1950] AIR 129 (Ind.).

14 Virendra vs State of Punjab, [1957] AIR 896 (Ind.).

15 Romesh Thapper vs State of Madras [1950] AIR 124 (Ind.).

16 1962 AIR 305 (Ind.).

v. Raj Narain, the Supreme Court held that the public has the right to know about every public act and transaction conducted by public officials[17]. The Court underscored that democracy requires openness and that people must be informed of government decisions to participate effectively in the democratic process[18]. Moreover, the right to freedom of speech and expression includes the right to acquire and disseminate information, enabling public debate on social and moral issues.[19] In another judgement in 2004, a Division Bench of the Supreme Court of India, comprising Justice S.B. Sinha and Justice B.M. Khare, observed that the right to information is a facet of the freedom of speech and expression contained in Article 19(1)(a) of the Constitution, making it indisputably a fundamental right .[20]

The analysis of judicial trends concerning Article 19 of the Indian Constitution makes it evident that the judiciary has consistently recognized the freedom of the press while also seeking to balance this with the public's right to information. The courts have underscored that an informed citizenry is crucial for democracy, emphasizing the role of the press in providing accurate and comprehensive information and acting as a watchdog against the abuse of power.

Unethical Reporting and Infodemics: Issues and Challenges in India

Information is an essential tool that empowers people to act more meaningfully in a democracy. This will enable public participation in decision making process of the country, press and media are the only mediums through which this is possible. Remembering the words of Shri Abraham Lincoln at Gettysburg "government is of the people, by the people, for the people". The decision of governed should be grounded on an adequate

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[17] 1975 SCR (3) 333 (Ind.).

[18] S. P. Gupta vs Union of India [1981]

[19] Secretary, Ministry of Information and Broadcasting, Govt. of India vs The Cricket Association of Bengal, 1995 (2) SCC 161 (Ind.).

[20] People's Union for Civil Liberties vs Union of India, 2004 (2) SCC 476 (Ind.).

information. In India press and media has been playing a vital role in fighting social evils as well however challenges thrown by unethical reporting and infodemics are not negligible. As the fourth pillar of democracy, the press and media wield significant influence, but this influence also poses a potential threat to democracy. It's essential to recognize that the right to freedom of speech and expression, enshrined in Article 19(1)(a) of the Indian Constitution, is not absolute. It comes with reasonable restrictions aimed at safeguarding the sovereignty, integrity, and security of the nation, as well as maintaining public order and decency. These restrictions are grounded in the potential consequences of speech and expression, ensuring that ideas propagated do not incite violence, harm individual reputations, or violate moral standards.

There are enormous literatures deliberating on the impact of unethical reporting, with one study noting fake news as a symptom of deeper problems than a problem.[21] Few studies highlight how fake news can influence political and informational spheres, particularly in electoral processes, where disinformation can sway voters with false information about candidate's backgrounds and qualifications. The 2016 U.S. presidential election is a notable example[22], showcasing the role of social media and disinformation in threatening the integrity of the electoral process worldwide.[23]Recognizing this threat, the final report of the European Union Expert Group on Fake News emphasizes the need for heightened vigilance against disinformation aimed at undermining election integrity.

During the global health emergency, the press, media, and social media exacerbated migrant panic through sensationalized

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21 Simons Greg & Joseph Goebbels, *Соціокомунікативне середовище: теорія та історія Fake News: as the Problem or a symPtom oF a DeePer Problem?*, 2016 33 (2017), http://medialens.org/index.php?option=com_acymailing&ctrl=archive&task=view&mailid=41.

22 Terry Lee, *The Global rise of Fake News and the Threat to Democratic Elections in USA*, 22 EMERALD PUBL. LTD. 15–24 (2019).

23 BEATA MARTIN-ROZUMILOWICZ & RASTO KUZEL, *Social Media, Disinformation and Electoral Integrity: IFES Working Paper*, (2019), https://www.ifes.org/sites/default/files/ifes_working_paper_social_media_disinformation_and_electoral_integrity_august_2019_0.pdf.

reporting. In response to this, a Public Interest Litigation (PIL) compelled the court to intervene, mandating the government to release daily bulletins to dispel doubts and instructing the media to reference and publish official information only[24]. Additionally, on April 10, 2020, the Mumbai Police issued an order to counter the spread of COVID-19 misinformation, prohibiting dissemination of incorrect information that distorts facts and incites panic, mistrust, and danger to public health and safety[25]. Moreover, electronic and social media platforms have been rife with misinformation and fake advisories regarding COVID-19 treatment, contributing to an infodemic.[26] These irresponsible reporting practices undermine evidence-based policy interventions and erode trust in scientific expertise, posing a significant challenge to effective crisis management.

Adding to the aforementioned instances another example is the internal disturbances caused due to the circulation of misinterpreted information's regarding the Citizenship Amendment Act (CAA). Here again the Apex Court had to intervene and direct the Central Government to publicise aims, objectives and the benefits of CAA to curtail the internal disturbances caused due to spread of fake information's.[27] The media activism and media trial have helped many victims to gain speedy justice however there are drawbacks associated with it. Media drew a lot of criticism in Arushi Talwar case[28] when they reported her own father as the accused before the court's judgement. The current scenario is that press and

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[24] Alakh Alok Srivastava Vs Union of India, [2020]

[25] GREATER MUMBAI. THE COMMISSIONER OF POLICE, *ORDER (UNDER SECTON 144 OF CRIMINAL PROCEDURE CODE-1973)*, 53–54 (2018).

[26] Misinformation, fake news spark India coronavirus fears | Coronavirus pandemic News | Al Jazeera, https://www.aljazeera.com/news/2020/3/10/misinformation-fake-news-spark-india-coronavirus-fears (last visited May 30, 2024).

[27] CAA Challenge | Supreme Court Issues Notice to Union On Stay Applications | Hearing Scheduled for April 9, https://www.livelaw.in/top-stories/caa-challenge-supreme-court-issues-notice-to-union-on-pleas-to-stay-citizenship-amendment-act-rules-posts-on-april-9-252749 (last visited May 30, 2024).

[28] Nupur Talwar v. CBI [2012] AIR 2012 SC 1921, (Ind.).

media have declared themselves as public court and the same is intervening the fair trial. This will create prejudice and impact the justice delivery in the country. The Hon'ble court in one of its judgements held that "*No doubt it would be mischievous for a newspaper to systematically conduct an independent investigation into a crime for which a man has been arrested and to publish the results of that investigation. This is because trial by newspapers, when a trial by one of the regular tribunals of the country is going on, must be prevented. The basis for this view is that such action on the part of a newspaper tends to interfere with the course of justice whether the investigation tends to prejudice the accused or the prosecution. There is no comparison between a trial by a newspaper and what has happened in this case*".[29]

Subsequently the High Court of Andhra Pradesh observed in one of the case that "*When litigation is pending before a Court, no one shall comment on it in such a way there is a real and substantial danger of prejudice to the trial of the action, as for instance by influence on the Judge, the witnesses or by prejudicing mankind in general against a party to the cause. Even if the person making the comment honestly believes it to be true, still it is a contempt of Court if he prejudices the truth before it is ascertained in the proceedings. To this general rule of fair trial one may add a further rule and that is that none shall, by misrepresentation or otherwise, bring unfair pressure to bear on one of the parties to a cause so as to force him to drop his complaint or defence. It is always regarded as of the first importance that the law which we have just stated should be maintained in its full integrity. But in so stating the law we must bear in mind that there must appear to be 'a real and substantial danger of prejudice*".[30] The learned Chief Justice in one of the judgements observed that the "*Constitutional right to freedom of speech and expression conferred by article 19(1)(a), which include freedom of press is not an absolute right nor indeed does it confer any right on press to have an unrestricted access to means of information. The press is entitled to exercise its freedom of speech and expression by*

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[29] Saibal Kumar Gupta And Others vs B. K. Sen And Another, [1961] SCR (3) 460 (Ind.).

[30] Y.V. Hanumantha Rao vs K.R. Pattabhiram And Anr, AIR 1975 AP 30 (Ind.).

publishing a matter which does not invade the rights of other citizens and which does not violate the sovereignty and integrity of India, security of the state, public order, decency and morality".[31] It is high time that press and media should pay little attention to understand the actual meaning of freedom of press guaranteed by our constitution.

One of the studies reveals that in India two dozen people have killed as a result of fake news spread through WhatsApp since May 2018 as per the record of cyber police[32]. Internal disputes caused in Kashmir due to disinformation's are much debated and daily news in India, as a result the government had to implement New Media Policy for Jammu & Kashmir to curb disinformation and allied issues. Riots, internal disputes and mob lynching are increasing as a result of disinformation's spread through electronic and social media. Fake news and misinformation's are a great threat to international peace and order too[33]. Though the International Organisations had instructed the member nations to regulate the fake news regime the problem is unsolved mainly due to the dilemma with respect to the definition of fake news in many parts of the world [34]. With the development of technology now it is difficult than before to verify the accuracy of a content, its origin or producer, their vested interest in the news etc[35].

Discussion and Findings from the Field Survey

To address the questions on unethical reporting and infodemic, the author conducted an online survey to gather the perceptions of various press and media stakeholders. In September 2020, a semi-structured questionnaire was used to carry out the

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31 Prabha Dutt v. Union Of India, {1982} SCR (1)1184 (Ind.).

32 MARTIN-ROZUMILOWICZ AND KUZEL, *supra* note 24.

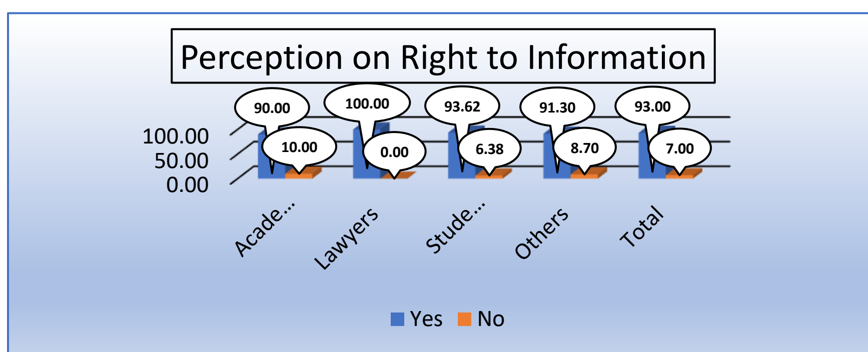
33 Andrei Richter, *Fake News and Freedom of the Media.*, 8 J. INT. ENTERTAIN. MEDIA LAW 1–33 (2018), https://login.proxy.lib.uiowa.edu/login?url=https://search.ebscohost.com/login.aspx?direct=true&db=afh&AN=136836101&site=ehost-live.

34 Tarlach McGonagle, *"Fake news": False fears or real concerns?*, 35 NETHERLANDS Q. HUM. RIGHTS 203–209 (2017).

35 Munadhil Abdul Muqsith & Valerii Leonidovich Muzykant, *Effect Fake News for Democracy*, 7 J. CITA HUK. 307–318 (2019).

survey. The survey reached 100 respondents, including 20 academicians, 10 lawyers, 47 law students, and 23 individuals from diverse backgrounds. The questionnaire aimed to understand views on the right to information, freedom of the press, whether this freedom is causing societal harm, how it should be regulated, and other issues related to unethical reporting.

Figure 1: Perception of Different Stakeholders on Whether 'Right to Know' guaranteed under Article 19(1)(a) of the constitution to be understood as Right to Correct Information?



The author thought it is important to understand the perceptions of respondents on the term ‘right to Information’. In the opinion of public does right to know means right to correct information or not. The table above depicts that the majority, that is total participated lawyers, 90 percent of the academicians, 93.62 percent of the students, 91.30 of the other participants believes that right to information means right to correct information. Out of the total participants only 7 percent thinks otherwise. It was interpreted by the apex court through various judgements that public has right to be supplied with information and the government owes a duty to educate the people within the limits of its resources. This duty of the government is mainly carried out by media, as they function as a medium of exchanging information between government and public. But when they start propagating fake information’s or on propaganda’s, the same shall influence the decision making of the public and pollute the concept of democracy.

Table 1: Perception On Question Whether Unethical Reporting Like Fake News, Misinformation and Infodemics are Violating Our Right to Information?

Category	Yes	No
Academicians	20(100%)	0
Lawyers	10(100%)	0
Students	47(100%)	0
Others	23(100%)	0

This question was included in the survey with a goal to comprehend the perception of different stakeholders on impact of unethical reporting including fake news, misinformation's and infodemics on our right to correct information. Means whether unethical reporting is in violation of our right to know as guaranteed by Constitution or not. For this question out of participated hundred respondents all were of the opinion that the unethical reporting is violating our right to know. Proper functioning of a democracy demands well informed public as only a knowledgeable citizen can take rational opinions.

Figure 2: Whether infodemics and unethical reporting activities carried out by both electronic and traditional press media are in violation to the concept of freedom of press as conceived by Indian constitution?

In Indian constitution the expression 'freedom of speech and expression' (Article19(1)(a)) means the right to receive and disseminate information. As discussed above, this freedom includes the freedom to communicate and circulate one's opinion to large population through any medium either press or electronic media without any interference. The essence of this provision is to protect the freedom of speech and expression and propagation of convictions and ideas through any medium. But the architects of the constitution never intended to safeguard the circulation of disinformation's, unethical reporting etc. Therefore, they limited this right by including Article 19(2) with restrictions on this right.

But they have not included unethical reporting as a clause under A.19(2), maybe they were under the impression that the other limitations are capable enough to curb any issues of unethical reporting or in the pre internet era when the constitution was drafted, they failed to foresee this issue.

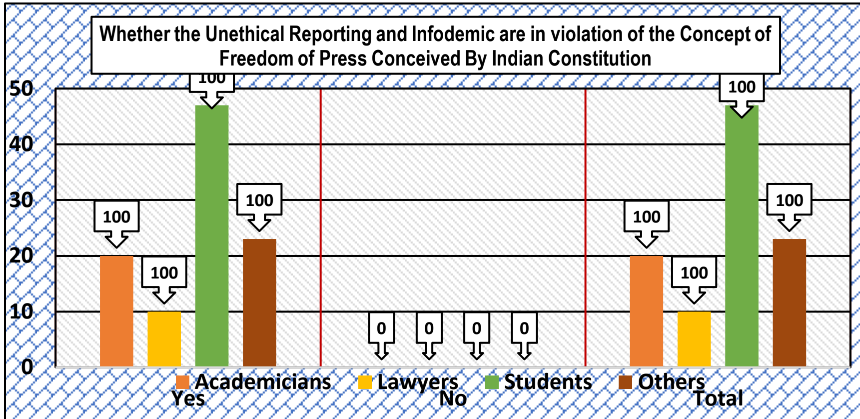
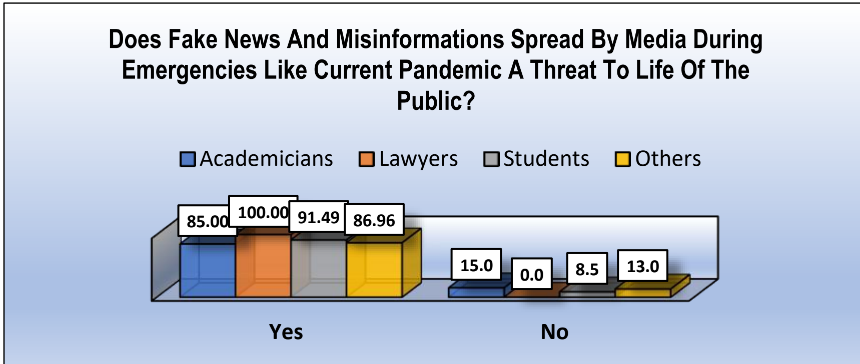


Figure 4: Whether the Unethical Reporting and Infodemic are in violation of the Concept of Freedom of Press Conceived by Indian Constitution

For this question out of participated hundred (100) respondents all were of the opinion that the practices such as unethical reporting, fake news, infodemics etc. are not in consonance with the constitutional vision of Freedom of Press. Participation and fair and free decision of the public in the matters of governance is an important element of the democracy hence no constitution would support evils like unethical reporting and disinformation’s.

Figure 3: Perceptions on Impact of Infodemics and fake news during emergencies like current Global Health Emergency



Considering the current scenario of the country due to the global health emergency, to understand the perception of different stakeholders on the fake information's circulated through media especially social media, this question was included in the survey. Out of total hundred respondents, 85% of the Academicians, 100% of the lawyers, 91% of the students and 86% of the other stakeholders were of the opinion that the fake information's propagated through media are causing threat to the life of the public. Total 90% of the participants shared the same feeling that misinformation's are capable of causing threat to the life of the public during pandemics and other emergencies.

Table 2: Perceptions on question on need for restrictions on Freedom of Press

Category	Yes (%)	No (%)
Academicians	70.00	30.00
Lawyers	60.00	40.00
Students	70.21	29.79
Others	69.57	30.43

As per the survey 69 percent of the participants voted in favour of restricting the freedom of press. The above table shows that out of total participants 70 percent of the academicians, 60

percent of the lawyers, 70.21 percent of the students and 69.57 percent of the others participated in the survey voted for restricting freedom of press whereas 31 percent of the total participants still think that media freedom should not be restricted.

Table 3: Perceptions on Question-Do you think there has to be more stringent laws and penalties for irresponsible journalism?

Category	Yes	No	Total
Academicians	20 (100%)	0	20
Lawyers	10(100%)	0	10
Students	47(100%)	0	47
Others	23(100%)	0	23

The responses given by the participants on the current question and the above question seems to be contradictory to each other. Because question 5 was a general one asked to understand the perception of respondents on limiting freedom of press and this question witnessed a mixed opinion whereas question 6 can be considered as a specific question on the modalities of countering the freedom of press. Here the respondents have unanimously voted in favour of introducing stringent laws to regulate unethical journalism and making press and media accountable for their mistakes. The table 3 shows that out of hundred participants all have voted in favour of enacting legislations to govern media and penalise them for unethical and irresponsible journalism.

Figure 4: Perception of stakeholders on question-In your opinion how can we bring a balance between right to correct information and freedom of press?

This was an open-ended question later categorised in to six categories based on the responses given by the participants of the survey. The author deliberately kept this question open ended to welcome the ideas of the respondents on this issue and see what are the different possibilities to regulate propagation of unethical

reporting and fake news to bring a balance between freedom of press and right to correct information.

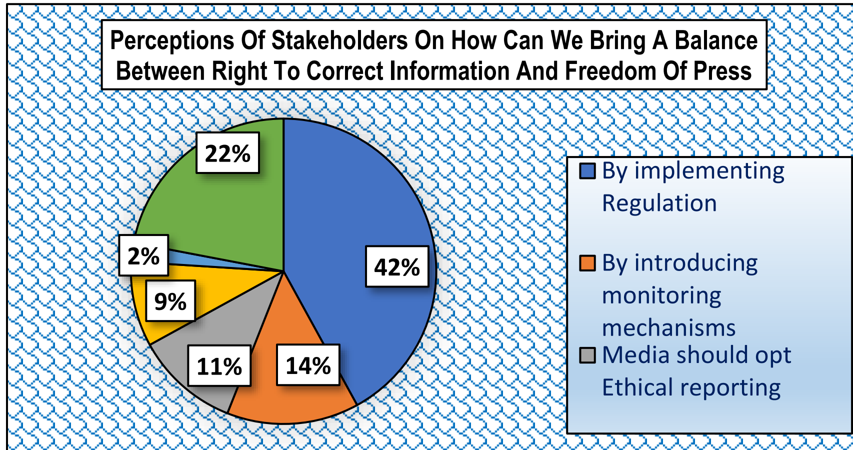


Figure 4 illustrates the opinions given by different stakeholders with reference to bringing balance between freedom of press and right to information. 42% of the respondents were of the opinion that enacting a legal framework may help in regulating this spectrum. 14% opined that there should be a monitoring mechanism to verify and approve the news or to investigate and initiate action against the wrong doers. 11% of the respondents talks about the self-realisation by media personnel. They say that media should go for ethical reporting. 9% of the respondents are of the view that the state should pay more attention to educating the public and also in spreading awareness, which will automatically enable them to choose the right news. 2% of the respondents were hopeless about bringing such balance, for them it will remain as a myth. 22% did not record any comments.

Few of the notable comments on the above question were as follows; Press and Media should be monitored and regulated by an independent body, media trial on pending cases should be subjected to strict supervision and approval, stringent policy should be adopted which forces the journalist to first authenticate the information that is being circulated all news should be verified prior to they go on air on came into public, a body for cross verification of information should be composed at state and district level, there

should be provisions and regulations to punish journalists and news channels which indulge in practice of fake news or misinformation, there should be strict norms for conduct of journalists, public have to get better at consuming information and smatter when we share such information. Setting up of statutory regulatory bodies that keep checks and balances on content. People must be educated enough to gauge the trustworthiness of a source and look at several sources and so on.

Table 4: Perception on question- In your opinion what are the other challenges put forth by fake news and misinformation to the public?

Category	Creating hatred, provoking people and resulting in internal disturbances and increased crime rate (%)	Creating pressure and influencing the adjudicating authorities (%)	Creating prejudice, confusion among people and influencing public decisions (%)	Dangerous to the Society (%)	Deprivation of correct information (%)	No Comments (%)
Academicians	15.00	10.00	25.00	10.00	0	40.00
Lawyers	10.00	0.00	40.00	30.00	10	10.00
Students	12.77	2.13	21.28	25.53	0	38.30
Others	4.35	4.35	26.09	39.13	0	26.09
Total	**11**	**4**	**25**	**26**	**1**	**33**

The above question was put forwarded by the author to understand the perceptions of people on the issues and challenges caused by unethical reporting and irresponsible journalism. This also was an open-ended question and based on the responses the author categories them under six broad headings namely creating hatred, provoking people and resulting in internal disturbances and increased crime rate; creating pressure and influencing the adjudicating authorities; creating prejudice, confusion among people and influencing public decisions; dangerous to the Society; deprivation of correct information and respondents who left the question without any comments.

Majority of the respondents opined that the practice of unethical reporting, fake news, misinformation and infodemics are dangerous to the society. 10% of the academicians 30% of the lawyers, 25.53% of the students and 39.13% of the other stakeholders expressed the same view constituting it 26% 0f the total respondents. 25% of the total respondents i.e., 25% of academicians, 40% of lawyers, 21.28 of students and 26.09% of the other stakeholders opined that this kind of unacceptable reporting will create prejudice and confusion among people and influence public decisions especially during elections. 11% of the total population (15% academicians, 10% lawyers, 12.77% students and 4.35% other stakeholders) said the other challenges put forth by unethical and irresponsible journalism include Creating hatred, provoking people and resulting in internal disturbances and increased crime rate. It is essential to take the issue of mob lynching and internal disputes caused during amendment of Citizenship Act here. 4% of the total respondents thinks that media trials are creating pressure and trying to influence the adjudicating authorities and intervening the free trial. One lawyer said that it is causing deprivation of correct information. 33% of the total respondents have failed to record their view on this issue.

Conclusion

In India it is a clear notion that no right is absolute as per the constitution, every fundamental rights are permitted with set of restrictions on it. The findings of the study enumerate that a number of issues and challenges are thrown by unethical reporting and irresponsible media around the world. Few of such issues are unrest in the society, influencing public opinion through propaganda's, intervening independent and fair trial by judiciary, depriving correct information to public, impacting free and fair election, dangerous to public during emergencies like current pandemic. Hence in essence we can say that unethical reporting, fake News, misinformation's and infodemics are a threat to democracy. There is requirement of some step to curb such unethical practices in a balanced way.

Some suggestions control and mitigate the challenges put forth by unethical reporting and fake news are; Enhancing

transparency of online news. As discussed in the findings the government can appoint an independent body to check the authenticity of news before it gets published in print and electronic media's and can also through a regulation make social media platforms to allow only reliable contents in their respective platforms. Promotion of digital media literacy is one of the best suited suggestions. Unintentional access and getting influenced by fake news are result of lack of information, literacy and critical thinking skills- assisting people to develop the ability to evaluate information and information seeking process may help to minimize the challenges thrown by fake news and infodemics. The onus of identifying fake news rest with the consumers. This will enable them to deal with disinformation's and to navigate the electronic media environment. As suggested by the respondents of the survey, enacting a legal framework to curb such unethical reporting like Malasia may be thought of. But the same should balance both right to correct information and the freedom of press. Establishment of an independent body to monitor the activities of press and media also should be included in the framework. Press and media should follow a strong code of conduct can be another solution to mitigate this challenge. Collaborative efforts among government, media, civil society, and academia will be crucial in addressing these challenges comprehensively.

Way Forward

This study, constrained by the global health emergency, focused on the legal aspects of unethical reporting through an online survey. Future research should expand to explore psychological, social, and economic impacts, and include in-depth interviews with media professionals and experts for more nuanced insights. Comparative analyses with other countries, technological solutions for detecting fake news, and robust policy development balancing press freedom with accountability are essential.

NAVIGATING COMPETITION LAW IN INDIAN E-COMMERCE SECTOR: TRENDS AND DEVELOPMENTS

Dr. Shiva Satish Sharda & Ms. Richa Jain♦*

Abstract

With the rapid penetration of internet access, e-commerce has gained unprecedented momentum in the past decade. With the emergence of technology in the e-commerce sector, benefits to consumers such as price transparency, higher number of options at lower costs, and convenience with doorstep deliveries have also significantly increased. However, this insurgence has brought with it its own set of challenges.

Many allegations of anti-competitive conduct and violation of Sections 3 and 4 of the Competition Act, 2002 (Act) such as predatory pricing, deep discounting, platform neutrality, exclusive supply agreement, exclusive distribution agreement, collusion using AI, abuse of dominant position, etc., have been levied against e-commerce giants. Further, in order to apply the provisions of the Act and to ascertain whether an enterprise is dominant or not, it is necessary to delineate the 'relevant market'. Owing to the dynamic nature of the digital sector, this is becoming a seemingly challenging task and is detrimental for the application of law.

The researchers through this study have reviewed the functioning of e-commerce in India and its implications on the traditional brick-and-mortar market and the competition. At the outset, an attempt has been made to unravel the dilemma of defining the 'relevant market' through legal regulations and judicial interpretations. Further, the researchers have identified potential anti-competitive allegations against e-commerce enterprises

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that can lead to market distortion. This study in elaboration discusses two specific allegations against e-commerce companies viz; the use of artificial intelligence (AI) to do collusion and to abuse their dominant position; and their use of dynamic pricing strategies to cause foreclosure of competitors in the market. This study further attempts to propose and make recommendations for maintaining equilibrium between both online and offline platforms as well as for the effective implantation of competition law in the e-commerce sector.

Keywords: E-commerce, Anti-competitive actions, collusion by AI, Dynamic Pricing, digital economy

1. Introduction

> *"This not only enabled online platforms to squelch competition, it has enabled them to control markets such that they get very complete profiles on you, me, and everybody"- Gary Reback*[1]

In India, e-commerce is leading the way in the digital revolution. India, which has the world's fastest-growing e-commerce market, is quickly developing into a major global e-commerce hub.[2] Notably, online marketplaces, or 'E-marketplaces', have emerged as a result of e-commerce and have become more and more well-known over the last ten years. In fact, the COVID-19 pandemic has had the unmistakable effect of hastening consumers' shift from offline to online shopping through e-marketplaces.[3] E-

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[1] Deesha Vyas & Mehek Chablani, *E-Commerce Market in India: Enigmatic Difficulties Necessitating Reforms,* 3 Indian JL & Legal Rsch 1 (2021).

[2] US Department of Commerce, *E-commerce Sales & Size Forecast* (International Trade Administration), https://www.trade.gov/ecommerce-sales-size-forecast#:~:text=According%20to%20recent%20industry%20 calculations, CAGR%20of%20over%2013.6%20percent. Last visited 23 Jan. 2024.

[3] OECD, *E-commerce in the time of COVID-19*, OECD Policy Responses to Coronavirus (COVID-19), (7 Oct. 2020),https://www.oecd.org/coronavirus/policy-responses/e-commerce-in-the-time-of-covid-19-3a2b78e8/. (last visited 23 Jan. 2024).

commerce platforms can spur new inventions in the market, improve consumer choice, boost competition, and bring information transparency. Interestingly, owing to the surge of e-commerce companies, many traditional retailers started partnering with these companies and started listing their products online. The reason behind this step was to tap into a larger consumer base and to finish their existing stocks.

While the use of e-commerce platforms has its own set of perks, yet, they are not impervious to anti-competitive behavior, though, just like any other market. However, many retailers who either partner with e-commerce companies or don't, have been time and again protesting against the malpractices such as predatory pricing and deep discounting, etc., done by the multinational retail giants.

As a matter of fact, there are a plethora of antitrust concerns that have been rising against the practices adopted by these companies. In fact, the competition laws regarding the e-commerce markets in the recent past have been the most debated and deliberated upon topic. In the past also, the offline traditional stores have alleged the absence of a level playing field in the market. Allegations of predatory pricing were levied by apparel company Beverly Hills Polo Club on Amazon for deep discounting and abuse of dominance.[4] In another case, allegations of violation of competition law were made by the members of the All India Online Vendors Association on Flipkart.[5]

E-commerce platforms' market structures are very different from those of conventional brick-and-mortar retailers. E-commerce platforms hold a notable edge as they grow their customer base through the acquisition and utilisation of consumer data, which is then utilized to comprehend consumer buying behavior. Traditional marketplaces can also adopt these strategies, although there are geographical limitations. E-commerce platforms can gather data from a wider range of sources which they can misuse to abuse their

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4 *Lifestyle Equities C.V. v. Amazon Seller Services Pvt. Ltd*., Case No. 09/2020.

5 *All India Online Vendors Association v. Flipkart,* Case No. 20/2018.

dominant positions. Against this backdrop, the traditional brick-and-mortar stores have beseeched the need for fair competition to ensure that the Indian retail sector, which is in fact the livelihood of millions, is not left behind.

Owing to this the antitrust watchdog of India, the Competition Commission of India (Commission/CCI) conducted a market study on the e-commerce sector in India.[6] The CCI further set up a Competition Law Review Committee (CLRC) to review the Competition Act of 2002 (Act) from the perspective of '*Technology and New Age Markets*'.[7] Additionally, in 2023 the new Digital Competition Bill was introduced, which aims to safeguard the interest of businesses and consumers alike in the digital marketplace.

Undeniably, a robust and competitive market is essential to the nation's economy and overall trade and commerce. The policies outlined by the authorities regarding competition law play a crucial role in the corporate sector as they dictate how various aspects of the market function. Numerous dynamic elements make up the competitive environment, and they must be continuously watched to ensure that there are no anti-competitive behaviors or power dynamics imbalances that could have a negative impact on the economy and the welfare of consumers. Therefore, the researchers in this study have highlighted the competition law concerns arising in the digital market.

This study is primarily doctrinal in nature wherein reliance has been given to primary and secondary data such as national and international statutes, books, articles, journals, and case laws. This study is divided into four parts. The first part introduces the issue and gives a background of the e-commerce sector. It also lays out the research methodology. Additionally, in this part the study identifies the 'relevant market'. It is believed that the first step in identifying anti-competitive behavior is identifying the relevant market. Therefore, in this part, the study enunciates the legal as well

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6 Competition Commission of India, *Market Study on E-commerce in India: Key Findings and Observations* (Jan. 2020).

7 Competition Law Review Committee Report, (2019).

as the judicial interpretation of the term. Further, the dilemma of ascertaining a 'relevant market' in the digital marketplace has been addressed.

Part two of this study identifies the unresolved anti-competitive allegations that have been levied against e-commerce companies. Owing to the brevity of time and other limitations, the researchers in detail have explained only two allegations amongst them viz: dynamic pricing and collusion by e-commerce companies. This part attempts to outline the relevant nuances of Sections 3 and 4 of the Competition Act, 2002 and discusses through what actions the e-commerce companies are violating them.

Part three of this study discusses how this issue of antitrust face-off between e-commerce dominant enterprises and traditional brick-and-mortar stores is also gaining international momentum. It further focuses on key actions taken by countries of select jurisdiction such as the USA, UK, EU and Japan.

Part four of this study deliberates upon the Judicial interpretation of violation of competition law by e-commerce companies. It further highlights the legislative actions being taken to ensure fair trade in the Indian digital markets. Keeping the above discussions in mind, in part the researchers have given the concluding remarks and have attempted to summarize the entire discussion and have also given few key recommendations.

1. 1. Delineation of 'Relevant Market'

The first step in identifying anti-competitive behavior is identifying the relevant market. According to the CCI, in layman's language "*a market is a collection of buyers and sellers, the interaction between whom, determine the price of a product or a set of products*."[8] A market where businesses are powerless to regulate the prices of the goods they sell is said to be perfectly competitive. Though it's rare for a competitive market to exist yet, the commission strives to create a market wherein the anti-competitive

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[8] Competition Commission of India, *Competition Law Module for Administrative and Judicial Academies* (2019).

conducts are eliminated and a level playing field is maintained.

The concept of a relevant market in competition law is utilized for identifying the goods and services that a business is directly competing with. Consequently, the market where the competition is held is the relevant market. Without considering the market where competition occurs, it would be impossible to enforce the provisions of competition law. Determining the **relevant** market is an evidence-based process in which the CCI evaluates an e-marketplace's strength by determining whether alternatives to its services are available in a specific geographic or product area. Section 2(r) of the Act defines the relevant market as: *"The market which may be determined by the commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets."*[9]

The provisions of Section 19(6) and 19(7) are the touchstone based on which the CCI determines the relevant geographic or product market. The Section 19(6) of the Act provides that while determining the 'relevant geographic market', the CCI shall pay due regard to any or all of the following factors such as-"*(a) regulatory trade barriers; (b) local specification requirements; (c) national procurement policies; (d) adequate distribution facilities; (e) transport costs; (f) language; (g) consumer preferences; (h) need for secure or regular supplies or rapid after-sales services; (i) characteristics of goods or nature of services; (j) costs associated with switching supply or demand to other areas*".

The Section 19(6) of the Competition Act provides that that while determining the 'relevant product market', the CCI shall pay due regard to any or all of the following factors such as- "*(a) physical characteristics or end-use of goods 5[or the nature of services]; (b) price of goods or service; (c) consumer preferences; (d) exclusion of in-house production; (e) existence of specialized producers; (f) classification of industrial products; (g) costs associated with switching demand or supply to other goods or services; (h) categories of customers*."

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9 Competition Act, 2002, § 2(r), No 12, Act of Parliament 2003 (India).

The Act focusses on '*substitutability*' as a test for determining the relevant (product) market, which is in tune with the test adopted by the rest of the world. This is owed to Section 2(t) of the Act, which describes a relevant product market as a market made up of all goods and services that consumers consider to be interchangeable or substitutable due to the goods' and services' qualities, costs, and intended uses. Therefore, delineating the relevant market is a crucial aspect in assessing the competitive landscape and in ascertaining whether an enterprise is dominant or not. Further, it is essential in analyzing whether a particular conduct or combination is anti-competitive or not.

Furthermore, in the case of *Bijaya Podar v. Coal India Ltd*.[10] Reliance on Section 2(s) of the Act, which defines a relevant geographic market as "*a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighboring areas*" and it was decided that these are the regions or areas in which the supply and demand for administrative products are homogeneous and easily distinguishable from those in nearby markets. In the case of *Atos Worldline v. Verifone India*[11] was decided that only certain factors at that time, such as regulatory trade barriers, local specifications requirements, national procurement policies, adequate distribution facilities, and transportation costs, etc., naturally fall under the purview of thought while deciding the relevant market. Consequently, the entire country would be the relevant geological market if every such factor were uniform throughout the country versus an item. The Commission stated in the case of *Tata Motors*[12] before establishing abuse of dominant position, the Commission defined the relevant product market as the "*market for manufacture and sale of commercial vehicles*" in light of the factors listed under Section 19(7) of the Act, including, among other things, physical characteristics, end-use, consumer preference, and the existence of specialized producers. It was further held that

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10 *Bijaya Podar v. Coal India Ltd.,* Case no 59/ 2013.
11 *Atos Worldline v. Verifone India*, Case no 56/ 2013.
12 *Neha Gupta v. Tata Motors,* Case no 21 of 2019.

"*commercial vehicles are separate from other categories of vehicles such as passenger or utility vehicles on factors such as speed, mileage, appearance, engine capacity, usage, etc*."[13] In the context of e-commerce defining the relevant market presents a unique challenge owing to the nature of digital transactions and the global reach of the online platforms.

1. 2. Defining 'Relevant Market' in the Digital Marketplace

It is a challenge for not just CCI, but also competition authorities across the world to define a 'relevant market' in the digital marketplace as most competition laws were created by keeping the traditional 'one-sided' markets in mind and not 'two-sided' markets. The dilemma in determining the relevant market in the e-commerce space is also the nature of the marketplace. Since multi-sided markets encompass distinct consumer groups, the definition of 'market' becomes more complex.[14] For instance, Amazon or Big Basket not only play the role of e-commerce platforms (marketplace) but also the role of online retailers. Amazon competes with its own generic and 'Solimo' products and Big Basket competes on its own platform with 'BB Brand' in such cases, it's difficult to ascertain the relevant market.

Further, the issue is that in the case of two-sided markets, it is difficult to apply the SSNIP Test[15] and assess which side of the hypothetical monopolistic market would raise the price, as there are distinct groups of consumers on either side having their independent demands having profits in one or both sides of the market.[16] In fact, even the CCI stance on delineating the 'relevant market' has not

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[13] *Id.*

[14] Tilottama Raychaudhuri, *Abuse of Dominance in Digital Platforms: An Analysis of Indian Competition Jurisprudence*, Competition Commission of India Journal on Competition Law and Policy, 1, 1–27 (2020).

[15] A vital tool for determining substitutability is the 'Small but Significant, Non-Transitory Increase in Price' Test or SSNIP test. So, to elaborate, "*SSNIP evaluates whether, for a small, yet significant price rise (of about 5% to 10%), the consumers of a particular product would shift their choices to another product. And if so, then the two products can be considered to be part of the same market*." *See*, Raychaudhuri, *supra* note 14.

[16] *Id.*

been consistent. In the case of *Ashish Ahuja v. Snapdeal and Sandisk* (Snapdeal Case) the *CCI* in respect to online and offline markets stated that *".... these two are different channels of distribution of the same product and are not two different relevant markets."*[17] The Commission received a second case that same year, *Mohit Manglani vs. Flipkart & ors*.,[18] alleging anti-competitive effects from 'exclusive agreements' between e-commerce websites and sellers for the exclusive sale of certain products on the chosen portals, to the exclusion of other e-portals, physical channels, or through any other physical channel. In that particular case, the CCI concluded that brick-and-mortar businesses and online platforms are separate channels within the same relevant market, but it also noted that *"[i]respective of whether we consider e-portal market as a separate relevant product market or as a sub-segment of the market for distribution, none of the entities seemed to be individually dominant."* Thus, the notion that the internet channel is a relevant market unto itself was born. The Commission reacted swiftly and effectively to the emergence of e-marketplaces as a popular means of conducting business and shopping. It adjusted market boundaries in a way that made sense at the time and, in certain cases, concluded that e-marketplaces belonged in a different category from offline marketplaces.[19]

However, in the case of *AIOVA v. Flipkart*, a different viewpoint of the CCI has been observed. In this case, the CCI acknowledged that there is a difference between the online and offline markets. In this matter regarding the abuse of dominant position by Flipkart, CCI deemed it necessary to define the 'relevant market' as "*services provided by online marketplaces for selling of goods in India*."[20] In this case, the CCI determined the relevant geographical market for online market platforms is 'India' as the conditions of competition are homogenous in the entire country. Additionally, CCI made a distinction between '*online marketplace platform*' and '*online retail store*'. CCI, while making this

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17 *Ashish Ahuja v. Snapdeal and Sandisk*, Case No. 17/2014.

18 *Mohit Manglani v. Flipkart & ors*., Case of 80/ 2014.

19 OECD, *Abuse of Dominance in Digital Markets- Contributions from India* (2020).

20 Flipkart, *supra* note 5.

distinction recognized the presence of network effects in the case of online platforms, which it found to be missing in the case of online retail stores. To quote, the CCI stated

> *"……….it may be appropriate to note that there is a difference between online retail store and online marketplace platform. In online retail store, a particular seller, who may or may not own a brick and mortar retail store, owns his portal to sell products thorough online website. Whereas in an online marketplace platform such as Amazon or Flipkart, the owner of the online portal offers a platform for buyers and sellers to transact. Hence, the sellers would be interested in selling on the platforms when an increasingly high number of buyers visit an online platform, thus characterizing the online platforms with network effects. In the case of online retail stores, there are hardly any network effects though there may be efficiencies of scale*."

Even though it can be difficult for end users to distinguish between online and offline sellers, it is undeniable that online marketplaces provide convenience and a platform for buyers and sellers to conduct business with one another. The advantages offered to buyers include the comfort of shopping from home, saving time and money on transportation, while sellers save money on store setup, sales staff, electricity, and other maintenance costs.[21] Additionally, the CCI mentioned that consumers have the ability to compare multiple products at once.

In a different case, the CCI integrated online and offline modes in the same relevant market when it examined a merger between two Online Travel Agencies (OTAs) in 2017.[22] However, it was noted that during the intervening period, online travel portals have gained a distinct and significantly more prominent position in the Indian hotel reservation space in an antitrust case involving the same

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21 Anshuman Sakle, Nandini Pahari, *The Interaction between Competition Law & Digital Ecommerce Markets in India*, 16 Indian Journal of Law and Technology 2 (2020).

22 Combination Registration No. C – 2016/10/451.

OTAs, which was filed two years later.[23] As a result, the Commission determined that it was essential to treat the online market as a distinct relevant market. In the *Google Case*[24], the CCI determined that the relevant product market was online general web search services, separating it from URL-based direct search options, based on consumer preference. The CCI concluded that India was the relevant geographic market for online general web search services after considering, among other things, the local specification requirements in India.

According to the above-mentioned expanding approach, the relevant market definition that was chosen in previous instances might not be applicable today.[25] An examination of the aforementioned cases shows that the CCI's relevant market analysis of the e-commerce platforms underwent a minor change. While the CCI did not specifically identify these markets as separate relevant markets, it did take into account their unique traits and attributes.

2. Unresolved Issues Against E-commerce Companies

Section 3 of the Act[26] aims to promote fair competition, safeguard consumer interest, and prevent anti-competitive practices that could lead to cartelization in the market. By regulating anti-competitive agreements, this section aims to foster fair-play and a competitive environment in the market where businesses can thrive on innovation and innovation. According to the CCI via Section 3, *"the Act prohibits any agreement which causes or is likely to cause, appreciable adverse effect on competition in markets in India. Any such agreement is void."*[27] Further, two categories of agreements have been qualified under the ambit of Section 3 viz, horizontal agreements and vertical agreements.

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23 *Federation of Hotel & Restaurant Associations of India v. MakeMyTrip India Pvt. Ltd. & Ors.* Case no. 14/2019.

24 Matrimony.com v. Google, Case No. 07 & 30 of 2012.

25 OECD, *supra* note 19.

26 Competition Act, 2002, §3, No 12, Act of Parliament 2003 (India).

27 *Id.*

a. Horizontal Agreements: Agreements involving businesses that trade goods or services in a similar or identical manner are known as horizontal agreements. Businesses that band together intending to distort market competition are deemed to have significantly harmed competition and, as a result, their agreement is null and void. According to the Act, the following four categories of horizontal agreements amongst competitors are presumed to have appreciable adverse effects on the market viz., agreement to fix price; agreement to limit production and/or supply; agreement to allocate markets; bid rigging or collusive bidding.

b. Vertical Agreements: According to Section 3, enterprises that enter into agreements at different stages or levels of production, distribution, supply, storage, etc. are said to be engaging in vertical agreements. Among these vertical restraints are- tie-in arrangements; exclusive supply/distribution arrangements; refusal to deal; and resale price maintenance. These restraints, however, are subject to scrutiny by the Commission.

Section 4 of the Act[28] addresses the abuse of dominant position by enterprises in the Indian market. It prohibits and conduct by a dominant enterprise that has the effect of preventing, restricting or distorting competition. This includes practices such as imposing unfair or discriminatory prices or conditions; limiting or restricting production, market or technical development to the prejudice of consumer; indulging in practices resulting in denial of market access; leveraging dominance in one market to enter another market; and concluding contacts containing obligations unrelated to the main subject of the contact. The aim of this section is to ensure that dominant firms do not exploit their market power to the detriment of competition and consumer welfare.

In light of this discussion and based on recent judicial case laws, the researchers concluded these as the potential violations by e-commerce companies under Section 3 and 4 of the Act:

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[28] Competition Act, 2002, §4, No 12, Act of Parliament 2003 (India).

- Price fixing to eliminate price competition: e-commerce companies collude with each other to fix prices of products or services which eliminates price competition in the market in violation of Section 3 of the Act;[29]
- Bank tie-ups with e-marketplaces: which gives them good deals on transactions, better refund/cashback options than offline stores;[30]
- Platform neutrality: online aggregator's own/ privately branded products being in direct competition with other branded products being sold on the same platform, under same category creating a conflict of interest (as the platform serves as both as a marketplace and a competitor on that marketplace) which is violation of Section 4 (2)(e) of the Act as the platform is leveraging its dominant position as intermediary to become a retailer;[31]
- Preferential treatment to some sellers on the platform being an abuse of dominant position is in violation of Section 4(2) of the Act;[32]
- Alteration of search algorithms: to change the ranking of products by 'paid listings', which is not revealed to the consumer which is violation of Section 4 (2)(b)(ii) of the Act;[33]
- Accumulating the bigdata of consumer's searches and preference through dominant position and misusing it to drive out competition which is violation of Section 4 (2)(b)(ii) of the Act;[34]
- Forcing the sellers/service providers to enter into unfair contracts having unreasonable or unconscionable bargains and unfair Platform-to-Business contract terms in violation of Section 4(2)(a) of the Act;[35]

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[29] CCI, *supra* note 6.

[30] *Id. at* para 53.

[31] CCI, *supra* note 6, para 57. *See also*, Rahul Shaw, *The Progress of E-commerce and Competition Law in India*, 4 (2) IJLMH 212 (2021).

[32] *Delhi Vyapar Mahasangh v. Flipkart*, Case No 40/2019.

[33] CCI, *supra* note 6, para 61.

[34] Google, *supra* note 24. *See also*, OECD, *supra* note 19.

[35] Flipkart, *supra* note 18. *See also*, *M/s Jasper Infotech Private Limited (Snapdeal) v. Kaff. Appliances Pvt. Ltd.* Case no 61/2014

- Differential and opaque discounting structure, often leading to deep discounting in violation of Section 4(2)(a)(ii) of the Act;[36]
- Predatory pricing or below-cost pricing in certain products, wherein substantial preferred discounts are availed directly from the manufacturers, makes it difficult for the competitors like brick-and-mortar stores to sustain in the market, violating Section 4 of the Act;[37]
- Bundling of services by the e-marketplace aggregators;[38]
- Platform parity clause: which restricts sellers/service providers from listing their goods and services on any other platform which violates Section 4 (2)(b)(ii) of the Act;[39]
- Exclusive distribution agreements: wherein the goods/services are launched on that particular platform only violating of Section 3(4)(c) of the Act;[40]
- Exclusive supply agreements: forcing the platform to list only one specific brand in one particular category of products which is in violation of Section 3(4)(b) of the Act;[41]

These instances can be recognized as a few examples of how e-commerce companies across the world violate competition laws that could have a negative impact on the welfare of consumers, competitors in the market, and the economy as a whole. Two of the most pertinent allegations amongst these are dynamic pricing and collusion by e-commerce companies using AI.

2.1. Price Competition and Dynamic Pricing

The practice of changing prices in response to consumer and market data is known as dynamic pricing. In other words, the

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36 CCI, *supra* note 6, para 69.

37 *Id.*

38 Stefan Holzweber, *Tying and Bundling in The Digital Era*, European Competition Journal, Taylor and Francis 14:2-3, 342 (2018).

39 CCI, *supra* note 6, para. *See also*, OECD, *Executive Summary of the Hearing on Across-Platforms Parity Agreements* (2016).

40 Flipkart, *supra* note 18.

41 *Id.* It is difficult to formally determine the violation of provisions of the Act in the cases of exclusive distribution or supply agreements (which are not anti-competitive act per se, but raises a competition concern, when it starts having adverse effect on the competitors).

practice of automatically changing a product or service's price in real time in order to maximize revenue and other financial performance metrics is known as dynamic pricing.[42] Different forms of dynamic pricing are used by e-commerce companies like Amazon and eBay to draw in more consumers and boost sales. A dynamic pricing strategy uses the current state of the market, including the company's prior price, changes in competitors' prices, customer preferences, demographics, time frame, and other external factors, as a basis to determine the best price.[43]

Pricing strategies are used in a wide range of business contexts by organizations such as airlines, railroads, theatres, concert venues, car rental companies, accommodation providers, and retail stores in order to react quickly to changes in the market. After processing and updating massive amounts of data, Amazon, for instance, keeps an eye on product prices and modifies them every ten minutes.[44] In the event that bad weather or a specific event results in high demand and price increases, Uber also employs a flexible pricing strategy.[45] According to the CCI and to quote:

> "*…..in the case of goods, most of the respondent retailers were found to change the price several times in a day, while some reported price revisions on a weekly basis and during promotional events. Majority of the hoteliers reported to undertake price revision on a daily basis*."[46]

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42 Wedad Elmaghraby and Pinar Keskinocak, *Dynamic Pricing in the Presence of Inventory Considerations: Research Overview, Current Practices and Future Directions*, 49 Management Science, Georgia Institute of Technology, 1287 (2003).

43 Wedad Elmaghraby and Pinar Keskinocak, *Dynamic Pricing in the Presence of Inventory Considerations: Research Overview, Current Practices and Future Directions*, 49 Management Science, Georgia Institute of Technology, 1287 (2003).

44 Maria Cristina Enache, *Machine Learning for Dynamic Pricing in e-Commerce*, Annals of Dunarea de Jos University of Galati Fascicle, I. Economics and Applied Informatics 3 (2021).

45 *Id.*

46 CCI, *supra* note 6.

Although dynamic pricing is not a novel concept, e-commerce has revolutionized the distribution of price information. Customers benefit from greater price transparency and the ease with which they can compare prices, but sellers can also keep an eye on rivals' prices in real-time and utilize that information to help determine their own prices. As far as traditional stores are concerned, the prices stay static for longer periods of time they are inflexible and unable to change with the market. This was mostly caused by the lack of reliable demand data, the high transaction costs connected to price fluctuations, and the substantial expenditures needed for the hardware and software required to implement a dynamic pricing strategy.[47] They don't take seasonal variations, demand fluctuations, or changes in customer preferences into account. This frequently results in excess inventory during off-seasons or lost revenue opportunities during peak times. Traditional pricing strategies often trap businesses in a pricing war that makes it impossible for them to stand out from the competition and continue to be profitable. Furthermore, the perceived value of a product may not be adequately reflected by traditional pricing techniques. This may result in either overpricing, which turns away price-conscious customers, or underpricing, which leaves room for profits.

However, using artificial intelligence to employ dynamic pricing is a strategy that owners of e-commerce companies are adopting at a heightened rate. Using dynamic pricing helps e-commerce business owners stay competitive by allowing them to price their products according to market trends, competition, and sales volumes. This leads to higher revenues and profits. Many retailers in the modern e-commerce market are implementing this flexible and dynamic pricing strategy in order to stay competitive.

As was previously mentioned, a number of factors affect dynamic pricing. Demand is the first consideration since prices can rise during periods of high demand, such as holidays, weekends, festivals, or epic events, and they can fall during off-seasons. The second factor is supply, which can be explained by a classic

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[47] Wedad, *supra* note 43.

economics theory that states that prices may rise as a result of scarcity when supply declines. On the other hand, businesses may decide to lower or maintain competitive prices for their products when there is a plentiful supply.[48] Prices may also vary depending on the time of day. Surge pricing can be observed when a consumer books a cab during peak travel hours or during rains when the demand is high and supply is short.

Further, airlines often implement dynamic pricing and offer discounted flight fares during the off-season or in the middle of the week and hike pricing during the weekends.[49] The fourth factor that impacts dynamic pricing is monitoring, wherein how much the businesses monitor their competitors and consumers impacts their strategies. To increase their monitoring behaviors, e-commerce companies often use AI and algorithms.

However, the dynamic pricing is not free from flows as it's possible for customers who pay the higher price to feel duped. Further, surge pricing such as exorbitant costs during an unexpected emergency or setting up minimum prices for certain products is price fixing, which is in violation of Section 3(3) of the Act. Also, abuse of the dynamic pricing strategies by dominant enterprises such as predatory pricing tends to negatively impact traditional stores which are unable to keep up with such sudden fluctuations in pricing, which is in violation of Section 4 of the Act. Additionally, unfair discriminatory pricing practices against the consumer wherein different prices are charged to different consumers (based on their purchasing history and user profile) are in Violation of Section 4 of the Act. Moreover, adding a dynamic pricing AI might not only add up costing more to the e-commerce company but might

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48 This is also evident in the cartel cases or hoarding cases, wherein a false decrease of supply is created to increase the price of goods.

49 As reported CCI has initiated an assessment against domestic flight companies for hiking prices and doing collusion using algorithms. Rajat Arora, '*CCI probing alleged fixing of airfares, looking at algorithms used by airline*s', The Economic Times (Nov 2018) < https://economictimes.indiatimes.com/industry/transportation /airlines-/-aviation/cci-probing-alleged-fixing-of-airfares-looking-at-algorithms-used-by-airlines/articleshow/66462186.cms?from=mdr> Last visited 20 Dec. 2023.

also lead to tacit collusion in violation of Section 3. This impacts overall competition in the market and harms the consumers and the economy in general.

In other words, price competition in digital markets is characterized by its dynamism, transparency, and its reliance on technology-driven pricing strategies. Businesses operating in the digital landscape as well as in the offline-traditional marketplace must navigate this competitive arena to attract customers and remain functioning.

2.2 Collusion by E-commerce Companies

The importance of AI in the lives of human beings today cannot be undermined. From booking airline tickets to booking hotels; from booking taxis to buying goods online, AI and algorithms are predominantly used everywhere. In fact, AI is so pervasive in this modern era that through algorithms it tracks, influences and predicts how individuals behave in nearly all facets of life.[50]

The heightened relevance of algorithms in the society is owed to their adoption by companies indulged in both online and offline businesses. Authors Stucke and Ezrachi have referred to the use of complex algorithms to improve business decisions and to automate the process as 'algorithm business.[51] According to this, e-commerce companies rely on algorithms for predictive analytics and business optimization. Predictive analytics involve encoding such advanced algorithms that can predict the likelihood of future outcomes based on historical data and can be used to estimate demand, forecast price changes, assess risks, predict consumer preference, consumer behavior, etc.[52] Such information can be

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50 Leo Hickman, 'How Algorithms Rule the World', The Guardian (July 2013). https://www.theguardian.com/science/2013/jul/01/how-algorithms-rule-world-nsa. Last visited 20 Dec. 2023.

51 Ariel Ezrachi & Maurice Stucke, *Two Artificial Neural Networks Meet in an Online Hub and Change the Future (Of Competition, Market Dynamics and Society),* Oxford Legal Studies Research Paper No. 24 (2017).

52 OECD, *Algorithms and Collusion: Competition Policy in the Digital Age* (2017).

extremely valuable to the decision-making process of e-commerce companies and can help them develop innovative and customized business strategies. Using algorithms for business optimization, on the other hand, gives these companies a competitive advantage by setting up optimal prices that respond well to the fluctuation in the market prices. This allows them to compute big data in a rapid, effortless, bargainous and in a much efficient manner than their human counterparts.[53]

As mentioned earlier, there are both merits and demerits for a heightened use of algorithms in the e-commerce. From a market point of view, this has increased allocative, dynamic and static efficiencies by reducing cost of production, improving the quality of goods and resources, and increasing transparency.[54] It has also made a pressure on the new and existing entrants to innovate and for developing new products.[55] On the flip side, there is a high probability that the digital market players might use this technology for private interests that are not in tune with the social goals.[56] Collusion is one such means to achieve their ulterior goals and this is where the complexity lies.

As per the CCI, collusion can be of two types. Firstly, there is explicit collusion, achieved by direct interactions of the competing enterprises through written or oral 'agreements', which is in direct violation of Section 3(3) of the Act. Secondly, we have tacit collusion in which coordination happens between competing enterprises through no direct contact but instead by recognizing their mutual interdependence by adopting strategies for their collective benefits. Generally, explicit collusion is recognized as anti-competitive by the law and is unlawful. Tacit collusion on the other hand is rather tricky to adjudge, as it sometimes falls in the grey area of conscious price parallelism (which is a business strategy of the firm to make their prices at par with their competitors); and is

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[53] *Id.*

[54] OECD, *Data Driven Innovation: Big Data for Growth and Well Being* (2015).

[55] OECD, *Protecting and Promoting Competition in Response to "Disruptive" Innovations in Legal Services*, (2016).

[56] OECD, *supra* note 52.

therefore, falls outside the scope of 'agreement' as punishable under the Act.[57] It is suggested that the use of one of these categories of algorithms could facilitate explicit or tacit collusion by making market conditions more suitable for coordination.[58] Some of the key algorithms that are used are:

(1) Monitoring algorithms: that monitor competitor's actions (by data collection, decision screening, and noticing deviations) in order to enforce a collusive agreement by immediately producing an outcome.[59]

(2) Parallel algorithm: it can be noticed how some competing players in the digital market such as airlines, hotel booking, and cab/transportation booking companies apply dynamic pricing algorithms to increase or decrease their prices in consonance with their rivals.[60] Due to the industry's dynamic nature, continuous change in supply and demand necessitates continuous price adjustments. This makes it difficult to implement explicit cartel agreements in these markets; so, the enterprises opt for collusion via algorithms and create an illusion of conscious parallelism, which is difficult to detect. Coordinated parallel behavior can also happen by programming the algorithm to follow a particular leader or by buying the same algorithm from the same third party.[61]

(3) Signaling algorithm: could be used to give signals that can

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57 CUTS International, *Study of Cartel Case Laws in Select Jurisdictions–Learning for the Competition Commission of India*, Competition Commission of India (2008).

58 Suzanne Rab, *Artificial Intelligence, Algorithms and Antitrust*, Competition Law Journal, 141 (2020).

59 As per OECD, "*companies may program pricing algorithms to effectively execute trigger strategies, which consists in settling the agreed price as long as all the rivals do the same, but reverting to a price war as soon as a firm deviate.*"

60 As reported by the Indian Express, CCI initiated an assessment against domestic flight companies for hiking prices and doing collusion using algorithms. *See supra* note 49.

61 An illustration of the 'Hub and Spoke' Model *see* Ezrachi, s*upra* note 51.

announce the (collusive) intention of competitors and then negotiate the terms of collusion.[62]

(4) Self-learning algorithm (digital eye): which through machine learning, deep learning, and predictive technologies, adapts to the actions of other market players and initiates actions for the maximum benefit of every player.

While signaling algorithms could be a good example of explicit collusion, usage of other categories suggests that algorithms could be categorized as 'plus factors' that render tacit collusion more likely.[63] However, these claims necessitate further inquiry. The analysis of collusion by algorithms being done by e-commerce companies is of utmost necessary and is deeply complex as they escape the traditional legal framework. Mr. Augustine Peter, former member, CCI has also stated that finding methods to prevent collusion between self-learning algorithms could be one of the biggest challenges that competition law enforcers have ever faced.[64] Apart from the intricacies of adjudging tacit collusion from conscious legal price parallelism, there are many other issues that hound the competition law enforcers in the digital sector.

How to include collusive algorithms under the definition of 'persons' and 'agreements' under the Act, is a question still unanswered. As the definition of 'persons' under the Act *prima facie* includes real and judicial persons whether AI could be a part of it is a mystery to be pondered upon. Moreover, they also pose a unique challenge because of the apparent non-intervention of the e-competitors in the anti-competitive conduct. These questions are especially intricate in the case of self-learning algorithms. The Act

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[62] For instance, the parties may send internal signals (for instance prices) to each other and the negotiation shall not be considered to be complete, till the time both parties don't send the same signal (which shall be the final price).

[63] S. Mehra, *Antitrust and the Robo Seller: Competition in the Time of Algorithms*, Minnesota Law Review, 1323-75 (2006).

[64] Mr. Augustine Peter, Member, CCI at the ASSOCHAM 5th International Conference on Competition Law & Tech Sector Bangalore, 19 Jan. 2018. *See*, http://164.100.58.95/node/3707. Last visited 30 May 2024.

does not provide any guidance in this regard. Furthermore, under Section 48 of the Act personal liability of the employees in case of violation by the company is mentioned. Yet, it is not the other way around. Also, in these circumstances, it's unclear who can be made liable in cases of colluding and violating Section 3 of the Act using (self-learning) algorithms, the e-commerce company or the employees, or the algorithm developer?

On one hand, it cannot be denied that the algorithms are programmed to produce outcomes for profit maximization, and if the algorithm designed to fulfil its target resorted to collusion, then it must be the fault of the commissioning e-commerce enterprise. However, on the other hand, it is argued that the intention of the enterprise must also be taken into consideration since it never had any express or implied will to collude and merely programmed its algorithms to generate profits. In such situations, whether the enterprise could be made liable or not is still undetermined by the law and by the CCI.

3. Recent International Developments

This issue of antitrust face-off between e-commerce dominant enterprises and traditional brick-and-mortar stores is also gaining international momentum. Key actions taken by countries of select jurisdiction are as follows:

<u>United Kingdom:</u> In the UK, the growth of e-commerce has generated significant benefits to consumers and has stimulated innovation. The challenge for competition authorities is therefore to ensure that they effectively distinguish between such pro-competitive and anti-competitive aspects, and are able to take adequate measures to mitigate any potential damages. The Competition and Markets Authority (CMA) of the UK recently launched its digital market strategy in which it laid out how it shall continue to protect the consumer welfare in this rapidly developing digital market while also ensuring that it simultaneously fosters innovation.[65] The CMA also established a Digital Markets Unit in

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[65] CMA, *AI Strategic Update* (July, 2019).

2021 to oversee and enforce a new regulatory regime for digital markets. Furthermore, the UK laid out Online Platforms and Regulatory Guidelines, 2021 to ensure that online platforms and marketplaces operate fairly and transparently to provide clear information to consumers and businesses.

United States: The antitrust authority of the U.S. Federal Trade Commission (U.S. FTC) and the antitrust division of the U.S. Department of Justice (U.S. DoJ), when examining the competitive consequences of actions or transactions in the United States, are increasingly being compelled to examine the effects of both offline and online sales. Furthermore, they while recognizing the obstacles faced by the competition authorities in implementation of the law in e-commerce sector published their findings in a study titled, 'Implication of E-commerce for Competition Policy'.[66] In fact, a case of online travel companies (OTC) came in front of the FTC wherein, hotels allegedly entered into 'rate parity' arrangements with OTCs under which the hotel would set the lowest permissible rate for a room and promise that the published rate offered to an OTC would be as favorable as the hotel's own rates or any other OTC's rates.[67] The plaintiffs alleged this as an industry-wide conspiracy to control pricing and eliminate intra-brand competition.[68] This showcases the USA's robust approach to address anti-trust issues. Additionally, on the legislative front, the American Innovation and Choice Online Bill, 2021 as well as the Platform Competition and Opportunity Bill, 2021 have been proposed to prevent dominant actions of online platforms that could harm the competition. Furthermore, the House Judiciary Committee Investigation and Report, 2020 enunciates the finding of anti-competitive investigation against tech giants like Amazon, Apple and Google etc.

Japan: The Japan Fair Trade Commission convened the Study Group on Competition Policy for Distribution Systems and Business Practices (DSBPG) in 2016, after the initial Guidelines Concerning

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[66] OECD, *Summary of Discussion of the Roundtable on Implications of E-commerce for Competition Policy* (2019).

[67] *Online Travel Co (OTC) Hotel Booking Antitrust Litigation*, (ND Tex 2014).

[68] Due to insufficient allegations, action was dismissed at the pleading stage.

Distribution Systems and Business Practices. In 2017, Japan revised the DSBPG in the light of development of e-commerce companies.[69] In 2019, Japan laid out Guidelines for digital platforms to provide a clear framework for fair transactions and transparency in search result ranking on the digital platforms. Furthermore, in the year 2020, Japan established a Digital Market Competition Headquarters to address anti-competitive actions and to promote fair competition in the digital markets. Additionally, in the year 2021, Japan introduced the Act on Improving Transparency and Fairness of Digital Platforms to ensure fair competition.

European Union: In 2017, the European Commission initiated an investigation of the e-commerce sector as part of its Digital Single Market Strategy.[70] The focus was focused on identifying e-commerce activities that impede market competition. Consumer goods, digital markets, and ensuring no discrimination between customers from and within EU countries were its primary findings. The European Commission has realized the multi-sidedness of e-platforms and the importance of clarifying the nature of agreements between platforms and third-party businesses (distribution or provision of platform services) on a case-to-case basis. The European Commission has also taken a stern view in the *Google shopping* case (abuse by giving an illegal advantage to another Google product in an adjacent market to the detriment of competing services) and has penalized Google.[71] On the legislative front, the EU adopted the Digital Markets Act, of 2022, and the Digital Services Act, of 2022 to impose obligations on gatekeepers (large online platforms) to prevent unfair practices. Additionally, the European Commission conducted market studies such as the Evaluation of Digital Platforms and Online Advertising study in 2022 to assess the impact of digital platforms and online advertising on competition.

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69 OECD, *supra* note 66.

70 European Commission, *Final Report on The E-commerce Sector Inquiry* (2017) https://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf. Last visited on 20 Dec. 2023.

71 Google Search (Shopping)**, AT. 39740.**

The implementation of a comprehensive and multi-faceted approach by the competition regulatory authorities across the globe highlights the presence and need to regulate competitive issues in the e-commerce sector. A similar approach has been followed by the Indian competition regulatory authority as well as the legislator which has been listed below.

4. Indian Judicial Interpretations and Legislative Actions

Time and again cases related to the violation of competition law by e-commerce companies have reached the doorsteps of the Indian Judiciary. For instance, allegations of pricing were levied by apparel company Beverly Hills Polo Club on Amazon for deep discounting, abuse of dominance, and foreclosure of competition by hindering entry into the markets.[72] However in this case it was held that Amazon does not seem to be a dominant entity in the relevant market and in the absence of dominance the question of abuse does not arise.

In another case, allegations of violation of competition law were made by the members of All India Online Vendors Association on Flipkart wherein it was alleged that Flipkart is having a direct conflict of interest with other manufacturers selling on their platform as their own brands like 'Smartbuy' and 'Billion' are also available online.[73]

Similar allegations were also levied against Amazon and Flipkart by members of Delhi Vyapar Mahasangh, an association of many micro, small and medium enterprise traders against Amazon and Flipkart for having vertical arrangements with their preferred sellers on their platform which had allegedly led to a foreclosure of other non-preferred traders from these platforms.[74] It was further alleged that they were gathering data on consumer preferences and were using this data to their own advantage. In a recent update on the matter, Amazon and Flipkart plea to stall antitrust investigation by CCI has been rejected by the Supreme Court, which has stated

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[72] Flipkart, s*upra* note 4.

[73] Vendors Association, *supra* note 5.

[74] Delhi Vyapar Mahasangh, *supra* note 32.

that being big e-commerce organizations, these companies should volunteer for antitrust investigation, instead of objecting to it. The CCI inquiry is a huge setback for Amazon and Flipkart, who are already dealing with the threat of stricter e-commerce regulations as well as allegations from brick-and-mortar retailers that they are circumventing Indian law by forming complex business structures.[75]

In an ongoing matter, Google was alleged to have abused its dominant position in the Indian Smartphone market due its mandatory pre-installed apps. In an investigation report published in June 2021, by CCI, it was stated that *"Google has reduced the ability and incentive of device manufacturers to develop and sell devices operating on alternative versions of Android i.e. Android forks, and thereby limited technical or scientific development relating to goods or services to the prejudice of consumers in contravention of Section 4(2)(b) of the Act."*[76]

In a classic observation made in the case of *Matrimony.com Limited*[77] wherein Google LLC. was fined for abusing its dominant position as an online search engine in contravention of Section 4(2)(a)(i) of the Act. It was observed that Google manipulated the search engine results to benefit its own vertical partners using artificially intelligent algorithms.

In another landmark order of 2020, CCI ordered an investigation against OYO and hotel aggregator platform Make My Trip (MMT) for abusing its dominant position and violating Sections 3 and 4 of the Act by putting price parity restrictions, exclusivity restrictions which can cause appreciable adverse effect on the competition in the market.[78]

Additionally, the CCI conducted a market study on the e-

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[75] '*Supreme Court rejects Amazon, Flipkart's plea against CCI investigation'* The Times of India (9 Aug. 2021) <https://timesofindia.indiatimes.com/business/india-business/supreme-court-rejects-amazon-flipkarts-plea-against-cci-investigation/articleshow/85172175.cms> Last visited on 20 Dec. 2023.

[76] Kshitiz Arya and Ors. v. Google, Case No. 19/2020.

[77] Matrimony, *supra* note 24.

[78] Rubtub Solutions Pvt. Ltd v. MakeMyTrip India Pvt. Ltd, Case No. 01/2020.

commerce sector titled '*Market Study on E-commerce in India: Key Findings and Observations'* in 2020 to develop a better understanding of the nuances of the sector and its implications on the market and the competition.[79] The study identified issues such as deep discounting, preferential listings, and exclusive tie-ups amongst other and suggested the need for self-regulation by platforms and transparency in their operations.

The Commission further set up a Competition Law Review Committee (CLRC) to review the Act of 2002 from the perspective of '*Technology and New Age Markets*' and recommend changes in tune with the issues of the growing digital market.[80] In the report, the Commission stated that the objective of the market study "*was to engage with industry and ascertain the Commission's enforcement and advocacy priorities in relation to e-commerce, with greater clarity on market developments and emerging impediments to competition, if any*."[81]

The Foreign Direct Investment (FDI) Policy in E-commerce in 2020 was also launched to regulate the operations of foreign-owned e-commerce platforms, it prohibited the e-commerce platforms with FDI from owning inventory and mandated them to operate as marketplaces to ensure transparency in pricing and discount pricing.

Additionally, in 2023 the new Digital Competition Bill was introduced, which aims to safeguard the interest of businesses and consumers alike in the digital marketplace. This Bill identifies Significant Digital Market Entities (SDME) based on their market share, user base and network effects and subjects them to stricter regulations due to their potential impact on the competition. Undoubtedly, this bill is a significant legislative step aimed at addressing the unique challenges posed by digital markets and ensuring fair competition. These efforts ensure that the large digital platforms do not abuse their market power and consumers and businesses benefit from a level playing field

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[79] CCI, *supra* note 6.

[80] Competition Law Review Committee Report, 2019.

[81] *Id.*

4.1. Conclusion and Analysis

As it has been the discourse of the market that the traditional brick-and-mortar stores are constantly facing market existence issues *qua* competition issues in the digital market; such as deep discounting, preferential treatment, abuse of dominance. These issues have been rising at an unprecedented rate which can be linked to a number of causes, including e-marketplaces' status as both a marketplace and a supplier to the consumers. This dual position assumed by e-marketplaces as both a marketplace and supplier have major implications for the e-marketplace's neutrality, lack of transparency in search ranks, user review policies, and data storage and use, among other things which can be categorized as violation of Section 3 and Section 4 of the Competition Act, 2002. Furthermore, the fact that association with leading e-commerce marketplaces have become a necessity for retailer's survival is being exploited by dominant e-commerce companies to unilaterally impose terms of contract that are unfair and unfavorable for the retailer's business.

In the light of this, it's necessary to find competition issues in the platform to retailer equation and the overall impact of it all on the traditional brick and mortar stores and their sustenance. This would help in ensuring that the ulterior aim of competition law which is "*to promote and sustain an enabling competition culture and inspire businesses to be fair, competitive and innovative; enhance consumer welfare; and to support economic growth is preserved*."[82]

The researchers have concluded that the competition concerns in digital markets are not comprehensively addressed by any of the current Indian laws or regulations. Although, the recent case laws and the introduction of the new Digital Competition Bill, 2023 (the Bill) reflect India's commitment to adopting to the rapidly evolving digital technology. Yet, the provisions of the Bill are not far away from criticism. Primarily, the Bill does not address the

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[82] CCI, *Vision and Mission of Competition Commission of India see*: https://www.cci.gov.in/vision-and-mission. Last visited on 13 Dec. 2023.

issue of collusion by AI, which is allegedly in violation of Section 3 of the Act. The issues that were identified earlier in this paper pertaining to the definition of 'persons' and 'agreements' under the Act, are still unaddressed. Furthermore, the definition and criteria of SDMEs (as discussed earlier), and anti-competitive practices are vague and open to interpretation. This ambiguity could lead to inconsistent enforcement and legal uncertainties. Enforcing the bill's provisions effectively require substantial resources and expertise which the regulatory authority lack. The researchers suggest that the Director General should promptly conduct a comprehensive investigation, considering the constantly shifting dynamics of the markets. To speed up the enforcement process, they can also use negotiation remedies like agreements and settlements. However, when analyzing the position of dominance and abuse, it is advised that the CCI consider the unique features of the e-commerce sector, such as the rapid advancement of technology, increasing returns, network effects, and user data. The CCI should use the essential facilities doctrine to ensure that a dominant player and other market participants are compatible. Another argument is that the Competition regime requires to be updated to reflect the quick changes occurring in the new economy. Given the rapid growth of digital markets, regulations pertaining to them must be developed.

In conclusion, one could argue that there is an urgent need to modify the way competition law is applied to India's digital marketplaces. Numerous related issues, such as data security, privacy, and consumer protection, also need to be considered in these markets. Because these markets are so complex, it is better for lawmakers and regulators to select reforms that are flexible enough to consider the specifics of each situation while still providing a wide but clear framework for the exercise of discretion. All things considered, this would be beneficial in analyzing the socio-legal and economic effects of the rise of e-commerce businesses in the Indian retail industry.

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UNDERSTANDING THE CHALLENGES FOR IMPLEMENTATION OF THE NEW CRIMINAL PROCEDURAL LAW: A CRITICAL APPRAISAL OF *BHARATIYA NAGARIK SURAKSHA SANHITA*, 2023

*Sunishth Goyal**

Abstract

Beginning 1st July 2024, our national criminal justice and legal framework is witnessing a massive overhaul of all the three new criminal laws. Of these three legislations, the biggest change is supposed to be reflected in the criminal procedure code which was last enacted in 1973. This article would critically analyse some of these changes and present the challenges which our law enforcers such as the police as well as courts might face in the coming times. Ever since the introduction of the first draft bill in August 2023, many scholars have highlighted in brief the potential implications of some of the proposed changes in criminal procedure such as provision enabling handcuffing or changes to remand procedure. However, apart from these changes, there are several other provisions where procedural safeguards have been diluted. Implications of the changes in provision enabling the collection of samples from accused, procedure regarding seizure of proceeds of crime etc. are just a few of the examples this article will seek to discuss in detail. Along with outlining these changes, the jurisprudential basis regarding these changes will also be discussed and whether these changes can withstand the inevitable judicial scrutiny in the upcoming future. In the past, many important verdicts given by the Apex Court such as Lalita Kumari vs. Govt. of Uttar Pradesh, C.B.I vs. Anupam Kulkarni etc. have also ruled contrary to some of the proposed changes. By understanding comprehensively all such

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changes, this article will navigate through the complexities of implementing this new law in the upcoming future.

Keywords: Bharatiya Nagarik Suraksha Sanhita, Code of Criminal Procedure, Criminal Reforms

Introduction

The Bharatiya Nagarik Suraksha Sanhita [1] (BNSS), recently enacted in December, 2023 to supplant the venerable Code of Criminal Procedure[2] (CrPC) from 1973, represents a significant shift in the Indian criminal justice framework. While the stated objective of the BNSS is to modernize and streamline criminal procedures, a critical examination reveals that its implementation may inadvertently compromise foundational tenets of justice and civil liberties.This article seeks to unpack the complexities inherent in the BNSS, scrutinizing its provisions through the lens of legal theory and practice. The legislative process leading to the BNSS has been characterized by a notable lack of comprehensive public discourse and expert engagement, raising pertinent questions about the legitimacy and efficacy of such sweeping reforms.

Key areas of concern include the expansion of police powers, which may encroach upon individual rights, and the introduction of procedural ambiguities that could hinder judicial efficiency rather than enhance it. Moreover, the BNSS appears to prioritize political expediency over the nuanced evolution of criminal law, suggesting that many of the proposed changes could have been more judiciously addressed through targeted amendments to the existing CrPC. As we delve into the implications of the BNSS, it becomes imperative to critically assess whether this legislative overhaul will serve to fortify the rule of law or, conversely, erode the protections afforded to citizens within the Indian legal system.

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1 The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46 of 2023, Acts of Parliament (India). [BNSS]

2 The Code of Criminal Procedure, 1973, No. 2 of 1974, Acts of Parliament (India). [CrPC]

Formally reintroducing Handcuffs?

One of the most concerning changes made in the new of law of BNSS is the formal introduction of handcuffs. In the previous edition of the law in CrPC, nowhere did the code mention the usage of handcuffs. In fact, the Hon'ble Supreme Court on several instances had criticised the usage of the same. Particularly, in the landmark *Prem Shankar Shukla* case[3], the Court heavily came down upon the inherent biases which were observed in the then existing Punjab Police Rules. There was also a discrimination being observed on where such fetters were being used because there was a differential treatment between 'ordinary' and 'better class' undertrial prisoners[4]. There is an inherent ambiguity in how such classes would be defined and thus discrimination is bound to take place. The court also relied upon several jurisprudential aspects particularly 'Universal Declaration of Human Rights' as well as 'International Covenant on Civil and Political Rights'[5]. A five judge Constitutional Bench of Apex Court in a prior verdict of *Sunil Batra*[6] had remarked that indiscriminate usage of handcuffs runs afoul of Articles 14, 19, and 21 of the Constitution. In another case of *Citizens for Democracy v. State of Assam*[7], the Court further supplemented these guidelines against using unnecessary fetters. Here, the Court directed that even when authorities have a strong suspicion regarding the tendency of a particular accused to escape custody, the correct procedure would be to produce the said individual before a magistrate and ask for permission before using cuffs. Thus, no fetters were allowed by the Court except in extreme circumstances and with the permission of a magistrate.

But looking at the current law of arrest procedure in BNSS[8], a lot of leeway has been accorded to the police authorities. While it may make some sense to use cuffs on an individual who "escaped

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[3] Prem Shankar Shukla v. Delhi Administration, (1980) 3 SCR 855.

[4] *Id.* at 875.

[5] *Id.* at 864.

[6] Sunil Batra v. Delhi Administration, (1979) 1 SCR 392.

[7] Citizens for Democracy v. State of Assam, (1995) 3 SCR 943.

[8] *Supra* note 1, § 43(3).

from custody”[9]. However, anyone who has supposedly committed some heinous crimes such as murder, rape, terrorist activities etc. should not be subject to the same. Similarly, another permitted category for usage of handcuffs is that of “habitual or repeat offender”[10]. But who would define the same? Would it be enough for a person to be declared so, even if he were to be named in two different FIR’s or has more than one trials instituted against him? Can an arresting officer be required to prove prior convictions at the time of arrest or would mere suspicions or beliefs be enough? Such ambiguities should ideally have been avoided and even for heinous crimes as envisaged in this provision, until a conviction, they are still accusations and the presumption of innocence cannot be overturned. The current law runs counter to the liberty and rights prescribed the Apex Court as discussed above.

Reinvigorating Remand and Increased Police Custody

One of the most discussed changes in the new laws is that the police remand as originally envisioned under CrPC[11] has been altered substantially. As the per previous law, as settled by the Hon’ble Supreme Court starting in its celebrated *Anupam Kulkarni*[12] verdict, not only is the maximum period of police remand for 15 days in total, but the police remand could not be granted after the first 15 days. For instance, let’s take a hypothetical where earlier if a person were to be produced before a judicial magistrate on the 1st of January and remanded to five days of police custody. After 5 days of this police remand, if the person was sent to 10 days of judicial remand. But after 15th January, the police can’t insist that he should be sent back to police remand as they still have 10 more days left. This was the contribution of the *Kulkarni* verdict and the consistent approach of the courts. The court went a step further to state that legislature has “disfavoured even the prolonged judicial custody”[13] let alone with the police. Similarly, simply because a person is in

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9 *Id.*

10 *Id.*

11 *Supra* note 2, § 167.

12 Central Bureau of Investigation, Special Investigation Cell-I, New Delhi v. Anupam J. Kulkarni, (1992) 3 SC R 158.

13 *Id.*at 175.

judicial custody, it wouldn't prohibit the investigating agencies to interrogate the accused[14]. But the current law of BNSS has upended this position. Now, even though the maximum period of police remand is still 15 days, but the duration till which it can be granted has been altered to the initial forty or sixty days[15] depending upon the crime. This seems quite draconian as earlier because of the first 15-day embargo, not all of the fifteen days of police custody was exhausted in a vast majority of the cases. However, with the relaxation of the time period as to when such a custody with the police can be sought, there is a much higher likelihood of increase in custody.

Such a view was discussed only once by the Apex Court in 2023 in the *Balaji* verdict. In this 2023 case, the Court doubted the *Kulkarni* verdict and recommended that police custody could be granted till the entirety of 60 or 90 days before default bail is granted[16]. In the author's view, this was an incorrect reading of the provision as the consistent judicial interpretation has always been favouring towards granting bail and disfavouring police custody. Thankfully, even BNSS has not gone as far by only limiting the custody to first 40 or 60 days as opposed to 60 or 90 days as suggested by the Court in *Balaji* verdict. However, some other key verdicts of the Court should have been taken in account while framing such a provision. For instance, recently in 2023 in the *Kapil Wadhawan* case, the Apex Court clarified that day of remand or first production before magistrate must be counted while computing the 60 or 90-days period for default bail. Similarly, in the *Ritu Chhabaria*[17] verdict, the Court came down heavily upon the practice of filing incomplete chargesheets simply to defeat the right of default bail.

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14 *Id.*

15 *Supra* note 1, § 187(2).

16 *V. Senthil Balaji v. The State Represented By Deputy Director And Ors*., (2023) 12 SCR 853.

17 *Ritu Chhabaria v. Union of India*, (2023) 3 SCR 826.

Intrusion into Privacy

There have also been significant changes in the way how authorities can collect your personal information. When one looks at Section 349 of BNSS which corresponds to the erstwhile Section 311A of CrPC, the scope and ambit of the provision has been significantly expanded. As per the newly added provision, a magistrate is now authorised to direct any person to furnish their fingerprints and voice samples as well[18]. Earlier, this was restricted to just handwriting and signatures. Now, the new law even extends to those individuals who have never been arrested for any crime as well[19]. This is quite concerning as when read with the 2022 Identification Act[20], the amount of personal information which the authorities can now legally gain from individuals is alarmingly high. That particular act when read with CrPC and now BNSS enables the collection of iris and retina scans, physical & biological samples etc. along with other sensitive information. For a person who has been convicted of any offence, their information can be legally retained for 75 years[21]. Furthermore, in our criminal trials, appeals and their final culmination itself can take several decades, so it would effectively mean that the authorities may argue for the retention of such data concomitant with this time period. This is quite concerning for our country as requisite fortifications should ideally be done to our cyber infrastructure as well. Such massive overhaul to personal data collection at the behest of authorities is further problematic considering we do not have any dedicated legislative framework for DNA regulation or Personal data privacy laws. Post the landmark Supreme Court *Puttaswamy* verdict[22] recognising Privacy as a Fundamental right, such broad and sweeping steps could be seen as violative of the Privacy right.

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[18] *Supra* note 1, § 349.
[19] *Id.*
[20] The Criminal Procedure (Identification) Act, 2022, No. 11 of 2022, Acts of Parliament (India).
[21] *Id.* § 4(2).
[22] *Justice K.S. Puttaswamy (Retd.) v. Union of Indi*a, (2017) 10 SCR 569.

Furthering hurdles in initiation of proceedings

The changes with regards to the registration of an FIR have been receiving considerable attention. One of the key changes in this regard is the formal recognition of the registration of e-FIR's. It is indeed a laudable change which was long overdue. However, the phrasing of the law could raise some ambiguities in its implementation. As per the law, if the information is given via electronic communication, then it has to be signed within three days by the informant[23]. Due to this mandatory physical presence requirement, it is being assumed that finally FIR can only be registered when a person physically signs the copy of an FIR, and until that point in time it can only be seen as mere information which has been recorded by a police officer. Then, what exactly is the benefit of recording such information by the police? In certain cases, particularly, for insurance claims or lost passport or bank documents, a copy of the FIR becomes very important. If a person, who is located in a different city or state, where the FIR can be registered wants to urgently procure a copy of the Fir, he would still be left helpless. In the author's opinion, until and unless this mandatory requirement of physically signing within 3 days is not removed, it cannot be said that we have fully achieved the object of registration of e-FIRs.

Another significant hurdle which has been noticed is the introduction of "preliminary enquiry". As per the new law, with regards to cognizable cases, the police may conduct some enquiry before registering an FIR. However, this would violate the spirit of the directions as laid down in the landmark *Lalita Kumari* verdict[24] by the Hon'ble Supreme Court. While giving due regards to accused rights and investigative efficiency, the court noted that it is mandatory to register an FIR as all information has to be recorded promptly. The Court further noted that registering an FIR compulsorily would enable "transparency" and "judicial oversight"[25]. Enquiry before registering FIR was only allowed in

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23 *Supra* note 1, § 173(1)(ii).

24 *Lalita Kumari v. Govt. of U.P., (2013*) 14 SCR 713.

25 *Id.* ¶ 86.

certain limited cases such as commercial, medical negligence, matrimonial disputes, or cases with over three months of delay[26]. Another complication which may arise is the phrasing of the law as the enquiry is only allowed for offences with punishment with "three years or more but less than seven years"[27]. If the enquiry is to be carried out, why are heinous offences with more than 7 years and simultaneously trivial offences with less than 3 years sentence exempt from the same? Only a handful of the offences under the penal law have punishment exactly between 3 to 7 years. Even if enquiry were to be carried out, it would be easier to state that all offences with less than seven years would have preliminary enquiry. Furthermore, the categories as prescribed in *Lalita Kumari* verdict could also have been incorporated by BNSS.

The new law has omitted a key phrase from the law related to police investigation. Earlier, as per the investigation procedure pursuant to registration of an FIR, there was a requirement to notify the informant if a police officer is not going to investigate the case[28]. However, now this explicit phrasing has been deleted from the corresponding provision in the new law[29]. However, this has the adverse potential of severely impacting upon the rights of an informant to be kept in loop regarding the status of their investigation. In fact, the Hon'ble Apex Court[30] has noted the existence of such provisions across the procedural law to reiterate the importance of rights of a victim or informant and even devised the important remedy of 'Protest Petition'. In fact, the new law could have given a formal statutory recognition to the same as well.

Changes to Complaint-based proceedings

In the new law, a key change has been brought in the manner how cognizance may be taken in complaint cases. As per this changed position, now it would be mandatory to provide "an accused an opportunity of being heard", before any cognizance in a

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26 *Id.* ¶ 111.
27 *Supra* note 1, § 173(3).
28 *Supra* note 2, § 157(2).
29 *Supra* note 1, § 176(2).
30 *Bhagwant Singh v. Commissioner of Police*, (1985) 3 SCR 942.

complaint case may be taken by a court[31]. This was not the position in the earlier code. However, it's implementation could raise some challenges. While *prima facie* it appears quite laudable that rights of an accused are being furthered by the new law. However, some context around this provision could be illuminating to understand the same. Firstly, no such rights accrue to an accused when the cognizance is sought to be taken on any of the other two methods under the law[32], particularly based upon a police report. Why is it that only for a complaint the same is being allowed? Secondly, what kind of a hearing is envisioned under the law is also not clear. Will the evidence be presented at this stage, or will it be merely in the nature of examination of an accused, or will the court ask for a 'plea of guilty' as usual happens in a trial? Finally, in cases of cognizable offences, complaints before magistrates are usually only lodged when the person fails to get a recourse from the police procedure. This is usually the case of power differentiation between parties, where either the accused comes from an underprivileged or socially disadvantaged background or the potential accused is influential or politically connected where the police hesitate to lodge an FIR. Indirectly recognising the same struggle to lodge an FIR, the Apex Court in *Sakiri Vasu* verdict[33] had laid down a SOP for cognizable offences where on being aggrieved by non-registration of FIR in a police station, a person must firstly approach the Superintendent of Police and then on further refusal by SP, may he be allowed to lodge a complaint. The same has also been tacitly recognized by some of the changes as observed in the new law[34]. However, if a magistrate is now forbidden to take cognizance before hearing such an accused, it is adding yet another obstacle in the way of initiation of proceedings.

Diluting and domesticating PMLA?

Much discussion has been ensuing over the domestication and widespread adoption of the terrorism and 'organised crime'

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31 *Supra* note 1, proviso under § 223(1).
32 *Supra* note 2, § 190(b) & (c).
33 *Sakiri Vasu v. State of U.P.,* (2007) 12 SCR 1100.
34 *Supra* note 1, § 173(4).

related provisions in the *Bharatiya Nyaya Sanhita*[35]. They are quite concerning with the adoption of over sweeping provisions such as 'Organised Crime'. However, very little discourse has been focussing upon similarly sweeping provisions under the BNSS which could be said to dilute the standards of Prevention of Money Laundering Act, 2002[36] (PMLA). As per section 107 of the new law, very broad powers have been granted to the authorities. In circumstances where the police possess a "reason to believe" that a property may have been acquired due to criminal activity, in such cases attachment proceedings may be initiated[37]. The court to which such an application may be made has also been granted an exceptional power of passing 'exparte' orders of attachment of a property if the concerned parties do not appear before the court in a short time span of just 14 days of issuing a notice[38]. Even this brief requirement of notice can be dispensed with in the court's discretion and interim '*ex parte*' orders of attachment can be issued[39]. Once, a determination has been made by a court linking the alleged property to a criminal enterprise, then the authorities will 'distribute' these properties to victims within 60 days[40]. However, this time period seems too short for a concerned party to be able effectively mount a feasible defence in the form of an appeal. Hypothetically, if after the passage an of initial court decree for attachment by a magistrate or a trial court, the concerned person wishes to approach High Court or Supreme Court against such a finding. However, if the alleged property is already distributed or sold or destroyed in the interim before the appellate court has had an opportunity to grant an injunction or other relief, the rights of the parties would be permanently affected.

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[35] Devesh K. Pandey, *Bharatiya Nyaya Sanhita has specific provisions on organised crime, in a first for national laws*, THE HINDU, (Jan. 19, 2024), https://www.thehindu.com/news/national/bharatiya-nyaya-sanhita-has-specific-provisions-on-organised-crime-in-a-first-for-national-laws/article67755898.ece

[36] The Prevention of Money Laundering Act, 2002, No. 15 of 2003, Acts of Parliament (India). [PMLA]

[37] *Supra* note 1, § 107(1).

[38] *Supra* note 1, § 107(4).

[39] *Supra* note 1, § 107(5).

[40] *Supra* note 1, § 107(7).

In case, no suitable claimants of such properties are found, then these proceeds will be government property[41]. All of these changes can be quite concerning since there have been many instances regarding the misuse of authorities' discretion with respect to taking action against alleged criminals. There have been many criticisms levelled against the authorities over the prevalent practice of seizure or destruction, usually dubbed as 'Bulldozer Justice', of properties of or related to alleged criminals[42]. These broad attachment powers may also have a similar potential to be misused by the authorities.

The definition of 'proceeds of crime' as used in BNSS[43] is nearly identical to as employed under PMLA[44]. But that special law also entails a lot more safeguards as compared to the general penal framework. For instance, a specialised body like Enforcement Directorate is supposed to the prime functionary under PMLA and any actions taken therein need to be affirmed by an adjudicatory authority under the law. Even the courts envisioned under the law are special courts as opposed to all hierarchies of courts including magistrates under BNSS. Even where the Hon'ble Supreme Court[45] has upheld the draconian attachment powers of E.D., it has been done so subject to the following of several safeguards under PMLA. Not only is this new law devoid of any such special safeguards, but the scope of misuse could be greatly enhanced if the investigation is left to all levels of police officials and courts without specialised or routine exposure in handling such crimes.

Preventive Action of Authorities

The new law has also undergone certain changes with respect to the quantum of executive satisfaction to 'use armed

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[41] *Supra* note 1, § 107(8).

[42] Awstika Das, *Criminals Must Be Taken To Task, But Demolishing Their Houses Affects Family: Dushyant Dave Deprecates 'Bulldozer Justice' Before Supreme Court*, LIVE LAW, (Jul. 10, 2023) https://www.livelaw.in/top-stories/supreme-court-criminals-taken-to-task-demolishing-house-affects-family-dushyant-dave-bulldozer-justice-232364

[43] *Supra* note 1, § 111(c).

[44] *Supra* note 36, § 2(u).

[45] *Vijay Madanlal Choudhary v. Union of India*, (2022) 6 SCR 382.

forces' for dispersing assembly. Earlier, such a decision to deploy armed forces was to be done only at the behest of highest-ranking executive magistrate[46]. However, now the same can be done by the District Magistrate or any other authorised Executive magistrate[47]. The law also sees the introduction of a new section broadening scope of powers to enforce their will as per their preventive powers. Under their mandate of preventive powers, if anyone who appears to be either "resisting, refusing, ignoring or disregarding to conform to any direction" can be detained or removed by the police[48]. These changes point out a dilution of the executive satisfaction required to use force for maintain law and order. Quite paradoxically then one sees the deletion of Section 144A of CrPC. This section while never notified, aimed to restrict carrying arms in public processions or mass drills/training. Often it has been witnessed in the recent past that several public gatherings have turned violent leading to widespread destruction including loss of lives.

Restricting Commutation & Mercy Petition

The new procedural code has also placed significant restrictions upon powers of respective governments vis-à-vis commutation of sentences. As per the previous law, a capital sentence could be brought down to any other sentence[49]. However, the same cannot be done anymore as a death sentence can now only be changed to imprisonment for life[50]. Previously, except capital sentence, all other forms of sentence including sentence of rigorous imprisonment or life sentence could have been commuted to a fine[51]. Now, only sentence of less than 7 years can be commuted to fine[52]. Another restriction has been placed particularly upon the powers of state governments. Previously, only 'consultation' was required with the Central government by the concerned state before

46 *Supra* note 2, § 130(1).
47 *Supra* note 1, § 149(1).
48 *Supra* note 1, § 172.
49 *Supra* note 2, § 433(a).
50 *Supra* note 1, § 474(a).
51 *Supra* note 2, §§ 433(b), (c), & (d).
52 *Supra* note 1, § 474(d).

exercising its power to remit or commute a sentence[53]. However, now it has been replaced with 'concurrence'[54]. This could be seen as a significant barrier upon the autonomy of states, particularly in politically contentious matters where the opinion of a state may run counter to the opinion of Central government. An example of this could be seen as the assassination of former Indian Prime Minister Sri Rajiv Gandhi.

The new law for the first time brings a formal procedure to file a mercy petition for those individuals who have been sentenced to death[55]. Earlier, this was completely based upon court precedents deriving from the Constitutional remit under Articles 72 & 161 for the 'President of India' and 'Governor of States' respectively. Earlier, anyone could file a mercy petition, as was usually done by NGO's or other members of civil society. But the new provision limits this filing to only convicts themselves, legal heirs, or other relatives[56]. This could be quite concerning since many convicts and their relatives themselves could be illiterate or unaware of their rights and may not be able to effectively seek such a remedy. This law also seeks to prohibit judicial review of the orders as passed by the President or Governor[57]. But such a blanket ban on the judicial review even upon procedural or technical grounds is wholly violative of the court directions[58].

Miscellaneous Changes to the Procedure

In 2005, a very important change was brought to the legal landscape concerning bail jurisprudence. As per Section 436A, an undertrial in custody after having undergone a period of half of the maximum period of incarceration if convicted, has to be released on bail[59]. In the new law, certain beneficial changes have been brought to the corresponding provision. However, there has been an addition

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53 *Supra* note 2, § 435.
54 *Supra* note 1, § 477(1).
55 *Supra* note 1, § 472.
56 *Supra* note 1, § 472(1).
57 *Supra* note 1, § 472 (7).
58 *Epuru Sudhakar v. Government of Andhra Pradesh*, 2006 INSC 695.
59 *Supra* note 2, § 436A.

of a new subsection according to which the benefit of the provision will not extend to those cases where "investigation, inquiry or trial" in more than one case is pending[60]. Respectfully submitted, such a change would effectively nullify the entire operation of this beneficial provision as it is highly unlikely that a person is accused of only a single charge. In real life scenarios, there is often at least a few charges which are tied down together and tried as a composite trial. Even in a simple case of theft, there could be additional charges of assault, hurt, or trespass etc.

Another discrepancy noticed in the new law is that how summary trials can be conducted. Earlier, only those cases could be tried summarily, where the punishment did not exceed two years[61]. In the new law, this limit has been enhanced to three years[62]. *Prima facie* this appears to be a good change. But this could raise some ambiguities as the definition of a 'summons' and 'warrant' case remains unchanged wherein the latter merely means any offences with more than two years of imprisonment[63]. Thus, there could be a conflict where the trial court could be left in dilemma whether to conduct a summary trial or a lengthier trial under the 'Warrant procedure'. This would not have arisen had the definition of 'warrant' been similarly changed to mean offences with more than three years of imprisonment.

This new law brings in a new provision whereby several proceedings can be conducted online[64]. As per the first draft of the new code as released in August, the provision 530 at that time had also included within its scope 'inquiry', 'plea bargaining', 'High Court trials', 'Sessions trials', 'warrant, summons, and summary trials' as well. However, by their explicit deletion from the present law, does it imply that legislative intent does not permit these important proceedings to conducted online?

Throughout the new code, many processes have been sought

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60 *Supra* note 1, § 479(2).
61 *Supra* note 2, § 260(1)(i).
62 *Supra* note 1, § 283(2).
63 *Supra* note 1, § 2(z).
64 *Supra* note 1, § 532.

to be expedited by adding time frames. Such changes certainly deserve to be appreciated. One such change in the new law is that only a maximum of two adjournments can be granted by a court[65]. But, in the case of conducting a complex trial with multiple witnesses, such a change may not be completely practically implementable.

Concluding Remarks

Many important changes have been brought to the new criminal laws including the criminal procedure law such as greater introduction of digital resources, updating many insensitive and archaic terminologies, clarifying various procedures etc[66]. But it cannot be ignored that several ambiguities and even problematic provisions have also been added when contrasted to the erstwhile procedural law. The changes with regards to handcuffing and increased scope of police remand have a potential to greatly enhance the chances of custodial torture. At the same time, it has been made tougher to initiate legal proceedings by changes made to the complaint procedure as well as the formal introduction of preliminary enquiry. High amount of discretion can also be observed with regards to the changes adopted in preventive powers of the police as well as the attachment proceedings akin to PMLA.

One can perhaps say that this could be seen as a missed opportunity to actually implement many other structural reforms and safeguards which could have been crucial in reforming Indian criminal justice system. For instance, despite the Hon'ble Supreme Court's landmark directions[67] to install CCTV cameras in all police stations, on the ground it can be seen that in several instances this is not being followed[68].

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65 *Supra* note 1, § 346(2)(b).

66 Sunishth Goyal, *An Exhaustive Comparative Analysis of Code of Criminal Procedure, 1973 and Bharatiya Nagarik Suraksha Sanhita, 2023*, BAR AND BENCH, (Aug. 20, 2023), https://www.barandbench.com/columns/comparative-analysis-of-code-of-criminal-procedure-1973-and-bharatiya-nagarik-suraksha-sanhita-2023

67 *Paramvir Singh Saini v. Baljit Singh and Ors*., (2020) 13 SCR 770.

68 *Tusharbhai Rajnikantbhai Shah v. Kamal Dayani and Ors*., (2024) 8 SCR 235.

Section 398 of the new law, in the author's opinion, is emblematic of yet another missed opportunity for reform. This new section simply provides that all states must prepare a witness protection scheme. However, the law should not have left this field completely unregulated to the discretion of states. As a guiding measure, the guidelines[69] as enunciated by the Supreme Court guidelines on this topic could have been provided legislative sanction. Another huge gaping hole in our criminal justice framework is that the premier national investigative agency of the country i.e., CBI does not even have a statute of its own. The guiding regulation for the same is merely a special resolution by the Home Ministry under the Delhi Special Police Establishment Act.[70] In fact, in 2013 the Hon'ble Gauhati High Court even declared the agency as 'unconstitutional'. While the same verdict was immediately stayed by the Supreme Court, even after over a decade, this has not been corrected.[71] Similarly, amendments should also be made to other suitable legislations, particularly the Probation of Offenders Act 1958.

The law has placed a huge emphasis upon electronic records and digital processes. Similarly, involvement of forensic teams in heinous offences have been made mandated[72]. But sight must not be lost of the fact that we are a country with disparate distribution of resources where some parts of the country still struggle with proper access to basic infrastructure such as roads, electricity, and water etc. Many police stations across the country face a shortage of infrastructural capacities, severely underfunded and understaffed[73]. The working conditions and organisational structure of police forces across the country requires several reforms as highlighted by the

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69 *Mahender Chawla v. Union of India*, (2018) 14 SCR 627.

70 Manu Sebastian, *6 Years Of Supreme Court's Life Support For CBI*, LIVE LAW, (Nov. 6, 2019) https://www.livelaw.in/top-stories/6-years-of-supreme-courts-life-support-for-cbi-149521?from-login=538859

71 *Id.*

72 *Supra* note 1, § 176(3).

73 Kanti Bajpai, *Outrage is not enough: To get better policing India also has to address shocking shortages of personnel, infrastructure*, THE TIMES OF INDIA, (Oct. 3, 2020), https://timesofindia.indiatimes.com/blogs/toi-edit-page/outrage-is-not-enough-to-get-better-policing-india-also-has-to-address-shocking-shortages-of-personnel-infrastructure/

Hon'ble Supreme Court in the landmark *Prakash Singh* verdict[74]. Even in 2024, one-fifth of Indian district courts don't possess separate toilets for women[75]. Thus, without a dedicated commitment to improve the judicial and police infrastructure and resources, any reforms will be meaningless.

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74 *Prakash Singh v. Union of India*, 2006 INSC 642.

75 Soibam Rocky Singh, *One-fifth of district courts in country lack separate toilets for women, says SC report*, THE HINDU, (Jan. 3, 2024), https://www.thehindu.com/news/national/one-fifth-of-district-courts-in-country-lack-separate-toilets-for-women-says-sc-report/article67699680.ece

NEED FOR FINANCIAL INCLUSION OF WOMEN: WOMEN ENTREPRENEURSHIP FOR ECONOMIC DEVELOPMENT

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Abstract

In the present paper the author explains the need for financial inclusion of women for economic development and growth. Development of women is essential for overall development of any country. India has various legislations and few provisions in the Constitution of India for having equal rights to women, but our laws concentrate on social upliftment of women and we may say that we are successful in achieving the social equality for women in our society, but unless we developa person financially there is no scope for all round development of that person. So here we need to develop women not only socially but also financially. We can say that there is a need for inclusion of women financially. This paper explains what is meant by financial inclusion for women in India, its current situationin India, the legal framework available for protecting the rights of women and the ideal legal framework that could help in achieving financial inclusion of women through Entrepreneurship that would lead to Economic Development

Introduction

Development of women helps in development of family at micro level and development of country at macro level[1]. For the development of any person financial growth is very essential, but

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1 O'Brien, M. (2016). Women's Contribution to Economic Development: The Role of Women in Development. *International Journal of Social Economics*, 43(12), 1291-1305. https://doi.org/10.1108/IJSE-12-2015-0135

unfortunately in the case of women in India, they are not included in the development of India and the financial assistance that is provided to women is very negligible in India. Women in India are having equal rights with men according to the Constitution of India and even according to various legislations in India [2]. We can say that the government of India has taken various measures to uplift the position of women in India. Some of them are 1) Pradhan Mantri Mudra Yojana (PMMY) offering micro-financing to women entrepreneurs, helping them start or grow small businesses, 2) Sukanya Samriddhi Yojana aimed at the girl child, encouraging parents to save for their daughters' education and marriage, 3) National Rural Livelihoods Mission (NRLM) focusing on self-employment through organization of rural communities, emphasizing women's participation in various livelihoods, 4) Women's Self-Help Groups (SHGs) enabling women to access credit, savings, and entrepreneurial training, 5) Jan Dhan Yojana aiming to provide bank accounts for all, with a special emphasis on women to ensure they can access banking services, 6) Beti Bachao Beti Padhao (BBBP): focusing on saving the girl child and promoting education, it also encourages financial literacy and empowerment among women and 7) Dhanlaxmi Scheme, a conditional cash transfer program aiming to improve the status of the girl child by providing financial assistance to families. We can even say that our country is successful in socially uplifting the women in our society. At present we can say that women are equal with men and they are having various mechanisms to protect their rights in our society. We are successful in social upliftment of women but we failed in financial upliftment of women in our society. Unless a person is financially developed, it is not possible for him or her to achieve overall development in society. In this paper the author explains what is the meaning of financial inclusion of women in development and the legal framework available for us for protecting the rights of women, measures taken by the government for upliftment of women in our country and finally explains about the ideal legal framework ought to be for financial inclusion of women for economic development and growth.

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2 Article 14, The Constitution of India (https://womenlawsindia.com/legal-awareness/women-rights-in-india/)

Objectives

- To explain about financial inclusion initiatives for women in India.
- To study the legal framework available for inclusive financial growth of women in India.
- To suggest the ideal legal framework for financial inclusion of women and Women Entrepreneurship.

Methodology

The researcher adopted descriptive and doctrinal methodology in the present study.

Sources of data

The data is collected from various secondary sources like government websites, articles published etc.

Financial Inclusion in India

- According to the commission on growth and Development World Bank 2008, Inclusiveness in growth means "a concept that encompasses equity, equality of opportunity and protection in market and employment transactions". Even According to Article 25 of the UN Declaration on Human Rights states that "everyone has the right to a standard of living adequate for the health and well-being of himself and of Fhis family, including food, clothing, and housing and medical care and necessary social services……[3][1]. Financial inclusion of women enables the individual of a family to have a decent. Standard of living.
- inancial inclusion means provision of financial services at affordable cost to lower income sections people, if financial services are not available at affordable cost to lower income section it is called financial exclusion. According to a World Bank report, almost 2 billion people are using banking and financial services, even 50% of the poorest families are not

[3] UN Declaration on Human Rights, Can be accessed at http://www.un.org/en/documents/udhr/index.shtml

having banking facilities which will help in financial inclusion[4].

- Financial inclusion is an important tool for rapid economic development but it requires a strong political will and close observation of RBI. Recent central government program Pradhan Mantry Jandhan Youjana is best example of financial inclusion of underprivileged section people because this program 51% percent of the bank accounts in the public sector banks accounts were opened by this low income group people to get the benefit of Pradhan Mantry Jandhan Youjana
- After the introduction of Pradhan Mantry Jandhan Youjana 47% of women in India are having the basic bank account, but this scheme is not encouraging entrepreneurship among women. As we know that 49% of the Indian population is female, financial inclusion of women is the driving force of Indian economic development. Along with that India adopted an Inclusive growth strategy in its planning and economic development process and even in 2024 budget. Now the aim of India is achieving Inclusive growth along with financial inclusion of women and underprivileged section of people According to Indian constitution women and under privileged section of society are having right to have financial inclusion through Articles 14, 15 and 16 Now we will discuss the legal provisions available for protection of women rights in India.

Legal Provisions

The Constitution of India grants equality to women. The state can take measures for eliminating discrimination against women. The Constitution states everyone is equal before the law and everyone can have equal protection of law and it prohibits the discrimination against any citizen on the grounds of religion, race, caste, sex or place of birth and guarantee equality of opportunity to all citizens in matters relating to employment.[5]. Some of the rights available to every woman under the Constitution of India as follows.

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4 **World Bank. (2021).** *The Global Findex Database 2021: Financial Inclusion, Digital Payments, and Resilience in the COVID-19 Era.* Washington, DC: World Bank.

5 http://mospi.nic.in/mospi_new/upload/man_and_women/Constitutional %20&%20Legal%20Rights.pdf

Constitutional Privileges

- Equality before law for women (Article 14)
- The State not to discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them (Article 15 (i))
- The State to make any special provision in favour of women and children (Article 15 (3))
- Equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State (Article 16)

Based on the above provisions in the Constitution of India, the government has taken various measures for upliftment of women in the society.

National Commission for Women: In January 1992, the Government set-up this statutory body with a specific mandate to study and monitor all matters relating to the constitutional and legal safeguards provided for women, review the existing legislation to suggest amendments wherever necessary, etc. but practically the commission restricted itself concentrating only on protection of women than the financial inclusion and encouraging the entrepreneurship[6].

National Policy for the Empowerment of Women, 2001[7]: The Department of Women & Child Development in the Ministry of Human Resource Development has prepared a "**National Policy for the Empowerment of Women"** in the year 2001. The goal of this policy is to bring about the advancement, development and empowerment of women.

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6 About the Commission can be accessed at http://ncw.nic.in/commission/about-us

7 Press Information Bureau, Government of India, Ministry of Women and Child Development, can accessed at https://pib.gov.in/newsite/PrintRelease.aspx?relid=103327#:~:text=National%20Policy%20for%20Women&text=The%20Government%20of%20India%20had,forms%20of%20discrimination%20against%20women.

The Ministry of Micro, Small and Medium Enterprises announced a scheme for encouraging entrepreneurship in women i.e, Scheme on Trade Related Entrepreneurship Assistance and Development (TREAD) for Women. Under this scheme Government Grant up to 30% of the total project cost as appraised by lending institutions which would finance the remaining 70% as loan assistance to applicant women, who have no easy access to credit from banks due to cumbersome procedures and the inability of poor & usually illiterate/semi-literate women to provide adequate security demanded by banks in the form of collaterals.[8]

Mudra Loan facility is provided to the entrepreneur who is willing to start an industry without any collateral security. This facility enables the entrepreneurs to start the business with innovative ideas. In the recent budget for the financial year 2024-25 the government of India enhanced the mudra loan facility from ₹ 10 Lakhs to ₹ 20 Lakhs. Which enables women entrepreneurs to start the business without any further collateral security. The statistical evidence shows that over 65% of the beneficiaries under mudra loan system are women[9]. Which shows that the rate of women entrepreneurs is increasing in India though a long way is there to achieve the equality as enshrined under the constitution of India.

The Stand-up India scheme is another policy which aims at women empowerment. This scheme was launched in the year 2016, under this scheme women can borrow between ₹ 10 lakhs and ₹ 1 Crores. Under this scheme the banking companies need to lend to women belonging to SC or ST per branch to set up greenfield establishments in trading, manufacturing or service sectors[10].

Start-up India is another scheme which aims at fostering

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8 Scheme on Trade Related Entrepreneurship Assistance and Development (TREAD) for Women. Dated 17.07.2008

9 "The Role of Mudra Loans in Promoting Women Entrepreneurship" By Data Centre by Punjab National Bank. Data can be accessed at https://www.pnbindia.in/Blog-Mudra-Loans-in-Promoting-Women-Entrepreneurship.html

10 Stand up India Policy. Can accessed at https://www.standupmitra.in/Home/SUISchemes

entrepreneurship in India. Under this Women-led startups are encouraged to register. If any entity is registered under this scheme, then such entity is entitled to various benefits like tax exemptions, self-certificate compliance, concession in registration fee while registering any IPR and funding support from the startup India Fund[11].

Though we have various provisions in the law and various schemes are developed based on these laws for encouraging women entrepreneurs in our country, we don't have proper mechanisms for implementing the law and policies and schemes for encouraging women as an entrepreneur in our society. The above schemes are reaching only urban women, whereas still rural women are excluded from these schemes due to lack of awareness. The women population in rural areas in our country is more than the urban population, so if we want to achieve inclusive growth and inclusiveness in entrepreneurship we need to concentrate more on rural areas than urban areas. So we need to have a legal framework for achieving financial inclusion of women for economic development and growth.

Suggestions

- A Separate law has to be passed especially concentrating financial inclusion of women.
- Awareness programs at rural areas to be conducted to involve women in rural areas.
- A separate authority has to be established which is quasi-judicial in nature with the combination of Judicial & Technical members from various fields to implement the law for financial inclusion.
- The authority has to encourage the advocacy of financial inclusion of women in India and the advocacy of the authority has to be a part of the legislation, like in the case of Competition Act, 200

[11] Benefits of Startup India Registration, can accessed at https://www.startupindia.gov.in/content/sih/en/startup-scheme.html

A SOCIO-LEGAL ANALYSIS OF THE MUSLIM WOMEN (PROTECTION OF RIGHTS ON MARRIAGE) ACT, 2019 AND ITS IMPLICATIONS FOR MUSLIM WOMEN

Dr. Abdullah Nasir[*] *& Dr. Samiuddin*[♦]

Abstract

The Supreme Court of India's invalidation of instant triple talaq prompted the enactment of the Muslim Women (Protection of Rights on Marriage) Act, 2019. The paper critically examines the provisions of the Act, delving into its potential consequences on marital relationships, family dynamics and its implications for Muslims in India. Additionally, the paper assesses the effectiveness of the Act in providing recourse to Muslim women facing the challenges of arbitrary divorce and its implications on the broader discourse of gender rights within the Muslim community.

Drawing upon empirical data collected through interviews, the paper examines the lived experiences of Muslim women affected by the Act. It analyzes the criminalization of instant triple talaq within the social and material vulnerabilities faced by Muslim women. Furthermore, the study evaluates the effectiveness of legal mechanisms provided by the Act in safeguarding the rights and interests of Muslim women.

The paper argues that the government priority should have been to address the financial and material vulnerabilities faced by Muslim women post-divorce through welfare legislation. However, instead of doing so, the government has opted to criminalize the utterance of triple talaq. The 2019 Act, ostensibly introduced to safeguard the rights of Muslim women, may actually lead to additional harm by criminalizing triple talaq. Considering the political dominance of right-wing party in India, the legislation is likely to inflict considerable harm by exposing India's Muslim minority to heightened State coercive powers.

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Introduction

In Islam, marriage is regarded primarily as a social contract rather than solely a religious one, emphasizing the legal equality of both men and women. Despite patriarchal tendencies amongst Muslims that often disregard this equality, the establishment of marriage as a contractual agreement was intended, in theory, is to grant women an equal role in determining its terms and conditions. As a prenuptial agreement, the contract also empowers women to establish conditions for divorce should the marriage dissolve. Historical instances reveal that women have utilized the contract to prohibit husbands from entering into polygamous marriages, assert their right to initiate divorce proceedings, specify the terms of a divorce settlement, negotiate child custody arrangements and more.[1] However, it is worth noting that despite the potential for Muslim women to utilize the contractual nature of marriage to their benefit, many may not have been afforded the opportunity or awareness of this possibility by Muslim men. This is often due to the patriarchal dynamics present within society, where men wield influence and power to their advantage. Within such structures, women may face barriers in exercising their rights and may be kept uninformed about the options available to them within the marriage contract.

Islam also acknowledges the complexities surrounding marital relationships and offers a structured framework for the termination of these bonds when they become untenable. It recognizes various methods through which Muslim marriages can be dissolved. One of the method is Talaq-e-biddat, commonly referred to as triple talaq[2], is a practice within Muslim Personal Law

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[1] ASMA BARLAS, BELIEVING WOMEN IN ISLAM UNREADING PATRIARCHAL INTERPRETATIONS OF THE QURAN 209-210 (University of Texas Press 2019)

[2] It is imperative to make clear that a number of Shia sects, like the Khojas, Bohra, Ismailis, and Itna Asharis, have establish elaborate dispute resolution systems in place for family affairs and do not recognize instant triple talaq. Furthermore, certain Sunni sects, such as Ahl-e-Hadith, do not recognize instant triple talaq. The majority of Muslims in North India, however, adhere to the Hanafi school of thinking, which acknowledges instant triple talaq. It's also important to remember that there are other ways for a Muslim couple to end their marriage besides instant triple talaq. Muslim law recognizes a number of alternative divorce procedures, including as the woman's right to

permitting husbands to unilaterally, instantly, and irrevocably divorce their wives without fault. In *Shayara Bano v. Union of India*[3], a five judges bench of the Supreme Court of India, by a majority of 3:2 declared instant triple talaq unconstitutional and void. The dissenting opinion while upholding the validity of instant triple talaq, ruled that the issue falls within the domain of the legislature and had urged the government to enact a law prohibiting triple talaq. This mandate from the Supreme Court has been invoked by the government to justify the enactment of The Muslim Women (Protection of Rights on Marriage) Act, 2019 which criminalizes the practice of instant triple talaq. However, since the majority decision (three judges) had declared instant triple talaq unconstitutional and void, according to Article 141 of the Constitution, it has become the law of the land. Consequently, legislation as recommended by the dissenting opinion is deemed unnecessary. Furthermore, the directive was to create a law invalidating instant triple talaq and establishing a clear procedure for valid talaq that falls strictly within the realm of civil law. Nowhere in the judgment is there indication of criminalizing instant triple talaq.

Analysis of Muslim Women (Protection of Rights on Marriage) Act, 2019

Criminalizing the practice of instant triple talaq and subjecting Muslim men to imprisonment lacks a justifiable basis. According to the Supreme Court's ruling, marriages remain legally valid and the individuals remain lawfully wedded. However, the 2019 Act, which criminalizes instant triple talaq, grants excessive coercive authority to the State. This Act declares the utterance of instant triple talaq as a cognizable and non-bailable offense[4],

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divorce (khula), divorce by consent between the parties (mubarra), and divorce administered by a Qazi (fasq).

[3] *Shayara Bano v. Union of India*, (2017) 9 SCC 1

[4] Offence to be cognizable, compoundable, etc.—Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—

(*a*) an offence punishable under this Act shall be cognizable, if information relating to the commission of the offence is given to an officer in charge of a police station by the married Muslim woman upon whom *talaq* is pronounced or any person related to her by blood or marriage;

(*c*) no person accused of an offence punishable under this Act shall be released on bail unless the Magistrate, on an application filed by the accused

allowing the police to arrest a Muslim man without a warrant for uttering triple talaq. Moreover, such power is not restricted to information provided by the Muslim woman alone but extends to any individual connected to her through blood or marriage. Upon arrest, a Muslim man is not entitled to automatic bail release. He is required to forfeit his liberty during the bail application process, including providing sureties and awaiting the Magistrate's decision based on his wife's testimony to determine if there are reasonable grounds for bail.

The 2019 Act, provides punishment for instant triple talaq which include imprisonment for a maximum of three years and imposition of a fine[5], is excessively severe considering there is no real "harm" that is being punished. This severity becomes more pronounced when compared to other offenses under the Indian Penal Code, such as rioting, causing death by negligence, and sedition, which arguably involve greater harm but attract lighter penalties. The inconsistency in sentencing for pronouncing instant triple talaq raises concerns, especially against the backdrop of policies from the current right wing government, which some perceive as biased against Muslims. This context casts doubt on the rationale for such stringent punishment.

The state should adopt a minimalist approach when it comes to criminalizing offenses, especially when imprisonment is involved. Stronger justifications are required when an offense carries a prison sentence. In the case of Joseph Shine v. Union of India[6], the Supreme Court had laid down that criminalization should not occur when the offense is groundless. In the case of instant triple talaq, criminalization appears groundless since the act is already void in nature.

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and after hearing the married Muslim woman upon whom *talaq* is pronounced, is satisfied that there are reasonable grounds for granting bail to such person.

5 Punishment for pronouncing *talaq*.—Any Muslim husband who pronounces *talaq* referred to in section 3 upon his wife shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine.

6 *Joseph Shine v. Union of India*, AIR 2018 SC 4898

While the 2019 Act, claims to "protect the rights of Muslim women", its provisions arguably fall short of substantiating this assertion. For instance, Section 5 of the Act ostensibly introduces a "subsistence allowance"[7], but it essentially mirrors the already existing remedy outlined in Section 125 of the Criminal Procedure Code (Cr.P.C). Additionally, questions arise about the allowance's acquisition, especially considering the husband's imprisonment. Likewise, the Section 6 of the Act states that upon the pronouncement of instant triple talaq, Muslim women are automatically "entitled to custody of her minor children"[8] overlooks the principle of the best interest of the child, which typically guides custody decisions[9]. Secondly, what was the necessity for such a provision when no legal divorce has occurred. Such a rigid provision could potentially add to the woman's financial responsibilities.

By opting for criminalization instead of enacting welfare legislation, the State has overlooked the fundamental issue surrounding instant triple talaq. Currently, the purpose behind prohibiting and criminalizing the pronouncement of instant triple talaq remains unclear, apart from discouraging its usage. One could argue that the implicit objective of such legislation is to deter divorce in general. However, it is important to recognize that legislation aimed at deterring divorce faces inherent challenges. Firstly, as asserted by family law scholars and policymakers[10], laws

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7 Subsistence allowance.—Without prejudice to the generality of the provisions contained in any other law for the time being in force, a married Muslim woman upon whom *talaq* is pronounced shall be entitled to receive from her husband such amount of subsistence allowance, for her and dependent children, as may be determined by the Magistrate.

8 Custody of minor children.—Notwithstanding anything contained in any other law for the time being in force, a married Muslim woman shall be entitled to custody of her minor children in the event of pronouncement of *talaq* by her husband, in such manner as may be determined by the Magistrate.

9 *See* LAW COMMISSION OF INDIA, REPORT ON REFORMS IN GUARDIANSHIP AND CUSTODY LAWS IN INDIA, Report No 257 (2015).

10 Mark Ira Ellman, *The Misguided Movement to Revive Fault Divorce, and Why Reformers Should Look Instead to the American Law Institute*, Vol 11, No 2 INTERNATIONAL JOURNAL OF LAW, POLICY AND THE FAMILY, 216-245 (1997); MINISTRY OF JUSTICE (ENGLAND AND

that attempt to prolong marriages where one or both parties wish to dissolve it often restrict individual autonomy and escalate conflicts within the relationship. Secondly, Muslim men may resort to alternative forms of unilateral, no-fault divorce, like talaq-i-ahsan and talaq-i-hasan, although finalized over a three-month period, still terminate the marriage. Lengthening the divorce process may not necessarily deter divorces from happening. Considering that the Supreme Court's ruling has already declared instant triple talaq void and there by rendered it powerless in terms of its impact on marriage. Therefore, the government's priority should have been to address the financial and material vulnerabilities faced by Muslim women post-divorce through welfare legislation. However, rather than doing so, the government has opted to criminalize the utterance of triple talaq.

Interaction at Darul Qazas on the consequences following the implementation of the Muslim Women (Protection of Rights on Marriage) Act, 2019[11]

Numerous studies have indicated that women from marginalized backgrounds often prefer to utilize informal community-based mechanisms rather than formal legal structures to advocate for their rights. Religious-based dispute resolution forums like darul gazas[12] are often perceived as more accessible by women as compared to courts and police stations, primarily due to a pervasive fear among the impoverished regarding engagement with these formal institutions. Women frequently navigate between formal and informal forums, as well as between secular and religious spaces, when seeking resolution for disputes.

About 100 Darul Qazas are run by the All India Muslim

WALES), REDUCING FAMILY CONFLICT: REFORM OF THE LEGAL REQUIREMENTS FOR DIVORCE (September 2018).

11 The authors had conducted a questionnaire-based interview with the Darul qazas run by the All India Muslim Personal Law Board.

12 Darul Qaza are also known as Sharia Court. They do not function as conventional courts but rather serve as counselling or arbitration centres and its decision is not binding on parties.

Personal Law Board (AIMPLB)[13] throughout the country. Ninety-five percent of the issues and complaints brought to Darul Qazas originate from women. Following the enactment of the 2019 Act, instances of instant triple talaq have significantly decreased. Many men, fearing potential imprisonment, refrain from issuing any form of talaq and instead compel women into seeking khula as an alternative mean of ending their marriage. This is the reason why the number of cases pertaining to khula has doubled in Darul Qazas nationwide. Under Islamic law, khula represent a method of divorce initiated by the wife. However, in khula the wife is required to pay consideration to the husband (forfeit her dower or maintenance paid by husband during the iddat period) in order to be released from the marriage tie. Before 2019, mostly women who were economically disadvantaged or faced barriers accessing the formal court system often turned to Darul Qaza for resolution. However, there's been a shift where even educated and financially well-off women now seek recourse in Darul Qaza for getting their marriage dissolved through khula. This is because of the growing perception that courts are making decisions that go against sharia principles in matters of marriages and divorces. This has created an environment where women are increasingly reluctant to resort to court proceedings, possibly due to concerns about the legal outcomes not aligning with sharia standards. Nevertheless in the khula process, Muslim women often find themselves in an economically disadvantaged position as they are required to bear the financial burden of obtaining a divorce.

Moreover, after the implementation of the 2019 Act, Muftis have largely ceased issuing written fatwas for triple talaq. This has exacerbated challenges for women, given that Muslims adhere to Sharia in matters of marriage and divorce. Without a written fatwa, women face uncertainty and hesitancy in remarrying until they are certain of their legal standing. Consequently, many women remain in limbo, unable to move forward in life whereas a Muslim men would simply deserted their wives and desertion of a wife is not a criminal offence. Muslim man can also take a second wife without

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[13] Although it is a group that represents Muslims from all sects, Hanafi sect clerics predominate. Despite not being a statutory body, it has significant influence over religious matters pertaining to Sunni sects in India.

giving talaq to the first wife. Legally Muslim men are allowed to have four wives at a time.

Although it may seem peculiar by contemporary standards, the Quran permits polygamy with the specific aim of ensuring justice for female orphans.[14] However, it is crucial to recognize that polygamy is considered an exception or a contingency measure in Islam, permitted only under stringent conditions and restrictions that are often exceedingly difficult to meet. Nonetheless, patriarchal and selective interpretations of the Quran, particularly by conservative male figures within Muslim communities, have led to the proliferation of polygamous practices among Muslim men. This has diverged from the intended purpose of polygyny as outlined in the Quran and has contributed to its widespread acceptance as an option for Muslim men, despite its highly conditional nature. The lack of educational opportunities for Muslim women further exacerbates this, as it grants men exclusive authority to interpret religious scriptures in ways that benefit them.

Polygamy, widely prohibited across the globe including in Muslim-majority nations like Turkey and Tunisia, is subject to rigorous regulation where permitted.[15] The United Nations Human Rights Committee has described it as "an inadmissible discrimination against women" and called for it to "be definitely abolished." In India, the Supreme Court is currently reviewing a constitutional challenge to polygamy within Muslim law. There are ongoing endeavors to reform Muslim family law in a manner aligned with gender justice principles derived from both the Quranic teachings and constitutional mandates, aiming for legal coherence and fairness.

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[14] ASMA BARLAS, BELIEVING WOMEN IN ISLAM UNREADING PATRIARCHAL INTERPRETATIONS OF THE QURAN 223-224 (University of Texas Press 2019)

[15] Stephanie Kramer, *Polygamy is rare around the world and mostly confined to a few regions*, THE PEW RESEARCH CENTER (December 7 2020), https://www.pewresearch.org/short-reads/2020/12/07/polygamy-is-rare-around-the-world-and-mostly-confined-to-a-fewregions/#:~:text=Polygamy%20is%20banned%20throughout%20much,to%20government%20administration%20of%20marriages

The 2019 Act, may possibly cause more harm than good despite its seeming introduction to protect the rights of Muslim women. A major consequence of putting a Muslim man in jail for saying triple talaq is the potential impairment or loss of his ability to maintain gainful employment. Consequently, this affects his capacity to financially support his wife and children. For the divorced Muslim women and her children, this makes matters worse in the absence of a state-sponsored safety net.

The increased vulnerability of an already marginalized minority to further state control is a significant concern arising from this criminalization. The law might heighten apprehensions within the Muslim community, which is already facing issues such as wrongful incarceration under charges of terrorism, anti-cow slaughter legislation, conversion laws, and the 'love jihad' narrative. This legislation could lead to more frequent law enforcement interventions in Muslim households, potentially arresting Muslim men and thereby fostering an atmosphere of increased anxiety and distrust within the community.

It could be argued that although instant triple talaq is legally void, it can still inflict emotional harm and violence. Although, the 2019 Act, which makes it illegal to pronounce instant triple talaq, may not be the best course of action because the trauma is not primarily caused by the pronouncement itself. The true underlying issue is the vulnerability of Muslim women in a patriarchal state, which the 2019 Act does not effectively address.

Additionally, the mental and physical abuse that is frequently associated with triple talaq is covered by domestic abuse laws, which include Section 498A of the Indian Penal Code and The Protection of Women from Domestic Violence Act, 2005. These laws provide victims of domestic abuse with a wide range of legal remedies, including both criminal and civil measures. The Domestic Violence Act offers avenues for civil recourse that concentrate on securing orders for protection, custody, residence and monetary relief. However, women can seek prosecution and imprisonment for offenders under Section 498A of the Indian Penal Code. As a result, the combination of these two laws provides several legal safeguards,

particularly those related to instant triple talaq, for women who are victims of domestic abuse.

Conclusion

Given that the Supreme Court had already rendered instant triple talaq void, a more effective and less restrictive approach to preventing its consequences would have been to enforce the Court's decision through heightened awareness within the Muslim community. Any attempt by the State to impose changes forcefully may only bring about superficial transformations without fostering genuine social change. Therefore, for reform to be successful, the State should adopt a supportive rather than hostile approach towards religious minorities.

One way to achieve this is by encouraging religious groups to engage in internal consultations about reforming their practices. The state can develop programs and incentives to inspire this process of reformation. This approach to reform not only promotes internal reflection and evolution within religious communities but also strengthens the bond of citizenship. By supporting this process, the state interacts with members of religious groups thereby fostering a sense of inclusivity. Accordingly, criminalizing instant triple talaq was not required. Furthermore, the 2019 Act targets Muslim men in particular, making them more susceptible to imprisonment and imposing harsh penalties for uttering triple talaq.

The rationale underlying the perplexing and ominous notion of "Hindu men saving Muslim women from Muslim men" hinges on portraying Muslim women as devoid of rights and agency, while casting Muslim men in a negative light. This portrayal can be seen as providing the current government with a moral high ground, positioning it as a protector of Muslim sisters. However, the response to protests led by Muslim women against the National Register of Citizens and the Constitutional (Amendment) Act suggests that the government's concern for Muslim women may not be consistent when it does not align with broader political narratives.

It is essential to acknowledge that divorcees and abandoned women frequently face destitution, loss of rights and social stigma. However, it's crucial to recognize that this issue is not exclusive to

the Muslim community rather, it is a broader problem deeply rooted in the patriarchal structure of the society.

The Hindu right employs the concept of equality to assert the sameness of all women, emphasizing that they should be treated equally. This stance positions Hindu men as the rightful protectors of all women, encompassing those from the Muslim background. Simultaneously, when proponents from the Hindu Right advocate for equal treatment of all women, their stance typically implies that Muslim women should receive the same treatment as Hindu women. However, it overlooks the ongoing legal disparities faced by Hindu women in areas such as marriage, maintenance, and inheritance. Importantly, there is a lack of advocacy for treating all women uniformly, especially when compared to the privileged status of Hindu men.[16]

The underlying historical, cultural, economic and political factors contributing to the exclusion and discrimination against Muslim women continue to be overlooked. Muslim women have raised concerns that the emphasis on liberating them reflects a savior mentality, which overlooks the broader historical, cultural, economic and political reasons behind their oppression and discrimination.

In the end, we need to understand that marriage is an oppressive institution because it is and has always been patriarchal and heteronormative. The conventional definition of marriage has frequently excluded non-heteronormative partnerships, supporting social norms that marginalize or stigmatize LGBTQ+ people and relationships while elevating heterosexual unions.

In order to advance gender equality, it is imperative that we keep pushing for a more inclusive and egalitarian conceptions of marriage and questioning the social conventions around marriage. This entails tackling the structural injustices that continue inside the institution of marriage itself as well as pushing for reforms that acknowledge and promote many types of marriages and relationship arrangements.

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[16] *See* BACCHETTA PAOLA, GENDER IN THE HINDU NATION: RSS WOMEN AS IDEOLOGUES (Women Unlimited 2004).

EXPOSURE OF CHILDREN TO CINEMA & DIGITAL MEDIA: REGULATING THE UNREGULATED CONTENT

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Abstract

Remember how growing up during the late 1990s and early 2000s with no internet access on an uninterrupted basis felt like? There used to be a landline telephone which everyone in the family could access. There were touchpad cellphones with limited data services. Children used to get their first smartphone when they entered graduation. Cut to 2020, I saw many children getting their first smartphones. The need for smartphone and internet-based services increased when COVID-19 pandemic hit. Multiplication of demand and supply for internet-based services led to the discussions on controlling the screen time of the children. The challenge was, however, felt as it became a necessary evil with education and entertainment both moving online.

With more accessibility, the abundance of information followed offering a pandora box to the youth. Since there is a lack of control all the time, children can watch anything anytime ditching the parental control. Indian cinema has been in existence since 1913. It has been on rise. Today, with more OTT platforms being in place, there is even more content being generated. The content created today contains vigilantism, which is often celebrated, glory is reflected in the anti-social conduct in terms of power-play and respect awarded to it out of fear, harsh and obscene language accompanied by abuses, used in most of the content is unfortunately, becoming a lingo for gen-Z.

Indian cinema already had some content which was exposing and suggestive of sexuality and vulgarity.

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Today, it has increased in greater proportion. Whether it is 'Kaleen bhaiya' who celebrates criminality, or 'Guddu bhaiya' who gets lured to violence due to the power and position it awarded him in the society from Mirzapur, violence, as a means of power to get 'one's own way' is attracting youth to stay in the criminality. Further, the innovation in crime genre has further provided the plethora of ideas for crime commission to lesser chances of being caught by the law enforcement agencies. From planning and plotting to the erasure of evidence, it supplants the youth with every information.

As a researcher of law, our apprehensions amplified after the interviews conducted with the counsellors of the Special Homes. It was revealed that this content does play a significant role in the development of criminality in children. It proved the theory of Durkheim, that no one is a born criminal, and it is society which provides the ground for germination of criminal tendencies. It further raises serious questions around the onus of parenting and the challenges which the internet bring to the extents of parental supervision.

In such a scenario, how do we deal with prevention of delinquency and commission of crimes is a challenge. This also leads to the question that children in conflict with the law fall within the bigger bracket of children in need of care and protection. This paper would be an endeavour to explore these two directions and further restorative practices as an to prevent criminal tendencies. This analysis shall accommodate the legal interplay of freedom of speech and censorship while trying to explore possible solutions in certification and censorship.

Introduction

If no one is a born criminal, as Durkheim points out, where does criminality in humans come from? The answer authors find most appropriate is based in the sociological theories of the

criminology that social and environmental factors influence the ability of the individuals to commit crime and the rational choice theories where individuals themselves make a choice 'rationally' for themselves to follow a path constituting criminal activities.

To the core of this, authors believe the question that lies is how society influences the commission of crime or how does 'rationality in crime' seep into mind of an individual for them to make a criminal choice.

The month of November 2022 sent chills with the news of one Aftab Amin Poonawalla who had brutally murdered his live-in partner Shraddha Walker by chopping her into pieces and disposing of her body in different parts of the NCT of Delhi. Post this, several other news was floating of similar kind. The use of social media by some of the perpetrators reflected the audacity they enjoyed in such a brutal act of killing whether it was partners killing their partners or people from one community killing others to reflect the hatred and the power with the deepest intensity to take revenge.

The authors staunchly believe that the impact of cinema is highly significant in influencing young minds and veering them off civil conduct. Celebration of criminality and the outcomes in the form of power imbalance, coerced respect, *et al*, irrespective of how short-lived they are, attract them to practice the path they should stay clear of.

Hence, this paper delves into how cinema has changed and impacted the masses, especially the youth, in mending their ways of behaving in the society. It starts with how much the media landscape has changed with the over-the-top platforms (hereinafter called OTT platforms) and ends with the current legal mechanism to ensure the quality content is shared with the public followed by certain suggestions.

Establishing the Data Set

India has the largest film industry, in terms of quantity, in the world producing over 1500+ movies in a year in around 20 languages. It includes Bollywood, which is the Hindi cinema contributing 45% of the net film revenue. Other than bollywood,

Indian cinema comprises of Pollywood which is the Punjabi film industry; Chollywood, the film industry based in Chhattisgarh; Tollywood, that is film industry in West Bengal, Andhra Pradesh and Telangana; Kollywood, film industry based in Tamil Nadu, Mollywood based in Kerala; Ollywood based in Odisha; and Dhollywood based in Gujarat, amongst others.[1]

Indian cinema is noted as one of the oldest film industries in the world with the first silent movie, *Raja Harishchandra*, being screened publicly in 1913. The director of the movie, Dadasaheb Phalke, is today remembered distinctly with gratitude by offering a life-time achievement award in the film industry in his name. Followed by this was an era of movies which attacked the social vices existing in the society and in the familial institutions relating to marriage, dowry, position of women in the society, widowhood, and others related to caste system, inequality based on economic, social, and religious background. V. Shantaram's films like *Savkari Pash* (1925), *Stri* (1961), *Kunku*, and *Manoos*, are mostly remembered as an attempt to bring social change in the society.

Since then, different production houses came up with movies getting produced in different genres. Exposure to the film industries across the globe and the advancement of technologies led to a noteworthy improvement in the way movies are created.

With the gradual yet remarkable surge in the use of internet-based services and the internet service providers, today the number of OTT platforms along with the content which is generated and placed over these has spiked up to a great extent. The use of smart devices further increased post 2020 when COVID-19 hit the world. This means that the availability, accessibility, and affordability of these services has improved and is quite easier as compared to previous times.

There are around 40+ OTT platforms currently existing in

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[1] *Bollywood, Pollywood, Tollywood, and More - Film Industry Nicknames Around The World*, WORLDATLAS (May 31, 2024, 9:45 AM), https://www.worldatlas.com/articles/film-industries-around-the-world-with-hollywood-inspired-nicknames.html.

India, including Disney+ Hotstar, Amazon Prime Video, Netflix, SonyLiv, Voot, Zee5, and ALTBalaji, amongst others. With the remarkable technological transformation in the media landscape, a lot of players have entered the market.[2] The number multiplied 4 times since 2015.[3] The number of users is increasing day by day. Between March and July 2020 itself, the number of paid subscribers of the OTT platforms increased from 22.2 million to 29 million[4] and to 70-80 million by the end of 2021, that is, second year of pandemic.[5] This is expected to grow to 650 million users by 2025.[6] In the 2021, the industry grew to USD 1.2-2.2 billion becoming the fastest growing segment of the domestic media and the entertainment industry.[7] The OTT market is set to reach USD 3.22 billion by Financial Year 2025[8] and USD 13-15 billion by 2030.

Pandemic, which is one of the prominent reasons behind the growth of OTT platforms, also impacted the education sector with study shifting from physical spaces to online classrooms. As physical interaction was restricted, outdoor activities reduced. On account of this, the screentime of children increased. In the opinion of the authors, there are quite good chances of this transition to be here for longer run.

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2 Rahul Ahuja, *A Study of Effects of Web Series and Streaming Content on Indian Youth*, 8(9) INTERNATIONAL JOURNAL OF CREATIVE RESEARCH THOUGHTS, 2020.

3 Sohini Mitter, *India had 70-80 Mn paid OTT subscribers in 2021; sector in 'scaling stage': CII-BCG*, BUSINESSTODAY (Jan. 14, 2022), https://www.businesstoday.in/technology/top-story/story/india-had-70-80-mn-paid-ott-subscribers-in-2021-sector-in-scaling-stage-cii-bcg-319095-2022-01-14.

4 *India's Ott Market: Witnessing A Rise In Number Of Paid Subscribers | Ibef*, IBEF (Oct. 15, 2020), https://www.ibef.org/blogs/india-s-ott-market-witnessing-a-rise-in-number-of-paid-subscribers.

5 *Supra* 5.

6 *OTT platforms like Netflix, Prime Video and others to have 650 million users by 2025: Bain & Co.*, Businesstoday (Oct. 6, 2021), https://www.businesstoday.in/technology/top-story/story/ott-platforms-like-netflix-prime-video-and-others-to-have-650-million-users-by-2025-bain-co-308579-2021-10-06.

7 *Supra* 5.

8 *Supra* 6.

Moving back to the current issue, this drastic change opened the gateway for a lot of concerns for the parents, educators, and the State, to ensure that the children are not exposed to the content which can impair their ability to think and work in any socially acceptable and respectable manner. Even though the platforms offered parental controls, there is always a risk of exposure to content which is age inappropriate.

Cinema: A Necessary Evil?

Cinema is an important medium not just as the social mirror reflecting the ideology prevailing society but also as the driver of social change through storytelling, documentary, realism and fiction. It provides not just entertainment but motivation as well. It has expanded so much with technological advancement and the impact in terms of outreach that there are special courses offered by the educational institutions to study this field.

In terms of the content it produces, there is an endless list of movies which stand firm on the ground of sending social messages and changing the world for good. It has become a universal language for understanding and representing emotions. Whether it is about supporting specially-abled sections of the society, like *Taare Zameen Par* (2007); inspiring nationalism, like *Mother India* (1957), *LOC: Kargil* (2003), *Mangal Pandey* (2005); raising voice against social vices like dowry and domestic violence, like *Provoked* (2006), *Thappad* (2020), *Darlings* (2022); or promoting empowerment of women in the society, like *Chak De India* (2007), or documenting real life events, like *Madras Café* (2), *Sachin- A Billion Dreams* (2017), *Uri: The Surgical Strike* (2019), and *Sam Bahadur* (2023) cinema has proven itself to be the driver of society in the right direction.

However, it cannot be denied that there are movies which are only for the purposes of entertainment and do not offer any constructive outcome. To the contrary they, knowingly or unknowingly, put forth ideas, may be with the intention to add the element of entertainment or comedy, which in the longer run can degrade the young minds.

Bollywood had been teaching, for instance, that *ladkiyon ki naa mein haan hoti hai,* loosely translated as 'girls' no means yes,' and that women can be objectified through all the items songs which are put for entertainment purposes adding 'glamour' to the movie. Shoojit Sircar had to write another movie, *Pink* (2016), to clarify that 'No actually means, No!'. There is no end to the kind of destructive messages which have been floating in the society due to movies promoting them as fashion, including picturization of smoking, drinking and consumption of drugs to portray characters as 'cool'.

In extension to this, crime as a genre is very popular in cinema. People enjoy such themes which are filled with thrill, suspense, and action. Remember how impactful it was with the background music being played in *Animal* (2023) during fight scenes? Goosebumps, right? An integrated difficulty with this genre is, obviously, in the form of the ideas it puts on table for the commission of crime. Whether it is chopping the victim into pieces to hide the body or burning it to remove evidences, using chemicals to delink tracing of crime to criminal, from innovative means for commission of crime to ideas to prevent detection of crime, everything is shown in the movies. This reminds the authors of the movie *Vadh* (2022), on Netflix starring Sanjay Mishra, Neena Gupta, and Manav Vij, directed and written by Jaspal Singh Sandhu and Rajiv Barnwal. The movie involves killing of one Prajapati, a criminal who exploits and assaults Sanjay Mishra and Neena Gupta for the loan they took from them, for he asked the male lead, Sanjay Mishra to fetch a girl who he treats as his daughter. The act of commission and erasure of evidence is quite mind boggling.

The power of cinema is unmatched whether it is showing how to express love for your loved ones, depicting sacrifice, peaceful protesting, unison or national love. In the incidents of crime as well, police have found similarities in the *modus operandi* and resemblance in the motives of crime. For instance, in 2019, a man killed his girlfriend after he refused to marry him, and the police found out that he was inspired by Shahid Kapoor's character from *Kabir Singh* (2019). In 2020 again, a girl was shot dead by a man

after she refused to accept her marriage proposal.[9] As per the report by *Dainik Jagran*, the resemblance was noted with the character of *Munna bhaiya* from the series *Mirzapur* (Amazon prime).

The crux of the matter is that with the more OTT platforms being in place, the access to smart devices and movies is more than ever. Hence, the access to information which could be destructive is also growing.

Delinquency and Impact of Cinema and Jurisprudential Understanding

The Cultivation Theory by George Gerbner and his colleagues at the University of Pennsylvania proposes that "high levels of television exposure results in a misperception of real-world conditions and a 'mean world' effect wherein viewers construct the world as a dangerous place."[10] Even though this theory has been criticized, relationship has been found between "greater exposure to media presentations of crime and both a public fear of crime and an overestimation of the prevalence of crime."[11]

Findings from different reports put forth that fictional media sources have persuasive effects on public attitudes and beliefs, they may influence how people think and feel about crime, justice, and fairness of punishment, and visual culture may strongly influence views and perceptions of individuals.[12]

Today's youth follow a 'binge-watch model'. Binge-watch is when viewers watch multiple episodes in succession without a pause. Some of them also schedule a binge-watch plan for themselves, for instance, awarding them with a binge-watch after an

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9 *Nikita Tomar Murder Case News: Was Tauseef Inspired by Munna From Mirzapur? Read on*, India.com (Mar. 17, 2023), https://www.india.com/entertainment/nikita-tomar-murder-case-news-was-tauseef-inspired-by-munna-from-mirzapur-read-on-4192445/.

10 Andrew Welsh, Thomas Fleming, Kenneth Dowler, *Constructing Crime and Justice on Film: Meaning and Message in Cinema* 14(4) CONTEMPORARY JUSTICE REVIEW 457, 458 (2011).

11 *Ibid*.

12 *Id*., p 459.

accomplishment, say watching a complete series after submitting an assignment. Studies have proven that binge watching leads to several changes in the attitude, behaviour and social life.[13] Other impacts include body dissatisfaction, academic loss, depressive symptoms, and low self-esteem.[14] Changes in the behaviour are closely related to negative feelings.[15]

Similarly, it can impact their understanding of how the outside world works. Let's take, for instance, one of the most popular web series on the internet *Mirzapur*. Irrespective of the language and use of violence, it became the most meme material web series in 2018[16] and most searched web series[17] with every character so minutely designed to keep everyone hooked. The hearts it won soon converted into accolades the series and the characters grabbed.

It is not just the commission of crime that resembles with the movies and web series but also the acts to hide such commission and manipulation of evidence. Further, not just the civilians, the authors believe that the public servants as well are influenced by vigilantism, especially, to become heroes in the eyes of general public. The movies like *Garv- Pride and Honour* (2004) and *Singham* (2011 and 2014), portray the police officers as the real justice doers by depicting how judiciary at last fails to punish the harm-doers in the absence of sufficiency of witnesses and evidence who are either bought, killed, or destroyed.

In 2019, a Hyderabad rape-murder case, it was reported that

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13 Rahul Ahuja, *Supra* note 4.

14 *Ibid*.

15 *Ibid*.

16 *Move over Sacred Games, Mirzapur memes are now the rage*, Trending News, THE INDIAN EXPRESS (Nov. 27, 2018), https://indianexpress.com/article/trending/trending-in-india/these-mirzapur-memes-are-now-breaking-the-internet-5466819/.

17 Hemai Sheth, *'Mirzapur' most searched web series, followed by 'Sacred Games': Report*, THE HINDU BUSINESSLINE (July 17, 2020), https://www.thehindubusinessline.com/news/variety/mirzapur-most-searched-web-series-followed-by-sacred-games-report/article32111733.ece.

the accused were deliberately shot dead by the police officers.[18] What is even more saddening is how the officers were celebrated by the general public for the sort 'justice' that was delivered. Fortunately, the Supreme Court of India, taking cognizance of this, set up a Justice V S Sirpurkar Commission to probe into the matter and book 10 police officers involved in the killing. The Commission found that the 4 boys (3 of whom were minor) were deliberately killed in a cold-blood fashion and that the police officers should be tried for murder.[19]

Driving back to the question, is there anything that they cannot learn on YouTube, the most easily accessible platform, and other digital media content publishers? From making an origami flower to making a bomb, everything is available there. In fact, while writing this paper, the authors came across the news article about a Maharashtra man who was held for allegedly printing currency notes at home after learning it from YouTube.[20] Nudity and obscenity available online can easily deprave the prurient minds encouraging them to indulge into sexual behaviours. Moreover, irrespective of the statutory warning, consumption of alcohol, tobacco, drugs, and cigarettes is quite rampant.

Article 19 of the Constitution of India gives every citizen a right to speech and expression. The importance of this right is rightly reflected in the labelling of it as 'mother of all liberties.' Time and again cinema has been recognized as a part of Article 19(1)(a), with restrictions under Article 19(2). Movies are a medium for the producers, directors, and writers to express their interpretation under

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[18] *Recap: How 2019 Hyderabad gangrape accused were 'deliberately' shot dead by police*, CITIES NEWS, THE INDIAN EXPRESS (May 20, 2022), https://indianexpress.com/article/cities/hyderabad/hyderabad-fake-encounter-recap-7927828/.

[19] THELEAFLET.IN, https://theleaflet.in/supreme-court-makes-the-v-s-sirpurkar-inquiry-commission-report-on-2019-telangana-fake-encounter-public/.

[20] *Maha: Man held for printing fake currency notes at home; cops say he learnt it from YouTube videos*, (Mar. 3, 2023), https://theprint.in/india/maha-man-held-for-printing-fake-currency-notes-at-home-cops-say-he-learnt-it-from-youtube-videos/1414601/?amp=&utm_campaign=fullarticle&utm_medium=referral&utm_source=inshorts.

different genres. Further, adult audiences have right to entertainment and their right cannot be restricted only because some content could be harmful to children. However, due to increased level of understanding and changing times, social responsibility of the artists has increased in the form of the content they are posting online and the ideology they are promoting. Due to the significant fan following, the actions they undertake are followed by the public, especially the youth. In such a scenario, they have a greater responsibility than ever.

Existing Checks and Balances

In the light of the increase in the use of social media and significant production of the online content, the legislation revised the guidelines in 2021 to regulate the content. The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 focus on the regulation of content which is placed on the OTT platforms.

The Guidelines define Digital Media as, "*digitized content that can be transmitted over the internet or computer networks and includes content received, stored, transmitted, edited or processed by- (i) an intermediary; or (ii) a publisher of news and current affairs content or a publisher of online curated content*."[21]

Part III of the Guidelines further elaborates on the procedures and the safeguards with respect to the digital media. These rules are applicable to the publishers of news and current affairs content and the publishers of online curated content.[22] Online curated content refers to "*any curated catalogue of audio-visual content, other than news and current affairs content, which is owned by, licensed to or contracted to be transmitted by a publisher of online curated content, and made available on demand, including but not limited through subscription, over the internet or computer networks, and includes films, audio visual programmes, documentaries, television programmes, serials, podcasts and other*

[21] THE INFORMATION TECHNOLOGY (INTERMEDIARY GUIDELINES AND DIGITAL MEDIA ETHICS CODE) RULES, 2021, 2(i).
[22] *Id.*, 8(1).

such content."[23]

The Guidelines provide for a three-tiered mechanism which is as follows:

a. Level I - Self-regulation by the publishers,
b. Level II - Self-regulation by the self-regulating bodies of the publishers, and
c. Level III - Oversight mechanism by the Central Government.

A summary of these mechanisms can be produced as:

A. Level I
   a. establishment of a grievance redressal mechanism by the publishers and appointment of a Grievance Officer based in India,'
   b. classification of online curated content, *viz,* U, U/A 7+, U/A 13+, U/A 16+, and A.
   c. classification of content based on the themes and messages, violence, nudity, sex, language, drug and substance abuse, and horror.

B. Level II
   a. establishment of self-regulating bodies by the publishers which shall be headed by retired judge of Supreme Court, High Court, or an independent eminent person from the field of media, broadcasting, entertainment, child rights, or such other relevant field.
   b. objective is to ensure that publishers adhere the Code of Ethics.

C. Level III
   a. Ministry of Information and Broadcasting shall develop the Code of Ethics, constitute an Oversight Mechanism and an Inter-departmental Committee
   b. blocking of content

[23] *Id.*, 2(p).

Code of Ethics annexed to the Guidelines mandates the publishers to consider certain factors before featuring, transmitting, publishing, or exhibiting any content in the light of:

a. sovereignty and integrity of India
b. security of the state
c. friendly relations with foreign countries
d. public order
e. India's multi-racial and multi-religious context and
f. activities, beliefs, practices

The guidelines intend to take as many measures as possible to categorize the content which is not age appropriate and which can be harmful in societal and national interest. It is also loaded with the penalties which ensue if these guidelines are breached. However, there are still loopholes present for them to succeed. For instance, there is an insufficient mechanism for the age verification and hence it be can easily be breached. Minors can easily make accounts and watch content which is categorized as 'A'.

Conclusion and Suggestion

What bothers the authors most is if this culture reflects how things are in our society or the reason behind changing things? Each of these sounds right in different contexts.

What then can be done to resolve either situation. As a society we need to ensure that children are guided if they come across any content which corrodes their understanding of civil behaviour and they do not embark on the journey leading to the anti-social tendencies. Role of parents and schools here become extremely important. The kind of conditioning they can get at these two institutions can go a long way in guiding them on what is right and what is not. Unfortunately, in a researcher conducted in Pune in 2021 with 395, it was revealed that 90% of the children use OTT platforms and 71% of the children watch content online without parents.[24] Hence, the involvement of parents is quite low.

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[24] Ajay Vaidya, Use of OTT Platforms among youth, April 2021, Use of ott platforms among youth - DRS (northeastern.edu)

But there are a lot of things parents can actually do to ensure that they keep a watch on their child's activities including setting of reasonable limits, sharing of accounts, monitoring of device use, monitoring of accounts, explaining what is not 'ok' and 'acceptable', entering into conversations which were earlier 'difficult' or 'taboo' like relationships, sex education, encouraging a face-to-face contact with friends, and discouraging making friends online. Similarly, as educators, it is the responsibility of school and teachers to educate them about every aspect of a healthy life. The role of film certifying authorities cannot be undermined in terms of the content they allow to float in the public.

One activity which authors really propagate is the use of restorative circles within families and classrooms. There can be different ways in which they can be used. For instance, after watching a movie or any other content, all the family members can sit together in a circle and discuss what happened in that contact, good or bad, how it impacted them, what is the way to move forward, what behavior can be adopted and what is not acceptable. This can be especially for any content which gains popularity, so that children who happen to get into discussion know in advance the pros and cons of it. Secondly, daily check-ins about how children are doing can be very helpful. Not only would it enable communication between family members strengthening their ties but also guide them through different types of contents they come across. The best things that can be done is creating a conducive environment for children where they feel safe and secure to communicate easily.

ECHOES OF JUSTICE: ADDRESSING THE RIGHTS & REHABILITATION OF CHILDREN IN CONFLICT WITH LAW

*Dr. Superna Venaik**

Abstract

As per UNICEF, a person under the age of eighteen who has been involved in legal proceedings for criminal conduct or is accused of committing one is considered a "child in conflict with the law." Petty offences like begging, truancy, vagrancy, or alcohol usage are the main causes of legal trouble for most children. However, some people have committed serious crimes like murder or sexual assault. Adults who know that children will get light punishment may force some children to commit crimes.

There has been a lot written about children who are victims and who require care and protection, but not much about children who are genuinely mistreated by juvenile offenders. The state apparatus conceals them in establishments that are off-limits to outsiders and gives up them to their ways with little regard for their recovery and well-being. They are depleted and unprepared to deal with life outside of the institution after serving their time. The treatment of juvenile offenders is appalling, particularly because juvenile legislation acknowledges the need for care and protection for young people who conflict with the law.

Young individuals who break the law do so because they have fewer opportunities to mature and flourish—not because they choose to or out of their own free will, but rather because of the limitations placed on those opportunities. Once children join the criminal justice system, their possibilities are much more limited. Adolescents belonging to high-risk groups who may

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encounter legal issues frequently suffer from maltreatment and disregard, inadequate and careless parenting, and financial hardships. Juvenile delinquency is a sign that society is failing to give a safe environment for its children, not a success story.[1]

The JJCPC Act, 2015, or Juvenile Justice (Care and Protection of Children) Act of 2015, which took the place of the previous JJ Act, 2015, governs children in dispute with the law in India. The legislation addresses children who are suspected or proven to be in legal trouble. It aims to safeguard children who require care by meeting their basic requirements, using a child judicial process, and assisting in their rehabilitation.[2] *Covering the principles of natural justice with the Prohibition of Child Marriage Act of 2006, IPC (Indian Penal Code)1860, along with National Policy for Children of 2013. The UNCRC (United Nations Convention on the Rights of the Child), the Beijing Rules, and the CRC's optional protocol on children's involvement in armed conflict all contain international provisions addressing the need for further protection and support for child victims.*

The study objectives are to provide a nuanced comprehension of the problems faced by children who find themselves entangled in legal conflicts and to shed light on a comprehensive approach considering individual experiences and systemic issues to identify gaps, inconsistencies, and areas for improvement in the legal system's treatment of juvenile offenders. The paper shall endeavor to bring out the procedure as a transparent legal right to lay down the emphasis on conviction before deciding on the sentence for a juvenile offender. As held by the SC ("Supreme Court") in ***Mohd. Imran Vs. State***

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1 An attempt on extracting the real facts by primary data i.e. through Questionnaire.

2 https://www.childlineindia.org/a/issues/conflict-with-law; Last accessed on 05-01-2023.

of Maharashtra[3] *the importance of conducting a social investigation report before deciding on the sentence, the comprehensive understanding of the juvenile's background and circumstances is essential.*

Keywords- Minors, Juveniles, POCSO, Rehabilitation, Justice

Introduction

As per JJCPC Act, 2000, *"A juvenile is a person who has not completed eighteen years of age[4]". A juvenile criminal is judged "delinquent" rather than "guilty".* A person under the age of eighteen who engages in criminal activity or antisocial behaviour is a juvenile delinquent. The state may enact laws for the protection, upbringing, custody, as well as maintenance of minors within its authority under the *parens patriae* theory. Children in India who are accused of committing crimes or offences are served by the juvenile justice system, together with children who require care and protection. Social reintegration and rehabilitation are handled by different systems.

The matter of children in conflict with the law is a complex and sensitive challenge that demands thoughtful considerations and comprehensive responses. Understanding and addressing the requirements of these children requires a nuanced perspective that goes beyond conventional approaches to justice[5].

Nature of Cases involving Children in Conflict with the Law (CICL)

The legal system categorizes offences into different types and the juvenile justice system often handles cases involving children differently than those involving adults. The primary focus is often on rehabilitation rather than punishment, recognizing the

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3 (2009) 6 SCC 682.

4 Section 2(k), Juvenile Justice (Care and Protection) Act, 2000.

5 https://epgp.inflibnet.ac.in/epgpdata/uploads/epgp_content/S001608/P001809/M027670/ET/1520851417SociolegalApproach.pdf; last accessed on 09-01-2024.

potential for positive change and development in young individuals[6].

1. Status Offences- These are offences that are only considered due to the age of the offender like running away from home, curfew violations, and truancy.
2. Property Crimes- Cases involving theft, burglary, vandalism, or other offences against property are common among juvenile offenders and they may result from peer pressure, socio-economic circumstances, or lack of guidance.
3. Substance Abuse Offences- Children may be involved in cases related to drug or alcohol offences in possession or distribution.
4. Alcohol-related offences- Possession or consumption of alcohol by minors under age who indulges in drinking[7].
5. Sexual Offences- Indulgence in sexual assault, rape etc.
6. Traffic Violations- Includes reckless driving, driving without a license, or other motor vehicle violations.
7. Cybercrimes face charges related to cyberbullying, hacking, online harassment, or other digital offences.
8. Weapons Offences- possession of weapons, firearms, or other dangerous instruments may lead to charges for juveniles with criminal organizations or gangs.
9. Domestic Violence- Charges related to violence or abuse within the family including assault or threats against family members.

The Procedural Law: Juvenile in Conflict with Law[8]

In 1986, India ratified the UN "Minimum Rules for Administration" of juvenile justice, in 1985, bypassing the Juvenile

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6 Ahuja, Ram, Social Problems in India, Central Agency, Allahabad , 2nd edn. 2003.

7 Biggeri Mario and Mehtrotra, Santosh, Child Rights in Industrial Outworker Households in India. Arihant Publications (India) Limited. Meerut , 2nd edn., 2009.

8 Sharma , Suresh Kumar, Child Rights : Problems and Prospects. Cochin University Press, Delhi < 6th edn ., 1999

Justice Act, 1986, which governed the development and care of minors. The Juvenile Justice (Care and Protection of Children) Act, 2000, was enacted as a consequence of the realization that new laws were necessary over time. The primary goal of this Act was juvenile rehabilitation. The legislature was compelled to change the Act on the care, trial, and age of minors in the case of the horrifying "Nirbhaya Rape" case in 2013. Ultimately, the Juvenile Justice Care and Protection of Children Act, 2015 was implemented.

As per this Act, an individual who has not reached the age of eighteen is considered a kid or juvenile. It lists two target populations: minors in legal trouble and children in need of protection and care. This law safeguards an individual's rights from their childhood as well as those of children. This means that the case would proceed as if the juvenile had not yet turned 18 if the crime or incident happened when the individual was a minor and the minor ceased to be of age during the hearing.[9]

Under the Act[10], JCL (Juveniles in Conflict with Law) is covered in the second chapter. JJBs (Juvenile Justice Boards) must be established wherever the State Government deems appropriate, according to this clause. In JJBs, there must be two social workers, one of whom should be a woman and a judicial magistrate. A background in child welfare or child psychology is required for the magistrate position. A different court cannot hear JCL cases; only the JJB may do so. In addition, the state must provide many facilities where the needs and protection of minors can be met. The JJB's powers may be used in a Court of Session or High Court upon the filing of an appeal under the Act. The state shall establish Special Homes and Observation Homes in each group or area of districts for the reception and rehabilitation of JCLs. The establishment of these houses may be handled by the state directly or by hiring a volunteer organization. While legal actions are pending, minors are institutionalized in observation houses. In cases where the JJB determines after a case's processes are over that the kid's

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9 The procedures regarding the trial of juvenile offenders Seep Gupta, from the Institute of Law, Jiwaji University.

10 Juvenile Justice (Care and Protection of Children) Act, 2015.

rehabilitation is incomplete, they may place the child in a special home for a maximum of 3 years.

When an officer of the law comes in contact with a juvenile, he is required to report the child to the SJPU (Special Juvenile Police Unit), who then has to report the youngster to the board right away. When the Board determines that releasing a juvenile won't put him in danger or expose him to criminal activity, minors are eligible for bail in all circumstances. Only an observation home will be able to care for the youngster if he is not freed on bond. Along with notifying the probation officer, who will conduct the required inquiries on the minor, the SJPU oversees notifying the juvenile's parents of the arrest.

After investigating and determining that the juvenile is guilty of the offence, the JJB may release the child following guidance and therapy. The youngster may be released with or without a bond, to live with his parents or guardians, or into an institution. In addition, if the youngster is older than fourteen and can afford it, the Board has the authority to require him to perform community service or pay a fee. To release the child, the probation officer must provide a social investigation report.[11] Even after the child is released from custody, the probation officers can still be expected to monitor them. A minor cannot be prosecuted for capital punishment, imprisoned for up to life, or put to jail for failing to pay a fine or provide collateral for bail.

Juvenile and non-juvenile matters cannot be conducted together under this provision. A minor cannot be "disqualified" or declared unfit. Since material regarding juveniles cannot be published in periodicals, newspapers, or visual media, juveniles are not exposed to the media.[12] It is possible to bring back children who run away from the Special or Observation homes without a warrant or penalty. Any act of cruelty (including abuse or neglect) committed against minors in the home or by those in their care is illegal. Those who use children as props for criminal activity will

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[11] Section 8 -Powers, functions and responsibilities of the Board, JJ Act 2015.

[12] Section 74 - Prohibition on disclosure of identity of children, JJ Act 2015.

also face consequences under this statute. A parent who puts a child to work in a dangerous business uses them for begging or gives them drugs or alcohol faces jail time and penalties.

CNCP (Children in Need of Care and Protection) is the topic of Chapter III. Cases under the CNCP are heard by the CWC (Child Welfare Committee) rather than a JJB[13]. There should be a chairperson and four additional members on the committee, including at least one woman and one child welfare specialist. The CWC's mission is to preserve children's rights by providing for their treatment, care, protection, rehabilitation, and development. The child, a social worker, a public servant, a police officer, or any other member of the public may bring the child before the CWC. If a child has no immediate family or other support structure, the committee may commit the child to a shelter or children's home.

CNCP is given access to Children's Homes and Shelter Homes[14], just like JCL. These houses may be established by the state directly or by hiring a nonprofit group to do so. Children whose cases have been resolved or whose relatives cannot be found are placed in shelter homes. Children who move to a different state or region must be placed in the CWC and institution nearest to their home. After establishing the environment's safety, the primary goal of this technique is to return the child to his family or family setting.

Rights of Juvenile Offenders

A child is entitled to the following fundamental rights when they are prosecuted for crimes:

- Right to have speedy and fair trials, right to have guardians or parents present at hearings, right to an appeal, the right to offer proof to support their case, right to have a lawyer, right to juvenile trials to be tried without juries, right to a trial transcript, right to remain silent, and right to cross-examine witnesses.
- Additionally, any child found guilty of a crime has the right to

[13] Section 27 - Child Welfare Committee, JJ Act 2015.

[14] Section 39- Process of rehabilitation and social reintegration, JJ Act 2015.

seek or request anticipatory bail under Section 437 of the Code of Criminal Procedure, 1973, hereinafter referred to as Cr.PC). This request might be made in the Court of Sessions and High Court.

- According to the JJ Act of 2000, among the rights granted to juveniles to prevent them from being treated like seasoned criminals are the following: hearing of cases through the JJB, bail provisions[15], elimination of conviction-related disqualification, no imprisonment, and no joint proceedings with non-juvenile parties.

Constitutional Provisions Ensuring Special Provisions for CICL

1. Article 15(3)- Empowering the state, the authority to enact unique laws, including ones that conflict with the law.
2. Article 21- Encompasses the right to a dignified life, thereby emphasizing the importance of protecting children's rights for humane treatment and rehabilitation[16].
3. Article 39(e) and (f)- Ensuring that children are not abused and that their childhood and adolescence are shielded from exploitation and both material and moral abandonment through the implementation of Directive Principles of State Policy[17].

International Conventions

1. **United Nations Convention on the Rights of the Child (CRC)-** Specific attention is given to the rights of children who are in legal trouble under Article 37. It highlights that a child must only be imprisoned, detained, or arrested as a last option and for the shortest duration that is appropriate. It also highlights the need for separating children from adults during legal proceedings.

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[15] Section 12- Bail to a person who is apparently a child alleged to be in conflict with law, JJ Act 2015.

[16] Rao, B. Shiva , The Framing of Indian Constitution – A study , Eastern Company , Bombay< 6th edn ., 1956.

[17] Rai, Kailash, Constitutional Law of India 203, Central Law Publications Allahabad 7th edn., 2008.

2. **Beijing Rules, 1985-** The rules adopted by the UN, provide guidelines on the administration of juvenile justice. They stress the importance of diversion, non-custodial measures, and the enhancement of a child's self-worth and dignity.
3. **Optional Protocol to the CRC on the Involvement of Children in Armed Conflict, 2000-** While not directly addressing children in conflict with the law, this protocol prohibits the involvement of children in armed forces and armed groups, emphasizing the need for special protection and assistance for child victims.

National Provisions on CICL

1. **JJCPC Act, 2015-** This legislation has replaced the JJ Act of 2000. It emphasizes a child-centric method defining a juvenile as anyone below the age of 18. The Act outlines procedures for dealing with JCL, emphasizing rehabilitation and reintegration over punitive measures.
2. **Principles of Natural Justice-** Ensuring the rights of children to be heard, to be represented in court, and to undergo a fair trial. These principles are fundamental to the protection of children's rights during legal proceedings.
3. **Prohibition of Child Marriage Act, 2006-** the Act addresses the issues of child marriages and creates penalties for those who perform, promote, or permit such marriages. It is crucial in preventing children from entering into legal conflicts related to early marriages.
4. **Indian Penal Code, 1860-** While the IPC primarily deals with criminal offences, it also recognizes the age of criminal responsibility. Children below a certain age are considered incapable of committing certain offences and are defaulted under the juvenile justice system.
5. **National Policy for Children, 2013-** This policy gives a system for the protection and well-being of children in India. It encompasses various aspects, including education, health, and protection, contributing to a holistic method of addressing the needs of children in the country.

The aforesaid national and international legal provisions collectively contribute to the protection and well-being of children in conflict with the law emphasizing their rehabilitation, reintegration, and the importance of age-appropriate legal processes. It reflects a global commitment to ensuring the rights of children will be the priority[18].

Influence of Cr.PC AND IPC ON Juvenile Justice

The Cr.PC (Code of Criminal Procedure, 1973) and the IPC (Indian Penal code, 1860) have a significant impact on the resolution of cases involving juvenile offences by applying various provisions of criminal law. The IPC covers juvenile and adult crimes and sets age-based guidelines for punishment.

1. As per IPC Section 82, "Nothing is an offence which is done by a child under seven years of age." This indicates that an act committed by an individual less than seven years old is not considered illegal.
2. As per IPC Section 83, "Nothing is an offence which is done by a child who is above seven years of age and under the age of 12 who has not attained sufficient maturity to understand the consequences of their actions."

Sections 27 and 437 of the CrPC are two of the sections that are used to discuss the jurisdiction of juveniles.

1. As per Section 27 of the CrPC, the law will handle any crime attempted by an individual under the age of sixteen whose penalty does not involve death or jail. This legislation offers therapy, training, the instillation of moral values, and the rehabilitation of children who have been found guilty.

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[18] Rehman M.H., and Rehman, Kanta , Child Rights and Child Rights : A Compendium, New Manak Publications, Delhi, 1 st edn., 2002 .

Questionnaire Analysis- Multiple Factors for Consideration: CICL[19]

1. Personal Experiences

To inquire about whether have they been ever in conflict with the law and how their personal experience occurred with the legal system as challenges or difficulties faced during legal proceedings.

2. Legal Proceedings

The interactions with law enforcement officials to inquire about whether they were informed about rights and legal processes or whether were they allowed access to legal representation.

3. Rehabilitation and Reintegration

The participation in any rehabilitation or reintegration programs and how it was beneficial towards rehabilitation and reintegration.

4. Social Factors

To determine which social factors, contribute to the children becoming involved in conflict with the law and how the community can better support at-risk children and prevent their involvement in criminal activities.

The culmination of exploration into the lives of JCL, facilitated through this questionnaire has provided a unique and invaluable perspective on their experiences within the legal system. The amalgamation of their voices, experiences, and opinions has not only humanized the statistical data but has also contributed nuanced insights that can significantly inform policy, advocacy, and intervention strategies. The narratives unveiled a mosaic of challenges, encompassing socio-economic disparities, inadequate legal awareness, and systemic deficiencies. The varying degree of support experienced during legal proceedings further underscored

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[19] While using this Questionnaire, the confidentiality and anonymity of participants is ensured.

the requirement for a more cohesive and comprehensive method to safeguard the well-being and rights of children entangled in the legal system. The questionnaire illuminated in a way that depicts the resilience of the children themselves. Despite the challenges they faced, many expressed a desire for positive change both in their own lives and in the broader community. Their recommendations for societal and systemic improvements offer a roadmap for creating environments that are conducive to preventing juvenile delinquency and fostering rehabilitation.

Challenges for Survival

1. Stigmatization and Social Rejection- Children in law often face societal stigma and rejection hindering their reintegration and this exacerbates psychological trauma, impeding the child's ability to rebuild their life[20].
2. Inadequate Rehabilitation Facilities- Insufficient rehabilitation infrastructure and resources limit the effectiveness of intervention programs and without proper rehabilitation, children may struggle to overcome the circumstances that led to their involvement in criminal activities.
3. Legal Disparities- Variations in legal frameworks and practices contribute to inconsistencies in the treatment of juvenile offenders and it affects the fairness and equity of the juvenile justice system[21].
4. Lack of Educational Opportunities- Limited access to education within correctional facilities hampers the intellectual development of children and it impacts the successful reintegration into society.
5. Psychological Trauma- Exposure to the criminal justice system can lead to severe psychological trauma among children and lead to impact untreated trauma resulting in long-term mental health issues hindering personal and social development.

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[20] Bhat , P Ishwara , Law and Social Transformation, Eastern Book Co., Lucknow : 1st edn, 2009.

[21] Massun, L.P ., UN System in India : Position Paper on child rights, ILO , Sage Publications , New Delhi , 5th edn., 1998 .

Judicial Interpretation

Re: Gault[22]

According to the SC of the United States, Juveniles have the right to due process in delinquency proceedings, which includes access to legal counsel.

Roper Vs. Simmons[23]

according to a ruling of the U.S. Supreme Court, a person who committed an offence while under the age of eighteen is not entitled to the death penalty.

Kent Vs. United States[24]

The SC of the United States emphasized the importance of legal representation and the right to a fair hearing for juveniles in delinquency proceedings.

A.C. & Others Vs. Jamaica[25] *and Inter-Am Ct. H.R. (Ser. C) No. 129*

The matter under consideration before the IACHR ("Inter-American Court of Human Rights") concerned the handling of juvenile offenders and their conditions of confinement.

R (on the application of T) Vs. Chief Constable of Greater Manchester and Another[26]

A case in the U.K. clarified the circumstances under which children in conflict with the law could be strip searched.

Terry Vs. Ohio[27]

The U.S. Supreme Court although not specifically on juveniles established the stop and frisk principle, which has implications for encounters between law enforcement and young

22 (1967) 387 U.S. 1.
23 (2005) 543 US. 551.
24 (1966) 383 U.S. 541.
25 (2005).
26 (2005) UKHL 10.
27 (1968) 392 U.S. 1.

individuals.

Sheela Barse vs. Union of India[28]

In this matter, a petition was submitted to the court requesting the release of minors under the age of sixteen who were being held in several state jails. Details on the number of shelters, juvenile courts along schools that are currently in operation, as well as further details about the youngsters incarcerated. The Judicial Magistrates in each district were instructed to visit and check every observation home, shelter home, and jail, so on. Within their districts and produce a document that had to be turned in to the court in a week by the Supreme Court in response to notice being sent to the respective respondents. Whether or whether minors under the age of sixteen who are detained in jails get cruel treatment and maltreatment was the main question at hand in this case.

The SC noted that it is a well-established legal norm that minors should not be imprisoned alongside adult offenders due to the detrimental consequences this would have on their development and maturation. In this regard, the following instructions were provided:

- The Children Act of 1960 was requested to be implemented in each state and to be strictly enforced.
- Every jail in the nation was asked to have up-to-date jail manuals.
- Every state's district and session judges were requested to visit prisons no less frequently than every 2 months.
- It is the responsibility of visiting judges to verify if the children are receiving the profit of jail manuals.

Pratap Singh v. State of Jharkhand[29]

In this matter, the appellant was detained on suspicion of contributing to the deceased's poisoned death. He was eighteen

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28 JT (1986) 136.

29 Criminal Appeal No. 210 of 2005.

when he appeared in court, and it was claimed that he was underage when the offence was done. After his certificates were reviewed and it was determined that he was a minor on the day the crime was committed, the matter was moved to the juvenile court, where it was decided to release him on bond. The opposing party was not happy with the ruling, so they filed an appeal with the Additional Session Judge. The judge's ruling said that the date of production in court should be used to calculate a juvenile's age rather than the date the offence was committed.

The Jharkhand High Court upheld this ruling, ruling that the school certificate is the most reliable piece of evidence in this case. Nonetheless, rather than using the date that the individual was brought before the court, the Supreme Court decided to use the date that the offences occurred as the criterion for determining the age of juvenility.

Determining the application of the JJCPC Act, 2000 was another matter on the court's agenda. The JJ Act of 1986 was the basis for the current case when it was brought before the Supreme Court, but the 2000 Act had taken its place. Based on the matter of Upendra Kumar vs. the State of Bihar[30], which noted that the Act's goal was to assist all juveniles, it was decided that the 2000 Act would apply to cases that were ongoing in any authority or court under the Act 1986 and that cases involving individuals who had not reached the age of 18 by 1 April 2001 that would be resolved per the 2000 Act.

The Hon'ble SC also described the significance of the "United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985," recognized as the "Beijing Rules". No juvenile is exempt from these regulations based on their ethnicity, nationality, caste, or religion.

- It believes that the regulations and trial processes that apply to adult offenders are inappropriate for younger people. Restrictions and juvenile penalties should be applied last.

[30] Criminal Appeal No. 210 of 2005.

- According to the regulations, children have the right to be presumed innocent in relation to prosecution, which is one of the foundations of the criminal justice system.
- Counseling and information about the charges must be provided to children.
- They have the right to stay silent while being investigated or interrogated.
- The regulations provide that their prosecution must take place in front of a legal guardian or their parents.
- The convention recognizes their right to appeal.

Hari Ram v. State of Rajasthan[31]

A person by the name of Hari Ram was charged with several crimes in this case. The issue concerned the accused's age and whether he should be handled as a juvenile or as an adult. Following the commencement of the trial, the Additional Sessions Judge found that the accused was under 16 years on the day of the offence, as required by the 1986 Act. As a result, the case was submitted to the JJB located in Ajmer, Rajasthan. The accused was older than 16 when the offence was committed, hence the accused was not considered a juvenile by the High Court, which based its decision on the accused's father's evidence and medical records. However, the age at which a juvenile would be deemed a juvenile under the Act was raised from 16 to 18 by the 2000 Act.

Which Act would apply to the accused was the question put before the SC. The Court ruled that, following the 2000 Act's enactment, all outstanding cases would be handled in accordance with it; hence, the accused would be regarded as a juvenile in this case and the 2000 Act would apply.

Abuzar Hossain @ Gulam Hossain v. State of West Bengal[32]

The appellate court, in this case, filed an appeal based on the

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31 SLP Cr. Appeal No. 3336 of 2006.

32 SLP Cr. Appeal No. 616 of 2012.

age of the accused on the day the offence was committed. Regarding the question of whether or not to allow the plea of juvenility, the SC ruled that the claim of juvenility may be made at any time and that any delay cannot be a legitimate reason for its denial. The onus is on the assertor to substantiate the allegation of juvenility. Furthermore, it was noted that when handling such allegations, the court could not apply any technological methodology. Nonetheless, the court has the authority to dismiss fabricated or fraudulent claims. In this case, the court further noted that neither the trial court nor the High Court had ever addressed the question of juvenility, nor had there been any supporting documentation.

The court cited the Gopinath Ghosh Vs. State of West Bengal[33] decision, which concluded that the court had to address the accused's age even if the issue of age determination was not taken into consideration. In this instance, one of the accused who was found guilty of murder filed an appeal, arguing that because he was younger than eighteen when the crime was committed, he was considered a "child" for the West Bengal Children Act of 1959. As a result, the question of how to determine an accused person's age was raised and directed to the court of Additional Session Judges.

Jarnail Singh v. State of Haryana[34]

The accused in this case was accused of removing the prosecutrix from her guardians and engaging in coercive sexual relations with her. She was discovered at his home during the inquiry, and as a result, the sessions court sentenced him to 10 years of hard labour and a fine. As the party who felt wronged, the accused filed an appeal of the ruling, claiming that the prosecutrix had enticed him to stay with her and had done so with his permission. Furthermore, he contended that the accuser's juvenile status had been established. In this matter, the SC ruled that the guidelines established by the JJCPC Act, 2007 for assessing the age of a juvenile also apply to situations involving the Children Protection from Sexual Offenses Act of 2012.

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[33] 1984 AIR 237.

[34] 2013.

Jitendra Singh @ Babboo Singh v. State of U.P. (2013)

This matter involves the murder and burning of a woman as part of a dowry dispute by her father-in-law and husband, among other three individuals. Nevertheless, her father-in-law passed away while the court case was still underway, and one of the defendants stated, on appeal to the SC, that he was only 14 years old when the crime was committed. The Minor Justice Act of 2000 classifies the accused as a juvenile, a fact that the Honorable Supreme Court noted while upholding the lower court's judgment to find the accused guilty in this instance. The JJB was tasked under the Act with determining the appropriate penalty in this instance. According to the Court, providing young people with restorative and rehabilitative possibilities is the primary aim of the criminal justice system in particular situations.[35]

The Court established many requirements that must be followed to prevent such circumstances in the future:

- The magistrate must document the accused's juvenile status as soon as feasible.
- It is not reasonable to assume that a juvenile is aware of all the regulations that are in place, particularly when it comes to socioeconomic concerns.
- The child himself cannot be expected to claim it, hence the magistrate has the responsibility to make that decision.
- When children are involved, the entire legal process needs to involve their parents or guardians.

Salil Bali v. Union of India[36]

A seventeen-and-a-half-year-old was accused of rape in a moving car in this case. There was a contention that the 2000 Act needed to be reexamined due to the severity of offences committed by minors between the ages of sixteen and eighteen. Considering

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35 Constitutional Provisions Ensuring Special Provisions For Children In Conflict With Law; Ms. Maharukh Adenwala.

36 Writ Petition No. 10 of 2013.

criminal offences committed by individuals between the ages of 16 and 18, the petitioner argued that Sections 2(k) and 2(l) as well as Section 15 of the JJCPC Act, 2000, must be taken into consideration. It should be mentioned that this occurred after the Nirbhaya case.

In this case, the Supreme Court considered 2 issues: (a) Should a juvenile who has reached majority be released even if their term hasn't finished? (b) Should the age of children under the Act be lowered from 18 to 16 years old? Regarding the first point, the Court determined that there is a misperception under the Act that a child who reaches majority must be released, even if their sentence is still in effect. It is important to remember that even if a juvenile reaches adulthood while serving his sentence, he still needs to finish it since he will still be required to serve out his whole term. The Court noted that the latter problem was being discussed and that the Act's goal was to give minors access to mechanisms and assistance for restorative and rehabilitative practices. The age of eighteen has been set since, according to science and psychology, minors can still be rehabilitated and reintegrated into society up to this point.

Shabnam Hashmi v. Union of India[37]

The JJ Act of 2000 pertains to the adoption of children in this case. Muslim lady Shabnam Hashmi, who adopted a girl, filed a petition in this case asking the court to acknowledge the right to adopt as a basic freedom guaranteed by Part III of the Constitution. Since adoption is forbidden by Muslim law, she merely possessed guardianship rights over the daughter she adopted. In this instance, the Supreme Court upheld Part III of the Constitution's essential rights such as freedom to adopt. It was decided that parents, regardless of their caste, religion, or faith, might adopt under the JJ Act, 2000. Additionally, it was noted that Muslim law does not forbid a spouse from providing for the emotional and financial needs of a child, nor does it recognize adoption.

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[37] AIR 2014 SC 1281.

Dr. Subramanian Swamy v. Raju, Thr. Member Juvenile Justice Board[38]

The Nirbhaya case, in which a female was viciously raped and physically and sexually attacked by five individuals, led to the filing of this complaint. Among those five, one person was underage. Although the JJB was tasked with reviewing his case, the petitioners contended that he ought to be tried as an adult.

In interpreting the Act in this matter, the SC reported that the statute's language is unequivocal, indicating the legislature's desire to rehabilitate and restore young offenders. Because of this, it has designated those under the age of 18 as juveniles, whose cases are investigated and handled differently from those involving adult offenders. Furthermore, this kind of classification—which is predicated on comprehensible distinctions that make sense in relation to the desired outcome—is not prohibited by the Constitution. As a result, the Apex Court maintained the Act's determination to classify individuals under the age of 18 as distinct.

Parag Bhati (Juvenile) through legal guardian v. State of Uttar Pradesh[39]

The defendant in this instance was detained in a juvenile home after being apprehended for the murder charge. According to an age-related application his father made, he is a minor. Numerous academic credentials served as additional evidence for this. However, after carefully examining the credentials, the JJB expressed some reservations about his youth, and the defendant was sent to the medical board to be examined and have his age determined. His matter was moved to the "Chief Judicial Magistrates" Court since the medical board declared him to be a major.

In a ruling on the evaluation of juvenility, the Supreme Court stated that the idea of a juvenile under the Act would only apply in circumstances in which the defendant is '*prima facie*' a minor. In

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[38] Criminal Appeal No. 695 of 2014.
[39] (2016) 12 SCC 744.

this instance, the accused is not innocent; rather, the well-thought-out, serious offence highlights his maturity. It was determined that the juvenile defence, in this case, was an attempt to circumvent the applicable legislation.

Sher Singh @ Sheru v. State of U.P.[40]

The appellant, in this matter, was found guilty of kidnapping and entered a plea of juvenility, arguing that the offence was committed while he was less than eighteen years old, based on his High School Examination (Matriculation) Record. His entitlement to the benefits of the JJCPC Act, 2015, and the JJCPC Rules, 2007 follows as a result. The aforementioned application was filed with the JJB, which rejected the plea due to a medical report indicating the defendant's age at the time of the offence was 19.

Four years later, the appellant submitted a plea once more to be declared a minor in the Session trial. But this was also brushed aside and denied. This order then came to be final. In 2013, he filed a writ petition, which was once more rejected as untimely. It was noted, meanwhile, that the appellant's ability to assert the defence of juvenility would remain unaffected. The court noted that Rule 12 of the 2007 rules and Section 7A of the JJCPC Act, 2000 require the court to do an inquiry rather than a trial or investigation. It was also noted that the investigation about the age determination needed to be finished within 30 days of the application date. This makes it simple for the court to gather evidence and get matriculation or other necessary credentials. The following list of court-provided papers must be consulted in this regard:

- If there is no matriculation certificate, the certificate of birth from the first school attended should be consulted, or
- a birth certificate issued by the panchayat, corporation, or local authority.
- Only if the aforementioned papers are unavailable is a medical report necessary.

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[40] (2016) 97 ACC 324.

The court additionally concluded that the writ petition cannot be dismissed or treated as infructuous to deny someone the ability to claim juvenility. Even if the plea has already been brought up before the board, it may be brought up again in the criminal appeal.

Sampurna Behura v. Union of India[41]

Sampurna Behura, a social activist, submitted a writ petition in this case, highlighting the issues that children and young people in shelter homes, observation homes, and so on. suffer. She called the Court's attention to many constitutional provisions that require the state govt to protect children's development and welfare and to penalize it when it fails to do so. These provisions include those pertaining to the creation of JJBs, juvenile police, proper living conditions, and medical facilities for juveniles.

In this case, the Supreme Court ruled that state governments must correctly execute the Act as per children's requirements and issued the following directives:

- To improve circumstances for children, the MWCD ("Ministry of Women and Children Development") must make sure that the State and National Commission for the Protection of Children's Rights are appropriately staffed.
- It was mandated that the JJB and Child Welfare Committees hold frequent meetings to discuss the prompt administration of justice to minors who are in legal trouble.
- At both the state and national levels, the Commission for Children's Rights must appropriately carry out its mandate and undertake surveys regularly.
- It was requested by the chief justices of every high court that the youngsters feel comfortable in the judicial atmosphere.
- All children's institutions must be registered, and state and union territory administrations are required to make sure that they have access to facilities for nourishment, health care, and education.
- To deal with juveniles, members or officials of the JJB, district

[41] (2018) 4 SCC 433.

child protection units, child welfare groups, and juvenile-specific police units must get appropriate and sufficient training.

In Re *Contagion of COVID-19 virus in Children's Protection Homes*[42]

In this case, a writ petition was submitted to guarantee the safety of children who were living in observation homes as well as children who had legal issues during the pandemic lockdown. The petition concerned the well-being and security of kids in foster and kinship care, as well as juvenile homes, during the COVID-19 pandemic. The Supreme Court issued the following guidelines in this regard:

- The child welfare groups were requested to take proactive measures to protect the children living in these types of households.
- To maintain records of children who have been returned home, they were also instructed to work in conjunction with the district child protection committees as well as the foster care and adoption committees.
- Support systems and online help centers were to be set up.
- The committees were also tasked with monitoring sexual harassment and violence and making sure that no such incident involved children living in such facilities.
- Proactive measures to stop the virus from spreading in juvenile homes were mandated by the JJB. To protect their health, safety, and best interests, children may be housed in childcare facilities.
- Online sessions must be used for the prompt resolution of cases.
- Children in observation homes must get counseling sessions.
- The government needs to let the childcare facilities know about all the steps that need to be followed in this case.
- The district protection units and childcare facilities need to make arrangements to rotate enough staff members, and the responsibility of caring for the children needs to be placed on qualified volunteers.

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42 Suo Moto Writ Petition (Civil) No. 4 of 2020.

- All officials and government employees need to be made sure they carry out their responsibilities with diligence.
- The facilities are adequately sanitized, and children are given high-quality face masks, sanitizers, hygiene items, etc.
- Children need to be educated about the transmission of diseases and the need for safety measures.
- Social separation needs to be consistently practiced.
- The individual has to be placed under quarantine right away if they exhibit viral symptoms.
- It was instructed that families that foster children be kept up to speed on virus protection measures.
- The safety and health of these families and their children need to be monitored.
- Instructions were given on how to get them to focus on enjoyable and educational activities to prevent stress and anxiety in youngsters.

Future Prospects

The considerations of adequate measures as per the legal compliances can lead to the following:-

1. Holistic Rehabilitation Programme- Development through comprehensive rehabilitation programs addressing the physical, psychological, and social needs of children.
2. Community Engagement and Awareness – Increasing community awareness to reduce stigma and promote community-based rehabilitation for successful integration and development.
3. Legal Reforms- Advocating for uniform and child-centric legal frameworks across jurisdictions to ensure consistent and fair treatment of juvenile offenders upholding their rights and dignity.
4. Education with Correctional Facilities- Strengthening the educational programs empowering to build a bright future reducing the likelihood of recidivism.
5. Mental Health Support- Addressing psychological trauma to overcome emotional challenges to pursue a positive path.

Conclusion

The assurance of justice to juveniles is a paramount concern that is to be with the intersection of legal frameworks for safeguarding the rights and well-being of juveniles involved in legal proceedings. India's legal and justice systems are greatly influenced by past judicial decisions. Every case highlights a potential legal loophole, and the courts offer measures to close it. The instances have contributed to the development of the juvenile justice system by highlighting gaps that exist for the care and betterment of these children. When deprivation of liberty is necessary, states should ensure that juvenile detention facilities prioritize rehabilitation and education.

SAMUDRA TIRAM SAMRAKSHANA: AN ELEGY ON COASTAL CONSERVATION AMIDST THE TEMPEST OF CLIMATE DISRUPTION

*Mr. Charan Tej T.V.**

Abstract

This article highlights the vital role of oceans in climate regulation and the urgent need for effective coastal conservation along India's 7,516.6 km coastline. It stresses that global warming impacts coastal communities and biodiversity, underscoring the necessity for cohesive conservation efforts. Despite India's recognition of coastal importance, current regulatory frameworks lack coherence and strategic clarity.

Advocating for an inclusive climate strategy, the article critiques the 2018 notification for favoring coastal commercialization and failing to meet COP 28 objectives. It examines the causes of coastal degradation and emphasizes the need for comprehensive plans rather than numerous amendments. The article underscores that leaving coasts untouched is the most effective preservation strategy, aligning with SDG 15 (Life on Land) and stressing sustainable approaches to protect ecosystems crucial for human survival (SDG 14 - Life Below Water).

The 2019 notification is also scrutinized for exacerbating vulnerabilities in coastal ecosystems. The article calls for a recalibration of India's coastal conservation strategies to prioritize environmental preservation over commercial interests, recommending a comprehensive regulatory framework to address

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climate-induced risks and support global sustainability goals. The urgency for effective coastal management in the face of escalating climate threats is clearly articulated.

Keywords: Coastal conservation, Climate crisis, Sustainable Development Goals (SDGs), COP 28, Coastal Zone Regulation.

INTRODUCTION

Coastal regions are at the forefront of the climate crisis, facing threats from both natural and human-induced factors. Land-use practices and human activities contribute to cumulative impacts, compounded by greenhouse gas emissions and climate change. Notably, 80% of ocean pollution originates from land-based sources such as municipal, industrial, and agricultural runoff, degrading marine ecosystems and affecting biodiversity. In response, global efforts like those from COP 28 focus on conserving natural ecosystems through changes in land use and coastal management, aligning with SDG 14 (Life Below Water) and SDG 15 (Life on Land).[1]

The link between coastal and terrestrial ecosystems highlights the relationship between SDGs 14 and 15 in addressing coastal challenges. Coastal areas, where land and sea meet, are impacted by inland human activities. Oceans, crucial for regulating the global climate, are rapidly degrading, with predictions that by 2050, plastic will outweigh fish, and by 2100, increased acidity will threaten marine life. These projections stress the need for urgent action to protect marine ecosystems.

India, with its extensive coastline stretching over 7500 kilometers along the Arabian Sea and the Bay of Bengal, exemplifies the magnitude of these challenges and the importance of concerted action. Its coastal areas encompass a diverse range of

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1 Marrakech Partnership for Global Climate Action, "Taking Stock of Climate Action on 'Land Use & Ocean and Coastal Zones'" (UN Climate Change COP 28, 2023).

ecosystems, from mangroves to coral reefs, supporting millions of livelihoods and playing a vital role in the economy and cultural heritage. However, rapid urbanization and industrialization, coupled with the impacts of climate change, pose significant challenges to both environmental sustainability and socio-economic stability. The climate crisis, characterized by rising temperatures, shifting precipitation patterns, and rising sea levels, has exacerbated vulnerabilities in coastal regions worldwide. In India, these impacts are particularly pronounced due to the densely populated coastal areas, extensive infrastructure development, and dependence on coastal resources for livelihoods and economic activities.

At the heart of India's response to the climate crisis in coastal areas lies the Coastal Regulation Zone Notification, 2019[2] aimed at conserving and protecting coastal ecosystems while promoting sustainable development. This regulatory response supposedly encompasses a wide range of initiatives, from coastal zone management plans to biodiversity conservation measures, aimed at mitigating the impacts of climate change and enhancing resilience in coastal communities. The paper aims to critically assess the effectiveness of regulatory responses in tackling the climate crisis in India's coastal zones. Through an in-depth policy analysis, the researcher explores the strengths, weaknesses, and gaps in existing frameworks and suggests areas for improvement. The focus is on evaluating the Coastal Zone Regulation Notification, with particular attention to the 2019 edition.

The first section examines how human activities, such as industrial pollution, unchecked urbanization, and unsustainable fishing, degrade coastal ecosystems, threatening their ecological and socio-economic importance. The second section reviews the regulatory framework, evaluating the 2019 notification's intent, scope, and implementation to determine its success in promoting sustainable coastal management and habitat conservation. The paper then assesses the notification's impact on addressing climate change, pointing out uncertainties about its efficacy and emphasizing the need for a more proactive approach.

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2 Ministry of Environment, Forest and Climate Change, *Coastal Regulation Zone Notification*, 2019.

Ultimately, this paper calls for a shift in coastal management, urging policymakers to prioritize the preservation of coastal ecosystems. It advocates sustainable practices that ensure the long-term resilience of these ecosystems, recognizing their vital role in both ecological integrity and human well-being.

CLIMATE CHANGE AND COASTAL VULNERABILITY

Understanding Climate Change

Throughout Earth's history, the climate has undergone significant fluctuations driven by natural factors such as changes in the Earth's orbit and volcanic activity. These variations, amplified by feedback processes within the climate system, have led to substantial shifts over different timescales. One prominent example is the glacial-interglacial cycles, particularly during the Quaternary Period, which began around 2.6 million years ago. The Last Glacial Maximum (LGM), occurring between 23,000 and 19,000 years ago, saw ice sheets covering large parts of North America, Europe, and Asia.[3]

Following the Last Glacial Maximum, Earth transitioned into the Holocene Epoch around 11,700 years ago, marked by a relatively stable and warmer climate compared to the preceding glacial period. This stability allowed human civilization to flourish, with favorable conditions for agriculture and permanent settlements. However, despite the Holocene's stability, human activities, especially since the Industrial Revolution, have significantly altered Earth's climate system. The rapid increase in greenhouse gas emissions has caused the climate trajectory to deviate dramatically from historical patterns, raising concerns about future climate dynamics and the continued stability of this interglacial period.[4]

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3 R. Krishnan et al., "Introduction to Climate Change Over the Indian Region," in R. Krishnan, J. Sanjay, *et al.* (eds.), *Assessment of Climate Change over the Indian Region: A Report of the Ministry of Earth Sciences (MoES), Government of India* 1–20 (Springer, Singapore, 2020).

4 David Q. Bowen, "Last Glacial Maximum," in V. Gornitz (ed.), *Encyclopedia of Paleoclimatology and Ancient Environments* 493–5 (Springer Netherlands, Dordrecht, 2009).

Today, an overwhelming body of scientific evidence confirms the undeniable influence of human activities on Earth's climate. Unlike natural factors such as orbital changes or volcanic eruptions, which caused climate variations over longer timescales, human-induced climate change is unprecedented in both speed and magnitude. Over the past century, global average temperatures have increased by about 1°C since pre-industrial times, with each decade consistently warmer than the last. This rapid warming cannot be explained by natural variations alone. The primary drivers are greenhouse gas emissions, aerosols, and changes in land use and land cover since industrialization, which have altered the Earth's atmospheric composition and energy balance, leading to disruptions in the climate system.

The impacts of anthropogenic climate change are already being felt globally, with more frequent extreme weather events, such as heatwaves, droughts, heavy rainfall, and severe cyclones. Other observable effects include shifts in wind and precipitation patterns, ocean warming and acidification, polar ice loss, rising sea levels, and disruptions to terrestrial and marine ecosystems. Climate models predict that, without significant intervention, global temperatures could rise by nearly 5°C by the end of this century, with catastrophic consequences for societies and ecosystems. Even if all commitments under agreements like the 2015 Paris Agreement are met, global warming is expected to exceed 3°C by the century's end.[5]

The recent 2023 Cyclone Biparjoy in the Arabian Sea served as a stark reminder of nature's alarming message, for a multitude of reasons. With heavy rainfall, coastal flooding, wind speeds reaching 125-135 kmph and gusts touching 150 kmph, it caused widespread damage to homes and standing crops, along with disrupting power supply and train movements. It was ranked as one of the most severe cyclones in recorded history, with mounting evidence pointing to its heightened intensity as a consequence of global warming. Apart

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[5] R. Krishnan et al. (eds.), *Assessment of Climate Change over the Indian Region: A Report of the Ministry of Earth Sciences (MoES), Government of India* (Springer Singapore, Singapore, 2020).

from being the fourth major cyclone to batter Gujarat in the past five years, underscoring its exceptional nature, it has garnered several distinctions as being one of the longest-lasting cyclones in the Arabian Sea and the third tropical cyclone to make landfall in Gujarat during the month of June and being the third 'extremely severe' cyclone in the Arabian Sea since 1965, with its severity exacerbated by the effects of global warming. A 2019 report of the UN Intergovernmental Panel on Climate Change (IPCC) warns of a threefold increase in severe cyclone frequency in the Arabian Sea, signaling a rapid response to climate change signals. It further underscores that the intensity of tropical cyclones in the region are reaching unprecedented levels.[6]

Vulnerability of Coasts

India's coasts face dual challenges from human development and climate change, significantly impacting the environment and coastal communities. Urbanization, industrialization, and population growth lead to habitat destruction, pollution, coastal erosion, and increased vulnerability to natural hazards. Unplanned development encroaches on vital coastal ecosystems like mangroves, wetlands, and coral reefs, resulting in habitat loss. In Kerala, extensive land reclamation has destroyed mangrove forests that are crucial for biodiversity and coastal protection.[7] Additionally, industrial activities contribute to pollution from effluents, sewage, and waste, degrading water quality and harming marine life For instance, in the industrial belt of Gujarat, the discharge of untreated industrial effluents into coastal waters has led to the contamination of marine habitats and the decline of fish stocks, impacting the livelihoods of fishing communities.[8] The

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6 "Why Cyclone Biparjoy is a rude global warming reminder," *India Todayavailable at*: https://www.indiatoday.in/india-today-insight/story/why-cyclone-biparjoy-is-a-rude-global-warming-reminder-2393557-2023-06-15 (last visited February 17, 2024).

7 Sachin Pavithran, N.R. Menon and K.C Sankaranarayanan, "An Analysis of Various Coastal Issues In Kerala," 2 *International Journal of Scientific Research And Education* (2014).

8 Jumana Shah, "Gujarat | Offshoring pollution" *India Today*, 25 December 2023.

encroachment on coastal habitats and the degradation of natural ecosystems increases the vulnerability of coastal communities to natural hazards such as storms, cyclones, and sea-level rise. Without natural buffers and resilient ecosystems, coastal areas are more susceptible to the impacts of extreme weather events and climate change. For example, the loss of mangroves and coral reefs along the coast of Andhra Pradesh has heightened the risk of flooding and coastal inundation during cyclonic storms.[9] Unplanned development and population growth exacerbate coastal erosion, threatening both human settlements and natural habitats. The removal of natural buffers such as mangroves and sand dunes, coupled with the construction of structures like seawalls and jetties, disrupts coastal processes and accelerates erosion. In Tamil Nadu, the construction of ports and harbors has altered sediment dynamics along the coast, leading to increased erosion rates and loss of land.[10]

Further, rising sea levels, a direct consequence of global warming, are leading to the gradual inundation of coastal areas, making low-lying regions increasingly vulnerable to flooding and saltwater intrusion. This phenomenon damages infrastructure, compromises freshwater sources, and threatens agricultural lands and ecosystems. For instance, the Sundarbans, a vast mangrove forest shared between India and Bangladesh, is experiencing rapid erosion, which jeopardizes the livelihoods of local communities reliant on agriculture and fishin.[11] Simultaneously, climate change is intensifying tropical storms and cyclones, resulting in extreme weather events characterized by torrential rainfall, strong winds, and storm surges that devastate coastal areas. The Michaung cyclone, which intensified unusually into a "very severe" storm in December, exemplifies this trend and is linked to rising sea surface temperatures in the Indian Ocean, which have increased by 1.1

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[9] Samdani MN, "Mangrove forests along AP coast degrading, says study" *The Times of India*, 11 October 2023.

[10] The Hindu Bureau, "42.7% of T.N.'s long coastline is eroding, reveals study" *The Hindu*, 10 January 2023, section Chennai.

[11] Kanksha Mahadevia Ghimire and M. Vikas, "Climate Change – Impact on the Sundarbans: A case study," 2 *International Scientific Journal* 7–15 (2012).

degrees Celsius since preindustrial times.[12] Furthermore, coastal erosion, exacerbated by rising sea levels and changing weather patterns, poses significant threats to coastal stability, leading to the loss of valuable land and undermining infrastructure such as roads and ports. This erosion has been particularly pronounced along the coasts of Odisha, where rising sea levels have submerged several villages, displacing communities and worsening social and economic hardships for those affected.[13]

The convergence of development pressures and climatic disturbances amplifies the challenges faced by India's coastal regions. Urgent and coordinated action is imperative to address both human-induced and natural threats. Sustainable coastal management approaches are crucial, integrating ecosystem conservation, disaster preparedness, and community resilience-building efforts. These measures can help mitigate the impacts of development and climate change while ensuring the long-term sustainability of coastal ecosystems and livelihoods.

COASTAL REGULATION ZONE NOTIFICATION, 2019

The Government of India took a significant step towards the conservation and sustainable management of coastal resources by promulgating the Coastal Regulation Zone (CRZ) Notification in 1991, under the Environment Protection Act of 1986. The Coastal Zone Regulation scheme was introduced to manage and regulate human activities along the country's coastlines. Accordingly, a zone called Coastal Regulation Zone (CRZ) was delineated to govern coastal areas up to 500 meters from the High Tide Line (HTL) and a buffer zone of 100 meters along the banks of creeks, estuaries, backwaters, and rivers subject to tidal fluctuations. This notification aimed to regulate and control developmental activities along India's coastlines to prevent further degradation of coastal ecosystems and ensure the sustainable utilization of coastal resources.

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[12] Gurinder Kaur, "Lessons from cyclone Michaung: Take better care of natural resources in coastal states" *Downt To Earth*, 11 December 2023.

[13] Satyasundar Barik, "16 villages along Odisha coast gone under seawater, State Assembly informed" *The Hindu*, 21 March 2023, section Other States.

The Coastal Zone Regulation (CRZ) notification, issued in 1991, was a pivotal step in India's efforts to manage unsustainable activities in coastal zones by balancing development and conservation.[14] It aimed to safeguard coastal communities and ecosystems but faced criticism for failing to curb industrial expansion and effectively implement regulations. This led to nearly 25 amendments and a report by the CAG highlighting the Ministry of Environment and Forests' shortcoming.[15] In 2008, the Coastal Management Zone Notification introduced a new framework focused on conservation and risk mitigation for coastal populations, but it was met with concerns from fishermen about reduced governmental oversight. A revised notification in 2011 sought to address these issues, reinforcing principles from the original CRZ notification. The 2019 iteration further refined the classification of coastal areas into four zones, considering ecological sensitivity and vulnerability to climate change. Key updates included stricter regulations for sensitive areas, a focus on ecosystem-based management, and enhanced community participation in decision-making. Overall, the 2019 notification aims to balance environmental protection, socio-economic development, and community resilience in India's coastal regions. [16]

CRZ 2011 vis-à-vis CRZ 2019

The comparison table below outlines the zonation and permitted activities under the Coastal Regulation Zone (CRZ) Notifications of 2011 and 2019. While this comparison is not exhaustive, it provides insight into the changes between the two notifications.

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14 Ministry of Environment, Forest and Climate Change, *Coastal Regulation Zone Notification*, 1991.

15 Amisha Agarwal, "Climate Change and Coastal Zone Regulation: Dilution of Coastal Protection, an Analysis of CRZ Notification, 2018," 13 *IOSR Journal of Environmental Science, Toxicology and Food Technology* 49–56 (2019).

16 Ministry of Environment, Forest and Climate Change, *Coastal Regulation Zone Notification*, 2019.

CRZ 2011		**CRZ 2019**	
Zonation	**Activities permitted**	**Zonation**	**Activities permitted**
Zone I – A: ecologically sensitive and the geomorphological features which play a role in the maintaining the integrity of the coast	no new construction shall be permitted except projects of DoAE, pipelines, installation of weather radar, construction of trans harbour sea link etc.	Zone I – A: ecologically sensitive and the geomorphological features which play a role in the maintaining the integrity of the coast	-Eco-tourism activities such as mangrove walks, tree huts, nature trails - In the mangrove buffer: pipelines, transmission lines, conveyance systems or mechanisms and construction of road on stilts, etc. that are required for public utilities. - Construction of roads and roads on stilts for defence, strategic purposes and public utilities
Zone I -B: The area between Low Tide Line and High Tide Line	7 Activities: -exploration and extraction of natural gas -construction of dispensaries, schools, public rainshelter, community toilets, bridges,etc which are required for traditional inhabitants - salt harvesting, desalination plants etc -construction of trans harbour sea links, roads on stilts or pillars - exploration and extraction of natural gas	Zone I -B: The intertidal zone	23 Activities: - Foreshore facilities like ports, harbours, Jetties etc - projects for defence, strategic and security purposes - Activities related to waterfront or directly needing foreshore facilities - Hatchery and natural fish drying. - Treatment facilities for waste and effluents and conveyance of treated effluents. - Projects classified as strategic, defence etc - Manual mining of atomic mineral(s) - Exploration and extraction of oil and natural gas and all associated activities and facilities
Zone II: The areas that have been developed upto or close to the shoreline	- buildings shall be permitted only on the landward side -	Zone II: The areas that have been developed upto or close to the shoreline	- Construction of buildings for residential purposestc. Only on the landward side - Development of vacant plots in designated areas for construction of beach resorts or hotels or tourism development projects -Temporary tourism facilities:

			shacks, toilets or washrooms, change rooms,
Zone III: -Areas that are relatively undisturbed and those do not belong to either CRZ-I or II - NDZ: Area upto 200mts from HTL on the landward side in case of seafront and 100mts along tidal influenced water bodies or width of the creek whichever is less	- No construction shall be permitted within NDZ except for repairs or reconstruction of existing authorized structure - Construction/reconstruction of dwelling units of traditional coastal communities - Area between 200mts to 500mts: development of vacant plot, Construction of public rain shelters, community toilets, water supply drainage, sewerage, roads and bridges, schools and dispensaries for local inhabitantsetc.	Zone III A: -Land areas that are relatively undisturbed with population density more than 2161 per square kilometre as per 2011 census. -NDZ: area up to 50 meters from the HTL on the landward side Zone III B: -Land areas that are relatively undisturbed with population density of less than 2161 per square kilometre, as per 2011 census - NDZ: area up to 200 meters from the HTL on the landward side	- Activities as permitted in CRZ-I B -NDZ: Mining of atomic minerals; repairs or reconstruction of existing 309uthorized structure; Agriculture, horticulture, gardens, pastures, parks, playfields and forestry; Construction of dispensaries, schools, public rain shelter for the local inhabitants; Facilities required for local fishing communities; temporary tourism facilities; -Beyond NDZ: Development of vacant plots in designated areas for construction of beach resorts or hotels or tourism development projects; Limestone mining; Mining of atomic minerals; Development of airports
Zone IV – A: The water area from the Low Tide Line to twelve	-traditional fishing and related activities undertaken by local communities	Zone IV – A: water area and the sea bed area between the Low Tide	25 Activities -Traditional fishing and allied activities undertaken by local communities. -foreshore facilities - projects for defence, strategic

nautical miles on the seaward side		Line up to twelve nautical miles	and security purpose - Activities related to waterfront or directly needing foreshore facilities - Exploration and extraction of oil and natural gas and all associated activities and facilities - Construction of memorials or monuments and allied facilities
Zone IV -B: Tidal influenced water body		Zone IV -B: Tidal influenced water body	

This comparison highlights the changes in zonation and permitted activities between the CRZ Notifications of 2011 and 2019, reflecting adjustments to regulatory frameworks and priorities in coastal management.

CRITICAL ANALYSIS OF CRZ, 2019

The comparison between the CRZ Notifications of 2011 and 2019 highlights a troubling trend where economic development often overshadows ecological concerns, particularly in tourism commercialization. The 2019 notification allows more commercial activities in sensitive coastal zones, raising fears that economic interests may undermine the well-being of coastal communities and fragile ecosystems. For example, while CRZ I-A areas, vital for ecological integrity, now permit eco-tourism activities like mangrove walks, these could increase human disturbance in sensitive habitats. Additionally, the promotion of tourism infrastructure in CRZ II emphasizes commercialization over conservation.

Relaxed restrictions in CRZ I-A and I-B, including eco-tourism and infrastructure projects, pose risks of habitat degradation, wildlife disturbance, and biodiversity loss. Activities such as salt harvesting, desalination, and land reclamation threaten coastal ecosystems by altering salinity, disrupting marine life, and increasing erosion. The expansion of commercial activities in CRZ III and IV, including tourism projects, could lead to resource conflicts and marine ecosystem degradation.

Climate change compounds these vulnerabilities, with rising sea levels and intensified storms threatening coastal communities

and infrastructure. Changes in coastal regulations must integrate climate resilience to protect these areas from heightened risks. The relaxation of regulations in CRZ II and III to allow increased development and reduced no-development zones heightens the risk of habitat destruction and exposure to coastal hazards. Similarly, in CRZ IV, allowing land reclamation and treated effluent discharge threatens marine biodiversity, especially as climate change impacts alter ocean conditions. Overall, prioritizing ecological sustainability in coastal planning is essential to mitigate these compounded risks.

The 2019 Coastal Regulation Zone (CRZ) notification has been criticized for potentially exacerbating the vulnerability and marginalization of coastal communities rather than protecting their land rights. Recommendations from the MS Swaminathan committee, which called for a land rights recognition law similar to the Forest Rights Act of 2006 to acknowledge the customary rights of these communities, have yet to be implemented. This lack of legal recognition leaves coastal residents exposed to displacement and exploitation by tourism and development projects, highlighting the urgent need for policy interventions that prioritize their rights and participation in decision-making processes. [17]

An audit by the Comptroller Auditor General (CAG) further revealed widespread violations of the CRZ regulations, with many projects not adhering to established norms. [18] Key findings included the clearance of projects without proper environmental impact assessments (EIAs) and illegal construction activities, as well as the use of outdated baseline data for approvals. The audit also noted a lack of expert participation and community engagement in decision-making, raising concerns about transparency and inclusivity in coastal development.

Overall, the CAG audit underscores the disparity between the stated goals of the 2019 notification—such as protecting coastal communities and ecosystems—and the reality of governmental

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[17] Ishan Kukreti, "Coastal Regulation Zone Notification: What development are we clearing our coasts for" *Down to Earth*, 2019.

[18] Shuchita Jha, "Coastal area projects got Centre's nod without proper environmental impact assessment, finds CAG" *Down to Earth*, 2022.

actions that favor commercialization over environmental conservation and social justice. These findings highlight a systemic failure to uphold the intended objectives of coastal management policies, suggesting that governmental priorities may lean more toward economic interests than genuine ecological preservation and community welfare.

The findings of the Comptroller Auditor General (CAG) audit regarding violations of coastal zone regulations shed light on the glaring disparities between the stated objectives of the 2019 Coastal Regulation Zone (CRZ) notification and the actual actions of the government. While the 2019 notification purported to prioritize the protection of the rights and livelihoods of coastal communities, the conservation of coastal ecosystems, and the creation of climate-resilient coasts, the audit reveals a stark contrast in governmental actions. The audit exposes how the government's actions, such as clearing projects without proper environmental impact assessments (EIAs) and allowing illegal construction activities and effluent discharges, reflect a prioritization of commercial interests over the stated objectives of coastal protection and community welfare. Despite the provisions of the 2019 notification ostensibly aiming to safeguard coastal ecosystems, the audit findings suggest a pattern of exploitation and disregard for environmental concerns.

CONCLUSION

The Coastal Zone Regulation (CRZ) Notification of 2019, while aligned with Sustainable Development Goals (SDGs), has been criticized for prioritizing commercial interests over ecological conservation and community well-being. Although India has committed to the SDGs, which emphasize the preservation of terrestrial and marine ecosystems, the implementation of CRZ 2019 shows a troubling disconnect. By allowing land reclamation, resort construction, and other infrastructure projects in ecologically sensitive areas, the notification undermines sustainability efforts and risks marginalizing local communities in favor of economic gains.

The rapid urbanization and industrialization, compounded

by climate change effects like sea-level rise and extreme weather, further stress vulnerable coastal ecosystems. Unchecked tourism development exacerbates issues such as beach erosion and habitat destruction, threatening the livelihoods of communities reliant on fishing and tourism. While these industries can drive economic growth, their unchecked expansion poses significant environmental risks.

The relaxation of restrictions in the 2019 notification raises concerns about negative impacts on biodiversity and community livelihoods. This trend towards commercialization underscores the urgent need to balance economic development with environmental protection in coastal management. To address these challenges, a reevaluation of priorities is necessary, ensuring ecological considerations are integrated with economic interests. Effective environmental impact assessments and stringent regulations are crucial to mitigating adverse effects, while promoting sustainable practices and community engagement will help safeguard the long-term health of India's coastal zones amid climate change and development pressures.

Book Review

Cyber security, privacy and data protection in EU law

*Dr. Debarati Halder, Ph.D (Law)**

Cyber security, privacy and data protection in EU law by Maria Grazia Porcedda, *Hart publishing, UK, 2023*

Cyber security, privacy and data protection in EU law By Maria Grazia Porcedda, is an excellent presentation of contemporary understanding of privacy and data protection from the lenses of cyber security and EU data protection laws. The monograph is divided into two parts and 8 chapters, the first part being dedicated to the discussions on interplay on cyber security, privacy and data protection laws. The second part deals with the discussions on technology and the triad in the Digital single market (DSM), the Area of freedom, security and justice(AFSJ) and the External action (EA). At the opening of the book, Procedaa provides an excellent graphical representation of the triad (the relationship between cyber security, privacy and data protection) and keeps the interconnection of the trio at focus from the perspective of law , policy and technology and technology. The first chapter explains triad and its challenges. Procedaa argues that while cyber security, privacy and protection are expected to be coexisting and securing each other, clashes between the three concepts cannot be ruled out. In the second chapter Procedaa goes ahead to provide crisp history of EU cyber security policies. This chapter also provides information about network infrastructure security related information, challenges and its connection with cybercrimes including electronic evidences. In the third chapter, the book discusses about privacy. In the entire book, this third chapter seems extremely interesting because of the discussions on individual privacy and its necessity in the contemporary world. Proceeda goes on to explain how family privacy and individual privacy may be considered as a challenge in the contemporary period. The chapter

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also includes discussions on interconnection with as well as challenges for the EU laws for privacy. This chapter in the conclusion also gives a wonderful summery of component of right to respect private and family life. Procedaa takes us to deeper understanding about the conundrum between security, technology, privacy and law the fourth chapter discusses about right to protection personal data. Procedaa weaves this chapter to present an intricate understanding of rights and duties circling around protection of personal data. Fifth and sixth chapters further takes up to the understanding of protection of personal data, transparency for processing of data and legal challenges. Seventh chapter essentially deals with the contemporary challenges for cyber security, privacy and data protection from the perspectives of weak policies and laws. It researches on EU data protection laws, specific provisions to understand what sorts of reconciliations are needed to prevent different types of cybercrimes including privacy related crimes. Eighth chapter continues the discussion on reconciliation of external challenges to cyber security and the triad. It meticulously points out the developments in the EU cyber security policies and the global needs to develop the said policy for a stringer resilience. This being the last chapter of the monograph, also reminds us that protection of privacy is no more the job of lawmakers, police or the courts alone. The app developers, tech companies and individuals are holistically liable for cyber security and privacy protection. The book ends with conclusion with summary of findings and research trajectory and future of triad. Each chapter of this book is divided into several parts and provides a conclusion that sums up the discussions of the chapter.

The book not only provides an engaging content for the readers, in the era of online AI enabled information that can cater to the needs of all, it also provides brain tickling cyber security cases that are explained through tables which makes the readers comfortable to understand the issues. Proceeda makes this book even more interesting by providing a list of abbreviations that are connected with different terminologies for cyber security, privacy, policies connected with cyber security and privacy protection, domestic as well as international legal documents for cyber security. The book also presents a table of cases, regulations and an excellent

Bibliography.

The book is available in hard back, paper back and e-book version. The overall design of the book, cover page, division of the chapters, table of contents and bibliography provides an excellent reading for the readers. The pricing of the book is well affordable. Overall, the book provides an excellent read for students, practitioners, lawmakers and researchers and interested stakeholders for cyber security, privacy and cybercrimes.

Book Review

A Clean take on the Dirty Dozen

*Dr. Poosarla Bayola Kiran**

The Dirty Dozen by N Sundaresha Subramaniun,

(Foreword by Dr. M.S.Sahoo; 292 + xxii, Pan Macmillan India, 2024)

In a credit economy, bankruptcy is caused by misfortune or mismanagement or both[1].

Long ago the moral foundations of repayment of loan walked into the realm of legal world, thanks to the law of obligations that made it possible. The legal obligations associated with debt repayment, though seemingly common, are different for natural and artificial persons. The difference is wider in the context of Insolvency, where there is clear asset-liability mis-match. The moral questions associated with the little or non-existing liability of people behind the insolvent companies and the possibility of their *fresh start* founded on *clean-slate* can trouble the regulatory realm. The Insolvency and Bankruptcy Code, 2016 (IBC, 2016) is a laudable attempt to deal with the insolvent entities, which hitherto roamed in the paradise of pale regulation at the courtesy of complex, converging and competing set of laws. The IBC 2016 is a landmark in the chequered history of India's tryst with the Non-Performing Assets (NPA).

The title of the book *Dirty Dozen* refers to the twelve large NPAs and the book portrayed the past, painted the present and prophesied the future (optimistically) of the biggest defaulters of the country that underwent the processes under IBC 2016. The book is divided into three parts. The first part sets the scene outlining the origins of the NPA crisis and described the dirtiest truth 'Companies Cry, But Owners Party' by unearthing the rampant corruption and undeniable political involvement. This part of the book paints a grim

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1 Philip R Wood, Principles of International Insolvency, 2nd ed., South Asian Edition, Thomson – Sweet & Maxwell, 2007.

picture of the system, as it was, and explained various ways in which promoters and corporates took advantage (both undue and unfair fall short to describe) of the regulatory gaps and pitfalls. The author had effectively connected the dots to show the gashes in the system by referring to peripherally unconnected, yet deeply connected issues in the banking system of the country. The contextual analysis of non-implementation, inaction and improper follow-ups on the recommendations of P J Nayak Committee, Anil Khandelwal Committee along with concerns raised by the All India Bank Officers' Association together portrayed a great politico-financial drama in the penumbra of regulation. The grey areas of the regulatory regime were explained in a lucid manner. The examples drawn from PPP projects, misuses of RBI circulars and pressures in the system shone light on the reasons for mounting NPAs. The part ends on low note about the mystery behind fleeing of a high-profile defaulter and explains how the system was falling short at the marvelling art of leaving the country by Vijay Mallya.

The second part is packed with a lucid analysis of the genesis of the twelve big NPAs and explained the factors contributed for emergence of the Dirty Dozen viz., Lanco Infratech, Amtek Auto, Jaypee Infratech, Alok Industries, Era Engineering, Jyoti Structures, ABG Shipyard, Essar Steel, Bhushan Steel, Bhushan Power & Steel, Monnet Ispat & Energy, and Electrosteel Steels. Each insolvent entity was dealt in a separate chapter except Bhusan Steel and Bhushan Power & Steel, which are dealt together in chapter titles Bhushan Twins. The uniqueness of the book lies in the attempt of the author to present hard-hitting facts in a smooth-tongued language and make the reader understand the systemic malaise that contributed to the NPA crisis in conjunction with frauds, scams and adventures in the grey area. Each chapter places the beginning of the corporate debtor in its opening paragraphs and then traces the problems that contributed for the corporate debtor's bad financial behaviour which ultimately classed it as NPA spiralling towards the insistence of institution of proceedings under IBC. While unfolding the CIRP proceedings of each of the dirty dozen, the author explained the last dances of the corporate debtors, graces of the creditors, grimaces of the promoters and directors.

The last part of the book deals with the aftermath wherein the author tried to cull out both the affects and effects of IBC 2016. In the chapter titled Conquerors, Survivor and Hindustan Leavers, the author examined the resilience, resources, decadence of the Indian companies and explained the efforts to various players to modify themselves to suit the need, to be specific to avoid the institution of CIRP proceedings and, further he scrutinized the consequences of such behavioural changes among companies. The chapter of RBI's response to the NPA crisis can be termed to be a write-up distilling the author's vast experience. He tried to strings the pearls and present a design that depicts the summary of RBI's attempts to tackle NPAs in the past decade or two. The last chapter explained the enforcement side struggles of law in the infancy. Though the book was about the twelve big defaulters, this chapter can be seen as a swift look at the journey of IBC, 2016, as it enumerates the efforts of IBBI, NCLT, NCLAT, High Courts and Supreme Court on one side and the union government on the other side to rise to the occasion and read, interpret, influence, modify and amend the law to protect the interests of the stakeholders and the economy as a whole.

It is a book packed with many aspects of law, written by a business journalist with a good focus of public interest. It is definitely a commendable contribution to the little and effective literature on the subject. It can stir a researcher and pose uncomfortable questions, which are the need of the hour as we are trying to usher next generation reforms for the betterment of Indian economy. It is a clean take on the dirty dozen and it highlight the struggles involved in cleansing the system.

FORM IV

Statement of ownership and other particulars about the **NALSAR Law Review**

Place of Publication	Justice City, Shaeerpet, R. R. Dist., Hyderabad - 500 078
Language	English
Periodicity	Annual
Printer's Name Nationality and address	Prof. (Dr.) Srikrishna Deva Rao Vice-Chancellor NALSAR University of Law Justice City, Shameerpet, Medchal-Malkajgiri District, Hyderabad - 500101
Publisher's Name Nationality and address	Prof. (Dr.) Srikrishna Deva Rao Vice-Chancellor NALSAR University of Law Justice City, Shameerpet, Medchal-Malkajgiri District, Hyderabad - 500101
Editor's Name Nationality and address	Prof. (Dr.) Aruna. B. Venkat NALSAR University of Law Justice City, Shameerpet, Medchal-Malkajgiri District, Hyderabad - 500101
Owner's Name	NALSAR University of Law, Hyderabad

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Tel: +91 40 2349 8104
E-mail: registrar@nalsar.ac.in
Website: www.nalsar.ac.in

ISSN 2319 - 1988