ILS
ABHIVYAKTI LAW JOURNAL
2023-24

Articles
Essays
Case Comments
Legislative Comments
LL.M. Articles
Teachers' and Ph.D. Research Articles

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Principal's Page

It is with profound happiness that I present the 2023-24 volume of the *Abhivyakti Law Journal*. This edition stands as a testament to the relentless efforts of our editorial team and the dedication of our contributing authors, whose hard work and passion have shaped the journal you hold in your hands.

ILS Law College has always strived to provide a fertile ground for academic growth, encouraging students, faculty, and researchers alike to showcase their intellectual acumen and critical thinking. The *Abhivyakti Law Journal* continues to be a proud platform that reflects the depth and diversity of legal scholarship within our institution.

This year's edition is a rich compilation of articles exploring a wide array of legal disciplines, from Arbitration Law, Labour Law, International Law, and Property Law to Digital & Media Law, Human Rights Law, Refugee Law, Sociology, and Intellectual Property Law. Our students have also engaged meaningfully with landmark judgments in areas such as Contract Law, Constitutional Law, Family Law, and Criminal Law and critically commented on these cases.

In addition to this, the journal features insightful commentaries on recent legislative developments, including the Digital Personal Data Protection (DPDP) Act, 2023; the Mediation Act, 2023; and the 106th Constitutional Amendment Act, 2023. We are also proud to include a contribution from our esteemed Assistant Professor, Mr. Rugved

Gadge, who delves into the economic dimensions of credit costs and delinquency rates in the United States.

I extend my heartfelt congratulations to all the students whose work has been selected for publication in this volume. Your scholarly contributions not only reflect your hard work but also uphold the academic excellence that ILS Law College has long been known for. A special note of gratitude goes to the editorial committee for their unwavering commitment in mentoring and guiding the contributors to present their ideas with clarity and rigor befitting our institution's legacy.

With warm regards.

Dr. Deepa Paturkar

Professor ;

Additional Charge, Principal,

ILS Law College, Pune.

Editorial

The Editorial team is elated to put forth the 2023-24 edition of the *Abhivyakti Law Journal.* The *Abhivyakti Law Journal*, an annual publication of the college, invites writings from students, research scholars and teachers.

The journal's primary purpose is to help students develop their latent creative abilities which in turn aids them in cultivating a habit of reading and writing. It helps them to hone their imaginative and intellectual skills while benefitting from widening their horizons of knowledge. This also sets an example for the other students to be inspired by their peers' experience.

We intend to bring the best out of our students through the *Abhivyakti Law Journal* as a venture to express freely without any restriction and reservation on the myriads of law topics. This year's journal is a compendium of the beautiful collection of ideas by our students and teachers. The journal is more than a publication, it is an array of information and a spectrum of imagination to ignite the minds for further quest of knowledge.

The purpose of education is said to be achieved when an individual is at her creative best. Going through this journal will prove the resourceful potentiality and enlightened expressions of ideas and information. One may come across striking burning issues on different perspectives of law and worldviews and the ingenious solutions provided to the same.

The student editorial team needs a special acknowledgement in this endeavour to make the *Abhivyakti Law Journal* a success.

"What makes a child gifted and talented may not always be good grades in school, but a different way of looking at the world and learning."- Chuck Grassley.

Finally, we extend our gratitude to all the authors who have submitted their articles.

We sincerely hope that the upcoming pages will provide an engaging reading experience.

Dr. Banu Vasudevan
Ms. Parul Raghuwanshi
Faculty Editors,
Abhivyakti Law Journal
2023-24

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I, Principal Dr. Deepa Paturkar, hereby declare that the particulars given above are true to the best of my knowledge and belief.

Dr. Deepa Paturkar
Professor ;
Additional Charge, Principal,
ILS Law College, Pune

Acknowledgments

We congratulate each of the student author who has helped us in bringing out yet another interesting and thought-provoking annual edition of the *Abhivyakti Law Journal* 2023-24.

We also appreciate the sincere and diligent editorial skills of our student editors

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ARTICLES

Clarifying Arbitration Awards: The Evolution of *'Interest on Interest'*

Aarya Balte
III B.A., LL.B.

Arbitration has always been a pragmatic and efficient method of dispute resolution for commercial disputes, owing to the flexibility and autonomy it provides. An imperative facet of arbitration is the competence of arbitral tribunals to award remedies. This includes the interest on sums owed- a vital tool in matters that involve delayed payments. But what about awarding interest on interest, commonly known as compound interest? Would it be an overreach of authority by arbitral tribunals?

Case Background

The Apex Court, in a recent ruling in the case of *UHL Power Company Ltd. v. State of Himachal Pradesh,*[1] affirmed the power of an arbitrator to sanction 'interest on interest' or compound interest.[2] The court relied upon its precedent in *Hyder Consulting (UK) Ltd. v. Governor, State of Orrisa*. It asserted that Section 31(7) of the Arbitration and Conciliation Act, 1996,[3] the statute governing arbitration law in India; expressly permits arbitral tribunals, the volition to grant interest on the total 'sum' directed for payment vide an arbitral award, including any interest formerly awarded therein.

The Supreme Court's ruling is based on extensive deliberation on the facts of *UHL Power Company Ltd. v. State of Himachal Pradesh* and the existing legal position on the said matter. An arbitral award was passed as a consequence of arbitration proceedings between UHL Power Company Limited and the State of Himachal Pradesh and pursuant to an arbitral award,

[1] UHL Power Co. Ltd. v. State of Himachal Pradesh, 2022 LL SC 18.
[2] Ibid.
[3] The Arbitration and Conciliation Act, No. 26 of 1996, § 31(7), India Code (1996).

UHL was awarded, among other things, a sum of Rs. 26,08,89,107, with a pre-claim interest-the interest computed on the money owed for the duration before the arbitration claim is made. Besides, compensating the party for the delayed payment leading up to arbitration; compound interest until claim filing, and future interest contingent to the non-payment of the awarded amount within six months. The post-award process comprises the compliance period, during which the losing party is given a period of six months to pay the amount awarded by the arbitral tribunal. Consequently, if the payment is not made in time, additional interest starts accruing.

The said award was challenged by the State of Himachal Pradesh under Section 34 of the Arbitration and Conciliation Act, 1996 ("the Act"), however, a Single Judge of the Himachal Pradesh High Court invalidated UHL's claim. A Division Bench of the Himachal Pradesh High Court inter-alia partly set aside the decision of the single Judge when his decision was challenged before the Division Bench. The appeal was made under Section 37 of the Act[4]. UHL's claim for the principal amount with simple interest was upheld by the Division Bench. Reliance was placed upon the decision of the Apex Court in the *State of Haryana v. S.L. Arora*[5] ("the S.L. Arora case") to prohibit the sanction of compound interest awarded by the arbitrator.

Both parties were aggrieved by the decision of the Division Bench and approached the Hon'ble Supreme Court by filing individual civil appeals. The Supreme Court assessed the existing legal position in the *S.L. Arora case*. In the said case, a Division Bench of the Apex Court held that an arbitral tribunal is incapable of awarding compound interest unless the contract expressly provides for it or an authority constituted under the Act mandates it. The Supreme Court placed its reliance on Section 3(3)(c) of the Interest Act, 1978,[6] which disallows an arbitrator from awarding interest upon interest. Interestingly, the Court expounded Section 31(7) of the Act to mean that it applies to the principal claims- the main monetary claims arising from the primary dispute in a contract, and not to interests or costs, which are

[4] The Arbitration and Conciliation Act, No. 26 of 1996, § 37, India Code (1996).
[5] State of Haryana v. S.L. Arora, [2010] AIR SC 1511.
[6] The Interest Act, No. 14 of 1978, § 3(3)(c), India Code (1978).

incidental thereto. Thus, if the main agreement or the arbitration agreement does not mention interest, explicitly, then the arbitral tribunal is incompetent to grant compound interest before or after the passage of the arbitral award.

It is imperative to note that the abovementioned findings in the *S.L. Arora case* were declared bad in law when a Full Bench of the Supreme Court, through its majority decision in *Hyder Consulting (UK) Ltd. v. Governor, State of Orrisa,*[7] decided that the decision in the *S.L. Arora case* does not align with the verbatim and understanding of Section 31(7) of the Act. The Court made the following observations:

1. The verbalization *"include in the sum for which the award is made" or "sum directed to be paid by an arbitral award", employed in Section 31(7), pertains to the total amount for the payment of which an award is issued. The Act does not specify "principal" as a prefix for "sum", thus, "sum" refers to a particular amount of money which could be inclusive of both principal and interest or either of them, depending upon the context.*
2. There is no distinction between a "sum" with interest and one devoid of it. When interest makes a part of the awarded sum, it is inseparable from the primary amount. Section 31(7) of the Act allows the arbitral tribunal to sanction interest even in the absence of an express mention of the same, in the contract.
3. Section 34 of the Code of Civil Procedure, 1908,[8] authorizes the Court to sanction interest on the principal amount awarded, unlike Section 31(7) of the Act which makes use of the term "sum" without specifying "principal."
4. The legislature, having the indubitable authority to codify laws on the matter, has explicitly stated in Section 31(7) of the Act that arbitral tribunals can award interest on the sum to be paid. It is an established principle in law that when the language of a statute is clear, the Court must comply with it, irrespective of the outcome. The Court has no power to alter or add to a statute's words or read between the lines. Section 31(7) of the Act requires no interpretation and is unequivocal.

[7] Hyder Consulting (UK) Ltd. v. Governor, State of Orissa, [2015] AIR SC 856.
[8] The Code of Civil Procedure, No. 5 of 1908, § 34, India Code (1908).

However, Hon'ble H.L. Dattu, CJI in his dissenting opinion,[9] supported the decision of the Court in the *S.L. Arora* judgment.

In the UHL case, the Apex Court's full bench upheld the legal position laid down by the majority ruling in the *Hyder Consulting* case. The bench reiterated that arbitrators can sanction post-award interest on the interest amount awarded formerly. The decision of the Division Bench that only simple interest could be awarded, was overturned and the original award of compound interest to UHL was restored.

Critical Analysis

The ruling by the Apex Court in *UHL Power Company Ltd. v. State of Himachal Pradesh* signifies a progressive step in understanding the application of compound interest in arbitral awards. The Hon'ble Court's proclamation of the arbitrator's power to sanction 'interest on interest', based on Section 31(7) of the Act cerebrates a nuanced exposition of statutory provisions and a deviation from conflicting antecedents.

The case emphasizes the intricacies inherent in reconciling statutory jargon with judicial elucidation. Section 31(7) of the Act serves as a centrepiece of the Court's interpretation, with a plethora of views emerging on its meaning and insinuation. The Court's decision to place reliance on the ratio set in *Hyder Consulting (UK) Ltd. v. Governor, State of Orrisa*, rather than sticking to the constrictive interpretation advocated in the *S.L. Arora case* exhibits an eagerness to adapt legal principles to modern-day realities.

Section 31(7) has been interpreted by the Hon'ble Court in a particularly interesting manner. By highlighting the absence of the term 'principal' as a prefix for 'sum', the Court inflates the scope of the provision to include both principal and interest. This all-encompassing interpretation aligns with the legislative intent to strengthen arbitral tribunals to award compound interest wherever deemed fit.

Additionally, the Court's examination of the correspondence between Section 31(7) and Section 34 of the Code of Civil Procedure, 1908, furnishes deeper

[9] S.L. Arora, supra note 1, at 1.

insights into the legislative framework directing interest awards. The clear distinction drawn between the sphere of command of arbitral tribunals and Courts to sanction interest on the principal sum underlines the distinctive role of arbitration in resolving disputes expeditiously. The dissenting opinion by Hon'ble H.L. Dattu CJI. further highlights the divergence of opinions within the judicial structure. Hon'ble H.L. Dattu, CJI's dissenting judgment[10] analysed the contested interpretation of Section 31(7) of the Act as deliberated in the *S.L. Arora case*.

The analysis made by the Hon'ble Judge, of the language used in Section 31(7) emphasises the importance of textual interpretation in statutory examination. H.L. Dattu, CJI, shed light on the distinct phrases used in the provision, such as *"where and insofar as an arbitral award is for the payment of money" and "the Arbitral Tribunal may include in the sum for which the award is made, interest… on the whole or any part of the money"* in Cl. (a), and "a sum directed to be paid by an arbitral award shall… carry interest" in Cl. (b). These phrases, according to the Judge, signify that the intention of the legislature was to contemplate the award only for simple interest and that interest on interest or compound interest cannot be read into the language of Section 31(7).

The term "sum" in Section 31(7) holds an important position in Judge Dattu's dissenting opinion. The Hon'ble Judge opined that the meaning of "sum", according to his examination of legal dictionaries specifically means the principal amount to be paid vide the arbitral award. Any interest *pendente lite* is excluded from the ordinary meaning of the term "sum". Pertinently, this narrow interpretation of the term "sum" restricts the scope of interest awards to simple interest on the principal amount and aligns with the rationale in the *S.L. Arora case*.

Furthermore, Hon'ble Judge Dattu underscored the basal importance of interest awards in arbitral proceedings. He argued that the purpose of post-award interest is to compensate the aggrieved party when the defaulting party withholds the principal amount, rather than withholding interest itself. Thus,

[10] S.L. Arora, supra note 2, at 1.

interest awards should fundamentally be directed towards compensating the claimant when there is a delay in the receipt of the principal amount, rather than aggrandizing the interest *pendente lite*.

Hon'ble Judge Dattu sought to establish a clear interpretation of the statute by delving deeper into the semantic intricacies of Section 31(7) and the legislative intent. Judge Dattu's dissent highlights an interesting aspect concerning interpretative difficulties inherent to arbitration law. The varying interpretations of Section 31(7) shed light on the contemporary debate within the judiciary about the scope of interest awards in arbitration. The dissent plays an important role in serving as a reminder to place statutory analysis in legal matters, on the highest pedestal and adds depth to the debate around interest awards. The majority's rejection of the orthodox interpretation of Section 31(7), however, outlines the modern judiciary's commitment to forge ahead the principles of arbitration law in the Indian landscape.

Interest on interest, popularly known as compound interest is a notable headway in the field of arbitration, owing to its manifold benefits and inferences. It is considered progressive due to its ability to provide a just and equitable recompense to the discontented party. The very goal of arbitration is to provide discourses that place the claimant in the position they would have been in had the dispute not occurred. Simple interest is incapable of completely recompensing the monetary loss suffered by the claimant over the time taken to reach an equitable settlement.

Furthermore, the sanction of interest on interest serves as a formidable deterrent against defiance of arbitral awards. Parties to an arbitral proceeding are more likely to adhere to the terms of the arbitral award and accelerate payment when they discern that interest will amass not only on the principal amount but also on the already accumulated interest. The sanction of compound interest, inter alia, brings the arbitration practice in India, in line with the international best practices. Leading arbitral authorities, such as London, Singapore, and Paris are known to routinely award compound interest on the defaulting parties to ensure that the claimants are compensated sufficiently and equitably. With this progressive step, the Indian arbitral

landscape is set to enhance its credibility and reputation as a destination for international arbitration.

Conclusion

From a procedural outlook, the sanction of compound interest encourages vital values such as transparency and uniformity in arbitral proceedings. Parties are provided with lucidity concerning the permissibility of compound interest under various circumstances. This clarity is essential to avoid post-award challenges and disputes and streamline the enforcement of arbitral awards, thereby instilling confidence in the arbitral process.

On a concluding note, the decision in *UHL Power Company Ltd. v. State of Himachal Pradesh* is a watershed milestone in the progression of arbitration law in India. An even-handed and efficacious dispute-resolution model is created by the robust interpretation of Section 31(7) of the Act, and the affirmation of the arbitrator's authority to sanction compound interest. An innovative approach has been adopted to embrace contemporary legal vicissitudes, ensuring that arbitration remains efficient and pertinent in solving complex commercial issues.

Navigating through the Legal Facets in Troubled Waters of South East Asia

Avantika Patra & Kanishka Khamkar
II B.A., LL.B.

Introduction

In the simplest of terms, maritime piracy is a range of unscrupulous activities like hijacking, kidnapping, illicit smuggling, and trafficking in the high seas that are beyond the jurisdictional waters of States[1] The focal point of this article will be on Maritime Piracy in the South East Asian region. South-East Asia, especially the Malacca Strait, has witnessed a surge of maritime piracy in different spans over the years. This region comprises a variety of factorsthat provide a conducive environment for the surge in piracy.[2] These factors are multifold; however, the most highlighted ones are: -

i) The region possesses limited resources and capacity for navies, coast guards, and other law enforcement agencies to regularly coordinate patrolling and monitoring activities.

ii) The countries in this region tend to have overlapping legal frameworks. This has also led to many internal and transnational conflicts between South Asian countries around Malacca Strait.

iii) The most concerning issue in the region is that of jurisdiction while prosecution.

iv) Two other factors are: first, 'the availability of political space and time' and second, 'access to economic infrastructure'. The presence of political space leads to acts of piracy like kidnappings in a politically unstable State. Whereas a flourishing economy requires colluding port authorities to facilitate

[1]Piracy Under International Law (no date). https://www.un.org/depts/los/piracy/piracy.htm.
[2]ICC-IMB PIRACY AND ARMED ROBBERY AGAINST SHIPS REPORT, 2023_Annual_IMB_Piracy_and_Armed_Robbery_Report_live.pdf (last visited Nov. 16, 2024).

the seizure of cargoes and ships, as well as their effective disposal by pirates. These factors will now be dealt with in the further sections of the article.

Chronological Events of Maritime Piracy in Southeast Asia

The first crucial advent of piracy in South-East Asia was during the Asian Financial Crisis of 1997-98 dominated by 'sophisticated attacks' like ship and cargo seizures. This was followed by another surge in 2009-2011 due to Global Financial Crisis, the 2014-15 period encountered plummeting oil prices which were exploited by criminal gangs to hijack and sell it on 'black market'.[3] Fortunately, 2016 witnessed a substantial drop in "ships/cargo seizures" and 2017 experienced a dip in 'maritime kidnappings'[4]. In 2020, piracy spiked again. This was because legal administration and financial sources were streamlined for pandemic, widespread anchorages outside ports tempted the pirates. However, dipped to pre-pandemic levels in 2021.[5]

Navigating the Maritime Piracy Landscape in the Region

Post-2007 maritime attacks were largely within the shipping lanes between Sabah, Malaysia, and Mindanao, an area in the vicinity of outbursts plagued by the presence of the Abu Sayyaf Group (ASG). ASG was an extremist terrorist group in the Sulu Sea[6]. These events do not substantiate ASG's involvement in the pirate attacks but pinpoint a clandestine relationship between the two elements. Moreover, piracy is considered a major source of income for ASG to finance its operations. Thus, the line between piracy and ASG activity becomes difficult to draw in this context.[7]

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[3]Ian Storey, Piracy and the Pandemic: Maritime Crime in Southeast Asia, 2020-2022, FULCRUM-Analysis on South-East Asia, accessed 5th May, 2:00 pm, https://fulcrum.sg/piracy-and-the-pandemic-maritime-crime-in-southeast-asia-2020-2022/

[4]THE UNIVERSITY OF BRITISH COLUMBIA, https://paca2018.sites.olt.ubc.ca/files/2021/05/pdfHollandShortlist2020_Hastings.pdf (last visited May. 15, 2024).

[5]THE UNIVERSITY OF BRITISH COLUMBIA, https://paca2018.sites.olt.ubc.ca/files/2021/05/pdfHollandShortlist2020_Hastings.pdf (last visited May. 15, 2024).

[6]Id. at 28.

[7]RECAAP INFORMATION SHARING CENTRE, https://www.recaap.org/resources/ck/files/reports/quarterly/ReCAAP%20ISC%201st%20Quarter%202024%20Report.pdf (last visited May. 15, 2024).

From the Indonesian perspective, the Acehnese Insurrection led to the Aceh Independence Movement called GAM in 1976 which led to a major Indonesian Military offensive in 2003[8]. During this Indonesia deployed its 'operational navy' to Aceh thus diverting the Navy's resources from the anti-piracy patrols. There was a breakdown of State capacity in Aceh during the GAM movement from almost 2001 to 2005.[9] This breakdown of State capacity opened the door for piracy to flourish. This was a significant factor contributing to piracy on the Sumatra coast side of the Malacca Strait. In the past, there had also been allegations of GAM engaging in piracy and ARAS to secure funding[10].

Ensuring navigational safety in straits jointly administered by several countries is by default a complex task. Furthermore, numerous and transnational conflicts between South Asian countries surrounding the Malaccas Strait provided the perfect breeding ground for piracy. In addition to this, these conflicting claims in the South China sea create a jurisdictional vacuum because of which implementing national and international maritime laws becomes challenging. Imprints of the colonial past have made these countries historically sensitive to territorial and maritime sovereignty.

Regional Initiatives

Concerns of widespread piracy prompted the Lloyd's of London (insurance market) Joint War Risk Committee to designate Malacca Strait as a war zone in its war zone's list in 2005. This resulted in steeper insurance premiums, to reflect heightened risk for vessels operating there[11]. The littoral States initially denounced this decision. But later in retaliation, launched several initiatives to enhance security in the Strait. They joined their forces by implementing a series of coordinated security measures to combat piracy and demonstrate

[8]UNITED STATES DEPARTMENT OF JUSTICE, https://www.justice.gov/file/266371/dl?inline= (last visited Nov. 16, 2024).
[9]INTERNATIONAL COURT OF JUSTICE, https://icj-cij.org/case/130 (last visited May. 15, 2024).
[10]Bateman, S. (2009) 'Piracy and Armed Robbery against Ships in Indonesian Waters', in R. Cribb and M. Ford (eds.) *Indonesia beyond the Water's Edge: Managing an Archipelagic State*. ISEAS–Yusof Ishak Institute (Books and Monographs), pp. 117–133.
[11]Khalid, N. (2006) 'Security in the straits of Malacca,' *The Asia-Pacific Journal | Japan Focus*, 4(6), pp. 1–3. https://apjjf.org/wp-content/uploads/2023/11/article-1838.pdf.

their collective commitment to a safe and secure Strait[12]. These measures exhibited their effectiveness in tackling piracy, reassuring the international community of their capacity to respond expeditiously and convince insurers to reconsider the Strait's war zone classification.

Some of the initiatives by the littoral States are discussed further below.

i) MALSINDO was one such initiative launched in 2004 where Malaysia, Singapore, and Indonesia performed coordinated sea patrols to establish effective sea surveillance and coordination mechanisms.[13] It was the first time the littoral States expanded their maritime cooperation from a bilateral to a trilateral one. But MALSINDO was heavily criticised for restricting the member States from crossing the territorial borders while carrying out security operations due to sovereignty concerns. Sovereignty concerns resulted in MALSINDO being coordinated patrols instead of joint patrols which reduced the initiative's overall efficacy.[14]

ii) MALACCA STRAIT PATROL: - In June 2005, Indonesia, Malaysia, Singapore, and Thailand founded a collaborative framework called the Malacca Straits Patrol ('MSP') to secure the Malacca Strait. It encompasses 'Malacca Straits Sea Patrol' ('MSSP'), 'Eyes-in-the-Sky' ('EiS'), and 'Intelligence Exchange Group' ('IEG'). The EiS includes 'Joint Maritime Arial Patrols' to Strengthen Sea patrols by adding air surveillance capabilities and enhancing overall maritime security. The IEG bolsters the MSSP and EiS by facilitating information sharing through the Malacca Straits Patrol Information System managed by the Information Fusion Centre ('IFC').[15]

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[12]Ibid. at 6.
[13]NAVAL POSTGRADUATE SCHOOL, HTTPS://NPS.PRIMO.EXLIBRISGROUP.COM/PERMALINK/01NPS_INST/OFS26A/ALMA991005398846703791 (last visited May. 15, 2024).
[14]RECAAP INFORMATION SHARING CENTRE, https://www.recaap.org/ (last visited May. 15, 2024).
[15]INFORMATION FUSION CENTRE, https://www.ifc.org.sg/ifc2web/app_pages/User/commonv2/aboutus.cshtml (last visited May. 15, 2024).

MSP being a 'defence diplomacy' activity promoted intergovernmental dialogues amongst military officials and multilateral military exercises to develop mutual trust, build confidence, expand cooperation, and amplify defence capability to tackle piracy.

The contracting parties established MSP for four main reasons.[16] First, united by a common concern, they all viewed the escalating piracy in the Strait as a serious security risk. Second, keeping in mind their national economic interests, securing Malacca Strait, a vital artery for the global and Southeast Asian trade was paramount for their economic well-being and prosperity. Third, in response to the changing dynamics of the strategic landscape, the littoral States desired greater regional cooperation fostering regional stability and alleviating international anxieties shared by the global maritime community. Fourth, technology and information sharing to handle regional threats.[17]

iii) INFORMATION FUSION CENTRE: - It played a major role. It's a 'regional Maritime Security (MARSEC) center' at Changi Command and Control Centre, staged by the Singapore Navy. IFC disseminates 'actionable information' to help regional and international maritime forces and coast guards mitigate MARSEC threats like piracy and ARAS. It collaborates with ReCAAP ISC to co-publish Regional Guides and statistical reports on 'theft, robbery, and piracy at Sea' ('TRAPS'). A different aspect that IFC brings into the picture is that it reports the unauthorized boardings on vessels along with piracy & ARAS[18].

iv) ReCAAP :- A major breakthrough came with the implementation of the Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia ('ReCAAP') and ReCAAP Information

[16]MINDEF SINGAPORE, https://www.mindef.gov.sg/web/portal/mindef/news-and-events/latest-releases/article-detail/2016/april/2016apr21-news-releases-00134/ (last visited May. 15, 2024).
[17]S. RAJARATNAM SCHOOL OF INTERNATIONAL STUDIES, https://www.rsis.edu.sg/rsis-publication/idss/718-malacca-straits-a-war-risk/ (last visited May. 15, 2024).
[18]INFORMATION FUSION CENTRE, https://www.ifc.org.sg/ifc2web/app_pages/User/commonv2/aboutus.cshtml (last visited May. 15, 2024).

> Sharing Centre ('ReCAAP ISC') on 4 Sep 2006 in Singapore.[19] It was the first Asian regional multilateral agreement that reiterated the 'duties' and set 'obligations' for each 'contracting party' towards 'prevention and suppression' of piracy and ARAS to the greatest degree in accordance with the international anti-maritime piracy framework like UNCLOS.[20]

The foundation of ReCAAP ISC lies in expeditious 'information sharing, capacity building, and cooperative arrangements' like joint patrols. In March 2024, ISC launched an 'enhanced mobile application' for information sharing and reporting incidents. It prepares statistics, reports, and guides together with its partner organisations like IFC, etc. In one of its recent reports, it reaffirmed the threats of crew members being abducted for ransom by the remnants of Abu Sayyaf Group (ASG) in the Sulu region of southern Philippines and the Tawi area.

ReCAAP is acclaimed for distinguishing between definitions of piracy and ARAS (Article 1). It provides for the 'arrests of pirates' and persons committing such acts, the seizure of ships used for or under the control of such people and onboard property confiscation. It also includes rescue operations for piracy victims. It provides extradition provisions (Article 12) where a member State shall coordinate the extradition process of persons who have perpetrated privacy or ARAS to the other member State that has legal jurisdiction over them. However, as discussed above there exists a jurisdictional vacuum in the Malacca Strait because of the lack of delineation of maritime boundaries caused by conflicting territorial claims. This legal quandary makes the execution of the extradition provision challenging. ReCAAP also establishes the facilitation of 'mutual legal assistance' and 'dissemination of evidence' to the respective member states.

Nevertheless, the implementation of the above measure and several other measures in ReCAAP have a significant limitation. It is the requirement that

[19]ReCAAP Information Sharing Centre, https://www.recaap.org/about_ReCAAP-ISC (last visited May. 15, 2024).
[20]ReCAAP Information Sharing Centre, https://www.recaap.org/resources/ck/files/ReCAAP%20Agreement/ReCAAP%20Agreement (1). pdf (last visited May. 15, 2024).

the administration of every provision in ReCAAP should conform with the 'national laws' of respective nations. Unfortunately, all four littoral States in Malacca Strait don't have any dedicated Anti-Maritime Piracy or ARAS legislation. And even the existing penal codes they implement on maritime security are of a disorganised and rudimentary nature.

Another setback is that ReCAAP's membership currently doesn't include Malaysia and Indonesia. Even if Malaysia and Indonesia actively collaborate with it on an operational level this does not fill the legal gap their absence creates.

Though it lacks effective enforcement mechanisms, it has proven successful in certain aspects. With further improvements, ReCAAP has the potential to become significantly more effective.

Reflecting On the Provisions of International Law

After shedding light on the conflict and vulnerabilities regarding law enforcement in the region and the effectual multilateral cooperation, delving into the critical role of International Law in combating this grave concern is essential. Since piracy is endemic to high seas beyond the jurisdiction of nations, in certain cases due to varied factors, nations relinquish their powers and responsibility to penalize such acts. Here the onus falls on international frameworks to give just and equitable decisions.

1) UNCLOS (United Nations Convention on the Law of the Sea, 1982) : - Navigating through the relevant provisions of the UNCLOS, one would understand that from Articles 100 to 107 and 110 deal with the issue of " repression of piracy".[21] The United Nations Convention on Law of the Seas, 1982 ('UNCLOS') under Article 101 gives a definition of piracy stating it as an "'*illegal act of violence or detention in the high seas against another ship or aircraft, or against persons or property on board such ship or aircraft*." Another important term being the act should be committed to 'meet private ends'. Article 100 obliges states to fully coordinate in combating piracy. Article 105 lays down guidelines on the seizure of pirates and properties on board a ship, they must be beyond

[21] *Piracy under international law* https://www.un.org/depts/los/piracy/piracy.htm#:~:text=The%201982%20United%20Nations%20Convention,100%20to%20107%20and%20110.

the jurisdictional borders of a state, somewhere in the High Seas. The authority to decide on respective punishment is at the discretion of the seizing state's laws. However, according to Article 106, if proven the seizure was executed without firm grounds, the seizing State may have to bear liability for losses. [22]

A significant distinction created by UNCLOS is the delineation of armed robbery and piracy. Piracy clearly is endemic to the High Seas, whereas those attacks occurring within territorial waters of the State are termed Armed Robbery.[23] The International Maritime Organisation's Code of Practice also denotes this segregation as pivotal. Here, the onus of determining the punishment lies on the State on whose territory the act was committed.[24] The South-East has confronted obstacles of both Armed Robbery and Piracy. Many countries do not ascertain an elaborate and steady legal framework for the same, this contention echoes in the nascent framework of Malaysia and Indonesia whose counter-piracy laws are not as dynamic.

Nonetheless, certain aspects of UNCLOS expounds significant ambiguity and does not seem to ponder upon the resources and frameworks of many countries. Starting from its definition of piracy to its provision of penalising do not seem to wholly take the plunge to govern regions. This was evident in the *Achille Lauro* incident of 1988 (4 terrorists hijacked an Italian cruise ship)[25] where UNCLOS failed to punish the perpetrators under Article 101. This was because, for conviction, the

[22]Hasjim Djalal , PIRACY IN SOUTH EAST ASIA: INDONESIAN & REGIONAL RESPONSES, Volume 1 Number 3 Marine Law Affairs, Indonesian Journal of International Law, 3-5, 12-14, August 2021.
[23]Marshall Reid, Countering Maritime Piracy in Southeast Asia, The International Affairs Review, accessed 5th May,2024, https://www.iar-gwu.org/print-archive/qkr0pd3r06y36dbx1ci21ve79ybhjz#:~:text=28%20Localized%20anti%2Dpiracy%20campaigns,enforcement%20of%20anti%2Dpiracy%20laws.
[24]Prakash Panneerselvam and K.G. Ramkumar, Piracy and Armed Robbery in Southeast Asia: The Need for a Fresh Approach, The Diplomat, accessed 3rd May,2024, https://thediplomat.com/2023/05/piracy-and-armed-robbery-in-southeast-asia-the-need-for-a-fresh-approach/#:~:text=The%20United%20Nations%20Convention%20on,is%20considered%20an%20armed%20robbery%2C.
[25]SAFETY4SEA (2021) 'Achille Lauro hijacking: A tragic example of maritime terrorism,' *SAFETY4SEA*, 9 April. https://safety4sea.com/cm-achille-lauro-hijacking-a-tragic-example-of-maritime-terrorism/.

term 'acts committed for private ends' was a vital prerequisite. The incident created diplomatic and political duress, where countries urged for formulation of an updated and codified framework for such criminal prosecutions.

2) Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA), 1988: The "Achille Lauro Incident" constituted grounds for the formulation of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation ('SUA'), 1988. This convention stipulates a broader definition of maritime piracy encompassing acts of varying magnitudes like 'unwarranted boarding of ships', cargo thefts and seizures, acts of intimidation or threats likely to peril ships traversing swiftly through the waters, transmitting misinformation and most notable being incorporation of armed robbery within territorial waters. Article 6(1) of SUA dictates grounds on which states can establish jurisdiction and initiate actions of piracy and maritime crimes. Article 10(1) stipulates the authority of States to prosecute offenders, whereas Article 11(1) allows for extradition based on extradition treaties between states, however in the absence of any such treaty, Article 11(2) prescribes SUA as a legal premise for extradition. [26]Despite this, the convention has countered significant issues regarding its implementation due to a variety of factors like intricate geographical structures, unclear criminal networks, the regional interests not aligning with the goals of the convention etc.[27]

3) International Maritime Organisation: The International Maritime Organisation's role highlights a fundamental ingredient. The data related to the number of alleged attacks arising in the zones, how they are addressed, and the type of attacks happening. IMO is a quintessential

[26]*Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf* (no date). https://www.imo.org/en/About/Conventions/Pages/SUA-Treaties.aspx#:~:text=In%20March%201988%20a,damage%20it.&text=Safety%20of%20Maritime%20Navigation.The,damage%20it.&text=persons%20committing%20unlawful%20acts,damage%20it.&text=persons%20on%20board%20ships%3B,damage%20it.

[27]Klein, N. and University of New South Wales (2023) *Responding to Maritime Terrorism in Southeast Asia: What Are the Alternatives to the 2005 sua Protocol?*, *Asia-Pacific Journal of Ocean Law and Policy*. journal-article, pp. 221–241. https://doi.org/10.1163/24519391-08020003

standard in such cases since it has been one of the oldest and bonafide source datasets. It consolidates data from the International Maritime Bureau's ('IMB') Piracy Reporting Centres and those of national governments and disseminates it in public space. IMO's published data exhibits information sorted into discrete categories like 'ship's size, its prevailing status, and the amount of violence used'. As of 2020, a culmination of the IMO dataset displays about 4951 incidents, out of which 2273 are attributed to Southeast Asia.[28]

Issue of Jurisdiction- A Key Concern

According to the international maritime legal framework governed by UNCLOS, the location of the incidence of piracy and ARAS becomes crucial in determining which country has legal jurisdiction for prosecuting the crime. Moreover, it helps piracy information centres in determining jurisdictional piracy hotspots. A bone of contention on similar lines facilitates piracy in Southeast Asia, it is the conflicting maritime boundary claims by the littoral States in the Malacca Strait. In the northern region of Malacca Strait near the Sumatra Islands, the opening of the Strait is quite narrow as a result both Indonesia and Malaysia have reached a deadlock over their overlapping claims on 200nm EEZs. Both have ex parte marked their EEZs as per their interpretation of laws in a way that benefits their respective countries. The lack of demarcation on the eastern end of the Strait, the South Ledge and competing claims in the South China Sea pose problems. With the South China Sea region being an already complicated and disputed region, the ambiguous boundaries emerge as an impediment in maximising security collaboration amongst the littoral States. The reason being that for legislating on any pirate act deciding the state of jurisdiction forms an important aspect of the procedure. However, the enforcement concept of 'Universal Jurisdiction'[29] which has been appended in Customary International Law, can become a key answer to the question of Jurisdiction. It is a mechanism to impede impunity, since it grants authority to States to prosecute offenders of

[28]*Maritime Security and Piracy*.
https://www.imo.org/en/ourwork/security/pages/maritimesecurity.aspx#:~:text=In%20addition%2C%20IMO%20provides%20assistance,activities%2C%20if%20and%20when%20requeste.
[29]What is Universal Jurisdiction? UNOHCHR Seoul,
https://seoul.ohchr.org/sites/default/files/2022-10/09_What%20is%20Universal%20Jurisdiction_formatting_FIN_ENG.pdf.

crimes with extortionate magnitudes, despite the fact that the crime was not committed in the respective state, or the perpetrator did not belong there. It legally empowers a third country to determine the liability of the perpetrator.[30]

Gaps in legislation under International Framework

In this conflict-prone maritime zone, International Law could have been a coherent solution, however, the obscure inconsistencies and ambiguity in UNCLOS' clauses entail the need to erect a more intricate, elaborate, and informed framework on the issue. However, the non-delineation of maritime boundaries, territorial sea waters, archipelagic baselines, and consequent jurisdictional ambiguity make the implementation of the international maritime framework difficult in Southeast Asia. The SUA Convention whose intent was to fill these inadequacies and formulate a codified structure, has failed to attain effective impetus in the region. This is due to the fact that the major littoral States of Indonesia and Malaysia, and other regions are not parties to the convention and its protocols, thereby rendering it ineffective in the region.[31]

Why do countries prefer regional cooperation over International Intervention?

The littoral states, emphasizing self-reliance, are cynical about international intervention and multilateral military pacts which are considered to jeopardize national sovereignty. Consequently, the countries are less receptive to 'extra-regional intervention' and believe in addressing the security concerns themselves. In spite of these redundant conflicts and skepticism in the region, it has increasingly shifted and relied on multilateral co-operations whose groundwork was laid in the agreement between Indonesia and Singapore for 'information sharing' in 1992, and the relative consistency has been maintained by the ReCAAP. Aside from that, the authorities seem to be working in a harmonious construction and ready to concede authority to some capacity with other agencies as well. They have joined forces with IMB's Piracy Reporting Centre ('PRC'), to deliberate on ways and means to inhibit

[30]UNIVERSAL JURISDICTION, ECCHR, https://www.ecchr.eu/en/glossary/universal-jurisdiction/.
[31]Robert Beckman, Piracy and Armed Robbery against Ships in the Southeast Asia: A Critical Evaluation with a Focus on the Singapore Strait, 8 (2023) 201–220, 3-5, 2023.

this issue. Though not central to its agenda or area of interest, the ASEAN seems to have taken pertinent measures regarding the same. The Federation of ASEAN Ship-owners Association (‘FASA’) and ASEANAPOL have accumulated and organized diverse trends and 'modus operandi' of pirates. This data helps perform extensive analysis to determine action plans to be adopted, check the viability of multilateral legal arrangements ‘to facilitate apprehension, investigation, hot pursuit, prosecution and extradition, exchange of witnesses, sharing of evidence, inquiry, seizure,’ and reinforce legal aid assistance and measures between member countries.

Conclusion

The susceptibility of this region to maritime piracy has prompted ubiquitous ramifications for the nations, for instance, sizable depletion of global trade due to frequent menaces faced by cargoes triggering slashing economic conditions. A proficiently crafted international structure comprising transnational clauses and its relevant enforcement mechanisms, a comprehensive codified definition in the UNCLOS, streamlining the major stumbling blocks in the enforcement of legal safeguards in these regions, and overall, an all-inclusive global maneuver may assist in the prudent handling of the issue.

Navigating Employment Contracts: Balancing Employer Interests and Employee Rights in Lock-in Clauses, Negative Covenants, and Indemnity Bonds

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Introduction

The relationship between an employer and an employee within a business setting is typically governed by an Employment Agreement or contract. This is important as it deals with key issues stemming from the divergent interests associated with employment. Both employers and employees are naturally motivated by their own interests and goals. For employers, retaining a highly trained, experienced, and skilled staff over an extended period of time has enormous benefits. Substantial amount of money is spent on training workers which underlines why such valuable assets ought to be retained within the organization for considerable time periods in order to protect the business' interests.

Conversely, employees are attracted to avenues that may expedite their career advancement. In today's competitive world of corporate businesses, if there are more alluring offers from other competing organizations or companies, employees will exploit such opportunities with a view to advance their career. To strike a balance between these competing interests, employers often integrate "lock-in" and "penalty clauses" within the employment agreement, ensuring stability while addressing the risk of employees leaving for better opportunities.

What is Lock-in Clause?

Lock-in provisions within employment contracts delineate a predefined period during which either or both parties are contractually bound to maintain the employment relationship. These contractual stipulations are designed to incentivize employees to commit to the organization for a specified duration. Employers use various legal mechanisms, such as indemnity bonds, restrictive

covenants, and confidentiality agreements, to mitigate potential adverse consequences arising from employee turnover.

While confidentiality agreements are widely acknowledged as crucial for safeguarding employers' proprietary information, the enforceability of restrictive covenantsand the use of indemnity bonds have sparked significant legal debate and varying interpretations. For example, restrictive covenants, often including non-compete and non-solicitation clauses, aim to prevent employees from immediately joining competing firms or engaging with key clients after leaving. Similarly, indemnity bonds, which obligate employees to compensate the employer for investments made in training and development should they depart prematurely, are also contentious. The central issue here is ensuring that any penalties are directly proportionate to the actual costs incurred by the employer, rather than serving as punitive measures. Consequently, these provisions can create an imbalance between the employer's interests and the employee's rights.

Enforceability and Validity of Lock-In clauses

Indian courts have consistently emphasized the importance of restricting such covenants to the period "during the term of the agreement." This judicial focus underscores that contractual restrictions imposed while the employee is actively engaged with the employer are generally deemed reasonable and enforceable. In *Brahmaputra Tea Co. Ltd. vs. Scarth*[1], the court recognized that an agreement requiring an employee to serve exclusively for a definite term is lawful when it operates during the employment period, thereby protecting the employer's interests. Similarly, in *Niranjan Shankar Golikari v. Century Spinning and Manufacturing Co.*[2] (1967), the Supreme Court held that an employee's commitment not to engage with another employer during the contract's active period does not violate Section 27 of the Indian Contract Act, 1872. By confining these obligations to the term of employment, the courts ensure that once the contractual relationship ends, the employee is free to pursue other opportunities without undue restriction.

[1] Brahmaputra Tea Co. Ltd. vs. Scarth (1885) ILR 11CAL 545
[2] Niranjan Shankar Golikari v. Century Spinning and Manufacturing Co. (1967) SCC Online SC

The Delhi High Court's judgment in *Lily Packers Private Limited vs. Vaishnavi Vijay Umak*[3] affirmed the enforceability of lock-in clauses in employment contracts, provided they are mutually negotiated upon by the employer and employee. In this case, the court upheld the validity of a 3-year lock-in period after probation, ruling that such clauses are essential for protecting employer investments in training and reducing attrition. However, the court also pointed out that the negotiation of such clauses should be fair, recognizing the potential for power imbalances between employers and employees. The court clarified that these provisions do not violate fundamental rights under the Indian Constitution and can be enforced during the term of employment

Contractual Provisions: Understanding Section 27 and Section 73 in Employment Agreements

The lock-in provision, a common inclusion in employment contracts, establishes a defined timeframe during which neither party can unilaterally terminate the agreement. Breaching this provision constitutes a contractual violation, often entailing significant financial repercussions, predetermined within the contract, which may include compensation to the aggrieved party. Penalty clauses, often incorporated alongside lock-in provisions in employment contracts, serve as mechanisms for employers to recover investments made in training or enhancing employees' skills. While these clauses are intended to discourage premature termination of employment contracts and mitigate turnover, they have encountered judicial scrutiny within the Indian legal landscape.

One significant critique revolves around the perceived imbalance between the fixed damages stipulated in the contract and the actual earnings of the employee. This raises concerns about the potential for coercion, as employees may feel compelled to prolong their tenure with the employer to avoid triggering substantial financial penalties. Essentially, the discrepancy between the imposed penalty and the employee's earnings could create an inequitable situation, wherein the employee's freedom to explore alternative opportunities is curtailed by the financial burden associated with contract termination.

[3] Lily Packers Private Limited vs. Vaishnavi Vijay Umak ARB.P. 1210, 1212 and 1213/2023

To safeguard employees' rights, Section 27 of the Indian Contract Act, 1872 (the Act) assumes significance. This provision renders agreements disallowing individuals from pursuing lawful professions, trades, or businesses void to that extent.[4] However, employers possess legal recourse under Section 73 of the same Act. This section enables employers to seek compensation for training and skill enhancement expenses incurred in the event of contract breach.[5]

This legal principle essentially ensures that if there's a breach of contract, the affected party can only claim compensation for damages that are directly related to what would naturally happen because of the breach. In simpler terms, employers can only seek reimbursement for losses that were expected because of the breach. This idea matches up with how lock-in clauses work in employment contracts. It's about making sure that both parties are treated fairly when things don't go as planned.

Constitutional Validity of Negative Covenants in Employment Contracts

Negative covenants, clauses within employment contracts that restrict certain activities, are a complex legal matter. These covenants often restrict employees from working for competitors during and even after their employment. They are introduced to protect trade secrets and confidential information, preventing employees from capitalizing on acquired knowledge for personal gain[6]. While they serve to protect employers' interests, they raise concerns about employee rights and constitutional validity.

A key constitutional issue is that negative covenants may encroach upon the freedom to practice any profession, as guaranteed by Article 19(1)(g) of the Indian Constitution. Courts reconcile this potential infringement by invoking Article 19(6), which allows for reasonable restrictions in the interest of the general public. For example, in Dr. S. Gobu v. State of Tamil Nadu, the Madras High Court observed that a negative covenant extending beyond the period of employment is generally viewed as an undue restraint on trade, as per Section 27 of the Indian Contract Act, 1872.

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[4] The Indian Contract Act, 1872, Section 27.
[5] The Indian Contract Act,1872, Section 73.
[6] Archana Balasubramanian, *Employment Bonds / Indemnity Bonds: Can One Truly Lock-in Their Key Employees?* (Aug 3,2021), https://www.mondaq.com/india/employee-benefits--compensation/1098574/employment-bonds--indemnity-bonds-can-one-truly-lock-in-their-key-employees.

Section 27 of the Act, 1872, declares agreements restricting lawful professions, trades, or businesses as void. In *Modicare Ltd. v. Gautam Bali*,[7] the Hon'ble Delhi High Court, emphasized this void nature, even when willingly agreed upon by parties. The clash between agreements and fundamental rights is evident, prompting scrutiny. However, enforcing these covenants post-employment raises concerns about restraint of trade, and their validity hinges on their reasonableness. Courts have ruled in favour of employers for valid negative covenants during employment. Yet, covenants extending beyond employment termination are often regarded as void restraints on trade, subject to scrutiny based on fairness, public policy, and reasonability.[8]

Similarly, the Delhi High Court looked at the validity of a non-solicitation clause in a commercial agreement between Wipro Ltd. and Beckman Coulter International SA in the case of *Wipro Ltd. v. Beckman Coulter International SA*[9]. These specific stipulations prohibited the parties to prevent their employees from being persuaded to leave their present jobs and join their opponents' companies, through contract clauses that were referred to as "non-solicitation" clause but seemed more restrictive on employment mobility rather than soliciting. The court focused on whether the restriction was reasonable given the circumstances and determined that it did not adversely affect unrelated trades or professions. As a result, the clause did not fall within the ambit of Section 27, which aims to protect the right to pursue one's profession.

The debate about negative covenants is a difficult one between the need of the employer to safeguard its interests and the rights of employees. These covenants have been judicially examined for their constitutionality, reasonableness within the context of each specific case taken on its merits, fairness and fidelity to constitutional norms. In terms of enforceability, there are courts have differing opinions about restrictive covenants; However, incorporation of lock-n clauses and other negative covenants is growing worldwide, in both commercial and employment agreements. There has been an increase in commercial conflicts with cases being determined by judges

[7] Modicare Limited vs. Gautam Bali and Ors. 2019 DHC 4856.
[8] Percept D'Mark (India) Pvt. Ltd. v. Zaheer Khan & Anr. AIR 2006 SC 3426.
[9] Wipro Ltd. v. Beckman Coulter International SA, 2006 (131) DLT 681.

depending on what they view as fair and sensible business practices. The Indian courts have held that such clauses do not void a contract automatically but may consider protection of proprietary information or balanced restrictions.

Understanding the Role and Regulations of Indemnity Bonds in Employment Contracts

Although it has a different function, an indemnification bond functions in tandem with an employment agreement. An indemnification bond focuses on specifics, whereas an employment agreement covers duties, obligations, and general terms of employment. It also frequently contains provisions about notice periods and termination. It focuses on the individual employee's promise to stick with the company for a predetermined amount of time. Similar to a security measure, this bond serves to safeguard the employer's interests when large expenditures, including training expenses, have been incurred on behalf of the employee.

The Act, specifically Section 74, governs these types of agreements. This section deals with liquidated damages as a form of payment for violations. A pre-determined amount between contracting parties known as "liquidated damages"[10] is due by the party who violates the agreement, regardless of whether the other party has really sustained losses. This amount is set as an accurate approximation of possible damages.

Once the bond is signed, the employee agrees to work for the employer for a set period of time. The employee is legally required to give the company the money outlined in the bond if they choose to leave before this time frame expires and submit a resignation. However, according to Section 74, the amount of compensation demanded in the form of penalties or damages must be fair. Exorbitant compensation will not be enforced, even if it was agreed upon by the employee. The amount of compensation must be commensurate with the advantages that the employee received as well as the loss and

[10] The Indian Contract Act, 1872, Section 74.

difficulty that their employer suffered as a result of the employee's early departure.[11]

Conclusion: Balancing Interests and Navigating Employment Contracts

In the intricately woven fabric of relationships between employers and employees, employer-employee relationships legislation, non-compete clauses, and indemnity bonds are significant for defining obligations, rights and protective measures for both sides. These legal instruments aren't just mere formalities but mechanisms meant to balance between the employer's interest and employee's rights. While there is bound to be some divergence of opinion or difference in legal interpretations, the general theme running through is of fairness, equity, and transparency in contract relations. Employers should ensure that employment agreements and other annexed instruments are entered into with clarity, specificity, and due regard for legal principles so that they reduce risk and instill trust and confidence in the employee.

In conclusion, the dynamic nature of labour laws regarding employment contracts, restrictive covenants, and indemnity bonds calls for an employer to exercise due diligence, foresight, and concern for the rights and interests of the parties. Legal norms, fairness, and progressive principles in the management of talent make for a strong, harmonious, and mutually rewarding relationship between employer and employee.

[11] Preeti Motani, *What are the rights of an employee fired from the job?* (Dec 20, 2022, 11:48:00 AM)*https://economictimes.indiatimes.com/wealth/legal/will/what-are-the-rights-of-an-employee-fired-from-the-job/articleshow/96340684.cms.*

Absolute Property: A Hindu Female's Long Overdue Right

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"Freedom and property rights are inseparable; you can't have one without another"- George Washington

Is it materialistic to demand absolute ownership over property? Do women even need property of their own, if they are going to live with their husbands? Woman can inherit property from both her husband and her father? Are the laws biased?

These are certain questions we often come across while having a discussion on women's right to property. Little do those making a point know, that the right was not given but asked for, fought for and then earned, and not without a cause. The under valuation of the need of a woman to hold property rights is not unheard of, in fact it could be unnerving to some that philosophically, women can be so "materialistic". It is frowned upon, and even considered a foul play to let them have it, even when they are no longer part of the family they were born in.

The fact to be understood is that, the property rights of a person provide them more than financial freedom, it is the pathway to personal liberty of a person. It should hardly ever be a gender based right.

The history of women rights in India

Throughout history, women's rights have been a subject of continuous debates and struggles. Be it right to vote or a right to have control over their own bodies. Most of the rights present and provided to women today have been carved out of the skin of those who fought for it against the norm. Any society, at any point in time, whenever faces resistance, finds itself in a war against its laws. And so has been the face of laws that secure women's rights on property. Ever changing.

For Hindu women, the evolution of their rights came rather slowly. In early Vedic period, women were considered an equal contributor to the society. While in later Vedic age, slowly, women were sidelined and men became the ones who ran the show. This was seen drastically in the *sabhas* where women's role became less and less valuable, ultimately leading to no participation in the same. In early 19th century, a few people in society only began to talk about women's right to education. During freedom struggle, India saw women coming forward in huge numbers. Post-independence, the questions were sharp and straight. "Why not us?" was the question of the hour, including the right to property.

The Hindu Succession Act, 1956

Hindu Succession Act, 1956 could be worshipped as the absolute boon to the bane of being a female Hindu when it comes to right over property. In India, these rights were deemed to be a threat to the existing structure of the society, the one which believed that a son should be the sole torchbearer to the legacy of the same. The inheritance of property and holding that property absolutely by a woman was not a concept known to people about half a century ago. The legislature has come a long way in providing women these rights, with an equally long way to go.

Earlier, the laws of succession for Hindu women were guided by Mitakshara and Dayabhaga schools. Under the Mitakshara coparcenary, women cannot be coparceners. A wife under Hindu law has a right to maintenance out of her husband's property yet she is not a coparcener with him.[1]

A woman's property existed as (1) streedhan and (2) a woman's estate. The term Streedhan is constituted by two words which are 'stree' and 'dhan' which means women and property in English if we have to define the term. Streedhan, we say that it's a woman's property upon which she has absolute ownership. Streedhan is whatever a woman receives during her lifetime, it includes movable as well as immovable property gifts. According to the age-old Smritis and all old schools of Hindu law such as Dayabhaga and Mitakshara, Streedhan is very well recognized under the eyes of the law. As it

[1] CIT v Govinda Ram Sugar Mills, AIR 1966 SC 240

is the absolute right of women, the law tends towards the women in order to protect their Streedhan.[2]

On the other hand, a woman's estate was the property over which she had limited ownership. Which meant that she did not have alienation rights over it.

Hindu Women Right to Property Act, 1937 was made to make important changes in succession laws. It was enacted to provide women with property rights; however, it did not fulfil the purpose. The Act had no retrospective operation. Even though widows had the right to maintenance from their husband's property, they were still deemed to be limited owners only. Although the Act made widows inherit the intestate property of their husbands just like their sons, for the very first time, it still retained the system of limited ownership. This, even though seemed like a step forward, but was actually bringing women's right back to square one, limited and restricted.

Clearly, the Act was not sufficient. And it was in this background that the Hindu Succession Act was passed in the year 1956. Women's right was protected under Article, 14 and 15 of the Constitution and it was easy to point out how the existing legislature was not doing justice to the rights provided in the Constitution.

The Hindu Succession Act provided much more consistency in the laws according to which the succession of property of Hindus was taking place. As for women, the Act provided more rights.

Importantly, section 14 of the Hindu Succession Act clearly states that the property of a female Hindu is to be her absolute right, no matter if the property was acquired before or after the commencement of the Act. Thus, women were no longer limited owners of property.

This Act was a milestone legislation, making women absolute owners of the property.

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[2] Snehal Upadhyay, *STREEDHAN AND WOMEN'S RIGHT TO PROPERTY,* Volume II Issue I, ISSN: 2583-0538, Indian journal of integrated research in law.

However, the Act still needed reforms since it was still not fair between man and women. Women still did not have many of the rights enjoyed by the male Hindu members, such as women were still no coparceners and did not have right over property by birth. Another such example was section 23 of the Act which gave women no right on partition of dwelling left interstate.

The Hindu Succession (Amendment) Act, 2005

In the year 2005, the Hindu Succession Act 1956, was amended. Through this amendment many changes were made towards making the law fairer towards both men and women and providing women with more rights over the property.

The Act highlighted several changes that seemed to be the need of the hour.

The Act deleted section 23, which restrained the female heirs from having any part in the partition of a dwelling left intestate, which is occupied by a male heir. They only had such right if and only if the male heir agrees to divide the share.

In section 30, dealing with testamentary succession, the word "her" was added with "him" to make the Act fairer. However, one of the biggest changes came in the form of section 6.

Section 6 of the Hindu Succession Act 2005, provided the fact that in a Hindu joint family governed by the Mitakshara law, the daughter of a coparcener shall become a coparcener just the way sons are, by birth. And that she shall have the same right as a coparcener if she was born a son instead. The daughter would be allotted the same share as the son and the child of the pre-deceased daughter shall have the same part that would have been given to the daughter had she been alive.

Now, section 14 and section 6 of the amendment, dealing with absolute right and coparcenary right to the women, was a milestone achieved in the continuous struggle for equal rights for women. Section 14 gave women the absolute right to the property inherited and on the other hand, section 6 provided women equal rights to be coparceners and equal share in the property.

The challenges in retrospective application

As with any change comes a wave of questions, so did here as well. One question that was pretty loud in this aspect was the question of retrospective application of the amendment.

In the case of *Prakash v Phulavati* [3], the plaintiff claimed the property of her father who died in 1988. The plaintiff claimed that the respondent could only claim the self-acquired property of her father, not the entire property. The Supreme Court held that the Act could not be applied retrospectively.

This judgment pushed back the motive of the amendment. Even though a lot of women had rights on the property they could not claim it due to the time-related technicalities. The law was being bended to be more conservative rather than progressive.

The recent case of *Vineeta Sharma vs Rakesh Sharma* [4], where the father died in the year 1999, and one son died in 2001. Vineeta Sharma claimed her share in the coparcenery property. It was argued that she could not be a coparcener as the death of the father was before the amendment and that she was no longer a part of the joint Hindu family once she got married.

The Court overruled the judgment given in the *Phulavati* case and held the coparcenary right does not pass from a 'living' coparcener to a 'living' daughter but rather from 'father to a daughter'. It ruled the Joint Hindu Family property to be unobstructed heritage where the right of partition is absolute and is thus created by the birth of the daughter. It is immaterial whether the father of the daughter was alive or deceased on 9th September 2005.[5]

The journey summarized

Hence, although the changes brought are narrow in a sense since they only apply to Hindu joint family, they still bring in a fresh chapter in the tale of the rights of women in India. Daughters getting the same and equal share as the

[3] Prakash vs. Phulavati, AIR 2016 SC 769
[4] Vineeta Sharma vs Rakesh Sharma AIR 2020 SC 3137
[5] Ibid

male heirs is one big milestone. Section 14 and section 6 of the Hindu Succession Act 1956 provide women with right as coparcenary and to have absolute right on the inherited property. And that too not just on paper, or books of law, but in real scenarios now that the said law is far clearer than before. Another need in the same aspect is to get each and every woman to be aware of their rights, as a person, as a family member and above all as a citizen of a country with laws, which put them on the same level as their male counterparts.

Food for thought

So, even though we have taken necessary legal steps to bring more rights to women, which might not even argue was a rather long struggle, we still find ourselves and people around us asking same questions even after all this.

Of all the questions, the more prominent one is often “why?”. Why does having absolute property a big deal for women? Why do they not get to be the coparcener, inherit both parents’ property as well as husband's?

Does it make the law biased?

Property in its crude self, is what a person can hold onto materialistically. It could serve as a way to live, way to get money, way to have basic necessity, and above all a sense of something belonging to us. Which is a basic essence of being a human in a society in our time and age.

This basic essence was missing for women for years. Not having any rights over inheritance in their birth home, is like never belonging in a place and of people. This could uproot a person’s sense of existing in a family and a sense of what is truly “theirs”

Women were historically regarded as secondary to men. They had nothing to hold onto but an arm of a man, upon whose will they could be something. With property rights, a feather in the cap, women found themselves rather independent and almost like a human that is valuable just as themselves.

Hence, property rights transcend financial freedom; they are intrinsic to personal liberty. For Hindu women, the fight for absolute ownership of property was not just worthwhile - it was transformative.

From Hashtags to Hearings : Analysing the Intersection of Social Media, Law, and the Common Man

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Background

Imagine the world functioning without the influence of social media. Seems like you have to think too far back, right?

The precursor to today's digital India is the internet revolution brought by Reliance Jio offering free and unlimited 4G as an introductory offer. It completely changed India's telecom landscape where eventually the competitors were forced to follow suit or face extinction. For instance, telecom giants like Airtel and Vodafone were compelled to drastically reduce their data prices and introduce competitive plans to retain customers. By offering free internet, Jio adopted a strategic loss-leader approach. The goal was to rapidly capture market share by attracting millions of users who previously found high-speed internet unaffordable. This signified that, every Indian now had the opportunity to enjoy free and fast internet access. This resulted in the onset of increased usage of social media platforms like Facebook, Instagram and WhatsApp.

Just like there are two sides of a coin, it came with its own pros and cons. On one hand it gave way for awareness and on the other hand for the propagation of misinformation, ironically leading to "false awareness".

A Comparative Analysis

On the positive side, social media plays an important role in facilitating connectivity with the community, allowing advocates and judges to gain insight into social dynamics and pertinent issues. It also serves as a potent tool for spreading legal awareness, by making legal information more accessible to the general public regardless of geographical constraints.

In lieu of this, the Supreme Court in the *Swapnil Tripathi*[1] case had ruled in favor of opening up the apex court through live-streaming bringing about the advent of e-hearings. It was held that the live streaming proceedings fall under the ambit of Article 21 of the Constitution, which protects the Right to Life and Personal Liberty, and would instill greater transparency and inclusivity by fostering equitable access to justice. This was further supplemented by social media by enhancing accessibility to information and justice.

Another interesting aspect is how social media is a great tool for discovering potential evidence for a case. It should become a standard procedure to request the search and examination of social media platforms as part of discovery requests. The evidence could include the Facebook Check in Location, Instagram Stories and Posts, as well as the past general conduct on these platforms.

But for this to work, courts will have to ensure that the requested social media evidence be relevant to the case. Parties must demonstrate a clear connection between the evidence and the issues at hand to avoid fishing expeditions. U.S. courts actively use social media evidence under the Federal Rules of Civil Procedure. The UK Civil Procedure Rules (CPR) also accommodate social media discovery.

The primary con of using social media as evidence is the potential breach of individual privacy. Private accounts, personal posts, and sensitive information could be exposed, leading to unintended consequences such as embarrassment, harassment, or misuse of personal data. Governments could enact laws defining the permissible scope of social media evidence discovery, emphasizing the protection of individual rights.

While the positives retain their relevance, the negatives also hold equal significance. There are several ramifications of social media on the justice system. A significant one being the propagation of prejudiced narratives and excessive trolling, this can distort and influence public opinion and subject legal professionals to unwarranted criticism. Furthermore, the unregulated

[1] Swapnil Tripathi v. Supreme Court of India, (2018) 10 SCC 639 (India)

circulation of information on social media poses risks of defamation and privacy invasion, impacting stakeholders including judges and parties involved in suits. At the same time the influence of social media may introduce bias in judicial decision-making. Balancing vox populi or the will of people with rule of law becomes difficult and requires extreme judicial craftmanship.

The other way round, even the statements made by judges in court become a topic of discussion and debate on social media. It was only some time back, when Justice Pardiwala faced social media outrage after a bench, he was part of made critical oral remarks about former BJP spokesperson Nupur Sharma. The comments, linked to Sharma's controversial statements on Prophet Muhammad, stirred intense online debate and polarized opinions.

In this context Chief Justice D.Y. Chandrachud had earlier clarified that the oral statements made during the hearing should not be interpreted as court rulings, but rather as a means of facilitating discussion.[2] He expressed worry over the tendency of social media users to frequently overlook the distinction between the two. This is a matter of grave concern and warrants careful attention.

Indian scenario

Nowadays there has been a profuse misuse of social media platforms on which the messages, comments, articles etc. are being posted in respect of the matters pending in the Court. These comments or posts are often published under the guise of the right to freedom of speech and expression, and have the tendency of undermining the authority of the Courts or of interfering with the course of justice.[3]

It was only recently that in the case of *Karim Uddin Barbhuiya v. Aminul Haque Laskar,*[4] the bench of Justices Aniruddha Bose and Bela Trivedi stated concerns over the abuse of social media platforms, where false and baseless

[2] Board of Control for Cricket in India v. Cricket Assn. of Bihar, 2022 SCC OnLine SC 1223.
[3] Amit Anand Choudhary, SC frets over 'social media misuse' on pending matters - Times of India, (Apr. 12, 2024, 01:48 IST), https://timesofindia,indiatimes,com/india/sc-frets-over-social-media-misuse-on-pending-matters/articleshow/109227295.cms
[4] Karim Uddin Barbhuiya v. Aminul Haque Laskar, 2024 SCC OnLine SC 509

claims were made about cases that were under consideration. Karim Uddin Barbhuiya, the Assam MLA, was found in contempt by the bench after he claimed in a Facebook post that the court had supported his plea, when in reality the judgment for it was pending and yet to be decided. The bench stressed that it was not acceptable to distort the image of the judiciary and the remarks of the judges during court proceedings. Such an attempt at distortion interferes with the confidence in the judicial mechanism and causes prejudice to the parties concerned.

A Global View

This phenomenon isn't limited only to India; it's occurring worldwide, with the likes of US at its helm. Consider the Cambridge Analytica Scandal for example, that took place during the 2016 US presidential election campaign. A whistleblower revealed how Cambridge Analytica – a company owned by the hedge fund billionaire Robert Mercer, and headed at the time by Trump's key adviser Steve Bannon – had used personal information of citizens taken without authorization in early 2014 to build a system that could profile individual US voters, in order to target them with personalized political advertisements based on their posts, likes, shares and interactions on Facebook.[5]

Users were presented with Targeted Advertisements keeping in mind their political views in such a way that either it would enhance the belief of a user or it would reinforce the pre-conceived notion related to any party.[6]

By the end of 2015, Facebook had discovered that data had been harvested on an unparalleled level. Yet, during that period, it neglected to notify users and only implemented limited measures to retrieve and safeguard the personal information of over 50 million people. The revelations provoked widespread

[5] Carole Cadwalladr and Emma Graham-Harrison, Revealed: 50 million Facebook profiles harvested for Cambridge Analytica in major data breach, The Guardian, (Mar. 17, 2018, 22.03 GMT), https://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election

[6] Professor Michael Webb et al, Understanding Mass Influence, (July 2021), https://www.unsw.edu.au/content/dam/pdfs/unsw-adobe-websites/canberra/research/defence-research-institute/2023-02-Understanding-Mass-Influence---A-case-study-of-Cambridge-Analytica.pdf

outrage making it one of the biggest scandals in elections as a result of misuse of personal data and voter profiling through social media platforms.

On similar grounds, we find TikTok, a popular social media platform for sharing short form content, based in China. With its increasing use in US where over 170 million users exist, it is a data heaven for the Chinese Communist Party (CCP). This raises questions about China's broader political intentions. By leveraging platforms like TikTok, the CCP could aim to subtly influence public opinion, shape narratives, or gather insights into U.S. societal trends and behaviors. Beyond data collection, the platform could serve as a soft power tool to promote pro-China content, suppress dissenting voices, and build a digital foothold within the U.S. community.

A former employee of ByteDance, TikTok's Beijing-based parent company, has outlined specific claims that the CCP accessed the data of TikTok users on a broad scale, and for political purposes.[7] Owing to this, US government agencies such as the FBI have often raised alarm about the possible collection of US citizens' data and their surveillance through the Chinese-origin app, resulting in an investigation by the FBI and U.S. Department of Justice on the same.

Subsequently, on 24th of April the Senate passed the "Protecting Americans' Data From Foreign Adversaries Act 2024" which would mandate TikTok to either sell its stake to a US approved entity or face a nationwide ban. This comes amidst similar bans imposed in several countries like India and Nepal on the grounds of protection of national security.

On similar lines, the government of India enacted the Digital Personal Data Protection Act, 2023 (DPDP Act).[8] The primary purpose of the Act is to regulate the processing of digital personal data and respect individuals' right to protect their data while recognising the necessity of processing and using such data for lawful purposes.

[7] Brian Fung, Analysis: There is now some public evidence that China viewed TikTok data, (June 8, 2023,10:28 AM EDT), https://www.cnn.com/2023/06/08/tech/tiktok-data-china
[8] Digital Personal Data Protection Act, 2023 (Act 22 of 2023)

These examples are just some of the many such instances happening around us. Whatsapp for instance has become one of the most prominent mediums of misinformation. The mindless forwarding of messages by people without pondering upon the consequences and the reliability of the sources is the cause of this. But that's not all. Social media has become a tool for the purposes of personal agenda propagation rather than an actual constructive platform for criticisms and feedback. People may take the stance of exercising their right to freedom of speech and expression but what they fail to realize is that this right is not absolute and comes with its own limitations.

This is especially relevant considering the Lok Sabha Elections in India and the unrestrained use of social media by several political parties to create false narratives and take forward their agendas which may stir up communal sentiments. Vulnerable sections of the society like the elderly, are extremely susceptible to undue influence. Even highly educated people are likely to get influenced and forget the need to actually fact check. Further, those influenced, carry forward this chain of falsehood all the while believing it to be real, giving a true meaning to the term *"Whatsapp Knowledge"*. This term has come to denote all those false and misleading messages being circulated on social media platforms like Whatsapp, and the people using those messages as the basis for forming their opinions. This 'knowledge' is so expansive in nature that from religion to medicine, and most importantly politics, it covers everything. Additionally, its unregulated nature makes it even more dangerous.

Several legislations and provisions have been enacted in an effort to curb this misuse.

Legislations

In India, Section 69 (a) of The Information Technology Act gives the government the right to ban or stop public access to any information that is not consistent with provisions of the government[9]. It also provides the procedure of blocking access of the public to certain information. Whoever

[9] Sec. 69 (a) of Information Technology Act, 2000, Act 21 of 2000.

doesn't comply with this provision will be punished with imprisonment for a term which may extend to seven years and shall also be liable to pay a fine.

In contrast to the Indian laws, the EU enacted the Digital Services Act (DSA) in 2022 where various duties were imposed in relation to content moderation on social media platforms.[10] It aims to protect users' free speech by making platforms clarify content restrictions in their terms of service and respect users' free speech rights when enforcing these rules. Platforms must also establish a system for users to file complaints about content or account limitations. It came into force in February 2024.

Additionally, the DPDP Act, 2023 apart from protecting privacy rights of individuals, empowers individuals (Data Principals) with rights such as access to personal data, correction, and grievance redressal.[11] Organizations (Data Fiduciaries) must implement stringent measures to protect data, report breaches, and obtain explicit consent for sensitive processing. Non-compliance attracts hefty penalties. By regulating cross-border data transfers and promoting transparency, the DPDP Act aligns India with global privacy standards, fostering trust in the digital ecosystem.

While these provisions do exist, there is much that can be improved.

Ways to mitigate

Despite all the complications, the situation is not completely out of hand, yet.

Firstly, in the Indian context, a lot of improvement is required in the digital laws. The primary action that needs to be taken is to make the laws more user oriented rather than simply restricting flow of information. To make digital laws in India more user-oriented, they should be drafted in simple, accessible language and made available in regional languages to ensure inclusivity. Empowering users with clear rights like data access, correction, and grievance redressal, alongside transparent data practices by organizations, is essential.

[10] European Commission, 'The Digital Services Act: ensuring a safe and accountable online environment' (European Commission, 2020), https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en

[11] Ibid, 5

Establishing efficient redressal mechanisms, such as independent data protection bodies, can enhance accountability. Public participation in drafting laws and feedback incorporation ensures diverse perspectives. Additionally, promoting digital literacy campaigns will educate users about their rights and privacy risks. Tailoring implementation to address regional challenges will further strengthen the effectiveness of digital laws in India.

The objective shouldn't be censorship, but rather the establishment of a system to ensure information is segregated based on its reliability. It should be mandated that social media platforms disclose their algorithms and mechanisms for content distribution and how users are targeted, thus allowing for greater scrutiny and understanding of how misinformation spreads.

Independent third-party bodies need to be established for the purpose of auditing, and identifying potential vulnerabilities to misinformation campaigns and monitoring and regulating misinformation on social media. These entities could set standards for content moderation, enforce compliance with transparency requirements and adjudicate disputes between users and platforms. Independent third-party bodies become essential because the authorities under the guise of creating guidelines to regulate and prevent the spread of misinformation may censor information that goes against their ideology and ideals.

Media Literacy should be at the forefront to tackle low awareness. It equips individuals with the ability to understand the role of media in society, identify biases, differentiate between credible and misleading information, and make informed decisions. Media literacy is crucial in the digital age, where people are exposed to vast amounts of information, including fake news and propaganda.

Along with this, the workings of entities that influence public opinion through digital platforms, including IT cells of political parties, corporate entities, advocacy groups, and social organizations, need to be transparent and better regulated. These entities significantly impact the masses through targeted campaigns and social media influence. Their methods of operation should be

brought under the oversight of appropriate regulatory bodies. This could be a step towards bringing more accountability on part of the entities.

Conclusion

The intersection of social media and society presents a challenge that requires a balanced approach. On one hand, platforms like Facebook, WhatsApp, and TikTok have revolutionized connectivity, legal awareness and information dissemination. They empower voices and provide unlimited opportunities for people's participation. However, the misuse of these platforms highlights the dual-edged nature of technology. From privacy invasions and misinformation to undue political influence, the unchecked proliferation of content threatens societal harmony, judicial impartiality, and democratic values.

To address these challenges, it is necessary to establish a balanced regulatory framework that ensures accountability without restraining freedom of expression. It is, therefore, imperative to raise media literacy among people and improve further provisions for transparency in content moderation processes while establishing independent oversight organizations for monitoring digital environments.

Social media's transformative potential lies not in its unrestricted growth but in its responsible utilization. Through the creation of a digital environment that fosters responsibility, transparency, and informed participation, societies can tap into the benefits of social media while reducing its detrimental effects, opening the way toward a better-informed and safe digital future.

Age of Consent in India: Protection or Restriction?

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What is the Age of Consent?

The age of consent can only be described after describing what 'consent' is. As per the Section 63 of the Bharatiya Nyaya Sanhita[1], the definition of consent is as follows, "*Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act."* With this now the age of consent can be best described as *"the age when one is legally competent to give consent to sexual intercourse or marriage.*"[2] In India, a major is anyone above the age of 18 and is considered qualified by law to provide consent.[3] This eventually leads to the conclusion that the concept of consent is immaterial as far as a minor is considered, so it can be said that any sexual activity with an individual who is less than 18 years[4] will be termed as 'Statutory Rape'. However, there are certain irregularities pertaining to the same, for instance, the Muslim Personal Law[5]. In contrast to communities across India, the age of consent is set uniformly but under the Muslim Personal Law, any girl who has completed the age of 15 years is competent enough to get married. In a recent judgment of the Honorable Punjab and Haryana High Court, the court upheld the marriage of a minor Muslim girl to a major Muslim man. The court reasoned that the Muslim Personal laws allow any girl who has attained puberty to get married as per her choice even if she is not a major[6]. The Honorable Supreme Court responded to this by restraining other High Courts to not treat that case as a precedent. This provision is still subjudice in the Honorable apex court.

In a country like India where indulging in sexual acts before marriage is considered against the cultural ethos, the age of marriage and consent is

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[1]Section 63, The Bharatiya Nyaya Sanhita, https://www.mha.gov.in/sites/default/files/250883_english_01042024.pdf
[2] "Age of Consent, "Cornell University, https
[3] Protection of Children from Sexual Offences Act, 2012, S 2(1)(d)
[4] Indian Majority Act 1875
[5]The Muslim Personal Law (Shariat) Application Act, 1937, https://ncwapps.nic.in/acts/TheMuslimPersonalLaw-Shariat-ApplicationAct1937.pdf
[6] Shameem And Another v. State of Haryana and Ors,- 2023:AHC:216972-DB

regarded as one and the same thing. Though both are interlinked to one another, they still hold a lot of differences. As per the Honourable Bombay High Court,

"The mere apprehension that adolescents would make an impulsive and bad decision, cannot classify them under one head and by ignoring their will and wishes. The age of consent necessarily has to be distinguished from the age of marriage as sexual acts do not happen only in the confines of marriage and not only in society, but the judicial system must take note of this important aspect."[7]

Trend of Age of Consent Around the World

For most developed countries around the globe the age of consent varies from 14 years to 16 years[8]. Nigeria reports to have the lowest age of consent at 11 years followed by Angola, both of which form a part of the continent of Africa. On the other hand, Bahrain poses to be the nation with the highest age of consent at 21 years of age. For Asian countries, the average age of consent lies between 13 to 18 years. For most European nations this lies in the bracket of 16 to 17 years. For the United States of America the age of consent varies across different states from 16 to 18 years of age.

History of Age of Consent in India[9]

- Till the year 1860, the age of consent was 10 years. However, after the horrific case of Phulmoni[10] who died due to haemorrhage as a result of a ruptured vagina as a result of forced sexual intercourse by her husband, it was increased.
- The*Age of Consent Act, 1891*[11] was legislation that stipulated the age of consent to be 12 years for any female.
- Further it was increased to 14 years in 1925.

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[7] Ashik Ramjan Ansari is the State of Maharashtra and Anr. Criminal Appeal No. 1184 of 2019.
[8] Age of Consent by Country 2024, World Population Review, https://worldpopulationreview.com/country-rankings/age-of-consent-by-country
[9] Geetanjali Ghosh and Shishir Tiwari, Decoding the Constitution in Indian Legal framework and Governing Age of Consent and Age of Marriage,14 RMLNLU J.227(2022)
[10] Marital Rape: No Excuse for the Inexcusable, The Asia Dialogue (8th March, 2020)
[11] Age of Consent Act of 1891, Britannica, https://www.britannica.com/topic/Age-of-Consent-Act-of-1891

- In the year 1949 this was increased to 16 years owing to a lot of unwanted early pregnancies in the country, which was leading to exponential growth in population.
- *Finally, with the coming of the Protection of Children from Sexual Offences Act, 2012*[12], the age of consent was increased to 18 years.

Determining the appropriate age of consent may seem like a straightforward task but it carries with it substantial ramifications. Presently, there is a divide in opinion: Some advocate for lowering the age of consent from 18 years to 16 years, while others strongly support maintaining the status quo.

Why Should Age of Consent Not be Reduced?

As per the 283rd report of the 22nd Law Commission of India headed by Justice Rituraj Awasthi, it was stated that "*Consent can always be manufactured*"[13], which implies that in certain situations consent may not be free but rather coerced, manipulated, or obtained under duress, thus can always be pretended. In circumstances where the relationship between the abuser and abused is of authority, trust, or dependency,consent can be given under pressure. So, the consent of any girl above the age of 16 and below 18 can be more easily "manufactured" by the abuser,leading to a situation where determining true consent is a tedious task. As a result, a lot of genuine cases under POCSO might not be able to see the light of the day, therefore becoming an impediment in the way of delivering justice.

Secondly, child marriage is a prevailing evil of the society despite several legislations curbing the same.[14] With the decrease in the age of consent, communities will get legal leverage to marry off minors. It is a well-established fact that child marriages in India have grave consequences for population control as adolescent brides tend to have a higher fertility

[12] National Human rights Commission, Protection of Children from Sexual Offences Act, https://nhrc.nic.in/sites/default/files/10_PROTECTION%20OF%20CHILDREN%20-%20SEXUAL%20OFFENCES.pdf
[13] Government of India, Report on Laws Governing Sexual Offences, https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2023/09/20230929466194485.pdf
[14] Prohibition of Child Marriage Act 2006; Prevention of Children from Sexual Offences Act 2012

rate.[15] Further, these marriages can have an adverse effect on the health of child brides due to early pregnancy and childbirth. Additionally, young mothers are at a higher risk of experiencing several complications including fistula, premature childbirth, low birth weight, child mortality, and maternal mortality among others. Complications during pregnancy and childbirth have become a leading cause of death of adolescents in underdeveloped and developing countries.[16] Further effects might include hurdles in education due to high dropout rates of child brides which can put a brake on the financial independence of these brides leading to poverty in the longrun[17]. Other repercussions may include poor mental health due to isolation, and increased domestic violence among others.

Thirdly, certain experts claim that each and every child is vulnerable due to limited physical and mental maturity and hence requires legal protection[18]. If the age of consent is reduced then children falling in the unguarded bracket will be exposed to a lot of horrendous crimes as a safe harbour would be readily served to perpetrators. Many offences including but not limited to cyber bullying or sextortion, honey trapping, forced sex work, human trafficking, many forms of mental, physical, and sexual abuse, etc would increase. The offender can exploit naivety, trust, and desire for social connections in the young minds.

Further, as per several researches[19] early indulgence in sexual activities can negatively impact mental health in several ways. Signs of depression, anxiety, and low self-esteem can be observed. Factors such as societal stigma, peer pressure, and relationship dynamics may increase the risk of depressive symptoms in young individuals who engage in sexual behaviours before being prepared emotionally for the same. Individuals can be faced with anxiety concerning pregnancies, sexually transmitted infections, or other social repercussions.

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[15] Organisation for Economic Cooperation and Development,Fertility Rates,OCED,https://www.oecd.org/en/data/indicators/fertility-rates.html
[16]State of World Population Report, UNFPA
[17] World Bank, education Girls,Ending Child Marriage, Worl Bank(22nd August,2017)
[18] U.N. Human rights Council,Access to Justice for Children: Report of the United Nations High Commissioner for Human Rights, U.N Doc. A/HRC/25/35(16th December,2013)
[19] Meier,2007; Zimmer Gimbeck and Hefland, 2008

It is often regarded by child health experts that minors are impressionable and fickle in nature[20] and tend to make volatile decisions which subsequently results in an unstable kind of psyche. Further aggravation of such kind of instability can take place with early indulgence in sexual pursuits[21]. This can eventually hamper academic endeavours due to decrement in concentration levels and attention spans and can also foil social relationships. In many cultures engaging in sexual behaviour at an early age can be looked down upon and indulging in them can lead to stracisation[22]. Besides that, peer-to-peer relationships can also be affected due to differences in maturity levels. In addition to that, early indulgence in sexual pursuits can even become an economic hurdle as young adults may channel all their focus and energy away from economic, educational and social pursuits.

Why Should the Age of Consent be Reduced?

The ex-Chief Justice of India Dr. D. Y. Chandrachud flagged his concern about the age of consent pertaining to the POCSO Act[23]. This concern was surrounded by cases under the jurisdictions of Madras[24], Delhi,[25] and Meghalaya[26] High Courts wherein these courts had also expressed their concern regarding criminalisation of consensual sexual encounters between

[20] Seok Hyun Gwon, Suyong Jeong, concept Analysis of impressionability among adolescents and young adults, National Library of Medicine,https://pmc.ncbi.nlm.nih.gov/articles/PMC6177548/

[21]Larissa F. Reis, Pamela J Surkan, Kaityn Atkins, Risk Factor for Early Sexual intercourse in Adolescence: A Systematic Review of Cohort Studies,https://pmc.ncbi.nlm.nih.gov/articles/PMC10039773/

[22] Shamini Siva Vikaraman et al., Adolescents Engaging in Sexual Activity: An Overview, 6 EPRA International Research and Development, https://www.researchgate.net/profile/Sharmini-Siva-Vikaraman/publication/354102519_ADOLESCENTS_ENGAGING_IN_SEXUAL_ACTIVITY_AN_OVERVIEW/links/612b7e3a0360302a00659b8f/ADOLESCENTS-ENGAGING-IN-SEXUAL-ACTIVITY-AN-OVERVIEW.pdf?origin=publication_detail&_tp=eyJjb250ZXh0Ijp7ImZpcnN0UGFnZSI6InB1YmxpY2F0aW9uIiwicGFnZSI6InB1YmxpY2F0aW9uRG93bmxvYWQiLCJwcmV2aW91c1BhZ2UiOiJwdWJsaWNhdGlvbiJ9fQ&__cf_chl_tk=AXRb2p8IERv3_lmSlwpY7hk1VVYOLk6uiyv09CeteZQ-1731667908-1.0.1.1-o458zN_GUF60H_Q5DjBrLxHK3O.mQIDrNGBMh.530IE

[23] CJI DY Chandrachud Urges Parliament to Consider Concerns About Age of Consent Under POCSO Act, Live Law (6th November,2023), https://www.livelaw.in/top-stories/cji-dy-chandrachud-urges-parliament-to-consider-concerns-about-age-of-consent-under-pocso-act-216336

[24]Consensual Sex With a Girl Aged 16 years Does Not Amount to Rape Under POCSO Act: Madras High Court, Bar&Bench(20th October,2023), https://www.barandbench.com/news/madras-high-court-consensual-sex-16-years-pocso

[25]POCSO Act Not to Criminalise Consensual Romantic Relationships Between Young Adults: Delhi High Court, Live Law(1st September,2023), https://www.livelaw.in/news-updates/pocso-act-not-to-criminalize-consensual-romantic-relationships-between-young-adults-delhi-hc-213995

[26]Meghalaya HC Quashes Proceedings Against Minor Girl's Boyfriend, SCC Online (23rd June,2023), https://www.scconline.com/blog/post/2023/06/23/meghalaya-hc-quashes-pocso-proceedings-against-minor-girls-boyfriend-legal-news/

adolescents. The Delhi High Court observed that the purpose of POCSO was to protect minors from sexual exploitation and not criminalise consensual romantic relationships between them.[27] In another such case, the Gwalior bench of the Madhya Pradesh High Court requested the centre to reduce the age of consent for females to 16 years while observing that the present age of consent has "*disturbed the fabric of society as injustice is going on with adolescent boys*[28]."

The matter was further aggravated by the coming in of the Criminal Law Amendment Act 2013[29] and its amendment 2018[30] which took away the opportunity of discretion of courts in sentencing of rape cases pertaining to minors.[31]

Pitre and Lingam noted that 18 to 30% of all rape cases falling in the age bracket of 16 to 18 years of age, decided between 2013 and 2016 in all over India, have been of consensual nature, the numbers typically rising after 2012.[32] Yet another study conducted in Lucknow in 2017-2018 corroborates such a trend, with 54% of such cases being consensual.[33]

Also, according to a report 93.8% of the consensual cases tried under POCSO ended up in acquittal after a period of 1.4 to 2.3 years from the time of filing of the FIR to disposal by court.[34] Many of the cases falling in this age bracket are filed on the behest of family members and the 'victim' per se has no say in the same. Often, at the times of trials, it is noticed that these so-

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[27] A.K v. State of NCT of Delhi (7th February,2023)

[28] MP High Court Requests Centre to Reduce Women's Consent Age to 16 from 18, The Hindu (9th November,2023), https://www.thehindu.com/news/national/other-states/mp-high-court-requests-centre-to-reduce-womens-consent-age-to-16-from-18/article67030944.ece

[29]The Criminal Law Amendment Act, Indian Institute of Technology Kanpur, https://www.iitk.ac.in/wc/data/TheCriminalLaw.pdf

[30]The Criminal Law (Amendment) Act 2018, Ministry of Home Affairs, https://www.mha.gov.in/sites/default/files/2023-02/CSdivTheCriminalLawAct_27022023.pdf

[31]Preeti Pratishurti Dash, Rape Adjudication in India in the aftermath of Criminal Law Amendment Act, 2023, Indian Law Review,https://www.nls.ac.in/wp-content/uploads/2021/04/Indian-Law-Review-Published.pdf

[32] Pitre A, Lingam L, "Age of consent: Contradictions and challenges of sexual violence laws in India," Sex Reproof Health Matters, 29(2):1-14 (Feb. 22, 2021), https://doi.org/10.1080/26410397.2021.1878656.

[33] Vishwanath N, "The shifting shape of the rape discourse," Indian J Gend Stud, 25(1):1–25 (2018), http://dx.doi.org/10.1177/0971521517738447.

[34] Enfold Proactive Health Trust, Bengaluru (2023)

called victims turn hostile thus not supporting the case of the prosecution.[35] These statistics reveal the fact that legal frameworks like the POCSO criminalizing consensual sexual relationships in the age group of 16 to 18 years lead to various unintended consequences. The high acquittal rate in these cases suggest that the present age of consent may not align with the realities of adolescent behaviour and evolving maturity.

With the onus of proof of innocence lying on the accused and the police procedure mandating prompt arrest of the major boy if the girl involved is a minor, the process of trial as well as bail is often very prolonged and tedious. As a result of which, the accused and his family are burdened with economic, psychological, and social consequences for the same. It is often noted in such cases that the minor girl and major boy tie the knot and even have children. The girl is ordinarily financially dependent on the boy and with him languishing behind bars, life becomes difficult for her and their children[36].

Certain ironies have also come to light related to the age bracket as far as males are concerned. POCSO is gender neutral in nature which means it overlooks the gender specific attributes of the perpetrator as well as the victim. However, on the ground the conditions are far from ideal. Due to the gender-neutral nature of the Act, it should consider both the girl and boy involved to be victims of the crime but in reality, it is always the boy who is regarded as an aggressor and then tried as an adult. With reduction in the age of consent, such harsh biased criminalisation of normal adolescent behaviour can be mitigated.

Moreover, the Justice Verma committee[37] also recommended lowering the age of consent to 16 years taking into regard the complex realities on the ground in relation to the autonomy of adolescent girls over their bodies, their reproductive rights, and their evolving capacity to exercise sexuality. Lowering the age of consent would acknowledge adolescents as individuals

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[35] "Age of consent under the POCSO Act," SCC Online Blog, https://www.scconline.com/blog/post/2023/03/12/age-of-consent-under-the-pocso-act/ (last visited Feb. 28, 2024).

[36] Decriminalising romantic adolescent relationships under the POCSO Act, Bar & Bench,(10th May,2024), https://www.barandbench.com/columns/exposing-double-standards-of-law-towards-adolescents-de-criminalising-romantic-adolescent-relationships-under-pocso

[37] Report of the J.S. Verma Committee (2013), https://spuwac.in/pdf/jsvermacommittereport.pdf

having autonomy over their bodies. It would affirm their right to make resolutions regarding their sexual lives based on their values, desires, and circumstances.

As per the Committee, the purpose of the POCSO Act is to safeguard the interests of minors and not to abuse minors in a consensual sexual relationship.

According to certain reports, 11% of girls had their first sexual intercourse before the age of 15 while 39% before the age of 18.[38] These statistics corroborate the fact that even adolescents in India start to explore the facets of their sexuality even before becoming a major. Cases such as these which are reported to the authorities increase an unnecessary burden on the judicial mechanism as well as penalise consensual sexual activities among young adults.

POCSO and *Criminal Law Amendment Act 2018* mandates reporting of any "apprehension" or "knowledge" of sexual activity where minors were involved[39]. This means that health practitioners are required to report any underage Medical Termination of Pregnancy, request for contraceptives, antenatal care, or any treatment of Sexually Transmitted Diseases for that matter. Generally, underage girls in these circumstances avoid availing health care to protect their partners from any legal consequences. Lowering the age of consent to 16 years could potentially ease access to essential resources.

Furthermore, in recent decades, fast exchange and easy accessibility of information through various channels have increased which can contribute to early exposure to sexual content, information, and behaviour which may impact adolescents in various ways[40]. Exposure to such information and discussion can lead to curiosity which further can then hasten up sexual maturity thus contributing to sexual autonomy.

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[38] National Family Health Survey,2015-16

[39] Protection of Children from Sexual Offences Act, Section 19,https://www.indiacode.nic.in/bitstream/123456789/2079/1/AA2012-32.pdf

[40]Megan Landry, Monique Turner, Amita Vyas, Susan Wood, Social Media and Sexual Behaviour Among Adolescents: Is there a link?,, https://pmc.ncbi.nlm.nih.gov/articles/PMC5457530/

Further, as per several researches conducted in developmental psychology, it was concluded that by the age of 16 many individuals attain cognitive maturity that is the stage of formal operational thought[41]with which individuals are able to formulate hypotheses and systematically test them to arrive at conclusions. This ultimately accelerates their abstract thinking, problem-solving, and decision-making skills. By 16, adolescents become better equipped to realise the consequence of their actions and weigh the risks and benefits of the same which enables them to make decisions about their sexual lives and behaviours. With the lowering of the age of consent, this developmental milestone will be acknowledged.

Additionally, with the lowering of the age of consent disseminating sexual awareness and providing comprehensive education would become a lot easier. With the age of consent set at 18 years, educators in schools might hesitate to provide sex education to the students as most of the students in schools are minors[42]. The educators might fear running into legal trouble for exposing children to the tenets of sex education. Additionally, dissemination of Sex education in schools would contribute to normalisation of deliberations around sexual health by providing a better understanding to adolescents of their bodies, pregnancies, Sexually Transmitted Diseases, contraceptives, emotions, and sexual behaviours, which can ultimately lead to more responsible decision-making and a reduced likelihood of risky or harmful sexual behaviours[43]. With this move, individuals with better sexual health and awareness can be integrated into society.

The age of consent is an equally topsy-turvy path to embark upon by any nation. As a consequence of which many nations across the globe have tried their hands at finding a middle ground for the same. One such move in furtherance of this, certain nations have applied what is popularly called “Romeo Juliet laws”. These laws permit consensual sexual intercourse between two individuals where either one or both have not reached the legally

[41] Figner B, Mackinley RJ, Wilkening F, Weber EU, "Development of Decision Making in School-Going Children and Adolescents: Evidence from Heart Rate and Skin Conductance Analysis" (2009)
[42] Global Education Monitoring Report Team, “Facing the Facts: the case for comprehensive Sexuality Education”,https://unesdoc.unesco.org/ark:/48223/pf0000368231
[43]María Lameiras-Fernández, Rosana Martínez-Román, María Victoria Carrera-Fernández, Yolanda Rodríguez-Castro, Sex Education in the Spotlight: What is Working?,https://pmc.ncbi.nlm.nih.gov/articles/PMC7967369/

permitted age of consent. These laws recognise the fact that adolescents develop sexually and young people can validly consent to sexual activity with someone falling in the same age group and such individuals should not be penalised for the same.

Certain nations practising the same: -

United States of America: The age of consent laws is determined individually by respective states and many states have adopted Romeo and Juliet or "close-in-age" exemptions which vary from state to state. For example, Florida's Romeo Juliet laws allow individuals to petition the court to remove the requirement to register as a sex offender if they were not older than 23 years at the time of the consensual sexual encounter with someone in the age bracket of 16- 17 years.

At the same time, in Texas, the law provides for a defense in the case when the younger party is at least 14 years old and the older one is at the most 17 years old.

Meanwhile, California does not have a traditional Romeo Juliet law but grants judges the discretion to decide whether an adult must be registered as a sex offender if the minor involved is at least 14 years old and the older party is at most ten years older.

Canada: One has to be at least 16 years of age to provide consent to sexual activity that is not exploitative in nature which includes prostitution, pornography or sexual encounters in relationships of authority, trust or dependency. However, certain exceptions surround this legal provision as well.

For individuals falling in the age bracket of 12 to 13 years, consensual sexual intercourse is allowed with a person who is less than 2 years older to that person. For instance, if an individual is 12, then she can consent to indulge in a sexual interaction with someone who is 14 years of age.[44]

This bracket increases to less than 5 years older for individuals who are 14 and 15 years of age. So, an individual who is 14 years of age can choose to indulge in sexual intercourse with a person who is a minimum of 12 and a maximum of 19 years of age.

[44]"Frequently Asked Questions - The Canadian Legal System," Department of Justice Canada, https://www.justice.gc.ca/eng/rp-pr/other-autre/clp/faq.html

Australia: The legal age for consent varies around different states ranging from 16-17 years. Despite that, if a person is less than two years older than the younger person who is under the age of consent will not attract punishment provided both are above the age of 10. [45]

These laws reflect the efforts to balance protecting minors with recognising the nuances of consensual relationships between young individuals.

Conclusion

The debates surrounding the age of consent are complex and multi-faceted which touch upon the legal, cultural, social as well as developmental dimensions. While the age of consent serves to protect minors from exploitation, at the same time it raises questions about the autonomy and evolving maturity of adolescents. The historical context, differing global practices and contemporary realities stress upon the need for a balanced approach which ensures protection not at the cost of criminalising consensual relationships among peers.

For states like India, where cultural values, jurisdictional interpretations and societal structures intersect, finding a middle ground can be exhaustive. While the arguments against reducing the age of consent emphasise the potential for abuse, health risks and societal ramifications, like child marriages, proponents highlight the need to decriminalise consensual adolescent relationships as well as acknowledge their autonomy.

Also, across the globe, *"Romeo Juliet laws"* have emerged as a pragmatic solution for allowing close-in- age exemptions while maintaining legal safeguards against potential abuse but similar solutions remain absent in India.

Ultimately, the decision to adjust the age of consent must weigh the protection of vulnerable individuals against the recognition of adolescent agencies and the realities of their maturing capabilities. Striking this delicate balance necessitates not only legislative reforms but also a robust system of education, awareness and counselling to guide young people about their sexual and emotional wellbeing.

[45]"Age of Consent", Armstrong Legal,https://www.armstronglegal.com.au/criminal-law/act/offences/age-of-consent/#:~:text=If%20a%20person%20is%20less,the%20Romeo%20and%20 Juliet% 20law.

Navigating Emergency Provisions in Domestic Arbitration

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Background

Emergency arbitration is a mechanism designed to provide urgent interim relief before the constitution of an arbitral tribunal, allowing parties to seek immediate remedies through an emergency arbitrator appointed by an arbitral institution. The Indian Arbitration and Conciliation Act, 1996 makes no provision of an emergency arbitrator, emergency orders, or emergency awards. In the year 2014, 246th Law Commission Report on revisions to the Arbitration and Conciliation Act, 1996 attempted to explicitly recognize emergency arbitration in India. The report recommended amendments to Section 2(1)(d) of the Act[1]. However, these recommendations were not included in the 2015 alteration that was approved.[2]

In 2016, the Indian government formed a High-Level Committee to Review Institutionalization of Arbitration Mechanism in India ("Committee") with the aim of identifying impediments to the expansion of institutional arbitration and investigating issues impacting the Indian arbitration scene. The Committee was tasked with devising a strategy to establish India as "a robust centre for international and domestic arbitration."[3] They suggested provisions for the recognition of emergency awards and their enforcement.

The Committee observed that there is a great deal of uncertainty surrounding Indian regulation, which affects the recognition and enforcement of awards given by Emergency Arbitrators. Recognising that India anticipated to

[1] 246th Report of the Law Commission of India, Amendments to the Arbitration and Conciliation Act 1996, 37 (2014)
[2] Arbitration and Conciliation (Amendment), Act, 2015. (No. 3 of 2016)
[3] Press Information Bureau Press Release, Ministry of Law and Justice, Government of India Constitution of. High-Level Committee to Review Institutionalization of Arbitration Mechanism in India, (December 2016)

provide permission of emergency awards in every arbitral cycle[4], the Committee suggested that India accept the Law Commission's proposals for administrative acknowledgment of emergency arbitrators under the Arbitration Act. Furthermore, disregarding the Committee's recommendation, the Government of India left emergency arbitrators out of the Arbitration and Conciliation (Amendment) Act, 2019.

Thus, neither the awards nor decisions issued by Emergency Arbitrators nor the Law Commission's recommendations nor the Committee's support have been recognised by law. As a result, there is still significant uncertainty as to whether the decisions made by the Emergency Arbitrators would be upheld in India, particularly considering the Committee's and the Law Commission's rejected recommendations. As such, for now, India remains a step behind (in this respect, at least) other countries in developing itself as an arbitration-friendly country.

Introduction-

Domestic Arbitration is a mechanism wherein the disagreement is brought before a designated individual who, after hearing the reasons from both sides, decides the matter in a quasi-judicial manner. Generally, the parties in dispute submit their case to an arbitral tribunal, and the tribunal's ruling is referred to as an “award”. In arbitration, where parties to the dispute decide the method for arbitrating, a delayed resolution could render the aggrieved party impotent and, as a result, in an unrecoverable state. Thus, the importance of arbitration has increased dramatically during the last few years. The effectiveness of "‘emergency arbitration’" comes into play if the arbitral tribunal is not created and enough time is wasted in doing so, the parties have only two possibilities for an instant remedy. The parties have two possibilities: they can approach the local courts for temporary relief, or they can wait for the arbitral tribunal to be established. The principal clauses of the 1996 Act that deal with the issuance of interim measures are Section 9 and Section 17.[5] In general, Section 9 provides the court the authority to issue temporary orders, and

[4] Report of the High-Level Committee to Review the Institutionalization of Arbitration Mechanism in India, (July, 2017, 76)
[5] The Arbitration and Conciliation Act, 1996, §9, 17.

Section 17 gives the arbitral tribunal the same authority. Notably, these clauses have been enacted in accordance with and in support of UNCITRAL Model Law Articles 9 and 17, respectively.[6] Interim measures may be necessary to determine the outcome of arbitration proceedings between parties. In a traditional court dispute resolution system, the parties have always looked for an intermediary measure to safeguard and defend the property or amount that is issue at hand. Interim measures of protection can be granted even prior to the initiation of arbitration proceedings as Supreme Court ruled in *R. McDill & Co. (P) Ltd v. Gouri Shanker*[7] that the parties to an arbitration may seek any intermediate remedy provided by the Civil Procedure Code, 1908. Subsequently, the Supreme Court addressed the question of whether a party can apply to a court for an injunction even before the arbitration process has really begun in *M/s. Sundaram Finance Ltd. V. M/s. NEPC India Ltd.*[8] and provided an affirmative response. The Court overruled the lower Court's justifications and determined that temporary protection orders might be issued even before arbitration proceedings are started.[9]

The dual system for providing interim relief (Sections 9 & 17) -

Section 9. Interim measures, etc. by court

The 1996 Act's section 9 provides the primary authority for granting interim relief until the arbitral tribunal is established. It stipulates that a party may petition the court for an interim injunction before, during, or at any point after the arbitral tribunal is established (but before it is enforced).[10] Regarding issues outlined in the clause, such as preservation, temporary custody, obtaining the disputed amount, or any other interim measures of protection is the court may deem appropriate and practical, a party may petition the court for protection. Additionally, it states that the court will have the same authority as any other competent court to enforce its ruling.

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[6] Variyar, supra note 55; Law Commission of India, Amendments to the Arbitration and Conciliation Act, 1996, Report No. 246, 4 (August2014) ('246th Law Commission Report').
[7] R. McDill and Co. (P) Ltd. v. Gouri Shankar Sarda, (1991) 2 SCC 548
[8] M/s. Sundaram Finance Ltd. v. M/s NEPC India Ltd., A.I.R. 1999 SC.565
[9] Ibid
[10] The Arbitration and Conciliation Act, 1996

A reading of various decisions suggests that parties generally seek assistance from the courts to resolve financial disputes and stop property from being alienated or dissolved. The reliefs that are typically requested and awarded by courts under the Act include the following examples:

i. Courts have ordered parties to provide guarantees under Section 9(ii)(b) to safeguard the amount in dispute, as parties have attempted to do.

ii. Courts have permitted parties to assume symbolic possession of properties under section 9(ii)(c). Additionally, a receiver has been appointed by courts to seize property that is not at issue.

iii. Courts have ordered parties to disclose the properties they hold in the exercise of the broad authority granted by section 9(ii)(e). Courts have found that in addition to ordering parties to refrain from disposing of their property, they may also issue an order of attachment against a third-party defendant.

The initial section 9, which is now section 9(1), has been amended to include sub-sections (2) and (3). According to section 9(2), arbitral proceedings must start within 90 days of the court issuing an interim order under section 9(1) if the court does so before the arbitral procedures begin. Prior to the change, initiating arbitration was not expressly required of a party seeking court-ordered interim relief as under the pre-amendment version of section 9, the court was empowered to grant interim measures even before the commencement of arbitration which typically occurred prior to the start of the arbitration. Because its interests were safeguarded, this led to a scenario where a party would receive temporary respite and would delay starting the arbitration. In addition to raising the possibility of procedural abuse, this would cause a delay in both the start of the arbitration procedure and its resolution. The addition of timelines to the Act's framework is a good overall modification that will guarantee discipline and prompt arbitration of disputes.[11]

[11] Center on Civil Justice, Recent Developments in Arbitration (David Siffert ed., N.Y.U. Sch. of L., 2022).

The insertion of section 9(3) limits the judiciary's ability to intervene in terms of temporary remedies. It specifies that unless there are circumstances that could make the remedy specified in section 17 ineffective, the court will not consider any application under section 9(1) after the arbitral tribunal has been established. The courts were mostly adhering to the stance in the modified Act, although there was still concern about parties shopping for a venue. The possibility that the authority granted by sections 9 and 17 could be used simultaneously created this risk. In the case of *ArcelorMittal Nippon Steel (India) Ltd. v. Essar Bulk Terminal Ltd.,* the Supreme Court clarified the interplay between sections 9 and 17. The Court held that once an arbitral tribunal is constituted, courts should refrain from entertaining applications for interim measures under Section 9, unless the remedy under section 17 is ineffective.[12] However, if a court has already taken up a section 9 application and applied its mind before the tribunal's constitution, it can proceed to adjudicate the matter. Unless there has been a clear modification, parties will not normally have access to section 9 proceedings while the arbitration is pending. However, if section 17 procedures prove ineffectual, such measures may be employed. A party who prefers such an application and seeks interim measures from the Court under section 9 will now have to effectively plead this.

Section 17. Interim measures by arbitral tribunal

According to Peter Hillerstrom, the arbitrator's powers are solely based on the parties' agreement and only apply to the parties to the arbitration, they are far more constrained than those of national courts. Temporary decisions can be issued by national courts on property owned by other parties, such banks. The parties may only delegate authority to the arbitrator in the interim when they do so.[13]

An arbitral tribunal may impose temporary restrictions in accordance with section 17(1). Like sections 9, section 17 offers a list of issues for which the parties may request temporary relief. However, the procedure under the Act

[12] *ArcelorMittal Nippon Steel India Ltd. v. Essar Bulk Terminal Ltd.*, (2021) 5 S.C.R. 1022 (India).
[13] Hillerstrom, Peter, "Emergency and Pre-Tribunal Arbitral Relief: Current Approach of the Key Arbitral
Institutions" in Stockholm International Arbitration Review, vol.2, pp.39-47, (2008)

was wholly useless prior to the 2015 amendment because it did not include any option for the arbitral tribunal to execute its orders. The sole statutory support arbitral tribunals had for these instructions came from section 27(5) of the 1996 Act, which outlined the consequences for disobeying the tribunal's orders and how contempt would be dealt with.[14] Even in this case, the arbitral tribunal would still need to ask the court for help in carrying out its directives. The arbitral tribunal would have to make a case and ask the court for help in determining the defaulting party's disadvantages, penalties, and punishments in the event of a refusal to abide by the order."

Section 17 addresses an arbitral tribunal's power to order interim relief. Prior to the amendment, the clause allowed the tribunal to grant any interim measure of protection and was rather broad in the types of relief that may be granted. However, courts and arbitral tribunals held the opinion that section 17's permissible interim measure scope was more constrained than section 9. As a result, several arbitral tribunals made the mistake of concluding that they were unable to make decisions like granting security. The Amendment Act clarifies the types of remedies that may be awarded and makes much-needed improvements to the way an arbitral tribunal grants interim remedy.[15] The following are certain reliefs that may be granted by an arbitral tribunal-

1. securing the amount that is at issue in the arbitration
2. holding, preserving, or inspecting any property or thing that is the subject of the arbitration dispute
3. granting interim injunctions and appointing a receiver
4. any other reasonable and practical interim measure.

The Act's Section 9 grants the tribunal wide power to grant any additional interim measure of protection that it may deem fit and reasonable thereby equating it to a court. Parties may now only request interim relief before arbitral tribunals following the start of arbitral proceedings, unless the nature of the reliefs calls for a court. For instance, the Supreme Court held in *Alka*

[14] The Arbitration and Conciliation Act, 1996 *§27(5).*
[15] Arbitration and Conciliation (Amendment) Act, No. 3 of 2016, § [relevant section], Gazette of India, Jan. 1, 2016 (India).

Chandewar v. Shamshul Ishrar Khan[16] that tribunals were authorised by section 27(5) of the 1996 Act to represent parties in court when they were in contempt of the court's orders. The Court additionally concluded that the matter should be referred to the High Court, which would decide the claimed contempt based on the relevant facts and legislative interpretation, as well as assess the consequences of the defaulting party's actions for the contempt.[17] As a result, the arbitrator's order and the court's were clearly distinct from one another, and only the court had the right to implement its orders, as stipulated by section 9. There was no such clause in section 17. As an arbitral tribunal is not a court, a defaulting party who violated the orders of the arbitral tribunal could not be penalised under the Contempt of Courts Act, 1971 (the "Contempt Act") or the Code of Civil Procedure, 1908 (the "CPC").

The Conflict between Sections 9 and 17 of the Arbitration Act

Section 9 and section 17 are complementary in nature, it is necessary to read and understand the applicability of section 17. In the case of *M.D., Army Welfare Housing Organisation v. Sumangal Services (P) Ltd*[18], the Supreme Court conceded the limited scope of section 17 and determined that the clause does not grant the arbitral tribunal any authority to carry out its directive or even to enforce it through the legal system. In this situation, section 9 helps the parties even if the arbitral processes continue, strengthening the role of the court.

With the amendment to section 17, the intervention of the court can now be minimized, and the pre-referral form of arbitration can take the front seat. The Court should be allowed to grant any interim measures in case of 'urgency' only when the provisions of emergency arbitration are not available.[19] The question of whether EA awards and decrees are enforceable under domestic law is another important one. The recognition and enforceability of emergency arbitrator orders across several jurisdictions is a challenge for

[16] (2017) 16 SCC 119 (Alka Chandewar)
[17] Ibid, at 6-8.
[18] *M.D. Army Welfare Housing Organisation v. Sumangal Services Pvt. Ltd., (2004) 9 SCC 619, Sri Krishan v. Anand (2009) 3 Arb LR 447 (Del).*
[19] See, *Gerald Metal S.A. v. Timis & Ors*, (2016) EWHC 2327 (Ch).

emergency arbitration in India. As the Courts in India traditionally have the power to grant interim relief under section 9 of the Arbitration Act. This creates conflict between EA decisions and court jurisdiction, leading to possible challenges and forum shopping. Furthermore, the absence of specific provisions in Indian law, as well as the type of interim relief offered, might have an impact on the enforcement process. It should be noted, however, that many EA orders are willingly implemented. This can be the case because it would have harmed their case before the established tribunal had they disregarded an EA judgement or order.

Choice Between Interim Relief from Indian Courts and Emergency Arbitrator:

The potency of any kind of dispute resolution is largely dependent on a party's capacity to secure speedy interim relief. Until recently, parties to disputes covered by arbitration agreements had only two choices: either apply for interim relief in support of the arbitration through national courts or wait until the arbitral tribunal was formed before submitting an application for interim relief. Under the former, parties would effectively have to start local proceedings before national courts, in which the main factor is the parties' initial option to choose arbitration. In the latter case, a party would run the risk of having their assets disappear while the arbitral tribunal was being established.

In this article, this analysis weighs the pros and cons of seeking immediate interim relief from emergency arbitrators versus national courts. It highlights India's experience and presents data derived from Indian judicial procedures. To provide some context, Indian courts have the authority to award temporary remedy in favour of arbitration under Section 9 of the Arbitration and Conciliation Act, 1996 (the Act). Prior to the arbitral tribunal's formation, parties can approach the courts for interim relief at any time. However, courts and arbitral Tribunals took the view that the scope of the interim measures that may be granted under section 17 was more limited than that under section 9. In *Arcelor Mittal Nippon Steel India Ltd. v. Essar Bulk Terminal Ltd.* (2021), the Supreme Court of India clarified that while Section 9 provides expansive powers to courts to grant interim reliefs, section 17 limits such

powers to the arbitral tribunal's jurisdiction and scope. The court emphasized that tribunals under section 17 cannot enforce their orders directly and rely on courts for enforcement under Section 27(5).[20] This reliance inherently limits the tribunal's ability to provide effective interim relief compared to courts under section 9. Parties are typically required to approach the tribunal immediately for interim relief after it has been established. Furthermore, unless the parties have agreed differently, Indian courts may grant interim relief even in situations where the arbitration will take place outside of India. Although emergency arbitration is not explicitly stated in the Act, parties may request orders from emergency arbitrators under the guidelines of Indian arbitration organisations like the Indian Council of Arbitration and the Mumbai Centre for International Arbitration. Moreover, emergency arbitration processes run by international organizations, specifically, SIAC, often involve Indian participants.

The table below contains a comparison of interim relief available under section 9 of the Act with emergency arbitration.[21]

Parameter	**Interim Relief from the Indian Court**	**Emergency Arbitration**
Duration	3 Days (Delhi High Court)	Varies depending on the institution
Success Rate	73% (Delhi High Court)	Data not available
Availability of orders against third parties	✓	×
Availability of ex-parte orders	✓	×
Enforceability	✓	×

[20] Supra note 12
[21] Rishab Gupta & Aonkan Ghosh, Choice Between Interim Relief from Indian Courts and Emergency Arbitrator, KLUWER ARB. BLOG (May 10, 2017)

The ICC Rules provide the emergency arbitrator with fifteen days to decide[22], whereas the SIAC Rules require him to render an award or order within fourteen days of his appointment[23]. Statistics indicate that emergency arbitrators for the SIAC and ICC frequently issue orders more quickly than that, but it is still conceivable that parties can obtain even faster relief by submitting a section 9 application to Indian courts.[24]

Stance of Indian arbitral institutions:

An emergency arbitrator is an idea that has been around for a while. To enhance the usefulness and efficiency of its regulations, arbitral institutions have created emergency or expedited processes to support parties in need of immediate temporary relief prior to the formation of an arbitral tribunal. These days, several institutions have introduced clauses that offer emergency relief in the form of expedited tribunal formation or the appointment of an emergency arbitrator. However, what seems disconcerting is emergency arbitrator provisions offered by Indian arbitral organisations, such as the Delhi High Court Arbitration Centre, the Indian Council of Arbitration, the Nani Palkhivala Arbitration Centre, and the International Chamber of Commerce (India). Going through the emergency arbitrator provisions in their arbitration rules reveals that they were adopted without considering their viability in the current Indian context. While the newly proposed amendments to the Arbitration and Conciliation Act of 1996 do include an emergency arbitrator in the definition of an arbitral tribunal and allow for the immediate enforcement of interim orders rendered by an arbitral tribunal, it is true that they do offer a solution.

Concluding remarks

EA proceedings prove to be more transparent than domestic court proceedings since most arbitration rules stipulate that prospective arbitrators will have to disclose circumstances that could give rise to any doubts concerning their impartiality and independence. Therefore, it becomes imperative to formulate a robust procedure for EA under the domestic rules to

[22] International Chamber of Commerce, Arbitration Rules (2012), Article 29 & Appendix V.
[23] Singapore International Arbitration Centre, Arbitration Rules (2016), Rule 30.
[24] supra note 17

provide the parties with an efficient resolution to their claims. Implementing emergency arbitration procedures would cater to disputes requiring urgent relief in arbitration, promoting the expansion of arbitration in India, and minimizing judicial intervention. It will help India's laws and regulations conform to international arbitration standards, furthering its goal of becoming a prominent global arbitration centre. Therefore, it becomes imperative to formulate a robust procedure for EA under the domestic rules to provide the parties with an efficient resolution to their claims which enables parties to seek prompt redress. Ensuring that justice is administered without delay with a framework that specifies the process, scope, and enforcement of emergency awards must be provided by clear, thorough law that particularly handles 'emergency arbitration.' Such laws should follow global best practises and consider the needs, issues, and concerns of Indian enterprises and the legal system. The adoption of 'emergency arbitration' law in India would not only provide parties engaged in 'emergency arbitration' the much-needed certainty they want, but it would also improve India's reputation as a pro-arbitration jurisdiction, draw foreign investment, and advance ease of doing business. It will also help lighten the load on the courts and advance India's conflict settlement procedures' effectiveness.

Safe Harbour Protection under the Information Technology Act, 2000

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III LL.B.

Background

The Information Technology Act, 2000 was passed by the Indian Parliament on 9th June, 2000 and came into effect on the 17th of October of the same year. It is the primary legislation operating in the field of information technology in India. This Act has been subsequently amended multiple times, most notably in the years 2002, 2008 and 2017.

One of the most significant provisions of the Information Technology Act, 2000 (hereinafter referred to as the "IT Act, 2000") relates to the exception carved out to protect internet-based entities that qualify as an "intermediary" as defined under this Act, from liability under the penal provisions of any law in force in India. This carve-out is commonly referred to as a 'safe harbour protection' and finds parallels in legislations enacted across multiple jurisdictions, such as Section 230 of the Communications Decency Act of 1996 in the United States of America. While this provision finds its genesis in the message boards of the 1990s that arose at the time of the rise of the internet, it finds applicability most often today in relation to social media intermediaries such as Facebook and Twitter. Although this provision is often touted as a salutary provision that protects free speech and is highlighted as a definitive contributor to the rise of large social media entities, it has also been subject to litigation globally on account of its perceived contribution to the failure to hold social media companies to account for their negligence in controlling the spread of hate speech and fake news. With the clear increase in the power of social media in controlling political narratives, and well documented instances of their complicity in hate-fuelled pogroms[1], this

[1] Amnesty International Amnesty International, "The Social Atrocity: Meta and the Right to Remedy for the Rohingya", ASA 16/5933/2022, September 29th 2022.

provision has come increasingly under attack, and India is no exception to this trend. The recent introduction of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 has been a paradigm shift in the safe harbour landscape in India, and has therefore led to a raft of petitions being filed in various High Courts of India challenging the constitutionality of various provisions thereunder. These petitions are still sub-judice, but it would be beneficial to analyse the legislative backdrop for the introduction of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, the provisions thereof having an impact on the safe harbour principle, the challenge to its constitutionality and the future outlook for safe harbour protection in India.

Legislative Backdrop

Section 79 of the Information Technology Act, 2000 provides for the safe harbour provision in India. As enacted originally, the section stated as follows:

> ***Network Service Providers not to be liable in certain cases:***
>
> *For the removal of doubts, it is hereby declared that no person providing any service as a network service provider shall be liable under this Act, rule or regulations made thereunder for any third-party information or data made available by him if he proves that the offence or contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence or contravention.*

From a plain reading of the provision above, one can discern that the provision as originally enacted provided for a blanket exception from liability under the IT Act, 2000, provided the intermediary could prove lack of knowledge of the offence and the exercise of due diligence. However, this section was subsequently amended in 2008, and various specific conditions were added under a new sub-section, in order for intermediaries to qualify for exception from liability: that the intermediary only functions as a communication system for third parties, does not initiate or modify the

information or choose the receiver, observes due diligence and follows government guidelines, does not commit unlawful acts, and removes or disables access to unlawful content promptly on being notified by the government. Effectively, the burden of proof was reversed. The intermediary was no longer required to prove that they did not have any knowledge of the commission of an offence. They merely needed to comply with the guidelines issued by the Central Government.

Further, the definition for intermediary under Section 2(1)(w) of the IT Act, 2000 was also expanded under the amendment to include specific entities such as telecom/network/internet/web-hosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes. This imposed a duty on an extended list of intermediaries to act as arbiters of content violation under the IT Act, 2000. Thus, restrictions were imposed on the ability of intermediaries to act as fora for debate and disagreement.

Thereafter four sets of Rules were notified under the amended IT Act, 2000, one of them being the Information Technology (Intermediary Guidelines) Rules, 2011 of which Rule 3 gave effect to the additional responsibilities imposed under the amended section 79. This amendment came to be challenged in the landmark judgement of *Shreya Singhal v. Union of India*[2]. The amendment to Section 79 was read down by a two-judge bench of the Supreme Court of India. In a noteworthy judgement authored by Justice Rohinton Nariman, the Supreme Court held:

> *"Section 79(3)(b) has to be read down to mean that the intermediary upon receiving actual knowledge that a court order has been passed asking it to expeditiously remove or disable access to certain material must then fail to expeditiously remove or disable access to that material".*

[2] (2015) 5 SCC 1

Rule 3 was also read down in a similar manner. The court held that intermediaries cannot be expected to exercise their own judgement as to the legitimacy of requests to take down content.

This was the settled position with respect to safe harbour for intermediaries until the year 2021, when the Government of India introduced the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (hereinafter referred to as the "IT Rules 2021") in supersession of the Information Technology (Intermediary Guidelines) Rules, 2011.

Safe Harbour Provisions under the IT Rules 2021

The IT Rules 2021 were first notified on 25th February 2021. Thereafter, the Rules were amended in 2022 which were notified on 28th October 2022. The notified Rules have in themselves introduced a sea change in multiple facets of the digital eco-system in India besides the safe harbour principle. Further amendments were proposed in 2023 that not only impact safe harbour protection, but also affect inter alia the news-media landscape and online gaming. The notified and proposed amendments with respect to safe harbour for intermediaries are briefly described below.

The first change is with respect to the definition of intermediary. The IT Rules 2021 introduced new definitions for social media intermediaries and significant social media intermediaries:

> *"**Social media intermediary**" means an intermediary which primarily or solely enables online interaction between two or more users and allows them to create, upload, share, disseminate, modify or access information using its services;*
>
> *"**Significant social media intermediary**" means a social media intermediary having number of registered users in India above such threshold as notified by the Central Government;*

Further, Rules 3 and 5 of the IT Rules 2021 impose due diligence requirements on all intermediaries, while Rule 4 imposes an additional due diligence requirement on significant social media intermediaries. Some of the

requirements are fairly innocuous and carried over from the IT Rules 2011, such as clearly identifying content that users are not allowed to share or upload. Additional requirements carried over include providing a grievance redressal mechanism for aggrieved users and retaining records of content blocking and removal for 90 days. The IT Rules 2021 made these requirements stricter by reducing timelines for compliance. The added burden imposed under Rule 4 pertinent to the safe harbour principle included:

1) The appointment of:
    a. A chief compliance officer to ensure compliance with the provisions of the IT Act, 2000 and the IT Rules 2021
    b. A nodal officer to co-ordinate with law enforcement agencies
    c. A resident grievance officer, all of whom must be resident in India
2) A mechanism to identify the first originator of information for those significant social media intermediaries who primarily provide messaging services, when an order is passed by a Court or a competent authority under the IT Act, 2000
3) Deployment of automated technology-based measures to identify violative content such as child pornography which is proportionate to the interests of free speech and privacy of users with an element of human oversight

Another notable departure from the IT Rules 2011 was the introduction of Rule 7, which states as follows:

> ***Non-observance of Rules*** *- Where an intermediary fails to observe these rules, the provisions of sub-section (1) of section 79 of the Act shall not be applicable to such intermediary and the intermediary shall be liable for punishment under any law for the time being in force including the provisions of the Act and the Indian Penal Code, 1860.*

Thus, the government fleshed out the conditional availability of the safe harbour principle for intermediaries, and significant social media intermediaries were given additional responsibilities in order to qualify for safe harbour. The duties imposed under the IT Rules 2011 were in and of

themselves under question for a variety of reasons, although not all of them had been tested in the courts of law. The additional burden of compliance imposed were open to question not only under Constitutional principles settled prior to 2011, but also in light of the evolution of constitutional jurisprudence in the intervening decade, such as the right to privacy.[3]

The amendment of 2022 exacerbated the concerns of the relevant stakeholders. Under the 2022 amendment, the Central Government increased the user-centric due diligence requirements under Rule 3, such as the duty to not only prominently publish, but also to inform users annually regarding their privacy policy, rules, regulations and user agreement in English and vernacular languages, as well as the explicit requirement to ensure respect for the rights of users under Articles 14, 19 and 21 of the Constitution of India. An important change brought about by the 2022 amendment was Rule 3A which introduced a Grievance Appellate Committee. This committee consisted of three members to be appointed by the Central Government including an ex officio member, and which would be the final appellate authority against any decisions of the Grievance Officer appointed by the significant social media intermediary. The appointment of this authority effectively made the Central Government the arbiter of all disputes regarding non-compliance with the IT Rules 2021 and the IT Act, 2000 with the consequence that since non-compliance led to the loss of safe harbour status for the intermediary under Rule 7, the Central Government gained outsized leverage over the intermediary and third-party content allowed therein.

In 2023, the Central Government introduced another draft amendment to the IT Rules 2021. While some of the provisions of the amendment are introduced in order to regulate online gaming, a noteworthy change germane to the safe harbour provision is the introduction of the Fact Check Unit at the Press Information Bureau under the Ministry of Information and Broadcasting, or other agency authorised by the Central Government, which would decide whether any information relating to the business of the government is false or untrue. This provision makes it even harder for digital

[3] Justice K.S. Puttaswamy (Retd.) & Anr. v. Union of India & Ors. (2019) 1 SCC 1.

news organisations to hold the government to account since the government arrogated the right to determine the truth of every news item to itself. The Central Government would therefore become the judge, jury and executioner in all matters related to its own functioning with the most stringent consequences available under the law in India viz. the loss of safe harbour and subsequent filing of cases under all the laws in force in India including the Indian Penal Code, 1860.

Constitutional Challenges to the IT Rules 2021

The IT Rules 2021 have come under intense scrutiny since their notification, and have been challenged under the writ jurisdiction of High Courts throughout the country. In all, there have been seventeen challenges to the constitutional validity of the IT Rules 2021 along with its amendments in the High Courts of India. The challenges to the provisions related to the safe harbour i.e. Part II of the IT Rules 2021 are as follows[4]:

1) *LiveLaw Media Private Limited and Ors. v. Union of India and Ors.*
   Kerala High Court [WP(C) 6272/2021]
2) *Sanjay Kumar Singh v. Union of India and Ors.*
   Delhi High Court [WP(C) 3483/2021]
3) *WhatsApp LLC. v. Union of India*
   Delhi High Court [WP(C) 7284/2021]
4) *Facebook Inc. v. Union of India*
   Delhi High Court [WP(C) 7281/2021]
5) *Uday Bedi v. Union of India*
   Delhi High Court [WP(C) 6844/2021]
6) *Praveen Arimbrathodiyil v. Union of India*
   Kerala High Court [WP(C) 9647/2021]
7) *T.M. Krishna v. Union of India*
   Madras High Court [WP (C) No. 12515/2021]
8) *Sayanti Sengupta v. Union of India and Anr.*
   Calcutta High Court [WPA(P) No. 153 of 2021]

[4] Internet Freedom Foundation, *Table summarizing challenges to IT Rules 2021,* (April 26th 2022), https://docs.google.com/document/d/1kmq-AlRO1XpPaThvesl5xQq2nVkZv6UdmaKFAJ8AMTk/edit, last visited on 14th May 2022.

9) *Nikhil Wagle v. Union of India*
Bombay High Court [PIL (L) /14204/2021 (with W.P.(L) No. 14172/2021)]

The thrust of the arguments in the petitions with respect to the safe harbour provision is along two axes – that the Rules are in violation of the fundamental rights guaranteed under Part III of the Constitution of India, and that the Rules are ultra-vires of the provisions of the parent statute i.e. the IT Act, 2000.

The petitioners have argued that the Rules have granted the right to determine the legality of free speech to private entities, and with the threat of Rule 7 i.e. the removal of safe harbour protection hanging over them, such entities will err on the side of caution and over-censor content as per their understanding of legal norms and the cultural mores that are acceptable to the government of the day. This would invariably be violative of the right to free speech and expression guaranteed under Article 19(1)(a) of the Constitution of India.

Further, the petitioners highlight that the intermediaries have been mandated to use technology in two separate contentious ways:

1) In order to automate removal of pornography, child sexual abuse material and other such illegal content. However, it is well-documented that the use of such automated tools is deeply problematic in their present state.[5] Such tools carry over the biases that are inherent in the data sets used to build such models, as well as those subconsciously carried in the minds of the developers themselves. In addition, such mandated use is an instance of pre-censorship by the intermediary by its very design.
2) In order to enable tracing of the originator of information. The primary issue with this mandate is the invasion of privacy of the users. The necessary corollary of this requirement is that there is a presumption of guilt on behalf of every user of the intermediary's product or services. The satisfaction of this 'due diligence condition'

[5] Gentzel, Michael. (2021). Biased Face Recognition Technology Used by Government: A Problem for Liberal Democracy,34, Philosophy & Technology:1639–1663 (2021).

would mean the acceptance of wholesale violation of the users' right to privacy guaranteed under Article 21 of the Constitution of India. The right to anonymity is a facet of the right to privacy, and would stand defeated once this provision is enforced. In the celebrated *K. S. Puttaswamy judgement* of 2018[6], the Supreme Court of India laid down the triple test of legality, necessity and proportionality. In the present situation there is no provision under the IT Act, 2000 that provides for the invasion of privacy, nor is there an element of judicial review of such invasive actions performed on the directions of the Central Government under the IT Rules 2021, and neither is the direction to effectively invade every user's privacy in compliance with the Central Government's mandate the 'least restrictive alternative' in meeting the object of the Act. Thus, this mandate on use of technology does not satisfy any of the three tests prescribed by the Supreme Court.

Further, the rule is vaguely worded and does not clarify the means to be adopted, technologically or otherwise, in order to satisfy this requirement. As per the state of the technology presently utilised by the intermediaries, fulfilling this requirement would require a wholesale rewriting of the software underlying these products or services.

Part II of the IT Rules 2021 fails on the counts of proportionality and necessity, and does not fall under the 'reasonable restrictions' allowed under Article 19(2) of the Constitution of India, since the rights of every citizen would stand on shaky ground in order to prosecute the few criminal elements within society at large. The due diligence requirements under Rule 3 are overbroad and the threat of removal of safe harbour protection under Rule 7 incentivises the intermediary to curtail the fundamental rights of citizens under Article 19(1)(a). Further, the Rules 3,4 and 5 i.e. the rules pertaining to due-diligence requirements also do not require the provision of an adequate opportunity of being heard to the person whose content is blocked or taken

[6] Justice K.S. Puttaswamy (Retd.) & Anr. v. Union of India & Ors. (2019) 1 SCC 1.

down. This therefore, violates the principle of natural justice of *audi alteram partem.*

The second axis along which the IT Rules 2021 have been challenged is that the rules travel beyond the scope of the parent legislation. The power to enact rules for the proper enforcement of Section 79 i.e. the safe harbour clause is derived from Section 87(2)(g) of the IT Act, 2000, but the rules cannot exceed the scope of Section 79. Yet, the obligations imposed under the garb of Section 79 are onerous, and have little to do with the safe harbour provision. Section 79 is used merely as a threat to ensure the onerous obligations are complied with by intermediaries. In fact, the obligation mandating a strict timeline of thirty-six hours for removal of unlawful content is contrary to the provisions of Section 69A read with the IT Blocking Rules of 2009. The obligations imposed are an attempt to exceed the powers granted under Parliamentary authority.

Another ground for challenging the IT Rules 2021 is that of over-delegation. The legislature cannot delegate an essential legislative function, and the requirement of identification of the originator of information under Rule 4 of the IT Rules 2021 falls beyond the pale of the parent statute, since the parent statute does not provide any guidelines as to the interpretation or implementation of this requirement. Section 79 merely allows the Central Government to prescribe due diligence requirements, but the Rule mandates a change to the fundamental nature of the intermediary's platform.

Future Outlook for Safe Harbour Protection in India

The current swathe of litigation is expected to bring some necessary clarity on the issue of safe harbour protection. More recently, the Supreme Court of India has granted an interlocutory injunction against the notification of the Fact Checking Unit in the Press Information Bureau under the Ministry of Information and Broadcasting by the Central Government in accordance with the amendment introduced in 2023, until the raft of challenges to the IT Rules 2021 has been finally adjudicated. Further, keeping in view the multiplicity of proceedings that are ongoing on the same subject matter in multiple High Courts spread across the four corners of India, the Supreme Court has directed

the transfer of all the petitions to the Delhi High Court. It is inevitable that whatever order may be passed by the Delhi High Court, at least one of the parties will feel aggrieved and approach the Supreme Court. As a result, there may not be a clear direction on safe harbour protection in India in the near future. The recent steps by the government to replace the IT Act, 2000 with the proposed Digital India Act has further added to the uncertainty.

However, the recent directions of the Supreme Court with respect to the Fact Checking Unit notification signify that it is alive to the potentially deleterious impact of the IT Rules 2021 on citizens' fundamental rights and its influence on the capability of the government, as well as private intermediaries, to alter popular discourse. The concerns of the Central Government are perfectly legitimate regarding the necessity of regulation in this realm and the need to force private intermediaries to take positive corrective action without hiding behind the veil of safe harbour protection. The lack of accountability on behalf of private intermediaries has led to disastrous consequences in the past, and their inaction has also led to lives being lost[7]. However, the road to hell is paved with good intentions, and the proposed regulations may end up becoming a slippery slope towards authoritarianism and stifling of alternative voices. In the current polarised climate, such regulations need to be examined on the anvil of fundamental rights, and the Supreme Court will ultimately have to adjudicate on this matter. The debate on the utility of safe harbour provisions is not restricted to India, and voices have been globally raised in support of, as well as against it. It has become a major political issue in the US presidential elections as well and has managed to unite all sides of the political spectrum, with their primary concerns being the influence of foreign state actors on the electoral process, and the purported stifling of voices by private intermediaries acting as arbiters of acceptability and legality of content.[8] This also goes to show that notwithstanding the particular

[7] Elyse Samuels, *How misinformation on WhatsApp led to a mob killing in India*, The Washington Post,
February 21st 2020, https://www.washingtonpost.com/politics/2020/02/21/how-misinformation-whatsapp-led-deathly-mob-lynching-india/

[8] Derek E. Bambauer, *Trump's Section 230 reform is repudiation in disguise*, Brookings Institution, October 8th 2020, https://www.brookings.edu/articles/trumps-section-230-reform-is-repudiation-in-disguise/, last visited on 14th May 2024.

idiosyncrasies typical of India, the issues arising out of the rapid growth of internet-based intermediaries are felt uniformly across the world. The approach to the issue of safe harbour needs to be nuanced, and India as a country would do well to keep an eye on the evolution of jurisprudence on safe harbour protection globally, before charting its own course.

Regulations of Blockchain Technology and Cryptocurrency

Prakhar Pandey
I B.A., LL.B.

Introduction

The advent of cryptocurrencies and blockchain technology have brought decentralization, transparency, and efficiency in the financial world. In 2008, Satoshi Nakamoto, a pseudonym for the individual or people who introduced blockchain technology via his whitepaper on Bitcoin signalling a ground-breaking invention that has completely changed the way money transfers are made. By allowing safe peer-to-peer ("P2P") transactions without intermediaries, this idea underpins digital currencies such as Bitcoin as well as Ethereum to some extent.

Decentralized nature of blockchain and cryptocurrencies makes it difficult for traditional regulators to provide it a label, and thus requires a need to re-define their strategies. Moreover, introducing new ways of conducting business through blockchain makes it impossible for any central authority to control the business as conventional financial institutions do. This sort of decentralization takes away power from traditional monetary middlemen democratizing financial services these transformative developments, regulatory authorities face a pressing imperative to navigate the complex interplay between technological innovation and regulatory oversight. While blockchain technology and cryptocurrencies offer unprecedented opportunities for financial inclusion, innovation, and economic growth, they also present inherent risks such as fraud, money laundering, and market manipulation. Regulators must strike a delicate balance between fostering innovation and safeguarding against potential risks, all while ensuring compliance, protecting investors, and maintaining market integrity.

Methodological Framework

The research method employed in this study to gather qualitative data was the case study approach. Based on the potential of delivering an in-depth

understanding of cryptocurrency regulations, a qualitative research methodology has been used along with data obtained during an extensive literature review, which primarily focused on academic research and regulatory documents. Document analysis included examining regulatory documents, government reports, and international guidelines.

Research Design: The study was based on a qualitative research design, which enabled us to gain a deep insight into the realm of regulatory policies on cryptocurrency and blockchain technology. Such an approach allowed us to consider subtle aspects of regulatory issues and gather varied opinions.

Data Collection Methods: Data were collected using various methods, including in-depth literature review, and document analysis.

Limitations: It must be recognized that data sources may be subjective and include some limitations. Nevertheless, such constraints do not detract from the thoroughness and all-inclusiveness of the study on the regulatory environment within which cryptocurrency and blockchain technology are now operating.

Literature Review

Rise of Cryptocurrency and Blockchain

Although Bitcoin has had a significant impact on blockchain technology, the story of this innovative development began with a need for secure digital documentation and has led to potentially changing the world by disrupting many industries.

i. In 1982, a blind signature system is proposed by David Chaum[1], a cryptographer, in his dissertation as the basis of secure electronic transactions.

ii. In 1991, Stuart Haber and W. Scott Stornetta[2] provide a cryptographically secure chain of blocks for sealing timestamps on digital documents, which guarantees their integrity and prevents any tampering with them.

[1] David Chaum, "Blind Signature Systems," Ph.D. dissertation, University of California, Berkeley, 1982.
[2] Stuart Haber and W. Scott Stornetta, "How to Time-Stamp a Digital Document," Proceedings on Security and Privacy (1991): 437-445.

iii. In 1998, Nick Szabo, a computer scientist, conceived of "Bit Gold," - a decentralized digital currency that would utilize cryptography.

iv. In 2008, the blockchain revolution began when Satoshi Nakamoto released the Bitcoin white paper that outlined the use of blockchain technology for secure and transparent cryptocurrency transactions.

v. In 2009, a notable event in the history of blockchain was the launch of the Bitcoin network by Nakamoto, with a real-time application of this technology.

vi. With the appearance of Bitcoin as the first-ever digital currency, platforms emerged to provide ease of exchange and purchase. March 2010 witnessed the birth of bitcoinmarket.com (which is now defunct) as the first cryptocurrency exchange. July 2010 followed the foundation of Mt. Gox, which not only acted as another marketplace for cryptocurrencies but also played a significant role in solidifying this nascent infrastructure for cryptocurrency trading. Between 2011 and 2013, there were some landmarks that are most memorable when it comes to Bitcoin. In February, Bitcoin reached parity with the US Dollar, which highlighted that the acceptance and valuation of this digital currency were growing. In addition, during this same time, the emergence of several competitors to Bitcoin in the form of new cryptocurrencies was witnessed. Within this window up to May 2013, the cryptocurrency market had created a repertoire of ten digital assets, including Litecoin. Further, XRP (Ripple) was another large market-cap entrant later in August that year.

vii. The rise and expansion period were characterized by an increased interest in blockchain and its potential uses. The year 2013 witnessed the launch of Ethereum, a blockchain technology that allows the creation and implementation of smart contracts or self-

executing agreements, thereby demonstrating to the world that blockchain was more than just currencies.

viii. Between 2014 and 2017, multiple startups surfaced with their own innovative ideas based on blockchain technology aimed at different industries such as finance, supply chain management, and even healthcare.

ix. Since 2018 the public sector, particularly government and corporate entities, has actively engaged in maturing and exploring how blockchain can help enhance their systems by increasing efficiency, transparency, and security.

x. From 2020 to the present day, Central Bank Digital Currencies (CBDCs) based on blockchain technology are being studied in various countries due to their potential disruption of traditional finance.

xi. 2021-Present: Non-Fungible Tokens (NFTs) and Decentralized Finance (DeFi) have also been gaining increased attention and driving the adoption of blockchain technology in other areas. Where one is going, no one knows; a description is impossible, an image out of the question. Although issues related to scalability and energy consumption persist, the development of blockchain technology is constant. Without a doubt, its transformational capabilities can change numerous sectors and promote the emergence of new economic systems. It can be expected that further progress and more extensive use in the coming years will influence the trajectory of digital trust and cooperation for future generations.

Current Legal Standing of Cryptocurrency and Blockchain Technology

Discovering the cryptocurrency's lawful status in a country of one’s residence, work, or business is an essential measure to adopt before making any financial decisions. Whether one invests a small sum of money or hundreds of thousands of dollars into a particular project, it is significant to

know all about the process.[3] The legality of the operation is one of the most crucial details that one should be aware of.

If there are no established legal frameworks in a particular country, then, by default, cryptocurrency will be considered legal.[4] Yet this data intends to shed light on the explicit status of cryptocurrency's legality in each nation as much as possible. Although there are few circumstances where the official legal status is missing except basic 'Legal' or 'Illegal'[5].

Notwithstanding the illegal tag that might have been placed on by a nation, there are extenuating factors that still make it possible for cryptocurrencies to exist within its jurisdiction. In Indonesia, it is illegal to use cryptocurrency as a payment tool, yet legal to mine or trade. Additionally, Argentina has banned cryptocurrencies but does not enforce the law. Therefore, prior to making any investments, acquisitions, or purchases in the world of cryptocurrency that should be monitored by a specific country, it is necessary to completely understand the legal issues of that jurisdiction.

Types of Cryptocurrencies

Bitcoin is one type of cryptocurrency that has become popular in recent times. Bitcoin has been instrumental in creating a new kind of system for sending payments between people without an intermediary like a bank. Blockchain technology makes transactions possible in a non-traditional manner. It is open-source software, in which the code is shared freely, allowing anyone to take the original source code and create something new out of it. In this way, developers have produced hundreds of alternatives to Bitcoin and many different applications of blockchain technology. These different coins are called altcoins[6].

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[3] Lianos, Ioannis, et al., eds. Regulating Blockchain: Techno-Social and Legal Challenges. Oxford University Press, 2019.
[4] Dimitropoulos, Georgios. "The Law of Blockchain." Washington Law Review 95 (2020): 1117
[5] Girasa, Rosario. Regulation of Cryptocurrencies and Blockchain Technologies: National and International Perspectives. Springer, 2018.
[6] Amsyar, Izwan, et al. "The Challenge of Cryptocurrency in the Era of the Digital Revolution: A Review of Systematic Literature." Aptisi Transactions on Technopreneurship (ATT) 2, no. 2 (2020): 153-159.

Three key types of cryptocurrencies are:

- **Transactional:** These are used to store and exchange value, such as Bitcoin and Litecoin[7].
- **Cryptocurrency platforms:** They create a base for new blockchain applications. For instance, Ethereum is an example of a cryptocurrency platform created to operate based on smart contracts. Furthermore, Factom provides a platform through which developers can create more secure record-keeping applications.
- **Cryptocurrency applications:** They are built on top of cryptocurrency platforms. Anything from Initial Coin Offerings ("ICO") used to raise start-up funds to things like the 0x Project, which creates a decentralized exchange for other cryptocurrencies (or anything else.

Challenges Faced By Blockchain And Cryptocurrency

i. **Scalability**: Both blockchain and cryptocurrency networks currently struggle to process large volumes of transactions, resulting in slow processing times and high fees. This is especially true for a proof-of-work based system like Bitcoin. Scaling solutions such as sharding and layer 2 solutions are being explored, but significant progress is still needed.

ii. **Energy consumption:** The proof-of-work consensus mechanism used in blockchains such as Bitcoin requires a lot of computing power, resulting in high energy consumption. This raises environmental concerns and conflicts with the Sustainable Development Goals. Alternative consensus mechanisms such as proof-of-stake are being implemented to address this challenge.

Regulation: The lack of clear and consistent regulation of cryptocurrencies creates uncertainty for businesses and

[7] Milutinović, Monia. "Cryptocurrency." Економика-Часопис за економску теорију и праксу и друштвена питања 1 (2018): 105-122.

individuals. This hinders mainstream adoption and makes it difficult for financial institutions to fully participate in the space. While regulatory frameworks are evolving, there is still a long way to go.

iii. **Security:** There are vulnerabilities in the way Blockchain technology is implemented in some smart contracts and exchanges. The constant challenge of hacks and scams, on the other hand, continues to negatively impact trust and slow down adoption in the community.

iv. **Accessibility:** Accessibility and user experience are some of the key barriers to the widespread adoption of cryptocurrencies as well as blockchain technology given high learning curves and technical bottlenecks. It is paramount to focus on better user interface, educational materials, and wallet offerings to enable people who want to use this technology.

Volatility: High volatility makes cryptocurrencies a less attractive investment for many. Also, this same volatility can dissuade businesses from adopting them as payment methods due to their oscillating values that often vary too quickly and to a great extent.

Sustainability: This goes far beyond the energy aspect. We also must consider the long-term environmental impact of blockchain and cryptocurrency on e-waste from mining hardware, as well as specific protocols' carbon footprint, to evaluate these problems and find a long-term solution.

v. **Centralization:** If decentralized in theory, there can be some blockchain networks with tendencies towards centralization, which brings a lot of worries about influence and control over this system. It is also a challenge to strike a balance between decentralization and efficiency of Blockchain Technology.

vi. **Fraud and Illicit activities:** Although cryptocurrencies are of a pseudonymous nature, they can be used in illegal activities,

making them vulnerable to adverse publicity and regulatory authorities. Preventing fraud and ensuring responsible adoption are central to the ecosystem's long-term viability.

vii. **Social Impact:** In respect to social impact, it is necessary to think thoroughly about blockchain and cryptocurrency, which are not too controlled. They do have the potential to promote financial inclusion and empower individuals. However, at the same time, they can deepen disparities and create ethical concerns, especially related to use, control, and manipulation.

There is a pertinent need to address these challenges for their responsible and sustainable development and wider adoption of Blockchain technology.

Existing Legal Frameworks Worldwide

Blockchain and cryptocurrency laws are diverse and complicated worldwide today. Despite there being no universal regulatory framework in place, this paper highlights some common approaches as well as challenges below:

i. Internationally, one of the existing frameworks is a patchwork approach which is primarily based on pre-existing regulations such as securities laws, AML/CFT Rules[8], and consumer protection frameworks. This methodology, according to a report by the **International Organization of Securities Commissions (IOSCO)**[9] in 2023, creates ambiguity for players in the market and disrupts creative ingenuity.

ii. As part of the emerging frameworks and considering the constraints, some authorities are developing their own rules for regulating virtual currency. **Japan's Payment Services Act**[10], which requires obtaining a license for cryptocurrency exchanges, is one such legislation. Furthermore, the **European Union's Markets in Crypto-Assets**

[8] "Guidance for the Implementation of a Risk-Based Approach to Virtual Assets and Virtual Asset Service Providers" (June 2021)
[9] International Organization of Securities Commissions (IOSCO), "Research Report on Crypto-Assets" (February 2023)
[10] Act on Settlement of Funds, Japan, Law No. 59 of 1998, art. 25-3.

(MiCA) Regulation[11], which is forthcoming, is expected to standardize regulations in member states.

iii. **Central Bank Digital Currencies**[12] **(CBDCs):** These, explored by central banks add another layer of complexity, raising questions about their interaction with existing cryptocurrencies and regulatory implications.

Some of the key challenges are:

i. The first challenge is the definition and classification of different assets and activities in the blockchain; this complicates the creation of appropriate regulation.

ii. Another challenge lies in ensuring cryptocurrency exchanges and stakeholders comply with anti-money laundering regulations to curb their involvement in illicit activities.

iii. In ensuring that customers are protected from deceit and market control, it is vital for regulators to work toward achieving a balance between innovation and consumer protection.

iv. Collaboration among countries is necessary to create globally accepted rules, which can help prevent regulatory arbitrage, but this requires the resolution of jurisdictional disparities and competition.

Legal Regulations Of Blockchain And Cryptocurrency

To date, the legal environment around blockchain and cryptocurrency in India continues to be fluctuating and ambiguous. Although there is no legislation mandating direct control over them, there are some steps initiated by regulatory agencies and the government towards handling and potentially regulating them.

i. **Blockchain**: There is no legislation that focuses on blockchain technology in India and neither a central authority to monitor this new

[11] European Commission, "Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-Assets, and amending Regulation (EU) 2017/1128" (September 2020)

[12] "Central Bank Digital Currencies: Policy Considerations" (October 2021)

technology. But its wide-ranging uses and potential are being researched and tested in many domains like healthcare, agriculture, the banking sector, and more.

ii. **Cryptocurrency**: The government of India's stance on cryptocurrency is "Not illegal, and not a legal tender as well." Owning, keeping, and using cryptocurrencies as a means of transaction does not have a clearly defined law in India. Nonetheless, it must be noted that, while these digital currencies can be stored and traded by anyone, they are not acceptable as a mode of payment for commodities or services. The Indian government has implemented taxation on income derived from crypto transactions[13], which suggests a form of acknowledgment despite the absence of specific laws.

iii. **Regulatory actions:** The **Reserve Bank of India** ("**RBI**") has issued warnings and advisories regarding the risks associated with cryptocurrencies, based on financial and security issues.[14]

iv. **Proposed legislation:** The Cryptocurrency and Regulation of Official Digital Currency Bill, 2021 aims to outlaw private cryptocurrencies and introduce a central bank digital currency (CBDC). However, the Bill is still under consideration, making the future regulation of cryptocurrencies uncertain.

Investors and keen individuals looking forward to buying cryptocurrencies in India keep in mind the considerable risk involved in the Indian cryptocurrency investment industry, given that no specific regulatory framework and legal safeguards exist. There are ongoing initiatives led by the government and regulatory agencies to develop and shape the landscape of blockchain and cryptocurrency in India, suggesting a possible introduction of regulations soon.

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[13] *2022-23* Annual Budget

[14] Reserve Bank of India, *Press Release: Result of the 3-day Variable Rate Reverse Repo (VRRR) Auction Held on November 8, 2024*, at 2, https://www.rbi.org.in/commonman/english/Scripts/PressReleases.aspx?Id=2522

Suggestions

It is safe to say that the legal framework of blockchain and cryptocurrency is highly complicated, but there could be several ways and possible actions that would lead to better systems. To enhance clarity and consistency, below are some of the suggested strategies:

i. Regulatory Clarity: To offer regulations that can be understood in every jurisdiction, forming an international consensus on the definition and classification of diverse blockchain-based assets and activities would promote regulatory clarity.

ii. Regulation Harmonization[15]: Global cooperation among regulators may encourage similar regulations, preventing regulatory arbitrage and supporting international acceptance.

iii. Policy Consistency: About the intrinsic nature of blockchain technology and cryptocurrency, making use of isolated interpretations of existing laws and creating integrated systems designed specifically for them can bring more transparency and uniformity.

iv. Anti-Money Laundering/Combating the Financing of Terrorism Integration: The adoption of appropriate strategies and methods to incorporate cryptocurrency exchanges and their users into the already existing AML/CFT mechanisms, while also developing measures tailored to particular risk factors of this technology, can foster the prevention of financial crime.

v. Consumer Protection: Application of regulations concentrated on the sphere of customer care, such as disclosure conditions, investor enlightenment, and an effective complaint settlement system, can be an effective means to limit negative consequences from frauds and speculative activity.

vi. Balancing Innovation and Regulation: The issue of how to strike a balance between encouraging innovation and putting control of

[15] Group of Twenty (G20), "G20 Roadmap for Enhancing Cross-Border Payments: Building on the G20 Principles for Enhancing Cross-Border Payments" (October 2020)

responsible development within regulations is a challenge. Regulatory sandboxes, as well as innovation hubs, could become special areas where new technology can be tested and tried out on a small scale.

vii. Leveraging RegTech for Blockchain and Cryptocurrency Oversight: To exploit the advantages of Blockchain technology and cryptocurrency industry can be effectively overseen by regulators if they adopt RegTech solutions. Among these solutions, data analytics and AI-based compliance tools play a major role in assisting regulatory processes.

viii. Collaborative work with the industry: If industry players and regulators could establish open channels of communication as well as collaboration, it would ensure that the new regulations are successfully implemented and any emerging challenges addressed before they grow into big problems.

ix. While the technology is still evolving, it is important that regulations can evolve with it and be flexible and adaptable so as not to stifle innovation or hamper new developments.

x. Awareness: Educating the public about blockchain and cryptocurrency can help them learn more about these topics, enabling individuals to make educated decisions and participate securely in this emerging ecosystem.

Conclusion

The regulation of blockchain and cryptocurrency is a complex and evolving issue with no easy answers. Finding the right balance between fostering innovation and mitigating risks requires careful consideration of the unique characteristics of these technologies and a collaborative approach involving governments, industry players, and international organizations. As the technology continues to evolve, ongoing dialogue and adaptation will be crucial to ensure a regulatory environment that fosters responsible innovation and protects consumers and the financial system.

Prostitution in India – Addressing the Fault Lines of the Existing Legal Frameworks to Deal with Social Issues, Its Consequences and Way Forward

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IV B.A., LL.B.

Introduction and Historical Background

The term "prostitution" originates from the Latin verb "*prostituere*," denoting public exposure. It refers to the exchange of sexual services for monetary compensation. Recognized as a gender-specific issue predominantly affecting women, it is vital to acknowledge that men also endure sexual exploitation and violence. Additionally, the transgender community frequently faces marginalization within discussions surrounding the complexities of prostitution, both in India and globally. This exploitative system generates substantial profits by exploiting individuals who are socially and economically vulnerable.

Starting from mythological characters to the erstwhile *Devadasi* system, the presence of organized sex-workers in form of prostitution can be traced historically in Indian society. The monarchial courtesans, female dancers and artists prominent in the medieval era were further brought to economic perils during the colonial era. Social backwardness, patriarchal and feudalistic society, economic vulnerabilities and lack of adequate regulatory mechanisms compelled and continues to force thousands of disadvantaged and vulnerable elements of society to be a part of this exploitative profession. In the recent times, more severe manifestations of prostitution have emerged in forms of immoral trafficking, child trafficking and sex trade having severe cross-border ramifications as well.

Existing Legal Framework to deal with Prostitution in India

The primary legislation dealing with prostitution in India is the Immoral Trafficking Prevention Act, 1956 (The Act). The Act defines prostitution as

the sexual exploitation or abuse of persons for commercial purpose[1]. The Act primarily focuses on prevention of immoral trafficking, curbing organized sex work, rehabilitation of vulnerable elements and maintenance of public order and morality. It imposes strict prohibition on public sex work, soliciting, usage of public roads for carrying out sex work, advertisements and any form of organized sex work. The Act not only penalizes the people engaged in the acts of prostitution, but the clients and the contractors (persons engaged in the act of pimping) as well .

Moreover, the Indian Penal Code, 1860[2] provides a discrete legal framework for certain acts of human trafficking. The Crimes associated with prostitution and human trafficking encompass several legal provisions, including the Procuration of Minor Girls (Section 366-A IPC), Importation of Girls (Section 366-B IPC), Selling of Girls for prostitution (Section 372 IPC), and Buying of Girls for Prostitution (Section 373 IPC). Moreover, the Prohibition of Child Marriage Act, 2006[3] plays a crucial role in combating these offenses. These legislative measures collectively aim to address and prevent the exploitation and trafficking of individuals, particularly women and minors, within the realm of prostitution and related activities.

Inadequacies of the Existing Legal Framework on Legality of The act of Voluntary Sex-Work

The existing legal framework proves to be inadequate and at times counter-productive in its outlook. The legal canvas fails to distinguish the presence of variations in the acts of prostitution, its consequences and its aftermaths. The Act restricts exploitative, abusive and organized sex work. It hereby penalizes every element directly/indirectly involved on organized prostitution. However, by restricting organized prostitution, it also curbs and restricts right/means of such individuals who willfully undertake acts of sex work. It puts a blanket consideration on all sex workers as being exploited or abused prostitutes. The courts have well recognized sex workers as professionals, drawing remuneration for survival.[4]

[1] The Immoral Trafficking Prevention Act, 1956, § 2.
[2] The Indian Penal Code, 1860.
[3] The Prohibition of Child Marriage Act, 2006.
[4] Budhadev Karmaskar v. The State of West Bengal, (2011) 10 SCC 354

Moreover, as per Global Commission on HIV and the Law (2012), *"Sex work and sex trafficking are not the same. The difference is that the former is consensual whereas the latter is coercive. Sex worker organisations understand sex work as a contractual arrangement where sexual services are negotiated between consenting adults. Sex work is not always a desperate or irrational act; it is a realistic choice to sell sex in order to support a family, an education or maybe a drug habit. It is an act of agency".*[5]

According to a NGO's report to the UNHCR[6] the prevailing stereotypes portraying women in prostitution either as hypersexual societal outcasts or as solely victims of abuse are overly simplistic. Most women in sex work actively choose this profession as a viable means to support themselves and their families, dispelling the notion that all are victims of trafficking or coercion.

As per UN Protocol to Prevent, Suppress and Punish Trafficking In Persons, 2000 - Article 3 Use o/terms For the purposes of this Protocol: (a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include. at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs."[7]

The Open Societies Foundation[8], an international human rights advocacy organization, defines sex workers as consenting adults who engage in the exchange of sexual services or erotic performances for compensation, either regularly or intermittently. They advocate for the use of the term "sex worker" to recognize this activity as lawful employment, contrasting with the

[5] Global Commission on HIV and the Law (2012), Risks, rights and health, New York: UNDP, Chapter 7.
[6] SANGRAM NGO's report to the UNHCR.
[7] UN Protocol to Prevent, Suppress and Punish Trafficking In Persons, 2000 - Article 3.
[8] https://www.opensocietyfoundations.org/explainers/understanding-sex-work-open-society

pejorative associations of the term "prostitute," which often implies criminality and moral reproach. This terminology aims to combat stigma and promote equitable access to health, legal, and social services for individuals in the profession. However, the existing legal framework fails to accommodate the necessary perspective in its ambit, thereby leading to adverse consequences on the life of the sex-workers. The effects extend to compromise with numerous fundamental rights guaranteed under the Constitution can be briefly discussed as follows -

Right to Livelihood and Security

Voluntary sex is a chosen profession, and as a practice has not been criminalized. But since, voluntary prostitution is completely absent within the statutory canvas, the ambit of voluntary workers stands completely unaddressed. The issues of dignity, health offences and conducts while dealing with sex workers, remuneration, physical violence and mental harassment by the clients, and protection of law given for other professions is completely ignored for voluntary prostitutes. It hence, completely denies them the right to life under Article 21, which may be further expanded to right to life with dignity[9], health and safety, security and livelihood.[10]

Right To Live with Dignity

In the landmark case of *Budhadev Karmaskar vs The State Of West Bengal* the Supreme Court of India observed *that "this basic protection of human decency and dignity extends to sex workers and their children, who, bearing the brunt of social stigma attached to their work, are removed to the fringes of the society, deprived of their right to live with dignity and opportunities to provide the same to their children."*[11] In the case of *Francis Coralie Mullin v. Administrator, Union Territory of Delhi***,** the Supreme Court held that the right to life under Article 21 of the Indian Constitution encompasses the right to live with human dignity. This includes access to basic necessities like adequate nutrition, clothing, shelter, as well as the ability to engage in activities such as reading, writing, and self-expression.[12] These rights are

[9] Maneka Gandhi v. Union of India [1978] AIR 597; [1978] SCR (2) 621.
[10] Olga Tellis & Ors v. Bombay Municipal Corporation & Ors, [1986] AIR 180; [1985] SCR (Supp) 2 51.
[11] Budhadev Karmaskar v. The State of West Bengal, (2011) 10 SCC 354.
[12] Francis Coralie Mullin v. Administrator, Union Territory of Delhi, (1981) 1 SCC 608.

subject to the economic development of the country but must always encompass the fundamental components of a dignified life. Any act that violates human dignity, including torture or cruel, inhuman, or degrading treatment, infringes upon this right to live and is prohibited under Article 21. Such violations must adhere to reasonable and just legal procedures that withstand scrutiny against other fundamental rights.

Moreover, any law or procedure that authorizes or leads to such violations, such as torture or cruel treatment, is inherently unreasonable and arbitrary, rendering it unconstitutional and void. This perspective aligns with international standards, including Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights, which emphasize protection against torture and inhumane treatment as an implicit component of the right to life enshrined in Article 21 of the Indian Constitution.[13]

Right To Health The Right to Healthcare encompasses an individual's entitlement to protect their health from detrimental State actions, alongside the State's duty to ensure accessibility and affordability of healthcare services. While not expressly enumerated in the Indian Constitution as a fundamental right, the judiciary, through the Doctrine of Implied Fundamental Rights, established the right to healthcare and medical treatment as an inherent component of the right to life under Article 21, notably articulated in the case of *State of Punjab v. M.S. Chawala*.[14] Moreover, the economic vulnerability of the sections of society already engaged in stigmatized works such as sex work has increased exponentially post pandemic. The sex workers are unable to get access to the antiretroviral therapy, which is essential for survival in case of HIV and other STDs, as many sex workers are out of the purview of government schemes due to lack of essential identity documents.[15]

Necessity for Legalization

Legalizing essentially means formally recognizing the existence of voluntary prostitution as a valid legal social reality and take steps to regulate such activities in accordance with the rule of law. Regulation does not necessarily

[13] Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights.
[14] State of Punjab & Ors v Mohinder Singh Chawla (1997) 2 SCC
[15] Committee of Experts on Pandemic and its effects on Human Rights and Future Response, 2020 (page 1).

imply promotion or normalization of an act. Rather regulating structure, helps in controlling and having better surveillance over such activities. It would ensure better access to the investigating agencies and would enable better and effective implementation of laws.

In the case of *Kalyan Ranjan Sarkar v. Rajesh Ranjan (2005),* it was emphasized that Article 142 of the Indian Constitution bestows upon the Supreme Court a vital constitutional power aimed at safeguarding the rights of citizens.[16] This provision enables the Court to intervene when existing laws prove insufficient in delivering justice, thereby permitting the Court to exercise its inherent and supplementary powers, which extend beyond those explicitly conferred by statutes. These powers exist independently of statutes and serve the purpose of ensuring complete justice and preventing any hindrance to the administration of justice. Furthermore, it was established that directions issued by the Court under Article 142 hold the status of the law of the land in the absence of substantive legislation, effectively filling legal voids until the legislature enacts relevant laws, a principle underscored by decisions such as *Vishaka v. State of Rajasthan* and *Vineet Narain v. Union of India*.[17] In the case of *Ashok Kumar Gupta and Another v. State of U.P. and Others*, it was reaffirmed that the phrase "complete justice" within Article 142 is broad and adaptable to address a wide array of circumstances, whether arising from human innovation, statutory laws, or judicial pronouncements under Articles 32, 136, and 141 of the Constitution. These powers also exist independent of the statutes with a view to do complete justice between the parties and are in the nature of supplementary powers and may be put on a different and perhaps even wider footing than ordinary inherent powers of a court to prevent injustice. The advantage that is derived from a constitutional provision couched in such a wide compass is that it prevents 'clogging or obstruction of the stream of justice.[18]

Call For Judicial Intervention in the interest of 'Complete Justice'.

In *Vishaka & Ors vs State Of Rajasthan & Ors*,[19] the honourable Supreme Court propounded that in case if there is absence of any effective law to deal with matters regarding sexual harassment or matter involving right to work

[16] Kalyan Sarkar v. Rajesh Ranjan, (2005) 3 SCC 310.
[17] Vishaka & Ors vs State Of Rajasthan & Ors, (1997) 6 SCC 241; Vineet Narain v. Union of India (1996) 2 SCC 199.
[18] Ashok Kumar Gupta and Another v. State of U.P. and Others, 1997 (5) SCC 201.
[19] Supra note 32

with dignity as guaranteed under the Constitution 14, 15 19(1)(g) and 21, the courts may refer to any international Conventions which are not inconsistent with the Indian laws. The Constitution bestows power on the executive to implement such a Convention under Articles 51(c) and 253. In absence of any such law made, the courts may, in order to ensure effective implementation of basic human rights, the Supreme Court may exercise its powers under Article 32 to issue guidelines for the same.

Due to the lack of legislations dealing with the rights of sex workers, there is a void in the effective implementation of their rights. Such an absence leads to violation of multiple basic rights.

The UNDHR under its guaranteed to every human being right of living with dignity, without discrimination, with security, free from slavery and servitude, no degrading treatment, etc.[20]

Recommendations by Advisory Bodies –

In order to ensure accommodation of the sex-workers in the beneficiary ambit of social welfare legislations, the timely guidelines NHRC Advisory on Rights of Women (Sex workers Included), 2020 were released based on the recommendations of the Expert Committee Report[21] to assess the effect of pandemic on marginalised sections. It suggested the following with regards to sex workers-

i. Recognize sex workers and register them as unorganised workers, in order to avail them with all the worker's benefits.
ii. Many sex workers are devoid of ration cards and citizenry documents. Hence, make provisions for such documents and give them access to all the welfare measures like the PDS.
iii. Migrant sex workers be recognized and given the benefits of migrant workers.
iv. Ensure access to health care services, especially with regards to HIV and prevention of other Sexually transmitted diseases and their treatment.

In *Budhadev Karmaskar vs The State of West Bengal,* pursuant to an order passed by the Supreme Court, a Panel was constituted.[22] The panel report

[20] Universal Declaration of Human Rights (UDHR), Article 2, 3, 4, 5, 6, 8.
[21] NHRC Advisory on Rights of Women (Sex workers Included), 2020 (page 8).
[22] Budhadev Karmaskar vs The State Of West Bengal, (2011) 10 SCC 354.

specifically observed that the liability of sex workers shall be determined by considering age and consent. When the acts are consensual, they shall not be criminalised. It made specific recommendations with regards to medical assistance for victims of sexual exploitation. It made suggestions for undertaking surveys of rehabilitation homes in order to understand the release of such sex workers detained against their will. It made special remarks on attitude of the police towards the sex workers and suggested a sensitised awareness approach towards them. All the basic rights, human rights, constitutional rights and a dignified treatment to such sex workers shall not be denied in any circumstances.

Conclusion

Prostitution, though exploitative and dreadful, forms a part of the larger social reality in India. The issue hence cannot be ignored and avoided. The existing legal framework proves to be inadequate and limited, lacking capacity to accommodate ever rising complexities and in regulating far reaching consequences of the same. Hence timely and effective measures to combat this social issue is necessary, since the spectrum of victims and vulnerabilities transcend beyond the prostitutes themselves. Legislative initiative is necessary for a holistic and adequate framework to deal with prevention, regulation and rehabilitation of the sex-workers, not merely by preventive special legislation, but also though social welfare policies and beneficiary schemes. The judicial supervision and timely intervention to grant pro-tanto reliefs and directives in certain instances will also be necessary, in the interest of larger public - welfare.

Implications of Forced Displacements Worldwide: Safeguarding Refugees' Rights

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Introduction

Forced displacement has persisted throughout human history, but it was only in the unstable 1920s and the inter-war period that concerted multilateral efforts emerged to address it. Amid the chaos in Europe caused by the Russian Revolution, the First World War, and the rise of Nazism and Fascism, institutional and normative initiatives were developed to provide international protection and assistance to displaced populations[1]. These measures culminated in nine institutional arrangements established between 1921 and 1951, reflecting a collective response by European States and international organisations to the challenges posed by forced displacement. The arrangements included:

1. The 1921 High Commissioner for Russian Refugees under the League of Nations,
2. The 1922 Arrangement for Russian Refugees,
3. The 1926 Agreement on Armenian Refugees,
4. The 1928 Arrangement for Assyrian and Turkish Refugees,
5. The 1930 Nansen International Office for Refugees,
6. The 1933 High Commissioner for Refugees (Jewish and Others) Coming from Germany,
7. The 1938 Evian Conference on German Jewish Refugees,
8. The 1943 United Nations Relief and Rehabilitation Administration (UNRRA), and
9. The 1947 International Refugee Organization (IRO).

[1] Samuel Berhanu Woldemariam et al., *A Centenary of Multilateral Response to Forced Human Displacement: Legacies, Limitations and the Future*, 20 Melb. J. Int'l L. 1, 6–7 (2019).

These frameworks sought to standardise refugee protection through repatriation, resettlement, and legal safeguards, marking a shift from ad hoc humanitarian responses to structured international cooperation.

The international legal and institutional frameworks that evolved during this period, primarily the 1951 Convention Relating to the Status of Refugees[2], the 1967 Protocol, and the United Nations High Commissioner for Refugees (UNHCR) Statute[3], were designed to address European displacement. However, much of Africa, Asia, and the Middle East remained under colonial rule during their formulation. Despite post-decolonization efforts to extend these frameworks to newly independent states, they proved obsolete and ill-suited to address region-specific challenges. For instance, the 1951 Convention's Eurocentric definition of refugees excluded individuals fleeing post-colonial conflicts or environmental disasters, while the UNHCR's mandate struggled to respond to mass displacements in regions like Sub-Saharan Africa and South Asia during the Cold War.

The inadequacy of these frameworks is evident in cases such as the Syrian refugee crisis, where over 6.6 million people were displaced by 2023 due to a conflict rooted in authoritarian governance and foreign intervention[4], and the Central American "caravans", where systemic violence and poverty, legacies of colonial exploitation and Cold War-era destabilization, drove mass migrations[5]. Similarly, the 1994 Rwandan genocide, which displaced 2 million people, exposed the limitations of the international community's reactive (rather than preventive) approach to displacement. These examples underscore how Eurocentric legal instruments failed to account for the socio-political realities of post-colonial states.

In light of these historical developments, it becomes imperative to promptly reevaluate the existing legal and institutional structures pertaining to these displacements in order to guarantee their inclusivity, enhanced responsiveness

[2] Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150.
[3] Statute of the Office of the United Nations High Commissioner for Refugees, G.A. Res. 428(V), Annex, 1 (Dec. 14, 1950).
[4] Woldemariam et al., *supra* note 1, at 5.
[5] Ibid. at 5–6.

and equitability while acknowledging the diverse experiences and obstacles encountered by refugees around the world.

Refugees, Migrants and Asylum Seekers – Understanding the Difference

Forced displacement, also referred to as 'forced migration' or 'forced relocation' is the involuntary and unwanted movement of individuals or communities away from their birthplace, place of residence or their original homeland. Essentially, it involves people being coerced to leave their homes against their will, often resulting in significant disruptions to their lives and livelihoods.

There are varied terminologies that are used for people affected by forced displacements, often used in close contexts that are usually confusing. Each is defined in a distinguished manner as follows:

- *REFUGEE*: Article 1 of the 1951 Convention defines a refugee as someone who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of their nationality and is unable or, owing to such fear, is unwilling to avail themselves of the protection of that country; or who, not having a nationality and being outside the country of their former habitual residence, is unable or, owing to such fear, is unwilling to return to it."
- In simple terms, refugees are defined as those individuals who have fled their homeland, crossed the international borders and now cannot go back as they fear for safety of their lives. People tend to become refugees when their basic rights are jeopardised. Due to this reason, refugees have been provided with numerous protections under the international law.
- *INTERNALLY DISPLACED PERSONS (IDP):* IDPs refer to those individuals who are forced to leave their home due to similar or analogous reasons as refugees, but do not cross any international borders, i.e. they are relocated within the territories of the same country. IDPs live in the country of origin, but are often terrified to back to their homes, fearing persecution. Although IDPs face the same hardships as refugees,

they are not granted the same rights for assistance to refugees is a legal requirement, while it is non obligatory in the case of IDPs.

- *ASYLUM-SEEKERS:* Asylum-Seekers are people who have left their homes and profess for international protection, but whose status has not yet been officially recognised under the law. While all existing refugees start as asylum seekers, not every individual seeking asylum is bestowed upon with a refugee status. It is the National Asylum Systems that assesses and determines the eligibility to be granted for a refugee status, and those who fail to secure one are usually sent back.

In early 2022, before the situation in Ukraine came to light, more than 92 million people around the world had been compelled to leave their homes, which accounts for[6] approximately:

- 20.8 million refugees
- 50.8 million internally displaced persons (IDPs)
- 4.4 million asylum seekers

In this article, the epicentre of the analysis is mainly concerned with Refugees, and thus such a distinction with a clear meaning of all these terms is an essential requisite to have a complete understanding of existing legal disposition of each group.

Causes Of Forced Displacement

Understanding the root causes as to why millions of people are forced to flee their homes every year is imperative for addressing and finding ways to narrow down such cases. Primarily, the causes will be covered under two broad umbrellas namely, Natural/Disaster Induced Displacement and Human-Made/Conflict Induced Displacement:

[6] *Refugee, IDP, Migrant: What's the Difference?*, CONCERN WORLDWIDE US (Apr. 22, 2022), <https://www.concern.net/news/refugee-idp-migrant-difference> (last visited Mar. 24, 2025).

i. Disaster Induced Displacement[7]

Forced displacement often escorts as a result of natural disasters and their accompanying consequences. When earthquakes, floods, or droughts strike they have the power to obliterate homes and infrastructure, leaving individuals with no alternative but to escape. However, the repercussions extend beyond this initial destruction. Scarcity of food and water resources, besides shattered local economies worsen the situation and propel individuals towards displacement. The duration of this displacement can vary, ranging from temporary while communities reconstruct, to permanent based on the extent of the devastation and the non-availability of resources. The presence of climate change also advances a concerning element to this equation. Example: In a catastrophic event caused by a tremendous 9.1 magnitude earthquake, the Indian Ocean tsunami[8] of 2004 wreaked havoc on Indonesia, Sri Lanka, and India, decimated both lives and homes. The toll was immensely large, with a sorrowful loss of 227,899 individuals and about 1.7 million people forced to abandon all that they had possessed.

ii. Conflict Induced Displacement

Forced displacement, ensuing as a result of human activities is usually referred to as human-made/conflict induced displacement. UNESCO emphasizes that armed conflict is the main catalyst for forced displacement, with regional studies underscoring political and armed conflict as significant contributors to the outflow of migrants from Latin America, Africa, and Asia. Human-Made displacement usually occurs as a result of the following:

- **Wars and Battles:** Full Scale Wars among countries entailing the use of destructive and damaging weapons of mass destruction often leads to forced displacement of residents of the affected nations. These residents, being devoid of any option have to leave their homes and become refugees in order to seek safe havens in the nearby countries. Example:

[7] Human vs 'natural' causes of displacement: the relationship between conflict and disaster as drivers of movement, PLATFORM ON DISASTER DISPLACEMENT, <https://www.platformondisasterdiaplacement.org/human-vs-natural-causes-displacement> (last visited Mar. 24, 2025).

[8] National Oceanic and Atmospheric Administration (US Department of Commerce), report titled “Jetstream Max: 2004 Indian Ocean Tsunami.”

The ongoing war between Russia and Ukraine that began in 2022 has forced thousands of people of the conflict prone areas to seek refuge in the neighbouring countries of Belarus and Romania.

- **State-Sponsored Violence and Persecution:** In many countries around the world, the governments themselves target specific groups and carry out their killings and persecution due to their beliefs, or for the want of power. Example: The Rohingyas of Myanmar, who became refugees, had to flee to neighbouring countries of India, Sri Lanka, and Bangladesh due to their military government's actions.
- **Ethnic and Religious Clashes:** Conflicts stoked up by ethnic or religious differences, especially in non-secular nations can lead to harassment, violence and even genocide against specific minority groups or communities. Example: Mass genocide of Jews by Adolf Hitler during the II World War, which is termed as 'HOLOCAUST', is one of the most cruel and immoral event in history, which coerced the entire Jew community to flee the continent of Europe and become refugees in the present-day Israel region.
- **Identity Based Persecution:** Many times, targeted violence and harassment in the form of discrimination, threats and physical violence are also faced by individuals based on their identities, as they are not easily accepted in the prevailing social fabric of the native places. For instance, the LGBTQIA+ individuals facing persecution in certain countries may seek asylum elsewhere.

Plight of Refugees in the New Environment

When Refugees arrive in a new country for protection and sustenance of their lives, they try to start a new life by settling there, away from the terror of death, violence and persecution.

Refugees, already in the need for money and a house to settle, are further loaded with problems as they are subjected to exploitative rental costs and are seen vulnerable to high illegal rents, leaving them dependent on landlords, for want of rights. Therefore, they are frequently seen residing in overcrowded and unsanitary conditions.

Language barriers, discriminatory treatment due to unwelcoming attitude of the host residents, and lack of proper awareness serve as blockades to accessing crucial mental health support and for various types of PTSDs, depressions and other essential healthcare services. The inability to comprehend and communicate easily prevents access to legal aid for the refugees and renders them vulnerable to injustice and oppression. Restricted mobility, either due to detention, surveillance, or lack of transportation, also impedes refugees' likelihood of getting employment and basic services.

Legal Framework for Safeguarding Refugee Rights

Men, women and children have faced arbitrary use of force and serious human rights violations. They may have been tortured, raped, molested, detained and sometimes not even recognised as citizens of the country where they are living; subjected to violence against their body and also mentally. To ensure that the rights of refugees are not blatantly violated and they are given and subjected to all their rights, UNHCR[9] has created a legal framework.

i. 1951 Convention[10] Relating to the Status of Refugees

Post the World War II, there arose a need for mitigating the refugee crises. It laid down the foundation for the International Refugee Law, which culminated in the form of signing of the Convention on the status of Refugees, entered on 21st April, 1951. The Convention provided meaning, definition, and scope of the word 'refugee' under Article 1 of the Convention. The document sets out key standards for addressing the needs of refugees, guaranteeing their basic rights such as housing, employment, and education while they are displaced. This allows them to maintain a sense of dignity and independence. Furthermore, the document outlines the obligations that refugees have towards their host countries, as well as identifying certain groups, such as those involved in war crimes, who are not eligible for refugee

[9] UN HIGH COMM'R FOR REFUGEES, REFUGEE PROTECTION: A GUIDE TO INTERNATIONAL REFUGEE LAW (2001), <https://www.unhcr.org/sites/default/files/legacy-pdf/44b500902.pdf> (last visited Mar. 24, 2025).

[10] *1951 Refugee Convention*, UN HIGH COMM'R FOR REFUGEES, <https://www.unhcr.org/in/about-unhcr/who-we-are/1951-refugee-convention> (last visited Mar. 24, 2025).

status. The duties of the refugees and the responsibility of the State towards them are also clearly laid down.

Some of the significant rights[11] accorded to Refugees under the 1951 Convention include the following:

- HUMAN RIGHTS- Protection of Refugees and granting them with basic human rights such as right to a dignified life, right to equality, right to return, right to remain etc.
- CHILD RIGHTS- The Convention mandates that it is the duty of UNHCR and the states to protect them from trafficking and exploitation and furnish them with all basic amenities irrespective of their parents' immigration status. The case of *Mugenzi v. France*[12] substantiates the "best interests of the child" principle, where the court stressed upon the issue that cases where family reunification involves children, the national authorities must give priority to the best interests of the child.
- FREEDOM OF MOVEMENT: Article 26 – This Article guarantees the refugees, the right to choose their place for residence, and the liberty to move freely within that region of the State, though many countries detest this provision and restrict the movements of refugees by their national laws.
- RIGHT TO NON-REFOULEMENT: Article 33 - This is one of the most important principles of the Convention, which States that the refugee shall not be sent back to the host country in case of any considerable danger to their life or basic human rights.

ii. 1967 Protocol[13]

The 1967 protocol, entered into force on 4th October, 1967, consists of 146 signatories. The protocol focused upon removing the limitations present in the 1951 Convention. It reformed the application of the term, moving past geographical boundaries, providing an umbrella coverage and including everyone that fall within the ambit of the new definition of 'refugee.'

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[11] UN HIGH COMM'R FOR REFUGEES, THE REFUGEE CONVENTION, 1951: THE TRAVAUX PRÉPARATOIRES ANALYSED WITH A COMMENTARY BY DR. PAUL WEIS (1990), <https://www.unhcr.org/media/refugee-convention-1951-travaux-preparatoires-analysed-commentary-dr-paul-weis> (last visited Mar. 24, 2025).
[12] *Mugenzi v. France*, App. No. 52701/09, Eur. Ct. H.R. (2014).
[13] Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267.

iii. 1948 Universal Declaration of Human Rights

This holds a crucial stance in evaluating the refugee related laws as the International Refugee Law cannot be used in isolation. It is used together with several basic rights guaranteed under this declaration. Article 14(1) specifically provides the right to seek asylum in other countries. It also lays down an obligation on State to ensure all basic rights to the refugees.

The rights enshrined in the Universal Declaration of Human Rights (UDHR) apply to each and every human being universally, starting from their birth to deaths. The refugees and immigrants are guarded by various specific Articles[14] within the UDHR and related Conventions, in order to ensure their right to have a dignified life:

Article 5 of the Universal Declaration of Human Rights ensures that refugees and immigrants are treated with dignity and respect, safeguarding them from any form of torture or inhumane treatment.

Article 19 guarantees refugees and immigrants the right to freedom of expression and opinion, allowing them to freely express their views and beliefs without censorship or discrimination.

Article 18 protects the freedom of religion, thought, and conscience for refugees and immigrants, ensuring they have the right to practice their faith without coercion or restriction.

Article 7 mandates equal protection under the law for refugees and immigrants, prohibiting discrimination based on nationality, origin, or legal status. They are entitled to the same rights and protections as any other individual, without prejudice.

iv. Geneva Convention of 1949 and Additional Protocols agreed to in 1977

The Geneva Conventions of 1949 and their other Conventions of 1977[15] are cornerstones of International Humanitarian Law (IHL), providing essential protection for refugees caught up in armed violence. Article 44[16] of the

[14] G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).
[15] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287.
[16] *International Humanitarian Law Database*, INT'L COMM. OF THE RED CROSS, https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949/article-44 (last visited Mar. 24, 2025).

Convention deals with refugees in particular. The importance of among these provisions is the "protected person" designation to the refugees under the Fourth Geneva Convention, which is directed to protect them against deliberate attacks and persecution. Furthermore, IHL recognizes that a number of refugees, particularly women and children, are extremely vulnerable, ensuring their safety from sexual violence, prevent the forced recruitment of children in armed forces and prioritize reintegration efforts for families of Refugees.

These principles principally apply to the laws of war or armed conflicts. Many refugees are often displaced amidst conflicts or war like situations or worse, an actual war. These frameworks ensure protection to those who are not fighting or are not in a position to fight. This helps wounded soldiers, civilians and women particularly and limits the aftermath on the people who are not directly involved in war.

Constraints in the Existing Frameworks

1. Narrow Definition of "Refugee": The 1951 Refugee Convention fundamentally emphasises on oppression and persecution based on certain definite grounds like religion, ethnicity, nationality, or individuals fleeing war torn regions, thus leaving behind victims of forced displacements due to climate activities, economic and social reasons. The evolving character of displacement presents challenges to this unbending definition, as new forms of persecution emerge, highlighting the Convention's limitations in adapting to these emerging causes.
2. Limited Legal Binding of the 1951 Convention: Despite its global recognition and a sign of triumph towards mitigating refugees' atrocities, the 1951 Refugee Convention is not in a position to command, i.e. it is not binding on the signatory countries to compulsorily adhere to it. This limitation hinders the efforts to ensure consistent and comprehensive protection of refugees globally.

3. Non-Refoulement Limitations[17]: The principle of non-refoulement, which safeguards refugees from being sent back to harm, is not without limitations. One such limitation is the existence of "safe third country" provisions, which may force refugees to return to vulnerable situations, thereby weakening the fundamental principle of protection.

The Right of Non-Refoulement is not an absolute right as there are two exceptions outlined in Article 33(2) where a refugee cannot invoke this right under following circumstances:

- If there are valid reasons to believe that a refugee poses a threat to the security of the host country, they may be deemed as such.
- If a refugee has been convicted of a very serious crime by a court of law, they may be considered a danger to the local community.

Suggestions

Primarily, origins of forced displacement and their effects on refuges need to be dealt with by addressing the roots of the problem. This involves concerted attempts to curb persecution, violence, and conflict while also mitigating the calamitous impact of environmental degradation and risks of climate change. Investing in conflict resolution, safeguarding human rights, and fortifying environmental resilience are foundational steps towards reducing forced displacements and the resulting refugee crisis.

Equivalently, it is crucial to provide necessary protection to the rights and well-being of displaced individuals. This requires a firm commitment to the principle of non-refoulement, and upholding the 1951 Refugee Convention creating relevant mechanisms to ensure strict adherence.

Efficient processing of refugee status applications is crucial to avoid uncertainty and hardships. Fair procedures, just legal representation, and support throughout the process will serve as progressive steps towards enhancing their disposition. During the application period, it is also recommended that refugees must receive language training and civic

[17]https://www.jstor.org/stable/23141409?searchText=non%20refoulement%20principle&searchUri=%2Faction%2FdoBasicSearch%3FQuery%3Dnon%2Brefoulement%2Bprinciple&ab_segments=0%2Fbasic_search_gsv2%2Fcontrol&refreqid=fastly-default%3A0acc55630e1f6922033f13cc43b5baab

amenities to aid their integration into their new communities and simultaneously making them conscious of their rights and responsibilities.

Lastly, revising the definition of "refugee" to widen the ambit of contemporary realities and evolving causes of forced displacement is paramount. The term should encompass not only persecution-driven displacement but also situations stemming from climate disasters, environmental degradation, political situations and economic hardship. Such an expansion would ensure that all asylum seekers receive requisite protection they deserve under the law in specific and from the society at large.

Conclusion

To deal with forced displacements and its domino effect in the form of escalating global refugee crisis call for a consolidated and comprehensive approach. Despite existing laws and protections for refugees in place, effective execution of the same remains a constant hurdle for the global community. Refugees are still coerced to endure severe hardships in the host areas, having to struggle for even the most basic of things. Mitigating this state of affairs not only demands for empathy and emotional support, but also practical solutions in the form of integrating refugee aid groups and organizations into broader frameworks in order to ensure the highest impact. Moreover, burden-sharing among nations is also imperative, with a moral obligation on countries with less refugee influx to provide the needed assistance to those nations where it is greater. Vigorous anti-trafficking measures, strict adherence to non-refoulement principles, and full support for UNHCR through the collaboration of both member as well as non-member States are an essential requisite. It is only through combined efforts at both domestic and international level, efficient implementation, and shared responsibility can we efficiently deal with the issue of forced displacements and its ramifications on the refugees.

Role of Geographical Indication Tags as Intellectual Property: Analyzing the Need for its Protection in India

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Every natural resource is precious; over time, most such resources have been associated with an economic value. India is a country rich in natural resources. Every region of the Indian territory is unique in its sense with abundant natural resources, traditional products, and their distinctive production methods. It proudly showcases a wealth of products spanning from handicrafts to agricultural goods each intricately produced with its unique techniques and skills.

Producing such natural products, unique and elaborately designed handmade products takes a lot of effort and is a major source of livelihood for the people engaged in producing such goods unique to the region. These goods do need protection in the market.

In what sense is protection needed?

Protection is essential for those products that are indigenous and to produce which exclusive techniques have been used, whose traditional method of production must be preserved. Then the question arises as to from whom the protection is needed. The protection is required to safeguard traditional producers from unfair competition in the market. This unfair competition is by those producers who do not adhere to traditional practices of production and bring in the same variety of goods at a cheaper price but not of the same standards as those produced using traditional techniques or those procured from the original geographical territory of origin. To provide such kind of protection, the legislation on GI Tags in India was enacted in the year 1999.

The governing body for GI Tags at the international level is the WTO's agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

The GI Tags are covered under Articles 22-24 of the TRIPS Agreement[1]. As India is a member of the TRIPS Agreement, legislation for the protection of GI Tags in India was enacted in 1999.

In December 1999, the Parliament passed the Geographical Indications of Goods (Registration and Protection) Act,1999. The Geographical Indications of Goods (Registration and Protection) Act,1999, and the Geographical Indications of Goods (Registration and Protection) Rules,2002 came into force on 15th September 2003. The Act would be administered by the Controller General of Patents, Designs, and Trade Marks, who is the Registrar of Geographical Indications.[2] The Geographical Indications Registry located in Chennai also came into effect on 15th September 2003. To aid the applicants of the GI Tags and the practitioners, a manual was published on the official website of the Controller General of Patents, Designs, and Trade Marks on 31st March 2011. The manual was finalized after several discussions, deliberations, and comments. The manual is updated from time to time to act as the primary guide to all the stakeholders.

The manual highlights several important points regarding the interpretation of the 'Geographical Indications of Goods (Registration and Protection) Act,1999' such as the application process, and therefore enables the stakeholders to efficiently put forth their applications with ease. The manual not only guides the application process but also elaborates on the examination of the application, prohibition on the registration of certain geographical indications, registration of the GI Tags, renewal of registration, and many other crucial pointers. However, the manual does not consist of rules and regulations or rulemaking and therefore does not have the force of effect of the law.

Who is eligible to apply for the Geographical Indication Tags?

The applicant can be an association of persons or producers or any organization or any authority established by or under any law representing the

[1] WTO, https://www.wto.org/english/tratop_e/trips_e/ta_docssec5_e.htm# (Last visited Nov 18, 2024).

[2]Manual of Geographical Indications Practice and Procedure 5 (Office of the Controller General of Patents, Designs and Trademarks and Registrar of Geographical Indications 2011).

interest of the producers of the concerned goods.[3] The application is also of various categories such as ordinary application, single-class application, multi-class application, and convention application. Various elements of this legislation are crucial to understanding the overall significance of the GI Tags included in the manual such as, who the 'producer' is? For example in the case of agricultural goods it is the person who produces these goods and includes the person who processes or packages the goods. There are further several different categories, these include; in case the goods are handicraft goods or industrial goods then the producer will be the person who manufactures them or if they are natural goods then it includes then the persons who exploit, trade or deal with such goods are termed as the producers of such goods.

A geographical indication tag (GI) is a sign used on products that have a specific geographical origin and possess qualities or a reputation that are due to that origin.[4] Therefore the GI Tag seeks to protect those who have the right to use it and at the same time prevent any misuse by those who bring products into the market that do not conform to the set standards. This right however does not refrain other producers from making the same product using the same standardized techniques, rather it is a right that is acquired over the sign that constitutes the indication.

The enactment of a legislation for the protection of various such unique goods in India, is indeed, a boon for several indigenous producers in India. It has and will in the future lead to the economic development of those regions specifically in which the GI-tagged goods are produced. Several such traditional products are crafted by communities across generations and are renowned in markets for their distinct and precise qualities, therefore the legislation protecting the local producers and the goods produced by them. This will lead to the overall development of such communities, whose livelihoods have been over time been disturbed by those producers attempting to produce similar kind of goods but by damaging the actual methods or

[3]Manual of Geographical Indications Practice and Procedure 8 (Office of the Controller General of Patents, Designs and Trademarks and Registrar of Geographical Indications 2011).
[4]WIPO, https://www.wipo.int/geo_indications/en/ (last visited May 15,2024).

techniques of production and thus resulting into cheaper and poor quality goods.

Further, the question arises as to why there is a need to have a separate legal framework for GI Tags despite there being an already existing legislation for trademarks in India. Trademarks and GI Tags are two different types of intellectual property rights. A trademark is simply a unique identification that distinguishes the goods of one person from that of another person. According to The Trade Marks Act, 1999, "trade mark" means a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colours.[5] However GI Tags give a unique identity to the product by denoting its place of origin, a specific geographical region in which the product is produced. It confers the right to those producers from a specific region in which the product has been produced for a long time using certain stipulated and distinguishable methods of production which owes to its quality and distinctiveness. Therefore, separate legislation for GI Tags was introduced to provide protection to the producers producing goods unique to a geographical region and to protect the interest of the consumers to receive a genuine product.

GI Tags act as a valuable marketing tool for the producers. This is because when the producers acquire a GI Tag, they gain an exclusive right to market their goods, originating from a specific geographical location and being unique to the region. In India, such authenticity is important especially because of the large size of the domestic markets and the import of cheap goods which act as the competitors of the original goods. GI Tags help to protect the authenticity of the goods and therefore they can be marketed as original and with distinctive qualities. Such a guarantee of authenticity not only helps the producers to attract customers but also gain their trust and therefore helps the producers of domestic and original goods to sustain their businesses. Also, reputation building is essential in the Indian markets as there have been several business houses in India such as the Tata Group,

[5] The Trademarks Act, 1999, No. 47, Acts of Parliament, 1999.

Dabur, Britannia, etc who have been running their businesses efficiently for several hundred years in diverse fields and they can do so because of their reputation in the markets. Similarly, if the local producers acquire a GI tag, this gives them an edge over the other substitute products in the market and with this, they can assure the originality and quality of the products which indirectly helps to build the reputation of their commodities in the market. Building this reputation also aids them in demanding a good market price.

Despite several such advantages of acquiring GI Tags, there has been a low number of applications. As India is one of the most populous countries with an abundance of natural resources and traditional products, the producers must acquire such protection in the form of GI Tags. Several reasons for such a low number of applications include lack of awareness, complicated process of registration, disputes between the producers regarding the origin of the products, etc. Some of the initiatives that can be taken by the government include the launching of awareness campaigns even in several remote places. Awareness campaigns should not only educate the stakeholders about the importance of GI Tags but also provide them with a guarantee of assistance in filing the applications for the same.

At present, there are more than 600 GIs registered in India from various States. At the same time, several are in process, which is crucial and involves scrutiny of every element. Several applications have been rejected and some have been granted GI Tags after long years of wait. The concept of GI Tags is still evolving in India. Several questions are still being raised regarding the details of the provisions and procedures in the Act. Recently, a question was raised whether the Government can apply as an applicant under the GI Act. An MLA from Cuttack raised the question in the assembly when, MSME Minister Gokulananda Mallick replied that there is no provision under the GI Act where the government can act as an applicant, it can simply facilitate any individual or organization to apply for the GI Tag for a product.

Producers from every State these days are applying for GI Tags. Recently, eight products from the Assam region were granted GI Tags, which included traditional food items and several unique varieties of rice. Also the famous Kutch Ajrakh from Rajasthan was granted a GI Tag. The Kutch Ajrakh is a

textile craft which is an age-old craft practiced by the artisans in the region.[6] At the same time, agricultural products such as Badlapur Jamun got a GI Tag. For obtaining a GI tag for the Jamuns, Aditya Gole of Jambhul Parisamvardhan and Samuday Vikas Charitable Trust began the process a few years ago. After rigorous follow-up, scientists from BARC conducted tests of the soil and jamuns across 30 villages in Badlapur and finally the Badlapur Jamuns received a GI Tag certificate. To tackle the problem of climate change which has affected its production in recent years, 10 hectares of land has been acquired to plant about 10,000 Jamun trees.[7]

India is a country, rich in natural resources and cultural heritage with a lot of potential to expand its markets at not only the domestic level but also at the international level. The traditional Indian products produced by the local producers by using intricate methods will reach a large base of consumers by competing efficiently with the substitute and non-original products as they will stand out because of the GI Tag identification, which acts like a seal of authenticity. As of 31st March 2024, 635 products have been granted GI Tags. More developments in the present legislation, ease of filing applications and stronger protection especially in the cases of unauthorized use of GI Tags is the need of the hour to increase the number of GI-tagged products in India.

[6] TOI Lifestyle Desk, Ajrakh from Kutch gets GI Tag, Times of India (Apr 30, 2024, 6:00 IST) https://timesofindia.indiatimes.com/life-style/fashion/buzz/ajrakh-from-kutch-gets-gi-tag/articleshow/109698796.cms

[7] Anamika Gharat, Jambhul Gaon to plant trees on 10 hectares to fight climate change, Hindustan Times (Aug 2, 2024, 7:50 AM IST) https://www.hindustantimes.com/cities/mumbai-news/jambhul-gaon-to-plant-jamun-trees-on-10-hectares-to-fight-climate-change-101722539526496.html

The Supreme Court's New Handbook: An Attempt to Combat Gender Stereotypical Language

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Individuals do not grow up in an isolated manner. They grow up as part of the society in which they live. The society thus influences the way in which an individual thinks, acts and behaves. Stereotypes stem from socialisation and the process of societal learning. They are grounded in the observations of everyday life. A stereotype is a set idea that people have about what someone or something is like, especially an idea that is wrong.[1] It is a belief or an idea that people belonging to a particular social group have certain characteristics. Most of the times such beliefs are incorrect. Stereotypes get shaped due to our societal, environmental and cultural conditioning, and many a times subconsciously. Stereotypes can cloud our judgement as they prevent us from looking at each person as a unique entity with their own characteristics and thus hamper our understanding about the reality of a situation. It can also be said that stereotypes misrepresent the groups which they seek to describe. Stereotypes can be based on an individual's religion, caste, gender, nationality, sexuality, etc. Gender-stereotypes, particularly those about women, are widely spread in a country like India. Historically, patriarchy has been deep-rooted in the Indian society. In a patriarchal system, men enjoy higher status and more authority than women in families and communities. This leads to the formation of gender roles and beliefs which dictate the duties and responsibilities of each gender. Strict adherence to these gender roles and their repeated execution leads to the formation of certain notions about each gender which eventually culminate into stereotypes. Numerous stereotypes and prejudiced beliefs about women have hindered their access to fair and equal treatment within the society and the justice system. Such stereotypes may have an adverse impact on judicial decision-making. Biases in the minds

[1] Cambridge Dictionary, https://dictionary.cambridge.org/dictionary/english/stereotype (last visited May 11, 2024).

of judges stemming from the stereotypes can lead to impartial distribution of justice. Due to the stereotype that women are emotional while men are rational, the credibility of testimony of a female witness may be reduced. Gender stereotypes may also affect outcomes in family law cases, especially those involving custody of the child and alimony arrangements. Stereotypes about the way in which a victim should behave may also affect the decisions in sexual violence cases. Thus, it is essential to challenge and overcome such stereotypes in order to have an equal and inclusive society.

Stereotypes find their existence in language and propagate through language. Language is an essential part of law as laws are coded in language, and the processes of the law are mediated through language. The legal system puts into action a society's beliefs and values, and it permeates many areas of life. At the same time, vocabulary also matters because it shapes narratives and influences societal attitudes. Language can contribute to gender inequality by transmitting gender stereotypes. Certain phrases used in legal discourse also reflect patriarchal undertones. Such stereotypical language reinforces ideas which are contrary to our constitutional provisions of equality. It can lead to perpetuation of discrimination and exclusion. The use of such stereotypical language by the judges is detrimental to the interpretation of law and can also lead to impartial application of law. Thus, as a measure to counter the use of such gender stereotypical language, the Supreme Court of India has released the 'Handbook on Combating Gender Stereotypes'.

This Handbook offers guidance on how to avoid utilising harmful gender stereotypes, in particular those about women, in judicial decision making and writing.[2] It aims to identify, understand, study and combat stereotypes about women thereby assisting the judges as well as the entire legal community. It identifies language that promotes gender stereotypes and offers alternative words and phrases. For instance, an alternative for the word 'prostitute' can be 'sex worker' and that for 'eve teasing' can be 'street sexual harassment'. Similarly, 'housewife' can be alternatively expressed as 'homemaker'. Here, 'housewife' is a gender-discriminatory word which emphasizes the stereotype

[2]Handbook on Combating Gender Stereotypes Supreme Court of India (2023).

that it is only the married woman's duty to do all the domestic work. It neglects the possibility that a married man can also stay at home and perform domestic chores. Therefore, using the word 'homemaker' is recommended as it helps in breaking the stereotype by making the task of performing domestic duties gender-neutral. The handbook also tries to understand the reasons behind the formation of such gender stereotypes and tries to explain why they are incorrect. Lastly, it highlights a few binding decisions of the Supreme Court of India that have rejected these stereotypes.

The handbook is primarily divided into three sections:

A. Understanding stereotypes
B. Understanding gender stereotypes
C. Current doctrine on key legal issues

These three sections can be explained as follows:

A. Understanding stereotypes

The first section mainly focuses on the functioning of stereotypes and their impact on judicial decision making. We all have subconscious biases which stem from stereotypes. These biases often lead to discrimination and exclusion of certain social groups because stereotypes influence our thoughts and actions towards the people. For example, if a stereotype exists that women are not as capable as men to handle leadership roles, it can result in few opportunities for women to flourish in their careers. It also impacts the mental health and well-being of the members of the stereotyped group. Due to constant exposure to negative stereotypes, individuals may begin to internalize these beliefs which can have long-term consequences on their psychological well-being. For instance, if a person constantly hears stereotypes about their racial or ethnic group being less intelligent or more prone to criminal activities, they may begin to doubt their own abilities and worth. Moreover, the fear of confirming stereotypes can lead to "stereotype threat". Stereotype threat refers to the risk of confirming negative stereotypes about an individual's racial, ethnic, gender, or cultural group which can create

high cognitive load and reduce academic focus and performance. [3] Individuals tend to underperform due to the pressure of fulfilling negative stereotypes.

Not only do these biases impact the individual but they also distort application of law with respect to specific groups of people. The judges due to their preconceived notions or stereotypes may ignore the appropriate legal requirements which may hamper the impartiality in judicial decisions. It also hinders the objective evaluation of the situation. Using stereotypes, goes against the constitutional principle of 'equal protection of laws', which posits that the law should apply uniformly and impartially to every individual, irrespective of their membership to a group or category[4]. Even when the outcomes are legally correct, the use of gender stereotypical language by the judge undermines the dignity and autonomy of the individual before the court.

B. Understanding gender stereotypes

The second section focuses on understanding the stereotypes related to gender. Gender refers to the socially constructed roles, behaviours, expressions and identities of girls, women, boys, men, and gender diverse people.[5] Gender is a social construct and includes roles, norms, characteristics and behaviours which are associated with a particular gender identity. Consequently, gender stereotypes are the assumptions about the characteristics that individuals of a particular gender possess and the roles which they are expected to perform.[6]

Gender stereotypes can further be divided into the following types:

i. Stereotypes based on so-called 'inherent characteristics of women'- The assumptions about the characteristics of men and women extend across physical, emotional and cognitive domains. They generally create restrictive and limiting expectations. Women are over emotional and illogical, women are passive, all women are weaker than men are some of the examples of such stereotypes.

[3] University of Colorado, https://www.colorado.edu/center/teaching-learning/inclusivity/stereotype-threat (last visited, May 12, 2024).
[4]Handbook on Combating Gender Stereotypes Supreme Court of India (2023).
[5] Canadian Institutes Of Health Research, https://cihr-irsc.gc.ca/e/48642.html (last visited May 12, 2024).
[6] United Nations Human Rights Office Of The High Commissioner, https://www.ohchr.org/en/women/gender-stereotyping (last visited May 12, 2024).

ii. Stereotypes based on gender roles-

Gender roles are based on society's understanding of femininity and masculinity. They are behavioural expectations which are generally considered acceptable, appropriate or desirable for a person based on that person's gender. For instance, women should do all the household chores, wives should take care of their husband's parents, women who work outside of the house do not care about their children are a few examples of such stereotypes.

iii. Stereotypes based on sex and sexual violence-

A woman's character is often judged by the bold choices made by her (like the way she dresses) and her sexual history. For example, it is a widely believed stereotype that women who wear non-traditional clothes want to engage in sexual relations with men. In such a case if a man touches the woman without her consent it is considered to be her fault. Several other stereotypes are also concerned with crimes like rape and sexual assault. It is commonly believed that women who are raped or sexually assaulted cry a lot and go through depression. If a woman deviates from the one mentioned above, it is believed that she is lying about having being raped. This leads to social stigmatisation.

All such stereotypes are extremely harmful for the administration of justice as well as for the smooth functioning of the society. The handbook plays an important role in distinguishing these stereotypes from the reality**.**

C. Current doctrine on key legal issues

The third section aims to explain the contemporary doctrines on key legal issues concerning these stereotypes. These precedents aim to reject most of the stereotypes mentioned above.

Firstly, it talks about how law helps in combating the patriarchal system and such stereotypes. For instance, the Supreme court in the case of Joseph Shine vs. Union of India unanimously struck down the offence of "adultery" under Section 497 of the Indian Penal Code, 1860 ("IPC"). Section 497 IPC imposed culpability on a man who engaged in sexual intercourse with another man's wife, although women were exempted from prosecution. It was also

observed that a man who had sexual relations outside of marriage with an unmarried woman was not punished under the law. The rationale for criminalization was that the woman is the property of the man. And only when the man's "rights over his wife" were violated, the offence of adultery took place. The provision of this offence stemmed from patriarchy and was inherently discriminatory in nature. Thus, the court deemed fit to disregard adultery as an offence.

Another important doctrine was the rejection of the pre-vaginum test. This test was conducted on sexual assault survivors to determine if the woman was habituated to sexual intercourse. In *State of Jharkhand v. Shailendra Kumar Rai*[7], the Supreme Court reiterated its ban on the "two finger test". The court held that whether the woman was habituated to sexual intercourse was irrelevant for the purpose of determining whether she was raped or not. The test was based on an errored assumption that a sexually active woman cannot be raped. It was also noted that a woman's sexual history is totally immaterial while trying a case of her rape. The Supreme Court thus observed that this two-finger test was not only irrelevant to the determination of rape but also violated the right to privacy and dignity of the rape victim.

The court, on several occasions, has also held that the testimony of a survivor or the victim should not be doubted on the basis of stereotypes like women lie about having been raped or that they tend to pose false cases against men. Instead, testimony of the victims should be held inherently credible. In the case of *State of Punjab v. Gurmit Singh*[8], the Supreme Court evaluated the testimony of the survivor. The trial court, owing to its certain perceived inconsistencies had refused to accept the victim's testimony. The Supreme Court invalidated these perceived inconsistencies and further held that there should not be any suspicion about the testimony of the victim on the erroneous assumption that women lie about sexual violence. Not relying on the victim's statement before seeking corroboration would add insult to the injury. Thus, the testimony of a victim of sexual violence should not be treated with suspicion or disbelief and should rather be given due weight as the victim of any other crime.

[7]State of Jharkhand v. Shailendra Kumar Rai, (2022) 14 SCC 299.
[8]State of Punjab v. Gurmit Singh, (1996) 2 SCC 384.

Another significant doctrine is that the absence of physical injuries must be evaluated contextually. In the case of *State of Uttar Pradesh v. Chhotey Lal*[9], the Supreme court observed that the absence of injuries on the person of prosecutrix was not sufficient to discredit her evidence as it might have occurred due to a variety of reasons. The absence of evidence of physical injuries is not sufficient to imply the absence of sexual violence. It is wrong to assume that every victim of sexual violence would have some injury on her internal or external parts. Thus, absence of injuries should not lead to a presumption that the sexual intercourse was consensual. It should not hamper the credibility of the victim's testimony. Hence such situations must be interpreted contextually with respect to the facts of the case and the surrounding circumstances.

Lastly, the Supreme court has also held that delay in lodging an FIR or filing a complaint cannot be used as a formula for doubting the prosecution case and discrediting the testimony of the survivor or victim. The reasoning behind this is that there might be several reasons why a survivor or victim of sexual violence may not have reported the incident immediately to the police. A woman who goes through such a traumatic experience might require some time to recover from it and file a complaint. Additionally, the offender might be a family member, friend, neighbour or employer which further creates complications and leads to delay in filing an FIR. Many a times, families of such women discourage them from filing a complaint due to societal pressure as they are concerned about the "honour" of their family. The courts must take into consideration such social realities facing women. In the case of *State of Punjab v. Gurmit Singh*[10], there was a delay in filing the FIR. The Supreme Court dismissed the contention and noted the delay was well explained and justified as the victim had approached the village panchayat before approaching the police authorities. A similar line of reasoning can also be seen in the case of *State of Himachal Pradesh v. Gian Chand*[11]where the Supreme Court held that the prosecution case cannot be discarded solely on the ground that there was a delay in filing the FIR. The courts should seek an explanation for the delay, and if the explanation is satisfactory, the delay cannot be held as a ground for completely discarding the prosecution case.

[9]State of Uttar Pradesh v. Chhotey Lal, (2011) 2 SCC 550.
[10]State of Punjab v. Gurmit Singh, (1996) 2 SCC 384.
[11]State of Himachal Pradesh v. Gian Chand (2001) 6 SCC 71.

Hence, a holistic approach should be adopted while looking at the facts of the case and the possible explanations or reasons for delay in filing an FIR must be considered seriously by the courts.

Conclusion

We employ stereotypes in our actions, words, and thoughts, in personal as well as professional spaces. While stereotypes can often stem from social conditioning, it is possible to challenge them and disengage. It is important for us to recognise and accept our biases. We must make conscious effort to overcome these implicit biases and resist the stereotype. For this we must educate ourselves by reading diverse perspectives and engaging in a dialogue with a variety of people. While doing so we should be open-minded and empathetic towards the experiences of others. Such exposure would enable us to broaden our mindset regarding the way in which we perceive gender. It is impossible to disengage from our stereotypes without self-reflection. Thus, practicing critical thinking and questioning our own biases is the key to breaking stereotypes.

The members of the judiciary are seen as protectors of the privacy and dignity of all individuals by interpreting the law. Thus, it is extremely essential that they not only avoid perpetuating such stereotypes but also rebut the incorrect conceptions. This will lead to impartial dispensation of justice. The handbook aims to serve as a guide for the judges to avoid stereotypes against women in all aspects of their decision making and writing. It empowers judges with the reasoning and language to dispel misconceived beliefs about a particular gender, especially women. It will also help the judges to maintain objectivity, uphold fairness, and protect the integrity of the judicial process. Consciously avoiding the use of language that promotes gender stereotype helps in fostering a gender equal environment. The use of inclusive language can change the patterns of thinking of the people for the good. This will align the legal system with the contemporary values of inclusivity and equality, ensuring that judiciary evolves while fostering social progress.

Judges must ensure that every person, regardless of their gender identity is treated equally before the law. They must be vigilant against all types of gender biases and protect the dignity of the individuals. Only then can they be truly called as the guardians of the legal and constitutional system of India.

Pleasure and Pain: A Thin Line in Between

The prevalence of violence against women in adult entertainment

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Introduction

It all starts with a sound familiar to those in the "appropriate" age group. The moving images come next, and the idea of adult entertainment (AE) content suddenly comes together. In this digital-first era, adult content is now easily accessible compared to its status a decade or two ago. Times were simpler back then, too. It is no longer the case. Taking shelter behind a multi-billion-dollar industry of desires is a disturbing reality: the pervasive and explicit display of violence against women. From streets to global screens, the tacit portrayal of violence against women in adult pornographies presents an urgent and multifaceted concern.

What is Adult Entertainment?

Adult entertainment is defined as anything that provides a display of specified anatomical areas or specified sexual activities or pornographic films, photographs, or other still or moving images with an emphasis on specified anatomical areas or specified sexual activities.[1] Adult entertainment is quite different from erotica - content that is full of sexually suggestive material but is sexism-free, racism-free, and dishes out due respect to all parties involved in its production, unlike popular pornographic content.

Causes

It is crucial to comprehend the initiating cause of the entire ordeal and to debate upon it. Why is it that women usually must yield? The answer to this can be traced back to our collective societal norms and patriarchal structures that actively perpetuate gender inequality, discrimination, and the blatant objectification of women. It tells its followers that devaluing a woman will

[1] American Legal Publishing, § 155.304.030 ADULT ENTERTAINMENT. (amlegal.com), (last visited April 26, 2024)

make her inferior and that it makes her open to domination and control, something "required" in the AE industry.

This is thus seen in the form of a tied-up woman, a "dirty" lady, and many other such derogatory formats. According to a study, approximately 88% of pornography scenes include acts of physical aggression, 48% contain verbal aggression, and 94% of the targets are women[2]. This creates an established ground for repetitive, unwarranted behavior, which millions enjoy. Such belittling portrayals lead to the dehumanization of women, and it contributes to the degradation of their agency, autonomy, and dignity.

Issues

1. *Power imbalance* - Subjectivity and subordination do not spare women, even in this field. It is usually portrayed in adult entertainment that the man is easily able to overpower and dominate the woman, and she bends to his desires and will without much resistance. This objectification of women not only devalues women's worth and dignity but also contributes to the normalization of violence against women in society.
2. *Disturbing and pervasive* - The main problem society seems to have with pornography is its potential addiction and the effects it will have on one's emotional and mental health. What is rare to see is someone speaking of the causes of these effects. Pornographic violence needs discussion. It reflects a wrong understanding amongst its viewers, who are either gullible or foolish enough to buy it. Many of the rape cases in our country have been found to have occurred solely due to the misguidance the criminals received by watching such ill content. A view raised by academicians is that pornography shows that the man is supposed to be the aggressor and make all the moves. This, when interpreted differently, can very well be the main cause of many sexual crimes and misdemeanours in daily life.

[2] Dr. Russell Kabir, *Pornography and Sexual Violence Against Women in India: A Scoping Review*, Academia.edu, 2 (2021), https://www.academia.edu/93906052/Pornography_and_Sexual_Violence_Against_Women_in_India_A_Scoping_Review.

3. *Type of content* - The current content popularly depicted everywhere is violent, misogynistic, and, in many instances, racist. It believes in ridiculing performing women, portraying them as achievable objects of sexual desire and as "easy" commodities for male gratification. Certain categories of women are now directly associated with exotic creatures, hypersexual, and passive. AE fetishizes individuals from racial and ethnic minorities as high-end fantasies. Such behavior is a reason why some categories of women are subject to bitter power dynamics and social prejudices because their diversity has been nullified. These ideas have now seeped their way into mainstream media in formats like movies, books, blogs, and podcasts. To validate the extent of its corruption, constituents of the Indian youth were asked to describe the image that pops into their head upon hearing the word 'erotic,' and they say that a woman in black attire is their first thought.
4. *Content is ubiquitous* - There is no place on Earth where pornography is not available. I speak not of the legal status, wherein many countries have banned the production and distribution of such content, but of its availability. Websites have been developed to bypass restrictions, covert apps make it easy to access explicit content, published material is smuggled through channels into countries, user-generated programs push boundaries further by allowing people to share material directly with their target audience, and many similar creative measures are executed every day.
5. *Anonymous consumption of content* - A troubling contention is the anonymity that is afforded to a viewer while engaging in such content. As trivial as it might sound, it has far-reaching implications that ought to be considered. Such viewers face no repercussions of any kind - neither legal nor social. A vulnerable viewer's basic understanding of sexual relations comes from an industry that has no care for its aftermath. Due to hiding behind a proverbial veil of ignorance, they propagate questionable behavior, which is otherwise looked down upon, unhindered. They might be inclined to act out in unacceptable ways and will do so without consequences, further exacerbating the problem. This can lead to desensitization towards

sexual violence, exploitation, extreme stereotyping, promotion of distorted sexual perceptions, and objectification of women, as these viewers are disconnected from the human impact of the content they consume.

6. *One kind of extreme* - A disturbing turn of events has occurred in the pornography industry; a trend that simulates scenes of rape in adult content has gained momentum. Somehow, it has gained acceptance and is growing with time. Careful observation shows that most of the videos available today have male perpetrators and a female victim. The normalization of rape fantasies in pornography has a harmful effect on its viewers. Another concern of AE is what is termed as "gonzo." It is an extreme form of body-punishing sexual acts, where the woman is debased, and the actors acknowledge the camera. It may mislead their understanding and attitude toward sexual consent and aggression. It will then disturb the idea of a woman's bodily integrity and right to choose her partner.

The Global Perspective

This is one of the crucial global issues that naturally transcends borders everywhere. A study conducted by a pornographic website stated that the United States is its leading viewer nation, followed closely by the United Kingdom, which gave the boot to France, Japan, and Mexico, respectively. It can be attributed to their ever-progressing technology, varying cultural norms, shared values, peer influence, curiosity, and sexual exploration. According to a 2017 data release by a leading adult entertainment website, on average, 81 million people log on each day across the world to watch pornography. In addition to it, the adult entertainment market is expected to boom at a compound annual growth rate (CAGR) of 5.2% from 2023 to 2032, from its latest estimated valuation of $58.4 billion in 2022 to $96.2 billion in a mere nine years.[3]

[3] Einpresswire, https://www.einpresswire.com/article/642393023/adult-entertainment-market-to-reach-96-2-billion-by-2032-with-a-sustainable-cagr-of-5-2-from-2023-2032, (last visited April 24, 2024).

The Indian Story

India too faces similar issues. Its suffering is greater. This is a country that views the complex facets of adult entertainment intersecting with iron-clad cultural norms, advancing legal frameworks, and strict societal values. As the people's appetite for explicit content surges, India finds itself at a crossroads, grappling with questions of morality, legality, and societal impact. A disturbing statistic that comes to mind is that India is the third-highest adult entertainment-watching country, as of 2020. This is despite a pornographic ban in place in the country. On average, an Indian spends 8 minutes and 23 seconds on leading pornography websites (per session).[4] This surge in demand can be attributed to factors like the increasing accessibility of the internet, rising smartphone penetration, changing social mores, and the influence of media and pop culture. Notably, around 90% of boys and 60% of girls below the bar of 18 years have been exposed to pornographic content at least once. What is even more dire is that the average age of primary exposure is 12 years of age.[5]

India is the fourth highest rape crime country in the world. Based on this, it is evident that there is a correlation between the prevalence of roughness in AE and the number of documented rape cases in the country. It can be assumed that at least some percentage of the cases in India are motivated by pornography. There are a few reviews related to sexual motivation and learning from pornography. However, there is yet no review on addiction to pornography and its relative sexual violence against women in India.[6]

Impact on Women

Though they constitute most of the content available everywhere, women in the adult entertainment industry are seldom looked after properly. They play a pivotal yet overlooked role in shaping the dynamics of this industry.

The World Health Organization defined sexual violence as "any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed, against a person's sexuality using

[4] Firstpost, https://www.firstpost.com/tech/news-analysis/despite-porn-ban-india-is-3rd-largest-porn-watcher-with-30-female-users-5721351.html, (last visited April 24, 2024)
[5] Dr. Russell Kabir, *supra* note 2, at 2.
[6] Dr. Russell Kabir, *supra* note 2, at 2.

coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work[7]." Since women are painted as objects of desire in AE, the narratives regarding consent, sexual autonomy, and pleasure become extremely distorted.

January Villarubia, a former performer turned advocate for women in the sex industry, says, *"It is degrading. You are constantly called names, you are constantly beat, choked, gagged, and there are a lot of women who are held against their will[8]."* This is not an attempt at arguing in a battle of 'us versus them.' It is simply stating facts.

AE promotes either directly or indirectly the following - human trafficking, sexual desensitization, paedophilia, physical exploitation of any person, sexual dysfunction, and the inability to be in healthy relationships.

Women in performance are subjected to slapping, kicking, hair-pulling, whipping, forced committal of sexual acts, hogtying, immobilization, restraining with chains, impact play, asphyxiation, needle play, emotional manipulation, name-calling, demeaning language, threats, multiple assailants, are exposed to STDs, and many such violent moves. The impact of this violence on women is profound, with many individuals facing physical, emotional, and psychological trauma as a result of their involvement in the industry. According to Dr. Robert Jensen, Professor of Journalism, *"Performers in the adult industry often experience high levels of stress, anxiety, and depression as a result of participating in scenes that are demeaning and degrading."*

In India, the situation escalates. The disturbingly high AE content here features scenes that depict violence and reflect the prevailing harmful patriarchal norms. Why is this a concern, you ask? It matters because India is a country where, historically, women have been and are still systemically

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[7] World Health Organization, *Understanding and addressing violence against women*, WHO-PANAM, 2 (2012), https://iris.who.int/bitstream/handle/10665/77434/WHO_RHR_12.37_eng.pdf;jsessionid=9D8AAF5D9D4CBF61970DF0BF363F4B6D?sequence=1

[8] J.D. Foubert, *How pornography harms: What today's teens, young adults, parents, and pastors need to know,* (Bloomington 2017).

discriminated against on the basis of their gender, face gender-based violence, and are at potential risk of sexual assault.

Sex-positive feminism aimed to grant women the freedom to explore and express their sexuality. Due to the current hypersexualization of women, it is no longer striving for its aim. In fact, women are at considerable risk because of the same, risk from others and themselves. Modern sex-positive feminism has lost its way due to various factors, one of which is the AE industry of today that caters to ill desires more than empowerment.

How is the Law Involved?

Should the law be associated with such an "immoral" industry? Yes. The Indian legal system impacts the AE industry, although its success is debatable. Various legislations, regulations, and precedents govern the industry and address issues such as obscenity, morality, decency, and public order.

AE is a paradox. It is sustained by Article 19 of the Indian Constitution. It is the expression of ideas and representation that relate to the sexuality of a person. From this lens, censoring and prohibiting pornography is technically infringing on someone's right to expression. This would make it unconstitutional. However, Article 19 is subject to reasonable restrictions in the interest of preserving mass morality, public decency, and health. Since pornography has content that is violent, exploitative, and unhuman in some cases, it warrants restrictions.

The *Aveek Sarkar v. State of West Bengal*[9] is classic example of restrictions intersecting with competing interests. The Supreme Court established precedence in interpreting obscenity laws while maintaining that each case needs a nuanced contextual analysis before judging. It held that the mere portrayal of nudity or sexual content does not necessarily constitute obscenity and that the impact of the material on the average person must be considered. This case did two things – it held up fundamental rights, and it maintained societal morals.

[9] Aveek Sarkar and Anr. vs. State of West Bengal and Ors., (2014) 4 SCC 257.

In the landmark case of *Ranjit Udeshi vs. the State of Maharashtra*[10], the Supreme Court went on record to bring in the test of obscenity in our country. It is known as the "community standards" test. The test screens through questionable content by posing a simple question, *Will this denigrate or corrupt the minds of the people meant to come in contact with it, according to the ideas of the collective community?* Depending on the answer, the permissibility of the contended matter is determined by the rightful authorities. It provides a framework for judging the level of obscenity in a scene and the depiction of the performers in it. It is useful in protecting the morality and decency of the collective, which has serious implications for the pornography industry. This also brings up the relationship between censorship, ethical considerations, constitutional rights, regulations, and societal values.

Proposed Solutions

Troubling the issue of regulation is the easy access to pay-per-view content and that the internet is riddled with even extreme material that anybody willing can view. Till the time new legislation comes to light, we must make do with the existing. Legal authorities can take action against platforms offering pay-per-view content that violates ethical standards and promotes harmful stereotypes by interpreting extreme material depicting violence against women as obscene under Section 292 of the IPC. This could include imposing penalties on providers of such content, thereby discouraging the dissemination of material that normalizes violence against women.

Section 293 of the IPC can be used to put a stop to the distribution or exhibition of obscene objects to minors, recognizing the need to protect children from exposure to explicit material.

Censorship and regulation of adult content prevents the exploitation and abuse of women. It maintains public morality and decency, thereby affirming the constitutionality and legality of obscenity laws in India. It assists in the quest to live a life of dignity and privacy. Additionally, in order to keep up

[10] Ranjit Udeshi vs. the State of Maharashtra, (1965) AIR 881.

with Article 19 rights, regulation should be done at the receiving end and not at the source.

Similar to the case of *Ajay Goswami vs. Union of India*,[11] Section 67B of the Information Technology Act can assist in creating guidelines to criminalize the transmission of AE material in electronic form, including online pornography. If this flounders, the State will have failed in its responsibility to protect the minors by appropriate legislation or executive orders. Notably, careful deliberation will be required to execute this, as nudity *per se* is not obscene.

In terms of sexual harassment and exploitation, not much progress has been made. We have Section 354A of the IPC in place, but it is not doing much good. Implementing is a challenge due to the hush-hush nature of the industry. The power imbalances between the stakeholders create further issues, as they are concerned about the safety of the performing women.

By bringing in mandatory consent protocols in the AE industry, we could ensure that all performers provide explicit and informed consent for their participation in explicit scenes, with stringent penalties for violations. This change will help women seek fairness if they are violated out of bounds.

A systematic change in the form of "reverse burden of proof" can be introduced. In specific cases of violence in AE, it shall be the employer or producer's burden to prove in court that the woman in question has been treated fairly, and not the other way around. This system would encourage reporting, address the issue of power imbalances, and hold the employer accountable.

If one were to strengthen cyber laws and regulations to address online harassment, cyberbullying, and the dissemination of explicit content without consent, which are prevalent issues faced by women in the adult entertainment industry, it would contribute to their safety. This could involve amendments to the IT Act of 2000 and the introduction of new legislation to address emerging challenges in cyberspace.

[11] Ajay Goswami vs. Union of India, (2007) 1 SCC 143.

Consumers of AE content could be educated to raise awareness about the impact of violence against women in adult entertainment and encourage them to practice responsible practices, including the promotion of ethical and consensual content.

Conclusion

The adult entertainment industry is the "quietest loud business." It highlights the silence and the secrecy of the dark aspects of pornography. It is essential to recognize the agency and resilience of women working within this industry. We have explored, through this medium, how violence against women in AE is a web of legal complexities, societal norms, and ethical considerations. It needs to be tackled by a multifaceted approach that goes beyond mere legal regulation. There is yet limited review on this topic, and this must change. While legal recourses set standards, they ought to be complemented by societal changes. As the curtain falls on this discussion, one must remember that the fight is not just about regulating an industry or punishing offenders—it is about creating a world where every individual is treated with dignity, respect, and compassion.

Affirmative Action as a Policy Tool to Address Inequalities*

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"Indifferentism is the worst kind of disease that can affect people."

- Dr. Bhimrao Ramaji Ambedkar[1]

The quote *"Indifferentism is the worst kind of disease that can affect people"* encapsulates the peril of apathy towards societal issues, particularly those related to inequality and discrimination. Indifferentism, or the state of being indifferent or unconcerned, allows the persistence of injustices and disparities to fester unchecked. In the realm of social policy, such indifference can be particularly detrimental when addressing complex issues like systemic discrimination and historical inequalities.

Affirmative action stands as a potent remedy against the disease of indifferentism. Rooted in acknowledging historical injustices and systemic discrimination, affirmative action policies aim to redress imbalances by providing targeted support to marginalized groups. This proactive approach challenges indifference by recognizing the need for deliberate efforts to dismantle deeply ingrained disparities. As former U.S. President Lyndon B. Johnson aptly expressed, *"You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, 'you are free to compete with all the others,' and still justly believe that you have been completely fair."*[2]

This quotation underscores the inadequacy of merely proclaiming equality without addressing the historical and systemic hurdles that certain groups face. Affirmative action serves as a necessary intervention, aiming to level the playing field and rectify the consequences of past injustices.

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* Winning Essay Entry, Annual Raghavendra Phadnis Essay Writing, Case Comment, and Legislative Comment Competition, 2023-24.

[1] Dr. B. R. Ambedkar, 'Writing and Speeches' https://www.mea.gov.in/Images/attach/amb/Volume_01.pdf

[2] The Vantage Point Perspectives of the presidency (Book) - Lyndon Baines Johnson.

Affirmative action is a policy measure wherein a person's nationality, gender, religious affiliation, and caste are considered by a company or a governmental organization when offering employment or educational opportunities. Through such initiatives, the government aims to enhance access to employment and education for disadvantaged citizens, thereby increasing opportunities for those who have historically faced socio-economic challenges.

John Rawls on Affirmative Action:

John Rawls, a prominent political philosopher, is renowned for his influential work on justice and fairness. His seminal work, "A Theory of Justice," has had a profound impact on contemporary political thought, particularly in discussions about social justice and equality.[3]

Rawls and Distributive Justice:

Rawls emphasizes the importance of distributive justice in creating a fair society. He argues that social and economic inequalities are acceptable only if they benefit the least advantaged members of society and are attached to positions open to all under conditions of fair equality of opportunity.[4] Rawlsian principles align with the general goals of affirmative action, as they seek to address systemic inequalities and provide fair opportunities for the most disadvantaged members of society. Affirmative action, when designed to uplift marginalized groups and ensure fair representation, can be seen as consistent with Rawlsian principles of justice.

Fair Equality of Opportunity:

Rawls places a significant emphasis on fair equality of opportunity, emphasizing that individuals should have an equal chance to compete for positions and resources. Affirmative action, by actively addressing historical and social barriers faced by certain groups, contributes to the realization of fair equality of opportunity as envisioned by Rawls.[5]

Rawls's theory prioritizes the well-being of the least advantaged members of society. Affirmative action aligns with this principle by directing attention

[3] John Rawls Book- A Theory of Justice
[4] John Rawls Book- A Theory of Justice- page no. 228
[5] John Rawls Book- A Theory of Justice, Page No. 171

and resources towards those who have historically been marginalized, ensuring that they receive additional support to overcome societal hurdles.

Sukhdev Thorat on Affirmative Action:

Sukhadeo Thorat sheds light on the broader landscape of affirmative action policies in developing nations, emphasizing their application in both public and private sectors.[6] Unlike some countries, India's predominant focus has been on the public employment sector, shaping the discourse around reservations. Thorat underscores that the affirmative action dialogue in India predominantly revolves around reservations in public employment. This emphasis has shaped the narrative and policy discussions, focusing distinctly on government job opportunities.

Root Cause: Concerns over "Economic Cost":

The limited discourse in India, according to Thorat, stems from apprehensions about the perceived "economic cost" of implementing reservations. This concern has dominated the conversation, often overshadowing the broader social and political implications of affirmative action policies. Thorat challenges the prevailing narrative by asserting that the consequences of reservations are primarily social and political rather than economic. He argues that reservations while incurring potential economic costs, play a crucial role in addressing social inequities and fostering political inclusion.

When did the implementation of Affirmative Action commence in India?

Rajarshi Shahu Maharaj:

Rajarshi Shahu Maharaj was a visionary ruler of the princely State of Kolhapur in the early 20th century.[7] His reign, marked by progressive reforms, left a lasting impact on social and educational policies. Rajarshi Shahu Maharaj introduced a groundbreaking reservation policy aimed at addressing social disparities. His vision was to uplift marginalized communities and provide them with opportunities that were historically denied to them. A key aspect of Shahu Maharaj's reservation policy was its emphasis on education. Recognizing the transformative power of education,

[6] Sukhadev Thorat interview In the Economic Times Newspaper. https://economictimes.indiatimes.com/opinion/interviews/quota-only-if-a-community-has-faced-discrimination-says-prof-sukhadeo-thorat/articleshow/51113895.cms

[7] Rajashri Shahu Maharaj Ek Magova (Book) - Dr. Jayasingrao Pawar

he implemented reservations to ensure access to quality educational opportunities for historically disadvantaged groups.

The reservation policy championed by Shahu Maharaj specifically targeted the empowerment of the depressed classes, offering them avenues for social and economic upliftment. This initiative aimed to rectify historical injustices and create a more inclusive society. Rajarshi Shahu Maharaj's reservation policy laid the foundation for future affirmative action measures in India. His forward-thinking approach to social justice and equal opportunities continues to influence contemporary policies aimed at fostering inclusivity and reducing socioeconomic disparities.

Sayajirao Gaikwad's Approach to Affirmative Action:

Sayajirao Gaikwad, a visionary ruler, played a pivotal role in shaping the reservation policy in India.[8] His efforts were particularly impactful during the early 20th century, a time when social disparities were deeply entrenched. Recognizing the need to address historical injustices and empower marginalized communities, Sayajirao Gaikwad championed the cause of reservations.

Under his leadership, initiatives were introduced to provide reserved seats in educational institutions and government jobs for communities that had historically faced discrimination and exclusion. These reservations aimed to create equal opportunities for the socially disadvantaged, fostering inclusivity and social justice.

Sayajirao Gaikwad's commitment to affirmative action reflected a progressive mindset, foreseeing the potential for societal transformation through targeted policies. His legacy in shaping early reservation policies in India remains integral to the ongoing discourse on social equity and representation.

The Socio-Political Analysis of Relevance of Affirmative Action Policy: The Legacy of Dr. B. R. Ambedkar:

Dr. B. R. Ambedkar, a key architect of India's constitution, played a pivotal role in shaping the nation's socio-political landscape. His legacy as a reformer continues to influence modern India, particularly in the realms of socio-

[8] Sayajirao Gaikawad Yanchi Bhashane - Khand 3 Published by Rajya Prashasan

economic policies, education, and affirmative action. Post-independence, Dr. Ambedkar's thoughts have garnered widespread respect, transcending political divides. Despite the polarized debate surrounding affirmative action, he, as a constitutional architect, mandated it for India's deep-rooted caste system.

Dr. Ambedkar's vision aimed at creating a society founded on principles of Liberty, Equality, and Fraternity**,** recognizing the caste system as a form of slavery. He believed in the annihilation of caste, acknowledging that affirmative action alone could not fully remedy the social ills perpetuated by the caste hierarchy.

This paper explores the reflection of caste discrimination's brutality, its societal impact, and the introduction of the Quota System as a novel affirmative action measure. The goal was to address social distances and discrimination arising from the false notion of **"**Caste Superiority**"** in Indian society, reflecting Dr. Ambedkar's ongoing commitment to dismantling the caste system.[9]

Constitutional Provisions and Affirmative Actions:

Affirmative action in India is primarily anchored in several Constitutional Articles that aim to address historical injustices, promote social justice, and ensure equal opportunities for marginalized communities.[10]

Article 15: Article 15 prohibits discrimination on grounds of religion, race, caste, sex, or place of birth.

Clause (4) of Article 15 empowers the State to make special provisions for the advancement of socially and educationally backward classes, including Scheduled Castes (SCs), Scheduled Tribes (STs), and Other Backward Classes (OBCs).

Special Provision for Women and Children

The concept of special provisions for women and children, though it might raise concerns about potential gender-based advantages at the expense of

[9] https://www.mea.gov.in/Images/attach/amb/Volume_01.pdf
[10] The Constitution of India 1950

men, is justified as a means to rectify historical injustices faced by women and children in a predominantly male-dominated society. This compensatory approach is evident in various legislative measures, such as the Right to Free and Compulsory Education for children under 14 years and the Maternity Benefit (Amendment) Act 2017.

In the case of *Rajesh Kumar Gupta v. State of Uttar Pradesh* [11] the Uttar Pradesh government implemented a reservation policy for the Basic Training Certificate (BTC) program, specifying that 50% of selected candidates should be from the Science stream and 50% from the Arts stream. Additionally, a further 50% of the seats were reserved for female candidates, with the remaining 50% allocated for male candidates. This reservation format was challenged as arbitrary and violating Article 15 of the Indian Constitution.

Navtej Singh Johar v. Union of India [12]

Justice DY Chandrachud highlighted that Article 15 of the Constitution prohibits discrimination, whether direct or indirect, rooted in stereotypical perceptions of sex roles. He observed that the term 'sex' in Article 15(1) encompasses gender-based stereotypes. Justice Chandrachud further asserted that sexual orientation falls under the purview of 'sex' in Article 15(1) due to two reasons: first, non-heterosexual relationships challenge traditional male-female binaries and associated gender roles, and second, discrimination based on sexual orientation indirectly reinforces gender stereotypes, contravening Article 15. Consequently, any law exhibiting direct or indirect discrimination based on sexual orientation raises constitutional concerns. Justice Chandrachud underscored a common thread in Article 15, emphasizing its impact on an individual's autonomy. In essence, any form of discrimination on grounds mentioned in Article 15 infringes upon an individual's autonomy, rendering such laws constitutionally questionable.

[11] Rajesh Kumar Gupta And Ors vs State Of U.P. And Ors (AIR 2005 SUPREME COURT 2540)
[12]Navtej Singh Johar vs Union Of India (AIR 2018 SUPREME COURT 4321) https://main.sci.gov.in/supremecourt/2016/14961/14961_2016_Judgement_06-Sep-2018.pdf

Satayama Dubey & Ors v. Union of India[13]

Despite legal safeguards like the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, instances of cruelty persist against marginalized communities in certain regions of India. Lower-caste individuals, particularly women, face severe challenges, including rape and fatalities stemming from protests and caste-related conflicts. In September 2020, a horrific gang rape in Hathras, Uttar Pradesh, involving a 19-year-old Dalit girl, highlighted the ongoing vulnerabilities.

Dalits also endure unprovoked atrocities, exemplified by a case in April 2010 where 18 Dalit homes were set ablaze due to a dog barking at a person from a higher caste. Despite legislative measures, discrimination persists, indicating a gap in both stringent punishments and societal adaptation. The need for widespread acceptance and adherence to anti-discrimination laws is crucial to eradicate these deeply ingrained biases and protect the rights of marginalized communities.

Article 16: Article 16 ensures equality of opportunity in matters of public employment.[14]

Clause (4) of Article 16 allows the State to make reservations in appointments or posts in favor of any backward class of citizens, which includes SCs, STs, and OBCs.

Article 16(4) provides an exception to the general rules outlined in Article 16(1) and (2). It allows the State to make special provisions for reserving job appointments in favor of backward classes that are considered underrepresented in the State's services. For this clause to apply, two conditions must be met: the identified citizen class must be both backward and underrepresented in State services.

Article 46:

Article 46 directs the state to promote the educational and economic interests of Scheduled Castes, Scheduled Tribes, and other weaker sections and protect them from social injustice and exploitation.

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[13] Satyama Dubey vs Union of India (AIR 2020 SUPREME COURT 5346) https://main.sci.gov.in/supremecourt/2020/21305/21305_2020_31_1501_24425_Judgement_27-Oct-2020.pdf

[14] The Constitution of India, 1950

Article 335:

Article 335 deals with claims of Scheduled Castes and Scheduled Tribes to services and posts in connection with the affairs of the Union or a State.

It emphasizes that the claims of SCs and STs shall be taken into consideration, consistently with the maintenance of efficiency in administration, when making appointments to services and posts.

Ninth Schedule of the Constitution of India.

Although not an article, the Ninth Schedule protects laws from judicial scrutiny to ensure their effectiveness. Many laws providing for reservations and affirmative action have been included in the Ninth Schedule to safeguard them from legal challenges.

Article 338 and 338A:

Article 338 establishes the National Commission for Scheduled Castes, while Article 338A establishes the National Commission for Scheduled Tribes.

These commissions are tasked with monitoring the implementation of affirmative action policies and investigating and reporting on matters related to the safeguards provided to SCs and STs.

These constitutional provisions collectively lay the foundation for affirmative action in India, reflecting the commitment to rectifying historical injustices and ensuring that the benefits of development reach all sections of society. The affirmative action measures, as enshrined in these articles, are essential for promoting social justice, inclusivity, and equal opportunities in a diverse and historically stratified society.

Legislative Laws and Affirmative Action:

The Scheduled Castes and Tribes (Prevention of Atrocities) Act, enacted in 1989 in India, is a crucial legislative instrument designed to address and alleviate the historical and systemic injustices faced by marginalized communities, namely the Scheduled Castes (SCs) and Scheduled Tribes (STs).[15] This legislation correlates with the broader concept of affirmative

[15] The Scheduled Castes and Tribes (Prevention of Atrocities) Act, 1989.

action, aiming to rectify historical discrimination and uplift these vulnerable groups.

Affirmative action refers to policies and measures implemented to redress historical disadvantages and promote equal opportunities for marginalized communities. The Scheduled Castes and Tribes (Prevention of Atrocities) Act aligns with the principles of affirmative action by specifically targeting the protection and welfare of SCs and STs, acknowledging their historically disadvantaged position within the societal framework.

The Act serves as a proactive approach to prevent atrocities and violence against SCs and STs, recognizing the need for special safeguards due to their vulnerable status. It criminalizes various forms of discrimination, humiliation, and violence against members of these communities. By doing so, it not only addresses the immediate concerns but also contributes to the larger goal of affirmative action, which seeks to create a more inclusive and just society.

In essence, the Scheduled Castes and Tribes (Prevention of Atrocities) Act of 1989 serves as a legislative embodiment of affirmative action principles in India. By focusing on the specific needs and challenges faced by SCs and STs, it contributes to the ongoing efforts to rectify historical injustices and create a more equitable and inclusive society.

Dr. Subhash Kashinath Mahajan vs The State of Maharashtra[16]

The judgment addresses concerns about the misuse of the Scheduled Castes and Tribes (Prevention of Atrocities) Act, highlighting instances where the law intended to protect marginalized communities was exploited for personal vendettas and settling scores, particularly after elections. The judge emphasizes the need for a balanced approach, preventing the mechanical application of Section 18 of the Act, which restricts anticipatory bail, and urging a careful examination of the genuineness and dependability of accusations. The judgment underscores the Act's crucial purpose in safeguarding the rights of Scheduled Castes and Scheduled Tribes while cautioning against its misuse for extraneous reasons. It calls for a discerning

[16] Dr. Subhash Kashinath Mahajan vs The State Of Maharashtra (AIR 2018 Supreme Court 1498)

judicial approach to avoid inadvertently supporting unscrupulous complainants and upholds the principle that the law, enacted for a laudable purpose, should not be allowed to become a tool for personal vendettas.

The Protection of Civil Rights Act of 1955 and Affirmative Action:

The Protection of Civil Rights Act of 1955 in India holds significant historical importance in addressing social injustices, particularly the eradication of untouchability and caste-based discrimination.[17] Though not explicitly labeled as affirmative action, its provisions align with the broader goals of affirmative measures, seeking to uplift and empower marginalized communities.

Enacted to abolish untouchability and promote social equality, the Civil Rights Act marked a pivotal step toward dismantling deeply entrenched discriminatory practices. It aimed to guarantee civil rights to all citizens, irrespective of caste, and foster a society based on principles of justice and equality. The Act's provisions correlate with affirmative action by directly challenging the historical oppression faced by Scheduled Castes (SCs) and Scheduled Tribes (STs). It sought to rectify the imbalances by criminalizing practices associated with untouchability and providing legal mechanisms to combat discrimination. This legislative initiative aimed to create a more inclusive and just social order, aligning with the affirmative action principles that address historical disadvantages.

Rationale and Justification of Affirmative Action:

Affirmative action is a set of policies and initiatives designed to address historical and systemic inequalities by providing preferential treatment to certain groups that have been historically marginalized or discriminated against. The rationale and justification for affirmative action generally revolve around several key principles and goals:

Historical Injustices:

Affirmative action seeks to rectify historical injustices, discrimination, and oppression faced by certain groups, such as racial and ethnic minorities,

[17] The Protection of Civil Rights Act of 1955

women, and socially disadvantaged classes. These groups have often been denied equal opportunities and access to resources over the years.

The core principle behind affirmative action is to ensure equal opportunities for all members of society. By providing targeted assistance to underrepresented groups, it aims to level the playing field and reduce the impact of historical disadvantages that hinder equal access to education, employment, and other opportunities.

Social Cohesion:

Promoting social cohesion and harmony is another goal of affirmative action. By addressing disparities and promoting inclusivity, these policies aim to create a more equitable and just society. This, in turn, contributes to social stability and reduces tensions arising from historical inequalities.

Economic Empowerment:

Affirmative action is often justified on economic grounds, aiming to uplift economically disadvantaged groups. By providing access to education and employment opportunities, these policies seek to break the cycle of poverty and contribute to the overall economic development of marginalized communities.

Constitutional Mandate:

Many countries, including India and the United States, have constitutional provisions that allow for affirmative action. These provisions often recognize the need to address historical injustices and promote social justice and equality.

Affirmative action is often intended to be a temporary measure to correct historical imbalances. Once a more equitable society is achieved, the need for such preferential treatment is expected to diminish.

Critiques and Controversies of Affirmative Action:

Affirmative action has been a topic of significant debate, and various critiques and controversies surround its implementation. While proponents argue that it is a necessary tool for addressing historical injustices and promoting diversity, critics raise several concerns:

Reverse Discrimination:

One of the primary criticisms of affirmative action is the notion of reverse discrimination. Critics argue that by giving preferential treatment to certain groups, individuals from majority communities may face discrimination, leading to tensions and resentment.

Meritocracy Concerns:

Opponents contend that affirmative action can undermine the principle of meritocracy by prioritizing characteristics such as race, gender, or ethnicity over qualifications and skills. Critics argue that hiring or admitting individuals based on these factors may result in less-qualified candidates being chosen over more qualified ones.

Stigmatization:

Some argue that affirmative action policies may inadvertently stigmatize the beneficiaries, as they may be perceived as having received opportunities not solely based on their merit or abilities. This stigma could affect the confidence and credibility of individuals who benefit from such policies.

Perpetuation of Stereotypes:

Some critics argue that affirmative action can perpetuate stereotypes by implying that certain groups need preferential treatment to succeed. This can reinforce negative perceptions and hinder efforts to break down stereotypes.

Legal Challenges:

Affirmative action policies have faced legal challenges in various jurisdictions. Critics argue that these policies may violate principles of equal protection under the law, leading to court cases and ongoing legal disputes.

Questions have been raised about the long-term effectiveness of affirmative action in addressing systemic inequalities. Critics argue that a more comprehensive approach, addressing root causes and investing in education and economic opportunities, may be more sustainable.

Effectiveness of Affirmative Action in Addressing Inequalities:

The effectiveness of affirmative action in addressing inequalities is a complex and debated topic. While proponents argue that it has made significant strides

in promoting diversity and addressing historical injustices, critics question its long-term impact and effectiveness.

Affirmative action has played a crucial role in addressing historical injustices, especially in societies with a legacy of discrimination based on race, ethnicity, or gender. It aims to break the cycle of disadvantage by providing opportunities to historically marginalized groups.

Access to Education and Employment:

Affirmative action policies have facilitated increased access to education and employment opportunities for individuals from underrepresented groups. This, in turn, contributes to social mobility and economic empowerment.

Affirmative action has been effective in addressing socioeconomic gaps by providing targeted assistance to those who face systemic barriers. This can contribute to reducing disparities in income, education, and overall well-being.

Conclusion

Affirmative action in India stands as a testament to the nation's commitment to rectifying historical injustices and addressing the pervasive issue of caste-based discrimination. Envisioned by the architect of the Indian Constitution, Dr. B. R. Ambedkar, affirmative action emerges as a nuanced and dynamic response to centuries-old societal inequities. Dr. Ambedkar, a visionary leader and staunch advocate for social justice, championed affirmative action not as a cure-all solution but as a pivotal step toward societal transformation.

Central to Dr. Ambedkar's ideals was the vision of the annihilation of caste, a profound aspiration to dismantle the rigid caste hierarchy and build a society founded on principles of Liberty, Equality, and Fraternity. Affirmative action, deeply entrenched in constitutional provisions, reflects this commitment to rectifying historical imbalances and fostering inclusivity. The Quota System, a pioneering approach within India's affirmative action framework, seeks to address the systemic and entrenched nature of caste discrimination, thereby mitigating the social distances perpetuated by false notions of caste superiority.

At its core, affirmative action in India is a multifaceted strategy aimed at leveling the playing field for historically marginalized communities. By

providing reserved quotas in education, employment, and political representation, affirmative action endeavors to create avenues of opportunity for those who have long been denied access due to their caste status. These policies not only serve as mechanisms for social upliftment but also as instruments for empowerment, enabling individuals from marginalized communities to break free from the shackles of caste-based discrimination and realize their full potential.

However, the implementation of affirmative action in India has not been without its challenges and controversies. Critics often argue that such policies perpetuate reverse discrimination and undermine meritocracy. Yet, it's crucial to recognize that affirmative action is not about lowering standards but rather about recognizing and addressing systemic barriers that have historically disadvantaged certain groups. Moreover, it is imperative to acknowledge that meritocracy itself is often a product of privilege, with individuals from dominant caste backgrounds having greater access to resources and opportunities from birth.

The ongoing debate surrounding affirmative action underscores the need for a balanced and evolving strategy that takes into account the complexities of diversity and historical disparities. While affirmative action has undoubtedly made significant strides in advancing social justice in India, there is still much work to be done. As the country continues to grapple with the legacies of colonialism, casteism, and socio-economic inequality, crafting inclusive policies remains imperative for fostering a just and equitable society.

Moreover, it is essential to recognize that affirmative action is not a one-size-fits-all solution. Different communities within India face unique challenges and require tailored interventions to address their specific needs. Therefore, policymakers must adopt a nuanced approach that takes into account the intersectionality of caste, class, gender, and other factors that shape individuals' lived experiences. Additionally, affirmative action should not be viewed in isolation but as part of a broader strategy for social change. Educational reforms, economic empowerment initiatives, and community development programs are equally essential in addressing the root causes of inequality and promoting sustainable development.

Understanding the Concept of Trademark Dilution

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In this rapid growth of globalization with continuous evolution of technology, it has provided new opportunities to manufacturers to develop and create a concrete platform for their respective goods at the world stage and get global recognition for their brand identity. Trademarks play an important role in building this global identity. With this there comes a threat of unauthorized /non-permitted use of trademark by anyone around the globe in local markets. This causes confusion as well as delusion in the minds of the consumers towards the original brand. Trademarks are an essential aspect of a company's identity and branding and serve as a symbol of quality, authenticity, and reputation. Hence it becomes necessary for global brands to protect their property with due care in the global market. The unauthorized use of trade mark leads to either trademark infringement or trademark dilution. These terms often cause confusion among the legal community.

Trademark infringement is a wider term in scope than trademark dilution. Trademark infringement is irrespective of reputation or goodwill of trademark applicable across all registered trademarks with similar or different goods and services offered under it. On the other hand, trademark dilution is a concept developed only to protect famous or well-known trademarks from weakening or diminishing of its unique and distinctive identity that it has built throughout years of experience in the market.

In Indian legal scenario, under Trademarks Act of 1999, trademark infringement is described under section 29 of the Act. But this act fails to specifically describe Trademark dilution.

The Section 29(4) though provides certain conditions as to trademark infringement which are indeed the requirements for trademark dilution. Section 29(4) reads as, *"A registered trademark is infringed by a person, who not being a registered proprietor or person using by a way of permitted use, uses in course of trade, a mark which-*

(a) Is identical with or similar to the registered trademark: and

(b) Is used in relation to goods or services which are not similar to those for which trademark is registered; and

(c) The registered trademark has reputation in India and use of the mark without due cause takes unfair advantage of or is detrimental to, the distinctive character or repute of the registered trademark.

One of the first mention of this concept appeared in 1927's article titled "The Rational Basis of Trademark Protection" authored by Frank Isaac Schechter in Harvard Law Review.[1] Where he discussed need of protection of trademark against vitiation or disassociation of mark from particular goods and services with which it has been used.

Case law-[2]*California cedar products company case.*

This is the first intimation of vitiation of identity of a trademark known in judicial proceedings. Where the court stated that, a disputed mark has become so identical with a particular Corporation that, whenever used, it designated to the mind that particular Corporation. Hence, allowing use to other parties that mark with respect to other product will lead to confusion among public and ultimately it will tarnish or result in loss of identity of the owner company.

Several cases of trademark dilution have been reported in India after the 1999 Trademark statute was passed. No laws pertaining to the same were included in The Trade and Merchandise Marks Act of 1958.

However, application of the doctrine can be traced back prior to enactment of Act in the case of "*Daimler Benz Aktiegessell Chaft & anr vs Hydo Hindustan*.,[3] where the defendant created a logo for his underwear line which consisted of a person doing a yoga pose which was identical to 3-pointed ring mark of the Benz.

Defendant relied upon many cases to invoke defence of honest and concurrent use. The court rejected defence due to the dominating presence of Benz

[1] Schechter, Frank I. "The Rational Basis of Trademark Protection." Harvard Law Review 40, no. 6 (1927): 813–33. https://doi.org/10.2307/1330367.
[2] (56 App. DC 156) - https://casetext.com/case/duro-pump-mfg-co-v-calif-cedar-products
[3] AIR 1994 Delhi 2369

throughout the global market. This was a major precedent which paved a way for Trademark dilution in India.[4]

Further there are different ways by which dilution of a trademark occurs. They are as follows-

1. **Blurring**-

   Blurring of trademark occurs when the use of similar or identical trademark diminishes the distinctiveness of a famous mark.

   It is most common way of dilution of mark, where people imitate famous marks. This reduces the possibility of recognizing and distinguishing the goods and services offered by the well-known mark. Also reduces the revenue generation ability of the owner's company.

   For Example -In the event that a company named "Apple Shoes" was to utilize a logo bearing a significant resemblance to the established Apple trademark, such use could potentially dilute the source-identifying characteristics associated with the Apple brand in the technological product sector.

2. **Tarnishing**-

   Tarnishing is another method of trademark dilution, where reputation of well-known mark is damaged or is tarnished. Here, unauthorized user uses the well-known mark with respect to its goods or services which receives negative opinion of consumers. Ultimately it leads to forming negative opinion about the trademark. Final result of such negative opinions is that the trademark's public identity gets tarnished.

   Illustration of Tarnishment will be, when a company introduced a line of low-priced, substandard footwear marketed under a brand name identical to that of a well-regarded luxury car manufacturer. This association of the esteemed luxury car brand with inferior quality shoes damaged its reputation amongst consumers who had previously equated the brand with opulence and exceptional quality.

[4] https://mason.co.in/the-doctrine-of-trademark-dilution-and-its-impact-on-popular-brands/

3. **Free riding/ cybersquatting-**

   The registration, sale, or use of a domain name that incorporates a pre-existing trademark or service mark, with the intent to capitalize on the established brand reputation for personal gain. This gain can be achieved by either selling the domain name to the trademark owner at an inflated price or by diverting internet traffic for illegitimate purposes.

   A well-known example of cybersquatting is the case of [5] *Microsoft v. MikeRoweSoft (2004),* where a Canadian teenager, Mike Rowe, registered the domain "MikeRoweSoft.com", which phonetically resembled "Microsoft". Microsoft alleged that this was an act of cybersquatting because the domain name was confusingly similar to its well-established trademark. Rowe then possessed two potential avenues for illicit gain:

- **Domain Name Extortion:**
  Rowe initially requested a small amount for transferring the domain, but after Microsoft's legal notice, he increased his demand to $10,000. This act of demanding a significantly higher sum after being challenged legally is a clear case of domain name extortion.

- **Traffic Diversion:**

  After Rowe publicly revealed his legal battle with Microsoft, his website gained massive media attention, drawing significant traffic. Internet users, out of curiosity and support, visited MikeRoweSoft.com, leading to further brand exposure and unintentional diversion of online traffic from Microsoft.

  This unintended traffic surge could have led to potential misuse or monetization opportunities, reinforcing the cybersquatting claim.

This practice of cybersquatting undeniably weakens the value associated with the original trademark by generating confusion amongst consumers and potentially inflicting harm upon the legitimate brand's reputation.

[5]https://www.theguardian.com/technology/2004/jan/20/microsoft.business?CMP=share_btn_url

Remedies

Preventing Trademark Dilution completely might not be feasible but remedies offer powerful tools to combat it and mitigate the potential harm.

1. **Injunctions –**
   a) Temporary Injunction
      - When the court orders to do or not do an act or omission to maintain the status quo, is called an injunction.
      - When the same is temporary in nature so as to prevent the immediate effects of the dilution is termed as temporary injunction.
      - To be granted a temporary injunction the plaintiff needs to prove that before the suit comes to an end the dilution can be beyond repair and hence needs to be injuncted immediately.
      - It generally takes place between the proceedings of the suit.

   b) Permanent Injunction
      - When an injunction is of a permanent nature it is termed as a Permanent injunction.
      - The court orders prohibiting the infringing party from using the diluting mark indefinitely.
      - This provides a long-term protection for the plaintiff and prevents future dilution.
      - This generally takes place when the suit has been decided or the judgment has been passed

2. **Monetary reliefs**
   a) Actual Damages
      - When the damages can be liquidated i.e. when they can be calculated, the amount that is calculated is to be paid to the plaintiff.
      - The compensation in relation with the financial losses that has been incurred by the well-known brand due to dilution is awarded.

b) Profits

- The court in some cases directs the defendant to pay the profit which the new brand has acquired due to the dilution to the plaintiff's trademark.

c) Punitive damages

- In cases where the dilution is done willfully or with malice then the court can take measures to prevent from engaging in a similar conduct by awarding exemplary damages to the defendant.
- This acts as a punishment and also as a deterrent to prevent trademark dilution in the future.

3. Other Remedies

a) Seizure or Destruction

- The court may direct seizure and destruction of goods and other marketing materials bearing the diluting trademark.
- This prevents further harm and removes these goods from the marketplace.

b) Cancellation of trademark Registration

- If in some cases the diluting mark is also a registered trademark, then the court may order to cancel the registration of such mark.

c) Corrective Advertising

- The court may order the defendant to run a corrective advertising campaign, to state the distinctiveness of the brands so as to mitigate the loss already faced by the well-known trademark.
- It prevents any negative association so caused during trademark dilution.

All these above remedies provide a deterrent effect in the market place and further prevents Trademark Dilution. But before the Dilution takes place brands can prevent it by employing other proactive measures such as:

I. Building a strong brand - To invest, reinvest to establish a brand that creates its unique and distinctive personality within the marketplace.
II. Advertising and creating awareness - To advertise the ethos, the objective behind the brand's trademark and what the primary goal of the trademark is. To advertise and create the same awareness between the customers. To promote the uniqueness and distinctiveness of one's brand/ trademark among the general public.
III. Monitoring trademark use - By employing a task force especially to monitor the authorized as well as the unauthorized use of one's trademark. This can be done through market surveys, customer interactions or through any other mechanisms available.
IV. To enforce Trademark rights - All the rights that have been given to a registered trademark under the Trademarks Act 1999 shall be enforced by the trademark holder.
V. Create a strong legal workforce - To employ legal counsels who can guide you to protect your brand and to also prepare a strategy to enforce all the rights and avail all the protection under the Trademark Act.
VI. Enforcement - Implementing effective enforcement actions, such as taking down infringing content from websites, pursuing legal actions against infringers, and collaborating with law enforcement authorities.

Conclusion

With the ever changing and fierce competitive landscape, protecting brand reputation is of primary importance. Trademark dilution can lead to a significant threat by weakening a brand's distinctiveness and tarnishing its image by its unauthorized use.

But with understanding and analyzing these threats brands can create a safe space in the market for themselves by taking proactive measures as well as asserting their rights in times when Trademark Dilution takes place.

Efficacy of Anti-Defection Law in Protecting the Democratic Choice of the Voters*

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Elections and voting rights are the cornerstone of India's democratic fabric, embodying the essence of citizen empowerment and political participation. We, the people of India celebrate the event as a festival. In a country as diverse and populous as India, where myriad voices clamour for attention and representation, the electoral process serves as a vital mechanism for individuals to assert their preferences and shape the trajectory of governance. The right to vote is not merely a legal entitlement but a powerful tool wielded by the populace to hold their elected representatives accountable and steer the course of national development.

India's electoral landscape is characterized by its sheer scale and complexity, with elections conducted at various levels, national, state, and local ensuring that every citizen has a stake in the democratic process. From the bustling metropolises to the remote villages, millions of voters exercise their franchise, imprinting their choices on the nation's political canvas. This inclusivity and breadth of participation underscore the democratic ethos ingrained in India's polity, wherein every vote carries equal weight, irrespective of one's socioeconomic status or background.

Albeit every vote carries an equal and significant amount of weightage, it is sometimes, more often now toyed with, and the evil behind that is known as “Defection”. Defection can be best defined as the joining of any other political party other than its own political party, upon whose ticket he/she contested the election, for monetary or career benefit, leaving its own party at the peril of dissolution. As a practice, it is neither sui generis to India nor has

* Winning Entry in Annual Raghavendra Phadnis Essay Writing, Case Comment, and Legislative Comment Competition, 2023-24.

it recently started. The roots of defection in India can traced after and around the period of fourth general elections that is late 1960s where the dominance of Congress was finally seeming to its end and the rise of coalition governments was quite visible. As Subhash Kashyap has rightly mentioned in his article that the main reasons behind the trend were (1) the history and nature of political parties in India, and particularly the Indian National Congress; (2) the aging leadership, bossism and the growth of establishments with vested interests in the status quo in almost all the parties; (3) the lack of ideological orientation and polarization among the parties; (4) the low level of popular involvement in the membership, objects and activities of political parties and the virtual indifference of the people to acts of defection by their representatives; (5) in-fighting and factionalism in the parties which lead to group- defections when, for example, party tickets are denied to members of a dissident faction[1]. Now particularly, we are seeing another trend of fear politics of threat politics that is as the name suggests, threatening politicians of the raids by certain governmental institutions such as ED, CBI etc.

An important event during the era took place in Haryana in 1967 where a politician named Gaya Lal who belonged to Congress party and elected from Hasanpur constituency in the Palwal district changed his affiliation three times in one day. This event evolved the notorious phrase “Aaya Ram Gaya Ram” and what was started by Gaya Lal become a common practice among the politicians afterwards[2]. A data revealed that prior to 1967, a net of 542 defections happened, which dramatically increased to 438 in only the year following February 1967 for the various reasons we have already discussed above[3]. Politicians hailing strong from a particular region or State started playing the politics of brinkmanship in which they would quote their prices for tilting in any of the directions and till then they remained the fence sitters. Although not specific to the north, the situation was worse in north

[1] Vol. 10, No. 3 Subhash C. Kashyap The Politics of Defection: The Changing Contours of the Political Power Structure in State Politics in India 207-208
[2] Sukhbir Siwach. 'Aaya Ram Gaya Ram' Haryana's gift to national politics. Times of India Dec 11 2021. 05:31 IST. https://timesofindia.indiatimes.com/city/chandigarh/amp39Aaya-Ram-Gaya-Ramamp39-Haryanaamp39s-gift-to-national-politics/articleshow/11188018.cms
[3] Vol. 10, No. 3 Subhash C. Kashyap The Politics of Defection: The Changing Contours of the Political Power Structure in State Politics in India 197

specifically in Bihar, West Bengal, Rajasthan and Uttar Pradesh. This was the time when Lok Sabha set up a committee headed by Y.B Chavan, which gave its report in 1968 suggesting passing an anti-defection law. But it took Parliament around seventeen years from there to actualize this finally in 1985 during the Rajiv Gandhi government when tenth schedule was inserted through 52nd amendment act which came into effect from March 18 of the year and incidentally it marked the addition of the term "political party" in our constitution.

Provisions of the Law

The tenth schedule of the constitution provided us with a definition of what constituted defection and laid out that if a legislator who has won an election on a political party ticket "voluntarily" gives up his or her party membership or votes against the organization's wishes in the legislature, the party can proceed against the member under the anti-defection law. Individuals who won elections independently were also not allowed to join a political party afterwards. As for nominated legislators, it allows them to join a political party within six months of being nominated, if they fail to do so, they also attracted these provisions.

It also listed two ways which did not attract disqualification from the law and those were-

SPLIT- If one-third of the total members of legislators moved from one party to another, it will not attract disqualification.

MERGER- If two-thirds of the total legislators moved out of the party to another, it will be termed as merger and not attract defection clauses[4].

But, after witnessing the various malpractices that kept misusing the provision of split, it was finally amended in the *91st Constitutional Amendment Act, 2003*.

This was evident from a survey of 55 petitions filed under the Tenth Schedule between 1986 and 2004 before the Speaker of the Lok Sabha. Of these 55 instances, disqualification occurred in only six. Of the 49 instances where no

[4] Schedule X, Constitution of India, 1950

disqualification occurred, 22 could be attributed to splits and 16 to mergers in political parties[5].

The amendment also incorporated one of the suggestions from Y B Chavan panel in limiting the size of the Council of Ministers and preventing defecting legislators from joining the Council of Ministers until their re-election. However, it can be popularly argued that these rectifications have done little to curb the malpractices.

Efficacy of the Law- Analysis

Removal of the "split" provision from the schedule however did not curb these defections but the engineering started to occur on a much larger scale. Instead of the retail ones, the politicians started to engage in wholesale defections evidently with the allure of money and significant ministerial positions.

A very relevant case is of the Maharashtra political turmoil that is still continuing. Starting with the sudden absence of Shiv sena legislature party leader Eknath Shinde and later the reveal of him with other 11 MLAs in Surat, Gujarat sparked the beginning of one of the most controversial matters in modern day politics in India. Afterwards, Shinde with other 40 MLAs, which was well above the two thirds requirement for exemption from the defection charges, defected from the Shiv sena party and claimed to be the forbearer of the will of Late Balasaheb Thackeray and subsequently the real shiv sena party. Consequently, due to the loss of the majority at the legislative assembly, the sitting CM Uddhav Thackeray had to resign and under 24 hours of that, Eknath Shinde was sworn in as the new CM of Maharashtra. With the help of the BJP, they gained the majority in the assembly. Notices for disqualifications were filed from Uddhav faction but owing to the indecision of the speaker and later in his absence the case remained unhandled. The case was moved to Supreme Court and then judicial proceedings were initiated[6].

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[5] Ritwika Sharma. Assemblies big or small, the anti-defection law fails them all. Deccan Herald. March 12, 2024. 6:02 P.M. https://www.deccanherald.com/opinion/assemblies-big-or-small-the-anti-defection-law-fails-them-all-2818149

[6] Maharashtra political crisis: The anti-defection law and how many MLAs Eknath Shinde needs to split the Shiv Sena June 22, 2022, 14:46:30 IST

But the point to be noted here is, this is not the first time this has happened the provisions of tenth schedule has been exploited many a times in the current BJP regime and in the past by Congress regime also. After the 4th General Elections, the Central Parliamentary Board of the Congress Party formally changed its policy regarding the admission of defectors from other parties. It was decided to waive all restrictions on the defection of non-Congress legislators to the Congress and to leave this matter to the discretion of the state units of the party. In some states several defectors from other parties were admitted to the Congress fold, and a number of former Congressmen were also welcomed back. At the Hyderabad session, the All-India Congress Committee (AICC) authorized the Congress State legislators to form coalition governments with defectors from other parties[7]. And if we come to the present, we have the case of Kamalnath government in Madhya Pradesh which got demolished due to defection from Jyotiraditya Scindiya and 22 MLAs with him. His father Madhavrao Scindia wholeheartedly served the Congress party. But Jyotiraditya in the avarice of power defected to BJP and notably, currently he serves as the civil aviation minister in the union. A rumored try was made in Rajasthan as well to exploit Sachin Pilot's disenchantment with his party, but it is quite evident that if it was true, it failed somehow, and Rajasthan managed to stick. But in particular, the Maharashtra case underlines the role of speaker in handling of such cases. The controversy can never be avoided if he is to follow the prejudices imposed upon him on account of his political affiliations.

Relevant Case Laws and Evolution of the Law

In the case of *Kihoto Hollohan vs. Zachillhu*, it was contended that the anti-defection law is incompatible with freedom of speech, dissent, and conscience. The Supreme Court concluded that the statute is intended to handle unprincipled defections that are not protected by freedom of conscience, right to dissent, or intellectual liberty. The ratio decidendi of the

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https://www.firstpost.com/politics/maharashtra-political-crisis-the-anti-defection-law-and-how-many-mlas-eknath-shinde-needs-to-split-the-shiv-sena-10823281.html

[7] Vol. 10, No. 3 Subhash C. Kashyap The Politics of Defection: The Changing Contours of the Political Power Structure in State Politics in India 200

case was that the majority in this case found that the Tribunal is the Speaker/Chairman under Paragraph 6(1) of the Tenth Schedule, and that the finality clause does not obliterate, but rather limits, the courts' authority under Arts. 136, 226 and 227. Again, this case underlines the controversy with the authority of speaker in the matter of defection[8].

In *Dr. Kashinath G. Jalmi v. Speaker (1993)*, the court dealt with the question whether the speaker have power to review the disqualification made by the former speaker. The court held that the Speaker has no power of review under the Tenth Schedule, and an order of disqualification made by him[9].

The court in *Ravi Naik v. Union of India (1994)* the court defined the scope of word voluntary giving up membership. The court held that "The words 'voluntarily given up his membership' are not synonymous with 'resignation' and have a wider connotation. A person may voluntarily give up his membership of a political party even though he has not resigned from membership of that party. Even in the absence of a formal resignation from the membership an inference can be drawn from the conduct of a member that he has voluntarily given up his membership of the political party to which he belongs[10]."

Another question raised before the court in *Rajendra Singh Rana v. Swami Prasad Maurya* was when a court can review the Speaker's decision-making process under the Tenth Schedule. The court held that "the scope of judicial review under Articles 136, and 226 and 227 of the Constitution in respect of an order passed by the Speaker/Chairman under paragraph 6 would be confined to jurisdictional errors only viz., infirmities based on violation of constitutional mandate, mala fides, non-compliance with rules of natural justice and perversity." The Supreme Court also held that even signing a letter to the governor supporting the Opposition party was tantamount to defection[11].

[8] Kihoto Hollohan v. Zachillhu & Ors., AIR 1993 SC 412
[9] Dr. Kashinath G. Jalmi v. Speaker 1993 2 SCC 703
[10] Ravi S. Naik v. Union of India, 1994 Supp (2) SCC 641
[11] Rajendra Singh Rana V. Swami Prasad Maurya and Others, (2007) 4 SCC 270

Even though, these cases have added much to the richness of the law, the loopholes remain to exist and have constantly been exploited through and through. Following things must be kept in mind while analyzing the anti-defection law in India.

Firstly, the provision of only speaker being allowed to adjudicate on the matter is nothing but controversial. A speaker as it is universally known belongs to the ruling party and thus his party bias or prejudice will come in front of him while deciding on such matters. A human and a politician for a matter of fact can never be expected to be totally value neutral or objective.

Secondly, the ambiguity regarding the reasonable time to give a decision in that create much more of a scope of corruption and malpractice. The speaker might delay it for years for that matter and we have seen that happen with our own eyes during the Maharashtra case. A bench comprising Justices R.F. Nariman and S. Ravindra Bhat urged that "Parliament may seriously consider amending the Constitution to substitute the Speaker of the Lok Sabha and Legislative Assemblies as arbiter of disputes concerning disqualification which arise under the Tenth Schedule with a permanent Tribunal headed by a retired Supreme Court Judge or a retired Chief Justice of a High Court, or some other outside independent mechanism, to ensure that such disputes are decided both swiftly and impartially, thus giving real teeth to the provisions contained in the Tenth Schedule, which are so vital in the proper functioning of our democracy[12]." The *Dinesh Goswami Committee* on Electoral Reforms in 1990 also recommended divesting speakers of the responsibility of deciding on defections. The National Commission to Review the Working of the Constitution *(NCRWC)* made a similar suggestion.

Thirdly, incorporating what has been suggested in *170th law commission report (1999)*, the provision of even merger must be done away with. It further underscored the importance of intra-party democracy by arguing that a political party cannot be a dictatorship internally and democratic in its functioning outside[13].

[12] Chakshu Roy. The Anti-Defection Law That Does Not Aid Stability. PRS Legislative Research. March 12, 2024. 5:56 P.M. https://prsindia.org/articles-by-prs-team/the-anti-defection-law-that-does-not-aid-stability

[13] India. Law Commission. Report No. 170, Reform of the Electoral Laws (1999).

Fourthly, a recall mechanism could be set up which allows voters to directly oust a minister, MLA, or MP for that matter if he commits defection. However, it will be quite difficult and tedious for a country like India owing to the constitutional hurdles as well as potential for its misuse. The constitution would have to be amended and boundaries be defined with a reasonable threshold to witness its fruits. Even an independent body like a tribunal could be established to oversee the recall process, ensuring fairness, and preventing misuse.

Finally, we can learn from a comparative analysis of defection laws in various countries. For instance, Germany has a rather strict law on defection where an elected representative who defects loses their seat if their new party fails to win at least 5% of the vote in the last federal election. This law aims to prevent defections motivated by personal gain and protect the proportionality of the electoral system.

Even public seems to be frustrated and a sense of resignation perpetuates in them specially when they are made to hear statements like the MLAs had taken permission from God before joining the BJP and "God agreed", of course the statement was made by former Goa CM Digambar Kamat after defecting from Congress to BJP. A 2019 survey by the Association for Democratic Reforms (ADR) found that 76% of respondents believed that defections weaken political parties and damage democracy. While a 2018 article in The Hindu quotes a political analyst who observes, "There is a sense of cynicism and fatigue among the voters. They feel that regardless of who they vote for, the same set of politicians will come to power through defections." But this view is also inclusive of the fact that voters in rural areas might be less informed about the nuances of the defections when compared to their urban counterparts. We might as well educate and aware voters of their political rights and also then recall mechanism will be truly effective.

In essence, the Anti-Defection Law was introduced in India to safeguard the democratic choices made by voters from the disruptive influence of opportunistic defections among elected representatives. However, as observed over the years, the efficacy of this legal framework in preserving the integrity of democratic processes has been subject to scrutiny. Despite the constitutional provisions and subsequent amendments, the law has encountered challenges and loopholes that undermine its intended purpose.

The evolution of the Anti-Defection Law reflects a dynamic interplay between legal provisions and political realities. While the enactment of the Tenth Schedule marked a significant step towards addressing defection-related issues, subsequent developments have highlighted the need for further refinement and reinforcement of the legal framework. One of the primary concerns revolves around the authority vested in the Speaker to adjudicate on defection cases. The inherent bias associated with the Speaker's political affiliations underscores the potential for partisan decision-making, raising questions about the fairness and impartiality of the process. The delay and ambiguity surrounding the resolution of defection cases only exacerbate these concerns, creating opportunities for manipulation and corruption. Considering these challenges, there have been calls for structural reforms to enhance the efficacy of the Anti-Defection Law. Proposals to establish an independent tribunal or mechanism, detached from political influence, have gained traction as a means to ensure timely and unbiased adjudication of defection disputes. Such reforms, if implemented, could strengthen the enforcement of the law and restore public trust in the democratic process. Moreover, the scope of the law itself warrants reexamination, particularly regarding provisions related to mergers and intra-party dynamics. The prevalence of wholesale defections and the exploitation of loopholes underscore the need for a more comprehensive and nuanced approach to defection-related regulations. The abolition of provisions such as mergers could promote greater intra-party democracy and accountability, aligning with the broader objectives of electoral integrity and governance. Ultimately, the efficacy of the Anti-Defection Law hinges not only on legislative measures but also on institutional mechanisms and political will. Addressing the systemic challenges associated with defection requires a multifaceted approach that combines legal reforms, institutional safeguards, and a commitment to democratic principles. By addressing these issues comprehensively, India can strengthen its democratic institutions and uphold the democratic choices of its citizens, ensuring a more robust and inclusive political landscape for generations to come.

CASE COMMENTS

M/s UNIBROS vs All India Radio[1]

Bhakti Ghotkar
III B.A., LL.B.

Statement of Facts:

Unibros (Appellant) was in contract with All India Radio (Respondent) to carry out the construction of Delhi Doordarshan Bhawan, Mandi House, Phase 2, New Delhi. The contract had a 1-year deadline (April 12, 1990 - April 11, 1991) but the project wasn't finished until October 30, 1994 (over 3.5 years late). Due to the delays and resulting losses, an arbitration process was initiated.

The disputes arising from the delay were referred to arbitration under the Arbitration and Conciliation Act, 1996 (the Act). The arbitrator's First Award (February 11, 1999) partially upheld the appellant's claims, awarding Rs. 1.44 crore under Claim No. 12 for loss of profit and 18% annual interest under Claim No. 13. This award relied on Hudson's formula to calculate the losses. Aggrieved, the respondent filed objections under Section 34 of the Act before the Delhi High Court, challenging the lack of sufficient evidence supporting the award. The Single Judge (May 20, 2002) set aside the award and remitted the claims for reconsideration.

The arbitrator issued a Second Award (July 15, 2002), reiterating the findings of the First Award and maintaining the loss of profit and interest awarded to the appellant. The respondent again challenged this award under Section 34. The Single Judge (February 25, 2010) quashed the Second Award on the grounds of lack of evidence, deeming it contrary to the public policy of India. Costs of Rs. 50,000 were imposed on the appellant.

The appellant then appealed the Single Judge's decision before a Division Bench under Section 37 of the Act. The Division Bench (December 9, 2019)

[1] M/S UNIBROS vs All India Radio 2023 SCC OnLine SC 1366

upheld the Single Judge's judgment, concluding that the arbitrator's findings were unsupported by evidence and failed to adhere to principles of contract law.

This case pertains to the appellants challenging the judgment passed by the Delhi High Court dismissing their appeal under section 37 of the Arbitration and Conciliation Act, 1996 ("the Act").

Procedural History:

1. **First Award and judgment challenging the award:**
    - This award dated 11th February 1999 upheld the Claim no.12 and Claim no.13 of the appellants and rejected the rest. These claims pertained to the loss of profit endured by the appellant by the retention of the contract despite delays. It awarded a sum of Rs. 1,44,83,830 towards Claim No. 12, along with an interest of 18% per annum under Claim No. 13 from 12th May 1997 to the date of actual payment to Unibros. The arbitrator reasoned that it was an indisputable fact the respondents were the sole cause of the delays and used Hudson's formula to justify the figures.
    - The Delhi High Court received an objection from the respondent under Section 34 of the Act. The court upheld the objection and set aside the award. The single-judge bench also ordered the arbitrator to reconsider the matter and pass a fresh award based on the evidence on record. The judge stated that the award violated the fundamental public policy under Indian law, as per Section 34(b)(ii) of the Act, due to the absence of credible evidence for the applicant's claim and the arbitrator being influenced by erroneous factors.
    - Grounds for Objection and Judicial Ratio:

    1. Lack of Evidence: The Arbitrator failed to establish credible and sufficient evidence to support the claimed loss of profit. The calculation relied solely on Hudson's formula without

substantiating that the contractor could have secured comparable contracts during the delay.

2. Public Policy Violation: The award was deemed contrary to the "fundamental policy of Indian law" under Section 34(2)(b)(ii) because it ignored judicial precedents and relied on factors that should not have influenced the arbitrator.

   The Delhi High Court upheld the objection, reasoning that:

   The Arbitrator's findings lacked a credible basis as no evidence was provided to substantiate the availability of alternate contracts or loss of profitability. Reliance on Hudson's formula in isolation was insufficient; its application requires concrete evidence of realistic loss of profit and an unambiguous causal link between the delay and financial damages.

Second Award and judgement challenging the award:

In the second award dated July 15, 2002, the arbitrator reaffirmed the decision of the first award, adding that the respondent's failure to deliver the complete site and drawings on time caused the delays. The arbitrator applied the legal doctrine that the party at fault for breaching the contract must compensate for the foreseeable losses. Given the appellant's reputation as a major contractor, the arbitrator deduced that the appellant could reasonably have made expected profits on other projects.

The respondent again filed a petition under Section 34 of the Act to set aside the Second Award. The High Court upheld the petition and presented similar reasoning as given in the earlier judgment and charged 50 thousand in favour of respondents and against the petitioner, payable within four weeks from the date of the final order and interest of 9% per annum in case of non-compliance.

1. Grounds for Objection:

   - Lack of Evidence: The respondent argued that the appellant failed to provide credible and sufficient evidence to substantiate the claim for loss of profit. The calculations using Hudson’s formula were

unsupported by any tangible proof, such as financial records, missed contract opportunities, or profit margins of similar projects during the period in question.

- Public Policy Violation: The award was claimed to contravene the fundamental policy of Indian law by ignoring the principles laid down in the earlier remand order and relying on speculative reasoning rather than evidence-based findings.

2. Reasoning Behind Upholding the Objection:

- The High Court found that the arbitrator had once again relied on assumptions and hypothetical figures, failing to adhere to the directives in the remand order. While the First Award was set aside for lack of evidence, the Second Award reiterated the same conclusions with no substantial improvements in evidentiary support.
- The court highlighted inconsistencies, noting that the arbitrator dismissed Claims 10 and 11 for lack of evidence yet awarded damages under Claim 12 on equally unsupported grounds.
- It reiterated that the use of Hudson's formula required sufficient evidence to demonstrate the opportunity cost or profits lost, which the appellant failed to provide.

As a result, the Second Award was quashed on the grounds of insufficient evidence and conflict public policy. The court further noted that the prolonged litigation.

Unibros appeal before the Division Bench of Delhi High Court under Section 37 of the Act:

The division bench upheld the single judge's judgment and dismissed the appeal. The court reasoned that no evidence was produced by the appellant to prove loss of profit and the arbitrator's finding was contrary to Contract law which governs the issue of loss of profit. The impugned order dated 25th February 2010 by the Single Judge had set aside the Second Award on the grounds of insufficient evidence to support the claimed loss of profits and

conflict with the public policy of India under Section 34(2)(b)(ii) of the Arbitration and Conciliation Act, 1996. Costs of Rs. 50,000 awarded by the Single Judge were also upheld.

Issues:

Whether the appeal is maintainable or not, by the questioning of the following aspects:

a. Whether the Second Award conflicts with the public policy of India under Section 34(2)(b)(ii) of the Act?

b. What is the quality and nature of the evidence required to prove loss of profits? What is the scope of application of Hudson's formula?

Arguments in Brief: For Appellant:

Referring to two cases, *Associated Builders vs. Delhi Development Authority*[2] and *Bharat Cooking Coal Limited vs. L.K. Ahuja*[3], the counsel argued that the arbitrator is the main judge of evidence quality and quantity, with limited interference from the High Court, only if the arbitrator exceeds the terms of the agreement or absence of apparent evidence in the award or presence of perversity.

Citing *M/s AT Brij Paul Singh & Ors.* vs. *State of Gujarat*[4], it was claimed that a general assessment suffices to determine damages due to loss of expected profits.

Drawing on *McDermott International Inc. vs Burn Standard Co. Ltd.*[5], Hudson's formula is widely accepted in legal circles and works based on contract figures rather than actual ongoing work figures.

For Respondent:

The counsel claimed that no evidence was led by the appellant, far less, any credible or cogent evidence, to prove that it was capable of earning such price elsewhere by way of any other contract that was available to it at that time, which it could not execute due to prolongation of the contract; such an award,

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[2] Associated Builders vs. Delhi Development Authority (2015) 3 SCC 49
[3] Bharat Cooking Coal Limited vs. L.K. Ahuja (2004) 5 SCC 109
[4] M/s AT Brij Paul Singh & Ors. vs. State of Gujarat (1984) 4 SCC 59
[5] McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181.

being perverse, conflicts with the public policy of India under Section 34(2)(b)(ii) of the Act.

This was substantiated by providing three conditions precedent for applying Hudson's formula: The profit awarded to the contractor must have been realistically attainable elsewhere, and the contractor should not consistently underestimate costs. Additionally, there should be no subsequent changes in the market affecting profitability at the time of contract conclusion. But there was no credible evidence for fulfilment of the above conditions precedent which is a *sine qua non*.

Court's Reasoning:

The Court dismissed the second award as it went against public policy. Public policy refers to public interest and good, which varies with time. But awards patently violating Indian statutes, or established court decisions are against Public Policy and cannot be upheld. The established principle of *ex proprio vigore (principles/laws which are inherently binding without external enforcement)* equally applies to an arbitrator, Court decisions are binding. Arbitration awards that ignore these decisions go against public policy and can't be upheld. The court cited *ONGC Ltd. vs. Saw Pipes Ltd and Associated Builders*[6] for the same.

The court reasoned that the arbitrator in the present case went on to ignore the judicial decision of the High Court with impunity. The factors that weighed in the Arbitrator's mind in both the first award and the second award are the same.

On the second issue, the Court reiterated that to prove a claim for loss of profit due to a delayed contract, the claimant must substantiate the presence of a viable opportunity through compelling evidence. This evidence should show that if the contract had been executed promptly, the contractor could have made additional profits using their existing resources elsewhere. The nature and quality of such evidence will be contingent on the facts of the case. However, it may generally include independent contemporaneous evidence such as other potential projects that the contractor had in the pipeline, the total number of tendering opportunities that the contractor received and declined,

[6] ONGC Ltd. vs. Saw Pipes Ltd and Associated Builders AIR 2003 (SC) 1035, (2003)

financial statements, or any clauses in the contract related to delays, etc. Hudson's formula cannot be applied in a vacuum, they are useful in assessing losses, but only if the contractor has shown evidence of the loss of profits.

Hence for the reasons above, the Court believes the arbitral award in question is patently illegal because it lacks any evidence and also goes against the "public policy of India".

Judgement:

The appeals stood dismissed. However, the cost awarded by the learned Single Judge of 50 thousand is waived.

Author's Critique:

The consistent reasoning provided by all courts involved in this case was grounded in a thorough legal analysis of the relevant law and facts. After a thorough analysis of the said case, a few policy questions are certainly prompted, Is the Arbitration Act of 1940, which explicitly allowed for modifications in the award as directed by the court more efficient than the present Act of 1996, modelled on the UNCITRAL Model Law on International Commercial Arbitration 1985, does not grant the court the power to modify awards under Section 34. In our legislative intent of minimizing judicial intervention in arbitral awards, are we ironically creating more work burden to the judiciary and more procedural delays to the public at large? It is recommended to include a provision in the 1996 Act that outlines specific consequences for arbitrators who fail to comply with court orders.

Charan Singh @Charanjit Singh and Ors. vs The State of Uttarakhand[1]

Vijeta Kulkarni and Kartikey Dwivedi
II B.A., LL.B.

Introduction:

In India, there are innumerable cases relating to dowry death. If a woman dies within 7 years of commencement of her marriage, it can be presumed in law by the Courts that the death happened due to dowry issues. Charan Singh, also known as Charanjit Singh, had filed a petition challenging the verdict and sentence against him under sections 304B, 498A, and 201 of the Indian Penal Code, 1860. This said challenge was in reference to the Criminal Appeal no.447 of 2012. The appellant (husband of the deceased), had challenged the trial court's decision which sentenced him to ten years of rigorous labor under section 304B, two years under section 498A, and 2 years under section 201 of the IPC, 1860.

The case revolves around the marriage between Charan Singh and Chhilo Kaur in 1993. Claims were made that the appellant and his family members harassed the deceased and asked her for dowry[2].

The appellant and two other accused were found guilty by the trial court. The appellant's conviction was upheld by the High Court under section 304B of IPC, but his sentence was reduced from ten years to seven years. However, the mother-in-law and brother-in-law's conviction and punishment were set aside by the Supreme Court after the appeal.

Under sections 304B and 498A of the IPC the defense claimed that the evidence presented during the trial did not prove the guilt of the accused. They argued that there was not enough proof to show that the deceased was subjected to cruelty or harassment in relation to dowry demands soon before the death.

[1] Criminal Appeal No. 447 of 2012
[2] Charan Singh v. State of Uttarakhand, 2023 SCC OnLine SC 454.

Essentials of Dowry death

1. Soon before the death the deceased was subjected to cruelty and harassment in connection with the demand of dowry,[3]
2. The death of the deceased woman was caused by any burn/bodily injury/some other circumstance which was not normal,
3. Such death occurs within seven years from the date of her marriage,
4. The victim was subjected to cruelty or harassment by her husband or any relative of her husband,
5. Such cruelty or harassment should be for/in connection with demand of dowry[4],
6. It should be established that such cruelty and harassment was made soon before her death.[5]

Section 498A: Husband or relative of husband of a woman subjecting her to cruelty.

Whoever, being the husband/the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.[6]

Facts of the Case:

In the present case, the appellant, who was husband of the deceased, had filed this appeal in the Apex court, challenging his conviction under sections 304 B, 498A and 201 of Indian Penal Code. The Trial Court convicted the appellant and sentenced him along with the mother-in-law and brother-in-law of the deceased. They were sentenced to rigorous imprisonment for 10 years for offense under Section 304B, and to 2 years imprisonment each under Sections 498A and 201. Whereas, High Court of Uttarakhand acquitted the other two accused and reduced the sentence of the appellant from 10 years to 7 years under Section 304B of the IPC, 1860.

[3] K. Prema S. Rao v. Yadla Srinivasa Rao, (2003) 1 SCC 217: 2003 SCC (Cri) 27.
[4] Baijnath v. State of M.P.
[5] Kashmir Kaur v. State of Punjab, AIR 2013 SC 1039. (In) Section 304b The Indian Penal Code.
[6] The Indian Penal Code— Updated On 07-12-2021.
[Chapter XXA of Cruelty by Husband or Relatives of Husband].

The facts of the current case are that, the appellant and deceased Chhilo Kaur got married in the year 1993. The father of the deceased Pratap Singh filed a complaint on June 24,1995 at 6:15 p.m. in the Police Station of Jaspur. He stated that in the marriage of his daughter he had given sufficient dowry as per his status. But, within two months of marriage, his daughter came to her parental house and told her father (Pratap Singh) that her in-laws are asking her to bring a motorcycle as it was not given in dowry. Not being able to meet the demand of the accused and his family, the complainant used to send his daughter back. After one year of marriage the demands further grew and the accused now pestered the deceased demanding a land. Failing to be in the position to fulfill the regular demands, the complainant used to send his daughter back to her marital home after pacifying her. On June 23, 1995, Jagir Singh, a villager from the village of Chhilo Kaur's matrimonial house (Bhogpur Dam) informed the complainant that his daughter had been murdered by her in-laws.

On June 24, 1995, the complainant visited Bhogpur Dam along with his wife and was shocked after knowing that his daughter had been beaten and strangled to death on 22.6.1995 by her husband Charan Singh, brother-in-law Gurmeet Singh and mother-in-law Santo Kaur. The accused and his family members after killing the complainant's daughter also cremated her dead body, without even informing the complainant. Allegedly her death was caused by the accused and his family members due to non-fulfillment of the demand of land and motorbike in dowry.

The matter was further investigated and a charge sheet was filed against the appellant. After the examination of 7 witnesses, 6 by prosecution and 1 by defense, the Trial Court ruled its decision in favor of the complainant.

Issues Involved:

1. Whether the appellant's conviction and sentence under 304 B, 498A is legally sustained?
2. Whether the evidence submitted by the appellant establishes brutality and harassment towards the deceased for the demand of dowry soon before the death?

Arguments Before the Hon'ble Supreme Court:

Petitioner's Arguments:

The Counsel representing the Appellant argued that the verdict and sentence cannot be legally upheld under section 304B or 498A of the IPC because none of the witnesses mentioned any harassment, brutality, or demand for dowry soon before the incident of death. Furthermore, the parents of the deceased, maternal grandmother, and two maternal uncles stated that she was not subjected to any brutality. The maternal grandmother and two maternal uncles lived near the village of the deceased and were also present during the cremation, but they did not report any complaint to the police. Additionally, the Counsel mentioned that intimation was also given to her father, who lived 290 km away from Bhogpur Dam.

It was further argued that Jagir Singh, who was mentioned by the appellant in the First Information Report (FIR), was not presented as a witness during the hearing. Jagir Singh was a resident of the deceased's village and had informed her father about the incident.

Respondent's Arguments:

The counsel representing the Respondent argued that this case involved the murder of a young woman by her in-laws for reasons of unfulfillment of dowry demands. The death of the woman was unnatural, and the marriage was only two years old. The woman's father was not even informed about her cremation. The cremation was witnessed by her maternal grandmother and two uncles. They noticed certain injury marks on the deceased's body along with the broken tooth.

The maternal grandmother and uncles did not report the incident to the police because they were being threatened. The death of Chhilo Kaur occurred in her matrimonial home, hence the burden of proof lies heavily on the appellant to disprove the presumption. There is sufficient material evidence, including witness statements, showing that the accused and his family had been repeatedly demanding dowry, which increased after some time with the demand of land along with that of the motorcycle. The High Court's judgment was faultless, and it already showed leniency by reducing

the appellant's sentence from 10 years to 7 years under section 304B of the IPC.[7] And hence, no further reduction of sentence is necessary.

Judgment of the Court:

The appellant challenged the judgment and punishment accordant with Sections 304B, 498A, and Section 201 of the Indian Penal Code, 1860. The defense argued that there was deficient evidence to assume that dowry was involved because the deceased was not subjected to any mistreatment or harassment right before her death. Additionally, the defense pointed out that the prosecution failed to bring forward a key witness (Jagir Singh) who could have provided vital evidence.

The prosecution claimed that there was sufficient evidence in the case file to support the accused's repeated demands for dowry and violent actions. After listening to both sides, the Supreme Court examined the available data. The Court concluded that there was insufficient evidence to support a conviction under Section 304B or 498A of the IPC. The Court observed that none of the witnesses mentioned that Chhilo Kaur had experienced abuse or harassment, or that she had been asked for dowry before her death. The Court further stated that her (deceased's) uncles and maternal grandmother, who were present during the cremation, did not object or file a complaint.

The Court ruled that the prosecution has failed to meet the required essentials to prove the charges of dowry death. As a result, the appellant's conviction and punishment was reversed under sections 304B and 498A of the IPC. The appellant was acquitted of all charges after the High Court's decision was overruled.

Critical Analysis:

The judgment of this case is widely admired by many legal professionals claiming it strengthens the legal safeguards against the fake dowry death cases in India. It lays down certain strict mandates as for the stern legal tests and to clearly demonstrate the strong nexus between the demand for the dowry and the death of the victim. It demands for a clear relation between section 304B and 498 of IPC to prove the reason behind the death as the harassment for the dowry.

[7] Charan Singh v. State of Uttarakhand, 2023 SCC OnLine SC 454.

Though it leads to a great impact on our legal system, it brought about a great threat to the legal protection of those dowry death victims who genuinely suffered. The judgment only emphasizes legal aspects, without looking into the underlying social and economic factors. It closed an important door of legal protection to the victims of dowry death who lost their lives in the name of dowry.

The judgment leads to the emergence of several potential concerns. It set up stricter evidentiary standards which make it harder to prove the guilt of the accused in genuine dowry cases, especially when the evidence is circumstantial. It is considered in the case that there was no dowry harassment but we must take a point into consideration that the dowry harassment is not only a physical kind of harassment but it can take many forms such as, verbal abuse, threat, mental torture and even social isolation (not letting her visit her parent's home). The conviction has been reversed due to the insufficient evidence presented by the prosecution but we should also consider that, it is extremely difficult to gather the evidence against those who live with her in the same house and spend most of the time together.

In this case, the burden of proof was completely upon the prosecution. The dowry harassment can be so abstruse and incapable to prove with undeniable evidence. The judgment here underlines the requirement for the evidence of cruelty "soon before" the death, which may be tremendously difficult to establish in cases where there had been prolonged harassment and cruelty.

Impact on Law:

Before the ruling of this judgment, the victims/deceased used to get justice for their sufferings. As, the prosecution was needed to prove that there was cruelty or harassment for dowry demands, which further led to the death of the wife. But, after this judgment of the Hon'ble Supreme Court, there is a need for stronger evidence of cruelty and harassment that is linked to dowry death. It is enormously difficult for the prosecution side to prove their side with stronger evidence. This will weaken the why and wherefores of Section 304B of IPC.

Lillu @Rajesh & Anr. vs State of Haryana[1]

Modini Swarnkar
I B.A., LL.B.

Facts

In the year 2002, two minor girls, Lillu (15) and Anju (13), were allegedly gang-raped by five men in Haryana. The medical examinations conducted on the girls included the "two-finger test," a discredited and unscientific procedure to assess a woman's sexual history. This invasive procedure, supposedly aimed at assessing past sexual history, involves inserting two fingers into the victim's vagina to check for laxity of the hymen. It is based on the false notion that an intact hymen signifies virginity, and a stretched hymen indicates prior sexual activity. Based on the test results by the two-finger test and other evidences, the trial court acquitted the accused, citing lack of conclusive proof. The High Court not only upheld the acquittal but also relied on the two-finger test results to give its verdict. The victims' families appealed to the Supreme Court and challenged the use of the two-finger test. Human Rights Organization were the intervenors in the case. Later, the appellant was convicted of rape by a lower court and the High Court of Punjab and Haryana.

Issues Raised

1. Whether the "two-finger test," holds any legal or scientific validity in rape cases?
2. Does the two-finger test violate the victim's fundamental right to privacy and dignity guaranteed by Article 21 of the Indian Constitution?
3. What should be the appropriate standard of proof in rape cases, considering challenges in collecting evidence?

[1] Lillu v. State of Haryana, (2013) 14 SCC 643

4. Is the use of the two-finger test compatible with India's obligations under international human rights treaties like the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)?
5. How does the use of the two-finger test impact the accused's right to a fair trial and the presumption of innocence before proven guilty?

Arguments

Arguments for Appellants (Lillu and Anju):

1. The "two-finger test" constituted a blatant violation of their fundamental right to life and personal liberty enshrined under Article 21 of the Indian Constitution. The invasive procedure inflicted physical and mental suffering, causing severe humiliation and compromising bodily integrity and privacy.
2. The "two-finger test" is devoid of any scientific merit and incapable of determining past sexual history. Reliance on such an unreliable test prejudiced the investigation and led to a miscarriage of justice, denying right to a fair trial.
3. The test's results created an unfair presumption of consent based on irrelevant factors, disregarding the lack of concrete evidence. This discriminatory practice shifted the burden of proof onto the victims, impeding their access to justice and perpetuating harmful stereotypes.
4. By employing the "two-finger test," India was in violation of its obligations under treaties like CEDAW, which guarantee women's right to dignity and freedom from discriminatory practices.

Arguments for State:

1. While acknowledging the limitations of the "two-finger test," State defended its use as a customary practice employed in rape investigations across the country. They argued that its results with other evidence, contributed to the overall assessment of case.

2. The State contended that lack of conclusive evidence, including eyewitness accounts relying on the "two-finger test" crucial for determining the alleged victims' sexual history and potential consent.
3. They emphasized the importance of upholding the accused's right to a fair trial and presumption of innocence until proven guilty. They argued that if "two-finger test" is excluded the results might bias the investigation and infringe the accused's right to a comprehensive defence.

Arguments on behalf of Human Rights Organizations (Intervenors):

1. The intervenors argued that the "two-finger test" was both unconstitutional and discriminatory, violating core human rights principles enshrined in the Constitution and international treaties. They highlighted lack of scientific validity, dehumanizing nature and perpetuation of gender stereotypes.
2. The intervenors emphasized the severe trauma and re-victimization inflicted upon survivors by undergoing the "two-finger test." They stressed its detrimental impact on physical and mental wellbeing, hindering their ability to seek justice and heal.
3. The intervenors contended that relying on the "two-finger test" compromised fair investigations by diverting focus from crucial evidence and creating a presumption of consent based on irrelevant factors. This hindered the prosecution of perpetrators and discouraged victims from reporting sexual violence.

Rationale

The Supreme Court delivered a landmark and ground breaking judgment, setting a significant precedent for future cases of sexual violence. The Court, in a 3:2 majority decision, declared the two-finger test "illegal, unconstitutional, and invasive."[2] This marked a crucial victory for women's rights.

[2] Lillu v. State of Haryana, (2013) 14 SCC 643

1. The Court rejected the "two-finger test" as having no scientific basis. They condemned its use as incapable of determining any past sexual history, emphasizing discriminatory nature and reliance on irrelevant stereotypes.
2. The Court ruled that "two-finger test" constituted grave violation of the victim's fundamental right to privacy and dignity enshrined under Article 21 of the Constitution. They recognized the test deeply intrusive and humiliating nature, inflicting physical and mental suffering that re-traumatized survivors and hindered their healing process.
3. The Court highlighted how relying on the "two-finger test" created false presumptions of consent, hindering fair investigations and prosecution of rape cases. They emphasized the inherent bias created by such unreliable evidence, shifting the burden of proof onto victims. This was supported by *Sate of U.P. V. Pappu @ Yunus and Anr*[3]. In which it was held that a victim's testimony is the best evidence and does not require any corroborative evidence.

While acknowledging the accused's right to fair trial, the Court concluded that upholding the dignity and fundamental rights of victims held paramount importance. The ratio of this case lays down a significant precedent marking a crucial step towards ensuring justice and upholding human rights principles in sexual violence cases.

Defects of Law

The case exposed several lacunae and inconsistencies within the legal framework concerning sexual violence:

1. Despite widespread condemnation, including other jurisprudences for citing The South African Commission for Gender Equality, in 2015, demanded the end of this practice on virginity testing because the activity contradicts the principle of dignity and equality protected in the constitution. Even Indonesia who before had virginity testing for policewomen and female students pushed an end to their prejudiced practice in the wake of international cry especially "Eliminating Virginity

[3] State of Uttar Pradesh v. Pappu @Yunus & Anr., (2005) AIR 1248

Testing: An Interagency Statement" by WHO[4]. These international actions reflect a deeper recognition that virginity testing, with the two-finger test, is a violation of women's rights. India must adhere to the global norm to uphold its commitment to human rights. the "two-finger test" lacked an explicit statutory ban. This grey area allowed its continued use in practice, rendering the Court's intervention necessary to declare its illegality.

2. The case highlighted the misappropriation and misinterpretation of medical evidence, particularly the "two-finger test," in rape investigations.[5] Guidelines and proper training for medical professionals regarding such examinations were deemed crucial to prevent prejudice and uphold evidence's integrity.

3. It was held in the *State of U.P. vs Munshi* that even if victim had any history of sexual intercourse, it is not license to rape. The most important question of consent still remains. It is accused who has to prove the innocence not the victim[6]. There is still absence of comprehensive victim-centric guidelines within the legal system left survivors vulnerable to re-traumatization and insensitive treatment. The Court emphasized the need for protocols regarding evidence collection, witness testimonies, and victim support to prioritize their dignity and well-being throughout the legal process.

4. Reliance on the "two-finger test" resulted in an impermissible shift in the burden of proof. The presumption of consent based on an unreliable and discriminatory test hampered fair investigations and prosecution, placing an undue burden on the victim instead of focusing on the accused's culpability. The practice has not only weakened the uprightness of the investigation but also gave rise to harmful biases against the victims. This in turn force woman to justify her bodily integrity in the court of law instead of focusing on accused's actions and reinforcing stereotypes about

[4] Eliminating virginity testing: an interagency statement. Geneva: World Health Organization; 2018. Licence: CC BY NC-SA 3.0 IGO
[5] Lillu v. State of Haryana, (2013) 14 SCC 643
[6] State of U.P. v. Munshi, (2008) 9 SCC 390

female sexuality. Further, the limited scope of existing rape legislation, particularly regarding definitions of consent and corroborative evidence requirements, was highlighted as a potential hinderance to securing justice for victims.

5. The case exposed the inadequate sensitization of law enforcement and judicial officers towards gender-based violence. The Court stressed the need for comprehensive training to enhance their understanding of victim psychology, trauma, and sensitive investigation techniques.
6. The Court acknowledged the reliance on an unscientific and unconstitutional test infringes upon the victim's right to privacy, dignity, and bodily autonomy under Article 21 of the Indian Constitution and therefore the need for continual revaluation and reform of laws to address evolving societal realities and ensure effective prosecution of perpetrators.

Author's Critique

The case marked a watershed moment by declaring the "two-finger test" illegal and unconstitutional, setting a strong precedent against discriminatory and unscientific practices in rape investigations. The Court's decision recognizes that the test not only lacks scientific basis but also violates fundamental rights of the victim as enshrined in the Constitution. It established the primacy of victims' right to dignity and privacy, emphasizing respect for their bodily integrity and protection from harmful procedures.

The bias of the test focusing on personal history of victim places an unfair burden on them, shifting the proof of innocence onto the survivors. The reliance on the test further compromises the quality of investigation as instead of directing resources toward objective forensic evidence and witness statements. One of the case's strongest points being its firm stance on treating survivor's testimony as the primary evidence. The case underscored the need for a paradigm shift towards a victim-centric approach in the legal system, promoting sensitive investigations, support mechanisms, and fair judicial processes.

5. The ruling aligns with the evolving standards by human rights and international conventions that India is obliged to uphold, like the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. The case reaffirmed India's commitment to upholding international human rights obligations concerning dignity, equality, and freedom from gender-based violence.

5. The landmark judgment triggered crucial legal reforms aimed at sensitizing authorities, strengthening evidence collection protocols, and revamping outdated rape legislation. However, the case exposes persistent gaps in the legal system in the handling of rape cases. Despite prior criticisms there is still need for strict procedural enforcement and awareness within legal and medical arenas. The case highlights cultural prejudices which focus on survivor's "virginity" rather than focusing on the act by the accused are also rooted in India's legal system. The ruling calls for increased collaboration between policymakers, legal personnel and healthcare professionals to create a more victim-centric society.

The judgement serves as a landmark decision that strengthens the legal protection for victims. Although, sustained change will require continuous legal reforms, efficient training and enforcement to prevent such outdated practices from obstructing justice.

Shri Rakesh Raman vs Smt. Kavita

Shivani Sawarkar
I LL.B.

Introduction:

Irretrievable breakdown of marriage as a ground for divorce under Indian matrimonial laws has been a topic of discussion for years. Till date, irretrievable breakdown of marriage is not considered as a distinct ground for divorce in India. Section 13 of the Hindu Marriage Act, 1955 enumerates various grounds upon which a petition for divorce may be presented, such as adultery, cruelty, desertion, etc.; however, it does not include irretrievable breakdown of marriage as a valid ground for divorce under the Act.[1] In April 2023, the Supreme Court of India held in the case of *Rakesh Raman v. Kavita*[2] that irretrievable breakdown of marriage can be read as falling within the scope of cruelty under the Hindu Marriage Act, 1955.

Facts of the Case:

- In April 1994, the appellant (i.e., the husband) and the respondent (i.e., the wife) were married as per Hindu customs and rituals. Shortly after their marriage, problems arose between the couple, and there were multiple instances of the wife leaving her matrimonial home, followed by the couple reconciling and coming to an agreement to live together again. Eventually problems between the couple grew to the extent that the couple stopped cohabiting together.
- The two lived together as a married couple for 4 years, but have been living separately for the last 25 years. There is no child born to them from this wedlock.
- During the last 25 years, the two were engaged in multiple legal suits against each other, with both the parties making grave allegations of cruelty and desertion.

[1] Hindu Marriage Act, 1955 § 13 (India).
[2] 2023 SCC OnLine 497

- On application by the appellant, the marriage between the couple was dissolved by a decree of the Trial Court. Resultantly, the decree of the Trial Court was appealed by the respondent in the Delhi High Court, who set aside the decree. This led to the appellant approaching the Supreme Court through a Special Leave Petition.
- Various attempts of mediation and reconciliation, as recommended by the Supreme Court, between the appellant and respondent were unsuccessful. The matter was sent to the Lok Adalat for settlement, which too was unfruitful. Even upon the Court's asking, the parties were unable to come to a mutual settlement. Thus, the Supreme Court, after the failed attempts at reconciliation, mediation and settlement, took up the matter for adjudication.

Judgement:

The matter was heard by a division bench comprising of Justice Sudhanshu Dhulia and Justice J.B. Pardiwala, with Justice Dhulia authoring the judgement.

The Court took the following points into consideration: firstly, that the couple has been living separately for the last 25 years; secondly, there is no child born to them from this union; thirdly, the two have been embroiled in multiple legal suits against each other; and lastly, attempts at mediation and reconciliation have not been fruitful.

Noting the above-mentioned points, the Court observed that the relation between the two had embittered to the point of there being no reconciliation between them, that their marriage had irretrievably broken down and that to allow such a marriage to continue would mean allowing the inflicting of cruelty by one party on the other.

Accordingly, the Court held that a marriage characterised by a long period of separation, lack of cohabitation, multiple litigations between the couple and no possibility of reconciliation, is a marriage that has irretrievably broken down and involves the two parties meting out cruelty to each, and so, such a

marriage can be dissolved on the ground of cruelty under Section 13(1)(i-a) of the Hindu Marriage Act, 1955[3].

The Court allowed this marriage to be dissolved, and directed the appellant to pay the respondent a permanent alimony of Rs. 30,00,000.

Analysis:

A marriage is said to have irretrievably broken down when the marital bond between the couple has broken down to the extent that there is no scope for fixing it. As per the Breakdown Theory of Divorce, if the Court is satisfied that a marriage has broken down to such a degree that it is no longer salvageable, and that such a marriage now exists only in name, then such a marriage can be dissolved without establishing "fault" of either party.[4] It may be argued that if a broken marriage is beyond repair, then why can't a couple mutually agree to dissolve the marriage. There are cases where a spouse may withhold their consent to divorce as a bargaining chip or as a means to harass and extort, and it falls upon the Court to step in and resolve the matter.

The Hindu Marriage Act, 1955 provides for various fault-based grounds for divorce such as adultery, cruelty, desertion etc, enumerated under section 13 of the Act[5]. The Act also provides for divorce by mutual consent under section 13-B[6]. However, the Act does not recognise irretrievable breakdown of marriage as a ground in itself for divorce, although it is indirectly reflected in provisions which allow for a divorce if there is no cohabitation between a couple for a year after a decree for judicial separation[7] or restitution of conjugal rights[8] has been obtained from the court.

In 1978, the Law Commission of India, in its 71st Report, recommended the addition of irretrievable breakdown of marriage to the Hindu Marriage Act, 1955 as a ground for divorce. The report stated that while it is the duty of the court to try and get a couple to reconcile, if the court finds that a marriage

[3] Hindu Marriage Act, 1955 § 13(1)(i-a) (India).
[4] Vol 2, Flavia agnes, Family Law: Marriage, Divorce and Matrimonial Litigation 59-62 (1st ed. 2011).
[5] Hindu Marriage Act, 1955 § 13 (India).
[6] Hindu Marriage Act, 1955 § 13-B (India).
[7] Hindu Marriage Act, 1955 § 13(1-A)(i) (India).
[8] Hindu Marriage Act, 1955 § 13(1-A)(ii) (India).

has broken down to the point of no saving, then a divorce must be granted otherwise such a marriage would be a source of misery for both the parties.[9] A Bill based on the recommendations of this report was introduced in the Parliament, but was later withdrawn due to severe backlash from various women's organizations. It was argued that such a provision could be misused by unscrupulous husbands who could desert their wives on the ground that their marriage had irretrievably broken down, which would resultantly render women at a disadvantage socially and economically. In 2009, the 217th Report of the Law Commission of India made another recommendation to include irretrievable breakdown of marriage as a ground for divorce[10], and accordingly, the following year saw a Bill being introduced in the Rajya Sabha which sought to add irretrievable breakdown of marriage as a ground for divorce in the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954. However, this too was faced with resistance, and till date, irretrievable breakdown of marriage has not found its distinct place officially in the codified matrimonial laws.

One must note that even though irretrievable breakdown of marriage is not contained within the legal provisions, that hasn't stopped the Indian courts from recognising its existence and the impact it can have on a marital bond between a husband and wife, as can be witnessed from various judgements and observations over the years.

It was emphasised by the Supreme Court in *Vishnu Dutt Sharma v. Manju Sharma*[11] that the Court cannot grant a divorce due to irretrievable breakdown of marriage because it does not fall within the grounds stated in the Hindu Marriage Act, 1955, and that doing so would mean amending the Act through judicial verdict; only the Legislature is empowered to amend the Act accordingly to include irretrievable breakdown of marriage as a ground for divorce. However, the Supreme Court has, from time-to-time, exercised its powers under Article 142 of the Indian Constitution to dissolve marriages that

[9] Law Commission of India, Report No. 71, the Hindu Marriage Act, 1955 - Irretrievable Breakdown of Marriage as a ground of Divorce 16 (1978).
[10] Law Commission of India, Report No. 271, Irretrievable Breakdown of Marriage – Another Ground for Divorce 23-24 (2009)
[11] 2009 (6) scc 379.

have irretrievably broken down in order to do "complete justice". It must be noted that the power granted to the Supreme Court under this Article is a discretionary one, and used only when the Court is satisfied that it is in the best interests of the parties if their marriage is dissolved.

In *V. Bhagat v. D. Bhagat*[12], the Supreme Court observed that a marriage had turned acrimonious to the extent that it was fit to be dissolved due to irretrievably breaking down, however, the Court also clarified that since irretrievable breakdown of marriage was not a ground for divorce as per the law, the ruling in this matter ought not to be considered as a precedent to be frequently applied.

In the landmark case *Naveen Kohli v. Neelu Kohli*[13], the Supreme Court held that a marriage marked by a long period of continuous separation and multiple allegations and counter-allegations by the couple towards each other is a marriage that exists only in name, and it is in the best interest of everyone that such a marriage be dissolved. The Court urged the Government to consider amending the Hindu Marriage Act, 1955 to include irretrievable breakdown of marriage as a ground for divorce.

When it comes to deciding matrimonial disputes, irretrievable breakdown of marriage is decided on a case-by-case basis, depending on the facts before the Court. The Court has also applied the principle of irretrievable breakdown of marriage in conjunction with available legal provisions, although over the years, it has been observed that such application has become more and more liberal. [14] A similar approach is seen in the current matter. The Court recognised that not dissolving a marriage that has grown bitter and acrimonious over the years would be an injustice and akin to cruelty, since both parties would be embittered and treating each other with cruelty.

Because cruelty is not defined in the Hindu Marriage Act, the possibilities that come within its ambit are large, as is the scope for its liberal application. To not dissolve a marriage marked by a long period of continuous separation and no hope of reconciliation is to subject the parties to cruelty, and would be

[12](1994) 1 SCC 337.
[13] (2006) 4 SCC 558.
[14] MULLA, HINDU LAW 901-904 (25th Ed. 2024).

in line with illustrations of mental cruelty provided by the Supreme Court in *Samar Ghosh v. Jaya Ghosh*[15].

Author's Critique:

This author is in agreement with the opinion held by the Court with respect to dissolution of the marriage. To keep a couple bound by a legal tie that functions only in name but not in spirit serves no purpose and is detrimental to both the parties in the long run. It would be in the interest of both the parties if they are released from such a legal bond.

Given that this judgement further expands the interpretational scope of cruelty as a ground for divorce, one must consider its impact. Cruelty essentially entails acts of one party towards another, or both parties acting in a manner that leads to frustration and mental anguish and affects the harmony of the marital bond. Previous judgements have had irretrievable breakdown of marriage read in tandem with acts of cruelty; this judgement, on the other hand, reads the continuation of an irretrievably broken marriage as sanctioning of an act of cruelty. However, the Court supports its reasoning for doing so with the facts of the case. While there is a possibility that matrimonial dispute cases might try and misuse the precedent set by the current matter, merits of the cases on an individual basis shall help the Court in determining whether not dissolving a marriage that is no longer salvageable shall amount to inflicting cruelty on the couple. Subsequent cases such as *Shilpa Sailesh v. Varun Sreenivasan* [16]and *Nirmal Singh Panesar v. Paramjit Kaur Panesar* [17] emphasised that irretrievable breakdown of marriage cannot be used as a straight jacket formula to dissolve a marriage, and that various factors such as period of separation, attempts at reconciliation, nature of allegations and litigations, the impact of divorce on parties etc. must be carefully considered in determining whether the dissolution of marriage will truly be an equitable solution for all parties concerned.

[15] (2007) 4 SCC 511
[16] 2023 SCC On-line 544
[17] 2023 SCC On-line SC 1297

Conclusion:

An irretrievably broken-down marriage is intrinsically linked with cruelty. A marriage that has irretrievably broken down can be a source of much anguish and pain, and perhaps it is in the best interest of the parties involved if they are released from such a bond. The Supreme Court has time and again recognised the significance and impact of an irreparably broken-down marriage while deciding matrimonial disputes and accordingly granted divorce where it is satisfied of the circumstances. While there is a need for the Indian Legislature to amend existing laws to incorporate irretrievable breakdown of marriage as a ground for divorce, past attempts have met with resistance. One can only hope that the Legislature will one day be able to successfully do so.

Rakesh Ranjan Shrivastava vs The State of Jharkhand & Anr.[1]

(Guidelines on Interim Compensation U/S 143-A of N.I. Act)

Shubham Mahadik
II LL.B.

Relevant Provisions:

1. Section 138[2] : Dishonour of cheque for insufficiency, etc., of funds in the account.—*Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may be extended to two years', or with fine which may extend to twice the amount of the cheque, or with both: Provided that nothing contained in this section shall apply unless—*

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice; in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

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[1] Criminal Appeal No. 741 Of 2024

[2] Negotiable Instruments Act, § 138, No. 26 of 1881, India Code

(c) *the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.*

Explanation. —For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.

2. Section 143-A[3] : Power to direct interim compensation.—(*1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, the Court trying an offence under section 138 may order the drawer of the cheque to pay interim compensation to the complainant— (a) in a summary trial or a summons case, where he pleads not guilty to the accusation made in the complaint; and (b) in any other case, upon framing of charge.*

(2) The interim compensation under sub-section (1) shall not exceed twenty per cent. of the amount of the cheque.

(3) The interim compensation shall be paid within sixty days from the date of the order under subsection (1), or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the drawer of the cheque.

(4) If the drawer of the cheque is acquitted, the Court shall direct the complainant to repay to the drawer the amount of interim compensation, with interest at the bank rate as published by the Reserve Bank of India, prevalent at the beginning of the relevant financial year, within sixty days from the date of the order, or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the complainant.

(5) The interim compensation payable under this section may be recovered as if it were a fine under section 421 of the Code of Criminal Procedure, 1973 (2 of 1974).

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[3] Negotiable Instruments Act, § 143-A, No. 26 of 1881, amended by Act 20 of 2018, India Code

(6) The amount of fine imposed under section 138 or the amount of compensation awarded under section 357 of the Code of Criminal Procedure, 1973 (2 of 1974), shall be reduced by the amount paid or recovered as interim compensation under this section.

3. Section 148[4]. Power of Appellate Court to order payment pending appeal against conviction. — *(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), in an appeal by the drawer against conviction under section 138, the Appellate Court may order the appellant to deposit such sum which shall be a minimum of twenty percent. of the fine or compensation awarded by the trial Court: Provided that the amount payable under this sub-section shall be in addition to any interim compensation paid by the appellant under section 143A.*

(2) The amount referred to in sub-section (1) shall be deposited within sixty days from the date of the order, or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the appellant.

(3) The Appellate Court may direct the release of the amount deposited by the appellant to the complainant at any time during the pendency of the appeal: Provided that if the appellant is acquitted, the Court shall direct the complainant to repay to the appellant the amount so released, with interest at the bank rate as published by the Reserve Bank of India, prevalent at the beginning of the relevant financial year, within sixty days from the date of the order, or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the complainant.

Facts:

1. The 2nd respondent (hereinafter referred as 'the Respondent') is the complainant in a complaint under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred as "N.I. Act.") The complaint was filed in the Court of the Chief Judicial Magistrate at Bokaro, Jharkhand.

[4] Negotiable Instruments Act, § 148, No. 26 of 1881, amended by Act 20 of 2018, India Code

2. The case in the complaint was that the appellant and the respondent formed various companies on different terms and conditions regarding profit sharing. On 23rd September 2011, an appointment letter was issued by the appellant in his capacity as the Managing Director of the company M/s Thermotech Synergy Pvt. Ltd. and on behalf of a proprietary concern, M/s Tech Synergy, by which the post of Executive Director was offered by the appellant to the respondent on a consolidated salary of Rs. 1,00,000/- per month.

3. On 1st June 2012, the appellant formed a partnership with one Rahul Kumar Basu, in which the respondent was shown as an indirect partner. According to the respondent's case, M/s Tech Synergy was merged with another company - M/s Megatech Synergy Pvt. Ltd.

4. It was alleged by the respondent that on August 2012, there was an agreement to pay him 50 per cent of the profit. One more partnership firm came into existence on 3rd June 2013, wherein the appellant, respondent, and Rahul Kumar were shown as partners. It is the case of the respondent that the appellant agreed to give a 50 per cent share in the profits of another company, Geotech Synergy Pvt. Ltd. It was alleged that the appellant did not pay the amounts due and payable to the respondent.

5. Therefore, a legal notice was issued to the appellant by the respondent. According to the case of the respondent, the appellant was liable to pay the total amount of Rs. 4,38,80,000/- to the respondent, and in fact, a civil suit had been filed by the respondent in the Civil Court at Bokaro for recovery of the said amount.

6. On 13th July 2018, there was a meeting between parties at Ranchi when the appellant agreed to pay a sum of Rs. 4,25,00,000/- to the respondent, and two cheques for the sum of Rs. 2,20,00,000/- and 2,05,00,000/- dated 6th August 2018 and 19th September 2018 respectively were handed over to the appellant. As the first cheque in the sum of Rs. 2,20,00,000/- was dishonoured, a complaint was filed after the service of a statutory notice alleging the commission of an offence punishable

under section 138 of the N.I. Act on which the learned Magistrate took cognizance of the offence.

7. Before the Court of the learned Magistrate, the respondent moved an application under Section 143A of the N.I. Act seeking a direction against the appellant/accused to pay 20 per cent of the cheque amount as compensation. By the order dated 7th March 2020, the learned Judicial Magistrate allowed the application and directed the appellant to pay an interim compensation of Rs. 10,00,000/- to the respondent within 60 days. The Sessions Court affirmed the order of the learned Magistrate in a revision application. The said orders were subjected to a challenge before the High Court. The learned Judge of Jharkhand High Court dismissed the petition by the impugned judgment. These orders were the subject matter of challenge in the present criminal appeal.

Issues Raised:

1. Whether section 143A of the N.I. Act is mandatory in nature?
2. Can the Trial Court pass an order imposing an interim compensation?

Contentions of Appellant:

1. The discretionary nature of the word 'may' in Section 143A of the N.I. Act suggests that the power to direct interim compensation is not obligatory but rather subject to the court's discretion.
2. The Trial Court's error lay in mechanically ordering the deposit of interim compensation without a thorough examination of the case's circumstances. The Court must apply its mind to the facts of the case before passing the drastic order of deposit.
3. It was submitted that the existence of a prima facie case is essential for exercising the power under section 143A. Only after prima facie consideration of the merits of the complainant's case and defence of the accused, the Court must conclude whether a case is made out for the grant of interim compensation.
4. Uniformly granting 20% of the cheque amount in every case, without regard to individual circumstances, is not appropriate. Instead, the court

should consider factors such as the nature of the transaction and the financial standing of the accused to determine the suitable quantum of interim compensation.

Contentions of Respondent:

1. The counsel for the respondent argues that the very purpose of section 138 of the N.I. Act necessitates the interpretation of sub-section (1) of section 143A as mandatory.
2. It was submitted that there is a presumption under section 139 of the N.I. Act[5] that unless a contrary is proved, the holder of a cheque received the cheque for the discharge, in whole or in part, of any debt or liability.
3. It was contended that the burden of rebutting this presumption arises only after evidence is presented. Hence, at the stage of considering an application under sub-section (1) of section 143A, the defence of the accused becomes irrelevant.
4. In every case, an order of payment of interim compensation must follow. It was submitted that unless it is held that sub-section (1) of section 143A is mandatory, the very object of the legislature enacting this provision will be frustrated.

Rationale:

1. Act No. 20 of 2018 amended the N.I. Act by adding sections 143A and 148[6], which became operative on September 1, 2018. The amendment attempted to alleviate the injustice that payees suffered as a result of dishonest drawers' filing of appeals and securing stays, which led to delays in the resolution of instances involving dishonoured checks. Trade and commerce were shown to be impacted by delays that undermined the trustworthiness of cheque transactions. Furthermore,

[5] 139. Presumption in favour of holder. —It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section138 for the discharge, in whole or in part, of any debt or other liability.

[6] Negotiable Instruments Act, §§ 143-A, 148, No. 26 of 1881, amended by Act 20 of 2018, India Code

Section 148 required the Appellate Court to direct the appellant to deposit a minimum of 20% of the fine or compensation issued by the Trial Court in appeals against convictions under section 138. This amount was not included in any interim compensation granted according to section 143A. It was observed that even while section 148 adds to the provisions of section 143A, no explicit goals or justifications were given for its inclusion.

2. The Supreme Court stressed the trial court's jurisdiction to award interim compensation while interpreting the discretionary character of the powers conferred by section 143A (1). It was made clear that such power does not apply in situations where the accused pleads not guilty since those cases are handled under the Criminal Procedure Code (CrPC) and carry a maximum sentence of one year imprisonment.

3. However, should there be a possibility that a sentence exceeding one year of imprisonment is warranted for valid reasons, the Criminal Procedure Code (CrPC) must be adhered to, despite section 143(1) of the N.I. Act stipulating that the Magistrate should conduct a summary trial, bypassing certain CrPC provisions. This scenario arises when a complaint under section 138 transitions into a summons case.

4. Section 143A allows for the exercise of power, including the imposition of interim compensation, even before the accused is found guilty. However, interpreting the word 'may' as 'shall' would lead to significant and potentially unjust consequences, requiring the accused to pay interim compensation in every section 138 complaint. Such an interpretation could violate the principles of fairness and justice and may be deemed arbitrary under Article 14 of the Constitution[7]. Considering the severe implications of exercising power under section 143A prior to the establishment of guilt, the word 'may' should be understood as discretionary rather than mandatory. Hence, the provision should be seen as directory, granting the court discretion in its application.

[7] Art. 14, Constitution of Indian, 1950

5. The tests applicable for the exercise of jurisdiction under sub-section (1) of section 148 can never apply to the exercise of jurisdiction under subsection (1) of Section 143A of the N.I. Act.

6. In the present case, it was observed "*the Trial Court has mechanically passed an order of deposit of Rs.10,00,000/- without considering the issue of prima facie case and other relevant factors. It is true that the sum of Rs.10,00,000/- represents less than 5 per cent of the cheque amount, but the direction has been issued to pay the amount without application of mind. Even the High Court has not applied its mind. We, therefore, propose to direct the Trial Court to consider the application for grant of interim compensation afresh. In the meanwhile, the amount of Rs. 10,00,000/- deposited by the appellant will continue to remain deposited with the Trial Court*[8]*".*

Guidelines For Exercising Discretion:

The Hon'ble Court clarified that the exercise of power under section 143A(1) is discretionary, emphasizing that the provision is directory and not mandatory. The term "may" in the section signifies discretion, not compulsion. Courts, when deciding an application under section 143A, must record brief reasons reflecting the consideration of all relevant factors. The Court further outlined broad parameters to guide the exercise of this discretion, which can be summarised as follows:

(i) The Court will have to prima facie evaluate the merits of the case made out by the complainant and the merits of the defence pleaded by the accused in the reply to the application. The financial distress of the accused can also be a consideration.

(ii) A direction to pay interim compensation can be issued, only if the complainant makes out a prima facie case.

(iii) If the defence of the accused is found to be prima facie plausible, the Court may exercise discretion in refusing to grant interim compensation.

[8] Rakesh Ranjan Shrivastava v. State of Jharkhand, (2024) 4 SCC 419, 430, 25 (India)

(iv) If the Court concludes that a case is made out to grant interim compensation, it will also have to apply its mind to the quantum of interim compensation to be granted. While doing so, the Court will have to consider several factors such as the nature of the transaction, the relationship, if any, between the accused and the complainant, etc.

(v) There could be several other relevant factors in the peculiar facts of a given case, which cannot be exhaustively stated. The parameters stated above are not exhaustive.

Defects in Interpretation:

1. Despite the 2018 amendment to the Negotiable Instruments Act, with bona fide intent, aimed at providing interim compensation to the aggrieved party, trial courts overlooked the discretionary nature of power under section 143A.
2. The Supreme Court clarified that the provision is directory, not mandatory, and the word "may" in section 143A indicates discretion, not compulsion.
3. A distinction was drawn between Sections 143A and 148, with the former applicable at the pre-conviction stage and the latter at the post-conviction and trial stage. The legislative intent behind sections 143A and 148 should be understood distinctly.
4. The lower courts failed to identify a prima facie case and issued a blanket order, contrary to the principles of natural justice.
5. Consequently, the Supreme Court corrected the lower courts' mistakes and ordered a fresh hearing of the matter.

Conclusion:

The present judgment provides valuable clarity on the interpretation and application of interim compensation under Section 143-A of the Negotiable Instruments Act. 1881. The court's reasoning affirms that the power granted to courts is discretionary, not mandatory. It emphasizes that the discretion to impose interim compensation should not be applied mechanically but must be based on a careful evaluation of both the complainant's case and the accused's

defense. Factors such as the nature of the transaction and the accused's financial standing are critical in determining the quantum of compensation. By interpreting 'may' as discretionary, the court ensures fairness and prevents unjust mandatory obligations on the accused in every Section 138 case. This judgment highlights the importance of context in each case and establishes broad guidelines to assist trial courts in making informed decisions. Ultimately, the judgment strikes a balance between facilitating timely settlements and safeguarding the rights of the accused, contributing significantly to the law surrounding Section 143-A of the N.I. Act. It underscores the importance of a nuanced, context-sensitive approach to interim compensation to uphold justice, equality, and the rule of law.

Shilpa Sailesh vs Varun Sreenivasan[*1]

Tanvi Srivastava
III B.A., LL.B.

Introduction

The *Shilpa Sailesh v Varun Sreenivasan* case is a landmark case that highlights the Supreme Court's progressive stance in handling marital disputes. This case demonstrates the Court's power to change India's family law, marriage, and divorce conversations. The Supreme Court has made a ruling in which it states that the doctrine of *fault and blame*, which applies to petitions for divorce under Section 13(1) (i-a) of the Hindu Marriage Act, does not limit the power of the Court so as to do complete justice under Article 142(1) of the Indian Constitution. Additionally, the Court can dissolve the marriage upon settlement by passing a divorce decree with mutual consent and waiving the cooling-off period. It can also quash and set aside other proceedings, including criminal proceedings.

Facts

In the case at hand, Shilpa Sailesh and Varun Sreenivasan had been embroiled in a protracted legal battle to dissolve their marriage due to a long-standing marital disagreement. The pair had been living apart for over six years, and their repeated attempts to get back together failed. It was discovered that both parties had pursued various legal options, including criminal prosecutions under Section 498-A of the Indian Penal Code and domestic abuse lawsuits. The couple had initially filed lawsuits under the Domestic Violence Act and Section 125 of the Criminal Procedure Code, each of which represented an attempt to pursue justice through a separate legal channel.

Reconciliation attempts at the lower Court were scant and did not address unaddressed marital issues, including financial disagreements, mis-communication, accusations of wrongdoing, and irreconcilable differences.

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[*] Winning entry of Raghavendra Phadnis Essay Writing, Case Comment, And Legislative Comment Competition 2023- 24

[1] Shilpa Shailesh v Varun Sreenivasan, 2023 SCC OnLine SC 544.

The parties decided to take the case to a higher court due to these ongoing problems. Due to conflicting testimony in later court proceedings, the matter reached the Supreme Court since lower courts could not reach a conclusive decision. Because of the case's complexity and nuanced legal arguments, lower courts could not reach a definitive verdict, and the Supreme Court had to step in to provide a final ruling.

Issues involved

Questions of law for consideration before this Constitution bench were:

I. What is the scope and ambit of power and jurisdiction of the Supreme Court under Article 142(1) of the Constitution of India?[2]

II. Whether the Supreme Court has the power under Article 142(1) of the Constitution of India,

   i. To grant a decree of divorce by mutual consent dispensing with the period and the procedure prescribed under Section 13-B of the Hindu Marriage Act given settlement between the parties,

   ii. And terminate legal action taken under the Protection of Women from Domestic Violence Act, 2005, Section 125 of the Criminal Procedure Code, 1973 or criminal prosecution under Section 498-A and other provisions of the Penal Code, 1860?[3]

   iii. If yes, then under what circumstances should the Supreme Court should exercise jurisdiction under Article 142(1) of the Constitution of India?[4]

III. Whether the Supreme Court can grant divorce under Article 142(1) of the Indian Constitution in case of a complete and irretrievable breakdown of marriage despite opposition from the other spouse?[5]

[2] Shilpa Shailesh v Varun Sreenivasan, 2023 SCC OnLine SC 544.
[3] Ibid.
[4] Ibid.
[5] Ibid.

Issue I

Article 142(1) empowers the Supreme Court to pass any decree or order necessary to achieve complete justice in any pending cause or matter before it.[6] The Court, while interpreting Article 142(1) of the Constitution of India, relied on the *M. Siddiq v Mahant Suresh Das case (Ram Janmabhumi Temple Case*). The Court emphasised that it is crucial to pay attention to not only the positive law but also to the silences of positive law. By doing so, the Court can find an equitable and just solution within the gaps of the law to do 'complete justice.'[7] In the case of *I.C. Golak Nath v State of Punjab*, the Supreme Court of India held that the power granted under Article 142(1) of the Constitution of India is broad and flexible. The Court also established that the use of this power to ensure 'complete justice' does not interfere with the legislature's authority to legislate.[8]

Ratio: The power under Article 142(1) of the Constitution of India is undefined and uncatalogued, allowing for flexibility to tailor relief to specific situations.[9] The Court reaffirmed its decision given in *Union Carbide Corporation* and *Supreme Court Bar Association* that, the exercise of power under Article 142(1) to do 'complete justice' in a 'cause or matter' is prohibited only when the power to pass an order is expressly barred by statutory provisions of the substantive law based on fundamental consideration of a general or specific public policy.[10] The Court emphasised that this power is conferred only on the Supreme Court and that it should be used with due restraint and circumspection.[11] The Court clarified that the Supreme Court would disregard a statutory provision only when necessary to balance the equities between conflicting claims of litigating parties.[12] As long as complete justice is achieved without violating fundamental principles of public policy, the

[6] Article 142(1), Constitution of India, 1950.
[7] M. Siddiq v Mahant Suresh Das, (2020) 1 SCC 1.
[8] I.C. Golak Nath v State of Punjab, AIR 1967 SC 1643.
[9] Shilpa Shailesh v Varun Sreenivasan, 2023 SCC OnLine SC 544.
[10] Union Carbide Corporation v Union of India, (1991) 4 SCC 584; Supreme Court Bar Association v Union of India
(1998) 4 SCC 409.
[11] Delhi Development Authority v Skipper Construction Co. (P) Ltd. (1996) 4 SCC 622.
[12] Shilpa Shailesh v Varun Sreenivasan, 2023 SCC OnLine SC 544.

exercise of power and discretion under Article 142(1) is valid as per the Constitution of India.[13]

Issue II

Hindu Marriage is traditionally a sacred bond and union that ideally lasts till eternity. However, Section 13 of the Hindu Marriage Act incorporates provisions through which parties to a marriage can seek divorce and dissolve their marriages.[14] Section 13-B of the Hindu Marriage Act, 1955 provides a provision for divorce through mutual consent. Sub-clause (2) of Section 13-B provides a cooling period of 6 to 18 months before the final divorce decree is passed.[15] The clear legislative intent behind this period is to let the couple introspect and possibly reconcile before the marriage is dissolved permanently.

However, some cases are so acrimonious that they are riddled with legal proceedings and hardships for the couples trying to dissolve their marriage. The continuance of the married relationship is impossible because of irreconcilable differences, accusations and defamations made against each other and family members, and in certain situations, several lawsuits, including criminal proceedings. Six months of cooling off fosters suffering and anguish with no return or advantage. In these cases, the six months act as an impediment to the dissolution.

In the case of *Amardeep Singh v Harveen Kaur*, the Court held that the cooling off period can be waived in exceptional circumstances, such as when the proceedings have remained pending in Court for a long time.[16] The waiting period under Section 13-B (2) is directory in nature and can be waived off in exceptional situations.[17]

While waiving off the cooling period, these questions should be considered by the Court to determine the exceptional circumstances:

a) How long have the parties been married?

b) How lengthy is the litigation pending?

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[13] Ibid.
[14] 15 Section 13, Hindu Marriage Act, 1955.
[15] Section 13-B (2), Hindu Marriage Act, 1955.
[16] Amardeep Singh v Harveen Kaur, (2017) 8 SCC 746.
[17] K. Omprakash v K. Nalini, Roopa Reddy v Prabhakar Reddy, Dhanjit Vadra v Beena Vadra, Dineshkumar Shukla v Neeta

c) What is the duration of time that the parties have been living separately from each other?

d) Are there any other legal proceedings currently going on between the parties?

e) Have the parties attempted to attend mediation or conciliation sessions in order to resolve any issues?

f) Have the parties reached a mutually agreeable settlement that addresses concerns such as alimony, child custody, and any other outstanding matters between them?[18]

It is important to note that these factors are illustrative, and the Court is not restricted to them. The Supreme Court has ruled that Section 13-B of the Hindu Marriage Act does not limit the Court's authority to grant a divorce decree by mutual consent. The Court can grant such a decree after considering and being satisfied with the relevant factors.

In B.S. Joshi v State of Haryana, Gian Singh v State of Punjab, and Jitendra Raghuvanshi v Babita Raghuvanshi, the High Court has the power to quash prosecutions in non-compoundable offences when justice demands.[19] Supreme Court laid stress on the fact that matrimonial litigation should be resolved amicably to bring the agony and torment to an end. The Court's role is to ensure that the settlement between the parties is reached freely and without undue influence, coercion, or fraud.[20] In the *State of Madhya Pradesh v Laxmi Narayan*, the Supreme Court has set out guidelines as to when the High Court may exercise jurisdiction to quash proceedings.[21]

Ratio:

i. Yes, the Supreme Court does have the power under Article 142(1) of the Constitution of India to waive off the six-month cooling-

[18] Amardeep Singh v Harveen Kaur, (2017) 8 SCC 746; Amit Kumar v Suman Beniwal, 2021 SCC OnLine SC 1270

[19] B.S. Joshi v State of Haryana, (2003) 4 SCC 675; Gian Singh v State of Punjab, (2012) 10 SCC 303, Jitendra Raghuvanshi v Babita Raghuvanshi, (2013) 4 SCC 58.

[20] Shilpa Shailesh v Varun Sreenivasan, 2023 SCC OnLine SC 544.

[21] State of Madhya Pradesh v Laxmi Narayan, (2019) 5 SCC 688.

off period between the parties and to grant a decree of divorce under Section 13-B of the Hindu Marriage Act, 1955 given the settlement between the parties.

ii. The Court can also quash and dispose of other proceedings under the Indian Penal Code, Criminal Procedure Code and Domestic Violence Act while granting the divorce decree.

iii. These powers given to the Supreme Court should be exercised with due care and caution according to the abovementioned factors to determine exceptional circumstances.

Issue III

In the case of *Ashok Hurra v Rupa Bipin Zaveri*, the Supreme Court utilised its power under Article 142(1) of the Constitution of India to grant a divorce decree. In this case, it was clear that the circumstances surrounding the marriage suggested that it was no longer functional and could not serve any beneficial purpose.[22] In *Naveen Kohli v Neelu Kohli*, the Court held that where the marriage had been wrecked beyond the hope of salvage, the public interest lies in recognising the fact and the Court dissolved the marriage.[23] Even though Section 13(1) of the Hindu Marriage Act enumerates the fault theory, the Supreme Court has applied the doctrine of irretrievable breakdown of marriage in exceptional cases to grant a decree of divorce.

The Supreme Court has ruled that in some instances, the fault theory can be relaxed by the Court to ensure 'complete justice' without violating the self-imposed limits that apply when exercising its power under Article 142(1) of the Constitution of India.[24]

The Court has exercised its power under Article 142(1) and recognised the futility of a completely failed and broken-down marriage in *Munish Kakkar v Nidhi Kakkar and Sivasankaran v Santhimeenal to* do 'complete justice'.[25]

[22] Ashok Hurra v Rupa Bipin Zaveri, (1997) 4 SCC 226.
[23] Naveen Kohli v Neelu Kohli, (2006) 4 SCC 558.
[24] Shilpa Shailesh v Varun Sreenivasan, 2023 SCC OnLine SC 544.
[25] Munish Kakkar v Nidhi Kakkar, (2020) 14 SCC 657; Sivasankaran v Santhimeenal, 2021 SCC OnLine SC 702.

Ratio: The Supreme Court can dissolve a marriage, due to its irretrievable breakdown, under Article 142 (2) of the Constitution of India. When the case's circumstances demonstrate that the marriage has wholly failed and that the parties cannot possibly coexist, the Court should use its discretionary power to do "complete justice" for the parties. As an equity court, the Court must also take into account the situation and history of the party challenging the dissolution.[26]

It is not an automatic right for the Supreme Court to grant a divorce based on the grounds of an irretrievable breakdown of the marriage. Instead, it is a discretion that must be exercised with great care and caution. Various factors must be considered to ensure that both parties are treated fairly and that 'complete justice' is served.[27]

Factors are illustrative and are as follows: the time the parties cohabited after marriage, the last time they cohabited, the nature of allegations made by parties against each other and family members, and more.[28] These factors are to be viewed concerning the economic and social status of the parties along with their educational qualification and more.[29]

Critique

The Indian Supreme Court has used Article 142(1) of the Constitution to dissolve marriages, a departure from established legal precedent. This decision responds to the changing views of marriage in Indian society and keeping up with international family law developments. However, concerns have been raised about the possible misuse of discretionary authority and the need for clear rules.

The Court's commitment to maintaining marital integrity through conflict resolution and mediation promotes family peace and communal harmony. It also reaffirms fundamental rights, such as life and personal liberty, and highlights the importance of each party's autonomy and mental health. The judiciary's proactive approach to filling in statutory gaps and adapting to the demands of modern society shows its

[26] Shilpa Shailesh v Varun Sreenivasan, 2023 SCC OnLine SC 544.
[27] Shilpa Shailesh v Varun Sreenivasan, 2023 SCC OnLine SC 544.
[28] Ibid
[29] Ibid

commitment to promoting a more humane approach to divorce proceedings.

Criticism has been levelled at Section 13-B of the Hindu Marriage Act, 1955 which allows divorce without strict adherence to statutory conditions. Additionally, the need for explicit, objective standards for using discretionary powers under Article 142(1) makes the legislation vulnerable to contradictions in its application and subjective interpretation.

The broad interpretation of judicial discretion raises concerns regarding possible abuse and misuse of power. If strong protections and checks are in place, discretionary power could be used, resulting in manipulation and arbitrary judgments.

Legal precedent may be compromised since this judgment deviates from accepted legal practices, such as the prerequisites outlined in the Hindu Marriage Act. This could lead to clarity and understanding about the law's implementation. The judiciary has been granted extensive discretionary powers, which may put additional strain on the system and delay the delivery of timely justice to all parties involved.

LEGISLATIVE COMMENTS

Digital Data Protection Act, 2023*

Khushi Agarwal
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Introduction

The Digital Data Protection Bill, 2023 was introduced in the Lok Sabha on the 3rd of August 2023 by the Ministry of Electronics and Information Technology[1]. The Bill was passed by both the Houses and the President gave the assent to the Bill on 11th August 2023[2].

The Act is enacted with the aim to balance, as the preamble of the Act states, "the rights of individuals to protect their data" on one hand and on the other hand "the need to process such data for lawful purposes."

The Act of 2023 is the fourth draft of the Data Protection Law and these four drafts were preceded by the landmark judgment of the Supreme Court of India i.e. *Justice K.S. Puttaswamy v. Union of India*[3]. The Judgment laid down that the Right to Privacy is a part of fundamental rights.

Following the landmark judgment, the Government of India first introduced the Personal Data Protection Bill, 2019 which was based on a draft produced by the Srikrishna committee[4]. The present Act i.e. The Digital Data Protection Act, 2023 is based on the draft prepared by the Government of India in 2022.

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* Winning entry in Raghavendra Phadnis Essay Writing, Case Comment, And Legislative Comment Competition 2023-24

[1] The Live Law. 2023. Parliament Passes Digital Personal Data Protection Bill available at: https://www.livelaw.in/news-updates (Accessed on 4th March 2024).

[2] The Live Law. 2023. The President gives Assent to the Bill available at: https://www.livelaw.in (Accessed on 4th March 2024).

[3] SCC Online. Justice KS Puttaswamy v. Union Of India (2017) SCC SC996 Available at: https://www.scconline.com/Members/NoteView.aspx?enc=KDIwMTcpIDEwIFNDQyAxJiYmJiY0MCYmJiYmU2VhcmNoUGFnZQ== (Accessed on 6th March, 2024).

[4] Ministry of electronics and IT. Justice BN Srikrishna Report available at: https://www.meity.gov.in/writereaddata/files/Data_Protection_Committee_Report.pdf (Accessed on 7th March, 2024).

Salient Features of The Act[5]

The present Act features comprehensive definitions and makes the regulation structure simpler than the previous bill. Some of the key features of the Act are as follows:

1. **Applicability-**

   In accordance with Section 3 of the Digital Data Protection Act, the Act is applicable to the processing of digital personal data within the territorial borders of India, wherein the personal data is collected in digital form or in non-digital form and digitized subsequently.

   Interestingly, the scope of the Act also extends outside the territory of India if the processing of personal data is connected to providing goods and services to data principals within the territory of India.

   Further, it is important to note that the Act does not pertain to data that is publicly accessible or the personal data that is processed by an individual for domestic purposes.

2. **Definitions-**

   The Act seeks to provide better protection for personal data by giving a comprehensive definition of key terms in Section 2 of the Act. Some of the important terms defined are Data Principal, Data Fiduciary, Data Processor, Consent Manager, and Appellate Tribunal.

   The Data Principal is the person to whom the personal data relates and the Data Fiduciary is the person who determines the purpose and means of processing of personal data.

   Section 4 of the Act states that personal data may be processed only, for the lawful purposes for which the Data Principal has given consent or for legitimate uses. The Act goes on further to define what lawful purposes mean and what is a Legitimate use for the purpose of this section. In order to process data for which consent has been given it has to be accompanied or preceded by a notice from the Data Fiduciary to the Data Principal informing the Data Principal of the purpose of processing data, the manner in which he/she can exercise

[5] Lexis advance. Universal bare Act, salient feature of the Act available at: https://advance.lexis.com/document/ (Accessed on 5th March, 2024).

his/her rights and the manner in which he/she can make complaint to the Board. Section 6 of the Act provides that the consent given must be free, specific, informed, unconditional and unambiguous.

3. **Rights and duties-**

The Act establishes obligations on Data Principals while simultaneously granting them certain rights. The following rights are granted to a Data Principal-

- The Right to be informed about how their personal data is being processed.
- The Right to request that the personal data be corrected or deleted.
- The Right to designate another person or a substitute to exercise rights in the event of death or incapacity;
- Lastly, the right to seek grievance redressal.

The duties imposed on Data Principals are-

- The obligation to refrain from filing a frivolous or misleading complaint, and
- They must not provide any fake information or impersonate another person.

Any violation of the above obligations imposed on the Data Principal is punishable with penalty.

4. **Obligations on Data Fiduciaries-**

The Data Fiduciaries are subject to various requirements under the Act. The obligations imposed are-

- A Data Fiduciary is obligated unless otherwise specified to ensure compliance with the terms of this Act.
- A Data Fiduciary has the authority to engage or appoint a Data Processor for the purpose of processing personal data on its behalf.
- When the data is likely to be used for decision-making that impacts the Data Principal or disclosed to another Data Fiduciary, it is the duty of the Data Fiduciary to guarantee that the data is complete, accurate, and consistent.

- A Data Fiduciary must put in place the necessary measures to guarantee compliance with the guidelines and regulations set forth in this Act.
- A Data Fiduciary is mandated to take action to guarantee that all personal data are safeguarded from any data breach.
- Should there be a data breach, the Data fiduciary bears the responsibility of notifying the Board and each of the affected data principals.
- In the event that a Data Principal withdraws her consent or the intended purpose is no longer served the Data Fiduciary has the authority to delete that personal data.

5. Provision for Children and persons with disabilities-

In order to ensure the protection of the personal data of children and persons with disabilities, the Act provides that the Data Fiduciary may process the personal data of such persons only with the consent of their legal guardian. Any data processing that could potentially harm the well-being of such persons is strictly prohibited.

6. Data Protection Board-

The Act provides for the establishment of the Data Protection Board of India by the Central Government, serving as an enforcement authority, endowed with the authority to prescribe remedial action and mitigating measures in cases of breach of data. The Board is empowered to investigate such breaches and impose penalties for any violation of the stipulated provisions. Orders pertaining to any breach or for non-compliance may be issued by the Board and an appeal against such order can be made before the Telecom Dispute Settlement and Appellate Tribunal (TDSAT) within a 60-day period from the date of order. Subsequently, a further appeal may be made before the Supreme Court of India.

7. Penalty-

Chapter VIII of the Act addresses penalties and adjudication, exclusively providing for monetary penalties only. The Board, in determining the penalty, is required to consider the following factors-

- The nature, gravity and duration of the breach.
- The type and nature of personal data impacted by the breach.

- The recurring nature of the breach.
- Whether the breach resulted in any gain or if any loss was avoided by such a breach.
- Proportionality of the imposed penalty to the harm caused.
- The impact of the penalty on the individual.

The Act does not include provisions for compensating individuals whose personal data has been affected by the breach. Additionally, the Act imposes specific duties on the Data Fiduciary, with non-compliance leading to penalties of up to 10,000 Rupees.

8. Exemptions-

The Act provides absolute exemptions from the application of its provisions for the instrumentalities of the State when processing data in the interest of India's sovereignty, integrity, and maintenance of public peace and order.

Partial exemptions are permissible in situations where processing is necessary for investigation, prosecution or enforcement of legal rights or claims, allowing for specific exemptions from certain provisions.

Furthermore, the Act grants the Central Government the authority to exempt specific Data Fiduciaries including startups, from certain obligations like notice and retention requirements.

9. Innovative Features-

The Act is concise and SARAL, that is, Simple, Accessible, Rational and Actionable Law, as it uses simple language with no use of proviso and further has illustrations which make the understanding of the provisions easier.[6]

10. Acknowledgement of women-

The Act for the first time in the history of law-making uses the term 'She' instead of 'He' to refer to all individuals, irrespective of their gender.

[6] Press Information Bureau. Salient Feature of the Digital Personal Data Protection Act available at: https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1947264 (Accessed on 5th March, 2024).

ANALYSIS

The 2023, Digital Personal Data Protection Act evolved from its predecessor i.e. Digital Personal Data Protection Bill 2022. The DPDP Act 2023 was not the first attempt by the Parliament at data privacy laws. It was the effect of the historic judgment of *Justice KS Puttaswamy* that led to the germination of data privacy concerns in India. While preserving the core concepts, the Act introduces strategic and precise provisions for the protection of personal data.

The Act uses simple language and gives a precise definition of the terms. The Act for the first time defined the term "Processing" and it introduced the term Data Principal to define the provider of information. The Act unlike earlier Bills does not make any distinction between personal data and sensitive personal data. Hence, the focus of the Act has been narrowed down to Digital Personal Data and safeguarding the same.

The following points provide a detailed analysis of the Act-

1. **Application-** The Act applies to digital as well as non-digital personal data which is digitalized later. This is a clear and unambiguous distinction as compared to the 2022 Bill which used the terms such as online and offline data. The Act also limits the territorial extent to outside India only if the data processing is in connection to offering goods and services to data principals within India.
2. **Consent-** The Act provides that the data processing can be done after the consent of the Data Principal and it also provides for a limited number of exceptions. The consent must be free and without any coercion. Further, the Act requires that a notice must be served to the Data Principal while obtaining their consent. The requirement of notice makes sure that the Data Principal understands the matter to which he is consenting and all the rights available to him. Further, the Data Principal has the right to withdraw the consent as well and when he does so the data fiduciary must stop his data from being processed unless it otherwise comes under the exception.

   The exceptions carved out possess certain defects as they empower the State considerably, placing the State's imperative at different levels. This may be justified in certain cases as in case of emergencies or disasters, but the Act broadens the scope of these provisions. For instance, section

7(b) of the Act allows the Central Government and its instrumentalities to override consent requirements when a government service beneficiary has previously agreed to receive any other benefit from the State. While this facilitates easier access personal data of the beneficiaries for government services, it also poses a potential for the government to aggregate databases. Utilizing this provision to its fullest extent would enable the government and its instrumentalities to be exempted from the limitation that mandates the deletion of personal data once the purpose intended has been fulfilled.

A similar instance is set out in Section 17, wherein the requirement of notice and consent is exempted, this is for the processing for investigation of any offence. However, section 17(2)(b) sets out an absolute exemption from the entire Act to any government agency that the government may notify, in the interest of sovereignty, integrity, and maintenance of public peace and order.

3. **Legitimate use-** In order to process Data, one way is to obtain the consent of the Data Principal and then proceed and the other way to process is when the Data Fiduciary can process data without the consent of the Data Principal when the Data Principal voluntarily provides their data and does not show unwillingness to consent to use it. This provision poses a problem as individuals daily enter into a lot of transactions, for instance, sharing phone numbers at pharmacies to obtain receipts, this would enable entities to process data without the consent of the individual. Other legitimate uses include the exceptions stated in the above point i.e.the situations when the State or its instrumentalities can override the provisions of this Act.
4. **Rights and obligations-** The Act provides certain rights to Data Principals and also imposes duties on them. The Act also provides for a grievance redressal mechanism. Not only Data Principals but also Data Fiduciaries are duty-bound, they ensure compliance with the provisions of the Act.

   It is important to note here that the Act creates a distinct category namely, Significant Data Fiduciary. These are the Data Fiduciaries that the government may notify as significant. While classifying as Significant Data Fiduciary government must take into account the

volume and sensitivity of data processed or the security of the State etc. This category of Data Fiduciary needs to comply with the additional requirements specified in the Act, for instance, they have to appoint a Data Protection Officer and an independent Data Auditor.

5. **Cross border transfer-** The Act moves from a "White list" approach to a "Negative list" approach. This means that data can be transferred to all other countries or jurisdictions except for those which are exclusively barred by the Government of India. The Act, however, nowhere defines or enlists the grounds on which a country may be barred, it is left for the government to decide.
6. **Children and persons with disability -** The Act gives due recognition to the personal data of children and persons with disability and makes specific provisions for the same. The Act defined the children as individuals below 18 years of age. In order to process their data the Data Fiduciary must obtain the consent of the Legal guardian. This is done to ensure that there is no misuse of their data and to ensure the well-being of children and persons with disability.
7. **Board-** The Act establishes the Data Protection Board of India, an adjudicatory authority to inquire into complaints, ensure compliance with the provisions of the Act and issue sanctions for non-compliance. The Board is to comprise a chairperson and certain other Board members all of whom are appointed by the Central Government. The procedure of appointment, their term and their removal are left for the Central Government to prescribe. This provision creates arbitrariness and makes the Board subservient to the Central Government. If appointment and removal are left in the hands of the Central Government, the Board will no longer be independent and the Central Government can function at its whims without any check.

   The Board will enforce the provisions of the Act and can issue directions, receive complaints and issue penalties in case of data breach or non-compliance. It has the power to conduct proceedings, summon for attendance, examine on oath etc. The Civil Courts are barred from hearing suits or proceedings falling exclusively under the jurisdiction of

the Board under the Act. This step leads to less burden on Civil Courts and a Special Court i.e. the Board will hear the matter and will ensure speedy justice.

The Board further has the authority to accept the voluntary undertaking of any Data Fiduciary to comply with the provisions of the Act at any stage of proceedings.

The Act also permits Alternate Dispute Resolution mechanisms, which means the parties can sit together and resolve their dispute with the help of a third party who is a Mediator.

8. **Appeals-** The Appeals from the decision of the Data Protection Board lie before the Telecom Disputes Settlement and Appellate Tribunal established under the Telecom Regulatory Authority of India Act, 1997 within a specified time and manner.[7]

Conclusion

In the virtual arena, where information flows like a river, the locks and dams of data protection are the guardians of our digital sovereignty. Data protection laws are inevitable in the present society which is driven by technology. However, there should be a balance between ensuring adherence to data protection laws and the right to privacy of individuals.

The Digital Personal Data Protection Act, of 2023 is the first Personal Data Protection Law enforced in India. The Act aims to safeguard the data of individuals, addressing long-standing needs with respect to internet users and putting light on cross-border measures.

The Act receives accolades as being the first of its kind to be implemented and the provisions of the Act are straightforward without any provisos which makes it easier to understand. The Act introduces robust provisions concerning notice requirements and consent requirements.

However, the Act, like any other Act, is not immune from criticism. The primary concern is that the Central Government has been granted

[7] Ministry of electronics and IT. Digital Personal Data Protection Act, 2023; Section 29, available at: https://www.meity.gov.in/writereaddata/files (Accessed on 7th March 2024).

discretionary powers under the Act. This can lead to arbitrary rule-making. The State will always be immune from its action in the name of good faith and only private entities are put on a check. Businesses might be reluctant to a provision like this which gives arbitrary power to a particular institution.

Although there are loopholes in the present Act, yet it shows a promising step towards digital safety. The protection of the privacy of individuals is the concern of the State and hence legislation is the need of the day. There is always a scope for amendment in any law, as mandated by the Constitution of India, through which Parliament ensures that the Act is suitable for the socio-economic conditions of the country.

The Mediation Act, 2023
Half-Paving the Way for India as a Mediation Hub

Vedant Lathi & Pratyusha Susarla
V B.A., LL.B.

"*The courts of this country should not be the place where resolution of disputes begins. They should be the place where disputes end after alternative methods of resolving disputes have been considered and tried.*"

Justice Sandra Day O'Connor[1]

Introduction

India boasts a rich history of legal traditions. While the current legal resolution system bears the influence of the colonial era, Alternative Dispute Resolution ('ADR') mechanisms like Mediation and Conciliation have long been embedded within the indigenous legal framework. The historical roots of mediation in India can be traced back to the epic, Mahabharata. Some scholars posit that Lord Krishna played the role of a mediator in the dispute between the Pandavas and the Kauravas over the division of the contested kingdom of Hastinapura.

Mediation excels over arbitration due to its inherent flexibility, informality, voluntariness, and cost-effectiveness. Unlike arbitration's adversarial nature, which resembles trial proceedings, mediation fosters collaborative negotiations, preserving relationships by facilitating consensual settlements. This voluntary process enables parties to retain control over outcomes, minimising resource expenditure. Mediation's efficacy lies in its ability to mitigate conflict while maintaining rapport, making it an optimal choice for resolving disputes outside of litigation.

[1] United States Office of Civil Rights, https://www.commerce.gov/cr/reports-and-resources/eeo-mediation-guide/what-mediation (last visited May 14, 2024).

Historical Background

The call for a standalone law on mediation has gained significant traction in recent years. This legislation would aim to bolster the legitimacy of the mediation process and rectify inconsistencies arising from its fragmented treatment across various existing statutes.

Apart from the fragmented treatment, a cornerstone of legislative support for mediation in India is section 89(1) of the Code of Civil Procedure ('CPC'). This provision empowers courts to recommend various forms of ADR, including mediation, arbitration, conciliation, and judicial settlement. The provision has been consistently upheld and applied by the courts.[2]

However, a solid legislative journey of the framework governing mediation in India began with the ruling in the case of Afcons Infrastructure wherein the Apex Court held that the general scope of section 89 of the CPC lacks perspicuity on the use of terms such as 'mediation' and judicial settlement.[3]

The inaugural initiative for a codified legislation for Mediation came along with the introduction of the Mediation Bill, 2021 ('the Bill'), in the Rajya Sabha on December 20, 2021. The Bill was promptly referred to the Standing Committee on Personnel, Public Grievances, Law and Justice for a thorough examination on December 21, 2021.[4] Following a meticulous review, the Standing Committee issued its 117th Report on the Mediation Bill on July 13, 2022, proposing specific recommendations for refining the Bill's provisions. After due consideration, the Union Cabinet adopted certain recommendations from the Report. The revised Bill, titled the Mediation Bill 2023, was then presented to the Rajya Sabha and passed on August 2, 2023. Subsequently, on August 7, 2023, the Lok Sabha also approved the Bill. Finally, on September 9, 2023, certain provisions of the Mediation Act, 2023 ('the Act') came into force, providing India with its first legislation on Mediation.

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[2] Department-Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, One Hundred Seventeenth Report on The Mediation Bill, 2021, https://prsindia.org/files/bills_acts/bills_parliament/2021/SC%20Report_Mediation%20bill.pdf ('Report') (last visited May 14, 2024).

[3] Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd., (2010) 8 SCC 24 ('Afcons Infrastructure').

[4] Report*, supra* note 3.

Further, India is also one of the prominent signatories to the United Nations Convention on International Settlement Agreements ('Singapore Convention') along with the United States of America and China was one of the first prominent signatories to the Convention. This Convention provides an effective mechanism for the enforcement of international mediated settlement agreements directly through the courts of the countries that have signed and ratified the Convention after making necessary changes in their domestic laws. India signed the Singapore Convention on August 7, 2019, but has yet to ratify it. [5] Thus, signing this convention was perhaps one of the triggers for bringing out this Bill.

The Act notably departs from the approach taken in the Arbitration and Conciliation Act, 1996 ('Arbitration Act'). Unlike the latter's near-verbatim adoption of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards' ('New York Convention'), the Act carves its own path by establishing a domestic legal framework for mediation practices in India.

The present Act aims to promote and facilitate mediation, particularly through established institutions, for resolving disputes of all kinds, be they commercial or others[6]. It seeks to encourage the enforceability of agreements reached through mediation, establish a body to register mediators, and promote the use of community mediation and online mediation as accessible and cost-effective methods of dispute resolution.[7]

Key Provisions of the Act

The scheme of the Act is laid down to foster and enhance mediation, with a specific emphasis on institutional mediation. It delineates mechanisms for online and community mediation, prioritising cost-efficiency, and timeliness. Furthermore, the Act provides for the enforcement of mediated settlement agreements and the establishment of the Mediation Council of India,

[5]Ibid.
[6] As clarified in the First Schedule of the Mediation Act, 2023.
[7]Preamble, The Mediation Act, 2023.

underscoring the legislative intent to fortify the landscape of dispute resolution through structured legal frameworks.

'Mediation' as defined under the Act, statutorily recognises and includes pre-litigation mediation, online mediation, community mediation and conciliation under the definition of mediation.[8] This shift would effectively merge the concept of conciliation into mediation, in accordance with the global trend of treating 'mediation' and 'conciliation' as synonymous, as endorsed by both the Supreme Court of India and codified in the Singapore Convention. Consequently, Part III of the Arbitration Act becomes redundant, prompting the Mediation Act to propose the removal of conciliation provisions from the Arbitration Act.[9]

The Act allows parties to voluntarily opt for mediation before initiating civil or commercial litigation, regardless of a mediation agreement.[10] However, certain commercial disputes are compulsory for pre-litigation mediation under the Commercial Courts Act, 2015 [11]and the courts or tribunals retain their discretion to refer parties to mediation at any stage of proceedings, even without a prior mediation agreement.[12] The Bill initially mandated pre-litigation mediation, regardless of whether a mediation agreement existed, before initiating any civil or commercial proceedings. However, following recommendations in the Report[13], this provision was proposed to be amended to allow for voluntary mediation before commencing litigation. The rationale behind this amendment was to uphold the principle that mediation should be a voluntary process, as mandatory mediation could be perceived as a denial of justice when parties are unwilling to engage in mediation voluntarily.

The Act applies to mediations conducted in India.[14] It would inter alia apply to mediations where:

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[8] The Mediation Act, 2023, §3(h).
[9] The Mediation Act, 2023, §61.
[10] The Mediation Act, 2023, §5(1).
[11] The Commercial Courts Act, 2015, §12A, and The Mediation Act, 2023, the Nineth Schedule.
[12] The Mediation Act, 2023§7(1).
[13] Report, *supra* note 3.
[14] The Mediation Act, 2023, §2.

(i) All parties are residents, incorporated, or conduct business in India[15]; or
(ii) The mediation agreement specifies the applicability of the Act[16]; or
(iii) International mediations involve at least one party residing or headquartered outside India[17];
(iv) For government-related disputes, the Act applies to commercial matters or other disputes as notified.[18]

However, while the Singapore Convention facilitates cross-border enforcement of settlement agreements through international mediations, the Act's jurisdiction is limited to mediations conducted within India. Consequently, it does not cover enforcement of settlement agreements from mediations conducted outside India, thus precluding their enforcement in India under the Act.[19] A critical aspect deserving attention is the Act's handling of international commercial disputes. By examining section 2(1)(c) of the Commercial Courts Act, 2015, which defines a 'commercial dispute', alongside section 2(i)(iii)(iv) and (v) of the Act, we can discern the parameters for its application to international mediations. Notably, the Act's jurisdiction extends solely to international mediations conducted within India. This limitation presents potential challenges for cross-border dispute resolution, as it restricts the enforcement of settlement agreements from mediations held outside India. Such constraints may deter businesses from considering India as a venue for resolving international trade disputes, impacting the Act's effectiveness in fostering global commercial harmony.

The absence of provisions for interim relief in the Act is notable, especially considering their inclusion in the Bill, primarily due to the presence of pre-litigation mediation. However, it is worth noting that courts or tribunals still retain the authority to issue interim orders while referring matters to mediation, aiming to safeguard the interests of the involved parties. The Act empowers courts or tribunals to issue interim orders only in court-referred

[15] The Mediation Act, 2023, §2(i).
[16] The Mediation Act, 2023, §2(ii).
[17] The Mediation Act, 2023, §2(iii).
[18] The Mediation Act, 2023, §2(iv) and 2(v).
[19] Report*, supra* note 3.

mediations to protect the interests of any party, where deemed appropriate.[20] But unlike section 9 of the Arbitration Act[21], the Act does not specify the nature or extent of such interim orders.

The legislation further allows for the incorporation of a mediation agreement within an existing contract or as a standalone document, provided it is documented in writing. The Act defines 'in writing' to include: (a) signed documents by the parties, (b) electronic exchanges as per the Information Technology Act, 2000, or (c) any legal filings where one party asserts the existence of a mediation agreement, uncontested by the other.[22] Additionally, parties maintain the flexibility to pursue mediation even post-dispute. While it is established that courts lack jurisdiction in the presence of an arbitration agreement, as per section 5 of the Arbitration Act[23], there is no explicit provision in the Act regarding minimal judicial intervention in mediation proceedings.

Regarding mediator fees, it stipulates that unless otherwise agreed upon by the parties, all mediation costs, encompassing mediator fees and mediation service provider charges, are to be shared equally among the parties.[24] Unlike the Arbitration Act, which outlines specific fee guidelines in its fourth schedule, the Act does not provide such detailed provisions regarding mediator fees.[25]

The Act dictates that a mediation must conclude within 120 days, extendable by a maximum of 60 days. In contrast to the Bill, the Act notably shortens the timeframe for completing mediation.[26]

Further, the Act introduces voluntary registration, contrasting with the Bill's mandatory registration of mediated settlement agreements.[27] Parties can register agreements with a Central Government-established Authority or another designated body within 180 days of receiving the authenticated copy. Registration beyond this period may be allowed for a fee. However, non-

[20] The Mediation Act, 2023, §7(2).
[21] The Arbitration and Conciliation Act, 1996, §9.
[22] The Mediation Act, 2023, §4.
[23] The Arbitration and Conciliation Act, 1996, §5.
[24] The Mediation Act, 2023, §25(2).
[25] The Arbitration and Conciliation Act, 1996, the Fourth Schedule.
[26] The Mediation Act, 2023, §18.
[27] The Mediation Act, 2023, §20.

registration does not impact the enforceability of a mediated settlement agreement.

The current formulation of the Act permits enforcement of mediated settlement agreements as if they were a judgment or decree passed by a court, thereby excluding them from the scope of the Singapore Convention.[28] This exclusion, thus, hampers cross-border enforcement, as no procedural framework exists for such agreements.

The Act's recognition of Mediation Service Providers and constitution of the Mediation Council of India (MCI) establishes a supportive framework.[29] However, this acknowledgement does little to guarantee its efficacy. The MCI is tasked with various responsibilities, including establishing guidelines for mediation proceedings, overseeing the accreditation and management of Mediation Service Providers, maintaining a digital repository of mediated settlement agreements, and submitting annual reports on the implementation of the Mediation Act to the Central Government.[30] Additionally, the MCI is empowered to enact rules and regulations in accordance with the provisions of the Mediation Act[31].

The Act includes provisions for amendments to various existing statutes, including the Indian Contract Act, 1872, the Code of Civil Procedure, 1908, the Legal Services Authorities Act, 1987, the Arbitration and Conciliation Act, 1996, the Micro, Small and Medium Enterprises Development Act, 2006, the Companies Act, 2013, the Commercial Courts Act, 2015, and the Consumer Protection Act, 2019.[32]

Concluding Remarks

In conclusion, the Act heralds a significant stride in India's journey towards fostering a robust mediation infrastructure. However, despite its commendable objectives, the Act presents a pathway only partially paved, with notable inconsistencies that necessitate careful examination.

[28] The Mediation Act, 2023, §27.
[29] The Mediation Act, 2023, §31 and 40.
[30] The Mediation Act, 2023, §31.
[31] The Mediation Act, 2023, §38.
[32] The Mediation Act, 2023, §58, 59, 60, 61, 62, 63, 64, and 65.

While the Act introduces vital provisions for mediation, such as voluntary registration and a defined timeframe for completion, it also exhibits certain lacunae. The absence of provisions for interim relief and the exclusion of mediated settlement agreements from the scope of the Singapore Convention are notable gaps that could impede the Act's effectiveness, particularly in cross-border dispute resolution.

In addition to the points mentioned above, it is crucial to highlight the distinct nature of mediated settlement agreements. Unlike ordinary contracts, these agreements emerge from disputed matters resolved consensually, representing a final resolution that extinguishes legal remedies. As such, they warrant a unique enforcement procedure that acknowledges their consensual origins and preserves confidentiality.

Treating mediated settlement agreements akin to court decrees could invite undue litigation and compromise confidentiality, undermining the essence of mediation as a flexible and confidential process. Instead, they should be recognised as binding contracts subject to ordinary contractual remedies. This approach not only minimises legal complexities and costs but also upholds the confidentiality and flexibility inherent in the mediation process. Integrating these considerations into the Act’s framework will enhance its effectiveness in promoting mediation as a preferred method of dispute resolution and solidify India's standing as a leader in the global mediation landscape

In striving to position India as a prominent mediation hub, it is essential that the Act undergo thorough scrutiny and refinement to address these inconsistencies. By rectifying these gaps and aligning with global best practices, the Act can realise its full potential in promoting mediation as a preferred method of dispute resolution and bolstering India's reputation as a leader in the field.

The Constitution (One-hundred and Sixth Amendment) Act, 2023

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The Women's Reservation Act, also known as *Nari Shakti Vandan Adhiniyam*, was passed by Parliament on 21st September and received the President's assent on 28th September 2023. Initially introduced as the Constitution (One Hundred and Twenty-Eighth Amendment) Bill, 2023[1], it was later referred to as the Constitution (One Hundred and Sixth) Amendment due to pending amendments. The primary objective behind this Act is to ensure proper political representation and participation for women in decision-making processes. Despite the long journey progress is evident, as seen in the Rajya Sabha, where 214 members voted in favour of the Bill with none against it, following the Lok Sabha's approval. However, this reservation will not apply until the dissolution of the Lok Sabha or the Legislative Assembly of a specific State or the Legislative Assembly of Delhi. It is crucial to recognize that the Women's Reservation Bill is not merely a favour but a matter of right, aimed at addressing the limited representation of women in State assemblies and Parliament. The Bill proposes a 15-year reservation period with a quota for SC/STs within the reserved seats for women. The reservation will come into effect after a delimitation exercise (given in Article 82 [2]of the Constitution of India) and will rotate seats after each exercise, as outlined in the Bill. Despite substantive participation in panchayats and municipal bodies, women's representation in state assemblies and Parliament remains limited, highlighting the necessity and significance of the Women's Reservation Act in promoting gender equity in political spheres.

[1] https://egazette.gov.in/WriteReadData/2023/249053.pdf
[2] Article 82, Constitution of India, 1950.

Key Features

1) Implementation Dates:
    i) Lok Sabha: September 20, 2023
    ii) Rajya Sabha: September 21, 2023
    iii) Central Government Notification: Time of Implementation
    iv) Article 334 A: Effective Post-Delimitation and Census
2) Time Limit Extension:
    i) Extension of 15-Year Time Limit as Required
3) Amendments:
    a) Revised Articles:
        i) Article 239AA
        ii) Newly Inserted Articles:
        iii) Article 330A
        iv) Article 332A
        v) Article 334A
4) Reservation Details:
    i) Reservation Allocation: General, OBC, SCs & STs = 33%
    ii) Total Lok Sabha Seats: 543
    iii) Reserved Seats: 1/3 (181 seats)
    iv) SCs/STs Reserved Seats: 131
    v) Remaining Seats after SCs/STs Reservation: 412
    vi) Percentage of Remaining Reservation: 33% (136 seats)
5) Additional Information:
    i) The Women's Reservation Act 2023, also known as the Constitutional (One Hundred and Sixth) Amendment, 2023, reserves seats for women in three bodies through the insertion of articles:
    ii) Legislative Assembly of the National Capital Territory of Delhi - Article 239AA
    iii) House of People (Lok Sabha) – Article 330A
    iv) Legislative Assembly of every State - Article 332A

6) According to The Wire (India), 15% of the members of the current Lok Sabha are women, while the average percentage of women in state legislative assemblies is 9%.[3]

Essential Factors:

Contention based on merit: The notion of meritocracy often raises concerns about implementing reservations for women in politics, as critics fear it may compromise merit-based selection. However, reservations address systemic barriers women face in accessing political opportunities due to historical inequalities. Merit should not be narrowly defined by traditional metrics but should encompass diverse perspectives, experiences, and skills that women bring to the table. Despite variations in women's participation across states, leaders like Mamata Banerjee have played pivotal roles in shaping political and economic trajectories, emphasizing the economic impact of women's empowerment. Women leaders across India, from Supriya Sule to Mayawati, have championed rights and reshaped politics, breaking barriers and inspiring others. Their efforts highlight the transformative potential of women's participation in politics for societal progress and inclusive governance.

Reservation for Women: Reservation for women is a crucial step towards achieving gender equality and promoting inclusivity in various spheres of society. Reservation for women, as outlined in the Women Reservation Act of 2023[4], not only serves as a means of ensuring representation but also acts as a platform for women to showcase their talents and capabilities. It recognizes that the battle for gender equality and recognition of women's abilities must be led by women themselves. This affirmative action acknowledges the historical disadvantages and discrimination that women have faced, ensuring their representation and voice in areas where they have been traditionally underrepresented. Moreover, reservation for women facilitates the diversification of perspectives, leading to more comprehensive and inclusive policies and practices. It serves as a catalyst for empowering women,

[3] The Wire, https://thewire.in/government/womens-reservation-bill-the-issues-to-consider (last visited March 2, 2024)

[4] UN women, https://www.unwomen.org/en/news-stories/feature-story/2023/10/india-passes-law-to-reserve-seats-for-women-legislators (last visited March 2, 2024)

breaking stereotypes, and fostering a more equitable society. By providing reserved seats, this Act enables women to step into leadership roles and demonstrate their competence, determination, and leadership qualities. It's an opportunity for women to lead the charge and show the world the exceptional contributions they are capable of making when given the chance. Through such measures, we can strive towards creating a world where every individual, regardless of gender, has equal opportunities and rights to fulfill their potential and contribute to the betterment of society.

OBC Debate: The debate [5]surrounding OBC reservation seems somewhat disconnected from the context, given that during elections, all three categories—SC, ST, and General (which includes OBC)—are already considered. Therefore, there may not be a pressing need for separate representation solely for OBCs. The primary focus of the Act is to provide reservation for women, with additional coverage for other disadvantaged groups such as SCs and STs. Introducing more reservations based on OBC status could potentially lead to subsequent demands for further reservations, such as for EWS and state-specific minorities in state legislative assemblies, possibly exceeding the reservation limit set by the *Indra Sawhney* case. If there is a perceived need to include OBCs due to their disadvantaged status in certain states, the Supreme Court's suggested approach of the Three-fold Test [6]in the case *Vikas Kishanrao Gawali vs The State of Maharashtra* could be utilised. This involves identification through the establishment of a commission, determining the size of the quota, and ensuring that the reservation, when combined with SCs and STs quotas, does not exceed 50%. By employing this method, adequate representation can be ensured where it is genuinely needed. However, the creation of additional reservations for OBCs may further diminish opportunities within the general category. This raises concerns about potential discrimination against women from the general

[5]The Wire, https://thewire.in/politics/100-regret-in-congress-that-upa-govts-womens-reservation-bill-lacked-obc-quota-rahul-gandhi (last visited March 4, 2024)
[6] SSC Online Blog, https://www.scconline.com/blog/post/2021/03/16/can-reservation-for-obcs-exceed-upper-ceiling-of-50-in-local-elections-for-entirely-scheduled-areas-supreme-court-explains-triple-test-pre-requisite/ (last visited March 3, 2024)

category. The current electoral system allows for representation from three categories: the general category (inclusive of OBCs), and from SCs and STs.

Representation in Rajya Sabha

The debate surrounding increased representation in the Rajya Sabha appears to be secondary when considering the broader context of gender representation in Indian politics. While the upper house has shown a more balanced representation of women compared to the Lok Sabha, with women constituting 12.24% of its members as of November 12, 2021, this aspect is pivotal in shaping economic policies and legislation. However, the objective of representation should transcend mere inclusion, focusing instead on ensuring adequate representation where it's most needed. Therefore, reserving seats in institutions where women are already adequately represented, such as the Rajya Sabha, may not be as pertinent as addressing the significant lack of representation in the Lok Sabha and state legislative assemblies. We can foster a more inclusive and equitable political system by prioritizing efforts to rectify this imbalance at lower levels of governance, where women's participation remains notably lower. This approach not only upholds democratic principles but also empowers women to contribute to decision-making processes at all levels of government actively, ultimately advancing a more representative and responsive democracy.

Chronology of Attempts by Indian Prime Ministers to Pass Women's Reservation Bill in Parliament:

To touch upon some history to understand the continuous struggle by various prime ministers and finally, it is finding its light. This is the seventh attempt since 1996 to pass the Women's Reservation Bill.

1996 - (United front) the Constitution (81st Amendment) Bill.

1998, 1999, 2002, 2003, 2004 - Former PM Atal Bihari Vajpayee.

2008 - The UPA government introduced the Bill in the Rajya Sabha first but In 2014, the Bill lapsed again with the dissolution of the Lok Sabha.

Rajiv Gandhi -May 1989-1/3rd reservation for women in urban and local bodies passed in Lok Sabha but failed in Rajya Sabha in Sept 1989.

P.V. Narasimha Rao – 1992 1993- Constitution Amendment Bill 72 and 73- 1/3rd of all seats and chairman posts for women in rural and urban local bodies- passed in both the Houses.

HD Deve Gowda-1996-81st Constitution Amendment Bill reservation of women in Parliament-Bill failed to get passed in Lok Sabha.[7]

Atal Bihari Vajpayee-1998-Womens reservation Bill in Lok Sabha-failed to get support and lapsed but was subsequently reintroduced in the years 1999, 2002 and 2003.

Manmohan Singh -2008 – Women's Reservation Bill introduced in its common minimum program -measures were to prevent lapsing of the Bill in Rajya Sabha-was passed at first instance but eventually as it was not taken in Lok sabha for consideration, it lapsed in 2014.

Narendra Modi- Present in 2023 the Women Reservation Bill was passed in the Lok Sabha on 21st September 2023 and on 23rd September 2023 in the Rajya Sabha.

Navigating the Implementation Challenges of the Women's Reservation Act: The gazette notification published on September 28, 2023, marked a significant step towards the implementation of the Women's Reservation Act. This notification clarified that the reservation would be enforced promptly after the completion of the first delimitation process, which is set to be frozen until 2026. Delimitation, as defined by the Election Commission of India, involves the fixing of territorial constituency boundaries, essentially redrawing them based on the latest population data from the Census. This process is crucial for achieving equal representation and balancing the number of constituencies with the population.

The last census data available dates to 2011 and the subsequent delimitation exercise was conducted even earlier. The delay in the 2021 census due to the Covid-19 pandemic further complicates the process. Delimitation is carried out to ensure a balance between the number of constituencies and the population, with specific provisions made for reserved categories, including

[7] Dr. Jaspreet Kaur, Women Reservation Bill in Lok Sabha: A century long struggle for gender Equality, IJFMR 1-3 (2024)

women. The Delimitation Commission is tasked with demarcating constituencies to achieve population equality and to provide equitable representation, including for Scheduled Castes (SCs) and Scheduled Tribes (STs).

In India, delimitation exercises have been conducted only four times, notably in 1952, 1963, 1973, and 2002. During the 2002 delimitation, the number of Lok Sabha constituencies was frozen at 543 until 2026. However, the completion of the Census 2021 was deferred due to the pandemic, further delaying the delimitation process.

As the Lok Sabha election 2024 approaches, the enactment of the Women's Reservation Bill is anticipated closer to the 2029 general elections, contingent upon the completion of a delimitation process aligned with the Census report. This underscores the intricate procedural hurdles and timeline constraints associated with the implementation of the Women's Reservation Act.

Conclusion:

The passage of the Women's Reservation Act in 2023 represents a significant victory for gender equity in Indian politics. Despite hurdles, its approval underscores a commitment to empowering women in decision-making roles. Challenges remain, particularly in implementation timing aligned with delimitation processes, but the Act signifies progress towards a more inclusive democracy.

LL.M. SUBMISSIONS

Morality in Law: Exploring the Various Dimensions of the Public Examination (Prevention of Unfair Means) Act, 2024

Akanksha Asanare
I LL.M.

Introduction

Morality, as a guiding principle in law-making, is critical in shaping legislation that promotes societal integrity and fairness. One area where morality and legal frameworks intersect is in public examinations, where the Public Examination (Prevention of Unfair Means) Act 2024 is a critical piece of legislation. This Act, which is intended to combat cheating and protect the sanctity of public examinations, demonstrates society's commitment to ethical behaviour and academic integrity. This article examines the various aspects of the Public Examination (Prevention of Unfair Means) Act 2024, focusing on the moral considerations that underpin its formulation and implementation.

Mathew Blackman in his article, "Does Law Exist to Provide Moral Order?"[1] offers his perspective on the Hart and Devlin debate over the relationship between law and morality. H.L.A. Hart and Lord Patrick Devlin were well-known legal scholars who debated in the 1950s and 1960s, primarily through their writings. Hart advocated for legal positivism, which holds that law and morality are separate domains. According to Hart, the law should only be concerned with preventing harm to others and maintaining societal order, rather than enforcing specific moral values. In his seminal work "The Concept of Law,"[2] Hart emphasised the importance of a "minimum content" of morality in law while rejecting the notion that law should enforce the majority's moral views.

On the other hand, Lord Devlin advocated for a more moralistic approach to law. He believed that the law should reflect and enforce society's moral

[1] Mathew Blackman, Does Law Exist to Provide Moral Order?, JSTOR DAILY, (Dec. 15, 2021), https://daily.jstor.org/does-law-exist-to-provide-moral-order/.
[2] H.L.A. Hart, Second Edition (Neil MacCormick ed., 2009)

values, even when certain behaviours did not directly harm others. Devlin famously asserted in his book "The Enforcement of Morals"[3] that society has the right to use the law to preserve its moral fabric and prevent behaviour that threatens its moral cohesion, even if it occurs in private.

Every year when public examinations are held in India, there are numerous instances of cheating and paper leaks, to the point where examinations must be cancelled, the state's internet is shut down, and many other measures are taken to combat the menace of cheating in exams. States such as Gujarat, Jharkhand, and Uttarakhand have enacted legislation to combat cheating and use of unfair means in examinations. In India, the recently enacted Public Examination (Prevention of Unfair Means) Act 2024 exemplifies the direct relationship between law and morality.

In India, widespread cheating in public examinations has long been an issue, raising serious concerns about the educational system's credibility. These incidents have harmed the credibility of examination processes while also emphasising the importance of strict measures to combat academic dishonesty. Several notable examples of mass cheating have played an important role in catalysing the implementation of the Public Examination (Prevention of Unfair Means) Act 2024:

1. Rajasthan Board Examination Scandal (2019)[4]: In 2019, the Rajasthan Board of Secondary Education (RBSE) faced a widespread cheating scandal, with images and videos revealing students cheating with impunity during board exams. The scandal exposed systemic vulnerabilities in the examination system, including inadequate supervision, lack of enforcement of rules, and collusion between students, parents, and examination authorities. It sparked widespread outrage and calls for stricter measures to protect exam integrity and ensure a level playing field for all students.

[3] Ronald Dworkin, Lord Devlin and Enforcement of Morals, 75 (1966), https://www.jstor.org/stable/794893.
[4] Rajasthan Board Releases Class 12 Supplementary Exam Result, NDTV Education, Sep 9, 2019.

2. On the 5th of March 2024, outright cheating marred the Class 10 board exam at a school in Haryana's Tauru area. Viral videos showed people climbing up the walls of the school to pass chits to students writing their Class 10 board exams. The incident took place at Chandravati School in Tauru in Nuh district. Shortly after the commencement of the exam, it was reported that the paper had allegedly been leaked.[5]
3. According to an investigation by the Indian Express[6], there have been 41 instances of paper leaks in recruitment exams across 15 States in the last five years. The media report revealed that these leaks derailed the schedules of up to 1.4 crore applicants trying for just about 1.04 lakh posts. Experts suggest that the escalating incidents of cheating and paper leaks in India can be attributed to challenges within the examination system.[7]

In response to these and other cases of widespread cheating, the Indian government passed the Public Examination (Prevention of Unfair Means) Act 2024 to combat academic dishonesty and protect examination integrity. The Act aims to discourage and penalise cheating, plagiarism, impersonation, and other forms of unfair behaviour during public exams. The Act seeks to restore trust and confidence in the examination system and promote a culture of honesty and accountability in education by establishing clear rules, imposing strict penalties, and improving mechanisms for investigation and adjudication.

Provisions of the Act

The Public Examination (Prevention of Unfair Means) Act 2024 (the Act) contains several provisions aimed at ensuring the integrity of public examinations. These provisions define the behaviours considered unfair means, impose penalties for violations, and establish mechanisms for investigation and adjudication. The Act provides a comprehensive legal

[5] People climb school walls in Haryana to help students cheat in board exam, India Today, Mar 5, 2024.
[6] S. Baruah, A. Mohan, H. Khan & S. Janyala, The big all India exam leak: Over 5 years, 1.4 crore job seekers in 15 states bore the brunt, The Indian Express, Apr 29, 2024.
[7] Z. Khan, Public Examination Bill 2024: Why creation of transparency during exams is much more than a bill? Financial Express, Apr 21, 2024.

framework for preventing and addressing cheating, plagiarism, impersonation, and other forms of dishonesty during exams. The objective of the Act is mentioned as *"An Act to prevent unfair means in the public examinations and to provide for matters connected therewith or incidental thereto."*

The Act also provides definitions of terms such as candidate, competent authority, institution, organised crime, person, public examination, service provider etc. However, this Act is limited to protecting the use of unfair means only in public examinations. Examinations conducted by the Central Government, the State Government, National testing Agency etc. are only covered under this Act.

Prohibited Behaviors

One of the central aspects of the Act is the delineation of prohibited behaviors during public examinations. The section 3 of the Public Examinations (Prevention of Unfair Means) Act describes the unfair activities that are now prohibited by this Act.

(i) leakage of question paper or answer key or part thereof,

(ii) participating in collusion with others to effect leakage of question paper or answer key;

(iii) accessing or taking possession of question paper or an Optical Mark Recognition response sheet without authority:

(iv) providing a solution to one or more questions by any unauthorized person during a public examination;

(v) directly or indirectly assisting the candidate in any manner unauthorizedly in the public examination;

(vi) tampering with answer sheets including Optical Mark Recognition response sheets;

(vii) altering the assessment except to correct a bona fide error without any authority;

(viii) willful violation of norms or standards set up by the Central Government for the conduct of a public examination on its own or through its agency;

(ix) tampering with any document necessary for short-listing candidates or finalizing the merit or rank of a candidate in a public examination;

(x) deliberate violation of security measures to facilitate unfair means in the conduct of a public examination;

(xi) tampering with the computer network or a computer resource or a computer system;

(xii) manipulation in seating arrangements, allocation of dates and shifts for the candidates to facilitate adopting unfair means in examinations;

(xiii) threatening the life, liberty or wrongfully restraining persons associated with the public examination authority or the service provider or any authorized agency of the Government; or obstructing the conduct of a public examination;

(xiv) creation of fake website to cheat or for monetary gain; and

(xv) conduct of fake examination, issuance of fake admit cards or offer letters to cheat or for monetary gain.[8]

Other activities such as conspiracy to facilitate or indulge in unfair activities, entering the premises of the examination Centre with an intent to disrupt the conduct of public examination, revealing any information or part thereof which has come to a person's knowledge for any undue advantage or wrongful gain, or if a service provider or any person associated with the service provider causes any premises other than the authorized examination center to be alternatively used for the purpose of holding public examination will also be considered as offences under the Act.

Punishment for the Offences

The Act establishes penalties for individuals, service providers, and persons associated with service providers who are found guilty of using unfair means during public examinations.

[8] Public Examinations (Prevention of Unfair Means) Act, 2024, § 3, 2024

The offences under this Act are cognizable, non-bailable and non-compoundable.

These penalties may include- Imprisonment for a term not less than three years but which may extend to five years and with fine up to ten lakh rupees. The service provider shall also be liable to be punished with imposition of a fine up to one crore rupees and proportionate cost of examination shall also be recovered from such service provider and he shall also be barred from being assigned with any responsibility for the conduct of any public examination for a period of four years.

If a person or a group of persons including the examination authority or service provider or any other institution commits an organised crime, he shall be punished with imprisonment for a term not less than five years but which may extend to ten years and with fine which shall not be less than one crore rupees.[9]

Mechanisms for Inquiry and Investigation

To ensure effective enforcement of the Act, mechanisms for investigation and adjudication are established. These mechanisms are provided for in section 12 of the Act and they may include:

(1) An officer not below the rank of Deputy Superintendent of Police or Assistant Commissioner of Police shall investigate any offence under this Act.

(2) Notwithstanding anything contained in sub-section (1), the Central Government shall have the powers to refer the investigation to any Central Investigating Agency.[10]

The Influence of Morality on Law

P. Cane in his article, *Morality, Law and Conflicting Reasons For Action*[11], has drawn from the theories of Hart, Devlin and Dworkin. Through this analysis he observes that *"one of the important social functions of legislation is to reinforce and supplement morality in various ways and to the extent such*

[9] Public Examinations (Prevention of Unfair Means) Act, 2024, § 10, 2024
[10] Public Examinations (Prevention of Unfair Means) Act, 2024, § 12, 2024
[11] P. Cane, Morality, Law And Conflicting Reasons For Action, 71 (1) The Cambridge Law Journal (2012), https://www.jstor.org/stable/23253789.

legislation is morally acceptable it can generate new moral reasons or actions as well as legal reasons."

The values that India cherishes have been incorporated into the Constitution as fundamental rights and guiding principles of State policy. These include equal treatment under the law, free speech, religion, and so on. Broadly speaking, these are the values valued by society today, not only in India but throughout the democratic world. These values are deeply rooted in the great epics, as well as the Vedas.

Just as morality fosters and strengthens the soul, morality in law gives it greater might and commands people's voluntary obedience. Even in ancient Hindu law, the term 'sadachar' (good conduct) was highly valued. It embodies the principles of good behaviour. It addresses the principles of right and wrong. It refers to good and virtuous behaviour. It equates to righteousness and honesty. Moral values such as justice, equity, good faith, and conscience have permeated the legal system. Besides legal sanctions, morals ensure compliance with the law. When morality shifts, the law typically follows suit. Thus, morals complete the law. Law is only a subset of morals in a broader sense. The ultimate basis of law and morality is the same. It is argued that ethics is the shared foundation. The Declaration of Human Rights, the UN Charter, the principles of international law, humanitarian law, and the Nuremberg principles are prominent examples of rich moral principles with a strong ethical foundation.

Intersection of Morality and Law in the Public Examination (Prevention of Unfair Means) Act, 2024

In terms of the relationship between law and morals, there was no distinction between them during the early stages of society. The ancient Hindu jurists made no distinction between law and morals. Morality, according to them, stems from religion or conscience. In post-Reformation Europe, it was asserted that law and morals are distinct and separate, and that law derives its authority from the State rather than morals. However, when natural law theories gained popularity in the seventeenth and eighteenth centuries, law was once again associated with morality. In the nineteenth century under the powerful influence of analytical positivism, only legal norms were made the subject of jurisprudence and morals were excluded from the study of law. In Kant's theory also law and morals are distinguished.

Values are the life-blood of law. The legislators when they formulate the laws and the judges when they give their decisions are not working in vacuum. They are guided by the values recognized in society. Values are the social ideals which form the matrix from which legal principles are evolved by the judges or legislators.

Values are more than potential materials for the legislative law-maker. They serve as critique of proposed measures of law making. The very nature of judicial process importing choice and discretion are guided by values. These values may themselves change with the progress of society. When values change law tends to change. Then the attitude of the legislators and the judges will also undergo a metamorphosis.[12]

Morality has served as the foundation for law on numerous occasions throughout legal history. Prohibition, anti-discrimination, environmental, animal welfare, and human rights laws are a few notable examples. These laws are frequently based on moral principles such as equality, fairness, human dignity, environmental stewardship, and the protection of sentient beings. In each case, moral considerations guide the creation and implementation of legal frameworks designed to promote the common good and advance justice in society.

The Public Examination (Prevention of Unfair Means) Act 2024 not only establishes a legal framework for preventing and dealing with cheating and other forms of dishonesty in public examinations, but it also embodies moral principles that support the educational system's integrity. This intersection of morality and law is visible in several aspects of the Act, which reflect society's broader ethical concerns and values regarding academic integrity.

1. Upholding honesty and integrity.

At its core, the Act reflects society's commitment to academic honesty and accountability. By making cheating, plagiarism, and impersonation illegal, the Act expresses a moral imperative to uphold the principles of fairness and honesty in examinations. It reinforces the idea that academic success should be earned through diligent study and genuine effort, rather than deception.

[12] A. Reddy, Role of Morality In Law-Making: A Critical Study, 49 (2) Journal of the Indian Law Institute (2007), https://www.jstor.org/stable/43952105.

2. Promoting equity and fairness.

Another moral aspect of the Act is its emphasis on promoting equality and fairness in public examinations. The Act aims to level the playing field for students from diverse backgrounds by penalising unfair practices and ensuring that all candidates are evaluated on their merit. This reflects a broader societal commitment to equal opportunities and social justice in education, in which achievement is determined by ability rather than access to resources or privilege.

3. Fostering trust and confidence

The public examinations are essential for building trust and confidence in the government system. These exams are crucial for recruiting and selecting public servants. If the exams for these positions are not fair, it will directly impact people's trust and confidence in the government systems.

4. Balancing individual rights and collective interests.

When individual rights are considered against the collective interest in maintaining examination integrity, a moral quandary arises. Students have the right to fair assessment and due process, but they also have a moral obligation to uphold ethical standards and protect exam integrity. The Act strikes a delicate balance between protecting students' rights and imposing penalties for violations that jeopardise the public interest in fair and honest examinations.

5. Promoting a Culture of Academic Integrity

The Act is critical to fostering an academic integrity culture in India, where honesty, fairness, and accountability are cherished values. Indian scholars such as Dr. A.P.J. Abdul Kalam and Dr. Radhakrishnan Pillai highlight education's transformative power in instilling ethical consciousness and moral values. By instilling values of integrity and ethical responsibility, the Act promotes ethical citizenship and moral principles in Indian educational institutions and society as a whole.

The Public Examination (Prevention of Unfair Means) Act 2024 is at the intersection of morality and law, reflecting society's ethical concerns and values regarding academic integrity. The Act aims to foster a culture of integrity and excellence in education by upholding honesty, promoting equity,

building trust, balancing individual rights, and cultivating ethical citizenship, thereby aligning legal principles with moral imperatives for the benefit of society at large.

Conclusion

Throughout this investigation, it is clear that the Act is an important tool for ensuring the principles of justice and equity in education. Furthermore, the Act reflects a broader commitment to fostering an environment of honesty, integrity, and responsibility in educational institutions, all of which are essential components of a just society.

However, our analysis focuses on the inherent difficulties and challenges of imposing moral standards through legal systems. While the Act seeks to prohibit and penalise academic dishonesty, its effectiveness is contingent on effective implementation, strong enforcement measures, and ongoing vigilance against new types of misconduct.

Furthermore, the report looked at how the Act affected stakeholders from various sectors, such as students, educators, legislators, and society as a whole. It emphasises the importance of collaborative efforts and proactive steps in cultivating a culture of academic integrity and ethical behaviour that extends beyond the scope of legislation.

In essence, the Public Examination (Prevention of Unfair Means) Act 2024 is a watershed moment in the ongoing debate over morality in the law. It emphasises the symbiotic relationship between legal frameworks and ethical imperatives, highlighting the importance of aligning legal mandates with broader moral values. As we navigate the complex terrain of morality and law, this legislation serves as a beacon, pointing us in the direction of a more just and equitable society, one marked by honesty and fairness in aspects of life.

Navigating Justice in the Era of Media Trial

Amiti Sinha
I LL.M.

In democratic systems, the will of the people holds significant importance, as emphasized by jurists like Rousseau and Bentham. Both believed that laws should be founded on the welfare of the public. Jeremy Bentham, like Rousseau, prioritized public welfare in legislation[1]. He introduced the concept of utility, which revolves around pleasure and pain. According to Bentham, pleasure and pain are fundamental aspects of human experience, affecting everyone equally. He developed the hedonistic calculus to evaluate actions based on their potential for pleasure or pain, advocating for laws that maximize pleasure and minimize pain. Bentham's framework categorized various pleasures and pains, ranging from sensory to intellectual experiences, intending to guide legislation to promote overall well-being and societal happiness[2].

The happiness and security of individuals or society constitute the ultimate goal for legislators, shaped by the will of the people, and influenced primarily by motives revolving around pleasure and pain. These motives translate into sanctions, as classified by Bentham into four categories: physical, political, religious, and moral[3]. A moral sanction, also termed popular or public opinion sanction, arises from the spontaneous disposition of individuals, offering either pleasure or pain. These sanctions interact within society, sometimes harmoniously, and discordantly, each contributing to the overall balance of pleasure and pain. While the legislator primarily operates through political sanction, the other three sanctions can either support or oppose legislative

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[1] Fred Cutler, *Jeremy Bentham and the Public Opinion Tribunal*, 63 OUP. 321, 323 (1999), https://www.jstor
.org/stable/2991711.
[2] James E. Crimmins, *Jeremy Bentham,* Stanford Encyclopedia of Philosophy (Dec. 08, 2021), https://plato.sta
nford.edu/entries/bentham/.
[3] William Sweet, *Jeremy Bentham (1748-1832),* Internet Encyclopedia of Philosophy, https://iep.utm.edu/jeremy-bentham/.

actions, highlighting the complex interplay between societal values and legislative decision-making.

Popular sanction or moral sanction is the consequences we face in the form of pain or pleasure while doing an act per public opinion. It is the pain or pleasure which is given by society according to their judgment and not according to any fixed rule. It influences an individual's behaviour and may also discourage them from engaging in certain actions. This is an important element of the society where the opinion of the society regulates its working and maintains a social order. Bentham's concept of popular sanction means that lawmakers and policymakers should consider public opinion and preferences when formulating and passing legislation. This could include conducting surveys, consulting with the public, or using democratic mechanisms like voting and referendums to gauge popular opinion. Jurists such as Cardozo and H.L.A Hart were staunch believers that judges make law when there are gaps in the law. Popular sanction occurs when we associate pleasure or suffering with public opinion. During decision-making, popular sanction can be either an ally or a foe of the judiciary.

Untouchability was once widely accepted until political measures like Article 17 and the Untouchability (Offenses) Act of 1955 intervened, challenging its moral sanction. Sex-selective abortions faced societal approval until moral and legal sanctions were imposed against them. Despite legal prohibitions, Sati persisted due to societal approval[4], eventually shifting with changing attitudes. Widows still face societal restrictions, reflecting outdated moral sanctions that inflict unnecessary pain. Section 377 criminalized same-sex relationships until challenged in *Navtej Singh Johar v. Union of India*[5], reflecting a shift in popular opinion towards decriminalization. Legal hurdles, like marriage equality[6], persist due to societal resistance, yet progress is underway. In modern culture, popular sanction manifests through social

[4] Shamsuddin, M. and Orgencisi, Y.L. (2020) A brief historical background of Sati *https://dergipark.org.tr/en/do wnload/article-file/1170035*.
[5] Navtej Singh Johar v. Union of India, AIR 2018 SC 4321.
[6] Supriyo @ Supriya Chakraborty & Anr. v Union of India, 2023 INSC 920.

media, cancel culture, and movements like #MeToo, shaping behaviour by reflecting and enforcing societal norms and values.

Bentham viewed legislation as a means to maximize happiness and prevent unhappiness, with popular sanction ensuring broad community support for laws, a type of cooking in which the correct cake is produced with the ingredients of happiness and the prevention of unhappiness. He considered the public as both the supreme constitutive power and the public opinion tribunal[7], where all individuals participate in expressing judgment on laws and institutions. Bentham believed that popular sanction, operating informally through public opinion, could pressure legislators to amend or repeal laws. He saw newspapers as vital for providing information and facilitating public discourse within this tribunal, essential for its effective functioning[8].

As Jeremy Bentham warned of the perils of superstition, rumours, and ignorance growing without it, he argued for strengthening popular sanctions, particularly through preserving press freedom. He recognized the critical importance of media outlets such as social media, news channels, and newspapers in influencing public opinion[9]. However, he cautioned against the unchecked spread of popular sanction. This is important, particularly in cases such as media trials, where it could be problematic and violate the rights of the accused. Democracy is based on free speech and expression, a value guaranteed by the Indian Constitution under Article 19(1)(a), albeit with some limitations mentioned in Article 19(2), such as national sovereignty and public order. The courts have widely defined "speech and expression" to include many parts of life, such as travel, sexual orientation, and involvement in sports. Recognizing the media's position as the fourth pillar of democracy, critical for informing and educating the people, the judiciary has emphasized the fundamental necessity. Justice Sastri highlighted the foundational importance of freedom of speech and the press in democratic societies, emphasizing that without open political discourse, public education necessary

[7] D.J. Galligan, Constitutions and the Classics – Patterns of Constitutional Thought from Fortescue to Bentham, 240 (Oxford University Press 2014).
[8] Ibid. at 241.
[9] James E. Crimmins, supra note 2.

for effective governance is impossible[10]. Bentham emphasized that while freedom of the press is essential for fostering enlightened public opinion and strengthening popular sanctions, there should be some level of restriction to prevent abuses.

In the landmark case of *Romesh Thappar v. State of Madras*[11] in 1950, the Supreme Court of India affirmed that freedom of the press is an integral aspect of freedom of speech and expression, essential for democratic societies. Subsequent cases further clarified the scope of this right. In *Life Insurance Corporation of India v. Manubhai D Shah*[12], the court explained that "freedom of speech and expression" in Article 19(1)(a) encompasses the right to express opinions through various mediums, including writing, printing, and electronic media. Justice Venkataramiah emphasized in *Express Newspapers Ltd. v. Union of India*[13] that freedom of the press is central to social and political discourse, with the media acting as public educators on a large scale. However, this power comes with responsibility. Media outlets must ensure the accuracy of information and avoid infringing on people's rights. In *Vijay Singhal v. Govt. of NCT Delhi*[14], it was underscored that while freedom of expression is crucial, it must not undermine the fair administration of justice. In cases where there is a conflict between freedom of expression and the right to a fair trial, the latter prevails in the interest of justice. In *R. Rajagopal v. State of Tamil Nadu*[15], the Hon'ble Supreme Court clarified the right as well as the restriction Article 19 provides. The privilege of freedom of speech and expression is subject to restrictions in the form of defamation and decency, which curtails the ambit of media and media trials.

Media trials, where the press conducts its versions of trials through extensive coverage on various platforms, have become a notable phenomenon, especially in high-profile cases. While the media plays a crucial role in informing the public and exposing wrongdoing, its influence can sometimes

[10] Romesh Thappar v. State of Madras, AIR 1950 SC 124.
[11] Ibid.
[12] Life Insurance Corporation of India v. Manubhai D Shah, AIR 1993 SC 171.
[13] Express Newspapers Ltd. v. Union of India, AIR 1986 SC 872.
[14] Vijay Singhal v. Govt. of NCT Delhi, 2013 SCC OnLine Del 1221.
[15] R. Rajagopal v. State of Tamil Nadu, AIR 1995 SC 264.

undermine the right to a fair trial and the judiciary's independence. In cases like *State of Maharashtra v. Rajendra Jawanmal Gandhi*[16], the Supreme Court emphasized that a trial by media or public agitation is contrary to the rule of law and can lead to miscarriages of justice. The Delhi High Court, in *Mother Diary Foods & Processing Ltd. v. Zee Telefilms*[17], highlighted the growing divide between journalism and ethics, stressing the importance of accuracy, honesty, and fairness in media reporting. However, these virtues are often compromised. Justifications range from sting operations, as seen in *R. K Anand v. Delhi High Court*[18], to claims of educating society. Yet, the media may not fully grasp its societal impact. Misinformation propagated by the media can lead to misconceptions, demonstrating the need for responsible journalism that upholds principles of accuracy, honesty, and respect for the truth.

Media trials pose a significant challenge to the right to a fair trial, a fundamental principle of justice protected under domestic and international legal frameworks. This right ensures that legal proceedings are conducted impartially, transparently, and with respect for the rights of all parties involved. International instruments like the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) explicitly protect the right to fair trial. In India, this right is enshrined in the constitution and encompasses principles such as the presumption of innocence, the right to legal representation, and the right to examine witnesses. The judiciary has emphasized the importance of fair trial, recognizing that its denial is an injustice not only to the accused but also to the victim and society. A case like *Zahira Habibullah Sheikh v. State of Gujarat*[19] underscores the detrimental effects of media trials on the rule of law and the potential for miscarriages of justice. The judiciary has emphasized that trials tainted by bias or prejudice must be eliminated to ensure fairness and uphold the principles of justice. Thus, the elimination of media trials

[16] State of Maharashtra v. Rajendra Jawanmal Gandhi, AIR 1997 SC 3986.
[17] Mother Diary Foods & Processing Ltd. v. Zee Tele Films, AIR 2005 Delhi H.C 195.
[18] R. K Anand v. Delhi High Court, (2009) 3 DLT (CRL) 486.
[19] Zahira Habibulla H. Sheikh v. State of Gujarat, (2004) 4 SCC 158.

during ongoing legal proceedings is crucial to safeguarding the right to a fair trial and ensuring justice for all parties involved.

The relation between media trials and the right to a fair trial is complex. While the media informs the public about legal issues, excessive information might influence trials. Negative portrayals of the court process by the media can sway judges, and sensationalist reporting can turn legal hearings into spectacles. Jerome Frank, a jurist from the American Realism School of Law, proposed that judges can be affected by a variety of variables, including public opinion. Media sources often operate as public courts, issuing decisions before legal proceedings are completed, influencing public opinion, and undermining the presumption of innocence. Journalists and investigators should not assume the role of judges. They undermine the impartiality of judges, affecting fair trials and the presumption of innocence. Fair trials need the assumption of innocence until proven guilty in both legal proceedings and media coverage.

Media trials, popular sanction, and the concept of fair trial intersect in a fascinating yet complex relationship. While the media serves to educate and inform the public, popular sanction—shaped by public opinion—affects individual behaviour. However, popular sanction can manifest as media trials, where extensive coverage of a case influences public perception of guilt and innocence. Media trials often reveal the identity of the accused prematurely, treating them as convicts before due process. This undermines the right to a fair trial by pressuring judges and creating prejudice, thus compromising judicial independence. Justice Kurian Joseph highlighted the pressure on the judiciary during the Nirbhaya case, where media trials influenced public sentiment[20]. He recounted instances where judges felt pressured to deliver verdicts aligned with public opinion, despite adhering to evidence and facts. Such interference in the judicial process obstructs justice and has been observed in various cases.

The Institute of Perception Studies researched media trials, publishing their findings in the report "Media Trials: A Case Study" as part of their initiative,

[20] Fayeza Farhana, *Trial by Media in India*, II IJLLR 1, 1 (2021).

Rate the Debate[21]. The report outlines four indicators to determine whether a media trial has occurred. The first indicator involves the media disproportionately sharing public opinion, often focusing on character assassination and introducing elements to sustain public interest, thereby influencing public opinion against the accused. The second and third indicators relate to the presumption of guilt and lack of fair hearing. Media outlets frequently presume the guilt of the accused and host debates with panelists who speak against them, violating human rights and the principle of fair trial. The final indicator occurs when anchors take on the roles of both prosecution and judge, presenting the case for guilt and declaring the accused as convicts, further undermining the principles of justice and fairness.

The death of actor Sushant Singh Rajput in June 2020 sparked a media frenzy, with various actors including the police, fans, and the media itself becoming involved. Despite initial police rulings of suicide or accidental death, the media began sensationalizing the case, particularly after a case was filed against Sushant's girlfriend, Rhea Chakraborty. Media coverage quickly shifted public perception, with Rhea being portrayed as guilty even before any trial commenced. The Bombay High Court intervened to restrain media coverage due to its detrimental impact on the administration of justice[22]. Despite this, some television channels continued sensationalizing the case, violating privacy rights and tarnishing the reputations of the accused. The media's portrayal of Rhea as guilty before any legal proceedings undermined her rights and liberties, leading to public condemnation and harassment. This case highlights the significant influence of media trials in shaping popular opinion and sanctions against individuals.

The Arushi Talwar and Hemraj murder case showcases the negative consequences of media trials and popular sanctions. Media initially suspected Hemraj, the Talwars' helper, however, soon shifted focus to the parents, Rajesh and Nupur Talwar, as prime suspects after Hemraj's body was found. Media houses sensationalized the case and abused the rights of both the

[21] Supriti David, *Trial by media: How Arnab and Navika spent over 65 percent of their debates on SSR*, Newslaundry (Oct. 17, 2020), https://www.newslaundry.com/2020/10/17/trial-by-media-how-arnab-and-navika-spent-over-65-percent-of-their-debates-on-ssr.

[22] *The Bombay High Court intervened to restrain media coverage due to its detrimental impact on the administration of justice,* Live Law (Jan. 18, 2021, 04:30 PM), https://www.livelaw.in/top-stories/media-trial-interferes-with-administration-of-justice-amounts-to-contempt-of-court-bombay-high-court-168535.

deceased and the accused. Despite the absence of evidence, the constant coverage sparked public outrage and swayed public opinion against the Talwars[23], harming the administration of justice.

In the Sheena Bora murder case, media sources depicted the defendants, particularly Indrani Mukerjea, as guilty before the court's decision. This hasty judgment swayed public opinion. The media's interference in establishing popular sanctions damages the assumption of innocence and the trial process's integrity, emphasizing the negative consequences of media trials on justice administration. Moreover, the media went beyond reporting to dissecting Mukerjea's character on national television[24].

In two prominent cases, media trials led to individuals being prematurely labelled as guilty by the public, despite eventual court exoneration. In Sunanda Pushkar's death case, Dr. Shashi Tharoor was portrayed as her murderer by the media, facing intense scrutiny and suspicion. Despite societal belief in his guilt, Dr Tharoor was cleared of all charges due to lack of evidence. Similarly, in the Mumbai Serial Blast case involving actor Sanjay Dutt, the media branded him as a terrorist, damaging his reputation. Despite being acquitted of terrorism charges, Dutt's reputation suffered due to the media trial's influence on public opinion. These cases underscore the detrimental impact of media trials on individuals' lives and reputations. In high-profile cases like *Johnny Depp v. Amber Heard,* jurors were instructed to avoid media coverage to prevent prejudice and uphold the principle of fair trial. In the Nanavathi case, media reports influenced the jury's decision, highlighting the potential impact of media coverage on trial outcomes[25].

Media trials, despite their often-negative consequences, have occasionally played a positive role in achieving justice. In the *Jessica Lal* murder case, the media's persistent coverage reignited public demand for accountability, leading to a renewed investigation and the eventual sentencing of the

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[23] *Implicated by the Media*, The Hoot (Oct. 13, 2017), http://asu.thehoot.org/media-watch/media-practice/
implicated-by-the-media-10336.

[24] Kalpana Sharma, *In media coverage of Sheena Bora case, sensationalism trumps proportionality yet again*, Scroll.in (Aug. 29, 2015), https://scroll.in/article/751972/in-media-coverage-of-sheena-bora-case-sensationalism-trumps-proportionality-yet-again.

[25] Surekha Vitthal Bhosale, *A Critical Analysis of Media Trial and Its Effect on Indian Judiciary*, 9 JETIR 619, 621 (2022).

perpetrator. Similarly, in the *Priyadarshini Mattoo* case, media intervention exposed flaws in the investigation, ultimately leading to the apprehension of the perpetrators by the CBI. Likewise, in the Bijal Joshi rape case, aggressive media coverage prevented the accused from manipulating the legal system, ensuring justice prevailed. These instances illustrate the potential positive impact of responsible media in advancing justice in society.

The media's influence on public perception can extend to legal cases, potentially impacting judicial decisions. According to the American realist school, judges are susceptible to various factors, including strong public opinion, which can affect their judgments. This influence was evident in the case of Asaram Bapu, where the public's intimidation of witnesses and judicial officials highlighted the significant impact of public sentiment on legal proceedings. However, the responsibility of pronouncing judgments lies with the court, where judges, learned law professionals, evaluate evidence and determine guilt or innocence. Despite media coverage, it's crucial for courts to remain impartial and base decisions solely on legal principles and evidence presented. Cases like *Re: P C Sen*[26] *and Rao Harnarain v. Gumani Ram*[27] emphasize the dangers of prejudicial media remarks and the limitations of journalists acting as investigators or attempting to sway court decisions. Both the Supreme Court and the House of Lords have recognized that judges can be subconsciously influenced by media coverage of suspects or accused individuals. Media trials can shape public opinion[28], aligning with Jeremy Bentham's concept of popular sanction, where public approval or disapproval impacts law enforcement and effectiveness. However, excessive media coverage may raise concerns about the politicization of legal processes and the potential for reactionary policymaking based on sensationalized stories rather than evidence.

Conclusion

Media, whether through print or digital platforms, has long served as the primary means of informing the masses, even in the face of historical

[26] Re: P C Sen, AIR 1970 SC 1821.
[27] Rao Harnarain Singh v. Gumani Ram Arya, AIR 1958 P&H 273.
[28] Anjum Saxena, *Impact of Media Trial on Judiciary*, 11 IJCRT 766, 769 (2023).

restrictions like the Vernacular Press Act during British rule in India. Today, the media is regarded as the fourth pillar of democracy in India, playing a crucial role in educating the public and promoting effective implementation of laws. While the freedom of the press is protected under Article 19(1)(a) of the Constitution, this power comes with the responsibility to ensure accurate and fair reporting. However, some media houses have neglected this responsibility, violated the rights of the accused and potentially influenced judicial outcomes.

Lawmakers should strike a balance between ensuring press freedom and imposing restrictions to prevent undue interference in the administration of justice. Specific legislation addressing media trials could provide clear guidelines for media outlets to follow, preventing them from conducting their trials or swaying public perception before a case reaches court. The Indian Press Council could play a proactive role in regulating media trials by implementing stringent rules and educating media practitioners on legal principles and responsible reporting.

In a democratic society, it is essential to balance freedom of expression with the need to uphold the integrity of the legal system. While Article 19(1)(a) grants individuals and the media the right to express themselves, there are also legal sanctions to prevent contempt of court. Striking this balance is crucial to ensuring responsible journalism and protecting the rights of the accused while upholding the principles of justice and fairness.

Quest for Clarity: Understanding the Bailability of Offenses in NDPS Legislation

Bhalchandra Bhanudas Mote
I LL.M.

Introduction:

Drugs are a significant social issue, particularly affecting the youth, and are considered both a malaise and a menace. As a victimless crime, drug control in India is governed by several central and state legislations, with the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) being the central piece of legislation. The Act was enacted to address the increasing problem of drug abuse, particularly by organized smuggling gangs, and to ensure compliance with the Psychotropic Substance Convention, 1971.

Section 37 of the NDPS Act makes all offences under the Act cognizable and non-bailable. However, the First Schedule of the Criminal Procedure Code (CrPC) outlines which offences are bailable and non-bailable. The journey of Section 37 reveals that the provision was firstly introduced in the NDPS Act, as earlier laws like the Dangerous Drugs Act of 1930 did not specifically address bail. The NDPS Act was designed to address the growing drug problem and enhance deterrence against drug-related offences. Over time, amendments to the Act sought to refine its approach, with the 1988 amendment[1] introducing stricter provisions on bail to curb drug trafficking.

In recent years, the legislature has adopted a reformative approach, recognizing the need to differentiate between serious offenders and those who are addicted to drugs. Amendments[2] have sought to rationalize the sentence structure and restrict strict bail provisions to more serious offences, while offering some leniency to those caught in the cycle of addiction.

A recent development in this area saw the Bombay High Court referring the issue of bail under Section 37 to a larger bench[3], as different single-judge benches had conflicting opinions on the matter. This highlights the ongoing

[1] The Narcotic Drugs and Psychotropic Substances (Amendment) Act, 1988.
[2] S.9, The Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2001
[3] Karishma Prakash v Union of India, ABA 1998/2021 (Bombay High Court, 12/07/2022).

debate and the need for clarity on how bail provisions under the NDPS Act should be applied[4].

This article aims to address the evolving issue of bail under the NDPS Act, particularly Section 37, which labels offences as cognizable and non-bailable. It explores the legislative intent, the journey of Section 37, and the various interpretations by different High Courts. Additionally, it offers suggestions for potential legislative changes to better align the law with its intended objectives.

Bail and Justice: Philosophy, Evolution, and Framework

Bail represents the balance between law enforcement's authority to restrict an individual's liberty when accused of a crime and the presumption of innocence[5]. It plays a pivotal role in the justice system, forming a distinct branch of criminal jurisprudence. Liberty, a fundamental pillar of modern society, underpins the philosophy of bail, ensuring the accused's presence during trial while protecting their right to freedom. Bail is not punitive or preventative; it serves to release the accused from custody, reduce the State's burden, and retain the accused under the Court's jurisdiction.

The word "bail" is derived from the Old French *baillier* (to give or deliver)[6] or the Latin *baiulare* (to bear a burden)[7]. Black's Law Dictionary defines bail as a security ensuring a prisoner's appearance in court. Although the term is not statutorily defined, it is conceptually understood as a right to assert freedom against State restraints. The inclusion of bail within the framework of human rights is reinforced by the United Nations Declaration of Human Rights (1948), to which India is a signatory[8].

In the landmark case *State of Rajasthan v. Balchand alias Baliay*[9], the Supreme Court of India affirmed the principle that *"Bail is the rule and jail is the exception."* Justice V.R. Krishna Iyer succinctly stated this as "bail, not jail." For bailable offences, bail is a matter of right. For non-bailable offences,

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[4] Ibid.
[5] Vaman Narain Ghiya vs State of Rajasthan, 2009 (2) SCC 281.
[6] Ibid.
[7] Ibid.
[8] UN Declaration of Human Rights of 1948, available at https://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf , last seen on 10/12/2023
[9] State of Rajasthan V. Balchand alias Baliay, 1978 SCR (1) 535.

it is granted at the Court's discretion, requiring the accused to furnish a suitable bond[10].

The denial of bail seeks to prevent tampering with evidence, intimidation of witnesses, or obstruction of justice. However, in non-bailable offences, the judiciary must exercise its discretion with fairness, reason, and objectivity. Despite this mandate, undue opposition from prosecution agencies often complicates bail proceedings, highlighting the importance of judicial vigilance. As a cornerstone of a humane justice system, bail safeguards individual liberty while maintaining the balance necessary for justice and societal order. It reflects the principle of harmonizing freedom with accountability, embodying the progressive values of a civilized society.

Unlocking Liberty: Understanding the Dynamics of Bail in NDPS Act

Behind the Legislator's Pen: The Purposeful Objectives of NDPS Act.

The NDPS Act was created to regulate narcotic drugs, control illicit trafficking, and allow for the forfeiture of property linked to drug offenses. It addresses the serious issue of drug abuse, recognized globally, and supports international efforts to combat trafficking.

The 2001 amendment[11] rationalized sentencing, ensuring harsher penalties for serious drug offenses and lighter ones for addicts or minor offenders. It also aimed to limit strict bail provisions to serious offenders.

Before this, the 1989 amendment[12] made drug offenses cognizable and non-bailable to combat transit trafficking. The 2001 amendment revised bail provisions to prevent drug offenders from being released on technical grounds, strengthening law enforcement.

Penalty Paradigm: Exploring Classifications in the NDPS Act

Chapter IV of the NDPS Act outlines 'Offenses and Penalties', with punishments under Sections 15–23 determined by the type and quantity of drugs involved. The Act categorizes offenses based on three levels of drug quantities: small quantity, lesser than commercial quantity, and commercial quantity. Punishments vary accordingly, and the provisions for imposing

[10] S.437, The Code of Criminal Procedure,1973
[11] The Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2001.
[12] Supra note, 1.

penalties can be broadly classified into four categories: Less than 5 years, up to 5 years, more than 5 years, Death penalty etc. Offenses involving small quantities under Sections 15(a), 17(a), 18(a), 20(b)(ii)(A), 21(a), 22(a), 23(a), 26, 27(a), 27(b), 32, 58(1), 58(2), and 59(1) (referred to as 'small quantity offenses') attract punishments of less than five years. Some of these offenses carry penalties as mild as imprisonment for up to one year or even six months, reflecting the less severe nature of small quantity contraventions.

Striking a Balance: Interplay of Code of Criminal Procedure and NDPS Act

The NDPS Act, as a special statute governed by its own procedural provisions over the Code of Criminal Procedure, 1973[13], if context otherwise is not required. If we look at the entire scheme of NDPS Act, no definition of bailable or non bailable offences is given. It is provided under section 2 (xxix) of NDPS Act, but the word and expressions used in the Act are defined in the Code, 1973.

Sec. 2 (a) of the Code, defines bailable offence as an offence included as bailable in first schedule or which is made, bailable by any other law for time being in force. On the other hand, power to grant bail as governed by Chapter XXXIII of the Code, lies with either court or concerning police officer as mentioned in sec. 436, after furnishing bond and completing other formalities.

For application of provisions regarding bails and bonds, Section 36C of the NDPS Act grants power to special courts to go ahead with provisions of the code, subject to save as otherwise in the NDPS Act. It is also needed to mention that Limitations on granting bail as provided in sub-clause (3) of sub-section (1) of 37 of the NDPS Act are in addition to limitations under the Code.

Furthermore, Section 2(a) of the Code defines, the Non bailable offence means, any other offence which are not shown as bailable in the first schedule, or which is made non bailable by any other law for the time being in force.

Schedule I of the Code is divided into 2 parts i.e., Classification of offences under Indian Penal Code and Classification of offence under other laws. The

[13] The Code of Criminal Procedure,1973.

NDPS Act comes under latter classification and Part II of First schedule of the Code made those offenses bailable which are punishable with imprisonment for less than 3 years or with fine only. After going in depth into the whole scheme of both Acts, one can easily note that no provision of the NDPS Act absolutely bars the application of the Code for deciding bail applications.

A Study on Parallel Bail Mechanisms within the PMLA Framework

The Prevention of Money Laundering Act (PMLA), 2002, similarly uses the phrase *"Offences to be cognizable and non-bailable,"* mirroring the language found in Section 37 of the NDPS Act. It also includes twin conditions for granting bail: the public prosecutor must be given a reasonable opportunity to oppose the bail application, and the court must be satisfied that there are reasonable grounds to believe the accused is not guilty.

In *Nikesh Tarachand Shah v. Union of India*[14], the Supreme Court struck down Section 45(1) of the PMLA Act as it imposed these twin conditions for release on bail for offences punishable by more than three years under Part A of the Schedule. In response, the Government amended Section 45(1) with effect from April 19, 2018[15], to apply these twin conditions to all offences under the PMLA. Furthermore, by way of the 2019 amendment (Act 23 of 2019), the legislature clarified that all offences under the PMLA are cognizable and non-bailable.

Following these amendments, in *P. Chidambaram v. Directorate of Enforcement*[16], the Supreme Court reiterated that Section 45 of the PMLA makes offences of money laundering cognizable and non-bailable, and no person accused of such offences can be released on bail unless the twin conditions are satisfied.

Even after the 2019 amendment[17], these conditions continue to apply to bail applications under the PMLA. However, while the PMLA explicitly clarifies the meaning of cognizability and bailability, the NDPS Act still lacks such clarification, leaving the interpretation of bailability under the Act to the courts. This absence in the NDPS Act invites ambiguity, particularly

[14] Nikesh Tara Chand Shah vs. Union of India & Anr. [2017] 12 SCR 358
[15] The Finance Act, 2018
[16] P. Chidambaram vs Directorate of Enforcement., (2019) 12 SCR 172.
[17] S.200, Finance Act, 2019.

regarding the classification of offences and their bailability, unlike the clear framework established by the PMLA.

Keys to Understanding: Principles of Interpretation Demystified

Headings prefixed to sections cannot override the clear language of the provisions they accompany. In case of conflict, the plain meaning of the provision takes precedence. Justice Lahoti emphasized that when the language of a provision is clear, the heading cannot control its meaning[18]. This was demonstrated in the *ABN Amro Bank* case[19], where the Supreme Court relied on the plain language of Section 29(1) of the Foreign Exchange Regulation Act[20], despite its heading, to establish restrictions on foreign companies in India.

Similarly, in the case of Section 37 of the NDPS Act, the provisions on bail and cognizability should only apply to the offences explicitly mentioned and cannot be extended to others under the Act.

Mastering Section 37: A Deep Dive into Legal Provisions

Section 37 Unveiled: A Chronicle of Its Inception and Evolution

Section 37 of the NDPS Act speaks about cognizability and bailablity of offences under the Act. If we trace the entire journey of section from beginning, we find that section was amended twice.

At the time of its birth, Section 37 under the NDPS Act, 1985, it only stated that notwithstanding anything contained in the Code, every offence punishable under this Act shall be Cognizable, an affixed heading to that section was *"offences to be cognizable and non bailable"*.

The Act underwent a change in form of Amendment Act 2 of 1989[21], replacing its earlier position which read as under –

"37. (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, -

(a) every offence punishable under this Act shall be cognizable.

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[18] Raichurmatham Prabhakar & Anr vs Rawatmal Dugar, [2004] 3 SCR 1130
[19] Union of India v. ABN Amro Bank, (2013) 13 SCR 820
[20] S.29, Foreign Exchange Regulation Act, 1973.
[21] Supra note, 1.

(b) no person accused of an offence punishable for a term of imprisonment of five years or more under this Act shall be released on bail or on his own bond unless-

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code."

A restriction was made that no person will be released on bail having accused of an offence punishable for a term of imprisonment of five years or more. Not only such restriction, but it was made that an opportunity be given to public prosecutor to oppose the bail application along with satisfaction of court reasonable grounds for believing that he is not guilty of such offence and certain additional requirement mentioned in criminal procedure code on granting bail of the accused.

The Second Amendment Act[22], substitutes above five years punishment criteria and made such twin conditions restricted to certain offences expressly, mentioned in sub clause (b) of sub section 1 i.e., Sec. 24, 19, 27-A and for offences involving Commercial quantity.

The statement of objects and reasons of 2001 Amendment Act[23], restricts the application of strict bail provision to those offenders who indulge in serious offences. This clarifies the intention of legislature behind the relaxing bail provisions of offences, other than which are kept intently in section 37(1) (b).

Headnote Reflections: Offences to be cognizable and non-bailable.

The heading has limited role to play, and it cannot be accorded much importance for controlling the unambiguous words of sections. They cannot be used to cutting down the plain and clear meaning of the words of the provision.

[22] Supra note, 2.
[23] Ibid.

The headnote of Section 37, introduced in 1985, states that "offences to be cognizable and non-bailable," potentially leading to the misconception that all offences under the NDPS Act are non-bailable. However, it is well established that while headings can be referred to for interpreting an Act, they are not part of the statute and cannot override or control the plain language of the provision.

In *Janhit Abhiyan vs Union of India*[24], the Supreme Court reaffirmed the principle laid down in *Frick India*[25], clarifying that headings or marginal notes cannot alter the clear and unambiguous words of a statute. Headings may only aid in interpretation when the provision is ambiguous or unclear, but even then, they cannot narrow the broad application of the statute's plain words.

Thus, the role of headings is limited and cannot diminish the unambiguous meaning of statutory provisions. They serve as interpretative aids in cases of doubt but do not hold substantive weight in overriding the clear language of the law.

Empowering Statutes: A Closer Look at the Non-Obstante Clause

Section 37, with its non-obstante clause, overrides the provisions of the Code, meaning that the Code's usual provisions on bail do not apply to offences covered by this clause. This non-obstante clause limits the applicability of the code, especially in the context of bail, for offences punishable by five years or more imprisonment, as amended in 1989 through Act 2 of 1989[26]. The legislature introduced a quantitative approach with distinct punishments for offences under the NDPS Act.

Section 37(b) underwent further amendment through Act 9 of 2001[27], which refined the bail provisions by restricting bail to serious offences only. Under clause (a), the legislature clearly intended all offences to be cognizable, enabling officers to arrest offenders without a warrant in accordance with the law. However, the non-obstante clause also restricts the application of the Code's bail provisions for offences under Sections 19, 24, 27-A, and those involving commercial quantities of drugs. It sets two conditions alongside the general bail provisions, which must be met for granting bail.

[24] Janhit Abhiyan vs. Union of India (2022) 14 SCR 1.
[25] M/s Frick India Ltd. v. Union of India and Ors. [1989] 2 Suppl. SCR 570.
[26] Supra note, 2.
[27] Supra note, 1.

The Supreme Court, in Central Bank of India v. State of Kerala[28], emphasized that when interpreting a non-obstante clause, courts must consider the extent and context of the legislature's intention. While the general purpose of such clauses is to give overriding effect, their actual scope depends on a careful reading of the specific language used. In Dominion of India v. Shrinbai A. Irani[29], the Court clarified that a non-obstante clause should be understood as clarifying the statute's position, not limiting the scope of its provisions, especially when the wording is clear and unambiguous. Thus, the non-obstante clause in Section 37 should be interpreted to apply to the cognizability of offences and those specifically mentioned in clause (b) of subsection (1).

Decoding Jurisprudence: Navigating the Realm of Judicial Wisdom.

Supreme Court of India-

In *Maktool Singh v. State of Punjab*[30], the Supreme Court clarified that only offenses under Sections 26 and 27 of the NDPS Act, punishable by a maximum of three years and one year imprisonment respectively, are exempt from stringent bail provisions, while bail for other offenses requires the Public Prosecutor's opposition and the court's satisfaction that the accused is not guilty. In *State of Punjab v. Baldev Singh*[31], the Constitution Bench noted that Section 37 makes offenses under the Act cognizable and non-bailable with stringent bail conditions, though this observation was incidental and not the case's *ratio decidendi*, which centered on Section 50. In *Intelligence Officer of NCB v. Sambhu Sonkar and Another*[32], the Court highlighted pre-1989 loopholes allowing bail based on punishment levels, leading to amendments strengthening enforcement. It cancelled bail granted by the High Court, applying stringent Section 37 conditions to offenses punishable by up to five years imprisonment.

Bombay High Court

In *Stefan Mueller v. State of Maharashtra*[33], the Bombay High Court held that the rigors of Section 37 of the NDPS Act apply only to offenses under sections 19, 24, and 27A. The Court clarified that, while the marginal note of

[28] Central Bank of India vs State of Kerala. [2009] 3 SCR 735
[29] Dominion of India vs Shrinbai A. Irani. (AIR 1954 SC 596)
[30] Maktool Singh vs State of Punjab, (1999 (1) SCR 1156.
[31] State of Punjab vs Baldev Singh, (1999) 6 SCC 172
[32] Intelligence officer of NCB vs Sambhu Sonkar and another. (2001) 1 SCR 821
[33] Stefan Mueller vs State of Maharashtra, 2010 SCC Online Bom. 1974

Section 37 states "Offenses to be cognizable and non-bailable," this does not imply that all offenses under the Act are non-bailable. Clause (a) of Section 37(1) ensures that all offenses under the Act are cognizable, including those punishable by imprisonment of less than three years or with a fine, which would otherwise be non-cognizable under the CrPC. However, Section 37 does not explicitly declare all NDPS Act offenses as non-bailable. The Court concluded that the additional conditions under Section 37(1)(b) apply only to the specific offenses mentioned in the section.

However, In *Rhea Chakraborty v. Union of India*[34], the Bombay High Court took a divergent view from *Stefan Muller v. State of Maharashtra* and relied on *State of Punjab v. Baldev Singh*. The Court ruled that the classification of offenses under the NDPS Act is governed strictly by Section 37, and Part II of the Schedule to the Code has no application. It clarified that the amendment to Section 37, which came into force in 1989, brought the bail provisions of the CrPC under the *non-obstante* clause of Section 37, effectively overriding the provisions of the CrPC. As a result, since 1989, the bail provisions under the NDPS Act have superseded the CrPC, and the classification of offenses under the Act is exclusively governed by Section 37, excluding the provisions of the CrPC.

Other High Courts –

In *Abdul Aziz v. State of U. P*[35]., the Allahabad High Court balanced the provisions of the NDPS Act and the CrPC, ruling that except for offenses under Sections 19, 24, and 27A of the NDPS Act, the bail provisions of the CrPC apply. The Court acknowledged that offenses under the NDPS Act are cognizable, but in the matter of bail, the provisions of the CrPC take precedence. The Court directed the Sessions Judge to dispose of the petitioner's bail application under Section 436 of the CrPC, treating the offense as bailable.

In *Shaffi Mohammed and Ors. v. State of Rajasthan*[36], the Rajasthan High Court, while releasing the accused on a personal bail bond, noted that the restrictions on bail under Section 37 of the NDPS Act were relaxed after the

[34] Rhea Chakraborty v. Union of India, 2020 SCC Online Bom 990.
[35] Abdul Aziz vs State Of U.P, 2002 Cri.L.J 2913
[36] Shaffi Mohammed and Ors. vs State of Rajasthan, 2005 Cri LJ 2112.

amendment on October 2, 2001, for offenses involving small and lesser than commercial quantities of contraband. The Court clarified that the restrictions in Section 37(1)(b)(ii) apply only to offenses under Sections 19, 24, and 27A, as well as those involving commercial quantities, while they do not apply to other offenses under the Act.

Ending on a Note: The Conclusion of the Discussion

As India faces ongoing challenges with drug abuse and trafficking, the issue of bail under the NDPS Act remains complex and evolving. The judiciary must balance enforcing the law with protecting personal freedom. Recent calls for bail reform emphasize a more liberal approach, especially for low-level offenders or those struggling with addiction, to align with justice and rehabilitation principles. This shift aims to ease prison overcrowding and address the root causes of drug abuse. The NDPS Act seeks to regulate narcotic drugs and psychotropic substances to prevent abuse and curb trafficking, reflected in its strict provisions, including bail conditions. Over time, amendments have expanded the Act's scope and introduced more detailed factors for bail applications, striving to balance preventing drug offenses with protecting individual rights. There is no doubt in ambiguity created in interpretation of section 37 in view of bailablity of offences under the Act as recently, single bench of Bombay High Court referred related issue to larger bench for consideration.[37]

The Supreme Court in *Mukesh K Tripathi*[38] referenced Maxwell's interpretation of statutes[39], stating that when the meaning of a statute is unclear, it should be understood in a way that harmonizes with the subject and legislative intent. This approach encourages the adoption of an object-oriented interpretation, ensuring that the legislature's intent is fulfilled[40].

The NDPS Act's statement of objects and reasons reveals that the legislature aimed to restrict strict bail provisions to serious offenders. As a result, bail provisions for offences punishable for more than five years were removed and are now limited to those specified in Section 37(1)(b). One challenge in interpreting the Act's intent is the heading of Section 37, which indicates that

[37] Supra note, 2
[38] Mukesh k Tripathi vs Senior Divisional Manager, UC & Ors., 2004 (4) Suppl. SCR 127
[39] Maxwell, Interpretation of Statutes, 9th Edition, p.55
[40] Nathi devi vs Radha devi, [2004] 6 Suppl. SCR 1141

offences under the Act are cognizable and non-bailable. However, the heading cannot override the actual provisions, which clarify that only specific offences, as detailed in Section 37(1)(b), are subject to stringent bail conditions. Offences outside this scope follow general provisions under the Criminal Procedure Code (CrPC), not subject to the non-obstante clause in Section 37. The *non-obstante clause* in Section 37 gives overriding effect only for offences under sections 19, 24, and 27-A, and not for smaller quantity offences. These smaller offences, which are not explicitly mentioned in Section 37(1)(b), are governed by the CrPC. The *Baldev Singh* ruling, which dealt with mandatory compliance under section 50 of the NDPS Act, is binding on the issue it addressed. However, its observations on bailability do not extend to all offences under the Act.

In conclusion, while the *non-obstante* clause in section 37 creates an exception to bail, the presumption that "bail is the rule and jail is the exception" still applies to smaller quantity offences under the NDPS Act, as governed by the CrPC.

Guiding the Future: Progressive Recommendations to Shape Legislation.

The 2001 amendment to the NDPS Act replaced the earlier 5-year punishment classification from the 1989 amendment, restricting strict bail provisions to serious offences and those involving commercial drug quantities. However, this approach resembles the pre-amendment classification under the Prevention of Money Laundering Act (PMLA), which was based on imprisonment length and later deemed arbitrary by Supreme Court. This raises concerns about the rationale behind the removal of the 5-year punishment criterion under Section 37 of NDPS Act and its consistency with Article 14 of the Constitution.

While the amendment aimed to adopt a reformative approach for minor offenders or addicts handling small drug quantities, using contraband quantity as a basis for bail decisions presents challenges. The Supreme Court, in the *Nikesh* judgment, held that monetary thresholds for bail under the PMLA were irrational. Similarly, smaller drug quantity offences excluded from Section 37’s stringent bail provisions now fall under the CrPC, where bail decisions depend on the length of punishment rather than contraband quantity.

Although the amendment sought to focus on serious offences, the logic of sentence-based classifications for bail has been rejected by the Supreme Court. For offences impacting national health and economic stability, a consistent and rational approach to bail provisions is necessary, akin to amendments made to the PMLA. Selective application of bail restrictions risks being deemed arbitrary.

To address this, Parliament could revise Section 37 to apply uniformly across all offences under the NDPS Act and include clarification like those in Section 45 of the PMLA to define the nature of offences and bail criteria more precisely[41].

[41] S.45, The Prevention of Money Laundering Act, 2002.

TEACHER'S AND RESEARCH SCHOLARS' SECTION

The Dynamics of Cost of Credit and Delinquency Rate in the USA

Rugved Gadge[*]

Introduction:

The liquidity preference theory of macroeconomics states an inverse relationship between the cost of borrowing and borrowing ability or demand for credit. Monetary and fiscal policy is essential for the business cycle to work where inflation and growth become an important part of it. This inverse principle guides the monetary policy's functioning. Looking at the current global conditions, a lot of central bankers are now focused on taming inflation, and the tool to tame inflation for the central bankers is the tightening of the monetary policy. This tightening of the policy has taken a toll on the consumer and the corporate balance sheets, adding to an increasing delinquency rate. These tightening standards and uncertain economic outlook has raised concerns for the central bank to steer the policy further and has created a scenario of higher for longer. However, in the recent speech of Federal Reserve Chairman Jerome Powell during his Jackson Hole symposium[1], he had a dovish stance, indicating a shift of policy stance and priority from inflation to growth.

Consumer behaviour has been a problem for the transmission of the policy. The transmission and effect of the policy change is seen after a lag in the economy. This delayed effect of the monetary policy has become a task for the Federal Reserve to further steer the policy with the fear of overtightening, with chances of leading the economy to a hard landing[2]. An expectation for

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[1] Jerome Powell, *Speech by Chair Powell on the Economic Outlook*, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM (2024), https://www.federalreserve.gov/newsevents/speech/powell20240823a.htm (last visited Aug 30, 2024).

[2] Tim Sablik, *The Fed Is Shrinking Its Balance Sheet. What Does That Mean?*, RESERVE BANK OF RICHMOND (2022), https://www.richmondfed.org/publications/research/ econ_focus/2022/q3_federal_reserve.

the rate cut is built for the September meeting due to the growth worry[3]. However, this stimulation has to be vigilant because of the tendency of inflation to put back all the work done by the central bank in order to control inflation which has happened, due to which the famous Volcker era[4] is remembered. It is essential to understand the functioning of the monetary policy transmission in order to predict the effect of the rate changes in the economy. The monetary policy transmission in the US has been very weak due to the competition in the financial markets and the present of shadow banks or shadow credit providers. Perhaps the reason for the FOMC to have a calibrated tightening stance, which has been a reason for the consumer to behave according to the rational expectation theory. The transmission of the policy depends a lot on the monetary policy stance which further prompts the consumer behaviour in a certain way.

Literature Review:

Major global economies is now seeing a restrictive policy stance which is reflected in the solvency numbers in numerous sectors. The rate hikes have been problematic for the companies as the total bankruptcy filings have increased in 2023 amounting to 642[5]. These filings are named pandemic-related filings. A probable reason for the bankruptcy is that such companies have to deal with relatively high rates and robust wage growth, affecting their profitability, reducing the margins and cash flows, escalating the situation in the near term. Considering the situation of labour[6] and wage growth, productivity started to decline before the pandemic started, the pandemic led to an upshot in the unit labour cost due to lower supply of labour, reduction in the industrial output further and creating an issue for the supply chain, which eventually led to an increase in the cost of the product fuelling the inflation to

[3] Powell, *supra* note 1.
[4] BEN BERNANKE, TWENTY-FIRST CENTURY MONETARY POLICY: THE FEDERAL RESERVE FROM THE GREAT INFLATION TO COVID-19 (2022).
[5] Ingrid Lexova & Umer Khan, *US Bankruptcies Hit 13-Year Peak in 2023; 50 New Filings in December | S&P Global Market Intelligence*, S&P GLOBAL (2024), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/us-bankruptcies-hit-13-year-peak-in-2023-50-new-filings-in-december-79967180 (last visited Aug 30, 2024).
[6] Frédéric Boissay et al., *Labour Markets and Inflation in the Wake of the Pandemic*, SSRN JOURNAL (2021), https://www.ssrn.com/abstract=3951233 (last visited Aug 30, 2024).

around 8%, which prompted the Federal Reserve to reverse its policy stance. The mentioned factors have affected the basic operations of the entities. Another reason for the reduced productivity is the government spending on social security measures. The problem with spending on social security is that it reduced the productivity of workers and also of the economy with a sudden uptick in the inflation. The problem with government expenditure on social security is that the first, stimulus checks were given to the consumers. Secondly, these stimulus checks motivated a lot of workers to resign as health and life became the first priority during the pandemic[7]. The reduction in the workforce added to the supply pressure and further increasing the wages of the existing work force. Third, social security measures added to the demand side of the consumer boosting the expenditure on durable goods, ignoring the supply side, which created a disequilibrium for inflation to strengthen further[8]. These measures failed to create a multiplier effect in the economy, adding up to the public debt burden and further putting pressure on the government's fiscal health. In addition to this a lot of companies received the pandemic checks as an assistance to survive in the tough times. The issue with the assistance package was that a lot of zombie companies became a beneficiary of the aid technically wasting the credit.

The issue with a lot of companies is the high leverage and low interest coverage ratio (ICR) which is an indicator of the ability of the firms to cover their debt servicing cost.[9] Adding to the low ICR, low sales growth with uncertain outlook has increased the chance of weakness in the firms. These similar problems are also visible in the healthcare industry where the stress signs have appeared. According to a report, around 80 healthcare companies filed for bankruptcy in 2023, which is the highest in the past five years. In just

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[7] Olivier Coibion, Yuriy Gorodnichenko & Michael Weber, *HOW DID U.S. CONSUMERS USE THEIR STIMULUS PAYMENTS?*, NATIONAL BUREAU OF ECONOMIC RESEARCH (2020), https://www.nber.org/papers/w27693.

[8] Francois De Soyres, Ana Maria Santacreu & Henry Young, *Demand-Supply Imbalance during the COVID-19 Pandemic: The Role of Fiscal Policy*, 105 R (2023), https://research.stlouisfed.org/publications/review/2022/12/22/demand-supply-imbalance-during-the-covid-19-pandemic-the-role-of-fiscal-policy (last visited Aug 30, 2024).

[9] Lucyna Górnicka et al., *Corporate Debt Service and Rollover Risks in an Environment of Higher Interest Rates*, EUROPEAN CENTRAL BANK (2024), https://www.ecb.europa.eu/press/financial-stability-publications/fsr/focus/2024/html/ecb.fsrbox202405_01~26eab485c5.en.html (last visited Aug 30, 2024).

the first month of this year, Fitch Ratings'[10] data for the top leveraged loans and high yield bonds of concern, show that healthcare companies represent 35% of the outstanding $76.5 billion. Bausch Health Companies BHC +1.9% Inc. has more than $15 million in loans and bonds of concern.[11] Various credit rating companies and economists have warned about the low ICR and piling of the debt during the low interest rate regime when the central banks in the mid of the previous decade had placed the benchmark rates near zero.

Methodology:

The paper is divided into three major segments discussing consumer, the real estate sector, and the banking sector as a whole. A major amount of data is taken from the Senior Loan Officer Opinion Survey (SLOOS)[12], which is published by the Federal Reserve Board, i.e., the central bank of the US. About eight large domestic banks and twenty-four U.S. branches and agencies of foreign banks are surveyed by the authorities. This survey is done quarterly and is published in such a way that the study is available during the Federal Open Market Committee meeting to assess the lending and borrowing conditions of the banks and the consumers. Some data which was available is taken from the year 2000 and few data variables are taken from the Q1 of 2011 as the data was not available for the said time period.

Various different variables are taken from the survey, which helps us judge the lending and demand for loans. Few variables like the Michigan Consumer Sentiment survey[13], commercial real estate price, and federal fund rate are also used in order to understand the relationship between consumer sentiments, prices and delinquency rate in order to assess the banking conditions. Money market funds data is used to understand the investor or

[10] Fitch Wire, *Leveraged Loan, High Yield Default Rates to Rise in 2024, Fall in 2025*, FITCH RATINGS (2023), https://www.fitchratings.com/research/corporate-finance/leveraged-loan-high-yield-default-rates-to-rise-in-2024-fall-in-2025-04-12-2023 (last visited Aug 30, 2024).
[11] Ibid.
[12] The July 2024 Senior Loan Officer Opinion Survey on Bank Lending Practices, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, https://www.federalreserve.gov/data/sloos/sloos-202407.htm (last visited Aug 30, 2024).
[13] University of Michigan, *Surveys of Consumers*, SURVEY OF CONSUMERS, https://data.sca.isr.umich.edu/ (last visited Aug 30, 2024).

deposit movement from the banking channel to a better investment opportunity instrument.

Some variables are taken from different government and institutional sites, which is essential for the Fed to decide its policy stance like the personal consumption expenditure (PCE). A few variables with monthly data available were converted into quarterly data to compare the data. Correlation is calculated of different variables using R. In order to get an approximation of the correlation between variables, an optimal lag is estimated using the VARselect package in the R software. After calculating the optimal lag, correlation is calculated between dependent and independent variables by considering the lag between the variables. The lags are to be considered in quarters as the policy transmission takes time to reflect in various economic variables.

Results:

Table1: Optimal lag and correlation between dependent and independent variables.

Sector	Dependent Variable	Independent Variable	Optimal Lag (In quarters)	Correlat-ion
Consumer	Delinquency Rate on Consumer Loans, All Commercial Banks	Consumer Debt Service Payments as a Percent of Disposable Personal Income	5	0.457
	Delinquency Rate on Consumer Loans, All Commercial Banks	Net Percentage of Domestic Banks Tightening Standards for Credit Card Loans	4	0.616
	Net Percentage of Domestic Banks Reporting Increased Willingness to Make Consumer Instalment Loans	Delinquency Rate on Consumer Loans, All Commercial Banks	3	-0.632
	Delinquency Rate on Consumer	Federal Fund		

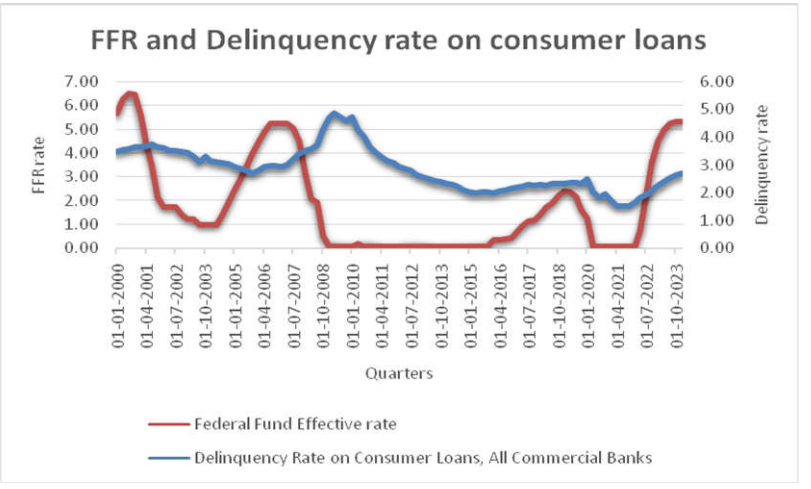
	Loans, All Commercial Banks	Effective rate	3	0.414
	Personal consumption Expenditure on Durable Goods	Federal Fund Effective rate	5	-0.406
	Personal consumption Expenditure on Durable Goods	Personal Savings rate	6	0.639
Commer-cial Real Estate	Delinquency Rate on Commercial Real Estate Loans (Excluding Farmland), Booked in Domestic Offices, All Commercial Banks	Commercial Real Estate Prices for United States, Percent Change from Year Ago	4	0.432
	Delinquency Rate on Commercial Real Estate Loans (Excluding Farmland), Booked in Domestic Offices, All Commercial Banks	Federal Fund Effective rate	3	0.416
	Delinquency Rate on Commercial Real Estate Loans (Excluding Farmland), Booked in Domestic Offices, All Commercial Banks	Commercial Real Estate Prices for United States	3	-0.656

Banking Industry	Net Percentage of Domestic Banks Reporting Stronger Demand for Commercial and Industrial Loans from Large and Middle-Market Firms	Federal Fund Effective rate	4	-0.536
	Net Percentage of Domestic Banks Reporting Stronger Demand for Credit Card Loans	Federal Fund Effective rate	4	-0.498

Source: Author's calculations

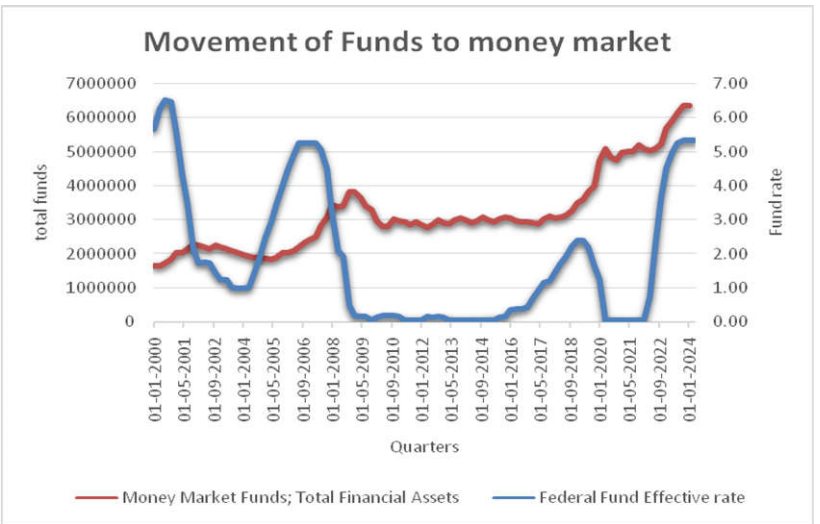
The Net Percentage of Domestic Banks Reporting Stronger Demand for Commercial and Industrial Loans from Large and Middle-Market Firms against the Federal Fund rate in the banking industry shows the demand side of the banking industry.

Figure 1



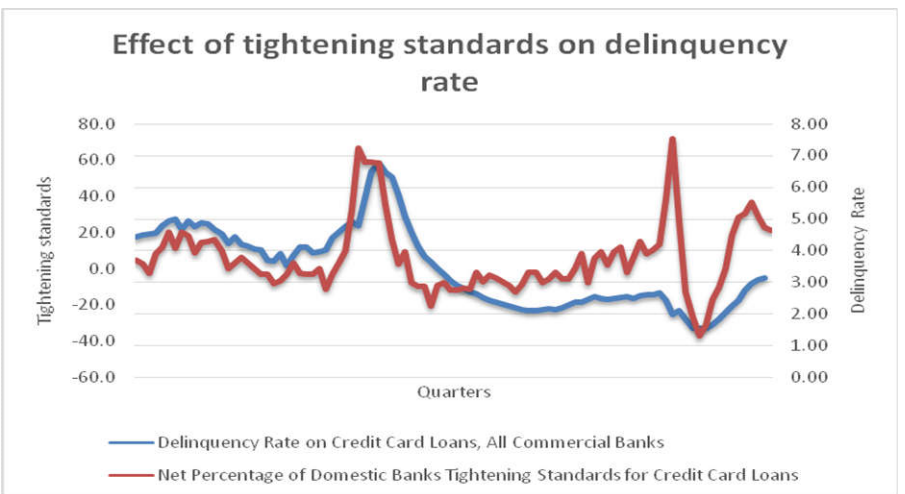
Data Source: SLOOS and Federal Reserve Bank website.

Figure 2



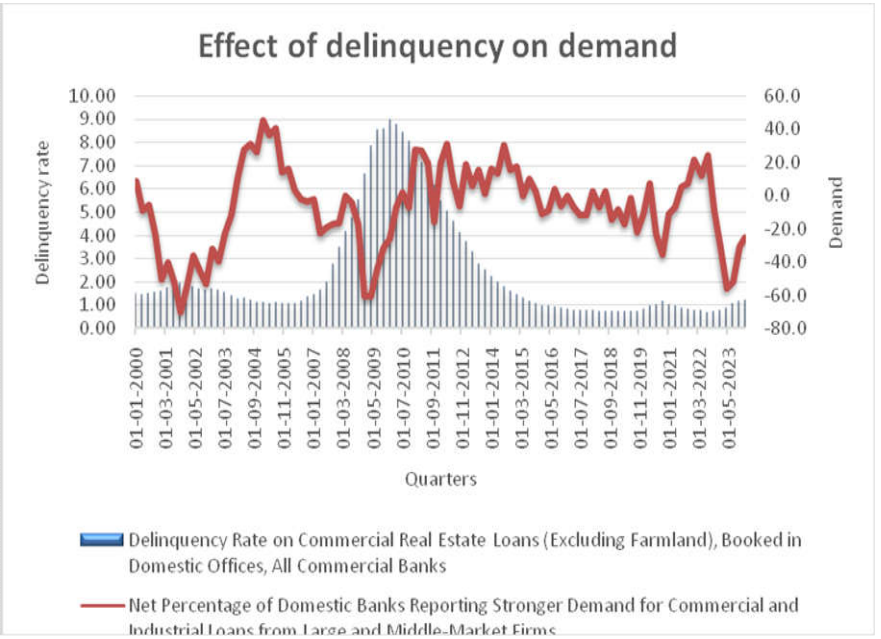
Data Source: Federal Reserve Bank website and Federal Reserve Bank of St. Louis (FRED) website.

Figure 3



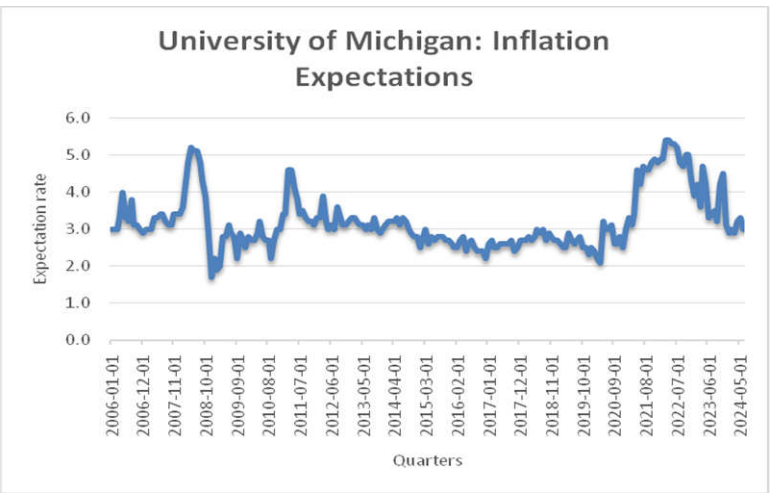
Data Source: SLOOS and Federal Reserve Bank website.

Figure 4



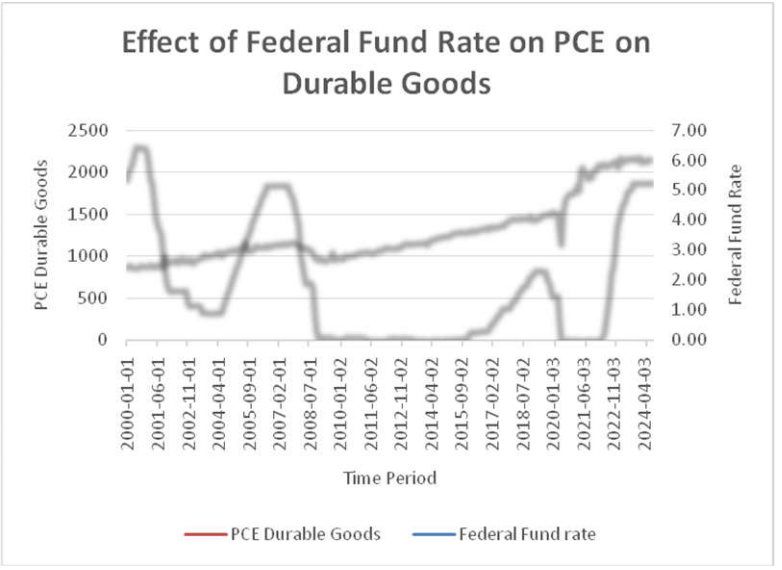
Data Source: SLOOS and Federal Reserve Bank website

Figure 5



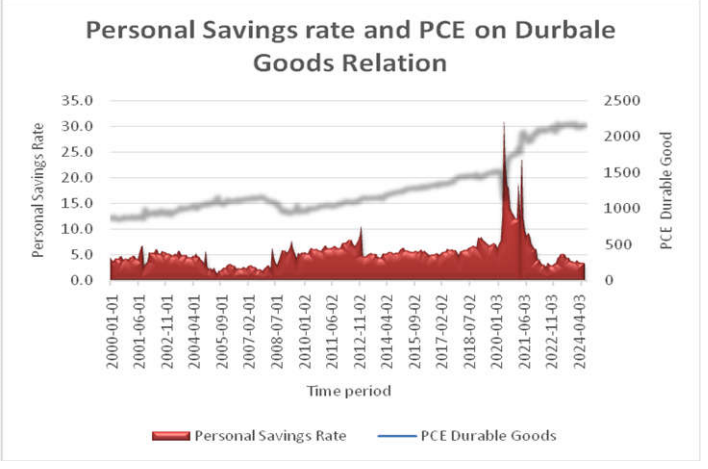
Source: Federal Reserve Bank of St. Louis (FRED) website.

Figure 6:



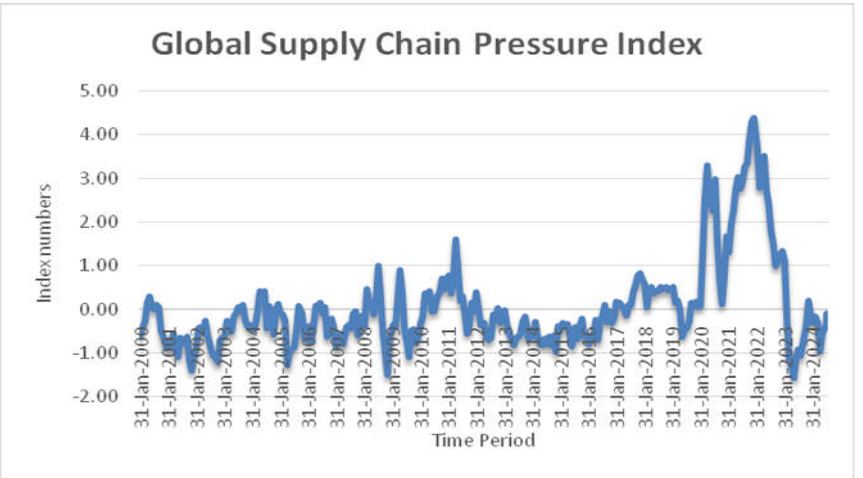
Data Source: Federal Reserve Bank of St. Louis.

Figure7:



Data Source: Federal Reserve Bank of St. Louis.

Figure 8:



Data source: Federal Reserve Bank of New York

Discussion:

The transmission of the rate cuts in the US has been slow, which has increased inflation during COVID-19 despite steep rate hikes. The US economy is now showing signs of recession. The increasing number of layoffs, pessimistic commentary by the companies during their conference calls, visible contraction in the PMIs and other regional Federal Reserve reports indicate the slowdown. A sign of a rate cut shortly demonstrates that the economy is slowing down, for which it needs to be stimulated further to control the damage.

Consumer:

The consumer had sufficient consumption power during the pandemic. The fiscal measures taken during the COVID-19 pandemic have flushed the markets with liquidity to support the economy. Certain restrictions, which were called moratoriums, were placed on the regulations of the banks to declare loans as non-performing assets. Perhaps these regulations and stimulus checks had made the consumer spend in excess. An example of this

moratorium, which turned into a spending spree (on durable goods as in figure 7), is the student loan, where the savings made to pay the instalments of the loans were used to spend, further ballooning the demand for various durable goods[14].

Credit card spending has sharply risen since the pandemic hit the economy. The credit card balance is now above the pre-pandemic level. The paradox in this is that despite significant tightening by the Federal Reserve, i.e., 525 basis points, during the pandemic till mid-2023, there is a significant uptick in borrowing and a sticky and exceptional rise in the personal consumption expenditure of the consumers. This rise is expenditure is based on the borrowed money which eventually has to be paid. Inability to pay this will lead to increase in the delinquency rate. The delinquency rate on credit card loans during the global financial crisis (GFC) was at a record high of 6.77[15] of the total loans of all the commercial banks. In contrast to the rate hikes, as of the data available for quarter 2, 2024, the delinquency rate has reached 3.25[16], almost half of what was during the GFC and has also soared in the segment for maxed-out borrowers. The delinquency transition rate has increased for all the product types in the consumer segment except for student loans (probable reason being the administrative/election effect on the student loan payment). However, there was a downtick in the delinquency rate in the first quarter, which may be due to seasonality. The share of credit card debt owed and the number of individuals who are maxed out has been on a continuous rise since 2020.[17] Around 9% of credit card loans transitioned into the delinquent

[14] Martin Daks, *Pausing Student-Loan Payments Boosted the Economy | Chicago Booth Review*, CHICAGO BOOTH REVIEW (2023), https://www.chicagobooth.edu/review/pausing-student-loan-payments-boosted-the-economy (last visited Aug 30, 2024).
[15] F, *Federal Reserve Economic Data | FRED | St. Louis Fed*, FEDERAL RESERVE BANK OF ST. LOUIS, https://fred.stlouisfed.org/ (last visited Aug 30, 2024).
[16] Ibid.
[17] Maureen Egen, *Delinquency Is Increasingly in the Cards for Maxed-Out Borrowers*, LIBERTY STREET ECONOMICS (May 14, 2024), https://libertystreeteconomics.newyorkfed.org/2024/05/delinquency-is-increasingly-in-the-cards-for-maxed-out-borrowers/ (last visited Aug 30, 2024).

category, with auto loans at 7.7% from 2023 to 2024.[18] The transition rate needs to fall, especially for the maxed-out borrowers in the credit card segment, to see a positive improvement. If the factors influencing delinquencies remain the same, we are expected to see a further rise in the rate[19]. The delinquency rate of credit card loans hit the historical bottom (as of the data available on the FRED website) in Q2 of 2021 at 1.54[20]. However, it has continuously increased since then. A possible explanation for the decrease in the delinquency rate during the pandemic could be due to the increase in the savings rate and certain restrictions imposed, which might have helped the consumer to service their debt. Another probable reason for reduction in the delinquency rate during 2020 is the soaring personal savings and income due to pandemic-era stimulus checks.

The delinquency rate on consumer loans as a net percentage of domestic banks tightening standards for credit card loans in figure 3 shows a relatively strong correlation of 0.616 with a lag of four quarters. This indicates that the delinquency rate rises with an increase in tightening standards by the banks. These standards were in negative territory during the COVID-19 pandemic; however, with the restrictive policy stance (proxy with the federal fund rate in figure 1) adopted by the central bank, there is an increase in the creditworthiness measures by various domestic banks. This is pretty taking a toll on the consumers' ability to pay back their debt, which may eventually pressure the delinquency rate. The reason behind the accumulation of debt is consumer behaviour during and after the pandemic, with the popularisation of few financial innovations. According to research, Buy Now Pay Later, offered by various e-commerce platforms, has significantly contributed to the rise in debt.[21] This scheme has become a reason for the generation of what is now infamously called the 'Phantom Debt.' An interpretation of the rise in such

[18] FEDERAL RESERVE BANK OF NEW YORK, *Household Debt and Credit Report*, (2 0 2 4 : Q 2 (RELEASE D AUGUST 2 0 2 4)), https://www.newyorkfed.org/microeconomics/hhdc (last visited Aug 30, 2024).
[19] Egen, *supra* note 17.
[20] *Supra* note 15.
[21] Giulio Cornelli, Leonardo Gambacorta & Livia Pancotto, *Buy Now, Pay Later: A Cross-Country Analysis*, BANK OF INTERNATIONAL SETTLEMENTS (2023).

kind of debt can be the inability of the consumer to manage their expenditure considering their current income, i.e., the expenditure is greater than the income. This, for now, is boosting the expenditure, but servicing the debt in the rising rate environment may prove to be a task in the future.

The pandemic has proved to be unique regarding the events and the behaviour that has panned out throughout. Despite the rate hike, the consumer has been robust in its spending. The pre-pandemic rate at which the mortgages were available was very low, around 1-3%, where the Fed was zero bound and had a loose/expansionary monetary policy. However, after 2021, the mortgage rates for housing and other asset classes soared, peaking at around 7.5% for housing almost after two decades, which is relatively high compared to the average rates during regular times.

A trend observed after the pandemic, even after a substantial rate hike by the central bank, the magnitude of demand and consumer spending regarding durable goods was very high. A conventional economics theory states an inverse relationship between the cost of credit[22] and the buying power of the individual or the consumption expenditure; however, contrary to the theory, the durable goods segment, the housing market, etc., were booming. A possible explanation for this is the presence of a higher for a longer narrative where the Fed had paused the rate hike and had signalled for the inflation to come near the target range, keeping the inflation expectations well anchored. This higher for longer may have proved the rational expectations theory right where the consumers expected the rates to rise further as the inflation outlook was uncertain and commentary by experts regarding the inflation was not very encouraging. When equated with the federal funds rate, the delinquency rate on all consumer loans in figure 1 with a lag of 3 quarters shows a correlation of 0.414, which is not very high per se but is reasonably moderate.

[22]Seema Saini, Wasim Ahmad & Stelios Bekiros, *Understanding the Credit Cycle and Business Cycle Dynamics in India*, 76 ELSEVIER (2021),
https://doi.org/ 10.1016/ j.iref. 2021. 08.006.

It is essential to track the borrowing pattern and spending patterns to be prepared for any countermeasures required in the future.

Commercial Real Estate:

The Global Financial Crisis has been essential for the banks, the insurance sector, and, most importantly, the housing market. The delinquency rate on loans secured by the real estate sector had peaked at a record high of 10.20% in Q1, 2010. The delinquency rate for real estate has not yet reached an alarming stage. Still, it can potentially disrupt the financial sector, especially the small and mid-sized banks or the regional banks. Banks with less than $100 billion in assets have significant exposure to commercial real estate, and this exposure in the restrictive policy environment can lead to failures.[23]

It is essential to understand the transmission mechanism of the monetary policy to understand the asset value. The primary transmission mechanism says that with the increase in interest rates (Federal Funds rate in this case), the fundamental value of the assets decreases. Similarly, with an appreciation of the domestic currency, which usually happens with the increase in the interest rates during the pandemic, due to the inflationary conditions and the US dollar being the dominant currency, the cost of credit has increased. This increase in the price of credit further leads to the devaluation of the assets. Now, because of the 525 bps increase in the rates, asset values must have significantly declined. This decrease in the collateral value has further demotivated the banks to lend and might have pressurized their asset side of the balance sheet. When looking at the portfolios of various category banks, one-third of US banks, mainly small and medium banks, with $3.7 trillion in total assets, reported CRE exposures exceeding 300 percent of their Tier 1 capital plus the allowance for credit losses, including a sizeable non-GSIB

[23] Fitch Wire, *Small U.S. Banks With High CRE Concentrations More Vulnerable to Losses*, FITCH RATINGS (2023), https://www.fitchratings.com/research/banks/small-us-banks-with-high-cre-concentrations-more-vulnerable-to-losses-05-12-2023 (last visited Aug 30, 2024).

bank, which shocked its shareholders by reporting sizable provisions for CRE-related loan losses in its fourth quarter 2023 earnings release.[24]

One fundamental problem with commercial real estate (CRE) is the rate hike and structural change due to the pandemic.[25] The contagion control measures taken during the pandemic resulted in lockdown, popularising the culture of working from home. Even though the pandemic is over, many corporations have now opted to work from home as a new work method. This has led to a sudden increase in the vacancy rate, lowering the occupancy rate among commercial properties. With the increasing vacancy rate and interest rate, commercial property valuation has almost declined by 40% in major cities.[26] The issue with the decline is that many commercial real estate companies have a significant mortgage amount, which, with increasing interest rates, might become hard to service.[27] With the increasing vacancy rate, the income from renting office space has reduced significantly, further reducing their ability to pay back.[28] Also, the commercial real estate prices, when correlated with the delinquency rate on the CRE loans, show a relatively strong positive correlation. Increased CRE prices during the COVID might lead to upward pressure on the delinquency rate on the CRE where the banks with more exposure might attract some trouble which will be discussed under the banking conditions. According to a survey conducted by the Federal Reserve of Minneapolis, rising rates have affected the business, where 63% of

[24] Global Financial Stability Report, April 2023: Safeguarding Financial Stability amid High Inflation and Geopolitical Risks, IMF, https://www.imf.org/en/Publications/GFSR/Issues/2023/04/11/global-financial-stability-report-april-2023 (last visited Aug 30, 2024).

[25] Andrea Deghi, Fabio Natalucci & Mahvash Qureshi, *Commercial Real Estate Prices During COVID-19: What Is Driving the Divergence? In: Global Financial Stability Notes Volume 2022 Issue 002 (2022)*, INTERNATIONAL MONETARY FUND (2022), https://www.elibrary.imf.org/view/journals/065/2022/002/article-A001-en.xml (last visited Aug 30, 2024).

[26] Kevin Fagan et al., *Moody's CRE | What's the Real Situation with CRE and Banks: Doom Loop or Headline Hype?*, MOODY'S CRE (Apr. 4, 2023), https://cre.moodysanalytics.com/insights/cre-news/whats-the-real-situation-with-cre-and-banks-doom-loop-or-headline-hype/ (last visited Aug 30, 2024).

[27] David Glancy, Robert Kurtzman & Lara Loewenstein, *CRE Redevelopment Options and the Use of Mortgage Financing*, FEDS 1 (2024).

[28] Fagan et al., *supra* note 26.

respondents stated that the rate hike hurts their outlook and the company. [29]Further, rising input and labour costs are putting downward pressure on the corporation's revenue and profits, making it hard for the corporates to pay their dues. This policy tightening has led to a disequilibrium between the demand and supply of loans, where the consumer hesitates to take loans.

Banking industry:

Banks are the most important vehicle through which monetary policy transmission is done in the economy. Commercial banks can be the creators of credit from the deposits that they receive. The banks have posted strong results in the year 2023, with the rise in segments like consumer banking and investments. However, the funding cost, economic outlook, and collateral value of consumer assets are reducing, putting pressure on the banks' balance sheets. Strong deposit outflow in the money market is also seen due to rising interest rates pressuring the banks' lending ability and, eventually, profitability. Fundamental economic theories state the inverse relationship between the interest rate and profitability, and with the restrictive environment in the US, bank balance sheets are to take a hit. A contractionary policy shock, ceteris paribus, will cause both banks to face a higher cost of capital and will force them to adjust the assets side of their balance sheets. The complete macroeconomic environment is directly or indirectly associated with the financial sector, and any crisis in the financial industry is believed to stay for a longer time and has more profound tremors inside the economy. The aftershocks remain for a longer time.

The SLOOS survey data shows a disequilibrium between the demand and supply for loans, where the supply exceeds the demand for loans. This is a sure indication of weakness in the borrowing part that eventually affects the lenders. The reduction in demand as in figure 4 for loans shows weakness in the market and may further drag down the incentive for the banks to lend.

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[29] Haley Chinander, *Rising Interest Rates Create More Challenges for Businesses | Federal Reserve Bank of Minneapolis*, FEDERAL RESERVE BANK OF MINNEAPOLIS, https://www.minneapolisfed.org/article/2023/rising-interest-rates-create-more-challenges-for-businesses (last visited Aug 30, 2024).

It is essential to understand the corporates' health to predict the banks' situation. According to a GSFR report by the IMF[30], there is a sudden increase in the number of small and mid-sized firms having a cash crunch to pay their interest expense where the defaults are on the rise in the leveraged loan markets where the weaker firm borrows. This may soon cause trouble as $5.5 trillion of corporate debt is due next year. [31]With the debt owing and current uncertain outlook, it will be a task for the corporations to survive in the rising rate regime, and with the increasing rate, refinancing is a challenge for the corporations.

Another major problem for banks is the CRE/office loans. The valuation of the CRE has been decreasing during the rate hikes and may put pressure on the institutions having concentrated holdings in the sector. According to a report by S&P Global[32], around 17 banks have reported office loans on their books, which amount to around $400 million, which were pulled back, causing weaker demand and an uncertain economic outlook. The concentration of CRE loans in the lending portfolio is observed to be greater with the regional banks, whereas the big banks have systematically diversified their portfolios[33]. Diversifying the portfolios decides the sensitivity of the monetary policy action in the economy. One-third of US banks, mostly small and regional banks, held exposures to CRE exceeding 300 percent of their capital plus the allowance for credit losses, representing 16 percent of total banking system assets. [34]The absorption rate of the CRE loans, which indicates how the demand reacts to the supply, continuously moves into negative territory, hinting at stress in the sector. [35]The problem with the bank

[30] Global Financial Stability Report, April 2023, *supra* note 24.
[31] Ibid.
[32] Lexova and Khan, *supra* note 5.
[33] Erica Xuewei Jiang et al., *Monetary Tightening, Commercial Real Estate Distress, and US Bank Fragility*, (2023), https://www.nber.org/papers/w31970 (last visited Aug 30, 2024).
[34] Global Financial Stability Report, April 2023, *supra* note 24.
[35] Anya Kleymenova, Lori Leu & Cindy M. Vojtech, *Is This Time Different: How Are Banks Performing during the Recent Interest Rate Increases Compared to 2004-2006?*, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM (2024), https://www.federalreserve.gov/econres/notes/feds-notes/is-this-time-different-how-are-banks-

lending channel is during the low rate regime. Low rates boost the asset value, making them more attractive for agents looking for higher-yielding assets[36]. This increases the borrower's collateral, anticipating a further rise in the asset value, leading to higher risk for both lenders and borrowers.

The lender's conditions and diversification help decide the transmission of the monetary policy. Where the financial conditions of the banks help in understanding the lenders' response to rate changes, seeing the current conditions, many banks have shaky balance sheets, making it harder for the monetary policy to be effective. Also, due to the competitive nature of the banking industry, the transmission of the economic policy becomes more challenging. Banks must maintain a healthy and diverse balance sheet to absorb such monetary shocks.

Conclusion:

The pandemic has been a roller-coaster for both consumer and the producer. The policy decisions during the pandemic have been questioned overall regarding allocations and rationale, which have proved more troublesome for the economy. The inflationary situation during and after the pandemic was unique in itself, where consumers, due to the stimulus, were robust in spending and proved American exceptionalism in terms of economic aspects. Also, the global supply chain disruption for which the proxy used is global supply chain pressure index[37], (Figure 8) with the persisting effect of the US-China trade war deteriorated the situation. Rising input costs, labour costs, and reduction in productivity further pressurized the supply side, eventually shooting inflation. A probable countermeasure that could have reduced the situation's intensity over the last few years would have been a balanced stimulus, somewhat like what was done in India, where the government

performing-during-the-rir-increases-compared-to-2004-2006-20240412.html (last visited Aug 30, 2024).

[36] EY Americas, *Higher Interest Rates and the Impact on Real Estate | EY - US*, ERNST & YOUNG, https://www.ey.com/en_us/insights/real-estate-hospitality-construction/higher-interest-rates-and-the-impact-on-real-estate (last visited Aug 30, 2024).

[37] Global Supply Chain Pressure Index, FEDERAL RESERVE BANK OF NEW YORK (2024), https://www.newyorkfed.org/research/policy/gscpi#/interactive (last visited Aug 30, 2024).

focused on the supply-side measures by encouraging the producers. Here, the producers were protected from the lending side with enough support from the banks, and special measures were taken by the government to improve the situation of the employees. Another vital measure the government took was rationing or distributing the fundamental needs amongst the needy, reducing the consumer surplus (which usually rises when cash is given instead of in-kind subsidy). Still, it helped keep the inflation in check. However, the distribution of packages in the form of cash in the US might have brought in the house money effect, where the consumer is more focused on spending on durable goods rather than looking after the fundamental need.

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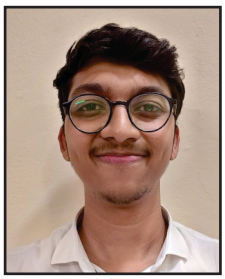

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